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

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TABLE OF CASES

A

Abbotsford Lumber Co., Boslund v. (1925) 34 B.C.R. 485; 36 B.C.R. 386; (1925) 1 D.L.R. 978; (1925) 1 W.W.R. 475; (1927) 1 D.L.R. 279 .....36, 209, 408, 521
Abbotsford Lumber Co., Stevens v. (1924) 33 B.C.R. 299; (1924) 1 D.L.R. 1163; (1924) 1 W.W.R. 660 408
Abbotsford Lumber Co. v. Stevenson, (1925) 35 B.C.R. 405; (1925) 36 B.C.R. 181; (1925) 4 D.L.R. 560; (1925) 3 W.W.R. 451 .....176, 544
Abbott v. Gold Seal Liquor Co., (1917) 24 B.C.R. 245 290
Abbott, Lomis v.: *In re Land Registry Act*, (1915) 22 B.C.R. 330; 25 D.L.R. 759; 33 W.L.R. 347; 9 W.W.R. 676 328
Abbott v. Western Canada Ranching Co., (1919) 27 B.C.R. 241 885
Acadia Ltd., In re (1918) 26 B.C.R. 153; (1918) 3 W.W.R. 477 196
Acme Steel Goods Co. v. Walsh Construction Co., (1922) 30 B.C.R. 539; 63 D.L.R. 529; (1922) 1 W.W.R. 689 .....981, 1054
Adair v. Tilton, (1928) 40 B.C.R. 235; (1928) 4 D.L.R. 183; (1928) 3 W.W.R. 92 .....470, 665, 740
Adam v. Richards, (1915) 21 B.C.R. 212; 22 D.L.R. 509; 8 W.W.R. 701 .....88, 497
Adams v. Burns, (1925) 36 B.C.R. 217 697
Adams, Nimmo v. (1922) 30 B.C.R. 527; (1922) 1 W.W.R. 1284 .....511, 1122
Adams, Van Wassenaer v. (1927) 38 B.C.R. 275; (1927) 3 D.L.R. 180; (1927) 2 W.W.R. 287 .....539, 874
Adams and Evans, Gerrard v. (1923) 32 B.C.R. 114 799
Adams River Lumber Co. v. Kamloops Sawmills, (1921) 30 B.C.R. 354; 70 D.L.R. 863 133
Adkin, R. v. (1931) 44 B.C.R. 295; 56 C.C.C. 347 605
Adolph Lumber Co., Meadow Creek Lumber Co. v. (1919) 58 S.C.R. 306; (1919) 1 W.W.R. 823; 45 D.L.R. 579 .....255, 969
Adolph Lumber Co. v. Meadow Creek Lumber Co. (1918) 3 W.W.R. 305 67
Adoption Act, In re. Painter v. McCabe, (1927) 39 B.C.R. 249; (1928) 2 D.L.R. 13; (1928) 1 W.W.R. 149 .....47, 591, 829
Aghion v. Stevens, (1921) 30 B.C.R. 77; 60 D.L.R. 395; (1921) 2 W.W.R. 961 ... .288, 878, 1047
Aickin v. Baxter (No. 1), (1928), 40 B.C.R. 176; (1928) 3 W.W.R. 142 252
Aickin v. Baxter (No. 2), (1929) 41 B.C.R. 217 .....59, 293
Aickin v. Baxter (No. 3), (1929) 42 B.C.R. 86; (1930) 2 D.L.R. 308 287
Aickin, B.C. Trust Corpn. v. (1916) 22 B.C.R. 417; 27 D.L.R. 725; 34 W.L.R. 303 .....261, 481, 744
Aikman v. Burdick Bros., (1923) 33 B.C.R. 23; (1923) 4 D.L.R. 852; (1923) 3 W.W.R. 785; 31 B.C.R. 478; (1923) 1 D.L.R. 1165; (1923) 1 W.W.R. 914 ....264, 462, 579, 914
Aird, Chisholm v., (1930) 43 B.C.R. 354 .....53, 794
Alberni Land Co. v. Registrar-General of Titles, (1918), 25 B.C.R. 273; 40 D.L.R. 142; (1918) 2 W.W.R. 537 .....444, 457, 941, 948
Alberni Pacific Lumber Co., In re: Thomas v. Lawson, (1927) 39 B.C.R. 1; (1927) 3 D.L.R. 1126; (1927) 2 W.W.R. 662 .....6, 903
Alberta Lumber Co., Pioneer Lumber Co. v. (1923) 32 B.C.R. 321, 442; (1923) 2 W.W.R. 913; (1923) 3 W.W.R. 1098 .....39, 494, 962 966
Alberta North West Lumber Co. v. Lewis, (1917) 24 B.C.R. 564; 38 D.L.R. 228; (1917) 3 W.W.R. 1007 1096

Alberts, R. v. (1925) 35 B.C.R. 106; (1925) 4 D.L.R. 672; (1925) 1 W.W.R. 441; 45 C.C.C. 51 ....355, 362
Albion Fisheries Ltd., Edward Rennebrg & Sons Co. v. (1931) 1 W.W.R. 231 ...3, 979
Albion Motor Express Ltd. v. City of New Westminster, (1918) 25 B.C.R. 379; (1918) 1 W.W.R. 493; (1918) 3 W.W.R. 19, 23; 59 S.C.R. 655; 52 D.L.R. 682 ....67, 569
Albutt v. Continental Guaranty Corpn., (1929) 41 B.C.R. 537; (1929) 3 W.W.R. 292; (1930) 1 D.L.R. 26 982
Albutt & Co. v. Riddell, (1930) 43 B.C.R. 74; (1930) 4 D.L.R. 111; (1930) 2 W.W.R. 623 ....101, 121, 973
Alcock, Maritime Trust Co. v. (1916) 22 B.C.R. 399 194
Alexander v. Letvinoff, (1918) 26 B.C.R. 324; (1919) 2 W.W.R. 808....260, 479
Alexander v. Vancouver Harbour Commissioners, (1922) 31 B.C.R. 11; 65 D.L.R. 355; (1922) 1 W.W.R. 1254 ....76, 327
Alexander, Robert, Deceased, In re Estate of (1926) 38 B.C.R. 28; (1927) 1 D.L.R. 602; (1927) 1 W.W.R. 143 1033
Alexander, T. & Sons and Chester Alexander, Bloomfield v. (1923) 32 B.C.R. 110 .. 810
Alexander, Vancouver Island Milk Producers Assn. v. (1922) 30 B.C.R. 524 ....598, 689
Alexander, Western Union Fire Insurance Co. v. (1918) 25 B.C.R. 393; 39 D.L.R. 632; (1918) 2 W.W.R. 546 196
Alexander & Smith v. Yorkshire Guarantee & Sec. Corpn., (1916) 23 B.C.R. 1; 27 D.L.R. 412; 34 W.L.R. 410; 10 W.W.R. 475 ....6, 244, 421, 1082
Alexandra Non-Sectarian Orphanage and Children's Home, Harris v. (1923) 32 B.C.R. 25; (1923) 1 D.L.R. 1153; (1923) 1 W.W.R. 624 1129
Allan, Dominion Trust Co. and, In re (1917) 24 B.C.R. 450; 37 D.L.R. 251; (1917) 3 W.W.R. 483 ....190, 194, 461
Allan v. Kirk, (1917) 24 B.C.R. 153; (1917) 2 W.W.R. 527 1068
Allan v. McLennan, (1916) 23 B.C.R. 515; 31 D.L.R. 617; (1917) 1 W.W.R. 513 ....42, 406, 494, 733, 852
Allan, Woodworth v. (1925) 36 B.C.R. 20 1008
Allanson, B.C. Poultry Assn. v. (1922) 2 W.W.R. 831 ....602, 963
Allen v. Allen, (1923) 32 B.C.R. 274 ....28, 441, 496, 499
Allen v. Esquimalt & Nanaimo Ry., (1921) 1 W.W.R. 750 804
Allen, Hay v. (1922) 64 S.C.R. 76; 69 D.L.R. 193; (1922) 3 W.W.R. 366; 30 B.C.R. 481; 67 D.L.R. 248; (1922) 1 W.W.R. 646 463
Allen-Stoltze Lumber Co. v. Summit Lake Lumber Co., (1920) 3 W.W.R. 985 121
Allen Thrasher Lumber Co., Compton v. (1927) 39 B.C.R. 70; (1927) 3 W.W.R. 724 ....298, 700
Alliance Finance Co. and Standard Motors v. Simons Garage, Ltd., (1925) 36 B.C.R. 117 (1928) 3 W.W.R. 621 ....94, 676, 974
Allison, Miller v. (1917) 24 B.C.R. 123; 33 D.L.R. 144; (1917) 2 W.W.R. 231 212
Allison v. Standard Lumber Co., (1924) 34 B.C.R. 257; (1924) 4 D.L.R. 465; (1924) 3 W.W.R. 481 ....463, 485, 694, 844, 856
All Red Line, Taxation Act and, In re (1920) 28 B.C.R. 86; (1920) 1 W.W.R. 1030.. 1040
All Risk Insurance Agencies, Ltd., In re (1927) 38 B.C.R. 532; (1927) 3 D.L.R. 245; (1927) 3 W.W.R. 58 ....606, 688
Alpha Mtge. & Invest. Co., Re (1916) 22 B.C.R. 513; 34 W.L.R. 483; 10 W.W.R. 652 1009
Altomare, R. v. (1928) 3 W.W.R. 487 378
Alton, Hynes v. (1928) 3 W.W.R. 261 ....156, 465
Alton, Hynes v., (No. 2) (1929) 1 W.W.R. 863; 52 C.C.C. 333.... 156
Alvo von Alvensleben, Ltd., Dominion Trust Co. and, In re (1919) 3 W.W.R. 209.... 185
Amar Chand, Banton v. (1921) 3 W.W.R. 368; (1922) 1 W.W.R. 929 ....470, 830 1008
Amar Singh v. Mitchell, (1916) 23 B.C.R. 248; 30 D.L.R. 719; (1917) 1 W.W.R. 201 ....421, 477, 1090
American Merchant Marine Ins. Co. v. Buckley-Tremaine Lumber Co., (1920) 28 B.C.R. 426; (1930) 3 W.W.R. 878 ....4, 269, 325, 423, 852

American Seamless Tube Corpn. v. Goward, (1930) 42 B.C.R. 551; (1931) 43 B.C.R. 407; (1930) 3 D.L.R. 870; (1931) 1 D.L.R. 878; (1930) 2 W.W.R. 31; (1931) 1 W.W.R. 509 ....169, 209, 460
American Securities Corpn. v. Woldson, (1927) 39 B.C.R. 145; (1927) 4 D.L.R. 1087; (1927) 3 W.W.R. 756; (1928) S.C.R. 432; (1928) 3 D.L.R. 687....52, 1078
American Timber Holding Co., Fukukawa v. (1928) 40 B.C.R. 44; (1928) 3 D.L.R. 44; (1928) 2 W.W.R. 37 252
Amyot v. Quinby & Watt, (1916) 22 B.C.R. 402 119
Andernach, Winterburn v. (1922) 31 B.C.R. 343; (1923) 1 D.L.R. 1157 955
Anderson v. Dawber, (1915) 22 B.C.B. 218; 25 D.L.R. 644; 9 W.W.R. 511 536
Anderson v. Fuller, (1915) 21 B.C.R. 509 ....734, 1095
Anderson v. Lake, (1928) 40 B.C.R. 189; (1928) 4 D.L.R. 220; (1928) 3 W.W.R. 136 ....859, 910
Anderson v. McNair Lbr., Etc., Ltd., (1929) 40 B.C.R. 466; (1929) 2 D.L.R. 209; (1929) 1 W.W.R. 480 186
Anderson, R. v. (1919) 27 B.C.R. 168 383
Anderson, Richards v. (1916) 10 W.W.R. 893 424
Anderson v. Stollery, (1918) 3 W.W.R. 580 1109
Anderson Logging Co., R. v. (1925) 95 L.J.P.C. 43; 134 L.T. 386; (1926) A.C. 140; (1926) 1 D.L.R. 785; (1926) 4 W.W.R. 488 1040
Andler v. Duke, (1931) 43 B.C.R. 549; 44 B.C.R. 201; 45 B.C.R. 96; (1931) 3 D.L.R. 561; (1932) 2 D.L.R. 19; (1932) 1 W.W.R. 527; (1932) S.C.R. 730; (1932) 4 D.L.R. 529 ....63, 210, 596
"Andrew Kelly," The, v. The "Commodore," (1919) 27 B.C.R. 439; 48 D.L.R. 213; (1919) 1 W.W.R. 1059; 19 Ex. C.R. 70 ....19, 474, 982
Andrews, Lefevre v. (1931) 44 B.C.R. 516; (1932) 1 D.L.R. 805; (1932) 1 W.W.R. 122 902
Andrews v. Pacific Coast Coal Mines, Ltd., (1922) 31 B.C.R. 537.... 718
Anglican Synod v. Russell & May, (1927) 38 B.C.R. 400 756
Anglo-B.C. Packing Co., Salo v. (1929) 40 B.C.R. 481; (1929) 1 D.L.R. 874; (1929) 1 W.W.R. 385 ....254, 694, 959
"Anglo Peruvian," The, Vancouver Orient Export Co. v. (1931) Ex. C.R. 127 159
Ansel v. Buscombe, (1927) 3 W.W.R. 137 ....302, 414, 405, 823
Anthony, Land Registry Act and, In re (1916) 22 B.C.R. 535; 10 W.W.R. 863.... ....509, 948, 1072, 1137
Apex Lumber Co. v. Johnstone, (1925) 36 B.C.R. 81; (1925) 3 D.L.R. 1050; (1925) 3 W.W.R. 360; 7 C.B.R. 157 ....29, 95, 99
Appleby, Clark v. (1928) 2 D.L.R. 95; (1928) 1 W.W.R. 784 ....423, 857, 858, 1010
Appleton v. Moore (1915) 22 B.C.R. 28; 23 D.L.R. 673; 32 W.L.R. 114; 8 W.W.R. 1286 ....485, 883
"Arabien," The, B.C. Telephone Co. v. (1924) 34 B.C.R. 319 997
Arbitration Act and Woods, In re (1923) 32 B.C.R. 211; (1923) 1 W.W.R. 1344; (1923) 2 D.L.R. 1000 ....77, 207
Arbuthnot v. Campbell (No. 1), (1930) 2 W.W.R. 275 ....118, 858
Arbuthnot v. Campbell (No. 2), (1931) 1 W.W.R. 240 ....119, 481
Arbuthnot v. Hill, (1927) 39 B.C.R. 81 ....59, 60, 284, 289
Arbuthnot, Pacific Coast Coal Mines, Ltd., v. (1916) 23 B.C.R. 267; 31 D.L.R. 378; 33 W.L.R. 487; 9 W.W.R. 1208; (1917) A.C. 607; 86 L.J.P.C. 172; 117 L.T. 613; 36 D.L.R. 564; (1917) 3 W.W.R. 762....167, 173, 174, 175, 184, 863, 1017
Arbuthnot, Pacific Coast Coal Mines, Ltd., v. (1920) 56 D.L.R. 452; (1921) 1 W.W.R. 529 (Imp.) 177, 626
Arbuthnot, Pacific Coast Coal Mines, Ltd., v. (1926) 36 B.C.R. 321; (1926) 1 W.W.R. 478; (1926) 1 D.L.R. 670 ....181, 284, 652
Arbuthnot, Pacific Coast Coal Mines, Ltd., v. (1927) 38 B.C.R. 453....305, 309
Armes v. Russell, (1923-24) 33 B.C.R. 303; (1923) 3 W.W.R. 216; (1924) 1 W.W.R. 825 ....727, 844
Armishaw v. Sacht, (1917) 24 B.C.R. 53; 30 D.L.R. 288; 34 W.L.R. 1180 ....283, 1051

Armitage, Chin Toy v. (1922) 70 D.L.R. 160; (1922) 2 W.W.R. 1269; 38 C.C.C. 382 ..... 331, 368
Armstrong, City of, Can. Nor. Pac. Ry. Co. v. (1920) A.C. 216; (1919) 88 L.J.P.C. 147; 122 L.T. 11; 36 T.L.R. 5; 48 D.L.R. 268; (1919) 3 W.W.R. 352; (1918) 26 B.C.R. 222; 44 D.L.R. 319; (1919) 1 W.W.R. 114.....784, 787, 935, 1044
Armstrong v. City of Revelstoke, (1927) 38 B.C.R. 253; (1927) 2 D.L.R. 223; (1927) 2 W.W.R. 245 885
Armstrong Growers' Assn. v. Harris, (1924) 33 B.C.R. 285; (1924) 1 D.L.R. 1043; (1924) 1 W.W.R. 729 .....534, 589
Armstrong v. New Westminster Harbour Board, (1929) 41 B.C.R. 1; (1929) 2 D.L.R. 150; (1929) 1 W.W.R. 755 ..... 75, 207
Army and Navy Veterans in Canada, In re. In re Government Liquor Act, (1921) 30 B.C.R. 164; 61 D.L.R. 416; (1921) 3 W.W.R. 29; 36 C.C.C. 83....235, 630, 920
Army and Navy Veterans (Victoria Unit) (No. 2), R. v. (1921) 30 B.C.R. 248; 66 D.L.R. 512; (1921) 3 W.W.R. 594; 36 C.C.C. 285..... 640
Arnold, Caulfield v. (No. 2), (1924) 34 B.C.R. 404; (1925) 1 D.L.R. 295; (1925) 1 W.W.R. 664 265
Arnold v. Dominion Trust Co., (1917) 24 B.C.R. 321; 56 S.C.R. 433; (1918) 2 W.W.R. 25; 41 D.L.R. 107 612
Arnold v. Goldstein, (1920) 2 W.W.R. 424 ..... 284, 1007
Aron v. Sproat, (1921) 39 B.C.R. 194 271
Ashcroft Estates, Ltd., Comstock v. (1916) 23 B.C.R. 476; (1917) 1 W.W.R. 1412 ..... 23, 92, 471
Ashdown v. Nickson Cons. Co., (1924) 34 B.C.R. 351; (1924) 4 D.L.R. 868..... 850
Ash-Temple Co. v. Wessels, (1926) 36 B.C.R. 424; (1926) 1 W.W.R. 654; (1926) 1 D.L.R. 1063 976
Ashwell, Canadian Financiers Trust Co. v. (1916) 23 B.C.R. 341; 31 D.L.R. 786; (1917) 1 W.W.R. 459; (1917) 25 B.C.R. 97; (1918) 1 W.W.R. 207; (1918) 25 B.C.R. 473 .....48, 300, 658, 833
Ashworth v. Vancouver Trust Co., (1922) 68 D.L.R. 746 947
Associated Growers of B.C. v. B.C. Fruit Lands Ltd., (1925) 34 B.C.R. 533; (1925) 1 D.L.R. 871; (1925) 1 W.W.R. 505 ..... 166, 177, 267 690
Associated Growers of B.C. v. Edmunds, (1926) 36 B.C.R. 413; (1926) 1 D.L.R. 1093; (1926) 1 W.W.R. 535 ..... 277, 529, 690
Associated Growers of B.C. and Keremeos Growers Co.-Op. Assn. v. Roddick, (1926) 36 B.C.R. 475 .....691, 1011
Associated Growers of B.C., R. v. (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R. 394; (1929) 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; 53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129 ..... 223, 268, 692, 927
Atkin, Muirhead v. (1920) 2 W.W.R. 228 1098
Atkins, Bank of Hamilton v. (1924) 33 B.C.R. 315; (1924) 1 W.W.R. 92, 1157; 4 C.B.R. 347 ..... 100, 198, 300, 551
Atkins, Giberson & Brown v. (1917) 24 B.C.R. 19..... 493
Atkinson v. Pacific Stevedoring & Contracting Co., (1915) 22 B.C.R. 109; 24 D.L.R. 400; 32 W.L.R. 154; 8 W.W.R. 1339..... 483, 706, 854, 856, 1047
Atlas Record Co. v. Cope & Son, (1922) 31 B.C.R. 432..... 50
Atma Ram v. Bhama, (1919) 27 B.C.R. 403 889
Atty.-Gen. for Alberta and Atty.-Gen. for B.C., Atty-Gen. for Canada v.: In re Insurance Act, (1916) 1 A.C. 588; 85 L.J.P.C. 124; 114 L.T. 772; 32 T.L.R. 339; 26 D.L.R. 288; 10 W.W.R. 405; 34 W.L.R. 192; 25 Que. K.B. 187 .....232, 605
Atty.-Gen. for B.C. v. Atty.-Gen. for Canada (Customs), (1922) 64 S.C.R. 377; 38 C.C.C. 283; (1923) 1 D.L.R. 223; 93 L.J.P.C. 129; 130 L.T. 257; 68 Sol. Jo. 58; 40 T.L.R. 4; (1923) 4 D.L.R. 669; (1923) 3 W.W.R. 1249; (1924) A.C. 222 ..... 221, 231, 1038
Atty.-Gen. for B.C., Atty.-Gen. for Canada v.: In re Fisheries Act, (1928) S.C.R. 457; (1928) 4 D.L.R. 190; (1929) 99 L.J.P.C. 20; 142 L.T. 73; 46 T.L.R. 1; (1929) 3 W.W.R. 449; (1930) A.C. 111; (1930) 1 D.L.R. 194.....224, 234, 524, 923

Atty.-Gen. for B.C. v. Atty.-Gen. for Canada. In re Japanese Treaty Act, (1923) 4 D.L.R. 698; (1923) 3 W.W.R. 945; 93 L.J.P.C. 33; 130 L.T. 227; 40 T.L.R. 7; 8 Sol. Jo. 79; (1924) A.C. 203 226
Atty.-Gen. of B.C., Bowman v. (1926) 38 B.C.R. 1; (1926) 4 D.L.R. 834.....506, 1016
Atty.-Gen. of B.C. v. Boyd, (1916) 23 B.C.R. 77; 28 D.L.R. 193; 34 W.L.R. 811; (1917) 54 S.C.R. 532; 36 D.L.R. 266; (1917) 2 W.W.R. 242.....229, 1030
Atty.-Gen. of B.C. v. British Columbia Sugar Refining Co., (1931) 44 B.C.R. 531; (1931) 3 W.W.R. 639; (1932) 1 D.L.R. 626.....1022, 1044
Atty.-Gen. of B.C., Brooks, Bidlake & Whittall v. (1922) 63 S.C.R. 446; 66 D.L.R. 475; (1922) 3 W.W.R. 9; (1923) A.C. 450; 92 L.J.P.C. 124; 128 L.T. 801; 67 Sol. Jo. 333; 39 T.L.R. 220; (1923) 2 D.L.R. 189; (1923) 1 W.W.R. 1150..227, 234
Atty.-Gen. for B.C. v. Can. Pac. Ry. Co., (1927) A.C. 934; 96 L.J.P.C. 149; 137 L.T. 745; 71 Sol. Jo. 761; 43 T.L.R. 750; (1927) 4 D.L.R. 113; (1927) 3 W.W.R. 460; (1927) S.C.R. 185; (1927) 2 D.L.R. 257; (1926) 37 B.C.R. 481; (1926) 3 W.W.R. 154; (1926) 36 B.C.R. 551; (1926) 1 W.W.R. 837; (1926) 4 D.L.R. 147 ..... 231, 1039
Atty.-Gen. for B.C. v. Corpn. of Saanich, (1921) 29 B.C.R. 268; 56 D.L.R. 482; (1921) 1 W.W.R. 471 ..... 568, 768, 1068
Atty.-Gen. for B.C. v. Freeman, (1924) 2 D.L.R. 99 .....522, 681, 710
Atty.-Gen. of B.C., Granby Cons. Mng., Etc., Co. v. (1922) 31 B.C.R. 262; 70 D.L.R. 299; (1922) 3 W.W.R. 153; (1923) A.C. 247; 92 L.J.P.C. 74; 128 L.T. 677; (1923) 1 D.L.R. 1064; (1923) 1 W.W.R. 992.....1021, 1045
Atty.-Gen. for B.C., Lee Sheck Yew v. (1923) 33 B.C.R. 109; (1924) 1 W.W.R. 753; (1924) 1 D.L.R. 1166..... 214, 580, 1034, 1124
Atty.-Gen. for B.C., Little v. (1921) 30 B.C.R. 343; 60 D.L.R. 335; (1921) 3 W.W.R. 625; (1922) 31 B.C.R. 84; 65 D.L.R. 297; 37 C.C.C. 189; (1922) 2 W.W.R. 359.. 229
Atty.-Gen. for B.C., Macdonald Murphy Lumber Co. v. (1929) 41 B.C.R. 473; (1929) 4 D.L.R. 954; (1929) 2 W.W.R. 529; (1930) A.C. 357; 99 L.J.P.C. 113; 143 L.T. 1; 46 T.L.R. 266; (1930) 2 D.L.R. 721; (1930) 1 W.W.R. 830.....230, 1039
Atty.-Gen. of B.C., Mackay v. (1922) 63 D.L.R. 171; (1922) 1 A.C. 457; 91 L.J.P.C. 193; 127 L.T. 81; (1922) 1 W.W.R. 982 1012
Atty.-Gen. for B.C., Redmond v. (1931) 44 B.C.R. 390; (1931) 3 W.W.R. 18....594, 1036
Atty.-Gen. of B.C. v. Robertson & Partners, Ltd., (1924) 33 B.C.R. 325; (1924) 1 D.L.R. 1090; (1924) 1 W.W.R. 1155 258
Atty.-Gen. for B.C. v. S.S. "Bermuda," (1923) 32 B.C.R. 76; (1923) 2 D.L.R. 272; (1923) 1 W.W.R. 956; (1923) Ex. C.R. 107 ..... 16, 995
Atty.-Gen. of B.C. v. Standard Lumber Co., (1925) 36 B.C.R. 481; (1926) 2 W.W.R. 167 1041
Atty.-Gen. for B.C. v. The King, (1922) 63 S.C.R. 622; 68 D.L.R. 106; (1922) 3 W.W.R. 269; (1923) 93 L.J.P.C. 76; 130 L.T. 231; 68 Sol. Jo. 138; 40 T.L.R. 13; (1923) 4 D.L.R. 690; (1923) 3 W.W.R. 1252; (1924) A.C. 213 ..... 202, 216, 221, 1021, 1022
Atty.-Gen. of B.C. v. The "Pacific Foam," (1928) 40 B.C.R. 100; (1928) 2 D.L.R. 877; (1928) 1 W.W.R. 965 .....160, 998
Atty.-Gen. for B.C. and Atty.-Gen. for Alberta, Atty.-Gen. for Canada v.: In re Insurance Act, (1916) 1 A.C. 588; 85 L.J.P.C. 124; 114 L.T. 772; 32 T.L.R. 339; 26 D.L.R. 288; 10 W.W.R. 405; 34 W.L.R. 192; 25 Que. K.B. 187 .....232, 605
Atty.-Gen. for B.C. and City of Victoria v. Bailey, (1920) 60 S.C.R. 38; 54 D.L.R. 50; (1920) 1 W.W.R. 917 .....563, 567, 1008, 1021
Atty.-Gen. of B.C., Untermyer Estate v. (1929) S.C.R. 84; (1929) 1 D.L.R. 315; (1928) 39 B.C.R. 533; (1928) 3 D.L.R. 311; (1928) 2 W.W.R. 209..... .....172, 230, 1033, 1035
Atty.-Gen. for Canada v. Atty.-Gen. for Alberta and Atty.-Gen. for B.C. In re Insurance Act, (1916) 1 A.C. 588; 85 L.J.P.C. 124; 114 L.T. 772; 32 T.L.R. 339; 26 D.L.R. 288; 10 W.W.R. 405; 34 W.L.R. 192; 25 Que. K.B. 187.....232, 605
Atty.-Gen. for Canada, Atty.-Gen. for B.C. v. (Customs) (1923) 93 L.J.P.C. 129; 130 L.T. 257; 68 Sol. Jo. 58; 40 T.L.R. 4; (1923) 4 D.L.R. 669; (1923) 3 W.W.R. 1249; (1924) A.C. 222 .....221, 231, 1038

Atty.-Gen. for Canada v. Atty.-Gen. for B.C.: In re Fisheries Act, (1928) S.C.R. 457; (1928) 4 D.L.R. 190; (1929) 99 L.J.P.C. 20; 142 L.T. 73; 46 T.L.R. 1; (1929) 3 W.W.R. 449; (1930) A.C. 111; (1930) 1 D.L.R. 194.....224, 234, 524 923
Atty.-Gen. for Canada, Atty.-Gen. for B.C. v.: In re Japanese Treaty Act, (1923) 4 D.L.R. 698; (1923) 3 W.W.R. 945; 93 L.J.P.C. 33; 130 L.T. 227; 40 T.L.R. 7; 8 Sol. Jo. 79; (1924) A.C. 203 226
Atty.-Gen. for Canada v. Cummings, (1924) 34 B.C.R. 433; (1925) 1 D.L.R. 642; (1926) 1 D.L.R. 52 .....471, 678, 869
Atty.-Gen. for Canada v. Gonzalves, (1924) 34 B.C.R. 360, 389; (1924) 4 D.L.R. 474; (1925) 1 W.W.R. 180; (1926) 1 D.L.R. 51.....238, 471, 678, 869
Atty.-Gen. of Canada v. Reed, (1925) 36 B.C.R. 336; (1926) 1 D.L.R. 821..... 1042
Atty.-Gen. for Canada v. Ritchie Contracting & Supply Co., (1919) A.C. 999; 88 L.J.P.C. 189; 121 L.T. 655; 36 T.L.R. 1; 48 D.L.R. 147; (1919) 3 W.W.R. 347.. 220
Atwood v. Lubotina, (1928) 40 B.C.R. 446 816
Aubin v. Aubin, (1919) 27 B.C.R. 445; (1919) 3 W.W.R. 312 440
Auld v. Taylor, (1915) 21 B.C.R. 192; 21 D.L.R. 577; 8 W.W.R. 552.....261, 478, 877
Austin Hotel Co. and Royal Trust Co., In re, (1918) 26 B.C.R. 353; 44 D.L.R. 480; (1919) 1 W.W.R. 934 .....123, 328
Automatic Elec. Telephone Co. v. Union S.S. Co., (1921) 1 W.W.R. 741.....142, 144
Avenue Theatre Ltd. v. Vancouver Gas Co., (1928) 40 B.C.R. 275.....842, 1057
Avery, Isbell Bean Co. v. (1923) 31 B.C.R. 502; (1923) 1 D.L.R. 708; (1923) 1 W.W.R. 441 543

B

B. v. B. and S., Intervener, (1929) 41 B.C.R. 184; (1929) 4 D.L.R. 1069; (1929) 1 W.W.R. 916 441
B.W.B. Navigation Co. v. The "Kiltuish," (1922) 31 B.C.R. 319; (1922) 2 W.W.R. 959; 67 D.L.R. 525; 21 Ex. C.R. 398 .....163, 262, 480
Bagley v. B.C. Southern Ry. Co., (1917) 24 B.C.R. 400; 37 D.L.R. 733; (1919) 2 W.W.R. 250 ..... 404, 1084
Bagley, R. v. (1926) 37 B.C.R. 353; (1926) 3 D.L.R. 717; (1926) 2 W.W.R. 513; 46 C.C.C. 257 ..... 398, 488
Bahme v. Great Northern Ry. Co., (1916) 23 B.C.R. 484; (1917) 1 W.W.R. 1255.... 696
Bailey, Atty.-Gen. for B.C. and City of Victoria v. (1920) 60 S.C.R. 38; 54 D.L.R. 50; (1920) 1 W.W.R. 917 ..... 563, 766, 776, 1021, 1025
Bain, Maddison v. (1930) S.C.R. 299; (1930) 1 D.L.R. 63; (1929) 40 B.C.R. 499; (1929) 1 D.L.R. 843; (1929) 1 W.W.R. 437; (1928) 39 B.C.R. 460; (1928) 3 D.L.R. 33 .....52, 269, 653, 699, 742, 858, 916
Bainbridge Lumber Co., Ltd., Goddard v. (1920) 29 B.C.R. 186; (1921) 29 B.C.R. 287 .....203, 288, 303
Baird v. Columbia Trust Co., (1915) 22 D.L.R. 150 1076
Baker v. Guaranty Savings & Loan Assn., (1931) S.C.R. 199; (1931) 1 D.L.R. 968 .....167, 985
Baker, R. v. (1925) 37 B.C.R. 1; 45 C.C.C. 1; (1926) 1 D.L.R. 99; (1926) S.C.R. 92; (1926) 1 D.L.R. 115; 45 C.C.C. 19 .....373, 375, 485
Baker v. Richards, (1918) 25 B.C.R. 397; 40 D.L.R. 351; (1918) 2 W.W.R. 902; 59 S.C.R. 656; 49 D.L.R. 684 .....5, 88, 299, 497, 502, 987
Baker & Ellicott v. Williams, (1916) 23 B.C.R. 124 .....711, 712
Balcom, Rissmuller v. (1917) 24 B.C.R. 353; (1917) 3 W.W.R. 535 .....577, 1130
Balderson, Nelson v. (1917) 3 W.W.R. 448 .....894, 1107
Balfour, Guthrie & Co. v. Can. Pac. Ry. Co. (1917) 3 W.W.R. 410 ...138, 141, 143, 472
Ball, Jesse Warren, In re (1923) 33 B.C.R. 162; (1924) 1 W.W.R. 33..... 466
Ball and Whieldon v. Royal Bank, (1915) 52 S.C.R. 254; 26 D.L.R. 385; 9 W.W.R. 776 .....120, 122, 123
Ballantyne v. McCulloch, (1927) 39 B.C.R. 97; (1927) 4 D.L.R. 525; (1927) 3 W.W.R. 148 .....497, 682, 989
Balment, R. ex rel. McFarlane v. (1915) 8 W.W.R. 111 .....447, 933

"Bamfield," The, Hernandez v. (1921) 30 B.C.R. 161; (1921) 3 W.W.R. 69; 21 Ex. C.R. 166 18
Bampton, R. v. (1931) 44 B.C.R. 427; 57 C.C.C. 232; (1932) 1 W.W.R. 154; (1932) S.C.R. 626; (1932) 4 D.L.R. 209; 58 C.C.C. 289 341
Banfield, Bank of Hamilton v. (1918) 25 B.C.R. 367; 40 D.L.R. 482; (1918) 2 W.W.R. 953 547
Bank of Hamilton v. Atkins, (1924) 33 B.C.R. 315; (1924) 1 W.W.R. 92, 1157; 4 C.B.R. 347 ..... 100, 198, 300, 551
Bank of Hamilton v. Banfield, (1918) 25 B.C.R. 367; 40 D.L.R. 482; (1918) 2 W.W.R. 953 547
Bank of Hamilton v. Black, (1917) 24 B.C.R. 394; 37 D.L.R. 801; (1917) 3 W.W.R. 909 ..... 536, 1072
Bank of Hamilton v. Copp, (1924) 3 W.W.R. 323 ..... 419, 455, 479, 651
Bank of Hamilton v. Hartery, (1919) 58 S.C.R. 338; 45 D.L.R. 638; (1919) 1 W.W.R. 868; (1918) 26 B.C.R. 22; 43 D.L.R. 14; (1918) 3 W.W.R. 551; (1917) 25 B.C.R. 150; (1917) 3 W.W.R. 964 ..... 499, 654, 748, 951, 1027
Bank of Hamilton v. Mutual Fruit Co., Ltd., (1921) 29 B.C.R. 448; (1921) 1 W.W.R. 727 177
Bank of Montreal, Brown v. (1916) 23 B.C.R. 68 532
Bank of Montreal v. Cruickshank, (1919) 27 B.C.R. 481; (1920) 1 W.W.R. 381 ... 861
Bank of Montreal, Gauley v. (1916) 23 B.C.R. 264; 34 W.L.R. 1192; 10 W.W.R. 1359; 30 D.L.R. 483 ..... 110, 527, 528, 745
Bank of Montreal, Kynoch v. (1923) 3 D.L.R. 877; (1923) 3 W.W.R. 161 .... 668, 1057
Bank of Montreal v. McNeill, (1924) 33 B.C.R. 263; (1924) 2 W.W.R. 165 117
Bank of Montreal, Sullivan Machinery Co. v. (1918) 3 W.W.R. 16 ..... 725, 975
Bank of Montreal v. Wiesdepp, (1917) 24 B.C.R. 73; 34 D.L.R. 26; (1917) 2 W.W.R. 615 ..... 109, 118, 467, 739
Bank of Toronto v. Harrell, (1916) 23 B.C.R. 202; (1917) 55 S.C.R. 512; 31 D.L.R. 440; 39 D.L.R. 262; (1917) 1 W.W.R. 213; (1917) 2 W.W.R. 1149 ..... 109, 659, 661, 734, 741, 837
Bank of Vancouver, In re (1917) 1 W.W.R. 163 114
Bank of Vancouver and Barrett, In re (1917) 24 B.C.R. 241; 36 D.L.R. 158; (1917) 3 W.W.R. 53 195
Bank of Vancouver, Dominion Winding-up Act and, In re (1920) 28 B.C.R. 85; (1920) 1 W.W.R. 816 189
Bank of Vancouver v. Kennedy, (1919) 3 W.W.R. 51 683
Bank of Vancouver, Kinman v. (1916) 22 B.C.R. 414; 28 D.L.R. 507; 10 W.W.R. 517 107
Bank of Vancouver, Macdonald v. (1916) 22 B.C.R. 310; 25 D.L.R. 567; 32 W.L.R. 339; 9 W.W.R. 8 ..... 110, 170, 458, 475
Bank of Vancouver v. Nordlund, (1920) 28 B.C.R. 342 35
Bank of Vancouver, Winding-up Act and, In re (1917) 3 W.W.R. 461 305
Bank of Vancouver, Winding-up Act and, In re (1919) 27 B.C.R. 457; (1919) 3 W.W.R. 986 191
Bankers Trust and Barnsley, In re (1915) 21 B.C.R. 130; 21 D.L.R. 623; 30 W.L.R. 738; 8 W.W.R. 38 194
Bankers Trust Co. and Okell, In re (1916) 22 B.C.R. 436; 27 D.L.R. 63; 34 W.L.R. 1; 10 W.W.R. 150 194
Banton v. Amar Chand, (1921) 3 W.W.R. 368; (1922) 1 W.W.R. 929 ..... 470, 830, 1008
Barclay, Ridley v. (1928) 40 B.C.R. 244; (1928) 4 D.L.R. 79; (1928) 3 W.W.R. 62 ..... 260, 479, 599
Bardgett v. Can. Pac. Ry. Co. (1916) 10 W.W.R. 810 ..... 24, 939
Barker v. Eadie, (1917) 2 W.W.R. 1013 1108
Barker v. Jung (1919) 26 B.C.R. 352; (1919) 1 W.W.R. 13 ..... 828, 889
Barker, Mahler v. (1924) 34 B.C.R. 136; (1924) 3 D.L.R. 292; (1924) 2 W.W.R. 796 ..... 247, 1083
Barlow v. Breeze, (1917) 31 D.L.R. 280; (1917) 1 W.W.R. 270 433

Barlow v. Merchants Casualty Insurance Co., (1929) 41 B.C.R. 427; (1929) 4 D.L.R. 701; (1929) 3 W.W.R. 724 616
Barnard, Robertson, Heisterman & Tait, Legal Professions Act and, In re (1926) 37 B.C.R. 161; (1926) 3 W.W.R. 63 1006
Barnet Lighterage Co. v. The "Kiltuish," (1922) 31 B.C.R. 319; 21 Ex. C.R. 398; 67 D.L.R. 525; (1922) 2 W.W.R. 959 163
Barnett-McQueen Co., Moncrieff v. (1917) 24 B.C.R. 185; 34 D.L.R. 737; (1917) 2 W.W.R. 625 704
Barnsley, Bankers Trust and, In re (1915) 21 B.C.R. 130; 21 D.L.R. 623; 30 W.L.R. 738; 8 W.W.R. 38 194
Barnswell v. National Amusement Co., (1915) 21 B.C.R. 435; 23 D.L.R. 615; 31 W.L.R. 542 275
Barr, Murphy v. (1921) 61 D.L.R. 343 527
Barr, Penrose v. (1927) 4 D.L.R. 407; (1927) 3 W.W.R. 104 .....414, 571, 811
Barrett and Bank of Vancouver, In re (1917) 24 B.C.R. 241; 36 D.L.R. 158; (1917) 3 W.W.R. 53 195
Barrett, Watson v. (1929) 41 B.C.R. 478 181
Barrett-Leonard, Splan v. (1931) 44 B.C.R. 371; (1931) 2 D.L.R. 857; 4 D.L.R. 686; (1931) 3 W.W.R. 41 .....36, 41, 285
Barron v. Kelly, (1917) 24 B.C.R. 283; 37 D.L.R. 8; (1917) 3 W.W.R. 65; (1918) 56 S.C.R. 455; (1918) 2 W.W.R. 131; 41 D.L.R. 590; (1918) 3 W.W.R. 466; (1918) 26 B.C.R. 379 .....68, 313, 503, 741, 830, 1097
Barron v. Morgan, (1930) 43 B.C.R. 84; (1930) 4 D.L.R. 985; (1930) 3 W.W.R. 65 .....725, 1086
Barton, R. v. (1919) 27 B.C.R. 485 434
Basant Singh and Jagat Singh v. Kehar Singh Gill, (1929) 41 B.C.R. 256; (1929) 2 W.W.R. 431; (1929) 4 D.L.R. 396 .....751, 1012
Bateman, Newlands Sawmills v. (1922) 31 B.C.R. 351; 70 D.L.R. 165; (1922) 3 W.W.R. 649 .....530, 532
Bates, F. H., Deceased, In re (1919) 27 B.C.R. 1 507
Batt, New York Outfitting Co. v. (1921) 30 B.C.R. 155; 60 D.L.R. 658 267
Battistoni v. Thomas, (1930) 43 B.C.R. 273; (1930) 3 W.W.R. 617; (1931) 44 B.C.R. 188; (1931) 1 D.L.R. 559; (1931) 4 D.L.R. 526; (1931) 3 W.W.R. 44; (1932) S.C.R. 144; (1932) 1 D.L.R. 577 .....413, 709, 813
Batzold, Stump v. (1931) 2 W.W.R. 784 534
Bauthier, Newton v.; Shaw, Assignee, (1915) 21 B.C.R. 4; 24 D.L.R. 890; 8 W.W.R. 903 50
Baxter, Aickin v. (No. 1), (1928) 40 B.C.R. 176; (1928) 3 W.W.R. 142 252
Baxter, Aickin v. (No. 2), (1929) 41 B.C.R. 217 .....59, 293
Baxter, Aickin v. (No. 3), (1929) 42 B.C.R. 86; (1930) 2 D.L.R. 308 287
Baxter, J. H., Royal Bank of Canada et al. v. (1922) 31 B.C.R. 248; (1922) 67 D.L.R. 585 291
Bayley v. Love, (1924) 34 B.C.R. 195; (1924) 3 D.L.R. 1093; (1924) 3 W.W.R. 155 796
Baynes & Horie v. Vancouver Board of School Trustees, (1927) 2 D.L.R. 698 ....129, 244
Beauchamp v. Savory, (1921) 30 B.C.R. 429 807
Beaumont v. Harris, (1920) 28 B.C.R. 70, 144; 59 D.L.R. 628 .....598, 1013, 1088
Beban, Hughes v. (1927-8) 39 B.C.R. 132; (1928) 1 D.L.R. 244; (1928) 1 W.W.R. 35 .....678, 1055
Beck v. The "Kobe," (1915) 22 B.C.R. 169; 17 Ex. C.R. 215; 32 W.L.R. 351; 9 W.W.R. 89, 351; 24 D.L.R. 573 .....9, 994
Beck, A. E., Legal Professions Act and, In re (1925) 36 B.C.R. 76; (1925) 3 W.W.R. 64 .....1001, 1007
Beckman Estate, In re (1925) 37 B.C.R. 41 .....507, 511
Befolchi v. Befolchi, (1919) 27 B.C.R. 460; (1920) 1 W.W.R. 248 .....590, 888
Begg Motor Co., Cox v. (1921) 29 B.C.R. 531; 62 D.L.R. 303; (1921) 2 W.W.R. 150 .....58, 292
Beguin, R. v. (1922) 31 B.C.R. 429 345
Bela Singh, R. v. (1915) 22 B.C.R. 321; 27 C.C.C. 40 .....380, 384

Bell, Carter v. (1915) 21 B.C.R. 55; 21 D.L.R. 243; 31 W.L.R. 1; 8 W.W.R. 47..... 753
Bell v. Green. In re Martin, (1920) 28 B.C.R. 462; (1920) 3 W.W.R. 900..... 1003
Bell v. Johnston Brothers, (1917) 25 B.C.R. 82; (1918) 2 W.W.R. 549..... 806, 1110
Bell v. Nicholls, (1918) 26 B.C.R. 102 .....502, 987
Bell v. Quagliotti, (1918) 25 B.C.R. 460; (1918) 2 W.W.R. 915; (1919) 26 B.C.R. 482 .....279, 666
Bell, R. v. (1930) 42 B.C.R. 136; (1930) 2 D.L.R. 647; 53 C.C.C. 44; (1929) 41 B.C.R. 166; (1929) 3 D.L.R. 931; (1929) 2 W.W.R. 399; 51 C.C.C. 388 .....58, 349, 388, 389, 399, 415, 476
Bell, Rankin v. (1923) 3 D.L.R. 907; (1923) 2 W.W.R. 922.....503, 987
Bell, Salvas v. (1927) 4 D.L.R. 1099..... 1114
Bell v. Wood and Anderson, (1927) 38 B.C.R. 310; (1927) 2 D.L.R. 827; (1927) 1 W.W.R. 580 ..... 656, 871
Bell-Irving v. Matthew, (1916) 31 D.L.R. 240 734
Bell-Irving Assessment, In re (1924) 33 B.C.R. 496; (1924) 3 D.L.R. 31; (1924) 2 W.W.R. 557 ..... 30, 786
Bell-Irving, Macaulay Nicolls Maitland & Co. v. (1931) S.C.R. 276; (1931) 1 D.L.R. 381 910
Bell Lumber & Pole Co., McAllister v. (1931) 3 W.W.R. 767..... 706, 708
Bellamy v. Green, (1927) 38 B.C.R. 182; (1927) 2 D.L.R. 327..... 707
Bellevue, Coldstream v. (1929) 4 D.L.R. 52; (1929) 2 W.W.R. 597..... 594, 1016
Bellos, R. v. (1927) S.C.R. 258; (1927) 3 D.L.R. 186; 48 C.C.C. 126; (1926) 38 B.C.R. 89; (1927) 1 W.W.R. 471; 47 C.C.C. 157.....397, 486
Belmont Investment Co. v. Moody, (1922) 31 B.C.R. 345; (1923) 32 B.C.R. 488; (1923) 3 D.L.R. 812; (1923) 1 W.W.R. 934; (1923) 3 W.W.R. 291...316, 652, 757
Belridge S.S., Can. Pac. Ry. Co. v. (1917) 27 B.C.R. 537; (1917) 3 W.W.R. 961; 68 D.L.R. 224; 20 Ex. C.R. 399 ..... 161, 162, 414
Bennett v. Kent Piano Co., (1921) 29 B.C.R. 465 .....980, 1067
Benson, In re (1918) 25 B.C.R. 458; (1918) 3 W.W.R. 583 .....506, 1110
Berdino, R. v. (1924) 34 B.C.R. 142; (1924) 3 D.L.R. 794; (1924) 3 W.W.R. 198; 42 C.C.C. 308 ..... 380, 641
Berenstein, R. ex rel. Robinson v. (1917) 24 B.C.R. 361; 29 C.C.C. 435 .....368, 377
Berg v. Bosence, (1931) 44 B.C.R. 71; (1931) 3 D.L.R. 611; (1931) 2 W.W.R. 469 ..... 469, 722, 723
Berg, Carr v. (1917) 24 B.C.R. 422; (1917) 38 D.L.R. 176; (1917) 3 W.W.R. 1037; (1918) 2 W.W.R. 368 ..... 271, 406
Bergklint v. Western Canada Power Co., (1915) 22 B.C.R. 241; 24 D.L.R. 565; 54 S.C.R. 285; (1917) 1 W.W.R. 1262; 34 D.L.R. 467 .....326, 701, 828
Berkley, Ibbotson v. (1918) 26 B.C.R. 156; (1918) 3 W.W.R. 1018..... 685
"Bermuda" The, Atty.-Gen. for B.C. v. (1923) 32 B.C.R. 76; (1923) 2 D.L.R. 272; (1923) 1 W.W.R. 956; (1923) Ex. C.R. 107..... 16, 995
Bernstein v. Erickson, (1921) 29 B.C.R. 151; 56 D.L.R. 616; (1921) 1 W.W.R. 834... 605
Berquist, In re (1925) 35 B.C.R. 368; (1925) 2 D.L.R. 696; (1925) 1 W.W.R. 1084 .....149, 993
Berry, Vandepitte v. (1928) 40 B.C.R. 408; (1929) 1 D.L.R. 1002.....414, 652, 823
Bertha Cons. Gold Mng. Co., Coryell v. (1923) 33 B.C.R. 81; (1924) 1 D.L.R. 236; (1924) 1 W.W.R. 122 520
Beseloff v. White Rock Resort Development Co. and Phillips, (1915) 22 B.C.R. 33; 23 D.L.R. 676; 32 W.L.R. 73; 8 W.W.R. 1338 712
Best v. Lefroy, (1922) 67 D.L.R. 455 .....571, 806
Bethune, Harris v. (1921) 29 B.C.R. 485; (1921) 2 W.W.R. 259 1093
Bevan Lbr. & Shingle Co., Millard v. (1928) 39 B.C.R. 430; (1928) 2 D.L.R. 367..468, 579
Bhana, Atma Ram v. (1919) 27 B.C.R. 403 889
Bieterilla, Olson v. (1920) 28 B.C.R. 95; (1920) 1 W.W.R. 1008.....276, 1131
Bigattini v. Dixon, (1919) 1 W.W.R. 464 634
Biggar v. Biggar, (1930) 42 B.C.R. 329; (1930) 2 D.L.R. 940.....212, 436
Bigrigg, R. ex rel. v. Williams, (1930) 42 B.C.R. 175; (1930) 2 D.L.R. 493; (1930) 1 W.W.R. 292; 53 C.C.C. 88 ..... 24, 27, 378, 471

Bing Kee v. McKenzie, (1919) 26 B.C.R. 509; (1919) 2 W.W.R. 172; 47 D.L.R. 43; (1919) 3 W.W.R. 221; 48 D.L.R. 287 ..... 424, 942
Bird v. Fisher, (1921) 2 W.W.R. 812 ..... 764, 789
Bird v. Greenhow, (1919) 27 B.C.R. 160; (1919) 2 W.W.R. 320 894
Bird, In re Kean v. (1927) 39 B.C.R. 169; (1927) 4 D.L.R. 561; (1927) 3 W.W.R. 369; 48 C.C.C. 363 ..... 34, 239, 1003, 1005
Bishop, Kenworthy v. (1925) 36 B.C.R. 38; (1925) 3 W.W.R. 183 1117
Bishop v. Liden, (1929) 40 B.C.R. 556; (1929) 1 D.L.R. 998; (1929) 1 W.W.R. 402 .. 25
Bishop of Vancouver Island v. City of Victoria, (1920) 28 B.C.R. 533; 54 D.L.R. 615; (1921) 3 W.W.R. 214; 90 L.J.P.C. 213; (1921) 2 A.C. 384; 59 D.L.R. 399 ..... 125, 680, 786, 790, 1018
Black, Bank of Hamilton v. (1917) 24 B.C.R. 394; 37 D.L.R. 801; (1917) 3 W.W.R. 909 ..... 536, 1072
Blackett v. Westcott, (1917) 3 W.W.R. 460 1110
Blackman v. The King, (1924) S.C.R. 406; (1924) 4 D.L.R. 123 ..... 1030, 1036
Blackman & Smith, R. v. (1931) 44 B.C.R. 115; (1931) 2 W.W.R. 11; 56 C.C.C. 48 ..... 348, 400
Blair v. Canadian Fishing Co., (1929) 41 B.C.R. 80 ..... 288, 319
Blair v. Dice, (1924) 34 B.C.R. 323; (1924) 4 D.L.R. 568; (1924) 3 W.W.R. 379 ..... 487, 528
Blair, Mellis v. (1916) 22 B.C.R. 450; 27 D.L.R. 165; 10 W.W.R. 241 ..... 116, 410, 975
Blair, R. v. (1931) 2 W.W.R. 893 637
Blakely, Gordon v. (1931) 2 W.W.R. 902 1058
Blakeman, Engleblom v. (1930) 42 B.C.R. 259; (1930) 2 D.L.R. 824; (1930) 1 W.W.R. 565; (1929) 41 B.C.R. 456; (1929) 4 D.L.R. 377 ..... 263, 457, 1102
Blanchard v. Vaughan, (1930) 42 B.C.R. 446 ..... 1057, 1068
Blanchard and Morgan, Land Registry Act and, In re (1919) 26 B.C.R. 447; 44 D.L.R. 728; (1919) 1 W.W.R. 311 1128
Bligh v. Gallagher et al., (1921) 29 B.C.R. 241; (1921) 1 W.W.R. 662; 57 D.L.R. 76 ..... 249, 490, 864
Bloomfield v. Alexander et al., (1923) 32 B.C.R. 110 810
Blue Funnel Motor Line v. City of Vancouver, (1918) 26 B.C.R. 142, 388; (1918) 3 W.W.R. 405, 473 ..... 567, 601, 777, 889
Blue Funnel Motor Line, Workmen's Compensation Act and, In re (1919) 27 B.C.R. 418; (1919) 3 W.W.R. 426 708
Blue River Pole & Tie Co., National Pole & Treating Co. v. (1930) 43 B.C.R. 98; (1930) 3 D.L.R. 996; (1929) 3 D.L.R. 638 ..... 178, 461, 544, 915
Blumberger v. Solloway, Mills & Co., (1931) 44 B.C.R. 41; (1931) 3 D.L.R. 204; (1931) 2 W.W.R. 56 880
Blygh v. Solloway, Mills & Co., (1930) 42 B.C.R. 531; (1930) 4 D.L.R. 582; (1930) 2 W.W.R. 208 ..... 51, 862
Boak, R. v. (1925) 35 B.C.R. 256; (1925) S.C.R. 525; (1925) 3 D.L.R. 887; 44 C.C.C. 218 ..... 29, 372, 379, 380, 382, 395, 657, 662
Boak v. Woods, (1926) 36 B.C.R. 456; (1926) 1 D.L.R. 1186 174
Board of Investigation under Water Act, Dept. of Indian Affairs v. (1925) 36 B.C.R. 62 1114
Bodnar v. Stuart, (1922) 30 B.C.R. 411; (1922) 1 W.W.R. 933 661
Body v. Body, (1924) 34 B.C.R. 315 574
Bond, Philip & Co. v. Conkey, (1921) 29 B.C.R. 240; (1921) 1 W.W.R. 758 890
Bonser, Motorcar Loan Co. v. (1928) 40 B.C.R. 55; (1928) 3 D.L.R. 875; (1928) 1 W.W.R. 801 977
Booth v. Ford & Shaw, (1927) 38 B.C.R. 279 ..... 703, 1058
Border Line Transportation Co. v. McDougal, (1916) 22 B.C.R. 496; 28 D.L.R. 42; 16 Ex. C.R. 319; 34 W.L.R. 123; 10 W.W.R. 230 ..... 19, 159, 465 467
Boscowitz, In re (1916) 27 D.L.R. 721; 10 W.W.R. 948 ..... 312, 1007
Bosence, Berg v. (1931) 44 B.C.R. 71; (1931) 3 D.L.R. 611; (1931) 2 W.W.R. 469 ..... 469, 722, 723

Boslund et al. v. Abbotsford Lumber Etc., Co., (1925) 34 B.C.R. 485; (1925) 36 B.C.R. 386; (1925) 1 D.L.R. 978; (1925) 1 W.W.R. 475; (1927) 1 D.L.R. 279 ....36, 209, 408 521
Boston Ins. Co., Brooks, Scanlon, O'Brien Co. v. (1919) 26 B.C.R. 490; 47 D.L.R. 93; (1919) 2 W.W.R. 129 622
Bostwick v. Coy, (1915) 21 B.C.R. 478 ....952, 1088
Bottoms v. Pacific Northwestern Lbr. Co., (1929) 2 W.W.R. 495; (1929) 4 D.L.R. 415; 3rd C.E.D. Supp. (1926-1931) p. 504 ....878, 898, 945, 959, 1047
Bouch v. Rath, (1918) 25 B.C.R. 445; 26 B.C.R. 320 ....45, 1107
Boultbee & Atkins, McLeod v. (1931) 44 B.C.R. 375; (1931) 2 W.W.R. 805; (1931) 4 D.L.R. 912 ....411, 413, 812, 824
Boulton, Cameron v. (1930) 43 B.C.R. 39; (1930) 4 D.L.R. 1021; (1930) 3 W.W.R. 61 ....312, 1005
Bourcet v. McLean, (1929) 4 D.L.R. 359; (1929) 3 W.W.R. 44 701
Bourgoin v. Bourgoin, (1930); 42 B.C.R. 349; (1930) 3 D.L.R. 155; (1930) 1 W.W.R. 576 ....298-9, 441
Bourner v. Pauling & Co., (1917) 24 B.C.R. 222; 35 D.L.R. 465; (1917) 2 W.W.R. 1129 853
Bouskill v. Williams, (1919) 27 B.C.R. 25; (1919) 2 W.W.R. 546 45
Bovero, R. v. (1925) 35 B.C.R. 103; (1925) 1 W.W.R. 304; 44 C.C.C. 324 357
Bowell, Winch v. (1922) 31 B.C.R. 186; 67 D.L.R. 471; (1922) 2 W.W.R. 1031 823
Bowen, R. v. (1930) 43 B.C.R. 507 350
Bowers, Whalen v. (1925) 35 B.C.R. 128; (1925) 3 D.L.R. 442; (1925) 1 W.W.R. 686 796
Bowles, R. v. (1923) 32 B.C.R. 340; (1923) 2 W.W.R. 1062 383
Bowman v. Atty.-Gen. of B.C. (1926) 38 B.C.R. 1; (1926) 4 D.L.R. 834....506, 1016
Boyce and Macpherson, Dominion Trust Co. and, In re (1918) 26 B.C.R. 302, 330; 43 D.L.R. 538; (1919) 2 W.W.R. 452; (1919) 59 S.C.R. 691 ....58, 188, 283
Boyd v. Atty.-Gen. for B.C. In re Succession Duty Act, (1916) 23 B.C.R. 77; Boyd v. Dickinson, (1930) 2 D.L.R. 96 667
Boyd and McDougal v. Houston et al., (1916) 10 W.W.R. 518 813
Boyd v. Atty.-Gen. for B.C. In re Succession Duty Act (1916) 23 B.C.R. 77; 28 D.L.R. 193; 34 W.L.R. 811; (1917) 54 S.C.R. 532; 36 D.L.R. 266; (1917) 2 W.W.R. 242 ....229, 1030
Boyd & Elgie v. Kersey, (1927) 38 B.C.R. 342; (1927) 2 D.L.R. 679; (1926) 2 W.W.R. 816; (1927) 1 W.W.R. 665 ....537, 539
Boyd and Anderson v. Superior Spruce Mills, (1927) 2 W.W.R. 54 1141
Boydell v. Hames, (1915) 21 B.C.R. 171; 21 D.L.R. 371; 30 W.L.R. 842; 8 W.W.R. 17 ....301, 1094, 1104
Boyer v. Moillet, (1921) 30 B.C.R. 216; 61 D.L.R. 136; (1921) 3 W.W.R. 62 ....761, 793 813
Boyle v. Seguin, (1922) 1 A.C. 462; 91 L.J.P.C. 137; 127 L.T. 198; 63 D.L.R. 369; (1922) 1 W.W.R. 1169 1146
Boyle Concessions, Ltd., Yukon Gold Co. v. (1916) 23 B.C.R. 103; 27 D.L.R. 672; 34 W.L.R. 436; 10 W.W.R. 585; 50 D.L.R. 742; (1919) 3 W.W.R. 145 1145
Braden v. Brown, (1917) 24 B.C.R. 374; (1917) 3 W.W.R. 906 716
Bradley, In re (1921) 30 B.C.R. 280; (1921) 3 W.W.R. 385 992
Bradner, Rule v. (1923) 4 D.L.R. 81 250
Bradshaw v. B.C. Rapid Transit Co., Ltd. (No. 2), (1926) 38 B.C.R. 56, 111; (1927) 1 W.W.R. 425; (1927) 1 D.L.R. 865 ....69, 656
Bradshaw v. B.C. Rapid Transit Co.. Ltd. (No. 3), (1926) 38 B.C.R. 64; (1927) 1 D.L.R. 599 ....657, 891
Bradshaw, B.C. Rapid Transit Co. v. (1927) 38 B.C.R. 430; (1927) 1 W.W.R. 989 .. 309
Bradshaw, Newman v. (1916) 22 B.C.R. 420; 23 B.C.R. 492; 28 D.L.R. 769; 10 W.W.R. 649; 33 W.L.R. 945; (1917) 1 W.W.R. 1223; (1917) 2 W.W.R. 743 .... 21, 22, 67
Bradshaw, R. v. (1927) 38 B.C.R. 558; (1927) 4 D.L.R. 278; (1927) 3 W.W.R. 85; (1928) S.C.R. 54; (1928) 2 D.L.R. 352 1042

Bradshaw, Schetky v. (1919) 26 B.C.R. 545; (1919) 2 W.W.R. 885 196
Bradstreet, Nelson v. (1917) 2 W.W.R. 1191 .....427, 856
Braid v. McDowell, (1919) 27 B.C.R. 423; (1919) 3 W.W.R. 596 758
Brammall v. Brammall (No. 2), (1929) 41 B.C.R. 224; (1929) 1 W.W.R. 800 441
Brandeis v. Weldon, (1916) 22 B.C.R. 405; 27 D.L.R. 235; 10 W.W.R. 45 797
Brandilini, R. v. (1926) 38 B.C.R. 87; (1927) 1 W.W.R. 832; 47 C.C.C. 166 154
Brandolini, R. v. (1930) 42 B.C.R. 536; (1930) 1 W.W.R. 890; 54 C.C.C. 122 645
Brandon v. Plimley, (1917) 24 B.C.R. 441; (1918) 1 W.W.R. 831 973
Branson, Brown & Co., Patterson v. (1930) 43 B.C.R. 26; (1930) 4 D.L.R. 222; (1930) 2 W.W.R. 236 .....246, 900
Brash & Jenkins v. Vulcan Iron Works, (1926) 36 B.C.R. 452; (1926) 1 W.W.R. 371 328
Bready v. McLennan, (1924) 33 B.C.R. 401, 460; (1924) 3 W.W.R. 924 ....62, 314, 444, 669
Breeze, Barlow v. (1917) 31 D.L.R. 280; (1917) 1 W.W.R. 270 433
Bremner, McKenzie v. (1926) 37 B.C.R. 128; (1926) 2 D.L.R. 96 .....849, 865
Bremner, R. v. (1924) 34 B.C.R. 494; 43 C.C.C. 366 781
Bresnik, Re (1920) 58 D.L.R. 233; 34 C.C.C. 167 22
Brethour v. Davis and Palmer, (1919) 27 B.C.R. 250 329
Brethour v. Taylor and Bank of Montreal, (1927) 3 W.W.R. 166 .....494, 538, 540
Brewer v. Calori, (1921) 29 B.C.R. 457 91
Brewer, Sayward v. (1917) 24 B.C.R. 129; (1917) 2 W.W.R. 233 855
Briggs, R. v. (1923) 33 B.C.R. 297 357
Brighouse, B.C. Thoroughbred Assn. v. (1922) 31 B.C.R. 381; 70 D.L.R. 130; (1922) 3 W.W.R. 665 .....672, 943
Brighouse, Morton v. (No. 1), (1927) S.C.R. 118; (1927) 1 D.L.R. 1009; (1925) 36 B.C.R. 231; (1925) 3 W.W.R. 412 .....542, 1079, 1080
Brighouse, Morton v. (No. 2), (1928) 40 B.C.R. 278; (1929) S.C.R. 512; (1929) 3 D.L.R. 91 .....490, 1080
Brighouse, Sam, Deceased, In re (1923) 33 B.C.R. 191; (1924) 1 D.L.R. 150; (1924) 1 W.W.R. 55 .....627, 1133
Brighten v. Smith, (1926) 37 B.C.R. 518 1135
B.C. Accident Etc. Ins. Co., Royal Bank of Canada v. (1917) 24 B.C.R. 197; 35 D.L.R. 650; (1917) 2 W.W.R. 989 .....182, 452, 605
B.C. Amusements Co., Jamieson v. (1930) 43 B.C.R. 317 .....411, 412, 827, 1057
B.C. Bond Corpn. and Lang, In re (1931) 43 B.C.R. 481; (1931) 2 D.L.R. 985; (1931) 1 W.W.R. 286; 12 C.B.R. 213 .....100, 179
B.C. College of Physicians and Surgeons, Latimer v. (1931) 3 D.L.R. 304; 55 C.C.C. 132 719
B.C. Electric Ry. Co. and City of Victoria, In re (1916) 24 B.C.R. 346; 36 D.L.R. 671; (1917) 3 W.W.R. 542 782
B.C. Electric Ry. Co., Brooks v. (1919) 27 B.C.R. 351; 48 D.L.R. 90; (1919) 3 W.W.R. 109 .....484, 578, 804, 814
B.C. Electric Ry. Co., Brown v. (1925) 35 B.C.R. 510; (1925) 3 D.L.R. 734; (1925) 2 W.W.R. 635 615
B.C. Electric Ry. Co., Calbick v. (1929) 41 B.C.R. 17; (1929) 2 D.L.R. 64 ...53, 136, 801
B.C. Electric Ry. Co., City of Vancouver v. (1918) 26 B.C.R. 162; (1918) 3 W.W.R. 558 775
B.C. Electric Ry. Co., Columbia Bitulithic v. (1917) 55 S.C.R. 1; 21 C.R.C. 243; 37 D.L.R. 64; (1917) 2 W.W.R. 664 .....802, 817, 841
B.C. Electric Ry. Co., Cremidas v. (1919) 27 B.C.R. 232; (1919) 2 W.W.R. 549.... .....6, 22, 513
B.C. Electric Ry. Co., Dunphy v. (1919) 27 B.C.R. 327; 48 D.L.R. 38; (1919) 3 W.W.R. 201; 59 S.C.R. 263; 50 D.L.R. 264; (1919) 3 W.W.R. 1076 819
B.C. Electric Ry. Co., Duthie v. (1924) 33 B.C.R. 481; (1924) 2 D.L.R. 462; (1924) 2 W.W.R. 81 801
B.C. Electric Ry. Co., Errico v. (1916) 23 B.C.R. 468; (1917) 2 W.W.R. 238 ....57, 285, 830, 832

B.C. Electric Ry. Co., Fraser v. (1919) 26 B.C.R. 536; (1919) 2 W.W.R. 513 817
B.C. Electric Ry. Co., Green v. (1916) 10 W.W.R. 614; 25 D.L.R. 543; 19 C.R.C. 240; 32 W.L.R. 393; 9 W.W.R. 75 .....802, 938
B.C. Electric Ry. Co., Honess v. (1916) 23 B.C.R. 90; 36 D.L.R. 301 800
B.C. Electric Ry. Co., Howard v. (1918) 3 W.W.R. 409.....659, 661, 830-1
B.C. Electric Ry. Co., Hughes v. (1925) 35 B.C.R. 321; (1925) 3 D.L.R. 541; (1925) 2 W.W.R. 250 318
B.C. Electric Ry. Co., Jackson v. (1917) 24 B.C.R. 484; 38 D.L.R. 145; (1917) 3 W.W.R. 1046 .....817, 886
B.C. Electric Ry. Co., Keen v. (1931) 44 B.C.R. 183 803
B.C. Electric Ry. Co., Key v. (1930) 43 B.C.R. 288; (1931) 1 D.L.R. 532; (1931) 3 D.L.R. 587; (1930) 3 W.W.R. 569; 38 C.R.C. 278; (1932) S.C.R. 106 ....413, 818, 836
B.C. Electric Ry. Co., Kinnee v. (1917) 1 W.W.R. 1190 571
B.C. Electric Ry. Co., Lochead v. (1920) 28 B.C.R. 453; 54 D.L.R. 254; (1920) 3 W.W.R. 417 .....135, 801
B.C. Electric Ry. Co., MacKenzie v. (1915) 21 B.C.R. 375; 8 W.W.R. 956 837
B.C. Electric Ry. Co., McCrimmon v. (1915) 22 B.C.R. 76; 24 D.L.R. 368; 32 W.L.R. 81; 8 W.W.R. 1289; 19 C.R.C. 329 .....602, 678, 797, 934, 940
B.C. Electric Ry. Co., McFeely v. (1917) 24 B.C.R. 385; 37 D.L.R. 686; (1918) 3 W.W.R. 15 .....216, 309
B.C. Electric Ry. Co., Maltby v. (1920) 28 B.C.R. 156; 60 D.L.R. 680; (1920) 2 W.W.R. 543 819
B.C. Electric Ry. Co., Mercer v. (1931) 43 B.C.R. 398; (1931) 1 W.W.R. 550 835
B.C. Electric Ry. Co., Milligan v. (1923) 32 B.C.R. 161; (1923) 4 D.L.R. 637; (1923) 1 W.W.R. 1373 820
B.C. Electric Ry. Co., Moldowan v. (1923) 32 B.C.R. 428 805
B.C. Electric Ry. Co. & Johnston, Moore v. (1916) 22 B.C.R. 504; (1917) 24 B.C.R. 314; 35 D.L.R. 771; (1917) 2 W.W.R. 729; 34 W.L.R. 469; 10 W.W.R. 631 ... .761, 792, 800, 803, 938
B.C. Electric Ry. Co., Morgan v. (1930) 42 B.C.R. 382; (1930) 4 D.L.R. 30; (1930) 2 W.W.R. 776 .....302, 413, 820
B.C. Electric Ry. Co., Pribble v. (1925) 35 B.C.R. 46; (1925) 1 W.W.R. 904; (1926) A.C. 466; 95 L.J.P.C. 51; 134 L.T. 711; 42 T.L.R. 332; (1926) 2 D.L.R. 865; (1926) 1 W.W.R. 786; 31 C.R.C. 418 .....136, 679, 858, 934
B.C. Electric Ry. Co., Raines v. (1921) 30 B.C.R. 340; 70 D.L.R. 738 .....135, 1055
B.C. Electric Ry. Co., Retallick v. (1925) 35 B.C.R. 165; (1925) 1 W.W.R. 885 ... 801
B.C. Electric Ry. Co., Roddy v. (1928) 40 B.C.R. 180 .....136, 802
B.C. Electric Ry. Co., Skidmore v. (1922) 31 B.C.R. 282; 68 D.L.R. 32; (1922) 2 W.W.R. 1036 826
B.C. Electric Ry. Co., Tait v. (1916) 22 B.C.R. 571; 27 D.L.R. 538; 10 W.W.R. 523; 34 W.L.R. 684; (1916) 54 S.C.R. 76; 32 D.L.R. 378; (1917) 1 W.W.R. 544, 1093 .....66, 326, 819
B.C. Electric Ry. Co., Union Assnce. Co. v. (1915) 21 B.C.R. 71; 21 D.L.R. 62; 30 W.L.R. 717; 8 W.W.R. 327 .....83, 611, 679, 934
B.C. Electric Ry. Co., Vancouver Ice & Cold Storage Co. v. (1927) 38 B.C.R. 234; (1927) 1 W.W.R. 631 .....410, 801
B.C. Electric Ry. Co., Viney v. (1922) 31 B.C.R. 434; (1923) 32 B.C.R. 468; 69 D.L.R. 738; (1923) 4 D.L.R. 159; (1922) 3 W.W.R. 899; (1923) 3 W.W.R. 329 .....679, 876, 934
B.C. Electric Ry. Co., Vivian v. (1930) 42 B.C.R. 423; (1930) 3 D.L.R. 892; (1930) 1 W.W.R. 791 .....136, 802
B.C. Electric Ry. Co., Walker v. (1926) 36 B.C.R. 338; (1926) 1 W.W.R. 503; (1926) 1 D.L.R. 1162 .....762, 804
B.C. Electric Ry. Co., Walton v. (1925) 35 B.C.R. 119; (1925) 3 D.L.R. 467; (1925) 1 W.W.R. 673 .....56, 798
B.C. Electric Ry. Co., Woldston v. (1918) 25 B.C.R. 518 .....60, 286, 838
B.C. Electric Ry. Co., Wood v. (1925) 34 B.C.R. 527; (1925) 1 D.L.R. 1093 895

B.C. Estates v. Coldicutt, (1924) 34 B.C.R. 7; (1924) 3 D.L.R. 363; (1924) 2 D.L.R. 1024 877
B.C. Express Co. v. Grand Trunk Pac. Ry. Co., (1916) 27 D.L.R. 497; 34 W.L.R. 361, 459; 10 W.W.R. 477, 583; 55 S.C.R. 328; 38 D.L.R. 29; (1917) 1 W.W.R. 961; (1918) 44 D.L.R. 1; (1919) 1 W.W.R. 497 (P.C.) 409, 1113
B.C. Express Co. v. Inland Express Co. et al., (1915) 21 B.C.R. 178; ..146, 253, 262, 481
B.C. Fir & Cedar Lumber Co., R. v. (1931) S.C.R. 435; (1931) 3 D.L.R. 354 1042
B.C. Fruit Lands, Associated Growers of B.C. v. (1925) 34 B.C.R. 533; (1925) 1 D.L.R. 871; (1925) 1 W.W.R. 505 .....166, 177, 267, 690
B.C. Fruit Lands v. Can. Northern Pac. Ry. Co., (1923) 1 D.L.R. 104 .....940, 1056
B.C. Granitoid Co. v. Dom. Shipbuilding, Eng. & Drydock Co., (1918) 2 W.W.R. 919 .....711, 712
B.C. Hop Co. v. District of Kent, (1925) 35 B.C.R. 380; (1925) 3 D.L.R. 171; (1925) 2 W.W.R. 31 .....449, 460, 567, 769, 944
B.C. Hop Co. v. The King, (1926) 37 B.C.R. 130; (1926) 3 D.L.R. 182; (1926) 2 W.W.R. 440 1046
B.C. Independent Undertakers v. Maritime Motor Car Co., (1917) 24 B.C.R. 300, 305; 35 D.L.R. 551; (1917) 3 W.W.R. 22 .....44, 972, 976
B.C. Land & Invst. Agency v. Robinson, (1923) 32 B.C.R. 375; (1923) 4 D.L.R. 416; (1923) 3 W.W.R. 113 .....451, 626, 747
B.C. Land & Invst. Agency v. Waldron Apts., (1929) 41 B.C.R. 74; (1929) 3 D.L.R. 723; (1929) 1 W.W.R. 739 .....451, 759
B.C. Liquor Co. v. Consolidated Exporters Corpn., (1930) 42 B.C.R. 481; (1930) 2 W.W.R. 379; (1931) 1 D.L.R. 195 862
B.C. Mills Tug & Barge Co. v. Kelley, (1923) 32 B.C.R. 1; (1923) 1 D.L.R. 1015; (1923) 1 W.W.R. 597 .....990, 997
B.C. Mills Timber & Trading Co. v. Vancouver, Mayor, Etc., of (1926) 39 B.C.R. 481; (1926) 2 D.L.R. 990; (1926) 2 W.W.R. 84 .....30, 327, 784
B.C. Motor Transportation, Price v. (1931) 44 B.C.R. 24; (1931) 3 D.L.R. 548; (1931) 2 W.W.R. 350 793
B.C. Mutual Benefit Assn., Turner v. (1927) 39 B.C.R. 209; (1927) 4 D.L.R. 541; (1927) 3 W.W.R. 341 612
B.C. Poultry Assn. v. Allanson, (1922) 2 W.W.R. 831 .....602, 963
B.C. Portland Cement Co., In re (1915) 21 B.C.R. 534; (1916) 22 B.C.R. 443; 27 D.L.R. 726; 31 W.L.R. 938; 10 W.W.R. 50 .....186, 193
B.C. Pressed Brick Co., Komnick System Sandstone Brick Co. v. (1918) 26 B.C.R. 191; 56 S.C.R. 539; 41 D.L.R. 423; (1918) 2 W.W.R. 564; (1919) 1 W.W.R. 645; (1921) 1 W.W.R. 207 .....187, 274, 952
B.C. Prohibition Act, In re War Measures Act, 1914, and (1918) 26 B.C.R. 137; 44 D.L.R. 584; (1919) 2 W.W.R. 27; 30 C.C.C. 332 .....236, 629
B.C. Rapid Transit Co., Bradshaw v. (No. 2), (1926) 38 B.C.R. 56, 111; (1927) 1 W.W.R. 425; (1927) 1 D.L.R. 865 .....69, 656
B.C. Rapid Transit Co., Bradshaw v. (No. 3), 1926) 38 B.C.R. 64; (1927) 1 D.L.R. 599 .....657, 891
B.C. Rapid Transit Co., Bradshaw v. (1927) 38 B.C.R. 430; (1927) 1 W.W.R. 989 309
B.C. Rapid Transit Co., Millar v. (1926) 36 B.C.R. 345; (1926) 1 D.L.R. 1171; (1926) 1 W.W.R. 543 887
B.C. Red Cedar Shingle Co. v. Stoltze Mfg. Co., (1931) 44 B.C.R. 458; (1932) 1 W.W.R. 164; (1932) 1 D.L.R. 762 171
B.C. Refining Co., Wilson v. (1915) 21 B.C.R. 414; 22 D.L.R. 634; 31 W.L.R. 381; 8 W.W.R. 838 .....168, 453, 461
B.C. Securities v. Mutual Life Assurance Co., (1918) 1 W.W.R. 733 .....40, 191
B.C. Southern Ry. Co., Bagley v. (1917) 24 B.C.R. 400; 37 D.L.R. 733; (1919) 2 W.W.R. 250 .....404, 1084
B.C. Sugar Refining Co., Atty.-Gen. for B.C. v. (1931) 44 B.C.R. 531; (1931) 3 W.W.R. 639; (1932) 1 D.L.R. 626 .....1022, 1044
B.C. Sugar Refining Co., Charlton v. (1924) 34 B.C.R. 409; (1924) 4 D.L.R. 1182; (1925) 1 W.W.R. 546 .....695, 697

B.C. Telephone Co., Flanders v. (1926) 36 B.C.R. 352; (1926) 1 W.W.R. 358 277
B.C. Telephone Co. v. Morrison, (1921) 29 B.C.R. 289; (1921) 1 W.W.R. 694 ....294, 598, 1064, 1065
B.C. Telephone Co. v. The "Arabien," (1924) 34 B.C.R. 319..... 997
B.C. Thoroughbred Assn. v. Brighouse, (1922) 31 B.C.R. 381; 70 D.L.R. 130; (1922) 3 W.W.R. 665 .....672, 943
B.C. Trust Corpn. v. Aickin, (1916) 22 B.C.R. 417; 27 D.L.R. 725; 34 W.L.R. 303 .....261, 481, 744
B.C. Wine Growers, Shatford v. (1927) 38 B.C.R. 419; (1927) 2 D.L.R. 759 243
British America Assce. Co. and Pacific Shipping Co., Thomson & Co. v. (1930) 43 B.C.R. 194 886
British America Paint Co. v. Fogh, (1915) 22 B.C.R. 97; 24 D.L.R. 61; 32 W.L.R. 142; 8 W.W.R. 1331 .....131, 273, 405, 962, 963
British America Paint Co. v. Palitti, (1920) 29 B.C.R. 162 830
British Canadian Securities, Walker v. (1917) 24 B.C.R. 119 1109
British Crown Assce. Corpn., A. R. Williams Machinery Co. v. (1921) 29 B.C.R. 481 611
British Petroleums, Ltd., In re (1925) 1 W.W.R. 236 170
British Traders Insurance Co., Queen Insurance Co. v. (1927) 38 B.C.R. 161; (1927) 3 D.L.R. 159; (1927) 1 W.W.R. 508; (1928) S.C.R. 9; (1928) 2 D.L.R. 399 609
Broder, Ex p. (1930) S.C.R. 45; (1930) 1 D.L.R. 420; 52 C.C.C. 95....356, 554, 555, 558
Bromiley, Noble & St. John v.: In re Legal Professions Act, (1928) 39 B.C.R. 518, (1928) 2 D.L.R. 605; (1928) 1 W.W.R. 899 308
Brooks v. B.C. Electric Ry. Co., (1919) 27 B.C.R. 351; 48 D.L.R. 90; (1919) 3 W.W.R. 109 .....484, 578, 804, 814
Brooks-Bidlake & Whittall, Ltd. v. Atty.-Gen. of B.C., (1922) 63 S.C.R. 446; 66 D.L.R. 475; (1922) 3 W.W.R. 9; (1923) A.C. 450; 92 L.J.P.C. 124; 128 L.T. 801; 67 Sol Jo. 333; 39 T.L.R. 220; (1923) 2 D.L.R. 189; (1923) 1 W.W.R. 1150 .....227, 234
Brooks-Scanlon-O'Brien Co. v. Boston Insce. Co. (1919) 26 B.C.R. 490; 47 D.L.R. 93; (1919) 2 W.W.R. 129 622
Brown v. Bank of Montreal, (1916) 23 B.C.R. 68 532
Brown v. B.C. Electric Ry. Co., (1925) 35 B.C.R. 510; (1925) 3 D.L.R. 734; (1925) 2 W.W.R. 635 615
Brown, Braden v. (1917) 24 B.C.R. 374; (1917) 3 W.W.R. 906 716
Brown v. Brown, (1924) 3 W.W.R. 94 575
Brown v. Brown, (1927) 38 B.C.R. 473; (1927) 4 D.L.R. 314; (1927) 3 W.W.R. 172 .....536, 575
Brown et al. v. Cadwell et al., (1918) 25 B.C.R. 405; (1918) 2 W.W.R. 229 190
Brown, Cairns & Winterbottom v. (1924) 34 B.C.R. 338; (1924) 4 D.L.R. 590; (1924) 3 W.W.R. 409 279
Brown v. Columbian Co., (1923) 32 B.C.R. 425; (1923) 3 D.L.R. 727 1046
Brown v. Delmas, (1919) 27 B.C.R. 471 666
Brown, Dowding v. (1919) 27 B.C.R. 513; (1920) 1 W.W.R. 698 1085
Brown v. Great Northern Ry. Co., (1920) 28 B.C.R. 484; (1920) 3 W.W.R. 426 ... 310
Brown v. Great Northern Ry. Co., (1927) 38 B.C.R. 115; (1927) 2 D.L.R. 316; (1927) 1 W.W.R. 516; 32 C.R.C. 326 .....939, 1056
Brown, Illingsworth v. (1916) 10 W.W.R. 1024 1105
Brown v. Kelly Douglas & Co., (1923) 32 B.C.R. 143; (1923) 2 D.L.R. 738; (1923) 1 W.W.R. 1340; 3 C.B.R. 812 96
Brown v. McInnes, (1927) 38 B.C.R. 324; (1927) 2 D.L.R. 655; (1927) 1 W.W.R. 597 .....435, 440
Brown v. Menzies Bay Timber Co., (1917) 24 B.C.R. 27; 34 D.L.R. 452; (1917) 2 W.W.R. 658 180
Brown, Mitsui v. (1920) 28 B.C.R. 516 963
Brown, Newberry v. (1915) 21 B.C.R. 556; 32 W.L.R. 118; 8 W.W.R. 1283; 23 D.L.R. 627 .....247, 477, 1082

Brown v. North American Lumber Co., (1915) 21 B.C.R. 253 872
Brown, Ritchie Contracting Co. v. (1915) 21 B.C.R. 89; 21 D.L.R. 86; 30 W.L.R. 723; 8 W.W.R. 84 .....34, 123, 500 627
Brown, Seeley & Co. v. (1926) 37 B.C.R. 514; (1927) 1 W.W.R. 185..... 1041
Brown v. Sidney Mills, (1920) 28 B.C.R. 73; 61 D.L.R. 112 88
Brown & Matthews v. Pike, (1916) 23 B.C.R. 246 751
Brown, W. G., Deceased, In re Estate of (1920) 28 B.C.R. 1; (1920) 2 W.W.R. 226.. 1128
Brown's Travel Bureau, D. E., v. Taylor, (1918) 26 B.C.R. 82; 44 D.L.R. 204; (1918) 3 W.W.R. 468 615
Bruin v. Bruin, (1929) 41 B.C.R. 298; (1929) 4 D.L.R. 802; (1929) 2 W.W.R. 218 .....577, 592
Brunette Sawmill Co., McDonald v. (1922) 31 B.C.R. 77; (1922) 1 W.W.R. 1163 .....1015, 1141
Brunswick, Balke Co., Smith v. (1917) 25 B.C.R. 37; 38 D.L.R. 455; (1917) 3 W.W.R. 1071 .....133, 274
Brydges, Dominion Trust Co. v. (1920) 28 B.C.R. 451; (1920) 2 W.W.R. 952 (1921) 30 B.C.R. 264; (1921) 3 W.W.R. 391; 62 D.L.R. 352 .....60, 190, 293, 418, 861
Brydges v. Dominion Trust Co., (1919) 27 B.C.R. 214; (1919) 2 W.W.R. 510; (1919) 3 W.W.R. 345; (1920) 2 W.W.R. 952 .....168, 169, 276, 417, 626, 735
Brydon-Jack, Granger v. (1918) 25 B.C.R. 526, 531; (1919) 58 S.C.R. 491; 46 D.L.R. 571; (1919) 2 W.W.R. 621 .....54, 240, 249, 329 480
Brymner & Rand, Westminster Trust Co. v. (1920) 28 B.C.R. 504; 54 D.L.R. 244; (1920) 1 W.W.R. 433; (1920) 3 W.W.R. 488 .....545, 550
Bryson, R. v. (1915) 21 B.C.R. 313; 21 D.L.R. 777; 31 W.L.R. 307 629
Bucke, Irving & Morris v. (1915) 21 B.C.R. 17 .....651, 890
Buckley-Tremaine Lbr. Co., American Merchants Marine Ins. Co. v. (1920) 28 B.C.R. 426; (1920) 3 W.W.R. 878 .....4, 269, 325, 423, 852
Buczko v. Chobotar, (1926) 1 D.L.R. 1024; (1926) 1 W.W.R. 379; 45 C.C.C. 216 .. 428
Bulger v. Home Ins. Co., (1928) S.C.R. 436; (1929) 1 D.L.R. 47 .....73, 611, 649
Bull Estate and Land Registry Act, In re (1926) 3 W.W.R. 263; 7 C.B.R. 279 ..98, 954
Bullen, Eliza Jane, Deceased, In re (1926) 37 B.C.R. 240..... 507
Bullen, Helmcken v. (1924) 34 B.C.R. 184; (1924) 3 W.W.R. 172 1127
Bunting v. Hovland & Watkins, (1924) 33 B.C.R. 291 904
Buntyn v. Hill-Tout, (1917) 24 B.C.R. 303; 33 D.L.R. 383; (1917) 2 W.W.R. 286 .. 1109
Buonaparte Ranch, Ltd., v. Schneider, (1928) 40 B.C.R. 1; (1928) 2 D.L.R. 993; (1928) 2 W.W.R. 106 .....925, 1116
Burch v. Towder, (1922) 69 D.L.R. 739; (1923) 1 W.W.R. 180 .....471, 869
Burckhardt & Burckhardt, Rice v. (1925) 36 B.C.R. 180..... 289
Burdick Bros., Aikman v. (1923) 33 B.C.R. 23; (1923) 4 D.L.R. 852; (1923) 3 W.W.R. 785; 31 B.C.R. 478; (1923) 1 D.L.R. 1165; (1923) 1 W.W.R. 914 .. ..264, 462, 579, 914
Burick, Tillicum Athletic Club v. (1925) 36 B.C.R. 176; (1925) 3 W.W.R. 368, 785 .....318, 538
Burgess v. Pacific Properties, (1923) 32 B.C.R. 317 735
Burgess & McKenzie, R. v. (1928) 39 B.C.R. 492; (1928) 2 D.L.R. 694; (1928) 1 W.W.R. 633; 49 C.C.C. 243 .....345, 376
Burke, R. v. (1925) 35 B.C.R. 453; (1925) 2 W.W.R. 480; 43 C.C.C. 393 641
Burke-Roche, Minister of Finance v. (1925) 36 B.C.R. 175; (1925) 4 D.L.R. 325.... 1036
Burke-Roche, R. v. (1926) 37 B.C.R. 313 1036
Burnaby Arbitration, Galt Bros. and, In re (1928) 39 B.C.R. 470; (1928) 1 W.W.R. 798 .....78, 294
Burnaby, Robinson v. (1915) 22 D.L.R. 788; 31 W.L.R. 419 .....132, 275
Burnaby, District of, v. Ocean View Development Ltd., (1923) 32 B.C.R. 413; (1923) 3 W.W.R. 1078; (1923) 3 D.L.R. 1073 1045
Burnaby, District of, Gilroy v. (1931) 44 B.C.R. 171; (1931) 4 D.L.R. 410; (1931) 3 W.W.R. 1 .....569, 771

Burnaby, District of, Watts v. (1929) 41 B.C.R. 282; (1929) 4 D.L.R. 142; (1929) 2 W.W.R. 612 ....570, 770, 842
Burnett, Divers v. (1930) 42 B.C.R. 203; (1930) 1 D.L.R. 930; (1930) 1 W.W.R. 150 698
Burnett, R. v. (1930) 43 B.C.R. 207; (1930) 3 W.W.R. 347; 54 C.C.C. 405 ....237, 781, 1023
Burns, Adams v. (1925) 36 B.C.R. 217 .... .697
Burns v. Johnson, (1917) 25 B.C.R. 35; (1918) 1 W.W.R. 180 930
Burns v. Marcus & Dimor, (1931) 43 B.C.R. 517; (1931) 2 D.L.R. 1004; (1931) 1 W.W.R. 169 846
Burns, Maritime Trust Co. v. (1915) 22 B.C.R. 177; 32 W.L.R. 442; 9 W.W.R. 167. 189
Burns, Stephens v. (1921) 30 B.C.R. 60; (1921) 2 W.W.R. 513 1140
Burns & Co., Lister v. (1931) 43 B.C.R. 468; (1931) 3 D.L.R. 105; 55 C.C.C. 197 .. ....264, 696
Burns, P. & Co. v. Godson, (1918) 26 B.C.R. 46; 46 D.L.R. 97; (1919) 58 S.C.R. 404; (1919) 1 W.W.R. 848 674
Burns, Jordan & Welch, Tecla et al. v. (1916) 22 B.C.R. 460; 27 D.L.R. 109; (1917) 1 W.W.R. 639 705
Burpee v. Burpee, (1929) 41 B.C.R. 201; (1929) 3 D.L.R. 18; (1929) 2 W.W.R. 128 ....212, 325, 436, 650
Burrard Inlet Tunnel & Bridge Co. v. The "Eurana," (1929) 41 B.C.R. 225; (1929) 3 D.L.R. 161; (1929) 2 W.W.R. 275; (1930) 3 D.L.R. 48; (1930) Ex. C.R. 38; (1931) 1 D.L.R. 785; (1931) 1 W.W.R. 325; (1931) A.C. 300; 100 L.J.P.C. 68; 144 L.T. 556; 38 C.R.C. 263 ....160, 161, 840, 998, 999, 1024
Burrows v. Evans, (1916) 23 B.C.R. 128 ....27, 1026
Buscombe, Ansel v. (1927) 3 W.W.R. 137 ....302, 414, 823
Buscombe v. Holden (1924) 34 B.C.R. 289; (1924) 4 D.L.R. 744; (1925) 1 W.W.R. 47 ....479, 1131
Buscombe v. Stark, (1916) 23 B.C.R. 155; 30 D.L.R. 736; (1917) 1 W.W.R. 204 ... .409, 674
Buscombe Securities Co. v. Hori Windebank and Quatsino Trading Co., (1918) 25 B.C.R. 441; (1918) 3 W.W.R. 582, 897; (1918-19) 26 B.C.R. 323, 486 ..874, 894
Buscombe Securities Co. v. Windebank, (1919) 27 B.C.R. 507; 48 D.L.R. 301; (1919) 3 W.W.R. 485; (1920) 3 W.W.R. 332 ....4, 49, 754, 854
Bush, Merchants Bank of Canada v. (1916) 25 D.L.R. 99; 32 W.L.R. 854; 9 W.W.R. 442; (1917) 24 B.C.R. 521; 38 D.L.R. 499; (1918) 1 W.W.R. 383; 56 S.C.R. 512; 42 D.L.R. 236; (1918) 2 W.W.R. 574, 631....114, 548, 857
Bush, Waddington v. (1923) 32 B.C.R. 434; (1923) 3 D.L.R. 884 .....247, 1084, 1087
Bushby v. Tanner, (1924) 34 B.C.R. 270; (1924) 4 D.L.R. 582; (1924) 3 W.W.R. 401 865
Butt, Wing Kee v. (1927) 2 D.L.R. 641 708
Butterfield v. Jackson, (1916) 23 B.C.R. 489; (1917) 2 W.W.R. 362 .....322, 503
Byng-Hall et al., Can. Northern Pac. Ry. Co. and, In re (1916) 23 B.C.R. 38; 35 D.L.R. 773 205
Byrne, J. D., Deceased, In re Estate of (1931) 43 B.C.R. 396; (1931) 1 W.W.R. 228 ....614, 1033

C

Caddedu v. Mount Royal Assurance Co., (1929) 41 B.C.R. 110; (1929) 2 D.L.R. 867; (1929) 2 W.W.R. 161 ....460, 617
Cadwell, Brown v. (1918) 25 B.C.R. 405; (1918) 2 W.W.R. 229 190
Caine v. Corporation of Surrey, (1919) 27 B.C.R. 23; (1920) 28 B.C.R. 321; 60 S.C.R. 654; 67 D.L.R. 794; (1920) 2 W.W.R. 681; (1921) 2 W.W.R. 273; (1918) 26 B.C.R. 338; (1919) 1 W.W.R. 12 ....566, 601, 768, 885
Caine v. Schultz, (1926) 38 B.C.R. 332; (1927) 1 W.W.R. 600 1090
Cairns v. Brown, (1924) 34 B.C.R. 338; (1924) 4 D.L.R. 590; (1924) 3 W.W.R. 409 279

Calbic, R. v. (1920) 28 B.C.R. 113; 61 D.L.R. 203; (1920) 2 W.W.R. 621; 33 C.C.C. 352 ....224, 568, 768
Calbick v. B.C. Electric Ry. Co., (1929) 41 B.C.R. 17; (1929) 2 D.L.R. 64 ...53, 136, 801
Caledonia & B.C. Mtge. Co., Turner, Meakin & Co. v. (1927) 38 B.C.R. 103; (1927) 2 D.L.R. 395 908
Caledonian Insurance Co., Minister of Finance v.: In re Land Registry Act and Higginson, (1923) 33 B.C.R. 29, 232; (1923) 4 D.L.R. 439; (1923) 3 W.W.R. 925; (1924) S.C.R. 207; (1924) 2 D.L.R. 649 ....65, 1031
California, State of, v. Skinner, (1924) 33 B.C.R. 555; (1924) 2 W.W.R. 209 ...345, 518
Callopy, Shelly Bros. v. (1918) 26 B.C.R. 149 309
Callow v. Hick; Liquor Control Board, Garnishee, (1923) 32 B.C.R. 71; (1923) 2 D.L.R. 1185; (1923) 2 W.W.R. 439 ....6, 535, 925
Calori, Brewer v. (1921) 29 B.C.R. 457 91
Cameron v. Regem, (1927) 38 B.C.R. 191; (1927) 2 D.L.R. 382; (1927) 1 W.W.R. 624 ....932, 1017
Cameron & Cameron v. Boulton, (1930) 43 B.C.R. 39; (1930) 4 D.L.R. 1021; (1930) 3 W.W.R. 61 ....312, 1005
Cameron Invst. & Sec. Co. and Bailey v. City of Victoria, (1920) 3 W.W.R. 1043 ....454, 680, 752, 791, 1066
Cameron, McMillan v. (1917-18) 24 B.C.R. 176, 509; (1917) 2 W.W.R. 946; (1918) 1 W.W.R. 836 ....244, 255, 1013, 1083
Cameron Valley Land Co., Innes v. (1919) 1 W.W.R. 751 .....122, 179, 530, 532, 745
Campbell, Arbuthnot v. (No. 1), (1930) 2 W.W.R. 275 ....118, 858
Campbell, Arbuthnot v. (No. 2), (1931) 1 W.W.R. 240 ....119, 481
Campbell v. Cleugh, (1920) 28 B.C.R. 352 501
Campbell v. Cox & Mitchell, (1929) 42 B.C.R. 120; (1930) 1 D.L.R. 649 .....432, 468
Campbell, Dorrell v. (1916) 22 B.C.R. 584; 23 B.C.R. 500; 27 D.L.R. 425; 32 D.L.R. 44; 34 W.L.R. 367; 10 W.W.R. 492; (1917) 1 W.W.R. 500 ....87, 465, 475, 713, 714, 941
Campbell, Jean, R. v. (1916) 22 B.C.R. 601; 28 D.L.R. 385; 26 C.C.C. 196 ....342, 552
Campbell v. Lennie, (1927) 38 B.C.R. 422; (1927) 2 W.W.R. 306 657
Campbell, McLean-Butorac Motors v. (1930) 3 W.W.R. 39 ....147, 264, 566
Campbell v. Mazur, (1915) 24 D.L.R. 893; 32 W.L.R. 439 754
Campbell, Reinseth v. (1920) 52 D.L.R. 357 ....23, 92, 471
Campbell v. Rogers, (1917) 31 D.L.R. 244 916
Campbell v. Shaw, (1920) 28 B.C.R. 77; (1920) 1 W.W.R. 1028 871
Campbell v. Sun Printing & Pub. Co., (1921) 30 B.C.R. 149; (1921) 2 W.W.R. 987 ....427, 602, 603
Campbell River Lbr. Co., McKinnon and McKillop v. (1922) 30 B.C.R. 471; 31 B.C.R. 18; 66 D.L.R. 266; (1922) 2 W.W.R. 549, 556; (1922) 3 W.W.R. 1069; (1922) 64 S.C.R. 396; (1923) 1 D.L.R. 29 .....180, 625, 649, 738, 893
Campbell River Mills, In re, Dining v. Ingham, (1931) 43 B.C.R. 477; (1931) 2 D.L.R. 946 ....82, 102
Campbell Security Fireproof Etc. Co., Maunsell v. (1921) 29 B.C.R. 424; 60 D.L.R. 128; (1921) 2 W.W.R. 348, 579 93
Campbell's, Ltd., and Central Motor Transfer Co., Erickson v. (1928) 39 B.C.R. 472 809
Camsusa v. Smith and Christie, (1919) 2 W.W.R. 332 ....253, 418
Canada Law Book Co. v. St. John, (1923) 32 B.C.R. 66 ....61, 315
Canada Lbr. Co., Stillwater Lbr. Co. and, In re (1923) 32 B.C.R. 81, 249; (1923) 2 D.L.R. 900; 3 C.B.R. 807 ....5, 96, 532
Canada Morning News v. Thompson, (1930) S.C.R. 338; (1930) 3 D.L.R. 833; (1929) 41 B.C.R. 24; (1929) 2 D.L.R. 114; (1929) 1 W.W.R. 548 .....434, 663
Canada National Fire Ins. Co., Royal Bank of Canada v. (1920) 28 B.C.R. 554; (1920) 3 W.W.R. 517; 55 D.L.R. 272 ....170, 498, 605
Canada Perm. Mtge. Corpn. v. Christensen, (1929) 41 B.C.R. 258; (1929) 3 D.L.R. 864; (1929) 2 W.W.R. 198 ....454, 650, 756
Canada Perm. Mtge. Corpn. and Dalgleish, In re (1915) 9 W.W.R. 180 1111

Canada Perm. Mtge. Corpn. v. Dalgleish, (1928) 39 B.C.R. 300; (1928) 1 D.L.R. 1113; (1928) 40 B.C.R. 94; (1928) 3 D.L.R. 59; (1928) 1 W.W.R. 473, 922 ....59, 287, 299, 752, 872, 946
Canada Perm. Mtge. Corpn. v. Natha Singh, (1921) 29 B.C.R. 397; 60 D.L.R. 56; (1921) 2 W.W.R. 361 ....755, 877
Canada Timber & Lands, Ltd., Clausen v. (1925) 35 B.C.R. 408, 461; (1923) 3 D.L.R. 751; (1923) 3 W.W.R. 1072 ....57, 310, 311, 888, 1087
Canada West Loan Co. v. Virtue, (1920) 29 B.C.R. 76; (1921) 1 W.W.R. 730 ....167, 255, 625
Canadian American Shipping Co. v. The "Woron," (1927) 4 D.L.R. 69; (1927) A.C. 906; 96 L.J.P.C. 137; 137 L.T. 747; 71 Sol. Jo. 649; 43 T.L.R. 698; 17 Asp. M.C. 322; (1927) 3 W.W.R. 465; (1927) Ex. C.R. 1 ....8, 1028
Canadian Australasian Royal Mail Line, Makins Produce Co. v. (1926) 36 B.C.R. 462; (1926) 1 D.L.R. 1053; (1926) 1 W.W.R. 635; (1927) 1 D.L.R. 97; (1927) 1 W.W.R. 206 ....54, 139, 146
Canadian Bakeries, R. v. (1930) 43 B.C.R. 234; 54 C.C.C. 369 ....335, 487
Canadian Bank of Commerce, Gordon v. (1931) 44 B.C.R. 213; (1931) 4 D.L.R. 635; (1931) 3 W.W.R. 185, 373 795
Canadian Bank of Commerce v. Martin, (1917) 24 B.C.R. 381; 40 D.L.R. 155; (1918) 1 W.W.R. 395 ....197, 551
Canadian Bank of Commerce, Robertson (John) & Sons, Ltd., v. (1920) 2 W.W.R. 1003 ....84, 114, 187, 625
Canadian Bank of Commerce, Roy v. (1917) 24 B.C.R. 397; 38 D.L.R. 742 88
Canadian Bank of Commerce v. Royal Bank of Canada, (1921) 29 B.C.R. 407; 60 D.L.R. 275; (1921) 2 W.W.R. 462 ....84, 655, 1076, 1087
Canadian Canning Co. v. Dickie and Sherman, (1915) 21 B.C.R. 338; 22 D.L.R. 890; 31 W.L.R. 273 172
Canadian Collieries (Dunsmuir), Cook v. (1915) 21 B.C.R. 64; 21 D.L.R. 215; 30 W.L.R. 750; 8 W.W.R. 41 ....799, 940
Canadian Collieries, Dixon v. (1917) 24 B.C.R. 34; 55 S.C.R. 620; 39 D.L.R. 758; (1917) 2 W.W.R. 763 702
Canadian Collieries (Dunsmuir) Ltd., Stanoszek v. (1915) 21 B.C.R. 470; 22 D.L.R. 691; 9 W.W.R. 710 798
Canadian Credit Men's Trust Assn., Hoffar v. (1929) 40 B.C.R. 454; (1929) 2 D.L.R. 73, 106; (1929) 1 W.W.R. 557; 10 C.B.R. 369, 374; (1929) S.C.R. 180; (1929) 2 D.L.R. 106 ....106, 226, 467, 531
Canadian Credit Men's Trust Assn. v. Jang Bow Kee and Yin Shee, (1922) 31 B.C.R. 40 ....58, 95, 98, 292
Canadian Credit Men's Trust Assn. v. Johnston, (1931) 44 B.C.R. 354; (1931) 4 D.L.R. 569; (1931) 3 W.W.R. 33 47
Canadian Credit Men's Trust Assn. v. Johnston, (1932) S.C.R. 219; (1932) 2 D.L.R. 462; 58 C.C.C. 1 1070
Canadian Credit Men's Trust Assn. v. Monka, (1924) 34 B.C.R. 99....90, 97, 670
Canadian Credit Men's Trust Assn., Redmond v. (1930) 43 B.C.R. 361; (1931) 1 W.W.R. 197 755
Canadian Credit Men's Trust Assn., Simpson, Balkwill & Co. et al. v. (1921) 30 B.C.R. 347; (1921) 70 D.L.R. 731; (1921) 3 W.W.R. 831 185
Canadian Dollar Co., R. v. (1926) 37 B.C.R. 264; 47 C.C.C. 69 ....31, 378
Canadian Educational Films v. Horan and Nichols Theatres, (1928) 39 B.C.R. 424 309
Canadian Explosives, Land Registry Act and, In re (1918) 1 W.W.R. 399; 39 D.L.R. 764 ....929, 949
Canadian Fairbanks-Morse Co. v. United States Fidelity & Guar. Co., (1915) 22 B.C.R. 157; (1916) 26 D.L.R. 12; 32 W.L.R. 316; 9 W.W.R. 48 ....403, 546
Canadian Financiers Trust Co. v. Ashwell, (1916) 23 B.C.R. 341; 31 D.L.R. 786; (1917) 1 W.W.R. 459; (1917) 25 B.C.R. 97; (1918) 1 W.W.R. 207; (1918) 25 B.C.R. 473 .... 48, 300, 658, 833

Canadian Financiers Trust Co. v. Chan Shun Chong et al., (1921) 29 B.C.R. 543; (1921) 2 W.W.R. 984 512
Canadian Financiers Trust Co., Stewart v. (1915) 22 B.C.R. 133; 23 D.L.R. 707; 9 W.W.R. 82; 32 W.L.R. 121 ..... 915, 1094
Canadian Fishing Co., Blair v. (1929) 41 B.C.R. 80 ..... 288, 319
Canadian Fishing Co., Neno v. (1916) 22 B.C.R. 455; 26 D.L.R. 714; 10 W.W.R. 97 996
Canadian Government Merchant Marine, Canadian Trading Co. v. (1922) 30 B.C.R. 509; 67 D.L.R. 485; (1922) 1 W.W.R. 662; 64 S.C.R. 106; 68 D.L.R. 544; (1922) 3 W.W.R. 197 273
Canadian Government Merchant Marine, Crombie v. (1921) 30 B.C.R. 260; 21 Ex. C.R. 299; 68 D.L.R. 314; (1922) 1 W.W.R. 805 ..... 332, 649, 992
Canadian Government Merchant Marine, Western Assce. Co. v. (1925) 36 B.C.R. 26; (1925) 3 D.L.R. 774 146
Canadian Home Invst. Co., In re (1917) 24 B.C.R. 294; 37 D.L.R. 598; (1917) 3 W.W.R. 629 197
Canadian Home Invst. Co., The, Hill v. (1915) 22 B.C.R. 301, 304 ..... 32, 192, 308
Canadian Klondyke Mining Co., Olsen v. (1917) 24 B.C.R. 114; 34 D.L.R. 529; (1917) 2 W.W.R. 640 ..... 731, 1145
Canadian Klondyke Power Co., Yukon Gold Co. v. (1919) 27 B.C.R. 81; 47 D.L.R. 146; (1919) 2 W.W.R. 814 ..... 276, 277, 1145
Canadian Logging Co., In re (1927) 1 W.W.R. 406; 8 C.B.R. 179 ..... 99, 109, 113, 226
Canadian Lumber Yards, Montreal Trust Co. v. (1928) 39 B.C.R. 325; (1928) 2 D.L.R. 37; (1928) 1 W.W.R. 509 ..... 320, 1140, 1144
Canadian Mtge. Invst. Co., City of Greenwood v. (1921) 30 B.C.R. 72; 69 D.L.R. 510; (1921) 2 W.W.R. 746 ..... 654, 789
Can. Nor. Pac. Ry. Co., B.C. Fruit Lands, Ltd., v. (1923) 1 D.L.R. 104 ..... 940, 1056
Can. Nor. Pac. Ry. Co. v. City of Armstrong, (1920) A.C. 216; (1919) 88 L.J.P.C. 147; 122 L.T. 11; 36 T.L.R. 5; 48 D.L.R. 268; (1919) 3 W.W.R. 352; (1918) 26 B.C.R. 222; 44 D.L.R. 319; (1919) 1 W.W.R. 114 ..... 784, 787, 935, 1044
Can. Nor. Pac. Ry. Co. v. City of New Westminster, (1915) 22 B.C.R. 247; 25 D.L.R. 28; (1917) A.C. 602; 86 L.J.P.C. 178; 117 L.T. 581; 36 D.L.R. 505, 506; 9 W.W.R. 425; 32 W.L.R. 779 ..... 786, 935, 1044
Can. Nor. Pac. Ry. Co. and Byng-Hall et al., In re (1916) 23 B.C.R. 38; 35 D.L.R. 773 205
Can. Nor. Pac. Ry. Co., Jennings v. (1925) 35 B.C.R. 16, 495; (1925) 2 D.L.R. 630; (1925) 1 W.W.R. 918; 30 C.R.C. 219 ..... 66, 709, 1055
Can Nor. Pac. Ry. Co. v. Kelowna, City of, (1917) 25 B.C.R. 514; 44 D.L.R. 315; (1918) 3 W.W.R. 845 ..... 786, 936, 1044
Can. Nor. Pac. Ry. Co. v. City of Vernon, (1918) 26 B.C.R. 222; 44 D.L.R. 317; (1919) 1 W.W.R. 114; 88 L.J.P.C. 147; 122 L.T. 11; 36 T.L.R. 5; 48 D.L.R. 268; (1919) 3 W.W.R. 352; (1920) A.C. 216 ..... 784, 935
Canadian Pacific Lbr. Co., Marshall v. (1921) 30 B.C.R. 270; 61 D.L.R. 268; (1921) 3 W.W.R. 209; (1922) 63 S.C.R. 352; 65 D.L.R. 461; (1922) 2 W.W.R. 266 1085
Canadian Pacific Lbr. Co., Marshall v. (1922) 31 B.C.R. 363; 63 D.L.R. 352; 69 D.L.R. 521; (1922) 3 W.W.R. 1105 ..... 654, 890
Canadian Pacific Lbr. Co., Marshall v. (1923) 2 D.L.R. 356 945
Canadian Pacific Lbr. Co., R. v. (1915) 26 D.L.R. 80; 15 Ex. C.R. 350 206
Can. Pac. Ry. Co., Atty.-Gen. for B.C. v. (1927) A.C. 934; 96 L.J.P.C. 149; 137 L.T. 745; 71 Sol. Jo. 761; 43 T.L.R. 750; (1927) 4 D.L.R. 113; (1927) 3 W.W.R. 460; (1927) S.C.R. 185; (1927) 2 D.L.R. 257; (1926) 37 B.C.R. 481; (1926) 3 W.W.R. 154; (1926) 36 B.C.R. 551; (1926) 1 W.W.R. 837; (1926) 4 D.L.R. 147 ..... 231, 1039
Can. Pac. Ry. Co., Balfour, Guthrie & Co. v. (1917) 3 W.W.R. 410 ..... 138, 141, 143, 472
Can. Pac. Ry. Co., Bardgett v. (1916) 10 W.W.R. 810 ..... 24, 939
Can. Pac. Ry. Co., Clamans, Ltd., v. (1920) 28 B.C.R. 226; (1920) 2 W.W.R. 117; 51 D.L.R. 668; 25 C.R.C. 368 ..... 139, 407

Can. Pac. Ry. Co., Cleugh v. (1918) 25 B.C.R. 335; 40 D.L.R. 512; (1918) 2 W.W.R. 416 703
Can. Pac. Ry. Co., Coast Steamship Co. v. (1921) 30 B.C.R. 283; (1921) 3 W.W.R. 631 998
Can. Pac. Ry. Co., Day v. (1922) 30 B.C.R. 532; (1922) 2 W.W.R. 398; 66 D.L.R. 838 ..... 412, 835
Can. Pac. Ry. Co., Dobie v. (1931) S.C.R. 277; (1930) 3 D.L.R. 856; 37 C.R.C. 385 ..... 659, 821
Can. Pac. Ry. Co., Eddy v. (1915) 22 B.C.R. 294 ..... 45, 48, 51
Can. Pac. Ry. Co., Farquharson v. (1922) 31 B.C.R. 338; 69 D.L.R. 445; (1922) 3 W.W.R. 537 853
Can. Pac. Ry. Co. v. Hall, (1916) 10 W.W.R. 11 889
Can. Pac. Ry. Co., Keane v. (1924) 34 B.C.R. 127 932
Can. Pac. Ry. Co., Kelly v. (1915) 22 B.C.R. 231; 25 D.L.R. 79; 32 W.L.R. 891; 9 W.W.R. 531 ..... 109, 117
Can. Pac. Ry. Co., McFetridge v. (1926) 36 B.C.R. 314; (1926) 1 D.L.R. 757; 37 B.C.R. 387; (1926) 4 D.L.R. 30; (1926) 3 W.W.R. 279 ..... 659, 823
Can. Pac. Ry. Co., Mid-Lakes Timber Co. v. (1928) 40 B.C.R. 526; (1928) 4 D.L.R. 922; (1928) 3 W.W.R. 745 523
Can. Pac. Ry Co., Panetta v. (1917) 24 B.C.R. 249 55
Can. Pac. Ry. Co., Paulson v. (1919) 26 B.C.R. 440 310
Can. Pac. Ry. Co. v. S.S. "Belridge," (1917) 27 B.C.R. 537; (1917) 3 W.W.R. 961; 68 D.L.R. 224; 20 Ex. C.R. 399 ..... 161, 162, 414
Can. Pac. Ry. Co., Strong v. (1915) 22 B.C.R. 224; 25 D.L.R. 51; 32 W.L.R. 849; 9 W.W.R. 451 852
Can. Pac. Ry. Co., Terainshi v. (1918) 25 B.C.R. 497, 536; (1918) 2 W.W.R. 1034; (1918) 3 W.W.R. 281 ..... 68, 667, 1060
Can. Pac. Ry. Co., Vancouver Incorporation Act and, In re (1930) 4 D.L.R. 80..... 783
Can. Pac. Ry. Co. v. Workmen's Compensation Board, (1919) 88 L.J.P.C. 169; 121 L.T. 662; 36 T.L.R. 3; 48 D.L.R. 218; (1919) 3 W.W.R. 167; (1920) A.C. 184 233
Canadian Pacific Timber & Logging Co., Leiser & Co. v. (1920) 1 W.W.R. 735 ... 543
Canadian Pac. Wine Co., R. v. (1921) 29 B.C.R. 490; 60 D.L.R. 308; (1921) 2 W.W.R. 442; 36 C.C.C. 103 645
Canadian Pac. Wine Co. v. Tuley, (1921) 29 B.C.R. 472; (1921) 1 W.W.R. 265; 60 D.L.R. 315; (1921) 2 W.W.R. 433; (1921) 2 A.C. 417; 90 L.J.P.C. 233; 126 L.T. 78; 37 T.L.R. 944; 60 D.L.R. 520; (1921) 3 W.W.R. 49; 36 C.C.C. 104 ..... 228, 236, 637, 1069
Canadian Puget Sound Lbr. Co., Lee & Rutherford v. (1924) 34 B.C.R. 557 960
Canadian Puget Sound Lbr. Co., Lutz v. (1920) 28 B.C.R. 39 867
Canadian Puget Sound Lbr. Co., Michigan Trust Co. v. (1918) 25 B.C.R. 560; (1918) 3 W.W.R. 273 ..... 198, 332, 649
Canadian Puget Sound Lbr. Co., Temple v. (1918) 25 B.C.R. 560; (1918) 3 W.W.R. 273 198
Canadian Robert Dollar Co., Patterson v. (1928-29) 41 B.C.R. 123, 133; (1929) 3 D.L.R. 33; (1929) 2 W.W.R. 181 ..... 563, 840, 1056
Canadian Stevedoring Co. v. Robin Line S.S. Co., (1928) S.C.R. 423; (1928) 3 D.L.R. 856 990
Canadian Trading Co. v. Canadian Government Merchant Marine, (1922) 30 B.C.R. 509; 67 D.L.R. 485; (1922) 1 W.W.R. 662; 64 S.C.R. 106; 68 D.L.R. 544; (1922) 3 W.W.R. 197 273
Canadian Trading Co., Vancouver Steamship Co. v. (1924) 1 W.W.R. 876 254
Canadian Western Cooperage, Ltd., v. Vernon Growers, Ltd., (1923) 32 B.C.R. 29; (1923) 1 W.W.R. 631 972
Canary v. Cohn (No. 1), (1925) 35 B.C.R. 478; (1925) 3 D.L.R. 223; (1925) 2 W.W.R. 563; (1925) 4 D.L.R. 431; (1925) 3 W.W.R. 357 ..... 260, 481, 578
Canary, Cohn v. (No. 2), (1925) 36 B.C.R. 185; (1925) 3 D.L.R. 223; (1925) 4 D.L.R. 431; (1925) 2 W.W.R. 563; (1925) 3 W.W.R. 357 ..... 578, 847

Canary et al. v. Vested Estates, Ltd., (1930) 43 B.C.R. 1, 365; (1930) 3 D.L.R. 989; (1930) 1 W.W.R. 996; (1931) 1 D.L.R. 997 .....477, 882, 884
Cann, Gibbs v. (1931) 44 B.C.R. 393 872
Cantin, Suttles v. (1915) 22 B.C.R. 139; 24 D.L.R. 1; 32 W.L.R. 101; 8 W.W.R. 293 .....842, 1146
Cantone, Turner v. (1929) 41 B.C.R. 514; (1929) 4 D.L.R. 724; (1929) 3 W.W.R. 413 .....55, 812
Capilano Timber Co., Winter v. (1926) 37 B.C.R. 91; (1926) 2 W.W.R. 536; 7 C.B.R. 553; (1927) 38 B.C.R. 401; (1927) 4 D.L.R. 36; (1927) 1 W.W.R. 811; (1928) S.C.R. 1 .....95, 97, 664, 665, 671
Carbon Coal & Clay Co. v. Nanoose Wellington Collieries, (1923) 1 D.L.R. 1160 241
Cardarelli, Ex. p., (1929) 2 W.W.R. 223; 52 C.C.C. 267; (1930) 1 D.L.R. 575 .....148, 356, 389, 562
Carey and Western Can. Liquor Co., In re (1920) 3 W.W.R. 329 687
Cariboo Trading Co., Dunphy & Rolph v. (1914) 21 B.C.R. 484; 22 D.L.R. 658; 29 W.L.R. 735; 7 W.W.R. 326; 8 W.W.R. 716; 9 W.W.R. 1180 .....466, 911
Carlin & Strickland v. McAusland & Spence, (1921) 30 B.C.R. 351; 70 D.L.R. 769 .....270, 971
Carlisle, District of North Vancouver v. (1922) 31 B.C.R. 372; 70 D.L.R. 527; (1922) 3 W.W.R. 811 .....744, 943, 951
Carlson v. Duncan, (1931) 44 B.C.R. 14; (1931) 3 D.L.R. 570; (1931) 2 W.W.R. 343 .....945, 948, 1081
Carlson, Hilma, In re (1923) 32 B.C.R. 24; (1923) 2 W.W.R. 798 466
Carlson, Nowell and, In re (1919) 26 B.C.R. 459; (1919) 1 W.W.R. 387...324, 329, 919-20
Carmichael, R. v. (1915) 22 B.C.R. 375; (1915) 26 C.C.C. 443 .....334, 371
Carmito, R. v. (1919) 27 B.C.R. 225; (1919) 2 W.W.R. 548 .....336, 630
Car Owners, Ltd., v. McKercher, (1922) 31 B.C.R. 257; 67 D.L.R. 626 .....669, 671
Carr v. Berg, (1917) 24 B.C.R. 422; 38 D.L.R. 176; (1917) 3 W.W.R. 1037; (1918) 2 W.W.R. 368 .....271, 406
Carr v. La Dreche, (1927) 38 B.C.R. 97; (1927) 2 D.L.R. 480; (1927) 1 W.W.R. 574 .....908, 1081
Carr & Son v. Dempsey, (1930) 43 B.C.R. 305; (1931) 1 D.L.R. 984 713
Carrick v. Point Grey, (1927) 38 B.C.R. 92, 481; (1927) 1 D.L.R. 446; (1927) 3 D.L.R. 909; (1927) 2 W.W.R. 684 775
Carter v. Bell, (1915) 21 B.C.R. 55; 21 D.L.R. 243; 31 W.L.R. 1; 8 W.W.R. 47 ... 753
Carter, Drake v. (1920) 28 B.C.R. 119; 51 D.L.R. 372; (1920) 1 W.W.R. 1063 ... 863
Cartwright and Crickmore, MacInnes v. (1930) 43 B.C.R. 265; (1931) 1 D.L.R. 572; (1931) 1 W.W.R. 81; (1931) S.C.R. 425; (1931) 3 D.L.R. 693 900
Casein. Ltd., Macdonald W. L. & Co. v. (1917) 24 B.C.R. 218; 35 D.L.R. 443; (1917) 2 W.W.R. 1132; (1918) 26 B.C.R. 204; (1919) 1 W.W.R. 293 .....406, 598, 896, 911, 918
Caskie v. Premier Mines, Ltd., (1921) 30 B.C.R. 116 .....28, 274
Caskie and Spark, R. v. (1922) 31 B.C.R. 368; (1922) 35 B.C.R. 78; (1922) 3 W.W.R. 1109; 38 C.C.C. 198; 70 D.L.R. 215; (1923) 3 D.L.R. 295; (1923) 2 W.W.R. 451 .....387, 639, 1019
Cassandra, R. v. (1929) 1 W.W.R. 866; 52 C.C.C. 326 .....384, 465
Castleman v. Johnson, (1921) 30 B.C.R. 354; 70 D.L.R. 862; (1921) 3 W.W.R. 830 .....697, 925
"Catala," The, Dagsland v. (1927) 38 B.C.R. 440; (1927) 4 D.L.R. 426; (1927) 3 W.W.R. 97; (1928) 3 D.L.R. 334; (1928) Ex. C.R. 83 .....12, 455
Cates, Capt. J. A., Tug & Wharfage Co. v. Franklin Fire Ins. Co., (1926) 37 B.C.R. 539; (1927) A.C. 698; 96 L.J.P.C. 132; 137 L.T. 709; 17 Asp. M.C. 319; (1927) 3 D.L.R. 1025; (1927) 3 W.W.R. 43 624
Cates, Capt. J. A., Tug & Wharfage Co. v. The Franklin Fire Ins. Co., (1927) 38 B.C.R. 95; (1927) 2 D.L.R. 71; (1927) 1 W.W.R. 438 311
Cathels, Davis Log & Raft Patents Co. v. (1927) 39 B.C.R. 57; (1927) 4 D.L.R. 95; (1927) 2 W.W.R. 753 850

Catherwood, Smith v.: In re Dewdney Election (No. 2), (1925) 36 B.C.R. 98; (1925) 3 D.L.R. 770; (1925) 1 W.W.R. 54 446
Caudwell v. George, (1925) 35 B.C.R. 134; (1925) 2 D.L.R. 229; (1925) 1 W.W.R. 579 .....31, 498
Caulfield v. Arnold (No. 2), (1924) 34 B.C.R. 404; (1925) 1 D.L.R. 295; (1925) 1 W.W.R. 664 265
C.C. Motor Sales, Ltd., v. Chan, (1926) S.C.R. 485; (1926) 3 D.L.R. 712; (1926) 35 B.C.R. 488; (1926) 1 D.L.R. 1065; (1926) 1 W.W.R. 508 977
C.C. Motor Sales, Ltd., (No. 2) Chan v. (1926) 37 B.C.R. 88..... 65
Ceal, R. v. (1929) 1 W.W.R. 797 633
Cedar Creek Mining Co., Darrall v. (1923) 33 B.C.R. 43 43
Central Okanagan Lands, Ltd., Milne v. (1919) 26 B.C.R. 575; (1919) 1 W.W.R. 720 891
Century Insurance Co., People's Trust Co. and, In re (1917) 25 B.C.R. 138; (1918) 1 W.W.R. 342 185
Ceperley, Grace E., Deceased, In re Estate of (1919) 27 B.C.R. 60; (1919) 2 W.W.R. 495 509
Chambers et al. v. Sampson, (1931) 44 B.C.R. 134; (1931) 3 D.L.R. 206; (1931) 2 W.W.R. 251 .....303, 413, 811, 825
Champion v. World Building Co., (1914) 50 S.C.R. 382; 22 D.L.R. 465; 7 W.W.R. 1162 66
Champion & White v. City of Vancouver, (1916) 23 B.C.R. 221; 31 D.L.R. 22; (1917) 1 W.W.R. 185 .....204, 217, 765
Champion & White v. World Building, Ltd., (1916) 22 B.C.R. 596; 27 D.L.R. 506; 10 W.W.R. 470; 34 W.L.R. 317 .....715, 748
Chan, C.C. Motor Sales, Ltd., v. (1926) S.C.R. 485; (1926) 3 D.L.R. 712; 35 B.C.R. 488 (1926) 1 D.L.R. 1065; (1926) 1 W.W.R. 508 977
Chan v. C.C. Motor Sales, Ltd. (No. 2), (1926) 37 B.C.R. 88..... 65
Chandler v. City of Vancouver, (1919) 26 B.C.R. 465; 45 D.L.R. 121; (1919) 1 W.W.R. 605 .....779, 1018
Chan Lung Toy, R. v. (1924) 34 B.C.R. 194; (1924) 3 W.W.R. 196 ..367, 589, 641, 644
Chang Song, R. v. (1923) 33 B.C.R. 176; (1924) 1 D.L.R. 1161; (1924) 1 W.W.R. 778; 42 C.C.C. 8 .....554, 585
Channell v. Rombough, (1923) 33 B.C.R. 65; (1923) 3 W.W.R. 1041; (1924) 1 D.L.R. 54; (1924) 33 B.C.R. 452; (1924) 2 D.L.R. 662; (1924) 2 W.W.R. 28; (1924) 34 B.C.R. 52; (1924) 3 W.W.R. 169 .....65, 1052, 1053, 1061
Chan Shun Chong et al., Canadian Financiers Trust Co. v. (1921) 29 B.C.R. 543; (1921) 2 W.W.R. 984 512
Chapman v. Stoddart & Co., (1930) 43 B.C.R. 182; (1930) 4 D.L.R. 1013; (1930) 3 W.W.R. 171 .....71, 493, 879
Charleson Assessment, In re (1915) 21 B.C.R. 281, 372; 22 D.L.R. 240; 31 W.L.R. 309; 8 W.W.R. 930 .....68, 687, 782, 785
Charleston, Eastley v. (1923) 33 B.C.R. 148 699
Charlie Sam, R. v. (1930) 42 B.C.R. 360; (1930) 2 W.W.R. 441; 53 C.C.C. 252 ... .344, 371, 373
Charlton v. The B.C. Sugar Ref. Co., (1924) 34 B.C.R. 409; (1924) 4 D.L.R. 1182; (1925) 1 W.W.R. 546 .....695, 697
Chartered Bank of India v. Pacific Marine Ins. Co., (1923) 32 B.C.R. 60; (1923) 33 B.C.R. 91; (1923) 2 D.L.R. 612; (1923) 4 D.L.R. 942; (1923) 1 W.W.R. 1136; (1924) 1 W.W.R. 114 624
"Chasina," The, Jorgensen v. (1925) 37 B.C.R. 24; (1926) 1 D.L.R. 1193; (1926) 1 W.W.R. 632; (1926) Ex. C.R. 110 .....9, 994
Chassy v. May, (1921) 68 D.L.R. 427; (1922) 2 W.W.R. 225; (1920) 29 B.C.R. 83; (1921) 1 W.W.R. 69 .....210, 455, 721, 729
Chassy v. May, (1925) 35 B.C.R. 113; (1925) 2 W.W.R. 199 721
Cheng Tong Seng, R. v. (1927) 39 B.C.R. 157; (1928) 1 W.W.R. 33; 49 C.C.C. 79 .....27, 337, 361
Chew Deb v. Davie, Trustee, (1917) 24 B.C.R. 18 539
Chew Deb, R. v. (1928) 39 B.C.R. 559; (1928) 1 W.W.R. 966; 49 C.C.C. 332; ...361, 557

Chew Deb, R. v. (No. 2), 1929) 41 B.C.R. 403 359
"Chicago Maru," S.S., Donkin v. (1916) 22 B.C.R. 529; 28 D.L.R. 804; 16 Ex. C.R. 501; 34 W.L.R. 472; 23 B.C.R. 551; 33 D.L.R. 38; 16 Ex. C.R. 503 ...19, 137, 140
Chiffey, Cutler v. (1920) 29 B.C.R. 120; (1921) 1 W.W.R. 686 .....80, 893
"Chilcot," The, East Asiatic Co. v. (1925) Ex. C.R. 172; (1925) 2 W.W.R. 543 ... .164, 410, 996
Chilliwack, City of, Clarke v. (1922) 31 B.C.R. 316; (1923) 2 W.W.R. 726 .....569, 769
Chilliwack, City of, Pelly v. (1916) 23 B.C.R. 97; 30 D.L.R. 651; (1917) 1 W.W.R. 208 .....782, 789
Chilliwack Evap. & Packing Co. v. Chung, (1917) 25 B.C.R. 90; (1918) 1 W.W.R. 870 .....35, 331
Chin Cam et al., Tai Sing v. (1916) 23 B.C.R. 8; 27 D.L.R. 528; 10 W.W.R. 460 .. ..43, 847, 896
Chin Chong, R. v. (1921) 29 B.C.R. 527 381
Chin Chong, alias Jeanne, R. v. (1929) 41 B.C.R. 33; (1929) 1 W.W.R. 254; 52 C.C.C. 283 384
Chinese Immigration Act and Lee Chow Ying, In re (1928) 39 B.C.R. 322; 49 C.C.C. 168 .....553, 586
Chinese Immigration Act and Young Sue Hing, In re (1926) 37 B.C.R. 227; (1926) 2 W.W.R. 374 586
Chin Mow, R. v. (1924) 34 B.C.R. 240; (1924) 4 D.L.R. 431; (1924) 3 W.W.R. 187; 42 C.C.C. 394 .....344, 1015
Chin Sack, R. v. (No. 1), (1928) 39 B.C.R. 223; (1928) 1 W.W.R. 618; 40 C.C.C. 43. 587
Chin Sack, R. v. (No. 2), (1928) 40 B.C.R. 68; 50 C.C.C. 137 .....297, 587, 650
Chin Toy v. Armitage, (1922) 70 D.L.R. 160; (1922) 2 W.W.R. 1269; 38 C.C.C. 382 .....331, 368
Chin Toy, R. v. (1922) 70 D.L.R. 160; (1922) 2 W.W.R. 1269; 38 C.C.C. 382 ..358, 364
Chin Yow Hing, R. v. (1929) 41 B.C.R. 214; (1929) 2 W.W.R. 73; 51 C.C.C. 407 .....149, 562
Chisholm v. Aird, (1930) 43 B.C.R. 354 .....53, 794
Chobotar, Buczko v. (1926) 1 D.L.R. 1024; (1926) 1 W.W.R. 379; 45 C.C.C. 216 .. 428
Chong v. Gin Wing Sig, (1917) 2 W.W.R. 183 53
Chong Jan v. Quong Wo On, (1922) 68 D.L.R. 65 242
Chong Kee, R. v. (1920) 29 B.C.R. 165; 37 C.C.C. 22 518
Chong Sam Bow, R. v. (1925) 1 W.W.R. 240 .....374, 382, 391, 658
Chow, R. ex. rel. Townley v. (1922) 31 B.C.R. 461 79
Chow Ben, R. v. (1925) 36 B.C.R. 319; 45 C.C.C. 152; (1926) 1 W.W.R. 384 355
Chow Chin, R. v. (1920-21) 29 B.C.R. 445; 57 D.L.R. 708; (1920) 2 W.W.R. 997: 34 C.C.C. 228 .....386, 518
Chow Duck Yuet, R. v. (1931) 43 B.C.R. 152, 556; 55 C.C.C. 344 .....400, 588
Chow, Henry, R. v. (1930) 42 B.C.R. 365; (1930) 2 W.W.R. 389; 53 C.C.C. 247 ... 374
Chow Kee, R. v. (1929) 42 B.C.R. 67 396
Chow Toy Dong, Li Din v. (1923) 32 B.C.R. 296; (1923) 3 D.L.R. 957; (1923) 2 W.W.R. 799 .....502, 989
Christensen, Canada Perm. Mtge. Corpn. v. (1929) 41 B.C.R. 258; (1929) 3 D.L.R. 864; (1929) 2 W.W.R. 198 .....454, 650, 756
Christensen, Hans C., In re: Tom v. Everett, (1928) 40 B.C.R. 124, 383; (1928) 4 D.L.R. 668; (1928) 3 W.W.R. 314, 432 .....422, 459, 745, 944
Christian Community of Universal Brotherhood, R. v. (1931) 1 W.W.R. 255..42, 297, 692
Chue Louie, R. v. (1924) 34 B.C.R. 177; (1924) 4 D.L.R. 300; 42 C.C.C. 382 355
Chuhei Fukukawa v. American Timber Holding Co., (1928) 40 B.C.R. 44; (1928) 3 D.L.R. 44; (1928) 2 W.W.R. 37 252
Chung Chan, R. v. (1918) 1 W.W.R. 398 .....386, 637
Chung, Chilliwack Evap. & Packing Co. v. (1917) 25 B.C.R. 90; (1918) 1 W.W.R. 870 .....25, 331

Chung Chuck, R. v. (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R. 394; 51 C.C.C. 260; (1929) 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; 53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129 .. ..223, 268, 324, 380, 692, 927
Chung Chuck, R. v. (1929) 42 B.C.R. 116; 52 C.C.C. 292; (1930) 43 B.C.R. 125; 54 C.C.C. 174 468
Chung Gee, Pantages v. (1929) 41 B.C.R. 401; (1929) 4 D.L.R. 542; (1929) 2 W.W.R. 503 305
Churton, R. v. (1919) 27 B.C.R. 26; 45 D.L.R. 725; (1919) 1 W.W.R. 774; 31 C.C.C. 188 374
Cianci, Robinson R. ex. rel. v. (1917) 24 B.C.R. 81; 35 D.L.R. 164; 28 C.C.C. 107 .. 643
Claman v. Claman, (1925) 35 B.C.R. 137, 141; (1926) S.C.R. 4 .....63, 435, 504
Claman's, Ltd., v. Can. Pac. Ry. Co., (1920) 28 B.C.R. 226; (1920) 2 W.W.R. 117; 51 D.L.R. 668; 25 C.R.C. 368 .....139, 407
Clancy, In re Land Registry Act and (1915) 21 B.C.R. 1; 25 D.L.R. 536 953
Clapham, Edwards v. (1923) 33 B.C.R. 277; (1924) 2 W.W.R. 207 439
Clapham, Leonora, Deceased, In re: Minister of Finance v. Burke-Roche, (1925) 36 B.C.R. 175; (1925) 4 D.L.R. 325 1036
Clappier v. Clappier, (1923) 32 B.C.R. 204 298
Clark v. Appleby, (1928) 2 D.L.R. 95; (1928) 1 W.W.R. 784 .....423, 857, 858, 1010
Clark v. Langs & Roddis, (1926) 37 B.C.R. 77 .....186, 243
Clark, McGee v. (1927) 38 B.C.R. 156; (1927) 1 W.W.R. 593 724
Clark v. McKenzie, (1929-30) 42 B.C.R. 71, 449; (1930) 2 D.L.R. 843; (1930) 1 W.W.R. 67, 785 .....126, 600, 1067
Clark v. Milligan, (1920) 28 B.C.R. 22; (1920) 1 W.W.R. 1044 ....564, 664, 929, 931, 1071, 1102
Clark & Buzza, Leslie v. (1928) 40 B.C.R. 441; (1929) 1 D.L.R. 903; (1930) 42 B.C.R. 391; (1930) 3 D.L.R. 369; (1930) 1 W.W.R. 513 ...595, 809, 817, 862, 1050
Clark Fruit & Produce Co., Symonds v. (1919) 26 B.C.R. 548; (1919) 1 W.W.R. 587 .....864, 965
Clark, R. P. & Co., In re (1931) 44 B.C.R. 301; (1931) 3 W.W.R. 79; 13 C.B.R. 118 .....101, 901, 1074
Clark, R. P. & Co. (Victoria) v. Robinson, (1930) 42 B.C.R. 409; (1930 4 D.L.R. 158. 971
Clarke v. City of Chilliwack, (1922) 31 B.C.R. 316; (1923) 2 W.W.R. 726 ...569, 769
Clarke, Hunter v. (1932) 44 B.C.R. 534; (1932) 1 W.W.R. 466 827
Clarkson, Cooil v. (1925) 35 B.C.R. 308; (1925) 2 D.L.R. 493; (1925) 1 W.W.R. 1049 .....420, 459, 743
Clarkson and Home Bank of Canada v. Lancaster, (1926) 38 B.C.R. 217 .....85, 112
Claud Loo v. Sun Fat, (1925) 36 B.C.R. 138; (1925) 4 D.L.R. 134 674
Clausen v. Canada Timber & Lands, Ltd., (1925) 35 B.C.R. 408, 461; (1923) 3 D.L.R. 751; (1923) 3 W.W.R. 1072 .....57, 310, 311, 888, 1087
Clayoquot Sound Canning Co. v. S.S. "Princess Adelaide," (1919) 27 B.C.R. 526; 48 D.L.R. 478; 19 Ex. C.R. 128; (1919) 3 W.W.R. 241 982
Clayton, Stanford v. (1922) 70 D.L.R. 864 847
Clazy, Marjory, Deceased, In re Land Registry Act and (1928) 40 B.C.R. 102; (1928) 2 D.L.R. 971; (1928) 1 W.W.R. 974 .....506, 1119
"Cleeve," The, v. The "Prince Rupert," (1917) 27 B.C.R. 533, 561; (1917) 3 W.W.R. 957; (1918) 1 W.W.R. 345 .....160, 163, 409
Clement, R. v. (1919) 27 B.C.R. 121; (1919) 3 W.W.R. 309; 32 C.C.C. 384 ....631, 920
Clements v. Coughlan: Anderson, Third Party, (1924) 34 B.C.R. 401 264
Clements, Sproule v. (1925) 2 D.L.R. 784; (1927) 39 B.C.R. 28; (1927) 3 D.L.R. 955; (1927) 2 W.W.R. 825.....944, 1076, 1078-9
Cleugh, Campbell v. (1920) 28 B.C.R. 352 501
Cleugh, v. Can. Pac. Ry. Co., (1918) 25 B.C.R. 335; 40 D.L.R. 512; (1918) 2 W.W.R. 416 703
Cline v. Kramer, R. ex rel. (1920) 29 B.C.R. 132; 36 C.C.C. 236 .....351, 1020
"Clinton," The, Pacific Great Eastern Ry. Co. v. (1918) 27 B.C.R. 400; (1919) 1 W.W.R. 947 16

Clough v. Greenwood and Clough, (1919) 27 B.C.R. 140 955
Coast Cement Co. v. Navigazione Libera Triestina S.A., (1930) 43 B.C.R. 167; (1930) 4 D.L.R. 897; (1930) 3 W.W.R. 69 144
Coast Paper Co., Mitchell v. (1930) 42 B.C.R. 352; (1930) 2 D.L.R. 720; (1930) 1 W.W.R. 608 .....653, 873
Coast Shingle Mill Co., In re (1926) 2 W.W.R. 536; 7 C.B.R. 553 .....95, 97
Coast Steamship Co. v. Can. Pac. Ry. Co., (1921) 30 B.C.R. 283; (1921) 3 W.W.R. 631 998
Coast Timber & Trading Co., McKinnon v. (1921) 61 D.L.R. 128 256
Coastwise S.S. & Barge Co., Premier Gold Mining Co. v. (1925) 35 B.C.R. 147; (1925) 1 W.W.R. 630; (1926) 1 D.L.R. 1009 144
Coates v. Mayo Singh, (1925) 36 B.C.R. 270; (1925) 4 D.L.R. 345; (1925) 3 W.W.R. 513 521
Cochrane v. Phillips, (1924) 34 B.C.R. 465; (1924) 3 D.L.R. 996; (1924) 3 W.W.R. 285 1010
Cochrane, Schetky v. (1918) 26 B.C.R. 257; (1920) 60 S.C.R. 650.....118, 742
Cochrane and Union Funding Co., Schetky and Acadia, Ltd., v. (1917) 24 B.C.R. 496; (1918) 1 W.W.R. 821 483
Coffin and O'Flynn v. The "Protoco," (1930) 42 B.C.R. 347; (1930) 2 D.L.R. 421; (1930) 1 W.W.R. 558; (1930) Ex. C.R. 153 .....9, 994
Cohn, Canary v. (No. 1), (1925) 35 B.C.R. 478; (1925) 3 D.L.R. 223; (1925) 2 W.W.R. 563; (1925) 4 D.L.R. 431; (1925) 3 W.W.R. 357 .....260, 481, 578
Cohn v. Canary (No. 2), (1925) 36 B.C.R. 185; (1925) 3 D.L.R. 223; (1925) 4 D.L.R. 431; (1925) 2 W.W.R. 563; (1925) 3 W.W.R. 357 .....578, 847
Cohn and Canary, Jones v. ((1924) 33 B.C.R. 321 .....4, 755, 855
Coldicutt, B.C. Estates, Ltd., v. (1924) 34 B.C.R. 7; (1924) 3 D.L.R. 363; (1924) 2 D.L.R. 1024 877
Coldstream v. Bellevue, (1929) 4 D.L.R. 52; (1929) 2 W.W.R. 597 .....594, 1016
Cole, Cronholm v. (1928) 39 B.C.R. 405; (1928) 2 D.L.R. 65; (1928) 3 D.L.R. 321 .....724, 1103
Coleman v. Interior Tree Fruit & Vegetable Committee of Direction, (1930) 42 B.C.R. 499; (1930) 4 D.L.R. 800; (1930) 2 W.W.R. 784 .....33, 50
College of Dental Surgeons v. Neff, (1928) 40 B.C.R. 371; (1928) 4 D.L.R. 839; (1928) 3 W.W.R. 299 429
Collinge, R. v. (1928) 40 B.C.R. 418; 51 C.C.C. 193 .....487, 488
Collins v. General Service Transport, Ltd., (1926) 38 B.C.R. 512; (1927) 2 D.L.R. 353 818
Collins v. Guardian Casualty, Etc. Co., (1918) 25 B.C.R. 401; 40 D.L.R. 133; (1918) 2 W.W.R. 763 615
Collister v. Reid, (1919) 27 B.C.R. 278; (1919) 59 S.C.R. 275; (1919) 3 W.W.R. 229, 1083; 50 D.L.R. 289 .....722, 1018
Collyer, Howe and, Howe v. (1916) 22 B.C.R. 550; 28 D.L.R. 772; 10 W.W.R. 1263. 753
Colpitts, McLennan, McFeely & Co. v. (1918) 25 B.C.R. 459 1110
Colquhoun, Goldie v. (1930) 42 B.C.R. 356; (1930) 2 D.L.R. 1002; (1930) 1 W.W.R. 624 327
Columbia Bitulithic, Ltd., v. B.C. Electric Ry. Co., (1917) 55 S.C.R. 1; 21 C.R.C. 243; 37 D.L.R. 64; (1917) 2 W.W.R. 664 .....802, 817, 841
Columbia Bitulithic, Ltd., v. Vancouver Lbr. Co., (1915) 21 B.C.R. 138; 21 D.L.R. 91; 30 W.L.R. 753; 8 W.W.R. 132 .....123, 176
Columbia Motors, Ltd., Romano v. (1930) 42 B.C.R. 168; (1930) 1 D.L.R. 815; (1930) 1 W.W.R. 159 .....92, 471, 520
Columbia Trust Co., Baird v. (1915) 22 D.L.R. 150 1076
Columbia Wine & Spirit Co., R. v. (1921) 30 B.C.R. 245 638
Columbian Co., Brown v. (1923) 32 B.C.R. 425; (1923) 3 D.L.R. 727 1046
Colville Estate, In re (1931) 44 B.C.R. 331; (1931) 3 W.W.R. 26; (1932) 1 D.L.R. 47 .....214, 1120, 1121
Colwood Park Assn. v. Oak Bay, (1928) 40 B.C.R. 233; (1928) 3 D.L.R. 812; (1928) 2 W.W.R. 593 .....270, 781

Commercial Invst. Co., Douglas, Sargison and White, Tobin v. (1916) 22 B.C.R. 481; 27 D.L.R. 387; 34 W.L.R. 23; 10 W.W.R. 123 .....47, 854, 860, 864
Commercial Pacific Cable Co. v. The "Prince Albert," (1925) 37 B.C.R. 434; (1926) 4 D.L.R. 543; (1926) 3 W.W.R. 309; (1927) Ex. C.R. 44 .....8, 12, 997
Commercial Securities (B.C.) Ltd. v. Johnston, (1931) 43 B.C.R. 381; (1931) 1 D.L.R. 861; (1931) 1 W.W.R. 420 981
Commissioners for Nakusp Dev. Dist., Leary v. (1930) 1 W.W.R. 97 .....412, 774, 792, 793, 799, 821
Commissioners of Dewdney Dyking Dist., Morrison v. (1922) 31 B.C.R. 23; (1922) 3 W.W.R. 250; 65 D.L.R. 409 .....408, 443
"Commodore," The, The "Andrew Kelly" v. (1919) 27 B.C.R. 439; (1919) 48 D.L.R. 213; (1919) 1 W.W.R. 1059; 19 Ex. C.R. 70 .....19, 474, 982
Commonwealth Trust Co., Fordham v. (1915) 8 W.W.R. 164 669
Comox Logging Co., Higgins v. (1926) 37 B.C.R. 525; (1926) 3 D.L.R. 852; (1926) 3 W.W.R. 417; (1927) 38 B.C.R. 477; (1927) 2 D.L.R. 682; (1927) S.C.R. 359; (1927) 3 D.L.R. 720; (1927) 2 W.W.R. 378.....77, 306, 521, 831
Comox Logging & Ry. Co., McIntyre v. (1924) 33 B.C.R. 504; (1924) 2 W.W.R. 118. 523
"Comox," S.S., Haley v. (1920) 30 B.C.R. 104; 56 D.L.R. 662; (1920) 3 W.W.R. 325; 20 Ex. C.R. 86 12
Compton v. Allen Trasher Lumber Co., (1927) 39 B.C.R. 70; (1927) 3 W.W.R. 724 .....298, 700
Comstock v. Ashcroft Estates, Ltd., (1916) 23 B.C.R. 476; (1917) 1 W.W.R. 1412 .....23, 92, 471
Concrete Appliances Co. v. Rourke et al. and Mussens, Ltd., (1915) 28 D.L.R. 635; 8 W.W.R. 6 850
Conds v. Kabota, (1925) 35 B.C.R. 506; (1925) 3 D.L.R. 376; (1925) 2 W.W.R. 620 .....330, 688
Confederation Life Assn., Moore v. (1918) 25 B.C.R. 465; (1918) 2 W.W.R. 895 .....245, 577, 613, 684
Conkey, Philip Bond & Co. v. (1921) 29 B.C.R. 240; (1921) 1 W.W.R. 758 890
Conn v. David Spencer, Ltd., (1929) 42 B.C.R. 128; (1930) 1 D.L.R. 805; (1930) 1 W.W.R. 26 1051
Conn, R. v. (1920) 28 B.C.R. 189; 36 C.C.C. 281 350
Consolidated Exporters Corpn., B.C. Liquor Co. v. (1930) 42 B.C.R. 481; (1930) 2 W.W.R. 379; (1931) 1 D.L.R. 195 862
Consolidated Mng. & Smeltg. Co., Enderby v. (1918) 26 B.C.R. 380; (1918) 3 W.W.R. 579 310
Consolidated Mng. & Smeltg. Co. and Fox, In re (1924) 34 B.C.R. 396; (1924) 3 W.W.R. 861; (1925) 1 D.L.R. 245 75
Consolidated Mng. & Smeltg. Co., Murdoch v. (1929) S.C.R. 141; (1929) 1 D.L.R. 913; (1928) 39 B.C.R. 386; (1928) 1 D.L.R. 853; (1928) 1 W.W.R. 578 .....53, 522, 709
Consolidated Motor Co., Katz v. (1930) 42 B.C.R. 214; (1930) 2 D.L.R. 241; (1930) 1 W.W.R. 305 .....302, 696, 806, 916
Constitutional Questions Determination Act, In re: In re Sec. 100 of the Legal Professions Act, (1927) 39 B.C.R. 83; (1927) 4 D.L.R. 195; (1927) 2 W.W.R. 808; 48 C.C.C. 278 .....228, 266, 331, 1006
Continental Guarantee Corpn. of Canada, Earle v. (1927) 4 D.L.R. 939; (1927) 3 W.W.R. 784 .....87, 284, 1002
Continental Guaranty Corpn. of Canada, Albutt & Co. v. (1929) 41 B.C.R. 537; (1929) 3 W.W.R. 292; (1930) 1 D.L.R. 26 982
Continental Guaranty Corpn. of Canada v. Mark, (1926) 37 B.C.R. 453; (1926) 4 D.L.R. 707; (1926) 3 W.W.R. 428 .....595, 736, 1049
Convention of Baptist Churches, Kerschner v. (1930) 43 B.C.R. 4; (1930) 4 D.L.R. 135; (1930) 2 W.W.R. 280 750
Conway, R. v. (1929) 3 W.W.R. 268; 52 C.C.C. 161 .....31, 295, 378, 465
Cooil v. Clarkson, (1925) 35 B.C.R. 308; (1925) 2 D.L.R. 493; (1925) 1 W.W.R. 1094 .....420, 459, 743

Cook v. Canadian Collieries (Dunsmuir), (1915) 21 B.C.R. 64; 21 D.L.R. 215; 30 W.L.R. 750; 8 W.W.R. 41 ..... 799, 940
Cooke v. Mocroft, (1926) 36 B.C.R. 393; (1926) 1 W.W.R. 827 717
Cooley, Keene v. (1925) 36 B.C.R. 170; (1925) 4 D.L.R. 229; (1925) 3 W.W.R. 250 ..... 6, 675
Cooper, Giannini v. (1918) 26 B.C.R. 382; (1918) 3 W.W.R. 642 ..... 49, 330
Cooper, R. v. (1925) 35 B.C.R. 457; (1925) 2 W.W.R. 778; 44 C.C.C. 314 ..... 228, 641
Cooper v. Warburton, (1931) 44 B.C.R. 328 425
Cope & Son, Atlas Record Co. v. (1922) 31 B.C.R. 432 50
Copethorne v. Elliott, (1916) 28 D.L.R. 773; (1916) 10 W.W.R. 1023; 34 W.L.R. 943. 1105
Copp, Bank of Hamilton v. (1924) 3 W.W.R. 323 ..... 419, 455, 479, 651
Coquitlam, Port, v. Langan, (1917) 33 D.L.R. 175; (1917) 2 W.W.R. 208 ..... 784, 789
Coquitlam, Port, Wilson v. (1922) 30 B.C.R. 449; 67 D.L.R. 49; (1922) 1 W.W.R. 640; (1923) S.C.R. 235; (1923) 2 D.L.R. 194; (1923) 1 W.W.R. 1025 ..... 521, 773, 833, 835, 836
Corano, Government Liquor Act and, In re (1928) 2 W.W.R. 695; 50 C.C.C. 199.... 632
Cormack et ux., Lyell v. (1928) 40 B.C.R. 345; (1928) 4 D.L.R. 902; (1928) 3 W.W.R. 284 ..... 250, 1011, 1084
Corsini v. Palm et al., (1925) 35 B.C.R. 417 ..... 760, 898, 914
Cortesi, Farquharson v. (1918) 3 W.W.R. 193 ..... 303, 330
Coryell v. Bertha Cons. Gold Mng. Co., (1923) 33 B.C.R. 81; (1924) 1 D.L.R. 236; (1924) 1 W.W.R. 122 520
Cosh, Rogerson v. (1917) 24 B.C.R. 367; 37 D.L.R. 694; (1917) 3 W.W.R. 911 ..... 1089, 1096
Costerton, Hanna v. (1918) 26 B.C.R. 347; 44 D.L.R. 478; (1919) 1 W.W.R. 930.. 456, 1110
Costerton, Hyland v. (1927) 1 D.L.R. 1166; (1927) 1 W.W.R. 340 902
Cottingham, Gibson v. (1916) 23 B.C.R. 392; 32 D.L.R. 213; (1917) 1 W.W.R. 496 ..... 739, 915, 957
Cotton v. Leighton, (1917) 24 B.C.R. 253 ..... 288, 930
Cotton v. The King, (1913) 83 L.J.P.C. 105; 110 L.T. 276; 30 T.L.R. 71; (1914) A.C. 176 229
Cottonwood Timber Co. v. Molsons Bank, (1916) 22 B.C.R. 541; 29 D.L.R. 29; 34 W.L.R. 909; 10 W.W.R. 1215 746
Coughlan, Clements v.: Anderson, Third Party, (1924) 34 B.C.R. 401 264
Coughlan, Royal Bank of Canada v. (1920) 28 B.C.R. 247; (1920) 2 W.W.R. 356. 746
Coupland v. Elmore, (1928) 2 D.L.R. 308; (1928) 1 W.W.R. 380 960
Coupland v. Foley Bros., Welch & Stewart, (1918) 25 B.C.R. 173 57
Courtenay v. Esquimalt & Nanaimo Ry. Co., (1914) 28 D.L.R. 381; 18 C.R.C. 384 ... 938
Courtenay, Esquimalt & Nanaimo Ry. Co. v. (1915) 22 B.C.R. 362; 25 D.L.R. 821; 32 W.L.R. 914; 9 W.W.R. 618 ..... 218, 936
Courtney, Johnston v. (1920) 2 W.W.R. 459 ..... 311, 946
Cousineau v. City of Vancouver, (1926) 37 B.C.R. 266; (1926) 3 D.L.R. 265; (1926) 2 W.W.R. 433 ..... 56, 811, 828
Cousins, Goodall v. (1923) 32 B.C.R. 440; (1923) 3 D.L.R. 718 910
Coutu v. James, (1926) 2 W.W.R. 87 712
Cowan v. The "St. Alice," (1915) 21 B.C.R. 540; 32 W.L.R. 17; 8 W.W.R. 1256; 17 Ex. C.R. 207 ..... 9, 332, 649, 993
Cox v. Begg Motor Co., (1921) 29 B.C.R. 531; 62 D.L.R. 303; (1921) 2 W.W.R. 150 ..... 58, 292
Cox v. Hogan and City of Victoria, (1924) 35 B.C.R. 286 1123
Cox, R. v. (1929) 41 B.C.R. 9; (1929) 2 D.L.R. 785; (1929) 1 W.W.R. 542; 51 C.C.C. 203 ..... 150, 359
Cox and Mitchell, Campbell v. (1929) 42 B.C.R. 120; (1930) 1 D.L.R. 649 ..... 432, 468
Cox and Quaille, Kunhardt v.: In re Parshalle, (1930) 42 B.C.R. 413; (1930) 1 W.W.R. 767; (1930) 3 D.L.R. 438; 43 B.C.R. 68; (1930) 3 D.L.R. 1004; (1930) 2 W.W.R. 802 ..... 430, 432, 452, 759
Coy, Bostwick and Curry v. (1915) 21 B.C.R. 478 ..... 952, 1088
Coy, R. v. (1925) 36 B.C.R. 34; (1925) 3 W.W.R. 538; 44 C.C.C. 119 341

Coyle, Hunting-Merritt Lumber Co., v. (1922) 67 D.L.R. 655 53
Crabbe v. Shields, (1925) 36 B.C.R. 89; (1925) 3 D.L.R. 1069; (1925) 2 W.W.R. 701. 1119
Craig v. Hamre and Young, (1925) 36 B.C.R. 1; (1925) 3 D.L.R. 979; (1925) 3 W.W.R. 81 832
Crawford Estate, In re (1918) 25 B.C.R. 178; (1918) 1 W.W.R. 267 1037
Credit Service Exchange, Neary v. (1929) 41 B.C.R. 223; (1923) 3 D.L.R. 107; (1929) 2 W.W.R. 287 .....328, 920
Creech, Higgins v. (1920) 28 B.C.R. 241; (1920) 31 D.L.R. 110 .....737, 1097
Creeden & Avery v. North China Insurance Co., (1917) 24 B.C.R. 335; 36 D.L.R. 359; (1917) 3 W.W.R. 33 621
Creeden & Avery, Radovsky v. (1919) 27 B.C.R. 303; 28 B.C.R. 331; 52 D.L.R. 618; (1920) 3 W.W.R. 234 .....405, 963
Creelman, Hudson Bay Ins. Co. v. (1919) 88 L.J.P.C. 197; 122 L.T. 198; 48 D.L.R. 234; (1919) 3 W.W.R. 9; (1920) A.C. 194; (1918) 25 B.C.R. 307; 40 D.L.R. 274; (1918) 2 W.W.R. 448 .....181, 594, 606, 1096
Creery, Hoyes v. (1917) 24 B.C.R. 505; 39 D.L.R. 516; (1918) 1 W.W.R. 873 ..434, 534
Cremidas v. B.C. Electric Ry. Co., (1919) 27 B.C.R. 232; (1919) 2 W.W.R. 549..6, 22, 513
Crichley et al., Dominion Trust Co. and, In re (1916) 23 B.C.R. 42; 27 D.L.R. 580; 34 W.L.R. 461 199
Crispin & Co. v. Evans, Coleman & Evans, (1923) 32 B.C.R. 132; (1923) 3 D.L.R. 1190; (1923) 2 W.W.R. 616, 1050; (1922) 31 B.C.R. 328; 68 D.L.R. 623; (1922) 3 W.W.R. 264 .....258, 970
Croll, Sanders v. (1921) 30 B.C.R. 284 822
Crombie v. Canadian Government Merchant Marine, (1921) 30 B.C.R. 260; 21 Ex. C.R. 299; 68 D.L.R. 314; (1922) 1 W.W.R. 805 .....332, 649, 992
Cromie, de Schelking v. (1918) 26 B.C.R. 345; (1918) 3 W.W.R. 1038; (1919) 27 B.C.R. 322; 47 D.L.R. 704; (1919) 3 W.W.R. 539 .....425, 426, 883
Cronholm v. Cole, (1928) 39 B.C.R. 405; (1928) 2 D.L.R. 65; (1928) 3 D.L.R. 321 .....724, 1103
Cross v. Kennedy, (1931) 2 D.L.R. 990 668
Cross & Co., Young v. (1926-27) 38 B.C.R. 49, 200; (1927) 1 D.L.R. 989; (1927) 2 D.L.R. 373; (1927) 1 W.W.R. 537; (1926) 37 B.C.R. 188; (1926) 2 D.L.R. 374; (1926) 1 W.W.R. 878 .....40, 293, 739, 1101
Crossley, Malkin, W. H. Co., Ltd. v. (1923) 32 B.C.R. 207; (1923) 3 D.L.R. 1189; (1923) 1 W.W.R. 1348 .....416, 846, 912
Crossley, Sanford v. (1931) 44 B.C.R. 481 468
Crow's Nest Pass Coal Co., Powell v. (1916) 22 B.C.R. 514; 26 D.L.R. 317; 34 W.L.R. 52; 10 W.W.R. 107 707
Cruickshank, Bank of Montreal v. (1919) 27 B.C.R. 481; (1920) 1 W.W.R. 381 861
Cruickshank, Curtis v. (1929) 40 B.C.R. 546; (1929) 2 D.L.R. 35; (1929) 1 W.W.R. 851 909
Crystal Dairy, Ltd., Lower Mainland Dairy Products Sales Adjustment Committee v. (1931) 44 B.C.R. 508; (1931) 3 W.W.R. 384; (1932) 45 B.C.R. 191; (1932) 2 D.L.R. 277; (1932) 2 W.W.R. 41; 102 L.J.P.C. 17; 49 T.L.R. 104; 148 L.T. 300; (1932) 3 W.W.R. 639; (1933) A.C. 168; (1933) 1 D.L.R. 82 ....231, 1039
Cudworth v. Eddy, (1926) 37 B.C.R. 407; (1927) 1 W.W.R. 583 .....57, 831, 910
Cumberland, City of, v. Cumberland Electric Light Co., (1931) 43 B.C.R. 525; (1931) 3 D.L.R. 69; (1931) 2 W.W.R. 377; (1931) S.C.R. 717; (1931) 4 D.L.R. 459 .....74, 76, 207, 259, 526, 775
Cummings, Atty.-Gen. for Canada v. (1924) 34 B.C.R. 433; (1925) 1 D.L.R. 642; (1926) 1 D.L.R. 52 .....471, 678, 869
Cummings v. O'Flynn, (1924) 34 B.C.R. 275 528
Cumyow, R. v. (1925) 36 B.C.R. 435; (1926) 1 D.L.R. 623; 45 C.C.C. 172 385
Cunard Steamship Co., Tolerton v. (1924) 33 B.C.R. 551; (1924) 3 D.L.R. 355; (1924) 2 W.W.R. 927 137
Cunliffe v. Planta, (1920) 28 B.C.R. 490; 54 D.L.R. 196; (1920) 3 W.W.R. 898 ... .46, 917, 1004, 1008

Cunningham, Insinger v. (1923) 32 B.C.R. 518; (1923) 4 D.L.R. 1199; (1923) 3 W.W.R. 1328 ....62, 314, 504
Cunningham, Stewart v. (1915) 21 B.C.R. 255; 22 D.L.R. 845; 8 W.W.R. 579 ...734, 1094
Cunningham, Tidy v. (1915) 21 B.C.R. 53; 22 D.L.R. 151; 30 W.L.R. 547; 7 W.L.R. 1205 ....795, 840
Cunningham v. Workmen's Compensation Board, (1920) 28 B.C.R. 284; 51 D.L.R. 470; (1920) 2 W.W.R. 676 295
Curley v. Sinser, (1931) 3 W.W.R. 763 538
Curtis v. Cruickshank, (1929) 40 B.C.R. 546; (1929) 2 D.L.R. 35; (1929) 1 W.W.R. 851 909
Curtis v. Skeffington, (1915) 9 W.W.R. 834 506
Cusack v. Day, (1925) 36 B.C.R. 106; (1925) 3 D.L.R. 1028; (1925) 2 W.W.R. 715 ....431, 489, 541
Cusick v. Taylor, (1920) 28 B.C.R. 241; (1920) 2 W.W.R. 579 ....735, 1098
Cutler v. Chiffey, (1920) 29 B.C.R. 120; (1921) 1 W.W.R. 686 ....80, 893

D

Dagsland v. The "Catala," (1927) 38 B.C.R. 440; (1927) 4 D.L.R. 426; (1927) 3 W.W.R. 97; (1928) 3 D.L.R. 334; (1928) Ex. C.R. 83 ....12, 455
Dahlin, R. v. (1919) 27 B.C.R. 564; 60 D.L.R. 604; 36 C.C.C. 223 ....222, 235
Dalbergh, R. v. (1931) 43 B.C.R. 474; (1931) 1 W.W.R. 260; 55 C.C.C. 177 ....473, 645
Dale v. International Mng. Syndicate, (1917) 25 B.C.R. 1; (1917) 2 W.W.R. 1031. 714
Dalgleish, Canada Perm. Mtge. Corpn. and, In re (1915) 9 W.W.R. 180 1111
Dalgleish, Canada Perm. Mtge. Corpn. v. (1928) 39 B.C.R. 300; (1928) 1 D.L.R. 1113; (1928) 40 B.C.R. 94; (1928) 3 D.L.R. 59; (1928) 1 W.W.R. 473, 922 ....59, 287, 299, 752, 872, 946
Dalton v. Dominion Trust Co., (1918) 25 B.C.R. 240; (1918) 3 W.W.R. 42 ....185, 749, 1080
Dalton v. West Shore and Northern Land Co., (1920) 28 B.C.R. 384; (1920) 2 W.W.R. 1022 ....942, 1115
Daly, MacInnes v.: Gwynn, Garnishee, (1921) 30 B.C.R. 20; 60 D.L.R. 365; (1921) 2 W.W.R. 869; 2 C.B.R. 23 193
Dana & Fullerton v. Vancouver Breweries, (1915) 21 B.C.R. 19; 52 S.C.R. 134; 25 D.L.R. 508; 26 D.L.R. 665; 9 W.W.R. 1018 ....272, 665
Danroth v. Railway Passengers Assurance Co., (1930) 43 B.C.R. 21; (1931) 1 D.L.R. 156; (1930) 2 W.W.R. 555 ....70, 609
Dansey v. Orcutt, (1928) 40 B.C.R. 97; (1928) 4 D.L.R. 27 686
Darrall v. Cedar Creek Mining Co., (1923) 33 B.C.R. 43 43
Davenport v. McNiven, (1930) 42 B.C.R. 468; (1930) 4 D.L.R. 386; (1930) 2 W.W.R. 263 ....700, 1022
Davey v. Davey, (1923) 32 B.C.R. 267; (1923) 4 D.L.R. 1199; (1923) 2 W.W.R. 686. 441
Davidson, London Guarantee & Accident Co. v. (1925) 36 B.C.R. 301; (1926) 1 D.L.R. 66; (1926) 1 W.W.R. 148 ....211, 455, 548
Davidson v. Northwestern Dredging Co., (1925) 35 B.C.R. 534 600
Davidson, People's Loan & Deposit Co. and, In re (1917) 25 B.C.R. 109; (1917) 3 W.W.R. 981 ....199, 200
Davie, Trustee, Chew Deb v. (1917) 24 B.C.R. 18 539
Davies, Infants Act and, In re (1920) 28 B.C.R. 10 590
Davies v. Duggan, (1927) 38 B.C.R. 249 ....36, 512
Davies, John Henry, In re Estate of (1927) 38 B.C.R. 249 ....36, 502
Davies v. Mills, (1930) 42 B.C.R. 506; (1930) 2 D.L.R. 997; (1930) 1 W.W.R. 672 ....317, 446
Davies v. Schulli & Mullin, (1927) 39 B.C.R. 321; (1928) 1 D.L.R. 746 ....305, 311
Davies v. Schulli & Mullin, (1928) 40 B.C.R. 197; (1928) 4 D.L.R. 132; (1928) 3 W.W.R. 158 ....727, 845
Davis v. Fraser & Shaw, (1920) 28 B.C.R. 12; 61 D.L.R. 48 670
Davis, Wilhelmina, R. v. (1922) 31 B.C.R. 453; 40 C.C.C. 335 632

Davis v. Yoshida, (1931) 3 W.W.R. 703 .....32, 945
Davis and Palmer, Brethour v. (1919) 27 B.C.R. 250 329
Davis Company v. Dollar Steamship Lines, (1922) 1 W.W.R. 522 142
Davis Log & Raft Patents Co., v. Cathels, (1927) 39 B.C.R. 57; (1927) 4 D.L.R. 95; (1927) 2 W.W.R. 753 850
Davy v. Davy (No. 1), (1921) 30 B.C.R. 356; 63 D.L.R. 341; (1922) 1 W.W.R. 359 438
Davy v. Davy (No. 2), (1921) 30 B.C.R. 355, 365; 63 D.L.R. 341, 345; (1922) 1 W.W.R. 345, 360 .....316, 440
Dawber, Anderson v. (1915) 22 B.C.R. 218; 25 D.L.R. 644; 9 W.W.R. 511 536
Dawson v. Paradise Mine et al., (1919) 26 B.C.R. 487; (1919) 1 W.W.R. 499 .....25, 800, 939, 1056
Day, Cusack v. (1925) 36 B.C.R. 106; (1925) 3 D.L.R. 1028; (1925) 2 W.W.R. 715 .....431, 489, 541
Day and Royal Trust Co. v. Can. Pac. Ry. Co., (1922) 30 B.C.R. 532; (1922) 2 W.W.R. 398; 66 D.L.R. 838 .....412, 835
Deal and Saulter, Moore v. (1917) 24 B.C.R. 181; (1917) 2 W.W.R. 955 721
Deal, R. v. (1923) 32 B.C.R. 279; (1923) 3 D.L.R. 201; (1923) 1 W.W.R. 615; 39 C.C.C. 105 .....376, 392
de Bortoli, R. v. (1927) 3 D.L.R. 193; (1927) S.C.R. 454; 48 C.C.C. 118; (1927) 38 B.C.R. 388; (1927) 2 W.W.R. 300; 47 C.C.C. 351 .....376, 390, 394
DeCagueray, Kelowna Growers Exchange v. (1922) 31 B.C.R. 347; 70 D.L.R. 865; (1922) 3 W.W.R. 1115 690
Deer Mountain Lbr. Co., Sheepwash v. (1925) 37 B.C.R. 418 .....83, 1138, 1141
DeGrassio, R. v. (1930) 1 W.W.R. 941 635
Deisler v. Spruce Creek Power Co., (1915) 21 B.C.R. 441; 22 D.L.R. 550; 31 W.L.R. 289 .....730, 731
Deisler v. U.S. Fidelity & Guaranty Co., (1917) 24 B.C.R. 278; 36 D.L.R. 29; 49 D.L.R. 688; (1917) 3 W.W.R. 1051 .....81, 83, 547
Delip Singh, R. v. (1918) 26 B.C.R. 390 348
Delmas, Brown v. (1919) 27 B.C.R. 471 666
De Mesquito, R. v. (1915) 21 B.C.R. 524; 26 D.L.R. 464; 32 W.L.R. 368; 9 W.W.R. 113; 24 C.C.C. 407 .....382, 391, 482
Dempsey, Carr & Son v. (1930) 43 B.C.R. 305; (1931) 1 D.L.R. 984 713
Dempsey v. Kurek, (1923) 3 W.W.R. 1007 .....83, 1141
Dennis v. Independent Lands, Ltd., (1930) 43 B.C.R. 65 .....913, 916
Denny, James Thomson & Sons v. (1916) 22 B.C.R. 479; 34 W.L.R. 483; (1917) 25 B.C.R. 29; 39 D.L.R. 421; (1918) 1 W.W.R. 435 .....49, 289, 848
Denny v. Lloyd, (1922) 31 B.C.R. 435; (1922) 3 W.W.R. 896 .....291, 866
Dept. of Indian Affairs v. Board of Inv. Under Water Act, (1925) 36 B.C.R. 62 1114
Dept. of Indian Affairs and Board of Inv. Under Water Act, Western Canada Ranching Co. v. (1921) 30 B.C.R. 25; 60 D.L.R. 360; (1921) 2 W.W.R. 834 .. ..589, 924, 1115
Derr, Haglund v. (1927) 38 B.C.R. 435; (1928) 1 W.W.R. 232 1144
DesBrisay, Stroud v. (1930) 42 B.C.R. 507 .....55, 402
de Schelking v. Cromie, (1918) 26 B.C.R. 345; (1918) 3 W.W.R. 1038; (1919) 27 B.C.R. 322; 47 D.L.R. 704; (1919) 3 W.W.R. 539 .....425, 426, 883
de Schelking v. Zurbrick, (1918) 26 B.C.R. 386; (1918) 3 W.W.R. 472 315
"Despatch," The, R. v. (1915) 21 B.C.R. 503; (1915) 22 B.C.R. 365; 32 W.L.R. 13; 33 W.L.R. 130; 16 Ex. C.R. 310; 9 W.W.R. 738; 23 D.L.R. 351; 25 D.L.R. 221; (1916) 22 B.C.R. 496; 28 D.L.R. 42; 34 W.L.R. 123; 10 W.W.R. 230; 16 Ex. C.R. 319 .....8, 16, 17, 19, 159, 474, 476
Devine, Gosse-Millerd v. (1928) S.C.R. 101; (1928) 2 D.L.R. 869..660, 665, 737, 835, 852
Devine v. Somerville, (1931) 44 B.C.R. 502; (1931) 3 W.W.R. 264 .....202, 246, 722, 726, 728, 729, 732, 1074
Devitt, Grady v. (1928) 40 B.C.R. 88; (1928) 1 W.W.R. 924 .....353, 685
Dewar, Winter v. (1928) 40 B.C.R. 312; (1929) 41 B.C.R. 336; (1929) 4 D.L.R. 389; (1929) 2 W.W.R. 518 .....298, 454

Dewdney Dyking District, Commissioners of, Morrison v. (1922) 31 B.C.R. 23; 65 D.L.R. 409; (1922) 3 W.W.R. 250 ....408, 443
Dewdney Election, In re: Smith v. Catherwood, (1925) 36 B.C.R. 98; (1925) 3 D.L.R. 770; (1925) 1 W.W.R. 54 446
Dewees v. Morrow, (1931) 3 W.W.R. 32 410
Dhana Singh, R. v. (1915) 7 W.W.R. 1101; 25 C.C.C. 250 152
Diamond, Robinson, R. ex rel. v. (1916) 23 B.C.R. 325; 31 D.L.R. 556; 27 C.C.C. 28.. 1037
Diamond Vale Supply Co., Mather & Noble v. (1918) 25 B.C.R. 446; (1918) 3 W.W.R. 581 314
Dice, Blair v. (1924) 34 B.C.R. 323; (1924) 4 D.L.R. 568; (1924) 3 W.W.R. 379 ....487, 528
Dickie and Sherman, Scottish Canadian Canning Co. v. (1915) 21 B.C.R. 338; 22 D.L.R. 890; 31 W.L.R. 273 172
Dickie, DeBeck & McTaggart and Sherman, In re (1916) 23 B.C.R. 538....309, 1007
Dickinson, Boyd v. (1930) 2 D.L.R. 96 667
Dierssen, Inlay Hardwood Floor Co. v. (1928) 39 B.C.R. 514; (1928) 2 D.L.R. 560; (1928) 1 W.W.R. 897 300
Dill v. Grand Trunk Pacific Coast Steamship Co., (1915) 21 B.C.R. 182; 21 D.L.R. 392 135
Dimor, Marcus & Dimor, Palmer & Co. v. (1931) 43 B.C.R. 517; (1931) 2 D.L.R. 1004; (1931) 1 W.W.R. 169 846
Dines, Paul v. (1929) 41 B.C.R. 49; (1929) 3 D.L.R. 617; (1929) 3 W.W.R. 287 ... 812
Dinning v. Ingham, (1931) 43 B.C.R. 477; (1931) 2 D.L.R. 946 ....82, 102
Dinning v. Workmen's Com. Board, (1931) 44 B.C.R. 412; (1932) 1 W.W.R. 136; (1932) 1 D.L.R. 373; 13 C.B.R. 256 ....102, 103
Dinsmore v. Philip, (1917-18) 26 B.C.R. 123; (1918) 1 W.W.R. 405; 3 W.W.R. 457 ....420, 458, 473, 474, 897
Distress Act, In re (1919) 27 B.C.R. 446; (1919) 3 W.W.R. 318 323
District Registrar of Titles, McMullen v. (1922) 30 B.C.R. 415; 68 D.L.R. 218; (1922) 1 W.W.R. 392 954
District Registrar of Titles, Scottish Temperance Life Assce. Co. v. (1917) 24 B.C.R. 232; 36 D.L.R. 152; (1917) 3 W.W.R. 30 ....754, 950
Divers v. Burnett, (1930) 42 B.C.R. 203 (1930) 1 D.L.R. 930; (1930) 1 W.W.R. 150. 698
Dixon, Bigattini v. (1919) 1 W.W.R. 464 634
Dixon v. Canadian Collieries, (1917) 24 B.C.R. 34; 55 S.C.R. 620; 39 D.L.R. 758; (1917) 2 W.W.R. 763 702
Doane v. Thomas, (1922) 31 B.C.R. 457; 69 D.L.R. 476; (1922) 3 W.W.R. 1117 64
Dobie v. Can. Pac. Ry. Co., (1931) S.C.R. 277; (1930) 3 D.L.R. 856; 37 C.R.C. 385 ....659, 821
Dobie, R. v. (1921) 29 B.C.R. 188; 57 D.L.R. 290; (1921) 1 W.W.R. 723; 35 C.C.C. 10 ....335, 360, 636, 683
Dobbin, R. v. (1929) 3 W.W.R. 176; 52 C.C.C. 342 ....24, 335
Dockendorff v. Johnston and Stolliday, (1924) 34 B.C.R. 97; (1924) 3 W.W.R. 207. 45
Doering, Royal Bank of Canada v. (1923) 33 B.C.R. 257; (1924) 1 D.L.R. 488; (1924) 1 W.W.R. 251 747
Doig v. Mathews, (1915) 22 B.C.R. 352; 25 D.L.R. 732; 33 W.L.R. 275; 9 W.W.R. 487. 174
Doig v. Port Edward Townsite Co., (1916) 22 B.C.R. 418 174
Dollar Co., Robert, v. Walker, (1926) 36 B.C.R. 405 530
Dollar Steamship Lines, Davis Co. v. (1922) 1 W.W.R. 522 142
Dominion Bank, Okanagan United Growers and, In re (1924) 34 B.C.R. 497; (1925) 2 D.L.R. 919 ....32, 41
Dominion Bank, Orchardson v. (1923) 32 B.C.R. 348; (1923) 2 W.W.R. 958..113, 736, 898
Dominion Bank v. Palitti, (1931) 45 B.C.R. 89; (1931) 3 W.W.R. 377 849
Dominion Bed Manufacturing Co., Fitzherbert v. (1915) 21 B.C.R. 226; 23 D.L.R. 125; 8 W.W.R. 743; (1917) 24 B.C.R. 38; 36 D.L.R. 600; (1917) 2 W.W.R. 727 ....167, 199, 294
Dominion Creosoting Co., Nickson Co. v. (1916) 23 B.C.R. 72; (1917) 55 S.C.R. 303; 35 D.L.R. 272; 38 D.L.R. 69; (1917) 2 W.W.R. 330 184

Dominion Express Co., Victoria Dominion Theatre Co. v. (1916) 23 B.C.R. 396; 35 D.L.R. 728 ....140, 407
Dominion Lumber Sales, Ltd., Pioneer Lumber Co. v. (1923) 2 D.L.R. 1194 966
Dominion Shingle & Cedar Co., Wallace Foundry Co. v. (1920) 28 B.C.R. 147 ...816, 1067
Dominion Shipbuilding, Etc., Co., B.C. Granitoid Co. v. (1918) 2 W.W.R. 919 ...711, 712
Dominion Trust Co., In re (1918) 25 B.C.R. 214; (1918) 1 W.W.R. 648....195, 456
Dominion Trust Co., In re (1918) 25 B.C.R. 537 ....192, 461
Dominion Trust Co., In re (1920) 28 B.C.R. 53; (1918) 1 W.W.R. 648 166
Dominion Trust Co., In re: Ex parte Ross, (1921) 29 B.C.R. 319; (1921) 1 W.W.R. 1089 192
Dominion Trust Co. and Allan, In re (1917) 24 B.C.R. 450; 37 D.L.R. 251; (1917) 3 W.W.R. 483 ....190, 194, 461
Dominion Trust Co. and Alvo von Alvensleben, In re (1919) 3 W.W.R. 209 185
Dominion Trust Co. and Critchley et al., In re (1916) 23 B.C.R. 42; 27 D.L.R. 580; 34 W.L.R. 461 199
Dominion Trust Co. and Gwynn v. Royal Bank of Canada, (1920) 28 B.C.R. 260; (1920) 2 W.W.R. 576 ....51, 493
Dominion Trust Co. and Harper, In re (1915) 22 B.C.R. 337; 24 D.L.R. 670; 32 W.L.R. 832; 9 W.W.R. 503 ....197, 201, 485, 1076
Dominion Trust Co. and Machray, In re (1916) 23 B.C.R. 401; 26 D.L.R. 408; 32 D.L.R. 63; (1917) 1 W.W.R. 618 173
Dominion Trust Co. and U.S. Fidelity Claim, In re (1918) 26 B.C.R. 339; (1918) 3 W.W.R. 1023 ....106, 201, 232, 1072
Dominion Trust Co., Arnold v. (1917) 24 B.C.R. 321; 56 S.C.R. 433; (1918) 2 W.W.R. 25; 41 D.L.R. 107 612
Dominion Trust Co., Boyce and Macpherson, In re (1918) 26 B.C.R. 302, 330; 43 D.L.R. 538; (1919) 2 W.W.R. 452; (1919) 59 S.C.R. 691 ....58, 188, 283
Dominion Trust Co., Brydges v. (1919) 27 B.C.R. 214; (1919) 2 W.W.R. 510; (1919) 3 W.W.R. 345; (1920) 2 W.W.R. 952 ....168, 169, 276, 417, 626, 735
Dominion Trust Co. v. Brydges, (1920) 28 B.C.R. 451; (1920) 2 W.W.R. 952; (1921) 30 B.C.R. 264; (1921) 3 W.W.R. 391; 62 D.L.R. 352 .....60, 190, 293, 418, 861
Dominion Trust Co., Dalton v. (1918) 25 B.C.R. 240; (1918) 3 W.W.R. 42 ..185, 749, 1080
Dominion Trust Co. v. Inglis, (1921) 29 B.C.R. 213; (1921) 1 W.W.R. 677 .....489, 541
Dominion Trust Co. v. Mutual Life Assce. Co., (1918) 26 B.C.R. 237; 43 D.L.R. 184; (1918) 3 W.W.R. 415 746
Dominion Trust Co. v. New York Life Ins. Co., (1918) 25 B.C.R. 271; (1918) 1 W.W.R. 614, 648; (1918) 3 W.W.R. 850; (1918) 88 L.J.P.C. 30; 119 L.T. 748; 44 D.L.R. 12; (1919) A.C. 254....69, 200, 878
Dominion Trust Co. v. Royal Bank of Canada, (1919) 27 B.C.R. 166 .....193, 882
Dominion Trust Co. v. Royal Bank of Canada, (1920) 29 B.C.R. 169; 59 D.L.R. 224; (1921) 1 W.W.R. 90; 1 C.B.R. 397 ....183, 192, 467, 475, 531
Dominion Trust Co. v. Sovereign Life Assce. Co., (1918) 88 L.J.P.C. 30; 119 L.T. 748; 44 D.L.R. 12; (1919) A.C. 254.... 878
Dominion Trust Co., Williams v. (1916) 23 B.C.R. 461; 31 D.L.R. 786; (1917) 1 W.W.R. 664 ....191, 510
Dominion Trust Co., Winding-up Act and, In re (1919) 3 W.W.R. 209.... 294
Dominion Winding-up Act and Bank of Vancouver, In re (1920) 28 B.C.R. 85; (1920) 1 W.W.R. 816 189
Donald v. Jukes, (1920) 28 B.C.R. 215; 54 D.L.R. 688; (1920) 2 W.W.R. 209; 60 S.C.R. 652; 56 D.L.R. 692; (1921) 2 W.W.R. 208; 86, 415, 417, 508, 547
Donald, R. v. (1931) 44 B.C.R. 514 .... 342.
Donkin v. S.S. "Chicago Maru," (1916) 22 B.C.R. 529; 28 D.L.R. 804; 16 Ex. C.R. 501; 34 W.L.R. 472; 23 B.C.R. 551; 33 D.L.R. 38; 16 Ex. C.R. 503 ....19, 137, 140, 492
Donovan Steamship Co. v. The "Hellen," (1924) 34 B.C.R. 461; (1925) Ex. C.R. 114; (1926) Ex. C.R. 59; (1926) S.C.R. 627; (1927) 3 W.W.R. 67; (1927) 3 D.L.R. 1089 (P.C.) 163
D'Orio v. Leigh & Cuthbertson, (1929) 41 B.C.R. 153; (1929) 2 W.W.R. 171..265, 341, 959

Dornberg v. Somerville, (1928) 40 B.C.R. 415; (1929) 1 D.L.R. 811 .....415, 1014
Dorrell v. Campbell, (1916) 22 B.C.R. 584; 23 B.C.R. 500; 27 D.L.R. 425; 32 D.L.R. 44; 34 W.L.R. 367; 10 W.W.R. 492; (1917) 1 W.W.R. 500..87, 465, 475, 713, 714, 941
Dougan Estate, In re (1921) 30 B.C.R. 334; (1922) 1 W.W.R. 1105..... 1122
Douglas, Drinnen v. (1931) 43 B.C.R. 362; (1931) 2 D.L.R. 606; (1931) 1 W.W.R. 160 .....429, 795
Douglas v. Mill Creek Lbr. Co., (1923) 32 B.C.R. 13; (1923) 1 D.L.R. 805; (1923) 1 W.W.R. 529 .....34, 495, 1141, 1142-3
Douglas Lake Cattle Co. v. Reinseth, (1922) 30 B.C.R. 552; 65 D.L.R. 646; (1922) 1 W.W.R. 1258 .....319, 655
Dowding v. Brown, (1919) 27 B.C.R. 513; (1920) 1 W.W.R. 698 1085
Downes v. Elphinstone Co-operative Assn., (1924) 35 B.C.R. 30 35
Dragani, R. v. (1927) 38 B.C.R. 420; (1927) 1 W.W.R. 914; 47 C.C.C. 301 ....152, 360
Dragoni, Whimster and Owen v. (1920) 28 B.C.R. 132; 51 D.L.R. 503, 506; (1920) 2 W.W.R. 185; 33 C.C.C. 39 .....640, 642, 643, 710, 1026
Drake v. Carter, (1920) 28 B.C.R. 119; 51 D.L.R. 372; (1920) 1 W.W.R. 1063..... 863
Drew, Vance v. (1925) 36 B.C.R. 241; (1925) 3 W.W.R. 740 .....565, 826
Drinkle v. Regal Shoe Co. et al., (1916) 23 B.C.R. 24; 28 D.L.R. 775; 10 W.W.R. 448; 34 W.L.R. 690 549
Drinnen v. Douglas, (1931) 43 B.C.R. 362; (1931) 2 D.L.R. 606; (1931) 1 W.W.R. 160 .....429, 795
Drysdale, McKay v. (1921) 30 B.C.R. 81; 60 D.L.R. 458; (1921) 2 W.W.R. 592 ... .466, 708, 813, 856
Drysdale, Stover v. (1925) 37 B.C.R. 28; (1925) 4 D.L.R. 994; (1926) 1 W.W.R. 98 .....158, 325
DuBois, R. v. (1921) 30 B.C.R. 394..... 372, 383
Duff, Mikkelson v. (1931) 44 B.C.R. 39; (1931) 2 D.L.R. 878 310
Duggan, Davies, v. (1927) 38 B.C.R. 249 .....36, 512
Duke, Andler v. (1931) 43 B.C.R. 549; 44 B.C.R. 201; 45 B.C.R. 96; (1931) 3 D.L.R. 561; (1932) 2 D.L.R. 19; (1932) 1 W.W.R. 527; (1932) S.C.R. 730; (1932) 4 D.L.R. 529 .....63, 210 596
Duncan, Carlson v. (1931) 44 B.C.R. 14; (1931) 3 D.L.R. 570; (1931) 2 W.W.R. 343 .....945, 948, 1081
Duncan v. City of Vancouver, (1917) 24 B.C.R. 267; 36 D.L.R. 218; (1917) 3 W.W.R. 18 881
Duncan v. Gairns, (1916) 10 W.W.R. 789; 27 C.C.C. 440 780
Duncan v. Ladysmith School Trustees, (1930) 43 B.C.R. 154; (1931) 1 D.L.R. 176; (1930) 3 W.W.R. 175 .....2, 681, 986
Duncan & Gray v. Silver Spring Brewery, (1925) 36 B.C.R. 249; (1925) 4 D.L.R. 724; (1925) 3 W.W.R. 675 201
Duncan, Loewen v. (1921) 30 B.C.R. 295; (1922) 2 W.W.R. 1131; 62 D.L.R. 152 ... 1098
Duncan Lumber Co., Mair v. (1927) 39 B.C.R. 260; (1928) 1 W.W.R. 108, 431 35
Duncan Lumber Co., Mair v. (No. 2), (1928) 39 B.C.R. 399; (1928) 1 W.W.R. 431.. 307
Dunlop, Esquimalt & Nanaimo Ry. Co. v. (1918) 25 B.C.R. 502; (1918) 3 W.W.R. 828; (1921) 91 L.J.P.C. 21; 126 L.T. 451; 61 D.L.R. 1; 28 C.R.C. 296; (1921) 3 W.W.R. 817; (1922) 1 A.C. 202 .....63, 220, 233, 234, 892, 936, 943
Dunphy v. B.C. Electric Ry. Co., (1919) 27 B.C.R. 327; 48 D.L.R. 38; (1919) 3 W.W.R. 201; 59 S.C.R. 263; 50 D.L.R. 264; (1919) 3 W.W.R. 1076..... 819
Dunphy & Rolph v. Cariboo Trading Co., (1914) 21 B.C.R. 484; 22 D.L.R. 658; 29 W.L.R. 735; 7 W.W.R. 326; 8 W.W.R. 716; 9 W.W.R. 1180 .....466, 911
Duthie v. B.C. Electric Ry. Co., (1924) 33 B.C.R. 481; (1924) 2 D.L.R. 462; (1924) 2 W.W.R. 81 801
Duthie v. Gallagher, (1930) 2 D.L.R. 582 .....508, 1080

E

Eadie, Barker v. (1917) 2 W.W.R. 1013 1108
Earle v. Continental Guarantee Corpn. of Canada, (1927) 4 D.L.R. 939; (1927) 3 W.W.R. 784 .....87, 284, 1002

East Asiatic Co. v. The "Chilcot," (1925) Ex. C.R. 172; (1925) 2 W.W.R. 543 ... .164, 410, 996
Eastern Freighters, Ltd., Imperial Veterans in Canada v. (1927) 39 B.C.R. 17 ... 271
Eastern Townships Invst. Co. v. McLennan, (1920) 29 B.C.R. 1 119
East Kootenay Power Co., Sale v. (No. 1), (1931) 43 B.C.R. 336; (1931) 3 W.W.R. 112 .....37, 326
East Kootenay Power Co., Sale v. (No. 2), (1931) 44 B.C.R. 141; (1931) 4 D.L.R. 221; (1931) 3 W.W.R. 117; (1931) S.C.R. 712; (1931) 4 D.L.R. 593.....798, 815
Eastley v. Charleston, (1923) 33 B.C.R. 148 699
Eaton, Marriage Act and, In re (1921) 30 B.C.R. 243; (1922) 1 W.W.R. 236..... 581
Eccles v. Russell, (1929) 41 B.C.R. 161; (1929) 3 D.L.R. 321; (1929) 2 W.W.R. 143. 1002
Eckley, Jones v. (1928) 40 B.C.R. 75; (1928) 2 D.L.R. 943 685
Eddy v. Can. Pac. Ry. Co., (1915) 22 B.C.R. 294 .....45, 48, 51
Eddy, Cudworth v. (1926) 37 B.C.R. 407; (1927) 1 W.W.R. 583 .....57, 831, 910
Eden, Turnbull v. (1929) 41 B.C.R. 381; (1929) 4 D.L.R. 261 728
Edgett v. Pac. Great Eastern Ry. Co., (1923) 32 B.C.R. 37; (1923) 1 W.W.R. 684. 142
Edmunds, Associated Growers of B.C. v. (1926) 36 B.C.R. 413; (1926) 1 D.L.R. 1093; (1926) 1 W.W.R. 535 .....277, 529, 690
Edward Jim, R. v. (1915) 22 B.C.R. 106; 26 C.C.C. 236 350
Edwards v. Clapham, (1923) 33 B.C.R. 277; (1924) 2 W.W.R. 207 439
Edwards v. Fairview Lodge, (1920) 28 B.C.R. 557; (1920) 3 W.W.R. 867 ..480, 663, 671
Edwards v. Gattmann, (1928) 40 B.C.R. 122; (1928) 3 D.L.R. 187; (1928) 2 W.W.R. 713 425
Eliot, Lee Dye v. (1920) 29 B.C.R. 103; 55 D.L.R. 622; (1921) 1 W.W.R. 785 1103
Eliot, Merchants Bank of Canada v. (1918) 1 W.W.R. 698 .....208, 1107
Elliott, Copethorne v. (1916) 28 D.L.R. 773; (1916) 10 W.W.R. 1023; 34 W.L.R. 943. 1105
Elliott v. Glenmore Irrigation Dist., (1923) 33 B.C.R. 205; (1923) 4 D.L.R. 1044; (1923) 3 W.W.R. 1384 .....1019, 1050
Elliott v. Holmwood & Holmwood, (1915) 22 B.C.R. 335; 25 D.L.R. 765; 33 W.L.R. 134; 9 W.W.R. 490 881
Elliott, Johnson v. (1928) 40 B.C.R. 130; (1928) 1 D.L.R. 1000; (1928) 1 W.W.R. 390; (1928) S.C.R. 408; (1929) 1 D.L.R. 208 .....412, 571, 808
Elliott, Scott & Peden v. (1926) 37 B.C.R. 143; (1926) 2 D.L.R. 504; (1926) 2 W.W.R. 154 .....278, 417, 545
Ellis, Swan v. (1923) 32 B.C.R. 104 490
Ellison, Kennedy v. (1923) 1 D.L.R. 1069 .....126, 471, 472, 869, 1113
Elmore, Coupland v. (1928) 2 D.L.R. 308; (1928) 1 W.W.R. 380 960
Elphinstone Co-operative Assn., Downes v. (1924) 35 B.C.R. 30 35
Elworthy, Testator's Family Maintenance Act and, In re (1928) 39 B.C.R. 474; (1928) 1 W.W.R. 737; (1928) 2 D.L.R. 421 1135
Emerson, National Fire Ins. Co. v. (1915) 22 B.C.R. 349 608
Empire Home Benefit Association, Pederson v. (1931) 2 W.W.R. 858 612
Empire Stevedoring Co. v. The "Empress of Japan," (1927) 38 B.C.R. 438; (1927) 2 D.L.R. 985 .....15, 17
"Empress of Japan," Empire Stevedoring Co. v. (1927) 38 B.C.R. 438; (1927) 2 D.L.R. 985 .....15, 17
Enderby v. Consolidated Mng. & Smelting Co., (1918) 26 B.C.R. 380; (1918) 3 W.W.R. 579 310
Endrizzi v. Peto and Beckley, (1917) 1 W.W.R. 1439 .....500, 572
Enfante v. Enfante, (1931) 44 B.C.R. 472; (1932) 1 D.L.R. 788; (1932) 1 W.W.R. 93 .....536, 992, 1006, 1008
Engineer Mng. Co. v. Fraser, (1922) 31 B.C.R. 224; (1923) A.C. 228; 92 L.J.P.C. 65; 128 L.T. 554; (1923) 1 D.L.R. 536; (1923) 1 W.W.R. 449 723
Engleblom v. Blakeman, (1930) 42 B.C.R. 259; (1930) 2 D.L.R. 824; (1930) 1 W.W.R. 565; (1929) 41 B.C.R. 456; (1929) 4 D.L.R. 377 .....263, 457, 1102
Ennis Gold Mng. Co. v. Henderson, (1927) 39 B.C.R. 76 .....730, 1116
Eno, St. Eloi v. (1925) 36 B.C.R. 153 279
Erickson, Bernstein v. (1921) 29 B.C.R. 151; 56 D.L.R. 616; (1921) 1 W.W.R. 834. 605

Erickson v. Campbell's, Ltd., and Central Motor Transfer Co., (1928) 39 B.C.R. 472. 809
Erickson v. Preferred Accident Ins. Co., (1928) 40 B.C.R. 241; (1928) 4 D.L.R. 567 .....615, 653, 854
Erickson, Schmit v. (1922) 1 W.W.R. 232 498
Eriksen v. The "Maple Leaf," (1922) 31 B.C.R. 443; (1923) 1 W.W.R. 76; (1923) 4 D.L.R. 1201; (1923) Ex. C.R. 39 .....10, 14
Ernst, R. v. (1927) 1 W.W.R. 961; 48 C.C.C. 190.....399, 630
Errico v. B.C. Electric Ry. Co., (1916) 23 B.C.R. 468; (1917) 2 W.W.R. 238 ....57, 285, 830, 832
Esquimalt & Nanaimo Ry. Co., Allen v. (1921) 1 W.W.R. 750 804
Esquimalt & Nanaimo Ry. Co., City of Courtenay v. (1914) 28 D.L.R. 381; 18 C.R.C. 384 938
Esquimalt & Nanaimo Ry. Co. v. City of Courtenay, (1915) 22 B.C.R. 362; 25 D.L.R. 821; 32 W.L.R. 914; 9 W.W.R. 618 .....218, 936
Esquimalt & Nanaimo Ry. Co. v. Dunlop, (1918) 25 B.C.R. 502; (1918) 3 W.W.R. 828; (1921) 91 L.J.P.C. 21; 126 L.T. 451; 61 D.L.R. 1; 28 C.R.C. 296; (1921) 3 W.W.R. 817; (1922) 1 A.C. 202 .....63, 220, 233, 234, 892, 936, 943
Esquimalt & Nanaimo Ry. Co., Granby Consolidated Mng., Etc. Co. v. (1920) A.C. 172; (1919) 88 L.J.P.C. 199; 122 L.T. 199; 48 D.L.R. 279; (1919) 3 W.W.R. 331; (1918) 25 B.C.R. 531; 41 D.L.R. 335; (1918) 2 W.W.R. 626 952
Esquimalt & Nanaimo Ry. Co. v. Granby Cons. Mng., Etc., Co., (1926) 37 B.C.R. 398; (1926) 3 W.W.R. 240 881
Esquimalt & Nanaimo Ry. Co. v. McLellan, (1918) 26 B.C.R. 104; 44 D.L.R. 697; (1918) 3 W.W.R. 645, 828 .....928, 929, 937
Esquimalt & Nanaimo Ry. Co., McPhee v. (1915) 22 B.C.R. 67; 23 D.L.R. 561; 32 W.L.R. 125; 8 W.W.R. 1319 .....465, 474, 702, 800
Esquimalt & Nanaimo Ry. Co. v. Treat, (1918) 26 B.C.R. 275; 43 D.L.R. 653; (1918) 3 W.W.R. 685; (1919) 121 L.T. 657; 35 T.L.R. 737; 48 D.L.R. 139; (1919) 3 W.W.R. 356 .....219, 931, 938
Esquimalt & Nanaimo Ry. Co. v. Wilson, (1919) 89 L.J.P.C. 27; 122 L.T. 563; 36 T.L.R. 49; (1920) A.C. 358 .....4, 237
Esquimalt & Nanaimo Ry. Co. v. Wilson, (1921) 91 L.J.P.C. 21; 126 L.T. 451; 61 D.L.R. 1; 28 C.R.C. 296; (1921) 3 W.W.R. 817; (1922) 1 A.C. 202 ....220, 233, 234, 924, 936, 943
Esquimalt & Nanaimo Ry. Co. v. Wilson and McKenzie, (1920) 28 B.C.R. 271; 52 D.L.R. 669 880
Esquimalt, District of, Municipal Elections Act and, In re (1922) 31 B.C.R. 474; (1923) 1 W.W.R. 1185 445
Esquimalt Water Works Co. v. Leeming (No. 1), (1930) 42 B.C.R. 163; (1930) 2 D.L.R. 37; (1930) 1 W.W.R. 401 1042
Esquimalt Water Works Co. v. Leeming (No. 2), (1930) 43 B.C.R. 251; (1931) 1 D.L.R. 615; (1931) 1 W.W.R. 148 1042
"Eurana," The, v. Burrard Inlet Tunnel & Bridge Co., (1929) 41 B.C.R. 225; (1929) 3 D.L.R. 161; (1929) 2 W.W.R. 275; (1931) A.C. 300; 100 L.J.P.C. 68; 144 L.T. 556; (1931) 1 D.L.R. 785; (1931) 1 W.W.R. 325; 38 C.R.C. 263 ....160, 161, 840, 998, 999, 1024
Evans, Burrows v. (1916) 23 B.C.R. 128 .....27, 1026
Evans, Coleman & Evans, Crispin & Co. v. (1923) 32 B.C.R. 132; (1923) 3 D.L.R. 1190; (1923) 2 W.W.R. 616, 1050; (1922) 31 B.C.R. 328; 68 D.L.R. 623; (1922) 3 W.W.R. 264 .....258, 970
Evans, Coleman & Evans v. The "Roman Prince," (1924) 34 B.C.R. 155, 157; (1924) 3 D.L.R. 95, 327; (1924) 2 W.W.R. 465, 897; (1924) Ex. C.R. 93, 129, 133..285, 291
Evans v. Dist. of South Vancouver and Tp. of Richmond, (1918) 26 B.C.R. 60; 48 D.L.R. 209; (1919) 3 W.W.R. 339 (P.C.) 570, 771
Evans, Gold v. (1920) 29 B.C.R. 81 45
Evans, Houghton v. (1925) 35 B.C.R. 454; (1925) 3 D.L.R. 109; (1925) 2 W.W.R. 248 .....267, 848

Evans v. Hudson's Bay Co., (1930) 43 B.C.R. 81; (1930) 3 D.L.R. 951; (1930) 2 W.W.R. 718 ....659, 702, 794
Evans v. Martyn, (1926) 37 B.C.R. 231; (1926) 2 D.L.R. 698 426
Evans, R. v. (1916) 23 B.C.R. 128 ....377, 383, 719
Evans, R. v.: In re George Fisher, (1915) 21 B.C.R. 322; (1915) 8 W.W.R. 444; 24 C.C.C. 125 240
Evans, Smiley v. (1927) 38 B.C.R. 468; (1927) 4 D.L.R. 629 446
Everett, Tom v.: In re Hans C. Christensen, (1928) 40 B.C.R. 124, 383; (1928) 4 D.L.R. 668; (1928) 3 W.W.R. 314, 432 ....422, 459, 745, 944
Ewing v. Hunter, (1929) 42 B.C.R. 161 ....62, 313

F

Fagan & Mutual Life Ins. Co., McArthur & Co. v. (1928) 39 B.C.R. 554; (1928) 2 D.L.R. 875; (1928) 2 W.W.R. 6 716
Fairview Lodge, Edwards v. (1920) 28 B.C.R. 557; (1920) 3 W.W.R. 867 ..480, 663, 671
Falk, Royal Bank of Canada v. (1917) 25 B.C.R. 142; (1917) 3 W.W.R. 654 ....110, 278, 416
Farmer, Deceased, In re (1926) 36 B.C.R. 334; (1926) 1 D.L.R. 894; (1926) 1 W.W.R. 366 1030
Farquharson v. Can. Pac. Ry. Co., (1922) 31 B.C.R. 338; 69 D.L.R. 445; (1922) 3 W.W.R. 537 853
Farquharson v. Cortesi, (1918) 3 W.W.R. 193 ....303, 330
Farrell, Vancouver Milling Co. v. (1922) 67 D.L.R. 237 53
Faulds, R. v. (1922) 31 B.C.R. 421; 40 C.C.C. 300 348
Fechner, Mehrer v. (1920) 27 B.C.R. 545 754
Federal Mortgage Corpn. and Kipp, In re (1917) 24 B.C.R. 12 196
Federal Mortgage Corpn. and Stewart, Re (1917) 2 W.W.R. 52, 282....191, 197
Federal Motor Co. v. Topham, (1928) 40 B.C.R. 375; (1929) 1 D.L.R. 995; (1929) 1 W.W.R. 116 123
Ferguson, Hugh, Deceased, In re Estate of (1929) 41 B.C.R. 269; (1929) 2 W.W.R. 372; (1929) 4 D.L.R. 208 1134
Ferguson, R. v. (1917) 33 D.L.R. 42; 26 C.C.C. 220 ....155, 292
Ferguson, R. v. (1922) 31 B.C.R. 100; 69 D.L.R. 153; (1922) 2 W.W.R. 473; 37 C.C.C. 89 222
Ferguson v. Taylor, (1926) 37 B.C.R. 340; (1926) 3 W.W.R. 203; 46 C.C.C. 149 .. ....31, 156, 330
Ferne, Hamilton v. (1921) 1 W.W.R. 249; 61 D.L.R. 213 671
Ferrara v. National Surety Co., (1916) 39 D.L.R. 175; (1917) 1 W.W.R. 719 551
Ferraro, R. v. (1924) 33 B.C.R. 491 366
Ferris v. Hardy, (1923) 32 B.C.R. 78; (1923) 1 W.W.R. 1483 ....751, 1068
Ferris, James v. (1931) 44 B.C.R. 522; (1932) 1 D.L.R. 472; (1932) 1 W.W.R. 250. 259
Fewster, Marchiori v. (1921) 30 B.C.R. 251; (1921) 3 W.W.R. 388; (1922) 63 S.C.R. 342; 69 D.L.R. 351 322
Field v. International Timber Co., (1928) S.C.R. 564; (1928) 4 D.L.R. 972 700
Field, Turner Meakin & Co. v. (1923) 33 B.C.R. 56 906
Finch, Johnston v. (1916) 23 B.C.R. 472 422
Finkleman, Johnson, R. N. & Co. v. (1926) 37 B.C.R. 95; (1926) 2 D.L.R. 425 ... .419, 455, 846
Finlayson v. Martin, (1921) 29 B.C.R. 305; 57 D.L.R. 423 758
Finucane, Standard Bank v. (1921) 59 D.L.R. 465; 62 S.C.R. 110; (1921) 3 W.W.R. 314; 29 B.C.R. 251; 57 D.L.R. 132 256
First Mortgage Invst. Co. v. Noud, (1925) 36 B.C.R. 104, 166; (1925) 4 D.L.R. 221 ....81, 266, 317
Fisher, Bird v. (1921) 2 W.W.R. 812 ....764, 789
Fisher, George, In re: R. v. Evans, (1915) 21 B.C.R. 322; (1915) 8 W.W.R. 444; 24 C.C.C. 125 240
Fisher, Wallingford v. (1927) 3 W.W.R. 740 37

Fitzherbert v. Dominion Bed Mfg. Co., (1915) 21 B.C.R. 226; 23 D.L.R. 125; 8 W.W.R. 743; (1917) 24 B.C.R. 38; 36 D.L.R. 600; (1917) 2 W.W.R. 727 ... .167, 199, 294
Fitzpatrick, R. v. (1923) 32 B.C.R. 289; (1923) 2 W.W.R. 497; 40 C.C.C. 75 348
Fitzpatrick, R. v. (1929) 40 B.C.R. 478; (1929) 1 D.L.R. 806; (1929) 1 W.W.R. 393; 51 C.C.C. 146 .....487, 491
Flanders v. B.C. Telephone Co., (1926) 36 B.C.R. 352; (1926) 1 W.W.R. 358 277
Flathead Hotel Co. v. Hewat, (1919) 1 W.W.R. 466 646
Fleming, R. v. (1921) 3 W.W.R. 629; 65 D.L.R. 229; 36 C.C.C. 335 .....638, 639, 1019
Fletcher, A Macdonald & Co. v. (1915) 22 B.C.R. 298 543
Fletcher v. Dist. of Point Grey, (1915) 21 D.L.R. 819..... 1023
Fletcher, McGeer, McGeer & Wilson v. (1929) 41 B.C.R. 437; (1929) 4 D.L.R. 348; (1929) 2 W.W.R. 500 1008
Fletcher, McLelan v. (1929) 41 B.C.R. 437; (1929) 4 D.L.R. 348; (1929) 2 W.W.R. 500 .....465, 1008
Fletcher v. Pendray, (1916) 22 B.C.R. 566; 27 D.L.R. 637; 34 W.L.R. 310; 10 W.W.R. 444 .....501, 572 988
Fletcher v. Wade, (1919) 26 B.C.R. 477; 45 D.L.R. 91; (1919) 2 W.W.R. 1 ....687, 785
Flinton, Rodger v. (1926) 3 W.W.R. 773 .....94, 414, 815
Florence Mining Co., In re (1921) 29 B.C.R. 558; 60 D.L.R. 575 1117
Floyd, Frey v. (1922) 30 B.C.R. 488; 63 D.L.R. 614; (1922) 1 W.W.R. 651 ....423, 1010, 1085
Fogh, British Am. Paint Co. v. (1915) 22 B.C.R. 97; 24 D.L.R. 61; 32 W.L.R. 142; 8 W.W.R. 1331 .....131, 273, 405, 962, 963
Foley Bros., McIlwee v. (1915) 22 B.C.R. 38; 27 D.L.R. 196; 33 W.L.R. 278, 928; 10 W.W.R. 5 .....275, 403
Foley Bros., McIlwee v. (1917) 24 B.C.R. 1 .....539, 891
Foley Bros., McIlwee & Sons v. (1917) 24 B.C.R. 532; (1918) 1 W.W.R. 222 ..39, 49, 132
Foley Bros. v. McIlwee, (1918) 44 D.L.R. 5; (1919) 1 W.W.R. 403 .....57, 487
Foley Bros., Welch & Stewart, Coupland v. (1918) 25 B.C.R. 173 57
Fong, Harry, R. v. (1930) 3 W.W.R. 479 .....331, 368, 921
Fong Soon, R. v. (1919) 26 B.C.R. 460; 45 D.L.R. 78; (1919) 1 W.W.R. 486; 31 C.C.C. 78 .....382, 581
Foran, Taylor v. (1931) 44 B.C.R. 529 131
Ford, Gray v. (1925) 34 B.C.R. 517; (1925) 1 W.W.R. 943 529
Ford, McMordie v. (1930) 42 B.C.R. 486; (1930) 3 D.L.R. 398; (1930) 2 W.W.R. 203 .....519, 927
Ford and Shaw, Booth v. (1927) 38 B.C.R. 279 .....703, 1058
Ford Motor Co. v. Union S.S. Co. of New Zealand, (1925) 36 B.C.R. 127; (1925) 3 D.L.R. 1169; (1925) 2 W.W.R. 708 .....138, 146, 912
Fordham v. Commonwealth Trust Co., (1915) 8 W.W.R. 164 669
Fordyce Motors, Ltd., Griffiths v. (1930) 43 B.C.R. 119; (1930) 4 D.L.R. 451; (1930) 2 W.W.R. 698 .....411, 980, 1054
Foreman v. Mutch, (1923) 33 B.C.R. 100; (1924) 1 W.W.R. 392 1143
Forsyth v. Imperial Guarantee & Acc. Ins. Co., (1925) 36 B.C.R. 253; (1925) 4 D.L.R. 479; (1925) 3 W.W.R. 669 .....615, 972
Forsyth, Woods v. (1918) 25 B.C.R. 427 864
Fort George Lumber Co. v. Grand Trunk Pac. Ry. Co., (1915) 24 D.L.R. 527; 9 W.W.R. 17; 32 W.L.R. 309 .....221, 1112
Fortin, Roy v. (1915) 22 B.C.R. 282; 32 W.L.R. 790; 25 D.L.R. 18; 9 W.W.R. 407 ..... 87-8, 572
Fossum and Toronto General Trusts Corpn., Ross v. (1930) 42 B.C.R. 272; (1930) 2 D.L.R. 42; (1930) 1 W.W.R. 375 .....57, 1131
Foster v. Goodacre, (1917) 2 W.W.R. 636; 34 D.L.R. 42 .....1011, 1089
Foster et al., Porter & Sons v. (1925) 36 B.C.R. 222; (1925) 4 D.L.R. 669; (1926) S.C.R. 328; (1926) 2 D.L.R. 340 .....421, 844, 1083
Foulger v. Lewis, (1917) 24 B.C.R. 556; (1917) 3 W.W.R. 1015 733
Fowkes v. Minister of Finance, (1927) 38 B.C.R. 395; (1927) 2 D.L.R. 717 1033

Fowler v. Spallumcheen, (1930) 43 B.C.R. 47; (1930) 3 W.W.R. 12 .....785, 1016
Fox, Consolidated Mng. & Smeltg. Co., and, In re (1924) 34 B.C.R. 396; (1924) 3 W.W.R. 861; (1925) 1 D.L.R. 245 75
Francis v. Wilkerson, (1917) 25 B.C.R. 132; (1917) 3 W.W.R. 920; (1918) 2 W.W.R. 956 .....88, 438, 576, 648
Franklin et ux., Gibson v. (1915) 21 B.C.R. 181 .....527, 853
Franklin Fire Ins. Co., Cates, Capt. J. A., Tug & Wharfage Co. v. (1926) 37 B.C.R. 539; (1927) A.C. 698; 96 L.J.P.C. 132; 137 L.T. 709; 17 Asp. M.C. 319; (1927) 3 D.L.R. 1025; (1927) 3 W.W.R. 43 624
Franklin Fire Ins. Co., Cates Tug & Wharfage Co. v. (1927) 38 B.C.R. 95; (1927) 2 D.L.R. 71; (1927) 1 W.W.R. 438 311
Frank Waterhouse & Co., Galt v. (1927) 39 B.C.R. 241; (1927) 4 D.L.R. 1005 ... .53, 140, 917
Fraser v. B.C. Electric Ry. Co., (1919) 26 B.C.R. 536; (1919) 2 W.W.R. 513 817
Fraser v. Engineering Mng. Co., (1922) 31 B.C.R. 224; (1923) A.C. 228; 92 L.J.P.C. 65; 128 L.T. 554; (1923) 1 D.L.R. 536; (1923) 1 W.W.R. 449 723
Fraser v. McGregor, Johnston & Thomas, Ltd., (1922) 31 B.C.R. 306 118
Fraser v. Neas, (1924) 35 B.C.R. 70; (1925) 3 D.L.R. 547; (1925) 2 W.W.R. 614 .....37, 39, 41
Fraser v. Pearce, (1928) 39 B.C.R. 338; (1928) 1 W.W.R. 837; (1928) 2 D.L.R. 54 .....668, 1059
Fraser, Roddy v. (1925) 35 B.C.R. 70; (1925) 3 D.L.R. 547; (1925) 2 W.W.R. 614 .....37, 39, 41
Fraser v. Sam Kee, (1916) 9 W.W.R. 1281 .....968, 1014
Fraser and Henderson v. Montreal Trust Co., (1923) 32 B.C.R. 546; (1923) 4 D.L.R. 745; (1923) 3 W.W.R. 808 1130
Fraser & Shaw, Davis v. (1920) 28 B.C.R. 12; 61 D.L.R. 48 670
Fraser Valley Delta Co-operative Assn. v. Kline, (1925) 36 B.C.R. 22; (1925) 3 D.L.R. 1203 831
Fraser Valley Milk Producers Assn. v. Minister of National Revenue, (1929) 3 D.L.R. 19; (1929) S.C.R. 435 1041
Fraser Valley Milk Producers Assn., Price v. (1931) 3 W.W.R. 48 .....302, 413
Fraser, Williams v. (1925) 35 B.C.R. 481 494
Frawley et al., Solloway, Mills & Co. v. (1930) 42 B.C.R. 524; (1930) 4 D.L.R. 235; (1930) 2 W.W.R. 231; 53 C.C.C. 306 353
Frederick, R. v. (1931) 44 B.C.R. 547; (1931) 3 W.W.R. 747; 57 C.C.C. 340 398
Freeman, Atty.-Gen. for B.C. v. (1924) 2 D.L.R. 99 .....522, 681, 710
Freeman, Robinson v. (1921) 61 D.L.R. 248 .....834, 835
"Freiya," The, v. The "R.S." (No. 2), (1921) 30 B.C.R. 132; 63 D.L.R. 687; (1921) 2 W.W.R. 749; 21 Ex. C.R. 147 17
"Freiya," The, v. The "R.S.," (1922) 65 D.L.R. 218; (1922) 1 W.W.R. 409; 21 Ex. C.R. 232 .....253, 262, 481, 983
Frey v. Floyd, (1922) 30 B.C.R. 488; 63 D.L.R. 614; (1922) 1 W.W.R. 651 ....423, 1010, 1085
Frick Company, Sanders v. (1916) 22 B.C.R. 472; 26 D.L.R. 685; 34 W.L.R. 65; 10 W.W.R. 163 706
Frost v. Welch, (1923) 32 B.C.R. 535; (1923) 3 W.W.R. 834 1099
Frumento v. Shortt, Hill & Duncan, (1916) 22 B.C.R. 427 .....34, 37, 627
Fujino, Ex parte: In re Nippon Kinyu Sha, (1923) 32 B.C.R. 56; (1923) 1 D.L.R. 1156; (1923) 1 W.W.R. 880; 3 C.B.R. 673 .....104, 416
Fukukawa v. American Timber Holding Co., (1928) 40 B.C.R. 44; (1928) 3 D.L.R. 44; (1928) 2 W.W.R. 37 252
Fuller, Anderson v. (1915) 21 B.C.R. 509 .....734, 1095
Fullerton Lbr. & Shingle Co., Northern Pac. Ry. Co. v. (1919) 27 B.C.R. 36; 47 D.L.R. 705; (1919) 2 W.W.R. 92 .....138, 139, 321
Fung Fang Yuk, R. v. (1923) 32 B.C.R. 311; (1923) 2 W.W.R. 447; 40 C.C.C. 126. 343
Furness v. Guaranty Savings & Loan Assn., (1928) 40 B.C.R. 61; (1928) 3 D.L.R. 175; (1928) 2 W.W.R. 337 984

Furuzawa, R. v. (1930) 42 B.C.R. 541, 548; (1930) 1 W.W.R. 953, 955; 53 C.C.C. 398 ....352, 476
Fusarelli v. Ioco Townsite Co., (1922) 1 W.W.R. 1238 ....327, 928

G

Gagnon v. Nelson (1915) 21 B.C.R. 356; 22 D.L.R. 179; 8 W.W.R. 907; 31 W.L.R. 346 ....469, 739, 1094
Gairns, Duncan v. (1916) 10 W.W.R. 789; 27 C.C.C. 440 780
Galbraith, Reid, v. (1927) 38 B.C.R. 287; (1927) 2 D.L.R. 857; (1927) 1 W.W.R. 780 ....50, 752, 1070
Galbraith, Vipond v. (1922) 31 B.C.R. 58; 65 D.L.R. 91; (1922) 2 W.W.R. 135 ..742, 1140
Gale v. Powley, (1915) 22 B.C.R. 18; 24 D.L.R. 450; 32 W.L.R. 65; 8 W.W.R. 1312 ....87, 855, 1086, 1102, 1104, 1111
Gale, Thomas v. (1925-26) 36 B.C.R. 512; (1925) 3 D.L.R. 757; (1926) 1 W.W.R. 569; (1927) S.C.R. 314; (1927) 1 D.L.R. 593 ....173, 184, 907
Gale & Williams, Huckell v. (1915) 22 B.C.R. 356; 25 D.L.R. 761; 33 W.L.R. 192; 9 W.W.R. 550 ....651, 875
Gallagher, Duthie v. (1930) 2 D.L.R. 582 ....508, 1080
Gallagher, R. v. (1925) 36 B.C.R. 246; (1925) 3 W.W.R. 757 365
Gallagher et al., Bligh v. (1921) 29 B.C.R. 241; (1921) 1 W.W.R. 662; 57 D.L.R. 76 ....249, 490, 864
Galt v. Frank Waterhouse & Co., (1927) 39 B.C.R. 241; (1927) 4 D.L.R. 1005 ....53, 140, 917
Galt Bros. and Burnaby Arbitration, In re (1928) 39 B.C.R. 470; (1928) 1 W.W.R. 798 ....78, 294
Gammon, Payne v. (1927) 38 B.C.R. 153; (1927) 2 D.L.R. 605; (1927) 1 W.W.R. 506 ....304, 514
Gan, R. v. (1925) 36 B.C.R. 125; (1925) 3 W.W.R. 783; 44 C.C.C. 334 362
Ganzini v. Jewel-Denero Mines, Ltd., (1915) 21 B.C.R. 317; 21 D.L.R. 406 ....702, 863
Gardner v. Holmes, (1917) 24 B.C.R. 416; 38 D.L.R. 156; (1918) 1 W.W.R. 456 ....668, 669
Garrett, Singer v. (1929) 41 B.C.R. 160; (1929) 4 D.L.R. 132; (1929) 2 W.W.R. 201 1104
Garrison v. Thomsen & Clarke Tbr. Co., (1926) 37 B.C.R. 224; (1926) 2 D.L.R. 803; (1926) 2 W.W.R. 81; (1929) 40 B.C.R. 492; (1929) 1 D.L.R. 887; (1929) 1 W.W.R. 449 ....178, 290
Gartshore, In re (1919) 27 B.C.R. 121; (1919) 3 W.W.R. 309; 32 C.C.C. 384 ...631, 920
Gartshore, R. v. (1919) 27 B.C.R. 175, 425; 49 D.L.R. 276; (1919) 3 W.W.R. 757; 32 C.C.C. 49 ....27, 332, 556, 648
Gas Boat, Larsen v. (1923) 31 B.C.R. 558; (1923) Ex. C.R. 104; (1923) 2 D.L.R. 281; (1923) 1 W.W.R. 958 983
Gates' Case, In re Municipal Act, (1918) 2 W.W.R. 930 782
Gattmann, Edwards v. (1928) 40 B.C.R. 122; (1928) 3 D.L.R. 187; (1928) 2 W.W.R. 713 425
Gauley v. Bank of Montreal, (1916) 23 B.C.R. 264; 34 W.L.R. 1192; 10 W.W.R. 1359; 30 D.L.R. 483 ....112, 527, 528, 745
Gauthier, Harrison Bay Co. v. (1925) 35 B.C.R. 498 932
Gauthier v. Letchford and Saltmarch, (1920) 28 B.C.R. 232; (1920) 2 W.W.R. 111. 243
Gauthier, R. v. (1921) 29 B.C.R. 401; (1921) 2 W.W.R. 1 482
Gautschi and Gautschi, Smith & Hunter v. (1916) 23 B.C.R. 455; (1917) 2 W.W.R. 225 539
Gavin v. Kettle Valley Ry. Co. (No. 1), (1918) 26 B.C.R. 30; 58 S.C.R. 501; 43 D.L.R. 47; 47 D.L.R. 65; (1918) 1 W.W.R. 251; (1918) 3 W.W.R. 385; (1919) 2 W.W.R. 611; 23 C.R.C. 379 ....67, 286, 818, 834
Gavin v. Kettle Valley Ry. Co. (No. 2), (1921) 29 B.C.R. 195; 56 D.L.R. 572; (1921) 1 W.W.R. 488 ....288, 660, 837
Geffler, R. v. (1923) 32 B.C.R. 423; (1923) 3 D.L.R. 1205; 41 C.C.C. 112 339

Gehm, Walter Edward, In re (1927) 38 B.C.R. 433; 39 B.C.R. 45; (1927) 4 D.L.R. 382 592
Geiger, Hall v. (1930) 42 B.C.R. 335; (1930) 3 D.L.R. 644; (1930) 2 W.W.R. 790; (1930) 43 B.C.R. 116; (1930) 3 D.L.R. 854; (1930) 2 W.W.R. 794 ..... 425, 427, 484, 686, 868
General Accident Assce. Co., MacLure v. (1925) 35 B.C.R. 33; (1925) 3 D.L.R. 133; (1925) 2 W.W.R. 145 617
General Casualty Ins. Co. v. Lambert and Vance, (1930) 43 B.C.R. 133; (1930) 3 D.L.R. 1007; (1930) 2 W.W.R. 548 ..... 616, 737
General Casualty Ins. Co., McKnight v. (1931) 44 B.C.R. 1; (1931) 3 D.L.R. 476; (1931) 2 W.W.R. 315 ..... 462, 549, 616
General Refrigeration Ltd., Welch et al. v. (1929) 42 B.C.R. 107; (1929) 3 W.W.R. 660; (1930) 2 D.L.R. 672 973
General Service Transport, Ltd., Collins v. (1926) 38 B.C.R. 512; (1927) 2 D.L.R. 353 818
George, Caudwell v. (1925) 35 B.C.R. 134; (1925) 2 D.L.R. 229; (1925) 1 W.W.R. 579 ..... 31, 498
Georgia Construction Co. v. Pac. Great Eastern Ry. Co., (1929) S.C.R. 630; (1929) 4 D.L.R. 161; (1928) 40 B.C.R. 290; (1929) 1 D.L.R. 77; (1928) 3 W.W.R. 466; 35 C.R.C. 204 ..... 130, 133, 262, 480
Georgia Construction Co. v. Pac. Great Eastern Ry. Co., (1929) 41 B.C.R. 469; (1929) 4 D.L.R. 607; (1929) 3 W.W.R. 92 ..... 63, 68, 504
German American Ins. Co., Pac. Coast Realty Co. v. (1917) 35 D.L.R. 522; (1917) 2 W.W.R. 632 610
Gee Dew, R. v. (1924) 33 B.C.R. 524, 548; (1924) 3 D.L.R. 153, 186; (1924) 2 W.W.R. 791, 793; 42 C.C.C. 188 ..... 552, 560, 585
Gee Dew (No. 2), R. v. (1924) 33 B.C.R. 545; (1924) 3 D.L.R. 175; (1924) 2 W.W.R. 791; 42 C.C.C. 210 153
Gerrard v. Adam and Evans, (1923) 32 B.C.R. 114 799
Giannini v. Cooper, (1918) 26 B.C.R. 382; (1918) 3 W.W.R. 642 ..... 49, 330
Gibb & Co. v. Northern Cons. Co., (1918) 26 B.C.R. 429; 43 D.L.R. 276; (1918) 3 W.W.R. 396 ..... 247, 838
Gibbons, Jones v. (1928) 40 B.C.R. 65; (1929) 4 D.L.R. 1067 ..... 320, 593
Gibbs v. Cann, (1931) 44 B.C.R. 393 872
Giberson and Brown v. E. C. Atkins & Co., (1917) 24 B.C.R. 19 493
Gibson v. Cottingham, (1916) 23 B.C.R. 392; 32 D.L.R. 213; (1917) 1 W.W.R. 496 ..... 739, 915, 957
Gibson v. Franklin et ux., (1915) 21 B.C.R. 181; 7 W.W.R. 1411 ..... 527, 853
Gibson v. Wilson & Downer, (1922) 67 D.L.R. 410 ..... 92, 471
Gibson Mining Co., In re Winding-up Act and (1923) 32 B.C.R. 360; (1923) 3 D.L.R. 1052; (1923) 3 W.W.R. 171 ..... 27, 188, 190, 199, 1018
Gibsons, Ltd., Scythes v. (1926) 3 W.W.R. 129; (1927) S.C.R. 352; (1927) 2 D.L.R. 834 666
Giffin, Schmidt v. (1916) 23 B.C.R. 459; 34 W.L.R. 1229; 10 W.W.R. 1356 879
Gilbert v. Southgate Logging Co., (1915) 21 B.C.R. 7; 22 B.C.R. 87; 24 D.L.R. 202; 32 W.L.R. 131; 7 W.W.R. 1133; 8 W.W.R. 1304 ..... 37, 43, 326, 797, 815
Gilchrist Mfg. Co. v. International Junk Co., (1930) 43 B.C.R. 258; (1931) 1 D.L.R. 595; (1931) 1 W.W.R. 101 845
Gill, Singh, et al. v. (1929) 41 B.C.R. 256; (1929) 4 D.L.R. 396; (1929) 2 W.W.R. 431 ..... L 751, 1012
Gillespie and Cotsworth, In re. In re Dist. of South Vancouver, (1920) 28 B.C.R. 494; 54 D.L.R. 144; (1920) 3 W.W.R. 440 ..... 688, 765
Gilmore, R. v. (1930) 43 B.C.R. 57 397
Gilroy v. District of Burnaby, (1931) 44 B.C.R. 171; (1931) 4 D.L.R. 410; (1931) 3 W.W.R. 1 ..... 569, 771
Gin Wing Sig, Chong v. (1917) 2 W.W.R. 183 53
Girone, R. v. (1925) 34 B.C.R. 554 346

Glenmore Irrigation Dist., Elliott v. (1923) 33 B.C.R. 205; (1923) 4 D.L.R. 1044; (1923) 3 W.W.R. 1384 ..... 1019, 1050
Globe Indemnity Co. of Canada, Shaw v. (1921) 29 B.C.R. 157; 57 D.L.R. 102; (1921) 1 W.W.R. 674 615
Goch v. Youschak, (1924) 34 B.C.R. 454; (1924) 4 D.L.R. 508; (1924) 3 W.W.R. 273 520
Goddard v. Bainbridge Lbr. Co., (1920) 29 B.C.R. 186; (1921) 29 B.C.R. 287 ..... 203, 288, 303
Goddard, Hayes v. (1915) 21 B.C.R. 389; 31 W.L.R. 424; 22 D.L.R. 566 ..... 403, 733, 1091
Godson, Burns, P. & Co., v. (1918) 26 B.C.R. 46; 46 D.L.R. 97; (1918) 58 S.C.R. 404; (1918) 1 W.W.R. 848 674
Godson, Greer v. (No. 1), (1918) 25 B.C.R. 229; 40 D.L.R. 218 902
Godson, Greer v. (No. 2), (1920) 28 B.C.R. 175; 52 D.L.R. 374; (1920) 2 W.W.R. 217; 60 S.C.R. 653; 56 D.L.R. 966; (1921) 2 W.W.R. 209 904
Godson and Ray v. Pantages, (1930) 43 B.C.R. 241; (1930) 3 W.W.R. 401; (1931) 1 D.L.R. 429 673
Godson, MacDonald Bros. Engineering Works v. (1916) 23 B.C.R. 166; 31 D.L.R. 363; 33 W.L.R. 392; (1917) 1 W.W.R. 233 175
Gold v. Evans, (1920) 29 B.C.R. 81 45
Gold, Lake of the Woods Milling Co. v. (1925) 34 B.C.R. 481; (1925) 1 D.L.R. 778; (1925) 1 W.W.R. 386 ..... 460, 971
Gold, Murray v. (1924) 34 B.C.R. 489 ..... 284, 647
Gold, North American Life Assce. Co. v. (1917) 24 B.C.R. 50; 34 D.L.R. 735; (1917) 2 W.W.R. 613 1109
Gold, Royal Bank of Canada v. (1917) 24 B.C.R. 145; (1918) 25 B.C.R. 409; 41 D.L.R. 276; (1918) 2 W.W.R. 745 ..... 111, 116, 118, 119, 1108
Gold v. South Vancouver, (1918) 26 B.C.R. 147; (1919) 2 W.W.R. 249 73
Gold, Woodworth v. (1915) 21 B.C.R. 333 832
Gold Seal Liquor Co., Abbott v. (1917) 24 B.C.R. 245 290
Gold Seal Liquor Co., R. ex rel. Miller v. (1922) 31 B.C.R. 177; (1922) 2 W.W.R. 1219; 38 C.C.C. 1 957
Goldie v. Colquhoun, (1930) 42 B.C.R. 356; (1930) 2 D.L.R. 1002; (1930) 1 W.W.R. 624 327
Goldstein, Arnold v. (1920) 2 W.W.R. 424 ..... 284, 1007
Gonzalves, Atty.-Gen. for Canada v. (1924) 34 B.C.R. 360, 389; (1924) 4 D.L.R. 474; (1925) 1 W.W.R. 180; (1926) 1 D.L.R. 51 ..... 238, 471, 678, 869
Goodacre, Foster v. (1917) 2 W.W.R. 636; 34 D.L.R. 42 ..... 1011, 1089
Goodall v. Cousins, (1923) 32 B.C.R. 440; (1923) 3 D.L.R. 718 910
Goodall, Mowat v. (1915) 21 B.C.R. 394; 22 B.C.R. 167; 24 D.L.R. 781, 891; 33 W.L.R. 230; 9 W.W.R. 171 ..... 60, 292, 322, 608
Goodwin v. Royal Trust Co., (1927) 39 B.C.R. 113; (1928) 1 D.L.R. 309 ..... 424, 986, 1074
Goon, Jim, R. v. (1916) 22 B.C.R. 381; 28 D.L.R. 374; 33 W.L.R. 761; 25 C.C.C. 415. 369
Gordon v. Blakely, (1931) 2 W.W.R. 902 1058
Gordon v. Canadian Bank of Commerce, (1931) 44 B.C.R. 213; (1931) 4 D.L.R. 635; (1931) 3 W.W.R. 185, 373 795
Gordon, Green v. (1925) 35 B.C.R. 92 810
Gore-Langton, Dist. of North Cowichan v. (1921) 29 B.C.R. 535; 60 D.L.R. 151; (1921) 2 W.W.R. 484 ..... 77, 205, 206
Gorgnigiani v. Welch, (1918) 26 B.C.R. 195; (1918) 3 W.W.R. 797 ..... 78, 707
Goslett, Wilkie, R. ex rel. v. (1923) 32 B.C.R. 216; (1923) 3 D.L.R. 298; (1923) 2 W.W.R. 461 635
Gosse-Millard v. Devine, (1928) S.C.R. 101; (1928) 2 D.L.R. 869 ..... 660, 665, 737, 835, 852
Goudy v. Mercer, (1924) 34 B.C.R. 103 810
Gould v. Thompson, (1923) 32 B.C.R. 481; (1924) 1 W.W.R. 191 ..... 47, 739
Government Liquor Act, In re: In re Army and Navy Veterans, (1921) 30 B.C.R. 164; 61 D.L.R. 416; (1921) 3 W.W.R. 29; 36 C.C.C. 83 ..... 235, 630, 920
Government Liquor Act and Corano, In re (1928) 2 W.W.R. 695; 50 C.C.C. 199 632

Government Liquor Act and The Rainier Bottling Works, In re (1924) 33 B.C.R. 443 640
Gow v. MacInnes & Arnold, (1923) 33 B.C.R. 1; (1923) 4 D.L.R. 1012; (1923) 3 W.W.R. 828 ..... 911, 1004
Goward, American Seamless Tube Corporation v. (1930) 42 B.C.R. 551; (1931) 43 B.C.R. 407; (1930) 3 D.L.R. 870; (1931) 1 D.L.R. 878; (1930) 2 W.W.R. 31; (1931) 1 W.W.R. 509 ..... 169, 209, 460
Grady v. Devitt, (1928) 40 B.C.R. 88; (1928) 1 W.W.R. 924 ..... 353, 685
Graham, A. R. Williams Machinery Co. v. (1916) 23 B.C.R. 481; (1917) 25 B.C.R. 284; 39 D.L.R. 140; (1918) 1 W.W.R. 161; 57 S.C.R. 229; 43 D.L.R. 437; (1918) 3 W.W.R. 597 ..... 62, 89, 198, 596
Granby Cons. Mng., Etc., Co. Re: In re Land Registry Act, (1918) 26 B.C.R. 297 ..... 41, 47 48
Granby Cons. Mng., Etc., Co. and Registrar-General of Titles, In re (1919) 26 B.C.R. 523; (1919) 2 W.W.R. 321 ..... 220, 937
Granby Cons. Mng., Etc., Co. v. Atty.-Gen. of B.C., (1922) 31 B.C.R. 262; 70 D.L.R. 299; (1922) 3 W.W.R. 153; (1923) A.C. 247; 92 L.J.P.C. 74; 128 L.T. 677; (1923) 1 D.L.R. 1064; (1923) 1 W.W.R. 992 ..... 1021, 1045
Granby Cons. Mng., Etc., Co. v. Esquimalt & Nanaimo Ry. Co., (1920) A.C. 172; (1919) 88 L.J.P.C. 199; 122 L.T. 199; 48 D.L.R. 279; (1919) 3 W.W.R. 331; (1918) 25 B.C.R. 531; 41 D.L.R. 335; (1918) 2 W.W.R. 626 952
Granby Cons. Mng., Etc., Co., Esquimalt & Nanaimo Ry. Co. v. (1926) 37 B.C.R. 398; (1926) 3 W.W.R. 240 881
Granby Cons. Mng., Etc., Co., Lilja v. (1915) 21 B.C.R. 384; 8 W.W.R. 690; 9 W.W.R. 662; (1916) 23 B.C.R. 147; 31 D.L.R. 591; (1917) 1 W.W.R. 243 ... . 702, 705, 837
Granby Cons. Mng., Etc., Co., Logan v. (1916) 23 B.C.R. 188; 30 D.L.R. 623; (1917) 1 W.W.R. 230 880
Granby Cons. Mng., Etc., Co., Meagher v. (1915) 24 D.L.R. 892; 32 W.L.R. 334; 9 W.W.R. 37 701
Granby Cons. Mng., Eetc., Co., Oliver v. (1922) 31 B.C.R. 450; (1923) 1 D.L.R. 1163; (1923) 1 W.W.R. 50 ..... 168, 171
Granby Cons. Mng., Etc., Co. v. West Kootenay Light & Power Co., (1929) 41 B.C.R. 89; (1929) 2 D.L.R. 651; (1929) 2 W.W.R. 470; (1928) 40 B.C.R. 269; (1928) 4 D.L.R. 724; (1928) 3 W.W.R. 301 ..... 526, 597, 1023, 1116
Grand Trunk Pacific Coast Steamship Co., Victoria-Vancouver Stevedoring Co. v. (1927) 25 B.C.R. 6; 38 D.L.R. 468; (1918) 57 S.C.R. 124; 43 D.L.R. 231; (1918) 3 W.W.R. 450 ..... 255, 544
Grand Trunk Pacific Development Co. v. City of Prince Rupert, (1923) 32 B.C.R. 463; (1923) 3 W.W.R. 1275 ..... 30, 785
Grand Trunk Pacific Ry. Co., B.C. Express Co. v. (1916) 27 D.L.R. 497; 34 W.L.R. 361, 459; 10 W.W.R. 477, 583; 55 S.C.R. 328; 38 D.L.R. 29; (1917) 1 W.W.R. 961; (1918) 44 D.L.R. 1; (1919) 1 W.W.R. 497 (P.C.) 409, 1113
Grand Trunk Pacific Ry. Co., Fort George Lbr. Co. v. (1915) 24 D.L.R. 527; 9 W.W.R. 17; 32 W.L.R. 309 ..... 221, 1112
Grand Trunk Pacific Ry. Co., Isitt v. (1918) 26 B.C.R. 90; (1918) 3 W.W.R. 50; (1919) 59 S.C.R. 686; 49 D.L.R. 687 ..... 287, 1047, 1066
Grand Trunk Pacific Ry. Co., Premier Lbr. Co. v. (1922) 31 B.C.R. 152; (1923) S.C.R. 84; 67 D.L.R. 334; (1923) 1 D.L.R. 649; (1923) 1 W.W.R. 473; 29 C.R.C. 144 138
Grand Trunk Pacific Ry. Co., Westholme Lbr. Co. v. (1916) 23 B.C.R. 323; 25 C.R.C. 136; (1917) 1 W.W.R. 170; (1918) 25 B.C.R. 343; 41 D.L.R. 42; (1918) 2 W.W.R. 551 ..... 217, 677, 678, 1112, 1118
Grand Trunk Pacific Steamship Co., Dill v. (1915) 21 B.C.R. 182; 21 D.L.R. 392 ... 135
Grand Trunk Pacific Steamship Co., Simpson v. (1922) 63 S.C.R. 361; 65 D.L.R. 614; (1922) 2 W.W.R. 320 135
Granger v. Brydon-Jack, (1918) 25 B.C.R. 526, 531; (1919) 58 S.C.R. 491; 46 D.L.R. 571; (1919) 2 W.W.R. 621 ..... 54, 240, 249, 329, 480

Grant, Keyes v. (1928) 40 B.C.R. 19; (1928) 3 D.L.R. 558; (1928) 2 W.W.R. 295 .. 1127
Grant, Mary, Deceased, In re Estate of (1929) 41 B.C.R. 511; (1930) 1 D.L.R. 365; (1929) 3 W.W.R. 644 430
Grant v. Matsubayashi, (1922) 31 B.C.R. 375; 70 D.L.R. 553 (1922) 3 W.W.R. 679 .....416, 846
Grant, Morrison v. (1929) 41 B.C.R. 511; (1929) 3 W.W.R. 644; (1930) 1 D.L.R. 365 430
Grant, R. v. (1926) 37 B.C.R. 423; (1926) 4 D.L.R. 784; (1926) 3 W.W.R. 253; 46 C.C.C. 182 .....632, 927
Grant, Welch v. (1920) 28 B.C.R. 367; (1920) 3 W.W.R. 388 .....46, 321
Grant Smith & Co., Seattle Construction & Dry Dock Co. v. (1916) 22 B.C.R. 433; 26 D.L.R. 671; 10 W.W.R. 49; 33 W.L.R. 981 .....485, 891
Grant Smith & Co., Seattle Construction & Dry Dock Co. v. (1918) 26 B.C.R. 414..63, 504
Grant Smith & Co., Seattle Construction & Dry Dock Co. v. (1920) A.C. 162; (1919) 89 L.J.P.C. 17; 122 L.T. 203; (1918-19) 26 B.C.R. 397, 560; 44 D.L.R. 90; 45 D.L.R. 476; 48 D.L.R. 172; (1918) 3 W.W.R. 703; (1919) 1 W.W.R. 783; (1919) 3 W.W.R. 33 .....60, 92, 272, 286, 324, 622, 740
Graves v. McLean, (1931) 2 W.W.R. 895 904
Gray v. Ford, (1925) 34 B.C.R. 517; (1925) 1 W.W.R. 943 529
Gray, McInnes v. (1930) 3 D.L.R. 337 .....129, 1092, 1102
Gray, Mariacher v. (1918) 26 B.C.R. 332; (1919) 1 W.W.R. 505 1110
Gray, Roach v. (1916) 22 B.C.R. 553; 27 D.L.R. 726; 10 W.W.R. 813 899
Great Northern Ry. Co., Bahme v. (1916) 23 B.C.R. 484; (1917) 1 W.W.R. 1255 ... 696
Great Northern Ry. Co., Brown v. (1920) 28 B.C.R. 484; (1920) 3 W.W.R. 426 ... 310
Great Northern Ry. Co., Brown v. (1927) 38 B.C.R. 115; (1927) 2 D.L.R. 316; (1927) 1 W.W.R. 516; 32 C.R.C. 326 .....939, 1056
Great Northern Ry. Co., Sporle v. (1924) 34 B.C.R. 180; (1924) 4 D.L.R. 184; (1924) 3 W.W.R. 136; 30 C.R.C. 183; (1925) 35 B.C.R. 232; (1925) 3 D.L.R. 302; (1925) 2 W.W.R. 385; 30 C.R.C. 186 .....141, 471
Great West Perm. Loan Co. v. National Mortgage Co., (1919) 26 B.C.R. 566; 45 D.L.R. 751; (1919) 1 W.W.R. 788 .....715, 760
Greaves, In re (1917) 1 W.W.R. 997 1123
Green v. B.C. Electric Ry. Co., (1916) 10 W.W.R. 614; 25 D.L.R. 543; 19 C.R.C. 240; 32 W.L.R. 393; 9 W.W.R. 75 .....802, 938
Green, Bell v.: In re Martin, (1920) 28 B.C.R. 462; (1920) 3 W.W.R. 900 1003
Green, Bellamy v. (1927) 38 B.C.R. 182; (1927) 2 D.L.R. 327 707
Green v. Gordon, (1925) 35 B.C.R. 92 810
Green v. Harry, (1929) 41 B.C.R. 433; (1929) 4 D.L.R. 410 686
Green, Newcombe v. (1923) 32 B.C.R. 395 890
Greenhow, Bird v. (1919) 27 B.C.R. 160; (1919) 2 W.W.R. 320 894
Greenizen v. Twigg, (1922) 63 S.C.R. 158; 65 D.L.R. 101; (1922) 2 W.W.R. 71 .....738, 1099
Greenshields and Reifel, Planta v. (1931) 43 B.C.R. 439; (1931) 2 D.L.R. 189; (1931) 1 W.W.R. 401 1123
Greenwood, City of, v. Can. Mortgage Invst. Co., (1921) 30 B.C.R. 72; 69 D.L.R. 510; (1921) 2 W.W.R. 746 .....654, 789
Greenwood and Clough, Clough v. (1919) 27 B.C.R. 140 955
Greer v. Godson, (1918) 25 B.C.R. 229; 40 D.L.R. 218 902
Greer v. Godson (No. 2), (1920) 28 B.C.R. 175; 52 D.L.R. 374; (1920) 2 W.W.R. 217; 60 S.C.R. 653; 56 D.L.R. 966; (1921) 2 W.W.R. 209 904
Gregory v. Princeton Collieries, (1918) 25 B.C.R. 180; 40 D.L.R. 739; (1918) 1 W.W.R. 265 .....499, 654, 949, 951, 1027
Gregory Tire & Rubber Co. v. Gregory, (1923) 4 D.L.R. 598 736
"Griff," The, The "Paschena" v. (1925) 36 B.C.R. 30 18
"Griff," The, The "Paschena" v. (1927) 38 B.C.R. 240; (1927) 2 D.L.R. 757; (1927) 1 W.W.R. 515; (1927) Ex. C.R. 92 18
Griffiths v. Fordyce Motors, (1930) 43 B.C.R. 119; (1930) 4 D.L.R. 451; (1930) 2 W.W.R. 698 .....411, 980, 1054

Griffiths v. Kenney, (1917) 1 W.W.R. 800 ....86, 750, 757
Grunder, Edward H., Deceased, In re Estate of: Blackman v. The King, (1924) S.C.R. 406; (1924) 4 D.L.R. 123 ....1030, 1036
Guaranty Savings & Loan Assn., Baker v. (1931) S.C.R. 199; (1931) 1 D.L.R. 968 ....167, 985
Guaranty Savings & Loan Assn., Furness v. (1928) 40 B.C.R. 61; (1928) 3 D.L.R. 175; (1928) 42 W.W.R. 337 984
Guardian Assurance Co. v. Gunther and Matthew, (1918) 25 B.C.R. 353; 58 S.C.R. 47; 40 D.L.R. 455; 45 D.L.R. 32; (1918) 2 W.W.R. 405; (1919) 1 W.W.R. 67 ....165, 607, 922
Guardian Casualty, Etc., Co., Collins v. (1918) 25 B.C.R. 401; 40 D.L.R. 133; (1918) 2 W.W.R. 763 615
Gulf Sawmills, Ltd., In re (1922) 31 B.C.R. 397; (1922) 3 W.W.R. 870; 3 C.B.R. 384. 100
Gunther and Matthew, Guardian Assurance Co. v. (1918) 25 B.C.R. 353; 88 S.C.R. 47; 40 D.L.R. 455; 45 D.L.R. 32; (1918) 2 W.W.R. 405; (1919) 1 W.W.R. 67 ....165, 607, 922
Gurditta, R. v. (1926) 38 B.C.R. 66; 47 C.C.C. 103; (1927) 1 W.W.R. 273; (1927) S.C.R. 80; (1927) 2 D.L.R. 577; 47 C.C.C. 154 336
Gurevitch v. Melchoir, (1921) 29 B.C.R. 394 ....94, 676, 974
Gustafson, R. v. (1929) 42 B.C.R. 58; (1929) 3 W.W.R. 209; 52 C.C.C. 151 ....154, 295
Gustafson, Royal Bank of Canada v. (1924) 33 B.C.R. 379; (1924) 1 W.W.R. 544 ....85, 932

H

Haahti, Munn v. (1924) 37 B.C.R. 71; (1925) 3 W.W.R. 700 ....242, 291
Hadden v. City of North Vancouver, (1922) 30 B.C.R. 497; 67 D.L.R. 669; (1922) 1 W.W.R. 655 ....221, 841
Haddington Island Quarry Co., Rudge v. (1929) 41 B.C.R. 502 754
Haddock v. Norgan, (1924) 34 B.C.R. 74; (1924) 3 D.L.R. 644; (1924) 2 W.W.R. 943 ....248, 1012, 1084
Haddon, In re (1927) 38 B.C.R. 328; (1927) 2 D.L.R. 747; (1927) 1 W.W.R. 737. 593
Hagel and The Law Society of B.C., In re (1922) 31 B.C.R. 75 ....114, 688
Haglund v. Derr, (1927) 38 B.C.R. 435; (1928) 1 W.W.R. 232 1144
Hahn v. Seibel, (1920) 28 B.C.R. 387; (1920) 2 W.W.R. 595; (1920) 3 W.W.R. 229 ....304, 318, 329, 864, 920, 1140, 1143
Haines and New Westminster Licence Commissioners, In re (1915) 21 B.C.R. 313; 21 D.L.R. 777; 31 W.L.R. 307 629
Halcrow, R. ex rel., v. St. Eloi, (1928) 2 W.W.R. 692 632
Hales v. Township of Spallumcheen, (1921) 30 B.C.R. 87; 61 D.L.R. 390; (1921) 2 W.W.R. 931 790
Haley v. S.S. "Comox," (1920) 30 B.C.R. 104; 56 D.L.R. 662; (1920) 3 W.W.R. 535; 20 Ex. C.R. 86 12
Hall, Alfred, Legal Professions Act and, In re (1917) 24 B.C.R. 226.... 115
Hall, Can. Pac. Ry. Co. v., (1916) 10 W.W.R. 11 889
Hall v. Commissioners of Sumas Draining, Etc., Dist., (1923) 32 B.C.R. 390; (1923) 3 W.W.R. 164; (1923) 3 D.L.R. 1075 298
Hall, Deceased, In re (1923) 33 B.C.R. 241 1135
Hall v. Geiger, (1930) 42 B.C.R. 335; (1930) 3 D.L.R. 644; (1930) 2 W.W.R. 790; (1930) 43 B.C.R. 116; (1930) 3 D.L.R. 854; (1930) 2 W.W.R. 794 ....425, 427, 484, 686, 868
Hall, Johnson v. (1930) 43 B.C.R. 598 592
Hall, Knox v. (1926) 38 B.C.R. 78; (1928) S.C.R. 87; (1928) 1 D.L.R. 193 ...38, 276
Hall v. Lane (No. 1), (1923) 31 B.C.R. 507; (1923) 1 D.L.R. 903; (1923) 1 W.W.R. 545 695
Hall v. Lane (No. 2), (1923) 32 B.C.R. 343; (1923) 2 D.L.R. 1151; (1923) 2 W.W.R. 442 ....60, 292
Hall v. More, (1928) 39 B.C.R. 346; (1928) 1 D.L.R. 1028; (1928) 1 W.W.R. 400. 268

Hall, Mortgage Co. of Canada v. (1918) 25 B.C.R. 280 1109
Hall v. Quesnel, (1922) 68 D.L.R. 80 530
Halpin v. City of Victoria, (1915) 21 B.C.R. 14; 23 D.L.R. 333; 7 W.W.R. 1058 ..520, 773
Halter, R. v. (1929) 42 B.C.R. 28; 52 C.C.C. 320 643
Ham, R. v. (1918) 25 B.C.R. 237; 29 C.C.C. 431 340
Hames, Boydell v. (1915) 21 B.C.R. 171; 21 D.L.R. 371; 30 W.L.R. 842; 8 W.W.R. 17 .....301, 1094, 1104
Hamilton v. Ferne, (1921) 1 W.W.R. 249; 61 D.L.R. 213 671
Hamilton v. Killick, (1920) 28 B.C.R. 418; 61 D.L.R. 213 .....669, 671
Hamilton, Wong Sam v. (1929) 42 B.C.R. 133; 52 C.C.C. 357 519
Hamilton and Abbott v. Hart, Tripp and Royal Trust Co., (1919) 27 B.C.R. 101; 47 D.L.R. 231; (1919) 2 W.WR. 164 1126
Hamilton & Wragge v. Stokes, (1921) 30 B.C.R. 65; 62 D.L.R. 282; (1921) 2 W.W.R. 921 954
Hammer v. Hammer and Luthmer, (1929) 41 B.C.R. 55; (1929) 3 D.L.R. 273; (1929) 2 W.W.R. 130 815
Hammond, Langley v. (1915) 21 B.C.R. 175; 22 D.L.R. 42 .....469, 739, 1091
Hammond et al., Isitt v. (1924) 34 B.C.R. 133; (1925) 1 W.W.R. 94 880
"Hampholm," The, v. The "Princess Adelaide," (1931) S.C.R. 254; (1930) 3 D.L.R. 423; 4 D.L.R. 778; (1930) Ex. C.R. 10 161
Hamre and Young, Craig v. (1925) 36 B.C.R. 1; (1925) 3 D.L.R. 979; (1925) 3 W.W.R. 81 832
Haney Garage, Walden v. (1928) 39 B.C.R. 413; (1928) 1 D.L.R. 688; (1928) 1 W.W.R. 371 93
Hankey, G. A. & Co. v. City of Vernon, (1926) 36 B.C.R. 401; (1926) 1 D.L.R. 684; (1926) 1 W.W.R. 375 535
Hanley v. Royal Exchange Assurance, (1924) 34 B.C.R. 222; (1924) 3 D.L.R. 860; (1924) 2 W.W.R. 880 609
Hanna v. Corporation of the City of Victoria (No. 1), (1916) 22 B.C.R. 555; 27 D.L.R. 213; 34 W.L.R. 307; 10 W.W.R. 457; 24 D.L.R. 889; 9 W.W.R. 761; 32 W.L.R. 916 .....203, 679
Hanna v. Costerton, (1918) 26 B.C.R. 347; 44 D.L.R. 478; (1919) 1 W.W.R. 930 .....456, 1110
Hanna, R. ex rel., v. Ernst, (1927) 1 W.W.R. 961; 48 C.C.C. 190.....399, 630
Hanna and City of Victoria, In re (1917) 24 B.C.R. 110; (1917) 3 W.W.R. 245; 35 D.L.R. 798 766
Hannafin, Lloyd v. (1931) 43 B.C.R. 401; (1931) 2 D.L.R. 1000; (1931) 1 W.W.R. 415 .....572, 811
"Hanna Nielsen," The, Heidner & Co. v. (1926) 37 B.C.R. 207; (1926) 2 D.L.R. 1059; (1926) 2 W.W.R. 397; (1927) Ex. C.R. 75 16
Hansen v. Killick, (1925) 35 B.C.R. 108; (1925) 3 D.L.R. 433; (1925) 1 W.W.R. 375 .....91, 472
Hansen, Walls v. (1921) 29 B.C.R. 552; (1921) 2 W.W.R. 250 990
Hanton v. Simmons, (1921) 1 W.W.R. 757 493
Hardy, Ferris v. (1923) 32 B.C.R. 78; (1923) 1 W.W.R. 1483 .....751, 1068
Harnam Singh v. Kapoor Singh, (1927) 39 B.C.R. 485 879
Harney v. Harney, (1926) 39 B.C.R. 275 437
Harper, Dominion Trust Co. and, In re (1915) 22 B.C.R. 337; 24 D.L.R. 670; 32 W.L.R. 832; 9 W.W.R. 503 .....197, 201, 485, 1076
Harper v. McLean, (1928) 39 B.C.R. 426; (1928) 2 D.L.R. 220; (1928) 1 W.W.R. 444 .....412, 827
Harper v. McLean (No. 2), (1928) 39 B.C.R. 480; (1928) 2 D.L.R. 986; (1928) 1 W.W.R. 912 302
Harrell, Bank of Toronto v. (1916) 23 B.C.R. 202; (1917) 55 S.C.R. 512; 31 D.L.R. 440; 39 D.L.R. 262; (1917) 1 W.W.R. 213; (1917) 2 W.W.R. 1149 ... .109, 659, 661, 734, 741, 837
Harris v. Alexandra Orphanage, (1923) 32 B.C.R. 25; (1923) 1 D.L.R. 1153; (1923) 1 W.W.R. 624 1129

Harris, Armstrong Growers Assn. v. (1924) 33 B.C.R. 285; (1924) 1 D.L.R. 1043; (1924) 1 W.W.R. 729 .....534, 589
Harris, Beaumont v. (1920) 28 B.C.R. 70, 144; 59 D.L.R. 628 .....598, 1013, 1088
Harris v. Bethune, (1921) 29 B.C.R. 485; (1921) 2 W.W.R. 259 1093
Harris v. Lindeborg, (1931) S.C.R. 235; (1931) 1 D.L.R. 945; (1930) 42 B.C.R. 276; (1930) 2 D.L.R. 117; (1930) 1 W.W.R. 411 .....450, 626, 729, 1073, 1082
Harris v. Mission Land Co., (1915) 22 B.C.R. 11 42
Harrison, In re (1918) 25 B.C.R. 433, 545; 29 C.C.C. 420 .....354, 515
Harrison, In re (No. 2), (1918) 25 B.C.R. 541; 41 D.L.R. 731; 30 C.C.C. 150 559
Harrison, In re (No. 3), (1918) 25 B.C.R. 545 516
Harrison, R. v. (1928) 40 B.C.R. 53; (1928) 3 D.L.R. 224; (1928) 1 W.W.R. 973; 49 C.C.C. 356 472
Harrison Bay Co. v. Gauthier, (1925) 35 B.C.R. 498 932
Harry, Green v. (1929) 41 B.C.R. 433; (1929) 4 D.L.R. 410 686
Hart v. Yarwood, (1931) 3 D.L.R. 291; (1931) 2 W.W.R. 435; (1932) 45 B.C.R. 331; (1932) 4 D.L.R. 164; (1932) 2 W.W.R. 74 434
Hart, Tripp and Royal Trust Co., Hamilton and Abbott v. (1919) 27 B.C.R. 101; 47 D.L.R. 231; (1919) 2 W.W.R. 164 1126
Hartery, Bank of Hamilton v. (1919) 58 S.C.R. 338; 45 D.L.R. 638; (1919) 1 W.W.R. 868; (1918) 26 B.C.R. 22; 43 D.L.R. 14; (1918) 3 W.W.R. 551; (1917) 25 B.C.R. 150; (1917) 3 W.W.R. 964 .....499, 654, 748, 951, 1027
Hartford Accident & Indemnity Co., Schwartz v. (1925) 35 B.C.R. 507; (1925) 2 W.W.R. 413 620
Hartley, Macdonald v. (1918) 3 W.W.R. 910 711
Hartley, Patton v. (1917) 24 B.C.R. 5; (1917) 2 W.W.R. 234 .....40, 299, 540
Harvey, R. v. (1924) 34 B.C.R. 492; (1925) 1 D.L.R. 1097; 43 C.C.C. 249 378
Harvey v. Sylvia Court, Ltd., (1924) 34 B.C.R. 322; (1924) 3 W.W.R. 849 882
Harwod, R. v. (1921) 30 B.C.R. 121 634
Hastings Shingle Mfg. Co. and Black, Loane v. (1925) 35 B.C.R. 485; (1925) 3 D.L.R. 940 .....34, 71, 658
Hastings Street Properties, Ltd., In re (1930) 43 B.C.R. 209; (1930) 3 W.W.R. 561; (1931) 1 D.L.R. 604 1042
Hawks v. Hawks, (1920) 29 B.C.R. 64; 56 D.L.R. 265; 59 D.L.R. 430; (1920) 3 W.W.R. 774; (1921) 3 W.W.R. 285 .....432, 574
Hawthornthwaite, Dist. of North Cowichan v. (1917) 24 B.C.R. 571; 42 D.L.R. 207; (1918) 3 W.W.R. 574 782
Hay v. Allen, (1922) 64 S.C.R. 76; 69 D.L.R. 193; (1922) 3 W.W.R. 366; 30 B.C.R. 481; 67 D.L.R. 248; (1922) 1 W.W.R. 646 463
Hayes v. Goddard, (1915) 21 B.C.R. 389; 31 W.L.R. 424; 22 D.L.R. 566 ...403, 733, 1091
Hayes v. Howard, (1919) 27 B.C.R. 167 886
Hayes v. Pacific Great Eastern Ry. Co., (1916) 10 W.W.R. 831; 34 W.L.R. 819 898
Haynes, McIntyre v. (1925) 35 B.C.R. 40; (1925) 2 D.L.R. 546; (1925) 1 W.W.R. 881 .....471, 677, 869
Hayes Manufacturing Co. v. Perdue & Cope, (1931) 43 B.C.R. 545; (1931) 2 D.L.R. 610 966
Hayward, Sellick v. (1917) 24 B.C.R. 125; (1917) 2 W.W.R. 803 752
Hazell v. Lund, (1915) 22 B.C.R. 264; 25 D.L.R. 204; 32 W.L.R. 818; (1915) 9 W.W.R. 749 .....82, 712, 715, 985
Hazlitt & Co. v. Trenwith, (1920) 54 D.L.R. 556; (1920) 3 W.W.R. 771 .....858, 860
Healman v. Pryce, (1929) 42 B.C.R. 104; (1930) 2 D.L.R. 608 979
Hecht, Joseph, Deceased, In re (1923) 33 B.C.R. 154; (1924) 1 W.W.R. 1153..... 1035
Heidner & Co. v. The "Hanna Nielsen," (1926) 37 B.C.R. 207; (1926) 2 D.L.R. 1059; (1926) 2 W.W.R. 397; (1927) Ex. C.R. 75 16
"Hellen," The, Wm. Donovan Steamship Co. v. (1924) 34 B.C.R. 461; (1925) Ex. C.R. 114; (1926) Ex. C.R. 59; (1926) S.C.R. 627; (1927) 3 W.W.R. 67; (1927) 3 D.L.R. 1089 (P.C.) 163
Helmcken v. Bullen, (1924) 34 B.C.R. 184; (1924) 3 W.W.R. 172 1127
Helmcken, J. D., In re Estate of (1924) 34 B.C.R. 184; (1924) 3 W.W.R. 172..... 1127

Hemphill and Cuckow v. McKinney et al., (1915) 21 B.C.R. 561; 27 D.L.R. 345; 33 W.L.R. 688 .....443, 796, 1024
Hemphill's Trade Schools, Nantel v. (1920) 28 B.C.R. 265, 422; 53 D.L.R. 37; (1920) 3 W.W.R. 408 .....656, 828, 830
Henderson, Ex. p., (1929) 52 C.C.C. 82; (1929) 2 W.W.R. 209; (1929) 52 C.C.C. 95; (1930) 1 D.L.R. 420; (1930) S.C.R. 45.....356, 554, 555, 558
Henderson, F. & F., v. Northwestern Mutual Fire Assn., (1924) 34 B.C.R. 441; (1925) 1 D.L.R. 339; 43 C.C.C. 217 .....617, 619
Henderson, Howard v. (1929) 41 B.C.R. 441 825
Henderson, J., Deceased, In re (1918) 26 B.C.R. 329; (1918) 3 W.W.R. 896 506
Henderson, J. N., Deceased, In re (1922) 31 B.C.R. 321; (1923) S.C.R. 23; (1923) 1 D.L.R. 636; (1923) 1 W.W.R. 391 1133
Henderson, R. v. (1929) 41 B.C.R. 242; (1929) 4 D.L.R. 984; 52 C.C.C. 82, 95; (1929) 2 W.W.R. 209; (1930) S.C.R. 45; (1930) 1 D.L.R. 420 .....149, 154, 337, 363, 366
Henderson v. Rouvala, (1923) 31 B.C.R. 515; (1923) 1 W.W.R. 467 1054
Henderson & Sons v. Russell House, Ltd., (1931) 1 W.W.R. 342 .....318, 717
Henderson, Ennis Gold Mining Co. v. (1927) 39 B.C.R. 76 .....730, 1116
Henderson, Stewart, Broder and Joe Go Get, In re (1930) S.C.R. 45; (1930) 1 D.L.R. 420; (1929) 52 C.C.C. 95.....356, 554, 555, 558
Hendrick, Purcell v. (1925) 35 B.C.R. 516; (1925) 3 D.L.R. 854; (1925) 2 W.W.R. 689 .....213, 1125
Hendry v. Laird, (1919) 27 B.C.R. 217; (1919) 2 W.W.R. 341; (1920) 28 B.C.R. 445; (1920) 3 W.W.R. 421 120
Henley, R. v. (1922) 70 D.L.R. 867; (1922) 3 W.W.R. 638 384
Henry v. Henry, (1926) 3 W.W.R. 250 317
Henry Chan, R. v. (1930) 42 B.C.R. 360; (1930) 2 W.W.R. 441; 53 C.C.C. 252 .....344, 371, 373
Henry Chow, R. v. (1930) 42 B.C.R. 365; (1930) 2 W.W.R. 389; 53 C.C.C. 247 ... 374
Herald Printing & Pub. Co. v. Ryall et al., (1923) 32 B.C.R. 19; (1923) 4 D.L.R. 488; (1923) 3 W.W.R. 953 .....427, 862
Hernandez v. The "Bamfield," (1921) 30 B.C.R. 161; (1921) 3 W.W.R. 69; 21 Ex. C.R. 166 18
Heron v. Lalonde, (1915) 22 B.C.R. 180; 24 D.L.R. 851; 9 W.W.R. 440; 32 W.L.R. 861; (1916) 53 S.C.R. 503; 31 D.L.R. 151; 10 W.W.R. 1241.....422, 1046
Herring, Thompson v. (1915) 22 B.C.R. 179 884
Hewat, Flathead Hotel Co. v. (1919) 1 W.W.R. 466 646
Hewat, Roux v. (1919) 1 W.W.R. 530 .....352, 633
Hick, Callow v.: Liquor Control Board, Garnishee, (1923) 32 B.C.R. 71; (1923) 2 D.L.R. 1185; (1923) 2 W.W.R. 439 .....6, 535, 925
Hicks, R. v. (1925) 37 B.C.R. 280; (1926) 1 W.W.R. 182; 46 C.C.C. 94 .....381, 382
Higgins v. Comox Logging Co., (1926) 37 B.C.R. 525; (1926) 3 D.L.R. 852; (1926) 3 W.W.R. 417; (1927) 38 B.C.R. 477; (1927) 2 D.L.R. 682; (1927) S.C.R. 359; (1927) 3 D.L.R. 720; (1927) 2 W.W.R. 378 .....77, 306, 521, 831
Higgins v. Creech, (1920) 28 B.C.R. 241; (1920) 31 D.L.R. 110 .....737, 1097
Higgins, H. N., v. Macdonald, (1928) 40 B.C.R. 150; 50 C.C.C. 353; (1928) 4 D.L.R. 241; (1928) 3 W.W.R. 115 988
Higginson, Land Registry Act and, In re (1923) 33 B.C.R. 29, 232; (1923) 3 W.W.R. 925; (1923) 4 D.L.R. 439; (1924) S.C.R. 207; (1924) 2 D.L.R. 649 .....65, 1031
Hill, Arbuthnot v. (1927) 39 B.C.R. 81 .....59, 60, 284, 481
Hill, Little v. (1916) 23 B.C.R. 321; 30 D.L.R. 483 753
Hill v. The Canadian Home Invst. Co., (1915) 22 B.C.R. 301, 304.....32, 192, 308
Hill-Tout, Buntyn v. (1917) 24 B.C.R. 303; 33 D.L.R. 383; (1917) 2 W.W.R. 286. 1109
Hine, Shields v. (1919) 27 B.C.R. 20 308
Hing Hop, R. v. (1926) 37 B.C.R. 158; (1926) 1 W.W.R. 799; 45 C.C.C. 239 .....149, 367, 554, 557, 561
Hitchcock and Canada Paint Co., Prat v. (1925) 36 B.C.R. 142, 158; (1925) 3 D.L.R. 1142; (1926) 1 W.W.R. 5 .....58, 292, 322, 501

Hoag v. Kloepfer, (1918) 26 B.C.R. 181; (1918) 3 W.W.R. 633 .....263, 1087
Hoare, R. v. (1932) 44 B.C.R. 557; (1932) 1 W.W.R. 470 337
Hobson v. Municipality of Richmond, (1923) 32 B.C.R. 369; (1923) 3 W.W.R. 401. 767
Hodges, Pacific Coast Coal Mines and, In re (1926) 37 B.C.R. 550; (1926) 4 D.L.R. 759; (1926) 3 W.W.R. 378; 8 C.B.R. 102.....96, 173
Hodges, R. v. (1921) 30 B.C.R. 37; 60 D.L.R. 618; (1921) 2 W.W.R. 388; 1 C.B.R. 530 .....105, 130
Hodges, Royal Bank of Canada v. (1929) 42 B.C.R. 44; (1929) 3 W.W.R. 605; (1930) 1 D.L.R. 397 .....111, 975
Hodgkinson v. Martyn, (1928) 40 B.C.R. 434; (1929) 1 D.L.R. 367; (1928) 3 W.W.R. 763 .....290, 407
Hodne, Nason v. (1929) 41 B.C.R. 398; (1929) 4 D.L.R. 490 820
Hoffar v. Canadian Credit Men's Trust Assn., (1929) 40 B.C.R. 454; (1929) 2 D.L.R. 73, 106; (1929) 1 W.W.R. 557; 10 C.B.R. 369, 374; (1929) S.C.R. 180; (1929) 2 D.L.R. 106 .....106, 226, 467, 531
Hoffman, In re Testator's Family Maintenance Act and (1931) 43 B.C.R. 463; (1931) 1 W.W.R. 293 1136
Hogan and City of Victoria, Cox v. (1924) 35 B.C.R. 286 1123
Hogue v. Leitch: Royal Bank of Canada, Garnishee, (1915) 22 B.C.R. 10 .....321, 536
Holbrook, Washington and Great Northern Townsite Co. v. (1924) 33 B.C.R. 388; (1924) 1 D.L.R. 818; (1924) 1 W.W.R. 511 868
Holden, Buscombe v. (1924) 34 B.C.R. 289; (1924) 4 D.L.R. 744; (1925) 1 W.W.R. 47 .....479, 1131
Holden, Royal Trust Co. v. (1915) 21 B.C.R. 185; 8 W.W.R. 500; 22 D.L.R. 660 .....417, 859
Holland, Rowlands and Johnstone v. (1920) 53 D.L.R. 652 1024
Holliday, Pipe v. (1930) 42 B.C.R. 230; (1930) 2 D.L.R. 73; (1930) 1 W.W.R. 225 .....567, 762, 770, 811
Holmes, Gardner v. (1917) 24 B.C.R. 416; 28 D.L.R. 156; (1918) 1 W.W.R. 456..668, 669
Holmes v. Kirk & Co., (1920) 28 B.C.R. 122; 53 D.L.R. 53; (1920) 1 W.W.R. 1037 .....468, 805, 806
Holmes, MacGill v. (1927) 39 B.C.R. 65 808
Holmes & Wilson, Holt v. (1930) 42 B.C.R. 545; (1930) 2 D.L.R. 987; (1930) 1 W.W.R. 887 .....301, 793
Holmes et al., Robinson v. (1914) 5 W.W.R. 1143; 17 D.L.R. 372 1090
Holmwood & Holmwood, Elliott v. (1915) 22 B.C.R. 335; 25 D.L.R. 765; 33 W.L.R. 134; 9 W.W.R. 490 881
Holt v. Holmes & Wilson and Thompson, (1930) 42 B.C.R. 545; (1930) 2 D.L.R. 987; (1930) 1 W.W.R. 887 .....301, 793
Holt, R. v. (1925) 36 B.C.R. 391; (1926) 1 W.W.R. 47; 46 C.C.C. 40 .....31, 378
Home Bank of Canada v. Sullivan, (1926) 37 B.C.R. 401; (1926) 4 D.L.R. 78; (1926) 3 W.W.R. 305; (1927) S.C.R. 115; (1927) 1 D.L.R. 1097 108
Home Bank of Canada and Winding-up Act, In re (1924) 34 B.C.R. 321; (1925) 1 D.L.R. 734 .....188, 189
Home Ins. Co., Bulger v. (1928) S.C.R. 436; (1929) 1 D.L.R. 47 .....73, 611, 649
Home Ins. Co. v. The M.S. "Tex," (1930) 43 B.C.R. 434; (1931) 2 D.L.R. 657; (1931) 1 W.W.R. 153 984
Home Ins. Co., Welch v. (1930) 43 B.C.R. 78 656
Honess v. B.C. Electric Ry. Co., (1916) 23 B.C.R. 90; 36 D.L.R. 301 800
Honeyman, In re (1930) 1 W.W.R. 999 466
Hong Lee, alias Wah Chew, R. v. (1920) 28 B.C.R. 459; 61 D.L.R. 271; (1920) 3 W.W.R. 795; 36 C.C.C. 5 381
Hooper v. City of North Vancouver, (1921-22) 31 B.C.R. 51, 138; 65 D.L.R. 286; (1922) 1 W.W.R. 1249 .....64, 596, 772
Hopkins v. Katsuda, (1926) 1 W.W.R. 598 160
Horan and Nichols Theatres, Canadian Educational Films v. (1928) 39 B.C.R. 424 .. 309
Hornby, Perry v. (1925) 1 D.L.R. 1133; (1925) 1 W.W.R. 761 1004
Hornby, R. v. (1923) 32 B.C.R. 505 393

Hornby and Hornby v. Paterson, (1929) 41 B.C.R. 548; (1930) 1 D.L.R. 86; (1929) 3 W.W.R. 276 823
Horsnail v. Shute, (1919) 27 B.C.R. 474; (1920) 1 W.W.R. 21; (1921) 30 B.C.R. 189; 62 D.L.R. 199; (1921) 3 W.W.R. 270 .....246, 327, 404, 887, 1084, 1091
Horst v. Livesley, (1923) 2 W.W.R. 987; (1923) 24 B.C.R. 19; (1924) 2 D.L.R. 1002; (1924) 2 W.W.R. 443 (1924) S.C.R. 605; (1925) 1 D.L.R. 159 ..208, 251, 960
Hou, Ruby, Pearl Wong v. (1928) 39 B.C.R. 425; (1928) 1 W.W.R. 480 .....246, 844
Hou, Ruby, Ray v. (1927) 39 B.C.R. 128; (1928) 1 D.L.R. 177; (1928) 40 B.C.R. 438 .....673, 1009, 1093
Houghton v. Evans, (1925) 35 B.C.R. 454; (1925) 3 D.L.R. 109; (1925) 2 W.W.R. 248 .....267, 848
Houston v. Victoria Machinery Depot, (1924) 33 B.C.R. 425; (1924) 2 D.L.R. 657 .. 180
Houston et al., Boyd and McDougal v. (1916) 10 W.W.R. 518 813
Hovland and Watkins, Bunting v. (1924) 33 B.C.R. 291 904
Howard v. B.C. Electric Ry. Co., (1918) 3 W.W.R. 409.....659, 661, 830-1
Howard v. District of South Vancouver, (1924) 34 B.C.R. 167; (1924) 4 D.L.R. 257; (1924) 3 W.W.R. 166 .....767, 791
Howard, Hayes v. (1919) 27 B.C.R. 167 886
Howard v. Henderson, (1929) 41 B.C.R. 441 825
Howard, Watson v. (1924) 34 B.C.R. 449; (1924) 4 D.L.R. 564; (1924) 3 W.W.R. 404 296
Howarth, Patching v. (1930) 43 B.C.R. 108; (1930) 4 D.L.R. 489; (1930) 3 W.W.R. 129 .....426, 428, 867
Howe v. Howe and Collyer, (1916) 22 B.C.R. 550; 28 D.L.R. 772; 10 W.W.R. 1263. 753
Howe Sound Mills & Logging Co., Roray v. (1915) 21 B.C.R. 406; 22 D.L.R. 855; 31 W.L.R. 409 172
Hoyes v. Creery, (1917) 24 B.C.R. 505; 39 D.L.R. 516; (1918) 1 W.W.R. 873 ...434, 534
Hubbard, Smith v. (1917) 1 W.W.R. 1237 1120
Huckell v. Gale & Williams, (1915) 22 B.C.R. 356; 25 D.L.R. 761; 33 W.L.R. 192; 9 W.W.R. 550 .....651, 875
Hudson Bay Ins. Co. v. Creelman, (1919) 88 L.J.P.C. 197; 122 L.T. 198; 48 D.L.R. 234; (1919) 3 W.W.R. 9; (1920) A.C. 194; (1918) 25 B.C.R. 307; 40 D.L.R. 274; (1918) 2 W.W.R. 448 .....181, 594, 606, 1096
Hudson Bay Ins. Co., Yamashita v. (1918) 26 B.C.R. 387; (1918) 3 W.W.R. 671 ... 882
Hudson's Bay Co., Evans v. (1930) 43 B.C.R. 81; (1930) 3 D.L.R. 951; (1930) 2 W.W.R. 718 .....659, 702, 794
Hudson's Bay Co. v. Scott, (1929) 4 D.L.R. 978; (1929) 3 W.W.R. 232 .....
.....278, 455, 580, 653
Huger, R. v. (1924) 33 B.C.R. 157 366
Hughes v. B.C. Electric Ry. Co., (1925) 35 B.C.R. 321; (1925) 3 D.L.R. 541; (1925) 2 W.W.R. 250 318
Hughes v. Beban, (1927-8) 39 B.C.R. 132; (1928) 1 D.L.R. 244; (1928) 1 W.W.R. 35 .....678, 1055
Hughes, R. v. (1924) 35 B.C.R. 55 371
Hughes v. Sun Publishing Co., (1925) 35 B.C.R. 422 834
Hull, Thompson v. (1921) 30 B.C.R. 358; 70 D.L.R. 863 313
Hull and Royal Trust Co., Roper v. (1921) 30 B.C.R. 405 .....579, 1132
Humphrey v. Wilson, (1917) 25 B.C.R. 110; (1917) 3 W.W.R. 529, 937 ....290, 403, 1051
Humphreys, Royal Bank of Canada v. (1922) 31 B.C.R. 81 677
Hunt v. Royal Bank of Canada, (1919) 27 B.C.R. 236; (1919) 2 W.W.R. 547 ...603, 1108
Hunter v. Clarke, (1932) 44 B.C.R. 554; (1932) 1 W.W.R. 466 827
Hunter v. Corporation of Point Grey, (1917) 1 W.W.R. 1244 1107
Hunter, Ewing v. (1929) 42 B.C.R. 161 .....62, 313
Hunter, Keill & Purdy v. (1928) 39 B.C.R. 396 .....1043, 1101
Hunting-Merritt Lbr. Co. v. Coyle, (1922) 67 D.L.R. 655 53
Hurndall, Morse v. (1926) 37 B.C.R. 216 866
Husband, Kennedy v. (1923) 1 D.L.R. 1069 .....125, 126, 471, 472, 869, 1113
Hutton, Marshall v. (1928) 2 W.W.R. 33 522

Hyde, Shaw v. (1921) 61 D.L.R. 666 188
Hyland v. Costerton, (1927) 1 D.L.R. 1166; (1927) 1 W.W.R. 340 902
Hynes v. Alton, (1928) 3 W.W.R. 261 .....156, 465
Hynes v. Alton (No. 2), (1929) 1 W.W.R. 863; 52 C.C.C. 333 156
Hyslop v. New Westminster School Trustees, (1930) 43 B.C.R. 201; (1930) 4 D.L.R. 1030; (1930) 3 W.W.R. 227 882

I

Iaci, R. v. (1924) 33 B.C.R. 501; (1924) 3 D.L.R. 321; 42 C.C.C. 266; (1925) 35 B.C.R. 95, 403; (1925) 4 D.L.R. 474; (1925) 1 W.W.R. 304; (1925) 2 W.W.R. 129; 43 C.C.C. 363; 44 C.C.C. 275 .....354, 357, 388, 552
Ibbotson v. Berkley, (1918) 26 B.C.R. 156; (1918) 3 W.W.R. 1018 685
Ice Delivery Co. v. Peers and Campbell, (1926) 36 B.C.R. 445, 559; (1926) 1 D.L.R. 1176; (1926) 1 W.W.R. 595 .....66, 698
Idsardi, Pratt v. (1915) 21 B.C.R. 497; 23 D.L.R. 257; 31 W.L.R. 541 696
Illingsworth v. Brown, (1916) 10 W.W.R. 1024 1105
Immigration Act and Jeu Jang How, In re (1919) 27 B.C.R. 294; 59 S.C.R. 175; 50 D.L.R. 41; (1919) 3 W.W.R. 1115; 32 C.C.C. 103 .....28, 66, 556, 581, 585, 587, 1028
Immigration Act and Lee Chow Ying, In re (1927) 38 B.C.R. 241; (1927) 1 W.W.R. 527; 47 C.C.C. 203 582
Immigration Act and Mah Shin Shong, In re (1923) 32 B.C.R. 176; (1923) 4 D.L.R. 844; (1923) 1 W.W.R. 1365; 39 C.C.C. 401 .....29, 556, 559, 585
Immigration Act and Pong Fook Wing, In re (1923) 33 B.C.R. 47; (1923) 4 D.L.R. 1034; (1923) 3 W.W.R. 819, 1006; 41 C.C.C. 42 .....28, 555, 585
Immigration Act and Samejima, In re (1931) 44 B.C.R. 317; (1931) 3 W.W.R. 56 .....560, 583
Immigration Act and Santa Singh, In re (1920) 28 B.C.R. 357; (1920) 2 W.W.R. 999 .....215, 582
Immigration Act and Toku Nishi, In re (1928) 41 B.C.R. 199 583
Immigration Act and Wong Shee, In re (1921) 30 B.C.R. 70; (1922) 31 B.C.R. 145; 59 D.L.R. 626; 66 D.L.R. 485; (1922) 2 W.W.R. 156; 37 C.C.C. 371 .....27, 555, 582, 585
Imperial Bank of Canada v. Ross, (1916) 22 B.C.R. 545; 34 W.L.R. 962; 10 W.W.R. 1174 111
Imperial Bank of Canada, Wallinder v. (1925) 36 B.C.R. 226; (1925) 4 D.L.R. 390; (1925) 3 W.W.R. 409 .....107, 116
Imperial Can. Trust Co. v. Winstanley, (1922) 31 B.C.R. 448; (1923) 1 D.L.R. 1148; (1923) 1 W.W.R. 935 .....431, 469, 489, 541
Imperial Guarantee & Accident Ins. Co. of Canada, Forsyth v. (1925) 36 B.C.R. 253; (1925) 4 D.L.R. 479; (1925) 3 W.W.R. 669 .....615, 972
Imperial Life Ins. Co., Powell v. (1919) 27 B.C.R. 135; (1919) 2 W.W.R. 285 613
Imperial Oil Co., May v. (1931) 44 B.C.R. 175; (1931) 4 D.L.R. 304; (1931) 3 W.W.R. 40 307
Imperial Oil Co., Ltd., Terminal Steam Navigation Co. v. (1920) 28 B.C.R. 393; (1920) 2 W.W.R. 689 970
Imperial Timber & Trading Co., Pac. Lumber Agency v. (1916) 23 B.C.R. 378; 31 D.L.R. 748; (1917) 1 W.W.R. 507 .....117, 331
Imperial Veterans in Canada v. Eastern Freighters, Ltd., (1927) 39 B.C.R. 17 271
Imported Hardwoods, Ltd., v. Robertson & Hackett Sash & Door Co., (1925) 36 B.C.R. 258; (1925) 4 D.L.R. 650 .....402, 966
Indar Singh, Shrimpton v. (1927) 39 B.C.R. 19, 319; (1928) 1 D.L.R. 462; (1928) 2 W.W.R. 22 .....59, 307, 816
Independent Lands and Hale, Dennis v. (1930) 43 B.C.R. 65 .....913, 916
Indian Affairs, Dept. of, Board of Inv. Under Water Act v. (1925) 36 B.C.R. 62 ... 1114
Indian Affairs, Dept. of, et al., Western Canada Ranching Co. v. (1921) 30 B.C.R. 25; 60 D.L.R. 360; (1921) 2 W.W.R. 834 .....589, 924, 1115

Infants Act and Davies, In re (1920) 28 B.C.R. 10 590
Ingham, Dinning v.: In re Campbell River Mills, (1931) 43 B.C.R. 477; (1931) 2 D.L.R. 946 .....82, 102
Ingles, Morrison v. (1920) 2 W.W.R. 50 1063
Ingles, Sharp v. (1915) 21 B.C.R. 584; 23 D.L.R. 636; 32 W.L.R. 150; 8 W.W.R. 1325 .....121, 972
Ingles v. Woodside, (1920) 2 W.W.R. 50 1063
Inglis, Dominion Trust Co. v. (1921) 29 B.C.R. 213; (1921) 1 W.W.R. 677 ....489, 541
Inland Express Co. et al., B.C. Express Co. v. (1915) 21 B.C.R. 178 ...146, 253, 262, 481
Inlay Hardwood Floor Co. v. Dierssen, (1928) 39 B.C.R. 514; (1928) 2 D.L.R. 560; (1928) 1 W.W.R. 897 300
Inman v. Western Club, (1918) 25 B.C.R. 276; 40 D.L.R. 9; (1918) 2 W.W.R. 583 .. 1106
Innes v. Cameron Valley Land Co., (1919) 1 W.W.R. 751 .....122, 179, 530, 532, 745
Insinger v. Cunningham, (1923) 32 B.C.R. 518; (1923) 4 D.L.R. 1199; 3 W.W.R. 1328 .....62, 314, 504
Interior Tree Fruit & Vegetable Committee of Direction, Coleman v. (1930) 42 B.C.R. 499; (1930) 4 D.L.R. 800; (1930) 2 W.W.R. 784 .....33, 50
Interior Tree Fruit & Vegetable Committee of Direction, Lawson v. (1930) 42 B.C.R. 493; (1930) 4 D.L.R. 1027, 1034; (1930) 2 W.W.R. 23; (1930) 43 B.C.R. 199; (1930) 3 W.W.R. 186; (1931) S.C.R. 357; (1931) 2 D.L.R. 193 ....223, 230, 310, 692, 1039
International Harvester Co., Trenwith v. (1928) 2 D.L.R. 121 904
International Junk Co., Ltd., Gilchrist Mfg. Co. v. (1930) 43 B.C.R. 258; (1931) 1 D.L.R. 595; (1931) 1 W.W.R. 101 845
International Mining Syndicate, Dale v. (1917) 25 B.C.R. 1; (1917) 2 W.W.R. 1031. 714
International Mining Syndicate, Koscis v. (1917) 25 B.C.R. 1; (1917) 2 W.W.R. 1031. 714
International Motors, Ltd., Trustee v. Telford, (1921) 2 C.B.R. 314; (1924) 2 D.L.R. 528 .....101, 121, 974
International Timber Co., Field v. (1928) S.C.R. 564; (1928) 4 D.L.R. 972 700
International Timber Co., Willard v. (1918) 25 B.C.R. 210 .....45, 705
Inverarity, Deceased, Succession Duty Act and, In re ((1924) 33 B.C.R. 318; (1924) 1 D.L.R. 1020; (1924) 1 W.W.R. 901 .....230, 1031
Ioco Townsite Co., Fusarelli v. (1922) 1 W.W.R. 1238 .....327, 928
Irving and Morris v. Bucke, (1915) 21 B.C.R. 17 .....651, 890
Irwin, R. v. (1919) 27 B.C.R. 226 465
Isbell Bean Co. v. Avery, (1923) 31 B.C.R. 502; (1923) 1 D.L.R. 708; (1923) 1 W.W.R. 441 543
Isitt v. Grand Trunk Pac. Ry. Co., (1918) 26 B.C.R. 90; (1918) 3 W.W.R. 500; (1919) 59 S.C.R. 686; 49 D.L.R. 687 .....287, 1047, 1066
Isitt v. Hammond and National Resources Sec. Co., (1924) 34 B.C.R. 133; (1925) 1 W.W.R. 94 880
Isitt v. Merritt Collieries, (1920) 28 B.C.R. 62; (1920) 1 W.W.R. 879 .....711, 716
Island Amusement Co. v. Parker & Kippen, (1920) 28 B.C.R. 43; 61 D.L.R. 28; (1920) 1 W.W.R. 1015 .....500, 960
Island Amusement Co. v. Quagliotti, (1920) 28 B.C.R. 43; 61 D.L.R. 28; (1920) 1 W.W.R. 1015 .....500, 960
Israelowitz, In re (1917) 25 B.C.R. 143; 29 C.C.C. 323 .....516, 562
Ivey v. Smith, (1929) 40 B.C.R. 475 .....415, 469, 484, 513, 551
Izen, Royal Bank of Canada v. (1921) 29 B.C.R. 547; 60 D.L.R. 467; (1921) 2 W.W.R. 919 .....545, 760

J

Jack v. Nanoose Wellington Collieries, (1926) S.C.R. 495; (1926) 2 D.L.R. 164; (1925) 35 B.C.R. 295; (1925) 3 D.L.R. 398; (1925) 2 W.W.R. 267 ....423, 740
Jack v. Nanoose Wellington Collieries, (1926) 37 B.C.R. 99..... 124
Jack, R. v. (1918) 25 B.C.R. 269; 33 C.C.C. 86 352

Jackman v. Jackman, (1923) 32 B.C.R. 356; (1923) 3 D.L.R. 798; (1923) 3 W.W.R. 125 575
Jackson v. B.C. Electric Ry. Co., (1917) 24 B.C.R. 484; 38 D.L.R. 145; (1917) 3 W.W.R. 1046 ..... 817 886
Jackson, Butterfield v. (1916) 23 B.C.R. 489; (1917) 2 W.W.R. 362 ..... 322, 503
Jackson v. Shell Oil Co., (1931) 43 B.C.R. 449; (1931) 1 W.W.R. 477 ..... 257, 958
Jacobson v. Schneider, (1926) 38 B.C.R. 83; (1927) 1 D.L.R. 1006; (1927) 2 W.W.R. 257 24
Jacobson Goldberg Co. v. Livingstone, (1920) 28 B.C.R. 35 885
Jagat Singh, R. v. (1915) 21 B.C.R. 545; 28 D.L.R. 125; 32 W.L.R. 637; 9 W.W.R. 514; 25 C.C.C. 281 ..... 376, 391
James, Coutu v. (1926) 2 W.W.R. 87 712
James v. Ferris, (1931) 44 B.C.R. 522; (1932) 1 D.L.R. 472; (1932) 1 W.W.R. 250. 259
James v. Ocean Accident & Guaranty Corpn., (1921) 30 B.C.R. 207; 70 D.L.R. 576; (1921) 3 W.W.R. 55 620
James Stark & Sons, Buscombe v. (1916) 23 B.C.R. 155; 30 D.L.R. 736; 10 W.W.R. 204 ..... 409, 674
James Thomson & Sons v. Denny, (1916) 22 B.C.R. 479; (1917) 25 B.C.R. 29; 39 D.L.R. 421; (1918) 1 W.W.R. 435; 34 W.L.R. 483 ..... 49, 289, 848
Jamieson v. B.C. Amusements Co., (1930) 43 B.C.R. 317 ..... 411, 412, 827, 1057
Jang Bow Kee and Yin Shee, Canadian Credit Men's Trust Assn. v. (1922) 31 B.C.R. 40 ..... 58, 95, 98, 292
Jansen v. The "Tex," (1926) 37 B.C.R. 399; (1926) 4 D.L.R. 288; (1926) 3 W.W.R. 225; (1926) Ex. C.R. 224 ..... 9, 993
Jardine, Mosdell v. (1929) 41 B.C.R. 487; (1929) 4 D.L.R. 617; (1929) 3 W.W.R. 95 ..... 980, 1014, 1103
Jarvis v. Southard Motors, Ltd., et al. (1931) 44 B.C.R. 286; (1931) 2 W.W.R. 812. 814
Jarvis Electric Co., Trenwith v. (1929) 41 B.C.R. 328; (1929) 4 D.L.R. 400; (1929) 2 W.W.R. 489 ..... 262, 285, 481, 909
Jay Set, R. v. (1921) 30 B.C.R. 349; 66 D.L.R. 520; (1921) 3 W.W.R. 847; 36 C.C.C. 250 149
Jeffares v. Wolfenden, (1915) 21 B.C.R. 432; 31 W.L.R. 428 807
Jefferson v. Pacific Coast Co. Mines, Ltd., (1916) 31 D.L.R. 557 184
Jennings v. Can. Nor. Pac. Ry. Co., (1925) 35 B.C.R. 16, 495; (1925) 2 D.L.R. 630; (1925) 1 W.W.R. 918; 30 C.R.C. 219 ..... 66, 709, 1055
Jennison, Thaker v. (1921) 1 W.W.R. 942; 61 D.L.R. 161 439
Jenns v. Jenns, (1921) 3 W.W.R. 226 ..... 80, 238
Jensen v. Jensen, (1918) 25 B.C.R. 513 442
"Jessie Mac," The, v. The "Sea Lion," (1919) 27 B.C.R. 394, 444; 48 D.L.R. 184; 61 D.L.R. 222; (1919) 2 W.W.R. 411; (1921) 1 W.W.R. 873; 19 Ex. C.R. 78; (1920) Ex. C.R. 137 ..... 18, 162
Jeu Jang How, In re (No. 1), (1919) 27 B.C.R. 294; 47 D.L.R. 538; 31 C.C.C. 341 .. 554
Jeu Jang How, R. v. (1919) 59 S.C.R. 175; 50 D.L.R. 41; (1919) 3 W.W.R. 1115; 32 C.C.C. 103 ..... 28, 66, 556, 581, 585, 587, 1028
Jewel-Denero Mines, Ganzini v. (1915) 21 B.C.R. 317; 21 D.L.R. 406 ..... 702, 863
Jim Goon and Wong Sing, R. v. (1916) 22 B.C.R. 381; 28 D.L.R. 374; 33 W.L.R. 761; 25 C.C.C. 415 369
Joe v. Maddox, (1919-20) 27 B.C.R. 224, 541 537
Joe Go Get, Ex parte, (1929) 52 C.C.C. 95; (1930) 1 D.L.R. 420; (1930) S.C.R. 45 ..... 344, 356, 367, 554, 555, 558
Johanson, R. v. (1922) 31 B.C.R. 211; (1922) 2 W.W.R. 1105; 38 C.C.C. 60 ..... 335, 352, 923
John Hing Co. v. Sit Way, (1917) 25 B.C.R. 153; (1918) 1 W.W.R. 978 ..... 603, 849, 887, 1008
John Robertson & Sons v. Canadian Bank of Commerce, (1920) 2 W.W.R. 1003 ... . 84, 114, 187, 625
John Robertson & Sons, Ltd., v. Whitelaw, Brown and Witton, (1917) 24 B.C.R. 88. 486
Johnson, Burns v. (1917) 25 B.C.R. 35; (1918) 1 W.W.R. 180 930

Johnson, Castleman v. (1921) 30 B.C.R. 354; 70 D.L.R. 862; (1921) 3 W.W.R. 830 ....697, 925
Johnson v. Elliott, (1928) 40 B.C.R. 130; (1928) 1 D.L.R. 1000; (1928) 1 W.W.R. 390; (1928) S.C.R. 408; (1929) 1 D.L.R. 208 ....412, 571, 808
Johnson, Eva C., In re: Johnson v. Hall, (1930) 43 B.C.R. 328 592
Johnson v. McMorran, (1927) 39 B.C.R. 24; (1927) 4 D.L.R. 335; (1927) 3 W.W.R. 37 ....414, 816
Johnson, Scottish Temperance Life Assce. Co. v. (1916) 23 B.C.R. 510; 31 D.L.R. 649; (1917) 1 W.W.R. 538; (1917) 25 B.C.R. 93; (1918) 1 W.W.R. 402 ....625, 651, 753, 876
Johnston, In re (1920) 29 B.C.R. 183 ....196, 682
Johnston, Canadian Credit Men's Trust Assn. v. (1931) 44 B.C.R. 354; (1931) 4 D.L.R. 569; (1931) 3 W.W.R. 33 47
Johnston, Canadian Credit Men's Trust Assn. v. (1932) S.C.R. 219; (1932) 2 D.L.R. 462; 58 C.C.C. 1 1070
Johnston, Commercial Securities (B.C.) Ltd. v. (1931) 43 B.C.R. 381; (1931) 1 D.L.R. 861; (1931) 1 W.W.R. 420 981
Johnston v. Courtney, (1920) 2 W.W.R. 459 ....311, 946
Johnston v. Finch, (1916) 23 B.C.R. 472 422
Johnston, McLean v. (1923) 32 B.C.R. 495; (1923) 3 W.W.R. 913; (1923) 4 D.L.R. 178 ....261, 478, 740, 755, 855
Johnston v. Minister of Lands, (1919) 27 B.C.R. 257; (1919) 3 W.W.R. 81 ..732, 924, 1020
Johnston, R. v. (1931) 44 B.C.R. 367; 56 C.C.C. 358 1028
Johnston, R. N. & Co. v. Finkleman, (1926) 37 B.C.R. 95; (1926) 2 D.L.R. 425 ....419, 455, 846
Johnston v. Salmon, (1917) 36 D.L.R. 796; (1917) 2 W.W.R. 644 967
Johnston, Walker v. (1916) 23 B.C.R. 50; 34 W.L.R. 817; 10 W.W.R. 938 273
Johnston and Stolliday, Dockendorff v. (1924) 34 B.C.R. 97; (1924) 3 W.W.R. 207. 45
Johnston Brothers, Ltd., Bell v. (1917) 25 B.C.R. 82; (1918) 2 W.W.R. 549 ...806, 1110
Johnston Brothers, Ltd., Winding-up Act and, In re (1919) 26 B.C.R. 551.... 189
Johnstone, Apex Lumber Co. v. (1925) 36 B.C.R. 81; (1925) 3 D.L.R. 1050; (1925) 3 W.W.R. 360; 7 B.C.R. 157 ....29, 95, 99
Jones v. City of Vancouver, (1919) 3 W.W.R. 313; (1920) 28 B.C.R. 100, 166; 51 D.L.R. 320; (1920) 1 W.W.R. 1012; 32 C.C.C. 260 ....69, 779, 780
Jones v. Cohn and Canary, (1924) 33 B.C.R. 321 ....4, 755, 855
Jones v. Eckley, (1928) 40 B.C.R. 75; (1928) 2 D.L.R. 943 685
Jones v. Gibbons, (1928) 40 B.C.R. 65; (1929) 4 D.L.R. 1067 ....320, 593
Jones v. Pacific Stages, Ltd., (1928) S.C.R. 92; (1928) 2 D.L.R. 897 817
Jones, R. v. (1923) 32 B.C.R. 160; (1923) 2 W.W.R. 141; 40 C.C.C. 198 ....365, 560
Jones v. Ryder, (1928) 39 B.C.R. 547; (1928) 3 D.L.R. 301; (1928) 2 W.W.R. 302 ....456, 756, 874
Jones, Thos. D., Deceased, In re Estate of (1920) 28 B.C.R. 481; (1920) 3 W.W.R. 425 ....1031, 1034
Jong, R. v. (1926) 1 W.W.R. 40; 44 C.C.C. 338 365
Jordan, R. v. (1925) 35 B.C.R. 1; (1925) 2 D.L.R. 1119; 44 C.C.C. 23; (1925) 1 W.W.R. 799 ....31, 361
Jorgensen v. The "Casina," (1925) 37 B.C.R. 24; (1926) 1 D.L.R. 1193; (1926) 1 W.W.R. 632; (1926) Ex. C.R. 110 ....9, 994
Joy, R. v. (1923) 3 W.W.R. 214 ....447, 695
Judd, Park v. (1920) 28 B.C.R. 399 314
Jukes, Donald v. (1920) 28 B.C.R. 215; 54 D.L.R. 688; 60 S.C.R. 652; (1920) 2 W.W.R. 209; 56 D.L.R. 692; (1921) 2 W.W.R. 208....86, 415, 417, 508, 547
Jung, Barker v. (1919) 26 B.C.R. 352; (1919) 1 W.W.R. 13 ....828, 889
Jung Yin, In re (1921) 3 W.W.R. 194 ....559, 584
Jungo Lee, R. v. (1926) 37 B.C.R. 318; (1926) S.C.R. 652; (1927) 1 D.L.R. 721; (1926) 2 W.W.R. 734; 46 C.C.C. 92; (1927) 38 B.C.R. 313; (1927) 1 W.W.R. 578; 47 C.C.C. 255 ....364, 553, 587

Jure, Motion v. (1928) 39 B.C.R. 354; (1928) 2 D.L.R. 79 .....53, 809
Jure v. Vancouver Harbour Commissioners, (1931) 44 B.C.R. 270; (1931) 4 D.L.R. 916; (1931) 3 W.W.R. 157; 38 C.R.C. 291 803

K

Kabota, Conds v. (1925) 35 B.C.R. 506; (1925) 3 D.L.R. 376; (1925) 2 W.W.R. 620 .....336, 688
Kamloops, City of, Rainier Brewing Co. v. (1925) 2 D.L.R. 376 .....783, 1022
Kamloops Copper Co. and City of Kamloops, In re (1925) 35 B.C.R. 243; (1925) 3 D.L.R. 896; (1925) 2 W.W.R. 733; 7 C.B.R. 17 .....99, 1114
Kamloops District Creamery Association v. Perry, (1921) 56 D.L.R. 492 .....268, 599
Kamloops Sawmills, Ltd., Adams River Lbr. Co. v. (1921) 30 B.C.R. 354; 70 D.L.R. 863 133
Kamway, R. v. (1929) 3 W.W.R. 165; 52 C.C.C. 188 379
Kapoor Singh, Harnam Singh v. (1927) 39 B.C.R. 485 879
Katsuda, Hopkins v. (1926) 1 W.W.R. 598 160
Katz v. Consolidated Motor Co., (1930) 42 B.C.R. 214; (1930) 2 D.L.R. 241; (1930) 1 W.W.R. 305 .....302, 696, 806, 916
Kean, In re, v. Bird, (1927) 39 B.C.R. 169; (1927) 4 D.L.R. 561; (1927) 3 W.W.R. 369; 48 C.C.C. 363 .....34, 239, 1003, 1005
Keane v. Can. Pac. Ry. Co., (1924) 34 B.C.R. 127 932
Keane, Sellon v. (1917) 24 B.C.R. 238; (1917) 3 W.W.R. 342.....285, 319, 329
Keane v. Sellon, (1920) 28 B.C.R. 67; (1920) 2 W.W.R. 117 889
Keays v. Shell Garage, Ltd., (1920) 28 B.C.R. 527; 54 D.L.R. 265; (1920) 3 W.W.R. 859 969
Keen v. B.C. Electric Ry. Co., (1931) 44 B.C.R. 183 803
Keene v. Cooley, (1925) 36 B.C.R. 170; (1925) 4 D.L.R. 229; (1925) 3 W.W.R. 250 .....6, 675
Kehar Singh Gill, Basant Singh and Jagat Singh v. (1929) 41 B.C.R. 256; (1929) 2 W.W.R. 431; (1929) 4 D.L.R. 396 .....751, 1012
Keill & Purdy v. Hunter, (1928) 39 B.C.R. 396 .....1043, 1101
Keith, J. C., In re Estate of. In re District of North Vancouver, (1918) 1 W.W.R. 626 ..... 514, 951
Kelley, The B.C. Mills Tug & Barge Co. v. (1923) 32 B.C.R. 1; (1923) 1 D.L.R. 1015; (1923) 1 W.W.R. 597 .....990, 997
Kelly, Barron v. (1917) 24 B.C.R. 283; 37 D.L.R. 8; (1917) 3 W.W.R. 65; (1918) 26 B.C.R. 379; (1918) 3 W.W.R. 466; (1918) 56 S.C.R. 455; (1918) 2 W.W.R. 131; 41 D.L.R. 590 .....68, 313, 503, 741, 830, 1097
Kelly v. Can. Pac. Ry. Co., (1915) 22 B.C.R. 231; 25 D.L.R. 79; 32 W.L.R. 891; 9 W.W.R. 531 .....109, 117
Kelly v. Kelly, (1925) 1 W.W.R. 332 493
Kelly, Douglas & Co., Brown v. (1923) 32 B.C.R. 143; (1923) 2 D.L.R. 738; (1923) 1 W.W.R. 1340; 3 C.B.R. 812 96
Kelly, Rainey v. (1922) 3 W.W.R. 346; 69 D.L.R. 534 .....54, 565, 571, 805
Kelowna, City of, Can. Nor. Pac. Ry. Co. v. (1917) 25 B.C.R. 514; 44 D.L.R. 315; (1918) 3 W.W.R. 845 .....786, 936, 1044
Kelowna Growers Exchange v. De Gagueray, (1922) 31 B.C.R. 347; 70 D.L.R. 865; (1922) 3 W.W.R. 1115 690
Kelpon v. Stewart, (1928) 40 B.C.R. 369; (1929) 1 D.L.R. 480; (1928) 3 W.W.R. 640 .....667, 1059
Kennedy, Bank of Vancouver v. (1919) 3 W.W.R. 51 683
Kennedy, City of New Westminster v. (1918) 1 W.W.R. 489 788
Kennedy, Cross v. (1931) 2 D.L.R. 990 668
Kennedy v. Ellison, (1923) 1 D.L.R. 1069 .....126, 471, 472, 869, 1113
Kennedy v. Husband, (1923) 1 D.L.R. 1069 .....125, 126, 471, 472, 869, 1113
Kennedy v. McIntosh and Bardsin, (1927) 39 B.C.R. 161; (1927) 4 D.L.R. 747; (1927) 3 W.W.R. 315 .....24, 471

Kennedy v. Trites, Ltd., (1916) 10 W.W.R. 412 ..... 211, 325, 650
Kennedy v. Victory Land & Timber Co., (1922) 3 W.W.R. 145; 68 D.L.R. 201 904
Kenney, Griffiths v. (1917) 1 W.W.R. 800 ..... 86, 750, 757
Kent, District of, British Columbia Hop Co. v. (1926) 35 B.C.R. 380; (1925) 3 D.L.R. 171; (1925) 2 W.W.R. 31 ..... 449, 460, 567, 769, 944
Kent Piano Co., Bennett v. (1921) 29 B.C.R. 465 ..... 980, 1067
Kent, Pilkington v. (1918) 25 B.C.R. 432; (1918) 3 W.W.R. 584 1110
Kent, v. Regem, (1924) S.C.R. 388; (1924) 4 D.L.R. 77 ..... 1025, 1040
Kenworthy v. Bishop, (1925) 36 B.C.R. 38; (1925) 3 W.W.R. 183 1117
Keremeos Land Co. v. McTavish et al., (1925) 1 D.L.R. 897 ..... 241, 252
Kerlin, Miller v. (1923) 33 B.C.R. 140 35
Kerr v. Motorcar Loan Co., (1930) 2 W.W.R. 367 978
Kerr, R. v. (1921) 29 B.C.R. 522; 59 D.L.R. 627; (1921) 2 W.W.R. 561 634
Kerr v. Stephen, (1930) 42 B.C.R. 518; (1930) 2 D.L.R. 978; (1930) 1 W.W.R. 896. 808
Kerr, Wise v. (1925) 35 B.C.R. 161; (1925) 1 W.W.R. 849 916
Kerschner v. Convention of Baptist Churches, (1930) 43 B.C.R. 4; (1930) 4 D.L.R. 135; (1930) 2 W.W.R. 280 750
Kersey, Boyd & Elgie v. (1927) 38 B.C.R. 342; (1927) 2 D.L.R. 679; (1926) 2 W.W.R. 816; (1927) 1 W.W.R. 665 ..... 537, 539
Ketchen v. The King, (1926) 37 B.C.R. 479; (1927) 39 B.C.R. 11; (1926) 3 W.W.R. 767; (1927) 3 W.W.R. 152 732
Kettle Valley Ry. Co., Gavin v. (No. 1), (1918) 26 B.C.R. 30; 58 S.C.R. 501; 43 D.L.R. 47; 47 D.L.R. 65; (1918) 1 W.W.R. 251; (1918) 3 W.W.R. 385; (1919) 2 W.W.R. 611; 23 C.R.C. 379 ..... 67, 286, 818, 834
Kettle Valley Ry. Co., Gavin v. (No. 2), (1921) 29 B.C.R. 195; 56 D.L.R. 572; (1921) 1 W.W.R. 488 ..... 288, 660, 837
Key v. B.C. Electric Ry. Co., (1930) 43 B.C.R. 288; (1931) 1 D.L.R. 532; (1931) 3 D.L.R. 587; (1930) 3 W.W.R. 569; 38 C.R.C. 278; (1932) S.C.R. 106 ..... 413, 818, 836
Keyes, George, In re Estate of (1928) 40 B.C.R. 19; (1928) 3 D.L.R. 558; (1928) 2 W.W.R. 295 1127
Keyes v. Grant, (1928) 40 B.C.R. 19; (1928) 3 D.L.R. 558; (1928) 2 W.W.R. 295. 1127
Keystone Logging & Mercantile Co., Wilson v. (1918) 25 B.C.R. 569; 52 D.L.R. 678; 59 S.C.R. 685 ..... 408, 1070
Kidston v. Stirling & Pitcairn, (1920) 28 B.C.R. 306; 53 D.L.R. 29; 61 S.C.R. 193; 55 D.L.R. 366; (1920) 2 W.W.R. 862; (1920) 3 W.W.R. 365; (1921) 1 W.W.R. 162 ..... 261, 308, 477, 693, 958, 1012
Kilby v. Municipality of Point Grey, (1917) 24 B.C.R. 107; (1917) 2 W.W.R. 206 ..... 407, 680, 766, 1066
Killam & Beck, In re (1916) 23 B.C.R. 442; 32 D.L.R. 387; (1917) 1 W.W.R. 529. 1003
Killick, Hamilton v. (1920) 28 B.C.R. 418; 61 D.L.R. 213 ..... 669, 671
Killick, Hansen v. (1925) 35 B.C.R. 108; (1925) 3 D.L.R. 433; (1925) 1 W.W.R. 375 ..... 91, 472
Kilmartin, R. v. (1923) 33 B.C.R. 151; (1924) 1 W.W.R. 107 ..... 355, 357, 558
Kilpatrick v. Kilpatrick (1929) 42 B.C.R. 88; (1930) 1 D.L.R. 288; (1929) 3 W.W.R. 463 ..... 213, 436, 592
"Kiltuish," The, Barnet Lighterage Co. v. (1922) 31 B.C.R. 319; 21 Ex. C.R. 398; 67 D.L.R. 525; (1922) 2 W.W.R. 959 163
"Kiltuish," The, B.W.B. Navigation Co. v. (1922) 31 B.C.R. 319; (1922) 2 W.W.R. 959; 67 D.L.R. 525; 21 Ex. C.R. 398 ..... 163, 262, 480
Kinder v. Macmillan, (1919) 26 B.C.R. 576; (1919) 2 W.W.R. 248 80
King v. King, (1925) 35 B.C.R. 556; (1925) 3 D.L.R. 872; (1925) 2 W.W.R. 641 .. 438
King v. Lanchick, (1922) 31 B.C.R. 193; 67 D.L.R. 692; (1922) 2 W.W.R. 1018 .. 496, 535
King, Shannon v. (1931) 44 B.C.R. 383; (1931) 4 D.L.R. 438; (1931) 2 W.W.R. 913 ..... 427, 867
Kingsley Navigation Co., Royal Exchange Corpn. v. (1923) A.C. 235; 92 L.J.P.C. 111; 128 L.T. 673; 16 Asp. M.C. 44; 67 Sol. Jo. 296; (1923) 1 D.L.R. 1048; (1923) 1 W.W.R. 737 ..... 143, 472

Kinman v. Bank of Vancouver et al., (1916) 22 B.C.R. 414; 28 D.L.R. 507; 10 W.W.R. 517 107
Kinman, McLennan v. (1916) 22 B.C.R. 414; 28 D.L.R. 507; 10 W.W.R. 517 107
Kinnee v. B.C. Electric Ry. Co., (1917) 1 W.W.R. 1190 571
Kinnie and Kinnie, Steves v. (1917) 24 B.C.R. 130; 33 D.L.R. 776; (1917) 1 W.W.R. 1250 .....793, 996
Kinnon, R. v. (1925) 35 B.C.R. 531 699
Kipp, Federal Mortgage Corpn. and, In re (1917) 24 B.C.R. 12..... 196
Kipp v. Simpson, (1928) 40 B.C.R. 248; (1928) 4 D.L.R. 421; (1928) 3 W.W.R. 331 .....126, 421, 865
Kirk, Allan v. (1917) 24 B.C.R. 153; (1917) 2 W.W.R. 527 1068
Kirk & Co., Holmes v. (1920) 28 B.C.R. 122; 53 D.L.R. 53; (1920) 1 W.W.R. 1037 .....468, 805, 806
Kissell, R. v. (1930) 1 W.W.R. 941 635
Kitchin v. The King, (1922) 30 B.C.R. 421; 63 D.L.R. 425; (1922) 1 W.W.R. 697... 723
Kizo Furuzawa, R. v. (1930) 42 B.C.R. 541, 548; (1930) 1 W.W.R. 953, 955; 53 C.C.C. 398 .....352, 476
Kline, Fraser Valley Delta Co-op. Assn. v. (1925) 36 B.C.R. 22; (1925) 3 D.L.R. 1203 831
Klinkhammer, Lanning, Fawcett & Wilson v. (1916) 23 B.C.R. 84; 35 D.L.R. 611 ... 534
Kloepfer, Hoag v. (1918) 26 B.C.R. 181; (1918) 3 W.W.R. 633 .....263, 1087
Knight, Miller v. (1925) 36 B.C.R. 362; (1926) 1 D.L.R. 764 1055
Knox v. Hall, (1926) 38 B.C.R. 78; (1928) S.C.R. 87; (1928) 1 D.L.R. 193.....38, 276
Knudsen, McDonald v. (1928) 40 B.C.R. 25; (1928) 3 D.L.R. 242; (1928) 2 W.W.R. 577 .....127, 449, 944, 1086
Knudson, O'Brien v. (1919) 27 B.C.R. 492; 48 D.L.R. 447; (1919) 3 W.W.R. 480 .. ..270, 422, 749
"Kobe," The, Beck v. (1915) 22 B.C.R. 169; 17 Ex. C.R. 215; 32 W.L.R. 351; 9 W.W.R. 89, 351; 24 D.L.R. 573..... 9, 994
Kogos, Parker v. (1925) S.C.R. 513; (1925) 3 D.L.R. 337 1091
Komnick System Sandstone Brick Co. v. B.C. Pressed Brick Co., (1918) 26 B.C.R. 191; 56 S.C.R. 539; 41 D.L.R. 423; (1918) 2 W.W.R. 564; (1919) 1 W.W.R. 645; (1921) 1 W.W.R. 207 .....187, 274, 952
Komnick System Sandstone Brick Machinery Co. v. Morrison, (1920) 28 B.C.R. 207; (1921) 1 W.W.R. 207 .....52, 528, 952
Kong Yick, R. v. (1918) 25 B.C.R. 269; 33 C.C.C. 86 352
Koop v. Smith, (1915) 51 S.C.R. 554; 25 D.L.R. 355; 8 W.W.R. 1203 529
Kory, In re Traders Trust and (1916) 26 D.L.R. 41; 33 W.L.R. 352; 9 W.W.R. 538. 173
Koscis v. International Mining Syndicate, (1917) 25 B.C.R. 1; (1917) 2 W.W.R. 1031 714
Kracovsky, Welch v. (1919) 27 B.C.R. 170; (1919) 3 W.W.R. 361 433
Kramer, R. ex rel., Cline v. (1920) 29 B.C.R. 132; 36 C.C.C. 236 .....351, 1020
Krom, Rydstrom v. (1915) 21 B.C.R. 254; 21 D.L.R. 118; 31 W.L.R. 7; 8 W.W.R. 1290 .....22, 291
Kunhardt v. Cox and Quaille: In re Parshalle, (1930) 42 B.C.R. 413; (1930) 1 W.W.R. 767; (1930) 3 D.L.R. 438; 43 B.C.R. 68; (1930) 3 D.L.R. 1004; (1930) 2 W.W.R. 802 .....430, 432, 452, 759
Kurek, Dempsey v. (1923) 3 W.W.R. 1007 .....83, 1141
Kwong Tai Chong Co., In re (1922) 65 D.L.R. 132; (1922) 2 W.W.R. 229; 3 C.B.R. 1 95
Kwong Yick Tai, R. v. (1915) 21 B.C.R. 127; 22 D.L.R. 323; 8 W.W.R. 808; 24 C.C.C. 28 .....26, 150, 326
Kyle v. Taylor, (1926) 38 B.C.R. 72; (1927) 1 D.L.R. 777; (1927) 1 W.W.R. 466 .. 46
Kynoch v. Bank of Montreal, (1923) 3 D.L.R. 877; (1923) 3 W.W.R. 161.....668, 1057

L

LaDreche, Carr v. (1927) 38 B.C.R. 97; (1927) 2 D.L.R. 480; (1927) 1 W.W.R. 574 .....908, 1081

Ladysmith School Trustees, Duncan v. (1930) 43 B.C.R. 154; (1931) 1 D.L.R. 176; (1930) 3 W.W.R. 175 ....2, 681, 986
Lai Cow et al., R. v. (1921) 30 B.C.R. 277; (1921) 3 W.W.R. 268 151
Laing Estate, In re (1927) 38 B.C.R. 449; (1927) 1 W.W.R. 699 1132
Laird, Hendry v. (1919) 27 B.C.R. 217; (1919) 2 W.W.R. 341; (1920) 28 B.C.R. 445; (1920) 3 W.W.R. 421 120
Laird v. Laird, (1920) 28 B.C.R. 255; 51 D.L.R. 642; (1920) 3 W.W.R. 1 ..28, 496, 628
Laird v. Laird, (1927) 38 B.C.R. 297 437
Lake, Anderson v. (1928) 40 B.C.R. 189; (1928) 4 D.L.R. 220; (1928) 3 W.W.R. 136 .... 859, 910
Lake of the Woods Milling Co. v. Gold, (1925) 34 B.C.R. 481; (1925) 1 D.L.R. 778; (1925) 1 W.W.R. 386 ....460, 971
Lake of the Woods Milling Co. v. Vincent, (1928) 2 D.L.R. 145 ....261, 479
Lakeside Orchards, Ltd., R. v. (1929) 1 W.W.R. 870; 51 C.C.C. 182 ...125, 126, 764, 1113
Lalonde, Heron v. (1915) 22 B.C.R. 180; 24 D.L.R. 851; 9 W.W.R. 440; 32 W.L.R. 861; (1916) 53 S.C.R. 503; 31 D.L.R. 151; 10 W.W.R. 1241 ....422, 1046
Lambert and Vance, General Casualty Ins. Co. v. (1930) 43 B.C.R. 133; (1930) 3 D.L.R. 1007; (1930) 2 W.W.R. 548 ....616, 737
Lam Joy, R. v. (1920) 28 B.C.R. 253; (1920) 2 W.W.R. 1006 ....155, 295
Lancaster, Clarkson and Home Bank of Canada v. (1926) 38 B.C.R. 217 ....85, 112
Lancaster v. Vancouver Log Co., (1919) 27 B.C.R. 3 81
Lancaster v. Vaughan, 1923) 33 B.C.R. 159 320
Lancaster v. Vaughan (No. 2), (1924) 33 B.C.R. 440 594
Lanchick, King v. (1922) 31 B.C.R. 193; 67 D.L.R. 692; (1922) 2 W.W.R. 1018 ..496, 535
Lanchick, Safety Storage & Warehousing Co. v. (1922) 31 B.C.R. 193; 67 D.L.R. 692; (1922) 2 W.W.R. 1018 ....496, 535
Land Registry Act, In re (1917) 1 W.W.R. 667 941
Land Registry Act, In re: B.C. Land & Invst. Agency v. Waldron Apartments, (1929) 41 B.C.R. 74; (1929) 3 D.L.R. 723; (1929) 1 W.W.R. 739 ....451, 759
Land Registry Act, In re: In re Mandeville et al., (1917) 24 B.C.R. 137; 36 D.L.R. 292; (1917) 1 W.W.R. 1522 .... 499, 941, 951
Land Registry Act, In re: Morrison & Pollard v. Taylor, (1926) 37 B.C.R. 324; (1926) 2 W.W.R. 371 949
Land Registry Act, Re: Lomis v. Abbott, (1915) 22 B.C.R. 330; 25 D.L.R. 759; 33 W.L.R. 347; 9 W.W.R. 676 328
Land Registry Act and Anthony, In re (1916) 22 B.C.R. 535; 10 W.W.R. 863 ....509, 948, 1072, 1137
Land Registry Act and Blanchard and Morgan, In re (1919) 26 B.C.R. 447; 44 D.L.R. 728; (1919) 1 W.W.R. 311 1128
Land Registry Act and Bull Estate, In re (1926) 3 W.W.R. 263; 7 C.B.R. 729 ..98, 954
Land Registry Act and Canadian Explosives, In re (1918) 1 W.W.R. 399; 39 D.L.R. 764 ....929, 949
Land Registry Act and Clancy, In re (1915) 21 B.C.R. 1; 25 D.L.R. 536 953
Land Registry Act and Clazy, Deceased, In re (1928) 40 B.C.R. 102; (1928) 2 D.L.R. 971; (1928) 1 W.W.R. 974 .... 506, 1119
Land Registry Act and Granby Cons. Mng., Etc., Co., In re (1918) 26 B.C.R. 297 ....41, 47, 48
Land Registry Act and Granby Cons. Mng., Etc., Co. v. Esquimalt & Nanaimo Ry. Co., (1920) A.C. 172; 88 L.J.P.C. 199; 122 L.T. 199; 48 D.L.R. 279; (1919) 3 W.W.R. 331; (1918) 25 B.C.R. 531; 41 D.L.R. 335; (1918) 2 W.W.R. 626 .. 952
Land Registry Act and Higginson, In re (1923) 33 B.C.R. 29, 232; (1923) 3 W.W.R. 925; (1923) 4 D.L.R. 439; (1924) S.C.R. 207; (1924) 2 D.L.R. 649 ....65, 1031
Land Registry Act and Prefontaine, In re (1917) 1 W.W.R. 667....509, 947
Land Registry Act and Scottish Temperance Life Assce. Co., In re (1919) 26 B.C.R. 504; (1919) 2 W.W.R. 125 ....295, 928, 954
Land Registry Act and Shaw, In re (1915) 22 B.C.R. 116; 24 D.L.R. 429; 32 W.L.R. 85; 8 W.W.R. 1270 ....900, 950, 953, 1082

Land Registry Act and Smith, In re (1917) 23 B.C.R. 547; (1917) 1 W.W.R. 332; 31 D.L.R. 702 ....1017, 1108
Land Registry Act and Standard Trust Co., In re (1916) 22 B.C.R. 538; 10 W.W.R. 877 ....750, 949
Land Registry Act and Studd, In re (1916) 22 B.C.R. 507; 28 D.L.R. 354; 34 W.L.R. 466; 10 W.W.R. 634 ....179, 420, 950
Land Registry Act, War Relief Act and, In re (1916) 23 B.C.R. 255; 30 D.L.R. 278; 10 W.W.R. 1329 ....948, 1106
Land Settlement Board, Rattenbury v. (1928) 39 B.C.R. 523; (1928) 3 D.L.R. 382; (1928) 2 W.W.R. 475 (1929) S.C.R. 52; (1929) 1 D.L.R. 242 ....6, 235, 925
Land Settlement Board, Sinclair v. (1925) 35 B.C.R. 434; (1925) 2 D.L.R. 1050 ... 241
Lane, Hall v. (No. 1), (1923) 31 B.C.R. 507; (1923) 1 D.L.R. 903; (1923) 1 W.W.R. 545 695
Lane, Hall v. (No. 2), (1923) 32 B.C.R. 343; (1923) 2 D.L.R. 1151; (1923) 2 W.W.R. 442 ....60, 292
Lang, B.C. Bond Corpn. and, In re (1931) 43 B.C.R. 481; (1931) 2 D.L.R. 985; (1931) 1 W.W.R. 286; 12 C.B.R. 213 ....100, 179
Langan, Parker v. (1920) 28 B.C.R. 3 316
Langan, Port Coquitlam v. (1917) 2 W.W.R. 208; 33 D.L.R. 175 ....784, 789
Langan v. Simpson, (1919) 27 B.C.R. 504 ....42, 48, 1001
Langer, McTavish Bros. v. (1929) 41 B.C.R. 363; (1929) 4 D.L.R. 465 ....660, 838
Langley v. Hammond, (1915) 21 B.C.R. 175; 22 D.L.R. 42 ....469, 739, 1091
30 W.L.R. 741; 8 W.W.R. 52 ....489, 513
Langs & Roddis, Clarke v. (1926) 37 B.C.R. 77 ....186, 243
Lanning, Fawcett & Wilson v. Klinkhammer, (1916) 23 B.C.R. 84; 35 D.L.R. 611 .. 534
Larbonne v. Shore, (1928) 39 B.C.R. 508; (1928) 2 D.L.R. 977; (1928) 2 W.W.R. 8 ....548, 551, 946
Larsen, National Surety Co. v. (1929) 42 B.C.R. 1; (1929) 4 D.L.R. 918; (1929) 3 W.W.R. 299 ....209, 266, 745
Larsen, Peter et al., Pacific Great Eastern Ry. Co. and, In re (1915) 22 B.C.R. 4; 8 W.W.R. 1, 630 ....74, 205, 206
Larsen v. The Gas Boat, (1923) 31 B.C.R. 558; (1923) Ex. C.R. 104; (1923) 2 D.L.R. 281; (1923) 1 W.W.R. 958 983
Larson, Deceased, In re (1923) 33 B.C.R. 161; (1924) 1 W.W.R. 35 430
Larson v. Montgomery, (1930) 43 B.C.R. 89; (1930) 3 D.L.R. 966; (1930) 2 W.W.R. 796 ....455, 489, 728, 929
Larue v. Royal Bank of Canada, (1926) S.C.R. 218; 7 C.B.R. 285; (1926) 2 D.L.R. 929 100
Latimer v. B.C. College of Physicians and Surgeons, (1931) 3 D.L.R. 304; 55 C.C.C. 132 719
Latta, Robertson v. (1915) 21 B.C.R. 597 46
Lauriente, R. v. (1928) 3 W.W.R. 265 ....31, 386
Law Society of B.C. v. Stewart, (1928) 40 B.C.R. 401; (1928) 4 D.L.R. 572 ....328, 839
Law Society of B.C. and Hagel, In re (1922) 31 B.C.R. 75 ....114, 688
Lawson v. Interior Tree Fruit & Vegetable Committee of Direction, (1930) 42 B.C.R. 493; 43 B.C.R. 199; (1930) 4 D.L.R. 1027, 1034; (1930) 2 W.W.R. 23; (1930) 3 W.W.R. 186 (1931) S.C.R. 357; (1931) 2 D.L.R. 193 ...223, 230, 310, 692, 1039
Lawson, Wallace v. (1919) 2 W.W.R. 408 428
Lawson and Gyles, Thomas v. (1927) 39 B.C.R. 1; (1927) 3 D.L.R. 1126; (1927) 2 W.W.R. 662 ....6, 903
Layfield et al., McIntosh v. (1919) 26 B.C.R. 574; (1919) 1 W.W.R. 590....72, 259
Leahy, R. v. (1920) 28 B.C.R. 151; 61 D.L.R. 333; (1920) 2 W.W.R. 95; 35 C.C.C. 358 ....152, 361
Leary v. Commissioners for Nakusp Dev. Dist., (1930) 1 W.W.R. 97 ....412, 774, 792, 793, 799, 821
Leask, Matson v. (1919) 2 W.W.R. 59 ....295, 927
LeBus & Co., E., Vancouver Island Coach Lines, Ltd., v. (1931) 44 B.C.R. 102; (1931) 3 D.L.R. 811; (1931) 2 W.W.R. 337 825

Lechtzier v. Lechtzier, (1931) 43 B.C.R. 423; (1931) 1 D.L.R. 1004; (1931) 1 W.W.R. 425 ....413, 762, 809
Ledingham v. Merchants Bank of Canada, (1917) 24 B.C.R. 207; (1917) 2 W.W.R. 1016; 35 D.L.R. 191 ....84, 258, 263, 463
Ledingham and Ledingham v. Skinner and Cox, (1915) 21 B.C.R. 41; 21 D.L.R. 300; 30 W.L.R. 741; 8 W.W.R. 52 ....489, 513
Lee v. Manning, (1919) 27 B.C.R. 216 878
Lee Bak Bong, Wright v. (1924) 34 B.C.R. 122; (1924) 4 D.L.R. 317; (1924) 2 W.W.R. 1186 .... 318, 321
Lee Cheong, Deceased, In re (1923) 33 B.C.R. 109; (1924) 1 W.W.R. 753; (1924) 1 D.L.R. 1166 ....214, 580, 1034, 1124
Lee Chow Ying, Chinese Immigration Act and, In re (1928) 39 B.C.R. 322; 49 C.C.C. 168 ....553, 586
Lee Chow Ying, Immigration Act and, In re (1927) 38 B.C.R. 241; (1927) 1 W.W.R. 527; 47 C.C.C. 203 582
Lee Duck, R. v. (1919) 27 B.C.R. 482; (1920) 1 W.W.R. 1051 ....335, 638
Lee Dye v. Eliot, (1920) 29 B.C.R. 103; 55 D.L.R. 622; (1921) 1 W.W.R. 785 ... 1103
Lee Foon, R. v. (1927) 39 B.C.R. 298; (1928) 1 W.W.R. 747; 49 C.C.C. 233 347
Lee Hing Leong, R. v. (1923) 33 B.C.R. 158 ....42, 555
Lee Hoy, R. v. (1922) 31 B.C.R. 123; 40 C.C.C. 102 341
Lee Kam Way, R. v. (1927) 3 W.W.R. 143; 49 C.C.C. 314 ....379, 636
Lee Kim et al., R. v. (1930) 42 B.C.R. 360; (1930) 2 W.W.R. 441; 53 C.C.C. 252 ....344, 371, 373, 400
Lee Mong Kow and Chetham v. The Registrar-General of Titles, (1923) 32 B.C.R. 148; (1923) 2 W.W.R. 545 953
Lee Moon Koo, R. v. (1931) 43 B.C.R. 458; (1931) 1 W.W.R. 571; 55 C.C.C. 188 ....559, 588
Lee Quong Kip, In re (1919) 27 B.C.R. 459; (1920) 1 W.W.R. 23 317
Lee, R. v. (1925) 35 B.C.R. 401; (1925) 2 W.W.R. 190; 45 C.C.C. 280 368
Lee, R. v. (1926) 37 B.C.R. 397; (1926) 3 W.W.R. 264 560
Lee Park, R. v. (1923) 33 B.C.R. 158; (1924) 34 B.C.R. 251; (1924) 4 D.L.R. 883; (1924) 3 W.W.R. 490 ....42, 555, 586
Lee Sheck Yew v. The Atty.-Gen. for B.C., (1923) 33 B.C.R. 109; (1924) 1 W.W.R. 753; (1924) 1 D.L.R. 1166 ....214, 580, 1034, 1124
Lee Sow, R. v. (1922) 31 B.C.R. 161; 66 D.L.R. 146; (1922) 2 W.W.R. 208; 37 C.C.C. 196 369
Lee Tan, R. v. (1920) 28 B.C.R. 49; 61 D.L.R. 516; (1920) 3 W.W.R. 792; 35 C.C.C. 377 381
Lee & Rutherford v. Canadian Puget Sound Lbr. Co., (1924) 34 B.C.R. 557 960
Leeming, Esquimalt Water Works Co. v. (No. 1), (1930) 42 B.C.R. 163; (1930) 2 D.L.R. 37; (1930) 1 W.W.R. 401 1042
Leeming, Esquimalt Water Works Co. v. (No. 2), (1930) 43 B.C.R. 251; (1931) 1 D.L.R. 615; (1931) 1 W.W.R. 148 1042
Lees, Walker v. (1918) 25 B.C.R. 511; (1918) 3 W.W.R. 586 577
Leeson, Paisley v. (1920) 28 B.C.R. 18, 363; (1920) 1 W.W.R. 479; 2 W.W.R. 511 .. 133
Lefeaux & Carlisle v. Pac. Great Eastern Ry. Co., (1919) 27 B.C.R. 420; 67 D.L.R. 792 ....207, 217
Lefevre v. Andrews, (1931) 44 B.C.R. 516; (1932) 1 D.L.R. 805; (1932) 1 W.W.R. 122 902
Lefroy, Best v. (1922) 67 D.L.R. 455 ....571, 806
Legal Professions Act, In re: Noble & St. John v. Bromiley, (1928) 39 B.C.R. 518; (1928) 2 D.L.R. 605; (1928) 1 W.W.R. 899 308
Legal Professions Act, In re Sec. 100 of the: Re Constitutional Questions Determination Act, (1927) 39 B.C.R. 83; (1927) 4 D.L.R. 195; (1927) 2 W.W.R. 808; 48 C.C.C. 278 ....228, 266, 331, 1006
Legal Professions Act and A. E. Beck, a Solicitor, In re (1925) 36 B.C.R. 76; (1925) 3 W.W.R. 64 ....1001, 1007

Legal Professions Act and Alfred Hall, In re (1917) 24 B.C.R. 226 115
Legal Professions Act and Barnard, Robertson, Heisterman & Tait, In re (1926) 37 B.C.R. 161; (1926) 3 W.W.R. 63 1006
Legg v. Parcells, (1925) 3 D.L.R. 1121 1100
Leigh & Cuthbertson, D'Orio v. (1929) 41 B.C.R. 153; (1929) 2 W.W.R. 171 ....265, 341, 959
Leighton, Cotton v. (1917) 24 B.C.R. 253 .....288, 930
Leiser & Co. v. Can. Pac. Timber & Logging Co., (1920) 1 W.W.R. 735..... 543
Leitch, Hogue v.: The Royal Bank of Canada, Garnishee, (1915) 22 B.C.R. 10 ..321, 536
Leland Hotel Co., Way v. (1927) 3 W.W.R. 224; (1928) 2 D.L.R. 235 .....1058, 1059
Lennie, Campbell v. (1927) 38 B.C.R. 422; (1927) 2 W.W.R. 306 657
"Leonor," The, (1916) 3 P. Cas. 91; (1917) 3 W.W.R. 861.....8, 324, 919
Lerik v. Zaferis, (1929) 41 B.C.R. 526; (1930) 1 D.L.R. 634; (1929) 3 W.W.R. 422 .....267, 600, 848, 1052
Leslie v. Clark & Buzza, (1928) 40 B.C.R. 441; (1929) 1 D.L.R. 903; (1930) 42 B.C.R. 391; (1930) 3 D.L.R. 369; (1930) 1 W.W.R. 513 ...595, 809, 817, 862, 1050
Letchford and Saltmarsh, Gauthier v. (1920) 28 B.C.R. 232; (1920) 2 W.W.R. 111. 243
Letvinoff, Alexander v. (1918) 26 B.C.R. 324; (1919) 2 W.W.R. 808 .....260, 479
Level, Louis, Deceased, In re Estate of (1926) 38 B.C.R. 211; (1927) 1 D.L.R. 900; (1927) 1 W.W.R. 1000 .....510, 1078
Levin, Skelding et al. v. (1916) 23 B.C.R. 47 332
Levy v. Lechtzier, (1931) 43 B.C.R. 423; (1931) 1 D.L.R. 1004; (1931) 1 W.W.R. 425 .....413, 762, 809
Lew v. Wing Lee, (1924) 33 B.C.R. 271; 34 B.C.R. 277; (1924) 1 W.W.R. 744; (1924) 3 W.W.R. 394; (1924) 4 D.L.R. 578; (1924) S.C.R. 612; (1925) 1 D.L.R. 179; (1925) A.C. 819; 94 L.J.P.C. 161; 133 L.T. 578; (1925) 3 D.L.R. 1009; (1925) 3 W.W.R. 49; (1925) 37 B.C.R. 81; (1926) 1 D.L.R. 678..... .....5, 64, 402, 504, 658, 829, 839
Lew Hing Loy, R. v. (1926) 38 B.C.R. 109; (1926) 2 W.W.R. 543; 46 C.C.C. 75 ... 345
Lewis, Alberta North West Lbr. Co. v. (1917) 24 B.C.R. 564; 38 D.L.R. 228; (1917) 3 W.W.R. 1007 1096
Lewis, Foulger v. (1917) 24 B.C.R. 556; (1917) 3 W.W.R. 1015 733
Lewis, R. v. (1918) 35 B.C.R. 442 640
Lewis, Scovil v. (1926) 37 B.C.R. 241; (1926) 2 W.W.R. 468 .....320, 653
Licence Commissioners of Point Grey, R. v. (1915) 26 D.L.R. 75; 32 W.L.R. 360; 8 W.W.R. 1072 629
Liddington, R. v. (1923) 32 B.C.R. 334; (1923) 2 W.W.R. 655; 40 C.C.C. 80 347
Liden, Bishop v. (1929) 40 B.C.R. 556; (1929) 1 D.L.R. 998; (1929) 1 W.W.R. 402. 25
Liden, R. v. (1922) 31 B.C.R. 126; 39 C.C.C. 369 .....150, 155, 296, 640
Li Din v. Chow Toy Dong, (1923) 32 B.C.R. 296; (1923) 3 D.L.R. 957; (1923) 2 W.W.R. 799 .....502, 989
Lilja v. Granby Consolidated Mining, Etc., Co., (1915) 21 B.C.R. 384; 8 W.W.R. 690; 9 W.W.R. 662; (1916) 23 B.C.R. 147; 31 D.L.R. 591; (1917) 1 W.W.R. 243 .....702, 705, 837
Limb v. Stewart, (1929) 2 D.L.R. 349 808
Lim Cooie Foo, R. v. (1930) 43 B.C.R. 54; (1931) 1 W.W.R. 233; 54 C.C.C. 383 ... 583
Lim Gim, R. v. (1928) 39 B.C.R. 457; (1928) 1 D.L.R. 1038; 49 C.C.C. 255 399
Lim Jim v. McRae, (1918) 1 W.W.R. 404 .....633, 956
Lindeborg, Harris v. (1931) S.C.R. 235; (1931) 1 D.L.R. 945; (1930) 42 B.C.R. 276; (1930) 2 D.L.R. 117; (1930) 1 W.W.R. 411 .. ...450, 626, 729, 1073, 1082
Lindley v. Vassar, (1918) 25 B.C.R. 219; (1918) 1 W.W.R. 879 757
Linnell v. Reid, (1923) 32 B.C.R. 87; (1923) 2 D.L.R. 445; (1923) S.C.R. 594; (1923) 3 D.L.R. 966; (1923) 3 W.W.R. 422 .....126, 829, 943, 1058
Lister v. Burns & Co., (1931) 43 B.C.R. 468; (1931) 3 D.L.R. 105; 55 C.C.C. 197 .....264, 696
Little v. Atty.-Gen. for B.C., (1921) 30 B.C.R. 343; 60 D.L.R. 335; (1921) 3 W.W.R. 625; (1922) 31 B.C.R. 84; 65 D.L.R. 297; 37 C.C.C. 189; (1922) 2 W.W.R. 359 229

Little v. Hill, (1916) 23 B.C.R. 321; 30 D.L.R. 483 753
Little, R. v. (1915) 10 W.W.R. 893; 27 C.C.C. 422 359
Littridge, In re (1927) 3 D.L.R. 250 1033
Livesley et al., Horst v. (1923) 34 B.C.R. 19; (1923) 2 W.W.R. 987; (1924) 2 W.W.R. 443; (1924) S.C.R. 605; (1924) 2 D.L.R. 1002; (1925) 1 D.L.R. 159 .....208, 251, 960
Livingston, Deceased, In re (1922) 31 B.C.R. 468; (1923) 1 D.L.R. 1167; (1923) 1 W.W.R. 628 1134
Livingstone, Jacobson Goldberg Co. v. (1920) 28 B.C.R. 35 885
Lloyd, Denny v. (1922) 31 B.C.R. 435; (1922) 3 W.W.R. 896 .....291, 866
Lloyd v. Hannafin, (1931) 43 B.C.R. 401; (1931) 2 D.L.R. 1000; (1931) 1 W.W.R. 415 .....572, 811
Loane v. Hastings Shingle Mfg. Co. and Black, (1925) 35 B.C.R. 485; (1925) 3 D.L.R. 940 .....34, 71, 658
Local International Alliance Theatrical Stage Employees, Schuberg v. (1927) 38 B.C.R. 130; (1927) 2 D.L.R. 20; (1927) 1 W.W.R. 548; 47 C.C.C. 213; (1926) 37 B.C.R. 284; (1926) 3 D.L.R. 166; (1926) 2 W.W.R. 254 1065
Lochead v B.C. Electric Ry. Co., (1920) 28 B.C.R. 453; 54 D.L.R. 254; (1920) 3 W.W.R. 417 .....135, 801
Lockwood v. National Surety Co., (1915) 21 B.C.R. 249; 22 B.C.R. 306 .....867, 888
Loewen v. Duncan, (1921) 30 B.C.R. 295; 62 D.L.R. 152; (1922) 2 W.W.R. 1131 .. 1098
Logan v. Granby Consolidated Mining, Etc., Co., (1916) 23 B.C.R. 188; 30 D.L.R. 623; (1917) 1 W.W.R. 230 880
Logan, Shipway v. (1915) 21 B.C.R. 595 36
Logan, Shipway v. (1916) 22 B.C.R. 410 .....38, 61, 315, 324
Lomis v. Abbot: In re Land Registry Act, (1915) 22 B.C.R. 330; 25 D.L.R. 759; 33 W.L.R. 347; 9 W.W.R. 676 328
London Guarantee & Accident Co. v. Davidson, (1925) 36 B.C.R. 301; (1926) 1 D.L.R. 66; (1926) 1 W.W.R. 148 .....211, 455, 548
London & Lancashire Guaranty & Acc. Co., McFarland v. (1926) 37 B.C.R. 373; (1926) 3 D.L.R. 974; (1926) 3 W.W.R. 290; (1928) S.C.R. 57; (1927) 3 D.L.R. 67 198
Long Kee, R. v. (1918) 26 B.C.R. 78; 31 C.C.C. 217 340
Loo Len (No. 1), In re (1923) 33 B.C.R. 448; (1924) 1 D.L.R. 909; (1924) 1 W.W.R. 733; 41 C.C.C. 386 554
Loo Len, R. v. (No. 2), (1923) 33 B.C.R. 213; (1924) 1 D.L.R. 910; (1924) 1 W.W.R. 735; 41 C.C.C. 388 .....550, 553
Loo Yip Yen, R. v. (1929) 42 B.C.R. 377; (1930) 1 W.W.R. 351; 53 C.C.C. 38 ..152, 362
Lore Yip, R. v. (1928) 39 B.C.R. 310; (1928) 3 D.L.R. 226; (1928) 1 W.W.R. 487; 49 C.C.C. 392 228
Louie Cheu, R. v.: 34 B.C.R. 177; (1924) 4 D.L.R. 300; 42 C.C.C. 382 355
Louie Fong, R. v. (1923) 32 B.C.R. 238 341
Love, Bayley v. (1924) 34 B.C.R. 195; (1924) 3 D.L.R. 1093; (1924) 3 W.W.R. 155 796
Loverock v. Webb, (1921) 30 B.C.R. 327; 70 D.L.R. 748 .....125, 1068
Low Chung, R. v. (1919) 27 B.C.R. 469 776
Low Hong Hing, In re (1926) 37 B.C.R. 295; (1926) 3 D.L.R. 692; (1926) 2 W.W.R. 597; 46 C.C.C. 65 .....154, 586
Low Quong, R. v. (1924) 33 B.C.R. 522; (1924) 3 D.L.R. 666; (1924) 2 W.W.R. 695; 42 C.C.C. 300 .....153, 400, 556
Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Ltd., (1931) 44 B.C.R. 508; (1931) 3 W.W.R. 384; (1932) 45 B.C.R. 191; (1932) 2 D.L.R. 277; (1932) 2 W.W.R. 41; 102 L.J.P.C. 17; 49 T.L.R. 104; 148 L.T. 300; (1932) 3 W.W.R. 639; (1933) A.C. 168; (1933) 1 D.L.R. 82 .....231, 1039
Loy Way, R. v. (1920) 61 D.L.R. 201; 35 C.C.C. 384; (1921) 1 W.W.R. 690 336
Lubotina, Atwood v. (1928) 40 B.C.R. 446 816
Lucas v. Ministerial Union, (1916) 23 B.C.R. 257; 31 D.L.R. 200 .....428, 833
Luchetta, Deceased, In re (1919) 27 B.C.R. 337; (1919) 2 W.W.R. 885 507

Lumsden v. Pacific Steamship Co., (1920) 28 B.C.R. 473; 54 D.L.R. 226; (1920) 3 W.W.R. 464 145
Lund, Hazell v. (1915) 22 B.C.R. 264; 25 D.L.R. 204; 32 W.L.R. 818; (1915) 9 W.W.R. 749 ..... 82, 712, 715 985
Lund and Hazell v. Vancouver Exhibition Assn., (1915) 22 B.C.R. 258; 25 D.L.R. 863; 32 W.L.R. 845; 9 W.W.R. 556 ..... 128, 402
Lunn, Sophia, Deceased, In re Estate of (1925) 35 B.C.R. 411; (1925) 2 W.W.R. 608. 1034
Lustig, Prince Rupert Dev. Syndicate v. (1919) 26 B.C.R. 497; (1919) 1 W.W.R. 496 ..... 1102, 1104
Luthmer v. Hammer and Luthmer, (1929) 41 B.C.R. 55; (1929) 3 D.L.R. 273; (1929) 2 W.W.R. 130 815
Lutz v. Can. Puget Sound Lbr. Co., (1920) 28 B.C.R. 39 867
Lyall Shipbuilding Co. v. Van Hemelryck, (1919) 27 B.C.R. 240, 446; (1919) 2 W.W.R. 551; (1919) 3 W.W.R. 317; (1919-20) 28 B.C.R. 196; 52 D.L.R. 670; (1920) 2 W.W.R. 360; (1921) 1 A.C. 698; 90 L.J.P.C. 96; 125 L.T. 133; 58 D.L.R. 48; (1921) 1 W.W.R. 926 873
Lyall Shipbuilding Co., Thorndyke-Trenholme Co., Inc., v. (1920) 29 B.C.R. 376; 59 D.L.R. 490; (1921) 2 W.W.R. 244; 3 W.W.R. 333 903
Lyell v. Cormack et ux., (1928) 40 B.C.R. 345; (1928) 4 D.L.R. 902; (1928) 3 W.W.R. 284 ..... 250, 1011, 1084
Lymburn and Frawley, Mayland & Mercury Oils, Ltd., v. (1932) A.C. 318; 101 L.J.P.C. 89; 146 L.T. 458; 48 T.L.R. 231; (1932) 2 D.L.R. 6; (1932) 1 W.W.R. 578; 57 C.C.C. 311 229
Lynch, R. v. (1927) 38 B.C.R. 124; (1927) 1 W.W.R. 502; 47 C.C.C. 176 356
Lyon and Lyon v. Morgan and Northwest Trust Co., (1916) 22 B.C.R. 511; 34 W.L.R. 485; 10 W.W.R. 630; (1917) 2 W.W.R. 224 74
Lyons v. Nicola Valley Pine Lbr. Co., (1916) 23 B.C.R. 141; 31 D.L.R. 133; (1917) 1 W.W.R. 237 704

M

"Maagen," The, City of New Westminster v. (1915) 21 B.C.R. 97; 21 D.L.R. 73 ..160, 998
Mabee Maclaren Motors, Ltd., McCannell v. (1926) 36 B.C.R. 369; (1926) 1 W.W.R. 353; (1926) 1 D.L.R. 282 ..... 252, 898
Mac & Mac Cedar Co., Morse v. (1918) 25 B.C.R. 417; (1918) 2 W.W.R. 205 ..... 242, 260, 272, 404, 478
Macaulay, Nicolls, Maitland & Co. v. Bell-Irving, (1931) S.C.R. 276; (1931) 1 D.L.R. 381 910
Macdonald v. Bank of Vancouver, (1915) 22 B.C.R. 310; 25 D.L.R. 567; 32 W.L.R. 339; 9 W.W.R. 8 ..... 110, 170, 458, 475
Macdonald v. Hartley, (1918) 3 W.W.R. 910 711
Macdonald, Higgins v. (1928) 40 B.C.R. 150; 50 C.C.C. 353; (1928) 4 D.L.R. 241; (1928) 3 W.W.R. 115 988
Macdonald v. Pacific Great Eastern Ry. Co., (1922) 68 D.L.R. 124 54
Macdonald, A. & Co. v. Fletcher and Fletcher, (1915) 22 B.C.R. 298 543
MacDonald Bros. Engineering Works v. Godson, (1916) 23 B.C.R. 166; 31 D.L.R. 363; 33 W.L.R. 392; (1917) 1 W.W.R. 233 175
Macdonald-Buchanan v. Vernon Fruit Union, (1926) 36 B.C.R. 307; (1926) 1 W.W.R. 413; (1926) 1 D.L.R. 748 ..... 72, 251
Macdonald Murphy Lumber Co. v. Atty.-Gen. for B.C., (1929) 41 B.C.R. 473; (1929) 4 D.L.R. 954; (1929) 2 W.W.R. 529; (1930) A.C. 357; 99 L.J.P.C. 113; 143 L.T. 1; 46 T.L.R. 266; (1930) 2 D.L.R. 721; (1930) 1 W.W.R. 830 ..... 230, 1039
MacDonald, Roberts v. (1916) 23 B.C.R. 542 172
Macdonald, W. L. & Co. v. Casein, Ltd., (1917) 24 B.C.R. 218; 35 D.L.R. 443; (1917) 2 W.W.R. 1132; (1918) 26 B.C.R. 204; (1919) 1 W.W.R. 293 ..... 406, 598, 896, 911, 918
MacGill v. Holmes, (1927) 39 B.C.R. 65 808

MacGregor, Ure v. (1923) 32 B.C.R. 122; (1923) 3 D.L.R. 1025; (1923) 2 W.W.R. 415 1138
Machray, Dominion Trust Co. and, In re (1916) 23 B.C.R. 401; 26 D.L.R. 408; 32 D.L.R. 63; (1917) 1 W.W.R. 618 173
MacInnes v. Cartwright & Crickmore, (1930) 43 B.C.R. 265; (1931) 1 D.L.R. 572; (1931) 1 W.W.R. 81; (1931) S.C.R. 425; (1931) 3 D.L.R. 693 900
MacInnes v. Daly: Gwynn, Garnishee, (1921) 30 B.C.R. 20; 60 D.L.R. 365; (1921) 2 W.W.R. 869; 2 C.B.R. 23 193
MacInnes & Arnold, Gow v. (1923) 33 B.C.R. 1; (1923) 4 D.L.R. 1012; (1923) 3 W.W.R. 828 .....911, 1004
Mack v. Royal Bank of Canada, (1932) S.C.R. 488; (1932) 1 D.L.R. 753 .....109, 913
Mackay v. Atty.-Gen. of B.C., (1922) 63 D.L.R. 171; (1922) 1 A.C. 457; 91 L.J.P.C. 193; 127 L.T. 81; (1922) 1 W.W.R. 982 1012
MacKay, City of Victoria v. (1917) 25 B.C.R. 23; 39 D.L.R. 450; (1918) 1 W.W.R. 863; (1918) 56 S.C.R. 524; 41 D.L.R. 498; (1918) 2 W.W.R. 610 ....776, 1019, 1021, 1025
Mackay, N. F., Public Works Acts and, In re (1921) 30 B.C.R. 1; 58 D.L.R. 332; (1921) 2 W.W.R. 821; (1922) 1 A.C. 457; 91 L.J.P.C. 193; 127 L.T. 81; 63 D.L.R. 171; (1922) 1 W.W.R. 982 .....71, 924, 1082
MacKee v. Solloway, Mills & Co., (1930) 42 B.C.R. 438; (1930) 3 D.L.R. 145; (1930) 1 W.W.R. 563 533
MacKee v. Solloway, Mills & Co. (No. 2), (1931) 44 B.C.R. 42; (1931) 2 D.L.R. 822; (1931) 1 W.W.R. 624 880
MacKee v. Solloway, Mills & Co. (No. 3), (1931) 44 B.C.R. 401; (1931) 4 D.L.R. 417; (1931) 2 W.W.R. 926 .....4, 892
Mackenzie v. B.C. Electric Ry. Co., (1915) 21 B.C.R. 375; 8 W.W.R. 956..... 837
Mackenzie, Mann & Co., In re (1915) 22 B.C.R. 15 .....30, 1045
Mackenzie v. Prince John Mining Co., (1924) 34 B.C.R. 193; (1924) 4 D.L.R. 221; (1924) 3 W.W.R. 168 .....181, 316
MacKenzie, Robert Porter & Sons v. (1926) 37 B.C.R. 287 756
Mackey v. Mackey and Magur, (1929) 42 B.C.R. 63; (1929) 4 D.L.R. 658 603
Mackey v. Mackey and Magur (No. 2), (1930) 42 B.C.R. 440; (1930) 3 D.L.R. 497; (1930) 1 W.W.R. 604 .....442, 527, 579, 648, 650
Mackintosh, Taylor v. (1924) 33 B.C.R. 383; 34 B.C.R. 56; (1924) 1 D.L.R. 877; (1924) 3 D.L.R. 926; (1924) 1 W.W.R. 859; (1924) 3 W.W.R. 97; 42 C.C.C. 327 .....228, 266, 1006
MacLure v. General Accident Assce. Co., (1925) 35 B.C.R. 33; (1925) 3 D.L.R. 133; (1925) 2 W.W.R. 145 617
Maclure and Houghton, Meldram v. (1916) 23 B.C.R. 176 512
Macmillan, Kinder v. (1919) 26 B.C.R. 576; (1919) 2 W.W.R. 248 80
Macrae, Sunder Singh v. (1922) 31 B.C.R. 67; 65 D.L.R. 392; (1922) 2 W.W.R. 392 .....42, 1002
MacVicar, Quebec Fire Ins. Co. v. (1916) 22 B.C.R. 448; 27 D.L.R. 720 750
Maddison v. Bain, (1930) S.C.R. 299; (1930) 1 D.L.R. 63; (1929) 40 B.C.R. 499; (1929) 1 D.L.R. 843; (1929) 1 W.W.R. 437; (1928) 39 B.C.R. 460; (1928) 3 D.L.R. 33 .....52, 269, 653, 699, 742, 858, 916
Maddox, Joe v. (1919-20) 27 B.C.R. 224, 541 537
Magee, Hugh, In re Estate of (1925) 36 B.C.R. 195..... 1124
"Maggie," The, Morrissette v. (1916) 22 B.C.R. 424, 476; 16 Ex. C.R. 494, 498; 34 W.L.R. 39, 120; 10 W.W.R. 21, 224, 228; 27 D.L.R. 464, 466..9, 10, 304, 994, 995
Magnolo, R. v. (1915) 22 B.C.R. 359; (1917) 32 D.L.R. 510; 26 C.C.C. 419 ....349, 488
Mah Fung, R. v. (1931) 43 B.C.R. 187; 54 C.C.C. 374 588
Mah Hon Hing, R. v. (1920) 28 B.C.R. 431; 53 D.L.R. 356; (1920) 3 W.W.R. 314; 33 C.C.C. 195 .....331, 374, 382, 397
Mahler v. Barker, (1924) 34 B.C.R. 136; (1924) 3 D.L.R. 292; (1924) 2 W.W.R. 796 .....247, 1083
Mah Poy, R. v. (1930) 42 B.C.R. 360; (1930) 2 W.W.R. 441; 53 C.C.C. 252 ....344, 371, 373

Mahrer v. Fechner, (1920) 27 B.C.R. 545 754
Mah Shin Shong, Immigration Act and, In re (1923) 32 B.C.R. 176; (1923) 4 D.L.R. 844; (1923) 1 W.W.R. 1365; 39 C.C.C. 401 .....29, 556, 559, 585
Mah Ten, North American Loan Co. v. (1922) 31 B.C.R. 133 538
Mainland Portland Cement Co., In re (1927) 38 B.C.R. 417; (1927) 2 D.L.R. 742 .....103, 1100
Mainland Potato Committee of Direction v. Tom Yee, (1931) 43 B.C.R. 453; (1931) 1 D.L.R. 990; (1931) 1 W.W.R. 529 .....36, 496, 693
Mainland Transfer Co., Wand v. (1919) 27 B.C.R. 340; (1919) 3 W.W.R. 193 .....55, 286, 401, 411, 659
Mair v. Duncan Lumber Co., (1927) 39 B.C.R. 260; (1928) 1 W.W.R. 108, 431 35
Mair v. Duncan Lumber Co. (No. 2), (1928) 39 B.C.R. 399; (1928) 1 W.W.R. 431. 307
Makins Produce Co. v. Canadian Australasian Royal Mail Line, (1926) 36 B.C.R. 462; (1926) 1 D.L.R. 1053; (1926) 1 W.W.R. 635; (1927) 1 D.L.R. 97; (1927) 1 W.W.R. 206 .....54, 139, 146
Malcolm v. Western Canada Magic Silver, Etc., Fur Co., (1929) 41 B.C.R. 305; (1929) 4 D.L.R. 580 .....698, 736
Male Minimum Wage Board and Davenport, Merryfield & Dack v. (1931) 44 B.C.R. 380 .....30, 701
Maliska, R. v. (1919) 27 B.C.R. 111; (1919) 2 W.W.R. 378 .....371, 644
Malkin, The W. H. Co., Crossley v. (1923) 32 B.C.R. 207; (1923) 3 D.L.R. 1189; (1923) 1 W.W.R. 1348 .....416, 846, 912
Malkin, The W. H. Co. v. Sherman, (1925) 35 B.C.R. 445 .....55, 547
Malkin, The W. H. Co., Wood v. (1928) 40 B.C.R. 255; (1928) 4 D.L.R. 511; (1928) 2 W.W.R. 674 .....71-2, 75, 77, 831, 968
Maltby v. B.C. Electric Ry. Co., (1920) 28 B.C.R. 156; 60 D.L.R. 680; (1920) 2 W.W.R. 543 819
Mandeville and Land Registry Act, In re (1917) 24 B.C.R. 137; 36 D.L.R. 292; (1917) 1 W.W.R. 1522 .....499, 941, 951
Manitoba Grain Co., Vitomen Cereal, Ltd., v. (1928) 40 B.C.R. 321; (1928) 4 D.L.R. 440 165
Manning, Lee v. (1919) 27 B.C.R. 216 878
Manning v. Nickerson, (1927) 38 B.C.R. 535; (1927) 3 D.L.R. 728; (1927) 2 W.W.R. 623; (1928) S.C.R. 91; (1928) 3 D.L.R. 494 .....353, 685, 1069
Manson v. Prince Rupert Dry Dock & Eng. Co., (1920) 28 B.C.R. 58; (1920) 2 W.W.R. 10 176
Maple Crispette Co. v. National Brokerage, (1919) 27 B.C.R. 501; (1920) 1 W.W.R. 332 .....329, 920
"Maple Leaf," The, Eriksen v. (1922) 31 B.C.R. 443; (1923) 4 D.L.R. 1201; (1923) 1 W.W.R. 76; (1923) Ex. C.R. 39 .....10, 14
Maple Ridge, District of, v. Western Power Co., (1926) 37 B.C.R. 252; (1926) 2 D.L.R. 525 775
Marchiori v. Fewster, (1921) 30 B.C.R. 251; (1921) 3 W.W.R. 388; (1922) 63 S.C.R. 342; 69 D.L.R. 351 322
Marcus & Dimor, Burns & Co. v. (1931) 43 B.C.R. 517; (1931) 2 D.L.R. 1004; (1931) 1 W.W.R. 169 846
Mariacher v. Gray, (1918) 26 B.C.R. 332; (1919) 1 W.W.R. 505 1110
Marino and Crisofi, R. v. (1927) 38 B.C.R. 452; (1927) 2 W.W.R. 468; 47 C.C.C. 348 .....364, 557
Marino and Yipp, R. v. (1931) 44 B.C.R. 265; (1931) S.C.R. 482; (1931) 4 D.L.R. 530; 56 C.C.C. 136 372
Mariott v. Martin, (1915) 21 B.C.R. 161; 21 D.L.R. 463; 30 W.L.R. 899; 7 W.W.R. 1291 .....406, 1003
Maritime Fish Corpn., Royal Fish Co. v. (1915) 9 W.W.R. 169 965
Maritime Motor Car Co., B.C. Independent Undertakers v. (1917) 24 B.C.R. 300, 305; 35 D.L.R. 551; (1917) 3 W.W.R. 22 ..... 44, 972, 976
Maritime Motor Car Co. v. McPhalen, (1919) 27 B.C.R. 244; (1920) 28 B.C.R. 168; (1919) 2 W.W.R. 811; (1920) 2 W.W.R. 213 .....82, 421, 477, 546, 550, 955

Maritime Trust Co. v. Alcock, (1916) 22 B.C.R. 399 194
Maritime Trust Co. v. Burns, (1915) 22 B.C.R. 177; 32 W.L.R. 442; 9 W.W.R. 167. 189
Mark, Continental Guaranty Corpn of Canada v. (1926) 37 B.C.R. 453; (1926) 4 D.L.R. 707; (1926) 3 W.W.R. 428 .....595, 736, 1049
Marks, R. ex rel., Robinson v. (1918) 26 B.C.R. 73; 31 C.C.C. 257 354
Marriage Act and Eaton, In re (1921) 30 B.C.R. 243; (1922) 1 W.W.R. 236 581
Marsh v. Simpson, (1928) 40 B.C.R. 114; (1928) 1 W.W.R. 956 979
Marshall v. Can. Pac. Lbr. Co., (1921) 30 B.C.R. 270; 61 D.L.R. 268; (1921) 3 W.W.R. 209; (1922) 63 S.C.R. 352; 65 D.L.R. 461; (1922) 2 W.W.R. 266.... 1085
Marshall v. Can. Pac. Lbr. Co., (1922) 31 B.C.R. 363; 63 D.L.R. 352; 69 D.L.R. 521; (1922) 3 W.W.R. 1105 .....654, 890
Marshall v. Can. Pac. Lbr. Co., (1923) 2 D.L.R. 356 945
Marshall v. Hutton, (1928) 2 W.W.R. 33 522
Marshall, R. v. (1915) 31 W.L.R. 702; 24 C.C.C. 180 386
Marshall v. Wawanesa Mutual Insurance Co., (1924) 33 B.C.R. 404; (1924) 2 D.L.R. 419; (1924) 2 W.W.R. 270 608-9
Marston v. The Minnekahda Land Co., (1918) 25 B.C.R. 372; 40 D.L.R. 76; (1918) 2 W.W.R. 471 .....27, 188, 189
Martin, Canadian Bank of Commerce v. (1917) 24 B.C.R. 381; 40 D.L.R. 155; (1918) 1 W.W.R. 395 .....197, 551
Martin, Finlayson v. (1921) 29 B.C.R. 305; 57 D.L.R. 423 758
Martin, Marriott v. (1915) 21 B.C.R. 161; 21 D.L.R. 463; 30 W.L.R. 899; 7 W.W.R. 1291 .....406, 1003
Martin v. The "Sea Foam," (1921) 30 B.C.R. 398; 68 D.L.R. 750; (1922) 2 W.W.R. 1181; 21 Ex. C.R. 395 .....10, 14
Martin, Wyllie v. (1931) 44 B.C.R. 486; (1931) 3 W.W.R. 465 .....212, 436
Martinson, R. v. (1919) 3 W.W.R. 896 386
Martyn, Evans v. (1926) 37 B.C.R. 231; (1926) 2 D.L.R. 698 426
Martyn, Hodgkinson v. (1928) 40 B.C.R. 434; (1929) 1 D.L.R. 367; (1928) 3 W.W.R. 763 .....290, 407
"Mary C. Fisher," The, R. v. (1929) 41 B.C.R. 461; (1929) 4 D.L.R. 679; (1929) Ex. C.R. 207; 52 C.C.C. 273 .....13, 1000
Mason, Maude, Deceased, In re Estate of (1916) 23 B.C.R. 329; 31 D.L.R. 305; (1917) 1 W.W.R. 329 .....430, 684
Mason v. City of Victoria, (1918) 26 B.C.R. 418; (1919) 1 W.W.R. 562 778
Mason, Smith v. (1921) 30 B.C.R. 174; 60 D.L.R. 258; (1921) 2 W.W.R. 614 ..667, 1059
Mather & Noble, Ltd., v. Diamond Vale Supply Co., (1918) 25 B.C.R. 446; (1918) 3 W.W.R. 581 314
Matheson v. Thynne, (1925) 34 B.C.R. 541; (1925) 1 D.L.R. 936; (1925) 1 W.W.R. 703; (1926) 36 B.C.R. 376; (1926) 2 D.L.R. 157; (1926) 1 W.W.R. 645 ..1071, 1092
Mathews, Doig v. (1915) 22 B.C.R. 352; 25 D.L.R. 732; 33 W.L.R. 275; 9 W.W.R. 487 174
Matson v. Leask, (1919) 2 W.W.R. 59 .....295, 927
Matsubayashi, Grant v. (1922) 31 B.C.R. 375; 70 D.L.R. 553; (1922) 3 W.W.R. 679 .....416, 846
Matte v. City of Vancouver, (1917) 2 W.W.R. 53 .....73, 293
Mattern v. Welch, (1929) 42 B.C.R. 111; (1930) 2 D.L.R. 231; (1930) 1 W.W.R. 398. 673
Matthew, Bell-Irving v. (1916) 31 D.L.R. 240 734
Matthew, Guardian Assce. Co. v. (1918) 25 B.C.R. 353; 58 S.C.R. 47; 40 D.L.R. 455; 45 D.L.R. 32; (1918) 2 W.W.R. 405; (1919) 1 W.W.R. 67 .....165, 607, 922
Mattice v. Mattice, (1925) 34 B.C.R. 474; (1925) 1 D.L.R. 755; (1925) 2 W.W.R. 203 .....489, 513, 678, 1076
Matuso v. Wallace Shipyards, (1919) 27 B.C.R. 247; (1919) 2 W.W.R. 549 316
Maunsell v. Campbell Security Fireproof, Etc., Co., (1921) 29 B.C.R. 424; 60 D.L.R. 128; (1921) 2 W.W.R. 348, 579 93
Mauvais v. Tervo, (1915) 22 B.C.R. 207; 25 D.L.R. 192; 9 W.W.R. 434; 32 W.L.R. 811 1095
Maxson, R. ex rel. v. Dobbin, (1929) 3 W.W.R. 176; 52 C.C.C. 342 .....24, 335

May, Chassy v. (1921) 68 D.L.R. 427; (1922) 2 W.W.R. 225; (1920) 29 B.C.R. 83; (1921) 1 W.W.R. 69 ....210, 455, 721, 729
May, Chassy v. (1925) 35 B.C.R. 113; (1925) 2 W.W.R. 199 721
May v. Imperial Oil Co., (1931) 44 B.C.R. 175; (1931) 4 D.L.R. 304; (1931) 3 W.W.R. 40 307
May, R. v. (1915) 21 B.C.R. 23; 21 D.L.R. 728; 7 W.W.R. 1261; 30 W.L.R. 488; 23 C.C.C. 469 ....390, 491
May v. Roberts, (1929) 41 B.C.R. 182; (1929) 3 D.L.R. 370; (1929) 2 W.W.R. 449 ....38, 210, 892
"May," The, v. The King, (1931) S.C.R. 374; (1931) 3 D.L.R. 15 ....14, 225, 524
Mayall, R. v. (1926) 37 B.C.R. 211; 45 C.C.C. 366 337
Mayland and Mercury Oils, Ltd., v. Lymburn and Frawley, (1932) A.C. 318; 101 L.J.P.C. 89; 146 L.T. 458; 48 T.L.R. 231; (1932) 2 D.L.R. 6; (1932) 1 W.W.R. 578; 57 C.C.C. 311 229
Mayor, Etc., of Vancouver, B.C. Mills Timber & Trading Co. v. (1926) 39 B.C.R. 481; (1926) 2 D.L.R. 990; (1926) 2 W.W.R. 84 ....30, 327, 784
Mayo Singh, Coates v. (1925) 36 B.C.R. 270; (1925) 4 D.L.R. 345; (1925) 3 W.W.R. 513 521
Mazur, Campbell v. (1915) 24 D.L.R. 893; 32 W.L.R. 439 745
McAdam, Mary Ann, In re (1925) 35 B.C.R. 547; (1925) 4 D.L.R. 33, 138; (1925) 2 W.W.R. 593 ....214, 593, 1136
McAdam, R. v. (1925) 35 B.C.R. 168; (1925) 4 D.L.R. 33; (1925) 3 W.W.R. 257; 44 C.C.C. 155 ....28, 228, 556
McAdam, R. v. (1927) 39 B.C.R. 101; 50 C.C.C. 31 926
McAllister v. Bell Lumber & Pole Co., (1931) 3 W.W.R. 767 ....706, 708
McArthur & Co. v. Fagan and Mutual Life Ins. Co., (1928) 39 B.C.R. 554; (1928) 2 D.L.R. 875; (1928) 2 W.W.R. 6 716
McAusland & Spence, Carlin & Strickland v. (1921) 30 B.C.R. 351; 70 D.L.R. 769 ....270, 971
McAvity, T. & Sons v. Walsh, (1927) 1 W.W.R. 242 714
McBride, Municipal Act and, In re (1927) 38 B.C.R. 431 784
McBride v. South Vancouver, (1924) 34 B.C.R. 81; (1924) 4 D.L.R. 201; (1924) 3 W.W.R. 124 783
McCabe, Painter v. (1927) 39 B.C.R. 249; (1928) 2 D.L.R. 13; (1928) 1 W.W.R. 149 ....47, 591, 829
McCallum v. Toronto General Trusts Corpn., (1930) 43 B.C.R. 342; (1931) 4 D.L.R. 926; 43 B.C.R. 31; (1931) 1 D.L.R. 271 ....449, 509
McCannell v. Mabee Maclaren Motors, Ltd., (1926) 36 B.C.R. 369; (1926) 1 W.W.R. 353; (1926) 1 D.L.R. 282 ....252, 898
McClure, Pye v. (1915) 21 B.C.R. 115; 22 D.L.R. 543; 8 W.W.R. 538 ....23, 92, 471
McClymont, McDonnell v. (1915) 22 B.C.R. 1; 8 W.W.R. 990 1088
McCormick, George, Deceased, In re (1915) 22 B.C.R. 327; 25 D.L.R. 735; 9 W.W.R. 199; 33 W.L.R. 190 ....508, 1072, 1137
McCoubrey v. The National Life Assce. Co., (1926) 36 B.C.R. 428; (1926) S.C.R. 277; (1926) 2 D.L.R. 550 613
McCoy v. National Life Assce. Co., (1918) 57 S.C.R. 29; 42 D.L.R. 21; (1918) 2 W.W.R. 591; (1919) 58 S.C.R. 306; (1919) 1 W.W.R. 823 607
McCoy v. Trethewey, (1929) 41 B.C.R. 295; (1929) 4 D.L.R. 240; (1929) 3 W.W.R. 381 ....53, 491
McCoy and Brown, R. v. (1924) 34 B.C.R. 14 358
McCrimmon v. B.C. Electric Ry. Co., (1915) 22 B.C.R. 76; 24 D.L.R. 368; 32 W.L.R. 81; 8 W.W.R. 1289; 19 C.R.C. 329 ....602, 678, 797, 934, 940
McCrossan, Standard Bank of Canada v. (1919-20) 28 B.C.R. 291; (1920) 2 W.W.R. 546; 60 S.C.R. 655; 55 D.L.R. 238; (1920) 3 W.W.R. 846 ....113, 478, 550, 863
McCulloch, Ballantyne v. (1927) 39 B.C.R. 97; (1927) 4 D.L.R. 525; (1927) 3 W.W.R. 148 ....497, 682, 989
McDermott v. Walker, (1930) 42 B.C.R. 354; (1930) 2 D.L.R. 413; (1930) 1 W.W.R. 332, 845 305

McDermott v. Walker, (1931) S.C.R. 94; (1931) 1 D.L.R. 662 1136
McDonald v. Brunette Sawmill Co., (1922) 31 B.C.R. 77; (1922) 1 W.W.R. 1163 .....1015, 1141
McDonald v. Knudsen, (1928) 40 B.C.R. 25; (1928) 3 D.L.R. 242; (1928) 2 W.W.R. 577 .....127, 449, 944, 1086
McDonald, R. v. (1927) 38 B.C.R. 298; (1927) 1 W.W.R. 867; 48 C.C.C. 208 640
McDonald v. Royal Bank of Canada, (1929) 41 B.C.R. 450 .....108, 913
McDonald, Shaw v. (1921) 29 B.C.R. 230; (1921) 1 W.W.R. 498; 56 D.L.R. 354 .....657, 988
McDonald v. Weir, (1925) 34 B.C.R. 502; (1925) 3 D.L.R. 70; (1925) 1 W.W.R. 937 .....56, 807-8, 826, 828, 836
McDonnell v. McClymont, (1915) 22 B.C.R. 1; 8 W.W.R. 990 1088
McDougall, Border Line Transportation Co. v. (1916) 22 B.C.R. 496; 28 D.L.R. 42; 16 Ex. C.R. 319; 34 W.L.R. 123; 10 W.W.R. 230 .....19, 159, 465, 467
McDowell, Braid v. (1919) 27 B.C.R. 423; (1919) 3 W.W.R. 596 758
McDuffee, Mt. Pleasant Undertaking Co. v. (1923) 33 B.C.R. 36; (1923) 4 D.L.R. 1200; (1923) 3 W.W.R. 957 512
McFadden, Corporation of Saanich v. (1923) 32 B.C.R. 221; (1923) 1 D.L.R. 1170; (1923) 3 D.L.R. 171; (1923) 2 W.W.R. 429 .....564, 567, 771
McFarland v. London & Lancashire Guar. & Acc. Co., (1926) 37 B.C.R. 373; (1926) 3 D.L.R. 974; (1926) 3 W.W.R. 290; (1927) 3 D.L.R. 67; (1928) S.C.R. 57.. 198
McFarlane v. Balment, R. ex rel., (1915) 8 W.W.R. 111 .....447, 933
McFeely v. B.C. Electric Ry. Co., (1917) 24 B.C.R. 385; 37 D.L.R. 686; (1918) 3 W.W.R. 15 .....216, 309
McFetridge v. Can. Pac. Ry. Co., (1926) 36 B.C.R. 314; (1926) 1 D.L.R. 757; 37 B.C.R. 387; (1926) 4 D.L.R. 30; (1926) 3 W.W.R. 279 .....659, 823
McGee v Clark, (1927) 38 B.C.R. 156; (1927) 1 W.W.R. 593 724
McGee v. Pooley, (1931) 44 B.C.R. 338; (1931) 4 D.L.R. 475; (1931) 3 W.W.R. 65, 140 .....229, 597
McGeer, McGeer & Wilson v. Fletcher, (1929) 41 B.C.R. 437; (1929) 4 D.L.R. 348; (1929) 2 W.W.R. 500 1008
McGivern, Suffern v. (1923) 32 B.C.R. 542; (1923) 4 D.L.R. 541; (1923) 3 W.W.R. 817 .....806, 826
McGregor, Johnston & Thomas, Ltd., Fraser v. (1922) 31 B.C.R. 306 118
McIlwee v. Foley Bros., (1915) 22 B.C.R. 38; 27 D.L.R. 196; 33 W.L.R. 278, 928; 10 W.W.R. 5 .....275, 403
McIlwee v. Foley Bros., (1917) 24 B.C.R. 1 .....539, 891
McIlwee & Sons v. Foley Bros., (1917) 24 B.C.R. 532; (1918) 1 W.W.R. 222..39, 49, 132
McIlwee, Foley Bros. v. (1918) 44 D.L.R. 5; (1919) 1 W.W.R. 403 .....57, 487
McInnes, Brown v. (1927) 38 B.C.R. 324; (1927) 2 D.L.R. 655; (1927) 1 W.W.R. 597 .....435, 440
McInnis v. Gray, (1930) 3 D.L.R. 337 .....129, 1092, 1102
McIntosh v. Layfield et al., (1919) 26 B.C.R. 574; (1919) 1 W.W.R. 590 .....72, 259
McIntosh and Bardsin, Kennedy v. (1927) 39 B.C.R. 161; (1927) 4 D.L.R. 747; (1927) 3 W.W.R. 315 .....24, 471
McIntyre v. Comox Logging & Ry. Co., (1924) 33 B.C.R. 504; (1924) 2 W.W.R. 118. 523
McIntyre v. Haynes, (1925) 35 B.C.R. 40; (1925) 2 D.L.R. 546; (1925) 1 W.W.R. 881 .....471, 677, 869
McIntyre v. McIntyre, (1925) 2 W.W.R. 581 .....808, 887
McIntyre v. Thompson, (1928) 1 W.W.R. 907 .....519, 666
McKay and City of Vancouver, In re (1917) 24 B.C.R. 298; (1917) 3 W.W.R. 447 .....687, 763, 780
McKay, David, Deceased, In re Estate of (1927) 39 B.C.R. 51 430
McKay v. Drysdale, (1921) 30 B.C.R. 81; 60 D.L.R. 458; (1921) 2 W.W.R. 592 ... .466, 708, 813, 856
McKee v. Philip, (1916) 55 S.C.R. 286; 38 D.L.R. 731; (1917) 1 W.W.R. 690 ..897, 912
McKelvie, Tedlock v. (1929) 41 B.C.R. 446; (1929) 4 D.L.R. 691 .....413, 825

McKenzie, Bing Kee v. (1919) 26 B.C.R. 509; (1919) 2 W.W.R. 172; 47 D.L.R. 43; (1919) 3 W.W.R. 221; 48 D.L.R. 287 ....424, 942
McKenzie v. Bremner, (1926) 37 B.C.R. 128; (1926) 2 D.L.R. 96 ....849, 865
McKenzie, Clark v. (1929-30) 42 B.C.R. 71, 449; (1930) 2 D.L.R. 843; (1930) 1 W.W.R. 67, 785 ....126, 600, 1067
McKenzie, Montgomery v. (1923) 32 B.C.R. 232 ....289, 468, 1049
McKenzie, R. v. (1921) 29 B.C.R. 513; 60 D.L.R. 163; (1921) 2 W.W.R. 627; 36 C.C.C. 70 643
McKercher, Car Owners, Ltd., v. (1922) 31 B.C.R. 257; 67 D.L.R. 626 ....669, 671
McKercher v. Vancouver-Iowa Shingle Co., (1929) 41 B.C.R. 252; (1929) 4 D.L.R. 231; (1929) 2 W.W.R. 287 850
McKinlay v. Mutual Life Assce. Co., (1918) 26 B.C.R. 5; 43 D.L.R. 259; (1918) 3 W.W.R. 1002 ....667, 1060
McKinney, Hemphill and Cuckow v. (1915) 21 B.C.R. 561; 27 D.L.R. 345; 33 W.L.R. 688 ....443, 796, 1024
McKinnon v. Coast Timber & Trading Co., (1921) 61 D.L.R. 128 256
McKinnon and McKillop v. Campbell River Lumber Co. (No. 2), (1922) 30 B.C.R. 471; 31 B.C.R. 18; 66 D.L.R. 266; (1922) 2 W.W.R. 549, 556; (1922) 3 W.W.R. 1069; (1922) 64 S.C.R. 396; (1923) 1 D.L.R. 29 ....180, 625, 649, 738, 893
McKnight v. General Casualty Ins. Co., (1931) 44 B.C.R. 1; (1931) 3 D.L.R. 476; (1931) 2 W.W.R. 315 ....462, 549, 616, 618
McKoryk, Watkins Garage, Ltd., v. (1928) 3 W.W.R. 429 978
McLane, Sutor v. (1919) 27 B.C.R. 480 883
McLane and Noon, R. v. (1927) 38 B.C.R. 306; (1927) 1 W.W.R. 701; 47 C.C.C. 208 ....297, 364
McLean v. Bourcet, (1929) 4 D.L.R. 359; (1929) 3 W.W.R. 44 701
McLean, Graves v. (1931) 2 W.W.R. 895 904
McLean, Harper v. (1928) 39 B.C.R. 426; (1928) 2 D.L.R. 220; (1928) 1 W.W.R. 444 ....412, 827
McLean, Harper v. (No. 2), (1928) 39 B.C.R. 480; (1928) 2 D.L.R. 986; (1928) 1 W.W.R. 912 302
McLean v. Johnston, (1923) 32 B.C.R. 495; (1923) 3 W.W.R. 913; (1923) 4 D.L.R. 178 ....261, 478, 740, 755, 855
McLean, Wheeler v. (1919) 27 B.C.R. 448; (1919) 3 W.W.R. 310 534
McLean and Peterson, Ross v. (1921) 1 W.W.R. 1108 1142
McLean-Butorac Motors, Ltd., v. Campbell, (1930) 3 W.W.R. 39 ....147, 264, 566
McLelan, a Solicitor, In re (1926) 1 W.W.R. 198 312
McLelan v. Fletcher, (1929) 41 B.C.R. 437; (1929) 4 D.L.R. 348; (1929) 2 W.W.R. 500 ....465, 1008
McLellan, Esquimalt & Nanaimo Ry. Co. v. (1918) 26 B.C.R. 104; 44 D.L.R. 697; (1918) 3 W.W.R. 645, 828 ....928, 929, 937
McLellan v. Watanabe, (1923) 33 B.C.R. 61 1139
McLennan, Allan v. (1916) 23 B.C.R. 515; 31 D.L.R. 617; (1917) 1 W.W.R. 513 .. ....42, 406, 494, 733, 852
McLennan, Bready v. (1924) 33 B.C.R. 401, 460; (1924) 3 W.W.R. 924..62, 314, 444, 669
McLennan v. Kinman, (1916) 22 B.C.R. 414; 28 D.L.R. 507; 10 W.W.R. 517 107
McLennan and Choate, Wilson v. (1919) 27 B.C.R. 262; (1919) 3 W.W.R. 62 ....483, 492, 1003
McLennan, Eastern Townships Invst. Co. v. (1920) 29 B.C.R. 1 119
McLennan, McFeely & Co. v. Colpitts, (1918) 25 B.C.R. 459 1110
McLennan, McFeely & Co., Simplex Machine Co. v. (1928) 3 W.W.R. 255 ....277, 967
McLennan, Royal Bank of Canada v. (1918) 25 B.C.R. 183; 41 D.L.R. 27; (1918) 2 W.W.R. 225 ....80, 239, 1016, 1027
McLeod v. Boultbee and Atkins, (1931) 44 B.C.R. 375; (1931) 2 W.W.R. 805; (1931) 4 D.L.R. 912 ....411, 413, 812, 824
McLeod v. McLeod, (1918) 25 B.C.R. 430; 40 D.L.R. 741 ....440, 533
McLeod, McTavish v. (1916) 26 D.L.R. 272; 9 W.W.R. 1121 1010
McLeod, R. v. (1930) 2 W.W.R. 37; 54 C.C.C. 107 ....235, 237, 590

McLeod, Royal Bank v. (1919) 27 B.C.R. 376; 48 D.L.R. 500; (1919) 3 W.W.R. 544 ....43, 753, 758
McLeod, Standard Bank v. (1921) 2 W.W.R. 173 875
McMillan v. Cameron, (1917-18) 24 B.C.R. 176, 509; (1917) 2 W.W.R. 946; (1918) 1 W.W.R. 836 ....244, 255, 1013, 1083
McMillan, Middleton v. (1929) 1 D.L.R. 977 ....57, 402
McMordie v. Ford, (1930) 42 B.C.R. 486; (1930) 3 D.L.R. 398; (1930) 2 W.W.R. 203 ....519, 927
McMorran, Johnson v. (1927) 39 B.C.R. 24; (1927) 4 D.L.R. 335; (1927) 3 W.W.R. 37 ....414, 816
McMullen v. District Registrar of Titles, (1922) 30 B.C.R. 415; 68 D.L.R. 218; (1922) 1 W.W.R. 392 954
McNair Lumber & Shingles, Ltd., Anderson v. (1929) 40 B.C.R. 466; (1929) 2 D.L.R. 209; (1929) 1 W.W.R. 480 186
McNeil, Stephen v. (1928) 40 B.C.R. 209; (1928) 3 W.W.R. 182; (1929) S.C.R. 537; (1929) 1 D.L.R. 1003 522
McNeill, Bank of Montreal v. (1924) 33 B.C.R. 263; (1924) 2 W.W.R. 165 117
McNiven, Davenport v. (1930) 42 B.C.R. 468; (1930) 4 D.L.R. 386; (1930) 2 W.W.R. 263 ....700, 1022
McPhalen, Maritime Motor Car Co. v. (1919) 27 B.C.R. 244; (1919) 2 W.W.R. 811; (1920) 28 B.C.R. 168; (1920) 2 W.W.R. 213 ....82, 421, 477, 546, 955
McPhee v. The Esquimalt & Nanaimo Ry. Co., (1915) 22 B.C.R. 67; 23 D.L.R. 561; 32 W.L.R. 125; 8 W.W.R. 1319 ....465, 474, 702, 800
McPherson, R. v. (1929) 41 B.C.R. 218; (1929) 2 W.W.R. 141; 51 C.C.C. 419 ....297, 361, 524
McQuade v. Moncrieff, (1929) 1 D.L.R. 984 ....320, 866
McQueen v. Vancouver Island Power Co., (1925) 35 B.C.R. 558 74
McRae, Lim Jim v. (1918) 1 W.W.R. 404 ....633, 956
McRae v. Planta, (1924) 33 B.C.R. 395; (1924) 2 D.L.R. 408; (1924) 2 W.W.R. 323 ....716, 749
McRae, Sloan v. (1926) 37 B.C.R. 464; (1926) 4 D.L.R. 450; (1926) 3 W.W.R. 136. 886
McSorley v. Murphy, (1928) 40 B.C.R. 403; (1928) 4 D.L.R. 790; (1928) 3 W.W.R. 589; (1929) S.C.R. 542; (1929) 4 D.L.R. 247 ....258, 1088
McTavish v. McLeod, (1916) 26 D.L.R. 272; 9 W.W.R. 1121 1010
McTavish Bros. v. Langer, (1929) 41 B.C.R. 363; (1929) 4 D.L.R. 465 ....660, 838
McTavish et al., Keremeos Land Co., Ltd., v. (1925) 1 D.L.R. 897 ....241, 252
Meadow Creek Lbr. Co., Adolph Lbr. Co. v. (1918) 3 W.W.R. 305 67
Meadow Creek Lbr. Co. v. Adolph Lbr. Co., (1919) 58 S.C.R. 306; (1919) 1 W.W.R. 823; 45 D.L.R. 579 ....255, 969
Meagher v. Granby Cons. Mining, Etc., Co., (1915) 24 D.L.R. 892; 32 W.L.R. 334; 9 W.W.R. 37 701
Medaini Estate, In re (1927) 38 B.C.R. 319; (1927) 4 D.L.R. 1137; (1927) 2 W.W.R. 38 431
Medical Act and Murphy, In re (1930) 43 B.C.R. 203; (1930) 4 D.L.R. 1008; (1930) 3 W.W.R. 234; 55 C.C.C. 113 719
Meehan, R. v. (1924) 2 W.W.R. 1231; (1924) 3 W.W.R. 305 682
Meehan, R. v. (1925) 35 B.C.R. 363; (1925) 2 D.L.R. 411; (1925) 1 W.W.R. 819; 43 C.C.C. 325 ....147, 297, 338, 1040
Meeker, Nicola Valley Lbr. Co. v. (1917) 1 W.W.R. 556; 31 D.L.R. 607; 55 S.C.R. 494; 39 D.L.R. 497 ....281, 1089
Melchoir, Gurevitch v. (1921) 29 B.C.R. 394 ....94, 676, 974
Meldram v. Maclure and Houghton, (1916) 23 B.C.R. 176 512
Meldrum v. Dist. of South Vancouver, (1916) 22 B.C.R. 574; 27 D.L.R. 193; 34 W.L.R. 314; 10 W.W.R. 519 ....206, 765, 776, 1026
Mellis v. Blair, (1916) 22 B.C.R. 450; 27 D.L.R. 165; 10 W.W.R. 241 ....116, 410, 975
Menzies Bay Timber Co., Brown v. (1917) 24 B.C.R. 27; 34 D.L.R. 452; (1917) 2 W.W.R. 658 180
Mercer v. B.C. Electric Ry. Co., (1931) 43 B.C.R. 398; (1931) 1 W.W.R. 550 835

Mercer, Goudy v. (1924) 34 B.C.R. 103 810
Merchants Bank of Canada v. Bush, (1916) 25 D.L.R. 99; 32 W.L.R. 854; 9 W.W.R. 442; (1917) 24 B.C.R. 521; 56 S.C.R. 512; 38 D.L.R. 499; 42 D.L.R. 236; (1918) 1 W.W.R. 383; 2 W.W.R. 574, 631 .....114, 548, 857
Merchants Bank of Canada v. Eliot, (1918) 1 W.W.R. 698 .....208, 1107
Merchants Bank of Canada, Ledingham v. (1917) 24 B.C.R. 207; (1917) 2 W.W.R. 1016; 35 D.L.R. 191 .....84, 258, 263, 463
Merchants Casualty Ins. Co., Barlow v. (1929) 41 B.C.R. 427; (1929) 4 D.L.R. 701; (1929) 3 W.W.R. 724 616
Merchants Casualty Ins. Co., Oberg v. (1930) 42 B.C.R. 317; (1930) 2 D.L.R. 156. 618
Mere Singh et al., R. v. (1923) 32 B.C.R. 184; (1923) 1 W.W.R. 1358; 39 C.C.C. 391. 347
Merkley v. Raper, (1922) 1 W.W.R. 1166 311
Merrick et al., Prentice v. (1917) 24 B.C.R. 432; 38 D.L.R. 388; (1917) 3 W.W.R. 1060 907
Merriman v. Pacific Great Eastern Ry. Co., (1922) 30 B.C.R. 457; (1922) 1 W.W.R. 935 .....25, 939
Merritt Collieries, Ltd., Isitt v. (1920) 28 B.C.R. 62; (1920) 1 W.W.R. 879 .....711, 716
Merritt and District Industrial Society v. Young, (1916) 10 W.W.R. 944; 34 W.L.R. 826 .....462, 851
Merryfield & Dack v. The Male Minimum Wage Board and Davenport, (1931) 44 B.C.R. 380 .....30, 701
Metcalfe v. Stewart, (1930) 42 B.C.R. 96; (1930) 1 D.L.R. 1001 686
Metcalfe v. Van Houten, (1919) 27 B.C.R. 138; (1919) 2 W.W.R. 410 1097
Michigan Trust Co. v. Canadian Puget Sound Lbr. Co., (1918) 25 B.C.R. 560; (1918) 3 W.W.R. 273 .....198, 332, 649
Middleton v. McMillan, (1929) 1 D.L.R. 977 .....57, 402
Midgley v. Midgley, (1929) 41 B.C.R. 482; (1929) 3 W.W.R. 121 .....238, 439, 649
Mid-Lakes Timber Co. v. Can. Pac. Ry. Co., (1928) 40 B.C.R. 526; (1928) 4 D.L.R. 922; (1928) 3 W.W.R. 745 523
Mikkelson v. Duff, (1931) 44 B.C.R. 39; (1931) 2 D.L.R. 878 310
Milkha Singh, R. v. (1931) 44 B.C.R. 278; 56 C.C.C. 211 215
Mill Creek Lumber Co., Douglas v. (1923) 32 B.C.R. 13; (1923) 1 D.L.R. 805; (1923) 1 W.W.R. 529 .....34, 495, 1141, 1142-3
Millar v. B.C. Rapid Transit Co., (1926) 36 B.C.R. 345; (1926) 1 D.L.R. 1171 (1926) 1 W.W.R. 543 887
Millard v. Bevan Lbr. & Shingle Co., (1928) 39 B.C.R. 430; (1928) 2 D.L.R. 367 .....468, 579
Miller v. Allison, (1917) 24 B.C.R. 123; 33 D.L.R. 144; (1917) 2 W.W.R. 231 212
Miller, Laura S., Deceased, In re Estate of (1916) 22 B.C.R. 531; 34 W.L.R. 620; 10 W.W.R. 645 1121
Miller v. Kerlin, (1923) 33 B.C.R. 140 35
Miller v. Knight, (1925) 36 B.C.R. 362; (1926) 1 D.L.R. 764 1055
Miller, R. v. (1923) 32 B.C.R. 298; (1923) 2 W.W.R. 625; 40 C.C.C. 130 .....376, 393
Miller, Court & Co., R. v. (1930) 3 D.L.R. 745 .....231, 1043
Miller, R. ex rel. v. Gold Seal Liquor Co., (1922) 31 B.C.R. 177; (1922) 2 W.W.R. 1219; 38 C.C.C. 1 957
Miller, Stahl v. (1918) 56 S.C.R. 312; 40 D.L.R. 388; (1918) 2 W.W.R. 197 .....900, 902, 1079, 1096
Miller, Stephen v. (1918) 25 B.C.R. 388; 40 D.L.R. 418; (1919) 2 W.W.R. 1042; 49 D.L.R. 698; 59 S.C.R. 690 .....512, 1078, 1079
Miller v. Wollaston, (1929) 41 B.C.R. 145; (1929) 3 D.L.R. 348; (1929) 2 W.W.R. 136 .....102, 1009
Millerd Packing Co., Peterson v. (1928) 40 B.C.R. 314; (1928) 4 D.L.R. 833; (1928) 3 W.W.R. 279 991
Millett, Sawyer v. (1918) 25 B.C.R. 193 .....837, 863
Milligan v. B.C. Electric Ry. Co., (1923) 32 B.C.R. 161; (1923) 4 D.L.R. 637; (1923) 1 W.W.R. 1373 820

Milligan, Clark v. (1920) 28 B.C.R. 22; (1920) 1 W.W.R. 1044 ..... 564, 664, 929, 931, 1071, 1102
Mills, In re: In re Vancouver Licensing Board, (1917) 3 W.W.R. 449 780
Mills, Davies v. (1930) 42 B.C.R. 506; (1930) 2 D.L.R. 997; (1930) 1 W.W.R. 672 ..... 317, 446
Mills v. Smith Shannon Lumber Co., (1916) 22 B.C.R. 579; 28 D.L.R. 40; 34 W.L.R. 358; 10 W.W.R. 454 1138
Mills, Tyrell v. (1924) 3 W.W.R. 387 747
Mills, Whimster v. (1920) 28 B.C.R. 132; 51 D.L.R. 503; (1920) 2 W.W.R. 185; 33 C.C.C. 39 1026
Milne v. Central Okanagan Lands, (1919) 26 B.C.R. 575; (1919) 1 W.W.R. 720 ... 891
Milne v. District of South Vancouver, (1917) 24 B.C.R. 255; 36 D.L.R. 180; (1917) 1 W.W.R. 335 789
Minister of Finance v. Burke-Roche: In re Leonora Clapham, Deceased, (1925) 36 B.C.R. 175; (1925) 4 D.L.R. 325 1036
Minister of Finance v. Caledonian Ins. Co.: In re Land Registry Act and Higginson, (1923) 33 B.C.R. 29, 232; (1923) 4 D.L.R. 439; (1923) 3 W.W.R. 925; (1924) S.C.R. 207; (1924) 2 D.L.R. 649 ..... 65, 1031
Minister of Finance, Fowkes v. (1927) 38 B.C.R. 395; (1927) 2 D.L.R. 717 1033
Minister of Finance v. Oldfield and Gardner, (1927) 39 B.C.R. 119; (1927) 4 D.L.R. 711; (1927) 3 W.W.R. 361 1035
Minister of Finance, Wilson v. (1928) 40 B.C.R. 14; (1928) 3 D.L.R. 253; (1928) 2 W.W.R. 585 1035
Minister of Finance of B.C., In re Estate of Sir Wm. Van Horne, Royal Trust Co. v. (1921) 91 L.J.P.C. 8; 126 L.T. 207; (1921) 3 W.W.R. 749; 61 D.L.R. 194; (1922) 1 A.C. 87 1030
Minister of Lands, Johnston v. (1919) 27 B.C.R. 257; (1919) 3 W.W.R. 81 ..... 732, 924, 1020
Minister of Lands, R. v. (1926) 37 B.C.R. 106; (1926) 2 D.L.R. 249; (1926) 1 W.W.R. 819 ..... 50, 930
Minister of National Revenue, Fraser Valley Milk Producers Assn. v. (1929) 3 D.L.R. 19; (1929) S.C.R. 435 1041
Minister of Public Works and Tipping, In re (1931) 44 B.C.R. 321; (1931) 2 W.W.R. 835 ..... 76, 564
Ministerial Union, Lucas v. (1916) 23 B.C.R. 257; 31 D.L.R. 200 ..... 428, 833
Minnekanda Land Co., Marston v. (1918) 25 B.C.R. 372; 40 D.L.R. 76; (1918) 2 W.W.R. 471 ..... 27, 188, 189
Mission, District of, Stoltze v. (1917) 24 B.C.R. 195; (1917) 1 W.W.R. 1388 . . 3, 788, 790
Mission Land Co., Harris v. (1915) 22 B.C.R. 11 42
Mitchell, Amar Singh v. (1916) 23 B.C.R. 248; 30 D.L.R. 719; (1917) 1 W.W.R. 201 ..... 421, 477, 1090
Mitchell v. Coast Paper Co., (1930) 42 B.C.R. 352; (1930) 2 D.L.R. 720; (1930) 1 W.W.R. 608 ..... 653, 873
Mitchell v. Renfrew, (1918) 1 W.W.R. 942 883
Mitchell Motor Agency, Page v. (1921) 1 W.W.R. 1107 ..... 308, 1047
Mitsui v. Brown, (1920) 28 B.C.R. 516 963
"Miyako," The, Ostrom v. (1924) 34 B.C.R. 4; (1924) Ex. C.R. 86; (1924) 2 D.L.R. 200; (1924) 1 W.W.R. 1098 ..... 9, 994
Modern Construction Co. v. Shaw, (1923) 35 B.C.R. 331; (1923) 3 D.L.R. 893; (1923) 3 W.W.R. 301 128
Moillet, Boyer v. (1921) 30 B.C.R. 216; 61 D.L.R. 136; (1921) 3 W.W.R. 62 ... . 761, 793, 813
Moldowan v. B.C. Electric Ry. Co., (1923) 32 B.C.R. 428 805
Molsons Bank, Cottonwood Timber Co. v. (1916) 22 B.C.R. 541; 29 D.L.R. 29; 34 W.L.R. 909; 10 W.W.R. 1215 746
Molybdenum Mining & Reduction Co., Stewart and Hayes v. (1921) 30 B.C.R. 51; 60 D.L.R. 497; (1921) 2 W.W.R. 954 ..... 724, 1076, 1090, 1111

Momsen & Rowe, Olympic Stone Construction Co. v. (1915) 21 B.C.R. 120; 21 D.L.R. 271; 30 W.L.R. 711; 8 W.W.R. 79 ....121, 957
Moncrieff v. Barnett-McQueen Co., (1917) 24 B.C.R. 185; 34 D.L.R. 737; (1917) 2 W.W.R. 625 704
Moncrieff, McQuade v. (1929) 1 D.L.R. 984 ....320, 866
Mocroft, Cooke v. (1926) 36 B.C.R. 393; (1926) 1 W.W.R. 827 717
Monka, Canadian Credit Men's Trust Assn. v. (1924) 34 B.C.R. 99 ....90, 97, 670
Montemurro, R. v. (1924) 2 W.W.R. 250 ....148, 359, 562
Montgomery, Larson v. (1930) 43 B.C.R. 89; (1930) 3 D.L.R. 966; (1930) 2 W.W.R. 796 ....455, 489, 728, 929
Montgomery v. McKenzie, (1923) 32 B.C.R. 232 ....289, 468, 1049
Montreal Trust Co. v. Can. Lbr. Yards, Ltd., (1928) 39 B.C.R. 325; (1928) 2 D.L.R. 37; (1928) 1 W.W.R. 509 ....320, 1140, 1144
Montreal Trust Co., Fraser and Henderson v. (1923) 32 B.C.R. 546; (1923) 4 D.L.R. 745; (1923) 3 W.W.R. 808 1130
Montreal Trust Co. v. The King, (1923) 33 B.C.R. 144 1043
Montreal Trust Co. v. South Shore Lbr. Co. et al., (1924) 33 B.C.R. 280; (1924) 1 D.L.R. 1030; (1924) 1 W.W.R. 657 ....296, 748, 1020
Moody, Belmont Investment Co. v. (1922) 31 B.C.R. 345; (1923) 32 B.C.R. 488; (1923) 3 D.L.R. 812; (1923) 1 W.W.R. 934; (1923) 3 W.W.R. 291 ..316, 652, 757
Moody v. Moody, (1924) 34 B.C.R. 49 438
Moore, Appleton v. (1915) 22 B.C.R. 28; 23 D.L.R. 673; 32 W.L.R. 114; 8 W.W.R. 1286 ....485, 883
Moore v. B.C. Electric Ry. Co. and Johnston, (1916) 22 B.C.R. 504; (1917) 24 B.C.R. 314; 35 D.L.R. 771; 34 W.L.R. 469; 10 W.W.R. 631; (1917) 2 W.W.R. 729 ....761, 792, 800, 803, 938
Moore v. Confederation Life Assn., (1918) 25 B.C.R. 465; (1918) 2 W.W.R. 895 ....245, 577, 613, 684
Moore v. Deal and Saulter, (1917) 24 B.C.R. 181; (1917) 2 W.W.R. 955 721
Moore v. Nyland, (1930) 42 B.C.R. 444; (1930) 3 D.L.R. 203; (1930) 1 W.W.R. 627 535
Moore, R. v. (1924) 3 W.W.R. 923 555
Moore, R. v. (1927) 38 B.C.R. 425 156
Moore, Stewart-Wardroper v. (1917) 25 B.C.R. 69 ....48, 248
Moore, Stuart v. (1927) 39 B.C.R. 237; (1927) 4 D.L.R. 639 53
Moran v. City of Vancouver, (1928) 40 B.C.R. 450; (1929) 1 D.L.R. 461; (1928) 3 W.W.R. 660 ....569, 770
More, Hall v. (1928) 39 B.C.R. 346; (1928) 1 D.L.R. 1028; (1928) 1 W.W.R. 400. 268
Morelle, R. v. (1927) 39 B.C.R. 140; (1928) 1 W.W.R. 68; 49 C.C.C. 15 395
Morgan, Barron v. (1930) 43 B.C.R. 84; (1930) 4 D.L.R. 985; (1930) 3 W.W.R. 65 ....725, 1086
Morgan v. Morgan, (1931) 44 B.C.R. 480; (1931) 3 W.W.R. 144 ....30, 330
Morgan v. Shaw, (1926) 31 B.C.R. 454; (1926) 1 W.W.R. 483; (1926) 1 D.L.R. 828. 117
Morgan Fuel Co. v. B.C. Electric Ry. Co., (1930) 42 B.C.R. 382; (1930) 4 D.L.R. 30; (1930) 2 W.W.R. 776 ....302, 413, 820
Morgan and Northwest Trust Co., Lyon v. (1916) 22 B.C.R. 511; 34 W.L.R. 485; 10 W.W.R. 630; (1917) 2 W.W.R. 224 74
Morin & Thompson, Vick v. (1915) 21 B.C.R. 8; 22 D.L.R. 29; 30 W.L.R. 412; 7 W.W.R. 1053 ....595, 795, 817
Morley v. Dist. of Oak Bay, (1923) 31 B.C.R. 523; (1923) 1 D.L.R. 869; (1923) 1 W.W.R. 454 ....237, 779
Morris v. Morris and French, (1931) 44 B.C.R. 166; (1931) 3 W.W.R. 427; (1931) 3 D.L.R. 325 ....500, 580, 654, 1077
Morris v. Structural Steel Co., (1917) 24 B.C.R. 59; 35 D.L.R. 739; (1917) 2 W.W.R. 749 .... 705-6, 1017
Morrison, B.C. Telephone Co. v. (1921) 29 B.C.R. 289; (1921) 1 W.W.R. 694 ....294, 508, 1064, 1065

Morrison v. Commissioners of Dewdney Dyking Dist., (1922) 31 B.C.R. 23; (1922) 3 W.W.R. 250; 65 D.L.R. 409 ....408, 443
Morrison v. Grant, (1929) 41 B.C.R. 511; (1929) 3 W.W.R. 644; (1930) 1 D.L.R. 365 430
Morrison v. Ingles, (1920) 2 W.W.R. 50 1063
Morrison, Komnick System Sandstone Brick Machinery Co. v. (1920) 28 B.C.R. 207; (1921) 1 W.W.R. 207 ....52, 528, 952
Morrison Mill Co. v. Queen Ins. Co. of America, (1925) 34 B.C.R. 509; (1925) 1 D.L.R. 1159; (1925) 1 W.W.R. 691 623
Morrison, R. v. (1923) 33 B.C.R. 244 393
Morrison & Pollard v. Taylor: In re Land Registry Act, (1926) 37 B.C.R. 324; (1926) 2 W.W.R. 371 949
Morrissette v. The "Maggie" et al., (1916) 22 B.C.R. 424, 476; 16 Ex. C.R. 494, 498; 34 W.L.R. 39, 120; 10 W.W.R. 21, 224, 228; 27 D.L.R. 464, 466 ....9, 10, 304, 994, 995
Morrow, Dewees v. (1931) 3 W.W.R. 32 410
Morse v. Hurndall, (1926) 37 B.C.R. 216 866
Morse v. Mac & Mac Cedar Co., (1918) 25 B.C.R. 417; (1918) 2 W.W.R. 205 ....242, 260, 272, 404, 478
Mortgage Co. of Canada v. Hall, (1918) 25 B.C.R. 280 1109
Morton v. Brighouse (No. 1), (1925) 36 B.C.R. 231; (1925) 3 W.W.R. 412; (1927) S.C.R. 118; (1927) 1 D.L.R. 1009 ....542, 1079, 1080
Morton v. Brighouse (No. 2), (1928) 40 B.C.R. 278; (1929) S.C.R. 512; (1929) 3 D.L.R. 91 ....490, 1080
Morton v. Vancouver General Hospital, (1922-23) 31 B.C.R. 141, 546; (1923) 1 D.L.R. 854; (1923) 1 W.W.R. 423 ....46, 658, 794, 835
Morton, Yorkshire & Canadian Trust v. (1926) 38 B.C.R. 10; (1926) 4 D.L.R. 887; (1926) 3 W.W.R. 370 1127
Mosdell v. Jardine, (1929) 41 B.C.R. 487; (1929) 4 D.L.R. 617; (1929) 3 W.W.R. 95 ....980, 1014, 1103
Motion v. Jure, (1928) 39 B.C.R. 354; (1928) 2 D.L.R. 79 ....53, 809
Motorcar Loan Co. v. Bonser, (1928) 40 B.C.R. 55; (1928) 3 D.L.R. 875; (1928) 1 W.W.R. 801 977
Motorcar Loan Co., Kerr v. (1930) 2 W.W.R. 367 978
Motorcar Loan Co. and Burns, Roman v. (1930) 42 B.C.R. 457; (1930) 3 D.L.R. 296; (1930) 1 W.W.R. 775 ....696, 709, 980, 1067
Motor Securities Co., Topham v. (1928) 40 B.C.R. 375; (1929) 1 D.L.R. 995; (1929) 1 W.W.R. 114 123
Mouat Bros. Co. v. Warnier, (1930) 43 B.C.R. 238; (1931) 1 D.L.R. 569 ....83, 86
Mould, R. v. (1920) 28 B.C.R. 221; 52 D.L.R. 302; (1920) 2 W.W.R. 540 778
Mt. Pleasant Undertaking Co. v. McDuffee, (1923) 33 B.C.R. 36; (1923) 4 D.L.R. 1200; (1923) 3 W.W.R. 957 512
Mount Royal Assurance Co., Caddedu v. (1929) 41 B.C.R. 110; (1929) 2 D.L.R. 867; (1929) 2 W.W.R. 161 ....460, 617
Mowat v. Goodall, (1915) 21 B.C.R. 394; 22 B.C.R. 167; 31 W.L.R. 537; 24 D.L.R. 781, 891; 33 W.L.R. 230; 9 W.W.R. 171 ....60, 292, 322, 608
Muirhead v. Atkin, (1920) 2 W.W.R. 228 1098
Mulholland, R. v. (1923) 33 B.C.R. 10; (1924) 1 W.W.R. 1032; (1923) 2 W.W.R. 594 339
Mullett v. United States Fidelity & Guaranty Co., (1929) 41 B.C.R. 81; (1929) 1 D.L.R. 140; (1929) 2 W.W.R. 146 621
Municipal Act, In re. Gates' Case, (1918) 2 W.W.R. 930 782
Municipal Act and McBride, In re (1927) 38 B.C.R. 431 784
Municipal Elections Act, In re: R. ex rel. Rose v. Moir, (1924) 34 B.C.R. 284; (1924) 4 D.L.R. 498; (1924) 3 W.W.R. 391 764
Municipal Elections Act and Corporation of Esquimalt, In re (1922) 31 B.C.R. 474; (1923) 1 W.W.R. 1185 445

Municipal Elections Act and Tomsett, In re (1924) 33 B.C.R. 377; (1924) 1 D.L.R. 921 446
Munn v. Haahti, (1924) 37 B.C.R. 71; (1925) 3 W.W.R. 700 ..... 242, 291
Murdoch v. Cons. Mining & Smelting Co., (1929) S.C.R. 141; (1929) 1 D.L.R. 913; (1928) 39 B.C.R. 386; (1928) 1 D.L.R. 853; (1928) 1 W.W.R. 578 ... 53, 522, 709
Murphy v. Barr, (1921) 61 D.L.R. 343 527
Murphy, McSorley v. (1928) 40 B.C.R. 403; (1928) 4 D.L.R. 790; (1928) 3 W.W.R. 589; (1929) S.C.R. 542; (1929) 4 D.L.R. 247 ..... 258, 1088
Murphy and Medical Act, In re (1930) 43 B.C.R. 203; (1930) 4 D.L.R. 1008; (1930) 3 W.W.R. 234; 55 C.C.C. 113 719
Murray v. Gold, (1924) 34 B.C.R. 489 ..... 284, 647
Mutch, Foreman v. (1923) 33 B.C.R. 100; (1924) 1 W.W.R. 392 1143
Mutual Fruit Co., Bank of Hamilton v. (1921) 29 B.C.R. 448; (1921) 1 W.W.R. 727. 177
Mutual Life Assurance Co., B.C. Securities v.: In re Winding-up Act, (1918) 1 W.W.R. 733 ..... 40, 191
Mutual Life Assurance Co., McKinley v. (1918) 26 B.C.R. 5; 43 D.L.R. 259; (1918) 3 W.W.R. 1002 ..... 667, 1060
Mutual Life Assurance Co. of Canada, Dominion Trust Co. v. (1918) 26 B.C.R. 237; 43 D.L.R. 184; (1918) 3 W.W.R. 415 746

N

Nakusp Development Dist., Commissioners for, Leary v. (1930) 1 W.W.R. 97 ..... 412, 774, 792, 793, 799, 821
Nanaimo, City of, Scott v. (1924) 33 B.C.R. 344, 474; (1924) 2 D.L.R. 811; (1924) 1 W.W.R. 1275 ..... 41, 61, 315, 569, 769
Nanaimo Motors, Rogers v. (1926) 37 B.C.R. 326 ..... 912, 977
Nanoose-Wellington Collieries, Ltd., Carbon Coal & Clay Co. v. (1923) 1 D.L.R. 1160. 241
Nanoose-Wellington Collieries, Ltd., Jack v. (1926) 37 B.C.R. 99 124
Nanoose-Wellington Collieries, Ltd., Jack v. (1926) S.C.R. 495; (1926) 2 D.L.R. 164; (1925) 35 B.C.R. 295; (1925) 3 D.L.R. 398; (1925) 2 W.W.R. 267 .. 423, 740
Nantel v. Hemphill's Trade Schools, Ltd., (1920) 28 B.C.R. 265, 422; 53 D.L.R. 37; (1920) 3 W.W.R. 408 ..... 656, 828, 830
Nason v. Hodne, (1929) 41 B.C.R. 398; (1929) 4 D.L.R. 490 820
Nat Bell Liquors, Ltd., Volansky v. (1922) 30 B.C.R. 558 537
Natha Singh, Canada Permanent Mtge. Co. v. (1921) 29 B.C.R. 397; 60 D.L.R. 56; (1921) 2 W.W.R. 361 ..... 755, 877
National Amusement Co., Barnswell v. (1915) 21 B.C.R. 435; (1915) 23 D.L.R. 615; (1915) 31 W.L.R. 542 275
National Brokerage, Maple Crispette Co. v. (1919) 27 B.C.R. 501; (1920) 1 W.W.R. 332 ..... 329, 920
National Fire Ins. Co. v. Emerson, (1915) 22 B.C.R. 349 608
National Ins. Co., Royal Bank of Canada v. (1921) 29 B.C.R. 286; (1921) 1 W.W.R. 759 306
National Life Assce. Co., McCoubrey v. (1926) 36 B.C.R. 428; (1926) S.C.R. 277; (1926) 2 D.L.R. 550 613
National Life Assce. Co., McCoy v. (1919) 58 S.C.R. 306; (1919) 1 W.W.R. 823; (1918) 57 S.C.R. 29; 42 D.L.R. 21; (1918) 2 W.W.R. 591 607
National Mortgage Co., Great West Permanent Loan Co. v. (1919) 26 B.C.R. 566; 45 D.L.R. 751; (1919) 1 W.W.R. 788 ..... 715, 760
National Mortgage Co. v. Rolston, (1916) 23 B.C.R. 384; (1917) 2 W.W.R. 1144; 32 D.L.R. 81; (1917) 1 W.W.R. 494; (1917) 59 S.C.R. 219 716
National Pole & Treating Co. v. Blue River Pole & Tie Co., (1930) 43 B.C.R. 98; (1930) 3 D.L.R. 996; (1929) 3 D.L.R. 638 ..... 178, 461, 544, 915
National Pole Co., Thurlow Logging Co. v. (1923) 31 B.C.R. 491; (1923) 3 D.L.R. 958; (1923) 4 D.L.R. 655 967
National Surety Co., Ferrara v. (1916) 39 D.L.R. 175; (1917) 1 W.W.R. 719 551
National Surety Co. v. Larsen, (1929) 42 B.C.R. 1; (1929) 4 D.L.R. 918; (1929) 3 W.W.R. 299 ..... 209, 266, 745

National Surety Co., Lockwood v. (1915) 21 B.C.R. 249; 22 B.C.R. 306 .....867, 888
Naugle Pole & Tie Co. of Canada v. Wilson, (1929) 3 W.W.R. 730 961
Navigazione Libera Triestina S.A., Coast Cement Co. v. (1930) 43 B.C.R. 167; (1930) 4 D.L.R. 897; (1930) 3 W.W.R. 69 144
Neary v. Credit Service Exchange, (1929) 41 B.C.R. 223; (1929) 3 D.L.R. 107; (1929) 2 W.W.R. 287 .....328, 920
Neas, Fraser v. (1924) 35 B.C.R. 70; (1925) 3 D.L.R. 547; (1925) 2 W.W.R. 614 .....37, 39, 41
December, R. v. (No. 1), (1931) 44 B.C.R. 210; (1931) 2 W.W.R. 810; 56 C.C.C. 110. 370
December, R. v. (No. 2), (1931) 3 W.W.R. 356; 56 C.C.C. 391 370
Neff, College of Dental Surgeons v. (1928) 40 B.C.R. 371; (1928) 4 D.L.R. 839; (1928) 3 W.W.R. 299 429
Neilsen v. Richard et al., (1929) 41 B.C.R. 220; (1929) 4 D.L.R. 1052; (1929) 2 W.W.R. 153 .....793, 813
Nelson v. Balderson, (1917) 3 W.W.R. 448 .....894, 1107
Nelson v. Bradstreet, (1917) 2 W.W.R. 1191 .....427, 856
Nelson, Gagnon, v. (1915) 21 B.C.R. 356; 22 D.L.R. 179; (1915) 8 W.W.R. 907; 31 W.L.R. 346 .....469, 739, 1094
Nelson v. Pacific Great Eastern Ry. Co., (1918) 25 B.C.R. 259; (1918) 1 W.W.R. 597; (1918) 26 B.C.R. 1; (1918) 3 W.W.R. 85; (1919) 27 B.C.R. 420; 67 D.L.R. 792 .....6, 203, 207, 217, 286
Nelson v. Person, (1927) 3 W.W.R. 161 1143
Nelson, Ryall v. (1917) 3 W.W.R. 647 534
Nemetz v. Telford, (1930) 43 B.C.R. 281 54
Neno v. Canadian Fishing Co., (1916) 22 B.C.R. 455; 26 D.L.R. 714; 10 W.W.R. 97. 996
NePage v. Pinner, (1915) 21 B.C.R. 81; 21 D.L.R. 315; 8 W.W.R. 322 714
Nettleton, In re (1928) 40 B.C.R. 413; (1929) 1 D.L.R. 692; (1928) 3 W.W.R. 735; 51 C.C.C. 413 .....353, 553
Nevison, R. v. (1919) 27 B.C.R. 12; 45 D.L.R. 382; (1919) 1 W.W.R. 793; 31 C.C.C. 116 334
Newberry v. Brown, (1915) 21 B.C.R. 556; 32 W.L.R. 118; 8 W.W.R. 1283; 23 D.L.R. 627 .....247, 477, 1082
Newcombe v. Green, (1923) 32 B.C.R. 395 890
New Dominion Club, R. v. (1925) 35 B.C.R. 502 643
Newlands Sawmills, Ltd., v. Bateman, (1922) 31 B.C.R. 351; 70 D.L.R. 165; (1922) 3 W.W.R. 649 .....530, 532
New Lulu Island Slough Dyking District, In re (1920) 28 B.C.R. 377 443
Newman v. Bradshaw, (1916) 22 B.C.R. 420; 23 B.C.R. 492; 28 D.L.R. 769; 33 W.L.R. 945; 10 W.W.R. 649; (1917) 1 W.W.R. 1223; 2 W.W.R. 743 ...21, 22, 67
News-Advertiser, Wade v. (1917) 24 B.C.R. 260; (1917) 2 W.W.R. 1134 .....425, 857
Newton v. Bauthier; Shaw, Assignee, (1915) 21 B.C.R. 4; 24 D.L.R. 890; 8 W.W.R. 903 50
New Westminster, City of, Albion Motor Express Co. v. (1918) 25 B.C.R. 379; (1918) 1 W.W.R. 493; (1918) 3 W.W.R. 19, 23; 59 S.C.R. 655; 52 D.L.R. 682 ...67, 569
New Westminster, City of, Can. Northern Pac. Ry. Co. v. (1915) 22 B.C.R. 247; 25 D.L.R. 28; (1917) A.C. 602; 86 L.J.P.C. 178; 117 L.T. 581; 36 D.L.R. 506; 9 W.W.R. 425; 32 W.L.R. 779 .....786, 935, 1044
New Westminster, City of, v. Kennedy, (1918) 1 W.W.R. 489 788
New Westminster, City of, v. The "Maagen," (1915) 21 B.C.R. 97; 21 D.L.R. 73 ..160, 998
New Westminster Construction Co., Van Hemelryck v. (1919) 27 B.C.R. 334; (1919) 2 W.W.R. 882; (1920) 29 B.C.R. 39, 60; 55 D.L.R. 589; (1920) 3 W.W.R. 709 .....69, 129, 245, 647, 890
New Westminster Harbour Board, Armstrong v. (1929) 41 B.C.R. 1; (1929) 2 D.L.R. 150; (1929) 1 W.W.R. 755 .....75, 207
New Westminster Licence Commissioners and Haines, In re (1915) 21 B.C.R. 313; 21 D.L.R. 777; 31 W.L.R. 307 629
New Westminster School Trustees, Hyslop v. (1930) 43 B.C.R. 201; (1930) 4 D.L.R. 1030; (1930) 3 W.W.R. 227 882

New York Life Ins. Co., Dominion Trust Co. v. (1918) 25 B.C.R. 271; (1918) 1 W.W.R. 614, 648; (1918) 3 W.W.R. 850; (1919) A.C. 254; (1918) 88 L.J.P.C. 30; 119 L.T. 748; 44 D.L.R. 12 ....69, 200, 878
New York Outfitting Co. v. Batt, (1921) 30 B.C.R. 155; 60 D.L.R. 658 267
Nichol v. Sugarman, (1928) 40 B.C.R. 119; (1928) 3 D.L.R. 292 ....627, 889
Nicholls, Bell v. (1918) 26 B.C.R. 102 ....502, 987
Nicholson, R. v. (1927) 39 B.C.R. 264; 49 C.C.C. 228 ....380, 386, 390, 395
Nickerson, Manning v. (1927) 38 B.C.R. 535; (1927) 3 D.L.R. 728; (1927) 2 W.W.R. 623; (1928) S.C.R. 91; (1928) 3 D.L.R. 494....345, 672
Nickson Construction Co., Ashdown v. (1924) 34 B.C.R. 351; (1924) 4 D.L.R. 868. 850
Nickson, T. R. Co. v. Dominion Creosoting Co., (1916) 23 B.C.R. 72; (1917) 55 S.C.R. 303; 35 D.L.R. 272; 38 D.L.R. 69; (1917) 2 W.W.R. 330 184
Nicola Land Co., Western Imperial Co. v. (1921) 29 B.C.R. 390; 61 D.L.R. 155; (1921) 2 W.W.R. 342 755
Nicola Pine Mills, Ltd., Reinseth v. (1927) 39 B.C.R. 151; (1928) 1 D.L.R. 93 ... 277
Nicola Valley Lbr. Co. v. Meeker, (1917) 1 W.W.R. 556; 31 D.L.R. 607; 55 S.C.R. 494; 39 D.L.R. 497 ....281, 1089
Nicola Valley Pine Lbr. Co., Lyons v. (1916) 23 B.C.R. 141; 31 D.L.R. 133; (1917) 1 W.W.R. 237 704
Nimmo v. Adams, (1922) 30 B.C.R. 527; (1922) 1 W.W.R. 1284 ....511, 1122
Nimpkish Lake Logging Co., Roray & Yeaman v. (1919) 27 B.C.R. 64; 47 D.L.R. 395; (1919) 2 W.W.R. 105 ....245, 905
Nimpkish Lake Logging Co. et al. v. Wood & English, (1926) 36 B.C.R. 237; (1927) 3 D.L.R. 926 ....257, 1092
Nip Gar alias Jang Shee, R. v. (1930) 42 B.C.R. 327; 47 C.C.C. 208 ....344, 400
Nippon Kinyu Sha, Ex parte Fujino, (1923) 32 B.C.R. 56; (1923) 1 D.L.R. 1156; (1923) 1 W.W.R. 880; 3 C.B.R. 673 ....104, 416
Nolan, R. v. (1930) 43 B.C.R. 357 377
Noon, R. v. (1927) 38 B.C.R. 306; (1927) 1 W.W.R. 701; 47 C.C.C. 208 .....297, 356
Nordlund, Bank of Vancouver v. (1920) 28 B.C.R. 342 35
Norgan, Haddock v. (1924) 34 B.C.R. 74; (1924) 3 D.L.R. 644; (1924) 2 W.W.R. 943 ....248, 1012, 1084
Norris, Parsons v. (1917) 24 B.C.R. 41; (1917) 2 W.W.R. 606; 33 D.L.R. 593 ..1012, 1108
North v. Sicilliano, (1922) 31 B.C.R. 463; (1923) 1 D.L.R. 1149; (1923) 1 W.W.R. 551 ....463, 484, 498, 580
North American Life Assce. Co. v. Gold, (1917) 24 B.C.R. 50; 34 D.L.R. 735; (1917) 2 W.W.R. 613 1109
North American Loan Co. v. Mah Ten, (1922) 31 B.C.R. 133 538
North American Lbr. Co., Brown v. (1915) 21 B.C.R. 253 872
North China Ins. Co., Creeden & Avery v. (1917) 24 B.C.R. 335; 36 D.L.R. 359; (1917) 3 W.W.R. 33 621
North Cowichan Dist. v. Gore-Langton, (1921) 29 B.C.R. 535; 60 D.L.R. 151; (1921) 2 W.W.R. 484 ....77, 205, 206
North Cowichan Dist. v. Hawthornthwaite, (1917) 24 B.C.R. 571; 42 D.L.R. 207; (1918) 3 W.W.R. 574 782
North Pacific Lbr. Co. v. Sayward, (1918) 25 B.C.R. 322; (1918) 2 W.W.R. 771 ....3, 219, 928, 931
North Vancouver, City of, Hadden v. (1922) 30 B.C.R. 497; 67 D.L.R. 669; (1922) 1 W.W.R. 655 ....221, 841
North Vancouver, Dist. of, Re: In re Estate of J. C. Keith, (1918) 1 W.W.R. 626 ....514, 951
North Vancouver, Dist. of, Orr and, In re (1928) 39 B.C.R. 478; (1928) 1 W.W.R. 799 ....78, 306
North Vancouver, Dist. of, v. Carlisle, (1922) 31 B.C.R. 372; 70 D.L.R. 527; (1922) 3 W.W.R. 811 ....744, 943, 951
North Vancouver, Hooper v. (1921-2) 31 B.C.R. 51, 138; 65 D.L.R. 286; (1922) 1 W.W.R. 1249 ....64, 596, 772

North Vancouver v. Vancouver Power Co., (1916) 22 B.C.R. 561; 27 D.L.R. 727; 34 W.L.R. 486; (1917) A.C. 598; 86 L.J.P.C. 97; 117 L.T. 492; 36 D.L.R. 462 ..... 525, 774
North Vancouver District School Trustees, Patterson v. (1929) 41 B.C.R. 123; (1929) 3 D.L.R. 33; (1929) 2 W.W.R. 181 ..... 563, 815
North Vancouver Horticultural Society v. Dist. of North Vancouver, (1917) 24 B.C.R. 290 787
Northern Club & Cafe Co., Whimster and Owen v. (1920) 28 B.C.R. 132; 51 D.L.R. 503; (1920) 2 W.W.R. 185; 33 C.C.C. 39 1026
Northern Construction Co. Gibb v. (1918) 26 B.C.R. 429; 43 D.L.R. 276; (1918) 3 W.W.R. 396 ..... 247, 838
Northern Construction Co., Rothery v. (1921) 30 B.C.R. 324; 70 D.L.R. 771; (1921) 2 W.W.R. 853 1141
Northern Crown Bank v. Walker, (1917) 24 B.C.R. 163; (1917) 2 W.W.R. 573 ..543, 550
Northern Life Assce. Co., Young v. (1922) 31 B.C.R. 65; 63 D.L.R. 107 614
Northern Loan & Mtge. Guarantee Corpn., Solton v. (1918) 25 B.C.R. 529 1097
Northern Pacific Ry. Co. v. Fullerton Lbr. & Shingle Co., (1919) 27 B.C.R. 36; 47 D.L.R. 705; (1919) 2 W.W.R. 92 ..... 138, 139, 321
Northwest Trading Co. v. Northwest Trading Co., (1920) 27 B.C.R. 546; (1920) 29 B.C.R. 17; (1920) 1 W.W.R. 353; (1920) 3 W.W.R. 729 ..... 166, 186, 187, 597, 1062
Northwestern Dredging Co., Davidson v. (1925) 35 B.C.R. 534 600
Northwestern Mutual Fire Assn., Henderson v. (1924) 34 B.C.R. 441; (1925) 1 D.L.R. 339; 43 C.C.C. 217 ..... 617, 619
Notaries Act and J. A. Stewart, In re (1929) 41 B.C.R. 467 839
Noud, First Mortgage Invst. Co. v. (1925) 36 B.C.R. 104, 166; (1925) 4 D.L.R. 221 ..... 81, 266, 317
Nowell v. Yellow Cab Co., (1929) 41 B.C.R. 494; (1930) 1 D.L.R. 493; (1929) 3 W.W.R. 606 812
Nowell v. Yellow Cab Co. and B.C. Electric Ry. Co. (No. 3), (1929) 41 B.C.R. 453; (1929) 4 D.L.R. 484; (1929) 3 W.W.R. 431 286
Nowell and Carlson, In re (1919) 26 B.C.R. 459; (1919) 1 W.W.R. 387...324, 329, 919-20
Nozaki, R. v. (1926) 37 B.C.R. 305; (1926) 4 D.L.R. 955; (1926) 3 W.W.R. 332; 44 C.C.C. 168 ..... 53, 476
Nyland, Moore v. (1930) 42 B.C.R. 444; (1930) 3 D.L.R. 203; (1930) 1 W.W.R. 627. 535

O

Oak Bay, Dist. of, City of Victoria v. (1917) 24 B.C.R. 516; 33 D.L.R. 238; (1918) 1 W.W.R. 158 ..... 772, 985
Oak Bay, Dist. of, Morley v. (1923) 31 B.C.R. 523; (1923) 1 D.L.R. 869; (1923) 1 W.W.R. 454 ..... 237, 779
Oak Bay, Municipality of, Colwood Park Assn. v. (1928) 40 B.C.R. 233; (1928) 3 D.L.R. 812; (1928) 2 W.W.R. 593 ..... 270, 781
Oberg v. Merchants Casualty Ins. Co., (1930) 42 B.C.R. 317; (1930) 2 D.L.R. 156. .. 618
Oblates of Mary Immaculate v. Pac. Great Eastern Ry. Co., (1918) 25 B.C.R. 259; 26 B.C.R. 1; (1919) 27 B.C.R. 420; (1918) 1 W.W.R. 597; (1918) 3 W.W.R. 85; 67 D.L.R. 792 ..... 126, 203, 207, 217, 286
O'Brien v. Knudsen, (1919) 27 B.C.R. 492; 48 D.L.R. 447; (1919) 3 W.W.R. 480 ..... 270, 422, 749
Ocean Accident & Guaranty Corpn., James v. (1921) 30 B.C.R. 207; 70 D.L.R. 576; (1921) 3 W.W.R. 55 620
Ocean View Development, Ltd., District of Burnaby v. (1923) 32 B.C.R. 413; (1923) 3 W.W.R. 1078; (1923) 3 D.L.R. 1073 1045
O'Connor, In re (1927) 39 B.C.R. 271; (1928) 1 D.L.R. 558; (1928) 1 W.W.R. 65; 49 C.C.C. 151 ..... 517, 552
O'Flynn, Cummings v. (1924) 34 B.C.R. 275 528

Okanagan Telephone Co. v. Summerland Telephone Co., (1918) 25 B.C.R. 221; (1918) 1 W.W.R. 656 ....565, 840
Okanagan United Growers, Ltd., In re, and Dominion Bank, (1924) 34 B.C.R. 497; (1925) 2 D.L.R. 919 ....32, 41
Okell, Bankers Trust Co. and, In re (1916) 22 B.C.R. 436; 27 D.L.R. 63; 34 W.L.R. 1; 10 W.W.R. 150 194
Oldfield, Henry, Deceased, In re Estate of (1927) 39 B.C.R. 119; (1927) 4 D.L.R. 711; (1927) 3 W.W.R. 361 1035
Oldfield and Gardner, Minister of Finance v. (1927) 39 B.C.R. 119; (1927) 4 D.L.R. 711; (1927) 3 W.W.R. 361 1035
Olds v. Paris, (1918) 25 B.C.R. 453; (1918) 2 W.W.R. 682 684
Oliver v. Granby Cons. Mining, Etc., Co., (1922) 31 B.C.R. 450; (1923) 1 D.L.R. 1163; (1923) 1 W.W.R. 50 ....168, 171
Olney, R. v. (1926) 37 B.C.R. 329; (1926) 4 D.L.R. 869; (1926) 3 W.W.R. 273; 46 C.C.C. 196 385
Olsen v. Canadian Klondyke Mining Co., (1917) 24 B.C.R. 114; 34 D.L.R. 529; (1917) 2 W.W.R. 640 ....731, 1145
Olsen v. Pearson and Evindsen, (1923) 32 B.C.R. 517, 520; (1924) 1 D.L.R. 1097 ....59, 61, 293, 313
Olsen, R. v. (1923) 32 B.C.R. 516 150
Olsen & Co. (The "Hampholm") v. The "Princess Adelaide," (1931) S.C.R. 254; (1930) 3 D.L.R. 423; (1930) 4 D.L.R. 778; (1930) Ex. C.R. 10.... 161
Olson v. Bieterilla, (1920) 28 B.C.R. 95; (1920) 1 W.W.R. 1008 ....276, 1131
Olympic Stone Construction Co. v. Momsen & Rowe, (1915) 21 B.C.R. 120; 21 D.L.R. 271; 30 W.L.R. 711; 8 W.W.R. 79 ....121, 957
O'Neal v. Vernon Fruit Union, (1922) 68 D.L.R. 556 964
On Sing, R. v. (1924) 2 W.W.R. 258 ....148, 343
Opsal, Woods v. (1918) 1 W.W.R. 985 ....218, 663, 666, 1113
Orchardson v. Dominion Bank, (1923) 32 B.C.R. 348; (1923) 2 W.W.R. 958 ....113, 736, 898
Orcutt, Dansey v. (1928) 40 B.C.R. 97; (1928) 4 D.L.R. 27 686
Orde v. Rutter, (1917) 25 B.C.R. 45; 39 D.L.R. 456; (1918) 1 W.W.R. 735; 59 S.C.R. 658; 49 D.L.R. 691 931
"Oregon," The (1916) 23 B.C.R. 53; 31 D.L.R. 161; (1917) 1 W.W.R. 139 919
"Oregon," The (No. 2), (1916) 23 B.C.R. 56; 31 D.L.R. 163; (1917) 1 W.W.R. 141. 919
"Oregon," The (No. 3), (1916) 23 B.C.R. 57; 31 D.L.R. 164; (1917) 1 W.W.R. 142 ....852, 919
Orpheum Theatrical Co. v. Rostein, (1923) 32 B.C.R. 251; (1923) 4 D.L.R. 499; (1923) 2 W.W.R. 582 ....458-9, 672
Orpheum Theatrical Co. v. Vulcan Engineering Construction Co., (1923) 3 D.L.R. 52. 129
Orr and District of North Vancouver, In re (1928) 39 B.C.R. 478; (1928) 1 W.W.R. 799 ....78, 306
Ostrom v. The "Myako," (1924) 34 B.C.R. 4; (1924) Ex. C.R. 86; (1924) 2 D.L.R. 200; (1924) 1 W.W.R. 1098 ....9, 994
Otton, Western Pac. Grain Elevator & Terminals, Ltd., v. (1924) 35 B.C.R. 59 ..218, 851
Oullette, R. v. (1930) 3 W.W.R. 37; 53 C.C.C. 405 633
Our Lord's Church, Treas. of, v. City of Victoria, (1915) 22 B.C.R. 174; 25 D.L.R. 617; 32 W.L.R. 330; 9 W.W.R. 173 ....125, 786
Overn v. Strand, 1930) 42 B.C.R. 358; (1930) 3 D.L.R. 994; (1930) 1 W.W.R. 629. 301
Overn v. Strand, (1930) 43 B.C.R. 309 50
Overn v. Strand, (1931) S.C.R. 720; (1931) 44 B.C.R. 47; (1931) 2 D.L.R. 44; (1931) 1 W.W.R. 694; (1932) 1 D.L.R. 490 ....71, 651, 899, 1002
Owen, C., Deceased, In re (1919) 26 B.C.R. 463; (1919) 1 W.W.R. 313 507

P

Pacific Berry Growers, Ltd., v. Western Packing Corpn., (1929) 41 B.C.R. 78; (1929) 1 D.L.R. 814; (1929) 1 W.W.R. 426 182

Pacific Bottling Works, Royal Bank of Canada v. (1916) 23 B.C.R. 463; (1917) 2 W.W.R. 227 ....49, 877
Pacific Coast Coal Freighters, Ltd., v. Westchester Fire Ins. Co. and Western Assce. Co., (1926-27) 38 B.C.R. 20, 315; (1926) 4 D.L.R. 963; (1926) 3 W.W.R. 356; (1927) 2 D.L.R. 590; (1927) 1 W.W.R. 878 ....624, 626, 893
Pacific Coast Coal Mines, Ltd., and Hodges, In re (1926) 37 B.C.R. 550; (1926) 4 D.L.R. 759; (1926) 3 W.W.R. 378; 8 C.B.R. 102 ....96, 173
Pacific Coast Coal Mines, Ltd., Andrews v. (1922) 31 B.C.R. 537 718
Pacific Coast Coal Mines, Ltd., v. Arbuthnot, (1916) 23 B.C.R. 267; 31 D.L.R. 378; 33 W.L.R. 487; 9 W.W.R. 1208; (1917) A.C. 607; 86 L.J.P.C. 172; 117 L.T. 613; 36 D.L.R. 564; (1917) 3 W.W.R. 762 ....167, 173, 174, 175, 184, 863, 1017
Pacific Coast Coal Mines, Ltd., v. Arbuthnot, (1920) 56 D.L.R. 452; (1921) 1 W.W.R. 529 ....177, 626
Pacific Coast Coal Mines, Ltd. v. Arbuthnot, (1926) 36 B.C.R. 321; (1926) 1 W.W.R. 478; (1926) 1 D.L.R. 670 ....181, 284, 652
Pacific Coast Coal Mines, Ltd., v. Arbuthnot, (1927) 38 B.C.R. 453 ....305, 309
Pacific Coast Coal Mines, Ltd., Jefferson v. (1916) 31 D.L.R. 557 184
Pacific Coast Coal Mines, Ltd., Wellington Colliery Co., Ltd., v. (1916) 23 B.C.R. 138; (1918) 25 B.C.R. 206; (1918) 26 B.C.R. 315; (1919) 27 B.C.R. 404; 48 D.L.R. 703; (1920) 60 S.C.R. 651; 56 D.L.R. 697; (1921) 2 W.W.R. 363 ....408, 732, 866, 881, 1070, 1071
Pacific Coast Realty Co. v. German American Ins. Co., (1917) 35 D.L.R. 522; (1917) 2 W.W.R. 632 610
"Pacific Foam," The, Atty.-Gen. of B.C. v. (1928) 40 B.C.R. 100; (1928) 2 D.L.R. 877; (1928) 1 W.W.R. 965 ....160, 998
Pacific Great Eastern Ry. Co., Edgett, Ltd., v. (1923) 32 B.C.R. 37; (1923) 1 W.W.R. 684 142
Pacific Great Eastern Ry. Co., Georgia Construction Co. v. (1929) 41 B.C.R. 469; (1929) 4 D.L.R. 607; (1929) 3 W.W.R. 92 ....63, 68, 504
Pacific Great Eastern Ry. Co., Georgia Construction Co. v. (1929) S.C.R. 630; (1929) 4 D.L.R. 161; (1928) 40 B.C.R. 290; (1928) 3 W.W.R. 466; (1929) 1 D.L.R. 77; 35 C.R.C. 204 ....130, 133, 262, 480
Pacific Great Eastern Ry. Co., Hayes v. (1916) 10 W.W.R. 831; 34 W.L.R. 819 .. 898
Pacific Great Eastern Ry. Co., Macdonald v. (1922) 68 D.L.R. 124 54
Pacific Great Eastern Ry. Co., Merriman v. (1922) 30 B.C.R. 457; (1922) 1 W.W.R. 935 ....25, 939
Pacific Great Eastern Ry. Co., Nelson et al. v. (1918) 25 B.C.R. 259; (1918) 1 W.W.R. 597; (1918) 26 B.C.R. 1; (1918) 3 W.W.R. 85; (1919) 27 B.C.R. 420; 67 D.L.R. 792 ....6, 203, 207, 217, 286
Pacific Great Eastern Ry. Co., Oblates of Mary Immaculate v. (1918) 25 B.C.R. 259; 26 B.C.R. 1; (1919) 27 B.C.R. 420; (1918) 1 W.W.R. 597; 3 W.W.R. 85; 67 D.L.R. 792 ....126, 203, 207, 217, 286
Pacific Great Eastern Ry. Co. and Peter Larsen et al., In re (1915) 22 B.C.R. 4; 8 W.W.R. 1, 630 ....74, 205, 206
Pacific Great Eastern Ry. Co. v. The "Clinton," (1918) 27 B.C.R. 400; (1919) 1 W.W.R. 947 16
Pacific Great Eastern Ry. Co., Ullock v. (1921) 30 B.C.R. 31; (1921) 2 W.W.R. 837 ....805, 938
Pacific Lumber Agency v. Imperial Timber & Trading Co., (1916) 23 B.C.R. 378; 31 D.L.R. 748; (1917) 1 W.W.R. 507 ....117, 331
Pacific Marine Ins. Co., Chartered Bank of India v. (1923) 32 B.C.R. 60; (1923) 33 B.C.R. 91; (1923) 2 D.L.R. 612; (1923) 4 D.L.R. 942; (1923) 1 W.W.R. 1136; (1924) 1 W.W.R. 114 624
Pacific Northwest Lumber Co., Bottoms v. (1929) 2 W.W.R. 495; (1929) 4 D.L.R. 415; 3rd Ed., 6 C.E.D. Supp. 1926-1931, p. 504 ....878, 898, 945, 959, 1047
Pacific Properties, Ltd., Burgess v. (1923) 32 B.C.R. 317 735
Pacific Salvage Co. and Vancouver Drydock & Salvage Co. v. The M.S. "Tex," (1930) 43 B.C.R. 434; (1931) 2 D.L.R. 657; (1931) 1 W.W.R. 153 984

Pacific Slope Lumber Co., Prembo v. (1915) 7 W.W.R. 1195 1138
Pacific Stages, Ltd., Jones v. (1928) S.C.R. 92; (1928) 2 D.L.R. 817 802
Pacific Steamship Co., Lumsden v. (1920) 28 B.C.R. 473; 54 D.L.R. 226; (1920) 3 W.W.R. 464 145
Pacific Stevedoring & Contracting Co., Atkinson v. (1915) 22 B.C.R. 109; 24 D.L.R. 400; 32 W.W.R. 154; 8 W.W.R. 1339 .....483, 706, 854, 856, 1047
"Pacifico," The, Winslow Marine Ry. & Shipping Co. v. (1924) 34 B.C.R. 1; (1924) 1 W.W.R. 930; (1925) 2 D.L.R. 162; (1925) Ex. C.R. 82 .....11, 626
Page v. Mitchell Motor Agency, (1921) 1 W.W.R. 1107 .....308, 1047
Page v. Page, (1915) 22 B.C.R. 185; 25 D.L.R. 99; 32 W.L.R. 854; 9 W.W.R. 442 .....211, 857, 861, 863
Painter v. McCabe, (1927) 39 B.C.R. 249; (1928) 2 D.L.R. 13; (1928) 1 W.W.R. 149 .....47, 591, 829
Paisley v. Leeson, (1920) 28 B.C.R. 18, 363; (1920) 1 W.W.R. 479; 2 W.W.R. 511. 133
Palitti, British America Paint Co. v. (1920) 29 B.C.R. 162..... 830
Palitti, Dominion Bank v. (1931) 45 B.C.R. 89; (1931) 3 W.W.R. 377 849
Palm, Corsini v. (1925) 35 B.C.R. 417 .....760, 898, 914
Palmer v. Palmer, (1919) 27 B.C.R. 401; (1919) 3 W.W.R. 1028 1125
Palmer v. Richards, (1921) 30 B.C.R. 321; 70 D.L.R. 732 .....498, 500, 989
Palmer & Co. v. Dimor, Marcus & Dimor, (1931) 43 B.C.R. 517; (1931) 2 D.L.R. 1004; (1931) 1 W.W.R. 169 846
Panases, Spero, R. v. (1920) 29 B.C.R. 80..... 353
Panetta v. Can. Pac. Ry. Co., (1917) 24 B.C.R. 249 55
Pantages v. Chung Gee et al., (1929) 41 B.C.R. 401; (1929) 4 D.L.R. 542; (1929) 2 W.W.R. 503 305
Pantages, Godson and Ray v. (1930) 43 B.C.R. 241; (1931) 1 D.L.R. 429; (1930) 3 W.W.R. 401 673
Pappas, In re (1921) 29 B.C.R. 318; (1921) 1 W.W.R. 949 .....587, 923
Paradise Mine and Can. Pac. Ry. Co., Dawson v. (1919) 26 B.C.R. 487; (1919) 1 W.W.R. 499 .....25, 800, 939, 1056
Parcells, Legg v. (1925) 3 D.L.R. 1121 1100
Paris, Olds v. (1918) 25 B.C.R. 453; (1918) 2 W.W.R. 682 684
Park v. Judd, (1920) 28 B.C.R. 399 314
Parker Estate, In re (1925) 36 B.C.R. 299; (1926) 1 W.W.R. 559; (1926) 1 D.L.R. 783 1032
Parker v. Kogos, (1925) S.C.R. 513; (1925) 3 D.L.R. 337 1091
Parker v. Langan, (1920) 28 B.C.R. 3 316
Parker v. Parker, (1922) 30 B.C.R. 560 440
Parker & Kippen, Island Amusement Co. v. (1920) 28 B.C.R. 43; 61 D.L.R. 28; (1920) 1 W.W.R. 1015 .....500, 960
Parry v. Thomson, (1931) 43 B.C.R. 461 .....32, 330
Parshalle, In re: Kunhardt v. Cox and Quaille, (1930) 42 B.C.R. 413; (1930) 1 W.W.R. 767; (1930) 3 D.L.R. 438; 43 B.C.R. 68; (1930) 3 D.L.R. 1004; (1930) 2 W.W.R. 802 .....430, 432, 452, 759
Parsons v. Norris, (1917) 24 B.C.R. 41; (1917) 2 W.W.R. 606; 33 D.L.R. 593 .....1012, 1108
"Paschena," The, v. The "Griff," (1925) 36 B.C.R. 30 18
"Paschena," The, v. The "Griff," (1927) 38 B.C.R. 240; (1927) 2 D.L.R. 757; (1927) 1 W.W.R. 515; (1927) Ex. C.R. 92 18
Patching v. Howarth, (1930) 43 B.C.R. 108; (1930) 4 D.L.R. 489; (1930) 3 W.W.R. 129 .....426, 428, 867
Paten v. Sigmore, (1919) 27 B.C.R. 157 .....49, 576, 1049
Paterson, Hornby and Hornby v. (1929) 41 B.C.R. 548; (1930) 1 D.L.R. 86; (1929) 3 W.W.R. 276 823
Patrick v. Royal Bank of Canada, (1931) 44 B.C.R. 448; (1931) 3 W.W.R. 100; (1932) 45 B.C.R. 437; (1932) 3 D.L.R. 532; (1932) 2 W.W.R. 257 .....113, 914
Patterson v. Branson, Brown & Co., (1930) 43 B.C.R. 26; (1930) 4 D.L.R. 222; (1930) 2 W.W.R. 236 .....246, 900

Patterson v. Canadian Robert Dollar Co., (1928-29) 41 B.C.R. 123; (1929) 3 D.L.R. 33; (1929) 2 W.W.R. 181 .....563, 840, 1056
Patterson, Chandler & Stephen v. The "Senator Jansen," (1919) 30 B.C.R. 97; 49 D.L.R. 166; (1919) 3 W.W.R. 458; 19 Ex. C.R. 105 997
Patterson v. Dist. of North Vancouver School Trustees, (1929) 41 B.C.R. 123; (1929) 3 D.L.R. 33; (1929) 2 W.W.R. 181 .....563, 815
Patterson v. Victoria School Trustees, (1917) 24 B.C.R. 365; (1917) 1 W.W.R. 526 .....772, 985
Patterson v. Vulcan Iron Works, (1930) 42 B.C.R. 300; (1930) 1 W.W.R. 640; (1930) 2 D.L.R. 961 .....171, 450
Patton v. Hartley, (1917) 24 B.C.R. 5; (1917) 2 W.W.R. 234 .....40, 299, 540
Paul v. Dines, (1929) 41 B.C.R. 49; (1929) 3 D.L.R. 617; (1929) 3 W.W.R. 287 ... 812
Pauling & Co., Bourner v. (1917) 24 B.C.R. 222; 35 D.L.R. 465; (1917) 2 W.W.R. 1129 853
Paulson v. Can. Pac. Ry. Co., (1919) 26 B.C.R. 440 310
Paul Wise, Ping Lee v. (1929) 41 B.C.R. 64; (1929) 3 D.L.R. 410; (1929) 2 W.W.R. 376; 52 C.C.C. 15 79
Paxton Estate, In re (1924) 2 W.W.R. 214 469
Payette, R. v. (1924) 34 B.C.R. 312; (1925) 1 D.L.R. 112; (1924) 3 W.W.R. 863; 43 C.C.C. 90; (1925) 35 B.C.R. 81; (1925) 2 W.W.R. 747; 44 C.C.C. 209 ....375, 377, 380, 395, 465
Payne v. Gammon, (1927) 38 B.C.R. 153; (1927) 2 D.L.R. 605; (1927) 1 W.W.R. 506 .....304, 514
Pearce, Fraser v. (1928) 39 B.C.R. 338; (1928) 1 W.W.R. 837; (1928) 2 D.L.R. 54 .....668, 1059
Pearl Wong v. Ruby Hou, (1928) 39 B.C.R. 425; (1928) 1 W.W.R. 480 .....246, 844
Pearson v. Read, (1925) 34 B.C.R. 524; (1925) 1 D.L.R. 893; (1925) 1 W.W.R. 487 .....793, 807
Pearson and Evindsen, Olsen v. (1923) 32 B.C.R. 517, 520; (1924) 1 D.L.R. 1097... .....59, 61, 293, 313
Pederson v. Empire Home Benefit Assn., (1931) 2 W.W.R. 858 612
Peers & Anderson v. S.S. "Tyndareus," (1921) 31 B.C.R. 312; 21 Ex. C.R. 219; (1922) 1 W.W.R. 673 162
Peers and Campbell, Ice Delivery Co. v. (1926) 36 B.C.R. 445, 559; (1926) 1 D.L.R. 1176; (1926) 1 W.W.R. 595 .....66, 698
Pelly v. City of Chilliwack, (1916) 23 B.C.R. 97; 30 D.L.R. 651; (1917) 1 W.W.R. 208 .....782, 789
Pemberton and Lewis, In re (1917) 25 B.C.R. 118; (1917) 3 W.W.R. 791 .....1120, 1124
Pendray, Fletcher v. (1916) 22 B.C.R. 566; 27 D.L.R. 637; 34 W.L.R. 310; 10 W.W.R. 444 .....501, 572, 988
Pendray, R. v. (1928) 40 B.C.R. 410; (1929) 1 W.W.R. 30; 51 C.C.C. 27 ..351, 777, 779
Penny, R. v. (1925) 35 B.C.R. 414 349
Penrose v. Barr, (1927) 4 D.L.R. 407; (1927) 3 W.W.R. 104 .....414, 571, 811
Penticton, District of, v. Sutherland, (1928) 40 B.C.R. 8; (1928) 2 W.W.R. 145 .. 1117
People of the State of California v. Skinner, (1924) 33 B.C.R. 555; (1924) 2 W.W.R. 209 .....345, 518
Peoples' Loan & Deposit Co. and Davidson, In re (1917) 25 B.C.R. 109; (1917) 3 W.W.R. 981 .....199, 200
People's Trust Co. and Century Ins. Co., In re (1917) 25 B.C.R. 138; (1918) 1 W.W.R. 342 185
Peppers Fruit Co., Swartz Bros. v. (1930) 4 D.L.R. 230 289
Perdue & Cope, Hayes Mfg. Co. v. (1931) 43 B.C.R. 545; (1931) 2 D.L.R. 610 ... 966
Perkins and McLeod, Vancouver Milling & Grain Co. v. (1930) 42 B.C.R. 557 915
Perri, R. v. (1926) 37 B.C.R. 289; (1926) 1 W.W.R. 551; 46 C.C.C. 86 642
Perrin v. Vancouver Drive Yourself Auto Livery, (1921) 30 B.C.R. 241; 61 D.L.R. 140; (1921) 3 W.W.R. 61 .....761, 762, 813
Perro, R. v. (1924) 34 B.C.R. 169; (1924) 4 D.L.R. 301; (1924) 2 W.W.R. 1006; 42 C.C.C. 384 .....27, 385, 631

Perron, R. v. (1922) 68 D.L.R. 392; (1922) 3 W.W.R. 138; 38 C.C.C. 121 .....350, 387
Perry v. Hornby, 1925) 1 D.L.R. 1133; (1925) 1 W.W.R. 761 1004
Perry, Kamloops Dist. Creamery Assn. v. (1921) 56 D.L.R. 492 .....268, 599
Perry, R. v. (1920) 2 W.W.R. 884 634
Perry, Royal Typewriter Agency v. (1928) 40 B.C.R. 222; (1928) 4 D.L.R. 383; (1928) 3 W.W.R. 173 .....321, 867
Perry v. Woodward's, Ltd., (1929) 41 B.C.R. 404, 433; (1929) 4 D.L.R. 410, 751; (1929) 3 W.W.R. 49 686
Person, Nelson v. (1927) 3 W.W.R. 161 1143
Peter v. Yorkshire Estates Co., (1925) 95 L.J.P.C. 91; (1926) A.C. 513; (1926) 2 D.L.R. 641; (1926) 2 W.W.R. 545; (1925) 36 B.C.R. 71; (1925) 3 D.L.R. 1193 707
Peters and Soldier Settlement Board, Wright v. (1920) 2 W.W.R. 696 .....881, 925
Peterson v. Millerd Packing Co., (1928) 40 B.C.R. 314; (1928) 4 D.L.R. 833; (1928) 3 W.W.R. 279 991
Peterson, Quinstrom v. (1929) 42 B.C.R. 81; (1930) 2 D.L.R. 224 .....319, 648, 861
Peterson v. Vancouver Gas Co., Ltd., and Keillor, (1919) 28 B.C.R. 107; 61 D.L.R. 98. 884
Peto and Beckley, Endrizzi v. (1917) 1 W.W.R. 1439 .....500, 572
Phelan, a Solicitor, In re (1916) 27 D.L.R. 729; 9 W.W.R. 1434..... 312
Philip, Dinsmore v. (1917-18) 26 B.C.R. 123; (1918) 1 W.W.R. 405; (1918) 3 W.W.R. 457 .....420, 458, 473, 474, 897
Philip, McKee v. (1916) 55 S.C.R. 286; 38 D.L.R. 731; (1917) 1 W.W.R. 690 ..897, 912
Philip Bond & Co. v. Conkey, (1921) 29 B.C.R. 240; (1921) 1 W.W.R. 758 890
Phillips, Cochrane v. (1924) 34 B.C.R. 465; (1924) 3 D.L.R. 996; (1924) 3 W.W.R. 285 1010
Phipps & Cosgrove, Shaw, Salter & Plomer v. (1926) 37 B.C.R. 184 1004
Phoenix Ins. Co., Veterans' Sightseeing & Transportation Co. v. (1924) 34 B.C.R. 428; (1924) 2 D.L.R. 674; (1924) 3 W.W.R. 782 609
Pidgeon, R. v. (1926) 27 B.C.R. 309; (1926) 3 W.W.R. 765; 45 C.C.C. 233 339
Pike, Brown & Matthews v. (1916) 23 B.C.R. 246 751
Pilkington v. Kent, (1918) 25 B.C.R. 432; (1918) 3 W.W.R. 584 1110
Ping Lee v. Paul Wise, (1929) 41 B.C.R. 64; (1929) 3 D.L.R. 410; (1929) 2 W.W.R. 376; 52 C.C.C. 15 79
Pinner, NePage v. (1915) 21 B.C.R. 81; 21 D.L.R. 315; 8 W.W.R. 322 714
Pioneer Lbr. Co. v. Alberta Lbr. Co., (1923) 32 B.C.R. 321, 442; (1923) 2 W.W.R. 913; (1923) 3 W.W.R. 1098 .....39, 494, 962, 966
Pioneer Lbr. Co. v. Dominion Lbr. Sales, Ltd., (1923) 2 D.L.R. 1194 966
Pioneer Savings & Loan Soc. and Registrar of Companies, (1928) 39 B.C.R. 372; (1928) 1 D.L.R. 830; (1928) 1 W.W.R. 361 .....687, 984
Pipe v. Holliday, (1930) 42 B.C.R. 230; (1930) 2 D.L.R. 73; (1930) 1 W.W.R. 225 .....567, 762, 770, 811
Plant v. Urquhart et al., (1921) 29 B.C.R. 488; 61 D.L.R. 211; (1921) 2 W.W.R. 324; 30 B.C.R. 461; 65 D.L.R. 242; (1922) 1 W.W.R. 632; 36 C.C.C. 339 ..360, 473
Planta, Cunliffe v. (1920) 28 B.C.R. 490; (1920) 54 D.L.R. 196; (1920) 3 W.W.R. 898 ..... 46, 917, 1004, 1008
Planta v. Greenshields and Reifel, (1931) 43 B.C.R. 439; (1931) 2 D.L.R. 189; (1931) 1 W.W.R. 401 1123
Planta, McRae v. (1924) 33 B.C.R. 395; (1924) 2 D.L.R. 408; (1924) 2 W.W.R. 323 .....716, 749
Planta, Scuilli v. (1928) 39 B.C.R. 450 .....503, 892
Plimley, Brandon v. (1917) 24 B.C.R. 441; (1918) 1 W.W.R. 831 973
Plummer v. Sullivan Machinery Co., (1917) 24 B.C.R. 104; (1917) 2 W.W.R. 229..4, 200
Point Grey, Dist. of, Carrick v. (1927) 38 B.C.R. 92, 481; (1927) 1 D.L.R. 446; (1927) 3 D.L.R. 909; (1927) 2 W.W.R. 684 775
Point Grey, Dist. of, Fletcher v. (1915) 21 D.L.R. 819 1023
Point Grey, Dist. of, Hunter v. (1917) 1 W.W.R. 1244 1107
Point Grey, Dist. of, Kilby v. (1917) 24 B.C.R. 107; (1917) 2 W.W.R. 206 .....
.....407, 680, 766, 1066

Point Grey, Dist. of, Robinson v. (1927) 38 B.C.R. 243; (1927) 2 D.L.R. 471; (1927) 3 W.W.R. 211 ..... 285, 829
Point Grey, Dist. of, Shannon v. (1921) 30 B.C.R. 136; 62 D.L.R. 248; (1921) 3 W.W.R. 442, 549; (1922) 63 S.C.R. 557; 66 D.L.R. 160; (1922) 2 W.W.R. 625 ..... 783, 1025
Pong Fook Wing, Immigration Act and, In re (1923) 33 B.C.R. 47; (1923) 4 D.L.R. 1034; (1923) 3 W.W.R. 819, 1006; 41 C.C.C. 42 ..... 28, 555, 585
Pooley, McGee v. (1931) 44 B.C.R. 338; (1931) 4 D.L.R. 475; (1931) 3 W.W.R. 65, 140 ..... 229, 597
Pooley, Woolworth Co. v. (1925) 35 B.C.R. 324; (1925) 2 W.W.R. 481 33
Pooley, Woolworth Co. v. (No. 2), (1925) 35 B.C.R. 386 1100
Port Coquitlam v. Langan, (1917) 2 W.W.R. 208; 33 D.L.R. 175 ..... 784, 789
Port Coquitlam, Wilson v. (1922) 30 B.C.R. 449; 67 D.L.R. 49; (1922) 1 W.W.R. 640; (1923) S.C.R. 235; (1923) 2 D.L.R. 194; (1923) 1 W.W.R. 1025 ..... 521, 773, 833, 835, 836
Port Edward Townsite Co., Doig v. (1916) 22 B.C.R. 418 174
Porter & Marks, R. v. (1928) 40 B.C.R. 361; (1928) 4 D.L.R. 825; 50 C.C.C. 399; (1929) 1 W.W.R. 39 396
Porter & Sons v. Foster, (1925) 36 B.C.R. 222; (1925) 4 D.L.R. 669; (1926) S.C.R. 328; (1926) 2 D.L.R. 340 ..... 421, 844, 1083
Potts v. Potts, (1919) 1 W.W.R. 906 612
Pound, Royal Bank of Canada v. (1917) 24 B.C.R. 23 ..... 52, 486
Powell, Anne Elizabeth, Deceased, In re (1921) 30 B.C.R. 134 429
Powell v. Crow's Nest Pass Coal Co., (1916) 22 B.C.R. 514; 26 D.L.R. 317; 34 W.L.R. 52; 10 W.W.R. 107 707
Powell v. Imperial Life Ins. Co. and Royal Trust Co., (1919) 27 B.C.R. 135; (1919) 2 W.W.R. 285 613
Powell, R. v. (1919) 27 B.C.R. 252 475
Powis v. City of Vancouver, (1916) 23 B.C.R. 180 ..... 76, 448, 462
Powley, Gale v. (1915) 22 B.C.R. 18; 24 D.L.R. 450; 32 W.L.R. 65; 8 W.W.R. 1312 ..... 87, 855, 1086, 1102, 1104, 1111
Prat v. Hitchcock and Canada Paint Co., (1925) 36 B.C.R. 142, 158; (1925) 3 D.L.R. 1142; (1926) 1 W.W.R. 5 ..... 58, 292, 322, 501
Pratt v. Idsardi, (1915) 21 B.C.R. 497; 23 D.L.R. 257; 31 W.L.R. 541 696
Preferred Accident Ins. Co., Erickson v. (1928) 40 B.C.R. 241; (1928) 4 D.L.R. 567 ..... 615, 653, 854
Preferred Accident Ins. Co. and Berry, Vandepitte v. (1932) W.N. 229; 102 L.J.P.C. 21; 148 L.T. 169; 49 T.L.R. 90; 76 Sol. Jo. 798; (1932) S.C.R. 22; (1932) 3 W.W.R. 573; (1932) 1 D.L.R. 107; (1933) A.C. 70; (1933) 1 D.L.R. 289 .. 280, 619
Preferred Accident Ins. Co. and Berry (No. 2), Vandepitte v. (1930) 42 B.C.R. 315; (1930) 2 D.L.R. 699 306
Prefontaine, Land Registry Act and, In re (1917) 1 W.W.R. 667 ..... 509, 947
Prembo v. Pacific Slope Lbr. Co., (1915) 7 W.W.R. 1195 1138
Premier Gold Mng. Co. v. Coastwise Steamship & Barge Co., (1925) 35 B.C.R. 147; (1925) 1 W.W.R. 630; (1926) 1 D.L.R. 1009 144
Premier Lbr. Co. v. Grand Trunk Pac. Ry. Co., (1922) 31 B.C.R. 152; (1923) S.C.R. 84; 67 D.L.R. 334; (1923) 1 D.L.R. 649; (1923) 1 W.W.R. 473; 29 C.R.C. 144. 138
Premier Mines, Ltd., Caskie v. (1921) 30 B.C.R. 116 ..... 28, 274
Prentice v. Merrick et al., (1917) 24 B.C.R. 432; 38 D.L.R. 388; (1917) 3 W.W.R. 1060 907
Prevedoros v. Prevedoros, (1927) 3 W.W.R. 755 ..... 29, 62, 596
Pribble v. B.C. Electric Ry. Co., (1925) 35 B.C.R. 46; (1925) 1 W.W.R. 904; (1926) A.C. 466; 95 L.J.P.C. 51; 134 L.T. 711; 42 T.L.R. 332; (1926) 2 D.L.R. 865; (1926) 1 W.W.R. 786; 31 C.R.C. 418 ..... 136, 679, 858, 934
Price v. B.C. Motor Transportation, Ltd., (1931) 44 B.C.R. 24; (1931) 3 D.L.R. 548; (1931) 2 W.W.R. 350 793
Price v. Fraser Valley Milk Producers Assn., (1931) 3 W.W.R. 48 ..... 302, 413

"Prince Albert," The, Commercial Pacific Cable Co. v. (1925) 37 B.C.R. 434; (1926) 4 D.L.R. 543; (1926) 3 W.W.R. 309; (1927) Ex. C.R. 44 .....8, 12, 997
Prince John Mining Co., MacKenzie v. (1924) 34 B.C.R. 193; (1924) 4 D.L.R. 221; (1924) 3 W.W.R. 168 .....181, 316
"Prince Rupert," The, The "Cleeve" v. (1917) 27 B.C.R. 533, 561; (1917) 3 W.W.R. 957; (1918) 1 W.W.R. 345 .....160, 163, 409
Prince Rupert, City of, Grand Trunk Pacific Dev. Co. v. (1923) 32 B.C.R. 463; (1923) 3 W.W.R. 1275 .....30, 785
Prince Rupert Dev. Syndicate v. Lustig, (1919) 26 B.C.R. 497; (1919) 1 W.W.R. 496 .....1102, 1104
Prince Rupert Dry Dock & Eng. Co., Manson v. (1920) 28 B.C.R. 58; (1920) 2 W.W.R. 10 176
"Princess Adelaide," The, Clayoquot Sound Canning Co. v. (1919) 27 B.C.R. 526; 48 D.L.R. 478; 19 Ex. C.R. 128; (1919) 3 W.W.R. 241 982
"Princess Adelaide," The Fred Olsen & Co. v. (1931) S.C.R. 254; (1930) 3 D.L.R. 423; (1930) 4 D.L.R. 778; (1930) Ex. C.R. 10..... 161
Princeton Collieries, Ltd., Gregory v. (1918) 25 B.C.R. 180; 40 D.L.R. 739; (1918) 1 W.W.R. 265 .....499, 654, 949, 951, 1027
Prohibition Act and Robinson, In re (1921) 30 B.C.R. 316 635
Prohibition Act and Tosey, In re (1921) 29 B.C.R. 438; 57 D.L.R. 340; (1921) 1 W.W.R. 669; 35 C.C.C. 12 .....638, 1018
Proteau, R. v. (1923) 33 B.C.R. 39 393
"Protoco," The, Coffin and O'Flynn v. (1930) 42 B.C.R. 347; (1930) 2 D.L.R. 421; (1930) 1 W.W.R. 558; (1930) Ex. C.R. 153 .....9, 994
Provincial Hotels, Ltd., In re (1922) 69 D.L.R. 744; (1922) 3 W.W.R. 96; 3 C.B.R. 296 104
Provincial Ins. Co., R. v. (1923) 33 B.C.R. 79 608
Provincial Lbr. Co. v. Tyee Lbr. Co., (1922) 2 W.W.R. 1330 .....254, 964
Prudential Life Ins. Co., In re (1919) 27 B.C.R. 402; (1919) 3 W.W.R. 428 893
Pryce, Healman v. (1929) 42 B.C.R. 104; (1930) 2 D.L.R. 608 979
Public Inquiries Act, In re (1919) 27 B.C.R. 361; 48 D.L.R. 237; (1919) 3 W.W.R. 115; 33 C.C.C. 119 .....237, 631, 1027
Public Works, Minister of, v. Tipping, (1931) 44 B.C.R. 321; (1931) 2 W.W.R. 835 .....75, 564
Public Works Act and N. F. Mackay, In re (1921) 30 B.C.R. 1; 58 D.L.R. 332; (1921) 2 W.W.R. 821; (1922) 1 A.C. 457; 91 L.J.P.C. 193; 127 L.T. 81; 63 D.L.R. 171; (1922) 1 W.W.R. 982 .....71, 924, 1082
Pulice, Standard Trusts Co. v. (1922) 70 D.L.R. 145; (1923) 32 B.C.R. 399; (1924) 33 B.C.R. 250; (1924) 1 D.L.R. 985; (1924) 3 W.W.R. 771; (1922) 32 B.C.R. 399 .....58, 304, 514, 647
Purcell v. Hendrick, (1925) 35 B.C.R. 516; (1925) 3 D.L.R. 854; (1925) 2 W.W.R. 689 .....213, 1125
Purdy v. Purdy, (1919) 27 B.C.R. 248; (1919) 2 W.W.R. 551 435
Purdy, Ltd., R. v. (1927) 38 B.C.R. 267; (1927) 1 W.W.R. 880; 48 C.C.C. 152 636
Pye v. McClure, (1915) 21 B.C.R. 115; 22 D.L.R. 543; 8 W.W.R. 538 .....23, 92, 471

Q

Quagliotti, Bell v. (1918) 25 B.C.R. 460; (1919) 26 B.C.R. 482; (1918) 2 W.W.R. 915 .....279, 666
Quaife and Rogers, Van Koughnet v. (1930) 1 W.W.R. 214 1140
Quebec Fire Ins. Co. v. MacVicar, (1916) 22 B.C.R. 448; 27 D.L.R. 720 750
Queen, R. v. (1921) 30 B.C.R. 256; (1921) 3 W.W.R. 123 992
"Queen City," The, R. v. (1930) 43 B.C.R. 494; (1931) S.C.R. 387; (1931) 3 D.L.R. 147 .....12, 14, 225, 524, 999
Queen Ins. Co. v. British Traders Ins. Co., (1927) 38 B.C.R. 161; (1927) 2 D.L.R. 159; (1927) 1 W.W.R. 508; (1928) S.C.R. 9; (1928) 2 D.L.R. 399 609

Queen Ins. Co., Morrison Mill Co. v. (1925) 34 B.C.R. 509; (1925) 1 D.L.R. 1159; (1925) 1 W.W.R. 691 623
Quesnel, Hall v. (1922) 68 D.L.R. 80 530
Quesnel Forks Gold Mining Co. v. Ward, (1919) 89 L.J.P.C. 13; 122 L.T. 206; (1919) 50 D.L.R. 1; (1919) 3 W.W.R. 946; (1920) A.C. 222; (1918) 25 B.C.R. 476; 42 D.L.R. 476; (1918) 3 W.W.R. 230 .....664, 721, 731, 1023
Quinby and Watt, Amyot v. (1916) 22 B.C.R. 402 119
Quinn v. Salmon Arm, (1928) 40 B.C.R. 111; (1929) 4 D.L.R. 1085 52
Quinn v. Walton, (1921) 30 B.C.R. 401 .....567, 769
Quinstrom v. Peterson, (1929) 42 B.C.R. 81; (1930) 2 D.L.R. 224 .....319, 648, 861
Quong Wo On, Chong Jan v. (1922) 68 D.L.R. 65 242
Quong Wong, R. v. (1930) 42 B.C.R. 241; (1930) 2 D.L.R. 422; (1930) 1 W.W.R. 299; 53 C.C.C. 60 .....355, 561, 584, 1027

R

Radinsky, R. v. (1929) 41 B.C.R. 317; (1929) 3 W.W.R. 212; 52 C.C.C. 131 342
Radovsky v. Creeden & Avery, (1919) 27 B.C.R. 303; 28 B.C.R. 331; 52 D.L.R. 618; (1920) 3 W.W.R. 234 .....405, 963
Railway Passengers Assce. Co., Danroth v. (1930) 43 B.C.R. 21; (1931) 1 D.L.R. 156; (1930) 2 W.W.R. 555 .....70, 609
Raines v. B.C. Electric Ry. Co., (1921) 30 B.C.R. 340; 70 D.L.R. 738 .....135, 1055
Rainey v. Kelly, (1922) 3 W.W.R. 346; 69 D.L.R. 534 .....54, 565, 571, 805
Rainier Bottling Works, Ltd., Government Liquor Act and, In re (1924) 33 B.C.R. 443 640
Rainier Brewing Co. v. City of Kamloops, (1925) 2 D.L.R. 376 .....783, 1022
Rainier Brewing Co., Seattle Brewing & Malting Co. v. (1924) 34 B.C.R. 334; (1924) 4 D.L.R. 940; (1924) 3 W.W.R. 502 .....1053, 1061
Rainy River Pulp & Paper Co., Western Fuel Co. v. (1919) 26 B.C.R. 442; (1919) 1 W.W.R. 323 965
Raisback v. Raisback, (1921) 1 W.W.R. 918; 61 D.L.R. 472 441
Ramage v. City of Vancouver, (1916) 23 B.C.R. 180 .....76, 439, 453
Ramsay v. District of West Vancouver, (1915) 21 B.C.R. 401; 22 D.L.R. 826; 31 W.L.R. 415; 8 W.W.R. 835; 53 S.C.R. 459; 30 D.L.R. 602; 10 W.W.R. 1184..567, 767
Ramsay v. Vancouver School Trustees, (1915) 21 B.C.R. 589; 24 D.L.R. 138; 32 W.L.R. 77; 8 W.W.R. 1328 132
Rankin v. Bell, (1923) 3 D.L.R. 907; (1923) 2 W.W.R. 922 .....503, 987
Rankin, Vancouver City Young Men's Christian Assn. v. (1916) 22 B.C.R. 588; 27 D.L.R. 417; 34 W.L.R. 304; 10 W.W.R. 482, 485 248
Rant, Zellinsky v. (1926) 37 B.C.R. 119; (1926) 2 D.L.R. 327; (1926) 2 W.W.R. 474 .....54, 822
Rant & Ker, In re (1930) 2 W.W.R. 274 201
Raper, Merkley v. (1922) 1 W.W.R. 1166 311
Rath, Bouch v. (1918) 25 B.C.R. 445; 26 B.C.R. 320 .....45, 1107
Rattenbury v. Land Settlement Board, (1928) 39 B.C.R. 523; (1928) 3 D.L.R. 382; (1928) 2 W.W.R. 475; (1929) S.C.R. 52; (1929) 1 D.L.R. 242 .....6, 235, 925
Ray v. Ruby Hou, (1926) 40 B.C.R. 438; (1927) 39 B.C.R. 128; (1928) 1 D.L.R. 177 .....673, 1009, 1093
Read, Pearson v. (1925) 34 B.C.R. 524; (1925) 1 D.L.R. 893; (1925) 1 W.W.R. 487 .....793, 807
Reader, R. v. (1922) 31 B.C.R. 417; 70 D.L.R. 226; (1922) 3 W.W.R. 1112; 28 C.C.C. 202 383
Ready & Cass, In re (1924) 33 B.C.R. 371; (1924) 2 D.L.R. 528 .....106, 529
Redmond, In re: Atty.-Gen. for B.C. v. Royal Trust Co., (1931) 44 B.C.R. 390; (1931) 3 W.W.R. 18 .....594, 1036
Redmond v. Canadian Credit Men's Trust Assn., (1930) 43 B.C.R. 361; (1931) 1 W.W.R. 197 755
Reed, Atty.-Gen. of Canada v. (1925) 36 B.C.R. 366; (1926) 1 D.L.R. 821 1042

Reevie v. The White Co., (1929) 41 B.C.R. 345; (1929) 4 D.L.R. 296; (1929) 3 W.W.R. 33 ..... 961, 968
Regal Shoe Co., Drinkle v. (1916) 23 B.C.R. 24; 28 D.L.R. 775; 10 W.W.R. 448; 34 W.L.R. 690 549
Registrar of Companies, Pioneer Savings & Loan Assn. and, In re (1928) 39 B.C.R. 372; (1928) 1 D.L.R. 830; (1928) 1 W.W.R. 361 ..... 687, 984
Registrar-General of Titles, Alberni Land Co. v. (1918) 25 B.C.R. 273; 40 D.L.R. 142; (1918) 2 W.W.R. 537 ..... 444, 457, 941, 948
Registrar-General of Titles, Granby Consolidated Mining, Etc., Co. and, In re (1919) 26 B.C.R. 523; (1919) 2 W.W.R. 321 ..... 220, 937
Registrar-General of Titles, Lee Mong Kow and Chetham v. (1923) 32 B.C.R. 148; (1923) 2 W.W.R. 545 953
Reid, Collister v. (1919) 27 B.C.R. 278; (1919) 59 S.C.R. 275; 50 D.L.R. 289; (1919) 3 W.W.R. 229, 1083 ..... 722, 1018
Reid v. Galbraith, (1927) 38 B.C.R. 287; (1927) 2 D.L.R. 857; (1927) 1 W.W.R. 780 ..... 50, 752, 1070
Reid, Linnell v. (1923) 32 B.C.R. 87; (1923) 2 D.L.R. 445; (1923) S.C.R. 594; (1923) 3 D.L.R. 594, 966; (1923) 3 W.W.R. 422 ..... 126, 829, 943, 1058
Reid, Russell v. (1928) 1 D.L.R. 628 ..... 100, 978
Reid v. Vancouver Tug Boat Co., (1928) 39 B.C.R. 479; (1928) 2 D.L.R. 244; (1928) 1 W.W.R. 800 ..... 493, 879
Reid, Watt v. (1929) 42 B.C.R. 90; (1930) 2 D.L.R. 215 ..... 413, 824
Reid and Reinhard, Vernon Hardware Co. v. (1927) 2 W.W.R. 117 ..... 82, 287, 323, 533
Reifel, Symington v. (1931) 43 B.C.R. 172, 388; (1931) 1 D.L.R. 935; (1931) 1 W.W.R. 410 ..... 2, 265
Reinseth v. Campbell, (1920) 52 D.L.R. 357 ..... 23, 92, 471
Reinseth, Douglas Lake Cattle Co. v. (1922) 30 B.C.R. 552; 65 D.L.R. 646; (1922) 1 W.W.R. 1258 ..... 319, 655
Reinseth v. Nicola Pine Mills, Ltd., and McDougall, (1927) 39 B.C.R. 151; (1928) 1 D.L.R. 93 277
Renahan v. City of Vancouver, (1930) 43 B.C.R. 147; (1930) 4 D.L.R. 1018; (1930) 3 W.W.R. 166 ..... 766, 1050
Renfrew, Mitchell v. (1918) 1 W.W.R. 942 883
Renneburg v. Albion Fisheries, Ltd., (1931) 1 W.W.R. 231 ..... 3, 979
Retallick v. B.C. Electric Ry. Co., (1925) 35 B.C.R. 165; (1925) 1 W.W.R. 885 ... 801
Revelstoke, City of, v. Armstrong, (1927) 38 B.C.R. 253; (1927) 2 D.L.R. 223; (1927) 2 W.W.R. 245 885
R. v. Adkin, (1931) 44 B.C.R. 295; 56 C.C.C. 347 605
R. v. Alberts, (1925) 35 B.C.R. 106; (1925) 4 D.L.R. 672; (1925) 1 W.W.R. 441; 45 C.C.C. 51 ..... 355, 362
R. v. Altomare, (1928) 3 W.W.R. 487 378
R. v. Anderson, (1919) 27 B.C.R. 168 383
R. v. Anderson Logging Co., (1925) 95 L.J.P.C. 43; 134 L.T. 386; (1926) A.C. 140; (1926) 1 D.L.R. 785; (1926) 1 W.W.R. 488 1040
R. v. Army & Navy Veterans (Victoria Unit), (No. 2) The, (1921) 30 B.C.R. 248; 66 D.L.R. 512; (1921) 3 W.W.R. 594; 36 C.C.C. 285 640
R. v. Associated Growers of B.C., (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R. 394; (1929) 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; 53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129 ... . 223, 268, 692, 927
R., Atty.-Gen. for B.C. v. (1922) 63 S.C.R. 622; 68 D.L.R. 106; (1922) 3 W.W.R. 269; (1923) 93 L.J.P.C. 76; 130 L.T. 231; 68 Sol. Jo. 138; 40 T.L.R. 13; (1923) 4 D.L.R. 690; (1923) 3 W.W.R. 1252; (1924) A.C. 213 .... 202, 216, 221, 1021, 1022
R. and Atty.-Gen. for Canada v. Wong Kit, (1930) A.C. 244; (1929) 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; 53 C.C.C. 14; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129 ..... 324, 380, 692, 927

R. v. Bagley, (1926) 37 B.C.R. 353; (1926) 3 D.L.R. 717; (1926) 2 W.W.R. 513; 46 C.C.C. 257 ....398, 488
R. v. Baker, (1925) 37 B.C.R. 1; 45 C.C.C. 1; (1926) 1 D.L.R. 99; (1926) S.C.R. 92; (1926) 1 D.L.R. 115; 45 C.C.C. 19 ....373, 375, 485
R. v. Bampton, (1931) 44 B.C.R. 427; 57 C.C.C. 232; (1932) 1 W.W.R. 154; (1932) S.C.R. 626; (1932) 4 D.L.R. 209; 58 C.C.C. 289 341
R. v. Barton, (1919) 27 B.C.R. 485 434
R. v. B.C. Fir & Cedar Lumber Co., (1931) S.C.R. 435; (1931) 3 D.L.R. 354 1042
R., B.C. Hop Co. v. (1926) 37 B.C.R. 130; (1926) 3 D.L.R. 182; (1926) 2 W.W.R. 440 1046
R. v. Beguin, (1922) 31 B.C.R. 429 345
R. v. Bela Singh, (1915) 22 B.C.R. 321; 27 C.C.C. 40 ....380, 384
R. v. Bell, (1929) 41 B.C.R. 166; 51 C.C.C. 388; (1929) 3 D.L.R. 931; (1929) 2 W.W.R. 399; (1930) 42 B.C.R. 136; (1930) 2 D.L.R. 647; 53 C.C.C. 44 ....58, 349, 388, 389, 399, 415, 476
R. v. Bellos, (1927) S.C.R. 258; (1927) 3 D.L.R. 186; 48 C.C.C. 126; (1926) 38 B.C.R. 89; (1927) 1 W.W.R. 471; 47 C.C.C. 157 ....397, 486
R. v. Berdino, (1924) 34 B.C.R. 142; (1924) 3 D.L.R. 794; (1924) 3 W.W.R. 198; 42 C.C.C. 308 ....380, 641
R. v. Berenstein, (1917) 24 B.C.R. 361; 29 C.C.C. 435....368, 377
R., Blackman v. (1924) S.C.R. 406; (1924) 4 D.L.R. 123 ....1030, 1036
R. v. Blackman and Smith, (1931) 44 B.C.R. 115; (1931) 2 W.W.R. 11; 56 C.C.C. 48 .... 348, 400
R. v. Blair, (1931) 2 W.W.R. 893 637
R. v. Boak, (1925) 35 B.C.R. 256; (1925) S.C.R. 525; (1925) 3 D.L.R. 887; 44 C.C.C. 218 ....29, 372, 379, 380, 382, 395, 657, 662
R. v. Bovero, (1925) 35 B.C.R. 103; (1925) 1 W.W.R. 304; 44 C.C.C. 324 357
R. v. Bowen, (1930) 43 B.C.R. 507 350
R. v. Bowles, (1923) 32 B.C.R. 340; (1923) 2 W.W.R. 1062 383
R. v. Bradshaw, (1927) 38 B.C.R. 558; (1927) 4 D.L.R. 278; (1927) 3 W.W.R. 85; (1928) S.C.R. 54; (1928) 2 D.L.R. 352 1042
R. v. Brandilini, (1926) 38 B.C.R. 87; (1927) 1 W.W.R. 832; 47 C.C.C. 166 154
R. v. Brandolini, (1930) 42 B.C.R. 536; (1930) 1 W.W.R. 890; 54 C.C.C. 122 645
R. v. Bremner, (1924) 34 B.C.R. 494; 43 C.C.C. 366.... 781
R. v. Briggs, (1923) 33 B.C.R. 297 357
R. v. Bryson, (1915) 21 B.C.R. 313; 21 D.L.R. 777; 31 W.L.R. 307 629
R. v. Burgess and McKenzie, (1928) 39 B.C.R. 492; (1928) 2 D.L.R. 694; (1928) 1 W.W.R. 633; 49 C.C.C. 243 ....345, 376
R. v. Burke, (1925) 35 B.C.R. 453; (1925) 2 W.W.R. 480; 43 C.C.C. 393 641
R. v. Burke-Roche, (1926) 37 B.C.R. 313 1036
R. v. Burnett, (1930) 43 B.C.R. 207; (1930) 3 W.W.R. 347; 54 C.C.C. 405..237, 781, 1023
R. v. Calbic, (1920) 28 B.C.R. 113; 61 D.L.R. 203; (1920) 2 W.W.R. 621; 33 C.C.C. 352 ....224, 568, 768
R., Cameron v. (1927) 38 B.C.R. 191; (1927) 2 D.L.R. 382; (1927) 1 W.W.R. 624 ....932, 1017
R. v. Campbell, Jean, (1916) 22 B.C.R. 601; 28 D.L.R. 385; 26 C.C.C. 196 ...342, 552
R. v. Canadian Bakeries, (1930) 43 B.C.R. 234; 54 C.C.C. 369 ....335, 487
R. v. Canadian Dollar Co., (1926) 37 B.C.R. 264; 47 C.C.C. 69 ....31, 378
R. v. Canadian Pacific Lbr. Co., (1915) 26 D.L.R. 80; 15 Ex. C.R. 350 206
R. v. Canadian Pacific Wine Co., (1921) 29 B.C.R. 490; 60 D.L.R. 308; (1921) 2 W.W.R. 442; 36 C.C.C. 103 645
R. v. Cardarelli, (1929) 2 W.W.R. 223; 52 C.C.C. 267; (1930) 1 D.L.R. 575 ....148, 356, 389, 562
R. v. Carmichael, (1915) 22 B.C.R. 375; (1915) 26 C.C.C. 443 ....334, 371
R. v. Carmito, (1919) 27 B.C.R. 225; (1919) 2 W.W.R. 548 ....336, 630
R. v. Caskie and Spark, (1922) 31 B.C.R. 368; 35 B.C.R. 78; (1922) 3 W.W.R. 1109; 38 C.C.C. 198; 70 D.L.R. 215; (1923) 3 D.L.R. 295; (1923) 2 W.W.R. 451 ....387, 639, 1019

R. v. Cassandra, (1929) 1 W.W.R. 866; 52 C.C.C. 326 .....384, 465
R. v. Ceal, (1929) 1 W.W.R. 797 633
R. v. Chan Lung Toy, (1924) 34 B.C.R. 194; (1924) 3 W.W.R. 196 ..367, 589, 641, 644
R. v. Chang Song, (1923) 33 B.C.R. 176; (1924) 1 D.L.R. 1161; (1924) 1 W.W.R. 778; 42 C.C.C. 8 .....554, 585
R. v. Charlie Sam, (1930) 42 B.C.R. 360; (1930) 2 W.W.R. 441; 53 C.C.C. 252 ... .344, 371, 373
R. v. Cheng Tong Seng, (1927) 39 B.C.R. 157; 49 C.C.C. 79; (1928) 1 W.W.R. 33 .....27, 337, 361
R. v. Chew Deb, (1928) 39 B.C.R. 559; (1928) 1 W.W.R. 966; 49 C.C.C. 332 ...361, 557
R. v. Chew Deb (No. 2), (1929) 41 B.C.R. 403 359
R. v. Chin Chong, (1921) 29 B.C.R. 527 381
R. v. Chin Chong, alias Jeanne, (1929) 41 B.C.R. 33; (1929) 1 W.W.R. 254; 52 C.C.C. 283 384
R. v. Chin Mow, (1924) 34 B.C.R. 240; (1924) 4 D.L.R. 433; (1924) 3 W.W.R. 187; 42 C.C.C. 394 .....344, 1015
R. v. Chin Sack, (1928) 39 B.C.R. 223; (1928) 1 W.W.R. 618; 40 C.C.C. 43 587
R. v. Chin Sack (No. 2), (1928) 40 B.C.R. 68; 50 C.C.C. 137.....297, 587, 650
R. v. Chin Toy, (1922) 70 D.L.R. 160; (1922) 2 W.W.R. 1269; 38 C.C.C. 382..358, 364
R. v. Chin Yow Hing, (1929) 41 B.C.R. 214; (1929) 2 W.W.R. 73; 51 C.C.C. 407 .. ..149, 562
R. v. Chong Kee, (1920) 29 B.C.R. 165; 37 C.C.C. 22 518
R. v. Chong Sam Bow, (1925) 1 W.W.R. 240 .....374, 382, 391, 658
R. v. Chow Ben, (1925) 36 B.C.R. 319; 45 C.C.C. 152; (1926) 1 W.W.R. 384 355
R. v. Chow Chin, (1920-21) 29 B.C.R. 445; 57 D.L.R. 708; (1920) 2 W.W.R. 997; 34 C.C.C. 228 .....386, 518
R. v. Chow Duck Yuet, (1931) 43 B.C.R. 152, 556; 55 C.C.C. 344 .....400, 588
R. v. Chow Kee, (1929) 42 B.C.R. 67 396
R. v. Christian Community of Universal Brotherhood, (1931) 1 W.W.R. 255 ... .42, 297, 692
R. v. Chung Chan, (1918) 1 W.W.R. 398 .....386, 637
R. v. Chung Chuck, (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R. 394; 51 C.C.C. 260; 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; 53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129..... .....223, 268, 324, 380, 692, 927
R. v. Chung Chuck, (1929) 42 B.C.R. 116; 52 C.C.C. 292; (1930) 43 B.C.R. 125; 54 C.C.C. 174 468
R. v. Chue, Louie, (1924) 34 B.C.R. 177; (1924) 4 D.L.R. 300; 42 C.C.C. 382 355
R. v. Churton, (1919) 27 B.C.R. 26; 45 D.L.R. 725; (1919) 1 W.W.R. 774; 31 C.C.C. 188 374
R. v. City of Victoria, (1920) 28 B.C.R. 315; 52 D.L.R. 324; (1920) 2 W.W.R. 948; 33 C.C.C. 108 .....227, 841
R. v. Clement, (1919) 27 B.C.R. 121; (1919) 3 W.W.R. 309; 32 C.C.C. 384 ...631, 920
R. v. Collinge, (1928) 40 B.C.R. 418; 51 C.C.C. 193 .....487, 488
R. v. Columbia Wine & Spirit Co., (1921) 30 B.C.R. 245 638
R. v. Conn, (1920) 28 B.C.R. 189; 36 C.C.C. 281 350
R. v. Conway, (1929) 3 W.W.R. 268; 52 C.C.C. 161 .....31, 295, 378, 465
R. v. Cooper, (1925) 35 B.C.R. 457; (1925) 2 W.W.R. 778; 44 C.C.C. 314 ...228, 641
R. v. Cox, (1929) 41 B.C.R. 9; (1929) 2 D.L.R. 785; (1929) 1 W.W.R. 542; 51 C.C.C. 203 .....150, 359
R. v. Coy, (1925) 36 B.C.R. 34; (1925) 3 W.W.R. 538; 44 C.C.C. 119 341
R. v. Cumyow, (1925) 36 B.C.R. 435; (1926) 1 D.L.R. 623; 45 C.C.C. 172 385
R v. Dahlin, (1919) 27 B.C.R. 564; 60 D.L.R. 604; 36 C.C.C. 223 .....222, 235
R. v. Dalbergh, (1931) 43 B.C.R. 474; (1931) 1 W.W.R. 260; 55 C.C.C. 177 ..473, 645
R. v. Davis, Wilhelmina, (1922) 31 B.C.R. 453; 40 C.C.C. 335 632
R. v. Deal, (1923) 32 B.C.R. 279; (1923) 3 D.L.R. 201; (1923) 1 W.W.R. 615; 39 C.C.C. 105 .....376, 392

R. v. de Bortoli, (1927) 3 D.L.R. 193; (1927) S.C.R. 454; 48 C.C.C. 118; (1927) 38 B.C.R. 388; (1927) 2 W.W.R. 300; 47 C.C.C. 351 .....376, 390, 394
R. v. DeGrassio, (1930) 1 W.W.R. 941 635
R. v. Delip Singh, (1918) 26 B.C.R. 390 348
R. v. DeMesquito, (1915) 21 B.C.R. 524; 26 D.L.R. 464; 32 W.L.R. 368; 9 W.W.R. 113; 24 C.C.C. 407 .....382, 391, 482
R. v. "Despatch," The, (1915) 21 B.C.R. 503; (1915) 22 B.C.R. 365; 32 W.L.R. 13; 33 W.L.R. 130; 16 Ex. C.R. 310; 9 W.W.R. 738; 23 D.L.R. 351; 25 D.L.R. 221; (1916) 22 B.C.R. 496; 28 D.L.R. 42; 34 W.L.R. 123; 10 W.W.R. 230; 16 Ex. C.R. 319 .....8, 16, 17, 19, 159, 474, 476
R. v. Dhana Singh, (1915) 7 W.W.R. 1101; 25 C.C.C. 250 152
R. v. Dobbin, (1929) 3 W.W.R. 176; 52 C.C.C. 342 .....24, 335
R. v. Dobie, (1921) 29 B.C.R. 188; 57 D.L.R. 290; (1921) 1 W.W.R. 723; 35 C.C.C. 10 .....335, 360, 636, 683
R. v. Donald, 1931) 44 B.C.R. 514 342
R. v. Dragani, (1927) 38 B.C.R. 420; (1927) 1 W.W.R. 914; 47 C.C.C. 301 ...152, 360
R. v. DuBois, (1919) 30 B.C.R. 394 .....372, 383
R. v. Edward Jim, (1915) 22 B.C.R. 106; 26 C.C.C. 236 350
R. v. Ernst, (1927) 1 W.W.R. 961; 48 C.C.C. 190.....399, 630
R. v. Evans, (1916) 23 B.C.R. 128 .....377, 383, 719
R. v. Evans: In re George Fisher, (1915) 21 B.C.R. 322; 8 W.W.R. 444; 24 C.C.C. 125 240
R. v. Faulds, (1922) 31 B.C.R. 421; 40 C.C.C. 300 348
R. v. Ferguson, (1917) 33 D.L.R. 42; 26 C.C.C. 220 .....155, 292
R. v. Ferguson, (1922) 31 B.C.R. 100; 69 D.L.R. 153; (1922) 2 W.W.R. 473; 37 C.C.C. 89 222
R. v. Ferraro, (1924) 33 B.C.R. 491 366
R. v. Fitzpatrick, (1923) 32 B.C.R. 289; (1923) 2 W.W.R. 497; 40 C.C.C. 75 348
R. v. Fitzpatrick, (1929) 40 B.C.R. 478; (1929) 1 D.L.R. 806; (1929) 1 W.W.R. 393; 51 C.C.C. 146 .....487, 491
R. v. Fleming, (1921) 3 W.W.R. 629; 65 D.L.R. 229; 36 C.C.C. 335 .....638, 639, 1019
R. v. Fong, Harry, (1930) 3 W.W.R. 479 .....331, 368, 921
R. v. Fong Soon, (1919) 26 B.C.R. 450; 45 D.L.R. 78; (1919) 1 W.W.R. 486; 31 C.C.C. 78 .....382, 581
R. v. Frederick, (1931) 44 B.C.R. 547; (1931) 3 W.W.R. 747; 57 C.C.C. 340 398
R. v. Fung Fang Yuk, (1923) 32 B.C.R. 311; (1923) 2 W.W.R. 447; 40 C.C.C. 126. 343
R. v. Furuzawa, Kizo (1930) 42 B.C.R. 541, 548; (1930) 1 W.W.R. 953, 955; 53 C.C.C. 398 .....352, 476
R. v. Gallagher, (1925) 36 B.C.R. 246; (1925) 3 W.W.R. 757 365
R. v. Gan, (1925) 36 B.C.R. 125; (1925) 3 W.W.R. 783; 44 C.C.C. 334 362
R. v. Gartshore, (1919) 27 B.C.R. 175, 425; 49 D.L.R. 276; (1919) 3 W.W.R. 757; 32 C.C.C. 49 .....27, 332, 556, 648
R. v. Gauthier, (1921) 29 B.C.R. 401; (1921) 2 W.W.R. 1 482
R. v. Gee Dew, (1924) 33 B.C.R. 524, 548; (1924) 3 D.L.R. 153, 186; (1924) 2 W.W.R. 791, 793; 42 C.C.C. 188 .....552, 560, 585
R. v. Gee Dew (No. 2), (1924) 33 B.C.R. 545; (1924) 3 D.L.R. 175; (1924) 2 W.W.R. 791; 42 C.C.C. 210 153
R. v. Geffler, (1923) 32 B.C.R. 423; (1923) 3 D.L.R. 1205; 41 C.C.C. 112 339
R. v. Gilmore, (1930) 43 B.C.R. 57 397
R. v. Girone, (1925) 34 B.C.R. 554 346
R. v. Grant, (1926) 37 B.C.R. 423; (1926) 4 D.L.R. 784; (1926) 3 W.W.R. 253; 46 C.C.C. 182 .....632, 927
R. v. Gurditta, (1926) 38 B.C.R. 66; 47 C.C.C. 103; (1927) 1 W.W.R. 273; (1927) S.C.R. 80; (1927) 2 D.L.R. 577; 47 C.C.C. 154 336
R. v. Gustafson, (1929) 42 B.C.R. 58; (1929) 3 W.W.R. 209; 52 C.C.C. 151 ...154, 295
R. v. Halter, (1929) 42 B.C.R. 28; 52 C.C.C. 320 643
R. v. Ham, (1918) 25 B.C.R. 237; 29 C.C.C. 431..... 340

R. v. Harrison, (1928) 40 B.C.R. 53; (1928) 3 D.L.R. 224; (1928) 1 W.W.R. 973; 49 C.C.C. 356 472
R. v. Harry Fong, (1930) 3 W.W.R. 479 ..... 331, 368, 921
R. v. Harvey, (1924) 34 B.C.R. 492; (1925) 1 D.L.R. 1097; 43 C.C.C. 249 378
R. v. Harwood, (1921) 30 B.C.R. 121 634
R. v. Henderson, (1929) 41 B.C.R. 242; (1929) 4 D.L.R. 984; (1929) 2 W.W.R. 209; 52 C.C.C. 82, 95; (1930) S.C.R. 45; (1930) 1 D.L.R. 420 ..... 149, 154, 337, 363
R. v. Henley, (1922) 70 D.L.R. 867; (1922) 3 W.W.R. 638 ..... 384, 646
R. v. Henry Chan, (1930) 42 B.C.R. 360; (1930) 2 W.W.R. 441; 53 C.C.C. 252 ..... 344, 371, 373
R. v. Henry Chow, (1930) 42 B.C.R. 365; (1930) 2 W.W.R. 389; 53 C.C.C. 247 .. 374
R. v. Hicks, (1925) 37 B.C.R. 280; (1926) 1 W.W.R. 182; 46 C.C.C. 94 ..... 381, 382
R. v. Hing Hop, (1926) 37 B.C.R. 158; (1926) 1 W.W.R. 799; 45 C.C.C. 239 ..... 149, 367, 554, 557, 561
R. v. Hoare, (1932) 44 B.C.R. 557; (1932) 1 W.W.R. 470 337
R. v. Hodges, (1921) 30 B.C.R. 37; 60 D.L.R. 618; (1921) 2 W.W.R. 388; 1 C.B.R. 530 ..... 105, 130
R. v. Holt, (1925) 36 B.C.R. 391; (1926) 1 W.W.R. 47; 46 C.C.C. 40 ..... 31, 378
R. v. Hong Lee, alias Wah Chew, (1920) 28 B.C.R. 459; 61 D.L.R. 271; (1920) 3 W.W.R. 795; 36 C.C.C. 5 381
R. v. Hornby, (1923) 32 B.C.R. 505 393
R. v. Huger, (1924) 33 B.C.R. 157 366
R. v. Hughes, (1924) 35 B.C.R. 55 371
R. v. Iaci, (1924) 33 B.C.R. 501; (1924) 3 D.L.R. 321; 42 C.C.C. 266; (1925) 35 B.C.R. 95, 403; (1925) 4 D.L.R. 474; (1925) 1 W.W.R. 304; (1925) 2 W.W.R. 129; 43 C.C.C. 363; 44 C.C.C. 275 ..... 354, 357, 388, 552
R. v. Irwin, (1919) 27 B.C.R. 226 465
R. v. Jack, (1918) 25 B.C.R. 269; 33 C.C.C. 86 352
R. v. Jagat Singh, (1915) 21 B.C.R. 545; 28 D.L.R. 125; 32 W.L.R. 637; 9 W.W.R. 514; 25 C.C.C. 281 ..... 376, 391
R. v. Jay Set, (1921) 30 B.C.R. 349; 66 D.L.R. 520; (1921) 3 W.W.R. 847; 36 C.C.C. 250 149
R. v. Jeu Jang How, (1919) 59 S.C.R. 175; 50 D.L.R. 41; (1919) 3 W.W.R. 1115; 32 C.C.C. 103 ..... 28, 66, 556, 581, 585, 587, 1028
R. v. Jim Goon and Wong Sing, (1916) 22 B.C.R. 381; 28 D.L.R. 374; 33 W.L.R. 761; 25 C.C.C. 415 369
R. v. Johanson, (1922) 31 B.C.R. 211; (1922) 2 W.W.R. 1105; 38 C.C.C. 60 ..... 335, 352, 923
R. v. Johnston, (1931) 44 B.C.R. 367; 56 C.C.C. 358 1028
R. v. Jones, (1923) 32 B.C.R. 160; (1923) 2 W.W.R. 141; 40 C.C.C. 198 ..... 365, 560
R. v. Jong, (1926) 1 W.W.R. 40; 44 C.C.C. 338 365
R. v. Jordan, (1925) 35 B.C.R. 1; (1925) 2 D.L.R. 1119; 44 C.C.C. 23; (1925) 1 W.W.R. 799 ..... 31, 361
R. v. Joy, (1923) 3 W.W.R. 214 ..... 447, 695
R. v. Jungo Lee, (1926) 37 B.C.R. 318; (1926) S.C.R. 652; (1927) 1 D.L.R. 721; (1926) 2 W.W.R. 734; 46 C.C.C. 92; (1927) 38 B.C.R. 313; (1927) 1 W.W.R. 578; 47 C.C.C. 255 ..... 364, 553, 587
R. v. Kamway, (1929) 3 W.W.R. 165; 52 C.C.C. 188 379
R., Kent v. (1924) S.C.R. 388; (1924) 4 D.L.R. 77 ..... 1025, 1040
R. v. Kerr, (1921) 29 B.C.R. 522; 59 D.L.R. 627; (1921) 2 W.W.R. 561 634
R., Ketchen v. (1926) 37 B.C.R. 479; (1927) 39 B.C.R. 11; (1926) 3 W.W.R. 767; (1927) 3 W.W.R. 152 732
R. v. Kilmartin, (1923) 33 B.C.R. 151; (1924) 1 W.W.R. 107 ..... 355, 357, 558
R. v. Kinnon, (1925) 35 B.C.R. 531 699
R. v. Kissell, (1930) 1 W.W.R. 941 635
R., Kitchin v. (1922) 30 B.C.R. 421; 63 D.L.R. 425; (1922) 1 W.W.R. 697 723
R. v. Kizo Furuzawa, (1930) 42 B.C.R. 541, 548; (1930) 1 W.W.R. 953, 955; 53 C.C.C. 398 ..... 352, 476

R. v. Kong Yick, (1918) 25 B.C.R. 269; 33 C.C.C. 86 352
R. v. Kramer, (1920) 29 B.C.R. 132; 36 C.C.C. 236 .....351, 1020
R. v. Kwong Yick Tai, (1915) 21 B.C.R. 127; 22 D.L.R. 323; 24 C.C.C. 28; 8 W.W.R. 808 .....26, 150, 326
R. v. Lai Cow et al., (1921) 30 B.C.R. 277; (1921) 3 W.W.R. 268 151
R. v. Lakeside Orchards, Ltd., (1929) 1 W.W.R. 870; 51 C.C.C. 182 ...125, 126, 764, 1113
R. v. Lam Joy, (1920) 28 B.C.R. 253; (1920) 2 W.W.R. 1006 .....155, 295
R. v. Lauriente, (1928) 3 W.W.R. 265 .....31, 386
R. v. Leahy, (1920) 28 B.C.R. 151; 61 D.L.R. 333; (1920) 2 W.W.R. 95; 35 C.C.C. 358 .....152, 361
R. v. Lee, (1925) 35 B.C.R. 401; (1925) 2 W.W.R. 190; 45 C.C.C. 280 368
R. v. Lee, (1926) 37 B.C.R. 397; (1926) 3 W.W.R. 264 560
R. v. Lee Duck, (1919) 27 B.C.R. 482; (1920) 1 W.W.R. 1051 .....335, 638
R. v. Lee Foon, (1927) 39 B.C.R. 298; (1928) 1 W.W.R. 747; 49 C.C.C. 233 347
R. v. Lee Hing Leong, (1923) 33 B.C.R. 158 .....42, 555
R. v. Lee Hoy et al., (1922) 31 B.C.R. 123; 40 C.C.C. 102 341
R. v. Lee Kam Way, (1927) 3 W.W.R. 143; 49 C.C.C. 314 .....379, 636
R. v. Lee Kim, (1930) 42 B.C.R. 360; (1930) 2 W.W.R. 441; 53 C.C.C. 252 .....344, 371, 373, 400
R. v. Lee Moon Koo, (1931) 43 B.C.R. 458; (1931) 1 W.W.R. 571; 55 C.C.C. 188 .....559, 588
R. v. Lee Park, (1923) 33 B.C.R. 158; (1924) 34 B.C.R. 251; (1924) 4 D.L.R. 883; (1924) 3 W.W.R. 490 .....42, 555, 586
R. v. Lee Sow, (1922) 31 B.C.R. 161; 66 D.L.R. 146; (1922) 2 W.W.R. 208; 37 C.C.C. 196 369
R. v. Lee Tan, (1920) 28 B.C.R. 49; 61 D.L.R. 516; (1920) 3 W.W.R. 792; 35 C.C.C. 377 381
R. v. Lew Hing Loy, (1926) 38 B.C.R. 109; (1926) 2 W.W.R. 543; 46 C.C.C. 75 .. 345
R. v. Lewis, (1918) 25 B.C.R. 442 640
R. v. Licence Commissioners of Point Grey, (1915) 26 D.L.R. 75; 32 W.L.R. 360; 8 W.W.R. 1072 629
R. v. Liddington, (1923) 32 B.C.R. 334; (1923) 2 W.W.R. 655; 40 C.C.C. 80 347
R. v. Liden, (1922) 31 B.C.R. 126; 39 C.C.C. 369 .....150, 155, 296, 640
R. v. Lim Cooie Foo, (1930) 43 B.C.R. 54; (1931) 1 W.W.R. 233; 54 C.C.C. 383 .. 583
R. v. Lim Gim, (1928) 39 B.C.R. 457; (1928) 1 D.L.R. 1038; 49 C.C.C. 255 399
R. v. Little, (1915) 10 W.W.R. 893; 27 C.C.C. 422 359
R. v. Long Kee, (1918) 26 B.C.R. 78; 31 C.C.C. 217 340
R. v. Loo Len (No. 2), (1923) 33 B.C.R. 213; (1924) 1 D.L.R. 910; (1924) 1 W.W.R. 735; 41 C.C.C. 388 .....550, 553
R. v. Loo Yip Yen, (1929) 42 B.C.R. 377; 53 C.C.C. 38; (1930) 1 W.W.R. 351 ..152, 362
R. v. Lore Yip, (1928) 39 B.C.R. 310; (1928) 3 D.L.R. 226; (1928) 1 W.W.R. 487; 49 C.C.C. 392 228
R. v. Louie Chue, (1924) 34 B.C.R. 177; (1924) 4 D.L.R. 300; 42 C.C.C. 382 347
R. v. Louie Fong, (1923) 32 B.C.R. 238 341
R. v. Low Chung, (1919) 27 B.C.R. 469 776
R. v. Low Quong, (1924) 33 B.C.R. 522; (1924) 3 D.L.R. 666; (1924) 2 W.W.R. 695; 42 C.C.C. 300 .....153, 400, 556
R. v. Loy Way, (1920) 61 D.L.R. 201; 35 C.C.C. 384; (1921) 1 W.W.R. 690 336
R. v. Lynch, (1927) 38 B.C.R. 124; (1927) 1 W.W.R. 502; 47 C.C.C. 176 356
R. v. Magnolo, (1915) 22 B.C.R. 359; 32 D.L.R. 510; 26 C.C.C. 419 .....349, 488
R. v. Mah Fung, (1931) 43 B.C.R. 187; 54 C.C.C. 374..... 588
R. v. Mah Hon Hing, (1920) 28 B.C.R. 431; 53 D.L.R. 356; (1920) 3 W.W.R. 314; 33 C.C.C. 195 .....331, 374, 382, 397
R. v. Mah Poy, (1930) 42 B.C.R. 360; (1930) 2 W.W.R. 441; 53 C.C.C. 252 .....344, 371, 373
R. v. Maliska, (1919) 27 B.C.R. 111; (1919) 2 W.W.R. 378 .....371, 644
R. v. Marino and Crisofi, (1927) 38 B.C.R. 452; (1927) 2 W.W.R. 468; 47 C.C.C. 348 .....364, 557

R. v. Marino and Yipp, (1931) 44 B.C.R. 265; (1931) S.C.R. 482; (1931) 4 D.L.R. 530; 56 C.C.C. 136 372
R. v. Marshall, (1915) 31 W.L.R. 702; 24 C.C.C. 180 386
R. v. Martinson, (1919) 3 W.W.R. 896 386
R. v. May, (1915) 21 B.C.R. 23; 21 D.L.R. 728; 7 W.W.R. 1261; 30 W.L.R. 488; 23 C.C.C. 469 ..... 390, 491
R. v. Mayall, (1926) 37 B.C.R. 211; 45 C.C.C. 366 337
R. v. McAdam, (1925) 35 B.C.R. 168; (1925) 4 D.L.R. 33; (1925) 3 W.W.R. 257; 44 C.C.C. 155 ..... 28, 228, 556
R. v. McAdam, (1927) 39 B.C.R. 101; 50 C.C.C. 31 926
R. v. McCoy and Brown, (1924) 34 B.C.R. 14 358
R. v. McDonald, (1927) 38 B.C.R. 298; (1927) 1 W.W.R. 867; 48 C.C.C. 208 640
R. v. McKenzie, (1921) 29 B.C.R. 513; 60 D.L.R. 163; (1921) 2 W.W.R. 627; 36 C.C.C. 70 643
R. v. McLane and Noon, (1927) 38 B.C.R. 306; (1927) 1 W.W.R. 701; 47 C.C.C. 208 ..... 297, 364
R. v. McLeod, (1930) 2 W.W.R. 37; 54 C.C.C. 107 ..... 235, 237, 590
R. v. McPherson, (1929) 41 B.C.R. 218; (1929) 2 W.W.R. 141; 51 C.C.C. 419 ..... 297, 361, 524
R. v. Meehan, (1924) 2 W.W.R. 1231; (1924) 3 W.W.R. 305 682
R. v. Meehan, (1925) 35 B.C.R. 363; (1925) 2 D.L.R. 411; (1925) 1 W.W.R. 819; 43 C.C.C. 325 ..... 147, 297, 338, 1040
R. v. Mere Singh et al., (1923) 32 B.C.R. 184; (1923) 1 W.W.R. 1358; 39 C.C.C. 391 347
R. v. Milkha Singh, (1931) 44 B.C.R. 278; 56 C.C.C. 211 215
R. v. Miller, (1923) 32 B.C.R. 298; (1923) 2 W.W.R. 625; 40 C.C.C. 130 ..... 376, 393
R. v. Miller, Court & Co., (1930) 3 D.L.R. 745 ..... 231, 1043
R. v. Minister of Lands, (1926) 37 B.C.R. 106; (1926) 2 D.L.R. 249; (1926) 1 W.W.R. 819 ..... 50, 930
R. v. Montemurro, (1924) 2 W.W.R. 250 ..... 148, 359, 562
R., Montreal Trust Co. v. (1923) 33 B.C.R. 144 1043
R. v. Moore, (1924) 3 W.W.R. 923 555
R. v. Moore, (1927) 38 B.C.R. 425 156
R. v. Morelle, (1927) 39 B.C.R. 140; (1928) 1 W.W.R. 68; 49 C.C.C. 15 395
R. v. Morrison, (1923) 33 B.C.R. 244 393
R. v. Mould, (1920) 28 B.C.R. 221; 52 D.L.R. 302; (1920) 2 W.W.R. 540 778
R. v. Mulholland, (1923) 33 B.C.R. 10; (1924) 1 W.W.R. 1032; (1923) 2 W.W.R. 594 339
R. v. December (No. 1), (1931) 44 B.C.R. 210; (1931) 2 W.W.R. 810; 56 C.C.C. 110. 370
R. v. December (No. 2), (1931) 3 W.W.R. 356; 56 C.C.C. 391 370
R. v. Nevison, (1919) 27 B.C.R. 12; 45 D.L.R. 382; (1919) 1 W.W.R. 793; 31 C.C.C. 116 334
R. v. New Dominion Club, (1925) 35 B.C.R. 502 643
R. v. Nicholson, (1927) 39 B.C.R. 264; 49 C.C.C. 228 ..... 380, 386, 390, 395
R. v. Nip Gar, alias Jang Shee, (1930) 42 B.C.R. 327; 53 C.C.C. 321 ..... 344, 400
R. v. Nolan, (1930) 43 B.C.R. 357 377
R. v. Noon, (1927) 38 B.C.R. 306; (1927) 1 W.W.R. 701; 47 C.C.C. 208 ..... 297, 356
R. v. Nozaki, (1926) 37 B.C.R. 305; (1926) 4 D.L.R. 955; (1926) 3 W.W.R. 332; 46 C.C.C. 168 ..... 53, 476
R. v. Olney, (1926) 37 B.C.R. 329; (1926) 4 D.L.R. 869; (1926) 3 W.W.R. 273; 46 C.C.C. 196 385
R. v. Olsen, (1923) 32 B.C.R. 516 150
R. v. On Sing, (1924) 2 W.W.R. 258 ..... 148, 343
R. v. Oullette, (1930) 3 W.W.R. 37; 53 C.C.C. 405 633
R. v. Payette, (1924) 34 B.C.R. 312; (1925) 1 D.L.R. 112; (1924) 3 W.W.R. 863; 43 C.C.C. 90; (1925) 35 B.C.R. 81; (1925) 2 W.W.R. 747; 44 C.C.C. 209 ..... 375, 377, 380, 395, 465
R. v. Pendray, (1928) 40 B.C.R. 410; (1929) 1 W.W.R. 30; 51 C.C.C. 27 ..... 351, 777, 779

R. v. Penny, (1925) 35 B.C.R. 414 349
R. v. Perri, (1926) 37 B.C.R. 289; (1926) 1 W.W.R. 551; 46 C.C.C. 86 642
R. v. Perro, (1924) 34 B.C.R. 169; (1924) 4 D.L.R. 301; (1924) 2 W.W.R. 1006; 42 C.C.C. 384 .....27, 385, 631
R. v. Perron, (1922) 68 D.L.R. 392; (1922) 3 W.W.R. 138; 38 C.C.C. 121 ....350, 387
R. v. Perry, (1920) 2 W.W.R. 884 634
R. v. Pidgeon, (1926) 37 B.C.R. 309; (1926) 3 W.W.R. 765; 45 C.C.C. 233 339
R. v. Porter & Marks, (1928) 40 B.C.R. 361; (1928) 4 D.L.R. 825; 50 C.C.C. 399; (1929) 1 W.W.R. 39 396
R. v. Powell, (1919) 27 B.C.R. 252 475
R. v. Proteau, (1923) 33 B.C.R. 39 393
R. v. Provincial Ins. Co., (1923) 33 B.C.R. 79 608
R. v. Purdy, Ltd., (1927) 38 B.C.R. 267; (1927) 1 W.W.R. 880; 48 C.C.C. 152 ... 636
R. v. Queen, (1921) 30 B.C.R. 256; (1921) 3 W.W.R. 123 992
R. v. Quong Wong, (1930) 42 B.C.R. 241; (1930) 2 D.L.R. 422; (1930) 1 W.W.R. 299; 53 C.C.C. 60 .....355, 561, 584, 1027
R. v. Radinsky, (1929) 41 B.C.R. 317; (1929) 3 W.W.R. 212; 52 C.C.C. 131 342
R. v. Ralston, (1919) 27 B.C.R. 563 761
R. v. Reader, (1922) 31 B.C.R. 417; 70 D.L.R. 226; (1922) 3 W.W.R. 1112; 38 C.C.C. 202 383
R. v. Richard, (1920) 2 W.W.R. 14 364
R. v. Richards, (1931) 44 B.C.R. 430; 57 C.C.C. 208; (1932) 2 D.L.R. 360; (1932) 1 W.W.R. 148 340
R. v. Riley, (1916) 23 B.C.R. 192; 30 D.L.R. 584; (1917) 1 W.W.R. 325; 26 C.C.C. 402 340
R. v. Riley, (1926) 2 W.W.R. 534 635
R. v. Robertson, (1915) 22 B.C.R. 13; 26 C.C.C. 239 377
R. v. Robertson & Hackett Sawmills, Ltd., (1926) 38 B.C.R. 222; (1927) 2 D.L.R. 494; (1927) 1 W.W.R. 657; 47 C.C.C. 279 700
R. v. Robertson's Bakeries, Ltd., (1931) 43 B.C.R. 377; (1931) 3 D.L.R. 437; 55 C.C.C. 163 357
R. v. Robinson, (1921) 30 B.C.R. 369; 70 D.L.R. 755; (1922) 1 W.W.R. 451; 39 C.C.C. 49 .....392, 483
R. v. Rock, (1923) 32 B.C.R. 67 639
R. v. Rodgers, (1923) 33 B.C.R. 16; (1923) 3 W.W.R. 955; 41 C.C.C. 190 367
R. v. Rosebery-Surprise Mining Co., (1924) S.C.R. 445; (1924) 4 D.L.R. 197 1044
R. v. Ross, (1929) 42 B.C.R. 124; 52 C.C.C. 315; (1929) 3 W.W.R. 601; (1930) 1 D.L.R. 991 396
R. v. Rowan, (1930) 42 B.C.R. 559; (1930) 2 W.W.R. 277; 54 C.C.C. 197 ..362, 562, 645
R. v. Royal, (1925) 36 B.C.R. 178; (1925) 3 W.W.R. 366; 44 C.C.C. 317 342
R. v. Rozonowski, (1926) 36 B.C.R. 327; (1926) 1 D.L.R. 732; (1926) 1 W.W.R. 241; 45 C.C.C. 193 .....151, 338
R. v. Rump, (1929) 41 B.C.R. 36; (1929) 2 D.L.R. 824; (1929) 1 W.W.R. 649; 51 C.C.C. 236 .....346, 400
R. v. Sales Service, Ltd., (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R. 394; 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; 53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129 ...223, 268, 692, 927
R v. Sally, (1919) 27 B.C.R. 419; (1919) 3 W.W.R. 427; (1920) 28 B.C.R. 268; (1920) 2 W.W.R. 953; 33 C.C.C. 350 .....152, 360, 388
R. v. Sam Bow, (1919) 27 B.C.R. 234; (1919) 3 W.W.R. 315; 31 C.C.C. 269; (1920) 28 B.C.R. 253; (1920) 2 W.W.R. 1006 .....155, 295, 1037
R. v. Sam Chin, (1926) 36 B.C.R. 397; (1926) 2 D.L.R. 287; 45 C.C.C. 291 363
R. v. Sankey, (1927) S.C.R. 436; (1927) 4 D.L.R. 245; 48 C.C.C. 97 ..398, 483, 487, 491
R. v. Sankey, (1927) 39 B.C.R. 247; 49 C.C.C. 195 372
R. v. Schmidt and Edlung, (1930) 42 B.C.R. 479; (1930) 2 W.W.R. 497; 54 C.C.C. 168 348
R. v. Seto Kin Kui, (1919) 27 B.C.R. 416; (1919) 3 W.W.R. 318 .....352, 921
R. v. Shannon, (1930) 43 B.C.R. 129 .....472, 927, 933

R. v. Sheridan, (1924) 34 B.C.R. 161; (1924) 3 D.L.R. 339; (1924) 3 W.W.R. 617 ....224, 720
R. v. Shewbrooke, (1931) 44 B.C.R. 313 79
R. v. Shumarin, (1928) 1 W.W.R. 300 389
R. v. Simmons, Elsie, (1923) 32 B.C.R. 455; (1923) 3 W.W.R. 749 393
R. v. Simpson, (1923) 3 W.W.R. 1095 ....370, 558
R. v. Sit Quin, (1918) 25 B.C.R. 362; (1918) 3 W.W.R. 316 ....27, 377, 634, 1026
R. v. Slinn, (1926) 37 B.C.R. 275; 47 C.C.C. 77 343
R. v. Slowin, (1923) 1 W.W.R. 252 ....227, 1037
R. v. Smith, (1923) 32 B.C.R. 172; 39 C.C.C. 102; 32 B.C.R. 241; (1923) 3 D.L.R. 302; (1923) 2 W.W.R. 454 639
R. v. Smith, (1916) 23 B.C.R. 197; (1917) 1 W.W.R. 553; 26 C.C.C. 398 340
R. v. Smith, (1919) 27 B.C.R. 338; (1919) 3 W.W.R. 311 ....331, 358, 561
R. v. Smith, (1926) 37 B.C.R. 248 363
R. v. Smith, (1931) 44 B.C.R. 422; (1932) 1 W.W.R. 131 365
R. v. Somers, (1923) 32 B.C.R. 553; (1923) 3 W.W.R. 813; (1924) 2 D.L.R. 1160; 41 C.C.C. 141 ....366, 644
R. v. Somers, (1929) 41 B.C.R. 190; (1929) 3 D.L.R. 772; (1929) 2 W.W.R. 366; 51 C.C.C. 356 ....359, 373, 921
R. v. Somerville Cannery Co., (1927) 39 B.C.R. 103; (1927) 4 D.L.R. 494; (1927) 3 W.W.R. 215; 49 C.C.C. 65 ....224, 234, 524
R. v. Soo Gong, (1927) 38 B.C.R. 321; (1927) 2 D.L.R. 269; (1927) 1 W.W.R. 669; 47 C.C.C. 275 ....364, 559
R. v. Sowash, (1925) 37 B.C.R. 1; 45 C.C.C. 1; (1926) 1 D.L.R. 99 373
R., Sowash v. (1926) S.C.R. 92; (1926) 1 D.L.R. 115; 45 C.C.C. 19 485
R. v. Spero Panases, (1920) 29 B.C.R. 80 353
R. v. Stanyer, (1923) 33 B.C.R. 223; 41 C.C.C. 206; (1924) 1 W.W.R. 570 369
R. v. Steele, (1923) 33 B.C.R. 197; (1924) 1 W.W.R. 1146; (1924) 4 D.L.R. 175; 42 C.C.C. 375 346
R. v. Steers, (1918) 26 B.C.R. 334 382
R. v. Stewart, (1930) 1 W.W.R. 941 635
R. v. Stewart, F. R. & Co., (1928) 39 B.C.R. 401; (1928) 1 W.W.R. 586; 49 C.C.C. 216 780
R. v. Stonehouse and Pasquale, (1927) 39 B.C.R. 279; (1928) 1 D.L.R. 506; (1928) 1 W.W.R. 161; 49 C.C.C. 122 ....346, 397, 400
R. v. Suckling, (1920) 3 W.W.R. 89 381
R. v. Sullivan, (1930) 42 B.C.R. 435; 53 C.C.C. 243; (1930) 2 D.L.R. 422 340
R. v. Sutherland, (1928) 43 B.C.R. 277 379
R. v. Sutherland, (1930) 42 B.C.R. 321, 367; (1930) 4 D.L.R. 183; (1930) 1 W.W.R. 530; (1930) 2 W.W.R. 244; 54 C.C.C. 313 781
R. v. Swanstrom, (1925) 3 D.L.R. 79; (1925) 1 W.W.R. 713 522
R. v. Takhar, (1931) 3 W.W.R. 37; 56 C.C.C. 376 583
R. v. Talbot, (1931) 43 B.C.R. 485; (1931) 3 D.L.R. 676; (1931) 1 W.W.R. 662; 55 C.C.C. 364 ....379, 387
R. v. Tarchuk, (1928) 40 B.C.R. 398; (1928) 3 W.W.R. 577; 50 C.C.C. 423 ....399, 557
R. v. Telford, (1921) 29 B.C.R. 452; 58 D.L.R. 593; (1921) 2 W.W.R. 255 720
R. v. Ten Chinamen, (1924) 34 B.C.R. 349 ....296, 561
R. v. The "Mary C. Fisher," (1929) 41 B.C.R. 461; (1929) 4 D.L.R. 679; (1929) Ex. C.R. 207; 52 C.C.C. 273 ....3, 1000
R., The "May" v. (1931) S.C.R. 374; 3 D.L.R. 15 ....14, 225, 524
R., The Queen City v. (1930) 43 B.C.R. 494; (1931) S.C.R. 387; (1931) 3 D.L.R. 147 ....2, 14, 225, 524, 999
R. v. The "Sunrise," (1930) 43 B.C.R. 494; (1931) S.C.R. 387; (1931) 3 D.L.R. 147 ....12, 14, 225, 524, 999
R. v. The "Tillie M.," (1930) 43 B.C.R. 494; (1931) S.C.R. 387; (1931) 3 D.L.R. 147 ....12, 14, 225, 524, 999
R. v. Thompson, (1929) 42 B.C.R. 77; (1929) 3 W.W.R. 333; 52 C.C.C. 278 ...641, 1026
R. v. Thornton, (1926) 37 B.C.R. 344; 46 C.C.C. 249 388

R. v. Tong Wah, (1931) 44 B.C.R. 260; 56 C.C.C. 194 397
R. v. Toy King and Toy Hing, (1921) 1 W.W.R. 796; 61 D.L.R. 398; 34 C.C.C. 207 .....149, 154, 338
R. v. United States Fidelity & Guaranty Co. and Quagliotti, (1921) 30 B.C.R. 440; 63 D.L.R. 469; (1922) 64 S.C.R. 48; 68 D.L.R. 297; (1922) 1 W.W.R. 389; (1922) 3 W.W.R. 180; (1923) A.C. 808; 93 L.J.P.C. 26; 130 L.T. 161; (1923) 3 D.L.R. 701; (1923) 3 W.W.R. 295 .....549, 926, 1029
R. v. Van Brothers, Ltd., (1930) 42 B.C.R. 340; (1930) 1 W.W.R. 559; 53 C.C.C. 29 644
R. v. Vancouver Lbr. Co., (1914) 17 Ex. C.R. 329; 41 D.L.R. 617; 50 D.L.R. 6; (1920) 1 W.W.R. 255; (1924) 33 B.C.R. 468; (1924) 2 D.L.R. 482; (1924) 1 W.W.R. 1041; (1925) 36 B.C.R. 53; (1925) 4 D.L.R. 188; (1925) 3 W.W.R. 122 .....524, 664, 673, 922, 929
R. v. Viennet, (1924) 34 B.C.R. 242; (1924) 4 D.L.R. 497; (1924) 3 W.W.R. 196; 42 C.C.C. 393 387
R. v. Volpatti, (1919) 1 W.W.R. 358 295
R. v. Vye, (1925) 36 B.C.R. 200; (1925) 3 W.W.R. 100; 44 C.C.C. 249 .....389, 492
R. v. Wah Lung, (1928) 40 B.C.R. 267; (1928) 3 W.W.R. 232; 50 C.C.C. 182 388
R. v. Wah Sing Chow, (1927) 38 B.C.R. 491; 48 C.C.C. 144 .....56, 389, 488
R. v. Wakabayashi, (1928) 39 B.C.R. 310; (1928) 3 D.L.R. 226; (1928) 1 W.W.R. 487; 49 C.C.C. 392 228
R. v. Wessell, (1924) 34 B.C.R. 119; (1924) 4 D.L.R. 139; (1924) 3 W.W.R. 233; 42 C.C.C. 371 .....358, 368
R. v. Western Canada Liquor Co., (1921) 29 B.C.R. 499; 60 D.L.R. 217; (1921) 2 W.W.R. 627, 774; 36 C.C.C. 65 .....236, 630, 1019
R. v. Westminster Brewery, Ltd., (1921) 29 B.C.R. 321; 57 D.L.R. 712; 34 C.C.C. 308 639
R. v. White, (1926) 37 B.C.R. 43; (1926) 3 D.L.R. 1; (1926) 2 W.W.R. 481; 45 C.C.C. 328 486
R. v. White, (1929) 3 W.W.R. 729 335
R. v. Wiggs, (1931) 44 B.C.R. 364; (1931) 3 W.W.R. 52 347
R. v. Wigman, (1918) 25 B.C.R. 350; 30 C.C.C. 362 343
R. v. Williams, (1921) 30 B.C.R. 303; 37 C.C.C. 126 492
R. v. Wilson, (1924) 35 B.C.R. 64 348
R. v. Wiser and McCreight, (1930) 42 B.C.R. 517; (1930) 1 W.W.R. 976; 54 C.C.C. 117 373
R. v. Wittman, (1917) 25 B.C.R. 108; (1917) 3 W.W.R. 438.....349, 1061
R. v. Wong et al., (1922) 31 B.C.R. 292; 40 C.C.C. 311 341
R. v. Wong Chuen Ben, (1930) 42 B.C.R. 520; (1930) 1 W.W.R. 899; 53 C.C.C. 331. 558
R. v. Wong Chuen Ben (No. 2), (1930) 43 B.C.R. 188; (1930) 3 W.W.R. 282; 54 C.C.C. 399 .....370, 558
R. v. Wong Chun Quong, (1923) 32 B.C.R. 108 .....335, 344
R. v. Wong Foon Sing, (1925) 36 B.C.R. 120; 44 C.C.C. 133 .....149, 356, 562
R. v. Wong Joe, (1918) 26 B.C.R. 337; (1918) 3 W.W.R. 581 .....153, 154
R. v. Wong Kit, (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R. 394; 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; 53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129.....223, 268, 324, 380, 692, 927
R. v. Wong O Sang, (1922) 34 B.C.R. 8; (1924) 3 W.W.R. 45.....374, 382, 391, 658
R. v. Wong Sack Joe, (1929) 41 B.C.R. 254 .....363, 688
R. v. Wong Shee, (1921) 30 B.C.R. 70; 59 D.L.R. 626..... 582
R. v. Wong Shee (No. 2), (1922) 31 B.C.R. 145; 66 D.L.R. 485; (1922) 2 W.W.R. 156; 37 C.C.C. 371 .....28, 555, 585
R. v. Wong Yet, (1925) 36 B.C.R. 140; (1925) 3 W.W.R. 672; 44 C.C.C. 343 367
R. v. Wong York: In re Johnston, (1930) 42 B.C.R. 246; (1930) 2 D.L.R. 552; (1930) 1 W.W.R. 388; 53 C.C.C. 68 151
R. v. Yeaman, (1924) 33 B.C.R. 390; (1924) 2 D.L.R. 1116; (1924) 2 W.W.R. 452; 42 C.C.C. 78 394

R. v. Yet Sun, (1920) 28 B.C.R. 68; 61 D.L.R. 281; (1920) 1 W.W.R. 816; 36 C.C.C. 8 336
R. v. Young, (1917) 24 B.C.R. 482; (1917) 3 W.W.R. 1066; 30 C.C.C. 137 336
R. v. Yuen, (1925) 44 C.C.C. 338; (1926) 1 W.W.R. 40 357
R. v. Zambapys and McKay, (1923) 32 B.C.R. 510 375
R. v. Zarelli and Newell, (1931) 43 B.C.R. 502; (1931) 2 W.W.R. 108; 55 C.C.C. 314 ..... 31, 379, 465
R. v. Zawada, (1930) 1 W.W.R. 92; 53 C.C.C. 411 633
R. v. Zimmerman, (1925) 37 B.C.R. 277; (1926) 2 W.W.R. 882; 46 C.C.C. 78 ... 399
R. ex rel. Burrows v. Evans, (1916) 23 B.C.R. 128 ..... 27, 1026
R. ex rel. Cline v. Kramer, (1920) 29 B.C.R. 132; 36 C.C.C. 236 ..... 351, 1020
R. ex rel. Halcrow v. St. Eloi, (1928) 2 W.W.R. 692 632
R. ex rel. Hanna v. Ernst, (1927) 1 W.W.R. 961; 48 C.C.C. 190 ..... 399, 630
R. ex rel. McFarlane v. Balment, (1915) 8 W.W.R. 111 ..... 447, 933
R. ex rel. Maxson v. Dobbin, (1929) 3 W.W.R. 176; 52 C.C.C. 342 ..... 24, 335
R. ex rel. Miller v. Gold Seal Liquor Co., (1922) 31 B.C.R. 177; (1922) 2 W.W.R. 1218 957
R. ex rel. Robinson v. Berenstein, (1917) 24 B.C.R. 361; 29 C.C.C. 435 368
R. ex rel. Robinson v. Cianci, (1917) 24 B.C.R. 81; 35 D.L.R. 164; 28 C.C.C. 107.. 643
R. ex rel. Robinson v. Diamond, (1916) 23 B.C.R. 325; 31 D.L.R. 556; 27 C.C.C. 28.. 1037
R. ex rel. Robinson v. Marks, (1918) 26 B.C.R. 73; 31 C.C.C. 257 354
R. ex rel. Robinson v. Sit Quin, (1918) 25 B.C.R. 362; (1918) 3 W.W.R. 316 ..... 27, 377, 634, 1026
R. ex rel. Rose v. Moir, (1924) 34 B.C.R. 284; (1924) 4 D.L.R. 498; (1924) 3 W.W.R. 391 764
R. ex rel. Sing v. Henley, (1922) 70 D.L.R. 867; (1922) 3 W.W.R. 638 ..... 384, 646
R. ex rel. Stoneberg v. Perron, (1922) 68 D.L.R. 392; (1922) 3 W.W.R. 138; 38 C.C.C. 121 350
R. ex rel. Townley v. Chow, (1922) 31 B.C.R. 461 79
R. ex rel. Tuley v. Rodgers, (1923) 32 B.C.R. 199; (1923) 1 W.W.R. 1361; 39 C.C.C. 379 642
R. ex rel. Whittaker v. Shannon, (1930) 43 B.C.R. 129 ..... 472, 927, 933
R. ex rel. Wilkie v. Goslett, (1923) 32 B.C.R. 216; (1923) 3 D.L.R. 298; (1923) 2 W.W.R. 461 635
Rice v. Burckhardt (No. 2), (1925) 36 B.C.R. 180 289
Richard, R. v. (1920) 2 W.W.R. 14 364
Richard et al., Neilsen v. (1929) 41 B.C.R. 220; (1929) 4 D.L.R. 1052; (1929) 2 W.W.R. 153 ..... 793, 813
Richards, Adam v. (1915) 21 B.C.R. 212; 22 D.L.R. 509; 8 W.W.R. 701 ..... 88, 497
Richards v. Anderson, (1916) 10 W.W.R. 893 424
Richards, Baker v. (1918) 25 B.C.R. 397; 40 D.L.R. 351; (1918) 2 W.W.R. 902; 59 S.C.R. 656; 49 D.L.R. 684 ..... 5, 88, 299, 497, 502, 987
Richards, Palmer v. (1921) 30 B.C.R. 321; 70 D.L.R. 732 ..... 498, 500, 989
Richards, R. v. (1931) 44 B.C.R. 430; 57 C.C.C. 208; (1932) 2 D.L.R. 360; (1932) 1 W.W.R. 148 340
Richards, Vancouver Life Ins. Co. v. (1919) 27 B.C.R. 449; 48 D.L.R. 707; (1919) 3 W.W.R. 907 170
Richards, Williams v. (1923) 32 B.C.R. 58; (1923) 1 W.W.R. 1021 ..... 497, 989
Richards, Williams and Sears v. (1917) 25 B.C.R. 19 ..... 454, 648
Richmond, City of Vancouver v. (1928) 40 B.C.R. 170; (1928) 4 D.L.R. 506; (1928) 3 W.W.R. 166 ..... 681, 781, 791, 1016
Richmond, Municipality of, Hobson v. (1923) 32 B.C.R. 369; (1923) 3 W.W.R. 401. 767
Riddell, Albutt & Co. v. (1930) 43 B.C.R. 74; (1930) 4 D.L.R. 111; (1930) 2 W.W.R. 623 ..... 101, 121, 973
Ridley v. Barclay, (1928) 40 B.C.R. 244; (1928) 4 D.L.R. 79; (1928) 3 W.W.R. 62 ..... 260, 479, 599
Riley, R. v. (1916) 23 B.C.R. 192; 30 D.L.R. 584; (1917) 1 W.W.R. 325; 26 C.C.C. 402 340

Riley, R. v. (1926) 2 W.W.R. 534 635
Rissmuller v. Balcom, (1917) 24 B.C.R. 353; (1917) 3 W.W.R. 535 .....577, 1130
Ritchie v. Webster, (1917) 35 D.L.R. 373; (1917) 2 W.W.R. 1124 .....131, 257
Ritchie, Wilgress v. (1920) 28 B.C.R. 345; 52 D.L.R. 543; (1920) 2 W.W.R. 421 ..24, 1019
Ritchie Contracting & Supply Co., Atty.-Gen. for Canada v. (1919) A.C. 999; 88 L.J.P.C. 189; 121 L.T. 655; 36 T.L.R. 1; 48 D.L.R. 147; (1919) 3 W.W.R. 347. 220
Ritchie Contracting & Supply Co. v. Brown, (1915) 21 B.C.R. 89; 21 D.L.R. 86; 30 W.L.R. 723; 8 W.W.R. 84 .....34, 123, 500, 627
Rithet, R. P. & Co. v. Scarff, (1920) 29 B.C.R. 70 .....101, 121, 974
Roach v. Gray, (1916) 22 B.C.R. 553; 27 D.L.R. 726; 10 W.W.R. 813 899
Robb, Deceased, In re (1931) 43 B.C.R. 439; (1931) 2 D.L.R. 189; (1931) 1 W.W.R. 401 1123
Robert Dollar Co. v. Walker, (1926) 36 B.C.R. 405 530
Robert Porter & Sons v. MacKenzie, (1926) 37 B.C.R. 287 756
Roberts v. MacDonald, (1916) 23 B.C.R. 542 172
Roberts, May v. (1929) 41 B.C.R. 182; (1929) 3 D.L.R. 370; (1929) 2 W.W.R. 449 .....38, 210, 892
Roberts v. Roberts, (1923) 2 W.W.R. 137 .....243, 722, 726, 729, 1076
Robertson, Hugh W. (Bankrupt), In re (1930) 43 B.C.R. 232; 12 C.B.R. 117; (1930) 3 W.W.R. 599 104
Robertson v. Latta, (1915) 21 B.C.R. 597 46
Robertson, R. v. (1915) 22 B.C.R. 13; 26 C.C.C. 239 377
Robertson (John) & Sons, Ltd., v. Canadian Bank of Commerce, (1920) 2 W.W.R. 1003 .....84, 114, 187, 625
Robertson, John & Sons, Ltd., v. Whitelaw, Brown and Witton, (1917) 24 B.C.R. 88. 486
Robertson & Hackett Sash & Door Co., Imported Hardwoods, Ltd., v. (1925) 36 B.C.R. 258; (1925) 4 D.L.R. 650 .....402, 966
Robertson & Hackett Sawmills, Ltd., R. v. (1926) 38 B.C.R. 222; (1927) 2 D.L.R. 494; (1927) 1 W.W.R. 657; 47 C.C.C. 279 700
Robertson & Partners, Ltd., Atty.-Gen. for B.C. v. (1924) 33 B.C.R. 325; (1924) 1 D.L.R. 1090; (1924) 1 W.W.R. 1155 258
Robertson's Bakeries, Ltd., R. v. (1931) 43 B.C.R. 377; (1931) 3 D.L.R. 437; 55 C.C.C. 163 357
Robin Line S.S. Co., Canadian Stevedoring Co. v. (1928) S.C.R. 423; (1928) 3 D.L.R. 856 990
Robinson, B.C. Land & Invst. Agency v. (1923) 32 B.C.R. 375; (1923) 4 D.L.R. 416; (1923) 3 W.W.R. 113 .....451, 626, 747
Robinson v. Burnaby, (1915) 22 D.L.R. 788; 31 W.L.R. 419 .....132, 275
Robinson v. Corporation of Point Grey, (1927) 38 B.C.R. 243; (1927) 2 D.L.R. 471; (1927) 3 W.W.R. 211 .....285, 829
Robinson, R. ex rel. v. Diamond, (1916) 23 B.C.R. 325; 31 D.L.R. 556; 27 C.C.C. 28.. 1037
Robinson v. Freeman, (1921) 61 D.L.R. 248 .....834, 835
Robinson v. Holmes et al., (1914) 5 W.W.R. 1143; 17 D.L.R. 372 1090
Robinson, Prohibition Act and, In re (1921) 30 B.C.R. 316 635
Robinson, R. v. (1921) 30 B.C.R. 369; 70 D.L.R. 755; (1922) 1 W.W.R. 451; 39 C.C.C. 49 .....392, 483, 491
Robinson, R. P. Clark & Co. (Victoria) v. (1930) 42 B.C.R. 409; (1930) 4 D.L.R. 158. 971
Robinson v. Sit Quin, (1918) 25 B.C.R. 362; (1918) 3 W.W.R. 316 ...27, 377, 634, 1026
Robson Investment Co., Winding-up Act and, In re (1918) 1 W.W.R. 779..... 1107
"Rochepoint," S.S., Stone v. (1921) 30 B.C.R. 113; (1921) 2 W.W.R. 701; 21 Ex. C.R. 143; 68 D.L.R. 651 .....10, 995
Rock, R. v. (1923) 32 B.C.R. 67 639
Roddick, Associated Growers of B.C. v. (1926) 36 B.C.R. 475 .....691, 1011
Roddy v. B.C. Electric Ry. Co., (1928) 40 B.C.R. 180 .....136, 802
Roddy v. Fraser, (1925) 35 B.C.R. 70; (1925) 3 D.L.R. 547; (1925) 2 W.W.R. 614 .....37, 39, 41
Rodger v. Flinton, (1926) 3 W.W.R. 773 .....94, 414, 815
Rodgers, R. v. (1923) 33 B.C.R. 16; (1923) 3 W.W.R. 955; 41 C.C.C. 190 367

Rodgers, Tuley, Rex ex rel. v. (1923) 32 B.C.R. 199; (1923) 1 W.W.R. 1361; 39 C.C.C. 379 642
Rodgers, Williams v. (1920) 60 S.C.R. 664; 56 D.L.R. 691; (1921) 2 W.W.R. 185; (1920) 28 B.C.R. 161; (1920) 2 W.W.R. 944 906
Rogers, Campbell v. (1917) 31 D.L.R. 244 916
Rogers v. Nanaimo Motors, Ltd., (1926) 37 B.C.R. 326 ..... 912, 977
Rogers v. Rogers, (1918) 25 B.C.R. 439 437
Rogerson v. Cosh, (1917) 24 B.C.R. 367; 37 D.L.R. 694; (1917) 3 W.W.R. 911 ..... 1089, 1096
Rolston, National Mortgage Co. v. (1916) 23 B.C.R. 384; (1917) 2 W.W.R. 1144; 32 D.L.R. 81; (1917) 1 W.W.R. 494; 59 S.C.R. 219 716
Rolston, R. v. (1919) 27 B.C.R. 563 761
Rolston v. Smith, (1923) 33 B.C.R. 235 39
Roman v. Motorcar Loan Co. and Burns, (1930) 42 B.C.R. 457; (1930) 3 D.L.R. 296; (1930) 1 W.W.R. 775 ..... 696, 709, 980, 1067
"Roman Prince," The, Evans, Coleman & Evans v. (1924) 34 B.C.R. 155, 157; (1924) 3 D.L.R. 95, 327; (1924) Ex. C.R. 93, 129, 133; (1924) 2 W.W.R. 465, 897 .. 285, 291
Romano v. Columbia Motors, Ltd., (1930) 42 B.C.R. 168; (1930) 1 D.L.R. 815; (1930) 1 W.W.R. 159 ..... 92, 471, 520
Rombough, Channell v. (1923) 33 B.C.R. 65; (1923) 3 W.W.R. 1041; (1924) 1 D.L.R. 54; (1924) 33 B.C.R. 452; (1924) 2 D.L.R. 662; (1924) 2 W.W.R. 28; (1924) 34 B.C.R. 52; (1924) 3 W.W.R. 169 ..... 65, 1052, 1053, 1061
Roper v. Hull and Royal Trust Co., (1921) 30 B.C.R. 405 ..... 579, 1132
Roray v. Howe Sound Mills & Logging Co., (1915) 21 B.C.R. 406; 22 D.L.R. 855; 31 W.L.R. 409 172
Roray & Yeaman v. Nimpkish Lake Logging Co., (1919) 27 B.C.R. 64; 47 D.L.R. 395; (1919) 2 W.W.R. 105 ..... 245, 905
Rose v. Moir: In re Municipal Elections Act, (1924) 34 B.C.R. 284; (1924) 4 D.L.R. 498; (1924) 3 W.W.R. 391 764
Rosebery-Surprise Mining Co., R. v. (1924) S.C.R. 445; (1924) 4 D.L.R. 197 1044
Rosebery-Surprise Mining Co. v. The Workmen's Compensation Board, (1920) 28 B.C.R. 284; 51 D.L.R. 470; (1920) 2 W.W.R. 676 ..... 295, 925
Rosen, In re (1931) 44 B.C.R. 203; (1931) 2 W.W.R. 799; 56 C.C.C. 162 ..... 517, 1023
Ross v. Fossum and Toronto General Trusts Corpn., (1930) 42 B.C.R. 272; (1930) 2 D.L.R. 42; (1930) 1 W.W.R. 375 ..... 577, 1131
Ross, Imperial Bank of Canada v. (1916) 22 B.C.R. 545; 34 W.L.R. 962; 10 W.W.R. 1174 111
Ross v. McLean and Peterson, (1921) 1 W.W.R. 1108 1142
Ross, R. v. (1929) 42 B.C.R. 124; 52 C.C.C. 315; (1929) 3 W.W.R. 601; (1930) 1 D.L.R. 991 396
Ross and Quickstad, Winlow v. (1926) 27 B.C.R. 412; (1926) 4 D.L.R. 219; (1926) 3 W.W.R. 268 301
Ross, Johnson, Ltd., v. Victoria Mines, (1929) 41 B.C.R. 321; (1929) 2 W.W.R. 511; (1930) 1 D.L.R. 57; 11 C.B.R. 23 99
Rostein, Orpheum Theatrical Co. v. (1923) 32 B.C.R. 251; (1923) 4 D.L.R. 499; (1923) 2 W.W.R. 582 ..... 458-9, 672
Rothery v. Northern Construction Co., (1921) 30 B.C.R. 324; 70 D.L.R. 771; (1921) 2 W.W.R. 853 1141
Roundy v. Salinas, (1915) 21 B.C.R. 323; 22 D.L.R. 315; 31 W.L.R. 338; 8 W.W.R. 912 ..... 721, 987
Rourke et al., Concrete Appliances Co. v. (1915) 28 D.L.R. 635; (1915) 8 W.W.R. 6. 850
Rousseau v. Rousseau, (1920) 3 W.W.R. 384 ..... 3, 437, 576
Rouvala, Henderson v. (1923) 31 B.C.R. 515; (1923) 1 W.W.R. 467 1054
Roux v. Hewat, (1919) 1 W.W.R. 530 ..... 352, 633
Rowan, R. v. (1930) 42 B.C.R. 559; (1930) 2 W.W.R. 277; 54 C.C.C. 197 .. 362, 562, 645
Rowlands and Johnstone v. Holland, (1920) 53 D.L.R. 652 1024
Roy v. Canadian Bank of Commerce, (1917) 24 B.C.R. 397; 38 D.L.R. 742 88

Roy v. Fortin, (1915) 22 B.C.R. 282; 32 W.L.R. 790; 25 D.L.R. 18; 9 W.W.R. 407 ..... 87-8, 572
Royal, R. v. (1925) 36 B.C.R. 178; (1925) 3 W.W.R. 366; 44 C.C.C. 317 342
Royal Bank of Canada v. B.C. Accident &c. Insurance Co., (1917) 24 B.C.R. 197; 35 D.L.R. 650; (1917) 2 W.W.R. 898 ..... 182, 452, 605
Royal Bank of Canada, Ball and Whieldon v. (1915) 52 S.C.R. 254; 26 D.L.R. 385; 9 W.W.R. 776 ..... 120, 122, 123
Royal Bank of Canada et al. v. Baxter, J. H., (1922) 31 B.C.R. 248; 67 D.L.R. 585. 291
Royal Bank of Canada v. Canada National Fire Ins. Co., (1920) 28 B.C.R. 554; (1920) 3 W.W.R. 517; 55 D.L.R. 272 ..... 170, 498, 605
Royal Bank of Canada, Canadian Bank of Commerce v. (1921) 29 B.C.R. 407; 60 D.L.R. 275; (1921) 2 W.W.R. 462 ..... 84, 655, 1076, 1087
Royal Bank of Canada v. Coughlan, (1920) 28 B.C.R. 247; (1920) 2 W.W.R. 356 .. 746
Royal Bank of Canada v. Doering, (1923) 33 B.C.R. 257; (1924) 1 D.L.R. 488; (1924) 1 W.W.R. 251 747
Royal Bank of Canada v. Dominion Trust Co., (1919) 27 B.C.R. 166 ..... 193, 882
Royal Bank of Canada, Dominion Trust Co. v. (1920) 29 B.C.R. 169; 59 D.L.R. 224; (1921) 1 W.W.R. 90; 1 C.B.R. 397 ..... 183, 192, 467, 475, 531
Royal Bank of Canada, Dominion Trust Co. and Gwynn v. (1920) 28 B.C.R. 260; (1920) 2 W.W.R. 576 ..... 51, 493
Royal Bank of Canada v. Falk, (1917) 25 B.C.R. 142; (1917) 3 W.W.R. 654 .... 110, 278, 416
Royal Bank of Canada v. Gold, (1917) 24 B.C.R. 145; (1918) 25 B.C.R. 409; 41 D.L.R. 276; (1918) 2 W.W.R. 745 ..... 111, 116, 118, 119, 1108
Royal Bank of Canada v. Gustafson, (1924) 33 B.C.R. 379; (1924) 1 W.W.R. 544 ..... 85, 932
Royal Bank of Canada v. Hodges, (1929) 42 B.C.R. 44; (1929) 3 W.W.R. 605; (1930) 1 D.L.R. 397 ..... 111, 975
Royal Bank of Canada v. Humphreys, (1922) 31 B.C.R. 81 677
Royal Bank of Canada, Hunt v. (1919) 27 B.C.R. 236; (1919) 2 W.W.R. 547 .. 603, 1108
Royal Bank of Canada v. Izen, (1921) 29 B.C.R. 547; 60 D.L.R. 467; (1921) 2 W.W.R. 929 ..... 545, 760
Royal Bank of Canada, Mack v. (1932) S.C.R. 488; (1932) 1 D.L.R. 753 .... 109, 913
Royal Bank of Canada, McDonald v. (1929) 41 B.C.R. 450 ..... 108, 913
Royal Bank of Canada v. McLennan, (1918) 25 B.C.R. 183; 41 D.L.R. 27; (1918) 2 W.W.R. 225 ..... 80, 239, 1016, 1027
Royal Bank of Canada v. McLeod, (1919) 27 B.C.R. 376; 48 D.L.R. 500; (1919) 3 W.W.R. 544 ..... 43, 753, 758
Royal Bank of Canada v. National Ins. Co., (1921) 29 B.C.R. 286; (1921) 1 W.W.R. 759 306
Royal Bank of Canada v. Pac. Bottling Works, (1916) 23 B.C.R. 463; (1917) 2 W.W.R. 227 ..... 49, 877
Royal Bank of Canada, Patrick v. (1931) 44 B.C.R. 448; (1931) 3 W.W.R. 100; (1932) 45 B.C.R. 437; (1932) 3 D.L.R. 532; (1932) 2 W.W.R. 257 ..... 113, 914
Royal Bank of Canada v. Pound, (1917) 24 B.C.R. 23 ..... 52, 486
Royal Bank of Canada, Simmons v. (1915) 22 B.C.R. 369; 27 D.L.R. 723; 33 W.L.R. 363 ..... 270, 578, 950
Royal Bank of Canada v. Skeans (No. 2), (1916-17) 24 B.C.R. 190, 193; 36 D.L.R. 390; (1917) 2 W.W.R. 942 ..... 300, 873
Royal Bank of Canada v. Skene and Christie, (1918) 25 B.C.R. 318; (1919) 3 W.W.R. 1071 ..... 32, 50
Royal Bank of Canada, Skene and Christie v. (1918) 25 B.C.R. 456; 59 S.C.R. 211; (1919) 3 W.W.R. 740, 1071 ..... 2, 651, 862
Royal Bank of Canada v. Skene and Christie, (1920) 28 B.C.R. 401; 59 D.L.R. 469 ..... 129, 132

Royal Bank of Canada v. Skene and Christie, (1921) 30 B.C.R. 127 307
Royal Bank of Canada v. Whieldon, (1916) 23 B.C.R. 436; (1917) 2 W.W.R. 58 .....51, 292, 893
Royal Bank of Canada v. Whieldon and Ball, (1915) 21 B.C.R. 267; 22 D.L.R. 647; 8 W.W.R. 734; 26 D.L.R. 385; 9 W.W.R. 776; 52 S.C.R. 254 ....111, 120, 122, 123
Royal Exchange Assce. Corpn., Hanley v. (1924) 34 B.C.R. 222; (1924) 3 D.L.R. 860; (1924) 2 W.W.R. 880 609
Royal Exchange Assce. Corpn. v. Kingsley Navigation Co., (1923) A.C. 235; 92 L.J.P.C. 111; 128 L.T. 673; 16 Asp. M.C. 44; 67 Sol. Jo. 296; (1923) 1 D.L.R. 1048; (1923) 1 W.W.R. 737 .....143, 472
Royal Fish Co. v. Maritime Fish Corpn., (1915) 9 W.W.R. 169 965
Royal Trust Co. v. Austin Hotel Co., (1918) 26 B.C.R. 353; 44 D.L.R. 480; (1919) 1 W.W.R. 934 .....123, 328
Royal Trust Co., Goodwin v. (1927) 39 B.C.R. 113; (1928) 1 D.L.R. 309 ..424, 986, 1074
Royal Trust Co. v. Holden, (1915) 21 B.C.R. 185; 8 W.W.R. 500; 22 D.L.R. 660 .....417, 859
Royal Trust Co. v. Minister of Finance for B.C.: In re Estate of Sir Wm. Van Horne, (1921) 91 L.J.P.C. 8; 126 L.T. 207; (1921) 3 W.W.R. 749; 61 D.L.R. 194; (1922) 1 A.C. 87 1030
Royal Trust Co., Stephens v. (1917) 25 B.C.R. 77 946
Royal Typewriter Agency v. Perry, (1928) 40 B.C.R. 222; (1928) 4 D.L.R. 383; (1928) 3 W.W.R. 173 .....321, 867
Rozonowski, R. v. (1926) 36 B.C.R. 327; (1926) 1 D.L.R. 732; (1926) 1 W.W.R. 241; 45 C.C.C. 193 .....151, 338
"R.S.," The, The "Freiya" v. (No. 2), (1921) 30 B.C.R. 132; 63 D.L.R. 687; (1921) 2 W.W.R. 749; 21 Ex. C.R. 147 17
"R.S.," The, The "Freiya" v. (1922) 65 D.L.R. 218; (1922) 1 W.W.R. 409; 21 Ex. C.R. 232 .....253, 262, 481, 983
Ruby Hou, Pearl Wong v. (1928) 39 B.C.R. 425; (1928) 1 W.W.R. 480 .....246, 844
Ruby Hou, Ray v. (1927) 39 B.C.R. 128; (1928) 40 B.C.R. 438; (1928) 1 D.L.R. 177 .....673, 1009, 1093
Rucker v. Wilson, (1923) 32 B.C.R. 401; (1923) 3 D.L.R. 433; (1923) 3 W.W.R. 130 1117
Rudge v. Haddington Island Quarry Co., (1929) 41 B.C.R. 502 754
Ruff v. Sutherland and Moss, (1930) 43 B.C.R. 218; (1931) 1 D.L.R. 651; (1930) 3 W.W.R. 554 .....761, 793, 812, 813
Rule v. Bradner, (1923) 4 D.L.R. 81 250
Rumely v. The "Vera M.," (1922) 31 B.C.R. 472; (1923) 1 W.W.R. 253; (1923) 2 D.L.R. 867; (1923) Ex. C.R. 36 .....15, 17, 94, 675, 995
Rump, R. v. (1929) 41 B.C.R. 36; (1929) 2 D.L.R. 824; (1929) 1 W.W.R. 649; 51 C.C.C. 236 .....346, 400
Russell, Armes v. (1923-24) 33 B.C.R. 303; (1923) 3 W.W.R. 216; (1924) 1 W.W.R. 825 .....727, 844
Russell, Eccles v. (1929) 41 B.C.R. 161; (1929) 3 D.L.R. 321; (1929) 2 W.W.R. 143 1002
Russell v. Reid, (1928) 1 D.L.R. 628 .....100, 978
Russell and May, Anglican Synod v. (1927) 38 B.C.R. 400 756
Russell House, Ltd., Henderson & Sons v. (1931) 1 W.W.R. 342 .....318, 717
Rutter, Orde v. (1917) 25 B.C.R. 45; 39 D.L.R. 456; (1918) 1 W.W.R. 735; 59 S.C.R. 658; 49 D.L.R. 691 931
Ryall v. Nelson, (1917) 3 W.W.R. 647 534
Ryall et al., Herald Printing & Pub. Co. v. (1923) 32 B.C.R. 19; (1923) 4 D.L.R. 488; (1923) 3 W.W.R. 953 .....427, 862
Ryan v. X.L. Logging Co., (1924) 33 B.C.R. 410 .....711, 713, 717
Ryder, Jones v. (1928) 39 B.C.R. 547; (1928) 3 D.L.R. 301; (1928) 2 W.W.R. 302 .....456, 756, 874

Rydstrom v. Krom, (1915) 21 B.C.R. 254; 21 D.L.R. 118; 31 W.L.R. 7; 7 W.W.R. 1290 ..... 22, 291

S

S., In re (1927) 38 B.C.R. 285; (1927) 2 D.L.R. 91; (1927) 1 W.W.R. 411 593
Saanich, Corpn. of, v. McFadden, (1923) 32 B.C.R. 221; (1923) 1 D.L.R. 1170; (1923) 3 D.L.R. 171; (1923) 2 W.W.R. 429 ..... 564, 567, 771
Saanich, Dist. of, Atty.-Gen. for B.C. v. (1921) 29 B.C.R. 268; 56 D.L.R. 482; (1921) 1 W.W.R. 471 ..... 568, 768, 1068
Saanich, Dist. of v. City of Victoria, (1917) 24 B.C.R. 121 786
Sacht, Armishaw v. (1917) 24 B.C.R. 53; 30 D.L.R. 288; 34 W.L.R. 1180 ..... 283, 1051
Safety Storage & Warehousing Co. v. Lanchick, (1922) 31 B.C.R. 193; 67 D.L.R. 692; (1922) 2 W.W.R. 1018 ..... 496, 535
Saint v. C. A. Welsh, Ltd., (1925) 35 B.C.R. 220 ..... 265, 271
"St. Alice," The, Cowan v. (1915) 21 B.C.R. 540; 32 W.L.R. 17; 8 W.W.R. 1256; 17 Ex. C.R. 207 ..... 9, 332, 649, 993
St. Eloi v. Eno, (1925) 36 B.C.R. 153 279
St. Eloi, Halcrow, Rex ex rel. v. (1928) 2 W.W.R. 692 632
St. James, Ltd., Westholme Lbr. Co. and Bank of Montreal v. (1915) 21 B.C.R. 100; 21 D.L.R. 549; 30 W.L.R. 781; 8 W.W.R. 122 ..... 128, 402
St. John v. Bromiley, (1928) 39 B.C.R. 518; (1928) 2 D.L.R. 605; (1928) 1 W.W.R. 899 308
St. John, Canada Law Book Co. v. (1923) 32 B.C.R. 66 ..... 61, 315
St. Louis, Rosalie, Deceased, In re Estate of (1922) 31 B.C.R. 336; (1923) 1 D.L.R. 1158; (1923) 1 W.W.R. 927 ..... 508, 511
Sale v. East Kootenay Power Co. (No. 1), (1931) 43 B.C.R. 336; (1931) 3 W.W.R. 112 ..... 37, 326
Sale v. East Kootenay Power Co. (No. 2), (1931) 44 B.C.R. 141; (1931) 4 D.L.R. 221; (1931) 3 W.W.R. 117; (1931) S.C.R. 712; (1931) 4 D.L.R. 593 .. 798, 837, 815
Sales Service, Ltd., R. v. (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R. 394; (1929) L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; 53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129 ... 223, 268, 692, 927
Salinas, Roundy v. (1915) 21 B.C.R. 323; 22 D.L.R. 315; 31 W.L.R. 338; 8 W.W.R. 912 ..... 721, 987
Sally, R. v. (1919) 27 B.C.R. 419; (1919) 3 W.W.R. 427; (1920) 28 B.C.R. 268; (1920) 2 W.W.R. 953; 33 C.C.C. 350 ..... 152, 360, 388
Salmon Arm, Johnston v. (1917) 36 D.L.R. 796; (1917) 2 W.W.R. 644 967
Salmon Arm, Quinn v. (1928) 40 B.C.R. 111; (1929) 4 D.L.R. 1085 52
Salo v. Anglo-B.C. Packing Co., (1929) 40 B.C.R. 481; (1929) 1 D.L.R. 874; (1929) 1 W.W.R. 385 ..... 254, 694, 959
Salvas v. Bell, (1927) 4 D.L.R. 1099 1114
Sam Bow, R. v. (1919) 27 B.C.R. 234; (1919) 3 W.W.R. 315; 31 C.C.C. 269; (1920) 28 B.C.R. 253; (1920) 2 W.W.R. 1006 ..... 155, 295, 1037
Sam Chin, R. v. (1926) 36 B.C.R. 397; (1926) 2 D.L.R. 287; 45 C.C.C. 291 363
Samejima, Immigration Act and, In re (1931) 44 B.C.R. 317; (1931) 3 W.W.R. 56 ..... 560, 583
Sam Kee, Fraser v. (1916) 9 W.W.R. 1281 ..... 968, 1014
Sampson, Chambers v. (1931) 44 B.C.R. 134; (1931) 3 D.L.R. 206; (1931) 2 W.W.R. 251 ..... 303, 413, 811, 825
Sanders v. Croll, (1921) 30 B.C.R. 284 822
Sanders v. Frick Co., (1916) 22 B.C.R. 472; 26 D.L.R. 685; 34 W.L.R. 65; 10 W.W.R. 163 706
Sanford v. Crossley, (1931) 44 B.C.R. 481 468
Sankey, R. v. (1927) 39 B.C.R. 247; 49 C.C.C. 195 372
Sankey, R. v. (1927) S.C.R. 436; (1927) 4 D.L.R. 245; 48 C.C.C. 97 .. 398, 483, 487, 491
Santa Singh, In re (1924) 34 B.C.R. 190; (1924) 3 D.L.R. 1088; (1924) 3 W.W.R. 164; 42 C.C.C. 346 ..... 559, 582

Santa Singh, Immigration Act and, In re (1920) 28 B.C.R. 357; (1920) 2 W.W.R. 999 ..... 215, 582
Savory, Beauchamp v. (1921) 30 B.C.R. 429 807
Sawyer v. Millett, (1918) 25 B.C.R. 193 ..... 837, 863
Sayward v. Brewer, (1917) 24 B.C.R. 129; (1917) 2 W.W.R. 233 855
Sayward, North Pacific Lbr. Co. v. (1918) 25 B.C.R. 322; (1918) 2 W.W.R. 771 ..... 3, 319, 928, 931
Scarff, R. P. Rithet & Co. v. (1920) 29 B.C.R. 70 ..... 101, 121, 974
Sceats v. Young, (1930) 43 B.C.R. 321 ..... 734, 1062
Schetky v. Bradshaw, (1919) 26 B.C.R. 545; (1919) 2 W.W.R. 885 196
Schetky et al. v. Cochrane, (1917) 24 B.C.R. 496; (1918) 1 W.W.R. 821 483
Schetky et al. v. Cochrane, (1918) 26 B.C.R. 257; (1920) 60 S.C.R. 650 ..... 118, 742
Schmalz, In re (1927) 38 B.C.R. 264; (1927) 1 D.L.R. 1113; (1927) 1 W.W.R. 408. 1134
Schmidt v. Giffin, (1916) 23 B.C.R. 459; 34 W.L.R. 1229; 10 W.W.R. 1356..... 879
Schmidt v. Stuckey & Pearse, (1928) 40 B.C.R. 161; (1928) 2 D.L.R. 928; (1928) 1 W.W.R. 913 ..... 549, 1140
Schmidt and Edlung, R. v. (1930) 42 B.C.R. 479; (1930) 2 W.W.R. 497; 54 C.C.C. 168 348
Schmit v. Erickson, (1922) 1 W.W.R. 232 498
Schneider, Buonaparte Ranch, Ltd., v. (1928) 40 B.C.R. 1; (1928) 2 D.L.R. 993; (1928) 2 W.W.R. 106 ..... 925, 1116
Schneider, Jacobson v. (1926) 38 B.C.R. 83; (1927) 1 D.L.R. 1006; (1927) 2 W.W.R. 257 24
Schuberg v. Local International Alliance Theatrical Stage Employees, (1927) 38 B.C.R. 130; (1927) 2 D.L.R. 20; (1927) 1 W.W.R. 548; 47 C.C.C. 213; (1926) 37 B.C.R. 284; (1926) 3 D.L.R. 166; (1926) 2 W.W.R. 254 1065
Schulli, Davies v. (1927) 39 B.C.R. 321; (1928) 1 D.L.R. 746 ..... 305, 311
Schulli & Mullin, Davies v. (1928) 40 B.C.R. 197; (1928) 4 D.L.R. 132; (1928) 3 W.W.R. 158 ..... 727, 845
Schultz, Caine v. (1926) 38 B.C.R. 332; (1927) 1 W.W.R. 600 1090
Schwartz v. Hartford Acc. & Indemnity Co., (1925) 35 B.C.R. 507; (1925) 2 W.W.R. 413 620
Scoble v. Woodward, (1924) 1 W.W.R. 1040 ..... 411, 575
Scollard, Thompson v. (No. 2), (1929) 41 B.C.R. 241; (1929) 3 D.L.R. 857; (1929) 2 W.W.R. 466 ..... 211, 861
Scott v. City of Nanaimo, (1924) 33 B.C.R. 344, 474; (1924) 2 D.L.R. 811; (1924) 1 W.W.R. 1275 ..... 41, 61, 315, 569, 769
Scott, Hudson's Bay Co. v. (1929) 4 D.L.R. 978; (1929) 3 W.W.R. 232 ..... 278, 455, 580, 653
Scott, Sleuter v. (1915) 21 B.C.R. 155; 22 D.L.R. 900; 27 W.L.R. 698; 8 W.W.R. 714 1064
Scott, Stubbert v. (1931) 43 B.C.R. 496; (1931) 1 W.W.R. 598 ..... 122, 424, 1069
Scott, Welch v. (1920) 28 B.C.R. 349; (1920) 2 W.W.R. 510 ..... 94, 140, 675, 1053
Scott, Yorkshire and Can. Trust, Ltd., v. (1919) 27 B.C.R. 5; (1919) 2 W.W.R. 87 116
Scott & Peden v. Elliott, (1926) 37 B.C.R. 143; (1926) 2 D.L.R. 504; (1926) 2 W.W.R. 154 ..... 278, 417, 545
Scottish Canadian Canning Co. v. Dickie and Sherman, (1915) 21 B.C.R. 338; 22 D.L.R. 890; 31 W.L.R. 273 172
Scottish Temperance Life Assce. Co. v. District Registrar of Titles, (1917) 24 B.C.R. 232; 36 D.L.R. 152; (1917) 3 W.W.R. 30 ..... 754, 950
Scottish Temperance Life Assce. Co., Land Registry Act and, In re (1919) 26 B.C.R. 504; (1919) 2 W.W.R. 125 ..... 295, 928, 954
Scottish Temperance Life Assce. Co. v. Johnson, (1916) 23 B.C.R. 510; 31 D.L.R. 649; (1917) 1 W.W.R. 538; (1917) 25 B.C.R. 93; (1918) 1 W.W.R. 402 ..... 625, 651, 753, 876
Scovil v. Lewis, (1926) 37 B.C.R. 241; (1926) 2 W.W.R. 468 ..... 320, 653
Scuilli v. Planta, (1928) 39 B.C.R. 450 ..... 503, 892

Scythes v. Gibsons, Ltd., (1926) 3 W.W.R. 129; (1927) S.C.R. 352; (1927) 2 D.L.R. 834 666
"Sea Foam," The, Martin v. (1921) 30 B.C.R. 398; 68 D.L.R. 750; (1922) 2 W.W.R. 1181; 21 Ex. C.R. 395 ..... 10, 14
"Sea Lion," The, The "Jessie Mac" v. (1919) 27 B.C.R. 394, 444; 48 D.L.R. 184; 61 D.L.R. 222; (1919) 2 W.W.R. 411; (1921) 1 W.W.R. 873; 19 Ex. C.R. 78; (1920) Ex. C.R. 137 ..... 18, 162
Sealy v. Stephenson, (1923) 32 B.C.R. 187; (1923) 3 D.L.R. 18; (1923) 2 W.W.R. 465 848
Seattle Brewing & Malting Co. v. Rainier Brewing Co., (1924) 34 B.C.R. 334; (1924) 4 D.L.R. 940; (1924) 3 W.W.R. 502 ..... 1053, 1061
Seattle Construction & Dry Dock Co. v. Grant, Smith & Co., (1916) 22 B.C.R. 433; 26 D.L.R. 671; 10 W.W.R. 49; 33 W.L.R. 981 ..... 485, 891
Seattle Construction & Dry Dock Co. v. Grant, Smith & Co., (1918) 26 B.C.R. 414 ..... 63, 504
Seattle Construction & Dry Dock Co. v. Grant, Smith & Co., (1920) A.C. 162; (1919) 89 L.J.P.C. 17; 122 L.T. 203; (1918-19) 26 B.C.R. 397, 560; 44 D.L.R. 90; 45 D.L.R. 476; 48 D.L.R. 172; (1918) 3 W.W.R. 703; (1919) 1 W.W.R. 783; (1919) 3 W.W.R. 33 ..... 60, 92, 272, 286, 324, 622, 740
Sechart Fisheries, Ltd., In re (1929) 41 B.C.R. 323; (1929) 4 D.L.R. 536; (1929) 2 W.W.R. 413; 10 C.B.R. 565; 11 C.B.R. 96 97
Sedgwick Estate, In re (1931) 1 W.W.R. 837 1125
Seeley & Co. v. Brown, (1926) 37 B.C.R. 514; (1927) 1 W.W.R. 185 1041
Seguin, Boyle v. (1922) 1 A.C. 462; 91 L.J.P.C. 137; 127 L.T. 198; 63 D.L.R. 369; (1922) 1 W.W.R. 1169 1146
Seibel, Hahn v. (1920) 28 B.C.R. 387; (1920) 2 W.W.R. 595; (1920) 3 W.W.R. 229 ..... 304, 318, 329, 864, 920, 1140, 1143
Seldon v. Zambowski, (1927) 39 B.C.R. 205; (1928) 1 D.L.R. 638; (1928) 1 W.W.R. 630 ..... 575, 719
Sellick v. Hayward, (1917) 24 B.C.R. 125; (1917) 2 W.W.R. 803 752
Sellon v. Keane, (1917) 24 B.C.R. 238; (1917) 3 W.W.R. 342 ..... 285, 319, 329
Sellon, Keane v. (1920) 28 B.C.R. 67; (1920) 2 W.W.R. 117 889
Selman, In re (1920) 2 W.W.R. 539 ..... 327, 673
"Senator Jansen," The, Patterson, Chandler & Stephen, Ltd., v. (1919) 30 B.C.R. 97; 49 D.L.R. 166; (1919) 3 W.W.R. 458; 19 Ex. C.R. 105 997
Seto Kin Kui, R. v. (1919) 27 B.C.R. 416; (1919) 3 W.W.R. 318 ..... 352, 921
Shannon v. Dist. of Point Grey, (1921) 30 B.C.R. 136; 62 D.L.R. 248; (1921) 3 W.W.R. 442, 549; (1922) 63 S.C.R. 557; 66 D.L.R. 160; (1922) 2 W.W.R. 625 ..... 783, 1025
Shannon v. King, (1931) 44 B.C.R. 383; (1931) 4 D.L.R. 438; (1931) 2 W.W.R. 913 ..... 427, 867
Shannon, Whittaker, Rex ex rel. v. (1930) 43 B.C.R. 129 ..... 472, 927, 933
Sharp v. Ingles, (1915) 21 B.C.R. 584; 23 D.L.R. 636; 32 W.L.R. 150; 8 W.W.R. 1325 ..... 121, 972
Shatford v. B.C. Winegrowers, Ltd., (1927) 38 B.C.R. 419; (1927) 2 D.L.R. 759. 243
Shaw, Campbell v. (1920) 28 B.C.R. 77; (1920) 1 W.W.R. 1028 871
Shaw v. Globe Indemnity Co., (1921) 29 B.C.R. 157; 57 D.L.R. 102; (1921) 1 W.W.R. 674 615
Shaw v. Hyde, (1921) 61 D.L.R. 666 188
Shaw, Land Registry Act and, In re (1915) 22 B.C.R. 116; 24 D.L.R. 429; 32 W.L.R. 85; 8 W.W.R. 1270 ..... 900, 950, 953, 1082
Shaw v. McDonald, (1921) 29 B.C.R. 230; (1921) 1 W.W.R. 498; 56 D.L.R. 354 ..... 657, 988
Shaw, Modern Construction Co. v. (1923) 35 B.C.R. 331; (1923) 3 D.L.R. 893; (1923) 3 W.W.R. 301 128
Shaw, Morgan v. (1926) 36 B.C.R. 454; (1926) 1 W.W.R. 483; (1926) 1 D.L.R. 828 117
Shaw, Salter & Plommer v. Phipps & Cosgrove, (1926) 37 B.C.R. 184 1004

Shaw v. Shaw, (1919) 27 B.C.R. 532 437
Shaw v. Westminster Thoroughbred Assn., (1924) 33 B.C.R. 361 818
Sheepwash v. Deer Mountain Lbr. Co., (1925) 37 B.C.R. 418 .....83, 1138, 1141
Shell Garage, Ltd., Keays v. (1920) 28 B.C.R. 527; 54 D.L.R. 265; (1920) 3 W.W.R. 859 969
Shell Oil Co., Jackson v. (1931) 43 B.C.R. 449; (1931) 1 W.W.R. 477 .....257, 958
Shelly Bros., Ltd., v. Callopy, (1918) 26 B.C.R. 149 309
Sheridan, R. v. (1924) 34 B.C.R. 161; (1924) 3 D.L.R. 339; (1924) 3 W.W.R. 617 .....224, 720
Sherman, Dickie, DeBeck & McTaggart and, In re (1916) 23 B.C.R. 538 .....309, 1007
Sherman, W. H. Malkin Co. v. (1925) 35 B.C.R. 445 .....55, 547
Sherman, Wood v. (1917) 24 B.C.R. 376; (1918) 1 W.W.R. 177 .....301, 647
Shewbrooks, R. v. (1931) 44 B.C.R. 313 79
Shields, Crabbe v. (1925) 36 B.C.R. 89; (1925) 3 D.L.R. 1069; (1925) 2 W.W.R. 701 1119
Shields v. Hine, (1919) 27 B.C.R. 20 308
Shields, Williams v. (1918) 25 B.C.R. 198 1096
Shields Lumber Co., Stoddard v. (1920) 28 B.C.R. 277; 53 D.L.R. 322; (1920) 2 W.W.R. 887 .....183, 548
Shipway v. Logan, (1915) 21 B.C.R. 595 36
Shipway v. Logan, (1916) 22 B.C.R. 410 .....38, 61, 315, 324
Shore, Larbonne v. (1928) 39 B.C.R. 508; (1928) 2 D.L.R. 977; (1928) 2 W.W.R. 8 .....548, 551, 946
Shore & Grant v. Wilson Bros., (1916) 23 B.C.R. 33; 35 D.L.R. 293 433
Short, A. E., Ltd., Whitney-Morton & Co., Ltd., v. (1922) 31 B.C.R. 275; 67 D.L.R. 573; (1922) 2 W.W.R. 1014 981
Shorting v. Shorting, (1918) 25 B.C.R. 351 1107
Shortt, Hill & Duncan, Ltd., Frumento v. (1916) 22 B.C.R. 427 .....34, 37, 627
Shrimpton v. Indar Singh, (1927) 39 B.C.R. 19, 319; (1928) 1 D.L.R. 462; (1928) 2 W.W.R. 22 .....59, 307, 816
Shuen Wah, Standard Bank of Canada v. (1919) 26 B.C.R. 441; (1919) 1 W.W.R. 586 .....4, 325, 678, 1048
Shumarin, R. v. (1928) 1 W.W.R. 300 389
Shute, Horsnail v. (1919) 27 B.C.R. 474; (1920) 1 W.W.R. 21; (1921) 30 B.C.R. 189; 62 D.L.R. 199; (1921) 3 W.W.R. 270 .....246, 327, 404, 887, 1084, 1091
Shuttleworth v. Vancouver General Hospital, (1927) 38 B.C.R. 300; (1927) 2 D.L.R. 573; (1927) 1 W.W.R. 476 .....600, 842
Sicilliano, North v. (1922) 31 B.C.R. 463; (1923) 1 D.L.R. 1149; (1923) 1 W.W.R. 551 .....463, 484, 498, 580
Sid B. Smith Lbr. Co., In re (1917) 25 B.C.R. 126; (1917) 3 W.W.R. 844 197
Sidney Mills, Ltd., Brown v. (1920) 28 B.C.R. 73; 61 D.L.R. 112 88
Sieman (No. 2), In re (1930) 2 W.W.R. 111 517
Sieman (No. 3), In re (1930) 2 W.W.R. 411 921
Sieman (No. 4), In re (1930) 2 W.W.R. 412 .....516, 517
Sigmore, Paten v. (1919) 27 B.C.R. 157 .....49, 576, 1049
Silk, Walker and Roberts v. (1930) 43 B.C.R. 43; (1930) 4 D.L.R. 201; (1930) 2 W.W.R. 407 .....542, 579
Silver Spring Brewery, Ltd., Duncan & Gray v. (1925) 36 B.C.R. 249; (1925) 4 D.L.R. 724; (1925) 3 W.W.R. 675 201
Simmons, Elsie, R. v. (1923) 32 B.C.R. 455; (1923) 3 W.W.R. 749 393
Simmons, Hanton v. (1921) 1 W.W.R. 757 493
Simmons v. Royal Bank of Canada, (1915) 22 B.C.R. 369; 27 D.L.R. 723; 33 W.L.R. 363 ..... 270, 578, 950
Simons Garage, Alliance Finance Co. v. (1925) 36 B.C.R. 117; (1928) 3 W.W.R. 621 .....94, 676, 974
Simplex Machine Co. v. McLennan, McFeeley & Co., (1928) 3 W.W.R. 255 .....277, 967
Simpson, Balkwill & Co. v. Canadian Credit Men's Trust Assn. et al., (1921) 30 B.C.R. 347; 70 D.L.R. 731; (1921) 3 W.W.R. 831 185

Simpson v. Grand Trunk Pacific Steamship Co., (1922) 63 S.C.R. 361; 65 D.L.R. 614; (1922) 2 W.W.R. 320 135
Simpson, Kipp v. (1928) 40 B.C.R. 248; (1928) 4 D.L.R. 421; (1928) 3 W.W.R. 331 ..... 126, 421, 865
Simpson, Langan v. (1919) 27 B.C.R. 504 ..... 42, 48, 1001
Simpson, Marsh v. (1928) 40 B.C.R. 114; (1928) 1 W.W.R. 956 979
Simpson, R. v. (1923) 3 W.W.R. 1095 ..... 370, 558
Sinclair v. Land Settlement Board, (1925) 35 B.C.R. 434; (1925) 2 D.L.R. 1050 .. 241
Sing, Rex ex rel. v. Henley, (1922) 70 D.L.R. 867; (1922) 3 W.W.R. 638 ... 384, 646
Singer v. Garrett, (1929) 41 B.C.R. 160; (1929) 4 D.L.R. 132; (1929) 2 W.W.R. 201 1104
Singh, Amar v. Mitchell, (1916) 23 B.C.R. 248; 30 D.L.R. 719; (1917) 1 W.W.R. 201 ..... 421, 477, 1090
Singh et al. v. Gill, (1929) 41 B.C.R. 256; (1929) 4 D.L.R. 396; (1929) 2 W.W.R. 431 ..... 751, 1012
Sinser, Curley v. (1931) 3 W.W.R. 763 538
Sit Quin, Rex ex rel. Robinson v. (1918) 25 B.C.R. 362; (1918) 3 W.W.R. 316 ..... 27, 377, 634, 1026
Sit Way, John Hing Co. v. (1917) 25 B.C.R. 153; (1918) 1 W.W.R. 978 ..... 603, 849, 887, 1108
Skeans, Royal Bank of Canada v. (1916-17) 24 B.C.R. 190, 193; 36 D.L.R. 390; (1917) 2 W.W.R. 942 ..... 300, 873
Skeffington, Curtis v. (1915) 9 W.W.R. 834 506
Skelding et al. v. Levin, (1916) 23 B.C.R. 47 322
Skene and Christie, Royal Bank of Canada v. (1918) 25 B.C.R. 318; (1919) 3 W.W.R. 1071 ..... 32, 50
Skene and Christie v. Royal Bank of Canada, (1918) 25 B.C.R. 456; 59 S.C.R. 211; (1919) 3 W.W.R. 740, 1071 ..... 2, 651, 862
Skene and Christie v. Royal Bank of Canada, (1920) 28 B.C.R. 401; 59 D.L.R. 469 ..... 129, 132
Skene and Christie, Royal Bank of Canada v. (1921) 30 B.C.R. 127 307
Skidmore v. B.C. Electric Ry. Co., (1922) 31 B.C.R. 282; 68 D.L.R. 32; (1922) 2 W.W.R. 1036 826
Skinner, Ledingham v. (1915) 21 B.C.R. 41; 21 D.L.R. 300; 30 W.L.R. 741; 8 W.W.R. 52 ..... 489, 513
Skinner, State of California v. (1924) 33 B.C.R. 555; (1924) 2 W.W.R. 209 .. 345, 518
Slater v. Velie Motors Corpn., (1928) 40 B.C.R. 184; (1928) 4 D.L.R. 487; (1928) 3 W.W.R. 170 ..... 653, 874
Sleuter v. Scott, (1915) 21 B.C.R. 155; 22 D.L.R. 900; 27 W.L.R. 698; 8 W.W.R. 714 1064
Slinn, R. v. (1926) 37 B.C.R. 275; 47 C.C.C. 77 343
Sloan v. McRae, 1926) 37 B.C.R. 464; (1926) 4 D.L.R. 450; (1926) 3 W.W.R. 136. 886
Slowin, R. v. (1923) 1 W.W.R. 252 ..... 227, 1037
Smiley v. Evans, (1927) 38 B.C.R. 468; (1927) 4 D.L.R. 629 446
Smiley v. Smiley, (1922) 30 B.C.R. 536 574
Smith, Brighten v. (1926) 37 B.C.R. 518 1135
Smith v. Brunswick Balke Co., (1917) 25 B.C.R. 37; 38 D.L.R. 455; (1917) 3 W.W.R. 1071 ..... 133, 274
Smith v. Catherwood: Re Dewdney Election, (1925) 36 B.C.R. 98; (1925) 3 D.L.R. 770; (1925) 1 W.W.R. 54 446
Smith, City of Vancouver v. (1922) 30 B.C.R. 311; (1922) 1 W.W.R. 344 926
Smith v. Dist. of South Vancouver and Township of Richmond, (1922-23) 31 B.C.R. 168, 481; (1923) 2 D.L.R. 535; (1923) 1 W.W.R. 417 .. 570, 661, 772, 838
Smith v. Gautschi, (1916) 23 B.C.R. 455; (1917) 2 W.W.R. 225 539
Smith v. Hubbard, (1917) 1 W.W.R. 1237 1120
Smith, Ivey v. (1929) 40 B.C.R. 475 ..... 415, 469, 484, 513, 551
Smith, Koop v. (1915) 51 S.C.R. 554; 25 D.L.R. 355; 8 W.W.R. 1203 529

Smith, Land Registry Act and, In re (1917) 23 B.C.R. 547; (1917) 1 W.W.R. 332; 31 D.L.R. 702 ....1017, 1108
Smith v. Mason, (1921) 30 B.C.R. 174; 60 D.L.R. 258; (1921) 2 W.W.R. 614..667, 1059
Smith, Shannon Lbr. Co., Mills v. (1916) 22 B.C.R. 579; 28 D.L.R. 40; 34 W.L.R. 358; 10 W.W.R. 454 1138
Smith, R. v. (1916) 23 B.C.R. 197; (1917) 1 W.W.R. 553; 26 C.C.C. 398 340
Smith, R. v. (1919) 27 B.C.R. 338; (1919) 3 W.W.R. 311 ....331, 358, 561
Smith, R. v. (1923) 32 B.C.R. 172; 39 C.C.C. 102; 32 B.C.R. 241; (1923) 3 D.L.R. 302; (1923) 2 W.W.R. 454 639
Smith, R. v. (1926) 37 B.C.R. 248 363
Smith, R. v. (1931) 44 B.C.R. 422; (1932) 1 W.W.R. 131 365
Smith, Rolston v. (1923) 33 B.C.R. 235 39
Smith, Sutton v. (1927) 38 B.C.R. 455; (1927) 3 D.L.R. 1008; (1927) 2 W.W.R. 481 ....56, 122, 627, 660, 836, 844, 851, 889
Smith v. Union Steamship Co., (1922) 31 B.C.R. 334; 68 D.L.R. 488 ....136, 406
Smith v. Yorkshire Guarantee Co., (1916) 23 B.C.R. 1; 27 D.L.R. 412; 10 W.W.R. 475; 34 W.L.R. 410 .... 6, 244, 421, 1082
Smith and Christie, Camsusa v. (1919) 2 W.W.R. 332 ....253, 418
Smithson v. Smithson, (1915) 22 B.C.R. 326; 25 D.L.R. 745; 33 W.L.R. 229; 9 W.W.R. 501 ....505, 1137
Snia Viscoha Societa, Etc., v. The "Yuri Maru," (1927) A.C. 906; 96 L.J.P.C. 137; 137 L.T. 747; 71 Sol. Jo. 649; 43 T.L.R. 698; 17 Asp. M.C. 322; (1927) 4 D.L.R. 69; (1927) 3 W.W.R. 465 1028
Snyder v. Snyder, (1927) 38 B.C.R. 336; (1927) 3 D.L.R. 151; (1927) 2 W.W.R. 240 ....213, 591
Solloway, Mills & Co., Blumberger v. (1931) 44 B.C.R. 41; (1931) 3 D.L.R. 204; (1931) 2 W.W.R. 56 880
Solloway, Mills & Co., Blygh v. (1930) 42 B.C.R. 531; (1930) 4 D.L.R. 582; (1930) 2 W.W.R. 208 ....51, 862
Solloway, Mills & Co. v. Frawley et al., (1930) 42 B.C.R. 524; (1930) 4 D.L.R. 235; (1930) 2 W.W.R. 231; 53 C.C.C. 306 353
Solloway, Mills & Co., MacKee v. (1930) 42 B.C.R. 438; (1930) 3 D.L.R. 145; (1930) 1 W.W.R. 563 533
Solloway, Mills & Co., MacKee v. (No. 2), (1931) 44 B.C.R. 42; (1931) 2 D.L.R. 822; (1931) 1 W.W.R. 624 880
Solloway, Mills & Co., MacKee v. (No. 3), (1931) 44 B.C.R. 401; (1931) 4 D.L.R. 417; (1931) 2 W.W.R. 926 ....4, 892
Solloway, Mills & Co., Sunderland v. (1930) 43 B.C.R. 297; (1930) 3 W.W.R. 641; (1931) 2 W.W.R. 393; (1931) S.C.R. 714; (1932) 4 D.L.R. 795 ....410, 901
Solton v. Northern Loan & Mtge. Guar. Corpn., (1918) 25 B.C.R. 529 1097
Somers, R. v. (1923) 32 B.C.R. 553; (1923) 3 W.W.R. 813; (1924) 2 D.L.R. 1160; 41 C.C.C. 141 ....366, 644
Somers, R. v. (1929) 41 B.C.R. 190; (1929) 3 D.L.R. 772; (1929) 2 W.W.R. 366; 51 C.C.C. 356 ....224, 234, 524
Somerville Cannery Co., R. v. (1927) 39 B.C.R. 103; (1927) 4 D.L.R. 494; (1927) 3 W.W.R. 215; 49 C.C.C. 65 ....224, 234, 524
Somerville, Devine v. (1931) 44 B.C.R. 502; (1931) 3 W.W.R. 264 ....202, 246, 722, 726, 728, 729, 732
Somerville, Dornberg v. (1928) 40 B.C.R. 415; (1929) 1 D.L.R. 811 ....415, 1017
Soo Gong, R. v. (1927) 38 B.C.R. 321; (1927) 2 D.L.R. 269; (1927) 1 W.W.R. 669; 47 C.C.C. 275 ....364, 559
Sorenson v. Young, (1919) 27 B.C.R. 335; (1920) 1 W.W.R. 189 ....445, 457, 942
Sostad v. Woldson, (1925) 36 B.C.R. 14; (1925) 3 D.L.R. 779; (1925) 2 W.W.R. 774 878
Southard Motors, Ltd, et al., Jarvis v. (1931) 44 B.C.R. 286; (1931) 2 W.W.R. 812. 814
Southgate Logging Co., Gilbert v. (1915) 21 B.C.R. 7; 22 B.C.R. 87; 24 D.L.R. 202; 32 W.L.R. 131; 7 W.W.R. 1133; 8 W.W.R. 1304 ....37, 43, 326, 797, 815

South Shore Lbr. Co. and The King, Montreal Trust Co. v. (1924) 33 B.C.R. 280; (1924) 1 D.L.R. 1030; (1924) 1 W.W.R. 657 ....296, 748, 1020
South Vancouver, Dist. of, In re: In re Gillespie and Cotsworth, (1920) 28 B.C.R. 494; 54 D.L.R. 144; (1920) 3 W.W.R. 440 ....688, 765
South Vancouver, Dist. of, and Township of Richmond, Evans v. (1918) 26 B.C.R. 60; 48 D.L.R. 209; (1919) 3 W.W.R. 339 ....570, 771
South Vancouver, Dist. of, Gold v. (1918) 26 B.C.R. 147; (1919) 2 W.W.R. 249.. 73
South Vancouver, Dist. of, Howard v. (1924) 34 B.C.R. 167; (1924) 4 D.L.R. 257; (1924) 3 W.W.R. 166 ....767, 791
South Vancouver, Dist. of, McBride v. (1924) 34 B.C.R. 81; (1924) 4 D.L.R. 201; (1924) 3 W.W.R. 124 783
South Vancouver, Dist. of, Meldrum v. (1916) 22 B.C.R. 574; 27 D.L.R. 193; 34 W.L.R. 314; 10 W.W.R. 519 ....206, 765, 776, 1026
South Vancouver, Dist. of, Milne v. (1917) 24 B.C.R. 255; 36 D.L.R. 180; (1917) 1 W.W.R. 335 789
South Vancouver, Dist. of, Tait v. (1924) 34 B.C.R. 81; (1924) 4 D.L.R. 201; (1924) 3 W.W.R. 124 783
South Vancouver, Dist. of, and Township of Richmond, Smith v. (1922) 31 B.C.R. 168, 481; (1923) 2 D.L.R. 535; (1923) 1 W.W.R. 417 ....570, 661, 772, 838
South Vancouver, Wood-Gundy & Co. v. (1916) 10 W.W.R. 928 764
Sovereign Life Assce. Co. of Canada, Dominion Trust Co. v. (1919) A.C. 254; (1918) 88 L.J.P.C. 30; 119 L.T. 748; 44 D.L.R. 12.... 878
Sowash v. The King, (1926) S.C.R. 92; (1926) 1 D.L.R. 115; 45 C.C.C. 19 485
Sowash, R. v. (1925) 37 B.C.R. 1; 45 C.C.C. 1; (1926) 1 D.L.R. 99 373
Spallumcheen, Township of, Fowler v. (1930) 43 B.C.R. 47; (1930) 3 W.W.R. 12 ....785, 1016
Spallumcheen, Township of, Hales v. (1921) 30 B.C.R. 87; 61 D.L.R. 390; (1921) 2 W.W.R. 931 790
"Speedway," The (1925) 35 B.C.R. 319 19
Spencer v. City of Vancouver, (1921) 30 B.C.R. 382; 68 D.L.R. 747; (1922) 1 W.W.R. 779 73
Spencer, David, Ltd., Conn v. (1929) 42 B.C.R. 128; (1930) 1 D.L.R. 805; (1930) 1 W.W.R. 26 1051
Spero Panases, R. v. (1920) 29 B.C.R. 80 353
Splan v. Barrett-Lennard, (1931) 44 B.C.R. 371; (1931) 2 D.L.R. 857; (1931) 4 D.L.R. 686; (1931) 3 W.W.R. 41 .... 36, 41, 285
Sporle v. Great Northern Ry. Co., (1924) 34 B.C.R. 180; (1924) 4 D.L.R. 184; (1924) 3 W.W.R. 136; 30 C.R.C. 183; (1925) 35 B.C.R. 232; (1925) 3 D.L.R. 302; (1925) 2 W.W.R. 385; 30 C.R.C. 186 ....141, 471
Sproat, Aron v. (1921) 29 B.C.R. 194 271
Sproule v. Clements, (1925) 2 D.L.R. 784; (1927) 39 B.C.R. 28; (1927) 3 D.L.R. 955; (1927) 2 W.W.R. 825 ....944, 1076, 1078-9
Sproule, Deceased, In re Estate of J. C.: In re Succession Duty Act and (1924) 34 B.C.R. 110; (1924) 2 W.W.R. 1087 1032
Spruce Creek Power Co., Deisler v. (1915) 21 B.C.R. 441; 22 D.L.R. 550; 31 W.L.R. 289 730-1
Stagg v. Ward and Ward, (1921) 30 B.C.R. 385 1075
Stahl v. Miller, (1918) 56 S.C.R. 312; 40 D.L.R. 388; (1918) 2 W.W.R. 197 ....900, 902, 1079, 1096
Standard Bank of Canada v. Finucane, (1921) 59 D.L.R. 465; 62 S.C.R. 110; (1921) 3 W.W.R. 314; 29 B.C.R. 251; 57 D.L.R. 132 256
Standard Bank of Canada v. McCrossan, (1919-20) 28 B.C.R. 291; (1920) 2 W.W.R. 546; 60 S.C.R. 655; 55 D.L.R. 238; (1920) 3 W.W.R. 846 ....113, 478, 550, 863
Standard Bank of Canada v. McLeod, (1921) 2 W.W.R. 173 875
Standard Bank of Canada v. Shuen Wah, (1919) 26 B.C.R. 441; (1919) 1 W.W.R. 586 ....4, 325, 678, 1048

Standard Bank of Canada v. Wade, (1924) 33 B.C.R. 493; (1924) 3 D.L.R. 251; (1924) 2 W.W.R. 497 946
Standard Lumber Co., Allison v. (1924) 34 B.C.R. 257; (1924) 4 D.L.R. 465; (1924) 3 W.W.R. 481 .....463, 485, 694, 844, 856
Standard Lumber Co., Atty.-Gen. of B.C. v. (1925) 36 B.C.R. 481; (1926) 2 W.W.R. 167 1041
Standard Marine Ins. Co. v. Whalen Pulp & Paper Mills, Ltd., (1922) 31 B.C.R. 1; 64 S.C.R. 90; 68 D.L.R. 269; (1922) 3 W.W.R. 211 623
Standard Silver Lead Mining Co. v. Workmen's Compensation Board, (1920) 28 B.C.R. 284; 51 D.L.R. 470; (1920) 2 W.W.R. 676 295
Standard Trusts Co. v. David Steele, Ltd., (1921-22) 30 B.C.R. 359, 522; 62 D.L.R. 650; (1922) 1 W.W.R. 137; 2 C.B.R. 183; 68 D.L.R. 750; (1922) 2 W.W.R. 510; 3 C.B.R. 141 .....97, 670
Standard Trusts Co., Land Registry Act and, In re (1916) 22 B.C.R. 538; 10 W.W.R. 877 .....750, 949
Standard Trusts Co. v. Pulice, (1922) 70 D.L.R. 145; (1923) 32 B.C.R. 399; (1924) 33 B.C.R. 250; (1924) 1 D.L.R. 985; (1924) 3 W.W.R. 771 .....58, 304, 514, 647, 1119, 1133
Stanford v. Clayton, (1922) 70 D.L.R. 864 847
Stanoszek v. Canadian Collieries, Ltd., (1915) 21 B.C.R. 470; 22 D.L.R. 691; 9 W.W.R. 710 798
Stanyer, R. v. (1923) 33 B.C.R. 223; 41 C.C.C. 206; (1924) 1 W.W.R. 570 369
Star Steamship Co. v. City of Vancouver, (1916) 23 B.C.R. 317; 30 D.L.R. 484; 34 W.L.R. 1188 .....570, 771
Stark, Buscomb v. (1916) 23 B.C.R. 155; 30 D.L.R. 736; (1917) 1 W.W.R. 204 .....409, 674
Steele, In re (1930) 2 D.L.R. 212 591
Steele, David, Ltd., Standard Trusts Co. v. (1921-22) 30 B.C.R. 359, 522; 62 D.L.R. 650; (1922) 1 W.W.R. 137; 2 C.B.R. 183; 68 D.L.R. 750; (1922) 2 W.W.R. 510; 3 C.B.R. 141 .....97, 670
Steele, R. v. (1923) 33 B.C.R. 197; (1924) 1 W.W.R. 1146; (1924) 4 D.L.R. 175; 42 C.C.C. 375 346
"Steel Scientist," The, Wrangell v. (1924) 34 B.C.R. 114; (1924) 3 D.L.R. 49; (1924) 2 W.W.R. 493; (1924) Ex. C.R. 136 19
"Steel Scientist," The, Wrangell v. (1926) 4 D.L.R. 191; (1926) Ex. C.R. 202 ..158, 162
Steers, R. v. (1918) 26 B.C.R. 334 382
Steeves, J. M., Dairy, Ltd., v. The Twin City Co-operative Milk Prod. Assn., (1925) 36 B.C.R. 286; (1926) 1 D.L.R. 130; (1926) 1 W.W.R. 25 .....599, 690
Stephen, Kerr v. (1930) 42 B.C.R. 518; (1930) 2 D.L.R. 978; (1930) 1 W.W.R. 896. 808
Stephen v. McNeil, (1928) 40 B.C.R. 209; (1928) 3 W.W.R. 182; (1929) S.C.R. 537; (1929) 1 D.L.R. 1003; 522
Stephen v. Miller, (1918) 25 B.C.R. 388; 40 D.L.R. 418; (1919) 2 W.W.R. 1042; 49 D.L.R. 698; 59 S.C.R. 690 .....512, 1078, 1079
Stephens v. Burns, (1921) 30 B.C.R. 60; (1921) 2 W.W.R. 513 1140
Stephens v. Royal Trust Co., (1917) 25 B.C.R. 77 946
Stephenson, Sealy v. (1923) 32 B.C.R. 187; (1923) 3 D.L.R. 18; (1923) 2 W.W.R. 465 848
Stevens v. Abbotsford Lbr. Co., (1924) 33 B.C.R. 299; (1924) 1 D.L.R. 1163; (1924) 1 W.W.R. 660 408
Stevens, Aghion v. (1921) 30 B.C.R. 77; 60 D.L.R. 395; (1921) 2 W.W.R. 961 .....288, 878, 1047
Stevenson, Abbotsford Lbr. Co. v. (1925) 35 B.C.R. 405; (1925) 36 B.C.R. 181; (1925) 4 D.L.R. 560; (1925) 3 W.W.R. 451 .....176, 544
Steves v. Kinnie, (1917) 24 B.C.R. 130; 33 D.L.R. 776; (1917) 1 W.W.R. 1250..793, 996
Stewart, Ex parte, (1929) 52 C.C.C. 95; (1930) S.C.R. 45; (1930) 1 D.L.R. 420 .....336, 356, 554, 555, 558
Stewart v. Canadian Financiers Trust Co., (1915) 22 B.C.R. 133; 23 D.L.R. 707; 9 W.W.R. 82; 32 W.L.R. 121 .....915, 1094

Stewart v. Cunningham, (1915) 21 B.C.R. 255; 22 D.L.R. 845; 8 W.W.R. 579 ..734, 1094
Stewart, Federal Mortgage Corporation and, In re (1917) 2 W.W.R. 52, 282 ..191, 197
Stewart, F. R. & Co., R. v. (1928) 39 B.C.R. 401; (1928) 1 W.W.R. 586; 49 C.C.C. 216 780
Stewart, J. A., Notaries Act and, In re (1929) 41 B.C.R. 467..... 839
Stewart, Kelpon v. (1928) 40 B.C.R. 369; (1929) 1 D.L.R. 480; (1928) 3 W.W.R. 640 .....667, 1059
Stewart, Law Society of B.C. v. (1928) 40 B.C.R. 401; (1928) 4 D.L.R. 572 ..328, 839
Stewart, Limb v. (1929) 2 D.L.R. 349 808
Stewart Mercantile Co., In re (1921) 1 W.W.R. 740; 1 C.B.R. 367; 59 D.L.R. 412. 96
Stewart, Metcalfe v. (1930) 42 B.C.R. 96; (1930) 1 D.L.R. 1001 686
Stewart, R. v. (1930) 1 W.W.R. 941 635
Stewart and Hayes v. Molybdenum Mining, Etc., Co., (1921) 30 B.C.R. 51; 60 D.L.R. 497; (1921) 2 W.W.R. 954 .....724, 1076, 1090, 1111
Stewart-Moore, Wardroper v. (1917) 25 B.C.R. 69 .....48, 248
Stigings, Deceased, In re (1924) 34 B.C.R. 347 1135
Stillwater Lbr. & Shingle Co. v. Canada Lumber & Timber Co., (1923) 32 B.C.R. 81, 249; (1923) 2 D.L.R. 900; 3 C.B.R. 807 .....5, 96, 532
Stirling & Pitcairn, Ltd., v. Kidston, (1920) 28 B.C.R. 306; 61 S.C.R. 193; 53 D.L.R. 29; 55 D.L.R. 366; (1920) 2 W.W.R. 862; (1920) 3 W.W.R. 365; (1921) 1 W.W.R. 162 .....261, 308, 477, 693, 958, 1012
Stoddard v. Shields Lbr. Co., (1920) 28 B.C.R. 277; 53 D.L.R. 322; (1920) 2 W.W.R. 887 .....183, 548
Stoddard, Venness v. (1915) 9 W.W.R. 832 713
Stoddard v. Williams, (1923) 32 B.C.R. 43; (1923) 1 D.L.R. 1113; (1923) 1 W.W.R. 688 .....452, 473, 1013, 1131
Stoddart & Co., Chapman & Sons v. (1930) 43 B.C.R. 182; (1930) 4 D.L.R. 1013; (1930) 3 W.W.R. 171 .....71, 493, 879
Stokes, Hamilton & Wragge v. (1921) 30 B.C.R. 65; 62 D.L.R. 282; (1921) 2 W.W.R. 921 954
Stollery, Anderson v. (1918) 3 W.W.R. 580 1109
Stoltze v. District of Mission, (1917) 24 B.C.R. 195; (1917) 1 W.W.R. 1388..3, 788, 790
Stoltze Mfg. Co., B.C. Red Cedar Shingle Co. v. (1931) 44 B.C.R. 458; (1932) 1 W.W.R. 164; (1932) 1 D.L.R. 762 171
Stone v. S.S. "Rochepoint," (1921) 30 B.C.R. 113; (1921) 2 W.W.R. 701; 21 Ex. C.R. 143; 68 D.L.R. 651 .....10, 995
Stoneberg v. Perron, Rex ex rel., (1922) 68 D.L.R. 392; (1922) 3 W.W.R. 138; 38 C.C.C. 121 350
Stonehouse and Pasquale, R. v. (1927) 39 B.C.R. 279; (1928) 1 D.L.R. 506; (1928) 1 W.W.R. 161; 49 C.C.C. 122 .....346, 397, 400
Stover v. Drysdale, (1925) 37 B.C.R. 28; (1925) 4 D.L.R. 994; (1926) 1 W.W.R. 98 .....158, 325
Strand, Overn v. (1930) 42 B.C.R. 358; (1930) 3 D.L.R. 994; (1930) 1 W.W.R. 629. 301
Strand, Overn v. (1930) 43 B.C.R. 309 50
Strand, Overn v. (1931) S.C.R. 720; (1931) 44 B.C.R. 47; (1931) 2 D.L.R. 44; (1931) 1 W.W.R. 694; (1932) 1 D.L.R. 490 .....71, 651, 899, 1002
Strong v. Can. Pac. Ry. Co., (1915) 22 B.C.R. 224; 25 D.L.R. 51; 32 W.L.R. 849; 9 W.W.R. 451 852
Stroud v. DesBrisay, (1930) 42 B.C.R. 507 .....55, 402
Structural Steel Co., Morris v. (1917) 24 B.C.R. 59; 35 D.L.R. 739; (1917) 2 W.W.R. 749 ..... 705-6, 1017
Stuart, Bodnar v. (1922) 30 B.C.R. 411; (1922) 1 W.W.R. 933 661
Stuart v. Moore, (1927) 39 B.C.R. 237; (1927) 4 D.L.R. 639 53
Stubbert v. Scott and Temple, (1931) 43 B.C.R. 496; (1931) 1 W.W.R. 598 ....122, 424, 1069
Stuckey & Pearse, Schmidt v. (1928) 40 B.C.R. 161; (1928) 2 D.L.R. 928; (1928) 1 W.W.R. 913 .....549, 1140

Studd, Land Registry Act and, In re (1916) 22 B.C.R. 507; 28 D.L.R. 354; 34 W.L.R. 466; 10 W.W.R. 634 ....179, 420, 950
Stump v. Batzold, (1931) 2 W.W.R. 784 534
Stuyvesant Ins. Co., Westminster Woodworking Co. v. (1915) 22 B.C.R. 197; 32 W.L.R. 802; 25 D.L.R. 284; 9 W.W.R. 418 608
Styles, Vater v. (1930) 42 B.C.R. 463; (1930) 3 D.L.R. 509; (1930) 2 W.W.R. 241. 535
Succession Duty Act, In re: In re Jones Estate, (1920) 28 B.C.R. 481; (1920) 3 W.W.R. 425 1034
Succession Duty Act, In re: Redmond v. Atty.-Gen. for B.C., (1931) 44 B.C.R. 390; (1931) 3 W.W.R. 18 ....594, 1036
Succession Duty Act, In re: Untermeyer Estate v. Atty.-Gen. for B.C., (1929) S.C.R. 84; (1929) 1 D.L.R. 315; (1928) 39 B.C.R. 533; (1928) 3 D.L.R. 311; (1928) 2 W.W.R. 209 ....172, 230, 1033, 1035
Succession Duty Act and Estate of J. C. Sproule, Deceased, In re (1924) 34 B.C.R. 110; (1924) 2 W.W.R. 1087 1032
Succession Duty Act and Inverarity, Deceased, In re (1924) 33 B.C.R. 318; (1924) 1 D.L.R. 1020; (1924) 1 W.W.R. 901 ....230, 1031
Succession Duty Act and Estate of Mossom Martin Boyd, Deceased, Re (1916) 23 B.C.R. 77; 28 D.L.R. 193; 34 W.L.R. 811; (1917) 54 S.C.R. 532; 36 D.L.R. 266; (1917) 2 W.W.R. 242 ....229, 1030
Succession Duty Act and J. H. Walker, Deceased, In re (1922) 30 B.C.R. 549; 63 D.L.R. 397; (1922) 1 W.W.R. 803 1032
Suckling, R. v. (1920) 3 W.W.R. 89 381
Suffern v. McGivern, (1923) 32 B.C.R. 542; (1923) 3 W.W.R. 817; (1923) 4 D.L.R. 541 ....806, 826
Sugarman, Nichol v. (1928) 40 B.C.R. 119; (1928) 3 D.L.R. 292 ....627, 889
Sullivan, Home Bank of Canada v. (1926) 37 B.C.R. 401; (1926) 3 W.W.R. 305; (1926) 4 D.L.R. 78; (1927) S.C.R. 115; (1927) 1 D.L.R. 1097 108
Sullivan Machinery Co. v. Bank of Montreal, (1918) 3 W.W.R. 16 ....725, 975
Sullivan Machinery Co., Plummer v. (1917) 24 B.C.R. 104; (1917) 2 W.W.R. 229 ....4, 200
Sullivan, R. v. (1930) 42 B.C.R. 435; 53 C.C.C. 243; (1920) 2 D.L.R. 422 340
Sumas Drainage, Dyk. & Dev. Dist., Commissioners of, Hall v. (1923) 32 B.C.R. 390; (1923) 3 W.W.R. 164; (1923) 3 D.L.R. 1075 298
Summerland, Dist. of, Summerland Development Co. v. (1928) 40 B.C.R. 142; (1928) 4 D.L.R. 258; (1928) 3 W.W.R. 145 788
Summerland Telephone Co., Okanagan Telephone Co. v. (1918) 25 B.C.R. 221; (1918) 1 W.W.R. 656 ....565, 840
Summit Lake Lbr. Co., Allen-Stoltze Lbr. Co. v. (1920) 3 W.W.R. 895 121
Sunderland v. Solloway, Mills & Co., (1930) 43 B.C.R. 297; (1930) 3 W.W.R. 641; (1931) 44 B.C.R. 241; (1931) 2 W.W.R. 393; (1931) S.C.R. 714; (1932) 4 D.L.R. 795 ....410, 901
Sunder Singh v. Macrae, (1922) 31 B.C.R. 67; 65 D.L.R. 392; (1922) 2 W.W.R. 392 ....42, 1002
Sun Fat, Claud Loo v. (1925) 36 B.C.R. 138; (1925) 4 D.L.R. 134 674
Sun Life Assurance Co. v. Tardiff, (1919) 27 B.C.R. 213; (1919) 2 W.W.R. 846 .. 873
Sun Printing & Pub. Co., Campbell v. (1921) 30 B.C.R. 149; (1921) 2 W.W.R. 987 ....427, 602, 603
Sun Publishing Co., Hughes v. (1925) 35 B.C.R. 422 834
"Sunrise," The, R. v. (1930) 43 B.C.R. 494; (1931) S.C.R. 387; (1931) 3 D.L.R. 147 ....12, 14, 225, 524, 999
Superior Spruce Mills, Ltd., Boyd and Anderson v. (1927) 2 W.W.R. 54 1141
Surrey, Dist. of, Caine v. (1918) 26 B.C.R. 338; (1919) 1 W.W.R. 12; (1919) 27 B.C.R. 23; (1920) 28 B.C.R. 321; 60 S.C.R. 654; 67 D.L.R. 794; (1920) 2 W.W.R. 681; (1921) 2 W.W.R. 273 ....566, 601, 768, 885
Surrey, Dist. of, Van Mackensen v. (1915) 21 B.C.R. 198; 22 D.L.R. 253; 8 W.W.R. 541 ....570, 768
Sutherland, District of Penticton v. (1928) 40 B.C.R. 8; (1928) 2 W.W.R. 145 ... 1117

Sutherland, R. v. (1928) 43 B.C.R. 277 379
Sutherland, R. v. (1930) 42 B.C.R. 321, 367; (1930) 4 D.L.R. 183; (1930) 1 W.W.R. 530; (1930) 2 W.W.R. 244; 54 C.C.C. 313 781
Sutherland and Moss, Ruff v. (1930) 43 B.C.R. 218; (1931) 1 D.L.R. 651; (1930) 3 W.W.R. 554 .....761, 793, 812, 813
Sutor v. McLane, (1919) 27 B.C.R. 480 883
Suttles v. Cantin, (1915) 22 B.C.R. 139; 24 D.L.R. 1; 32 W.L.R. 101; 8 W.W.R. 1293 .....842, 1146
Sutton v. Smith, (1927) 38 B.C.R. 455; (1927) 3 D.L.R. 1008; (1927) 2 W.W.R. 481 .....56, 122, 627, 660, 836, 844, 851, 889
Swan v. Ellis, (1923) 32 B.C.R. 104 490
Swanstrom, R. v. (1925) 3 D.L.R. 79; (1925) 1 W.W.R. 713 522
Swartz Bros. v. Peppers Fruit Co., (1930) 4 D.L.R. 230 289
Sylvia Court, Ltd., Harvey v. (1924) 34 B.C.R. 322; (1924) 3 W.W.R. 849 882
Symington v. Reifel, (1931) 43 B.C.R. 172, 388; (1931) 1 D.L.R. 935; (1931) 1 W.W.R. 410 .....2, 265
Symonds v. Clark Fruit & Produce Co., (1919) 26 B.C.R. 548; (1919) 1 W.W.R. 587 .....864, 965

T

Tai Sing Co. v. Chim Cam et al., (1916) 23 B.C.R. 8; 27 D.L.R. 528; 10 W.W.R. 460 .....43, 847, 896
Tait v. B.C. Electric Ry. Co., (1916) 22 B.C.R. 571; 34 W.L.R. 684; 27 D.L.R. 538; 10 W.W.R. 523; 54 S.C.R. 76; 32 D.L.R. 378; (1917) 1 W.W.R. 544, 1093 .....66, 326, 819
Tait v. Dist. of South Vancouver, (1924) 34 B.C.R. 81; (1924) 4 D.L.R. 201; (1924) 3 W.W.R. 124 783
Tait, W. L., Estate of, In re (1921) 30 B.C.R. 363; (1922) 1 W.W.R. 73 1129
Takhar, R. v. (1931) 3 W.W.R. 37; 56 C.C.C. 376 583
Talbot, R. v. (1931) 43 B.C.R. 485; (1931) 3 D.L.R. 676; (1931) 1 W.W.R. 662; 55 C.C.C. 364 .....379, 387
Tanner, Bushby v. (1924) 34 B.C.R. 270; (1924) 4 D.L.R. 582; (1924) 3 W.W.R. 401 865
Tarchuk, R. v. (1928) 40 B.C.R. 398; (1928) 3 W.W.R. 577; 50 C.C.C. 423 ...399, 557
Tardiff, Sun Life Assce. Co. v. (1919) 27 B.C.R. 213; (1917) 2 W.W.R. 846..... 873
Taxation Act, In re: Seeley & Co. v. Brown, (1926) 37 B.C.R. 514; (1927) 1 W.W.R. 185 1041
Taxation Act and All Red Line, Ltd., In re (1920) 28 B.C.R. 86; (1920) 1 W.W.R. 1030 1040
Taylor, Auld v. (1915) 21 B.C.R. 192; 21 D.L.R. 577; 8 W.W.R. 552 .....261, 478, 877
Taylor, Brethour v. (1927) 3 W.W.R. 166 .....494, 538, 540
Taylor, Cusick v. (1920) 28 B.C.R. 241; (1920) 2 W.W.R. 579 .....735, 1098
Taylor, D. E. Brown's Travel Bureau v. (1918) 26 B.C.R. 82; 44 D.L.R. 204; (1918) 3 W.W.R. 468 615
Taylor, Ferguson v. (1926) 37 B.C.R. 340; (1926) 3 W.W.R. 203; 46 C.C.C. 149 .....31, 156, 330
Taylor v. Foran, (1931) 44 B.C.R. 529 131
Taylor, Kyle v. (1926) 38 B.C.R. 72; (1927) 1 D.L.R. 777; (1927) 1 W.W.R. 466. 46
Taylor v. Mackintosh, (1924) 33 B.C.R. 383; 34 B.C.R. 56; (1924) 1 D.L.R. 877; (1924) 3 D.L.R. 926; (1924) 1 W.W.R. 859; (1924) 3 W.W.R. 97; 42 C.C.C. 327 .....228, 266, 1006
Taylor, Morrison & Pollard v.: In re Land Registry Act, (1926) 37 B.C.R. 324; (1926) 2 W.W.R. 371 949
Taylor, Wintemute v. (1919) 27 B.C.R. 237; (1919) 2 W.W.R. 882 .....90, 675
Tecla et al. v. Burns, Jordan & Welch, (1916) 22 B.C.R. 460; 27 D.L.R. 109; (1917) 1 W.W.R. 639 705
Tedlock v. McKelvie, (1929) 41 B.C.R. 446; (1929) 4 D.L.R. 691 .....413, 825

Telford, International Motors, Ltd., v. (1921) 2 C.B.R. 314; (1924) 2 D.L.R. 528 ....101, 121, 974
Telford, Nemetz v. (1930) 43 B.C.R. 281 54
Telford, R. v. (1921) 29 B.C.R. 452; 58 D.L.R. 593; (1921) 2 W.W.R. 255 720
Temple v. Canadian Puget Sound Lbr. Co., (1918) 25 B.C.R. 560; (1918) 3 W.W.R. 273 198
Ten Chinamen, R. v. (1924) 34 B.C.R. 349 ....296, 561
Terainshi v. Can. Pac. Ry. Co., (1918) 25 B.C.R. 497, 536; (1918) 2 W.W.R. 1034; (1918) 3 W.W.R. 281 ....68, 667, 1060
Terminal Steam Navigation Co. v. Imperial Oil, Ltd., (1920) 28 B.C.R. 393; (1920) 2 W.W.R. 689 970
Tervo, Mauvais v. (1915) 22 B.C.R. 207; 25 D.L.R. 192; 9 W.W.R. 434; 32 W.L.R. 811 1095
Testator's Family Maintenance Act and Elworthy, In re (1928) 39 B.C.R. 474; (1928) 2 D.L.R. 421; (1928) 1 W.W.R. 737 1135
Testator's Family Maintenance Act and Hoffman, In re (1931) 43 B.C.R. 463; (1931) 1 W.W.R. 293 1136
"Tex," The M.S., Home Ins. Co. v. (1930) 43 B.C.R. 434; (1931) 2 D.L.R. 657; (1931) 1 W.W.R. 153 984
"Tex," The M.S., Jansen v. (1926) 37 B.C.R. 399; (1926) 4 D.L.R. 288; (1926) 3 W.W.R. 225; (1926) Ex. C.R. 224 ....9, 993
"Tex," The M.S., Pacific Salvage Co. and Vancouver Drydock & Salvage Co. v. (1930) 43 B.C.R. 434; (1931) 2 D.L.R. 657; (1931) 1 W.W.R. 153 984
Thaker v. Jennison, (1921) 1 W.W.R. 942; 61 D.L.R. 161 439
Thom and Lamont v. Walker, (1930) 43 B.C.R. 142; (1930) 3 D.L.R. 915; (1930) 3 W.W.R. 33 ....458, 760, 914
Thomas, Battistoni v. (1930) 43 B.C.R. 273; (1930) 3 W.W.R. 617; (1931) 44 B.C.R. 188; (1931) 1 D.L.R. 559; (1931) 4 D.L.R. 526; (1931) 3 W.W.R. 44; (1932) S.C.R. 144; (1932) 1 D.L.R. 577 ....413, 709, 813
Thomas, Doane v. (1922) 31 B.C.R. 457; 69 D.L.R. 476; (1922) 3 W.W.R. 1117 ... 64
Thomas v. Gale, (1925-26) 36 B.C.R. 512; (1925) 3 D.L.R. 757; (1926) 1 D.L.R. 968; (1926) 1 W.W.R. 569; (1927) S.C.R. 314; (1927) 1 D.L.R. 593..173, 184, 907
Thomas v. Lawson and Gyles, (1927) 39 B.C.R. 1; (1927) 3 D.L.R. 1126; (1927 2 W.W.R. 662 ....6, 903
Thomsen & Clark Timber Co., Garrison v. (1926) 37 B.C.R. 224; (1926) 2 D.L.R. 803; (1926) 2 W.W.R. 81; (1929) 40 B.C.R. 492; (1929) 1 D.L.R. 887; (1929) 1 W.W.R. 449 ....178, 290
Thomsen & Clark Timber Co., Victoria Lbr. & Mfg. Co. v. (1926) 38 B.C.R. 46; (1926) 4 D.L.R. 971; (1926) 3 W.W.R. 459 ....851, 860
Thomson, Parry v. (1931) 43 B.C.R. 461 ....32, 330
Thomson & Company v. British America Assec. Co., (1930) 43 B.C.R. 194 886
Thomson, James & Sons v. Denny, (1916) 22 B.C.R. 479; (1917) 25 B.C.R. 29; 39 D.L.R. 421; (1918) 1 W.W.R. 435; 34 W.L.R. 483 ....49, 289, 848
Thompson, Canada Morning News v. (1930) S.C.R. 338; (1930) 3 D.L.R. 833; (1929) 41 B.C.R. 24; (1929) 2 D.L.R. 114 ....434, 663
Thompson, Gould v. (1923) 32 B.C.R. 481; (1924) 1 W.W.R. 191 ....47, 739
Thompson v. Herring, (1915) 22 B.C.R. 179 884
Thompson v. Hull, (1921) 30 B.C.R. 358; 70 D.L.R. 863 313
Thompson, McIntyre v. (1928) 1 W.W.R. 907 ....519, 666
Thompson, R. v. (1929) 42 B.C.R. 77; (1929) 3 W.W.R. 333; 52 C.C.C. 278.....641, 1026
Thompson v. Scollard (No. 2), (1929) 41 B.C.R. 241; (1929) 3 D.L.R. 857; (1929) 2 W.W.R. 466 ....211, 861
Thorndyke Realty Co. v. Lyall Shipbuilding Co., (1920) 29 B.C.R. 376; 59 D.L.R. 490; (1921) 2 W.W.R. 244; 3 W.W.R. 333 903
Thornton, R. v. (1926) 37 B.C.R. 344; 46 C.C.C. 249 388
Thurlow Logging Co. v. National Pole Co., (1923) 31 B.C.R. 491; (1923) 3 D.L.R. 958; (1923) 4 D.L.R. 655 967

Thynne, Matheson v. (1925) 34 B.C.R. 54; (1925) 1 D.L.R. 936; (1925) 1 W.W.R. 703; (1926) 36 B.C.R. 376; (1926) 2 D.L.R. 157; (1926) 1 W.W.R. 645..1071, 1092
Tidy v. Cunningham, (1915) 21 B.C.R. 53; 22 D.L.R. 151; 30 W.L.R. 547; 7 W.W.R. 1205 ....795, 840
Tillicum Athletic Club v. Burick, (1925) 36 B.C.R. 176; (1925) 3 W.W.R. 368, 785 ....318, 538
"Tillie M.," The, R. v. (1930) 43 B.C.R. 494; (1931) S.C.R. 387; (1931) 3 D.L.R. 147 ....12, 14, 225, 524, 999
Tilton, Adair v. (1928) 40 B.C.R. 235; (1928) 4 D.L.R. 183; (1928) 3 W.W.R. 92 ....470, 665, 740
Tipping, Minister of Public Works for B.C. and, In re (1931) 44 B.C.R. 321; (1931) 2 W.W.R. 835 .... 76, 564
Tobin v. Commercial Invst. Co., Douglas, Sargison and White, (1916) 22 B.C.R. 481; 27 D.L.R. 387; 34 W.L.R. 23; 10 W.W.R. 123 ....47, 854, 860, 864
Todd v. Wong Gum Tim, (1917) 24 B.C.R. 161; (1917) 2 W.W.R. 280 ....757, 855
Toku Nishi, Immigration Act and, In re (1928) 41 B.C.R. 199.... 583
Tolerton v. Cunard Steamship Co., (1924) 33 B.C.R. 551; (1924) 3 D.L.R. 355; (1924) 2 W.W.R. 927 137
Tom v. Everett: In re Hans C. Christensen, (1928) 40 B.C.R. 124, 383; (1928) 4 D.L.R. 668; (1928) 3 W.W.R. 314, 432 ....422, 459, 745, 944
Tomsett, Municipal Elections Act and, In re (1924) 33 B.C.R. 377; (1924) 1 D.L.R. 921 446
Tom Yee, Mainland Potato Committee of Direction v. (1931) 43 B.C.R. 453; (1931) 1 D.L.R. 990; (1931) 1 W.W.R. 529 ....36, 496, 693
Tong Wah, R. v. (1931) 44 B.C.R. 260; 56 C.C.C. 194 397
Toronto General Trusts Corpn., McCallum v. (1930) 43 B.C.R. 342; (1931) 4 D.L.R. 926; 43 B.C.R. 31; (1931) 1 D.L.R. 271 ....449, 509
Toronto General Trusts Corpn., Witcomb v. (1931) 2 W.W.R. 545 917
Tosey, Prohibition Act and, In re (1921) 29 B.C.R. 438; 57 D.L.R. 340; (1921) 1 W.W.R. 669; 35 C.C.C. 12 ....638, 1018
Towder, Burch v. (1922) 69 D.L.R. 739; (1923) 1 W.W.R. 180 ....471, 869
Townley v. City of Vancouver, (1924) 34 B.C.R. 201; (1924) 3 D.L.R. 948; (1924) 3 W.W.R. 78 ....244, 1081
Townley, Rex ex rel. v. Chow, (1922) 31 B.C.R. 461 79
Topham, Federal Motor Co. v. (1928) 40 B.C.R. 375; (1929) 1 D.L.R. 995; (1929) 1 W.W.R. 116 123
Topham v. Motor Securities, Ltd., (1928) 40 B.C.R. 375; (1929) 1 D.L.R. 995; (1926) 1 W.W.R. 116 123
Toy King v. Toy Hing, R. v. (1921) 1 W.W.R. 796; 61 D.L.R. 398; 34 C.C.C. 207 ....149, 154, 338
Traders Trust, Ltd., and Kory, Re (1916) 26 D.L.R. 41; 33 W.L.R. 352; 9 W.W.R. 538 173
Treat, E. & N. Ry. Co. v. (1918) 26 B.C.R. 275; 43 D.L.R. 653; (1918) 3 W.W.R. 685; (1919) 121 L.T. 657; 35 T.L.R. 737; 48 D.L.R. 139; (1919) 3 W.W.R. 356 ....219, 931, 938
Trenwith, In re (1922) 3 W.W.R. 1205; 3 C.B.R. 371 ....105, 573
Trenwith, Hazlitt & Co. v. (1920) 54 D.L.R. 556; (1920) 3 W.W.R. 771 ....858, 860
Trenwith v. International Harvester Co., (1928) 2 D.L.R. 121 904
Trenwith, Ltd., v. Jarvis Electric Co., (1929) 41 B.C.R. 328; (1929) 4 D.L.R. 400; (1929) 2 W.W.R. 489 ....262, 285, 481, 909
Trethewey, McCoy v. (1929) 41 B.C.R. 295; (1929) 4 D.L.R. 240; (1929) 3 W.W.R. 381 ....53, 491
Trites, Ltd., Kennedy v. (1916) 10 W.W.R. 412 ....211, 325, 650
Trumbell v. Trumbell, (1919) 27 B.C.R. 161; (1919) 2 W.W.R. 198 ....24, 331, 470, 527, 1076
Trustees of Our Lord's Church in Victoria, City of Victoria v. (1915) 22 B.C.R. 174; 25 D.L.R. 617; 32 W.L.R. 330; 9 W.W.R. 173 ....125, 786

Tuley, Canadian Pac. Wine Co. v. (1921) 29 B.C.R. 472; (1921) 1 W.W.R. 265; 60 D.L.R. 315; (1921) 2 W.W.R. 433; (1921) 2 A.C. 417; 90 L.J.P.C. 233; 126 L.T. 78; 37 T.L.R. 944; 60 D.L.R. 520; (1921) 3 W.W.R. 49; 36 C.C.C. 104 ....228, 236, 637, 1069
Tuley v. Rodger, Rex ex rel., (1923) 32 B.C.R. 199; (1923) 1 W.W.R. 1361; 39 C.C.C. 379 642
Turnbull v. Eden, (1929) 41 B.C.R. 381; (1929) 4 D.L.R. 261 728
Turner v. B.C. Mutual Benefit Assn., (1927) 39 B.C.R. 209; (1927) 4 D.L.R. 541; (1927) 3 W.W.R. 341 612
Turner v. Cantone, (1929) 41 B.C.R. 514; (1929) 4 D.L.R. 724; (1929) 3 W.W.R. 413 ....55, 812
Turner, Meakin & Co. v. Caledonia and B.C. Mtge. Co., (1927) 38 B.C.R. 103; (1927) 2 D.L.R. 395 908
Turner, Meakin & Co. v. Field, (1923) 33 B.C.R. 56 906
Turner, Weeden v. (1921) 30 B.C.R. 289; (1921) 3 W.W.R. 544; (1922) 3 W.W.R. 623; 68 D.L.R. 748 907
Twigg, Greenizen v. (1922) 63 S.C.R. 158; 65 D.L.R. 101; (1922) 2 W.W.R. 71 ....738, 1099
Twin City Co-operative Milk Producers Assn., J. M. Steeves Dairy, Ltd., v. (1925) 36 B.C.R. 286; (1926) 1 D.L.R. 130; (1926) 1 W.W.R. 25 ....599, 690
Tyee Lbr. Co., Provincial Lbr. Co. v. (1922) 2 W.W.R. 1330 ....254, 964
"Tyndareus," The, Peers & Anderson v. (1921) 31 B.C.R. 312; 21 Ex. C.R. 219; (1922) 1 W.W.R. 673 162
Tyrrell v. Mills, (1924) 3 W.W.R. 387 747
Tyson, Union Bank v. (1915) 7 W.W.R. 1117 ....415, 528

U

Ullock v. Pacific Great Eastern Ry. Co., (1921) 30 B.C.R. 31; (1921) 2 W.W.R. 837 ....805, 938
Union Assurance Co. v. B.C. Electric Ry. Co., (1915) 21 B.C.R. 71; 21 D.L.R. 62; 30 W.L.R. 717; 8 W.W.R. 327 ....83, 611, 679, 934
Union Bank of Canada v. Tyson, (1915) 7 W.W.R. 1117 ....415, 528
Union Bank of Canada v. West Shore and Northern Land Co., (1916) 23 B.C.R. 64; 35 D.L.R. 575 116
Union Steamship Co., Automatic Electric Tel. Co. v. (1921) 1 W.W.R. 741 ...142, 144
Union Steamship Co., Smith v. (1922) 31 B.C.R. 334; 68 D.L.R. 488 ....136, 406
Union Steamship Co. v. The "Wakena," (1917) 24 B.C.R. 156; 35 D.L.R. 644; 59 S.C.R. 659; 37 D.L.R. 579; (1918) 1 W.W.R. 57; 49 D.L.R. 690; 16 Ex. C.R. 397 ....159, 409
Union S.S. Co. of New Zealand, Ford Motor Co. v. (1925) 36 B.C.R. 127; (1925) 3 D.L.R. 1169; (1925) 2 W.W.R. 708 ....138, 146, 912
United Electric Co. v. Watson, (1927) 1 W.W.R. 87 978
United States Fidelity Claim, Dominion Trust Co. and, In re (1918) 26 B.C.R. 339; (1918) 3 W.W.R. 1023 ....106, 201, 232, 1072
United States Fidelity & Guar. Co., Canadian Fairbanks Morse Co. v. (1915) 22 B.C.R. 157; 26 D.L.R. 12; 32 W.L.R. 316; 9 W.W.R. 48 ....403, 546
United States Fidelity & Guar. Co. v. Deisler, (1917) 24 B.C.R. 278; 36 D.L.R. 29; 49 D.L.R. 688; (1917) 3 W.W.R. 1051 ....81, 83, 547
United States Fidelity & Guar. Co., Mullett v. (1929) 41 B.C.R. 81; (1929) 1 D.L.R. 140; (1929) 2 W.W.R. 146 621
United States Fidelity & Guar. Co., Woodwards, Ltd., v. (1926) 37 B.C.R. 450; (1927) 38 B.C.R. 171; (1927) 2 D.L.R. 126; (1927) 1 W.W.R. 529 620
United States Fidelity & Guar. Co. and Quagliotti, R. v. (1921) 30 B.C.R. 440; 63 D.L.R. 469; 68 D.L.R. 297; (1922) 1 W.W.R. 389; 3 W.W.R. 180; 64 S.C.R. 48; (1923) A.C. 808; 93 L.J.P.C. 26; 130 L.T. 161; (1923) 3 D.L.R. 701; (1923) 3 W.W.R. 295 ....549, 926, 1029

United States Shipping Board, Vancouver Milling & Grain Co. v. (1923) 32 B.C.R. 269; (1923) 2 W.W.R. 579; (1924) 33 B.C.R. 329; (1924) 1 D.L.R. 937; (1924) 1 W.W.R. 662 ....145, 857
Untermyer, Isaac, Deceased, Estate of v. Atty.-Gen. of B.C., (1929) S.C.R. 84; (1929) 1 D.L.R. 315; (1928) 39 B.C.R. 533; (1928) 3 D.L.R. 311; (1928) 2 W.W.R. 209 ....172, 230, 1033, 1035
Ure v. MacGregor, (1923) 32 B.C.R. 122; (1923) 3 D.L.R. 1025; (1923) 2 W.W.R. 415 1138
Urquhart, Plant v. (1921) 29 B.C.R. 488; 61 D.L.R. 211; (1921) 2 W.W.R. 324; 30 B.C.R. 461; 65 D.L.R. 242; (1922) 1 W.W.R. 632; 36 C.C.C. 339 ...360, 473

V

Van Brothers, Ltd., R. v. (1930) 42 B.C.R. 340; (1930) 1 W.W.R. 59; 53 C.C.C. 29. 644
Vance v. Drew, (1925) 36 B.C.R. 241; (1925) 3 W.W.R. 740 ....565, 826
Vancouver Breweries, Ltd., Dana & Fullerton v. (1915) 21 B.C.R. 19; 52 S.C.R. 134; 25 D.L.R. 508; 26 D.L.R. 665; 9 W.W.R. 1018 ....272, 665
Vancouver Carriage & Implement Co., In re (1916) 10 W.W.R. 579 502
Vancouver, City of, v. B.C. Electric Ry. Co., (1918) 26 B.C.R. 162; (1918) 3 W.W.R. 558 775
Vancouver, City of, B.C. Mills, Timber & Trading Co. v. (1926) 39 B.C.R. 481; (1926) 2 D.L.R. 990; (1926) 2 W.W.R. 84 ....30, 327, 784
Vancouver, City of, Blue Funnel Motor Line v. (1918) 26 B.C.R. 142, 388; (1918) 3 W.W.R. 405, 473 ....567, 601, 777, 889
Vancouver, City of, Champion & White v. (1916) 23 B.C.R. 221; 31 D.L.R. 22; (1917) 1 W.W.R. 185 ....204, 217, 765
Vancouver, City of, Chandler v. (1919) 26 B.C.R. 465; 45 D.L.R. 121; (1919) 1 W.W.R. 605 ....779, 1018
Vancouver, City of, Cousineau v. (1926) 37 B.C.R. 266; (1926) 3 D.L.R. 265; (1926) 2 W.W.R. 433 ....56, 811, 828
Vancouver, City of, Duncan v. (1917) 24 B.C.R. 267; 36 D.L.R. 218; (1917) 3 W.W.R. 18 881
Vancouver, City of, Jones v. (1919) 3 W.W.R. 313; (1920) 28 B.C.R. 100, 166; 51 D.L.R. 320; (1920) 1 W.W.R. 1012; 32 C.C.C. 320 ....69, 779, 780
Vancouver, City of, McKay and, In re (1917) 24 B.C.R. 298; (1917) 3 W.W.R. 447 ....687, 763, 780
Vancouver, City of, Matte v. (1917) 2 W.W.R. 53 ....73, 293
Vancouver, City of, Moran v. (1928) 40 B.C.R. 450; (1929) 1 D.L.R. 461; (1928) 3 W.W.R. 660 ....569, 770
Vancouver, City of, Powis v. (1916) 23 B.C.R. 180 ....76, 448, 462
Vancouver, City of, Ramage v. (1916) 23 B.C.R. 180 ....76, 439, 453
Vancouver, City of, Renahan v. (1930) 43 B.C.R. 147; (1930) 4 D.L.R. 1018; (1930) 3 W.W.R. 166 ....766, 1050
Vancouver, City of, v. Richmond, (1928) 40 B.C.R. 170; (1928) 4 D.L.R. 506; (1928) 3 W.W.R. 166 ....681, 781, 791, 1016
Vancouver, City of, v. Smith, (1922) 30 B.C.R. 311; (1922) 1 W.W.R. 344 926
Vancouver, City of, Spencer v. (1921) 30 B.C.R. 382; 68 D.L.R. 747; (1922) 1 W.W.R. 779 73
Vancouver, City of, Star Steamship Co. v. (1916) 23 B.C.R. 317; 30 D.L.R. 484; 34 W.L.R. 1188 ....570, 771
Vancouver, City of, Townley v. (1924) 34 B.C.R. 201; (1924) 3 D.L.R. 948; (1924) 3 W.W.R. 78 ....244, 1081
Vancouver, City of, Vancouver School Trustees v. (1916) 10 W.W.R. 1330 ...601, 773
Vancouver, City of, Woodcock v. (1927) 39 B.C.R. 288; (1928) 1 D.L.R. 1080; (1927) 3 W.W.R. 759 ....569, 770
Vancouver, City of, Wood Gundy & Co. v. (1922) 31 B.C.R. 165; 67 D.L.R. 225; (1922) 2 W.W.R. 470 ....183, 546

Vancouver City Y.M.C.A. v. Rankin, (1916) 22 B.C.R. 588; 27 D.L.R. 417; 34 W.L.R. 304, 686; 10 W.W.R. 482, 485 248
Vancouver City Y.M.C.A. v. Wood, (1916) 22 B.C.R. 588; 27 D.L.R. 417; 34 W.L.R. 304, 686; 10 W.W.R. 482, 485 248
Vancouver Dress Co., In re (1931) 44 B.C.R. 283; (1931) 3 W.W.R. 220; 13 C.B.R. 66 103
Vancouver Drive Yourself Auto Livery, Perrin v. (1921) 30 B.C.R. 241; 61 D.L.R. 140; (1921) 3 W.W.R. 61 .....761, 762, 813
Vancouver Exhibition Assn., Lund and Hazell v. (1915) 22 B.C.R. 258; 25 D.L.R. 863; 32 W.L.R. 845; 9 W.W.R. 556 .....128, 402
Vancouver Gas Co., Avenue Theatre, Ltd., v. (1928) 40 B.C.R. 275 .....842, 1057
Vancouver Gas Co., Ltd., and Keillor, Peterson v. (1919) 28 B.C.R. 107; 61 D.L.R. 98 884
Vancouver General Hospital, Morton v. (1922-23) 31 B.C.R. 141, 546; (1923) 1 D.L.R. 854; (1923) 1 W.W.R. 423 .....46, 658, 794, 835
Vancouver General Hospital, Shuttleworth v. (1927) 38 B.C.R. 300; (1927) 2 D.L.R. 573; (1927) 1 W.W.R. 476 .....600, 842
Vancouver Harbour Commrs., Alexander v. (1922) 31 B.C.R. 11; 65 D.L.R. 355; (1922) 1 W.W.R. 1254 .....76, 327
Vancouver Harbour Commrs., Jure v. (1931) 44 B.C.R. 270; (1931) 4 D.L.R. 916; (1931) 3 W.W.R. 157; 38 C.R.C. 291 803
Vancouver Harbour Commrs. and Weaver Estate, In re (1922) 31 B.C.R. 11; 65 D.L.R. 355; (1922) 1 W.W.R. 1254 .....76, 327
Vancouver Ice & Cold Storage Co. v. B.C. Electric Ry. Co., (1927) 38 B.C.R. 234; (1927) 1 W.W.R. 631 .....410, 801
Vancouver Incorporation Act, In re (1916) 10 W.W.R. 1362 778
Vancouver Incorporation Act and Can. Pac. Ry. Co., In re (1930) 4 D.L.R. 80 .. 783
Vancouver-Iowa Shingle Co., McKercher v. (1929) 41 B.C.R. 252; (1929) 4 D.L.R. 231; (1929) 2 W.W.R. 287 850
Vancouver Island Coach Lines, Ltd., v. E. LeBus & Co., (1931) 44 B.C.R. 102; (1931) 3 D.L.R. 811; (1931) 2 W.W.R. 337 825
Vancouver Island Milk Prod. Assn. v. Alexander, (1922) 30 B.C.R. 524 .....598, 689
Vancouver Island Power Co., McQueen v. (1925) 35 B.C.R. 558 74
Vancouver Island Power Co., Vogel v. (1926) 37 B.C.R. 194; (1926) 2 D.L.R. 969 .....523, 682, 1118
Vancouver Licensing Board, In re: In re Mills, (1917) 3 W.W.R. 449 780
Vancouver Life Ins. Co. v. Richards, (1919) 27 B.C.R. 449; 48 D.L.R. 707; (1919) 3 W.W.R. 907 170
Vancouver Log Co., Lancaster v. (1919) 27 B.C.R. 3 81
Vancouver Lbr. Co., Columbia Bitulithic, Ltd., v. (1915) 21 B.C.R. 138; 21 D.L.R. 91; 30 W.L.R. 753; 8 W.W.R. 132 .....123, 176
Vancouver Lbr. Co., R. v. (1914) 17 Ex. C.R. 329; 41 D.L.R. 617; 50 D.L.R. 6; (1920) 1 W.W.R. 255; (1924) 33 B.C.R. 468; (1924) 2 D.L.R. 482; (1924) 1 W.W.R. 1041; (1925) 36 B.C.R. 53; (1925) 4 D.L.R. 188; (1925) 3 W.W.R. 122 .....524, 664, 673, 922, 929
Vancouver Milling Co. v. Farrell, (1922) 67 D.L.R. 237 53
Vancouver Milling & Grain Co. v. Perkins and McLeod, (1930) 42 B.C.R. 557 ... 915
Vancouver Milling & Grain Co. v. United States Shipping Board, (1923) 32 B.C.R. 269; (1923) 2 W.W.R. 579; (1924) 33 B.C.R. 329; (1924) 1 D.L.R. 937; (1924) 1 W.W.R. 662 .....145, 857
Vancouver Orient Export Co. v. The "Anglo-Peruvian," (1931) Ex. C.R. 127 159
Vancouver Power Co. v. North Vancouver, (1916) 22 B.C.R. 561; 27 D.L.R. 727; 34 W.L.R. 486; (1917) A.C. 598; 86 L.J.P.C. 97; 117 L.T. 492; 36 D.L.R. 462 .....525, 774
Vancouver School Trustees, Baynes & Horie v. (1927) 2 D.L.R. 698 .....129, 244
Vancouver School Trustees v. City of Vancouver, (1916) 10 W.W.R. 1330 ...601, 773

Vancouver School Trustees, Ramsay v. (1915) 21 B.C.R. 589; 24 D.L.R. 138; 32 W.L.R. 77; 8 W.W.R. 1328 132
Vancouver School Trustees, Walton v. (1924) 34 B.C.R. 38; (1924) 2 D.L.R. 387; (1924) 2 W.W.R. 49 .....796, 815, 986
Vancouver Steamship Co. v. Canadian Trading Co., (1924) 1 W.W.R. 876 254
Vancouver Trust Co., Ashworth v. (1922) 68 D.L.R. 746 947
Vancouver Tug Boat Co., Reid v. (1928) 39 B.C.R. 479; (1928) 2 D.L.R. 244; (1928) 1 W.W.R. 800 .....493, 879
Vandepitte v. Berry, (1928) 40 B.C.R. 408; (1929) 1 D.L.R. 1002 .....414, 652, 823
Vandepitte v. Preferred Accident Ins. Co. and Berry, (1932) W.N. 229; 102 L.J.P.C. 21; 148 L.T. 169; 49 T.L.R. 90; 76 Sol. Jo. 798; (1932) S.C.R. 22; (1932) 3 W.W.R. 573; (1932) 1 D.L.R. 107; (1933) A.C. 70; (1933) 1 D.L.R. 289 .....280, 619
Vandepitte v. Preferred Accident Ins. Co. and Berry (No. 2), (1930) 42 B.C.R. 315; (1930) 2 D.L.R. 699 306
Van Hemelryck, Lyall Shipbuilding Co. v. (1919) 27 B.C.R. 240, 446; (1919) 2 W.W.R. 551; (1919) 3 W.W.R. 317; (1919-20) 28 B.C.R. 196; 52 D.L.R. 670; (1920) 2 W.W.R. 360; (1921) 1 A.C. 698; 90 L.J.P.C. 96; 125 L.T. 133; 58 D.L.R. 48; (1921) 1 W.W.R. 926 873
Van Hemelryck v. New Westminster Construction Co., (1919) 27 B.C.R. 334; (1919) 2 W.W.R. 882; (1920) 29 B.C.R. 39, 60; 55 D.L.R. 589; (1920) 3 W.W.R. 709 .....69, 129, 245, 647, 890
Van Horne, Sir William, Deceased, In re Estate of and Succession Duty Act, (1919) 27 B.C.R. 269, 372; 47 D.L.R. 529; (1919) 3 W.W.R. 76, 598; (1921) 91 L.J.P.C. 8; 126 L.T. 207; 61 D.L.R. 194; (1921) 3 W.W.R. 749; (1922) 1 A.C. 87 .....297, 1030, 1037
Van Houten, Metcalfe v. (1919) 27 B.C.R. 138; (1919) 2 W.W.R. 410 1097
Van Koughnet v. Quaife and Rogers, (1930) 1 W.W.R. 214 1140
Van Wassenaer v. Adams, (1927) 38 B.C.R. 275; (1927) 3 D.L.R. 180; (1927) 2 W.W.R. 287 .....539, 874
Vassar, Lindley v. (1918) 25 B.C.R. 219; (1918) 1 W.W.R. 879 757
Vater v. Styles, (1930) 42 B.C.R. 463; (1930) 3 D.L.R. 509; (1930) 2 W.W.R. 241. 535
Vaughan, Blanchard v. (1930) 42 B.C.R. 446 .....1057, 1068
Vaughan, Lancaster v. (No. 1), (1923) 33 B.C.R. 159 320
Vaughan, Lancaster v. (No. 2), (1924) 33 B.C.R. 440 594
Velie Motors Corpn., Slater v. (1928) 40 B.C.R. 184; (1928) 4 D.L.R. 487; (1928) 3 W.W.R. 170 .....653, 874
Venness v. Stoddard, (1915) 9 W.W.R. 832 713
"Vera M.," The, Rumely v. (1922) 31 B.C.R. 472; (1923) 1 W.W.R. 253; (1923) 2 D.L.R. 867; (1923) Ex. C.R. 36 .....15, 17, 94, 675, 995
Vernon, City of, Can. Nor. Pac. Ry. Co. v. (1918) 26 B.C.R. 222; 44 D.L.R. 317; (1919) 1 W.W.R. 114; 88 L.J.P.C. 147; 122 L.T. 11; 36 T.L.R. 5; 48 D.L.R. 268; (1919) 3 W.W.R. 352; (1920) A.C. 216 .....784, 935
Vernon, City of, Hankey, G. A. & Co. v. (1926) 36 B.C.R. 401; (1926) 1 D.L.R. 684; (1926) 1 W.W.R. 375 535
Vernon Fruit Union, Macdonald-Buchanan v. (1925) 36 B.C.R. 307; (1926) 1 W.W.R. 413; (1926) 1 D.L.R. 748 .....72, 251
Vernon Fruit Union, O'Neal v. (1922) 68 D.L.R. 556 964
Vernon Growers, Ltd., Canadian Western Cooperage, Ltd., v. (1923) 32 B.C.R. 29; (1923) 1 W.W.R. 631 972
Vernon Hardware Co. v. Reid and Reinhard, (1927) 2 W.W.R. 117 ..82, 287, 323, 533
Vested Estates, Ltd., Canary et al. v. (1930) 43 B.C.R. 1, 365; (1930) 3 D.L.R. 989; (1930) 1 W.W.R. 996; (1931) 1 D.L.R. 997 .....477, 882, 884
Veterans' Sightseeing & Trans. Co. v. Phoenix Ins. Co., (1924) 33 B.C.R. 428; (1924) 2 D.L.R. 674; (1924) 3 W.W.R. 782 609
Vick v. Morin & Thompson, (1915) 21 B.C.R. 8; 22 D.L.R. 29; 30 W.L.R. 412; 7 W.W.R. 1053 .....595, 795, 817

Victoria, City of, Bailey v. (1920) 60 S.C.R. 38; 54 D.L.R. 50; (1920) 1 W.W.R. 917 .....563, 766, 776, 1021, 1025
Victoria, City of, B.C. Electric Ry. Co. and, In re (1916) 24 B.C.R. 346; 36 D.L.R. 671; (1917) 3 W.W.R. 542 782
Victoria, City of, Bishop of Vancouver Island v. (1920) 28 B.C.R. 533; 54 D.L.R. 615; (1921) 3 W.W.R. 214; 90 L.J.P.C. 213; (1921) 2 A.C. 384; 59 D.L.R. 399 .....125, 680, 786, 790, 1018
Victoria, City of, Cameron Invst. & Sec. Co. and Bailey v. (1920) 3 W.W.R. 1043 .....454, 680, 752, 791, 1066
Victoria, City of, v. District of Oak Bay, (1917) 24 B.C.R. 516; 33 D.L.R. 238; (1918) 1 W.W.R. 158 .....772, 985
Victoria, City of, Halpin v. (1915) 21 B.C.R. 14; 23 D.L.R. 333; 7 W.W.R. 1058 .....520, 773
Victoria, City of, Hanna and, In re (1917) 24 B.C.R. 110; (1917) 3 W.W.R. 245; 35 D.L.R. 798 766
Victoria, City of, Hanna v. (No. 1), (1916) 22 B.C.R. 555; 27 D.L.R. 213; 34 W.L.R. 307; 10 W.W.R. 457; 24 D.L.R. 889; 9 W.W.R. 761; 32 W.L.R. 916 .....203, 679
Victoria, City of, v. MacKay, (1917) 25 B.C.R. 23; 39 D.L.R. 450; (1918) 1 W.W.R. 863; (1918) 56 S.C.R. 524; 41 D.L.R. 498; (1918) 2 W.W.R. 610 .....776, 1019, 1021, 1025
Victoria, City of, Mason et al. v. (1918) 26 B.C.R. 418; (1919) 1 W.W.R. 562 .. 778
Victoria, City of, R. v. (1920) 28 B.C.R. 315; 52 D.L.R. 324; (1920) 2 W.W.R. 948; 33 C.C.C. 108 .....227, 841
Victoria, City of, v. Trustees of Our Lord's Church in Victoria, (1915) 22 B.C.R. 174; 25 D.L.R. 617; 32 W.L.R. 330; 9 W.W.R. 173 .....125, 786
Victoria, City of, Weiler Bros. and, Re (1917) 24 B.C.R. 148 74
Victoria, City of, Westholme Lumber Co. v. (1916) 23 B.C.R. 178 45
Victoria, City of, Westholme Lumber Co. v. (1920) 28 B.C.R. 81; 61 D.L.R. 371. 689
Victoria, City of, Zeigler v. (1921) 30 B.C.R. 389; 70 D.L.R. 722; (1922) 1 W.W.R. 75 .....697, 764
Victoria Dominion Theatre Co. v. Dominion Express Co., (1916) 23 B.C.R. 396; 35 D.L.R. 728 .....140, 407
Victoria (B.C.) Land Investment Trust, Ltd. v. White (No. 1), (1920) 27 B.C.R. 559; (1920) 1 W.W.R. 272 875
Victoria (B.C.) Land Investment Trust, Ltd. v. White (No. 2), (1920) 28 B.C.R. 21; (1920) 1 W.W.R. 594 875
Victoria (B.C.) Land Investment Trust, Ltd. v. White (No. 3), (1920) 28 B.C.R. 30 .....890, 894
Victoria (B.C.) Land Investment Trust v. White (No. 4), (1920) 28 B.C.R. 31 ... 876
Victoria Lumber & Mfg. Co. v. Thomsen & Clark Timber Co., (1926) 38 B.C.R. 46; (1926) 4 D.L.R. 971; (1926) 3 W.W.R. 459 .....851, 860
Victoria Machinery Depot, Houston v. (1924) 33 B.C.R. 425; (1924) 2 D.L.R. 657. 180
Victoria Mines, Ltd., Ross, Johnson v. (1929) 41 B.C.R. 321; (1929) 2 W.W.R. 511; (1930) 1 D.L.R. 57; 11 C.B.R. 23 99
Victoria and Saanich Motor Trans. Co. v. Wood Motor Co., (1915) 21 B.C.R. 515; 23 D.L.R. 79; 31 W.L.R. 853; 8 W.W.R. 1124 .....285, 405, 418, 857, 859, 961
Victoria School Trustees, Patterson v. (1917) 24 B.C.R. 365; (1917) 1 W.W.R. 526 .....772, 985
Victoria U Drive Yourself Auto Livery, Ltd. v. Wood, (1930) 42 B.C.R. 291; (1930) 2 D.L.R. 811; (1930) 1 W.W.R. 522, 634 .....595, 761, 814
Victoria-Vancouver Stevedoring Co. v. G.T.P. Coast Steamship Co., (1917) 25 B.C.R. 6; 38 D.L.R. 468; (1918) 57 S.C.R. 124; 43 D.L.R. 231; (1918) 3 W.W.R. 450 .....255, 544
Victory Land & Timber Co., Kennedy v. (1922) 3 W.W.R. 145; 68 D.L.R. 201 ... 904
Vincent, Lake of The Woods Milling Co. v. (1928) 2 D.L.R. 145 .....261, 479

Viney v. B.C. Electric Ry. Co., (1922) 31 B.C.R. 434; (1923) 32 B.C.R. 468; 69 D.L.R. 738; (1923) 4 D.L.R. 159; (1922) 3 W.W.R. 899; (1923) 3 W.W.R. 329 .....679, 876, 934
Viennet, R. v. (1924) 34 B.C.R. 242; (1924) 4 D.L.R. 497; (1924) 3 W.W.R. 196; 42 C.C.C. 393 387
Vipond v. Galbraith, (1922) 31 B.C.R. 58; 65 D.L.R. 91; (1922) 2 W.W.R. 135 .....742, 1140
Virtue, Canada West Loan Co. v. (1920) 29 B.C.R. 76; (1921) 1 W.W.R. 730 ... .167, 255, 625
Vitomen Cereal, Ltd., v. Manitoba Grain Co., (1928) 40 B.C.R. 321; (1928) 4 D.L.R. 440 165
Vivian v. B.C. Electric Ry. Co., (1930) 42 B.C.R. 423; (1930) 3 D.L.R. 892; (1930) 1 W.W.R. 791 .....136, 802
Vogel v. Vancouver Island Power Co., (1926) 37 B.C.R. 194; (1926) 2 D.L.R. 969 .....523, 682, 1118
Volansky v. Nat Bell Liquors, Ltd., (1922) 30 B.C.R. 558 537
Volpatti, R. v. (1919) 1 W.W.R. 358 295
Von Alvensleben Alvo, Ltd., Dominion Trust Co. and, In re (1919) 3 W.W.R. 209... 185
Von Mackensen v. District of Surrey, (1915) 21 B.C.R. 198; 22 D.L.R. 253; 8 W.W.R. 541 .....570, 768
Vulcan Engineering Con. Co., Orpheum Theatrical Co. v. (1923) 3 D.L.R. 52 129
Vulcan Iron Works, Brash & Jenkins v. (1926) 36 B.C.R. 452; (1926) 1 W.W.R. 371. 328
Vulcan Iron Works, Patterson v. (1930) 42 B.C.R. 300; (1930) 1 W.W.R. 640; (1930) 2 D.L.R. 961 .....171, 450
Vye, R. v. (1925) 36 B.C.R. 200; (1925) 3 W.W.R. 100; 44 C.C.C. 249 .....389, 492

W

Waddington v. Bush, (1923) 32 B.C.R. 434; (1923) 3 D.L.R. 884 .....247, 1084, 1087
Wade, Fletcher v. (1919) 26 B.C.R. 477; 45 D.L.R. 91; (1919) 2 W.W.R. 1 ..687, 785
Wade v. News-Advertiser, (1917) 24 B.C.R. 260; (1917) 2 W.W.R. 1134 .....425, 857
Wade, Standard Bank v. (1924) 33 B.C.R. 493; (1924) 3 D.L.R. 251; (1924) 2 W.W.R. 497 946
Wah Lung, R. v. (1928) 40 B.C.R. 267; (1928) 3 W.W.R. 232; 50 C.C.C. 182 388
Wah Sing Chow, R. v. (1927) 38 B.C.R. 491; 48 C.C.C. 144 .....56, 389, 488
Wakabayashi, R. v. (1928) 39 B.C.R. 310; (1928) 3 D.L.R. 226; (1928) 1 W.W.R. 487; 49 C.C.C. 392 228
"Wakena," The, Union Steamship Co. v. (1917) 24 B.C.R. 156; 35 D.L.R. 644; 59 S.C.R. 659; 37 D.L.R. 579; (1918) 1 W.W.R. 57; 49 D.L.R. 690; 16 Ex. C.R. 397 .....159, 409
Walden v. Haney Garage, Ltd., (1928) 39 B.C.R. 413; (1928) 1 D.L.R. 688; (1928) 1 W.W.R. 371 93
Waldron Apts., Ltd., B.C. Land & Invst. Agency v.: In re Land Registry Act, (1929) 41 B.C.R. 74; (1929) 3 D.L.R. 723; (1929) 1 W.W.R. 739 .....451, 759
Walker v. British Can. Securities, Ltd., (1917) 24 B.C.R. 119 1109
Walker v. B.C. Electric Ry. Co., (1926) 36 B.C.R. 338; (1926) 1 W.W.R. 503; (1926) 1 D.L.R. 1162 .....762, 804
Walker, J. H., Deceased, and Succession Duty Act, In re (1922) 30 B.C.R. 549; 63 D.L.R. 397; (1922) 1 W.W.R. 803 1032
Walker v. Johnston, (1916) 23 B.C.R. 50; 34 W.L.R. 817; 10 W.W.R. 938 273
Walker v. Lees (1918) 25 B.C.R. 511; (1918) 3 W.W.R. 586 577
Walker v. McDermott, (1930) 42 B.C.R. 354; (1930) 2 D.L.R. 413; (1930) 1 W.W.R. 845 305
Walker, McDermott v. (1931) S.C.R. 94; (1931) 1 D.L.R. 662 1136
Walker, Northern Crown Bank v. (1917) 24 B.C.R. 163; (1917) 2 W.W.R. 573 ..543, 550
Walker, Robert Dollar Co. v. (1926) 36 B.C.R. 405 530
Walker, Thom and Lamont v. (1930) 43 B.C.R. 142; (1930) 3 D.L.R. 915; (1930) 3 W.W.R. 33 .....458, 760, 914

Walker v. Woodyatt, (1931) 44 B.C.R. 110; (1931) 3 D.L.R. 516; (1931) 2 W.W.R. 306 ....121, 242, 451, 751, 964
Walker and Roberts v. Silk, (1930) 43 B.C.R. 43; (1930) 2 W.W.R. 407; (1930) 4 D.L.R. 201 ....542, 579
Wall v. Wells, (1926) 37 B.C.R. 445; (1926) 4 D.L.R. 799; (1926) 3 W.W.R. 353 .. 315
Wallace Foundry Co. v. Dom. Shingle & Cedar Co., (1920) 28 B.C.R. 147 ....816, 1067
Wallace v. Lawson, (1919) 2 W.W.R. 408 428
Wallace v. Westerman, (1928) 40 B.C.R. 35; (1928) 3 D.L.R. 939 908
Wallace Shipyards, Ltd., Matuso v. (1919) 27 B.C.R. 247; (1919) 2 W.W.R. 549 .. 316
Wallace Shipyards, Ltd., Whiteside v. (1919) 27 B.C.R. 40; 45 D.L.R. 434 905
Wallinder v. Imperial Bank of Canada, (1925) 36 B.C.R. 226; (1925) 4 D.L.R. 390; (1925) 3 W.W.R. 409 ....107, 116
Wallingford v. Fisher, (1927) 3 W.W.R. 740 37
Walls v. Hansen, (1921) 29 B.C.R. 552; (1921) 2 W.W.R. 250 990
Walsh Construction Co., Acme Steel Goods Co. v. (1922) 30 B.C.R. 539; 63 D.L.R. 529; (1922) 1 W.W.R. 689 ....981, 1054
Walsh, T. McAvity & Sons v. (1927) 1 W.W.R. 242 714
Walton v. B.C. Electric Ry. Co., (1925) 35 B.C.R. 119; (1925) 3 D.L.R. 467; (1925) 1 W.W.R. 673 ....56, 798
Walton, Quinn v. (1921) 30 B.C.R. 401 ....567, 769
Walton v. Vancouver School Trustees, (1924) 34 B.C.R. 38; (1924) 2 D.L.R. 387; (1924) 2 W.W.R. 49 ....796, 815, 986
Wand v. Mainland Transfer Co., (1919) 27 B.C.R. 340; (1919) 3 W.W.R. 193 ... .55, 286, 401, 411, 659
Warburton, Cooper v. (1931) 44 B.C.R. 328 425
Ward, Quesnel Forks Gold Mining Co. v. (1919) 89 L.J.P.C. 13; 122 L.T. 206; (1919) 50 D.L.R. 1; (1919) 3 W.W.R. 946; (1920) A.C. 222; (1918) 25 B.C.R. 476; 42 D.L.R. 476; (1918) 3 W.W.R. 230 ....664, 721, 731, 1023
Ward and Ward, Stagg v. (1921) 30 B.C.R. 385 1075
Wardroper v. Stewart-Moore, (1917) 25 B.C.R. 69 .... 48, 248
War Measures Act, 1914, and B.C. Prohibition Act, In re (1918) 26 B.C.R. 137; 44 D.L.R. 584; (1919) 2 W.W.R. 27; 30 C.C.C. 332 ....236, 629
Warnier, Mouat Bros. Co. v. (1930) 43 B.C.R. 238; (1931) 1 D.L.R. 569 ....83, 86
War Relief Act, In re: In re Lot 18, Subdn. F., Block 174, Vancouver, (1918) 26 B.C.R. 255; (1918) 3 W.W.R. 475 1106
War Relief Act and Land Registry Act, In re (1916) 23 B.C.R. 255; 30 D.L.R. 278; 10 W.W.R. 1329 ....948, 1106
Warren, Stanley, In re (1926) 37 B.C.R. 322 ....591, 652
Washington and Great Nor. Townsite Co. v. Holbrook, (1924) 33 B.C.R. 388; (1924) 1 D.L.R. 818; (1924) 1 W.W.R. 511 868
Watanabe, McLellan v. (1923) 33 B.C.R. 61 1139
Waterhouse, Frank & Co., Galt v. (1927) 39 B.C.R. 241; (1927) 4 D.L.R. 1005 ... .53, 140, 917
Watkins Garage, Ltd., v. McKoryk, (1928) 3 W.W.R. 429 978
Watson v. Barrett, (1929) 41 B.C.R. 478 181
Watson v. Howard, (1924) 34 B.C.R. 449; (1924) 4 D.L.R. 564; (1924) 3 W.W.R. 404 296
Watson, United Electric Co. v. (1927) 1 W.W.R. 87 978
Watt v. Reid, (1929) 42 B.C.R. 90; (1930) 2 D.L.R. 215 ....413, 824
Watts v. District of Burnaby, (1929) 41 B.C.R. 282; (1929) 4 D.L.R. 142; (1929) 2 W.W.R. 612 ....570, 770, 842
Wawanesa Mutual Ins. Co., Marshall v. (1924) 33 B.C.R. 404; (1924) 2 D.L.R. 419; (1924) 2 W.W.R. 270 608-9
Way v. Leland Hotel Co., (1927) 3 W.W.R. 224; (1928) 2 D.L.R. 235 ....1058, 1059
Weatherhead et al., In re (1930) 43 B.C.R. 232; (1930) 3 W.W.R. 599; 12 C.B.R. 117 104
Weaver Estate and Vancouver Harbour Commissioners, Alexander and, In re (1922) 31 B.C.R. 11; 65 D.L.R. 355; (1922) 1 W.W.R. 1254 ....76, 327

Webb, Loverock v. (1921) 30 B.C.R. 327; 70 D.L.R. 748 .....125, 1068
Webster, Ritchie v. (1917) 35 D.L.R. 373; (1917) 2 W.W.R. 1124 .....131, 257
Weeden v. Turner, (1921) 30 B.C.R. 289; (1921) 3 W.W.R. 544; (1922) 3 W.W.R. 623; 68 D.L.R. 748 907
Weiler Bros. and City of Victoria, In re (1917) 24 B.C.R. 148 74
Weir, McDonald v. (1925) 34 B.C.R. 502; (1925) 3 D.L.R. 70; (1925) 1 W.W.R. 937 ..... 56, 807-8, 826, 828, 836
Weir v. Weir, (1920) 29 B.C.R. 30; 55 D.L.R. 222; (1920) 1 W.W.R. 785; (1920) 3 W.W.R. 728 541
Welch, Frost v. (1923) 32 B.C.R. 535; (1923) 3 W.W.R. 834 1099
Welch v. General Refrigeration, Ltd., (1929) 42 B.C.R. 107; (1929) 3 W.W.R. 660; (1930) 2 D.L.R. 672 973
Welch, Gorgnigiani v. (1918) 26 B.C.R. 195; (1918) 3 W.W.R. 797 .....78, 707
Welch v. Grant, (1920) 28 B.C.R. 367; (1920) 3 W.W.R. 388 .....46, 321
Welch v. Home Ins. Co., (1930) 43 B.C.R. 78 656
Welch v. Kracovsky, (1919) 27 B.C.R. 170; (1919) 3 W.W.R. 361 433
Welch, Mattern v. (1929) 42 B.C.R. 111; (1930) 2 D.L.R. 231; (1930) 1 W.W.R. 398 673
Welch v. Scott, (1920) 28 B.C.R. 349; (1920) 2 W.W.R. 510.....94, 140, 675, 1053
Welch, Wilson v. (1923) 32 B.C.R. 240; (1923) 4 D.L.R. 1200 .....61, 314
Weldon, Brandeis v. (1916) 22 B.C.R. 405; 27 D.L.R. 235; 10 W.W.R. 45 797
Wellington Colliery Co. v. Pacific Coast Coal Mines, (1916) 23 B.C.R. 138; (1918) 25 B.C.R. 206; (1918) 26 B.C.R. 315; (1919) 27 B.C.R. 404; 48 D.L.R. 703; (1920) 60 S.C.R. 651; 56 D.L.R. 697; (1921) 2 W.W.R. 363 ....408, 732, 866, 881, 1070, 1071
Wells, Wall v. (1926) 37 B.C.R. 445; (1926) 4 D.L.R. 799; (1926) 3 W.W.R. 353. 315
Welsh, C. A., Saint v. (1925) 35 B.C.R. 220 .....265, 271
Wessell, R. v. (1924) 34 B.C.R. 119; (1924) 4 D.L.R. 139; (1924) 3 W.W.R. 233; 42 C.C.C. 371 .....358, 368
Wessels, Ash-Temple Co. v. (1926) 36 B.C.R. 424; (1926) 1 W.W.R. 654; (1926) 1 D.L.R. 1063 976
Westchester Fire Ins. Co., Pacific Coast Coal Freighters, Ltd., v. (1926-27) 38 B.C.R. 20, 315; (1926) 4 D.L.R. 963; (1926) 3 W.W.R. 356; (1927) 2 D.L.R. 590; (1927) 1 W.W.R. 878 .....624, 626, 893
Westcott, Blackett v. (1917) 3 W.W.R. 460 1110
Westerman, Wallace v. (1928) 40 B.C.R. 35; (1928) 3 D.L.R. 939 908
Western Assurance Co. v. Can. Government Merchant Marine, (1925) 36 B.C.R. 26; (1925) 3 D.L.R. 774 146
Western Canada Liquor Co., In re Carey and (1920) 3 W.W.R. 329 687
Western Canada Liquor Co., R. v. (1921) 29 B.C.R. 499; 60 D.L.R. 217; (1921) 2 W.W.R. 627, 774; 36 C.C.C. 65 .....236, 630, 1019
Western Canada Magic Silver Black Fox & Fur Co., Malcolm v. (1929) 41 B.C.R. 305; (1929) 4 D.L.R. 580 .....698, 736
Western Canada Power Co., Berkglint v. (1915) 22 B.C.R. 241; 24 D.L.R. 565; 54 S.C.R. 285; (1917) 1 W.W.R. 1262; 34 D.L.R. 467 .....326, 701, 828
Western Canada Ranching Co., Abbott v. (1919) 27 B.C.R. 241 885
Western Canada Ranching Co. v. Indian Department and Board of Investigation under Water Act, (1921) 30 B.C.R. 25; 60 D.L.R. 360; (1921) 2 W.W.R. 834 .....589, 924, 1115
Western Club, Inman v. (1918) 25 B.C.R. 276; 40 D.L.R. 9; (1918) 2 W.W.R. 583. 1106
Western Fuel Co. v. Rainy River Pulp & Paper Co., (1919) 26 B.C.R. 442; (1919) 1 W.W.R. 323 965
Western Imperial Co. v. Nicola Land Co., (1921) 29 B.C.R. 390; 61 D.L.R. 155; (1921) 2 W.W.R. 342 755
Western Pacific Grain Elev. & Terminals, Ltd. v. Otton, (1924) 35 B.C.R. 59....218, 851
Western Packing Corpn., Pacific Berry Growers, Ltd., v. (1929) 41 B.C.R. 78; (1929) 1 D.L.R. 814; (1929) 1 W.W.R. 426 182

Western Power Co., District of Maple Ridge v. (1926) 37 B.C.R. 252; (1926) 2 D.L.R. 525 775
Western Union Fire Ins. Co. v. Alexander, (1918) 25 B.C.R. 393; 39 D.L.R. 632; (1918) 2 W.W.R. 546 196
Westholme Lumber Co. v. City of Victoria, (1920) 28 B.C.R. 81; 61 D.L.R. 371. 689
Westholme Lumber Co. v. City of Victoria et al., (1916) 23 B.C.R. 178 45
Westholme Lumber Co. v. Grand Trunk Pac. Ry. Co., (1916) 23 B.C.R. 323; 25 C.R.C. 136; (1917) 1 W.W.R. 170; (1918) 25 B.C.R. 343; 41 D.L.R. 42; (1918) 2 W.W.R. 551 ..... 217, 677, 678, 1112, 1118
Westholme Lumber Co. and Bank of Montreal v. St. James, Ltd., (1915) 21 B.C.R. 100; 21 D.L.R. 549; 30 W.L.R. 781; 8 W.W.R. 122 ..... 128, 402
West Kootenay Light & Power Co., Granby Cons. Mining, Etc., Co. v. (1929) 41 B.C.R. 89; (1929) 2 D.L.R. 651; (1929) 2 W.W.R. 470; (1928) 40 B.C.R. 269; (1928) 4 D.L.R. 724; (1928) 3 W.W.R. 301 ..... 526, 597, 1023, 1116
Westminster Brewery, Ltd., R. v. (1921) 29 B.C.R. 321; 57 D.L.R. 712; 34 C.C.C. 308 639
Westminster Thoroughbred Assn., Shaw v. (1924) 33 B.C.R. 361 818
Westminster Trust Co. v. Brymner and Rand, (1920) 28 B.C.R. 504; 54 D.L.R. 244; (1920) 1 W.W.R. 433; (1920) 3 W.W.R. 488 ..... 545, 550
Westminster Woodworking Co. v. Stuyvesant Ins. Co., (1915) 22 B.C.R. 197; 32 W.L.R. 802; 25 D.L.R. 284; 9 W.W.R. 418 608
West Shore and Nor. Land Co., Ltd., Dalton v. (1920) 28 B.C.R. 384; (1920) 2 W.W.R. 1022 ..... 942, 1115
West Shore and Nor. Land Co., Ltd., Union Bank v. (1916) 23 B.C.R. 64; 35 D.L.R. 575 116
West Vancouver, Dist. of, Ramsay v. (1915) 21 B.C.R. 401; 22 D.L.R. 826; 31 W.L.R. 415; 8 W.W.R. 835; 53 S.C.R. 459; 30 D.L.R. 602; 10 W.W.R. 1184 ..... 567, 767
Whalen v. Bowers, (1925) 35 B.C.R. 128; (1925) 3 D.L.R. 442; (1925) 1 W.W.R. 686 796
Whalen Pulp & Paper Mills, Ltd., Standard Marine Ins. Co. v. (1922) 31 B.C.R. 1; 64 S.C.R. 90; 68 D.L.R. 269; (1922) 3 W.W.R. 211 623
Wheeler v. McLean, (1919) 27 B.C.R. 448; (1919) 3 W.W.R. 310 534
Whieldon, Royal Bank v. (1916) 23 B.C.R. 436; (1917) 2 W.W.R. 58 ..... 51, 292, 893
Whieldon & Ball, Royal Bank of Canada v. (1915) 21 B.C.R. 267; 22 D.L.R. 647; 8 W.W.R. 734; 26 D.L.R. 385; 9 W.W.R. 776; 52 S.C.R. 254 ..... 111, 120, 122, 123
Whimster and Owen v. Dragoni, (1920) 28 B.C.R. 132; 51 D.L.R. 503, 506; (1920) 2 W.W.R. 185; 33 C.C.C. 39 ..... 640, 642, 643, 710, 1026
Whimster and Owen v. Mills, (1920) 28 B.C.R. 132; 51 D.L.R. 503; (1920) 2 W.W.R. 185; 33 C.C.C. 39 1026
Whimster and Owen v. Northern Club & Cafe Co., (1920) 28 B.C.R. 132; 51 D.L.R. 503; (1920) 2 W.W.R. 185; 33 C.C.C. 39 1026
White, R. v. (1926) 37 B.C.R. 43; (1926) 3 D.L.R. 1; (1926) 2 W.W.R. 481; 45 C.C.C. 328 486
White, R. v. (1929) 3 W.W.R. 729 335
White Co., Reevie v. (1929) 41 B.C.R. 345; (1929) 4 D.L.R. 296; (1929) 3 W.W.R. 33 ..... 961, 968
White Rock Resort Dev. Co. and Phillips, Beseloff v. (1915) 22 B.C.R. 33; 23 D.L.R. 676; 32 W.L.R. 73; 8 W.W.R. 1338 712
White, Victoria (B.C.) Land Invst. Trust, Ltd. v. (No. 1), (1920) 27 B.C.R. 559; (1920) 1 W.W.R. 272 875
White, Victoria (B.C.) Land Invst. Trust, Ltd. v. (No. 2), (1920) 28 B.C.R. 21; (1920) 1 W.W.R. 594 875
White, Victoria (B.C.) Land Invst. Trust, Ltd. v. (No. 3), (1920) 28 B.C.R. 30 ..... 890, 894
White, Victoria (B.C.) Land Invst. Trust, Ltd. v. (No. 4), (1920) 28 B.C.R. 31 876
White v. X., (1917) 3 W.W.R. 332 1005
Whitfield, In re (1922) 31 B.C.R. 349; 70 D.L.R. 658; (1922) 3 W.W.R. 894 591

Whitelaw, Brown and Witton, John Robertson & Sons v. (1917) 24 B.C.R. 88 486
Whiteside v. Wallace Shipyards, Ltd., (1919) 27 B.C.R. 40; 45 D.L.R. 434 905
Whitney-Morton & Co. v. A. E. Short, Ltd., (1922) 31 B.C.R. 275; 67 D.L.R. 573; (1922) 2 W.W.R. 1014 981
Whittaker v. Shannon, R. ex rel., (1930) 43 B.C.R. 129 .....472, 927, 933
Wiesdepp, Bank of Montreal v. (1917) 24 B.C.R. 73; 34 D.L.R. 26; (1917) 2 W.W.R. 615 .....109, 118, 467, 739
Wiggs, R. v. (1931) 44 B.C.R. 364; (1931) 3 W.W.R. 52 347
Wigman, R. v. (1918) 25 B.C.R. 350; 30 C.C.C. 362 343
Wilgress v. Ritchie, (1920) 28 B.C.R. 345; 52 D.L.R. 543; (1920) 2 W.W.R. 421 .....24, 1019
Wilkerson, Francis v. (1917) 25 B.C.R. 132; (1917) 3 W.W.R. 920; (1918) 2 W.W.R. 956 .....88, 438, 576, 648
Wilkie, Rex ex rel. v. Goslett, (1923) 32 B.C.R. 216; (1923) 3 D.L.R. 298; (1923) 2 W.W.R. 461 635
Wilson Estate, In re (1926) 37 B.C.R. 336; (1926) 4 D.L.R. 139; (1926) 3 W.W.R. 265 1033
Wilson, D. H., Deceased, In re Estate of (1928) 40 B.C.R. 14; (1928) 3 D.L.R. 253; (1928) 2 W.W.R. 585 1035
Wilson v. B.C. Refining Co., (1915) 21 B.C.R. 414; 22 D.L.R. 634; 31 W.L.R. 381; 8 W.W.R. 838 .....168, 453, 461
Wilson, Esquimalt & Nanaimo Ry. Co. v. (1919) 89 L.J.P.C. 27; 122 L.T. 563; 36 T.L.R. 49; (1920) A.C. 358 .....4, 237
Wilson, Humphrey v. (1917) 25 B.C.R. 110; (1917) 3 W.W.R. 529, 937 ..290, 403, 1051
Wilson v. Keystone Logging & Mercantile Co., (1918) 25 B.C.R. 569; 52 D.L.R. 678; 59 S.C.R. 685 .....408, 1070
Wilson v. McLennan and Choate, (1919) 27 B.C.R. 262; (1919) 3 W.W.R. 62 ... . 483, 492, 1003
Wilson v. Minister of Finance for B.C., (1928) 40 B.C.R. 14; (1928) 3 D.L.R. 253; (1928) 2 W.W.R. 585 1035
Wilson, Naugle Pole & Tie Co. v. (1929) 3 W.W.R. 730 961
Wilson v. Port Coquitlam, (1922) 30 B.C.R. 449; 67 D.L.R. 49; (1922) 1 W.W.R. 640; (1923) S.C.R. 235; (1923) 2 D.L.R. 194; (1923) 1 W.W.R. 1025 ....521, 773, 833, 835, 836
Wilson, R. v. (1924) 35 B.C.R. 64 348
Wilson, Rucker v. (1923) 32 B.C.R. 401; (1923) 3 D.L.R. 433; (1923) 3 W.W.R. 130 1117
Wilson v. Welch, (1923) 32 B.C.R. 240; (1923) 4 D.L.R. 1200 .....61, 314
Wilson et al., Esquimalt & Nanaimo Ry. Co. v. (1921) 91 L.J.P.C. 21; 126 L.T. 451; 61 D.L.R. 1; 28 C.R.C. 296; (1921) 3 W.W.R. 817; (1922) 1 A.C. 202 .....220, 233, 234, 924, 936, 943
Wilson & Downer, Gibson v. (1922) 67 D.L.R. 410 .....92, 471
Wilson and McKenzie, Esquimalt & Nanaimo Ry. Co. v. (1920) 28 B.C.R. 271; 52 D.L.R. 669 880
Willard v. International Timber Co., (1918) 25 B.C.R. 210 .....45, 705
Wm. Donovan Steamship Co. v. The "Hellen," (1924) 34 B.C.R. 461; (1925) Ex. C.R. 114; (1926) Ex. C.R. 59; (1926) S.C.R. 627; (1927) 3 W.W.R. 67; (1927) 3 D.L.R. 1089 (P.C.) 163
Williams, Baker & Ellicott v. (1916) 23 B.C.R. 124 .....711, 712
Williams, Bouskill v. (1919) 27 B.C.R. 25; (1919) 2 W.W.R. 546..... 45
Williams v. Dominion Trust Co., (1916) 23 B.C.R. 461; 31 D.L.R. 786; (1917) 1 W.W.R. 664 .....191, 510
Williams, A. R., Machinery Co. v. British Crown Assce. Corpn., (1921) 29 B.C.R. 481 611
Williams, A. R., Machinery Co. v. Graham, (1916) 23 B.C.R. 481; (1917) 25 B.C.R. 284; 39 D.L.R. 140; (1918) 1 W.W.R. 161; 57 S.C.R. 229; 43 D.L.R. 437; (1918) 3 W.W.R. 597 .....62, 89, 198, 596

Williams, R. v. (1921) 30 B.C.R. 303; 37 C.C.C. 126 492
Williams v. Richards, (1923) 32 B.C.R. 58; (1923) 1 W.W.R. 1021 .....497, 989
Williams v. Rodgers, (1920) 60 S.C.R. 664; 56 D.L.R. 691; (1921) 2 W.W.R. 185; (1920) 28 B.C.R. 161; (1920) 2 W.W.R. 944 906
Williams v. Shields, (1918) 25 B.C.R. 198 1096
Williams, Bigrigg, R. ex rel. v. (1930) 42 B.C.R. 175; (1930) 2 D.L.R. 493; (1930) 1 W.W.R. 292; 53 C.C.C. 88 ..... 24, 27, 378, 471
Williams, Stoddard v. (1923) 32 B.C.R. 43; (1923) 1 D.L.R. 1113; (1923) 1 W.W.R. 688 .....452, 473, 1013, 1131
Williams and Sears v. Richards, (1917) 25 B.C.R. 19 .....454, 648
Williams and Williams v. Fraser, (1925) 35 B.C.R. 481 494
Williamson, In re (1927) 38 B.C.R. 479 .....90, 97, 670
Winch v. Bowell, (1922) 31 B.C.R. 186; 67 D.L.R. 471; (1922) 2 W.W.R. 1031 ... 823
Windebank, Buscombe Securities Co. v. (1919) 27 B.C.R. 507; 48 D.L.R. 301; (1919) 3 W.W.R. 485; (1920) 3 W.W.R. 332 .....4, 49, 754, 854
Windebank, Hori et al., Buscombe Securities Co. v. (1918) 25 B.C.R. 441; (1918) 3 W.W.R. 582; (1918-19) 26 B.C.R. 323, 486 .....874, 894
Winding-up Act, In re: B.C. Securities v. Mutual Life Assurance Co., (1918) 1 W.W.R. 733 .....40, 191
Winding-up Act and Bank of Vancouver, In re (1917) 3 W.W.R. 461 305
Winding-up Act and Bank of Vancouver, In re (1919) 27 B.C.R. 457; (1919) 3 W.W.R. 986 191
Winding-up Act and Dominion Trust Co., In re (1919) 3 W.W.R. 209 294
Winding-up Act and Gibson Mining Co., In re (1923) 32 B.C.R. 360; (1923) 3 D.L.R. 1052; (1923) 3 W.W.R. 171 .....27, 188, 190, 199, 1018
Winding-up Act and Home Bank of Canada, In re (1924) 34 B.C.R. 321; (1925) 1 D.L.R. 734 .....188, 189
Winding-up Act and Johnston Brothers, Ltd., In re (1919) 26 B.C.R. 551 189
Winding-up Act and The Robson Investment Co., In re (1918) 1 W.W.R. 779 ... 1107
Wing Kee v. Butt, (1927) 2 D.L.R. 641 708
Wing Lee, Lew v. (1924) 33 B.C.R. 271; 34 B.C.R. 277; (1924) 1 W.W.R. 744; 3 W.W.R. 394; (1924) 4 D.L.R. 578; (1924) S.C.R. 612; (1925) A.C. 819; 94 L.J.P.C. 161; 133 L.T. 378; (1925) 1 D.L.R. 179; (1925) 3 D.L.R. 1009; (1925) 3 W.W.R. 49; (1925) 37 B.C.R. 81; (1926) 1 D.L.R. 678 ....5, 64, 402, 504, 658, 829, 839
Winlow v. Ross and Quickstad, (1926) 37 B.C.R. 412; (1926) 4 D.L.R. 219; (1926) 3 W.W.R. 268 301
Winslow Marine Ry. and Shipping Co. v. The "Pacifico," (1924) 34 B.C.R. 1; (1924) 1 W.W.R. 930; (1925) 2 D.L.R. 162; (1925) Ex. C.R. 82 .....11, 626
Winstanley, Imp. Can. Trust Co. v. (1922) 31 B.C.R. 448; (1923) 1 D.L.R. 1148; (1923) 1 W.W.R. 935 .....431, 469, 489, 541
Wintemute v. Taylor, (1919) 27 B.C.R. 237; (1919) 2 W.W.R. 882 .....90, 675
Winter v. Capilano Timber Co., (1926) 37 B.C.R. 91; (1926) 2 W.W.R. 536; 7 C.B.R. 553; (1927) 38 B.C.R. 401; (1927) 4 D.L.R. 36; (1927) 1 W.W.R. 811; (1928) S.C.R. 1 .....95, 97, 664, 665, 671
Winter v. Dewar, 1928) 40 B.C.R. 312; (1929) 41 B.C.R. 336; (1929) 4 D.L.R. 389; (1929) 2 W.W.R. 518 .....298, 454
Winterburn v. Andernach, (1922) 31 B.C.R. 343; (1923) 1 D.L.R. 1157..... 955
Wise v. Kerr, (1925) 35 B.C.R. 161; (1925) 1 W.W.R. 849..... 916
Wiser and McCreight, R. v. (1930) 42 B.C.R. 517; (1930) 1 W.W.R. 976; 54 C.C.C. 117 373
Witcomb v. Toronto General Trusts Corpn., (1931) 2 W.W.R. 545..... 917
Wittman, R. v. (1917) 25 B.C.R. 108; (1917) 3 W.W.R. 438.....349, 1061
Woldson, American Securities Corpn. v. (1927) 39 B.C.R. 145; (1927) 4 D.L.R. 1087; (1927) 3 W.W.R. 756; (1928) S.C.R. 432; (1928) 3 D.L.R. 687 ...52, 1078
Woldson, Sostad v. (1925) 36 B.C.R. 14; (1925) 3 D.L.R. 779; (1925) 2 W.W.R. 774 878
~~Woldson v. B.C. Electric Ry. Co., (1918) 25 B.C.R. 518.....66, 286, 838~~

Wolfenden, Jeffares v. (1915) 21 B.C.R. 432; 31 W.L.R. 428 807
Wollaston, Miller v. (1929) 41 B.C.R. 145; (1929) 3 D.L.R. 348; (1929) 2 W.W.R. 136 .....102, 1009
Wong Chuen Ben, R. v. (1930) 42 B.C.R. 520; (1930) 1 W.W.R. 899; 53 C.C.C. 331. 558
Wong Chuen Ben, R. v. (No. 2), (1930) 43 B.C.R. 188; (1930) 3 W.W.R. 282; 54 C.C.C. 399 .....370, 558
Wong Chun Quong, R. v. (1923) 32 B.C.R. 108 .....335, 344
Wong et al., R. v. (1922) 31 B.C.R. 292; 40 C.C.C. 311 341
Wong Foon Sing, R. v. (1926) 36 B.C.R. 120; 44 C.C.C. 133 .....149, 356, 562
Wong Gum Tim, Todd v. (1917) 24 B.C.R. 161; (1917) 2 W.W.R. 280 .....757, 855
Wong Joe, R. v. (1918) 26 B.C.R. 337; (1918) 3 W.W.R. 581 .....153, 154
Wong Kit, R. and Atty.-Gen. for Canada v. (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R. 394; (1929) 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; 53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129 .....223, 268, 324, 380, 692, 927
Wong O Sang, R. v. (1922) 34 B.C.R. 8; (1924) 3 W.W.R. 45 ....374, 382, 391, 658
Wong, Pearl, v. Ruby Hou, (1928) 39 B.C.R. 425; (1928) 1 W.W.R. 480 .....246, 844
Wong Sack Joe, R. v. (1929) 41 B.C.R. 254 .....363, 688
Wong Sam v. Hamilton, (1929) 42 B.C.R. 133; 52 C.C.C. 357 519
Wong Shee, Immigration Act and, In re (No. 2), (1922) 31 B.C.R. 145; (1922) 2 W.W.R. 156; 66 D.L.R. 485; 37 C.C.C. 371 .....28, 555, 585
Wong Shee, R. v. (1921) 30 B.C.R. 70; 59 D.L.R. 626 582
Wong Sit Kit, R. v. (1921) 61 D.L.R. 475; (1921) 3 W.W.R. 116; 36 C.C.C. 36.... .....554, 583, 584
Wong Suey Mong, R. v. (1921) 61 D.L.R. 351; (1921) 3 W.W.R. 122; 35 C.C.C. 383 .....554, 582, 583, 584
Wong Yet, R. v. (1925) 36 B.C.R. 140; (1925) 3 W.W.R. 672; 44 C.C.C. 343 367
Wong York, R. v. (1930) 42 B.C.R. 246; (1930) 2 D.L.R. 552; (1930) 1 W.W.R. 388; 53 C.C.C. 68 151
Wood v. B.C. Electric Ry. Co., (1925) 34 B.C.R. 527; (1925) 1 D.L.R. 1093 895
Wood v. Sherman, (1917) 24 B.C.R. 376; (1918) 1 W.W.R. 177 .....301, 647
Wood v. W. H. Malkin Co., Ltd., (1928) 40 B.C.R. 255; (1928) 4 D.L.R. 511; (1928) 2 W.W.R. 674 .....71-2, 75, 77, 831, 968
Wood and Anderson, Bell v. (1927) 38 B.C.R. 310; (1927) 2 D.L.R. 827; (1927) 1 W.W.R. 580 .....656, 871
Wood & English v. Nimpkish Lake Logging Co. et al., (1926) 36 B.C.R. 237; (1927) 3 D.L.R. 926 .....257, 1092
Wood Motor Company, Victoria and Saanich Motor Trans. Co. v. (1915) 21 B.C.R. 515; 23 D.L.R. 79; 31 W.L.R. 853; 8 W.W.R. 1124..285, 405, 418, 857, 859, 961
Wood, Vancouver City Y.M.C.A. v. (1916) 22 B.C.R. 588; 27 D.L.R. 417; (1916) 34 W.L.R. 304, 686; 10 W.W.R. 482, 485 248
Wood, Victoria U Drive Yourself Auto Livery, Ltd. v. (1930) 42 B.C.R. 291; (1930) 2 D.L.R. 811; (1930) 1 W.W.R. 522, 634.....595, 761, 814
Woodcock v. City of Vancouver, (1927) 39 B.C.R. 288; (1928) 1 D.L.R. 1080; (1927) 3 W.W.R. 759 .....569, 770
Wood-Gundy & Co. v. City of Vancouver, (1922) 31 B.C.R. 165; 67 D.L.R. 225; (1922) 2 W.W.R. 470 .....183, 546
Wood-Gundy & Co. v. Dist. of South Vancouver, (1916) 10 W.W.R. 928..... 764
Woods, Arbitration Act and, In re (1923) 32 B.C.R. 211; (1923) 2 D.L.R. 1000; (1923) 1 W.W.R. 1344 ..... 77, 207
Woods, Boak v. (1926) 36 B.C.R. 456; (1926) 1 D.L.R. 1186..... 174
Woods v. Forsyth, (1918) 25 B.C.R. 427 864
Woods v. Opsal, (1918) 1 W.W.R. 985.....218, 663, 666, 1113
Woodside, Ingles v. (1920) 2 W.W.R. 50 1063
Woodward, Scoble v. (1924) 1 W.W.R. 1040 ..... 411, 575
Woodward's, Ltd., Perry v. (1929) 41 B.C.R. 404, 433; (1929) 4 D.L.R. 410, 751; (1929) 3 W.W.R. 49 686

Woodward's, Ltd. v. United States Fidelity & Guar. Co., (1926) 37 B.C.R. 450; (1927) 38 B.C.R. 171; (1927) 2 D.L.R. 126; (1927) 1 W.W.R. 529 620
Woodworth v. Allan, (1925) 36 B.C.R. 20 1008
Woodworth v. Gold, (1915) 21 B.C.R. 333 832
Woodyatt, Walker v. (1931) 44 B.C.R. 110; (1931) 3 D.L.R. 516; (1931) 2 W.W.R. 206 ..... 121, 242, 451, 751, 964
Woolston v. B.C. Electric Ry. Co. (1918) 25 B.C.R. 578 ..... 60, 286, 838
Woolworth Co. v. Pooley, (1925) 35 B.C.R. 324; (1925) 2 W.W.R. 481 33
Woolworth Co. v. Pooley (No. 2), (1925) 35 B.C.R. 386 1100
Workmen's Compensation Act and Blue Funnel Motor Line, In re (1919) 27 B.C.R. 418; (1919) 3 W.W.R. 426 708
Workmen's Compensation Board, Can. Pac. Ry. Co. v. (1919) 88 L.J.P.C. 169; 121 L.T. 662; 36 T.L.R. 3; 48 D.L.R. 218; (1919) 3 W.W.R. 167; (1920) A.C. 184 238
Workmen's Compensation Board, Cunningham v. (1920) 28 B.C.R. 284; 51 D.L.R. 470; (1920) 2 W.W.R. 676 295
Workmen's Compensation Board, Dinning v. (1931) 44 B.C.R. 412; (1932) 1 W.W.R. 136; (1932) 1 D.L.R. 373; 13 C.B.R. 256 ..... 102, 103
Workmen's Compensation Board, Rosebery Surprise Mining Co. v. (1920) 28 B.C.R. 284; 51 D.L.R. 470; (1920) 2 W.W.R. 676 ..... 295, 925
Workmen's Compensation Board, Standard Silver Lead Mining Co. v. (1920) 28 B.C.R. 284; 51 D.L.R. 470; (1920) 2 W.W.R. 676 295
World Building Co., Champion v. (1914) 50 S.C.R. 382; 22 D.L.R. 465; 7 W.W.R. 1162 66
World Building, Ltd., Champion & White v. (1916) 22 B.C.R. 596; 27 D.L.R. 506; 10 W.W.R. 470; 34 W.L.R. 317 ..... 715, 748
"Woron," The, Can. American Shipping Co. v. (1927) 4 D.L.R. 69; (1927) A.C. 906; 96 L.J.P.C. 137; 137 L.T. 747; 71 Sol. Jo. 649; 43 T.L.R. 698; 17 Asp. M.C. 322; (1927) 3 W.W.R. 465; (1927) Ex. C.R. 1 ..... 8, 1028
Wrangell v. The "Steel Scientist," (1924) 34 B.C.R. 114; (1924) 3 D.L.R. 49; (1924) 2 W.W.R. 493; (1924) Ex. C.R. 136 19
Wrangell v. The "Steel Scientist," (1926) 4 D.L.R. 191; (1926) Ex. C.R. 202 ..... 158, 162
Wright v. Lee Bak Bong, (1924) 34 B.C.R. 122; (1924) 4 D.L.R. 317; (1924) 2 W.W.R. 1186 ..... 318, 321
Wright v. Peters and Soldier Settl't. Board, (1920) 2 W.W.R. 696 ..... 881, 925
Wyllie v. Martin, (1931) 44 B.C.R. 486; (1931) 3 W.W.R. 465 ..... 212 436

X

X., White v. (1917) 3 W.W.R. 332 1005
X.L. Logging Co., Ryan v. (1924) 33 B.C.R. 410 ..... 711, 713, 717

Y

Yale, J. M., Deceased, In re Estate of (1931) 44 B.C.R. 196 1128
Yamashita v. Hudson Bay Ins. Co., (1918) 26 B.C.R. 387; (1918) 3 W.W.R. 671 882
Yarwood, Hart v. (1931) 3 D.L.R. 291; (1931) 2 W.W.R. 435; (1932) 45 B.C.R. 331; (1932) 4 D.L.R. 164; (1932) 2 W.W.R. 74 434
Yeaman, R. v. (1924) 33 B.C.R. 390; (1924) 2 D.L.R. 1116; (1924) 2 W.W.R. 452; 42 C.C.C. 78 394
Yellow Cab Co., Nowell v. (1929) 41 B.C.R. 494; (1930) 1 D.L.R. 493; (1929) 3 W.W.R. 606 812
Yellow Cab Co., and B.C. Electric Ry. Co. (No. 3) Nowell v. (1929) 41 B.C.R. 453; (1929) 4 D.L.R. 484; (1929) 3 W.W.R. 431 286
Yet Sun, R. v. (1920) 28 B.C.R. 68; 61 D.L.R. 281; (1920) 1 W.W.R. 816; 36 C.C.C. 8 336
Yorkshire and Can. Trust, Ltd., v. Morton, (1926) 38 B.C.R. 10; (1926) 4 D.L.R. 887; (1926) 3 W.W.R. 370 1127
Yorkshire and Can. Trust, Ltd. v. Scott, (1919) 27 B.C.R. 5; (1919) 2 W.W.R. 87 116
Yorkshire Estates Co., Peter v. (1925) 95 L.J.P.C. 91; (1926) A.C. 513; (1926) 2 D.L.R. 641; (1926) 2 W.W.R. 545; (1925) 36 B.C.R. 71; (1925) 3 D.L.R. 1193. 707

Yorkshire Guarantee Co., Alexander and Smith v. (1916) 23 B.C.R. 1; 27 D.L.R. 412; 10 W.W.R. 475; 34 W.L.R. 410 ..... 6, 244, 421, 1082
Yoshida, Davis v. (1931) 3 W.W.R. 703 ..... 32, 945
Young v. Cross & Co., (1926-7) 38 B.C.R. 49, 200; (1927) 1 D.L.R. 989; (1927) 2 D.L.R. 373; (1927) 1 W.W.R. 537; (1926) 37 B.C.R. 188; (1926) 2 D.L.R. 374; (1926) 1 W.W.R. 878 ..... 40, 293, 737, 1101
Young, Merritt and Dist. Ind. Soc. v. (1916) 10 W.W.R. 944; 34 W.L.R. 826...462, 851
Young v. Nor. Life Assce. Co. of Canada, (1922) 31 B.C.R. 65; 63 D.L.R. 107..... 614
Young, R. v. (1917) 24 B.C.R. 482; (1917) 3 W.W.R. 1066; 30 C.C.C. 137..... 336
Young, Sceats v. (1930) 43 B.C.R. 321 ..... 734, 1062
Young, Sorenson v. (1919) 27 B.C.R. 335; (1920) 1 W.W.R. 189..... 445, 457, 942
Young, Sue Hing, Chinese Immigration Act and, In re (1926) 37 B.C.R. 227; (1926) 2 W.W.R. 374 586
Youschak, Goch v. (1924) 34 B.C.R. 454; (1924) 4 D.L.R. 508; (1924) 3 W.W.R. 273 520
Yuen, R. v. (1925) 44 C.C.C. 338; (1926) 1 W.W.R. 40 357
Yukon Gold Co. v. Boyle Concessions, Ltd., (1916) 23 B.C.R. 103; 27 D.L.R. 672; 34 W.L.R. 436; 10 W.W.R. 585; 50 D.L.R. 742; (1919) 3 W.W.R. 145..... 1145
Yukon Gold Co. v. Canadian Klondyke Power Co., (1919) 27 B.C.R. 81; 47 D.L.R. 146; (1919) 2 W.W.R. 814.....276, 277, 1145
"Yuri Maru," The, Snia Viscoha Societa etc. v. (1927) A.C. 906; 96 L.J.P.C. 137; 137 L.T. 747; 71 Sol. Jo. 649; 43 T.L.R. 698; 17 Asp. M.C. 322; (1927) 4 D.L.R. 69; (1927) 3 W.W.R. 465 1028

Z

Zaferis, Lerik v. (1929) 41 B.C.R. 526; (1930) 1 D.L.R. 634; (1929) 3 W.W.R. 422 .....267, 600, 848, 1052
Zambapys and McKay, R. v. (1923) 32 B.C.R. 510..... 375
Zambowski, Seldon v. (1927) 39 B.C.R. 205; (1928) 1 D.L.R. 638; (1928) 1 W.W.R. 630 ..... 575, 719
Zarelli and Newell, R. v. (1931) 43 B.C.R. 502; (1931) 2 W.W.R. 108; 55 C.C.C. 314 ..... 31, 379, 465
Zawada, R. v. (1930) 1 W.W.R. 92; 53 C.C.C. 411 633
Zeigler v. City of Victoria, (1921) 30 B.C.R. 389; 70 D.L.R. 722; (1922) 1 W.W.R. 75 ..... 697, 764
Zellinsky and Zellinsky v. Rant, (1926) 37 B.C.R. 119; (1926) 2 D.L.R. 327; (1926) 2 W.W.R. 474 ..... 54, 822
Zimmerman, R. v. (1925) 37 B.C.R. 277; (1926) 2 W.W.R. 882; 46 C.C.C. 78..... 399
Zurbrick, de Schelking v. (1918) 26 B.C.R. 386; (1918) 3 W.W.R. 472..... 315

DIGEST

OF

BRITISH COLUMBIA CASE LAW

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 ENQUIRIES.

See PRACTICE.

ACQUIESCENCE.

See EQUITY.

ACTION.

I. CAUSES OF ACTION, 2.
II. PARTIES, 4.

I. CAUSES OF ACTION.

1. Judgment—Action to set aside.]—An action may be brought to set aside a consent judgment on the ground of mistake or misrepresentation. *Skene & Christie* v. *Royal Bank of Canada,* (1918) 25 B.C.R. 456; 59 S.C.R. 211; (1919) 3 W.W.R. 740; 1071.

2. Trespass on the case — Limitation of action.]—The words "Action of trespass" contained in sec. 8 of the Statute of Limitations extend to and comprehend actions for trespass on the case. *Duncan* v. *Ladysmith School Trustees,* (1930) 43 B.C.R. 154 at 158; (1931) 1 D.L.R. 176; (1930) 3 W.W.R. 175.

3. Ex turpi causa non oritur actio.]—The plaintiff, who had been convicted of a breach of the Excise Act, advised R., his solicitor, that one B., against whom he had a grievance, had likewise committed a breach of the Excise Act. R. then approached the defendant L. who was in touch with persons eager to be revenged on B. as B. had given information to the Customs Commission which resulted in heavy penalties being imposed on said parties, and he entered into an agreement with L. on behalf of himself and the plaintiff to secure evidence against B. shewing that he had been guilty of a breach of the Excise Act, for which R. was to receive from L. $150 for bringing about the prosecution; $1,000 when a conviction was secured and $1,000 for each month that B. was sentenced to serve. R., with the

plaintiff's assistance, then secured the necessary evidence and on it being submitted to the Customs officials, proceedings were instituted against B., who was convicted and sentenced to 12 months' imprisonment:—Held, that as the contract provides for remuneration upon a sliding scale corresponding in amount to the length of the sentence secured by the informer's evidence, this is so direct and inevitable an incentive to perjury and other nefarious conduct, that it is not in the public interest to countenance a transaction that is so dangerous to the administration of criminal justice. *Symington* v. *Reifel*, (1931) 43 B.C.R. 388; (1931) 1 D.L.R. 935; (1931) 1 W.W.R. 410.

4. Conditional sale agreement—Action to declare title.]—By a conditional sale agreement the plaintiff sold certain machinery to the defendant A. and later commenced action against the defendants for the balance due under the agreement. After the commencement of the action the defendant A. gave to the defendant C. a lease of the machinery with an option to purchase the same under a conditional sale agreement, without the knowledge of the plaintiff. The defendant A. subsequently consented to judgment in the plaintiff's action. In a second action brought against both defendants for a declaration that the title and ownership of the machinery remained in the plaintiff:—Held, that the plaintiff had not waived its rights of ownership under the conditional sale agreement by commencing the first action and the lease and option to the defendant C. should be set aside. *Renneburg* v. *Albion Fisheries Ltd. et al.*, (1931) 1 W.W.R. 231.

5. Alimony.]—An action for alimony may be maintained under the ordinary jurisdiction of the Supreme Court apart from its divorce jurisdiction. *Rousseau* v. *Rousseau*, (1920) 3 W.W.R. 384.

6. Tax sale — Enforcement of.] — An action to enforce the delivery of a tax sale deed must be brought against the Collector of Taxes and not against the municipality. *Stoltze* v. *Municipality of Mission*, (1917) 24 B.C.R. 195; (1917) 1 W.W.R. 1388.

7. Crown grants—Validity of.]—In an ordinary suit between subject and subject, irregularities alleged to have occurred leading up to documents of title such as Crown grants, cannot be set up unless the Crown be made a party. This particularly applies where the defendant is a purchaser for value without notice of such irregularities. *North Pacific Lumber Co. Ltd.* v. *Sayward*, (1918) 25 B.C.R. 322; (1918) 2 W.W.R. 771.

8. Crown interests affected—Attorney-General as party.]—In cases where procedure by petition of right is not applicable the Court can nevertheless direct that the Attorney-General as representing the interests of the Crown be added as a defendant to the proceedings if they concern the interests of the Crown. *Esquimalt and Nanaimo Ry. Co.* v. *Wilson*, (1919) 89 L.J.P.C. 27; 122 L.T. 563; 36 T.L.R. 40; (1920) A.C. 358.

9. Judgment pending criminal proceedings.]—A civil action where a crime is involved may be proceeded with in a case where a criminal prosecution has actually been carried through and decision is under consideration. *Standard Bank of Canada* v. *Shuen Wah*, (1919) 26 B.C.R. 441; (1919) 1 W.W.R. 586.

10. Stay of civil action pending criminal prosecution.]—The Court will not grant a stay of a civil action against an incorporated company until a criminal prosecution against certain officers thereof is disposed of. *Mackee* v. *Solloway, Mills & Co. Ltd. (No. 3)*, (1931) 44 B.C.R. 401; (1931) 4 D.L.R. 417; (1931) 2 W.W.R. 926.

11. Partnership.]—Where an action is brought against defendants under an alleged firm name the plaintiff must prove that they are carrying on business as co-partners within the Province, otherwise there is no jurisdiction and the action cannot stand. *American Merchant Marine Insurance Co.* v. *Buckley-Tremaine Lumber and Timber Co.*, (1920) 28 B.C.R. 426; (1920) 3 W.W.R. 878.

12. Consolidation of actions.]—A mortgagee having obtained an order nisi for foreclosure and taken accounts thereunder should not be allowed to consolidate the action with a second action for the same debt, claiming foreclosure of the same mortgage together with other collateral securities. *Buscombe Securities Co.* v. *Windebank*, (1919) 27 B.C.R. 507; 48 D.L.R. 301; (1919) 3 W.W.R. 485.

See PRACTICE.

13. Foreclosure of mortgages — Possession—Receiver.] — A claim for possession and the appointment of a receiver may be joined with one for foreclosure or redemption. *Jones* v. *Cohn & Canary*, (1924) 33 B.C.R. 321.

II. PARTIES.

1. Company winding-up — Leave to commence action.—The sections of the Winding-up Act enabling the Court to interfere were intended not for the purpose of

harassing or impeding or injuring third parties, but for the purpose of preserving the limited assets of the company in the best way for distribution among all creditors who have claims upon it. The Court will exercise its power with due regard to the rights of third persons who are not members of the company and who have not to come in and claim to share in the distribution of the company's assets among the creditors, and who are not therefore quasi parties to the winding-up proceedings. *Plummer* v. *Sullivan Machinery Co.*, (1917) 24 B.C.R. 104; (1917) 2 W.W.R. 229.

2. Bankruptcy—Action by trustee.]—A trustee in bankruptcy obtained written permission of the inspector under sec. 20 (1) (c) of the Bankruptcy Act to "bring, institute, or defend any action or other legal proceeding relating to the property of the debtor." He then brought action in the Supreme Court to set aside a transaction between the bankrupt and defendant whereby the defendant received $1,000, and to recover same for the benefit of the estate:—Held, that as the written consent of the inspector does not in terms authorize him to bring an action in the Supreme Court he should have taken proceedings in the summary manner provided for in the Bankruptcy Act and Rules. *Stillwater Lumber & Shingle Co. Ltd.* v. *Canada Lumber & Timber Co. Ltd.*, (1923) 32 B.C.R. 81; (1923) 2 D.L.R. 900; 3 C.B.R. 807.

3. Wrongful possession.] — Where a sheriff in possession of goods under a writ of fieri facias refuses to give up possession upon the receipt of a notice of the assignment of the execution debtor under the Creditors Trust Deeds Act, the costs of the execution creditor being tendered up to that time, it is not necessary to join the execution creditor in an action brought by the assignee against the sheriff. *Baker* v. *Richards*, (1918) 25 B.C.R. 397; 40 D.L.R. 351; (1918) 2 W.W.R. 902; affd. 59 S.C.R. 656; 49 D.L.R. 684.

4. Abatement and revivor — Death of plaintiff.]—Where an appellant, plaintiff, dies between the date of the judgment appealed from and the hearing of the appeal in the Supreme Court of Canada, the latter may allow the appellant's personal representative to enter a suggestion of death, and may, in directing a new trial as to the quantum of damages, impose as a condition on the respondent that no exception at the hearing shall be taken on the ground of the appellant's death. *Lew* v. *Wing Lee*, (1925) A.C. 819; 94 L.J.P.C. 161; 133 L.T. 578; (1925) 3 D.L.R. 1009; (1925) 3 W.W.R. 49.

5. Joint contractors — Judgment against two — Third not party — Res judicata.]—Where there is but one cause of action on the part of joint contractors a judgment against two of them is a bar to an action by the third. *In re Alberni Pacific Lumber Co.; Thomas* v. *Lawson*, (1927) 39 B.C.R. 1; (1927) 3 D.L.R. 1126; (1927) 2 W.W.R. 662.

6. Deeds—Parties to.]—A person who is not a party to a deed is not capable of suing or being sued thereon. *Alexander and Smith* v. *Yorkshire Guarantee & Securities Corporation Ltd.*, (1916) 23 B.C.R. 1; 27 D.L.R. 412; 34 W.L.R. 410; 10 W.W.R. 475.

7. Alien enemy.]—An action by the administrator of the estate of a deceased person for the benefit of a dependant of the deceased cannot be maintained if the dependant is an alien enemy. *Cremidas* v. *B.C. Electric Ry. Co. Ltd.*, (1919) 27 B.C.R. 232; (1919) 2 W.W.R. 549.

8. Public bodies and officers—Liquor Control Board.] — The Liquor Control Board is not a corporate body either actually or by implication, it being merely an agent of the Government in the carrying out of the Government Liquor Act and does not come within the definition of "person" in the Interpretation Act or the Attachment of Debts Act. *Callow* v. *Hick*, (1923) 32 B.C.R. 71; (1923) 2 D.L.R. 1185; (1923) 2 W.W.R. 439.

9. Land Settlement and Development Act.]—The Land Settlement Board created by the Legislature under the Land Settlement and Development Act is a department of State in its real constitution and cannot be sued in an action for tort in its official capacity. *Rattenbury* v. *Land Settlement Board*, (1928) 39 B.C.R. 523; (1928) 3 D.L.R. 382; (1928) 2 W.W.R. 475; (1929) S.C.R. 52; (1929) 1 D.L.R. 242.

10. Members of Legislature—Disqualification.]—An action being brought against a sitting member of the Legislative Assembly of British Columbia under sec. 31 of the Constitution Act to recover penalties for sitting and voting as a member of said Assembly when he was disqualified from so doing, being interested in three contracts made between himself and His Majesty the King in the right of the Province, it appeared that a writ had previously been issued against the defendant under the same section for the recovery of penalties for sitting and voting on the same day for which

penalty is sought to be recovered in this action, and one of the contracts alleged in this action as having existed is the same as the contract alleged in the former action:—Held, that unless the former action was collusive it is a bar to this action. An action for a statutory penalty is not collusive where the plaintiff is liable for costs, *Keene* v. *Cooley*, (1925) 36 B.C.R. 170; (1925) 4 D.L.R. 229; (1925) 3 W.W.R. 250.

See ALIENS.

See CONTRACTS.

See COURTS.

See ESTOPPEL.

See HUSBAND AND WIFE.

See INFANTS.

See JUDGMENTS.

See LIMITATION OF ACTIONS.

See PLEADINGS.

See PRACTICE.

See TORT.

See WAR RELIEF.

ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS.

ADMIRALTY.

I. JURISDICTION, 7.
- *A. In general*, 7.
- *B. Wages*, 9.
- *C. Building, equipping and repairing*, 10
- *D. Necessaries*, 11.
- *E. Damage to cargo*, 12.
- *F. Damage to persons*, 12.
- *G. Damage to property*, 12.
- *H. Forfeiture*, 12.
  - 1. Under Customs and Fisheries Protection Act, 12.
  - 2. Alien enemy ships, 14.

II. PRACTICE AND PROCEDURE, 14.
- *A. Arrest*, 14.
- *B. Set-off and counterclaim*, 16.
- *C. Interrogatories*, 16.
- *D. Custody and sale*, 16.
- *E. Liens*, 16.
- *F. Security for damages*, 17.
- *G. Appeal*, 17.
- *H. Costs and fees*, 18.
- *I. Payment out of Court*, 19.

III. EVIDENCE, 19.

I. JURISDICTION.

A. In General.

1. Extent of.]—The effect of the Colonial Courts of Admiralty Act, 1890, (Imp.) cap. 27 was to define as a maximum of jurisdictional authority for the Courts to be set up thereafter the Admiralty jurisdiction of the High Court in England as it was at that date. Additions to the jurisdiction of the Admiralty Court in England do not extend the Admiralty jurisdiction of the Exchequer Court in Canada. *Canadian American Shipping Co. Ltd.* v. *The "Woron"* (1927) A.C. 906; 96 L.J.P.C. 137; 137 L.T. 747; (1927) 4 D.L.R. 69; (1927) 3 W.W.R. 465; (1927) Ex. C.R. 1.

2. Right to vary or rescind proceedings.]—Sec. 34 of the Admiralty Court Act, 1861, gives or defines the right to vary or rescind proceedings in Admiralty, being one of the more extensive powers conferred upon the High Court of Admiralty which it did not formerly possess, and the Admiralty Court of Canada falls heir to the same jurisdiction. Assuming that sec. 34 is not applicable to this case the necessary jurisdiction is conferred by Rule 228 of the Rules in Admiralty. *The King* v. *The "Despatch,"* (1915) 22 B.C.R. 365; 25 D.L.R. 221; 33 W.L.R. 130; 9 W.W.R. 738.

3. Tort on High Seas.]—The Exchequer Court of Canada in Admiralty has jurisdiction to entertain an action against a ship arrested in Canadian waters for a tort committed on the high seas. *Commercial Pacific Cable Co.* v. *The "Prince Albert,"* (1925) 37 B.C.R. 434; (1926) 4 D.L.R. 543; (1926) 3 W.W.R. 309; (1927) Ex. C.R. 44.

4. Identical application to two judges of concurrent jurisdiction.] — While a Court motion, made by the Crown, was being heard by the judge of the Prize Court of British Columbia with complete jurisdiction, and stood for further argument, the Crown made a concurrent and identical application to the President of the Court at Ottawa and obtained from him the order it desired before its original application was disposed of by the judge in British Columbia:—Held, that the Prize Court of British Columbia and its officers would entirely ignore an order made in such circumstances, which constituted the legal impossibility of a hearing of the same motion before two judges at the same time, as being merely "a thing of naught which could not be disobeyed," applying the principle laid down in *McLeod* v. *Noble* (1897) 28 O.R. 528; 24 O.A.R. 549. A Prize Court should decide judicially in accordance with what it conceives to be the law of nations and must not receive even an "intimation"

from the Crown or the Executive in the discharge of its duty. *The "Leonor,"* (1917) 3 W.W.R. 861; 3 P. Cas. 91.

B. Wages.

1. Minimum amount recoverable.]—Under sec. 191 of the Canada Shipping Act, the plaintiff must recover at least the minimum amount specified or the action will be dismissed, as the Court has no jurisdiction to entertain actions for less than such prescribed amount. *Cowan* v. *The "St. Alice,"* (1915) 21 B.C.R. 540; 17 Ex. C.R. 207; 32 W.L.R. 17; 8 W.W.R. 1256.

2. Minimum amount recoverable.]—A master of a ship is put upon the same basis as a seaman in respect of recovery and remedy, as well as of substantive rights under the provisions of the Canada Shipping Act. The claim of a master for wages, where the amount is less than $200 is, therefore, within the restrictive provisions of sec. 191 of the Act, and the Admiralty Court has no jurisdiction to entertain it. *Beck* v. *The "Kobe,"* (1915) 22 B.C.R. 169; 17 Ex. C.R. 215; 32 W.L.R. 351; 9 W.W.R. 351.

3. Minimum amount recoverable.]—Where a seaman is employed under a monthly contract, for a certain period, and deserts before the end of any month, he loses all claim to wages for the part of the month during which he worked. Where a seaman's wage claim is under $200 the Provincial Admiralty Court has no jurisdiction and the action must be dismissed by virtue of the Canada Shipping Act, R.S.C. 1906, cap. 113. *Ostrom* v. *"The Miyako,"* (1924) 34 B.C.R. 4; (1924) Ex. C.R. 86; (1924) 2 D.L.R. 200; (1924) 1 W.W.R. 1098.

See also *Jorgensen* v. *The "Chasina,"* (1925) 37 B.C.R. 24; (1926) 1 D.L.R. 1193; (1926) 1 W.W.R. 632; (1926) Ex. C.R. 110. *Jansen* v. *The "Tex,"* (1926) 37 B.C.R. 399; (1926) 4 D.L.R. 288; (1926) 3 W.W.R. 225; (1926) Ex. C.R. 224. *Coffin and O'Flynn* v. *The "Protoco,"* (1930) 42 B.C.R. 347; (1930) 2 D.L.R. 421; (1930) 1 W.W.R. 558; (1930) Ex. C.R. 153.

4. Fishermen.]—Persons employed on a salmon fishing "lay" performing work on a fishing launch in the double capacity of sailors and fishermen though most of their time is occupied in fishing (they not having any sleeping quarters on board the vessel) are nevertheless "seamen" and are entitled to their maritime lien for seamen's wages; but the lien will not attach if the use of the vessel is no part of the agreement on which the lay is based, it having been merely lent by the owner as a matter of convenience. *Morrissette* v. *The "Maggie" et al.,* (1916) 22 B.C.R. 424; 16 Ex. C.R. 494; 34 W.L.R. 39; 10 W.W.R. 21.

5. Caretaker.]—The caretaker of a ship not in commission is not a seaman and has no lien for wages. *Jorgensen* v. *The "Chasina,"* (1925) 37 B.C.R. 24; (1926) 1 D.L.R. 1193; (1926) 1 W.W.R. 632; (1926) Ex. C.R. 110.

6. Consolidation of claims.] — Where several seamen by consolidation join their individual claims in one action for wages against the owner of one or more ships engaged in a common enterprise, with resulting liens on different ships, each claimant is not thereby liable for costs consequent upon the failure of another claimant to establish a specific lien, which the former never set up. *Morrissette* v. *The "Maggie" et al.,* (1916) 22 B.C.R. 476; 16 Ex. C.R. 498; 34 W.L.R. 120; 10 W.W.R. 224.

7. Priority.]—The lien of the mate of a vessel for wages will be subject to the claim of a mortgagee where the payment of the mortgagee has been guaranteed by the mate; there is no distinction to be made between the position of a master and mate in this respect. A lien claimed by an engineer of a vessel for wages in priority to the claim of a mortgagee was not allowed, the Court holding that, on all the evidence, although the registered owner of the vessel was a company, the engineer and two others were the true owners thereof. *Stone et al.* v. *S.S. "Rochepoint,"* (1921) 30 B.C.R. 113; 21 Ex. C.R. 143; 68 D.L.R. 651; (1921) 2 W.W.R. 701.

C. Building, Equipping and Repairing.

1. Seizure by mortgagee—Arrest.]—A vessel was seized by a mortgagee thereof when it was being repaired by plaintiff in plaintiff's yard. Plaintiff brought action in the Admiralty Court claiming a lien for repairs done at the time the vessel was in possession and repairs previously executed on her last trip:—Held, that the Court had no jurisdiction to entertain the action, as the vessel was not "under arrest" within the meaning of section 13 of The Admiralty Court Act, 1861, 24 Vict. (Imperial), cap. 10, at the time the writ was issued. *Martin* v. *The "Sea Foam,"* (1921) 30 B.C.R. 398; 21 Ex. C.R. 395; 68 D.L.R. 750; (1922) 2 W.W.R. 1181.

2. Abuse of process—Sham proceedings—Alterations and additions.] — As soon as a creditor finds a ship "under arrest and the Admiralty Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping or repairing the ship. Work done in making certain alterations in and additions to the pilot house, rig, spars, sails, tanks, etc., of a gasolene boat necessitated by her intended new employment in outside waters were for the "building" or "equipping" of the ship within sec. 24 of the Admiralty Court Act, 1861 (Imp.) and claims therefor were within the jurisdiction of the Admiralty Court where at the time of the institution of the causes the ship or the proceeds were under arrest of the Court. The ship was arrested at the suit of a member of a firm which was one of the plaintiffs. His independent claim for wages as a ship's carpenter on board the ship "Maple Leaf" was in fact only a part of his firm's claim sued on herein and immediately after the ship was arrested his firm's action was instituted:—Held, that these facts so obviously disclosed mala fides and an abuse of the process of the Court that the arrest could only be viewed as a sham proceeding and as not having any legal existence regarding that firm; but the other claimants could support their suit upon its existence in fact, because in good faith they instituted actions relying upon the records of the Court which on their face shewed that its jurisdiction could be invoked. *Eriksen* v. *The "Maple Leaf,"* (1922) 31 B.C.R. 443; (1923) Ex. C.R. 39; (1923) 4 D.L.R. 1201; (1923) 1 W.W.R. 76.

3. Interest on claim ex contractu.]—In the Admiralty Court, in an action to recover for work done and material supplied, the Court will allow interest from the time of rendering the bill after completion, in the absence of legal excuse for non-payment. *Winslow Marine Railway and Shipping Company* v. *The "Pacifico,"* (1924) 34 B.C.R. 1; (1925) 2 D.L.R. 162; (1924) 1 W.W.R. 930; (1925) Ex. C.R. 82.

D. Necessaries.

Domicile of owner—Port.]—The home port of a vessel is where its true owner is domiciled even though it may be registered elsewhere, and evidence may be admitted to contradict the register and shew the true owner and home port. The Court has jurisdiction under the Admiralty Court Act, 1861, sec. 5 in a claim for necessaries supplied to a foreign ship at a port in the Province. *Haley* v. *S.S. "Comox,"* (1920) 30 B.C.R. 104; 56 D.L.R. 662; (1920) 3 W.W.R. 325; 20 Ex. C.R. 86.

E. Damage to Cargo.

See CARRIERS.

F. Damage to Persons.

Action in rem.]—The Maritime Conventions Act, 1914 (Can.) cap. 13 did not extend the Admiralty jurisdiction of the Exchequer Court so as to permit the bringing of actions in rem for injuries involving loss of life. Where a plaintiff has successfully pursued a remedy under the Workmen's Compensation Act, R.S.B.C. 1924, he cannot renounce it and pursue an alternative remedy in Admiralty. *Dagsland* v. *The "Catala,"* (1928) Ex. C.R. 83; (1928) 3 D.L.R. 334; revg. (1927) 38 B.C.R. 440; (1927) 4 D.L.R. 426; (1927) 3 W.W.R. 97.

G. Damage to Property

Tort on high seas.] — The Exchequer Court of Canada in Admiralty has jurisdiction to entertain an action against a ship arrested in Canadian waters for a tort committed on the high seas. The licensee or bailee of a submarine cable and in sole control thereof is entitled to damages for injury done to the cable by the wrongful use of it by a ship for deep sea anchorage. *Commercial Pacific Cable Co.* v. *The "Prince Albert,"* (1925) 37 B.C.R. 434; (1926) 4 D.L.R. 543; (1926) 3 W.W.R. 309; (1927) Ex. C.R. 44.

See COLLISION.

See SHIPPING.

H. Forfeiture.

1. Under Customs and Fisheries Protection Act.

1. Purpose not permitted by statute.]—Where a judgment has been given against fishing vessels, declaring them forfeited to His Majesty for violation of the provisions of sec. 10 of the Customs and Fisheries Protection Act, a claim under a conditional sale contract and mortgage on the engine of a vessel cannot be asserted against the vessel in these proceedings directed to her forfeiture for violation of "statutes passed for the protection of the revenue or of public property," for in such cases the vessel itself is the offender. *The King* v. *The "Sunrise." The King* v. *The "Tillie M." The King* v.

The "Queen City," (1931) 43 B.C.R. 494. Affd. (1931) S.C.R. 387; (1931) 3 D.L.R. 147.

2. Fishing within territorial waters.]—Where 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 defence disclosed that the sole man in command during the illness of the master, anchored at a place which he believed was within the territorial waters of Canada and it appearing that he had become exhausted, having only had two or three hours' sleep in 72 hours, it was held that in the special circumstances of the case the mistaken position of the vessel can be deemed to be an "unavoidable cause" within sec. 183 of the Customs Act. The Court must look upon their position with a "lenient eye" as being the misfortunes of innocent and much distressed mariners, and the ship must be released. *The King* v. *The "Mary C. Fischer,"* (1929) 41 B.C.R. 461; (1929) 4 D.L.R. 679; (1929) Ex. C.R. 207; 52 C.C.C. 273.

3. Foreign fishing vessel within territorial waters—Stress of weather—Unavoidable cause.]—To justify (as against incurrence of penalty under the Customs and Fisheries Protection Act, R.S.C. 1927, cap. 43, sec. 10) an entry by a foreign fishing vessel into Canadian territorial waters on the ground of "stress of weather" (Customs Act, R.S.C. 1927, cap. 42, sec. 183), the weather must be such as to produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well-grounded bona fide apprehension that if he remains outside such waters he will put in jeopardy his vessel and cargo. In each case the questions whether the master fairly and honestly on reasonable ground believed it necessary to take shelter, and whether he exercised reasonable skill, competence and courage in the circumstances, are questions of fact for the tribunal whose duty it is to find the facts. The defendant ship was within such waters when seized and was not justified on the ground of "stress of weather" in entering them. A contention that necessity to repair the engine was an "unavoidable cause" justifying such entry, was rejected, as, on the evidence, the repair in question was not an immediate necessity, the defect not affecting the sailing of the vessel or making it more dangerous; moreover, failure to have the vessel in reasonable repair on going to sea could not be deemed an "unavoidable cause." The Convention of October 20, 1918, between Great Britain and the United States (respecting fisheries and boundary lines) did not apply to the Pacific waters so far as fisheries were concerned, and therefore could not be available as justification for the entry in question. *The King* v. *The "May,"* (1931) S.C.R. 374; (1931) 3 D.R.L. 15.

See The King v. *The "Queen City," The King* v. *The "Tillie M.," The King* v. *The "Sunrise," infra.*

4. Foreign fishing vessel within territorial waters—Weakness of vessel—Distress.]—There is a suspicion against bona fides if a foreign fishing vessel enters Canadian waters for shelter because it is of such a class of construction that it cannot with safety remain outside against weather known to prevail on its fishing ground Want of bona fides would abrogate any right or privilege to shelter given by the statutes. Weaknesses in a vessel may be such that any distress arising from them should be deemed distress created by the owner or master himself and not due to "stress of weather" or "unavoidable cause." *The King* v. *The "Queen City;" The King* v. *The "Tillie M.;" The King* v. *The "Sunrise,"* (1931) S.C.R. 387; (1931) 3 D.L.R. 147.

2. Alien Enemy Ships.

See PRIZE COURT.

II. PRACTICE AND PROCEDURE.

A. Arrest.

1. Seizure by mortgagee.]—A vessel was seized by a mortgagee thereof when it was being repaired by plaintiff in plaintiff's yard. Plaintiff brought action in the Admiralty Court claiming a lien for repairs done at the time the vessel was in possession and repairs previously executed on her last trip:—Held, that the Court had no jurisdiction to entertain the action, as the vessel was not "under arrest" within the meaning of sec. 13 of The Admiralty Court Act, 1861, 24 Vict. (Imperial), cap. 10, at the time the writ was issued. *Martin* v. *The "Sea Foam,"* (1921) 30 B.C.R. 398; 21 Ex. C.R. 395; 68 D.L.R. 750; (1922) 2 W.W.R. 1181.

2. Abuse of process—Sham proceedings.]—As soon as a creditor finds a ship "under arrest of the Court" he may bring his action for, and the Admiralty Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping or repairing the ship. Work done in making

certain alterations in and additions to the pilot house, rig, spars, sails, tanks, etc., of a gasolene boat necessitated by her intended new employment in outside waters were for the "building" or "equipping" of the ship within sec. 24 of the Admiralty Court Act, 1861 (Imp.) and claims therefor were within the jurisdiction of the Admiralty Court where at the time of the institution of the causes the ship or the proceeds were under arrest of the Court. The ship was arrested at the suit of a member of a firm which was one of the plaintiffs. His independent claim for wages as a ship's carpenter on board the ship "Maple Leaf" was in fact only a part of his firm's claim sued on herein and immediately after the ship was arrested his firm's action was instituted:—Held, that these facts so obviously disclosed *mala fides* and an abuse of the process of the Court that the arrest could only be due as a sham proceedings and as not having any legal existence as regards that firm; but the other claimants could support their suit upon its existence in fact, because in good faith they instituted actions relying upon the records of the Court which on their face shewed that its jurisdiction could be invoked. *Eriksen* v. *The "Maple Leaf,"* (1922) 31 B.C.R. 443; (1923) Ex. C.R. 39; (1923) 4 D.L.R. 1201; (1923) 1 W.W.R. 76.

3. Effect of arrest upon possessory lien.]—A possessory lien is destroyed if the party entitled to it gives up his right to possession of the subject of the lien. A person claiming a possessory lien at common law for repairs done on a vessel loses his lien if he causes the vessel to be arrested in an action for the value of the repairs as this proceeding involves the transfer of his writ of possession to the marshal whose assistance is invoked. *Rumely* v. *The "Vera M.,"* (1922) 31 B.C.R. 472; (1923) 2 D.L.R. 867; (1923) 1 W.W.R. 253; (1923) Ex. C.R. 36.

4. Re-arrest pending appeal.] — The plaintiffs' action against a steamship having been dismissed, they brought an appeal, and launched a motion that the bail bond in Court be retained, or in the alternative that the ship be re-arrested pending the appeal, on the ground that the ship was being broken up and would be demolished before the appeal was decided. As it appeared that the appeal would be determined before the value of the ship would be reduced to the sum claimed the motion was dismissed. *Empire Stevedoring Co. Ltd.* v. *The "Empress of Japan,"* (1927) 38 B.C.R. 438; (1927) 2 D.L.R. 985.

B. Set-off and Counterclaim.

Cross-cause.]—There cannot be a "cross-cause" unless at least one of the plaintiffs in the original action is a defendant in the cross-cause. When, therefore, the Crown is taking proceedings in rem against a ship for damages to a king's ship caused by a collision, and the defendant has commenced proceedings in personam against the master of the ship for negligence causing the same collision, but whose actions the Crown has repudiated, there is no cross-cause to justify the making of such an order as was made in *The King* v. *The "Despatch,"* (1915) 21 B.C.R. 503; *The King* v. *The "Despatch,"* 22 B.C.R. 365; 25 D.L.R. 221; 33 W.L.R. 130; 9 W.W.R. 738.

C. Interrogatories.

Materiality.] — Where the information sought by the plaintiff in interrogatories is both material and calculated to destroy the defensive case set up, an objection that the defendant's evidence would be necessarily in part disclosed by the answer will not be sustained. *Heidner & Co.* v. *The "Hanna Nielsen,"* (1926) 37 B.C.R. 207; (1926) 2 D.L.R. 1059; (1926) 2 W.W.R. 397; (1927) Ex. C.R. 75.

D. Custody and Sale.

Wrongful seizure—Writ of Possession.]—A writ of possession will issue to restore to her owner a ship which has been wrongfully seized by her crew. *Pacific Great Eastern Ry. Co.* v. *The "Clinton,"* (1918) 27 B.C.R. 400; (1919) 1 W.W.R. 947.

E. Liens.

1. Maritime lien for damages—Proceedings to enforce.]—A maritime lien for damages done by a ship attaches that instant upon the vessel doing it, and notwithstanding any change of possession travels with her into the hands of a bona fide purchaser though without notice, and being afterwards perfected by proceedings in rem relates back to the moment when it first attached. Such proceedings, however, to be effectual must be taken with reasonable diligence and followed up in good faith. *Attorney-General for British Columbia* v. *S.S. "Bermuda,"* (1923) 32 B.C.R. 76; (1923) 2 D.L.R. 272; (1923) 1 W.W.R. 956; (1923) Ex. C.R. 107.

2. Effect of arrest upon possessory lien.]—A lien is destroyed if the party entitled to it gives up his right to possession of the subject of the lien. A person claiming a possessory lien at common law for repairs done on a vessel loses his lien if he causes the vessel to be arrested in an action for the value of the repairs as this proceeding involves the transfer of his writ of possession to the marshal whose assistance is invoked. *Rumely* v. *The "Vera M.,"* (1922) 31 B.C.R. 472; (1923) 2 D.L.R. 1201; (1923) 1 W.W.R. 253; (1923) Ex. C.R. 36.

F. Security for Damages.

1. Cross-cause.] — Proceedings in an action by the Crown against a ship for damages to a King's ship through collision will be suspended on motion under sec. 34 of the Admiralty Court Act, 1861, until the Crown has given security to answer a judgment the defendants anticipate recovering in a cross-cause in personam against the master of the King's ship for damages arising out of the same collision. The actions should be consolidated. *The King* v. *The "Despatch,"* (1915) 21 B.C.R. 503; 16 Ex. C.R. 310; 23 D.L.R. 351; 32 W.L.R. 13.

G. Appeal.

1. Bail pending appeal.] — Where a claim for salvage against a ship has been dismissed, there is no general right, in case of appeal, to hold the bail bond, or after its cancellation to re-arrest the ship, nor will such right be granted without good reason therefor, such as that it appears to the Court that the ship will not be within jurisdiction to answer the appeal should it go against it. *The "Freiya"* v. *The "R. S.,"* No. 2, (1921) 30 B.C.R. 132; 63 D.L.R. 687; (1921) 2 W.W.R. 749; 21 Ex. C.R. 147.

2. Re-arrest pending appeal.] — The plaintiffs' action against a steamship having been dismissed, they brought an appeal, and launched a motion that the bail bond in Court be retained, or in the alternative that the ship be re-arrested pending the appeal, on the ground that the ship was being broken up and would be demolished before the appeal was decided. As it appeared that the appeal would be determined before the value of the ship would be reduced to the sum claimed, the motion was dismissed. *Empire Stevedoring Co. Ltd.* v. *The "Empress of Japan,"* (1927) 38 B.C.R. 438; (1927) 2 D.L.R. 985.

H. Costs and Fees.

1. Marshal's fees on sale by option.]—A marshal, though not licensed as an auctioneer, is entitled to a double fee on the gross proceeds in selling a vessel at option by order of Court; the condition of "being duly qualified" in the appropriate item in the Table of Fees refers to his competence, not to any requirement of a licence as auctioneer. In any case a local municipal requirement should not intervene between the Court and its officer in disposing, in any manner and by such agency as it seems fit, of the property in its custody and control. *Hernandez* v. *The "Bamfield,"* (1921) 30 B.C.R. 161; (1921) 3 W.W.R. 69; 21 Ex. C.R. 166.

2. Appraiser's fees.] — An appraiser, appointed by arrangement of all parties concerned, to act as marshal's substitute, and appraise a vessel under a commission of appraisement issued to the marshal in form 44 in the Appendix to the Rules, is entitled to reasonable remuneration for his services, in addition to the fee for executing a warrant authorized in Part V. of the Table of Fees. *The "Paschena"* v. *The "Griff,"* (1925) 36 B.C.R. 30.

3. Following the event—Rule.]—The rule as to costs is the same in the Exchequer Court of Canada in Admiralty as it is in the Admiralty Division of the High Court of England; and under such rule as now established, costs follow the event, even in cases of inevitable accident, where no special circumstances require a departure from such rule. *The "Jessie Mac"* v. *The "Sea Lion,"* (1919) 2 W.W.R. 411; (*See* (1921) 1 W.W.R. 873; (1919) 27 B.C.R. 444; 19 Ex. C.R. 78.

4. Taxation — Application of English Rules.] — Admiralty Rule 228 does not authorize the allowance of items in a bill of costs which are not to be found in the Table of Fees, notwithstanding that they appear in the English Admiralty Tariff. *The "Paschena"* v. *The "Griff,"* (1927) 38 B.C.R. 240; (1927) Ex. C.R. 92; (1927) 2 D.L.R. 757; (1927) 1 W.W.R. 515.

5. Security for Costs.] — Where the plaintiff is resident out of the jurisdiction, and its ship is a foreign one, security for costs may be ordered, even at an advanced stage of the action and though the delay in applying therefor is unaccounted for, in the absence of any prejudice to the other side occasioned by such delay. Scope of rule 134 considered, with regard to the practice of

the Court.) *Wrangell* v. *The Steel Scientist*, (1924) 34 B.C.R. 114; (1924) 3 D.L.R. 49; (1924) 2 W.W.R. 493; (1924) Ex. C.R. 136.

I. Payment Out of Court.

To foreign owner—Notice.]—An application by the assignee of a foreign reputed owner of a ship which had been sold by the marshal after arrest for wages, for payment out of the balance remaining in Court at the credit of the ship, should be advertised for at least one month, and notice thereof should be posted in the registry and served upon the local Consul for the country in which the owner resides. *The "Speedway,"* (1925) 35 B.C.R. 319.

III. EVIDENCE.

1. Depositions of deceased persons.]—The depositions of a deceased mate, taken before the Court of Formal Investigation respecting a collision under the Canada Shipping Act, the other side having been a party to and represented by counsel at such proceedings, are receivable in evidence in an action brought for damages due to the collision. *The King* v. *The "Despatch." The Border Line Transportation Co.* v. *McDougal*, (1916) 22 B.C.R. 496; 16 Ex. C.R. 319; 28 D.L.R. 42; 34 W.L.R. 123.

2. Foreign witness.]—The propriety of the employment of an interpreter on the examination of a witness is a question of fact, and the tribunal before which he is to be examined must decide whether he possesses a sufficient knowledge of the English language to understand and answer the questions put to him. Semble, objection to the use of an interpreter should not be lightly taken, as the value of the testimony might be later reduced or otherwise rendered unsatisfactory by the introduction of an element of uncertainty. *Donkin et al.* v. *The "Chicago Maru,"* (1916) 22 B.C.R. 529; 28 D.L.R. 804; 16 Ex. C.R. 501; 34 W.L.R. 472.

3. Memoranda of master of ship—Log.]—Certain manuscript notes made by the master of the rescuing ship and produced by him at the trial were under the circumstances (set out in the judgment) rejected as evidence as part of the ship's log. *The "Andrew Kelly"* v. *The "Commodore,"* (1919) 27 B.C.R. 439; 19 Ex. C.R. 70; 48 D.L.R. 213; (1919) 1 W.W.R. 1059.

4. Naval charts.] — Canadian Naval charts issued under the orders of the Minister of the Naval Service of Canada are accepted in the Admiralty Court of Canada to the same extent as Imperial Admiralty charts. *The King* v. *The "Despatch,"* (1916) 22 B.C.R. 496; 28 D.L.R. 42.

See CARRIERS.
See COLLISION.
See NEGLIGENCE.
See PRIZE COURT.
See SALVAGE.
See SHIPPING.

ADMISSIONS.

See CRIMINAL LAW.
See EVIDENCE.
See PRACTICE AND PROCEDURE.

ADOPTION.

See INFANTS.

ADULTERY.

See DIVORCE.

ADVERSE POSSESSION.

See POSSESSION.

ADVERTISEMENT.

See CONTRACT.
See TRADE MARKS.

AFFIDAVIT.

See EVIDENCE.
See PRACTICE.

AFFIRMATION.

See EVIDENCE.
See PRACTICE.

AGENCY.

See PRINCIPAL AND AGENT.

AGISTMENT.

See ANIMALS.

See BAILMENT.

AGREEMENT.

See CONTRACT.

OF GUARANTEE—*See* GUARANTEE.

OF LEASE—*See* LANDLORD AND TENANT.

SALE OF GOODS—*See* SALE OF GOODS.

SALE OF LAND—*See* VENDOR AND PURCHASER.

ALIENATION.

See REAL PROPERTY.

See TRUSTS.

ALIENS.

I. NATURALIZATION, 21.

II. DISABILITIES AND CAPACITIES, 22.

I. NATURALIZATION.

1. Change of domicile—Alien enemy by birth.]—The plaintiffs (brothers), who were Germans by birth, emigrated to the United States, where the older became naturalized. Some time later they came to British Columbia, where they lived a number of years, acquired property, and became naturalized citizens of Canada. Later they sold their property under an agreement of sale, and returned and made their home in the United States, the younger brother later declaring his intention of becoming an American citizen. In an action for the moneys due under the aforesaid agreement of sale:—Held, that the fact of their living permanently in the United States, and the younger brother declaring his intention of becoming an American citizen, does not affect their status as British subjects, and they are entitled to bring this action. *Newman* v. *Bradshaw*, (1916) 23 B.C.R. 492; (1917) 1 W.W.R. 1223; (1917) 2 W.W.R. 743.

2. Previous conviction.]—A judge will not necessarily refuse to recommend an alien for naturalization because he has previous undergone a sentence of imprisonment in default of paying a fine imposed for supplying intoxicating liquor to an Indian. *Re Bresnik*, (1920) 58 D.L.R. 233; 34 C.C.C. 167.

II. DISABILITIES AND CAPACITIES.

1. Alien enemy.]—An action by the administrator of the estate of a deceased person for the benefit of a dependent of the deceased cannot be maintained in the case of the dependent being an alien enemy. *Cremidas* v. *B.C. Electric Ry. Co.*, (1919) 27 B.C.R. 232; (1919) 2 W.W.R. 549.

2. Alien enemy by birth.]—The only exception to the rule that an alien enemy by birth can have no standing in a British Court is the case of an alien residing upon British soil under the King's peace (i.e., his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace pro hac vice). *Newman* v. *Bradshaw*, (1916) 22 B.C.R. 420; 28 D.L.R. 769; 10 W.W.R. 649; 33 W.L.R. 945.

3. Alien enemy — Residence of.]—An alien enemy resident in the United States cannot sue in a Canadian Court, but the proper procedure is to enlarge a motion to set aside a writ on such grounds to the trial, to which the plaintiffs may proceed at their own risk. *Ibid.*

See also *Newman* v. *Bradshaw*, (1916) 23 B.C.R. 492; (1917) 1 W.W.R. 1223; (1917) 2 W.W.R. 743.

4. Alien enemy — Defendant—Costs.]—An alien enemy may be sued during a state of war and if the action against him is dismissed the Court may award him costs. *Rydstrom* v. *Krom*, (1915) 21 B.C.R. 254; 21 D.L.R. 118; 31 W.L.R. 7; 7 W.W.R. 1290.

IMMIGRANTS—*See* IMMIGRATION.

DEPORTATION—*See* IMMIGRATION.

JAPANESE TREATY ACT—*See* CONSTITUTIONAL LAW.

LEGISLATION WITH REGARD TO—*See* CONSTITUTIONAL LAW.

ORIENTAL ORDERS IN COUNCIL VALIDATION ACT—*See* CONSTITUTIONAL LAW.

PROHIBITION AGAINST EMPLOYMENT OF CHINESE AND JAPANESE—*See* CONSTITUTIONAL LAW.

ALIMONY.

See DIVORCE.

ALLOTMENTS.

See COMPANY.

ALTERATION OF INSTRUMENTS.

See BILLS OF EXCHANGE.

See CONTRACTS.

See DEEDS AND OTHER INSTRUMENTS.

See WILLS.

AMBIGUITY.

See DEEDS AND OTHER INSTRUMENTS.

See WILLS.

AMENDMENT.

See CRIMINAL LAW.

See PLEADING.

See PRACTICE AND PROCEDURE.

ANIMALS.

1. Agistment — Death of animal.] — Where a pony is given into the sole care of an agister, and dies while in his charge, the onus is upon him to shew that the death of the pony was not due to his negligence. *Pye* v. *McClure,* (1915) 21 B.C.R. 114; 22 D.L.R. 543; 8 W.W.R. 538.

2. Agistment — Loss of animal.]—An agister is bound to take reasonable care of animals in his charge. If an owner demands an animal and the agister is not able to produce it, the onus is on him to shew that he took all reasonable care for the animal's safety. *Comstock* v. *Ashcroft Estates, Limited,* (1916) 23 B.C.R. 476 (1917) 1 W.W.R. 1412.

3. Hire of horse—Negligence.]—If a horse hired is taken out sound and brought back damaged there is an onus on the hirer to shew that the injury was not caused through his fault. He is bound to ride it as moderately and treat it as carefully as a man of common discretion would his own and if, in spite of this care and treatment, the horse is injured, the hirer is not responsible. *Reinseth* v. *Campbell,* (1920) 52 D.L.R. 357.

4. Branding of cattle.]—A conviction of an accused person for unlawfully impressing a brand other than the registered brand of the owner upon a calf without the consent of the owner thereof will be set aside in the absence of mens rea or evil intention or knowledge of the wrongfulness of the act on the part of the accused. *Rex ex rel. Maxson* v. *Dobbin,* (1929) 3 W.W.R. 176; 52 C.C.C. 342.

5. Wanton abuse and maltreatment of —Sheep Protection Act.]—Sec. 3 of the Sheep Protection Act cannot be invoked by the defence in an action for damages for the wanton abuse and maltreatment of an unlicensed dog within a protected district resulting in the dog's death, where such act is not bona fide and within the intention of the statute. In a case where two constructions may be put upon a statute, one reasonable and the other unreasonable, the Court will give effect to the former and have regard to the intention of the Legislature in passing the Act. *Wilgress* v. *Ritchie,* (1920) 28 B.C.R. 345; 52 D.L.R. 543; (1920) 2 W.W.R. 421.

6. Dogs — Sheep Protection Act.] — Under the Sheep Protection Act it is not necessary for the owner of the injured animal to prove that the dog which inflicted the injury had a previous mischievous propensity. *Rex ex rel. Bigrigg* v. *Williams,* (1930) 42 B.C.R. 175; (1930) 2 D.L.R. 493; (1930) 1 W.W.R. 292; 53 C.C.C. 88.

7. Dog — Destruction of fowls.]—The onus is upon the defendant to satisfy the Court of the peaceful nature of a dog which had destroyed fowls belonging to the plaintiff and the onus is discharged if it is shewn that the dog was a harmless puppy without vicious propensities. *Kennedy* v. *McIntosh and Bardsin,* (1927) 39 B.C.R. 161; (1927) 4 D.L.R. 747; (1927) 3 W.W.R. 315.

8. Bull—Unlawfully at large.]—A bull six months old which escapes from its owner's premises and enters the enclosure of a neighbour and therein causes injury is unlawfully at large within the meaning of the Animals Act. *Jacobson* v. *Schneider,* (1926) 38 B.C.R. 83; (1927) 1 D.L.R. 1006; (1927) 2 W.W.R. 257.

9. Cattle on range.]—Cattle running at large on the range are lawfully at large and if the cattle are killed on a railway track the railway company is liable under the Railway Act. *Bardgett* v. *Canadian Pacific Railway Co.,* (1916) 10 W.W.R. 810.

10. Leaving poisonous material on unguarded railway track — Injury to cattle.]—A mining company in the course of its business loaded lead ore on cars of a

railway company and at other times unloaded oats from cars at the same spot, the right-of-way not being inclosed. In the course of its operation particles of lead ore were allowed to drop on the right-of-way and a small quantity of oats was allowed to drop mixing with the ore. The plaintiff's cows which were allowed to run at large strayed on the right-of-way and eating the oats mixed with lead ore died from lead poisoning:—Held, that the evidence did not disclose liability on the part of the shipper or the railway company. *Dawson* v. *Paradise Mine and Canadian Pacific Railway Co.*, (1919) 26 B.C.R. 487; (1919) 1 W.W.R. 499.

11. Indian reserve — Railway — Cattle straying.] — The plaintiff's cow which was pastured on an enclosed area within an Indian reservation and adjoining the defendant company's right-of-way, made its way through the fence on to the right-of-way and was killed by a passing train. The cow was pasturing on the enclosed area by reason of a bargain made by the plaintiff with an Indian who had no authority to deal with the property:—Held, that the animal was "at large" within the meaning of sec. 210 (4) of the British Columbia Railway Act and being at large by the wilful act of the plaintiff he cannot recover. *Merriman* v. *Pacific Great Eastern Railway Co.*, (1922) 30 B.C.R. 457; (1922) 1 W.W.R. 935.

12. Swine unlawfully at large.]—Sec. 3 of the Animals Act prohibits an owner of swine from allowing them to be at large. The owner of such animals "unlawfully at large" within sec. 11 is liable thereunder for actual damage committed by them whether the injured party's fences are "lawful fences" as defined by the Trespass Act or not. *Bishop* v. *Liden*, (1929) 40 B.C.R. 556; (1929) 1 D.L.R. 998; (1929) 1 W.W.R. 402.

APPEALS.

I. Jurisdiction, 26.
- *A. Court of Appeal*, 26.
- *B. Supreme Court*, 29.
- *C. County Court*, 31.

II. What Appealable, 32.

III. Formal Conditions of Appeal, 34.
- *A. Finality of decision*, 34.
- *B. Time for appealing*, 36.
- *C. Extension of time for appeal*, 37.
- *D. Parties*, 41.
- *E. Notice of appeal*, 42.
  - 1. In general, 42.
  - 2. Grounds of appeal, 43.
- *F. Setting down*, 43.
- *G. Appeal books*, 45.
  - 1. Contents of, 45.
  - 2. Preparation of, 47.

IV. Preliminary Motions, 48.
- *A. In general*, 48.
- *B. Preliminary objections*, 48.

V. Hearing and Determination, 49.
- *A. Evidence*, 49.
- *B. What reviewable generally*, 50.
  - 1. Acting under judgments, 50.
  - 2. Interlocutory matters, 51.
- *C. Discretionary matters*, 51.
- *D. Questions not raised below*, 52.
  - 1. In general, 52.
  - 2. Jurisdiction, 52.
- *E. Review of facts*, 52.
- *F. What errors warrant reversal*, 56.
- *G. Argument on appeal*, 57.

VI. Judgment, 57.

VII. Costs, 58.
- *A. In general*, 58.
- *B. Following the event*, 59.
- *C. Good cause for depriving of*, 60.
- *D. Taxation of*, 60.

VIII. Security for Costs, 61.
- *A. In general*, 61.
- *B. Application for*, 61.

IX. Stay of Proceedings, 62.

X. Stay of Execution, 63.

XI. Supreme Court of Canada, 64.
- *A. Leave to appeal*, 64.
- *B. What appealable*, 66.
- *C. Matters pending appeal to Supreme Court*, 67.
- *D. Review of facts*, 67.

XII. Leave to Appeal to the Privy Council, 68.

XIII. Matters Pending Appeal to Privy Council, 69.

I. Jurisdiction.

A. Court of Appeal.

1. Extent of jurisdiction.]—The Court of Appeal for British Columbia is merely an Appellate Court and has no original jurisdiction except that set forth in the Court of Appeal Act, 1917, cap. 10. *In re Kwong Yick Tai*, (1915) 21 B.C.R. 127; 22 D.L.R. 323; 24 C.C.C. 28; 8, W.W.R. 808.

2. Summary conviction.]—The Court of Appeal Act being subsequent in date of passage to the Summary Convictions Act (R.S.B.C. 1911, cap. 218), the Court of

Appeal Act, in case of conflict, prevails, and it continues to prevail notwithstanding the subsequent re-enactment of the Summary Convictions Act. *Rex ex rel. Burrows* v. *Evans,* (1916) 23 B.C.R. 128; *Rex ex rel. Robinson* v. *Sit Quin,* (1918) 25 B.C.R. 362; (1918) 3 W.W.R. 316.

3. Summary conviction.]—The Court of Appeal has jurisdiction to hear an appeal from the decision of a Supreme Court judge quashing a conviction under the Summary Convictions Act on a stated case by a magistrate. *Rex* v. *Gartshore,* (1919) 27 B.C.R. 175; 49 D.L.R. 276; (1919) 3 W.W.R. 757.

4. Summary conviction.]—The Court of Appeal has jurisdiction to hear an appeal from the judgment of a County Court dismissing an appeal from a conviction of an accused by a stipendiary magistrate upon a charge of keeping or concealing on premises controlled by him wash suitable for the manufacture of spirits contrary to sec. 180 (f) of the Excise Act. *Rex* v. *Cheng Tong Seng,* (1927) 39 B.C.R. 157; (1928) 1 W.W.R. 33; 49 C.C.C. 79.

5. Summary conviction—Point of law.]—The Court of Appeal has jurisdiction to hear an appeal from a judgment of the County Court in an appeal taken from a conviction by a police magistrate on a question of law raised in the Court below. *Rex ex rel. Bigrigg* v. *Williams,* (1930) 42 B.C.R. 175; (1930) 2 D.L.R. 493; (1930) 1 W.W.R. 292; 53 C.C.C. 88.

6. Stated case.]—If there is an appeal on a question of law to a County Court judge the latter cannot after judgment state a case for the Court of Appeal. The appeal will be proceeded with in the ordinary way upon the points of law raised. *Rex* v. *Perro,* (1924) 34 B.C.R. 169; (1924) 4 D.L.R. 301; (1924) 2 W.W.R. 1006; 42 C.C.C. 384.

7. Winding-up Act—Appeal from refusal of order.]—Under sec. 101 of the Winding-up Act, an appeal lies from the refusal of a winding-up order, as it involves future rights. *Marston* v. *The Minnekahda Land Company,* (1918) 25 B.C.R. 372; 40 D.L.R. 76; (1918) 2 W.W.R. 471.

8. Winding-up Act — Disallowance of claim.]—The order of a judge setting aside the disallowance of a claim in proceedings under the Winding-up Act involving an amount in excess of $500 is appealable under sec. 101 (c) of the Act to the Court of Appeal on leave granted. *Re Gibson Mining Co. Ltd.,* (1923) 32 B.C.R. 360; (1923) 3 D.L.R. 1052; (1923) 3 W.W.R. 171.

9. Interpleader — Execution following judgment in divorce.] — The Court of Appeal has jurisdiction to hear an appeal from a judgment in an interpleader issue arising out of a seizure by the sheriff of the property of a co-respondent under an order against him for costs in a divorce action. *Laird v. Laird,* (1920) 28 B.C.R. 255; 51 D.L.R. 642; (1920) 3 W.W.R. 1.

10. County Court—Amount involved.]—The determining factor as to whether an appeal may be taken from the judgment of a County Court is the amount claimed by the complainant and not the amount recovered by the judgment. *Caskie* v. *Premier Mines,* (1921) 30 B.C.R. 116.

11. From order under Execution Act.]—The Court of Appeal has jurisdiction to hear an appeal from an order of a judge under sec. 28 of the Execution Act for the sale of the respondent's lands or to realize the amount payable under a judgment in a divorce action. *Allen* v. *Allen,* (1923) 32 B.C.R. 274.

12. Habeas corpus—Immigration matters—Civil proceedings.]—An order made by the Minister of Justice under the Immigration Act directing the warden of a gaol that on the expiration of his sentence the accused person be handed over to an officer authorized by a warrant of the Deputy Minister of Immigration for his deportation, is a civil proceeding under sec. 2 of the Court of Appeal Act Amendment Act, 1920, and the Court has jurisdiction to hear an appeal in habeas corpus proceedings resulting in the release of the accused person from custody. *In re Immigration Act and Pong Fook Wing,* (1923) 33 B.C.R. 47; (1923) 4 D.L.R. 1034; (1923) 3 W.W.R. 819, 1006; 41 C.C.C. 42. *Rex* v. *Wong Shee,* (1922) 31 B.C.R. 145; 66 D.L.R. 485; (1922) 2 W.W.R. 156; 37 C.C.C. 371. *Rex* v. *Jeu Jang How,* (1919) 27 B.C.R. 294; 59 S.C.R. 175; 50 D.L.R. 41; (1919) 3 W.W.R. 1115; 32 C.C.C. 103.

13. Habeas corpus—Criminal charge.]—An appeal from a refusal of a writ of habeas corpus arising out of a criminal matter is a criminal appeal and falls within the definition of Criminal Law assigned to the Dominion by sec. 91 of the B.N.A. Act and there is therefore no right of appeal in such a case. *Rex* v. *McAdam,* (1925) 35 B.C.R. 168; (1925) 4 D.L.R. 33; (1925) 3 W.W.R 257; 44 C.C.C. 155.

14. Habeas corpus — Opium and Narcotic Drug Act.]—The accused were convicted of having opium in their possession

without first obtaining a license, contrary to sec. 5a (2) of the Opium and Narcotic Drug Act (Can.) 122, cap. 36. On their application writs of habeas corpus were granted and the accused were discharged from custody:—Held, that the proceedings were criminal proceedings and therefore the Provincial Act giving an appeal from an order of discharge in habeas corpus is not applicable. The Court has no jurisdiction to hear the appeal. *In re Immigration Act and Mah Shin Shong*, (1923) 32 B.C.R 176; (1923) 4 D.L.R. 844; (1923) 1 W.W.R. 1365; 39 C.C.C. 401.

15. Criminal charge—Question of law.]—Clause (b) of sec. 1013 of the Criminal Code is meant to cover questions of law arising out of the proceedings at the trial based upon facts admitted or conclusively proved and not involving the appreciation or weighing of evidence by the Appellate Court. This is implied in the term "law alone" and leave to appeal is not required. *Rex* v. *Boak*, (1925) S.C.R. 525; (1925) 3 D.L.R. 887; 44 C.C.C. 218.

16. Criminal law—Questions of fact and of mixed law and fact.]—Clause (b) of sec. 1013 of the Criminal Code authorizes appeals on questions of fact and of mixed law and fact, and relates to matters in issue on the trial, the determination of which by the trial Court is challenged by the accused. In these cases leave of the Court of Appeal or a certificate of the trial judge that it is a fit case for appeal must be obtained. *Ibid.*

17. Injunction pending appeal.] — The Court of Appeal has inherent jurisdiction to grant an injunction to preserve rights pending an appeal. *Prevedoros* v. *Prevedoros*, (1927) 3 W.W.R. 755.

18. Bankruptcy.]—The Court of Appeal has jurisdiction to entertain an appeal from an order of a judge in bankruptcy made on appeal from the denial of the authorized trustee of the right of a creditor to rank as a secured creditor, the amount involved exceeding $500. *Apex Lumber Co.* v. *Johnstone*, (1925) 36 B.C.R. 81; (1925) 3 D.L.R. 1050; (1925) 3 W.W.R. 360.

B. Supreme Court.

1. Assessment appeal — Wrong basis adopted.]—Where a Court of Revision intends to confirm an assessment on a wholly wrong basis, a judge of the Supreme Court may interfere to prevent a palpable injustice, notwithstanding that the question raised would not be arguable before him on an appeal from the Court of Revision. *B.C. Mills Timber & Trading Co.* v. *Vancouver*, (1926) 39 B.C.R. 481; (1926) 2 D.L.R. 990; (1926) 2 W.W.R. 84.

2. Assessment appeal — Rehearing.]—An appeal from the decision of a Court of Revision under the Taxation Act is a rehearing and fresh evidence may be adduced. *In re McKenzie, Mann & Co. Ltd.*, (1915) 22 B.C.R. 15.

3. Assessment appeal — City of Vancouver—Basis of assessment.]—An appeal to a judge of the Supreme Court under sec. 56 of the Vancouver Incorporation Act, 1921, from a decision of the Court of Revision on an assessment is (as provided by subsec. 3 thereof) "limited to the question whether the assessment in respect of which the appeal is taken is or is not equal and rateable with the assessment of other similar property in the city having equal advantage of situation" and does not bring within its scope the provisions of sec. 39 of said Act. *In re Bell Irving Assessment*, (1924) 33 B.C.R. 496; (1924) 3 D.L.R. 31; (1924) 2 W.W.R. 557.

4. Small Debts Court.]—An appeal from the Small Debts Court is by way of rehearing and the Court has power to receive evidence on questions of fact even of witnesses not called at the trial. *Morgan* v. *Morgan*, (1931) 44 B.C.R. 480; (1931) 3 W.W.R. 144.

5. Assessment appeal—Condition precedent.]—It is a condition precedent to the right of appeal to the Court of Appeal from a judgment of the Supreme Court on appeal from a Court of Revision that a point of law was raised upon the hearing before the judge below. *Grand Trunk Pacific Development Co.* v. *City of Prince Rupert*, (1923) 32 B.C.R. 463; (1923) 3 W.W.R. 1275.

6. Male Minimum Wage Act—Order on petition for review—Appeal.] — Upon a petition to a judge of the Supreme Court under sec. 9 of the Male Minimum Wage Act to rescind an order made by the Board the judge dismissed the application to rescind the order and directed that the appeal from the order should be heard on a further date as a rehearing de novo of the matters considered by the Board:—Held, that the whole appeal brought by the petition to the Court below must be disposed of before an appeal can be taken to the Court of Appeal. *Merryfield & Dack* v. *Male Minimum Wage Board*, (1931) 44 B.C.R. 380.

7. Proceeds of execution against lands —Distribution by registrar — Appeal.]—

Where money realized from a sale of land by a judgment creditor is paid into Court it is to be distributed by the registrar to the persons to whom the sheriff would distribute it under the Creditors' Relief Act, and an appeal lies from his scheme of distribution under sec. 39 as it is the intention of the statute to substitute the registrar for the sheriff in such a case. *Caudwell* v. *George*, (1925) 35 B.C.R. 134; (1925) 2 D.L.R. 229; (1925) 1 W.W.R. 579.

C. County Court.

1. Summary Conviction Act — Nearest County Court.]—An appeal under sec. 77 of the Summary Convictions Act should be to the nearest County Court measured by a straight line regardless of convenience to travel. *Rex* v. *Holt*, (1925) 36 B.C.R. 391; (1926) 1 W.W.R. 47; 46 C.C.C. 40. *Rex* v. *Canadian Robert Dollar Co. Ltd.*, (1926) 37 B.C.R. 264; 47 C.C.C. 69. *Rex* v. *Conway*, (1929) 3 W.W.R. 268; 52 C.C.C. 161.

2. Summary Conviction Act — Nearest County Court—Transmission of order to Appellate Court.]—On an appeal by the Crown from the dismissal by a magistrate at Goldstream of an information laid for a contravention of the Game Act, it was held that Goldstream is sufficiently notorious for its situation to be taken judicial notice of by the judge in whose county it is situate, the nearest sittings being held by him at Victoria. Sec. 85 (1) of the Summary Convictions Act is merely directory, and the failure of the magistrate to transmit the order dismissing the information to the Court to which the appeal is taken does not deprive the appellant of his appeal properly brought by notice duly given. *Rex* v. *Zarelli*, (1931) 43 B.C.R. 502; (1931) 2 W.W.R. 108; 55 C.C.C. 314.

3. Summary conviction — Children of Unmarried Parents Act.]—An appeal from a conviction under the Children of Unmarried Parents Act should be taken to the County Court nearest to the place where the offence, namely the seduction, was committed. *Ferguson* v. *Taylor*, (1926) 37 B.C.R. 340; (1926) 3 W.W.R. 203; 46 C.C.C. 149.

4. Summary conviction — Trial de novo.]—An appeal from a summary conviction is a proceeding de novo. *Rex* v. *Jordan*, (1925) 35 B.C.R. 1; (1925) 2 D.L.R. 1119; (1925) 1 W.W.R. 799; 44 C.C.C. 23. *Rex* v. *Lauriente*, (1928) 3 W.W.R. 265.

5. Small Debts Court.]—Sec. 48 of the Small Debts Court Act provides that an appeal from the decision of a magistrate shall lie either to the nearest County Court or to a judge of the Supreme Court. An appeal from a decision of the Small Debts Court at Powell River taken in the County Court at Vancouver was quashed for want of jurisdiction, as there are other County Courts closer to where the trial took place than Vancouver. Held, further, that as the section reads "nearest County Court" it refers to the Court itself and not to the County Court District. *Parry* v. *Thomson*, (1931) 43 B.C.R. 461.

6. Question of procedure.] — The sections of the Small Debts Court Act, R.S.B.C. 1924, cap. 57, which provide for an appeal, do not apply to mere matters of practice or procedure in that Court, but to final "decisions" such as a judgment for the plaintiff on his claim or for the defendant dismissing the claim. Therefore an appeal does not lie from the dismissal by the magistrate of an application for the appointment of a receiver by way of equitable execution. *Davis* v. *Yoshida*, (1931) 3 W.W.R. 703.

II. What Appealable.

1. Company winding-up.]—The words "future rights" in subsection (a) of section 101 of the Winding-up Act apply only to rights that arise in the future and do not include present existing rights that may be the subject of determination in an action at a later date. *Hill* v. *The Canadian Home Investment Company, Limited*, (1915) 22 B.C.R. 301.

2. Appeal from order extending time for appeal.]—The Court will not entertain an appeal from an order granting extension of time to appeal. This is different from a refusal to extend the time for appealing in which case the Court might be justified in removing an obstacle which might stand in the way of an appeal being heard on the merits. *In re The Okanagan United Growers Limited and The Dominion Bank*, (1924) 34 B.C.R. 497; (1925) 2 D.L.R. 919.

3. Settlement of amount to avoid reference—Extra cursum curiae.]—The judgment in an action on a contract for work done and material supplied allowed two certain items as extras, the amount to be determined by a reference. The parties then agreed as to the amount of the items. The formal judgment, on being drawn, was assented to by the defendant, and recited:

"The parties hereto having settled the entire accounts between them on the basis of this judgment, and after making all proper deductions and allowances on both sides and it appearing from such accounts that the defendants are indebted to the plaintiff in the sum of," etc. The defendants appealed from the judgment and the plaintiff took the preliminary objection that there was no jurisdiction to hear the appeal by reason of the form in which the judgment was entered:—Held, that as the judgment states that the parties have settled the entire accounts after making proper deductions and allowances, the result of which a certain amount is owing, the judgment is extra cursum curiæ, and there is no appeal. *Royal Bank of Canada* v. *Skene and Christie,* (1918) 25 B.C.R. 318.

4. Benefit taken under judgment below.]—The plaintiff appealed to a County Court judge from the suspension of his license under the Produce Marketing Act by a Committee of Direction appointed under the Act. "The order annulling" the suspension of the license was only on the terms that the balance due for levies imposed on products marketed by the plaintiff under the Act should be paid into Court. Counsel for the Committee of Direction took the money out of Court and accepted the same in satisfaction of the levies. On appeal from the order annulling the suspension of the licence it was held that the appellant, having taken the benefit of the judgment below, is precluded from the right of appeal. *Coleman* v. *Interior Tree Fruit & Vegetable Committee of Direction,* (1930) 42 B.C.R. 499; (1930) 4 D.L.R. 800; (1930) 2 W.W.R. 784.

5. Taking benefit under order.]—Where a plaintiff obtained an order to amend a statement of claim, but was refused an order which he sought on the same application, for examination for discovery and for further production of documents, and took out one order disposing of the three applications, and amended in pursuance of such order, and appealed with respect to the applications dismissed, it was held that by so amending he had not taken a benefit under the parts of the order appealed from which prevented the appeal being entertained. *Woolworth Co. Ltd.* v. *Pooley,* (1925) 35 B.C.R. 324; (1925) 2 W.W.R. 481.

6. Jury less than statutory number—Consent of parties—Arbitration.]—On a trial with a special jury when seven men were on the jury the panel became exhausted and the parties agreed to go on with the trial with the seven jurors. On appeal, objection was taken by the respondent that as the Jury Act requires eight jurors, the jury that rendered the verdict must be regarded as arbitrators from whose verdict no appeal can be taken:—Held, that although the judge and seven jurymen as arbitrators had with the consent of the parties jurisdiction over the subject-matter, the proceedings are "extra cursum curiæ" and there is no appeal. *Loane* v. *The Hastings Shingle Manufacturing Company Limited and Black,* (1925) 35 B.C.R. 485; (1925) 3 D.L.R. 940.

7. Contempt of Court.] —An alleged contempt in the breach of an undertaking to pay money is a civil matter, and an appeal lies from a committal order for such contempt. *In re Kean and Bird,* (1927) 39 B.C.R. 169; (1927) 4 D.L.R. 561; (1927) 3 W.W.R. 369; 48 C.C.C. 363.

8. County Court—Interpleader issue.]—Under Order XIII., r. 7 of the County Court Rules, 1912, an appeal lies without leave from a County Court judgment in an interpleader issue where the value of the property involved is over $100. *Ritchie Contracting Co* v. *Brown,* (1915) 21 B.C.R. 89; 21 D.L.R. 86; 30 W.L.R. 723; 8 W.W.R. 84.

9. County Court — Consolidated claims.]—Where separate claimants each having a claim under $100, the aggregate exceeding that sum, joined together in issuing one writ of attachment under secs. 10 and 13 of the County Court Act and the claims were consolidated for trial and one judgment was given setting out the respective amounts due each of the claimants it was held that no appeal would lie without leave. *Douglas* v. *Mill Creek Lumber Co. Ltd.,* (1923) 32 B.C.R. 13; (1923) 1 D.L.R. 805; (1923) 1 W.W.R. 529.

III. Formal Conditions of Appeal.

A. Finality of Decision.

1. Interpleader issue.]—The decision of a judge on an interpleader issue is not a final judgment and an appeal must be taken within fifteen days. *Frumento* v. *Shortt, Hill & Duncan, Limited,* (1916) 22 B.C.R. 427.

2. Order refusing to set aside judgment.]—Where a motion by the defendant to set aside a judgment by default was dismissed, damages were assessed pursuant to the judgment by default and final judgment

entered. Thirty-five days later the defendant gave notice of appeal both from the final judgment and from the order refusing to reopen the case:—Held, that the order refusing to reopen was interlocutory and that the notice of appeal was out of time. *Chilliwack Evaporating & Packing Co.* v. *Chung*, (1917) 25 B.C.R. 90; (1918) 1 W.W.R. 870.

3. Definition of final order.]—A final order is one made on such an application or proceeding that for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. An order setting aside the writ and the judgment signed in default of appearance in an action against a partnership firm is an interlocutory and not a final order. *Bank of Vancouver* v. *Nordlund*, (1920) 28 B.C.R. 342.

4. Reference as to damages.]—When a Court decides the substantial question of liability and merely refers the assessment of damages to a referee, reserving nothing to itself, the judgment ought to be regarded as a final judgment, but where a reference is ordered to ascertain the quantity and value of timber improperly taken from lands within a certain period and the Court reserves to be disposed of by further order the costs of the reference and the question of the defendant's liability to the plaintiff with respect to the timber removed, the judgment must be regarded as an interlocutory one. *Mair* v. *Duncan Lumber Company*, (1927) 39 B.C.R. 260; (1928) 1 W.W.R. 108, 431.

5. Final disposition of rights of parties.]—A judgment which finally disposes of the rights of the parties leaving nothing further to be done except the taxation of costs to be added to the judgment debt, is a final and not an interlocutory judgment. *Miller* v. *Kerlin*, (1923) 33 B.C.R. 140.

6. Order dismissing action owing to agreement for arbitration.] — An order dismissing an action for damages for wrongful dismissal of an employee on the ground that the claim should have been submitted to arbitration under rule 65, Schedule B, of the Co-operative Associations Act, B.C. Stats. 1920, cap. 19 is an interlocutory order. *Downes* v. *Elphinstone Co-operative Association*, (1924) 35 B.C.R. 30.

7. Reference.]—When the Court decides the substantial question of liability in an action and merely refers the assessment of damages to a referee, reserving nothing to itself, the judgment should be regarded as a final judgment for the purposes of appeal. *Boslund et al.* v. *Abbotsford Lumber, Mining & Development Company, Limited*, (1925) 36 B.C.R. 386; (1925) 1 W.W.R. 475; (1927) 1 D.L.R. 279.

8. Refusal to set aside execution.]—An order made for the purpose of working out the rights of the parties after judgment is an interlocutory order and the party dissatisfied with the order must appeal within the time limited for appealing from interlocutory orders. *Mainland Potato Committee of Direction* v. *Tom Yee*, (1931) 43 B.C.R. 453; (1931) 1 D.L.R. 990; (1931) 1 W.W.R. 529.

9. Question reserved for further consideration.]—A judgment which decides the question of liability and directs the payment of money into Court but reserves for the further consideration of the Court the application and disposal thereof, is an interlocutory judgment. *Splan* v. *Barrett-Lennard*, (1931) 44 B.C.R. 371; (1931) 4 D.L.R. 686; (1931) 3 W.W.R. 41.

10. Remuneration of executor—Order for—Question of discharge reserved.]—Where an executor applies for an order fixing his remuneration and for his discharge, and an order is made for remuneration but reserving the question of his discharge for further hearing, the order is an interlocutory one. *In re Estate of John Henry Davies*, (1927) 38 B.C.R. 249.

B. Time for Appealing.

1. County Court.]—The time for taking an appeal from a judgment of the County Court to the Court of Appeal must be computed from the delivery of the judgment and not from the taking out of the formal order. *Shipway* v. *Logan*, (1915) 21 B.C.R. 595.

2. Delay in settling interlocutory order.]—Where an interlocutory order was made on November 12th, 1926, but owing to a dispute as to form was not signed or entered until November 25th a notice of appeal served on the following December 3rd was held to be out of time and the appeal was quashed. *In re Estate of John Henry Davies*, (1927) 38 B.C.R. 249.

3. Time a quo.]—The time for appealing against a judgment of the Supreme Court dismissing an action runs from the date of signing and entering, even though the judgment has been given on a motion by the plaintiff for judgment after a jury

trial. *Sale* v. *East Kootenay Power Co.*, (1931) 43 B.C.R. 336; (1931) 3 W.W.R. 112.

4. Interpleader.] — The character of interpleader proceedings requires that the parties should be active to bring them to finality. *Fraser* v. *Neas, Roddy* v. *Fraser*, (1924) 35 B.C.R. 70; (1925) 3 D.L.R. 547; (1925) 2 W.W.R. 614.

C. Extension of Time for Appeal.

1. Application for — Postponement if notice given.]—Where notice of appeal has been given for a certain sittings of the Court for which the case has not been set down, the Court may postpone the hearing until the following sittings. The proper practice is to apply to the Court for an extension of time, and then serve notice for the following sittings. *Gilbert* v. *Southgate Logging Co.*, (1915) 21 B.C.R. 7; 7 W.W.R. 1133.

2. Neglect of agent.]—Upon an application to extend the time for appealing from a judgment on the grounds that the solicitor's agent was lax in giving information as to the entry of judgment and that judgment had not been given on a supplementary application by the respondent to include in the judgment a special clause as to costs:—Held, that no distinction can be drawn between the laxity of an agent and that of the solicitor and as the supplementary motion could be disposed of by a separate order and did not in any way affect the completeness of the judgment appealed from, the extension should not be granted. *Frumento* v. *Shortt, Hill & Duncan, Limited,* (1916) 22 B.C.R. 427.

3. Grounds for relief — Interest of justice.]—An extension of time for serving notice of appeal will be granted when the interest of justice requires it. The term "interest of justice" refers generally to the merits of the case; it does not mean something connected with the default in giving notice. In order that such default may be relieved from, it must be the result of the special circumstances of the case. Although there has been a mistake or want of diligence in bringing the appeal yet justice may require that the extension be granted. *Wallingford* v. *Fisher,* (1927) 3 W.W.R. 740.

4. Delay due to lack of funds.]—Judgment was delivered dismissing an action on the 2nd of June, 1926. Notice of appeal was served on the defendants on the 3rd of September for the October sittings of the Court in Vancouver. The appeal not having been entered for hearing the defendants' solicitor wrote the plaintiffs' solicitor on the 11th of November following that he intended advising the defendants that the appeal was definitely and finally abandoned. The plaintiffs' solicitor immediately replied that he had just received instructions from the plaintiffs to apply to extend the time for appeal and for leave to set the case down for hearing at the next sittings of the Court at Victoria. The application was accordingly made on the 18th of November, 1926. The only excuse submitted for being out of time was that the evidence was very voluminous and costly and the plaintiffs lacked funds for prosecuting the appeal but were now in a position to proceed with the appeal:—Held, that in the circumstances the motion should be acceded to, that the extension should be granted and notice of appeal be given for the next Victoria sittings of the Court, the applicant to pay the costs of this motion and perfect his security for $500 before the 20th of December, 1926. *Knox and Lewis* v. *Hall et al.*, (1926) 38 B.C.R. 78.

5. Instructions from abroad.]—The appellants' solicitors who were instructed by the defendants' attorneys in Oregon advised an appeal. The Oregon attorneys enquired how much time they had in which to appeal and were advised that notice must be served within fifteen days from the date of judgment. The appellants' solicitors did not receive instructions to appeal until four days after the expiration of time for an appeal, the explanation being that a partner of the Oregon attorneys who had sole charge of the case was absent and had neglected to leave with his firm the solicitors' letter giving the information as to the time for appeal, and the said attorneys were under the impression that they could give notice at any time before the opening of the appeal:—Held, that in the circumstances the time should be extended for giving notice of appeal. *May* v. *Roberts,* (1929) 41 B.C.R. 182; (1929) 3 D.L.R. 370; (1929) 2 W.W.R. 449.

6. County Court.]—A County Court judge has no power to extend the time for hearing an appeal under marginal rule 967 of the Supreme Court Rules. The exercise by a judge of his jurisdiction under said rule is a judicial act and not a question of practice and procedure as contemplated by section 121 of the County Courts Act. *Shipway* v. *Logan,* (1916) 22 B.C.R. 410.

7. County Court — Jurisdiction.]—A County Court judge has no jurisdiction to make an order to extend the time for taking an appeal from his own Court to the Court of Appeal. Order XIX. rule 7 of the County Court Rules is confined to the enlargement or abridgement of time fixed by the County Court rules. *Fraser* v. *Neas, Roddy* v. *Fraser*, (1924) 35 B.C.R. 70; (1925) 3 D.L.R. 547; (1925) 2 W.W.R. 614.

8. Counsel not prepared.]—An application to adjourn the hearing of an appeal on the ground that counsel through pressure of work was unable to prepare his case, will be refused if objected to by opposing counsel. *McIlwee & Sons* v. *Foley Bros.*, (1917) 24 B.C.R. 532; (1918) 1 W.W.R. 222

9. Order in Chambers.] — A motion by the appellant had previously been made to the Court of Appeal, when four judges were sitting, to extend the time for delivery of appeal books and for leave to set down the appeal for the then sittings of the Court. Upon objection being taken to counsel for respondent reading his own affidavit in opposition to the motion, the Court divided equally as to whether he should be allowed to do so and two judges declined to take part in the hearing of the motion until other counsel appeared for the respondent. Later the Chief Justice of the Court of Appeal made an order in Chambers granting an extension of time for delivery of appeal books and for leave to set down the appeal for the sittings aforesaid. An application to the Court (five judges sitting) to set aside the order of the Chief Justice was dismissed. *Pioneer Lumber Company* v. *Alberta Lumber Company*, (1923) 32 B.C.R. 321; (1923) 3 W.W.R. 1098.

10. Illness of appellant and solicitor.]—An application to extend the time for giving notice of appeal after the expiration of the statutory period will not be granted if there is reasonable doubt of the soundness of the ground upon which the application is made. Where, on such an application, the excuse for delay was the illness of the applicant and of her solicitor the evidence in support must shew precisely that the severity of the illness and the period it covered reasonably precluded the possibility of giving notice of appeal within the statutory period. *Rolston* v. *Smith*, (1923) 33 B.C.R. 235.

11. Delay from reasonable cause.]—Where money is paid into Court by a bank under a garnishee order, the bank suggesting that it had been held by the defendant in trust for third parties, notwithstanding which an order is made for payment out to the plaintiff, and the parties then, recognizing that the order could not stand if the moneys belonged to third parties, endeavour to ascertain by correspondence who the actual owners are before going to the expense of an appeal, and in the meantime the time for giving notice of appeal expires, an application to extend the time for giving notice of appeal will be granted. *Patton* v. *Hartley: Bank of Montreal, Garnishee*, (1917) 24 B.C.R. 5; (1917) 2 W.W.R. 234.

12. Delay in obtaining approval of appeal books.]—Judgment was delivered in an action on the 29th of March, 1926. Notice of appeal was served on the 7th of June for the sittings of the Court of Appeal at Vancouver on the 5th of October, 1926. The appeal book was submitted to the respondents' solicitors at Victoria for approval on the 30th of September, was returned duly approved on the same day and immediately sent to the registrar at Vancouver for entry on the list of appeals. Finding that the book had not been approved by the registrar at Victoria as required, it was sent back for his approval and did not again arrive at the Vancouver registry until the 4th of October. On motion to the Court of Appeal for an order extending the time and that the appeal be entered and set down for that sittings of the Court:—Held, that in the circumstances the time should be extended for setting down the appeal, the appellant to pay the costs of the motion. *Young* v. *Cross & Co. and O'Reilly*, (1926) 38 B.C.R. 49; (1927) 1 D.L.R. 989; (1927) 1 W.W.R. 537.

13. Necessary delay in obtaining instructions.]—Upon an application under the Winding-up Act, R.S.C. 1906, cap. 144, for an extension of the time within which to appeal, such time having expired, it is necessary to shew that the intention to appeal was formed within the time limited, or that there was difficulty in communicating with clients and obtaining instructions. *In re Winding-up Act. B.C. Securities* v. *Mutual Life Assurance Co.*, (1918) 1 W.W.R. 733.

14. Neglect of solicitor — Exceptional circumstances.]—An application to extend the time for appealing is on a different footing to an application to extend the time to set down an appeal. The first takes away from the judgment creditor the benefit of a statutory limitation and an extension of

time would open to further litigation a judgment which but for the extension would be inassailable; the second has to do with practice and procedure and can, where an extension should be granted and where the opposite party is not otherwise prejudiced, be compensated for by costs. While cases may arise where there has been a mistake or dilatoriness of solicitors and yet justice may require that an extension be granted, only very exceptional circumstances will justify an extension of time for bringing an appeal. *Fraser* v. *Neas; Roddy* v. *Fraser*, (1924) 35 B.C.R. 70; (1925) 3 D.L.R. 547; (1925) 2 W.W.R. 614.

15. When granted—Interests of justice.]—On an application for an order extending the time for giving notice of appeal the general rule is that leave to appeal should be given when "the interests of justice require that course to be adopted" having regard to the special circumstances of the case. *Splan* v. *Barrett-Lennard*, (1931) 44 B.C.R. 371; (1931) 4 D.L.R. 686; (1931) 3 W.W.R. 41.

16. Security for costs—Delay in furnishing.]—Where an appellant has not furnished security for costs pursuant to demand, and the respondent has not had sufficient time in which to make effective his order for security, the Court of Appeal may postpone the hearing by putting the case in a lower place on the list, where the extension can be made without great prejudice to the appellant. *Scott* v. *City of Nanaimo*, (1924) 33 B.C.R. 344.

17. Order extending time for appeal.]—A Court of Appeal will not reverse an order extending the time for appeal. *In re The Okanagan United Growers Ltd. and The Dominion Bank*, (1924) 34 B.C.R. 497; (1925) 2 D.L.R. 919.

D. Parties.

Parties interested.] — Any interested party, who has been served with a petition to a judge in Chambers under section 114 of the Land Registry Act, is, on appeal from the decision given on the hearing, entitled to notice of, and to appear upon the settlement of the appeal book before the registrar. All material before the judge below should be included in the appeal book. *In re Land Registry Act and Granby Consolidated Mining, Smelting & Power Company Limited and the Registrar-General of Titles*, (1918) 26 B.C.R. 297.

E. Notice of Appeal.

1. In General.

1. Notice of appeal—Omission of date.] Where notice of appeal was given for the Vancouver sittings and the date of hearing the appeal was omitted from the notice, but the following Vancouver sittings of the Court were out of time, and no steps were taken to set the case down for hearing at the previous sittings of the Court in Victoria, at which sittings the hearing of the appeal would have been in time, the notice of appeal will on motion be discharged. *Harris* v. *Mission Land Company, Limited*, (1915) 22 B.C.R. 11.

2. Cross-appeals—Notice of.] — A respondent who seeks to have a judgment varied on a point in which the appellant may be interested may proceed by notice under rule 870. *Allan* v. *McLennan*, (1916) 23 B.C.R. 515.

3. Service on solicitor.]—Where there is no rule of Court such as r. 3 of Order VII., applicable to the case, then if there remains nothing to be done or to be worked out in the Court appealed from, the retainer of the solicitor is at an end and he cannot without fresh instruction accept service of a notice of appeal. *Sunder Singh* v. *McRae*, (1922) 31 B.C.R. 67; (1922) 65 D.L.R. 392; (1922) 2 W.W.R. 392.

4. Substitutional service.]—On appeal by the Crown from an order releasing prisoners on habeas corpus proceedings, an order for substitutional service of the notice of appeal will be granted where after diligent search, officers of the Crown have been unable to ascertain the whereabouts of the respondent. *Rex* v. *Lee Park*. *Rex* v. *Lee Hing Leong*, (1923) 33 B.C.R. 158.

5. Notice by litigant in person—Address for service omitted.]—A solicitor's retainer in the Court below does not entitle him to take an appeal to the Court of Appeal and where an unsuccessful litigant has not retained a solicitor after the case has been decided by the trial judge he may file a notice of appeal in person and the validity of such notice is not affected by his omission to give an address for service. *Langan* v. *Simpson* (1919) 27 B.C.R. 504.

6. Time.]—The appellants were given liberty to withdraw their appeals and serve fresh notices by a certain date falling on a Sunday:—Held, that the notices could be properly served on the following Monday. *Rex* v. *Christian Community Universal Brotherhood Ltd.*, (1931) 1 W.W.R. 255.

2. Grounds of Appeal.

1. Amendment.]—A new ground of appeal may, on application, be added to the notice of appeal where the new ground turns upon facts shewn at the trial; but if it appears during the argument that the amendment should not have been made, it will be struck out. *Tai Sing Company* v. *Chim Cam et al.*, (1916) 23 B.C.R. 8; 27 D.L.R. 528; (1916) 10 W.W.R. 460.

2. Amendment on hearing.]—The plaintiff being the mortgagee of land became owner of the mortgaged premises and sold the same to a third party, thereby putting it out of his power to reconvey in case of redemption. It was held on appeal that he was precluded from suing upon a covenant or other promise to pay for any part of the debt secured by the mortgage. At the hearing of the appeal the plaintiff applied to add a ground of appeal to the effect that a certain portion of the indebtedness sued on was not covered by the mortgage and could therefore be recovered:—Held, that as the point was not pleaded or raised in the Court below and the parties had throughout the litigation treated the security as one for the whole indebtedness, the application should be refused. *Royal Bank of Canada* v. *McLeod*, (1919) 27 B.C.R. 376; 48 D.L.R. 500; (1919) 3 W.W.R. 544.

F. Setting Down.

1. Appeal not set down — Postponement.]—Where notice of appeal has been given for a certain sittings of the Court for which the case has not been set down, the Court may postpone the hearing until the following sittings. The proper practice is to apply to the Court for an extension of time, and then serve notice for the following sittings. *Gilbert* v. *Southgate Logging Co.*, (1915) 21 B.C.R. 7; 7 W.W.R. 1133.

2. Failure to set down.]—Even although there may be gross negligence on the part of the appellant's solicitor in obtaining approval of appeal books and setting an appeal down for hearing, the Court will in its discretion grant an extension of time where it can be done without prejudice to the respondent, but in such a case the appellant should pay the costs of the application. *Darrall* v. *Cedar Creek Mining Co.*, (1923) 33 B.C.R. 43.

3. Failure to set down. — Notice of appeal having been given, the appellant on the fourth day before the sittings submitted an appeal book to the respondent's solicitors for approval. In the absence of the member of the firm who had the conduct of the case, his partner refused to approve, intimating that he knew nothing of the case and it would be necessary to wait for the return of his partner, but that he would, however, take no advantage of failure to get the case down in time owing to the delay occasioned by the absence of his partner. On the day before the sittings of the Court, appellant's solicitor, finding the book had not as yet been approved, gave notice of motion to extend the time for entering appeal. This was opposed by respondent, the solicitor denying that he had given any undertaking not to take advantage of failure to enter the appeal in time. The application was refused by the Court, and appellant then made a further application on new material, which was also refused. Respondent then moved for a declaration of abandonment of the appeal, which was opposed by the appellant who again applied for an extension of time for entering the appeal:—Held, that in the circumstances the application for a declaration of abandonment of the appeal be refused, and that an extension of time be granted for entering the appeal. *B.C. Independent Undertakers, Limited* v. *Maritime Motor Car Company, Limited (No. 1)*, (1917) 24 B.C.R. 300.

4. Failure to set down.] — On giving notice of appeal, an appeal book was left with the respondents' solicitor for approval when appellant was advised the book would be approved upon security for costs being put up. Nothing further was done for four weeks, when appellant on the fourth day prior to the last day for setting the case down, called for the appeal book. The book had been mislaid in respondents' office but appellant was reminded that security for costs had not been put up. Appellant then perfected the security and submitted another copy of the appeal book which was approved and returned to the appellant, who, on the following day (the day prior to the last day for entry), applied to the registrar at Vancouver for entry of the appeal, but was advised the books had to be approved by the registrar at Nanaimo. They were immediately sent to Nanaimo for approval but arrived back in Vancouver three days late. Application was then made to set the case down for hearing:—Held, that as the parties were at arm's length, the failure of the appellant to send the books to Nanaimo in time for their return and entry was no

excuse for failure to comply with the statute and the application should be refused. *Bouch and Bouch* v. *Rath*, (1918) 26 B.C.R. 320.

5. Delay in settling appeal book.]—When notice of appeal has been given and the appellant is in default in setting the appeal down for hearing owing to a delay in the settlement of the appeal book, the Court may relieve the appellant and extend the time. *Gold* v. *Evans*, (1920) 29 B.C.R. 81.

6. Application to set down.]—An application affecting the list of appeals should be made to the Court when the Court is sitting, but when not sitting to a judge in Chambers. *Eddy* v. *The Canadian Pacific Railway Company*, (1915) 22 B.C.R. 294.

G. Appeal Books.

1. Contents of.

1. Addresses of counsel.]—It is the duty of the registrar not to allow anything in an appeal book that is not concerned in the appeal. Addresses of counsel at the conclusion of the evidence should therefore be excluded unless there is some ground of appeal founded upon the address of counsel. *Willard* v. *International Timber Co.*, (1918) 25 B.C.R. 210.

2. Recommendations of assessors.]—Where a trial takes place before a judge assisted by assessors, and the assessors have given their recommendations to the judge, parties appealing from the judge's decision are not entitled to the assessors' recommendations for use on the appeal. *The Westholme Lumber Company, Limited* v. *Corporation of the City of Victoria et al.*, (1916) 23 B.C.R. 178.

3. Judge's notes.] — Upon notice of appeal being given, the trial judge should, on application, produce his notes of evidence taken on the trial. *Bouskill* v. *Williams*, (1919) 27 B.C.R. 25; (1919) 2 W.W.R. 546.

4. Judge's notes—Uncertainty of supplementary notes.] — Where solicitors expect to appeal it is their duty to have the evidence taken in the Court below so that it can be brought before the Court of Appeal. *Dockendorff* v. *Johnston and Stolliday*, (1924) 34 B.C.R. 97; (1924) 3 W.W.R. 207.

5. Judge's notes — Evidence omitted from—Affidavits.]—A motion by the appellant to the Court of Appeal to admit affidavits disclosing the evidence given at the trial before the County judge on the ground that the judge's notes obtained did not sufficiently set out in evidence, was adjourned in order to give the appellant an opportunity to apply to the County judge to supplement his notes. The County judge refused to accede to this on the ground that his memory would not permit his doing so. The appellant then renewed his application to admit the affidavits:—Held, that where the evidence cannot otherwise be obtained it may, in a proper case, be supplemented from other sources, and that in the special circumstances of this case the affidavits should be admitted. It is very dangerous to admit extraneous evidence and a motion to be allowed to do so should be acceded to with great caution. *Kyle* v. *Taylor*, (1926) 38 B.C.R. 72; (1927) 1 D.L.R. 777; (1927) 1 W.W.R. 466.

6. Judge's notes—Amendment of.]—Any party to an action, dissatisfied with the settlement of an appeal book by the registrar, may go to the County Court judge who can make any amendment to his notes that he sees fit, but his action is not in the nature of an order or decree from which there is a right of appeal under section 116 of the County Court Act. The hearing of an appeal may proceed in the absence of the notes of the County Court judge and it is for the Court in each case to say what satisfies it when it cannot get the best evidence of what took place. *Robertson* v. *Latta*, (1915) 21 B.C.R. 597.

7. Judge's notes.]—There is no duty cast upon a judge of the County Court to take notes of the evidence on the trial of an action. Where it appears from the learned judge's statement that his notes were so imperfect and fragmentary that they would not only be of no use but misleading to the Court of Appeal, an order will not be made directing the judge to furnish a copy of his notes. *Welch* v. *Grant*, (1920) 28 B.C.R. 367; (1920) 3 W.W.R. 388.

8. Copies of letters.]—Copies of letters put in as exhibits on the trial should always contain the signature of the writer, and on appeal should be so copied into the appeal books. *Cunliffe* v. *Planta*, (1920) 28 B.C.R. 490; 54 D.L.R. 196; (1920) 3 W.W.R. 898.

9. Relevant material.] — The registrar with the assistance of the parties should keep appeal books within proper limits and have included in them only such material as is relevant to the appeal. *Morton* v. *The Vancouver General Hospital*, (1922) 31 B.C.R. 141; (1923) 1 D.L.R. 854; (1923) 1 W.W.R. 423.

10. Relevant material.] — All relevant material before the Court below should be in the appeal book. *In re Land Registry Act and Granby Consolidated Mining, Smelting & Power Co. Ltd.*, (1918) 26 B.C.R. 297.

11. Ex post facto judgment.]—Reasons for judgment handed down by the trial judge after notice of appeal was given cannot form part of the case on appeal and should be struck out of the appeal book. *Gould* v. *Thompson*, (1923) 32 B.C.R. 481; (1924) 1 W.W.R. 191.

12. Notes of evidence not available.]—Upon the hearing of a petition for the adoption of a child under the provisions of the Adoption Act, an application for the presence of an official stenographer to report the proceedings in shorthand was refused:—Held, on appeal, that as it is impossible to dispose of the appeal on the evidence before the Court, the case should be sent back to a judge of the Supreme Court to hear the whole matter in accordance with the practice and procedure of the Court. *Painter* v. *McCabe*, (1927) 39 B.C.R. 249; (1928) 2 D.L.R. 13; (1928) 1 W.W.R. 149.

13. Question of law—Inclusion of evidence.]—Where a point of law only is involved it is improper to include in the appeal book evidence not having a direct bearing thereon. *Canadian Credit Men's Trust Association* v. *Johnston*, (1931) 44 B.C.R. 354; (1931) 4 D.L.R. 569; (1931) 3 W.W.R. 33.

2. Preparation of.

1. Approval of by respondent.]—It is the duty of a solicitor to see that an appeal book contains all material required on the appeal before approving of same. Where an appeal book is approved by respondent's solicitor "subject to insertion of minutes as enclosed" and later the registrar settles the appeal book without including the minutes, the presumption is that the appeal book was properly settled, and the minutes cannot be used on the appeal. *Tobin* v. *Commercial Investment Company, Limited, Douglas, Sargison and White*, (1916) 22 B.C.R. 481; 27 D.L.R. 387; 34 W.L.R. 23; 10 W.W.R. 123.

2. Additional cost of extra copy.]—On appeal to the Court of Appeal an appellant may either print or type the appeal book, but if he adopt the more expensive method he will, on a party and party taxation, be allowed only for the least expensive mode of preparing the books. The taxing officer may, however, take into consideration difficulties in special cases of having the appeal book printed. The cost of an extra copy of the appeal book, supplied at the request of the unsuccessful party, will not be allowed on a party and party taxation. A copy of the transcript of evidence supplied by the reporter, made for incorporation in the draft appeal book, will not be allowed on a party and party taxation where the transcript itself could have been used for that purpose. *Canadian Financiers Trust Company* v. *Ashwell*, (1918) 25 B.C.R. 473.

3. Settling—Parties interested.]—Any interested party who has been served with a petition to a judge in Chambers under sec. 114 of the Land Registry Act, is, on appeal from the decision given on the hearing, entitled to notice of, and to appear upon the settlement of the appeal book before the registrar. *In re Land Registry Act and Granby Consolidated Mining, Smelting & Power Co. Ltd.*, (1918) 26 B.C.R. 297.

IV. Preliminary Motions.

A. In General.

1. Chambers.] — Applications in the Court of Appeal should, where there is jurisdiction, be disposed of at Chambers except when it is proposed to interfere with the list during the sittings, in which case motion must be made to the Court. *Langan* v. *Simpson*, (1919) 27 B.C.R. 504.

2. Application affecting list of appeals.]—An application affecting the list of appeals should be made to the Court when the Court is sitting but when not sitting to a judge in Chambers. *Eddy* v. *The Canadian Pacific Railway Company*, (1915) 22 B.C.R. 294.

B. Preliminary Objections.

1. Notice of motion—Grounds.]—When a preliminary objection is taken that an appeal is out of time, the respondent will be held strictly to the grounds taken in his notice of motion. *Wardroper* v. *Stewart-Moore*, (1917) 25 B.C.R. 69.

2. Lack of jurisdiction in Court below.]—In the case of an appeal from the County Court, if it appears that there was no jurisdiction in the Court below to hear the case and that it should have been transferred to the Supreme Court under Order IV., r. 13, of the County Court Rules, the Court of Appeal will not dismiss the appeal, but will make the order that should have been made

below. As the appellant did not raise the question of jurisdiction in the Court below, no order was made as to the costs of the appeal. *Giannini* v. *Cooper*, (1918) 26 B.C.R. 382; (1918) 3 W.W.R. 642.

3. Appeal from interlocutory order.]—Where an appellant moves for leave to withdraw an appeal from an interlocutory order, which has been made unnecessary, owing to the appellant having succeeded on the final disposition of the action, it was held that the appeal should be struck off the list but there should be no order as to costs thereof or of the motion. *James Thomson & Sons* v. *Denny*, (1917) 25 B.C.R. 29; 39 D.L.R. 421; (1918) 1 W.W.R. 435.

V. Hearing and Determination.

A. Evidence.

Fresh Evidence on Appeal.

1. Interlocutory appeal.]—A party intending to offer new evidence on an interlocutory appeal which he may do without special leave must give notice thereof in his notice of appeal and file the material intended to be used. *Royal Bank of Canada* v. *Pacific Bottling Works*, (1916) 23 B.C.R. 463; (1917) 2 W.W.R. 227.

2. Matters occurring after date of decision appealed from.]—Under Rule 868 the Court of Appeal has no discretion to refuse to admit further evidence to be given without special leave in any case as to matters which have occurred after the date of the decision appealed from. *Buscombe Securities Co. Ltd.* v. *Windebank*, (1920) 3 W.W.R. 332.

3. Inadvertently omitted at trial.]—An application to the Court of Appeal to allow in evidence a document that was in the pocket of a witness when examined in the Court below but inadvertently overlooked by counsel, will be refused. *J. A. McIlwee & Sons* v. *Foley Bros.*, (1917) 24 B.C.R. 532; (1918) 1 W.W.R. 222.

4. Matter not pleaded.] — An application to the Court of Appeal to introduce new evidence on a matter not pleaded will be refused. *Paten* v. *Sigmore*, (1919) 27 B.C.R. 157.

5. Practice.]—On appeal from an order that a writ of mandamus do issue directed to the Minister of Lands commanding him to determine the rights of an applicant for a lease of a certain lot and of an objection thereto, and to proceed in accordance with section 139 of the Land Act, an application to put in an affidavit of the minister to shew what actually took place before him was refused. *The King* v. *The Minister of Lands*, (1926) 37 B.C.R. 106; (1926) 2 D.L.R. 249; (1926) 1 W.W.R. 819.

6. Diligence.]—On an application to the Court of Appeal to introduce fresh evidence, due diligence must be shewn, and the application should not be granted unless supported by affidavits shewing the evidence desired to be used and setting forth when and how the applicant became aware of its existence and what efforts were made to have it adduced at the trial. *Overn* v. *Strand et al.*, (1930) 43 B.C.R. 309.

7. Diligence.]—When it appears that by using due diligence, evidence sought to be admitted on motion before the Court of Appeal could have been procured for the hearing in the Court below, where a final order was made, the application will be refused. *Newton* v. *Bauthier*: *Shaw, Assignee*, (1915) 21 B.C.R. 4; 24 D.L.R. 890; 8 W.W.R. 930.

B. What Reviewable Generally.

1. Acting Under Judgments.

1. Settlement of amount to avoid reference.]—Where after trial of an action a reference was ordered to take certain accounts and the final judgment recites that the parties have settled accounts between themselves after making just deductions and allowances the result shewing a certain amount owing by the defendant to the plaintiff, the judgment is extra cursum curiæ and there is no appeal. *Royal Bank of Canada* v. *Skene and Christie*, (1918) 25 B.C.R. 318; (1919) 3 W.W.R. 1071.

2. Waiver by taking benefit under judgment appealed from.]—If a party appeals from a judgment that is in his favour for a portion of the amount claimed, and pending the appeal he proceeds upon the judgment and obtains the relief granted thereby, he has precluded himself from prosecuting the appeal. *Atlas Record Company, Limited* v. *Cope & Son, Limited*, (1922) 31 B.C.R. 432. *Reid* v. *Galbraith*, (1927) 38 B.C.R. 287; (1927) 2 D.L.R. 857; (1927) 1 W.W.R. 780; (1927) 2 W.W.R. 852.

3. Taking benefit under judgment below.]—An appellant having taken the benefit of the judgment of the Court below is precluded from the right of appeal. *Coleman* v. *Interior Tree Fruit and Vegetable*

Committee of Direction, (1930) 42 B.C.R. 499; (1930) 4 D.L.R. 800; (1930) 2 W.W.R. 784.

2. Interlocutory Matters.

1. Liberty to apply.]—The defendant obtained an order to examine a witness de bene esse which included a clause "that the plaintiff may at any time not less than two weeks before the date of trial apply to discharge this order":—Held, that there was a right of appeal from the order without first resorting to the Court below under said clause. *Dominion Trust Co. and Gwynn* v. *Royal Bank of Canada*, (1920) 28 B.C.R. 260.

C. Discretionary Matters.

1. Judicial discretion.]—Where an application was made to set aside a judgment under sec. 110 of the County Court Act by reason of the applicant's solicitor being at fault, and the judgment is set aside ex debito justitiæ on the ground of irregularity of the judgment:—Held, on appeal, that as there was no exercise by the judge below of his judicial discretion as required under said section the order should be set aside. *Eddy* v. *The Canadian Pacific Railway Company*, (1915) 22 B.C.R. 294.

2. Judicial discretion.]—An order of the trial judge for an enquiry as to damages owing to the granting of an interim injunction for which the plaintiff gave his undertaking, being within the discretion of the judge, will not be interfered with unless the Court of Appeal is convinced that the trial judge was entirely wrong. *Royal Bank* v. *Whieldon*, (1916) 23 B.C.R. 436; (1917) 2 W.W.R. 58.

3. Discovery—Application for.]—When a judge to whom an application has been made for further and better particulars of paragraphs contained in a statement of claim makes an order postponing the defendant's application until after the defendant has made discovery that order ought not to be interfered with on appeal unless the judge has exercised his discretion upon an erroneous principle. *Blygh* v. *Solloway, Mills & Co.*, (1930) 42 B.C.R. 531; (1930) 4 D.L.R. 582; (1930) 2 W.W.R. 208.

4. Striking out plea.]—It is not usual for a Court of Appeal to set aside orders in the exercise of discretion. Where an order has been made by a trial judge striking out a plea as embarrassing and scandalous and not relevant to the issue the Court of Appeal will not set aside his order unless there has been a very substantial injustice. *Maddison* v. *Donald H. Bain Ltd.*, (1928) 39 B.C.R. 460; (1928) 3 D.L.R. 33.

5. Grounds for interference.]—Where the rules confer wide discretion in a judge hearing a motion his discretion will not be interfered with unless in very strong and special circumstances based upon the absence of any materials to ground a discretion or error in principle. *American Securities Corporation* v. *Woldson*, (1927) 39 B.C.R. 145; (1927) 4 D.L.R. 1087; (1927) 3 W.W.R. 756; (1928) S.C.R. 432.

D. Questions Not Raised Below.

1. In General.

Improper evidence not objected to.]—Where evidence has been improperly admitted before a judge without a jury, even when no objection has been there raised, it is the duty of the Court of Appeal to reject it and to decide the case on legal evidence. *Royal Bank of Canada* v. *Pound*, (1917) 24 B.C.R. 23.

2. Jurisdiction.

Municipal assessments—Point of law not taken in Court below.]—There is no jurisdiction to hear an appeal within section 228 (7) of the Municipal Act from the decision of a County Court judge on an appeal from the Court of Revision in respect of the assessment of land unless the point of law has been clearly brought out for adjudication in the Court below. *Quinn* v. *City of Salmon Arm*, (1928) 40 B.C.R. 111; (1929) 4 D.L.R. 1085.

E. Review of Facts.

1. Reversing trial judge.]—In an action to set aside a conveyance on the ground of fraud, but not so found by the trial judge, the Court of Appeal being a Court of rehearing, should overrule the finding of the trial judge, if on full consideration of the case they come to the conclusion that the judgment was wrong. *The Komnick System Sandstone Brick Machinery Co.* v. *Morrison*, (1920) 28 B.C.R. 207.

2. Reversing trial judge.]—In an action for damages for negligence, it is for the

trial judge to decide upon the evidence whether there is any case to meet, and in order to reverse, a Court of Appeal must not merely entertain doubts whether the decision below is right but be convinced that it is wrong. *Stuart* v. *Moore*, (1927) 39 B.C.R. 237; (1927) 4 D.L.R. 639.

3. Reversing trial judge.]—The usual practice of not interfering with the findings of fact of the trial judge should not be disregarded unless the evidence coerces the judgment of the Appellate Court to do so. *McCoy* v. *Trethewey*, (1929) 41 B.C.R. 295; (1929) 4 D.L.R. 240; (1929) 3 W.W.R. 381.

4. Reversing trial judge — Credibility of witnesses.]—Unless it can be shewn that the trial judge has taken an erroneous view of the facts, or acted under some misapprehension, or clearly come to an unreasonable decision about the facts, an Appellate Court will not overrule his decision on matters of fact which depend mainly on the credibility of witnesses. *Vancouver Milling Co.* v. *Farrell*, (1922) 67 D.L.R. 237.

5. Reversing trial judge — Presumption.]—Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and in order to succeed on the appeal it is incumbent on the appellant to shew that the trial judge had no sufficient evidence before him which would admit of his reasonably finding as he did. *Huntting Merritt Lumber Co.* v. *Coyle*, (1922) 67 D.L.R. 655. *Chong* v. *Gin Wing Sig*, (1917) 2 W.W.R. 183.

6. Reversing trial judge—Demeanour of witnesses.]—A trial judge having the opportunity of observing the demeanour of witnesses is at liberty to disregard the evidence of witnesses whom he does not believe and to accept the evidence of witnesses whom he believes to be credible, and in such a case his decision will in general be upheld unless the Appeal Court is satisfied that the trial judge is clearly wrong. *Chisholm* v. *Aird*, (1930) 43 B.C.R. 354. *Galt* v. *Frank Waterhouse & Co. of Can. Ltd.*, (1927) 39 B.C.R. 241; (1927) 4 D.L.R. 1005. *Calbick* v. *B.C. Electric Ry. Co.*, (1929) 41 B.C.R. 17; (1929) 2 D.L.R. 64. *Murdoch* v. *Cons. Mining & Smelting Co.*, (1928) 39 B.C.R. 386; (1928) 1 D.L.R. 853; (1928) 1 W.W.R. 578. *Motion* v. *Jure*, (1928) 39 B.C.R. 354; (1928) 2 D.L.R. 79. *R.* v. *Nozaki*, (1926) 37 B.C.R. 305; (1926) 4 D.L.R. 955; (1926) 3 W.W.R. 332; 46 C.C.C. 168.

7. Reversing trial judge—Credibility of witnesses.]—The advantage of the trial judge in seeing the witnesses is of great importance in drawing conclusions as to the quantum of damage in negligence actions, and his finding should not be set aside by an Appellate Court unless from the evidence his conclusion is clearly erroneous. *Macdonald* v. *Pacific Great Eastern Ry. Co.*, (1922) 68 D.L.R. 124.

8. Reversing trial judge—Credibility of witnesses.]—Where an appeal depends upon questions of fact and the trial judge has expressed himself strongly as to the credibility of certain witnesses the Court of Appeal will not interfere with his findings of fact unless it appears that he was clearly wrong. *Nemetz* v. *Telford*, (1930) 43 B.C.R. 281.

9. Reversing trial judge—Finding of negligence.]—In an action arising out of a collision between a motor car and a pedestrian it is for the trial judge on the hearing of the evidence pro and con. to decide where the negligence lay, and an Appellate Court will not disturb his finding unless he is clearly wrong in his decision. *Rainey* v. *Kelly*, (1922) 69 D.L.R. 534; (1922) 3 W.W.R. 346.

10. Reversing trial judge—Inferences to be drawn.]—Where the decision depends upon the inferences to be drawn from undisputed evidence the Appeal Court is in as good a position as the trial judge to draw the true inferences. *Makins Produce Co.* v. *Canadian Australasian Royal Mail Line*, (1926) 36 B.C.R. 462; (1926) 1 D.L.R. 1053; (1926) 1 W.W.R. 635.

11. Reversing trial judge — Issue of pure fact.] — An Appellate Court is not justified in reversing on an issue of pure fact the finding of a trial judge, necessarily and expressly made to depend upon the credit to be given to the conflicting evidence of the parties to the transaction whom he saw and heard testify. *Granger* v. *Brydon-Jack*, (1919) 58 S.C.R. 491; 46 D.L.R. 571; (1919) 2 W.W.R. 621.

12. Reversing trial judge—Wrong conclusion or principle.]—When a judge or a jury comes to a manifestly wrong conclusion or has proceeded upon a wrong principle the duty of the Appeal Court is to overrule the decision of the Court below although this function of the Appeal Court is to be exercised with great care and caution. *Zellinsky* v. *Rant*, (1926) 37 B.C.R. 119; (1926) 2 D.L.R. 327; (1926) 2 W.W.R. 474.

13. Judge at trial inviting review.]—Where the trial judge has decided on the

facts with hesitation and expresses the wish that his judgment should be reviewed, the Court of Appeal is freed from the usual rules respecting its attitude towards the findings of fact at the trial. Where the evidence in all material respects is undisputed and the question of credibility of witnesses is not involved a Court of Appeal is in as good a position as the trial judge was to come to a conclusion on the facts and should not shrink from overruling the trial judge's judgment if it decides that the judgment was wrong. *Turner* v. *Cantone*, (1929) 41 B.C.R. 514; (1929) 4 D.L.R. 724; (1929) 3 W.W.R. 413.

14. Dismissal of action without finding facts.]—Where there are two grounds on either of which the action could be dismissed, and the trial judge gives no reasons for dismissing the action the Court of Appeal is free to find the facts unembarrassed by any finding in the Court below. *The W. H. Malkin Company Limited* v. *Sherman*, (1925) 35 B.C.R. 445.

15. Appeal for larger amount.] — A Court of Appeal will not increase the amount of damages awarded by a trial judge on the verdict of a jury unless it appears that the jury has failed to consider some element of damage which should have been considered. *Stroud* v. *DesBrisay and Colgan*, (1930) 42 B.C.R. 507.

16. Excessive damages.] — Where the plaintiff has obtained a verdict in an action for damages by reason of the defendant's negligence the Court of Appeal will not interfere on the ground of excessive damages, unless they think that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably have given them. *Panetta* v. *The Canadian Pacific Railway Company*, (1917) 24 B.C.R. 249.

17. Verdict of jury—Inferences of fact not inconsistent with.]—A Court of Appeal may draw inferences of fact not inconsistent with the findings of the jury, having sufficient material before it, although the Court may not take questions away from the jury, which are questions of fact properly for the consideration of the jury. *Wand* v. *Mainland Transfer Co. Ltd.*, (1919) 27 B.C.R. 340; (1919) 3 W.W.R. 193.

18. Unreasonable verdict — Refusal to draw plain inferences.]—The Appeal Court will not hesitate to set aside a verdict if the jury acted unreasonably and refused to draw plain inferences from the evidence and undisputed facts. On the other hand while the Court of Appeal may find that a jury failed to discharge its functions it must not usurp them. *McDonald* v. *Weir*, (1925) 34 B.C.R. 502; (1925) 3 D.L.R. 70; (1925) 1 W.W.R. 937. *Cousineau* v. *City of Vancouver*, (1926) 37 B.C.R. 266; (1926) 3 D.L.R. 265; (1926) 2 W.W.R. 433.

19. Where evidence to support verdict.]—A Court of Appeal will not reverse the verdict of a jury where there is some evidence to support it, and the verdict is not so inconclusive as to be unsatisfactory. *Walton* v. *B.C. Electric Ry. Co.*, (1925) 35 B.C.R. 119; (1925) 3 D.L.R. 467; (1925) 1 W.W.R. 673.

20. Unwarranted inference from facts.] —Where facts and circumstances coupled with the acts of the accused are taken by the trial judge as indicating a guilty mind the Court of Appeal is free to draw another inference from the same facts if it believes that the inference drawn below was unwarranted. *Rex* v. *Wah Sing Chow*, (1927) 38 B.C.R. 491; 48 C.C.C. 144.

F. What Errors Warrant Reversal.

1. Entering judgment for plaintiff.]—A jury when returning a verdict without stating precisely in whose favour the verdict was given gave reasons which would support only a judgment for the plaintiff. On being sent back to reconsider they returned and gave the same reasons adding thereto the words "We find a verdict for the defendant Smith":—Held, that the reasons could not be ignored and as the only course which was open to the jury according to the logic of their own verdict was to find for the plaintiff it would be a mistake to send the issue back for new trial and judgment accordingly should be entered for the plaintiff. *Sutton* v. *Smith*, (1927) 38 B.C.R. 455; (1927) 3 D.L.R. 1008; (1927) 2 W.W.R. 481.

2. Evidence on commission — Reading dispensed with.]—At the conclusion of the plaintiff's case on the trial, counsel for the defence intimated that he desired to put in the whole of the evidence of a witness taken on commission and that that was his whole case. The trial judge then asked that he give the "gist" of what the evidence was. Counsel then gave a resume of the evidence, but asked that the Court read the evidence before delivering judgment. The Court refused to read the evidence and gave judgment for the plaintiff:—Held, on appeal,

after reading the evidence taken on commission, that it would be impossible for a judge to form a true estimate of the weight of the evidence for the defence without reading it. The Court was not, therefore, subject to the ordinary rules as to deciding an appeal on questions of fact, and upon reading all the evidence, the appeal should be allowed. *Coupland* v. *Foley Bros., Welch & Stewart,* (1918) 25 B.C.R. 173.

3. Unfair comment of counsel.]—Counsel commented upon the refusal of a railway company to produce a confidential report and the trial judge refused to direct the jury that they were not entitled to draw an unfavourable inference against the Company by reason of such refusal:—Held, that there should be a new trial. *Errico* v. *B.C. Electric Ry. Co.,* (1917) 2 W.W.R. 238.

G. Argument on Appeal.

Opening case.]—On appeal counsel for the appellant should exhaust his case in opening and if counsel for respondent brings up anything new the appellant's counsel in reply has a right to explain. *Clausen* v. *Canada Timber and Lands Ltd.,* (1925) 35 B.C.R. 461.

VI. JUDGMENT.

1. Damages—Quantum.]—The quantum of damages will not be disturbed on appeal unless it is clear that the trial judge overlooked some element of damages. *Middleton* v. *McMillan,* (1929) 1 D.L.R. 977.

2. On appeal from non-suit.]—Where in the Court below the defendant has asked for and obtained a non-suit, and afterwards it is found on appeal that the plaintiff has made out a case, it is not usual to grant a new trial, and as it is apparent that the only defence is the alleged want of licence, the plaintiff should have judgment for her commission. *Cudworth* v. *Eddy,* (1926) 37 B.C.R. 407; (1927) 1 W.W.R. 583.

3. Damages—Further enquiry as to.]—Where from the evidence it is impossible for an Appellate Court to say that the point raised and urged by the appellants was in fact considered by the judge by whom damages were assessed, and if it was omitted from his consideration, there is a flaw in his judgment which requires to be remedied. The only order that should be made is an order to remit the case back so that the point may be determined. *Foley Bros.* v. *McIlwee,* (1918) 44 D.L.R. 5; (1919) 1 W.W.R. 403.

4. Criminal appeals.]—On a criminal appeal only one judgment can be given except where the question is one of law and the Court decides that more than one judgment may be delivered. *Rex* v. *Bell,* (1929) 42 B.C.R. 136; (1930) 2 D.L.R. 647; 53 C.C.C. 44.

5. Amendment.]—A judgment of the Court of Appeal as drawn and entered will on application be amended to conform with the decision of the Court in respect of costs. *Standard Trusts Co.* v. *Pulice,* (1923) 32 B.C.R. 399.

VII. COSTS.

A. In General.

1. Appeal from County Court—Collateral motions.]—The costs of a motion to strike out portions of a notice of appeal and a further motion to discharge the order refusing the first motion should be regarded as collateral and apart from the costs of appeal which are restricted in amount by section 122 (1) of the County Courts Act. *Prat* v. *Hitchcock,* (1925) 36 B.C.R. 158; (1925) 3 D.L.R. 1142; (1926) 1 W.W.R. 5.

2. Party not on record.]—Upon an interested party appearing when not a party to the appeal, he must apply for and obtain a status on the record in order to recover costs if successful. *In re Dominion Trust Co., Boyce and MacPherson,* (1918) 26 B.C.R. 330.

3. County Court.]—The plaintiff claimed $1,000 damages in a County Court action and recovered $250 at the trial. The defendant appealed and the appeal was dismissed with costs:—Held, that the plaintiff's costs on appeal are limited to $100 under section 122 (2) of the County Courts Act. The words "where the plaintiff shall claim" in said section mean claim as determined by the judgment appealed against, and the costs awarded below should not be included in estimating the amount. *Cox* v. *The Begg Motor Company, Limited,* (1921) 29 B.C.R. 531; 62 D.L.R. 303; (1921) 2 W.W.R. 150.

4. Bankruptcy.]—The Court of Appeal when acting as a Court of Appeal in Bankruptcy has absolute jurisdiction over costs. The combined effect of the section and rules of The Bankruptcy Act governing appeals is that appeals thereunder coming before the various Appeal Courts are to be disposed of in all respects both as to subject-matter and costs as if they were ordinary appeals. *Canadian Credit Men's Trust Association,*

Limited v. *Jang Bow Kee and Yin Shee*, (1922) 31 B.C.R. 40.

5. In forma pauperis.]—An applicant for leave to prosecute his appeal in forma pauperis swore that he was not worth $25, his wearing apparel, the subject-matter of this appeal and an interest in a further appeal pending, alone excepted. It further appeared from an unanswered affidavit of the respondent (a) that the applicant was a judgment creditor in an action in which there was still due $230.47; (b) that he offered the respondents' solicitors an assignment of his rights in a pending appeal as security for respondents' costs of this appeal; and (c) that an appeal was pending in which the applicant claimed $600:—Held, that in the circumstances he has not brought himself within the statute and he should not be allowed to prosecute his appeal in forma pauperis. *Olsen* v. *Pearson and Evindsen (No. 2)*, (1923) 32 B.C.R. 520. *See* 32 B.C.R. 517; (1924) 1 D.L.R. 1097.

6. Appeal from County Court.]—Section 2 (5) of the Court Rules of Practice Act Amendment Act, 1925, applies to the costs of an appeal from the County Court and the taxation is under the provisions of Appendix N of the Supreme Court Rules. *Shrimpton* v. *Indar Singh*, (1927) 39 B.C.R. 319; (1928) 1 D.L.R. 462; (1928) 2 W.W.R. 22.

7. Foreclosure—Mortgagee's costs of appeal.]—A mortgagee is entitled to payment forthwith of the costs of an unsuccessful appeal by the mortgagor unless there are exceptional circumstances. *Canada Permanent Mortgage Corporation* v. *Dalgleish and Canadian Bank of Commerce*, (1928) 40 B.C.R. 94; (1928) 3 D.L.R. 59; (1928) 1 W.W.R. 922.

8. Application to abridge time for hearing appeal.]—Where an order is made abridging the time for hearing an appeal on an application that is justified on the merits and within the statute, the costs of the application should be costs in the cause. *Aickin* v. *J. H. Baxter & Co.*, (1929) 41 B.C.R. 217.

B. Following the Event.

1. On equal division of the Court.]—The general rule is to give the costs to the respondent where an appeal is dismissed upon the Court being equally divided. *Arbuthnot* v. *Hill*, (1927) 39 B.C.R. 81.

2. Following the event—New trial.]—Where the appellant although having failed on all grounds of appeal obtains an order for a new trial the respondent having an order he did not ask for, the costs should be costs in the cause. *Woolston* v. *B.C. Electric Ry. Co.*, (1918) 25 B.C.R. 518.

3. Succeeding on principal issues.]—The party who upon the whole succeeds on an appeal is entitled to the general costs, but where there are separate and distinct issues involved, the word "event" should be read distributively, and the party who upon the whole has been unsuccessful is entitled to the costs of the issues upon which he has been successful. *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co. and McDonnell, Limited. (No. 3)*, (1919) 26 B.C.R. 560; 45 D.L.R. 476; (1919) 1 W.W.R. 783.

C. Good Cause for Depriving of.

Misconduct.]—Where an appeal is dismissed on an equal division of the Court the respondent may be deprived of costs if he has been guilty of misconduct or an abuse of the process of the Court below. *Arbuthnot* v. *Hill*, (1927) 39 B.C.R. 81.

D. Taxation of.

1. Appeal from County Court.]—The costs of an appeal from a County Court judgment taken pursuant to leave granted under sec. 119 of the County Courts Act, R.S.B.C. (1911), cap. 53, should be taxed on the Supreme Court scale in accordance with sec. 122 of the Act exclusive of subsecs. 1 and 2 which do not apply. *Mowat* v. *Goodall*, (1915) 22 B.C.R. 167; 24 D.L.R. 891; 33 W.L.R. 230; 9 W.W.R. 171.

See also *Hall* v. *Lane (2)*, (1923) 32 B.C.R. 343; (1923) 2 D.L.R. 1151; (1923) 2 W.W.R. 442.

2. Appeal books—Irrelevant matter.]—The Court of Appeal has jurisdiction to order a successful respondent to pay the additional costs occasioned by the inclusion in the appeal book of certain material insisted upon by the respondent that was irrelevant to the issues raised on the appeal. *Dominion Trust Company* v. *Brydges et al.*, (1921) 30 B.C.R. 264; 62 D.L.R. 352; (1921) 3 W.W.R. 391.

VIII. SECURITY FOR COSTS.

A. In General.

1. Absence of security.]—The hearing of an appeal will not be refused on the ground that security for costs has not been given. It is the duty of the party entitled to take proceedings to enforce his right. *Shipway* v. *Logan,* (1916) 22 B.C.R. 410. *Scott* v. *Nanaimo,* (1924) 33 B.C.R. 344. *See* 33 B.C.R. 474; (1924) 2 D.L.R. 811; (1924) 1 W.W.R. 1275.

B. Application for.

1. Before whom made.]—Section 29 of the Court of Appeal Act as amended by B.C. Stats. 1913, cap. 13, refers the whole matter of security for costs to be occasioned by an appeal to the Court appealed from, and the judge may fix a time within which the security must be furnished. *Olsen* v. *Pearson and Evindsen,* (1923) 32 B.C.R. 517. *See* 32 B.C.R. 520; (1924) 1 D.L.R. 1097.

2. Demand.]—On an appeal being taken, a demand for security for the costs of the appeal should first be made. If this is not complied with, and an application in Chambers is necessary, the costs of the application should be to the applicant in any event. *Wilson* v. *Welch,* (1923) 32 B.C.R. 240; (1923) 4 D.L.R. 1200.

3. County Court.]—On application to a judge of the Court of Appeal in Chambers on February 26th, 1923, to strike out an appeal on the ground that security for costs had not been furnished as ordered by the County Court judge from whom the appeal was taken, it was ordered that the security for costs be furnished on or before the 1st of March, 1923, and that in default a motion be made to the Court of Appeal at its next sittings to strike out the appeal. *Canada Law Book Company, Limited* v. *St. John,* (1923) 32 B.C.R. 66.

4. Insufficient time—Postponement of hearing.]—Notice of appeal was served on the 22nd of December for the next sitting of the Court of Appeal commencing on the 8th of January following. Respondent's solicitor immediately demanded security for costs by letter to which he received no reply. After vacation he gave notice of motion for an order for security but did not obtain the order until the morning of the 8th of January. He then applied on the same day to the Court of Appeal to put the case at the bottom of the list of appeals in order to have sufficient time to make effective his order for security:—Held, that there were reasonable grounds for making the application in the circumstances and as the extension can be made with no great prejudice to the appellant the application should be acceded to. *Scott* v. *The Corporation of the City of Nanaimo,* (1924) 33 B.C.R. 344. *See* 33 B.C.R. 474; (1924) 2 D.L.R. 811; (1924) 1 W.W.R. 1275.

5. Delay in furnishing.]—A motion to strike out an appeal for want of security will be dismissed where security is deposited after notice but before hearing of the application, but if there has been undue delay in furnishing security the respondent should have the costs of the motion in any event of the cause. *Bready* v. *McLennan,* (1924) 33 B.C.R. 401. *See* 33 B.C.R. 460; (1924) 3 W.W.R. 924.

6. Amount of security.]—In an appeal to the Supreme Court from a judgment ordering a reference to ascertain the quantum of damages the whole of section 76 should be read to give the result obviously aimed at:—Held, that notwithstanding the fact that the exact amount of damages has not as yet been ascertained, the subsection should be read as giving the judge power to consider the amount for which security should be given and reach an estimate of what would be reasonable. *Insinger* v. *Cunningham,* (1923) 32 B.C.R. 518; (1923) 4 D.L.R. 1199; (1923) 3 W.W.R. 1328.

7. Time.]—A judge appealed from may fix the amount of security but cannot limit the time for depositing security. This must be done by application to a judge of the Court of Appeal. Before a motion can be made to the Court of Appeal to dismiss for want of security a time limit for deposit must have been fixed by a judge. An order dismissing an appeal for default in giving security cannot be made in Chambers, but only by the Court. *Ewing* v. *Hunter,* (1929) 42 B.C.R. 161.

IX. STAY OF PROCEEDINGS.

1. Injunction pending appeal — Preservation of assets ad interim.]—The Court of Appeal will, in a proper case, grant an injunction to prevent disposition of the assets in dispute, pending the hearing of the appeal. *The A. R. Williams Machinery Company of Vancouver, Limited* v. *Graham,* (1916) 23 B.C.R. 481. *Prevedoros* v. *Prevedoros,* (1927) 3 W.W.R. 755.

2. Injunction pending appeal.] — An appellant is entitled to an injunction restraining the respondent from dealing with the subject-matter of an action pending appeal, if the appellant might otherwise be deprived of the fruits of a successful appeal. A judge of the Court of Appeal can grant such an injunction unless the Court is in session. It is vacation in the Court of Appeal whenever the Court is not in session. *Andler, Executor of Promis et al.* v. *Duke et al.*, (1931) 44 B.C.R. 201.

3. Stay of proceedings pending appeal.] —If while an action is pending a question arises which may affect the course of the action and is the subject of an appeal the action should be stayed until the question has been dealt with by the Court of Appeal. *Esquimalt and Nanaimo Ry. Co.* v. *Dunlop*, (1918) 25 B.C.R. 502; (1918) 3 W.W.R. 828.

X. Stay of Execution.

1. Pending appeal to Privy Council.]—The defendant applied to stay execution pending an appeal from the Supreme Court of Canada to the Privy Council on the ground of the financial inability of the plaintiff the Georgia Construction Company to return the amount of the judgment in the event of a reversal. The plaintiff, the Bank of Toronto, had an assignment of the moneys claimed under the contract sued upon. The application was refused as the material in support does not justify depriving the plaintiffs of the fruits of their judgment, and further in the event of the defendant's success on appeal repayment of the moneys paid is secured by the joinder of the Bank of Toronto as a plaintiff in the action. *Georgia Construction Co. Ltd. et al.* v. *Pacific Great Eastern Ry. Co.*, (1929) 41 B.C.R. 469; (1929) 4 D.L.R. 607; (1929) 3 W.W.R. 92.

2. Pending appeal to Supreme Court of Canada.]—The Court of Appeal has no jurisdiction to make an order that a sum of money which has been paid into Court to stay execution under a decree of alimony pending the decision of the Court of Appeal be retained in Court pending a further appeal to the Supreme Court of Canada. *Claman* v. *Claman*, (1925) 35 B.C.R. 141.

3. Time for application.] — Application to the Court of Appeal for a stay of execution should be made at the time of application for leave to appeal to the Privy Council, and the granting of such leave constitutes a bar to any further proceedings in the Court of Appeal. *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.*, (1918) 26 B.C.R. 414.

4. Payment into Court.]—The plaintiff recovered judgment at the trial for $5,490, and costs. The defendant appealed and obtained an order staying execution upon paying into Court the amount of the judgment and costs which, with the security for costs of appeal, amounted in all to $6,700. The Court of Appeal set aside the judgment and ordered a new trial (see (1924) 33 B.C. 271). The plaintiff then appealed to the Supreme Court of Canada and the defendant applied to a judge for payment out of the moneys in Court. An order was made that $5,000 of the sum paid in remain in Court pending the disposition of the appeal, and that the balance of $1,700 (costs and security) be paid out to the defendant forthwith. An appeal by the defendant from this order was dismissed on an equal division of the Court. *Lew* v. *Wing Lee*, (1924) 34 B.C.R. 277; (1924) 4 D.L.R. 578; (1924) 3 W.W.R. 394.

XI. Supreme Court of Canada.

A. Leave to Appeal.

1. Final determination.]—An application for special leave under section 41 of the Supreme Court Act, R.S.C. 1906, Cap. 139, as re-enacted by Can. Stats. 1920, Cap. 32, Sec. 2, to appeal from an order of the Court of Appeal setting aside an order for an injunction until the trial was refused because there had been no disposition of the action. The allowing of an appeal at this stage might be followed by a second appeal, and it is desirable that the action be tried before an appeal be taken to the Supreme Court of Canada. *Hooper* v. *North Vancouver*, (1922) 31 B.C.R. 138. *See* 31 B.C.R. 51; 65 D.L.R. 286; (1922) 1 W.W.R. 1249.

2. Important question of law.] — On application to the Court of Appeal for leave to appeal to the Supreme Court, leave should only be granted where the case involves matters of public interest, some important question of law, the construction of Imperial or Dominion statutes, a conflict of Provincial and Dominion authority or questions of law applicable to the whole Dominion. *Doane* v. *Thomas*, (1922) 31 B.C.R. 457; (1922) 3 W.W.R. 1117. *See* 69 D.L.R. 476.

3. General rule.] — The plaintiff purchased an automobile under a conditional sale agreement. Being in default the vendor

(defendant) seized the car and resold it, receiving in all $532.78 more than the original purchase price. The plaintiff recovered judgment for the surplus which was confirmed by the Court of Appeal (1926) 36 B.C. 488). On motion by the defendant for leave to appeal to the Supreme Court of Canada:—Held, that the questions involved are important as they affect all agreements of this character in the several Provinces and leave should be granted. *Chan* v. *C. C. Motor Sales, Limited (No. 2)*, (1926) 37 B.C.R. 88.

4. Succession Duty Act and interpretation of.]—On a petition for an order directing the registrar of titles to register a title clear of a lien claimed on behalf of the Crown for succession duty, it appeared the lot in question had been sold under agreement for sale by a former owner who died before the final payment was made. A bond by a guarantee company was accepted to cover the succession duty on the estate and the executor on receiving the final payment conveyed the lot to the purchaser. A subsequent owner obtained an indefeasible title and then mortgaged to the petitioner who subsequently obtained judgment in a foreclosure action. A caution was then filed against the property by the minister of finance under section 50 of the Succession Duty Act. It was held by the Court of Appeal that the lot was not subject to the succession duty claimed. On an application for leave to appeal to the Supreme Court of Canada:—Held, that as it is a matter of some importance and of grave concern as to land titles, the Act being somewhat ambiguous, it is a proper case for granting leave to appeal. *Minister of Finance* v. *Caledonian Insurance Company. In re Land Registry Act and Higginson*, (1923) 33 B.C.R. 232. *See* (1924) S.C.R. 207; (1924) 2 D.L.R. 649; (1923) 33 B.C.R. 29; (1923) 4 D.L.R. 439; (1923) 3 W.W.R. 925.

5. Infringement of trade-mark.] — An action for infringement of a trade-mark is a private matter between the plaintiffs and defendants and that the plaintiffs have half a dozen suits for infringements in as many Provinces does not make the matter of public importance. An application for leave to appeal to the Supreme Court was refused. *Channell Limited et al.* v. *Rombough et al.*, (1924) 34 B.C.R. 52; (1924) 3 W.W.R. 169.

6. Habeas corpus.]—An appeal to the Supreme Court of Canada from a judgment of the Appeal Court granting the applicant for a writ of habeas corpus his liberty and freedom from an order for deportation under the Immigration Act does not come within any of the classes of enumerated cases stated in sec. 48 (as amended) of the Supreme Court Act, within which an appeal as of right is given. There is no right of appeal to the Supreme Court of Canada in cases of habeas corpus where the Court below has ordered the release of a person the legality of whose custody was in question and that person is at large. *In re Immigration Act. Rex* v. *Jeu Jang How*, (1919) 50 D.L.R. 41; (1919) 3 W.W.R. 1115; 32 C.C.C. 103.

7. Inferences of fact.]—Where the question involved in an action is one of inference of fact to be drawn from undisputed evidence, and there is no question of conflict between the Court of Appeal and the Court below, and no question as to the general law affecting other Provinces as well as British Columbia, special leave to appeal to the Supreme Court of Canada will not be granted. *Jennings* v. *Canadian Northern Railway Company*, (1925) 35 B.C.R. 495.

8. Public interest—Important question of law.]—The question of the right of a servant while in his master's service to solicit business from his customers for himself when his service is at an end, and he sets up on his own account, is not a matter of public importance or an "important question of law" such as would justify granting leave to appeal to the Supreme Court of Canada. *Ice Delivery Company Limited* v. *Peers and Campbell*, (1926) 36 B.C.R. 559.

B. What Appealable.

1. Jurisdiction.]—In order that there should be jurisdiction in the Supreme Court of Canada under sec. 37, subsec. (b) of the Supreme Court Act, in an appeal from the provincial Court of Appeal where the case did not originate in a superior Court, it is not sufficient that in respect to some part of the action, some claim made in it or some relief which may be accorded, there is concurrent jurisdiction in both the superior and inferior Courts; the jurisdiction to enable such appeal must be concurrent over the action as a whole. *Champion* v. *World Building Co.*, (1914) 50 S.C.R. 382; 22 D.L.R. 465; 7 W.W.R. 1162.

2. Mechanic's lien action.]—Under the Mechanics' Lien Act an action to enforce a mechanic's lien may be maintained only in a County Court; consequently there can be no appeal to the Supreme Court of Canada from the decision of the Court of Appeal, on appeal from such County Court. *Tait* v.

British Columbia Electric Ry. Co. (1916) 54 S.C.R. 76; 32 D.L.R. 378; (1917) 1 W.W.R. 544.

3. Jurisdiction—County Court action.]—An appeal does not lie to the Supreme Court of Canada from the judgment of the B.C. Court of Appeal on an appeal from a County Court in an action for damages within its jurisdiction. *Ibid.*

4. Order for new trial—Final judgment.]—On the ground that the plaintiff was an alien enemy the trial judge dismissed his action with leave to bring further action after the war. On appeal it was held that the plaintiff was not an alien enemy and a new trial was ordered:—Held, that the judgment of the Court of Appeal was a final judgment and an appeal lay to the Supreme Court of Canada under sec. 38 of the Supreme Court Act. *Newman* v. *Bradshaw*, (1917) 2 W.W.R. 743.

5. Appeal on question of costs.]—While the Supreme Court of Canada ordinarily refuses to entertain an appeal which merely involves costs, if a party entitled by statute to receive his costs of certain proceedings from his opponent has been ordered to pay that opponent's costs, it is the duty of the Court to reverse such order. *Gavin* v. *The Kettle Valley Ry. Co.*, (1919) 58 S.C.R. 501; 47 D.L.R. 65; (1919) 2 W.W.R. 611.

C. Matters Pending Appeal to Supreme Court.

1. Notice of appeal.]—In ordinary cases of appeal to the Supreme Court of Canada notice of appeal is not required before or after approving of the security. *Albion Motor Express Co.* v. *City of New Westminster*, (1918) 3 W.W.R. 23.

2. Extension of time for appeal.] — A judge of the Court of Appeal has power to extend the time for giving notice of appeal under sec. 70 of the Supreme Court Act, notwithstanding that notice has been given by the respondent of intention to move the Supreme Court to quash the appeal, and S.C. rule 5 is not a bar to such an application. *Adolph Lumber Co. Ltd.* v. *Meadow Creek Lumber Co. Ltd.*, (1918) 3 W.W.R. 305

D. Review of Facts.

Finding of Appeal Court.]—The right of appeal to the Supreme Court of Canada is upon questions of fact as well as upon those of law, and while a plaintiff who claims relief in respect to a contract on the ground that he was induced to enter into it by a fraudulent misrepresentation, but who has failed to convince either the trial judge or the provincial Courts of Appeal that he is entitled to judgment, can rarely hope to succeed on an appeal to the Supreme Court, yet it is the duty of the Supreme Court, if convinced that there has been manifest error in the findings of the lower Courts, to reverse their judgments and to give the judgment which the provincial Appeal Court should have given. *Barron* v. *Kelly*, (1918) 56 S.C.R. 455; (1918) 2 W.W.R. 131; 41 D.L.R. 590.

XII. Leave to Appeal to the Privy Council.

1. Question of public importance.]—An application for leave to appeal to the Judicial Committee of the Privy Council from the judgment of the Court of Appeal dismissing an appeal from the dismissal of an action for $1,700 damages for personal injuries will be refused. *Terainshi* v. *Canadian Pacific Railway Co.*, (1918) 25 B.C.R. 536; (1918) 3 W.W.R. 281.

2. Matter of dominant public importance.]—Decisions of the Supreme Court of Canada are final on general questions connected merely with the construction of agreements which do not raise either far-reaching questions of law or matters of dominant public importance. *Georgia Construction Company Limited and Bank of Toronto* v. *Pacific Great Eastern Railway Company*, (1929) 41 B.C.R. 469; (1929) 4 D.L.R. 607; (1929) 3 W.W.R. 92.

3. Municipal assessment.]—An application for a writ of mandamus directed to the members of a Court of Revision to hear an appeal from an assessment in the manner provided by section 38 of the Vancouver Incorporation Act, 1900, is not "a matter of public importance" within the meaning of subsection (b) of rule 2 of the Rules regulating appeals to the Privy Council. *In re Charleson Assessment*, (1915) 21 B.C.R. 372.

4. Loss of business.]—On an application for leave to appeal to the Privy Council from a judgment of the Court of Appeal, it was submitted in evidence that the loss to appellant's business resulting from the enforcement of a city by-law providing "that the keeper of a billiard or pool-room should not permit any person to play on the

licensed premises for a wager other than the price of the game," would exceed the sum of £500, counsel for respondent admitting that the loss would exceed that amount:—Held, that notwithstanding the admission of counsel for respondent, the evidence of loss of profit arising from the by-law is purely problematical and lacks the definiteness of proof required to bring the case within the rules. *Jones* v. *City of Vancouver. (No. 2)*, (1920) 28 B.C.R. 166.

5. Leave to appeal to Privy Council.]—Leave will not be given to appeal to the Privy Council where the only question involved is one of procedure. *Bradshaw* v. *B.C. Rapid Transit Co. Ltd. (No. 2)*, (1926) 38 B.C.R. 111; (1927) 1 W.W.R. 425.

XIII. MATTERS PENDING APPEAL TO PRIVY COUNCIL.

1. Application for adjournment.]—An application to a winding-up judge for an order directing a liquidator to consent to the adjournment of appeals pending before the Privy Council will be refused. Assuming that there is jurisdiction under the Winding-up Act, the Court would, in interfering with the conduct of litigation, which the liquidator has been authorized to carry on, be assuming a responsibility which it could not adequately discharge. It is impossible for a winding-up judge in an involved litigation to know all its ramifications as does the liquidator and his legal advisers, and without such knowledge, interference with the conduct of suits might well be highly detrimental to the liquidation. *Dominion Trust Co.* v. *New York Life Insurance Co.*, (1918) 25 B.C.R. 271; (1918) 1 W.W.R. 648; (1918) 3 W.W.R. 850.

2. Consolidation.]—An application for consolidation of appeals to the Privy Council under Rule 15 of the Privy Council rules will not be granted where three actions were brought by the same plaintiff against three defendants based on separate contracts although precisely similar in form. *Van Hemelryck* v. *New Westminster Construction and Engineering Co.*, (1920) 29 B.C.R. 60.

See NEW TRIAL.

APPEARANCE.

See PRACTICE.

APPROPRIATION.

OF PAYMENTS—*See* CONTRACT.

ARBITRATION.

I. IN GENERAL, 70.
II. SUBMISSION, 71.
III. STAYING ACTION, 72.
IV. ARBITRATORS: UMPIRE, 73.
V. AWARD, 74.
A. In general, 74.
B. Remitting, 75.
C. Setting aside, 76.
1. Jurisdiction of Courts, 76.
2. Grounds for setting aside, 76.
VI. COSTS, 78.

I. IN GENERAL.

1. Appraisal under insurance policy.]—The plaintiff insured his motor-truck against loss by fire in the defendant company and during the life of the policy the motor-truck was badly damaged by fire. As the parties could not agree as to the loss, appraisers were appointed to ascertain the extent of the defendant's liability in the manner provided by the statutory conditions of the policy as set out in sec. 154 of the Insurance Act. The appraisers gave their decision in writing finding that the motor-truck was worth $800 at the time of the fire but failed to state the amount to be deducted for depreciation, salvage or other cause in order to arrive at the actual loss sustained. On motion of the plaintiff the matter was remitted back to the appraisers to determine the actual loss or damage:—Held, on appeal, that the proceeding is not an arbitration under the Arbitration Act so that the Act does not apply and as the appraisers are not parties to the application the order must be set aside. *Danroth* v. *Railway Passengers Assurance Co.*, (1930) 43 B.C.R. 21; (1931) 1 D.L.R. 156; (1930) 2 W.W.R. 555.

2. Arbitration without previous dispute—Summary proceedings to enforce award.]—Where a contract respecting the sale of lands provides that the price thereof shall be determined by arbitration an award pursuant thereto is not enforceable in summary proceedings under the Arbitration Act, as it is an essential preliminary to summary enforcement of an award that there must have been a dispute, difference or controversy between the parties. Such a contract is an agreement for valuation and not a submission to arbitration as defined

in the Act. *In re Public Works Act and N. F. Mackay*, (1921) 30 B.C.R. 1; 63 D.L.R. 171; (1922) 1 W.W.R. 982.

3. Action—Trial by consent—Insufficient number of jurymen.]—Where parties to an action consent to trial of the action before a judge and a jury whose number is smaller than the number fixed by law, the judge and jury have no jurisdiction to deal with the case as a Court, and must be regarded as arbitrators from whose verdict no appeal can be taken. *Loane* v. *The Hastings Shingle Manufacturing Company Ltd. and Black*, (1925) 35 B.C.R. 485; (1925) 3 D.L.R. 940.

4. Action — County Court — Lack of jurisdiction—Trial by consent.] — Where by the consent of solicitors for the parties an action is tried before a County Court judge, the amount involved being beyond the jurisdiction of the County Court, the trial is in effect an arbitration, and there is no appeal from the judge's decision. *Overn* v. *Strand*, (1931) S.C.R. 720; (1931) 44 B.C.R. 47; (1931) 2 D.L.R. 44; (1931) 1 W.W.R. 694.

5. Evidence—Production of documents.]—A dispute between the owners and charterers of a vessel as to the construction of a charter party was referred to a sole arbitrator. Subpœnæ duces tecum were served on officers of other companies. On the hearing they did not produce the documents described in the subpœnæ:—Held, that the arbitrator should not direct the witnesses to produce the documents in question where neither of the companies of which they were officers were parties to the arbitration and no evidence having been given to show authority given by the directors of the companies to the witnesses to produce the documents. *Chapman & Sons* v. *Stoddart & Co.*, (1930) 43 B.C.R. 182; (1930) 4 D.L.R. 1013; (1930) 3 W.W.R. 171.

II. Submission.

1. By contract.]—The contract between the parties refers to "arbitration" without outlining the procedure to be adopted with respect to an arbitration, so this term of the contract must be treated as a "submission" and the Arbitration Act and the Schedule thereto becomes applicable; therefore under section 14 (2) where the arbitrator has misconducted himself, or the arbitration or award has been improperly procured, the Court may set the award aside. *Wood* v. *W. H. Malkin Co. Ltd.*, (1928) 40 B.C.R. 255; (1928) 4 D.L.R. 511; (1928) 2 W.W.R. 674.

2. Specific question of fact or law.]—As to parties being bound by an arbitration when they agree to abide by the result, a distinction is to be drawn between parties generally referring their differences arising out of a contract and a case where a specific question of fact or law is submitted. In the former case when the arbitrator has failed to follow the recognized rules of law the award will be set aside. *Ibid.*

III. Staying Action.

1. Co-operative associations.]—The defendant Corporation is subject to and governed by the Co-operative Associations Act, sec. 29 of which provides that "every dispute arising out of the affairs of an association between a member thereof or any person aggrieved, . . . and the association or a director thereof, shall be decided by arbitration," etc. One W. who later transferred his shares in the defendant Company to the plaintiff and assigned to him the debts in question in this action contracted to market his crops through the defendant Company (Local) and the Associated Growers of British Columbia (Co-operative) and in pursuance thereof for the years 1923 and 1924 his crops were delivered to the Local and forwarded to the Co-operative for sale. The proceeds of sales after certain deductions, were returned to the Local, who made certain deductions before handing over the balance to the plaintiff who brings this action to recover three amounts he contends were improperly retained by the Local:—Held, that as the disputes referred to in the above section are those which arise between the Association and a member as a member, and do not apply to collateral contracts which may arise between a member and the Association, this action is properly brought. *Macdonald-Buchanan* v. *The Vernon Fruit Union*, (1926) 36 B.C.R. 307; (1926) 1 D.L.R. 748; (1926) 1 W.W.R. 413.

2. Contract — Arbitration clause—Fraud.]—A contract for the purchase of certain timber contained an arbitration clause that any dispute as to the interpretation of the contract should be settled by arbitration. The purchaser, after inspecting the timber, repudiated the whole contract. Upon the vendor bringing action for specific performance, the defendants moved for a stay of proceedings on the ground that they should proceed under the arbitration clause:—Held, that as the defence goes to the root of the contract, the arbitration clause does not apply, and the application

should be dismissed. *McIntosh* v. *Layfield*, (1919) 26 B.C.R. 574; (1919) 1 W.W.R. 590.

3. Insurance—Fire—Arbitration—Stay of proceedings.]—In an action against an insurance company for damages for its failure to replace goods destroyed and the insurer denies electing to replace the goods and applies for the appointment of an arbitrator to determine the value, an issue should be directed to determine the dispute and if decided against the insurer the action should be continued; if otherwise proceedings in the action should be stayed and the arbitration proceeded with. *Bulger* v. *Home Insurance Co.*, (1928) S.C.R. 436; (1929) 1 D.L.R. 47.

IV. ARBITRATORS: UMPIRE.

1. Refusal of Municipality to appoint arbitrator.]—A motion to appoint an arbitrator under section 8 of the Arbitration Act upon the refusal of a municipality to appoint an arbitrator upon a claim made for damages alleged to have arisen through the re-grading of a street, will be refused for want of jurisdiction since the coming into force of section 358 of the Municipal Act, B.C. Stats. 1914, Cap. 52. *Gold* v. *South Vancouver*, (1918) 26 B.C.R. 147; (1919) 2 W.W.R. 249.

2. Judge appointing arbitrator—Persona designata.]—In appointing an arbitrator under a statute enabling any judge of a particular Court to name the arbitrator, the judge is considered to be acting as persona designata and unless specially authorized so to do neither he nor the Court of which he is a judge acquires any jurisdiction to order costs of the application. *Matte* v. *Vancouver*, (1917) 2 W.W.R. 53.

3. Judge appointing arbitrator—Persona designata.]—The plaintiff claiming compensation for damages resulting from the construction of a viaduct, appointed an arbitrator and notified the City but the City made no appointment on its own behalf. Section 133 (9) of the Vancouver Incorporation Act provides that if after 20 days' notice the party notified omits to appoint an arbitrator, a judge of the Supreme Court may appoint an arbitrator for the party in default. The plaintiff then proceeded under section 133 (9) and entituled his proceedings "In the Supreme Court of British Columbia" and an order was made similarly entituled appointing an arbitrator for the City. In an action on the award:—Held, that the award must stand or fall on the order as it exists and having been made by one holding the office of judge of the Supreme Court and not persona designata it was made without jurisdiction and the award must fall. *Spencer* v. *City of Vancouver*, (1921) 30 B.C.R. 382; 68 D.L.R. 747; (1922) 1 W.W.R. 779.

3. Arbitrator unable to act.]—By virtue of section 8 (*a.*) of the Arbitration Act a party to an arbitration has power to appoint another arbitrator in place of a first who has rendered himself incapable of acting. *In re Weiler Brothers and the Corporation of the City of Victoria*, (1917) 24 B.C.R. 148.

V. AWARD.

A. In General.

1. Construction.]—Where by the language of an award the exact intention of the arbitrators as to payment of costs of witnesses on the arbitration is left so uncertain that it is fairly open to two constructions, the Court of Appeal will not disturb that one adopted by the Court below. *McQueen* v. *Vancouver Island Power Co.*, (1925) 35 B.C.R. 558.

2. Submission unsigned.]—An award is binding upon a party who took part by his counsel in arbitration proceedings and accepted the award before the Court of Appeal although he had not signed the submission. *Lyon and Lyon* v. *Morgan and North West Trust Company, Limited*, (1916) 22 B.C.R. 511; 34 W.L.R. 485; 10 W.W.R. 630; (1917) 2 W.W.R. 224.

3. Value of lands expropriated—Several owners interested.]—Arbitrators in making their award as to the value of lands taken for railway purposes in which more than one person is interested should set out the amount to which each of the said persons is entitled. *In re Pacific Great Eastern Ry. Co. and Larsen*, (1915) 22 B.C.R. 4; 8 W.W.R. 1.

4. Unexpired term of franchise.]—Where by an agreement between an electric light company and a city municipality the city has the right to purchase the electric light company's undertaking at a price to be agreed upon by arbitration and the submission is to assess the value of the undertaking, property, rights and privileges of

the company the award may without error take into consideration the value of the whole undertaking including prospective profits for the unexpired term of the electric light company's franchise. *City of Cumberland* v. *Cumberland Electric Light Co. Ltd.*, (1931) 43 B.C.R. 525; (1931) 3 D.L.R. 70; (1931) 2 W.W.R. 377.

B. Remitting.

1. Omission.] — On expropriation proceedings under section 12 of The New Westminster Harbour Commissioners Act, where the award discloses the fact that the arbitrator omitted to give any or manifestly inadequate compensation for a certain portion of the land appropriated, the Court of Appeal should correct the award under section 232 (5) of the Railway Act and increase it in such amount as the evidence justifies. *Armstrong and Sutherland* v. *New Westminster Harbour Board*, (1929) 41 B.C.R. 1; (1929) 2 D.L.R. 150; (1929) 1 W.W.R. 755.

2. Mistake.]—Unless there is a mistake in law or fact evident on the face of an award, or the arbitrator admits that he has made a mistake in law or fact, or unless there has been fraud or corruption it will not be referred back to the arbitrator for reconsideration. An arbitrator having made an award as to damages to claimant's lands through smoke from the defendant Company's smelter, the claimant applied for an order that it be referred back on the ground that the arbitrator allowed a much larger sum to another claimant whose lands surrounded one of the present claimant's parcels of land:—Held, that this is not a ground that comes within the rule as many circumstances may be considered by the arbitrator, such as the quality of land, or its state of cultivation and fertility, and the application should be dismissed. On an application that an award be sent back for rehearing by the arbitrator, a question arose as to whether all the claimant's land (which consisted of two parcels) was taken into consideration by the arbitrator, and an affidavit was obtained from the arbitrator in which he stated that both parcels of land were considered by him in making has award. An application by the claimant to examine the arbitrator on his affidavit was refused. *In re Fox and The Consolidated Mining and Smelting Company of Canada, Limited*, (1924) 34 B.C.R. 396; (1925) 1 D.L.R. 245; (1924) 3 W.W.R. 861.

C. Setting Aside.

1. Jurisdiction of Courts.

1. Misconduct.]—Whether the Court has power under its inherent jurisdiction to set aside an award, depends upon whether it is "bad on its face" or on some ground which is more or less an extension of the same principle. The Court has the right to consider the evidence adduced before the arbitrator to determine if there was "legal misconduct" on his part which would be a ground for setting aside the award. *Wood* v. *W. H. Malkin Co. Limited*, (1928) 40 B.C.R. 255; (1928) 4 D.L.R. 511; (1928) 2 W.W.R. 674.

2. Railway Act.] — A judge of the Supreme Court sitting in Court has jurisdiction to hear an appeal from an award under the Railway Act. *In re Alexander, Weaver Estate, and Vancouver Harbour Commissioners*, (1922) 31 B.C.R. 11; 65 D.L.R. 355; (1922) 1 W.W.R. 1254.

3. Misconduct.]—The Court has jurisdiction to set aside any award which purports to exercise jurisdiction beyond that given by the authorizing Act and the submission made pursuant thereto. "Misconduct" should be construed in its widest sense and includes a mere mistake as to the scope of the authority conferred by the submission. Where the powers of arbitrators are statutory, anything they do beyond what they were authorized to do by the statute to do, is not binding on the parties to the submission and cannot have any effect. *In re Minister of Public Works of British Columbia and Tipping*, (1931) 44 B.C.R. 321; (1931) 2 W.W.R. 835.

4. Application for stated case—Time for.]—Where a party to an arbitration takes a chance of having the award made in his favour and allows the arbitrator to make his award without asking him to state a case during the hearing he cannot afterwards appeal to the Court because he is dissatisfied with the amount fixed by the umpire. *City of Cumberland* v. *Cumberland Electric Light Company*, (1931) 43 B.C.R. 525; (1931) 3 D.L.R. 70; (1931) 2 W.W.R. 377.

2. Grounds for Setting Aside.

1. Misconduct—Waiver of objection.] —On an application to set aside an award on the ground of misconduct by one of the arbitrators, it appeared that after the proceedings before the arbitrators were closed,

counsel for the objecting party, with knowledge of the alleged misconduct, attended on an application and consented to an order extending the time for the arbitrators to make their award:—Held, that the act of consent to extension of time, and recognition of the propriety of the arbitrators making the award, is of the nature of an estoppel, and precludes objection to the award on the ground of misconduct. *Powis* v. *The City of Vancouver*. *Ramage* v. *The City of Vancouver*, (1916) 23 B.C.R. 180.

2. Admission of evidence after close of case.]—In an arbitration as to the loss suffered by a seller of coffee, because of its non-acceptance by the buyer, on motion to set aside the award, objection was taken that the seller did not prove as part of his case, that the coffee tendered was in accordance with the contract and the arbitrator erred in allowing him to give evidence as to the quality of the coffee after the buyer had called his witnesses on the point:—Held, that there was error in allowing the seller to "split" his case, yet as he had exercised his discretion in the matter, and no substantial injustice was occasioned thereby, the course adopted did not invalidate the award. *Wood* v. *W. H. Malkin Co. Ltd.*, (1928) 40 B.C.R. 255; (1928) 4 D.L.R. 511; (1928) 2 W.W.R. 674.

3. View by arbitrator before assuming office—Arrangement between arbitrators.]—On an arbitration as to compensation for land taken under the Public Works Act the arbitrator appointed by the Government and the umpire had a view of the locus in quo before the umpire entered upon his duties. The arbitrator appointed by the owner arrived on the scene during the view and no objection was taken until after the award was made. It was arranged among the arbitrators that the material of that part of a shed which was on the land taken be retained by the owner and his damages on account of the portion of the shed taken down were then allowed at $75.00:—Held, that there was no misconduct on the part of the arbitrators and no ground for setting aside the award. *In re Arbitration Act and Woods*, (1923) 32 B.C.R. 211; (1923) 1 W.W.R. 1344; (1923) 2 D.L.R. 1000.

4. View in absence of parties.]—Where an arbitrator or referee appointed to assess damage to property takes a view of the injured property in the absence of the parties and their counsel the award should be set aside. *Higgins* v. *Comox Logging* Company, (1927) S.C.R. 359; (1927) 2 D.L.R. 682; Affmg. (1926) 37 B.C.R. 525; (1926) 4 D.L.R. 852; (1926) 3 W.W.R. 417.

5. Lump sum.]—An award cannot be contested on the ground that the arbitrators allowed no sum to a municipal corporation for the advantage resulting from the operation of an expropriating bye-law where the award is a lump sum and is without error on its face. *Corporation of the District of North Cowichan* v. *Gore-Langton*, (1921) 29 B.C.R. 535; 60 D.L.R. 151; (1921) 2 W.W.R. 484.

6. Fresh evidence—Re-opening award.]—Where an applicant for compensation neglects to follow the instructions of his medical adviser, which, if followed, would have effected a cure, he is not entitled to compensation beyond the time when such cure would reasonably have been effected. An award of a certain sum under the Workmen's Compensation Act is not invalid if it is the result of the addition of the several sums of a weekly allowance. An award will not be re-opened because of the discovery of fresh evidence unless it is shewn that prior to the award there was reasonable diligence on the part of the applicant to discover such evidence. An appeal was dismissed, the Court being equally divided. *Gorgnigiani* v. *Welch*, (1918) 26 B.C.R. 195; (1918) 3 W.W.R. 797.

VI. Costs.

1. Municipal Act — Party and party costs—Appendix N.]—The costs of an arbitration provided for in section 349 of the Municipal Act mean party and party costs and Appendix N. governs the taxation. *In re Orr and District of North Vancouver*, (1928) 39 B.C.R. 478; (1928) 1 W.W.R. 799.

2. Witness fees.]—Under section 24 of the Public Works Act, the arbitrators are solely vested with authority to grant or withhold witness fees in the case of any particular witness, at any rate to the extent of deciding whether such fees should be included in the bill for taxation or not, and what amount of preparation was reasonably necessary. *In re Galt Bros. and Burnaby Arbitration*, (1928) 39 B.C.R. 470; (1928) 1 W.W.R. 798.

Expropriation—*See* Compulsory Purchase
See Highways
See Insurance
See Municipal Corporation

ARCHITECT.

1. Unqualified person advertising as "Architect."]—Accused had placed a signboard in front of his office on which was printed the words "W. H. Chow, Architect." He was convicted on a charge of unlawfully advertising or putting out a sign for the purpose of indicating to the public that he was entitled to practise as an architect in contravention of section 30 of the British Columbia Architects Act:—Held, that there is a large field open to architects in British Columbia without it being incumbent upon them to become registered under the Act, so that the use of the word "architect" alone on the sign is not an infraction of the Act. *Rex ex rel. Townley* v. *Chow*, (1922) 31 B.C.R. 461.

2. Disqualification.]—A defendant applied for registration and was registered in the Architects' register, receiving a certificate of such registration. Having failed to pay his annual fees for several years his name was removed from the register and not restored. Upon having put out signs with the view of indicating to the public that he was an architect it was held that in putting out the signs he acted unlawfully and contrary to the provisions of sec. 31 (1) of the Architects' Act. *Rex* v. *Shewbrooks*, (1931) 44 B.C.R. 313; 56 C.C.C. 365; (1931) 3 W.W.R. 97.

See BUILDING CONTRACT.

ARREST AND IMPRISONMENT FOR DEBT.

I. ARREST BEFORE JUDGMENT, 79.
II. ARREST AFTER JUDGMENT, 80.

I. ARREST BEFORE JUDGMENT.

1. Capias ad respondendum—Debtor's means of payment.]—A defendant arrested under sec. 3 of the Arrest and Imprisonment for Debt Act will be discharged from custody in the absence of reasonable evidence that he is possessed of the means or ability to satisfy the plaintiff's claim or any part thereof.. *Ping Lee* v. *Paul Wise*, (1929) 41 B.C.R. 64; (1929) 3 D.L.R. 410; (1929) 2 W.W.R. 376; 52 C.C.C. 15.

2. Maintenance money.]—Order LXIX., r. 1, requires that the party at whose instance a writ of capias is issued must pay the sheriff maintenance money in advance immediately after arrest. This rule is not affected by any private arrangement whereby the defendant agrees with the sheriff to pay the expense of an attendant in order to be at large. *Kinder* v. *MacMillan*, (1919) 26 B.C.R. 576; (1919) 2 W.W.R. 248.

II. ARREST AFTER JUDGMENT.

1. Refusal to pay alimony — Attachment.]—A decree for alimony and maintenance made by a British Columbia Court cannot be enforced by attachment or committal, even though the respondent be in contempt. *Jenns* v. *Jenns*, (1921) 3 W.W.R. 226.

2. Judgment debtor—Attachment for non-payment of instalments.] — A debtor who has disobeyed an order of the Supreme Court directing him to pay the amount of a judgment by instalments cannot be committed for contempt of Court for mere non-payment. Under the Arrest and Imprisonment for Debt Act an order of committal may be made: (1) Where the debtor does not attend under the order for examination; (2) refuses to disclose his property; (3) gives unsatisfactory answers in connection therewith; or (4) where the debtor incurred the debt which is the subject of a judgment against him or any material part thereof by fraud or false pretences, or where he has concealed or made away with his property or any part thereof, in order to defeat, delay or defraud his creditors or any of them. The County Courts Act provides for committal in default of payment by a judgment debtor after his examination and order directing payment but this power is confined to the County Court alone. *Royal Bank of Canada* v. *McLennan*, (1918) 25 B.C.R. 183; 41 D.L.R. 27; (1918) 2 W.W.R. 225.

3. Judgment debtor's expenditures—Defeating, delaying or defrauding creditors.]—The due and reasonable appropriation by a judgment debtor of his property or income to the maintenance and health of himself and his family according to circumstances is not defeating, delaying or defrauding his creditors within the meaning of the Arrest and Imprisonment for Debt Act. *Cutler* v. *Chiffey*, (1920) 29 B.C.R. 120; (1921) 1 W.W.R. 686.

See MALICIOUS PROSECUTION.
See TORT.

ASSAULT.

See TORT.

ASSESSMENT.

See MUNICIPAL CORPORATIONS.

See TAXATION.

ASSESSMENT WORK.

See MINES AND MINERALS.

ASSIGNMENT

I. WHAT ASSIGNABLE, 81.
II. EQUITABLE ASSIGNMENTS, 81.
III. ASSIGNMENTS OF BOOK ACCOUNTS, 82.
IV. NOTICE, 82.
V. RIGHTS AND LIABILITIES OF PARTIES, 83.
A. Priority, 83.
B. Right to sue, 85.
C. Necessary parties, 87.

I. WHAT ASSIGNABLE.

1. Damages.]—A right to recover damages for a tort is not assignable at law. *Lancaster* v. *Vancouver Log Co.*, (1919) 27 B.C.R. 3.

2. Right of action—Champertous agreement.]—An assignment of a right of action under such circumstances that all parties know that the consideration for the assignment can only be paid in the event of a successful outcome of the action, is champertous and illegal. *First Mortgage Co.* v. *Noud*, (1925) 36 B.C.R. 166; (1925) 4 D.L.R. 221.

II. EQUITABLE ASSIGNMENTS.

1. Pendente lite.]—An assignment of a legal chose in action made pendente lite and not in compliance with the Laws Declaratory Act, operates, if at all, only as an equitable assignment and the action must be continued in the name of the assignor. *Deisler* v. *The United States Fidelity & Guaranty Company*; *Denny and Miller, Third Parties*, (1917) 24 B.C.R. 278; 36 D.L.R. 29; (1917) 3 W.W.R. 1051.

2. Building contract — Completion of work by owner.]—A stipulation in a building contract that upon default of the contractor the school trustees shall be entitled to take his place to complete the contract and deduct the cost of completion from the balance of the purchase price, is in effect an assignment of the unpaid balance of the contract price within the purview of sec. 16 of the Mechanics' Lien Act (B.C.) and therefore invalid against the lien for the full balance of the contract price acquired under the Act. *Hazell* v. *Lund*, (1915) 22 B.C.R. 264; 25 D.L.R. 204; 32 W.L.R. 818; 9 W.W.R. 749.

III. ASSIGNMENTS OF BOOK ACCOUNTS.

1. Proceeds of fire insurance policy.]—Registration of an assignment of money payable to the assignor under insurance policies made by way of security for money lent is not necessary as the money in question is "growing due under a specified contract or contracts as recited in the Assignment of Book Accounts Act Amendment Act, 1930, section 2. *In re Campbell River Mills Ltd. Dinning* v. *Ingham*, (1931) 43 B.C.R. 477; (1931) 2 D.L.R. 946.

2. Individual book accounts.]—An isolated assignment of a small individual book account does not require attestation and registration under the Assignment of Book Accounts Act. *Vernon Hardware Co.* v. *Reid and Reinhard*, (1927) 2 W.W.R. 117.

IV. NOTICE.

1. Defective notice.]—The person named in a notice of assignment of a bond was not the assignee named in the assignment itself, and the notice was of an assignment of a bond "bearing date on or about the 18th of September, 1915," whereas the bond sued on was dated "this 18th day of September, 1815":—Held, that there was not a sufficient "express notice in writing" of the assignment as required by section 2 (25) of the Laws Declaratory Act and the plaintiff had no status to bring the action. *Maritime Motor Car Company Limited* v. *McPhalen*, (1920) 28 B.C.R. 168; (1920) 2 W.W.R. 213; affg. (1919) 27 B.C.R. 244; (1919) 2 W.W.R. 811.

2. Insurance—Claim under fire insurance policy.]—The claim of a person whose premises are damaged by fire against another for negligence in causing the fire is

assignable to a fire insurance company which, in consequence, is called upon to pay a loss under its policy to the owner of the premises. If, however, there is no notice of the assignment to the defendant bringing it within the operation of the Laws Declaratory Act, the plaintiff must sue in the name of the assignor. *Union Assurance Company* v. *B.C. Electric Railway Co. Ltd.*, (1915) 21 B.C.R. 71; 21 D.L.R. 62; 30 W.L.R. 717; 8 W.W.R. 327.

3. Equitable transfer pendente lite.]—An assignment of a legal chose in action made pendente lite and not in compliance with the Laws Declaratory Act operates, if at all, only as an equitable assignment, and the action must be continued in the name of the assignor. *Deisler* v. *United States Fidelity & Guaranty Co.*, (1917) 24 B.C.R. 278; 36 D.L.R. 29; affd. 49 D.L.R. 688.

4. Assignment of claim of lien.]—An assignment of claim of lien under the Woodman's Lien for Wages Act, R.S.B.C. 1911, cap. 243, is not within subsec. 25 of sec. 2 of the Laws Declaratory Act, R.S.B.C. 1911, cap. 133, and, in a suit by an assignee of such claims of lien, enforcement thereof is not defeated by lack of proof of notice of the assignment. *Dempsey* v. *Kurek*, (1923) 3 W.W.R. 1007. [Disapproved by Martin, J.A., in *Sheepwash* v. *Deer Mountain Lumber Company*, (1925) 37 B.C.R. 418.

5. Assignment after commencement of action — Reassignment to plaintiff before trial.]—Where during the course of an action for the price of goods sold and delivered the plaintiff assigned the debt to assignees who on the following day assigned the debt to N. who reassigned to the plaintiff, all notices of the assignments being given under the Laws Declaratory Act:—Held, that the several assignments were merely equitable and in the absence of notice the plaintiff was the proper party to continue the action. *Mouat Bros. Co.* v. *Warnier*, (1930) 43 B.C.R. 238; (1931) 1 D.L.R. 569.

V. Rights and Liabilities of Parties.

A. Priority.

1. Second assignee — Duty of prior assignee to account.]—Book debts were assigned as security to defendant bank. Subsequently they were assigned to plaintiff subject to the assignment to the bank. The bank realized under its assignment:—Held, the plaintiff was entitled to an accounting from the bank in detail; the bank could not, as against the plaintiff, charge a higher rate of interest than permitted under the Bank Act, and must give credit for interest collected above said rate, even though the payments were voluntary by the individual debtors; the bank could not, as against the plaintiff, collect a less amount than was due and release the balance of an account and charge such balance against moneys realized from other accounts. *John Robertson & Son, Ltd.* v. *Canadian Bank of Commerce*, (1920) 2 W.W.R. 1003.

2. Sale of land—Assignment of instalments of purchase price—Registration.]—Where an owner of land sold under agreement of sale and in order to secure an indebtedness assigned to a third party all subsequent payments under the agreement for sale, the purchaser being duly notified, the third party is entitled to receive the payments due under the agreement in priority to a judgment creditor although the assignment is unregistered. As the agreement of sale is not an interest in land within the meaning of the Land Registry Act or the Execution Act registration of the assignment is not required. *Canadian Bank of Commerce* v. *Royal Bank of Canada*, (1921) 29 B.C.R. 407; 60 D.L.R. 275; (1921) 2 W.W.R. 462.

3. Assignment of money accruing under contract — Set-off.] — A promise by the principals to pay to a bank, the assignee of the contractor, the money due under a building contract "until otherwise advised" does not estop them from setting up a term in their contract giving them the right to discharge from the moneys still in their hands any indebtedness for the work on the part of the contractor. The words "until otherwise advised" have a well-defined meaning in legal parlance, which is, in other words, "until we see reason to do otherwise." In an assignment of "all moneys due or accruing due" the word "or" should be read "and." *Ledingham & Cooper* v. *The Merchants' Bank of Canada*, (1917) 24 B.C.R. 207; 35 D.L.R. 191; (1917) 2 W.W.R. 1016.

4. Moneys accruing due — Set-off.]—The defendant being indebted to the Home Bank of Canada for advances, and having certain moneys payable to him from time to time by the Great Northern Ry. Co. in consideration of the delivery of railway ties, executed and delivered to the Bank an absolute assignment of all moneys due or to accrue due to him from the Railway Company, and also assigned to the Bank his interest in the ties to be delivered to the

Railway Company. The liquidators of the Bank brought action against the defendant for the amount of certain promissory notes made in the Bank's favour to secure his indebtedness. The defence was raised that the notes were paid by virtue of the right of the Railway Company to set off the amount owing to the Bank by the Railway Company by virtue of the assignment against moneys of the Railway Company on deposit in the Bank:—Held, that the first assignment to the Bank was an absolute assignment within the meaning of the Laws Declaratory Act and that the debts owing by the Railway Company to the Bank were mutual debts and there was the right of set-off of one against the other. The discharge of the first assignment by the manager of the Bank after liquidation commenced was ineffective as the only way the choses in action could have come again into its hands was by execution of another assignment by the Bank to the defendant and no such assignment was ever executed. *Clarkson and Home Bank of Canada* v. *Lancaster*, (1926) 38 B.C.R. 217.

5. Contract — Assignment of moneys accruing due—Subsequent breach of contract—Right of assignee.]—Where a lumber company entered into an agreement with the defendants to purchase from them at fixed prices a sufficient quantity of logs and shingle bolts to keep its mill in operation for a certain period, and under the same agreement sold its logging plant and equipment to the defendants and agreed to sell them certain shingle bolts at a fixed price, and subsequently assigned to the plaintiff all moneys accruing due in respect of the sale of the logging plant and equipment and shingle bolts:—Held, that there were two branches of the agreement and the claim for damages for failure to take delivery of material which the lumber company agreed to buy from the defendants, being a claim which arose subsequent to the assignment and notice of assignment, and not being so interwoven with the plaintiff's claim as to be inseparable from it, could not avail against the plaintiff as assignee of the lumber company. *Royal Bank of Canada* v. *Gustafson*, (1924) 33 B.C.R. 379; (1924) 1 W.W.R. 544.

B. Right to Sue.

1. Laws Declaratory Act—Notice.]—The plaintiff brought action upon a debt which he had assigned to three persons, who re-assigned the debt to the plaintiff. No notice was given to bring the original assignment within the provisions of the Laws Declaratory Act:—Held, that the plaintiff was the proper party to bring the action as the original assignees were merely equitable assignees. *Mouat Brothers Company Limited* v. *Warnier*, (1930) 43 B.C.R. 238; (1931) 1 D.L.R. 569.

2. Surety.]—The defendant guaranteed payment of a debt due by another. After payment was due the debt and covenant of the guarantor were assigned to the plaintiff who gave notice of the assignment to the defendant but not to the primary debtor:—Held, that as there was a right of action against the surety who alone was sued, and as to himself the provisions of the Laws Declaratory Act were strictly complied with, the plaintiff should succeed. *Donald* v. *Jukes*, (1920) 28 B.C.R. 215; 54 D.L.R. 688; (1920) 2 W.W.R. 209; affd. 56 D.L.R. 692; 60 S.C.R. 652; (1921) 2 W.W.R. 208.

3. Notice.] — Where a legal chose-in-action including the benefit of the covenant for repayment in a mortgage of land is assigned otherwise than in conformity of the Laws Declaratory Act, it being neither alleged nor proved that notice of the assignment of the mortgage had been given to the mortgagor, the assignee must still sue in the name of the assignor. *Griffiths et al.* v. *Kenney et al.*, (1917) 1 W.W.R. 800.

4. Set-off.]—The plaintiff was administratrix and sole beneficiary of the estate of her deceased husband who in his lifetime had given a mortgage with covenant to repay $11,500 advanced by the Pacific Mainland Mortgage & Investment Company. This company (after the assignment to the plaintiff of the debt sued on in this action) assigned the mortgage to the principal debtor. The defendant claimed the right of set-off against the plaintiff:—Held, that although the moneys were loaned the primary debtor by the trustee of the real estate of the deceased husband, the evidence was conclusive that the money so advanced was in fact the private moneys of the plaintiff and a debt due from the estate cannot be set off as against her personal estate. *Donald* v. *Jukes*, (1920) 28 B.C.R. 215; 54 D.L.R. 688; (1920) 2 W.W.R. 209; affd. 56 D.L.R. 692; 60 S.C.R. 652; (1921) 2 W.W.R. 208.

5. Costs.]—Where an assignee of a debt has given the assignor's solicitor authority to bring an action in his (the assignee's) name, he is responsible for the costs unless

in giving the authority he expressly excepts such liability. *Earle* v. *Continental Guaranty Corp.*, (1927) 4 D.L.R. 939; (1927) 3 W.W.R. 784.

C. Necessary Parties.

1. Sale of land—Action by assignee of vendor—Necessary parties.]—In an action by the assignee of a vendor under agreement of sale of land, the assignee to whom the purchaser has assigned his interest under the agreement is a necessary party when the purchaser's assignment was made to the knowledge of the vendor and his assignee. *Gale* v. *Powley*, (1915) 22 B.C.R. 18; 24 D.L.R. 450; 32 W.L.R. 65; 8 W.W.R. 1312.

2. Contract price.]—The assignee of the balance of the contract price owing by the owner to the principal contractor, has a sufficient interest to be added a party defendant in a mechanic's lien action. The power of adding parties in a mechanic's lien action should be sparingly exercised. *Dorrell* v. *Campbell*, (1916) 22 B.C.R. 584; 27 D.L.R. 425; 34 W.L.R. 367; 10 W.W.R. 492.

See ASSIGNMENT FOR CREDITORS.

See CONTRACT.

See GARNISHMENT.

See MECHANICS' LIENS.

See MORTGAGE.

See VENDOR AND PURCHASER.

ASSIGNMENT FOR CREDITORS.

I. CONSTRUCTION AND EFFECT OF ASSIGNMENT, 87.
II. PRIORITY, 88.
III. ASSIGNEE OR TRUSTEE, 88.
IV. PREFERENTIAL CLAIMS, 89.
V. LIABILITY OF ASSIGNEE, 90.

I. CONSTRUCTION AND EFFECT OF ASSIGNMENT.

1. Exemption.]—Exemption under the Homestead Act is a special privilege which may be insisted upon or not at the option of the debtor, and the failure to make a claim within a reasonable time after an assignment for the benefit of creditors operates as an abandonment of the privilege. *Roy* v. *Fortin*, (1915) 22 B.C.R. 282; 32 W.L.R. 790; 25 D.L.R. 18; 9 W.W.R. 407.

2. Replevin.]—An assignee for the benefit of creditors need not rely upon the special statutory remedies given him under secs. 48 and 50 of the Creditors Trust Deeds Act, R.S.B.C. 1911, ch. 13, to enable him to proceed in replevin to recover the possession of goods assigned to him. *Ibid.*

3. Payment within ten days prior to assignment.]—Moneys to the credit of a customer at a bank, not shewn to be trust funds, may be retained and set off by the bank as against the indebtedness of the customer which had accrued due before the insolvency, and the transaction in question does not come within section 40 of the Creditors' Trust Deeds Act. *Roy* v. *Canadian Bank of Commerce*, (1917) 24 B.C.R. 397; 38 D.L.R. 742.

II. PRIORITY.

1. Execution.]—A sheriff who has seized goods under a writ of fieri facias, and on the same day is formally notified of the assignment by the execution debtor under the Creditors' Trust Deeds Act and tendered the costs of the execution creditor up to that time, and thereafter remains in possession and refuses the amount of costs tendered is in wrongful possession of the goods in question and not entitled to charge poundage. *Baker* v. *Richards*, (1918) 25 B.C.R. 397; 40 D.L.R. 351; (1918) 2 W.W.R. 902; affd. 59 S.C.R. 656; 49 D.L.R. 684.

2. Seizure of money.]—Upon the sheriff seizing money under an execution it becomes the property of the execution creditor and is not affected by an assignment for the benefit of creditors executed after the seizure. *Adam* v. *Richards*, (1915) 21 B.C.R. 212; 22 D.L.R. 509; 8 W.W.R. 701.

3. Alimony.] — A decree for alimony does not give an assignor's wife a preference over other unsecured creditors. Such a decree is a judgment of the Supreme Court within the meaning of sec. 14 of the Creditors' Trust Deeds Act. *Francis* v. *Wilkerson*, (1917) 25 B.C.R. 132; (1918) 2 W.W.R. 956.

III. ASSIGNEE OR TRUSTEE.

Disclaimer by.]—The assignee of an estate cannot make a disclaimer of a debt owing to the estate without the consent of the creditors. *Browne* v. *Sidney Mills, Ltd.*, (1920) 28 B.C.R. 73; 61 D.L.R. 112.

IV. PREFERENTIAL CLAIMS.

1. Proceeds of fire insurance policy—Valuation of security.]—The plaintiff sold machinery to a company retaining the right of ownership in themselves. It was at the same time arranged that schedule insurance should be obtained on the whole of the Company's plant, $12,000 of which should in case of loss be made payable to the plaintiff "as its interest may appear." Shortly before a fire destroying the plant all the insurance policies (with the exception of one for $3,000 that had been made payable to the plaintiff in case of loss) ran out, and arrangement was in progress for further schedule insurance up to $40,000, only $18,000 of which was actually placed before the fire took place, it being the intention to make $9,000 of the new insurance payable to the plaintiff in case of loss. The Company went into liquidation immediately after the fire and the liquidator was compelled to bring action for the $18,000 insurance obtained immediately prior to the fire. Pending the action liquidation proceedings continued and the plaintiff filed its claim and valued its securities at $3,700 (being the unexpired $3,000 policy and a boiler recovered from the fire, valued at $700). Upon the assignee recovering the $18,000 insurance, the plaintiff brought action to enforce its claim to $9,000 of the insurance money so recovered:—Held, that the insurance was in the nature of additional security, and was subject to the provisions of section 31 of the Creditors' Trust Deeds Act, and the plaintiff having failed to value the security it now claims, as required by said section, and not having the right to revalue its security after the recovery of the insurance moneys as it would work an injustice to the unsecured creditors, who shared in the expense of the litigation, it could not succeed. *The A. R. Williams Machinery Company of Vancouver, Limited* v. *Graham,* (1917) 25 B.C.R. 284; 39 D.L.R. 140; (1918) 1 W.W.R. 161; affd. (1918) 57 S.C.R. 229; 43 D.L.R. 437; (1918) 3 W.W.R. 597.

2. Trade fixtures — Disclaimer.] — A tenant assigned his interest in leased premises including trade fixtures to certain parties who later took a new lease of the premises from the owner. The lease with fixtures passed through the hands of several tenants through assignments and "reorganizations." The last tenant assigned for the benefit of its creditors to the defendant who gave notice to the plaintiff that he wished to determine the lease. In an action by the landlord to prevent the removal of the fixtures:—Held, that the fixtures belonged to the defendant and his disclaimer as assignee had no operation to defeat the right of removal within the three months' delay given by sec. 55 (1) of the Creditors' Trust Deeds Act. *Wintemute* v. *Taylor,* (1919) 27 B.C.R. 237; (1919) 2 W.W.R. 882.

V. LIABILITY OF ASSIGNEE.

1. Rent payable by trustee in possession.]—Notwithstanding a clause in a lease providing that in the event of the lessee making an assignment for the benefit of his creditors the term snall expire and the rent for the current month and three additional months, shall immediately become due and payable, under sec. 2 of the Landlord and Tenant Act Amendment Act, 1923, the landlord is only entitled to rent for the time the premises are occupied by the trustee. *Canadian Credit Men's Trust Association Ltd.* v. *Monka,* (1924) 34 B.C.R. 99.

2. Rent payable by trustee in possession.]—Under sec. 33 of the Landlord and Tenant Act, 1924, irrespective of whether the bankrupt's premises are held under lease or not, the landlord can only claim from trustee in bankruptcy in possession proportionate rent for the time the premises are actually used by the trustee, notwithstanding that according to the lease a month's rent has become payable in advance during possession by the trustee. *In re Williamson,* (1927) 38 B.C.R. 479.

See BANKRUPTCY.
See COMPANIES (WINDING UP).
See FRAUDULENT AND VOIDABLE TRANSACTIONS.
See LANDLORD AND TENANT.

ASSIZE.

See CRIMINAL LAW.

ATTACHMENT OF DEBTS.

See GARNISHMENT.

ATTACHMENT OF PERSON.

See CONTEMPT OF COURT.
See INJUNCTION.

ATTORNEY.

See PRINCIPAL AND AGENT.
See SOLICITOR

ATTORNEY-GENERAL.

See CONSTITUTIONAL LAW.
See MINES AND MINERALS.
See NUISANCE.

AWARD.

See ARBITRATION.
See COMPULSORY PURCHASE.
See MASTER AND SERVANT.

BAIL.

See ARREST.
See CRIMINAL LAW.

BAILMENT.

I. DUTY AND LIABILITY OF BAILEE, 91.
II. LIMITATION OF LIABILITY, 93.
III. RIGHTS OF BAILEE, 94.
A. As against third persons, 94.
B. Possessory lien, 94.

I. DUTY AND LIABILITY OF BAILEE.

1. Inn-Keeper.] — An hotel-keeper who gratuitously permits a guest on departure to leave a trunk in the baggage room of the hotel is a gratuitous bailee, and only bound to exercise that degree of care which a reasonably prudent man would exercise in respect of his own property of a like description. *Brewer* v. *Calori,* (1921) 29 B.C.R. 457.

2. Inn-Keeper.]—An hotel-keeper who becomes, by purchase of the hotel, gratuitous bailee of baggage left there previous to his purchase, is liable for delivery of such baggage to an unauthorized person, unless he can shew circumstances justifying him in so delivering it. *Hansen* v. *Killick,* (1925) 35 B.C.R. 108; (1925) 3 D.L.R. 433; (1925) 1 W.W.R. 375.

3. Hire of horse.]—If a hired horse is taken out sound and brought back damaged, there is an onus on the hirer to shew that the injury was not caused through his fault. He is bound to ride it as moderately and treat it as carefully as a man of common discretion would his own, and if, in spite of this care and treatment, the horse is injured, the hirer is not responsible. *Reinseth* v. *Campbell,* (1920) 52 D.L.R. 357.

4. Machine.]—When a machine, which has previously done its work satisfactorily, is damaged while in the care of a custodian, the onus of proof is on the custodian to shew that the damage did not happen in consequence of his neglect to use such care and diligence as a careful and prudent man would exercise in relation to his own property. *Gibson* v. *Wilson & Downer,* (1922) 67 D.L.R. 410.

5. Garage proprietor.]—When a motor car is damaged by fire while stored for hire with a garage company, the onus is on the company to shew that it had used the same degree of care towards the preservation of the goods entrusted to it as a reasonable person would take in respect of his own goods. *Romano* v. *Columbia Motors Ltd.,* (1930) 42 B.C.R. 168; (1930) 1 D.L.R. 815; (1930) 1 W.W.R. 159.

6. Floating drydock — Obligation to return.]—A lessee agreed to use a floating drydock in the construction of a breakwater, to insure it against both marine and fire risks and to deliver it to the lessor in good condition at the end of the term. During the work the dock collapsed and became a total wreck. The lessee did not succeed in obtaining the insurance agreed upon owing to the method of user:—Held, that the lessor was entitled to recover the actual value of the dock which was lost in circumstances rendering the lessee contractually responsible for its value. The measure of damages for failure to insure is merely nominal as a policy would not have covered the loss which was inevitable and due to the unfitness of the structure and dissociated from any peril by wind or water. *Seattle Construction and Drydock Co.* v. *Grant Smith & Co. and McDonnell Ltd.,* (1919) 89 L.J.P.C. 17; 122 L.T. 203; 48 D.L.R. 172; (1919) 3 W.W.R. 33; (1920) A.C. 162. Affg. (1918) 26 B.C.R. 397; 44 D.L.R. 90; (1918) 3 W.W.R. 703.

7. Agistment.]—The onus is upon an agister to shew that the loss or death of an animal while in his charge was not due to his negligence. *Pye* v. *McClure,* (1915) 21

B.C.R. 114; 22 D.L.R. 543; (1915) 8 W.W.R. 538. *Comstock* v. *Ashcroft Estates Ltd.*, (1916) 23 B.C.R. 476; (1917) 1 W.W.R. 1413.

II. LIMITATION OF LIABILITY.

1. Warehouseman's contract.] — The plaintiffs stored goods with a warehouse company. The warehouse contract cited, inter alia, "that the responsibility of the company for the contents of any piece or package is limited to the sum of $50, unless the value thereof is made known at the time of storage and receipted for in the schedule; an additional charge will be made for higher valuation." Nine packages were stored without a declaration of value and without an additional charge being made. Owing to the mistake of a warehouseman, a servant of the defendant, four of the plaintiffs' packages were included in a shipment of goods to another customer in England. Two of the packages were lost in transit and two returned in a damaged condition:—Held, that the goods having been negligently but not wilfully parted with through the mistake of the defendant's servant the amount recoverable is subject to the limitation of the warehouse contract. *Maunsell and Maunsell* v. *Campbell Security Fireproof Storage & Moving Company, Limited*, (1921) 29 B.C.R. 424; 60 D.L.R. 128; (1921) 2 W.W.R. 348, 579.

2. Negligence — Exemption by contract.]—The plaintiffs' car broke down near the defendant's garage, and leaving the car in the garage for repairs he signed a "work order" containing at the end in small type: "This company does not assume in any way any liability whatever either for cars left with us for repair, storage or other purposes, or while being driven by our employees." Upon repairs being made, the defendant moved the car to a warehouse which was not heated, without removing the water from the radiator. In cold weather that followed, the water in the radiator froze damaging the radiator and the engine: Held, that the special clause in the "work order" exonerated the defendant from liability irrespective of whether it was read by the plaintiff when he signed it or not. *Walden* v. *Haney Garage Ltd.*, (1928) 39 B.C.R. 413; (1928) 1 D.L.R. 688; (1928) 1 W.W.R. 371.

III. RIGHTS OF BAILEE.

A. As Against Third Persons.

Damage to property in bailee's possession.]—A bailee of a motor car and goods therein is entitled to recover full damages for negligence causing injury to the car and the goods, irrespective of his liability towards the true owner. *Rodger* v. *Flinton*, (1926) 3 W.W.R. 773.

B. Possessory Lien.

1. Possession—Giving up—Effect of.]—A possessory lien on goods at common law is lost if the party claiming the lien gives up possession of the goods, and he cannot afterwards revive his lien by retaking possession. *Welch* v. *Scott*, (1920) 28 B.C.R. 349; (1920) 2 W.W.R. 510.

2. Repairs.]—A possessory lien for repairs is destroyed if the party entitled to it gives up his right to the possession of the goods. *Rumely* v. *The "Vera M.,"* (1922) 31 B.C.R. 472; (1923) Ex. C.R. 36; (1923) 2 D.L.R. 867; (1923) 1 W.W.R. 253.

3. Conditional sales — Repairs by buyer.]—Where the vendor under a hire-purchase agreement to secure the purchase price of a chattel, has not taken possession, and where there has been no default in payment, the purchaser has the right and duty to have the property repaired although it may create a lien in favour of the workman engaged in carrying out the repairs. *Gurevitch* v. *Melchoir*, (1921) 29 B.C.R. 394.

4. Conditional sales — Repairs by buyer.]—Where an agreement for the conditional sale of a motor car contained the following covenant on the part of the buyer: "We shall not at any time suffer or permit any charge or lien whether possessory or otherwise to exist against said automobile," it was held that the buyer could not authorize the doing of repairs in such a way as to give the repairer a lien. *Alliance Finance Co. and Standard Motors Ltd.* v. *Simons*, (1928) 3 W.W.R. 621.

5. Possession—Custom.]—A lien upon goods does not exist by local usage or custom because of a general agreement among owners of trucks to claim liens upon goods placed in their hands to be moved. *Welch* v. *Scott, supra.*

See ANIMALS.

See MOTOR VEHICLES.

See NEGLIGENCE.
See SALE OF GOODS.

BANKRUPTCY.

I. JURISDICTION, 95.
II. ACTS OF BANKRUPTCY, 95.
III. PROCEDURE, 96.
IV. TRUSTEE, 97.
V. EFFECT OF BANKRUPTCY ON ANTECEDENT TRANSACTIONS, 98.
VI. SECURED AND PREFERRED CREDITORS, 98.
VII. ORDINARY CREDITORS, 104.
VIII. PROPERTY AVAILABLE FOR DISTRIBUTION, 104.
IX. FRAUDULENT PREFERENCE, 105.

I. JURISDICTION.

1. Court of Appeal—Costs.]—By sec. 63 (3b) of the Bankruptcy Act the Court of Appeal of British Columbia is constituted an Appeal Court of Bankruptcy and under sec. 68 (2) of the same Act the Appeal Court has untrammeled power and discretion over costs. *In re Kwong Tai Chong Co.*, (1922) 65 D.L.R. 132; (1922) 2 W.W.R. 229; 3 C.B.R. 1. *Canadian Credit Men's Ass'n* v. *Jang Bow Kee and Yin Shee*, (1922) 31 B.C.R. 40.

2. Appeal from judge in bankruptcy.]—The Court of Appeal has jurisdiction to entertain an appeal from the judgment of a judge in Bankruptcy on an appeal to him from the decision of a trustee refusing to recognize the right of a creditor to rank as a secured creditor, the amount involved exceeding $500. *Apex Lumber Co. Ltd.* v. *Johnstone*, (1925) 36 B.C.R. 81; (1925) 3 D.L.R. 1050; (1925) 3 W.W.R. 360; 7 C.B.R. 157.

3. Procedure.]—No appeal lies from the decision of a judge in Bankruptcy on a question of procedure. *Winter* v. *Capilano Timber Co.*, (1926) 37 B.C.R. 91 *(sub nom. In re Coast Shingle Mill Co. Ltd.)*, (1926) 2 W.W.R. 536; 7 C.B.R. 553.

II. ACTS OF BANKRUPTCY.

1. Failure to meet liabilities.]—Under the Bankruptcy Act it is an act of bankruptcy if the debtor "ceases to meet his liabilities as they become due:—Held, that the word "ceases" does not include a continuing default, and if a person has failed to pay liabilities on their due dates eighteen months prior to the presentation of the bankruptcy petition against him, the mere continuance of the failure to pay the same liabilities cannot be said to be an act of bankruptcy occurring within six months before the presentation of the petition. *Brown* v. *Kelly Douglas & Co. Ltd.*, (1923) 32 B.C.R. 143; (1923) 2 D.L.R. 738; (1923) 1 W.W.R. 1340; 3 C.B.R. 812

2. Debt assumed by insolvent company.]—A receiving order against a company under the Bankruptcy Act may be based upon a debt owing by the company by reason of its having undertaken, after the Act came into operation, the liabilities incurred by a firm before the Act came into operation. *In re Stewart Mercantile Company Ltd.*, (1921) 1 W.W.R. 740; 1 C.B.R. 367; 59 D.L.R. 412.

3. Authorized assignment — Directors of company.]—A board of directors of a company if duly and properly constituted has power to make an assignment in bankruptcy without first having received authority to do so from the shareholders. Even if the board making the assignment has been appointed at a meeting of shareholders representing a majority of shares only and of which notice was not given to the other shareholders, the Court notwithstanding the irregularity will not interfere in the absence of fraud or of oppression of the minority shareholders. *In re Pacific Coast Coal Mines Ltd. and Hodges*, (1926) 37 B.C.R. 550; (1926) 4 D.L.R. 759; (1926) 3 W.W.R. 378; 8 C.B.R. 102.

III. PROCEDURE.

1. Action by trustee.]—A trustee in bankruptcy obtained written permission of the inspector under section 20 (1) (c) of the Bankruptcy Act to "bring, institute, or defend any action or other legal proceeding relating to the property of the debtor." He then brought action in the Supreme Court to set aside a transaction between the bankrupt and defendant whereby the defendant received $1,000, and to recover same for the benefit of the estate:—Held, that as the written consent of the inspector does not in terms authorize him to bring an action in the Supreme Court, he should have taken proceedings in the summary manner provided for in the Bankruptcy Act and Rules. *Stillwater Lumber & Shingle Company*

Limited v. *Canada Lumber & Timber Company Limited,* (1923) 32 B.C.R. 81; (1923) 2 D.L.R. 900; 3 C.B.R. 807.

2. Appeal.]—No appeal lies from the decision of a judge in Bankruptcy upon a question of procedure. *Winter* v. *Capilano Timber Co.,* (1926) 37 B.C.R. 91 *(sub. nom. In re Coast Shingle Mill Co. Ld.),* (1926) 2 W.W.R. 536; 7 C.B.R. 553.

IV. TRUSTEE.

1. Rented premises—Trustee in possession.]—Under section 33 of the Landlord and Tenant Act as re-enacted by section 2 of chapter 27 of the statutes of 1924, irrespective of whether the bankrupt's premises are held under lease or not, the trustee in bankruptcy in possession can only be charged by the landlord proportionate rent for the time the premises are actually used by him. *In re Williamson,* (1927) 38 B.C.R. 479.

2. Power to lease.]—There is no specific power vested in the trustee to lease the property of the debtor under section 43 of the Bankruptcy Act, and the Court will set aside a lease the granting whereof is not beneficial to the winding up of the debtor's business. *In re Sechart Fisheries Ltd.,* (1929) 41 B.C.R. 323; (1929) 4 D.L.R. 536; (1929) 2 W.W.R. 413; 10 C.B.R. 565; 11 C.B.R. 96.

3. Bankruptcy of tenant — Landlord's re-entry previous to assignment.]—A writ issued by a landlord claiming possession simpliciter and any further relief which is incidental to a claim for possession, is equivalent to re-entry, bringing a proviso in the lease of the demised premises as to forfeiture of the term into operation, and the privilege given to a trustee in bankruptcy under the Bankruptcy Act to retain "leased premises" occupied by the bankrupt for the purposes of the trust estate, will not be exercisable in respect of premises which the landlord has already re-entered in law. *Standard Trusts Co.* v. *David Steele Ltd.,* (1921-2) 30 B.C.R. 359, 522; 62 D.L.R. 650; (1922) 1 W.W.R. 137; 2 C.B.R. 183; 68 D.L.R. 750; (1922) 2 W.W.R. 510; 3 C.B.R. 141.

4. Rent of premises — Acceleration clause—Lease.]—Notwithstanding a clause in a lease as to acceleration rent, under Sec. 2 of the Landlord and Tenant Act Amendment Act, 1923, the landlord is only entitled to rent for the time the premises are occupied by the trustee. *Canadian Credit Men's Trust Ass'n Ltd.* v. *Monka,* (1924) 34 B.C.R. 99.

5. Personal liability for costs — Jurisdiction of Court of Appeal.]—The Court of Appeal when acting as a Court of Appeal in bankruptcy has absolute jurisdiction over costs. On motion to the Court of Appeal by the authorized trustee in bankruptcy (who had been successful in an action in the Court below but unsuccessful in the Court of Appeal) to vary the settling of the judgment by the registrar which made him personally responsible for the costs of the opposite party:—Held, that in sec. 68(2), Bankruptcy Act, which provides that "subject to the provisions of and incidental to any proceeding in Court . . . shall be in the discretion of the Court," the word "Court" has impliedly a wider meaning than that given in the interpretation clause, and said section applies to the Court of Appeal. In the present case, the clause making the trustee personally liable should not be struck out. The combined effect of the section and rules of the Bankruptcy Act governing appeals is that appeals thereunder coming before the various Appeal Courts are to be disposed of in all respects both as to subject-matter and costs as if they were ordinary appeals, the expansion of the meaning of "Court" is therefore unnecessary and the motion should be dismissed. *Canadian Credit Men's Trust Ass'n Ltd.* v. *Jang Bow Kee and Yin Shee,* (1922) 31 B.C.R. 40.

V. EFFECT OF BANKRUPTCY ON ANTECEDENT TRANSACTIONS.

Registration of conveyance by insolvent person.]—The grantor being insolvent executed a conveyance to a trustee for her creditors. The registrar took the position that under sec. 9 (1) of the Bankruptcy Act, 1919, the conveyance was void and refused registration:—Held, that the conveyance is voidable only at the instance of some person entitled and that if no one of the persons entitled to complain has done so and has had the conveyance declared null and void, the registrar must accept the same for registration. *In re Land Registry Act. In re Bull Estate,* (1926) 3 W.W.R. 263; 7 C.B.R. 729.

VI. SECURED AND PREFERRED CREDITORS.

1. Arrears of tolls for electric power—Registered judgment.]—The City of Kamloops recovered judgment against the Kamloops Copper Co. for arrears of tolls for

electric power supplied, and registered the judgment. Two days after the date of the judgment the Company made an authorized assignment under the Bankruptcy Act. The City claimed to rank as a secured creditor by virtue of its registered judgment and section 151 of the Water Act, B.C. Stats. 1914, cap. 81:—Held, that the City is entitled to the position of a secured creditor. *In re Kamloops Copper Co. and City of Kamloops*, (1925) 35 B.C.R. 243; (1925) 3 D.L.R. 896; (1925) 2 W.W.R. 733; 7 C.B.R. 17.

2. Purchaser's lien.] — The plaintiff entered into a contract in July, 1923, with T. & V. for delivery of 300,00 feet of lumber at a certain price, and at the same time advanced T. & V. moneys to carry on the work said moneys being secured by promissory notes. On the 13th of August, 1923, T. & V. gave the plaintiff a bill of sale for 100,000 feet of lumber and on the 13th of September following T. & V. assigned for the benefit of their creditors without delivery of the lumber. The plaintiff sought to establish a purchaser's lien upon the lumber in question:—Held, that the moneys were advanced as a loan to enable T. & V. to carry out the contract which is inconsistent with the claim for a lien; further the taking of a bill of sale as security and claiming to rank as a secured creditor by reason thereof is also inconsistent with the claim for a lien. *Apex Lumber Company* v. *Johnstone*, (1925) 36 B.C.R. 81; (1925) 3 D.L.R. 1050; (1925) 3 W.W.R. 360; 7 C.B.R. 157.

3. Costs of execution creditor.]—The costs of an execution creditor will not rank as a preference claim unless there has been an actual seizure by the sheriff before the assignment. Subsection 2 of section 25 of the Bankruptcy Act is governed by the prior and enacting portion of the section. *Ross Johnson Ltd.* v. *Victoria Mines, Ltd.*, (1929) 41 B.C.R. 321; (1929) 2 W.W.R. 511; (1930) 1 D.L.R. 57; 11 C.B.R. 23.

4. Priority of claims under Act.]—Sec. 51 of the Bankruptcy Act as amended by 1921, ch. 17, sec. 39, does not apply to claims already secured by the debtor, especially if the security is given under the Bank Act. *In re Canadian Logging Company*, (1927) 1 W.W.R. 406; 8 C.B.R. 179.

5. Crown lien—Priority over expenses of administration.] — Where the Crown, having a statutory lien over property for royalties has made a seizure, and the owner has later become bankrupt and the trustee sells the property but realizes insufficient to pay both expenses of administration as well as the Crown's claim for royalties, the Crown's claim has priority. It is the duty of a trustee before taking a trusteeship, to guard against the contingency of being placed in the position of having to bear the expenses of administration himself. *In re Gulf Sawmills Limited*, (1922) 31 B.C.R. 397; (1922) 3 W.W.R. 870; 3 C.B.R. 384.

6. Security taken on eve of insolvency.] —A person who makes a bona fide advance to another person or company when it is on the eve of insolvency and takes security therefor does not thereby come within the provisions of sec. 64 of the Bankruptcy Act relating to preferred creditors, if, at least, he is not at the time already a creditor; and even one who is already a creditor may, in special circumstances, make such an advance and take a valid security therefor as well as for his pre-existing debt. Moreover, if a preferred creditor within the meaning of the Act did not take his security with the intent of procuring a preference to himself over other creditors the transaction stands. *In re British Columbia Bond Corporation, Limited and Lang*, (1931) 43 B.C.R. 481; (1931) 2 D.L.R. 985; (1931) 1 W.W.R. 286; 12 C.B.R. 213.

7. Valuation of—Acceptance by trustee.]—Acquiescence in the valuation of a secured creditor's security against the property of a bankrupt under sec. 46 (6) of the Bankruptcy Act is equivalent to payment pro tanto. On a valuation to the full amount of the debt, with notice to the trustee to elect whether or not he will redeem or will require realization of the security, the trustee's failure to elect results in the security vesting in the creditor in satisfaction of the debt. The debtor's personal guarantors in respect thereof are consequently released. *Bank of Hamilton* v. *Atkins et al.*, (1923) 4 C.B.R. 347; (1924) 1 W.W.R. 92. *See Larue* v. *Royal Bank of Canada*, (1926) S.C.R. 218; 7 C.B.R. 285; *(sub nom. Re Belanger, Trustee,* v. *Royal Bank)*, (1926) 2 D.L.R. 929.

8. Conditional sale — Seizure under execution for balance due — Election— Right of trustee.]—A conditional seller after suing and recovering judgment for the balance owing and obtaining the seizure of the goods by the sheriff upon the execution thereunder, cannot claim title to the goods under the conditional sales contract as against a trustee in bankruptcy. *Russell* v. *Reid*, (1928) 1 D.L.R. 628.

9. Conditional sale contract as security for loan—Fictitious transaction.]—Where a debtor company to secure advances for the purposes of its retail motor-car business enters into conditional sale contract whereby it purports to purchase from the lenders a second-hand motor-car in its own possession acquired as part payment on a new car, the transaction is invalid to confer any title in the lenders as against the debtor's trustee in bankruptcy, being in effect a loan upon the security of the second-hand car to which the Bills of Sale Act applies. *In re International Motors, Ltd. Trustee* v. *Telford*, (1921) 2 C.B.R. 314. *See R. P. Rithet & Co.* v. *Scarff*, (1920) 29 B.C.R. 70; *W. J. Albutt & Co. Ltd.* v. *Riddell*, (1930) 43 B.C.R. 74; (1930) 4 D.L.R. 111; (1930) 2 W.W.R. 623.

10. Property held in trust.]—Where an agent is entrusted by his principal with money to buy shares, the money will be considered as trust funds in his hands and the principal has the same interest in the shares when bought as it had in the funds which were used to purchase them. On the bankruptcy of a stock-broker, where there are sufficient shares of any particular description to satisfy orders given by customers to the debtor, they should be delivered to such customers who have purchased shares of that description. If these customers have paid in full for their shares no trouble arises except that a splitting of the share certificates might become necessary to deliver certificates representing the proper number of shares. If, however, any of these customers have not paid in full, pursuant to their several orders for purchase, then, aside from any liability to make payment befor being entitled to the certificates representing the shares so purchased, they should be required to make payment of the balance payable by them in respect of their purchase with interest as well as making payment of any other indebtedness by them to the debtor. If there are not sufficient certificates available of a particular description to satisfy the purchases by the different customers, there should be awarded to them their pro rata parts of the shares, so insufficient to satisfy the claims of the customers. *In re R. P. Clark & Company (Vancouver) Ltd.*, (1931) 44 B.C.R. 301; (1931) 3 W.W.R. 79; 13 C.B.R. 118.

11. Priority—Solicitors' costs—Property recovered or preserved]—Under sec. 104 of the Legal Professions Act, a solicitor employed to prosecute or defend any cause in any Court of justice shall be deemed to have a charge upon and a right to payment out of property which is recovered or preserved therein through his services, for the proper costs in reference to the cause or matter. A solicitor defended five actions brought against a company, which subsequently became bankrupt, as follows: (1) To recover a commission owing by the company; (2) to recover for professional services as a mining engineer; (3) a mechanic's lien action for work done in the company's mine; (4) to recover the amount of a promissory note; (5) for goods sold and delivered. The amount recovered in each case being substantially less than the amount claimed:—Held, that with the exception of the mechanic's lien action all the cases defended by the solicitor were personal actions and not actions in rem, and the words "property recovered or preserved" do not apply. In the mechanic's lien action the property upon which the lien attached was relieved to the extent of a sum of money, in respect of which the solicitor is entitled to rank as a preferred creditor. *Miller* v. *Wollaston*, (1929) 41 B.C.R. 145; (1929) 2 W.W.R. 136 (1929) 3 D.L.R. 348.

12. Priority—Assignment of proceeds of insurance policy.]—The property of a company was destroyed by fire and the company thereafter became bankrupt and a sum of money was received on certain fire insurance policies effected by the company. On an issue to ascertain priorities of various claimants it appeared that the defendant had previously sold certain timber to the company in which he still retained an interest. When the fire occurred the defendant advanced a sum of money to the company, taking as security therefor an assignment of the same sum payable in priority out of the proceedings of insurance policies. The assignment was not registered under the Assignment of Book Accounts Act:—Held, that as the money was growing due under a specified contract as recited in sec. 2 of the 1930 amendment to said Act registration was not necessary and the defendant was entitled to priority in respect of the money in question. *In re Campbell River Mills Ltd. Dinning* v. *Ingham*, (1931) 43 B.C.R. 477; (1931) 2 D.L.R. 946.

See Dinning v. *Workmen's Compensation Board. Infra.*

13. Sale of land—Unpaid grantor.]—Under agreement for sale made in 1923, H. agreed to sell certain lands to the Mainland Portland Cement Company for

which he was to be paid from the proceeds of the sale of bonds issued by the company. He delivered a conveyance of the lands to the company which was duly registered. The sale of bonds then proceeded but the proceeds were wrongfully used for other purposes and the company became bankrupt in 1926. On a motion for rescission of the agreement and reconveyance of the lands:—Held that if any action lay it was not for a reconveyance as upon failure of consideration but for the amount of the purchase-money. Held, further, that a claim as possessor of a vendor's lien in priority over the claims of other creditors is inconsistent with the claim for rescission and in the circumstances he has abandoned his lien if it ever existed. *In re Mainland Portland Cement Co.*, (1927) 38 B.C.R. 417; (1927) 2 D.L.R. 742.

14. Priority—Liens—Workmen's Compensation Act.]—Questions of priority in the distribution of the assets of a bankrupt are to be distinguished from the question whether a lien or charge has been created. The plaintiff held as trustee for debenture holders a blanket mortgage on the property of a bankrupt which became a specific charge in the property when the bankruptcy order was made. The plaintiff claimed priority for the mortgage in the distribution of assets over an amount owing to the Workmen's Compensation Board on an assessment for fees:—Held, that assuming that the plaintiff valued his security and claimed only for the balance the trustee took only the equity of redemption. The general creditors had no interest in the charge created by the mortgage. No lien or charge is created by sec. 46 of the Workmen's Compensation Act, or sec. 125 of the Bankruptcy Act, and there is here no question of priority between secured creditors. The plaintiff is therefore entitled to succeed. *Dinning* v. *Workmen's Compensation Board*, (1931) 44 B.C.R. 412; (1932) 1 D.L.R. 373; (1932) 1 W.W.R. 136; 13 C.B.R. 256.

See Dinning v. *Ingham, supra.*

15. Services of insurance adjuster.]—Under sec. 121 of the Bankruptcy Act an insurance adjuster is entitled to a preferential claim for his services on the debtor's behalf in adjusting with representatives of insurers a loss by fire in the debtor's premises. *In re Vancouver Dress Co. Ltd.*, (1931) 44 B.C.R. 283; (1931) 3 W.W.R. 220; 13 C.B.R. 66.

VII. Ordinary Creditors.

1. Stock brokers — Purchasers of shares.] — The appellants employed the bankrupt stock-brokers to purchase certain shares for them. The shares were purchased but they were not included in assets held by the trustee and there was no evidence as to what became of them:—Held, (1) where claimant paid for his shares in full, and at the time of the assignment the shares had appreciated in value, the sum allowed should be the value of the stock on the date of the assignment and to this should be added the amount of any dividend received by the bankrupt. (2) Where the stock depreciates in value the same rule applies and the claimant receives only the value of the stock at the time of the assignment. (3) Where a claimant bought on margin and her stock increased in value her claim must be treated in the same way, the trustee having a lien for the balance of the purchase price and interest. *In re Hugh W. Robertson Limited (Bankrupt). In re Weatherhead et al.*, (1930) 43 B.C.R. 232; (1930) 3 W.W.R. 599; 12 C.B.R. 117.

2. Company — Shareholders as creditors.]—Shareholders of a company debtor in bankruptcy may attend meetings of creditors of the debtor and vote thereat as creditors, their votes to be recorded separately in the class of shareholders. *In re Provincial Hotels Co.*, (1922) 69 D.L.R. 744; (1922) 3 W.W.R. 96; 3 C.B.R. 296.

3. Company—Ranking of creditors.]—Where a company is deprived of its power to receive money on deposit, in subsequent bankruptcy proceedings the depositors claiming for moneys on deposit prior to its losing such powers will be paid in full before depositors claiming for deposits made after the power was withdrawn. In the case of a person having two demands, one recognized by law, and the other arising on a matter forbidden by law, and an unappropriated payment is made to him, the law will afterwards appropriate it to the demand which it acknowledges and not to the demand which it prohibits. *In re Nippon Kinyu Sha, Limited; Ex parte Fujino*, (1923) 32 B.C.R. 56; (1923) 1 D.L.R. 1156; (1923) 1 W.W.R. 880; 3 C.B.R. 673.

VIII. Property Available for Distribution.

1. Right of Crown to possession as against trustee in bankruptcy.]—The judge of the Court exercising jurisdiction in bank-

ruptcy may entertain and grant an application for recovery from the trustee in bankruptcy of possession of ships partly built and materials in connection therewith, and the necessary portion of the bankrupt's building yards claimed by the applicant under a lien to secure the completion and delivery of the ships, in accordance with the bankrupt's contract with the applicant, and which ships, etc., under such claim and for such purpose, had, prior to the order declaring the bankruptcy, been taken possession of by the applicant, and subsequently to such order had been taken possession of by the trustee in bankruptcy. Such applicant, although not a "creditor" or "secured creditor" under the Bankruptcy Act, comes within the words "any other person aggrieved by any such act or decision of the trustee" in sec. 39 of said Act. *The King* v. *Hodges*, (1921) 30 B.C.R. 37; (1921) 2 W.W.R. 388; 1 C.B.R. 530.

2. Homestead exemption.] — A debtor who had made an authorized assignment under the Bankruptcy Act is not entitled to any exemption of personal property under sec. 17 of the B.C. Homestead Act, if he has not made his claim to exemption within the proper time, whether such proper time is before execution of the assignment, at time of delivery of possession to the assignee, within a reasonable time thereafter, or within the statutory period set out in the Homestead Act. A right to such exemption is a special privilege which may be lost if not exercised in a proper manner. *In re Trenwith*, (1922) 3 W.W.R. 1205; 3 C.B.R. 371.

IX. Fraudulent Preference.

1. Rebuttable presumption.]—A debtor within three months before his assignment for the general benefit of his creditors, assigned a debt to one of his creditors without the intention of giving an unlawful preference. Under sec. 3 of the Fraudulent Preferences Act such an assignment is deemed to be void as a fraudulent preference. Under sec. 64 (2) of the Bankruptcy Act such an assignment "shall be presumed prima facie to have been made with the view of giving such a preference, and the presumption is rebuttable. Sec. 3 of the Fraudulent Preferences Act has been rendered inoperative by the overriding enactment of sec. 64 of the Bankruptcy Act. While the Bankruptcy Act does not abrogate a Provincial Act merely because the latter deals with preferential transactions, yet with respect to such transactions a Provincial statute cannot be enforced if it provides that a certain result shall follow from circumstances which under the Dominion statute are followed by a different result. *Hoffar Ltd.* v. *Can. Credit Men's Trust Assn.*, (1929) 40 B.C.R. 454; (1929) 2 D.L.R. 73; (1929) 1 W.W.R. 557; 10 C.B.R. 369. Leave to appeal refused, (1929) S.C.R. 180; (1929) 2 D.L.R. 106; 10 C.B.R. 374.

2. Conveyance to wife—Bona fides—Burden of proof.] — When a conveyance from a husband to his wife is questioned as being a fraud on his creditors and suspicion touching the reality of bona fides of the transaction arises from the circumstances in which the transaction took place, then the fact of relationship itself is sufficient to put the burden of explanation upon the parties interested and their testimony must be scrutinized with care and suspicion. *In re Ready & Cass*, (1924) 33 B.C.R. 371; (1924) 2 D.L.R. 528.

See Assignment for Creditors.
See Banks and Banking.
See Companies Winding-up.
See Execution.
See Fraudulent and Voidable Transactions.

BANKS AND BANKING.

I. Organization and Powers, 106.
II. Customers' Accounts, 107.
A. *Duty to customers*, 107.
B. *Lien*, 109.
C. *Appropriation of payments*, 110.
D. *Entries in bank book*, 110.
III. Securities Under the Bank Act, 110.
IV. Interest, 113.
V. Winding-up, 114.

I. Organization and Powers.

1. Company customers' deposits.]—It is within the powers of the Provincial Legislature to incorporate a company with the object of carrying on that branch of banking which consists of receiving money on deposit, paying interest thereon and allowing the customer to issue cheques against his deposits. *In re Dominion Trust Co. and United States Fidelity Claim*, (1918) 26 B.C.R. 339; (1918) 3 W.W.R. 1023.

2. Capital—Deposit with Minister of Finance—Subscribers' notes.]—A sale of securities held by the provisional directors of a bank about to be established for stock redistribution, in order to put itself in funds to make the deposit with the Minister of Finance necessary to obtain the certificates from the treasury board authorizing the bank to commence business, was not an illegal proceeding prior to the 1913 amendment to the Bank Act. *McLennan* v. *Kinman. Kinman* v. *Bank of Vancouver et al.*, (1916) 22 B.C.R. 414; 28 D.L.R. 507; 10 W.W.R. 517.

II. CUSTOMERS' ACCOUNTS.

A. Duty to Customers.

1. Authority to combine accounts—Charging customers' indebtedness.]—The plaintiff who was general superintendent of the Kamloops Copper Company, Inc., issued a cheque and delivered it to the manager of the defendant Bank as follows: "Kamloops, B.C., Feb. 15, 1923. Pay to the order of Kamloops Copper Co. Inc.....Dollars. Savings [sgd.] 'A. T. Wallinder.'" It was endorsed by said company to the Bank and was given to secure the company's overdraft at the Bank. The bank manager afterwards transferred all of the plaintiff's moneys in his savings account to his current account increasing his current account to $594.65. He then added the symbol "C/A &" above the word "Savings" in the cheque, filled in the amount of $593.65, charged this amount to the plaintiff's current account and used it to liquidate in part the debt owing by the Company to the Bank:—Held, that the cheque was given to the Bank to be used, if necessary, as security for overdrafts in the company's account generally, and what the bank manager did was within the scope of his authority. To be a material alteration to a cheque the change must be made without the assent of the parties liable thereon and must be of such a character as to alter their legal position. In the absence of any special contract to keep a customer's account separate a bank may combine his accounts in different departments of the bank for the purpose of meeting his indebtedness to the bank without notifying him or obtaining his consent thereto. *Wallinder* v. *Imperial Bank of Canada*, (1925) 36 B.C.R. 226; (1925) 4 D.L.R. 390; (1925) 3 W.W.R. 409.

2. Suspending payment—Subsequent deposit.] — The Home Bank of Canada closed its doors at head office in Toronto at 2.55 p.m. on the 17th of August, 1923, which by Standard Time would be 10.55 a.m. in Vancouver. Shortly after 10.55 in Vancouver defendant gave H. & Co. certain bonds and securities for which he received H. & Co.'s cheque for $17,373.71 drawn on The Home Bank of Canada. At about 2.20 p.m. on the same day H. & Co. sold the defendant certain bonds and received a cheque from him drawn on the Standard Bank of Canada for $10,657.70. The defendant then went to the Standard Bank of Canada to deposit his day's receipts when he was told that the cheque on The Home Bank of Canada could not be accepted as the bank had closed its doors. The defendant then stopped payment on the cheque for $10,657.70:—Held, that the contract between H. & Co. and the defendant remained good notwithstanding that the cheque given by the defendant was countermanded in consequence of the discovery of insolvency of The Home Bank of Canada. By deposit of the cheque The Home Bank of Canada became the holder in due course and was entitled to enforce payment. *The Home Bank of Canada* v. *Sullivan*, (1926) 37 B.C.R. 401; (1926) 4 D.L.R. 78; (1926) 3 W.W.R. 305; (1927) S.C.R. 115; (1927) 1 D.L.R. 1097.

3. Manager — Scope of authority — Responsibility of bank.]—The manager of a local branch of the defendant Bank suggested an investment to the plaintiff who had an account in the savings bank department. The plaintiff signed a cheque payable to cash or bearer for the amount required and gave it to the manager to complete the investment when he approved of it. Some time later the manager told the plaintiff that the investment was unsatisfactory and that the money was still in the bank. About two months after he was given the cheque the manager paid it in to his own account to cover money he had taken from the bank. In an action to recover the amount of the cheque from the bank:—Held, that the bank cannot take advantage of its own manager's improper use of the cheque to make good his thefts from it. *McDonald* v. *Royal Bank of Canada*, (1929) 41 B.C.R. 450.

4. Manager — Misappropriation.] — A bank is liable to a customer for loss sustained because of the misappropriation by its local manager of money which the customer had left with him to be used in transactions falling within the general scope of his employment and appertaining to the business of banking, but an undertaking by the manager to invest the money

on the customer's behalf is not a transaction of this nature, and in such case the bank will not be held responsible for the manager's wrongful act. *Mack* v. *Royal Bank of Canada*, (1932) S.C.R. 488; (1932) 1 D.L.R. 753.

5. Misrepresentation by manager.]—A Bank is entitled to recover the amount of a promissory note obtained by misrepresentation of a local manager of the Bank, which does not amount to legal fraud and is not sufficient to found an action for deceit. *Bank of Toronto* v. *Harrell*, (1917) 55 S.C.R. 512; (1917) 39 D.L.R. 262; (1917) 2 W.W.R. 1149.

6. Cheque—Payment stopped—Action by payee.]—The defendant company paid the plaintiff wages by cheques drawn on the Bank of Montreal in Vancouver. The cheques were lost in Seattle, and notice to stop payment was telegraphed the bank on the same day. On the following day the cheques were cashed upon forged indorsements at the branch of the same bank in Spokane, and from there forwarded to the Vancouver branch, where they were debited to the account of the defendant company:—Held, that an action will not lie for the wages for which the cheques were given while the cheques are outstanding in the hands of third parties. Held, further, that the plaintiff should either have taken proceedings to recover the cheques or joined the Bank of Montreal as a party to the action. *Kelly* v. *Canadian Pacific Ry. Co.*, (1915) 22 B.C.R. 231; 25 D.L.R. 79; 32 W.L.R. 891; 9 W.W.R. 531.

7. Cheque—Instructions to stop payment—Sufficiency of.]—A telegram containing the words "stop all payments on cheques C.P.R." signed by the payee is insufficient to countermand payment. *Ibid.*

B. Lien.

1. Collateral security.] — Promissory notes held by a bank as collateral security, though given by the maker as renewals, under pressure of legal proceedings by the bank, entitle the bank, as holder for value, where no fraud is shewn, to recover from the maker to the extent of its lien. *Bank of Montreal* v. *Wiesdepp*, (1917) 24 B.C.R. 73; 34 D.L.R. 26; (1917) 2 W.W.R. 615.

2. Under sec. 78—Provincial legislation.]—A lien possessed by a bank under sec. 78 of the Bank Act, 1913, ch. 9, cannot be destroyed by Provincial legislation. *In re Canadian Logging Co.*, (1927) 1 W.W.R. 406; 8 C.B.R. 179.

C. Appropriation of Payments.

Banker and surety.]—Where a principal debtor owes money to a bank in addition to the amount of a note upon which the defendant is an accommodation endorser, the bank is not bound to appropriate the moneys collected by it for the principal debtor towards the extinguishment of the note. *Royal Bank of Canada* v. *Falk*, (1917) 25 B.C.R. 142; (1917) 3 W.W.R. 654.

D. Entries in Bank Book.

Proof of.]—Where a witness recognizes his initials written against an entry in the books of a bank at the time of the transaction referred to in the entry, it may be accepted as evidence of the transaction even if he has no recollection of the actual transaction. *Macdonald* v. *Bank of Vancouver*, (1915) 22 B.C.R. 310; 25 D.L.R. 567; 32 W.L.R. 339; 9 W.W.R. 8.

III. Securities Under The Bank Act.

1. Deposit of security by third party—Estoppel.]—Where the owner of a share certificate endorses it in blank and deposits it with a company as security for an advance, and such company hypothecates it with a bank as collateral security for its own benefit, such hypothecation is a fraud on the owner, and upon payment of his debt to the company he is entitled to a return of the certificate; but where the bank has in good faith made advances to the company on the strength of such security, and the owner, upon learning that the certificate is in the hands of the bank, takes no steps to recover it, he is estopped by conduct from claiming delivery of the certificate free from encumbrances which he, by his own neglect, has allowed to be created. *Macdonald* v. *Bank of Vancouver*, (1915) 22 B.C.R. 310; 25 D.L.R. 567; 32 W.L.R. 339; 9 W.W.R. 8.

2. Chattel mortgage—Assignment.]—The assignment of a chattel mortgage by a trust company to a chartered bank on the latter taking over the trust company's securities and giving credit therefor, is not in contravention of section 76 of the Bank Act if the transaction is entered into in good faith, and without any intention of evading

the provisions of the Act. *The Royal Bank of Canada* v. *Whieldon and Ball*, (1915) 21 B.C.R. 267; 22 D.L.R. 647; 8 W.W.R. 734. Revsd. 52 S.C.R. 254; 26 D.L.R. 385; 9 W.W.R. 776.

3. Additional security.]—A bank may recover upon a promissory note although certificates of title were deposited with the Bank as additional security at the time the advance was made, in contravention of section 76, subsection 2 (c) of the Bank Act. *Royal Bank of Canada* v. *Gold*, (1918) 25 B.C.R. 409; 41 D.L.R. 276; (1918) 2 W.W.R. 745.

4. Void mortgage.] — The fact that a person who has agreed to take a conveyance of land subject to certain incumbrances, as part of the consideration for a promissory note might not have done so had he known the incumbrances were void, is no defence to an action upon the note where no representations, innocent or fraudulent, were made respecting the incumbrances. The taking of a void mortgage does not prevent a bank from suing to recover the loan in respect of which the mortgage was taken. *Imperial Bank of Canada* v. *Ross et al.*, (1916) 22 B.C.R. 545; 34 W.L.R. 962; 10 W.W.R. 1174.

5. Section 88—Unregistered conditional sale agreement.]—Where under a conditional sale agreement a purchaser agrees to buy timber licenses together with the timber standing on the land comprised within the boundaries mentioned therein, the vendor retaining the property in the timber and licenses until all instalments of the purchase price are paid, the purchaser is the owner of the timber within the meaning of sec. 88 of the Bank Act. Where such conditional sale agreement is not registered in accordance with the Conditional Sales Act, 1924, it is void as against subsequent purchases or mortgages for value and without notice. Hence, where the purchaser assigned the timber cut under such agreement to a bank to secure advances under sec. 88 of the Bank Act the bank, taking without notice of the conditional sale agreement has priority over the vendor. *Royal Bank of Canada* v. *Hodges*, (1929) 42 B.C.R. 44; (1930) 1 D.L.R. 397; (1929) 3 W.W.R. 605.

6. Assignment to bank of moneys accruing due by customer—Set-off.]—The defendant being indebted to the Home Bank of Canada for advances, and having certain moneys payable to him from time to time by the Great Northern Ry. Co. in consideration of the delivery of railway ties, executed and delivered to the Bank an absolute assignment of all moneys due or to accrue due to him from the Railway Company, and also assigned to the Bank his interest in the ties to be delivered to the Railway Company. The liquidators of the Bank brought action against the defendant for the amount of certain promissory notes made in the Bank's favour to secure his indebtedness. The defence was raised that the notes were paid by virtue of the right of the Railway Company to set off the amount owing to the Bank by the Railway Company by virtue of the assignment against moneys of the Railway Company on deposit in the Bank:—Held, that the first assignment to the Bank was an absolute assignment within the meaning of the Laws Declaratory Act and that the debts owing by the Railway Company to the Bank were mutual debts and there was the right of set-off of one against the other. The discharge of the first assignment by the manager of the Bank after liquidation commenced was ineffective, as the only way the choses in action could have come again into its hands was by execution of another assignment by the Bank to the defendant and no such assignment was ever executed. *Clarkson and Home Bank of Canada* v. *Lancaster*, (1926) 38 B.C.R. 217.

7. Mortgage on eve of insolvency—Pressure.]—A company, acting under pressure from its bank, authorized the giving of a mortgage by resolution to secure its indebtedness to the bank, but owing to delay in settling questions of title and registration, the mortgage was not actually given until six months later. Six months after the mortgage was delivered, an order was made winding up the company:—Held, that the presumption created by the statute against transactions of this nature does not arise, as in the circumstances it cannot be said that the bank took the mortgage in contemplation of the insolvency of the mortgagor and with intent of obtaining an unjust preference over his other creditors. *Gauley* v. *Bank of Montreal*, (1916) 23 B.C.R. 264; 34 W.L.R. 1192; 10 W.W.R. 1359.

8. Discharge of guarantor—Guarantor—Verbal stipulations.] — The defendant, with a number of other persons, signed a guarantee to secure the account of a company with the plaintiff bank. An action on the guarantee was dismissed on the ground that when signing it the defendant verbally stipulated to the local bank manager as a condition of its use against him that certain notes on which he was liable as an indorser

should be paid out of the funds to be advanced, which was not done:—Held, that parol evidence of the condition under which the guarantee was signed is admissible, that the decision turns on the credibility of the parties and witnesses, and on the evidence there is no ground for disturbing the finding of the trial judge. *The Standard Bank of Canada* v. *McCrossan*, (1920) 28 B.C.R. 291; (1920) 2 W.W.R. 546; 55 D.L.R. 238; affd. 60 S.C.R. 655; (1920) 3 W.W.R. 846; 55 D.L.R. 238.

9. Fraudulent hypothecation of bonds.]—A company being indebted to the defendant bank the secretary thereof on demand of an officer of the bank procured by misrepresentation from the plaintiff the hypothecation of certain bonds and the execution of powers of attorney to the bank in respect thereof:—Held, that the plaintiff was entitled to recover from the bank the value of the bonds on the ground that her execution of the documents was obtained by fraudulent misrepresentation of the secretary of the company for which the bank could not escape responsibility. *Orchardson* v. *The Dominion Bank*, (1923) 32 B.C.R. 348; (1923) 2 W.W.R. 958.

10. Bankruptcy—Distribution of assets—Bank securities.]—Sec. 51 of the Bankruptcy Act as amended by 1921, cap. 17, sec. 39, does not apply to claims already secured by the debtor, especially if the security is given under The Bank Act. *In re Canadian Logging Co.*, (1927) 1 W.W.R. 406; 8 C.B.R. 179.

11. Pledge of securities—Duty of bank to make enquiries.]—Where share certificates transferred in blank are left by the owner with another person for the purpose of being used by the latter in a certain contingency only, and, before such contingency arises, the person who so received them pledges them to his bank as collateral security for his own account and the circumstances are such when the bank receives them as should arouse the suspicion that the pledgor has no authority, or only a limited authority, to deal with the certificates, but the bank takes them without enquiry, although in the belief that it has a legal right to do so, it obtains no title to them as against the owner. *Patrick* v. *The Royal Bank of Canada*, (1931) 44 B.C.R. 448; (1931) 3 W.W.R. 100; revd. (1932) 45 B.C.R. 437; (1932) 3 D.L.R. 532; (1932) 2 W.W.R. 257.

IV. Interest.

1. Guarantor.]—A director of an incorporated company who has given a written guarantee to a Bank that he will pay any indebtedness incurred by the Company to the Bank, not exceeding $3,000, is not released by the Bank charging the Company interest at a rate higher than that allowed by the Bank Act without the knowledge of the Company. The agreement between the Bank and the Company is not void because of the illegal interest charged and the charging of interest at an illegal rate does not constitute a variation in the terms of the contract of guarantee, but the Bank can only recover interest at the legal rate. *Merchants Bank of Canada* v. *Bush*, (1917) 24 B.C.R. 521; 38 D.L.R. 499; (1918) 1 W.W.R. 383; revsd. 56 S.C.R. 512; 42 D.L.R. 236; (1918) 2 W.W.R. 574, 631.

2. Rate of interest chargeable.]—Where book debts were assigned as security to a bank and later assigned to the plaintiff subject to the assignment to the bank, which realized under its assignment, the plaintiff is entitled to an accounting from the bank in detail; and the bank cannot as against the plaintiff charge a higher rate of interest than that permitted by the Bank Act, and must give credit for interest collected above such rate even though the payments were voluntarily made by the individual debtors. *John Robertson & Son Ltd.* v. *Canadian Bank of Commerce*, (1920) 2 W.W.R. 1003.

V. Winding Up.

Double liability of shareholders.]—Upon the winding-up of a bank the liquidator is entitled to place upon the list of contributories all the persons who appear on the register of shareholders in respect of the double liability imposed upon them by the Bank Act, even though the shares appear to be fully paid. *In re Bank of Vancouver (In Liquidation)*, (1917) 1 W.W.R. 163.

BARRISTER.

I. Call, 114.
II. Disbarment, 115.

I. Call.

Discretion of Benchers.]—The Court will not grant a mandamus to compel the Benchers of the Law Society to admit an individual as a member of the Society with a view to his qualifying himself to be called to the bar. *In re Hagel and the Law Society of British Columbia*, (1922) 31 B.C.R. 75.

II. DISBARMENT.

Appeal from decision of Benchers—Refusal to reinstate.]—In order to constitute a valid notice of appeal from disbarment or disqualification by the Benchers of the Law Society, the grounds of appeal must be set forth as specified in rule 96 of the Rules of the Law Society and the failure to do so deprives the judges of the Supreme Court of jurisdiction to hear the appeal. There is no appeal from the refusal of the Benchers to reinstate a disbarred barrister or disqualified solicitor. Semble: Section 41 of the Legal Professions Act requires that all the judges of the Supreme Court must sit in banc on an appeal from disbarment or disqualification by the Benchers. *In re Legal Professions Act and Alfred Hall*, (1917) 24 B.C.R. 226.

BENCHERS.

See BARRISTER.
See SOLICITOR.

BILLS OF EXCHANGE.

I. NATURE AND VALIDITY, 115.
II. INDORSEMENT AND TRANSFER, 116.
III. PRESENTMENT AND NOTICE, 117.
IV. HOLDER IN DUE COURSE, 118.
V. RENEWAL, 119.
VI. ACTIONS AND DEFENCES, 119.

I. NATURE AND VALIDITY.

1. Material alteration—Consent of parties.]—A company of which A was president made a promissory note signed by A, as president of the Company, payable to A and B in one month. A and B indorsed the note and presented it to a bank for discount. The bank would not discount unless C's indorsement was obtained. C would not indorse unless payment of the note was changed from one to two months. The bank manager thereupon, without A being present or obtaining his assent, changed the word "one" to "two" on the note. C then indorsed and B and C initialled the change. The bank discounted the note, and on its maturity brought action against A, B and C for payment:—Held, that the alteration was a material one that vitiated the note, as the change was not assented to by the maker, and the holder could not recover in an action against the maker or indorsers. *Union Bank of Canada* v. *West Shore and Northern Land Company, Limited, Keith, Whyte and Hammond*, (1916) 23 B.C.R. 64; 35 D.L.R. 575.

2. Material alteration.]—To be a material alteration to a cheque the change must be made without the assent of the parties liable thereon, and must be of such a character as to alter their legal position. A cheque given to a banker to cover overdrafts in a customer's account generally and not a specific overdraft was left blank as to the amount and marked "Savings" (meaning savings account). When the bank manager sought to make use of the cheque he filled in the amount required and added "C/A &" over the word "Savings" debited the amount to current account and placed it to the credit of the overdrawn account:—Held, that the cheque having been issued in blank for the purpose of protecting overdrafts and handed to the manager of the bank, the reasonable inference is that both parties understood that it was to be filled in by the manager so as to carry out that purpose by drawing from any moneys at the credit of the customer, and that the manager was justified in making it applicable to the current account. *Wallinder* v. *Imperial Bank of Canada*, (1925) 36 B.C.R. 226; (1925) 3 W.W.R. 409; (1925) 4 D.L.R. 390.

3. Substituting lien note.]—A lien note given in place of a promissory note which is still current, for the same indebtedness is void in the absence of further consideration. A hire purchase agreement is not a negotiable instrument and does not carry days of grace. *Mellis* v. *Blair*, (1916) 22 B.C.R. 450; 27 D.L.R. 165; 10 W.W.R. 241.

4. Illegal collateral security.]—A promissory note given to a bank as one security for repayment of a valid debt cannot be impugned by reason of additional security being given in contravention of the Bank Act. *Royal Bank* v. *Gold*, (1917) 24 B.C.R. 145; (1918) 25 B.C.R. 409; 41 D.L.R. 276; (1918) 2 W.W.R. 745.

II. INDORSEMENT AND TRANSFER.

1. After maturity.]—In an action against an indorser on a promissory note, evidence is admissible to shew that the indorsement was made after maturity without consideration, and on the understanding that the indorser was not to be liable on the note. *Yorkshire and Canadian Trust Ltd.* v. *Scott*, (1919) 27 B.C.R. 5; (1919) 2 W.W.R. 87.

2. No indorsement by payee.]—Under section 131 of the Bills of Exchange Act a person who indorses a promissory note, not indorsed by the payee at the time, is liable to the payee who has given value for it to the maker. *Pacific Lumber Agency* v. *Imperial Timber & Trading Company, Limited et al.*, (1916) 23 B.C.R. 378; 31 D.L.R. 748; (1917) 1 W.W.R. 507.

3. Lost cheques — Forged endorsements.]—The defendant Company paid the plaintiff wages by cheques drawn on the Bank of Montreal in Vancouver. The cheques were lost in Seattle, and notice to stop payment was telegraphed the bank on the same day. On the following day the cheques were cashed upon forged indorsements at the branch of the same bank in Spokane, and from there forwarded to the Vancouver branch, where they were debited to the account of the defendant Company:—Held, that an action will not lie for the wages for which the cheques were given while the cheques are outstanding in the hands of third parties. The plaintiff should either have taken proceedings to recover the cheques or joined the Bank of Montreal as a party to the action. *Kelly* v. *Canadian Pacific Railway Company*, (1915) 22 B.C.R. 231; 25 D.L.R. 79; 32 W.L.R. 891; 9 W.W.R. 483; (1926) 1 D.L.R. 828.

III. Presentment and Notice.

1. Presentment—Acceleration clause.]—Where two promissory notes were given, a collateral agreement providing that if any one or any part of either note was not paid at maturity, both would immediately become due and payable will not relieve the holder from the necessity of presenting the promissory note for payment before action brought at the place named in the note. *Morgan* v. *Shaw*, (1926) 36 B.C.R. 454; (1926) 1 W.W.R. 483; (1926) 1 D.L.R. 828.

2. Reasonable time.]—Where a promissory note payable on demand and indorsed by the defendant was not presented for payment for over seven years:—Held, that the presentation was not made within a reasonable time, and that as there was no proof that the note was delivered as a collateral or continuing security with the assent of the indorser, the action did not come within the proviso in section 181 of the Bills of Exchange Act, R.S.C. 1906. *Bank of Montreal* v. *McNeill*, (1924) 33 B.C.R. 263; (1924) 2 W.W.R. 165.

3. Notice of dishonour—Proof of.]—Sec. 103 of the Bills of Exchange Act, providing that a notice of dishonour mailed to the address given in the instrument is a sufficient notice, does not preclude the proof of notice by any other method. *Royal Bank of Canada* v. *Gold*, (1918) 25 B.C.R. 409; 41 D.L.R. 276; (1918) 2 W.W.R. 745.

IV. Holder in Due Course.

1. Collateral security.] — Promissory notes held by a bank as collateral security though given by the maker as renewals, under pressure of legal proceedings by the bank, entitle the bank, as holder for value, where no fraud is shewn, to recover from the maker, to the extent of its lien. *Bank of Montreal* v. *Wiesdepp*, (1917) 24 B.C.R. 73; 34 D.L.R. 26; (1917) 2 W.W.R. 615.

2. Assignment of conditional sale agreement with promissory note.]—The plaintiff purchased a 1916 model motor truck from a dealer under a conditional sale agreement. A cash payment was made on account of the purchase price and 15 promissory notes given for the balance. On the following day the dealer assigned the agreement with the notes to the defendant Company for valuable consideration of which the plaintiff had due notice. Two months later the plaintiff found the truck was a 1913 model but continued to use the truck for three months longer:—Held, that the defendant was a holder of the notes in due course and was under no responsibility for the fraudulent conduct of the dealer of which it had no notice. *Fraser* v. *McGregor, Johnston & Thomas Ltd.*, (1922) 31 B.C.R. 306.

3. Fraud or illegality.]—In an action against the maker of a promissory note by an alleged holder in due course the defendant has the right to plead fraud of the payee. *Arbuthnot* v. *Campbell*, (1930) 2 W.W.R. 275.

4. Payment to wrongful holder—Knowledge of fraud—Liability to holder for value.]—Where the maker of a promissory note by payment of less than the principal and interest thereof obtains possession of his note from a holder who has obtained the same by fraudulent means of which the maker has full knowledge, although not a party to the fraud he is liable to the rightful holder for value for the full amount of the note. *Schetky* v. *Cochrane*, (1918) 26 B.C.R. 257; (1920) 60 S.C.R. 650.

V. RENEWAL.

Agreement to renew.]—A promissory note for $150 made by a debtor and indorsed by a third party was given upon an undertaking in writing by the creditor, that if $60 and interest be paid on the note when it became due he would agree to its renewal for the balance due for a term of three months. The note was protested at maturity and on the following day the debtor tendered $60 with interest and a renewal note for the balance which the creditor then refused to accept:—Held, that where there is a condition precedent such as in this case it must be strictly performed. The agreement to extend the time never came into operation because the condition upon which the right to an extension was based had not been complied with. *Amyot* v. *Quinby and Watt*, (1916) 22 B.C.R. 402.

VI. ACTIONS AND DEFENCES.

1. War relief—Action stayed against maker — Recovery against indorser.]—A holder for value may recover against the indorser of a promissory note notwithstanding that the action is stayed as against the principal debtor under the War Relief Act. *Royal Bank of Canada* v. *Gold*, (1917) 25 B.C.R. 409; 41 D.L.R. 276; (1918) 2 W.W.R. 745.

2. Accommodation indorser—Denial of signature.]—Where a defendant in an action to recover against him as an accommodation party the amount of a promissory note positively denies that the signature thereon is his, the Court of Appeal will not reverse the trial judge's holding that alleged signature was a forgery unless there is direct and positive evidence to shew that his decision is clearly wrong. *Eastern Townships Inv. Co.* v. *McLennan*, (1920) 29 B.C.R. 1.

3. Proof of signature.] — Where a plaintiff submits proof of promissory notes by producing a letter from the plaintiff's solicitors to the defendant describing the promissory notes in detail and demanding payment thereof and a letter in reply from the defendant admitting in effect the making of the promissory notes but denying the liability thereof, the letter and reply will be regarded as prima facie proof of the execution of the notes by the defendant. *Arbuthnot* v. *Campbell (No. 2)*, (1931) 1 W.W.R. 240.

BILL OF LADING.

See CARRIER.

BILLS OF SALE.

I. TRANSACTIONS AFFECTED BY THE ACT, 120.
II. FORM, 121.
A. *In general*, 121.
B. *Description of property*, 122.
III. FILING, 123.
IV. PRIORITY, 123.
V. ENFORCEMENT OF CHATTEL MORTGAGE, 124.

I. TRANSACTIONS AFFECTED BY THE ACT.

1. Verbal sale.]—There is nothing in the Bills of Sale Act which requires that a verbal sale should be evidenced by a written document. A debtor can therefore make a secret verbal sale of his personal property which is not affected by the Act, while, if a sale is made in writing it comes within its purview. *Hendry* v. *Laird*, (1919) 27 B.C.R. 217; (1919) 2 W.W.R. 341.

2. Receipt for purchase price—Assurance.]—A receipt given by the vendor of goods for purchase money is not an assurance amounting to a bill of sale within the meaning of the Bills of Sale Act intended to be a part of the bargain to pass the property in the goods. *Hendry* v. *Laird*, (1920) 28 B.C.R. 445; (1920) 3 W.W.R. 421.

3. Hire purchase—Agreement as security—Assurance.]—C. purchased an automobile, paying for it partly in cash and the balance with a post-dated cheque. Later, requiring money to finance his business, he borrowed $1,400 from the plaintiff, entering into and giving as security a hire-purchase agreement as to the automobile. C. continued in possession of the car and later sold it to the defendant, who was a bona fide purchaser for value. In an action to recover possession of the car under the hire-purchase agreement:—Held, that the transaction is not one that comes within the purview of the Sale of Goods Act, as it was never the intention of the plaintiff to become the owner of the car except in the event of its requiring to invoke the agreement. The document was an assurance and came within the Bills of Sale Act, but as registration and the other necessary essentials required by the Act had not been complied with, the action should be dismissed.

R. P. Rithet & Company Limited v. *Scarff*, (1920) 29 B.C.R. 70.

See In re International Motors Ltd. Trustee v. *Telford*, (1921) 2 C.B.R. 314; *W. J. Albutt & Co.* v. *Riddell*, (1930) 43 B.C.R. 74; (1930) 4 D.L.R. 111; (1930) 2 W.W.R. 623.

4. Agreement for manufacture and delivery of goods.]—An agreement for the manufacture and delivery of goods does not require registration under the Bills of Sale Act in order to protect the purchaser's right to goods subsequently manufactured and paid for under the agreement, and the property in which has under the terms of the agreement passed to him, but which are still on the vendor's premises. Sec. 7 of the said Act, as amended by ch. 8 of 1916, does not operate to avoid a bill of sale as against a liquidator, owing to the failure to supply the appropriate words with regard to the time that the rights of the liquidator arise. *Allen-Stoltze Lumber Company Ltd.* v. *Summit Lake Lumber Co. Ltd.*, (1920) 3 W.W.R. 895.

5. Chattel mortgage—Interest of purchaser under conditional sale.]—The interest of a purchaser under a conditional sale, whereby the title to the goods remains in the seller until the price is fully paid may form the subject-matter of a chattel mortgage. *Sharp* v. *Ingles*, (1915) 21 B.C.R. 584; 23 D.L.R. 636; 32 W.L.R. 150; 8 W.W.R. 1325.

6. Sale of goods—Assumption of mortgage—Indemnity.]—If goods are sold subject to a mortgage, the purchaser taking it with knowledge of the mortgage, is liable in equity to indemnify his vendor against the encumbrance. *Walker* v. *Woodyatt*, (1931) 44 B.C.R. 110; (1931) 3 D.L.R. 516; (1931) 2 W.W.R. 306.

7. Necessity of written instrument—"Barter" or "sale."]—Where a boat is not registered and it is not shewn that she ought to have been registered, a written instrument is not essential to the validity of her sale. Where the consideration for the transfer of the property in goods consists partly of goods and partly of money, the transaction is a sale and not a barter. *Olympic Stone Construction Co. Ltd.* v. *Momsen & Rowe*, (1915) 21 B.C.R. 120; 21 D.L.R. 271; 30 W.L.R. 711; 8 W.W.R. 79.

II. Form.

A. In General.

1. Chattel mortgage to secure promissory note.]—A chattel mortgage given to a bank as security for the payment of a promissory note, containing recitals shewing particulars of the note and that interest was payable on the amount thereof, but the note itself not being annexed to nor registered with the instrument, and the rate of interest payable thereon not being specified, does not disclose a complete statement of the terms of defeasance or assurance, and is, therefore, inoperative under sec. 19 of the Bills of Sale Act, R.S.B.C. 1911, cap. 20, requiring all defeasances and conditions to be truly set out in the same instrument. *Ball and Whieldon* v. *Royal Bank*, (1915) 52 S.C.R. 254; 26 D.L.R. 385; 9 W.W.R. 776.

2. Note for past debt.]—The consideration in a chattel mortgage is truly set forth within the meaning of sec. 7 of the Bills of Sale Act, R.S.B.C. 1911, cap. 20, where it is stated to be for "a loan of $1,200 on a promissory note of even date," though it fails to set out the past debt for which the note is given. *Ibid.*

3. Principal consideration — Essential facts not shewn in mortgage.]—A mortgage of chattels was held invalid under the Bills of Sale Act, because while the mortgage on its face appeared to be given to secure a loan, the transaction was in fact largely for security for prior indebtedness; the true consideration was not stated; there was nothing to shew the mortgagees were trustees, as they in fact were; and their authority to act and receive the mortgage was not shewn. *Innes* v. *Cameron Valley Land Co. Ltd.*, (1919) 1 W.W.R. 751.

4. Consideration not truly stated—Possession.]—Where a chattel mortgage is defective in that the consideration is not truly stated therein the defect may be cured by taking possession of the goods. *Sutton* v. *Smith*, (1927) 38 B.C.R. 455; (1927) 3 D.L.R. 1008; (1927) 2 W.W.R. 481.

B. Description of Property.

1. Inventory attached after mortgage signed.]—The fact that an inventory of goods and chattels referred to in a chattel mortgage was not attached thereto when the mortgagor signed the mortgage, but was attached later under the instructions of the mortgagor before the mortgage was delivered to the mortgagee, and before the mortgagor had obtained possession of the goods under a bill of sale from the mortgagee, will not invalidate the mortgage. *Stubbert* v. *Scott*, (1931) 43 B.C.R. 496; (1931) 1 W.W.R. 598.

2. Sufficiency of.]—The Bills of Sale Act, R.S.B.C. 1911, does not require a specific description of the property comprised in the bill of sale; any description by which the goods can be identified is formally sufficient. *Ball and Whieldon* v. *Royal Bank. Supra.*

III. FILING.

1. Before whom sworn.] — When a County Court is the depository of a chattel mortgage, rule 309 of the County Court Rules applies, and registration of a chattel mortgage is void where the affidavit of bona fides is sworn before the solicitor of the party on whose behalf the affidavit is to be used; this rule applies where the solicitor acts for both mortgagor and mortgagee. *Columbia Bitulithic Limited* v. *Vancouver Lumber Company, Limited, et al.*, (1915) 21 B.C.R. 138; 21 D.L.R. 91; 30 W.L.R. 753; 8 W.W.R. 132.

2. Effect of affidavit.]—A chattel mortgagee whose mortgage is not effectively registered because of a defective affidavit will not be protected as against execution creditors of the mortgagor by the fact that he took and held actual possession against the mortgagor for a short time after the execution of the mortgage, if he afterwards voluntarily parted with possession to the mortgagor so that the latter appeared thereafter to be the ostensible owner of the mortgaged goods. *Ritchie Contracting Co.* v. *Brown*, (1915) 21 B.C.R. 89; 21 D.L.R. 86; 30 W.L.R. 723; 8 W.W.R. 84.

3. Jurisdiction.]—A County Court judge has no jurisdiction as a local judge of the Supreme Court to make an order extending the time for registration of a bill of sale. A "Judge of the Supreme Court" referred to in sec. 21 of the Act is persona designata. *In re Austin Hotel Co. Ltd.*, (1918) 26 B.C.R. 353; 44 D.L.R. 480; (1919) 1 W.W.R. 934.

IV. PRIORITY.

1. Chattel mortgage—Holding unregisterable instruments.]—Where the registration of a chattel mortgage does not comply with the Bills of Sale Act, the holder thereof is not protected by the Act as against a prior chattel mortgage the registration of which was also not in compliance with the requirements of the Act. *Topham* v. *Motor Securities Company Limited, and Federal Motor Company Limited* v. *Topham et al.*, (1928) 40 B.C.R. 375; (1929) 1 D.L.R. 995; (1929) 1 W.W.R. 116.

V. ENFORCEMENT OF CHATTEL MORTGAGE.

Accounts — Mortgagor and third person.]—A plaintiff sold property to a defendant company which agreed to form a new company to acquire the property and to assume and pay off a chattel mortgage thereon. The plaintiff was induced by fraud to sign an instrument releasing the defendant from its obligation to pay off the chattel mortgage, and in an action against the defendant it was held that he was entitled to be indemnified. An application by the plaintiff for an order for payment by the defendant to the mortgagee of the amount due under the mortgage and for a reference to the registrar to take an account of the amount due was dismissed on the ground that the mortgagee is a necessary party, and that a mortgage account cannot be taken between the mortgagor and the third party. An appeal from the order was dismissed, the Court being equally divided. *Jack* v. *Nanoose Wellington Collieries Ltd.*, (1926) 37 B.C.R. 99.

BLAZING.

See MINES AND MINING.

BONA VACANTIA.

See CONSTITUTIONAL LAW.

BOND.

See REPLEVIN.
See GUARANTEE.

BOOK DEBTS.

See ASSIGNMENT.

BOUNDARIES.

I. MUNICIPALITIES, 125.
II. PRIVATE PROPERTY, 125.

I. MUNICIPALITIES.

Shore of lake.]—Where the letters patent incorporating a municipality describe one of its boundaries as the "shore" of a certain navigable lake, the limits of the municipality extend to low water mark although the lake in question is non-tidal water. *Rex* v. *Lakeside Orchards Ltd*, (1929) 1 W.W.R. 870; 51 C.C.C. 182.

See also *Kennedy* v. *Husband, infra.*

II. PRIVATE PROPERTY.

1. Building used for public worship.]—The construction to be placed upon the words "building and site thereof" in subsec. (1) of sec. 228 of the Municipal Act, 1911, is that not only the land upon which a church is actually built should be exempt from taxation, but also the surrounding land required for affording reasonable light, air and access to the structure. In case an improper assessment is made of such sites the owner need not appeal in order to be relieved from liability. *Corporation of the City of Victoria* v. *Trustees of Our Lord's Church in Victoria*, (1915) 22 B.C.R. 174; 25 D.L.R. 617; 9 W.W.R. 173; 32 W.L.R. 330.

2. Building used for public worship.]—The exemption from taxation of every building set apart and in use for the public worship of God under sec. 197 (1) of the Municipal Act, 1914, includes the building and the land upon which it stands. *Bishop of Vancouver Island* v. *City of Victoria*, (1920) 28 B.C.R. 533; 54 D.L.R. 615; (1920) 3 W.W.R. 493; (1921) 2 A.C. 384; 90 L.J.P.C. 213; (1921) 3 W.W.R. 214.

3. Overhanging tree.]—A landowner who cuts off a portion of a tree overhanging his land, the trunk of which is on the adjoining owner's land, is not under obligation to deliver the cut portion to the neighbour although the latter has the right to enter and take that portion away. If he cuts any portion of the tree beyond his own line and over the property of his neighbour he is a trespasser. *Loverock* v. *Webb*, (1921) 30 B.C.R. 327; 70 D.L.R. 748.

4. High water mark.]—The high water mark in British Columbia, where there is no record of tides kept for a sufficient length of time to determine the high water mark in different localities, should be determined by what is termed "visible high water mark," i.e., the point fixed by signs on the ground, such as the state of vegetation, accumulation of driftwood and debris. *Nelson* v. *Pacific Great Eastern Ry. Co.*, (1918) 25 B.C.R. 259; (1918) 1 W.W.R. 597.

5. Riparian owner.]—The title of a riparian owner whose land extends to the banks of an inland non-tidal navigable body of fresh water extends to the water's edge at low water mark, and such owner has a right to protect his riparian privilege against trespass by the erection of boathouses on his land above such low water mark. *Kennedy* v. *Husband*. *Kennedy* v. *Ellison*, (1923) 1 D.L.R. 1069.

See Rex v. *Lakeside Orchards Ltd., supra.*

6. Building encroaching on adjoining land.]—Where an owner of land has in good faith erected valuable buildings upon his own property and it afterwards appears that his walls have encroached slightly upon his neighbour's land, he will not be compelled to demolish the walls which extend beyond the true boundary line, but should be allowed to retain the land upon which he has encroached upon payment of reasonable indemnity. *Clark* v. *McKenzie*, (1929-30) 42 B.C.R. 71, 449; (1930) 2 D.L.R. 843; (1930) 1 W.W.R. 67, 785.

7. Lateral support.]—Though an owner of land is entitled to have his soil supported in its natural state and as an incident to the land itself, yet if he artificially imposes upon it an additional weight by the erection of a building he is not entitled to the lateral support of the adjacent land of another owner to sustain that additional weight unless he has acquired a right thereto by an easement or otherwise. *Linnell* v. *Reid*, (1923) 32 B.C.R. 87 (Martin, J.A., at p. 93); (1923) 2 D.L.R. 445; (1923) S.C.R. 594; (1923) 3 D.L.R. 966; (1923) 3 W.W.R. 422.

8. Description on plan attached to deed.]—Where the description in a deed varies from a plan attached thereto, the Court will adopt whichever was on the proper construction intended to govern. *Kipp* v. *Simpson*, (1928) 40 B.C.R. 248; (1928) 4 D.L.R. 421; (1928) 3 W.W.R. 331.

9. Vendor's representation as to location—Estoppel.]—Where a vendor goes on the land with the prospective purchaser and

points out and defines by his surveyor then present for the express purpose the exact boundaries of the lot he is selling and after the surveyor has then and there located the lot and a wrong description of it supposed to define and represent the actual location is inserted in the deed and the purchaser receives his deed and takes possession of the lot which has been pointed out to him and retains peaceable possession thereof for sixteen years and makes valuable improvements thereon during that period, the vendor is estopped from disputing the purchaser's right to possession and title. *McDonald* v. *Knudsen*, (1928) 40 B.C.R. 25; (1928) 3 D.L.R. 242; (1928) 2 W.W.R. 577.

See CONSTITUTIONAL LAW.

See MUNICIPAL CORPORATIONS.

See REGISTRATION OF LANDS.

See TRESPASS.

See WATERS AND WATERCOURSES.

BRIDGES.

See ADMIRALTY.

See COLLISION.

See MUNICIPAL CORPORATIONS.

BRITISH NORTH AMERICA ACT.

See CONSTITUTIONAL LAW.

BROKER.

See PRINCIPAL AND AGENT.

BUILDING CONTRACT.

I. CONSTRUCTION IN GENERAL, 127.
II. EXTRAS, 132.
III. CONDITIONS PRECEDENT TO PAYMENT, 133.

I. CONSTRUCTION IN GENERAL.

1. Demurrage—Inconsistency between contract and specifications.]—Where there is a provision in a building contract for the payment of demurrage by the contractor for every day exceeding the date fixed by the contract for completion, with the further provision that the time be extended upon the ordering of additional work, the contractor is liable for the number of days delay, less the time allowed for the additional work. Where there is an inconsistency between the contract and the specifications as to the time from which the work under the contract is to commence to run, there is a repugnancy, and the contract shall prevail. Where power is reserved to the owner to make alterations or additions, he may reasonably exercise such right up to the last minute of the completion of the work. *The Westholme Lumber Company, Limited, and the Bank of Montreal* v. *St. James Limited.* (1915) 21 B.C.R. 100; 21 D.L.R. 549; 30 W.L.R. 781; 8 W.W.R. 122.

2. Delay by contractor — Waiver.]—The giving of the final certificate by the architect under a building contract shewing the balance due the contractor, but in which no mention is made of damages for the contractor's delay in completing his work, does not preclude the owner from claiming damages. The fact that an extension of time has been granted for the completion of the work owing to delay caused by the owners, does not constitute a waiver by the owners from claiming damages under the penalty clause. When the amount of compensation for delay in the erection of a building under a contract is fixed at a certain sum per day up to a certain time and a greater sum per day for further delay, it may, in certain circumstances, be held to be liquidated damages. *Lund and Hazell* v. *Vancouver Exhibition Association*, (1915) 22 B.C.R. 258; 25 D.L.R. 863; 9 W.W.R. 556; 32 W.L.R. 845.

3. Deviation from plans — Quantum meruit.]—Where a building contractor fails to follow plans agreed upon, the general rule is that he is not entitled to the contract price, and the proprietor has the option of calling upon him to remove the materials from his ground or of retaining them subject to the builder's claim against him for the work and material supplied, but where the deviations are not material, the proprietor may be ordered to pay the contract price less the cost of bringing the building into conformity with the plans. *Modern Construction Company Limited* v. *Shaw*, (1923) 35 B.C.R. 331; (1923) 3 D.L.R. 893; (1923) 3 W.W.R. 301.

4. Work in violation of by-law—Failure of consideration.]—A party having paid a builder for the alteration of a building acording to plans and specifications supplied to him, cannot recover such money or claim damages on the ground of failure of consideration where the alteration is in

violation of a city by-law and has to be removed. *Orpheum Theatrical Co.* v. *Vulcan Engineering Construction Co.*, (1923) 3 D.L.R. 52.

5. Tender—Forfeiture of deposit.]—Where tenders are called for, to be accompanied by a deposit, the deposit cannot be forfeited unless the tender be accepted, and an acceptance made after negotiations and a call for a new tender, but not communicated to the tenderer is not valid. *Baynes & Horie* v. *Board of School Trustees of Vancouver*, (1927) 2 D.L.R. 698.

6. Non-compliance with contract and specifications.]—Where one party agrees to erect a house for another on a lot belonging to the former, the latter agreeing to buy the house when completed, and there is a material departure from the building specifications in matters of primary importance, and the owner is not protected from liens as agreed upon, the prospective purchaser is entitled to repudiate the contract and recover instalments paid by him on the purchase price. *McInnis* v. *Gray*, (1930) 3 D.L.R. 337.

7. Variation of terms.]—Parol evidence will not be admitted to vary a written contract by adding another term claimed by one of the parties thereto as having been agreed upon as the basis upon which that contract was to be entered into. Where a contract and specifications exist which admittedly could have been carried out according to the architect's plan if flat louvres are used, and the contractor for his own purposes substitutes shaped louvres instead, the same cannot be allowed as an extra. *The Royal Bank of Canada* v. *Skene & Christie*, (1920) 28 B.C.R. 401; 59 D.L.R. 469.

8. Privity—Rights of third parties.]—Where a party contracts in his own name, an undisclosed principal cannot sue or be sued on such contract if the terms are such as import that the person signing is the real and only principal, and recitals in several contracts making the other contracts part of that containing the recital can only bind the parties to the recital; they can give no rights against a third party and can confer no rights upon a third party. *Van Hemelryck* v. *New Westminster Construction and Engineering Co.*, (1920) 29 B.C.R. 39; 55 D.L.R. 589; (1920) 3 W.W.R. 709.

9. Owner acting as engineer—Certificate.]—Where under a construction contract a certificate of the engineer of the owner is a pre-requisite to a contractor's right to payment, and the engineer is made sole judge of all disputed questions as to the performance of the contract, the owner will be precluded from relying on the absence of such certificate where he has himself assumed the functions of the engineer under the contract; in the case of such a contract the engineer will be disqualified from acting as umpire of disputed questions where he has previously formed an unalterable opinion as to the effect of an important term of the contract involved in a dispute. *Georgia Construction Co.* v. *Pacific Great Eastern Ry. Co.*, (1929) S.C.R. 630; (1929) 4 D.L.R. 161.

10. Default by contractor—Completion of work by owner.]—Contractors agreed with the Crown to construct and deliver certain ships, and further agreed, in order to ensure the construction, completion and delivery of the ships under the conditions of the contract, to erect and maintain upon a suitable site a complete shipbuilding and engineering plant. Payment was to be made in instalments. The contract provided that the vessels and fittings should be subject to a lien in favour of the minister for securing the completion of building the vessels, and that under certain conditions the minister should have the power to take the work out of the hands of the contractor and relet the same to any other person or employ additional workmen and provide material and other necessaries in order to complete the work:—Held, that a breach having occurred in the performance of the contract, the Crown was entitled to take possession of the ships together with the slips in which they stood, with free access to so much of the contractor's yards as was reasonably necessary to be used in completing the work, and also all material, engines, etc., and fittings which were actually on board the ships or in the building yards, and whether wrought or in the rough; but not to make use of the contractor's plant and equipment. *The King* v. *Hodges*, (1921) 30 B.C.R. 37; 60 D.L.R. 618; (1921) 2 W.W.R. 388; 1 C.B.R. 530.

11. Construction of sentence in contract.]—A contract for the construction of a service reservoir contained the following clause: "Provided that before any certificate is issued by the engineer authorizing any payment under this contract, the contractor shall, when and so often as required by the engineer, produce satisfactory evidence that all just claims and demands of his workmen and other employees or of parties from whom materials used in the construction of the said work may have been

purchased or produced are fully satisfied, and that the materials furnished and the work done are fully released from all liens, claims and demands." Upon the argument that the word "and" in the last sentence should be read as if it had been written "so":—Held, that there was no reason for departing from the literal meaning of the word. *Ritchie* v. *Webster*, (1917) 2 W.W.R. 1124; 35 D.L.R. 373.

12. Installation of heating plant.] — Where, after the installation of a new burning plant, it fails to operate as economically as warranted at the time of the sale, and the work performed proves of no value and less economical than the old equipment, which necessitates the removal of the new plant and the reinstalling of the old system, the buyer may rightfully recover all expenses incurred and damages suffered in connection with the construction of the new plant and the reinstatement of the old one, against which no counterclaim for the price is maintainable. *British America Paint Company* v. *Fogh*, (1915) 22 B.C.R. 97; (1915) 24 D.L.R. 61; 32 W.L.R. 142; 8 W.W.R. 1331.

13. Mechanic's lien—Stoppage of work by owner.]—The plaintiff partially completed a plumbing contract in defendant's house while it was under construction, when the defendant stopped work and was unable to complete the house. The plaintiff was unable to continue his plumbing until construction work was resumed on the house and after waiting one year he filed a lien for the balance due on the plumbing work already done:—Held, that as long as the contract remains in a state of incompletion owing to the owner's default, the plaintiff is entitled to file a lien and he is entitled to judgment for the balance due and to a lien on the property charged. *Taylor* v. *Foran*, (1931) 44 B.C.R. 529.

14. Owner assuming work—Damages.] —Where the question of proper work and of due diligence in proceeding with the work to be done for a municipal corporation in making road improvements is left to the decision of the construction engineer under the contract, and upon the contractor's default and due notification of the engineer's decision in respect thereof, the municipality takes the work out of the contractor's hands under a condition of the contract empowering it so to do, the contractor may still be liable to the municipality for the loss incurred by the latter through the failure of the contractor to fulfil his contract, if the option given by the contract for terminating the contractor's work expressly reserves any right of action to which the contractor may be subject from any neglect in not proceeding with the work in accordance with the specifications. *Robinson* v. *Burnaby*, (1915) 22 D.L.R. 788; 31 W.L.R. 419.

15. Measure of damages.] — Where a railway contractor is wrongfully prevented by the other party to the contract from carrying out his undertaking, he is entitled to the difference between the amount he would have received if his contract had been completed and the amount which he would have expended in carrying out the work having regard to what in the circumstances a prudent man would have done whereby his loss might have been diminished. *J. A. McIlwee & Sons* v. *Foley Bros.*, (1917) 24 B.C.R. 532; (1915) 33 W.L.R. 278; (1916) 10 W.W.R. 5 (P.C.); (1918) 1 W.W.R. 222; 44 D.L.R. 5.

II. Extras.

1. Substantial change.]—A building contract containing a clause providing that "the contractor shall, when authorized by the employer and the architect, vary, by way of extra or omission, from the drawings or specifications," does not authorize any substantial change in the character of the work contracted for. *Ramsay* v. *Board of School Trustees of the City of Vancouver*, (1915) 21 B.C.R. 589; 24 D.L.R. 138; 32 W.L.R. 77; 8 W.W.R. 1328.

2. Alteration by architect's consent.]— Where the construction is originally altered by the consent of the owner and contractor and under the direction of the architect in charge of the building, the additional costs of such altered construction may be properly claimed as extras. *The Royal Bank of Canada* v. *Skene & Christie*, (1920) 28 B.C.R. 401; 59 D.L.R. 469.

3. Usage — Proof of — Computation of overhaul.]—The existence of an alleged binding usage arising from the presence of certain words in a contract of a certain class (e.g., a railway construction contract) or importing a special meaning to such words in a contract of that class, can only be judicially established by evidence that such usage is so well recognized among persons engaging in such contracts and so widely known as to justify a presumption that everyone who enters into such a contract does so with the intention of being bound thereby:—Held, accordingly, in a case of a

railway construction contract that an alleged usage or practice as to measuring or computing the distance of "overhaul" or "extra-haul" had not been so established. *Georgia Construction Co.* v. *Pacific Great Eastern Ry. Co.*, (1929) S.C.R. 630; (1929) 4 D.L.R. 161.

III. CONDITIONS PRECEDENT TO PAYMENT.

Negligence of contractor—Insufficient ventilation.]—In the case of a contract to supply and instal bowling-alleys, which provides that a concrete foundation must first be laid by the owner under the contractor's directions, it is the duty of the contractor to make reasonable provision for ventilation for the protection and preservation of the alleys. *Smith* v. *Brunswick Balke Collender Company*, (1917) 25 B.C.R. 37; 38 D.L.R. 455; (1917) 3 W.W.R. 1071.

BULK SALES ACT.

1. Sale to creditor.]—The sale to a creditor of a debtor's stock of merchandise on the terms of paying certain claims against the debtor and setting off the purchaser's claim against the purchase price is void under the Bulk Sales Act as against unsatisfied creditors. Waiver from creditors in order to be effective must be obtained after receipt of the statutory declaration provided for in the Act and before the sale is consummated. *Paisley* v. *Leeson et al.*, (1920) 28 B.C.R. 18; (1920) 1 W.W.R. 479.

2. Buildings and fixtures.]—The stock in trade of a business comes within the purview of sec. 2 of the Bulk Sales Act, but the section does not apply to the sale of the vendor's buildings and fixtures which are attached to the freehold. *Paisley* v. *Leeson et al.*, (1920) 28 B.C.R. 363; (1920) 2 W.W.R. 511.

3. Assets of sawmill.]—A sale en bloc of the assets of a sawmill except the lumber is not in contravention of the Bulk Sales Act. *Adams River Lumber Co.* v. *Kamloops Sawmills Ltd.*, (1921) 30 B.C.R. 354; 70 D.L.R. 863.

BUSH FIRES.

See FIRE.

BY-LAWS.

See MUNICIPAL CORPORATIONS.

CANCELLATION.

See LANDLORD AND TENANT.

See PRACTICE.

See REGISTRATION OF DEEDS.

See VENDOR AND PURCHASER.

CAPIAS AD RESPONDENDUM.

See ARREST AND IMPRISONMENT FOR DEBT.

CARRIERS.

I. CARRIERS OF PASSENGERS, 134.
- *A. Liability for personal injuries*, 134.
- *B. Liability for baggage of passengers*, 136.

II. CARRIERS OF GOODS, 137.
- *A. Duties of*, 137.
  - 1. As to stowage, 137.
  - 2. Delivery, 138.
- *B. Payment of freight*, 139.
- *C. Damages for delay*, 140.
- *D. Stipulations as to liability*, 140.
  - 1. Special contract, 140.
  - 2. Negligence, 143.

III. THROUGH CONTRACTS OF CARRIAGE, 144.

IV. CONTRACTS BETWEEN CARRIERS, 146.

I. CARRIERS OF PASSENGERS.

A. Liability for Personal Injuries.

1. Conditions printed on ticket.]—Where reasonable care has been taken to send a boat to sea in a seaworthy condition, a passenger's ticket for transportation containing conditions printed thereon whereby the company was not to be liable for loss of or injury to the passenger or his baggage arising from perils of the sea or defects in the boat fittings, will bind the passenger where the latter has reasonable opportunity

to read the ticket and to get notice therefrom, and from posted notices in the company's office, provided the company does all that is reasonably required of it to bring the conditions to the attention of the passengers. *Dill* v. *Grand Trunk Pacific Coast Steamship Company, Limited,* (1915) 21 B.C.R. 182; 21 D.L.R. 392.

2. Injury to passenger while landing.]—There is no arbitrary or definite rule governing the question whether the holder of a ticket entitling him to transportation must be held to have known the conditions, if any, in the contract for transportation contained on the ticket he purchased. It is purely a question of fact, and the finding of the jury will not be interfered with unless clearly contrary to the evidence. *Simpson* v. *Grand Trunk Pacific SS. Co.,* (1922) 63 S.C.R. 361; 65 D.L.R. 614; (1922) 2 W.W.R. 320.

3. Passenger boarding moving car.]—A car of the defendant Company stopped for passengers as it was about to round a curve into another street. A woman immediately in front of the plaintiff boarded the car and the conductor not seeing the plaintiff started to close the gates and gave the starting signal. When the gates were half closed and the car commenced moving, seeing the plaintiff he reopened the gates but did not give the signal to stop. The plaintiff grasped both handle-bars and put her right foot on the lower step but as the car gained momentum she was thrown violently against the gate and was injured:—Held, that the plaintiff in attempting to board the car was entitled to assume that it would stop and the conduct of the conductor justified a verdict for damages against the railway company. *Lochead* v. *B.C. Electric Ry. Co. Ltd.,* (1920) 28 B.C.R. 453; 54 D.L.R. 254; (1920) 3 W.W.R. 417.

4. Assault on passenger.]—The forcible attempt of a conductor to eject a passenger for his refusal to move up in a crowded car is an unjustifiable assault for which the company is liable, particularly where such passenger is an elderly person. *Raines* v. *B.C. Electric Ry. Co.,* (1921) 30 B.C.R. 340; 70 D.L.R. 738.

5. Injury to passenger—Limitation of action.]—Sec. 60 of the Consolidated Railway Company's Act, 1896, which provides that "all actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within 6 months next after the time when such supposed damage is sustained" does not apply to an action based on the Company's duty to carry the plaintiff safely. *Pribble* v. *B.C. Electric Ry. Co. Ltd.,* (1925) 35 B.C.R. 46; (1925) 1 W.W.R. 904; (1926) A.C. 466; 95 L.J.P.C. 51; 134 L.T. 711; 42 T.L.R. 332; (1926) 1 W.W.R. 786; (1926) 2 D.L.R. 865; 31 C.R.C. 418.

6. Construction of floor of car.]—Where a passenger wearing high-heeled shoes met with an accident as the result of her heel being caught between the slats of the flooring of a tram-car it was held that the floor being of the usual construction to prevent slipping was not defective and the railway company was not liable in damages for the injury sustained by the passenger. *Roddy* v. *B.C. Electric Ry. Co.,* (1928) 40 B.C.R. 180.

7. Starting car when passenger alighting.]—A street railway company is liable in damages for negligence of its motorman when a passenger who is about to alight is thrown down and injured by reason of the motorman suddenly starting the car without warning. *Calbick* v. *B.C. Elevtric Ry. Co. Ltd.,* (1929) 41 B.C.R. 17; (1929) 2 D.L.R. 64.

8. Car stopping suddenly without warning.]—The plaintiff was injured by the sudden stopping of a car of the defendant Company travelling at night as the motorman saw a railway tie lying across the track. The passenger was thrown off her balance, and falling in the body of the car was severely injured:—Held, that the plaintiff being injured by the sudden stopping of the car established a prima facie case and the burden was on the defendant not only to shew that the car was reasonably so stopped but that it was not because of its negligence that the obstruction was there. *Vivian* v. *B.C. Electric Ry. Co. Ltd.,* (1930) 42 B.C.R. 423; (1930) 3 D.L.R. 892; (1930) 1 W.W.R. 791.

B. Liability for Baggage of Passengers.

1. Negligence of servants.]—A passenger on a steamship is entitled to recover from the owners the value of baggage lost through the negligence of the company's servants. *Smith* v. *Union Steamship Company,* (1922) 31 B.C.R. 334; 68 D.L.R. 488.

2. Loss in transit—Limitation of liability.]—Where a steamship ticket limits the amount of the carrier's liability for loss of luggage, but the passenger, a person of

scant education, does not read that portion of the ticket containing the limitation, which is not called to the passenger's attention by the agent from whom the ticket is purchased, it may be held under the circumstances that the carrier has waived the limitation. Whether the passenger knew of the conditions or not is a question of fact and the finding of the trial judge will not be interfered with unless clearly against the evidence. If the carrier permits the passenger either on payment or without payment of an extra charge to take more than the regulated quantity of luggage or knowingly permits the passenger to take as personal luggage articles that would not come under that denomination, the carrier will be liable for their loss although not arising from negligence. *Tolerton* v. *Cunard Steamship Company, Ltd.*, (1924) 33 B.C.R. 551; (1924) 3 D.L.R. 355; (1924) 2 W.W.R. 927.

II. Carriers of Goods.

A. Duties of.

1. As to Stowage.

1. Inclement weather.] — A cargo of maize was shipped on the defendant's steamship under a bill of lading excepting "accidents of the seas." Owing to inclement weather and for the safety of the ship the ventilators were closed on a number of occasions during the voyage with the result that the air in the holds became heated and a portion of the cargo was damaged:—Held, that the case comes within the exception "accidents of the seas" and the ship owners are not liable as the heating of the maize was caused by the stoppage of ventilation which, as a matter of good seamanship, was necessitated by the state of the weather *Donkin et al.* v. *S.S. "Chicago Maru,"* (1916) 23 B.C.R. 551; 33 D.L.R. 38; 16 Ex. C.R. 503.

2. Improper stowage—Unseaworthiness —System of ventilation.]—The fact that a cargo is improperly stowed in that it is not supplied with sufficient ventilation may be "unseaworthiness" as far as such cargo is concerned. Where a steamship line, operating presumably up-to-date ships manned by competent officers, has, in carrying on its business for a number of years, deliberately adopted a certain system as to the carriage of grain cargoes, without any apparent objection being raised thereto by shippers, such system should not be held to be improper unless it is shewn that a contrary system is well recognized as proper and necessary. In an action against a shipowner for failure to deliver a cargo in the condition it was in when shipped, evidence as to the condition in which other shipments of the same kind of goods, shipped over different lines, were found upon delivery at near-by ports during the same season should not be entirely ignored on the question of the sufficiency of ventilation given the cargo in question. *Balfour, Guthrie & Co.* v. *Can. Pacific Ry. Co.*, (1917) 3 W.W.R. 410.

3. Fraud of shipper's representative.]—Apart from any agreement, stowage on deck is negligent stowage. Where a broker contracts for cargo space with a shipper and then arranges with a steamship company to supply the cargo space, the shipper is not bound by a special contract in the bill of lading entered into without his knowledge between the broker and the steamship company, whereby the latter is relieved from liability for loss by negligence in the stowage on deck of the goods shipped. *Ford Motor Co. of Canada Ltd.* v. *Union Steamship Co.*, (1925) 36 B.C.R. 127; (1925) 3 D.L.R. 1169; (1925) 2 W.W.R. 708.

2. Delivery.

1. Delivery to wrong person.]—Five cars of lumber were shipped under contract with the defendant Company from Prince Rupert to the State of Minnesota. They were carried over the defendant Company's line to Winnipeg and from there proceeded over another Company's line to their destination where they arrived without delay but were wrongly delivered. An action by the assignee of the bills of lading for the loss sustained was dismissed on the ground that the plaintiff failed to give notice of loss which by the bills of lading was made a condition of the defendant Company's liability:—Held, that the failure to give notice of loss was fatal to the plaintiff's claim. *Premier Lumber Company, Limited* v. *Grand Trunk Pacific Railway Company,* (1922) 31 B.C.R. 152; 67 D.L.R. 334; (1923) S.C.R. 84; (1923) 1 D.L.R. 649; (1923) 1 W.W.R. 473; 29 C.R.C. 144.

See Northern Pacific Ry. Co. v. *Fullerton Lumber & Shingle Co. Ltd. Infra.*

2. Damage to goods—Onus.]—Where goods arrive at their destination in a damaged condition after passing through the hands of more than one carrier, the first

carrier cannot be made liable for the damage without more evidence than the mere inference tnat the damage was caused by his negligence to be drawn from the fact that goods being a small part only of the shipment were admittedly damaged by his negligence, compensation having been paid therefor. *Makins Produce Company Inc.* v. *Canadian Australasian Royal Mail Line*, (1927) 1 D.L.R. 97; (1927) 1 W.W.R. 206. Affg. (1926) 36 B.C.R. 462; (1926) 1 D.L.R. 1053; (1926) 1 W.W.R. 635.

3. Damage to goods—Loss of goods in transit.]—From a shipment of shirts from the manufacturer to a retail merchant some of the shirts were lost in transit on the defendant's railway:—Held, that the plaintiff is entitled to recover only the actual value of the shirts lost, and not for depreciation in value of the incomplete shipment received. *Claman's Limited* v. *Canadian Pacific Ry. Co.* (1920) 28 B.C.R. 226; 51 D.L.R. 668; 25 C.R.C. 368; (1920) 2 W.W.R. 117.

B. Payment of Freight.

1. Wrong delivery.]—Goods consigned to the defendant at a station in the Province of Alberta were carried on the plaintiff's line from a point in the State of Washington to the border, and from there, on the line of the Canadian Pacific Railway to its destination. The way-bill which gave the freight charges was marked "collect." On arrival at the destination the goods were delivered to parties other than the consignees without collection of the freight charges. In an action for freight charges:—Held, that as the plaintiff is suing on a contract which was not performed on its part, it cannot recover. *Northern Pacific Railway Company* v. *Fullerton Lumber & Shingle Company, Limited*, (1919) 27 B.C.R. 36; 47 D.L.R. 705; (1919) 2 W.W.R. 92.

2. Agents — Liability for freight charges.]—The defendants contracted with shippers to carry goods from Vancouver and connect with a steamship at Seattle and not having a ship available gave the plaintiff an order to carry the cargo. The plaintiff's vessel arriving at Seattle was too late to connect with the steamship there and brought the goods back to Vancouver, where they were shipped by another steamship. There being no evidence that the shippers authorized the defendants to act as their agents to make the contract with the plaintiff, in that they adopted it, the defendants were held liable for the freight. *Galt* v. *Frank Waterhouse & Co. of Canada Ltd.*, (1927) 39 B.C.R. 241; (1927) 4 D.L.R. 1005.

3. Possessory lien.]—A possessory lien on goods at common law is lost if the party claiming the lien gives up possession of the goods and he cannot afterwards revive his lien by retaking possession. *Welch* v. *Scott*, (1920) 28 B.C.R. 349; (1920) 2 W.W.R. 510.

C. Damages for Delay.

Motion picture films.]—An express company is liable for loss of profits and expenses incurred by unnecessary delay in the delivery of a parcel containing films for moving pictures where the goods did not arrive in time for the production for which they were intended, and the defendant knew of the use to which they were to be put. *Victoria Dominion Theatre Co.* v. *Dominion Express Co.*, (1916) 23 B.C.R. 396; 35 D.L.R. 728.

D. Stipulations as to Liability.

1. Special Contract.

1. Accidents of the seas — Inclement weather.]—A cargo of maize was shipped on the defendant's steamship under a bill of lading excepting "accidents of the seas." Owing to inclement weather and for the safety of the ship the ventilators were closed on a number of occasions during the voyage with the result that the air in the holds became heated and a portion of the cargo was damaged:—Held, that the case comes within the exception "accidents of the seas" and the ship owners are not liable as the heating of the maize was caused by the stoppage of ventilation which, as a matter of good seamanship, was necessitated by the state of the weather. *Donkin et al.* v. *S.S. "Chicago Maru,"* (1916) 23 B.C.R. 551; 33 D.L.R. 38; 16 Ex. C.R. 503.

2. Approved by Railway Commissioners.]—The plaintiff shipped four valuable polo ponies from New Westminster to Portland, State of Oregon, and after being used there for exhibition purposes they were shipped back to New Westminster. On reaching New Westminster junction the car in which the ponies were shipped was placed temporarily on a side track and while there was run into by a Canadian Northern train in a fog. The polo ponies were very severely injured. The shipment was under a uniform live stock contract (prescribed

by the Interstate Commerce Commission) by which the ponies were to be carried by the railway and connecting lines to place of delivery. One of the conditions endorsed on the back of the contract was that when a lower value than the actual value is represented in writing by the shipper as the released value of the stock as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges shall be the maximum amount to be recovered in case of loss, and the shipper declared over his signature that the shipment covered by the bill of lading was ordinary live stock and under the consolidated freight classification the standard or basic value of each pony is $150:—Held, that section 322 (4) of The Railway Act, 1919, authorizes the contract of carriage, and as there was nothing to shew that the Board of Railway Commissioners had made any regulation, order or direction to the contrary, the parties were competent to make the contract and the plaintiff could only recover $150 per pony. With the respondent's declaration that the value of the ponies was $150 per head, he induced the Company to accept them for shipment. It is impossible that he should now be allowed more than the full value so declared. *Sporle* v. *Great Northern Railway Company*, (1925) 35 B.C.R. 232; (1925) 3 D.L.R. 302; (1925) 2 W.W.R. 385; 30 C.R.C. 186.

3. Insurance on cargo—Effect on shipowners' liability.]—The fact that a cargo is insured does not affect the shipowner's liability for its deterioration. *Balfour, Guthrie & Co.* v. *Canadian Pacific Ry. Co.*, (1917) 3 W.W.R. 410.

4. Bill of lading—Limitation of liability in.]—A clause in a bill of lading limiting the shipowner's liability for damage to a cargo, held merely to limit the total liability of the shipowner to the cash value of the goods at the point of shipment. *Ibid.*

5. Bills of lading — "Apparent good condition"—Evidence.]—Where a bill of lading admits the receipt of goods "in apparent good order and condition" and they are not so delivered, but there is no evidence to prove that they were in proper condition when loaded, negligence is not, therefore, to be presumed. The words quoted mean nothing more than that there was nothing specially noticeable about the goods which would require to be marked on the mate's receipts. Evidence adduced by a shipper as to the condition of a shipment at the time of loading held to be sufficient to make out a prima facie case which the defendant was required to meet. *Ibid.*

6. Illegal clauses in bill of lading—Action for penalty.]—A person who has suffered damage within the Water-Carriage of Goods Act, 1910, ch. 61 (Dom.), has the same meaning as a person aggrieved in other similar Acts and a person forced to take a bill of lading, containing clauses illegal under said Act, is injured or aggrieved by their presence, without first having to test the clauses in an action against the carrier on the bill of lading. *Davis Company, Ltd.* v. *Dollar Steamship Lines, Ltd.*, (1922) 1 W.W.R. 522.

7. Condition against accidents of the seas.]—A condition in a contract of carriage by sea that the carrier should not be responsible for any loss or damage arising from "perils or accidents of the seas and of navigation" or "from unseaworthiness at or after the commencement of the voyage" was held not to apply to a case where goods were damaged after being loaded on board but while the ship was still moored at the wharf and the voyage in fact had not yet commenced. "Loading" simply is not part of the voyage. *Automatic Electric Telephone Co.* v. *Union Steamship Co.*, (1921) 1 W.W.R. 741.

8. Negligence — Railway Act.]— Some days after the defendant had taken delivery of four carloads of potatoes bills of lading were issued therefor, and it was found on the evidence that in the meantime the potatoes had been damaged by frost:—Held, that the defendant was not excused from liability by a special contract contained in the bills of lading and having failed to relieve itself of the onus cast upon it by section 215 of the British Columbia Railway Act, shewing the damage was not caused by the fault or neglect of it or its agents, servants or employees, it was liable in damages. *Edgett Limited* v. *Pacific Great Eastern Railway Company*, (1923) 32 B.C.R. 37; (1923) 1 W.W.R. 684.

9. Loss of cargo by fire—Unseaworthiness of barge.]—Apart from any limitation of liability either by statute or agreement, a carrier of goods by sea is liable as insurer of the safety of the goods which he undertakes to deliver, and further warrants that the vessel in which the goods are intended to be carried is seaworthy at the time when the goods are placed on board, and while there is nothing in sec. 4 of the Water-Carriage of Goods Act, 1910 (Can.), ch. 61,

which prohibits a shipowner from contracting out of his common law liability to warrant the absolute seaworthiness of the ship, he cannot contract out of the obligation imposed by the Act to exercise due diligence to make and keep the ship seaworthy, and where such diligence has not been exercised, and the unseaworthiness is the natural and direct cause of the loss, the owner is not protected by the Act from his common law liability. In such case the resulting loss is not deemed to be a "loss by fire" within sec. 7 of the Act. The onus is on the carrier to shew that the loss arose without his fault or neglect or that of his servants. *Corporation of the Royal Exchange Assurance* v. *Kingsley Navigation Co. Ltd.*, (1923) A.C. 235; 92 L.J., P.C. 111; 128 L.T. 673; 67 Sol. Jo. 296; (1923) 1 D.L.R. 1048; (1923) 1 W.W.R. 737.

2. Negligence.

1. Ignorance.]—In an action against a shipowner for damages for negligently injuring a cargo it is not necessary to prove that any acts of commission or omission of a negligent nature by the defendant were intentional, but it is sufficient to shew that ignorance governed his actions. *Balfour, Guthrie & Co.* v. *C.P.R.*, (1917) 3 W.W.R. 410.

2. Proximate cause.]—Negligence of a shipowner relied upon as the basis of an action for damages because of deterioration of a cargo must be shewn, even if proven, to have been the cause of such deterioration. *Ibid.*

3. Onus of proof.]—In an action by a shipper against a shipowner for breach of a contract to deliver goods in apparent good order and condition, the onus is upon the defendant, upon proof of failure so to deliver, of shewing that, notwithstanding such fact, it is not liable. *Ibid.*

4. Admission contained in receipt.]—The admission of the receipt of a shipment "in apparent good order and condition" as set out in a bill of lading does not mean anything more than that there was nothing noticeable about it which would require to be marked on the mate's receipt. *Ibid.*

5. Action by consignor.]—A consignor of goods may maintain an action against the carrier for damage to the goods in transit, where the consignor is under obligation to the consignee to deliver the goods at their destination, and as against the consignee bears the risk of transit. *Automatic Electric Telephone Co.* v. *Union Steamship Company*, (1921) 1 W.W.R. 741.

6. Unseaworthiness—Hidden defect.]—Where a contract with a carrier requires carriage by sea, this entails on the part of the carrier, in the absence of effectual exempting provisions, a warranty of seaworthiness. Such warranty is absolute and is broken though the unseaworthiness be due to a hidden defect, which the most careful inspection would not have revealed. Such warranty includes the fitness of the ship to receive as well as carry the cargo. *Ibid.*

7. Reasonable fitness.] — A statute requiring as a condition of excuse from liability of a carrier by sea for damage to goods, that due diligence shall be pursued by the shipowner, requires such diligence or care as will fully render the ship in fit condition to receive the cargo. A provision in a contract of carriage by sea limiting the liability of the carrier was held not to apply where the damage arose through the carrier not providing a ship reasonably fit for the carriage of the goods. *Ibid.*

8. Damage to scow in discharging cargo.]—In the discharge of a cargo from a vessel on to a scow, the carrier through its stevedores is in charge of the scow to the extent that it owes a duty to the owners of the scow and of the cargo to take reasonable care. *Coast Cement Co. Ltd.* v. *Navigazione Libera Triestina S.A.*, (1930) 43 B.C.R. 167; (1930) 4 D.L.R. 897; (1930) 3 W.W.R. 69.

9. Carriage of ore—Obligation to provide seaworthy scow.] — The defendant company contracted with the plaintiff to carry ore in its barges from Stewart to the Anyox Smelter. During the voyage the barges encountered rough weather and one overturned and its cargo was lost. An action to recover damages for loss of the cargo was dismissed:—Held, that irrespective of the onus of proof of seaworthiness the evidence shewed that the barge was seaworthy when she commenced her voyage and there was no fault on the part of those who had her in tow during the voyage the action must fail. *Premier Gold Mining Co.* v. *Coastwise Steamship & Barge Co.*, (1925) 35 B.C.R. 147; (1925) 1 W.W.R. 630; (1926) 1 D.L.R. 1009.

III. Through Contracts of Carriage.

1. Liability of first carrier.]—By bill of lading the defendant undertook to carry a

cargo of eggs from Shanghai to Vancouver by a ship named or by any other vessel operated by or on account of the defendant. The ship named sailed to Seattle and the cargo was transhipped to Vancouver by a vessel not operated by or on account of the defendant. The eggs were damaged by improper stowage on the second vessel:—Held, that there was breach on the part of the defendant in transhipping the cargo on the second vessel, and in the circumstances a general clause in the bill of lading authorizing the defendant to tranship at any intermediate port "by any other vessel, steam, motor or sail" did not warrant the defendant in departing from the special clause of the contract relative to the using of the vessel named or another vessel operated by or on account of the defendant:—Held, further, that under the American law applicable, if the defendant transhipped without the right to do so, it cannot rely upon the special terms contained in the bill of lading exempting it from liability in the various cases therein mentioned and the defendant was liable as a common carrier. *Vancouver Milling & Grain Co., Ltd.* v. *United States Shipping Board Emergency Fleet Corporation*, (1924) 33 B.C.R. 329; (1924) 1 D.L.R. 937; (1924) 1 W.W.R. 662. Affg. (1923) 32 B.C.R. 269; (1923) 2 W.W.R. 579.

2. Deviation.]—Unless there is a special contract that the luggage of a passenger by steamship shall be forwarded by the same ship, it is open to the steamship company to send the luggage by any of its vessels by which it would reach its destination in due course. *Lumsden* v. *Pacific Steamship Co.*, (1920) 28 B.C.R. 473; 54 D.L.R. 226; (1920) 3 W.W.R. 464.

3. Bill of lading — Conditions—Deviation.]—Goods were shipped from Vancouver to Yokohama under a bill of lading one of the conditions in which gave the ship the privilege of deviation without qualification. On leaving Vancouver the ship proceeded towards Portland, Oregon, for the purpose of completing her cargo before going across the Pacific but was lost on Willapa Spit at the mouth of the Columbia River:—Held, that although general provisions in a bill of lading must be construed so as to be consistent with the contemplated voyage, the object of the deviation clause was to enable the ship to complete her cargo at ports within a reasonable distance from Vancouver, and Portland being within such reasonable distance the action should be dismissed. *Western Assurance Co.* v. *Canadian Government Merchant Marine*, (1925) 36 B.C.R. 26; (1925) 3 D.L.R. 774.

4. Stowage on deck.]—Apart from any agreement, stowage on deck is negligent stowage. Where a broker contracts for cargo space with a shipper and then arranges with a steamship company to supply the cargo space the shipper is not bound by a special contract in the bill of lading entered into without his knowledge between the broker and the steamship company, whereby the latter is relieved from liability for loss by negligence in the stowage on deck of the goods shipped. *Ford Motor Co. of Canada Ltd.* v. *Union Steamship Co.*, (1924) 36 B.C.R. 127; (1925) 3 D.L.R. 1169; (1925) 2 W.W.R. 708.

5. Delivery in damaged condition.]—Where goods arrive at their destination in a damaged condition after passing through the hands of more than one carrier, the first carrier cannot be made liable for the damage without more evidence than the mere inference that the damage was caused by his negligence, to be drawn from the fact that goods being a small part only of the shipment were admittedly damaged by his negligence, compensation having been paid therefor. *Makins Produce Company Inc.* v. *Canadian Australasian Royal Mail Line*, (1927) 1 D.L.R. 97; (1927) 1 W.W.R. 206. Affg. (1926) 36 B.C.R. 462; (1926) 1 D.L.R. 1053; (1926) 1 W.W.R. 635.

IV. Contracts Between Carriers.

1. Interpretation — Custom.] — Two transportation companies entered into a contract whereby the one agreed to carry for the other "mail and express" upon certain terms. Feed (hay and oats) was offered but the carrier refused to accept delivery as "express" and carried it as "freight." It appeared from the evidence that both parties had been engaged in the transportation business within the area in question for some years and were familiar with the custom and usages established, and that it had always been the custom to carry feed as freight. In an action for freight charges for the feed carried by the plaintiff for the defendant:—Held, that the parties knew that it was the custom to carry feed (hay and oats) as freight, and that it was in their minds when they entered into the contract. *B.C. Express Co.* v. *Inland Express Co.*, (1915) 21 B.C.R. 178.

2. Assignment of stage route.] — The right to operate motor vehicles for the public carriage of passengers under a certificate of approval of schedule under the Highway Act is personal to the owner or person in charge of the motor vehicle, and is not assignable, and a promise to pay for such an alleged right is not founded upon a legal consideration, as the promissor could not lawfully carry on the public carriage of passengers without obtaining for himself such a certificate. *McLean-Butorac Motors* v. *Campbell*, (1930) 3 W.W.R. 39.

See ADMIRALTY.

See DAMAGES.

See LIMITATION OF ACTIONS.

See NEGLIGENCE.

See SHIPPING.

CERTIORARI.

I. JURISDICTION, 147.
II. EXISTENCE OF OTHER REMEDIES, 150.
III. PROCEDURE, 150.
A. Application for writ, 150.
B. Affidavits, 151.
C. Amendment of proceedings complained of, 151.
D. Recognizance, 152.
E. Order absolute, 152.
IV. GROUNDS FOR QUASHING CONVICTIONS, 153.
V. COSTS, 155.

I. JURISDICTION.

1. Income War Tax Act.]—An information for failing to make a return of income within 30 days after demand under sec. 8 of the Income War Tax Act, 1917, as amended by sec. 11, cap. 49 of 1920, must be laid within six months from the day or days as to which the accused is charged with being in default, sec. 1142 of the Criminal Code being applicable thereto. Sec. 135 of the Inland Revenue Act does not apply to proceedings based on an infraction of any of the provisions of the Income War Tax Act, 1917. Where a magistrate dismisses a charge punishable by summary conviction and is reversed by appeal to the County Court the accused may seek redress by certiorari. Where such a charge is not laid by the Crown the Crown Costs Act does not apply and if on certiorari proceedings the order of the County Court judge allowing the appeal from the magistrate is quashed, costs may be given the accused. *Rex* v. *Meehan*, (1925) 35 B.C.R. 363; (1925) 2 D.L.R. 411; (1925) 1 W.W.R. 819; 43 C.C.C. 325.

2. Statute taking away certiorari — Crown.—A statute taking away the right of certiorari does not disentitle the Crown to certiorari, where the Crown is not named and there were no words necessarily implying a reference to the Crown. *Rex* v. *On Sing*, (1924) 2 W.W.R. 258.

3. Jurisdiction of inferior Court.]—Although certiorari may have been taken away by statute and notwithstanding any law or authority deciding that the Court cannot look at the evidence to quash a conviction, the Court is entitled, on a habeas corpus application, to receive affidavit evidence to shew that the magistrate had no jurisdiction or has exceeded his jurisdiction in convicting the applicant. If the affidavit shews, and the Court is satisfied, that the magistrate tried two separate and distinct offences against the accused at one time, the convictions on the charges will be quashed. Sec. 84 of the B.C. Government Liquor Act, 1921, ch. 30, does not permit of such a trial on charges under that Act. *Rex* v. *Montemurro*, (1924) 2 W.W.R. 250.

4. Jurisdiction of magistrate — Detention of accused.]—Where an objection to a magistrate's jurisdiction has been raised after conviction and it appears that if the magistrate had known of the objection he would have tried the accused in another capacity in which he has jurisdiction, the conviction will be quashed but the Court will proceed under sec. 1120 of the Criminal Code and order the detention of the accused in order that he may be dealt with under the proper jurisdiction. *Rex* v. *Cardarelli*, (1929) 2 W.W.R. 223; (1930) 1 D.L.R. 575; 52 C.C.C. 267.

5. Jurisdiction of magistrate—Proof.]—If a summary trial is proceeded with under the Excise Act by a stipendiary magistrate who had jurisdiction territorially and otherwise to try a case of this kind, it is immaterial whether the proceedings prior to the trial were legal or not. On habeas corpus proceedings with certiorari in aid with respect to a conviction and imprisonment under the Excise Act, proof of the informant's authorization to lay the information is immaterial but the case of Rex v. Nat Bell Liquors, Ld. (1922), 2 A.C.

128, does not deprive an applicant from proving dehors the record that the magistrate has no jurisdiction to convict him. *Rex* v. *Henderson*, (1929) 41 B.C.R. 242; (1929) 4 D.L.R. 984; (1929) 2 W.W.R. 209; 52 C.C.C. 82.

6. Certiorari taken away — Inferior tribunal without jurisdiction.]—Certiorari will lie to review the decision of an inferior tribunal even though taken away by statute, where the tribunal has acted without jurisdiction. A tribunal which condemns a man without giving him an opportunity to present a full answer and defence, through failure to state positive charges against him, acts without jurisdiction. *Re Berquist*, (1925) 35 B.C.R. 368; (1925) 2 D.L.R. 696; (1925) 1 W.W.R. 1084.

7. Unfair trial.]—Where the magistrate proceeds on grounds manifestly unfair to the accused so that he did not receive a fair trial the magistrate will be regarded as having acted in excess of his jurisdiction and the proceedings are open to review. *Ibid.*

8. Certiorari taken away—Examination of depositions.] — Where a certiorari is taken away by statute the depositions can not be examined to determine whether there is any evidence. *Rex* v. *Jay Set*, (1921) 30 B.C.R. 349; 66 D.L.R. 520; (1921) 3 W.W.R. 847; 36 C.C.C. 250.

9. Right to certiorari.]—The right to certiorari exists as a protection to a party considering himself aggrieved by a conviction, to quash the conviction, although a right of appeal exists and no exceptional circumstances are shewn, unless the right to such a writ is expressly taken away. *Rex* v. *Toy King and Toy Hing*, (1921) 1 W.W.R. 796; 61 D.L.R. 398; 34 C.C.C. 207.

10. Right of Crown to certiorari.]—The Crown may have certiorari in opposing a habeas corpus application. *Rex* v. *Hing Hop*, (1926) 37 B.C.R. 158; (1926) 1 W.W.R. 799; 45 C.C.C. 239.

11. After committal for trial.]—After a committal for trial the Court cannot on habeas corpus proceedings with certiorari in aid, look at the depositions to see whether there is any evidence, the sufficiency of the evidence not being a matter going to the jurisdiction of the magistrates and such evidence not being a part of the record. *Rex* v. *Wong Foon Sing*, (1925) 36 B.C.R. 120; 44 C.C.C. 133; *Rex* v. *Chin Yow Hing*, (1929) 41 B.C.R. 214; 51 C.C.C. 407; (1929) 2 W.W.R. 73.

12. Appeal.] — No appeal lies from a refusal of a writ of certiorari in criminal matters in British Columbia. *Rex* v. *Kwong Yick Tai*, (1915) 21 B.C.R. 127; (1915) 22 D.L.R. 323; 8 W.W.R. 808; 24 C.C.C. 28.

13. Irregularity.]—Where there is nothing in the record to shew that the magistrate had not properly taken the depositions, it must be assumed that he did his duty, and the Court will not enquire into the matter. *Rex* v. *Cox*, (1929) 41 B.C.R. 9; (1929) 2 D.L.R. 785; (1929) 1 W.W.R. 542; 51 C.C.C. 203.

14. Upon plea of guilty.]—Certiorari in respect of a summary conviction made upon a plea of guilty must be based either upon want of jurisdiction or upon perjury or fraud in obtaining the conviction. *Rex* v. *Liden*, (1922) 31 B.C.R. 126; 39 C.C.C. 369.

II. Existence of Other Remedies.

Pending appeal to County Court.]—A writ of certiorari will not be granted to bring up a conviction made by a justice of the peace to be quashed, on the ground that the justice of the peace acted without jurisdiction, if the conviction and other papers have been forwarded to the County Court for use upon appeal by the accused. *Rex* v. *Olsen*, (1923) 32 B.C.R. 516.

III. Procedure.

A. Application for Writ.

1. Depositions and material.]—The effect of sec. 707 of the Criminal Code is that if there is no specific direction in any Act or law requiring two or more justices then a complaint or information may be heard, tried, determined and adjudged by any one justice and this applies to an offence coming within sec. 228A of the Criminal Code. A conviction for an offence under sec. 228A which does not state that the accused "knowingly" permitted his premises to be used for the illegal purpose described is materially defective. The word "knowingly" having been omitted from a conviction under sec. 228A, on application to quash, the Court not being satisfied that the applicant committed an offence of the nature described, held that sec. 1124 should not be applied.

While depositions cannot be used on certiorari in determining whether the magistrate's jurisdiction was established, an applicant who seeks to quash a conviction, on the ground of want of or excess of jurisdiction may incorporate proper material and present to the Court any facts, whether within or outside the depositions, which would affect the jurisdiction of the magistrate. When the validity of a conviction is in question an adjournment of the application may be allowed in the discretion of the Court at any time before the conviction has been quashed in order to permit an amended conviction to be filed. But such an adjournment will not be allowed unless the Court is satisfied that a conviction could be substituted which would be according to the truth and supported by the facts before the magistrate; and on the motion for adjournment the Court should consider all the available material including the depositions that will assist it in exercising its discretion. *Rex* v. *Rozonowski*, (1926) 36 B.C.R. 327; (1926) 1 D.L.R. 732; (1926) 1 W.W.R. 241; 45 C.C.C. 193.

2. Return by magistrate—Depositions held by stenographer pending payment of fees.]—Where depositions are in the hands of an official stenographer who refuses to deliver a transcript of the evidence until paid his fees, the failure of the magistrate to return the depositions does not constitute non-compliance with the writ as the depositions in such case are not in the custody or power of the magistrate. *Rex* v. *Wong York. In re Johnston*, (1930) 42 B.C.R. 246; (1930) 2 D.L.R. 552; (1930) 1 W.W.R. 388; 53 C.C.C. 68.

B. Affidavits.

Officer before whom sworn.]—An affidavit proving service of process on a magistrate on an application to quash a conviction by way of certiorari, cannot be sworn before a notary public or a justice of the peace, as neither is an officer authorized to take affidavits under Crown Office Rules relating to certiorari. *Rex* v. *Lai Cow et al.*, (1921) 30 B.C.R. 277; (1921) 3 W.W.R. 268.

C. Amendment of Proceedings Complained of.

1. Amendment of conviction.] — Sec. 1124 of the Criminal Code requires the judge before whom the question of invalidity is raised to peruse the depositions and determine as to the guilt of the person seeking redress, and if he is satisfied that the offence actually alleged in the conviction has been committed, such conviction should not be held invalid. Where in a conviction the year 1923 was added after describing the statute under which it was based, such figures having been incorporated in the nomenclature of a statute which had been repealed the conviction was amended by striking out the figures "1923." *Rex* v. *Loo Yip Yen*, (1929) 42 B.C.R. 377; 53 C.C.C. 38; (1930) 1 W.W.R. 351.

2. Amendment as to costs.]—Where on conviction on a charge under sec. 180 (e) of the Inland Revenue Act the magistrate erred in directing that the accused should pay him his costs, the Court may on certiorari amend the warrant of conviction by deleting the order as to costs. *Rex* v. *Dragani*, (1927) 38 B.C.R. 420; (1927) 1 W.W.R. 914; 47 C.C.C. 301.

3. Duplicity and uncertainty.]—In the case of a summary conviction by a magistrate of a person on a charge that he did "expose for sale and offer to sell 24 double cases and 4 single cases of intoxicating liquor," etc., and the evidence returned on certiorari was sufficient to convict such person on the charge that "he did offer to sell," etc., the Court will not quash the conviction for duplicity and uncertainty but will amend the conviction under sec. 1124 of the Criminal Code by striking out the charge of exposing for sale. *Rex* v. *Leahy*, (1920) 28 B.C.R. 151; 61 D.L.R. 333; (1920) 2 W.W.R. 95; 35 C.C.C. 358.

D. Recognizance.

1. Bail pending appeal.]—There is jurisdiction in the Supreme Court to order bail pending an appeal from the refusal of certiorari on a conviction under sec. 10 of the British Columbia Prohibition Act. *Rex* v. *Sally*, (1919) 27 B.C.R. 419; (1919) 3 W.W.R. 427.

2. When dispensed with.]—A recognizance may be dispensed with when the notice of motion shews that the quashing of the conviction will be requested without the issuance of the writ. *Rex* v. *Dhana Singh*, (1915) 7 W.W.R. 1101; 25 C.C.C. 250.

E. Order Absolute.

On original hearing.] — A judge has power on a motion for a writ of certiorari

to make an order absolute on the first hearing. The notice of motion may be signed by a solicitor on behalf of his client. *Rex* v. *Wong Joe*, (1918) 26 B.C.R. 337; (1918) 3 W.W.R. 581.

IV. GROUNDS FOR QUASHING CONVICTIONS.

1. Illegal sentence—Hard labour.]—An accused was convicted for having cocaine in his possession without lawful authority and sentenced to six months' imprisonment with hard labour. On an application for a writ of habeas corpus with certiorari in aid:—Held, that as there was no power to impose hard labour the conviction was illegal and should be quashed. Held, further, that assuming an offence of the nature described was committed, sec. 1124 of the Criminal Code should not be given effect to where the illegal punishment has been partially enforced. *Rex* v. *Low Quong*, (1924) 33 B.C.R. 522; (1924) 3 D.L.R. 666; (1924) 2 W.W.R. 695; 42 C.C.C. 300.

2. Illegal sentence — Hard labour.]—Upon an application in habeas corpus proceedings to quash a conviction under the Opium and Narcotic Drug Act for having unlawful possession of opium, the discharge of the prisoner was sought on the ground that there was an unauthorized imposition of "hard labour" in the conviction and commitment in answer to which counsel for the Crown urged that the Court should resort to the powers given by sec. 1124 of the Criminal Code: — Held, dismissing the application, that although there were no depositions for the Court to peruse to satisfy itself of the accused's guilt, the accused having pleaded guilty before the magistrate, the rule that the Court should hold a thing to be within the law when it is plainly within its spirit although not strictly within the letter, should be applied. The provisions of said sec. 1124 should therefore be given effect to and the "hard labour" clauses should be struck out of the conviction and commitment under the provisions of sec. 754 of the Criminal Code, it appearing by the memorandum of conviction that hard labour had not in fact been imposed. *Rex* v. *Gee Dew*, (*No. 2*), (1924) 33 B.C.R. 545; (1924) 3 D.L.R. 175; (1924) 2 W.W.R. 791; 42 C.C.C. 210.

3. Objection not raised on hearing.]—On an information being laid before a magistrate, an officer without a warrant arrested the accused who was subsequently tried without objection and convicted. On an application for a writ of certiorari:—Held, that the conviction must be sustained as neglect to raise objection at the hearing amounted to waiver. *Rex* v. *Wong Joe*, (1918) 26 B.C.R. 417; (1918) 3 W.W.R. 672.

4. Chinese Immigration Act.] — Certiorari in general lies with respect to an order for deportation made under sec. 26, and sec. 38 is no bar to its application when such orders are made without or in excess of jurisdiction or in violation of the essentials of justice. *In re Low Hong Hing*, (1926) 37 B.C.R. 295; (1926) 3 D.L.R. 692; (1926) 2 W.W.R. 597; 46 C.C.C. 65.

5. Questions of fact.]—Once the jurisdiction of the magistrate has been established on certiorari proceedings the Court cannot review the evidence for the purpose of ascertaining whether there was any upon which the conviction could be supported. *Rex* v. *Brandilini*, (1926) 38 B.C.R. 87; (1927) 1 W.W.R. 832; 47 C.C.C. 166.

6. Evidence.]—If the jurisdiction of the magistrate is conceded, the formal conviction is conclusive and excludes from consideration, on certiorari, the sufficiency of the evidence supporting the conviction as to the facts alleged, but extrinsic evidence may be received to shew that an accused person pleading "not guilty" in a Court with limited territorial jurisdiction was deprived of the right to have it established in the course of the evidence, as a condition precedent to the exercise of its jurisdiction, that the charge was one triable in the Court purporting to deal with it. *Rex* v. *Gustafson*, (1929) 42 B.C.R. 58; (1929) 3 W.W.R. 209; 52 C.C.C. 151.

7. Fine less than prescribed by statute.]—The imposition of a fine less than that prescribed by the statute is no ground for holding the conviction invalid. *Rex* v. *Henderson*, (1929) 41 B.C.R. 242; (1929) 4 D.L.R. 984; (1929) 2 W.W.R. 209; 52 C.C.C. 82.

8. Disorderly houses—Prima facie evidence.]—Sec. 986 of the Criminal Code which deals with prima facie evidence as to disorderly houses, only applies to prosecution under secs. 228 and 229 of the Code, and where there is no evidence before a magistrate on which he can convict on a charge laid under sec. 228A unless he invokes the provisions of sec. 986, the conviction will be quashed on certiorari. *Rex* v. *Toy King and Toy Hing*, (1921) 1 W.W.R. 796; 61 D.L.R. 398; 34 C.C.C. 207.

V. COSTS.

1. Of Crown.]—The Crown Costs Act, 1911, is a bar to giving costs to the Crown in opposing certiorari proceedings directed to a magistrate in respect of a summary conviction under a Provincial statute. *Rex* v. *Liden*, (1922) 31 B.C.R. 126; 39 C.C.C. 369.

2. Order for.] — A Court may grant costs in favour of the Crown in certiorari proceedings directed to a magistrate in respect of a conviction under the Lord's Day Act. *Rex* v. *Lam Joy*. *Rex* v. *Sam Bow*, (1920) 28 B.C.R. 253; (1920) 2 W.W.R. 1006.

3. Prosecutor.]—In quashing a conviction the Court has power to award costs against the prosecutor. *Rex* v. *Ferguson*, (1916) 33 D.L.R. 42; 26 C.C.C. 220.

See CRIMINAL LAW.

See HABEAS CORPUS.

CESTUI QUE TRUST.

See TRUSTS.

CHALLENGE.

See CRIMINAL LAW.

See JURY.

CHAMBERS.

See PRACTICE.

CHAMPERTY.

See CONTRACT.

CHARITABLE USES.

See ENGLISH LAW.

CHARTER PARTY.

See SHIPPING.

CHILDREN OF UNMARRIED PARENTS.

1. Application for maintenance—Corroboration.]—Although there was nothing to prove that the defendant lived with the complainant after 1923, and the child was born in January, 1925, the evidence disclosed that he lived with her during the year 1923; that he was co-respondent in divorce proceedings against the complainant; that after the child was born he made an allowance to the mother of $100 a month for the support of herself and her two children of which the child in question was one; and he paid the hospital expenses of the children. These facts are sufficient corroboration of her statement that he was the father of the child. *Rex* v. *Moore*, (1927) 38 B.C.R. 425.

2. Prohibition — Jurisdiction — Where cause of complaint arose.]—The cause of complaint is the seduction and not the birth of a child. An appeal from the magistrate hearing a complaint under the Act should be taken to the County Court nearest the place where the conception took place. *Ferguson* v. *Taylor*, (1926) 37 B.C.R. 340; (1926) 3 W.W.R. 203; 46 C.C.C. 149.

3. Appeal — Condition precedent.] — It is not a condition precedent to the bringing of an appeal by a defendant from an order under the Children of Unmarried Parents Act that proof be furnished that he has complied with the order. *Hynes* v. *Alton*, (1928) 3 W.W.R. 261.

4. Costs.]—Although an appeal from a conviction under the Act is decided in favour of the appellant, the reputed father, on the ground that he is not proven to be the father of the child, he is nevertheless liable for all the costs of the appeal since sec. 13 (3) (a) of the Act provides that where the putative father is the appellant he shall pay all the costs of the appeal. *Hynes* v. *Alton* (*No. 2*), (1929) 1 W.W.R. 863; 52 C.C.C. 333.

CHINESE.

See CONSTITUTIONAL LAW.

See HABEAS CORPUS.

See IMMIGRATION.

See MARRIAGE.

See MUNICIPAL CORPORATIONS.

CHOSES IN ACTION.

See ASSIGNMENT.

CHURCH UNION.

Election — Jurisdiction of church tribunals.]—A voters' list to be used at the January, 1925, election as to whether the congregation should enter The United Church of Canada was drawn up by the Session of St. Andrew's Presbyterian Church of Nanaimo, which excluded most of the persons on the communion roll opposite whose names were pencil annotations on said roll. The result of the voting was a majority of ten against union. An appeal was forwarded to the Presbytery by eight members of the Session raising the question of disqualification of voters and a further appeal signed by 134 persons claiming to be members of St. Andrew's Church was later filed raising the same question. The Presbytery gave no decision but stated it would place no obstacle in the way of action in the civil Courts. On appeal to the Synod from the Presbytery's decision the Synod decided that every person whose name was on the communion roll on the 19th of July, 1924, was entitled to vote, and on appeal this decision was upheld by the General Assembly of the church. In an action by the plaintiffs on behalf of themselves and all other members and adherents who desired to enter the Union against the defendants represented by those who did not desire to enter the Union, the trustees and the Session of the church, for a declaration that the vote taken was not in accordance with the provisions of The United Church of Canada Acts (Dominion and Provincial), that the congregation had gone into the Union, and for an injunction restraining the trustees from holding the church's property:—Held, that at least all those persons whose names appear on the communion roll and whose names were not put on the voters' list because pencil annotations appear opposite their names on the communion roll, which pencil annotations were made at the alleged purgings of the roll in 1921, 1923 and 1924, were legally entitled to vote under the provisions of said Acts and should have had their names on the voters' list. As the anti-union majority at the election was ten and the names of a far greater number than ten persons entitled to vote were not put on the list because of said pencil annotations on the communion roll, the outcome of the election might have been different had the names of said persons been on the voters' list. There was therefore no valid election such as is called for by both the Dominion and Provincial Acts. Although there is some difference in the phraseology of the relevant sections of the two Acts as to the qualification of voters, as the ownership of property is affected by the election, the provisions of the Provincial Act would govern:—Held, further, that the church tribunals are the proper tribunals to decide whether the persons whose names were on the communion roll on the 19th of July, 1924, were entitled to vote on the question of Church Union. *Stover et al.* v. *Drysdale et al.*, (1925) 37 B.C.R. 28; (1925) 4 D.L.R. 994; (1926) 1 W.W.R. 98.

CLUB.

See INTOXICATING LIQUOR.

COLLISION.

I. REGULATIONS FOR PREVENTING, 158.
A. In general, 158.
B. Narrow channel, 159.
C. Speed in bad weather, 161.
D. Lights, 162.
E. Inevitable accident, 162.
II. BOTH TO BLAME, 162.
III. DAMAGES, 163.

I. REGULATIONS FOR PREVENTING.

A. In General.

1. Careless navigation.]—Where a ship by bad navigation has got into a dilemma and a collision results with another ship in nowise to blame, the onus is on the former to excuse her conduct. *Wrangell* v. *The "Steel Scientist,"* (1926) 4 D.L.R. 191; (1926) Ex. C.R. 202.

2. Weighing of evidence.]—In an action by plaintiff to recover damages suffered by reason of defendant's ship coming into collision with one of its booms of logs in Burrard Inlet, North Vancouver, while the said ship was backing out of a wharf:—Held, that in cases of collision where the evidence is conflicting and nicely balanced, the Court

should be guided by the possibilities of the respective cases which are set up, in weighing the evidence; that it is almost impossible for one on a moving vessel, unless he is in a position to see her from stem to stern and at the same time maintain a complete and commanding view of the shore, to follow the course, speed or evolutions in the manœuvres of a vessel; and that the plaintiff's witnesses being some on the boom and some on land overlooking the locus of the accident were in a better position to follow the course of the vessel than were those on board the same. *Vancouver Orient Export Co. Ltd.* v. *The "Anglo-Peruvian,"* (1931) Ex. C.R. 127.

B. Narrow Channel.

1. Winding channel.]—Two vessels will not come within the crossing rule whatever their bearings from one another while rounding a bend in a narrow channel, when there is no indication that either vessel is in fact crossing the channel and when they are keeping on opposite sides of the channel, or one is keeping in mid-channel so that the vessels, on the courses to be reasonably attributed to them, will pass clear of each other. A vessel entering a channel at such a high rate of speed as to be forced into the wrong side of the fairway is liable for a collision with an outgoing vessel which has observed the regulations. Semble, a "fairway" is practically the same as mid-channel. *The King* v. *The "Despatch." The Border Line Transportation Co.* v. *McDougal,* (1916) 22 B.C.R. 496; 28 D.L.R. 42; 34 W.L.R. 123.

2. Regaining proper position.]—When a steamer after entering a narrow passage in a fog suddenly finds herself in a dangerous position on the wrong side of the channel, she is justified in crossing directly to the proper side of the channel if this can be done in such a manner as is consistent with the greatest care for the safety of other vessels. *Union Steamship Company of British Columbia* v. *The "Wakena,"* (1917) 24 B.C.R. 156; 35 D.L.R. 644; 16 Ex. C.R. 397; 37 D.L.R. 579; (1918) 1 W.W.R. 57; 59 S.C.R. 659; 49 D.L.R. 690.

3. Neglect to keep proper look-out.]—The making of a landing along the waterfront of a busy harbour is a manœuvre which ought to be accompanied by full precautions, the first of which is an adequate look-out. A serious burden is imposed upon a vessel if she fails to "keep her course and speed" as required by article 21 of the Sea Regulations, and she lays herself open to attack by the "give-way" vessel by departing from the directions of the article and must be prepared to justify the departure by the proper execution of nautical manœuvres, such as in dropping a pilot, or approaching a landing or drawing up to an anchorage, or to lessen the consequences of collision, to save life or otherwise. *The "Cleeve"* v. *The "Prince Rupert,"* (1917) 27 B.C.R. 533; (1917) 3 W.W.R. 957; (1918) 1 W.W.R. 345.

4. Wrong side of channel.]—A signal to indicate the intended course of a ship in a harbour should be promptly and effectively carried out; and if the ship giving the signal finds herself on the wrong side of the channel by reason of delay in changing her course after the signal is given, she is responsible by reason of faulty navigation for any collision which may occur as the result thereof. *Hopkins* v. *Katsuda,* (1926) 1 W.W.R. 598.

5. Damage to bridge.]—A ship may be sued and condemned in damages in the Admiralty side of the Exchequer Court by a municipality whose bridge over a tidal and navigable river has been injured by the ship colliding with it through careless navigation amounting to negligence. *City of New Westminster* v. *The "Maagen,"* (1915) 21 B.C.R. 97; 21 D.L.R. 73.

6. Damage to bridge.]—The reasonable use by vessels of a channel depends upon the circumstances in each case. Where there is no sound ground for holding that the master of a tug with a scow in tow navigated her in a narrow channel in a way which was not proper and seamanlike in the circumstances, the tug will not be held liable for damages for injury caused by coming into contact with a bridge over the channel. *Attorney-General of British Columbia* v. *The "Pacific Foam,"* (1928) 40 B.C.R. 100; (1928) 2 D.L.R. 877; (1928) 1 W.W.R. 965.

7. Damage to bridge.]—When a vessel passing through a bridge collides with it causing damage to the bridge, the owners of the bridge can only recover such damage upon proof that the vessel was negligently navigated. *The Burrard Inlet Tunnel & Bridge Co.* v. *The S.S. "Eurana,"* (1929) 41 B.C.R. 225; (1929) 3 D.L.R. 161; (1929) 2 W.W.R. 275; (1930) 3 D.L.R. 48; (1930) Ex. C.R. 38.

8. Bridge—Obstruction to navigation—Special and general Acts.]—The owners of

a bridge over navigable waters which does not comply with statutory requirements and constitutes a public nuisance, are liable to a ship suffering "special damage" by reason of colliding therewith. Where a special Act of the Dominion Legislature has authorized the construction of a bridge carrying a railway over a navigable channel "so as not to interfere with navigation," and has incorporated the Railway Act, an order made by the Railway Board under sec. 268 of that Act, which empowers the Board to authorize the construction of a bridge over navigable waters according to plans approved by the Governor in Council, affords no defence to a claim in respect of damage caused to a ship by reason of the bridge constructed being a substantial interference with navigation and therefore a public nuisance. The protection of the public right of navigation being dealt with both in the special Act and in the general Act, the express provisions of the special Act override those of the general Act, both having regard to sec. 3 of the Railway Act. *The Burrard Inlet Tunnel & Bridge Co.* v. *The S.S. "Eurana,"* (1929) 41 B.C.R. 225; (1929) 3 D.L.R. 161; (1929) 2 W.W.R. 275; (1930) 3 D.L.R. 48; (1930) Ex. C.R. 38; (1931) 1 D.L.R. 785; (1931) 1 W.W.R. 325; (1931) A.C. 300; 100 L.J.P.C. 68; 144 L.T. 556.

C. Speed in Bad Weather.

1. Fog and snow.]—A ship is not entitled to run through fog and snow at a speed which may be safe for herself but is immoderate and dangerous for others. *Canadian Pacific Railway* v. *Steamship "Belridge,"* (1917) 27 B.C.R. 537; 68 D.L.R. 224; 20 Ex. C.R. 399; (1917) 3 W.W.R. 961.

2. Fog.]—Where a steamship is proceeding in a fog at the rate of 12 knots, the visibility being only about 300 feet, and persists in the maintenance of that speed when she is aware by signals that another steamship is approaching on the starboard bow, she will be held liable for a resulting collision in the absence of proof that the approaching ship did not navigate with the requisite caution. *Fred Olsen & Co.* (*The "Hampholm"*) v. *The "Princess Adelaide,"* (1931) S.C.R. 254; (1930) 4 D.L.R. 778; (1930) Ex. C.R. 10; (1930) 3 D.L.R. 423.

D. Lights.

Lights—Crib light.]—An ordinary cold-blast lantern with a visibility of about 2½ or 3 miles was held not to be a sufficient crib light, as such would not convey that "reasonable intimation of the true state of affairs" necessary as a matter of good seamanship and safe navigation. A crib light should be at least of the same visibility as a ship's white light. *Peers & Anderson* v. *Ship "Tyndareus,"* (1921) 31 B.C.R. 312; 21 Ex. C.R. 219; (1922) 1 W.W.R. 673.

E. Inevitable Accident.

1. Essentials for defence of.]—In order to support a defence of "inevitable accident" for injury done by one vessel to another, it must be shewn that the accident could not have been prevented by the exercise of ordinary skill and prudence in the management of the vessel doing the damage. *The "Jessie Mac"* v. *The "Sea Lion,"* (1919) 27 B.C.R. 394; 48 D.L.R. 184; 19 Ex. C.R. 78; (1920) Ex. C.R. 137; 61 D.L.R. 222; (1921) 1 W.W.R. 873.

2. Reasonable care.]—It is an "inevitable" accident where one vessel doing a lawful act without any intention of harm and using proper precautions to prevent danger, happens to run into another vessel. *Wrangell* v. *The "Steel Scientist,"* (1926) 4 D.L.R. 191; (1926) Ex. C.R. 202.

II. Both to Blame.

1. Equal liability.]—In apportioning damages resulting from a collision between two ships, where the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of damages should be half and half. *Canadian Pacific Railway* v. *The "Belridge,"* (1917) 27 B.C.R. 537; 68 D.L.R. 224; 20 Ex. C.R. 399; (1917) 3 W.W.R. 961.

2. Equal liability.]—A tug-boat and its tow came into collision with a steamship, all suffering damage. The Court found that both parties were to blame, the fault on the part of the steamship being its neglect to stop and navigate with caution when the danger became apparent, and that on the part of the tug-boat being the misleading of the steamship by failure to exhibit the

regulation lights on the tow and also allowing the tow to drift too far across the channel. It was held that it was a case where the liability should be apportioned equally under the Maritime Conventions Act, 1914, Can. Stats. 1914, cap. 13, and each delinquent should bear its own costs. Evidence is not admissible to prove custom where the alleged custom conflicts with statutes or regulations. *B. W. B. Navigation Company, Limited* v. *The "Kiltuish." Barnet Lighterage Company, Limited* v. *The "Kiltuish,"* (1922) 31 B.C.R. 319; 21 Ex. C.R. 398; 67 D.L.R. 525; (1922) 2 W.W.R. 959.

3. Equal liability.]—Where both vessels were on the wrong side of a channel and in approaching a narrow part of the channel they both headed for the same buoy and, the weather becoming misty, came into collision: —Held, that in coming down the wrong side of the channel the ships had by common violation of article 25 created a situation not contemplated or provided for by the articles; and as it is impossible to attempt even to reconcile the conflicting body of testimony given in support of the respective contentions, in the circumstances the only appropriate decree is that both vessels are equally in fault and should bear the damage occasioned in like proportion. *The Wm. Donovan Steamship Co. (Inc.)* v. *The "Hellen,"* (1924) 34 B.C.R. 461; (1925) Ex. C.R. 114; (1926) Ex. C.R. 59; (1926) S.C.R. 627; (1926) 4 D.L.R. 497; (1927) 3 W.W.R. 67; (1927) 3 D.L.R. 1089 (P.C.).

III. Damages.

1. Loss of profit.]—The loss of profit resulting from the laying-up of a tug while her master and engineer were in attendance at the Wreck Commissioners' Court of Investigation, held not to be an item which should be allowed on the assessment of damages arising out of a collision between the tug and another vessel. *The "Cleeve"* v. *The "Prince Rupert,"* (1917) 27 B.C.R. 561.

2. Engine-room space.]—In estimating the extent of liability for damage based upon a ship's tonnage the term "engine-room space" in sec. 922 of the Canada Shipping Act, R.S.C. 1906, ch. 113, as amended by 1923, ch. 35, sec. 9, covers the space occupied by the boilers appurtenant to the engines whether or not the boilers are in the same compartment with the engines. Quære, whether "engine-room space" is in general equivalent to "space occupied by the propelling power." *East Asiatic Co. Ltd.* v. *The "Chilcot,"* (1925) Ex. C.R. 172; (1925) 2 W.W.R. 543.

COMPANIES

I. Promotion, 165.
II. Name and Change of Name, 165.
III. Capital, 166.
IV. Membership, 167.
- *A. Contract of membership*, 167.
- *B. Register of members*, 168.
- *C. Liabilities of members*, 168.

V. Shares, 169.
- *A. Allotment and issue*, 169.
- *B. Transfer*, 170.
- *C. Surrender*, 170.
- *D. Situs*, 171.

VI. Regulation and Management, 172.
- *A. Directors*, 172.
  1. Fiduciary position of, 172.
  2. Powers of, 172.
  3. Liabilities of, 173.
  4. Removal of, 174.
- *B. Meetings of members*, 174.

VII. Powers and Liabilities of Company, 175.
- *A. In general*, 175.
- *B. Acts ultra vires of the company*, 176.
- *C. Agency*, 177.
- *D. Execution of instruments*, 179.
- *E. Contracts*, 179.

VIII. Actions and Proceedings, 180.
IX. Ownership and Disposition of Property, 181.
X. Borrowing and Securing Money, 182.
- *A. Rights of lenders*, 182.
- *B. Registration of mortgages and charges*, 184.
- *C. Trustee for debenture holders*, 185
- *D. Debentures as collateral security*, 185.
- *E. Shares as security*, 186.

XI. Unregistered Extra-Provincial Companies, 186.
- *A. Rights of*, 186.
- *B. Disabilities of*, 187.

XII. Companies Struck Off List, 187.
XIII. Winding-up by the Court, 188.
- *A. Jurisdiction*, 188.

B. Grounds for winding-up, 188.
C. Practice, 188.
1. Petition, 188.
2. Applications, 189.
D. Actions and proceedings, 189.
E. Appeal, 190.
F. Liquidator and inspectors, 191.
1. Powers of liquidator, 191.
2. Liabilities of liquidator, 192.
3. Remuneration of liquidator, 192
4. Actions by and against, 192.
(*a*) *Appeal*, 192.
(*b*) *Discovery*, 193.
(*c*) *Costs, liability for*, 193.
G. Contributories, 193.
H. Creditors, 197.
1. Secured creditors, 197.
2. Ordinary creditors, 199.
I. Stay of proceedings, 199.
J. Dividends, 200.
XIV. VOLUNTARY LIQUIDATION, 200.
XV. TRUST COMPANIES, 201.
XVI. BONA VACANTIA, 201.
XVII. SECURITY FRAUDS PREVENTION ACT, 202.

I. PROMOTION.

Secret Profits.]—A promoter who makes a secret profit, at the expense of the company he promotes, by purchasing for the intended company property which he sells to it at an enhanced profit, is liable in damages for the resultant loss to the company. *Vitomen Cereal, Limited* v. *Manitoba Grain Company Limited et al.*, (1928) 40 B.C.R. 321; (1928) 4 D.L.R. 440.

II. NAME AND CHANGE OF NAME.

1. Similarity.]—When the circumstances point to an intention on the part of a company to do business under a name which might easily be mistaken for the name of an existing company doing the same class of business, and thereby deceive the public, the Court will interfere at once if the circumstances are such as to make it reasonably certain that what is sought to be restrained is in furtherance of a plan to carry on such business. *Guardian Assurance Company, Limited* v. *Gunther and Matthew*, (1918) 25 B.C.R. 353; (Sub nom. *Guardian Assurance Co.* v. *Garrett*), 40 D.L.R. 455; (1918) 2 W.W.R. 405. Reversed on other grounds, 58 S.C.R. 47; 45 D.L.R. 32; (1919) 1 W.W.R. 67.

2. Identity.]—A Company cannot acquire the exclusive use of a name which is merely geographical and in no sense fanciful either as attached to its manufactured products or its business associations. Where a foreign company applies to be registered in British Columbia, if its name is identical with that of a company already incorporated in the Province its application should be refused. A foreign company may, however, in a proper case attack the name adopted by the domestic company and is not debarred by the Companies Act from obtaining redress if the use of the name under which the domestic company has been incorporated belongs to the foreign company. *Northwest Trading Co.* v. *Northwest Trading Co.*, (1920) 27 B.C.R. 546; (1920) 1 W.W.R. 353; 29 B.C.R. 17; (1920) 3 W.W.R. 729.

3. Name prohibited by statute—Validity of incorporation.]—Where a company incorporated under the Companies Act, 1921, includes in its name the word "co-operative" contrary to sec. 4 (2) of the Co-operative Associations Act, B.C. Stats. 1920, cap. 19, the company is not thereby rendered illegal, as sec. 28 of the Companies Act makes a certificate of incorporation conclusive evidence that the company was duly incorporated. *Associated Growers of British Columbia* v. *British Columbia Fruit Lands*, (1925) 34 B.C.R. 533; (1925) 1 D.L.R. 871; (1925) 1 W.W.R. 505.

III. CAPITAL.

1. Reconstruction — Assignment of assets of old company.]—Where in the reconstruction of a company, provision being made for shareholders in the old company to exchange their shares for an equal number of shares in the new company, where the capital shall comprise the unpaid capital of the old company, the new company shall be entitled to receive payment on account of capital of the old company and give a valid discharge to any shareholder thereof, and the unpaid capital of the old company is an asset of the new company to be called up for the benefit of the new company and not to be applied by the liquidator of the old company in discharge of the general liabilities thereof. *In re Dominion Trust Co., Ltd.*, (1920) 28 B.C.R. 53; (1918) 1 W.W.R. 648.

2. Reduction of.]—A special Act authorizing a reduction in capital must be read in the light of the general Companies Act in so far as the provisions for the reduction of capital are concerned, and where the pro-

visions of sec. 17 of the Act of 1910 were not complied with there could be no such reduction. *Pacific Coast Coal Mines* v. *Arbuthnot*, (1916) 23 B.C.R. 267; 31 D.L.R. 378; 33 W.L.R. 487; 9 W.W.R. 1208; (1917) A.C. 607; 86 L.J.P.C. 172; 117 L.T. 613; (1917) 3 W.W.R. 762; 36 D.L.R. 564.

IV. Membership.

A. Contract of Membership.

1. Misrepresentation — Rescission.] — Where in an action by a shareholder against a company for rescission of a contract to take shares, the company was in financial difficulties at the commencement of the action but liquidation had not taken place and no question of contribution had arisen, rescission will, in a proper case, be granted. *Fitzherbert* v. *The Dominion Bed Manufacturing Company, Limited*, (1915) 21 B.C.R. 226; 23 D.L.R. 125; 8 W.W.R. 743.

2. Representations inducing subscription for shares.]—In answer to the plaintiff Company's claim for the balance due on the purchase of shares in the Company, the defence was raised that the contract of purchase made many years before was induced by the representation of the general manager of the Company that he would not be called upon to make any further payment but that the dividends would be sufficient to wipe out the balance due on the shares:—Held, that the statement should not be deemed misrepresentation in the absence of proof that the person making it made it dishonestly or did not believe it was warranted. *Canada West Loan Co.* v. *Virtue*, (1920) 29 B.C.R. 76; (1921) 1 W.W.R. 730.

3. Subscription obtained by misrepresentation.] — A subscriber is deemed to apply for shares which the Company has power to issue. But where misrepresentations by the agent led him to believe that the ownership of the shares applied for would carry privileges not within the power of the Company to grant, and materially different from the restrictions imposed upon the shares allotted by the directors, and he signs an ambiguous printed application form supplied by the Company, he is entitled to repudiate the transaction and obtain a refund of his money. This right is not impaired by failure to take objection to the rules contained in a pass book issued to him by the Company; the minds were never ad adem: there was no contract. *Baker* v. *Guaranty Savings & Loan Assn.*, (1931) S.C.R. 199; (1931) 1 D.L.R. 968.

4. Fraud — Repayment by company—Interest—Set-off.]—Where plaintiff recovered judgment against a company in liquidation for moneys paid as a result of his application for shares, which application the Court found had been improperly complied with by giving him shares already issued and held by a third party, he was given interest on such moneys to the date of the liquidation. The company was not allowed to set-off or recover sums which had been paid to the plaintiff as dividends on the shares. *Brydges* v. *Dominion Trust Company*, (1919) 3 W.W.R. 345.

B. Register of Members.

To be kept in Province.]—A company incorporated by a private Act of the Legislature of British Columbia to which the Companies Clauses Act applies must keep its register of shareholders within the Province, the proper place being the registered office of the Company. The purchaser of shares in such a company belonging to a judgment debtor and sold by the sheriff under the provisions of the Execution Act, is entitled to compel the Company to enter him upon its register as the holder of such shares. *Oliver* v. *Granby Consolidated Mining &c. Power Co.*, (1922) 31 B.C.R. 450; (1923) 1 D.L.R. 1163; (1923) 1 W.W.R. 50.

C. Liabilities of Members.

1. Lien on dividend for debt—Shareholder trustee.] — Provision in the Companies Act that a person holding shares in a company as collateral security shall not be liable as a shareholder has no reference to a case where a transfer of shares has been made. It can only apply where the shares appear to have been pledged as collateral security, and the real owner's name appears on the books of the Company. *Wilson* v. *B.C. Refining Co.*, (1915) 21 B.C.R. 414; 22 D.L.R. 634; 31 W.L.R. 381; 8 W.W.R. 838.

2. Shareholder in foreign company residing in British Columbia—Liability.] —Through an agent for a California company in Victoria, the defendant applied for shares in the Company. He understood he was to receive treasury shares, but the shares he received were shares owned by another person. The defendant's name was entered on the Company's register of shareholders to his knowledge and he

received dividends and contributed funds to assist in rehabilitating the Company but it was not until after this action was brought that he learned that he had not received treasury shares. He then repudiated ownership. In the action the creditors of the Company sought in accordance with the law of California to fix the defendant with a liability for its debts in proportion to the amount of his shares:—Held, that in the case of an ex juris defendant sought to be made liable to creditors under the California law, the Court will first enquire whether or not such defendant must be taken by implied authority to have contracted with the plaintiffs (creditors of the corporation) to be liable individually for a portion of the debt due them. This must be decided according to the law of British Columbia, and under it the defendant never became a shareholder as no contract making him such ever came into existence, and his conduct did not estop him from denying his liability as a shareholder. Moreover, the same result would follow even if the case were decided according to the law of California. *American Seamless Tube Corporation et al.* v. *Goward*, (1930) 42 B.C.R. 551; (1930) 3 D.L.R. 870; (1930) 2 W.W.R. 31; (1931) 43 B.C.R. 407; (1931) 1 D.L.R. 878; (1931) 1 W.W.R. 509.

V. Shares.

A. Allotment and Issue.

1. Contractual relations.]—The plaintiff applied for shares in the Dominion Trust Company. It appeared from the wording of the application and other documents submitted in evidence that he bargained for original shares in the Company, but he was given shares that had previously been issued and held by a third party. In an action to recover the moneys paid and securities given for the shares and for removal from the list of contributories:—Held, that the contractual relation contemplated was never established and the plaintiff was entitled to the return of the moneys and securities given the Company as a result of his application notwithstanding the liquidation of the Company, and was entitled to be removed from the list of contributories. *Brydges* v. *Dominion Trust Company*, (1919) 27 B.C.R. 214; (1919) 2 W.W.R. 510.

2. False representation. — Where an application for shares is induced by a false representation by an agent of a company that the statutory requirements to enable the Company to commence business had been complied with, the subscriber is entitled to recover the money paid upon subscription and to refuse payment of promissory notes given in respect thereof. *Vancouver Life Insurance Co.* v. *Richards*, (1919) 27 B.C.R. 449; 48 D.L.R. 707; (1919) 3 W.W.R. 907.

B. Transfer.

1. Endorsement in blank.]—When the form of transfer on the back of a share certificate has been signed by the registered owner, but the space for the name of the transferee is left blank, delivery of the certificate so signed by the owner, or on his authority, transmits the title to the shares, both legal and equitable. Where therefore the owner of a certificate so signed delivers it to another party, he is estopped from asserting his title as against a person to whom such party has disposed of it, and who has received it in good faith and for value. *Macdonald* v. *Bank of Vancouver*, (1915) 22 B.C.R. 310; 25 D.L.R. 567; 32 W.L.R. 339; 9 W.W.R. 8.

2. Seizure under writ of fi. fa.]—Where a statute or the charter of a company provides a method of service of process upon it an execution against shares held by a judgment debtor in the Company cannot be carried out unless service required by the Execution Act is effected in the prescribed manner. *Royal Bank of Canada* v. *Canada National Fire Insurance Co.*, (1920) 28 B.C.R. 554; 55 D.L.R. 272; (1920) 3 W.W.R. 517.

3. Dominion Act—Ineffective transfer.]—A shareholder in a Dominion company, having transferred certain of his shares to another person as a bonus on certain contingencies, and the purpose of the transfer having failed, applied by petition under sec. 101 of The Companies Act, 1906, for an adjudication upon the ownership of the shares, and an order was made awarding the shares to the petitioner and directing the Company to transfer the shares accordingly. *In re British Petroleums, Ltd.*, (1925) 1 W.W.R. 236.

C. Surrender.

1. Agreement as to—Company trafficking in shares.]—The plaintiff incorporated the defendant Company for the purpose of taking over the assets and business of certain

boiler works of which he was the principal owner. Some time after the business was taken over by the Company the original agreement as to the transfer of the assets and business of the boiler works was modified by an agreement whereby the Company agreed to assume the liabilities of said business and issue to the plaintiff 55 fully paid-up shares of the Company in consideration of the transfer of the assets of said works. Later it was discovered that the liabilities of the plaintiff's business substantially equalled the value of the assets and a compromise agreement was entered into whereby he surrendered his shares to the Company and agreed to take in lieu thereof whatever the shareholders of the Company should vote him. An action brought more than 20 years after the last transaction to recover his shares under the original agreement was dismissed:—Held, on appeal, that the compromise agreement was within the power of the Company and did not bring about a real reduction of capital or constitute a purchase by the Company of its own shares or prejudice creditors. *Patterson* v. *Vulcan Iron Works*, (1930) 42 B.C.R. 300; (1930) 1 W.W.R. 640; (1930) 2 D.L.R. 961.

2. Reduction of capital.]—Where shares of a company have been issued in consideration of the transfer of property and it afterwards appears that the property cannot be operated at a profit and the company transfers the property back to the vendor in consideration of the surrender of the shares which are of no value, the transaction is not ultra vires, as the extinguishment of the shares does not bring about an illegal reduction of capital. *B.C. Red Cedar Shingle Co. Ltd.* v. *Stoltze Mfg. Co. Ltd.*, (1931) 44 B.C.R. 458; (1932) 1 D.L.R. 762; (1932) 1 W.W.R. 164.

D. Situs.

1. Execution Act.]—The situs of shares of a company incorporated in British Columbia is in the Province in so far as the provisions of the Execution Act are concerned. *Oliver* v. *Granby Consolidated Mining &c. Power Co.*, (1922) 31 B.C.R. 450; (1923) 1 D.L.R. 1163; (1923) 1 W.W.R. 50.

2. Succession Duty Act—Place of share registration.]—Under the Succession Duty Act where a company is registered and has its property, head office and place of share registration in British Columbia the situs of its shares is in the Province irrespective of the domicil of the owner. Mobilia sequuntur personam does not apply. *Executors of Estate of Isaac Untermyer, Deceased* v. *Attorney-General of British Columbia*, (1929) S.C.R. 84; (1929) 1 D.L.R. 315. Aff. (1928) 39 B.C.R. 533; (1928) 3 D.L.R. 311; (1928) 2 W.W.R. 209.

VI. Regulation and Management.

A. Directors.

1. Fiduciary Position of.

Personal interest in company's dealings.]—Where the articles of association of a company provide that the position of a director shall not be affected by his appointment as the company's solicitor, and the person so appointed in acting as solicitor carries through a sale of the Company's assets realizing a commission and profit therefrom, the liquidator of the company in the process of winding up its affairs is not entitled to recover the solicitor's remuneration and profits as the transactions in question are not among those which the liquidator is entitled by the Winding-Up Act to attack, the company itself being debarred from questioning the same. *Roberts* v. *MacDonald*, (1916) 23 B.C.R. 542.

2. Powers of.

1. Managing director.]—The managing director of a company to whom the company has given a power of attorney to do all acts and execute all deeds and instruments as in his opinion may be necessary convenient or expedient in relation to the property and business of the company, has authority to lease the company's property and business as a going concern. *Scottish Canadian Canning Co.* v. *Dickie and Sherman*, (1915) 21 B.C.R. 338; 22 D.L.R. 890; 31 W.L.R. 273.

2. Sale of assets by director—Commission.]—Directors cannot pay themselves for their services out of the company's assets unless authorized so to do by the instrument which regulates the company, or by the shareholders at a properly convened meeting. *Roray* v. *Howe Sound Mills and Logging Company, Limited*, (1915) 21 B.C.R. 406; 22 D.L.R. 855; 31 W.L.R. 409.

3. Authorized assignment — Directors of company.]—A board of directors of a company if duly and properly constituted

has power to make an assignment in bankruptcy without first having received authority to do so from the shareholders. Even if the board making the assignment has been appointed at a meeting of shareholders representing a majority of shares only and of which notice was not given to the other shareholders, the Court notwithstanding the irregularity will not interfere in the absence of fraud or of oppression of the minority shareholders. *In re Pacific Coast Coal Mines Ltd. and Hodges*, (1926) 37 B.C.R. 550; (1926) 4 D.L.R. 759; (1926) 3 W.W.R. 378; 8 C.B.R. 102.

3. Liabilities of.

1. Misfeasance.]—Directors of a company who have not attended any of the meetings of the board and are not shewn to have been cognizant of any of the acts of commission or omission complained of, will not be held answerable for what has been done or omitted by the Board. The loss must result from the negligence or ultra vires acts of the directors before they can be charged with misfeasance in the legal sense of the word. Section 9 of the Act incorporating the Dominion Trust Company does not require company funds to be kept in a separate bank account from trust funds, and there is error in law in finding the resident directors guilty of misfeasance by reason of company and trust funds being kept in the same bank account. *In re Dominion Trust Company and Machray et al.*, (1916) 23 B.C.R. 401; 26 D.L.R. 408. Varied in 32 D.L.R. 63; (1917) 1 W.W.R. 618.

2. Misfeasance—Personal liability.]—Directors who have notice of the application to purposes of a company of moneys entrusted to the company for investment, are liable for the amount to the investor and may be so held upon a misfeasance summons in the winding-up of the company. *Re Traders Trust and Kory*, (1916) 26 D.L.R. 41; 33 W.L.R. 352; 9 W.W.R. 538.

3. Secret profits.]—Even if there is no fraud, a secret profit made by a vendor-director cannot be retained by him but must be handed over to the Company. *Pacific Coast Coal Mines* v. *Arbuthnot*, (1916) 23 B.C.R. 267; 33 W.L.R. 487; 9 W.W.R. 1208.

4. Dividends exhausting assets.]—A person claiming commission for services rendered to a company may have personal judgment against the directors where they have declared a dividend which wipes out the assets of the company. *Thomas* v. *Gale*, (1925-26) 36 B.C.R. 512; (1925) 3 D.L.R. 757; (1926) 1 D.L.R. 968; (1926) 1 W.W.R. 569. Rev. on other grounds (1927), S.C.R. 314; (1927) 1 D.L.R. 593.

4. Removal of.

By directors—Regulations.]—Where the other directors of a company have excluded a director on the ground that he has been convicted of a criminal offence, in an action for wrongful exclusion, the onus is on the defendant to prove the regulation under which such exclusion is justified. *Boak* v. *Woods et al.*, (1926) 36 B.C.R. 456; (1926) 1 D.L.R. 1186.

B. Meetings of Members.

1. Quorum.]—Clauses 51 and 63 of Table A of the Companies Act, 1911, must be read together and where the quorum is three, there must be three members of a company qualified to vote to form a quorum competent to transact voting business, although three members not qualified to vote may form a valid quorum to transact non-voting business. *Doig* v. *Port Edward Townsite Co. Ltd.*, (1916) 22 B.C.R. 418. *See Doig* v. *Mathews*, (1915) *ibid* 352; 25 D.L.R. 732; 33 W.L.R. 275; 9 W.W.R. 487.

2. Notice — Sufficiency of.]—Shareholders in and directors of a company entered into an agreement between themselves, the Company being a party. The company in pursuance of the agreement, obtained a private Act whereby the agreement was "validated, ratified and confirmed, subject to the same being adopted by a resolution passed by 75 per cent. of the shareholders present, personally or by proxy, at any meeting of the shareholders called for that purpose." A resolution was passed by the required majority, but the notices convening the meeting did not state the effect of the agreement:—Held, the resolution was ineffective owing to the absence of notice of the contents of the agreement. *Pacific Coast Coal Mines* v. *Arbuthnot*, (1917) A.C. 607; 86 L.J.P.C. 172; 117 L.T. 613; 36 D.L.R. 564; (1917) 3 W.W.R. 762.

2. Personal interest of shareholder.]—A shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstances of his having a personal interest in the subject matter of the vote, unless otherwise specially provided

by the company's regulations. *MacDonald Bros. Engineering Works, Limited* v. *Godson and The Robertson Godson Company, Limited*, (1916) 23 B.C.R. 166; 31 D.L.R. 363; 33 W.L.R. 392; (1917) 1 W.W.R. 233.

VII. Powers and Liabilities of Company.

A. In General.

1. Unanimous resolution — Regularity of proceedings.]—It is unnecessary to consider the regularity of the proceedings of a company leading up to the granting of a bonus and fixing of a salary provided it is intra vires of the company and consented to by every shareholder. *MacDonald Bros. Engineering Works, Ltd.* v. *Godson and The Robertson Godson Co. Ltd.*, (1916) 23 B.C.R. 166; 31 D.L.R. 363; 33 W.L.R. 392; (1917) 1 W.W.R. 233.

2. Person dealing with company—Matters of internal management.] — Where some act such as the granting of an obligation in the course of its business is put by the constitution of a company within its power, and certain formalities of administration are prescribed by the articles of association which for domestic purposes regulate the duties of the directors to the shareholders, the mere failure to comply with a formality such as a proper appointment or the presence of a quorum of directors, will not affect a person dealing with the company from outside and without knowledge of the irregularity. He is presumed to know the constitution of the company but not what may or may not have taken place within doors that are closed to him. But the case stands quite otherwise when the act is one which was not, by the constitution of the corporation, put within its powers except on the fulfilment of a condition. In that event, the persons dealing with the corporation are bound to ascertain whether the condition has been fulfilled. *Pacific Coast Coal Mines, Ltd.* v. *Arbuthnot*, (1917) A.C. 607; 86 L.J.P.C. 172; 117 L.T. 613; (1917) 3 W.W.R. 762; 36 D.L.R. 564.

3. Auditor — Appointment of.] — The appointment of an auditor of a company should not be made by the Lieutenant-Governor in Council without notice of the application being given to the company; this especially applies where on such appointment there is to be considered the validity of the annual general meeting of the company and there is pending litigation. Where an auditor was appointed without such notice the Court refused to make a mandatory order directing the company to give him access to the company's books, accounts, etc. *Manson* v. *Prince Rupert Dry Dock and Engineering Co.*, (1920) 28 B.C.R. 58; (1920) 2 W.W.R. 10.

B. Acts Ultra Vires of the Company.

1. Power to lend money.]—Where the memorandum of association of a trading company does not expressly give the power to lend, but includes a clause "generally to do all acts and things necessary or convenient to carry out and perform all acts above enumerated and all acts incidental thereto":—Held, that the lending of money and undertaking to make future advances on a mortgage is not incidental to any of the purposes mentioned in the memorandum of association; it is ultra vires of the company and the mortgage is void. The question of what is "incidental" to the powers of a company must be determined by fair implication from the powers expressly conferred, and the omission from the memorandum of association of express power to lend is of significance in determining the question of "incidental" power. Although a chattel mortgage given to a company to secure an ultra vires loan is void, the mortgagee may nevertheless have the right to sue for the return of the money. *Columbia Bitulithic, Limited* v. *Vancouver Lumber Company, Limited, et al.*, (1915) 21 B.C.R. 138; 21 D.L.R. 91; 30 W.L.R. 753; 8 W.W.R. 132.

2. Guarantee.]—A company cannot enter into a contract not authorized by its memorandum of association. Where a company is authorized under its memorandum of association to guarantee the contracts of or otherwise assist another company the power to guarantee the repayment of moneys owing by the other company is dependent upon a prior or contemporaneous agreement between the guarantor and the company whose debt is guaranteed. *Abbotsford Lumber &c. Co.* v. *Stevenson*, (1925) 35 B.C.R. 405; (1925) 2 D.L.R. 1114; 36 B.C.R. 181; (1925) 4 D.L.R. 560; (1925) 3 W.W.R. 451.

3. Invalid resolution — Repayment to company of money paid under—Interest.] —The Courts have power to direct that moneys received from a company on a claim which is ultra vires shall be repaid with interest, but there is no fixed rule on this point. Where the directors were guilty of great delay in impeaching the claim, and

have acted under what they must have known to have been an invalid resolution, the recipients will only be ordered to repay the money actually received. *Pacific Coast Coal Mines Ltd.* v. *Arbuthnot*, (1921) 56 D.L.R. 452; (1921) 1 W.W.R. 529 (P.C.).

C. Agency.

1. Liability of company for acts of agent.]—Where the manager of a company acting in good faith under the authority which he thought was vested in him and which could have been vested in him under the articles of association, executes a contract on behalf of the company, and the other party accepts him as having authority, the company is bound by his act. *Associated Growers of B.C. Ltd.* v. *B.C. Fruit Lands Ltd.*, (1925) 34 B.C.R. 533; (1925) 1 D.L.R. 871; (1925) 1 W.W.R. 505.

2. Contract made before incorporation.]—Where a person has executed a contract with a company before incorporation and has handed it to the promoters as his agents to hold the same and hand it over to the company when incorporated, the company having adopted the contract and acted under it may sue for specific performance thereof. *Ibid.*

3. Bill of exchange — Acceptance by directors.]—The defendant Company had power under its articles of association to accept bills of exchange and its directors had power to determine who should be appointed to sign acceptances on behalf of the Company. A bill of exchange was accepted by one of its directors, who was also its accountant and traffic manager. He had previously signed acceptances on behalf of the Company, although no formal authority had been given him for that purpose:—Held, that the Company was bound as against a holder in due course where the acceptance occurred in the ordinary course of business, on the footing that he had power to accept, and where, by the acceptance, the Company obtained goods they could not otherwise have obtained. Held, further, that the Company was bound by estoppel, having by means of the acts of the director, and to the knowledge of the managing director, received the goods. *The Bank of Hamilton* v. *Mutual Fruit Company, Limited*, (1921) 29 B.C.R. 448; (1921) 1 W.W.R. 727.

4. Contract by managing director.]—The plaintiff entered into a verbal agreement with E. (the president and general manager of the defendant Company) in the summer of 1923 whereby he agreed to remove the marketable poles from the Company's limits, the Company to haul the poles to salt water on its logging-trains, and the Company was to receive 20 per cent. of the price received by the plaintiff for the poles. The agreement was reduced to writing and signed by E. and the plaintiff on the 1st of November, 1923. Some poles were cut before that date but none were removed until after the 10th of May, 1924, upon which date the Company wrote the plaintiff renouncing the contract on the ground that E. had no authority to make it. Up to this time the plaintiff had cleared roads and cut a quantity of logs near them. He did not abandon his rights under the agreement with E. but in order to cut losses entered into a new agreement with the Company whereby he should cut the poles near his constructed roads and the Company should haul the poles and he should pay $1 per pole for those removed:—Held, that E. had authority to make the contract and that the plaintiff's action in entering into a new contract as to the cutting and removal of the poles did not preclude him from an action for damages for breach of the first contract. *Garrison* v. *Thomsen & Clarke Timber Company, Limited*, (1926) 37 B.C.R. 224; (1926) 2 D.L.R. 803; (1926) 2 W.W.R. 81.

5. Holding out.]—Where a company held out its managing director as having authority to make contracts and to sign negotiable instruments in the ordinary course of its business the authority does not include the power to endorse notes and give a guarantee for the accommodation of others, the transaction not being made in the ordinary course of the company's business. *National Pole & Treating Co.* v. *Blue River Pole & Tie Co.*, (1930) 43 B.C.R. 98; (1930) 3 D.L.R. 996; (1929) 3 D.L.R. 638.

6. Managing director—Presumption of authority.]—In dealing with a company in the ordinary course of business through its general manager, it may be assumed that he has authority to act for the company if under the articles of association of the company such powers can be conferred upon him. One who makes an advance to a company which happens to be on the eve of bankruptcy and takes security therefor does not thereby come within the provisions of section 64 of the Bankruptcy Act if he is not at the time already a creditor; and even if he is already a creditor, he may, in special circumstances, make such an advance

and take a valid security therefor as well as for his pre-existing debt. Further, if a preferred creditor within the meaning of the Act, did not take his security with the intent of procuring a preference to himself over other creditors the transaction stands. *In re British Columbia Bond Corporation and Lang*, (1931) 43 B.C.R. 481; (1931) 2 D.L.R. 985; (1931) 1 W.W.R. 286; 12 C.B.R. 213.

D. Execution of Instruments.

1. Authority of officers signing.]—Signature of a deed by two directors and by one of such directors as secretary is an insufficient compliance with the regulation as to the signatures to a company's deed imposed by clause 76 of Table A of the Companies Act, 1911, requiring signatures of three distinct persons. *Re Land Registry Act and Studd*, (1916) 22 B.C.R. 507; 28 D.L.R. 354; 34 W.L.R. 466; 10 W.W.R. 634.

2. Authority of officers signing.]—The execution of a mortgage on a company's behalf by two directors, one of whom was the secretary, and by another person as assistant secretary, there being no appointment proved authorizing N. as assistant secretary or otherwise to sign the mortgage or authenticate the affixing of the seal is bad as not complying with clause 76 of Table A of the Companies Act, 1911, and where one of the mortgagees was a solicitor who had prepared the document, instructed its mode of execution and had been appointed solicitor for the company prior to its execution, knowledge of the defective execution was brought home to the mortgagees, and they were not protected by the principle contained in *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327. *Innes* v. *Cameron Valley Land Co. Ltd.*, (1919) 1 W.W.R. 751.

E. Contracts.

Fraudulent concealment and misrepresentation.]—The plaintiff entered into negotiations for the sale of certain timber to the defendant company at a fixed price. The defendant company not being in a position to purchase at this price sought the aid of a third party, the transaction depending upon inducing him to pay to the plaintiffs $65,000 more than the plaintiffs were actually to receive as the selling price under the belief that he was paying no more than their price. A secret arrangement was made with the plaintiffs whereby the difference of $65,000 would be paid to the defendant company as its commission for securing the sale. Agreements were accordingly executed between the plaintiffs and the defendant company whereby they were to co-operate in this deception. The third party paid a portion of the purchase price by the transfer of shares of the company which the defendant verbally agreed to purchase from the plaintiffs. In an action to recover from the defendant company the portion of the purchase price represented by the shares:—Held, that the plaintiffs had by co-operation in the machinations of the defendant disqualified themselves from maintaining the action, the whole transaction being so tainted with fraud that it would not be enforced by the Court. *McKinnon* v. *Campbell River Lumber Company*, (1922) 64 S.C.R. 396; (1922) 3 W.W.R. 1069; (1923) 1 D.L.R. 29.

VIII. Actions and Proceedings.

1. Action by shareholder — Internal management.]—The Court will not interfere with the internal management of a company acting within its powers, and an action to redress a wrong done to a company must be brought by the company itself and not by an individual shareholder unless the acts complained of are of a fraudulent nature or ultra vires of the company. *Brown* v. *Menzies Bay Timber Co. Ltd.*, (1917) 24 B.C.R. 27; 34 D.L.R. 452; (1917) 2 W.W.R. 658.

2. Suit by shareholder on behalf of himself and other shareholders.]—A shareholder suing on behalf of himself and all other shareholders can maintain an action alleging illegal use of the company's moneys, when it clearly appears that an application to the company to authorize such an action would be futile. When the plaintiff complains of the directors voting a salary and travelling expenses to the managing director he must shew that their action was either ultra vires or of a fraudulent character. *Houston* v. *Victoria Machinery Depot*, (1924) 33 B.C.R. 425; (1924) 2 D.L.R. 657.

3. Action commenced in name of company without authority.]—In an action of the plaintiff and two shareholders who sued on behalf of themselves and all other shareholders to set aside a certain debenture

issue, the Judicial Committee of the Privy Council declared that the debenture issue was null and void and the defendant recovered judgment against the plaintiff for $139,953.88. The company became insolvent. The defendant moved for an order compelling H. a director and shareholder in the plaintiff company to pay the remainder of the judgment debt and costs ordered to be paid by the plaintiffs on the final disposition of the action, on the ground that he was the initiator and instigator of the proceedings and in fact the real plaintiff and acted without authority in retaining solicitors to issue the writ and prosecute the action. His responsibility as to the judgment debt was not pressed except as to the costs:—Held, that in cases such as this the question to be decided is whether the solicitor who issued the writ had authority to do so, and if the applicant has any remedy it lies against the solicitor who issued the writ and not against the respondent. *Pacific Coast Coal Mines* v. *Arbuthnot*, (1926) 36 B.C.R. 321; (1926) 1 D.L.R. 670; (1926) 1 W.W.R. 478.

4. Internal management — Irregularity capable of rectification.]—The Court will not interfere in the internal management of a company if irregularities were committed in the conduct of a meeting at which resolutions complained of were passed or could be regularized by the passing of fresh and regular resolutions. *Watson* v. *Barrett*, (1929) 41 B.C.R. 478.

5. Security for costs.]—Sec. 264 of the Companies Act, 1921, applies to a company which is plaintiff by counterclaim as well as to a company which is plaintiff in an action where the counterclaim is based upon a cause of action which is separate and distinct from the plaintiff's claim. *Mackenzie* v. *Prince John Mining Co.*, (1924) 34 B.C.R. 193; (1924) 4 D.L.R. 221; (1924) 3 W.W.R. 168.

IX. Ownership and Disposition of Property.

1. Land vested in ultra vires transaction—Validity of sale.]—A company which acquires an indefeasible title to land in pursuance of an ultra vires transaction is entitled to enter into an agreement of sale of the land and to enforce such agreement, particularly against a purchaser who entered into the agreement with full knowledge of the company's title. *Hudson Bay Insurance Company* v. *Creelman*, (1919) 88 L.J.P.C. 197; 48 D.L.R. 234; (1919) 3 W.W.R. 9; (1920) A.C. 194; Affg. (1918) 25 B.C.R. 307; 40 D.L.R. 274; (1918) 2 W.W.R. 448.

2. Amalgamation of companies—Repudiation after transfer of assets.]—Where a company entering with other companies into a scheme of amalgamation, conveys its property to a new company for the purpose of carrying out such amalgamation and accepts shares in the new company in consideration of such transfer, the Court will not set aside the transaction at the suit of the grantor, on the ground that the sale was ultra vires for the reason that the shareholders of the grantor had not passed a resolution pursuant to section 15 of the Companies Act. The question of capacity is wholly a matter for the grantor which could at any time clothe itself with the necessary capacity by complying with the provisions of the section. *Pacific Berry Growers, Limited* v. *Western Packing Corporation, Limited*, (1929) 41 B.C.R. 78; (1929) 1 D.L.R. 814; (1929) 1 W.W.R. 426.

X. Borrowing and Securing Money.

A. Rights of Lenders.

1. Power to borrow — Ultra vires—Subrogation.]—An insurance company is a commercial corporation, and therefore has implied power to borrow, and to pledge and mortgage its securities to secure the sum borrowed, though for the purpose of meeting the statutory security to the Government authorities to enable it to carry on the business; even if ultra vires, if moneys were used for the payment of a just debt, the lender is entitled to be subrogated to the rights of those whose debts were paid therewith. *Royal Bank* v. *British Columbia Accident etc. Co. Ltd.*, (1917) 24 B.C.R. 197; 35 D.L.R. 650; (1917) 2 W.W.R. 898.

2. Action by debenture holder.]—A clause in a trust deed by way of mortgage to secure bonds or debentures of a company and providing that no bondholder shall have the right to institute proceedings in equity of any kind under the terms of the trust deed including "any suit action or proceeding in equity" for the collection of any of the money evidenced by such bonds, without first giving notice to the trustee named in the trust deed of default having been made, will not debar a right of action at law by a bondholder against the company to

recover the principal and interest due and payable under the terms of the bond, such an action not being a proceeding in equity or against the security. *Stoddard* v. *Shields Lumber Co.*, (1920) 28 B.C.R. 277; 53 D.L.R. 322; (1920) 2 W.W.R. 887.

3. Presumption of regularity of exercise of borrowing powers.]—If a bank in lending money to a company, receives letters from the company's solicitors indicating that all the requirements as to borrowing have been complied with, and also receives copies of the by-laws and resolutions, properly certified, authorizing the borrowing, the genuineness whereof it has no reason to doubt, the bank is justified in concluding that the borrowing powers have been properly exercised, and that as against the company all matters of internal management have been duly complied with. Section 98 (1) of the Winding-Up Act is inapplicable to set aside securities given by a company, in the absence of evidence to shew that they were given "in contemplation of insolvency under the Act." Securities are not deemed to have been so given merely because the company's manager knew of the insolvent condition of the company, if the person receiving them had no such knowledge. *Dominion Trust Co.* v. *Royal Bank of Canada*, (1920) 29 B.C.R. 169; 59 D.L.R. 224; (1921) 1 W.W.R. 90; 1 C.B.R. 397.

4. Place of payment.]—In construing the liability of a municipal corporation which guaranteed the payment of debentures issued by the authorities of an hospital, consideration must be given to the intention of the parties at the time the debentures were issued and guaranteed; and where it is evident that the intention was to guarantee payment of principal at a bank in the place where the bonds were issued, the holder cannot by presenting the bonds for payment of principal at a branch of such bank in the United States compel payment in United States currency or its equivalent in Canadian currency, notwithstanding that interest may be payable in the United States at the option of the holder, the debenture not distinctly stating that payment of the principal would be made there upon presentation of the debenture. *Wood Gundy & Co.* v. *City of Vancouver*, (1922) 31 B.C.R. 165; 67 D.L.R. 225; (1922) 2 W.W.R. 470.

5. Presumption of regularity of issue of security.]—An innocent purchaser of debentures which appeared to have been regularly issued by a duly incorporated company having power to create the debentures cannot be held to have a constructive notice of the internal management of the company and is not bound to enquire into the regularity of directors' proceedings. *Jefferson* v. *Pacific Coast Company Mines, Ltd.*, (1916) 31 D.L.R. 557.

6. Borrowing bye-law—Internal management.]—Where a trading company is incorporated by statute, the passing of a borrowing bye-law is a matter of internal management unless the wording of the statute is such as to make it a condition. *Thomas* v. *Gale*, (1925-26) 36 B.C.R. 512; (1925) 3 D.L.R. 757; (1926) 1 D.L.R. 968; (1926) 1 W.W.R. 569. Rev. on other grounds, (1927) S.C.R. 314; (1927) 1 D.L.R. 593.

7. Internal management—Statute validating debentures.]—The conditions of a statute validating an ultra vires agreement to secure debentures subject to the confirmation of the company's acts by a specified majority of the shareholders must be actually and literally complied with to render the agreement intra vires, and the fulfilment cannot be inferred from acquiescence; a notice of meeting which does not sufficiently apprise the shareholders of the purpose of the meeting, so that each could judge for himself whether he would consent to the proposals made at the meeting, is insufficient and the resolutions of the meeting are null and void. *Pacific Coast Coal Mines, Ltd.* v. *Arbuthnot*, (1917) A.C. 607; 86 L.J.P.C. 172; 117 L.T. 613; 36 D.L.R. 564; (1917) 3 W.W.R. 762.

B. Registration of Mortgages and Charges.

1. Assignment of debt.]—An assignment by a company of money due under contract as security for indebtedness whether legal or equitable and although it may be absolute in form is within sec. 102 of the Companies Act, 1910, which requires every mortgage or charge by a company to be registered in order to be valid against a liquidator. *T. R. Nickson Co. Ltd.* v. *The Dominion Creosoting Co. Ltd.*, (1916) 23 B.C.R. 72; 35 D.L.R. 272; (1917) 55 S.C.R. 303; 38 D.L.R. 69; (1917) 2 W.W.R. 330.

2. Failure to register before liquidation —Relief.]—The mortgagee of property of a company who has failed to register his mortgage under sec. 102 of the Companies Act, 1910, may apply for relief under the enabling provisions of sec. 4 of the Companies Act Amendment Act, 1916, and

obtain an order permitting the registration of the mortgage, notwithstanding that an order winding up the company has been made in the meantime, but the registration in such case must be subject to priority of the liquidator's expenses. *In re Peoples' Trust Co. Ltd. and the Century Insurance Co.*, (1917) 25 B.C.R. 138; (1918) 1 W.W.R. 342.

3. Extension of time for registration.]—A company issued investment certificates entitling holders to a mortgage given by another company as mortgagor. The holders of the investment certificates applied for relief under sec. 103 of the Companies Act, as amended in 1916, allowing registration of the mortgage in the office of the Registrar of Companies, both companies being in liquidation at the time of the application:—Held, that leave to register the mortgage should be given without any prior lien or claim of the liquidator of the mortgagor company. *In re Dominion Trust Co. (In Liquidation) and Alvo von Alvensleben (In Liquidation)*, (1919) 3 W.W.R. 209.

4. Registration — Persons affected.]—Only purchasers, mortgagees or creditors in relation to the mortgagor are entitled to the benefit of sec. 102 of the Companies Act, 1910, requiring mortgages or charges created by a company to be filed with the Registrar of Joint Stock Companies. *Dalton* v. *Dominion Trust Co.*, (1918) 25 B.C.R. 240; (1918) 3 W.W.R. 42.

C. Trustee for Debenture Holders.

Remuneration.]—The appointment of a receiver for a company does not discharge the trustee for the debenture holders. The continuance of a trustee's remuneration after the appointment of a receiver is a question of contract to be arrived at from the provisions of the trust deed relative to the trustee's remuneration. *Simpson Balkwill & Company Limited et al.* v. *Canadian Credit Men's Trust Association Limited et al.*, (1921) 30 B.C.R. 347; 70 D.L.R. 731; (1921) 3 W.W.R. 831.

D. Debentures as Collateral Security.

1. Pledge to secure existing indebtedness.]—Directors having power by resolution to borrow a sum of money and to issue new bonds having priority over a former issue and to pledge or sell the same, have no power to use the bonds as collateral security for an existing indebtedness. *In re British Columbia Portland Cement Company, Limited*, (1915) 21 B.C.R. 534; 31 W.L.R. 938; 8 W.W.R. 1119; 22 D.L.R. 609; (1916) 22 B.C.R. 443; 27 D.L.R. 726; 10 W.W.R. 50.

2. Right of pledgee to enforce security.]—A pledgee of debentures may apply to the trustee of debenture holders to enforce the trust mortgage. *Anderson* v. *McNair Lumber and Shingles Ltd.*, (1929) 40 B.C.R. 466; (1929) 2 D.L.R. 209; (1929), 1 W.W.R. 480.

E. Shares as Security.

Agreement to repurchase.] — Where a company borrows money giving shares as security for the loan with an agreement to repurchase the shares at a stated time the lender is entitled to recover the amount of the loan upon default in payment. *Clarke* v. *Langs & Roddis Ltd.*, (1926) 37 B.C.R. 77.

XI. Unregistered Extra-Provincial Companies.

A. Rights of.

1. Enforcement of equitable remedy.]—A company cannot acquire the exclusive use of a name which is merely geographical and in no sense fanciful either as attached to its manufactured products or its business associations. Where a foreign company applies to be registered in British Columbia, if its name is identical with that of a company already incorporated in the Province, its application should be refused. A foreign company may, however, in a proper case attack the name adopted by the domestic company, and is not debarred by the Companies Act from obtaining redress if the use of the name under which the domestic company has been incorporated belongs to the foreign company. A foreign company duly registered can enforce its contracts although such contracts were made in the Province before the company's registration. The company's conduct in doing business before registration cannot be raised as a bar to an equitable remedy sought by the company. *Northwest Trading Co.* v. *Northwest Trading Co.*, (1920) 27 B.C.R. 546; (1920) 1 W.W.R. 353; 29 B.C.R. 17; (1920) 3 W.W.R. 729.

2. Right to sue.]—A company does not require registration under the Companies Act in order to have access to the Courts of the Province in the capacity of a suitor the action not being one for a breach of contract to be performed within the Province. *John Robertson & Son Ltd.* v. *Canadian Bank of Commerce,* (1920) 2 W.W.R. 1003.

B. Disabilities of.

1. Name.]—An application by a foreign company to be registered in the Province should be refused if its name is identical with that of a company already incorporated in the Province. *Northwest Trading Co.* v. *Northwest Trading Co.,* (1920) 27 B.C.R. 546; (1920) 1 W.W.R. 353; 29 B.C.R. 17; (1920) 3 W.W.R. 729.

2. Action by unregistered company—Dismissal—Reinstatement upon registration.]—Sec. 168 of the Companies Act as re-enacted by the amendment of 1917 allows a company if it is licensed to "maintain anew" an action which has been decided against it on the ground that any transaction of the company was invalid because it was an extra-provincial company and the company was not licensed. The company is not obliged to bring an action de novo but is entitled to have the action reinstated at the stage at which it stood when the Court decided that the action could not be maintained by reason of non-compliance with the statute. *Komnick System Sandstone Brick Co.* v. *B.C. Pressed Brick Co.,* (1918) 56 S.C.R. 539; 41 D.L.R. 423; (1918) 2 W.W.R. 564.

XII. Companies Struck Off List.

Liability of shareholders.]—An action against individual defendants alleged to have been carrying on business together and admitted to be shareholders of a limited company, for goods sold and delivered to the company after it has been struck off the register of companies and dissolved pursuant to the provisions of sec. 268 of the Companies Act, R.S.B.C. 1911, cap. 39, and before its restoration to the register pursuant to the Act, the goods being supplied not to the defendants personally but to the company, all the parties apparently being in ignorance of the proceedings striking the name off the register, will be dismissed where the whole proceedings are simply an attempt to get at the assets of an individual shareholder to pay for a debt of the company against which bankruptcy proceedings have been commenced. *Shaw* v. *Hyde et al.,* (1921) 61 D.L.R. 666.

XIII. Winding-Up by the Court.

A. Jurisdiction.

1. Effect of Bankruptcy Act.]—Under sec. 2(*o*) of the Bankruptcy Act, as re-enacted by Can. Stats. 1920, cap. 34, sec. 2, leave of the Bankruptcy Court is not necessary to the continuance of winding-up proceedings commenced before said Act came into force. *In re Winding-up Act and Gibson Mining Co. Ltd.,* (1923) 32 B.C.R. 360; (1923) 3 D.L.R. 1052; (1923) 3 W.W.R. 171.

2. Extra-territorial jurisdiction.]—To enforce an order of the Court of another Province made under the Winding-up Act the registrar should on production thereof enter same without direction, as an order of the Supreme Court of British Columbia, and proceed thereon as upon an ordinary record of that Court. *In re Home Bank of Canada and Winding-up Act,* (1924) 34 B.C.R. 321; (1925) 1 D.L.R. 734.

B. Grounds for Winding Up.

Just and equitable.]—Under sec. 101 of the Winding-up Act, an appeal lies from the refusal of a winding-up order, as it involves future rights. On an application for the winding-up of a company that had previously made an assignment for the benefit of its creditors, where it appears that the petitioner was a secured creditor, that he had no substantial interest in the winding-up, and was the only creditor who desired the order, the order ought not to be made. *Marston* v. *The Minnekahda Land Company, Limited,* (1918) 25 B.C.R. 372; 40 D.L.R. 76; (1918) 2 W.W.R. 471.

C. Practice.

1. Petition.

1. Contributory.]—A member of a company whose shares are not fully paid up has the right to petition for the winding-up of the company as a contributory, on the ground that it is just and equitable to make the order, there being evidence of the company having both assets and liabilities, and the objects for which the company was incorporated having ceased to exist. *In re*

Dominion Trust Co., Boyce and Macpherson, (1918) 26 B.C.R. 302; 43 D.L.R. 538; (1919) 2 W.W.R. 452; (1919) 59 S.C.R. 691.

2. Oral evidence.]—On a petition to wind up a company under the Winding-Up Act, if the affidavit supporting the petition is not sufficient to prove the allegations therein contained, leave may be granted the petitioner to adduce oral evidence on the hearing to prove said allegations. *In re Winding-up Act and Johnston Brothers, Ltd.,* (1919) 26 B.C.R. 551.

3. Petitioner—Substantial interest.]—Where it is not made to appear that a petitioner for a winding-up order has a substantial interest in the winding-up, and where he is the only creditor desiring an order to wind up, the order ought not to be made. *Marston* v. *Minnekahda Land Co.* (1918) 25 B.C.R. 372; 40 D.L.R. 76; (1918) 2 W.W.R. 471.

2. Applications.

1. Form of order.]—Although applications under the Dominion Winding-up Act are made by summons or motion in Chambers the order must take the form of a Court order. *In re Dominion Winding-up Act and Bank of Vancouver,* (1920) 28 B.C.R. 85; (1920) 1 W.W.R. 816.

2. Agreement between company and outsider — Determination of validity — Chambers.]—The Court has no jurisdiction to determine upon a summary application in Chambers the validity of an agreement between a company in liquidation and an outside party who is not connected with the company. *Maritime Trust Co.* v. *Burns,* (1915) 22 B.C.R. 177; 32 W.L.R. 442; 9 W.W.R. 167.

3. Order made in another Province—Enforcement.]—To enforce an order of the Court of another Province made under the Winding-up Act the registrar should, on production thereof, enter same without direction as an order of the Supreme Court of British Columbia and proceed upon same as an ordinary record of that Court. *In re Home Bank of Canada and Winding-up Act,* (1924) 34 B.C.R. 321; (1925) 1 D.L.R. 734.

D. Actions and Proceedings.

Counterclaim.]—If the subject-matter of a counterclaim is not outside and independent of the subject-matter of the claim it is in the nature of a defence, in which state it is not a proceeding as to which leave to commence or proceed against a company in liquidation is necessary. *Dominion Trust Co.* v. *Brydges,* (1920) 28 B.C.R. 451; (1920) 2 W.W.R. 952.

E. Appeal.

1. Jurisdiction — New evidence.]—The question of the jurisdiction of the Court to grant leave to appeal under sec. 101 of the Winding-up Act from an order or decision of the Court in a winding-up proceeding may be raised on the appeal from such order or decision. New evidence may be introduced at the hearing of an appeal from an order or decision in a proceeding under the Winding-up Act, but such evidence will not be allowed in unless it is clearly shewn that due diligence was exercised in endeavouring to obtain it for submission at the trial. *In re Dominion Trust Co. and Allan,* (1917), 24 B.C.R. 450; 37 D.L.R. 251; (1917) 3 W.W.R. 483.

2. Pecuniary amount and future rights.]—An order refusing to set aside the service of a summons under an order for service ex juris in a misfeasance action brought against former directors of a company in liquidation under the Winding-up Act does not involve any controversy as to a pecuniary amount, nor does it involve "future rights" within the meaning of section 101 of said Act. There is, therefore, no appeal. *Brown et al.* v. *Cadwell et al.,* (1918) 25 B.C.R. 405; (1918) 2 W.W.R. 229.

3. Appeal.]—There is a right of appeal under sec. 101 (c) of the Winding-up Act from an order in winding-up proceedings setting aside a previous order confirming the disallowance of the respondent's claim (in excess of $500) to be a creditor of the estate. The time for appeal from such an order which by sec. 104 of the Act must be taken within fourteen days "or within such time as the Court or judge appealed from allows" may be extended by the Court although the fourteen days have already expired. Under sec. 2 (o) of the Bankruptcy Act leave of the Bankruptcy Court is not necessary to the continuance of winding-up proceedings commenced before the said Act came into force. *In re Gibson Mining Co. Ltd.,* (1923) 32 B.C.R. 360; (1923) 3 D.L.R. 1052; (1923) 3 W.W.R. 171.

4. Extension of time to appeal.]—Upon an application under the Winding-up Act, R.S.C. 1906, cap. 144, for an extension of the time within which to appeal, such time having expired, it is necessary to show that the intention to appeal was formed within the time limited, or that there was difficulty in communicating with clients and obtaining instructions. *In re Winding-up Act. B.C. Securities* v. *Mutual Life Assurance Co.*, (1918) 1 W.W.R. 733.

5. Review of taxation.]—A judge of a Supreme Court has no power to review a taxation made in the winding-up of a company. Where the registrar is, in the opinion of counsel, proceeding on the wrong principle, the proper course to pursue is to apply for an adjournment and request the registrar to refer the matter to a judge for directions. *Re Federal Corporation Ltd. and Stewart*, (1917) 2 W.W.R. 52.

F. Liquidator and Inspectors.

1. Powers of Liquidator.

1. Sanction of the Court.]—Authority to carry on a company's business under the Winding-up Act does not empower the liquidator to part with the company's right of retainer as executor. Upon the making of a winding-up order all the company's affairs are under the control of the Court, and acts such as parting with the company's right of retainer as executor must have the express sanction of the Court. *Williams* v. *Dominion Trust Co.*, (1916) 23 B.C.R. 461; 31 D.L.R. 786; (1917) 1 W.W.R. 664.

2. Appointment of solicitor.]—Where a solicitor selected by a liquidator in the work of winding up a company has been acting up to the time of his selection for claimants in the winding-up, his selection may be approved if he first relinquishes acting for such claimants. In assigning reasons for a change of solicitors, it is sufficient for a liquidator to state that the change is in the best interests of the winding-up. *In re Winding-up Act and Bank of Vancouver*, (1919) 27 B.C.R. 457; (1919) 3 W.W.R. 986.

3. Attacking the right of creditors to retain securities.]—In an action by the liquidator of a company being wound up under the Winding-up Act, attacking the right of a bank to retain securities given by the company on the ground that the conditions imposed on the company before it became entitled to do business were not complied with, namely, that the minimum stock subscription had not been obtained nor had the minimum amount been paid thereon:—Held, that the liquidator had a status to attack the right of the bank to retain the securities, but the onus was on him to shew that the conditions imposed had not been complied with. Information derived from the books, papers and documents of the company produced for examination is not sufficient evidence of such non-compliance. Section 175 of the Dominion Companies Act does not give the right to use the books of a company as evidence against strangers. *Dominion Trust Co.* v. *Royal Bank of Canada*, (1920) 29 B.C.R. 169; 59 D.L.R. 224; (1921) 1 W.W.R. 90; 1 C.B.R. 397.

2. Liabilities of Liquidator.

Custody of documents.]—Where a specific document is traced into the hands of a company which has since been ordered to be wound up, the liquidator will be ordered to produce that document, or properly account for his inability to produce it. *In re Dominion Trust Co., Ltd.; Ex parte Ross*, (1921) 29 B.C.R. 319; (1921) 1 W.W.R. 1089.

3. Remuneration of Liquidator.

Resolution of creditors.] — An application to reduce the monthly remuneration of a liquidator, on the ground that the liquidation is at a stage where his entire services are no longer required, will be refused upon opposition by creditors whose claims form a substantial portion of the aggregate. *In re Dominion Trust Co.*, (1918) 25 B.C.R. 537.

4. Actions By and Against.

(a) Appeal.

1. Future rights.]—The words "future rights" in subsec. (a) of sec. 101 of the Winding-up Act apply only to rights that arise in the future and do not include present existing rights that may be the subject of determination in the action at a later date. In the circumstances the judge has no power to grant leave to appeal under the section. *Hill* v. *The Canadian Home Investment Company, Limited*, (1915) 22 B.C.R. 301.

2. Debenture-holders.]—In a winding-up proceeding where counsel have been appointed under sec. 131A of the Winding-up Act to represent two conflicting classes of bondholders, and judgment has been given in the Court below, any bondholder who is dissatisfied with the judgment has the right of appeal. *In re British Columbia Portland Cement Company, Limited,* (1915) 22 B.C.R. 443.

(*b*) *Discovery.*

Discovery by liquidator.]—In an action by the liquidator of a company, he being an officer of the Court and subject to its directions, an order will not be made compelling him to make an affidavit of documents when he is willing to make disclosure. *Dominion Trust Co.* v. *Royal Bank of Canada,* (1919) 27 B.C.R. 166.

(*c*) *Costs, Liability for.*

Solicitor engaged by liquidator.]—The solicitor appointed by the liquidator of a company under authorization by the Court, pursuant to sec. 38 of the Winding-up Act, has no claim against the official liquidator personally for his costs, but must look to the assets of the company in liquidation, and as against a garnishing creditor of the solicitor, the liquidator may set off against the costs owing to the solicitor a debt owing by the solicitor to the company. *MacInnes* v. *Daly*: *Gwynn, Garnishee,* (1921) 30 B.C.R. 20; 60 D.L.R. 365; (1921) 2 W.W.R. 869; 2 C.B.R. 23.

G. Contributories.

1. Shares—Invalidly issued.]—A company was incorporated with a capital stock of common shares; subsequently it was reorganized, the capital being divided into preference and common shares. Later, without any authority from the shareholders, the directors, by resolution, increased the capital stock of the company by the creation of new shares. The shareholders afterwards passed a resolution in the same terms as that passed by the directors. Under the articles of association of the company, the directors could only pass such a resolution as above with the sanction of a special resolution of the company in general meeting first had and obtained. New preference shares were issued under these resolutions and later the company went into liquidation:—Held, that the holders of shares issued as preference shares were not liable as contributories, since the directors had no power to pass a resolution to create new shares without having first obtained the sanction of the shareholders. *Re Bankers Trust and Barnsley,* (1915) 21 B.C.R. 130; 21 D.L.R. 623; 30 W.L.R. 738; 8 W.W.R. 38.

2. Call.]—Upon a company in liquidation obtaining an order under the Winding-up Act for the payment of a call of a certain sum of money by the defendant, the company may sue for judgment on the call if a final order for judgment has not been obtained under the Act, but where a more expensive mode of procedure is adopted in obtaining judgment, the Court will order the party taking such course to pay the difference in cost as compared with the less expensive and equally effective method. *Maritime Trust Company* v. *Alcock,* (1916) 22 B.C.R. 399.

3. Irregular allotment.] — Where the directors of a company pass a resolution creating new shares without having first obtained the sanction of the shareholders as required by the articles of association, and no resolution was passed creating any of them preference shares, a holder of such shares, which were applied for and issued as preference shares, is not liable as a contributory, upon the company going into liquidation:—Held, further, that the fact of the holder being made a director and taking part in directors' meetings after his shares were allotted to him by the company, did not estop him from setting up that he did not acquire shares for which he had applied and there was no contract between himself and the company. *In re Bankers Trust Corporation, Limited, and Okell,* (1916) 22 B.C.R. 436; 27 D.L.R. 63; 34 W.L.R. 1; 10 W.W.R. 150.

4. Reconstruction.] — Upon the organization of a new company, as where a Provincial company is incorporated into a Dominion company, the shareholders of the old company do not become shareholders of the new company and liable as contributories, even when receiving dividends and participating in the business of the latter, unless shares in the new company are in fact allotted to them. *Re Dominion Trust Co. and Allan,* (1917) 24 B.C.R. 450; 37 D.L.R. 251; (1917) 3 W.W.R. 483.

5. Delay in repudiation of allotment.]—An allottee of shares who has received notice thereof and delays to exercise his right of

repudiation until after the winding-up of the company, may be held liable as a contributory. *In re Barrett and Bank of Vancouver*, (1917) 24 B.C.R. 241; 36 D.L.R. 158; (1917) 3 W.W.R. 53.

6. Petitioner.]—The petitioner for the winding-up of the Dominion Trust Company, Limited (old company), was a shareholder therein prior to the carrying out of the agreement between that company and the Dominion Trust Company (new company), whereby the new company took over the assets and assumed the liabilities of the old company, the shareholders in the old company receiving an equal number of shares in the new company. Upon the new company going into liquidation the deputy district registrar, to whom was referred the settlement of the list of contributories, placed all the shareholders in the old company on the list, his certificate being dated the 6th of March, 1916. Some of these appealed and succeeded in having their names struck from the list, but those not appealing, of whom the petitioner was one, remained on the list. On this application, objection was taken that the petitioner had no status as he is on the list of contributories of the new company and a shareholder in that company only:—Held, that he is not on the list of contributories of the new company because he is legally a shareholder of that company, but because by estoppel by record he will not be heard to say he is not a contributory. Such estoppel could only arise at the earliest on the date of the registrar's direction (March 6th, 1916), so that even if such estoppel operated to make him cease to be a shareholder in the old company, he would by virtue of sec. 182 of the Companies Act still have the status to present this petition, for he is thereby still liable as a past member to be put on the list of contributories. A registrar's direction that a certain person be placed on a list of contributories is not a judgment *in rem*. The moneys owing on their shares by shareholders of the Dominion Trust Company, Limited, who have not exchanged such shares for shares in the Dominion Trust Company, are assets of the old company, although the beneficial ownership of these moneys is in the new company. *In re Dominion Trust Company, Limited*, (1918) 25 B.C.R. 214; (1918) 1 W.W.R. 648.

7. Shares applied for not allotted.]—Unless an allotment of shares has been made there is no contract between the applicant and the company, and the name of such applicant should be stricken from the list of contributories. *Western Union Fire Insurance Co.* v. *Alexander*, (1918) 25 B.C.R. 393; 39 D.L.R. 632; (1918) 2 W.W.R. 546.

8. Allotment to one of joint applicants for shares.]—A and B applied for shares in a company in the following terms: "I hereby subscribe for and request you to allot me five shares of stock," etc., both signing the one application. The minute-book of the company shewed that the directors allotted five shares to B only, although five shares were entered in the share ledger to A and B jointly, and a share certificate for five shares was issued to them jointly but never delivered, being held by the company pending payment for the shares in full. Subsequently the company went into liquidation, and A and B were both placed upon the list of contributories by the registrar, whose report was affirmed by the Court:—Held, that as there was no allotment of shares to A, there was not a concluded contract as between A and the company, and A's name must be removed from the list of contributories. *In re Federal Mortgage Corporation Ltd. and Kipp*, (1917) 24 B.C.R. 12.

9. Forfeited shares.]—Where, under the Dominion Winding-up Act, the power of forfeiture is properly and legally exercised, the person whose shares are so forfeited ceases to be a member or shareholder of the company and is not liable to be put on the list of contributories. *In re Acadia Limited*, (1918) 26 B.C.R. 153; (1918) 3 W.W.R. 477. *Schetky* v. *Bradshaw*, (1919) 26 B.C.R. 545; (1919) 2 W.W.R. 885.

10. Limitation of action running from date of call.]—The liability of a contributory to pay for shares under the Winding-up Act commences on the date when a call is made, and until that time the Statute of Limitations does not begin to run against the company. *In re Johnston Brothers Ltd.*, (1920) 29 B.C.R. 183.

11. Partly paid shares.]—A director of a company owning partly paid up shares therein transferred some of such shares to another director, the sums paid up on all shares being attributed to the retained shares by informal agreement between these two directors and another. A new certificate was issued with respect to the retained shares, bearing an indorsement as to agreed amount paid up thereon:—Held, that the liquidator of the company was right in placing the original owner of the shares upon the list of contributories and treating the retained shares as if only the original

payments had been made thereon. *Re Federal Mortgage Corporation, Ltd. and Stewart*, (1917) 2 W.W.R. 282.

H. Creditors.

1. Secured Creditors.

1. Trust funds for investment.]—The right of a trust company to retain as its remuneration part of the profits realized from investments, creates a trust coupled with an interest, which upon the winding-up of the corporation passes to the liquidator as an asset for the general benefit of creditors, and the Court will not compel the liquidator, before the final winding up, to surrender such securities to the cestui que trust, nor appoint a special trustee to carry the trust into effect. *In re Dominion Trust Co. and Harper*, (1915) 22 B.C.R. 337; 24 D.L.R. 670; 32 W.L.R. 832; 9 W.W.R. 503.

2. Trust fund—Set-off.]—Where at the date of the winding-up order a fund came into the hands of the liquidator impressed with certain trusts, a debt owing the company by a debtor having a claim against the trust fund should not be set off against the sum payable to the debtor out of the trust fund. *In re Canadian Home Investment Co.*, (1917) 24 B.C.R. 294; 37 D.L.R. 598; (1917) 3 W.W.R. 629.

3. Election to retain security—Release of surety.]—If a creditor bank elect to take securities at a valuation in payment of a debt of an insolvent company in process of voluntary liquidation, the bank is bound even though there is no statutory provision for such valuation, and a surety for the debtor is released to the extent of that valuation. *Canadian Bank of Commerce* v *Martin*, (1917) 24 B.C.R. 381; 40 D.L.R. 155; (1918) 1 W.W.R. 395.

4. Priority of debts owing to Crown.]—Upon the winding-up of a company the debts due the Province take priority over all unsecured debts, and the claim of the Province is not subject to the claims of employees of the company in respect of wages under sec. 70 of the Winding-up Act. Claims by the Workmen's Compensation Board in respect of the "accident fund" are within the category of "claims by the Province," and are entitled to preference. *In re Sid B. Smith Lumber Company, Limited*, (1917) 25 B.C.R. 126; (1917) 3 W.W.R. 844.

5. Amendment of claim—Estoppel.]—A creditor, having amended his claim, and valued his securities against an insolvent debtor, and such valuation having been acquiesced in, is estopped from setting up subsequently any preferential claim not set out in the amended claim. *Williams Machinery Co.* v. *Graham*, (1917) 25 B.C.R. 284; 39 D.L.R. 140; (1918) 1 W.W.R. 161; 57 S.C.R. 229; 43 D.L.R. 437; (1918) 3 W.W.R. 597.

6. Election to take securities—Misappropriation by liquidator.]—A secured creditor of a company in liquidation may either keep his securities and stay out of the liquidation or value or surrender his securities and come into the liquidation. If he does the former and subsequently gives the liquidator authority to realize the securities for him, the latter does so as his agent and not as liquidator, and a surety for the liquidator qua liquidator is not liable as agent of the creditor. *McFarland* v. *London & Lancashire Guarantee & Accident Co. of Canada*, (1926) 37 B.C.R. 373; (1926) 3 D.L.R. 974; (1926) 3 W.W.R. 290; (1927) 3 D.L.R. 67; (1928) S.C.R. 57.

7. Valuation of security—Guarantors—Election.]—If a company has gone into liquidation and made an authorized assignment under The Bankruptcy Act, and a creditor in putting in its claim values its securities at the amount of the debt, the valuation being accepted, the creditor has thereafter no claim against the sureties who had guaranteed the debt. *Bank of Hamilton* v. *Atkins*, (1924) 1 W.W.R. 92; 4 C.B.R. 347.

8. Enforcement of mortgage.]—In an action for foreclosure of a mortgage given by the defendant company by way of a trust deed to secure a debenture issue, the company having before the commencement of the action gone into liquidation under the Winding-up Act:—Held, that the plaintiff was entitled to a final order for foreclosure. The submission that when a company is in progress of winding up under the Winding-up Act an action for foreclosure of a mortgage given by the company does not lie, but that the mortgagee is restricted to the remedy given by sec. 133 of the Act, can only prevail, if at all, when the case falls strictly within the class of cases mentioned in the section, but this case does not fall within it for the reason that the mortgaged premises were never "in the hands, possession or custody of the liquidator." *Michigan Trust Co.* v. *Canadian Puget Sound Lumber Co. Temple* v. *The Same*, (1918) 25 B.C.R. 560; (1918) 3 W.W.R. 273.

2. Ordinary Creditors.

1. Action commenced before liquidation.]—The plaintiff commenced action for rescission of contract and repayment of sums paid thereunder before the defendant company went into liquidation. The liquidator subsequently opposed the action but the plaintiff obtained judgment for repayment of the sums paid and costs:—Held, that the plaintiff must rank as an ordinary creditor both as to the sums to be repaid and as to costs. *Fitzherbert* v. *The Dominion Bed Manufacturing Company Limited,* (1917) 24 B.C.R. 38; 36 D.L.R. 600; (1917) 2 W.W.R. 727.

2. Appeal from order disallowing claim.]—On leave granted by the Court of Appeal under sec. 101 (c) of the Winding-up Act an appeal will lie from the order of a judge setting aside the disallowance of a claim in excess of $500 in proceedings under the Act. *In re Winding-up Act and Gibson Mining Co.,* (1923) 32 B.C.R. 360; (1923) 3 D.L.R. 1052; (1923) 3 W.W.R. 171.

3. Delay in presenting claim.] — Upon the People's Loan and Deposit Company going into liquidation the liquidator, owing to the books of the company being lost, was unable to notify all the creditors of the liquidation. In due course a dividend was declared and paid to all the creditors whose claims were filed. Subsequently another creditor filed his claim and made a demand that he be paid pro rata on the first dividend before payment of any further dividends:—Held, that he was entitled to rank as an unsecured creditor but that he could only participate in the undistributed assets of the company. *In re Peoples' Loan and Deposit Co. and Davidson,* (1917) 25 B.C.R. 109; (1917) 3 W.W.R. 981.

I. Stay of Proceedings.

1. Statutory duties of liquidator — Jurisdiction to interfere.]—The Court has no jurisdiction to interfere with the statutory duties of a liquidator under sec. 73 of the Winding-up Act by making an order staying all proceedings until the final adjudication of certain selected claims, even where the intention is merely to minimize costs and expedite proceedings. A liquidator is not an officer of the Court in the same full sense as its regular officers are, such as the registrar, etc. *In re Dominion Trust Company and Critchley et al.,* (1916) 23 B.C.R. 42; 27 D.L.R. 580; 34 W.L.R. 461.

2. Third parties.]—The sections of the Winding-up Act enabling the Court to interfere were intended not for the purpose of harassing or impeding or injuring third parties, but for the purpose of preserving the limited assets of the Company in the best way for distribution among all creditors who have claims upon it. *Plummer* v. *Sullivan Machinery Company,* (1917) 24 B.C.R. 104; (1917) 2 W.W.R. 229.

3. Application for adjournment of appeal to Privy Council.]—An application to a winding-up judge for an order directing a liquidator to consent to the adjournment of appeals pending before the Privy Council will be refused. Assuming that there is jurisdiction under the Winding-up Act, the Court would, in interfering with the conduct of litigation, which the liquidator has been authorized to carry on, be assuming a responsibility which it could not adequately discharge. It is impossible for a winding-up judge in an involved litigation to know all its ramifications as do the liquidator and his legal advisers, and without such knowledge, interference with the conduct of suits might well be highly detrimental to the liquidation. *Dominion Trust Company* v. *New York Life Insurance Company et al.,* (1918) 25 B.C.R. 271; (1918) 1 W.W.R. 614.

J. Dividends.

All creditors not notified.]—Upon a company going into liquidation the liquidator, owing to the books of the company being lost, was unable to notify all the creditors of the liquidation. In due course a dividend was declared and paid to all creditors whose claims were filed. Subsequently another creditor filed his claim and made a demand that he be paid pro rata on the first dividend before payment of any further dividends:—Held, that he was entitled to rank as an unsecured creditor but that he could only participate in the undistributed assets of the Company. *In re Peoples' Loan and Deposit Company and Davidson,* (1917) 25 B.C.R. 109; (1917) 3 W.W.R. 981.

XIV. Voluntary Liquidation.

1. Validity of resolutions.]—A company in British Columbia can only wind up under an extraordinary resolution when it cannot continue in business owing to its liabilities, and if the extraordinary resolution assigns any other reason, it is irregular and the

liquidator is improperly appointed and cannot sue on behalf of the company. *Duncan & Gray, Ltd. (in Liquidation)* v. *Silver Spring Brewery Ltd.*, (1925) 36 B.C.R. 249; (1925) 4 D.L.R. 724; (1925) 3 W.W.R. 675.

2. Applications to the Court.]—Sec. 218 of the Companies Act, 1929, provides that where a company is being wound up the liquidator and any member of the company may apply to the Court to determine any question arising in the winding up, etc:—Held, that sec. 218 is limited to matters of internal administration as between the liquidator and the company's members, and the question as to the ownership of bonds should be determined in an action and not summarily. *In re Rant & Ker, Ltd.*, (1930) 2 W.W.R. 274.

XV. TRUST COMPANIES.

1. Remuneration.]—The right of a trust company, to retain, as its remuneration, part of the profits realized from investments, creates a trust coupled with an interest, which, upon the winding-up of the corporation passes to the liquidator as an asset for the general benefit of creditors, and the Court will not compel the liquidator, before the final wind-up to surrender such securities to the cestui que trust, nor appoint a special trustee to carry the trust into effect. *In re Dominion Trust Co. and Harper*, (1915) 22 B.C.R. 337; 24 D.L.R. 670; 32 W.L.R. 832; 9 W.W.R. 503.

2. Power to accept money on deposit.]—A trustee authorized to hold money on deposit pending investment and to pay interest on same, may enter into an arrangement with its cestui que trust that pending such investment the cestui que trust may withdraw such sums as he wishes by cheque and even after investment continue to do so. *In re Dominion Trust Company and U.S. Fidelity Claim*, (1918) 26 B.C.R. 339; (1918) 3 W.W.R. 1023.

3. Power of Provincial Legislature.]—It is within the province of the Provincial Legislature to incorporate companies for the purpose of carrying on that branch of the banking business which consists of accepting money on deposit, paying interest thereon and allowing the customer to issue cheques against such deposit. *Ibid.*

XVI. BONA VACANTIA.

Rights of Province and of Dominion.]—The right of bona vacantia in regard to the assets of a defunct English corporation, which previously had carried on business in British Columbia, is vested in the Province under secs. 102 and 109 of the British North America Act, being comprised in the word "royalties" which at the time of the union were assigned to the Province. *Attorney-General for British Columbia* v. *The King*, (1922) 63 S.C.R. 622; 68 D.L.R. 106; (1922) 3 W.W.R. 269.

XVII. SECURITY FRAUDS PREVENTION ACT.

Prospector.] — Where a prospector in order to dispose of a part of his interest in a mineral claim enters into an agreement with the plaintiffs to form a syndicate and to hold the property as trustee therefor in 400 shares or units and to transfer 25 of the shares to the plaintiffs for their services in forming the syndicate, the transaction is a trade in good faith by a prospector within the meaning of sec. 3 (h) of the Security Frauds Prevention Act, 1930. The plaintiffs are also entitled to shares in the syndicate which they purchased from the defendant. The plaintiffs not having secured a license under the Act are not entitled to the commission provided for in the agreement on the proceeds of sale of shares of the syndicate negotiated by them, as they are not actual prospectors, and are not selling shares on behalf of the defendants, but for the syndicate of which they are themselves members, and such transactions do not come within the exemption mentioned in said sec. 3 (h). *Devine* v. *Somerville et al.*, (1931) 44 B.C.R. 502; (1931) 3 W.W.R. 264.

See BANKRUPTCY.
See CONFLICT OF LAWS.
See CONSTITUTIONAL LAW.
See CONTRACT.
See ESTOPPEL.
See NEGLIGENCE.
See TORT.

COMPULSORY PURCHASE.

I. COMPULSORY POWER OVER LAND, 203.
II. COMPENSATION, 204.
A. *Right to*, 204.
1. In whom vested, 204.
2. Injurious affection, 205.
B. *Subjects of*, 205.
C. *Measure of*, 206.

I. COMPULSORY POWER OVER LAND.

1. Municipal Act — Land taken when plans filed.]—Land is "taken" by a municipality when plans and specifications are filed and notice to treat is served in pursuance of sec. 399 of the Municipal Act. An application to appoint an arbitrator is merely a step in the statutory proceedings to determine compensation and not an "action" within the meaning of sec. 513 of the Municipal Act, barring actions against the municipality if not commenced within a year. *Hanna* v. *Corporation of the City of Victoria*, (1916) 22 B.C.R. 555; 27 D.L.R. 213; 34 W.L.R. 307; 10 W.W.R. 457; Affg. (1915) 124 D.L.R. 889; 32 W.L.R. 916; 9 W.W.R. 761.

2. Forestry Act—Construction prior to expropriation — Costs.] — The defendant company after commencing expropriation proceedings under the Forest Act for right of way across the plaintiff's lands held the expropriation proceedings in abeyance and proceeded to construct upon the right of way, on an alleged understanding with the plaintiff pending negotiations with a view to agreeing on a purchase price for the right of way. In an action for damages for trespass and for an injunction:—Held, that the defendant company was not entitled to proceed with the work and an action was maintainable, but in the circumstances the company should have an opportunity of doing what it ought to have done in the first instance and proceed with due diligence under the Forest Act and upon ascertainment and payment of the amount of compensation awarded to the plaintiff under the Act the plaintiff can then sign judgment for $25 the amount of the damages and costs. *Goddard* v. *Bainbridge Lumber Company, Limited*, (1920) 29 B.C.R.186.

3. Power of Legislature—Foreshore.]—By clear and distinct legislation the Province in dealing with civil rights may deprive a person of his property without compensation. An owner of land adjoining the sea is entitled to free access to and egress from the sea, and where the construction of a railway is an invasion of this right he is entitled to damages unless the statute empowering the railway company is an exercise of the power of the Province to deprive the owner of his right to compensation or damages. *Nelson* v. *Pacific Great Eastern Ry. Co. Order of the Oblates of Mary Immaculate* v. *The Same*, (1918) 25 B.C.R. 259; (1918) 1 W.W.R. 597.

4. Foreshore — Sea-wall — Right of access.]—The City of Vancouver and the Canadian Northern Pacific Railway entered into an agreement, inter alia, for the erection of a sea-wall on the foreshore of False Creek, which was subsequently embodied by the local Legislature in the False Creek Terminals Act empowering the city to erect the sea-wall. The agreement provided that the city would indemnify the railway company (which was to construct the sea-wall) against all claims on account of any lands or rights in lands taken or injuriously affected by reason of the work, but there was nothing in the Act directing that the city should make compensation to those so injuriously affected. The plaintiff as owner of a wharf, access to which would be interfered with by the erection of the sea-wall, obtained an injunction restraining the city from proceeding with the work. On appeal from the order granting the injunction:—Held, that the plaintiff was without remedy, as there was no statute making payment of compensation a condition precedent to the defendant's right to proceed with the erection of the wall. The Order-in-Council passed pursuant to the powers contained in the Navigable Waters' Protection Act cannot in any way govern or assist in the decision of this matter. As the guardian of the public right of navigation, the Governor-General in Council permits the erection of the wall, and so makes it lawful as against that right, but it does not purport to authorize interference with the private right of owners of land of access to their own properties. *Champion & White* v. *City of Vancouver*, (1916) 23 B.C.R. 221; 31 D.L.R. 22; (1917) 1 W.W.R. 185.

5. Legislation affecting private rights.] Where the Legislature directs that a thing shall at all events be done, the doing of which if not authorized by the Legislature would entitle anyone to an action, the right of action is taken away. It is reductio ad absurdum to suppose it left in the power of the person who had the cause of complaint to obtain an injunction, and so prevent the doing of that which the Legislature intended to be done. *Ibid.*

II. COMPENSATION.

A. Right to.

1. In Whom Vested.

1. Registered owner.]—Where a municipality has taken the required statutory

steps to determine the compensation for the taking of land for highway purposes, the arbitrators appointed, having jurisdiction to determine matters submitted to them, and having exercised that jurisdiction, and no error being shewn upon the face of the award, the award is incontestable. Once the expropriation proceedings are commenced they will proceed upon the basis of the registered title, and if it should later develop that there has been a change of ownership pending the making of the award, it does not affect the validity of the award, but the person entitled to the land becomes entitled to the money under the Municipal Act. *North Cowichan* v. *Gore-Langton*, (1921) 29 B.C.R. 535; 60 D.L.R. 151; (1921) 2 W.W.R. 484.

2. Separate interests in land taken.]—The proprietor of land and the tenant thereof, as well as mortgagor and mortgagee, have the right to separate arbitration proceedings to determine the value of their respective interests in land taken for railway purposes. There is no reason, however, if the parties are satisfied, why the amount to which each party is entitled should not be determined in one arbitration. *In re Pacific Great Eastern Ry. Co. and Larsen et al.*, (1915) 22 B.C.R. 4; 8 W.W.R. 1 and 630.

2. Injurious Affection.

Severance.]—A railway company expropriated a strip of land through a block which had been subdivided and advertised for sale in building lots for the purposes of constructing their line. The arbitrators, in addition to the value of the land taken, allowed a certain sum for injurious affection to the remaining portion of the block: —Held, that as the lots had no common connection except that they were owned by the same persons, they were not entitled to damages for injurious affection, and even if the block were treated as a whole, there was no evidence of depreciation owing to the strip of land being taken by the railway company. *In re Canadian Northern Pacific Railway Company and Byng-Hall et al.*, (1916) 23 B.C.R. 38; 35 D.L.R. 773.

B. Subjects of.

1. Riparian rights.] — The value of a water-lot, expropriated for the purpose of a public work, must be assessed in view of such riparian rights as are actually enjoyed by the owner at the time of the taking; and where property used in connection with a saw mill is taken by the Crown and subsequently abandoned under sec. 23 of the Expropriation Act (Can.), the owner is entitled to be compensated for what the property would have been worth to him if used for that business during the time he was ousted from its possession by the Crown. *The King* v. *Canadian Pacific Lumber Co.*, (1915) 26 D.L.R. 80; 15 Ex. C.R. 350.

2. Acquisition of land by municipality.] —With reference to the purchase and acquisition of real property, the provisions of sec. 5, B.C. Stats. 1915, cap. 46, amending the Municipal Act, B.C. Stats. 1914, cap. 52, as to the necessity of the assent of the electors, are incompatible with the powers conferred by subsec. (155) of sec. 54 of the 1914 Act, and, therefore, to this extent the latter must be deemed to have been repealed by implication. *Meldrum* v. *District of South Vancouver*, (1916) 22 B.C.R. 574; 27 D.L.R. 193; 34 W.L.R. 314; 10 W.W.R. 519.

C. Measure of.

1. Increased value—Set-off.]—In ascertaining the compensation to be made to a landowner where foreshore rights are in question for land expropriated for a railway under sec. 57 of the British Columbia Railway Act, any increased value which the arbitrators may find is given to the remainder of the lands and foreshore in which the parties are interested beyond the increased value common to all lands in the locality, will be set off against both the amount which may be awarded as the value of the foreshore taken, and also any sum which may be awarded as damages for the taking and severance as distinguished from the value of the lands taken. The arbitrators, in making their award in respect of a property in which more than one person is interested, shall set out the amount to which each party is entitled. *In re Pacific Great Eastern Railway Company and Peter Larsen et al.*, (1915) 22 B.C.R. 4; 8 W.W.R. 1 and 630.

2. Lump sum.]—An award cannot be contested on the ground that the arbitrators allowed no sum to the municipal corporation for the advantage resulting from the operation of the expropriating bye-law where the award is a lump sum and is without error on its face. *The Corporation of the District of North Cowichan* v. *Gore-Langton*, (1921) 29 B.C.R. 535; 60 D.L.R. 151; (1921) 2 W.W.R. 484.

3. Railway embankment.]—On an arbitration to determine the compensation assessed under the Railway Act for land taken for right-of-way purposes on the foreshore, the cost of providing access to the sea is not the true measure of damages, as the relative value of the access afforded and what existed before the railway would then arise, and the arbitrators were properly guided by the evidence of value of the properties before and after the railway was built. *Nelson* v. *Pacific Great Eastern Ry. Co. Oblate Order of Mary Immaculate* v. *The Same. Lefeaux & Carlisle* v. *The Same.*, (1919) 27 B.C.R. 420; 67 D.L.R. 792.

4. Public works — Part of building taken.]—During the hearing of evidence on an arbitration as to compensation for land taken under the Public Works Act, it was arranged among the arbitrators that the material of that part of a shed which was on the land taken be retained by the owner, and his damages on account of the portion of the shed taken down were then allowed at $75:—Held, that there was no misconduct on the part of the arbitrators and no ground for setting aside the award. *In re Arbitration Act and Woods*, (1923) 32 B.C.R. 211; (1923) 2 D.L.R. 1000; (1923) 1 W.W.R. 1344.

5. Award—Inadequate compensation.]—On expropriation proceedings under sec. 12 of The New Westminster Harbour Commissioners Act, where the award discloses the fact that the arbitrator omitted to give any or allowed manifestly inadequate compensation for a certain portion of the land appropriated, the Court of Appeal should correct the award under sec. 232 (5) of the Railway Act and increase it in such amount as the evidence justifies. *Armstrong* v. *New Westminster Harbour Board*, (1929) 41 B.C.R. 1; (1929) 2 D.L.R. 150; (1929) 1 W.W.R. 755.

6. Franchise—Expropriation of.]—An electric light franchise was granted by a municipality to a company for a period of 50 years subject to the privilege of the municipality to purchase the "undertaking property and rights" of the company at any time at a price to be agreed on or in default of agreement found by arbitrators:—Held, that since the only right of the municipality was to take over not merely the physical assets but the undertaking as a whole, an award of arbitrators allowing compensation for prospective profits should not be disturbed. *City of Cumberland* v. *Cumberland Electric Light Co. Ltd.*, (1931) 43 B.C.R. 525; (1931) 3 D.L.R. 69; (1931) 2 W.W.R. 377. Affd. (1931) S.C.R. 717; (1931) 4 D.L.R. 459.

See ARBITRATION.
See CONSTITUTIONAL LAW.
See MUNICIPAL CORPORATIONS.

CONDITION.

See CONTRACT.
See WILL.

CONFLICT OF LAWS.

I. ACTIONS, 208.
II. FOREIGN JUDGMENTS, 209.
A. In rem, 209.
B. In personam, 210.
III. DOMICILE: STATUS, 212.
A. Divorce, 212.
B. Succession: Will, 213.
C. Immigrants, 214.

I. ACTIONS.

1. War Relief Act — Application to action in England.]—The War Relief Act Amendment Act, 1917, of British Columbia relates to procedure only and therefore is no defence to an action in the English Courts against a volunteer who enlisted in the Province but upon whom service of process is made in England. Quaere, whether a resident of British Columbia could be penalized for bringing an action in the English Courts in direct opposition to the terms of the B.C. War Relief Acts, or an injunction could be obtained in the Province to restrain him from violating the prohibition of the statute. *Merchants Bank of Canada* v. *Eliot*, (1918) 1 W.W.R. 698.

2. Foreign contract — Damages for breach.]—The right to damages for breach of a contract made in a foreign country and to be executed there, is governed by the lex loci contractus and not by the lex fori. *Livesley* v. *Horst Company*, (1924) S.C.R. 605; (1925) 1 D.L.R. 159; Affg. (1924) 34 B.C.R. 19; (1924) 2 D.L.R. 1002; (1924) 2 W.W.R. 443; Affg. (1923) 2 W.W.R. 987.

3. Injury to real property in foreign country.]—A resident of a foreign state cannot recover in the Courts of British

Columbia the damages caused to real property by fire originating and being allowed to escape from British Columbia. Growing crops, including grass for pasture, should be treated as chattels and the loss recovered. *Boslund* v. *Abbotsford Lumber, Mining & Development Co. Ltd.*, (1925) 34 B.C.R. 485; (1925) 1 D.L.R. 978; (1925) 1 W.W.R. 475.

4. Bail in foreign country—Mortgage on British Columbia property to indemnify obligor.]—Where a contract of indemnity against loss with respect to bail given in proceedings in a Court of a foreign country is lawful under the law of that country, the contract and the security given in implement of it can be enforced in Canada although the contract was executed in Canada and the security is a mortgage on lands in Canada. *The National Surety Co.* v. *Larsen*, (1929) 42 B.C.R. 1; (1929) 4 D.L.R. 918; (1929) 3 W.W.R. 299.

5. Foreign company — Action against Provincial shareholder under foreign law.]—In an action brought in British Columbia by the creditors of a foreign company to fix the defendant with liability for the company's debts in proportion to the amount of his shares in accordance with the law of the foreign state, it was held that the plaintiffs being in the position of persons having a statutory right to bring an action against shareholders, it must first appear that the defendant was a shareholder before the action can succeed, but the defendant having been led by the company's agent to believe that he was buying treasury shares, when as a fact he was not given treasury shares, there is no contract between the foreign company and the defendant for the shares standing in his name, and the action cannot succeed. *American Seamless Tube Corporation* v. *Goward*, (1931) 43 B.C.R. 407; (1931) 1 D.L.R. 878; (1931) 1 W.W.R. 509; Affg. (1930) 42 B.C.R. 551; (1930) 3 D.L.R. 870; (1930) 2 W.W.R. 31.

II. Foreign Judgments.

A. In rem.

1. Real property in British Columbia—Fraud.]—In accordance with the general rule that the Courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in that country, a judgment of a Court of California on a question of title and ownership of real property situate in British Columbia cannot be recognized as final and be enforced by the Courts of the Province. *Andler* v. *Duke*, (1932) S.C.R. 734; (1932) 4 D.L.R. 529; Revg. (1931) 45 B.C.R. 96; (1932) 2 D.L.R. 19; (1932) 1 W.W.R. 257.

See (1931) 43 B.C.R. 549; (1931) 3 D.L.R. 561.

2. Lex situs—Mineral claims in British Columbia.]—The interest of a free miner in his mineral claim being an interest in land, a foreign Court has no jurisdiction to make any decree affecting the ownership of or interests in such claims outside of its territorial jurisdiction. The decree of an American Court, in so far as it adjudicates upon the rights of claimants to mineral claims in Canada, is of no effect, and a company acquiring the interests of persons claiming under such decree is not a bona fide purchaser and acquires no title thereto. *Chassy* v. *May*, (1922) 68 D.L.R. 427; (1922) 2 W.W.R. 225; Aff. (1920) 29 B.C.R. 83; (1921) 1 W.W.R. 69.

3. Appeal—Action in British Columbia—Stay of proceedings.]—The defendants obtained judgment in an action in the State of Oregon and then sued upon that judgment and obtained judgment in British Columbia, where certain mining properties in dispute are situate. Later the plaintiffs brought action in the State of Oregon to set aside the judgment obtained there on the ground that it was obtained through fraud practised on the Court, and obtained judgment in their favour. The defendants appealed from this judgment to the Supreme Court of Oregon, and proceedings in the Court below were stayed pending the disposition of the appeal. The plaintiffs also brought action in British Columbia to set aside the judgment obtained here, based on the original Oregon judgment, on the ground of fraud, and the defendants then applied for a stay of proceedings in the action pending the result of the appeal in the State of Oregon:—Held, that there should be a stay of the action here until the Supreme Court of Oregon has decided whether or not a fraud was practised on their circuit Court in order to obtain the judgment which is attacked. *May* v. *Roberts*, (1929) 41 B.C.R. 185; (1929) 3 D.L.R. 370; (1929) 2 W.W.R. 449.

B. In Personam.

1. Fraud.]—Fraud, for the purpose of impeaching a foreign judgment in other

respects valid, must be some fraud dehors the record. An allegation of fraud without particulars may be treated as if it were struck out of the pleadings. A general denial of the allegations in the statement of claim is ineffectual, and will be treated as an admission. Where an application to amend, by giving particulars of an otherwise defective allegation of fraud, has been refused in the Court of first instance, it will not, except in very unusual circumstances, be granted in the Court of Appeal. *Page* v. *Page*, (1915) 22 B.C.R. 185; 25 D.L.R. 99; 32 W.L.R. 854; 9 W.W.R. 442.

2. Objection to jurisdiction of foreign Court.]—Where the defendants at their own instance obtain an adverse decision in Ontario on the question of jurisdiction of such Court, they cannot again raise that objection when sued on the judgment in British Columbia. *Kennedy* v. *Trites, Ltd.*, (1916) 10 W.W.R. 412.

3. Judgment of another Province—Estoppel.]—The plaintiff company at the defendants' request (the defendants giving the plaintiff a bond of indemnity to save the plaintiff harmless, etc.) entered into a bond of indemnity. The plaintiff was sued on the bond and notified the defendants of the action and urged them to assist in the defence but they gave no assistance. The plaintiff defended the action but judgment was given against it in the Court of King's Bench of Manitoba. The plaintiff appealed and notified the defendants but again receiving no assistance dropped the appeal. In an action by the plaintiff against the defendants on their bond of indemnity to repay the moneys paid in satisfaction of the judgment:—Held, that the judgment against the plaintiff in the Manitoba Court was recovered on the bond given by the plaintiff at the defendants' request. The plaintiff has paid the judgment and the defendants are estopped from denying liability. *London Guarantee and Accident Co.* v. *Davidson*, (1925) 36 B.C.R. 301; (1926) 1 D.L.R. 66; (1926) 1 W.W.R. 148.

4. Action on foreign judgment—Counterclaim for malicious prosecution.]—Where an action is brought upon a foreign judgment the defendant, after filing his defence, is within his rights in filing a counterclaim for damages for malicious prosecution. *Thompson* v. *Scollard, No. 2*, (1929) 41 B.C.R. 241; (1929) 3 D.L.R. 857; (1929) 2 W.W.R. 466.

III. DOMICILE: STATUS.

A. Divorce.

1. Foreign marriage.]—Where a British subject domiciled in British Columbia enters into a contract of marriage during a visit to a foreign country, the validity of the marriage as to essentials is governed by the lex domicilii. *Miller* v. *Allison*, (1917) 24 B.C.R. 123; 33 D.L.R. 144; (1917) 2 W.W.R. 231.

2. Foreign divorce—Validity in Canada.]—The Courts in Canada will recognize the binding effect of a decree of divorce obtained in a foreign country against a husband domiciled outside Canada, although he had not acquired domicile in the country of the Court which granted the decree, if the Courts of the country of his domicile will recognize the validity of the decree, but where the husband was domiciled in the State of Oregon, and the wife obtained a decree of divorce in the State of California, and the evidence was that the Courts of the husband's domicile would not recognize the divorce which had been obtained without further inquiry, the California divorce will not be recognized in Canada. *Wyllie* v. Martin, (1931) 44 B.C.R. 486; (1931) 3 W.W.R. 465.

3. Foreign divorce.] — The law of the State of Oregon requires that the plaintiff in a divorce action must have been a resident and inhabitant of the State of Oregon one year next prior to the commencement of the suit, and the Supreme Court of the State has defined domicile, residence and habitation as synonymous in relation to divorce proceedings. In an action for divorce in the Province it was held that where the respondent has not renounced his British Columbia domicile he is not in the ordinary meaning of the words a resident or inhabitant of the State of Oregon and has not acquired a domicile there. Domicile being the governing factor, there was no jurisdiction in the Courts of the State of Oregon to grant a decree of divorce. *Biggar* v. *Biggar*, (1930) 42 B.C.R. 329; (1930) 2 D.L.R. 940.

4. Foreign divorce.]—A divorce granted in a foreign jurisdiction is valid here provided the husband was domiciled within the jurisdiction of the Court granting the decree. *Burpee* v. *Burpee*, (1929) 41 B.C.R. 201; (1929) 3 D.L.R. 18; (1929) 2 W.W.R. 128.

5. Custody of children.]—A husband who had resided with his wife in the State of Ohio, U.S.A., came to Vancouver with his

children and established his domicile. The wife who remained in Ohio applied for and obtained a divorce with an order giving her the custody of the children, but previous to the granting of the divorce the husband brought proceedings in British Columbia under the Equal Guardianship of Infants Act:—Held, that foreign guardians as such have no rights here, their powers and functions being confined to the limits of the country in which they have been appointed. The paramount consideration is the best interest of the children, and in the circumstances the interest of the children would be best served by giving the guardianship to the father. *Snyder* v. *Snyder*, (1927) 38 B.C.R. 336; (1927) 3 D.L.R. 151; (1927) 2 W.W.R. 240.

6. Domicile—Custody of children.]—On petition by a wife for divorce and for the custody of her children, where the father's domicile is in British Columbia but the mother is living in the Province of Alberta with her children:—Held, that the domicile of the children is the same as that of the father during his lifetime, and there is jurisdiction to make an order granting the custody of the children to the petitioner. *Kilpatrick* v. *Kilpatrick*, (1929) 42 B.C.R. 88; (1930) 1 D.L.R. 288; (1929) 3 W.W.R. 463.

B. Succession: Will.

1. Adopted child.]—A testator who died domiciled in British Columbia, by will made in British Columbia, bequeathed the residue of his estate, consisting of personal property to his sister who was domiciled in Massachusetts, U.S.A. "or her heirs." The sister died intestate during the testator's lifetime, but she and her husband had adopted a daughter under the law of Massachusetts, who survived. The evidence disclosed that under the laws of Massachusetts" an adopted child is an heir of the adopting parents and has the rights and status of a child born in lawful wedlock":—Held, that the question is one of status, the adopted daughter has by the law of Massachusetts the requisite status of heir or next of kin and is entitled to the residuary estate. *Purcell* v. *Hendrick*, (1925) 35 B.C.R. 516; (1925) 3 D.L.R. 854; (1925) 2 W.W.R. 689.

2. Adopted child—Alien.] — An alien non-resident adopted child is entitled to the benefit of the provisions of the Testator's Family Maintenance Act, if the adoption complies with the essential requirements of the statue in force in the country where the adoption takes place. The rights and liabilities pertaining to an adoption are based upon the law of the locality in which it occurs and such rights are not lost by change of residence. *In re McAdam*, (1925) 35 B.C.R. 547; (1925) 4 D.L.R. 33; (1925) 2 W.W.R. 593.

3. Foreign polygamous marriage—Succession duty—Domicile.] — The deceased, domiciled in China, had contracted two lawful marriages there with Chinese women of Chinese domicile. He died in British Columbia and by his will bequeathed an annuity to each wife:—Held, that both women should be recognized as wives of the deceased and they are entitled to the benefit extended to wives under the Succession Duty Act. *In re Lee Cheong, Deceased. Lee Sheck Yew* v. *The Attorney-General for British Columbia*, (1923) 33 B.C.R. 109; (1924) 1 D.L.R. 1166; (1924) 1 W.W.R. 753.

4. Foreign holograph will.]—Sec. 14A of the Wills Act Amendment Act, 1914, cap. 47, fixes a time as to when the validity of a will of the class referred to therein is determined, viz., when it was made. Therefore, if a British subject when outside the Province, makes a will which meets the requirements of said section, its validity is not destroyed by the fact that the testator afterwards ceases to be a British subject. Where a person while domiciled in British Columbia and owning realty therein makes a will valid as to realty in that Province, and he acquires a foreign domicile and makes a holograph will (invalid as to realty in British Columbia) revoking all previous wills and disposing of both realty and personalty, and dies domiciled in said foreign country, the British Columbia will remains effective as to the British Columbia realty. Where a will has been declared by the testator to be revoked for the purpose of making a fresh will, but no fresh will is made, or if made is not effectual, the original will is not revoked. *In re Colville Estate*, (1931) 44 B.C.R. 331; (1931) 3 W.W.R. 26; (1932) 1 D.L.R. 47.

C. Immigrants.

1. Loss of Canadian domicile.]—Subsec. I. (iii.) of sec. 2 of the Immigration Act Amendment Act, 1919, is not retroactive. A native of India domiciled in Canada, and having resided outside Canada for more

than one year, is not deemed to have lost his Canadian domicile pursuant to the said subsection if he returns to Canada within one year from the passage of the said Act. *In re Immigration Act and Santa Singh*, (1920) 28 B.C.R. 357; (1920) 2 W.W.R. 999.

2. Loss of Canadian domicile.] — An East Indian who came to Canada when twenty years old and remained as a labourer for seven years, returned to his native village in India, where he engaged in farming for five years and later conducted a shop, was married there and had three children He returned to Canada fifteen years after his departure for India:—Held, that even if he had acquired a domicile in Canada before he left for India, which is doubtful, he had resumed his domicile of origin and was therefore not entitled to readmission to Canada as a person domiciled here. *The King* v. *Milkha Singh*, (1931) 44 B.C.R. 278; 56 C.C.C. 211.

See ALIENS.

See DIVORCE.

See EXTRADITION.

See IMMIGRATION.

CONSPIRACY.

See TORT.

CONSTITUTIONAL LAW.

I. THE ROYAL PREROGATIVE, 216.
A. Bona vacantia, 216.
B. Foreshore, 216.
II. ROYAL GRANTS, 218.
A. Construction of, 218.
B. Action to set aside, 219.
III. DIVISION OF PROPRIETARY RIGHTS BETWEEN CROWN IN RIGHT OF DOMINION AND CROWN IN RIGHT OF PROVINCE, 220.
IV. LEGISLATION, 221.
A. Dominion and Provincial legislation, 221.
1. Trade and commerce, 221.
2. Seacoast and inland fisheries, 224.
3. Bankruptcy and insolvency, 225.
4. Naturalization and aliens, 226.
5. Criminal law and procedure, 227.
6. Taxation, 229.
7. Property and civil rights, 231.
8. Matters of a local or private nature, 235.
9. Administration of justice, 237.
B. English laws, 238.

I. THE ROYAL PREROGATIVE.

A. Bona Vacantia.

Extra-Provincial company dissolved — Assets of.]—The right of bona vacantia in regard to the assets of an extra-provincial corporation which previously had carried on business in British Columbia is vested in the Province under secs. 102 and 109 of the British North America Act, being comprised in the word "royalties" which at the time of the union were assigned to the Province. *Attorney-General for British Columbia* v. *The King*, (1922) 63 S.C.R. 622; 68 D.L.R. 106; (1922) 3 W.W.R. 269.

B. Foreshore.

1. Right of access—Navigable waters.] —In an action by a property owner for a mandamus directing the defendants to remove an embankment erected and maintained by them across an arm of False Creek whereby the plaintiff's right of ingress and egress to said lots is interfered with and his right of navigating False Creek is prevented, the evidence disclosed that False Creek was navigable only to a point some distance below the property in question, and the plaintiff or his predecessors in title had never used False Creek for navigation purposes in connection with his property, but it appeared that the channel could by artificial means be made navigable up to the plaintiff's property:—Held, that speculation of future changes in the use and employment of the property cannot legitimately be imported into the case, and as the property in question does not abut on navigable waters, the action must be dismissed. *McFeely* v. *British Columbia Electric Railway Company, Limited*, (1917) 24 B.C.R. 385; 37 D.L.R. 686; (1918) 3 W.W.R. 15.

2. Right of access.]—The high-water mark in British Columbia, where there is no record of tides kept for a sufficient length of time to determine the high-water mark in different localities, should be determined by what is termed "visible high-water mark," that is, the point fixed by signs on the ground, such as the state of vegetation,

accumulation of drift-wood and debris. The owners of land adjoining the sea are entitled to free access to and egress from the sea, and are entitled to damages, even as against the Crown, where such right of access has been invaded by obstruction. The word "damage" in sec. 32, cap. 36, B.C. Stats. 1912, incorporating the defendant Company, includes a claim for compensation because of an obstruction of a riparian owner's right of access to the sea. *Nelson* v. *Pacific Great Eastern Railway Company. The Order of the Oblates of Mary Immaculate* v. *Pacific Great Eastern Railway Company,* (1918) 25 B.C.R. 259; (1918) 1 W.W.R. 597.

3. Right of access — Limitation of action.]—Sec. 306 of the Railway Act applies to an action for damages owing to the illegal obstruction of access to the sea by a railway company, and it must be brought within one year from the completion of the obstruction. *Westholme Lumber Company, Limited* v. *Grand Trunk Pacific Railway Company,* (1918) 25 B.C.R. 343; 41 D.L.R. 42; (1918) 2 W.W.R. 551.

4. Right of access — Sea wall.] — An order-in-council passed by the Governor-General in Council pursuant to the powers contained in the Navigable Waters' Act permitting the construction of a sea wall without reference to the right of access to private lands:—Held, that as guardian of the public right of navigation the Governor-General in Council in permitting the construction of the wall makes it lawful as against that right, but it does not purport to authorize interference with the private right of an owner of land to have access to his own property. *Champion & White* v. *City of Vancouver,* (1916) 23 B.C.R. 221; 31 D.L.R. 22; (1917) 1 W.W.R. 185.

5. Railway embankment.]—On an arbitration to determine the compensation assessed under the Railway Act for land taken for right-of-way purposes on the foreshore, the cost of providing access to the sea is not the true measure of damages, as the relative value of the access afforded and what existed before the railway would then arise, and the arbitrators were properly guided by the evidence of value of the properties before and after the railway was built. *Nelson* v. *Pacific Great Eastern Ry. Co., Oblate Order of Mary Immaculate* v. *The Same. Lefeaux & Carlisle* v. *The Same.* (1919) 27 B.C.R. 420; 67 D.L.R. 792.

6. Right to obtain lease as against owner of lands abutting on foreshore.]—The plaintiff applied to the department of marine and fisheries for a lease of a water lot on Burrard Inlet on which he was to erect an elevator. The defendant entered a protest with the department claiming that he as owner of the adjoining property was entitled to riparian rights over the water lot. The department then refused to grant a lease for the water lot until the defendant's protest was disposed of. An action for a declaration that the defendant was not entitled to any riparian rights in the water lot in question was dismissed:—Held, that the action was rightly dismissed as the plaintiff had no existent interest in the foreshore rights in question. In order to have a right of action there must at least be privity in law between the parties. *Western Pacific Grain Elevator & Terminals Limited* v. *Otton,* (1924) 35 B.C.R. 59.

6. Owner of foreshore — Obstruction by.]—Neither the Navigable Waters' Protection Act, 1906, cap. 115, as a whole nor sec. 20 thereof in particular appears to be aimed at preventing the filling in by a riparian owner of the foreshore in front of his property. The filling of False Creek did not create a nuisance or an illegal obstruction to navigation within the meaning of sec. 7 of the Navigable Waters' Protection Act. *Woods* v. *Opsal,* (1918) 1 W.W.R. 985.

II. Royal Grants.

A. Construction of.

1. Validity of prior grant.]—Ten days after the date of letters patent incorporating the defendant Municipality an order in council was passed under sec. 196 of the Taxation Act exempting the plaintiff Railway for 10 years from taxation under sec. 193 of the Act, in respect of a portion of the plaintiff's line including, prima facie, the portion lying within the bounds of the defendant Municipality:—Held, that the Crown will do nothing in derogation of the grant of corporate powers; and any subsequent Act of the Crown will be treated as done without intent to break faith with those benefited by the earlier grant. The order in council was therefore construed as not intended to apply to that portion of the plaintiff's line which lies within the defendant Municipality. Construed otherwise the order in council would be pro tanto void. *Esquimalt & Nanaimo Railway* v. *Municipality of the City of Courtenay,* (1915) 22 B.C.R. 362; 25 D.L.R. 821; 9 W.W.R. 618.

2. Coast-line.]—The term "coast-line" as descriptive of the eastern boundary of the block of land granted by the Province to the Dominion and by the latter granted to the plaintiff to aid in the construction of the Esquimalt and Nanaimo railway, means the detailed coast-line as fixed by high-water mark. *Esquimalt and Nanaimo Railway Company* v. *Treat*, (1918) 26 B.C.R. 275; 43 D.L.R. 653; (1919) 121 L.T. 657; 35 T.L.R. 737; (1919) 3 W.W.R. 356; 48 D.L.R. 139.

B. Action to Set Aside.

1. Irregularities prior to grant.]—In an ordinary suit between subject and subject irregularities alleged to have occurred leading up to documents of title, such as Crown grants, cannot be set up unless the Crown be made a party. This particularly applies where the defendant is a purchaser for value without notice of such irregularities. *North Pacific Lumber Company* v. *Sayward*, (1918) 25 B.C.R. 322; (1918) 2 W.W.R. 771.

2. Disallowance of Act under which Crown grant made.]—Disallowance by the Governor-General of Canada under secs. 56 and 90 of the British North America Act, 1867, of a Provincial Act in virtue of which a Crown grant of land in the Province has been issued before the disallowance does not invalidate the title of the grantee. Absence of registration of the grant under a Land Registry Act of the Province is not material if the grantee, before the disallowance, applied for and was entitled to registration, whether or not under other circumstances absence of registration would invalidate the title. Where the Lieutenant-Governor of a Province has authority by statute to issue Crown grants upon "reasonable proof" of certain facts, his function is judicial, but he is not bound to follow the rules regulating proceedings in a Court of justice, and if there is before him some proof of the necessary facts, it is within his discretion to determine that there is "reasonable proof." Provincial lands vested by statute in a railway company which has been declared by a Dominion statute to be a "work for the general advantage of Canada" within sec. 91 (10) of the British North America Act, are subject to a statute of the Province authorizing the issue of Crown grants of the lands, save so far as the lands are part of the "railway" as defined by sec. 2 (21) of the Railway Act of Canada, 1906. *Esquimalt & Nanaimo Ry. Co.* v. *Wilson*. *Esquimalt & Nanaimo Ry. Co.* v. *Dunlop*, (1921) 91 L.J.P.C. 21; 126 L.T. 451; 61 D.L.R. 1; 28 C.R.C. 296; (1921) 3 W.W.R. 817; (1922) 1 A.C. 202.

See In re Granby Consolidated Mining, Smelting & Power Co. and The Registrar-General of Titles, (1919) 26 B.C.R. 523.

III. Division of Proprietory Rights Between Crown in Right of Dominion and Crown in Right of Province.

1. Public harbour—English Bay.]—By sec. 108 of the British North America Act, 1867, "the public works and property of each Province, enumerated in the third schedule of the Act, shall be the property of Canada." The schedule includes "public harbours." "Public harbour" in the above connection means not merely a place suited by its physical characteristics for use as a harbour but a place to which on the relevant date the public had access as a harbour, and which they had actually used for that purpose. The date at which the test must be made is the date at which the British North America Act, by becoming applicable, effected a division of the assets between the Province and the Dominion; that date being in the case of British Columbia, 1871. Applying the above test, English Bay, which forms the outer approach to Burrard Inlet which leads to the City of Vancouver, is not a "public harbour" within the meaning of the term, and the Dominion Government cannot restrain the removal of sand and gravel therefrom. *Attorney-General for Canada* v. *Ritchie Contracting and Supply Co.*, (1919) A.C. 999; 88 L.J.P.C. 189; 121 L.T. 655; 36 T.L.R. 1; 48 D.L.R. 147; (1919) 3 W.W.R. 347.

2. Public harbour — North Shore of Burrard Inlet.]—In the absence of proof that the north shore of the First Narrows, Burrard Inlet, was a public harbour at the date of the entry of British Columbia into the Dominion of Canada, a person in possession of foreshore property by virtue of a lease from the Vancouver Harbour Commission, who had title thereto under a Crown grant from the Dominion Government, cannot maintain action for injury to the property from sewer outlets. The finding of fact in *Attorney-General for British Columbia* v. *Canadian Pacific Railway Company*, (1906) A.C. 204; 75 L.J.P.C. 38 must be restricted to the foreshore at the point to which that action related, i.e., a portion

of the south shore of Burrard Inlet. *Hadden* v. *Corporation of the City of North Vancouver*, (1922) 30 B.C.R. 497; 67 D.L.R. 669; (1922) 1 W.W.R. 655.

3. Navigable waters—Ownership of.]—The grant to the Federal Parliament of legislative power over the subject-matter of navigation and shipping in no way implies Federal ownership of the rivers, lakes and sea-coast waters upon which ships may ply, or in regard to which there may exist rights of navigation, either on the part of the public or on the part of private owners. *Fort George Lumber Co.* v. *Grand Trunk Pacific Ry. Co.*, (1915) 24 D.L.R. 527; 9 W.W.R. 17; 32 W.L.R. 309.

4. Bona vacantia.]—The right of bona vacantia in regard to the assets of an extra-provincial corporation which had carried on business in British Columbia is vested in the Province under subsecs. 102 and 109 of the British North America Act, being comprised in the word "royalties" which at the time of the union were assigned to the Province. *Attorney-General for British Columbia* v. *The King*, (1922) 63 S.C.R. 622; 68 D.L.R. 106; (1922) 3 W.W.R. 269; Affd. (1923) 93 L.J.P.C. 76; 130 L.T. 231; 68 Sol. Jo. 138; 40 T.L.R. 13; (1923) 4 D.L.R. 690; (1923) 3 W.W.R. 1252; (1924) A.C. 213.

IV. Legislation.

A. Dominion and Provincial Legislation.

1 Trade and Commerce.

1. Customs duties upon liquors imported by a Province.] — The Government of the Province of British Columbia in the exercise of its powers of control and sale of intoxicating liquors under the Government Liquor Act, 1921 (B.C.), cap. 30 cannot import such liquors into the Province for the purposes of sale without paying customs duties thereon to the Dominion of Canada. *Attorney-General for British Columbia* v. *Attorney-General for Canada*, (1922) 64 S.C.R. 377; 38 C.C.C. 283; (1923) 1 D.L.R. 223; (1923) 93 L.J.P.C. 129; 130 L.T. 257; 68 Sol. Jo. 58; 40 T.L.R. 4; (1923) 4 D.L.R. 669; (1923) 3 W.W.R. 1249; (1924) A.C. 222 (P.C.).

2. Prohibition Act.]—The local Legislature has power to pass the British Columbia Prohibition Act (B.C. Stats. 1916, cap. 49), may impose the penalty of imprisonment for breach of its provisions, and enact the necessary procedure to enforce the same *Rex* v. *Dahlin*, (1919) 27 B.C.R. 564; 60 D.L.R. 604; 36 C.C.C. 223.

3. Government Liquor Act — Trade monopoly.]—The Government Liquor Act, 1921, which vests in the Liquor Control Board (constituted under said Act) the administration of the Act including the general control, management and supervision of all Government liquor stores is intra vires of the Provincial Legislature. its operation is only an incident thereto. The policy of the Act was the abatement of a social evil and the fact that a revenue was derived in administering the Act did not invalidate it. An objection taken on appeal from an order affirming a conviction under the Government Liquor Act, that the efficacy of the proclamation bringing the Act into force was destroyed as it recited the order in council authorizing it, was held to be met by sec. 41 of the Interpretation Act, also the objection that the proclamation was not proved on the trial was met by sec. 101 of the Summary Convictions Act, 1915. *Rex* v. *Ferguson*, (1922) 31 B.C.R. 100; 69 D.L.R. 153; (1922) 2 W.W.R. 473; 37 C.C.C. 89.

4. Produce Marketing Act — Levy for expenses.]—By sec. 3 of the Produce Marketing Act of British Columbia (1926-27), cap. 54 a "Committee of Direction" was constituted, "with the exclusive power to control and regulate (under the Act) the marketing of all tree fruits and vegetables . . . , being products grown or produced in that portion of the Province contained within boundaries therein specified. By sec. 10 (1), it was provided that, "for the purpose of controlling and regulating, under this Act, the marketing of any product within its authority the Committee shall, so far as the legislative authority of the Province extends, have power to determine at what time and in what quantity, and from and to what places, and at what price the product may be marketed, and to make orders and regulations in relation to such matters." By section 10 (k), the committee was also given the power "for the purpose of defraying the expenses of operation, to impose levies on any product marketed." By subsec. 3 of sec. 16, as enacted by the Amendment Act of 1928, cap. 39, it was provided that "the committee may fix license fees to be paid by shippers":—Held, that this legislation is ultra vires of the Provincial Legislature. Per Duff, Newcombe, Rinfret and Lamont, JJ.: Such legislation is referable to the exclusive Dominion power to regulate trade and commerce (sec. 91 (2)

B.N.A. Act). The provisions of the statute, which authorize the committee to impose levies and to fix license fees are ultra vires, the levy not being within sec. 92 (2) and the license not being within sec. 92 (9) of the B.N.A. Act. Per Cannon, J.: The levy is an export tax falling within the category of duties of customs and excise and, as such, as well as by reason of its inherent nature as an indirect tax, could not competently be imposed by the Provincial Legislature. Per Newcombe, J.: Legislation not coming within the definition of property and civil rights or private and local matters in the Province, is clearly incompetent to the Legislature. *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction*, (1931) S.C.R. 357; (1931) 2 D.L.R. 193; Revg. (1930) 42 B.C.R. 493; (1930) 4 D.L.R. 1027; (1930) 2 W.W.R. 23.

5. Produce Marketing Act—Powers of Province.]—An Act designed to regulate and control the marketing of certain farm produce under which a committee is given power to fix the quantity of produce which may from time to time be marketed and the minimum and maximum prices to be obtained is intra vires the Provincial Legislature. The marketing of produce is a trade or business carried on within the Province, and the Local Legislature in imposing restrictions upon it is dealing with the property and civil rights of individuals within the Province and because it affects trading in the products of the farm, or even regulates that domestic operation it is not "regulation of trade and commerce" as contemplated by sec. 91 (2) of the British North America Act. The grower is prevented by the Act from taking orders for the sale of produce within or without the Province without written permission, a transaction with a purchaser outside the Province being simply subsidiary and incidental to the main purpose of the Act which deals with "property and civil rights" and refers to matters "of a merely local or private nature in the Province." It cannot lose that character and be regarded as legislation dealing with "the regulation of trade and commerce" whether the produce shipped is contracted for within or without the Province. *Rex* v. *Chung Chuck*. *Rex* v. *Wong Kit*. *Rex* v. *Sales Service Ltd*. *Rex* v. *Associated Growers of* B.C., (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R. 394. Leave to appeal to Privy Council refused, (1929) 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; 53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129.

6. Regulation of motor-vehicle traffic.]—A statute passed by the Provincial Legislature permitting a municipality to arrange motor-vehicles in classes, impose license fees on owners of motor-vehicles and prohibit the operation on any streets of all motor-vehicles not coming within any of such classes is not ultra vires of the Legislative Assembly as being an interference with trade and commerce in violation of sec. 91 (2) of the British North America Act. *Rex* v. *Calbic*, (1920) 28 B.C.R. 113; 61 D.L.R. 203; (1920) 2 W.W.R. 621; 33 C.C.C. 352.

7. Federal and Provincial Act—Same object.]—The Proprietary or Patent Medicine Act, 1908 (Can.) is in pari materia with sec. 23 of the Pharmacy Act, B.C. The Dominion Act lays down conditions under which an acetanilide can be sold. Applying said sec. 23 to the same facts, both legislative bodies have legislated about the same thing and with the same object, i.e., the protection of the public. The Provincial legislation is therefore inoperative. *Rex* v. *Sheridan*, (1924) 34 B.C.R. 161; (1924) 3 D.L.R. 339; (1924) 3 W.W.R. 617.

2. Seacoast and Inland Fisheries.

1. Regulation of canneries.] — The imposition of a licensing system upon fish canneries or curing establishments in the manner attempted by secs. 7A and 18 of the Fisheries Act, 1914, is beyond the competency of the Dominion Parliament and accordingly those sections are ultra vires. *Rex* v. *Somerville Cannery Company Limited*, (1927) 39 B.C.R. 103; (1927) 4 D.L.R. 494; (1927) 3 W.W.R. 215; 49 C.C.C. 65. *In re Fisheries Act, 1914. Attorney-General for Canada* v. *Attorney-General for British Columbia et al.*, (1929) 99 L.J.P.C. 20; 142 L.T. 73; 46 T.L.R. 1; (1929) 3 W.W.R. 449; (1930) A.C. 111; (1930) 1 D.L.R. 194. Affg. (1928) S.C.R. 457; (1928) 4 D.L.R. 190.

2. Foreign fishing vessel — Convention between Great Britain and United States.]—To justify an entry by a foreign fishing vessel into Canadian territorial waters on the ground of "stress of weather," the weather must be such as to produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well grounded bona fide apprehension that if he remains outside such waters he will put in jeopardy his vessel and cargo. In each case the questions whether the master

fairly and honestly on reasonable ground believed it necessary to take shelter and whether he exercised reasonable skill, competence and courage in the circumstances are questions of fact for the tribunal whose duty it is to find the facts. The Convention of October 20, 1818, between Great Britain and the United States, respecting fisheries and boundary lines, did not apply to the Pacific waters so far as fisheries were concerned and therefore could not be available as justification for the entry in question. *The "May"* v. *The King*, (1931) S.C.R. 374; (1931) 3 D.L.R. 15.

3. Foreign fishing vessel—Convention between Great Britain and United States.]—To justify as against incurrence of penalty under the Customs and Fisheries Protection Act, R.S.C., 1927, sec. 10, a foreign fishing vessel entering Canadian territorial waters on the ground of "stress of weather," there must be such a condition of atmosphere and sea as would produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well grounded bona fide apprehension that if he remains outside such waters he will put in jeopardy his vessel and cargo. A want of bona fides would abrogate any right or privilege to shelter given by the statute. Further, weaknesses in a vessel may be such, as instanced in certain respects in the present case, as, e.g., glass of inadequate thickness in pilot house windows a small height from the sea, constituting a special danger from waves, that any distress arising from them should be deemed a distress created by the owner or master himself. The Convention of October 20, 1818, between Great Britain and the United States, respecting fisheries and boundary lines, has no application to Canadian territorial waters on the Pacific Coast, so far as fisheries are concerned. Even if it had, defendant's vessel could claim no privilege under it, as the only permission to take shelter in Canadian waters given by the proviso to art. 1 thereof is permission to enter "bays or harbours" and the place where they were seized was not shewn to be a bay or harbour. *The "Queen City"* v. *The King. The "Tillie M."* v. *The King. The "Sunrise"* v. *The King* (1931) S.C.R. 387; (1931) 3 D.L.R. 147; Affg. (1930) 43 B.C.R. 494.

3. Bankruptcy and Insolvency.

1. Security under Bank Act.]—The lien possessed by a bank under sec. 78 of the Bank Act, 1913, ch. 9, cannot be destroyed by provincial legislation. *In re Canadian Logging Company*, (1927) 1 W.W.R. 406; 8 C.B.R. 179.

2. Preferred claims.]—Sec. 51 of the Bankruptcy Act, as amended by 1921, cap. 17, sec. 30, does not apply to claims already secured by the debtor, especially if the security is given under the Bank Act. *Ibid.*

3. Rebuttable presumption.]—A debtor within three months before his assignment for the general benefit of his creditors, assigned a debt to one of his creditors without the intention of giving an unlawful preference. Under sec. 3 of the Fraudulent Preferences Act such an assignment is deemed to be void as a fraudulent preference. Under sec. 64 (2) of the Bankruptcy Act such an assignment "shall be presumed prima facie to have been made with the view of giving such a preference, and the presumption is rebuttable." Sec. 3 of the Fraudulent Preferences Act has been rendered inoperative by the overriding enactment of sec. 64 of the Bankruptcy Act. While the Bankruptcy Act does not abrogate a provincial act merely because the latter deals with preferential transactions, yet with respect to such transactions a provincial statute cannot be enforced if it provides that a certain result shall follow from circumstances which under the Dominion statute are followed by a different result. *Hoffar Ltd.* v. *Canadian Credit Men's Trust Association*, (1929) 40 B.C.R. 454; (1929) 2 D.L.R. 73, 106; (1929) 1 W.W.R. 557; 10 C.B.R. 369.

4. Naturalization and Aliens

1. Employment of Aliens—Japanese Treaty Act.]—The Oriental Orders in Council Validation Act (1921) of British Columbia is ultra vires the Province as infringing the principle of the Japanese Treaty Act, 1913 (Can.), cap. 27, that the subjects of the Emperor of Japan are to be in all that relates to their industries and callings in all respects on the same footing as the subjects or citizens of the most favoured nation. *Attorney-General for British Columbia* v. *Attorney-General for Canada et al.*, (1923) 4 D.L.R. 698; (1923) 3 W.W.R. 945; 93 L.J.P.C. 33; 130 L.T. 227; 40 T.L.R. 7; 8 Sol. Jo. 79; (1924) A.C. 203.

2. Crown Lands Act—License—Condition against employing Chinese or Japanese—Japanese Treaty Act.]—A clause

in a special timber license issued by the Government of British Columbia under sec. 50 of the Crown Lands Act that "This license is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith" is not void as conflicting with sec. 91 (25) of the B.N.A. Act, the provision coming within sec. 92 (5) and sec. 109, by which the Province is empowered to regulate the management of the public property in the Province, and the condition having been broken by the employment of Chinese, the holders of such timber license are not entitled to any renewal of the license. *Brooks-Bidlake and Whittall Ltd.* v. *Attorney-General of British Columbia*, (1923) A.C. 450; 92 L.J.P.C. 124; 128 L.T. 801; 67 Sol. Jo. 333; 39 T.L.R. 220; (1923) 2 D.L.R. 189; (1923) 1 W.W.R. 1150. Affg. (1922) 63 S.C.R. 466; 66 D.L.R. 475; (1922) 3 W.W.R. 9.

5. Criminal Law and Procedure.

1. Sunday observance.]—A municipal by-law prohibiting discharging of fire arms on Sunday within the municipal limits, purporting to be passed under subsec. 142 of sec. 54 of the Municipal Act (1914, cap. 52, and amendments) is held ultra vires of the municipality, being in effect legislation dealing with observance of the Lord's Day, and a conviction thereunder was quashed. *Rex* v. *Slowin*, (1923) 1 W.W.R. 252.

2. Destruction of bridge by Municipal Corporation — Civil wrong — Provincial jurisdiction.]—A municipal corporation had torn down a bridge which had become unsafe through neglect to repair. An indictment was preferred by a grand jury charging that under sec. 221 of the Criminal Code the municipality was guilty of committing a common nuisance in destroying the bridge and neglecting to restore it: —Held, that there was no unlawful act or omission to discharge a legal duty under sec. 221 of the Code. The offence (if any) charged according to sec. 223 of the Criminal Code is not a criminal offence but a civil wrong ab initio reserved to the jurisdiction of the Province by sec. 92 (14) of the British North America Act. *Rex.* v. *City of Victoria*, (1920) 28 B.C.R. 315; 52 D.L.R. 324; (1920) 2 W.W.R. 948; 33 C.C.C. 108.

3. Legal Professions Act—Champerty.] —Champerty is an offence under the criminal law of England introduced into British Columbia in 1858, and sec. 100 of the Legal Professions Act, R.S.B.C. 1924, (being sec. 97 of the Act of 1911) in so far as this section permits a barrister or solicitor to contract with his client for a share of the property which is the subject of litigation or of the proceeds thereof, as his fee, is ultra vires of the Legislature, as being an invasion of the field of criminal law occupied exclusively by the Federal Parliament. Such a contract, being champertous, is void. *In re Constitutional Questions Determination Act and In re Section 100 of the Legal Professions Act*, (1927) 39 B.C.R. 83; (1927) 4 D.L.R. 195; (1927) 2 W.W.R. 808; *Taylor* v. *Mackintosh*, (1924) 33 B.C.R. 383; (1924) 1 D.L.R. 877; (1924) 1 W.W.R. 859; 34 B.C.R. 56; (1924) 3 D.L.R. 926; (1924) 3 W.W.R. 97; 42 C.C.C. 327.

4. Summary Convictions Act.] — The Summary Convictions Act of the Province of British Columbia, 1915 (B.C.), cap. 59, only relates to punishment for offences against the provisions of the statutes of the Province, and is to be read as if the provisions to this end were expressly declared in some such statute, and reading secs. 91 and 92 of the B.N.A. Act together there is no doubt that the Act is within the competence of the Provincial Legislature. *Can. Pacific Wine Co. Ltd.* v. *Tuley*, (1921) 2 A.C. 417; 90 L.J.P.C. 233; 37 T.L.R. 944; 126 L.T. 79; 60 D.L.R. 520; (1921) 3 W.W.R. 49; 36 C.C.C. 104.

5. Habeas corpus—Appeal in criminal matter.]—An appeal from a refusal of a writ of habeas corpus arising out of a criminal matter, is a criminal appeal and falls within the Criminal Law assigned to the Dominion by sec. 91 (27) of the British North America Act. There is no right of appeal in such a case, as none is granted by the Criminal Code. *Rex* v. *McAdam*, (1925) 35 B.C.R. 168; (1925) 4 D.L.R. 33; (1925) 3 W.W.R. 257; 44 C.C.C. 155.

6. Sale of liquor to Indian.]—The sale of liquor to an Indian being an offence under the Indian Act, R.S.C. 1906, cap. 81, cannot be charged as an offence under a Provincial statute. *Rex* v. *Cooper*, (1925) 2 W.W.R. 778; 44 C.C.C. 314.

7. Opium and Narcotic Drug Act.]—The Opium and Narcotic Drug Act, 1923, is criminal and not licensing legislation and is therefore intra vires of the Dominion Parliament. *Rex* v. *Wakabayashi; Rex* v. *Lore Yip*, (1928) 39 B.C.R. 310; (1928) 3 D.L.R. 226; (1928) 1 W.W.R. 487; 49 C.C.C. 392.

8. Security Frauds Prevention Act—Provincial Legislature — Delegation of powers—Validity of exercise.]—The delegate of a Provincial Legislature can no more usurp indirectly the functions of the Parliament of Canada than can the Legislature itself, and it is the duty of the Courts to interfere to protect the subject from such an illegitimate exercise of powers founded upon oblique motives. *McGee* v. *Pooley*, (1931) 44 B.C.R. 338; (1931) 4 D.L.R. 475; (1931) 3 W.W.R. 65, 140.

9. Security Frauds Prevention Act—Whether ultra vires.] — Examination or questioning persons and the seizure of books of account and documents in alleged pursuance of "delegated authority" under sec. 10 of the Security Frauds Prevention Act will be enjoined as ultra vires and an unconstitutional application of the powers delegated to the representative of the Attorney-General, where the examination and inspection are being directly and primarily used as a method of criminal procedure to obtain evidence to support a prosecution on a criminal charge, which is exclusively within the jurisdiction of the Parliament of Canada under sec. 91 of the British North America Act. The said Act is ultra vires because it infringes on Criminal Law and procedure. *Ibid.*

See Mayland and Mercury Oils Ltd. v. *Lymburn and Frawley*, (1932) A.C. 318; 101 L.J.P.C. 89; 146 L.T. 458; 48 T.L.R. 231; (1932) 2 D.L.R. 6; (1932) 1 W.W.R. 578; 57 C.C.C. 311.

6. Taxation.

1. Intoxicating liquor.] — The imposition by sec. 55 of the Government Liquor Act, 1921, of a tax on any liquor not purchased from a vendor at a Government store is intra vires of the Provincial Legislature. *Little* v. *Attorney-General of British Columbia*, (1921) 30 B.C.R. 343; 60 D.L.R. 335; (1921) 3 W.W.R. 625; (1922) 31 B.C.R. 84; 65 D.L.R. 297; 37 C.C.C. 189; (1922) 2 W.W.R. 359.

2. Succession duty.]—The imposition of a succession duty upon the interest of a deceased person within the Province where he was domiciled is direct taxation within the Province and consequently within the powers of a Provincial Legislature. *Boyd* v. *Attorney-General for British Columbia*, (1917) 54 S.C.R. 532; 36 D.L.R. 266; (1917) 2 W.W.R. 242. Affg. (1916) 23 B.C.R. 77; 28 D.L.R. 193; 34 W.L.R. 811. *See* also *Cotton* v. *The King*, (1913) 83 L.J.P.C. 105; 110 L.T. 276; 30 T.L.R. 71; (1914) A.C. 176.

3. Succession Duty Act.]—The tax imposed by the Succession Duty Act is a direct one within the powers conferred upon the Province by the British North America Act and the Act is in terms effective to impose succession duty upon the estate of a deceased person within and without the Province. *In re Succession Duty Act and Inverarity, deceased*, (1924) 33 B.C.R. 318; (1924) 1 D.L.R. 1020; (1924) 1 W.W.R. 901.

4. Succession duty—Situs of shares in company—Direct taxation.] — The shares of a company incorporated under the Companies Act of British Columbia and having its head office and place of share registration within the Province are "properties situate within the Province" within the meaning of the Succession Duty Act, and taxation imposed under the said Act in respect of these shares is direct taxation and intra vires the Legislature of the Province. *In re Succession Duty Act: Untermyer Estate* v. *Attorney-General for British Columbia*, (1929) S.C.R. 84; (1929) 1 D.L.R. 315; Affg. (1928) 39 B.C.R. 533; (1928) 3 D.L.R. 311; (1928) 2 W.W.R. 209.

5. Export tax on timber.]—The tax imposed by the Forest Act on timber which is cut within and exported from the Province is an indirect tax and its imposition is therefore ultra vires of the Provincial Legislature. *Macdonald Murphy Lumber Company Limited* v. *Attorney-General of British Columbia*, (1929) 41 B.C.R. 473; (1929) 4 D.L.R. 954; (1929) 2 W.W.R. 529; (1930) A.C. 357; 99 L.J.P.C. 113; 143 L.T. 1; 46 T.L.R. 266; (1930) 2 D.L.R. 721; (1930) 1 W.W.R. 830.

6. Produce Marketing Act — Levy for expenses.]—Sec. 10, subsec. *(k)* of the Produce Marketing Act provides that the Committee of Direction shall have power for the purpose of defraying the expenses of operation to impose levies on any product marketed:—Held, that a levy authorized by said section is a tax and therefore invalid on the ground that it is an indirect taxation. *Lawson* v. *Interior Fruit Committee*, (1931) S.C.R. 357; (1931) 2 D.L.R. 193. Revg. (1930) 42 B.C.R. 493; (1930) 4 D.L.R. 1027; (1930) 2 W.W.R. 23. *Supra.*

7. Customs duties upon liquor imported by a Province.]—The provisions of

sec. 125 of the B.N.A. Act 1867 exempting the lands or property of a Province from taxation do not enable any Province to import into Canada goods for the purpose of carrying on a business or trade free from any customs duty chargeable on such goods. *Attorney-General for British Columbia* v. *Attorney-General for Canada*, (1923) 93 L.J.P.C. 129; 130 L.T. 257; 68 Sol. Jo. 58; 40 T.L.R. 4; (1923) 4 D.L.R. 669; (1923) 2 W.W.R. 1249; (1924) A.C. 222; (1923) 1 D.L.R. 223; 64 S.C.R. 377; 38 C.C.C. 283.

8. Transfer of shares and bonds — Stamp tax.]—Sec. 58 of the Special War Revenue Act, authorizing a stamp tax on the sale or transfer of stocks, bonds, etc., is intra vires and within the power of the Parliament of Canada to enact. *Rex* v. *Miller Court & Co.*, (1930) 3 D.L.R. 745.

9. Direct and indirect taxation.]—The imposts authorized by sec. 9 (g) of the Dairy Products Sales Adjustment Act, B.C. Stats. 1929, cap. 20, including the levies made to defray the expenses of said Act, are indirect taxes; the Act is therefore ultra vires of the Provincial Legislature. *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.*, (1931) 44 B.C.R. 508; (1931) 3 W.W.R. 384; (1932) 45 B.C.R. 191; (1932) 2 D.L.R. 277; (1932) 2 W.W.R. 41; 102 L.J.P.C. 17; 49 T.L.R. 104; 148 L.T. 300; (1932) 3 W.W.R. 639; (1933) A.C. 168; (1933) 1 D.L.R. 82.

10. Fuel oil tax—Direct or indirect tax.]—A Provincial tax tnat may be intra vires in respect of one person at the present time, may be declared ultra vires if it appears that looking at the matter prospectively it may be reasonably assumed that business conditions will make the tax indirect in the near future. The Fuel Oil Tax Act, 1925, cap. 71, is therefore ultra vires the Provincial Legislature. *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.*, (1927) A.C. 934; 96 L.J.P.C. 149; 137 L.T. 745; (1927) 3 W.W.R 460. Affg. (1927) S.C.R. 185; (1927) 2 D.L.R. 257. Affg. (1926) 37 B.C.R. 481; (1926) 3 W.W.R. 154. Affg. 36 B.C.R. 551; (1926) 1 W.W.R. 837.

7. Property and Civil Rights.

1. Federal regulation of insurance business.] — The Insurance Act (Can.) 1910, cap. 32 (secs. 4 and 70) prohibiting under penalty any person or corporation from engaging in insurance business unless it be done by or on behalf of a company of underwriters holding a license from the Minister, deprives private individuals of their liberty to carry on the business of insurance and is an interference with the civil rights of individuals and corporations, as well as an encroachment upon the legislative powers of provinces to confer such rights upon corporations beyond the provincial limits and, therefore, ultra vires of the Dominion Parliament. The general authority to make laws for the peace, order and good government of Canada, which the initial part of sec. 91 of the British North America Act confers, does not, unless the subject-matter of legislation falls within some of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in sec. 92 of the Act. The Dominion Parliament, in virtue of the power to regulate trade and commerce under sec. 91 (2) of the British North America Act, has jurisdiction to require a foreign company to take out a license from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. *Attorney-General for Canada* v. *Attorney-General of Alberta and Attorney-General of British Columbia*, (1916) 26 D.L.R. 288; 10 W.W.R. 405; 34 W.L.R. 192; (1916) 1 A.C. 588; 85 L.J.P.C. 124; 114 L.T. 772; 32 T.L.R. 339.

2. Banking — Trust company — Customers' deposits.]—It is within the power of the Provincial Legislature to incorporate companies for the purpose of carrying on that branch of the banking business which consists of accepting money on deposit, paying interest thereon, and allowing the customer to issue cheques against such deposit. *In re Dominion Trust Co. and U.S. Fidelity Claim*, (1918) 26 B.C.R. 339; (1918) 3 W.W.R. 1023.

3. Workmen's Compensation Act.]—The owners of a steamship which foundered within the territorial waters of the United States applied for an injunction to restrain the Workmen's Compensation Board constituted for the purpose of the administration of Part 1 of the Workmen's Compensation Act, from paying compensation to the dependents of seamen who were lost with the ship and who had been engaged while resident within British Columbia:—Held, that the provisions of the Workmen's Compensation Act whereby the compensation was payable were intra vires the Provincial Legislature; that they did not

derogate from the owners' right to limit any liability under sec. 503 of the Merchant Shipping Act, 1894 (Imp.); and were not inconsistent with the provisions of sec. 215 of the Canada Shipping Act (R.S.C. 1906) with regard to the duty of the owner of a Canadian foreign seagoing ship towards injured seamen. *Canadian Pacific Railway Co.* v. *Workmen's Compensation Board*, (1919) 88 L.J.P.C. 169; 121 L.T. 662; 36 T.L.R. 3; 48 D.L.R. 218; (1919) 3 W.W.R. 167; (1920) A.C. 184.

4. Vancouver Island Settlers' Rights Act, 1904—Esquimalt & Nanaimo Railway.]—Upon the passing by the Parliament of Canada of an Act of 1905, cap. 90, declaring the Esquimalt & Nanaimo Railway to be a work for the general advantage of Canada, the Legislature of British Columbia ceased to possess the authority theretofore vested in it under the British North America Act to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be a work for the general advantage of Canada, and to vest that title in another, but lands required by the railway company as a subsidy granted for the purpose of aiding in the construction of the railway and not held by the company as part of its railway, are not withdrawn from the legislative jurisdiction of the Province in relation to property and civil rights, *Esquimalt & Nanaimo Ry. Co.* v. *Wilson. Esquimalt & Nanaimo Ry. Co.* v. *Dunlop*, (1921) 91 L.J.P.C. 21; 126 L.T. 451; (1921) 61 D.L.R. 1; 28 C.R.C. 296; (1921) 3 W.W.R. 817; (1922) 1 A.C. 202.

5. Vancouver Island Settlers' Rights Act—Effect of disallowance.]—By sec. 56 of the B.N.A. Act a power of disallowance in respect of Dominion Acts is vested in the Queen in Council, and by sec. 90 the provisions of sec. 56 are, inter alia, made applicable to statutes passed by Provincial Legislatures, the Governor-General in Council being substituted as disallowing authority for the Queen in Council, and the period of two years mentioned in sec. 56 being reduced to one year. The words in the section "shall annul the act from and after the day of such signification" desclose with sufficient clearness an intention that at all events as to private rights completely constituted and founded upon transactions entirely past and closed, the disallowance of a Provincial statute was inoperative, and therefore where a patent to lands had issued under the Vancouver Island Settlers' Rights Act of 1904 and the amending Act of 1917, the subsequence disallowance of the Act of 1917 was inoperative in regard to the patent issued. *Esquimalt & Nanaimo Ry. Co.* v. *Wilson. Esquimalt & Nanaimo Ry. Co.* v. *Dunlop*, (1921) 91 L.J.P.C. 21; 126 L.T. 451; 61 D.L.R. 1; 28 C.R.C. 296; (1921) 3 W.W.R. 817; (1922) A.C. 202.

6. Crown Lands Act—License—Condition against employing Chinese or Japanese—Japanese Treaty Act.]—A clause in a special timber license issued by the Government of British Columbia under sec. 50 of the Crown Lands Act that "this license is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith" is not void as conflicting with sec. 91 (25) of the B.N.A. Act, the provision coming within sec. 92 (5) and sec. 109, by which the Province is empowered to regulate the management of the public property in the Province and the condition having been broken by the employment of Chinese the holders of such timber license are not entitled to any renewal of the license. *Brooks-Bidlake and Whittall Ltd.* v. *Attorney-General of British Columbia* (1923) A.C. 450; 92 L.J.P.C. 124; 128 L.T. 801; 67 Sol. Jo. 333; 39 T.L.R. 220; (1923) 2 D.L.R. 189; (1923) 1 W.W.R. 1150. Affg. (1922) 63 S.C.R. 466; 66 D.L.R. 475; (1922) 3 W.W.R. 9.

7. Fisheries Act.]—The imposition of a licensing system upon fish canneries or curing establishments in the manner attempted by ss. 7A and 18 of the Fisheries Act, 1914, is beyond the competency of the Dominion Parliament and accordingly those sections are ultra vires. *Rex* v. *Somerville Cannery Company Limited*, (1927) 39 B.C.R. 103; (1927) 4 D.L.R. 494; (1927) 3 W.W.R. 215; 49 C.C.C. 65. *In re Fisheries Act, 1914. Attorney-General for Canada* v. *Attorney-General for B.C.*, (1929) 99 L.J.P.C. 20; 142 L.T. 73; 46 T.L.R. 1; (1929) 3 W.W.R. 449; (1930) A.C. 111; (1930) 1 D.L.R. 194. Affg. (1928) S.C.R. 457; (1928) 4 D.L.R. 190.

8. Land Settlement and Development Act—Direct taxation.]—The Land Settlement and Development Act is intra vires of the Legislature of the Province of British Columbia. A tax imposed by way of penalty for non-compliance with the demands of the Board under sec. 53 of the said Act is direct taxation and imposition thereof is within the power of the Provincial Legislature. The Land Settlement Board created by the Legislature under the Land Settlement and Development Act is a department

of State in its real constitution, and cannot be sued in an action for tort in its official capacity. *Rattenbury* v. *Land Settlement Board,* (1929) S.C.R. 52; (1929) 1 D.L.R. 242. Affg. (1928) 39 B.C.R. 523; (1928) 3 D.L.R. 382; (1928) 2 W.W.R. 475.

9. Preservation of game — Indian lands.]—The fact that the Dominion Parliament has exclusive legislative authority over "Indians and lands reserved for Indians" does not prevent a provincial game protection Act which prohibits the killing of game out of season from being applied to the killing of game on an Indian reserve where the offender is a white man. *Rex* v. *McLeod,* (1930) 2 W.W.R. 37; 54 C.C.C. 107.

8. Matters of a Local or Private Nature.

1. Prohibition Act.]—The local Legislature has power to pass the British Columbia Prohibition Act (B.C. Stats. 1916, cap. 49), and may impose the penalty of imprisonment for breach of its provisions, and enact the necessary procedure to enforce the same. *Rex* v. *Dahlin,* (1919) 27 B.C.R. 564; 60 D.L.R. 604; 36 C.C.C. 223.

2. Government Liquor Act.]—The Government Liquor Act, 1921, appropriating solely to the Government the liquor trade of the Province is intra vires, being legislation in respect to a matter of "a merely local or private nature in the Province" within No. 16 of sec. 92 of the British North America Act, and supported by No. 13 of sec. 92, which gives the Province jurisdiction over "property and civil rights in the Province," and not being an interference with "the regulation of trade and commerce" within the meaning of the British North America Act as belonging to the Dominion. *In re Army and Navy Veterans in Canada. In re Government Liquor Act,* (1921) 30 B.C.R. 164; 61 D.L.R. 416; 36 C.C.C. 83; (1921) 3 W.W.R. 29.

3. Intoxicating liquor—War Measures Act Regulations and Prohibition Act.]—Paragraphs 5 and 11 of the regulations made and approved on the 11th of March, 1918, under the provisions of sec. 6 of the War Measures Act, 1914 (Can.), do not operate to abrogate, annul or supersede the provisions of sec. 28 of the British Columbia Prohibition Act. By reason of the explicit declaration of the supplementary character of the regulations in paragraph 13 thereof, the said regulations apply only to cases in respect to which the Province would have no jurisdiction to legislate. *In re British Columbia Prohibition Act and in re The War Measures Act, 1914,* (1918) 26 B.C.R. 137; 44 D.L.R. 584; 30 C.C.C. 332; (1919) 2 W.W.R. 27.

4. Prohibition Act.]—The British Columbia Prohibition Act as consolidated in 1920, cap. 72, for the suppression of the liquor traffic in that Province is within the powers of the Provincial Legislature, under sec. 92 (16) of the B.N.A. Act, its subject being a matter of merely a local nature within the meaning of the section, although in its enforcement it must necessarily interfere with the revenue of the Dominion and with business operations outside of the Province. *Canadian Pacific Wine Co., Ltd.* v. *Tuley,* (1921) 2 A.C. 417; 90 L.J.P.C. 233; 37 T.L.R. 944; 126 L.T. 79; 60 D.L.R. 520; (1921) 3 W.W.R. 49; 36 C.C.C. 104.

5. Prohibition Act—Trade with other Provinces—Interference with.]—Secs. 52 (a) and 52 (b) of the British Columbia Prohibition Act, 1919, prohibiting the taking of orders within the Province for the purchase of liquor outside of the Province and displaying within the Province circulars giving the names and addresses of persons dealing in liquor outside the Province, are intra vires of the Provincial Legislature as relating to matters of a merely local or private nature within the Province and not an interference with trade and commerce. *Rex* v. *Western Canada Liquor Co. Ltd.,* (1921) 29 B.C.R. 499; 60 D.L.R. 217; (1921) 2 W.W.R. 774; 36 C.C.C. 65.

See TRADE AND COMMERCE, *supra.*

6. Municipal bye-law prohibiting horse-racing.]—Sec. 54 (118) of the Municipal Act, which authorizes the council of a municipality to pass bye-laws for preventing or regulating horse-racing, is intra vires of the Provincial Legislature and a municipality may prohibit horse-racing within its limits. The provisions of the Criminal Code dealing with horse-racing apply where horse-racing is caried on but do not amount to legislation authorizing horse-racing, and do not interfere with the Provincial Legislature's right to prevent it. Dealing with the question on the footing that the Dominion has power to deal with horse-racing in the interest of the "peace, order and good government of Canada," in the absence of Dominion legislation the Province may legislate upon it as being a matter of "a merely local or private nature

in the Province." *Morley* v. *Oak Bay*, (1923) 31 B.C.R. 523; (1923) 1 D.L.R. 869; (1923) 1 W.W.R. 454.

7. Municipal license.]—Under sec. 92 (9) of the British North America Act in each Province the Legislature may exclusively make laws in relation to ship, saloon, tavern, auctioneer and other licenses. Under this authority there is power under the Provincial Legislature to pass the requisite legislation and in a municipality to pass the requisite bye-law to impose a license tax on a teacher of music. *Rex* v. *Burnett*, (1930) 43 B.C.R. 207; (1930) 3 W.W.R. 347; 54 C.C.C. 405.

9. Administration of Justice.

1. Public Inquiries Act—Appointment of Commissioner.]—The Public Inquiries Act (R.S.B.C. 1911, cap. 110) is within Provincial legislative powers under sec. 92 of the British North America Act. The appointment of a commissioner under the Public Inquiries Act to inquire into the unlawful importation of intoxicating liquor into the Province, by what means such importation was effected, the names of persons or corporations engaged in such importation, the disposition of the liquor so imported, and the unlawful sales of liquor within the Province is intra vires of the Lieutenant-Governor in Council. *In re Public Inquiries Act*, (1919) 27 B.C.R. 361; 48 D.L.R. 237; (1919) 3 W.W.R. 115.

2. Action affecting rights of Crown—Petition of right not applicable.]—In cases where procedure by petition of right is not applicable the Court can nevertheless direct that the Attorney-General as representing the interests of the Crown be added as a defendant to the proceedings if they concern the interests of the Crown. *Esquimalt & Nanaimo Ry. Co.* v. *Wilson*, (1919) 89 L.J.P.C. 27; 122 L.T. 563; 36 T.L.R. 49; (1920) A.C. 358.

3. Indian lands—Preservation of game.]—The fact that the Dominion Parliament has exclusive legislative authority over "Indians and lands reserved for Indians" does not prevent a Provincial Game Protection Act which prohibits the killing of game out of season from being applied to the killing of game on an Indian reserve where the offender is a white man. *Rex* v. *McLeod*, (1930) 2 W.W.R. 37; 54 C.C.C. 107.

B. English Law.

Crown lands — Adverse possession.]—By an Act of 9 Geo. III. (Imp.), cap. 16, the rights of the Crown in all lands and hereditaments are barred by adverse possession after the lapse of sixty years and that statutory law is in force in British Columbia by virtue of the ~~Law Declaratory Act~~ Statute of Limitations, R.S.B.C. 1924, cap. 1~~2~~4. *Attorney-General for Canada* v. *Gonzalves*, (1924) 34 B.C.R. 360; (1924) 4 D.L.R. 474; (1925) 1 W.W.R. 180.

See CONFLICT OF LAWS.
See STATUTES.

CONTEMPT OF COURT.

I. DISOBEDIENCE OF ORDER OF COURT, 238.
II. BREACH OF UNDERTAKING BY SOLICITOR, 239.
A. Jurisdiction, 239.
B. Nature of undertaking, 239.
C. Appeal, 239.
III. PRACTICE, 239.

I. DISOBEDIENCE OF ORDER OF COURT.

1. Order to register title in trust.]—An order of Court directed that in the event of the respondent selling his interest in certain property he was immediately to reinvest the proceeds of the sale in the purchase of a new home, to be registered in the names of the official guardian and the respondent in trust for his children until the youngest child shall attain the age of twenty-one years. The respondent sold his interest in the property and reinvested it in a new home, registered the new home in his own name and subsequently gave a mortgage of the property to secure a loan, which was duly registered:—Held, that the Court has jurisdiction to enforce the order and the contempt has been so gross and the disobedience so wilful that the respondent should be committed. *Midgley* v. *Midgley*, (1929) 41 B.C.R. 482; (1929) 3 W.W.R. 121.

2. Alimony—Attachment for non-payment.]—A decree for alimony and maintenance cannot be enforced by attachment or committal even though the respondent be in contempt. *Jenns* v. *Jenns*, (1921) 3 W.W.R. 226.

3. Order for payment of judgment—Disobedience.]—A debtor who has disobeyed an order of the Supreme Court directing him to pay the amount of the judgment by instalments cannot be committed for contempt, where the circumstances referred to in secs. 15 and 19 of the Arrest and Imprisonment for Debt Act do not exist. *Royal Bank of Canada* v. *McLennan*, (1918) 25 B.C.R. 183; 41 D.L.R. 27; (1918) 2 W.W.R. 225.

II. BREACH OF UNDERTAKING BY SOLICITOR.

A. Jurisdiction.

County Court.]—A County Court judge has power to hear and dispose of a motion for committal for contempt for breach of an undertaking and the Supreme Court has no jurisdiction to interfere. *In re Kean* v. *Bird*, (1927) 39 B.C.R. 169; (1927) 4 D.L.R. 561; (1927) 3 W.W.R. 369.

B. Nature of Undertaking.

On client's behalf.]—An appeal to the County Court from the magistrate's decision on proceedings taken under the Deserted Wives' Maintenance Act was dismissed on the undertaking of the solicitor acting for the husband, the judge's note being as follows: "Mr. B. for his client says that his client will pay the wife $20 a week in future, first payment today. Mr. Kean [the client] confirms his solicitor":—Held, that the undertaking was not the personal undertaking of the solicitor. Even if it could be held to amount in words to a personal undertaking it was inadvertently given, and equity looks to the spirit rather than to the form of the transaction. *Ibid.*

C. Appeal.

Civil matter.]—An alleged contempt in breach of an undertaking to pay money is a civil matter and an appeal lies from a committal order for such contempt. *Ibid.*

III. PRACTICE.

1. Specific Charge.]—Contempt of Court is a criminal offence and no one should be punished therefor unless the specific charge is distinctly stated and an opportunity of answering it given before sentence is passed. *Rex* v. *Evans*. *In re George Fisher*, (1915) 21 B.C.R. 322; 8 W.W.R. 444; 24 C.C.C. 125.

2. Person charged must be named.]—Contempt of Court being a criminal offence, the person charged must be specifically named in the application to commit, and an application to amend by adding the name of such person will be refused. *Granger* v. *Brydon-Jack*, (1918) 25 B.C.R. 526.

CONTRACT.

I. FORMATION OF OBLIGATION, 241.
- *A. In general*, 241.
- *B. Implied contract*, 241.
- *C. Intention to contract binding obligations*, 242.
- *D. Definiteness*, 243.
- *E. Offer and acceptance*, 243.

II. PARTIES, 244.
- *A. Privity of contract*, 244.
- *B. Contracts of agents*, 245.
- *C. Contracts of lunatics*, 245.

III. FORM, 245.

IV. STATUTE OF FRAUDS, 246.
- *A. In general*, 246.
- *B. Note or memorandum*, 246.
- *C. Signature by agent*, 247.
- *D. Parties*, 247.
- *E. Part performance*, 247.

V. CONSIDERATION, 248.

VI. CONSTRUCTION, 250.
- *A. In general*, 250.
- *B. Particular words and phrases*, 256.
- *C. Arbitration clauses*, 259.

VII. PAROL EVIDENCE, 259.

VIII. ASSIGNMENT, 262.
- *A. In general*, 262.
- *B. Novation*, 263.

IX. ILLEGALITY, 263.
- *A. Transactions prohibited by statute*, 263.
- *B. Transactions contrary to public policy*, 265.
  - 1. In general, 265.
  - 2. Champerty, 266.
  - 3. Restraint of trade, 267.
- *C. Recovery under illegal contract*, 269.

X. MISTAKE, 269.

XI. Duress and Undue Influence, 270.
XII. Impossibility, 271.
A. *In general*, 271.
B. *Implied condition*, 272.
XIII. Performance: Breach, 273.
A. *Time of performance*, 273.
B. *Conditions precedent*, 273.
C. *Repudiation*, 275.
D. *Breach by negligent performance*, 276.
E. *Effect of breach*, 277.
XIV. Discharge, 277.
A. *In general*, 277.
B. *Appropriation of payments*, 278.
C. *Accord and satisfaction*, 278.
XV. Constructive Contracts, 279.
XVI. Quantum Meruit, 281.

I. Formation of Obligation.

A. *In General.*

1. Acceptance of engineer's plans—Liability for payment.]—Where a board has adopted and used plans for a reclamation scheme submitted by an engineer and the object of the work has been effectively accomplished by their use, although there is no express contract therefor, the engineer is entitled to payment for his plans. *Sinclair* v. *Land Settlement Board*, (1925) 35 B.C.R. 434; (1925) 2 D.L.R. 1050.

2. Variation by legislative authority.]—Where a long term contract purports incidentally to fix certain rates and there is a board set up by legislative authority to control such rates, the terms of the contract must be taken to be subject to variance in accordance with the rulings of the board as to such rates. *Keremeos Land Co. Ltd.* v. *McTavish et al.*, (1925) 1 D.L.R. 897.

3. Mutuality.]—Where two officers who are also directors of a company have authority to enter into a contract on the company's behalf, and a draft agreement is prepared and approved by these officers which is afterwards substantially altered by the solicitors for the parties to the agreement, the company is not bound thereby in the absence of the officers' approval and execution on the company's behalf. *Carbon Coal and Clay Co.* v. *Nanoose-Wellington Collieries*, (1923) 1 D.L.R. 1160.

B. *Implied Contract.*

1. Sale of property subject to mortgage—Indemnity.]—If an estate is sold subject to a chattel mortgage, the purchaser taking it with knowledge of the mortgage is liable in equity to indemnify his vendor against the encumbrance. *Walker* v. *Woodyatt*, (1931) 44 B.C.R. 110; (1931) 3 D.L.R. 516; (1931) 2 W.W.R. 306.

2. Agreement to operate mill.]—Where the defendants agreed to supply, and the plaintiff agreed to purchase the total output of certain grades of lumber manufactured at the defendants' sawmill for a period of six months and after delivering lumber for three months the defendants closed their mill and delivery ceased:—Held, that it was an implied term of the contract that the defendants were to continue to operate the mill and supply lumber for a period of six months and the plaintiff was therefore entitled to damages for non-delivery of the lumber. *Morse* v. *Mac & Mac Cedar Co.*, (1918) 25 B.C.R. 417; (1918) 2 W.W.R. 205.

C. *Intention to Contract Binding Obligation.*

1. Promise of marriage.]—The plaintiff residing in England commenced correspondence with the defendant in British Columbia. The correspondence continued with a view of matrimony after the plaintiff had arrived in Canada. Photographs were exchanged and the defendant sent money to the plaintiff, after which the plaintiff arrived in British Columbia and met the defendant, who desired to defer the marriage until his house in course of construction would be completed. The plaintiff thereupon departed:—Held that there was a promise to marry which was accepted on the condition that the parties were suited, and either party could in the circumstances withdraw, and that therefore an action for breach of a promise to marry could not succeed. The plaintiff is, however, entitled to recover the expenses of her visit. *Munn* v. *Haahti*, (1924) 37 B.C.R. 71.

2. Intention of parties — Authority of stamp as signature.] — In construing a clause of a contract the Court will look at the whole contract, and give effect to the intention of the parties having regard to the object of the contract. A person may bind himself by putting his name to a document without putting it in his own handwriting, and if he uses a stamp it is as effective as if he had signed his name. *Chong Jan* v. *Quong Wo On*, (1922) 68 D.L.R. 65.

D. Definiteness.

1. Share in mineral claim — Express trust—Statute of Frauds.]—Where a person suggested to the owner of certain mineral rights that the latter should transfer same to the former, and said that "if anything came of it" he would give the owner "a share," nothing being said as to the time when such share would be given, and the owner accordingly transferred the rights without any other consideration, it was held that the transferor was owner of one-half of the property subject to the transferee being repaid certain outlay, and subject to an option for sale entered into by the transferee with a third person. Notwithstanding the agreement was only verbal and within the Statute of Frauds, and sec. 19 of the Mineral Act, it was enforced, as these enactments will not be allowed to be made instruments of fraud. Where a trust is so indefinite as to make its terms incapable of determination, a resulting trust of the whole property affected arises in favour of the creator of the trust, but in the present case the agreement to give "a share" was held in equity to mean one-half, on the rule in equity that "equality is equity." *Roberts* v. *Roberts*, (1923) 2 W.W.R. 137.

2. Loan on shares of company—Agreement to repurchase.]—Where on the facts the communications and negotiations between parties present all the "phenomena of agreement" the Court may draw the inference that a contract has been entered into. *Clarke* v. *Langs & Roddis Ltd.*, (1926) 37 B.C.R. 77.

E. Offer and Acceptance.

1. Alternative option.]—A letter of acceptance of an option to purchase certain patent rights setting forth a manner of payment not according to the terms of the option, and subsequent correspondence shewing that the vendors acquiesced in the variation expressed in the letter of acceptance, were held to constitute a valid contract between the parties. *Gauthier* v. *Letchford and Saltmarsh*, (1920) 28 B.C.R. 232; (1920) 2 W.W.R. 111.

2. Reasonable time.]—An offer by mail requires acceptance within a reasonable time having regard to the circumstances. *Shatford* v. *B. C. Wine Growers Ltd.*, (1927) 38 B.C.R. 419; (1927) 2 D.L.R. 759.

3. Uncertainty.]—Where a contract for the purchase and sale of land does not provide for a price beyond stating that it is to be a price to be mutually agreed upon in a particular manner, and the price has never been fixed accordingly there is no enforceable contract and specific performance cannot be granted. *Townley* v. *City of Vancouver*, (1924) 34 B.C.R. 201; (1924) 3 D.L.R. 948; (1924) 3 W.W.R. 78.

4. Acceptance subject to preparation of formal contract.]—When an agreement embracing all the particulars essential for finality and completeness, even though it may be desired to reduce it to shape by a solicitor, is such that these particulars must remain unchanged, it is not less coercive because of the technical formality which remains to be carried out. If the intention is, however, that what is agreed in the first instance shall be subject to the completion of a formal document there is no bargain while that condition remains unfulfilled. *McMillan* v. *Cameron*, (1917) 24 B.C.R. 176, 509; (1917) 2 W.W.R. 946; (1918) 1 W.W.R. 836.

5. Tenders — Deposit—Forfeiture.]—Where tenders are called for to be accompanied by a deposit the deposit cannot be forfeited unless the tender be accepted, and acceptance made, after negotiations and a call for a new tender, but not communicated to the tenderer is not valid. *Baynes & Horie* v. *Vancouver Board of School Trustees*, (1927) 2 D.L.R. 698.

II. PARTIES.

A. Privity of Contract.

1. Agreement under seal.]—A contract under seal is only binding upon those who sign it, and an agreement under seal for the purchase of land, which is executed by one of two purchasers, cannot, even on the principle of agency, bind the other who was not a party to it. *Smith* v. *Yorkshire Guarantee Co.*, (1916) 27 D.L.R. 412; 10 W.W.R. 475; 34 W.L.R. 410.

2. Undisclosed principal.] — Where a party contracts in his own name, an undisclosed principal cannot sue or be sued on such contract, if the terms are such as import that the person signing is the real and only principal, and recitals in several contracts making the other contracts part of that containing the recital can only bind the parties to the recital; they can give no rights against a third party and can confer

no rights upon a third party. *Van Hemelryck* v. *New Westminster Construction and Engineering Co.*, (1920) 29 B.C.R. 39; 55 D.L.R. 589; (1920) 3 W.W.R. 709.

B. Contracts of Agents.

Acceptance by agent.]—Acceptance of an offer to purchase binds a company, though ignorant of the employment, to pay to agents whom its general manager is authorized to employ to procure the very offer accepted, but not in like ignorance to pay commission on a contract of employment which the general manager has neither the actual authority to enter into nor to bind the company by estoppel. *Roray* v. *Nimpkish Lake Logging Co.*, (1919) 27 B.C.R. 64; 47 D.L.R. 395; (1919) 2 W.W.R. 105.

C. Contracts of Lunatics.

Insanity of contracting party—Knowledge of other party.]—It is a good defence to an action upon a contract if it can be shewn that the defendant was not of capacity to contract on account of insanity, and that the plaintiff knew it.

Quaere, as to how far the rule that it is necessary for a party attacking a document on the ground of insanity to prove knowledge of such insanity on the part of the person supporting it has been affected by *"Daily Telegraph" Newspaper Co.* v. *McLaughlin*, (1904) A.C. 776; 73 L.J.P.C. 95; 91 L.T. 233; 20 T.L.R. 674 and *Molyneux* v. *Natal Land Etc. Co.*, (1905) A.C. 555; 74 L.J.P.C. 108; 93 L.T. 59; 21 T.L.R. 645. *Moore* v. *Confederation Life Association* (1918) 25 B.C.R. 465; (1918) 2 W.W.R. 895.

III. Form.

Acceptance of common form.]—Where a principal signs a printed buying order for the purchase of wheat, in the usual form supplied by the broker, which provides that "It is further understood and agreed that on all marginal business the right is reserved to close the transactions when margins are running out without further notice," and on several subsequent transactions notices confirming orders containing these words are sent by the broker to the buyer, and prices having fallen, the principal must be taken to have assented to this condition, and it must be regarded as a term of the contract between him and the brokers whose decision when the principal's margins have run low that they are justified in selling him out, is reasonable on the facts as they exist, particularly when the broker is being bound to give reasonable notice before selling has in fact given reasonable notice. *Patterson* v. *Branson, Brown & Co., Ltd.*, (1930) 43 B.C.R. 26; (1930) 4 D.L.R. 222; (1930) 2 W.W.R. 236.

IV. Statute of Frauds.

A. In General.

1. Partnership intended to continue more than a year.] — Although, in the absence of a written contract, it was contemplated that a partnership would exist for more than one year the Statute of Frauds is not a bar to an action brought to dissolve the partnership and for an accounting. *Pearl Wong* v. *Ruby Hou*, (1928) 39 B.C.R. 425; (1928) 1 W.W.R. 480.

2. Trustee for syndicate—Oral agreement by.]—In an action for a declaration that the defendants are trustees, for the plaintiffs and other members of a syndicate formed by the plaintiffs and defendants, of certain mineral claims under an oral agreement entered into by the said parties, the defence of the Statute of Frauds and sec. 75 of the Mineral Act will not be given effect to, where to do so would be to permit the defendant to perpetrate a fraud both on the plaintiffs and on all other parties who became members of the syndicate agreement. *Devine* v. *Somerville*, (1931) 44 B.C.R. 502; (1931) 3 W.W.R. 264.

B. Note or Memorandum.

1. Correspondence.]—When the correspondence in negotiations for the sale of land contains all particulars essential to a final and complete contract, it is binding, although it appears from the correspondence that the parties desired an agreement in writing for the purpose of convenience. *Horsnail* v. *Shute*, (1919) 27 B.C.R. 474; (1920) 1 W.W.R. 21.

2. Novation.]—A written memorandum at the foot of an assignment of an agreement for the sale of land substituting the defendant in lieu of the original purchasers,

agreed to by the defendant but not signed by him, is not an acknowledgment in writing of the defendant's liability with respect to the novation as will satisfy the Statute of Frauds; nor can such writing be connected up with a quit claim deed of the defendant containing no reference to the memorandum. *Waddington* v. *Bush*, (1923) 32 B.C.R. 434; (1923) 3 D.L.R. 884.

C. Signature by Agent.

Stamp in lieu of signature.] — In an action upon a contract for the sale of goods where the jury failed to find as a fact whether the writing alleged to be a sufficient memorandum was made and signed by the party to be charged or his agent in that behalf, and the trial judge made the finding in favour of the plaintiff, it was held that there should be a new trial. *David Gibb & Co.* v. *Northern Construction Co.*, (1918) 26 B.C.R. 429; 43 D.L.R. 276; (1918) 3 W.W.R. 396.

D. Parties.

1. Sale of land—Description of parties.] —The description of one of the parties to a contract for an exchange of land as a "client of A" is insufficient to satisfy the Statute of Frauds. The rule is that the description must be such that there can be no reasonable doubt as to who the parties are, or, "such that their identity cannot be fairly disputed." Semble, the word "exchange" does not import more of ownership than the word "sell." *Newberry* v. *Brown*, (1915) 21 B.C.R. 556; 23 D.L.R. 627; 32 W.L.R. 118; 8 W.W.R. 1283.

2. Memorandum—Names of agents—Parties.]—In order that a contract for the sale of lands may comply with the Statute of Frauds the parties must be sufficiently identified in the note or memorandum. The name of the agent of one of the parties is only sufficient if the agent would have himself been liable on the contract. *Mahler* v. *Barker*, (1924) 34 B.C.R. 136; (1924) 3 D.L.R. 292; (1924) 2 W.W.R. 796.

E. Part Performance.

1. Mortgage—Extension of time.]—A mortgagee extended the time for payment of interest due by a mortgagor in consideration of an agreement to reserve a sufficient sum out of rentals of the mortgaged property to pay the interest during the term of the mortgage. The mortgagor subsequently directed the mortgagee's agent to discontinue the collection of rents. In the mortgagee's action against the tenants to recover rents: Held, that irrespective of the question of equitable assignment, the extending of the time for payment of principal, the benefit of which was accepted by the mortgagor upon his agreeing that the mortgage should be paid out of the rents, was a sufficient part performance of the agreement to take the case out of the Statute of Frauds. *Wardroper* v. *Stewart-Moore*, (1917) 25 B.C.R. 69.

2. Sale of land—Possession—Part performance.]—A vendor can obtain specific performance of a parol agreement for the sale of land where the agreement is complete in all its terms, and the purchaser has taken possession with the consent and knowledge of the vendor, and despite the fact that the vendor has not registered his title but offers .a conveyance from the registered owner. *Haddock* v. *Norgan*, (1924) 34 B.C.R. 74; (1924) 3 D.L.R. 644; (1924) 2 W.W.R. 943.

V. CONSIDERATION.

1. Subscription to charitable organization.]—A subscription promised towards the expense of erecting and equipping a building for the Young Men's Christian Association, in reliance of which liabilities are incurred and other subscriptions obtained, forms a sufficient consideration for a contract and is enforceable even before the completion of the building. *Vancouver City Young Men's Christian Association* v. *Rankin; Vancouver City Young Men's Christian Association* v. *Wood*, (1916) 22 B.C.R. 588; 27 D.L.R. 417; 34 W.L.R. 304, 686; 10 W.W.R. 482, 485.

2. Payment by delivery of mortgage.] —On issues raised, under a sale by plaintiff to defendant of shares in a yacht, as to whether a third mortgage on certain land taken for the amount of the consideration of the sale, was taken as security for the price payable by defendant, or taken as payment and satisfaction without any personal liability of defendant and to be realized only from the land when sold, the mortgage not containing the usual covenant for payment or any specified time for payment, but certain interest having been paid

in accordance with proviso in the mortgage; on conflicting evidence of the parties the trial Judge found in favour of plaintiff which judgment was reversed by the B. C. Court of Appeal. On appeal to the Supreme Court of Canada:—Held, that parol evidence was admissible to explain the contract; that under the circumstances the judgment of the trial Judge, necessarily depending on the credit to be given conflicting evidence, should not be disturbed; that the absence of a personal covenant for payment did not prevent the plaintiff from enforcing payment; that the payment of interest by the defendant was a fact strongly in favour of the plaintiff's claim; that the time for payment, not being specified, must be taken to be a reasonable time, and such time had elapsed before action brought. *Granger* v. *Brydon-Jack*, (1919) 2 W.W.R. 621; 58 S.C.R. 491; 46 D.L.R. 571.

3. Lodging and personal care.]—An aged woman was taken into the plaintiff's home and cared for until her death in consideration of a small payment per month and a promise to make a will leaving all her property to the plaintiff with certain small exceptions. The will was made in accordance with the promise, but was later revoked and another will made in favour of her sons:—Held, that the promise of deceased to make the will was an enforceable contract, the actual making of the first will, and certain statements by deceased to others as to her promise or intention and the circumstances of the case were sufficiently corroborative of the promise testified to by the plaintiff. It appearing from the evidence that the executors under the second will realized some $2,077, and disbursed the same with the exception of $800, the plaintiff was allowed to amend her pleadings and claim damages for breach of contract instead of specific performance. *Bligh* v. *Gallagher et al.*, (1921) 29 B.C.R. 241; 57 D.L.R. 76; (1921) 1 W.W.R. 662.

4. Contract to leave property by will—Possession.]—The plaintiff, an elderly person, entered into an oral agreement with the defendant's niece and the latter's husband to grant them possession of certain land during her lifetime and also to leave it to them by her will in consideration of personal services to be rendered to her during the remainder of her life. The defendants took possession of the land and built a house and made other improvements thereon. In an action by the plaintiff to recover possession of the land:—Held, that the defendants were entitled to retain possession, but a declaration that the defendants are entitled upon counterclaim to specific performance on the plaintiff's death would be premature and cannot be granted during the lifetime of the plaintiff. *Lyell* v. *Cormack et ux.*, (1928) 40 B.C.R. 345; (1928) 4 D.L.R. 902; (1928) 3 W.W.R. 284.

5. Correspondence course in Law—Validity.]—In the absence of fraud, one signing a contract for a correspondence course in law is liable on it, although such course is insufficient to qualify the student for the practice of law; the contract being otherwise valid cannot be attacked for want of sufficient consideration. *Rule* v. *Bradner*, (1923) 4 D.L.R. 81.

VI. Construction.

A. In General.

1. Associated Growers—Wrongful retaining of proceeds of sale.]—One W. who later transferred his shares in the defendant Company to the plaintiff and assigned to him the debts in question in this action contracted to market his crops through the defendant Company (Local) and the Associated Growers of British Columbia (Co-operative) and in pursuance thereof for the years 1923 and 1924 his crops were delivered to the Local and forwarded to the Co-operative for sale. The proceeds of sales after certain deductions, were returned to the Local, who made certain deductions before handing over the balance to the plaintiff. Sec. 11 of the contract provided that "there shall also be retained [by the Local] if deemed advisable, a reserve fund or funds necessary to meet contingencies or the better to enable the Local to finance or operate its business; there shall also be retained any moneys due the Local for material or supplies furnished or moneys advanced to the grower or any other indebtedness or any other obligation due the Local, the same to be first lien upon the balance due the grower by the Local." The defendant made three deductions objected to by the plaintiff, the first out of the 1924 crop to purchase shares in a storage company in which the defendant and its members had shares, the money being used to pay off a mortgage of the storage company which was a subsidiary company. The second item was reserved out of the 1923 crop as a basis of a contingent reserve fund, but this was done in 1924. The

proceeds of the third deduction being part of the proceeds of the 1924 crop, were used in the purchase of packing-houses. The defendants claimed that all three items could be charged under said sec. 11 of the contract:—Held, as to the first item, that there is no power to use the plaintiff's money to purchase shares in another company. As to the second item, that the defendant cannot take money in respect of the 1923 crop to provide for a reserve for those who might be members for later years. As to the third item it was the intention under the contract that provision should be made for packing-houses by the central organization and that the burden should not be placed on the Locals. The plaintiff is therefore entitled to recover on all three items. *Macdonald-Buchanan* v. *The Vernon Fruit Union*, (1926) 36 B.C.R. 307; (1926) 1 D.L.R. 748; (1926) 1 W.W.R. 413.

2. Lex loci contractus.]—The right to damages for breach of a contract is a substantive right and not a question of procedure governed by the lex fori. The damages recoverable in an action for breach of contract made abroad will be determined by the proper law of the contract, that is to say, the law which the parties intended should govern their rights and liabilities. The rate of damages to be recovered for breach of contract is a part of the right to which the injured party is entitled and is totally distinct from the remedy provided for enforcing it. *E. Clemens Horst and Daisy B. Horst* v. *Livesley et al.*, (1924) 34 B.C.R. 19; (1924) 2 D.L.R. 1002; (1924) 2 W.W.R. 443; (1924) S.C.R. 605; (1925) 1 D.L.R. 159.

3. Automobile agency — Division of commission.]—An agreement made between a dealer in automobiles and the maker thereof containing rules and conditions governing the dealer's relations and obligations to other dealers for the same maker, and providing that it should be construed as an agreement between the dealer signing it and all other said dealers "who have signed a similar agreement," held to bring about a contractual relationship between said dealers involving an obligation for breach of which an action lies by one dealer against another who signed such agreement, even though the agreement entered into by the defendant was executed some time before the execution of that entered into by the plaintiff. The maker must be regarded, under such circumstances, as the agent of the dealers to bring about privity of contract between them. The consideration moves, not from the maker to the dealer, but from one dealer to the other. *McCannell* v. *Mabee Maclaren Motors, Ltd.*, (1926) 36 B.C.R. 369; (1926) 1 W.W.R. 353; (1926) 1 D.L.R. 282.

4. Timber—Deficiency in quantity—Rescission.]—In an agreement for the transfer of a certain tract of timber the purchaser relied on the estimate of quantity made by a firm of timber cruisers employed by the vendor and submitted to him by the vendor's agent. It was afterwards established by a cruise made for the purchaser, that there was a shortage of approximately one-third as between the actual quantity of timber and said estimates of the cruisers: —Held, that even assuming there was no fraud, where there is such a substantial deficiency as one-third in the quantity of timber as represented in the original estimate the plaintiffs are entitled to recission. *Chuhei Fukukawa* v. *American Timber Holding Co.*, (1928) 40 B.C.R. 44; (1928) 3 D.L.R. 44; (1928) 2 W.W.R. 37.

5. Logging operations—Cost—Depreciation of plant.]—In taking accounts of the cost of production of logs under a contract whereby the contractor was to be paid by the owner for his services in superintending production a bonus to be estimated on the basis of a saving in net cost of production, it is proper for the Registrar to take into consideration depreciation on plant as a part of the cost. *Aickin* v. *J. H. Baxter & Co.*, (1928) 40 B.C.R. 176; (1928) 3 W.W.R. 142.

6. Variation of rates by legislative authority.]—Where a long term contract purports incidentally to fix certain rates, and there is a board set up by legislative authority to control such rates, the terms of the contract must be taken to be subject to variance in accordance with the rulings of the board as to such rates. *Keremeos Land Co. Ltd.* v. *McTavish et al.*, (1925) 1 D.L.R. 897.

7. Custom—Knowledge of.] — Two transportation companies entered into a contract whereby the one agreed to carry for the other "mail and express" upon certain terms. Feed (hay and oats) was offered for carriage under the contract "as express," but the carrier refused to accept delivery as "express" and carried it as "freight." It appeared from the evidence that both parties had been engaged in the transportation business within the area in question for some years and were familiar with the custom and usages established, and that it had always been the custom to carry

feed as freight. In an action for freight charges for the feed carried by the plaintiff for the defendant:—Held, that the parties knew that it was the custom to carry the feed (hay and oats) as "freight," and that this custom was in their minds when they entered into the contract. *British Columbia Express Company, Limited* v. *Inland Express Company, Limited, et al.*, (1915) 21 B.C.R. 178.

8. Local custom—Vessel in distress—Voluntary assistance.]—Every usage must have acquired such notoriety in the business or amongst the class of persons affected by it that any person in that business or amongst that class, who enters into a contract affected by the usage must be presumed to have intended that the usage should form part of the contract, and no one who is ignorant of an alleged usage can be bound by it if it appears to be unreasonable and he can only be assumed to have acquiesced in a reasonable usage:—Held, that the custom on the coast of British Columbia that all vessels engaged in the fishing industry afford to each other in the common interest, and for their joint benefit, voluntary and gratuitous assistance to crews and vessels in distress in any of the various accidents which are incidental to vessels of various descriptions engaged in that industry, was not sufficiently established to deprive the owner of a boat engaged in buying and marketing fish, who was ignorant of any such custom, from recovering salvage under sec. 759 of the Canada Shipping Act (R.S.C. 1906, cap. 113). *The "Freiya"* v. *The "R.S.,"* (1922) 65 D.L.R. 218; (1922) 1 W.W.R. 409; 21 Ex. C.R. 232.

9. Contract for payment by third party—Set off.]—By an agreement signed by the plaintiff and defendants and others it was agreed that the plaintiff was to be credited by a company (not a party) with certain salary and expenses "and said amount to be paid in cash"; and by another agreement the defendants undertook and agreed that the amount should be paid by the company forthwith. The company refused payment to the plaintiff, alleging that the plaintiff was indebted to it on other accounts exceeding the said amount. It was held that the plaintiff could recover against the defendant even though had the company been sued by the plaintiff it might have counter-claimed. *Camsusa* v. *Smith and Christie*, (1919) 2 W.W.R. 332.

10. Sale of lumber—Payment of shortage on affidavit of consignee.]—The plaintiffs ordered lumber from defendant, stipulating "that in consideration of our waiving a personal inspection that you guarantee the weights and grades to conform to" a specified standard, "also that you will pay promptly all claims for shortage of count, inferiority of grades, etc., upon our furnishing of affidavit from the consignees." Plaintiffs sold and shipped the lumber to dealers in Toronto, who alleged shortage and poor quality and made an affidavit setting out this claim. In an action for a certain refund it was held that under the contract the consignees were the dealers in Toronto, and, notwithstanding evidence submitted by the defendant that the lumber when it left its yard was good and according to contract, that in the absence of evidence of lack of obligation in procuring said affidavit the plaintiffs were entitled to judgment for the allowance claimed. *Provincial Lumber Company, Ltd.* v. *Tyee Lumber Co., Ltd.*, (1922) 2 W.W.R. 1330.

11. Inconsistent clauses—Surrounding circumstances.]—In construing a contract containing clauses which are inconsistent with one another it is proper to look at all the circumstances surrounding the contract; and the Court will be influenced not only by what the parties to the contract apparently by their actions sought to agree upon, but also by their after conduct, in determining what, after all, should be the basic principle upon which the contract should be construed, namely, the intention of the parties; and the Court will not adhere to any literal meaning that the words might import, which would do injustice, but will rather permit the meaning of the parties to be shown, in order that justice may be done between them. Verbal evidence to vary the terms of such a written contract should not be admitted, but the Court should deal with the contract as it finds it, coupled with the surrounding circumstances. *Vancouver Steamship Company, Limited* v. *Canadian Trading Company, Limited*, (1924) 1 W.W.R. 876.

12. Cannery company and fishermen.]—Where a contract is fundamentally a contract for the sale of goods, the nature of the contract is not changed to one of employment, because by its terms the seller submits to a measure of control by the buyer. *Salo* v. *Anglo-British Columbia Packing Co., Ltd.*, (1929) 40 B.C.R. 481; (1929) 1 D.L.R. 874; (1929) 1 W.W.R. 385.

13. Uncertainty.]—A contract for the sale of standing timber fixing the price "on

a basis of 50 cents per thousand stumpage net" but making no provision for the method by which or the persons by whom measurement is to be made is not enforceable by specific performance. *McMillan* v. *Cameron*, (1918) 24 B.C.R. 176, 509; (1917) 2 W.W.R. 946; (1918) 1 W.W.R. 836.

14. Indemnity for injury to workmen.]—The appellant having failed in its supply of what it had contracted for, one of the men was sent to get it from the respondent's warehouse. He met with an accident in doing so for which he had recourse against the respondent and rightfully recovered damages. The Court held that the respondent was entitled to be indemnified by the appellant under a clause in an agreement between the parties as follows: "That the S.S. Co. shall hold the Stevedoring Company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced within this agreement." The workman at the time he was injured was performing labour embraced in the agreement. *Grand Trunk Pacific Coast Steamship Co.* v. *Victoria-Vancouver Stevedoring Co.*, (1918) 57 S.C.R. 124; 43 D.L.R. 231; (1918) 3 W.W.R. 450. Affg. (1917) 25 B.C.R. 6; 38 D.L.R. 468.

15. Ambiguity.]—A contract being ambiguous in its terms, and a construction having been placed upon it by the conduct and language of the parties, that construction will be accepted by the Court as the true one. *Meadow Creek Lumber Co.* v. *Adolph Lumber Co.*, (1919) 58 S.C.R. 306; (1919) 1 W.W.R. 823; 45 D.L.R. 579.

16. Company — Shares — Interest on unpaid balance.]—If the memorandum of association of a company gives the directors power to fix a rate of interest on the balance unpaid on shares, a shareholder whose certificate provides that he holds the shares subject to the memorandum and articles of association is liable for such interest. *Canada West Loan Co. Ltd.* v. *Virtue*, (1920) 29 B.C.R. 76; (1921) 1 W.W.R. 730.

17. Timber cruiser—Payment for services from profits—Net interest.]—Under a certain agreement the plaintiff was to locate and cruise certain timber limits for defendants, and to receive therefor certain money considerations for salary, expenses and hire of boat, and in addition a three-tenths net interest in each timber limit so cruised and accepted by the defendants, and by a further provision the defendants were to pay the carrying charges for preserving the licenses issued for the limits and the plaintiff was to receive his interest free from these charges. The Court held that the defendants' contention that they were to advance these moneys and when sales were made the moneys advanced were to be deducted before plaintiff received his three-tenths share, could not be upheld and that the plaintiff held a three-tenths interest in the limits free from all carrying charges. *McKinnon* v. *Coast Timber & Trading Co. Ltd.*, (1921) 61 D.L.R. 128.

18. Bankers—Deposit of borrowed moneys—Agreement—Approval of bank.]—Where a customer of a bank, having hypothecated to the bank its entire product and output as security for advances made, and being in need of more money, borrows from another company a sum of money which is deposited in the bank and becomes subject to the usual exigencies of business between the bank and its client, the bank, although in no way a party to the borrowing, having knowledge of it and having given its approval, and for a certain period having honoured the cheques to the borrower in payments on the loan in accordance with the agreement, the approval of the bank is a specific undertaking to see that the payments are made in accordance with the terms of the agreement and an assignee of such agreement may enforce such undertaking. *Standard Bank* v. *Finucane*, (1921) 62 S.C.R. 110; 59 D.L.R. 465; (1921) 3 W.W.R. 314; Affg. 29 B.C.R. 251; 57 D.L.R. 132.

B. Particular Words and Phrases.

1. "Quantity of timber."]—The plaintiffs purchased timber and timber licenses from the defendants on a logging basis, a paragraph of the contract providing that the plaintiffs should log and scale a certain quantity in each year for eight years, the paragraph then reciting "in the event of the purchasers not having carried away and scaled the whole of the said trees and timber before the expiration of the eight years the purchasers shall pay to the vendor at the expiration of the eight years the balance of the purchase price based upon the quantity of timber on the unlogged licenses or portions thereof as shewn on the cruise of the said timber licenses made by one Rankine," etc. At the expiration of the eight years large sections still remained unlogged:—Held, that in construing the

words "quantity of timber on the unlogged licenses or portions thereof" the question of whether a profit can be made in logging said timber cannot be considered but the expression "quantity of timber" is qualified in the contract by the words "as shewn on the cruise of the said timber licenses made by one Rankine," the report accompanying which settles the size and length of trees to be cruised. *Wood & English* v. *Nimpkish Lake Logging Co., Ltd. et al.*, (1926) 36 B.C.R. 237; ~~(1927) 3 D.L.R. 920.~~

2. "Usual and current trade discount."]—The plaintiffs, proprietors of a gas station, entered into an agreement with the defendant to purchase from it exclusively for three years, gasoline, distillate and other petroleum products, in consideration for which the defendant paid the plaintiffs $1,500 in cash and agreed to furnish the petroleum products at the same current market price as furnished to the trade generally, and in addition to the usual and current trade discount allowed to dealers of the Company, an additional sum of one cent per gallon of gasoline sold. At the time the contract was entered into the current trade discount was four cents per gallon, but shortly afterwards the defendant Company entered into contracts with other dealers who agreed to purchase from them exclusively whereby they allowed them the usual discount of four cents and an additional discount of two cents per gallon. The plaintiffs brought this action for specific performance, claiming that by virtue of this the current discount was raised to six cents per gallon:—Held, that the Company may enter into special contracts with retailers who agree to buy from it exclusively as to the discount to be allowed and this does not affect the "usual and current trade discount allowed to dealers." *Jackson & Jackson* v. *Shell Oil Company of British Columbia, Limited*, (1931) 43 B.C.R. 449; (1931) 1 W.W.R. 477.

3. "And"—"So."]—Where the literal meaning of a contract leads to no inconsistency, absurdity or injustice, and the text is unambiguous and grammatically correct, the word "and" cannot be read as "so." *Ritchie* v. *Webster*, (1917) 2 W.W.R. 1124; 35 D.L.R. 373.

4. "Until otherwise advised"—"Or"—"And."]—A promise by the principals to pay to a bank, the assignee of the contractor, the money due under a building contract "until otherwise advised" does not estop them from setting up a term in their contract giving them the right to discharge from the moneys still in their hands any indebtedness for the work on the part of the contractor. The words "until otherwise advised" have a well-defined meaning in legal parlance, which is, in other words, "until we see reason to do otherwise." In an assignment of "all moneys due or accruing due," the word "or" should be read "and." *Ledingham & Cooper* v. *Merchants Bank of Canada*, (1917) 24 B.C.R. 207; (1917) 2 W.W.R. 1016; 35 D.L.R. 191.

5. Ejusdem generis.]—A contract by the defendant to sell and deliver salmon of the 1917 run, packed in tins, contained a provision relieving against default in delivery arising from "the packing being interfered with or stopped or falling short through the failure of fishing or through strikes or lockouts of fishermen or workmen or from any cause not under the control of the sellers." The tins used proved defective and before a proper supply could be obtained the run of salmon ceased and the defendant was unable to make delivery:—Held, that the ejusdem generis rule applied and the defendant was liable for breach of contract. *Crispin & Co.* v. *Evans, Coleman & Evans Ltd.*, (1923) 32 B.C.R. 132; (1923) 3 D.L.R. 1190; (1923) 2 W.W.R. 616 and 1050. Affg. (1922) 31 B.C.R. 328; 68 D.L.R. 623; (1922) 3 W.W.R. 264.

6. Forest Act—Fire permit—"Warning"—Condition.]—A clause inserted at the end of a permit to set out fire issued under the Forest Act, 1912, as follows: "Warning: The permittee is responsible for all damage and for all fire-fighting costs resulting from fire set out under authority of the permit," is not to be interpreted as a condition, provision, restriction or regulation within sec. 109 of the Act, and is not to be construed as a contract between the Crown and permittee. *Attorney-General of British Columbia* v. *Robertson & Partners, Ltd.*, (1924) 33 B.C.R. 325; (1924) 1 D.L.R. 1090; (1924) 1 W.W.R. 1155.

7. "Balance to be arranged."]—Where an option for the purchase of land provides for the purchase price, with the payment of so much down and "balance to be arranged," specific performance cannot be granted on the ground of uncertainty." *McSorley* v. *Murphy*, (1928) 40 B.C.R. 403; (1928) 4 D.L.R. 790; (1928) 3 W.W.R. 589; (1929) S.C.R. 542; (1929) 4 D.L.R. 247.

8. Brokers—Agreement to share commission—"Split."]—The defendant, an investment broker, was employed to bring about the sale of a lithographing business

and induced the plaintiff to assist him in a sale upon a verbal agreement to "split" the profits. The plaintiff introduced a buyer who eventually purchased the property. In an action for one-half of the commission on the sale:—Held that this was a joint venture in which the plaintiff performed the services required of him under the agreement; that the word "split" meant, without language to qualify it, "giving one-half," and that the plaintiff was entitled to one-half of the commission. *James* v. *Ferris*, (1931) 44 B.C.R. 522; (1932) 1 D.L.R. 472; (1932) 1 W.W.R. 250.

9. Utility company—Sale of undertaking—Definition of assets.]—In a contract giving a municipal corporation the right to purchase the "undertaking, property rights and privileges" of a public utility company at a price to be fixed by arbitration, the arbitrators should assess the price according to the value of the whole undertaking and not merely the value of the physical assets of the vendor company. *Corporation of the City of Cumberland* v. *Cumberland Electric Light Co. Ltd.*, (1931) 43 B.C.R. 525; (1931) 3 D.L.R. 69; (1931) 2 W.W.R. 377. Affd. (1931) S.C.R. 717; (1931) 4 D.L.R. 459.

C. Arbitration Clauses.

Effect of Repudiation.]—A contract for the purchase of certain timber contained an arbitration clause that any dispute as to the interpretation of the contract should be settled by arbitration. The purchaser, after inspecting the timber, repudiated the whole contract. Upon the vendor bringing action for specific performance, the defendant moved for a stay of proceedings on the ground that they should proceed under the arbitration clause:—Held, that as the defence goes to the root of the contract, the arbitration clause does not apply, and the application should be dismissed. *McIntosh* v. *Layfield et al.*, (1919) 26 B.C.R. 574; (1919) 1 W.W.R. 590.

VII. Parol Evidence.

1. To vary written instrument.]—The defendant agreed to supply and the plaintiffs agreed to purchase the total output of certain grades of lumber manufactured at the defendant's mill, estimated at from 300,000 to 500,000 board-measure per month, for a period of six months. Lumber was delivered, for which payment was duly made, for slightly over three months, when the mill shut down and deliveries ceased. The defendant Company then sold its plant, and no more lumber was supplied under the contract. In an action for damages for breach of contract:—Held, that it was an implied term of the contract that the defendant would continue to operate the mill and supply the lumber for a period of six months, and that the plaintiffs were entitled to damages estimated on the difference between the price fixed by the contract and the market price at the time of the failure to deliver the lumber, and from the terms of the contract and the deliveries made, the plaintiffs were entitled to this difference on 750,000 feet. Held, further, than an alleged oral agreement that the plaintiffs would, as part of the consideration for the defendant's promise to supply the lumber, finance the defendant in connection with the contract, was inadmissible in evidence. *Morse et al.* v. *Mac & Mac Cedar Company*, (1918) 25 B.C.R. 417; (1918) 2 W.W.R. 205.

2. Executed contract.]—In an action for repayment of money due on a written contract, the fact that it is necessary for the plaintiff to shew by oral evidence that the contract had been carried out does not entitle the defendant to submit evidence to vary or contradict the contract. *Alexander* v. *Letvinoff*, (1918) 26 B.C.R. 324; (1919) 2 W.W.R. 808.

3. Stranger to contract.]—In the case of ownership of a motor-car purchased under a conditional sale agreement, as between the purchaser and a stranger to the contract the real facts may be shewn in evidence although contradicting the terms of the agreement. *Canary* v. *Cohn*, (1925) 35 B.C.R. 478; (1925) 3 D.L.R. 223; (1925) 2 W.W.R. 563.

4. Agreement collateral to agreement in writing.]—Evidence of an alleged oral agreement collateral to and part of a written agreement cannot be given where such written agreement was not to be performed within a year and should therefore have been wholly in writing. *Ridley* v. *Barclay*, (1928) 40 B.C.R. 244; (1928) 4 D.L.R. 79; (1928) 3 W.W.R. 62.

5. Demand note—Agreement for extension — Concurrent collateral security.]—The fact that the lender suing upon demand notes had taken a deed absolute in form as security for the payment of the debt, will support an order giving unconditional leave to defend, so that defendant's rights in

respect of the mortgage may be tried out in the one action, where his affidavit sets up a contemporaneous oral agreement that he should have a period of time not yet expired within which to make payment. *Auld* v. *Taylor*, (1915) 21 B.C.R. 192; 21 D.L.R. 577; 8 W.W.R. 552.

6. Equitable mortgage.]—A legal mortgagee cannot prove by parol evidence that he is entitled to an additional equitable mortgage on the same property. *British Columbia Trust Corporation* v. *Aickin et al.*, (1916) 22 B.C.R. 417; 27 D.L.R. 725; 34 W.L.R. 303.

7. Ambiguity.]—In order to help the Court in the interpretation of an ambiguously written contract, extrinsic evidence may be given of the surrounding circumstances under which it was entered into. *Kidston* v. *Stirling & Pitcairn Ltd.*, (1920) 28 B.C.R. 306; 53 D.L.R. 29; (1920) 3 W.W.R. 365; 61 S.C.R. 193; 55 D.L.R. 366; (1921) 1 W.W.R. 162.

8. Written contract—Parol evidence of collateral agreement.]—Where the owners of shares in a company pledged them for a loan in the terms of a written agreement whereby it was agreed that the principal and interest of the loan should be paid on a certain date, that time was to be considered of the essence of the agreement, and that if principal and interest were not paid on the date specified, the shares, after due notice of default, should become the property of the lenders, evidence of an independent collateral agreement for repayment of the loan solely out of the dividends and profits accruing from the shares is not admissible, as it is directly contrary to the covenants contained in the written agreement. *McLean* v. *Johnston*, (1923) 32 B.C.R. 495; (1923) 4 D.L.R. 178; (1923) 3 W.W.R. 913.

9. Varying written instrument.]—Where there is no allegation of mutual mistake and no claim for rectification, extrinsic evidence is not admissible to vary or contradict a written instrument. Where therefore a bill of sale is given partly in consideration of the assumption of certain specified debts, no evidence is admissible to shew that one of the debts specified was not meant to be included. *Lake of the Woods Milling Co.* v. *Vincent*, (1928) 2 D.L.R. 145.

10. Usage—Railway contract—Meaning of words.]—Usage, where it is established, may annex an unexpressed incident to a written contract, but it must be reasonably certain and so notorious and so generally acquiesced in that it may be presumed to form an ingredient of the contract. The evidence must be sufficient to satisfy the Court that the alleged usage is "so all pervading and so reasonable and so well known that everybody doing business" (of the nature in question) "must be assumed to know" and to contract subject to it. *Georgia Construction Co.* v. *Pacific Great Eastern Railway Co.*, (1929) S.C.R. 630; (1929) 4 D.L.R. 161. Revg. (1928) 40 B.C.R. 290; (1929) 1 D.L.R. 77; (1928) 3 W.W.R. 466; 35 C.R.C. 204.

See B.C. Express Co., Ltd. v. *Inland Express Co., Ltd.*, (1915) 21 B.C.R. 178.

11. Custom and usage.] — Evidence is not admissible to prove custom where the alleged custom conflicts with statutes or regulations. *B.W.B. Navigation Co.* v. *The "Kiltuish,"* (1922) 31 B.C.R. 319; (1922) 2 W.W.R. 959; 67 D.L.R. 525; 21 Ex. C.R. 398.

See also *The "Freiya"* v. *The "R.S.,"* (1922) 65 D.L.R. 218; (1922) 1 W.W.R. 409; 21 Ex. C.R. 232.

12. Commercial or trade terms—Usage.]—Trade usage or custom is proved first by alleging the custom, followed by particulars of it. Trade usage is a question the effect of which might alter the meaning of a document, and the evidence concerning such a usage should be narrowly watched. Extrinsic evidence of the trade meaning of the phrase "handle cash basis," contained in a contract relating to the sale of goods on commission, is not admissible, failing a proper foundation therefor. *Trenwith Ltd.* v. *The Jarvis Electric Co. Ltd.*, (1929) 41 B.C.R. 328; (1929) 4 D.L.R. 400; (1929) 2 W.W.R. 489.

See EVIDENCE.

VIII. ASSIGNMENT.

A. In General.

1. Principal and assignee.]—A promise by the principals to pay to a bank, the assignee of the contractor, the money due under a building contract "until otherwise advised" does not estop them from setting up a term in their contract giving them the right to discharge from the moneys still in their hands any indebtedness for the work on the part of the contractor. The words "until otherwise advised" have a well-defined meaning in legal parlance, which is, in other words, "until we see reason to do

otherwise." In an assignment of "all moneys due or accruing due" the word "or" should be read "and." *Ledingham & Cooper* v. *Merchants Bank of Canada,* (1917) 24 B.C.R. 207; (1917) 2 W.W.R. 1016; 35 D.L.R. 191.

2. Capacity of assignee.] — Where a defendant purchased a lease of a hotel with the furniture and fixtures thereof, paying a portion of the consideration in cash, and giving a chattel mortgage upon the contents for the balance of the purchase price, a part of the consideration being the assignment of a beer license attached to the property, and the defendant entered into possession and afterwards attempted to repudiate the bargain on the ground that he was not qualified to hold a beer license, it was held that the plaintiffs not being aware that the defendant was not so qualified, and having done all in their power to transfer the license to him, are entitled to enforce the contract. *Engleblom* v. *Blakeman,* (1930) 42 B.C.R. 259; (1930) 2 D.L.R. 824; (1930) 1 W.W.R. 565. Affg. (1929) 41 B.C.R. 456; (1929) 4 D.L.R. 377.

B. Novation.

Purchase of land.]—The defendant purchased a property under agreement for sale and after paying four instalments of the purchase price with interest assigned the agreement to M., who covenanted to pay the remaining instalments with interest and entered into possession and paid interest, water rates and insurance for a period, after which he made no further payments and gave the vendor an order to collect the rents, the vendor going into possession and exercising rights of ownership. The defendant after assigning the property immediately advised the vendor of the assignment and there was no further dealing between the vendor and the defendant until the commencement of the action five years later: —Held, that the vendor had dealt with the property as his own, having taken possession and exercised other acts of ownership and that M. had been accepted as debtor in place of the defendant and a novation was established. *Hoag* v. *Kloepfer,* (1918) 26 B.C.R. 181; (1918) 3 W.W.R. 633.

IX. Illegality.

A. Transactions Prohibited by Statute.

1. Member of Parliament—Beneficial interest in transaction with Government.] —No one engaged in public business is allowed to have a beneficial interest which may conflict with his duty or which might unduly influence him in performing that duty. A member of the Dominion Parliament who brought about the sale or transfer of a contract and subsidy authorized by statute for building a dry dock, it being his duty under agreement with the vendor to use his influence with the minister in charge to secure the Government's consent which was necessary to complete the sale, is not entitled to a commission for his services, his agreement with the vendor being void at common law on the ground of public policy. *Clements* v. *Coughlan: Anderson, Third Party,* (1924) 34 B.C.R. 401.

2. Performance necessitating breach of law—Consideration.]—The right to operate motor vehicles for the public carriage of passengers under a certificate of approval of schedule under the Highway Act is personal to the owner or person in charge of the motor vehicle, and is not assignable and a promise to pay for such an alleged right is not founded upon a legal consideration, as the promissor could not lawfully carry on the public carriage of passengers without obtaining for himself such a certificate. *McLean-Butorac Motors* v. *Campbell,* (1930) 3 W.W.R. 39.

3. Lord's Day Act.]—A contract made on Sunday for the hiring of a person as manager of a farm is a "transaction in connection with the ordinary calling" of a farmer and so within the prohibition of the Lord's Day Act. *Lister* v. *Burns & Co. Ltd.,* (1931) 43 B.C.R. 468; (1931) 3 D.L.R. 105; 55 C.C.C. 197.

4. Purchase of shares on margin — Legality of.]—A contract for the purchase of shares on margin, where the purchaser is bound to pay for the shares and the seller is bound to deliver, is not illegal as a gambling transaction. *Aikman* v. *Burdick Bros.,* (1923) 33 B.C.R. 23; (1923) 4 D.L.R. 852; (1923) 3 W.W.R. 785.

5. Gambling machine — Sale of.] — Where a player, upon payment of a sum of money, selects by chance one of a number of problems to be solved, the successful solution depending upon his own skill to result in his winning a prize, the use of the device by means of which his selection is made is not a violation of the Criminal Code. As the only element of chance alleged is involved in selecting the game to be played, the contract for the sale of the device is not

illegal as being in violation of the Criminal Code, sec. 236. *D'Orio* v. *Leigh & Cuthbertson Ltd.*, (1929) 41 B.C.R. 153; (1929) 2 W.W.R. 171.

B. Transactions Contrary to Public Policy.

1. In General.

1. Promise of marriage made before divorce.]—On the grounds of public policy a Court will not grant damages for breach of a promise to marry where such promise is contingent on the obtaining of a divorce. *Caulfield* v. *Arnold* (*No. 2*), (1924) 34 B.C.R. 404; (1925) 1 D.L.R. 295; (1925) 1 W.W.R. 664.

2. Payment to avoid prosecution—Duress.]—Where a plaintiff after being in the employment of the defendant, and having during a number of years misappropriated money of the defendants to her own use, was called into the defendants' office and questioned as to her fault by her employers and a solicitor, and under pressure was induced to give a cheque, it was held that in the circumstances there was no bargain to stifle a criminal prosecution, the whole setting surrounding the interview going no further than to create in her mind the impression that if she did not settle she would be prosecuted, which does not constitute duress. *Saint* v. *C. A. Welsh, Limited*, (1925) 35 B.C.R. 220.

3. Ex turpi causa non oritur actio.]—A contract whereby an informer agrees to lay an information charging another person with an offence and give evidence against him on his trial, in consideration of payment of an amount based upon and in proportion to the length of sentence imposed upon the alleged offender upon conviction secured as a result of the informer's evidence, is a direct and inevitable incentive to perjury and other infamous conduct, and it is not in the public interest to countenance a transaction so dangerous to the administration of criminal justice. *Symington* v. *Reifel*, (1930) 43 B.C.R. 172, 388; (1931) 1 D.L.R. 935; (1931) 1 W.W.R. 410.

4. Bail in foreign country—Contract of indemnity.]—Where a contract of indemnity against loss with respect to bail given in proceedings in a Court of a foreign country is lawful under the law of that country, the contract and the security given in implement of it can be enforced in Canada, although the contract was executed in Canada and the security is a mortgage on lands in Canada. *The National Surety Co.* v. *Larsen*, (1929) 42 B.C.R. 1; (1929) 4 D.L.R. 918; (1929) 3 W.W.R. 299.

2. Champerty.

1. Legal Professions Act.]—A contract which provides that a barrister or solicitor is to receive a portion of the proceeds of the subject-matter of the action or suit in which he is retained is champertous and void. *Taylor* v. *Mackintosh*, (1924) 33 B.C.R. 383; (1924) 1 D.L.R. 877; (1924) 1 W.W.R. 859: 34 B.C.R. 56; (1924) 3 D.L.R. 926; (1924) 3 W.W.R. 97; 42 C.C.C. 327. *In re Constitutional Questions Determination Act. In re sec. 100 of the Legal Professions Act*, (1927) 39 B.C.R. 83; (1927) 4 D.L.R. 195; (1927) 2 W.W.R. 808.

2. Assignment of right of action to company without assets.]—A bankrupt's trustee declined to sue on an alleged oral agreement by the vendor to pay the bankrupt a commission in the event of the sale of certain timber licenses, as he did not wish to be responsible for costs in the event of failure of the action. With the consent of the inspectors, he assigned the claim to the plaintiff Company the consideration being the Company's note for $250 (the claim for commission being $16,000). The plaintiff company had no assets and prior to the action the bankrupt's wife acquired all but the odd qualifying shares in the Company for the consideration of $1: Held, that the assignment was either a genuine or a collusive transaction. If genuine it is illegal and void on the ground that there was in reality a champertous bargain as the consideration was a promise to pay which all parties knew could only be made good in the event of a substantial recovery on the claim, there being no assets. On the other hand a sale to a bubble company, without capital, is not a sale which the statute authorizes the trustees to make, even with the consent of the inspectors, as it is only in the event of recovery by the Company that the creditors would receive even a fraction of the amount recovered whereas they should receive the whole of it. The sale being either champertous or colourable, in either of which it is illegal, the assignee cannot recover. *First Mortgage Investment Company* v. *Noud* (*No. 2*), (1925) 36 B.C.R. 166; (1925) 4 D.L.R. 221.

3. Restraint of Trade.

1. Contract of employment.]—An agreement between the plaintiff and defendant contained the following clause, "in the event of his [the defendant] terminating this agreement and withdrawing from the employment of the parties of the first part [the plaintiffs], that he shall not thereafter for a period of five years engage in like business in Vancouver." The defendant terminated the agreement but did not withdraw from the employment, being subsequently dismissed by the plaintiffs. The Court held that both these events must take place before the restrictive clause could become effective. *New York Outfitting Co.* v. *Batt*, (1921) 30 B.C.R. 155; 60 D.L.R. 658.

2. Fruit growers' marketing contract.]—A contract between a marketing company and a grower of fruits and vegetables under which the latter agrees to deliver all his products to the company for marketing is not illegal as being in restraint of trade. *Associated Growers of British Columbia* v. *British Columbia Fruit Lands Ltd.*, (1925) 34 B.C.R. 533; (1925) 1 D.L.R. 871; (1925) 1 W.W.R. 505.

3. Covenant not to engage in certain business.]—A covenant in an agreement for the dissolution of a partnership restricting one of the parties from carrying on the same business will be construed less strictly than a contract between employer and apprentice. The test of validity of such a covenant is whether it affords only a reasonable protection to the covenantee, and if reasonable it will be enforced. *Houghton* v. *Evans*, (1925) 35 B.C.R. 454; (1925) 3 D.L.R. 109; (1925) 2 W.W.R. 248.

4. Sale of business—Covenant not to engage in similar business.]—Where the defendant upon the sale of his partnership interest in a restaurant business to the plaintiff, entered into a covenant with the plaintiff that he would not, during the following three years, "carry on or be engaged in, either directly or indirectly, or as principal, agent or director of a company or servant, or otherwise take part in the business of a restaurant, cafe or hotel in the city of Victoria," and within five months entered into the employment of the proprietors of a cafe situate a few doors from the plaintiff's restaurant:—Held, that the plaintiff was entitled to damages and an injunction to restrain further breach of the covenant. *Lerik* v. *Zaferis*, (1929) 41 B.C.R. 526; (1929) 3 W.W.R. 422; (1930) 1 D.L.R. 634.

5. Physician's practice—Restrictive condition — Reasonableness.]—Where a contract restricting a physician from carrying on his practice in a certain area is unreasonable as covering a wider area than is necessary, but the localities to which it relates are severable and it would be reasonable if confined to one of them, it may be severed and enforced as to the reasonable area alone. *Hall* v. *More*, (1928) 39 B.C.R. 346; (1928) 1 D.L.R. 1028; (1928) 1 W.W.R. 400.

6. Sale of business — Solicitation of former customers by vendor.]—After a vendor has sold out his business, including his good will, he cannot solicit his old customers to the detriment of the buyer, and should he do so the buyer may obtain an injunction enjoining the seller from further solicitation, and also damages for injuries suffered. *Kamloops District Creamery Association* v. *Perry*, (1921) 56 D.L.R. 492.

7. Restraint by statute—Produce Marketing Act.]—An Act designed to regulate and control the marketing of certain farm produce, under which a committee is given power to fix the quantity of produce which may from time to time be marketed, and the minimum and maximum prices to be obtained, is intra vires the Provincial Legislature. The marketing of produce is a trade or business carried on within the Province, and the local Legislature in imposing restrictions upon it is dealing with the property and civil rights of individuals within the Province, and because it affects trading in the products of the farm, or even regulates that domestic operation it is not "regulation of trade and commerce" as contemplated by sec. 91 (2) of the British North America Act. The grower is prevented by the Act from taking orders for the sale of produce within or without the Province without written permission, a transaction with a purchaser outside the Province being simply subsidiary and incidental to the main purposes of the Act which deals with "property and civil rights" and refers to matters "of a merely local or private nature in the Province." It cannot lose that character and be regarded as legislation dealing with "the regulation of trade and commerce" whether the produce shipped is contracted for within or without the Province. *Rex* v. *Chung Chuck*. *Rex* v. *Wong Kit*. *Rex* v. *Sales Service Ltd*. *Rex* v. *Associated Growers of B.C.*, (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R.

394; 51 C.C.C. 260. Appeal refused, 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; 53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129.

C. Recovery Under Illegal Contract.

Breach of duty to employer—Not a party—Pleading.] — The plaintiff brought action for damages for the failure of the defendant to supply a certain quantity of walnuts at a price provided in a written agreement. At the time the agreement was entered into M. was manager of the wholesale grocery department of a company dealing in walnuts. The defendant raised an alternative defence that the plaintiff committed a breach of duty to his employer by entering into such a contract, which was made with the defendant's agent, who knew that the plaintiff was manager of the company and not at liberty to purchase on his own account the goods in question, and that the contract was procured by fraud:—Held, that the amended pleading, after stating the respective duties of the plaintiff and the defendant's agent to their respective employers, alleges a fraudulent conspiracy which is not an allegation of fraud upon the plaintiff's employer but upon the defendant, and this allegation has been disposed of by the jury. Fraud must be distinctly pleaded and proven, and as fraud is not alleged against the plaintiff's employers, evidence as to the plaintiff's hiring was properly rejected and the plaintiff is entitled to succeed. *Maddison* v. *Bain*, (1930) S.C.R 299; (1930) 1 D.L.R. 63. Affg. (1929) 40 B.C.R. 499; (1929) 1 D.L.R. 843; (1929) 1 W.W.R. 437.

X. MISTAKE.

1. Rectification.]—In seeking rectification of an agreement on the ground of mistake it must be proved that the mistake was mutual or that the defendant had such knowledge as to make it fraudulent, to avail himself of the mistake. *American Merchant Marine Insurance Company* v. *Buckley-Tremaine Lumber and Timber Co.*, (1920) 28 B.C.R. 426; (1920) 3 W.W.R. 878.

2. Mistake as to liability—Rectification.]—A covenant in a mortgage by trustees expressed to be made by them "as trustees but not otherwise" will in the absence of other controlling words be held to limit their liability to the payment of the money out of trust estate and will not render them personally liable. If, therefore, it appears from the evidence that the parties agreed that the mortgagors were to pay as trustees and not otherwise, and failed through a mistake in draughtsmanship to express that intention in the instrument, it should be reformed so as to limit the liability as intended. *O'Brien* v. *Knudson*, (1919) 27 B.C.R. 492; 48 D.L.R. 447; (1919) 3 W.W.R. 480.

3. Merchant delivering wrong article by mistake.]—Mistake of a storekeeper in delivering nitrate of soda instead of salt, intended for cattle, resulting in the poisoning of the cattle fed therewith, will render him liable to the customer for the damages which he has sustained thereby, although there was no warranty express or implied, nor negligence on his part. *Carlin & Strickland* v. *McAusland & Spence*, (1921) 30 B.C.R. 351; 70 D.L.R. 769.

4. Mistake of law.]—Money which has been paid voluntarily under a mistake of law cannot be recovered even if paid under a by-law which is ultra vires. *Colwood Park Association, Ltd.* v. *Corporation of Oak Bay*, (1928) 40 B.C.R. 233; (1928) 3 D.L.R. 812; (1928) 2 W.W.R. 593.

XI. DURESS AND UNDUE INFLUENCE.

1. Husband and wife.]—A wife, at the request of her husband, executed a mortgage in favour of a bank in order to relieve the husband from pressure by the bank for payment of a debt. The evidence disclosed that there was no undue influence exercised by the husband but she signed the instrument without obtaining any independent advice. In an action to set aside the mortgage:—Held, that a mortgage executed in the circumstances was binding upon the maker. *Simmons* v. *Royal Bank of Canada*, (1915) 22 B.C.R. 369; 27 D.L.R. 723; 33 W.L.R. 363.

2. Payment to avoid prosecution.] — Duress.]—Where a plaintiff, after being in the employment of the defendants and having during a number of years misappropriated money of the defendants to her own use, was called into the defendants' office and questioned as to her fault by her employers and a solicitor, and under pressure was induced to give a cheque, it was held that in the circumstances there was no bargain to stifle a criminal prosecution, the

whole setting surrounding the interview going no further than to create in her mind the impression that if she did not settle she would be prosecuted, which does not constitute duress. *Saint* v. *C. A. Welsh, Limited*, (1925) 35 B.C.R. 220.

XII. Impossibility.

A. In General.

1. Matter not in control of contractor.]—The defendant agreed to arrange the purchase of hail notes not to exceed $52,000 in amount, which were to be obtained by a firm of insurance brokers in the course of the season's business then about to commence, and hand them over to the plaintiff for collection on certain terms as to remuneration, in consideration of the plaintiff giving up his agency of a hail-insurance company of which he (defendant) was manager. In an action for damages for breach of contract the defendant admitted that he did not secure the notes, alleging that in fact the notes never came into existence and he was therefore not liable for non-performance of his contract to procure the notes:—Held, that from the conduct of the parties and the circumstances in which the agreement was made it was not the question of the existence of the notes on the date upon which they were to be delivered, but the termination of the plaintiff's agency that was the foundation of what was to be done and the defendant is not excused from liability for non-performance of the contract. *Carr* v. *Berg*, (1917) 24 B.C.R. 422; 38 D.L.R. 176; (1917) 3 W.W.R. 1037.

2. Prevention by local authority.]—A contract for the removal of a house became impossible of performance owing to the refusal of the city engineer to grant a permit for its removal. In an action for damages for non-performance:—Held, that the altered circumstances were such that had it occurred to the parties that the refusal of a permit were imminent, it would have been made a term of the contract and the action should be dismissed. *Aron* v. *Sproat*, (1921) 29 B.C.R. 194.

3. Party disabled by his own default.]—Where the promisor disables himself by his own default from performing his promise he is not excused. *The Imperial Veterans in Canada* v. *Eastern Freighters, Ltd.*, (1927) 39 B.C.R. 17.

4. Lease of hotel—Failure to renew license.]—The failure of a lessor to procure the renewal of a license to sell liquor upon premises leased for the purpose of an hotel will not have the effect of determining the lease or afford a defence to the tenant in an action for rent where the land and house and not the license were the subject-matter of the lease, and the right of the tenant to occupy the house for any other purpose continued after the cancellation of the license. *Dana & Fullerton* v. *Vancouver Breweries Ltd.*, (1915) 21 B.C.R. 19; 25 D.L.R. 508; 52 S.C.R. 134; 26 D.L.R. 665; 9 W.W.R. 1018.

5. Implied condition as to continuance of circumstances.]—If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances there is an implied acknowledgment on his part and he should do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operated. If it is put to an end by his own voluntary act there is a breach of covenant on his part. *Morse* v. *Mac & Mac Cedar Company*, (1918) 25 B.C.R. 417; (1918) 2 W.W.R. 205.

6. Discharge by.]—There is no phrase more frequently misused than the statement that impossibility of performance excuses breach of contract. Without further qualification such a statement is not accurate, and indeed, if it were necessary to express the law in a sentence, it would be more exact to say that precisely the opposite was the real rule. *Seattle Construction & Dry Dock Co.* v. *Grant Smith & Co.*, (1919) 89 L.J.P.C. 17; 122 L.T. 203; 48 D.L.R. 172; (1919) 3 W.W.R. 33; (1920) A.C. 162 (per Lord Buckmaster).

B. Implied Condition.

1. Contract for cargo in ship under construction.]—The plaintiff entered into two contracts with the defendant for cargo space on two certain ships, one for April and the other for April or May, 1920. The ships were at the time of the agreement under construction and were to be delivered to the defendant upon completion, of which the plaintiff had knowledge. The contract contained a clause that "this contract is entered into conditional upon the continuance of the steamship company's service and the sailings of its steamers between the

ports named therein." There was delay in construction for reasons not clearly defined, but largely through disputes between the builders and owners, and the ships were not ready to sail within the specified time. The plaintiff then cancelled the contract and brought action for damages which was dismissed:—Held, that it was not a case of impossibility of performance, the express condition in the contract only covered the abandonment of the company's undertaking and a complete cessation of its service and had no reference to delays in sailings, and there should not be read into the contract an implied term relieving the defendant in the event of the ships not being ready within the specified period. *Canadian Trading Company, Limited* v. *Canadian Government Merchant Marine, Limited*, (1922) 30 B.C.R. 509; 67 D.L.R. 485; (1922) 1 W.W.R. 662; 64 S.C.R. 106; 68 D.L.R. 544; (1922) 3 W.W.R.. 197.

XIII. Performance: Breach.

A. Time of Performance.

Pledge of chattel—Time of the essence.]—Where there is no agreement that time shall be of the essence of a contract a pledgee cannot of his own accord without judicial decree make time of the essence. *Walker* v. *Johnston*, (1916) 23 B.C.R. 50; 34 W.L.R. 817; 10 W.W.R. 938.

B. Conditions Precedent.

1. Installation of heating plant.]—Where, after the installation of a new burning plant, it fails to operate as economically as warranted at the time of the sale, and the work performed proves of no value and less economical than the old equipment, which necessitates the removal of the new plant and the reinstalling of the old system, the buyer may rightfully recover all expenses incurred and damages suffered in connection with the construction of the new plant and the re-instatement of the old one, against which no counterclaim for the price is maintainable. *British America Paint Company* v. *Fogh*, (1915) 22 B.C.R. 97; 24 D.L.R. 61; 32 W.L.R. 142; 8 W.W.R. 1331.

2. Building contractor's duty.]—In the case of a contract to supply and install bowling-alleys, which provides that a concrete foundation must first be laid by the owner under the contractor's directions, it is the duty of the contractor to make reasonable provision for ventilation for the protection and preservation of the alleys. *Smith* v. *Brunswick Balke Collender Company*, (1917) 25 B.C.R. 37; 38 D.L.R. 455; (1917) 3 W.W.R. 1071.

3. Installation of plant subject to test.]—A contract for the sale and installation of a brick-making plant provided that the final payments therefor should be made within certain periods after the plant was completed and had been demonstrated to be of a capacity of 17,000 good merchantable bricks in 10 hours or 34,000 merchantable bricks in a day of 20 hours. It appeared from the evidence that the presses have to be worked six or seven hours to produce the necessary quantity of unbaked bricks to fill the retort in which they are hardened by steam, so that when the plant is started the hardening section of it must remain idle for six or seven hours. An action for the balance of the purchase price was dismissed on the ground that it had not been demonstrated the plant was of the required capacity:—Held, on appeal, that in making a test of the capacity of the plant, allowance must be made for the initial time required to produce the necessary quantity of unbaked bricks to fill the retort and that the time for the test should then start when both sections of the plant are working continuously. *The Komnick System Sandstone Brick Machinery Company, Limited* v. *The B.C. Pressed Brick Company, Limited*, (1918) 26 B.C.R. 191; (1919) 1 W.W.R. 645.

4. Failure of condition.]—The workmen (including the plaintiff) at the defendant Company's mines went on strike, being dissatisfied with a Chinese cook whom the Company refused to discharge. Later the plaintiff and other workmen entered into a contract at Prince Rupert with the Company's agent to return to work at the mines at Stewart upon the agent agreeing "to settle the trouble to the satisfaction of the men affected." The men returned to Stewart, but on arriving at the mine the Company refused to discharge the cook and the men refused to go to work:—Held, that the agent having agreed to "settle the trouble to the satisfaction of the men affected" and not having done so, this constituted a breach of contract upon which the plaintiff was entitled to recover. *Caskie* v. *The Premier Mines Limited*, (1921) 30 B.C.R. 116.

5. Default of contractor—Liability for damages.]—Where the question of proper work and of due diligence in proceeding with the work to be done for a municipal corporation in making road improvements is left to the decision of the construction engineer under the contract, and upon the contractor's default and due notification of the engineer's decision in respect thereof, the municipality takes the work out of the contractor's hands under a condition of the contract empowering it so to do, the contractor may still be liable to the municipality for the loss incurred by the latter through the failure of the contractor to fulfil his contract, if the option given by the contract for terminating the contractor's work expressly reserves any right of action to which the contractor may be subject from any neglect in not proceeding with the work in accordance with the specifications. *Robinson* v. *Burnaby,* (1915) 22 D.L.R. 788; 31 W.L.R. 419.

C. Repudiation.

1. Theatre—Refusal of admission to ticket holder.]—The purchaser of a ticket for admission to a theatre who is allowed entrance to the lobby but is refused admission to the auditorium and forcibly ejected may recover damages for breach of contract, and for assault. *Barnswell* v. *National Amusement Company, Limited,* (1915) 21 B.C.R. 435; 23 D.L.R. 615; 31 W.L.R. 542.

2. Damages.]—Where the contractor is entitled to treat the contract as broken and sues at once for its breach, he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, and in assessing the damages the jury must take into account whatever the plaintiff has done, or has had the means of doing and as a prudent man ought in reason to have done, whereby the loss has been or would have been diminished. *J. A. McIlwee & Sons* v. *Foley Bros.,* (1915) 22 B.C.R. 38; 33 W.L.R. 278; Affd. (1916) 27 D.L.R. 196; 33 W.L.R. 928; 10 W.W.R. 5.

3. Purchase of shares.]—The plaintiff applied for shares in the Dominion Trust Company. It appeared from the wording of the application and other documents submitted in evidence that he bargained for original shares in the company, but was given shares that had previously been issued and held by a third party. In an action to recover the moneys paid and securities given for the shares and for removal from the list of contributories:—Held, that the contractual relationship contemplated was never established, and the plaintiff was entitled to the return of the moneys and securities given the company as a result of his application, notwithstanding the liquidation of the company, and was entitled to be removed from the list of contributories. *Brydges* v. *Dominion Trust Company,* (1919) 27 B.C.R. 214; (1919) 3 W.W.R. 345.

4. Agreement to leave property by will.]—A contract whereby the defendant agreed to leave his property by his will to the plaintiff, in consideration of the plaintiff assisting him and rendering necessary services on the defendant's farm, and in pursuance whereof the defendant made such a will and delivered it to the plaintiff, will not entitle the plaintiff to claim on a quantum meruit, where the defendant orders the plaintiff off the farm, as the action of the defendant does not amount to repudiation of the contract. *Olson* v. *Bieterilla,* (1920) 28 B.C.R. 95; (1920) 1 W.W.R. 1008.

5. Misrepresentation.]—A principal is justified in repudiating his contract with his agent, where the latter's duty under the contract is personally to inspect certain timber limits, and instead of doing so he not only relies on hearsay as to the value of the limits, but represents to the principal that he has personally inspected such limits. *Knox* v. *Hall,* (1928) S.C.R. 87; (1928) 1 D.L.R. 193.

D. Breach by Negligent Performance.

1. Contract to supply electric power—Unwarranted deviation from terms.]—One who has contracted to purchase measured electrical current is not obliged to take unmeasured current, and incur the danger of a controversy, but is entitled to obtain the measured current elsewhere at the best price procurable, and charge the defaulting party with the excess in price. *Yukon Gold Co.* v. *Canadian Klondyke Power Co.,* (1919) 27 B.C.R. 81; 47 D.L.R. 146; (1919) 2 W.W.R. 814.

2. Telephone subscriber — Name left out of telephone directory through error.]—A telephone company is liable in damages for the omission from its telephone directory of the name of a subscriber whose

business is carried on largely through telephone orders. *Flanders* v. *British Columbia Telephone Co.*, (1926) 36 B.C.R. 352; (1926) 1 W.W.R. 358.

3. Work and labour.]—A manufacturer cannot recover for work and labour done under a contract to manufacture and deliver a machine according to specifications as to dimensions and description, unless the machine is completed according to such specifications. *Simplex Machine Co.* v. *McLennan, McFeeley & Co., Ltd.*, (1928) 3 W.W.R. 255.

E. Effect of Breach.

1. Right to terminate.]—Where a contract for the supply of electric current gives the purchaser the right to terminate such contract if the supply is interrupted for a certain period, interruptions caused by such purchaser's own fault or by the act of God are not to be included in computing the length of such interruptions. *Yukon Gold Co.* v. *Canadian Klondyke Power Co.*, (1919) 27 B.C.R. 81; 47 D.L.R. 146; (1919) 2 W.W.R. 814.

2. Damages.]—Where parties have agreed to accept the estimate of two certain persons as to the amount of timber on a limit, they cannot question that estimate in the absence of fraud, except on the ground that the cruisers failed to do what was contemplated by the parties, namely, to estimate all the timber on the limit. *Reinseth* v. *Nicola Pine Mills, Limited and McDougall*, (1927) 39 B.C.R. 151; (1928) 1 D.L.R. 93.

3. Transfer of property—Breach by—Legality.]—A transfer of property legal in itself, is not impeachable on the ground that it was made with the avowed intention of terminating certain obligations under a contract. *Associated Growers of B.C. Ltd.* v. *Edmunds*, (1926) 36 B.C.R. 413; (1926) 1 D.L.R. 1093; (1926) 1 W.W.R. 535.

XIV. DISCHARGE.

A. In General.

Joint Debtors.]—A judgment recovered against one of two or more joint debtors is a bar to further action against another joint debtor. A default judgment is in the same category as an order drawn up and signed by a Judge and duly entered and the plaintiff cannot have it set aside and have a joint debtor added as a party. *Hudson's Bay Co.* v. *Scott*, (1929) 4 D.L.R. 978; (1929) 3 W.W.R. 232.

B. Appropriation of Payments.

1. Creditor and surety.]—Where a principal debtor owes money to a bank in addition to the amount of a note upon which the defendant is an accommodation indorser, the bank is not bound to appropriate the moneys collected by it for the principal debtor towards the extinguishment of the note. *Royal Bank of Canada* v. *Falk*, (1917) 25 B.C.R. 142; (1917) 3 W.W.R. 654.

2. Principal and Surety.]—A creditor may appropriate payments made unconditionally by his debtor to any part of the debtor's account, although he has credited them in the debtor's open account, provided that he has not communicated that account to the debtor. Where therefore a creditor had an account which was guaranteed, and when the amount of the guarantee was exhausted, communicated that fact to the surety and the debtor and subsequently had dealings with the debtor but opened no new account, he was entitled to appropriate subsequent payments made by the debtor to the dealings subsequent to the exhaustion of the guarantee, provided that the credits in the open account had not been communicated to the debtor. *Scott & Peden* v. *Elliott*, (1926) 37 B.C.R. 143; (1926) 2 D.L.R. 504; (1926) 2 W.W.R. 154.

C. Accord and Satisfaction.

1. Part performance and satisfaction.]—Sec. 2 (33) of the Laws Declaratory Act provides that "Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation":—Held, that the statute does not change the general law that a promise, unless under seal, requires a consideration to support it; that the word "agreement" in the statute applies only to a "binding agreement," and that the words "rendered in pursuance of an agreement for that purpose" refer to a part performance other than the payment

of money. *Bell* v. *Quagliotti et al.*, (1918) 25 B.C.R. 460; (1918) 2 W.W.R. 915.

2. Accord without satisfaction.]—Where a mortgagee offers to accept a quit-claim deed from the mortgagor in discharge of his right of action on the covenant, the right of action is discharged only when the agreement to accept the quit claim is accompanied by delivery thereof. There must be not only accord but satisfaction to discharge a cause of action. *Cairns and Winterbottom* v. *Brown*, (1924) 34 B.C.R. 338; (1924) 4 D.L.R. 590; (1924) 3 W.W.R. 409.

XV. CONSTRUCTIVE CONTRACTS.

1. Proceeds of Joint Savings.]—The plaintiff and defendant lived together as man and wife for 25 years, children being born to them. The plaintiff during that period handed the bulk of his earnings to the defendant who with moneys earned by herself in sewing and baking invested in a home and purchased a ranch upon which she carried on dairying for a time. At the end of the 25 years she sold the home and the ranch and taking all the proceeds left the plaintiff who brought an action for moneys had and received to his use. It was held that in the circumstances the defendant must account to the plaintiff for the moneys that she had received from him. *St. Eloi* v. *Eno*, (1925) 36 B.C.R. 153.

2. Licensee—Liability of insurer to indemnify—Insurance Act, 1925, Sec. 24.]—The owner of an automobile was insured against loss in the defendant company. Under the policy the indemnity to the owner was also available in the same manner to any person or persons while riding in or legally operating the automobile with the permission of the insured, or of an adult member of the household of the insured. An accident occurred when the daughter of the insured was driving the car with his permission, and the plaintiff, being injured, recovered judgment against her for negligent driving, the insurance company taking charge of the defence on the trial. An execution against the daughter of the insured was returned unsatisfied. The judgment creditor then brought an action against the insurance company under sec. 24 of the Insurance Act, 1925, to recover the amount of the judgment rendered against the owner's daughter:—Held, that the plaintiff was not entitled to recover against the insurer, as the owner's daughter was not insured within the meaning of said sec. 24, which is a provision in aid of execution and in the nature of a garnishee proceeding. The action thereby authorized lies only if the judgment debtor is insured, or has a right to recover indemnity from the insurer. The owner's daughter is not a party to the policy, and there is no consideration moving from her to the insurer for the covenant on which the judgment creditor relies to establish that she was insured within the meaning of sec. 24. While it may be that the owner of the car, according to the covenant, may recover from the insurer, presumably for the bénefit of a person driving his car with his permission, it cannot be said that he can be compelled to exercise such a right of recovery or to undertake the duties and responsibilities of a trustee, unless by his consent or by reason of his having become a custodian of indemnity belonging to his daughter. Sec. 24 does not confer upon the licensee of the car a right of action upon the policy to recover against the insurer, or to compel the insurer to exercise his remedies for the recovery, and the insured cannot be compelled to be a trustee for a licensee for no other cause than that he had permitted the licensee to drive his car or ride in it at the time when that licensee negligently caused an accident in which a third party suffered bodily injuries. Held, further, that the insurer, by its conduct in defending the action against the daughter of the insured, was not estopped from denying liability under the insurance policy on the ground that she was not "insured" within the meaning of sec. 24.

Although only the party to the contract can sue on it at common law, he may constitute himself a trustee for a third party for a right under the contract and thus confer upon the third party such a right enforceable in equity. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee. If, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant. The intention to constitute the trust must be affirmatively proved. *Vandepitte* v. *The Preferred Accident Insurance Co. of New York and Berry*, (1932) 3 W.W.R. 573; (1932) W.N. 229; 102 L.J.P.C. 21; 148 L.T. 169; 49 T.L.R. 90; 76 Sol. Jo. 798; (1933) A.C. 70; (1933) 1 D.L.R. 289; Affg. (1932) S.C.R. 22; (1932) 1 D.L.R. 107.

XVI. QUANTUM MERUIT.

Renunciation dispensing with performance.]—Performance of a condition precedent by one party to a contract is excused where the other party prevents its performance; and the party originally required to perform the condition precedent may sue for breach of contract or may treat the contract as terminated and sue on a quantum meruit. *Nicola Valley Lumber Company* v. *Meeker*, (1917) 1 W.W.R. 556; 31 D.L.R. 607.

See ACTIONS.
See ALIENS.
See ASSIGNMENT FOR CREDITORS.
See ASSIGNMENTS.
See BAILMENT.
See BANKRUPTCY.
See BILLS OF SALE.
See BUILDING CONTRACT.
See CARRIERS.
See COMPANIES.
See DAMAGES.
See EQUITY.
See EVIDENCE.
See GUARANTEE.
See INFANTS.
See INJUNCTION.
See INSURANCE.
See LIMITATION OF ACTIONS.
See LUNATICS.
See MARKETING ASSOCIATIONS.
See MASTER AND SERVANT.
See MISREPRESENTATION AND FRAUD.
See MORTGAGE.
See MUNICIPAL CORPORATIONS.
See PARTNERSHIP.
See PRINCIPAL AND AGENT.
See REGISTRATION OF LAND.
See SALE OF GOODS.
See SHIPPING.
See SPECIFIC PERFORMANCE.
See VENDOR AND PURCHASER.
See WAR LEGISLATION.

CONTRIBUTOR.

See GUARANTEE.
See TORT.

CONTRIBUTORY.

See COMPANY.

CONTRIBUTORY NEGLIGENCE

See NEGLIGENCE.
See COSTS.

CONVERSION.

See TORT.

CONVEYANCE.

See DEEDS AND OTHER INSTRUMENTS.
See VENDOR AND PURCHASER.

CONVICTION.

See CRIMINAL LAW.

CORPORATION.

See COMPANIES.
See MUNICIPAL CORPORATIONS.
See RAILWAYS.

COSTS.

I. RECOVERY OF, 283.
II. FOLLOWING THE EVENT, 285.
III. GOOD CAUSE FOR DEPRIVING OF, 288.
IV. IN PARTICULAR CASES, 290.
A. *Alien enemy*, 290.
B. *Amendment*, 291.
C. *On appeal*, 291.
D. *Arbitration*, 293.
E. *Companies*, 294.
F. *Illegal interference with contracts*, 294.
G. *By and against the Crown*, 294.
H. *Of party indemnified*, 298.
I. *Divorce and matrimonial causes*, 298.
J. *Execution*, 299.
K. *Foreclosure*, 299.
L. *Garnishee proceedings*, 299.
M. *Jury*, 299.
N. *Separate actions between same parties*, 300.
O. *As between defendants*, 300.

P. Not disposed of at trial, 301.
Q. Contributory negligence, 301.
R. Trespass, 303.
S. Of trustee, 303.
T. Seaman's wages, 304.
U. Woodman's lien, 304.
V. Of actions respecting wills, 304.
V. TAXATION, 305.
A. In general, 305.
B. Review of taxation, 308.
C. Fees to counsel, 309.
D. Witness fees, 310.
E. Preparation of evidence, 310.
F. Winding-up proceedings, 311.
G. Travelling expenses, 311.
H. Improper, vexatious and unnecessary proceedings, 311.
VI. SOLICITOR AND CLIENT, 311.
VII. ON COUNTY COURT SCALE, 312.
VIII. TIME FOR PAYMENT, 313.
IX. SECURITY FOR COSTS, 313.
A. Application for, 313.
B. When ordered to be given, 315.

I. RECOVERY OF.

1. Extra costs—Travelling expenses—Loss of time.]—In an action for damages by reason of the defendant conspiring to injure the plaintiffs, it appeared that legal proceedings previously brought by one of the defendants against the plaintiffs were dismissed with costs, but no order had been taken out, or any attempt made, to collect the costs from the unsuccessful party. The jury found that there was a conspiracy which was carried out by the taking of said legal proceedings, and the damages were particularly set out as "legal costs, fares and expenses to Vancouver and return, loss of time on farm." Held, on appeal, that although party and party costs of the former proceedings may be recovered in such an action, it must first be shewn that the costs could not have been recovered from the unsuccessful party, and that as the damages particularized "fares and expenses to Vancouver and return, loss of time on farm," refer to losses caused by the former civil proceedings, they come within the term "extra costs" and are not recognized by law. *Armishaw* v. *Sacht*, (1917) 24 B.C.R. 53.

2. Party not on record.]—Upon an interested party appearing when not a party to the appeal, he must apply for and obtain a status on the record in order to recover costs if successful. *In re Dominion Trust Co., Boyce and Macpherson*, (1918) 26 B.C.R. 330; (1919) 2 W.W.R. 452.

See 26 B.C.R. 302; 43 D.L.R. 538; 59 S.C.R. 691.

3. Solicitor as party.]—A solicitor appearing on behalf of his partner, the plaintiff in an action, cannot tax against the defendant unnecessary costs, including items of instruction, counsel fees not actually disbursed, conferences with client and attending to take minutes of evidence. *Arnold* v. *Goldstein*, (1920) 2 W.W.R. 424.

4. Action to recover.]—In an action by a solicitor to recover the amount of a bill of costs a County Court judge gave judgment for the plaintiff for the amount found due upon taxation of the costs by the registrar, who refused to tax the bill on the ground of lack of jurisdiction, the costs having been incurred in a Supreme Court action. On application by the plaintiff the trial judge then gave judgment for the full amount claimed:—Held, on appeal, that the judgment must be set aside as the trial judge having already disposed of the case had no jurisdiction to interfere with his original judgment. *Murray* v. *Gold*, (1924) 34 B.C.R. 489.

5. Stranger to record.]—An appeal from the dismissal of a motion to compel a third party to pay the remainder of a judgment and costs upon the ground that he was the instigator of the action and had abused the process of the Court by instructions to solicitor to issue the writ without authority, was dismissed, the Court being equally divided, and no order for costs of the appeal was made, the Court being equally divided on this point also. *Arbuthnot* v. *Hill*, (1927) 39 B.C.R. 81.

See Pacific Coast Coal Mines Ltd. v. *Arbuthnot*, (1926) 36 B.C.R. 321; (1926) 1 D.L.R. 670; (1926) 1 W.W.R. 478.

6. Assignee of debt.]—Where an assignee of a debt has given the assignor's solicitor authority to bring an action in his (the assignee's) name he is responsible for the costs unless in giving the authority he expressly excepts such liability. *Earle* v. *Continental Guaranty Corporation*, (1927) 4 D.L.R. 939; (1927) 3 W.W.R. 784.

7. Set-off.]—An agent for the sale of a refrigerating plant at a remuneration of 25 per cent. on the sale price if "handled" on a "cash basis," fearing that his commission was in jeopardy, induced the buyer to give him a cheque for the price, and refused to hand the cheque to the vendor unless paid his commission. Upon the vendor bringing action against the buyer the agent handed the cheque to the vendor and sued for the

commission:—Held, that the agent was entitled to his commission of twenty-five per cent. and the vendor was not entitled to set-off the costs of the action against the buyer. *Trenwith, Ltd.* v. *Jarvis Electric Co. Ltd.*, (1929) 41 B.C.R. 328; (1929) 4 D.L.R. 400; (1929) 2 W.W.R. 489.

8. Costs incurred at request of another —Right of action.]—Where one person incurs the costs of an action at the request of another and pays the costs he has a claim against the second person for such costs as money paid to the second person's use. *Splan* v. *Barrett-Lennard*, (1931) 2 D.L.R. 857.

II. Following the Event.

1. Costs of an action should follow the event unless exceptional circumstances arise. *Evans, Coleman & Evans, Ltd.* v. *The "Roman Prince,"* (1924) 34 B.C.R. 157; (1924) 3 D.L.R. 327; (1924) Ex. C.R. 129; (1924) 2 W.W.R. 897.

See 34 B.C.R. 155; (1924) 3 D.L.R. 95; (1924) Ex. C.R. 93, 133.

2. Event—Definition of.]—In construing the statutory provision that the costs are to follow the event, the word "event" must be read distributively, so as to include where necessary one or more events. *Victoria and Saanich Motor Transportation Company* v. *Wood Motor Company, Limited*, (1915) 21 B.C.R. 515; 23 D.L.R. 79; 31 W.L.R. 853; 8 W.W.R. 1124.

3. Error—Successful appellant responsible for.]—Where the appellant is responsible for taking his proceedings before the wrong Court, and having obtained an order with which he is dissatisfied and from which he appeals successfully, he will not be allowed the costs of appeal. *Sellon* v. *Keane*, (1917) 24 B.C.R. 238; (1917) 3 W.W.R. 342.

4. New trial.]—Where a new trial is ordered the costs of the abortive trial will follow the result of the second trial except under very exceptional circumstances. *Errico* v. *B.C. Electric Ry. Co.*, (1916) 23 B.C.R. 468; (1917) 2 W.W.R. 238. *Robinson* v. *Corporation of Point Grey*, (1927) 38 B.C.R. 243; (1927) 2 D.L.R. 471; (1927) 3 W.W.R. 211.

5. New trial—Order for.]—Where the appellant, although having failed on all grounds of appeal, obtains an order for a new trial, the respondent having an order he did not ask for, the costs should be costs in the cause. *Woolston* v. *B.C. Electric Ry. Co.*, (1918) 25 B.C.R. 518.

6. New trial — Order for — Objection not raised below.]—Sec. 55 of the Supreme Court Act, R.S.B.C. 1911, cap. 58, directs that where a new trial is granted upon grounds of objection not taken at the trial the costs of the appeal shall be paid by the appellant. The Court of Appeal has no discretion in such a case to order the costs payable otherwise. *Gavin* v. *Kettle Valley Ry. Co.*, (1919) 58 S.C.R. 501; 47 D.L.R. 65; (1919) 2 W.W.R. 612. *Wand* v. *Mainland Transfer Co.*, (1919) 27 B.C.R. 340; (1919) 3 W.W.R. 193.

7. Divided success.]—Where there are two or more distinct issues in an action the Court may order that the costs of particular issues shall be taxed in favour of the party who has succeeded on them. *Nelson* v. *Pacific Great Eastern Ry. Co. The Order of the Oblates of Mary Immaculate* v. *The Same*, (1918) 26 B.C.R. 1; (1918) 3 W.W.R. 85.

8. Divided success.]—The party who upon the whole succeeds is entitled to the general costs, but where there are separate and distinct issues involved, the word "event" should be read distributively, and the party who upon the whole has been unsuccessful is entitled to the costs of the issues upon which he has been successful. *Seattle Construction & Dry Dock Co.* v. *Grant Smith & Co. and McDonnell Ltd.*, (1919) 26 B.C.R. 560; 45 D.L.R. 476; (1919) 1 W.W.R. 783; 89 L.J.P.C. 17; 122 L.T. 203; 48 D.L.R. 172; (1919) 3 W.W.R. 33; (1920) A.C. 162.

9. Several plaintiffs—One successful.]—Where four plaintiffs are rightly joined in an action founded on tort and they are all successful in recovering certain amounts, but only one of them recovers a sufficient amount to entitle him to costs under marginal rule 976, he is entitled to the whole of the party and party costs except such items as are not attributable to his cause of action. *Nowell et al.* v. *Yellow Cab Company, Limited, and British Columbia Electric Railway Company, Limited (No. 3)*, (1929) 41 B.C.R. 453; (1929) 4 D.L.R. 484; (1929) 3 W.W.R. 431.

10. Separate issues.]—Under contract between the two parties the plaintiff was to carry on logging operations in two distinct areas, namely, Stillwater and Texada Island. An action for damages for breach of contract and for an accounting was dismissed. On appeal the judgment was upheld

in respect of the Stillwater operations but it was decided that the Texada operations had been wrongfully terminated and the action was remitted to the Court appealed from for assessment of damages in respect of the operations there. The damages were assessed in a substantial amount and on appeal the amount assessed was reduced in a substantial sum:—Held, that the plaintiff is entitled to the general costs of the action and the defendants are entitled to the costs of the issue on which they succeeded, i.e., the Stillwater branch of the case. *Aickin* v. *J. H. Baxter & Co.*, (1929) 42 B.C.R. 86; (1930) 2 D.L.R. 308.

11. Apportionment of costs.]—A County Court judge has no jurisdiction to deprive a successful litigant of costs, or to award costs on a lower scale than he is entitled to, except for cause. His discretion must be exercised judicially. *Vernon Hardware Company* v. *Reid*, (1927) 2 W.W.R. 117.

12. Mortgage action.]—An appeal by a mortgagor and a second mortgagee from an order setting aside the registrar's certificate and directing that a new account be taken, having been dismissed:—Held, that the usual rule should be followed and the first mortgagee is entitled to the costs of the appeal payable forthwith after the taxation thereof. *Canada Permanent Mortgage Corporation* v. *Dalgleish*, (1928) 40 B.C.R. 94; (1928) 3 D.L.R. 59; (1928) 1 W.W.R. 922.

13. Payment into Court.]—The defendant made a payment into Court in satisfaction of the plaintiffs' claim, of which notice was given the plaintiffs, but did not amend its defence accordingly. Leave was given to amend at the commencement of the trial and the trial proceeded. On judgment being given for less than the amount paid into Court it was held that the plaintiff was entitled to the costs up to the application for leave to amend the defence and the defendant should have the costs subsequent thereto. *Isitt* v. *Grand Trunk Pacific Ry. Co.*, (1918) 26 B.C.R. 90; (1918) 3 W.W.R. 500; (1919) 59 S.C.R. 686; 49 D.L.R. 687.

14. Payment into Court—Denial of liability.]—In an action for money had and received the defendant paid into Court a sum he considered sufficient to satisfy the plaintiff's claim but denied any liability. The action was dismissed but on appeal the plaintiff recovered a sum less than the amount paid in:—Held, that the plaintiff is entitled to the costs of the issues as to liability and the defendant to the costs of the issue as to the amount recoverable. Held, further, that the same rule applies if at the time of payment in there was no denial of liability but subsequently by amendment defendant denies liability. *Aghion* v. *T. M. Stevens & Company Incorporated*, (1921) 30 B.C.R. 77; 60 D.L.R. 395; (1921) 2 W.W.R. 961.

15. After payment into Court.]—The defendant commenced expropriation proceedings under the Forest Act for a right of way across the plaintiff's land, but stopped proceedings pending an attempt to settle on the purchase price. In the meantime he proceeded to construct a railway across the proposed right of way. On the plaintiff bringing an action for trespass the defendant paid into Court $350 to satisfy the plaintiff's claim. The trial judge gave $25 damages and ordered the defendant to proceed with the arbitration. On the question of costs:—Held, that if the sum determined by the arbitration as the value of the land expropriated with the $25 above mentioned does not exceed the amount paid into Court, the plaintiff is only entitled to his costs up to the time of payment in and the costs of the issue as to liability on which he succeeded, the other costs to go to the defendant. *Goddard* v. *Bainbridge Lumber Company, Limited* (*No. 2*), (1921) 29 B.C.R. 287.

16. Upon payment into Court—Tender.]—Where a defendant pays into Court a sum of money under a defence of tender, and the evidence does not sustain this defence under Order VI., r. 10 of the County Court Rules, the plaintiff is entitled to the costs of the action on the basis of the amount recovered, notwithstanding that this amount does not exceed the sum paid into Court. *Blair* v. *The Canadian Fishing Co. Ltd.*, (1929) 41 B.C.R. 80.

III. Good Cause for Depriving of.

1. Error in procedure—Misconduct.]—The successful party may be deprived of costs if in an action for specific performance of an agreement to exchange land he fails to tender a conveyance, and if the land conveyed to him is virtually a gift from which he profits, and if his conduct towards the other party is not such as to meet with the approbation of the Court. *Cotton* v. *Leighton*, (1917) 24 B.C.R. 253.

2. Error in procedure.]—Where neither party has pursued the proper course for the determination of his rights the Court of

Appeal may deprive both parties of costs. *Gavin* v. *Kettle Valley Ry. Co.*, (1921) 29 B.C.R. 195; 56 D.L.R. 572; (1921) 1 W.W.R. 488.

3. Misconduct.]—Where an appeal is dismissed on an equal division of the Court the respondent may be deprived of costs if he has been guilty of misconduct or an abuse of the process of the Court below. *Arbuthnot* v. *Hill*, (1927) 39 B.C.R. 81.

4. Misconduct of solicitor.]—The Court will not deprive a successful party of his costs merely because of misconduct on the part of his solicitor. *Swartz Bros. Ltd.* v. *Peppers Fruit Co.*, (1930) 4 D.L.R. 230.

5. Successful defendant guilty of moral delinquency.]—In the case of dismissal of an action for indecent assault the defendant is not entitled to costs where the evidence shews he is guilty of moral degradation in respect to the matters charged. *Montgomery* v. *McKenzie*, (1923) 32 B.C.R. 232.

6. Oppressive conduct.]—A party who declines to facilitate his opponent gratuitously is not guilty of such oppressive conduct as would justify the Court in depriving him of costs. Once good cause is found the Court becomes possessed of full discretion to make such order as to costs as it deems just in accordance with the principles and practice of the Court. That discretion is as full and absolute as that enjoyed by the Court of Chancery before the Judicature Act. Although a successful plaintiff may be ordered to pay the defendant's costs, in no case has a successful defendant been ordered to pay the plaintiff's costs, as the plaintiff being the aggressor and having dragged the defendant into Court, no matter how technical and unmeritorious the defence may have been, the defendant cannot be ordered to pay the costs of the action which was not initiated by him. *James Thomson & Sons* v. *Denny*, (1917) 25 B.C.R. 29; 39 D.L.R. 421; (1918) 1 W.W.R. 435.

7. Conduct occasioning cost of litigation.]—Where an action has been dismissed as against a defendant who by his conduct occasions or increases the cost of the litigation, that is "good cause" for his being deprived of his costs. *Rice* v. *Burckhardt and Burckhardt (No. 2)*, (1925) 36 B.C.R. 180.

8. Where nothing recovered.]—In an action for breach of contract, judgment was given for the plaintiff with costs, and the matter was referred to the registrar for the assessment of damages with a direction that the plaintiff might enter judgment for the amount so found with costs of the reference. The registrar found that no damage had been sustained:—Held, that as the plaintiff recovered nothing, he should be refused the costs of both actions and reference and marginal Rule 987 does not apply. *Garrison* v. *Thomsen & Clark Timber Company Limited*, (1929) 40 B.C.R. 492; (1929) 1 D.L.R. 887; (1929) 1 W.W.R. 449.

9. Nominal damages for assault.]—Where, on an appeal from a judgment for $500 damages for assault, the Court found the assault to have been of a trivial and technical nature and reduced the damages to a nominal amount, the defendant was granted the costs of the appeal and the plaintiff was deprived of the costs below. *Hodgkinson* v. *Martyn*, (1928) 40 B.C.R. 434; (1929) 1 D.L.R. 367; (1928) 3 W.W.R. 763.

10. Counterclaim dismissed.]—An action for damages brought in the County Court in which the defendant counterclaimed, was at the instance of the defendant transferred to the Supreme Court under sec. 34 of the County Courts Act. The learned trial judge gave judgment for the plaintiff for $40 and dismissed the counterclaim allowing the plaintiff costs on the County Court scale in the action but no costs on the counterclaim: —Held, on appeal, that in a case of both claim and counterclaim the trial judge must decide the question of "good cause" in each. In the case of the action there was jurisdiction and the exercise of his discretion is not subject to review, but on the counterclaim there were no facts upon which he could found a decision that there was "good cause" for depriving the plaintiff of his costs to which he is entitled on the Supreme Court scale. *Abbott* v. *The Gold Seal Liquor Company, Limited*, (1917) 24 B.C.R. 245.

11. Admissions by defendant.]—If, upon the receipt of a letter from the defendant admitting nominal damages, the plaintiff continues the action and recovers nominal damages only, he will be deprived of costs from the date of the receipt of the letter. *Humphrey* v. *Wilson*, (1917) 25 B.C.R. 110; (1917) 3 W.W.R. 529, 937.

IV. In Particular Cases.

A. Alien Enemy.

Right to costs.]—An alien enemy may be sued during a state of war and if the

action against him is dismissed the Court may award him costs. *Rydstrom* v. *Krom et al.*, (1915) 21 B.C.R. 254; 21 D.L.R. 118; 31 W.L.R. 7; 7 W.W.R. 1290.

B. Amendment.

1. Amendment of pleadings — New cause of action.]—A judge granting leave to amend a statement of claim to include alternative claims may order the plaintiff to pay the costs of the application to amend and of the amendment, if he considers that these costs will be full compensation for the omission to plead the allegations in question at the proper time. *The Royal Bank of Canada and The Little River Pole and Timber Company and Helm* v. *J. H. Baxter & Co.*, (1922) 31 B.C.R. 248; 67 D.L.R. 585.

2. Amendment at trial.] — On the amendment of a statement of claim at the trial of an action the judge may in proper circumstances order that the plaintiff is entitled to the general costs of the action, and the defendant may be allowed to set off the costs thrown away by reason of the amendment. *Denny* v. *Lloyd*, (1922) 31 B.C.R. 435; (1922) 3 W.W.R. 896.

3. Amendment at trial.] — Where an action for breach of promise is brought to trial on that footing, but is found untenable, and after amendment of the statement of claim to set up a substantial contract for the payment of expenses, the plaintiff recovers judgment against the defendant for the amount thereof, the defendant is entitled to the costs up to the amount and including the costs of the amendment and the plaintiff is entitled to the costs on which she has succeeded after the amendment. *Munn* v. *Haahti*, (1925) 3 W.W.R. 700.

4. Amendment at trial.]—Costs of and consequent upon an amendment adding a party plaintiff, except in extraordinary cases should be to the defendant in any event. *Evans, Coleman & Evans* v. *The "Roman Prince."* (1924) 34 B.C.R. 157; (1924) 3 D.L.R. 327; (1924) Ex. C.R. 129; (1924) 2 W.W.R. 897.

C. On Appeal.

1. Appeal from County Court.] — The costs of an appeal from a County Court judgment taken pursuant to leave granted under sec. 119 of the County Courts Act, R.S.B.C. 1911, cap. 53, should be taxed on the Supreme Court scale in accordance with sec. 122 of the Act exclusive of subsecs. 1 and 2 which do not apply. *Mowat* v. *Goodall*, (1915) 22 B.C.R. 167; 24 D.L.R. 891; 33 W.L.R. 230; 9 W.W.R. 171.

See Hall v. *Lane* (2), (1923) 32 B.C.R. 343; (1923) 2 D.L.R. 1151; (1923) 2 W.W.R. 442.

2. County Court.] — The plaintiff claimed $1,000 damages in a County Court action and recovered $250 at the trial. The defendant appealed, and the appeal was dismissed with costs:—Held, that the plaintiff's costs on appeal are limited to $100 under sec. 122 (2) of the County Courts Act. The words "where the plaintiff shall claim" in said section mean claim as determined by the judgment appealed against, and the costs awarded below should not be included in estimating the amount. *Cox* v. *The Begg Motor Co. Ltd.*, (1921) 29 B.C.R. 531; 62 D.L.R. 303; (1921) 2 W.W.R. 150.

3. Appeal from County Court—Collateral motions.]—The costs of a motion to strike out portions of a notice of appeal and a further motion to discharge the order refusing the first motion should be regarded as collateral, and apart from the costs of appeal which are restricted in amount by sec.. 122 (1) of the County Courts Act. *Prat* v. *Hitchcock*, (1925) 36 B.C.R. 158; (1925) 3 D.L.R. 1142; (1926) 1 W.W.R. 5.

4. Summary conviction—Appeal.]—The Court in quashing a summary conviction has jurisdiction to award costs against the prosecutor. *Rex* v. *Ferguson*, (1917) 33 D.L.R. 42; 26 C.C.C. 220.

5. Refund after successful appeal—Interest.]—A party who succeeds in his appeal and becomes entitled to a refund of costs paid by him under the judgment in the Court below is not entitled to interest thereon. *Royal Bank* v. *Whieldon*, (1916) 23 B.C.R. 436; (1917) 2 W.W.R. 58.

6. Bankruptcy.]—The Court of Appeal when acting as a Court of Appeal in Bankruptcy has absolute jurisdiction over costs. The combined effect of the section and rules of the Bankruptcy Act governing appeals is that appeals thereunder coming before the various Appeal Courts are to be disposed of in all respects both as to subject-matter and costs as if they were ordinary appeals. *Canadian Credit Men's Trust Association, Limited* v. *Jang Bow Kee and Yin Shee*, (1922) 31 B.C.R. 40.

7. In forma pauperis.]—An applicant for leave to prosecute his appeal in forma

pauperis stated in his affidavit that he was not worth $25, his wearing apparel, the subject-matter of this appeal and an interest in a further appeal pending, alone excepted. It further appeared from an unanswered affidavit of the respondent (a) that the applicant was a judgment creditor in an action in which there was still due $230.47; (b) that he offered the respondents' solicitors an assignment of his rights in a pending appeal as security for respondents' costs of this appeal; and (c) that an appeal was pending in which the applicant claimed $600:—Held, that in the circumstances he has not brought himself within the statute and he should not be allowed to prosecute his appeal in forma pauperis. *Olsen* v. *Pearson and Evindsen (No. 2)*, (1923) 32 B.C.R. 520.

See 32 B.C.R. 517; (1924) 1 D.L.R. 1097.

8. Appeal books—Irrelevant matter.]—The Court of Appeal has jurisdiction to order a successful respondent to pay the additional costs occasioned by the inclusion in the appeal book of certain material insisted upon by the respondent that was irrelevant to the issues raised on the appeal. *Dominion Trust Company* v. *Brydges et al.*, (1921) 30 B.C.R. 264; 62 D.L.R. 352; (1921) 3 W.W.R. 391.

9. Application to abridge time for hearing appeal.]—Where an order is made abridging the time for hearing an appeal on an application that is justified on the merits and within the statute, the costs of the application should be costs in the cause. *Aickin* v. *J. H. Baxter & Co.*, (1929) 41 B.C.R. 217.

10. Extension of time to file appeal books.]—The appellant will be ordered to pay the costs of a motion to extend the time for setting down an appeal. *Young* v. *Cross & Co.*, (1926) 38 B.C.R. 49; (1927) 1 D.L.R. 989.

D. Arbitration.

1. Appointing judge—Jurisdiction as to costs.]—A judge of the Supreme Court in appointing an arbitrator under the Vancouver Incorporation Act, sec. 133 (a), acts as persona designata and has no jurisdiction to award costs. *Matte* v. *City of Vancouver*, (1917) 2 W.W.R. 53.

2. Witness fees.]—Under sec. 24 of the Public Works Act the arbitrators are solely vested with authority to grant or withhold witness fees in the case of any particular witness, at any rate to the extent of deciding whether such fees should be included in the bill for taxation or not, and what amount of preparation was reasonably necessary. *In re Galt Bros. and Burnaby Arbitration*, (1928) 39 B.C.R. 470; (1928) 1 W.W.R. 798.

E. Companies.

1. Mortgage—Registration under Companies Act—Costs—Liquidator of mortgagor.]—The liquidator of a company is not entitled to the costs of the liquidation in priority to a mortgage, registration whereof has been ordered under the Companies Act Amendment Act, 1916, cap. 10, sec. 4. *In re Winding-up Act and Dominion Trust Co. and Alvo von Alvensleben*, (1919) 3 W.W.R. 209.

2. Company in liquidation—Judgment for rescission against liquidator — Costs.]—Where a plaintiff succeeds in an action for rescission of contract and repayment of sums paid thereunder before the defendant went into liquidation:—Held that the plaintiff must rank as an ordinary creditor and is not entitled to payment of his costs in priority to other claims. *Fitzherbert* v. *Dominion Bed Mfg. Co. Ltd.*, (1917) 24 B.C.R. 38; 36 D.L.R. 600; (1917) 2 W.W.R. 727.

F. Illegal Interference With Contracts.

Illegal interference with contracts.]—Where judgment for an injunction for illegal interference between employer and employee was given against some defendants but not against others, the latter were given their general costs, although they had joined with the others in pleading fraud and other defences which were not established, but they were required to pay the costs of such unsuccessful issues, to be set off against their general costs. *British Columbia Telephone Company* v. *Morrison*, (1921) 29 B.C.R. 289; (1921) 1 W.W.R. 694.

G. By and Against the Crown.

1. Crown Costs Act—Effect of.]—The Crown Costs Act, R.S.B.C. 1924, cap. 62, forbids the awarding of costs either in

favour of or against the Crown as represented by the Government of the Province of British Columbia unless expressly authorized by statute. *Rex* v. *Conway*, (1929) 3 W.W.R. 268; 52 C.C.C. 161.

See Rex v. *Gustafson*, (1929) 42 B.C.R. 58; (1929) 3 W.W.R. 209; 52 C.C.C. 151.

2. Appeal from summary conviction.]—Sec. 80 of the Summary Convictions Act, providing that upon any appeal the Court to which the appeal is made "may make such order as to costs to be paid by any party as it thinks fit," does not authorize an order as to costs in favour of or against the Crown within the exception in sec. 2 of the Crown Costs Act. *Rex* v. *Volpatti*, (1919) 1 W.W.R. 358.

3. Against officer of Crown.]—Where an appeal is allowed from a conviction, the information leading to which was laid by the chief of police of a municipality, no costs should be allowed, as such chief of police is "an officer, servant or agent of and acting for the Crown" within the meaning of the Crown Costs Act. *Matson* v. *Leask*, (1919) 2 W.W.R. 59.

4. District Registrar of Titles.]—A district registrar of titles is an officer of the Crown within the meaning of the Crown Costs Act, and the Court is prohibited from making any order or direction as to costs for or against him. This rule applies to cases where by statute the costs are to follow the event, also on the dismissal of an appeal taken by him to the Court of Appeal. *In re Land Registry Act and Scottish Temperance Life Assurance Company*, (1919) 26 B.C.R. 504; (1919) 2 W.W.R. 125.

5. Certiorari]—Upon dismissal of certiorari proceedings in a criminal matter the Court if requested to do so may award costs in favour of the Crown. *Rex* v. *Lam Joy; Rex* v. *Sam Bow*, (1920) 28 B.C.R. 253; (1920) 2 W.W.R. 1006.

6. Workmen's Compensation Board.]—The Workmen's Compensation Board is a corporation created by statute to carry out public purposes and the members thereof are appointees of the Lieutenant-Governor in Council. The Board is an agent of the Crown and comes within the purview of the Crown Costs Act. *Rosebery Surprise Mining Company, Limited* v. *The Workmen's Compensation Board. Cunningham* v. *The Workmen's Compensation Board. Standard Silver Lead Mining Company, Limited* v. *The Workmen's Compensation Board*, (1920) 28 B.C.R. 284; 51 D.L.R. 470; (1920) 2 W.W.R. 676.

7. Certiorari.]—No costs will be allowed against an unsuccessful applicant for a writ of certiorari following a conviction under the Summary Convictions Act for unlawful sale of intoxicating liquor. *Rex* v. *Liden*, (1922) 31 B.C.R. 126; 39 C.C.C. 369.

8. Crown Costs Act—Provincial matters.]—The Crown Costs Act applies to the Crown in right of the Province only and the Crown (Dominion) as the successful party is entitled to the costs of the appeal. *Montreal Trust Company* v. *South Shore Lumber Co.*, (1924) 33 B.C.R. 280; (1924) 1 D.L.R. 1030; (1924) 1 W.W.R. 657.

9. Habeas corpus.]—An application for a writ of habeas corpus without any proceedings in aid, in respect of a conviction under Dominion law, is an independent civil proceeding and is therefore subject to the provisions of the Crown Costs Act and no costs can be given. Where counsel appears for the Crown (Dominion) in police-court proceedings and afterwards without instructions appears in habeas corpus proceedings in respect to the same matter:—Held, that as his retainer ceased with the conviction the Dominion Government was not a party to the subsequent proceedings and an application for costs failed. *Rex* v. *Ten Chinamen*, (1924) 34 B.C.R. 349.

10. Expressly authorized.]—An assistant fire marshal ordered the removal of a building under sec. 17 of the Fire Marshal Act. An appeal to the fire marshal was dismissed and an appeal was then taken to the County Court judge who set aside the order of the assistant fire marshal with costs:—Held, on appeal, that the Fire Marshal Act which was enacted subsequently to the Crown Costs Act, contemplates costs in the County Court by requiring the appellant to give security therefor. Per Martin, J.A.: The Crown Costs Act provides that there shall be no costs for or against the Crown except under the provisions of a statute which "expressly authorizes" the Court, etc. The word "expressly" in construing such an enactment is satisfied by whatever is "necessarily or even naturally implied." *Watson* v. *Howard*, (1924) 34 B.C.R. 449; (1924) 4 D.L.R. 564; (1924) 3 W.W.R. 404.

11. Certiorari — Charge not laid by Crown.]—Where a charge punishable by summary conviction is not laid by the Crown, the Crown Costs Act does not apply and if on certiorari proceedings an order of the County Court judge allowing an

appeal from the magistrate is quashed, costs may be given the accused. *Rex* v. *Meehan*, (1925) 35 B.C.R. 363; (1925) 2 D.L.R. 411; (1925) 1 W.W.R. 819; 43 C.C.C. 325.

12. Appeal under Summary Convictions Act.]—Where a conviction for an offence against the Government Liquor Act is quashed on appeal taken under the Summary Convictions Act, the Crown Costs Act is a bar to the awarding of costs against the Crown. *Rex* v. *McLane*. *Rex* v. *Noon*, (1927) 38 B.C.R. 306; (1927) 1 W.W.R. 701; 47 C.C.C. 208.

13. Chinese Immigration Act—Appeal.]—There is no right of appeal from an order of a judge of the Supreme Court under sec. 17 of the Chinese Immigration Act, 1923, the judge being persona designata, and upon the dismissal of an appeal by the Crown from such an order, costs will be awarded against the Crown. *Rex* v. *Chin Sack* (*No. 2*), (1928) 40 B.C.R. 68.

14. Produce Marketing Act.]—The provisions of the Produce Marketing Act, 1926-1927, cap. 54, do not modify or affect the provisions of the Crown Costs Act, 1924. *Rex.* v. *Christian Community of Universal Brotherhood Ltd.*, (1931) 1 W.W.R. 255.

15. Fisheries.]—Sec. 21 of the fishery regulations makes it an offence for a purse-seine to be kept open for any time after being cast in the manner known as an "open set." The alleged offence set out in the conviction is that the accused "did fish for salmon with a purse-seine in the manner known as an 'open set'":—Held, that the offence created by said sec. 21 is not properly described in the conviction and the conviction should be quashed. Held, further, that on proceedings such as these, the rule, in civil matters, that costs must follow the event unless good cause be shewn, should be followed. *Rex* v. *McPherson*, (1929) 41 B.C.R. 218; (1929) 2 W.W.R. 141; 51 C.C.C. 419.

16. Succession duty — Petition.] — On appeal from a judge's decision on a petition under sec. 43 of the Succession Duty Act to ascertain the duty payable on an estate, the Court is governed by the Crown Costs Act and has no power to order costs against the Crown. *In re Estate of Sir William Van Horne, Deceased, and the Succession Duty Act* (*No. 2*), (1919) 27 B.C.R. 372; (1919) 3 W.W.R. 598.

H. Of Party Indemnified.

1. Male Minimum Wage Act—Attorney-General.]—On the plaintiff being unsuccessful on the trial the Attorney-General retained and paid counsel to argue the appeal and telegraphed the plaintiff's solicitor that the Government would undertake to pay the costs of the appeal in the event of his being unsuccessful:—Held, that the plaintiff is entitled to all costs incurred by him for which he is responsible but not to costs which he has not incurred and against which he is indemnified. *Compton* v. *Allen Thrasher Lumber Co.*, (1927) 39 B.C.R. 70; (1927) 3 W.W.R. 724.

2. Costs undertaken by Government Department.]—Where the successful parties in an action are under no legal obligation to pay for the services of the solicitor who appeared for them, they are not entitled to the usual award of costs. In such a case there is nothing against which the successful parties require indemnity, and costs are only granted by way of indemnity. Thus, where successful defendants had been represented by the solicitor of a Government department, which department had undertaken the defence, they were not awarded costs. *Hall* v. *Commissioners of Sumas Drainage, Dyking & Development District*, (1923) 32 B.C.R. 390; (1923) 3 D.L.R. 1075; (1923) 3 W.W.R. 164.

3. Where no liability.]—Where a defendant is not liable for the costs of the defence he cannot if successful in the action recover costs from the plaintiff. *Winter* v. *Dewar*, (1928) 40 B.C.R. 312.

I. Divorce and Matrimonial Causes.

1. Discretion.]—There is complete discretion vested in the Court under sec. 35 of the Divorce and Matrimonial Causes Act with regard to fixing costs. In a proper case, costs may be awarded on solicitor and client scale. *Clappier* v. *Clappier*, (1923) 32 B.C.R. 204.

2. Wife unsuccessful respondent.]—Where a wife is respondent in a divorce action, although unsuccessful, she is entitled to her costs if her defence has been fairly and reasonably conducted; her costs are not to be limited to the amount paid into Court or secured by her husband pursuant to the Divorce Rules, but should be ascertained on taxation between party and party on the usual scale. *Bourgoin* v. *Bourgoin*, (1930) 42 B.C.R. 349; (1930) 3 D.L.R. 155; (1930) 1 W.W.R. 576.

3. Intervener.] — The intervener was given costs against the respondent and it was ordered that the respondent's costs should not be paid without the intervener's costs against her being provided for. *Ibid.*

4. Co-respondent's liability for.]—The petitioner was given costs against the co-respondent, it being found on the evidence that even if the co-respondent did not know that the respondent was married, he had the means of knowledge or was careless as to whether she was or not. *Ibid.*

J. Execution.

Assignment for creditors — Goods in possession of sheriff under execution—Costs.]—Where an execution debtor assigns for the benefit of his creditors while the sheriff is in possession of his goods under a writ of execution, costs of the execution without poundage are payable up to the service upon the sheriff of notice of the assignment. *Baker* v. *Richards*, (1918) 25 B.C.R. 397; 40 D.L.R. 351; (1918) 2 W.W.R. 902; Affd. 59 S.C.R. 656; 49 D.L.R. 684.

K. Foreclosure.

Mortgagee's costs of appeal.]—A mortgagee is entitled to payment forthwith of the costs of an unsuccessful appeal by the mortgagor unless there are exceptional circumstances. *Canada Permanent Mortgage Corporation* v. *Dalgleish and Canadian Bank of Commerce*, (1928) 40 B.C.R. 94; (1928) 3 D.L.R. 59; (1928) 1 W.W.R. 922.

L. Garnishee Proceedings.

Unsuccessful garnishee proceedings after judgment — Defendant's costs set off against judgment.]—Where a plaintiff has obtained judgment in an action and the judgment debtor is successful on appeal against an order for attachment of a debt, the costs of the appeal will be set off against the judgment. *Patton* v. *Hartley*: *Bank of Montreal, Garnishee*, (1917) 24 B.C.R. 5; (1917) 2 W.W.R. 234.

M. Jury.

Special jury—Order for.] — Where a defendant applies for a jury and the plaintiff while objecting asks that in the event of the application being granted a special jury may be ordered, the costs of the special jury should be costs in the cause. *Canadian Financiers Trust Co.* v. *Ashwell*, (1916) 23 B.C.R. 341; 31 D.L.R. 786; (1917) 1 W.W.R. 459.

N. Separate Actions Between Same Parties.

1. Separate actions between same parties.]—The plaintiff obtained judgment with costs in two actions which remained unsatisfied. He brought a third action against the same defendant in which he failed, and the costs were awarded against him. On motion to set off the costs of the third action against the two unsatisfied judgments:—Held, that the Court may in its discretion deal with such a case, and in the circumstances of the present case the application should be granted. *The Royal Bank of Canada* v. *Skeans (No. 2)*, (1917) 24 B.C.R. 193; 36 D.L.R. 390; (1917) 2 W.W.R. 942.

2. Separate actions between same parties—Set off.]—One of the plaintiffs applied to set off the defendant's costs against a judgment obtained by him against the defendant in a former action:—Held, that a set-off should not be refused owing to a solicitor's lien if as between the parties themselves it is fair and just, and if no fraud has been practised upon the solicitor. *Inlay Hardwood Floor Co.* v. *Dierssen*, (1928) 39 B.C.R. 514; (1928) 2 D.L.R. 560; (1928) 1 W.W.R. 897.

3. Separate actions between the same parties—Set-off.]—Where a plaintiff has obtained judgment with costs against the defendant in one action, and a subsequent action between the said parties was dismissed on the appeal with costs, a judge of the Court below may order that the defendant is entitled to set off his costs of the second action against the sum due to the plaintiff in the first action. An order for a set-off is not an attempt to vary the judgment of the Court of Appeal but a process of enforcement pro tanto of the two judgments concerned and in the attainment of this end a judgment of the Appeal Court is to be viewed as a judgment of the Court below. *Bank of Hamilton* v. *Atkins*, (1924) 33 B.C.R. 315; (1924) 1 W.W.R. 1157.

O. As Between Defendants.

1. One defendant successful—Another unsuccessful.]—Where a plaintiff sues two

defendants and succeeds against one but not the other, there is no jurisdiction in the Court to order that there be added to his costs against the unsuccessful defendant the costs which he has to pay to the successful defendant although he was justified in suing both. *Holt* v. *Holmes & Wilson Limited and Thomson*, (1930) 42 B.C.R. 545; (1930) 2 D.L.R. 987; (1930) 1 W.W.R. 887.

2. Of parties added as precautionary measure—Where no defence entered.]—Parties added as defendants as a precautionary measure who know that no personal judgment is claimed against them and put in no defence, are not entitled to costs for attendance of counsel. *Boydell* v. *Hames et al.*, (1915) 21 B.C.R. 171; 21 D.L.R. 371; 30 W.L.R. 842; 8 W.W.R. 17.

3. One cause of action—Separate defences.]—As Appendix N of the Tariff of Costs limits the amount taxable in certain circumstances by one party against another party, where there is only one cause of action against two or more defendants the plaintiff can only tax a bill up to the fixed amount against all the defendants collectively even though the defendants have severed in their defences. *Winlow* v. *Ross and Quickstad*, (1926) 37 B.C.R. 412; (1926) 4 D.L.R. 219; (1926) 3 W.W.R. 268.

4. Apportionment.] — On the taxation of costs pursuant to a judgment which does not contain any direction as to any segregation or apportionment of costs as between several defendants, there is no jurisdiction in the taxing officer to make any such segregation or apportionment. *Overn* v. *Strand*, (1930) 42 B.C.R. 358; (1930) 3 D.L.R. 994; (1930) 1 W.W.R. 629.

P. Not Disposed Of at Trial.

Jurisdiction.]—After judgment has been entered, the Supreme Court has power by virtue of marginal rule 319 to make an order disposing of costs that had been reserved for disposition at the trial but through oversight were not then disposed of, and the County Court by virtue of sec. 11 of the County Courts Act can invoke the same rule and exercise the powers so given. *Wood* v. *Sherman*, (1917) 24 B.C.R. 376; (1918) 1 W.W.R. 177.

Q. Contributory Negligence.

1. Apportionment of costs.] — Where in an action for damages arising out of a collision between two motor vehicles, the finding of the jury is that the plaintiff and defendant were both at fault the degree of fault of the defendant being sixty per cent. and that of the plaintiff being forty per cent., the costs of both parties should be taxed and the plaintiff should recover sixty per cent. of the total costs and the defendant forty per cent. thereof. *Ansel* v. *Buscombe*, (1927) 3 W.W.R. 137.

2. Apportionment.]—Where in an action for damages for negligence it is found that the fault lies equally upon both parties, under sec. 4 of the Contributory Negligence Act, the plaintiff's costs and defendant's costs should be added together and each party held liable for one-half the total. *Harper* v. *McLean* (*No.* 2), (1928) 39 B.C.R. 480; (1928) 2 D.L.R. 986; (1928) 1 W.W.R. 912.

3. Both at fault.]—Under the Contributory Negligence Act in an action for damages for personal injuries where both persons are found at fault the costs of both parties should be added together and divided in the same proportion in which the joint total damages were divided "unless the judge otherwise directs." The power reserved to the judge to make a special "direction" is intended to meet a case where the statutory direction would work an injustice. *Katz* v. *Consolidated Motor Co.* (1930) 42 B.C.R. 214; (1930) 2 D.L.R. 241; (1930) 1 W.W.R. 305. Followed in *W. L. Morgan Fuel Co.* v. *B.C. Electric Ry. Co.*, (1930) 42 B.C.R. 382; (1930) 4 D.L.R. 30; (1930) 2 W.W.R. 776.

4. Apportionment of costs.] — In an action wherein damages were apportioned under the Contributory Negligence Act, 1925, cap. 8, as between the adult plaintiff and the defendant, and damages were awarded the infant plaintiff (a gratuitous passenger in the adult plaintiff's car) as against the defendant:—Held, that the latter was entitled to have the damages payable to the infant plaintiff included as part of the loss sustained by the defendant, and to claim payment from the adult plaintiff of his proportion thereof according to his degree of blame for the accident. *Price* v. *Fraser Valley Milk Producers Association*, (1931) 3 W.W.R. 48.

5. Apportionment of costs.] — In an action for damages resulting from a collision between motor vehicles where the apportionment of fault was found to be two-thirds on the defendant and one-third on the plaintiff who was driving one of the cars,

the co-plaintiffs being passengers, it was held that the defendant was entitled to contribution from the plaintiff driver as against the amount allowed the co-plaintiffs to the extent of one-third, and that, exercising the power given under marginal rule 977, the whole costs of the plaintiffs be taxed and two-thirds thereof paid by the defendant to the plaintiff, the defendant not to be entitled to any costs from the plaintiff in respect of either claim or contribution. *Chambers et al.* v. *Sampson*, (1931) 44 B.C.R. 134; (1931) 3 D.L.R. 206 (1931) 2 W.W.R. 251.

R. Trespass.

1. Power of magistrate.] — Where an action under the Trespass Act, 1911, is brought before a stipendiary magistrate, he can adjudicate thereon only by virtue of the powers conferred upon him by sub-sec. 1 of sec. 4 of the Small Debts Court Act; the Court in which he sits is the Small Debts Court, and no fees or costs, other than disbursements, can be taxed against the unsuccessful party. *Farquharson* v. *Cortesi*, (1918) 3 W.W.R. 193.

2. After payment into Court.] — The defendant commenced expropriation proceedings under the Forest Act for a right of way across the plaintiff's land, but stopped proceedings pending an attempt to settle on the purchase price. In the meantime he proceeded to construct a railway across the proposed right of way. On the plaintiff bringing an action for trespass the defendant paid into Court $350 to satisfy the plaintiff's claim. The trial judge gave $25 damages and ordered the defendant to proceed with the arbitration. On the question of costs:—Held, that if the sum determined by the arbitration as the value of the land expropriated with the $25 above mentioned does not exceed the amount paid into Court, the plaintiff is only entitled to his costs up to the time of payment in and the costs of the issue as to liability on which he succeeded, the other costs to go to the defendant. *Goddard* v. *Bainbridge Lumber Company, Limited (No. 2)*, (1921) 29 B.C.R. 287.

S. Of Trustee.

Under what tariff.]—The costs of a contested motion for the removal of an administrator and the appointment of another should be taxed under Appendix N of the Supreme Court Rules and not as between solicitor and client. Rule 60 of the Probate Rules of 1925 only applies to non-contentious matters. *Payne* v. *Gammon*, (1927) 38 B.C.R. 153; (1927) 2 D.L.R. 605; (1927) 1 W.W.R. 506.

T. Seaman's Wages.

Consolidated Action.]—Where a number of seamen, by consolidation, join in one action their individual claims for wages against the owner of one or more ships engaged in a common enterprise, with resulting liens on different ships, each claimant is not thereby liable for costs consequent upon the failure of another claimant to establish a specific lien not set up by the former, but the costs in each case are awarded according to the discretion conferred by r. 132. *Morrisette* v. *The "Maggie,"* (1916) 22 B.C.R. 424; 16 Can. Ex. 494, 498; 27 D.L.R. 464, 466; 34 W.L.R. 39, 120; 10 W.W.R. 228.

U. Woodman's Lien.

Woodman's lien for wages.]—Under the authority of sec. 23 of the Woodman's Lien for Wages Act the Court may award costs in personam against a defendant disputing the plaintiff's right to a woodman's lien. *Hahn* v. *Seibel*, (1920) 3 W.W.R. 229.

V. Of Actions Respecting Wills.

1. Particular portion of estate.]—A judgment of the Court of Appeal as drawn and entered will on application be amended to conform with the judgment of the Court in respect to costs. Under Supreme Court Rule 989d the Court has power, in an action with respect to the validity of a will, to direct that the costs should be payable out of any particular portion of the estate. *The Standard Trusts Company* v. *Pulice*, (1923) 32 B.C.R. 399.

2. Testator's Family Maintenace Act —Unsuccessful claimant.] — There is no real analogy between proceedings under the Testator's Family Maintenance Act and those within the provisions of Supreme Court Rule 976 and sec. 28 of the Court of Appeal Act, the proceedings being directed not to implement a will but to deprive the beneficiary of property derived thereunder. It would in general be an unfortunate

encouragement to litigation if unsuccessful claimants entertained the hope that even if their claim proved to be baseless yet the beneficiary under the will would be saddled with the costs thereof. *McDermott* v. *Walker*, (1930) 42 B.C.R. 354; (1930) 2 D.L.R. 413; (1930) 1 W.W.R. 845.

V. TAXATION.

A. *In General.*

1. Appendix M—Power of registrar to reduce costs under.]—The taxing officer has no authority under Order 65, R. 27 (29) (1912) to allow a smaller sum than the amount specified in Appendix M, Sub-rule 38 (a) only applies where the taxing officer may exercise his discretion. *In re Winding-up Act and Bank of Vancouver*, (1917) 3 W.W.R. 461.

2. Appendix M.]—The proper allowance under tariff 38, Appendix M, for compromising suits should be fixed by the judge whose fiat should be obtained in the usual way, and not by the taxing officer. *Ibid.*

3. Appendix M (214)—"Hearing."]—On a motion to compel a person not appearing on the record to indemnify the applicant against costs, on the ground that he was the instigator of the action, the facts being in dispute and cross-examinations on affidavits being read:—Held, that the argument of the motion is a "hearing" within item 214 of Appendix M to the Supreme Court Rules and higher counsel fees than upon an ordinary motion can be taxed. *Pacific Coast Coal Mines* v. *Arbuthnot*, (1927) 38 B.C.R. 453.

4. Appendix N—Amount involved.]—"The amount involved" does not necessarily mean the amount claimed. In the case of a contested action it means the amount really in issue between the parties. *Davies* v. *Schulli*, (1927) 39 B.C.R. 321; (1928) 1 D.L.R. 746.

5. Appendix N—Amount involved.]—In an action where the plaintiff recovers judgment for only part of the damages he has suffered, through the application of the Contributory Negligence Act, "the amount involved" for the purposes of determining the scale under which the defendant's costs are to be taxed is the difference between the amount recovered by the plaintiff and the amount of his original claim. *Pantages* v. *Chung Gee et al.*, (1929) 41 B.C.R. 401; (1929) 4 D.L.R. 542; (1929) 2 W.W.R. 503.

6. Tariff—Appendix N—"Matter."]—The costs provided for in sec. 349 of the Municipal Act mean party and party costs, and Appendix N governs the taxation. *In re Orr and District of North Vancouver*, (1928) 39 B.C.R. 478; (1928) 1 W.W.R. 799.

7. Maximum amount — Appendix N.]—The maximum amount taxable as between party and party under Appendix N is exclusive of disbursements. The recovery of disbursements on the scale set out in Appendix M is not affected by the fixing of a maximum in Appendix N. *Higgins and Chan Sing* v. *Comox Logging Company*, (1927) 38 B.C.R. 477; (1927) 3 D.L.R. 720; (1927) 2 W.W.R. 378.

8. Appendix N — Other actions and proceedings.]—The last clause of the letter press in Appendix N of the Rules of Court provides that "In all other actions and proceedings there shall be taxable the amount set out opposite each respective tariff item in column 2. Provided, however, that for special cause the Court or judge may at any time at or after trial and before the bill of costs has been taxed, order the costs to be taxed under column 1, 3 or 4":—Held, that the proviso is limited in its application to actions and proceedings other than those for liquidated amounts, etc., as set out in the opening paragraph of Appendix N. *Vandepitte* v. *The Preferred Accident Insurance Company of New York and Berry (No. 2)*, (1930) 42 B.C.R. 315; (1930) 2 D.L.R. 699.

9. Discretion of registrar.]—The registrar's discretion on the taxation of a bill of costs will not be interfered with unless good reason therefor is disclosed. Under the new tariff of costs (Appendix N) the registrar has in his discretion the power to allow junior counsel a fee and brief on taxation. *Royal Bank of Canada* v. *National Insurance Company*, (1921) 29 B.C.R. 286; (1921) 1 W.W.R. 759.

10. Judgment on appeal varying Court below—New Tariff.]—The plaintiff having brought action to recover extras on two distinct items in connection with a construction contract, was successful as to both on the trial, and taxed his costs, which were paid after the taxation, but before the disposition of the appeal a new tariff of costs came into force. The Supreme Court of Canada, in finally disposing of the action, disallowed the extras as to one of the items and directed that the plaintiff receive the general costs of the action and that the defendant recover the

costs of the issue on which he is successful. The taxing officer again taxed the plaintiff's costs under the new tariff and the defendants' costs on the issue on which they were successful:—Held, on appeal, that there should not be another taxation of the plaintiff's costs of the trial under the new tariff, but that he should refund what was taxed on the original taxation with respect to the item upon which he finally failed. *The Royal Bank of Canada* v. *Skene & Christie*, (1921) 30 B.C.R. 127.

11. Appeal from County Court.]—Sec. 2 (5) of the Court Rules of Practice Act Amendment Act, 1925, applies to the costs of an appeal from the County Court and the taxation is under the provisions of Appendix N of the Supreme Court Rules. *Shrimpton* v. *Indar Singh*, (1927) 39 B.C.R. 319; (1928) 1 D.L.R. 462; (1928) 2 W.W.R. 22.

12. Tariff—Claim allowed — Counterclaim dismissed.] — Where the plaintiff recovers judgment in the action with costs and the counterclaim is dismissed with costs, two sets of costs cannot be allowed for claim and counterclaim under the present tariff. One set of costs only is allowed on the scale applicable to the action, and to this is added under tariff items 2 or 19 of Appendix N the difference between that scale and the scale applicable to the counterclaim, unless otherwise ordered. *May* v. *Imperial Oil Limited*, (1931) 44 B.C.R. 175; (1931) 4 D.L.R. 304; (1931) 3 W.W.R. 40.

13. Costs of appeal.]—Tariff Item 28 of Appendix N of the Supreme Court Rules applies only to the actual hearing before the Court of Appeal. Attendances before the registrar or before a judge of the Court of Appeal to settle a judgment are merely incidental thereto for which no additional counsel fee is provided. *Mair* v. *Duncan Lumber Company, Limited (No. 2)*, (1928) 39 B.C.R. 399; (1928) 1 W.W.R. 431.

14. After payment into Court during action.]—In determining the scale on which a plaintiff's costs should be taxed in the County Court, where the defendant with his dispute note pays into Court less than the plaintiff is held entitled to receive, regard should be had to the amount in dispute at the trial. Plaintiff sued for $602. Defendant paid into Court with his dispute note $97 which the plaintiff did not accept. At trial it was held plaintiff was entitled to $152:—Held, the costs up to the time of payment in should be taxed on the scale applicable to $152 and after that on the scale applicable to $55. *Page* v. *Mitchell Motor Agency*, (1921) 1 W.W.R. 1107.

15. Appeal books.]—Where an appellant has typewritten the appeal books he should be allowed the scale of fees provided by the tariff appropriate thereto, notwithstanding that the typewriting has been done by a public stenographer at an agreed price; subject to such allowance being reduced if the respondent shews that the total fees allowed by the tariff for the alternative course of printing would be less than that allowed for the course adopted. *Stirling & Pitcairn, Ltd.* v. *Kidston*, (1920) 2 W.W.R. 862.

See 28 B.C.R. 306; 53 D.L.R. 29.

16. Telephone messages.]—The registrar's allowance of fees for telephone messages as for ordinary letters and not attendance will be sustained. *In re Legal Professions Act. Noble & St. John* v. *Bromiley*, (1928) 39 B.C.R. 518; (1928) 2 D.L.R. 605; (1928) 1 W.W.R. 899.

17. Brief on interlocutory application.]—There is no provision in the tariff of costs for briefs on interlocutory proceedings in Chambers. *Hill* v. *The Canadian Home Investment Company Limited (No. 2)*, (1915) 22 B.C.R. 304.

B. Review of Taxation.

1. Quantum.]—The Court will not interfere with the taxing officer's discretion when the question is only one of quantum and no question of wrong principle in volved. *In re Legal Professions Act. Noble & St. John* v. *Bromiley*, (1928) 39 B.C.R. 518; (1928) 2 D.L.R. 605; (1928) 1 W.W.R. 899.

2. Wrong basis.]—Notwithstanding the provisions of Order LXV., r. 27 (41), that the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters not objected to in the manner provided in said rule, the certificate may be set aside when the bill has been taxed on a wrong basis, and this was ordered where agents of the unsuccessful party's solicitors appeared on a taxation without instructions, and the bill of costs of an appeal was taxed without objection. *Shields* v. *Hine*, (1919) 27 B.C.R. 20.

3. Discretion of Registrar.]—A taxing officer's ruling as to whether any particular item should be allowed or excluded ought rarely to be interfered with on appeal, if it

appears he understood the governing principle. *Canadian Educational Films Ltd. et al.* v. *Horan and Nichols Theatres, Ltd.*, (1928) 39 B.C.R. 424.

4. Finding of fact by taxing officer.]—The decision of the registrar on a question of fact on a reference with regard to a solicitor and client bill of costs, will not be interfered with by the Court of Appeal, unless convinced he is clearly wrong. *In re Dickie, De Beck & McTaggart and Sherman*, (1916) 23 B.C.R. 538.

C. Fees to Counsel.

1. Increased counsel fees — Solicitor's charges incidental to.]—Solicitor's charges incidental to written arguments supplementing oral arguments are not taxable under a fiat for an increased counsel fee made in view of the submission of written arguments. *McFeeley* v. *B.C. Electric Ry. Co. Ltd.*, (1918) 3 W.W.R. 15.

2. Appendix N.]—The word "process" in item 13 of Appendix N of the Supreme Court Rules is not intended to include counsel fees and the plaintiff is entitled to tax for "process" under item 13, and for counsel fees under item 6. *Bradshaw* v. *British Columbia Rapid Transit Co.*, (1927) 38 B.C.R. 430; (1927) 1 W.W.R. 989.

3. Extraordinary motion — Hearing.]—On a motion to compel a person not appearing on the record to indemnify the applicant against costs on the ground that he was the instigator of the action, the facts being in dispute and cross-examinations on affidavits being read:—Held, that the argument of the motion is a "hearing" within item 214 of Appendix M to the Supreme Court Rules and higher counsel fees than upon an ordinary motion can be taxed. *Pacific Coast Coal Mines Limited et al.* v. *Arbuthnot et al.*, (1927) 38 B.C.R. 453.

4. Discretion of registrar.]—On a taxation as between party and party there is no discretion in the registrar under Order LXV., r. 27, subsec. (29) of the Supreme Court Rules to allow an increased counsel fee above the tariff without a fiat of a judge to that effect. *Shelly Bros. Limited* v. *Callopy et al.*, (1918) 26 B.C.R. 149.

5. Counsel on appeal.]—The registrar having allowed $500 for senior counsel and $325 for junior counsel on an appeal the hearing of which occupied one hour of the first day, all of the next three days and over one-half of the fifth day, it was held that in the circumstances the view taken by the registrar should not be disturbed. *Clausen* v. *Canada Timber and Lands Ltd.*, (1925) 35 B.C.R. 408.

See 35 B.C.R. 461.

D. Witness Fees.

1. Railway passes.]—Where a railway company issues passes to witnesses required on the trial of an action, the regular fares covered by the passes are not chargeable against an unsuccessful party. *Paulson* v. *Canadian Pacific Ry. Co.*, (1919) 26 B.C.R. 440.

2. Witnesses present but not called.]—The Court will not review the allowance of a witness's expenses on the ground that they were incurred through over-caution or mistake under marginal rule 1002 (29), if on proper consideration they have been allowed by the taxing officer. *Endersby* v. *Consolidated Mining and Smelting Co.*, (1918) 26 B.C.R. 380; (1918) 3 W.W.R. 579.

3. Actually paid.] — Witness fees not actually paid at or before the taxation cannot be allowed on the taxation of party and party costs under Appendix N of the Supreme Court Rules. *Mikkelsen* v. *Duff*, (1931) 44 B.C.R. 39; (1931) 2 D.L.R. 878.

4. Attending more than one trial—Affidavit of disbursements.]—In general the fees for a witness called at a trial should not be disallowed on the ground that evidence negativing the fact of his attending more than one trial at the time was not produced; where, however, it is seriously suggested as a fact by counsel on the taxation that a witness has attended in more than one case or for another purpose, the taxing officer in his discretion may require an affidavit negativing the statement or suggestion so made. *Lawson* v. *Interior Fruit and Vegetable Committee of Direction*, (1930) 43 B.C.R. 199; (1930) 4 D.L.R. 1034; (1930) 3 W.W.R. 186.

E. Preparation of Evidence.

1. Timber cruisers.] — Expenses incurred by timber cruisers in preparing themselves to give evidence were allowed as part of the witness fees taxable by a successful party. *Brown* v. *Great Northern Railway Company*, (1920) 28 B.C.R. 484; (1920) 3 W.W.R. 426.

2. Maps.]—The expenses of preparing a map used in a trial will not be allowed as costs upon taxation unless the map was necessary and the expense thereof allowed by the Court or judge at the trial. *Merkley* v. *Raper*, (1922) 1 W.W.R. 1166.

3. Evidence before Registrar.]—Where on a taxation of costs viva voce evidence has been taken before the taxing officer but no notes of such evidence have been taken, a judge is powerless under O. 65 r. 27 (42) to review the taxation. *Cates Tug & Wharfage Co. Ltd.* v. *The Franklin Fire Insurance Company*, (1927) 38 B.C.R. 95; (1927) 2 D.L.R. 71; (1927) 1 W.W.R. 438.

F. Winding-up Proceedings.

Partnership — Appendix N.] — The expression "winding-up proceedings" in the caption of Appendix N of the Tariff of Costs is used in its technical sense and means proceedings taken under the Winding-up Acts. *Davies* v. *Schulli*, (1927) 39 B.C.R. 321; (1928) 1 D.L.R. 746.

G. Travelling Expenses.

Solicitor.]—Where upon the taxation of a bill of costs upon an appeal charge is made for travelling expenses of a solicitor to attend on taxation, the amount will be limited by making only such allowance as would have been made if the solicitor's agent at the place of taxation had attended. *Clausen* v. *Canada Timber and Lands Ltd.*, (1925) 35 B.C.R. 408.

H. Improper, Vexatious and Unnecessary Proceedings.

Interpleader issue — Pleadings.] — The delivery of pleadings after an interpleader issue is delivered and returned involves an unjustifiable expense. *Johnston* v. *Courtney*, (1920) 2 W.W.R. 459.

VI. Solicitor and Client.

1. Taxation—Appendix M.]—In a taxation of costs as between solicitor and client the registrar is not bound by the scale of fees in Appendix M to the Supreme Court Rules but can allow a reasonable sum for services rendered using Appendix M only as a guide for him to fix what is reasonable. *In re Boscowitz*, (1916) 27 D.L.R. 721; 10 W.W.R. 948.

2. Application for taxation — Ordinary summons.]—An application by a client for an order of course under sec. 76 of the Legal Professions Act, for the taxation of a solicitor's bill of costs, should be made by ordinary summons intituled in the matter of the Act and the Solicitor. *In re Phelan, a Solicitor*, (1916) 27 D.L.R. 729; 9 W.W.R. 1434.

3. Certificate of taxing officer—Execution thereon.]—A solicitor may issue execution after the filing of a certificate of the District Registrar of the taxation of the solicitor's bill against his client upon the authority of an order for such taxation which does not direct payment of the amount as taxed, and Order 65, Rule 27, subsec. 14 giving the client 14 days' time in which to apply to a judge to renew the taxation does not prevent the solicitor from issuing execution. *In re McLelan, a Solicitor*, (1926) 1 W.W.R. 198.

4. Commission upon collection.]—In the absence of a special agreement between solicitor and client as to the amount to be charged upon the collection of a claim a solicitor is entitled to charge the defendant a commission in lieu of costs according to the scale provided for by Rules of Court, Order LXV., r. 29. Where after discussion without determining the fee to be charged, the solicitor fails to draw the client's attention to the rule and advise him that in the absence of an agreement payment will be exacted according to the rule, this is held to be sufficient ground for depriving a solicitor of his costs of an action to recover the amount of the commission. *Cameron and Cameron* v. *Boulton*, (1930) 43 B.C.R. 39; (1930) 4 D.L.R. 1021; (1930) 3 W.W.R. 61.

VII. On County Court Scale.

Damages.]—In an action in the Supreme Court for damages for trespass arising out of the wrongful seizure of goods and chattels under a distress warrant, the plaintiff recovered a sum within the jurisdiction of the County Court: — Held, that where rights of this character are invaded with the possible result of a breach of the peace, an action in the Supreme Court is justifiable and although the damages awarded

come within the County Court jurisdiction the costs should be taxed on the Supreme Court scale. *Thompson* v. *Hull*, (1921) 30 B.C.R. 358; 70 D.L.R. 863.

VIII. Time for Payment.

Execution for pending reference.]—The plaintiff's action for rescission of an agreement for the sale of land and damages for deceit was dismissed on the trial and in the Court of Appeal. The Supreme Court of Canada allowed the appeal as to damages and ordered a reference as to the amount to the Master in British Columbia, and that there be a set-off between the said damages as found by the Master and the moneys payable on the agreement for sale. It was further ordered that the defendants pay the costs of the appeal and of the two Courts below. On application for stay of execution pending the reference:—Held, that as the plaintiff is entitled to her costs unconditionally under the judgment, the application for stay must be refused. *Barron* v. *Kelly et al.*, (1918) 26 B.C.R. 379; (1918) 3 W.W.R. 466.

IX. Security for Costs.

A. Application For.

1. Before whom made.]—Sec. 29 of the Court of Appeal Act as amended by B.C. Stats. 1913, cap. 13, refers the whole matter of security for costs to be occasioned by an appeal to the Court appealed from, and the judge may fix a time within which the security must be furnished. *Olsen* v. *Pearson and Evindsen*, (1923) 32 B.C.R. 517.

2. Time.]—A judge appealed from may fix the amount of security but cannot limit the time for depositing security. This must be done by application to a judge of the Court of Appeal. Before a motion can be made to the Court of Appeal to dismiss for want of security, a time limit for deposit must have been fixed by a judge. An order dismissing an appeal for default in giving security cannot be made in Chambers, but only by the Court. *Ewing* v. *Hunter*, (1929) 42 B.C.R. 161.

3. Demand.]—On an appeal being taken, a demand for security for the costs of the appeal should first be made. If this is not complied with, and an application in Chambers is necessary, the costs of the application should be to the applicant in any event. *Wilson* v. *Welch*, (1923) 32 B.C.R. 240; (1923) 4 D.L.R. 1200.

4. Court appealed from—Jurisdiction.]—On an application for security for costs of appeal, the powers of a judge of the Court appealed from are limited to consideration of the sufficiency of the proposed security and to the extension of time for giving the security when asked for, and the judge will not consider the jurisdiction of the Appellate Court to entertain the appeal. *Park* v. *Judd*, (1920) 28 B.C.R. 399.

5. Delay in application.]—The defendant applied for security for costs, under sec. 114 of the Companies Act, on the day before trial. The writ had been issued in March, 1916, and the action set down for trial in March, 1918. The plaintiff's insolvency was disclosed on examination for discovery four days previously to the application:—Held, that by reasonable care the defendant might have discovered the plantiff's status at a much earlier date, and the application was refused. *Mather & Noble, Limited* v. *Diamond Vale Supply Company, Limited*, (1918) 25 B.C.R. 446; (1918) 3 W.W.R. 581.

6. Amount of security.]—In an appeal to the Supreme Court from a judgment ordering a reference to ascertain the quantum of damages, the whole of sec. 76 of the Supreme Court Act (Can.) should be read to give the result obviously aimed at. Notwithstanding the fact that the exact amount of damages has not as yet been ascertained, the subsection should be read as giving the judge power to consider the amount for which security should be given and reach an estimate of what would be reasonable. *Insinger* v. *Cunningham*, (1923) 32 B.C.R. 518; (1923) 4 D.L.R. 1199; (1923) 3 W.W.R. 1328.

7. Delay in furnishing.]—A motion to strike out an appeal for want of security will be dismissed, where security is deposited after notice but before hearing of the application, but if there has been undue delay in furnishing security the respondent should have the costs of the motion in any event of the cause. *Bready* v. *McLennan*, (1924) 33 B.C.R. 401.

See ibid 460.

8. Insufficient time—Postponement of hearing.]—Notice of appeal was served on the 22nd of December for the next sittings of the Court of Appeal commencing on the 8th of January following. Respondent's solicitor immediately demanded security for costs by letter to which he received no reply.

After vacation he gave notice of motion for an order for security but did not obtain the order until the morning of the 8th of January. He then applied on the same day to the Court of Appeal to put the case at the bottom of the list of appeals in order to have sufficient time to make effective his order for security:—Held, that there were reasonable grounds for making the application in the circumstances, and as the extension can be made with no great prejudice to the appellant the application should be acceded to. *Scott* v. *The Corporation of the City of Nanaimo,* (1924) 33 B.C.R. 344.

See ibid 474; (1924) 2 D.L.R. 811; (1924) 1 W.W.R. 1275.

9. Additional security—Prompt application for.]—An application for security for costs or for an increase thereof must be promptly made. If, therefore, it is made after a substantial accumulation of costs, security will not be ordered in respect of such accumulation. *Wall* v. *Wells,* (1926) 37 B.C.R. 445; (1926) 4 D.L.R. 799; (1926) 3 W.W.R. 353.

10. Absence of security.]—The hearing of an appeal will not be refused on the ground that security for costs has not been given. It is the duty of the party entitled to take proceedings to enforce his right. *Shipway* v. *Logan,* (1916) 22 B.C.R. 410. *Scott* v. *Nanaimo,* (1924) 33 B.C.R. 344.

See ibid 474; (1924) 2 D.L.R. 811; (1924) 1 W.W.R. 1275.

11. Absence of security.]—On an application to a judge of the Court of Appeal in Chambers on February 26th, 1923, to strike out an appeal on the ground that security for costs had not been furnished as ordered by the County Court judge from whom the appeal was taken, it was ordered that the security for costs be furnished on or before the 1st of March, 1923, and that in default a motion be made to the Court of Appeal at its next sittings to strike out the appeal. *Canada Law Book Co. Ltd.* v. *St. John,* (1923) 32 B.C.R. 66.

B. When Ordered to be Given.

1. Foreigner—Temporary residence.]—When the Court is satisfied that a plaintiff, who is a temporary resident, will be present at the trial, an application for security for costs under marginal rule 981a will be refused. *de Schelking* v. *Zurbrick,* (1918) 26 B.C.R. 386; (1918) 3 W.W.R. 472.

2. Extra-provincial company—Further security.]—The Court has jurisdiction to order the furnishing of further security for costs by an extra-provincial company. *Matuso* v. *Wallace Shipyards,* (1919) 27 B.C.R. 247; (1919) 2 W.W.R. 549.

3. Mortgagee of property without jurisdiction.]—A mortgagee residing out of the jurisdiction, who, previously to bringing action for foreclosure, had paid a judgment against the mortgagor for taxes in order to save the property, will not be compelled to furnish security for costs. *Parker* v. *Langan,* (1920) 28 B.C.R. 3.

4. Divorce and matrimonial causes.]—English rules and regulations concerning the practice and procedure of the Court for divorce causes do not apply to procedure in divorce causes in British Columbia. There is no jurisdiction to order a husband to furnish security for his wife's costs in a suit brought by the wife for divorce even if it be shewn the wife has no separate estate and the husband has means of complying with the order if made. *Davy* v. *Davy,* (1921) 30 B.C.R. 355, 365; 63 D.L.R. 341, 345; (1922) 1 W.W.R. 359, 360.

5. Company possessed of property.]—When it appears from the evidence that a plaintiff company is not in debt and owns at least property admittedly of value more than sufficient to pay costs if judgment were to go against it, an order for security for costs of the defendant should not be made. *Belmont Investment Co.* v. *Moody,* (1922) 31 B.C.R. 345; (1923) 1 W.W.R. 934.

6. Insolvent company—Counterclaim.]—In the case of an action against a company founded on a claim entirely separate and distinct from that set up in a counterclaim, if the company has no assets the plaintiff is entitled to security for costs of the counterclaim under sec. 264 of the Companies Act, 1921. *Mackenzie* v. *Prince John Mining Company,* (1924) 34 B.C.R. 193; (1924) 4 D.L.R. 221; (1924) 3 W.W.R. 168.

7. Company with no exigible assets—Delay in application.]—On an application for security for costs under sec. 264 of the Companies Act, the report of the registrar of joint-stock companies, that only four shares of the Company had been allotted, one to each of four persons, was held to be sufficient evidence upon which to conclude that the Company was one of straw and the defendants were entitled to security. Where the application is not made promptly the

judge may in his discretion confine the security to future costs. *First Mortgage Investment Company* v. *Noud*, (1925) 36 B.C.R. 104.

8. Reciprocal enforcement of Judgments Act.]—Security will not be ordered where the plaintiff resides in a Province in which an Act in the terms of the Reciprocal Enforcement of Judgments Act, 1925, cap. 44, is in force. *Henry* v. *Henry*, (1926) 3 W.W.R. 250.

9. Election petition.]—Although an application to dismiss an election petition under the Municipal Elections Act on the ground that no security for costs had been given was refused, the petition cannot be proceeded with until security for costs is given pursuant to sec. 98, subsec. (3) of the Act. *Davies* v. *Mills*, (1930) 42 B.C.R. 506; (1930) 2 D.L.R. 997; (1930) 1 W.W.R. 672.

10. Discretion of Court.]—Whether an order should be made under sec. 29 of the Court of Appeal Act for security for the costs of an appeal is a matter within the discretion of the Court. *In re Lee Quong Kip*, (1919) 27 B.C.R. 459; (1920) 1 W.W.R. 23.

See ADMIRALTY.
See APPEAL.
See COUNTY COURT PRACTICE.
See CRIMINAL LAW.
See JUDGMENTS AND ORDERS.
See PRACTICE.

COUNTY COURT PRACTICE.

I. IN GENERAL, 318.
II. PLEADINGS, 318.
A. In general, 318.
B. Plaint and particulars, 318.
C. Dispute note, 318.
D. Counterclaim, 319.
III. ACTIONS AGAINST INFANTS, 319.
IV. AMENDMENT AND WITHDRAWAL, 320.
V. JUDGMENT BY DEFAULT, 320.
VI. DISCOVERY, 320.
VII. AFFIDAVITS, 320.
VIII. ATTACHMENT OF DEBTS, 321.
IX. TRIAL, 321.
X. NONSUIT, 322.
XI. CHARGING ORDER, 322.
XII. STAY OF PROCEEDINGS, 322.
XIII. COSTS, 322.

I. IN GENERAL.

1. Law Stamps.]—The lack of sufficient stamps upon a document filed is a matter of revenue only and does not affect the filing or registration. *Henderson & Sons* v. *Russell House Ltd.*, (1931) 1 W.W.R. 342.

2. Action standing for more than one year.]—Where no step has been taken in a County Court action for more than a year the action is dead and cannot be reinstated. *Hughes* v. *B.C. Electric Co. Ltd.*, (1925) 35 B.C.R. 321; (1925) 3 D.L.R. 541; (1925) 2 W.W.R. 250. (But *see* Ord. II., r. 50 (1932)).

II. PLEADINGS.

A. In General.

Reply.]—There is no provision in the County Court Rules or in the practice authorizing a reply of the plaintiff except in the case of a counterclaim. *Tillicum Athletic Club* v. *Burick*, (1925) 36 B.C.R. 176; (1925) 3 W.W.R. 368, 785.

B. Plaint and Particulars.

1. Amendment—Jurisdiction.]—If the plaint in an action in the County Court does not disclose the territorial jurisdiction of the Court, an amendment may be allowed to do so if the facts in evidence disclose that the Court has actual jurisdiction. *Hahn* v. *Seibel*, (1920) 28 B.C.R. 387; (1920) 2 W.W.R. 595.

2. Description and address of plaintiff.]—Where a defendant fails to attend upon a motion for speedy judgment, the ensuing judgment will not be set aside on appeal on the ground that the plaint did not disclose the residence, place of business and description of the plaintiff, although the irregularities in question are objected to in the dispute note. *Wright* v. *Lee Bak Bong*, (1924) 34 B.C.R. 122; (1924) 4 D.L.R. 317; (1924) 2 W.W.R. 1186.

C. Dispute Note.

Tender.]—Where a defendant pays into Court a sum of money under a defence of tender and the evidence does not sustain this defence under Order VI., r. 10 of the County Court Rules the plaintiff is entitled to the costs of the action on the basis of the amount recovered notwithstanding that

this amount does not exceed the sum paid into Court. *Blair* v. *The Canadian Fishing Co. Ltd.*, (1929) 41 B.C.R. 80.

See COSTS.

D. Counterclaim.

1. No reply to counterclaim—Amendment after judgment.]—Where the defendant files a counterclaim and the plaintiff fails to deliver a defence thereto and the action proceeds to judgment the issues raised by the counterclaim being fought out as well as those by the claim and the decision in favour of the plaintiff involving the consideration of the matters alleged in the counterclaim, the trial judge being functus officio has no power pending appeal to reopen the matter for the purpose of granting leave to the plaintiff to file a defence to the counterclaim. *Quinstrom* v. *Peterson*, (1929) 42 B.C.R. 81; (1930) 2 D.L.R. 224.

2. Exceeding jurisdiction—Transfer to Supreme Court.]—An application to transfer a County Court action to the Supreme Court by reason of the counterclaim exceeding the jurisdiction should be made before a judge of the Supreme Court or a County Court judge sitting as a local judge of the Supreme Court under sec. 23 of the County Courts Act. A County Court judge sitting as such has no jurisdiction to make the order under sec. 72 of the Act. Terms with reference to matters not before the Court should not be imposed when transferring an action from the County Court to the Supreme Court. Where a successful appellant is responsible for the wrong order from which the appeal is taken he will not be allowed the costs of the appeal. *Sellon* v. *Keane*, (1917) 24 B.C.R. 238; (1917) 3 W.W.R. 342.

3. Jury.]—Under Order 5, Rule 18, of the British Columbia County Court Rules, if the amount claimed either by the original claim or by the counterclaim exceeds $50 either party is entitled to give a jury notice and to have both claim and counterclaim tried by a jury. *Douglas Lake Cattle Co.* v. *Reinseth* (1922) 30 B.C.R. 552; 65 D.L.R. 646; (1922) 1 W.W.R. 1258.

III. ACTIONS AGAINST INFANTS.

Guardian ad litem.]—Where in an action against a minor for damages for negligence, the affidavit in support of an application for the appointment of a guardian ad litem is not in the form set out in the Appendix to the County Court Rules but contains substantially all the essentials therein prescribed, effect should be given to the rule that "where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them." *Jones* v. *Gibbons*, (1928) 40 B.C.R. 65; (1929) 4 D.L.R. 1067.

IV. AMENDMENT AND WITHDRAWAL.

1. Mistake.]—An amendment should be allowed where it appears to have been the result of a mistake and to be necessary in order to do justice between the parties. *McQuade et al.* v. *Moncrieff et al.*, (1929) 1 D.L.R. 984.

2. Woodman's lien for wages—Amendment of statement.]—Sec. 8 of the Woodman's Lien for Wages Act does not give a County Court judge the power in an action to enforce a lien, to amend the statement of claim of lien, required by the Act, so as to reform the statement therein of the location of the logs which are the subject of the lien. *Montreal Trust Co.* v. *Canadian Lumber Yards: Riis et al. Claimants*, (1928) 39 B.C.R. 325; (1928) 2 D.L.R. 37; (1928) 1 W.W.R. 509.

V. JUDGMENT BY DEFAULT.

Setting aside.]—Where an interlocutory judgment has been entered in default of a dispute note being filed, an affidavit of the defendant's solicitor stating that in his opinion there is a good defence on the merits is not sufficient to justify the Court in setting aside the judgment. *Scovil* v. *Lewis*, (1926) 37 B.C.R. 241; (1926) 2 W.W.R. 468.

VI. DISCOVERY.

Examination of infant party.]—Under Order VIII., r. 17, an infant, a party to an action, may be examined by the opposite party for discovery before the trial. *Lancaster* v. *Vaughan*, (1923) 33 B.C.R. 159.

VII. AFFIDAVITS.

Scandalous matter.]—On appeal from an order dismissing an application to strike

out certain paragraphs in an affidavit as scandalous, impertinent, and irrelevant, the discretion of the judge appealed from should not be interfered with unless a gross miscarriage of justice has been occasioned thereby. *Royal Typewriter Agency* v. *Perry & Fowler*, (1928) 40 B.C.R. 222; (1928) 4 D.L.R. 383; (1928) 3 W.W.R. 173.

VIII. ATTACHMENT OF DEBTS.

Power of registrar.]—Sec. 20 of the Attachment of Debts Act, 1911, does not take away the power which is expressly given to the district registrar to issue a garnishee order under sec. 3 of said Act. A company is not a bank nor is a bank a company. *Hogue* v. *Leitch: The Royal Bank of Canada, Garnishee*, (1915) 22 B.C.R. 10.

IX. TRIAL.

1. Trial—Judge's notes.]—There is no duty cast upon a judge of the County Court to take notes of the evidence on the trial of an action. On an application to a judge of the Supreme Court under sec. 130 of the County Courts Act, it was ordered that a judge of the County Court furnish a copy of his notes taken on the trial of an action for use on appeal to the Court of Appeal:—Held, on appeal, that as it appeared from the learned judge's statement that his notes were so imperfect and fragmentary that they would not only be of no use but misleading to the Court of Appeal, it is not in the interests of justice that such an order should be made. *Welch* v. *Grant*, (1920) 28 B.C.R. 367; (1920) 3 W.W.R. 388.

2. Judge's notes.]—In the absence of a stenographer it is the duty of a County Court judge to take down a full note of the evidence submitted on the trial. *Northern Pacific Ry. Co.* v. *Fullerton Lumber & Shingle Co.*, (1919) 27 B.C.R. 36; 47 D.L.R. 705; (1919) 2 W.W.R. 92.

3. Clerk's notes of decision.] — Upon the clerk of the Court making a note of the decision rendered, that note is the judgment. Clerks should take note of this and be careful to see that they always make proper notes of decisions given. *Wright* v. *Lee Bak Bong*, (1924) 34 B.C.R. 122; (1924) 4 D.L.R. 317; (1924) 2 W.W.R. 1186.

X. NONSUIT.

New action following.]—A judgment of nonsuit under sec. 110 of the County Courts Act is not a bar to another action by the plaintiff on the same subject-matter. *Skelding et al.* v. *Levin*, (1916) 23 B.C.R. 47.

XI. CHARGING ORDER.

Money in Court.] — A charging order may be made by a judge of the County Court upon moneys in his Court paid in to the debtor's credit under garnishee proceedings. A charging order upon moneys in the custody of the Court is not a "forced seizure" within the meaning of sec. 25 of the Execution Act, and the provisions in said section as to exemption do not apply. *Prat* v. *Hitchcock*, (1925) 36 B.C.R. 142, 158; (1925) 3 D.L.R. 1142; (1926) 1 W.W.R. 5.

XII. STAY OF PROCEEDINGS.

Stay of execution.]—When a plaintiff has recovered judgment in the County Court a judge has power, under sec. 113 of the County Courts Act, to suspend execution when the defendant has a judgment against the plaintiff in the Supreme Court for a larger amount. *Butterfield* v. *Jackson*, (1916) 23 B.C.R. 489; (1917) 2 W.W.R. 362.

XIII. COSTS.

1. Against person not a party.]—By sec. 161 of the County Courts Act the Court has jurisdiction to order payment of costs by one who although not an ostensible party to the proceedings is the instigator thereof and has a beneficial interest in the outcome. *Marchiori* v. *Fewster*, (1921) 30 B.C.R. 251; (1921) 3 W.W.R. 388; (1922) 63 S.C.R. 342; 69 D.L.R. 351.

2. Appeal—Section 119.]—The costs of an appeal taken pursuant to leave granted under sec. 119 of the County Courts Act should be taxed on the Supreme Court scale in accordance with the main portion of sec. 122 of the Act; subsecs. (1) and (2) of sec. 122 do not apply. *Mowat* v. *Goodall*, (1915) 22 B.C.R. 167; (1915) 24 D.L.R. 891; 33 W.L.R. 230; 9 W.W.R. 171.

3. Costs of bailiff under landlord's warrant.]—A judge of the County Court has no jurisdiction to review by way of appeal a taxation by the deputy registrar of a bill of costs of a sheriff acting as bailiff under a landlord's warrant. *In re Distress Act*, (1919) 27 B.C.R. 446; (1919) 3 W.W.R. 318.

4. Discretion. —A County Court judge has no jurisdiction to deprive a successful litigant of costs, or to award costs on a lower scale than he is entitled to except for cause. His discretion must be exercised judicially. *Vernon Hardware Co.* v. *Reid and Reinhard*, (1927) 2 W.W.R. 117.

See APPEAL.
See COSTS.
See COURTS.
See PRACTICE.

COURTS.

I. JURISDICTION, 323.
A. *Powers in general*, 323.
B. *Waiver of objection to*, 325.
II. APPEAL COURT, 325.
III. SUPREME COURT, 326.
A. *Jurisdiction*, 326.
B. *Officials of*, 327.
IV. LOCAL JUDGE OF SUPREME COURT, 328.
V. COUNTY COURT, 328.
VI. SMALL DEBTS COURT, 330.
VII. COURTS OF SUMMARY JURISDICTION, 331.
VIII. REFERENCE TO COURTS BY PROVINCIAL GOVERNMENT, 331.
IX. EFFECT OF PREVIOUS DECISIONS, 331.

I. JURISDICTION GENERALLY.

A. *Powers in General.*

1. Identical application to two judges of concurrent jurisdiction.]—A Court or judge cannot intervene in the hearing of a motion pending before another Court or judge of coordinate jurisdiction. A hearing of the same motion or trial before two judges at the same time is a legal impossibility, and an order of interference under the circumstances is a thing of naught which could not be disobeyed and will be ignored by the Court attempted to be interfered with and its officers as a document made wholly without jurisdiction and therefore null and void. *The "Leonor,"* (1916) 3 P. Cas. 91; (1917) 3 W.W.R. 861.

2. Inferior Courts—Prohibition.]—On the question of jurisdiction the rule is that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so; and nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged. Where the want of jurisdiction is apparent on the face of the proceedings, waiver or acquiescence cannot create jurisdiction; nor can laches operate to defeat the right of prohibition. *In re Nowell and Carlson*, (1919) 26 B.C.R. 459; (1919) 1 W.W.R. 387.

3. Dual jurisdiction.] — Where a dual jurisdiction is conferred on two separate tribunals to do a particular act, to either of which a litigant may resort, upon his selecting one of them the other is excluded, and the matter must be solely adjudicated upon by the forum to which he has decided to resort. *Shipway* v. *Logan*, (1916) 22 B.C.R. 410.

4. Privy Council — Fraud — Review of facts.]—When the Provincial Courts have upon the evidence and circumstances negatived a charge of fraud, it is contrary to the established practice of the Judicial Committee to reinvestigate the question. *Seattle Construction & Dry Dock Co.* v. *Grant Smith & Co.*, (1919) 89 L.J.P.C. 17; 122 L.T. 203; 48 D.L.R. 172; (1919) 3 W.W.R. 33; (1920) A.C. 162.

5. Privy Council—Criminal appeal.]——The Court of Appeal has no power to grant leave to appeal to the Privy Council, from its judgment sustaining conviction by setting aside an acquittal under a Provincial statute which creates an offence and provides that a person guilty thereof shall be liable to imprisonment, as it is a criminal charge and no appeal may be brought in any criminal case to His Majesty in Council. *Rex and Attorney-General for Canada* v. *Chung Chuck, Rex and Attorney-General for Canada* v. *Wong Kit*, (1929) 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; 53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129. Affg. (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R. 394.

6. Extra-Provincial judgment—Jurisdiction.]—Where a defendant in another Province defends an action on the merits at the same time disputing the jurisdiction of the Court and it has been held that the Court has jurisdiction he cannot raise the question of jurisdiction when action is brought

against him on the judgment in British Columbia. *Kennedy* v. *Trites*, (1916) 10 W.W.R. 412.

7. Foreign judgment.]—A divorce granted in a foreign jurisdiction is valid here provided a husband was domiciled within the jurisdiction of the Court granting the decree. Where, as ancillary to the decree of divorce, a final and valid judgment for alimony is entered against the husband, it will be enforced by a judgment in British Columbia notwithstanding that the foreign divorce may have been granted upon grounds which would not be recognized as sufficient within the Province. *Burpee* v. *Burpee*, (1929) 41 B.C.R. 201; (1929) 3 D.L.R. 18; (1929) 2 W.W.R. 128.

8. Civil action — Concurrent criminal prosecution.]—A civil action where a crime is involved may be proceeded with in a case where a criminal prosecution has actually been carried through and decision is under advisement. *Standard Bank of Canada* v. *Shuen Wah*, (1919) 26 B.C.R. 441; (1919) 1 W.W.R. 586.

9. Church Courts—Status of members.]—The civil Courts have no jurisdiction to decide the question of status of members of a church as affecting their rights to vote under the United Church of Canada Acts, 1924 (Can.), cap. 100, and 1924 (B.C.), cap. 50. Such status must be decided by the church Courts. *Stover* v. *Drysdale*, (1925) 37 B.C.R. 28; (1925) 4 D.L.R. 994; (1926) 1 W.W.R. 98.

B. Waiver of Objection to.

Entering appearance.] — The right to object to the jurisdiction is not waived by entry of appearance and delivery of defence. The plaintiff alleged that the defendant firm carried on business as a partnership in the Province. The alleged partners appeared individually and in their defence denied that allegation which was not proved and there was nothing otherwise to shew jurisdiction:—Held, that the plaintiff having failed to shew jurisdiction the action should be dismissed. *American Merchant Marine Insurance Co.* v. *Buckley-Tremaine Lumber and Timber Co.*, (1920) 28 B.C.R. 426; (1920) 3 W.W.R. 878.

II. Appeal Court.

1. Extent of jurisdiction.]—The Court of Appeal for British Columbia is an appellate Court only and has no original jurisdiction except that set forth in the Court of Appeal Act, and this jurisdiction is confined to matters incidental to the hearing and determination of appeals. *Rex* v. *Kwong Yick Tai*, (1915) 21 B.C.R. 127; 22 D.L.R. 323; 24 C.C.C. 28; 8 W.W.R. 808.

2. Full Court.]—The late Full Court was a Court of Appeal of which the present Court of Appeal is the successor and the present Court will not set aside a judgment of the Full Court especially on a question of practice where the decision has been in force for many years unless under special circumstances one of which is that contrary decision of a concurrent or higher Court was not cited to the Full Court. *Sale* v. *East Kootenay Power Company (No. 1)*, (1931) 43 B.C.R. 336; (1931) 3 W.W.R. 112.

3. Place of hearing.]—All cases are to be heard by the Court of Appeal in the city in which they are entered for hearing, but an order may be made transferring a case from one place of hearing to another if the parties agree. *Gilbert* v. *Southgate Logging Co.*, (1915) 21 B.C.R. 7; 7 W.W.R. 1133.

4. Order for new trial—Prior decision on substantive question.] — Where the Court of Appeal in granting a new trial decides a substantive question in the litigation, that question for the purposes of that litigation is to be taken to have been conclusively determined between the parties. On a second appeal the Court of Appeal is for this purpose not confined to the formal judgment. *Bergklint* v. *Western Canada Power Co.*, (1916) 54 S.C.R. 285; 34 D.L.R. 467; (1917) 1 W.W.R. 1262.

III. Supreme Court.

A. Jurisdiction.

1. Extent of.]—The Supreme Court of British Columbia has jurisdiction in every kind of action, including the actions in which special jurisdiction in conferred upon the County Court and other inferior Courts. *Tait* v. *B.C. Electric Ry. Co. Ltd.*, (1916) 22 B.C.R. 571; 27 D.L.R. 538; 34 W.L.R. 684; 54 S.C.R. 76; 32 D.L.R. 378; (1917) 1 W.W.R. 1093.

2. Inherent jurisdiction to prevent injustice.]—There is an inherent jurisdiction in the Supreme Court to prevent an injustice and if a municipal Court of Revision has assessed a leasehold interest as

freehold, the Court has power to direct that the interest be properly assessed and an injunction will be granted restraining the confirmation of the assessment until the owner is given an opportunity of shewing the value of his leasehold. *B.C. Mills, Etc. Co.* v. *Mayor, &c., of Vancouver et al.*, (1926) 39 B.C.R. 481; (1926) 2 D.L.R. 990; (1926) 2 W.W.R. 84.

3. Reference to officer of Court.]—The Court has inherent jurisdiction to refer the question of damages to its officer. *Horsnail* v. *Shute*, (1921) 30 B.C.R. 189; 62 D.L.R. 199; (1921) 3 W.W.R. 270.

4. Appeal from award under Railway Act.]—A judge of the Supreme Court of British Columbia sitting in Court, is sitting as a superior Court, and has jurisdiction to hear an appeal taken under sec. 232 of the Railway Act of Canada (1919 Stats., cap. 68) from an award made under that Act. *Alexander* v. *Vancouver Harbour Commissioners*, (1922) 31 B.C.R. 11; 65 D.L.R. 355; (1922) 1 W.W.R. 1254.

5. Landlord and Tenant Act—Appeal.]—An appeal does not lie to a single judge of the Supreme Court under sec. 23 of the Landlord and Tenant Act, R.S.B.C., cap. 126. *In re Selman*, (1920) 2 W.W.R. 539.

6. Actions on contract within the jurisdiction of County Courts.]—The object of sec. 73 of the County Courts Act is to keep claims founded on contracts, which do not exceed the jurisdiction, within the local jurisdiction of the County Courts and under the term "good cause" the plaintiff must shew that there are extraordinary circumstances justifying the retention of the case in the Supreme Court. *Goldie* v. *Colquhoun*, (1930) 42 B.C.R. 356; (1930) 2 D.L.R. 1002; (1930) 1 W.W.R. 624.

B. Officials of.

Acting Deputy District Registrar.]—A person appointed as Acting Deputy District Registrar of the Supreme Court is empowered to exercise the powers of a Deputy District Registrar of that Court to hear the evidence and make a report in a reference, having carried out the duties of the office, and having proceeded in the reference without objection being taken to his power to act. *Fusarelli* v. *Ioco Townsite Company*, (1922) 1 W.W.R. 1238.

IV. Local Judge of Supreme Court.

1. Judgment for foreclosure.]—A local judge of the Supreme Court has no jurisdiction to grant a judgment in an action set down on motion for judgment under Order XXVII., r 11. *In re The Land Registry Act. Lomis* v. *Abbott*, (1915) 22 B.C.R. 330; 25 D.L.R. 759; 33 W.L.R. 347; 9 W.W.R. 676.

2. Bills of Sale Act.]—The words "any judge of the Supreme Court" in sec. 2 of the Bills of Sale Act Amendment Act, 1914, apply to a judge of the Supreme Court persona designata, and a local judge of the Supreme Court has no jurisdiction to make an order extending the time for registration of a chattel mortgage under said Act. *The Royal Trust Company* v. *Liquidator of The Austin Hotel Company, Limited*, (1918) 26 B.C.R. 353; 44 D.L.R. 480; (1919) 1 W.W.R. 934.

3. Notaries Act.]—A County Court judge, acting as a local judge of the Supreme Court, has no jurisdiction to make an order for the examination and enrolment of an applicant under secs. 5 and 6 of the Notaries Act. *The Law Society of British Columbia* v. *Stewart*, (1928) 40 B.C.R. 401; (1928) 4 D.L.R. 572.

V. County Court

1. Account.]—In an action in the County Court where the plaint asks for an account, the case is not ex facie beyond the jurisdiction of the County Court as that Court has jurisdiction in such actions up to $1,000. An application for a writ of prohibition will therefore be refused especially when it appears that the plaintiff has filed a waiver of any claim over $1,000. *Neary* v. *Credit Service Exchange*, (1929) 41 B.C.R. 223; (1929) 3 D.L.R. 107; (1929) 2 W.W.R. 287.

2. Amount involved exceeding $1,000.]—The plaintiffs brought action in the County Court claiming in tort $1,000. The defendant counterclaimed for $500 due by the plaintiffs under a certain contract in answer to which the plaintiffs claimed the defendant owed them $900 in respect of the same contract. An application by the plaintiffs for an order to remove the proceedings into the Supreme Court under sec. 23 of the County Courts Act was granted. *Brash & Jenkins* v. *Vulcan Iron Works*, (1926) 36 B.C.R. 452; (1926) 1 W.W.R. 371.

3. Must be disclosed on face of proceedings.]—On the question of jurisdiction the rule is that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so; and that nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged. Where the want of jurisdiction is apparent on the face of the proceedings, waiver or acquiescence cannot create jurisdiction; nor can laches operate to defeat the right of prohibition. *In re Nowell and Carlson*, (1919) 26 B.C.R. 459; (1919) 1 W.W.R. 387. *Maple Crispette Co.* v. *National Brokerage*, (1919) 27 B.C.R. 501; (1920) 1 W.W.R. 332.

4. Amendment—Jurisdiction.]—If the plaint in an action in the County Court does not disclose the territorial jurisdiction of the Court, an amendment may be allowed to do so if the facts in evidence disclose that the Court has actual jurisdiction. *Hahn* v. *Seibel*, (1920) 28 B.C.R. 387; (1920) 2 W.W.R. 595.

5. Equitable jurisdiction—Partition.]—The County Court has no equitable jurisdiction except that given by statute, and therefore cannot make an order for the appointment of a receiver and for an injunction for the purpose of granting relief in an action for the partition of personal property. *Granger* v. *Brydon-Jack (No. 2)*, (1918) 25 B.C.R. 531.

6. Fraudulent preference.]—An action to set aside a chattel mortgage as a fraudulent preference is not an action for "relief against fraud" within the meaning of sec. 40 (12) of the County Courts Act. *Brethour* v. *Davis and Palmer*, (1919) 27 B.C.R. 250.

7. Transfer to Supreme Court.]—An application to transfer a County Court action to the Supreme Court by reason of the counterclaim exceeding the jurisdiction, should be made before a judge of the Supreme Court or a County Court judge sitting as a local judge of the Supreme Court under sec. 23 of the County Courts Act. A County Court judge sitting as such has no jurisdiction to make the order under sec. 72 of the Act. *Sellon* v. *Keane*, (1917) 24 B.C.R. 238; (1917) 3 W.W.R. 342.

8. Transfer to Supreme Court—Lack of jurisdiction appearing in trial.]—The words "if it shall be made to appear to the judge" in sec. 72 of the County Courts Act, mean "if it appears to the judge," or, "if it appears." Therefore the lack of jurisdiction may "appear" so as to necessitate the transfer of an action, cause or matter to the Supreme Court even though the absence of jurisdiction escapes at the time the attention of the judge and counsel. Where on an appeal from a County Court judge it appears that the case is one which should have been transferred under sec. 72 of the County Courts Act to the Supreme Court, the Court of Appeal should order the transfer rather than dismiss the action. *Giannini* v. *Cooper*, (1918) 26 B.C.R. 382; (1918) 3 W.W.R. 642.

9. Dismissal of action—Mandamus.]—Where a County Court judge has dismissed an action for want of jurisdiction, mandamus will not lie to compel him to hear it. *Conds* v. *Kabota*, (1925) 35 B.C.R. 596; (1925) 3 D.L.R. 376; (1925) 2 W.W.R. 620.

10. Children of Unmarried Parents Act—Jurisdiction—Locus.]—An appeal from the decision of a magistrate under the Children of Unmarried Parents Act will lie to the County Court nearest to the place where the cause of the complaint arose, namely, where conception took place, and not to the place of the child's birth. *Ferguson* v. *Taylor*, (1926) 37 B.C.R. 340; (1926) 3 W.W.R. 203; 46 C.C.C. 149.

VI. Small Debts Court.

1. Appeal to County Court.]—Under the Small Debts Court Act an appeal from the decision of a Magistrate lies either to the nearest County Court or to a judge of the Supreme Court:—Held, that the words "nearest County Court" refer to the County Court itself and not to the County Court District. *Parry* v. *Thomson*, (1931) 43 B.C.R. 461.

2. Appeal.]—An appeal from the Small Debts Court is by way of a rehearing and the Court has power to receive evidence on questions of fact even of witnesses not called at the trial. The rehearing should take place in open Court and not in Chambers. *Morgan* v. *Morgan*, (1931) 44 B.C.R. 480; (1931) 3 W.W.R. 144.

3. Trespass Act.]—Where an action under the Trespass Act is brought before a stipendiary magistrate he can adjudicate thereon only under the powers conferred upon him by subsec. 1 of sec. 4 of the Small Debts Court Act; the Court in which he sits is the Small Debts Court and no fees or costs other than disbursements can be taxed against an unsuccessful party. *Farquharson* v. *Cortesi*, (1918) 3 W.W.R. 193.

VII. COURTS OF SUMMARY JURISDICTION.

Justice of peace—Jurisdiction in city.]—In order that a conviction made before a justice of the peace, purporting to adjudicate in a city on an offence committed in such city, may be valid, it must shew on its face either that such adjudication takes place because of the illness, or absence, or at the request of the city police magistrate, or else that the city has no police magistrate. *Rex* v. *Smith*, (1919) 27 B.C.R. 338; (1919) 3 W.W.R. 311. *Chin Toy* v. *Armitage*, (1922) 70 D.L.R. 160; (1922) 2 W.W.R. 1269; 38 C.C.C. 382. *Rex* v. *Harry Fong*, (1930) 3 W.W.R. 479.

VIII. REFERENCE TO COURTS BY PROVINCIAL GOVERNMENT.

Constitutional Questions Determination Act.]—The Constitutional Questions Determination Act should be invoked only for obtaining the advice of the Court on constitutional questions of high public concern, and not as a medium for determining extra judicial questions of a private nature. *In re Constitutional Questions Determination Act. In re Sec. 100 of the Legal Professions Act*, (1927) 39 B.C.R. 83; (1927) 4 D.L.R. 195; (1927) 2 W.W.R. 808; 48 C.C.C. 278.

IX. EFFECT OF PREVIOUS DECISIONS.

1. Rule of Canadian Precedent.]—The Supreme Court of Canada primarily settles the law of Canada, being only subject to review by the Judicial Committee of the Privy Council and, save as aforesaid, it may disregard the opinion of any other Court in the Empire, including the House of Lords, which only settles the law of the United Kingdom. Where the facts are the same it is the duty of the Provincial Courts to give effect to the decisions of the Dominion appellate tribunal. *Pacific Lumber Agency* v. *Imperial Timber & Trading Company, Ltd. et al.*, (1916) 23 B.C.R. 378; 31 D.L.R. 748; (1917) 1 W.W.R. 507. *Trumbell* v. *Trumbell*, (1919) 27 B.C.R. 161; (1919) 2 W.W.R. 198. *Chilliwack Evaporating & Packing Co. Ltd.* v. *Chung*, (1917) 25 B.C.R. 90; (1918) 1 W.W.R. 870. *Rex* v. *Mah Hon Hing*, (1920) 28 B.C.R. 431 at 442; (1920) 3 W.W.R. 314 at 322.

2. Precedent—Later decision.]—When two cases are inconsistent and the judge who is considering them has no very clear opinion on the point involved, the later decision should be accepted as the greater authority if it was given with the knowledge and deliberate disregard of the first decision. *Cowan* v. *The St. Alice*, (1915) 21 B.C.R. 540; 32 W.L.R. 17; 8 W.W.R. 1256.

3. Dicta.] — Dicta are not of binding authority and to be accepted against one's own individual opinion unless they can be shewn to express a legal proposition which is a necessary step to the judgment pronounced. *Michigan Trust Company* v. *Canadian Puget Sound Lumber Co. Ltd.*, (1918) 25 B.C.R. 560; (1918) 3 W.W.R. 273.

4. Precedent — Privy Council.] — The decisions of the Privy Council and the English Court of Appeal are binding on the judges of the Supreme Court of British Columbia. *Rex* v. *Gartshore*, (1919) 27 B.C.R. 425; 49 D.L.R. 276; (1919) 3 W.W.R. 757; 32 C.C.C. 49.

5. Stare decisis.]—In construing a seaman's articles, some of the reasons upon which English decisions are based which apply to an island with relatively only a small and all-enveloping assessible coastline need not necessarily be applied where the articles in question have reference to such a vast country as Canada fronting upon two oceans thousands of miles apart, the separated coasts of which are most accessible through a canal owned by another nation. *Crombie* v. *Canadian Government Merchant Marine*, (1921) 30 B.C.R. 260; 21 Ex. C.R. 299; 68 D.L.R. 314; (1922) 1 W.W.R. 805.

See ADMIRALTY.
See APPEAL.
See CONSTITUTIONAL LAW.
See COUNTY COURT PRACTICE.
See CRIMINAL LAW.
See PRACTICE.

COVENANT.

See CONTRACT.
See DEED.

CREDITORS' TRUST DEED.

See ASSIGNMENTS FOR CREDITORS.

CRIMINAL LAW.

I. JURISDICTION IN GENERAL, 334.
II. CRIMINAL LIABILITY, 335.
III. OFFENCES AGAINST THE ADMINISTRATION OF LAW, 335.
IV. OFFENCES AGAINST PUBLIC REVENUE, 336.
V. OFFENCES AGAINST MORALITY, 338.
A. Disorderly house, 338.
B. Gaming, 338.
C. Vagrancy, 342.
D. Juvenile delinquency, 343.
E. Opium and Narcotic Drug Act, 343.
VI. OFFENCES AGAINST THE PERSON, 345
A. Murder, 345.
B. Rape, 345.
C. Carnal knowledge, 346.
D. Abduction, 347.
E. Assault, 347.
F. Indecent assault, 347.
VII. OFFENCES AGAINST RIGHTS OF PROPERTY, 348.
A. Theft, 348.
B. Forgery, 349.
C. False pretences and fraud, 349.
VIII. GAME LAWS, 350.
IX. SPECIAL PROCEDURE AND POWERS, 351.
A. Prosecution requiring consent of Governor-General, 351.
B. Prosecution requiring consent of Attorney-General, 352.
X. SEARCH WARRANT, 352.
XI. COMPELLING APPEARANCE OF ACCUSED BEFORE JUSTICES, 353.
A. Arrest without warrant, 353.
B. Information, 355.
XII. PROCEDURE ON APPEARANCE OF ACCUSED BEFORE JUSTICES, 356.
XIII. SUMMARY CONVICTION, 356.
A. Jurisdiction of justices, 356.
B. Information, 357.
C. Bail, 357.
D. Trial, 358.
E. Adjudication, 359.
1. Conviction, 359.
2. Warrant of commitment, 365.
XIV. SUMMARY TRIAL OF INDICTABLE OFFENCES, 367.
XV. SPEEDY TRIAL, 368.
XVI. INDICTMENT, 371.
XVII. GRAND JURY, 372.
XVIII. VENUE, 372.
XIX. PLEA, 372.
XX. TRIAL, 373.
XXI. JURY, 374.
XXII. JUDGE'S CHARGE, 374.
XXIII. APPEALS, 377.
A. Jurisdiction, 377.
B. Right of appeal, 378.
C. Leave to appeal, 379.
D. Grounds of appeal, 381.
E. Practice, 382.
F. Bail pending appeal, 387.
G. Hearing and determination, 388.
XXIV. NEW TRIAL, 390.
XXV. SENTENCE, 398.

I. JURISDICTION IN GENERAL.

1. Place where criminal intent conceived.]—If an accused person coming innocently in possession of property in the Province of British Columbia, and after removing the property to another Province conceives the determination of stealing it, the offence is committed within the Province in which he conceived the guilty act. *Rex* v. *Carmichael*, (1915) 22 B.C.R. 375; (1915) 26 C.C.C. 443.

2. Offence committed beyond County limits—Jurisdiction of County judge.]—A County Court judge of the County of Vancouver has jurisdiction under sec. 577 of the Criminal Code to try a sleeping car conductor on a through train from Calgary to Vancouver for accepting a bribe from persons to permit them to ride free in his car, although the offence was committed prior to the arrival of the train within the boundaries of the County of Vancouver. The words "within the jurisdiction of said Court to try" in the section have reference, not to the territorial limits of the Court, but to any crime or offence within the competence of the Court to try. *Rex* v. *Nevison*, (1919) 27 B.C.R. 12; 45 D.L.R. 382; (1919) 1 W.W.R. 793; 31 C.C.C. 116.

3. Offences on the sea—Three-mile limit.] — The master and engineer of a launch from a foreign port were arrested within three miles from shore by the Customs Collector of the Port of Vancouver upon a charge of failure to make inward and outward entries:—Held, that whether the case is governed by sec. 591 of the Criminal Code or sec. 3 of the Territorial Waters Jurisdiction Act, 1878, Imp. the definition of "proceedings" in the Imperial Act is a logical and reasonable one which should also be applied to the Criminal Code and makes the commitment the initial proceeding in the trial. As the statute requires that before such an offender be committed for trial leave of the Governor-General must be had, the conviction was bad as leave was

not obtained until after the commitment. The Customs Collector was not acting "in the execution of his duty" since he had gone outside the limits of his jurisdiction over the Port of Vancouver. *Rex* v. *Johanson*, (1922) 31 B.C.R. 211; (1922) 2 W.W.R. 1105; 38 C.C.C. 60.

II. CRIMINAL LIABILITY.

1. Wrongful branding of another's cattle.]—An accused person should not be convicted for unlawfully impressing a brand other than the registered brand of the owner upon a calf, the property of another person, without the consent of such person, in the absence of mens rea or evil intention or a knowledge of the wrongful nature of the act on the part of the accused. *Rex* v. *Dobbin*, (1929) 3 W.W.R. 176; 52 C.C.C. 342.

2. Intent.] — Where a defendant is charged with selling bread to which a false trade description was applied, and the evidence discloses that in a very large volume of business carried on with proper machinery only two sales of loaves of bread under the prescribed weight, of which the directors and owners had no connection or knowledge, had occurred, and there being so much opportunity of letting a light-weight loaf of bread on the market by mere accident, there should be no conviction . *Rex* v. *Canadian Bakeries Limited*, (1930) 43 B.C.R. 234; 54 C.C.C. 369.

3. Guilty knowledge.]—When by the language of the statute guilty knowledge is made an essential element of the offence, in order to ensure a conviction the guilty knowledge must be clearly shewn. *Rex* v. *Lee Duck*, (1919) 27 B.C.R. 482; (1920) 1 W.W.R. 1051. *Rex* v. *Dobie*, (1921) 29 B.C.R. 188; 57 D.L.R. 290; (1921) 1 W.W.R. 723; 35 C.C.C. 10. *Rex* v. *Wong Chung Quong*, (1923) 32 B.C.R. 108.

III. OFFENCES AGAINST THE ADMINISTRATION OF LAW.

1. Statutory declaration.] — A false statement which is neither under oath nor under a statutory declaration made "knowing it to have the same force and effect as if made under oath" does not amount to an indictable offence under sec. 175 or sec. 176 of the Criminal Code. *Rex* v. *White*, (1929) 3 W.W.R. 729.

2. Proof of judicial proceeding—Writ of summons.]—On the trial of a charge of perjury it is not necessary to produce the writ of summons in a case where copies of pleadings filed pursuant to Rules of Court are produced, which pleadings contain a statement that the writ was issued on a certain day. *Rex* v. *Gurditta*, (1926) 38 B.C.R. 66; 47 C.C.C. 103; (1927) 1 W.W.R. 273; (1927) S.C.R. 80; (1927) 2 D.L.R. 577; 47 C.C.C. 154.

See INTOXICATING LIQUORS.

IV. OFFENCES AGAINST PUBLIC REVENUE.

1. Inland Revenue Act—Possession.]—The mere handling or temporary control of tobacco by a person who is not the owner does not constitute "possession" within the meaning of sec. 356 of the Inland Revenue Act. *Rex* v. *Young*, (1917) 24 B.C.R. 482; (1917) 3 W.W.R. 1066; 30 C.C.C. 137.

2. Possession.]—A person accused of unlawfully having in his possession a still and mash suitable for the manufacture of spirits without having first given notice thereof under the Inland Revenue Act, may be tried by a magistrate in a summary manner. *Rex* v. *Carmito*, (1919) 27 B.C.R. 225; (1919) 2 W.W.R. 548.

3. Possession.]—One who is in charge and has the responsibility for the conduct of a store during the absence of the owner, will be held to "have in his possession" within the meaning of sec. 356 of the Inland Revenue Act tobacco in the store, which was purchased by him in the course of his management of the business, and he is responsible for its not being in packages and stamped as required by the Act. *Rex* v. *Yet Sun*, (1920) 28 B.C.R. 68; 61 D.L.R. 281; (1920) 1 W.W.R. 816; 36 C.C.C. 8.

4. Possession.]—Sec. 356 of the Inland Revenue Act, R.S.C. 1906, cap. 51, forbids a vendor to have possession of tobacco not put up in packages and stamped:—Held, that a vendor who has sold tobacco to a customer and at his request has cut it up and is keeping it for the customer who is to call back for it, has the tobacco in his possession within the meaning of the Act. *Rex* v. *Loy Way*, (1920) 61 D.L.R. 201; 35 C.C.C. 384; (1921) 1 W.W.R. 690.

5. Fine and imprisonment.] — Under secs. 127 and 128 of the Excise Act both fine and imprisonment may be imposed on summary conviction. *Ex parte Stewart*, (1929) 52 C.C.C. 95; (1930) S.C.R. 45; (1930) 1 D.L.R. 420.

6. Description of excise officer.]—An information under the Excise Act describing the informant as a customs and excise officer, and so sworn is sufficient if it be necessary that the informant be such an officer. It is no objection that the informant is not shown on the face of the conviction to have been entitled to institute a prosecution under the Act. Such a question is a matter of procedure only not going to the jurisdiction. *Rex* v. *Henderson*, (1929) 41 B.C.R. 242. (Sub nom. *Ex parte Henderson*), 52 C.C.C. 82, 95; (1930) 1 D.L.R. 420; *In re Henderson*, (1930) S.C.R. 45.

7. Excise Act—Jurisdiction of Magistrate.]—A magistrate before whom a new information is laid is not deprived of jurisdiction under sec. 129 of the Excise Act by reason of a previous information laid before another magistrate and withdrawn. *Rex* v. *Henderson*, (1929) 41 B.C.R. 242. (Sub nom. *Ex parte* v. *Henderson*), 52 C.C.C. 82, 95; (1930) 1 D.L.R. 420; *In re Henderson*, (1930) S.C.R. 45.

8. Excise Act — Still — Guilty knowledge.]—A truck driver should not be convicted under sec. 176 of the Excise Act of having in his possession a still suitable for the manufacture of spirits, where he was merely hired to transport the articles in question and did not know what they were, mens rea necessary to enable the Crown to succeed not having been proved. *Rex* v. *Hoare*, (1932) 44 B.C.R. 57; (1932) 1 W.W.R. 470.

9. Summary jurisdiction.]—A stipendiary magistrate has jurisdiction under sec. 133 of the Excise Act to hear and determine in a summary way, a charge of keeping or allowing or suffering to be concealed and kept in a place or premises controlled by the accused. *Rex* v. *Cheng Tong Seng*, (1927) 39 B.C.R. 157; (1927) 49 C.C.C. 79; (1928) 1 W.W.R. 33.

10. Smuggling.]—To constitute the offence of "smuggling or clandestinely introducing into Canada any goods subject to duty under the value of two hundred dollars" under sec. 206 of the Customs Act, it is not enough that the party charged had such goods in his cabin on board a boat docked in Vancouver Harbour; it must be shewn that the accused intended to defraud the revenue and had actually landed or made an attempt to land the goods for that purpose. *Rex* v. *Mayall* (1926) 37 B.C.R. 211; 45 C.C.C. 366.

11. Income tax return—Failure to file.]—Where a conviction for failing to file an income tax return shews on its face that such default occurred on two specific dates more than six months before the information was laid, the conviction will be quashed on certiorari as barred by sec. 142 of the Criminal Code. *Rex* v. *Meehan*, (1925) 35 B.C.R. 363; (1925) 2 D.L.R. 411; (1925) 1 W.W.R. 819; 43 C.C.C. 325.

V. Offences Against Morality.

A. Disorderly House.

1. Prima facie evidence.]—Sec. 986 of the Criminal Code which deals with prima facie evidence as to disorderly houses, only applies to prosecution under secs. 228 and 229 of the Code, and where there is no evidence before a magistrate on which he can convict on a charge laid under sec. 228A unless he invokes the provisions of sec. 986, the conviction will be quashed on certiorari. *Rex* v. *Toy King and Toy Hing*, (1921) 1 W.W.R. 796; 61 D.L.R. 398; 34 C.C.C. 207.

2. Permitting use of premises as disorderly house.]—The effect of sec. 707 of the Criminal Code is that if there is no specific direction in any Act or law requiring two or more justices, then a complaint or information may be heard, tried, determined and adjudged by any one justice and this applies to an offence coming within sec. 228A of the Criminal Code. A conviction for an offence under sec. 228A which does not state that the accused "knowingly" permitted his premises to be used for the illegal purpose described, is materially defective. The word "knowingly" having been omitted from a conviction under sec. 228A, on application to quash, the Court not being satisfied that the applicant committed an offence of the nature described: —Held, that sec. 1124 should not be applied. *Rex* v. *Rozonowski*, (1926) 36 B.C.R. 327; (1926) 1 D.L.R. 732; (1926) 1 W.W.R. 241; 45 C.C.C. 193.

B. Gaming.

1. Shooting machine—Mixed game of chance and skill.] — Accused operated a machine known as a "straight aim machine" in a poolroom. A revolver was mounted on a curved traveller and about 30 inches beyond were five diamond-shaped targets.

The mouth of the revolver contained a slot into which the player inserted a ten-cent piece. The player pulled the trigger and endeavored to shoot the ten-cent piece into one of the diamond-shaped receptacles. If he succeeded it released a number of dimes contained in a cup beneath, which he received. If he missed, the dime would either fall into one of the cups or to the bottom of the machine, in which latter event it would belong to the owner of the machine:—Held, that there was no evidence to warrant the Court in finding that the element of "chance" was present in the shooting of this revolver at a mark when in the hands of an expert. It is substantially target-shooting which is not "a mixed game of chance and skill." *Rex* v. *Geffler*, (1923) 32 B.C.R. 423; (1923) 3 D.L.R. 1205; 41 C.C.C. 112.

2. Office used for betting—"Football competition."]—The accused published a newspaper offering prizes to persons subscribing for the paper and paying certain subscriptions and sending in on coupons guesses as to the results of certain football games:—Held, that the accused was guilty of unlawfully keeping a common gaming house and unlawfully advertising, or giving notice of an offer, invitation or inducement to guess or foretell the result of contests contrary to the provisions of sec. 227 (b) (i) and 228 of the Criminal Code and contrary to the provisions of sec. 235, sub-sec. (i) (g) of the Criminal Code. *Rex* v. *Mulholland*, (1923) 33 B.C.R. 10; (1924) 1 W.W.R. 1032; Affg. (1923) 2 W.W.R. 594.

3. Premises containing gambling devices — Prima facie evidence.] — Prima facie evidence of guilt under sec. 986 of the Criminal Code where premises are found to be "provided with any means or contrivances for playing any game of chance," etc., is established by evidence of the finding on the premises in question of card tables at which players are sitting with cards and poker chips on the table. *Rex* v. *Pidgeon*, (1926) 37 B.C.R. 309; (1926) 3 W.W.R. 765; 45 C.C.C. 233.

4. Nickel-in-the-slot machine.] — The defendant, a fruit and cigar vendor, kept in his shop a nickel-in-the-slot machine, described as a "gum vending machine." A depositor of a nickel knew before he deposited the coin that he was to receive a package of gum and a certain number of brass tokens (worth 5 cents in the purchase of goods in the shop) as shewn by an indicator on the machine. After depositing the coin the indicator would then shew the number of coins the next depositor of a nickel would receive. Each depositor could continue playing indefinitely:—Held, that the game was one of chance played in a place kept by the defendant for gain. *Rex* v. *Smith*, (1916) 23 B.C.R. 197; (1917) 1 W.W.R. 553; 26 C.C.C. 398. *Rex* v. *Richards*, (1931) 44 B.C.R. 430; 57 C.C.C. 208; (1932) 2 D.L.R. 360; (1932) 1 W.W.R. 148.

5. Club.]—A bona fide club where the members frequently play games of chance and skill, and form a pool from the money staked to expend for refreshments and for the upkeep of the club is not a common gaming house within the definition of sec. 226 of the Criminal Code, and the steward cannot be convicted as a keeper under sec. 228 of the Code. *Rex* v. *Riley*, (1916) 23 B.C.R. 192; 30 D.L.R. 584; (1917) 1 W.W.R. 325; 26 C.C.C. 402.

6. Club.]—Although premises may be controlled by an unincorporated body having all the paraphernalia of a club including a constitution, officers, membership roll, admission fees, monthly dues, rules, a minute book, and maintaining a billiard-room, dining room and offices, and where strangers are admitted to play games of chance contributing a rake-off from their winnings and appropriated to the uses of the device to conceal under the appearance of a club the real underlying business which is gambling. A conviction under sec. 226 (a) of the Code will be sustained accordingly. *Rex* v. *Long Kee*, (1918) 26 B.C.R. 78; 31 C.C.C. 217.

7. Club.] — Where strangers are permitted to play a mixed game of chance and skill on premises ostensibly conducted as a club, and a rake-off is exacted from their winnings and appropriated to the uses of a club, persons found gaming therein may be properly convicted of being found without lawful excuse in a disorderly house. *Rex* v. *Ham*, (1918) 25 B.C.R. 237; 29 C.C.C. 431.

8. Club—Play restricted to members.] —Where club premises are used for games of chance in which cards and chips are used, and an assessment is made upon the players to assist the finances of the club, the steward in charge may properly be convicted of unlawfully keeping a gaming house, notwithstanding that the club is duly incorporated with constitution and by-laws, and the playing of cards in its premises confined to members only, and although the accused received no remuneration other than his salary as steward. *Rex* v. *Sullivan*, (1930) 42 B.C.R. 435; 53

C.C.C. 243; (1930) 2 D.L.R. 422. *Rex* v. *Bampton,* (1931) 44 B.C.R. 427; 57 C.C.C. 232; (1932) 1 W.W.R. 154; Revd. (1932) S.C.R. 626; (1932) 4 D.L.R. 209; 58 C.C.C. 289.

9. Chinese lottery.]—The sale of Chinese lottery tickets in a room used for that purpose constitutes the offence of keeping a common gaming house within the meaning of sec. 226 of the Code, although the purchase and marking of a lottery ticket could be described as making a bet within the meaning of sec. 227 of the Code. *Rex* v. *Lee Hoy et al.,* (1922) 31 B.C.R. 123; 40 C.C.C. 102.

10. Common gaming house.] — The accused were found in a room at the rear of a fruit and tobacco shop at a table on which there were dice, dominoes and $17 in money. There was no "rake-off" from the games to the proprietor but the tobacco was at times sold to the players:—Held, that it was a common gaming house, as the game was allowed to be carried on for the purpose of acquiring gain for the keeper of the shop. *Rex* v. *Wong et al.,* (1922) 31 B.C.R. 292; 40 C.C.C. 311.

11. Unlawful game.]—Eleven men sat around a table upon which were two packs of playing cards. In the premises were other packs of cards, poker chips, dice, punch boards and a board from which on payment of ten cents a collar button containing a number could be drawn and if the number was one of a selected number it drew a prize:—Held, that the person in charge of the premises was legally convicted of keeping a common gaming house. *Rex* v. *Coy,* (1925) 36 B.C.R. 34; (1925) 3 W.W.R. 538; 44 C.C.C. 119.

12. Hope of gain.]—Where the keeper of a shop permits persons to play at games of chance or mixed games of chance and skill in a room behind his shop, although no proof of gain is submitted, it will be presumed that he allows games to be played in the hope of "gain" in his business and his premises will be held to be a "common gaming house." *Rex* v. *Louie Fong et al.,* (1923) 32 B.C.R. 238.

13. Game of skill.]—Where a player, upon payment of a sum of money, selects by chance one number of problems to be solved, the successful solution depending upon his own skill to result in his winning a prize, the use of the device by means of which his selection is made is not a violation of the Criminal Code. *D'Orio* v. *Leigh & Cuthbertson Ltd.,* (1929) 41 B.C.R. 153; (1929) 2 W.W.R. 171.

14. Rake-off — Payment for refreshments partly furnished on premises.]—Where the proprietor of a shop maintains a room in his premises to which persons resort for the purpose of playing with cards and chips a mixed game of chance and skill, paying the proprietor a "rake-off" in a certain sum every half hour for each player, the money being wholly expended in the purchase of refreshments partly furnished from the proprietor's shop, he is guilty of keeping a common gaming house. *Rex* v. *Radinsky,* (1929) 41 B.C.R. 317; (1929) 3 W.W.R. 212; 52 C.C.C. 131.

15. Common gaming house.] — Where the accused and four men were found sitting around a table in the premises of the accused playing "pan giny," a mixed game of chance and skill, with cards and poker chips, and other packets of cards, poker chips and dice boxes with poker dice were found on the premises, and the accused gave evidence on his own behalf that there was no "rake-off" and he recovered no profit from the game a conviction of keeping a common gaming house was upheld on the ground that the magistrate by his conviction disbelieved the evidence of the accused and there remained only the prima facie evidence which convicted him. *Rex* v. *Donald,* (1931) 44 B.C.R. 514.

C. Vagrancy.

1. Good account.]—Although a woman cannot be convicted of the offence of vagrancy under sec. 238 (i) of the Criminal Code unless she has failed to give a proper account of herself on being asked to do so, when found wandering at night in the public streets, the absence from the conviction of the allegation that she was asked to do so is not fatal to its validity where the offence is charged in accordance with sec. 723, sub-sec. 3 of the Criminal Code. *Rex* v. *Jean Campbell,* (1916) 22 B.C.R. 601; 28 D.L.R. 385; 26 C.C.C. 196.

2. General character—Means of support.]—On a charge of being a loose, idle and disorderly person or vagrant under sec. 238 (a) of the Criminal Code, it is the general trend of the life of the accused that is to be looked at and the sort of character he is exhibiting. *Rex* v. *Royal,* (1925) 36 B.C.R. 178; (1925) 3 W.W.R. 366; 44 C.C.C. 317.

D. Juvenile Delinquency.

1. Jurisdiction.]—The Juvenile Delinquents Act (Dominion) is not in force in British Columbia because it was not proclaimed as required by sec. 34 thereof after the passing of the Provincial Act, the proclamation produced (made under sec. 35) being futile because it could only be made if no Provincial Act had been passed. *Rex* v. *Slinn* (1926) 37 B.C.R. 275; 47 C.C.C. 77.

2. Plea of guilty invalid.]—The conviction of a girl charged as a juvenile delinquent under sec. 16 of The Juvenile Delinquents Act upon a plea of guilty is invalid, and will be quashed. *Rex* v. *Wigman*, (1918) 25 B.C.R. 350; 30 C.C.C. 362.

E. Opium and Narcotic Drug Act.

1. Unlawful possession.] — Where a charge has been laid against a person under sec. 5A sub-sec. (2) (*e*), of The Opium and Narcotic Drug Act, he having been found to be in unlawful possession of a preparation containing opium, the onus is upon him to prove that he is within the protection of the proviso in sub-sec. (4) (*a*) of sec. 5A and that the preparation in question not only contains no more than two grains of opium to one ounce of the preparation but also that it contains active medicinal drugs other than narcotic drugs. As the analyst deposed that the drug seized was "opium prepared for smoking" sub-sec. (4) of sec. 5A of the Act relating to the necessity of the presence of a certain percentage of opium in "preparations and remedies" does not apply and the conviction should be sustained. *Rex* v. *Fung Fang Yuk*, (1923) 32 B.C.R. 311; (1923) 2 W.W.R. 447; 40 C.C.C. 126.

2. Without lawful authority.]—A conviction for having unlawfully opium in possession contrary to sec. 4 (d) of The Opium and Narcotic Drug Act, 1923, is not rendered invalid merely by omission of the words "without lawful authority." The use of the word "unlawfully" and the use of the words "contrary to sec. 4, subsec. (d) of The Opium and Narcotic Drug Act, 1923" are each sufficient to overcome such omission. On such conviction it is not necessary or proper to use the words "without first obtaining a license from the Minister," these words in sec. 4 (d) not referring to the offence in question. *Rex* v. *On Sing*, (1924) 2 W.W.R. 258.

3. Stool-pigeon.]—A quantity of opium in the importation of which the accused were supposed to be parties, came into the hands of an agent for the police or "stool-pigeon" who handed it to the police. The police gave it back to the agent to be used for decoying the defendants. On the contention of the defence that the opium became the property of the Crown, and the defendants in obtaining possession from the Crown were not in illegal possession of it:—Held, that in so obtaining the opium the defendants were in illegal possession thereof. *Rex* v. *Lee Kim, Mah Poy, Henry Chan, Charlie Sam*, (1930) 42 B.C.R. 360; (1930) 2 W.W.R. 441; 53 C.C.C. 252.

4. Serious Nature of Offence.]—The accused was convicted of selling a tin of opium, and was sentenced to the maximum penalty of seven years' imprisonment and fined $1,000. She was a Chinese woman of over 50 years of age and had never been charged of any offence before. On appeal from sentence:—Held, that having regard to the serious nature of this offence and the calamity to the public welfare that this traffic causes, the justice of this case does not require the Court to interfere with the sentence. *Rex* v. *Nip Gar alias Jang Shee* (1930) 42 B.C.R. 327; 53 C.C.C. 321.

5. Mens rea.]—Mens rea is a necessary ingredient on a charge against a person of unlawfully having drugs in his possession in contravention of The Opium and Narcotic Drug Act. *Rex* v. *Wong Chun Quong*, (1923) 32 B.C.R. 108.

6. Minimum penalty—Costs not included.]—Sec. 4 (2) of The Opium and Narcotic Drug Act prohibiting the imposition of less than "the minimum penalties" does not apply to costs. *Ex parte Joe Go Get*, (1929) 52 C.C.C. 95; (1930) 1 D.L.R. 420; (1930) S.C.R. 45.

7. Right to elect for summary trial.]—A prisoner accused of having drugs in his possession contrary to The Opium and Narcotic Drug Act, sec. 4, without lawful authority is not entitled to elect whether he will be tried summarily or go before a jury. *Rex* v. *Chin Mow*, (1924) 34 B.C.R. 240; (1924) 4 D.L.R. 433; (1924) 3 W.W.R. 187; 42 C.C.C. 394. (But *see Rex* v. *Lew Hing Loy, infra*).

8. Summary trial with consent of accused.]—An accused charged with being in unlawful possession of morphine contrary to The Opium and Narcotic Drugs Act, 1923, may elect to be tried either by indictment or by summary trial. By sec. 28 of

the Interpretation Act, R.S.C. 1906, cap. I, all provisions of the Criminal Code relating to indictable offences apply to such an offence. *Rex* v. *Lew Hing Loy*, (1926) 38 B.C.R. 109; (1926) 2 W.W.R. 543; 46 C.C.C. 75. (*Rex* v. *Chin Mow, supra*, overruled.)

VI. Offences Against the Person.

A. Murder.

1. Evidence of surgeon.]—It is not incumbent on the Crown to call as a witness a surgeon who performed an operation following on the injury caused by the accused. *Rex* v. *Burgess and McKenzie*, (1928) 39 B.C.R. 492; (1928) 2 D.L.R. 694; (1928) 1 W.W.R. 633; 49 C.C.C. 243.

2. Charge of murder — Acquittal — Return of weapons.]—Where it appears to the Court that notwithstanding the acquittal of the accused a verdict of murder was the only proper verdict open on the evidence the administration of the law should not be further discredited by the return of his weapons to the assassin. *Rex* v. *Beguin*, (1922) 31 B.C.R. 429.

See Judge's Charge and New Trial—*Infra*, pp. 366 and 381.

B. Rape.

1. Feigned marriage.] — Cohabitation after a feigned marriage is not rape within sec. 298 of the Criminal Code. The proposition that fraud vitiates consent with regard to the crime of rape is not true if taken to apply without qualification. The only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself or as to the identity of the person who does the act. The obtaining of a woman's consent by means of a feigned marriage is not "personating her husband" within the meaning of sec. 298 of the Criminal Code. *The People of the State of California* v. *Skinner*, (1924) 33 B.C.R. 555; (1924) 2 W.W.R. 209.

2. Statement of prosecutrix under pressure.]—On a trial for rape evidence of a statement of the prosecutrix made under pressure to her mother was admitted and was not objected to until after the case for the prosecution had closed, when an application that by reason thereof the case should be taken from the jury was refused. The trial judge carefully instructed the jury to pay no attention whatever to what the prosecutrix had said:—Held, that it cannot be said that any substantial miscarriage of justice had actually occurred and that the appeal from a conviction should be dismissed. The sentence of life imprisonment should in the circumstances of the case be reduced to three years. *Rex* v. *Stonehouse and Pasquale*, (1927) 39 B.C.R. 279; (1928) 1 D.L.R. 506; (1928) 1 W.W.R. 161; 49 C.C.C. 122.

C. Carnal Knowledge.

1. Corroboration.] — On a charge of having had carnal knowledge of a girl between 14 and 16 years of age evidence that the accused and the girl had been dancing together, left the dance hall separately, met outside and proceeded towards a park where the crime was alleged to have been committed, was corroboration of the girl's evidence. The evidence of a threat made to a witness, unexplained except as to stifle the giving of evidence which the accused knew the witness could give, is corroborative evidence. It is the duty of the Court to decide whether there is any corroboration at all, and for the jury to find as to its sufficiency. *Rex* v. *Steele*, (1923) 33 B.C.R. 197; (1924) 1 W.W.R. 1146; (1924) 4 D.L.R. 175; 42 C.C.C. 375.

2. Corroboration.]—A conviction under sec. 301 of the Criminal Code, of an accused person, on the charge of carnally knowing a child aged four years and two months founded upon the uncorroborated evidence of the child who contradicted herself on the vital point in the trial, and on several minor matters, cannot be sustained. *Rex* v. *Girone*, (1925) 34 B.C.R. 554.

3. Girl under 14 years.]—On a charge of attempting to have carnal knowledge of a girl under the age of 14 years, the proof that the girl and the accused were not married need not be direct, but may reasonably be inferred from all the evidence, and the fact that the child had never seen the appellant before the day of the crime is sufficient. *Rex* v. *Rump*, (1929) 41 B.C.R. 36; (1929) 2 D.L.R. 824; (1929) 1 W.W.R. 649; 51 C.C.C. 236.

D. Abduction.

Girl voluntarily leaving home.]—Where a girl under 16 years of age leaves her father's house against his will, but only for a temporary purpose, intending to return home again, and during such absence she is induced by an accused to change her mind and go away with him, he may be guilty of abduction within the meaning of sec. 315 of the Criminal Code. *Rex* v. *Liddington*, (1923) 32 B.C.R. 334; (1923) 2 W.W.R. 655; 40 C.C.C. 80.

E. Assault.

1. Conviction—Loss of time.]—"Loss of time" for which an allowance may be made under sec. 1044, sub-sec. 2, of the Criminal Code is only in connection with costs and expenses incurred in and about the prosecution and conviction, and is not intended to cover compensation for loss of time through being incapacitated for work. *Rex* v. *Mere Singh et al.* (1923) 32 B.C.R. 184; (1923) 1 W.W.R. 1358; 39 C.C.C. 391.

2. Unlawful wounding.]—On a charge of unlawfully wounding with intent to murder, a verdict of guilty of wounding with intent to do bodily harm is a verdict of common assault. *Rex* v. *Lee Foon*, (1927) 39 B.C.R. 298; (1928) 1 W.W.R. 747; 49 C.C.C. 233.

3. Provocation.] — Where a father assaulted a boy whom he saw with other boys in the act of punching and kicking his son after he was thrown to the ground, it was held that he was justified in defending his son not using more force than was necessary under the circumstances. Per Macdonald, J.A.: The law makes allowances for human passions aroused in a father by a vicious attack on a defenceless boy and permits the father to use such a degree of force as may reasonably prevent its repetition. *Rex* v. Wiggs, (1931) 44 B.C.R. 364; (1931) 3 W.W.R. 52.

F. Indecent Assault.

Attempt.]—Evidence of the condition of the clothing as well as of the acts and physical condition of the accused may be received to establish an attempt to commit an offence within the meaning of sec. 72 of the Criminal Code. *Rex* v. *Delip Singh*, (1918) 26 B.C.R. 390.

VII. Offences Against Rights of Property.

A. Theft.

1. Receiving stolen goods — Evidence of theft.]—On a trial for receiving stolen goods it is incumbent upon the Crown to prove that the goods received by the accused were in fact stolen and that the receiver knew it. In the absence of proof that the goods were stolen, the conviction cannot stand even where it is shewn that the accused believed that they were stolen. *Rex* v. *Fitzpatrick*, (1923) 32 B.C.R. 289; (1923) 2 W.W.R. 497; 40 C.C.C. 75.

2. Possession of stolen goods.]—When the accused person is found in possession of stolen property and the question of recent possession is excluded, as the possibility of the property going from hand to hand was negatived by the testimony of the accused, the onus is cast upon the accused to account for such possession and where there is clear evidence of identity of the property in question leave to appeal from a conviction for theft will not be granted. *Rex* v. *Wilson*, (1924) 35 B.C.R. 64.

3. Fraudulent conversion.] — Where money was deposited with an incorporated company, and misappropriated by the company, a director of the company will not be held guilty of a charge for converting the money to his own use unless he participated personally in the misappropriation. *Rex* v. *Faulds*, (1922) 31 B.C.R. 421; 40 C.C.C. 300.

4. Theft.] — Where the accused are charged with the theft of an automobile, contrary to sec. 347 of the Criminal Code, it is the duty of the magistrate to convict when he finds the offence is proved and it is not legally open to him to refuse to convict under said section, and to convict instead of the minor offence set out in sec. 285 (3) of the Criminal Code. *Rex* v. *Schmidt and Edlung*, (1930) 42 B.C.R. 479; (1930) 2 W.W.R. 497; 54 C.C.C. 168.

5. Sum of money exceeding $200.]—On a trial by a magistrate by consent under sec. 733 (b) of the Criminal Code of a charge of attempted theft, where the sum attempted to be stolen exceeds $200 the accused is liable on conviction to a sentence of two years and six months' imprisonment. *Rex* v. *Blackman and Smith*, (1931) 44

B.C.R. 115; (1931) 2 W.W.R. 111; 56 C.C.C. 48.

B. Forgery.

Trade tickets.]—P., a grocer, sold tickets to his customers on which were printed the words "good for 25 cents, L. Politano, 317 Powell Street" and P.'s signature was on the back of each ticket in his own handwriting. The tickets were good for their face value for the purchase of goods at P.'s store. The prisoner had printed a number of tickets (through a boy, to whom he gave a genuine ticket for the purpose, who ordered and received them from a printer's office for the prisoner) in imitation of those of P.'s, only leaving out signature on the back. Four men other than the prisoner attempted to use the spurious tickets for the purchase of goods at P.'s store:—Held, that the essentials required to establish a forgery were not in evidence. Held, further, that as the evidence lacked the corroboration required by sec. 1002, sub-sec. (*e*) of the Criminal Code the prisoner should be discharged. *Rex* v. *Magnolo*, (1915) 22 B.C.R. 359; 32 D.L.R. 510; 26 C.C.C. 419.

C. False Pretences and Fraud.

1. Sale of shares in company—Waiver of misrepresentation.]—Upon the trial of an indictment for obtaining money under false pretences, it was proved that the prosecutor, upon the faith of certain representations made to him by the prisoner, purchased a number of shares in a lumber company, and then became a director of the company and manager of one of its sawmills on a salary:—Held, that in the circumstances a conviction could not be sustained. *Rex* v. *Penny*, (1925) 35 B.C.R. 414.

2. Trading in bottles.] — Trading in bottles to which are affixed paper labels bearing the name of the owner, is in contravention of sec. 490 of the Criminal Code. *Rex* v. *Wittman*, (1917) 25 B.C.R. 108; (1917) 3 W.W.R. 438.

3. Fraud upon creditors.]—The accused was the manager of a company carrying on the business of a grocer and while in control was accused of concealing and disposing of funds of the company in fraud of creditors contrary to sec. 417 (a) (ii) of the Criminal Code:—Held, that the creditors who claimed to have been defrauded were not creditors of the accused, but those of the company of which he was an officer and manager. The question of whose creditors had been defrauded was the crucial point in the case and the onus of proving this was on the Crown. The Crown therefore had no right to call a witness in rebuttal of the defendant's evidence on this point. *Rex* v. *Bell*, (1929) 41 B.C.R. 166; (1929) 3 D.L.R. 931; (1929) 2 W.W.R. 399; 51 C.C.C. 388.

4. False statements by directors and promoters of companies.] — A conviction under sec. 414 of the Criminal Code which deals with false statements by directors and promoters of companies can only be secured if proof is given that (1) the statements are in themselves false in some material particular (2) and not only so but false to the knowledge of the accused and (3) made with intent to defraud. *Rex* v. *Bowen*, (1930) 43 B.C.R. 507.

VIII. GAME LAWS.

1. Indian reservation.—The provisions of the Game Protection Act do not apply to Indians when killing game on Indian reservations. *Rex* v. *Edward Jim*, (1915) 22 B.C.R. 106; 26 C.C.C. 236.

2. Fisheries regulations.]—A conviction that three accused did unlawfully take more than twenty-five trout in one day contrary to sec. 1 (e) of the Fishery Regulations of British Columbia is invalid as disclosing no offence under the section. Where no offence is disclosed in the information the proceedings taken thereunder are not an irregularity but a nullity, and as the defect is fundamental and irremediable an Appellate Court cannot amend such defect. *Rex ex rel. Stoneberg* v. *Perron*, (1922) 68 D.L.R. 392; (1922) 3 W.W.R. 138; 38 C.C.C. 121.

3. Onus of proof.]—Where accused are found with fish which in number largely exceed the aggregate which they could all lawfully catch, the onus is cast on each of them to show that he himself did not catch more than the lawful number. *Ibid.*

4. Possession of firearms.] — Evidence of finding headlights and firearms in an automobile in which the accused were riding at 10.15 o'clock in the evening, is sufficient evidence upon which the magistrate might reasonably conclude that the accused were in possession of the firearms and headlights between one hour after sunset and one hour before sunrise, and guilty of an offence against the Game Act. *Rex* v. *Conn*, (1920) 28 B.C.R. 189; 36 C.C.C. 281.

5. Confiscation of skins.]—The accused having been found with 70 beaver skins in a sleigh during the prohibited season without a permit, was convicted under sec. 33 of the Game Act and the skins were confiscated:—Held, on appeal, that although the words "any part of the animal" are not included in sec. 51 of the Act in construing the section regard must be had to the whole Act and the objects for which it was enacted, and the magistrate was right in ordering the confiscation of the skins under said section. *Rex ex rel. Cline* v. *Kramer*, (1920) 29 B.C.R. 132; 36 C.C.C. 236.

6. Game destroying crops.]—The Game Act is passed for the protection of game, and the qualifying clauses are only intended to restrict the operation of penal clauses in certain circumstances. The reason for the change of language in sec. 3 of the 1925 amendment to the Act was because the Legislature decided it should no longer be necessary for a farmer killing game found destroying his crops to report to the game warden, and was not intended to give him an absolute right to shoot game found doing damage, provided he did not shoot across a public highway. The statute of 1925 simply means that so far as the penalties imposed by the Game Act are concerned, they shall not be enforceable against a farmer shooting under the circumstances therein described, and the right of the municipality to protect its citizens from the discharge of firearms is not interfered with. *Rex* v. *Pendray*, (1928) 40 B.C.R. 410; (1929) 1 W.W.R. 30; 51 C.C.C. 27.

IX. Special Procedure and Powers.

A. Prosecution Requiring Consent of Governor-General.

1. Offence by foreign seaman within three-mile limit.]—The master and engineer of a launch from a foreign port were arrested within three miles from shore by the Customs Collector of the Port of Vancouver upon a charge of failure to make inward and outward entries:—Held, that whether the case is governed by sec. 591 of the Criminal Code or sec. 3 of the Territorial Waters Jurisdiction Act, 1878 (Imp.) the definition of "proceedings" in the Imperial Act is a logical and reasonable one which should also be applied to the Criminal Code, and makes the commitment the initial proceeding in the trial. As the statute requires that before such an offender be committed for trial leave of the Governor-General must be had, the conviction was bad, as leave was not obtained until after the commitment. The Customs Collector was not acting "in the execution of his duty" since he had gone outside the limits of his jurisdiction over the Port of Vancouver. *Rex* v. *Johanson*, (1922) 31 B.C.R. 211; (1922) 2 W.W.R. 1105; 38 C.C.C. 60.

2. Offence committed by foreigner on ship moored at pier.]—Sec. 591 of the Criminal Code does not apply to an offence committed on a ship moored at Lapointe Pier in Burrard Inlet. Even where the section applies, the leave of the Governor-General is effective if obtained before the committal of the accused for trial. *Rex* v. *Kizo Furuzawa (No. 2)*, (1930) 42 B.C.R. 548; (1930) 1 W.W.R. 955; 53 C.C.C. 398.

B. Prosecution Requiring Consent of Attorney-General.

Unlawful association.]—The assent of the Attorney-General to a prosecution of members of an unlawful association under order in council of September 28th, 1918 (P.C. 2384) must be specific, and the document containing such assent should be sufficient to satisfy the Court that the case assented to came before the Attorney-General, and that he dealt with the matter by itself, the offence was committed within the Province, and that the Attorney-General approved of the information laid. *Rex* v. *Seto Kin Kui*, (1919) 27 B.C.R. 416; (1919) 3 W.W.R. 318.

X. Search Warrants.

1. Surplusage.]—If a warrant issued under sec. 641 of the Criminal Code contains the necessary essentials, i.e., "to go to the place and enter" and the statute gives the constable power to do anything contained in the warrant, it is not bad by reason of its containing additional matter which may be looked upon as mere surplusage. *Rex* v. *Kong Yick*. *Rex* v. *Jack*, (1918) 25 B.C.R. 269; 33 C.C.C. 86.

2. Information and belief.]—A search warrant is invalid which is founded upon an information which does not contain grounds of information and belief and is unsigned. *Roux* v. *Hewat*, (1919) 1 W.W.R. 530.

3. Information and belief.]—An informant who lays an information leading to the issue of a search warrant, stating upon oath that he suspects and believes that the goods to be searched for are in certain premises, must take reasonable care to inform himself as to the facts, and honestly believe in the case lead before the magistrate without being actuated by malice. *Manning* v. *Nickerson*, (1927) 38 B.C.R. 535; (1927) 3 D.L.R. 494; (1927) 2 W.W.R. 623; (1928) S.C.R. 91; (1928) 3 D.L.R. 494. *Grady* v. *Devitt*, (1928) 40 B.C.R. 88; (1928) 1 W.W.R. 924.

4. Offence charged in another Province.] — A search warrant issued in one Province may be properly backed in another Province in aid of a prosecution pending in the Province of issue. Things seized under a search warrant issued and executed in one Province may be sent out of the Province for use in a prosecution pending in another Province. *Solloway, Mills & Co. Ltd.* v. *Frawley et al.*, (1930) 42 B.C.R. 524; (1930) 4 D.L.R. 235; (1930) 2 W.W.R. 231; 53 C.C.C. 306.

XI. Compelling Appearance of Accused Before Justices.

A. Arrest Without Warrant.

1. Peace officer—Instruction by telegraph.]—A peace officer may arrest, without a warrant, a person suspected of committing an offence within secs. 646 and 647 of the Criminal Code, if he has reasonable and probable grounds for believing that an offence within said sections has been committed. Telegraphic instructions may be accepted by a peace officer as a sufficient ground upon which to proceed. *Rex* v. *Spero Panases*, (1920) 29 B.C.R. 80.

2. Warrant issued in another Province.]—Where a warrant of arrest is issued in one Province and duly indorsed in another, where the accused is arrested, the Court where the warrant is executed has no jurisdiction in habeas corpus proceedings to go into the merits of the case, as anything that may be alleged by way of defence is for the magistrate and Courts where the warrant is issued. *In re Nettleton*, (1928) 40 B.C.R. 413; (1929) 1 D.L.R. 692; (1928) 3 W.W.R. 735; 51 C.C.C. 413.

3. Arresting officer.]—It is no valid objection to the arrest of a person by a constable on a warrant, that the constable is the person who laid the information upon which the warrant to apprehend was based. *In re Harrison (No. 1)*, (1918) 25 B.C.R. 433; 29 C.C.C. 420.

4. Arrest while in custody.]—A person in custody, lawful or otherwise, may be arrested on lawful process without the necessity of his being set at liberty before being arrested on another charge. The validity of the original caption is not material. *In re Harrison (No. 1)*, (1918) 25 B.C.R. 433; 29 C.C.C. 420.

5. Warrant unnecessary.] — If objection is not taken before the magistrate to a defect in the proceedings, the point is assumed to have been waived; objection is, however, properly taken if raised as soon as the defendant becomes aware of the defect, at any time before conviction. A prisoner was arrested and tried without a warrant on a charge laid under the Prohibition Act. Preliminary objection was taken on the appeal that the conviction was therefore illegal:—Held, that the objection must be overruled as the accused was before the magistrate who had jurisdiction to try the case, and he need not inquire how the prisoner came there but may proceed to try it. *Rex ex rel. Robinson* v. *Marks*, (1918) 26 B.C.R. 73; 31 C.C.C. 257.

6. Warrant unnecessary.] — Police officers entered the premises of accused under a search warrant and after finding a quantity of liquor in both the dwelling-house and the garage they arrested the occupant without a warrant. Upon being brought before the magistrate on a charge of keeping liquor for sale, accused took the objection that having been arrested without a warrant the magistrate had no jurisdiction to hear the charge. He was convicted on the charge and an application for release on habeas corpus was refused:—Held, that accused was rightly convicted as jurisdiction existed in the magistrate, and the warrant being a proceeding and not a condition precedent, it is immaterial whether objection was taken by accused or not. *Rex* v. *Iaci*, (1925) 35 B.C.R. 95; (1925) 4 D.L.R. 474; (1925) 1 W.W.R. 304; 44 C.C.C. 275.

7. Arrest in another county.]—Given a valid information and the presence of the accused before a magistrate of the district where the offence is alleged to have occurred the jurisdiction of the magistrate to try attaches at once, and he is not concerned with informalities or irregularities which may have occurred in connection with the execution of an otherwise valid warrant. Where, therefore, an accused charged with

an offence under the Government Liquor Act was arrested at Fernie on a warrant issued by the magistrate of Port Alberni and brought back to Nanaimo for trial, the fact that the warrant was not backed by a justice at Fernie having jurisdiction to do so, does not affect the jurisdiction of the magistrate at Nanaimo to hear and dispose of the charge. *Rex* v. *Kilmartin*, (1923) 33 B.C.R. 151; (1924) 1 W.W.R. 107.

8. Date of offence.]—A conviction dated on September 25th, 1923, reciting that the accused committed the offence charged "within the space of one month last past, to wit, on the 18th day of August, 1923," will be upheld notwithstanding the error which is not misleading, the date of the offence being clearly stated. *Rex* v. *Alberts*, (1925) 35 B.C.R. 106; (1925) 1 W.W.R. 441; (1925) 4 D.L.R. 672; 45 C.C.C. 51.

B. Information.

1. Surplusage.]—In 1929 the defendant was convicted on a charge of "unlawfully having in his possession a drug, to wit, opium, contrary to sec. 4 of the Opium and Narcotic Drug Act, 1923." In 1925 the Act was amended by severing sub-sec. (*d*) of said sec. 4 into two sub-sections but no change was made in the wording of the offences. The said Act as amended was carried without change into the Revised Statutes of 1927:—Held, that there has been no period since the Act of 1923 in which the act upon which the defendant was convicted did not constitute an offence against all the statutes referred to and the clerical error made in the conviction by adding the figures "1923" to the then existing Act was a mere matter of surplusage which could be disregarded. *Rex* v. *Quong Wong*, (1930) 42 B.C.R. 241; (1930) 2 D.L.R. 422; (1930) 1 W.W.R. 299; 53 C.C.C. 60.

2. Two offences in one charge.]—An accused cannot be charged with an offence which is compounded of two offences. *Rex* v. *Louie Chue*, (1924) 34 B.C.R. 177; (1924) 4 D.L.R. 300; 42 C.C.C. 382.

3. Duplicity.]—A charge of unlawfully having "morphine and cocaine" is not void for duplicity. *Rex* v. *Chow Ben*, (1925) 36 B.C.R. 319; 45 C.C. 152; (1926) 1 W.W.R. 384.

XII. Procedure on Appearance of Accused Before Justices.

Powers of Magistrate — Evidence to warrant committal.]—Where the detention of an accused can be said to be legal, which must be the case where the magistrate has any evidence at all to act upon, then the Court cannot interfere even although convinced that the detention which is for the time being legal will turn out afterwards, by reason of the subsequent proceedings, to be unwarranted or unfounded. The evidence before a magistrate on a charge of murder against a Chinaman disclosed that he was in the house where deceased was found, that blood was found on his clothing and there was evidence to repel the theory of suicide or accident:—Held, on an application for a writ of habeas corpus that there was some evidence upon which the magistrate might act and the application should be dismissed. *Rex* v. *Wong Foon Sing*, (1925) 36 B.C.R. 120; 44 C.C.C. 133.

XIII. Summary Conviction.

A. Jurisdiction of Justices.

1. Excise Act.]—A magistrate before whom a new information is laid is not deprived of jurisdiction under sec. 129 of the Excise Act by reason of a previous information laid before another magistrate and withdrawn. *Ex parte Henderson. Ex parte Broder. Ex parte Stewart. Ex parte Joe Go Get*, (1930) S.C.R. 45; (1930) 1 D.L.R. 420; 52 C.C.C. 95.

2. Objection after conviction—Detention of acused until procedure under proper jurisdiction.]—Where an objection to a magistrate's jurisdiction has been raised after conviction, and it appears that such magistrate, if he had known of the objection, could have tried the accused in another capacity in which he would have had jurisdiction, the conviction must be quashed, but the Court will proceed under sec. 1126 of the Criminal Code and order the occused to be further detained in order that he may be proceeded against properly and dealt with under the proper jurisdiction. *Ex p. Cardarelli*, (1929) 2 W.W.R. 223; 52 C.C.C. 267; (1930) 1 D.L.R. 575.

3. Offence committed in one county—Conviction in another.]—There is no local venue by custom or statute in cases before a magistrate whose commission covers the whole Province. *Rex* v. *Lynch*, (1927) 38

B.C.R. 124; (1927) 1 W.W.R. 502; 47 C.C.C. 176.

4. Corporations.]—Objection to a magistrate proceeding with a preliminary inquiry against an accused on the ground that being a corporation the offence charged could be prosecuted by indictment only, is without force since the passing of sec. 782 of the Criminal Code. *Rex* v. *Robertson's Bakeries Limited,* (1931) 43 B.C.R. 377; (1931) 3 D.L.R. 437; 55 C.C.C. 163.

B. Information.

1. Signature of informant.]—An information under sec. 13 of the Summary Convictions Act must be in writing and signed by the informant. *Rex* v. *Kilmartin,* (1923) 33 B.C.R. 151; (1924) 1 W.W.R. 107.

2. Examination of complainant by Justice.]—Under sec. 14 of the Summary Convictions Act it is only when the Justice of the Peace considers it advisable or necessary that he should have witnesses upon information being laid. *Rex* v. *Bovero,* (1925) 35 B.C.R. 103; (1925) 1 W.W.R. 304; 44 C.C.C. 324.

3. Government Liquor Act.]—A charge of an infraction of sec. 26 of the Government Liquor Act, 1921, reading "unlawfully did keep for sale," instead of "expose or keep for sale" according to the wording contained in the section, is properly laid. *Rex* v. *Iaci,* (1924) 33 B.C.R. 501; (1924) 3 D.L.R. 321; (1924) 2 W.W.R. 958; 42 C.C.C. 266.

C. Bail.

1. Application to estreat.]—An application by the Crown for an order to estreat a bail bond for the appearance of an accused person under the Summary Convictions Act, B.C. Stats. 1915, cap. 59, sec. 65 should be made to the County Court. *Rex* v. *Briggs,* (1923) 33 B.C.R. 297.

2. Enforcement of bail bond.] — M. entered into a recognizance as principal and B. as surety that he would appear as a witness on a criminal prosecution. He failed to appear and the magistrate, after certifying on the back of the recognizance M.'s non-appearance at the hearing, forwarded it to the clerk of the County Court within the jurisdiction. An application by the Crown to a judge of the Supreme Court for an order estreating said recognizance was refused. Application was then made to a judge of the County Court for the same order which was granted:—Held, on appeal from both orders, that the estreating of a recognizance may be carried out under the provisions of sec. 1099 of the Criminal Code itself, and any further necessary proceedings follow under the subsequent section of the statute without the requirement of any order from the Courts. Held, further, that as the case was in the magistrate's Court and the County Court Judge's Criminal Court, rule 6 of the Criminal rules does not apply, as sec. 576 of the Criminal Code under which it was passed deals with the powers of the Supreme Court judges to make rules for their own Court only. *Rex* v. *McCoy and Brown,* (1924) 34 B.C.R. 14.

D. Trial.

1. Stipendiary magistrate as counsel.]—A stipendiary magistrate may not appear as counsel before a magistrate or justice of the peace in the prosecution of a charge of selling liquor contrary to the provisions of the Government Liquor Act. *Rex* v. *Wessell,* (1924) 34 B.C.R. 119; (1924) 4 D.L.R. 139; (1924) 3 W.W.R. 233; 42 C.C.C. 371.

2. Acting magistrate.]—No person can sit in the place of a police magistrate of a municipality except on account of the illness or absence or at the request of such police magistrate. The jurisdiction of the magistrate must appear on the face of the proceedings. A defect in this respect is fatal to a conviction which cannot on appeal be cured by amendment. *Rex* v. *Chin Toy,* (1922) 70 D.L.R. 160; (1922) 2 W.W.R. 1269; 38 C.C.C. 382.

3. Absence of police magistrate—Justices.]—In order that a conviction made before a justice of the peace, purporting to adjudicate in a city on an offence committed in such city, may be valid, it must shew on its face either that such adjudication takes place because of the illness or absence, or at the request of the city police magistrate, or else that the city has no police magistrate. *Rex* v. *Smith,* (1919) 27 B.C.R. 338; (1919) 3 W.W.R. 311.

4. Withdrawal of summons — Conviction on second information.]—Unless it can be said on the facts that there has been an adjudication and acquittal on the merits, the permission of the Court to withdraw a charge is not equivalent to a dismissal

which can be pleaded in bar of subsequent proceedings. Where there is no determination of this matter on the first summons, the magistrate has jurisdiction to hear and determine the second summons. *Rex* v. *Somers*, (1929) 41 B.C.R. 190; (1929) 3 D.L.R. 772; (1929) 2 W.W.R. 366; 51 C.C.C. 356.

5. Plea.]—Calling upon the accused to plead guilty or not guilty is an essential part of the arraignment and if omitted the conviction is bad. *Rex* v. *Chew Deb*, (1929) 41 B.C.R. 403.

6. Waiver of defects in procedure.]—The Court will not accede to an application to set aside a conviction by reason of alleged wrongful procedure brought about at the request of the accused, as where the justice at the instance of the accused viewed the locus in quo after the evidence was completed. *Rex* v. *Cox*, (1929) 41 B.C.R. 9; (1929) 2 D.L.R. 785; (1929) 1 W.W.R. 542; 51 C.C.C. 203.

7. Several charges tried together.]—Where the Court is satisfied that the magistrate tried two separate and distinct offences against the accused at one time the convictions on the charges will be quashed. Sec. 83 of the B.C. Government Liquor Act, 1921, does not permit of such a trial of charges under that Act. *Rex* v. *Montemurro*, (1924) 2 W.W.R. 250. *See* also Sec. XIV. *Infra*.

E. Adjudication.

1. Conviction.

1. Describing offence.] — A conviction "for storing inflammable goods" purporting to be made under sec. 42 of the By-Laws of the Harbour Commissioners of Vancouver which makes it an offence to store "explosive material" cannot be amended, the defect being fundamental and irremediable. *Rex* v. *Little*, (1915) 10 W.W.R. 893; 27 C.C.C. 422.

2. Stenographer's oath not on record.]—An objection that the stenographer officiating at a trial before a magistrate under the Summary Convictions Act was not sworn is not one going to the jurisdiction. An affidavit of the magistrate that the stenographer was duly sworn may be received in evidence in certiorari proceedings. The fact that the stenographer was sworn need not appear on the face of the record, and an affidavit of counsel that as far as he had observed the stenographer had not been sworn is not prima facie proof that the oath was not administered before the trial commenced, as such oath need not be administered in open Court. *Rex* v. *Sally*, (1920) 28 B.C.R. 268; (1920) 2 W.W.R. 953; 33 C.C.C. 350.

3. Duplicity.] — A conviction on the charge against an occupant of a hotel that he had "permitted and suffered drunken persons to consume liquor therein" and did "permit and suffer drunken persons to assemble or meet therein" is objectionable because of duplicity, there being two offences charged, but the Court has power to cure the defect by striking out one of the charges; as to what charge should be struck out depends upon the facts in the case. *Rex* v. *Dobie*, (1921) 29 B.C.R. 188; 57 D.L.R. 290; (1921) 1 W.W.R. 723; 35 C.C.C. 10.

4. Magistrate's costs.]—Where, on the conviction on a charge under sec. 180 (*e*) of the Inland Revenue Act, the magistrate erred in directing that the accused should pay him his costs, the Court may on certiorari amend the warrant of conviction by deleting the order as to costs. *Rex* v. *Dragani*, (1927) 38 B.C.R. 420; (1927) 1 W.W.R. 914; 47 C.C.C. 301.

5. Second conviction erroneously signed.]—A magistrate signed a conviction declaring liquor confiscated under the British Columbia Prohibition Act after having noted the adjudication on the information. Later he inadvertently signed another form of conviction in the same case but it contained no adjudication of confiscation. The latter document, but not the first, was forwarded to the County Court on an appeal which was dismissed. The plaintiff then brought action for a return of the confiscated liquor which was dismissed:—Held, on appeal, that there was a valid conviction which correctly expressed the adjudication of the Court and the later document must be viewed as a nullity and be entirely disregarded. Counsel upon the appeal to the County Court did not discharge his full duty in failing to call the attention of the Court to the erroneous form of the conviction on file. *Plant* v. *Urquhart et al.*, (1921) 30 B.C.R. 461; 65 D.L.R. 242; (1922) 1 W.W.R. 632; 36 C.C.C. 339.

6. Describing offence.] — A conviction stating that the accused, not being the holder of a certificate of registration, did unlawfully practice optometry within the Province, contrary to the provisions of sec. 5 of the Optometry Act Amendment Act 1922, is bad, as it does not set out the acts or particular acts which constituted here

the practice of optometry. *Rex* v. *Jordan*, (1925) 35 B.C.R. 1; (1925) 2 D.L.R. 1119; 44 C.C.C. 23; (1925) 1 W.W.R. 799.

7. Under repealed statute.]—A conviction for an offence therein expressed to be contrary to a statute which has been repealed, is invalid and should be quashed, notwithstanding that the statute in force at the time of the unlawful act and the conviction recites a similar offence. *Rex* v. *Chew Deb*, (1928) 39 B.C.R. 559; (1928) 1 W.W.R. 966; 49 C.C.C. 332.

8. Duplicity and uncertainty—Amendment.]—In the case of a summary conviction by a magistrate of a person on a charge that he did "expose for sale and offer to sell 24 double cases and 4 single cases of intoxicating liquor," etc., where evidence returned on certiorari was sufficient to convict such person on the charge that "he did offer to sell," etc., the Court will not quash the conviction for duplicity and uncertainty but will amend the conviction under sec. 1124 of the Criminal Code by striking out the charge of exposing for sale. *Rex* v. *Leahy*, (1920) 28 B.C.R. 151; 61 D.L.R. 333; (1920) 2 W.W.R. 95; 35 C.C.C. 358.

9. Charging an offence in different modes.]—Where an accused was convicted under sec. 180 of the Excise Act upon the charge that "without having a license under the Excise Act he unlawfully did cause or keep or allow or suffer to be concealed and kept in a place or premises controlled by him wash suitable for the manufacture of spirits":—Held, that as the conviction does not charge two offences, it is not invalid as stating the offence to have been committed in different modes, and is within the saving provisions of sec. 725 of the Criminal Code. *Rex* v. *Cheng Tong Seng*, (1927) 39 B.C.R. 157; 49 C.C.C. 79; (1928) 1 W.W.R. 33.

10. Description of offence.]—Sec. 21 of the fishery regulations makes it an offence for a purse-seine to be kept open for any time after being cast in the manner known as an "open set." The alleged offence set out in the conviction is that the accused "did fish for salmon with a purse-seine in the manner known as an 'open set'":—Held, that the offence created by said sec. 21 is not properly described in the conviction and the conviction should be quashed. *Rex* v. *McPherson*, (1929) 41 B.C.R. 218; (1929) 2 W.W.R. 141; 51 C.C.C. 419.

11. Previous conviction charged.]—Sec. 93 (2) of the Government Liquor Act is peremptory as to the stage of proceedings at which the enquiry as to former offences should be made, and where the magistrate had improperly admitted evidence of a previous conviction before the determination of the defendant's guilt upon the charge for which he was being tried, the conviction was quashed. *Rex* v. *Rowan*, (1930) 42 B.C.R. 559; (1930) 2 W.W.R. 277; 54 C.C.C. 197.

12. Lack of precision—Error in reciting statute.]—A conviction made after the passage of the Opium and Narcotic Drug Act, 1923, is not invalid for the reason that the warrant states that it is made under the Opium and Narcotic Drug Act which was repealed when the Act of 1923 was enacted and substituted therefor, as it is within the saving provisions of sec. 723 (d) of the Criminal Code. *Rex* v. *Gan*, (1925) 36 B.C.R. 125; (1925) 3 W.W.R. 783; 44 C.C.C. 334.

13. Error in date of offence.]—Where the date on which an offence was committed is clearly stated in the conviction the erroneous statement that it was committed "within one month last past" is in no way misleading and the conviction should be affirmed. *Rex* v. *Alberts*, (1925) 35 B.C.R. 106; (1925) 4 D.L.R. 672; (1925) 1 W.W.R. 441; 45 C.C.C. 51.

14. Clerical error.]—On habeas corpus proceedings with certiorari in aid, the warrant of commitment filed in the return disclosed that accused was convicted of having in his possession a drug, to wit: opium, contrary to sec. 4 (d) of The Opium and Narcotic Drug Act and he was sentenced to the common gaol for six months with a fine of $200, and imprisonment for two months in default of payment. The conviction upon which the warrant of commitment was based described the Act as being "The Opium and Narcotic Drug Act, 1923." This statute had been repealed at the time the offence was alleged to have been committed:—Held, that sec. 1124 of the Criminal Code requires the judge before whom the question of invalidity is raised to peruse the depositions and determine as to the guilt of the person seeking redress, and if he is satisfied that the offence actually alleged in the conviction has been committed, such conviction should not be held invalid. Being satisfied after reading the depositions that the accused had committed the offence alleged, the conviction should be amended by striking out the figures "1923," confirmed as amended, and the release of the applicant refused. *Rex* v. *Loo Yip Yen*, (1929) 42 B.C.R. 377; 53 C.C.C. 38; (1930) 1 W.W.R. 351.

15. Substitution of proper conviction.]—Where the accused is charged with and convicted of house-breaking, but the evidence shews that the offence was committed at night, the Court of Appeal may substitute a conviction for stealing from a dwelling house, where the magistrate might have convicted him for that offence under the charge as laid. *Rex* v. *Sam Chin*, (1926) 36 B.C.R. 397; (1926) 2 D.L.R. 287; 45 C.C.C. 291.

16. Sufficiency of evidence.]—On appeal from the conviction of an accused as keeper of a common betting-house, the question for the Court is whether in its opinion there was evidence before the magistrate which would justify him in drawing the inferences of fact that he has drawn, and if there is such evidence the conviction should be upheld. *Rex* v. *Smith*, (1926) 37 B.C.R. 248.

17. Imposition of fine less than that prescribed by statute.]—The imposition of a fine less than that prescribed by the statute is no ground for holding the conviction invalid. Where a conviction is valid with respect to the term of imprisonment imposed, but a provision therein as to costs is beyond the jurisdiction of the magistrate, the portion which provides for imprisonment nevertheless remains good. *Rex* v. *Henderson*, (1929) 41 B.C.R. 242; (1929) 2 W.W.R. 209; 52 C.C.C. 82.

18. Offence proved — Conviction for minor offence—Mandamus.]—An accused was charged with having opium in his possession contrary to sec. 4 (*d*) of the Opium and Narcotic Drug Act. On the trial before a County Court judge under Part XVIII. of the Criminal Code the offence was proved, but he was convicted of the minor offence of smoking opium under sec. 10 of said Act. On an application for a prerogative writ of mandamus directed to the County Court judge commanded him to proceed with and conclude the trial of the accused on the charge laid:—Held, that if a charge under sec. 4 (*d*) of said Act be proved the Court should convict under that section and not reduce or substitute an offence under other sections of the Act. The conviction as entered is a nullity. *Mandamus* should issue to compel completion of the unfinished trial with an order for the rearrest of the accused. *Rex* v. *Wong Sack Joe*, (1929) 41 B.C.R. 254.

19. Under statute enacted after commission of offence.]—There cannot be a conviction for a crime under a statute enacted after an offence has been committed. *Rex* v. *Soo Gong*, (1927) 38 B.C.R. 321; (1927) 2 D.L.R. 269; (1927) 1 W.W.R. 669; 47 C.C.C. 275.

20. Absence of Police Magistrate — Acting Magistrate.]—No person can sit in the place of a police magistrate of a municipality except on account of the illness or absence or at the request of such police magistrate. The jurisdiction of the magistrate must appear on the face of the proceedings. A defect in this respect is fatal to a conviction which cannot on appeal be cured by amendment. *Rex* v. *Chin Toy*, (1922) 70 D.L.R. 160; (1922) 2 W.W.R. 1269; 38 C.C.C. 382.

21. Conspiracy to defraud.]—A conviction of some of those named in a charge of conspiracy is good on the ground that they have conspired unless the agreement between them differs from that contained in the charge. *Rex* v. *Marino and Crisofi*, (1927) 38 B.C.R. 452; (1927) 2 W.W.R. 468; 47 C.C.C. 348.

22. Costs against Crown.]—Where a conviction for an offence against the Government Liquor Act is quashed on appeal taken under the Summary Convictions Act, the Crown Costs Act is a bar to the awarding of costs against the Crown. *Rex* v. *McLane*. *Rex* v. *Noon*, (1927) 38 B.C.R. 306; (1927) 1 W.W.R. 701; 47 C.C.C. 208.

23. Conviction in another Province.]—A habeas corpus application arising out of a conviction in another Province should not be entertained unless good reason can be shewn that the application could not have been made in that Province. *Rex* v. *Jungo Lee*, (1927) 38 B.C.R. 313; (1927) 1 W.W.R. 578; 47 C.C.C. 255.

24. Double charge.]—A conviction and warrant by a magistrate which were held bad because of a double charge were amended under sec. 1124 of the Criminal Code by striking out one of the charges. *Rex* v. *Richard*, (1920) 2 W.W.R. 14.

25. Double charge.]—A conviction reciting that the accused "did unlawfully issue trading stamps to one Hart and others being merchants for use in their business" is not a conviction for a dual offence where the evidence adduced at the trial was restricted to the sale to Hart alone and the conviction should be sustained, no uncertainty arising in the Court below or on appeal as to the offence for which the accused was tried and convicted, it being impossible to say that any substantial wrong or miscarriage of

justice had occurred. *Rex* v. *Smith*, (1931) 44 B.C.R. 422; (1932) 1 W.W.R. 131.

2. Warrant of Commitment.

1. Prisoner in lawful custody—Application for discharge.]—A warrant of commitment shewed that accused had been convicted under The Opium and Narcotic Drug Act and sentenced to 6 months in gaol and to pay a fine of $200, or in default of payment thereof to serve a further term of imprisonment. No costs were imposed. Application was made for a writ of habeas corpus on the ground that since the Act made the imposition of costs compulsory in addition to the fine, the warrant was defective:—Held, that the imposition of imprisonment and the imposition of further imprisonment in default of a fine are two separate directions as to detention, as the warrant clearly indicated, and as the application was made before the expiration of the six months period of imprisonment, the accused was lawfully held under the warrant. *Rex* v. *Jong*, (1926) 1 W.W.R. 40; (sub nom. *Rex* v. *Wong Yuen*), (1925) 44 C.C.C. 338.

2. Not shewing violation of Act.]—A warrant of commitment made on a conviction for an infraction of sec. 20 of the Government Liquor Act is bad if it does not shew on its face that the Act has been violated. A motion by the Crown to amend the warrant of commitment was refused in view of it having already been twice amended. *Rex* v. *Jones*, (1923) 32 B.C.R. 160; (1923) 2 W.W.R. 141; 40 C.C.C. 198.

3. Describing offence.] — An accused was committed for trial on a charge of bringing into the Province a gasoline launch which was obtained by theft in Alaska, United States, contrary to sec. 398 of the Criminal Code. On an application for a writ of habeas corpus on the ground that the warrant of commitment was defective in that it did not shew that the accused had obtained the launch outside of Canada: —Held, refusing the writ, that the warrant sufficiently disclosed the offence and the reference to sec. 398 of the Criminal Code makes plain to the accused the offence for which he has been committed. *Rex* v. *Gallagher*, (1925) 36 B.C.R. 246; (1925) 3 W.W.R. 757.

4. Duplicity — Amendment.]—Sec. 91 (1) of the Government Liquor Act having been repealed, the Court may examine into the proceedings where there is a defect in a warrant of commitment upon which a prisoner is held, and if satisfied that accused was rightly convicted uphold the conviction. An accused was convicted by two justices of the peace for that he did sell or keep for sale intoxicating liquor contrary to sec. 26 of the Government Liquor Act. The objection to the warrant of commitment was that there was duplicity in the charge:—Held, that the duplicity in the charge was a mere irregularity, the fundamental question being whether the accused was guilty of an infraction of sec. 26 of the Act. The conviction and warrant of commitment were amended by striking out the words referring to "selling" and the conviction sustained. *Rex* v. *Ferraro*, (1924) 33 B.C.R. 491.

5. Unlawful sale of intoxicating liquor —Omitting name of statute and names of vendors.]—The warrant of commitment in a prosecution under the Summary Convictions Act to enforce a penalty for breach of the Government Liquor Act, declared that accused was convicted for that he at a certain time and place "unlawfully did sell intoxicating liquor, to wit: two bottles of 'Perfection' Whisky," the names of the persons to whom the whisky was sold and the statute under which the accused was convicted having been omitted from the warrant:—Held, that the omissions above quoted did not invalidate the warrant of commitment. Had the word "unlawfully" been omitted the conviction could not stand in the absence of an averment that the sale was contrary to the provisions of the Act. *Rex* v. *Somers*, (1923) 32 B.C.R. 553; (1923) 3 W.W.R. 813; (1924) 2 D.L.R. 1160; 41 C.C.C. 141.

6. Seal of Magistrate.]—A warrant of commitment upon a conviction under the Summary Convictions Act must be authenticated by the seal of the magistrate. *Rex* v. *Huger*, (1924) 33 B.C.R. 157.

7. Sentence—Improper addition of fine to imprisonment.]—Where a sentence on a valid conviction imposes a fine and imprisonment and the imprisonment is good but the fine is bad, the one part may be severed from the other, and the prisoner is not entitled to his discharge on habeas corpus. *Rex* v. *Henderson*, (1929) 41 B.C.R. 242; 52 C.C.C. 82; (1929) 2 W.W.R. 209.

8. Costs not shewn—Cumulative term not commenced.] — Discharge cannot be granted on habeas corpus because the commitment does not shew a conviction in which the costs are stated; nor can a discharge be granted on habeas corpus by reason of a deficit in a cumulative term of

imprisonment which has not yet commenced. *Ex p. Joe Go Get*, (1929) 52 C.C.C. 95; (1930) S.C.R. 45; (1930) 1 D.L.R. 420.

9. Omission of word "forfeit."]—An accused, having been convicted for being in unlawful possession of opium, applied for his discharge on habeas corpus on the ground that the word "forfeit" was omitted from the warrant of commitment:—Held, that as the word appeared in the conviction itself there was substantial compliance with the provisions of the Code. The omission of the word from the warrant should be regarded as a technicality as the word "pay" when used in a conviction necessarily connotes the idea of forfeiture of money and the evidence disclosed that the magistrate had come to a proper conclusion. *Rex* v. *Hing Hop*, (1926) 37 B.C.R. 158; (1926) 1 W.W.R. 799; 45 C.C.C. 239.

10. Government Liquor Act.]—A conviction and the warrant of commitment thereunder for an offence under the Government Liquor Act will not be set aside because they do not contain the name of the person to whom the liquor was sold. An Indian is punishable in the same manner as others, for offences against Provincial legislation when committed outside a reservation. *Rex* v. *Chan Lung Toy*, (1924) 34 B.C.R. 194; (1924) 3 W.W.R. 196.

11. Order for costs omitted.]—A warrant of commitment under the Opium and Narcotic Drug Act, 1923, is not vacated by the omission of an order for payment of costs. *Rex* v. *Wong Yet*, (1925) 36 B.C.R. 140; (1925) 3 W.W.R. 672; 44 C.C.C. 343.

12. Date of offence not disclosed.]—A warrant of commitment to comply with the provisions of the Summary Convictions Act must state the time when the offence was committed. *Rex* v. *Rodgers*, (1923) 33 B.C.R. 16; (1923) 3 W.W.R. 955; 41 C.C.C. 190.

XIV. Summary Trial of Indictable Offences.

1. Police Magistrate.]—The words "two justices of the peace sitting together" in sec. 797 of the Criminal Code, as re-enacted by Can. Stats. 1913, cap. 13, sec. 28, do not apply to a police magistrate on a summary trial of an indictable offence. Where, therefore, the accused was convicted by a police magistrate on a charge of being the keeper of a disorderly house, no appeal lies. *Rex el rel. Robinson* v. *Berenstein*, (1917) 24 B.C.R. 361; 29 C.C.C. 435.

2. Stipendiary.]—A stipendiary magistrate has no jurisdiction to try an offence alleged to have been committed in the City of Vancouver, except at the request or in the absence or illness of the police magistrate of the city and prohibition will be accordingly. *Rex* v. *Harry Fong* (1930) 3 W.W.R. 479.

3. Stipendiary.]—A stipendiary magistrate is prohibited from appearing as counsel on the trial of an accused person before another stipendiary magistrate of the same county, who is also prohibited from hearing the case under such circumstances. *Rex* v. *Wessell*, (1924) 34 B.C.R. 119; (1924) 4 D.L.R. 139; (1924) 3 W.W.R. 233; 42 C.C.C. 371.

4. Stipendiary.]—The stipendiary magistrate in and for the County of Kootenay has no jurisdiction within the City of Cranbrook, unless in the illness or absence or at the request of the police magistrate of the City of Cranbrook, and where such stipendiary magistrate has made a conviction in a case which should have been tried by the police magistrate, and the jurisdiction of the stipendiary as above stated does not appear on the face of the proceedings, the defect is fatal and the conviction will be quashed. *Chin Toy* v. *Armitage*, (1922) 70 D.L.R. 160; (1922) 2 W.W.R. 1269; 38 C.C.C. 382.

5. Plea—Interrogation of prisoner.]—Sec. 721 of the Criminal Code does not authorize the interrogation of a prisoner by the magistrate other than to ask if he has any cause to shew why he should not be convicted. This can be done by asking "what does he say, guilty or not," but if his reply is not a clear admission of all the elements of the crime, the magistrate must proceed to inquire into the charge without further questioning. A statement of a police officer not under oath is not evidence. *Rex* v. *Lee*, (1925) 35 B.C.R. 401; (1925) 2 W.W.R. 190; 45 C.C.C. 280.

XV. Speedy Trial.

1. Prosecuting officer.]—The term "prosecuting officer" appearing in sec. 827, sub-sec. 3 of the Criminal Code, is used to describe various officers who may be appointed by the Provincial Government to prefer the charge against a prisoner for

which he has been committed for trial, and may include a clerk of the peace or the prosecuting counsel or counsel for the Crown. Instructions to counsel by telegram or telephone to conduct a prosecution is sufficient authority for him to state to the judge that he appears for the Crown and for the judge to recognize his appointment as prosecuting officer, and to act upon the charge preferred by him. The signature of Crown counsel at the foot of the charge is improper and superfluous. *Rex* v. *Jim Goon and Wong Sing*, (1916) 22 B.C.R. 381; 28 D.L.R. 374; 33 W.L.R. 761; 25 C.C.C. 415.

2. Clerk of the peace.]—The doctrine of omnia praesumuntur applies and where the record contains a formal charge and a certificate of the clerk of the peace as to the conviction, it must be assumed that the clerk of the peace was present in Court and discharged his duty in all respects. *Ibid.*

3. Right to obtain advice before election.]—On the accused being brought before the magistrate and after the information had been read to him by an interpreter, the magistrate told him he had the right to choose whether he would be tried by him or in a higher Court. The interpreter then said accused wanted an adjournment until he could obtain advice. This was refused and he was called upon to elect at once. He decided to be tried by the magistrate, was convicted, and sentenced to the penitentiary for five years:—Held, on certiorari, that the refusal of an adjournment in the circumstances rendered the trial unfair and the conviction should be quashed. *Rex* v. *Lee Sow*, (1922) 31 B.C.R. 161; 66 D.L.R. 146; (1922) 2 W.W.R. 208; 37 C.C.C. 196.

4. Preferring new charge at election.]—An accused after committal for trial on a charge under the Criminal Code and coming before the judge of a County Court for election may properly be apprised by the judge both of the charge upon which he was committed and also a new count proposed to be added, and may be asked to elect as to both charges, the judge's assent to the proposed new count being then added. *Rex* v. *Stanyer*, (1923) 33 B.C.R. 223; 41 C.C.C. 206; (1924) 1 W.W.R. 570.

5. Irregular second election after amendment of charge.]—Where a prisoner is convicted in the County Court Judge's Criminal Court after electing for speedy trial, and an entry of this appears on the record it will be presumed, unless the contrary is shewn, that the consent of the prisoner to be so tried was regularly obtained and that his option to elect was exercised only after the judge stated his right of election in the manner prescribed by sec. 827 of the Criminal Code. A good election for speedy trial was held not to be affected by the fact that a subsequent election made after a slight amendment in the charge may not have been taken in the proper manner. Upon the County Court Judge's Criminal Court becoming a Court of competent jurisdiction with respect to a case before it, the remedy, if any, for irregularities in the subsequent conduct of the proceedings is in sec. 1014 of the Criminal Code. *Rex* v. *Wong Chuen Ben (No. 2)*, (1930) 43 B.C.R. 188; (1930) 3 W.W.R. 282; 54 C.C.C. 399.

6. Separate charges tried together—Stealing and receiving.] — Accused, being charged with stealing, elected to take a speedy trial. At the opening of said trial the Crown preferred a second charge, namely, that of receiving. The accused, being put to re-election on these two separate and distinct charges, elected to be tried in the County Court Judge's Criminal Court without a jury. He was then tried on both charges in one trial and convicted on the charge of stealing and sentenced to six months' imprisonment with hard labour. The warrant of commitment bore the fact of the one trial on both charges:—Held, that where there is no statute in force authorizing two charges to be tried together recourse must be had to the common law, and that at common law the procedure adopted in the present case was not permissible, and the warrant of commitment being defective on its face the prisoner was discharged. *Rex* v. *Simpson*, (1923) 3 W.W.R. 1095.

7. Two counts tried together—Conviction on one.]—Where the accused having elected to take speedy trial was tried on both counts in one trial and convicted on one:—Held, that the provisions of secs. 856 and 857 of the Code as to joinder of counts apply to proceedings under the Speedy Trials part and that the proper procedure was followed. *Rex* v. *December (No. 1)*, (1931) 44 B.C.R. 210; (1931) 2 W.W.R. 810; 56 C.C.C. 110.

But *see Rex* v. *December (No. 2)*, (1931) 3 W.W.R. 356; 56 C.C.C. 391.

8. Correction of sentence.]—On a conviction on a charge of robbery with violence the trial judge ordered lashes to be administered to the prisoner within one month

from the beginning of the sentence. Counsel for the Crown then drew to his attention that this was contrary to sec. 1018, sub-sec. 3, of the Criminal Code. The judge then corrected this error, but later being advised that he had not stated the number of times prisoner was to be whipped, provided for this in the record of conviction in the prisoner's absence:—Held, that the learned judge when correcting the error was not functus officio; that the sentence as corrected was not illegal and that there was no mistrial. *Rex* v. *Hughes*, (1924) 35 B.C.R 55.

9. Procedure on election.]—On preliminary inquiry the charge was read and interpreted to the accused. It was contended that the charge should have been reduced to writing and read to them at the time of election, but held that this was unnecessary as the whole proceeding was one transaction and the charge read to them was the charge on which they were to be tried. *Rex* v. *Lee Kim et al.*, (1930) 42 B.C.R. 360; (1930) 2 W.W.R. 441; 53 C.C.C. 252.

XVI. INDICTMENT.

1. Conflicting counts.]—Unless a thief has parted with possession of and afterwards regains possession of a stolen article the prisoner should not be found guilty on two counts: (a) Stealing an article; (b) Receiving or retaining possession thereof. *Rex* v. *Carmichael*, (1915) 22 B.C.R. 375; 26 C.C.C. 443.

2. Style of cause.]—The words "The King" should appear in the style of cause in criminal matters and there is no precedent for putting the words "The Crown" on the record. *Rex* v. *Maliska*, (1919) 27 B.C.R. 111; (1919) 2 W.W.R. 378.

3. Two sales—Continuous offence.]—Where M. one of the accused received money from agents of the police for the purchase of drugs from him and one of the agents upon information given by M. found a parcel of morphine in a hiding place in which it had been placed by the accused Y. under instructions from M. and the agents later paid the accused a sum of money for cocaine, afterwards finding cocaine in the same hiding place in which it had been placed under similar instructions, the accused were both found guilty on a charge that "they unlawfully did distribute a drug, to wit, morphine and cocaine":—Held, that in the circumstances of this case the sales of drugs as disclosed by the evidence do not constitute separate and distinct transactions and the offence of distribution within subsec. (f) of sec. 4 of The Opium and Narcotic Drug Act was properly set forth in the indictment. *Rex* v. *Marino and Yipp*, (1931) 44 B.C.R. 265; 56 C.C.C. 136; (1931) S.C.R. 482; (1931) 4 D.L.R. 530; 56 C.C.C. 136 at p. 138.

XVII. GRAND JURY.

1. Drafting.]—Upon selectors, appointed under sec. 29 of the Jury Act, B.C. Stats. 1913, cap. 34, at Clinton, B.C., making their selection of Grand and Petit Jurors, the sheriff proceeded with the drafting of a panel, cutting down the number so selected. On appeal from a conviction for cattle stealing:—Held, that as the Grand Jury so drafted was not competent, the indictment should be quashed and a new trial ordered. *Rex* v. *DuBois*, (1919) 30 B.C.R. 394.

2. Directions by Trial Judge.]—Under the Jury Act, 1923, the judge designated as the presiding judge at the Assizes, may, before the opening thereof, make an order directing the sheriff to summon extra Grand and Petit jurymen. *Rex* v. *Boak*, (1925) S.C.R. 525; (1925) 3 D.L.R. 887; 44 C.C.C. 218.

XVIII. VENUE.

1. Change of—Appeal from dismissal of application for.]—By sec. 884 of the Criminal Code the judge is given power to change the place of trial whenever it appears to him to be in the interests of justice to do so. When it can properly be inferred from the facts before him that it is expedient to the ends of justice to make the change, his decision thereon is one of fact and not of law and the Court of Appeal will not interfere. *Rex* v. *Sankey*, (1927) 39 B.C.R. 247; 49 C.C.C. 195.

XIX. PLEA.

Withdrawal of charge at previous trial —Autrefois acquit.]—The permission of the Court to withdraw a charge is not equivalent to a dismissal which can be pleaded in bar of subsequent proceedings

unless it can be said on the facts that there has been an adjudication and acquittal on the merits. *Rex* v. *Somers*, (1929) 41 B.C.R. 190; (1929) 3 D.L.R. 772; (1929) 2 W.W.R. 366; 51 C.C.C. 356.

XX. TRIAL.

1. Postponement.]—On a trial for murder, counsel for the accused moved for a postponement of the trial on the ground that one of the four accomplices was a necessary and material witness on their behalf, that the latter was under order for extradition to this country from the State of Washington, but had appealed from said order and the appeal was then pending. The motion was denied. *Rex* v. *Baker*. *Rex* v. *Sowash*, (1925) 37 B.C.R. 1; 45 C.C.C. 1; (1926) 1 D.L.R. 99.

2. Prisoners jointly indicted.]—Where the accused is under joint indictment with another prisoner upon a charge of murder a separate trial will not be granted unless the accused would be prejudiced by a joint trial. *Ibid.*

3. Prisoners jointly indicted.]—Persons jointly indicted should, by general rule, be jointly tried; but where in any particular instance this would work an injustice the presiding judge should, on due cause being shewn, permit a severance, and allow separate trials. *Rex* v. *Wiser and McCreight*, (1930) 42 B.C.R. 517; (1930) 1 W.W.R. 976; 54 C.C.C. 117.

4. Joint indictment of several prisoners—Motion to discharge one.]—Where parties are indicted jointly it is in the discretion of the judge or magistrate to keep all parties together until the end of the trial and a motion to dismiss as to one of the accused at the end of the Crown's case may be refused. *Rex* v. *Lee Kim*. *Rex* v. *Mah Poy*. *Rex* v. *Henry Chan*. *Rex* v. *Charlie Sam*, (1930) 42 B.C.R. 360; (1930) 2 W.W.R. 441; 53 C.C.C. 252.

5. Exhibits.] — The accused was convicted on a charge of unlawfully having cocaine and morphine in his possession. On the trial certain material exhibits were marked for identification only and were not put in and marked as part of the evidence: —Held, on appeal, that although strictly the exhibits ought to have been put in, nevertheless, they were before the Court and jury and were considered by the jury in arriving at a verdict. No miscarriage of justice occurred and the appeal should be dismissed. *Rex* v. *Henry Chow*, (1930) 42 B.C.R. 365; (1930) 2 W.W.R. 389; 53 C.C.C. 247.

XXI. JURY.

1. Empanelling—Preliminary challenge on second calling of panel.]—When jurors, on being directed to stand aside on a criminal trial, are called a second time after the panel has been exhausted, the Crown has no right to challenge peremptorily even where the right to challenge peremptorily four jurors on the first calling of the panel has not been exhausted. If the Crown is allowed to challenge peremptorily jurors recalled after the panel has been exhausted, the jury is improperly constituted, and a substantial wrong has been done, entitling the accused to a new trial. *Rex* v. *Churton*, (1919) 27 B.C.R. 26; 45 D.L.R. 725; (1919) 1 W.W.R. 774; 31 C.C.C. 188.

(*See* 1919 amendment to Code, sec. 928.)

2. Disagreement—New jury.]—When a jury being unable to agree are discharged and a new jury directed, a second jury containing three members of the discharged jury is not a new jury within sec. 960 of the Code. *Rex* v. *Wong O Sang*, (1922) 34 B.C.R. 8; (1924) 3 W.W.R. 45. *Rex* v. *Chong Sam Bow*, (1925) 1 W.W.R. 240.

3. Discharge of jury before verdict.] —In the discharge of a jury during a trial it is a matter solely within the jurisdiction of the trial judge, his discretion not being open to review on appeal. *Rex* v. *Chong Sam Bow, supra.*

XXII. JUDGE'S CHARGE.

1. Comment on evidence.]—The failure of an accused to disclose his defence at the preliminary hearing must not be a matter of comment by the judge in his instructions to the jury on the trial. *Rex* v. *Mah Hon Hing*, (1920) 28 B.C.R. 431; 53 D.L.R. 356; (1920) 3 W.W.R. 314; 33 C.C.C. 195.

2. Inconsistent verdict.]—The accused were tried under an indictment containing two counts, one of rape and the other of seduction, and both counts related to the same act alleged. The jury found them guilty on both and they were sentenced on the lesser of the two counts. On appeal by way of case stated:—Held, that the accused being found guilty under both counts was

an inconsistent finding by the jury resulting in a substantial wrong and there should be a new trial. The two counts were properly submitted but the learned judge should have instructed the jury that if they found the accused guilty on the one count they would not do so on the other. *Rex* v. *Zambapys and McKay*, (1923) 32 B.C.R. 510.

3. Reasonable doubt.]—On the trial of a person accused of murder it is the duty of the trial judge to charge the jury upon the point of reasonable doubt. If upon the whole question of guilt or innocence of the accused it has not been established to a moral certainty that all hypotheses inconsistent with guilt had been excluded then the accused must be given the benefit of the doubt. Absence of any such instruction occasions a substantial wrong to the accused and there should be a new trial. *Rex* v. *Payette*, (1925) 35 B.C.R. 81; (1925) 2 W.W.R. 747; 44 C.C.C. 209.

4. Murder.]—The accused was charged with murder of the captain of a motor boat and his son. The evidence disclosed that the accused had come aboard the boat belonging to the deceased, wearing a yachtsman's cap with a white top and gold braid to give himself the appearance of a revenue officer, and was equipped with and displayed revolvers, handcuffs and a flashlight such as officers might be expected to use in dealing with those in possession of contraband liquor. In giving evidence on his own behalf the accused swore that he had not used a revolver for a number of years, had never owned handcuffs and had never used a flashlight. Evidence was adduced by the Crown in rebuttal that Baker on one occasion recently and on another about three years previously, had employed similar equipment and the same ruse for the purpose of deceiving and disarming the opposition of rumrunners while he took possession of their stock of liquors: —Held, on appeal, that the evidence was properly admitted as shewing the falsity of the appellant's statements on the direct issue; moreover the trial judge put it to the jury merely as evidence affecting the credibility of the appellant. *Rex* v. *Baker*, (1925) 37 B.C.R. 1; 45 C.C.C. 1; (1926) 1 D.L.R. 99; (1926) S.C.R. 92; (1926) 1 D.L.R. 115; 45 C.C.C. 19.

5. Murder.]—On a trial for murder the trial judge having failed to direct the jury upon the question of manslaughter which in his opinion was excluded from the case in the circumstances thereof, it is his duty to confine the issue to the real question and not allow the jury to be perplexed or diverted by irrelevant directions or otherwise. *Rex* v. *Burgess and McKenzie*, (1928) 39 B.C.R. 492; (1928) 2 D.L.R. 694; (1928) 1 W.W.R. 633; 49 C.C.C. 243.

6. Murder—Non-direction—Accident.] —Failure to charge the jury that the facts might support a defence of accidental shooting is ground for a new trial. *Rex* v. *Deal*, (1923) 32 B.C.R. 279; (1923) 3 D.L.R. 201; (1923) 1 W.W.R. 615; 39 C.C.C. 105.

7. Murder—Misdirection.]—Where in a trial for murder the jury might have inferred from the evidence that the prisoner was guilty of manslaughter and not murder the trial judge should instruct the jury with reference to the crime of manslaughter, even when the defence is that of self-defence. *Rex* v. *Jagat Singh*, (1915) 21 B.C.R. 545; 28 D.L.R. 125; 32 W.L.R. 637; 9 W.W.R. 514; 25 C.C.C. 281.

8. Misdirection — Charge viewed as a whole.]—On the question of misdirection the Court must look at the charge to the jury as a whole and with regard to the circumstances under consideration, and where a trial judge has made use of expressions which it might be supposed would, if taken alone, lead the jury to believe that the evidence of the accused himself is not sufficient to prove an alibi unless it is corroborated, but a perusal of the whole charge shews that the alleged error is at the worst merely technical, and that no substantial wrong has been done to the accused, a new trial should be refused. *Rex* v. *Miller*, (1923) 32 B.C.R. 298; (1923) 2 W.W.R. 625; 40 C.C.C. 130.

9. Verbal slip.] — A verdict of a jury will not be set aside for a verbal slip in the judge's charge where there is ample evidence to support the verdict. *Rex* v. *de Bortoli*, (1927) 3 D.L.R. 193; (1927) S.C.R. 454; 48 C.C.C. 118, affg. 38 B.C.R. 388; (1927) 3 D.L.R. 193; (1927) 2 W.W.R. 300; 47 C.C.C. 351.

10. Reference to aliases.]—The unnecessary inclusion in an indictment of a number of aliases is contrary to practice, is a deviation from the ordinary course of criminal justice, and should be deprecated. Whether this amounts to a substantial wrong to the accused is a question of degree. Nowithstanding, however, that an indictment included a number of aliases and the trial judge in his charge stated in error that the accused was going about the country under

three or four aliases, when in fact only one alias was proven at the trial, a new trial was not ordered as no substantial wrong or miscarriage of justice had occurred. *Rex* v. *Nolan*, (1930) 43 B.C.R. 357.

XXIII. Appeals.

A. Jurisdiction.

1. Disorderly house.]—There is no appeal under sec. 797 of the Criminal Code from a conviction by a police magistrate sitting as a magistrate under Part XVI. of the Criminal Code. *Rex* v. *Robertson*, (1915) 22 B.C.R. 13; 26 C.C.C. 239. *Rex* v. *Berenstein*, (1917) 24 B.C.R. 361; 29 C.C.C. 435.

2. Court of Appeal Act.]—The Court of Appeal Act being subsequent in date of passage to the Summary Convictions Act, the provisions of sec. 6 of the later Act prevail over sec. 92 of the earlier one. The Court of Appeal has, therefore, jurisdiction to hear an appeal from the decision of a Supreme Court judge on a stated case from a conviction by a magistrate under the Summary Convictions Act. *Rex* v. *Evans*, (1916) 23 B.C.R. 128. *Rex* v. *Sit Quin*, (1918) 25 B.C.R. 362; (1918) 3 W.W.R. 316.

3. Fit case for appeal—Judge's certificate.] — On an application to the trial judge on behalf of an accused who was convicted of murder and sentenced to be hanged, for a certificate that "it was a fit case for appeal" under sec. 1013 (b) of the Criminal Code, it was submitted that the certificate should be granted on the grounds that the jury erred in not finding (a) that accused was insane within the statute; (b) that he was in such a state of drunkenness at the time of the killing as to be incapable of forming an intention to commit the crime:—Held, that from the wording of the statute, before a trial judge gives a certificate he should have an opinion or belief of the fitness of the appeal upon the questions of fact or mixed questions of law and fact. The questions raised are essentially for a jury to decide and in such circumstances the certificate should be refused. Refusal of the certificate is discretionary. *Rex* v. *Payette*, (1924) 34 B.C.R. 312; (1925) 1 D.L.R. 112; (1924) 3 W.W.R. 863; 43 C.C.C. 90.

4. From County Court—Point of law.] —The Court of Appeal has jurisdiction to hear an appeal from a judgment of the County Court in an appeal taken from a conviction by a police magistrate on a question of law raised in the Court below. *Rex ex rel. Bigrigg* v. *Williams*, (1930) 42 B.C.R. 175; (1930) 2 D.L.R. 493; (1930) 1 W.W.R. 292; 53 C.C.C. 88.

5. Plea of guilty — Oppressive sentence.]—Even although there has been a plea of guilty to a charge under the Government Liquor Act, R.S.B.C., 1924, cap. 146, the Appellate Court has jurisdiction to hear an appeal provided the magistrate in imposing sentence has acted oppressively, harshly, irregularly, illegally, or from any unauthorized motive. Therefore the appeal may be heard where the magistrate imposed a severe sentence because he took into consideration, inter alia, evidence which he had heard in another case in which the accused was not a party. The objection that when the accused has pleaded guilty he cannot make the affidavit of merits required by sec. 99 of said Act or that if he does so it cannot be considered, was overruled. *Rex* v. *Altomare*, (1928) 3 W.W.R. 487.

6. Under Summary Convictions Act—Nearest County Court.]—An appeal under sec. 77 of the Summary Convictions Act should be to the nearest County Court measured by a straight line regardless of convenience of travel. *Rex* v. *Holt*, (1925) 36 B.C.R. 391; (1926) 1 W.W.R. 47; 46 C.C.C. 40. *Rex* v. *Canadian Robert Dollar Co. Ltd.*, (1926) 37 B.C.R. 264; 47 C.C.C. 69. *Rex* v. *Conway*, (1929) 3 W.W.R. 268; 52 C.C.C. 161.

B. Right of Appeal.

1. Payment of fine—Effect of on right to appeal.] — Unenforced compliance with the adjudication sought to be appealed from as in payment of a fine constitutes waiver. *Rex* v. *Harvey*, (1924) 34 B.C.R. 492; (1925) 1 D.L.R. 1097; 43 C.C.C. 249.

2. On formal conviction before Court.] —An accused, convicted under the Government Liquor Act is not deprived of his right of appeal by the fact that on the opening of the appeal no formal conviction had yet been drawn up and returned to the Court, nor by the fact that the fine and costs imposed by the magistrate and paid by the appellant had been remitted by the magistrate to a Government Department and were not in his possession when the notice of

appeal was served upon him. *Rex* v. *Kamway,* (1929) 3 W.W.R. 165; 52 C.C.C. 188.

3. Waiver.]—Payment by the accused of the fine imposed by the magistrate is not waiver of his right of appeal when the circumstances surrounding the payment shew that he had no intention of waiving his said right. *Ibid.*

See Rex v. *Sutherland,* (1928) 43 B.C.R. 277. *Rex* v. *Talbot,* (1931) 43 B.C.R. 485; (1931) 3 D.L.R. 676; (1931) 1 W.W.R. 662; 55 C.C.C. 364.

4. Absence of depositions.]—The rights of an appellant from a conviction under the Summary Convictions Act are not affected by the fact that the convicting magistrate did not take down the evidence in writing and there are no depositions to transmit. *Rex* v. *Lee Kam Way,* (1927) 3 W.W.R. 143; 49 C.C.C. 314.

5. No return of magistrate's order.]—Where a magistrate does not, as directed by sec. 85 of the Summary Convictions Act, transmit the order dismissing the information to the Court to which the appeal is by the Act given, an appellant is not thereby deprived of his appeal properly brought by notice duly given, as this provision is merely directory. *Rex* v. *Zarelli,* (1931) 43 B.C.R. 502; (1931) 2 W.W.R. 108; 55 C.C.C. 314.

C. Leave to Appeal.

1. Questions of law.]—Clause (a) of sec. 1013 of the Criminal Code is meant to cover questions of law arising out of the proceedings at the trial based upon facts admitted or conclusively proved and not involving the appreciation or weighing of evidence by the Appellate Court. This is implied in the term "law alone" and leave to appeal is not required. *Rex* v. *Boak,* (1925) S.C.R. 525; (1925) 3 D.L.R. 887; 44 C.C.C. 218.

2. Questions of fact and of mixed law and fact.]—Clause (b) of sec. 1013 of the Criminal Code authorizes appeals on questions of fact and of mixed law and fact, and relates to matters in issue on the trial, the determination of which by the trial Court is challenged by the accused. In these cases leave of the Court of Appeal or a certificate of the trial judge that it is a fit case for appeal must be obtained. *Ibid.*

3. Refusal of judge's certificate.]—Refusal of the judge's certificate under clause (b) of sec. 1013 of the Code is discretionary. *Rex* v. *Payette,* (1924) 34 B.C.R. 312; (1925) 1 D.L.R. 112; (1924) 3 W.W.R. 863; 43 C.C.C. 90.

4. Successive appeals.]—Where certain objections to a conviction by way of case stated were decided against the prisoner, and some months later he seeks another case stated on a new point that is in its nature technical, his application should be refused. *Rex* v. *Bela Singh,* (1915) 22 B.C.R. 321; 27 C.C.C. 40.

5. Evidence to support conviction.]—Where the Court cannot say that there was no evidence to support the conviction, leave to appeal on a question of fact will be refused. *Rex* v. *Berdino,* (1924) 34 B.C.R. 142; (1924) 3 D.L.R. 794; (1924) 3 W.W.R. 198; 42 C.C.C. 308.

6. Substantial wrong.] — A motion for leave to appeal on facts or mixed questions of law and fact will not be acceded to unless the Court is satisfied that there has been a substantial wrong amounting to a miscarriage of justice by reason of remarks and rulings of a judge or other matters of fact involved on the trial. *Rex* v. *Nicholson,* (1927) 39 B.C.R. 264; 49 C.C.C. 228.

7. Other grounds.] — That a juror was afflicted with deafness is a ground of appeal falling within clause (c) of sec. 1013 of the Code, in respect of which leave to appeal is a condition precedent. *Rex* v. *Boak,* (1925) S.C.R. 525; (1925) 3 D.L.R. 887; 44 C.C.C. 218.

8. Privy Council—Leave to appeal to—Offence under Provincial statute.]—Where a Provincial statute creates an offence and provides that a person guilty thereof shall be liable to imprisonment, an appeal from a judgment of a Court in Canada sustaining a conviction, or setting aside an acquittal, on a charge of said offence is an appeal in a "criminal case" within the meaning of sec. 1025 (present 1024) of the Criminal Code, which provides that "no appeal shall be brought in any criminal case" to His Majesty in Council (*Rex* v. *Nadan,* (1926) A.C. 482; 95 L.J.P.C. 114; 134 L.T. 706; 28 Cox, C.C. 167; 42 T.L.R. 356; 45 C.C.C. 221; (1926) 2 D.L.R. 177; (1926) 1 W.W.R. 801). The Order in Council (Imp.) of January 23, 1911, does not enable the Court of Appeal of British Columbia to grant leave to appeal to the Privy Council in a criminal case. *Rex and Attorney-General for Canada* v. *Chung Chuck. Rex and Attorney-General for Canada* v. *Wong Kit,* (1929) 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134;

53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129.

D. Grounds of Appeal.

1. Improper admission of evidence.]—If upon a criminal appeal it appears that evidence was improperly admitted that may have influenced the magistrate adversely to the accused upon a material issue, the conviction should be quashed. *Rex* v. *Chin Chong*, (1921) 29 B.C.R. 527.

2. Person aggrieved.]—Where an information is laid in the name of an individual for damage to the personal property of a club of which the informant was the president, he is not a person "aggrieved" by reason of the magistrate's order dismissing the charge, within the meaning of sec. 749 of the Criminal Code, and he has no right of appeal from the order. *Rex* v. *Lee Tan*, (1920) 28 B.C.R. 49; 61 D.L.R. 516; (1920) 3 W.W.R. 792; 35 C.C.C. 377.

3. Person aggrieved.] — Upon the acquittal of an accused on a charge under sec. 749 of the Criminal Code, the right of appeal extends to those who prosecute in an official capacity and allege themselves to be "aggrieved" (although there is no pecuniary loss) by the decision. The Crown is always "aggrieved" when there has been a failure of justice and when the law officers of the Crown advise that a magistrate should have convicted, the police officers and police Court clerks "who are complainants for the public" may allege that they are "aggrieved" within the meaning of the Act. *Rex* v. *Hong Lee alias Wah Chew*, (1920) 28 B.C.R. 459; 61 D.L.R. 271; (1920) 3 W.W.R. 795; 36 C.C.C. 5.

See Rex v. *Hicks, infra.*

4. Person aggrieved.]—Under sec. 749 of the Criminal Code a complainant has no right to appeal from an acquittal of accused unless he "thinks himself aggrieved" by such acquittal. *Rex* v. *Suckling*, (1920) 3 W.W.R. 89.

5. Person aggrieved.] — A harbour board policeman laid a charge against the master of a steamer for infringement of a by-law made by the harbour commissioners prohibiting the unloading or discharging of refuse or rubbish within the limits of the harbour. On the charge being dismissed:—Held, on appeal, that the harbour master not being an "aggrieved party" nor the "prosecutor or complainant" had no right of appeal under sec. 749 of the Criminal Code. Semble, only the complainant or informant (including in the meaning of the word "complainant" the King and bodies corporate) and the defendant have a right of appeal under said section. *Rex* v. *Hicks*, (1925) 37 B.C.R. 280; (1926) 1 W.W.R. 182; 46 C.C.C. 94.

6. Deafness of juror—Leave to appeal.] — A ground of appeal under the Criminal Code resting upon the alleged deafness of a petit juror falls under sec. 1013 (c) as enacted by 1923 (Can.) C 41 and an appeal cannot be taken without leave. *Rex* v. *Boak*, (1925) S.C.R. 525; (1925) 3 D.L.R. 887; 44 C.C.C. 218.

7. New trial before jury including members of discharged jury.] — Where after the discharge of a jury after the evidence has been partly heard the accused is convicted by a second jury including members of the discharged jury a new trial will be ordered. *Rex* v. *Wong O Sang*, (1922) 34 B.C.R. 8; (1924) 3 W.W.R. 45. *Rex* v. *Chong Sam Bow*, (1925) 1 W.W.R. 240.

E. Practice.

1. Stated case — Contents of.] — A stated case should only set out the evidence which the trial judge considered in reaching a decision on such point, which is a trial within a trial; and all the evidence thereon should be taken at one time. *Rex* v. *De Mesquito*, (1915) 21 B.C.R. 524; 26 D.L.R. 464; 32 W.L.R. 368; 9 W.W.R. 113; 24 C.C.C. 407.

2. Stated case—Findings of fact.]—A case reserved for the Court of Appeal must contain all the findings of fact upon which the judge below based his decision. *Rex* v. *Steers*, (1918) 26 B.C.R. 334.

3. Stated case—Evidence.]—It is not necessary that a transcript of all the evidence be sent up with the stated case. In special cases where some of the evidence is necessary it should be confined to that portion of it which is relevant to the points in question. *Rex* v. *Fong Soon*, (1919) 26 B.C.R. 450; 45 D.L.R. 78; (1919) 1 W.W.R. 486; 31 C.C.C. 78.

4. Stated case—Evidence.]—The evidence taken at the trial should not as a rule be included in a stated case for the opinion of the Court of Appeal. *Rex* v. *Mah Hon Hing*, (1920) 28 B.C.R. 431; 53 D.L.R. 356; (1920) 3 W.W.R. 314; 33 C.C.C. 195.

5. Stated case—Evidence.] — The case stated should contain the facts upon which the questions are founded with the findings of the trial judge and all evidence except what is specially required should be excluded from the appeal book. *Rex* v. *DuBois*, (1919) 30 B.C.R. 394.

6. Transmitting the case stated.]—The provision of sub-sec. 4 of sec. 7 of the Summary Convictions Act Amendment Act, 1914, that the appellant shall, within three days after receiving the case stated, transmit it to the Court, is a condition precedent to the jurisdiction of the Court to hear the appeal, and it cannot be waived. The provisions of the sub-section not having been complied with, the Court, notwithstanding strong circumstances shewing waiver, struck out the appeal. *Rex* v. *Evans*, (1916) 23 B.C.R. 128.

7. Insufficient notice.]—A notice of appeal from an order of a justice of the peace dismissing an information was properly filed in the County Court registry, but the copies served respectively on the respondent and the justice were signed by some person other than appellant's solicitor without further description, and gave the wrong date for the hearing of the appeal:—Held, that the notices served were not "copies" of the notice filed within the meaning of the Act and were invalid. *Rex* v. *Anderson*, (1919) 27 B.C.R. 168.

8. Notice of appeal—Personal service.]—Where the respondent has left the jurisdiction and personal service cannot be effected upon him or any person representing him the Court has no jurisdiction to try the appeal. Service upon the solicitor who acted for the accused in the Court below is ineffectual where it does not appear that at the time of such service he was acting for the accused. *Rex* v. *Reader*, (1922) 31 B.C.R. 417; 70 D.L.R. 226; (1922) 3 W.W.R. 1112; 38 C.C.C. 202.

9. Notice of appeal—Evasion of service.]—Where an appeal has been taken from the dismissal of a complaint under the Game Act and service of the notice of appeal was one day late, if the evidence discloses that every endeavor had been made to serve the accused in time, the failure to do so having arisen through his deliberate and successful efforts to evade service, he will be held to have dispensed with a strict compliance with provisions as to service in the Summary Convictions Act. *Rex* v. *Bowles*, (1923) 32 B.C.R. 340; (1923) 2 W.W.R. 1062.

10. First notice of appeal defective—Second notice to proper Court—Affidavit of merits.] — Where an appeal is taken under the Summary Convictions Act of British Columbia, and the notice of appeal is given to the wrong Court, this does not prevent the giving of a second notice of appeal to the proper Court within the time fixed by statute. Where an appeal is taken from a conviction for keeping liquor for sale contrary to the Government Liquor Act, the affidavit of merits required by sec. 99 of that Act must be sworn before a "justice." A notary public will not do, even where the notary is also a justice of the peace, having taken the affidavit in his capacity as notary public. *Rex* v. *Chin Chong, alias Jeanne*, (1929) 41 B.C.R. 33; (1929) 1 W.W.R. 254; 52 C.C.C. 283.

See Rex v. *Henley, infra.*

11. Summary conviction — Time for appealing.]—Under sec. 78 of the Summary Convictions Act, 1924, the period within which an appeal may be taken is twenty days after the conviction or order complained of in case the place where the cause of the information or complaint arose is situate in unorganized territory. In view of sec. 103 of the Summary Convictions Act, and of the definition of "unorganized territory" in the Interpretation Act, the Court will take judicial notice of the fact that such a place is in unorganized territory. *Rex* v. *Cassandra*, (1929) 1 W.W.R. 866; 52 C.C.C. 326.

12. Successive appeals.]—The practice of successive appeals should not be encouraged, and in this case where certain objections to the conviction by way of case stated have been decided against the prisoner and some months later he seeks another case stated on a new point that is in its nature technical, his application should be refused. *Rex* v. *Bela Singh et al.*, (1915) 22 B.C.R. 321; 27 C.C.C. 40.

13. Government Liquor Act—Affidavit of Merits.]—On an appeal from a conviction under sec. 28 of the B.C. Government Liquor Act the affidavit of merits cannot be sworn before a notary public as he is not the officer authorized to take such affidavits under sec. 89 of the Government Liquor Act, 1921, cap. 30. A justice of the peace is the officer named for this purpose. If there is any conflict between the B.C. Evidence Act and the Government Liquor Act the language in the latter Act must govern as it deals explicity in sec. 89 with practice in appeals while the B.C. Evidence Act is

general. *Rex* v. *Henley*, (1922) 70 D.L.R. 867; (1922) 3 W.W.R. 638.

14. Appeal from County Court judge —Consideration of questions submitted by magistrate.]—An appeal may be taken in the ordinary course to the Court of Appeal under sec. 6 (4) (f) of the Court of Appeal Act from the decision of a judge dismissing an appeal by the accused from a conviction by the police magistrate under the Summary Convictions Act. Questions submitted by the magistrate should be disregarded and the hearing of the appeal proceeded with in the ordinary way upon the points of law raised. *Rex* v. *Perro*, (1924) 34 B.C.R. 169; (1924) 4 D.L.R. 301; (1924) 2 W.W.R. 1006; 42 C.C.C. 384.

15. Amendment of charge.]—An accused was convicted and sentenced to one month's imprisonment with hard labour on a charge of selling "a liquid known or described as beer." On appeal to the County Court the Crown moved to amend the charge by adding after the word "beer" the words "which is liquor within the meaning of the Government Liquor Act." This was refused for want of jurisdiction on the ground that the proposed amendment describes a different article from the beer as originally contemplated under sec. 46 of the said Act and therefore is a different offence:—Held, on appeal, that there is only one offence contemplated by the Act, the object of the section being merely to add a penalty to the original offence. *Ibid.*

16. Postponement of appeal.] — The Court of Appeal may admit fresh evidence if it is shewn that all due diligence was taken to have that evidence at the trial and that the new evidence would be practically decisive of the case. The Court of Appeal will not substitute itself for the jury in one case or for the judge who is sitting as a jury in the other, and try the case without reference to the judge or jury. *Rex* v. *Cumyow*, (1925) 36 B.C.R. 435; (1926) 1 D.L.R. 623; 45 C.C.C. 172.

17. Evidence as to plea.]—Where on a false premise of a plea of guilty a magistrate proceeded without jurisdiction, evidence may be adduced on appeal to shew that there had been no real plea of guilty. *Rex* v. *Olney*, (1926) 37 B.C.R. 329; (1926) 4 D.L.R. 869; (1926) 3 W.W.R. 273; 46 C.C.C. 196.

18. New evidence on appeal.]—Care must be taken on criminal appeals not to admit new evidence which might bring about a new trial unless it should appear that a miscarriage of justice would occur if its admission is refused. *Rex* v. *Nicholson*, (1927) 39 B.C.R. 264; 49 C.C.C. 228.

19. Judgment of the Court.]—On an application for leave to appeal on a question of fact or on mixed questions of law and fact, only one judgment may be pronounced and that judgment is to be pronounced by the presiding judge or by some one nominated by him. *Ibid.*

20. Mixed questions of law and fact.] —A motion for leave to appeal on facts or mixed questions of law and fact will not be acceded to unless the Court is satisfied that there has been substantial wrong amounting to a miscarriage of justice by reason of remarks and rulings of a judge or other matters of fact involved on the trial. *Ibid.*

21. Appeal to County Court judge—Witnesses.]—On a criminal appeal from a conviction by a magistrate where it is alleged by counsel that there are witnesses under subpœna who can probably give material evidence, upon request that their attendance be secured, it is the duty of the Court, if possible, to secure the attendance of those witnesses, unless the Court is of opinion that the application is not made in good faith. *Rex* v. *Chow Chin*, (1920-21) 29 B.C.R. 445; 57 D.L.R. 708; 34 C.C.C. 228.

22. Summary conviction — Adjournment of appeal.]—When on the first day of the sittings of the County Court a date is set for the hearing of an appeal from a summary conviction an endorsement thereof on the conviction is unnecessary. *Rex* v. *Martinson*, (1919) 3 W.W.R. 896.

23. Amendment of conviction upon appeal.]—On an appeal from a summary conviction on a charge under the Prohibition Act of unlawfully having intoxicating liquor in a place of public entertainment an amendment should not be allowed so as to make the charge one of having liquor in a place other than a private dwelling house. *Rex* v. *Chung Chan*, (1918) 1 W.W.R. 398.

24. Summary Convictions Act — Trial de novo.]—An appeal to the County Court under the Summary Convictions Act is a trial de novo on the merits on the substance of the information and the evidence adduced and not upon the form of the conviction. *Rex* v. *Lauriente*, (1928) 3 W.W.R. 265. *Rex* v. *Marshall*, (1915) 31 W.L.R. 702; 24 C.C.C. 180.

25. Summary conviction—Punishment after appeal—Warrant.]—Upon the dismissal of an appeal by the accused and the conviction being affirmed the Court shall order the appellant to be punished according to the conviction. There is no jurisdiction in the County Court to issue a warrant to hold the prisoner after an unsuccessful appeal and the Court has no power to do anything further except to issue process to enforce any order which it makes about the costs of the appeal and then only if necessary. *Rex* v. *Viennet*, (1924) 34 B.C.R. 242; (1924) 4 D.L.R. 497; (1924) 3 W.W.R. 196; 42 C.C.C. 393.

26. Deposit of costs of appeal.]—A deposit by an appellant of the costs of appeal with the registrar, who in any case would have been entitled to receive it from the magistrate and was authorized by him to receive it direct from the accused is a sufficient compliance with sec. 78 (c) of the Summary Convictions Act. *Rex* v. *Talbot*, (1931) 43 B.C.R. 485; (1931) 1 W.W.R. 662; (1931) 3 D.L.R. 676; 55 C.C.C. 364.

27. Amendment.]—Where no offence is disclosed in the information, the justice has no power to amend it so as to disclose an offence, and proceed with the hearing; the proceedings taken under such information are not an irregularity but a nullity; the defect is fundamental and irremediable, and the Appellate Court cannot amend. *Rex* v. *Perron*, (1922) 68 D.L.R. 392; (1922) 3 W.W.R. 138; 38 C.C.C. 121.

28. Improper penalty—Amendment of convicton — Costs.] — On appeal to the Court of Appeal from a County Court judge dismissing an appeal from a conviction where the accused was punished for an offence under the Government Liquor Act in excess of the penalty clause in the Act, the Court has power to amend the conviction and impose the proper penalty. Where an appeal by accused is allowed as in this case, the costs of appeal come within the provisions of the Crown Costs Act and no costs can be given. *Rex* v. *Caskie and Spark*, (1922) 31 B.C.R. 368; 70 D.L.R. 215; (1922) 3 W.W.R. 1109; 38 C.C.C. 198.

F. Bail Pending Appeal.

1. Stay of execution — Bail pending appeal.] — There is jurisdiction in the Supreme Court to order bail pending an appeal from the refusal of certiorari on a conviction under sec. 10 of the British Columbia Prohibition Act. *Rex* v. *Sally*, (1919) 27 B.C.R. 419; (1919) 3 W.W.R. 427.

2. Reopening and further argument.]—An accused having been released on bail pending the hearing of an appeal, after the hearing and dismissal thereof the appeal was reopened for further argument and again dismissed:—Held, that this did not discharge the bail, as the accused was released on bail until the determination of the appeal and the appeal was not determined until the final order was drawn up and entered. *Rex* v. *Wah Lung*, (1928) 40 B.C.R. 267; (1928) 3 W.W.R. 232; 50 C.C.C. 182.

3. No direction to whom accused should surrender.] — The order of the judge admitting accused to bail did not state to whom the accused should surrender in the event of the appeal being dismissed: —Held, not to be necessary as the recognizance itself makes this provision and the bondmen having entered into it are bound by it. *Ibid.*

4. Time of imprisonment—Admission to bail pending appeal.]—Where a prisoner is out on bail under an order made at his own request, the time cannot be reckoned as part of his term of imprisonment, even though such order be ultra vires. *Rex* v. *Iaci*, (1925) 35 B.C.R. 403; (1925) 2 W.W.R. 129; 43 C.C.C. 363.

See 35 B.C.R. 95; (1925) 4 D.L.R. 474; 44 C.C.C. 275.

G. Hearing and Determination.

1. Attempt to use Criminal Court for collection of debts.]—A conviction should be set aside where the prosecution is an attempt to use the Criminal Courts for the collection of a debt or the punishment of a defaulting debtor. *Rex* v. *Thornton*, (1926) 37 B.C.R. 344; 46 C.C.C. 249.

See Rex v. *Bell*, (1929) 41 B.C.R. 166; (1929) 3 D.L.R. 931; (1929) 2 W.W.R. 399; 51 C.C.C. 388.

2. Inference from facts.]—Where facts and circumstances, coupled with the actions of the accused are taken by the trial judge as indicating a guilty mind, the Court of Appeal is free to draw another inference from the same facts if it believes that the inference drawn below was unwarranted.

Guilt should be brought home to an accused person by evidence which is reasonably conclusive. *Rex* v. *Wah Sing Chow*, (1927) 38 B.C.R. 491; 48 C.C.C. 144.

3. Jurisdiction of magistrate—Objection after conviction.]—Where an objection to a magistrate's jurisdiction has been raised after conviction, and it appears that such magistrate, if he had known of the objection, could have tried the accused in another capacity in which he would have had jurisdiction, the conviction must be quashed, but the Court will proceed under sec. 1120 of the Criminal Code and order further detention of the accused in order that he may be proceeded against properly and dealt with under the proper jurisdiction. *Ex p. Cardarelli*, (1929) 2 W.W.R. 223; 52 C.C.C. 267; (1930) 1 D.L.R. 575.

4. Reopening after dismissal of appeal —New evidence.]—On the question as to whether a new trial should be granted on the discovery of new evidence going only to credibility, in that after the trial the chief witness for the Crown was alleged to have made an oral statement contradicting part of her story at the trial, the Court was equally divided. *Rex* v. *Vye*, (1925) 36 B.C.R. 200; (1925) 3 W.W.R. 100; 44 C.C.C. 249.

5. Substitution of sentence for lesser offence — Further evidence.] — Where on an appeal from a conviction for unlawfully having carnal knowledge of a girl under 14 years of age, it appeared that the accused had not been properly convicted, but there being no majority of the Court in favour of directing a new trial, the Crown asked the Court to proceed under sec. 1016 (2) of the Criminal Code, and substitute a sentence for indecent assault, whereupon the accused's counsel moved for leave to obtain and present new evidence from one who would have been a compellable witness at the trial:—Held, that such leave should be granted, the additional evidence to be confined to the charge of indecent assault, and that the hearing of the appeal should stand over until further order, and in the meantime the evidence of said witness should be taken before the registrar of the Supreme Court and forwarded by him to the registrar of the Court of Appeal. *Rex* v. *Shumarin*, (1928) 1 W.W.R. 300.

6. Judgment.]—On a criminal appeal only one judgment can be given except where the question is one of law and the Court decides that more than one judgment may be delivered. *Rex* v. *Bell*, (1929) 42 B.C.R. 136; (1930) 2 D.L.R. 647; 53 C.C.C. 44.

7. Application for leave to appeal—One judgment.]—On an application for leave to appeal on a question of fact or on mixed questions of law and fact, only one judgment may be pronounced and that judgment is to be pronounced by the presiding judge or by someone nominated by him. *Rex* v. *Nicholson*, (1927) 39 B.C.R. 264; 49 C.C.C. 228.

8. Delivery of dissenting judgment.]—An appeal will not lie in a criminal case to the Supreme Court of Canada, upon the ground of a dissenting judgment in the Court of Appeal of a Province, where such dissenting judgment was not delivered in accordance with the provisions of the Criminal Code regulating the delivery of dissenting judgments. *Rex* v. *de Bortoli*, (1927) S.C.R. 45; (1927) 3 D.L.R. 193; 48 C.C.C. 118. Affg. 38 B.C.R. 388; (1927) 3 D.L.R. 193; (1927) 2 W.W.R. 300; 47 C.C.C. 351.

XXIV. New Trial.

1. Fair comment — Cross-examination of adverse witness.] — It is ground for ordering a new trial that evidence of a statement made by a Crown witness to the police and taken down in writing on their inquiry into the crime was improperly admitted for the Crown on the witness' failure to identify at the trial as belonging to the accused certain clothing, which in his statement to the police he had identified as such, when there had been no finding by the trial judge, under sec. 9 of the Canada Evidence Act, that the witness was adverse, and that such statement was read by the Crown counsel to the jury and referred to by the trial judge as being in evidence, although the latter, in his charge, advised the jury not to base a finding on the statement so admitted. A direction to the jury on a criminal trial that the accused had failed to account for a particular occurrence to which, by reason of the testimony adduced against him, the onus was cast upon him to answer, is not a comment upon the failure of the accused to testify, and does not contravene sec. 4 of the Canada Evidence Act. *Rex* v. *May*, (1915) 21 B.C.R. 23; 21 D.L.R. 728; 7 W.W.R. 1261; 30 W.L.R. 488; 23 C.C.C. 469.

2. Confession.] — A master, with a police constable in attendance (in plain clothes, but known to the accused to be a

constable) threatened his servant, suspected of theft, saying, "You will be arrested if you do not say where the goods are." The servant was then brought to the police station, where he made a confession:—Held, that the confession was not free and voluntary. Whether or not there is any evidence upon which the trial judge could hold that a confession was free and voluntary is a question of law. *Rex* v. *De Mesquito*, (1915) 21 B.C.R. 524; 26 D.L.R. 464; 32 W.L.R. 368; 9 W.W.R. 113; 24 C.C.C. 407.

3. Murder—Misdirection.]—Where in a trial for murder the jury might have inferred from the evidence that the person was guilty of manslaughter and not murder the trial judge should instruct the jury with reference to the crime of manslaughter, even when the defence is that of self-defence. *Rex* v. *Jagat Singh*, (1915) 21 B.C.R. 545; 28 D.L.R. 125; 32 W.L.R. 637; 9 W.W.R. 514; 25 C.C.C. 281

4. New jury including members of first jury.]—A new trial of a charge of murder will be ordered where the jury which convicted was composed in part of jurors who had been members of a jury which had sat on a prior trial of the accused for the same offence and had been discharged after hearing the evidence in part. *Rex* v. *Wong O Sang*, (1922) 34 B.C.R. 8; (1924) 3 W.W.R. 45. *Rex* v. *Chong Sam Bow*, *infra*.

5. Discharge of jury—Discretion of trial judge.]—The question of discharging a jury before or after the case has been committed to it by the trial judge is one of the necessity for the adoption of that course and determinable by the judicial discretion of said judge. The grounds of that discretion should be entered on the record. The discharge of the jury ex mero motu raises a question of "mixed law and fact" on which leave to appeal may be given under sec. 1013 (1) (b) of the Criminal Code, as amended by 1923, cap. 41; and is, perhaps, reviewable as a question of law as being "a miscarriage of justice." *Rex* v. *Chong Sam Bow*, (1925) 1 W.W.R. 240.

6. Evidence—Accomplice—Promise of recommendation for pardon.]—A trial judge may, even after a prima facie case has been made out, direct that an accomplice be examined on the understanding that if he gives his evidence in an unexceptionable manner he shall be recommended for pardon. The trial judge in stating conditions to an accomplice about to give evidence as to his recommending a pardon, appeared to give witness the impression that unless he told the same story to the Court as he did previously to the magistrate a recommendation for pardon would not be given:—Held, on appeal, that by the statements made the witness was fettered in his answers so as to constitute the doing of "something not according to law" at the trial, within the meaning of sec. 1019 of the Criminal Code which resulted in a "substantial wrong or miscarriage" of justice entitling the accused to a new trial. *Rex* v. *Robinson*, (1921) 30 B.C.R. 369; 70 D.L.R. 755; (1922) 1 W.W.R. 451; 39 C.C.C. 49.

7. Murder — Insufficient charge to jury.]—Where the trial judge declines to charge the jury that if the death was caused by misadventure, as alleged by the accused, it was a good defence to a charge of murder, a new trial should be granted. *Rex* v. *Deal*, (1923) 32 B.C.R. 279; (1923) 3 D.L.R. 201; (1923) 1 W.W.R. 615; 39 C.C.C. 105.

8. Misdirection—Charge viewed as a whole.]—On the question of misdirection the Court must look at the charge to the jury as a whole and with regard to the circumstances under consideration, and where a trial judge has made use of expressions which it might be supposed would, if taken alone, lead the jury to believe that the evidence of the accused himself is not sufficient to prove an alibi unless it is corroborated, but a perusal of the whole charge shews that the alleged error is at the worst merely technical, and that no substantial wrong has been done to the accused, a new trial should be refused. If the Court of Appeal is satisfied from a perusal of the evidence that the accused is guilty, a new trial should not be ordered because of alleged errors in the trial judge's charge to the jury, if such errors do not seriously prejudice the accused. The Court has a duty to society as well as to the accused, and it should not shrink from exercising the powers given by sec. 1019 of the Criminal Code, but sustain the conviction. Evidence given by an accused purporting to shew that he has an alibi is merely evidence of innocence. It is a misnomer to call it evidence of an alibi. A true alibi is proved by evidence of other persons as to accused's whereabouts at the time of the crime or by circumstances tending in the same direction. There may be circumstances where the evidence of an accused person alone should satisfy a jury as to the truth of his alibi, because there is no reason why that defence should not be established in the same way as any other now that an accused may

testify on his own behalf. *Rex* v. *Miller*, (1923) 32 B.C.R. 298; (1923) 2 W.W.R. 625; 40 C.C.C. 130.

9. On case stated.]—On appeal from the refusal of a case stated the Court of Appeal may, if the application has merit, grant a new trial instead of sending the case back for a statement. *Rex* v. *Elsie Simmons*, (1923) 32 B.C.R. 455; (1923) 3 W.W.R. 749.

10. Accomplice — Counsel prevented from cross-examination.]—Counsel for the accused is entitled to the fullest opportunity of convincing the jury either by demeanor of the witness or his answers to questions that his story is unreliable, and if a counsel is stopped in his proper cross-examination there is error that may influence the verdict of the jury and cause the accused substantial wrong, and a new trial should be ordered. *Ibid.*

11. Verdict of guilty on two counts relating to same act.]—A charge of selling beer was dismissed by the magistrate. When the case came up on appeal before the County Court judge it was found that the order of the magistrate had not been filed and the appeal was adjourned until the following day for further argument. On the following day the magistrate's order was produced but the learned judge dismissed the appeal as not in order:—Held, that the requirement to file the conviction is directory only, that in fact it was filed before judgment was given, and the learned judge below did not properly exercise his discretion as to the admission of the magistrate's order and the case should be sent back for a rehearing by him. *Rex* v. *Hornby*, (1923) 32 B.C.R. 505.

12. Incest—Evidence of complaint.]—In a trial for incest, evidence of complaint by the prosecutrix is inadmissible unless made at the first reasonable opportunity after the offence was committed. If, therefore, the trial judge admits evidence of a complaint made several days after the opportunity therefor occurred, a new trial will be ordered. *Rex* v. *Proteau*, (1923) 33 B.C.R. 39.

13. Evidence of criminal acts other than that charged.]—On a charge of theft, evidence tending to shew that an accused has been guilty of criminal acts other than that upon which he has been charged is inadmissible, and when allowed in entitles the accused to a new trial. *Rex* v. *Morrison*, (1923) 33 B.C.R. 244.

14. Alteration of charge before arraignment — Right to elect as to altered charge.]—Where an accused has elected for speedy trial under Part XVIII. of the Criminal Code on a charge of receiving goods knowing them to have been stolen and before arraignment the charge was altered by counsel for the prosecution by striking out the words "did unlawfully receive and have" and inserting in their place "did unlawfully retain." Notwithstanding the statement of prisoner's counsel when the alteration was made that he was not objecting to any amendment of the original charge, the accused must be given the option of electing as to the altered charge and where this option has not been given to him, a conviction on the charge as altered will be set aside. *Rex* v. *Yeaman*, (1924) 33 B.C.R. 390; (1924) 2 D.L.R. 1116; (1924) 2 W.W.R. 452; 42 C.C.C. 78.

15. Judge's charge—Accidental slip—Whether jury misled.]—The accused, on a charge of perjury of which there were three counts, was found guilty on the third count, namely, that he had sworn "that he did not know whether or not Joe Esposito had kept intoxicating liquor for sale, knowing the same to be false." On his charge to the jury the judge first recited the three counts correctly but in summing up he misquoted the third count by reciting "that he had not given evidence with regard to Esposito having kept intoxicating liquor for sale." Evidence of the accused on a former trial was put in disclosing his own admission that he had been a bartender on Esposito's premises and had sold liquor there at the time in question:—Held, on appeal, that there is no ground for a new trial as the third count was clearly brought to the jury's attention not only by the evidence but at the beginning of the charge and they were not misled by the accidental slip of the learned judge in summing up. The accused admitted that he served liquor on Esposito's premises as a bartender during the period in question and there was ample evidence upon which the jury could find him guilty. *Rex* v. *de Bortoli*, (1927) 38 B.C.R. 388; (1927) 2 W.W.R. 300; (1927) 3 D.L.R. 193; 47 C.C.C. 351. Affd. (1927) S.C.R. 454; (1927) 3 D.L.R. 193; 48 C.C.C. 118.

16. Depositions admitted on trial—Non-compliance with sec. 999 of Criminal Code.]—Where on a trial for manslaughter the deposition of a witness taken on preliminary hearing is read without proof that such deposition was taken in the presence of the person accused, and that he or his

counsel had full opportunity to cross-examine the witness, or that the deposition purports to be signed by the magistrate before whom it was taken, a new trial will be ordered. *Rex* v. *Morelle*, (1927) 39 B.C.R. 140; (1928) 1 W.W.R. 68; 49 C.C.C. 15.

17. Non-direction amounting to misdirection.]—Where there is an omission on the part of the trial judge to submit for the consideration of the jury an essential fact of the defence, a new trial may be ordered on the ground that failure to direct the jury in a vital matter amounts to misdirection constituting a miscarriage of justice. *Rex* v. *Nicholson*, (1927) 39 B.C.R. 264; 49 C.C.C. 228.

18. Effect of judge's comment on value of evidence.] — Where comment by the judge, while important evidence was being given, must have diminished its proper value in the minds of the jury, a new trial will be directed. *Ibid.*

19. Non-direction—Reasonable doubt.]—Failure to direct the jury that the guilt of the accused must be proved beyond a reasonable doubt is ground for a new trial. *Rex* v. *Payette*, (1925) 35 B.C.R. 81; (1925) 2 W.W.R. 747; 44 C.C.C. 209.

20. Deafness of juror—Secret test by judge—Waiver by counsel.]—During the trial of an accused person on a charge of manslaughter a question arose as to the deafness of one of the jurymen, and counsel for the accused fearing the loss of witnesses in case of an adjournment undertook not to raise the question of the juror's deafness in case of appeal. The trial judge would not accept the undertaking, but later, without the knowledge of the accused, or his counsel, made a secret test with the sheriff's assistance by which he satisfied himself that the juror was properly qualified:—Held, that no substantial wrong or miscarriage of justice had occurred and a new trial should not be granted. *Rex* v. *Boak*, (1925) 35 B.C.R. 256; (1925) S.C.R. 525; (1925) 3 D.L.R. 887; 44 C.C.C. 218.

21. Conspiracy—Joint conviction.]—P. and M. were jointly convicted on a charge of conspiracy with others to defraud the public. On the trial the jury was instructed that it must convict or acquit both the accused and could not convict one and acquit the other:—Held, that the linking of M.'s guilt with P.'s was prejudicial to M., who thereby suffered a substantial wrong and was entitled to a new trial. As the case was clear against P. he suffered no wrong thereby and his appeal was dismissed. *Rex* v. *Porter & Marks*, (1928) 40 B.C.R. 361; (1928) 4 D.L.R. 825; 50 C.C.C. 399; (1929) 1 W.W.R. 39.

22. Verdict of guilty without specifying count.]—An accused was indicted on three separate counts in the same indictment, namely, (a) rape; (b) assault with intent to commit rape; and (c) indecent assault. The jury was properly instructed but found the accused guilty without stating to which of the counts the verdict applied and the accused was sentenced by the judge on the assumption that the conviction was one for rape:—Held, on appeal, that while the verdict could be sustained on the least of the three counts and the sentence reduced to one appropriate thereto, the Court can order a new trial and in the circumstances the latter is the better course to adopt. *Rex* v. *Ross*, (1929) 42 B.C.R. 124; 52 C.C.C. 315; (1929) 3 W.W.R. 601; (1930) 1 D.L.R. 991.

23. Motion to admit new evidence.]—A new trial will not be granted on a motion to admit new evidence alleged to have been discovered after the trial where it appears by the cross-examination upon her affidavit that the proposed witness had been interviewed before the trial by the interpreter employed by the defence to whom she related all she knew about the case. *Rex* v. *Chow Kee*, (1929) 42 B.C.R. 67.

24. Burglary.]—On a charge of burglary the accused stated he was instructed by a police officer to take part in a burglary in order to assist the police in bringing a criminal to justice. He informed the police before the burglary as to where and when it was to take place, accompanied the real criminal in his breaking into a house and taking goods, then instructed the police where the goods were to be found and gave information leading to the arrest of the criminal. There was conflict between the evidence of the accused and that of the police officer who instructed him. The magistrate convicted the accused, stating he was relieved from weighing the evidence of the police officer and the other witnesses, as the evidence shewed clearly that the accused helped to commit the crime:—Held, on appeal, reversing the decision of the magistrate, that if the accused's evidence is believed, what he did was not with the intention of committing a felony but with the intention of assisting the police in bringing the real criminal to trial. The magistrate was bound to weigh the evidence of the witnesses and come to a conclusion, and there being a finding he omitted to

make which is essential to the disposal of the appeal, there should be a new trial. *Rex* v. *Gilmore*, (1930) 43 B.C.R. 57.

25. Questions after arrest—Warning.]—The Crown must shew that a statement of the accused proposed to be placed in evidence is a voluntary statement not obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority. *Rex* v. *Bellos*, (1927) S.C.R. 258; (1927) 3 D.L.R. 186; 48 C.C.C. 126.

26. Improper evidence admitted—Jury charged to reject.]—Where during a trial evidence has been admitted without objection at the time and has been cross-examined upon, a new trial cannot be granted if upon objection being subsequently made the trial judge strongly charged the jury to reject the evidence as not properly admitted. *Rex* v. *Stonehouse and Pasquale*, (1927) 39 B.C.R. 279; (1928) 1 D.L.R. 506; (1928) 1 W.W.R. 161; 49 C.C.C. 122.

27. Improper evidence admitted.]—Where on a charge of procuring, the complainant, upon being asked by the Court whether she knew the accused, replied, "I have had him pointed out to me as someone who took girls to where they could make money," it was held that the answer to the learned judge's question was an improper one creating a reasonable apprehension of prejudice or injustice to the accused, and should have been struck out with a warning to the jury to pay no attention to it, and as neither of these safeguards was taken there should be a new trial. *Rex* v. *Tong Wah*, (1931) 44 B.C.R. 260; 56 C.C.C. 194.

28. Comment on failure of accused to disclose defence.]—Comment by the trial judge on the failure of the accused to disclose his defence at the preliminary hearing is improper comment and ground for an order for a new trial. *Rex* v. *Mah Hon Hing*, (1920) 28 B.C.R. 431; 53 D.L.R. 356; (1920) 3 W.W.R. 314; 33 C.C.C. 195.

29. Identification — Use of photographs.]—Shewing a bundle of photographs to an eye-witness of a crime without any suggestion, in order that he may identify from them the photograph of the person who committed the crime, is not ground for an order for a new trial, but a witness must not be shewn a single photograph of the accused in order that he may be assisted thereby in making a physical identification in the usual way. Only valid objections which may occasion miscarriage of justice should be considered by the Court. *Rex* v. *Bagley*, (1926) 37 B.C.R. 353; (1926) 3 D.L.R. 717; (1926) 2 W.W.R 513; 46 C.C.C. 257.

30. Child's testimony. — The unsworn evidence of a child cannot be admitted unless the Court first ascertains whether the child understands the nature of an oath and satisfies itself as to the intelligence of such child, and his appreciation of the duty of telling the truth. If the Court omits either of these requisites the evidence is improperly received, and the conviction should be set aside and a new trial ordered. *Rex* v. *Sankey*, (1927) S.C.R. 436; (1927) 4 D.L.R. 245; 48 C.C.C. 97.

31. Confession—Whether voluntary—Onus on Crown.]—The onus is on the Crown to establish that a confession is voluntary, and this can rarely if ever be established by the evidence of the police officer who took the statement that it was voluntarily and freely given. All the surrounding circumstances and details must be given. *Ibid.*

32. Statement of accused — Incorrect translation.]—When in a trial for murder a written statement in a foreign language signed by the accused is put in evidence and incorrectly translated to the jury in such a manner so as to be prejudicial to the accused, a new trial should be ordered. *Rex* v. *Frederick*, (1931) 44 B.C.R. 547; (1931) 3 W.W.R. 747; 57 C.C.C. 340

XXV. Sentence.

1. Amendment of sentence on appeal of Crown.]—Where a trial judge has admitted and acted on inadmissible evidence tending to leniency in imposing sentence the Court of Appeal may increase it. The accused was found guilty on two separate charges for unlawful sale of opium and having opium in his possession. Before sentence the trial judge read a petition for leniency which was presented to him and in giving sentence stated that it would be heavier if it were not for the fact that the accused's friends had presented him with a petition asking for leniency, the sentence being four years' imprisonment and a fine of $500 for each offence, the imprisonment to run concurrently. On appeal by the Crown for increase of sentence:—Held, that there was error in receiving the petition, the proper practice in the presentation of

evidence in mitigation of sentence being the hearing of evidence after verdict either viva voce or by affidavit, and in the circumstances the sentence should be increased to seven years, and a fine of $1,000 in each case, the imprisonment to run concurrently. *Rex* v. *Lim Gim*, (1928) 39 B.C.R. 457; (1928) 1 D.L.R. 1038; 49 C.C.C. 255.

2. Removal of prisoner from one gaol to another.]—A prisoner convicted of an offence under the Criminal Code and after serving part of his sentence was removed by the Attorney-General from one gaol to another under the authority of sec. 33 of the Police and Prisons Regulation Act (B.C.):—Held, that sec. 1056 of the Criminal Code overrides any conflicting Provincial statute and the latter cannot be invoked in support of the removal of a prisoner who has been committed for an offence under the Criminal Code from one gaol to another and he should be released. *Rex* v. *Tarchuk*, (1928) 40 B.C.R. 398; (1928) 3 W.W.R. 577; 50 C.C.C. 423.

3. Confinement during appeal — Included in sentence.]—The prisoner was in custody at the time of sentence and was confined in prison for six months prior to the disposition of the appeal:—Held, that the six months already served should be included in the sentence of five years. *Rex* v. *Bell*, (1929) 42 B.C.R. 136; (1930) 2 D.L.R. 647; 53 C.C.C. 44.

4. Grounds for reduction of sentence — Prisoner's health.] — On appeal by a prisoner from his sentence on a charge of false pretences the ground that the state of his health had become worse since his conviction should more properly be the subject of consideration on an application for the clemency of the Crown, which is in a much better position than the Court of Appeal to receive and entertain current reports of proper officials who have had the convict under observation since imprisonment and can speak authoritatively upon his condition. *Rex* v. *Zimmerman*, (1925) 37 B.C.R. 277; (1926) 2 W.W.R. 882; 46 C.C.C. 78.

5. Magistrate's decision under Inland Revenue Act.]—No appeal from the sentence of a magistrate in a conviction under the Inland Revenue Act may be made to a County Court judge at the instance of the Crown. *Rex* v. *Ernst*, (1927) 1 W.W.R. 961; 48 C.C.C. 190.

6. Improper sentence — Hard labour.] —Where a sentence of hard labour is improperly imposed, the sentence, conviction and commitment are all illegal, and the prisoner will be discharged on habeas corpus. *Rex* v. *Low Quong*, (1924) 33 B.C.R. 522; (1924) 3 D.L.R. 666; (1924) 2 W.W.R. 695; 42 C.C.C. 300.

7. Reduction.] — The Court of Appeal may reduce the penalty when it is of opinion that the justice of the case will be met by doing so. *Rex* v. *Rump*, (1929) 41 B.C.R. 36; (1929) 2 D.L.R. 824; (1929) 1 W.W.R. 649; 51 C.C.C. 236. *Rex* v. *Stonehouse and Pasquale*, (1927) 39 B.C.R. 279; (1928) 1 D.L.R. 506; (1928) 1 W.W.R. 161; 49 C.C.C. 122.

8. Reduction.]—Under sec. 778 the penalty for a conviction for attempted theft pursuant to sec. 773 (b) is limited to six months' imprisonment where the sum attempted to be stolen exceeds $200, but under sec. 387 the offender may be sentenced to two years in addition to the punishment to which he is otherwise liable. A sentence of three years' imprisonment upon such a conviction should therefore be reduced to a maximum imprisonment of two years and six months. *Rex* v. *Blackman and Smith*, (1931) 44 B.C.R. 115; (1931) 2 W.W.R. 111; 56 C.C.C. 48.

9. Increase.]—The Court of Appeal may amend a sentence by adding to the penalty in order to bring it within sec. 14 of The Opium and Narcotic Drug Act. *In re Chow Duck Yuet*, (1931) 43 B.C.R. 556; 55 C.C.C. 344.

See (1930) 43 B.C.R. 152 *infra*.

10. Increase for uniformity.] — The Court of Appeal may use its powers of interference with sentences in the interest of uniformity. *Rex* v. *Lee Kim et al.*, (1930) 42 B.C.R. 360; (1930) 2 W.W.R. 441; 53 C.C.C. 252.

11. Increase.] — On a charge of selling opium the accused was found guilty and sentenced to imprisonment for one year and one day and fined $200. On appeal by the Crown that the sentence be increased by directing that in default of payment of the fine the accused be imprisoned until the fine be paid or for a period not exceeding twelve months, as required by sec. 14 of The Opium and Narcotic Drug Act, 1929:—Held, that the Court has power to increase the sentence and there should be added thereto a term of imprisonment in default of payment of the fine. *Rex* v. *Chow Duck Yuet*, (1930) 43 B.C.R. 152.

12. Sentence confirmed.] — Where a Chinese woman over 50 years of age, having never been charged with an offence before,

was convicted of selling opium and sentenced to seven years' imprisonment, the Court would not interfere with the sentence, having regard to the serious nature of the offence and the calamity to the public welfare caused by traffic in opium. *Rex* v. *Nip Gar*, (1930) 42 B.C.R. 327; 53 C.C.C. 321.

See APPEAL.

See CERTIORARI.

See EVIDENCE.

See HABEAS CORPUS.

See IMMIGRATION.

See INTOXICATING LIQUORS.

DAMAGES.

I. IN GENERAL, 401.
II. MEASURE OF DAMAGES, 402.
A. *On contracts generally*, 402.
B. *Sales of realty*, 403.
C. *Sales of personalty*, 404.
1. Non-delivery, 404.
2. Breach of warranty, 404.
3. Misrepresentation and fraud, 405.
D. *Contract of employment or agency*, 406.
E. *Carriage of goods*, 406.
F. *Assault*, 407.
G. *Trespass to land*, 407.
H. *Landlord and tenant*, 408.
I. *Unlawful obstruction of navigation*, 409.
J. *Collision*, 409.
K. *Injury to personal property*, 410.
L. *Personal injury*, 411.
III. APPORTIONMENT OF DAMAGES, 412.
A. *Under Contributory Negligence Act*, 412.
B. *Shipping*, 414.

I. IN GENERAL.

1. Reviewing damages on appeal—Excessive damages.]—Where in an action for personal injury to an infant in the sum of $18,000 of which the sum of $2,000 was allowed for doctor's and hospital fees paid by the plaintiff's father who was not a party to the action except as next friend to the infant, it was held that the sum of $2,000 is separable and should be deducted without affecting the judgment for the balance. *Wand* v. *Mainland Transfer Co.*, (1919) 27 B.C.R. 340; (1919) 3 W.W.R. 193.

2. Reference to registrar.]—It is preferable that trial judges should assess damages themselves instead of referring the assessment to the registrar, as they are in a better position to do so, and by so doing there would be a substantial reduction of costs. *Imported Hardwoods, Limited* v. *Robertson & Hackett Sash & Door Company Limited*, (1925) 36 B.C.R. 258; (1925) 4 D.L.R. 650.

3. Assessment of.]—An order of the Privy Council referring a case back for re-assessment of damages "to the jury" does not mean the actual jury before whom the action was originally tried. *Lew* v. *Wing Lee*, (1925) 37 B.C.R. 81; (1926) 1 D.L.R. 678.

4. Quantum—Appeal.]—The quantum of damages will not be disturbed on appeal unless it is clear that the trial judge overlooked some element of damages. *Middleton* v. *McMillan*, (1929) 1 D.L.R. 977.

5. Quantum — Appeal.] — A Court of Appeal will not increase the amount of damages awarded by a trial judge on the verdict of a jury, unless it appears that the jury has failed to consider some element of damage which should have been considered. *Stroud* v. *DesBrisay*, (1930) 42 B.C.R. 507.

II. MEASURE OF DAMAGES.

A. On Contracts Generally.

1. Binding contract — Non-completion within prescribed time—Liquidated damages.]—Where there is a provision in a building contract for the payment of demurrage by the contractor for every day exceeding the time fixed by the contract for completion, with the further provision that the time be extended upon the ordering of additional work, the contractor is liable for the number of days delay, less the time allowed for the additional work. Whether the amount stipulated for damages is applicable depends upon the circumstances. If it amounts to a penalty it may be relieved against. *Westholme Lumber Co. Ltd.* v. *St. James Ltd.*, (1915) 21 B.C.R. 100; 21 D.L.R. 549; 30 W.L.R. 781; 8 W.W.R. 122. *Lund and Hazell* v. *Vancouver Exhibition Association*, (1915) 22 B.C.R. 258; 25 D.L.R. 863; 32 W.L.R. 845; 9 W.W.R. 556.

2. Damages stipulated by contract.]—Where it is a term of a contract that in a certain event a sum mentioned shall be

payable by one party to another, if the amount so fixed is reasonably commensurate with the probable loss upon the happening of such event, it shall be regarded as liquidated damages. *Canadian Fairbanks-Morse Co.* v. *United States Fidelity & Guaranty Co.*, (1915) 22 B.C.R. 157; 26 D.L.R. 12; 32 W.L.R. 316; 9 W.W.R. 48.

3. On breach of contract.]—Where a railway contractor is wrongfully prevented by the other party to the contract from carrying out his undertaking, he is entitled to the difference between the amount he would have received if his contract had been completed and the amount which he would have expended in carrying out the work, having regard to what in the circumstances a prudent man would have done whereby his loss might have been diminished. *J. A. McIlwee & Sons* v. *Foley Bros.*, (1916) 27 D.L.R. 196; 33 W.L.R. 928; 10 W.W.R. 5 (P.C.). Affg. (1915) 22 B.C.R. 38; 33 W.L.R. 278; 44 D.L.R. 5 (P.C.).

4. Wrongful expulsion from club membership.]—The foundation for the jurisdiction which a Court exercises to prevent improper expulsion of a club member rests upon the principle that the member may thereby be deprived of his right of property, in which case the ordinary principles of assessing damages in contract apply. *Humphrey* v. *Wilson*, (1917) 25 B.C.R. 110; (1917) 3 W.W.R. 529.

B. Sales of Realty.

1. Sale of land—Deficiency in frontage of lot.]—Where in the absence of fraud in respect of misrepresentation as to the size of a lot the purchaser claims compensation for deficiency in its width, he is entitled to an abatement in the purchase price for the deficiency according to the value thereof at the time of sale. *Hayes* v. *Goddard*, (1915) 21 B.C.R. 389; 31 W.L.R. 424; 22 D.L.R. 566.

2. Repudiation by vendor.]—Where a vendor refuses to carry out an executory contract for the sale of land, and later sells the land to another, the measure of damages recoverable is not limited to the difference between the contract price and the value of the land at the date of repudiation; the purchaser may recover the difference between the contract price and the value at the time of the resale; or if the resale is unknown to him, the value at the time of his discovery thereof. He may also recover the net profits that have been realized from the land since the time that he should have had possession under his contract. *Horsnail* v. *Shute*, (1921) 30 B.C.R. 189; 62 D.L.R. 199; (1921) 3 W.W.R. 270.

3. Compensation for deficiency—Delay in making title.]—After a conveyance has been made under a contract of sale of land, damages may be claimed for breach of covenant of title in respect of any portion of the land bargained for not conveyed, and the grantee is also entitled to rectification; the value of the land not conveyed would be the measure of damages, in addition to any special damage within the contemplation of the parties when the contract was made; loss of profits through delay in registration of title caused by the vendor's negligence is too remote to be recovered as damages on a covenant for good title. *Bagley* v. *B.C. Southern Ry. Co.*, (1917) 24 B.C.R. 400; 37 D.L.R. 733; (1919) 2 W.W.R. 250.

C. Sales of Personalty.

1. Non-Delivery.

Loss of profits.]—The defendant agreed to supply and the plaintiffs agreed to purchase the total output of certain grades of lumber manufactured at the defendant's mill, estimated at from 300,000 to 500,000 board-measure per month, for a period of six months. Lumber was delivered, for which payment was duly made, for slightly over three months, when the mill shut down and deliveries ceased. The defendant Company then sold its plant, and no more lumber was supplied under the contract. In an action for damages for breach of contract:—Held, that it was an implied term of the contract that the defendant would continue to operate the mill and supply the lumber for a period of six months, and that the plaintiffs were entitled to damages estimated on the difference between the price fixed by the contract and the market price at the time of the failure to deliver the lumber, and from the terms of the contract and the deliveries made, the plaintiffs were entitled to this difference on 750,000 feet. *Morse et al.* v. *Mac & Mac Cedar Company*, (1918) 25 B.C.R. 417; (1918) 2 W.W.R. 205.

2. Breach of Warranty.

1. Economic operation of plant.]—Where after the installation of new machinery or plant, it fails to operate as

economically as warranted at the time of the sale, and the work performed proves of no value and less economical than the old equipment, which necessitates the removal of the new plant and the re-installing of the old system, the buyer may rightfully recover all expenses incurred and damages suffered in connection with the construction of the new plant and the reinstatement of the old one, against which no counterclaim for the price is maintainable. *British America Paint Company* v. *Fogh*, (1915) 22 B.C.R. 97; 24 D.L.R. 61; 32 W.L.R. 142; 8 W.W.R. 1331.

2. Condition.]—Where under sec. 50 of the Sale of Goods Act acceptance is inferred after the lapse of a reasonable time for the rejection of goods, a breach of condition entitling to the right of repudiation, particularly in a sale of specific goods, may be treated as a breach of warranty under sec. 19 which will entitle the buyer, under sec. 67, to further damages in consequence thereof in addition to the extinction or diminution of the price. *Ibid.*

3. Loss of profit and burden of proof.]—The defendants entered into contracts with plaintiffs to supply "Manchurian white beans, handpicked." The defendants tendered beans that the plaintiffs refused to accept as beans of Manchurian origin and brought action for damages for breach of contract:—Held, that the burden was on the defendants to prove the beans tendered were of Manchurian origin and having failed in this they were liable in damages for the difference between the market price of "Manchurian white beans, handpicked" at the time of the breach and contract price. *Radovsky* v. *Creeden & Avery*, (1919) 27 B.C.R. 303; 28 B.C.R. 331; 52 D.L.R. 618; (1920) 3 W.W.R. 234.

4. Sale of motor truck.] — The true measure of damages for the breach of warranty as to the standard of a motor truck is the difference between the price paid for the truck and its market value at the date of the sale. *Victoria and Saanich Motor Transportation Co.* v. *Wood Motor Company*, (1915) 21 B.C.R. 515; 23 D.L.R. 79; 31 W.L.R. 853; 8 W.W.R. 1124

3. Misrepresentation and Fraud.

Action of deceit.] — In an action of deceit for fraudulent sale of shares, the measure of damages to be awarded each plaintiff is the difference in value of the shares with all their incidents at the time of the discovery of the deceit, and what was paid for them. *Allan* v. *McLennan*, (1916) 23 B.C.R. 515; 31 D.L.R. 617; (1917) 1 W.W.R. 513.

D. Contract of Employment or Agency.

1. Loss of profits.]—Where the plaintiff was employed as sole agent for the sale of the defendants' goods in Western Canada no definite period of employment being fixed, upon breach of the contract by the principal a reasonable time for performance should be estimated (which the trial judge fixed at two years) allowing the plaintiff as damages the profits he would reasonably have made during that period. *W. L. Macdonald & Co.* v. *Casein Ltd.*, (1918) 26 B.C.R. 204; (1919) 1 W.W.R. 293.

2. Loss of profits.]—Where the plaintiff, an insurance agent, was induced to give up the agency of a company of which the defendant was manager, on the defendant's promise to procure hail insurance notes not yet in existence and hand them over to the plaintiff for collection at a remuneration fixed by the contract, the termination of the agency is the foundation of what was to be done, and upon the failure of the defendant to procure the notes for collection, the plaintiff is entitled to recover damages in the amount of profit which he might have reasonably expected to make if the notes had been delivered to him for collection. *Carr* v. *Berg*, (1917) 24 B.C.R. 422; 38 D.L.R. 176; (1918) 2 W.W.R. 368.

3. Solicitor and client.]—In an action by a client against his solicitor for neglect of duty, the burden of proving negligence is primarily on the plaintiff, and if negligence is proved, in the absence of evidence on the part of the solicitor to reduce the damage, the plaintiff is entitled to recover the full amount of the pecuniary loss he has sustained. *Mariott* v. *Martin*, (1915) 21 B.C.R. 161; 21 D.L.R. 463; 30 W.L.R. 899; 7 W.W.R. 1291.

E. Carriage of Goods.

1. Negligence of servants.]—A passenger on a steamship is entitled to recover from the owners the value of baggage lost through the negligence of the company's servants. *Smith* v. *Union Steamship Company*, (1922) 31 B.C.R. 334; 68 D.L.R. 488.

2. Loss of goods.]—A portion of a shipment of goods was lost in transit on the defendant's railway:—Held, that the plaintiff is entitled to recover only the actual value of the goods lost and not for the depreciation in value of the incomplete shipment received. *Claman's Limited* v. *Canadian Pacific Railway Co.*, (1920) 28 B.C.R. 226; 51 D.L.R. 668; (1920) 2 W.W.R. 117; 25 C.R.C. 368.

3. Damages for delay of motion picture films.]—An express company is liable for loss of profits and expenses incurred by unnecessary delay in the delivery of a parcel containing films for moving pictures where the goods did not arrive in time for the production for which they were intended, and the defendant knew of the use to which they were to be put. *Victoria Dominion Theatre Co.* v. *Dominion Express Co.*, (1916) 23 B.C.R. 396; 35 D.L.R. 728.

F. Assault.

No actual injury.]—Where an assault is merely a technical one courted by the plaintiff with a view to an action for damages, nominal damages only will be awarded. *Hodgkinson* v. *Martyn*, (1928) 40 B.C.R. 434; (1929) 1 D.L.R. 367; (1928) 3 W.W.R. 763.

G. Trespass to Land.

1. Municipal drains.]—A person holding a lot under an agreement for sale that is not registered, but who has cleared the lot and paid taxes, has a possessory title upon which to found an action for damages against those who permit water to escape from drains to the injury of the lot. The measure of damages is the diminished value of the lot, or if the plaintiff's interest is less, then the plaintiff's interest in it. *Kilby* v. *Municipality of Point Grey*, (1917) 24 B.C.R. 107; (1917) 2 W.W.R. 206.

2. Reversioner—Damages payable to.]—In an action for damages, the plaintiffs claiming that the improper construction and failure to keep in repair of a canal resulted in the flooding of their farm, a claim was made for injury to the reversion. The lease to the tenant had four years to run from the date of the flooding, and evidence was adduced to the effect that by reason of the flooding the future selling price of the land would be affected:—Held, on appeal, that a reversioner can only recover damages where the injury to the property is permanent so that it will continue to affect it when the reversioner comes into possession, and he is not entitled to damages in respect of a temporary injury on the ground that it affects the present saleable value of his reversion. *Morrison* v. *Commissioners of Dewdney Dyking District*, (1922) 31 B.C.R. 23; 65 D.L.R. 409; (1922) 3 W.W.R. 250.

3. Loss by fire.]—The measure of damages occasioned by fire starting on the defendant's property and sweeping over the plaintiff's lands is the true value of the property destroyed. The cost of replacement is not a proper estimate of damages but it may be taken into account in arriving at the real value of the property at the time of its destruction. *Stevens* v. *Abbotsford Lumber Etc. Co.*, (1924) 33 B.C.R. 299; (1924) 1 D.L.R. 1163; (1924) 1 W.W.R. 660.

4. Fire—Destruction of growing crops.]—Where fire originating and allowed to escape from British Columbia causes injury to property in the adjoining State of Washington damages may not be recovered by residents of the foreign state for injury to the freehold, but growing crops including grass used for pasture should be treated as chattels and the loss recoverable. *Boslund* v. *Abbotsford Lumber Etc. Co., Ltd.*, (1925) 34 B.C.R. 485; (1925) 1 D.L.R. 978; (1925) 1 W.W.R. 475.

5. Timber.]—In an action for damages for trespass on lands for the taking of timber and injury to the soil, where the defendants are unable to substitute a plea of leave and license they may not necessarily be assessed in exemplary damages. *Wilson* v. *Keystone Logging & Mercantile Co., Ltd.*, (1918) 25 B.C.R. 569; 52 D.L.R. 678; 59 S.C.R. 685.

6. Mining—Coal—Trespass.] — Where a company in working its mine enters upon and works the coal on adjoining property without the consent or knowledge of the owners and takes it for the purpose of sale, the proper estimate of damages is the value of the coal without deducting any of the necessary expense of working and taking it out. *Wellington Colliery Co., Ltd.* v. *Pacific Coast Coal Mines Ltd.*, (1918) 26 B.C.R. 315.

H. Landlord and Tenant.

Covenant to restore—Measure of damages.]—Where a lease contains a covenant

to restore the premises to their original condition at the end of the term, the measure of damages for the breach of that covenant is the amount which the landlord proves to be the fair and reasonable amount necessary to put the premises into the state of repair required by the covenant. Such measure of damages is not affected by the lessor's intentions as to the restoration of the premises. *Buscombe* v. *James Stark & Sons*, (1916) 23 B.C.R. 155; 30 D.L.R. 736; (1917) 1 W.W.R. 204.

I. Unlawful Obstruction of Navigation.

Direct and remote losses.]—In an action for unlawfully obstructing a private right of navigation, the losses in respect of a warehouse and wharf and the wood piled thereon for steamers' use, as well as the loss of business and profits are recoverable as elements of damage; but depreciation in the value of the steamer is too remote and not a special damage as distinguished from the damage occurring to others of the public plying on such waters. *B.C. Express Co.* v. *Grand Trunk Pac. Ry. Co.*, (1916) 27 D.L.R. 497; 34 W.L.R. 361, 459; 10 W.W.R. 477, 583; 55 S.C.R. 328; 38 D.L.R. 29; (1917) 1 W.W.R. 961; (1918) 44 D.L.R. 1 (P.C.).

J. Collision.

1. Negligent navigation.]—The ship guilty of negligent navigation is liable for the resultant damage to another ship with which she collides. *Union S.S. Co.* v. *The "Wakena,"* (1917), 24 B.C.R. 156; 35 D.L.R. 644; 16 Ex. R. 397; 37 D.L.R. 579; (1918) 1 W.W.R. 57; 49 D.L.R. 690; 59 S.C.R. 659.

2. Loss of profit.]—The loss of profit resulting from the laying-up of a tug while her master and engineer were in attendance at the Wreck Commissioners' Court of Investigation, is not an item which should be allowed on the assessment of damages arising out of a collision between the tug and another vessel. *The "Cleeve"* v. *The "Prince Rupert,"* (1917) 27 B.C.R. 561; (1918) 1 W.W.R. 345.

3. Engine-room space.]—In estimating the extent of liability for damage based upon a ship's tonnage the term "engine-room space" in sec. 922 of the Canada Shipping Act, R.S.C. 1906, cap. 113, as amended by 1923, cap. 35, sec. 9, covers the space occupied by the boilers appurtenant to the engines whether or not the boilers are in the same compartment with the engines. Quære whether "engine-room space" is in general equivalent to "space occupied by the propelling power." *East Asiatic Co., Ltd.* v. *The "Chilcot,"* (1925) Ex. C.R. 172; (1925) 2 W.W.R. 543.

See APPORTIONMENT OF DAMAGES.

K. Injury to Personal Property.

1. Wrongful seizure of goods.]—In an action for damages for the wrongful seizure of goods the measure of damages is the value of the goods so seized with any special damage that the plaintiff can prove. *Mellis* v. *Blair*, (1916) 22 B.C.R. 450; 27 D.L.R. 165; 10 W.W.R. 241.

2. Depreciation—Replacement.]—Where the plaintiff's motor truck was damaged in a collision with a tramcar, but was efficiently repaired, no damages were awarded for depreciation in value owing to the accident, and the plaintiff was not allowed compensation for replacement of the motor truck during the period of repairs by another motor truck, the property of the plaintiff, not otherwise in use during such period. *Vancouver Ice and Cold Storage Co.* v. *B.C. Electric Ry Co.*, (1927) 38 B.C.R. 234; (1927) 1 W.W.R. 631. *See Dewees* v. *Morrow*, (1931) 3 W.W.R. 32.

3. Stock broker—Unauthorized sale of customer's shares.]—In assessing damages where stock brokers were held liable to a customer for selling shares which they held for him without his authority:—Held, that the date when the customer would have sold had he not been prevented by the brokers' prior sale, should be determined on the assumption that he would have done what a prudent person would do, and in this case the date is fixed when, after objecting to a statement of his account which shewed that his shares were sold, he requested that they be placed to his credit as he wanted to sell them. He was allowed the difference between the low market price on that day and the price at which the brokers had previously sold. *Sunderland* v. *Solloway, Mills & Co. Limited*, (1930) 43 B.C.R. 297; (1930) 3 W.W.R. 641; (1931) 44 B.C.R. 241; (1931) 2 W.W.R. 393; (1931) S.C.R. 714; (1932) 4 D.L.R. 795.

4. Exemplary or punitive damages.]—Exemplary damages may be awarded in an

action for trespass founded on the wrongful seizure of a motor car purchased by the plaintiff from the defendant under conditional sale where the defendant was guilty of high-handed and improper conduct. *Griffiths* v. *Fordyce Motors, Ltd.*, (1930) 43 B.C.R. 119; (1930) 4 D.L.R. 451; (1930) 2 W.W.R. 698.

L. Personal Injury.

1. Husband and wife.]—In an action in which the plaintiffs, husband and wife, sued the defendant for damages resulting from an automobile collision, the trial judge dismissed the husband's action upon the ground of contributory negligence with an award of damages to the wife, disallowing, however, her claim for medical and hospital bills on the ground that these expenses were obligations of the husband and not the wife, and could not be awarded to her as part of her damages. *Scoble* v. *Woodward*, (1924) 1 W.W.R. 1040.

2. General damages—Wages.]—In an action for damages for personal injuries, a claim for loss of wages or earnings to the date of the commencement of the action or of the trial is not recoverable as special damages but falls within the purview of general damages. *McLeod* v. *Boultbee and Atkins*, (1931) 44 B.C.R. 375; (1931) 4 D.L.R. 912; (1931) 2 W.W.R. 805.

3. Pain and suffering.]—In an action by an infant, an invitee on the defendant's premises, the evidence showed that a finger of the plaintiff's right hand was amputated as the result of the defendant's negligence, and the jury awarded special damages for the amount claimed but no general damages:—Held, that it was the duty of the jury to pass upon general damages as well as special damages, they having made no allowance for pain and suffering, the loss of a finger and the attendant inconvenience for life. *Jamieson* v. *B.C. Amusements Co., Ltd.*, (1930) 43 B.C.R. 317.

4. High cost of living.]—The amounts awarded for damages for injuries in some former cases are no longer a safe guide owing to the unprecedented advance in the high cost of living, and juries must deal with the state of the times in which they are called upon to act, taking such reasonable view of future prospects as is humanly possible. *Wand* v. *Mainland Transfer Co.*, (1919) 27 B.C.R. 340; (1919) 3 W.W.R. 193.

5. Lord Campbell's Act—Expectancy.]—In an action under Lord Campbell's Act on behalf of the wife and four children of the deceased who fell into a pit from the unguarded curb of the driveway at the southern end of the defendant Company's hotel at Victoria, B.C., and died from injuries sustained, it was proved that the deceased's life expectancy (being 62 years old at the time of his death) was twelve years, that the profits of his brokerage business from the year 1910 to 1920 averaged $4,000 a year but for the last five years only $2,600 a year. It was further proved that the estate received on his death $7,500 accident insurance and $6,000 life insurance and the total value of his estate was $130,000. The verdict of the jury was $12,000 for the wife and $5,000 and $3,000 respectively for the two younger children for which judgment was entered:—Held, that on the evidence the jury might reasonably find as they did. *Day and The Royal Trust Company* v. *The Canadian Pacific Railway Company*, (1922) 30 B.C.R. 532; 66 D.L.R. 838; (1922) 2 W.W.R. 398.

III. APPORTIONMENT OF DAMAGES.

A. Under Contributory Negligence Act.

1. Degrees of fault.]—Where a pedestrian was injured by coming into contact with a motor car it was found the defendant was negligent in not keeping a proper lookout, and the plaintiff was negligent in failing to look for approaching vehicles:—Held, that the Contributory Negligence Act applies and the responsibility for damages should be divided equally between them. *Harper* v. *McLean*, (1928) 39 B.C.R. 426; (1928) 2 D.L.R. 220; (1928) 1 W.W.R. 444.

2. Proximate cause.]—Damage or loss is caused by the fault of two or more persons within the meaning of the Contributory Negligence Act, 1925, only when the fault of each of such persons is a proximate or efficient cause of such damage or loss, i.e., only when at common law each would properly have been held guilty of negligence which contributed to the injurious occurrence. *Leary* v. *Commissioners for Nakusp Development District*, (1930) 1 W.W.R. 97.

3. Proximate cause.]—While there may be negligence on both sides but the proximate cause of the injury is the negligence of one of the parties the Contributory Negligence Act does not apply. *Johnson* v. *Elliott*, (1928) 40 B.C.R. 130; (1928) 1

D.L.R. 1000; (1928) 1 W.W.R. 390; (1928) S.C.R. 408; (1929) 1 D.L.R. 208.

4. Proximate cause.]—Where the jury finds on sufficient evidence that notwithstanding the plaintiff's negligence the defendant by the exercise of reasonable care could have avoided the accident, the plaintiff is entitled to recover and the Contributory Negligence Act has no application. *Key* v. *B.C. Electric Ry. Co.* (1930) 43 B.C.R. 288; (1931) 1 D.L.R. 532; (1930) 3 W.W.R. 569; (1931) 3 D.L.R. 587; 38 C.R.C. 278; (1932) S.C.R. 106.

5. Duty of jury to apportion.]—Where the jury has found contributory negligence it is its duty after finding the whole of the damages to apportion them between the parties in the manner specified by the Contributory Negligence Act. *Jamieson* v. *B.C. Amusements Co., Ltd.*, (1930) 43 B.C.R. 317.

6. Gratuitous passenger.]—The driver of a motor vehicle is liable for damages for injury to a gratuitous passenger in his car if the injury resulted from the driver's disobedience to a stop sign at a street intersection, notwithstanding that the driver of a car coming into collision with the defendant's car was also guilty of negligence. *Lechtzier* v. *Lechtzier. Levy* v. *Lechtzier*, (1931) 43 B.C.R. 423; (1931) 1 D.L.R. 1004; (1931) 1 W.W.R. 425.

7. Gratuitous passenger.]—Where damages are given for personal injury to a gratuitous passenger of a motor car against a defendant, the latter is entitled to contribution from a third party according to his degree of fault in causing the accident. *Price* v. *Fraser Valley Milk Producers Assn.*, (1931) 3 W.W.R. 48. *See* also *McLeod* v. *Boultbee and Atkins*, (1931) 44 B.C.R. 375; (1931) 4 D.L.R. 912; (1931) 2 W.W.R. 805. *Chambers* v. *Sampson*, (1931) 44 B.C.R. 134; (1931) 3 D.L.R. 206; (1931) 2 W.W.R. 251.

See further as to Apportionment of Damages under the Contributory Negligence Act:

Battistoni v. *Thomas*, (1930) 43 B.C.R. 273; (1931) 1 D.L.R. 559; (1930) 3 W.W.R. 617.

Morgan v. *B.C. Electric Ry Co.*, (1930) 42 B.C.R. 382; (1930) 4 D.L.R. 30; (1930) 2 W.W.R. 776.

Watt v. *Reid*, (1929) 42 B.C.R. 90; (1930) 2 D.L.R. 215.

Tedlock v. *McKelvie*, (1929) 41 B.C.R. 446; (1929) 4 D.L.R. 691.

Johnson v. *McMorran*, (1927) 39 B.C.R 24; (1927) 4 D.L.R. 335; (1927) 3 W.W.R. 37.

Penrose v. *Barr*, (1927) 4 D.L.R. 407; (1927) 3 W.W.R. 104.

Rodger v. *Flinton*, (1926) 3 W.W.R. 773.

Vandepitte v. *Berry: E. J. Vandepitte, Third Party*, (1928) 40 B.C.R. 408; (1929) 1 D.L.R. 1002.

Ansel v. *Buscombe*, (1927) 3 W.W.R. 137.

B. Shipping.

Collision.] — In apportioning damages resulting from a collision between two ships where the evidence does not establish that a clear preponderance of culpability rests upon one ship the division should be equal. *Canadian Pacific Railway* v. *S.S. Belridge*, (1917) 27 B.C.R. 537; (1917) 3 W.W.R. 961.

See ADMIRALTY.
See BUILDING CONTRACT.
See CARRIERS.
See COLLISION.
See CONTRACTS.
See FIRE.
See MASTER AND SERVANT.
See MISREPRESENTATION AND FRAUD.
See MUNICIPAL CORPORATIONS.
See NEGLIGENCE.
See PRINCIPAL AND AGENT.
See SALE OF GOODS.
See SHIPPING.
See TORT.
See VENDOR AND PURCHASER.

DEATH.

PROOF AND PRESUMPTION OF,

See EVIDENCE.

DEATH DUTIES.

See SUCCESSION DUTY.

DEBENTURES.

See COMPANIES.

DEBTOR AND CREDITOR.

I. In General, 415.
II. Appropriation of Payments, 415.
III. Set-off, 417.
IV. Discharge of Debtor, 419.

I. In General.

1. Debt—Accommodation indorser.]—The liability on an accommodation endorsement is not a debt, but an obligation which may in certain circumstances become a debt. *Union Bank* v. *Tyson*, (1915) 7 W.W.R. 1117.

2. Guarantor.]—Under the Laws Declaratory Act it is not necessary to give the primary debtor as well as the guarantor notice before the assignee commences an action against the guarantor whose liability has accrued at the date of the assignment, as he then becomes a debtor within the meaning of the Act. *Donald* v. *Jukes*, (1920) 28 B.C.R. 215; 54 D.L.R. 688; (1920) 2 W.W.R. 209.

3. Criminal proceedings for collection of debt.]—Criminal proceedings not taken in vindication of public justice but to compel payment of a claim against a debtor are considered an abuse of the process of the Court. *Rex* v. *Bell*, (1929) 41 B.C.R. 166; 51 C.C.C. 388; (1929) 3 D.L.R. 931; (1929) 2 W.W.R. 399.

4. Proof of non-payment.]—The rule that unless a debtor can prove repayment the debt will be treated as subsisting, will not be applied where the representative of the estate of a deceased creditor in an action against the guarantor, the primary debtor also being dead, cannot prove that the debt is still unpaid. *Ivey* v. *Smith*, (1929) 40 B.C.R. 475.

5. Tender—Specific performance.]—Where payment of the balance due of the purchase price of shares is by agreement to be made at a certain place on a fixed date and the vendors do not appear at the said place on the day so fixed either to demand payment or to put themselves in a position to accept payment, they cannot claim that the plaintiff is in default and he is entitled to specific performance of the agreement. *Dornberg* v. *Somerville*, (1928) 40 B.C.R. 415; (1929) 1 D.L.R. 811.

II. Appropriation of Payments.

1. Accommodation indorser—Application of payments by holder of notes.]—When a principal debtor owes money to a bank in addition to the amount of a promissory note secured by an accommodation indorser, the bank is not bound to appropriate the money collected by it for the principal debtor towards the discharge of the note. *Royal Bank* v. *Falk*, (1917) 25 B.C.R. 142; (1917) 3 W.W.R. 654.

2. After dissolution of partnership.]—Where a creditor is found to be aware of the dissolution of a partnership that is his debtor on open account for goods supplied, and he continues to supply goods to the business as carried on after the dissolution, he has no claim for payment for the goods so supplied as against the former partners. Where a creditor has rendered no account shewing debits and credits in an unbroken line in a continuing account, and the debtor in making payments has not appropriated such payments to any particular item or part of the account, the creditor has a right of election to appropriate and may do so by action or in any way that makes his intention clear. *Grant* v. *Matsubayashi and Tanabe*, (1922) 31 B.C.R. 375; 70 D.L.R. 553; (1922) 3 W.W.R. 679.

3. Company receiving deposits of money—Appropriation of withdrawal payments.]—In the case of a person having two demands, one recognized by law and the other arising on a matter forbidden by law, and an unappropriated payment is made to him the law will afterwards appropriate it to the demand which it acknowledges and not to the demand which it prohibits. *In re Nippon Kinyu Sha Ltd.; Ex Parte Fujino*, (1923) 32 B.C.R. 56; (1923) 1 D.L.R. 1156; (1923) 1 W.W.R. 880; 3 C.B.R. 673.

4. Company—Assumption of partnership debt—Appropriation of payment.]—A partnership of three was dissolved and a limited company formed by two of them which took over the assets and assumed the liabilities. A selling agent of the plaintiff was notified of the change. The plaintiff supplied goods after the change for which certain payments were made:—Held, that notification to the selling agent of the change was sufficient notification to the plaintiff and he could charge only the company for goods thereafter supplied. Held, further, that payments made by the company to the plaintiff from time to time, no appropriation being made by either party and the plaintiff keeping one general account, should be applied first in satisfaction of the partnership debt. *W. H. Malkin Co. Ltd.* v. *Crossley*, (1923) 32 B.C.R. 207; (1923) 3 D.L.R. 1189; (1923) 1 W.W.R. 1348.

5. Guarantee.]—A creditor may appropriate payments made unconditionally by his debtor to any part of the debtor's account, although he has credited them in the debtor's open account, provided that he has not communicated that account to the debtor. Where, therefore, a creditor had an account which was guaranteed, and when the amount of the guarantee was exhausted communicated that fact to the surety and the debtor and subsequently had dealings with the debtor but opened no new account, he was entitled to appropriate subsequent payments made by the debtor to the dealings subsequent to the exhaustion of the guarantee, provided that the credits in the open account had not been communicated to the debtor. *Scott & Peden* v. *Elliott*, (1926) 37 B.C.R. 143; (1926) 2 D.L.R. 504; (1926) 2 W.W.R. 154.

III. SET-OFF.

1. In equity.]—Under the common law there was originally no right of set-off and it was not until the statute of set-off in the reign of George II. that any such right was established. A court of equity did allow set-off, but following the spirit of the statute would not allow a man to set off even at law, unless the rights, although legally mutual, were not equitably mutual. A defendant may set off against a trustee a debt due from the cestui que trust where the rights are equitably mutual. *Royal Trust Co.* v. *Holden*, (1915) 21 B.C.R. 185; 22 D.L.R. 660; (1915) 8 W.W.R. 500.

See Donald v. *Jukes*, (1920) 60 S.C.R. 652; 56 D.L.R. 692; (1921) 2 W.W.R 208. Affg. (1920) 28 B.C.R. 215; 54 D.L.R. 688; (1920) 2 W.W.R. 209.

2. By liquidator — Against claim for wrongful allotment.]—Where a plaintiff applied for original shares in a company, but was given shares that had previously been issued and held by a third party, and was adjudged to be entitled to the return of the money paid with interest notwithstanding the liquidation of the company, the liquidator is not entitled to set off dividends paid to him in respect of the shares. *Brydges* v. *Dominion Trust Co.*, (1919) 27 B.C.R. 214; (1919) 3 W.W.R. 345.

3. Pleading.]—On the construction of Marginal Rule 199 the words "shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim," mean that the cross-claim shall have that effect merely for the purpose of enabling the Court to pronounce such final judgment, and the right to set off in the wide sense of the language of the first part of the rule enables any cross-claim to be pleaded by way of defence and not necessarily by way of counter-claim, with the result that a defendant may elect whether he will plead his cross-claim as a set-off or by way of counter-claim. *Victoria and Saanich Motor Transportation Co.* v. *Wood Motor Co.*, (1915) 21 B.C.R. 515; 23 D.L.R. 79; 31 W.L.R. 853; 8 W.W.R. 1124.

4. Set-off and counter-claim.]—A set-off is a defence proper to the plaintiff's claim arising out of the subject-matter and must be for a liquidated claim only. The plaintiff's claim and the defendant's set-off must be mutual debts both due from and to the same parties in the same right. A counter-claim has its origin in sec. 24 of the Judicature Act, 1873, and is in the nature of a cross-action. It may raise any cross-claim that can conveniently be tried at the same time as the plaintiff's claim and may have arisen either before or since the commencement of the plaintiff's action. It need not be connected with the original matter of the plaintiff's action, except where a third person is made defendant to the counterclaim along with the plaintiff, in which case it must be so connected. If the subject-matter of the counter-claim is not outside of and independent of the subject-matter of the claim it is in the nature of a defence. A set-off can be pleaded as a counter-claim but a counter-claim cannot be pleaded as a set-off. *Dominion Trust Co.* v. *Brydges*, (1920) 28 B.C.R. 451; (1920) 2 W.W.R. 952.

5. Undertaking for payment by third party—Set-off.]—By an agreement signed by plaintiff and defendants and others it was agreed that plaintiff was to be credited by M. Coy. with certain salary and expenses "and said amount to be paid in cash"; and by another agreement defendants undertook and agreed that said amount should be paid by M. Coy. forthwith. M. Coy. refused payment to plaintiff alleging that plaintiff was indebted to it on other accounts exceeding said amount. It was held that plaintiff could recover against defendants even though had the M. Coy. been sued by plaintiff it might have counterclaimed. *Camsusa* v. *Smith and Christie*, (1919) 2 W.W.R. 332.

IV. DISCHARGE OF DEBTOR.

1. Release of co-debtor—The discharge of one or several judgment debtors without reservation.]—Judgment creditors accepted in writing a sum from one of the judgment debtors as satisfaction in full of the judgment as against him. On the plaintiff, assignee of the judgment creditors, seeking to recover under the judgment as against the other judgment debtor it was held that the plaintiff could not adduce parol evidence to show that the written documents of satisfaction given to the first judgment debtor were given with an oral reservation of the judgment creditors' rights against the other. *Bank of Hamilton* v. *Copp*, (1924) 3 W.W.R. 323.

2. Release of co-debtor.] — An action was brought against M. and F. carrying on business under the firm name of The Fishermen's Poolroom for $424.17 for goods sold and delivered. M. then approached the plaintiff with the view of settling the claim as against him, and the plaintiff in consideration of M. paying $185 on account of the debt executed an unconditional release to M. under seal. The plaintiff's solicitor then enclosed the release with a letter to M.'s solicitor, reciting that "the understanding of course is that we discontinue our action against M. and amend our plaint for the balance still owing on this account and carry on against F." The plaintiff recovered judgment for the balance against F.:—Held, on appeal, that the solicitor knowing what was in the plaintiff's mind with regard to the release drew up the letter accompanying it in accordance therewith, which should be construed as making the release conditional to the holding of F. liable for the balance of the debt. *R. N. Johnston & Company, Limited* v. *Finkleman*, (1926) 37 B.C.R. 95; (1926) 2 D.L.R. 425.

See ARREST AND IMPRISONMENT FOR DEBT.

See BANKS AND BANKING.

See CONTRACT.

See JUDGMENT.

See PLEADING.

DECEIT.

See MISREPRESENTATION AND FRAUD.

DEEDS AND OTHER INSTRUMENTS.

I. EXECUTION OF, 420.
II. PARTIES, 420.
III. CONSTRUCTION OF, 421.
A. Covenants, 421.
B. Parcels, 421.
C. Ambiguity, 421.
D. Delivery, 422.
IV. RECTIFICATION, 422.
V. LOST DEED, 424.

I. EXECUTION OF.

1. By attorney.]—Authority to execute an instrument which must be under seal must itself be given by instrument under seal, unless possibly the maker is personally present and asks another to execute the instrument for him. *Dinsmore* v. *Philip*, (1917-18) 26 B.C.R. 123 at p. 125; (1918) 1 W.W.R. 405; (1918) 3 WW.R. 457.

2. By company.]—Where the articles of association of a company require that the seal of the company shall not be affixed except by the authority of a resolution of the directors, and in the presence of two directors and of the secretary or such other person as the directors may appoint for the purpose, who shall join in signing the instrument to which the seal is affixed, the seal shall only become effective when such requirement is complied with, and the signature of two directors as such and by one of them as secretary is not sufficient. *In re Land Registry Act and Studd*, (1916) 22 B.C.R. 507; 28 D.L.R. 354; 34 W.L.R. 466; 10 W.W.R. 634.

3. Induced by misrepresentation—Relationship of parties.]—Where an owner of property has been induced to sign a mortgage by the fraudulent representation of a person other than the mortgagee that the deed is not a mortgage, the owner is not estopped from denying that it is his deed, unless he owed a duty to the mortgagee, and where there were no relations of any kind between the owner and mortgagee there can be no duty. *Cooil* v. *Clarkson*, (1925) 35 B.C.R. 308; (1925) 2 D.L.R. 493; (1925) 1 W.W.R. 1094.

II. PARTIES.

Action.]—A person who is not a party to a deed is not capable of suing or being

sued thereon. Where a contract is under seal the deed must be declared upon, notwithstanding that the nature of the contract be such that without the existence of the deed an action of debt could have been maintained. *Alexander and Smith* v. *Yorkshire Guarantee and Securities Corporation, Ltd.*, (1916) 23 B.C.R. 1; 27 D.L.R. 412; 34 W.L.R. 410; 10 W.W.R. 475.

III. CONSTRUCTION OF.

A. Covenants.

Covenant for right to convey.] — A limited covenant for the right to convey in pursuance of the Real Property Conveyance Act does not constitute a warranty of title; it only operates as to the vendor's own acts. If the vendor has no title at all to the property conveyed, there would be no breach of such covenant. *Amar Singh* v. *Mitchell*, (1916) 23 B.C.R. 248; 30 D.L.R. 719; (1917) 1 W.W.R. 201.

B. Parcels.

1. Covenants—Joint and several.]—A covenant contained in an agreement for the purchase of land whereby two or more purchasers covenant with the vendor that they will pay the purchase price with interest is not the covenant of each but a joint obligation. *Robert Porter & Sons Ltd.* v. *Foster et al.*, (1925) 36 B.C.R. 222; (1925) 4 D.L.R. 669; (1926) S.C.R. 328; (1926) 2 D.L.R. 340.

2. Description by plans annexed.]—Where the description in a deed of land varies from a plan attached thereto, the Court will adopt whichever was on the proper construction intended to govern. *Kipp* v. *Simpson*, (1928) 40 B.C.R. 248; (1928) 4 D.L.R. 421; (1928) 3 W.W.R. 331.

C. Ambiguity.

Patent ambiguity — Evidence.] — A patent ambiguity in a deed cannot be explained by parol evidence. *Maritime Motor Car Co. Ltd.* v. *McPhalen & McPhalen*, (1919) 27 B.C.R. 244; (1919) 2 W.W.R. 811.

D. Delivery.

1. Date of delivery—Presumption of.] —A deed is presumed to have been delivered on the day of its date even where that date is prior to the expiration of a period fixed by statute within which the deed can have no effect. *Heron* v. *Lalonde*, (1916) 53 S.C.R. 503; 31 D.L.R. 151; 10 W.W.R. 1241.

2. Equitable mortgage — Deposit of title deeds in blank.]—The deposit by a person not being the owner of a certificate of title coupled with the delivery of a conveyance in blank is not sufficient to establish the right to an equitable mortgage. *Hans C. Christensen; Tom* v. *Everett*, (1928) 40 B.C.R. 383; (1928) 4 D.L.R. 668; (1928) 3 W.W.R. 314, 432.

IV. RECTIFICATION.

1. Mistake — Printed form.] — 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":—Held, that the action should be dismissed, and that the lease should be rectified by striking out the printed words "and to pay taxes." *Johnston* v. *Finch*, (1916) 23 B.C.R. 472.

2. Mistake — Burden of proof.] — In order to rectify a mistake in the drawing up and execution of a lease, the party seeking rectification must produce clear and unambiguous evidence that the mistake was mutual. *Ibid.*

3. Mistake in draughtsmanship.] — A covenant in a mortgage by trustees expressed to be made by them "as trustees but not otherwise" will in the absence of other controlling words be held to limit their liability to the payment of the money out of trust estate and will not render them personally liable. If, therefore, it appears from the evidence that the parties agreed that the mortgagors were to pay as trustees and not otherwise and failed through a mistake in draughtsmanship to express that intention in the instrument, it should be reformed so as to limit the liability as intended. *O'Brien* v. *Knudson*, (1919) 27 B.C.R. 492; 48 D.L.R. 447; (1919) 3 W.W.R. 480.

4. Mistake as to contents of instrument.]—Where a party without intention to give a release of existing liability signs a document containing such a release and his mistake is not due to negligence on his part, he is not bound by his signature, upon the ground that there is in reality no release binding him on his part. A basic fact upon which his case must rest is that he executed the document in ignorance of its effect, and the burden of proving his ignorance rests on him. *Jack* v. *Nanoose Wellington Collieries Ltd.*, (1926) S.C.R. 495; (1926) 2 D.L.R. 164. Revg. on facts, (1925) 35 B.C.R. 295; (1925) 3 D.L.R. 398; (1925) 2 W.W.R. 267.

5. Mutuality of mistake.]—A defence of mutual mistake without a claim for rectification may be pleaded to an action for specific performance of an agreement, where all that remains to be done under the agreement is the payment of admitted amounts of which the defendant was ignorant when the action was begun. *Clark* v. *Appleby*, (1928) 2 D.L.R. 95; (1928) 1 W.W.R. 784.

6. Mutuality of mistake.]—In seeking rectification of an agreement on the ground of mistake it must be proved that the mistake was mutual, or that the defendant had such knowledge as to make his availing himself of the mistake amount to fraud. *American Merchant Marine Insurance Co.* v. *Buckley-Tremaine Lumber and Timber Co.*, (1920) 28 B.C.R. 426; (1920) 3 W.W.R. 878.

7. Agreement for sale — Reservation omitted.]—Where the defendant purchased lands from the plaintiff under an agreement omitting the reservation of coal as contained in the original conveyance from the Esquimalt and Nanaimo Railway Company, the plaintiff is entitled to rectification of the agreement where there is evidence upon which it can reasonably be found that the defendant had notice of the reservation in the original conveyance. A decree for rectification and specific performance of a written agreement may be made in the same action. *Frey* v. *Floyd*, (1922) 30 B.C.R. 488; 63 D.L.R. 614; (1922) 1 W.W.R. 651.

8. Filling blanks.] — Where the inventory of goods and chattels referred to in a chattel mortgage was not attached thereto when the mortgager signed the mortgage, but was attached later under instructions of the mortgagor before the mortgage was delivered to the mortgagee, and before the mortgagor had obtained possession of the goods under a bill of sale from the mortgagee:—Held, not to invalidate the mortgage. *Stubbert* v. *Scott and Temple*, (1931) 43 B.C.R. 496; (1931) 1 W.W.R. 598.

9. Voluntary settlement.]—Mere alteration of intention or change of mind is not sufficient to induce the Court to interfere with or vary a voluntary trust settlement which was fully understood and deliberately executed by the grantor. *Goodwin* v. *The Royal Trust Co.*, (1927) 39 B.C.R. 113; (1928) 1 D.L.R. 309.

V. Lost Deed.

Lost document—Oral evidence of contents.]—In an action for a declaration as to the ownership of the under surface rights in land where one of the title deeds has been lost, the party who alleges that all that usually goes with a sale of land was not conveyed must prove the reservation. The true inference to be drawn from the fact that during the negotiations for sale of the land nothing was said about the reservation of coal is that there was no such reservation. *Bing Kee* v. *McKenzie*, (1919) 26 B.C.R. 509; 47 D.L.R. 43; (1919) 2 W.W.R. 172.

DEFAMATION.

I. What Actionable, 424.
II. Publication, 424.
III. Defences, 425.
IV. Practice, 426.
A. Evidence, 426.
B. Interlocutory judgments, 426.
C. Pleadings, 427.
D. Damages, 428.
E. Costs, 428.

I. What Actionable.

Imputation of offence.]—It is slanderous to allege that a person has done something for which he can be imprisoned. *Richards* v. *Anderson*, (1916) 10 W.W.R. 893.

II. Publication.

1. Communication to plaintiff's solicitor.]—The communication to the plaintiff's

solicitor of a memorandum alleged to contain defamatory statements concerning the plaintiff is privileged. *de Schelking* v. *Cromie*, (1919) 27 B.C.R. 322; 47 D.L.R. 704; (1919) 3 W.W.R. 539.

2. Statement of claim—Allegation of publication.] — Where the statement of claim in an action for libel contains an allegation of publication without stating to whom the libel was published, no particulars being asked for by the defence, and evidence was tendered at the trial of publication to the defendant's stenographer, and the evidence was allowed in without objection, the plaintiff is entitled to succeed. *Hall* v. *Geiger*, (1930) 42 B.C.R. 335; (1930) 3 D.L.R. 644; (1930) 2 W.W.R. 790.

3. Slander—Repetition by third party.] —Where the defendant finding that his name did not appear among those of his friends who had contributed to a social service association falsely stated that he had contributed to the association by payment of $5 to the plaintiff who was the treasurer of the association:—Held, that the statement made by the defendant might be most injurious to the plaintiff and if true would justify his removal from office, and the repetition of his words by third persons was the natural consequence of the defendant uttering them, there being an obligation on those contributors who heard the defendant's assertions to repeat them to those in authority and the plaintiff is entitled to recover damages for slander. *Cooper* v. *Warburton*, (1931) 44 B.C.R. 328.

III. DEFENCES.

1. Privilege.]—A communication to a City Council in a duly assembled meeting thereof by a member of that body is privileged, and if no malice is proved an action in respect thereof will be dismissed. *Edwards* v. *Gattmann*, (1928) 40 B.C.R. 122; (1928) 3 D.L.R. 187; (1928) 2 W.W.R. 713.

2. Fair comment—Matter of public interest.]—The acts of a Dominion official in the conduct of his office are not matters of public interest in a political contest in another part of the country sixteen years after he has ceased to hold such office, he not being a candidate or official in the contest in question. *Wade* v. *The News-Advertiser, Lineham and Scott*, (1917) 24 B.C.R. 260; (1917) 2 W.W.R. 1134.

3. Plea of justification.]—A defendant unnecessarily proceeding with the defence of justification must be assumed to have admitted that there was something to meet. Such a course, therefore, must be taken as a virtual admission of publication. *Patching* v. *Howarth*, (1930) 43 B.C.R. 108; (1930) 4 D.L.R. 489; (1930) 3 W.W.R. 129.

IV. PRACTICE.

A. Evidence.

1. Essential words.]—Clear proof of the essential words constituting the slander should be afforded. The precise words complained of are material not only as to shewing a cause of action but so that they may be considered in the light of evidence adduced to support their utterance. It is not sufficient to give the substance or purport of the slander complained of. *Evans* v. *Martyn*, (1926) 37 B.C.R. 231; (1926) 2 D.L.R. 698.

2. Newspaper disclosure of names of contributors.] — Newspapers being published in the interests of the general public and which take upon themselves full responsibility for whatever they publish, ought not to be compelled to disclose the names of their contributors or informants except under special circumstances. *de Schelking* v. *Cromie*, (1918) 26 B.C.R. 345; (1918) 3 W.W.R. 1038.

3. Application to amend.]—A defendant's application to the Court of Appeal to amend a defence will not be granted where, had an amendment been made at the proper time, the trial would have taken a different course. *Patching* v. *Howarth*, (1930) 43 B.C.R. 108; (1930) 4 D.L.R. 489; (1930) 3 W.W.R. 129.

B. Interlocutory Judgments.

To restrain discussion in newspaper pending trial.]—During the progress of an action for libel contained in newspaper articles an injunction was granted against the newspaper publisher restraining the continuance of articles discussing the transaction which had been the subject of the articles in question, as tending to interfere with a fair trial of the action. The Court having required the plaintiff to file

an affidavit pledging his oath to the untruthfulness of the alleged libellous statements before granting the injunction, such affidavit was accepted only as sufficient for the purposes of the application, and not affecting the trial of the action. As the application finally disposed of the matter under consideration, the plaintiff was given the costs of the application in any event. *Campbell* v. *Sun Printing and Publishing Company*, (1921) 30 B.C.R. 149; (1921) 2 W.W.R. 987.

C. Pleadings.

1. Justification — Particulars.] — A defendant who has pleaded a general justification must furnish the plaintiff with the particulars of the facts before obtaining discovery from the plaintiff. *Nelson* v. *Bradstreet*, (1917) 2 W.W.R. 1191.

2. Particulars.]—In an action for damages for libel in which the defendants have entered a plea of fair comment, the plaintiff is not entitled to particulars setting out specifically the facts relied on as a basis for fair comment, unless specifically demanded, and even if he were, he is not entitled to specific instances of the truth of such facts. Where the alleged libel is "flagrant defiance of the law as interpreted in other Provinces" the plea must set out specific instances of the alleged interpretation of the law in other Provinces. *The Herald Printing and Publishing Company Limited et al.* v. *Ryall et al.*, (1923) 33 B.C.R. 19; (1923) 4 D.L.R. 488; (1923) 3 W.W.R. 953.

3. Statement of claim—Allegation of publication.]—In an action for defamation the statement of claim must set out the exact words complained of. *Shannon* v. *King*, (1931) 44 B.C.R. 383; (1931) 4 D.L.R. 438; (1931) 2 W.W.R. 913.

4. Statement of claim—Allegation of publication.] — Where the statement of claim in an action for libel contains an allegation of publication without stating to whom the libel was published no particulars being asked for by the defence, and evidence was tendered at the trial of publication to the defendant's stenographer, and the evidence was allowed in without objection, the plaintiff is entitled to succeed. *Hall* v. *Geiger*, (1930) 42 B.C.R. 335; (1930) 3 D.L.R. 644; (1930) 2 W.W.R. 790.

5. Plea of justification—Admission of publication.]—A plea of justification not in the alternative is an admission of publication. *Patching* v. *Howarth*, (1930) 43 B.C.R. 108; (1930) 4 D.L.R. 489; (1930) 3 W.W.R. 129.

D. Damages.

Nominal damages.]—Where counsel for the plaintiff states in the course of a trial that his client does not come into Court asking for any substantial sum of damages, and withdraws the charge of malice, a verdict for an amount beyond nominal damages cannot stand. *Lucas* v. *Ministerial Union*, (1916) 23 B.C.R. 257; 31 D.L.R. 200. Per Martin, J.A.

E. Costs.

1. Successful defendant.]—A successful defendant to a prosecution for criminal libel, commenced by an ordinary information or complaint, cannot claim costs from the prosecutor under sec. 1045 of the Criminal Code. *Buczko* v. *Chobotar*, (1926) 1 D.L.R. 1024; (1926) 1 W.W.R. 379; 45 C.C.C. 216.

2. Security for costs—Libel involving criminal charge.]—In an action for libel contained in a newspaper where the words are alleged by the plaintiff to have been used in a sense which involves the making by the person using them of a criminal charge against the plaintiff and may have that meaning, the case is brought within the exception, disentitling defendant to security for costs, contained in sec. 16 (2) of the Libel and Slander Act, which exception is applicable to cases where an innuendo is necessary to give the words complained of a defamatory sense; and upon application for security there cannot be a trial of the action on the merits in order to determine whether the words used involve a criminal charge. *Wallace* v. *Lawson*, (1919) 2 W.W.R. 408.

DEFENCE.

See PLEADINGS.

DENTISTRY.

1. Graduate.]—The word "graduate" in sec. 22 (b) of the Dentistry Act does not import that the receiving of a certificate of graduation was preceded by a course of training of a practical kind or otherwise. *The College of Dental Surgeons* v. *Neff*, (1928) 40 B.C.R. 371; (1928) 4 D.L.R. 839; (1928) 3 W.W.R. 299.

2. Unskilful work.]—The doctrine in the case of a physician that treatment is to be tested by the principles of the physicians' school is not applicable to the mechanical manipulative labour entailed in the pulling of teeth. The rule in such a case is that applicable to all skilled labourers, namely, that if your position implies skill you must use it. When, therefore, injury has been sustained that could not have arisen except from the absence of reasonable skill, or negligence, there is liability. *Drinnen* v. *Douglas*, (1931) 43 B.C.R. 362; (1931) 2 D.L.R. 606; (1931) 1 W.W.R. 160.

DESCENT AND DISTRIBUTION OF ESTATES.

I. Intestate Estate, 429.
II. Donatio Mortis Causa, 431.
III. Survivorship, 431.
IV. Relatives of the Half-Blood, 432.

I. Intestate Estate.

1. Next of kin.]—Where one who dies intestate is survived by a mother and five brothers and sisters, the mother takes one-half of the personalty and the brothers and sisters the other half. *In re Anne Elizabeth Powell, Deceased*, (1921) 30 B.C.R. 134.

2. Next of kin.]—M., who was unmarried, died intestate. He had one sister still living and another sister who had predeceased him, left one son living. One brother was still living. A second brother who had predeceased him left three children still living and a third brother (Andrew) who had predeceased him left nine children still living, and a tenth child (Edward) who had predeceased M. left four children (grandchildren of M.) still living. On a petition for directions: —Held, that the one-fifth share of the estate to which the brother Andrew would have been entitled should be divided into ten parts and one of the ten parts should be equally divided amongst Edward's four children. *In re Estate of David McKay, Deceased*, (1927) 39 B.C.R. 51.

3. Next of kin.]—On the death of an intestate, leaving her surviving her husband and the children of deceased brothers and sisters, the proviso to sec. 116 of the Administration Act applies, and after the husband's share of the estate has been segregated, the residue is divided amongst the nephews and nieces per capita. *In re Estate of Mary Grant, Deceased. Morrison* v. *Grant*, (1929) 41 B.C.R. 511; (1930) 1 D.L.R. 365; (1929) 3 W.W.R. 644.

4. Next of kin.]—Where one dying intestate is survived by his father, one brother and the children of two deceased brothers and one deceased sister (the father dying before distribution of the estate) the whole of the real estate and one-half of the personalty goes to the estate of the father, and the other half of the personalty in equal shares to the three brothers and sister, the children of the two brothers and sister who predeceased their brother who died intestate taking equal shares of their parent's portion in each case. *In re Larson, Deceased*, (1923) 33 B.C.R. 161; (1924) 1 W.W.R. 35.

5. Merger.]—A testator devised to a beneficiary under his will certain real property a portion of which was already subject to a mortgage in favour of the beneficiary. After the beneficiary received the inheritance, she assigned the mortgage as collateral security for an advance, declaring that the mortgage was a good and subsisting one, and upon repayment of the advance the mortgage was assigned to her and not discharged: —Held, that this was unmistakable indication of her intention to keep the mortgage separate. Having elected in the first place to treat the mortgage as a separate portion of her estate it remained so until her death and was not merged and is part of the personal estate to be administered by her administrator. *In re Parshalle. Kunhardt* v. *Cox*, (1930) 43 B.C.R. 68; (1930) 3 D.L.R. 1004; (1930) 2 W.W.R. 802.

6. Estate of homicide — Insanity.] — The rule that no one can profit by his own wrong or benefit by his criminal act does not apply to prevent an insane person who commits homicide from taking an inheritance from the person killed. *In re Estate of Maude Mason, Deceased*, (1916)

23 B.C.R. 329; 31 D.L.R. 305; (1917) 1 W.W.R. 329.

7. Murderer — Estate of victim — Public policy.] — On the ground of public policy a murderer can take nothing under the will of his victim and this principle applies in the case of an intestacy. *In re Medaini Estate*, (1927) 38 B.C.R. 319; (1927) 4 D.L.R. 1137; (1927) 2 W.W.R. 38.

II. DONATIO MORTIS CAUSA.

1. Delivery of keys.]—The delivery by a person in extremis of the keys of his safe accompanied by the words "they lead to everything I have got—everything I have got is yours" will operate as a donatio mortis causa of the things in the safe other than money in a bank represented by a pass-book found in the safe. *Cusack* v. *Day*, (1925) 36 B.C.R. 106; (1925) 3 D.L.R. 1028; (1925) 2 W.W.R. 715.

2. Bank pass-book.]—The delivery of an ordinary pass-book with respect to an ordinary current bank account cannot constitute a donatio mortis causa so as to give the donee title to the money represented by it. *Ibid.*

3. Evidence of.]—Where articles were claimed under a donatio mortis causa it was held that the evidence of the claimant was sufficient to establish such a gift notwithstanding sec. 11 of the Evidence Act, 1911, especially where there are circumstances which tend to corroborate such evidence. *Imperial Canadian Trust Co.* v. *Winstanley*, (1922) 31 B.C.R. 448; (1923) 1 D.L.R. 1148; (1923) 1 W.W.R. 935.

III. SURVIVORSHIP.

Presumption.]—Those who found a right upon the fact of a person having survived a particular period, must establish that fact affirmatively by evidence. The evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail. M., who had made a will in his wife's favour, committed suicide on the 28th of June, 1928, and on the same day that he committed suicide he killed his wife. The plaintiff seeks to establish her right to M.'s estate as the next of kin of the wife. The evidence disclosed that M. shot his wife fatally and then shot himself three times, the third shot entering his brain and killing him instantly, but there is no direct evidence that his wife survived him:—Held, that the person seeking to establish survivorship has failed and the action is dismissed. *Campbell* v. *Cox and Mitchell*, (1929) 42 B.C.R. 120; (1930) 1 D.L.R. 649.

IV. RELATIVES OF THE HALF-BLOOD.

Ancestral property—Meaning of ancestor.]—The proviso contained in sec. 126 of the Administration Act, 1924, cap. 57, excludes without qualification those who are not of the blood of the ancestor. "Ancestor" within the meaning of the said section is the person from whom the estate in question is derived. He need not be a progenitor of the successor or lineal ancestor so long as he really preceded in the estate and is a blood relative. *In re Parshalle Estate. Kunhardt* v. *Cox*, (1930) 42 B.C.R. 413; (1930) 3 D.L.R. 438; (1930) 1 W.W.R. 767.

See EXECUTORS AND ADMINISTRATORS.

See FAMILY MAINTENANCE ACT.

See WILLS.

BONA VACANTIA—*See* CONSTITUTIONAL LAW.

DETINUE.

Action to recover deeds.]—The defendant purchased Crown lands in Ontario and procured the patents to be issued in his wife's name but kept them in his own possession. The wife later brought action for possession of the title deeds:—Held, that as the wife's evidence is that she does not claim the property as her own in fact but bases her claim on the doctrine of the common law that husband and wife are one, she cannot succeed. The action is one of detinue and does not involve determination of title. *Hawks* v. *Hawks*, (1920) 29 B.C.R. 64; 56 D.L.R. 265; (1920) 3 W.W.R. 774; Affd. (1921) 59 D.L.R. 430; (1921) 3 W.W.R. 285.

DISCONTINUANCE.

See PRACTICE.

DISCOVERY.

See PRACTICE.

DISORDERLY HOUSE.

See CRIMINAL LAW.

DISTRESS.

1. Unlawful entry.]—A tenant occupying an apartment or a suite or rooms in an apartment-house, owing two and one-half months' rent, removed part of her furniture from the building; the landlord then entered the apartment (which was locked) with a pass-key and made distress by removing the remaining furniture to another room:—Held, that the landlord was in possession of the hall and other passages in the building which were common to himself and the other tenants and there could be no breaking of the outer door of the building by the landlord, the only outer door to bar his entrance being the door from the hall into the apartment, and the use of the pass-key by him to obtain entrance was equivalent to breaking in, and amounted to a trespass for which the plaintiff was entitled to relief. *Welch* v. *Kracovsky*, (1919) 27 B.C.R. 170; (1919) 3 W.W.R. 361.

2. Landlord as purchaser.]—A landlord cannot become purchaser of goods sold under distress for rent. *Shore & Grant* v. *Wilson Bros.*, (1916) 23 B.C.R. 33; 35 D.L.R. 293. *Barlow* v. *Breeze*. *Infra*.

3. Pretended sale to landlord's agent.]—While the conditional sale of goods by a tenant to his wife is no protection to the vendee under the Distress Act, the landlord can only deprive the vendee of the goods by lawful distress and sale, and a sale professed to be made by the bailiff to an agent of the landlord is a mere pretence and ineffective as against the vendee. *Barlow* v. *Breeze*, (1917) 31 D.L.R. 280; (1917) 1 W.W.R. 270.

4. Assignment by tenant for benefit of creditors — Rent in hands of assignee—Receiver—Attachment.] — Where a landlord distrains upon the goods of his tenant for rent, and the tenant thereupon assigns for the benefit of his creditors, and subsequently the mortgagee of the premises, by a receiver appointed to collect the rental thereof, makes a demand upon the assignee for payment of the amount distrained for, the receiver is entitled to the payment thereof as against a creditor of the landlord who has entered garnishee proceedings to attach the landlord's money in the hands of the assignee. An assignee is an officer of the Court to distribute money in his hands in a particular way, and no debt is created which can be the subject-matter of attachment against him as garnishee. *Hoyes* v. *Creery*, (1917) 24 B.C.R. 505; 39 D.L.R. 516; (1918) 1 W.W.R. 873.

5. Relationship of landlord and tenant—Illegal distress.]—Property of an incorporated society was held in the name of a branch of the society incorporated under the Benevolent Societies Act. The officers of the parent society let a portion of the premises to a tenant and on default distrained upon the tenant's goods:—Held, that such a society is incapable of making a lease and that the relationship of landlord and tenant never existed between the tenant and the society on whose behalf the distress was made, and that the distress was illegal. *Canada Morning News Co.* v. *Thompson* (1930) S.C.R. 338; (1930) 3 D.L.R. 833. Revg. (1929) 41 B.C.R. 24; (1929) 2 D.L.R. 114; (1929) 1 W.W.R. 548.

6. Landlord and chattel mortgagee.]—An arrangement made between a chattel mortgagee of a tenant and the landlord that the latter should seize for rent and make all the necessary arrangements for the sale on behalf of both of them was held, on the evidence to include the right of the landlord to bid in, if he should wish to do so. Moreover, the mortgagee's conduct at the sale was held to estop him from complaining merely on the ground that the landlord bid in the goods. *Hart* v. *Yarwood*, (1931) 3 D.L.R. 291; (1931) 2 W.W.R. 435; Revd. (1932) 45 B.C.R. 331; (1932) 4 D.L.R. 164; (1932) 2 W.W.R. 74.

7. Costs—Actual possession.]—Under sec. 3 of the Distress Act Amendment Act, 1913, the sheriff is not entitled to charge for a man in possession where goods are distrained under a distress warrant, unless he has remained in actual possession. *The King* v. *Barton*, (1919) 27 B.C.R. 485.

See LANDLORD AND TENANT.

See SALE OF GOODS.

DIVORCE.

I. Jurisdiction, 435.
II. Grounds of Relief, 436.
III. Misconduct of Petitioner, 437.
IV. Alimony, 437.
V. Nullity of Marriage, 439.
IV. Practice, 440.
VII. Evidence, 442.

I. Jurisdiction.

1. Domicile.]—A petition by a husband for a declaration of nullity of marriage was dismissed for want of jurisdiction because the evidence shewed he had no domicil in British Columbia. On application for reinstatement it was shewn that residence only is sufficient to found jurisdiction in an action for nullity of marriage as distinguished from divorce actions, but such residence must be bona fide, the Court finding however, on the evidence, that the petitioner, as soon as he learned of the position of matters regarding his wife, determined to return to his home in Saskatchewan after remaining in British Columbia only for such length of time as would enable him to have this case settled, refused to reinstate the action. *Purdy* v. *Purdy*, (1919) 27 B.C.R. 248; (1919) 2 W.W.R. 551.

2. Action to set aside decree.] — A judge of the Supreme Court sitting in his ordinary capacity has no jurisdiction to interfere with decrees pronounced by the Court sitting as a Court for divorce and matrimonial causes under the Divorce and Matrimonial Causes Act, 20 & 21 Vict., cap. 85. *Claman* v. *Claman*, (1925) 35 B.C.R. 137; (1926) S.C.R. 4.

3. Domicile—Animus manendi.]—Residence in a place coupled with contestation of a divorce action there and payment of maintenance ordered in the judgment in that action, will prove domicile in that place in the absence of contradictory evidence. *Brown* v. *McInness*, (1927) 38 B.C.R. 324; (1927) 2 D.L.R. 655; (1927) 1 W.W.R. 597.

4. Validity in Canada of foreign divorce.]—The Courts in Canada will recognize the binding effect of a decree of divorce obtained in a foreign country against a husband domiciled outside Canada, although he was not domiciled in the country of the Court which granted the decree, if the Courts of the country of his domicile would recognize the validity of the decree. Anything going to the root of the jurisdiction of a foreign Court granting a decree of divorce will be investigated, and if the foreign Court had not jurisdiction to grant a decree of divorce which would be recognized extra-territorially owing to absence of one of the parties the Court will not recognize the decree. *Wyllie* v. *Martin*, (1931) 44 B.C.R. 486; (1931) 3 W.W.R. 465.

5. Foreign divorce.]—A divorce granted in a foreign jurisdiction is valid in British Columbia providing the husband was domiciled within the jurisdiction of the Court granting the decree. *Burpee* v. *Burpee*, (1929) 41 B.C.R. 201; (1929) 3 D.L.R. 18; (1929) 2 W.W.R. 128.

6. Foreign divorce.]—The law of the State of Oregon requires that the plaintiff in a divorce action must have been a resident and inhabitant of the State of Oregon for one year next prior to the commencement of the suit, and the Supreme Court of the State has defined domicile, residence and habitation as synonymous in relation to divorce proceedings. In an action for divorce in the Province it was held that where the respondent has not renounced his British Columbia domicile he is not in the ordinary meaning of the words a resident or inhabitant of the State of Oregon and did not acquire a domicile there. Domicile being the governing factor, there was no jurisdiction in the Courts of the State of Oregon to grant a decree of divorce. *Biggar* v. *Biggar*, (1930) 42 B.C.R. 329; (1930) 2 D.L.R. 940.

7. Domicile—Custody of children.]—On petition, by a wife, for divorce and for the custody of her children, where the father's domicile is in British Columbia but the mother is living in the Province of Alberta with her children:—Held, that the domicile of the children is the same as that of the father during his lifetime, and there is jurisdiction to make an order granting the custory of the children to the petitioner. *Kilpatrick* v. *Kilpatrick*, (1929) 42 B.C.R. 88; (1930) 1 D.L.R. 288; (1929) 3 W.W.R. 463.

II. Grounds of Relief.

1. Adultery.]—On a petition for dissolution of marriage where there is a charge of adultery, neither the respondent, co-respondent nor the petitioner, even where there is a counter-charge, is bound to

answer any questions tending to prove him or her guilty of adultery. *Rogers* v. *Rogers*, (1918) 25 B.C.R. 439.

2. Admission in letter.]—On petition for divorce the petitioner submitted in evidence a letter she had received from the respondent in England, in which he admitted that he had committed adultery on various occasions and that he intended to remain in England:—Held, that if the Court is satisfied as to the bona fides of the letter, the evidence is sufficient proof of adultery and there should be an order absolute. *Shaw* v. *Shaw*, (1919) 27 B.C.R. 532.

III. Misconduct of Petitioner.

1. Petitioner guilty of adultery.]—Where on a petition for divorce it is admitted by the petitioner that he has been guilty of adultery, the Court will exercise its discretion in his favour in a case that comes clearly within the principles laid down in *Wilson* v. *Wilson*, (1919) 89 L.J., P. 17. *Laird* v. *Laird*, (1927) 38 B.C.R. 297.

2. Discretion of Court.]—A wife who was deserted by her husband, having reason to believe he was dead, married a second time. The first husband appeared and petitioned for divorce. It appeared from the evidence that the petitioner had been guilty of an infraction of substantially all the matters set out in sec. 16 of the Divorce and Matrimonial Causes Act, and that the wife was a very deeply injured woman without a stain on her character:—Held, that although there is power to refuse the petitioner a decree, the judge's discretion is left unfettered and absolute by the Legislature, and it is in the best interests of the wife, in the circumstances, to be set free, and the marriage dissolved on condition that the petitioner give security for the maintenance of the respondent in the terms of sec. 17 of the said statute. *Harney* v. *Harney*, (1926) 39 B.C.R. 275.

IV. Alimony.

1. Jurisdiction—Ordinary action.]—An action for alimony may be maintained under the ordinary jurisdiction of the Supreme Court apart from its divorce jurisdiction. Rule 1040a of the Rules of the Supreme Court is intra vires. *Rousseau* v. *Rousseau*, (1920) 3 W.W.R. 384.

2. Huband's assignment for benefit of creditors.]—On a husband making an assignment under the Creditors Trust Deeds Act, a decree for alimony does not give the assignor's wife a preference over unsecured creditors. Such a decree is a judgment of the Supreme Court and is of the same value as any other judgment of that Court. *Francis* v. *Wilkerson*, (1917) 25 B.C.R. 132; (1917) 3 W.W.R. 920; (1918) 2 W.W.R. 956.

3. Agreement for separation—Subsequent adultery.]—A husband and wife separated under the provisions of a deed whereby it was agreed, inter alia, that neither of them should take proceedings against the other for restitution of conjugal rights or molest, annoy or interfere with one another in any way, the wife agreeing that as long as the husband duly performed all obligations upon his part under the agreement she would not have any further claim upon him except as specified in the agreement. Three years later the wife filed a petition for a decree of judicial separation on the ground of her husband's adultery:—Held, that as according to the evidence this petition was obviously brought so that a petition for alimony might be founded on the decree which is sought, it should not be granted. *King* v. *King*, (1925) 35 B.C.R. 556; (1925) 3 D.L.R. 872; (1925) 2 W.W.R. 641.

4. Petition for permanent alimony prior to trial.]—A petition for permanent alimony may be filed in dissolution of marriage proceedings, prior to the trial. The proper construction of Divorce Rule 26 is that it applies only to proceedings for alimony pendente lite in dissolution cases when it is sought to examine witnesses in support of an alimony petition previous to the hearing of the cause. *Davy* v. *Davy* (*No. 1*), (1921) 30 B.C.R. 356; 63 D.L.R. 341; (1922) 1 W.W.R. 359.

5. Application for reduction.]—The claim of a wife to alimony upon obtaining a divorce, is paramount to that of a second wife or any children had by her, and the liability of the husband to maintain her can not be prejudiced by the existence of a second family. That the earning power of the respondent in a divorce action had fallen off to a considerable extent is ground for a reasonable reduction in the monthly allowance but not for a reduction in the arrears of alimony. *Moody* v. *Moody*, (1924) 34 B.C.R. 49.

6. Contempt of Court.]—The Court having made an order that in the event of the respondent selling his interest in his property, he should reinvest the proceeds in a new home to be registered jointly in his own name and that of the official guardian, in trust for the children of his marriage, until the youngest should attain the age of 21 years. The respondent sold his interest and reinvested the proceeds thereof in a new home, and registered the same in his own name, and subsequently gave a mortgage thereon to secure a loan:—Held, that the respondent should be committed for gross and wilful contempt of court. *Midgley* v. *Midgley*, (1929) 41 B.C.R. 482; (1929) 3 W.W.R. 121.

V. NULLITY OF MARRIAGE.

1. Duress or fraud—Mental incapacity.]—It is essential to the validity of a marriage that, inter alia, each of the parties should as regards age, mental capacity and otherwise be capable of contracting marriage, and that the parties, with an understanding of the nature of the contract, should freely consent to marry one another. Duress or fraud is a ground for dissolving a marriage, and there may be a fraud in taking advantage of a person of weak mind and thus bringing about a marriage, and such fraud may be as important as if it had been actually in the marriage itself. The marriage between the petitioner and respondent is declared a nullity on the ground that at the time the ceremony of marriage was performed the petitioner had not the mental capacity to appreciate what she was doing, and therefore had not really consented to the marriage. The validity of a marriage cannot be attacked on the ground of the manner in which the licence therefor was obtained. *Thaker* v. *Jennison*, (1921) 1 W.W.R. 942; 61 D.L.R. 161.

2. Non-consummation of marriage.]—Although wilful and persistent refusal by the wife of intercourse is not of itself a ground to support a decree of nullity of marriage, yet the Court may find on the evidence that the marriage cannot be consummated through her incapacity, "arising from nervousness, hysteria or unconquerable aversion" and on this ground grant a decree of nullity. *Edwards* v. *Clapham*, (1923) 33 B.C.R. 277; (1924) 2 W.W.R. 207.

3. Prior marriage—Foreign divorce.]—A petition to have a marriage declared null and void on the ground that at the time it was celebrated the respondent was the lawful wife of another will not succeed if the respondent proves that she obtained a divorce from her former husband in a foreign country in which he was domiciled in the English sense of the term at the time of the divorce proceedings. *Brown* v. *McInness*, (1927) 38 B.C.R. 324; (1927) 2 D.L.R. 655; (1927) 1 W.W.R. 597.

VI. PRACTICE.

1. Damages — Enforcement of judgment.]—A judgment in an action under the Divorce and Matrimonial Causes Act is, by sec. 18 of the Judgments Act, 1838 (Imperial), enforceable by an attaching order issued under the Attachment of Debts Act. *McLeod* v. *McLeod*, (1918) 25 B.C.R. 430; 40 D.L.R. 741.

2. Vacation.]—An application for directions under 22 of the Divorce Rules will not be heard in vacation. *Aubin* v. *Aubin*, (1919) 27 B.C.R. 445; (1919) 3 W.W.R. 312.

3. English rules.]—English rules and regulations concerning the practice and procedure of the Court for divorce causes do not apply to procedure in divorce causes in British Columbia. *Davy* v. *Davy*, (1921) 30 B.C.R. 365; 63 D.L.R. 341; (1922) 1 W.W.R. 360.

4. Security for wife's costs.]—There is no jurisdiction to order a husband to put up security for his wife's costs in a suit brought by the wife for divorce, even if it be shewn that the wife has no separate estate and the husband has means to comply with the order if made. *Ibid.*

5. Service of citation.]—Service of a citation upon the respondent and co-respondent on a petition in a divorce or matrimonial cause, may be dispensed with if after a bona fide effort has been made to trace them, they cannot be found. *Parker* v. *Parker and Gorst*, (1922) 30 B.C.R. 560.

6. Alternative remedy.]—Upon the petition of a wife for a decree of divorce being refused, she then sought as an alternative remedy a decree of judicial separation:—Held, that on the ground of cruelty, proved, it should be granted even though not asked for in the petition. Where a wife is unsuccessful in obtaining a divorce, but is granted judicial separation she is entitled to costs, if upon the facts submitted to her

solicitor, and upon which he proceeded to trial, he had reasonable grounds to warrant him in instituting proceedings for divorce. *Davey* v. *Davey*, (1923) 32 B.C.R. 267; (1923) 4 D.L.R. 1199; (1923) 2 W.W.R. 686.

7. Execution.]—A decree of alimony is within the purview of the Execution Act, and capable of being registered so as to be a charge against land. *Allen* v. *Allen*, (1923) 32 B.C.R. 274.

8. Intervener — Particulars.] — On the application of the intervener in a divorce action for further and better particulars giving the time and places where the alleged adultery was committed, as her reputation is at stake, she is entitled to press for the fullest particulars and is not bound by any order previously made at the instance of the respondent. *B.* v. *B. and S., Intervener*, (1929) 41 B.C.R. 184; (1929) 4 D.L.R. 1069; (1929) 1 W.W.R. 916.

9. Interrogatories.]—The Court will not order interrogatories in a petition for divorce where they can be material only in so far as they may tend to establish adultery. *Brammall* v. *Brammall* (*No. 2*), (1929) 41 B.C.R. 224; (1929) 1 W.W.R. 800.

10. Costs of wife — Intervener — Co-respondent.]—Where a wife is defendant in a divorce action, although unsuccessful, she is entitled to her costs if her defence has been fairly and reasonably conducted; her costs are not to be limited to the amount paid into Court or secured by her husband pursuant to the Divorce Rules, but should be ascertained on taxation between party and party on the usual scale. The intervener was given costs against the respondent and it was ordered that the respondent's costs should not be paid without the interveners' costs against her being provided for. The petitioner was given costs against the co-respondent, it being found on the evidence that even if the co-respondent did not know that the respondent was married, he had the means of knowledge or was careless as to whether she was or not. *Bourgoin* v. *Bourgoin and Wheway*, (1930) 42 B.C.R. 349; (1930) 3 D.L.R. 155; (1930) 1 W.W.R. 576.

11. Jury.]—A jury may be summoned under the Jury Act to try issues of fact in a divorce action. *Raisback* v. *Raisback*, (1921) 1 W.W.R. 918; 61 D.L.R. 472.

12. Decree of judicial separation.]—A decree of judicial separation with costs is a decree of the Supreme Court and the successful petitioner is a creditor entitled to invoke the provisions of the Fraudulent Conveyances Act. *Mackey* v. *Mackey*, (1930) 42 B.C.R. 440; (1930) 3 D.L.R. 497; (1930) 1 W.W.R. 604.

VII. EVIDENCE.

Evidence on trial by affidavit.]—On an application for an order for directions in a divorce action, counsel for petitioner asked for an order allowing proof of the facts by affidavit at the trial, owing to the remoteness of witnesses and the financial disability of the petitioner:—Held, that on the material the trial must be held on oral evidence, but a saving clause giving the trial judge power to allow proof by affidavit of such facts as he may deem proper may be inserted in the order. *Jensen* v. *Jensen*, (1918) 25 B.C.R. 513.

DOCUMENTS.

See DEEDS AND OTHER INSTRUMENTS

DOGS.

See ANIMALS.

DOMESTIC RELATIONS.

See DIVORCE.
See HUSBAND AND WIFE.
See INFANTS.
See MASTER AND SERVANT.

DOMICILE.

See CONFLICT OF LAWS.
See DIVORCE.

DONATIO MORTIS CAUSA.

See DESCENT AND DISTRIBUTION OF PROPERTY.
See GIFT.

DOWER.

See HUSBAND AND WIFE.

DYKING, DRAINAGE AND IRRIGATION.

1. Statute not retrospective—Remedy for injury to land.]—The provisions of cap. 18 of the British Columbia Statutes, 1913, amending the Drainage, Dyking and Irrigation Act, R.S.B.C. 1911, cap. 69 are not retrospective. Sec. 21 of the Drainage, Dyking and Irrigation Act, R.S.B.C. 1911, cap. 69, does not apply to work carried on under a general scheme adopted by proprietors under sec. 8 of said Act, and there being no statutory remedy open to persons who have been injured by the negligent carrying out of the works, an action at law will lie. A general scheme of drainage formulated by the proprietors provided an efficient and safe outlet for the waters, but it was not opened, and an alternative outlet was employed, which had the effect of flooding the lands of the plaintiffs with alkali water:—Held, that the defendants had been guilty of negligence, and the fact that another authority had turned additional water into the same drain and increased the flow did not excuse them. *Hemphill and Cuckow* v. *McKinney*, (1915) 21 B.C.R. 561; 27 D.L.R. 345; 33 W.L.R. 688.

2. Assessment.]—Where improvements are prepared within a district formed under the Drainage, Dyking and Development Act, the assessment for the work should not be at a flat rate but the land should be divided into various classes according to the benefit to be derived from the work. *In re New Lulu Island Slough Dyking District*, (1920) 28 B.C.R. 377.

3. Non-repair of canal—Injury to reversioner.]—A reversioner can only recover damages for injury to the land by failure to keep in repair a canal, where the injury to the property is permanent so that it will continue to affect it when the reversioner comes into possession, and he is not entitled to damages in respect of a temporary injury on the ground that it affects the present saleable value of the reversion. The duty cast upon the commissioners by sec. 18 of the Drainage, Dyking and Irrigation Act, 1911, to keep a canal in a proper state of repair is not relieved against by subsequent legislation. *Morrison* v. *Commissioners of Dewdney Dyking District*, (1922) 31 B.C.R. 23; 65 D.L.R. 409; (1922) 3 W.W.R. 250.

See DAMAGES.

See HIGHWAYS.

See MUNICIPAL CORPORATIONS.

See TRESPASS.

See WATERS AND WATER COURSES.

EASEMENT.

1. Private road adjoining leased premises—User by prior lessees.]—Where a lease of land contains no reference to the right of user for right of way purposes of a private road over the lessor's lands and the circumstances are not such as to base a finding that such a right is implied from the lease and is not an easement of necessity, the lessee is not entitled thereto notwithstanding that the private road in question was used by prior lessees and by the lessee himself for a short period, and was described in the lease as one of the boundaries of the land therein comprised. *Bready* v. *McLennan*, (1924) 33 B.C.R. 460; (1924) 3 W.W.R. 924.

2. Reservation of minerals — Right of way—Easement of necessity.] — Reservations in a conveyance of "all coal, coal oil, petroleum, oil springs, iron and fire clay within, upon or under the same" are exceptions and reservations from the grant and not easements, and should not be registered as charges. A certificate of indefeasible title may issue subject to these reservations, a memorandum of which should be indorsed on the certificate. Incorporeal rights such as rights of entry and rights of way are easements, but if they are easements of necessity incidental to the getting of the minerals, it is not necessary to register them as a charge. *Alberni Land Co., Ltd.* v. *Registrar-General of Titles*, (1918) 25 B.C.R. 273; 40 D.L.R. 142; (1918) 2 W.W.R. 537.

3. Certificate of indefeasible title — Effect of as to reservation omitted from conveyance.]—The plaintiff sold a lot to R., reserving to himself in the conveyance a right of way across the lot. The conveyance was duly registered, and subsequently R. sold the lot to the defendant without reservation. A certificate of indefeasible title was issued to the defendant. After the defendant had purchased, the plaintiff continued to use the right of way for over four years, when the defendant prevented its further use by the plaintiff by fencing it:—Held, that the indefeasible title in fee

simple held by the defendant was a bar to any claim by the plaintiff to a right of way over the land. The plaintiff has not registered his easement, and to declare him entitled thereto would be to ignore the provisions of sec. 104 of the Land Registry Act, 1911, cap. 127. *Sorensen* v. *Young*, (1919) 27 B.C.R. 335; (1920) 1 W.W.R. 189.

EJECTMENT.

See LANDLORD AND TENANT.

See TRESPASS.

EJUSDEM GENERIS.

See CONTRACTS.

See STATUTES.

ELECTIONS.

I. VOTERS, 445.
II. RECOUNTS, 445.
III. CONTROVERTED ELECTIONS, 446.
A. Practice and procedure, 446.
B. Avoidance of election, 446.

I. VOTERS.

Householders—Soldiers in barracks.]—Statutes conferring the right of franchise should be construed liberally, particularly when the history of the Act shews that the tendency has been to broaden or enlarge the scope of the Act as time progresses. Soldiers in barracks are "householders" within the meaning of the Municipal Elections Act, as they physically occupy a portion of a building which is used exclusively as a dwelling. The permanent corps of Canada is a part of the active militia within the meaning of sec. 54 (168) of the Municipal Act. *In re Municipal Elections Act and Corporation of Esquimalt*, (1922) 31 B.C.R. 474; (1923) 1 W.W.R. 1185.

II. RECOUNTS.

Minor infraction of statute—Absentee voters.]—An election is not necessarily void if there are minor irregularities or breaches of the rules of procedure under the Provincial Elections Act, 1924, where the election has been conducted within the general spirit of the statute and the question of violation of the secrecy of the ballot is not involved. Where a returning officer gives out a ballot paper to an absentee voter, which in the course of his duty he is not permitted to do until an affidavit of the voter is sworn and delivered to him, and there is no evidence either for or against that having been done, it is a presumption of law that the officer did not commit a breach of his duty in giving out a ballot paper without having obtained the requisite affidavit. *Re Dewdney Election, Smith* v. *Catherwood (No. 2)*, (1925) 36 B.C.R. 98; (1925) 3 D.L.R. 770; (1925) 3 W.W.R. 54.

III. CONTROVERTED ELECTIONS.

A. Practice and Procedure.

Security for costs.]—A petition under the Municipal Elections Act cannot be proceeded with until security for costs is given under sec. 98 sub-sec. (3) of the Act. *Davies* v. *Mills*, (1930) 42 B.C.R. 506; (1930) 2 D.L.R. 997; (1930) 1 W.W.R. 672.

B. Avoidance of Election.

1. Tie.]—A statute laying down procedure upon an election must be strictly complied with. Where a tie vote was recorded and the returning officer drew lots instead of giving the casting vote as directed by statute, a new election was ordered. *In re Municipal Elections Act and Tomsett*, (1924) 33 B.C.R. 377; (1924) 1 D.L.R. 921.

2. Municipal election—Irregularity.]—Where an election is conducted in accordance with the provisions of the statute, but an irregularity is committed by the deputy returning officer, if such irregularity does not materially affect the result the Court will not void the election. *Smiley* v. *Evans*, (1927) 38 B.C.R. 468; (1927) 4 D.L.R. 629.

3. Quo warranto.]—Where six aldermen were to be elected to the council of a municipality and it is alleged that eight were nominated and that the returning officers after publicly declaring the names of the candidates and the place and time for a poll

issued a notice purporting to disqualify two of the candidates and declaring the other six elected by acclamation, proceedings by quo warranto may be taken to determine by what authority the persons declared to be elected exercise the office of aldermen. As this is not a contested election within the meaning of sec. 92 of the Municipal Elections Act, R.S.B.C. 1911, cap. 71, relief by way of quo warranto is still open. *Rex ex rel. McFarlane* v. *Balment*, (1915) 8 W.W.R. 111.

EMINENT DOMAIN.

See ARBITRATION.
See COMPULSORY PURCHASE.
See MUNICIPAL CORPORATIONS.
See RAILWAYS.

EMPLOYER'S LIABILITY.

See MASTER AND SERVANT.
See WORKMEN'S COMPENSATION.

EMPLOYMENT AGENCIES.

Fees.]—The provisions of sec. 3 of the Employment Agencies Act Repeal Act of British Columbia, 1919, cap. 26, are aimed at the collection of fees from employers as well as from employees, the purpose of the Act being to prevent the exploitation of the working-man. The fact that sec. 3 of the Employment Agencies Act Repeal Act Amendment Act, 1921, provides that "employment agencies" shall furnish certain periodical reports, does not imply a repeal of sec. 3 of cap. 26, 1919. Such agencies may exist but they must make no charge against either employer or employee for bringing them together. *Rex* v. *Joy*, (1923) 3 W.W.R. 214.

ENGLISH LAW.

See ADMIRALTY.
See COURTS.

EQUITY.

I. ACQUIESCENCE, 448.
II. LACHES, 449.
III. CONTRIBUTION AND INDEMNITY, 451.
IV. MERGER, 451.
V. ELECTION, 452.
VI. SUBROGATION, 452.
VII. PURCHASER FOR VALUE WITHOUT NOTICE, 453.

I. ACQUIESCENCE.

1. Arbitration—Misconduct of arbitrator—Waiver.]—On an application to set aside an award on the ground of misconduct by one of the arbitrators, it appeared that after the proceedings before the arbitrators were closed, counsel for the objecting party, with knowledge of the alleged misconduct, attended on an application and consented to an order extending the time for the arbitrators to make their award:—Held, that the act of consent to extension of time, and recognition of the propriety of the arbitrators making the award, is of the nature of an estoppel, and precludes objection to the award on the ground of misconduct. *Powis* v. *City of Vancouver*. *Ramage* v. *City of Vancouver*, (1916) 23 B.C.R. 180.

2. Municipal highway — Thirty years' user—Estoppel.]—Under and by virtue of a survey made in 1872 the defendant Municipality claimed the right to open up a public road through the plaintiff's property. When the old survey was made the land was a pre-emption, and on the issue of a Crown grant no reservation was made for a road nor was it even used as such since the formation of the defendant Municipality in 1895. A former owner of the land had agreed to give the Municipality another strip for a road in lieu of portion set off for that purpose in the old survey and in accordance with this agreement a road was constructed and has been continuously in use as a public highway. The assertion of the right to open the road in accordance with the old survey the plaintiff contended was a cloud on the title which should be removed:—Held, that irrespective of whether the Municipality had the power to make the exchange when the present road was built, it is a highway used by the public, and in view of the length of time which has elapsed since the old survey was made the Municipality is estopped from opening up a road in accordance with the old plans. *British Columbia Hop Co.* v. *Corporation of*

Kent, (1925) 35 B.C.R. 380; (1925) 3 D.L.R. 171; (1925) 2 W.W.R. 31.

3. Sale of land—Representation as to location—Possession—Estoppel.]—Where a vendor goes on the land with the prospective purchaser and points out and defines by his surveyor then present for the express purpose the exact boundaries of the lot he is selling, and after the surveyor has then and there located the lot and a wrong description of it supposed to define and represent the actual location is inserted in the deed, and the purchaser receives his deed and takes possession of the lot which has been pointed out to him and retains peaceable possession thereof for sixteen years and makes valuable improvements thereon during that period, the vendor is estopped from disputing the purchaser's right to possession and title. *McDonald* v. *Knudsen*, (1928) 40 B.C.R. 25; (1928) 3 D.L.R. 242; (1928) 2 W.W.R. 577.

4. Trustee—Administration of estate—Sale of assets — Acquiescence of beneficiary.]—Where an executor carries on the testator's business with the concurrence and approval of the sole beneficiary, and at her request allows the business to be assigned to a company incorporated to avoid the risk of personal liability, with the consent of the only undischarged creditor of the estate, the beneficiary by reason of acquiescence is estopped from alleging a breach of trust on the part of the trustee. *McCallum* v. *Toronto General Trusts Corporation*, (1930) 43 B.C.R. 342; (1931) 4 D.L.R. 926.

II. LACHES.

1. Surrender of shares in company—Validity—Lapse of time.]—The plaintiff procured the incorporation of a company for the purpose of taking over the assets of a business of which he was the principal owner accepting fully paid shares in consideration of the transfer of the assets, and later it was discovered that the liabilities of the business substantially equalled the value of the assets, and a compromise agreement was entered into whereby the plaintiff surrendered his shares to the company and agreed to take in lieu thereof whatever shares the company should vote him. The company continued under a new management, and the shareholders did not vote for any compensation to the plaintiff in lieu of the shares which he had given up. In an action brought by the plaintiff more than twenty years after the last transaction to recover his shares which had been surrendered:—Held, that the compromise agreement was valid and within the power of the company and did not bring about a real reduction of capital or constitute a purchase by the company of its own shares or prejudice creditors, and that it would be inequitable to restore the shares to one who was a party to every step taken, after twenty years' silence on his part. *Patterson* v. *Vulcan Iron Works*, (1930) 42 B.C.R. 300; (1930) 2 D.L.R. 961; (1930) 1 W.W.R. 640.

2. Oral agreement—Proceeds of sale—Trust.]—An oral agreement between a free miner and two prospectors whereby the latter are to perform on a certain mineral claim whatever work is necessary to keep up all assessments, record the same, manage and look after the claim, place it under Crown grant, handle, option and sell it, is no mere contract for work and labour, but makes the prospectors agents of the free miner in what they are to do, and establishes a fiduciary relationship whereby the prospectors must in equity be held to have become trustees for the miner, and they or their representatives must account to him for all sums of money received thereunder. Under such arrangement, an action by the free miner for a share of the proceeds received and a declaration of trusteeship in respect to the moneys paid to the prospectors, is not "asserting an interest in a mineral claim which has been located and recorded by another free miner" and sec. 19 of the Mineral Act (R.S.B.C. 1924, cap. 167) does not apply. Nor is the action barred by the Statute or Frands (R.S.B.C. 1924, cap. 95), the agreement, being one only for the division of the proceeds of the sale of land, does not come within the 4th section of the statute. When the action is not barred by any statute of limitations, mere lapse of time is not sufficient to deprive one of his equitable rights. In order to decide whether the remedy should be granted or withheld, the Courts must examine the nature of the acts done in the interval, the degree of change which has occurred, how far they have affected the parties, and where lies the balance of justice and injustice. Under an agreement for a division of the proceeds of a sale, the claimant can wait until the sale is completed by the payment of the price before starting his action for an account and for his share of the proceeds. *Harris* v. *Lindeborg*, (1931) S.C.R. 235; (1931) 1 D.L.R. 945.

III. Contribution and Indemnity.

1. Mortgage—Indemnity in respect of taxes.]—The plaintiff, being the assignee of a mortgage, latter containing covenants to pay principal, interest and taxes, was held entitled to indemnity against the mortgagor in respect of taxes paid by the mortgagee to protect the mortgaged lands notwithstanding that the plaintiff at the date of paying the taxes was not the owner of the mortgage, having assigned the same to another person but with a guarantee as to principal and interest, that the mortgagor had sold the lands to transferees who had undertaken to relieve him of the mortgage, that the receipts for the taxes so paid were necessarily taken in name of the mortgagor, and that the plaintiff had taken a second mortgage from the transferees containing a covenant to pay taxes with right to the mortgagee to pay them on default. *British Columbia Land and Investment Agency Ltd.* v. *Robinson*, (1923) 32 B.C.R. 375; (1923) 4 D.L.R. 416; (1923) 3 W.W.R. 113.

2. Sale of property subject to mortgage —Implied contract to indemnify grantor.]—If an estate is sold subject to a mortgage the purchaser taking it with knowledge of the mortgage is liable in equity to indemnify the vendor against the encumbrance. *Walker* v. *Woodyatt*, (1931) 44 B.C.R. 110; (1931) 3 D.L.R. 516; (1931) 2 W.W.R. 306.

IV. Merger.

1. Quit claim by mortgagor.]—A mortgagee who takes a quit claim deed from the mortgagor, expressed to be in satisfaction of all claims against the mortgagor, but who registers the quit claim deed subject to his mortgage, does not thereby let in as a first charge a judgment registered against the mortgagor between the dates of the mortgage and the quit claim deed. The taking of the quit claim deed creates no merger of the mortgage unless the mortgagee so intends, and registration in the way mentioned negatives such intention. The mortgagee may exercise the power of sale in the mortgage, although the mortgagor is released from personal liability. *In re Land Registry Act; British Columbia Land and Investment Agency Limited* v. *Waldron Apartments Limited*, (1929) 41 B.C.R. 74; (1929) 3 D.L.R. 723; (1929) 1 W.W.R. 739.

2. Declaration of intention.]—Where a mortgagor by his will devised the mortgaged lands to the mortgagee, the mortgagee does not merge in the inheritance if the mortgagee's declaration and conduct indicate her intention to maintain the mortgage separate from the inheritance. The assignment of the mortgage as collateral security with a declaration that it is a good and subsisting mortgage is evidence of that intention. The mortgagee having elected to treat the mortgage as a separate portion of her estate it remains so until her death unless in the meantime she has altered her election, and is a part of her personal estate to be distributed by the administrator if she dies intestate and does not descend to her heirs by inheritance. *In re Parshalle; Kunhardt* v. *Cox and Quaille*, (1930) 43 B.C.R. 68; (1930) 3 D.L.R. 1004; (1930) 2 W.W.R. 802.

V. Election.

Devise in violation of agreement—Compensation.]—A wife having given her husband a quit claim deed to certain property, verbal evidence may be given to shew the terms of an agreement between the husband and wife which induced the wife to give the quit claim and to shew that the husband was to give the property to his daughter by will. The husband having in violation of the agreement devised the property to a third party, but having amply provided for the daughter by devising other properties to her, the doctrine of election arises, and the daughter if she wishes to retain the specific property devised to the third party, must compensate such third person from the other properties devised to her. Where it is impossible to enforce a judgment ordering compensation to be made because the trustee has not been made a party to the action, the Court will dismiss an action for specific performance of the agreement. *Stoddard* v. *Williams*, (1923) 32 B.C.R. 43; (1923) 1 D.L.R. 1113; (1923) 1 W.W.R. 688.

VI. Subrogation.

Principle of.]—The principle of subrogation is an equitable one merely and will be carried out in the exercise of a proper equity discretion with due regard to the legal and equitable rights of others. *Royal Bank of Canada* v. *B.C. Accident Insurance Co.*, (1917) 24 B.C.R. 197; 35 D.L.R. 650; (1917) 2 W.W.R. 898.

VII. PURCHASER FOR VALUE WITHOUT NOTICE.

Company — Transfer of shares — Debt owing to company by transferor.]—Where the transferee of shares in a company applies for and obtains registration of the shares on the company's register, the company may not deduct from the dividends payable in respect of the shares a debt owing by the transferor to the company, of which the transferee had no notice or knowledge, notwithstanding that the transfer was expressed to be in trust, unless the transferor was in fact the cestui que trust or unless the shares appear to be pledged for collateral security and the real owner's name appears on the company's books. *Wilson* v. *B.C. Refining Co.*, (1915) 21 B.C.R. 414; 22 D.L.R. 634; 8 W.W.R. 838; 31 W.L.R. 381.

See DEEDS AND OTHER INSTRUMENTS.
See ESTOPPEL.
See MISREPRESENTATION AND FRAUD.
See RECTIFICATION.
See SPECIFIC PERFORMANCE.
See SUCCESSION DUTY.
See VENDOR AND PURCHASER.
See WILLS.

ESCHEAT.

See CONSTITUTIONAL LAW.

ESTATE DUTIES.

See PROBATE.
See SUCCESSION DUTIES.

ESTOPPEL.

I. BY RECORD, 453.
II. BY DEED, 456.
III. BY CONDUCT, 459.

I. BY RECORD.

1. Res Judicata.]—The plaintiff brought an action to recover possession of certain buildings, plant and fixtures, founding his claim on a memorandum of agreement. He had previously brought action for possession of the same property and for other material in addition, founded upon the same memorandum of agreement and it was held that the instrument was at an end and the action was dismissed. On the pleadings in the former action he could have raised the question of his right to possession of the material he now claims:—Held, that the matter in question is res judicata and the action should be dismissed. *Winter* v. *Dewar & Co., Ltd.*, (1929) 41 B.C.R. 336; (1929) 4 D.L.R. 389; (1929) 2 W.W.R. 518.

2. Res Judicata.]—On the question of res judicata the test is whether the issues sought to be set up were disposed of on the former trial. The discovery of new evidence has no bearing on the case. *Williams* v. *Richards*, (1917) 25 B.C.R. 19.

3. Res judicata—Dismissal of counterclaim—Quaere.]—Where a judgment is registered dismissing a counterclaim the plaintiffs by counterclaim can again raise the issues involved therein if the judgment therein was not rendered upon the same points as are sought to be established in the second action. *Cameron Investment and Sec. Co.* v. *City of Victoria*, (1920) 3 W.W.R. 1043.

4. Consent judgment in previous action.]—Where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which were not brought forward only because they have from negligence, inadvertence, or even accident, omitted part of their case. *Canada Permanent Corporation, Ltd.* v. *Christensen*, (1929) 41 B.C.R. 258; (1929) 3 D.L.R. 864; (1929) 2 W.W.R. 198.

5. Consent judgment.] — A consent judgment should be regarded as a judgment pronounced after a hearing on the merits. *Ibid.*

6. Interest in mineral claims—Transfer to company.]—One having an interest in mineral claims who consents to a transfer of the claims in their entirety to a company formed to take them over, and who was to receive shares in the company as a bonus for financing it, cannot attack the

validity of the transfer for the purpose of regaining, in addition to the shares, his interest in the claims. *Chassy* v. *May & Gibson Mining Co., Ltd.*, (1921) 68 D.L.R. 427; (1922) 2 W.W.R. 225; Affg. (1920) 29 B.C.R. 83; (1921) 1 W.W.R. 69.

7. As against joint debtors.]—A judgment recovered against one of two or more joint debtors is a bar to further action against another joint debtor. A default judgment is in the same category as an order drawn up and signed by a judge and duly entered and the plaintiff cannot have it set aside and have a joint debtor added as a party. *Hudson's Bay Co.* v. *Scott*, (1929) 4 D.L.R. 978; (1929) 3 W.W.R. 232. See *Bank of Hamilton* v. *Copp*, (1924) 3 W.W.R. 323; *R. N. Johnston & Co. Ltd.* v. *Finkleman*, (1926) 37 B.C.R. 95; (1926) 2 D.L.R. 425.

8. Contract of indemnity — Judgment against person indemnified.]—A defendant who has covenanted to indemnify the plaintiff against liabilities and actions in respect of a bond of indemnity given for the defendant by the plaintiff, is as between himself and the plaintiff estopped from disputing the judgment given in an action against the plaintiff of which the defendant has had notice and in the defence whereof he has refused to assist. *London Guarantee & Accident Co.* v. *Davidson*, (1925) 36 B.C.R. 301; (1926) 1 D.L.R. 66; (1926) 1 W.W.R. 148.

9. Master and workman—Action after workmen's compensation awarded.]—Where a plaintiff has already successfully pursued a remedy under the Workmen's Compensation Act he cannot renounce it and pursue an alternative remedy in admiralty. *Dagsland* v. *The "Catala,"* (1927) 38 B.C.R. 440; (1928) 3 D.L.R. 334; (1928) Ex. C.R. 83.

10. Judgment by default rectifying a Crown Grant.]—Where a plaintiff by petition of right claimed rectification of a Crown grant of a mineral claim by striking out the defendant's name, and the defendant entered an appearance in the action but did nothing more, and judgment was rendered striking out the defendant's name from the Crown grant pro confesso, the defendant is estopped from setting up that the plaintiff was actually trustee of an undivided one-half interest in the said mineral claim at the time of the rectification of the Crown grant. *Larson* v. *Montgomery*, (1930) 43 B.C.R. 89; (1930) 3 D.L.R. 966; (1930) 2 W.W.R. 796.

11. Foreclosure order by consent—Res judicata.]—The plaintiff consented to a foreclosure order in an action brought by the defendant and later entered into a verbal arrangement with the defendant whereby it was agreed that the plaintiff should be allowed to collect rents and profits of the foreclosed property until the same had been sold. The defendant having instructed the tenants of the property to pay no further rentals to the plaintiff the latter brought action against the defendant for a declaration as to his rights under the agreement, and an order for service of the writ of summons in the action was set aside on the defendant's application. The plaintiff then brought action to recover the amount of the rents to which he claimed to be entitled under the verbal agreement:—Held, that res judicata does not apply as the agreement for payment of the rents and profits to the plaintiff did not affect the foreclosure in the original action, and that the setting aside of the plaintiff's first writ for a declaration of his rights does not prevent him bringing a new action for other relief although arising out of the same state of facts. *Jones* v. *Ryder*, (1928) 39 B.C.R. 547; (1928) 3 D.L.R. 301; (1928) 2 W.W.R. 302.

12. Company—Contributory.]—A person whose name is placed upon the list of contributories by the District Registrar and does not take steps to have his name removed therefrom, is not on the list because he is legally a shareholder of the company but because by reason of estoppel by record he cannot be heard to say that he is not a contributory. *In re Dominion Trust Co.*, (1918) 25 B.C.R. 214; (1918) 1 W.W.R. 648.

13. Res judicata.]—A decision cannot be pleaded in estoppel unless the Court pronouncing it has jurisdiction to decide the question at issue. *Hanna* v. *Costerton*, (1918) 26 B.C.R. 347; (1919) 1 W.W.R. 930; 44 D.L.R. 478.

II. By Deed.

1. Reservation of minerals—Registration—Right of way and entry—Charge.]—Reservations in a conveyance of "all coal, coal oil, petroleum, oil springs, iron and fire clay within, upon or under the same" are exceptions and reservations from the grant and not easements, and should not be registered as charges. A certificate of indefeasible title may issue subject to these reservations, a memorandum of which

should be indorsed on the certificate. Incorporeal rights such as rights of entry and rights of way are easements, but if they are easements of necessity incidental to the getting of the minerals, it is not necessary to register them as a charge. *Alberni Land Co., Ltd.* v. *Registrar General of Titles*, (1918) 25 B.C.R. 273; 40 D.L.R. 142; (1918) 2 W.W.R. 537.

2. Right of way reserved in conveyance — Effect of registration of subsequent conveyance without reservation.] — The plaintiff sold a lot to R., reserving to himself in the conveyance a right of way across the lot. The conveyance was duly registered, and subsequently R. sold the lot to the defendant without reservation. A certificate of indefeasible title was issued to the defendant. After the defendant had purchased, the plaintiff continued to use the right of way for over four years, when the defendant prevented its further use by the plaintiff by fencing it:—Held, that the indefeasible title in fee simple held by the defendant was a bar to any claim by the plaintiff to a right of way over the land. The plaintiff has not registered his easement, and to declare him entitled thereto would be to ignore the provisions of sec. 104 of the Land Registry Act, 1911, cap. 127. *Sorenson* v. *Young*, (1919) 27 B.C.R. 335; (1920) 1 W.W.R. 189.

3. Sale of hotel—Beer license.]—One who takes an assignment of a lease of licensed premises and a bill of sale of the furniture therein, and of the payment of a portion of the purchase price and giving a chattel mortgage for the balance, enters into possession, but being neither a voter nor entitled to registration as a voter is not qualified by law to hold a beer license or accept a transfer thereof, is estopped from asserting that there is any contract between himself and the vendor other than the bill of sale and assignment, notwithstanding that the vendor had throughout the negotiations assumed that the purchaser was qualified to hold a beer license. *Engleblom* v. *Blakeman*, (1930) 42 B.C.R. 259; (1930) 2 D.L.R. 824; (1930) 1 W.W.R. 565.

4. Release of mortgage.]—The defendant, against whose property the plaintiffs held a mortgage, arranged with a third person that certain moneys of his in the hands of an agent should be used to retire the mortgage, whereupon a new mortgage would be given to the third person to secure the loan. The agent procured a release of the first mortgage to be executed by the plaintiffs and returned to him, whereupon he prepared a mortgage in favour of the second mortgagee which was executed by the defendant who subsequently paid interest thereon. After a year from the date of delivery of the release the agent absconded without having paid the plaintiffs the money for which the release was given: —Held, that the plaintiffs having put it in the power of the wrongdoer to commit the wrong, they should bear the loss, and are estopped from asserting that the mortgage had not been paid after the release duly executed and acknowledging payment had been exhibited to the defendant and to the mortgagee. *Thom and Lamont* v. *Walker*, (1930) 43 B.C.R. 142; (1930) 3 D.L.R. 915; (1930) 3 W.W.R. 33.

5. Endorsement of share certificate in blank.]—When the form of transfer on the back of a share certificate has been signed by the registered owner, but the space for the name of the transferee is left blank, delivery of the certificate so signed by the owner, or on his authority, transmits the title to the shares, both legal and equitable. Where therefore the owner of a certificate so signed delivers it to another party, he is estopped from asserting his title as against a person to whom such party has disposed of it, and who has received it in good faith and for value. *Macdonald* v. *Bank of Vancouver*, (1915) 22 B.C.R. 310; 25 D.L.R. 567; 32 W.L.R. 339; 9 W.W.R. 8.

6. Deed executed by attorney.]—The maker of a deed is estopped from denying the truthfulness of a recital stated therein where it was executed by an attorney lawfully authorized by power of attorney. *Dinsmore* v. *Philip*, (1918) 26 B.C.R. 123; (1918) 1 W.W.R. 405.

7. Lease—Breach by tacit agreement.] —Although a lessor may have the right to claim forfeiture of the term under a lease owing to breach of certain covenants by the lessee as to subletting and the use to be made of the premises, he may nevertheless be estopped by his conduct from claiming such forfeiture where in a long course of dealing with his lessee he stands by and tacitly agrees to the breaches which occur from time to time, thereby causing the lessee and others interested to believe that their acts are not to be used as a foundation to enforce a forfeiture. *Orpheum Theatrical Co.* v. *Rostein*, (1923) 32 B.C.R. 251; (1923) 4 D.L.R. 499; (1923) 2 W.W.R. 582.

8. Lease by company—Breach—Knowledge of secretary.]—In the case of a lessor being a limited company it may not be bound by the knowledge of its secretary and manager as to the manner in which covenants were being broken, but in the circumstances of the present case, the lessor, a limited company, was held bound by such knowledge, as after a written warning by the company the lessee did not commit any new breach and endeavoured to comply strictly with the terms of the lease. *Ibid.*

9. Lease—Acceptance of rent—Forfeiture.]—Acceptance of rent by a lessor after breach by the lessee, but before action, shews a definite intention to treat the lease as subsisting, and precludes the lessor from taking advantage of any breach that had previously taken place. Acceptance by the lessor of moneys paid as rent after an action for possession is brought by him, may not be a waiver of forfeiture for breach of the lessee's covenants. *Ibid.*

10. Mortgage — Signature obtained by misrepresentation — Non est factum.] — Where the owner of property has been induced to sign a mortgage by the fraudulent representation of a person, other than the mortgagee, that the deed is not a mortgage, the owner is not estopped from denying that it is his deed unless he owed a duty to the mortgagee, and where there were no relations of any kind between the owner and the mortgagee there can be no such duty. *Cooil* v. *Clarkson*, (1925) 35 B.C.R. 308; (1925) 2 D.L.R. 493; (1925) 1 W.W.R. 1094.

11. Deposit of title deed — Name of transferee in blank.]—Where the owner of land delivers a transfer thereof not under seal executed in blank as to name of the transferor, and the person to whom it is delivered deposits it with another as security for an advance, the latter does not obtain an equitable mortgage of the land as against the owner, who is not estopped from denying the legality of the act or that the document was worthless as it stood. The lender is not entitled to rectification, having accepted a worthless document with notice of its defect. *In re Hans C. Christensen: Tom* v. *Everett*, (1928) 40 B.C.R. 383; (1928) 4 D.L.R. 668; (1928) 3 W.W.R. 314, 432.

III. By Conduct.

1. Municipality closing highway—Land obtained in lieu—Declaration.]—Where a municipality has induced an owner of land to transfer to it land for use as a highway by clearly evincing an intention and permitting the land-owner to close up another road across his land, it cannot afterwards deny the intention to close the latter and that it should remain closed. Under such circumstances the land-owner is entitled to a declaration in effect preventing the municipality from opening up the closed road. *British Columbia Hop Co. Ltd.* v. *District of Kent*, (1925) 35 B.C.R. 380; (1925) 3 D.L.R. 171; (1925) 2 W.W.R. 31.

2. Representation—Receipts for goods delivered.]—Where during a lengthy period a customer has signed receipts for goods delivered from time to time, the customer will afterwards be estopped from denying the accuracy of the quantities mentioned in the receipts, although it be proved that the truckman delivering the goods was in the habit of stealing some, and had confessed such theft. *Lake of the Woods Milling Co.* v. *Gold*, (1925) 34 B.C.R. 481; (1925) 1 D.L.R. 778; (1925) 1 W.W.R. 386.

3. Company—Repudiation of application for shares.]—One who has applied for shares in a company, understanding that he is to receive treasury shares and who in fact receives shares owned by another person is entitled to repudiate ownership thereof and is not estopped by his knowledge that his name appeared on the company's register as a shareholder or the fact that he received dividends and later contributed funds to assist in rehabilitating the company before ascertaining that he had not received treasury shares. *American Seamless Tube Corporation* v. *Goward*, (1931) 43 B.C.R. 407; (1931) 1 D.L.R. 878; (1931) 1 W.W.R. 509.

4. Estoppel in Pais.]—Estoppel in pais can only be set up in transactions between the parties to the action or persons claiming through a party. *Ibid.*

5. Insurance—Conduct of insurer.]—Notwithstanding that the person insured may have been guilty of a breach of a statutory condition contained in his policy, if the breach came to the knowledge of the insurer, and its solicitor by continuing to defend an action upon the policy could only do so upon the assumption that the policy was valid and subsisting, the insurer is thereby estopped from raising the defence that the policy was avoided by the alleged breach of condition. *Cadeddu* v. *Mount Royal Assurance Company*, (1929) 41 B.C.R. 110; (1929) 2 D.L.R. 867; 2 W.W.R. 161.

6. Company—Shares transferred—Retention of dividend for transferor's debt.]—Where a company has registered a transfer of shares and entered the transferee on its register as the holder thereof it cannot retain dividends accruing in respect of the shares in question as a set-off against indebtedness of the transferor to the company. *Wilson* v. *B.C. Refining Co. Ltd.*, (1915) 21 B.C.R. 414; 22 D.L.R. 634; 31 W.L.R. 381; 8 W.W.R. 838.

7. Reconstruction of company—New company — Contributories — Estoppel.]—Upon the organization of a new company for the purpose of taking over the business and assets of an existing company the shareholders of the old company do not become shareholders of the new company and liable as contributories, upon receiving dividends and participation in the business of the latter, unless shares in the new company are in fact allotted to them. *In re Dominion Trust Co. and Allan*, (1917) 24 B.C.R. 450; 37 D.L.R. 251; (1917) 3 W.W.R. 483.

8. Company—Winding-up — Contributory.]—If in the winding-up of a company which was founded to acquire the business and assets of another company by way of reorganization, the name of a shareholder in the original company appears on the registrar's list as a contributory of the new company which is being wound up and the shareholder fails to appeal from the registrar's finding, he remains a contributory by reason of estoppel by record and not because he is regularly a shareholder of the original company. *In re Dominion Trust Co.*, (1918) 25 B.C.R. 214; (1918) 1 W.W.R. 648.

9. Company—Managing director—Ordinary course of business.]—Where a company holds out its managing director as having authority to make contracts between the company and others and to sign negotiable instruments in the ordinary course of its business, it is not estopped from denying that the managing director was not authorized to indorse notes or give a guarantee for the accommodation of others as such a transaction is not in the course of the company's business but contrary thereto. *National Pole and Treating Co.* v. *Blue River Pole and Tie Co. et al.*, (1930) 43 B.C.R. 98; (1930) 3 D.L.R. 996.

10. Society—Member of managing committee.]—A member of the managing committee of a co-operative association who has in that capacity given effect to a bye-law of the society is estopped from setting up in a subsequent action brought by a society against himself that the bye-law is irregular. *Merritt, etc. Society* v. *Young*, (1916) 10 W.W.R. 944; 34 W.L.R. 826.

11. Principal and agent — Implied authority.]—Although an agent may have authority to sell chattels, the principal is not estopped from denying the right of the agent to receive the proceeds thereof, and payment to an agent without authority to receive payment does not discharge the debtor. *Aikman* v. *Burdick Bros.*, (1923) 33 B.C.R. 23; (1923) 4 D.L.R. 852; (1923) 3 W.W.R. 785; Revg. in part 31 B.C.R. 478; (1923) 1 D.L.R. 1165; (1923) 1 W.W.R. 914.

12. Arbitration—Misconduct of arbitrator—Waiver.]—Where one of the parties to an arbitration with knowledge of alleged misconduct of an arbitrator attends on an application and consents to an order extending the time for the arbitrators to make their award, he is estopped from objecting afterwards to the award on account of the alleged misconduct. *Powis* v. *City of Vancouver. Ramage* v. *City of Vancouver*, (1916) 23 B.C.R. 180.

13. Insurance—Automobile accident—Defence undertaken by insurer—Repudiation of liability.]—Where insurers undertake the defence of an action brought against the insured for damages resulting from a collision of motor cars with full knowledge of the failure of the plaintiff to give the notice and declaration required by the statutory conditions in the policy of insurance, they are estopped from alleging failure to comply with the statutory conditions, having undertaken the burden of defence, and repudiated during the litigation, not because of want of notice, but because they suspected that the respondent was intoxicated at the time of the accident, and withdrew from the defence on that account only. *McKnight* v. *General Casualty Insurance Co.*, (1931) 44 B.C.R. 1; (1931) 3 D.L.R. 476; (1931) 2 W.W.R. 315.

14. Note given bank to make appearance of assets—Liability.]—The defendant gave a promissory note to make an appearance of assets, so as to deceive the bank examiner in the State of Washington in connection with the account of a certain company. In an action by the bank to recover on the note, the Court held, affirming the judgment of the British Columbia Court of Appeal, that the case must be decided by the law of the State of Washington

and under that law the defendant was estopped from alleging want of consideration for the note, although the manager of the bank with whom the transaction was made had agreed, at the time the note was given, that he should not be liable. *Hay* v. *Allen*, (1922) 64 S.C.R. 76; 69 D.L.R. 193; (1922) 3 W.W.R. 366; Affg. 30 B.C.R. 481; 67 D.L.R. 248; (1922) 1 W.W.R. 646.

15. Cause of action arising after issue of writ—Defence — Traverse.]—Where a statement of claim includes an allegation setting up a cause of action which did not arise until after the writ was issued the defendant is not estopped from objecting to evidence in support of that cause of action even though he traversed the allegation by his defence. *Allison* v. *Standard Lumber Company*, (1924) 34 B.C.R. 257; (1924) 4 D.L.R. 465; (1924) 3 W.W.R. 481. (*See* APPEAL.)

16. Building contract — Assignment of moneys due under.]—A promise by the principals to pay to a bank, the assignee of the contractor, the money due under a building contract "until otherwise advised," does not estop them from setting up a term of the contract giving them the right to discharge, from the moneys still in their hands, any indebtedness for the work on the part of the contractor. *Ledingham* v. *Merchants Bank of Canada*, (1917) 24 B.C.R. 207; (1917) 2 W.W.R. 1016; 35 D.L.R. 191.

17. Execution against husband—Wife's goods—Admissions.]—Where an execution debtor's wife claims household goods which have been seized under execution, joint occupation of the premises has no weight against her claim especially when she is the registered owner thereof and the evidence of third parties will be admitted to shew that prior to the execution creditor's cause of action arising, the execution debtor had admitted that the goods belonged to his wife, and as the admissions were such as would estop him from subsequently claiming the goods as against his wife, the execution creditor would be in no better position. *North* v. *Sicilliano*, (1922) 31 B.C.R. 463; (1923) 1 D.L.R. 1149; (1923) 1 W.W.R. 551.

As to Asquiescence, Laches and Waiver,

See CONTRACTS.

See EQUITY.

See EVIDENCE.

EVIDENCE.

I. JUDICIAL NOTICE, 464.
- *A. Matters of public notoriety*, 464.
- *B. Public documents*, 465.
- *C. Proclamations*, 465.

II. PRESUMPTIONS AND BURDEN OF PROOF, 466.
- *A. In general*, 466.
- *B. Onus of proof of claims*, 468.
- *C. Onus of proof of defences*, 470.

III. BEST AND SECONDARY EVIDENCE, 472.

IV. DOCUMENTARY EVIDENCE, 473.
- *A. Judgments and judicial records*, 473.
- *B. Official records*, 474.
- *C. Records of corporation*, 475.
- *D. Crown grant*, 475.
- *E. Evidence previously taken or used*, 475.

V. PAROL AND EXTRINSIC EVIDENCE CONCERNING WRITTEN INSTRUMENTS, 477.

VI. OPINIONS, 481.

VII. CONFESSIONS, 482.

VIII. ADMISSIONS, 483.

IX. HEARSAY, 484.

X. RELEVANCY AND MATERIALITY, 484.

XI. WEIGHT: EFFECT: SUFFICIENCY, 485.
- *A. In general*, 485.
- *B. Corroboration*, 488.
  - 1. Sufficiency of, 488.
  - 2. Claims against estates of deceased persons, 489.

XII. WITNESSES, 491.

XIII. PRIVILEGE, 492.

XIV. EVIDENCE OUT OF COURT, 493.
- *A. Where examination out of Court will be ordered*, 493.
  - 1. Witnesses within the jurisdiction, 493.
  - 2. Witnesses abroad, 493.
- *B. Procedure to obtain*, 494.
- *C. Return and use of the evidence*, 494.

XV. AFFIDAVITS, 494.
- *A. Who may take*, 494.
- *B. Affidavit of counsel*, 494.
- *C. Jurat*, 495.

I. JUDICIAL NOTICE.

A. Matters of Public Notoriety.

1. Distance—Identity of names.]—Judicial notice cannot be taken of the fact that a particular place is within a certain judicial district or of the distance of one place from another or of the identity of a place referred to in one document with that

of a place referred to in another document, even though the names be the same. *Hynes* v. *Alton*, (1928) 3 W.W.R. 261.

2. Distance.]—Judicial notice cannot be taken of the distance of one place from another. *Rex* v. *Conway*, (1929) 3 W.W.R. 268; 52 C.C.C. 161.

3. Situation of place of trial within county.]—The situation of a town within the bounds of a county is a matter of public notoriety. A magistrate may take judicial notice of the fact that the town in which he is sitting is within the county in which he exercises his jurisdiction. *Rex* v. *Irwin*, (1919) 27 B.C.R. 226. *Rex* v. *Zarelli & Newell*, (1931) 43 B.C.R. 502; (1931) 2 W.W.R. 108; 55 C.C.C. 314. *McLelan* v. *Fletcher*, (1929) 41 B.C.R. 437; (1929) 4 D.L.R. 348; (1929) 2 W.W.R. 500. *Rex* v. *Cassandra*, (1929) 1 W.W.R. 866; 52 C.C.C. 326.

4. Well-known place.] — A Court will take judicial notice of the principal geographic features and well-known places within its jurisdiction. *Rex* v. *Payette*, (1924) 34 B.C.R. 312 at 314; (1924) 3 W.W.R. 863; 43 C.C.C. 90; (1925) 1 D.L.R. 112.

B. Public Documents.

Hudson's Bay Company's land tenures—Reserved area.]—Apparently there is no public document of which judicial notice could be taken defining the extent of the reserved areas round its "posts or stations" in British Columbia, such as there is in its deed of surrender of Rupert's Land to the Crown, dated the 19th of November, 1869, given under the Rupert's Land Act of 1868 (Martin's Hudson's Bay Company's Land Tenures, 1898, Appendix "Q," pp. 216, 222). *Dorrell* v. *Campbell*, (1916) 23 B.C.R. 500 at 509; 32 D.L.R. 44; (1917) 1 W.W.R. 500.

C. Proclamation.

Proclaimed railway orders.]—The publication of the orders and general train and interlocking rules under sec. 31 of the Railway Act, 1906, gives them the effect of statutes, of which the Courts are bound to take judicial notice; but the omission to publish them does not necessarily invalidate them; it merely necessitates their proof before the Courts can act on them. *McPhee* v. *Esquimalt & Nanaimo Ry. Co.*, (1915) 22 B.C.R. 67; 23 D.L.R. 561; 8 W.W.R. 1319; 32 W.L.R. 125.

II. Presumptions and Burden of Proof.

A. In General.

1. Affirmative and negative statements.]—As between affirmative and negative statements the presumption is that the affirmative statement is correct. *Dunphy* v. *Cariboo Trading Co.*, (1914) 21 B.C.R. 484; 29 W.L.R. 735; 7 W.W.R. 326.

2. Presumption of death — Absence over seven years.]—Where a wife has left her home, and her husband has endeavoured but has been unable to find any trace of her for seven years the Court will presume that she is dead. *In re Hilma Carlson*, (1923) 32 B.C.R. 24; (1923) 2 W.W.R. 798.

3. Presumption of death — Absence over seven years.]—Upon the petition of a wife it appeared that her husband had left the Province and that she had been unable to ascertain his whereabouts and had not heard from him for over eleven years. The only tidings she had of him were contained in a letter from an unknown woman in a foreign country written eight years before the date of the petition stating that her husband was living under an assumed name:—Held, that the death of the husband could be presumed. *In re Jesse Warren Ball*, (1923) 33 B.C.R. 162; (1924) 1 W.W.R. 33.

4. Disappearance from steamship at sea.]—On a petitioner's application for an order declaring that her husband should be presumed to be dead it was shown that the husband being in poor health had embarked upon a steamship at Prince Rupert, occupied a cabin and disappeared from his cabin and was not again seen, the door being locked from the inside. His luggage and personal effects were found in the cabin and a note of farewell had been left there. An order was made presuming the death of the husband on the day of his disappearance. *In re Honeyman*, (1930) 1 W.W.R. 999.

5. Negligence of servant.]—In an action alleging that the defendant's servant while driving the defendant's motor car negligently drove it so as to collide with the plaintiff's motor car causing damage, the fact that the servant was driving the defendant's car raises the presumption that it was being driven in the master's service, and unless the defendant adduces evidence to destroy this presumption the plaintiff is entitled to succeed. *McKay* v. *Drysdale*, (1921) 30

B.C.R. 81; 60 D.L.R. 458; (1921) 2 W.W.R. 592.

6. Presumption against fraud.] — The law presumes against fraud and in favour of honesty. Fraud must be distinctly and clearly proven in order to afford ground for decision on a contract. *Bank of Montreal* v. *Wiesdepp*, (1917) 24 B.C.R. 73; 34 D.L.R. 26; (1917) 2 W.W.R. 615.

7. Rebuttable presumption — Transfer by insolvent debtor.]—A debtor within three months before his assignment for the general benefit of his creditors, assigned a debt to one of his creditors without the intention of giving an unlawful preference. Under sec. 3 of the Fraudulent Preference Act such an assignment is deemed to be void as a fraudulent preference. Under sec. 64 (2) of the Bankruptcy Act, such an assignment is presumed prima facie to have been made with the view of giving such a preference, and the presumption is rebuttable. Sec. 3 of the Fraudulent Preferences Act has been rendered inoperative by the overriding enactment of sec. 64 of the Bankruptcy Act. While the Bankruptcy Act does not abrogate a Provincial Act merely because the latter deals with preferential transactions, yet with respect to such transactions a Provincial statute cannot be enforced if it provides that a certain result shall follow from circumstances which under the Dominion statute are followed by a different result. *Hoffar Ltd.* v. *Can. Credit Men's Trust Assn.*, (1929) 40 B.C.R. 454; (1929) 2 D.L.R. 73, 106; (1929) 1 W.W.R. 557; 10 C.B.R. 369, 374; (1929) S.C.R. 180.

8. Deposit of securities in contemplation of insolvency.]—Sec. 98 (1) of the Winding-up Act is ineffectual to support a recovery of all or a portion of the securities given by a company, unless the person taking such securities had knowledge that the condition of the affairs of the company was such as to border on insolvency at the time of obtaining the advances for which the security was given. The presumption in sec. 98 (2) that such securities were deposited in contemplation of insolvency is rebuttable, the burden of proof being cast upon the party receiving such securities of shewing that he had no intention of so receiving such securities or of defrauding the creditors. Evidence that the securities were obtained by pressure exercised upon the company may be material in discharging such onus. *Dominion Trust Co.* v. *Royal Bank of Canada*, (1920) 29 B.C.R. 169; 59 D.L.R. 224; (1921) 1 W.W.R. 90; 1 C.B.R. 397.

B. Onus of Proof of Claims.

1. Death—Evidence of.] — Those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases but sufficient evidence there must be, or the person asserting title will fail. *Campbell* v. *Cox*, (1929) 42 B.C.R. 120; (1930) 1 D.L.R. 649.

2. Produce Marketing Act.] — While under sec. 20 (b) of the Produce Marketing Act, the burden of proving that a product marketed in an area over which a committee had jurisdiction was not grown or produced within that area, or that the act complained of was not an act of marketing within the meaning of the Act, should be on the person accused of the marketing a product contrary to the Act or regulations, the Crown still has to give evidence of the acts of which it complains. *Rex* v. *Chung Chuck*, (1929) 42 B.C.R. 116; 52 C.C.C. 292; (1930) 43 B.C.R. 125; 54 C.C.C. 174.

3. Lord Campbell's Act — Pecuniary loss.]—In order to succeed in an action under Lord Campbell's Act it is necessary for the plaintiff to shew that he has lost a reasonable probability of pecuniary advantage. *Sanford* v. *Crossley*, (1931) 44 B.C.R. 481.

4. Motor driver sounding horn.]—Sec. 4 of the Motor-traffic Regulation Act Amendment Act, 1914, provides that "every motor shall be equipped with an alarm bell, gong, or horn, and the same shall be sounded whenever it shall be reasonably necessary to notify pedestrians and others of the approach of such motor":—Held, that in an action for negligence the onus is on the plaintiff to shew not only that it was reasonably necessary to sound the horn, but also that it was not sounded. *Holmes* v. *Kirk & Co.*, (1920) 28 B.C.R. 122; 53 D.L.R. 53; (1920) 1 W.W.R. 1037.

5. Agency of husband.]—A husband is not prima facie an agent for his wife by reason of their relationship. The onus is on the person alleging such agency to prove that he is her agent. *Millard* v. *Bevan Lumber and Shingle Co.*, (1928) 39 B.C.R. 430; (1928) 2 D.L.R. 367.

6. Indecent assault.]—In an action for damages for indecent assault the burden of proof is on the plaintiff. *Montgomery* v. *McKenzie*, (1923) 32 B.C.R. 232.

7. Administrator's action against guarantor.]—*In an action against a guarantor* of a debt alleged to be payable to the estate

of a deceased person, the administratrix of the estate must establish the fact that the debt is still unpaid. *Ivey* v. *Smith*, (1929) 40 B.C.R. 475.

8. Minerals — Adverse claims.] — The onus is on both parties to an adverse claim to establish their title to the mineral claims in dispute and on the failure of both parties to establish title judgment will be given declaring the claims of both the plaintiff and defendant invalid. *Berg* v. *Bosence*, (1931) 44 B.C.R. 71; (1931) 3 D.L.R. 611; (1931) 2 W.W.R. 469.

9. Claim against estate of deceased.]—Where articles are claimed under donatio mortis causa the evidence of the claimant may be sufficient to establish such gift notwithstanding sec. 11 of the Evidence Act, 1911, especially where the circumstances tend to corroborate such evidence. *Imperial Canadian Trust Co.* v. *Winstanley*, (1922) 31 B.C.R. 448; (1923) 1 D.L.R. 1148; (1923) 1 W.W.R. 935.

10. Claim against estate of deceased.] —On a claim made by an executor for sums advanced to the deceased, where the claimant's account of the transactions with the deceased seemed reasonable and free from suspicion, and another witness, who testified of his own knowledge of the correctness of another claim of the claimant, also testified that he was told by the claimant of the alleged advances at the time they were made, it was held that there was corroborative evidence to uphold the claim. *In re Paxton Estate*, (1924) 2 W.W.R. 214.

11. Misrepresentation.]—In an action for damages suffered through the complainant having purchased property relying on statements made by the vendor, the burden is on the complainant to convince the Court that the statements were made falsely, either with knowledge of their falsity or with such recklessness as to amount to moral guilt, and that the statements were in regard to some material fact and an inducing cause leading him to enter into the contract. *Langley* v. *Hammond*, (1915) 21 B.C.R. 175; 22 D.L.R. 42.

12. Misrepresentation — Inducing cause.]—In an action for rescission of a contract for the sale of land on the ground of misrepresentation, it must be proved that the misrepresentation complained of was the inducing cause of the purchase, and whether it was or not is a question of fact to be determined by the trial judge and will not be interfered with by the Court of Appeal without strong reason. *Gagnon* v. *Nelson*, (1915) 21 B.C.R. 356; 22 D.L.R. 179; 8 W.W.R. 907; 31 W.L.R. 346.

13. Misrepresentation—Conduct of parties.]—The burden of proof is on the party alleging fraudulent misrepresentation to shew that the statements complained of are untrue to the knowledge of the person making them or were made with reckless carelessness as to their truth or falsity, and that it was intended that the party complaining should act upon them to his detriment. Misrepresentation if only a statement of opinion will not form a ground for redress. In considering the truth of allegation of fraudulent misrepresentation the conduct of the party complaining and all the surrounding facts will be taken into consideration. *Adair* v. *Tilton*, (1928) 40 B.C.R. 235; (1928) 4 D.L.R. 183; (1928) 3 W.W.R. 92.

14. Conveyance absolute in form — Trust.]—In an action by a husband to recover property standing in the name of his deceased wife, on the ground that the vesting of the property in her was in the nature of a trust for his benefit, the Court must be satisfied not only that the property was not purchased with her money, but that it was not intended as a gift to her, and in view of her death, the Court will require strict proof and must be thoroughly satisfied as to the truth of the evidence. *Trumbell* v. *Trumbell*, (1919) 27 B.C.R. 161; (1919) 2 W.W.R. 198.

C. Onus of Proof of Defences.

1. Solicitor's costs.]—In an action by a solicitor for his costs the onus is upon a defendant to prove payment of a bill of costs rendered by the solicitor. *Banton* v. *Amar Chand*, (1922) 1 W.W.R. 929.

2. Carrier — Railway — Restriction of liability.]—Where a railway company enters into a special contract restricting or limiting its liability in respect to the carriage of goods, the onus is upon the company to establish the contract, and in construing it a strict interpretation should be applied. Where it is necessary by statute to obtain the approval of any such special contract by order or regulation of the Board of Railway Commissioners failure to submit specific proof of such approval will render the special contract of no avail. If no defence has been adduced on behalf of the carrier proving that the contract has been approved by the Board, the special contract is of no

avail and the carrier is not relieved from liability. *Sporle* v. *Great Northern Railway Co.*, (1924) 34 B.C.R. 180; (1924) 4 D.L.R. 184; (1924) 3 W.W.R. 136; 30 C.R.C. 183. Revd. (1925) 35 B.C.R. 232; (1925) 3 D.L.R. 302; (1925) 2 W.W.R. 385; 30 C.R.C. 186.

3. Land—Adverse possession—Onus.]—Where the Statute of Limitations is raised as the defence to an action for possession of land, the onus is on the defendant to shew adverse possession for the requisite period to the satisfaction of the Court. *Attorney-General of Canada* v. *Gonzalves*, (1926) 1 D.L.R. 51. *Attorney-General of Canada* v. *Cummings*, (1926) 1 D.L.R. 52. *McIntyre* v. *Haynes*, (1925) 35 B.C.R. 40; (1925) 2 D.L.R. 546; (1925) 1 W.W.R. 881. *Burch* v. *Towder*, (1922) 69 D.L.R. 739; (1923) 1 W.W.R. 180.. *Kennedy* v. *Husband; Kennedy* v. *Ellison*, (1923) 1 D.L.R. 1069.

4. Dog—Injury caused by.]—In order to escape liability for damage for injury caused by a dog running at large the onus is on the owner to shew the peaceful nature of the dog and the owner's ignorance of any vicious propensity. *Kennedy* v. *McIntosh and Bardsin*, (1927) 39 B.C.R. 161; (1927) 4 D.L.R. 747; (1927) 3 W.W.R. 315. *Rex ex rel. Bigrigg* v. *Williams*, (1930) 42 B.C.R. 175; (1930) 2 D.L.R. 493; (1930) 1 W.W.R. 292; 53 C.C.C. 88.

5. Agistment.]—In an action against an agister for injury to animals the onus of proof is on him to shew that he took reasonable care for the safety of animals in his charge. *Pye* v. *McClure*, (1915) 21 B.C.R. 114; 22 D.L.R. 543; 8 W.W.R. 538. *Comstock* v. *Ashcroft Estates, Ltd.*, (1916) 23 B.C.R. 476; (1917) 1 W.W.R. 1412.

6. Bailee of animal.]—In an action against a hirer for injury to a horse while in his care, the onus is upon the hirer to shew that the injury was not caused through his fault. *Reinseth* v. *Campbell*, (1920) 52 D.L.R. 357.

7. Bailee of goods.]—The onus of proof is on a bailee to shew that damage to goods left in his care did not happen in consequence of his neglect to use such care and diligence as a careful and prudent man would exercise in relation to his own property. *Gibson* v. *Wilson & Downer*, (1922) 67 D.L.R. 410. *Romano* v. *Columbia Motors Ltd.*, (1930) 42 B.C.R. 168; (1930) 1 D.L.R. 815; (1930) 1 W.W.R. 159.

8. Innkeeper.]—An hotel keeper being the gratuitous bailee of baggage left in the premises purchased by him is liable for delivery of such baggage to an unauthorized person unless he can shew circumstances justifying him in delivering it. *Hansen* v. *Killick*, (1925) 35 B.C.R. 108; (1925) 3 D.L.R. 433; (1925) 1 W.W.R. 375.

9. Carrier—Damaged cargo.]—In an action by a shipowner against a carrier for breach of a contract to deliver goods in apparent good order and condition, the onus is upon the defendant, upon proof of failure so to deliver, to shew that the loss arose without his fault or neglect or that of his servants. *Corporation of the Royal Exchange Assurance* v. *Kingsley Navigation Co. Ltd.*, (1923) A.C. 235; 92 L.J.P.C. 111; 128 L.T. 673; 16 Asp. M.C. 44; 67 Sol. Jo. 296; (1923) 1 D.L.R. 1048; (1923) 1 W.W.R. 737. *Balfour Guthrie Co.* v. *Canadian Pacific Railway Co.*, (1917) 3 W.W.R. 410.

10. Quo warranto.]—On the hearing of an information in the nature of quo warranto proceedings to oust the respondent from his office as one of a committee of adjustment under the Dairy Products Sales Adjustment Act, the onus is on the respondent to prove that he is entitled to hold the office so attacked. *Rex ex rel. Whittaker* v. *Shannon*, (1930) 43 B.C.R. 129.

See CORROBORATION. *Infra.*

III. BEST AND SECONDARY EVIDENCE.

1. Photographic copies.]—A photographic copy (photostat) of original documents which are deposited as a public record in a Provincial department, with a letter from a public officer of the department in charge of the original record may be received in evidence, although the formal certificate required by sec. 32 of the Evidence Act, R.S.B.C. 1911, cap. 78 is not endorsed on such photographic copy. *Kennedy* v. *Husband; Kennedy* v. *Ellison*, (1923) 1 D.L.R. 1069.

2. Identification by photographs.]—The police may use photographs of a person whom they suspect of a crime for the purpose of identification but evidence of what was said when shewing photographs for such purpose will not be allowed. *Rex* v. *Harrison*, (1928) 40 B.C.R. 53; (1928) 3 D.L.R. 224; (1928) 1 W.W.R. 973; 49 C.C.C. 356.

3. Lost document—Evidence of contents.]—Where an agreement is contained in correspondence which has been lost, the contents of the correspondence can be proved by satisfactory evidence thereof, and the agreement thereby established, notwithstanding that the Statute of Frauds is pleaded, and evidence of a third party giving an account of a conversation as to the agreement made in the correspondence is admissible. *Stoddard* v. *Williams*, (1923) 32 B.C.R. 43; (1923) 1 D.L.R. 1113; (1923) 1 W.W.R. 688.

See Dinsmore v. *Philip. Infra.*

IV. DOCUMENTARY EVIDENCE.

A. Judgments and Judicial Records.

1. Conviction.]—A magistrate signed a conviction declaring liquor confiscated to the Crown under the British Columbia Prohibition Act, and properly noted the adjudication on the information, but later he inadvertently signed another document purporting to be a conviction in the same case which contained no adjudication of confiscation, and this document instead of the first signed conviction was by mistake forwarded to the County Court on appeal which was dismissed. In an action against the Crown officers for a return of liquor:—Held, that the true conviction could be adduced in evidence in this action as it has no relation to the County Court appeal. *Plant* v. *Urquhart*, (1921) 29 B.C.R. 488; 61 D.L.R. 211; (1921) 2 W.W.R. 324; (1922) 30 B.C.R. 461; 65 D.L.R. 242; 36 C.C.C. 339; (1922) 1 W.W.R. 632.

2. Proof of previous conviction.]—Where the certificate of the registrar of a County Court, produced as evidence of a previous conviction, contains no proof or statement that his office is one in which convictions are returned or that a conviction of the nature referred to was so returned, or any proof that the judge mentioned therein was a judge of the County Court or of any Court entitled to convict the accused, such a certificate does not comply with the requirements of sec. 93 (b) of the Government Liquor Act as proof of a previous conviction. *Rex* v. *Dalbergh*, (1931) 43 B.C.R. 474; (1931) 1 W.W.R. 260; 55 C.C.C. 177.

B. Official Records.

1. Order of Railway Commissioners.]—The omission to publish in the Gazette an order of the Railway Board cannot invalidate it, but merely necessitates the proper proof of the order before the Court can act on it. *McPhee* v. *The Esquimalt and Nanaimo Railway Company*, (1915) 22 B.C.R. 67; 23 D.L.R. 561; 8 W.W.R. 1319; 32 W.L.R. 125.

2. Documents registered or filed in public offices.]—Under sec. 45 of the Evidence Act, in any action where it would be necessary to produce and prove an original instrument or document which has been registered or filed in any land registry office or County Court office, in order to establish such instrument, or the contents thereof, the party intending to prove the instrument may give notice to the opposite party of his intention to do so by certified copy, and in every such case the copy so certified shall be sufficient evidence of the instrument and of its validity and contents, unless the opposite party shall give notice disputing its validity. The plaintiff gave the first mentioned notice of his intention to submit a certified copy of a mortgage in evidence, but no counter-notice was given by the defendant:—Held, that the failure of the defendant to give such notice did not deprive him of questioning the validity of the mortgage by reason of the want of authority of the agent to sign the instrument, as a copy of an original document offered in evidence under the Act can have no greater effect than the original if it were produced. *Dinsmore* v. *Philip et al.*, (1918) 26 B.C.R. 123; (1918) 3 W.W.R. 457.

3. Naval charts.] — Canadian Naval charts issued under the orders of the Minister of the Naval Service of Canada are accepted in the Admiralty Court of Canada to the same extent as Imperial Admiralty charts. *The King* v. *The "Despatch." The Border Line Transportation Co.* v. *McDougal*, (1916) 22 B.C.R. 496; 28 D.L.R. 42; 16 Ex. C.R. 319; 34 W.L.R. 123; 10 W.W.R. 230.

4. Memoranda of master of ship—Log.]—Certain manuscript notes made by the master of the rescuing ship and produced by him at the trial were under the circumstances (set out in the judgment) rejected as evidence as part of the ship's log. *The "Andrew Kelly"* v. *The "Commodore,"* (1919) 27 B.C.R. 439; 48 D.L.R. 213; 19 Ex. C.R. 70; (1919) 1 W.W.R. 1059.

C. Records of Corporation.

1. Matters of internal management.]—Information derived from the books, papers and documents of a company produced for examination is not sufficient evidence of non-compliance with the conditions imposed upon a company before it becomes entitled to do business. Sec. 175 of the Dominion Companies Act does not give the right to use the books of the company as evidence against strangers. If a bank in loaning to a company receives letters from the company's solicitors indicating that all the requirements as to borrowing have been complied with, and also received copies of the by-laws and resolutions, properly certified, authorizing the borrowing, the genuineness whereof it has no reason to doubt, the bank is justified in concluding that the borrowing powers have been properly exercised, and that as against the company all matters of internal management have been duly complied with. *Dominion Trust Co.* v. *Royal Bank of Canada*, (1920) 29 B.C.R. 169; 59 D.L.R. 224; (1921) 1 W.W.R. 90; 1 C.B.R. 397.

2. Entry in bank book.] — Where a witness recognizes his initials written against an entry in the books of a bank at the time of the transaction referred to in the entry, it may be accepted as evidence of the transaction even in the case of his having no recollection of the actual transaction. *Macdonald* v. *Bank of Vancouver*, (1915) 22 B.C.R. 310; 25 D.L.R. 567; 32 W.L.R. 339; 9 W.W.R. 8.

D. Crown Grant.

Unregistered Crown grant.]—An unregistered Crown grant is admissible in evidence when it is not sought to set it up against a registered instrument. *Dorrell* v. *Campbell (No. 2)*, (1916) 23 B.C.R. 500; 32 D.L.R. 44; (1917) 1 W.W.R. 500.

E. Evidence Previously Taken or Used.

1. Depositions—Proof of.]—It is the duty of the judge in a criminal case to see that proper evidence only is before the jury. Depositions must be formally approved before being put in evidence. *Rex* v. *Powell*, (1919) 27 B.C.R. 252.

2. Depositions — Proof of.] — Depositions taken on a preliminary hearing signed by the Stipendiary Magistrate before whom they were taken with a reporter's certificate attached will be admitted in evidence in proper cases. *Rex* v. *Bell*, (1929) 42 B.C.R. 136; (1930) 2 D.L.R. 647; 53 C.C.C. 44.

3. Depositions—Absence of witnesses.]—On an application for use on the trial of depositions taken on the preliminary hearing of certain witnesses alleged to have left Vancouver as part of the crew of a Japanese steamer bound for the Orient:—Held, that as there were names on the crew list, similar to the names of the witnesses and in view of the regulations governing the landing of Japanese sailors and other circumstances, there was sufficient to shew the identity of said members of the crew with said witnesses and to justify the inference that the witnesses were absent from Canada. *Rex* v. *Kizo Furuzawa*, (1930) 42 B.C.R. 541; (1930) 1 W.W.R. 953; 53 C.C.C. 398.

4. Evidence taken in civil proceedings—Admissibility on trial of criminal charge.]—The evidence of an accused person given on examination for discovery in aid of execution is admissible against him on a criminal charge unless the witness at the time of giving the evidence objects to answer on the ground that his answers may tend to incriminate him in any subsequent criminal proceedings. *Rex* v. *Nozaki*, (1926) 37 B.C.R. 305; (1926) 4 D.L.R. 955; (1926) 3 W.W.R. 332; 46 C.C.C. 168.

5. Depositions of deceased persons.]—The depositions of a deceased mate, taken before the Court of Formal Investigation respecting a collision under the Canada Shipping Act, the other side having been a party to and represented by counsel at such proceedings, are receivable in evidence in an action brought for damages due to the collision. *The King* v. *The "Despatch." The Border Line Transportation Co.* v. *McDougal*, (1916) 22 B.C.R. 496; 28 D.L.R. 42; 16 Ex. C.R. 319; 34 W.L.R. 123; 10 W.W.R. 230.

6. Examination for discovery—Relevant portions.]—Where on the trial of an action or issue the plaintiff had put in certain parts of the examination of the opposite party, it is the duty of the judge, either ex mero motu or at the request of counsel to "look at the whole of the examination" to see if he could form the "opinion that any other part of it is so connected with the part to be used that the last-mentioned part ought not to be used without such other

part," and in so doing the object sought to be accomplished by putting in the original part must be taken into consideration as one of the elements in the forming of that opinion. It is to be observed that the part to be put in by the judge is not "explanatory" merely, but is "connected" with the original part in such a way that it would be contrary to justice to disregard it. *Canary* v. *Vested Estates Limited*, (1931) 43 B.C.R. 365; (1931) 1 D.L.R. 997.

See PRACTICE—DISCOVERY.

V. PAROL AND EXTRINSIC EVIDENCE CONCERNING WRITTEN INSTRUMENTS.

1. Description of parties.] — A true description of contracting parties may be established by the admission of extrinsic evidence. *Newberry* v. *Brown*, (1915) 21 B.C.R. 556; 23 D.L.R. 627; 32 W.L.R. 118; 8 W.W.R. 1283.

2. Ambiguity.]—In order to help the Court in the interpretation of an ambiguously written contract, extrinsic evidence may be given of the surrounding circumstances under which it was entered into. *Kidston* v. *Stirling & Pitcairn Ltd.*, (1920) 61 S.C.R. 193; 55 D.L.R. 366; (1921) 1 W.W.R. 162.

3. Bond—Patent ambiguity.] — Action on a bond "for the sum of $2,000 of lawful money of British Columbia" was dismissed, there being nothing in the document to assist in construing the said words. *Coles* v. *Hulme*, 8 B. & C. 568 (distinguished). Semble, the ambiguity, being patent, cannot be cured by extrinsic evidence. *Maritime Motor Car Co., Ltd.* v. *McPhalen*, (1919) 27 B.C.R. 244; (1919) 2 W.W.R. 811; (1920) 28 B.C.R. 168; (1920) 2 W.W.R. 213.

4. Conditional delivery — Escrow.] — Parol evidence is inadmissible to shew that a deed delivered to a purchaser was delivered conditionally or in escrow. *Amar Singh* v. *Mitchell*, (1916) 23 B.C.R. 248; 30 D.L.R. 719; (1917) 1 W.W.R. 201.

5. Demand note—Agreement for extension—Concurrent collateral security.]—The fact that the lender suing upon demand notes had taken a deed absolute in form as security for the payment of the debt, will support an order giving unconditional leave to defend, so that defendant's rights in respect of the mortgage may be tried out in the one action, where his affidavit sets up a contemporaneous oral agreement that he should have a period of time not yet expired within which to make payment. *Auld* v. *Taylor*, (1915) 21 B.C.R. 192; 21 D.L.R. 577; 8 W.W.R. 552.

6. Contract for supply of lumber—Oral agreement for financial assistance.]—Where by writing the defendant agrees to supply and the plaintiffs agree to purchase the output of certain grades of lumber manufactured at the defendant's mill, an alleged oral agreement that the plaintiff will, as part of the consideration for the defendant's promise to supply the lumber, assist him by the advance of money in connection with the contract is inadmissible in evidence. *Morse* v. *Mac & Mac Cedar Co.*, (1918) 25 B.C.R. 417; (1918) 2 W.W.R. 205.

7. Guarantee—Oral conditions.]—The respondent at the time of signing a guarantee to the bank stipulated that unless and until certain notes to the bank upon which he was liable as an endorser were paid, the guarantee given by him should not become operative or effective:—Held, that the stipulation was a condition precedent, which could be proved by parol evidence and not having been fulfilled, the respondent was not liable on the guarantee. The stipulation was at most a condition subsequent or a term of the contract and parol evidence in proof of it was not admissible. *Standard Bank* v. *McCrossan*, (1920) 60 S.C.R. 655; 55 D.L.R. 238; (1920) 3 W.W.R. 846.

8. Written contract—Parol evidence of collateral agreement.]—Where the owners of shares in a company pledged them for a loan in the terms of a written agreement whereby it was agreed that the principal and interest of the loan should be paid on a certain date, that time was to be considered of the essence of the agreement, and that if principal and interest were not paid on the date specified, the shares, after due notice of default, should become the property of the lenders, evidence of an independent collateral agreement for repayment of the loan solely out of the dividends and profits accruing from the shares is not admissible, as it is directly contrary to the covenants contained in the written agreement. *McLean* v. *Johnston*, (1923) 32 B.C.R. 495; (1923) 4 D.L.R. 178; (1923) 3 W.W.R. 913.

9. Varying written instrument.]—Where there is no allegation of mutual mistake and no claim for rectification, extrinsic evidence is not admissible to vary or contradict a written instrument. Where therefore a bill of sale is given partly in

consideration of the assumption of certain specified debts, no evidence is admissible to shew that one of the debts specified was not meant to be included. *Lake of the Woods Milling Co.* v. *Vincent*, (1928) 2 D.L.R. 145.

10. Oral agreement collateral to agreement in writing.]—Evidence of an alleged oral agreement collateral to a part of a written agreement cannot be given where such written agreement was not to be performed within a year and should therefore have been wholly in writing. *Ridley* v. *Barclay*, (1928) 40 B.C.R. 244; (1928) 4 D.L.R. 79; (1928) 3 W.W.R. 62.

11. Joint debtor—Satisfaction of judgment against one.] — Where a judgment creditor accepts in writing a sum from one of two judgment debtors in satisfaction in full of the judgment against him, parol evidence is not admissible to shew that the written document of satisfaction given to the first judgment creditor was given with an oral reservation of the judgment creditor's right against the other. *Bank of Hamilton* v. *Copp*, (1924) 3 W.W.R. 323.

12. Contract to repay loan.]—Where defendants executed a contract under seal addressed to W. reading, "In consideration of your advancing us the sum of $5,000 we hereby jointly and severally covenant . . . to repay you the said sum of $5,000 within," etc., and it appeared in evidence that the said sum was advanced to the defendants, it was held in an action by the trustees of W. deceased that the defendants should not have been allowed to adduce evidence to shew that the said sum was a gift to the church, or that it was intended that all the members of the congregation should sign the agreement. *Alexander* v. *Letvinoff*, (1918) 26 B.C.R. 324; (1919) 2 W.W.R. 808.

13. Conveyance to wife — Parol evidence of trust and agreement to reconvey.] —Parol evidence will be admitted to prove that where a husband prior to marriage conveyed property to his wife she was to hold it as trustee for him, and in the event of her death the property was again to become his, and that pursuant to this agreement she executed a will in his favour shortly after marriage. *Buscombe* v. *Holden*, (1924) 34 B.C.R. 289; (1924) 4 D.L.R. 744; (1925) 1 W.W.R. 47.

14. Explanation of meaning.] — Parol evidence is admissible to explain a contract for sale by the plaintiff to the defendant of shares in a yacht, as to whether a third mortgage on certain land taken for the amount of consideration of a sale was taken as security for the price payable by the defendant, or as payment in satisfaction without any personal liability of the defendant, the price to be realized only from the land when sold. *Granger* v. *Brydon-Jack*, (1919) 58 S.C.R. 491; 46 D.L.R. 571; (1919) 2 W.W.R. 621.

15. Meaning of words.]—A proviso for re-entry in a lease as follows: "Proviso for re-entry by the said lessor on non-payment of rent, whether lawfully demanded or not, or on non-performance of covenants or seizure or forfeiture of the said term for any of the causes aforesaid," though containing words not in the short form given by the Leaseholds Act, was held to come within said Act. A lessee covenanted not to use or assign or sublet the premises as a dance hall or suffer or permit them to be used for any such purpose or otherwise than for lodge purposes, without the consent in writing of the lessor, provided that the lessee or its regular tenants might use them "for a private invitation dance held under their auspices":—Held, extrinsic evidence was admissible to explain what was understood by "a private invitation dance," and even without such evidence the term could not be held to include a dance where an admission fee was charged and which any one of the public vouched for by a member of the lodge giving it could attend, apparently whether invited beforehand or not. Held, further, the proviso for re-entry applied for breach of such covenant, under sec. 8 of the Leaseholds Act, and it not being a case of "fraud," "accident," "surprise" or "mistake" the Court would not relieve against the forfeiture. *Edwards* v. *Fairview Lodge*, (1920) 28 B.C.R. 557; (1920) 3 W.W.R. 867.

16. Custom and usage.]—Evidence is not admissible to prove custom where the alleged custom conflicts with statutes or regulations. *B.W.B. Navigation Co.* v. *The "Kiltuish,"* (1922) 31 B.C.R. 319; 67 D.L.R. 525; 21 Ex. C.R. 398; (1922) 2 W.W.R. 959.

17. Usage—Railway contract — Meaning of words.]—Usage, where it is established, may annex an unexpressed incident to a written contract, but it must be reasonably certain and so notorious and so generally acquiesced in that it may be presumed to form an ingredient of the contract. The evidence must be sufficient to satisfy the Court that the alleged usage is "so all prevading and so reasonable and so well known that everybody doing business (of the nature in question) must be assumed to know" and to contract subject to it. *Georgia Construction Co.* v. *Pacific Great*

Eastern Railway Co., (1929) S.C.R. 630; (1929) 4 D.L.R. 161. Revg. (1928) 40 B.C.R. 290; (1929) 1 D.L.R. 77; (1928) 3 W.W.R. 466; 35 C.R.C. 204.

See B.C. Express Co. v. *Inland Express Co.*, (1915) 21 B.C.R. 178.

18. Commercial or trade terms.]—Trade usage or custom is proved first by alleging the custom followed by particulars of it. Trade usage is a question the effect of which might alter the meaning of a document and the evidence concerning such a usage should be narrowly watched. Extrinsic evidence of the trade meaning of the phrase "handle cash basis" contained in a contract relating to the sale of goods on commission is not admissible failing a proper foundation therefor. *Trenwith Ltd.* v. *The Jarvis Electric Co. Ltd.*, (1929) 41 B.C.R. 328; (1929) 4 D.L.R. 400; (1929) 2 W.W.R. 489.

See The "Freiya" v. *The "R.S.,"* (1922) 65 D.L.R. 218; (1922) 1 W.W.R. 409; 21 Ex. C.R. 232.

19. By stranger to contract.] — In the case of ownership of a motor-car purchased under a conditional sale agreement, as between the purchaser and a stranger to the contract, the real facts may be shewn in evidence although contradicting the terms of the agreement. *Canary* v. *Cohn*, (1925) 35 B.C.R. 478; (1925) 3 D.L.R. 223; (1925) 2 W.W.R. 563.

20. Equitable mortgage.]—A legal mortgagee cannot prove by parol evidence that he is entitled to an additional equitable mortgage on the same property. *British Columbia Trust Corporation* v. *Aickin et al.*, (1916) 22 B.C.R. 417; 27 D.L.R. 725; 34 W.L.R. 303.

See CONTRACTS.

VI. OPINIONS.

Comparison of signatures.]—Where execution of a document is denied:—Comparison of an admitted signature of the alleged party with the signature appearing on the disputed document may furnish prima facie evidence that the latter was executed by the same party, without the intervention of any opinion of such identity by a witness under sec. 48 of the Evidence Act, 1921. *Arbuthnot* v. *Campbell*, (1931) 1 W.W.R. 240.

VII. CONFESSIONS.

1. Voluntary statement.]—A master, with a police constable in attendance (in plain clothes, but known to the accused to be a constable), threatened his servant, suspected of theft, saying, "You will be arrested if you do not say where the goods are." The servant was then brought to the police station where he made a confession:—Held, that the statement should be excluded because it was not made freely and voluntarily. *Rex* v. *De Mesquito*, (1915) 21 B.C.R. 524; 26 D.L.R. 464; 32 W.L.R. 368; 9 W.W.R. 113; 24 C.C.C. 407.

2. Voluntary statement.]—On a criminal trial for theft a written confession by the accused was submitted in evidence. On the question of its admissibility being raised, counsel for the Crown, although requested by accused's counsel to do so, refused to call as a witness a third party who was present when the alleged confession was made, and the judge refused to compel the Crown to call him or any other witnesses with regard to the alleged confession before admitting it in evidence. The trial then proceeded, and in submitting the defence, counsel for accused called the third party as a witness and examined him as to the alleged confession. On motion for leave to appeal from the refusal to reserve a case as to the admission of the confession:—Held, that before receiving the confession in evidence, all evidence should be taken thereon to see that it was made with that degree of freedom which would allow its reception, the question of its admission being "a trial within a trial," that it was the duty of the Crown to call the third party present at the alleged confession, and if accused's counsel had maintained his position that "the trial within the trial" should first have been completed and the Crown should have called the suppressed witness, he would have been entitled to a case stated; but having subsequently called the third party as a witness himself, thereby becoming a party to reopening the trial of the question, he could not then recede from its consequences, and the Court could give him no remedy. *Rex* v. *Gauthier*, (1921) 29 B.C.R. 401; (1921) 2 W.W.R. 1.

3. Voluntary—Onus on Crown.]—The onus is on the Crown to establish that a confession is voluntary, and this can rarely, if ever, be established by the evidence of the police officer who took the statement, that it was freely and voluntarily given. Evidence must be given of all the surrounding

circumstances and details. *Rex* v. *Sankey*, (1927) S.C.R. 436; (1927) 4 D.L.R. 245; 48 C.C.C. 97.

4. Evidence of accomplice — Inducement by trial judge.]—A Superior Court judge at the trial may promise an accomplice a recommendation of pardon if he makes full disclosure even after a prima facie case has been made out against him. *Rex* v. *Robinson*, (1921) 30 B.C.R. 369; 70 D.L.R. 755; 39 C.C.C. 49; (1922) 1 W.W.R. 451.

VIII. Admissions.

1. Junior counsel.]—Where a junior counsel upon a trial makes an admission against the protest of his leader, the attitude of the leader must be taken as representing the true attitude of the client. *Atkinson* v. *The Pacific Stevedoring and Contracting Company, Limited*, (1915) 22 B.C.R. 109; 24 D.L.R. 400; 32 W.L.R. 154; 8 W.W.R. 1339.

2. Without prejudice.]—Where fraud is alleged, a party is entitled to disclosure of what took place at negotiations for settlement made "without prejudice" only where the negotiations were for the purpose of committing or furthering fraud but not where they were innocent. When statements or admissions would, if unqualified, have been pertinent to the issue and the question of their admissibility in evidence turns on the fact that they were made "without prejudice" in negotiations for compromise, they will be ordered disclosed on discovery at the instance of a party who was not a party in the negotiations, but they may not necessarily be allowed in evidence at the trial. *Schetky, and Acadia, Limited* v. *Cochrane and Union Funding Company et al.*, (1917) 24 B.C.R. 496; (1918) 1 W.W.R. 821.

3. Solicitor and client.]—The privilege of a client to object to the disclosure by his solicitor of a confidential communication does not apply when the communication was made by both parties to the action in the form of instructions to their common solicitor. *Wilson* v. *McLennan*, (1919) 27 B.C.R. 262; (1919) 3 W.W.R. 62.

4. Household goods seized under execution — Execution against husband—Admissions as to wife's ownership.]—Where an execution debtor's wife claims household goods which have been seized under execution, joint occupation of the premises has no weight against her claim especially when she is the registered owner thereof, and the evidence of third parties will be admitted to shew, that prior to the execution creditor's cause of action arising, the execution debtor had admitted that the goods belonged to his wife, and as the admissions were such as would estop him from subsequently claiming the goods as against his wife, the execution creditor would be in no better position. *North* v. *Sicilliano*, (1922) 31 B.C.R. 463; (1923) 1 D.L.R. 1149; (1923) 1 W.W.R. 551.

IX. Hearsay.

Declaration by creditor prior to death.]—By agreement in writing, one Ivey loaned one Hamilton the sum of $400 for one year and the defendant agreed that if Hamilton did not repay said sum he would repay same to the said Ivey. Hamilton died shortly after the maturity of the debt, and Ivey died two years later. Ivey's wife as administratrix of his estate brought action against the guarantor for the amount of the debt. The only evidence submitted in proof of non-payment of the debt was that of the plaintiff, her sole information on the subject having been obtained from her husband prior to his death, and the action was dismissed:—Held, that although the plaintiff swears positively that the debt was not paid it is apparent that her knowledge is derived solely from her deceased husband and as this is mere hearsay it should not be admitted. *Ivey* v. *Smith*, (1929) 40 B.C.R. 475.

X. Relevancy and Materiality.

1. Duty of counsel.]—Where evidence is submitted which is not admissible the Court may pay no attention to it. It is the duty of counsel to object to the improper admission of evidence, and the duty of the Court to rule as to whether it should or should not be admitted. *Brooks* v. *B.C. Electric Ry Co.*, (1919) 27 B.C.R. 351; 48 D.L.R. 90; (1919) 3 W.W.R. 109.

2. Evidence admitted without objection.]—Where evidence is admitted without objection the Court will assume that it is not prejudicial to the person who might have taken the objection. *Hall* v. *Geiger*, (1930) 42 B.C.R. 335; (1930) 3 D.L.R. 644; (1930) 2 W.W.R. 790.

3. Sale of shares—Rescission—Disposal of assets of company.]—In an action for the rescission of a sale of shares on the ground of fraudulent misrepresentations as to the assets of the corporation due to an exchange of timber lands, a question in the examination of the defendant for discovery as to whether he disposed of the lands or utilized them for profit, or raised money upon them is irrelevant to the issue. *Appleton* v. *Moore*, (1915) 22 B.C.R. 28; 23 D.L.R. 673; 32 W.L.R. 114; 8 W.W.R. 1286.

4. Taking samples for use at trial.]—The grant or refusal of an application to take samples of the hull of a sunken drydock, under marginal rule 659, for use on the trial in an action for damages for loss of a drydock, is largely in the discretion of the judge below. If such a course is admissible under the "sample" rule, it should be ordered with great caution. Inspection and survey are preferable. *Seattle Construction Co.* v. *Grant Smith & Co.*, (1916) 22 B.C.R. 433; 26 D.L.R. 671; 10 W.W.R. 49; 33 W.L.R. 981.

5. Prior similar acts — Admissibility—Effect.] — Evidence of the use, by the accused, of similar implements to commit similar offences is admissible to shew system and to rebut an appearance of innocence which the facts if unexplained might bear. *Baker* v. *The King*, *Sowash* v. *The King*, (1926) S.C.R. 92; (1926) 1 D.L.R. 115; 45 C.C.C. 19.

6. Cause of action arising after action commenced.]—Evidence cannot be received in respect of a cause of action arising after issue of the writ although set up by the plaintiff in his statement of claim and traversed by the defendant in his statement of defence. *Allison* v. *Standard Lumber Co.*, (1924) 34 B.C.R. 257; (1924) 4 D.L.R. 465; (1924) 3 W.W.R. 481.

XI. Weight: Effect: Sufficiency.

A. In General.

1. Statement by counsel.]—The practice of supplying evidence to the Court by statements of counsel would lead to misunderstanding and is not to be encouraged. *In re Dominion Trust Company and Harper*, (1915) 22 B.C.R. 337.

2. No objection at trial.]—Where evidence has been improperly admitted before a judge without a jury, even when no objection has been there raised, it is the duty of the Court of Appeal to reject it and to decide the case on legal evidence. *Royal Bank of Canada* v. *Pound*, (1917) 24 B.C.R. 23.

3. As to use of bloodhounds.]—On a trial for murder, evidence was allowed to be submitted that two bloodhounds, trained to follow the tracks of human beings, were on the day following the homicide put on what appeared to be the tracks of the guilty party and followed them to the house of the accused's brother where the accused was shewn to have been on the previous evening:—Held, that evidence of the action of bloodhounds was inadmissible, and the accused was entitled to a new trial. The use of such dogs may be of assistance to the police to give them the cue to the identity of the offender, which, if obtained may be followed up by conventional proof of guilt, but evidence of the actions of the dogs themselves should find no place in a Court of law. *Rex* v. *White*, (1926) 37 B.C.R. 43; (1926) 3 D.L.R. 1; (1926) 2 W.W.R. 481; 45 C.C.C. 328.

4. Questions after arrest and warning.]—On a charge of assault occasioning actual bodily harm a policeman testified that upon arresting the accused he first warned him that anything he said would be used in evidence against him, then seeing that his hat was smashed he asked him how that happened, to which accused replied that he wore another hat that evening; he then asked him the cause of a scrape on his arm about three inches long which appeared to be a fresh wound and his reply was that it was an old mark that had been there a long time. The accused was convicted:—Held, on appeal, ordering a new trial, that there was substantial wrong in admitting the policeman's evidence as it was practically intimating to the jury that accused had told a falsehood when questioned and would affect the credence to be attached to his evidence. *Rex* v. *Bellos*, (1926) 38 B.C.R. 89; (1927) 3 D.L.R. 186; (1927) 1 W.W.R. 471; 47 C.C.C. 157. Revsd. (1927) S.C.R. 258; (1927) 3 D.L.R. 186; 48 C.C.C. 126.

5. Objectionable testimony—No formal objection taken.]—Where the trial judge allows in certain evidence, to the reception of which no objection is raised, he may on giving judgment ignore the evidence on the ground that it is not proper and should have no weight with the Court in deciding the rights of the parties. *John Robertson & Son, Limited* v. *Whitelaw, Brown and Witton*, (1917) 24 B.C.R. 88.

6. Child of tender years — Competency.]—The competency of a child as a witness rests primarily with the trial judge who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. *Rex* v. *Fitzpatrick*, (1929) 40 B.C.R. 478; (1929) 1 W.W.R. 393; (1929) 1 D.L.R. 806; 51 C.C.C. 146. *Rex* v. *Sankey*, (1927) S.C.R. 436; (1927) 4 D.L.R. 245; 48 C.C.C. 97.

7. Credibility.]—Where credibility is an issue, the word of a witness against whose character no evidence is offered should be accepted rather than that of a confessed lawbreaker. *Rex* v. *Collinge*, (1928) 40 B.C.R. 418; 51 C.C.C. 193.

8. Discretion of trial judge.] — The trial judge before whom a matter is heard is at full liberty, having considered the evidence on both sides, to decide that he will trust and accept in toto the evidence given by one witness. *Foley Bros.* v. *McIlwee*, (1918) 44 D.L.R. 5; (1919) 1 W.W.R. 403.

9. Fraudulent conveyances — Res gestae.]—On the trial of an action to set aside a conveyance of land from a husband to his wife as being in fraud of creditors, a witness who at the time that the impeached transactions were entered into had heard conversations between the husband and wife as to their manner of carrying on business and the passing of money between them, was not permitted to tell the arrangements between them as disclosed in the discussions heard:—Held, that the evidence was properly excluded, not being with respect to a specific agreement, and no foundation was laid for introducing the conversations as part of the res gestæ. *Blair* v. *Dice*, (1924) 34 B.C.R. 323; (1924) 4 D.L.R. 568; (1924) 3 W.W.R. 379.

10. False trade description.]—Where a defendant is charged with selling bread to which a false trade description was applied, and the evidence disclosed only two cases of the sale of light-weight bread in a very large volume of business carried on with proper machinery, and of which the directors and owners had no connection or knowledge, and there being so much opportunity of letting a light-weight loaf of bread on the market by mere accident there should be no conviction. *Rex* v. *Canadian Bakeries Limited*, (1930) 43 B.C.R. 234; 54 C.C.C. 369.

11. Shewing photographs of suspected person to identifying witnesses.]—Police officers may, before sending witnesses into a foreign state to identify persons, take the precaution of shewing them sets of photographs in a fair and cautious way. Such photographs may afterwards be handed to the jury for inspection. *Rex* v. *Bagley*, (1926) 37 B.C.R. 353; (1926) 3 D.L.R. 717; (1926) 2 W.W.R. 513; 46 C.C.C. 257.

12. Unreasonable finding.]—Where the accused gives undisputed evidence of certain facts consistent throughout with his innocence, and is corroborated, the trial judge's finding of "guilty" cannot be sustained as it is unreasonable and cannot be supported according to the evidence. *Rex* v. *Wah Sing Chow*, (1927) 38 B.C.R. 491; 48 C.C.C. 144. *Rex* v. *Collinge*, (1928) 40 B.C.R. 418; 51 C.C.C. 193.

B. Corroboration.

1. Sufficiency of.

1. Forgery.]—P., a grocer, sold tickets to his customers on which were printed the words "good for 25 cents, L. Politano, 317 Powell Street" and P.'s signature was on the back of each ticket in his own handwriting. The tickets were good for their face value for the purchase of goods at P.'s store. The prisoner had printed a number of tickets (through a boy, to whom he gave a genuine ticket for the purpose, who ordered and received them from a printer's office for the prisoner) in imitation of those of P.'s only leaving out P.'s signature on the back. Four men other than the prisoner attempted to use the spurious tickets for the purchase of goods at P.'s store:—Held, per Irving and Galliher, JJ.A., that there was a forgery. Per Macdonald, C.J.A. and McPhillips, J.A.: That the essentials required to establish a forgery were not in evidence. Held, further, that as the evidence lacked the corroboration required by sec. 1002, sub-sec. (*e*) of the Criminal Code the prisoner should be discharged. *Rex* v. *Magnolo*, (1915) 22 B.C.R. 359; 32 D.L.R. 510; 26 C.C.C. 419.

2. Sufficiency of.]—On the question of corroboration, sec. 11 of the Evidence Act does not necessarily require another witness who swears to the same thing. Circumstantial evidence and fair inferences of fact arising from other facts proved, that render it improbable that the fact sworn to be not

true, and reasonably tend to give certainty to the contention which it supports and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence. *Mattice* v. *Mattice*, (1925) 34 B.C.R. 474; (1925) 1 D.L.R. 755; (1925) 2 W.W.R. 203.

3. Credibility.]—Where the evidence of a party requires corroboration by law before he can obtain judgment, it is not necessary that his credibility be established before corroboration can be resorted to or relied upon. *Dominion Trust Co.* v. *Inglis*, (1921) 29 B.C.R. 213; (1921) 1 W.W.R. 677.

4. Character of evidence.]—Where the story told by the plaintiff fits into all the probabilities of the case in a way that carries conviction and affords that corroboration by circumstances that is a sufficient compliance with sec. 11 of the Evidence Act. *Larson* v. *Montgomery*, (1930) 43 B.C.R. 89; (1930) 3 D.L.R. 966; (1930) 2 W.W.R. 796.

2. Claims Against Estates of Deceased Persons.

1. Joint claims.]—Where two persons make a joint claim against the estate of a deceased person, it cannot be maintained unless there is independent corroboration in addition to that supplied by each of the claimants giving the same testimony as the other. *Ledingham and Ledingham* v. *Skinner and Cox*, (1915) 21 B.C.R. 41; 21 D.L.R. 300; 30 W.L.R. 741; 8 W.W.R. 52.

2. Donatio mortis causa.] — Where articles are claimed under donatio mortis causa the evidence of the claimant may be sufficient to establish such gift notwithstanding sec. 11 of the Evidence Act, 1911, especially where the circumstances tend to corroborate such evidence. *Imperial Canadian Trust Co.* v. *Winstanley*, (1922) 31 B.C.R. 448; (1923) 1 D.L.R. 1148; (1923) 1 W.W.R. 935.

3. Donatio mortis causa — Delivery of keys.]—The delivery by a person in extremis of the keys of his safe accompanied by the words "they lead to everything I have got—everything I have got is yours" will operate as a donatio mortis causa of the things in the safe other than money in a bank represented by a pass-book found in the safe. *Cusack* v. *Day*, (1925) 36 B.C.R. 106; (1925) 3 D.L.R. 1028; (1925) 2 W.W.R. 715.

4. Contract to devise by will.]—The promise of deceased to make a will leaving property to the promisee in consideration of lodging and care during the illness of deceased, is an enforceable contract, and certain statements by the deceased to others as to her promise or intention, and the circumstances of the case including the making of a will which was later revoked, are sufficiently corroborative of the promise testified to by the plaintiff. *Bligh* v. *Gallagher*, (1921) 29 B.C.R. 241; 57 D.L.R. 76; (1921) 1 W.W.R. 662.

5. Corroboration to be material and relevant to issue.]—In an action by the plaintiff against the administrator of her father's estate to recover $1,000 rent for use and occupation of a house by her father and mother for six years immediately prior to his death, the only evidence in corroboration of plaintiff's was that of an illiterate foreigner who said the deceased father said to him in his lifetime: "Ten years I been here, no rent at all." "Sylvie [plaintiff] good to me, good to her mother." "I can pay my rent all right to my girl Sylvie, who is good friend to us":—Held, that the foregoing was sufficient corroboration of the plaintiff's evidence. Under sec. 10 of the Evidence Act all that is required in corroboration is that it be material, relevant to the issue, and of such a nature as to be calculated to convince the Court that the main evidence is true. *Swan* v. *Ellis*, (1923) 32 B.C.R. 104.

6. Management of estate by proposed beneficiary — Accounting.] — Where the owner of an estate informs an intended beneficiary that it is his intention to leave him the estate by will, and places him in control and management thereof under power of attorney, upon the understanding that an accounting will not be required, and afterwards under the terms of a will the beneficiary is called upon to account, the circumstances are such that he should not be penalized in the same way as a trustee who mixes the funds of his cestui que trust with his own, and where corroboration is required, evidence of expenditures should be accepted on any slight corroboration. *Morton* v. *Brighouse*, (1928) 40 B.C.R. 278; Revd. (1929) S.C.R. 512; (1929) 3 D.L.R. 91.

7. Cheque revoked by death.]—Where a cheque had been held by a payee for over three years and was not presented for payment before the death of the drawer and was therefore revoked, it affords corroborative evidence of the existence of a debt

owing by the estate of the deceased, and in the absence of a plea or evidence of an immoral consideration the Court will not give weight to that suggestion. *McCoy* v. *Trethewey*, (1929) 41 B.C.R. 295; (1929) 4 D.L.R. 240; (1929) 3 W.W.R. 381.

XII. WITNESSES.

1. Hostile witness.]—The question of the hostility of a witness is to be decided in the discretion of the trial judge. *Rex* v. *May*, (1915) 21 B.C.R. 23; 21 D.L.R. 728; 7 W.W.R. 1261; 30 W.L.R. 488; 23 C.C.C. 469.

2. Accomplice — Inducement by trial judge.]—A Superior Court judge at the trial may promise an accomplice a recommendation of pardon if he makes full disclosure even after a prima facie case has been made out against him. *Rex* v. *Robinson*, (1921) 30 B.C.R. 369; 70 D.L.R. 755; 39 C.C.C. 49; (1922) 1 W.W.R. 451.

3. Child of tender years.]—The unsworn evidence of a child of tender years cannot be admitted unless the Court first ascertains whether or not the child understands the nature of an oath, and satisfies itself as to the intelligence of the child and his appreciation of the duty of telling the truth. If the Court omits either of these requisites it is improper to receive the evidence. *Rex* v. *Sankey*, (1927) S.C.R. 436; 48 C.C.C. 97; (1927) 4 D.L.R. 245.

4. Child of tender years.]—The competency of a child as a witness rests primarily with the trial judge who sees the proposed witness, notices his manners, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. *Rex* v. *Fitzpatrick*, (1929) 40 B.C.R. 478; (1929) 1 D.L.R. 806; (1929) 1 W.W.R. 393; 51 C.C.C. 146.

5. Foreign witness—Interpretation.]—The propriety of the employment of an interpreter on the examination of a witness is a question of fact, and the tribunal before which he is to be examined must decide whether he possesses a sufficient knowledge of the English language to understand and answer the questions put to him. Semble, objection to the use of an interpreter should not be lightly taken, as the value of the testimony might be later reduced or otherwise rendered unsatisfactory by the introduction of an element of uncertainty. *Donkin et al.* v. *The Chicago Maru*, (1916) 22 B.C.R. 529; 28 D.L.R. 804; 16 Ex. C.R. 501.

6. Cross-examination of witness as to former statement.]—Where an accused person was convicted upon the evidence of a witness who later denied the truth of the evidence by a statement made to credible witnesses, the Court of Appeal will not receive in evidence an affidavit of such witnesses on an application to discharge the prisoner on the ground of a miscarriage of justice unless the prosecuting witness is first cross-examined and given an opportunity to deny her later statement. *Rex* v. *Vye*, (1925) 36 B.C.R. 200; (1925) 3 W.W.R. 100; 44 C.C.C. 249.

XIII. PRIVILEGE.

1. Solicitor and client.]—The privilege of a client to object to the disclosure by his solicitor of a confidential communication does not apply when the communication was made by both parties to the action in the form of instructions to their common solicitor. *Wilson* v. *McLennan and Choate*, (1919) 27 B.C.R. 262; (1919) 3 W.W.R. 62.

2. Wife of accused—Admissibility of evidence.]—On a trial for murder a woman was called as a witness by the Crown who had married the accused according to Indian custom about 20 years previously and had had several children by him. The accused had been married by Indian custom to two other women who were still living but they had redeemed themselves, i.e., purchased their release from marriage by Indian custom, before his marriage to the witness. The witness gave evidence to the effect that a short time before this trial she had redeemed herself according to Indian custom and left her husband:—Held, that her evidence was not admissible. *Rex* v. *Williams*, (1921) 30 B.C.R. 303; 37 C.C.C. 126.

3. Production of documents.]—A servant cannot be compelled to produce the documents of his master where the suit or proceeding is one to which the master is not a party and it is not shewn that he has given authority for their production, even though the master is outside the jurisdiction. *Chapman & Sons* v. *Stoddart & Co.*, (1930) 43 B.C.R. 182; (1930) 4 D.L.R. 1013; (1930) 3 W.W.R. 171.

4. Insufficiency of evidence.]—Where there is nothing on the face of documents indicating that they are privileged and there is no affidavit from any person who has examined them shewing proper grounds for refusing, their production will be ordered. *Reid* v. *Vancouver Tug Boat Co.*, (1928) 39 B.C.R. 479; (1928) 2 D.L.R. 244; (1928) 1 W.W.R. 800.

XIV. Evidence Out of Court.

A. Where Examination Out of Court Will be Ordered.

1. Witnesses Within the Jurisdiction.

1. Evidence de bene esse—Discretion of judge.]—Permission to examine a witness de bene esse under Marginal Rule 487 is a matter within the discretion of the judge to whom application for an order for such examination is made. *Dominion Trust Co. and Gwynn* v. *Royal Bank of Canada*, (1920) 28 B.C.R. 260; (1920) 2 W.W.R. 576.

2. Illness of party.]—Under Supreme Court Order 37, Rule 5, the plaintiff may, on the grounds of serious illness, obtain leave to issue a writ of commission to have his evidence taken for use on the trial before the time for appearence has elapsed. *Kelly* v. *Kelly*, (1925) 1 W.W.R. 332.

2. Witnesses Abroad.

1. Discretion of Court.]—The Court of Appeal is loath to interfere with the discretion exercised by the Court below in granting a commission. Each case must depend upon its own circumstances and no general rule as to the exercise of that discretion can be laid down. *Giberson and Brown* v. *E. C. Atkins & Company*, (1917) 24 B.C.R. 19.

2. Taking plaintiff's evidence on commission.]—An order may be made to take the evidence of a plaintiff and other witnesses on his behalf outside the jurisdiction where to compel the plaintiff to come to the Province would be oppressive, and the order will not prejudice the defendant. *Hanton* v. *Simmons*, (1921) 1 W.W.R. 757.

3. Furtherance of justice.]—It is a fundamental rule of jurisprudence that witnesses shall give their evidence viva voce in open Court, and an order for a commission to examine witnesses abroad will only be granted where there is such evidence before the judge as would enable him to come to the conclusion that it is in the furtherance of justice to do so. *Williams and Williams* v. *Fraser*, (1925) 35 B.C.R. 481.

B. Procedure to Obtain.

Rectification of long order.] — Where the short order for a commission provides that the long order shall be drawn in the form set out in the appendix, an error in the drawing of the long order which is apparent upon the face of the proceedings may be rectified under rule 319. *Allan* v. *McLennan*, (1916) 23 B.C.R. 515.

C. Return and Use of the Evidence.

Condition precedent to admission—Manner of use, etc.]—The trial judge has jurisdiction to accept such evidence as he deems necessary as proof of a condition precedent to the admission of evidence taken on commission. *Allan* v. *McLennan*, (1916) 23 B.C.R. 515.

XV. Affidavits.

A. Who May Take.

Commissioner's proper title.]—An affidavit purporting to be taken before an officer giving his title as "A Commissioner in and for the Province of British Columbia" is invalid. *Brethour* v. *Taylor and Bank of Montreal*, (1927) 3 W.W.R. 166.

B. Affidavit of Counsel.

Counsel reading his own affidavit.]—It is contrary to good ethics for counsel to appear on the trial or appeal on the merits when his own affidavit is before the Court. *Pioneer Lumber Co.* v. *Alberta Lumber Co.*, (1923) 32 B.C.R. 32; (1923) 2 W.W.R. 913; (1923) 3 W.W.R. 1098.

C. Jurat.

Affidavit resworn without alteration.]—Affidavits for claim under the Woodman's Lien for Wages Act, being resworn without the jurat being rewritten, having been received and acted upon in the Court below, will not be disturbed on appeal notwithstanding that no memorandum of their acceptance was made on them under sec. 62 of the Evidence Act, which is merely directory. *Douglas* v. *Mill Creek Lumber Co.*, (1923) 32 B.C.R. 13; (1923) 1 D.L.R. 805; (1923) 1 W.W.R. 529.

EVIDENCE IN CRIMINAL CASES—*See* CRIMINAL LAW, CERTIORARI, HABEAS CORPUS, INTOXICATING LIQUORS.

See ADMIRALTY.

See ARBITRATION.

See BANKS AND BANKING.

See CONTRACTS.

See DAMAGES.

See DEED AND OTHER INSTRUMENTS.

See DIVORCE.

See EASEMENTS.

See ESTOPPEL.

See FRAUDULENT AND VOIDABLE TRANSACTIONS.

See GIFT.

See GUARANTEE.

See HUSBAND AND WIFE.

See INSURANCE.

See LANDLORD AND TENANT.

See MALICIOUS PROSECUTION.

See MINES AND MINERALS.

See MISREPRESENTATION AND FRAUD.

See MUNICIPAL CORPORATIONS.

See NEGLIGENCE.

See PRACTICE.

See SALE OF GOODS.

See TORT.

See TRUSTS.

See WILLS.

EXECUTION.

I. IN GENERAL, 496.
II. SEIZURE, 497.
III. AGAINST CHATTELS, 497.
IV. AGAINST LANDS, 498.
V. PRIORITY AS AGAINST OTHER TRANSACTIONS, 500.
VI. EXEMPTION FROM SEIZURE, 500.
A. What property exempt, 500.
B. Conditions of, 501.
VII. CLAIMS ENTITLED TO PREFERENTIAL PAYMENT, 501.
VIII. EQUITABLE EXECUTION, 501.
IX. COSTS, 502.
X. STAY OF EXECUTION, 503.

I. IN GENERAL.

1. Execution following divorce action.]—The Court of Appeal has jurisdiction to hear an appeal from a judgment in an interpleader issue arising out of a seizure by the sheriff of the property of a co-respondent under an order against him for costs in a divorce action. *Laird* v. *Laird*, (1920) 28 B.C.R. 255; 51 D.L.R. 642; (1920) 3 W.W.R. 1. *Allen* v. *Allen*, (1923) 32 B.C.R. 274.

2. Money improperly paid into Court—No charging order.]—Money paid into Court without authority to the registrar who has no authority to receive it is in the same position as if it had been paid to a trustee of the person paying it, and if the person to whom it is intended to be paid in settlement of his claim refuses to accept it on the conditions offered, it remains the property of the person paying it in and is not subject to a charging order at the instance of a judgment creditor or of the person who has refused to accept it in settlement of his claim. *King* v. *Lanchick. Safety Storage and Warehousing Co.* v. *Lanchick*, (1922) 31 B.C.R. 193; 67 D.L.R. 692; (1922) 2 W.W.R. 1018.

3. Statutory committee—Personal liability of member.]—If a plaintiff brings an action in the name of a committee under the Produce Marketing Act, of which he is the sole member, an execution may issue against his goods if the action fails and costs are awarded against him, as he was a party before the Court having sued in his representative name. *Mainland Potato Committee of Direction* v. *Tom Yee*, (1931) 43 B.C.R. 453; (1931) 1 D.L.R. 990; (1931) 1 W.W.R. 529.

4. Execution against sheriff.]—A writ of fieri facias against the goods of a sheriff issued in his own county may be directed to and executed by the coroner. *Williams* v. *Richards*, (1923) 32 B.C.R. 58; (1923) 1 W.W.R. 1021.

II. SEIZURE.

1. Wrongful seizure—Judgment creditor.]—Under a warrant of execution a deputy sheriff seized goods in the possession of a debtor, but not his property:—Held, that the judgment creditor is not responsible for the sheriff's action where no specific direction was given to seize the goods, nor can the judgment creditor ratify the deputy sheriff's act and make it his own. *Ballantyne* v. *McCulloch & Company and Simms*, (1927) 39 B.C.R. 97; (1927) 4 D.L.R. 525; (1927) 3 W.W.R. 148.

2. Wrongful seizure—Action against sheriff—Joinder of execution creditor.]—Where a sheriff in possession of goods under a writ of fieri facias refuses to give up possession upon the receipt of a notice of the assignment of the execution creditor under the Creditors Trust Deeds Act, the costs of the execution creditor being tendered up to that time it is not necessary to join the execution creditor in an action brought by the assignee against the sheriff. *Baker* v. *Richards*, (1918) 25 B.C.R. 397; 40 D.L.R. 351; (1918) 2 W.W.R. 902; Affd. 59 S.C.R. 656; 49 D.L.R. 684.

III. AGAINST CHATTELS.

1. Seizure of money.]—Upon the sheriff seizing money under an execution it becomes the property of the execution creditor and is not affected by an assignment for the benefit of creditors executed after the seizure. *Adam* v. *Richards*, (1915) 21 B.C.R. 212; 22 D.L.R. 509; 8 W.W.R. 701.

2. Shares of company.]—The provisions of the Execution Act with relation to the method of carrying out execution against the shares in a company standing in the name of a judgment debtor must be strictly complied with. Where by statute or the charter of a company provides a method of service of process upon it an execution against shares held by a judgment debtor in the company cannot be carried out unless service required by the Execution Act is effected in the prescribed manner. *Royal Bank of Canada* v. *Canada National Fire Insurance Co.*, (1920) 28 B.C.R. 554; (1920) 3 W.W.R. 517; 55 D.L.R. 272.

3. Household goods claimed by wife—Admissions by husband.]—Where an execution debtor's wife claims household goods which were seized under execution, joint occupation of the premises has no weight against her claim especially when she is the registered owner thereof. In support of the wife's claim evidence of third parties was admitted to shew that prior to the execution creditors' cause of action arising the execution debtor had admitted to said parties that the goods belonged to his wife, and as the admissions were such as would estop him from subsequently claiming the goods as against his wife, the execution creditors would be in no better position. *North* v. *Sicilliano et al.*, (1922) 31 B.C.R. 463; (1923) 1 D.L.R. 1149; (1923) 1 W.W.R. 551.

4. Money in hands of sheriff.]—Surplus money in the sheriff's hands after an execution has been satisfied is not available for seizure under an execution. The sheriff's return admitting surplus funds in his hands but not levied on under the execution is not a return of his seizure and not conclusive as an estoppel of record. *Palmer* v. *Richards*, (1921) 30 B.C.R. 321; 70 D.L.R. 732.

IV. AGAINST LANDS.

1. Unregistered conveyance.]—Where an unregistered conveyance is by way of security only the land is liable for sale, under sec. 28 of the Execution Act, R.S.B.C. 1911, cap. 79, under a subsequent registered certificate of judgment. *Schmit* v. *Erickson*, (1922) 1 W.W.R. 232.

2. Creditors' Relief Act—Distribution of proceeds.]—Where money realized from the sale of lands by a judgment creditor is paid into Court under sec. 50 of the Execution Act and the registrar prepares his scheme of distribution under sec. 35 of the Creditors' Relief Act, any person prejudiced by the proposed scheme of distribution may contest the same under sec. 35 (4) of the Creditors' Relief Act. *Caudwell* v. *George*, (1925) 35 B.C.R. 134; (1925) 2 D.L.R. 229; (1925) 1 W.W.R. 579.

3. Prior unregistered mortgage—Land Registry Act.]—A judgment registered in the Land Registry Office on an application made after the date of the execution of a

mortgage by the judgment debtor, but before the application for the registration thereof takes priority over the mortgage by virtue of sec. 73 of the Land Registry Act. *Bank of Hamilton* v. *Hartery*, (1918) 26 B.C.R. 22; 43 D.L.R. 14; (1918) 3 W.W.R. 551. Affd. (1919) 58 S.C.R. 338; 45 D.L.R. 638; (1919) 1 W.W.R. 868.

4. Prior unregistered trust deed.]—Where judgment is recovered against a defendant who had previously executed a trust deed covering all his lands, his only interest remaining being an equity of redemption in the said lands, the equity only is available to satisfy the judgment, notwithstanding the fact that the trust deed was not registered. *Gregory* v. *Princeton Collieries*, (1918) 25 B.C.R. 180; 40 D.L.R. 739; (1918) 1 W.W.R. 265.

5. Mortgage—Judgment against—Registration.]—The Execution Act (R.S.B.C. 1911, cap. 79, sec. 27) by virtue of which a judgment, when registered, forms a lien and charge on all the lands of the judgment debtor, includes all the interest of a mortgage; and the mortgagor and intending purchaser of the mortgage when making payments, should search and determine whether any judgments are registered against the interest of the mortgagee before dealing with him. *In re Land Registry Act and Mandeville et al.*, (1917) 24 B.C.R. 137; 36 D.L.R. 292; (1917) 1 W.W.R. 1522.

6. Divorce — Sale of respondent's lands.]—The Court of Appeal has jurisdiction to hear an appeal from an order of a judge under sec. 28 of the Execution Act for the sale of the respondent's lands to realize the amount payable under a judgment in a divorce action. A decree of alimony is one which is within the purview of the Execution Act and capable of being registered so as to be a charge against land. *Allen* v. *Allen*, (1923) 32 B.C.R. 274.

7. Registration of judgment—Against husband — Land purchased with wife's money.]—In November, 1927, the plaintiff purchased certain lands with her own money. The conveyance of the land was made to her husband and duly registered. In November, 1930, a creditor obtained a judgment against the husband and registered the judgment in the Land Registry Office against said lands. In an action against her husband and the judgment credifor for a declaration that there was a resulting trust in her favour:—Held, that under sec. 40 of the Land Registry Act the registered owner of a charge is entitled to the estate or interest in respect of which he is registered, with liberty to sell the property registered in the name of the judgment debtor, subject only to such exceptions and registered charges as appear on the register, and sec. 37 (2) of the Land Registry Act does not assist the plaintiff as she was not adversely in actual possession of the land at any time. *Morris* v. *Morris*, (1931) 44 B.C.R. 166; (1931) 3 D.L.R. 325; (1931) 3 W.W.R. 427.

V. Priority as Against Other Transactions.

1. Priority over purchase of goods.]—A purchaser of goods is not entitled thereto as against an execution creditor of the vendor under sec. 2 (24) of the Laws Declaratory Act where he cannot shew that he acquired the goods without notice of the existence of the execution. *Island Amusement Co., Ltd.* v. *Parker & Kippen*, (1920) 28 B.C.R. 43; 61 D.L.R. 28; (1920) 1 W.W.R. 1015.

2. Chattel mortgage—Defective affidavit.]—A chattel mortgagee whose mortgage is not effectively registered because of a defective affidavit will not be protected as against execution creditors of the mortgagor by the fact that he took and held actual possession against the mortgagor for a short time after the execution of the mortgage, if he afterwards voluntarily parted with possession to the mortgagor so that the latter appeared thereafter to be the ostensible owner of the mortgaged goods. *Ritchie Contracting Co.* v. *Brown*, (1915) 21 B.C.R. 89; 21 D.L.R. 86; 30 W.L.R. 723; 8 W.W.R. 84.

VI. Exemption From Seizure.

A. What Property Exempt.

1. Stock in trade.] — The safe, cash register, counter, etc., of a butcher are stock in trade of his business and so not exempt from seizure under a writ of fi. fa. *Endrizzi* v. *Peto*, (1917) 1 W.W.R. 1439.

2. Surplus money in sheriff's hands.]—Surplus moneys in the sheriff's hands after an execution has been satisfied are not available for seizure under an execution. *Palmer* v. *Richards*, (1921) 30 B.C.R. 321; 70 D.L.R. 732.

3. Funds in Court.]—Exemption cannot be claimed under sec. 25 of the Execution Act (R.S.B.C. 1924) in respect of funds in Court. *Prat* v. *Hitchcock and the Canada Paint Co. Ltd.*, (1925) 36 B.C.R. 142, 158; (1925) 3 D.L.R. 1142; (1926) 1 W.W.R. 5.

B. Conditions of.

Sale of property upon which exemption claimed.]—A sheriff's sale under execution of property upon which exemption has been claimed under secs. 17 and 18 of the Homestead Act is an unlawful act in defiance of the statute and void, and the owner can treat the purchaser who has taken possession of it as a trespasser, and either recover the goods or damages for their conversion. *Fletcher* v. *Pendray*, (1916) 22 B.C.R. 566; 27 D.L.R. 637; 34 W.L.R. 310; 10 W.W.R. 444.

VII. Claims Entitled to Preferential Payment.

Wages—Preference.]—The sheriff having taken possession of the goods of a mining company under a writ of fieri facias a labourer applied under sec. 7 of the Execution Act for payment of his wages in preference to the debt due to the execution creditor. The application being dismissed, an action for stay of proceedings pending appeal was refused, and the sheriff paid over to the execution creditor the money realized upon sale of the company's property. The Appeal Court held that the applicant was entitled to wages in preference to judgment creditors but upon settlement of the judgment refused to insert an order for repayment of the money by the execution creditor to the sheriff. *Campbell* v. *Cleugh*, (1920) 28 B.C.R. 352.

VIII. Equitable Execution.

Charging order.] — Under the County Court practice a judge may make a charging order upon funds in the County Court paid in under a garnishee order. *Prat* v. *Hitchcock and the Canada Paint Co. Ltd.*, (1925) 36 B.C.R. 142; (1925) 3 D.L.R. 1142; (1926) 1 W.W.R. 5.

IX. Costs.

1. Lien for costs of execution creditor.]—A sheriff in possession of goods under a writ of execution prior to the execution of an assignment under the Creditors' Trust Deeds Act may either retain possession of such goods until the costs of the execution creditor have been paid or go out of possession and rely upon the statutory lien for such costs. *In re Vancouver Carriage & Implement Co. Ltd.*, (1916) 10 W.W.R. 579.

2. Poundage—Writ of possession.]—Where a sheriff has executed a writ of possession he is entitled to poundage on the yearly rental value of the premises to which possession is given, which is the "sum made" within the meaning of item 38 of Schedule No. 4 of Apendix M. to the Supreme Court Rules, 1912. *Bell* v. *Nicholls*, (1918) 26 B.C.R. 102.

3. Possession money.]—Where a sheriff makes a seizure under execution he is not entitled to costs of placing men in possession where there is no danger of the property being removed, as in the case of a building or land or where the property can be conveniently secured by storing it. A sheriff is not entitled to make profit out of possession money, when not personally in possession of the goods seized. In a proper case for putting a man in possession, possession money can only be charged when he is in actual possession and only for the period in which he is in actual possession. The amount charged shall not exceed the sum paid out by the sheriff in that connection and he must produce vouchers for the sums so paid out by him. *Li Din* v. *Chow Toy Dong*, (1923) 32 B.C.R. 296; (1923) 3 D.L.R. 957; (1923) 2 W.W.R. 799.

4. Sheriff in possession—Assignment for creditors — Tender — Poundage.]—Where the sheriff retains possession of goods seized under a writ of fieri facias after a notice of assignment of the execution creditor under the Creditors' Trust Deeds Act and has been tendered the costs of the execution, he is in wrongful possession and is not entitled to charge poundage. *Baker* v. *Richards*, (1918) 25 B.C.R. 397; 40 D.L.R. 351; (1918) 2 W.W.R. 902; Affd. 59 S.C.R. 656; 49 D.L.R. 684.

5. Sheriff's fees—Possession by judgment debtor.]—A sheriff seizing goods under execution who leaves them in the care of the execution debtor and his wife under their agreement to care for the goods as his bailees, and supervises the goods under

agreement that he be paid for his services, has a claim for keeping "possession" of the goods, or on a quantum meruit for services rendered. *Rankin* v. *Bell*, (1923) 3 D.L.R. 907; (1923) 2 W.W.R. 922.

X. STAY OF EXECUTION.

1. Pending reference.]—Where in an action in which there were two distinct issues the plaintiff recovered $1,500 damages with costs and the defendant shewed at the trial that on the taking of accounts the balance in their favour as against the plaintiff would be $604 there should be no stay of execution except as to this sum. *Scuilli* v. *Planta*, (1928) 39 B.C.R. 450.

2. Pending reference.] — Where the Supreme Court of Canada gives judgment for a plaintiff for damages for deceit ordering a reference as to the amount thereof, with a direction that there should be a set-off of the amount due from the plaintiff to the defendant under a contract and awards unconditional judgment in favour of the plaintiff for costs, a judge of the Supreme Court has no jurisdiction to order a stay of execution for the costs pending the result of the reference. *Barron* v. *Kelly*, (1918) 3 W.W.R. 466.

See 56 S.C.R. 455; 41 D.L.R. 590; (1918) 2 W.W.R. 131.

3. Under County Court judgment.]—A County Court judge may in his discretion order a stay of execution upon a judgment obtained in the County Court where there is in existence a judgment obtained by the defendant against the plaintiff in the Supreme Court for a larger amount. *Butterfield* v. *Jackson*, (1916) 23 B.C.R. 489; (1917) 2 W.W.R. 362.

4. Pending appeal to Privy Council.]—The defendant applied to stay execution pending an appeal from the Supreme Court of Canada to the Privy Council, on the ground of the financial inability of the plaintiff, the Georgia Construction Company, to return the amount of the judgment in the event of a reversal. The plaintiff, the Bank of Toronto, had an assignment of the moneys claimed under the contract sued upon. The application was refused as the material in support does not justify depriving the plaintiffs of the fruits of their judgment, and further in the event of the defendant's success on appeal repayment of the moneys paid is secured by the joinder of the Bank of Toronto as a plaintiff in the action. *Georgia Construction Co.* v. *Pacific Great Eastern Ry. Co.*, (1929) 41 B.C.R. 469; (1929) 4 D.L.R. 607; (1929) 3 W.W.R. 92.

5. Pending appeal to Supreme Court of Canada.]—The Court of Appeal has no jurisdiction to make an order that a sum of money which has been paid into Court to stay execution under a decree of alimony pending the decision of the Court of Appeal be retained in Court pending a further appeal to the Supreme Court of Canada. *Claman* v. *Claman*, (1925) 35 B.C.R. 141.

6. Pending appeal to Supreme Court of Canada.]—On an application for a stay of execution pending an appeal to the Supreme Court of Canada where the exact amount of damages for which a judgment has been given is not yet ascertained a judge of the Court of Appeal has power to consider the amount for which security should be given and to make an estimate of what would be reasonable. *Insinger* v. *Cunningham*, (1923) 32 B.C.R. 518; (1923) 4 D.L.R. 1199; 3 W.W.R. 1328.

7. Time for application.]—Application to the Court of Appeal for a stay of execution should be made at the time of application for leave to appeal to the Privy Council, and the granting of such leave constitutes a bar to any further proceedings in the Court of Appeal. *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.*, (1918) 26 B.C.R. 414.

8. Payment into Court.]—The plaintiff recovered judgment at the trial for $5,490 and costs. The defendant appealed and obtained an order staying execution upon paying into Court the amount of the judgment and costs which, with the security for costs of appeal, amounted in all tc $6,700. The Court of Appeal set aside the judgment and ordered a new trial (*see* 33 B.C. 271). The plaintiff then appealed to the Supreme Court of Canada and the defendant applied to a judge for payment out of the moneys in Court. An order was made that $5,000 of the sum paid in remain in Court pending the disposition of the appeal, and that the balance of $1,700 (costs and security) be paid out to the defendant forthwith. An appeal by the defendant from this order was dismissed on an equal division of the Court. *Lew* v. *Wing Lee*, (1924) 34 B.C.R. 277; (1924) 4 D.L.R. 578; (1924) 3 W.W.R. 394.

See APPEALS.
See ARREST AND IMPRISONMENT FOR DEBT.
See DEBTOR AND CREDITOR.
See EXEMPTIONS.
See PRACTICE.
See RECEIVER.
See REGISTRATION OF LAND.
See SHERIFF.

EXECUTORS AND ADMINISTRATORS.

I. PROBATE, 505.
A. *In general*, 505.
B. *Probate duties*, 506.
II. LETTERS OF ADMINISTRATION, 506.
III. THE OFFICIAL ADMINISTRATOR, 507.
IV. DUTIES OF THE REPRESENTATIVE, 507.
V. POWERS AND RIGHTS OF, 508.
A. *Carrying on testator's business*, 508.
B. *Sale of testator's assets*, 509.
C. *Right of retainer*, 509.
D. *Necessary and reasonable disbursements*, 510.
E. *Application to Court for advice*, 510.
F. *Foreign administrators*, 511.
G. *Remuneration and discharge of representative*, 511.
VI. CLAIMS OF CREDITORS, 512.
VII. ACTIONS BY AND AGAINST REPRESENTATIVE, 513.
VIII. ADMINISTRATION OF INSOLVENT ESTATES, 514.
IX. COSTS, 514.

I. PROBATE.

A. *In General.*

1. Appointment of executors.]—It is within the discretion of the Court to override the express provision in a will naming the executors, but it should be exercised very sparingly. Probate will be granted an alien executor who comes within the jurisdiction and takes the executor's oath. *Smithson* v. *Smithson*, (1915) 22 B.C.R. 326; 25 D.L.R. 745; 33 W.L.R. 229; 9 W.W.R. 501.

2. Foreign corporation.] — Where a company in Manitoba, not licensed to do business in British Columbia, is appointed executor of an estate under the will of a deceased person an application to appoint the manager of said company administrator of the estate in British Columbia will be refused. *In re J. Henderson, Deceased*, (1918) 26 B.C.R. 329; (1918) 3 W.W.R. 896.

3. Holograph Will—Probate unsealed.] —An executrix of a Scottish holograph will, letters probate of which have been resealed under the Probates Recognition Act, is entitled to have lands in British Columbia registered in her name where the will shews that she is appointed executrix without qualification. *In re Land Registry Act and Marjory Clazy, Deceased*, (1928) 40 B.C.R. 102; (1928) 2 D.L.R. 971; (1928) 1 W.W.R. 974.

4. Appointee under power of attorney.] —An appointee by power of attorney under the Execution of Trusts (War Facilities) Act, B.C. Stats. 1916, cap. 68, has power to make the usual affidavits required from the executor on an application for probate. *In re Benson, Deceased*, (1918) 25 B.C.R. 458; (1918) 3 W.W.R. 583.

B. *Probate Duties.*

Probate Duties Act — Limited to personal estate.]—The Legislature did not by the Probate Duties Act in question clearly indicate an intention to impose probate duty upon real estate and such taxation should be limited to personal estate. *Bowman* v. *Attorney-General of British Columbia*, (1926) 38 B.C.R. 1; (1926) 4 D.L.R. 834.

II. LETTERS OF ADMINISTRATION.

1. Letters of administration with will annexed.]—Where there are several residuary legatees and no executor, one of them may take out letters of administration with the will annexed without the consent of or notice to the others and may proceed to prove the will in solemn form either ex mero motu or in consequence of having been challenged to do so by a party whose interests are adverse to it. *Curtis* v. *Skeffington*, (1915) 9 W.W.R. 834.

2. Intention of deceased.]—Deceased, a Syrian, after returning from active service started a tea and coffee shop. Subsequently being taken ill he gave power of attorney to E. and M., fellow countrymen, to transact his business. Shortly before his death

he requested that a will be drawn leaving his estate to his mother in Asia Minor and appointing E. and M. his executors. When the will was ready for signature he was too weak to sign and died intestate. He also had certain moneys in a bank at the time of his death. On application by E. and M. for letters of administration under sec. 12 of the Administration Act:—Held, that E. and M. should be appointed administrators for the purpose of selling deceased's business only, and that as to the balance of the estate the mother should be consulted. *In re C. Owen, Deceased,* (1919) 26 B.C.R. 463; (1919) 1 W.W.R. 313.

III. THE OFFICIAL ADMINISTRATOR.

1. Deceased resident outside Province.]—The personal estate of one who dies intestate, being at the time of his death resident outside of the Province, and having no relations within the Province, should be administered by the official administrator unless special circumstances are shewn that the estate by the appointment of another would be appreciably benefitted. *In re F. H. Bates, Deceased,* (1919) 27 B.C.R. 1.

2. Foreign intestate.]—In the absence of special circumstances the estate of one who dies intestate, being at the time of his death a resident outside of the Province, and having no relatives within the Province, should be administered by the official administrator. *In re Beckman, Deceased,* (1925) 37 B.C.R. 41.

3. Foreign executor—Attorney for.]—When the executors of a deceased person, domiciled in a foreign country, have appointed an attorney-in-fact within British Columbia with instructions to apply for letters of administration with the will annexed, the petition will be granted in preference to leaving the estate within the Province in the hands of the official administrator. *In re Eliza Jane Bullen, Deceased,* (1926) 37 B.C.R. 240.

IV. DUTIES OF THE REPRESENTATIVE.

1. Administrator's bond — Infants.]—On an application for letters of administration where there are infant children, the administrator must provide the usual bond. *In re L. Luchetta, Deceased,* (1919) 27 B.C.R. 337; (1919) 2 W.W.R. 885.

2. Duties of representative.] — The official administrator in the Province having collected and paid into Court money of the estate of a deceased person who died resident in a foreign country, the foreign administrator of the estate should give security for the protection of any persons who might have a claim to the fund before payment thereof to him out of Court. *In re Estate of Rosalie St. Louis, Deceased,* (1922) 31 B.C.R. 336; (1923) 1 D.L.R. 1158; (1923) 1 W.W.R. 927.

3. Direction to executors to sell property when expedient—Liability. —Where trustees, under a will which authorizes them to sell the testator's real and personal property, if they think it expedient, think it necessary to sell but the beneficiaries object to a sale, the trustees should either sell the property or apply to the Court for direction, otherwise they may be held liable for a breach of trust. In the circumstances of the present case, however, the trustees having acted honestly and reasonably are excused for the breach of trust by virtue of sec. 88 of the Trustee Act. *Duthie et al.* v. *Gallagher et al.,* (1930) 2 D.L.R. 582.

4. Administratrix beneficiary.] — The plaintiff who held an assignment of a debt from J. and of the rights under a guarantee by the defendant for the payment thereof, was administratrix of the estate of D. (her deceased husband). The defendant claimed the right of set-off against the plaintiff the sum due upon a covenant in a mortgage given by D. which had been assigned by the mortgagee to J.:—Held, that although the money was lent to the primary debtor by the trustee of the real estate of the deceased husband, the evidence was conclusive that the money so advanced was in fact the private money of the plaintiff, and a debt due from the estate cannot be set off against her personal estate. *Donald* v. *Jukes,* (1920) 60 S.C.R. 652; 56 D.L.R. 692; (1921) 2 W.W.R. 208; Affg. (1920) 28 B.C.R. 215; 54 D.L.R. 688; (1920) 2 W.W.R. 209.

V. POWERS AND RIGHTS OF.

A. Carrying on Testator's Business.

1. Investments by executors.] — The setting out in a will of specific modes of investment does not operate to prevent the executors investing trust funds in the securities referred to in sec. 12 of the Trustee Act. *In re George McCormick, Deceased,*

(1915) 22 B.C.R. 327; 25 D.L.R. 735; 9 W.W.R. 199; 33 W.L.R. 190.

2. Maintenance of property specifically devised.]—A testatrix bequeathed all her estate except "Fairacres" to her executors in trust to convert into money and pay thereout all her debts, succession and probate fees and legal and testamentary expenses, and then pay several legacies. She then bequeathed "Fairacres" with the furniture and personal property belonging thereto to said executors upon trust to the use of her husband for life, and on his death to be sold and the proceeds up to a certain sum to be paid to the park commissioners of Vancouver for a playground for children:—Held, that the executors could not apply any moneys from the general estate for the upkeep of "Fairacres." *In re Estate of Grace E. Ceperley, Deceased,* (1919) 27 B.C.R. 60; (1919) 2 W.W.R. 495.

3. Assignment of business to company —Concurrence of beneficiary.]—There is no breach of trust when an executor carrying on the testator's business with the concurrence and approval of the sole beneficiary, at her request allows the business to be assigned to a company incorporated to avoid the risk of personal liability, the company assuming with the consent of the creditor the only debt of the testator remaining undischarged. *McCallum* v. *Toronto General Trusts Corporation,* (1930) 43 B.C.R. 342; (1931) 4 D.L.R. 926; Revg. 43 B.C.R. 31; (1931) 1 D.L.R. 271.

B. Sale of Testator's Assets.

1. Power of sale.]—The interests of executors in real estate under an unrestricted power of sale is not ownership and may be registered only as a charge. *In re Prefontaine,* (1917) 1 W.W.R. 667.

2. Sale of undivided interest.]—When a testator by his will gives his real and personal property to trustees "upon trust to sell and convert into money such real and personal estate" the trustees are not thereby authorized to sell an undivided share or interest in real property. *In re Land Registry Act and Anthony,* (1916) 22 B.C.R. 535; 10 W.W.R. 863.

C. Right of Retainer.

1. Company in liquidation—Power of liquidator.]—A liquidator of a company in liquidation is an officer of Court for the time and except in minor acts entirely under its direction. Where the company in liquidation is an executor of an estate the liquidator thereof cannot part with the right of retainer of the company unless authorized by the Court to do so. *Williams* v. *Dominion Trust Co.,* (1916) 23 B.C.R. 461; 31 D.L.R. 786; (1917) 1 W.W.R. 664.

D. Necessary and Reasonable Disbursements.

Employment of solicitors and agents.]—Executors are entitled to employ the services of solicitors or their agents where the circumstances render it reasonable that they should do so and the costs thereby incurred may be charged as a disbursement on the executors' accounts. *In re Estate of Louis Level, Deceased,* (1926) 38 B.C.R. 211; (1927) 1 D.L.R. 900; (1927) 1 W.W.R. 1000.

E. Application to Court for Advice.

Duty to apply.]—A testator bequeathed her house and furniture to her daughter G., and the residue of her estate to two executors, who had authority to carry on at their discretion a certain business of which the testatrix was a two-thirds owner, and out of such residue of her estate to pay certain sums and "to divide my . . . . . interest in the said business or what remains thereof . . . . one-third thereof to my grandson W. . . . . and the balance thereof to my daughter G." There was then a provision as to the division of certain company shares and a residuary devise in favour of G. Subsequently the testatrix conveyed by deed to G. her residence and furnishings and gave her certain sums of money. Later by codicil the testatrix revoked the bequest to W. of the portion of her interest in the business and charged her interest in the business with the sum of $1,000 in favour of a certain daughter and further provided "after such payment I give . . . . . the whole of my . . . . . interest remaining in the said business . . . . . to my son F. and my grandson W. . . . . in equal shares," in all other respects confirming her will:—Held, that by the codicil the bequest to W. of the one-third share of testatrix's interest in the business was revoked and in lieu thereof F. and W. were given her entire interest in the business to

the exclusion of G. and subject only to the bequest of $1,000; notwithstanding the fact that this construction might result in revoking or rendering impossible of performance other dispositions in the original will not so treated in the codicil; that the Court was entitled to consider "the surrounding circumstances" at the time of the execution of the codicil in case of any ambiguity which was thereby removed; that the gift to F. and W. was a specific legacy (subject to the right of said legatee of $1,000) and therefore the beneficiaries named in the will other than F. and W. had no right to intervene or seek any redress in connection with the business. It is the duty of an executor to seek the aid and protection of the Court in the interpretation of the will. Here, the executor, having launched an action to wind up a business specifically devised, instead of seeking the advice of the Court, was condemned personally in costs. *Nimmo et al.* v. *Adams et al.*, (1922) 30 B.C.R. 527; (1922) 1 W.W.R. 1284.

F. Foreign Administrators.

Right of payment out of Court.]—The official administrator at Victoria who was appointed at the instigation of the administrator of the estate of deceased appointed in the State of Washington received certain moneys for the estate which he paid into Court in Victoria. On the application of the administrator for Washington State for payment out:—Held, that an order for payment out be made upon proper security being given to the satisfaction of the registrar. *In re Estate of Rosalie St. Louis, Deceased*, (1922) 31 B.C.R. 336; (1923) 1 D.L.R. 1158; (1923) 1 W.W.R. 927.

G. Remuneration and Discharge of Representative.

1. Administrators' fees.]—Under sec. 80 of the Trustee Act the power to grant remuneration to an administrator is limited to 5 per cent. of the gross value of the estate. *In re Beckman, Deceased*, (1925) 37 B.C.R. 41.

2. Basis of remuneration.]—Remuneration to trustees, of a percentage of the gross value of the estate, should be allowed on the gross value as of the time when the accounts are passed; a valuation should then be made by the registrar of the unrealized assets and the percentage based on that valuation. Trustees who have been allowed a commission to manage the estate will not be allowed as a disbursement commissions paid to agents on collection of interest of mortgages in which some of the estate moneys were invested. *Stephen* v. *Miller*, (1918) 25 B.C.R. 388; 40 D.L.R. 418; (1918) 2 W.W.R. 1042. Affd. 49 D.L.R. 698; 59 S.C.R. 690.

3. Basis of remuneration.]—Sec. 80 of the Trustee Act bases the remuneration of a trustee on "the gross value of the estate." In fixing the remuneration of a trustee for the administration of an estate the Court of Appeal allowed 5 per cent. of the amount in the trustee's hands for distribution among the beneficiaries, varying the order of the Court below allowing 5 per cent. of the sum "actually collected" only. *Canadian Financiers Trust Company, Trustee, and Dorrell, Guardian* v. *Chan Shun Chong et al.*, (1921) 29 B.C.R. 543; (1921) 2 W.W.R. 984.

4. Remuneration and discharge—Order for—Time for appeal.]—On an application by an executor for an order fixing his remuneration and for his discharge an order was made as to the amount of remuneration to be paid him but the question of his discharge was deferred for further hearing. The order was not finally settled and entered until thirteen days from the date upon which it was pronounced and notice of appeal therefrom was given eight days after entry:—Held, that the order being interlocutory the appeal is out of time. *In re Davies Estate. Davies* v. *Duggan*, (1927) 38 B.C.R. 249.

VI. Claims of Creditors.

1. Funeral expenses.]—Funeral expenses and expenses of proving the will are of the same degree and a first charge on the assets and when they are of the same degree the executor is within his right in paying one in preference to the other. *Mount Pleasant Undertaking Company* v. *McDuffee*, (1923) 33 B.C.R. 36; (1923) 4 D.L.R. 1200; (1923) 3 W.W.R. 957.

2. Action on administrator's bond.]—A bond given to secure the due administration of the estate of an intestate cannot be put in suit by a creditor for the purpose of recovering his debt. *Meldram* v. *Maclure and Houghton*, (1916) 23 B.C.R. 176.

3. Corroboration.] — For protection from unfounded claims it has always been the rule of the Courts that claims against the estate of a deceased person should be examined with jealous suspicion. Where two persons make a joint claim against executors in respect of an alleged contract of a deceased person it cannot be maintained unless there is independent corroboration in addition to the evidence of each of the claimants giving the same testimony as the other. *Ledingham* v. *Skinner*, (1915) 21 B.C.R. 41; 21 D.L.R. 300; 30 W.L.R. 741; 8 W.W.R. 52.

4. Corroboration.]—Sec. 11 of the Evidence Act is as follows: "In any action or proceeding by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S. 1911, cap. 78, sec. 11." This section does not necessarily require another witness who swears to the same thing. Circumstantial evidence and fair inference of fact arising from other facts proved, that render it improbable that the fact sworn to be not true, and reasonably tend to give certainty to the contention which it supports, and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence. *Mattice* v. *Mattice*, (1925) 34 B.C.R. 474; (1925) 1 D.L.R. 755; (1925) 2 W.W.R. 203.

See EVIDENCE, Corroboration.

VII. ACTIONS BY AND AGAINST REPRESENTATIVE.

1. Administratrix of creditor's estate—Action against guarantor.] — Where an administratrix brings action against the guarantor of a debt owing to a deceased creditor her evidence of non-payment by the debtor based upon knowledge derived solely from the deceased before his death is hearsay and inadmissible. *Ivey* v. *Smith*, (1929) 40 B.C.R. 475.

2. Families Compensation Act—Action for benefit of alien enemy.] — An action cannot be maintained under the Families Compensation Act for the benefit of the mother of the deceased if she is an alien enemy. *Cremidas* v. *B.C. Electric Ry. Co.*, (1919) 27 B.C.R. 232; (1919) 2 W.W.R. 549.

VIII. ADMINISTRATION OF INSOLVENT ESTATES.

Judgment creditor — Registration tax sale deed.]—On an application to register a tax sale deed, service of notice under sec. 137 B of the Land Registry Act, 1911, upon judgment creditors is not required where the executrix of the owner has filed a declaration of insolvency. *In re District of North Vancouver. In re Estate of J. C. Keith*, (1918) 1 W.W.R. 626.

IX. COSTS.

1. Motion for removal of administrator.]—The costs of a contested motion for the removal of an administrator and the appointment of another should be taxed under Appendix N of the Supreme Court Rules and not as between solicitor and client. Rule 60 of the Probate Rules, 1925, applies to non-contentious matters only. *Payne* v. *Gammon*, (1927) 38 B.C.R. 153; (1927) 2 D.L.R. 605; (1927) 1 W.W.R. 506.

2. Lunacy—Expenses of lunacy and of administration.]—After making his will a testator was found to be of unsound mind by a judge of the Court. A committee was appointed and by orders of the Court in Luncy sums were authorized to be raised for maintenance of the lunatic and the committee made up the payments out of the estate in British Columbia. On an application that the expenses of maintenance during lunacy and the testamentary expenses be borne proportionately by the beneficiaries:—Held, that the committee in lunacy was entitled to draw the costs of maintenance during lunacy from the British Columbia fund. Held, further, that as it was clearly expressed in the testator's will that the costs of executing the trusts should be shared proportionately by the beneficiaries, it is the duty of the Court to carry out that intention and the testamentary expenses including the costs of the application and appeal should be borne proportionately by the beneficiaries of the deceased both in the Province and elsewhere. *Standard Trusts Co.* v. *Pulice*, (1924) 33 B.C.R. 250; (1924) 1 D.L.R. 985; (1924) 3 W.W.R. 771.

EXEMPTION.

See EXECUTION.

See HOMESTEAD EXEMPTIONS.

See INSOLVENCY.

See LANDLORD AND TENANT.

EXPROPRIATION.

See ARBITRATION.

See COMPULSORY PURCHASE.

See MUNICIPAL CORPORATIONS.

See RAILWAYS.

EXTRADITION.

1. Information and general conditions.]—An information for the purpose of obtaining the issue of a provisional warrant to apprehend a fugitive under the provisions of the Fugitive Offenders Act, R.S.C. 1906, cap. 154, may be laid upon information and belief, and witnesses need not be examined in support unless the magistrate considers it desirable or necessary, as provided by sec. 655 of the Criminal Code, the provisions of which are made applicable to sec. 9 of the Fugitive Offenders Act. It is sufficient to follow the statutory language when laying the information. An information charged the accused as getting money by false pretences from "Smith and Woodman," not indicating whether they were a firm, or a company, or two separate individuals:—Held, that this, while objectionable, did not invalidate the proceedings. Additional care ought to be taken in the case of extraditing persons to foreign countries than in facilitating criminal proceedings in various parts of the Empire, to which alone the Fugitive Offenders Act applies. *In re Harrison*, (1918) 25 B.C.R. 433; 29 C.C.C. 420.

2. Arrest of person already in custody.]—A person in custody, lawful or otherwise, may be arrested on lawful process without the necessity of his being set at liberty before being arrested on another charge. The validity of the original caption is not material. *Ibid.*

3. Arresting constable as informant.]—It is no valid objection to the arrest of a person by a constable on a warrant, that the constable is the person who laid the information upon which the warrant to apprehend was based if he has no special interest in the case. *Ibid.*

4. Prima facie case.]—Where the facts disclosed in extradition proceedings make out a prima facie case of theft under Canadian law, proof that such facts constitute larceny under the foreign law may be inferred from the defendant's indictment in the foreign state for the offence. It is no objection to an information that it contains more than one charge. *In re Israelowitz*, (1917) 25 B.C.R. 143; 29 C.C.C. 323.

5. Prima facie case of guilt.] — Extradition from Canada to another British possession will not be confirmed on habeas corpus unless a prima facie case of guilt is made out to the satisfaction of the superior Court to which the accused has made application for discharge. On a charge of obtaining by false pretences it is not necessary that all the statements made should be proved to be false, nor is it necessary that all the statements subject of discussion, and which are alleged to have been false, should have operated upon the mind of the party who paid out his money on the strength of such representations. In determining whether a prima facie case of obtaining by false pretences has been made out, the Court will be guided by the same principles that govern a jury, acting not on admissions nor direct evidence, but drawing proper inferences from proved facts. It is incumbent upon a Judge, if possible to follow decisions in criminal cases as rendered in other Provinces, in order to create and perpetuate a uniformity of decisions in criminal cases throughout Canada. *In re Harrison (No. 3)*, (1918) 25 B.C.R. 545.

6. Principles governing construction of treaty.]—With respect to the construction and operation of extradition treaties and legislation in furtherance thereof the ordinary technicalities of criminal proceedings should not be favoured. *In re Sieman (No. 4)*, (1930) 2 W.W.R. 412.

7. Writ of prohibition.] — A writ of prohibition will not lie to an extradition judge. *Ibid.*

8. Evidence—Admissions after warning.] — The common law remedy against illegal detention by inferior tribunals by making applications to different judges until the judicial power is exhausted for a writ of habeas corpus still exists with respect to extradition proceedings. A habeas corpus judge must look at the evidence in order to ascertain whether the conditions of the treaty and statute have been fulfilled, as for example, whether there was evidence of an extradition crime and that the prisoner was not in reality being pursued for a political offence, so that the decision in *Rex*

v. *Nat Bell Liquors, Ld.*, (1922) 2 A.C. 128 is inapplicable, but at the same time it is not the duty of the habeas corpus judge to interfere with the proceedings on merely technical grounds. It is well settled that extradition proceedings need not initiate in the foreign country. Evidence, which under Canadian law, may be inadmissible at the trial on the ground that the prisoner had not been properly warned of the possible consequences of his making a statement on giving answers to a policeman's questions, is at least admissible in extradition proceedings to prove the identity of the person arrested with the person charged. *In re O'Connor*, (1927) 39 B.C.R. 271; (1928) 1 D.L.R. 558; (1928) 1 W.W.R. 65; 49 C.C.C. 151.

9. Abortion.]—Procuring an abortion is extraditable on the demand of the State of Alabama and this Court is not concerned as to what Court in the foreign state has jurisdiction to try the prisoner. *Ibid.*

10. Breaches of Anti-Narcotic Law.]—A breach of the provisions of the "Harrison Anti-Narcotic Law" of the United States of America which is a statute for the suppression of narcotics being enumerated under the Extradition Act, the offence against the laws of both Canada and the United States is extraditable. *In re Sieman (No. 2)*, (1930) 2 W.W.R. 111.

11. Breaches of Narcotic Law.]—An offence against sec. 2 (a) of the "Jones Miller Act" of the United States of America is extraditable. *In re Sieman (No. 4)*, (1930) 2 W.W.R. 412.

12. Obtaining goods by false pretences —Ejusdem generis.]—A prisoner was committed for extradition on the charge that in the city of Baltimore, in the State of Maryland, by a certain false pretence he obtained goods from one Engle and others with intent to defraud. The schedule to the Extradition Act containing extraditable offences includes: "7. Obtaining money, valuable security or other property by false pretences." On motion for release through habeas corpus proceedings:—Held, that the ejusdem generis rule applies and the words "other property" used in the description of the crime of "obtaining money, valuable security or other property by false pretences" must be construed as covering other property of the same kind as "money" or "valuable security" and would not include "goods." The applicant was therefore discharged from custody. *In re Rosen*, (1931) 44 B.C.R. 203; (1931) 2 W.W.R. 799; 56 C.C.C. 162.

13. Rape — Feigned marriage.] — Cohabitation after a feigned marriage is not rape within sec. 298 of the Criminal Code. The proposition that fraud vitiates consent with regard to the crime of rape is not true if taken to apply without qualification. The only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself or as to the identity of the person who does the act. The obtaining of a woman's consent by means of a feigned marriage is not "personating her husband" within the meaning of sec. 298 of the Criminal Code. *State of California* v. *Skinner*, (1924) 33 B.C.R. 555; (1924) 2 W.W.R. 209.

FACTORIES.

1. Factory—Meaning of.]—A laundry operated by several persons, all working and sharing in the profits equally, and all living on the premises, and with no others employed and no one receiving compensation for work other than as aforesaid, is not a "factory" within the meaning of the Factories Act, and a prosecution for work being done therein after seven o'clock p.m. is not justified under the Act. *Rex* v. *Chow Chin*, (1920) 2 W.W.R. 997.

2. Factory—Meaning of.]—Four Chinamen who lived and prepared their meals in a house in which were two bedrooms upstairs, an ironing-room, dining-room and kitchen on the ground floor and a washing-room in the basement, obtained a license under the city by-laws to operate a laundry on the premises. They were convicted by the magistrate for operating in prohibited hours under the Factories Act:—Held, on appeal, that sec. 2, sub-sec. (d) of the Factories Act contemplates the existence of a "dwelling-house" and a "factory" in the one building, and the conviction should be sustained. *Rex* v. *Chong Kee et al.*, (1920) 29 B.C.R. 165; 37 C.C.C. 22.

3. Laundry—Operating on holiday.]—The accused were sole owners of their own laundry and operated them on their own behalf without employing any labour:—Held, that the owner of a laundry as defined by sec. 3 (2) who carries on without any employees and works the laundry solely by himself comes within the prohibition of sec.

4 (2). Said section is not governed by the heading "employees" (inserted in the Act between secs. 3 and 4). *Wong Sam* v. *Hamilton*, (1929) 42 B.C.R. 133; 52 C.C.C. 357.

See MASTER AND SERVANT.
See NEGLIGENCE.
See TORT.

FALSE IMPRISONMENT.

See MALICIOUS PROSECUTION.

FALSE PRETENCES.

See CRIMINAL LAW.

FALSE REPRESENTATIONS.

See MISREPRESENTATION AND FRAUD.

FIERI FACIAS.

See EXECUTION.

FIRE.

1. Alterations ordered by fire marshal —Responsibility of lessor.]—A moving-picture theatre in Prince Rupert, owned by the defendant, was leased to the plaintiff, it having been operated for a number of years previously. The fire marshal ordered that certain alterations be made to reduce the fire risk. The owner refused to make the alterations and the lessee made the alterations and recovered judgment against the owner for the cost thereof:—Held, that under sec. 17 (3) of the Fire Marshal Act the owner of a moving-picture theatre is liable to the lessee for the cost of alterations made by the latter in order to comply with the order of the fire marshal. The Fire Marshal Act and the Moving Pictures Act in so far as they apply to fire hazards in moving-picture theatres were intended to be complementary. *McMordie* v. *Ford*, (1930) 42 B.C.R. 486; (1930) 3 D.L.R. 398; (1930) 2 W.W.R. 203.

See McIntyre v. *Thompson*, (1928) 1 W.W.R. 907.

2. Public garage—Reasonable care.]—When a motor car is damaged by fire while stored for hire with a garage company the onus is on the company to shew that all reasonable care was taken to prevent such damage. *Romano* v. *Columbia Motors Ltd.*, (1930) 42 B.C.R. 168; (1930) 1 D.L.R. 815; (1930) 1 W.W.R. 159.

3. Fireworks.]—A municipal corporation is not liable for injury to an infant eluding her parents and approaching within range of fireworks displayed in a municipal park, but under the direct control of an independent contractor, although the municipal authorities contributed towards the expense of the display which was held under the direction of a Citizens' Committee. *Halpin* v. *Corporation of the City of Victoria*, (1915) 21 B.C.R. 14; 23 D.L.R. 333; 7 W.W.R. 1058.

4. Liability of owner—Negligence of licensee.]—An owner who knowingly permits another to erect and operate works on his premises which if not properly controlled are liable to cause damage to a stranger by allowing fire to spread, is liable for damage occurring by reason of the operator's negligence. *Coryell* v. *Bertha Consolidated Gold Mining Co. Ltd.*, (1923) 33 B.C.R. 81; (1924) 1 D.L.R. 236; (1924) 1 W.W.R. 122.

5. Spread of fire—Liability of owner—Clearing land.]—An owner of land who sets out a fire thereon must use all reasonable precautions to prevent the fire from spreading to and damaging the property of others. Failure to do so is negligence for which the owner is liable. Statutory provisions giving authority to set out a fire are merely permissive and the liability is not thereby avoided. *Goch* v. *Youschak*, (1924) 34 B.C.R. 454; (1924) 4 D.L.R. 508; (1924) 3 W.W.R. 273.

6. Damage by fire to real property—Growing crops.]—The law of the State of Washington with respect to liability in damages for negligently allowing fire to spread being the same as that of British Columbia, an action for injury so caused to property in that State from a fire originating and being allowed to escape from British Columbia may be maintained in British Columbia. In such an action damages cannot be recovered by residents of a foreign State for injury done to the soil, trees, or to buildings or fences erected on foreign property for the better enjoyment of the soil and with the intent that they remain permanently whether or not they

were affixed to the soil otherwise than by their own weight; but growing crops, including grass used for pasture, should be treated as chattels and the loss recoverable. *Boslund et al.* v. *Abbotsford Lumber, Mining & Development Company, Limited,* (1925) 34 B.C.R. 485; (1925) 1 D.L.R. 978; (1925) 1 W.W.R. 475.

7. Forest fire.]—Where a fire starts on forest land and the owner thereof while co-operating with the statutory authorities to put out that fire and under their express direction, without negligence starts another fire that spreads to his neighbour's property, the owner is not responsible for the damage thereby occasioned. *Coates* v. *Mayo Singh,* (1925) 36 B.C.R. 270; (1925) 4 D.L.R. 345; (1925) 3 W.W.R. 513.

8. Municipal corporation — Defective smoke pipe.]—A municipality which in contravention of a by-law allows a metallic smoke pipe to pass through a wooden floor and through the roof of a fire hall, the upper part of which is used by a fire chief employed by the municipality and his family as living quarters, such smoke pipe not being enclosed in brick or tile walls as required by the by-law, is guilty of negligence and liable to adjacent owners for damages to their property caused by a fire originating from the defective pipe. *Wilson* v. *Port Coquitlam,* (1922) 30 B.C.R. 449; (1923) S.C.R. 235; (1923) 2 D.L.R. 194; (1923) 1 W.W.R. 1025.

9. Accident—Use of old type of appliance.]—Where a fire occurred from sparks unexpectedly generated by friction caused by the breaking of a cable in logging operations, and all reasonable efforts were made to prevent the spread of the fire, it was held that the resulting damage occurred by accident and the person carrying on the logging operations was not responsible. It is not negligence to use an old type of appliance if it is reasonably safe and efficient, nor is it negligence to provide against damages that could not reasonably have been expected. *Higgins* v. *Comox Logging Co.,* (1926) 37 B.C.R. 525; (1926) 3 W.W.R. 417; (1926) 4 D.L.R. 852; (1927) S.C.R. 359; (1927) 2 D.L.R. 682.

10. Prospectors setting out fire.] — Where a fire is made by prospectors, employed by a mining company, for the purpose of preparing a meal and is allowed to spread, causing damage to the property of another, the employer cannot be held liable on the ground that the prospectors were acting in the course of their employment, as the lighting of the fire was an act which they were under no contractual obligation to perform as a duty to their employer, or which their employer had ordered them to do. Although their contract with the employer called upon them to board themselves, in cooking their food the prospectors were doing something for themselves rather than discharging a duty towards their employer. *Murdoch* v. *Consolidated Mining and Smelting Co.,* (1929) S.C.R. 141; (1929) 1 D.L.R. 913; Revsg. (1928) 39 B.C.R. 386; (1928) 1 D.L.R. 853; (1928) 1 W.W.R. 578.

11. Careless use of torch.]—In an attempt to thaw frozen waterpipes belonging to the defendant a neighbour offering gratuitous assistance attempted without the knowledge or authorization of the defendant to thaw the pipes by means of the use of a gasolene torch. A fire having resulted which destroyed the plaintiff's building, it was held in an action for damages by reason thereof that the defendant was not responsible. *Stephen* v. *McNeil,* (1928) 40 B.C.R. 209; (1928) 3 W.W.R. 182; (1929) S.C.R. 537; (1929) 1 D.L.R. 1003.

12. Setting out fire—Escape to adjoining property.]—A person who sets a fire on his land must take proper precautions to see that the fire does not get beyond his control to the injury of another. It is doubtful whether the doctrine in *Rylands* v. *Fletcher,* (1868 L.R. 3 H.L. 330) applies to a fire set out in the usual course of husbandry. *Marshall* v. *Hutton,* (1928) 2 W.W.R. 33.

13. Obligation to fight fire.] — The statutory call to service under said Forest Act is in effect like the summons to a juryman, "laying aside all excuses, you do personally appear." *The King* v. *Swanstrom,* (1925) 3 D.L.R. 79; (1925) 1 W.W.R. 713.

14. Expenses incurred in fighting fire.] —The Crown in the right of the Dominion may sue for expenses incurred in fire fighting under sec. 114 of the Forest Act, R.S.B.C. 1924, cap. 93. *The King* v. *Swanstrom,* (1925) 3 D.L.R. 79; (1925) 1 W.W.R. 713.

15. Limitation of actions.]—An action for the recovery of expenses incurred in fighting a fire, under the Forest Act, 1918 (B.C.) cap. 44, sec. 12, is an action for a penalty, and is therefore barred in six months under the Interpretation Act, R.S.B.C. 1911, cap. 1, sec. 32. *Attorney-General for British Columbia* v. *Freeman,* (1924) 2 D.L.R. 99.

16. Limitation of actions under Water Act.] — Where a company deriving its powers from the Water Act during the operation of clearing land for right of way for a power transmission line allows fire to spread through the property of another, an action for damages for the resulting loss is barred by the limitation contained in sec. 130 of the Water Act unless notice of action has been given to the Attorney-General within six months next after the damage was suffered. *Vogel* v. *Vancouver Island Power Co.*, (1926) 37 B.C.R. 194; (1926) 2 D.L.R. 969.

17. Fire caused by locomotive.]—The defendant operated a railway for logging purposes. Owing to a defective spark arrester on a locomotive operated on the railway a fire started in debris left on logged-over ground near the track. The defendant was directed by the Provincial fire warden to allow the fire to burn up the debris on the slashed area but to keep it under control. Owing to a strong wind the fire spread so that the plaintiff's property with that of about fifty others was destroye with that of about fifty others was destroyed: —Held, that a fire which started through a defective spark arrester on a locomotive which later becomes uncontrollable cannot be adopted by an officer of the Forestry Department as a legal fire pursuant to a demand as contemplated by sec. 127A (1) of the Forest Act, B.C. Stats. 1912, cap. 17, and the defendant is not relieved by the fact that an "act of God" intervened. The defendant is guilty of negligence and liable in damages in operating a locomotive with a defective spark arrester at a time of the year when everything surrounding the railway is in an inflammable condition and in allowing the debris to accumulate along the tracks. *McIntyre* v. *Comox Logging and Railway Co.*, (1924) 33 B.C.R. 504; (1924) 2 W.W.R. 118.

See Mid-Lakes Timber Co. v. *Canadian Pacific Ry. Co.*, (1928) 40 B.C.R. 526; (1928) 4 D.L.R. 922; (1928) 3 W.W.R. 745.

FISHERIES.

1. Use of public property—Notice to vacate.]—Sec. 62 of The Fisheries Act, 1914, provides that "every subject of His Majesty may use vacant public property, such as by law is common and accessory to public rights of fishery and navigation, for the purpose of landing, salting, curing and drying fish":—Held, that as against a person relying on this section the serving of a writ claiming possession is a sufficient demand to vacate, without making a demand to vacate before action is brought. *The King* v. *Vancouver Lumber Co.*, (1924) 33 B.C.R. 468; (1924) 2 D.L.R. 482; (1924) 1 W.W.R. 1041.

2. Fisheries Act.]—The imposition of a licensing system upon fish canneries or curing establishments in the manner attempted by secs. 7A and 18 of the Fisheries Act, 1914, is beyond the competency of the Dominion Parliament and accordingly those sections are ultra vires. *Rex* v. *Somerville Cannery Co., Ltd.*, (1927) 39 B.C.R. 103; (1927) 4 D.L.R. 494; (1927) 3 W.W.R. 215; 49 C.C.C. 65. *Attorney-General for Canada* v. *Attorney-General for B.C. et al.*, (1929) 99 L.J.P.C. 20; 142 L.T. 73; (1929) 3 W.W.R. 449; (1930) A.C. 111; (1930) 1 D.L.R. 194.

3. Offence against fisheries regulations —Keeping purse-seine open.]—Sec. 21 of the fishery regulations makes it an offence for a purse-seine to be kept open for any time after being cast in the manner known as an "open-set." A conviction stating that the accused 'did fish for salmon with a purse-seine "in the manner known as an 'open set'" does not properly describe the offence and should be quashed. *Rex* v. *McPherson*, (1929) 41 B.C.R. 218; (1929) 2 W.W.R. 141; 51 C.C.C. 419.

4. Foreign fishing vessel—Convention between Great Britain and United States.] —To justify an entry by a foreign fishing vessel into Canadian territorial waters on the ground of "stress of weather," the weather must be such as to produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well-grounded bona fide apprehension that if he remains outside such waters he will put in jeopardy his vessel and cargo. In each case the questions whether the master fairly and honestly on reasonable ground believed it necessary to take shelter and whether he exercised reasonable skill, competence and courage in the circumstances are questions of fact for the tribunal whose duty it is to find the facts. The Convention of October 20, 1818, between Great Britain and the United States, respecting fisheries and boundary lines, did not apply to the Pacific waters so far as fisheries were concerned and therefore could not be available as justification for the entry in question. *The "May"* v. *R.*, (1931) S.C.R. 374; (1931)

3 D.L.R. 15. *The "Queen City"* v. *R.,; The "Tillie M."* v. *R.; The "Sunrise"* v. *R.*, (1931) S.C.R. 387; (1931) 3 D.L.R. 147.

See CONSTITUTIONAL LAW.

FIXTURES.

See BUILDING CONTRACT.

See LANDLORD AND TENANT.

See MORTGAGE.

See TAXATION.

FORESHORE.

See CONSTITUTIONAL LAW.

See WATERS AND WATERCOURSES.

FORESTS.

See FIRE.

See PUBLIC LANDS.

FORGERY.

See CRIMINAL LAW.

FRANCHISE.

1. Electric light system — Right of municipality to assume ownership—Alteration of boundary.] — Where a district municipal corporation has granted to a company the right to operate an electric light system, it being provided in the agreement for the franchise that at the expiration of ten years the municipality, upon giving twelve months notice, might assume the ownership of the system within the district, held that the district municipality is entitled to assume the ownership of the system throughout the entire district as it existed at the date of the agreement notwithstanding that a portion of the district has since been converted into a new municipality. *North Vancouver* v. *Vancouver Power Co.*, (1916) 22 B.C.R. 561; (1917) A.C. 598; 86 L.J.P.C. 97; 117 L.T. 492; 36 D.L.R. 462.

2. Electric light system — Municipal corporation assuming—"Undertaking" defined.]—Where a municipal corporation has the right by agreement to purchase the undertaking, property rights and privileges of an electric light and power company, the price to be paid should represent the value of the whole undertaking and is not restricted to the physical assets of the company. *City of Cumberland* v. *Cumberland Electric Light Company, Ltd.*, (1931) 43 B.C.R. 525; (1931) 3 D.L.R. 69; (1931) 2 W.W.R. 377.

3. Electric power—Obligation of company to furnish.]—An electric power company will not be restrained from cutting off power which it has supplied to a purchaser if the power company has exceeded its rights in supplying the power beyond the territory in which it is allowed to operate, and is not under statutory obligation to continue the supply. *Granby Consolidated Mining, Smelting & Power Co.* v. *West Kootenay Light and Power Company*, (1929) 41 B.C.R. 89; (1929) 2 D.L.R. 651; (1929) 2 W.W.R. 470.

See ELECTIONS.

FRAUDULENT AND VOIDABLE TRANSACTIONS.

I. PARTIES TO ACTIONS TO SET ASIDE, 526.
II. CONVEYANCES IMPEACHABLE AS FRAUDULENT AGAINST CREDITORS GENERALLY, 527.
A. *Fraudulent intent*, 527.
B. *Voluntary assurances*, 529.
C. *Void as against subsequent creditors*, 530.
III. CONVEYANCE IMPEACHABLE AS GIVING PREFERENCE TO PARTICULAR CREDITORS, 530.
A. *Intent to defeat, hinder or delay*, 530.
B. *Pressure*, 531.
C. *Right to impeach transactions*, 532.
IV. APPEAL, 532.

I. PARTIES TO ACTIONS TO SET ASIDE.

1. Co-owner.] — Where two persons have an equal interest in a mineral claim and a conveyance of the claim is taken in the name of one of the parties, such party becomes a trustee of an undivided one-half interest for the other party, and where the

party in whose name the conveyance is taken obtains it from the other party by fraud and conveys the whole interest in fraud of the rights of such other party, the Court will order a reconveyance of the one-half interest of such party or if the parties refuse to re-convey will make a vesting order. *Murphy* v. *Barr*, (1921) 61 D.L.R. 343.

2. Grantor under fraudulent conveyance.]—In an action for the restoration of property fraudulently transferred for the protection of the grantor against his creditors, the Court should not grant relief even if the illegal purpose has not been accomplished. *Trumbell* v. *Trumbell*, (1919) 27 B.C.R. 161; (1919) 2 W.W.R. 198.

3. Judgment debtor.]—In an action by a creditor to set aside a conveyance by a judgment debtor as a fraudulent transaction, the judgment debtor is a proper although not a necessary party. *Gibson* v. *Franklin et ux.*, (1915) 21 B.C.R. 181. *Gauley* v. *Bank of Montreal*, (1916) 23 B.C.R. 264; 34 W.L.R. 1192; 10 W.W.R. 1359.

4. Decree for judicial separation and alimony — Wife creditor.] — A decree for judicial separation with costs and a subsequent decree for permanent alimony in the same proceedings are judgments in the Supreme Court and the wife in whose favour the decrees are made is a creditor for amounts unpaid thereunder and entitled to invoke the provisions of the Fraudulent Conveyances Act. *Mackey* v. *Mackey and Magur*, (1930) 42 B.C.R. 440; (1930) 3 D.L.R. 497; (1930) 1 W.W.R. 604.

II. Conveyances Impeachable as Fraudulent Against Creditors Generally.

A. Fraudulent Intent.

1. Intent.]—A company, acting under pressure from its bank, authorized the giving of a mortgage by resolution to secure its indebtedness to the bank, but owing to delay in settling questions of title and registration, the mortgage was not actually given until six months later. Six months after the mortgage was delivered, an order was made winding up the company:—Held, that the presumption created by the statute against transactions of this nature does not arise, as in the circumstances it cannot be said that the bank took the mortgage in contemplation of the insolvency of the mortgagor and with intent of obtaining an unjust preference over his other creditors. *Gauley* v. *Bank of Montreal*, (1916) 23 B.C.R. 264; 10 W.W.R. 1359; 34 W.L.R. 1192; 30 D.L.R. 483.

2. Gift by husband to wife.]—Where a debtor in anticipation of a judgment against him voluntarily conveys land to his wife, who enters into an agreement for sale to an innocent purchaser and later conveys the land to her daughter subject to the agreement, the land remains the property of the debtor and available for execution on behalf of the creditor, subject to the prior rights of others not parties to an action taken to set aside the conveyance. Evidence of a conversation between husband and wife in the presence of a third party, adversely affecting the interest of a person who is absent and favourable to the interest of the parties present will not be admitted. *Blair* v. *Dice*, (1924) 34 B.C.R. 323 ; (1924) 4 D.L.R. 568; (1924) 3 W.W.R. 379.

3. Surrounding circumstances.] — The Court may look at the whole of the circumstances surrounding the execution of a conveyance alleged to have been granted in fraud of creditors, in order to ascertain whether the purchaser was aware or should have been aware of the fraud and it is not necessary to prove that he had actual notice of the fraud. *The Komnick System Sandstone Brick Machinery Co.* v. *Morrison*, (1920) 28 B.C.R. 207.

4. Surrounding circumstances.]—In an action to set aside a conveyance as fraudulent, the whole of the circumstances surrounding the execution must be looked at, and then the question asked, whether the conveyance was in fact executed with the intent to defeat and delay creditors. Upon the payment of income by a wife to a husband, a presumption arises that such payment is made by way of gift. *Union Bank* v. *Tyson*, (1915) 7 W.W.R. 1117.

5. Transfer in fraud of creditors.]—The owner of a lot upon which a dwelling is situate conveyed it to his son for a nominal consideration at a time when he was pressed for payment of arrears payable to the mortgagee upon a mortgage of other property. The grantor was in default in payment of both interest and taxes:—Held, that the conveyance was fraudulent and should be set aside. *Cummings* v. *O'Flynn*, (1924) 34 B.C.R. 275.

6. Transfer between near relatives—Suspicious circumstances — Corroboration.]—Where a bill of sale made between

near relatives is impeached as being in fraud of creditors and the circumstances attending its execution are such as to arouse suspicion, the Court may as a matter of prudence exact corroborative evidence in support of the reality of the consideration and the bona fides of the transaction. *Koop* v. *Smith*, (1915) 51 S.C.R. 554; 25 D.L.R. 355; 8 W.W.R. 1203.

B. Voluntary Assurances.

1. Circumstances placing burden of explanation on parties interested.]—When a conveyance from a husband to his wife is questioned as being a fraud on his creditors, and suspicion touching the reality or bona fides of the transaction arises from the circumstances in which the transaction took place, then the fact of relationship itself is sufficient to put the burden of explanation upon the parties interested and their testimony must be scrutinized with care and suspicion. *In re Ready & Cass*, (1924) 33 B.C.R. 371; (1924) 2 D.L.R. 528.

2. Gift by husband to wife.]—Where a husband conveys land to his wife in anticipation of a personal judgment against him upon the covenant for payment in a mortgage, the conveyance to the wife will be set aside as being in fraud of the mortgagee notwithstanding that the defendant sets up an anti-nuptial agreement whereby he promised to give his wife the dwelling in which they lived and the money obtained from a sale of the same had been ultimately invested in the land in question. *Gray* v. *Ford*, (1925) 34 B.C.R. 517; (1925) 1 W.W.R. 943.

3. Conveyance of land to evade contract.]—A transfer of property legal in itself and not in fraud of creditors or subsequent purchasers is not impeachable on the ground that it was made with the intention of terminating certain obligations under a contract. *Associated Growers of British Columbia Limited and Kelowna Growers Exchange* v. *Edmunds, Edmunds and Bryant Orchards, Limited*, (1926) 36 B.C.R. 413; (1926) 1 D.L.R. 1093; (1926) 1 W.W.R. 535.

4. Right of grantee to set up ownership.]—The fact that a wife has entered into agreement for sale and a bill of certain chattels from the husband as grantor to the wife as grantee for the alleged fraudulent purpose of hindering, defeating and delaying the creditors of the husband, does not estop the wife from giving evidence to shew that she was the real owner of the chattels before the giving of the bill of sale, and that the chattels were purchased by her with her own earnings. *Hall* v. *Quesnel*, (1922) 68 D.L.R. 80.

C. Void as Against Subsequent Creditors.

1. Contract of hazardous nature—Previous transfer.]—A logger made a voluntary conveyance of a farm to his wife shortly after entering into a contract to cut and log merchantable timber in a certain area involving risk of financial loss:—Held, that the conveyance was a fraud upon persons who subsequently became his creditors and should be set aside. The result is the same whether the business or undertaking is hazardous or not. The principle is based on the contemplated entry into a trading or other venture which might lead to indebtedness. *Newlands Sawmills, Ltd.* v. *Bateman*, (1922) 31 B.C.R. 351; 70 D.L.R. 165; (1922) 3 W.W.R. 649.

2. Resident of foreign country—Transfer of shares to wife.]—Where an insolvent person residing in a foreign country transfers property consisting of shares in a company in order to protect himself against subsequent creditors, the transfer may be impeached even assuming that by the law of the country of his residence the shares might be regarded as community property and belonging in part to his wife. *Robert Dollar Co.* v. *Walker et al.*, (1926) 36 B.C.R. 405.

III. CONVEYANCE IMPEACHABLE AS GIVING PREFERENCE TO PARTICULAR CREDITORS.

A. Intent to Defeat, Hinder or Delay.

1. Intent to defraud.]—In order to defeat a mortgage of property to a creditor on the ground of fraudulent preference a Court may be satisfied that the preferring of a creditor was the predominant view of the debtor. That if he acted from mixed motives the Court must find out which was the predominant view in his mind. *Innes* v. *Cameron Valley Land Co. Ltd.*, (1919) 1 W.W.R. 751.

2. Rebuttable presumption.]—A debtor within three months before his assignment for the general benefit of his creditors, assigned a debt to one of his creditors without the intention of giving an unlawful preference. Under sec. 3 of the Fraudulent Preferences Act such an assignment is deemed to be void as a fraudulent preference. Under sec. 64 (2) of the Bankruptcy Act such an assignment shall be presumed prima facie to have been made with the view of giving such a preference, and the presumption is rebuttable. Sec. 3 of the Fraudulent Preferences Act has been rendered inoperative by the overriding enactment of sec. 64 of the Bankruptcy Act. While the Bankruptcy Act does not abrogate a Provincial Act merely because the latter deals with preferential transactions, yet with respect to such transactions a Provincial statute cannot be enforced if it provides that a certain result shall follow from circumstances which under the Dominion statute are followed by a different result. *Hoffar Ltd.* v. *Can. Credit Men's Trust Assn.*, (1929) 40 B.C.R. 454; (1929) 2 D.L.R. 73, 106; (1929) 1 W.W.R. 557; 10 C.B.R. 369.

B. Pressure.

1. Deposit of securities in contemplation of insolvency.]—Sec. 98 (1) of the Winding-up Act is ineffectual to support a recovery of all or a portion of the securities given by a company unless the person taking such securities had knowledge that the condition of the affair of the company was such as to border on insolvency at the time of obtaining the advances for which the security was given. The presumption in sec. 98 (2) that such securities were deposited in contemplation of insolvency is rebuttable, the burden of proof being cast upon the party receiving such securities of shewing that he had no intention of so receiving such securities or of defrauding the creditors. Evidence that the securities were obtained by pressure exercised upon the company may be material in discharging such onus. *Dominion Trust Co.* v. *Royal Bank of Canada*, (1920) 29 B.C.R. 169; 59 D.L.R. 224; (1921) 1 W.W.R. 90; 1 C.B.R. 397.

2. Knowledge of debtor's insolvency.]—If bona fide pressure is exercised by the transferee upon the debtors, and there is no fraud, the transfer should be upheld even if the inference is that the debtor was at the time insolvent and the transferee knew of his financial condition. *Brown* v. *the Bank of Montreal*, (1916) 23 B.C.R. 68.

C. Right to Impeach Transactions.

1. Creditors entitled to impeach.]—Creditors protected by the Fraudulent Preferences Act are only those existing at the time when the instrument sought to be impeached was executed. *Innes* v. *Cameron Valley Land Co. Ltd.*, (1919) 1 W.W.R. 751.

2. Liabilities—Unlawful distribution of proceeds of assets.]—If a company sells its assets and divides the proceeds amongst its shareholders at a time when it is bound to carry out a contract and such division avoided the satisfaction of a judgment subsequently obtained for breach of contract, the transaction is an illegal one and will be set aside and the shareholders must refund the money so obtained. *In re Stillwater Lumber & Shingle Company Limited* v. *Canada Lumber & Timber Company Limited et al.*, (1923) 32 B.C.R. 249; (1923) 2 D.L.R. 900.

IV. APPEAL.

Jurisdiction.]—The Court of Appeal has jurisdiction to hear and determine an appeal from a decision of the Supreme Court on an application to set aside a conveyance under sec. 7 of the Fraudulent Preferences Act. *Newlands Sawmills Limited* v. *Bateman*, (1922) 31 B.C.R. 351; 70 D.L.R. 165; (1922) 3 W.W.R. 649.

See ASSIGNMENT FOR CREDITORS.
See BANKRUPTCY.
See COMPANIES.
See CONTRACT.

FRAUDS, STATUTE OF.

See CONTRACT.
See MINES AND MINERALS.
See VENDOR AND PURCHASER.

GARNISHMENT.

I. In General, 533.
II. Property Subject to Garnishment, 533.
III. Priorities, 536.
IV. Procedure, 536.
A. Who may make order, 536.
B. Affidavit, 537.
C. Order, 538.
D. Issue, 539.
E. Discharge of garnishee, 539.
F. Payment out of Court, 539.
G. Appeal, 540.

I. In General.

1. Claims sufficient to support attachment.]—A plaintiff who engaged the defendants, stock brokers, to deal in stocks on his behalf and deposited with them stocks and shares to be held as collateral to his account or to be sold when so ordered by him, and also handed them money to be used in purchasing stocks and shares, and who brings action claiming that the defendants instead of using his collateral as agreed sold it for their own account and retained the proceeds and failed to purchase stocks and bonds with the money supplied by the plaintiff, is entitled on these claims to sustain a garnishee summons issued before judgment. *Mackee* v. *Solloway, Mills & Co.*, (1930) 42 B.C.R. 438; (1930) 3 D.L.R. 145; (1930) 1 W.W.R. 563.

2. Divorce.]—A judgment in an action under the Divorce and Matrimonial Causes Act is, by sec. 18 of the Judgments Act, 1838 (Imperial), enforceable by an attaching order issued under the Attachment of Debts Act. *McLeod* v. *McLeod*, (1918) 25 B.C.R. 430; 40 D.L.R. 741.

3. Creditors' Relief Act—Prior assignment.]—Moneys paid into Court by a garnishee and found on an interpleader issue to have been previously assigned under a valid assignment are not subject under the Creditors' Relief Act to distribution among the creditors of the assignor. *Vernon Hardware Company* v. *Reid*, (1927) 2 W.W.R. 117.

II. Property Subject to Garnishment.

1. Liquidated damages.]—A sum of money agreed upon in settlement of a claim for damages arising out of breach of contract and tort is within the meaning of "debts, obligations and liabilities, owing, payable, or accruing due," as defined in the Attachment of Debts Act, and subject to attachment. *Lanning, Fawcett & Wilson, Limited* v. *Klinkhammer*, (1916) 23 B.C.R. 84; 35 D.L.R. 611.

2. Liquidated damages.]—In an action to recover a specific sum for damages for breach of contract for delivery of goods, the claim comes within the term "debt, claim or demand" in marginal rule 622 and a garnishee order may issue. *Wheeler* v. *McLean*, (1919) 27 B.C.R. 448; (1919) 3 W.W.R. 310.

3. Money in hands of assignee for creditors.]—An assignee for the benefit of creditors is an officer of the Court to distribute moneys in his hands in a particular way. The relation of debtor and creditor is not constituted between him and any of his assignor's creditors, and no debt is created which can be the subject-matter of attachment against him as garnishee. *Hoyes* v. *Creery*, (1917) 24 B.C.R. 505; 39 D.L.R. 516; (1918) 1 W.W.R. 873.

4. Monthly salary — Attaching order before due date.]—A monthly salary is not attachable before it is fully earned and becomes due and payable. *Stump* v. *Batzold*, (1931) 2 W.W.R. 784.

5. Indians.]—The property of an Indian is not subject to any form of attachment if it be untaxable, and the proceeds of wheat raised on an Indian's land free from taxation and from the process of execution cannot be attached by garnishee process. *Armstrong Growers' Association* v. *Harris*, (1924) 33 B.C.R. 285; (1924) 1 D.L.R. 1043; (1924) 1 W.W.R. 729.

6. Money payable on exercise of option.]—The expression "such claims and demands as could be available under equitable execution" in sec. 4 of the Attachment of Debts Act refers only to ascertained debts. Therefore moneys which will become payable if the holder of an option decides to exercise it are not attachable. *Ryall* v. *Nelson*, (1917) 3 W.W.R. 647.

7. Money paid into Court.]—Money paid into Court without authority to the registrar who has no authority to receive it is in the same position as if it had been paid to a trustee of the person paying it, and if the person to whom it is intended to be paid in settlement of his claim refuses to accept it on the conditions offered, it remains the property of the person paying it in, and is not subject to a charging order at the instance of a judgment creditor of

the person who has refused to accept it in settlement of his claim. *King* v. *Lanchick. Safety Storage and Warehousing Co.* v. *Lanchick*, (1922) 31 B.C.R. 193; 67 D.L.R. 692; (1922) 2 W.W.R. 1018.

8. Money in hands of Liquor Control Board.]—The Liquor Control Board is not a corporate body either actually or by implication, being merely an agent of the Government in the carrying out of the Government Liquor Act, and the salary of an employee of the Board is not attachable under the Attachment of Debts Act. *Callow* v. *Hick; Liquor Control Board, garnishee*, (1923) 32 B.C.R. 71; (1923) 2 D.L.R. 1185; (1923) 2 W.W.R. 439.

9. Claims subject to equitable execution.]—Debts or obligations which might be the subject of equitable relief and made available by appointment of a receiver may be allotted under the Attachment of Debts Act. *G. A. Hankey & Co.* v. *Vernon; Bank of Montreal and Rome, garnishees*, (1926) 36 B.C.R. 401; (1926) 1 D.L.R. 684; (1926) 1 W.W.R. 375.

10. Claims available under equitable execution—Agreement for sale.]—Claims and demands arising out of trusts or contract where such claims and demands could be made available under equitable execution are attachable under the Attachment of Debts Act, and moneys payable under agreement for sale can be reached by execution if it is shewn that defendant has a good title, and that the garnishee is certain to obtain a good title when he shall have completed payment of the purchase-money. *Moore* v. *Nyland; McPherson, garnishee*, (1930) 42 B.C.R. 444; (1930) 3 D.L.R. 203; (1930) 1 W.W.R. 627.

11. Money payable on insurance policy —Conditions.]—Subject to certain conditions the defendant would become entitled to the benefit of a group of insurance policies provided by his employer for the benefit of his employees:—Held, that where conditions may arise which would either prevent payment or vest the amount in another the moneys are not attachable. *Vater* v. *Styles*, (1930) 42 B.C.R. 463; (1930) 3 D.L.R. 509; (1930) 2 W.W.R. 241.

12. Solicitor and client—Fund in Court —Costs—Charging order.]—Where a solicitor has brought an action for his client and a sum of money is paid into Court pursuant to a garnishing order issued in the action, the solicitor is entitled to an order charging the fund in Court with payment of his costs, where the client has compromised the action without the knowledge of the solicitor and without providing for his costs. *Enfante* v. *Enfante*, (1931) 44 B.C.R. 472; (1932) 1 D.L.R. 788; (1932) 1 W.W.R. 93.

III. PRIORITIES.

1. Attachment before judgment.]—The service of an attaching summons, although not a transfer of the debt, creates a charge on it in favour of the attaching creditor which is not taken away by the subsequent receipt of writs of execution by the sheriff. *Anderson & Son* v. *Dawber*, (1915) 22 B.C.R. 218; 25 D.L.R. 644; 9 W.W.R. 511.

2. Prior assignment.]—A voluntary assignment of a fund in trust to cover moneys taken from a trust account, made in good faith with the intention of the parties carried out, cannot be attacked by an attaching creditor of the assignor. It is not necessary that the trust should be mentioned in the assignment. *Bank of Hamilton* v. *Black*, (1917) 24 B.C.R. 394; 37 D.L.R. 801; (1917) 3 W.W.R. 909.

3. Wages—Exemptions.]—Where an attachment issued out of the County Court to enforce a judgment of that Court affirming a magistrate's order for weekly payments under the Deserted Wives Maintenance Act, the attaching order cannot stand unless it provides for the exemptions contained in the Attachment of Debts Act, the procedure invoked being that of the County Court, although an order for attachment could have been made by the magistrate under the Deserted Wives Maintenance Act in which case the exemptions would not have applied. *Brown* v. *Brown*, (1927) 38 B.C.R. 473; (1927) 4 D.L.R. 314; (1927) 3 W.W.R. 172.

IV. PROCEDURE.

A. Who may make order.

1. Registrar.]—Sec. 20 of the Attachment of Debts Act does not take away the power which is expressly given to the district registrar to issue a garnishee order under sec. 3 of the said Act. *Hogue* v. *Leitch*, (1915) 22 B.C.R. 10.

2. Partnership debt — County Court registrar.]—The word "person" in sec. 3 of the Attachment of Debts Act and in Order

XI., rule 1, of the County Court Rules, does not include a partnership, and a partnership debt is not attachable by order of the registrar. *Joe* v. *Maddox*, (1919) 27 B.C.R. 224.

3. Discretion of registrar.] — The Attachment of Debts Act provides the procedure to be followed in obtaining an attaching order, and when that procedure has been followed the registrar has no discretion to refuse it, though if not followed the order may be attacked subsequently for irregularity. *Boyd & Elgie* v. *Kersey*, (1927) 38 B.C.R. 342; (1927) 2 D.L.R. 679; (1926) 2 W.W.R. 816; (1927) 1 W.W.R. 665.

B. Affidavit.

1. Form and substance—Defect.]—In order to enable the Court to make an order under sec. 3 of the Attachment of Debts Act, the strictest compliance with the statute is required. Where an affidavit in support of an application for such an order sets out that the garnishees are indebted "to the defendant," when on the face of the proceedings there are three defendants, the defect is one both in form and substance and the order should be refused. *Joe* v. *Maddox*, (1920) 27 B.C.R. 541.

2. Address of garnishee.]—The address of the garnishee set forth in an affidavit in support of an application for an attaching order was stated as Standard Bank Building, Vancouver, B.C.:—Held, that such an address is insufficient and the affidavit is therefore defective. *Ibid.*

3. Defect in form.]—An affidavit in support of an application to garnishee a bank under the Attachment of Debts Act gave the address of the garnishee as "Vancouver, B.C." without further description:—Held, that in the case of banks incorporated by Act of Parliament the address was a substantial compliance with the Act. *Volansky* v. *The Nat Bell Liquors Limited*, (1922) 30 B.C.R. 558.

4. Information and belief.] — A garnishee order was made by a registrar under sec. 3 of the Attachment for Debts Act, the applicant in his affidavit in support swearing merely as to his belief:—Held, that under the statute the applicant must swear upon information and belief. There was not a sufficient compliance with the statute, and the order should be set aside. Where a form of affidavit is supplied by the statute and the form is followed it is sufficient even where the form varies from the substance of the Act. *North American Loan Co.* v. *Mah Ten*, (1922) 31 B.C.R. 133.

5. Information and belief.]—Notwithstanding Form C in the Schedule to the Attachment of Debts Act the affidavit verifying the cause of action in support of a motion for a garnishee order before judgment, which is founded on information and belief should recite that it is so founded and also give the source of deponent's information. *Tillicum Athletic Club* v. *Burick*, (1925) 36 B.C.R. 176; (1925) 3 W.W.R. 368, 785.

6. Cause of action — Officer before whom affidavit sworn.]—The words "an action against the above-named defendant in respect of a partnership existing between the plaintiff and defendant for moneys due by the defendant to the plaintiff" appearing in clause 2 of an affidavit in form A in the Schedule to the Attachments of Debts Act, 1924, do not sufficiently set forth the plaintiff's cause of action. An affidavit purporting to be taken before an officer giving his title as "A Commissioner in and for the Province of British Columbia" is not properly sworn. *Brethour* v. *Taylor and Bank of Montreal*, (1927) 3 W.W.R. 166.

7. Information and belief.]—An affidavit in support of a garnishing order is sufficient if it follows the form provided for by sec. 3 (2) without stating the source of information and belief. *Curley* v. *Sinser*, (1931) 3 W.W.R. 763.

C. Order.

1. Identifying defendant in attaching order.]—A garnishee order was taken out in an action in which Henri Gautschi was defendant, and served on a bank in which one Gautschi Henri had an account. The bank notified Gautschi Henri that his account was garnisheed, and paid the amount of the account to their solicitors for payment into Court. The solicitors advised the bank that they should not pay the money into Court, and it was thereupon put back in the defendant's account, from which it was subsequently paid out. Henri Gautschi kept his account in the bank in the name of Gautschi Henri:—Held, that on the facts the bank had concluded that Henri Gautschi and Gautschi Henri were one and the same

person, and is liable for the amount garnisheed. *Smith and Hunter* v. *Gautschi and Gautschi; Royal Bank of Canada, garnishee,* (1916) 23 B.C.R. 455; (1917) 2 W.W.R. 225.

2. Description of garnishee.]—A garnishee order which described the garnishee as the "Bank of Commerce," without stating that it carries on a banking business, is sufficient, as its description would impart that the garnishee carries on a banking business. *Van Wassenaer* v. *Adams,* (1927) 38 B.C.R. 275; (1927) 3 D.L.R. 180; (1927) 2 W.W.R. 287.

D. Issue.

Right of creditor.]—The attaching order raises an issue as between the judgment creditor and the garnishee which the judgment creditor is entitled to have tried in accordance with the procedure provided in that behalf. An affidavit by the judgment debtor to the effect that no moneys are due him is not sufficient to justify an order to set aside the garnishee order. *Boyd & Elgie* v. *Kersey,* (1927) 38 B.C.R. 342; (1927) 2 D.L.R. 679; (1926) 2 W.W.R. 816; (1927) 1 W.W.R. 665.

E. Discharge of Garnishee.

1. Upon application of garnishee.]—A garnishee, upon filing a dispute note as to his liability, may apply under sec. 15 of the Attachments of Debts Act for the discharge of the garnishee order, and for his costs. *Chew Deb* v. *Davie, Trustee,* (1917) 24 B.C.R. 18.

2. Stay of proceedings pending appeal — Discharge.] — Where after obtaining judgment a plaintiff attaches a debt accruing to the defendant, who applies for and obtains an order for a stay of execution pending appeal, the garnishee proceedings will not be discharged on the ground that the defendant has paid into Court as security for the stay of execution a sum of money sufficient to satisfy the judgment. *J. A. McIlwee & Sons* v. *Foley Bros., Welch & Stewart,* (1917) 24 B.C.R. 1.

F. Payment Out of Court.

Invalid order.]—Money paid into Court by the garnishee under an invalid garnishing order may be paid out to the defendant, the garnishee being discharged from liability after payment into Court. *Brethour* v. *Taylor and The Bank of Montreal,* (1927) 3 W.W.R. 166.

G. Appeal.

1. Extension of time.]—Where money is paid into Court by a bank under a garnishee order, the bank suggesting that it had been held by the defendant in trust for third parties, notwithstanding which an order is made for payment out to the plaintiff, and the parties then, recognizing that the order could not stand if the moneys belonged to third parties, endeavour to ascertain by correspondence who the actual owners are before going to the expense of an appeal, and in the meantime the time for giving notice of appeal expires, an application to extend the time for giving notice of appeal will be granted. *Patton* v. *Hartley; Bank of Montreal, garnishee,* (1917) 24 B.C.R. 5; (1917) 2 W.W.R. 234.

2. Costs of successful appeal.]—Where the plaintiff has obtained judgment in the action in the Court below, and the defendant is successful in subsequent garnishee proceedings in the Court of Appeal, the costs of the garnishee proceedings will be set off against the judgment. *Ibid.*

GIFT.

1. Undue influence.]—An aged woman with five children sought advice from a son as to two pieces of encumbered property in Vancouver. The son examined into the properties and reported to his mother who then transferred the properties by deed to the son and a daughter with whom she lived, concluding from the report that the properties were of substantially no value. She had previously made her will dividing her estate equally among her five children: —Held, that there was undue influence on the part of the son who was a donee mentioned in the deed and the transfer should be set aside on the principle that where the donee stands in such a relation to the donor as to expose the donor to the influence of the donee the latter can maintain no deed of gift from the donor unless he can establish that it was the result of the

donor's free will and effected by the intervention of some indifferent person. In any case the donees were entitled to allowance for moneys disbursed in preserving the property and a lien on the land therefor. *Weir* v. *Weir*, (1920) 29 B.C.R. 30; 55 D.L.R. 222; (1920) 1 W.W.R. 785; (1920) 3 W.W.R. 728.

2. Corroboration.]—Where a grantor states that he is desirous of making a gift of a dwelling house to his sister and offers to convey the property to her free of encumbrances upon condition that she will complete the construction of the dwelling house and the donee's evidence is supported by the statements of several witnesses, the gift will be confirmed. Where the evidence of a party requires corroboration by law before he can obtain judgment, it is not necessary that his credibility be established before corroboration can be resorted to or relied upon. *Dominion Trust Company* v. *Inglis and Inglis*, (1921) 29 B.C.R. 213; (1921) 1 W.W.R. 677.

3. Donatio mortis causa—Corroboration.]—Where articles were claimed under a donatio mortis causa it was held that the evidence of the claimant was sufficient to establish such a gift notwithstanding sec. 11 of the Evidence Act, 1911, especially where there are circumstances which tend to corroborate such evidence. *Imperial Canadian Trust Company* v. *Winstanley*, (1922) 31 B.C.R. 448; (1923) 1 D.L.R. 1148; (1923) 1 W.W.R. 935.

4. Donatio mortis causa—Delivery of keys.]—The delivery by a person in extremis of the keys of his safe accompanied by the words "they lead to everything I have got—everything I have got is yours" will operate as a donatio mortis causa of the things in the safe other than money in a bank represented by a pass-book found in the safe. *Cusack* v. *Day*, (1925) 36 B.C.R. 106; (1925) 3 D.L.R. 1028; (1925) 2 W.W.R. 715.

5. Bank pass-book.]—The delivery of an ordinary pass-book with respect to an ordinary current bank account cannot constitute a donatio mortis causa so as to give the donee title to the money represented by it. *Ibid.*

6. Intention — Appointment of donee executor.]—Where a testator has indicated in his lifetime an intention to make a gift and in his will has appointed the donee executor, the gift is completed; but this principle will not be extended to an imperfect gift of future property where the donee is only made the beneficiary of a portion of the donor's estate in his will. *Morton* v. *Brighouse*, (1927) S.C.R. 118; (1927) 1 D.L.R. 1009; Revg. (1925) 36 B.C.R. 231; (1925) 3 W.W.R. 412.

7. Wife's funds controlled by husband —Presumption of gift.]—Where a wife entrusts to her husband the management of her funds out of which he pays their expenses and makes investments that they from time to time agree upon, the question of whether the law implies a gift to the husband depends on the particular facts in each case. *Walker and Roberts* v. *Silk*, (1930) 43 B.C.R. 43; (1930) 4 D.L.R. 201; (1930) 2 W.W.R. 407.

See BANKRUPTCY.
See DESCENT AND DISTRIBUTION OF ESTATES.
See FRAUDULENT AND VOIDABLE TRANSACTIONS.
See HUSBAND AND WIFE.
See TRUSTS.
See WILLS.

GRAND JURY.

See CRIMINAL LAW.

GUARANTEE.

I. IN GENERAL, 542.
II. RIGHTS OF SURETY, 544.
III. LIABILITIES OF SURETY, 546.
IV. DISCHARGE OF SURETY, 549.

I. IN GENERAL.

1. Statute of Frauds.]—The defendant wrote the following memorandum on a leaf of a ledger in the plaintiff's office: "I hereby guarantee the account of W. G. Fletcher successor to Fletcher and Jackson covering past and future purchases to the value of $750. (Signed) Emma Fletcher." There was no writing on the ledger to shew to whom it belonged:—Held, that as the name of the plaintiff did not in any way appear upon the document there was no sufficient agreement or memorandum or note of an agreement within the fourth section of the Statute of Frauds, and the plaintiff cannot

recover. Where there is nothing in the document to indicate that the account which was guaranteed was the account of the plaintiff, parol evidence cannot be given to prove that it was the plaintiff's account. *A. Macdonald & Company* v. *Fletcher and Fletcher*, (1915) 22 B.C.R. 298.

2. Consideration.]—The defendant who had bought out his partner and continued the business by himself was pressed by the plaintiff for payment on an old partnership debt when he wrote the plaintiff "kindly let the matter rest for the time being and the writer will personally see that your claim is fully paid":—Held, that this constituted a guarantee. *Isbell Bean Company* v. *Avery*, (1923) 31 B.C.R. 502; (1923) 1 D.L.R. 708; (1923) 1 W.W.R. 441.

3. Statute of frauds—Credit given on promise to endorse debtor's paper.]—Although plaintiff would not have given credit to a debtor except on defendant's alleged promise to endorse his paper, sec. 4 of the Statute of Frauds applies and such promise is not enforceable unless in writing, not having been given in performance of an obligation under any antecedent contract or of any obligation or liability under which the promisor lay independently of the particular promise in question. *Leiser & Co.* v. *Canadian Pacific Timber & Logging Company Limited*, (1920) 1 W.W.R. 735.

4. Oral agreement to procure another's guarantee—Damages.]—An oral agreement in consideration of plaintiff furnishing goods to another, to procure a certain company to endorse that other's paper, is enforceable. On breach of the contract, in order to obtain more than nominal damages, it must be shewn that had the endorsation been procured it could have been made the ground of an action. *Leiser & Company* v. *Canadian Pacific Timber & Logging Company, Ltd.*, (1920) 1 W.W.R. 735.

5. Absence of seal—Consideration.]—Where a guarantee is not under seal it is necessary to shew a consideration in order to support it. *Northern Crown Bank* v. *Walker*, (1917) 24 B.C.R. 163; (1917) 2 W.W.R. 573.

6. Injury to workman—Indemnity.]—A steamship company having entered into a contract for the services of a stevedoring company agreed as follows: "that the S.S. Co. shall hold the Stevedoring Company entirely harmless from any and all liability of personal injury to any of the Stevedoring Company's employees while performing labour embraced within this agreement." The S.S. Co. having failed in its supply of what it had contracted for one of the Stevedoring Company's men was sent to get it from the former's warehouse. He met with an accident in doing so for which he had recourse against his employer and rightfully recovered damages:—Held, that as the workman at the time he was injured was performing labour embraced in the agreement the Stevedoring Company was entitled to be indemnified under the agreement. *Victoria, Vancouver Stevedoring Co.* v. *G.T.P. Coast Steamship Co.*, (1917) 25 B.C.R. 6; 38 D.L.R. 468; (1918) 57 S.C.R. 124; 43 D.L.R. 231; (1918) 3 W.W.R. 450.

7. Assignment as collateral security for another company — Validity.]—Where a company makes an assignment of a sum of money deposited in its name in a savings account in a bank as collateral security for a credit arranged for another company, its validity depends on whether express authority to make the assignment can be found in the memorandum of association. *Abbotsford Lumber &c. Co.* v. *Stevenson*, (1925) 35 B.C.R. 405; (1925) 4 D.L.R. 560; (1925) 3 W.W.R. 451.

8. Officer of company.]—Although a company holds out its managing director as having authority to make contracts and sign negotiable instruments in the ordinary course of business this authority will not be held sufficient to enable the manager to sign or endorse promissory notes or otherwise guarantee the payment of money for the accommodation of others. *National Pole & Treating Co.* v. *Blue River Pole & Tie Co.*, (1930) 43 B.C.R. 98; (1930) 3 D.L.R. 996; Revg. (1929) 3 D.L.R. 638.

II. Rights of Surety.

1. Guarantee of performance of purchase of land.]—A vendor assigned his interest in an agreement of sale of land and at the same time gave a bond to his assignee with respect to the payments to be made under the agreement of sale. An action for payment of the amount due under the bond was dismissed:—Held, that the bond was a guarantee of payment and not an independent contract of indemnity as it was so treated by the parties and its wording and the nature of the transaction so indicated, and an extension of time given by the obligee to the purchaser without consulting the obligor, operated as a discharge of the liability under the bond.

Whether the bond is a guarantee or an independent contract of indemnity depends on the fact of the original party remaining liable coupled with the absence of any liability on the part of the promisor or his property except such as arises from his express promise. *Westminster Trust Company* v. *Brymner and Rand*, (1920) 28 B.C.R. 504; (1920) 1 W.W.R. 433; 54 D.L.R. 244; (1920) 3 W.W.R. 488.

2. Appropriation of payments.] — A creditor may appropriate payments made unconditionally by his debtor to any part of the debtor's account, although he has credited them in the debtor's open account provided that he has not communicated that account to the debtor. Where therefore a creditor had an account which was guaranteed, and when the amount of the guarantee was exhausted communicated that fact to the surety and the debtor and subsequently had dealings with the debtor but opened no new account, he was entitled to appropriate subsequent payments made by the debtor to the dealings subsequent to the exhaustion of the guarantee, provided that the credits in the open account had not been communicated to the debtor. *Scott & Peden* v. *Elliott*, (1926) 37 B.C.R. 143; (1926) 2 D.L.R. 504; (1926) 2 W.W.R. 154.

3. Guarantor's right to security.] — Where the plaintiff holds a mortgage to secure a debt for a portion of which the defendant is liable as indorser of two promissory notes, the defendant is not entitled as a condition of recovery against him on his liability and without payment of the whole debt secured by the mortgage, to have the mortgage security handed over to him. In order to marshal, not only must there be two creditors of the same person but one of them must have two funds belonging to the same person to which he can resort. *The Royal Bank of Canada* v. *Izen*, (1921) 29 B.C.R. 547; 60 D.L.R. 467; (1921) 2 W.W.R. 929.

4. Assignment of bond—Notice.]—The person named in the notice of assignment of a bond as assignee was not the assignee named in the assignment itself and the notice was of an assignment of a bond "bearing date on or about the 18th day of September, 1915," whereas the bond sued on was dated "this eighteenth day of September, one thousand eight hundred and fifteen":—Held, that the notice was not sufficient to enable the assignee to maintain an action in his own name and the Court refused to add the assignor as a party after so finding. *Maritime Motor Car Co. Ltd.* v. *McPhalen & McPhalen*, (1919) 27 B.C.R. 244; (1919) 2 W.W.R. 811.

5. Debentures—Guarantee by municipality—Where interest payable.] — The Vancouver General Hospital issued debentures that became due and payable June 1st, 1921, and they were guaranteed by the City of Vancouver. Each debenture stipulated that "the principal moneys and interest secured by this debenture shall be payable at the Bank of Montreal" and that the debtor would pay interest to the bearer of every interest coupon "upon the same being presented at the Bank of Montreal, Vancouver, or any branch of the Bank of Montreal in Toronto, Montreal, New York or London, England." At maturity the plaintiff presented a number of debentures for payment at the branch of the Bank of Montreal in New York, and sought payment in American funds. He was paid in Canadian funds and then brought action for the difference in exchange:—Held, that it was the evident intention of the parties that the principal should be payable at Vancouver in Canadian currency and that upon default of the principal debtor, the defendant would, on proper demand, make payment at the same place, that the principle that the debtor seeks the creditor was inapplicable in the circumstances and as against the defendant under the terms of its guarantee. *Wood Gundy & Co.* v. *City of Vancouver*, (1922) 31 B.C.R. 165; 67 D.L.R. 225; (1922) 2 W.W.R. 470.

III. Liabilities of Surety.

1. Bond for performance of building contract.]—Where in an agreement by a lessor to erect a building, and to lease same when completed, there is no provision similar to that generally contained in a building contract whereby the owner may, upon default of the contractor, proceed with the completion of the building and charge the amount expended against the contractor, a surety for the performance of such contract, unless it is otherwise expressly agreed, cannot be called upon to assume any further liability than for the amounts of liquidated damages expressly fixed by the contract for any delay of performance thereof, and will, therefore, not be liable for the amounts expended by the lessee for the completion of the building. *Canadian Fairbanks-Morse Co.* v. *United States Fidelity & Guaranty Company*, (1915) 22

B.C.R. 157; 26 D.L.R. 12; 9 W.W.R. 48; 32 W.L.R. 316.

2. Interest.]—A stipulation in a bond to pay all such damages as may be awarded in an action covers interest at the legal rate upon the judgment but not the costs where the bond is not of indemnity. *Deisler* v. *United States Fidelity & Guaranty Co.*, (1917) 24 B.C.R. 278; 36 D.L.R. 29; (1917) 3 W.W.R. 1051.

3. Intention.]—A surety will not be relieved from liability because the language of the guarantee carries more than the parties have contemplated, even though the Court may be of opinion that had the surety understood this he would not have entered into the guarantee. *Bank of Hamilton* v. *Banfield*, (1918) 25 B.C.R. 367; 40 D.L.R. 482; (1918) 2 W.W.R. 953.

4. Assignment — Overdue debt.] — In the case of an assignment of the rights under a guarantee to pay another's debt in the event of the primary debtor not paying the debt within a specified time, if the assignment is made after the debt is overdue, it is not necessary to notify the primary debtor of the assignment in order that the assignee may sue the guarantor, as the guarantor has become a "debtor" within the meaning of sec. 2 (25) of the Laws Declaratory Act. *Donald* v. *Jukes*, (1920) 60 S.C.R. 652; 56 D.L.R. 692; (1921) 2 W.W.R. 208; Affg. (1920) 28 B.C.R. 215; 54 D.L.R. 688; (1920) 2 W.W.R. 209.

5. Wife as surety—Knowledge of facts.] —Where a shareholder gives a promissory note to secure payment in instalments of a debt owing to a creditor of a company, the note being indorsed by the wife of the maker, being the principal shareholder of the company, who understood the nature of the transaction, the indorser is not discharged as a surety when the creditor, the maker of the note being unable to meet one of the instalments, agrees to accept the same in monthly payments. *The W. H. Malkin Co. Ltd.* v. *Sherman*, (1925) 35 B.C.R. 445.

6. Warrant of indemnity.]—The plaintiff company at the defendants' request (the defendants giving the plaintiff a bond of indemnity to save the plaintiff harmless, etc.) entered into a bond of indemnity. The plaintiff was sued on the bond and notified the defendants of the action and urged them to assist in the defence but they gave no assistance. The company defended the action but judgment was given against it in the Court of King's Bench of Manitoba. The plaintiff appealed and notified the defendants but again receiving no assistance dropped the appeal. In an action by the company against the defendants on their bond of indemnity to repay the moneys paid in satisfaction of the judgment:—Held, that the judgment against the plaintiff in the Manitoba Court was recovered on the bond given by the plaintiff at the defendants' request. The plaintiff having paid the judgment, the defendants are estopped from denying liability. *London Guarantee and Accident Co.* v. *Davidson*, (1925) 36 B.C.R. 301; (1926) 1 D.L.R. 66; (1926) 1 W.W.R. 148.

7. Debenture—Surety for payment of debentures—Notice under trust deed.]—Notwithstanding that a trust deed given by a company to secure an issue of debentures contains a clause providing that before action can be brought by a debenture holder to collect the amount payable under his debentures notice of default must be given to the trustee, an action may be brought without first giving such notice against a surety who has guaranteed payment of debentures unless such notice was provided for in the contract of surety. *Stoddard* v. *Shields Lumber Company*, (1920) 28 B.C.R. 277; 53 D.L.R. 322; (1920) 2 W.W.R. 887.

8. Guarantor.]—A director of an incorporated company who has given a written guarantee to a bank that he will pay any indebtedness incurred by the company to the bank, not exceeding a certain amount, is not released by the bank charging the company interest at a rate higher than that allowed by the Bank Act without the knowledge of the company. The agreement between the bank and the company is not void because of the illegal interest charged, and the charging of interest at an illegal rate does not constitute a variation in the terms of the contract of guarantee, but the bank can only recover interest at the legal rate upon the sum guaranteed. *Merchants Bank of Canada* v. *Bush*, (1917) 24 B.C.R. 521; (1918) 56 S.C.R. 512; 42 D.L.R. 236; (1918) 2 W.W.R. 574, 631.

9. Costs.]—A surety on a bond of indemnity to secure the performance of a receiver's duty to account is liable for the costs of proceedings to compel the receiver to do his duty. *Larbonne* v. *Shore*, (1928) 39 B.C.R. 508; (1928) 2 D.L.R. 977; (1928) 2 W.W.R. 8.

10. Succession duty—Liability on executor's bond.]—The duty payable under the Succession Duty Act being a charge upon the whole of the estate of the deceased and

every distributive share, a surety bond, given by an executor to secure payment of the duty as to the property and estate "coming into his hands," will cover lands coming into the hands of the executor as devisee, although no title to the property has passed as a result of non-registration of the title. Where the amount of the tax has been duly determined and agreed to, it cannot be questioned by a surety. *Rex* v. *United States Fidelity and Guaranty Co.*, (1923) A.C. 808; 93 L.J.P.C. 26; 130 L.T. 161; (1923) 3 D.L.R. 701; (1923) 3 W.W.R. 295; Affg. (1922) 64 S.C.R. 48; 68 D.L.R. 297; (1922) 3 W.W.R. 180.

11. Automobile insurance—When action maintainable against insurer.]—Where an insurer has undertaken to indemnify the owner of an automobile against liability for injury to another and the liability has arisen, an action will lie against the insurer to enforce the contract independent of and before payment by the plaintiff. *McKnight* v. *General Casualty Ins. Co. of Paris, France*, (1931) 44 B.C.R. 1; (1931) 3 D.L.R. 476; (1931) 2 W.W.R. 315.

12. Hauling contract.] — Where the plaintiff agreed with one of the defendants to haul poles, the number whereof was ascertained, at a price per lineal foot, it was held that in the circumstances he was a wage earner and entitled to a lien on the poles, and that the owner thereof who had guaranteed payment "the sum of three cents per foot to haul said poles" was liable on his guarantee notwithstanding that only a portion of the hauling had been carried out. *Schmidt* v. *Stuckey and Pearse*, (1928) 40 B.C.R. 161; (1928) 2 D.L.R. 928; (1928) 1 W.W.R. 913.

IV. Discharge of Surety.

1. Change of relationshp.]—Where a continuing guarantee is given, the surety is discharged if the contract between the debtor and the creditor is varied without the knowledge of the guarantor by the creditor taking a mortgage upon the property of the debtor and practically taking charge of his business. *Drinkle* v. *Regal Shoe Company, Limited, Endacott and Rae*, (1916) 23 B.C.R. 24; 28 D.L.R. 775; 10 W.W.R. 448; 34 W.L.R. 690.

2. Creditor's failure to obtain additional security.]—A guarantor is not released if, after the guarantee is given, the creditor fails to secure effectively additional security which of his own motion he attempted to secure and which was not in contemplation of either party when the guarantee was given. *Northern Crown Bank* v. *Walker*, (1917) 24 B.C.R. 163; (1917) 2 W.W.R. 573.

3. Extension of time.]—Where a vendor assigns his interest in an agreement of sale of land and at the same time gives a bond to his assignee to guarantee the payments to be made under the agreement of sale:—Held, that the bond being a guarantee of payment and not an independent contract of indemnity, an extension of time given by the obligee to the purchaser without consulting the obligor, operates as a discharge of the liability under the bond. *Westminster Trust Company* v. *Brymner and Rand*, (1920) 28 B.C.R. 504; (1920) 1 W.W.R. 433; 54 D.L.R. 244; (1920) 3 W.W.R. 488.

4. Bond—Ambiguity.]—In an action on a bond for "the sum of two thousand of lawful money of British Columbia" there being nothing in the document to assist in construing these words, it was held that the ambiguity being patent and not curable by extrinsic evidence, the action should be dismissed. *Maritime Motor Car Co. Ltd.* v. *McPhalen & McPhalen*, (1919) 27 B.C.R. 244; (1919) 2 W.W.R. 811.

5. Verbal stipulations.]—The defendant, with a number of other persons, signed a guarantee to secure the account of a company with the plaintiff bank. An action on the guarantee was dismissed on the ground that when signing it the defendant verbally stipulated to the local bank manager as a condition of its use against him that certain notes on which he was liable as an indorser should be paid out of the funds to be advanced, which was not done:—Held, that parol evidence of the condition under which the guarantee was signed is admissible, that the decision turns on the credibility of the parties and witnesses, and on the evidence there is no ground for disturbing the finding of the trial judge. *The Standard Bank of Canada* v. *McCrossan*, (1919-20) 28 B.C.R. 291; 60 S.C.R. 655; (1920) 3 W.W.R. 846; 55 D.L.R. 238.

6. Bankruptcy—Creditor valuing securities—Discharge of surety.]—If a company has gone into liquidation and made an authorized assignment under The Bankruptcy Act, and a creditor, in putting in its claim, values its securities at the amount of the debt, the valuation being accepted, the creditor has thereafter no claim against the

sureties who had guaranteed the debt. *Bank of Hamilton* v. *Atkins*, (1923) 4 C.B.R. 347; (1924) 1 W.W.R. 92.

7. Building contract—Alteration—Discharge of surety.]—Where in the performance of a building contract the contractors made use of mortar which the architect testified was not in his opinion suitable and was the cause of some trouble during the erection of a building, although no permanent harm was done, and a surety for the due performance of the contract in the absence of notice of the deviation from specifications claimed to be discharged by reason thereof:—Held, that where differences and complications arise in the performance of contracts of this nature a bond is desirable, and if too strict a construction of the duties of the obligee were to be adopted in such transactions there might always be some technical error or omission on his part which would render the bond void. *Ferrara* v. *National Surety Company*, (1916) 39 D.L.R. 175; (1917) 1 W.W.R. 719.

8. Winding-up proceedings — Acceptance of sureties.]—Where upon the voluntary winding up of a company under the Companies Act a creditor making its claim as such valued its securities at a certain sum and accepted for that sum certain book debts of the company, the amount thereof being deducted from the creditor's claim:—Held, that the creditor having elected to take securities in payment of the sum at which they were valued the debt was reduced by the amount of the valuation and sureties for the debt were released to that extent. *Canadian Bank of Commerce* v. *Martin*, (1917) 24 B.C.R. 381; (1918) 1 W.W.R. 395.

9. Absence of proof of non-payment.]—In an action against a guarantor of a debt alleged to be payable to the estate of a deceased person, the administratrix of the estate must establish the fact that the debt is still unpaid. *Ivey* v. *Smith*, (1929) 40 B.C.R. 475.

10. Non-fulfilment of condition as to execution.]—Where a surety executed a receiver's bond on the condition that it is also to be executed by the receiver himself, failure to secure the signature of the receiver thereto discharges the surety. *Larbonne* v. *Shore*, (1928) 39 B.C.R. 508; (1928) 2 D.L.R. 977; (1928) 2 W.W.R. 8.

See BILLS AND NOTES.

See CONTRACT.

HABEAS CORPUS.

I. JURISDICTION, 552.
A. In general, 552.
B. Appeals, 555.
II. RIGHT TO DISCHARGE, 556.
A. In general, 556.
B. Alien, 559.
III. PROCEDURE, 560.
A. Applications, 560.
B. Amendment, 560.
C. Certiorari in aid, 561.
D. Adjournment, 561.
E. Costs, 561.
IV. EVIDENCE, 561.

I. JURISDICTION.

A. In General.

1. Application to different judges.]—The dismissal of a habeas corpus application is not a bar to making a further application for habeas corpus before the same judge. *Rex* v. *Jean Campbell*, (1916) 22 B.C.R. 601; 26 C.C.C. 196; 28 D.L.R. 385. *Rex* v. *Iaci*, (1925) 35 B.C.R. 403; (1925) 2 W.W.R. 129; 43 C.C.C. 363.

2. Applications to different judges.]—There was, and still is, the right at common law to renew an application for a writ of habeas corpus in criminal cases either on the same or different ground, and it can make no difference in principle whether it is made to another judge of the same Court or a different Court, assuming that all the judges have jurisdiction to issue the writ. This right has not been impaired by the amendment to the Court of Appeal Act, B.C. Stats. 1920, cap. 21. The judge hearing a renewed application has exactly the same power as the judge who heard the first application, and is uncontrolled in any way by the former decision. The doctrine of res judicata not only has no application to cases involving the liberty of the subject, but is inconsistent with the nature of the remedy. *Rex* v. *Gee Dew*, (1924) 33 B.C.R. 524; (1924) 3 D.L.R. 153; (1924) 2 W.W.R. 791; 42 C.C.C. 188.

3. Applications to different judges.]—The common law remedy against illegal detention by inferior tribunals by making applications to different judges until the judicial power is exhausted for a writ of habeas corpus still exists with respect to extradition proceedings. *In re O'Connor*, (1927) 39 B.C.R. 271; (1928) 1 D.L.R. 558; (1928) 1 W.W.R. 65; 49 C.C.C. 151.

4. Applications to different judges.]—Where an appeal lies a prisoner who is restrained of his liberty by an order in a matter which must be regarded as a civil proceeding and therefore within the ambit of the Provincial Legislature is limited to only one application for a writ of habeas corpus and may not go from judge to judge, and after an appeal is taken and disposed of it is conclusive. *Rex* v. *Loo Len (No. 2)*, (1923) 33 B.C.R. 213; (1924) 1 D.L.R. 910; (1924) 1 W.W.R. 735; 41 C.C.C. 388.

5. Conviction made in another Province.]—Where the accused has been convicted in another Province an application for habeas corpus ought not to be entertained unless some good reason is shewn why the application could not have been made in that Province as for instance where the applicant was not allowed sufficient time to do so. *Rex* v. *Jungo Lee*, (1927) 38 B.C.R. 313; (1927) 1 W.W.R. 578; 47 C.C.C. 255.

6. Warrant issued in another Province.]—Where a warrant of arrest is issued in one Province and duly indorsed in another where the accused is arrested, the Court where the warrant is executed has no jurisdiction in habeas corpus proceedings to consider the merits of the case, as anything that may be alleged by way of defence is for the magistrate and Courts of the Province where the warrant is issued. *In re Nettleton*, (1928) 40 B.C.R. 413; (1929) 1 D.L.R. 692; (1928) 3 W.W.R. 735; 51 C.C.C. 413.

7. Matter within jurisdiction of inferior Court—Immigration.]—Where an inferior Court is acting within its jurisdiction, the Superior Court has no power at common law to assume the function of an appellate Court and review its conclusions by means of a writ of habeas corpus either with or within certiorari, but the controller of Chinese immigration does not come within the ordinary meaning of the word "Court." Moreover sec. 38 of the Chinese Immigration Act enacts inferentially that anyone claiming Canadian birth has a right to apply for relief by way of habeas corpus from the decision of the controller. *In re Chinese Immigration Act and Lee Chow Ying*, (1928) 39 B.C.R. 322; 49 C.C.C. 168.

8. Technicalities.]—A writ of habeas corpus is a prerogative process available when "there is a deprivation of personal liberty without justification." Courts should not permit the use of this great writ to free criminals on mere technicalities. It is the spirit of the criminal law and more particularly of the law on summary convictions that defects and informalities be corrected so as to prevent a denial of justice. *In re Henderson, Stewart, Broder and Joe Go Get*, (1929) 52 C.C.C. 95; (1930) S.C.R. 45; (1930) 1 D.L.R. 420.

9. Technicalities.] — The Courts will give effect to technicalities when in their opinion it is necessary to do so in order to prevent injustices that might otherwise result in legislation which cuts off the ordinary common law mode of redress against improper convictions. *Rex* v. *Hing Hop*, (1926) 37 B.C.R. 158; (1926) 1 W.W.R. 799; 45 C.C.C. 239.

10. Deportation.]—Where an alien is ordered deported and the order is clearly right and proper habeas corpus will not lie. *Ree Loo Len (No. 1)*, (1923) 33 B.C.R. 448; (1924) 1 D.L.R. 909; (1924) 1 W.W.R. 733; 41 C.C.C. 386.

11. Discharged prisoner detained for deportation.]—When a prisoner has been released from prison and is in the hands of the immigration authorities for deportation under the Opium and Narcotic Drug Act habeas corpus will not lie to release him on the ground that the sentence imposed was illegal, even though the rule nisi for the issue of the writ was obtained before release. *Rex* v. *Chang Song*, (1923) 33 B.C.R. 176; (1924) 1 D.L.R. 1161; (1924) 1 W.W.R. 778; 42 C.C.C. 8.

12. Chinese immigrant—Deportation.]—A Chinese person having gained admission to Canada under the provisions of the Chinese Immigration Act can be deported if at all only under sec. 7 (b) of that Act enacted by amendment in 1917, and in such a case the Board of Enquiry of the Immigration Act has no jurisdiction. *In re Jeu Jang How (No. 1)*, (1919) 27 B.C.R. 294; 47 D.L.R. 538; 31 C.C.C. 341.

13. Admission into Canada—Board of Enquiry — Review of decision.] — Under sec. 23 of the Immigration Act, 1910, the Court has no jurisdiction on habeas corpus to review any decision of the Board of Enquiry concerning the admission of aliens into Canada. *Re Wong Sit Kit*, (1921) 61 D.L.R. 475; (1921) 3 W.W.R. 116; 36 C.C.C. 36.

See Wong Suey Mong, (1921) 61 D.L.R. 351; (1921) 3 W.W.R. 122; 35 C.C.C. 383.

14. Evidence before magistrate.]—On an application for habeas corpus a contention by the petitioner that no proof of the

authority of the informant was adduced at the trial does not raise a question of jurisdiction; if the judge before whom the application is made is right in his view that the magistrate had the right to enter on and proceed with the case he had not to consider the sufficiency of the evidence on which the former was convicted. *In re Henderson, Stewart, Broder and Joe Go Get,* (1929) 52 C.C.C. 95; (1930) S.C.R. 45; (1930) 1 D.L.R. 420.

B. Appeals.

1. Right of appeal.]—Under the Court of Appeal Act as amended in 1920, there is the right of appeal to the Court of Appeal in habeas corpus proceedings in civil matters over which the Legislature of British Columbia has jurisdiction, whether the person detained be remanded to custory or discharged from custody. Proceedings under the federal Immigration Act are not of a criminal nature. *In re Immigration Act and Wong Shee,* (1922) 31 B.C.R. 145; 66 D.L.R. 485; (1922) 2 W.W.R. 156; 37 C.C.C. 371. *In re Immigration Act and Pong Fook Wing,* (1923) 33 B.C.R. 47; (1923) 4 D.L.R. 1034; (1923) 3 W.W.R. 819, 1006; 41 C.C.C. 42.

See Rex v. *Lee Park. Rex* v. *Lee Hing Leong,* (1923) 33 B.C.R. 158.

2. Conviction affirmed on appeal.]—An accused person having appealed from a conviction under the Government Liquor Act, 1921, and the conviction having been confirmed on appeal there is no right to a writ of habeas corpus. *Rex* v. *Moore,* (1924) 3 W.W.R. 923.

3. Appeal—Summary Convictions Act.]—The Court of Appeal held that it had jurisdiction to entertain an appeal from the decision of a Supreme Court judge quashing a conviction under the Summary Convictions Act on a case stated by a magistrate (*Rex* v. *Evans,* (1916) 23 B.C.R. 128 followed) and restored the conviction. Subsequently on an application for a writ of habeas corpus Hunter, C.J.B.C. held that the finding of the Supreme Court in such cases is final and conclusive under sec. 92 of the Summary Convictions Act, 1915, being the last legislative declaration on the subject, and the Court of Appeal had therefore no jurisdiction to hear the appeal under the Court of Appeal Act, 1911. The prisoner was accordingly discharged from custody. *Rex* v. *Gartshore,* (1919) 27 B.C.R. 175, 425; 49 D.L.R. 276; (1919) 3 W.W.R. 757; 32 C.C.C. 49.

4. Appeal to Supreme Court of Canada.]—The Supreme Court of Canada will not entertain an appeal from an order of the Court of Appeal of a Province allowing an application for a writ of habeas corpus unless special leave to appeal has been granted under sec. 48 (e) of the Supreme Court Act. The right of appeal given by sec. 39 (c) in cases of habeas corpus does not exist where the Court below had ordered the release of the person, the legality of whose custody was in question, and that person is at large. *Rex* v. *Jeu Jang How,* (1919) 59 S.C.R. 175; 50 D.L.R. 41; (1919) 3 W.W.R. 1115; 32 C.C.C. 103.

5. Right of appeal.]—No appeal lies to the Court of Appeal from a decision of a judge of the Supreme Court refusing a writ of habeas corpus in a criminal proceeding within sec. 91 (27) of the British North America Act. *Rex* v. *McAdam,* (1925) 35 B.C.R. 168; (1925) 4 D.L.R. 33; (1925) 3 W.W.R. 257; 44 C.C.C. 155.

6. Deportation.]—Habeas corpus for the discharge of an alien held for deportation after serving a term of imprisonment for a criminal offence being a criminal proceeding, the right of appeal under a Provincial statute from an order of discharge under habeas corpus is not applicable in such proceeding. *In re Immigration Act and Mah Shin Shong,* (1923) 32 B.C.R. 176; (1923) 4 D.L.R. 844; (1923) 1 W.W.R. 1365; 39 C.C.C. 401.

II. Right to Discharge.

A. In General.

1. Improper sentence—Hard labour.]—Where a sentence of hard labour is improperly imposed the sentence, conviction and commitment are all illegal and the prisoner will be discharged on habeas corpus. *Rex* v. *Low Quong,* (1924) 33 B.C.R. 522; (1924) 3 D.L.R. 666; (1924) 2 W.W.R. 695; 42 C.C.C. 300.

2. Warrant of commitment—Omission of the word "forfeit."]—The word "pay" when used in a conviction necessarily connotes the idea of forfeiture of money. The word "forfeit" when omitted from the phrase "forfeit and pay" in a warrant of commitment will not entitle the accused to his discharge of habeas corpus where the

proper phrase appears in the conviction. *Rex* v. *Hing Hop,* (1926) 37 B.C.R. 158; (1926) 1 W.W.R. 799; 45 C.C.C. 239.

3. Conspiracy—Information.]—Where an informant charges a conspiracy between A, B, C, and D, together with E and F and others and a conviction finds A guilty of a conspiracy with B and with E and F the Court will not hold that the conspiracy on which A is convicted is a different conspiracy from the one on which he was charged and the prisoner will not be discharged on habeas corpus. *Rex* v. *Marino and Crisofi,* (1927) 38 B.C.R. 452; (1927) 2 W.W.R. 468; 47 C.C.C. 348.

4. Vagueness as to place of offence and autrefois convict.]—If the conviction and warrant of conviction are each such that it will be impossible to plead autrefois convict by reason thereof the record being one of an inferior court the conviction is therefore vague and uncertain and will be quashed and the prisoner discharged on habeas corpus. *Rex* v. *Marino and Crisofi,* (1927) 38 B.C.R. 452; (1927) 2 W.W.R. 468; 47 C.C.C. 348.

5. Offence stated under repealed statute.]—A conviction will be quashed on an application for writ of habeas corpus which recites the commission of an offence described as being contrary to an Act which had been repealed and for which a new statute was substituted. *Rex* v. *Chew Deb,* (1928) 39 B.C.R. 559; (1928) 1 W.W.R. 166; 49 C.C.C. 332.

6. Removal of prisoner from one gaol to another.]—Sec. 33 of the Police and Prisoners Retulation Act, R.S.B.C. 1924, cap. 91, cannot be invoked to support the removal by order of the Attorney-General from one gaol to another for a prisoner who has been committed for an offence under the Criminal Code, and a prisoner so removed after serving part of his sentence will be discharged under habeas corpus proceedings. *Rex* v. *Tarchuk,* (1928) 40 B.C.R. 398; (1928) 3 W.W.R. 577; 50 C.C.C. 423.

7. Application during period of imprisonment.]—Where the order of a magistrate is absolute for a term and a further term is imposed for default of payment of the fine and costs, the conviction and commitment of the inferior Court are severable and the prisoner will not be discharged on an application for habeas corpus on account of the illegality of the part dealing with the further imprisonment as such application was premature before the expiration of the term for which the conviction imposed an absolute order of imprisonment; up to that time, the applicant cannot complain that he is illegally restrained of his liberty. *In re Henderson, Stewart, Broder and Joe Go Get,* (1929) 52 C.C.C. 95; (1930) S.C.R. 45; (1930) 1 D.L.R. 420.

8. After speedy trial.]—Where on a trial before the County Court Judge's Criminal Court the statement required by sec. 827 of the Criminal Code to be made to the accused on his arraignment or election is not made the Court acquires no jurisdiction to hear the case or convict the accused and if so convicted he is entitled to apply for his discharge on habeas corpus. *Rex* v. *Wong Cheun Ben,* (1930) 42 B.C.R. 520; (1930) 1 W.W.R. 899; 53 C.C.C. 331.

9. After speedy trial.]—In the absence of material to shew that the judge did not properly state all that was required by sec. 829 if it appears by the record that the accused elected to be tried summarily it will be presumed that the statements were made to him as required by that section. *Rex* v. *Wong Cheun Ben (No. 2),* (1930) 43 B.C.R. 188; (1930) 3 W.W.R. 282; 54 C.C.C. 399.

10. Speedy trial—Two charges in one trial.]—Where there is no statute in force authorizing two charges to be tried together, recourse must be had to the common law, and where at the opening of the speedy trial of the accused upon a charge of stealing the Crown preferred a second charge, namely, that of receiving, and the accused being put to re-election on these two separate and distinct charges elected to be tried by speedy trial, and was tried on both charges in one trial and convicted on the charge of stealing and sentenced to imprisonment with hard labour, the warrant of commitment bearing the fact of the one trial on both charges is defective and the prisoner will be discharged on habeas corpus. *Rex* v. *Simpson,* (1923) 3 W.W.R. 1095.

11. Arrest on irregular warrant.] — Given a valid information and the presence of the accused before a magistrate of the district where the offence is alleged to have occurred, the jurisdiction of the magistrate attaches at once, and he is not concerned with informalities or irregularities which may have occurred in connection with the execution of an otherwise valid warrant and habeas corpus will not lie. *Rex* v. *Kilmartin,* (1923) 33 B.C.R. 151; (1924) 1 W.W.R. 107.

B. Alien.

1. Deportation—Violation of Drug Act—Sentence.]—An alien convicted for violation of the Opium and Narcotic Drug Act and sentenced to a fine only without imprisonment is not deportable under the Immigration Act notwithstanding that the sentence imposed imprisonment in default of payment of the fine, and in such case the alien will be discharged on habeas corpus proceedings. *In re Immigration Act and Mah Shin Shong*, (1923) 32 B.C.R. 176; (1923) 4 D.L.R. 844; (1923) 1 W.W.R. 1365; 39 C.C.C. 401.

2. Place to which deportation ordered.]—Where an alien is held for deportation to a place other than that to which the Board of Enquiry under the Immigration Act has ordered may be discharged and a writ of habeas corpus will be granted. *Re Santa Singh*, (1924) 34 B.C.R. 190; (1924) 3 D.L.R. 1088; (1924) 3 W.W.R. 164; 42 C.C.C. 346.

3. Invalid conviction.]—A prisoner will be discharged on habeas corpus where the conviction purports to be made under an Act which is not in force at the time the offence is committed, and an order for a deportation order under the Chinese Immigration Act when based upon a bad conviction is ineffectual *Rex* v. *Soo Gong*, (1927) 38 B.C.R. 321; (1927) 2 D.L.R. 269; (1927) 1 W.W.R. 669; 47 C.C.C. 275.

4. Custody pending appeal from order.]—Pending an appeal from an order for deportation under the Chinese Immigration Act an application for a writ of habeas corpus will not be granted to discharge an appellant in custody under sec. 13 of the Act as this section is tantamount to a stay of proceedings for his release. *Rex* v. *Lee Moon Koo*, (1931) 43 B.C.R. 458; (1931) 1 W.W.R. 571; 55 C.C.C. 188.

5. Board of enquiry—Order of deportation.]—If it be proved that the Board of Enquiry under the Immigration Act has not acted judicially but merely on instructions from Ottawa, the Court will be bound to release the immigrant on a writ of habeas corpus. *Re Jung Yin*, (1921) 3 W.W.R. 194.

6. Immigration—Order for deportation—Insufficient reasons.]—In order for the deportation of an immigrant the reasons for rejecting him must be stated in full. If the reasons are not sufficiently given in the order it is defective and not in accordance with the provisions of the Act, and the applicant should be discharged. *In re Immigration Act and Munetaka Samejima*, (1931) 44 B.C.R. 317; (1931) 3 W.W.R. 56.

7. Fugitive Offenders Act.]—A person charged under a warrant issued under the provisions of the Fugitive Offenders Act with the offence of obtaining by false pretences cannot be committed for the offence of attempting to obtain by false pretences when the evidence does not justify committal for the full offence and habeas corpus will lie. *In re Harrison (No. 2)*, (1918), 25 B.C.R. 541.

See 25 B.C.R. 433; 545; 41 D.L.R. 731; 29 C.C.C. 420; 30 C.C.C. 150.

See JURISDICTION, *Supra.*

III. PROCEDURE.

A. Applications.

1. Alternate grounds of relief.]—An applicant cannot hold back either intentionally or inadvertently any ground of relief against an order which is regarded as a civil proceeding or under a Provincial Act and then found a new application for a writ of habeas corpus to the same or another judge in respect thereof. *Rex* v. *Loo Len (No. 2)*, (1923) 33 B.C.R. 213; (1924) 1 D.L.R. 910; (1924) 1 W.W.R. 735; 41 C.C.C. 388.

See Rex v. *Gee Dew*, *supra*, p. 552.

2. Grounds of application—Notice and affidavit.]—The grounds upon which an application for a writ of habeas corpus is founded must be stated in definite terms either in the notice or in the affidavit in support. *Rex* v. *Lee*, (1926) 37 B.C.R. 397; (1926) 3 W.W.R. 264.

B. Amendment.

Warrant of commitment.]—On a motion for habeas corpus for discharge of a prisoner the Crown will be permitted to amend the warrant of commitment but leave will not be given to amend a warrant which has already been amended twice. *Rex* v. *Jones*, (1923) 32 B.C.R. 160; (1923) 2 W.W.R. 141; 40 C.C.C. 198.

C. Certiorari in Aid.

Certiorari on application of Crown.]—Where an accused person having been convicted for being in unlawful possession of opium applied for his discharge on habeas corpus on the ground that the word "forfeit" was omitted from the warrant of commitment, the Crown obtained certiorari and the conviction and depositions were brought in. *Rex* v. *Hing Hop*, (1926) 37 B.C.R. 158; (1926) 1 W.W.R. 799; 45 C.C.C. 239.

D. Adjournment.

Refusal of.]—A clerical error made in a conviction by adding the figures "1923" to the then existing Act which had been repealed but included in the Act of 1929, a revision and consolidation thereof, is not sufficient to avoid a conviction as it is a mere matter of surplusage which can be disregarded and the prisoner will not be discharged on habeas corpus by reason thereof. *Rex* v. *Quong Wong*, (1930) 42 B.C.R. 241; (1930) 2 D.L.R. 422; (1930) 1 W.W.R. 299; 53 C.C.C. 60.

E. Costs.

Costs.] — Application for a writ of habeas corpus without any certiorari in aid in respect of a conviction under the Dominion law is an independent civil proceeding and is therefore subject to the provisions of the Crown Costs Act, and no costs can be given. *Rex* v. *Ten Chinamen*, (1924) 34 B.C.R. 349.

IV. EVIDENCE.

1. Extrinsic evidence to supplement record.]—In order that a conviction made before a justice of the peace, purporting to adjudicate in a city on an offence committed in such city, may be valid it must shew on its face either that such adjudication takes place because of the illness or absence or at the request of the city police magistrate, or else that the city has no police magistrate. *Rex* v *Smith*, (1919) 27 B.C.R. 338; (1919) 3 W.W.R. 311.

2. Extrinsic evidence shewing lack of jurisdiction.] — Although certiorari may have been taken away by statute and notwithstanding any law or authority deciding that the Court cannot look at the evidence to quash a conviction, the Court is entitled on a habeas corpus application, to receive affidavit evidence to shew that the magistrate had no jurisdiction or has exceeded his jurisdiction on convicting the applicant. If the affidavit shews, and the Court is satisfied, that the magistrate tried two separate and distinct offences against the accused at one time, the convictions on the charges will be quashed. Sec. 83 of the B.C. Government Liquor Act, 1921, cap. 30, does not permit of such a trial on charges under that Act. *Rex* v. *Montemurro*, (1924) 2 W.W.R. 250.

3. Extrinsic evidence shewing lack of jurisdiction.]—On an application for habeas corpus with certiorari in aid proper evidence may be submitted to shew that the convicting magistrate had no jurisdiction to convict the person imprisoned. *Rex* v. *Wong Foon Sing*, (1925) 36 B.C.R. 120; 44 C.C.C. 133. *Rex* v. *Chin Yow Hing*, (1929) 41 B.C.R. 214; (1929) 2 W.W.R. 73; 51 C.C.C. 407. *Rex* v. *Cardarelli*, (1929) 2 W.W.R. 223; 52 C.C.C. 267; (1930) 1 D.L.R. 575. *Rex* v. *Rowan*, (1930) 42 B.C.R. 559; (1930) 2 W.W.R. 277; 54 C.C.C. 197.

4. Evidence before magistrate.]—The judge before whom the application for habeas corpus is made cannot look at the depositions to see whether there is any evidence to support the conviction, the sufficiency of the evidence not being a matter going to the jurisdiction of the magistrate. *Rex* v. *Wong Foon Sing*, (1925) 36 B.C.R. 120; 44 C.C.C. 133. *Rex* v. *Chin Yow Hing*, (1929) 41 B.C.R. 214; (1929) 2 W.W.R. 73; 51 C.C.C. 407.

5. Extradition—Discretion of commissioner.] — Where an extradition commissioner has found that there is evidence justifying an order for extradition his decision will not be reviewed if the judge before whom the application is made is of the opinion that a prima facie case has been made out. Proof that an extraditable crime has been committed may be inferred from the indictment of the accused in a foreign state for the offence. *In re Israelowitz*, (1917) 25 B.C.R. 143; 29 C.C.C. 323.

See ALIENS.
See CERTIORARI.
See CRIMINAL LAW.
See EXTRADITION.
See IMMIGRATION.

HIGHWAYS.

I. In General, 563.
II. Establishment, 563.
III. Use by Public Generally, 564.
IV. Use by Public Utility Companies, 564.
V. Use by Public Carriers, 565.
VI. Municipal Highways, 566.
A. Acquiring land for highway purposes, 566.
B. Altering and closing, 567.
C. Rights of municipalities, 567.
D. Liabilities of municipality, 568.
VII. Rule of the Road, 570.

I. In General.

1. Tree falling on highway—Responsibility of adjoining owner—Natural growth.]—The occupier of land on which is standing a decayed forest tree in a state of nature and who has done nothing to change its condition, is not liable in damages for injury caused by the falling of the tree upon an adjoining highway. *Patterson* v. *Canadian Robert Dollar Co.*, (1929) 41 B.C.R. 133; (1929) 3 D.L.R. 33; (1929) 2 W.W.R. 181.

2. Board of School Trustees—Protection of pupils on highway.]—There is no duty imposed on a Board of School Trustees to protect pupils from injury from trees falling on a highway leading to but beyond the boundaries of the school premises. *Patterson* v. *Board of School Trustees of the District of North Vancouver*, (1929) 41 B.C.R. 123; (1929) 3 D.L.R. 33; (1929) 2 W.W.R. 181.

II. Establishment.

1. Dedication.]—In order to establish a public nighway by dedication there must be on the part of the owner an actual intention to dedicate the land for the specific purpose of a highway, and it must appear that the intention was carried out by the way being thrown open to the public, and that the way has been accepted by the public. *Attorney-General of British Columbia and City of Victoria* v. *Bailey*, (1920) 60 S.C.R. 38; 54 D.L.R. 50; (1920) 1 W.W.R. 917.

2. Dedication.]—One of the essentials of dedication is an actual intention on the part of the owner to dedicate, and where an owner has signed documents and performed acts which are consistent with the belief on his part that the road in question was built under statutory powers, such documents and acts will not necessarily be taken as evidence in support of an intention to dedicate. *Corporation of Saanich* v. *McFadden*, (1923) 32 B.C.R. 221; (1923) 1 D.L.R. 1170; (1923) 3 D.L.R. 171; (1923) 2 W.W.R. 429.

3. Declaration by Commissioner of Lands.]—A notice of declaration of a public highway under sec. 88 of the Highways Act, 1908, cap. 30, is without effect when it does not fully set forth the direction and extent of the proposed highway. *Clark* v. *Milligan*, (1920) 28 B.C.R. 22; (1920) 1 W.W.R. 1044.

4. Highway existing prior to 1905.]—Where it is proved that a road has been an existing travel road on some portion of which public money was expended prior to 1905, it is a public highway by virtue of sec. 6 of the Highway Act. *Corporation of Saanich* v. *McFadden*, (1923) 32 B.C.R. 221; (1923) 1 D.L.R. 1170; (1923) 3 D.L.R. 171; (1923) 2 W.W.R. 429.

5. Compulsory purchase of land for highway purposes.]—A submission to arbitration to determine the amount of compensation to be awarded for land "entered upon and taken possession of for highway purposes" is one under the Highway Act, 1930, cap. 24, and the arbitration sections of the Public Works Act, R.S.B.C. 1924, cap. 211, are made applicable thereto by the Highways Act. When under such an arbitration the time for making an award by the arbitrators has not expired, secs. 15 and 20 of the Public Works Act circumscribe both the appointment and jurisdiction of the umpire and make certain conditions precedent to his right to determine the whole matter. *In re Minister of Public Works of British Columbia and Tipping*, (1931) 44 B.C.R. 321; (1931) 2 W.W.R. 835.

III. Use by Public Generally.

1. Pedestrians.]—A pedestrian is not confined to the crossing in passing over a public street or highway. He is entitled to cross at any point. If he goes out into the traffic he must be allowed to extricate himself in safety. A driver of a motor vehicle is not entitled merely to sound his horn and

expect pedestrians to evade him. He must be careful to evade the pedestrians. *Rainey* v. *Kelley*, (1922) 3 W.W.R. 346; 69 D.L.R. 534.

2. Pedestrians and drivers of vehicles.]—Neither the pedestrian nor the driver of a vehicle has a paramount right to the use of the highway, but both have equal rights, subject to the rules of the road, and any special regulation for the time being in force for the common safety. Both are under a continuing duty not only to use care but to avoid the result of the other's negligence so far as reasonably possible without doing injury to others. *Vance* v. *Drew*, (1925) 36 B.C.R. 241; (1925) 3 W.W.R. 740.

IV. Use by Public Utility Companies.

Rival telephone companies.]—Where a private corporation cuts down the telephone poles of another corporation on a highway as being an obstruction on the highway amounting to a nuisance, in order to justify such action it must establish that it could not have constructed its own line without removing the property of such other corporation. A telephone company which acquires from another company the latter's poles and wires which have been on a highway for some years without objection from the municipality, is entitled to consider that the poles and wires were on the highway with the approval of the municipality, and that it had the right to use such line as part of its system under its powers conferred by statute. Where a telephone company has legally placed its equipment on a highway, a second company having the same powers, is not entitled to interfere with or do any act of injury to such equipment. *Okanagan Telephone Company* v. *Summerland Telephone Company, Limited*, (1918) 25 B.C.R. 221; (1918) 1 W.W.R. 656.

V. Use by Public Carriers.

Assignment of right to operate as public carrier.]—The right to operate motor vehicles for the public carriage of passengers under a certificate of approval of schedule under the Highway Act is personal to the owner or person in charge of the motor vehicle, and is not assignable, and a promise to pay for such an alleged right is not founded upon a legal consideration, as the promiser could not lawfully carry on the public carriage of passengers without obtaining for himself such a certificate. *McLean-Butorac Motors* v. *Campbell*, (1930) 3 W.W.R. 39.

VI. Municipal Highways.

A. Acquiring Land for Highway Purposes.

1. Resumption of land for highway purposes.]—In an action against a municipal corporation proposing to resume portions of the plaintiff's lands under sec. 325 of the Municipal Act which contains a proviso "that no such assumption shall be made of any lands on which any buildings may be erected or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings": —Held, that in determining whether land is in use for the more convenient occupation of a building, regard must be had to the uses to which a building is put. A driveway is for the more convenient occupation of a house and so is a barnyard for a stable or barn. The question is one of fact whether it was so used in each case, and an element to be considered is whether the land is withdrawn from the larger purposes of the farm, such as growing of grain and depasturing of cattle, etc., and kept for use in connection with house and farm buildings. *Caine* v. *Corporation of the District of Surrey et al.*, (1919) 27 B.C.R. 23; (1920) 28 B.C.R. 321; 60 S.C.R. 654; 67 D.L.R. 794; (1921) 2 W.W.R. 273.

2. Land required for highway purposes —Purchase by municipality — Charge created prior to registration.]—Where a municipal corporation proceeding under a by-law to expropriate land for the purpose of widening a highway which was invalid owing to insufficient publication thereof, takes a conveyance from the owner of a strip of land required for the purposes of the highway, paying compensation therefor, and fails to register its conveyance, a mortgagee who makes a prior application to register his mortgage is entitled to registration in the absence of proof that the land was used for highway purposes when he obtained and registered his mortgage or that the mortgagee dedicated his interest for highway purposes, or is estopped by his conduct since becoming mortgagee from denying the existence of the highway

claimed. *Attorney-General of British Columbia and City of Victoria* v. *Bailey*, (1920) 60 S.C.R. 38; 54 D.L.R. 50; (1920) 1 W.W.R. 917.

B. Altering and Closing.

1. Narrowing highway.] — Under the Municipal Act, 1911, sec. 52 (176) (193) a municipality has power to close up a portion of a highway for the purpose of narrowing it. This entitles owners of land abutting on the highway to recover damages for consequential injury to their property. *Ramsay* v. *Corporation of the District of West Vancouver*, (1916) 53 S.C.R. 459; 30 D.L.R. 602; 10 W.W.R. 1184.

2. Estopped by conduct—Closing highway — Land given in lieu.] — Where a municipality has induced an owner of land to transfer to it land for use as a highway by clearly evincing an intention and permitting the land-owner to close up another road across his land, it cannot afterwards deny the intention to close the latter and that it should remain closed. Under such circumstances the land-owner is entitled to a declaration in effect perventing the municipality from opening up the closed road. *British Columbia Hop Co. Ltd.* v. *District of Kent*, (1925) 35 B.C.R. 380; (1925) 3 D.L.R. 171; (1925) 2 W.W.R. 31.

C. Rights of Municipalities.

1. Control of traffic.]—A municipal by-law passed by the authority of the Legislature to prohibit jitneys from plying for hire in the streets of a city in competition with a street railway company is not unreasonable, and the by-law and the statute under the authority of which it has been enacted are not ultra vires as legislation affecting "trade and commerce." *Blue Funnel Motor Line Ltd.* v. *City of Vancouver*, (1918) 26 B.C.R. 142; (1918) 3 W.W.R. 405.

2. Right of way at street crossing.]—A by-law regulating the right of way at street crossings is intra vires of the Council of the City of Victoria and is not within the term "rule of the road" in sec. 37 of the Motor-traffic Regulation Act. *Quinn* v. *Walton*, (1921) 30 B.C.R. 401.

3. Municipal regulations—Validity of.] —A municipality is by the Municipal Act given power to regulate traffic, this power being definitely limited to regulations other than the rules of the road. A regulation as to the right of way of vehicles at street intersections is a rule of the road and a municipal by-law which lays down a rule as to the right of way at street intersections is ultra vires. *Pipe* v. *Holliday*, (1930) 42 B.C.R. 230; (1930) 2 D.L.R. 73; (1930) 1 W.W.R. 225.

4. Obstructions.] — Under sec. 332 of the Municipal Act a municipal corporation may bring an action for a mandatory injunction to compel a land-owner to remove obstructions placed by him on a road within the municipality and restrain him from interfering with or obstructing the same. *Corporation of Saanich* v. *McFadden*, (1923) 32 B.C.R. 221; (1923) 1 D.L.R. 1170; (1923) 3 D.L.R. 171; (1923) 2 W.W.R. 429.

5. Motor-vehicle regulations.]—Where the statutory power conferred upon the city to make by-laws respecting vehicle and motor traffic contains express power to prohibit, the City Council may pass by-laws prohibiting certain classes of vehicles from driving or operating on its streets. The power given to the city to "arrange all motor-vehicles in classes and differentiate in the conditions contained in licenses granted" is not restricted to classification of the vehicles themselves, but extends to the routes or areas over which they run or within which they operate. *Rex* v. *Calbic*, (1920) 28 B.C.R. 113; 61 D.L.R. 203; (1920) 2 W.W.R. 621.

6. Trees on highway.]—An action is not maintainable by an adjoining land-owner for the cutting by the municipality of trees on a highway the possession whereof is vested in the municipality. *Attorney-General for British Columbia* v. *Corporation of Saanich*, (1921) 29 B.C.R. 268; 56 D.L.R. 482; (1921) 1 W.W.R. 471.

D. Liabilities of Municipality.

1. Duty to repair—Nonfeasance.]—In all cases where an accident has occurred by reason of the wearing out or imperfect repair of a highway or sidewalk, there is a presumption without proof of notice of such defect, of negligence on the part of the municipality if charged with the duty of

keeping its highways in repair, which can only be rebutted by shewing that the municipality has taken all reasonable and proper precautions to anticipate and remedy such a condition. *Woodcock* v. *City of Vancouver*, (1927) 39 B.C.R. 288; (1928) 1 D.L.R. 1080; (1927) 3 W.W.R. 759.

2. Duty to repair—Misfeasance.]—It is the duty, and only duty, of a municipality, in repairing a road under statutory authority, to see that traps are not left for the unwary, such as dangerous places unguarded by a warning of their condition. Where the work is open to the observation of any person using the road, and it is conducted in a lawful manner, the user has no cause of action for injuries sustained. *Albion Motor Express* v. *Corporation of the City of New Westminster*, (1918) 25 B.C.R. 379; (1918) 1 W.W.R. 493; (1918) 3 W.W.R. 19. Affd. 59 S.C.R. 655; 52 D.L.R. 682.

3. Duty to repair—Nonfeasance.]—Sec. 320 of the Vancouver Incorporation Act as amended in 1928 imposes upon the City of Vancouver the duty of keeping the public highways in reasonable repair. The City is liable in damages for injury sustained by a pedestrian walking along a sidewalk and stumbling over an obstruction covering an excavation made with the permission of the City by an owner of land abutting on the highway. *Moran* v. *City of Vancouver*, (1928) 40 B.C.R. 450; (1929) 1 D.L.R. 461; (1928) 3 W.W.R. 660.

4. Municipality—Duty to repair.]—The Municipal Act does not impose on a municipal corporation any liability in damages for injury caused to any person through non-repair of roads or sidewalks. *Clarke* v. *The Corporation of Chilliwack*, (1922) 31 B.C.R. 316; (1923) 2 W.W.R. 726.

See Scott v. *City of Nanaimo*, (1924) 33 B.C.R. 474; (1924) 2 D.L.R. 811; (1924) 1 W.W.R. 1275.

5. Sidewalks — Non-repair of.] — The Municipal Act imposes no obligation on a municipality to repair sidewalks and where there is no evidence of original faulty construction the municipal corporation is not liable for the consequences of inevitable decay of material properly used in construction. *Gilroy* v. *Corporation of the District of Burnaby*, (1931) 44 B.C.R. 171; (1931) 4 D.L.R. 410; (1931) 3 W.W.R. 1.

6. Under Municipal Act—Duty to repair.]—The Municipal Act casts no duty on municipalities controlled by it to repair the roads the possession of which was vested in them by sec. 370 of the Municipal Act. Where therefore a road built by others without authority is so vested the municipality is not liable to pay damages for injuries sustained owing to mere non-repair. *Von Mackensen* v. *Corporation of Surrey*, (1915) 21 B.C.R. 198; 22 D.L.R. 253; 8 W.W.R. 541.

7. Misfeasance—Nuisance.] — Where a municipality in constructing a sewer excavated a portion of a highway and erected a barricade leaving a narrow and unsafe passage for the use of pedestrians it creates a nuisance and is guilty of misfeasance and liable in damages to a pedestrian who meets with an accident resulting from the dangerous condition of the footway. *Watts* v. *District of Burnaby*, (1929) 41 B.C.R. 282; (1929) 4 D.L.R. 142; (1929) 2 W.W.R. 612.

8. Bridge.] — A municipal corporation which has provided the funds for defraying half the cost of constructing a bridge and has exercised control over it and whose servant is the bridge keeper is prima facie under his duty of protecting the public against the dangers of working a draw span in the bridge; and if it desires to dispute this responsibility it is incumbent upon the municipality to prove that the officials who had in fact exercised control were exceeding their lawful powers. The contention that as there was no evidence shewing the situs of the bridge to be within its territorial limits the municipality is not legally responsible for maintaining it in safe condition for travel, or for the negligent acts of the persons in control of it, will not be given effect. *Smith* v. *Municipality of South Vancouver and Township of Richmond*, (1922) 31 B.C.R. 168.

See Evans v. *Municipality of South Vancouver and Township of Richmond*, (1918) 26 B.C.R. 60; (1919) 3 W.W.R. 339; 48 D.L.R. 209.

9. Bridge.] — A municipality is liable for damage caused to a ship by the defective condition of a drawbridge under the control of the municipal corporation and the negligence of the bridge tender in failing to notify the captain of the ship of the danger in time to avoid the accident. *Star S.S. Co.* v. *City of Vancouver*, (1916) 23 B.C.R. 317; 30 D.L.R. 484; 34 W.L.R. 1188.

VII. Rule of the Road.

1. Pedestrians.]—A pedestrian is not confined to the crossing in passing over a

public street or highway. He is entitled to cross at any point. If he goes out into the traffic he must be allowed to extricate himself in safety. A driver of a motor vehicle is not entitled merely to sound his horn and expect pedestrians to evade him. He must be careful to evade the pedestrians. *Rainey* v. *Kelly*, (1922) 3 W.W.R. 346; 69 D.L.R. 534.

2. Driving motor car on street railway.]—It is the duty of the driver of a motor car not to pass upon the rails of a street railway car save when the way is clear, for the reason that a street car cannot pass except over the rails whereas a motor car can be operated in any direction. *Kinnee* v. *B.C. Electric Railway Co.* (1917) 1 W.W.R. 1190.

3. Duty of person overtaking.]—A bicycle is a vehicle within the meaning of the British Columbia Highway Act, and the driver of a motor car who overtakes a person walking along the highway on the proper side of the road and pushing along his bicycle is guilty of a violation of sec. 2 (19) of the Act as amended by 1920 (B.C.) cap. 32, if he turns out to his right in passing such person, and is liable for damages resulting therefrom. *Best* v. *Lefroy*, (1922) 67 D.L.R. 455.

4. Motor car held in ruts—Duty of driver.]—The paramount duty of a driver of a motor car approaching another car is to give the approaching driver at least one-half of the road on which to pass, and if he is prevented from moving over to his half of the road by ruts his duty is to stop and give a signal to the approaching driver. If he does not do so under those circumstances he cannot claim as negligence contributory to the cause of the accident the fact that the other driver expected him to obey the law and give him half the road, with the result that he did not stop before a collision was inevitable. *Penrose* v. *Barr*, (1927) 4 D.L.R. 407; (1927) 3 W.W.R. 104.

5. Pedestrian—Intersection of streets.]—The driver of a motor car knowing that a pedestrian will probably cross his path and there being no obstruction to his view the obligation rests upon the driver coming from behind the pedestrian to avoid hitting the latter. *Johnson* v. *Elliott*, (1928) 40 B.C.R. 130; (1928) 1 D.L.R. 1000; (1928) 1 W.W.R. 390.

6. Street intersection—Right-of-way.]—Where the drivers of two motor vehicles arrive at a street intersection at the same time the one coming from the right is entitled to the right of way and his right is not displaced unless there has been a reasonable and substantial prior entry upon the crossing of the intersection by the other car. *Lloyd* v. *Hanafin*, (1931) 43 B.C.R. 401; (1931) 2 D.L.R. 1000; (1931) 1 W.W.R. 415.

See MOTOR VEHICLES.
See MUNICIPAL CORPORATIONS.
See NEGLIGENCE.

HOMESTEAD EXEMPTION.

1. Assignment for creditors.]—Exemption under the Homestead Act is a special privilege which may be insisted upon or not at the option of the debtor, and the failure to make a claim within a reasonable time operates as an abandonment of the privilege. *Roy* v. *Fortin*, (1915) 22 B.C.R. 282; 32 W.L.R. 790; 25 D.L.R. 18; 9 W.W.R. 407.

2. Sheriff's sale of exempt property.]—A sheriff's sale under execution of goods upon which exemption has been claimed under sections 17 and 18 of the Homestead Act is an unlawful act in defiance of the statute and void, and the owner can treat the purchaser who has latter possession of it as a trespasser, and either recover the goods or damages for their conversion. *Fletcher* v. *Pendray*, (1916) 22 B.C.R. 566; 27 D.L.R. 637; 34 W.L.R. 310; 10 W.W.R. 444.

3. Stock in trade.]—The safe, cash register, counter and other chattels used in connection with the business of a trader are included in the term "stock in trade of his business" and are not exempt from seizure under a writ of fi. fa. *Endrizzi* v. *Peto and Beckley*, (1917) 1 W.W.R. 1439.

4. Claim to be promptly made.]—A debtor who has made an authorized assignment under the Bankruptcy Act is not entitled to any exemption of personal property under sec. 17 of the B.C. Homestead Act, if he has not made his claim to exemption within the proper time, whether such proper time is before execution of the assignment, at the time of delivery of possession to the assignee, within a reasonable time thereafter, or within the statutory period set out in the Homestead Act. A right to such exemption is a special privilege which

may be lost if not exercised in a proper manner. *In re Trenwith*, (1922) 3 W.W.R. 1205; 3 C.B.R. 371.

NOTE: Sections of the Homestead Act, 1911, dealing with exemption of personal property from seizure are now to be found in the Execution Act, R.S.B.C. 1924, secs. 24-32 inc.

See BANKRUPTCY.
See EXECUTION.

HUSBAND AND WIFE.

I. RIGHTS AND LIABILITIES, 573.
A. *Rights of husband*, 573.
B. *Liabilities of husband*, 574.
1. Under Deserted Wives' Maintenance Act, 574.
2. Medical and other expenses, 575.
3. For wife's tort, 576.
4. Alimony, 576.
5. Separation agreements, 576.
C. *Rights of wife*, 577.
II. PROPERTY RIGHTS, 579.
III. MARRIAGE, 580.
A. *Solemnization of*, 580.
B. *Annulment*, 581.

I. RIGHTS AND LIABILITIES.

A. Rights of Husband.

1. Title Deeds—Detinue.]—The defendant purchased the rights of a certain applicant for Crown lands in Ontario, and subsequently made the remaining payments due the Crown, but having previously exhausted his own right of acquirement of further lands under the land laws, he had the patents issued in his wife's name and upon receiving them he kept them in his own possession. He entered on the lands with his wife, laboured, and spent further money of his own in improvements. Later he and his wife quarrelled and she came to British Columbia, to which Province he followed her in order to recover his property. Upon his arrival she brought action for delivery and return of the patents for said lands:—Held, that as the wife's evidence is that she does not claim the property as her own in fact, but bases her claim on the doctrine of the common law that husband and wife are one, she cannot succeed, and it is therefore unnecessary to deal with the question of jurisdiction. The action is one of detinue and does not involve the determination of title; the defendant is within the jurisdiction and this fact gives jurisdiction to this Court. *Hawks* v. *Hawks*, (1920) 29 B.C.R. 64; 56 D.L.R. 265; 59 D.L.R. 430; (1920) 3 W.W.R. 774; (1921) 3 W.W.R. 285.

2. Action to recover real property—Furniture—Detinue.]—In an action brought by a husband to have his wife declared trustee of land purchased jointly by them and afterwards conveyed by the husband to the wife, the plaintiff at the trial did not set up a trust, but stated that when he made the conveyance to his wife he did so on her undertaking that the members of her family would vacate the dwelling house situate on the land, and that this had never been carried out:—Held, that while the plaintiff's evidence of the facts is accepted, he cannot succeed as to the dwelling house in question as there was no amendment of the pleadings, and if there had been, the only claim he could set up would be that he had made a conveyance for a consideration that had failed and his action in such case should be either for specific performance or damages. His action for recovery of the furniture in the dwelling house, being an action in detinue, is precluded by sec. 12 of the Married Women's Property Act, 1911. *Body* v. *Body*, (1924) 34 B.C.R. 315.

B. Liabilities of Husband.

1. Under Deserted Wives' Maintenance Act.

1. Action pending in Supreme Court.]—Where a petition by a wife in the Supreme Court for judicial separation and alimony is dismissed the Supreme Court is seised of the matter, and a magistrate ought not to entertain any application by the wife against her husband under the Deserted Wives' Maintenance Act. *Smiley* v. *Smiley*, (1922) 30 B.C.R. 536.

2. Separation agreement.]—While a separation agreement is in force there is no desertion and a magistrate has no jurisdiction to make an order under the Deserted Wives' Maintenance Act. *Ibid.*

3. Deserted or destitute.]—On appeal from the order of a police magistrate for the payment of maintenance under sec. 4 of the Deserted Wives' Maintenance Act, if the Court is of the opinion that there was evidence upon which he might be satisfied that

the wife is "deserted or destitute" within the meaning of said section, his decision is conclusive. *Jackman* v. *Jackman*, (1923) 32 B.C.R. 356; (1923) 3 D.L.R. 798; (1923) 3 W.W.R. 125.

4. Separation agreement — Destitute circumstances.]—A separation agreement made between husband and wife is not a bar to proceedings under the Deserted Wives' Maintenance Act. There is a distinction between the position of a woman deserted and a woman in destitute circumstances. Notwithstanding the provisions of a separation agreement the wife may be destitute. The obligation of a husband to support his wife and children is now made absolute in British Columbia by statutory law. The object of the Deserted Wives' Maintenance Act is to see that that obligation is carried out. *Brown* v. *Brown*, (1924) 3 W.W.R. 94.

5. Garnishment.]—Wages or salary due to a husband may be attached under sec. 11 of the Deserted Wives' Maintenance Act without any deduction by way of exemption, but if an order of attachment is issued out of the County Court after confirmation on appeal of the magistrate's order, the attaching order must provide for an exemption of $60 in accordance with the Attachment of Debts Act. *Brown* v. *Brown*, (1927) 38 B.C.R. 473; (1927) 4 D.L.R. 314; (1927) 3 W.W.R. 172.

2. Medical and Other Expenses.

1. Medical and hospital expenses.]—In an action in which the plaintiffs, husband and wife, sued the defendant for damages resulting from an automobile collision, the trial judge dismissed the husband's action upon the ground of contributory negligence with an award of damages to the wife, disallowing however her claim for medical and hospital bills on the ground that these expenses were obligations of the husband and not the wife and could not be awarded to her as part of her damages. *Scoble* v. *Woodward*, (1924) 1 W.W.R. 1040.

2. Expenses of surgical operation.]—A wife is the agent of her husband for the purpose of engaging a surgeon and notwithstanding the fact that the wife has money of her own, her husband is liable for her necessities, including surgical operations. *Seldon* v. *Zambowski*, (1927) 39 B.C.R. 205; (1928) 1 D.L.R. 638; (1928) 1 W.W.R. 630.

3. For Wife's Tort.

Action against husband and wife—Married Women's Property Act.]—In an action against a husband and wife for damages for wrongful trespass on the part of the wife the husband will be held liable unless he claims in his defence the benefit of the Married Women's Property Act. *Paten* v. *Sigmore*, (1919) 27 B.C.R. 157.

4. Alimony.

1. Decree — Judgment of Supreme Court — Insolvency of respondent.] — A decree for alimony is at the same time a judgment of the Supreme Court and is in the same position as any other judgment in that Court. On a husband making an assignment under the Creditors' Trust Deeds Act a decree for alimony does not give the assignor's wife a preference over his unsecured creditors. *Francis* v. *Wilkerson*, (1917) 25 B.C.R. 132; (1917) 3 W.W.R. 920; (1918) 2 W.W.R. 956.

2. Jurisdiction.]—Alimony arises out of relationship of husband and wife and is a matter of civil rights within provincial jurisdiction, and is not a matter of marriage and divorce within the powers of the Dominion. A wife may obtain a judgment for alimony without bringing action for divorce or judicial separation. *Rousseau* v. *Rousseau*, (1920) 3 W.W.R. 384.

See also DIVORCE.

5. Separation Agreements.

1. Separation deed—Covenant by wife to indemnify—Mortgage debt.]—Husband and wife entered into a separation agreement, the wife agreeing to keep her husband indemnified from all debts and liabilities thereafter contracted by her. On the same day he conveyed to her a property upon which the plaintiff held a mortgage. Subsequently, in order to obtain an extension of time for repayment, she covenanted to pay the mortgage. On action being brought against the husband on his covenant in the mortgage to pay the mortgage debt, he claimed the right to be indemnified by his wife, and made her a third party to the action:—Held, that the wife's covenant to indemnify did not cover the mortgage debt,

notwithstanding her covenant with the mortgagee, as the indemnity clause only applied to debts, her incurring which would render her husband liable. *Walker* v. *Lees*, (1918) 25 B.C.R. 511; (1918) 3 W.W.R. 586.

2. Life annuity—Lump sum payable on death of husband.]—Where a separation deed provides that an annuity be paid to the wife during her life, and there is a further provision in the deed for payment to her of a lump sum on the husband's death, the annuity is payable during their joint lives only. *Rissmuller* v. *Balcom*, (1917) 24 B.C.R. 353; (1917) 3 W.W.R. 535.

3. Maintenance of child — Subsequent provisions in will.]—Where in a separation agreement the husband made special provision for the support and otherwise of the child of the marriage, and later without making any reservation disposed of all his property by will directing his trustees to set apart certain income for the maintenance and education of the child in a manner similar to the provisions made by him during his lifetime, the intention to guard against double provision is manifest in the two instruments read together. *Ross* v. *Fossum and The Toronto General Trusts Corporation*, (1930) 42 B.C.R. 272; (1930) 2 D.L.R. 42; (1930) 1 W.W.R. 375.

4. Custody of children.]—Where under the terms of a separation agreement between husband and wife the custody of the child is left with one of the parents, the onus is upon the other to shew that it is in the best interests of the child that the arrangement should be disturbed and other provisions for the custody of the child ordered by the Court. *Bruin* v. *Bruin*, (1929) 41 B.C.R. 298; (1929) 4 D.L.R. 802; (1929) 2 W.W.R. 218.

C. Rights of Wife.

1. Voluntary deed—Separate advice.]—There is no presumption that a voluntary deed executed by a wife in favour of her husband and prepared by the husband's solicitor is invalid. The onus of proof lies upon the party who impugns the instrument and not on the party who supports it. *Moore* v. *Confederation Life Association*, (1918) 25 B.C.R. 465; (1918) 2 W.W.R. 895.

2. Action by wife against third person for personal injury — Contributory negligence of husband.]—Where there is evidence to support the finding of a jury of negligence causing injury to a married woman the verdict should not be disturbed by reason of the plaintiff's husband being guilty of contributory negligence, the Married Women's Property Act having rendered non-existent the common law doctrine of the unity of husband and wife. *Brooks* v. *B.C. Electric Ry. Co.*, (1919) 27 B.C.R. 351; 48 D.L.R. 90; (1919) 3 W.W.R. 109.

3. Purchase by wife, husband joining agreement.]—Both husband and wife signed a lien agreement as purchasers of a motor-car, the wife made the cash payment and signed promissory notes for the deferred payments which were endorsed by the husband. He paid the instalments under an agreement with his wife to repay her in this way for a loan she had previously made to him. The car was seized under an execution against the husband and was claimed by the wife. On an interpleader issue:—Held, that the car was the property of the wife. In the case of ownership of a motor-car purchased under a conditional sale agreement, as between the purchaser and a stranger to the contract the real facts may be shewn in evidence although contradicting the terms of the agreement. *Canary* v. *Cohn* (*1*), (1925) 35 B.C.R. 478; (1925) 3 D.L.R. 223; (1925) 2 W.W.R. 563; (1925) 4 D.L.R. 431; (1925) 3 W.W.R. 357.

4. Undue influence.]—A wife, at the request of her husband, executed a mortgage in favour of a bank in order to relieve the husband from pressure by the bank for payment of a debt. The evidence disclosed that there was no undue influence exercised by the husband but she signed the instrument without obtaining any independent advice. In an action to set aside the mortgage:—Held, that a mortgage executed in the circumstances was binding upon the maker. *Simmons* v. *Royal Bank of Canada*, (1915) 22 B.C.R. 369; 27 D.L.R. 723; 33 W.L.R. 363.

5. Partnership.]—The wife's share in the profits of a business carried on by her in partnership with her husband is not the wife's separate estate. *Cohn* v. *Canary* (*2*), (1925) 36 B.C.R. 185; (1925) 3 D.L.R. 223; (1925) 4 D.L.R. 431; (1925) 2 W.W.R. 563; (1925) 3 W.W.R. 357.

6. Alimony—Invoking Fraudulent Conveyances Act.]—A wife who has obtained a decree for permanent alimony is a creditor of the husband and entitled to invoke the provisions of the Fraudulent Conveyances Act in order to set aside a fraudulent conveyance of the husband's property. *Mackey*

v. *Mackey and Magur*, (1930) 42 B.C.R. 440; (1930) 3 D.L.R. 497; (1930) 1 W.W.R. 604.

II. PROPERTY RIGHTS.

1. Agency of husband.]—A husband is not prima facie an agent for his wife by reason of their relationship. The onus is on the person alleging such agency to prove that he is her agent. *Millard* v. *The Bevan Lumber and Shingle Co.*, (1928) 39 B.C.R. 430; (1928) 2 D.L.R. 367.

2. Agency of husband.]—A husband has no implied authority to sell shares belonging to his wife, although he had been duly authorized to purchase the shares on her behalf and place them in the hands of brokers, and if the brokers having knowledge only of the husband's right to purchase on his wife's behalf, obey his instructions in transferring the account for the shares to the husband's name, and later sell the same and pay him the proceeds, they are liable with the husband to account to the wife for the proceeds. *Aikman* v. *Burdick Bros. Ltd. and Aikman*, (1923) 33 B.C.R. 23; (1923) 4 D.L.R. 852; (1923) 3 W.W.R. 785.

3. Gifts—Management of wife's estate.]—Where a wife entrusts to her husband the management of her funds out of which he pays their expenses and makes investments that they from time to time agree upon, the question of whether the law implies a gift to the husband depends on the particular facts in each case. *Walker and Roberts* v. *Silk*, (1930) 43 B.C.R. 43; (1930) 2 W.W.R. 407; (1930) 4 D.L.R. 201.

4. Gift.]—Where a husband by his will gives an immediate legacy and an additional annuity to his wife, the executors of the will are at liberty to recover against the wife the amount of instalments paid by the husband on the wife's purchase of property and the amount of mortgage moneys and interest thereon assigned to the husband and secured upon the wife's land. *Roper* v. *Hull and The Royal Trust Company*, (1921) 30 B.C.R. 405.

5. Execution — Seizure of household goods—Claim of wife.]—Where an execution debtor's wife claims household goods which were seized under execution, joint occupation of the premises has no weight against her claim especially when she is the registered owner thereof. In support of the wife's claim, evidence of third parties was admitted to shew that prior to the execution creditors' cause of action arising, the execution debtor had admitted to third parties that the goods belonged to his wife, and as the admissions were such as would estop him from subsequently claiming the goods as against his wife, the execution creditors would be in no better position. *North* v. *Sicilliano*, (1922) 31 B.C.R. 463; (1923) 1 D.L.R. 1149; (1923) 1 W.W.R. 551.

6. Chinese marriage—Two wives.]—A resident of China and domiciled there, lawfully married two Chinese women also of Chinese domicile. After his death it was held that both women should be recognized as wives of the deceased, entitled to the benefits extended to wives under the Succession Duty Act in reference to property situate in British Columbia. *In re Lee Cheong, Deceased. Lee Sheck Yew* v. *Attorney-General for British Columbia*, (1923) 33 B.C.R. 109; (1924) 1 D.L.R. 1166; (1924) 1 W.W.R. 753.

7. Judgment—Estoppel as against joint debtor.]—A creditor having first elected to give credit to, and subsequently to sue and obtain judgment against a husband for the price of goods sold, is not entitled to have the judgment set aside in order to join the wife in the action as a joint debtor. *Hudson's Bay Co.* v. *Scott*, (1929) 4 D.L.R. 978; (1929) 3 W.W.R. 232.

8. Judgment registered against wife's estate in husband's name.]—A judgment creditor who has registered his judgment against the lands of a judgment debtor is entitled to the estate or interest in respect of which he is registered with liberty to sell the property subject only to such exceptions and registered charges as appear on the register, and where the land was purchased by the judgment debtor's wife and paid for with her own money, the conveyance thereof being made to the husband and duly registered, sec. 37 (2) of the Land Registry Act does not confer upon the wife the right to a declaration that there is a resulting trust in her favour as she was not adversely in actual possession of the land at any time. *Morris* v. *Morris and French*, (1931) 44 B.C.R. 166; (1931) 3 D.L.R. 325; (1931) 3 W.W.R. 427.

III. MARRIAGE.

A. Solemnization of.

Foreign decree of divorce.]—An applicant for a marriage license obtained a decree

of divorce in the State of Washington on the 26th of June, 1921, containing a clause in conformance with the Washington Divorce Act prohibiting the marriage of either party for six months:—Held, that the prohibition contained in the decree of divorce against the remarriage of either party within six months of the date of the decree is an integral part of the proceeding, which must be fulfilled before the parties can contract a fresh marriage. *In re Marriage Act and Eaton*, (1921) 30 B.C.R. 243; (1922) 1 W.W.R. 236.

B. Annulment.

See DIVORCE.

See DIVORCE.

See FRAUDULENT AND VOIDABLE TRANSACTIONS.

See GIFT.

IMMIGRATION.

I. WHO LIABLE TO DEPORTATION, 581.
II. JURISDICTION, 584.
III. PRACTICE, 587.

I. WHO LIABLE TO DEPORTATION.

1. Chinese resident in Canada.] — A Chinese person duly admitted and residing in Canada, returning from a visit abroad, is not subject to the Chinese Immigration Act, and a conviction for landing in Canada without payment of the tax under that Act cannot be sustained. *Rex* v. *Fong Soon*, (1919) 26 B.C.R. 450; 45 D.L.R. 78; (1919) 1 W.W.R. 486; 31 C.C.C. 78.

2. Chinese Immigration Act.] — The Chinese Immigration Act provides a clear procedure for deporting a person of Chinese origin, and the repugnancy clause in the Immigration Act disentitles the Immigration authorities to invoke the procedure under that Act against a person of Chinese origin who had gained admission into Canada. *In re Jeu Jang How*, (1919) 27 B.C.R. 294; 50 D.L.R. 41; (1919) 3 W.W.R. 271, 1115; 31 C.C.C. 341.

3. Canadian domicile.]—Subsec. 1 (iii.) of sec. 2 of the Immigration Act Amendment Act, 1919, is not retrospective or retroactive. A native of India domiciled in Canada, and having resided outside Canada for more than one year, is not deemed to have lost his Canadian domicile pursuant to the said subsection, if he returned to Canada within one year from the passage of the said Act. *In re Immigration Act and Santa Singh*, (1920) 28 B.C.R. 357; (1920) 2 W.W.R. 999.

4. Country from which alien enters.]—There is no power under the Chinese Immigration Act to deport to a country other than that from which the immigrant entered. *In re Wong Shee*, (1921) 30 B.C.R. 70; 59 D.L.R. 626.

5. Place to which alien deported.]—A person cannot be held for deportation to any other country than that mentioned in the warrant of deportation *Re Santa Singh*, (1924) 34 B.C.R. 190; (1924) 3 D.L.R. 1088; (1924) 3 W.W.R. 164; 42 C.C.C. 346.

6. Alien released without security.]—A Chinese girl seeking admission into Canada was examined by the controller who, on adjourning the hearing, allowed her to go ashore without any deposit of money as security for her return pursuant to sec. 14 of the Chinese Immigration Act, 1923. On the adjourned hearing an order was made for her deportation:—Held, that although the controller may have failed to obtain security as required by said sec. 14 the mistake is not the equivalent of an assent to her being landed in Canada. *In re Immigration Act and Lee Chow Ying*, (1927) 38 B.C.R. 241; (1927) 1 W.W.R. 527; 47 C.C.C. 203.

7. Admission of infant — Domicile of father.]—The domicile acquired under the Chinese Immigration Act gives only a personal right and the domicile acquired by a Chinese father cannot be appropriated to his son 12 years old who has lived all his life in China so as to give him a right to enter Canada under the Act. *In re Wong Suey Mong*, (1921) 61 D.L.R. 351; (1921) 3 W.W.R. 122; 35 C.C.C. 383.

8. Chinese Immigration Act.]—All alien immigrants seeking entry into Canada come within the provisions of the Immigration Act, and a Chinese is in no better position than any other person seeking admission to Canada. It is the intention of Parliament to leave matters of immigration completely within the control of the authorities and if

the Board of Inquiry acts properly and exercises its functions with reason no Court should sit in review upon its decision. *In re Wong Sit Kit*, (1921) 61 D.L.R. 475; 3 W.W.R. 116; 36 C.C.C 36 *Re Wong Suey Mong, supra*

9. Relatives of citizen — Illiteracy — Other disqualifications.]—Sec. 3 (t) of the Immigration Act is restricted to the question of illiteracy of relatives of an admitted immigrant and when otherwise disqualified such persons are prohibited from entering Canada. *In re Immigration Act and Toku Nishi et al.*, (1928) 41 B.C.R. 199.

10. Chinese Immigration Act.]—Where a prisoner of Chinese origin has been deported, sec. 8 of the Chinese Immigration Act applies and he is thereby precluded from admission into Canada. *The King* v. *Lim Cooie Foo*, (1930) 43 B.C.R. 54; (1931) 1 W.W.R. 233; 54 C.C.C. 383.

11. Order of deportation — Surreptitious entry.]—An order for deportation made by a Board of Enquiry under sec. 33 (7) of the Immigration Act, 1927, which states that it was made because the deportee had entered Canada surreptitiously is not invalid because it does not also state that the Board found that he was not a Canadian citizen and did not have Canadian domicile. *In re Immigration Act. Rex* v. *Takhar*, (1931) 3 W.W.R. 37; 56 C.C.C. 376.

12. Order for deportation.]—An order of a Board of Inquiry under the Immigration Act must state in full the reasons for rejecting an immigrant, otherwise the latter is entitled to be discharged. *In re Immigration Act and Munetaka Samejima*, (1931) 44 B.C.R. 317; (1931) 3 W.W.R. 56.

13. Opium and Narcotic Drug Act—Conviction—Validity.] — The accused was held for deportation, having been convicted on a charge of "unlawfully having in his possession a drug, to wit, opium, contrary to sec. 4 of The Opium and Narcotic Drug Act, 1923." In 1925 the Act was amended by severing subsec. (d) of said sec. 4 into two subsections but no change was made in the wording of the offences. The said Act as amended was carried without change into the Revised Statutes of 1927. On habeas corpus proceedings the accused was released: —Held, on appeal, that there has been no period since the Act of 1923 in which the act upon which the defendant was convicted did not constitute an offence against all the statutes referred to and the clerical error made in the conviction by adding the figures "1923" to the then existing Act was a mere matter of surplusage which could be disregarded. *Rex* v. *Quong Wong*, (1930) 42 B.C.R. 241; (1930) 2 D.L.R. 422; (1930) 1 W.W.R. 299; 53 C.C.C. 60.

II. Jurisdiction.

1. Chinese Immigration Act.]—Sec. 18 of the Chinese Immigration Act is not repugnant to sec. 3 of the Immigration Act. While it states merely the ground on which the controller is bound to act it does not purport to say that no other grounds can be raised. *In re Jung Yin*, (1921) 3 W.W.R. 194.

2. Deportation — Right of Court to interfere.]—If it be proved that the Board of Inquiry under the Immigration Act has not acted judicially, but merely on instructions from Ottawa, in ordering the deportation of a Chinese person, the Court would be bound to grant an application for a writ of habeas corpus. Where, however, two members of the Board swear positively that they did perform their functions in a judicial manner and that, at any rate, they were not influenced by any directions from Ottawa, the Court should not, in the absence of evidence to contradict them, hold that they had not acted judicially. *In re Jung Yin*, (1921) 3 W.W.R. 194.

3. Review by Court.]—Under sec. 23 of the Chinese Immigration Act the Court has no jurisdiction to sit in review upon any decision of the Board of Inquiry concerning his admission into Canada. A decision of the Board of Inquiry refusing to allow a Chinese boy to enter Canada under the Immigration Act cannot be reviewed by the Court. *Re Wong Sit Kit*, (1921) 61 D.L.R. 475; (1921) 3 W.W.R. 116; 36 C.C.C. 36. *Re Wong Suey Mong*, (1921) 61 D.L.R. 351; (1921) 3 W.W.R. 122; 35 C.C.C. 383.

4. Deportation order—Habeas corpus —Appeal.] — The Court of Appeal Act Amendment Act, 1920, sec. 2, giving the right of appeal from a decision of a judge of the Supreme Court in habeas corpus proceedings, applies only to civil matters. An order of deportation under the Federal Immigration Act, 1910, is made in civil and not criminal proceedings and therefore an appeal will lie from an order made by a judge of the Supreme Court upon an application for a writ of habeas corpus for the discharge of a prisoner held for deportation

under that Act. *Rex* v. *Jeu Jang How*, (1919) 59 S.C.R. 175; 50 D.L.R. 41; (1919) 3 W.W.R. 1115; 32 C.C.C. 103. *In re Wong Shee*, (1922) 31 B.C.R. 145; 66 D.L.R. 485; (1922) 2 W.W.R. 156; 37 C.C.C. 371.

5. Deportation order—Habeas corpus—Criminal matter.]—An appeal will not lie under the Court of Appeal Act from an order made upon application for a writ of habeas corpus to discharge a prisoner held for deportation after fine and imprisonment for an offence committed in breach of The Opium and Narcotic Drug Act as these proceedings are of a criminal nature. The order of deportation in such a case is made under the Opium and Narcotic Drug Act and not under the Immigration Act which is resorted to only for the machinery of deportation. (*In re Jeu Jang How*, (1919) 59 S.C.R. 175; dist.) *In re Immigration Act and Mah Shin Shong*, (1923) 32 B.C.R. 176; (1923) 4 D.L.R. 844; (1923) 1 W.W.R. 1365; 39 C.C.C. 401.

See Rex v. *Chang Song*, (1923) 33 B.C.R. 176; (1924) 1 D.L.R. 1161; (1924) 1 W.W.R. 778; 42 C.C.C. 8.

6. Appeal from Board of Inquiry.]—The Court has no jurisdiction to review or otherwise interfere with the decision or order of the Board of Inquiry in relation to the admission or deportation of a rejected immigrant unless such person is a Canadian citizen or has Canadian domicile. *In re Immigration Act and Wong Shee* (2), (1922) 31 B.C.R. 145; (1922) 2 W.W.R. 156; 66 D.L.R. 485.

7. Order for detention.] — A prisoner serving a sentence imposing imprisonment in default of payment of a fine is an "inmate of a prison" under sec. 40 of the Immigration Act, R.S.C. 1910, cap. 17. The order having recited that a written complaint was made under sec. 40 of the Immigration Act, it is not necessary to specify the particular person making the complaint. *In re Immigration Act and Pong Fook Wing*, (1923) 33 B.C.R. 47; (1923) 4 D.L.R. 1034; (1923) 3 W.W.R. 819, 1006; 41 C.C.C. 42.

8. Deportation—Warrant of.] — Under sec. 77 of the Immigration Act it is impossible in habeas-corpus proceedings to go behind the warrant of deportation except to shew that there was no conviction upon which to found the warrant. *Rex* v. *Gee Dew*, (1924) 33 B.C.R. 548; (1924) 3 D.L.R. 186; (1924) 2 W.W.R. 793.

9. Order against deportation.]—Where at the time of a conviction under the Opium and Narcotic Drug Act the magistrate does not order that the accused be not deported after completion of his sentence but subsequently makes such an order, the order so made is invalid, the magistrate being functus officio. *Rex* v. *Lee Park*, (1924) 34 B.C.R. 251; (1924) 4 D.L.R. 883; (1924) 3 W.W.R. 490.

10. Order of deportation.] — Where a person of Chinese origin applies for entry into Canada the authority of the official dealing with the question of immigration is absolute, subject to appeal under the Acts controlling immigration. The Court has no right to interfere with the acts of immigration officials refusing admission to Chinese who have not yet acquired a domicile in Canada. *In re Chinese Immigration Act and Young Sue Hing*, (1926) 37 B.C.R. 227; (1926) 2 W.W.R. 374.

11. Order of deportation.]—The Court will not interfere with an order for deportation which has been made with jurisdiction, none of the essentials of justice having been violated. *In re Low Hong Hing*, (1926) 37 B.C.R. 295; (1926) 3 D.L.R. 692; (1926) 2 W.W.R. 597; 46 C.C.C. 65.

12. Certiorari.]—Certiorari in general lies with respect to an order for deportation made under sec. 26, and sec. 38 is no bar to its application when such orders are made without or in excess of jurisdiction or in violation of the essentials of justice. Sec. 10 (2) of the Chinese Immigration Act, 1923, has no application to deportation proceedings under sec. 26. *Ibid.*

13. Chinese immigration—Controller.] Where an inferior Court is acting within its jurisdiction the Superior Court has no power at common law to assume the function of an appellate Court and review its conclusions by means of a writ of habeas corpus either with or without certiorari, but the controller of Chinese immigration does not come within the ordinary meaning of the word "Court." Moreover sec. 38 of the Chinese Immigration Act enacts inferentially that anyone claiming Canadian birth has a right to apply for relief by way of habeas corpus from the decision of the controller. *In re Chinese Immigration Act and Lee Chow Ying* (2), (1928) 39 B.C.R. 322; 49 C.C.C. 168.

14. Entry by fraud—Order of controller.]—When the controller has made his inquiry and come to a conclusion, and given effect to it by actually landing the person who is the subject of the inquiry he has

exhausted his jurisdiction. If afterwards it is discovered that a fraud has been committed the proper course is to contest his right to remain in Canada before a judge. *Rex* v. *Chin Sack*, (1927) 39 B.C.R. 223; (1928) 1 W.W.R. 618; 49 C.C.C. 43; (1928) 1 D.L.R. 779.

15. Persona designata.] — The words "any judge of the Supreme Court" in sec. 17 of the Chinese Immigration Act, 1923, should be construed as "persona designata" and there is no appeal from an order made under said section. *Rex* v. *Chin Sack (No. 2)*, (1928) 40 B.C.R. 68; 50 C.C.C. 137.

III. PRACTICE.

1. Person admitted under Chinese Immigration Act.] — A Chinese person admitted to Canada pursuant to the provisions of the Chinese Immigration Act having paid a head tax thereunder can only be deported on the procedure provided by that Act. The powers and mode of procedure of the Board of Inquiry as to deportation under the Immigration Act are repugnant to the provisions of the Chinese Immigration Act. *In re The Immigration Act. Rex* v. *Jeu Jang How*, (1919) 27 B.C.R. 294; 50 D.L.R. 41; (1919) 3 W.W.R. 271, 1115; 31 C.C.C. 341.

2. Amending order.]—In the case of an order of deportation being insufficient in form the officer making it may, at any time before the return is made to a writ of habeas corpus and certiorari in aid involving the question of validity of the order, issue an amended order. *Re Pappas*, (1921) 29 B.C.R. 318; (1921) 1 W.W.R. 949.

3. Appointment of immigration officer.] —The appointment of an immigration officer under sec. 22 (2) of the Immigration Act is valid when signed by the acting deputy minister of immigration and colonization by authority of sec. 31 (1) of the Interpretation Act and sec. 48 of the Civil Service Act. *Ibid.*

4. Warrant of deportation—Omission.] —An application on the return of an order nisi for habeas corpus to release accused on the ground that in the recital in the original warrant of deportation the figures "1923" were omitted from the citation of "The Opium and Narcotic Drug Act, 1923," was refused:—Held, that the omission does not invalidate the warrant. *Rex* v. *Jungo Lee*, (1926) 37 B.C.R. 318; (1926) 2 W.W.R. 734; 46 C.C.C. 92; (1926) S.C.R. 652; (1927) 1 D.L.R. 721.

5. Chinese Immigration Act.]—Sec. 13 of the Chinese Immigration Act, R.S.C. 1927, cap. 95, providing that the appellant from an order of deportation shall be kept in custody at an immigration station unless released upon security in accordance with the next succeeding section is tantamount to a stay of proceedings for his release, and a writ of habeas corpus should not issue in the meantime. *Rex* v. *Lee Moon Koo*, (1931) 43 B.C.R. 458; (1931) 1 W.W.R. 571; 55 C.C.C. 188.

6. Warrant of deportation.] — A warrant of deportation signed by the Deputy Minister of Immigration and Colonization is not invalid by reason of its being addressed to "Mr. Thomas Jelley, Controller of Chinese Immigration, Winnipeg, Man., or to any Canadian Immigration Officer." *Rex* v. *Mah Fung*, (1931) 43 B.C.R. 187; 54 C.C.C. 374.

7. Revision of sentence on appeal.]— An order of the Court of Appeal amending the conviction by revising the sentence to bring it within the requirements of the Opium and Narcotic Drug Act is not a new conviction and the validity of an order of deportation reciting the conviction before amendment is not thereby affected. *In re Chow Duck Yuet*, (1931) 43 B.C.R. 556; 55 C.C.C. 344.

See ALIENS.

See CERTIORARI.

See CONSTITUTIONAL LAW.

See CRIMINAL LAW.

See HABEAS CORPUS.

INCOME.

See TAXATION.

INDEMNITY.

See CONTRACTS.

See GUARANTEE.

INDIANS.

1. Garnishee.]—The plaintiff brought action in the County Court against an Indian living on a reserve for the price of goods sold and delivered to him and obtained a garnishee order from the registrar against one G. who lived off the reserve, to whom the defendant sold a crop of wheat that he had raised on the reserve and for which he had not been paid:—Held, that wheat while on the reserve is not subject to taxation nor the process of execution, nor does the language of the Act render the proceeds of a sale of wheat subject to taxation or execution. *Armstrong Growers' Association* v. *Harris*, (1924) 33 B.C.R. 285; (1924) 1 D.L.R. 1043; (1924) 1 W.W.R. 729.

2. Government Liquor Act.]—A conviction and the warrant of commitment thereunder for an offence under the Government Liquor Act will not be set aside because they do not contain the name of the person to whom the liquor was sold. An Indian is punishable in the same manner as others, for offences against Provincial legislation when committed outside a reservation. *Rex* v. *Chan Lung Toy*, (1924) 34 B.C.R. 194; (1924) 3 W.W.R. 196.

3. Indian reserve — Water rights — Board of Investigation.]—The Board of Investigation under the Water Act, 1914, acted without jurisdiction in granting a license to the Department of Indian Affairs to divert water from St. Paul's Creek for use on the Indian reserve. The powers conferred on the Board as to adjudicating on claims under sec. 288 of the Act do not extend to a claim not founded upon a record or a right obtained pursuant to an Act or Ordinance, and the Indians' claim was not so founded; the parties would be left in respect of their rights in the position which they occupied respectively at the date of the initiation of proceedings before the Board. *The Western Canadian Ranching Company Ltd.* v. *The Department of Indian Affairs and The Board of Investigation under Water Act*, (1921) 30 B.C.R. 25; 60 D.L.R. 360.

4. Indian lands—Preservation of game.]—The fact that the Dominion Parliament has exclusive legislative authority over "Indians and lands reserved for Indians" does not prevent a provincial game protection Act which prohibits the killing of game out of season from being applied to the killing of game on an Indian reserve where the offender is a white man. *Rex* v. *McLeod*, (1930) 2 W.W.R. 37; 54 C.C.C. 107.

INFANTS.

I. Guardianship of Person and Estate, 590.
A. Custody of person, 590.
B. Guardianship of estate, 593.
II. Duties of Parents, 594.
III. Property and Other Rights, 594.
A. Succession Duty Act, 594.
B. Injuries to infants, 595.
IV. Torts of Infants, 595.

I. Guardianship of Person and Estate.

A. Custody of Person.

1. Parents living apart.]—When parents are living apart without any voluntary arrangement the Court has jurisdiction under sec. 13 of the Equal Guardianship of Infants Act to make an order as to custody of an infant. In making such an order although the Court should have regard to the conduct of the husband and wife respectively, the primary consideration is the welfare of the infant. An application under sec. 13 of the Act should be by notice of motion. *In re Befolchi, an Infant; Befolchi* v. *Befolchi*, (1919) 27 B.C.R. 460; (1920) 1 W.W.R. 248.

2. Best interests of child.]—On the motion of a father for the return of his child at the time in the custody of an aunt, if it appears to the Court that it would be in the best interest of the child that she should remain with the aunt, the motion will be dismissed. *In re Infants Act and Davies*, (1920) 28 B.C.R. 10.

3. Foster parents.]—On the death of his wife a father under stress of circumstances was forced to leave his young child in an institution. Some months later the child was taken by another man and his wife to their house under a verbal agreement with the father that he would not at any time afterwards claim her. On the application of the father six years later for the custody of the child:—Held, that although the agreement was not binding on the father, the child being settled in a comfortable and happy home where she wanted to stay and the father's offer of a home being one

that was likely to prove of a temporary nature the Court was of opinion it would be hazardous to the child's welfare to remove her and the application was refused. *In re Whitfield, an Infant,* (1922) 31 B.C.R. 349; 70 D.L.R. 658; (1922) 3 W.W.R. 894.

4. Adoption of infant—Order made in Chambers.]—The powers conferred on the Court by the Adoption Act may be exercised by a judge in Chambers. *In re Stanley Warren, an Infant,* (1926) 37 B.C.R. 322.

5. Ex parte order — Setting aside.]—Even if an order for the adoption of an infant is made ex parte and the material upon which jurisdiction was exercised may have been defective or insufficient, if there was the right to make the order and confer rights and responsibility upon those adopting the infant, it is only by way of appeal that the order can be set aside. *Ibid.*

6. Equal guardianship — Unfitness of both parents.]—Upon a petition by one of the parents for the custody of an infant of tender years where it appears that neither parent is fit to be entrusted with the care of the child the Court may order the child to be given into the custody of a suitable person. its welfare being the prime consideration. *Re Steele,* (1930) 2 D.L.R. 212.

7. Effect of foreign decree — Interests of infant paramount.]—Foreign guardians, as such, have no rights in British Columbia their powers and functions being confined to the limits of the country under which they have been appointed. The interest of the infant itself is paramount and the wide discretion of the judge who exercises it will not be interfered with unless there is a strong case and a lack of proper material for the exercise of that discretion. *Snyder* v. *Snyder,* (1927) 38 B.C.R. 336; (1927) 3 D.L.R. 151; (1927) 2 W.W.R. 240.

8. Welfare of child.]—Where a child's mother is dead and the father is entitled to its custody, unless it can be conclusively shewn that it would be contrary to the welfare of the child, if it appears from the evidence that the child is delicate and requires tender care and attention, and since his birth was almost continuously under the care of his maternal grandmother; that he was subject to fits in California where the father lives, but did not suffer from them in Vancouver; that he is of a highly nervous temperament as appears from the demonstration he made in Court when separated from his maternal grandmother, in such circumstances the Court is justified in concluding that it would be contrary to the welfare of the child to take him away from his maternal grandmother to California and the father's application for the custody of the child should be refused. *In re Walter Edward Gehm, an Infant,* (1927) 38 B.C.R. 433; 39 B.C.R. 45; (1927) 4 D.L.R. 382.

9. Separation agreement.]—Where under a separation agreement the custody of a child is given to one of the parents the Court will not interfere with its terms unless it is clearly shewn that such a course is for the welfare of the child. *Bruin* v. *Bruin,* (1929) 41 B.C.R. 298; (1929) 4 D.L.R. 802; (1929) 2 W.W.R. 218.

10. Domicile of infants.]—On petition by a wife for divorce and for the custody of her children, where the father's domicile is in British Columbia but the mother is living in the Province of Alberta with her children:—Held, that the domicile of the children is the same as that of the father during his lifetime and there is jurisdiction to make an order granting the custody of the children to the petitioner. *Kilpatrick* v. *Kilpatrick,* (1929) 42 B.C.R. 88; (1930) 1 D.L.R. 288; (1929) 3 W.W.R. 463.

11. Right of father.] — Where the mother of a child is dead and the father has never surrendered his paternal right and there is no suggestion of unfitness on his part it is the settled practice that the claim of the father to the custody of the child must prevail unless the Court is judicially satisfied that the welfare of the child requires that the paternal right should be superseded. *In re Eva C. Johnson, an Infant. Johnson* v. *Hall,* (1930) 43 B.C.R. 328.

12. Petition for adoption — Stenographer's notes refused.]—Upon the hearing of a petition for the adoption of a child under the provisions of the Adoption Act an application for the presence of an official stenographer to report the proceedings in shorthand was refused:—Held, on appeal, that as it is impossible to dispose of the appeal on the evidence before the Court, the case should be sent back to a judge of the Supreme Court to hear the whole matter in accordance with the practice and procedure of the Court. *Painter* v. *McCabe,* (1927) 39 B.C.R. 249; (1928) 2 D.L.R. 13; (1928) 1 W.W.R. 149.

13. Guardianship.] — The Equal Guardianship of Infants Act has no application

to an illegitimate child. *In re S.*, (1927) 38 B.C.R. 285; (1927) 2 D.L.R. 91; (1927) 1 W.W.R. 411.

14. Alien non-resident adopted child.]—The rights and liabilities resulting from the adoption of a child depend on the law of the country in which it occurs. Where the adoption of a child in a foreign country gives it under the law thereof the same standing and rights as if it were the natural born child of its adoptive parents, the child does not lose such rights through such parents leaving such country and taking up their residence in British Columbia. A child legally adopted in a foreign country where the child and adoptive parents were then domiciled held entitled to the benefits of the Testator's Family Maintenance Act, R.S.B.C. 1924, cap. 256, with respect to the estate of one of such parents who died domiciled in British Columbia, even though the child had always been an alien domiciled in the foreign country. *In re McAdam*, (1925) 35 B.C.R. 547; (1925) 4 D.L.R. 138; (1925) 2 W.W.R. 593.

B. Guardianship of Estate.

1. Official guardian's consent.]—Where the official guardian's consent, as required by rule 29 of the Probate Rules, to the appointment of a guardian, has been given by letter but before it is acted upon he withdraws the consent, such withdrawal should not be regarded as ineffectual. If, however, the consent has been given in open Court, the leave of the Court to withdraw it is necessary. *In re Haddon*, (1927) 38 B.C.R. 328; (1927) 2 D.L.R. 747; (1927) 1 W.W.R. 737.

2. Guardian ad litem.] — Where in an action against a minor for damages for negligence, the affidavit in support of an application for the appointment of a guardian ad litem is not in the form set out in the Appendix to the County Court Rules but contains substantially all the essentials therein prescribed, effect should be given to the rule that "where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them." *Jones* v. *Gibbons*, (1928) 40 B.C.R. 65; (1929) 4 D.L.R. 1067.

II. Duties of Parents.

1. Necessaries — Children of Unmarried Parents Act—Affidavit.]—In an action brought for necessaries supplied to an infant child under sec. 24 of the Children of Unmarried Parents Act it appeared that the affidavit filed by the mother stated that the defendant was the father of said child, not "really the father" as required by sec. 26 of said Act:—Held, that the omission of the word "really" from the affidavit was fatal and the action should be dismissed. Sec. 26 of the Children of Unmarried Parents Act subject to necessary alterations, is an exact copy of secs. 3 and 4 of cap. 131, R.S.O. 1877, which were reproduced in subsequent revisions of the Ontario statutes with slight alterations. Held, further, that where a statutory provision is adopted from another jurisdiction after having been in force there for a long period, the judicial decisions of that jurisdiction should be followed unless there are strong reasons for a contrary view. *Lancaster* v. *Vaughan* (*No. 2*), (1924) 33 B.C.R. 440.

2. Obligation to provide necessaries.]—The payment to a municipality by a father of maintenance expenses incurred by it for a neglected child pursuant to a magistrate's order under the Infants Act can be enforced only in the manner provided in sec. 80 (8) of that Act. *Coldstream* v. *Bellevue*, (1929) 4 D.L.R. 52; (1929) 2 W.W.R. 597.

III. Property and Other Rights.

A. Succession Duty Act.

Right of adopted child to exemption.]—Where a deceased person has provided for maintenance of an adopted child and visited her several times in a year, and treated her as his own and acknowledged her as his adopted daughter, the infant is held to be one to whom the testator stood for not less than ten years immediately prior to his death in the acknowledged relationship of a parent within the meaning of sec. 2 of the Succession Duty Act, 1924, and therefore the amount owing to the infant under his will is entitled to exemption under sec. 4 of the Act. *In re Succession Duty Act. Redmond* v. *Attorney-General for British Columbia*, (1931) 44 B.C.R. 390; (1931) 3 W.W.R. 18.

B. Injuries to Infants.

1. Negligence causing death.]—A driver of a motor truck is negligent and liable in damages for injury causing the death of a boy six years of age where he has invited a number of children to ride with him and has failed to see that the deceased did not obey his instructions to those who had been unable to find room to stand back after the available space on the truck was taken, but attempted to cling to a bar on the side of the truck as it gained speed. Negligence cannot be imputed to a child six years old. *Leslie* v. *Clarke & Buzza Ltd. and Buzza,* (1930) 42 B.C.R. 391; (1930) 3 D.L.R. 369; (1930) 1 W.W.R. 513.

2. Contributory negligence.]—The doctrine of contributory negligence does not apply to a child of tender years. *Vick* v. *Morin & Thompson,* (1915) 21 B.C.R. 8; 22 D.L.R. 29; 7 W.W.R. 1053; 30 W.L.R. 412.

IV. TORTS OF INFANTS.

1. Motor vehicle — Liability of father and of infant.]—A father is not liable in damages for injury caused by the negligent driving of a motor car hired by his son, an infant, who permitted another infant to drive the car. The son who was entrusted with the control of the car and permitted another person accompanying him to drive it is jointly liable with the other for his reckless and negligent driving. *Victoria U Drive Yourself Auto Livery Ltd.* v. *Wood,* (1930) 42 B.C.R. 291; (1930) 2 D.L.R. 811; (1930) 1 W.W.R. 522, 634.

2. Deceit.]—An action for deceit will lie against an infant whose misrepresentations have enabled another to make a fraudulent contract with a third party. *Continental Guaranty Corporation of Canada Ltd.* v. *Mark,* (1926) 37 B.C.R. 453; (1926) 4 D.L.R. 707; (1926) 3 W.W.R. 428.

See NEGLIGENCE.

See WILLS.

INHERITANCE ACT.

See DESCENT AND DISTRIBUTION OF ESTATES.

INJUNCTION.

I. RIGHT TO AND WHEN GRANTED, 596.
A. In general, 596.
B. Violation of public rights, 596.
C. Companies, 597.
D. Contract rights, 598.
E. Works of construction, 600.
F. Trespass, 600.
G. Legal proceedings, 601.
H. Municipal corporations, 601.
I. Libel, 601.
J. Railways, 602.
II. INTERLOCUTORY INJUNCTION, 602.
III. PROCEDURE, 602.
A. In general, 602.
B. Ex parte applications, 603.

I. RIGHT TO AND WHEN GRANTED.

A. In General.

Pending appeal.]—The Court of Appeal has inherent jurisdiction to grant an injunction to preserve rights pending an appeal. *The A. R. Williams Machinery Co.* v. *Graham,* (1916) 23 B.C.R. 481. *Andler* v. *Duke (No. 2),* (1931) 44 B.C.R. 201. *Prevedoros* v. *Prevedoros,* (1927) 3 W.W.R. 755.

B. Violation of Public Rights.

1. Municipal corporation operating ferry—Discount of fares.]—An order was made granting an interlocutory injunction in an action to restrain a municipal corporation from operating a municipal ferry under a resolution which provided for the allowing of a discount on the regular fares: —Held, that the plaintiff had not suffered any special damage and had not shewn that he suffered irreparable injury and the order should be discharged. If it could be said that the action lay because there might be damage to the public, then the Attorney-General is a necessary party. *Hooper* v. *City of North Vancouver,* (1921) 31 B.C.R. 51; 65 D.L.R. 286; (1922) 1 W.W.R. 1249.

2. Provincial Legislature — Delegation of powers — Validity of exercise of.]—Where the Attorney-General through his delegated representative has taken proceedings under the Security Frauds Prevention Act, 1930, in pursuance of "delegated authority" under sec. 10 of the said Act, he has unconstitutionally misapplied the

powers delegated to him, if the purpose of his proceedings is to aid a criminal prosecution which was not contemplated by the Act. The result is that the federal field has been invaded even indirectly as if the primary invasion had been accomplished by the passage of an Act which in its terms is a violation of the overriding statute, the British North America Act. *McGee et al.* v. *Pooley*, (1931) 44 B.C.R. 338; (1931) 4 D.L.R. 475; (1931) 3 W.W.R. 65.

C. Companies.

1. Foreign company — Domestic company of identical name — Registration before action.]—A foreign company is not barred by the Companies Act from obtaining redress, and, independently of fraud, the right of the foreign company to compel the domestic company to change its name depends on the character of the name and the nature and extent of the foreign company's business in the Province at the time the name was adopted by the domestic company. A foreign company's conduct in doing business before registration under the Companies Act cannot be raised as a bar to an equitable remedy against the use of its name which it may claim has become associated with its business. *Northwest Trading Co. Ltd.* v. *Northwest Trading Co. Ltd.*, (1920) 27 B.C.R. 546; (1920) 29 B.C.R. 17; (1920) 1 W.W.R. 353; (1920) 3 W.W.R. 729.

2. Injunction involving the continuation of an illegal course of conduct.]—The Water Clauses Consolidation Act, 1897, and subsequent legislation in lieu thereof require that grants for use of water thereunder shall be circumscribed in the manner in which the licenses held by the defendant company are circumscribed; these licenses provide that the territory within which the power to be generated by use of the water thereby granted may be sold, bartered or exchanged, is an area within fifty miles of Rossland. Therefore the continuance of an interim injunction restraining the defendant company from cutting off the power which it had been supplying to a company beyond such area was refused since it would require it to continue an illegal course of contract. *Granby Consolidated M. S. & P. Co.* v. *West Kootenay Light & Power Co.*, (1929) 41 B.C.R. 89; (1929) 2 D.L.R. 651; (1929) 2 W.W.R. 470.

D. Contract Rights.

1. Contract — Personal service.] — A principal who contracts to give an exclusive right of sale of a certain article within a specified area, will not, where there is no express negative stipulation, be enjoined from giving others the right to sell within such area. *W. L. Macdonald & Co.* v. *Casein Ltd.*, (1917) 24 B.C.R. 218; 35 D.L.R. 443; (1917) 2 W.W.R. 1132.

2. Parties to action.]—Where a plaintiff having agreed to purchase an interest in mineral claims held by the vendor under option refused to pass title and pay his purchase money upon demand, and the vendor in order to protect his option raises the sum necessary therefor on the security of an interest in the claims, and later after refusal of the plaintiff to pass title sells and transfers the last mentioned interest to the vendor in consideration of the sum of money lent, the transferee should be joined as defendant in an action for an injunction to restrain the defendant from selling the claims. *Beaumont* v. *Harris*, (1920) 28 B.C.R. 70; 59 D.L.R. 628.

3. Public utility company—Trade union interfering with employees.]—Where it is apparent to a company carrying on an industry which serves the public that damage may result from interference with its employees, it is not required to wait until damages ensue before taking action but may apply at once for an injunction. *B.C. Telephone Company* v. *Morrison*, (1921) 29 B.C.R. 289; (1921) 1 W.W.R. 694.

4. Breach of contract.]—The Court will not grant an injunction to restrain the breach of a contract for the sale and delivery of goods where an action for specific performance does not lie. Where, therefore, a milk vendor contracts to sell and deliver to the plaintiff all the milk and cream produced by himself for sale for a period of three years there being a covenant that he pay $500 as liquidated damages in case of breach:—Held, that as the parties had agreed in the contract for liquidated damages in case of breach the Court will not grant an injunction. *Vancouver Island Milk Producers' Association* v. *Alexander*, (1922) 30 B.C.R. 524.

5. Goodwill.]—After a man has sold out his business, including goodwill, he cannot solicit his old customers to the detriment of the buyer, and should he do so, the buyer may obtain an injunction enjoining the seller from further solicitation, and also

damages for injuries suffered. *Kamloops District Creamery Association* v. *Perry*, (1921) 56 D.L.R. 492.

6. Restraint of trade—Malicious interference.]—The plaintiff was invited to join the defendant association but refused to sign a contract and after endeavouring to induce him to join them, the object being to better the condition of all concerned, the defendant Association wrote the plaintiff a letter advising him that if he did not sign an agreement as aforesaid, the Association would in seven days stop the producers with whom the Association had contracts from supplying him with milk. In an action for an injunction restraining the Association from carrying out its threat, it appeared that the plaintiff had at this time certain contracts with certain producers for the supply of milk from time to time:—Held, that the defendant Association had no right to interfere with and destroy any contractual relationship existing between the plaintiff and those supplying it with milk and the plaintiff is entitled to a perpetual injunction preventing any such interference. *J. M. Steeves Dairy Limited* v. *The Twin City Co-operative Milk Producers Association*, (1925) 36 B.C.R. 286; (1926) 1 D.L.R. 130; (1926) 1 W.W.R. 25.

7. Contract in writing for removal of timber—Verbal alteration.]—Where the plaintiffs entered into a contract with the defendant to cut and remove timber from the defendant's property upon the terms of certain contracts in writing, the evidence of a verbal alteration of the terms may not be set up by the defendant as a ground for repudiating the agreements in writing and the plaintiffs are entitled to an injunction to restrain the defendant from interfering with the removal of the timber which had been cut by the plaintiffs. *Ridley and Ridley* v. *Barclay*, (1928) 40 B.C.R. 244; (1928) 4 D.L.R. 79; (1928) 3 W.W.R. 62.

8. Restraint of trade — Covenant by retiring partner.]—A member of a partnership carrying on business of a restaurant proprietor who sells his interest to his partner and covenants that he will not carry on or be engaged directly or indirectly in such a business as principal, agent, servant or otherwise, will be restrained by injunction from acting as manager of another restaurant situate within the area and within a few doors of the plaintiff's restaurant, and the defendant's employers who induced him to injure the plaintiff by engaging in a competitive business will be liable with the defendant for damages for conspiracy. *Lerik* v. *Zaferis*, (1929) 41 B.C.R. 526; (1930) 1 D.L.R. 634; (1929) 3 W.W.R. 422.

E. Works of Construction.

Excavation — Blasting — Conflicting evidence.] — An injunction will not be granted to restrain blasting operations in dredging and excavating. An interim injunction will not be granted to restrain blasting operations carried on in the ordinary course of the exercise of legal rights unless the evidence clearly shews that irreparable damage will result if the blasting is continued, and when upon consideration of the testimony of qualified witnesses there is difficulty in deciding that damage is likely to result from continuing the work, the Court will not interfere. *Davidson* v. *North Western Dredging Co.*, (1925) 35 B.C.R. 534.

F. Trespass.

1. Nuisance — Hospital for infectious diseases — Quia timet action.]—In an action for an injunction restraining the establishment of a hospital for infectious diseases on the ground that it will constitute a nuisance the law requires proof of a well-founded apprehension of injury; proof of actual and real danger; a strong probability almost amounting to moral certainty that if the hospital be established it will be an actual nuisance, and the plaintiff cannot succeed on an alternative claim for damages, without proving a violation of a legal right. Depreciation of the value of a property with a sentiment of danger will not of itself constitute a cause of action. *Shuttleworth* v. *Vancouver General Hospital*, (1927) 38 B.C.R. 300; (1927) 2 D.L.R. 573; (1927) 1 W.W.R. 476.

2. Trespass — Encroachment of building on adjoining land.]—A mandatory injunction will not be granted for the removal of a building encroaching 3¼ inches on the plaintiff's land where the evidence shews that the removal of the building would cost more than the value of the plaintiff's land. In the circumstances the proper remedy is an action for compensation in damages. *Clark* v. *McKenzie*, (1930) 42 B.C.R. 449; (1930) 2 D.L.R. 843; (1930) 1 W.W.R. 785.

G. Legal Proceedings.

1. Police Court proceedings—Validity of city by-laws.]—Before an injunction will be granted to restrain police court proceedings for infraction of a city by-law until the validity of the legislation upon which it is founded and the municipal enactment is first finally determined, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiffs are entitled to relief. Public bodies invested with statutory powers must take care to keep within the limits of the authority committed to them, and in carrying out their powers must act in good faith and reasonably and with some regard to the interest of those who may suffer for the good of the community. *Blue Funnel Motor Line* v. *City of Vancouver*, (1918) 26 B.C.R. 142, 388; (1918) 3 W.W.R. 405, 473.

2. Inquiry by judge into School Board contracts—Judicial process.]—Sec. 214 of the Vancouver Incorporation Act enables the City Council by resolution to request a judge of the Supreme Court to enquire into contracts entered into by the Board of School Trustees. Such inquiry, however, is not a judicial process and therefore the Court will not restrain it by an injunction as an abuse or wrongful use of a process of the Court. *Vancouver Board of School Trustees* v. *City of Vancouver*, (1916) 10 W.W.R. 1330.

H. Municipal Corporations.

Resumption of land for road purposes.]—An injunction will be granted to restrain a municipal corporation from resuming lands for road purposes under sec. 325 of the Municipal Act where the land is used for the more convenient occupation of a building. *Caine* v. *Corporation of the District of Surrey*, (1920) 28 B.C.R. 321; (1920) 2 W.W.R. 681; 60 S.C.R. 654; 67 D.L.R. 794; (1921) 2 W.W.R. 273.

I. Libel.

Newspaper articles discussing subject-matter of libel action during trial.]—During the progress of an action for libel contained in newspapers the Court will restrain the publication of further discussion of the transaction which had been the subject of the articles in question as tending to interfere with a fair trial of the action. *Campbell* v. *The Sun Printing and Publishing Company*, (1921) 30 B.C.R. 149; (1921) 2 W.W.R. 987.

J. Railways.

Defective drainage.]—The provisions of sec. 166 of the Railway Act (B.C.) 1911, cap. 44, authorizing the Minister of Railways to make orders in cases of defective drainage do not deprive the Courts of jurisdiction in a proper case to grant an injunction. *McCrimmon* v. *B.C. Electric R. Co.*, (1915) 22 B.C.R. 76; 24 D.L.R. 368; 32 W.L.R. 81; 8 W.W.R. 1289; 19 C.R.C. 329.

II. INTERLOCUTORY INJUNCTION.

Necessity of shewing danger of irreparable injury.]—An interlocutory injunction will not be granted unless the plaintiff can shew that otherwise he will suffer substantial or irreparable injury. *B.C. Poultry Association* v. *Allanson*, (1922) 2 W.W.R. 831.

III. PROCEDURE.

A. In General.

1. Ascertaining damages pursuant to undertaking — Damages.] — The plaintiff obtained an interim injunction, giving the usual undertaking as to damages. Later he made a settlement with one of the two defendants, and, assuming that the defendants were partners, he discontinued the action. The other defendant, contending there was no partnership, and that his co-defendant had no power to settle the action for him, applied for an order declaring the plaintiff liable to him in damages resulting from the injunction, and that a reference be ordered to ascertain the amount of damages. An order was made directing an inquiry before the registrar to ascertain whether the defendants were partners and to report what

damages, if any, were payable by the plaintiff to the said defendant:—Held, on appeal, that the question of whether a partnership exists is a mixed question of law and fact, and it was the duty of the trial judge to decide first whether the defendants were partners and then, if necessary, direct an inquiry as to the quantum of damages. *John Hing Company* v. *Sit Way and Chew Chock*, (1917) 25 B.C.R. 153; (1918) 1 W.W.R. 978.

2. War Relief Act.]—The War Relief Act does not apply to an action for an injunction. *Hunt* v. *Royal Bank of Canada*, (1919) 27 B.C.R. 236; (1919) 2 W.W.R. 547.

3. Affidavit on application.]—In an application for an injunction during the process of an action for libel to restrain the publication of libelous statements discussing the transaction which had been the subject-matter of newspaper articles in respect of which action was brought, an affidavit of the plaintiff pledging his oath to the untruthfulness of the alleged libelous statements will be accepted only as sufficient for the purposes of the application and not affecting the trial of the action. *Campbell* v. *The Sun Printing and Publishing Company*, (1921) 30 B.C.R. 149; (1921) 2 W.W.R. 987.

B. Ex parte applications.

Ex parte—After appearance.]—If a defendant has entered an appearance in an action, the plaintiff, on applying for an ex parte injunction, should inform the judge of that fact, otherwise the defendant, on a motion to dissolve, is entitled to his costs in any event. *Mackey* v. *Mackey and Magur*, (1929) 42 B.C.R. 63; (1929) 4 D.L.R. 658.

INSOLVENCY.

See ASSIGNMENT FOR CREDITORS.

See BANKRUPTCY.

See COMPANIES.

See CONSTITUTIONAL LAW.

INSURANCE.

I. COMPANIES, OFFICERS AND AGENTS, 604
A. In general, 604.
B. Statutory powers, 605.
C. Foreign countries, 606.
II. FIRE INSURANCE, 607.
A. Contract of insurance, 607.
B. Proof of loss, 610.
C. Parties entitled to sue, 610.
D. Change of interest, 611.
III. LIFE INSURANCE, 611.
A. Application, 611.
B. Beneficiaries, 612.
C. Forfeiture, 614.
D. Succession duty, 614.
IV. ACCIDENT INSURANCE, 614.
V. AUTOMOBILE INSURANCE, 615.
VI. BURGLARY INSURANCE, 619.
VII. MARINE INSURANCE, 621.

I. COMPANIES, OFFICERS AND AGENTS.

A. In General.

1. Federal regulation of insurance business.]—Secs. 4 and 70 of the Insurance Act (Can.), 1910, cap. 32, prohibiting under penalty any person or corporation from engaging in insurance business unless it be done by or on behalf of a company of underwriters holding a license from the Minister, deprive private individuals of their liberty to carry on the business of insurance, which is an interference with the civil rights of individuals and corporations, as well as an encroachment upon the legislative powers of provinces to confer such rights upon corporations beyond the provincial limits and, therefore, ultra vires of the Dominion Parliament. The general authority to make laws for the peace, order and good government of Canada, which the initial part of sec. 91 of the British North America Act confers, does not, unless the subject-matter of legislation falls within some of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the Provincial Legislatures by the enumeration in sec. 92 of the Act. The Dominion Parliament, in virtue of the power to regulate trade and commerce under sec. 91 (2) of the British North America Act, has jurisdiction to require a foreign company to take out a license from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a

single province. *Attorney - General for Canada* v. *Attorney-General of Alberta and Attorney - General of British Columbia,* (1916) 1 A.C. 588; 85 L.J., P.C. 124; 114 L.T. 772; 26 D.L.R. 288; 10 W.W.R. 405; 34 W.L.R. 192; 25 Que. K.B. 187.

2. Deposit of security with Government —Borrowed money.]—Where a private Act incorporating a company with power to carry on certain insurance business, provides that the company, before carrying on insurance business, shall deposit such security with the Provincial Government as may be directed by Order-in-Council, the company, being a trading or commercial company, has implied power to borrow money for the purpose of furnishing the security. *Royal Bank of Canada* v. *British Columbia Accident &c. Insurance Co.,* (1917) 24 B.C.R. 197; 35 D.L.R. 650; (1917) 2 W.W.R. 898.

3. Serving documents.]—The admission by letter by an insurance company of receipt of documents does not prevent its subsequent objection to the validity of service of the documents, having regard to the necessity of protection of a shareholder. *Royal Bank of Canada* v. *Canada National Fire Insurance Co.,* (1920) 28 B.C.R. 554; (1920) 3 W.W.R. 517.

4. Agreement to share commission.]—Where an insurance agent offers the insured a rebate of premium as an inducement to take the policy, the contract for insurance is illegal, being prohibited by sec. 83 of the Insurance Act. *Bernstein* v. *Erickson,* (1921) 29 B.C.R. 151; 56 D.L.R. 616; (1921) 1 W.W.R. 834.

5. Insurance adjuster—License.]—The intention of sec. 187 of the Insurance Act is that all persons adjusting insurance should be licensed and upon failure to obtain a license shall be subject to the penalty provided in the Act. *Rex* v. *Adkin,* (1931) 44 B.C.R. 295; 56 C.C.C. 347.

B. Statutory Powers.

1. Power to sell lands.]—The plaintiff Company entered into an agreement for the sale of certain property in the City of Vancouver to the defendants, the purchase price being payable in instalments. After paying certain sums the defendants defaulted and the plaintiff brought action for the balance due, the defendants counterclaiming for a return of the moneys paid. The Act incorporating the plaintiff Company provides, inter alia, that "The company may acquire, hold, convey, mortgage, lease or otherwise dispose of any real property required in part or wholly for the purposes, use or occupation of the Company but the annual value of such property held in British Columbia shall not exceed ten thousand dollars":—Held, that the Company having obtained an indefeasible title may properly enter into an agreement for sale of the property and recover arrears due under such agreement. The certificate of title while it remains unaltered or unchallenged upon the register, is a certificate which the purchaser is bound to accept. *Hudson Bay Insurance Co.* v. *Creelman,* (1919) 88 L.J.P.C. 197; 122 L.T. 198; 48 D.L.R. 234; (1919) 3 W.W.R. 9; (1920) A.C. 194; Affg. (1918) 25 B.C.R. 307; 40 D.L.R. 274; (1918) 2 W.W.R. 448.

2. License — Renewal refused — Mandamus.] — Three shareholders, who held nearly all the shares in a company engaged in loaning money on motor-cars, were the sole directors of a fire and automobile insurance company in which the majority of the capital stock was held by the shareholders of the loan company. In a year's business the insurance company wrote 950 policies and of these only 63 were on motors in which the loan company had no interest:—Held, that the circumstances did not justify the refusal of renewal of the insurance company's license on the ground that it was not carrying on business in good faith. Held, further, that the two companies did not constitute a scheme to enable the shareholders to obtain rebates by insuring their own property. *In re All Risk Insurance Agencies Limited,* (1927) 38 B.C.R. 532; (1927) 3 D.L.R. 245; (1927) 3 W.W.R. 58.

C. Foreign Companies.

1. Action to restrain from applying for Provincial license—Amendment of Insurance Act.]—An action brought to restrain a foreign insurance company from applying for registration under a provincial Act was dismissed. Between the date of the trial judgment and the hearing of the appeal, the Dominion Insurance Act was amended (7 & 8 Geo. V., cap. 29), and secs. 4 and 11 provided that a foreign insurance company could not carry on its business in Canada unless

and until it had obtained a license from the Minister of Finance for the Dominion of Canada. The Court held that the Court of Appeal for the Province should have taken judicial notice of the Dominion Amendment, and that as the company could not transact any business by the issuing of a provincial license the proceedings by way of injunction were premature. *Guardian Insurance Co.* v. *Gunther and Matthew*, (1918) 25 B.C.R. 353; 58 S.C.R. 47; 45 D.L.R. 32; (1919) 1 W.W.R. 67.

2. General agent.]—The general agent of a foreign insurance company whose capacity to sue and be sued on behalf of the company does not commence until it has become registered, is not its agent in an action brought to restrain it from applying for registration under a Provincial Insurance Act; the action is improperly constituted without such company being made a party thereto. *Ibid.*

3. Foreign company doing business in Canada—Bound by acts of general agent.]—A foreign company doing business in Canada is bound by the action of its general agent appointed for a province, although the insurance policy contains a clause that "the company is not liable for loss . . . if any subsequent insurance is effected in any other company unless and until the company assents thereto." Where such agent, after a fire has occurred, learns of subsequent insurance having been effected, and does not repudiate on account of the condition in the policy, but continues to treat the claim as good, and appoints an adjuster with authority to make a settlement with the assured, his action constitutes an assent on behalf of the company. *McCoy* v. *National Life Assurance Co.*, (1918) 57 S.C.R. 29; 42 D.L.R. 21; (1918) 2 W.W.R. 591.

II. Fire Insurance.

A. *Contract of Insurance.*

1. Right of agent to sue for premium.]—As a rule an agent for a fire-insurance company cannot personally recover premiums from the insured, but where the insured is aware that the agent was paying his premiums to the insurers with his assent and at his request, either expressed or implied, the agent looking to the insured to be recompensed, the relationship of principal and agent is established between them, and the agent may maintain an action to recover the premium so paid. *Mowat and Mowat* v. *Goodall Brothers*, (1915) 21 B.C.R. 394; 31 W.L.R. 537; 24 D.L.R. 781.

2. Preliminary agreement.]—A preliminary agreement to insure a property from fire, and to protect the risk in the meantime, although informally made by the agent of the insurance company by word of mouth, is enforceable as against the company, which is liable in case of loss. *Westminster Woodworking Company, Limited* v. *The Stuyvesant Insurance Company et al.*, (1915) 22 B.C.R. 197; 32 W.L.R. 802; 25 D.L.R. 284; 9 W.W.R. 418.

3. Premium — Mortgagee.] — A mortgagor took out an insurance policy payable in case of loss to the mortgagee. Upon the mortgagor's default in payment of premium, the insurance company cancelled the policy and sued the mortgagee for the earned premium:—Held, that as there was no privity of contract between the insurance company and the mortgagee, the mortgagee could not be held liable for the premium. *National Fire Insurance Company of Hartford* v. *Emerson*, (1915) 22 B.C.R. 349.

4. Subsequent endorsement.] — An endorsement to a fire-insurance policy, increasing the property covered and for which a further premium is charged, is a contract of insurance within the meaning of sec. 43B of the British Columbia Fire Insurance Act and must be signed by the resident agent of the company. An endorsement to be added to a fire-insurance policy was completed in accordance with the terms arranged between the parties, executed by the insurers in its office at Montreal and forwarded direct to the insured company at Vancouver:—Held, that the British Columbia Fire-Insurance Act referred to the document which evidenced the contract and not to the contract itself. It was therefore placed in Vancouver within the meaning of said Act, and a charge of an infraction of the conditions imposed by the Act is within the jurisdiction of the police magistrate at Vancouver. *Rex* v. *Provincial Insurance Company*, (1923) 33 B.C.R. 79.

5. Purchaser under agreement of sale—Owner.]—A purchaser under an agreement for sale can fairly be described as "owner" in an application for insurance. *Marshall* v. *Wawanesa Mutual Insurance Co.*, (1924) 33 B.C.R. 404; (1924) 2 D.L.R. 419; (1924) 2 W.W.R. 270.

6. Statutory conditions — Non-compliance with.] — A special condition in an insurance policy, varying the statutory conditions, cannot be given effect to unless endorsed on the policy, as required by statute. This rule is not affected by the statutory provisions making the application part of the policy, and providing that the policy shall be deemed to be in accordance with the application unless otherwise stated in the policy, if the special condition is part of the application form. *Ibid.*

7. Agent—Acceptance of risk—Change of insurer — Acceptance by insured.]—Where an insurance agent accepts a risk on a certain date, being then agent for three companies, he cannot, when subsequently appointed agent for another company cover the risk in the latter company. The agent has no power of suspension or postponement, and there is no contract between the insured and the fourth company, although that company has purported to assume the risk by issuing a policy, as there is no consent by the insured. *Hanley* v. *Corporation of The Royal Exchange Assurance of London, England,* (1924) 34 B.C.R. 222; (1924) 3 D.L.R. 860; (1924) 2 W.W.R. 880.

8. Contract—Reinsurance.] — A contract of fire insurance may be effected by an oral proposal and acceptance, and specific performance will be decreed even if a fire occurs before the issue of the formal contract or policy. Where reinsurance has been agreed upon prior to the acceptance of the risk by the original insurer, its right to the reinsurance exists at the moment of its acceptance of the risk. *Queen Insurance Company* v. *British Traders Insurance Co. Ltd.,* (1928) S.C.R. 9; (1928) 2 D.L.R. 399; Affg. (1927) 38 B.C.R. 161; (1927) 2 D.L.R. 159; (1927) 1 W.W.R. 508.

9. Appraisal.]—An inquiry by appraisers appointed to ascertain the extent of an insurance company's liability in the manner provided by the statutory conditions of a fire insurance policy as set out in sec. 154 of the Insurance Act is not an arbitration under the Arbitration Act, which does not apply. *Danroth* v. *Railway Passengers Assurance Co.,* (1930) 43 B.C.R. 21; (1931) 1 D.L.R. 156; (1930) 2 W.W.R. 555.

10. Policy not in accordance with statute—Statutory conditions.]—A policy of insurance that does not comply with the Fire Insurance Act, 1919, becomes subject to the statutory conditions. *Veterans' Sightseeing and Transportation Co., Ltd.* v *The Phœnix Insurance Company,* (1924) 33 B.C.R. 428; (1924) 2 D.L.R. 674; (1924) 3 W.W.R. 782.

11. Appraisal—Innocent misrepresentation.]—Where the applicant for a fire insurance policy upon a motor vehicle represented by error that the car was "model year 1915" when in fact it was a 1912 model, and the insurance agent inspected the car before placing the risk and issued the policy as the result of his own inspection, the insurer is not entitled to avoid the policy. The plaintiff is bound by the finding of the appraiser appointed pursuant to a term in the policy. *Ibid.*

B. Proof of Loss.

Goods in house—Absence of proof.]—In an action upon a policy of fire insurance, there must be affirmative evidence from which it may be reasonably inferred that the goods insured were actually in the house described in the policy at the time of the fire. *Pacific Coast Realty Company et al.* v. *German American Insurance Company,* (1917), 24 B.C.R. 95. Sub nom. *Anderson* v. *German American Insurance Co.,* 35 D.L.R. 522; (1917) 2 W.W.R. 632.

C. Parties Entitled to Sue.

1. Assignment of claim—Limitation of action.]—The claim of the person whose premises are damaged by fire against another for negligence in causing the fire, is assignable to a fire insurance company, which, in consequence, is called upon to pay a loss under its policy to the owner of the premises. Where a fire insurance company, on paying the loss of the assured alleged to have been caused by the neglect of an electric company, does not bring its action against the latter in the name of the assured, under the subrogation clause of its policy, but instead sues in its own name after taking a written assignment from the assured of his rights against the electric company, it can maintain the action only if it has given the latter notice in writing of the assignment under the Laws Declaratory Act, R.S.B.C., cap. 133; and the defect is not cured by an order adding the assured as a co-plaintiff, made without prejudice to defendants' rights, after the period of limitation had

expired within which the added party would have had to sue. *Union Assurance Co.* v. *B.C. Electric Railway Co.*, (1915) 21 B.C.R. 71; 21 D.L.R. 62; 30 W.L.R. 717; 8 W.W.R. 327.

2. Election to replace goods destroyed—Action to enforce reinstatement—Arbitration.]—Where a policy of fire insurance contains a clause entitling the insurance company to repair or replace goods destroyed, and there has been an election by the company to take advantage of the reinstatement clause, the insured is entitled to enforce the obligation to reinstate, and if the insured brings an action for damages for failure of the insured so to do, the arbitration clause contained in the statutory conditions in the policy will have no application, and an application for stay of proceedings pending arbitration will therefore be denied. *Bulger* v. *Home Insurance Co.*, (1928) S.C.R. 436; (1929) 1 D.L.R. 47.

D. Change of Interest.

Executory contract of sale.]—The plaintiff Company, on selling machinery for installation in a saw-mill, for which it held a lien agreement, took out an insurance policy in the name of the owner but payable to itself, to cover the amount due on the machinery. The owner of the saw-mill shortly after assigned for the benefit of his creditors. The creditors, on meeting, resolved to sell by tender. The highest bidder, on being advised that his tender was accepted, took out a policy in another company to cover the whole works, but two days later repudiated his tender. On the following day the mill was destroyed by fire:—Held, that the acceptance of the tender created an executory contract of sale, which remained executory until after the fire; that the assignee still retained an interest in the property until after the fire, and there was not an assignment within the meaning of clause 12 of the Schedule to the Fire-Insurance Policy Act. The plaintiff was therefore entitled to recover on the policy. *A. R. Williams Machinery Company* v. *The British Crown Assurance Corporation, Limited*, (1921) 29 B.C.R. 481.

III. Life Insurance.

A. Application.

1. Application—Misrepresentation.]—Under the Insurance Act a policy is not avoided because of misrepresentations or non-disclosures in the application of the insured, unless they are material, even though the policy provides that it shall become null and void if the statements or answers are found to be false or fraudulent in any respect. The question of materiality is one of fact. *Turner* v. *B.C. Mutual Benefit Association*, (1927) 39 B.C.R. 209; (1927) 4 D.L.R. 541; (1927) 3 W.W.R. 341.

2. Fraternal benefit society.]—An application for membership in a fraternal society as defined under sec. 75 of the Insurance Act, 1925, and the acceptance thereof, will not constitute a contract binding on the society, where contrary to conditions contained in the by-laws of the Society and set forth in the form of application, the applicant failed to pay the membership fees and annual dues, and no policy or certificate of membership was delivered to him. *Pederson* v. *Empire Home Benefit Association*, (1931) 2 W.W.R. 558.

B. Beneficiaries.

1. Bequest of policy.]—A bequest to the widow of a testator of "the first $75,000 collected on account of policies of life insurance" is ineffective in that it is not "a writing identifying the policies by number or otherwise" within sec. 7 of the Life-insurance Policies Act. The statute was passed to secure benefits to wives and children, and should receive such construction as would tend to effectuate that purpose. The term "any writing" in sec. 7 includes a will. *Arnold* v. *Dominion Trust Co.*, (1917) 24 B.C.R. 321; 56 S.C.R. 433; 41 D.L.R. 107; (1918) 2 W.W.R. 25.

2. Change of.]—The deceased made his will directing the payment of the proceeds of a certain insurance policy to members of his family as set out in the will, and by a letter addressed to the insurance Company on a later date varied the disposition of the proceeds of the policy:—Held, that the letter of later date is a sufficient instrument within the meaning and interpretation of the Life Insurance Act to effect a change of beneficiary. *Potts* v. *Potts*, (1919) 1 W.W.R. 906.

3. Declaration under will.]—An insured directed in the policy that the insurance moneys be paid to his wife. His will made shortly before his death recited "I hereby declare that all policies of insurance on my

life are and shall from this 24th day of January, A.D. 1925, be considered to be for the benefit of my wife Florence Mae McCoubrey and that the proceeds thereof shall belong to her." The insurance Company refused to pay without letters of probate being taken out:—Held, that by the wording of the will, the deceased was not placing the insurance moneys under the jurisdiction of his personal representatives, but that the insurance Company should hold the moneys in trust for his wife. *McCoubrey* v. *The National Life Assurance Company of Canada*, (1926) 36 B.C.R. 428; (1926) S.C.R. 277; (1926) 2 D.L.R. 550.

4. Validity of appointment.]—The wife of an insured was named beneficiary in the policy. Later, by trust deed, the insured appointed trustees to collect upon his death the amount of certain policies, including the above, and pay the proceeds to his son on attaining the age of 25 years, with provision for investment and maintenance in the interval, and if the son should die before the insured or before attaining the age of 25 years the moneys were to go to the wife or issue of the son, but if none, then the moneys were to go to insured's residuary legatees. The residuary legatees were the said son and certain others whom it was not within the power of the insured to benefit without the consent of the wife under the Life-insurance Policies Act:—Held, that the appointment of the son under the trust deed as a beneficiary of the insurance moneys from the said policy was valid under sec. 8 of the said Act. The intention was to benefit the son at all events, and such intention and its effects can and ought to be separated from the nugatory intent to benefit persons not proper objects of the power. *Powell* v. *Imperial Life Insurance Company and Royal Trust Company*, (1919) 27 B.C.R. 135; (1919) 2 W.W.R. 285.

5. Surrender—Wife's consent.]—Under the provisions of the Life-insurance Policies Act it is not necessary that a wife should have independent advice before joining with her husband in the surrender of a policy of insurance taken out by him in her favour, and this particularly applies where there is substantially a refund of the premiums paid. There is no rule of law casting upon the insurance company the burden of shewing that the instruments were sufficiently explained to the wife or that she had sufficient protection. *Moore* v. *Confederation Life Association*, (1918) 25 B.C.R. 465; (1918) 2 W.W.R. 895.

C. Forfeiture.

Premium—Overdue promissory note—Payment after death of assured.]—A policy of life insurance contained the following clause: "If within the first three years that this policy is in force default be made in the payment of any premium due or obligation given in settlement thereof, then this policy shall ipso facto become void, but it may be reinstated within two years from the date of lapse upon the production of evidence of insurability satisfactory to the company and the payment of all overdue premiums and any other indebtedness to the company under the policy":—Held, that the giving of a note for the amount of premium due was an "obligation given in settlement of the premium," but that payment of the note when overdue and after the death of the assured will not entitle the beneficiary to recover, it being impossible to produce evidence of insurability. The acceptance of the amount of the note by the agent of the company, with knowledge of the death of the assured, was not a waiver of the breach of the condition sufficient to effect reinstatement of the policy. *Young* v. *Northern Life Assurance Co. of Canada*, (1922) 31 B.C.R. 65; 63 D.L.R. 107.

D. Succession Duty.

Proceeds accruing to estate.] — Insurance moneys subject to be disposed of by the deceased as he should see fit up to the time of his death, are subject to succession duty under subsec. (1) (f) of sec. 5 of the Succession Duty Act as amended in 1929. *In re Estate of J. D. Byrne, Deceased*, (1931) 43 B.C.R. 396; (1931) 1 W.W.R. 228.

IV. Accident Insurance.

1. Application — Terms of.]—The defendant applied to an agent at Vancouver for an accident-insurance policy to cover trip commencing the 2nd of June from Montreal to England and return, the policy to be delivered to him in Montreal before sailing. The policy was issued by the agent's principals in Montreal on the 4th of June, but was ante-dated the 2nd of June and sent to the plaintiff's office at Victoria, B.C.:—Held, that as the applicant's terms had not been observed in that the policy was not

issued until after he had sailed he was not liable to pay the premium. *D. E. Brown's Travel Bureau* v. *Taylor*, (1918) 26 B.C.R. 82; 44 D.L.R. 204; (1918) 3 W.W.R. 468.

2. Construction of contract.]—In construing a policy of insurance whether life, fire or marine, or any other kind of policy, an ambiguous clause should be construed against, rather than in favour of the insurance company. *Shaw* v. *The Globe Indemnity Company of Canada*, (1921) 29 B.C.R. 157; 57 D.L.R. 102; (1921) 1 W.W.R. 674.

V. AUTOMOBILE INSURANCE.

1. Construction of policy.]—A pile of sand on the roadway is not part of the road-bed and is not within the exceptions contained in an accident insurance policy, insuring an automobile but excluding all loss or damage caused by "striking any portion of the road-bed or by striking the rails or ties of any street, steam or electric railway." *Collins* v. *Guardian Casualty, Etc., Co.*, (1918) 25 B.C.R. 401; 40 D.L.R. 133; (1918) 2 W.W.R. 763.

2. Exclusive ownership—Holder under conditional sale agreement.]—An insurer of an automobile cannot deny liability on the ground that the insured represented himself as sole and unconditional owner, whereas he was owner by virtue of a conditional sale agreement. *Forsyth* v. *The Imperial Guarantee and Accident Insurance Company of Canada*, (1925) 36 B.C.R. 253; (1925) 4 D.L.R. 479; (1925) 3 W.W.R. 669.

3. Action—Right of insurer to maintain.] — Where insurers have paid the amount of the loss occasioned by the smashing of an automobile in a collision with a street-car they may maintain an action in the name of the assured against those responsible for the collision. *Brown* v. *British Columbia Electric Railway Company Limited*, (1925) 35 B.C.R. 510; (1925) 3 D.L.R. 734; (1925) 2 W.W.R. 635.

4. Action by injured person against insurer—Adding insured as defendant.]—Where a plaintiff obtains judgment against the owner of a motor-car for damages for negligence in driving the car and a writ of execution thereon is returned nulla bona, and the plaintiff subsequently brings action against the execution debtor's insurer under sec. 24 of the Insurance Act, 1925, the insurer is not entitled to have the execution debtor added as a party defendent. *Erickson* v. *The Preferred Accident Insurance Co.*, (1928) 40 B.C.R. 241; (1928) 4 D.L.R. 567.

5. Discharge of insurer—Subsequent claim by injured third person.]—Where an owner of a motor-car is insured against loss by accident, and having injured a third party while driving her car obtains a sum of money from the insurer and gives a receipt expressed to be in settlement of the injured person's claim, the insurer cannot afterwards be held liable if the injured person refuses to accept the sum paid. *Barlow* v. *Merchants Casualty Insurance Co.*, (1929) 41 B.C.R. 427; (1929) 4 D.L.R. 701; (1929) 3 W.W.R. 724.

6. Notice of commencement of action.]—Where an owner of a motor-car holds a policy of insurance against loss by accident while driving her car, and action is brought against her for damages for injury incurred in such an accident, no action will lie on the policy unless the insured gives notice to the insurer of commencement of the action and sends to the insurer the documents served upon her. *Ibid.*

7. Accident—Driver intoxicated—Misrepresentation by insured and passenger.]—An insurer of the owner of a motor-car against damage to his car and liability for negligence causing injury to another having paid the cost of the defence of an action against the owner of the car and the damage to the car arising out of an accident, may recover from the owner the amount of costs and damages, if the owner of the car was intoxicated while driving it at the time of the accident; and a passenger in the car at the time of the accident who had in view a claim for damages on her own behalf is under an obligation to the insurer not to misrepresent the facts, and having done so is jointly liable with the insured for the amount paid him. *General Casualty Insurance Co. of Paris* v. *Lambert and Vance*, (1930) 43 B.C.R. 133; (1930) 3 D.L.R. 1007; (1930) 2 W.W.R. 548.

8. Statutory conditions — Intoxication of driver.]—In the proper interpretation of sec. 158 (5) of the Insurance Act one who has taken alcohol in sufficient quantity to render himself unsafe to be in charge of an automobile is intoxicated. *McKnight* v. *The General Casualty Insurance Co. of Paris*, (1931) 44 B.C.R. 1, (1931) 3 D.L.R. 476; (1931) 2 W.W.R. 315.

9. Theft—Robbery or pilferage—Wanton destruction.]—Where a thief has committed acts constituting theft within sec. 347 (2), Criminal Code, and attempting to

steal a motor-vehicle fails to start the motor, but does wilful damage thereto, not incidental to starting it, such damage is covered by an insurance policy against theft of the motor-vehicle, which covers also damage "caused by the theft." *F. & F. Henderson* v. *Northwestern Mutual Fire Association*, (1924) 34 B.C.R. 441; (1925) 1 D.L.R. 339; 43 C.C.C. 217.

10. Unlicensed chauffeur.] — A policy whereby the owner of a motor-car is insured against liability to pay compensation for accidental personal injuries caused through the driving of the car, is not void as against public policy by reason of the fact that at the time of an accident tne automobile was driven with the owner's knowledge by a chauffeur who was not a licensed driver as required by the Motor-vehicle Act. *MacLure* v. *The General Accident Assurance Co. of Canada*, (1925) 35 B.C.R. 33; (1925) 3 D.L.R. 133; (1925) 2 W.W.R. 145.

11. Insurer undertaking defence — Waiver of conditions in policy.]—Where by the terms of a policy, an insurance company agrees to indemnify the owner of an automobile against loss from liability arising out of an accident to a third person, and undertakes the defence of an action brought for damages for bodily injury suffered by a passenger in the automobile, the solicitor for the insurance company, by electing to continue the defence after notice of the breach by the insured of a condition of the policy, can only do so on the assumption that the policy is valid and subsisting. It is a representation by acts that the insurer will assume any judgment obtained within the limits of the policy. *Caddedu* v. *Mount Royal Assurance Co.*, (1929) 41 B.C.R. 110; (1929) 2 D.L.R. 867; (1929) 2 W.W.R. 161.

12. Insurer undertaking defence—Repudiation—Estoppel.]—Where the insurer of the owner of a motor-car against liability for injury to another undertakes the defence of the insured in an action for damages for negligence causing the death of a passenger, and continues the defence to trial, when it withdraws and repudiates liability professing to discover that the driver of the car was intoxicated at the time of the accident, and it is afterwards found on the trial that the driver of the car was not intoxicated, the insurer in a subsequent action by the owner having previously conducted the defence until withdrawal with full knowledge of the plaintiff's failure to comply with statutory conditions as to notice and otherwise contained in the policy and having repudiated liability because it suspected the insured of having been intoxicated, and on that ground only, will be estopped from alleging failure to comply with the statutory conditions. *McKnight* v. *General Casualty Insurance Co. of Paris*, (1931) 44 B.C.R. 1; (1931) 3 D.L.R. 476; (1931) 2 W.W.R. 315.

13. Action against insurer — Third party.]—Where a policy of insurance on an automobile contains a statutory condition that in case of any claim made on account of any accident, the insured shall promptly give notice to the insurer of the claim and shall not interfere in any negotiations for settlement or in any legal proceedings, but shall co-operate with the insurer in the defence of any action, and in an action against the insured by a passenger in his automobile, the insurer is not recognized or consulted, the insured cannot recover from the insurer the amount of the judgment recovered by the passenger. The logic of the legislation requiring the observance of the statutory conditions set out in the Insurance Act is to give the full conduct of the defence to the insurer to the end that the insurer may be satisfied there is no collusion or other element lacking bona fides. *Oberg* v. *Merchants Casualty Insurance Co.*, (1930) 42 B.C.R. 317; (1930) 2 D.L.R. 156.

14. Licensee—Liability of insurer to indemnify — Insurance Act, 1925, Sec. 24.] — The owner of an automobile was insured against loss in the defendant company. Under the policy the indemnity to the owner was also available in the same manner to any person or persons while riding in or legally operating the automobile with the permission of the insured, or of an adult member of the household of the insured. An accident occurred when the daughter of the insured was driving the car with his permission, and the plaintiff being injured recovered judgment against her for negligent driving, the insurance company taking charge of the defence on the trial. An execution against the daughter of the insured was returned unsatisfied. The judgment creditor then brought an action against the insurance company under sec. 24 of the Insurance Act, 1925, to recover the amount of the judgment rendered against the owner's daughter:—Held, that the plaintiff was not entitled to recover judgment against the insurer, as the owner's daughter was not insured within the meaning of said sec. 24, which is a provision in aid of execution and in the nature of a garnishee proceeding. The action thereby authorized lies only if the judgment debtor

is insured, or has a right to recover indemnity from the insurer. The owner's daughter is not a party to the policy, and there is no consideration moving from her to the insurer for the covenant on which the judgment creditor relies to establish that she was insured within the meaning of sec. 24. While it may be that the owner of the car, according to the covenant, may recover from the insurer, presumably for the benefit of a person driving his car with his permission, it cannot be said that he can be compelled to exercise such a right of recovery or to undertake the duties and responsibilities of a trustee, unless by his consent or by reason of his having become a custodian of indemnity belonging to his daughter. Sec. 24 does not confer upon the licensee of the car a right of action upon the policy to recover against the insurer, or to compel the insurer to exercise his remedies for the recovery, and the insured cannot be compelled to be a trustee for a stranger for no other cause than that he had permitted the stranger to drive his car or ride in it at the time when that stranger negligently caused an accident in which a third party suffered bodily injuries. Held, further, that the insurer by its conduct in defending the action against the daughter of the insured was not estopped from denying liability under the insurance policy on the ground that she was not "insured" within the meaning of sec. 24. *Vandepitte* v. *The Preferred Accident Insurance Co. of New York and Berry*, (1932) W.N. 229; 102 L.J.P.C. 21; 148 L.T. 169; 49 T.L.R. 90; 76 Sol. Jo. 798; (1932) 3 W.W.R. 573; (1933) A.C. 70; (1933) 1 D.L.R. 289; Affg. (1932) S.C.R. 22; (1932) 1 D.L.R. 107.

VI. BURGLARY INSURANCE.

1. Theft—Robbery or pilferage—Wanton destruction.]—Where a thief has committed acts constituting theft within sec. 347 (2), Criminal Code, and attempting to steal a motor-vehicle fails to start the motor, but does wilful damage thereto, not incidental to starting it, such damage is covered by an insurance policy against theft of the motor-vehicle, which covers also damage "caused by the theft." *F. & F. Henderson* v. *Northwestern Mutual Fire Association*, (1924) 34 B.C.R. 441; (1925) 1 D.L.R. 339; 43 C.C.C. 217.

2. Terms of application—Variation in policy.]—Where an application for burglary insurance has been accepted and the risk "covered" in accordance with the terms thereof, a clause inserted in the policy by the manager of the insurance company without the consent of the assured limiting liability thereunder in respect of certain chattels, at variance with the terms of the application, is not binding upon the assured. *James* v. *Ocean Accident & Guarantee Corporation, Ltd.*, (1921) 30 B.C.R. 207; 70 D.L.R. 576; (1921) 3 W.W.R. 55.

3. Theft—Proof of.]—In an action on an insurance policy against loss by burglary, theft or larceny, the plaintiff's evidence was that on the day previous to the theft her husband, a commercial traveller, left home on business and in the morning of the next day she with her brother left their suite locked and when they came back a little after six o'clock in the evening they found the door open, the rooms ransacked and the articles in question missing:—Held, that the evidence was sufficient to prove that the goods in respect to which the claim of loss was made had been stolen. *Schwartz* v. *Hartford Accident & Indemnity Company*, (1925) 35 B.C.R. 507; (1925) 2 W.W.R. 413.

4. Money in safe.]—The plaintiff held two policies of insurance against burglary in the defendant company. It had a safe inside a vault on its premises. The vault was burglarized but the moneys taken although inside the vault were not in the safe as the safe would not hold all the moneys on hand at that time. The insuring clause in the policies contained the words "from the interior of any safe or vault described in the schedule":—Held, that the doctrine *verba chartarum fortius accipiuntur contra proferentem* should be applied and there should be judgment for the plaintiff. *Woodwards, Limited* v. *United States Fidelity and Guaranty Company*, (1926) 37 B.C.R. 450. (Affirmed on appeal by equal division (1927) 38 B.C.R. 171; (1927) 2 D.L.R. 126; (1927) 1 W.W.R. 529.

5. Forcible entry—Tools.]—A policy of burglary insurance provided, inter alia, that the assured was indemnified against loss by burglary, etc. "occasioned by any person making felonious entry into the premises by actual force and violence when the premises are not open for business, of which force and violence there shall be visible marks made upon the premises at the place of such entry by tools," etc. A burglary having taken place it was found that entrance had been effected by tearing away from its fastenings a fly screen covering an aperture in

an upper window of the premises insured:—Held, that there being evidence of theft following upon forcible and violent entry, the Court might fairly draw the inference that some tool had been used to force open the screen from the fact that a stick bearing marks of rust had been found inside the window. *Mullett* v. *United States Fidelity & Guaranty Co.*, (1929) 41 B.C.R. 81; (1929) 1 D.L.R. 140; (1929) 2 W.W.R. 146.

VII. Marine Insurance.

1. Perils of the sea.]—Where goods in good condition and insured under a marine insurance policy against loss through damage on a sea voyage are properly stored on a ship which during the voyage encounters a sudden storm, causing the seas to wash over the decks, and the goods when examined after the voyage are found to have been damaged by salt water, the fair inference is that the water got down the hatches during the storm and the onus upon the insured of proving damages from a peril of the sea is satisfied. *Creeden & Avery, Ltd.* v. *North China Insurance Co.*, (1917) 24 B.C.R. 335; 36 D.L.R. 359; (1917) 3 W.W.R. 33.

2. Dry dock—Method of user.]—Under the terms of lease of a dry dock the lessee agreed to use it for making concrete caissons or cribs used in the construction of a breakwater and ocean pier; the lessee also covenanted to have it insured for the benefit of the lessor in some company or companies satisfactory to the lessor for not less than $75,000 against both marine and fire risks, and to return it in good condition, less wear and tear, at the end of the term. The use of the dry dock for the making of concrete cribs was in the nature of an experiment and by reason of the method of user no insurance could be obtained although its seaworthiness was demonstrated by weathering a gale while being taken from Seattle to Esquimalt. After the completion of the cribs and when lowering the dry dock to float them off, the dry dock overturned and became a total wreck:—Held, that the proper construction to be placed upon the covenant to insure was that it was a covenant to indemnify against loss with the medium of an insurance against loss as a security, and irrespective of the amount of insurance agreed upon, the lessee is only liable for actual loss. The loss of the dry dock is not a loss that could be characterized as a "marine risk," and there could not be damages for this default, but action is maintainable for the loss of the dry dock on the covenant to redeliver, the rental being unpaid and the dock lost beyond recovery. The loss being inevitable owing to the unfitness of the structure disassociated from any peril by wind or water the measure of damage for breach of the covenant is purely nominal. *Seattle Construction and Dry Dock Company* v. *Grant Smith & Co.*, (1918) 26 B.C.R. 397; (1919) 89 L.J.P.C. 17; 122 L.T. 203; 48 D.L.R. 172; (1919) 3 W.W.R. 33; (1920) A.C. 162.

3. Promissory representation.]—While the plaintiff's agent was negotiating with the defendant's agent for insuring steel rails and fittings to be taken on a scow in tow of a tug belonging to independent parties, the insurance agent asked whether the scow was to be towed singly or in tandem with other scows, intimating that in the latter case the insurance would be higher. The plaintiff's agent then telephoned the master of the tug who informed him the scow was to be towed singly. He then advised the insurance agent that the scow was to be towed singly and arranged for insurance at the rate allowed for single towage. The scow was towed in tandem with two other scows and was lost:—Held, that the policy never attached and the plaintiff could not recover. The interview, after the plaintiff's agent telephoned, was not merely an expression or expectation of belief but amounted to a representation known in marine insurance law as a "promissory representation" which though by word of mouth only, afforded an answer to the plaintiff's claim. *Brooks-Scanlon-O'Brien Company, Limited* v. *Boston Insurance Company*, (1919) 26 B.C.R. 490; 47 D.L.R. 93; (1919) 2 W.W.R. 129.

4. Floating policy—Material concealment.]—The appellant issued to the respondent a floating policy of marine insurance to cover wood pulp during transportation (including loading) between certain termini. The respondent chartered a barge. While in the course of being loaded, she sank at respondent's wharf. The respondent, being bound to "declare" all shipments made and to pay premiums thereon at rates fixed by a schedule to the policy, complied with these conditions as to the above cargo and the premium was accepted by the appellant. The claim for insurance was also paid by the appellant; but, subsequently, it took an action to recover the amount on the

ground that the barge was unseaworthy and uninsurable to the knowledge of the respondent at the time the cargo was declared and the premium paid:—Held, that the appellant was liable under the floating policy. The evidence did not shew that the respondent had known of the unseaworthiness of the barge. As all the conditions of the policy had been complied with, the appellant would have been bound even if the fact of the uninsurability of the barge had been communicated to it so that the non-disclosure of that fact, although known by the respondent at the time the premium was paid, did not vitiate the contract. *Standard Marine Insurance Co. Ltd.* v. *Whalen Pulp & Paper Mills, Ltd.*, (1922) 31 B.C.R. 1; 64 S.C.R. 90; 68 D.L.R. 269; (1922) 3 W.W.R. 211.

5. Deep Sea Raft—Constructive total loss.]—The plaintiff entered into a marine insurance policy insuring the plaintiff against the risk of total or constructive total loss from the perils of the sea of a deep sea raft of logs. While in transit the raft was broken in two by a storm and 83 per cent. of the logs were lost, the remainder being collected together and taken to port: —Held, that this special kind of deep sea raft was insured as a distinct entity upon which the insured is entitled to recover as and for a constructive total loss. In construing a policy of insurance in case of ambiguity where the risk is novel and an attempt is being made to adapt a standard form of policy to such risk, the written words, in contradistinction to the printed words, should govern. *Morrison Mill Co.* v. *Queen Insurance Co. of America*, (1925) 34 B.C.R. 509; (1925) 1 D.L.R. 1159; (1925) 1 W.W.R. 691.

6. Deviation.] — A policy of marine insurance was issued by the defendant to cover 318 crates of veneer on a voyage from Vancouver to Yokohama. A deviation clause provided that "such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change." The ship was partially loaded at Vancouver and then sailed for Portland to complete her cargo, intending to sail from there direct for Yokohama but was lost on Willapa Spit at the mouth of the Columbia River. Notice of deviation was not given until after the vessel was lost but neither the insured nor its agent knew of the deviation or intention to deviate until after the loss:—Held, that the notice of deviation given was within the terms of the policy and the fact that no arrangement was made fixing the additional premium did not affect the contract as the Court could fix a reasonable premium to cover the deviation. The policy therefore attached and damages were recoverable thereon. *Chartered Bank of India* v. *Pacific Marine Insurance Company*, (1923) 33 B.C.R. 91; (1923) 4 D.L.R. 942; (1924) 1 W.W.R. 114; Affg. 32 B.C.R. 60; (1923) 2 D.L.R. 612; (1923) 1 W.W.R. 1136.

7. Constructive total loss.]—The sinking of a vessel will not constitute total loss where the circumstances are such that raising her is comparatively easy and the cost of repairs compared with the repaired value leaves an ample margin of value for the owner. *Captain J. A. Cates Tug and Wharfage Co.* v. *Franklin Fire Ins. Co.*, (1926) 37 B.C.R. 539; (1927) A.C. 698; 96 L.J.P.C. 132; 137 L.T. 709; 17 Asp. M.C. 319; (1927) 3 D.L.R. 1025; (1927) 3 W.W.R. 43.

8. Evidence of total loss.] — Where marine insurance policies stipulate that they shall be subject to English law and usage as to liability for and settlement of any and all claims and the vessel insured is not heard of afterwards but some of her deck cargo is picked up after leaving port the facts establish the presumption under sec. 58 of the Marine Insurance Act, 1906, cap. 41 (Imp.) of the actual total loss of the missing ship. *Pacific Coast Coal Freighters, Ltd.* v. *Westchester Fire Insurance Company of New York and Pacific Coast Coal Freighters* v. *Western Assurance Company*, (1927) 38 B.C.R. 20, 315; (1927) 2 D.L.R. 590; (1927) 1 W.W.R. 878.

9. Overloading by charterer.]—It is no defence to an action on a policy of marine insurance that the vessel insured was unseaworthy through being overloaded, where such overloading, if any, was done by the charterers without the knowledge or privity of the insured. *Ibid.*

10. Interest.]—Where an assured succeeds in an action under a policy of marine insurance he may be allowed interest under 3 & 4 William IV., cap. 42, on the amount recovered, even when the action is not tried by a jury. *Ibid.*

INTEREST.

1. Mortgage — Default of payment of interest—Action.] — Where an instalment of interest on a mortgage becomes due and payable on a certain day, and there is a

clause in the mortgage that in default of payment of interest the whole of the moneys thereby secured become due and payable in case of default, an action to enforce payment of the principal and interest may be commenced on the following day. *Scottish Temperance Life Assurance Co., Ltd.* v. *Johnson,* (1917) 25 B.C.R. 93; (1918) 1 W.W.R. 402.

2. Company — Balance unpaid on shares—Interest on.]—If the memorandum of association of a company gives the directors power to fix a rate of interest on the balance unpaid on shares, a shareholder whose certificate provides that he holds the shares subject to the memorandum and articles of association is liable for such interest. *Canada West Loan Co. Ltd.* v. *Virtue,* (1920) 29 B.C.R. 76; (1921) 1 W.W.R. 730.

3. Bank Act—Rate of interest.]—Where book debts were assigned as security to a bank and later assigned to the plaintiff subject to the assignment to the bank, which realized under its assignment, the plaintiff is entitled to an accounting from the bank in detail; and the bank cannot as against the plaintiff charge a higher rate of interest than that permitted by the Bank Act, and must give credit for interest collected above such rate even though the payments were voluntarily made by the individual debtors. *John Robertson & Son, Ltd.* v. *Canadian Bank of Commerce,* (1920) 2 W.W.R. 1003.

4. Judgment debt — Date from which interest runs.]—A judgment of the Court of Appeal when drawn up should be dated as of the date when the decision was given and interest at the legal rate runs from that date. *McKinnon and McKillop* v. *Campbell River Lumber Company Ltd., (No. 2),* (1922) 31 B.C.R. 18; 66 D.L.R. 266; (1922) 2 W.W.R. 556; Revd. on other grounds (1923) 64 S.C.R. 396; (1923) 1 D.L.R. 29; (1922) 3 W.W.R. 1069.

5. No agreement.]—Where a plaintiff recovers judgment for the return of moneys paid to a company under an agreement which is ultra vires the company, he is entitled to recover interest on the amount thereof, there being no valid written agreement to pay such interest in the absence of a provincial statute for the recovery of interest in such case, the law in British Columbia being the same as it was in England on November 19, 1858. *Ibid.*

6. Policy of marine insurance—Interest on proceeds.]—Where an assured succeeds in an action under a policy of marine insurance he may be allowed interest under 3 & 4 William IV., cap. 42, on the amount recovered even when the action is tried by a jury. *Pacific Coast Coal Freighters, Ltd.* v. *Westchester Fire Insurance Company of New York and Pacific Coast Coal Freighters, Ltd.* v. *Western Assurance Company,* (1927) 38 B.C.R. 20, 315; (1927) 2 D.L.R. 590; (1927) 1 W.W.R. 878.

7. Company—Recovery of money paid ultra vires—Interest.]—The Courts have power to direct that moneys received from a company on a claim which is ultra vires shall be repaid with interest. Where the directors were guilty of great delay in impeaching the claim, and have acted under what they must have known to be an invalid resolution the recipients will only be ordered to repay the money actually received. *Pacific Coast Coal Mines, Ltd.* v. *Arbuthnot,* (1920) 56 D.L.R. 452; (1921) 1 W.W.R. 529.

8. Company—Improper application of money subscribed.]—Where a plaintiff recovered judgment against a company in liquidation for moneys paid upon his application for shares which had been improperly complied with by giving him shares already issued and held by a third party, he was awarded interest on such moneys to the date of liquidation. *Brydges* v. *Dominion Trust Co.,* (1919) 3 W.W.R. 345.

9. Mortgage — Payment of taxes by assignee.]—The plaintiff, being the assignee of a mortgage, and having assigned it in turn, with a guarantee of payment of principal and interest acruing thereunder, is entitled to recover from the mortgagor, under his covenant in the mortgage, sums paid for arrears of taxes to protect the security with interest at the statutory rate of five per cent. per annum. *B.C. Land & Investment Co.* v. *Robinson,* (1923) 32 B.C.R. 375; (1923) 4 D.L.R. 416; (1923) 3 W.W.R. 113.

10. Admiralty—Work and materials.]—In the Admiralty Court, in an action to recover for work done and material supplied, the Court will allow interest from the time of rendering the bill after completion, in the absence of legal excuse for non-payment. *Winslow Marine Ry. and Shipbuilding Co.* v. *The "Pacifico,"* (1924) 34 B.C.R. 1; (1924) 1 W.W.R. 930; (1925) 2 D.L.R. 162; (1925) Ex. C.R. 82.

11. Annuity under will — Arrears.]—The Court will direct payment of interest at five per cent. per annum on arrears of

annuity provided for by will pursuant to a valid contract made in the testator's lifetime. *In re Brighouse, Deceased,* (1923) 33 B.C.R. 191; (1924) 1 D.L.R. 150; (1924) 1 W.W.R. 55.

INTERNATIONAL LAW.

See ALIENS.
See CONFLICT OF LAWS.
See CONSTITUTIONAL LAW.
See IMMIGRATION.

INTERPLEADER.

1. Affidavit of claimant.]—In an interpleader issue the claimant's case must be supported by an affidavit of the claimant himself unless circumstances are shewn making it impractical to obtain such an affidavit, in which case an affidavit by some person on behalf of the claimant will be received. *Nichol* v. *Sugarman,* (1928) 40 B.C.R. 119; (1928) 3 D.L.R. 292.

2. Pleadings.]—The Court should not direct pleadings to be delivered after the usual and proper interpleader issue has been drawn up and delivered in accordance with the established practice. *Sutton* v. *Smith,* (1927) 38 B.C.R. 455; (1927) 3 D.L.R. 1008; (1927) 2 W.W.R. 481.

3. Judgment on interpleader issue—Interlocutory.]—The decision of a judge on an interpleader issue is interlocutory and not a final judgment. *Frumento* v. *Shortt, Hill & Duncan, Ltd.,* (1916) 22 B.C.R. 427.

4. Appeal.]—By virtue of sec. 116 of the County Courts Act there is the right of appeal from an order of a County Court judge disposing of an interpleader action ordered to be tried summarily under Order XIII., r. 7 of the County Court Rules, where the amount involved is $100 or over. Order X., r. 13 being inconsistent with the Act the Act prevails. *Ritchie Contracting Co.* v. *Brown,* (1915) 21 B.C.R. 89; 21 D.L.R. 86; 30 W.L.R. 723; 8 W.W.R. 84.

5. Appeal.]—The Court of Appeal has jurisdiction to hear an appeal from a judgment in an interpleader issue arising out of a seizure by the sheriff of the property of a co-respondent under an order against him for costs in a divorce action. *Laird* v. *Laird,* (1920) 28 B.C.R. 255; (*Sub nom. Hendry* v. *Laird*), 51 D.L.R. 642; (1920) 3 W.W.R. 1.

INTERPRETATION.

See CONTRACTS.
See DEEDS AND OTHER INSTRUMENTS.
See STATUTES.
See WILLS.

INTESTACY.

See DESCENT AND DISTRIBUTION OF ESTATES.
See EXECUTORS AND ADMINISTRATORS.

INTIMIDATION.

See TRADE UNION.

INTOXICATING LIQUORS.

I. LICENSES, 629.
II. PROHIBITION AND REGULATIONS, 629.
  A. Statutes, 629.
    1. War Measures Act, 1919, 629.
    2. British Columbia Prohibition Act, 630.
    3. Excise Act, 630.
    4. Inland Revenue Act, 630.
    5. Public Inquiries Act, 631.
    6. Government Liquor Act, 631.
III. INTERDICTION, 631.
IV. UNLAWFUL POSSESSION, 633.
  A. In general, 633.
  B. Dwelling houses, 634.
  C. Public houses and other premises, 635.
  D. Carriers, 637.
V. UNLAWFUL SALES, 638.
  A. In general, 638.
  B. Person, 640.
  C. Indian, 641.
  D. Police officers, 641.
  E. Liability of owner of premises, 642.
VI. PROCEDURE, 644.
  A. Conviction, 644.
  B. Previous conviction, 644.
  C. Appeals and certiorari, 645.

I. LICENSES.

1. Petition — Non - compliance with statute.]—The jurisdiction of the License Commissioners to grant a liquor license is conditional upon a properly signed petition being before them. Parties specially aggrieved, owing to the granting of a license, in the sense that they have suffered an injury beyond that suffered by the rest of the public, are entitled to the relief prayed for ex debito justitiæ, but it is in the discretion of the Court to grant or refuse relief to an applicant not specially aggrieved, in which case the decision is not subject to review on appeal. *In re Haines and the Board of License Commissioners of the City of New Westminster. The King* v. *Bryson et al.*, (1915) 21 B.C.R. 313; 21 D.L.R. 777; 31 W.L.R. 307.

2. Municipal license—Exercise of discretion.]—Under sec. 50 of the Municipal Act (B.C.), 1915, the Board of License Commissioners has the absolute discretion to grant the renewal of licenses, and where no bad faith is shewn the Court will not interfere with the Board's discretion in refusing to grant a renewal of hotel licenses, even where such refusal would result in a total denial of liquor licenses in the municipality. *Rex* v. *License Commissioners of Point Grey*, (1915) 26 D.L.R. 75; 32 W.L.R. 360; 8 W.W.R. 1072.

II. PROHIBITION AND REGULATIONS.

A. Statutes.

1. War Measures Act, 1919.

Application to Prohibition Act.]—Paragraphs 5 and 11 of the regulations made and approved on the 11th of March, 1918, under the provisions of sec. 6 of the War Measures Act, 1914 (Dominion) do not operate to abrogate, annul or supersede the provisions of sec. 28 of the British Columbia Prohibition Act. By reason of the explicit declaration of the supplementary character of the regulations in paragraph 13 thereof the said regulations apply only to cases in respect to which the Province would have no jurisdiction to legislate. *In the Matter of the British Columbia Prohibition Act and in the Matter of the War Measures Act, 1914*, (1918) 26 B.C.R. 137; 44 D.L.R. 584; 30 C.C.C. 32; (1919) 2 W.W.R. 27.

2. British Columbia Prohibition Act.

Transactions in liquor within Province.]—The British Columbia Prohibition Act, as enacted by cap. 69, B.C. Stats. 1919, is intra vires of the Provincial Legislature and prohibits taking orders within the Province for the purchase of liquor outside the Province and displaying within the Province circulars giving the name and address of persons dealing in liquor outside the Province. The legislation relates to matters "of a merely local or private nature in the Province" within sec. 92, No. 16, of the British North America Act and is not an interference with "trade and commerce" such as to deprive the Legislature of jurisdiction. The taking of an order within the Province for liquor to be delivered within the Province is a transaction which is complete within the Province and is not made incomplete because the liquor comes from a source outside the Province: the word "transaction" should not be construed as applying only to the whole contract between the purchaser and the vendor with all its intermediate steps. *Rex* v. *Western Canada Liquor Company, Limited*, (1921) 29 B.C.R. 499; 60 D.L.R. 217; (1921) 2 W.W.R. 627; 36 C.C.C. 65. *In re Army & Navy Veterans of Canada; In re Government Liquor Act*, (1921) 30 B.C.R. 164; 61 D.L.R. 416; (1921) 3 W.W.R. 29; 36 C.C.C. 83.

3. Excise Act.

Brewing without license — Appeal.]—An appeal does not lie to the County Court from the sentence imposed by a magistrate for brewing without a license in violation of sec. 204 of the Excise Act, cap. 51, in sentencing an accused for a violation of the said section a magistrate has power to impose a fine of less than $50, the sum mentioned under the section. The word "incur" in sec. 204 is synonymous with the expression "liable to." *Rex ex rel. Hanna* v. *Ernst*, (1927) 1 W.W.R. 961; 48 C.C.C. 190.

4. Inland Revenue Act.

Unlawful possession of still.]—A charge under the Inland Revenue Act for unlawful possession of a still may be tried summarily under Part XV. of the Criminal Code. *Rex* v. *Carmito*, (1919) 27 B.C.R. 225; (1919) 2 W.W.R. 548.

5. Public Inquiries Act.

1. Commission — Jurisdiction.] — The Lieutenant-Governor in Council, under the provisions of the Public Inquiries Act, appointed a judge of the Supreme Court sole commissioner to inquire whether intoxicating liquor had been unlawfully imported into the Province, and as to the names of the persons or corporations engaged in such unlawful importation, the disposition of the liquor, and unlawful sales of intoxicating liquor within the Province in respect of which no prosecution was had:—Held, that the commissioner was not acting judicially in holding the inquiry; that he had no power to impose any legal duty or obligation on any person, and was, therefore, not subject to control by a writ of prohibition. *In re Gartshore. The King* v. *Clement*, (1919) 27 B.C.R. 121; (1919) 3 W.W.R. 309; 32 C.C.C. 384.

2. Commission — Validity of appointment.]—The Public Inquiries Act (R.S.B.C. 1911, cap. 110) is within Provincial legislative powers under sec. 92 of the British North America Act. The appointment of a commissioner under the Public Inquiries Act to inquire into the unlawful importation of intoxicating liquor into the Province, by what means such importation was effected, the names of persons or corporations engaged in such importation, the disposition of the liquor so imported, and the unlawful sales of liquor within the Province is intra vires of the Lieutenant-Governor-in-Council. *In re Public Inquiries Act*, (1919) 27 B.C.R. 361; 48 D.L.R. 237; (1919) 3 W.W.R. 115; 33 C.C.C. 119.

6. Government Liquor Act.

Beer.]—The amendment of the Government Liquor Act, 1921, by the Government Liquor Act Amendment Act, 1922, sec. 7, does not create the offences, one of selling a liquid labelled "beer" and the other of selling intoxicating beer, but merely imposes a new penalty for selling intoxicating beer. *Rex* v. *Perro*, (1924) 34 B.C.R. 169; (1924) 4 D.L.R. 301; (1924) 2 W.W.R. 1006; 42 C.C.C. 384.

III. Interdiction.

1. Government Liquor Act — Intoxication.]—A magistrate or other interdiction official may make an order of interdiction under sec. 57 of the Government Liquor Act without first giving notice to the person against whom the order is to be made. An order of interdiction under said section was made by two justices of the peace against the proprietor of an ice-cream parlor on the ground that loggers and others congregated there to drink liquor, that drinking was carried on on the premises and it was disorderly. On appeal to the County Court judge under sec. 60 of the said Act:—Held, that as the whole scheme of the section is to prevent a person who is abusing the use of liquor from doing so to the detriment of himself and family, and that as the accused was not shewn to be indulging in excessive drinking nor was his family suffering from his use of intoxicants, the order for interdiction should therefore be set aside. *Rex* v. *Wilhelmina Davis*, (1922) 31 B.C.R. 453; 40 C.C.C. 335.

2. Grounds of.]—A chief of police having previously made an interdiction order against the accused laid an information against her for having liquor in her dwelling-house being an interdicted person:—Held, that the requirements of sec. 66 of the Government Liquor Act are obligatory and as the chief of police admitted there was no evidence of excessive drinking by the accused the interdiction order was made without jurisdiction. *Rex* v. *Grant*, (1926) 37 B.C.R. 423; (1926) 4 D.L.R. 784; (1926) 3 W.W.R. 253.

3. Persons subject to — Notice.] — Before a person can be interdicted under the Government Liquor Act, R.S.B.C. 1924, cap. 146, he must clearly be found to be within the class of persons who "by excessive drinking, etc.," are subject to interdiction under sec. 66 of the Act. A magistrate or other interdiction official has no power to make the order without first giving the person against whom the order is sought an opportunity to shew cause why it should not be made. *Rex et rel. Halcrow* v. *St. Eloi*, (1928) 2 W.W.R. 692.

4. Period of.]—When on an application under sec. 69 of the Government Liquor Act, R.S.B.C. 1924, cap. 146, to a County Court judge to set aside an interdiction order it is proved that the applicant has refrained from drunkenness for at least twelve months it is obligatory on the judge to set the order aside. *In re Government Liquor Act and Corano*, (1928) 2 W.W.R. 695; 50 C.C.C. 199.

IV. UNLAWFUL POSSESSION.

A. In General.

1. Keeping for sale.]—Where an accused is charged with unlawfully keeping liquor for sale the mere possession of the liquor is not sufficient under sec. 91 of the Government Liquor Act, R.S.B.C. 1924, cap. 146, to place the onus on him of proving his innocence if the liquor was legally purchased by him and found in a place where he was legally entitled to have liquor. *Rex* v. *Ceal*, (1929) 1 W.W.R. 797.

2. Presumption against accused.]—Where liquor legally purchased is legally possessed or controlled some overt act of an illegal nature must be proved by the Crown in order to raise the presumption created by sec. 91 of the Government Liquor Act, R.S.B.C. 1924, cap. 146; but where there is evidence of either illegal purchase or illegal possession, sec. 91 casts upon the accused the onus of proving his innocence of a charge of violating the Act in one of the ways referred to in said sec. 91. *Rex* v. *Zawada*, (1930) 1 W.W.R. 92; 53 C.C.C. 411.

3. Delivery of liquor unlawfully imported.]—Any person who knowing that liquor has been improperly transported into British Columbia delivers it or causes it to be delivered is guilty of an infraction of Dominion Order-in-Council 589. *Roux* v. *Hewat*, (1919) 1 W.W.R. 530.

4. Keeping for sale — Purchase of immoderate amount of liquor from Government vendor.] — Where a person is charged with unlawfully keeping intoxicating liquor for sale, the fact that the accused purchased an immoderate amount of liquor from the Government vendor is in itself evidence of an overt act of wrongdoing which the accused is called upon to answer and from which the justice may, under sec. 90 of the Government Liquor Act, R.S.B.C. 1924, cap. 146, infer the commission of such an act. The question of what constitutes an immoderate amount of liquor is one of fact depending on all the circumstances of the case. *Rex* v. *Oullette*, (1930) 3 W.W.R. 37; 53 C.C.C. 405.

5. Replevin of liquor seized.]—A replevin order should not be granted against a chief of police for the return of intoxicating liquor in his custody which has been seized in a place other than a private dwelling house. *Lim Jim* v. *McRae*, (1918) 1 W.W.R. 404.

B. Dwelling-Houses.

1. Having liquor in unlawful place.]—A person employed by the owner of liquor in transporting it from one place to another is not in possession and cannot be charged with having liquor in a place other than the dwelling-house in which he resides as the owner who accompanied him on the removal had possession and never parted with it. *Bigattini* v. *Dixon*, (1919) 1 W.W.R. 464.

2. Unlawfully having liquor.]—Where a joint occupant of a room in a hotel has a bottle of whiskey therein under his control to such an extent that he may take a drink from it when he likes, though it is kept in the pocket of another occupant he must be said to have liquor in a place other than a private dwelling-house contrary to sec. 11 of the British Columbia Prohibition Act. *Rex* v. *Perry*, (1920) 2 W.W.R. 884.

3. Single room.]—The accused occupied a room in which he slept and cooked his meals in a building on the same floor of which was a tailor shop, photographer's quarters and other occupied rooms and from the hall of which there were entrances through a party-wall to the quarters of a social club in an adjoining building. On appeal from the quashing of a conviction for having intoxicating liquor in a room other than a dwelling-house:—Held, that the room was a "private dwelling-house" within the meaning of sec. 3 of the Prohibition Act. *Rex* v. *Kerr*, (1921) 29 B.C.R. 522; 59 D.L.R. 627; (1921) 2 W.W.R. 561.

See Rex ex rel. Robinson v. *Sit Quin*, (1918) 25 B.C.R. 362; (1918) 3 W.W.R. 316.

4. Dwelling-house—Definition.] — The Prohibition Act, 1916, sec. 11, excludes the broad and general definition of a private dwelling-house and restricts it to the separate building actually used as a dwelling as distinguished from a collection of buildings, and where a quantity of liquor was found in a root-house situate about six feet away from the accused's dwelling-house which was used for cold storage of food and other supplies of daily use and consumption by the accused and his family, he is guilty of having intoxicating liquor elsewhere than in his private dwelling-house. *Rex* v. *Harwood*, (1921) 30 B.C.R. 121.

5. Building apart from dwelling-house.]—On an appeal from a conviction under sec. 48 of the Government Liquor Act, R.S.B.C. 1924, cap. 146:—Held, that the building in question in which the liquor was found and which was 50 or 60 feet

away from the back of a hotel was not part of the hotel. It is a question of fact in every case whether the room or rooms in which liquor is found are used or occupied as part of a hotel. *Rex* v. *Riley*, (1926) 2 W.W.R. 534.

6. Room in inn—Proprietor's apartment.]—A room in the rear of the ground floor of a rooming-house was used exclusively by the proprietor and his family as a kitchen and living-room and the roomers were admitted therein only on special invitation:—Held, that the room was not a "room in an inn" within the meaning of sec. 48 (2) of the Government Liquor Act, R.S.B.C. 1924, cap. 146, which provides that no person shall have, keep or consume liquor "in any room of an inn," unless he is a bona fide guest duly registered at the office of the inn as the occupant of that room. *Rex* v. *Stewart, Rex* v. *DeGrassio, Rex* v. *Kissell*, (1930) 1 W.W.R. 941.

7. Forfeiture.]—The police searched R.'s house and seized a quantity of liquor under sec. 50 of the British Columbia Prohibition Act. An application by R. to a police magistrate for a return of the liquor under sec. 51 (4) of said Act was refused and the liquor declared forfeited:—Held, that the magistrate had to hear the evidence and it was his duty to draw the inference as to whether there had been a breach of the Prohibition Act. This is an inference of fact that the magistrate alone can draw and except in a case where there is no legal evidence at all, a Court of Appeal cannot sit in review as to the correctness of his conclusions. *In re Prohibition Act and Robinson*, (1921), 30 B.C.R. 316.

C. Public Houses and Other Premises.

1. Storeroom—Beer.]—On the conviction of the accused for keeping "liquor" in a part of his inn other than a private guest-room, the evidence disclosed that 22 bottles of beer were found in a store-room attached to the main building but entered from the outside:—Held, that the prohibition in sec. 43 of the Government Liquor Act applies to "beer" as the exclusion of beer from the term "liquor" should not go further than is necessary to give full effect to sec. 46. *Rex ex rel. Wilkie* v. *Goslett*, (1923) 32 B.C.R. 216; (1923) 3 D.L.R. 298; (1923) 2 W.W.R. 461.

2. Restaurant.]—A pint bottle in which there was a small quantity of liquor was found in a woodpile underneath a stairway leading up to rooms rented to transient lodgers for periods of one night or longer. The stairway was open to the public:—Held, that the evidence taken in conjunction with the flat denial of ownership or knowledge of the bottle by the owner of the restaurant was insufficient to support a conviction against him for unlawfully having liquor in his restaurant. *Rex* v. *Lee Kam Way*, (1927) 3 W.W.R. 143; 49 C.C.C. 314.

3. Shop — Liqueur chocolates.] — An accused kept chocolates for sale in his store. The chocolates consisted of an outer shell made in the shape of a bottle and the cavity thus formed was filled with a liquid found to contain 7.87 per cent. of alcohol:—Held, that the manufacture of the said liqueur chocolates was not authorized by sec. 60, subsec. (2) of the Government Liquor Act and that the accused was guilty of keeping intoxicating liquor for sale. *Rex* v. *Purdy, Limited*, (1927) 38 B.C.R. 267; (1927) 1 W.W.R. 880; 48 C.C.C. 152.

4. Knowledge of owner.]—A guest in a hotel went to his room late at night with bottles of liquor, bringing a friend with him. They drank the liquor and made some disturbance until arrested about an hour later. The accused who was proprietor of the hotel went to bed before the guest had arrived and knew nothing of what took place. He was convicted on a charge that being the owner or occupant of a hotel he did "permit and suffer drunken persons to consume liquor therein" and did "permit and suffer drunken persons to assemble or meet therein" contrary to sec. 24 of the British Columbia Prohibition Act:—Held, that irrespective of the question of duplicity, the accused cannot be convicted on said charge where the consumption of liquor or meeting of persons was without any knowledge, connivance or carelessness on his part. The magistrate reserved his decision for the purpose of obtaining the opinion of the Attorney-General upon the construction of the statute. While the Attorney-General may properly advise executive officers of the Government, he cannot be appealed to for advice by judicial officers. Conviction on such a charge is objectionable because of duplicity, there being two offences charged, but the Court has power to cure the defect by striking out one of the charges; as to what charge should be struck out depends upon the facts of the case. *Rex* v. *Dobie*, (1921) 29 B.C.R. 188; 57 D.L.R. 290; (1921) 1 W.W.R. 723; 35 C.C.C. 10.

5. Concealed on premises—Knowledge of owner.]—Where intoxicating liquors are found hidden in the premises of an accused, but no evidence is given connecting him with its concealment or unlawful possession a conviction of having possession of spirits of unlawful manufacture cannot be sustained. *Rex* v. *Blair*, (1931) 2 W.W.R. 893.

6. Search of premises—Illegal seizure of books and money.]—Sec. 48 of the British Columbia Prohibition Act giving the right to police officers, etc., to search premises applies to liquor export warehouses, notwithstanding secs. 19 and 57 of the Act. Persons entitled to enter and search under said sec. 48 cannot legally seize and carry away money and books without the authority of a search warrant. But where such persons have entered for the purposes authorized under sec. 48, their illegal seizure of money and books does not make them trespassers ab initio. Even if such persons were trespassers ab initio the jurisdiction of the police magistrate to declare confiscation of the liquor under sec. 50 of the said Act would not be ousted. Money unlawfully taken on entry made as aforesaid may be recovered and pleas in defence that the money was received in payment of an illegal sale of liquor or that it was given by the police authorities to a person for the purpose of buying illegally liquor from the plaintiffs with a view to their conviction, are no bar to such recovery. *Canadian Pacific Wine Company* v. *Tuley et al.*, (1921) 29 B.C.R. 472; (1921) 1 W.W.R. 265; 60 D.L.R. 315; (1921) 2 W.W.R. 433. Aff'd. (1921) 2 A.C. 417; 90 L.J., P.C. 233; 126 L.T. 78; 37 T.L.R. 944; 60 D.L.R. 520; (1921) 3 W.W.R. 49.

See CRIMINAL LAW, p. 352.

7. Amendment of conviction upon appeal.]—On an appeal from a summary conviction on a charge under the Prohibition Act of unlawfully having intoxicating liquor in a place of public entertainment an amendment should not be allowed so as to make the charge one of having liquor in a place other than a private dwelling-house. *Rex* v. *Chung Chan*, (1918) 1 W.W.R. 398.

D. Carriers.

1. Forfeiture.]—Before any automobile, vessel, or other conveyance illegally employed in carrying intoxicating liquor for the purpose of selling or disposing of the same illegally can be forfeited under sec. 52 of the B.C. Prohibition Act, 1916, cap. 49, the owner thereof should be notified of the proceedings and have an opportunity to be heard. The onus is upon the prosecution to shew the illegality of the purpose for which the liquor is being transported. *In re Prohibition Act and Tosey*, (1921) 29 B.C.R. 438; 57 D.L.R. 340; (1921) 1 W.W.R. 669.

2. Onus of proof.]—Under sec. 41 of the British Columbia Stats. 1916, cap. 49, when prima facie proof is given that accused had intoxicating liquor in his possion he will be convicted unless he offers evidence to shew his innocence. The section is framed for the double purpose of making convictions easy and the acquittal of the innocent possible. *Rex* v. *Lee Duck*, (1919) 27 B.C.R. 482; (1920) 1 W.W.R. 1051.

V. UNLAWFUL SALES.

A. In General.

1. Sale within the Province—Fictitious.]—S. asked P. the manager of a liquor company at Golden to sell him a case of whisky. P. said he would have the whisky shipped to Calgary, Alberta, and it would be shipped from Calgary to S. at Revelstoke. S. paid P. $45 for the whisky and then at P.'s request, signed an order on a Calgary firm for a case of whisky which P. retained. Some days later S. received a case of whisky at Revelstoke that had been shipped from Calgary:—Held, that the transaction was a completed sale which took place wholly within the Province and was in contravention of the Prohibition Act. It was never intended that the liquor should be sent in from an outside firm, the signing of the order and the sending of the liquor to Calgary, thence to be returned, being merely a fictitious attempt to evade the Act. *Rex* v. *Columbia Wine & Spirit Company, Limited*, (1921) 30 B.C.R. 245.

2. Sale of beer.]—The sale of beer which is prohibited by sec. 46 of the Government Liquor Act, cap. 30 of 1921 B.C. is excluded from the prohibitions of sec. 26 dealing with liquor generally, and from the penalties attached thereto. The penalty for selling beer is that prescribed by sec. 63. *Rex* v. *Fleming*, (1921) 65 D.L.R. 229; (1921) 3 W.W.R. 629.

3. Sale of beer—Section of statute regulating.]—On a charge of selling beer the offence is under sec. 46 of the Government

Liquor Act and not sec. 26 and the penalty to be imposed is as provided in sec. 63 of the Act and not sec. 62. *Rex* v. *Caskie*, (1922) 35 B.C.R. 78; (1923) 3 D.L.R. 295; (1923) 2 W.W.R. 451.

4. Imprisonment.]—The definition of "liquor" under sec. 2 of the Government Liquor Act includes beer. An accused person may be sentenced to imprisonment under the Government Liquor Act Amendment Act, 1922, under sec. 7 (2) upon summary conviction for the sale of beer in contravention of the Act. *Rex* v. *Smith*, (1923) 32 B.C.R. 172; 39 C.C.C. 102; 32 B.C.R. 241; (1923) 3 D.L.R. 302; (1923) 2 W.W.R. 454; 40 C.C.C. 37.

5. Unlicensed vendor — Beer.] — A charge against an accused person other than a Government vendor of selling beer should be brought under sec. 46 with the appropriate penalty prescribed by sec. 63 of the Government Liquor Act, 1921, and the conviction should not be in terms of 26 for sale of intoxicating liquor with the more onerous penalty applicable thereto. *Rex* v. *Fleming*, (1921) 3 W.W.R. 629; 65 D.L.R. 229; 36 C.C.C. 335.

6. Mistake of shipper.]—Certain bottles of beer manufactured by a brewery company having been found to contain over two and one-half per cent. proof-spirit not lawfully saleable were set aside to be poured back into vats and brought under the allowed percentage. Not being informed that the beer was over-proof the brewery company's shipper used a number of the bottles to complete a shipment:—Held, that the company was not guilty of unlawful sale of liquor. *Rex* v. *Westminster Brewery, Limited*, (1921) 29 B.C.R. 321; 57 D.L.R. 712; 34 C.C.C. 308.

7. Distributing—Club.]—The members of a club on purchasing beer from a Government vendor may store it at the club and the club is entitled to charge a fee for storage and service. When the member of a club receives a token from the secretary for which there is no evidence of his having paid anything, and on presentation of the token to a servant of the club he receives a bottle of beer:—Held, that the servant is not "distributing" beer within the meaning of sec. 2 of the Government Liquor Act Amendment Act, 1921. *Rex* v. *Rock*, (1923) 32 B.C.R. 67.

8. Liquor given in exchange for services.]—An accused person giving a bottle of whisky to another in appreciation of his services in assisting the accused with repairs to his automobile is guilty of a violation of the British Columbia Prohibition Act, 1916, sec. 10. *Rex* v. *Liden*, (1922) 31 B.C.R. 126; 39 C.C.C. 369.

9. Vendor.]—The word "vendor" in subsec. 2 of sec. 39 of the Act is confined to a person appointed by the Lieutenant-Governor-in-Council under sec. 4 of the Act and has no reference to the ordinary sale of liquor by an employee. *Whimster* v. *Dragoni*, (1920) 28 B.C.R. 132; 51 D.L.R. 503, 506; (1920) 2 W.W.R. 185; 33 C.C.C. 39.

10. Export.]—On an application under sec. 68 of the Government Liquor Act, 1921, for claiming the ownership of a quantity of beer seized by constables in the hands of carriers it was held that the goods having passed to the purchaser's agent without reservation the property and possession of the goods had passed and the unpaid vendor had no further interest in them upon which an application under sec. 68 could be founded. *In re Government Liquor Act and The Rainier Bottling Works, Limited*, (1924) 33 B.C.R. 443.

11. Sale of liquor to minors — Mens rea.]—On a charge of an infraction of sec. 40 of the Government Liquor Act in supplying a minor with beer:—Held, that considering the object and scope of the statute, although there is no language to that effect, it was evidently the intention of the Legislature to deprive the accused of the application of the doctrine of mens rea. *Rex* v. *McDonald*, (1927) 38 B.C.R. 298; (1927) 1 W.W.R. 867; 48 C.C.C. 208.

12. Particularity of proof.]—Before imposing the consequences of an infraction of the Prohibition Act there should be reasonable particularity of proof as to when and where the offence alleged was committed. *Rex* v. *Lewis*, (1918) 25 B.C.R. 442.

B. Person.

Meaning of.]—The Victoria Unit of the Army and Navy Veterans in Canada, being a branch established in Victoria by that body, which was incorporated by cap. 70 of 7 & 8 Geo. V. of the Statutes of Canada, is not a "person" within the meaning of the Government Liquor Act, 1921, and can not be a subject of conviction under sec. 26 or sec. 46 thereof. *Rex* v. *The Army and Navy Veterans in Canada (Victoria Unit) (No. 2)*, (1921) 30 B.C.R. 248; 66 D.L.R. 512; (1921) 3 W.W.R. 594; 36 C.C.C. 285.

C. Indian.

1. Offence outside reservation.] — An Indian is punishable in the same manner as others for offences against Provincial statute when committed outside a reservation. *Rex* v. *Chan Lung Toy*, (1924) 34 B.C.R. 194; (1924) 3 W.W.R. 196.

2. Offence outside reservation.] — A white person found in possession of an intoxicant off a reserve, in a place where an Indian may be living, temporarily or permanently cannot be convicted under sec. 126 (*c*) of the Indian Act. The words "on any reserve" with the subsequent words of the subsection govern and if a person does not come within them, no offence has been committed. *Rex* v. *Thompson et al.*, (1929) 42 B.C.R. 77; (1929) 3 W.W.R. 333; 52 C.C.C. 278.

3. Sale of liquor to Indian.]—The Government Liquor Act does not apply to a sale of liquor which is within the terms of the Indian Act. *Rex* v. *Cooper*, (1925) 35 B.C.R. 457; (1925) 2 W.W.R. 778; 44 C.C.C. 314.

D. Police Officers.

1. Police trap.]—Where the accused was requested by police officers in plain clothes to procure liquor for them, and unlawfully purchased whisky and sold it to the police officers, receiving from them the price which he had paid for it, a conviction of the accused for unlawful sale to the police officers was upheld, notwithstanding that the purchase and sale took place as the result of a trap laid by the police to apprehend an offender. *Rex* v. *Berdino*, (1924) 34 B.C.R. 142; (1924) 3 D.L.R. 794; (1924) 3 W.W.R. 198; 42 C.C.C. 308.

2. Procuring liquor for constable.]—While two constables were associating with the accused one of them expressed a desire for a bottle of liquor the outcome of which was that one of the constables gave the accused $10 with which to buy intoxicating liquor. The accused went off and returned with a bottle of whisky which he gave to the constable with $4 change. The accused was convicted of unlawfully selling liquor: —Held, on appeal, that the accused acted as a purchasing agent for the constable, using his money and was therefore wrongfully convicted. *Rex* v. *Burke*, (1925) 35 B.C.R. 453; (1925) 2 W.W.R. 480; 43 C.C.C. 393.

3. Sale to constable.]—A sum of money was given two constables by the chief inspector of Provincial police who, under his instructions, bought whisky with it from the accused. It was found by the magistrate that the money was provided by the Provincial Government:—Held, that the accused could not rely on sec. 47 of the Act which provides that "nothing in this Act shall apply to or prevent the sale of liquor by any person to the Government" and the conviction should be sustained. *Rex et rel. Tuley* v. *Rodgers*, (1923) 32 B.C.R. 199; (1923) 1 W.W.R. 1361; 39 C.C.C. 379.

4. Police.]—A member of the Provincial police may lay an information in the case of an offence against the British Columbia Prohibition Act committed within a municipality. *Whimster* v. *Dragoni*, (1920) 28 B.C.R. 132; 51 D.L.R. 503, 506; (1920) 2 W.W.R. 185; 33 C.C.C. 39.

E. Liability of Owner of Premises.

1. Onus of proof—Reasonable doubt.] —Sec. 91 of the Government Liquor Act casts on the accused, on a prosecution for the unlawful sale of liquor, the onus of proving his innocence where there is evidence of possession, but the rule laid down in *Rex* v. *Schama* (1914), 84 L.J., K.B. 396 nevertheless applies and he is entitled to the benefit of any reasonable doubt as to his guilt. *Rex* v. *Perri*, (1926) 37 B.C.R. 289; (1926) 1 W.W.R. 551; 46 C.C.C. 86.

2. Percentage of alcohol—Mens rea.]—Although a person licensed to sell liquor containing not more than two and one-half per cent. proof-spirits honestly and reasonably believed that the liquor which he sold was not over that strength it is not a defence to a charge of selling liquor over that strength in contravention of sec. 10 of the British Columbia Prohibition Act, 1916. The scope and object of the Act is to absolutely prohibit the sale of liquor above a certain percentage and one who engages in the sale of liquor of a proper percentage of proof-spirits does so at his peril of its being over strength. In construing the statute with regard to the application of the common law doctrine of mens rea to the act made penal thereby, the object and scope of the statute and the purposes for which it was enacted must be considered, and if it can be gathered from these that the intention of the Legislature was to deprive the accused of the application of such doctrine it may be so construed though

express language to that effect is not used. *Rex* v. *McKenzie*, (1921) 29 B.C.R. 513; 60 D.L.R. 163; (1921) 2 W.W.R. 627; 36 C.C.C. 70.

3. Sale by employee.]—Where liquor is sold by an employee of the occupant of a premises contrary to the provisions of the Government Liquor Act the occupant is subject to conviction, and a prior conviction of the employee is no bar to such a conviction. *Rex* v. *Halter*, (1929) 42 B.C.R. 28; 52 C.C.C. 320.

4. Sale by employee.]—A sale of liquor on a premises by an employee of the occupant contrary to the provisions of the British Columbia Prohibition Act, subjects the occupant to conviction under secs. 38 and 39 of the said Act, though he had no knowledge of the sale, and a prior conviction of the employee is no bar to such a conviction. *Whimster* v. *Dragoni*, (1920) 28 B.C.R. 132; 51 D.L.R. 503, 506; (1920) 2 W.W.R. 185; 33 C.C.C. 39.

5. Prohibited hours.]—Sec. 118 of the Liquor Licence Act as enacted by cap. 40, sec. 9, B.C. Stats. 1913, which makes a licensee liable to conviction for unlawful sales by a servant, does not apply to the offence of selling liquor during prohibited hours in contravention of cap. 37 of the Liquor Licence Act Amendment Act, 1916, under sec. 3 of which the "person violating" only is liable and the penalty applies only when the accused has committed the offence or has authorized or connived at it. *Rex et rel. Robinson* v. *Cianci*, (1917) 24 B.C.R. 81; 35 D.L.R. 164; 28 C.C.C. 107.

6. Exceptions—Burden of proof.]—On a charge of keeping liquor for sale contrary to the provisions of sec. 28 of the Government Liquor Act, the Crown is not bound to negative the exceptions contained in said section, as by sec. 92 thereof the burden is cast upon the prisoner to prove that he comes within the exceptions. Where sec. 85 of the Government Liquor Act and sec. 30 of the Summary Convictions Act are read together it is not arguable that it is incumbent upon the Crown to negative the exceptions. *Rex* v. *New Dominion Club*, (1925) 35 B.C.R. 502.

7. Servant.]—In the case of a sale of liquor in violation of the Government Liquor Act by a servant while acting within the general scope of his employment, the master is liable to conviction therefor even where the sale was made by the servant contrary to the master's express instructions. *Rex* v. *Van Brothers, Limited*, (1930) 42 B.C.R. 340; (1930) 1 W.W.R. 559; 53 C.C.C. 29.

VI. Procedure.

A. Conviction.

1. Conviction — Name of person to whom sale made.]—A conviction and the warrant of commitment thereunder for an offence under the Government Liquor Act will not be set aside because they do not contain the name of the person to whom the liquor was sold. *Rex* v. *Chan Lung Toy*, (1924) 34 B.C.R. 194; (1924) 3 W.W.R. 196. *Rex* v. *Somers*, (1923) 32 B.C.R. 553; (1924) 2 D.L.R. 1160; (1923) 3 W.W.R. 813; 41 C.C.C. 141.

B. Previous Conviction.

1. Proof of previous conviction.]—The accused was charged with having sold liquor contrary to the provisions of the British Columbia Prohibition Act, with the added allegation that she had previously been convicted of the same offence. She was convicted by the magistrate, who imposed the penalty for a second offence, but there was no evidence adduced at the hearing of a former conviction. On certiorari the conviction was amended and a penalty imposed for a first offence:—Held, on appeal, that there is but one offence under sec. 10 of the British Columbia Prohibition Act, the penalty only being different for a second offence, and the Court may amend the conviction so as to impose only the penalty for a first offence where there is no evidence to support the finding of the magistrate that the accused had been previously convicted. In the style of cause in criminal matters it should always be "The King." There is no precedent for putting "The Crown" on the record. *Rex* v. *Maliska*, (1919) 27 B.C.R. 111; (1919) 2 W.W.R. 378.

2. Previous conviction.]—On a charge under sec. 93 of the Government Liquor Act where the person accused is also charged with a previous conviction, the magistrate trying the case should first read to the accused only that portion of the information dealing with the subsequent offence and should adjudicate thereon before asking the accused whether he was previously convicted; further he should not read the whole information himself until he has

decided as to the innocence or guilt of the accused on the subsequent offence. *Rex* v. *Brandolini*, (1930) 42 B.C.R. 536; (1930) 1 W.W.R. 890; 54 C.C.C. 122.

3. Evidence of previous conviction—When admissible.]—Sec. 93 (*a*) of the Government Liquor Act is peremptory as to the stage of proceedings at which the inquiry as to former offences should be made, and where the magistrate had improperly admitted evidence of a previous conviction before the determination of the defendant's guilt upon the charge for which he was being tried, the conviction was quashed. *Rex* v. *Rowan*, (1930) 42 B.C.R. 559; (1930) 2 W.W.R. 277; 54 C.C.C. 197.

4. Previous conviction.] — Where an information for an offence under the Government Liquor Act alleges a previous conviction the magistrate may read the whole of the information to the accused before proceeding with the hearing of the charge of the subsequent offence. A certificate of the registrar of a County Court produced as evidence of a previous conviction, which contains no proof or statement that his office is one in which convictions can be returned, or a statement that the conviction of the nature referred to was so returned, and which does not afford any proof that the judge before whom the previous conviction was made was in fact a judge of the County Court entitled to convict the accused, does not comply with the requirements of sec. 93 (*b*) of the Government Liquor Act as proof of a previous conviction. *Rex* v. *Dalbergh*, (1931) 43 B.C.R. 474; (1931) 1 W.W.R. 260; 55 C.C.C. 177.

C. Appeals and Certiorari.

1. Certiorari—Affidavit under Prohibition Act.]—Secs. 53 and 54 of the British Columbia Prohibition Act, 1916, do not take away the right of an incorporated company to a writ of certiorari or the right of appeal because of the incapacity of the company to make the affidavits required by the section. *Rex* v. *The Canadian Pacific Wine Co., Ltd.*, (1921) 29 B.C.R. 490; 60 D.L.R. 308; (1921) 2 W.W.R. 442; 36 C.C.C. 103.

2. Appeal from conviction—Affidavit of merits.]—On an appeal from a conviction under sec. 28 of the B.C. Government Liquor Act the affidavit of merits cannot be sworn before a notary public as he is not the officer authorized to take such affidavits under sec. 89 of the Government Liquor Act, 1921, cap. 30. A justice of the peace is the officer named for this purpose. If there is any conflict between the B.C. Evidence Act and the Government Liquor Act the language in the latter Act must govern as it deals explicitly in sec. 89 with practice in appeals while the B.C. Evidence Act is general. *Rex ex rel. Sing* v. *Henley*, (1922) 3 W.W.R. 638; 70 D.L.R. 867.

3. Appeal—Sentence.]—The appellant, an incorporated company, through its manager, pleaded guilty to having liquor in its possession, etc., and the magistrate inflicted the maximum fine of $1,000 under a misapprehension of the meaning of the Act, believing he had no power to inflict a lesser fine. On appeal it was held (1) that the fact that the appellant had pleaded guilty need not prevent the judge from allowing the appeal and reviewing the sentence; (2) the requirement of an affidavit of merits, under sec. 54 of the British Columbia Prohibition Act (which, having pleaded guilty, the appellant could not make) was a fatal objection against appellant. By reason of sec. 45 of the Interpretation Act, this requirement applies to bodies corporate. In any case, the word "party" in said sec. 54 was, with doubt, held to include a body corporate. *The Flathead Hotel Co., Ltd.* v. *Hewat*, (1919) 1 W.W.R. 466.

(NOTE.—See additional articles under Information, Convictions, Warrant of Commitment, and Appeal, in CRIMINAL LAW, *ante*.)

See APPEAL.

See CERTIORARI.

See CONSTITUTIONAL LAW.

See CRIMINAL LAW.

JUDGMENTS AND ORDERS.

I. ENTRY: AMENDMENT, 647.
A. Drawing up and settling, 647.
B. Amendment, 647.
II. EFFECT AND CONCLUSIVENESS, 648.
A. In general, 648.
B. Setting aside, 651.
III. THE LIEN, 654.

I. ENTRY: AMENDMENT.

A. Drawing Up and Settling.

Practice—Settling by registrar—Reference to trial judge.]—All applications to settle orders or judgments must in the first instance go before the registrar. If referred by the registrar to the judge who made the order, counsel must then apply to the registry office and have the matter set down on the Chambers list, paying the usual fee, to come before the judge who made the order. *Van Hemelryck* v. *New Westminster Construction Company*, (1919) 27 B.C.R. 334; (1919) 2 W.W.R. 882.

B. Amendment.

1. Rectification of error after entry.]—Under sec. 11 of the County Courts Act a judge of that Court may resort to Order XXVIII., r. 11, being marginal rule 315 of the rules of the Supreme Court to correct an accidental slip in a judgment which has been entered. The trial judge may therefore make an order disposing of costs reserved for disposition at the trial, but which through oversight were not then dealt with. *Wood* v. *Sherman*, (1917) 24 B.C.R. 376; (1918) 1 W.W.R. 177.

2. Court of Appeal.]—A judgment of the Court of Appeal as drawn and entered will on application be amended to conform with the judgment of the Court in respect of costs. *Standard Trusts Co.* v. *Pulice*, (1923) 32 B.C.R. 399.

3. Judgment for costs to be taxed—Registrar's refusal to tax.]—The plaintiff brought action on a bill of costs for services rendered as a barrister and solicitor. On the trial it was ordered that the bill of costs be referred to the registrar of the Court to be taxed and that the plaintiff recover from the defendant the amount found due on the taxation. The registrar refused to tax the bill on the ground of lack of jurisdiction. On the application of the plaintiff the learned trial judge then gave judgment for the full amount claimed:—Held, on appeal, that the judgment must be set aside as the trial judge had already disposed of the case and had no jurisdiction to interfere further with his original judgment. *Murray* v. *Gold*, (1924) 34 B.C.R. 489.

4. County Court judgment — Amendment.]—Where the defendant files a counterclaim, and the plaintiff fails to deliver a defence thereto, and the action proceeds to judgment, the issues raised by the counterclaim being fought out as well as those by the plaintiff's claim, and the decision in favour of the plaintiff involving the consideration of the matters alleged in the counterclaim, the trial judge being functus officio has no power pending appeal to reopen the matter for the purpose of granting leave to the plaintiff to file a defence to the counterclaim. *Quinstrom* v. *Peterson*, (1929) 42 B.C.R. 81; (1930) 2 D.L.R. 224.

II. EFFECT AND CONCLUSIVENESS.

A. In General.

1. Alimony — Decree.] — Although a decision in a wife's favour for alimony, granted in proceedings under the Divorce and Matrimonial Causes Act, may be termed a "decree" it is at the same time a "judgment" of the Supreme Court, and is in the same position as any other judgment in that Court. *Francis* v. *Wilkerson*, (1917) 25 B.C.R. 132; (1917) 3 W.W.R. 920; (1918) 2 W.W.R. 956. *Mackey* v. *Mackey and Magur*, (1930) 42 B.C.R. 440; (1930) 3 D.L.R. 497; (1930) 1 W.W.R. 604.

2. Res judicata.] — The plaintiffs obtained a judgment against the defendant by default in 1895, for debt. Ten years later the defendant brought action to set aside the judgment on the ground that it was obtained by fraud, which was dismissed. In an action by the plaintiffs for the amount due on the first judgment the grounds for decision were substantially the same as those upon which the action of 1905 was based, but the defendant also claimed that new evidence had been discovered since the action in 1905. The learned trial judge dismissed the action on the ground of res judicata:—Held, that on the question of res judicata the test is whether the issues now sought to be set up were disposed of on the former trial. The discovery of new evidence has no bearing on the case. *Williams and Sears* v. *Richards*, (1917) 25 B.C.R. 19.

3. Precedent — Privy Council.] — The decisions of the Privy Council and the English Court of Appeal are binding on the judges of the Supreme Court of British Columbia. *Rex* v. *Gartshore*, (1919) 27 B.C.R. 175; 49 D.L.R. 276; (1919) 3 W.W.R. 757; 32 C.C.C. 49.

4. Stare decisis.]—In construing a seaman's articles, some of the reasons upon which English decisions are based which apply to an island with relatively only a small and all-enveloping accessible coastline need not necessarily be applied where the articles in question have reference to such a vast country as Canada fronting upon two oceans thousands of miles apart, the separated coasts of which are most accessible through a canal owned by another nation. *Crombie* v. *Canadian Government Merchant Marine*, (1921) 30 B.C.R. 260; 68 D.L.R. 314; 21 Ex. C.R. 299; (1922) 1 W.W.R. 805.

5. Judgment debt—Date from which interest runs.]—A judgment of the Court of Appeal when drawn up should be dated as of the date when the decision was given and interest at the legal rate runs from that date. *McKinnon and McKillop* v. *Campbell River Lumber Co., Ltd. (No. 2)*, (1922) 31 B.C.R. 18; 66 D.L.R. 266; (1922) 2 W.W.R. 556; (1922) 3 W.W.R. 1069; (1923) 64 S.C.R. 396; (1923) 1 D.L.R. 29.

6. Later decision.]—When two cases are inconsistent and the judge who is considering them has "no very clear opinion on the point" involved, the later decision should be accepted as the greater authority if it was given with the knowledge and deliberate disregard of the first decision. *Cowan* v. *The "St. Alice,"* (1915) 21 B.C.R. 540; 32 W.L.R. 17; 8 W.W.R. 1256; 17 Ex. C.R. 207.

7. Judgments.]—Dicta are not of binding authority and to be accepted unless they can be shewn to express a legal proposition which is a necessary step to the judgment pronounced. *Michigan Trust Company* v. *Canadian Puget Sound Lumber Co., Ltd.*, (1918) 25 B.C.R. 560; (1918) 3 W.W.R. 273.

8. Finality.]—A judgment determining a substantive right of one party in a judicial proceeding is a final judgment and where it affects the right of that party to claim damages over $2,000 the judgment may be appealed from to the Supreme Court of Canada under the Supreme Court Act Amendment Act, 1920. *Bulger* v. *Home Insurance Company*, (1927) S.C.R. 451; (1927) 3 D.L.R. 1044.

9. Order in divorce action—Disobedience—Committal.]—Wrongful disobedience to an order of the Supreme Court in divorce and matrimonial causes not being an order for mere payment of money will justify committal for contempt of Court without any supplementary order. *Midgley* v. *Midgley*, (1929) 41 B.C.R. 482; (1929) 3 W.W.R. 121.

10. Extra-Provincial judgment—Jurisdiction.]—Where a defendant in another Province defends an action on the merits at the same time disputing the jurisdiction of the Court and it has been held that the Court has jurisdiction he cannot raise the question of jurisdiction when action is brought against him on the judgment in British Columbia. *Kennedy* v. *Trites*, (1916) 10 W.W.R. 412.

11. Foreign judgment.] — A divorce granted in a foreign jurisdiction is valid here provided the husband was domiciled within the jurisdiction of the Court granting the decree. Where, as ancillary to the decree of divorce, a final and valid judgment for alimony is entered against the husband, it will be enforced by a judgment in British Columbia notwithstanding that the foreign divorce may have been granted upon grounds which would not be recognized as sufficient within the Province. *Burpee* v. *Burpee*, (1929) 41 B.C.R. 201; (1929) 3 D.L.R. 18; (1929) 2 W.W.R. 128.

12. Chinese Immigration Act — Judge persona designata.]—The words "any judge of the Supreme Court" in sec. 17 of the Chinese Immigration Act, 1923, should be construed as "persona designata" and there is no appeal from an order made under this section. *Rex* v. *Chin Sack (No. 2)*, (1928) 40 B.C.R. 68; 50 C.C.C. 137.

13. Judgment by consent—Effect of.]—A judgment is conclusive proof between the parties of the matters actually decided, and a consent judgment should be regarded as a judgment after a hearing on the merits. *Canada Permanent Corporation v. Christensen*, (1929) 41 B.C.R. 258; (1929) 3 D.L.R. 864; (1929) 2 W.W.R. 198.

14. Decree of judicial separation.]—A decree of judicial separation with costs is a judgment of the Supreme Court and the successful petitioner whose judgment is unsatisfied is a creditor entitled to invoke the provisions of the Fraudulent Conveyances Act. *Mackey* v. *Mackey & Magur*, (1930) 42 B.C.R. 440; (1930) 3 D.L.R. 497; (1930) 1 W.W.R. 604.

15. Judgment in Supreme Court action by County Court judge—Effect of.]—A judgment of the Supreme Court in an action tried by consent before a County Court judge may be set aside in a subsequent action, if the consent was given by solicitors acting therein without the authority of the defendant, although the defendant upon

becoming aware of the facts brought an appeal from the judgment of the County Court judge which was dismissed on the ground that the judgment was in effect an award. *Overn* v. *Strand*, (1931) 44 B.C.R. 47; (1931) 2 D.L.R. 44; (1931) 1 W.W.R. 694; (1931) S.C.R. 720.

16. Joint judgment debtors — Release of one.]—The effect of the release of one of three judgment debtors is to release the other two unless the judgment creditor expressly reserves his right against them. *Bank of Hamilton* v. *Copp*, (1924) 3 W.W.R. 323.

B. Setting Aside.

1. Order—Subsequent application to another judge.]—Since the Judicature Act where a judge of the Supreme Court makes an order refusing an application, the remedy (if any) is in general by appeal, unless leave is given to renew it. *Irving and Morris* v. *Bucke*, (1915) 21 B.C.R. 17.

2. Default judgment—Setting aside.]—The Court may refuse to set aside a judgment entered in default of appearance where there is unreasonable delay on the part of the defendants in making their application but leave may be given the defendants to shew that the plaintiff has been in fact overpaid. *Huckell* v. *Gale & Williams*, (1915) 22 B.C.R. 356; 25 D.L.R. 761; 33 W.L.R. 192; 9 W.W.R. 550.

3. Judgment by default — Excessive amount—Setting aside.]—Where a personal judgment for principal and interest due under a mortgage and for foreclosure is obtained by default, and includes a sum for which a previous judgment has been obtained, it is the duty of the plaintiff to apply to rectify the wrong and the judgment should be set aside and the defendant allowed in to defend generally. *Scottish Temperance Life Assurance Co., Ltd.* v. *Johnson*, (1916) 23 B.C.R. 510; 31 D.L.R. 649; (1917) 1 W.W.R. 538.

4. Setting aside—Mistake in form.]—An action should be brought to set aside a judgment rather than a motion to amend where by common error the judgment is made to appear as a consent judgment but is not intended as such. *Skene* v. *Royal Bank of Canada*, (1918) 25 B.C.R. 456; 59 S.C.R. 211; (1919) 3 W.W.R. 1071.

5. Power of trial judge to reopen judgment.]—Since the Judicature Act the right of a judge to set aside his own judgment cannot be exercised after the judgment has been drawn up and entered. *Vandepitte* v. *Berry*, (1928) 40 B.C.R. 408; (1929) 1 D.L.R. 1002.

6. Default judgment — Application to set aside.]—A widow having settled her rights in her deceased husband's estate, and not being a beneficiary therein, has no status to intervene for the purpose of reopening a default judgment rendered against the estate, and in an action against her to upset the settlement with the executors of the estate and make her property acquired thereunder answerable to the creditors of the estate, she is not prejudiced in her defence by reason of a default judgment having been taken against the executors. *Belmont Investment Company* v. *Moody*, (1923) 32 B.C.R. 488; (1923) 3 D.L.R. 812; (1923) 3 W.W.R. 291.

7. Officer of company—Action commenced by—Personal liability.]—An officer of a company who commences an action on the company's behalf, acting in good faith, will not be held personally liable for the costs or any part of the judgment recovered against the company in the action. *Pacific Coast Coal Mines* v. *Arbuthnot*, (1926) 36 B.C.R. 321; (1926) 1 D.L.R. 670; (1926) 1 W.W.R. 478.

8. Adoption of infant—Order for.]—Where a judge in Chambers makes an order under the Adoption Act for the adoption of an infant, the petition therefor being supported by an affidavit of the infant's mother giving her consent and approval, the order will not be set aside if it is made in the terms intended, and contains the proper pronouncement of the Court even if it may be wrong in form. If there is a right to make an ex parte order and confer rights and responsibilities upon those adopting the infant, it is only by way of appeal that such an order will be set aside. *In re Warren, an Infant*, (1926) 37 B.C.R. 322.

9. County Court—Interlocutory judgment by default — Application to set aside.]—Where the plaintiff in a County Court action has entered an interlocutory judgment in default of a dispute note being filed and an application is made to set aside the judgment, the affidavit in support of the application must disclose a defence on the merits and there must be something more than a mere statement that the defendant

has a good defence. An affidavit simply giving the opinion of the defendant's solicitor to this effect is not sufficient. *Scovil* v. *Lewis*, (1926) 37 B.C.R. 241; (1926) 2 W.W.R. 468.

10. Order in exercise of discretion.]—It is not usual for a Court of Appeal to set aside orders made in the exercise of a discretion, and a Court will not do so unless the order in question would result in a substantial injustice. *Maddison* v. *Bain*, (1928) 39 B.C.R. 460; (1928) 3 D.L.R. 33.

11. Discretion wrongly exercised.]—Where a person injured in an automobile accident recovered judgment against the owner of a car who was insured against legal liability, and the judgment being unsatisfied the plaintiff brought action against the insurance company under sec. 24 of the Insurance Act and the defendant company applied for and obtained an order adding the owner of the car as party defendant for his examination for discovery, the order will be set aside. *Erickson* v. *The Preferred Accident Insurance Company of New York*, (1928) 40 B.C.R. 241; (1928) 4 D.L.R. 567.

12. Order for service ex juris.]—A judge of the Supreme Court may set aside an ex parte order for service of a writ of summons ex juris in an action for breach of contract, where on the material it is clear that there is no such contract as alleged. *Slater* v. *Velie Motors Corporation*, (1928) 40 B.C.R. 184; (1928) 4 D.L.R. 487; (1928) 3 W.W.R. 170.

13. Default judgment—Application to set aside and add joint debtor.]—A judgment obtained by default against one of two joint debtors will not be set aside in order to enable the plaintiff to join the other joint debtor as a defendant. *Hudson's Bay Co.* v. *Scott*, (1929) 4 D.L.R. 978; (1929) 3 W.W.R. 232.

14. Default judgment—Solicitor undertaking to enter appearance.] — Where a solicitor accepts service of a writ of summons and undertakes to appear but fails to do so, the plaintiff is not in a position to enter judgment by default, and if so entered the judgment will be set aside. His remedy is to compel the solicitor for the defendant to implement his undertaking. *Mitchell* v. *Coast Paper Co., Ltd.*, (1930) 42 B.C.R. 352; (1930) 2 D.L.R. 720; (1930) 1 W.W.R. 608.

15. Mortgagees.] — Where mortgagees are in possession of mortgaged property, and in receipt of the rents and profits, and an order is made affecting the property and the mortgagees have received no notice of the application on which the order is founded, the judge who made the order may vacate it in so far as to enable the mortgagees to be heard, and after hearing the matter may vacate the order previously made in so far as it prejudices the mortgagees' right. *Greenwood* v. *Canadian Mortgage Investment Co.*, (1921) 30 B.C.R. 72; 69 D.L.R. 510; (1921) 2 W.W.R. 746. *Marshall* v. *Canadian Pacific Lumber Company*, (1922) 31 B.C.R. 363; 69 D.L.R. 521; (1922) 3 W.W.R. 1105.

See APPEAL, Final and Interlocutory Judgments.

III. THE LIEN.

1. Priority.]—A judgment registered in the Land Registry Office on an application made after the date of execution of a mortgage by the judgment debtor, but before the application for the registration thereof, takes priority over the judgment by virtue of sec. 73 of the Land Registry Act. *Bank of Hamilton* v. *Hartery*, (1917) 25 B.C.R. 150; (1917) 3 W.W.R. 964; (1918) 26 B.C.R. 22; 43 D.L.R. 14; (1918) 3 W.W.R. 551; (1919) 58 S.C.R. 338; 45 D.L.R. 638; (1919) 1 W.W.R. 868.

2. Equity of redemption.]—Where a judgment is recovered against a defendant who has previously executed a trust deed covering all its lands its only interest remaining being an equity of redemption in the said lands, the equity of redemption only is liable to satisfy the judgment, notwithstanding the fact that the trust deed was not registered. *Gregory* v. *Princeton Collieries, Ltd.*, (1918) 25 B.C.R. 180; 40 D.L.R. 739; (1918) 1 W.W.R. 265.

3. Beneficial owner.]—Under sec. 40 of the Land Registry Act a judgment creditor as registered owner of a charge is entitled to the estate or interest in respect of which he is registered, with liberty to sell the property registered under the name of the judgment debtor, subject only to such exceptions and registered charges as appear on the register. A registered judgment will therefore prevail as against the interest of an unregistered beneficial owner. *Morris* v. *Morris and French*, (1931) 44 B.C.R. 166; (1931) 3 D.L.R. 325; (1931) 3 W.W.R. 427.

4. As against assignment of proceeds of agreement of sale.]—An assignment of moneys due under an agreement of sale of

land is not a transfer of an interest in land within the meaning of the Land Registry Act or Execution Act, and registration thereof is not required and it takes priority over a subsequent registered judgment. *The Canadian Bank of Commerce* v. *The Royal Bank of Canada*, (1921) 29 B.C.R. 407; 60 D.L.R. 275; (1921) 2 W.W.R. 462.

See ADMIRALTY.
See APPEALS.
See COURTS.
See ESTOPPEL.
See PRACTICE.
See REGISTRATION OF LANDS.

JURY.

I. RIGHT TO TRIAL BY JURY, 655.
II. APPLICATION FOR, 656.
III. IMPANELLING—SELECTION, 657.
IV. SPECIAL JURY, 658.
V. VERDICT, 658.
A. In general, 658.
B. General verdict and questions, 659.
C. Reasons, 660.
D. Majority verdict, 660.
VI. DISCHARGE, 661.

I. RIGHT TO TRIAL BY JURY.

1. Counterclaim.]—A counterclaim is as much a part of an action for the purpose of the judgment which involves the trial as the claim itself. Where the amount claimed by a counterclaim exceeds the sum of $50 a defendant is entitled to have his counterclaim tried by a jury notwithstanding that the plaintiff has secured judgment for the amount of his claim on the pleadings and admissions in discovery. *Douglas Lake Cattle Co.* v. *Reinseth*, (1922) 30 B.C.R. 552; 65 D.L.R. 646; (1922) 1 W.W.R. 1258.

2. New trial.]—The plaintiff obtained an order for trial by jury but later by agreement proceeded to trial without a jury. The action was dismissed and on appeal a new trial was ordered. A further application for trial by jury was refused:—Held, on appeal, that the waiver of the plaintiff's right to a jury was only in respect of the first trial, that he was entitled to a jury on the second trial on the first order which was still effective, a further order being unnecessary. *Nantel* v. *Hemphill's Trade Schools, Limited (No. 2)*, (1920) 28 B.C.R. 422; 53 D.L.R. 37; (1920) 3 W.W.R. 408.

3. Scientific or local investigation.]—Where damages are claimed for personal injuries sustained in an accident although the evidence of medical men in regard to the nature and extent of the injuries is in a sense scientific, it is not a scientific or local investigation that brings the case within marginal rule 429. *Bradshaw* v. *British Columbia Rapid Transit Company, Limited*, (1926) 38 B.C.R. 56; (1927) 1 D.L.R. 865; (1927) 1 W.W.R. 425.

4. Issues of complex nature.]—A Davis raft owned by the plaintiff was insured in the defendant Company for $6,000 against loss from perils of the sea while being towed from Green Cove, Barclay Sound, to Victoria, B.C. In the course of the voyage the raft, through the action of the sea, broke up and was lost. In an action for loss under the policy the plaintiff's application for trial with a jury was refused:—Held, that the sole issue is as to the construction of the raft in question which is not of an intricate or complex nature and does not come within the exceptions in marginal rule 429. The plaintiff is entitled to an order for trial with a jury. *Welch* v. *The Home Insurance Company of New York*, (1930) 43 B.C.R. 78.

II. APPLICATION FOR.

1. Affidavit in support.]—An application for a jury under Order XXXVI., r. 6 ought to be supported by an affidavit which should either verify the claim or state the cause of action in clear and positive terms so that the judge can have no doubt as to the plaintiff's right to the order. No counter affidavit ought to be allowed nor supplementary affidavits, except to supply immaterial omissions or to correct clerical errors. If the plaintiff makes out that his cause of action comes within the terms of the rule the judge has no discretion to refuse the order. The Court has a discretion to make any order about a matter of procedure which it considers the circumstances require, when the rules are silent on the subject and especially when it tends to prevent misuse of the process. *Bell* v. *Wood and Anderson*, (1927) 38 B.C.R. 310; (1927) 2 D.L.R. 827; (1927) 1 W.W.R. 580.

2. Material upon.]—An application may be made on the pleadings which shew that the action is one for damages and does not fall within any of the marginal rules preceding rule 430, and an affidavit in support is unnecessary. *Campbell* v. *Lennie*, (1927) 38 B.C.R. 422; (1927) 2 W.W.R. 306.

3. Order for word "common" inadvertently inserted—Slip rule.]—When counsel on an application for a jury direct their submissions solely to the question as to whether there shall be a jury or not, and the order for a jury is drawn up with the word "common" improperly inserted before the word "jury," the slip rule applies and the order should be amended. *Bradshaw* v. *British Columbia Rapid Transit Co., Ltd. (No. 3)*, (1926) 38 B.C.R. 64; (1927) 1 D.L.R. 599.

III. Impanelling—Selection.

1. Procedure—Inadvertence in choosing petit jury.]—The provisions of the Jury Act with reference to the procedure to be followed by the sheriff in summoning a jury are directory only. Where the sheriff by inadvertence selects a common jury from the grand jury list and the trial has proceeded to a verdict, sec. 59 of the Jury Act is applicable and the unsuccessful party cannot then impeach the verdict on the ground of the mistake of the sheriff. *Shaw* v. *McDonald*, (1921) 29 B.C.R. 230; 56 D.L.R. 354; (1921) 1 W.W.R. 498.

2. Insufficient number summoned—Additional jurors.]—An order made by the judge designated to preside at the Assizes directing the sheriff to summon other persons to serve on the grand and petit juries in the place of those whom the sheriff had been unable to serve, was drawn up by inadvertence to cover only the summoning of petit jurymen:—Held, that the order as pronounced by the judge may be regarded as the order made by him, rather than the order in the mistaken form in which it was drawn up, and there was no illegality in the constitution of the grand jury. *Rex* v. *Boak*, (1925) 35 B.C.R. 256; (1925) S.C.R. 525; (1925) 3 D.L.R. 887; 44 C.C.C. 218.

3. Insufficient jurymen—Agreement to proceed with less than statutory number—Arbitration.] — Where parties to an action consent to trial of the action before a judge and a jury whose number is smaller than the number fixed by law, the judge and jury have no jurisdiction to deal with the case as a Court, and must be regarded as arbitrators from whose verdict no appeal can be taken. *Loane* v. *The Hastings Shingle Manufacturing Company, Limited and Black*, (1925) 35 B.C.R. 485; (1925) 3 D.L.R. 940.

4. New jury.]—A new trial of a charge of murder will be ordered where the jury which convicted was composed in part of jurors who had been members of a jury on a prior trial of the accused for the same offence, and had been discharged after hearing the evidence in part. *Rex* v. *Wong O Sang*, (1922) 34 B.C.R. 8; (1924) 3 W.W.R. 45. *Rex* v. *Chong Sam Bow*, (1925) 1 W.W.R. 240.

5. Reassessment of damages.]—A decision of the Judicial Committee of the Privy Council that the case be "referred back to the jury in the Supreme Court of British Columbia to reassess the damages generally" should not be construed as meaning that the jury which first tried the case and was discharged should be recalled, such a construction being inconsistent with our jurisprudence and repugnant to the Jury Act. *Lew* v. *Wing Lee*, (1925) 37 B.C.R. 81; (1926) 1 D.L.R. 678.

IV. Special Jury.

Costs.]—Where the plaintiff does not require a jury, but the defendant demands one, and the plaintiff asks that if a jury be ordered it shall be a special jury, the costs of the special jury should be costs in the cause. *Canadian Financiers Trust Co.* v. *Ashwell*, (1916) 23 B.C.R. 341; 31 D.L.R. 786; (1917) 1 W.W.R. 459.

V. Verdict.

A. In General.

1. Excessive Amount.]—Where a jury brings in a verdict for damages in excess of the amount claimed by the plaintiff, the trial judge should send the jury back with instructions to keep the verdict within the pleadings. *Lew* v. *Wing Lee*, (1924) 33 B.C.R. 271; (1924) 1 W.W.R. 744.

2. Sealed verdict—Consent.]—Consent of counsel must be obtained for the delivery of a sealed verdict by a jury. *Morton* v. *The Vancouver General Hospital*, (1922) 31 B.C.R. 141.

See (1923) 31 B.C.R. 546; (1923) 1 D.L.R. 854; (1923) 1 W.W.R. 423.

B. General Verdict and Questions.

1. Questions—Duty of jury.]—In an action for damages for negligence when specific questions are put to the jury by the Court, the jury need not answer them but may return a general verdict. *Evans* v. *Hudson's Bay Company*, (1930) 43 B.C.R. 81; (1930) 3 D.L.R. 951; (1930) 2 W.W.R. 718.

2. Answers inconsistent with general verdict.]—Where a jury sees fit to answer specific questions in addition to bringing in a general verdict its findings cannot be ignored, and if inconsistent with the general verdict the latter will not be sustained. *Bank of Toronto* v. *Harrell*, (1917) 55 S.C.R. 512; 39 D.L.R. 262; (1917) 2 W.W.R. 1149.

3. Negligence cases—Duty of counsel.] It is the duty of a trial judge, particularly in negligence cases, to submit questions to be answered by the jury, where the judge can properly do so. Counsel engaged in such a case should allow the questions to be put and the answers to be made without interfering with the judge in the exercise of his duty, by pointing out or suggesting that the jury is not obliged to answer the questions. *Howard* v. *B.C. Electric Ry. Co., Ltd.*, (1918) 3 W.W.R. 409.

4. Court of Appeal.]—The Court of Appeal may draw inferences of fact not inconsistent with the findings of the jury, having sufficient material before it, although the Court may not take questions away from the jury, which are questions of fact properly for the consideration of the jury. *Wand* v. *Mainland Transfer Co. Ltd.*, (1919) 27 B.C.R. 340; (1919) 3 W.W.R. 193.

5. Answers unsatisfactory but shewing intention.] — Where, notwithstanding that the answers by the jury to questions submitted to them are unsatisfactory but it is apparent that they intended to find for the plaintiff, no exception to the verdict being taken by counsel for either party, the plain intention of the jury should be given effect to, and their findings should be considered as a general verdict for the plaintiff. *McFetridge* v. *Canadian Pacific Ry. Co.*, (1926) 36 B.C.R. 314; (1926) 37 B.C.R. 387; (1926) 1 D.L.R. 757; (1926) 4 D.L.R. 30; (1926) 3 W.W.R. 279. *Dobie* v. *Canadian Pac. Ry. Co.*, (1930) 3 D.L.R. 856; 37 C.R.C. 385; (1931) S.C.R. 277.

6. Inconclusive verdict.] — Where answers to questions submitted to a jury are so inconclusive as to be insufficient to justify a judgment in favour of either party, it is within the power of the trial judge to send the jury back with instructions to make a clear finding, or he may dismiss the action on the ground that the plaintiff has failed to secure a verdict in his favour. *Gavin* v. *Kettle Valley Ry. Co. (No. 2)*, (1921) 29 B.C.R. 195; 56 D.L.R. 572; (1921) 1 W.W.R. 488.

7. Inconclusive verdict.] — When it becomes apparent that the answers to questions submitted to jurors are uncertain or indefinite, the jury should be sent back to make their meaning plain. *McTavish Bros.* v. *Langer*, (1929) 41 B.C.R. 363; (1929) 4 D.L.R. 465.

8. General verdict—Failure to establish all claims.]—After judgment following a general verdict of a jury a new trial will be ordered where the party in whose favour damages were awarded admits that certain of the claims raised by his pleadings were not established, but the charge to the jury did not differentiate those established from those not established, and the jury were not properly directed as to the measure of damages. *Gosse-Millerd, Ltd.* v. *Devine*, (1928) S.C.R. 101; (1928) 2 D.L.R. 869.

C. Reasons.

Inconsistent with verdict.] — Where a jury rendered a general verdict in favour of the defendant giving reasons therefor, which were inconsistent with the verdict, the reasons cannot be ignored, and where the proper logical course for the jury according to the reasons given was to find a verdict for the plaintiff, the Court of Appeal will not grant a new trial but will direct judgment to be entered for the plaintiff. *Sutton* v. *Smith*, (1927) 38 B.C.R. 455; (1927) 3 D.L.R. 1008; (1927) 2 W.W.R. 481.

D. Majority Verdict.

1. Expiration of prescribed period.]—Where the notes of a trial taken by a Court stenographer disclose the fact that the jury were not absent from the Court room for the period of three hours prescribed as necessary before a majority verdict of three-fourths of their number could be accepted,

the Court will not take judicial notice of the fact. *Bank of Toronto* v. *Harrell*, (1916) 23 B.C.R. 202; 31 D.L.R. 440; (1917) 1 W.W.R. 213; 55 S.C.R. 512; (1917) 2 W.W.R. 1149.

2. Consent of counsel.]—A trial judge should not, as the result of an agreement by counsel to "consider" that the jurors have given full three hours' consideration to their verdict, when in fact they have not done so, charge the jury that they may at once return a verdict of three-fourths of their number. This course is contrary to sec. 45 of the Jury Act. *Bodnar* v. *Stuart*, (1922) 30 B.C.R. 411; (1922) 1 W.W.R. 933.

3. Partial disagreement.]—Where a jury composed of eight members, being unable to find a unanimous verdict after three hours' deliberation, bring in a verdict of three-fourths of their number pursuant to the Jury Act, 1913, sec. 45, finding the defendant guilty of negligence, but by an insufficient majority finding no contributory negligence on the part of the plaintiff, a judgment for damages against the defendant cannot be sustained and a new trial will be ordered. *Smith* v. *South Vancouver and Richmond*, (1923) 31 B.C.R. 481; (1923) 2 D.L.R. 535; (1923) 1 W.W.R. 417.

VI. Discharge.

1. Improper motive.]—Whenever and as soon as it becomes known to a trial judge that a juror is actuated by improper motives it is the duty of the judge of his own motion to protect the litigants from the results of such a scandal by discharging the jury and summoning another as would have to be done where a juror is discovered to be insane or to have accepted a bribe. *Howard* v. *B.C. Electric Ry. Co.*, (1918) 3 W.W.R. 409.

2. Deafness of juror—Secret test by judge—Waiver by counsel.]—During the trial of an accused person on a charge of manslaughter, a question arose as to the deafness of one of the jurymen, and counsel for the accused, fearing the loss of witnesses in case of an adjournment, undertook not to raise the question of the juror's deafness in case of appeal. The trial judge would not accept the undertaking, but later, without the knowledge of the accused or his counsel, made a secret test with the sheriff's assistance by which he satisfied himself that the juror was properly qualified:—Held, that no substantial wrong or miscarriage of justice had occurred and a new trial should not be granted. *Rex* v. *Boak*, (1925) 35 B.C.R. 256; (1925) S.C.R. 525; (1925) 3 D.L.R. 887; 44 C.C.C. 218.

See Appeal.
See Criminal Law.
See Negligence.
See New Trial.
See Practice.

JUDICIAL OFFICER.

See Certiorari.
See Courts.
See Criminal Law.
See Magistrates.

JUVENILE DELINQUENTS.

See Criminal Law.

LACHES AND ACQUIESCENCE.

See Equity.
See Estoppel.

LANDLORD AND TENANT

I. Relation of Landlord and Tenant, 663.
II. The Lease, 663.
A. *In general*, 663.
B. *Covenants express and implied*, 665.
C. *Assignment and sub-letting*, 669.
D. *Termination*, 669.
1. By notice, 669.
2. By operation of law, 670.
3. Forfeiture, 671.
III. Overholding Tenants, 673.
IV. Fixtures, 674.

I. Relation of Landlord and Tenant.

1. Caveat emptor.]—The principle of caveat emptor applies to a tenant in respect of his landlord's title. *Woods* v. *Opsal*, (1918) 1 W.W.R. 985.

2. Estoppel.]—A tenant cannot say that the person to whom he is paying his rent is not his landlord, and he cannot dispute his landlord's title unless, being a sub-lessee, he can establish that the lease to his landlord was granted for an illegal purpose. *Ibid.*

3. Landlord—Inquiry as to status of—Estoppel.]—The Courts will, at the instance of a person alleged to be a tenant, determine the status of the alleged landlord for the purpose of ascertaining whether or not the relation of landlord and tenant exists between them and the consequent legality of a distress for rent. Estoppel, which exists where the relationship of landlord and tenant is admitted or established, and which prevents the tenant from questioning the landlord's title, will not apply to a case in which the real question is as to the existence of that relationship. *Canada Morning News Co.* v. *Thompson*, (1930) S.C.R. 338; (1930) 3 D.L.R. 833.

4. Unincorporated society.]—An unincorporated and unregistered society, although not within the prohibition of sec. 8 of the Companies Act, 1924, inasmuch as it has not "for its object the acquisition of gain," is an entity unknown to the law, and therefore incapable of making a lease and assuming the position of a landlord, and a distress made on behalf of such a society is illegal. *Ibid.*

II. The Lease.

A. *In General.*

1. Short form—Additional words.]—Where a lease contained the following proviso for re-entry "Proviso for re-entry by the said lessor on non-payment of rent, whether lawfully demanded or not, or on non-performance of covenants, or seizure or forfeiture of the said term for any of the causes aforesaid" which included words not in the short form of the corresponding proviso contained in the Leaseholds Act:—Held, that the additional words did not exclude the application of the Act. *Edwards* v. *Fairview Lodge*, (1920) 28 B.C.R. 557; (1920) 3 W.W.R. 867.

2. Short form—Reference to.]—Where a lease is expressed to be made "in pursuance of the Act respecting short forms of leases" there being no Act of the Legislature of British Columbia so intituled, and it appears from the pleadings and the obvious intention of the parties as expressed in the lease itself that the lease was made pursuant to the Leaseholds Act, 1897, that Act being in force at the date of the lease will apply and the rent having remained unpaid for fifteen days after it was due no formal demand for payment was necessary before suing for possession. *The King* v. *The Vancouver Lumber Co.*, (1924) 33 B.C.R. 468; (1924) 2 D.L.R. 482; (1924) 1 W.W.R. 1041.

See Winter v. *Capilano Timber Co.*, (1926) 37 B.C.R. 91; (1926) 2 W.W.R. 536; 7 C.B.R. 553; (1927) 38 B.C.R. 401; (1927) 4 D.L.R. 36; (1927) 1 W.W.R. 811 (1928) S.C.R. 1.

3. Crown lease.]—An indenture containing amendments to a lease of Crown lands made between a corporation and a minister acting on behalf of the Crown and approved by Order-in-Council, must similarly be duly approved by Order-in-Council, otherwise such an indenture is a nullity. *The King* v. *The Vancouver Lumber Co. Ltd.*, (1919) 50 D.L.R. 6.

4. Crown lease of timber—Application for.]—An advertisement or application for a timber lease confers no interest in the land on the applicant. *Clark* v. *Milligan*, (1920) 28 B.C.R. 22; (1920) 1 W.W.R. 1044.

5. Placer mining lease—Special Act—Failure of lessee to perform conditions.]—Where a mining lease is granted by virtue of a special Act, the terms of which are inconsistent with an earlier general Act, the lease will be construed according to the special Act. The lapse of a company's free miner's certificate required by the Placer Mining Act, 1891, does not cause the forfeiture of a placer mining lease granted by virtue of a subsequent special Act and later ratified and confirmed by another special Act. A mining leasehold cannot be said to be completely abandoned where the lessee leaves a caretaker in charge of the demised premises. Where a Crown lease of placer mining lands granted pursuant to a special Act contains a condition requiring yearly performance of work and mining operations upon penalty of forfeiture upon default for two years, breach of the condition by non-performance of the work will not forfeit the lease but it will be voidable only at the option of the lessor. *Quesnel Forks Gold*

Mining Co. Ltd. v. *Ward,* (1919) 89 L.J.P.C. 13; 122 L.T. 206; 50 D.L.R. 1; (1919) 3 W.W.R. 946; (1920) A.C. 222; Affg. (1918) 25 B.C.R. 476; 42 D.L.R. 476; (1918) 3 W.W.R. 230.

6. Fraud of lessor—Damages.]—Where a tenant is entitled to damages against his landlord for fraudulent misrepresentation inducing the tenant to enter into a lease and contemporary contracts, the damages recoverable will include not only sums paid in execution of the obligations entered into, but all loss reasonably incurred in carrying out those obligations or in measures reasonably taken for that purpose, allowance being made for moneys received and the pecuniary value of advantages gained. *Gosse-Millerd, Ltd.* v. *Devine,* (1928) S.C.R. 101; (1928) 2 D.L.R. 869.

See Adair v. *Tilton,* (1928) 40 B.C.R. 235; (1928) 4 D.L.R. 183; (1928) 3 W.W.R. 92.

7. Possession.]—A lessor cannot claim rent from a lessee who never was effectively put in possession of the premises. *Winter* v. *Capilano,* (1928) S.C.R. 1; (1926) 37 B.C.R. 91; (1926) 2 W.W.R. 536; 7 C.B.R. 553; (1927) 38 B.C.R. 401; (1927) 4 D.L.R. 36; (1927) 1 W.W.R. 811.

B. Covenants Express and Implied.

1. Default in covenant to make improvements to retain liquor license.]—By an indenture of lease made in 1905 the plaintiffs' predecessors in title demised to the defendant a hotel licensed to sell liquors for a term of ten years. The lease contained a covenant by the lessor to enlarge and improve the premises from time to time in compliance with any by-laws or regulations passed by the City of Vancouver with relation to premises for which liquor licenses are granted. Prior to July, 1913, a by-law was passed by the City requiring the premises of hotels licensed to sell liquors to be enlarged and improved in certain particulars. The plaintiffs did not make the improvements required and in July, 1913, the renewal of the liquor license was refused. In an action to recover rent due in December, 1913:—Held, that the lease does not in terms or by implication provide against the contingency of the license being cancelled. The non-renewal of the license had not the effect of putting an end to the lease and the defendant was therefore liable for the rent. *Dana and Fullerton* v. *The Vancouver Breweries, Limited,* (1915) 21 B.C.R. 19; 52 S.C.R. 134; 25 D.L.R. 508; 9 W.W.R. 1018.

2. Alteration of terms — Gratuitous arrangement with agent.]—Where an agent for a landlord who is absent from the Province voluntarily reduces the monthly rent payable by the tenant, reserving to the landlord the right to a higher rent upon improvement in business conditions, and, after acceptance for a time of the rent at the reduced rate, demands payment of future rent in full in accordance with the lease, the arrangement must be regarded as gratuitous on the part of the agent and adjudication by the landlord as to whether conditions have improved or not is not necessary. *Bell* v. *Quagliotti,* (1919) 26 B.C.R. 482; (1918) 2 W.W.R. 915.

3. Quiet enjoyment.]—A covenant for quiet enjoyment applies only to the acts of the lessor himself and of those who claim through or under him, and to constitute a breach of such a covenant there must be an actual interference with the tenant's possession. A notice demanding possession for non-payment of rent is not sufficient. *Woods* v. *Opsal,* (1918) 1 W.W.R. 985.

4. Quiet enjoyment.]—Where by reason of the landlord's failure to comply with an order made under the Fire Marshal Act, 1924, a portion of the premises under lease to his tenant was closed and the tenant deprived of the use thereof the latter is entitled to recover from the landlord damages for the loss which he has thereby sustained. *McIntyre* v. *Thompson,* (1928) 1 W.W.R. 907.

5. Implied warranty — Unfurnished house.]—There is no implied warranty on the lease of an unfurnished house that it is or shall be reasonably fit for habitation. *Brown* v. *Delmas,* (1919) 27 B.C.R. 471.

6. Implied warranty—Freezing of water pipes.]—In an action by the lessee of warehouse space against his lessor for damages caused by the freezing and bursting of a standpipe in the warehouse, it was held that, as there was no provision in the lease as to the heating, the landlord was under no duty to prevent the standpipe from bursting. *Scythes* v. *Gibsons Limited,* (1927) S.C.R. 352; (1927) 2 D.L.R. 834; Affg. (1926) 3 W.W.R. 129.

7. Furnished apartments—Implied warranty of fitness for habitation.]—A landlord who lets furnished apartments gives an implied warranty that they are fit for habitation. Where the landlord with knowledge of the existence of vermin in furnished

apartments deliberately conceals that knowledge from the tenant the latter is entitled to damages for fraud. *Boyd* v. *Dickinson*, (1930) 2 D.L.R. 96.

8. Repairs.]—In the absence of an agreement on his part to repair, a landlord is not liable to a tenant of a furnished house for an injury caused by an ordinary defect of repair, which could easily be remedied. *Kelpon* v. *Stewart*, (1928) 40 B.C.R. 369; (1929) 1 D.L.R. 480; (1928) 3 W.W.R. 640.

9. Dangerous condition of elevator.]—A landlord is not liable in damages for injury suffered by the employee of its tenant resulting from the defective state of an elevator in the premises occupied by the tenant, there being no covenant for repairs in the lease, notwithstanding that the landlord from time to time sent its own engineer to examine and make necessary repairs to the elevator. *Terainshi* v. *Canadian Pacific Railways*, (1918) 25 B.C.R. 497; (1918) 2 W.W.R. 1034.

10. Unlighted stairway — Trap.]—Where the lease of rooms in an office building does not contain a covenant on the part of the landlord to keep the halls and stairways lighted, the landlord will not be responsible in damages for injury to a licensee of the tenant resulting from a fall in a dark stairway. A municipal by-law requiring owners of buildings to provide fire escapes with necessary lights in public halls, stairways and passageways to assist occupants to find the exits from the buildings in case of fire cannot be invoked in the case of an accident not connected with or referable to a fire. *McKinlay* v. *Mutual Life Assurance Co.*, (1918) 26 B.C.R. 5; 43 D.L.R. 259; (1918) 3 W.W.R. 1002.

11. Defective premises—Trap—Landlord's duty to public.]—A landlord is not responsible for injury to a stranger who entered his building intending to visit a tenant's rooms, and by mistake, took an unlighted passageway not connected with the tenant's premises, and fell down the stairs leading to a basement. The stairway in question being at least three feet from a door opening on a street sidewalk cannot be deemed a public nuisance. (An appeal was dismissed, the Court being equally divided.) *Smith* v. *Mason*, (1921) 30 B.C.R. 174; 60 D.L.R. 258; (1921) 2 W.W.R. 614.

12. Landlord's duty to licensee.]—Where the landlord has covenanted to repair, and in effecting repairs creates a concealed danger by weakening the support of a railing, part of the structure of the leased premises, he is liable in damages for injury to a member of the tenant's family who was ignorant of the danger resulting from a fall caused by the collapse of the railing. *Fraser* v. *Pearce*, (1928) 39 B.C.R. 338; (1928) 2 D.L.R. 54; (1928) 1 W.W.R. 837.

13. Dangerous stairway — Injury to servant of tenant.]—In an action by a servant of a tenant of an office building against the owner for injuries sustained by falling down a stairway, it was held that the evidence pointed to a patent defect in construction and not to a hidden danger, and the plaintiff knew or ought to have known the height of the balustrade and accepted the risk of using the access to the stairway in the form in which it was provided, and was therefore not entitled to damages. *Kynoch* v. *Bank of Montreal*, (1923) 3 D.L.R. 877; (1923) 3 W.W.R. 161.

14. Rent for period after cancellation.]—Where a lease had been determined by notice of cancellation under the terms thereof and it was agreed between the lessor and lessee that the lessee should remain in possession until the purchaser demanded possession, the lessor is entitled to rent based on the annual rental in the lease. *Gardner* v. *Holmes*, (1917) 24 B.C.R. 416; 38 D.L.R. 156; (1918) 1 W.W.R. 456.

15. Breach of covenant to erect buildings.]—An agreement for a lease contained a covenant on the part of the lessee to erect buildings, and also to enter into an agreement to purchase the premises, with a proviso that on the failure of the lessee to live up to the terms of the lease the lessor might cancel it and in such event all improvements should be left on the premises as liquidated damages. The lessee failed to erect the buildings and the lessor sued for damages for such failure:—Held, that the rights of the parties should be treated as similar to those under an agreement of sale of land where the purchaser had broken his agreement. The lessor having treated the lease as determined and the lessee having thereby lost the right to purchase the premises it would not be equitable to compel him to pay damages for failure to erect the buildings. *Cross* v. *Kennedy*, (1931) 2 D.L.R. 990.

16. Right of way — Road adjoining leased premises.]—Where a lessee has used a private road along one of the boundaries of the leased premises without objection for a period after the date of the lease, the same road having been used by a prior lessee:—Held, that as the lease contains no reference

to the right of user of the private road and the circumstances are not such as to base a finding that an implied right of way was granted under the lease to the lessee, the lessee will not be entitled to an injunction to restrain the lessor from closing the road. *Bready* v. *McLennan* (*No. 2*), (1924) 33 B.C.R. 460; (1924) 3 W.W.R. 924.

C. Assignment and Subletting.

1. Leave to assign—Reassignment by holder of collateral security.]—Where the assignees of a lease by way of collateral security are prepared to release and abandon the security, a reassignment by them without consent is not a breach of a covenant not to assign or sublet without leave. *Fordham* v. *Commonwealth Trust Co.*, (1915) 8 W.W.R. 164.

2. Covenant not to assign—Breach.]—Where a lease contains a covenant not to assign or sublet without leave, with a proviso for re-entry in case of breach, the lessor is entitled upon breach of the covenant to a declaration that the lease is forfeited and to recover possession and the case is not one in which the Court should relieve against forfeiture. *Hamilton* v. *Killick*, (1920) 28 B.C.R. 418; 61 D.L.R. 213.

3. Consent to assignment—Waiver of forfeiture.]—Where a landlord consents to the assignment of a lease on condition of payment of arrears of rent, and the overdue rent not having been paid two days later, the landlord re-enters by virtue of a proviso for re-entry for nonpayment of rent contained in the lease, his consent to the assignment will not be considered as a waiver or election on his part not to exercise the right of forfeiture. *Car Owners* v. *McKercher*, (1922) 31 B.C.R. 257; 67 D.L.R. 626.

D. Termination.

1. By Notice.

1. Notice to quit—Tenant remaining in occupation—Rental.]—A tenant who is allowed to occupy the leased premises after the termination of his lease by notice to quit, is a tenant by sufferance, and liable to pay a reasonable sum by way of rental for use and occupation. *Gardner* v. *Holmes*, (1917) 24 B.C.R. 416; 38 D.L.R. 156; (1918) 1 W.W.R. 456.

2. Notice to quit.]—Under a monthly or weekly lease only a reasonable notice of intention to terminate the tenancy is necessary. Eviction from a portion of the premises does not of itself determine a lease. *Davis* v. *Fraser & Shaw*, (1920) 28 B.C.R. 12; 61 D.L.R. 48.

2. By Operation of Law.

1. Bankruptcy of tenant—Landlord's re-entry previous to assignment.]—A writ issued by a landlord claiming possession simpliciter and any further relief which is incidental to a claim for possession, is equivalent to re-entry, bringing a proviso in the lease of the demised premises as to forfeiture of the term into operation, and the privilege given to a trustee in bankruptcy under the Bankruptcy Act to retain "leased premises" occupied by the bankrupt for the purposes of the trust estate, will not be exercisable in respect of premises which the landlord has already re-entered in law. *Standard Trusts Co.* v. *David Steele, Ltd.*, (1921-2) 30 B.C.R. 359, 522; 62 D.L.R. 650; (1922) 1 W.W.R. 137; 2 C.B.R. 183; 68 D.L.R. 750; (1922) 2 W.W.R. 510; 3 C.B.R. 141.

2. Bankruptcy of tenant—Rent payable by trustee in possession.]—Notwithstanding a clause in a lease providing that in the event of the lessee making an assignment for the benefit of his creditors the term shall expire and the rent for the current month and three additional months shall immedately become due and payable, under sec. 2 of the Landlord and Tenant Act Amendment Act, 1923, the landlord is only entitled to rent for the time the premises are occupied by the trustee. *Canadian Credit Men's Trust Association, Ltd.* v. *Monka*, (1924) 34 B.C.R. 99.

3. Bankruptcy—Rent payable by trustee in possession.]—Under sec. 33 of the Landlord and Tenant Act, 1924, irrespective of whether the bankrupt's premises are held under lease or not, the landlord can only claim from trustee in bankruptcy in possession proportionate rent for the time the premises are actually used by the trustee, notwithstanding that according to the lease a month's rent has become payable in advance during possession by the trustee. *In re Williamson*, (1927) 38 B.C.R. 479.

3. Forfeiture.

1. Relief against—Breach of covenant limiting use of premises.]—Where a lease of premises contains a covenant by the lessee that he will not assign or sublet the premises or permit the premises to be used as a dance hall or for any other than lodge purposes without the lessor's consent, excepting that the premises may be used for a "private invitation dance," the latter term cannot be held to include a dance where an admission fee is charged, and where the proviso for re-entry contained in the lease applies in case of a breach of such a covenant, the Court will not relieve against forfeiture upon by reason thereof. Equity will not intervene in such cases unless the breach is occasioned by fraud, accident, surprise or mistake and then only where complete compensation can be made. *Edwards* v. *Fairview Lodge*, (1920) 28 B.C.R. 557; (1920) 3 W.W.R. 867.

2. Relief against — Covenant not to assign or sub-let—Breach of.]—Where a lease contained a covenant by the lessee that he would not assign or sub-let without leave, and a proviso for re-entry in case of breach of the covenant, the Court held upon proof of breach of the covenant by the tenant that the landlord was entitled to recovery of possession of the premises and mesne profits, and that it was not a proper case for relief against forfeiture. *Hamilton* v. *Ferne*, (1921) 1 W.W.R. 249; 61 D.L.R. 213.

See also *Hamilton* v. *Killick*, (1920) 28 B.C.R. 418; 61 D.L.R. 213.

3. Waiver of—Consent to assignment.]—Where a landlord consents to the assignment of a lease on condition of payment of arrears of rent, and the overdue rent not having been paid two days later, the landlord re-enters by virtue of a proviso for re-entry for non-payment of rent contained in the lease, his consent to the assignment will not be considered as a waiver or election on his part not to exercise the right of forfeiture. *Car Owners* v. *McKercher*, (1922) 31 B.C.R. 257; 67 D.L.R. 626.

4. Ground of forfeiture wrongly stated.]—Where a lessor has forfeited a lease on a ground that is invalid, but a valid ground of forfeiture exists and is available, the forfeiture will be valid notwithstanding the wrong ground stated therefor. *Winter* v. *Capilano*, (1927) 4 D.L.R. 36; (1927) 1 W.W.R. 811; (1928) S.C.R. 1; (1926) 37 B.C.R. 91; (1926) 2 W.W.R. 536; 7 C.B.R. 553; (1927) 38 B.C.R. 401.

5. Company struck off register—Effect of restoration on forfeiture and re-entry.]—The restoration to the register of a company which has been struck off under sec. 268 of the Companies Act as amended in 1913 has the effect of restoring the company to its original position as if it had not been struck off except in so far as the rights of others may have intervened. Where a proper re-entry has been made under a lease at a time when the company was in a state of disorganization, although prior to its being struck off the register, and the property has been let to others, the restoration of the company under the statute does not revive its former rights under the lease and the case is not one for relief against forfeiture. *B.C. Thoroughbred Ass'n* v. *Brighouse* (1922) 31 B.C.R. 381; 70 D.L.R. 130; (1922) 3 W.W.R. 665.

6. Waiver by landlord — Estoppel — Acceptance of rent after action brought.]—Although a lessor may have the right to claim forfeiture of the term under a lease owing to breach of certain covenants by the lessee as to sub-letting and the use to be made of the premises, he may nevertheless be estopped by his conduct from claiming such forfeiture where in a long course of dealing with his lessee he stands by and tacitly agrees to the breaches which occur from time to time, thereby causing the lessee and others interested to believe that their acts are not to be used as a foundation to enforce a forfeiture. In the case of a lessor being a limited company it may not be bound by the knowledge of its secretary and manager as to the manner in which covenants were being broken. Acceptance by the lessor of moneys paid as rent after an action for possession is brought by him may not be a waiver of forfeiture for breach of the lessee's covenants. The proviso for re-entry in a lease will not be more strongly construed against the lessor. *Orpheum Theatrical Co., Ltd.* v. *Rostin*, (1923) 32 B.C.R. 251; (1923) 4 D.L.R. 499; (1923) 2 W.W.R. 582.

7. Relief against—Payment of arrears—Disturbed possession.]—Where the tenants have been in default for years and have not expressed any willingness or disclosed any ability to pay rent in arrears they should first put themselves in good standing by payment or tender of arrears of rent, otherwise the Court will not consider granting relief against forfeiture notwithstanding that the tenants have been harassed by lawsuits and disturbed in their possession of

the demised premises. *The King* v. *Vancouver Lumber Co.*, (1924) 33 B.C.R. 468; (1924) 2 D.L.R. 482; (1924) 1 W.W.R. 1041; (1925) 36 B.C.R. 53; (1925) 4 D.L.R. 188; (1925) 3 W.W.R. 122.

8. Relief against—Doubtful construction of covenant—Good faith of tenant.]—Difficulty in construing a covenant so expressed that its meaning is doubtful is a circumstance entitling a tenant to relief against forfeiture where he has done in good faith what he supposed to be a performance of it. The Court should afford relief against forfeiture for mere non-payment of rent on its due date. Where the conduct of the lessor may disentitle him to invoke a breach of a covenant as a ground of forfeiture the performance of the covenant may be made a term on which relief is granted. *Godson and Ray* v. *Pantages*, (1930) 43 B.C.R. 241; (1931) 1 D.L.R. 429; (1930) 3 W.W.R. 401.

9. Relief against breach of covenant—Waiver.]—A lease containing a covenant that the lessee should not sub-let without leave. The lessee did sub-let without leave but the lessor raised no objection and collected the rents. Upon an action for possession by reason of the breach of covenant it was held that on general equitable principles the Court has power to relieve from forfeiture under the covenant. *Mattern* v. *Welch*, (1929) 42 B.C.R. 111; (1930) 2 D.L.R. 231; (1930) 1 W.W.R. 398.

III. Overholding Tenants.

1. Appeal.] — A single judge of the Supreme Court of British Columbia has no appellate jurisdiction conferred on him under sec. 23 of the Landlord and Tenant Act. *In re Selman et al.*, (1920) 2 W.W.R. 539.

2. Summary proceedings — Involved question of fact.]—A summary order should not be made under the overholding tenants provisions of a Landlord and Tenant Act, where there is an involved question of fact to be tried and if an action for possession were brought the tenant might be entitled to relief against forfeiture. *In re Ray and Hou*, (1927) 39 B.C.R. 128; (1928) 1 D.L.R. 177.

3. Proceedings—Notice to tenant—Service of documents.]—Where a landlord has obtained an appointment of time and place for inquiry under sec. 20 of the Landlord and Tenant Act, the notice served on the tenant with a copy of the affidavit on which the appointment was obtained under sec. 21 thereof, must be accompanied by copies of all exhibits therein referred to. *Claud Loo* v. *Sun Fat et al.*, (1925) 36 B.C.R. 138; (1925) 4 D.L.R. 134.

IV. Fixtures.

1. Covenant to restore fixtures — Breach of—Damages.]—The general rule as to measure of damages in an action for breach of covenant by a lessee to restore the demised premises to its original condition on the determination of the lease, is that such damages are the cost of putting the premises into the state of repair required by the covenant. The measure of damages is not affected by the lessor's intentions as to restoration of the premises. *Buscombe* v. *James Stark & Sons, Limited*, (1916) 23 B.C.R. 155; 30 D.L.R. 736; (1917) 1 W.W.R. 204.

2. Improvements—Covenant as to.]—Where a clause in a lease gave the lessee the right of renewal "upon such terms as may be mutually agreed upon," and a further clause provided that in the event of the renewal not being granted the lessor should pay the lessee the cost of alterations and additions made by him on the premises, and at the expiration of the term the parties fail to agree on the terms of renewal, the lessee is entitled to recover the cost of the alterations and additions which he has made. A proviso in the lease that "all improvements, alterations and fixtures constructed or made in and upon the said premises shall become the absolute property of the lessor" does not include the tenant's trade fixtures. *P. Burns & Company, Ltd.* v. *Godson*, (1918) 26 B.C.R. 46; 46 D.L.R. 97; (1919) 58 S.C.R. 404; (1919) 1 W.W.R. 848.

3. Assignment of tenant's interest in.]—A tenant assigned his interest in a leased premises including trade fixtures to certain parties who later took a new lease of the premises from the owner. The lease with fixtures passed through the hands of several tenants through assignments and "reorganizations." The last tenant assigned for the benefit of its creditors to the defendant who gave notice to the plaintiff that he wished to determine the lease. In an action by the landlord to prevent the removal of the fixtures:—Held, that the fixtures belonged to the defendant and his disclaimer as assignee had no operation to defeat the right of

removal within the three months' delay given by sec. 55 (1) of the Creditors' Trust Deeds Act. *Wintemute* v. *Taylor*, (1919) 27 B.C.R. 237; (1919) 2 W.W.R. 882.

See DISTRESS.

See MINES AND MINING.

See PUBLIC LANDS.

LEGISLATIVE ASSEMBLY.

Disqualification—Action for penalties.]—An action brought against a sitting member of the Legislative Assembly under sec. 31 of the Constitution Act is barred by a previous action brought by another plaintiff against the same person for the same penalty, unless the previous action was collusive. Such an action is not collusive when it was honestly taken with the view of determining the question to the defendant's disqualification and was honestly carried out. *Keene* v. *Cooley*, (1925) 36 B.C.R. 170; (1925) 4 D.L.R. 229; (1925) 3 W.W.R. 250.

See ELECTIONS.

LIBEL.

See DEFAMATION.

LIEN.

1. Possession—Giving up—Effect of.]—A possessory lien on goods at common law is lost if the party claiming the lien gives up possession of the goods and he cannot afterwards revive his lien by retaking possession. *Welch* v. *Scott*, (1920) 28 B.C.R. 349; (1920) 2 W.W.R. 510.

2. Repairs—Possession.]—A possessory lien for repairs is destroyed if the party entitled to it gives up his right to the possession of the goods. *Rumely* v. *The "Vera M,"* (1922) 31 B.C.R. 472; (1923) 2 D.L.R. 867; (1923) Ex. C.R. 36; (1923) 1 W.W.R. 253.

3. Possession—Custom.]—A lien upon goods does not exist by local usage or custom because of a general agreement among owners of trucks to claim liens upon goods placed in their hands to be moved. *Welch* v. *Scott*. *Supra*.

4. Automobile — Conditional sales — Repairs by buyer.]—Where the vendor under a hire-purchase agreement to secure the purchase price of a chattel has not taken possession, and where there has been no default in payment, the purchaser has the right and duty to have the property repaired although it may create a lien in favour of the workman engaged in carrying out the repairs. *Gurevitch* v. *Melchoir*, (1921) 29 B.C.R. 394.

5. Automobile — Conditional sales — Repairs by buyer.]—Where an agreement for the conditional sale of a motor car contained the following covenant on the part of the buyer: "We shall not at any time suffer or permit any charge or lien whether possessory or otherwise to exist against said automobile," it was held that the buyer could not authorize the doing of repairs in such a way as to give the repairer a lien. *Alliance Finance Co. and Standard Motors Ltd.* v. *Simons*, (1928) 3 W.W.R. 621.

(Note—Liens of different classes are dealt with under the various titles set out hereunder.)

See ADMIRALTY.

See AGENTS.

See BAILMENT.

See BANKS AND BANKING.

See BROKERS.

See CARRIERS.

See COMPANIES.

See CONTRACTS.

See EXECUTION.

See INNKEEPERS.

See JUDGMENT.

See LANDLORD AND TENANT.

See MECHANIC'S LIEN.

See MORTGAGE.

See MUNICIPAL CORPORATIONS.

See SALE OF GOODS.

See SOLICITORS.

See SUCCESSION DUTY.

See TAXATION.

See TOWAGE.

See WAREHOUSEMEN.

See WOODMAN'S LIEN.

LIEN NOTE.

See SALE OF GOODS.

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTIONS.

I. IN GENERAL, 677.
II. SPECIAL STATUTE, 678.
A. Railways, 678.
B. Municipal corporations, 679.
C. Forest Act, 681.
D. Public School Trustees, 681.
E. Officers of the Court, 682.
F. Water Act, 682.
G. Income tax, 682.
H. Winding-up Act, 682.
III. ACKNOWLEDGMENT, 683.

I. IN GENERAL.

1. Navigable waters—Obstruction of access to.]—An action for damages sustained by reason of the illegal obstruction of access to navigable waters by a railway company must be brought within one year from the completion of the obstruction. *Westholme Lumber Company, Limited* v. *Grand Trunk Pacific Railway Company*, (1918) 25 B.C.R. 343; 41 D.L.R. 42; (1918) 2 W.W.R. 551; 25 C.R.C. 136; Affg. (1916) 23 B.C.R. 323; (1917) 1 W.W.R. 170.

2. Guarantee.]—The wife of the maker of certain promissory notes guaranteed that the husband would pay, the guarantee being given after the liability of the husband was overdue. The guarantee was signed on the 26th of October, 1915, and this action was commenced on the 26th of October, 1921:—Held, that the action was in time and the plaintiff entitled to succeed. *Royal Bank of Canada* v. *Humphreys*, (1922) 31 B.C.R. 81.

3. Land—Uninterrupted possession for twenty years — Tax sale.] — When the plaintiff is in undisputed possession of land for 20 years a tax sale within that period will not interrupt the possession, if the period of twenty years is completed before the expiry of the period of redemption from tax sale. *McIntyre* v. *Haynes*, (1925) 35 B.C.R. 40; (1925) 2 D.L.R. 546; (1925) 1 W.W.R. 881.

4. Trespass and conversion.]—In an action for trespass where the question arises as to whether any trespass took place within the statutory limitation period, it is misdirection to charge the jury to ignore the Statute of Limitations unless questions are put to the jury from which it may be ascertained whether they find that any trespass took place within the necessary time. *Hughes* v. *Beban*, (1927) 39 B.C.R. 132; (1928) 1 D.L.R. 244; (1928) 1 W.W.R. 35.

5. Civil remedy—Concurrent criminal prosecution.]—A civil remedy for any act or omission is not affected by reason of the fact that such act or omission amounts to a criminal offence. *Standard Bank* v. *Shuen Wah*, (1919) 26 B.C.R. 441; (1919) 1 W.W.R. 586.

6. Constructive trust.]—The Statute of Limitations does not apply to a constructive trust arising from the receipt of property by one person on behalf of another. *Mattice* v. *Mattice*, (1925) 34 B.C.R. 474; (1925) 1 D.L.R. 755; (1925) 2 W.W.R. 203.

7. Actions by the Crown.]—The Act of 9 Geo. III., cap. 16 (Imp.) providing a limitation of actions by the Crown to recover property after sixty years' adverse possession is in force in British Columbia by virtue of the ~~Land Registry Act~~ Statute of Limitations. *Attorney-General for Canada* v. *Gonzalves*, (1924) 34 B.C.R. 360 at 389; (1924) 4 D.L.R. 474; (1925) 1 W.W.R. 180; (1926) 1 D.L.R. 51. *Attorney-General for Canada* v. *Cummings*, (1924) 34 B.C.R. 433; (1926) 1 D.L.R. 52.

II. SPECIAL STATUTE.

A. Railways.

1. Negligent construction — Railway Act.]—The negligent construction of a culvert obstructing the flow of a natural watercourse and causing the flooding of lands is a continuing cause of action arising from time to time as damage is done, and the limitations under sec. 267 of the Railway Act (B.C.), 1911, cap. 44, will not begin to run until after one year after the doing or committing of such damage ceases. *McCrimmon* v. *B.C. Electric Railway Co.*, (1915) 22 B.C.R. 76; 24 D.L.R. 368; 32 W.L.R. 81; 8 W.W.R. 1289; 19 C.R.C. 329.

2. Navigable waters — Obstruction to railway company—When action arises.]—Sec. 306 of the Railway Act applies to an action for damages owing to the illegal obstruction of access to the sea by a railway company, and it must be brought within one year from the completion of the obstruction. *Westholme Lumber Co.* v. *Grand Trunk Pac. Ry. Co.*, (1918) 25 B.C.R. 343; 41 D.L.R. 42; (1918) 2 W.W.R. 551; 25 C.R.C. 136.

3. Consolidated Railway Company's Act — Damages for personal injury.]—An action against a street railway company to recover damages for injury to a person, who was not a passenger, while crossing the street, is one for "damages or injury sustained by reason of the tramway or railway, or of the works or operations of the company" within the meaning of sec. 60 of the Consolidated Railway and Light Act, 1896, and is barred unless commenced within six months. *Viney* v. *B.C. Electric Ry. Co.*, (1923) 32 B.C.R. 468; (1923) 4 D.L.R. 159; (1923) 3 W.W.R. 329.

4. Consolidated Railway Company's Act—Damages to property.]—The statutory obligation of an electric railway company to supply lighting to customers within a certain distance of the company's lines makes its negligence in allowing a dangerous current to set fire to the customer's premises one in relation to the works or operations of the defendant, and the customer's action therefor must be brought within the period of limitation which is provided for that class of action by its special Act. *Union Assurance Co.* v. *B.C. Electric Ry. Co.*, (1915) 21 B.C.R. 71; 21 D.L.R. 62; 30 W.L.R. 717; 8 W.W.R. 327.

5. Consolidated Railway Company's Act —Injury to passenger.]—An action based upon the company's duty to carry passengers in safety is included in "actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway or the works or operations of the company" as set forth in sec. 60 of the Consolidated Railway Company's Act, 1896, and must be commenced within six months after the cause of action arises. *Pribble* v. *B.C. Electric Ry. Co.*, (1926) A.C. 466; 95 L.J., P.C. 51; 134 L.T. 711; 42 T.L.R. 332; (1926) 2 D.L.R. 865; (1926) 1 W.W.R. 786.

B. Municipal Corporations.

1. Expropriation of land—Proceedings to determine compensation.] — Land is taken by a municipality when plans and specifications are filed and notice to treat is served in pursuance of sec. 399 of the Municipal Act. An application to appoint an arbitrator is merely a step in the statutory proceedings to determine compensation and not an "action" within the meaning of sec. 513 of the Municipal Act, barring actions against a municipality if not commenced within one year. *Hanna* v. *City of Victoria*, (1916) 22 B.C.R. 555; 27 D.L.R. 213; 34 W.L.R. 307; 10 W.W.R. 457; Affg. (1915) 24 D.L.R. 889; 32 W.L.R. 916; 9 W.W.R. 761.

2. Municipality — Defective drains— Action respecting.]—When a municipality permits water to escape from its drains an action for damages against the municipality by the owner of lands injuriously affected thereby may be commenced within one year after the cause of action arises pursuant to sec. 485 of the Municipal Act, 1914, and the limitation contained in sec. 484 of the Act does not apply. *Kilby* v. *Municipality of Point Grey*, (1917) 24 B.C.R. 107; (1917) 2 W.W.R. 206.

3. Trespass by Municipality—Exercise of powers.]—The Corporation of the City of Victoria purchased land for the purpose of widening a street and received a deed therefor but failed to register the deed. The land was subsequently mortgaged without notice to the mortgagee of the City's deed. The City's workmen proceeded to remove fences and shrubbery and constructed a sidewalk on the land which it had purchased. In an action brought by the City against the mortgagee the latter's title was upheld. The mortgagee then brought action to compel the City to remove the sidewalk and restore the property to its original condition, for an injunction and damages for trespass:—Held, that the mortgagee's action not having been commenced within six months after the cause of action arose, was barred by sec. 484 of the Municipal Act, as the City might lawfully have expropriated the land. *Cameron Investment Co. & Bailey* v. *City of Victoria*, (1920) 3 W.W.R. 1043.

4. Invalid assessments.]—The limitation of actions provided for by secs. 484 and 485 of the Municipal Act does not apply to prevent an action to restrain tax sale proceedings under invalid assessments, as the assessments, not interfering with the use and occupation of the premises, could in the meantime be ignored as nullities. *Bishop of Vancouver Island* v. *City of Victoria*, (1920) 28 B.C.R. 533; 54 D.L.R. 615; (1921) 2 A.C. 384; 90 L.J.P.C. 213; 59 D.L.R. 399; (1921) 3 W.W.R. 214.

5. Municipal corporation—Action for negligence—Families Compensation Act.] —Sec. 484 of the Municipal Act, 1914, limiting the time within which actions may be brought against a municipality to six months pertains to the unlawful performance by a municipality of anything purporting to have been done under authority con-

ferred by legislation. Claims for compensation under the Families Compensation Act may be properly instituted if commenced within twelve months after the death of the husband or father. *Smith* v. *Corporation of South Vancouver and Corporation of the Township of Richmond*, (1922-3) 31 B.C.R. 168, 481; (1923) 2 D.L.R. 535; (1923) 1 W.W.R. 417.

6. Action by municipality—Arrears of taxes.]—An action by a municipality to recover taxes in arrears is not barred by sec. 227 of the Vancouver Incorporation Act, 1921. That section which provides a limitation of action "against any person for anything done in pursuance of this Act" is one of a fasciculus secs. 226 to 234—entitled "actions and judgments against the City" and a perusal of all of them shews that they are a weapon of defence and remedy for the City and not of attack against it. *City of Vancouver* v. *Richmond*, (1928) 40 B.C.R. 170; (1928) 4 D.L.R. 506; (1928) 3 W.W.R. 166.

C. Forest Act.

Recovery of expenses.]—An action for the recovery of expenses incurred in fighting a fire, under the Forest Act, 1918 (B.C.), cap. 44, sec. 12, is an action for a penalty, and is therefore barred in six months under the Interpretation Act, R.S.B.C. 1911, cap. 1, sec. 32. *Attorney-General for B.C.* v. *Freeman*, (1924) 2 D.L.R. 99.

D. Public School Trustees.

Public Schools Act—Action of negligence.]—Under sec. 81 of the Public Schools Act no action shall be brought against any school trustee unless within three months after the act committed, etc. The plaintiff then 14 years old suffered injury by an explosion from chemicals used in experiments in chemistry at a high school. The plaintiff reached his majority in November, 1927, and brought action against the school trustees in April, 1929:—Held, that the action was barred by sec. 11 of the Statute of Limitations. *Duncan* v. *The Board of School Trustees of Ladysmith*, (1930) 43 B.C.R. 154; (1931) 1 D.L.R. 176; (1930) 3 W.W.R. 175.

E. Officers of the Court.

County Court Act—Sheriff—Wrongful seizure.]—A sheriff seizing goods under a writ of fi. fa. is not acting as agent for the execution creditor but in his ministerial capacity as an officer of the Court, and an action against him in a County Court for damages for wrongful seizure under execution must be brought within three months as set forth in sec. 171 of the County Courts Act after due notice as provided in sec. 172 of the Act. *Ballantyne* v. *McCulloch*, (1927) 39 B.C.R. 97; (1927) 4 D.L.R. 525; (1927) 3 W.W.R. 148.

F. Water Act.

Negligence in clearing land for right-of-way.] — Where a company deriving its powers from the Water Act during the operation of clearing land for right-of-way for a power transmission line allows fire to spread through the property of another an action for damages for the resulting loss is barred by the limitation contained in sec. 30 of the Water Act unless notice of action has been given to the Attorney-General within six months next after the damage was suffered. *Vogel* v. *Vancouver Island Power Co.*, (1926) 37 B.C.R. 194; (1926) 2 D.L.R. 969.

G. Income Tax.

Income tax—Failure to file return.]—The limitation of prosecution for failure to file a return for income tax purposes is two years under the Inland Revenue Act, R.S.C. 1906, cap. 51. *Rex* v. *Meehan*, (1924) 2 W.W.R. 1231; (1924) 3 W.W.R. 305.

H. Winding-up Act.

Company — Contributory.] — The liability of a contributory to pay for shares under the Winding-up Act commences on the day when a call is made and until that time the Statute of Limitations does not begin to run against the company. *In re Johnston Bros. Ltd.*, (1920) 29 B.C.R. 183.

III. ACKNOWLEDGMENT.

Unconditional acknowledgment.] — The law implies a promise to pay where the acknowledgment of a debt is unconditionally sufficient to take the debt out of the Statute of Limitations. *Bank of Vancouver (In Liquidation)* v. *Kennedy*, (1919) 3 W.W.R. 51.

See CRIMINAL LAW.
See EQUITY.
See MECHANIC'S LIEN.
See MORATORIUM.
See MUNICIPAL CORPORATIONS.
See POSSESSION.
See RAILWAYS.
See WAR LEGISLATION.
See WOODMAN'S LIEN.

JUDICIAL OFFICERS.

Advice by Attorney-General.]—Where a magistrate reserved his decision for the purpose of obtaining the opinion of the Attorney-General upon the construction of the statute, it was held that while the Attorney-General may properly advise executive officers of the Government, he should not be appealed to for advice by judicial officers. *Rex* v. *Dobie*, (1921) 29 B.C.R. 188; 57 D.L.R. 290; (1921) 1 W.W.R. 723; 35 C.C.C. 10.

See CERTIORARI.
See COURTS.
See CRIMINAL LAW.

JUVENILE DELINQUENTS.

See CRIMINAL LAW.

LOCAL JUDGES

See COURTS.

LUNATICS.

1. Contract by insane person.]—When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about. *Moore* v. *Confederation Life*, (1918) 25 B.C.R. 465; (1918) 2 W.W.R. 895.

2. Homicide — Inheritance by lunatic guilty of.]—The rule that no one can profit by his own wrong or benefit by his criminal act does not apply to prevent an insane person who commits homicide from taking an inheritance from the person killed. *In re Mason*, (1916) 23 B.C.R. 329; 31 D.L.R. 305; (1917) 1 W.W.R. 329.

See CONTRACTS.
See CRIMINAL LAW.

MAGISTRATE.

See CERTIORARI.
See CRIMINAL LAW.
See PROHIBITION.
See COURTS, SMALL DEBTS.

MALICIOUS PROSECUTION.

REASONABLE AND PROBABLE CAUSE.

1. Solicitor's advice.] — Although the taking of counsel's advice is evidence in the defendant's favour in an action for malicious prosecution, it is not conclusive unless he can shew he had taken proper care to inform himself of all the facts. *Olds* v. *Paris*, (1918) 25 B.C.R. 453; (1918) 2 W.W.R. 682.

2. Information.]—Malice is sufficiently established in an action for malicious prosecution by proving that the defendant endeavoured to use the criminal Courts as a means for collecting a debt. *Ibid.*

3. Solicitor's advice.]—In an action for malicious prosecution if the defendant raises the defence that he consulted a solicitor

before instituting criminal proceedings it must be shewn that he took reasonable care to inform himself of the true state of the case. Improperly to utilize the criminal procedure in order to establish a civil right constitutes malice in an action for malicious prosecution. *Ibbotson* v. *Berkley*, (1918) 26 B.C.R. 156; (1918) 3 W.W.R. 1018.

4. Prosecution to establish civil rights.]—When the defendant threatened the plaintiff by telephoning that if a sum of money was not paid to him by ten o'clock on the following morning he would have him arrested it was with the idea that if he did not pay the money over he would resort to the police Court to redress the wrong done him; in doing so he rendered himself liable for damages for malicious prosecution. *Jones* v. *Eckley*, (1928) 40 B.C.R. 75; (1928) 2 D.L.R. 943.

5. Search warrant.]—Where a police officer upon receiving a message by telephone from an unknown person to the effect that liquor was being stored in a dwelling-house, and being instructed to investigate the charge, and without making a preliminary investigation procured a search warrant and searched the house without finding liquor a jury may reasonably infer malice as alleged, and he cannot escape liability for damages by virtue of sec. 73 of the Government Liquor Act unless he shews that he took reasonable care to inform himself of the facts and that he honestly believed that the charge laid before the magistrate was true and that he was not actuated by malice. *Manning* v. *Nickerson*, (1927) 38 B.C.R. 535; (1927) 3 D.L.R. 728; (1927) 2 W.W.R. 623; (1928) S.C.R. 91; (1928) 3 D.L.R. 494.

6. Search warrant.] — An informant known to the police complained to the chief of police that the plaintiff was illicitly dealing in liquor. An investigation was had but all reports were in the plaintiff's favour. Later the same informant telephoned the police office that a load of liquor was leaving for the plaintiff's place. The chief of police laid an information for a warrant to search the plaintiff's premises and the search was immediately made but no liquor was found:—Held, that in the absence of an invesigation the information was improperly laid and the absence of reasonable and probable cause would support a finding of malice. The Government Liquor Act does not change the law in connection with malicious prosecution. *Grady* v. *Devitt*, (1928) 40 B.C.R. 88; (1928) 1 W.W.R. 924.

7. Capias—Evidence of intention to leave Province.] — An applicant for an order for a writ of capias is required to prove first, that he has a cause of action, and secondly, that the debtor is about to leave the Province, and when he believes he has a bona fide claim (even although later it may be decided not to be well founded) and has correct information that the debtor is about to leave the Province, an action for malicious prosecution will not lie. *Dansey* v. *Orcutt*, (1928) 40 B.C.R. 97; (1928) 4 D.L.R. 27.

8. Jury — Question of fact.]—In an action for malicious prosecution the burden of proof as to all issues arising therein lies on the plaintiff, and it is the duty of the judge to determine the issue of reasonable and probable cause, but he should submit to the jury questions respecting any facts upon which the evidence conflicts. *Perry* v. *Woodward's, Limited*, (1929) 41 B.C.R. 404; (1929) 4 D.L.R. 751; (1929) 3 W.W.R. 49.

9. Informant—Reasonable care—Honest belief.]—Want of reasonable and probable cause and malice must occur in order to sustain an action for malicious prosecution. Where a defendant takes reasonable care to inform himself of the facts of the case and honestly believes in the case which he laid before the magistrate, the action should be dismissed. *Green* v. *Harry*, (1929) 41 B.C.R. 433; (1929) 4 D.L.R. 410.

10. Malice.]—Where a defendant gave the plaintiff the keys of his automobile for the purpose of examining it and trying the engine, the plaintiff at the same time giving the defendant his telephone number, and after the car had been taken out of the defendant's garage and driven for a short time by the plaintiff it was damaged and the defendant caused the plaintiff to be arrested for theft of the car, it was held that the defendant acted without reasonable and probable cause and malice must be inferred from the circumstances. *Metcalfe* v. *Stewart*, (1930) 42 B.C.R. 96 ;(1930) 1 D.L.R. 1001.

11. Committal for trial.]—In an action for malicious prosecution the law in this Province does not, at most, go further than to allow the action of the committing magistrate to be considered as one element in the decision by the trial judge on the question of the existence of reasonable and probable cause. *Hall* v. *Geiger*, (1930) 43 B.C.R. 116; (1930) 3 D.L.R. 854; (1930) 2 W.W.R. 794.

MANDAMUS.

1. Discretion.]—The granting or refusing of a mandamus is a matter of discretion. *In re Pioneer Savings & Loan Society and the Registrar of Companies*, (1928) 39 B.C.R. 372; (1928) 1 D.L.R. 830; (1928) 1 W.W.R. 361.

2. Alternative remedy.] — A writ of mandamus will not be granted where there is an alternative remedy that is equally convenient, beneficial or effective nor will a mandamus lie when the issue of the writ would be ineffectual. *In re McKay and the City of Vancouver*, (1917) 24 B.C.R. 298; (1917) 3 W.W.R. 447.

3. Court of Revision.]—Mandamus will not be granted to compel members of a Court of Revision to review their decision on an appeal from an assessment when they have considered the evidence before them and honestly applied their minds to the decision of the case under the provisions of the Act giving them jurisdiction. *In re Charleson Assessment*, (1915) 21 B.C.R. 281; 22 D.L.R. 240; 31 W.L.R. 309; 8 W.W.R. 930.

4. Court of Revision.]—A Court of Revision of a municipality is a judicial body and the Court of Appeal cannot review its proceedings in the sense of inquiring into the correctness of the Court's conclusions. If mandamus will lie at all to the Court of Revision it will only lie when it is made to appear that the Court has refused to hear and determine the complaint. *Fletcher* v. *Wade*, (1919) 26 B.C.R. 477; 45 D.L.R. 91; (1919) 2 W.W.R. 1.

5. Officers of the Crown—Collector of Customs.]—An application for a prerogative writ of mandamus directing a collector of Customs to allow the warehousing of certain whisky, was refused on the ground that the collector in refusing the entry was acting as a servant of the Crown and as such was amenable to the Crown, and therefore was not amenable to the Court in the exercise of its prerogative jurisdiction. *In re Carey and Western Canada Liquor Company, Ltd.*, (1920) 3 W.W.R. 329.

6. Commissioner appointed by Order-in-Council.] — Mandamus is an extraordinary remedy and ought not to be applied unless there is real necessity therefor; and where it appeared that a commissioner appointed by the Lieutenant-Governor-in-Council under the Corporation of the District of South Vancouver Administration Act, cap. 82, of 1918, to have the management and control of said municipal corporation, had filed in the office of the County Court the by-laws passed by him during his tenure of office, mandamus to compel production of such by-laws for inspection of ratepayers was refused. If the by-laws had not been registered in the office of the County Court and there was no obligation to do so in the case of the commissioner mandamus would be the ratepayers' proper remedy. *In re Gillespie and Cotsworth. In re Corporation of the District of South Vancouver*, (1920) 28 B.C.R. 494; 54 D.L.R. 144; (1920) 3 W.W.R. 440.

7. County Court judge.] — Mandamus will not lie to compel a County Court judge to try again an action which he has already dismissed on the grounds that he has no jurisdiction. *Conds* v. *Kabota*, (1925) 35 B.C.R. 506; (1925) 3 D.L.R. 376; (1925) 2 W.W.R. 620.

8. County Court judge—Speedy trial.] —Where an accused is charged with having opium in his possession contrary to sec. 4 (d) of the Opium and Narcotic Drug Act and the offence is proved on speedy trial but he is convicted of the minor offence of smoking opium under sec. 10 of the Act, mandamus should issue directing the County Court judge to proceed with and conclude the trial with an order for the arrest of the accused as the judge should convict under sec. 4 (d) and not reduce or substitute an offence under other sections of the Act. *Rex* v. *Wong Sack Joe*, (1929) 41 B.C.R. 354.

9. Superintendent of insurance — Discretion.]—Mandamus will lie to compel the superintendent of insurance to issue a licence to an insurance company notwithstanding the fact that the company has written most of its policies upon motor cars in which another company having the same shareholders as the insurance company has lent money, as this is not an indication of bad faith under the Insurance Act, 1925. *In re All Risk Insurance Agencies*, (1927) 38 B.C.R. 532; (1927) 3 D.L.R. 245; (1927) 3 W.W.R. 58.

10. Legal Professions Act—Application for entry as applicant for call—Refusal by Benchers.]—The Court will not grant a mandamus to compel the Benchers of the Law Society to admit an individual as a member of the Society with a view to his qualifying himself to be called to the Bar. *In re Hagel and The Law Society of British Columbia*, (1922) 31 B.C.R. 75.

11. Municipal corporation — Contract Undertaking of counsel.]—An action by a contractor for the construction of municipal water works having been dismissed, but matters of account remaining to be settled, counsel for the corporation undertook that any question which would have been left with the city engineer by the contract should be referred to an independent engineer. The parties having agreed on the latter, a dispute arose concerning the progress estimates under the contract. Upon appeal from a mandamus to compel the city to proceed with the reference before the engineer agreed upon, it was held that neither the contract nor the undertaking contained any provision for a reference to the engineer or to anyone else in the broad terms of the order. It was the city's water commissioner who under the contract was to account to the plaintiff, and while incidentally the engineer might be called upon to decide matters referred to him by the contract for his decision, that fact did not justify an order for a mandamus in the absence of an allegation that some concrete question which ought to have been submitted for his decision had not been so submitted. *Westholme Lumber Co., Ltd.* v. *The City of Victoria,* (1920) 28 B.C.R. 81; 61 D.L.R. 371.

MARKETING ASSOCIATIONS.

1. Contract with producer—Injunction to restrain breach of.]—Where a milk vendor contracts to sell and supply to a marketing association all the milk and cream produced from his dairy for sale for a period of three years and the contract contains a covenant that the vendor will pay a certain sum as liquidated damages in case of breach thereof the Court will not grant an injunction to restrain the breach and the proper action is for damages and not specific performance. *Vancouver Island Milk Producers Association* v. *Alexander,* (1922) 30 B.C.R. 524.

2. Contract with producer—Agency.]—Where a contract between a fruit-grower and certain associations for the marketing of the grower's whole crop is held to be merely a contract of agency, it cannot be enforced by injunction or receivership. When a number of fruit-growers each has his own separate contract with the marketing associations and the growers are not parties to any agreement among themselves, there cannot be held to be a co-operative arrangement between the growers and the associations. *Kelowna Growers Exchange* v. *De Cagueray,* (1922) 31 B.C.R. 347; 70 D.L.R. 865; (1922) 3 W.W.R. 1115.

3. Restraint of trade.] — A contract between a marketing company and a grower of fruits and vegetables under which the latter agrees to deliver all his products to the company for marketing is not illegal as being in restraint of trade. *Associated Growers of British Columbia* v. *British Columbia Fruit Lands, Ltd.,* (1925) 34 B.C.R. 533; (1925) 1 D.L.R. 871; (1925) 1 W.W.R. 505.

4. Independent dealer — Interference with legal right by association.]—A milk producers association comprising a majority of dairy farmers in a district has no right to interfere with and destroy any contractual relationship existing between an independent dealer and farmers supplying it with milk, and the dealer is entitled to a perpetual injunction preventing any such interference. *J. M. Steeves Dairy, Ltd.* v. *The Twin City Co-operative Milk Producers' Association,* (1925) 36 B.C.R. 286; (1926) 1 D.L.R. 130; (1926) 1 W.W.R. 25.

5. Contract for exclusive sale—Formation of company—Evasion of contract.]—Where a farmer enters into a contract with a marketing association to sell to the association all fruit and vegetables to be grown on his farm for a period of years, the contract containing a clause to the effect that if the farmer should sell and transfer the lands in good faith and give notice thereof to the association the agreement would be cancelled, and the farmer procured the incorporation of a company to which the lands were transferred: — Held, that although the transfer should be regarded as a mere scheme to evade observance of a contract solemnly entered into, the title of the land passed to the company with rights and liabilities governed solely by the Companies Act and its own articles. The company is not an alias for the farmer and the relationship of principal and agent or trustee and cestui que trust does not subsist between them. *Associated Growers of British Columbia Limited and Kelowna Growers Exchange* v. *Edmunds and Byzant Orchards, Ltd.,* (1926) 36 B.C.R. 413; (1926) 1 D.L.R. 1093; (1926) 1 W.W.R. 535.

6. Contract for exclusive sale—Refusal of lessor to grant leave—Duty of lessee.]—Where the defendant enters into a contract with a marketing association whereby

she agrees to market all her fruit and vegetables with the association, and later enters into a lease of additional land adjoining her farm and the lessor refuses to give the defendant leave to market her fruit and vegetables in accordance with her contract, it is the defendant's duty to obtain the lessor's consent for the sale of her produce to the association, and the latter is entitled to specific performance of the agreement and an injunction to restrain the defendant from selling elsewhere. *Associated Growers of British Columbia Limited and Keremeos Growers Co-operative Association* v. *Roddick*, (1926) 36 B.C.R. 475.

7. Produce Marketing Act — Levy for expenses.]—By sec. 3 of the Produce Marketing Act of British Columbia (1926-1927), cap. 54 a "Committee of Direction" was constituted, with the exclusive power to control and regulate (under the Act) the marketing of all tree fruits and vegetables . . . being products grown or produced in that portion of the Province contained within" boundaries therein specified. By sec. 10 (1) it was provided that, "for the purpose of controlling and regulating, under this Act, the marketing of any product within its authority the Committee shall, so far as the legislative authority of the Province extends, have power to determine at what time and in what quantity, and from and to what places, and at what price the product may be marketed, and to make orders and regulations in relation to such matters." By sec. 10 (k), the committee was also given the power "for the purpose of defraying the expenses of operation, to impose levies on any product marketed." By subsec. 3 of sec. 16, as enacted by the Amendment Act of 1928, cap. 39, it was provided that "the committee may fix license fees to be paid by shippers":—Held, that this legislation is ultra vires of the Provincial Legislature. Per Duff, Newcombe, Rinfret and Lamont, JJ.: Such legislation is referable to the exclusive Dominion power to regulate trade and commerce (sec. 91 (2), B.N.A. Act). The provisions of the statute, which authorize the committee to impose levies and to fix license fees are ultra vires, the levy not being within sec. 92 (2) and the license not being within sec. 92 (9) of the B.N.A. Act. Per Cannon, J.: The levy is an export tax falling within the category of duties of customs and excise and, as such, as well as by reason of its inherent nature as an indirect tax, could not competently be imposed by the Provincial Legislature. Per Newcombe, J.: Legislation not coming within the definition of property and civil rights or private and local matters in the Province, is clearly incompetent to the Legislature. *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction*, (1931) S.C.R. 357; (1931) 2 D.L.R. 193; Revg. (1930) 42 B.C.R. 493; (1930) 4 D.L.R. 1027; (1930) 2 W.W.R. 23.

8. Produce Marketing Act—Powers of Province.]—An Act designed to regulate and control the marketing of certain farm produce under which a committee is given power to fix the quantity of produce which may from time to time be marketed and the minimum and maximum prices to be obtained is intra vires the Provincial Legislature. The marketing of produce is a trade or business carried on within the Province and the local Legislature in imposing restrictions upon it is dealing with the property and civil rights of individuals within the Province and because it affects trading in the products of the farm, or even regulates that domestic operation it is not "regulation of trade and commerce" as contemplated by sec. 91 (2) of the British North America Act. The grower is prevented by the Act from taking orders for the sale of produce within or without the Province without written permission, a transaction with a purchaser outside the Province being simply subsidiary and incidental to the main purposes of the Act which deals with "property and civil rights" and refers to matters "of a merely local or private nature in the Province." It cannot lose that character and be regarded as legislation dealing with "the regulation of trade and commerce" whether the produce shipped is contracted for within or without the Province. *Rex* v. *Chung Chuck*. *Rex* v. *Wong Kit*. *Rex* v. *Sales Service Ltd*. *Rex* v. *Associated Growers of B.C.*, (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R. 394; 51 C.C.C. 260. Appeal refused, (1929) 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129; 53 C.C.C. 14.

9. Produce Marketing Act — Crown costs.]—The provisions of the Produce Marketing Act, 1926-1927, cap. 54, do not modify or affect the provisions of the Crown Costs Act, 1924. *Rex* v. *Christian Community of Universal Brotherhood Ltd.*, (1931) 1 W.W.R. 255.

10. Committee of direction—Personal liability of sole member.] — Where an action is brought by a committee of direction appointed under the provisions of the

Produce Marketing Act, the committee consisting of a sole member, the latter is the real party to the action although he has chosen to sue in the name of the committee and he is personally liable for the costs if the action fails. *Mainland Potato Committee of Direction* v. *Tom Yee*, (1931) 43 B.C.R. 453; (1931) 1 D.L.R. 990; (1931) 1 W.W.R 529.

11. Sale of fruit—Market price indefinite.]—Where a fruit grower agrees in writing to sell the crop of fruit in his orchard for a period of several years the price being "the market price of such fruit in each year" the parties are not ad idem as to the market price and have not arrived at a contract in terms of which specific performance can be decreed but the vendor is entitled to recover a reasonable price for the goods sold. *Kidston* v. *Stirling & Pitcairn*, (1920) 61 S.C.R. 193; 55 D.L.R. 366; (1921) 1 W.W.R. 162.

MANSLAUGHTER.

See CRIMINAL LAW.

MARINE INSURANCE.

See INSURANCE.

MARRIAGE.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

I. CREATION OF THE RELATION, 694.
A. *Formation of contract creating the relation*, 694.
B. *Duration and termination of contract*, 696.
II. REMEDIES FOR BREACH OF CONTRACT, 698.
A. *Breach by master*, 698.
B. *Breach by servant*, 698.
III. MINIMUM WAGE ACT, 699.
IV. MALE MINIMUM WAGE ACT, 700.
A. *Occupations to which Act applies*, 700.
B. *Establishing scale of wages*, 700.
V. LIABILITY OF MASTER IN CASE OF ACCIDENT OR DEATH, 701.
A. *Master's duty at common law*, 701.
1. Plant — Machinery — Place of work, 701.
2. System, 702.
3. The doctrine of common employment, 703.
B. *Employers' Liability Act*, 703.
1. Employments within the Act, 703.
2. Defective ways, works, machinery and plant, 703.
3. Negligence of superintendent, 704.
C. *Workmen's Compensation Act*, 705.
VI. LIABILITY OF MASTER TO THIRD PERSONS, 708.
VII. LIABILITY OF MASTER UNDER PENAL STATUTE, 709.

I. CREATION OF THE RELATION.

A. *Formation of Contract Creating the Relation.*

1. Cannery company and fisherman.]—Where a contract is fundamentally a contract for the sale of goods, the nature of the contract is not changed to one of employment, because by its terms the seller submits to a measure of control by the buyer. *Salo* v. *Anglo-B.C. Packing Co. Ltd.* (1929) 40 B.C.R. 481; (1929) 1 D.L.R. 874; (1929) 1 W.W.R. 385.

2. Percentage of profits—Account.]—Where a contract of employment provides for salary at a percentage of net profits computed semi-annually and an account is taken not for a semi-annual period, such an account must be taken to be a settlement up to that time unless it is merely an approximation. A loss in one period cannot be set off against the net profits in other periods so as to make the servant repay salary already paid to him. *Allison* v. *Standard Lumber Co. Ltd.*, (1924) 34 B.C.R. 257; (1924) 4 D.L.R. 465; (1924) 3 W.W.R. 481.

3. Medical attendance upon employees.]—The request of 30 or more workmen under the Master and Servant Act, that the master deduct from their wages a sum to be

paid to a medical officer for attendance upon them, affects only those who make it and the employer, It does not bind the others, and the procedure provided by the Act must be followed in order to have its sanction, and there is nothing in the Act making any arrangement binding for any specific period. Where the certificate of the chairman and secretary of the meeting given under sec. 13 (1) states that the requisitionists were present either in person or by proxy then in the absence of evidence to the contrary the legality of the meeting in that respect should be presumed especially where by the issue the onus of proof is on the party objecting to its legality. When the procedure has been taken under the Act pure technical objections as to the procedure ought not to prevail when a clear and unequivocal mandate is apparent calling for the application of the statutory privilege accorded the workmen, which in its essence means that they should have the attention of a medical practitioner of their own choosing and that their money should go to that one only. *Hall* v. *Lane*, (1923) 31 B.C.R. 507; (1923) 1 D.L.R. 903; (1923) 1 W.W.R. 545. *See* (1923) 32 B.C.R. 343; (1923) 2 D.L.R. 1151; (1923) 2 W.W.R. 442.

4. Voluntary contract of service—Employment for life in lieu of damages.]—Where an employer agrees to give employment for life in consideration of an employee's forbearance to sue for damages resulting from an accident sustained in the course of his employment, the contract is not a voluntary contract of service within sec. 2 of the Master and Servant Act, and is therefore enforceable after nine years from its date. *Charlton* v. *The British Columbia Sugar Refining Co. Ltd.*, (1924) 34 B.C.R. 408; (1924) 4 D.L.R. 1182; (1925) 1 W.W.R. 546.

5. Employment agencies.] — The provisions of sec. 3 of the Employment Agencies Act Repeal Act of British Columbia, 1919, cap. 26, are aimed at the collection of fees from employers as well as from employees, the purpose of the Act being to prevent the exploitation of the working-man. The fact that sec. 3 of the Employment Agencies Act Repeal Act Amendment Act, 1921, provides that "employment agencies" shall furnish certain periodical reports, does not imply a repeal of sec. 3 of cap. 26, 1919. Such agencies may exist but they must make no charge against either employer or employee for bringing them together. *Rex* v. *Joy*, (1923) 3 W.W.R. 214.

6. Bailiff.]—A bailiff employed by the vendor of a motor car to seize the car upon default in payment under a conditional sale agreement is an independent contractor and not a servant of the vendor. *Roman* v. *Motorcar Loan Co. and Burns*, (1930) 42 B.C.R. 457; (1930) 3 D.L.R. 296; (1930) 1 W.W.R. 775.

7. Motor dealer and salesman.]—The relationship between a dealer in motor cars and salesman who takes out the dealer's car for the purpose of demonstrating it to a prospective purchaser, and who is to be paid a commission if a sale results, is not that of master and servant but of principal and agent. *Katz* v. *Consolidated Motor Co., Ltd. and Thomson*, (1930) 42 B.C.R. 214; (1930) 2 D.L.R. 241; (1930) 1 W.W.R. 305.

8. Contract of employment—Sunday.]—The employment of a manager by the owners of a dairy farm by agreement entered into on a Sunday is a transaction in connection with the ordinary calling of the employers and within the prohibition of the Lord's Day Act. Although it is not pleaded the Court may take cognizance of the statute and raise the point ex mero motu. *Lister* v. *Burns & Co., Ltd.*, (1931) 43 B.C.R. 468; (1931) 3 D.L.R. 105; 55 C.C.C. 197.

B. Duration and Termination of Contract.

1. Wages in lieu of notice.]—A discharged servant is not entitled to wages in lieu of notice if he fails to comply with the requirements of the law in seeking other employment. *Pratt* v. *Idsardi*, (1915) 21 B.C.R. 497; 23 D.L.R. 257; 31 W.L.R. 541.

2. Wages with transportation expenses.] Where a servant employed with a survey party by the defendant at monthly wages with board and transportation leaves the defendant's service of his own accord he cannot recover the cost of transportation. *Ibid.*

3. Summary dismissal for cause—Set-off by master.]—Where an employee hired at a monthly salary was dismissed at the end of a month owing to his failure to account for money of his employer which came into his hands, it was held that he was entitled only to his salary for the completed month and not to wages in lieu of notice as his failure to account was a good ground for his dismissal without notice and the employer was entitled to set off the sum not accounted for. *Bahme* v. *Great Northern Ry. Co.*, (1916) 23 B.C.R. 484; (1917) 1 W.W.R. 1255.

4. Liquor Control Board.]—A remedy by way of mandamus against the Liquor Control Board based on a contract of hiring must be by application for a prerogative writ. *Castleman* v. *Johnson*, (1921) 30 B.C.R. 354; 70 D.L.R. 862; (1921) 3 W.W.R. 830.

5. Municipal servant—Fire captain.]—A captain of a city fire department is an employee of the city and subject to dismissal by the chief of the department and where the dismissal has been for cause after due inquiry and after confirmation by the city council, it is a due exercise of authority and an action for wrongful dismissal will not lie. *Zeigler* v. *City of Victoria*, (1921) 30 B.C.R. 389; 70 D.L.R. 722; (1922) 1 W.W.R. 75.

6. Monthly hiring—Absence through illness — Notice of termination.] — The plaintiff, a farm labourer, having been in the employment of the defendant for two years on a monthly hiring became ill and was taken to a hospital, remaining there for ten days, but did not return to his employment. After twenty-eight days' absence the defendant dismissed him on one day's notice:—Held, that he was entitled to full wages up to the date of his dismissal and for two weeks thereafter in lieu of notice, this being a reasonable notice in view of the circumstances. *Adams* v. *Burns*, (1925) 36 B.C.R. 217.

7. Dismissal of employee for acts outside his employment.]—An employer may dismiss an employee for acts done by him outside his employment, but the question as to what will justify such dismissal is one of fact depending on the circumstances of each case. Where an employee in charge of a fund provided by the employer and employees jointly for an annual picnic, negligently, but without any intention to misappropriate, used some of the fund for his own purposes, and afterwards repaid it, the employer was not justified in dismissing him. *Charlton* v. *The British Columbia Sugar Refining Co., Ltd.*, (1924) 34 B.C.R. 408; (1924) 4 D.L.R. 1182; (1925) 1 W.W.R. 546.

8. Dismissal procured by third party.]—When the dismissal of a servant by his employer is brought about by a third party, even when the third party's conduct in the matter is malicious, if it resulted in no legal wrong the servant has no cause of action. The defendant, who had a general contract, employed the plaintiff on the work but discharged him when the plaintiff used abusive language to the defendant and threatened him. The plaintiff then obtained employment by the hour with a sub-contractor on the same contract. The defendant then, on seeing the plaintiff at work, asked the sub-contractor to dismiss him. Owing to this the plaintiff's employment was discontinued by the sub-contractor who then gave the plaintiff a good certificate of character:—Held, that there was a violation of a legal right of the plaintiff to carry on his calling as a workman. This violation was committed knowingly and would give rise to a cause of action in case of insufficient justification for interference. On the evidence the trial judge rightly found that there was sufficient justification and the action was properly dismissed. *Divers* v. *Burnett*, (1930) 42 B.C.R. 203; (1930) 1 D.L.R. 930; (1930) 1 W.W.R. 150.

II. Remedies for Breach of Contract.

A. Breach by Master.

Wrongful dismissal — Fraud of employer.]—Where a contract of employment contained a clause providing that the employee's services would terminate on the happening of a certain event, and the employer by an untrue representation that such event has actually occurred induces the employee to give up his position, the latter is entitled to damages for wrongful dismissal. *Malcolm* v. *Western Canada Magic Silver Black Fox and Fur Co., Ltd.*, (1929) 41 B.C.R. 305; (1929) 4 D.L.R. 580.

B. Breach by Servant.

1. Soliciting customers of master.]—A servant is liable in damages to his master, when, in breach of his duty, while in the master's employment, and during the hours of service, he solicits for himself his master's customers. *Ice Delivery Co., Ltd.* v. *Peers and Campbell*, (1926) 36 B.C.R. 445; (1926) 1 D.L.R. 1176; (1926) 1 W.W.R. 595.

2. Soliciting customers of master—Injunction.]—An injunction will not be granted to restrain a former servant from soliciting his master's customers where the servant has made no list of such customers, but retains their names in his memory. *Ibid.*

3. Breach of duty—Right of third persons by reason of.]—Where the plaintiff, an employee of a merchant, under a contract to devote his entire time to his employer's business, and to refrain from dealing personally in any kind of goods dealt in by his employer and in breach of his duty enters into the purchase of certain goods at a price less than the market price therefor, his breach of duty to his employer will not preclude him from maintaining an action of damages for non-delivery of the goods where the defence of fraud and illegality has not been distinctly pleaded and proven. *Maddison* v. *Donald H. Bain, Ltd.*, (1930) S.C.R. 299; (1930) 1 D.L.R. 63; Affg. (1929) 40 B.C.R. 499; (1929) 1 D.L.R. 843; (1929) 1 W.W.R. 437.

III. MINIMUM WAGE ACT.

1. Incompetent employee.]—The defendant, a photographer, advertised for a first-class finisher. The plaintiff applied, and was given the position, but two days' employment proved her to be unfitted for that work. She continued on, however, in the outer office of the studio at other work as a probationer from the 1st of April and was paid $12 a week for the first month with a slight increase in each of the two following months and on the last day of June the defendant asked her to return to the studio for half a day on the 1st of July. She refused to do this, left the studio and did not return. In an action under the Minimum Wage Act:—Held, that she was not entitled to wages for the first two days as she presented herself as a first-class finisher when she was not competent for the work, that as a probationer in the outer office she was paid sufficient to comply with the Act and as she refused to return to the studio on Dominion Day and remained away altogether she was not dismissed and was not entitled to any wages in lieu of notice of discharge. *Eastley* v. *Charleston*, (1923) 33 B.C.R. 148.

2. Girls in training as hairdressers.]—Girls in course of training in a hairdressing school under competent instructors and paying fees for their tuition are within the meaning of the Minimum Wage Act, R.S.B.C. 1924, cap. 173, secs. 2 and 8 although credited with commissions on the moneys received from customers served by them. *Rex* v. *Kinnon*, (1925) 35 B.C.R. 531.

IV. MALE MINIMUM WAGE ACT.

A. Occupations to Which Act Applies.

1. Cook.]—The services of a cook employed in a lumber camp are incidental to the lumber industry and included in the occupations to which the Male Minimum Wage Act applies. *Compton* v. *Allen Thrasher Lumber Co.*, (1927) 39 B.C.R. 70; (1927) 3 W.W.R. 724.

2. Licentiates of pharmacy.]—Sec. 17 of the Male Minimum Wage Act, 1929, cap. 44, provides that the Act is to apply to occupations generally with the exception of those specifically mentioned in the section, and the occupation of a licentiate of pharmacy employed at a salary or for wages by a druggist is within the definition, although he may be the member of a profession. The governing intention of the Act is to assist those serving for remuneration, and as a remedial Act it should receive a liberal interpretation. *Davenport* v. *McNiven*, (1930) 42 B.C.R. 468; (1930) 4 D.L.R. 386; (1930) 2 W.W.R. 263.

B. Establishing Scale of Wages.

1. Order of Board — Limited to one industry.] — The Male Minimum Wage Board has power to establish a minimum wage for persons engaged in any one or more industries and vary the order from time to time without making a preliminary inquiry into wages subsisting in all the industries of the Province save those excepted by the Act. *Rex* v. *Robertson and Hackett Sawmills, Ltd.*, (1926) 38 B.C.R. 222; (1927) 2 D.L.R. 494; (1927) 1 W.W.R. 657; 47 C.C.C. 279.

2. Scale of wages.]—The intention of the Male Minimum Wage Act, 1925, is that the minimum is to be fixed by reference to the nature of the individual employee's work, and an order of the Board grouping employees according to industries does not carry out the intent of the Act and is ultra vires. *Field* v. *International Timber Co.*, (1928) S.C.R. 564; (1928) 4 D.L.R. 972.

3. Appeal.]—Where the Male Minimum Wage Board has made an order fixing a minimum scale of wages payable to employees of a specified industry or business and on petition to a judge of the Supreme Court to review, rescind or vary the order of the Board the judge dismisses the application to rescind, but directs that an appeal

should be heard on a later date as a rehearing de novo, an appeal from the order will be quashed as it was simply an adjudication made during the hearing of the petition. There can be no interlocutory appeal on interlocutory adjudications and the whole appeal brought by the petition to the Court below must be disposed of before an appeal can be taken to the Court of Appeal. *Merryfield & Dack* v. *The Male Minimum Wage Board and Davenport*, (1931) 44 B.C.R. 380.

V. LIABILITY OF MASTER IN CASE OF ACCIDENT OR DEATH.

A. Master's Duty at Common Law.

1. Plant: Machinery: Place of Work.

1. Absence of protective barriers.]—Failure of a master to erect permanent barriers for the safe protection of workmen engaged in excavation work on a sloping hillside is actionable negligence, notwithstanding the master's adoption of means of removing the loose rock and material likely to come down. *Bergklint* v. *Western Canada Power Co.*, (1915) 22 B.C.R. 241; 24 D.L.R. 565; 54 S.C.R. 285; 34 D.L.R. 467; (1917) 1 W.W.R. 1262.

2. Machinery in smelter.]—Where the machinery and supports were reasonably fit and proper for the purpose intended and the duties of the plaintiff consisted of looking after the said machinery and he was familiar with its operation over a period of years, he must be presumed to have undertaken to have relieved his employer from liability in the event of an accident and to have taken upon himself the risk without precaution, and even in the case of negilgence the defence of volens was available. *Meagher* v. *Granby Consolidated*, (1915) 24 D.L.R. 892; 32 W.L.R. 334; 9 W.W.R. 37.

3. Volenti non fit injuria.] — A farm labourer who while splitting firewood in his employer's shed received an injury alleged to have been caused by an accumulation of refuse in the shed is not entitled to damages in respect thereof having knowledge of the condition of the premises and impliedly consented to assume the risk. *McLean* v. *Bourcet*, (1929) 4 D.L.R. 359; (1929) 3 W.W.R. 44.

4. Volenti non fit injuria.]—There must be an assent on the part of the servant to accept the risk, with a full appreciation of its extent, to bring the servant within the maxim volenti non fit injuria. It is a question of fact and not of law whether the plaintiff voluntarily accepted the risk and the burden of proof is on the defendant. *Evans* v. *Hudson's Bay Co.*, (1930) 43 B.C.R. 81; (1930) 3 D.L.R. 951; (1930) 2 W.W.R. 718.

2. System.

1. Exposed gear.]—In the absence of express consent or agreement to take the risk without precautions, the question of volens is peculiarly one for the jury, and the Court of Appeal should only interfere where the evidence is of such a character that only one view can reasonably be taken of the effect of the evidence. *McPhee* v. *The Equimalt and Nanaimo Railway Company*, (1915) 22 B.C.R. 67; 23 D.L.R. 561; 32 W.L.R. 125; 8 W.W.R. 1319.

2. Statutory signals.]—Where a statutory standard of signals is adopted, but miscarries owing to an imperfection, it cannot be made a basis of a negligence action on the contention that the system should have been supplemented by another such as the speaking tube system. *Ganzini* v. *Jewel-Denero Mines, Limited*, (1915) 21 B.C.R. 317; 21 D.L.R. 406.

3. Storage of dynamite—Thawing.]—The verdict of a jury based on a reasonable conclusion from the evidence that injuries occasioned by an explosion in the course of mining operations had been caused by a defective system of storing and thawing powder cannot be disturbed on appeal. *Lilja* v. *The Granby Consolidated Mining, Smelting and Power Company, Limited*, (1916) 23 B.C.R. 147; 31 D.L.R. 591; (1917) 1 W.W.R. 243.

4. Inadequate inspection.] — In an action by a widow on behalf of herself and children for damages because of the death of her husband, the jury in answer to questions found that the deceased met his death as a result of the defendant's negligence and that the negligence consisted in "inadequate inspection, inadequate repairs":—Held, on appeal, that there was evidence of defect in the system of inspection and the answers read with the trial judge's charge and the evidence should be interpreted as a finding of an "inadequate system of inspection." *Dixon* v. *Canadian Collieries (Dunsmuir), Limited*, (1917) 24 B.C.R. 34; 55 S.C.R. 620; 39 D.L.R. 758; (1917) 2 W.W.R. 763.

5. Unlighted corridor — Defect in condition or arrangement of way.] — The plaintiff had been working for two weeks as a chambermaid on the first floor of a hotel of which the defendants were proprietors and at about 2.30 on the afternoon of the 22nd of December, 1925, after she had finished making up a room at the end of a corridor she walked out of the room and after taking about four steps fell over a man lying on the floor, breaking her arm and suffering other injuries. The corridor was fairly dark at the time and although there was an electric light in the ceiling at the middle of the corridor it was not lit. The man she fell over disappeared immediately after the accident. The jury found the defendants were negligent in not having the corridor properly lighted and awarded the plaintiff damages for which judgment was entered:—Held, on appeal, that in the circumstances of the case there were grounds upon which the jury might reasonably have found that there was negligence on the part of the defendants and the verdict should not be disturbed. *Booth* v. *Ford and Shaw*, (1927) 38 B.C.R. 279.

3. The Doctrine of Common Employment.

Negligence—Fellow servant.]—The verdict of a jury that an accident was due to the neglect and lack of proper supervision of the officer in charge, in not having a gang-plank on a ship sufficiently manned, will be set aside where the evidence is equally consistent with the occurrence being attributable to the impetuosity of one or more fellow servants. *Cleugh* v. *The Canadian Pacific Railway Company*, (1918) 25 B.C.R. 335; 40 D.L.R. 512; (1918) 2 W.W.R. 416.

B. Employers' Liability Act.

1. Employments Within the Act.

Seaman.]—The Employers' Liability Act does not apply to a seaman. *Cleugh* v. *The Canadian Pacific Railway Co.*, (1918) 25 B.C.R. 335; 40 D.L.R. 512; (1918) 2 W.W.R. 416.

2. Defective Ways, Works, Machinery and Plant.

Insufficient guard rail.]—The plaintiff, a sawyer, was injured, having been crushed between the saw frame and a log that broke through the guard rail of the deck upon which it was sliding to the carriage in a sawmill. The log slid down the deck with one end lower than the other, and on the lower end reaching the carriage the upper end was from two to three feet up the deck and close to the guard rail. The case centred on whether the upper end of the log broke through the guard of its own weight or whether it was driven through by the sawyer moving the carriage with the lever, which was at the time under his control. The judge and jury viewed the premises of a mill, but not the one in which the accident occurred. The jury brought in a verdict for the plaintiff under the Employers' Liability Act, for which judgment was entered: —Held, on appeal, that the jury having taken the view that the log came in forcible contact with the guard and broke it with its own weight, the system was defective, and there being evidence to support this view, the verdict should stand. *Lyons* v. *The Nicola Valley Pine Lumber Company*, (1916) 23 B.C.R. 141; 31 D.L.R. 133; (1917) 1 W.W.R. 237.

3. Negligence of Superintendent.

1. Failure to give warning.] — The plaintiff and other workmen, engaged in removing wooden form work used in the construction of a cement roof on a grain elevator had loosened some of the form work and attached ropes thereto by which men on the floor below, acting under instructions of a foreman, were to pull it down. The plaintiff who had just cut the braces attaching the loose portions of the form work from what was still stationary, was crossing a plank about eight feet above the floor (part of the scaffolding) to get out of the way, when the men below pulled the ropes and part of the form work striking the plank, the plaintiff was thrown to the floor sustaining injury:—Held, that there was negligence of the foreman which consisted in not giving sufficient time to the plaintiff to reach a place of safety before directing the workmen to pull the form work down. *Moncreiff* v. *Barnett-McQueen Company, Limited*, (1917) 24 B.C.R. 185; 34 D.L.R. 737; (1917) 2 W.W.R. 625.

2. Directions to insure safety.]—The fact that a foreman, in charge of railway construction, permits his workmen to cross a river in a rowboat without directing them

as to the manner in which they are to cross or cautioning them of the danger of colliding with a cable which sagged into the water, does not, in the absence of evidence of unseaworthiness of the boat or incompetency of the boatmen in charge, support a specific finding of negligence on the part of the foreman under the Employers' Liability Act so as to render the employer liable for the drowning of the men owing to the capsizing of the boat when in collision with the cable. *Tecla et al.* v. *Burns, Jordan & Welch,* (1916) 22 B.C.R. 460; 27 D.L.R. 109; (1917) 1 W.W.R. 639.

3. Duty of employer to warn workmen of danger.]—While in process of loading logs on to trucks by means of a donkey engine, owing to the incompetence of the engineer, C., who was acting as superintendent of the work, temporarily took charge of the donkey-engine and instructed the engineer how to work it. While he was so engaged, a man employed as a loader was struck by a log that was improperly lowered, and killed:—Held, on appeal, that C., being so engaged, was "a person having superintendence instrusted to him" within the meaning of sec. 3, subsec. (2) of the Employers' Liability Act. *Willard* v. *International Timber Co.,* (1918) 25 B.C.R. 210.

C. Workmen's Compensation Act.

1. Notice.]—Where an action under the Employers' Liability Act is dismissed by the trial judge the plaintiff must either elect to appeal or to apply for compensation under the Workmen's Compensation Act at the conclusion of the trial. *Lilja* v. *The Granby Consolidated Mining, Smelting and Power Company, Limited,* (1915) 21 B.C.R. 384; 8 W.W.R. 690.

2. Contractor.]—Under sec. 9 of the Workmen's Compensation Act the principal contractor, who is not the employer, is liable at common law to the same extent as the employer. *Morris* v. *Structural Steel Co., Ltd.,* (1917) 24 B.C.R. 59; 35 D.L.R. 739; (1917)) 2 W.W.R. 749.

3. Construction of Act.]—Where the main object and intention of the statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law except in cases of necessity by reason of the absolute intractability of the language used. Where, therefore, the word "hereinafter" in the phrase "undertakers as hereinafter defined" in sec. 4 of the Workmen's Compensation Act is clearly a draftsman's error, it should be read "hereinbefore." The expression "any other work" in the definition of "engineering work" in sec. 2 of the Workmen's Compensation Act is not limited to work ejusdem generis with work of a railroad, harbour, dock, canal or sewer. *Ibid.*

4. Undertaker.]—The installing of piping forms a necessary part of the construction of a cold-storage plant, with the building which was in the course of construction, and the contractor engaged in its installation is an "undertaker" within the meaning of sec. 4 of the Workmen's Compensation Act. *Sanders* v. *Frick Company,* (1916) 22 B.C.R. 472; 26 D.L.R. 685; 34 W.L.R. 65; 10 W.W.R. 163.

5. Independent contractor.]—A workman hired by a lumber company to drive a truck in the hauling and delivery of ties and poles under the direction of the company's superintendent and the yard foreman is a servant in the employment of the company and a workman within the meaning of the Workmen's Compensation Act and not an independent contractor. *McAllister* v. *Bell Lumber and Pole Company, Ltd.,* (1931) 3 W.W.R. 767.

6. Measure of compensation.] — An award for a lump sum under the Workmen's Compensation Act cannot be made under sec. 10, without the acquiescence of all parties as to the character of compensation and no award for indemnity against a third party in respect of the liability may therefore be made without the latter's consent. *Atkinson* v. *Pacific Stevedoring and Contracting Co.,* (1915) 22 B.C.R. 109; 24 D.L.R. 400; 32 W.L.R. 154; 8 W.W.R. 1339.

7. Jurisdiction—Voluntary submission to award.] — Unless the employment is within the purview of the Workmen's Compensation Act, the Court has no jurisdiction under the Act to award compensation merely upon the voluntary submission of the parties to such award, in an action for negligence. In order to succeed upon a claim for indemnity against an award under the Workmen's Compensation Act, it must be established that the damages are paid by reason of and for the liabilities enumerated in the Act. *Ibid.*

8. Lump sum.]—An award of a certain sum under the Workmen's Compensation Act is not invalid if it is the result of the addition of the several sums of a weekly allowance. An award will not be reopened

because of the discovery of fresh evidence unless it is shewn that prior to the award there was reasonable diligence on the part of the applicant to discover such evidence. *Gorgnigiani* v. *Welch*, (1918) 26 B.C.R. 195; (1918) 3 W.W.R. 797.

9. Measure of compensation—Medical adviser's instructions neglected.]—Where an applicant for compensation neglects to follow the instructions of his medical adviser, which, if followed, would have effected a cure, he is not entitled to compensation beyond the time when such cure would reasonably have been effected. *Ibid.*

10. Workmen's Compensation Board—Jurisdiction of.] — The Workmen's Compensation Board under R.S.B.C. 1924, cap. 278, 574 (1) have exclusive and final jurisdiction in matters falling within that section, and where the Board have found questions of fact necessary to their jurisdiction, a Court cannot interfere on the ground that the Board assumed jurisdiction by wrongfully deciding questions of fact, the decision of which the Legislature had specifically put within their power. *Peter* v. *Yorkshire Estates Co.*, (1925) 95 L.J.P.C. 91; (1926) A.C. 513; (1926) 2 D.L.R. 641; (1926) 2 W.W.R. 545; Affg. (1925) 36 B.C.R. 71; (1925) 3 D.L.R. 1193.

11. Contributory negligence—Assisting fellow servant.]—A servant is not to be held guilty of contributory negligence because, when assigned to do a particular thing for the moment, he does something else intending it to be for his master's benefit, in assisting a fellow servant. *Bellamy* v. *Green*, (1927) 38 B.C.R. 182; (1927) 2 D.L.R. 327.

12. Serious neglect.]—The meaning of the words "serious neglect" in sec. 6, subsec. (a) (c) of the Workmen's Compensation Act, R.S.B.C. 1911, in their ordinary and non-statutory sense import more than ordinary negligence, and while that section has no application to the conduct of an injured workman after the accident, failure on his part to continue treatment of an eye after injury resulting in its permanent loss constitutes serious neglect which will preclude the right to claim further compensation in respect of the injury. *Powell* v. *Crow's Nest Pass Coal Co., Ltd.*, (1916) 22 B.C.R. 514; 26 D.L.R. 317; 34 W.L.R. 32; 10 W.W.R. 107.

13. Agreement for deduction of assessment from wages.]—An agreement between a workman and his employer that the latter may deduct from the former's wages assessments payable by the employer under Part 1 of the Workmen's Compensation Act, R.S.B.C. 1924, cap. 278, is illegal except with respect to deductions for medical aid. *McAllister* v. *Bell Lumber and Pole Co., Ltd.*, (1931) 3 W.W.R. 767.

14. Assessment.] — Where applicants after hearing and assessment by the Workmen's Compensation Board, have paid the assessment, sec. 67 of the Workmen's Compensation Act applies, and there is no jurisdiction to quash the assessment. *In re Workmen's Compensation Act and Blue Funnel Motor Line*, (1919) 27 B.C.R. 418; (1919) 3 W.W.R. 426.

VI. Liability of Master to Third Persons.

1. Respondeat superior—Scope of employment — Presumption.] — If, in an action for damages resulting from a collision with the defendant's motor car, it is held that the accident was due to negligence of the defendant's servant in driving the car the Court will presume without further proof that the servant was acting within the scope of his employment at the time of the accident, and the onus is cast upon the defendant to displace the presumption. *McKay* v. *Drysdale*, (1921) 30 B.C.R. 81; 60 D.L.R. 458; (1921) 2 W.W.R. 592.

2. Respondeat superior—Penalty under statute — Conversion and trespass.]—A master is liable for the tort of his servant in the course of his employment although outside the apparent scope of his authority. Therefore a master is liable for the act of his servant who without any colour of right, seizes the goods of a debtor of his master in the belief that such debtor had absconded. *Wing Kee* v. *Butt*, (1927) 2 D.L.R. 641.

3. Prospectors setting out fire.] — Where a fire is made by prospectors, employed by a mining company, for the purpose of preparing a meal and is allowed to spread, causing damage to the property of another, the employer cannot be held liable on the ground that the prospectors were acting in the course of their employment, as the lighting of the fire was an act which they were under no contractual obligation to perform as a duty to their employer, or which their employer had ordered them to do. Although their contract with the

employer called upon them to board themselves, in cooking their food, the prospectors were doing something for themselves rather than discharging a duty towards their employer. *Murdoch* v. *Consolidated Mining and Smelting Co.*, (1929) S.C.R. 141; (1929) 1 D.L.R. 913.

4. Scope of employment.]—Where a servant in the employment of his father as a truck driver, instead of returning home after delivery of goods according to his instructions, proceeded in another direction for his own purposes, and while on his way home after some hours, caused injury to the plaintiff by negligent driving, he will be held not to have been acting within the scope of his employment but on a frolic of his own and the master is not liable. *Battistoni* v. *Thomas*, (1931) 44 B.C.R. 188; (1931) 4 D.L.R. 526; (1931) 3 W.W.R. 44; Affd. (1932) S.C.R. 144; (1932) 1 D.L.R. 577.

5. Railway conductor.]—It is the duty of a railway company to safeguard its passengers and to protect them from injury at the hands of its servants. Where the conductor of a railway train assaults a passenger while collecting his ticket the two acts being part of the same transaction he is acting within the scope of his employment, and the railway company is liable. *Jennings* v. *Canadian Northern Railway Company*, (1925) 35 B.C.R. 16; (1925) 2 D.L.R. 630; (1925) 1 W.W.R. 918.

6. Bailiff—Forcible entry by independent contractor.]—The plaintiff being in default on his payments on the purchase of a motor-car under a conditional sale agreement, the defendant company authorized the defendant B., who was a licensed bailiff, to seize the motor-car. While making the seizure B. broke open the door of the plaintiff's garage and assaulted the plaintiff who was endeavouring to hold his motor-car:—Held, that the plaintiff was an independent contractor and the company was not liable. *Roman* v. *Motorcar Loan Co., Ltd. and Burns*, (1930) 42 B.C.R. 457; (1930) 3 D.L.R. 296 (1930) 1 W.W.R. 775.

VII. Liability of Master Under Penal Statute.

1. Respondeat superior—Penalty under statute.]—The maxim respondeat superior only applies in an action for damages at common law, not in an action for a penalty under a statute. *Attorney-General for B.C.* v. *Freeman*, (1924) 2 D.L.R. 99.

2. B.C. Prohibition Act.]—A sale of liquor on the premises by an employee of the occupant contrary to the provisions of the British Columbia Prohibition Act subjects the occupant to conviction under sec. 38 and 39 of the said Act, though he has no knowledge of the sale and a prior conviction of the employee is no bar to such a conviction. *Whimster* v. *Dragoni*, (1920) 28 B.C.R. 132; 51 D.L.R. 503, 506; (1920) 2 W.W.R. 185; 33 C.C.C. 39.

See Intoxicating Liquors.
See Negligence.
See Principal and Agent.
See Tort.

MECHANIC'S LIEN.

I. The Right: When Lien Exists, 710.
A. Against whose interest, 710.
B. For what work and material, 712.
C. To what property attaches, 712.
II. Perfecting Lien, 713.
A. Time for filing, 713.
B. Registration in Land Registry Office, 714.
III. Assignment, 714.
IV. Priority of, 715.
V. Enforcement: Procedure, 716.
A. Affidavit, 716.
B. Amendment, 717.
C. Reopening, 717.
D. Distribution of proceeds, 717.
E. Appeal, 718.

I. The Right: When Lien Exists.

A. Against Whose Interest.

1. Vendor and purchaser — Covenant by purchaser to build.]—An agreement for the sale of land which contains a covenant binding the purchaser to erect certain works on the land at a certain cost and contains a covenant by the vendor, the owner, to remit a specified amount from the purchase price on the completion of said undertaking, is such a request in writing as gives a mechanics' lien arising from the erection of the said works general application under

sec. 6 of the Mechanics' Lien Act, 1916, and therefore the lien is not restricted to the increase in value of the premises by reason of such works. *British Columbia Granitoid Co. Ltd.* v. *Dominion Shipbuilding, Engineering and Drydock Co.*, (1918) 2 W.W.R. 919.

2. Vendor — Interest of vendor in agreement for sale.]—An interest in a timber license is an interest in land and the vendor under an agreement for sale is deemed to be a mortgage under sec. 9 (a) of the Mechanics' Lien Act, R.S.B.C. 1911, cap. 154, and where the agreement provides for construction and a request in writing is implied in its terms a mechanics' lien will be enforced against the vendor's interest. *Ryan* v. *X.L. Logging Co.*, (1924) 33 B.C.R. 410.

3. Person representing himself as owner—Squatter on Crown land.]—Where a squatter on Crown land accepts work and materials applied to the erection of a building thereon he holds himself out to be the owner of the land within the meaning of the Mechanics' Lien Act and in an action under the Act to enforce a lien will not be permitted to escape liability on the ground that he has no interest in the land. *Macdonald* v. *Hartley*, (1918) 3 W.W.R. 910.

4. Knowledge of owner.]—In an action to enforce a lien where the owner of the property did not contract for the work or improvements, it is incumbent upon the plaintiff, under sec. 10 of the Mechanics' Lien Act, to shew that the owner had knowledge of such works or improvements. *Baker & Ellicott* v. *Williams*, (1916) 23 B.C.R. 124.

5. Owner—Property held in trust for bondholders.]—Persons who are the registered holders of the mining properties of a company as trustees for the bondholders are not "owners" within the meaning of the Mechanics' Lien Act and as such liable for work done on the properties unless there is something in the nature of a direct dealing between the contractor and the persons sought to be charged, mere knowledge of or mere consent to the work being done is not sufficient:—Held, that a labourer's lien for work done in or about a mine to the extent of twenty-five days' wages is absolute and unconditional and the lien-holders can enforce their liens to the extent of twenty-five days' wages, their rights being prior to the mortgages on record. *Isitt* v. *Merritt Collieries, Limited*, (1920) 28 B.C.R. 62; (1920) 1 W.W.R. 879.

B. For What Work and Material.

Preparation for work.]—There is no lien under the Mechanics' Lien Act in respect of the cost of preparing for work to be done upon a site although such work has been frustrated without fault of the contractor. *B.C. Granitoid Co., Ltd.* v. *Dominion Shipbuilding, Engineering & Drydock Co., Ltd.*, (1918) 2 W.W.R. 919.

C. To What Property Attaches.

1. Adjoining houses—One owner.]—In the case of a single contract to do work at the same time on two adjoining houses each of which stands partly on each of two lots owned by the same person, the two houses can be treated as one structure for purposes of the Mechanics' Lien Act, R.S.B.C. 1924, cap. 156, and a single lien can, therefore, be placed on the whole property to cover the work done on both houses. *Coutu* v. *James*, (1926) 2 W.W.R. 87.

2. Clearing townsite.]—A workman who clears a portion of a block of land subdivided into lots and streets under a contract to clear the whole tract is entitled to a lien upon all the lands except such portion as may be excluded under sec. 3 of the Mechanics' Lien Act. *Bescloff* v. *The White Rock Resort Development Company, Limited, and Phillips*, (1915) 22 B.C.R. 33; 23 D.L.R. 676; 32 W.L.R. 73; 8 W.W.R. 1338.

3. Public school building.] — School trustees are within the meaning of the word "owner" in sec. 8 of the Mechanics' Lien Act (B.C.) and the lien is enforceable against school property, notwithstanding the provisions in sec. 3 of the Act making it inapplicable to any public work carried on by a municipal corporation or the express exemption of school property from sale under execution contained in the School Act. *Hazell et al.* v. *Lund and The Royal Trusts Co. and the Board of School Trustees of Point Grey and the Corporation of the Municipality of Point Grey*, (1915) 22 B.C.R. 264; 25 D.L.R. 204; 32 W.L.R. 818; 9 W.W.R. 749.

4. Knowledge of owner.]—In an action to enforce a lien where the owner of the property did not contract for the work or improvements, it is incumbent upon the plaintiff, under sec. 10 of the Mechanics' Lien Act, to shew that the owner had knowledge of such works or improvements. *Baker & Ellicott* v. *Williams et al.*, (1916) 23 B.C.R. 124.

5. Mineral claim.] — A miner may enforce a mechanic's lien against a mineral claim, which has not been Crown granted. *Venness* v. *Stoddard*, (1915) 9 W.W.R. 832.

6. Unregistered Crown grant.]—Actual possession under grant from the Crown, coupled with the statutory right to register the grant, creates an estate or interest within the meaning of the word "owner" in sec. 2 of the Mechanics' Lien Act upon which a mechanic's lien may attach. An unregistered Crown grant is admissible in evidence when it is not sought to set it up against a registered instrument. *Dorrell* v. *Campbell*, (1916) 23 B.C.R. 500; 32 D.L.R. 44; (1917) 1 W.W.R. 500.

7. Timber license.]—An interest in a timber license is an interest in land. Under sec. 9 (a) of the Mechanics' Lien Act the unpaid vendor of land is a mortgagee. Liens are only prior to the mortgage as against the increase in value "unless the same is done at the request of the mortgagee in writing. *Ryan* v. *X.L. Logging Co., Ltd.*, (1924) 33 B.C.R. 410.

II. Perfecting Lien.

A. Time for Filing.

1. Plumbing during construction—Completion of contract.] — Where the plaintiffs enter into a contract to furnish the necessary plumbing for a building under construction and performed three items of work of installation over a month elapsing between the completion of the principal part of the work and other work of trifling value as the placing in its proper position a flour bin and installing a tap, the three items are to be considered as one job under the contract and the time for filing commences to run from the completion of the last item. *Carr & Son* v. *Dempsey*, (1930) 43 B.C.R. 305; (1931) 1 D.L.R. 984.

2. Sub-contractor—Completion of contract.]—The plaintiff supplied materials to a plumber to carry out a sub-contract which he had entered into with a building contractor. Owing to a dispute between the sub-contractor and the principal contractor the contract was abandoned on August 16th. On September 20th the plaintiff filed an affidavit of mechanic's lien, the principal contract not having been completed:—Held, that the affidavit not having been filed within 31 days prescribed by sec. 19 of the Mechanics' Lien Act the lien could not be enforced. *T. McAvity & Sons, Ltd.* v. *Walsh*, (1927) 1 W.W.R. 242.

3. Completion of contract.]—The lien of a wage-earner under a daily hiring attaches on the completion of the day's work, and so from day to day. The lien of a contractor or sub-contractor attaches when he has completed his contract, or, if the contract provides for interim payments on account, a lien attaches when each payment becomes due or payable to the extent of the amount thereof. Where a sub-contractor undertakes to do a certain work and supply materials for a lump sum, without any stipulation as to payment before completion, his lien attaches only on completion of his work and if there is no money then due from the owner to the contractor, the sub-contractor's lien fails by virtue of sec. 8 of the Mechanics' Lien Act. *NePage* v. *Pinner*, (1915) 21 B.C.R. 81; 21 D.L.R. 315; 8 W.W.R. 322.

B. Registration in Land Registry Office.

Land registry.]—Omission to register an affidavit of lien in the Land Registry Office pursuant to sec. 19 of the Mechanics' Lien Act within a specific time is not cured by sec. 20 of the Act and is fatal to the validity of the lien even where registration was effected within the prescribed time in the County Court Registry. *Dale* v. *International Mining Syndicate. Koscis* v. *International Mining Syndicate*, (1917) 25 B.C.R. 1; (1917) 2 W.W.R. 1031.

III. Assignment.

1. Contract price.]—The assignee of the balance of the contract price owing by the owner to the principal contractor, has a sufficient interest to be added a party defendant in a mechanic's lien action. The power of adding parties in a mechanic's lien action should be sparingly exercised. *Dorrell* v. *Campbell*, (1916) 22 B.C.R. 584; 27 D.L.R. 425; 34 W.L.R. 367; 10 W.W.R. 492.

2. Completion of work by owner.]—A stipulation in a building contract that upon default of the contractor the school trustees shall be entitled to take his place to complete the contract and deduct the cost of completion from the balance of the purchase price, is in effect an assignment of the

unpaid balance of the contract price within the purview of sec. 16 of the Mechanics' Lien Act (B.C.) and therefore invalid against the lien for the full balance of the contract of price acquired under the Act. *Hazell* v. *Lund*, (1915) 22 B.C.R. 264; 25 D.L.R. 204; 32 W.L.R. 818; 9 W.W.R. 749.

IV. PRIORITY OF.

1. Increased value.]—For the purpose of arriving at the sum to which the holder of a mechanic's lien should have priority over a prior mortgage under sec. 9 of the Mechanics' Lien Act, the value of the property before the lien attached is to be taken for the purpose of fixing the upset price as against the increase in value of the mortgaged premises by reason of the work and improvements, which must, however, be limited only to the extent to which the specific contract enhances the selling value and not for work or improvements by others under independent contracts. In case no greater sum than the upset price is obtained at the sale the lienholder has no priority, and his only recourse is against the equity of redemption. *Champion & White* v. *World Building Ltd.*, (1916) 22 B.C.R. 596; 27 D.L.R. 506; 10 W.W.R. 470; 34 W.L.R. 317.

2. Mortgage—Covenant allowing payment of liens.]—A covenant in the plaintiffs' mortgage, entitling them to pay "liens, taxes, rates, charges or encumbrances" affecting the mortgaged lands, and adding them to the mortgage debt, did not entitle them as against defendants, subsequent mortgagees, to add to their mortgage debt amounts used to pay off mechanics' liens of later date than the registration of defendants' mortgage and as to which there had been no adjudication establishing priority to defendants' mortgage through increase in value of the premises under sec. 9 of the Mechanics' Lien Act. *Great West Permanent Loan Co.* v. *National Mortgage Co.*, (1919) 26 B.C.R. 566; 45 D.L.R. 751; (1919) 1 W.W.R. 788.

3. Over unregistered interests in land.]—The holders of mechanics' liens are entitled to priority over all unregistered interests of which the lienholders had no notice or knowledge, actual or constructive. An application for registration of a charge by a person entitled to apply for registration as owner in fee of the legal estate is a nullity and does not amount to notice of the owner's interest, but even if it amounted to notice, where the work is in progress prior to the owner acquiring his interest the liens would not be adversely affected. *National Mortgage Company, Ltd.* v. *Rolston*, (1916) 23 B.C.R. 384; 32 D.L.R. 81; (1917) 1 W.W.R. 494; Affd. (1917) 59 S.C.R. 219; (1917) 2 W.W.R. 1144.

4. Mineral claim—Labourer's lien.]—A labourer's lien for work done in or about a mine to the extent of twenty-five days' wages is absolute and unconditional and the lienholders can enforce their liens to the extent of twenty-five days' wages, their rights being prior to the mortgages on record. *Isitt* v. *Merritt Collieries Ltd.*, (1920) 28 B.C.R. 62; (1920) 1 W.W.R. 879.

5. Prior mortgage.] — As between the owner of the land and a lienholder under the Mechanics' Lien Act the latter has a lien from the inception of the work, but as between a mortgagee or other third person having a registrable interest, the date of registration of their respective charges determines priority under sec. 42 of the Land Registry Act. *McRae* v. *Planta*, (1924) 33 B.C.R. 395; (1924) 2 D.L.R. 408; (1924) 2 W.W.R. 323.

V. ENFORCEMENT: PROCEDURE.

A. Affidavit.

1. Sworn before claimant's solicitor.]—Rule 309 of the County Court Rules applies to affidavits required by sec. 19 of the Mechanics' Lien Act and an affidavit under said section is void if sworn before a solicitor acting for the party. The lien of a subcontractor attaches when he has completed his contract, but if the contract provides for interim payments, a lien attaches when each payment becomes due to the extent of the amount thereof. *Braden* v. *Brown et al.*, (1917) 24 B.C.R. 374; (1917) 3 W.W.R. 906.

2. Sufficiency of — Personal knowledge.]—An affidavit made by an agent of a person claiming a lien which shews in several essential particulars that he is speaking from information and not from personal knowledge is not a sufficient compliance with sec. 19 of the Mechanics' Lien Act Amendment Act, 1924, cap. 156, sec. 19. *W. T. McArthur & Co.* v. *Fagan & Mutual Life Ins. Co.*, (1928) 39 B.C.R. 554; (1928) 2 D.L.R. 875; (1928) 2 W.W.R. 6.

B. Amendment.

1. Adding parties.]—In a mechanics' action begun within the statutory limit of 31 days the plaintiff is entitled to have a mortgagee added as a party after the 31 days have elapsed, where the purpose of adding him is not to obtain the relief provided for in sec. 9 of the Mechanics' Lien Act but in order to have the mortgage set aside as a fraudulent attempt to defeat the lien. *Cooke* v. *Mocroft*, (1926) 36 B.C.R. 393; (1926) 1 W.W.R. 827.

2. Summons insufficiently stamped.]—The lack of a law stamp upon a document filed is a matter of revenue only and does not affect the validity of the filing. An application by the defendant to strike out part of a plaintiff's claim under the Mechanics' Lien Act as being insufficiently stamped was denied. *James Henderson & Sons* v. *Russell House, Ltd. and Dartt*, (1931) 1 W.W.R. 342.

C. Reopening.

Slip rule — Application of.] — On the enforcement of a mechanic's lien the action may be reopened to allow the plaintiff to make all necessary formal proofs on terms of paying defendant's costs to date, where the Court concludes that the plaintiff's counsel made a slip arising from his being allowed to make an amendment reducing the amount claimed in the lien as filed. *Ryan* v. *X.L. Logging Co., Ltd.*, (1924) 33 B.C.R. 410.

D. Distribution of Proceeds.

1. Priorities.]—After judgment had been entered in a consolidated action of several lienholders and the usual order for sale had been made with conditions and reservations, an order was made by the same judge at the instance of the holders of a judgment and a mortgage registered against the properties in question, that if they became the purchasers of the properties under the sale, then after paying the lienholders in the action and a further prior lien for solicitor's costs, they would be entitled to deduct from the balance of the purchase money the amount of their encumbrances. There were in all three mortgages and seven judgments registered against the properties:—Held, that the order should be set aside as it is a variation of the original judgment and extends beyond the notice of motion, operating to the exclusion of the other encumbrances without the question of priorities being first properly determined. *Andrews* v. *Pacific Coast Coal Mines, Ltd.*, (1922) 31 B.C.R. 537.

E. Appeal.

Consolidated actions.] — Proceedings taken under the Mechanics' Lien Act are proceedings in the County Court and there is the right of appeal subject to the provisions of sec. 35 of the Mechanics' Lien Act. Where several lienholder' actions are consolidated and judgment is entered for the whole amount, for the purposes of appeal each claim is distinct and subject to the provisions of sec. 35 of the Mechanics' Lien Act which prevails over any conflicting provisions as to the right of appeal in the County Courts Act. *Andrews* v. *Pacific Coast Coal Mines, Ltd. et al.*, (1922) 31 B.C.R. 537.

See LIENS.
See MINES AND MINERALS.
See REGISTRATION OF LAND.
See VENDOR AND PURCHASER.
See WOODMAN'S LIEN.

MEDICINE.

I. MEDICAL PRACTITIONER, 718.
A. Medical Council, 718.
B. Fees, 719.
C. Registration, 719.
II. PHARMACY ACT, 720.

I. MEDICAL PRACTITIONER.

A. Medical Council.

1. Inquiry under Medical Act.]—Where the conduct of a member of the College of Physicians and Surgeons is the subject of inquiry the Medical Act only authorizes the executive committee of the council thereof to find the facts and report to the council. It cannot adjudicate on the facts as found and the fact that the membership of the executive committee is identical with that of the council does not entitle the council

to merely adopt the adjudication made by the committee. When the conduct of a member is the subject of an inquiry he is entitled to be represented by counsel both before the committee and before the council. Where the Court holds on appeal that the council has not adjudicated on the matter before it, the matter should be remitted to council for rehearing and adjudication. *In re Medical Act. In re Murphy,* (1930) 43 B.C.R. 203; (1930) 4 D.L.R. 1008; (1930) 3 W.W.R. 234; 55 C.C.C. 113.

2. Unprofessional conduct—Appeal.]—A Court on appeal should not disturb the decision of a tribunal appointed to investigate charges of unprofessional conduct unless it has made findings which are clearly wrong or has applied a standard of conduct which should not be recognized by the Courts. Sec. 58 of the British Columbia Medical Act requires a Court on appeal to determine the rights of the parties on the law, evidence and merit of the case. *Latimer* v. *B.C. College of Physicians and Surgeons,* (1931) 3 D.L.R. 304; 55 C.C.C. 132.

B. Fees.

Authority of wife to pledge husband's credit.]—A wife is the agent of her husband for the purpose of engaging a surgeon, and notwithstanding the fact that the wife has money of her own, her husband is liable for her necessities including surgical operations. *Seldon* v. *Zambowski,* (1927) 39 B.C.R. 205; (1928) 1 D.L.R. 638; (1928) 1 W.W.R. 630.

C. Registration.

1. Chiropractic.]—A person who is not qualified under the Medical Act and holds himself out as a "doctor of chiropractic" and "spine and nerve specialist," and treats a patient for asthma by what is termed the "adjustment treatment" the process being the rubbing of the spinal column varied at intervals with twisting of the patient's head, and receives a fee therefor, practises medicine in violation of the Act. *Rex* v. *Evans,* (1916) 23 B.C.R. 128.

See MEDICAL ACT, sec. 34.

2. Turkish bath.] — The accused not being a duly registered medical practitioner treated a patient for sciatica in a room in which he kept a portable Turkish bath, by massage treatment and the use of acetic acid and olive oil, for which he charged a fee:—Held, that this was unlawfully practising medicine under sec. 63 of the Medical Act. To come within the exception in the proviso to sec. 63 of the Medical Act the primary object of the establishment must be the bath and the treatment merely incidental thereto. *Rex* v. *Telford,* (1921) 29 B.C.R. 452; 58 D.L.R. 593; (1921) 2 W.W.R. 255.

II. PHARMACY ACT.

Vendors of patent medicines.]—Vendors of proprietary or patent medicines registered and put up in compliance with the Proprietary or Patent Medicine Act and containing any of the substances set out in Schedules A and B of the Pharmacy Act are not subject to the provisions of sec. 23 of the Pharmacy Act if they have complied with all the provisions of the Proprietary or Patent Medicine Act. The Proprietary or Patent Medicine Act is in pari materia with sec. 23 of the Pharmacy Act. The Dominion Act lays down conditions under which acetanilide can be sold. Applying said sec. 23 to the same facts, both legislative bodies are legislating about the same thing and with the same object, i.e., the protection of the public. The Provincial legislation is therefore inoperative. *Rex* v. *Sheridan,* (1924) 34 B.C.R. 161; (1924) 3 D.L.R. 339; (1924) 3 W.W.R. 617.

MINES AND MINING.

I. FREE MINER'S CERTIFICATE, 721.
II. CLAIMS, INTEREST IN, NATURE OF, 721.
III. LOCATION, 722.
IV. CERTIFICATE OF IMPROVEMENTS, 722.
V. OFFICIALS, POWERS AND MISTAKES OF, 722.
VI. CONFLICTING CLAIMS, 723.
VII. AGREEMENTS RELATING TO MINING PROPERTY, 724.
VIII. PARTNERSHIP, 727.
IX. STATUTE OF FRAUDS AND SECTION 19 OF THE MINERAL ACT, 729.
X. PLACER CLAIMS AND LEASES, 729.
XI. COAL LICENSES, 731.
XII. SECURITY FRAUDS PREVENTION ACT, 732.

I. FREE MINER'S CERTIFICATE.

1. Sheriff's sale—Purchaser at.]—The sale by the sheriff under execution of a mineral claim is not invalid because the purchaser was not the holder of a free miner's certificate at the time of making his bid at the sheriff's sale, if he had a certificate at the later date when the sheriff made a bill of sale of the claim to him; the Court will uphold sheriff's sales bona fide made notwithstanding mere irregularities. *Roundy* v. *Salinas*, (1915) 21 B.C.R. 323; 22 D.L.R. 315; 31 W.L.R. 338; 8 W.W.R. 912.

2. Lienholder.]—Any person who has a lien upon a mineral claim in a certain sum has a "right or interest in or to a mining property" and must have a free miner's certificate unexpired as provided in sec. 12 of the Mineral Act, 1911. *Chassy* v. *May*, (1925) 35 B.C.R. 113; (1925) 2 W.W.R. 199.

3. Lapse of—Placer mining lease under special Act.]—Where a mining lease is granted by virtue of a special Act, the terms of which are inconsistent with an earlier general Act, the lease will be construed according to the special Act. The lapse of a lessee's free miner's certificate required by the Placer Mining Act, 1891, does not cause the forfeiture of a placer mining lease granted by virtue of a subsequent special Act and later ratified and confirmed by another special Act. *Quesnel Forks Gold Mining Co. Ltd.* v. *Ward*, (1919) 89 L.J., P.C. 13; 122 L.T. 206; (1919) 50 D.L.R. 1; (1919) 3 W.W.R. 946; (1920) A.C. 222; Affg. (1918) 25 B.C.R. 476; 42 D.L.R. 476; (1918) 3 W.W.R. 230.

II. CLAIMS, INTEREST IN, NATURE OF.

1. Written acknowledgment by locator.]—A claim to a share in a mineral location must, under sec. 19 of the Mineral Act, be supported by a written acknowledgment from the locator, and the claim to be interested as a partner in a mining location, where the rules laid down in the Mineral Act as to partnership have not been complied with, must be supported by a written agreement. *Moore* v. *Deal and Saulter*, (1917) 24 B.C.R. 181; (1917) 2 W.W.R. 955.

2. Interest in land.]—The interest of a free miner in his claim is an interest in land within the meaning of the Statute of Frauds. *Chassy* v. *May*, (1920) 29 B.C.R. 83; (1921) 1 W.W.R. 69.

3. Agreement to give share in claim.] Where a mineral claim is transferred without consideration, a promise by the transferee to give the transferor a "share" if anything comes of it is an agreement which entitles the transferor to an undivided one-half interest in the property. *Roberts* v. *Roberts*, (1923) 2 W.W.R. 137.

4. Verbal agreement.]—In an action for a declaration that the defendants are trustees for the plaintiffs and other members of a syndicate formed by the plaintiffs and defendants, of certain mineral claims under a verbal agreement entered into by the said parties, the defence of the Statute of Frauds and sec. 75 of the Mineral Act will not be given effect to where to do so would be to permit the defendant to perpetrate a fraud both on the plaintiffs and on all other parties who became members of the syndicate. *Devine and Bonness* v. *Somerville*, (1931) 44 B.C.R. 502; (1931) 3 W.W.R. 264.

III. LOCATION.

Location.]—The location line of a mineral claim must be clearly marked so that it can be distinctly seen, by blazing, legal posts or monuments, and if monuments are used they must be not less than two feet high and of two feet diameter at the base. *Berg* v. *Bosence*, (1931) 44 B.C.R. 71; (1931) 3 D.L.R. 611; (1931) 2 W.W.R. 469.

IV. CERTIFICATE OF IMPROVEMENTS.

Application for—Adverse action pending.]—Where the free miner goes before the recorder in a bona fide manner and submits such proofs by all documents which it is possible to obtain and otherwise as will shew a genuine and substantial attempt to satisfy the statute, an application is then made as provided by sec. 57 of the Act and is pending until disposed of and is capable of being supported by such further proof as may be allowed to be submitted by the tribunal whose satisfaction is sought to be obtained. *Collister et al.* v. *Reid et al.*, (1919) 27 B.C.R. 278; (1919) 3 W.W.R. 229, 1083; 59 S.C.R. 275; 50 D.L.R. 289.

V. OFFICIALS, POWERS AND MISTAKES OF.

1. Mistakes of officials.]—Sec. 27 of the Mineral Act which provides that a free miner is not to suffer from the mistakes of officials, must not be construed too widely

and was not intended to relieve an owner of mineral claims who withdraws his applications for certificates of improvements and allows his free miner's certificate to lapse and fails to procure the necessary assessment work to be done, even though the mining recorder has erroneously suggested that the applications be withdrawn and that the claims be allowed to expire and be relocated. *The Engineer Mining Co.* v. *Fraser*, (1922) 31 B.C.R. 224; 92 L.J.P.C. 65; 128 L.T. 554; (1923) A.C. 228; (1923) 1 D.L.R. 536; (1923) 1 W.W.R. 449.

2. Erroneous advice.]—Sec. 27 of the Mineral Act which provides that "no free miner shall suffer from any acts of omission, or commission, or delays on the part of any Government official," does not apply to a case where a claim has lapsed as a result of the mining recorder wrongly advising a miner as to the requirements of the Act even in the case of his subsequently accepting money tendered by the miner in pursuance of said advice. Even if such a case came within the section an action does not lie for the return of fees paid while the claim was in good standing, but for damages suffered for the loss of the claims which, if the claims are of no value, would be nothing. *Kitchin* v. *The King*, (1922) 30 B.C.R. 421; 63 D.L.R. 425; (1922) 1 W.W.R. 697.

VI. Conflicting Claims.

1. Adverse proceedings — Affirmative evidence of title by both parties.]—Where both parties to an adverse claim fail to establish their title, judgment must be given declaring the claims of both plaintiff and defendant to be invalid, which judgment shall be entered without costs to either party. *Berg* v. *Bosence*, (1931) 44 B.C.R. 71; (1931) 2 W.W.R. 469; (1931) 3 D.L.R. 611.

2. Crown grant—Action to set aside.]—A former owner of a mineral claim who has allowed his claim to expire following the erroneous advice of an official, cannot maintain an action to set aside a Crown grant of the ground to another but in order to attack the title of the subsequent holder he must take adverse proceedings before a certificate of improvements is obtained. *The Engineer Mining Co.* v. *Fraser*, (1922) 31 B.C.R. 224; 92 L.J.P.C. 65; 128 L.T. 554; (1923) A.C. 228; (1923) 1 D.L.R. 536; (1923) 1 W.W.R. 449.

VII. Agreements Relating to Mining Property.

1. Default in work by purchaser.]—If by an agreement for sale of a mineral claim the purchasers agree to perform and record the assessment work, but do not do the work, and on the claim expiring, restake it, the restakers or purchasers therefrom with knowledge of the facts, will in equity be held to be trustees for the vendor. *Stewart and Hayes* v. *Molybdenum Mining and Reduction Company, Limited et al.*, (1921) 30 B.C.R. 51; 60 D.L.R. 497; (1921) 2 W.W.R. 954.

2. Transfer under agreement — Covenant for assessment work.]—The defendant obtained a transfer of the plaintiff's mineral claim under an agreement that he would pay her $1,000 in the event of his being successful in making a sale of the claim and that he would protect the claim by doing the assessment work until the claim be sold. The claim was worked in conjunction with two adjoining claims for two years and certificates of work were taken out. The defendant then wrote the plaintiff that he intended to abandon the claims as he was of opinion they were of no value. The claims lapsed and were relocated by others. The plaintiff stated she did not receive the defendant's letter as to abandonment:—Held, that the plaintiff was entitled to damages for breach of contract, the measure of damages being the value of the property lost by the plaintiff. *McGee* v. *Clark*, (1927) 38 B.C.R. 156; (1927) 1 W.W.R. 593.

3. Agreement for sale — Time of essence — Forfeiture.] — In adjudicating upon an agreement for sale of mining leases, the property being of a speculative nature, it is essential to hold the parties strictly to the time provided for performance, and particularly where the parties have placed their mining leases in escrow and have put their agreement in the form of an option for the purpose of avoiding litigation and delay in reselling. In such a transaction the Court will deem time to be of the essence even if it is not so stipulated in the agreement, but while directing forfeiture of the option will in the absence of express agreement relieve against the forfeiture of an instalment paid immediately before the default in performance by the optionee. *Cronholm* v. *Cole*, (1928) 39 B.C.R. 405; (1928) 3 D.L.R. 321.

4. Agreement for sale—Covenant for possession by owner if mechanics' lien

filed — Equitable mortgage.]—An agreement between the vendor and purchaser of mineral claims that if mechanics' liens are filed against the property the vendor shall have the right to enter and "possess himself of all machinery, fittings . . . upon the mineral claims and to sell the same" and so recoup himself for any moneys paid by reason thereof, will cover after-acquired property, and constitute an equitable mortgage. The vendor under such an agreement is a "mortgagee" within the meaning of sec. 28, Sale of Goods Act, R.S.B.C., cap. 203. *Sullivan Machinery Company* v. *Bank of Montreal*, (1918) 3 W.W.R. 16.

5. Agreement for sale—Mutual mistake as to area—Abatement of price.]—Where the purchasers of a group of unsurveyed mineral claims after payment of a large portion of the purchase price become aware that the claims are encroached upon to a serious extent by mineral claims held by other persons under Crown grant, no fraud being alleged or proved, it was held that the agreement was entered into under a mistake common to both parties and the purchasers are entitled to an abatement of the purchase price. *Barron* v. *Morgan*, (1930) 43 B.C.R. 84; (1930) 4 D.L.R. 985; (1930) 3 W.W.R. 65.

6. Oral agreement—Proceeds of sale —Trust—Laches.] — An oral agreement between a free miner and two prospectors whereby the latter were to perform on a certain mineral claim whatever work was necessary to keep up all assessments, record the same, manage and look after the claim, place it under Crown grant, handle, option and sell it, is no mere contract for work and labour, but makes the prospectors agents of the free miner in what they are to do, and establishes a fiduciary relationship whereby the prospectors must in equity be held to have become trustees for the miner, and they or their representatives must account to him for all sums of money received thereunder. Under such arrangement, an action by the free miner for a share of the proceeds received and a declaration of trusteeship in respect to the moneys paid to the prospectors is not "asserting an interest in a mineral claim which has been located and recorded by another free miner" and sec. 19 of the Mineral Act (R.S.B.C. 1924, cap. 167) does not apply. Nor is the action barred by the Statute of Frauds (R.S.B.C., 1924, cap. 95), the agreement, being one only for the division of the proceeds of the sale of land, does not come within the 4th section of the statute. When the action is not barred by any statute of limitations, mere lapse of time is not sufficient to deprive one of his equitable rights. In order to decide whether the remedy should be granted or withheld, the Courts must examine the nature of the acts done in the interval, the degree of change which has occurred, how far they have affected the parties, and where lies the balance of justice and injustice. Under an agreement for a division of the proceeds of a sale, the claimant can wait until the sale is completed by the payment of the price before starting his action for an account and for his share of the proceeds. *Harris* v. *Lindeborg*, (1931) S.C.R. 235; (1931) 1 D.L.R. 945; Revg. (1930) 42 B.C.R. 276; (1930) 2 D.L.R. 117; (1930) 1 W.W.R. 411.

7. Verbal agreement—Beneficial interest—Express trust.]—Where a person suggested to the owner of certain mineral rights that the latter should transfer same to the former, and said that "if anything came of it" he would give the owner "a share" nothing being said as to the time when such share would be given, and the owner accordingly transferred the rights without any other consideration, it was held that the transferor was owner of one-half of the property subject to the transferee being repaid certain outlay, and subject to an option for sale entered into by the transferee with a third person. Notwithstanding that the agreement was only verbal and within the Statute of Frauds, and sec. 19 of the Mineral Act (B.C.) it was enforced, as these will not be allowed to be made instruments of fraud. Where a trust is so indefinite as to make its terms incapable of determination, a resulting trust of the whole property affected arises in favour of the creator of the trust, but in the present case the agreement to give "a share" was held in equity to mean one-half, on the rule in equity that "equality is equity." *Roberts* v. *Roberts*, (1923) 2 W.W.R. 137.

8. Beneficial interest — Declaration of trust.]—In an action for a declaration that the defendants are trustees for the plaintiffs and other members of a syndicate formed by the plaintiffs and defendants, of certain mineral claims under a verbal agreement entered into by the said parties, the defence of the Statute of Frauds and sec. 75 of the Mineral Act will not be given effect to where to do so would be to permit the defendant to perpetrate a fraud both on the plaintiffs and on all other parties who became members of the syndicate. *Devine and Bonness*

v. *Somerville*, (1931) 44 B.C.R. 502; (1931) 3 W.W.R. 264.

VIII. PARTNERSHIP.

1. Grubstake agreement — Claims located after expiration of agreement.]—The plaintiff and defendant entered into a grubstake agreement whereby the plaintiff was to pay expenses and wages to the defendants who were to prospect for minerals during the current year in a certain district, the claims staked to be equally divided. Certain claims were staked and the defendants returned home before winter. In the following spring the defendants staked a number of claims in the district. The plaintiff alleged that as the claims were staked on ground covered with snow the defendants could not have made the discovery at the time of staking but must have discovered the minerals on the previous expedition during the existence of the contract and that he was therefore entitled to his undivided one-half interest in the claims: —Held, that the evidence was not conclusive, the facts constituting fraud must be clearly established, and circumstances of mere suspicion would not warrant the conclusion of fraud. *Armes* v. *Russell*, (1923-24) 33 B.C.R. 303; (1923) 3 W.W.R. 216; (1924) 1 W.W.R. 825.

2. Proof of.]—Partnership cannot be assumed without apt words and acts signifying an agreement. An agreement that several co-owners would go in as partners and pay their own individual shares of all the expenses and do the assessment work coupled with the understanding that the co-owners would be all partners in anything staked is evidence of the use of the word "partners" in a juridical sense and raises a strong presumption of partnership, making the letters written by one co-owner to another admissible in evidence and a co-owner who disposes of his one-third interest in one of the claims after a sale had been made by his associates without his concurrence is not estopped thereby from asserting his claim to a partnership interest in the other claims. *Davies* v. *Schulli & Mullin*, (1928) 40 B.C.R. 197; (1928) 4 D.L.R. 132; (1928) 3 W.W.R. 158.

3. Contract to supply funds for development — Relocation.] — The plaintiff entered into an agreement with the defendant E., the owner of mineral claims to raise $5,000 to develop, survey the claims and obtain Crown grants in respect thereof in consideration of a one-fourth interest in the claims which was transferred to the plaintiff. The plaintiff raised only $2,000 and after further expenditure the defendant E. informed the plaintiff that he could do no more. Three years later the claims were allowed to expire and the ground was relocated by this defendant and others:—Held, that when the plaintiff failed to raise and advance the necessary funds the defendant E. was under no obligation to continue expenditure or maintain the claims and there was no breach of contract on his part. *Turnbull* v. *Eden*, (1929) 41 B.C.R. 381; (1929) 4 D.L.R. 261.

4. Death of one partner—Estoppel.]—A and B, the owners of adjoining mineral claims entered into a partnership in respect of one of the claims and agreed that upon sale both claims should be valued at the same price and division of the proceeds should be made according to their respective interests, namely, three-fourths to A and one-fourth to B, and a portion of the money was divided before B's death. Afterwards A procured by error a Crown grant of the claim which did not belong to the partnership in the names of A and the administrator of B's estate. Upon the administrator claiming one-half of the final payment of the proceeds of sale A filed a petition of right and procured rectification of the Crown grant by striking out the administrator's name. Upon A's action for a declaration that he was entitled to three-fourths of the proceeds of sale on deposit it was held that the case was within sec. 19 of the Mineral Act and excludes the administrator from setting up a trusteeship in A as to the mineral claim in question and A is entitled to three-fourths of the proceeds of sale on deposit. *Larson* v. *Montgomery*, (1930) 43 B.C.R. 89; (1930) 3 D.L.R. 966; (1930) 2 W.W.R. 796.

5. Verbal agreement.]—In an action for a declaration that the defendants are trustees for the plaintiffs and other members of a syndicate formed by the plaintiffs and defendants, of certain mineral claims under a verbal agreement entered into by the said parties, the defence of the Statute of Frauds and sec. 75 of the Mineral Act will not be given effect to where to do so would be to permit the defendant to perpetrate a fraud both on the plaintiffs and on all other parties who became members of the syndicate agreement. *Devine and Bonness* v. *Somerville*, (1931) 44 B.C.R. 502; (1931) 3 W.W.R. 264.

6. Agreement to give share in claim.]—Where a mineral claim is transferred without consideration a promise by the transferee to give the transferor a "share" if anything comes of it is an agreement which entitles the transferor to an undivided one-half interest in the property. *Roberts* v. *Roberts*, (1923) 2 W.W.R. 137.

IX. STATUTE OF FRAUDS AND SEC. 19 OF THE MINERAL ACT.

1. Agreement to hold shares in mineral claim as trustee.]—Where a person suggested to the owner of certain mineral rights that the latter should transfer same to the former, and said that "if anything came of it" he would give the owner "a share" nothing being said as to the time when such share would be given, and the owner accordingly transferred the rights without any other consideration, it was held that the transferor was owner of one-half of the property subject to the transferee being repaid certain outlay, and subject to an option for sale entered into by the transferee with a third person. Notwithstanding that the agreement was only verbal and within the Statute of Frauds, and sec. 19 of the Mineral Act it was enforced, as there will not be allowed to be made instruments of fraud. *Roberts* v. *Roberts*, (1923) 2 W.W.R. 137.

See Devine and Bonness v. *Somerville*, *supra*.

2. Proceeds of sale—Agreement for interest in.]—An agreement for the division of the proceeds of sale of mineral claims is not within the 4th section of the Statute of Frauds. *Harris* v. *Lindeborg*, (1931) S.C.R. 235; (1931) 1 D.L.R. 945.

3. Interest in land.]—The interest of a free miner in his claim is an interest in land within the meaning of the Statute of Frauds. *Chassy* v. *May (No. 1)*, (1920) 29 B.C.R. 83; (1921) 1 W.W.R. 69.

X. PLACER CLAIMS AND LEASES.

1. Hydraulic mining material appurtenant to leases.]—The plaintiff obtained an option on several mining leases. The ground had previously been worked by one H. who constructed a water system for washing the gravel but after operating for a time abandoned the property leaving certain chattels used in connection with the water system on the ground. Upon the plaintiff commencing operations it purchased the chattels from H.'s estate and used them until it in turn abandoned the properties. The owners took possession and refused to give up the chattels claiming that the water licenses authorizing the plaintiff to use water are together with all works constructed appurtenant to the lease and cannot be separated from the property:—Held, that the defendants have not satisfied the burden of proof which is upon them to shew that these chattels were in fact to be regarded as part of the works which are appurtenant to the leases. They are in fact parts of the mining machinery and appliances for recovering the gold, not of the water system, and are quite separate and distinct from those works and not attached in any way to them or to the soil. *Ennis Gold Mining Company* v. *Henderson*, (1927) 39 B.C.R. 76.

2. Placer claim.]—A free miner, locating a placer claim that does not conflict with the boundaries of a prior lease, is not deprived of his claim, legally obtained by his location and record, when a rectification is afterwards made of the boundaries described in the lease under the authority of an Order-in-Council, apart from the fact that the Order-in-Council contained a clause saving the rights of free miners. *Deisler* v. *The Spruce Creek Power Company Ltd.*, 1915) 21 B.C.R. 441; 22 D.L.R. 550; 31 W.L.R. 289.

3. Placer mining lease.]—The marking out of the ground by an applicant for a mining lease under the Placer Mining Act is merely a preliminary to the application for a lease; it does not constitute occupation and is subject to the modifications which the gold commissioner may make and to the boundaries which he may fix. As soon as an applicant for a lease enters upon "any unoccupied or unreserved Crown land" and "marks out" an "area" of mining ground with the intention of applying for a lease, said ground so marked out then and there becomes "land lawfully occupied for placer-mining purposes" within the meaning of sec. 11 of the Placer Mining Act, and, being land thus segregated from the Crown domain, is not open for location by other free miners until the application has been adjudicated upon by the Lieutenant-Governor in Council under sec. 96 of the Act. *Ibid.*

4. Placer mining lease—Special Act—Failure of lessee to perform conditions.]—Where a mining lease is granted by virtue of a special Act, the terms of which are inconsistent with an earlier general Act, the lease will be construed according to the special Act. The lapse of a lessee's free miner's certificate required by the Placer Mining Act, 1891, does not cause the forfeiture of a placer mining lease granted by virtue of a subsequent special Act and later ratified and confirmed by another special Act. A mining leasehold cannot be said to be completely abandoned where the lessee leaves a caretaker in charge of the demised premises. Where a Crown lease of placer mining lands granted payment to a special Act contains a condition requiring yearly performance of work and mining operations upon penalty of forfeiture upon default for two years, breach of the condition by non-performance of the work will not forfeit the lease but it will be voidable only at the option of the lessor. *Quesnel Forks Gold Mining Co., Ltd.* v. *Ward*, (1919) 89 L.J.P.C. 13; 122 L.T. 206; 50 D.L.R. 1; (1919) 3 W.W.R. 946; Affg. (1918) 25 B.C.R. 476; 42 D.L.R. 476; (1918) 3 W.W.R. 230.

5. Contract to work out claims.]—Under the terms of a contract to work out certain placer ground the contractor was to work and mine the property in a thorough and minerlike manner until the same was worked out, and out of the gold recovered retain 30 cents per cubic yard for every yard of dirt mined. The contractor worked out the property in a minerlike manner with a dredge, but in order to complete the work it was necessary to work over a portion of the ground a second time:—Held, that the removal of material which had previously passed through the dredge and was deposited as tailings, should not be charged for, although the removal of such tailings was necessary in order to complete the mining operations. *Olsen* v. *Canadian Klondyke Mining Co., Ltd.*, (1917) 24 B.C.R. 114; 34 D.L.R. 529; (1917) 2 W.W.R. 640.

XI. Coal Licenses.

1. Prospecting license — Application for—Discretion of minister.]—There is no appeal from the discretion of the Minister of Lands in granting or refusing a prospecting license under sec. 3 of the Coal and Petroleum Act; the intention of the Legislature is shewn by the substitution of "may" for "shall" in the amendment of that section in cap. 33 of the Statutes of 1910. *Johnston* v. *The Minister of Lands*, (1919) 27 B.C.R. 257; (1919) 3 W.W.R. 81.

2. Trespass.]—Where a company in working its mine enters upon and works the coal on adjoining property without the consent or knowledge of the owners, and takes it for the purpose of sale, the proper estimate of damages is the value of the coal without deducting any of the necessary expenses of working and taking it out. *Wellington Colliery Company, Limited and Esquimalt & Nanaimo Railway Company* v. *Pacific Coast Coal Mines, Limited*, (1918) 26 B.C.R. 315.

3. Crown grants of coal lands — Land under sea.]—A suppliant, having paid $10 per acre upon obtaining Crown grants to coal rights in lands under the sea, his petition of right for a refund of $5 per acre was refused as the surface of the lands in question had not been leased or alienated to any person. If the appellant has any right, it is the right to a grant of the surface in addition to what he already has, but he has no right to recover any of the moneys paid. *Ketchen* v. *The King*, (1926) 37 B.C.R. 479; (1926) 3 W.W.R. 767; (1927) 39 B.C.R. 11; (1927) 3 W.W.R. 152.

XII. Security Frauds Prevention Act.

Sale of security by prospectors.]—Where the defendants being owners of mineral claims enter into an agreement to divide their property into shares or units to be held by a syndicate and agree with the plaintiffs that the latter are to be entitled to receive a certain number of the units as soon as the syndicate is formed, the transaction is one under which the defendants must be regarded as actual "prospectors" within the meaning of subsec. (h) of sec. 3 of the Security Frauds Prevention Act and therefore the plaintiffs were entitled to sue thereon although the defendants were not licensed under the Act. When the property is transferred to the syndicate a sale of the shares or units thereof by its agents without a license being first obtained under the Security Frauds Prevention Act is illegal, as neither the syndicate nor its agents are actual prospectors within the meaning of subsec. (h) of sec. 3 of the Act. *Devine* v. *Somerville*, (1931) 44 B.C.R. 502; (1931) 3 W.W.R. 264.

See Yukon Mining Law.

MISREPRESENTATION AND FRAUD.

I. INNOCENT MISREPRESENTATION, 733.
II. FRAUDULENT MISREPRESENTATION, 735.
A. *In general*, 735.
B. *Inducement and materiality*, 739.
C. *Waiver*, 741.
III. FRAUD OTHER THAN BY MISREPRESENTATION, 741.
IV. ESTOPPEL, 743.

I. INNOCENT MISREPRESENTATION.

1. Misrepresentation.]—A purchaser is entitled to an abatement in the purchase price for the deficiency in size of a parcel of land where innocent misrepresentation was made as to area. *Hayes* v. *Goddard*, (1915) 21 B.C.R. 389; 22 D.L.R. 566; 31 W.L.R. 424.

2. Executed contract.]—In an action for rescission of a contract for the transfer of timber licenses on the ground of misrepresentation as to title where it is found that the contract was executed and fraud has not been shewn, the plaintiff cannot succeed unless there is a total failure of consideration. *Foulger* v. *Lewis*, (1917) 24 B.C.R. 556; (1917) 3 W.W.R. 1015.

3. Executed contract — Alteration of position.]—A person induced by fraud to enter into a contract under which he pays money may at his option rescind the contract and recover back the price as money had and received if he can return what he has received under it, but when he can no longer place the parties in statu quo as if he had become unable to return what he had received in the same plight as that in which he received it, the right to rescind no longer exists and his remedy must be by an action for deceit and not for money had and received. Where the representation is fraudulent the representee may adhere to the contract and claim damages, but no damages can be claimed where the representation is innocent. *Allan* v. *McLennan*, (1916) 23 B.C.R. 515; 31 D.L.R. 617; (1917) 1 W.W.R. 513.

4. Restitutio in integrum.] — If the possessor of a secret process of manufacture enters into a contract for the use thereof and in pursuance of the contract puts the secret formulæ into the hands of the other contracting party, and the contract is later rescinded because of innocent misrepresentation on his part, he cannot avoid rescission on the ground that the secrecy of the formulæ has been disclosed. The essential effect of restitutio in integrum is not the restoration in all respects of the status quo ante, but the reciprocal restoration by each party to the other of all money or property which either of them has received from the other in pursuance of the contract. At common law this was the entirety of the matter. Equity, however, will, as incidental or accessory to such restoration make pecuniary adjustments between the parties in respect of the profit or loss accruing to the parties from the possession of the property so restored." *Sceats* v. *Young*, (1930) 43 B.C.R. 321.

5. Material misrepresentation.] — A party to an instrument for the extension of time for payment of a mortgage where there had been no agreement that he should assume personal liability for payment of the mortgage moneys will not be bound thereby if upon being assured that it was the "ordinary extension form" he signed it without reading its contents and afterwards discovered that he had thereby assumed personal liability. *Bell Irving* v. *Matthew*, (1916) 31 D.L.R. 240.

6. Intent to defraud—Absence of.]—An action for deceit will not lie where there is nothing in the evidence to disclose that misrepresentations were made with intent to defraud or with a reckless disregard as to whether they were true or false. *Anderson* v. *Fuller*, (1915) 21 B.C.R. 509.

7. Intent to defraud—Absence of.]—Actual fraud is necessary to found an action for deceit. The expression of an opinion honestly held will not amount to a misrepresentation having legal consequences. *Bank of Toronto* v. *Harrell*, (1917) 55 S.C.R. 512; 39 D.L.R. 262; (1917) 2 W.W.R. 1149.

8. Materiality.] — A misrepresentation sufficient to justify the refusal of an order for specific performance will not necessarily be sufficient to support a claim for a rescission. *Stewart* v. *Cunningham*, (1915) 21 B.C.R. 255 at 266; 22 D.L.R. 845; 8 W.W.R. 579 at 591.

9. Alteration of position — Acts of ownership.] — The plaintiff purchased a house, made a substantial payment on account of the purchase price, entered into possession and made improvements, adding on a kitchen. She then brought action for rescission, on the grounds of misrepresentation as to the construction of the house, as to the dampness of the locality, and other matters:—Held, that as there was no claim

for damages for deceit the action is for rescission and the plaintiff having exercised acts of ownership and carried out material structural alterations and being unable to restore the subject-matter of the contract, the action must fail. *Cusick* v. *Taylor*, (1920) 28 B.C.R. 241; (1920) 2 W.W.R. 579.

II. Fraudulent Misrepresentation.

A. In General.

1. Sale of shares—Rescission.]—Where an applicant applies for shares in a company and it appears from the wording of the application and the evidence that he bargained for original shares of the company but was given shares that had previously been issued and held by a third person he is entitled to the return of his money and securities given to the company as the result of his application notwithstanding the liquidation of the company and he is entitled to have his name removed from the list of contributories. *Brydges* v. *Dominion Trust Co.*, (1919) 27 B.C.R. 214; (1919) 3 W.W.R. 345; (1920) 2 W.W.R. 952.

2. False advertisement — Agreement waiving misrepresentations.] — Where an advertisement of the sale of lots in a townsite and the price list of the lots contained a false statement that the townsite was to be the terminus of a transcontinental railway, a purchaser who has entered into a contract of purchase of lots in the townsite relying on the truth of the said statement is entitled to rescission and repayment of his money on the ground of fraudulent misrepresentation. A vendor's attempt to entrap a purchaser into an agreement that he cannot rely upon the truth of representations made by the vendor, when the latter knows that the purchaser is actually relying upon such representations is in itself evidence of fraud. *Burgess* v. *Pacific Properties, Ltd.*, (1923) 32 B.C.R. 317.

3. Misrepresentation as to knowledge and capacity.]—A man who represents to a company that he has the knowledge and capacity to manufacture goods under a certain patent, and thereby induces the company to enter into a contract for the purchase of the patent from him, represents not only that he has such knowledge but also that he will place that knowledge and his services at the disposal of the company, and if he fails to account satisfactorily for default in so doing, the company is entitled to rescind the contract. *Gregory Tire and Rubber Co.* v. *Gregory*, (1923) 4 D.L.R. 598.

4. Fraudulent hypothecation of bonds.]—A company being indebted to the defendant bank, the secretary thereof on demand of an officer of the bank procured by misrepresentation from the plaintiff the hypothecation of certain bonds and the execution of powers of attorney to the bank in respect thereof:—Held, that the plaintiff was entitled to recover from the bank the value of the bonds on the ground that her execution of the documents was obtained by fraudulent misrepresentation of the secretary of the company, for which the bank could not escape responsibility. *Orchardson* v. *The Dominion Bank*, (1923) 32 B.C.R. 348; (1923) 2 W.W.R. 958.

5. Fraud of employer—Release induced by misrepresentation.]—By written agreement the plaintiff lent the defendant $2,000 and the defendant agreed to employ him as manager of its fox farm for one year from the 2nd of June, 1927, the plaintiff to occupy the house on the farm and enjoy other perquisites. The agreement contained a stipulation that in the event of a certain option held by another company for the purchase of the fox farm being exercised the plaintiff's services would terminate on the date of the company holding the option taking possession. On the 2nd of August, the plaintiff received a letter from the defendant advising him that the holder of the option "will exercise it and will require possession of the premises on the 8th of August, 1927." The plaintiff was then paid back his loan and gave up possession of the premises. It was found that the representations contained in the notice were false to the knowledge of the defendant's manager; the option holders did not exercise their option in accordance with its terms or at all:—Held, that the plaintiff having acted upon the misrepresentations and relying on their truth was entitled to the damages claimed. *Malcolm* v. *Western Canada Magic Silver Black Fox and Fur Co.*, (1929) 41 B.C.R. 305; (1929) 4 D.L.R. 580.

6. Misrepresentation by infant—Liability.]—An action for deceit will lie against an infant whose misrepresentations have enabled another to make a fraudulent contract with a third party. *Continental Guaranty Corporation of Canada, Ltd.* v. *Mark*, (1926) 37 B.C.R. 453; (1926) 4 D.L.R. 707; (1926) 3 W.W.R. 428.

7. Automobile accident — Fraudulent claim for insurance.]—Where an insurance company has insured the owner of a motor car against liability for loss to passengers in the car resulting from an accident and has made payments of money upon misrepresentation of the circumstances of the accident, the insurance company is entitled to recover the amount of such payments from the insured and from a passenger who has assisted in the false representations with the view of making a claim for damages on her own behalf, and is therefore under an obligation to the insurer not to misrepresent the facts. *General Casualty Co. of Paris* v. *Lambert and Vance*, (1930) 43 B.C.R. 133; (1930) 3 D.L.R. 1007; (1930) 2 W.W.R. 548.

8. Execution of lease induced by.]—Where the owner of land procured the lessee to enter into a lease by fraudulent misrepresentation, the lessee is entitled to recover compensation for the loss arising naturally and directly from the assumption of the obligations of the lease and the benefit of certain contracts in connection therewith but not for loss of profits which he might have made if the representations had been true and which he did not realize because the facts stated were non-existent. The lessee on learning the facts was entitled to repudiate the lease and the accompanying contracts but was not bound to do so and having elected against repudiation is entitled to maintain an action for deceit if the elements of such a cause of action are disclosed by the facts in evidence. *Gosse-Millerd Ltd.* v. *Devine*, (1928) S.C.R. 101; (1928) 2 D.L.R. 869.

9. Vendor's misrepresentation.] — The rescission of an agreement for sale may be decreed notwithstanding considerable delay in bringing action therefor where there is evidence of the vendor's misrepresentations as to the drainage of the land and its fitness for agricultural purposes; the findings of the trial Court based on such evidence cannot be disturbed on appeal. *Higgins* v. *Creech*, (1920) 31 D.L.R. 110.

10. Vendor's duty.]—Where a vendor sells to a purchaser his interest in a syndicate formed to acquire and sell lands he is not bound to disclose the fact that he is the owner of the interest which the plaintiff contracts to purchase unless he stands in a fiduciary relationship towards the purchaser. *Young* v. *Cross & Co.*, (1927) 38 B.C.R. 200; (1927) 2 D.L.R. 373; (1927) 1 W.W.R. 537.

11. Sale of land—Secret profit on sale by member of syndicate—Rescission.]—Where a vendor of land grants an option for its purchase at an agreed price per acre and the optionee forms a syndicate to complete the purchase, taking a share in the syndicate, and by collusion with the vendor procures the vendor to enter into an agreement of sale to the syndicate at an advanced price without disclosing his profit to his fellow members, the vendor will not be permitted to foreclose a mortgage given for the balance of the purchase price, but the obtaining of a secret profit by the original optionee is sufficient ground on which to grant rescission of the whole contract, and the fact that the vendor has parted with the land and the vendee has changed its character by subdividing it into town lots, and as a consequence had given the Government of British Columbia an interest in it does not preclude a judgment for conditional rescission. The burden of procuring cancellation of the plan of subdivision and reconveyance of the lots transferred to the Provincial Government should rest on the defendants, the plaintiff being required to deposit with the registrar of the Supreme Court his consent as mortgagee to such cancellation and reconveyance duly verified. *Greenizen* v. *Twigg*, (1922) 63 S.C.R. 158; 65 D.L.R. 101; (1922) 2 W.W.R. 71.

12. Sale of timber limits—Fraudulent concealment and misrepresentation.]—The plaintiffs being the holders of certain timber limits entered into negotiations for sale thereof to the defendant company at a fixed price. The defendant company, not being in a position to purchase at the price at which the holders were willing to sell, sought the aid of a relative of one of the members of the company. The whole transaction hinged on getting this relative to pay to the holders $65,000 more than they were to receive as the selling price under the belief that he was paying the vendors their price and no more, and this amount was to be paid to the company as its commission on securing the sale. To accomplish this agreements were executed between the parties whereby they were to co-operate in this deception. The Court held that the defendants had, by their co-operation in the machinations of the purchasers, disqualified themselves from maintaining the action and that the whole transaction was so tainted with fraud that it would not be enforced by the Court. *McKinnon* v. *Campbell River Lumber Co., Ltd.*, (1922) 64 S.C.R. 396; (1922) 3 W.W.R.

1069; (1923) 1 D.L.R. 29; Revg. (1922) 30 B.C.R. 471; (1922) 2 W.W.R. 549.

13. Misrepresentation by agent.] — A material misrepresentation innocently made by an agent, inducing a sale, and known to the principal to be false, entitles the purchaser to rescission. *Gibson* v. *Cottingham*, (1916) 23 B.C.R. 392; 32 D.L.R. 213; (1917) 1 W.W.R. 496.

B. Inducement and Materiality.

1. Presumption against fraud.] — The law presumes against fraud and in favour of honesty. Fraud must be distinctly and clearly proven in order to afford ground for rescission of a contract. *Bank of Montreal* v. *Wiesdepp*, (1917) 24 B.C.R. 73; 34 D.L.R. 26; (1917) 2 W.W.R. 615.

2. Sale of land—False representation—Burden of proof—Damages.—In an action for damages suffered through the complainant having purchased property relying on statements made by the vendor, the burden is on the complainant to convince the Court that the statements were made falsely, either with knowledge of their falsity, or with such recklessness as to amount to moral guilt, and that the statements were in regard to some material fact and an inducing cause leading him to enter into the contract. *Langley* v. *Hammond*, (1915) 21 B.C.R. 175; 22 D.L.R. 42.

3. Inducing cause.]—In an action for rescission of a contract for the sale of land on the ground of misrepresentation it must be proved that the misrepresentation complained of was the inducing cause of the purchase, and whether it was or not is a question of fact to be determined by the trial judge and will not be interfered with by the Court of Appeal without strong reason. *Gagnon* v. *Nelson*, (1915) 21 B.C.R. 356; 22 D.L.R. 179; 31 W.L.R. 346; 8 W.W.R. 907.

4. Inducing cause—Materiality.] — An action for the return of money paid under an alleged innocent misrepresentation will not succeed unless the plaintiff was misled by and relied upon the misrepresentation. *Gould* v. *Thompson*, (1923) 32 B.C.R. 481.

5. Conduct of parties — Burden of proof.]—The burden of proof is on the party alleging fraudulent misrepresentation to shew that the statements complained of are untrue to the knowledge of the person making them or were made with reckless carelessness as to their truth or falsity, and that it was intended that the party complaining should act upon them to his detriment. Misrepresentation if only a statement of opinion will not form a ground for redress. In considering the truth of allegation of fraudulent misrepresentation the conduct of the party complaining and all the surrounding facts will be taken into consideration. *Adair* v. *Tilton*, (1928) 40 B.C.R. 235; (1928) 4 D.L.R. 183; (1928) 3 W.W.R 92.

6. Reversing trial judge — Credibility of witnesses.]—A Court of Appeal should not find fraud in the face of the trial judge's finding of the absence thereof based on the credibility of the witnesses in the case. Under an agreement between the respondent and the appellant company for the sale of the respondent's brick plant, the appellant undertook to incorporate a new company to take over the business and also agreed to assume and pay the amount due from the respondent to one B. on a chattel mortgage. Some months later, the respondent signed another instrument transferring the brick property to the new company which assumed liability for the payment of the mortgage, but the instrument expressly released the appellant company from its obligation to pay off the mortgage. In an action for specific performance of the first agreement: —Held, that the basic fact on which the respondent's case must rest is that he executed the instrument containing the release clause in ignorance of its presence and effect and the burden of proving such ignorance rested on him; and that his evidence, which alone was offered to substantiate it, did not discharge that onus. *Jack* v. *Nanoose Wellington Collieries Ltd.*, (1926) S.C.R. 495; (1926) 2 D.L.R. 164.

7. Privy Council—Issue of fraud.]—Where the Provincial Courts have on the evidence and circumstances negatived a charge of fraud it is contrary to the established practice of the Judicial Committee of the Privy Council to reinvestigate the question. *Seattle Construction & Dry Dock Co.* v. *Grant Smith & Co.*, (1919) 89 L.J.P.C. 17; 122 L.T. 203; 48 D.L.R. 172; (1919) 3 W.W.R. 33; (1920) A.C. 162.

8. Pleading and proof.]—Allegations of fraud must be precisely alleged and conclusively proven. Where allegations are incomplete and not conclusive the defendant cannot be expected to meet them and the Court should not take notice of them. *McLean* v. *Johnston*, (1923) 32 B.C.R. 495; (1923) 4 D.L.R. 178; (1923) 3 W.W.R. 913.

C. Waiver.

1. Affirming contract after notice of misrepresentation.]—A purchaser of land under an agreement of sale who, upon discovering that statements which led him to make the purchase are untrue, makes further payments on the purchase price stating that he was completing the purchase rather than lose the money already paid before he learned of the fraud, and that he does not waive his right to insist upon reparation for the deceit practised upon him and makes additional payments, elects not to rescind the contract. Later discovery of other false representations will not entitle him to rescission but he is left to his remedy in damages for deceit. *Barron* v. *Kelly*, (1918) 56 S.C.R. 455; 41 D.L.R. 590; (1918) 2 W.W.R. 131.

2. Renewal of promissory note procured by misrepresentation.] — Where a maker of a promissory note executed a renewal thereof with full knowledge of fraudulent misrepresentations which induced him to become a party to the original promissory note he has elected to waive any defence that the misrepresentations may have afforded him. *Bank of Toronto* v. *Harrell*, (1917) 55 S.C.R. 512; 39 D.L.R. 262; (1917) 2 W.W.R. 1149.

III. Fraud Other Than by Misrepresentation.

1. Company—Fraudulent sale by directors of assets of.]—C. being engaged by a company to collect promissory notes given by shareholders in part payment of their shares, procured the incorporation of a foreign company, giving a promissory note for his shares therein, the latter company having no other assets. C. and his associates in the foreign company procured themselves to be appointed as the executive committee of the first mentioned company to deal with the company's property. C. & E. being then in control of both companies an agreement was made whereby the first mentioned company transferred to the foreign company all its promissory notes wherefor it received shares in the foreign company. Upon failure of negotiations to have the agreement annulled the provincial company commenced liquidation. After liquidation D. who had been a director in the local company and had given a promissory note in payment of his shares therein negotiated with the foreign company and recovered his promissory note on the payment of a small part of the face value thereof:—Held, that the scheme whereby the agreement was brought about was conceived in fraud and it should be set aside. Held, further, that D. although not a party to the fraud, having obtained the note from the wrongful holder with full knowledge of the facts, was liable to the plaintiff for its full amount. *Schetky* v. *Cochrane*, (1918) 26 B.C.R. 257; (1920) 60 S.C.R. 650.

2. Agent — Fraudulent conspiracy—Pleadings.]—Where in an action for breach of a contract for the sale and delivery of goods made with the defendant's agent the defendant intends to rely upon a fraudulent conspiracy as between the plaintiff and the defendant's agent to obtain a price lower than the market price in breach of their duty to their respective employers and corruptly inducing the defendant to enter into the contract, the defendant is not entitled to adduce evidence of the plaintiff's hiring and of the corrupt inducement unless the plaintiff has had notice in the pleadings of the nature of the defence. *Maddison* v. *Bain*, (1929) 40 B.C.R. 499; (1929) 1 D.L.R. 843; (1929) 1 W.W.R. 437; (1930) S.C.R. 299; (1930) 1 D.L.R. 63.

3. Company—Collusion between officers — Intent to defraud creditors.] — Three directors, constituting the whole body of a lumber company, voted themselves salaries of $5,000 per year each as president, manager and secretary-treasurer respectively. When the company closed its mill a resolution was passed to continue the officers' salaries for the following year, the secretary-treasurer remaining in charge of the works, there being evidence of his making one insignificant sale of lumber and doing some piling and sawing. The plaintiff, who had supplied the company with logs, brought action to recover the purchase price and the secretary-treasurer sought to enforce a lien under the Woodman's Lien for Wages Act:—Held, that in the circumstances the secretary-treasurer is not entitled to a lien under the Act, and a judgment obtained by him for the enforcement of his lien is null and void against the creditors of the company, on the ground that it was obtained by collusion with the company with the intent of defrauding and delaying its creditors and giving a preference. *Vipond* v. *Galbraith*, (1922) 31 B.C.R. 58; 65 D.L.R. 91; (1922) 2 W.W.R. 135.

IV. ESTOPPEL.

Mortgage obtained by fraud—Non est factum.]—The defendant desiring to purchase a property asked S. for a loan. S. agreed to advance the money and to act for the parties in carrying out the sale. S. then without defendant's knowledge obtained the necessary money from the plaintiff undertaking to have the purchaser execute a mortgage on the property to be purchased in his favour for the amount loaned when the purchase was completed. S. carried through the sale and submitted a mortgage deed to the defendant for his signature which he signed on S.'s representation that it was merely an acknowledgment of the receipt of the money loaned by S. the defendant thinking he advanced it. S. without registering the mortgage put it away and did not deliver it to the plaintiff. The defendant later made two payments to S. on account of the loan and shortly after this S. disappeared without accounting to the plaintiff for the money paid him:—Held, that the plaintiff having put in evidence the defendant's examination for discovery it has the seal of his approval and this evidence disclosed that the defendant was induced to sign the mortgage by the fraudulent representation of a person other than the mortgagee that the deed was not a mortgage, and the defendant is not estopped from denying that it is his deed unless he owed a duty to the mortgagee; as there were no relations of any kind between the defendant and the mortgagee there can be no such duty and the action should be dismissed. *Cooil* v. *Clarkson*, (1925) 35 B.C.R. 308; (1925) 2 D.L.R. 493; (1925) 1 W.W.R. 1094.

See COMPANIES.

See CONTRACTS.

See CRIMINAL LAW.

See DEEDS AND OTHER INSTRUMENTS.

See FRAUDULENT CONVEYANCE.

See SALE OF GOODS.

See VENDOR AND PURCHASER.

MISTAKE.

See CONTRACT.

MORTGAGE.

I. NATURE, VALIDITY AND EFFECT, 744.
- *A. Transfer of legal estate*, 744.
- *B. Equitable mortgage*, 744.
- *C. Validity*, 745.
- *D. What property covered*, 745.
- *E. Fixtures*, 746.

II. RIGHTS AND LIABILITIES OF PARTIES, 747.
- *A. Interest and taxes*, 747.
- *B. Priorities*, 747.
- *C. Liability of trustee*, 749.
- *D. Rights of assignee*, 749.
- *E. Registration*, 751.
- *F. Mortgagee's right of entry*, 751.
- *G. Mortgagee's rights against trespassers*, 752.
- *H. Rights of mortgagor in possession*, 752.

III. ENFORCEMENT, 752.
- *A. On default in payment of interest*, 752.
- *B. Sale*, 753.
- *C. Foreclosure*, 754.
- *D. Action on covenant*, 757.

IV. REDEMPTION, 758.

V. MERGER, 759.

VI. ACCOUNTS, 759.

VII. PAYMENT, 760.

I. NATURE VALIDITY AND EFFECT.

A. Transfer of Legal Estate.

Legal estate in mortgagee.]—The Land Registry Act, 1921, cap. 26, does not affect the law that a mortgage transfers the legal estate in the mortgaged property to the mortgagee subject to an equity of redemption in the mortgagor. *The Corporation of the District of North Vancouver* v. *Carlisle*, (1922) 31 B.C.R. 372; 70 D.L.R. 527; (1922) 3 W.W.R. 811.

B. Equitable Mortgage.

1. In addition to legal mortgage.]—A legal mortgagee cannot prove by parol evidence that he is entitled to an additional equitable mortgage on the same property. *British Columbia Trust Corporation* v. *Aickin et al.*, (1916) 22 B.C.R. 417; 27 D.L.R. 725; 34 W.L.R. 303.

2. Deposit of title deeds—Conveyance in blank.]—Where an owner of land delivers a transfer thereof executed without the insertion of the name of the transferor.

and the person to whom it is delivered deposits it with another as security for an advance, the latter does not obtain an equitable mortgage of the land as against the owner. *Tom* v. *Trustee of Hans C. Christensen, Ltd.*, (1928) 40 B.C.R. 124, 383; (1928) 4 D.L.R. 668; (1928) 3 W.W.R. 314, 432.

C. Validity.

1. Bail bond—Mortgage to indemnify obliger.]—Where a contract of indemnity against loss with respect to bail given in proceedings in a Court of a foreign country is lawful under the law of that country, the contract and the security can be enforced in Canada although the contract was executed in Canada and the security is a mortgage on lands in Canada. *The National Surety Company* v. *Larsen*, (1929) 42 B.C.R. 1; (1929) 4 D.L.R. 918; (1929) 3 W.W.R. 299.

2. Mortgage to trustee for unascertained beneficiary.]—A mortgage of real estate granted to a trustee as security for parties who are not ascertained at the time of the execution of the mortgage, while it is not operative in the meantime, will become a valid security in favour of the beneficiaries when ascertained. *Innes* v. *Cameron Valley Land Company*, (1919) 1 W.W.R. 751.

3. Mortgage on eve of insolvency.]—A company, acting under pressure from its bank, authorized the giving of a mortgage by resolution to secure its indebtedness to the bank, but owing to delay in settling questions of title and registration, the mortgage was not actually given until six months later. Six months after the mortgage was delivered, an order was made winding up the company:—Held, that the presumption created by the statute against transactions of this nature does not arise, as in the circumstances it cannot be said that the bank took the mortgage in contemplation of the insolvency of the mortgagor and with intent of obtaining an unjust preference over his other creditors. *Gauley* v. *Bank of Montreal*, (1916) 23 B.C.R. 264; 30 D.L.R. 483; 34 W.L.R. 1192; 10 W.W.R. 1359.

D. What Property Covered.

After-acquired property.]—In order to establish that by a mistake mutual and common to both parties an "after-acquired" clause was inserted in a mortgage, the evidence must be such as leaves no shadow of doubt upon the mind of the Court, and where the mortgagee has changed his position by paying out money on the strength of the "after-acquired" clause it would be inequitable to strike it out. *Cottonwood Timber Company, Limited* v. *Molsons Bank*, (1916) 22 B.C.R. 541; 29 D.L.R. 29; 34 W.L.R. 909; 10 W.W.R. 1215.

E. Fixtures.

1. Stone-cutting plant.]—Upon a property on which the plaintiff held a mortgage was installed a stone-cutting plant equipped for the purpose of cutting and dressing building stone. The parts included an air compressor, travelling gantry, crane, gang-saw, stone-planing machines, electric motors, shafting, pulleys and belting, air-pipes and valves:—Held, that the parts were fixtures and part of the realty and were covered by a mortgage on the land as against the assignee for the benefit of the creditors of the mortgagor. *The Royal Bank of Canada* v. *Coughlan*, (1920) 28 B.C.R. 247; (1920) 2 W.W.R. 356.

2. Safety-deposit boxes.]—The vault in a mortgagor's building at Vancouver was constructed as a receptacle for safety-deposit boxes. Before the completion of the building a large number of safety-deposit boxes were installed in the vault. They were placed in steel sections containing 25 to 30 boxes each weighing about one and one-half tons, and rested on the steel floor of their own weight, not being attached to the realty in any way. After they were installed, a rubber tiling, half an inch thick, was placed on the floor and made flush with the base of the boxes but not under them. Other fixtures were added to the vault, some of which it would have been necessary to tear away before the boxes could be removed. About a year afterwards another set of boxes was installed in the vault, but they rested of their own weight on the top of the rubber tiling floor and were not attached in any way:—Held, that the boxes installed during the construction of the building were part of the realty which passed to the mortgagee under foreclosure proceedings. The boxes installed a year later were chattels, and removable by the mortgagor. *Dominion Trust Company* v. *Mutual Life Assurance Company of Canada*, (1918) 26 B.C.R. 237; 43 D.L.R. 184; (1918) 3 W.W.R. 415.

II. Rights and Liabilities of Parties.

A. Interest and Taxes.

1. Interest after maturity.]—Where a mortgage does not contain a covenant on the part of the mortgagor to pay interest after maturity the interest thereafter is computed at the statutory rate. *B.C. Land & Investment Agency* v. *Robinson*, (1923) 32 B.C.R. 375; (1923) 4 D.L.R. 416; (1923) 3 W.W.R. 113.

2. Taxes—Non-payment of—Right of mortgagee.]—A mortgagor who conveys his equity of redemption remains liable on his covenants to pay contained in the mortgage, including the liability to indemnify the mortgagee against payment of taxes required to protect the mortgaged property from tax sale. Apart from the covenant the liability may be predicated on the trustee relationship of the mortgagee towards the mortgagor, to protect the mortgaged property; nor is payment of the taxes by the mortgagee under such circumstances a voluntary payment. *Ibid.*

B. Priorities.

1. Neglect to register legal mortgage—Subsequent equitable mortgage.]—If a legal mortgagee neglects to get possession of the title deeds and thereby renders possible the creation of a subsequent equally meritorious equitable claim, the legal mortgagee will be postponed to the holder of the subsequent equitable claim. *Tyrell* v. *Mills*, (1924) 3 W.W.R. 387.

2. First and second mortgages to secure debt and future advances.]—Where there are first and second mortgages both taken to cover present and future advances and the first mortgagee has notice of the execution of a second mortgage, the first mortgagee cannot claim priority for advances made by him to the mortgagor after the date of the second mortgage as against antecedent advances made by the second mortgagee under the second mortgage. But the first mortgagee is entitled to assert that his mortgage operated as security for an amount he was required to pay on the mortgagor's account by reason of a transaction that arose prior to the execution of the second mortgage. *Royal Bank of Canada* v. *Doering*, (1923) 33 B.C.R. 257; (1924) 1 D.L.R. 488; (1924) 1 W.W.R. 251.

3. Business profits tax—Crown lien.]—A mortgage was given by the defendant company in November, 1915, to secure a debenture debt and the debentures were immediately delivered to the company's bankers to secure the current account at the bank, but the indebtedness for which the bank makes its claim in these proceedings began to accrue in October, 1919. Under the Business Profits War Tax Act, 1916, the defendant company was assessed in 1922 for business profits taxes for the year 1919; —Held, that the assessment is a mere ascertainment of the amount due and under sec. 3 of the Act the lien attaches when the profits are earned irrespective of the assessment. The advances made by the bank after the lien of the Crown attached would therefore be subject to the Crown's prior rights. Held, further, that the Crown Costs Act applies to the Crown in right of the Province only and the Crown (Dominion) and the successful party is entitled to the costs of the appeal. *Montreal Trust Company* v. *South Shore Lumber Company, Limited and The King*, (1924) 33 B.C.R. 280; (1924) 1 D.L.R. 1030; (1924) 1 W.W.R. 657.

4. As against registered judgment.]—A registered judgment takes priority over a mortgage executed before but not registered until after registration of the judgment. *Bank of Hamilton* v. *Hartery*, (1919) 58 S.C.R. 338; 45 D.L.R. 638; (1919) 1 W.W.R. 868. Affg. (1918) 26 B.C.R. 22; 43 D.L.R. 14; (1918) 3 W.W.R. 551.

5. Mechanics' lien—Time of taking effect—Priority over mortgages for increase in value.]—For the purpose of arriving at the sum to which the holder of a mechanics' lien should have priority over a prior mortgage under sec. 9 of the Mechanics' Lien Act, the value of the property before the lien attached is to be taken for the purpose of fixing the upset price as against the increase in value of the mortgaged premises by reason of the work and improvements, which must, however, be limited only to the extent to which the specific contract enhances the selling value, and not for work or improvements by others under independent contracts. In case no greater sum than the upset price is obtained at the sale the lienholder has no priority, and his only recourse is against the equity of redemption. *Champion & White* v. *World Building, Limited*, (1916) 22 B.C.R. 596; 27 D.L.R. 506; 10 W.W.R. 470; 34 W.L.R. 317.

6. Mechanics' lien.]—As between owner and contractor or wage-earner the latter has

a lien from the inception of the work, but where a third person is concerned a lien does not come into existence until registered. It comes within the operation of sec. 42 of the Land Registry Act which gives priority to the earlier registered instrument. The lienholder can claim only the increase in value brought about by his work pursuant to sec. 9 of the Mechanics' Lien Act. *McRae* v. *Planta*, (1924) 33 B.C.R. 395; (1924) 2 D.L.R. 408; (1924) 2 W.W.R. 323.

7. Company—Mortgage—Not registered—Equitable priorities.]—Sec. 102 of the Companies Act providing for the registration of mortgages given by a company was enacted for the benefit of purchasers, mortgagees and creditors of the company creating the charge, and where the plaintiff has only an equitable interest not founded on express trust, whereas the defendants' interests, although equitable, are founded on express trusts, and the defendants are in fact mortgagees and creditors of the company creating the charge, they have the better right to call for the legal estate and their rights must prevail as against the plaintiff. *Dalton* v. *Dominion Trust Company*, (1918) 25 B.C.R. 240; (1918) 3 W.W.R. 42.

C. Liability of Trustee.

Mistake in draughtsmanship.]—A covenant in a mortgage by trustees expressed to be made by them as "trustees but not otherwise" will in the absence of other controlling words be held to limit their liability to the payment of the money out of trust estate and will not render them personally liable. If, therefore, it appears from the evidence that the parties agreed that the mortgagors were to pay as trustees and not otherwise and failed through a mistake in draughtsmanship to express that intention in the instrument, it should be reformed so as to limit the liability as intended. *O'Brien* v. *Knudson*, (1919) 48 D.L.R. 447; (1919) 3 W.W.R. 480.

D. Rights of Assignee.

1. Assignment of mortgage—Registration.]—The assignee of an assignee of the holder of a registered mortgage may have his title registered without the necessity of registering the first assignment. *In re Land Registry Act and The Standard Trust Company*, (1916) 22 B.C.R. 538; 10 W.W.R. 877.

2. Discharge by assignee of mortgage—Effect — Presumption.] — Where a third party pays off a mortgage and takes an assignment of the mortgage the presumption is that he does not intend to discharge it but to keep it alive for his own benefit, and where a creditor alleges that the mortgage is discharged it is for him to shew an intention to wipe it out. *Kerschner* v. *The Convention of Baptist Churches*, (1930) 43 B.C.R. 4; (1930) 4 D.L.R. 135; (1930) 2 W.W.R. 280.

3. Assignee's right to proceeds of insurance policy.]—V. having insured certain premises in the plaintiff Company for $1,800, mortgaged the property to R. Under an agreement for sale V. then agreed to sell to M. who insured the property in another company without notice to or consent of the plaintiff Company. V. later conveyed all his interest in the land to S. and M. assigned his agreement for sale to K. Some time later the premises were destroyed by fire. R. then assigned the mortgage to the plaintiff Company and S. conveyed the property to K., all the conveyances aftermentioned being made subject to the mortgage. In an action for foreclosure K. claimed that there should be deducted from the amount unpaid under the mortgage $1,800, for which the premises had been insured in the plaintiff Company as the Company had waived its right to plead that the policy was void by invoking the mortgage clause in the insurance policy:—Held, that as the contract of insurance was a collateral contract made solely between the plaintiff and V. who had disposed of his interest in the property before the fire took place and had never assigned the policy either to R., the mortgagee, or to M. or S. through whom K. claimed title, K. had no interest in the policy whereby he could raise any question as to its validity. *Quebec Fire Insurance Company* v. *MacVicar et al.*, (1916) 22 B.C.R. 448; 27 D.L.R. 720.

4. Notice of assignment before action.]—The assignee of a mortgage must give notice of the assignment to the mortgagor before he can proceed in an action in his own name against the mortgagor upon the covenant for payment contained in the mortgage. In the absence of notice the action should be carried on in the name of the assignor. *Griffiths* v. *Kenney*, (1917) 1 W.W.R. 800.

5. Assignee of equity of redemption.]—The relationship subsisting between mortgagee, mortgagor, and an assignee of the equity of redemption who has covenanted to pay the mortgage debt, is not that of creditor, surety and principal debtor. *Brown and Matthews* v. *Pike*, (1916) 23 B.C.R. 246.

6. Assignment of equity of redemption—Implied covenant of indemnity.]—If an estate is sold subject to a mortgage, the purchaser taking it with knowledge of the mortgage is liable in equity to indemnify his vendor against the encumbrance. *Walker* v. *Woodyatt*, (1931) 44 B.C.R. 110; (1931) 3 D.L.R. 516; (1931) 2 W.W.R. 306.

E. Registration.

Agreement to deliver mortgage—Right to registration of.]—In an agreement to deliver a mortgage of lands the word "mortgage" means a mortgage capable of being registered under the Land Registry Act and such agreement is not satisfied by delivery of a document which contains a stipulation that it will not be registered. *Basant Singh et al.* v. *Kehar Singh Gill*, (1929) 41 B.C.R. 256; (1929) 4 D.L.R. 396; (1929) 2 W.W.R. 431.

F. Mortgagee's Right of Entry.

1. Trespass.] — Defendant entered on plaintiff's lands which plaintiff had mortgaged, and removed therefrom and sold two greenhouses and one boiler. Defendant alleged that in so doing he acted as agent of the mortgagee whose security was scanty. In subsequent foreclosure proceedings credit was given for the proceeds. Plaintiff was held entitled to recover from defendant damages for trespass, as the mortgagee or his agent had no right to make such removal and sale. *Ferris* v. *Hardy*, (1923) 32 B.C.R. 78; (1923) 1 W.W.R. 1483.

2. Rents before entry.]—A mortgagee is not entitled to a refund of rents paid by a tenant to a purchaser of the property from the mortgagor before the mortgagee takes possession. Where, therefore, such rents have been paid to the purchaser's solicitors and are paid over by the solicitors to a receiver appointed on the application of the mortgagee, the fact that the purchaser is indebted to the mortgagor and is out of jurisdiction does not entitle the receiver to retain the rents. *Sellick* v. *Hayward*, (1917) 24 B.C.R. 125; (1917) 2 W.W.R. 803.

3. Receiver of mortgaged premises—Failure to serve or renew writ.]—A writ of summons which has not been served within twelve months from the date of issue or renewed within that time is invalid for the purpose of service, but is not a nullity, and a receiver appointed for mortgaged premises within twelve months from the date of the writ may continue to act with authority until discharged. *Canada Permanent Mortgage Corporation* v. *Dalgleish*, (1928) 39 B.C.R. 300; (1928) 1 D.L.R. 1113; (1928) 1 W.W.R. 473.

G. Mortgagee's Rights Against Trespasser.

Tresspass—Mortgagee's right to recovery for.]—Until a mortgagee enters into possession of the mortgaged premises or becomes entitled to do so, he cannot recover for trespass thereto. *Cameron Investment and Securities Company and Bailey* v. *City of Victoria*, (1920) 3 W.W.R. 1043.

H. Rights of Mortgagor in Possession.

Right of mortgagor to cut timber.]—A mortgagor in possession may cut timber on the land comprised in the mortgage and give other persons a right to do so, unless it is shewn that the security is thereby impaired, and the onus is on the party seeking to establish impairment to plead and offer proof of it. If the mortgagor in possession could sue for a trespass committed before the mortgagee's possession but does not, the mortgagee, after possession, can do so. *Reid* v. *Galbraith*, (1927) 38 B.C.R. 287; (1927) 2 D.L.R. 857; (1927) 1 W.W.R. 780; 2 W.W.R. 852.

III. Enforcement.

A. On Default in Payment of Interest.

1. Payment of arrears.]—Although an acceleration clause is not actually set out in a mortgage made in pursuance of the Act Respecting Short Forms of Mortgages it is imported into the mortgage by operation of law. The fact that the acceleration clause is not expressly inserted but is included in

the mortgage only by operation of law, does not preclude the application of sec. 15 of the Second Schedule of the said Act. The Court has power to relieve against penalties and forfeitures under sec. 2 (14) of the Laws Declaratory Act. *Howe* v. *Howe and Collyer*, (1916) 22 B.C.R. 550; 28 D.L.R. 772; 10 W.W.R. 1263.

2. Absence of acceleration clause.]—A mortgage, which was not drawn in accordance with the Mortgages Statutory Form Act, did not contain an acceleration clause. There was a proviso for redemption in case the principal and interest should be paid in accordance with the terms therein contained. Default having been made in payment of interest, an action for foreclosure was commenced, although the period for payment of the principal had not yet arrived:—Held, that the condition having been broken, the mortgagee was entitled to a decree of foreclosure. *Little* v. *Hill*, (1916) 23 B.C.R. 321; 30 D.L.R. 483.

3. Commencement of action — Time for.]—Where an instalment of interest on a mortgage becomes due and payable on a certain day, and there is a clause in the mortgage that in default of payment of interest the whole of the moneys thereby secured become due and payable in case of default, an action to enforce payment of the principal and interest may be commenced on the following day. *Scottish Temperance Life Assurance Company, Limited* v. *Johnson*, (1917) 25 B.C.R. 93; (1918) 1 W.W.R. 402.

B. Sale.

1. Sale under power—Mortgagee purchaser.]—Where, under the power of sale in a mortgage, a mortgagee goes through the form of making a sale of the mortgaged premises to a person who on the same day reconveys to the mortgagee, the sale is invalid and does not affect the interest of the person whose property is sought to be affected by such sale. *Carter* v. *Bell et al.*, (1915) 21 B.C.R. 55; 21 D.L.R. 243; 31 W.L.R. 1; 8 W.W.R. 47.

2. Assignment of agreement for sale as security.]—Where an assignment of an agreement for sale as security for a debt contains a power of sale, the power of sale must be exercised before the assignee acquires the equity of redemption or it is of no effect. *Royal Bank of Canada* v. *McLeod*, (1919) 27 B.C.R. 376; 48 D.L.R. 500; (1919) 3 W.W.R. 544.

3. Estoppel.]—A mortgagee sold land under a power of sale contained in its mortgage and a conveyance was made to the trustee for the purchaser. An action to set aside the sale was dismissed by the Privy Council on the ground that fraud had not been alleged. The conveyance to the trustee was not registered and a subsequent conveyance was made to another trustee and the land was by him conveyed to a company incorporated for the purpose inter alia of acquiring the land and on this conveyance a second title was issued. In an action brought by the heirs of the original mortgagors for redemption and to set aside the conveyance to the second trustee under power of sale contained in tne mortgage on the ground of fraud it was held that as the evidence does not disclose that the property was sold at such an undervalue as to constitute fraud the plea of res judicata applies and the action fails. *Rudge* v. *Haddington Island Quarry Co.*, (1929) 41 B.C.R. 502.

C. Foreclosure.

1. Form of judgment.]—There should be a reference to the registrar to take accounts of what is due or to accrue due under the mortgage. *Campbell* v. *Mazur*, (1915) 24 D.L.R. 893; 32 W.L.R. 439.

2. Registration — Personal judgment and decree absolute.]—A personal judgment for the mortgage debt duly registered will not prevent the mortgagee from registering his title in fee under a decree absolute without first discharging the judgment. *Scottish Temperance Life Assurance Co.* v. *District Registrar of Titles*, (1917) 24 B.C.R. 232; 36 D.L.R. 152; (1917) 3 W.W.R. 30.

3. Consolidation of actions.]—A mortgagee having obtained an order nisi for foreclosure and taken accounts thereunder should not be allowed to consolidate the action with a second action for the same debt claiming foreclosure of the same mortgage together with other collateral securities. *Buscombe Securities Co.* v. *Windebank*, (1919) 27 B.C.R. 507; 48 D.L.R. 301; (1919) 3 W.W.R. 485.

4. Order nisi—Directions.]—When an order nisi in an action for foreclosure includes an order for the taking of accounts that does not contain all the directions required under marginal rule 795 a substantive application may be made for an order to proceed with accounts. *Mahrer* v. *Fechner*, (1920) 27 B.C.R. 545.

5. Period fixed by order nisi.]—Where an order nisi fixing the period of redemption has been drawn up and entered, such period cannot be shortened either in Chambers or in Court, and this particularly applies when the period has been fixed at the request of the mortgagors. *Western Imperial Co.* v. *Nicola Land Co.*, (1921) 29 B.C.R. 390; 61 D.L.R. 155; (1921) 2 W.W.R. 342.

6. Time for redemption.]—In a foreclosure action unless the mortgagee can shew that the security will be seriously impaired unless the usual time for redemption is abridged an application to reduce the time for redemption will be refused. *Redmond* v. *Canadian Credit Men's Trust Association, Ltd.*, (1930) 43 B.C.R. 361; (1931) 1 W.W.R. 197.

7. False affidavit of service.]—On a false affidavit of service of writ of summons the plaintiff obtained final order for foreclosure, a certificate of indefeasible title was issued and the property was sold:—Held, that the judgment was without foundation and all proceedings following the issue of the writ should be set aside ex debito justitiæ. *Canada Permanent Mortgage Corporation* v. *Natha Singh*, (1921) 29 B.C.R. 397; (1921) 2 W.W.R. 361.

8. Mortgage of shares in company.]—Where the plaintiff who was a shareholder in a company pledged his shares to secure money lent to him by the defendants who were also shareholders in the same company under the terms of a recited agreement which provided that if principal and interest were not paid on a specified date the shares should become the property of the lenders, time being of the essence of the contract, it was held that notwithstanding an alleged collateral oral agreement that the loan should be repaid out of dividends and profits accruing to the borrower in respect of the pledged shares, the lender should have judgment for foreclosure with the usual reference to take accounts and that in the circumstances the plaintiff should be allowed one year for redemption. *McLean* v. *Johnston*, (1923) 32 B.C.R. 495; (1923) 4 D.L.R. 178; (1923) 3 W.W.R. 913.

9. Joinder of causes of action.] — A claim for possession and the appointment of a receiver may be joined with one for foreclosure or redemption. *Jones* v. *Cohn and Canary*, (1924) 33 B.C.R. 321.

10. Order — Immediate foreclosure—Depreciation of mortgaged premises.]—On a motion for judgment in default of defence in a foreclosure action, judgment for immediate foreclosure absolute will be granted upon the Court being satisfied by evidence that the value of the property is insufficient to pay the amount of principal due on the mortgage and the wasting nature of the property is such that the longer the delay the greater will be the loss. *Anglican Synod* v. *Russell and May*, (1927) 38 B.C.R. 400.

11. Verbal agreement for higher rate after maturity — Basis of foreclosure.]—An agreement by a mortgagor to pay a higher rate of interest after maturity than that stipulated in the mortgage in consideration of the mortgagee's agreement that the principal moneys shall not be called in is not within the Statute of Frauds, sec. 4, and is therefore not required to be in writing, as it does not charge the lands with the higher rate of interest. In foreclosure proceedings the charge is to be enforced on the basis of the original rate of interest after the mortgagor has failed to continue payment at the higher rate. *Robert Porter & Sons* v. *MacKenzie*, (1926) 37 B.C.R. 287.

12. Effect of foreclosure order—Collateral oral agreement for possession by mortgagor.] — Where a mortgagor consented to the foreclosure of the mortgage on his lands in consideration of a verbal agreement of one of the mortgagees that the mortgagor should have the rents and profits of the mortgaged premises until the same could be sold, he is not precluded by the judgment of foreclosure vesting the premises in the mortgagee from setting up the verbal agreement and his alleged right to the rents and profits in an action against the mortgagee, as the breach of the agreement constitutes a triable issue which will entitle him to service of the writ of summons ex juris. *Jones* v. *Ryder*, (1928) 39 B.C.R. 547; (1928) 3 D.L.R. 301; (1928) 2 W.W.R. 302.

13. Judgment declaring validity of mortgage—Subsequent foreclosure action —Res judicata.] — A consent judgment should be regarded as a judgment after a hearing on the merits, and conclusive proof between the parties of the matters actually decided, and where such a judgment is given declaring that title to lands in question in the action are subject to a valid mortgage the validity of the mortgage cannot be attacked as a defence in a subsequent action for foreclosure between the same parties. *Canada Permanent Corporation* v. *Christensen*, (1929) 41 B.C.R. 258; (1929) 3 D.L.R. 864; (1929) 2 W.W.R. 198.

14. Application by stranger to action.]—The widow of a testator was refused an order setting aside a default judgment of foreclosure of a mortgage obtained against the executors of the testators's will in which she was not mentioned as a beneficiary. Her legal claims had been settled by agreement with the executors and the conveyance of certain property. There was no evidence of collusion or fraud by the parties to the action. The application was refused on the ground that even assuming that the applicant had any status before the agreement and conveyance, she was thereafter a stranger to the estate. In applications of this sort each case presents its own particular circumstances to which regard must be had in exercising the jurisdiction invoked. *Belmont Investment Co. Ltd.* v. *Moody*, (1923) 32 B.C.R. 488; (1923) 3 D.L.R. 812; (1923) 3 W.W.R. 291.

15. Pleading—Claim for possession.]—A statement of claim stating that the plaintiffs are entitled to possession, the premises were granted and conveyed by the defendant to the plaintiffs by way of mortgage, the mortgage is still subsisting and the defendant has never given up possession to the plaintiffs and still remains in wrongful possession thereof, contains the necessary allegations and a good cause of action is disclosed. *Todd* v. *Wong Gum Tim*, (1917) 24 B.C.R. 161; (1917) 2 W.W.R. 280.

D. Action on Covenant.

1. Joint covenant.]—A covenant in a mortgage by two or more mortgagors to pay the mortgage moneys, interest and taxes, is a joint covenant unless otherwise expressly stated in the mortgage, and in the event of the death of one of the mortgagors his estate is not liable even in respect of what was due and payable at the time of his death. *Lindley* v. *Vassar*, (1918) 25 B.C.R. 219; (1918) 1 W.W.R. 879.

2. Assignment—Action by—Notice of assignment before action.]—The assignee of a mortgage must give notice of the assignment to the mortgagor before he can proceed in an action in his own name against the mortgagor upon the covenant for payment contained in the mortgage. In the absence of notice the action should be carried on in the name of the assignor. *Griffiths* v. *Kenney*, (1917) 1 W.W.R. 800.

3. Effect of foreclosure and sale upon.]—If a person, first a mortgagee, becomes owner of the mortgaged premises by foreclosure or otherwise and sells to a third party, thereby putting it out of his power to reconvey in case of redemption, he is precluded from suing upon a covenant or other promise to pay for any part of the debt secured by the mortgage or from asserting a proprietary right over any property held by way of collateral security. *Royal Bank of Canada* v. *McLeod*, (1919) 27 B.C.R. 376; 48 D.L.R. 500; (1919) 3 W.W.R. 544.

IV. Redemption.

1. Stay of proceedings pending mortgagee's action for foreclosure.]—A mortgagor, anticipating foreclosure proceedings on five mortgages, commenced action for taking of accounts and redemption of four of them, and for a declaration that the assignment of the fifth mortgage to the defendant (who held all five mortgages) was a fraudulent scheme to prevent the redemption of the property securing the other mortgages. The mortgagee immediately commenced foreclosure proceedings, and applications were then made by the defendant in each of the actions for a stay of proceedings pending a decision in the other:—Held, that the claim of the mortgagor which arises out of the substantial claim of the mortgagee for foreclosure should be stayed pending the mortgagee's action, particularly where the mortgagor's claim can be advanced by way of defence to the mortgagee's action. *Martin* v. *Finlayson*. *Finlayson* v. *Martin*, (1921) 29 B.C.R. 305; 57 D.L.R. 423.

2. Third mortgagee.]—In an action by a first mortgagee for foreclosure it appeared that the second mortgagee held its mortgage not for a present existing indebtedness but for a possible contingent liability. The plaintiff had obtained an order nisi giving the defendants (including the second and third mortgagees) six months in which to redeem. The third mortgagee, intending to redeem if the second mortgagee should not do so, applied for an extension of time for redemption:—Held, that in the circumstances the third mortgagee should have an opportunity to redeem in case the second mortgagee is foreclosed. *Braid* v. *McDowell*, (1919) 27 B.C.R. 423; (1919) 3 W.W.R. 596.

V. MERGER.

1. Quit claim by mortgagor.]—A mortgagee who takes a quit claim deed from the mortgagor, expressed to be in satisfaction of all claims against the mortgagor, but who registers the quit claim deed subject to his mortgage, does not thereby let in as a first charge a judgment registered against the mortgagor between the dates of the mortgage and the quit claim deed. The taking of the quit claim deed creates no merger of the mortgage unless the mortgagee so intends, and registration in the way mentioned negatives such intention. The mortgagee may exercise the power of sale in the mortgage, although the mortgagor is released from personal liability. *In re Land Registry Act and British Columbia Land and Investment Agency, Limited* v. *Waldron Apartments, Limited,* (1929) 41 B.C.R. 74; (1929) 3 D.L.R. 723; (1929) 1 W.W.R. 739.

2. Declaration of intention.]—Where a mortgagor by his will devised the mortgaged lands to the mortgagee the mortgage does not merge in the inheritance if the mortgagee's declaration and conduct indicate her intention to maintain the mortgage separate from the inheritance. The assignment of the mortgage as collateral security with a declaration that it is a good and subsisting mortgage is evidence of that intention. The mortgagee having elected to treat the mortgage as a separate portion of her estate it remains so until her death unless in the meantime she has altered her election, and is a part of her personal estate to be distributed by the administrator if she dies intestate, and does not descend to her heirs by inheritance. *In re Parshalle: Kunhardt* v. *Cox and Quaille,* (1930) 43 B.C.R. 68; (1930) 3 D.L.R. 1004; (1930) 2 W.W.R. 802.

VI. ACCOUNTS.

Foreclosure.] — In a foreclosure action, the plaintiff added to the mortgage debt the amount of four mechanics' liens paid off under a clause in the mortgage entitling the mortgagees to pay "liens, taxes, rates," etc., affecting the mortgaged lands and add the amounts so paid to the mortgage debt. One of the liens was filed prior to the registration of the plaintiff's mortgage, but the remaining three were filed subsequently to the registration of a second mortgage held by the defendant:—Held, that such clause must be confined to the payment of liens which affected the plaintiff's interest in the property, and did not entitle him, as against subsequent mortgagees, to add to the mortgage debt amounts used to pay off mechanics' liens subsequent in date to the registration of the defendant's mortgage, and as to which there was no adjudication establishing priority through increase in value of the premises under sec. 9 of the Mechanics' Lien Act. *The Great West Permanent Loan Company* v. *The National Mortgage Company, Limited,* (1919) 26 B.C.R. 566; 45 D.L.R. 751; (1919) 1 W.W.R. 788.

VII. PAYMENT.

1. Part payment by guarantor—Right to security — Marshalling.] — Where the plaintiff holds a mortgage to secure a debt for a portion of which the defendant is liable as endorser of promissory notes, the defendant is not entitled as a condition of recovery against him to have the mortgage security handed over to him without payment of the whole debt secured by the mortgage. In order to marshal not only must there be two creditors of the same person but one of them must have two funds belonging to the same person to which he can resort. *Royal Bank of Canada* v. *Izen,* (1921) 29 B.C.R. 547; 60 D.L.R. 467; (1921) 2 W.W.R. 929.

2. Release — Mortgagee neglecting to collect from third party—Onus of loss.]—Where a mortgagee agrees to release a mortgage and the mortgagor places money for that purpose in the hands of a third party, with the knowledge of the mortgagee, and the release is regularly executed, but the mortgagee neglects to collect the release money from the third party, who later absconds with it, the mortgagee must bear the loss, having put it in the power of the third party to commit the wrong. *Thom* v. *Walker,* (1930) 43 B.C.R. 142; (1930) 3 D.L.R. 915; (1930) 3 W.W.R. 33.

See Corsini v. *Palm,* (1925) 35 B.C.R. 417.

See BANKRUPTCY.

See BILLS OF SALE.

See EXECUTORS AND ADMINISTRATORS.

See MECHANIC'S LIEN.

See REGISTRATION OF LAND.

See TRUSTS.

See VENDOR AND PURCHASER.

MOTOR VEHICLES: LEGISLATION.

I. STATUTES, 761.
A. Motor Traffic Regulation Act, 761.
B. Motor Vehicle Act, 1920, 762.
C. Vancouver Incorporation Act, 762.

I. STATUTES.

A. Motor-traffic Regulation Act.

1. Person entrusted with motor-car.]—Where a passenger is injured in a motor-car licensed as a jitney while being operated by one of two joint owners as a jitney such owner is not a person "entrusted" with the motor-car by the other owner (who had a chauffeur's license) so as to render the latter liable under sec. 33 of the Motor-traffic Regulation Act. In an action for damages sustained while riding in a motor-car the onus is on the plaintiff to establish liability within sec. 33 of the Motor-traffic Regulaton Act. *Moore* v. *British Columbia Electric Railway Company, Limited and Johnston*, (1916) 22 B.C.R. 504; 34 W.L.R. 469; 10 W.W.R. 631.

2. Responsibility of owner.]—In order to hold an owner of an automobile responsible for an infraction of the Motor-traffic Regulation Act it must be shewn that he was the driver or that the driver was entrusted with its care. *Rex* v. *Ralston*, (1919) 27 B.C.R. 563. *Perrin* v. *Vancouver Drive Yourself Auto Livery*, (1921) 30 B.C.R. 241; 61 D.L.R. 140; (1921) 3 W.W.R. 61.

3. Responsibility of owner.] — The responsibility of the owner of an automobile under sec. 35 of the Motor-vehicle Act is confined to the penalties imposed by the Act, and the section does not create a civil liability in damages on the owner of an automobile by reason of the negligence of a person entrusted with its possession. *Boyer* v. *Moillet*, (1921) 30 B.C.R. 216; 61 D.L.R. 136; (1921) 3 W.W.R. 62. *Ruff* v. *Sutherland*, (1930) 43 B.C.R. 218; (1931) 1 D.L.R. 651; (1930) 3 W.W.R. 554. *Victoria U Drive Yourself Auto Livery* v. *Wood*, (1930) 42 B.C.R. 291; (1930) 1 W.W.R. 522; (1930) 2 D.L.R. 811.

4. Person entrusted.]—A person who is in possession of a motor-car for the purpose of trying it with a view to purchase is a person entrusted with the motor-car within the meaning of the Motor-traffic Regulation Act. *Ibid.*

5. Person entrusted.]—A person who hires a motor-car from the owner and drives it himself is a "person entrusted" within the meaning of the Act. *Perrin* v. *Vancouver Drive Yourself Auto Livery, supra.*

B. Motor-vehicle Act.

1. Failure to obtain license—Effect of as to action for negligence.]—The failure to obtain a license under sec. 9 (a) 1 of the Motor-vehicle Act which contains a prohibition against driving on a highway without a license, or other failure to comply with statutory requirements, does not deprive the driver of a right of action he would otherwise have against a negligent defendant unless the breach of the statute was the proximate cause of the action. *Walker* v. *British Columbia Electric Railway Company*, (1926) 36 B.C.R. 338; (1926) 1 D.L.R. 1162; (1926) 1 W.W.R. 503.

2. Municipal Traffic Regulation By-law —Rule of the road.]—A regulation as to the right-of-way of vehicles at street intersections is a rule of the road and a municipal by-law which lays down a rule as to the right-of-way at street intersections is ultra vires under the Highway Act and under sec. 17 of the Motor-vehicles Act (R.S.B.C. 1924, cap. 177). *Pipe* v. *Holliday*, (1930) 42 B.C.R. 230; (1930) 2 D.L.R. 73; (1930) 1 W.W.R. 225.

3. Municipal by-law—Stop sign.]—As a municipal council has power to pass by-laws regulating the traffic of motor-vehicles and trailers on the highways, save as to rules of the road and rate of speed, a by-law providing for the installation of a stop sign at intersecting streets is intra vires of the municipal council. *Lechtzier* v. *Lechtzier; Levy* v. *Lechtzier*, (1931) 42 B.C.R. 423; (1931) 1 D.L.R. 1004; (1931) 1 W.W.R. 425.

C. Vancouver Incorporation Act.

Licenses—Discrimination.] — The 1917 amendment to subsec. 130 (a) of sec. 125 of the Vancouver Incorporation Act, 1900, as indicated by the Vancouver Incorporation Act Amendment Act, 1915, sec. 19, expressly empowers the City to discriminate between holders of vehicle licenses. *In re McKay*, (1917) 24 B.C.R. 298; (1917) 3 W.W.R. 447.

See BAILMENT.
See HIGHWAYS.
See INSURANCE.
See LIENS.
See MUNICIPAL CORPORATIONS.
See NEGLIGENCE.
See SALE OF GOODS.
See WAREHOUSEMEN.

MUNICIPAL CORPORATIONS.

I. BOUNDARIES, 764.
II. GOVERNMENT AND PROCEDURE, 764.
A. Governing body: Qualification, 764
B. Officers, 764.
C. Commissioner, 765.
III. POWERS, DUTIES AND LIABILITIES, 765.
A. Exercise of power, 765.
B. Liabilities, 766.
1. As to drains and sewers, 766.
2. As to streets and highways, 767.
3. As to bridges, 771.
4. As to ferries, 772.
5. As to public schools, 772.
6. As to public parks, 773.
7. As to municipal buildings, 773.
8. As to waterworks, 773.
C. Contracts, 774.
D. Expropriation of property, 775.
IV. BY-LAWS, 775.
A. In general, 775.
B. Authentication, 776.
C. Validity, 776.
D. Excess of powers, 777.
E. Regulation and prohibition, 778.
F. Quashing, 779.
V. TRADE LICENSES, 780.
VI. TAXATION, 781.
A. Power of, 781.
B. Principles of liability, 782.
C. Principles of assessment, 782.
D. Remedies for improper assessment, 784.
E. Court of Revision, 785.
F. Exemption, 786.
VII. TAX SALE, 787.
A. Effect of, 787.
B. Action to enforce, 788.
C. Invalidity of, 788.
D. Lien for taxes, 788.
E. Action to recover taxes, 789.
F. Redemption, 789.
VIII. ACTIONS BY AND AGAINST, 789.
A. Parties, 789.
B. Limitation of actions, 790.

I. BOUNDARIES.

Shore of lake.] — Where the letters patent incorporating a British Columbia municipality describe one of its boundaries as the "shore" of a certain navigable lake, the limits of the municipality extend to low-water mark, although the lake in question is non-tidal water. *Rex* v. *Lakeside Orchards, Limited*, (1929) 1 W.W.R. 870; 51 C.C.C. 182.

II. GOVERNMENT AND PROCEDURE.

A. Governing Body. Qualification.

Registered owner — Agreement—Charge.]—An owner of land under a purchase agreement registered as a charge against the land is a registered owner within the meaning of sec. 19 of the Municipal Act, 1914, cap. 52, as re-enacted, so as to qualify him for election as a councillor of a municipality. *In re Municipal Elections Act. Rex ex rel. Rose* v. *Moir*, (1924) 34 B.C.R. 284; (1924) 4 D.L.R. 498; (1924) 3 W.W.R. 391.

B. Officers.

1. Fiscal agent.—A municipal council cannot bind succeeding councils by the appointment of a fiscal agent with exclusive right to sell municipal bonds. *Wood-Gundy & Company* v. *Municipality of South Vancouver*, (1916) 10 W.W.R. 928.

2. Purchase of tax sale lands by.]—A clerk in the city treasurer's office is ineligible to make a purchase of land from the city after the redemption period has expired, the principle being applicable which prohibits a person from placing himself in a position in which his duty conflicts with his private interest. *Bird* v. *Fisher*, (1921) 2 W.W.R. 812.

3. Employee not an officer—Dismissal.] —A captain of a city fire department is an employee as distinguished from an officer. Where the conduct of an employee is investigated and passed upon by the municipal council the Court will not be astute in nullifying the result. The test is whether the council was unreasonable in the conclusion to which it came, having regard to the circumstances. *Zeigler* v. *City of Victoria*, (1921) 30 B.C.R. 389; 70 D.L.R. 722; (1922) 1 W.W.R. 75.

C. Commissioner.

1. Production of books and accounts.]—When the management of a municipal corporation is in the hands of a commissioner appointed by the Lieutenant-Governor in Council under a statute which also provides for inspection and audit of his books and accounts, a ratepayer has no right to demand from the commissioner their production for inspection where there is no statutory provision requiring him to produce them. *In re Gillespie, Commissioner of the Municipality of South Vancouver,* (1920) 28 B.C.R. 494; 54 D.L.R. 144; (1920) 3 W.W.R. 440.

2. Production of by-laws passed by.]—Where it appears that a commissioner appointed by the Lieutenant-Governor in Council under statutory authority to have the management and control of a municipal corporation had filed in the office of the County Court the by-laws passed by him during his tenure of office, mandamus to compel production of such by-laws for inspection by ratepayers will be refused. *Ibid.*

III. Powers, Duties and Liabilities.

A. Exercise of Power.

1. Acquisition of land.]—With reference to the purchase and acquisition of real property, the provisions of sec. 5, B.C. Stats. 1915, cap. 46, amending the Municipal Act, B.C. Stats. 1914, cap. 52, as to the necessity of the assent of the electors, are incompatible with the powers conferred by subsec. (155) of sec. 54 of the 1914 Act, and, therefore, to this extent the latter must be deemed to have been repealed by implication. *Meldrum* v. *District of South Vancouver,* (1916) 22 B.C.R. 574; 27 D.L.R. 193; 34 W.L.R. 314; 10 W.W.R. 519.

2. Sea wall—Private rights—Access to wharf.]—The erection of a sea wall authorized by statute (False Creek Terminal Act, B.C. 1913, cap. 76) upon a foreshore owned by a municipality cannot be enjoined because it partly interferes with a private right of access to a wharf. *Champion & White* v. *Vancouver,* (1916) 23 B.C.R. 221; 31 D.L.R. 22; (1917) 1 W.W.R. 185.

3. City waterworks—Bursting of water main.]—Where the construction of waterworks is authorized by Act of Parliament a city municipality is not responsible, in the absence of negligence, for damage caused by flooding resulting from the bursting of a water main. *Renahan* v. *City of Vancouver,* (1930) 43 B.C.R. 147; (1930) 4 D.L.R. 1018; (1930) 3 W.W.R. 166.

4. Highway dedication—Acceptance by municipality—By-law.]—In order that a public highway may be established by dedication two concurrent conditions must be satisfied; there must be on the part of the owners the actual intention to dedicate; and it must appear that the intention was carried out by the way being thrown open to the public and that the way has been accepted by the public. Such acceptance by the public can only be established by proof of public user, or by the act of some public authority done in the execution of statutory powers. The sole authority of a municipal corporation for establishing a highway is conferred by subsec. 176 of sec. 53 of the Municipal Act, R.S.B.C. 1911, cap. 170; and such a power must be exercised by passage of a by-law meeting the requirements of that section, and if the by-law does not comply with the essential requirements it is not sufficient as acceptance of the way. *Bailey* v. *City of Victoria,* (1920) 60 S.C.R. 38; 54 D.L.R. 50; (1920) 1 W.W.R. 917.

5. Local improvement.]—In an arbitration under sec. 357 of the Municipal Act it is proper to allow as against the damage sustained by an owner by reason of the work, any enhancement in the value of the property derived from the work in question, but on arriving at the enhanced value of the property the arbitrators must not deduct the cost of the work done which is chargeable against the property under the Local Improvement By-law. *In re Hanna and the City of Victoria,* (1917) 24 B.C.R. 110; 35 D.L.R. 798; (1917) 3 W.W.R. 245.

B. Liabilities.

1. As to Drains and Sewers.

1. Drains causing slide.] — A person holding a lot under an agreement for sale that is not registered but who has cleared the lot and paid taxes, has a possessory title upon which to found an action for damages against those who permit water to escape from drains on to and to the injury of the lot. The measure of damages is the diminished value of the lot, or if the plaintiff's interest is less than the freehold, then of the plaintiff's interest in it. *Kilby* v. *Municipality of Point Grey,* (1917) 24 B.C.R. 107; (1917) 2 W.W.R. 206.

2. Defective condition.] — A municipality having constructed drains along the sides of a highway is under the duty of keeping them in repair and removing obstructions so that the water therefrom will not overflow and flood the lands abutting on the highway. *Hobson* v. *Corporation of Richmond*, (1923) 32 B.C.R. 369; (1923) 3 W.W.R. 401.

3. Faulty construction—Notice of accident—Reasonable excuse for want of.]—Where a plaintiff commenced an action for injuries sustained from falling into a drain, the accident being due to the negligent construction of the drain by the defendant municipality, and the evidence disclosed that the plaintiff was deaf and dumb and the only other member of his household could neither read nor write, and the injuries sustained did not appear to be serious until after two months had expired, it was held that there was reasonable excuse for failure to give the notice required under sec. 486 of the Municipal Act which provides (inter alia) that the want of notice required by the section will not be a bar to the maintenance of an action if the Court is of opinion that there is reasonable excuse for want of notice, and that the defendant municipality has not thereby been prejudiced in its defence. *Howard* v. *Municipality of South Vancouver*, (1924) 34 B.C.R. 167; (1924) 4 D.L.R. 257; (1924) 3 W.W.R. 166.

2. As to Streets and Highways.

1. Narrowing highway—Compensation to abutting owners.]—A municipality has power under subsec. 176 and 193 of sec. 52 of the Municipal Act, R.S.B.C. 1911, to close up a portion of a highway in order to provide a right-of-way for a line of railway, thereby reducing the width of the highway, and the owner of property abutting upon the highway is entitled to compensation for consequential injury to his property. *Ramsay* v. *Corporation of the District of West Vancouver*, (1915) 21 B.C.R. 401; 22 D.L.R. 826; 31 W.L.R. 415; 8 W.W.R. 835; (1916) 53 S.C.R. 459; 30 D.L.R. 602; 10 W.W.R. 1184.

2. Resumption of lands for highways and other purposes.]—In an action against a municipal corporation proposing to resume portions of the plaintiff's lands under sec. 325 of the Municipal Act which contains a proviso "that no such resumption shall be made of any lands on which any buildings may be erected or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings":—Held, that in determining whether land is in use for the more convenient occupation of a building, regard must be had to the uses to which a building is put. A driveway is for the more convenient occupation of a house and so is a barnyard for a stable or barn. The question is one of fact whether it was so used in each case, and an element to be considered is whether the land is withdrawn from the larger purposes of the farm, such as growing of grain and depasturing of cattle, etc., and kept for use in connection with house and farm buildings. *Caine* v. *Corporation of the District of Surrey et al.*, (1919) 27 B.C.R. 23; (1920) 28 B.C.R. 321; 60 S.C.R. 654; 67 D.L.R. 794. (1921) 2 W.W.R. 273.

3. Construction — Motor-vehicles.]—Where the statutory power conferred upon the City to make by-laws respecting vehicle and motor traffic contains express power to prohibit, the City Council may pass by-laws prohibiting certain classes of vehicles from driving or operating on its streets. The power given to the City to "arrange all motor-vehicles in classes and differentiate in the conditions contained in licenses granted" is not restricted to classification of the vehicles themselves, but extends to the routes or areas over which they run or within which they operate. *Rex* v. *Calbic*, (1920) 28 B.C.R. 113; 61 D.L.R. 203; (1920) 2 W.W.R. 621.

4. Highway—Duty of municipality—Non-feasance.]—The Municipal Act casts no duty on municipalities controlled by it to repair the roads, the possession of which is vested in them by sec. 370 of the Municipal Act. Where, therefore, a road built by others without authority is so vested, the municipality is not liable to pay damages for injuries sustained owing to mere non-repair. *Von Mackensen* v. *The Corporation of the District of Surrey*, (1915) 21 B.C.R. 198; 22 D.L.R. 253; 8 W.W.R. 541.

5. Trees on highway.]—An action is not maintainable by an adjoining land owner for the cutting by the municipality of trees on a highway the possession whereof is vested in the municipality. *Attorney-General for British Columbia* v. *Corporation of Saanich*, (1921) 29 B.C.R. 268; 56 D.L.R. 482; (1921) 1 W.W.R. 471.

6. Right of way at street crossing.]—A by-law regulating the right of way at street crossings is intra vires of the Council

of the City of Victoria and is not within the term "rules of the road" in sec. 37 of the Motor-traffic Regulation Act. *Quinn* v. *Walton*, (1921) 30 B.C.R. 401.

7. Sidewalks—Duty to repair—Nonfeasance.]—The Municipal Act, 1914, does not impose on a municipal corporation any liability of damages for injury caused to any person through non-repair of roads and sidewalks. *Clarke* v. *The Corporation of Chilliwack*, (1922) 31 B.C.R. 316; (1923) 2 W.W.R. 726.

8. Sidewalks — Duty to repair — Nonfeasance.]—The obligation upon a municipality is to build its sidewalks according to good engineering practice, and it is not required to build them so as to avoid every possible source of disturbance. Where the cause of a disturbance could not fairly be anticipated or foreseen at the time of construction an action will not lie for injury resulting therefrom. Sec. 45 of the Local Improvement Act, 1913, does not impose any liability on a municipality for nonfeasance. *Scott* v. *The Corporation of the City of Nanaimo*, (1924) 33 B.C.R. 474; (1924) 2 D.L.R. 811; (1924) 1 W.W.R. 1275.

9. Highway—Closing—Land in lieu—Estoppel.]—Where a municipality has induced an owner of land to transfer to it land for use as a highway by clearly evincing an intention and permitting the landowner to close up another road across his land, it cannot afterwards deny the intention to close the latter and that it should remain closed. Under such circumstances the land-owner is entitled to a declaration in effect preventing the municipality from opening up the closed road. *British Columbia Hop Co., Ltd.* v. *Corporation of the District of Kent*, (1925) 35 B.C.R. 380; (1925) 3 D.L.R. 171; (1925) 2 W.W.R. 31.

10. City of Vancouver—Non-repair.]—Under the Vancouver Incorporation Act the City of Vancouver is under the duty of keeping its streets and highways in repair. The plaintiff while passing along Hastings Street near the intersection of Renfrew Street in the City of Vancouver, tripped over an obstruction in the form of some wire which was imbedded in the street, fell to the ground, and was severely injured:—Held, that the defendant must assume the burden of proving that it did all that could be reasonably done to prevent the want of repair, and accepting the evidence of the plaintiff as to the manner in which the accident occurred, the defendant has not, in the circumstances, satisfied such burden, and is therefore liable in damages. *Woodcock* v. *City of Vancouver*, (1927) 39 B.C.R. 288; (1928) 1 D.L.R. 1080; (1927) 3 W.W.R. 759.

11. Excavation in sidewalk area.]—An abutting owner having been allowed by the City of Vancouver to excavate within the sidewalk area of the street, covered it over with an iron frame. The plaintiff while walking on the sidewalk stumbled over the iron frame and fell, sustaining injury:—Held, that the accident happened because of want of proper repair and the city has failed to shew that it had done all that it reasonably could to prevent the want of repair. *Moran* v. *City of Vancouver*, (1928) 40 B.C.R. 450; (1929) 1 D.L.R. 461; (1928) 3 W.W.R. 660.

12. Misfeasance.]—In constructing a sewer along the south side of Kingsway the defendant municipality erected a barricade of planks against which the earth taken from the excavation was piled up. The barricade was near the inside edge of the sidewalk and left a space of about two and one-half feet between the barricade and private properties for the use of pedestrians. From the wet condition of the earth so piled up and from occasional rain the clay seeped through the cracks on to the narrow pathway resulting in its surface becoming very slippery. The plaintiff coming from a store behind the barricade on to this pathway, slipped and fell, breaking certain bones in her ankle:—Held, that the defendant had created a nuisance and was guilty of misfeasance. *Watts* v. *The Corporation of the District of Burnaby*, (1929) 41 B.C.R. 282; (1929) 4 D.L.R. 142; (1929) 2 W.W.R. 612.

13. Regulation of traffic.]—A municipality is by the Municipal Act given power to regulate traffic, this power being definitely limited to regulations other than the rules of the road. A regulation as to the right of way of vehicles at street intersections is a rule of the road and a municipal by-law which lays down a rule as to the right of way at street intersections is ultra vires. *Pipe* v. *Holliday*, (1930) 42 B.C.R. 230; (1930) 2 D.L.R. 73; (1930) 1 W.W.R. 225.

14. Obligation to repair.]—The Municipal Act does not impose upon a municipality the obligation to repair sidewalks, and where there is no evidence of faulty construction the municipal corporation will not be liable for loss resulting from an accident due to inevitable decay of the material properly used in the construction

of a sidewalk. *Gilroy* v. *Corporation of the District of Burnaby*, (1931) 44 B.C.R. 171; (1931) 4 D.L.R. 410; (1931) 3 W.W.R. 1.

15. Obstruction — Mandatory injunction.]—Under sec. 332 of the Municipal Act a municipal corporation may bring an action for a mandatory injunction to compel a land-owner to remove obstructions placed by him on a road within the municipality and to restrain him from interfering with or obstructing same. *Corporation of Saanich* v. *McFadden*, (1923) 32 B.C.R. 221; (1923) 1 D.L.R. 1170; (1923) 2 W.W.R. 429; (1923) 3 D.L.R. 171.

3. As to Bridges.

1. Drawbridge — Safeguard.] — Where the protection afforded to vehicles crossing a bridge over the Fraser River consisted of a red light in the middle of the drawbridge which was displayed when the draw was open, and light iron gates twenty feet from each side of the draw, it was held that the proper safeguards had not been provided, and that the municipal corporation in control of the bridge was liable in damages for the death of passengers in a motor-car which broke through one of the gates and fell into the river. If a corporation has provided funds for defraying one-half the bridge and has in fact exercised control over it, prima facie it is the duty of the corporation to take reasonable measures to protect the public against the dangers incidental to the workings of a draw span, and if the corporation disputes this responsibility it is incumbent upon it to prove that the officers who had exercised control were exceeding their lawful powers. *Evans* v. *South Vancouver and Township of Richmond*, (1918) 26 B.C.R. 60; 48 D.L.R. 209; (1919) 3 W.W.R. 339.

2. Negligence of bridge tender.] — Where a drawbridge belonging to the City of Vancouver was under repairs and the bridge tender at times was unable to move the draw the City is liable for damages resulting from his negligence in failing to call to the attention of a master of a ship who had telephoned that he would pass through the draw at a certain hour the condition of the drawbridge and the danger of the power being cut off thereby preventing its operation. *Star Steamship Company* v. *City of Vancouver*, (1916) 23 B.C.R. 317; 30 D.L.R. 484; 34 W.L.R. 1188.

3. Negligence.]—The Municipality of South Vancouver and the Municipality of Richmond both contributed to the maintenance of a bridge constructed by the Provincial Government and forming a portion of the highway connecting the municipalities. By agreement the Municipality of Richmond appointed and had immediate control of the bridge tender and the Municipality of South Vancouver contributed towards his wages. The span of the bridge was physically within the boundaries of South Vancouver. In an action by a widow for negligence of the defendant municipality in failing to safeguard the open span of the bridge, it was held that the municipalities were jointly liable. *Smith* v. *South Vancouver and Corporation of Richmond*, (1922-3), 31 B.C.R. 168, 481; (1923) 2 D.L.R. 535; (1923) 1 W.W.R. 417.

4. As to Ferries.

Free pass.]—Where a municipal corporation, acting under a by-law and the general powers conferred by its city charter, confers on the residents of the corporation free transportation on its municipal ferries, a ratepayer as such has no right of action to enjoin the corporation from operating such ferry by reason of the fact that if loss is occasioned by such operation it will fall on the ratepayers of the city. *Hooper* v. *City of North Vancouver*, (1921) 31 B.C.R. 51; 65 D.L.R. 286; (1922) 1 W.W.R. 1249.

5. As to Public Schools.

1. Non-resident pupils.]—There is no duty cast upon a school board to receive within its schools children who are not resident within its own municipal district. *Patterson et al.* v. *Victoria School Trustees*, (1917) 24 B.C.R. 365; (1917) 1 W.W.R. 526.

2. City schools—Pupils from adjoining municipality—Cost.]—In the case of children residing in a district municipality attending a public or high school in a city municipality the latter may compel the former to pay for education of the children under sec. 15 of the Public Schools Act. *Corporation of the City of Victoria* v. *District of Oak Bay*, (1917) 24 B.C.R. 516; 38 D.L.R. 238; (1918) 1 W.W.R. 158.

3. School Board — Commission of inquiry.]—Sec. 214 of Vancouver Incorporation Act is wide enough to enable the City

Council to request by resolution a judge of the Supreme Court to inquire into contracts which have been entered into by the School Board. Such an inquiry is not a judicial process and therefore even if the above section were not wide enough to support it the Court would not restrain it by injunction. *Vancouver Board of School Trustees* v. *City of Vancouver et al.*, (1916) 10 W.W.R. 1330.

6. As to Public Parks.

Fireworks display — Injury resulting from.]—Where the City authorities contributed towards the expense of a fireworks display held by a committee of citizens in a public park, it was held that the City did not conduct the celebration and in any event would not be liable except in the absence of due care, for injury to an infant who escaped from her parents and approached within range of the fireworks. *Halpin* v. *Corporation of the City of Victoria*, (1915) 21 B.C.R. 14; 23 D.L.R. 333; 7 W.W.R. 1058.

7. As to Municipal Buildings.

Building used as fire hall — By-law respecting smoke pipes not complied with —Fire.]—A municipality which in contravention of a by-law allows a metallic smoke pipe to pass through a wooden floor and through the roof of a fire hall, the upper part of which is used by a fire chief employed by the municipality and his family as living quarters, such smoke pipe not being enclosed in brick or tile walls as required by the by-law, is guilty of negligence and liable to adjacent owners for damages to their property caused by a fire originating from the defective pipe. *Wilson* v. *Port Coquitlam*, (1922) 30 B.C.R. 449; 67 D.L.R. 49; (1922) 1 W.W.R. 640; (1923) S.C.R. 235; (1923) 2 D.L.R. 194; (1923) 1 W.W.R. 1025.

8. As to Waterworks.

Negligence — Freezing of water pipes.]—Where a householder after closing his dwelling-house asked the superintendent of the defendants' waterworks system to cut off the water from the branch service pipe and the latter failed to do so and action was brought against the Commissioners of the Development District for damage caused by the freezing of the water pipes in the plaintiff's house, it was held that the plaintiff must fail on the ground that his own failure to take the reasonable precautions which he should have taken under the circumstances was the cause of his loss, and also on the ground that the loss was not shewn to have been the natural and probable consequence of the defendants' negligence. *Leary* v. *Commissioners for Nakusp Development District*, (1930) 1 W.W.R. 97.

C. Contracts.

1. Power company—Right to purchase assets of—Separate incorporation of portion of area concerned.]—The plaintiff Corporation entered into an agreement with the defendant Company for the construction and operation of an electric lighting, heating and power system within the district. The contract contained a clause giving the Corporation the right to assume ownership of the system at the expiration of ten years upon certain terms. In the meantime a portion of the district was incorporated into a City, and by the Act of incorporation the City assumed the liability of the district to the defendant Company in so far as its own area was concerned:—Held, that the right still remained with the District to assume ownership of the Power Company's system, and was enforceable under the terms of the agreement. *The Corporation of the District of North Vancouver* v. *Vancouver Power Company, Limited*, (1917) A.C. 598; 86 L.J.P.C. 97; 117 L.T. 492; 36 D.L.R. 462; Affg. (1916) 22 B.C.R. 561; 27 D.L.R. 727; 34 W.L.R. 486.

2. Street railway fares.]—The Vancouver City Council has power under sec. 39 of the Consolidated Railway Company's Act, 1896, to enter into an agreement with the Street Railway Company increasing the amount of fares to be paid by passengers, and may pass a by-law authorizing the same without submitting the by-law to the electors. The power of the Council under sec. 39 to make or vary an agreement as to fares is not affected by subsec. (15) of sec. 125 of the Vancouver Incorporation Act, 1900, as amended in 1912, cap. 59, sec. 5. Upon the by-law duly passed to confirm the agreement being acted upon in good faith by a party to the agreement, the Council could not of its own motion nullify its deliberative act a month after its passage. The mayor has no discretion, but owes a public

duty which should be performed by his signing both the by-law and the agreement, thereby rendering them fully effective. *City of Vancouver* v. *British Columbia Electric Railway Company*, (1918) 26 B.C.R. 162; (1918) 3 W.W.R. 558.

3. Right-of-way and erection of pole line — By-law — Submission to electors.] —Where a company having an electric power franchise in a municipality, and desiring certain further powers, induces the municipal authorities to submit a by-law for the grant of such powers to the ratepayers, and pending the by-law being submitted to the ratepayers obtains the approval of the municipal authority to the location of certain poles for use in carrying out the additional powers required, it cannot contend that such approval was given except conditionally upon the by-law being passed by the ratepayers. *Corporation of The District of Maple Ridge* v. *Western Power Company of Canada, Limited*, (1926) 37 B.C.R. 252; (1926) 2 D.L.R. 525.

4. Electric light system — Municipal corporation assuming—"Undertaking" defined.]—Where a municipal corporation has the right by agreement to purchase the undertaking, property rights and privileges of an electric light and power company, the price to be paid should represent the value of the whole undertaking and is not restricted to the physical assets of the company. *City of Cumberland* v. *Cumberland Electric Light Co., Ltd.*, (1931) 43 B.C.R. 525; (1931) 3 D.L.R. 69; (1931) 2 W.W.R. 377; Affd. (1931) S.C.R. 717; (1931) 4 D.L.R. 459.

D. Expropriation of Property.

See COMPULSORY PURCHASE.

IV. BY-LAWS.

A. In General.

1. Good in part.]—A by-law that is bad in part cannot be declared good as to the remainder where it cannot be presumed that the council would have passed the good part only if it had realized the rest was ultra vires, and where each part is connected with and essential to the other. *Carrick* v. *Point Grey*, (1927) 38 B.C.R. 92, 481; (1927) 1 D.L.R. 446; (1927) 3 D.L.R. 909; (1927) 2 W.W.R. 684.

2. Honest exercise of power — Ultra vires.]—Where express power to pass a by-law is conferred by the Legislature the objection that it is prohibitive, discriminatory and unreasonable must go so far as to establish that the passage of the by-law was brought about, not in good faith as an honest exercise of the power conferred, but in abuse thereof for ulterior purposes and that it goes beyond what was intended to be allowed by the Act. *Rex* v. *Low Chung*, (1919) 27 B.C.R. 469.

B. Authentication.

1. Publication.] — A by-law passed under subsec. (142) of sec. 50 of the Municipal Clauses Act (1906) must be published in the B.C. Gazette and in a newspaper as specified in the Act, otherwise it is invalid and an arbitration held under the authority of such a by-law is void. *City of Victoria* v. *MacKay*, (1918) 56 S.C.R. 524; 41 D.L.R. 498; (1918) 2 W.W.R. 610.

2. Publication.]—The publication of a by-law in the Gazette pursuant to subsec. 176 of sec. 53 of the Municipal Act, R.S.B.C. 1911, implies the publication of the by-law in extenso. *Bailey* v. *City of Victoria*, (1920) 60 S.C.R. 38; 54 D.L.R. 50; (1920) 1 W.W.R. 917.

3. Assent of electors.]—A municipal by-law passed for the purpose of purchasing certain properties for street widening and the erection of a fire hall, which has not received the assent of the electors as required by the Municipal Act as amended in 1915, even if operative under the Act as to one of the purposes but incapable of segregation from the general scheme, fails as a whole, and should be quashed. *Meldrum* v. *Corporation of the District of South Vancouver*, (1916) 22 B.C.R. 574; 27 D.L.R. 193; 34 W.L.R. 314; 10 W.W.R. 519.

C. Validity.

1. Stay of proceedings pending determination of.]—Before an injunction will be granted to restrain police court proceedings for infraction of a city by-law until the validity of the legislation upon which it is founded, and the municipal enactment is first finally determined, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a

probability that the plaintiffs are entitled to relief. Public bodies invested with statutory powers must take care to keep within the limits of the authority committed to them, and in carrying out their powers must act in good faith and reasonably and with some regard to the interest of those who may suffer for the good of the community. *Blue Funnel Motor Line* v. *City of Vancouver*, (1918) 26 B.C.R. 142, 388; (1918) 3 W.W R. 405, 473.

2. Discharge of firearms.]—The Game Act is passed for the protection of game, and qualifying clauses are only intended to restrict the operation of penal clauses in certain circumstances. The reason for the change of language in sec. 3 of the 1925 amendment to the Act was because the Legislature decided it should no longer be necessary for a farmer killing game found destroying his crops to report to the game warden, and was not intended to give him an absolute right to shoot game found doing damage, provided he did not shoot across a public highway. The statute of 1925 simply means that so far as the penalties imposed by the Game Act are concerned, they shall not be enforceable against a farmer shooting under the circumstances therein described and the right of the municipality to protect its citizens from the discharge of firearms is not interfered with. *Rex* v. *Pendray*, (1928) 40 B.C.R. 410; (1929) 1 W.W.R. 30; 51 C.C.C. 27.

D. Excess of Powers.

Based on repealed statute.]—The Victoria City Council passed by-law No. 1147, authorizing certain local improvements, in 1911. In 1915, the Council passed by-law No. 1868, under sec. 133 of the Municipal Act (B.C. Stats. 1914, cap. 52), reciting that the work authorized had been carried out in part and that the Council deemed it inadvisable to complete the said work, and enacted that an assessment be made on the lands benefited by the works so far completed. In September, 1916, the Council, acting under said sec. 133, passed by-law No. 1925, which after reciting what had previously been done, levied and fixed the assessment necessary to provide for the proportion of the cost of the work to be borne by the owners of the property immediately to be benefited and the City respectively, and the by-law received the sanction of the Lieutenant-Governor in Council. On the 31st of May, 1916, sec. 133 was amended by sec. 25 of the Municipal Act Amendment Act, 1916, its operation being thereby confined to drains, and on the same day sec. 10 of the Local Improvement Act Amendment Act, 1916, was passed, providing that the Council may provide, under certain conditions, that work undertaken and carried out in part shall not be completed, a condition being that if the special assessment roll with respect to the work undertaken has not been made and confirmed (and this had not been done), the Council may pass a by-law amending the by-law authorizing the construction of the work in so far as it relates to the extent of the work. In an action for a declaration that by-law No. 1925 is illegal and void:—Held, that owing to the repeal of sec. 133, the Council had no jurisdiction to pass by-law No. 1925, and that the proper course was to have amended by-law No. 1147, to effect the necessary change under sec. 10 of the Local Improvement Act Amendment Act, 1916, which at the time conferred the sole power for such an assessment. *Mason et al.* v. *The Corporation of the City of Victoria*, (1918) 26 B.C.R. 418; (1919) 1 W.W.R. 562.

E. Regulation and Prohibition.

1. Creating monopoly.]—An Act of the Legislature giving a municipal corporation authority to pass by-laws regulating motor vehicles and compelling an owner, driver or chauffeur to furnish a bond or security against damages, is not intended to give the Council the right to create a monopoly or arbitrarily exclude from the position of bondsmen any person, company or class, and any investigation having in view the object of rejecting any person or company as surety under such a bond should be a fair and impartial one in which all parties interested are given an opportunity of being heard. *In re Vancouver Incorporation Act*, (1916) 10 W.W.R. 1362.

2. Prohibition and exclusion.]—A by-law of the Municipality of Saanich providing that "no animal affected with any infectious or contagious disease shall be brought into the municipality" is prohibitive in its effect and is ultra vires. If the Legislature intended to confer upon the municipal authority the power of prohibition and exclusion of animals suffering from infectious or contagious diseases it would have done so in apt language. *Rex* v. *Mould*, (1920) 28 B.C.R. 221; 52 D.L.R. 302; (1920) 2 W.W.R. 540.

3. Discharge of firearms.]—A municipality has the right to protect its citizens from the discharge of firearms and the validity of a by-law for that purpose is not affected by secs. 3 and 4 of the Game Act, 1925, which simply means that so far as the penalties imposed by the Game Act are concerned they shall not be enforceable against a farmer shooting under the circumstances therein described. *Rex* v. *Pendray*, (1928) 40 B.C.R. 410; (1929) 1 W.W.R. 30; 51 C.C.C. 27.

4. Horse-racing.]—Sec. 54, subsec. 118 of the Municipal Act, 1914, cap. 52, which enacts that "In every municipality the council may from time to time make, alter and repeal by-laws for preventing and regulating horse-racing" is intra vires the Provincial Legislature both under sec. 92 (13) of the B.N.A. Act, "Property and civil rights" and under sec. 92 (16) of the same Act, "Generally all matters of a merely local and private nature," and a by-law passed in pursuance of this section by a municipal council prohibiting horse-racing within the municipality is valid. *Morley* v. *Oak Bay*, (1923) 31 B.C.R. 523; (1923) 1 D.L.R. 869; (1923) 1 W.W.R. 454.

5. Pool-room — By-laws.] — A by-law of the City of Vancouver providing that the keeper of a billiard and pool-room shall not permit any person to play on a licensed premises for a wager other than the price of the game, is intra vires of the Council as it does not amount to prohibition but is within the province of regulation of pool-rooms. It does not create a new offence nor does it intrench in any way upon criminal law. *Jones* v. *City of Vancouver*, (1920) 28 B.C.R. 100, 166; 51 D.L.R. 320; (1920) 1 W.W.R. 1012; 32 C.C.C. 260.

F. Quashing.

Judge hearing application — Persona designata.]—Sec. 127 of the Vancouver Incorporation Act provides that "In case a ratepayer or any person interested in a by-law, or order or resolution of the Council applies to any judge of the Supreme Court . . . the judge, after at least ten days' service on the corporation of a rule to shew cause in this behalf, may quash the by-law, order or resolution," etc.:—Held, that the term "judge" in the statute is persona designata and only the judge who issued the rule nisi can hear the application on its return. *Chandler* v. *The City of Vancouver*, (1919) 26 B.C.R. 465; 45 D.L.R. 121; (1919) 1 W.W.R. 605.

V. Trade Licenses.

1. Cancelling licenses—Procedure.]—When cancelling a license under the authority of a by-law which contains no provisions as to procedure, a licensing board is not bound to observe the principles governing procedure in Court. *In re Vancouver Licensing Board. In re Mills*, (1917) 3 W.W.R. 449.

2. Discrimination.]—The 1917 amendment to subsec. (130a) of sec. 125 of the Vancouver Incorporation Act, 1900, as enacted by B.C. Stats. 1915, cap. 72, sec. 19, expressly empowers the City to discriminate between holders of vehicle licenses. *In re McKay and the City of Vancouver*, (1917) 24 B.C.R. 298; (1917) 3 W.W.R. 447.

3. Conditions imposed after date of license.]—The provisions of a by-law imposing onerous conditions on a licensee are not to be held unreasonable because the by-law was passed after the date of the license. *Jones* v. *City of Vancouver*, (1919) 3 W.W.R. 313.

4. Motor-truck—Owner residing outside of municipality.]—A merchant carrying on business at Vancouver and taking orders for delivering merchandise to customers in North Vancouver, using a motor-truck for delivery without a license, is guilty of infraction of the City of North Vancouver Trade License By-law which is in exact compliance with the power given by sec. 290, subsec. 234 of the Municipal Act. *The King* v. *F. R. Stewart & Co.*, (1928) 39 B.C.R. 401; (1928) 1 W.W.R. 586; 49 C.C.C. 216.

5. Transient trader—Sale of Bibles.]—The principal object of the British and Foreign Bible Society is to distribute Bibles among the people, and the selling of Bibles is incident to that object and cannot be held to be trading within the meaning of the Municipal Clauses Act, 1906, cap. 32. *Duncan* v. *Gairns*, (1916) 10 W.W.R. 789; 27 C.C.C. 440.

6. Wholesale trade.]—An agent or traveller in the employ of a firm of wholesale stationers, printers, book-binders and manufacturers of loose-leaf devices called on the city clerk of Salmon Arm in his office and solicited orders for stationery and office supplies. He also solicited a grocer as to his supply of counter-check books, which are specially printed and supplied in 1,000 lots. On appeal from a summary conviction for soliciting business by retail as an agent of a Vancouver firm without taking out a license contrary to sec. 6 of By-law 136 (1923) and sec. 294 of the Municipal Act:

—Held, that the sales so made were not sales by retail within the meaning of said by-law or the Municipal Act and the conviction should be quashed. *Rex* v. *Bremner*, (1924) 34 B.C.R. 494; 43 C.C.C. 366.

7. Teacher of music.]—A municipality has power to pass a by-law which requires a teacher of music to take out a license. *Rex* v. *Burnett*, (1930) 43 B.C.R. 207; (1930) 3 W.W.R. 347; 54 C.C.C. 405.

8. Printer.]—A printer is not entitled to be licensed as a manufacturer under the Companies, Trades and Business License By-Law (No. 1954) of the City of Vancouver, but should procure a license as a printer or publisher. *Rex* v. *Sutherland*, (1930) 42 B.C.R. 321, 367; (1930) 1 W.W.R. 530; (1930) 4 D.L.R. 183; (1930) 2 W.W.R. 244; 54 C.C.C. 313.

9. License fee paid in mistake of law.] — Money paid to a municipality for a license fee under a by-law cannot be recovered under an action attacking the validity of the by-law. *Colwood Park Association* v. *Oak Bay*, (1928) 40 B.C.R. 233; (1928) 3 D.L.R. 812; (1928) 2 W.W.R. 593.

VI. Taxation.

A. Power Of.

1. Fixing date for payment.]—Under sec. 311 of the Vancouver Incorporation Act the City Council is justified in passing a by-law fixing the date of payment of taxes which it could lawfully impose, it being "necessarily incidental" to a power of annual taxation to declare the time of year when such taxes should be due and payable. *City of Vancouver* v. *Richmond*, (1928) 40 B.C.R. 170; (1928) 4 D.L.R. 506; (1928) 3 W.W.R. 166.

2. Tax on professions.]—The Legislature in empowering the City of Vancouver under the Vancouver Incorporation Act to tax all the professions had no intention of conferring upon the City any power or jurisdiction beyond its corporate limits. *Ibid.*

3. Notice of assessment.] — A notice published by a municipal corporation reciting that the corporation was to expropriate lands necessary for certain local improvements and that documents shewing the amounts chargeable against the various lands to be benefited by the work were open to inspection at the City Hall, is deemed to be a sufficient compliance with sec. 256 (22) of the Municipal Clauses Act, B.C. Stats. 1906, cap. 32, as the intention of making the assessment clearly appears from the notice. *In re B.C. Electric Ry. Co. and City of Victoria*, (1916) 24 B.C.R. 346; 36 D.L.R. 671; (1917) 3 W.W.R. 542.

B. Principles of Liability.

Local improvements — Assessments—Action for.]—Rates levied on land under the Municipalities Local Improvement Act (B.C. Statutes, 1913, cap. 49) are recoverable as a debt, and may be counterclaimed in an action on an award for land taken under the Act; any defects in the by-law or assessments are cured by secs. 38 and 44 (2) and cannot therefore be set up. The expressions "number of instalments" in sec. 30 (e) and "annual instalments" in sec. 42 (2) mean one or more instalments. *Pelly* v. *City of Chilliwack*, (1916) 23 B.C.R. 97; 30 D.L.R. 651; (1917) 1 W.W.R. 208.

C. Principles of Assessment.

1. Actual value.]—In assessing property the assessor should determine the "actual value" thereof within the meaning of the Municipal Act, R.S.B.C. 1911, cap. 170, as amended by B.C.S. 1915, Cap. 46, sec. 30, by taking the viewpoint of a solvent owner not anxious to sell but yet not holding for a fictitious or merely speculative rise in price and by considering how such value is affected by present conditions. In assessing an hotel property the effect of the British Columbia Prohibition Act upon the former value thereof should therefore be taken into consideration. *In re Charleson Assessment*, (1915) 21 B.C.R. 281; 22 D.L.R. 240; 31 W.L.R. 309; 8 W.W.R. 930. *In re Municipal Act. Gates' Case*, (1918) 2 W.W.R. 930.

2. Municipal boundaries.]—If an assessment of land is illegal the person assessed is not compelled to resort to the remedy of an appeal to the Courts of Revision, but may resist an action under the Municipal Act (B.C. 1914, cap. 52, sec. 275) to recover the taxes. A municipality has no power to assess lands situate in another municipality. *North Cowichan* v. *Hawthornthwaite*, (1917) 24 B.C.R. 571; 42 D.L.R. 207; (1918) 3 W.W.R. 574.

3. Fixtures.] — The provisions of the Municipal Act, R.S.B.C. 1924, cap. 179, relating to taxation are in pari materia with the Taxation Act, R.S.B.C. 1924, cap. 254, and therefore the construction to be placed upon "fixtures" in the former must conform to the construction given in the interpretation section of the latter, and therefore machinery which as between landlord and tenant would be a trade fixture, is not assessable, as improvements, under the former Act. *Rainier Brewing Co.* v. *City of Kamloops*, (1925) 2 D.L.R. 376.

4. Structural improvements.]—In estimating the value for the purposes of assessment of an hotel of a first-class type the assessor may take into consideration the recent expenditure of a large sum for structural improvements and the possibility of a large increase in rooms by construction of a wing. If the municipal assessor has acted honestly without mistake in principle and law great weight should be given to his valuation. *In the City of Vancouver Incorporation Act and Canadian Pacific Railway Company*, (1930) 4 D.L.R. 80.

5. Agricultural land.]—Subsec. (3) (c) of sec. 219 of the Municipal Act, B.C. Stats. 1914, cap. 52, as enacted by sec. 7, B.C. Stats. 1919, cap. 63, provides that the powers, inter alia, of the Court of Revision shall be "to fix the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes":—Held, that the subsection is imperative in its nature and does not admit of any discretionary power in the Court, but requires it to fix at its agricultural value the assessment of all land held in blocks of three or more acres and used for agricultural purposes only. *Shannon* v. *Corporation of Point Grey*, (1921) 30 B.C.R. 136; 62 D.L.R. 248; (1921) 3 W.W.R. 442, 549; (1922) 63 S.C.R. 557; 66 D.L.R. 160; (1922) 2 W.W.R. 625.

6. Agricultural land.]—The Court of Revision has power to invoke sec. 219 (3) (c) of the Municipal Act, B.C. Stats. 1919, cap. 63, and there is no appeal from the Court of Revision in respect of any decision under this clause. *McBride* v. *South Vancouver. Tait* v. *South Vancouver*, (1924) 34 B.C.R. 81; (1924) 4 D.L.R. 201; (1924) 3 W.W.R. 124.

7. Improper classification — Agricultural land.]—Where the owner of an unsubdivided block of land used for agricultural purposes sold a strip of the land to a railway company dividing the parcel into two parts, the assessor may not assess one part as agricultural land and the other part upon another basis but the whole area excluding the railway company's right-of-way should be assessed as one parcel. *In re Municipal Act and McBride*, (1927) 38 B.C.R. 431.

D. Remedies for Improper Assessment.

1. Illegal assessment—Appeal.] — A person assessed need not appeal to the Court of Revision where the assessment is illegal. The jurisdiction of the Court of Revision is confined to the question of whether the assessment is too high or too low, there being no jurisdiction to decide whether the assessment commissioner has exceeded his powers. *Canadian Northern Pacific Railway Co.* v. *City of Vernon. The Same* v. *City of Armstrong*, (1918) 26 B.C.R. 222; 44 D.L.R. 317, 319; (1919) 1 W.W.R. 114.

2. Injunction.]—There is inherent jurisdiction in the Court to prevent the Court of Revision from confirming an assessment which has been made upon a wrong basis. The assessor of the City of Vancouver assessed a leasehold interest as if it had been an estate in fee simple. The Court has power to declare that the interest in question be valued as a leasehold interest under the Laws Declaratory Act and an injunction will be granted restraining the defendants from confirming the assessment until the plaintiff be given an opportunity of shewing the value of the leasehold, and that such value should not be fixed on any other basis than that it is a leasehold interest. *British Columbia Mills &c.* v. *Mayor &c. of Vancouver*, (1926) 39 B.C.R. 481; (1926) 2 D.L.R. 990; (1926) 2 W.W.R. 84.

3. Action against municipalities.]—If a municipality has no power to make an assessment the party assessed may resist the illegal assessment by an action, but if it has power the only remedy is by appeal to the Court of Revision. *City of Coquitlam* v. *Langan*, (1917) 33 D.L.R. 175; (1917) 2 W.W.R. 208.

4. Action to recover taxes.] — Where taxes have been paid upon land which is clearly liable to assessment, in ignorance of a defect in the assessment which is a mere matter of procedure, the mistake in payment is a mistake of law and not of fact

and money so paid cannot be recovered. *Fowler* v. *Spallumcheen*, (1930) 43 B.C.R. 47; (1930) 3 W.W.R. 12.

E. Court of Revision.

1. Appeal.]—Where the members of a Court of Revision, on an appeal from an assessment, have considered the evidence before them and honestly applied their minds to the decision of the case under the provisions of the Act giving them jurisdiction, a mandamus to compel them to review their decision will not lie. By sec. 38 of the Vancouver Incorporation Act, the Legislature endeavoured to fix a basis upon which the assessments should be made. What the land would fetch at the moment at a forced sale is not the test. The assessor should look to the past, the present and the future. His viewpoint should not be different from that of a solvent owner not anxious to sell yet not holding for a fictitious or merely speculative rise in price. *In re Charleson Assessment*, (1915) 21 B.C.R. 281; 22 D.L.R. 240; 31 W.L.R. 309; 8 W.W.R. 930.

2. Mandamus.]—On motion by a ratepayer for a writ of mandamus to compel a Court of Revision to hear an assessment appeal, if it appears that the Court of Revision did hear and adjudicate upon the complaint, the Court cannot review its proceedings by way of inquiry into the correctness of its conclusions. A mandamus to a Court of Revision will only lie, if at all, when it is made to appear that said Court has not heard and determined the complaint. *Fletcher et al.* v. *Wade*, (1919) 26 B.C.R. 477; 45 D.L.R. 91; (1919) 2 W.W.R. 1.

3. Appeal from—Condition precedent.]—It is a condition precedent to the right of appeal to the Court of Appeal that a point of law was raised upon the hearing of the appeal from the Court of Revision by the judge below. *Grand Trunk Pacific Development Co.* v. *City of Prince Rupert*, (1923) 32 B.C.R. 463; (1923) 3 W.W.R. 1275.

4. Appeal.]—An appeal to a judge of the Supreme Court under sec. 56 of the Vancouver Incorporation Act, 1921, from a decision of the Court of Revision on an assessment is (as provided by subsec. (3) thereof) "limited to the question whether the assessment in respect of which the appeal is taken is or is not equal and rateable with the assessment of other similar property in the city having equal advantage of situation" and does not bring within its scope the provisions of sec. 39 of said Act. *In re Bell Irving Assessment*, (1924) 33 B.C.R. 496; (1924) 3 D.L.R. 31; (1924) 2 W.W.R. 557.

F. Exemption.

1. Public park.]—Lands within one municipality granted by the Crown under sec. 175 of the Municipal Act, C.S.B.C. 1888, to another municipality upon trust to maintain and preserve the same as a public park or pleasure grounds, are not exempt from taxation by the municipality within which they are situate. *The Corporation of the District of Saanich* v. *The Corporation of the City of Victoria*, (1917) 24 B.C.R. 121.

2. Building for public worship.]—The construction to be placed upon the words "building and site thereof" in subsec. (1) of sec. 228 of the Municipal Act is that not only the land upon which the church is actually built should be exempt from taxation but also the surrounding land required for affording reasonable light, air and access to the structure. In case an improper assessment is made of such sites the owner need not appeal in order to be relieved from liability. *Corporation of the City of Victoria* v. *Trustees of Our Lord's Church in Victoria*, (1915) 22 B.C.R. 174; 25 D.L.R. 617; 32 W.L.R. 330; 9 W.W.R. 173.

3. Church.]—The exemption from taxation of every building set apart and in use for the public worship of God under sec. 197 (1) of the Municipal Act, R.S.B.C. 1914, cap. 52, includes the building and the land upon which it stands. *Bishop of Vancouver Island* v. *City of Victoria*, (1921) 2 A.C. 384; 90 L.J.P.C. 213; 59 D.L.R. 399; (1921) 3 W.W.R. 214, affg. (1920) 28 B.C.R. 533; 54 D.L.R. 615.

4. Lands taken for railway purposes.]—Lands acquired by a railway company for railway purposes, contingent upon the approval of the plans by the Minister of Railways, are not, until definitely appropriated as part of the railway and taken from other uses, "properties and assets which form part or are used in connection with its railway," so as to be exempt from taxation under clause 13 (e), cap. 3, B.C. Statutes 1910. *Canadian Northern Pacific Railway Co.* v. *City of New Westminster*, (1915) 22 B.C.R. 247; 25 D.L.R. 28; (1917) A.C. 602; 86 L.J.P.C. 178; 117 L.T. 581; 36 L.D.R. 505 *Canadian Northern Pacific*

Railway Co. v. *Corporation of the City of Kelowna*, (1917) 25 B.C.R. 514; 44 D.L.R. 315; (1918) 3 W.W.R. 845.

5. Lands taken for railway purposes.]—By an agreement between the Government of British Columbia and the Canadian Northern Railway Company properties and assets "which form part of or are used in connection with the operation of its railway shall be exempt from all taxation":—Held, that the approval by the Minister of Railways of a plan of a proposed line designated as company's right-of-way deposited under the provisions of the B.C. Railway Act, did not bring such right-of-way within the meaning of the exemption clause, where there was nothing in the uses to which the lands were devoted or in the circumstances of their occupation to mark them in a physical sense as part of a railway constructed or in the process of construction. The reason for the remission of taxation was the benefit to the public from the railway, and did not arise when the public were neither getting the actual railway nor having it in process of construction for their benefit. *Canadian Northern Pacific Railway Co.* v. *City of Armstrong*, (1919) 88 L.J.P.C. 147; 36 T.L.R. 5; 122 L.T. 11; 48 D.L.R. 268; (1919) 3 W.W.R. 352; (1920) A.C. 216.

6. Horticultural society.] — The lands of an horticultural society duly incorporated under the laws of British Columbia and affiliated with the Farmers' Institute, having neither shareholders nor stockholders, are exempt by law from taxation and a tax sale to recover rates and assessments under a local improvement by-law should be set aside. *North Vancouver Horticultural Society* v. *District of North Vancouver*, (1917) 24 B.C.R. 290.

VII. Tax Sale.

A. *Effect of.*

Sale of land—Fixtures.]—Where land is sold under the Municipal Act for arrears of taxes, improvements thereon become the property of the purchaser although improvements are not assessed. A purchaser at a tax sale obtains an inchoate right in or title to the property which may ripen into a complete title upon failure of the owner to redeem, and while the purchaser cannot enter into possession during the year allowed for redemption, equity will apply to the person in possession the principles of equitable waste, so as to prevent him from acting in respect of the property to the injury of the tax sale purchaser, and therefore the purchaser may obtain an order restraining the owner from removing from or disposing of fixtures in a building on the land sold and for the return of those removed. *City of New Westminster* v. *Kennedy*, (1918) 1 W.W.R. 489.

B. *Action to Enforce.*

Collector.]—An action to enforce the delivery of a tax-sale deed must be brought against the tax collector and not against the municipality. *Stoltze* v. *Municipality of Mission*, (1917) 24 B.C.R. 195; (*sub nom. Stolle* v. *Municipality of Mission*) (1917) 1 W.W.R. 1388.

C. *Invalidity of.*

Inclusion of invalid rates.]—A tax sale under the Municipal Act is not valid if the land was not liable for all the taxes for which it was sold. As an irrigation rate cannot be charged on land which does not require or use water under a by-law imposing such rates only on lands liable to be charged therewith, a tax sale for arrears of taxes and arrears of irrigation rates is void. *Summerland Development Co.* v. *Corporation of the District of Summerland*, (1928) 40 B.C.R. 142; (1928) 4 D.L.R. 258; (1928) 3 W.W.R. 145.

D. *Lien for Taxes.*

Enforcement.]—A municipal corporation cannot enforce the preferential special lien for taxes given by sec. 229 of the Municipal Act, B.C. Stats. 1914, cap. 52, as amended by sec. 9, B.C. Stats. 1919, cap. 63, by an order to appropriate to itself the rents and profits of the land due to a mortgagee in possession, who is collecting them. The proper course is a direction by the Court for sale in the usual way in an action or proceedings which can only be commenced after application therefor and such notice as the Court may direct. A judge may reopen an order made by him in order to hear a claim not considered and which could not previously be presented, and the order may be varied so as to give effect to such claim.

The Corporation of the City of Greenwood v. *Canadian Mortgage Investment Company,* (1921) 30 B.C.R. 72; 69 D.L.R. 510; (1921) 2 W.W.R. 746.

E. Action to Recover Taxes.

1. Local improvements — Assessments —Action for.]—Rates levied on land under the Municipalities Local Improvement Act (B.C. Statutes 1913, cap. 49) are recoverable as a debt, and may be counterclaimed in an action on an award for land taken under the Act; any defects in the by-law or assessments are cured by secs. 38 and 44 (2) and cannot therefore be set up. The expressions "number of instalments" in sec. 30 (e) and "annual instalments" in sec. 42 (2) mean one or more instalments. *Pelly* v. *City of Chilliwack,* (1916) 23 B.C.R. 97; 30 D.L.R. 651; (1917) 1 W.W.R. 208.

2. Plaintiff.]—A municipality may sue for taxes in its own name and it is not necessary to join the collector as a plaintiff. *Port Coquitlam* v. *Langan,* (1917) 2 W.W.R. 208; 33 D.L.R. 175.

F. Redemption.

1. Corporation purchaser at tax sale.]—When land is offered for sale for arrears of taxes under the Vancouver Incorporation Act and the City is declared the purchaser and subsequently sells the land, the time for redemption runs from the date of sale for taxes and not from the date of the subsequent sale by the City. *Bird* v. *Fisher,* (1921) 2 W.W.R. 812.

2. Time limit.]—The right of an owner to redeem land sold at a tax sale ceases on the expiration of one year from the date of the sale as fixed by sec. 266 of the Municipal Act, the notice required under sec. 260 not operating as an extension of time. *Milne* v. *District of South Vancouver,* (1917) 24 B.C.R. 255; 36 D.L.R. 180; (1917) 1 W.W.R. 335.

VIII. Actions By and Against.

A. Parties.

Collector.]—An action to enforce the delivery of a tax-sale deed must be brought against the tax collector and not against the municipality. *Stoltze* v. *Municipality of Mission,* (1917) 24 B.C.R. 195; (*sub nom. Stolle* v. *Municipality of Mission*) (1917) 1 W.W.R. 1388.

B. Limitation of Actions.

1. Action to quash by-law.]—Where a local improvement has been commenced before the passing of the Local Improvement Act, 1913, B.C. Stats., cap. 49, the municipality is given by sec. 55 (2) of the Act, the option of completing the work either under the Local Improvement Act or under the Municipal Act, R.S.B.C. 1911, cap. 170, under which the work was formerly authorized, and where such municipality elects to proceed under the Municipal Act the procedure under this Act must be followed and sec. 82 of the Act after its repeal is still in force by virtue of sec. 55 (2) of the Local Improvement Act as regards all undertakings which were being carried on to completion under it, and under this section the municipality has jurisdiction to pass a new by-law to embody the essential features of an old one passed in conformity with this section which was found to be so defective that payment of the rate levied under it was successfully resisted by one of the ratepayers; in any case the by-law being registered under the Act, sec. 180 of the Municipal Act, 1914, cap. 52, prohibits the quashing of such by-law unless the application is made within one month from the registration. *Hales* v. *Corporation of the Township of Spallumcheen,* (1921) 30 B.C.R. 87; 61 D.L.R. 390; (1921) 2 W.W.R. 931.

2. Restraining sale of lands — Action for declaration that land not taxable.]—An action against a municipality for a declaration that certain land is not taxable and for an injunction restraining the sale of the said land for taxes is not barred by sec. 484 of the Municipal Act, 1914, which limits the time for the bringing of actions against a municipality, as this section deals only with actions for unlawful doing of a thing which the municipality might have done. *Bishop of Vancouver Island* v. *City of Victoria,* (1921) 2 A.C. 384; 90 L.J.P.C. 213; 59 D.L.R. 399; (1921) 3 W.W.R. 214.

3. Trespass.] — An action against a municipality for trespass to land must be commenced within six months after the cause of action arises under sec. 484 of the Municipal Act, 1914, provided that the

municipality might lawfully have expropriated the land if acting in the manner prescribed by law. *Cameron Investment & Sec. Co. & Bailey* v. *Victoria*, (1920) 3 W.W.R. 1043.

4. Reasonable excuse for failure to give notice.]—Where a plaintiff commenced an action for injuries sustained from falling into a drain, the accident being due to the negligent construction of the drain by the defendant municipality, and the evidence disclosed that the plaintiff was deaf and dumb and the only other member of his household could neither read nor write, and the injuries sustained did not appear to be serious until after two months had expired, it was held that there was reasonable excuse for failure to give the notice required under sec. 486 of the Municipal Act which provides (inter alia) that the want of notice required by the section will not be a bar to the maintenance of an action if the Court is of opinion that there is reasonable excuse for want of notice, and that the defendant municipality has not thereby been prejudiced in its defence. *Howard* v. *Municipality of South Vancouver*, (1924) 34 B.C.R. 167; (1924) 4 D.L.R. 257; (1924) 3 W.W.R. 166.

5. Tax on professions—Action to recover.]—Sec. 227 of the Vancouver Incorporation Act is as follows: "Any action against any person for anything done in pursuance of this Act shall be brought within six months next after the act committed and not afterwards.":—Held, that the section is one of a fasciculus—secs. 226 to 234—entitled "Actions and judgments against the City" and they are a weapon of defence and remedy for the City and not of attack against it. *City of Vancouver* v. *Richmond*, (1928) 40 B.C.R. 170; (1928) 4 D.L.R. 506; (1928) 3 W.W.R. 166.

See CERTIORARI.
See COMPULSORY PURCHASE.
See CRIMINAL LAW.
See HIGHWAYS.
See NEGLIGENCE.

MURDER.

See CRIMINAL LAW.

NARCOTIC DRUGS.

See CRIMINAL LAW.

NATURALIZATION.

See ALIENS.

NAVIGATION.

See SHIPPING.
See WATER AND WATERCOURSES.

NEGLIGENCE.

I. GENERAL PRINCIPLES, 792.
II. NATURE OF ACT, 794.
A. *In general*, 794.
B. *Drainage*, 796.
C. *Use of firearms*, 796.
D. *Hospital*, 796.
E. *Logging operations*, 797.
F. *Watercourse*, 797.
G. *Mining*, 797.
H. *Electric current*, 798.
I. *Waterworks*, 798.
J. *Pedestrian*, 799.
K. *In management of railway*, 799.
L. *Railway and motor vehicles*, 803.
M. *Motor vehicles*, 805.
1. Injury to pedestrian, 805.
2. Gratuitous passenger, 808.
3. Collision, 809.
III. RELATIONSHIP OF PARTIES, 812.
A. *Owner*, 812.
B. *Parent*, 814.
C. *Married woman*, 814.
D. *Co-owners*, 815.
E. *School trustees and pupils*, 815.
F. *Bailee*, 815.
G. *Trespasser*, 815.
IV. CONTRIBUTORY NEGLIGENCE, 816.

I. GENERAL PRINCIPLES.

1. Natural and probable consequence.]—The onus is on the plaintiff to shew that the injury is the natural and probable consequence of the defendant's negligence. *Leary* v. *Commissioners for Nakusp Development District*, (1930) 1 W.W.R. 97.

2. Error in judgment.]—A mere error of judgment in an emergency brought about by another person is not actionable negligence. *Moore* v. *B. C. Electric Ry. Co., Ltd.*, (1917) 24 B.C.R. 314; 35 D.L.R. 771; (1917) 2 W.W.R. 729.

3. Error in judgment.]—Serious errors of judgment, or even wrong decisions honestly made, may in the circumstances be regarded as negligence. [Per Macdonald, J.A.] *Price* v. *B.C. Motor Transportation, Ltd.*, (1931) 44 B.C.R. 24; (1931) 3 D.L.R. 548; (1931) 2 W.W.R. 350.

4. Duty of person injured.]—The plaintiff is not entitled to succeed when the cause of his loss is to be attributed to his own failure to take reasonable precautions which he should have taken under the circumstances. *Leary* v. *Commissioners for Nakusp Development District*, (1930) 1 W.W.R. 97.

5. Inevitable accident—Onus.]—Where a servant was injured while engaged in duties of a hazardous nature in the course of his employment it was held that the onus was upon the employer to shew that all reasonable precautions were taken and that the accident was inevitable. *Steves* v. *Kinnie*, (1917) 24 B.C.R. 130; 33 D.L.R. 776; (1917) 1 W.W.R. 1250.

6. Car in sole control of co-defendant.]—A plaintiff will not succeed in an action for negligence against a defendant, the owner of a motor-vehicle, where the vehicle was in the sole possession and within the sole control of his co-defendant under the terms of a contract. *Holt* v. *Holmes & Wilson, Ltd. et al.*, (1930) 42 B.C.R. 545; (1930) 2 D.L.R. 987; (1930) 1 W.W.R. 887.

7. Breach of statutory regulation—Intention of by-law.]—A pedestrian cannot claim as an act of negligence breach of a by-law passed, not in contemplation of the protection of pedestrians, but solely to prevent a blockade of the traffic by a particular class of vehicle. *Pearson* v. *Read*, (1925) 34 B.C.R. 524; (1925) 1 D.L.R. 893; (1925) 1 W.W.R. 487.

8. Motor-Vehicles Act—Civil liability under.]—Sec. 35 of the Motor-Vehicles Act does not impose civil liability on an owner in excess of that which attaches at common law. *Neilsen* v. *Richard et al.*, (1929) 41 B.C.R. 220; (1929) 4 D.L.R. 1052; (1929) 2 W.W.R. 153. *Ruff* v. *Sutherland & Moss*, (1930) 43 B.C.R. 218; (1931) 1 D.L.R. 651; (1930) 3 W.W.R. 554. *Boyer* v. *Moillet*, (1921) 30 B.C.R. 216; 61 D.L.R. 136; (1921) 3 W.W.R. 62.

9. Res ipsa loquitur.]—The doctrine of res ipsa loquitur, a phrase used in actions for injury by negligence, where no proof of negligence is required beyond the accident itself, which is such as necessarily to involve negligence, does not apply in an action against hospital authorities for injury from burns alleged to have been inflicted by negligence in care and nursing, where the accident may have been the result of an abnormal susceptibility of the patient's skin to ordinary heat applied by the customary methods. *Morton* v. *Vancouver General Hospital*, (1923) 31 B.C.R. 546; (1923) 1 D.L.R. 854; (1923) 1 W.W.R. 423.

10. Res ipsa loquitur.]—When a thing is under the sole management of the defendant and its servants, and the accident is such as in the ordinary course of events does not happen to those having the management of such things and using proper care, the accident itself affords prima facie evidence of negligence. *Evans* v. *Hudson's Bay Co.*, (1930) 43 B.C.R. 81; (1930) 3 D.L.R. 951; (1930) 2 W.W.R. 718.

11. Error in judgment.]—Where a collision results from misapprehension on the part of the defendant, driving his motor-car across a street intersection, as to the direction which he thought the plaintiff would take when crossing in front of him, the defendant is liable in the absence of conduct on the part of the plaintiff such as would be likely to mislead him. *Chisholm* v. *Aird*, (1930) 43 B.C.R. 354.

12. Volenti non fit injuria.]—In an action of negligence it is a good defence that the plaintiff, with full knowledge and appreciation of the risk of danger from the defendant's negligence, voluntarily accepted the risk and exposed himself to the danger. It is a question of fact and not of law whether the plaintiff voluntarily incurred the risk and the burden of proof is on the defendant. *Ibid.*

II. Nature of Act.

A. In General.

1. Negligence of third party.] — The flowers in the shop of a florist were injured through the escape of gas from a pipe belonging to the defendant's gas system. Unknown to the defendant the pipe had been fractured through the operation of a steam-roller by a third party while constructing a road under which the pipe had been laid:—Held, that the defendant was not liable, as the fracture was caused without his knowledge by a third party over whom he had no control and the consequence

of whose acts he could not reasonably have anticipated. *Tidy* v. *Cunningham*, (1915) 21 B.C.R. 53; 22 D.L.R. 151; 30 W.L.R. 547; 7 W.W.R. 1205.

2. Occupation implying skill.] — The doctrine applied in the case of a physician that treatment is to be tested by the principles of the physicians' school is not applicable to the mechanical manipulative labour entailed in the extraction of teeth by a dentist. The rule in such a case is that applicable to all skilled labourers, namely, that if the position implies skill it must be used. When injury has been sustained except by negligence or absence of reasonable skill, there is no liability. *Drinnen* v. *Douglas*, (1931) 43 B.C.R. 362; (1931) 2 D.L.R. 606; (1931) 1 W.W.R. 160.

3. Reasonable precaution — Infant of tender years.] — The defendants in the course of construction of a steam-heating plant left a detached section thereof on the floor in the basement of a school which to their knowledge was used by the children for play in inclement weather. The section being in the way of the children, the caretaker, under instructions from the school teacher, removed it from the floor and placed it with another similar section in an upright position against the wall. The section fell on a boy nine years of age and injured him:—Held, that the defendants could not have been expected to take precautions to prevent an accident which could not reasonably have been foreseen by them. Held, further, that the doctrine of contributory negligence does not apply to a child of tender years. *Vick* v. *Morin & Thompson*, (1915) 21 B.C.R. 8; 22 D.L.R. 29; 30 W.L.R. 412; 7 W.W.R. 1053.

4. Negligence — Natural and probable consequence.]—Where the plaintiff, a tenant in the defendant's building met with an accident resulting from negligence in the operation of the defendant's elevator, and evidence was given that his health was so run down from the accident that nine months thereafter he was not able to resist disease and therefore lost the sight of an eye from an abscess which formed owing to a foreign substance entering the eye:—Held, that the loss of the eye was not the natural and probable consequence of the injury sustained in the elevator accident and the defendant was not liable in damages therefor. *Gordon* v. *The Canadian Bank of Commerce*, (1931) 44 B.C.R. 213; (1931) 4 D.L.R. 635; (1931) 3 W.W.R. 185, 373.

B. Drainage.

Defective system.] — Where a general scheme of drainage formulated by a Board of Dyking Commissioners provided an efficient and safe outlet for water, but it was not opened, and an alternative outlet was employed which had the effect of flooding the lands of the plaintiff with alkali water, the Commissioners are liable at common law for damages for the negligent carrying out of their statutory powers, and the fact that another authority had turned additional water into the same drain and increased the flow did not excuse them. *Hemphill and Cuckow* v. *McKinney et al.*, (1915) 21 B.C.R. 561; 27 D.L.R. 345; 33 W.L.R. 688.

C. Use of Firearms.

1. Shooting competition — Defective rifle.]—Where the trustees of a public school arrange a programme of sports including a shooting contest they must provide proper safeguards against accident, and are negligent and liable in damages for injury to a pupil caused by the backfiring of a rifle used in the competition having a loose bolt and enlarged chamber. *Walton* v. *Board of School Trustees of Vancouver*, (1924) 34 B.C.R. 38; (1924) 2 D.L.R. 387; 1924) 2 W.W.R. 49.

2. Defective safety device.]—When a gun in the hands of a hunter explodes and injures his companion a presumption of negligence arises calling for an explanation on the part of the person using the gun and the onus is shifted to him. *Bayley* v. *Love*, (1924) 34 B.C.R. 195; (1924) 3 D.L.R. 1093; (1924) 3 W.W.R. 155.

3. Hunter—Injury to dog.]—Where a person using a gun shoots at a bird and hits a dog belonging to another hunter he is prima facie guilty of negligence. *Whalen* v. *Bowers*, (1925) 35 B.C.R. 128; (1925) 3 D.L.R. 442; (1925) 1 W.W.R. 686.

D. Hospital.

Escape of patient.] — Where a patient escapes from a hospital, resulting in death by drowning and the attendants neglect to notify the patient's husband immediately upon hearing of her disappearance, in an action for damages for negligence the burden is on the plaintiff to shew that the

patient was not already deceased when her absence was discovered and that notification might have saved her. *Brandeis* v. *Weldon*, (1916) 22 B.C.R. 405; 27 D.L.R. 235; 10 W.W.R. 45.

E. Logging Operations.

Injury to trespasser.]—There is no liability on the part of a company conducting logging operations for injuries to a trespasser thereby occasioned. *Gilbert* v. *Southgate Logging Co.*, (1915) 22 B.C.R. 87; 24 D.L.R. 202; 32 W.L.R. 131; 8 W.W.R. 1304.

F. Watercourse.

Defective culvert.]—The construction of a culvert by a power company in a negligent manner, whereby it interferes with the flow of a natural watercourse, giving rise to the flooding of the abutting lands, will render the company liable for damages occasioned thereby. The negligent construction of a culvert obstructing the flow of a natural watercourse and causing the flooding of lands is a continuation of damage, and the limitations under sec. 267 of the Railway Act (B.C.) 1911, cap. 44, will not begin to run until after one year after the doing or committing of such damage ceases. The provisions of sec. 166 of the Railway Act (B.C.) 1911, cap. 44, authorizing the Minister of Railways to make orders in cases of defective drainage do not deprive the Courts of jurisdiction in a proper case to grant an injunction. *McCrimmon* v. *B.C. Electric Ry. Co.*, (1915) 22 B.C.R. 76; 24 D.L.R. 368; 32 W.L.R. 81; 8 W.W.R. 1289; 19 C.R.C. 329.

G. Mining.

Unexploded powder.]—In an action for an injury sustained in a mine through alleged breach of statutory rules, a charge of powder having been left unexploded in a hole in the face of a tunnel in defiance of the Coal-mines Regulation Act, it is a ground for a new trial when the trial judge gave credence to extracts from the report of the mining company to the Government although the report itself was not put in evidence, the plaintiff (who referred to certain extracts in the report on the cross-examination of a witness) not wishing to be bound by all the statements therein contained, and the defendant Company contending that the entire report must go in or none of it. *Stanoszek* v. *Canadian Collieries (Dunsmuir), Limited*, (1915) 21 B.C.R. 470; 22 D.L.R. 691; 9 W.W.R. 710.

H. Electric Current.

1. Absence of ground wire.] — Where the plaintiff's husband was killed by coming into contact with a secondary wire which connected his dwelling house with the defendant's electric light system and had broken and fallen against a primary wire outside the house containing a high voltage, the defendant Company is guilty of negligence, the evidence shewing that if the secondary wire had been grounded outside the house a fuse would have blown out, rendering it harmless. *Walton* v. *B.C. Electric Ry. Co., Ltd.*, (1925) 35 B.C.R. 119; (1925) 3 D.L.R. 467; (1925) 1 W.W.R. 673.

2. Trespasser or licensee on right-of-way—Knowledge of danger.]—Where the defendant, an electric power company, maintains a high tension transmission line along its right-of-way across a ranch at a distance from a highway it owes no duty to a trespasser or bare licensee using a footpath under the power line to protect him against the consequences of touching the transmission wire, where it had sagged to within ten feet of the ground, with a steel fishing rod carried in his hand, especially when he was well aware from previous knowledge of the danger he was incurring in carrying a steel rod under a high voltage wire. There is nothing in the nature of a concealed danger or trap and the defendant does not owe any duty to the plaintiff to have the wire strung at a greater height. *Sale* v. *The East Kootenay Power Co., Ltd.*, (1931) S.C.R. 712; (1931) 4 D.L.R. 593. Affg. (1931) 44 B.C.R. 141; (1931) 4 D.L.R. 221; (1931) 3 W.W.R. 117.

I. Waterworks.

Freezing of water pipes—Failure to disconnect water system.] — In an action against the commissioners of a development district for damages because of the freezing of the water pipes in plaintiff's house after he had closed the house and had asked the man in charge of defendants' waterworks system to cut off the water from the branch

service pipe, it was held that the plaintiff must fail on the ground that his own failure to take the reasonable precautions which he should have taken under the circumstances was the cause of his loss, and also on the ground that said loss was not shewn to have been the natural and probable consequence of the defendants' negligence. *Leary* v. *Commissioners for Nakusp Development District*, (1930) 1 W.W.R. 97.

J. Pedestrian.

Negligence of pedestrian.]—Where the plaintiff, a woman 75 years of age, while walking along a sidewalk was struck and injured by the defendant who was carelessly running back and forth across the sidewalk, without regard to the plaintiff's presence, when engaged in loading a wagon standing at the curb, the defendant was held to be liable in damages for his negligence. *Gerrard* v. *Adam and Evans*, (1923) 32 B.C.R. 114.

K. In Management of Railway.

1. Defective coupling device.]—A coal company operated a railway upon which were carried passengers and freight wholly on its own lands in connection with its mines, the railway not having been incorporated. The plaintiff, while coupling two cars supplied with the "link-and-pin" coupling, was injured:—Held, that although the Railway Acts, which require incorporated railways to use the automatic coupler, did not apply to the railway in question, the use of the antiquated and dangerous system of "link-and-pin" coupling by the company constituted negligence. *Cook* v. *Canadian Collieries (Dunsmuir) Limited*, (1915) 21 B.C.R. 64; 21 D.L.R. 215; 30 W.L.R. 750; 8 W.W.R. 41.

2. Exposed gear — Volenti non fit injuria.]—In the absence of express consent or agreement to take the risk without precautions, the question of volens is peculiarly one for the jury, and the Court of Appeal should only interfere where the evidence is of such a character that only one view can reasonably be taken of the effect of the evidence. The omission to publish in the Gazette an order of the Railway Act cannot invalidate it, but merely necessitates the proper proof of the order before the Court can act on it. *McPhee* v. *The Esquimalt and Nanaimo Railway Company*, (1915) 22 B.C.R. 67; 23 D.L.R. 561; 32 W.L.R. 125; 8 W.W.R. 1319.

3. Signal at street crossing.]—A motorman of an electric street railway car on approaching a street crossing after giving the statutory warning is not bound to give further warning to persons approaching the crossing unless he has reason to apprehend that such persons are oblivious of his presence and of the danger of crossing the track. *Honess* v. *British Columbia Electric Railway Company, Ltd.*, (1916) 23 B.C.R. 90; 36 D.L.R. 301; 21 C.R.C. 238.

4. Alarm bell at street crossing.]—An electric railway company is not guilty of negligence in failing to maintain an automatic alarm bell at a highway crossing nor for a mere error of judgment of the motorman in an emergency brought about by another person. *Moore* v. *B.C. Electric Ry. Co., Ltd.*, (1916) 22 B.C.R. 504; 34 W.L.R. 469; 10 W.W.R. 631; (1917) 24 B.C.R. 314; 35 D.L.R. 771; (1917) 2 W.W.R. 729.

5. Poisonous material on unguarded track.]—The defendant Company in the course of its business loaded lead ore on cars of a railway company and at other times unloaded oats from cars at the same spot, the right of way not being enclosed. In the course of these operations particles of lead ore were allowed to drop on the right of way and a certain amount of oats fell in the unloading. The plaintiff's cows which were allowed to run at large, strayed on the right of way, and eating the oats mixed with the lead ore, died from lead poisoning:—Held, that the evidence did not disclose any duty on the defendant's part towards the plaintiff. *Dawson* v. *Paradise Mine*, (1919) 26 B.C.R. 487; (1919) 1 W.W.R. 499.

6. Passenger boarding moving car.]—A car of the defendant Company stopped for passengers as it was about to round a curve into another street. A woman immediately in front of the plaintiff boarded the car and the conductor not seeing the plaintiff started to close the gates and gave the starting signal. When the gates were half closed and the car commenced moving, seeing the plaintiff he reopened the gates but did not give the signal to stop. The plaintiff grasped both handle-bars and put her right foot on the lower step but as the car gained momentum she was thrown violently against the gate and was injured:—Held, that the plaintiff in attempting to board

the car was entitled to assume that it would stop and the conduct of the conductor justified a verdict for damages against the railway company. *Lochead* v. *B.C. Electric Ry. Co., Ltd.*, (1920) 28 B.C.R. 453; 54 D.L.R. 254; (1920) 3 W.W.R. 417.

7. Children stealing ride.] — As a motor-engine of the defendant Company was slowly hauling four box cars easterly along Hastings Street in Vancouver in December about 7.30 in the evening the plaintiff (a boy of nine years) with a companion ran out from the north sidewalk, the companion jumping on the rear ladder on the left side of the first box car, and the plaintiff on the rear ladder of the third or fourth box car. Almost immediately a street-car of the defendant's approached going westerly, and struck the boy on the first box car killing him and then struck the plaintiff who lost his right leg:—Held, that the motorman on the street-car was not negligent in failing to see the boys in time to avoid the accident or in failing after seeing the boy on the first car, to see the plaintiff and stop his car in time to avoid injuring him. *Retallick* v. *British Columbia Electric Railway Company, Limited*, (1925) 35 B.C.R. 165; (1925) 1 W.W.R. 885.

8. Street-car and freight train.]—Where the motorman of a street-car misunderstood a signal made by a railway company's flagman to the engineer of a freight train directing him to back across the street on which the street-car was running, and in the resulting accident the plaintiff's husband was killed, the defendant street-car company was held responsible in damages for the negligence of the motorman in failing to exercise ordinary care and prudence in the operation of his car. *Duthie* v. *B.C. Electric Ry. Co., Ltd.*, (1924) 33 B.C.R. 481; (1924) 2 D.L.R. 462; (1924) 2 W.W.R. 81; 29 C.R.C. 410.

9. Starting car when passenger alighting.]—A street railway company is liable in damages for negligence of its motorman when a passenger who is about to alight is thrown down and injured by reason of the motorman suddenly starting the car without warning . *Calbick* v. *B.C. Electric Ry. Co. Ltd.*, (1929) 41 B.C.R. 17; (1929) 2 D.L.R. 64.

10. Fog.]—A driver of a street-car while driving in a fog should have his car under such control that he may stop within the limits of his vision. *Vancouver Ice and Cold Storage Co.* v. *B.C. Electric Ry. Co., Ltd.*, (1927) 38 B.C.R. 234; (1927) 1 W.W.R. 631.

11. Construction of floor of car.]—Where a passenger wearing high-heeled shoes met with an accident as the result of her heel being caught between the slats of the flooring of a tram-car, it was held that the floor being of the usual construction to prevent slipping was not defective, and the railway company was not liable in damages for the injury sustained by the passenger. *Roddy* v. *B.C. Electric Ry. Co., Ltd.*, (1928) 40 B.C.R. 180.

12. Car stopping suddenly without warning.]—The plaintiff was injured by the sudden stopping of a car of the defendant Company travelling at night as the motorman saw a railway tie lying across the track. The passenger was thrown off her balance, and falling in the body of the car was severely injured: — Held, that the plaintiff being injured by the sudden stopping of the car established a *prima facie* case and the burden was on the defendant not only to shew that the car was reasonably so stopped but that it was not because of its negligence that the obstruction was there. *Vivian* v. *B.C. Electric Ry. Co. Ltd.*, (1930) 42 B.C.R. 423; (1930) 3 D.L.R. 892; (1930) 1 W.W.R. 791.

13. Cars on siding — Children attracted.]—It is the duty of a railway company to take precautions against the escape of cars left standing on a grade siding, knowing that there is a likelihood that boys will be attracted to them and will meddle with the brakes and start the cars down the incline. *Green* v. *B.C. Electric Railway Co., Ltd.*, (1916) 10 W.W.R. 614; 25 D.L.R. 543; 19 C.R.C. 240; 32 W.L.R. 393.

14. Tram-car — Defective brakes.] — Operating a street-car with defective brakes incapable of arresting its speed when approaching a highway crossing is negligence which will render a railway company liable for a collision notwithstanding the plaintiff's contributory negligence. *Columbia Bitulithic, Limited* v. *B.C. Electric Ry. Co., Ltd.*, (1917) 55 S.C.R. 1; 21 C.R.C. 243; 37 D.L.R. 64; (1917) 2 W.W.R. 664.

15. Irrelevant statement of witness.]—The plaintiff, a passenger in a street-car, fell as she was about to get off and injured her hip, owing, as she alleged, to the car suddenly starting as she got up and then suddenly stopping again. A witness for the defence, after giving evidence that the plaintiff had hip trouble prior to the accident, suddenly volunteered the statement without being questioned that she came there voluntarily on account of the man who

was driving the car; she didn't like the idea of his having to bear the blame for the accident which she knew was through the plaintiff's physical condition. Counsel for the plaintiff objected to the statement but nothing further was said by either counsel or the Court. The jury found that negligence was not proven and the action was dismissed:—Held, on appeal, that the statement made by the witness had no bearing on the question of whether the defendant was negligent or not. After counsel for the plaintiff objected the matter was dropped, as it was manifestly such an irresponsible and voluntary statement that no one attached any importance to it and the plaintiff did not suffer any prejudice thereby. *Keen and Keen* v. *B.C. Electric Ry. Co., Ltd.*, (1931) 44 B.C.R. 183.

16. Railway yard—Pedestrian.]—Where a pedestrian left a footpath beside the tracks in a railway yard and while standing by a switch was struck by a car being shunted in order to couple it with other cars and suffered injury, it was held that as the defendants occupied the place in question with the approval of the Railway Board and were rightfully in occupation, and the plaintiff had left the footpath provided for pedestrians, he was in the position of a trespasser to whom the defendants owed no duty except to refrain from wilfully injuring him, he was not entitled to recover damages by reason of the accident. *Jure* v. *Vancouver Harbour Commissioners*, (1931) 44 B.C.R. 270; (1931) 4 D.L.R. 916; (1931) 3 W.W.R. 157; 38 C.R.C. 291.

L. Railway and Motor-vehicles.

1. Error of judgment.] — When the reckless action of a driver of a motor-vehicle puts the motorman of an electric car in a position where he is suddenly and unexpectedly confronted with the imminent probability of killing the occupants of the motor-car, and then in the agony of imminent collision caused by the motor-car driver's recklessness the motorman makes what at the highest can only be termed an error of judgment, the law will not hold the company liable. *Moore* v. *B.C. Electric Ry. Co., Ltd. and Johnston*, (1916) 22 B.C.R. 504; 34 W.L.R. 469; 10 W.W.R. 631; (1917) 24 B.C.R. 314; 35 D.L.R. 771; (1917) 2 W.W.R. 729.

2. Collision between tram and motor-car.]—Where the plaintiff riding in a motor-car driven by her husband which had been travelling about 30 feet behind a tram-car and turning to enter an intersecting street was struck by a tram-car travelling at an excessive rate of speed whereby the plaintiff was injured, she is entitled to recover against the railway company by reason of its negligence, notwithstanding that her husband may have been guilty of contributory negligence. *Brooks* v. *B.C. Electric Ry. Co., Ltd.*, (1919) 27 B.C.R. 351; 48 D.L.R. 90; (1919) 3 W.W.R. 109.

3. Crossing track—Duty of engineer as to approaching traffic.]—If a railway company has complied with all the conditions imposed by statute and by the Board of Railway Commissioners, and there are no exceptional circumstances, it cannot be found negligent in respect of an accident at a level crossing, for failure to increase the visibility to persons driving along the highway. There is no duty cast upon the engineer in charge of a railway locomotive to observe the adjacent locality or particularly to take a note of motor-cars that may be approaching on a highway. Unless he feels satisfied that an accident is bound to occur, he has a right to proceed across a highway, though he sees a motor-car approaching, on the assumption that the motor-car is under control and that the driver will not take any chances, but bring his car to a standstill within a reasonable distance of the crossing in order to avoid an accident. *Allen* v. *Esquimalt and Nanaimo Railway Company*, (1921) 1 W.W.R. 750.

4. Collision of street-car and motor-car — Unlicensed driver of motor-car.]—Failure to obtain a license under a statute containing a prohibition against driving on the highway without a license or other failure to comply with a statutory requirement does not deprive the driver of a right of action he would otherwise have against a negligent defendant unless the breach of the statute was the proximate cause of the accident. *Walker* v. *British Columbia Electric Railway Company, Limited*, (1926) 36 B.C.R. 338; (1926) 1 D.L.R. 1162; (1926) 1 W.W.R. 503.

5. Gasoline railway-car and motor-car.]—A passenger car which has its own motor power consisting of a gasoline engine in its fore part all being under one roof is a train within the meaning of the British Columbia Railway Act, and the provisions of the Act therefore apply where a railway company's servants were negligent in travelling at an excessive speed without ringing

a bell. *Ullock* v. *Pacific Great Eastern Ry. Co.*, (1921) 30 B.C.R. 31; (1921) 2 W.W.R. 837.

6. Collision between tram and motor-car.]—The plaintiff, when driving a motor-car easterly in the evening when it was nearly dark, entered a street intersection intending to cross the street-car tracks and turn north. On reaching the easterly track he was struck by a street-car going north on Main Street at an excessive speed. The motor-car was carried 100 feet and the plaintiff was badly injured. The jury found the defendant guilty of negligence owing to excessive speed, that the plaintiff was not guilty of contributory negligence, and assessed damages at $1,500, for which judgment was entered:—Held, on appeal, that the judge below rightly submitted the case to the jury, that there was evidence for the jury to consider on the questions submitted to them, and the verdict should not be disturbed. *Moldowan* v. *B.C. Electric Ry. Co., Ltd.*, (1923) 32 B.C.R. 428.

M. Motor-vehicles.

1. Injury to Pedestrian.

1. Right to use of highway.]—A pedestrian is not confined to the crossing in passing over a public street or highway. He is entitled to cross at any point. If he goes out into the traffic he must be allowed to extricate himself in safety. A driver of a motor-vehicle is not entitled merely to sound his horn and expect pedestrians to evade him. He must be careful to evade the pedestrians. *Rainey* v. *Kelly*, (1922) 3 W.W.R. 346; 69 D.L.R. 534.

2. Passing standing street-car.] — A street-car backed from a cross-street and stopped on a main track to take on passengers before proceeding forward. The plaintiff who was about to board the car was struck and injured by a motor-truck travelling in the direction which the street-car was intended to take:—Held, that sec. 16 of the Motor Traffic Regulation Act Amendment Act, 1913, does not apply as the motor-truck was not going in the same direction as and overtaking the street-car. *Holmes* v. *Kirk & Co.*, (1920) 28 B.C.R. 122; 53 D.L.R. 53; (1920) 1 W.W.R. 1037.

3. Overtaking street-car.]—By sec. 11 of the Motor-vehicles Act "Every person who drives or operates . . . a motor-vehicle going in the same direction as and overtaking a street-car which is stopped or is about to stop for the purpose of discharging or taking on passengers shall also stop the motor-vehicle at a distance of at least ten feet from and in the rear . . . of the street-car":—Held, that the object of the section was to protect those getting on or off the street-car and even if a driver has no intimation that a street-car ahead of him is about to stop until he is within ten feet from it, he is still bound to stop his car when he becomes aware that the street-car is about to stop. *Katz* v. *Consolidated Motor Co.*, (1930) 42 B.C.R. 214; (1930) 2 D.L.R. 241; (1930) 1 W.W.R. 305.

4. Warning signal.]—In an action for negligence the onus is on the plaintiff to shew not only that it was reasonably necessary for the driver of a motor-car to sound his horn as provided in sec. 2 of the Motor Traffic Regulation Act Amendment Act, 1914, but also that it was not sounded. *Holmes* v. *Kirk & Co., supra.*

5. Warning signal.]—The failure of a driver of a motor-vehicle to sound his horn on turning a corner is evidence upon which the trial judge may reasonably find the driver of a motor-vehicle to be negligent. *Bell* v. *Johnston Brothers, Ltd.*, (1917) 25 B.C.R. 82.

6. Excessive speed.]—Where a pedestrian crossed a well-lighted street in a diagonal direction and not at an intersection and after passing directly in front of a moving street-car was struck by a motor-car on the far side going in the same direction as the street-car at an excessive rate of speed, it was held that as the real cause of the accident was due to the excessive speed of the motor-car the driver thereof was liable in damages for the injury resulting to the pedestrian from the accident. *Suffern* v. *McGivern*, (1923) 32 B.C.R. 542; (1923) 3 W.W.R. 817; (1923) 4 D.L.R. 541.

7. Duty of person overtaking.] — A bicycle is a vehicle within the meaning of the British Columbia Highway Act, and the driver of a motor-car who overtakes a person, walking along the highway on the proper side of the road and pushing along his bicycle, is guilty of a violation of sec. 2 (19) of the Act as amended by 1920 (B.C.) cap. 32, if he turns out to his right in passing such person, and is liable for damages resulting therefrom. *Best* v. *Lefroy*, 67 D.L.R. 455.

8. Driving in fog.] — It is the duty of the driver of a motor-car to travel very

slowly in a fog and to have his car entirely under control when approaching a street intersection. Those travelling on a highway whether pedestrians or persons driving in a carriage or riding horses are not under any duty when going with the traffic to look behind at short intervals as they are entitled to expect that drivers of motor-cars and others following will not run them down. *Beauchamp* v. *Savory*, (1921) 30 B.C.R. 429.

9. Driving in fog—By-law to prevent blocking of traffic.] — Driving a motor-vehicle in a thick fog within the City of Vancouver is not in itself negligence. A by-law of the City of Vancouver provides that "Any person who operates or drives any vehicle . . . in or through any of the streets of the city shall . . . when travelling at the rate of a walk . . . keep as close as possible to the right-hand curb":—Held, that it was passed solely to prevent the blocking of traffic and the breach thereof is not in itself negligence on which an injured pedestrian can base an action for damages. *Pearson* v. *Read*, (1925) 34 B.C.R. 524; (1925) 1 D.L.R. 893; (1925) 1 W.W.R. 487.

10. Crossing city street.]—A pedestrian when crossing a well-lighted street upon which is a double street-car line with a fifteen-foot fairway on each side of the tracks may reasonably be entitled to feel secure on reaching the street-car track and as it is the duty of a motor-car driver to remain in the fairway as far as is reasonably possible, the latter upon striking the pedestrian is guilty of negligence if by taking reasonable care he could have avoided the accident. *Jeffares* v. *Wolfenden and Millington*, (1915) 21 B.C.R. 432; 31 W.L.R. 428.

11. At street intersection.]—The plaintiff crossing a street at its intersection with another street and at a point usually made use of by pedestrians was struck by a motor-car travelling at a rate admittedly exceeding the lawful speed limit, having dimmers but without bright headlights, with its curtain closed on the side from which the pedestrian was crossing so that the defendant who was driving the car could not see through it. The defendant's attention was fixed on an approaching car and he paid no attention to pedestrians crossing the street. The jury found that there was no negligence on the part of the defendant: —Held, that the jury's finding was perverse and that there should be a new trial. *McDonald* v. *Weir* (1925) 34 B.C.R. 502; (1925) 3 D.L.R. 70; (1925) 1 W.W.R. 937.

12. Traffic regulation.]—Sec. 19, subsec. 16 of the City of Vancouver Traffic By-law No. 1496 does not apply to a pedestrian, who is not thereby prohibited from crossing a street at a place other than an intersection with another street. *Ibid.*

13. At street intersection.]—Where a driver of a motor-car knows that a pedestrian will probably cross his path and there is no obstruction to his view he is guilty of negligence and liable in damages if, coming from behind, he strikes the pedestrian. *Johnson* v. *Elliott*, (1928) S.C.R. 408; (1929) 1 D.L.R. 208. Affg. (1928) 40 B.C.R. 130; (1928) 1 D.L.R. 1000; (1928) 1 W.W.R. 390.

14. Pedestrian.]—The driver of an automobile should have his car under such control that he is able to come to a stop in the space which he sees clear ahead. *MacGill* v. *Holmes*, (1927) 39 B.C.R. 65.

2. Gratuitous Passenger.

1. Negligent driving.]—A defendant is liable to gratuitous passengers in his motor-car for negligence in driving which causes them personal injuries. *McIntyre* v. *McIntyre*, (1925) 2 W.W.R. 581.

2. Negligence must be shewn.] — A driver of a motor-vehicle is not liable to a gratuitous passenger for injuries received while in his vehicle unless negligence on his part is shewn. *Limb* v. *Stewart*, (1929) 2 D.L.R. 349.

3. Negligence of driver.]—The plaintiff, who was one of a family party of five on a motor-car trip, was injured owing to the negligence of her brother who was driving the car which was owned by her stepfather. The plaintiff knew nothing about the operation of a car, never had control of it, and trusted solely to her brother to do the driving:—Held, as she had nothing to do with the operation of the car and could not be identified with her brother's negligence, she was entitled to recover. *Kerr* v. *Stephen*, (1930) 42 B.C.R. 518; (1930) 2 D.L.R. 978; (1930) 1 W.W.R. 896.

4. Collision.] — Where a driver of a motor-car having slowed down to fifteen miles an hour in a dense fog, the visibility being about fifteen feet and unconsciously turned to the wrong side of the road, and his car came into collision with another car driven at a high rate of speed, it was held that the defendant had acted reasonably in

the circumstances and was not liable for injury to a gratuitous passenger in his car, the cause of the accident being the unreasonable rate of speed of the car with which he collided. *Motion v. Jure,* (1928) 39 B.C.R. 354; (1928) 2 D.L.R. 79.

5. Motor-truck—Child invited to ride.] —As an empty truck was passing a school where there were a number of boys on the sidewalk, the boys called to the driver asking for a ride, to which he replied "come on." After five or six had got on the truck, two getting on the seat and the others standing on the running-board, he told the others (including plaintiffs' boy, who was six years old) to stand back as the car was full. The boys stepped back and the driver started the truck. As he did so the plaintiffs' boy ran forward, and as there was no room on the running-board he grasped a trip cross-bar on the right side of the truck that ran between the running-board and the back wheel. As the speed of the truck increased he was unable to hold on and falling to the ground was run over by the rear wheel and killed:—Held, that the boy was not a trespasser as he was included in the general invitation to get on the truck and negligence should not be imputed to a child of six years of age. *Leslie et ux.* v. *Clark and Buzza, Limited and Buzza,* (1930) 42 B.C.R. 391; (1930) 3 D.L.R. 369; (1930) 1 W.W.R. 513.

6. Disobedience to stop sign.] — The driver of a motor-vehicle is liable for damages for injury to gratuitous passengers in his car if the injury results from the driver's disobedience to a stop sign at a street intersection notwithstanding that the driver of a car coming into collision with the defendant's car was also guilty of negligence. *Lechtzier* v. *Lechtzier. Levy* v. *Lechtzier,* (1931) 43 B.C.R. 423; (1931) 1 D.L.R. 1004; (1931) 1 W.W.R. 425.

7. Collision between motor-trucks.]—Where a motor-truck in which the plaintiffs were riding at a speed of about 15 miles an hour collided at a street intersection with another motor-truck travelling at about 10 miles an hour and it does not appear that either driver was guilty of negligence an action brought against both drivers should be dismissed. *Erickson* v. *Campbell's Ltd. and Central Motor Transfer Co.,* (1928) 39 B.C.R. 472.

3. Collision.

1. Motor-truck and motor-car.] — Where a motor-car was about to pass on the left side of a truck going in the same direction and the truck swerved sharply to the left in order to make a straight turn into a driveway on the right side of the road upon which they were driving and in so swerving to the left drove the motor-car into the curb on the left:—Held, that there was negligence on the part of the driver of the truck in crossing the line of traffic without having regard to those coming behind and in failing to give warning of his intention to do so. *Bloomfield* v. *T. Alexander and Sons and Chester Alexander,* (1923) 32 B.C.R. 110.

2. With horse-drawn vehicle.] — The plaintiff's father, while driving a horse and cart with the plaintiff sitting beside him, across a bridge between 7 and 8 o'clock in the evening in February, was run into from behind by the defendant driving an automobile that had full headlights. The cart was smashed and the plaintiff injured:—Held, that assuming that the story of the defendant and his witnesses was correct that the cart did not have a lantern and was driven with one wheel on the sidewalk to the right of the road, the defendant, driving an automobile with perfect lights set straight ahead with a minimum radius of 20 feet and running down the plaintiff, cannot escape the charge of recklessly and negligently driving without taking heed of what he was doing or where he was going. *Goudy* v. *Mercer,* (1924) 34 B.C.R. 103.

3. Collision at intersection.] — The plaintiff, while riding a motor-cycle easterly in the afternoon in a lane between Hastings and Pender Streets, Vancouver, entered Homer Street and intending to turn to his right (south), looked to his left and saw nothing. On reaching the curb he commenced to turn to his right and when about two-thirds of the way towards the middle of the road he was struck by the defendant's car going south on Homer Street and was knocked over sustaining severe injuries:—Held, that excessive speed or want of care on the part of the defendant caused the accident. *Green* v. *Gordon,* (1925) 35 B.C.R. 92.

4. Inevitable accident.] — Where the driver of a fire-truck proceeding to a fire and blowing a siren when approaching a street intersection crossed the street intersection in front of a street-car which had stopped about one-third of the way across the intersection in response to the warning of the siren and struck a motor-truck travelling on the other side of the street-car which had advanced after the street-car

stopped, it was held that the resulting death of a passenger on the motor-truck and injury to the driver were held to be due to inevitable accident. *Cousineau* v. *City of Vancouver*, (1926) 37 B.C.R. 266; (1926) 3 D.L.R. 265; (1926) 2 W.W.R. 433.

5. Motor-car held in ruts — Duty of driver.]—The paramount duty of a driver of a motor-car approaching another car is to give the approaching driver at least one-half of the road on which to pass, and if he is prevented from moving over to his half of the road by ruts, his duty is to stop and give a signal to the approaching driver. If he does not do so under those circumstances he cannot claim as negligence contributory to the cause of the accident the fact that the other driver expected him to obey the law and give him half the road with the result that he did not stop before a collision was inevitable. *Penrose* v. *Barr*. (1927) 4 D.L.R. 407; (1927) 3 W.W.R. 104.

6. Street intersection—Rule of the road.]—Where the drivers of two motor-vehicles arrive at a street intersection at the same time, the one coming from the right is entitled to the right-of-way and his right is not displaced unless there has been a reasonable and substantial prior entry upon the crossing of the intersection by the other car. *Lloyd* v. *Hanafin*, (1931) 43 B.C.R. 401; (1931) 2 D.L.R. 1000; (1931) 1 W.W.R. 415.

7. Collision.]—Where two cars on different streets approach an intersection and the car to the left of the other is substantially on the intersection first and its rear wheel is hit by the other car, the right of way which the latter would otherwise have had is displaced in the circumstances. *Chambers et al.* v. *Sampson*, (1931) 44 B.C.R. 134; (1931) 3 D.L.R. 206; (1931) 2 W.W.R. 251.

8. Street intersection—Duty of driver.]—One cannot by stopping at an intersection marked by a "stop" abandon all care upon resuming the journey. Care must be exercised at all stages. The first requirement of motor-car drivers is to be alert, to keep a sharp look out for possible danger. The object is to put the driver in a position to take steps to meet any emergency suddenly arising. *Pipe* v. *Holliday*, (1930) 42 B.C.R. 230; (1930) 2 D.L.R. 73; (1930) 1 W.W.R. 225.

9. Right-of-way.]—The driver of a motor-car who assumes that another driver who has the right-of-way will not exercise his privilege does so at his own risk and is liable in damages if an accident results therefrom which cannot be attributed to the negligence of the driver irrespective of the rule of the road. *Turner* v. *Cantone et al.*, (1929) 41 B.C.R. 514; (1929) 4 D.L.R. 724; (1929) 3 W.W.R. 413.

10. Right-of-way.]—The driver of a motor-car approaching a road intersection at a speed of from 30 to 35 miles per hour, and when about 90 feet from the intersection sees another motor-car coming on to the highway at a slow speed, and proceeds with the intention of passing to the rear of the latter when his car skids and crashes into it, is guilty of negligence in travelling at such a speed when approaching an intersection. *Paul* v. *Dines*, (1929) 41 B.C.R. 49; (1929) 3 D.L.R. 617; (1929) 3 W.W.R. 287.

11. Person entrusted with car.]—The plaintiff's motor-truck travelling on the highway came into collision with the defendant's motor-car coming in the opposite direction driven by the defendant M. to whom it was entrusted by the owner, the defendant S. The defendant's car was 18 inches on the wrong side of the road:—Held, that the defendant M. was guilty of negligence. *Ruff* v. *Sutherland and Moss*, (1930) 43 B.C.R. 218; (1930) 3 W.W.R. 554; (1931) 1 D.L.R. 651.

12. Overtaking car.]—The driver of a motor-car in travelling behind another car at an intersection should take reasonable care to minimize the risk which might arise from the driver of the car ahead making a sudden turn without giving any signal. *McLeod* v. *Boultbee and Atkins*, (1931) 44 B.C.R. 375; (1931) 4 D.L.R. 912; (1931) 2 W.W.R. 805.

13. Driving on car tracks.]—A driver of a taxicab is not negligent if while proceeding at a slow rate in a fog he seeks to guide himself by street-car rails on his proper side of the highway, and being stalled on the car tracks does not let his passengers out of the cab before attempting immediately to start his car, and while in the course of his attempt is run down by a street-car in a manner which is admittedly negligent, causing injury to his passengers and cab. *Nowell* v. *Yellow Cab Co., Ltd.*, (1929) 41 B.C.R. 494; (1929) 3 W.W.R. 616; (1930) 1 D.L.R. 493.

III. Relationship of Parties.

A. Owner.

1. Liability of owner.]—Where injuries occasioned by collision with a motor-car

were due to the negligence of the driver in driving on the wrong side of the road the father of the driver being the owner of the car and having authorized the use of it is liable with the son for damages both under the statute and at common law. *Boyd and McDougal* v. *Houston et al.*, (1916) 10 W.W.R. 518.

2. Negligence of person entrusted with car.]—The responsibility of the owner of an automobile under sec. 35 of the Motor-vehicle Act is confined to the penalties imposed by the Act, and does not create a civil liability in damages on the owner of an automobile by reason of the negligence of a person entrusted with its possession. *Boyer* v. *Moillet*, (1921) 30 B.C.R. 216; 61 D.L.R. 136; (1921) 3 W.W.R. 62. *Perrin* v. *Vancouver Drive Yourself Auto Livery*, (1921) 30 B.C.R. 241; 61 D.L.R. 140; (1921) 3 W.W.R. 61.

3. Negligence of servant.]—Where the plaintiff proved that the driver was the defendant's servant at the time of the accident, driving the defendant's car, and the defendant did not allege or shew, or there is nothing in the circumstances to shew that the servant was not acting within the scope of his employment the Court will presume without further allegation or proof that the servant at the time of the accident was acting within the scope of his employment. *McKay* v. *Drysdale*, (1921) 30 B.C.R. 81; 60 D.L.R. 458; (1921) 2 W.W.R. 592.

4. Negligence of servant — Deviation from route.]—Where a driver after delivering goods on the instructions of his father and employer was returning after having used the truck for his own purposes for a number of hours and the plaintiff suffered injury owing to his negligence as a driver: —Held, that the driver at the time of the accident was not acting within the scope of his employment but was "on a frolic of his own" and his employer is not liable. *Battistoni* v. *Thomas*, (1931) 44 B.C.R. 188; (1931) 4 D.L.R. 526; (1931) 3 W.W.R. 44; Affd. (1932) S.C.R. 144; (1932) 1 D.L.R. 577.

5. Motor-vehicle Act — Civil liability under.]—Sec. 35 of the Motor-vehicle Act does not impose civil liability on an owner in excess of that which attaches at common law. *Neilsen* v. *Richard et al.*, (1929) 41 B.C.R. 220; (1929) 4 D.L.R. 1052; (1929) 2 W.W.R. 153. *Ruff* v. *Sutherland and Moss*, (1930) 43 B.C.R. 218; (1930) 3 W.W.R. 554; (1931) 1 D.L.R. 651.

6. Negligence of servant—Deviation.]—G. was employed by the defendant Company for selling its motor-cars and he took a car out each day for demonstrating to prospective buyers. On taking a car out one day he volunteered to drive two young ladies to their destination and they entered the car. As there was time to spare he proceeded in a direction away from their objective and while so engaged collided with another car and the plaintiff was injured. It was found on the evidence that the collision was caused solely by G.'s negligence: —Held, that G. was the agent or servant of the defendant Company, that the question of deviation does not arise here and he was acting in the course of his employment. The Company is therefore liable for the damages suffered by the plaintiff. *Jarvis* v. *Southard Motors Ltd. et al.*, (1931) 44 B.C.R. 286; (1931) 2 W.W.R. 812.

B. Parent.

Motor-vehicle hired by infant.] — A father is not liable for damages caused by a car in charge of his son under the age of 21 years who hired the car from the plaintiff unless the son is driving the car at the time of the accident in respect of which damages are claimed, although the person injured may be entitled to recover damages against the son who permitted another person who brought about the accident to drive the car. *Victoria U-Drive Yourself Auto Livery, Ltd.* v. *Wood*, (1930) 42 B.C.R. 291; (1930) 2 D.L.R. 811; (1930) 1 W.W.R. 522, 634.

C. Married Woman.

Contributory negligence of husband.]—A wife who is injured in a collision may under the Married Women's Property Act maintain an action in her own name and for her own benefit in respect of the injury sustained, and contributory negligence on the part of her husband who was the driver of the car in which she was a passenger will not interfere with her success in the action as he is not her servant and she is not responsible for his negligence. *Brooks* v. *B.C. Electric Ry. Co., Ltd.*, (1919) 27 B.C.R. 351; 48 D.L.R. 90; (1919) 3 W.W.R. 109.

D. Co-Owners.

Both driving.]—Where the defendants were co-owners driving alternatively with the understanding that the co-owner might assist the driver by applying the emergency brake when necessary they were both liable. *Hammer* v. *Hammer and Luthmer. Luthmer* v. *Hammer and Luthmer,* (1929) 41 B.C.R. 55; (1929) 3 D.L.R. 273; (1929) 2 W.W.R. 130.

E. School Trustees and Pupils.

1. Protection of children.]—There is no duty imposed on a Board of School Trustees to protect children from injury on a highway after they have left the school premises. *Patterson* v. *Board of School Trustees of District of North Vancouver,* (1929) 41 B.C.R. 123; (1929) 3 D.L.R. 33; (1929) 2 W.W.R. 181.

2. Shooting competition — Defective rifle.]—Where the trustees of a public school arranged a programme of sports including a shooting contest they must provide proper safeguards against accident and are negligent and liable in damages for injury to a pupil caused by the backfiring of a rifle used in the competition having a loose bolt and enlarged chamber. *Walton* v. *Board of School Trustees of Vancouver,* (1924) 34 B.C.R. 38; (1924) 2 D.L.R. 387; (1924) 2 W.W.R. 49.

F. Bailee.

Right to damages.]—A bailee of a motor-car and goods therein is entitled to recover full damages for negligence causing injury to the car and the goods, irrespective of his liability towards the true owner. *Rodger* v. *Flinton,* (1926) 3 W.W.R. 773.

G. Trespasser.

1. Logging operations.]—There is no liability on the part of a company conducting logging operations for injuries to a trespasser thereby occasioned. *Gilbert* v. *Southgate Logging Co.,* (1915) 22 B.C.R. 87; 24 D.L.R. 202; 32 W.L.R. 131; 8 W.W.R. 1304.

See also *Sale* v. *East Kootenay Power Co. Ltd.,* (1931) 44 B.C.R. 141; (1931) 4 D.L.R. 221; (1931) 3 W.W.R. 117; (1931) S.C.R. 712; (1931) 4 D.L.R. 593.

2. Wharf constructed without authority.]—The owner of a boom of logs cannot justify damaging another's wharf to which the boom was tied without leave, on the ground that the building of the wharf was unauthorized and constructed in navigable waters. *Wallace Foundry Co. Ltd.* v. *Dominion Shingle & Cedar Co. Ltd.,* (1920) 28 B.C.R. 147.

IV. Contributory Negligence.

1. Street crossing.]—Where the plaintiff driving a car with defective brakes sees a truck crossing his path fifty feet away and collides with it although he could have stopped in less than that distance, he is not entitled to recover in respect of the accident as it was brought about through his own negligence. *Shrimpton* v. *Indar Singh,* (1927) 39 B.C.R. 19.

2. Standing car.]—Where a driver of a motor-car ran into another car standing by the curb of a street, his excuse that other cars ahead obscured his vision was held to be untenable as he should have noticed the other cars turning out to avoid an obstruction. *Johnson* v. *McMorran,* (1927) 39 B.C.R. 24; (1927) 4 D.L.R. 335; (1927) 3 W.W.R. 37.

3. No rear light.]—At about 12 o'clock on a rainy night the defendant left his truck close to the curb-line near his home on the outskirts of Vancouver. The rear of his truck was about three feet out from the curb-line, and he left no tail-light. The plaintiff, driving a friend home, stopped to let him out about 60 feet behind the defendant's truck on the same side of the street. He then started his car and while still in low gear he ran into the defendant's truck damaging his car:—Held, that the defendant was negligent in failing to have a light at the rear of his truck and in the circumstances the plaintiff was not guilty of contributory negligence in not seeing the defendant's truck. *Atwood et al.* v. *Lubotina,* (1928) 40 B.C.R. 446.

4. Dangerous condition of street — Lack of knowledge of.]—Where a motor accident occurs by reason of the slippery condition of a street, and the evidence shews that though the driver had passed over the same street a short time previously, the condition of the pavement had materially changed in the meantime, and the preponderance of the evidence is that such condition was not observable until an attempt to

stop was made, the proper conclusion is that the accident was not caused by negligence of the driver, as the evidence supports neither a knowledge of the dangerous condition of the street, nor a culpable lack of knowledge. *Jones* v. *Pacific Stages Ltd.*, (1928) S.C.R. 92; (1928) 2 D.L.R. 897.

5. On the part of a child.]—The doctrine of contributory negligence does not apply to a child of tender years. *Vick* v. *Morin & Thompson*, (1915) 21 B.C.R. 8; 22 D.L.R. 29; 30 W.L.R. 412; 7 W.W.R. 1053. *Leslie* v. *Clark & Buzza, Ltd.*, (1930) 42 B.C.R. 391; (1930) 3 D.L.R. 369; (1930) 1 W.W.R. 513.

6. Tram-car — Defective brakes.] — Operating a street-car with defective brakes incapable of arresting its speed when approaching a highway crossing is negligence which will render a railway company liable for a collision notwithstanding the plaintiff's contributory negligence. *Columbia Bitulithic, Limited* v. *B.C. Electric Ry. Co., Ltd.*, (1917) 55 S.C.R. 1; 21 C.R.C. 243; 37 D.L.R. 64; (1917) 2 W.W.R. 664.

7. Ultimate negligence—Collision.]—The jury having found that both parties have been negligent in the circumstances the plaintiff is not entitled to succeed unless the defendant by exercise of reasonable care could have avoided the accident. *Jackson* v. *British Columbia Electric Ry. Co., Ltd.*, (1917) 24 B.C.R. 484; 38 D.L.R. 145; (1917) 3 W.W.R. 1046.

8. Ultimate negligence.]—In an action for damages for personal injuries and the wreck of an automobile the plaintiff cannot recover where the accident was due to the negligence of both the plaintiff and the defendant, and the defendant could not have avoided the accident by the exercise of reasonable care after he became aware of the danger. *Fraser* v. *B.C. Electric Ry. Co., Ltd.*, (1919) 26 B.C.R. 536; (1919) 2 W.W.R. 513.

9. Ultimate negligence.]—In an action for damages to a motor-car owing to a collision with a train of the defendant Company through the alleged negligence of its servants, the jury in answer to questions, found the defendant negligent owing to delay in the application of brakes, and that the driver of the motor-car was negligent in not keeping a proper look out. They also found that after the employees of the defendant became aware that the motor-car was in danger they could have avoided the accident by the exercise of reasonable care, and awarded the plaintiff damages. The driver of the motor-car admitted in evidence that she saw the train when from 30 to 35 yards from the track and that she could have stopped the motor in from 20 to 25 yards:—Held, on appeal, that the jury should have been asked whether the driver of the motor-car, after she saw the train coming, could by the exercise of reasonable care and skill have avoided the accident, and that such question not having been submitted there should be a new trial. *Gavin* v. *The Kettle Valley Railway Company*, (1918) 26 B.C.R. 30; 43 D.L.R. 47; (1918) 1 W.W.R. 251; 58 S.C.R. 501; 23 C.R.C. 379; 47 D.L.R. 65; (1918) 3 W.W.R. 385.

10. Ultimate negligence.]—The plaintiff, an experienced horseman having owned a race horse was looking through a partially opened gate inside of which was a race track, a race being in progress, when a horse in a race bolted and coming towards the gate struck it. The gate smashed outwards, hitting the plaintiff violently and injuring him:—Held, that the plaintiff saw and appreciated the negligent condition of the gate and from his experience he knew of the tendency of horses to bolt in a race and was guilty of contributory negligence in standing where he did outside the gate. *Shaw* v. *Westminster Thoroughbred Association, Limited*, (1924) 33 B.C.R. 361.

11. Ultimate negligence.]—Where the jury finds, on sufficient evidence, that notwithstanding the negligence of which the plaintiff was found guilty, the defendant could, by the exercise of reasonable care, have avoided the accident, the plaintiff is entitled to recover and the contributory negligence Act has no application. *Key* v. *B.C. Electric Ry. Co., Ltd.*, (1930) 43 B.C.R. 288; (1930) 3 W.W.R. 569; (1931) 1 D.L.R. 532; (1931) 3 D.L.R. 587; 38 C.R.C. 278; (1932) S.C.R. 106.

12. Collision — Presumption of negligence.]—Where the driver of a motor-car strikes the rear end of a motor-truck at an intersection the motor-truck having reached the intersection first and being nearly across the street which was well lighted, and both cars were travelling at about 10 miles per hour, there is a presumption that the driver of the motor-car was negligent in not keeping a proper lookout. *Collins* v. *General Service Transport, Ltd.*, (1926) 38 B.C.R. 512; (1927) 2 D.L.R. 353.

13. Collision between tram and motor-car.]—The plaintiff driving his motor-car approaching the defendant's railway track was warned by one of the occupants of the

motor-car to look out for the approach of a tram-car but continued in his course and struck the front steps of the tram-car. The driver of the tram-car sounded a whistle but there was no bell. The growth of the brush close to the track obstructed the view as the tram-car approached the crossing. The jury by division of seven to one found that there was no contributory negligence but stated in answer to a subsequent question that the plaintiff's negligence was "not stopping and not taking more precaution after being warned." Damages were assessed accordingly:—Held, that there was evidence to justify the findings of the jury both as to negligence and absence of contributory negligence, and that the jury's findings in conjunction with the pleadings, the evidence and the charge of the judge were to be justified and sufficient to support the judgment in favour of the plaintiff. *Dunphy* v. *B.C. Electric Ry. Co.*, (1919) 27 B.C.R. 327; 48 D.L.R. 38; (1919) 3 W.W.R. 201; 59 S.C.R. 263; 50 D.L.R. 264; (1919) 3 W.W.R. 1076.

14. Collision between tram and motor-car.]—Driving a motor-car contrary to a municipal traffic by-law, and proceeding out from behind a street-car in a diagonal course, thereby hiding from view a street-car approaching from an opposite direction, constitutes contributory negligence which will preclude recovery for injuries sustained in consequence of a collision with a street-car. *Tait* v. *British Columbia Electric Railway Company, Limited*, (1916) 22 B.C.R. 571; 27 D.L.R. 538; 34 W.L.R. 684; 10 W.W.R. 523. Appeal quashed, 54 S.C.R. 76; 32 D.L.R. 378; (1917) 1 W.W.R. 544.

15. Collision between tram and motor-car.]—In an action for damages for wreckage and non-user of the plaintiff's automobile owing to a collision with a tram-car of the defendant Company the jury brought in a verdict for the plaintiff but on motion of the defendant the trial judge dismissed the action:—Held, on appeal, that notwithstanding the verdict of the jury the plaintiff's action should be dismissed, as his own negligence in not looking carefully when approaching the crossing was the cause of the accident and the jury's verdict was unreasonable. *Maltby* v. *British Columbia Electric Railway Company, Limited*, (1920) 28 B.C.R. 156; 60 D.L.R. 680; (1920) 2 W.W.R. 543.

16. Collision between tram and motor-car.]—Shortly after the noon hour the plaintiff in his automobile approached a street on which was a street-car line. As he neared the intersection he heard nothing and when about 15 feet from the track he looked to the left and saw nothing. He then proceeded to cross the intersection and when his front wheels were within two feet of the track he again looked to his left and saw a street-car about 40 feet away coming at an excessive rate of speed. It was then too late to avoid a collision. The automobile was smashed and the driver and passengers injured:—Held, that in not exercising reasonable care by slowing down his car, and looking when entering into the street to be crossed to see if there was danger before proceeding the plaintiff was guilty of contributory negligence. *Milligan* v. *B.C. Electric Ry. Co., Ltd.*, (1923) 32 B.C.R. 161; (1923) 4 D.L.R. 637; (1923) 1 W.W.R. 1373.

17. Collision between train and motor-truck.]—On the 26th of December at about 5.15 o'clock in the evening a motor-car of the plaintiff Company was dumping a load of wood into its woodyard on the north side of a street, the truck standing at right angles to the curb with the engine and forepart of the truck across the north street-car track when a street-car of the defendant Company going west, collided with and damaged the truck. There was an arc light 28 feet west of the truck and the truck's headlights faced across to the south side of the road:—Held, that the apportionment of the damages should be four-fifths to be paid by the plaintiff and one-fifth by the defendant. *Morgan Fuel Co. Ltd.* v. *B.C. Electric Ry. Co., Ltd.*, (1930) 42 B.C.R. 382; (1930) 4 D.L.R. 30; (1930) 2 W.W.R. 776.

18. Overtaking vehicle —Proximate cause.]—Where the plaintiff had stopped his car on an arterial highway with the left wheels at the edge of the paved portion of the road and was run down by the defendant's car driving in the same direction, it was held that if the defendant had been keeping a proper lookout he would have seen the plaintiff's car and his failure to do so was the proximate cause of the injury. *Nason* v. *Hodne*, (1929) 41 B.C.R. 398; (1929) 4 D.L.R. 490.

19. Contributory Negligence Act — Proximate or efficient cause.]—Damage or loss is caused by the fault of two or more persons, within the meaning of the Contributory Negligence Act, 1925, only when the fault of each of such persons is a proximate or efficient cause of such damage or loss, i.e., only when at common law each would properly have been held guilty of negligence which contributed to causing the injurious

occurrence. *Leary* v. *Commissioners for Nakusp Development District,* (1930) 1 W.W.R. 97.

20. Passenger falling from platform of car.]—The plaintiff, nine years old, was a passenger on the defendant's train. While the train was approaching a station he went to the rear end of the car in which he was riding and as he was stepping from the passage to the platform, and while his hand was on the door, there came a sudden jerk of the car, in consequence of which he was thrown to the platform, and the vestibule door being open, fell down the steps to the ground and suffered injury which made it necessary to amputate both legs. The jury found that the railway company was negligent in that the exits to the train were not properly safeguarded and that the proximate cause of the accident was the plaintiff's falling off the train, and that the plaintiff was not guilty of negligence, and awarded damages:—Held, that notwithstanding the defendant's printed regulations forbidding the use of any step of any car as a place on which to stand or stay, and sec. 398 of the Railway Act which provides that no person injured while on the platform of a car in violation of the regulations shall have any claim in respect of the injury if sufficient room inside of the passenger cars was furnished at the time, the verdict of the jury should be upheld as the plaintiff's injury was the natural and direct consequence of the open trap door, and the plaintiff was not guilty of contributory negligence. *Dobie* v. *Canadian Pacific Ry. Co.,* (1931) S.C.R. 277; (1930) 3 D.L.R. 856; 37 C.R.C. 385.

21. Motor-car—Pedestrian—Agony of collision.] — The plaintiff in crossing a street at a corner and when about two-thirds of the way across looked to her right and saw the defendant's automobile almost upon her. Her evidence was that she hesitated as to which way she should go. The defendant admitted that when he first saw her he swerved to the left to try to avoid her and put on his brakes but they did not take effect until after he struck her; but he claimed that she hesitated and suddenly took two steps back that brought her in front of his car. The defendant's car skidded 63 feet and the plaintiff was carried from 45 to 50 feet after she was struck:—Held, that as the plaintiff's evidence which was uncontradicted on the point was that she did not see the defendant's car until it was practically upon her, being then in the "agony of collision," she could not be guilty of contributory negligence and was entitled to recover for the damages sustained. *Zellinsky and Zellinsky* v. *Rant,* (1926) 37 B.C.R. 119; (1926) 2 D.L.R. 327; (1926) 2 W.W.R. 474.

22. Bicycle and motor-car.] — The plaintiff when riding on a bicycle on the highway between Alberni and Port Alberni on the 24th of August, 1920, at about 8 o'clock in the evening, was struck and injured by the defendant's automobile coming in the opposite direction. The road was about 16 feet wide and straight for some considerable distance in both directions from the point of accident. The automobile had one light but there was no light on the bicycle. Sunset was at about 7.20 p.m. at that time of year and at the time of the accident it was dark. It was found on the evidence that the accident took place on the plaintiff's side of the road:—Held, that the driver of a rapidly moving vehicle on a public highway is bound at common law to take reasonable precaution in time of darkness or fog to warn others, the natural and ordinary mode being by a light attached to the vehicle. Had the plaintiff carried a light the defendant would have been warned of his presence and would have avoided him. The want of a light on the bicycle was therefore the decisive cause of the accident and the action failed. As the defendant had only one light burning and was going at too high a speed, considering the width of the highway and amount of traffic, the action was dismissed without costs. *Sanders* v. *Croll,* (1921) 30 B.C.R. 284.

23. Railway yard.]—The plaintiff who was a passenger on a train of the defendant Company intended to change cars at a station. His train did not go to the station but stopped in the yard. He was deaf and, misconstruing instructions, was late in getting off the train and missed his connection. When he got off he walked through the yard to the station where he was told that he should proceed back of the station to reach an hotel, but instead of going as directed he again proceeded through the railway yard towards the spot where he got off the train and on the way was struck by a car from behind. The jury found the defendant negligent and that the negligence consisted in failure of proper transfer at the station, and after finding there was no contributory negligence gave an affirmative answer to the question "If the plaintiff was guilty of contributory negligence could the defendant by the exercise of reasonable care immediately before the accident have avoided the accident?" Judgment was given for the plaint-

iff on the jury's findings:—Held, that the jury's answers to questions failed to make their meaning clear and there should be a new trial. *McFetridge* v. *Canadian Pacific Railway Company and Spokane International Railway Company,* (1926) 37 B.C.R. 387; (1926) 4 D.L.R. 30; (1926) 3 W.W.R. 279.

24. Both to blame.]—Where the inference to be drawn from the evidence, both oral and physical, is that both parties to a motor-car collision were driving their cars negligently, one being as much to blame as the other, and that the negligence continued until it was too late to avoid the accident, neither party can recover damages for injury caused thereby. *Winch* v. *Bowell,* (1922) 31 B.C.R. 186; 67 D.L.R. 471; (1922) 2 W.W.R. 1031.

25. Joint negligence — Contribution.]—In an action for damages for injury sustained in a motor-car accident the jury having found that the accident resulted from the joint negligence of the defendant and the third party, the defendant was held to be entitled to contribution from the third party less one-half the amount of the damages awarded by the verdict. *Vandepitte* v. *Berry. E. J. Vandepitte, Third Party,* (1928) 40 B.C.R. 408; (1929) 1 D.L.R. 1002.

26. Both to blame—Degrees of negligence.]—In an action for damages arising out of the collision between two motor-cars the degree of fault of the defendant being 60 per cent. and that of the plaintiff 40 per cent. and the total damages having been assessed accordingly, it was directed that the costs of both parties should be taxed and be payable by the parties in the same proportions. *Ansel* v. *Buscombe,* (1927) 3 W.W.R. 137.

27. Both to blame.] — The defendant driver emerging from a private road to a main road saw another motor-car approaching from the west about 200 feet distant and endeavoured to cross the road and proceed westerly. The plaintiff saw the defendant's car emerging from the private road and expecting it to stop continued at the speed of 35 miles per hour and struck the defendant's car resulting in injury:—Held, that the accident was due to the negligence of both drivers and the damages should be apportioned equally under the Contributory Negligence Act. *Hornby and Hornby* v. *Paterson,* (1929) 41 B.C.R. 548; (1929) 3 W.W.R. 276; (1930) 1 D.L.R. 86.

28. Both to blame—Apportionment of damages.]—The plaintiff driving his motor-car north came into collision at a street intersection with the defendant who was driving his car west and who had the right-of-way. The defendant assumed that the plaintiff would allow him to pass but when 15 feet from the point of contact saw that the plaintiff was trying to pass ahead of him and endeavoured to stop and turn when the cars collided:—Held, that both parties were at fault and that the plaintiff is liable for three-quarters of the damages and costs and the defendant for one-quarter thereof, the defendant's contributory negligence consisting in proceeding across the intersection without observing that the plaintiff was approaching at a high rate of speed. *Watt* v. *Reid,* (1929) 42 B.C.R. 90; (1930) 2 D.L.R. 215.

29. Both to blame—Left-hand turn at intersection—No warning.]—A was driving his car easterly approaching an intersection, B with the plaintiff as a passenger driving his car in the same direction a few feet behind A. On reaching the intersection A without giving warning turned to the left to go north. B who was proceeding at about 35 miles per hour on seeing A turn to the left turned to the left himself but too late to avoid collision:—Held, that A was negligent in not signalling on turning at the intersection and that B travelling behind another car at an intersection should have taken reasonable care to minimize the risk which might arise from the driver of the car ahead making a sudden turn without giving any signal:—Held, that the Contributory Negligence Act applied and that damages should be assessed 60 per cent. to A and 40 per cent to B. *McLeod* v. *Boultbee and Atkins,* (1931) 44 B.C.R. 375; (1931) 4 D.L.R. 912; (1931) 2 W.W.R. 805.

30. Both to blame — Contribution—Costs.]—In an action for damages resulting from a collision between motor-vehicles it was found that the accident was caused by the negligence of both drivers and the apportionment of fault should be two-thirds on the defendant and one-third on the plaintiff who was driving. The co-plaintiffs being passengers in the latter's car, the defendant is entitled to contribution from her to the amount of one-third of the damages allowed to her co-plaintiffs. Pursuant to marginal rule 977 the whole costs of the plaintiffs should be taxed and two-thirds thereof paid by the defendant to the plaintiffs, the defendant not being entitled to any costs from the plaintiffs in respect of either

claim or counterclaim. *Chambers et al.* v. *Sampson*, (1931) 44 B.C.R. 134; (1931) 3 D.L.R. 206; (1931) 2 W.W.R. 251.

31. Street intersection — Vision restricted by street-car.]—As a motor-coach of the plaintiff Company was being driven westerly and approaching a street intersection, the defendant's motor-truck going southerly was approaching the intersection parallel with and to the left of a street-car going in the same direction. The coach entered the intersection first and the driver thinking the street-car was slowing down for passengers before entering the intersection, proceeded to cross in front of it. The street-car did not stop, but entered the intersection at the same time as the truck, to its left, the motorman slowing down to let the coach cross in front, the coach clearing the street-car by five to six feet. The driver of the truck not seeing the coach owing to the street-car restricting his vision, until it was partly across the tracks, could not avoid running into the coach:—Held, that the drivers of both coach and truck were equally to blame in bringing about the accident and the damages should be equally divided between them. *Vancouver Island Coach Lines Limited* v. *E. LeBus & Co., Ltd.*, (1931) 44 B.C.R. 102; (1931) 3 D.L.R. 811; (1931) 2 W.W.R. 337.

32. Entering main artery from side street—Collision at street intersection.]—Where the driver of the plaintiff's car in turning into a street intersection saw the defendant about 216 feet away and in crossing 60 feet at 15 miles per hour was run down by the defendant who should have seen her car, the defendant could not escape a finding of negligence, and although the plaintiff's driver cut the corner and was short of the statutory turn this did not affect the case, as it did not relieve the defendant who ought to have seen her and slowed down to avoid a collision. *Howard* v. *Henderson*, (1929) 41 B.C.R. 441.

33. Collision at street intersection.]—The plaintiff's motor-car driven by her son 17 years old proceeding westerly at a street intersection on a dark and misty evening struck the defendant's car when the latter attempted to cross the same intersection. The defendant was travelling without lights. Counsel for the plaintiff admitted contributory negligence:—Held, that two-thirds of the damage should be borne by the defendant and one-third by the plaintiff. *Tedlock* v. *McKelvie*, (1929) 41 B.C.R. 446; (1929) 4 D.L.R. 691.

34. Excessive speed of motor-car.]—The plaintiff alighting from the back end of a street-car on a dark rainy night, turned, and crossed the track at the back of the car but before clearing the adjoining track was struck by a car coming from the opposite direction at an excessive rate of speed:—Held, that as the defendant's negligence was in excessive speed and the plaintiff's negligence in not taking due care to avoid danger, the negligence of both of them continuing until it was too late for the motorman to avoid the accident the plaintiff could not recover. *Skidmore* v. *British Columbia Electric Railway Company, Limited*, (1922) 31 B.C.R. 282; 68 D.L.R. 32; (1922) 2 W.W.R. 1036.

35. Excessive speed.] — The plaintiff crossed a well-lighted street in the evening in a diagonal direction (not at the intersection) and after passing immediately in front of a moving street-car was struck by a motor-car on the far side going in the same direction as the street-car at an excessive speed:—Held, that despite the negligence of the plaintiff in crossing the street diagonally in contravention of the by-law the real cause of the accident was due to the excessive speed of the defendant's car. *Suffern* v. *McGivern*, (1923) 32 B.C.R. 542; (1923) 4 D.L.R. 541; (1923) 3 W.W.R. 817. As to by-law *see McDonald* v. *Weir*, (1925) 34 B.C.R. 502; (1925) 3 D.L.R. 70; (1925) 1 W.W.R. 937.

36. Motor-car and pedestrian.] — At about 6 o'clock in the evening in November, 1924, the plaintiff started in a hurry to go diagonally across a street intersection to catch a car that had stopped at the opposite corner while on its way to Vancouver. She left the curb but before reaching the middle of the road was struck at an acute angle by defendant's automobile and severely injured. The lights of defendant's car were on, also the street lights, there being the common condition of a lighted street with some parts of it less illuminated than others:—Held, that the plaintiff's sudden stepping into the zone of danger without taking the obvious and simple precaution which the circumstances required was the decisive cause of the accident. Held, further, that neither a pedestrian nor a driver of a car has paramount right to the use of the highway. Both have equal rights subject to the rules of the road, and any special regulation for the time being in force for the common safety. *Vance* v. *Drew*, (1925) 36 B.C.R. 241; (1925) 3 W.W.R. 740.

37. Pedestrian — Contributory Negligence Act.]—Where a pedestrian was injured by coming into contact with a motor-car it was found the defendant was negligent in not keeping a proper lookout and the plaintiff was negligent in failing to look for approaching vehicles:—Held, that the Contributory Negligence Act applies and the damages should be divided equally between them. *Harper* v. *McLean,* (1928) 39 B.C.R. 426; (1928) 2 D.L.R. 220; (1928) 1 W.W.R. 444.

38. Duty of jury.]—Where the jury have found contributory negligence it is their duty after finding the whole of the damages to apportion them between the parties in the manner specified by the Contributory Negligence Act. *Jamieson* v. *B.C. Amusements Co., Ltd.,* (1930) 43 B.C.R. 317.

39. Contributory Negligence Act — Families Compensation Act.]—In an action for damages for negligence brought under the Families Compensation Act where it is found that the negligence of the deceased contributed to the accident the Contributory Negligence Act applies. *Hunter* v. *Clarke,* (1932) 44 B.C.R. 554; (1932) 1 W.W.R. 466.

FOR APPORTIONMENT OF COSTS—*See* COSTS.

FOR INJURY TO SERVANTS AND EMPLOYEES—*See* MASTER AND SERVANT, TORT.

FOR DANGEROUS PREMISES—*See* TORT, NUISANCE.

FOR NEGLIGENCE IN RESPECT OF PROPERTY—*See* ADMIRALTY, ANIMALS, BAILMENT, CARRIERS, COLLISION, FIRE, SHIPPING, TORT.

FOR LIABILITY OF INSURERS IN NEGLIGENCE CASES—*See* INSURANCE.

See DAMAGES.

See DYKING, DRAINAGE AND IRRIGATION.

See HIGHWAYS.

See LIMITATION OF ACTIONS.

See MOTOR-VEHICLES.

See MUNICIPAL CORPORATIONS.

See NEW TRIAL.

See RAILWAYS.

NEGOTIABLE INSTRUMENTS.

See BILLS OF EXCHANGE.

NEWSPAPER.

See DEFAMATION.

NEW TRIAL.

I. IN GENERAL, 828.
II. CONDUCT OF TRIAL, 830.
III. WRONGFUL ADMISSION OR REJECTION OF EVIDENCE, 831.
IV. MISDIRECTION, 832.
V. ERRONEOUS VERDICT, 836.
A. In general, 836.
B. Incomplete verdict, 837.
VI. EXCESSIVE DAMAGES, 838.

I. IN GENERAL.

1. Order for jury.]—Where a plaintiff obtained an order for trial by jury but afterwards agreed to go to trial without a jury, the waiver of his right to a jury was one in respect of the first trial and the order being still effective, he was entitled to a jury on a new trial without further application. *Nantel* v. *Hemphill's Trade Schools Ltd.,* (1920) 28 B.C.R. 422; (1920) 3 W.W.R. 408.

2. Notice.]—Notice of a new trial must be in the form set out in the Rules of Court. *Barker* v. *Jung,* (1919) 26 B.C.R. 352; (1919) 1 W.W.R. 13.

3. Questions determined by Court of Appeal.]—Where a Court of Appeal in granting a new trial decides a substantial question in the litigation, that question is to be taken to have been conclusively determined between the parties. *Bergklint* v. *Western Canada Power Co., Ltd.,* (1917) 54 S.C.R. 285; 34 D.L.R. 467; (1917) 1 W.W.R. 1262.

4. Power to order ex mero motu.]—The Court of Appeal has power under Rule 869 and sec. 15 (3) of the Court of Appeal Act to order a new trial ex mero motu even if the appellant disclaims that disposition of his appeal and asks for judgment in his favour. *McDonald* v. *Weir,* (1925) 34 B.C.R. 502; (1925) 3 D.L.R. 70; (1925) 1 W.W.R. 937.

(*See Cousineau* v. *City of Vancouver,* (1926) 37 B.C.R. 266; (1926) 3 D.L.R. 265; (1926) 2 W.W.R. 433. Martin, J.A. at p. 270.)

5. Abatement and revivor—Suggestion of death—New trial.]—Where in an action for malicious prosecution the defendant obtained an order for a new trial on appeal from the trial judgment, and pending an appeal therefrom by the plaintiff to the Supreme Court of Canada the plaintiff died, his personal representatives were allowed to enter a suggestion of death, and in directing a new trial as to the quantum of damages, the Court imposed as a condition that no exception should be taken at the hearing on the ground of the the plaintiff's death. *Lew* v. *Wing Lee*, (1925) A.C. 819; 94 L.J.P.C. 161; 133 L.T. 578; (1925) 3 D.L.R. 1009; (1925) 3 W.W.R. 49. Affg. (1924) S.C.R. 612; (1925) 1 D.L.R. 179.

6. After non-suit.]—Where the defendant's counsel at the trial of an action expresses himself as being in doubt whether he should ask for a non-suit before putting in his defence and the trial judge takes the matter into his own hands and dismisses the action without a formal motion for non-suit, the Court of Appeal upon finding that the trial judge was in error will direct a new trial. *Robinson* v. *Corporation of Point Grey*, (1927) 38 B.C.R. 243; (1927) 2 D.L.R. 471; (1927) 3 W.W.R. 211.

7. Petition under Adoption Act—Application or presence of official reporter refused.]—Where on the hearing of a petition for the adoption of a child under the provisions of the Adoption Act, an application for the presence of an official stenographer to report the proceedings is refused, and it is impossible to dispose of an appeal on the notes of evidence before the Court, the case should be sent back to a judge of the Supreme Court for a re-hearing. *In re Adoption Act. Painter* v. *McCabe*, (1927) 39 B.C.R. 249; (1928) 2 D.L.R. 13; (1928) 1 W.W.R. 149.

8. Election as to issue submitted to jury.]—If a party at a trial by his Counsel deliberately elects to fight his case upon a given issue as to negligence which is submitted to the jury and on which he is unsuccessful he cannot afterwards claim a new trial on the ground that the case really turned upon another issue. *Linnell* v. *Reid*, (1923) S.C.R. 594; (1923) 3 D.L.R. 966; (1923) 3 W.W.R. 422. Affg. (1923) 32 B.C.R. 87; (1923) 2 D.L.R. 445.

9. Action for solicitor's costs—Defence of payment—Onus of proof.]—In an action by a solicitor for his costs where the defence of payment is set up the onus is on the defendant to prove payment and where the trial judge otherwise directs a new trial will be ordered. *Banton* v. *Amar Chand*, (1922) 1 W.W.R. 929.

II. CONDUCT OF TRIAL.

1. Trial prematurely stopped.]—Where a trial has been prematurely stopped by the trial judge, a new trial will not be ordered where it appears that counsel for the appellant failed at the time to object. *Barron* v. *Kelly*, (1917) 24 B.C.R. 283; 37 D.L.R. 8; (1917) 3 W.W.R. 65.

2. Unfair comment by counsel.]—Counsel commented on the refusal of a railway company to produce a confidential report, and the trial judge refused to direct the jury that they were not entitled to draw an unfavourable inference against the company so refusing production:—Held, that there should be a new trial. *Errico* v. *B.C. Electric Ry. Co., Ltd.*, (1916) 23 B.C.R. 468; (1917) 2 W.W.R. 238.

3. Dismissing action before plaintiff's case closed.]—If it appears to the Court of Appeal that a plain error of law and miscarriage of justice has taken place upon the trial judge dismissing an action before the plaintiff's case is closed, a new trial will be ordered. *Nantel* v. *Hemphill Trade Schools, Ltd.*, (1920) 28 B.C.R. 265; 53 D.L.R. 37.

4. Judge's view in absence of counsel.]—In an action for damages owing to a collision between motor-cars, where it is shewn that the trial judge took a view of the locus in quo in the course of the trial without counsel being present, and without their knowledge, a new trial will be ordered. *British America Paint Co.* v. *Palitti*, (1920) 29 B.C.R. 162.

5. Conduct of trial—Jury actuated by improper motives.]—Whenever and as soon as it becomes known to a trial judge that a juror is actuated by improper motives, it is the duty of the judge of his own motion to protect the litigants from the results of such a scandal by discharging the jury then and there and summoning another, as would have to be done in the case where a juror is discovered to be insane or to have accepted a bribe. Where such course is not taken there should be a new trial. *Howard and Howard* v. *B.C. Electric Ry. Co., Ltd.*, (1918) 3 W.W.R. 409.

6. Questions to jury.]—It is the duty of a trial judge, in negligence cases particularly, to submit questions to be answered

by the jury, where the judge can properly do so. It is therefore the duty of counsel engaged in such a case to allow the questions to be put and the answers to be made, and they should not interfere with the judge in the exercise of that duty by pointing out or suggesting to the judge that the jury is not obliged to answer the questions. *Ibid.*

7. Arbitration—Misconduct of arbitrator.]—In the case of an arbitration under the Arbitration Act, where an arbitrator has failed to follow the recognized rules of law, or has otherwise misconducted himself, or the award has been improperly procured the Court may set the award aside. The Court has power to consider the evidence adduced before the arbitration to determine if there was misconduct on his part which would be a ground for setting aside the award. *Wood* v. *W. H. Malkin Co., Ltd.*, (1928) 40 B.C.R. 255; (1928) 4 D.L.R. 511; (1928) 2 W.W.R. 674.

8. Assessment of damages—Impropriety of assessor.]—A new trial will be ordered if an assessor appointed to assess damages to property takes a view of the property in the absence of the parties and their counsel. *Higgins* v. *Comox Logging Co.*, (1927) S.C.R. 359; (1927) 2 D.L.R. 682. Affg. (1926) 37 B.C.R. 525; (1926) 4 D.L.R. 852; (1926) 3 W.W.R. 417.

9. Nonsuit.]—It is in the discretion of the Court of Appeal to say whether a new trial will be granted or not. When the defendant asks for and obtains a nonsuit and afterwards it is found on appeal that the plaintiff has made out a case it is not usual to grant a new trial. *Cudworth* v. *Eddy*, (1926) 37 B.C.R. 407; (1927) 1 W.W.R. 583.

III. Wrongful Admission or Rejection of Evidence.

1. Reply.] — Where the plaintiff is allowed to put evidence in rebuttal upon a crucial point which should have been given in chief, and the defendant is prejudiced if he is not given an opportunity of reply, a new trial should be granted. *Fraser Valley Delta Co-operative Association* v. *Kline*, (1925) 36 B.C.R. 22; (1925) 3 D.L.R. 1203.

2. Objection not taken until after verdict.]—In an action for damages owing to a collision between two automobiles, the plaintiff when relating the circumstances stated that the defendant Y. (who was driving a stage owned by the defendant H.) said that he was in the wrong, that the car was insured and he would pay the damages, and the plaintiffs' son gave the same evidence. This evidence was given early in the trial without objection and although subsequently commented on by defendants' counsel, the question of its admissibility was not brought to an issue until after the verdict for the plaintiffs. The trial judge dismissed the action:—Held, on appeal, that a new trial should not be granted. Objection to the admissibility of the evidence should have been taken at once and the matter not being brought to an issue until after the verdict, it was then too late, and judgment should be entered in accordance with the verdict. *Craig* v. *Hamre and Young*, (1925) 36 B.C.R. 1; (1925) 3 D.LR. 979; (1925) 3 W.W.R. 81.

IV. Misdirection.

1. Reference to matter not in evidence.]—Where on the trial of an action by a solicitor for payment of a bill of costs incurred in an action conducted by the solicitor in the defendant's behalf, the trial judge who had conducted the first trial in his charge to the jury referred to matters within his own knowledge which took place at the first trial but were not in evidence in the case at Bar, it was held that there was misdirection and there should be a new trial. *Woodworth* v. *Gold*, (1915) 21 B.C.R. 333.

2. Misdirection to jury.]—In an action for damages owing to the negligence of the motorman of a street-car, the conductor refused to produce in evidence the written report of the accident that he had given to his company, the contents of which were privileged. Counsel for the plaintiff commented on the refusal of the defendant to produce the report and told the jury that they might draw their own inference:—Held, that counsel is not entitled to tell the jury that they may draw such an inference, and the learned judge not having instructed the jury that they were not entitled to draw an unfavourable inference from the non-production of the report, there was misdirection and there must be a new trial. *Errico* v. *British Columbia Electric Ry. Co., Ltd.*, (1916) 23 B.C.R. 468; (1917) 2 W.W.R. 238.

3. Judge's remarks.]—Where remarks of the judge during the trial and his charge to the jury are calculated to prejudice a fair trial of the action a new trial will be granted. *Lucas* v. *Ministerial Union,* (1916) 23 B.C.R. 257; 31 D.L.R. 200.

4. Jury not misled.]—A trust company brought an action against an executor for the amount of calls upon shares held by the testator in the company. The defences set up were that the testator was mentally incompetent to contract when he purchased the shares and that he was induced to buy through misrepresentation: — Held, that there was no misdirection sufficient to require a new trial, where the judge in his charge said that if the testator were mentally incompetent then the question of misrepresentation would not arise at all. On the question of misdirection in the judge's charge it is the duty of the Court of Appeal to consider the charge as a whole and unless there is a substantial misdirection or an element tending to mislead or confuse there is no ground for a new trial. *Canadian Financiers Trust Co.* v. *Ashwell,* (1917) 25 B.C.R. 97; (1918) 1 W.W.R. 207.

5. As to onus of proof.]—On the trial of an action against a municipal corporation for damages for the destruction of property by a fire which originated in the defendant municipality's fire-hall the jury brought in a verdict for the defendant:—Held on appeal, that there should be a new trial because the trial judge had misdirected the jury in telling them that the onus of proving negligence was on the plaintiff and because in view of the evidence at the trial the verdict of the jury was perverse. *Wilson* v. *City of Coquitlam,* (1922) 30 B.C.R. 449; 67 D.L.R. 49; (1922) 1 W.W.R. 640.

6. Defamation — Judge's comment on plaintiff's failure to deny statements.]—A husband and wife having separated, the wife applied for custody of their adopted child under the Equal Guardianship of Infants Act, and she filed an affidavit in support, in which she charged her husband with misconduct and cruelty. The husband did not file an affidavit denying the statements made by his wife, relying on the objection that there was no jurisdiction to hear the application and on this ground it was dismissed. On the following day the defendant published in its newspaper a substantial repetition of the charges made in the wife's affidavit and this publication was the subject of this action for trial. On the trial the learned trial judge told the jury that they were to take into consideration the fact that the plaintiff had not denied the statements made by the wife in her application for custody of the child:—Held, on appeal, that the husband was entitled to rely on the point that the Court had no jurisdiction to hear his wife's application and refrain from putting in any material in answer to her affidavit; that there was error in charging that because he had failed to file affidavits in answer he was subject to the comments which had been made in the alleged libel and there must be a new trial. Per Macdonald, C.J.A. and Martin, J.A.: When a verdict is being set aside, it is not desirable that the judges who take part should make any observations about what the effect of the evidence was or what course should be pursued because such observations are likely to prejudice the trial which may come on afterwards. *Hughes* v. *The Sun Publishing Company, Limited,* (1925) 35 B.C.R. 422.

7. Misdirection or non-direction—Jury not misled.]—The Court of Appeal will not order a new trial on the ground of misdirection or non-direction where it is not made out that a mis-trial has taken place and the judge's charge has not misled the jury. *Robinson* v. *Freeman,* (1921) 61 D.L.R. 248.

8. Negligence — Obligation of both parties—Insufficiency of charge.]—In an action for damages for injuries sustained in a collision between a tram and a motor-car where the jury in answer to questions in rendering a verdict for the plaintiff found both parties guilty of negligence but that after the trainmen became aware that the motor-car was in danger they could have avoided the accident by the exercise of reasonable care, but the jury were neither asked nor instructed to consider whether the plaintiff's driver by the exercise of reasonable care and skill could have avoided injury a new trial will be ordered. *Gavin* v. *Kettle Valley Railway Co.* (*No. 1*), (1918) 26 B.C.R. 30; 43 D.L.R. 47; 23 C.R.C. 379; (1918) 3 W.W.R. 385; (1919) 58 S.C.R. 501; 47 D.L.R. 65; (1919) 2 W.W.R. 611.

9. Jury misled.]—A new trial will be ordered where a plaintiff claims damages for injury occasioned by the negligent application by hospital attendants of hot water bottles and poultices, and the judge directed the jury that the whole hospital equipment and staff were charged with negligence and unless the plaintiff could establish that charge she could not succeed and further directed that the jury should take into consideration the surrounding circumstances simpliciter, where there are no

surrounding circumstances entering into the case other than the plaintiff's physical condition. The judge's charge to a jury must be considered as a whole, and if it does not present the plaintiff's case fairly to the jury which must have been misled by it a new trial will be ordered. *Morton* v. *Vancouver General Hospital*, (1923) 31 B.C.R. 546; (1923) 1 D.L.R. 854; (1923) 1 W.W.R. 423.

10. Jury not misled.] — An Appellate Court will not order a new trial on the ground of misdirection or nondirection where it is not made out that a mistrial has taken place, and the judge's charge has not confused the jury. *Robinson* v. *Freeman*, (1921) 61 D.L.R. 248.

11. Charges in compliance with judgment of Court of Appeal—Res judicata.] —Where the Court of Appeal ordered a new trial on the ground of misdirection and the charge in the second trial was in substantial compliance with the opinions expressed by a majority of the Court of Appeal, neither the doctrine of res judicata nor estoppel will prevent the unsuccessful party from disputing the correctness of the judge's directions to the jury on the second trial. *Wilson* v. *Port Coquitlam*, (1923) S.C.R. 235; (1923) 2 D.L.R. 194; (1923) 1 W.W.R. 1025.

12. In charge — Subsequent explanation.]—Where a remark of the trial judge might have been regarded as misdirection but the subject in question was later sufficiently explained in his charge to the jury there is no misdirection. *Day* v. *Canadian Pacific Ry. Co.*, (1922) 30 B.C.R. 532; 66 D.L.R. 838; (1922) 2 W.W.R. 398.

13. In charge—Rectification by other statements.]—On a point of misdirection the charge as a whole must be read, and if statements are made by the learned trial judge which go too far, they may be rectified by other statements so as to make the whole charge consistent with the law. *Mercer* v. *B.C. Electric Ry. Co., Ltd.*, (1931) 43 B.C.R. 398; (1931) 1 W.W.R. 550.

14. Part of claim not established—Failure to point out.]—A new trial will be ordered where one party admits that certain of his claims raised in his pleadings were not established, but the charge to the jury did not point out this fact and the jury were not properly directed as to the measure of damages. *Gosse-Millerd, Ltd.* v. *Devine*, (1928) S.C.R. 101; (1928) 2 D.L.R. 869.

15. Non-direction.]—A new trial will not be granted on the ground of mere nondirection, not objected to at the trial, and will only be granted where the interests of justice require it. *Key* v. *B.C. Electric Ry. Co.*, (1931) 3 D.L.R. 587; 38 C.R.C. 278; (1932) S.C.R. 106; Affg. (1930) 43 B.C.R. 288; (1930) 3 W.W.R. 569; (1931) 1 D.L.R. 532.

V. Erroneous Verdict.

A. In General.

1. Perverse verdict.]—The plaintiff was crossing a street at an intersection on a dark evening and was struck by the left front of the defendant's motor-car which was travelling at an excessive rate of speed with dim lights, the defendant's evidence shewing he was unable to see anything on the left side and was not on the lookout for pedestrians and that when he struck the plaintiff his car skidded 16 feet. The jury found that the defendant was not guilty of negligence:—Held, on appeal, that the verdict of the jury was perverse and there should be a new trial. *McDonald* v. *Weir*, (1925) 34 B.C.R. 502; (1925) 3 D.L.R. 70; (1925) 1 W.W.R. 937.

2. Perverse verdict.]—Where the evidence as adduced at the trial by the appellants is of such a nature and of such completeness contrasted with that adduced by the respondents, that the verdict of the jury for the respondents cannot be characterized as other than a perverse verdict, the Court will order a new trial. *Wilson* v. *Coquitlam*, (1923) S.C.R. 235; (1923) 2 D.L.R. 194; (1923) 1 W.W.R. 1025. Affg. (1922) 30 B.C.R. 449; 67 D.L.R. 49; (1922) 1 W.W.R. 640.

3. General verdict—Voluntary reasons added inconsistent with.]—Where a jury renders a verdict for a defendant which cannot be supported on reasons voluntarily given by the jury whose only course according to the logic of their own findings of fact should have been to render a verdict for the plaintiff, a new trial will not be ordered, but judgment will be entered for the plaintiff. *Sutton* v. *Smith*, (1927) 38 B.C.R. 455; (1927) 3 D.L.R. 1008; (1927) 2 W.W.R. 481.

4. General verdict—Inconsistent with answers to specific questions.]—A jury may find a general verdict and ignore specific questions put to them, but if ques-

tions are put to them which they answer, a general verdict inconsistent with the answers to such questions will be set aside, and where no reasonable view of the evidence could justify any other result, a new trial will not be ordered, but judgment will be directed according to the answers given. *Bank of Toronto* v. *Harrell*, (1917) 55 S.C.R. 512; 39 D.L.R. 262; (1917) 2 W.W.R. 1149.

See Mackenzie v. *B.C. Electric Ry. Co., Ltd.*, (1915) 21 B.C.R. 375; 8 W.W.R. 956.

B. Incomplete Verdict.

1. Indefinite finding as to negligence.]—In an action for damages for injuries sustained by a workman in a mine, two defective systems of the defendant Company having been alleged, the verdict of the jury stated that the accident was due to defective systems without specifying which system was at fault:—Held, that there must be a new trial. *Lilja* v. *The Granby Consolidated Mining Smelting & Power Co. Ltd.*, (1915) 21 B.C.R. 384; 9 W.W.R. 662.

2. Insufficient answers.] — When a jury's answers to questions are so insufficient and vague that it is apparent they were confused when answering them, and their meaning is not sufficiently plain for judgment to be entered upon them, a new trial will be ordered. *Sawyer* v. *Millett*, (1918) 25 B.C.R. 193.

3. Inconclusive verdict — Refusal of trial judge to direct judgment for either party.]—Where a verdict is inconclusive, the jury finding negligence on both sides without saying whose negligence is the proximate cause of the plaintiff's injury, the findings not amounting to a general verdict, the trial judge should dismiss the action on the ground that the plaintiff has failed to secure a verdict. The refusal of the trial judge under such circumstances to direct judgment for either party is ground for a new trial which may be ordered although not asked for by either party. *Gavin* v. *Kettle Valley Ry. Co. (No. 2)*, (1921) 29 B.C.R. 195; 56 D.L.R. 572; (1921) 1 W.W.R. 488.

4. Incomplete verdict — Insufficient majority.]—Where a jury by the proper three-fourths majority found the defendant guilty of negligence but their finding on the question of contributory negligence was by a majority of five to three and damages were assessed and judgment entered for the plaintiff, there should be a new trial. *Smith* v. *South Vancouver and Corporation of Richmond*, (1923) 31 B.C.R. 481; (1923) 2 D.L.R. 535; (1923) 1 W.W.R. 417.

5. Incomplete verdict—Uncertainty of finding.]—In an action for damages for personal injuries where the jury finds the defendant guilty of negligence and the plaintiff not guilty of contributory negligence there should be a new trial if the meaning of the jury's answer as to what the negligence consisted of is uncertain. A judge of the County Court has no power in the circumstances to order a new trial. *Woolston* v. *B.C. Electric Ry. Co.*, (1918) 25 B.C.R. 518.

6. Failure to answer question.]—A new trial will be ordered where the jury have failed to answer a question of fact submitted to them the answer to which is necessary to the proper determination of the case. *Gibb* v. *Northern Construction Co.*, (1918) 26 B.C.R. 429; 43 D.L.R. 276; (1918) 3 W.W.R. 396.

7. Indefinite answers — Unfair inference.]—In an action to recover the balance of the purchase price of shares in a mining company on the defendant's counterclaim to recover the sum already paid on account thereof the jury in answer to questions found that the defendant bought the shares relying on the strength of reports and a telegram relating to the company's mine, but that the plaintiffs had withheld from the defendant a report from the manager of the company to the effect that the mine was worthless:—Held, that the answers disclose the jury's opinion that the defendant would not have been influenced by the manager's unfavourable opinion of the mine had it been disclosed to him and that this is not a fair inference from the evidence, and in order to prevent a miscarriage of justice there should be a new trial. When the uncertainty of the answers became apparent the jury should have been required to make their meaning plain. *McTavish Brothers, Ltd.* v. *Langer*, (1931) 4 D.L.R. 209. Affg. (1929) 41 B.C.R. 363; (1929) 4 D.L.R. 465.

VI. EXCESSIVE DAMAGES.

1. Verdict for damages exceeding amount claimed—Reduced by trial judge.]—Where in an action for malicious prosecution the plaintiff claimed $490 for special

damages and $5,000 for general damages, and the jury rendered a verdict for $10,000 and the trial judge with the acquiescence of the plaintiff reduced the verdict to $5,000 as to general damages, there should be a new trial as to the quantum of damages, as the judge had no jurisdiction to reduce the verdict even with the plaintiff's consent. *Lew* v. *Wing Lee*, (1925) A.C. 819; 94 L.J.P.C. 161; 133 L.T. 578; (1925) 3 D.L.R. 1009; (1925) 3 W.W.R. 49. Varying (1924) S.C.R. 612; (1925) 1 D.L.R. 179.

2. Directions as to assessment of damages.]—On an appeal to the Judicial Committee of the Privy Council it was ordered that the judgment of the Supreme Court be varied in that the case be "referred back to the jury in the Supreme Court of British Columbia to re-assess the damages generally":—Held, that the decision of the Judicial Committee of the Privy Council should not be construed as meaning that the jury which first tried the case and was discharged should be recalled to reassess the damages, such a construction being inconsistent with our jurisprudence and repugnant to the Jury Act. *Lew* v. *Wing Lee*, (1925) 37 B.C.R. 81; (1926) 1 D.L.R. 678.

See APPEAL.
See CRIMINAL LAW.
See JURY.
See NEGLIGENCE.

NOTARY PUBLIC.

1. Examination and enrolment.] — A County Court judge, acting as a Local Judge of the Supreme Court, has no jurisdiction to make an order for the examination and enrolment of an applicant under secs. 5 and 6 of the Notaries Act. *The Law Society of British Columbia* v. *Stewart*, (1928) 40 B.C.R. 401; (1928) 4 D.L.R. 572.

2. Public necessity.]—An applicant for an order for examination and enrolment under the Notaries Act, being Provincial assessor for the Fort Steele Assessment District and his duties taking him constantly into the more sparsely settled portions of the district:—Held, that although there is more than a sufficient number of notaries public in the three larger towns within the district, there is a public necessity for having a notary available in the outlying portions thereof and the application should be granted. *In re Notaries Act and J. A. Stewart*, (1929) 41 B.C.R. 467.

NUISANCE.

I. WHO LIABLE, 840.
II. WHO MAY SUE, 841.
III. NATURE OF ACT, 841.
IV. ABATEMENT, 842.

I. WHO LIABLE.

1. Highway—Obstruction—Telephone line.]—Where a telephone company under a franchise for a limited use of highway cuts down the telephone poles of another company on a highway as being an obstruction amounting to a nuisance, in order to justify such an action it must establish that it could not construct its own line without removing the property of the other corporation even if the latter did not possess a franchise to use the highway for its pole lines. *Okanagan Telephone Co.* v. *Summerland Telephone Co.*, (1918) 25 B.C.R. 221; (1918) 1 W.W.R. 656.

2. Escape of gas—Negligence of third party.]—The flowers in the plaintiff's flower store were injured through the escape of gas from a fractured pipe of the defendant. Unknown to the defendant the pipe had been fractured through the operation of a steam-roller by a third party while constructing a road under which the pipe had been laid:—Held, that the defendant was not liable, as the fracture was caused without his knowledge by a third party over whom he had no control, the consequence of whose acts he could not reasonably have anticipated. *Tidy* v. *Cunningham*, (1915) 21 B.C.R. 53; 22 D.L.R. 151; 30 W.L.R. 547; 7 W.W.R. 1205.

3. Decayed tree — Dangerous to highway.]—The occupier of unimproved land on which is standing a decayed forest tree which had grown there naturally is not responsible for damage done by its falling either on a neighbour's premises or on an adjoining highway. *Patterson* v. *Canadian Robert Dollar Co., Ltd.*, (1928-29) 41 B.C.R. 123, 133; (1929) 3 D.L.R. 33; (1929) 2 W.W.R. 181.

4. Bridge—Obstruction to navigation.]—The owners of a bridge over navigable waters which does not comply with statutory requirements and constitutes a substantial interference with navigation are liable to a ship suffering special damage by reason of colliding therewith. *The "Eurana"*

v. *Burrard Inlet Tunnel & Bridge Co.*, (1931) A.C. 300; 100 L.J.P.C. 68; 144 L.T. 556; (1931) 1 D.L.R. 785; (1931) 1 W.W.R. 325; 38 C.R.C. 263.

II. WHO MAY SUE.

1. Foreshore.]—One in possession of foreshore property by virtue of a lease from the Vancouver Harbour Commission who had title thereto under a Crown grant from the Dominion Government, cannot maintain action for injury to the property from sewer outlets in the absence of proof that the foreshore was part of the public harbour at the date of the Union of the Province with Canada within the purview of sec. 108 of the British North America Act. *Hadden* v. *City of North Vancouver*, (1922) 30 B.C.R. 497; 67 D.L.R. 669; (1922) 1 W.W.R. 655.

III. NATURE OF ACT.

1. Indictment — Destruction of bridge —Civil wrong.]—To commit a common nuisance as described in sec. 223 of the Criminal Code is not a criminal offence but a civil wrong, the procedure in respect thereof being reserved to Provincial jurisdiction under sec. 92 (14) of the British North America Act. *Rex* v. *City of Victoria*, (1920) 28 B.C.R. 315; 52 D.L.R. 324; (1920) 2 W.W.R. 948; 33 C.C.C. 108.

2. Defective brakes.]—Defective brakes in a street-car incapable of arresting its speed when approaching a highway crossing is negligence which will render the railway company liable for a collision notwithstanding the plaintiff's contributory negligence. *Columbia Bitulithic, Ltd.* v. *B.C. Electric Ry. Co., Ltd.*, (1917) 55 S.C.R. 1; 37 D.L.R. 64; (1917) 2 W.W.R. 664; 21 C.R.C. 243.

3. Hospital for infectious diseases.]—In an action for an injunction restraining the establishment of a hospital for infectious diseases on the ground that it will constitute a nuisance, the law requires proof of a well-founded apprehension of injury; proof of actual and real danger, and a strong probability almost amounting to moral certainty that if the hospital be established it will be an actual nuisance; and the plaintiff cannot succeed on an alternative claim for damages, without proving a violation of a legal right. Depreciation of the value of a property with a sentiment of danger will not of itself constitute a cause of action. *Shuttleworth* v. *Vancouver General Hospital*, (1927) 38 B.C.R. 300; (1927) 2 D.L.R. 573; (1927) 1 W.W.R. 476.

4. Ammonia plant—Noxious vapours.]—In an action for damages for the loss of business of a theatre caused by the emission of noxious vapours from the defendant's ammonia plant, and the evidence shewed that there were several other sources from which offensive odours may have reached the theatre, and that the theatre had proved a failure before the establishment of the ammonia plant due to its being submerged in the murk and squalor of an industrialized district where people would not resort for theatrical amusement, the plaintiff was held not entitled to damages against the defendant for maintenance of an actionable nuisance. *Avenue Theatre, Ltd.* v. *Vancouver Gas Co.*, (1928) 40 B.C.R. 275.

5. Municipal corporation—Unsafe footway.]—Where a municipal corporation in constructing a sewer erects a barrier on the edge of a sidewalk against which earth is taken from the excavation which from its wet condition seeps through rendering the sidewalk slippery and unsafe the corporation is guilty of maintaining a nuisance and liable in damages to a person who suffers injury in consequence thereof. *Watts* v. *The District of Burnaby*, (1929) 41 B.C.R. 282; (1929) 4 D.L.R. 142; (1929) 2 W.W.R. 612.

IV. ABATEMENT.

Notice.]—Where a nuisance is one of commission, entry may be made on the land of the wrongdoer without notice, for the purpose of abatement, whether there is an emergency or not, but this is a remedy which should not be encouraged because of its liability to bring about a breach of the peace unless there is an emergency it is advisable to give notice. *Suttles* v. *Cantin*, (1915) 22 B.C.R. 139; 24 D.L.R. 1; 32 W.L.R. 101; 8 W.W.R. 1293.

See COLLISION.

See CRIMINAL LAW.

See FIRE.

See HIGHWAYS.

See MUNICIPAL CORPORATIONS.

See NEGLIGENCE.

See TORT.

ORDER.

See PRACTICE.

PARENT AND CHILD.

See INFANT.

PARTICULARS.

See PLEADING.

PARTIES.

See PLEADING.

PARTNERSHIP.

I. CREATION AND DURATION, 843.
II. LIABILITY OF PARTNERS TO THIRD PERSONS, 845.
A. Joint and several creditors, 845.
B. Power of one partner to bind the firm, 846.
III. RELATIONS OF PARTNERS INTER-SE, 847.
A. Partnership property and separate property, 847.
B. Rights after dissolution, 847.
IV. LEGAL PROCEEDINGS, 849.

I. CREATION AND DURATION.

1. Prospectors — Grubstake agreement.]—Where the plaintiff and defendants entered into a grubstake agreement whereby the plaintiff was to pay expenses and wages to the defendants who were to prospect for minerals during the season of 1921, the claims staked to be equally divided, and after certain claims were located the defendants being accompanied by the plaintiff's son returned home before winter but in the following year the defendants returned to the vicinity and staked a number of claims:—Held, that the plaintiff's evidence that some depth of snow existed in the locality in which the second year's staking was done was not sufficient to shew that the defendants must have discovered the minerals on the claims staked in the second year when with the plaintiff's son, and the plaintiff cannot recover an interest in the said claims. The facts constituting fraud must be clearly and conclusively established and the circumstances of mere suspicion will not warrant such a conclusion. *Armes* v. *Russell*, (1924) 33 B.C.R. 303; (1924) 1 W.W.R. 825.

2. Percentage of profits.]—Where a contract provides that the defendant is to build and equip a general store which the plaintiff is to manage at a salary equivalent to 25 per cent. of the net profits arising from the business as computed semi-annually, the contract being subject to the right of cancellation by either party upon giving 60 days' notice, the relationship between the parties is that of master and servant and not that of co-partners. *Allison* v. *Standard Lumber Co.*, (1924) 34 B.C.R. 257; (1924) 4 D.L.R. 465; (1924) 3 W.W.R. 481.

3. Joint purchase of land.]—The existence of a partnership is not established by proving an isolated transaction by which two parties jointly buy property with the view of turning it over at a profit which will be divided between them. *Porter & Sons, Ltd.* v. *Foster et al.*, (1925) 36 B.C.R. 222; (1925) 4 D.L.R. 669; (1926) S.C.R. 328; (1926) 2 D.L.R. 340.

4. Advance of money—Share of profits in consideration of.]—Where a plaintiff contracted to advance certain moneys to a firm of loggers to assist them in carrying on their enterprise and for use of this money was to receive by way of remuneration one cent per foot for each pole taken off by the loggers, the remuneration may be considered as interest on money advanced or its equivalent, and the arrangement does not constitute a partnership. *Sutton* v. *Smith*, (1927) 38 B.C.R. 455; (1927) 3 D.L.R. 1008; (1927) 2 W.W.R. 481.

5. Action for dissolution—Statute of Frauds.]—Although it was contemplated that a partnership would exist for more than one year, the Statute of Frauds is not a bar to an action brought to dissolve the partnership and for an accounting. *Pearl Wong* v. *Ruby Hou*, (1928) 39 B.C.R. 425; (1928) 1 W.W.R. 480.

6. Mines and minerals—Co-owners—Evidence of partnership.] — Where the plaintiffs and defendants were co-owners in a coal lease, each bearing his share of the expenses of assessment work for two years and during this period discussed acquiring adjoining property when it became vacant, and later one of the defendants found the adjoining land vacant and wrote the plaintiff

asking him for a payment on account of location expenses which the plaintiff paid, a partnership exists between the parties, and the plaintiff is entitled to a one-third interest in the leases acquired comprising the vacant lands, and the plaintiff is not estopped from setting up a partnership by having disposed separately of his one-third interest in the original coal lease. The question as to the formation of a partnership is one of fact and may be decided upon oral evidence. *Davies* v. *Schulli and Mullin*, (1928) 40 B.C.R. 197; (1928) 4 D.L.R. 132; (1928) 3 W.W.R. 158.

7. Partnership or joint adventure—Intention of parties.]—The plaintiff and defendant entered into an agreement to undertake the cutting and dismantling of the hulk of a ship lying in Vancouver Harbour. They were each to pay one-half the cost of cutting, dismantling, loading, scow rent, wages and other necessary expenses incurred to put the steel obtained from the hulk alongside transport ship necessary for loading. After the said expenses were paid the defendant was entitled to retain $500 per shipment from the net profits of the first two shipments only, and the ultimate balances of the net profits from all shipments were to be divided equally between the plaintiff and defendant. They worked together under said agreement for eight months when the plaintiff claimed that the defendant retained moneys due the plaintiff: —Held, that while there were elements that might point to a partnership as the defendant alleged, the nature of the transaction, the circumstances surrounding it and the manner in which it was carried out point to the fact that the parties had no intention of carrying on as a partnership but were independent contractors. *Gilchrist Manufacturing Co., Ltd.* v. *International Junk Co., Ltd.*, (1930) 43 B.C.R. 258; (1931) 1 D.L.R. 595; (1931) 1 W.W.R. 101.

II. Liability of Partners to Third Persons.

A. Joint and Several Creditors.

1. Goods supplied to partner continuing business after dissolution.]—Where a creditor is found to be aware of the dissolution of a partnership which is indebted to him on open account for goods supplied, and he continues to supply goods to the business as carried on after the dissolution he has no claim for payment for the goods so supplied as against the former partners. *Grant* v. *Matsubayashi*, (1922) 31 B.C.R. 375; 70 D.L.R. 553; (1922) 3 W.W.R. 679.

2. Goods supplied after notice to creditor.]—A partnership of three was dissolved and a limited company formed by two of them which took over the assets and assumed the libalities. A selling agent of the plaintiff was notified of the change. The plaintiff supplied goods after the change for which certain payments were made:—Held, that notification to the selling agent of the change was sufficient notification to the plaintiff and he could charge only the company for goods thereafter supplied. Payments made by the company to the plaintiff from time to time, no appropriation being made by either party and the plaintiff keeping one general account, should be applied first in satisfaction of the partnership debt. *W. H. Malkin Co., Limited* v. *Crossley et al.*, (1923) 32 B.C.R. 207; (1923) 3 D.L.R. 1189; (1923) 1 W.W.R. 1348.

3. Debt — Release of one partner—Condition.]—Where a creditor sues two partners and in the course of the action releases one of them upon payment of part of the debt upon condition that the release shall not affect his rights against the other partner the creditor may press his claim for the balance against the other partner and obtain judgment therefor. *R. N. Johnston & Co.* v. *Finkleman*, (1926) 37 B.C.R. 95; (1926) 2 D.L.R. 425.

B. Power of One Partner to Bind the Firm.

1. Liability of retired partners.]—Certain creditors of a partnership, having received notice that it had been dissolved and that the business was continued by one of the former partners with a new partner, and it appearing from the evidence that their dealing with the new firm was such that they had adopted it as their debtor with respect to the debts incurred both before and after the dissolution:—Held, that they had thereby discharged the retiring partners from liability. Held, further, that other creditors who had not received notice of the change, and did not shew in the course of their dealing that they had adopted the new firm as their sole debtors, were entitled to recover from the former partners. *Burns & Co.* v. *Marcus & Dimor. Palmer & Co.* v. *Dimor, Marcus & Dimor*, (1931) 43 B.C.R. 517; (1931) 2 D.L.R. 1004; (1931) 1 W.W.R. 169.

2. Power to borrow.]—The power to borrow money in the capacity of partners cannot be validly exercised where the transaction appears to be foreign to the firm's business. *Tai Sing Company* v. *Chin Cam et al.*, (1916) 23 B.C.R. 8; 27 D.L.R. 528; 10 W.W.R. 460.

III. Relations of Partners inter se.

A. Partnership Property and Separate Property.

1. Husband and wife—Wife's share of profits—Married Women's Property Act.]—The wife's share of the profits from a partnership carried on between husband and wife is not part of the wife's separate estate under sec. 8 of the Married Women's Property Act. *Cohn* v. *Canary*, (1925) 36 B.C.R. 185 (1925) 4 D.L.R. 431; (1925) 3 W.W.R. 357.

2. Contribution to partnership assets—Logging contract — Timber rights.]—Where in the formation of a logging partnership the plaintiff contributed to the partnership the benefit of his experience as a logger and his prospects of obtaining a logging contract and certain equipment of small value, and the defendant contributed $5,000 and agreed that the firm should log the timber off certain lands of which the defendant was possessed and other lands which the defendant had agreed to purchase, it was held that while if the venture was a success the partners would continue to log the timber from the defendant's land, upon dissolution of the firm the partnership would cease to hold any further interest in the defendant's timber. Where the plaintiff sets up a bargain which on its face was greatly to his advantage and to the disadvantage of the defendant the plaintiff must satisfy the Court that the bargain was actually made on the terms contended for by him. *Stanford* v. *Clayton*, (1922) 70 D.L.R. 864.

B. Rights After Dissolution.

1. One partner assuming debts—Novation—Surety—Giving time.]—Where partners are indebted as principals and it is afterwards agreed that as between themselves one of them shall assume the partnership debts, and this agreement is not made known to the creditors, the rule as to the discharge of a surety by giving time to the principal debtors does not apply. *James Thomson & Sons* v. *Denny*, (1916) 22 B.C.R. 479; 34 W.L.R. 483.

2. Death of partner—Right of a survivor—Winding-up.] — Two promissory notes were held by the plaintiff against a partnership which was later dissolved by the death of one partner. The surviving partner took over the business and assumed all liabilities. He then renewed the two notes by giving one note for the balance due on the two:—Held, that the powers of partners, as such, with regard to partnership obligations remain after dissolution for the purpose of the beneficial winding-up of partnership affairs, the surviving partner had power to sign the note on behalf of the dissolved partnership for which the estate of the deceased partner was liable. *Sealy* v. *Stephenson et al.*, (1923) 32 B.C.R. 187; (1923) 3 D.L.R. 18; (1923) 2 W.W.R. 465.

3. Covenant by retiring partner not to engage in business.]—The plaintiff and the defendant Z. were partners in a restaurant business. Z. sold his interest to the plaintiff and covenanted that he would not during the following three years "carry on or be engaged in, either directly or indirectly, and whether as principal, agent, director of a company, servant, or otherwise, or take part in the business of a restaurant or cafe, or hotel, within the City of Victoria. . . ." The defendants P. and Z.'s wife opened a combined cafe and candy store a few doors from the plaintiff's restaurant and about five months after the dissolution they employed Z. to manage it:—Held, that the said covenant is sufficient to prevent the defendant from taking part as manager in the conduct of the business carried on by the defendant P. and Z.'s wife, and that there was evidence of conspiracy on the part of the defendants to injure the plaintiff by setting up a competitive business in breach of the covenant. *Lerik* v. *Zaferis*, (1929) 41 B.C.R. 526; (1929) 3 W.W.R. 422; (1930) 1 D.L.R. 634.

4. Covenant against continuing in business.]—A covenant in an agreement for the dissolution of a partnership, restricting one of the parties from carrying on the same business, will be construed less strictly than a contract between employer and apprentice. The test of validity of such a covenant is whether it affords only a reasonable protection to the covenantee, and if reasonable it will be enforced. *Houghton* v. *Evans*, (1925) 35 B.C.R. 454; (1925) 3 D.L.R. 109; (1925) 2 W.W.R. 248.

IV. LEGAL PROCEEDINGS.

1. Amendment of pleadings.] — An amendment of a statement of claim in an action for dissolution of a partnership in order to set up a claim for rescission of the partnership agreement, will be allowed although a consent order for accounts has been made, where it is clear that this order is only interlocutory and no prejudice will result to the defendant in allowing the amendment. *McKenzie* v. *Bremner*, (1926) 37 B.C.R. 128; (1926) 2 D.L.R. 96.

2. Injunction—Discontinuance—Damages—Reference as to existence of partnership.]—Where the plaintiff, after obtaining an injunction giving the usual undertaking as to damages, settled the action with one of two defendants, assuming that the defendants were partners, and discontinued the action, and the other defendant contending that there was no partnership and that his co-defendant had no power to settle the action for him, applied for damages resulting from the injunction, and an order was made directing an inquiry before the registrar to ascertain whether the defendants were partners and to report what damages, if any, were payable by the plaintiff to the said defendant:—Held, that the question of whether a partnership exists is a mixed question of law and facts and it was the duty of the trial judge first to decide whether the defendants were partners and then, if necessary, direct an inquiry as to the quantum of damages. *John Hing Co.* v. *Sit Way*, (1917) 25 B.C.R. 153; (1918) 1 W.W.R. 978.

3. Action against firm—Style of cause.] —In an action against a firm the style of cause may properly include the names of the individual partners as well as the firm's name. *Dominion Bank* v. *Palitti*, (1931) 45 B.C.R. 89; (1931) 3 W.W.R. 377.

See CONTRACT.

See MINES AND MINERALS.

See PRACTICE.

PATENT.

A. In general, 850.
B. Infringement, 850.

A. In General.

1. User prior to patent.]—Where, prior to a certain patent, persons had to resort to a dangerous practice to do that which was the object of the patent, although not a determining factor it strengthens the conclusion that the invention is a new and useful one. *Ashdown* v. *Nickson Construction Company, Limited*, (1924) 34 B.C.R. 351; (1924) 4 D.L.R. 868.

2. Public use or sale before application —Experimental user.] — Where an invention is one necessarily requiring considerable use before the inventor can be satisfied that it is practicable and the work to determine the practicability had to be on a large scale and in a public manner, if the work is merely experimental the inventor is warranted in protecting his invention by patent. *Concrete Appliances Co.* v. *Rourke McDonald & Moncrieff and Mussens, Ltd.*, (1915) 28 D.L.R. 635; 8 W.W.R. 6.

B. Infringement.

1. Log rafts — Prior construction of similar raft.]—Although all the elements of a combination may be old the combination may itself constitute a patentable invention. A raft of logs when properly retained in position by wire, rope or chain forming one solid structure, its buoyancy for transportation purposes being increased by its manner of formation, making it very safe for deep-sea transportation in rough waters, which has been successful and has novelty both in construction and result, is a patentable invention. *Davis Log and Raft Patents Co. et al.* v. *Cathels*, (1927) 39 B.C.R. 57; (1927) 4 D.L.R. 95; (1927) 2 W.W.R. 753.

2. Discovery.] — In an action for infringement of letters patent held by the plaintiff in Canada the defendant moved for an order for inspection of certain correspondence which passed between the plaintiff and his patent attorney in the United States in respect of applications of the plaintiff pending before the United States Patent Office:—Held, that the general rule that patent agents are not considered as professional legal advisers and communications with them are not privileged, does not apply, and the plaintiff is not required to disclose details relating to applications not before the Court that are pending at Washington. *McKercher* v. *Vancouver-Iowa Shingle Company, Ltd. et al.* (1929) 41 B.C.R. 252; (1929) 4 D.L.R. 231; (1929) 2 W.W.R. 287.

PLEADING.

I. In General, 851.
II. Parties, 852.
A. *Joinder of parties*, 852.
1. Plaintiffs, 852.
2. Defendants, 853.
3. Third party, 854.
III. Joinder of Causes of Action, 854.
IV. Statement of Claim, 855.
V. Defence, 856.
A. *In general*, 856.
B. *Special defence*, 857.
VI. Counterclaim and Set-off, 859.
VII. Particulars, 861.
VIII. Amendment, 862.
A. *Writ of summons*, 862.
B. *Pleadings*, 863.
IX. Striking Out Pleadings and Allegations, 866.
X. Admissions, 867.

I. In General.

1. Estoppel.]—The facts relied on to prove estoppel should be set forth also the allegations which it is alleged the other party is precluded from setting up. *Merritt and District Industrial Society, Ltd.* v. *Young*, (1916) 10 W.W.R. 944; 34 W.L.R. 826.

2. Privity of law.]—In order to have a right of action there must at least be privity in law between the parties. A person who has no right or interest in property is not entitled to a declaratory judgment regarding it. *Western Pacific Grain & Terminals, Ltd.* v. *Otton*, (1924) 35 B.C.R. 59.

3. Document pleaded verbatim—Construction.]—A party having pleaded a document verbatim will not be allowed to plead the meaning and effect of it as the construction of a document is a matter for the Court. *The Victoria Lumber & Manufacturing Co., Ltd.* v. *Thomsen & Clark*, (1926) 38 B.C.R. 46; (1926) 4 D.L.R. 971; (1926) 3 W.W.R. 459.

4. Interpleader issue—Sufficiency of.]—The Court should not direct pleadings to be delivered after the usual and proper interpleader issue has been drawn up and delivered in accordance with the established practice. *Sutton* v. *Smith*, (1927) 38 B.C.R. 455; (1927) 3 D.L.R. 1008; (1927) 2 W.W.R. 481.

5. Some claims not established—New trial.]—A new trial will be ordered where one party admits that certain of his claims raised in his pleading were not established, but the charge to the jury did not differentiate those established from those not established and the jury were not properly directed as to the measure of damages. *Gosse-Millerd, Ltd.* v. *Devine*, (1928) S.C.R. 101; (1928) 2 D.L.R. 869.

6. Prize Court.] — In a Prize Court pleadings and particulars of grounds of condemnation will only be ordered in extremely special cases, as where there is no intimation of such grounds in the writ. *The "Oregon,"* (1916) 23 B.C.R. 57; 31 D.L.R. 164; (1917) 1 W.W.R. 142.

7. Jurisdiction—Failure to prove.]—Where the plaintiff alleges that the defendants carry on business as a partnership in the Province and the alleged partners appear individually and in their defence deny the allegation which is not proved and there is no evidence to shew jurisdiction on other grounds, the action will be dismissed. *American Merchant Marine Ins. Co.* v. *Buckley-Tremaine Lumber & Timber Co.*, (1920) 28 B.C.R. 426; (1920) 3 W.W.R. 878.

II. Parties

A. *Joinder of Parties.*

1. Plaintiffs.

1. Consent of plaintiff.]—An application to add a party plaintiff on the hearing of an appeal should be refused unless his consent in writing has been obtained. *Strong* v. *The Canadian Pacific Ry. Co.*, (1915) 22 B.C.R. 224; 25 D.L.R. 51; 32 W.L.R. 849; 9 W.W.R. 451.

2. Series of transactions.]—Two persons purchased shares separately, and on different occasions, in the capital stock of a bank through the solicitation of an agent who had received a block of shares from the president of the bank for sale in England. They joined in one action against the president and the bank to set aside the sale of the shares on the ground of fraud or, in the alternative, for damages:—Held, that they were properly joined as plaintiffs within the meaning of marginal rule 123, as it was in the mind of the president that the shares in question were not to be sold en bloc to one person, but to several persons, in what may be called a series of transactions in respect of that block of shares. *Allan* v. *McLennan*, (1916) 23 B.C.R. 515; 31 D.L.R. 617; (1917) 1 W.W.R. 513.

3. Separate contracts.]—Claims by several persons for balance due and owing in respect of separate contracts for work and labour performed in respect to the same undertaking are not causes of action arising out of the same transaction or series of transactions so as to enable the claimants to join in one action, although the contracts were identical in form and made with the same defendant. *Bourner* v. *Pauling & Co.*, (1917) 24 B.C.R. 222; 35 D.L.R. 465; (1917) 2 W.W.R. 1129.

4. Adding plaintiff at trial—Terms.]—When under the circumstances the plaintiff was the only proper person to bring an action, but on account of the peculiar terms of an assignment of which no notice was given, which fact did not become known until the close of the plaintiff's case at the trial, the discretion of the trial judge in adding the necessary party and in reopening the trial, with the accompanying opportunity for discovery, will not be interfered with, but where he has applied a wrong principle in fixing the costs, by treating the plaintiff as if he had been originally responsible for the non-joinder, this part of his judgment will be modified, the plaintiff being only liable for the costs of and occasioned by the application to add the necessary party and by the delay in applying for the amendment from the time when it should have been made until it was actually made after judgment reserved. *Farquharson* v. *Canadian Pacific Ry. Co.*, (1922) 31 B.C.R. 338; 69 D.L.R. 445; (1922) 3 W.W.R. 537.

2. Defendants.

1. Fraudulent conveyance — Insolvent debtor.]—A judgment debtor is a proper, although not a necessary party to an action by a judgment creditor to set aside a conveyance by the debtor as fraudulent. *Gibson* v. *Franklin et ux.*, (1915) 21 B.C.R. 181; 7 W.W.R. 1411.

2. Addition of defendants to counterclaim.]—The paramount object of the Judicature Act and Rules is to enable all matters arising out of one transaction, particularly where the same parties are involved, to be disposed of in one action and thus prevent multiplicity of suits; thus a corporation in an action against it to recover certain moneys and securities claimed to be wrongfully obtained, has the right to counterclaim for fraudulent conspiracy and to set up an agreement that such property was given in restitution for fraudulent acts and misfeasance in office as directors, and may, for that purpose, join other persons jointly connected therewith. *Tobin* v. *Commercial Investment Co., Ltd.*, (1916) 22 B.C.R. 481; 27 D.L.R. 387; 34 W.L.R. 23; 10 W.W.R. 123.

3. Right of defendant to add co-defendant.] — The plaintiff recovered judgment against the driver of a motor-car in an action for damages resulting from an accident. The judgment was unsatisfied and a writ of fieri facias was returned nulla bona. The driver of the car held an insurance policy against legal liability for bodily injuries or death to one person in the sum of $5,000. The plaintiff then brought action against the insurance company to recover the amount of the judgment and costs under sec. 34 of the Insurance Act. The insurance company applied for and obtained an order adding the defendant in the first action as a party defendant and for his examination for discovery:—Held, that the defendant Company was not entitled to add the insured as a defendant under marginal rule 133 and that the discretion of the Court below was improperly exercised. *Erickson* v. *The Preferred Accident Ins. Co. of New York*, (1928) 40 B.C.R. 241; (1928) 4 D.L.R. 567.

3. Third Party.

Tort.]—Where in an action for damages at common law the defendant brought in a third party the action was dismissed upon the jury's answers to questions, the trial judge had no jurisdiction to make an order against the third party for compensation under the Workmen's Compensation Act. *Atkinson* v. *The Pacific Stevedoring and Contracting Company, Limited*, (1915) 22 B.C.R. 109; 24 D.L.R. 400; 32 W.L.R. 154; 8 W.W.R. 1339.

III. Joinder of Causes of Action.

1. Consolidation of actions.]—A mortgagee having obtained an order nisi for foreclosure and taken accounts thereunder should not be allowed to consolidate the action with a second action for the same debt claiming foreclosure of the same mortgage together with other collateral securities. *Buscombe Securities Co.* v. *Windebank*, (1919) 27 B.C.R. 507; 48 D.L.R. 301; (1919) 3 W.W.R. 485.

2. Foreclosure of mortgages — Possession—Receiver.]—A claim for possession and the appointment of a receiver may be joined with one for foreclosure or redemption. *Jones* v. *Cohn & Canary*, (1924) 33 B.C.R. 321.

IV. STATEMENT OF CLAIM.

1. Agreement for sale of land—Default —Counterclaim — Recovery of possession.]—In an action for the cancellation of the registration of an agreement for sale of land and recovery of possession the plaintiff should allege in his statement of claim that possession was given to or taken by the purchaser, that the vendor's title was registered and that the agreement of sale was also registered. *Gale* v. *Powley*, (1915) 22 B.C.R. 18; 24 D.L.R. 450; 32 W.L.R. 65; 8 W.W.R. 1312.

2. Claim for possession.]—In an action by a mortgagee for possession, the statement of claim recited that (1) the plaintiffs were entitled to possession; (2) the premises were granted and conveyed by the defendant unto and to the use of the plaintiffs, their heirs, successors and assigns by way of mortgage and that the mortgage is still subsisting; and (3) the defendant has never given up possession to the plaintiffs and has remained and still remains in wrongful possession thereof:—Held, that the statement of claim has set out all the necessary allegations and a good cause of action is disclosed. *Todd et al.* v. *Wong Gum Tim*, (1917) 24 B.C.R. 161; (1917) 2 W.W.R. 280.

3. Special endorsement.]—In order to enable the plaintiff to obtain final judgment on a specially-indorsed writ, the indorsement of the plaintiff's claim on the writ must be headed with the words "Statement of Claim." *Sayward* v. *Brewer*, (1917) 24 B.C.R. 129; (1917) 2 W.W.R. 233.

4. Averment of belief—Fraud.]—Allegations of fraud must be precisely alleged and conclusively proven. The introduction into a pleading of mere belief is not permissible in setting up a cause of action which can only be founded upon averment of facts followed by proof, and not of mere belief in their existence. *McLean* v. *Johnston*, (1923) 32 B.C.R. 495; (1923) 4 D.L.R. 178; (1923) 3 W.W.R. 913.

5. Cause of action arising after issue of writ.]—A plaintiff cannot include in his statement of claim an allegation of a breach of contract which did not arise until after the writ of summons was issued, and will not be allowed to adduce evidence in support of such an allegation, even if traversed in the statement of defence. *Allison* v. *Standard Lumber Co., Ltd.*, (1924) 34 B.C.R. 257; (1924) 4 D.L.R. 465; (1924) 3 W.W.R. 481.

6. Negligence of servant — Scope of employment—Presumption.] — If in an action for damages resulting from the negligence of the defendant's servant the plaintiff alleges and proves facts from which an inference may be drawn that the servant was upon his master's business, it is sufficient to make out a prima facie case. The Court will presume that the servant was acting within the scope of his employment when the plaintiff alleges and proves that the driver was the defendant's servant and at the time of the accident was driving the defendant's car. *McKay* v. *Drysdale*, (1921) 30 B.C.R. 81; 60 D.L.R. 458; (1921) 2 W.W.R. 592.

V. DEFENCE.

A. In General.

1. Payment into Court.] — Payment into Court of a sum of money in satisfaction of the cause of action is proper, but it is not so to pay in and plead it in satisfaction of a right or claim not sued on. *Atkinson* v. *Pacific Stevedoring & Contracting Co., Ltd.*, (1915) 22 B.C.R. 109; 24 D.L.R. 400; 32 W.L.R. 154; 8 W.W.R. 1339.

2. Libel — Justification.]—A plea of justification must be accompanied with particulars of the facts on which the defendant relies to prove justification and discovery will be allowed only in respect of the facts so alleged. *Nelson* v. *Bradstreet*, (1917) 2 W.W.R. 1191.

3. Libel—Matters of public interest—Fair comment—Defence—Motion to strike out.]—On motion to strike out portions of the defence giving particulars of matters of alleged public interest following a plea that the articles complained of in an action for libel were fair comments upon matters of public interest and importance and for the public benefit:—Held, that the acts of a Dominion official in the conduct of his office are not matters of public interest in a political contest in another part of the country sixteen years after he had ceased to

hold such office, he not being a candidate or official in the contest in question, and the clauses in question should be struck out. *Wade* v. *News-Advertiser*, (1917) 24 B.C.R. 260; (1917) 2 W.W.R. 1134.

4. General denial.]—A general denial of the allegations in the statement of claim is ineffectual and will be treated as an admission. *Page* v. *Page*, (1915) 22 B.C.R. 185; 25 D.L.R. 99; 32 W.L.R. 854; 9 W.W.R. 442. *Merchants Bank of Canada* v. *Bush*, (1918) 24 B.C.R. 521; 38 D.L.R. 499; (1918) 1 W.W.R. 383.

5. Specific denial—Sufficiency of.]—In paragraph 3 of the plaintiff's statement of claim the plaintiff alleged that "by a bill of lading the defendant acknowledged receipt and shipment on board of 2,000 cases of fresh eggs in apparent good order and condition." The defendant in his defence "denied each and every allegation of fact contained in paragraph 3 of the statement of claim":—Held, that this is a sufficient denial of all allegations in paragraph 3. *Vancouver Milling & Grain Co., Ltd.* v. *United States Shipping Board*, (1923) 32 B.C.R. 269; (1923) 2 W.W.R. 579.

6. Mutual mistake.] — A defence of mutual mistake without a claim for rectification, may be pleaded to an action for performance of an agreement where all that remains to be done under the agreement is the payment of admitted amounts of which the defendant was ignorant when the action was begun. *Clark* v. *Appleby*, (1928) 2 D.L.R. 95; (1928) 1 W.W.R. 784.

B. Special Defence.

1. Set-off.] — A defendant may elect whether he will plead his cross-claim as a set-off or by way of counterclaim. *Victoria and Saanich Motor Transportation Company* v. *Wood Motor Company, Limited*, (1915) 21 B.C.R. 515; 23 D.L.R. 79; 8 W.W.R. 1124; 31 W.L.R. 853.

2. Statute of frauds—Plea.]—The plea that "the 4th section of the Statute of Frauds has not been complied with" is a sufficient pleading of the statute under Order V., Rule 12, of the County Court Rules. It is not necessary to plead any particular section and it is wiser not to do so as the party pleading will not be allowed to rely on another section except by amendment in the judge's discretion. It is competent to a plaintiff in his reply to a counterclaim of defendant to counterclaim on his own behalf in connection with matters set up by defendant. *Hazlitt & Co.* v. *Trenwith*, (1920) 54 D.L.R. 556; (1920) 3 W.W.R. 771.

3. Action for specific performance—Plea of mutual mistake.]—A defence of mutual mistake without a claim for rectification may be pleaded to an action for performance of an agreement where all that remains to be done under the agreement is the payment of admitted amounts of which the defendant was ignorant when the action was begun. *Clark* v. *Appleby*, (1928) 2 D.L.R. 95; (1928) 1 W.W.R. 784.

4. Irrelevant matter.] — M. brought action for damages against B. for failure to supply a certain quantity of walnuts at a certain price as provided in a written agreement. At the time the agreement was entered into M. was manager of the wholesale grocery department of the Hudson's Bay Company, a company dealing in walnuts. B. raised an alternative defence that M. committed a breach of his duty to his employer by entering into such a contract as the one sued on, as the company dealt in the commodity in question, that B. knew M. was manager of the wholesale grocery department of the company and as such was not at liberty to purchase on his own account the goods in question, and B. refused to assist M. in committing a breach of duty to his employer:—Held, that these allegations in the statement of defence are not relevant to the issue and should be disallowed. *Maddison* v. *Donald H. Bain, Limited*, (1928) 39 B.C.R. 460; (1928) 3 D.L.R. 33; (1929) 40 B.C.R. 499; (1929) 1 D.L.R. 843.

See (1930) S.C.R. 299; (1930) 1 D.L.R. 63.

5. Bills of exchange—Fraud of payee.]—In an action against the maker of a promissory note by an alleged holder in due course the defendant has the right to plead fraud of the payee. *Arbuthnot* v. *Campbell*, (1930) 2 W.W.R. 275.

6. Limitation of action.]—A plea that an action based upon a railway company's duty to carry passengers in safety is barred by a section of the railway statute limiting the time within which action may be brought for damages sustained by reason of the railway or works or operation of the company will be upheld. *Pribble* v. *B.C. Electric Ry. Co., Ltd.*, (1926) A.C. 466; 95 L.J.P.C. 51; 134 L.T. 711; 42 T.L.R. 332; (1926) 2 D.L.R. 865; (1926) 1 W.W.R. 780; 31 C.R.C. 418.

7. Court of Appeal—Failure to plead public statute.]—A Court of Appeal may allow an amendment to plead a statutory defence where no additional evidence is involved which might necessitate a new trial. *Anderson* v. *Lake,* (1928) 40 B.C.R. 189; (1928) 4 D.L.R. 220; (1928) 3 W.W.R. 136.

VI. COUNTERCLAIM AND SET-OFF.

1. Set-off — Cestui que trust.] — The defendant agreed to pay to the plaintiff Company as trustee for H. a certain sum of money in instalments "in order to settle all matters in difference between the defendant and H. and to make provision for her support and maintenance." In an action by the trustee to recover certain overdue instalments the defendant was held to be entitled to set off sums due from H. under certain judgments. *The Royal Trust Company* v. *Holden,* (1915) 21 B.C.R. 185; 22 D.L.R. 660; 8 W.W.R. 500.

2. Set-off by defence or counterclaim.] —On the construction of Order XIX., r. 3, the words "shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim," mean that the cross-claim shall have that effect merely for the purpose of enabling the Court to pronounce such final judgment, and the right to set-off in the wide sense of the language of the first part of the rule enables any cross-claim to be pleaded by way of defence, and not necessarily by way of counterclaim, with the result that a defendant may elect whether he will plead his cross-claim as a set-off or by way of counterclaim. *Victoria and Saanich Motor Transportation Company* v. *Wood Motor Company, Limited,* (1915) 21 B.C.R. 515; 23 D.L.R. 79; 8 W.W.R. 1124; 31 W.L.R. 853.

3. Multiplicity of suits.] — The paramount object of the Judicature Act and Rules is to enable all matters arising out of one transaction, particularly where the same parties are involved, to be disposed of in one action and thus prevent multiplicity of suits; thus a corporation in an action against it to recover certain moneys and securities claimed to be wrongfully obtained has the right to counterclaim for fraudulent conspiracy and to set up an agreement that such property was given in restitution for fraudulent acts and misfeasance in office as directors, and may, for that purpose, join other persons jointly connected therewith. *Tobin* v. *Commercial Investment Co. Ltd.,* (1916) 22 B.C.R. 481; 27 D.L.R. 387; 34 W.L.R. 23; 10 W.W.R. 123

4. Counterclaim to counterclaim.]—It is competent to a plaintiff in his reply to a counterclaim of defendant to counterclaim on his own behalf in connection with matters set up by defendant. *Hazlitt & Co.* v. *Trenwith,* (1920) 54 D.L.R. 556; (1920) 3 W.W.R. 771.

5. Estoppel.]—The rule that a plea of estoppel is not allowed to appear in a statement of claim applies to a counterclaim. In an action to recover the balance due in respect of the sale of certain timber lands the defendants counterclaimed setting up fraud on the part of the plaintiff in negotiating the sale and pleaded by way of counterclaim that "the plaintiff fraudulently misrepresented to the defendants that a certain cruise shewn to the defendants and made by the Portland Engineering Company was a true and correct cruise of the timber in question, whereby the defendants were fraudulently misled into paying for a large quantity of timber which was in fact non-existent, and the plaintiff was at the time in possession of another cruise made by Brown & Brown shewing a much smaller quantity of timber, which later cruise was true in substance and in fact, and shewed the actual amount of timber upon the lands." This was followed by a plea that "a few days prior to the sale the plaintiff filed with the Government of British Columbia in the department having the conduct of assessment and taxation the said Brown & Brown's cruise as shewing truly the amount of standing timber upon the lands, and the defendants had no knowledge or notice of such filing":—Held, to be a good plea and should not be struck out. *The Victoria Lumber & Manufacturing Co., Ltd.* v. *Thomsen & Clark,* (1926) 38 B.C.R. 46; (1926) 4 D.L.R. 971; (1926) 3 W.W.R. 459.

6. Litigant bound by conduct of trial.] —In an action in the County Court to recover a balance due on the construction of a dwelling-house, the defendant counterclaimed for the cost of completing the house. The plaintiff filed no reply to the counterclaim and the action proceeded, the issue raised on the counterclaim being fought out on the trial. Judgment was given for the plaintiff's claim without any mention of the counterclaim. The defendant gave notice of appeal and then on motion of the plaintiff, before the trial judge, the plaintiff was

granted leave to file a reply to the counterclaim and the judgment was amended by adding thereto the dismissal of the counterclaim:—Held, that as the counterclaim was considered as well as the claim and the decision in favour of the plaintiff involved the consideration of the counterclaim the appeal should be dismissed. The judge was functus officio and had no power to amend the judgment. *Quinstrom* v. *Peterson*, (1929) 42 B.C.R. 81; (1930) 2 D.L.R. 224.

7. After defence filed.]—In an action on a foreign judgment the defendant, after filing his defence, filed a counterclaim in which he claimed damages for malicious prosecution. A motion to strike out the counterclaim on the grounds that (a) it ought not to have been filed without leave and (b) that it cannot be conveniently tried with the claim, was dismissed. *Thompson* v. *Scollard. (No. 2)*, (1929) 41 B.C.R. 241; (1929) 3 D.L.R. 857; (1929) 2 W.W.R. 466.

8. Personal action against defendant—Counterclaim.]—Where an action is brought against a defendant personally, he may counterclaim in his representative capacity as assignee of an estate, provided the counterclaim can be conveniently disposed of in the action. *Bank of Montreal* v. *Cruickshank*, (1919) 27 B.C.R. 481; (1920) 1 W.W.R. 381.

9. Counterclaim—By way of defence.]—If the subject-matter of a counterclaim is not apart from and independent of the subject-matter of the claim, it is in the nature of a defence, in which state it is not a proceeding as to which leave to commence or proceed against a company in liquidation is necessary under the Winding-up Act. *Dominion Trust Co.* v. *Brydges*, (1920) 28 B.C.R. 451; (1920) 2 W.W.R. 952.

VII. Particulars.

1. Allegation of fraud.]—An allegation of fraud without particulars may be treated as if it were struck out of the pleadings. *Page* v. *Page*, (1915) 22 B.C.R. 185; 25 D.L.R. 99; 32 W.L.R. 854; 9 W.W.R. 442.

2. Libel—Plea of fair comment.]—In an action for damages for libel in which the defendants have entered a plea of fair comment, the plaintiff is not entitled to particulars setting out specifically the facts relied on as a basis for fair comment, unless specifically demanded, and even if he were, he is not entitled to specific instances of the truth of such facts Where the alleged libel is "flagrant defiance of the law as interpreted in other Provinces" the plea must set out specific instances of the alleged interpretation of the law in other Provinces. *The Herald Printing Co.* v. *Ryall*, (1923) 33 B.C.R. 19; (1923) 4 D.L.R. 488; (1923) 3 W.W.R. 953.

3. Defendant having means of knowledge—Discovery — Fiduciary relationship —Particulars of claim — Prior discovery by defendant.] — Where the relationship between the plaintiff and defendant is fiduciary or akin to it the Court may require the defendant to make discovery before particulars of the plaintiff's claim are required if because of the relationship the facts are generally known only to the defendant and the plaintiff may be reasonably supposed to be ignorant thereof. *The B.C. Liquor Co. Ltd.* v. *Consolidated Exporters Corporation, Limited*, (1930) 42 B.C.R. 481; (1930) 2 W.W.R. 379; (1931) 1 D.L.R. 195.

4. Under Families' Compensation Act.]—Sec. 6 of the Families' Compensation Act specifies all that is required to be set forth by the plaintiffs. This section having been complied with nothing further is required, the question of pecuniary injury being a matter of evidence only. *Leslie* v. *Clarke & Buzza, Ltd.*, (1928) 40 B.C.R. 441; (1929) 1 D.L.R. 903.

5. Demand for particulars.] — On an appeal from an order postponing the defendant's application for further and better particulars of certain paragraphs of the statement of claim until after the defendant had made discovery:—Held, that in applications of this kind no general rule can be laid down, as each case depends upon its own circumstances and is decided on its own merits. The Court would not therefore be justified in interfering with the exercise of the discretion that the judge below has given effect to by his order. *Blygh* v. *Solloway, Mills & Co., Ltd.*, (1930) 42 B.C.R. 531; (1930) 4 D.L.R. 582; (1930) 2 W.W.R. 208.

VIII. Amendment.

A. Writ of Summons.

1. Indorsement on writ.]—The indorsement of fraud on a writ will, on application, be struck out where there is no allegation of fraud in the statement of claim. *Skene* v. *Royal Bank of Canada*, (1918) 25 B.C.R. 456.

2. Re-statement.]—An application for leave to deliver an amended statement of claim specially endorsed on a writ of summons will be granted where the amended claim is intended to correct an error and is substantially the same as originally made, and does not allege a new cause of action but merely restates the cause of action in proper form. *Drake* v. *Carter*, (1920) 28 B.C.R. 119; 51 D.L.R. 372; (1920) 1 W.W.R. 1063.

B. Pleadings.

1. Amendment.]—Where an application to amend the pleadings is made by the plaintiff after his case is closed, involving a change in the nature of the attack, the discretion of the trial judge in refusing the application should be reviewed only under exceptional circumstances. *Ganzini* v. *Jewel-Denero Mines, Limited*, (1915) 21 B.C.R. 317; 21 D.L.R. 406.

2. Particulars of fraud—Amendment to give.]—Where an application to amend by giving particulars of an otherwise defective allegation of fraud has been refused in the Court of first instance, it will not be granted in the Court of Appeal except in very unusual circumstances. *Page* v. *Page*, (1915) 22 B.C.R. 185; 25 D.L.R. 99; 32 W.L.R. 854; 9 W.W.R. 442.

3. Formality of amendment at trial.]—If parties wish to amend their pleadings at the trial a formal amendment should be submitted and the matter settled forthwith, and not left open to be dealt with at some future time during the trial or on appeal. *Pacific Coast Coal Mines* v. *Arbuthnot*, (1916) 23 B.C.R. 267; 33 W.L.R. 487; 9 W.W.R. 1208.

4. During course of trial.]—An application for amendment of the pleadings during the course of the trial should be either granted or refused at once, and when granted, the applicant should be required to put in his amendment in writing forthwith. *Sawyer* v. *Millett*, (1918) 25 B.C.R. 193. *The Standard Bank of Canada* v. *McCrossan*, (1920) 28 B.C.R. 291; 55 D.L.R. 238; (1920) 2 W.W.R. 546; 60 S.C.R. 655; 55 D.L.R. 238; (1920) 3 W.W.R. 846.

5. Amendment ex mero motu to conform with evidence.]—Where in an action for the purchase price of two cars of merchandise all the relevant evidence relating to the matters in issue is before the Court and the defendant is found to be entitled to a counterclaim for breach of warranty and the counterclaim delivered refers only to one car the counterclaim may be amended by the Court ex mero motu to conform with the evidence and to include the breach of warranty as to the other car, as it would be a useless expense to compel the defendant to bring a separate action on this warranty. *Symonds* v. *Clark Fruit & Produce Co., Ltd.*, (1919) 26 B.C.R. 548; (1919) 1 W.W.R. 587.

6. Amendment of pleadings.]—On an application to amend the defence, where it appears that an arguable question has been raised by the proposed amendment, the application should be granted. *Woods* v. *Forsyth*, (1918) 25 B.C.R. 427.

7. Specific performance—Amendment to claim damages in lieu.]—In an action against executors for specific performance of a contract made by the deceased, where it appears from the evidence that the executors have disbursed the moneys of the estate to such an extent as to render specific performance impossible, the Court will allow the plaintiff to amend and claim damages against the executors. *Bligh* v. *Gallagher*, (1921) 29 B.C.R. 241; 57 D.L.R. 76; (1921) 1 W.W.R. 662.

8. Inapt wording.]—Where an allegation in a pleading is not happily worded and may be embarrassing an amendment may be allowed. *Tobin* v. *Commercial Investment Co.*, (1916) 22 B.C.R. 481; 27 D.L.R. 387; 34 W.L.R. 23; 10 W.W.R. 123.

9. County Court—Jurisdiction.]—If a plaint in an action in the County Court does not disclose the territorial jurisdiction of the Court, an amendment may be allowed to do so if the facts disclose that the Court has actual jurisdiction. *Hahn* v. *Seibel*, (1920) 28 B.C.R. 387; (1920) 2 W.W.R. 595.

10. Appeal.] — An action founded on fraud was dismissed on the ground that no cause of action was shewn in the statement of claim. On appeal, after admitting that on the pleadings he could not succeed, counsel for the appellant applied for the first time for leave to amend so as to set up a new cause of action based on the same set of facts in order to shew that a certain release therein mentioned was obtained by fraudulent misrepresentation: — Held, that although the allowance of the amendment would unduly expand the indorsement on the writ which would necessitate an amendment thereof as the case was really disposed of below on a demurrer, in the unusual

circumstances the application should not be refused but on terms that the appellant pay the costs of the action including those of and consequent upon the amendment with costs of the appeal. *Bushby* v. *Tanner*, (1924) 34 B.C.R. 270; (1924) 4 D.L.R. 582; (1924) 3 W.W.R. 401.

11. Appeal.]—The Court of Appeal will allow an amendment to state the true issue on which the judgment was founded where the issue was fully gone into by both parties in the Court below, and no injustice is occasioned by the amendment. *Kipp* v. *Simpson*, (1928) 40 B.C.R. 248; (1928) 4 D.L.R. 421; (1928) 3 W.W.R. 331.

12. New cause of action ascertained on taking of accounts.]—The plaintiff and defendant were in partnership in a logging operation, the defendant being in full charge of the work. On the defendant refusing to complete the work the plaintiff brought action claiming damages, for an accounting and for dissolution. Subsequently an order was made with the consent of the parties directing the defendant to give an account of the real and personal property of the partnership, and of all moneys received and expended by him on behalf of the partnership. On cross-examination of the defendant on his affidavit supporting his accounts the plaintiff said that he first ascertained that there was material misrepresentation at the inception of the partnership contract regarding the purchase price of the partnership property made by the defendant. The plaintiff then applied for leave to amend his statement of claim alleging misrepresentation and claiming rescission and alternatively claiming dissolution and an accounting:—Held, that the cases cited to the effect that another action must be started to set aside the order on the ground of fraud are not in point as the alleged misrepresentation, if there was such, goes to the contract itself, and the rights and liabilities of the parties would be wholly different if the Court found that the right of rescission was established. Held, further, that in the existing statement of claim there is a claim for damages or breach of the alleged agreement which could not be disposed of by the registrar under the order for taking accounts, but the liability would have to be decided by the Court itself, so that the order for accounts is not in the nature of a final order disposing of all the issues in the action but only an interlocutory order, and the amendment should be allowed. *McKenzie* v. *Bremner*, (1926) 37 B.C.R. 128; (1926) 2 D.L.R. 96.

13. Alternative claim.]—The plaintiff brought action against the defendant for a balance due on money loaned. The evidence on discovery disclosed that the parties had entered into a written agreement with M. whereby they agreed to provide M. with capital up to $2,000 to carry on a lumber business on premises upon which M. had obtained a lease, and to provide him with sufficient logs to enable him to operate the mill at full capacity, M. in consideration therefor agreeing to pay the plaintiff and defendant two-thirds of the net profits. The plaintiff then moved and obtained an order to amend the statement of claim by setting up alternatively that the plaintiff and defendant carried on a partnership with the object of financing M. in the operation of a sawmill and for an accounting of the partnership dealings:—Held, on appeal, that the agreement only defined the rights of plaintiff and defendant as against M. and M.'s rights against them. There was no mutual undertaking as between themselves and no partnership. The order should therefore be set aside as embarrassing. The plaintiff should, however, have leave to make a proper amendment and the defendant should have leave to plead in answer to it. *Morse* v. *Hurndall*, (1926) 37 B.C.R. 216.

14. Mistake.] — An amendment should be allowed to correct a mistake where it appears to be necessary in order to do justice between the parties. *McQuade et al.* v. *Moncrieff et al.*, (1929) 1 D.L.R. 984.

15. Costs.]—An unsuccessful defendant may be allowed to set off against the costs of the action costs thrown away by reason of an amendment to the plaintiff's pleadings and a consequent adjournment. *Denny* v. *Lloyd*, (1922) 3 W.W.R. 896.

IX. Striking Out Pleadings and Allegations.

1. Unnecessary and superfluous.] — Although there may appear in the pleadings matters which are unnecessary and superfluous, if they are not embarrassing, an application to strike them out will be refused. The Court of Appeal will examine more carefully the reasons and pay more attention to the pleadings, and examine them more narrowly to see if any harm has been done by the rejection of the pleadings, than in a case where the judge below refused to strike them out. *Wellington Colliery Company* v. *Pacific Coast Coal Mines*, (1918) 25 B.C.R. 206.

2. Superfluous.]—In the case of an allegation in pleadings which is merely superfluous and is not calculated to embarrass the other side, the Court will not strike it out. *Lutz* v. *Canadian Puget Sound Lumber Co.*, (1920) 28 B.C.R. 39.

3. Scandalous matter.]—Where a trial judge in the exercise of his discretion has refused to strike out matter which is alleged to be scandalous the Court of Appeal will not interfere. *Royal Typewriter Agency* v. *Perry*, (1928) 40 B.C.R. 222; (1928) 4 D.L.R. 383; (1928) 3 W.W.R. 173.

4. Libel—Particulars of words complained of.]—In an action for damages for libel the practice requires the libellous words to be set out in the pleadings, and a paragraph of the statement of claim which suggests that the defendant has done something of which the plaintiff is unable to give particulars, will be struck out. *Shannon* v. *King*, (1931) 44 B.C.R. 383; (1931) 4 D.L.R. 438; (1931) 2 W.W.R. 913.

X. ADMISSIONS.

1. Judgment upon admissions.]—On application for judgment upon admissions under Order XXXII., r. 6 (marginal rule 376) the defendant company set up that the money sued for was claimed by third parties under a foreign jurisdiction. An order was made directing the payment of the amount claimed into Court and also directing service of notice of application for payment out of Court upon the foreign claimants the motion for judgment to be disposed of at the same time. The foreign claimants were duly served with notice, but they did not appear on the motion, and judgment was given for the plaintiff with an order for the payment out to him of the moneys in Court:—Held, on appeal, that as the foreign claimants had been notified and given an opportunity to appear and prove their claims but did not do so, the order appealed from should be affirmed. *Lockwood* v. *National Surety Company*, (1915) 22 B.C.R. 306.

2. Libel—Plea of justification.]—In a libel action the defendant's plea of justification is an admission of publication. *Patching* v. *Howarth*, (1930) 43 B.C.R. 108; (1930) 4 D.L.R. 489; (1930) 3 W.W.R. 129.

3. Libel—Allegation of publication.]—Publication will be considered established where the statement of claim in an action for libel contains an allegation of publication without stating to whom the libel was published, no particulars being asked for by the defence, and evidence was tendered at the trial of publication to the defendant's stenographer, and the evidence was allowed in without objection. *Hall* v. *Geiger*, (1930) 42 B.C.R. 335; (1930) 3 D.L.R. 644; (1930) 2 W.W.R. 790.

See ACTIONS.
See ADMIRALTY.
See BILLS OF EXCHANGE.
See DEFAMATION.
See DIVORCE.
See ESTOPPEL.
See FRAUD.
See LIMITATION OF ACTIONS.
See MORTGAGES.
See MUNICIPAL CORPORATIONS.
See NEGLIGENCE.
See PETITION OF RIGHT.
See SALE OF GOODS.
See VENDOR AND PURCHASER.

POSSESSION.

1. As against holder of indefeasible title.]—In an action to recover possession of certain lands it was held on the evidence that the defendant had failed to discharge the onus which rested on him of shewing that he had been in actual, open, visible, exclusive, continuous and undisturbed possession of the lands for a period of twenty years. Held, further, that in any case on a proper construction of the Land Registry Act the defendant in the circumstances of the case, could not acquire a title by possession as against a person holding a certificate of indefeasible title. *Washington and Great Northern Townside Company et al.* v. *Holbrook*, (1924) 33 B.C.R. 388; (1924) 1 D.L.R. 818; (1924) 1 W.W.R. 511.

2. Land — Adverse possession.] — A claimant to possessory title to land by prescription must satisfy the Court that he has been in open visible adverse and constant possession of the land and not by sufferance or permission of the registered owner for the full period of twenty years before action is brought. If during a portion of such period he lived on the land as one of the household of an occupant who has

been in adverse possession the claimant shall not be entitled to any advantage therefrom unless the possessory rights of such occupant shall have been lawfully conveyed to the claimant. *Burch* v. *Towder*, (1922) 69 D.L.R. 739; (1923) 1 W.W.R. 180.

3. Land—Adverse possession.]—One of the salient conditions requisite to establish prescriptive title is that the onus is on the defendant to prove that the possession which he asserts is an adverse or exclusive possession. If defendant is in possession as tenant at will or by sufferance of the owner his possession cannot in law be one which dispossesses the owner. *Kennedy* v. *Husband; Kennedy* v. *Ellison*, (1923) 1 D.L.R. 1069.

4. Adverse possession—Onus.]—Where the Statute of Limitations is raised as the defence to an action for possession of land, the onus is on the defendant to shew adverse possession for the requisite period to the satisfaction of the Court. *Attorney-General of Canada* v. *Gonzalves*, (1926) 1 D.L.R. 51; Revg. (1924) 34 B.C.R. 360; (1924) 4 D.L.R. 747, and (1925) 1 D.L.R. 605; (1925) 1 W.W.R. 180. *Attorney-General of Canada* v. *Cummings*, (1926) 1 D.L.R. 52; Revg. (1924) 34 B.C.R. 433; (1925) 1 D.L.R. 642.

5. Uninterrupted possession for 20 years.]—A. purchased lot 158 in the Similkameen Division of Yale in 1884 and on having it surveyed obtained a Crown grant in 1885. Shortly after A. died and E. purchased the lot from his heirs. M. pre-empted the land adjoining to the south of lot 158 in 1886. In 1895 E. and M. agreed to the boundary line between the two lots and E. put up a fence on this line, M. clearing and cultivating the land up to this fence. It later appeared that 78 acres of lot 158 as surveyed for A. was on M.'s side of the fence. E. not paying his taxes lot 158 was sold for taxes in 1905 to the defendant who obtained a tax-sale deed in 1911:—Held, that M. had uninterrupted possession since his pre-emption in 1886; that the tax sale in 1905 was not an interruption of the running of the Statute of Limitations as the owner having a year within which to redeem he had uninterrupted possession to the end of that year giving him a full period of 20 years' possession. *McIntyre* v. *Haynes*, (1925) 35 B.C.R. 40; (1925) 2 D.L.R. 546; (1925) 1 W.W.R. 881.

See BAILMENT.
See BILL OF SALE.
See DETINUE.
See EXECUTION.
See INTOXICATING LIQUORS.
See LANDLORD AND TENANT.
See LIEN.
See LIMITATION OF ACTIONS.
See MORTGAGES.
See REGISTRATION OF LAND.
See SALE OF GOODS.
See VENDOR AND PURCHASER.

PRACTICE.

I. IN GENERAL, 871.
II. WRIT OF SUMMONS, 871.
A. *In general*, 871.
B. *Setting aside*, 872.
C. *Service of, within jurisdiction*, 872.
1. Generally, 872.
2. Substituted service, 873.
D. *Service of, out of the jurisdiction*, 873.
1. Leave to issue, 873.
2. Cases within Order XI., 874.
E. *Special indorsement*, 874.
III. APPEARANCE, 874.
IV. JUDGMENT BY DEFAULT: SETTING ASIDE, 875.
V. SUMMARY JUDGMENT, 877.
A. *Application for*, 877.
B. *Leave to defend*, 877.
VI. THIRD PARTY PROCEEDINGS, 877.
VII. CONSOLIDATION OF ACTIONS, 878.
VIII. PAYMENT INTO AND OUT OF COURT, 878.
IX. DISCONTINUANCE, 878.
X. DISCOVERY, 879.
A. *Discovery of documents*, 879.
1. In general, 879.
2. Privilege, 879.
3. Further and better affidavit, 879.
B. *Interrogatories*, 880.
C. *Examination for discovery*, 881.
1. Who liable to, 881.
2. Corporation, officers of, 881.
3. Application for, 883.
4. Time for, 883.
5. Scope of, 883.
6. Use of, at trial, 884.
XI. VENUE, 884.
A. *In particular actions*, 884.
B. *Change of*, 885.

XII. TRIAL, 886.
A. *Notice of*, 886.
B. *Conduct of*, 886.
XIII. REFERENCE, 887.
XIV. MOTIONS FOR JUDGMENT, 888.
XV. CHAMBERS, MATTERS DISPOSABLE IN, 888.
XVI. INTERPLEADER, 889.
XVII. ORIGINATING SUMMONS, 889.
XVIII. NOTICE OF MOTION, 889.
XIX. SUMMONS, 889.
XX. ORDERS, 890.
XXI. ACCOUNTS AND INQUIRIES, 891.
XXII. PRESERVATION AND INSPECTION OF PROPERTY, 891.
XXIII. STAY OF PROCEEDINGS, 891.
XXIV. EXECUTION, DISCOVERY IN AID OF, 893.
XXV. JUDGMENT, INTEREST ON, 893.
XXVI. TIME, 894.
XXVII. IRREGULARITIES, 894.

I. IN GENERAL.

Rules of Court—Discretion where no rule.]—The Court has discretion to make any order about a matter of procedure which it considers that the circumstances require, when the rules of Court are silent on the subject and especially where it tends to prevent misuse of process. *Bell* v. *Wood and Anderson*, (1927) 38 B.C.R. 310; (1927) 2 D.L.R. 827; (1927) 1 W.W.R. 580.

II. WRIT OF SUMMONS.

A. *In General.*

1. Indorsement in action for libel.]—In an action for libel where the indorsement on the writ does not comply with marginal rule 18a, the service of a statement of claim at the same time as the writ does not cure the defect and enable the plaintiff to sign interlocutory judgment after eight days in default of appearance under rule 105. Where interlocutory judgment is so signed the defendant is entitled to have it set aside ex debito justitiæ without an affidavit of merits. *Campbell* v. *Shaw*, (1920) 28 B.C.R. 77; (1920) 1 W.W.R. 1028.

2. Expiry of.]—In an action for foreclosure of a mortgage a receiver of the mortgaged premises was appointed on the day of the issue of the writ of summons. The writ was never served on the defendants. The receiver managed the mortgaged premises for three years after his appointment notwithstanding that the writ was neither served nor renewed within the period of twelve months from the date thereof. A new writ was issued two years after the twelve months had elapsed:—Held, that although the writ had not been served within the time limited by the Rules of Court and could not be served afterwards without renewal, it had not lost its validity for all purposes. The office of the receiver could only be determined by an order of the Court. His authority continued after the expiration of the period of twelve months and the losses in managing the property during the second and third years of his being in charge should be included in the accounts to be taken by the registrar pursuant to the order for foreclosure. *Canada Permanent Mortgage Corporation* v. *Dalgleish*, (1928) 39 B.C.R. 300; (1928) 1 D.L.R. 1113; (1928) 1 W.W.R. 473.

3. Indorsement—Enlargement upon in statement of claim.]—The plaintiff indorsed his writ with a claim for money had and received by the defendant in trust for the plaintiff and in his statement of claim set up a claim for the money as informer and entitled to the money as the first person suing for the same under sec. 236 (3) of the Criminal Code:—Held, that the claim set out in the statement of claim is a justifiable enlargement or extension of the indorsement on the writ and within the provisions of marginal rule 228, and does not set up an entirely distinct cause of action, and the discretion of the judge below in so ordering should not be interfered with. *Gibbs* v. *Cann*, (1931) 44 B.C.R. 393.

B. *Setting Aside.*

Writ—No address of defendant.]—The omission in the writ of summons of the address of a defendant company is fatal, and the writ will be set aside. *Brown* v. *North American Lumber Company, Limited, et al.*, (1915) 21 B.C.R. 253.

C. *Service of, Within Jurisdiction.*

1. Generally.

Solicitor accepting service.]—Where a solicitor accepts service of a writ of summons and undertakes to appear but fails to do so, the plaintiff is not in a position to

enter default judgment but may proceed to enforce the solicitor's undertaking. *Mitchell* v. *Coast Paper Co., Ltd.* (1930) 42 B.C.R. 352; (1930) 2 D.L.R. 720; (1930) 1 W.W.R. 608.

2. Substituted Service.

Sufficiency of affidavit.]—The material in support of an application for substitutional service must shew that notice of the writ will probably come to the notice of the defendant. *Sun Life Assurance Co.* v. *Tardiff*, (1919) 27 B.C.R. 213; (1919) 2 W.W.R. 846.

D. Service of, Out of the Jurisdiction.

1. Leave to Issue.

1. Affidavit in support.]—A good cause of action must be shewn in support of an application for an order for service of a writ of summons ex juris. *Royal Bank of Canada* v. *Skeans*, (1916) 24 B.C.R. 190.

2. Application leading to order for—Cross-examination on.]—There can be no cross-examination on an affidavit in support of an order for service ex juris on an application to set aside the writ where no counter-affidavit is filed. *Lyall Shipbuilding Co.* v. *Van Hemelryck*, (1919) 27 B.C.R. 240; (1919) 2 W.W.R. 551.

3. Indorsement under rule 62.]—In the case of service of notice of writ on a defendant, who is not a British subject, in a foreign country, indorsement on the writ of the day of service under marginal rule 62 is not necessary. *Lyall Shipbuilding Co.* v. *Van Hemelryck*, (1919) 27 B.C.R. 446; (1919) 3 W.W.R. 317.

4. Waiver of objection.]—Application by the defendant for leave to cross-examine on the affidavit filed in support of an application for leave to issue a writ and serve notice thereof on the defendant outside of the jurisdiction is not a step in the action by which the defendant submits to the jurisdiction and waives objection to the service. *Lyall Shipbuilding Co.* v. *Van Hemelryck*, (1919-20) 28 B.C.R. 196; 52 D.L.R. 670; (1920) 2 W.W.R. 360; (1921) 1 A.C. 698; 90 L.J.P.C. 96; 125 L.T. 133; 58 D.L.R. 48; (1921) 1 W.W.R. 926.

2. Cases Within Order XI.

1. Application—Affidavit.]—An order for service ex juris may be properly made upon the filing of an affidavit disclosing a prima facie case, shewing a probable cause of action and otherwise complying with the conditions required by the rules. The setting aside of a first writ does not prevent the plaintiff bringing a new action claiming other relief although arising out of the same state of facts. *Jones* v. *Ryder*, (1928) 39 B.C.R. 547; (1928) 3 D.L.R. 301; (1928) 2 W.W.R. 302.

2. Breach of contract.]—In applying for leave to serve a writ of summons ex juris it is not necessary to establish a contract conclusively. It is not the duty of the judge to go into the merits or attempt to try the case but to satisfy himself that there is reasonable evidence of a contract or a probable cause of action. If on the material it is clear that there is no such contract as alleged, the order should not be made. *Slater* v. *Velie Motors Corporation*, (1928) 40 B.C.R. 184; (1928) 4 D.L.R. 487; (1928) 3 W.W.R. 170.

E. Special Indorsement.

Error — Amendment — Effect of.] — Where the statement of claim indorsed on a writ of summons erroneously states the date of the maturity of an obligation as occurring after the date of the writ, and the latter appears thereby to be premature, an amendment will be allowed and will support a prior attaching order. *Van Wassenaer* v. *Adams*, (1927) 38 B.C.R. 275; (1927) 3 D.L.R. 180; (1927) 2 W.W.R. 287.

III. Appearance.

1. Conditional appearance — Entering without leave.] — An application to set aside a writ on the ground that it did not include the plaintiff's address will be refused upon it appearing that the defendant had entered a conditional appearance without having first obtained the leave of the Court to do so. *Buscombe Securities Co.* v. *Hori Windebank and Quatsino Trading Co.*, (1918) 25 B.C.R. 441; (1918) 3 W.W.R. 582.

2. Conditional appearance—Necessity of.]—Judgment having been entered against the defendant in default of defence, he

applied to set aside an order allowing substitutional service of the writ, the writ itself and the judgment:—Held, that the defendant, not having entered a conditional appearance, had no status to attack the writ and subsequent proceedings in the action. *Victoria (B.C.) Land Investment Trust, Ltd.* v. *White*, (1920) 27 B.C.R. 559; (1920) 1 W.W.R. 272.

3. Conditional appearance—Leave to enter.]—After judgment had been entered in default of defence and a previous application to set aside the writ and other proceedings had been dismissed on the ground that the defendant not having entered an appearance, had no status to attack the writ, a further application to enter a conditional appearance was granted. *Victoria (B.C.) Land Investment Trust, Limited* v. *White, (No. 2)*, (1920) 28 B.C.R. 21; (1920) 1 W.W.R. 594.

4. Conditional appearance—Effect of.]—A conditional appearance entered by defendant without leave is bad (O. 12, R. 30), but defendant's right is not thereby affected to apply without leave to set aside service of the writ ex juris on the ground of the insufficiency of the affidavit in support of the order therefor. *Standard Bank* v. *Macleod*, (1921) 2 W.W.R. 173.

IV. JUDGMENT BY DEFAULT—SETTING ASIDE.

1. Delay in application.]—The defendants moved to set aside a judgment obtained in default of appearance, alleging they had not been personally served and that they had a good defence. The motion was not disposed of and was delayed until the plaintiff died. Over two years later administration was taken out by the wife of the deceased plaintiff and she proceeded to revive the action. She was notified by the defendants that if she proceeded they would bring on their application to set aside the judgment. Upon the defendants' application being later heard:—Held, that as the good faith of the defendants as to personal service not being effected was evinced before the death of the plaintiff they should be allowed to defend only as to proving that the amount claimed in the action had been paid, and the judgment should remain in force as security for the plaintiff until the action be disposed of. *Huckell* v. *Gale & Williams*, (1915) 22 B.C.R. 356; 25 D.L.R. 761; 33 W.L.R. 192; 9 W.W.R. 550.

2. Excessive amount.]—Where a personal judgment for principal and interest due on a mortgage and for foreclosure was obtained by default, and interest, which was the subject of a judgment in a previous action in the County Court, was included in the sum recovered:—Held, that the judgment should be set aside, and the defendant allowed in to defend generally. *Scottish Temperance Life Assurance Company, Limited* v. *Johnson*, (1916) 23 B.C.R. 510; 31 D.L.R. 649; (1917) 1 W.W.R. 538.

3. Improper service of writ.]—On an application to set aside an order for service ex juris and the writ of summons and all subsequent proceedings, it appeared the order was for service upon the defendant in England but subsequently service was effected in California. Judgment was entered in default of appearance and was subsequently assigned to a third party:—Held, that the Court should endeavour to have the rights of the parties considered and determined and not have them thwarted or affected by acts or slips of counsel or solicitors and an order should be made that the order for service ex juris and service of writ be not set aside but that the judgment be opened up and as security for the plaintiff and its assignee the certificate of judgment remain unaffected by such opening up of the judgment and the action should be tried and disposed of as soon as possible. Held, further, that the assignee of the judgment may apply to be added as a party if so advised. *Victoria (B.C.) Land Investment Trust, Limited* v. *White. (No. 4)*, (1920) 28 B.C.R. 31.

4. Terms imposed.]—The Court, in setting aside a judgment obtained through a slip of the defendant Company's solicitor, and in allowing the defendant to defend the action, has no power to impose upon him the condition that he shall not plead its special Statute of Limitations. *Viney* v. *British Columbia Electric Railway Company, Limited*, (1922) 31 B.C.R. 434; 69 D.L.R. 738; (1922) 3 W.W.R. 899.

5. Foreclosure—False effect of service.]—On a false affidavit of service of writ of summons the plaintiff obtained final order for foreclosure, a certificate of indefeasible title was issued and the property was sold. On the application of the defendant on the ground that he was not served with the writ and that he knew nothing of the foreclosure proceedings until after the property was sold:—Held, that the judgment was without foundation and all proceedings following the issue of the writ

should ex debito justitiæ be set aside. *Canada Permanent Mortgage Corporation* v. *Natha Singh*, (1921) 29 B.C.R. 397; 60 D.L.R. 56; (1921) 2 W.W.R. 361.

V. SUMMARY JUDGMENT.

A. Application for.

Service of affidavits.]—Upon the filing of affidavits for the defence on an application for speedy judgment under Order XIV. notice of such filing must be given to the opposite party but the service of copies is not necessary. Copies must be furnished on demand of the opposite party but must be paid for. *B.C. Estates, Limited* v. *Coldicutt*, (1924) 34 B.C.R. 7; (1924) 3 D.L.R. 363; (1924) 2 W.W.R. 1024.

B. Leave to Defend.

1. Summary judgment—Triable issue.]—The defendant gave two promissory notes payable on demand to secure a debt, at the same time executing a deed of land as collateral security therefor. The plaintiff having sued on the notes, moved for judgment under Order XIV. The defence was that in consideration of giving the deed of land there was a verbal agreement that payment of the notes would not be enforced for two years. The motion was dismissed:—Held, on appeal, that the application was rightly dismissed as the conveyance of land as collateral security for the payment of the debt created a "triable issue" that should come before the Court for determination. *Auld* v. *Taylor*, (1915) 21 B.C.R. 192; 21 D.L.R. 577; 8 W.W.R. 552.

2. Right to question amount obtained on disposition of securities.]—On an application for leave to sign final judgment, a defendant, who was surety for the debt sued upon, sought leave to defend on the ground that the plaintiff should have obtained a greater sum for certain securities he sold, the proceeds of which were applied in reduction of the debt:—Held, that the defendant be allowed in to defend. *Royal Bank of Canada* v. *Pacific Bottling Works*, (1916) 23 B.C.R. 463; (1917) 2 W.W.R. 227.

VI. THIRD PARTY PROCEEDINGS.

Procedure—Service out of jurisdiction.]—An application for leave to issue and serve a third party notice is within the scope of Order XI., R. 8. The granting of the order is now almost entirely a matter of discretion. *Sostad* v. *Woldson*, (1925) 36 B.C.R. 14; (1925) 3 D.L.R. 779; (1925) 2 W.W.R. 774.

VII. CONSOLIDATION OF ACTIONS.

Discretion of judges.]—Order 49, r. 1 of the Supreme Court Rules is absolute and leaves the matter of consolidation entirely in the discretion of the judges. *Dominion Trust Co.* v. *New York Life Ins. Co.; Dominion Trust Co.* v. *Sovereign Life Ass'nce Co. of Canada*, (1918) 88 L.J.P.C. 30; 119 L.T. 748; 44 D.L.R. 12; (1919) A.C. 254.

VIII. PAYMENT INTO AND OUT OF COURT.

1. Payment out of Court—Payment to solicitor.]——An application for payment out of Court to solicitors of a sum exceeding $50 must be supported by the client's assent verified by affidavit. *Lee* v. *Manning*, (1919) 27 B.C.R. 216.

2. Payment into Court.]—In an action for money had and received the defendant paid into Court a sum he considered sufficient to satisfy the plaintiff's claim but denied any liability. The action was dismissed but on appeal the plaintiff recovered a sum less than the amount paid in:—Held, that the plaintiff is entitled to the costs of the issue as to liability and the defendant to the costs of the issue as to the amount recoverable. Held, further, that the same rule applies if, at the time of payment in, there was no denial of liability but subsequently by amendment the defendant denies liability. *Aghion* v. *T. M. Stevens & Co.*, (1921) 30 B.C.R. 77; 60 D.L.R. 395; (1921) 2 W.W.R. 961. *Bottoms* v. *Pacific Northwestern Lumber Co.*, (1929) 2 W.W.R. 495.

IX. DISCONTINUANCE.

Money paid into Court.]—When an action is discontinued after money has been paid into Court under an attaching order, the money ceases to be subject to any Court process, and the defendant may assign the fund to a third party who may successfully resist an application that the fund be kept

in Court to abide the result of further action between the same parties. *Schmidt* v. *Giffin*, (1916) 23 B.C.R. 459; 34 W.L.R. 1229; 10 W.W.R. 1356.

X. Discovery.

A. Discovery of Documents.

1. In General.

Partnership.]—In an action to have it declared that the plaintiff is entitled to an interest in a partnership and for an accounting, it is premature to order the production of the financial records of the partnership business until the plaintiff has shewn that he is a partner. *Harnam Singh* v. *Kapoor Singh*, (1927) 39 B.C.R. 485.

2. Privilege.

1. Production of documents.]—A servant cannot be compelled to produce the documents of his master where the suit or proceeding is one to which the master is not a party, and it is not shewn that he has given authority for their production, even though the master is outside the jurisdiction of the Court. *Chapman* v. *Stoddart & Co.*, (1930) 43 B.C.R. 182; (1930) 4 D.L.R. 1013; (1930) 3 W.W.R. 171.

2. Insufficiency of evidence.]—Where there is nothing on the face of documents indicating that they are privileged and there is no affidavit from any person who has examined them shewing proper grounds for refusing, their production will be ordered. *Reid* v. *Vancouver Tug Boat Co., Ltd.*, (1928) 39 B.C.R. 479; (1928) 2 D.L.R. 244; (1928) 1 W.W.R. 800.

3. Further and Better Affidavit.

1. Specific description of documents.]—In an action for specific performance of an agreement for the sale of land an order was made that an affidavit of documents be filed on behalf of a company incorporated to take over the lands in question, the evidence disclosing that the plaintiff acted as trustee for the company in respect of said lands. The plaintiff's affidavit of documents contained an item "Pleadings and proceedings in an action in the Supreme Court of British Columbia between the plaintiffs and the Grand Trunk Pacific Railway Company as defendant being No. 1, 2315/1915":—Held, that a further and better affidavit of documents must be made by the plaintiffs in respect of this item. *Isitt and Isitt* v. *Hammond and National Resources Security Company Limited*, (1924) 34 B.C.R. 133; (1925) 1 W.W.R. 94.

2. Documents in hands of opposite party.]—The Court will not order delivery of a further and better affidavit of documents when the books and documents in question have been delivered to and are in the possession of the representative of the opposite party. *MacKee* v. *Solloway, Mills & Co. Ltd.* (*No. 2*), (1931) 44 B.C.R. 42; (1931) 2 D.L.R. 822; (1931) 1 W.W.R. 624.

B. Interrogatories.

1. Default in answering.]—Where, in an action for pecuniary damages, the statement of defence is struck out by order of a local judge of the Supreme Court owing to the defendant's default in answering interrogatories, the plaintiff can, under marginal rule 297, enter interlocutory judgment without the order of a judge. Where an order striking out the defence included the words "the plaintiff is at liberty to sign interlocutory judgment forthwith" (irrespective of whether the local judge exceeded his powers in inserting them), such words must be regarded as merely surplusage, and do not invalidate the order. *Logan* v. *The Granby Consolidated Mining, Smelting and Power Company, Limited*, (1916) 23 B.C.R. 188; 30 D.L.R. 623; (1917) 1 W.W.R. 230.

2. Objection to.]—Interrogatories which are oppressive and immaterial or irrelevant to the issue will not be allowed. *Esquimalt & Nanaimo Railway Co.* v. *Wilson and McKenzie*, (1920) 28 B.C.R. 271; 52 D.L.R. 669.

3. Interrogatories.] — A party being examined on interrogatories is not treated as a witness and is excused from answering questions on the ground that his answers may tend to incriminate him. *Blumberger* v. *Solloway, Mills & Co., Ltd.*, (1931) 44 B.C.R. 41; (1931) 3 D.L.R. 204; (1931) 2 W.W.R. 56.

4. Objection to.]—The allowance by a judge of interrogatories to be administered to a party under marginal rule 344 (2) even in the face of objection does not amount to a decision that the party must answer

them, but leaves him at liberty under marginal rule 348 to take any objection to answering that he sees fit. *Esquimalt & Nanaimo Railway Co.* v. *Granby Consolidated Mining, Smelting & Power Co.*, (1926) 37 B.C.R. 398; (1926) 3 W.W.R. 240.

C. Examination for Discovery.

1. Who Liable to.

No discovery against the Crown.]—The Soldier Settlement Board represents the Crown and is not subject to discovery in an action against it. *Wright* v. *Peters and The Soldier Settlement Board*, (1920) 2 W.W.R. 696.

2. Corporation, Officers of.

1. Past officer.]—Where it is sought to examine a person for discovery as a past officer of a corporation said person should, even although he denies he was an officer of the corporation, attend and be examined as to the position he occupied with respect to the corporation, the powers he was entrusted with, and the duties he had to perform. *Elliott* v. *Holmwood & Holmwood, Limited*, (1915) 22 B.C.R. 335; 25 D.L.R. 765; 33 W.L.R. 134; 9 W.W.R. 490.

2. Servant.]—The "officer" of a company for the purposes of examination for discovery may be an employee of a sort usually termed a "servant" as distinguished from "official." *Ibid.*

3. Officer of parent company.]—A person, not an officer or servant of a company party to an action, but who is an officer in a company to which the first company is subsidiary, holding all its shares and having full control of its affairs, is not subject to examination for discovery under marginal rules 370c and 370d, notwithstanding his having negotiated and his being the only person in authority to negotiate, the proceedings over which the action arose. *Wellington Colliery Company, Limited* v. *Pacific Coast Coal Mines, Limited*, (1916) 23 B.C.R. 138.

4. City solicitor.] — A solicitor employed by a municipal corporation at a fixed salary exclusively devoting his services to the corporation is an "officer" or "servant" within the meaning of rule 370c (1) and subject to examination for discovery. *Duncan* v. *The City of Vancouver*, (1917) 24 B.C.R. 267; 36 D.L.R. 218; (1917) 3 W.W.R. 18.

5. Agent.]—An agent of a company is included in the words "officer or servant" in marginal rule 370c (a), and may, on application, be examined for discovery. *Yamashita* v. *Hudson Bay Insurance Co.*, (1918) 26 B.C.R. 387; (1918) 3 W.W.R. 671.

6. Liquidator.]—In an action by the liquidator of a company, being an officer of the Court and subject to its directions, an order will not be made compelling him to make an affidavit of documents when he is willing to make disclosure. *Dominion Trust Company* v. *The Royal Bank of Canada*, (1919) 27 B.C.R. 166.

7. Bailiff.]—In an action against a landlord for damages for illegal distress the bailiff, not being a party to the action, is not subject to examination for discovery. *Harvey* v. *Sylvia Court, Limited*, (1924) 34 B.C.R. 322; (1924) 3 W.W.R. 849.

8. Former director—Present solicitor.]—B., a former director and present solicitor of the defendant Company, with A., a real estate agent, were instructed by the president of said Company to negotiate with the plaintiffs in regard to the surrender of the plaintiffs' current lease on the defendant's premises. B. and A. came to terms with the plaintiffs and on the terms being reduced to writing by B. were submitted by B. to the plaintiffs who signed them. B. took the document away ostensibly for the purpose of having the defendant sign it but it disappeared as far as the plaintiffs are concerned as they never saw it again nor were they given a copy of it:—Held, that the law as to privilege cannot be applied to the facts as disclosed and B., as agent or servant of the defendant Company, is subject to examination for discovery. *Canary et al.* v. *Vested Estates, Limited*, (1930) 43 B.C.R. 1; (1930) 3 D.L.R. 989; (1930) 1 W.W.R. 996.

9. Building contract — Architect.]—Where an architect is engaged in such a capacity that the primary purpose and effect of his engagement is to delegate to him a portion of the defendants' authority and constitute him their agent to deal with third parties within the general scope of his employment, he is subject to examination for discovery by the plaintiff. *Hyslop* v. *Board of School Trustees of New Westminster*, (1930) 43 B.C.R. 201; (1930) 4 D.L.R. 1030; (1930) 3 W.W.R. 227.

3. Application for.

Appointment—Registry of issue.]—An appointment for examination for discovery must be taken out in the registry of the county in which the party to be examined resides. *Sutor* v. *McLane*, (1919) 27 B.C.R. 480.

4. Time for.

Time for.]—Until the defence has been delivered the defendant is not entitled to examine for discovery without leave. *Mitchell* v. *Renfrew*, (1918), 1 W.W.R. 942.

5. Scope of.

1. Refusal to answer questions.] — A. brought action against M. for rescission of a contract for the sale of shares in a lumber company on the ground of fraudulent misrepresentation as to possession by the company of certain valuable timber limits, when in fact the company had already passed a resolution approving of an exchange of these limits for certain lands of a second company with which it had agreed to make the exchange. In order to establish a fraudulent conspiracy between M. and others to relieve the company of its assets by means of the exchange, M. on his examination for discovery, was asked, "You (i.e., the second company in which he was largely interested) still own them, yes, but first of all you raised $200,000 on them didn't you?":—Held, that upon the examination of M. for discovery he should not be asked questions as to what the purchasing company did with the alienated property, after alienation. *Appleton* v. *Moore*, (1915) 22 B.C.R. 28; 23 D.L.R. 673; 32 W.L.R. 114; 8 W.W.R. 1286.

2. Source of information.]—In an action for libel the plaintiff sought to compel the defendant to disclose, on discovery, the source of his information relative to the contents of the paper writing complained of:—Held, that if there are grounds for the suggestion that the questions are not put bona fide for the purpose of the pending action but for use in an action brought by the plaintiff against another, to compel an answer would be oppressive and illegitimate and the application should be refused. *de Schelking* v. *Cromie*, (1918) 26 B.C.R. 345; (1918) 3 W.W.R. 1038.

3. Reasonable and probable cause—Public policy.]—The test as to whether questions should be answered on the ground of public policy is whether they are calculated to discourage the giving of information leading to the investigation and punishment of crime; if, therefore, the inquiries are directed to persons and the information is from persons, the rule against disclosing its sources must prevail, but the rule is inapplicable when the questions are directed to witness's enquiry into circumstances and his information obtained by personal inspection of things the disclosure of which does not tend to hamper the administration of justice. *Peterson* v. *Vancouver Gas Company, Limited Liability, and Keillor*, (1919) 28 B.C.R. 107; 61 D.L.R. 98.

6. Use of, at Trial.

Connected passages.]—Where on the trial of an action a party has put in certain parts from the examination of the opposite party the judge may, either ex mero motu or at the request of counsel, look at the whole of the examination to see if he can form the "opinion that any other part of it is so connected with the part to be used that the last mentioned part ought not to be used without such other part" and in so doing the object sought to be accomplished by putting in the original part must be taken into consideration as one of the elements in the forming of that opinion. The part to be put in by the judge is not merely explanatory but is "connected" with the original part in such a way that it would be contrary to justice to disregard it. *Canary* v. *Vested Estates, Limited*, (1930) 43 B.C.R. 365; (1931) 1 D.L.R. 997.

XI. Venue.

A. In Particular Actions.

1. Place of trial.]—Where the statement of claim does not mention the place of trial, the setting down of the case for trial and notice thereof will, on the application of the defendant, be struck out. *Thompson* v. *Herring*, (1915) 22 B.C.R. 179.

2. Discretion of judge.]—The Court of Appeal will not interfere with an order of a judge changing the place of trial of an

action unless satisfied that he was clearly wrong. *Abbott* v. *Western Canadian Ranching Co.*, (1919) 27 B.C.R. 241.

B. Change of.

1. Preponderance of convenience.]—Although the plaintiff has the selection in the first instance of the place of trial, if the preponderance of convenience and expense lies in favour of another place the venue may on application be changed. *Caine* v. *Corporation of Surrey*, (1918) 26 B.C.R. 338; (1919) 1 W.W.R. 12.

2. Preponderance of convenience.]—Although there may be preponderance of convenience in favour of the defendant, nothing short of a great preponderance and expense would justify the taking from the plaintiff the right that the law gives him to select the place of trial. The onus is on the defendant to displace this right. *Armstrong* v. *Corporation of City of Revelstoke*, (1927) 38 B.C.R. 253; (1927) 2 D.L.R. 223; (1927) 2 W.W.R. 245.

3. After order fixing.]—A judge who makes an order for change of venue has no right to set aside that order. The Court of Appeal will not interfere with an order of a judge in Chambers changing the venue unless he has proceeded on a wrong principle or has done an injustice to the party opposing the application. *Jacobson Goldberg Co.* v. *Livingstone*, (1920) 28 B.C.R. 35.

4. Fair trial.]—An action was brought for damages for libelous statements published at the instigation of the defendant in Vancouver in January, 1924, in a pamphlet entitled "The Searchlight" under the heading "A petition for Royal Commission." The writ was issued in Nanaimo and the defendant applied for change of venue. Nine affidavits were read in support of the application, all expressing the belief that a fair trial could not be had in Nanaimo because the plaintiff was returned at the previous Provincial election for Nanaimo; that he was a minister of the Crown; a resident of Nanaimo for many years; was popular amongst the people of the town and was a man of great influence in this comparatively small place:—Held, that the affidavits submitted by the defendant were mere expressions of opinion founded on the plaintiff's popularity, that he is a minister of the Crown representing the constituency and of considerable influence. In order to found a case for change of venue facts must be set out, not opinions. The judge below not only founded his order upon insufficient evidence but proceeded on a wrong principle in accepting opinion evidence supported as above without any act of misuse of his popularity or influence, and the venue should be restored to Nanaimo. *Sloan* v. *McRae*, (1926) 37 B.C.R. 464; (1926) 4 D.L.R. 450; (1926) 3 W.W.R. 136.

XII. TRIAL.

A. Notice of.

1. Reasonable time.]—The plaintiff gave notice of trial on the 3rd of April, fixing the date for the trial in the following September. On motion to set aside the notice:—Held, that such a long notice was not intended by the rules, and the plaintiff should proceed to trial in June. *Hayes* v. *Howard*, (1919) 27 B.C.R. 167.

2. Application to dismiss for want of prosecution — Notice given pending.]—The pleadings were closed in the action on the 7th of November, 1929. At the instance of the defendant, a summons was issued on the 26th of May, 1930, for an order for dismissal of the action for want of prosecution and on the 28th of May the plaintiff served notice of trial for the 15th of September. An order was made that the plaintiff give notice of trial for a date not later than the 24th of June, 1930:—Held, on appeal, that the plaintiffs giving notice of trial in the interval between service of notice and the hearing of the motion did not interfere with the learned judge's discretion which was properly exercised and the appeal should be dismissed. *W. Thomson & Company* v. *British America Assurance Company and Pacific Shipping Company, Limited*, (1930) 43 B.C.R. 194.

B. Conduct of.

1. Charge of jury.]—In order to comply with sec. 55 of the Supreme Court Act in an action for damages for negligence, the judge in his charge is bound to direct the jury as to the law and to direct their attention how that law is to be applied to the facts before them. *Jackson* v. *B.C. Electric Ry. Co., Ltd.*, (1917) 24 B.C.R. 484; 38 D.L.R. 145; (1917) 3 W.W.R. 1046.

2. Cross-examination.]—At the trial of a civil action (except divorce cases) separate counsel should not be heard where the parties have not pleaded separately; where they have pleaded separately but there is no substantial difference in tneir interests the judge may refuse to allow separate representation or cross-examination of co-defendant's witnesses. The trial judge is allowed wide discretion and regulation at the trial. He may allow counsel to cross-examine his own witnesses in a proper case. *Millar* v. *B.C. Rapid Transit Co.*, (1926) 36 B.C.R. 345; (1926) 1 D.L.R. 1171; (1926) 1 W.W.R. 543.

3. Exclusion of witnesses.] — Where there are two plaintiffs and both are witnesses the defendant has not the right to insist that while one of them is giving his testimony the other shall be excluded. *McIntyre* v. *McIntyre*, (1925) 2 W.W.R. 581.

XIII. REFERENCE.

1. Jurisdiction.]—The plaintiff obtained an interim injunction, giving the usual undertaking as to damages. Later he made a settlement with one of the two defendants, and, assuming that the defendants were partners, he discontinued the action. The other defendant, contending there was no partnership, and that his co-defendant had no power to settle the action for him, applied for an order declaring the plaintiff liable to him in damages resulting from the injunction, and that a reference be ordered to ascertain the amount of damages. An order was made directing an inquiry before the registrar to ascertain whether the defendants were partners and to report what damages, if any, were payable by the plaintiff to the said defendant:—Held, on appeal, that the question of whether a partnership exists is a mixed question of law and fact, and it was the duty of the trial judge first to decide whether the defendants were partners and then, if necessary, direct an inquiry as to the quantum of damages. *John Hing Company* v. *Sit Way and Chew Chock*, (1917) 25 B.C.R. 153; (1918) 1 W.W.R. 978.

2. Review of registrar's certificate.]—Where the Court directs a reference to the registrar to ascertain the amount of damages, judgment to be entered for the amount of the damages so ascertained, a judge in Chambers has jurisdiction to review the registrar's certificate fixing the damages. *Horsnail* v. *Shute*, (1921) 30 B.C.R. 189; 62 D.L.R. 199; (1921) 3 W.W.R. 270.

3. Damages.]—When damages are to be based on anticipated profits, particularly those of a speculative and uncertain undertaking such as that of logging with all its vicissitudes of changing markets, fire risks, labour troubles and changing costs of labour and equipment, the safer and better way of arriving at the result is upon evidence of persons skilled and experienced in the trade and on the sale and disposal of timber berths as to what, at the time of breach, was the market value of the contract, or if the contractors had special skill or facilities for carrying on the works what it was worth to them. The registrar's report as to damages in such a case should not be disturbed unless shewn to have been come to upon wrong principles or that it otherwise appears to be clearly wrong. The registrar upon a reference to ascertain what damages have been sustained by reason of the wrongful termination of a contract is not bound to give reasons for his findings and an application to send back the report for further consideration on the ground that it did not set out reasons for his findings was refused. *Clausen* v. *Canada Timber Lands Co., Ltd.* (1925) 35 B.C.R. 461.

XIV. MOTIONS FOR JUDGMENT.

Judgment — Admissions in defence — Order XXXII., r. 6.]—On application for judgment upon admissions in the defence under Order XXXII., r. 6, the defendant Company (a foreign corporation licensed to carry on business in British Columbia) set up that the money sued for was claimed by third parties under a foreign jurisdiction. An order was made directing the defendant Company to pay the amount claimed into Court, but that the said moneys be not paid out unless notice of the application therefor be served on the foreign claimants, the application for judgment to be finally disposed of on that application:—Held, on appeal, affirming the decision of HUNTER, C.J.B.C. that the order was properly made in the circumstances. *Lockwood* v. *National Surety Company*, (1915) 21 B.C.R. 249.

XV. CHAMBERS, MATTERS DISPOSABLE IN.

Custody of infant.]—An application for an order as to the custody of an infant should be by notice of motion. *In re Befolchi*, (1919) 27 B.C.R. 460; (1920) 1 W.W.R. 248.

XVI. INTERPLEADER.

1. Affidavit by claimant.]—On an application for interpleader the affidavit in claimant's support should be made by herself unless it is impracticable owing to illness, absence in a foreign country or inaccessibility. *Nichol* v. *Sugarman*, (1928) 40 B.C.R. 119; (1928) 3 D.L.R. 292.

2. Pleadings.]—The Court should not direct pleadings to be delivered after the usual and proper interpleader issue has been drawn up and delivered in accordance with the established practice. *Sutton* v. *Smith*, (1927) 38 B.C.R. 455; (1927) 3 D.L.R. 1008; (1927) 2 W.W.R. 481.

XVII. ORIGINATING SUMMONS.

Return day.]—The return day of an originating summons may be fixed in Chambers. *Canadian Pacific Ry. Co.* v. *Hall*; (1916) 10 W.W.R. 11.

XVIII. NOTICE OF MOTION.

1. Notice of motion.] — A motion for judgment must be by way of notice of motion to the Court in the form set out in the Appendix to the Supreme Court Rules. *Barker* v. *Jung*, (1918) 26 B.C.R. 352; (1919) 1 W.W.R. 13.

2. Special leave.]—When the time for return of a motion after service is curtailed by special leave, an indorsement on the notice must contain both the date upon which leave is given and upon which the motion is made returnable. *Blue Funnel Motor Line Co.* v. *City of Vancouver*, (1918) 26 B.C.R. 388; (1918) 3 W.W.R. 473.

XIX. SUMMONS.

1. Short leave.]—The indorsement of short leave for service of a Chamber summons must shew the time and date within which the summons must be served. *Atma Ram* v. *Bhana*, (1919) 27 B.C.R. 403.

2. Presiding judge.]—A summons should be made returnable before the presiding judge in Chambers and should not mention the name of any particular judge. *Keane* v. *Sellon*, (1920) 28 B.C.R. 67; (1920) 2 W.W.R. 117.

3. Summons returnable in less than one day.]—A summons served less than one clear day before the return thereof is not a nullity, but is merely affected with an irregularity which is waived by an appearance on the application at the time fixed by the defective summons. *Philip Bond & Company, Limited* v. *Conkey*, (1921) 29 B.C.R. 240; (1921) 1 W.W.R. 758.

XX. ORDERS.

1. Re-hearing by second judge.] — Where a judge of the Supreme Court makes an order refusing an application, the remedy is, in general, by appeal, unless leave be given to renew it. *Irving and Morris* v. *Bucke*, (1915) 21 B.C.R. 17.

2. Settlement of order.]—If the settlement of an order is referred by the registrar to the judge who made it, application must be made to the registry office to set the same down on the Chamber list with payment of the usual fees. *Van Hemelryck* v. *New Westminster Construction Co.*, (1919) 27 B.C.R. 334; (1919) 2 W.W.R. 882.

3. Order effective when made.]—Orders are effective from the day they are made without being drawn up or entered. *Victoria (B.C.) Land Investment Trust, Ltd.* v. *White*, (1920) 28 B.C.R. 30.

4. Order after addition of party.]—A judge who has made a Court order may reopen and vary it on the application of a person who is added as a party to the action after the order was made. *Marshall* v. *Canadian Pacific Lumber Co.*, (1922) 31 B.C.R. 363; 69 D.L.R. 521; (1922) 3 W.W.R. 1105.

See (1922) 63 S.C.R. 352; 65 D.L.R. 461; (1923) 2 D.L.R. 356.

5. Jurisdiction to amend.]—A judge may vary his own order after it has been drawn and entered in order to make it conform with the judgment as pronounced. *Newcomb* v. *Green*, (1923) 32 B.C.R. 395.

6. Amendment—Slip rule.]—Upon an order for a jury being granted the order was drawn up with the word "common" inserted before the word "jury." Subsequently the plaintiff applied to amend the order by striking out the word "common" under the "slip" rule:—Held, that as counsel on the first application directed their submissions solely to the question of jury or no jury the "slip" rule applied and the

amendment should be granted. *Bradshaw* v. *British Columbia Rapid Transit Company, Limited.* (*No. 3*), (1926) 38 B.C.R. 64; (1927) 1 D.L.R. 599.

XXI. ACCOUNTS AND INQUIRIES.

Confirmation not necessary.] — Under the terms of Order LV., r. 65, it is unnecessary to obtain an order confirming the certificate of the district registrar verifying the accounts of the receiver and manager of a company in a debenture-holder's action. *Milne* v. *Central Okanagan Lands, Ltd.*, (1919) 26 B.C.R. 575; (1919) 1 W.W.R. 720.

XXII. PRESERVATION AND INSPECTION OF PROPERTY.

Samples for use at trial.]—On appeal from the refusal of an application to take samples of the hull of a sunken dry dock under marginal rule 659 for use on the trial in an action for damages for loss of the dry dock:—Held, that the question is largely in the discretion of the judge below and that discretion was rightly exercised. If such a course is permissible under the "sample" rule it should be ordered with great caution; an inspection and survey is preferable. *Seattle Construction and Dry Dock Company* v. *Grant Smith & Co. and McDonnell, Limited*, (1916) 22 B.C.R. 433; 26 D.L.R. 671; 33 W.L.R. 981; 10 W.W.R. 49.

XXIII. STAY OF PROCEEDINGS.

1. Garnishee order.]—An order for stay of execution pending appeal is not a ground for granting an order setting aside a previous attachment of a debt. The Court below has no jurisdiction to discharge a garnishee order obtained after judgment, upon the ground that a subsequent order has been granted for a stay of execution pending appeal from the judgment, even if the full amount of the judgment and costs has been paid into Court as security. *J. A. McIlwee & Sons* v. *Foley Bros., Welch & Stewart*, (1917) 24 B.C.R. 1.

2. Pending appeal from interlocutory order.]—If, while an action is pending, a question arises which may affect the course of the action and is the subject of an appeal, the action should be stayed until the question has been dealt with by the Court of Appeal. *Esquimalt & Nanaimo Ry. Co.* v. *Dunlop*, (1918) 25 B.C.R. 502; (1918) 3 W.W.R. 828.

3. Pending taking accounts.] — In an action in which there were two distinct issues, one being a claim for damages and the other for the taking of accounts between the parties, the plaintiff recovered $1,500 damages with costs and a reference was ordered for the taking of accounts. On the issue of execution the defendants applied for and obtained a stay subject to furnishing a bond for $1,500 as security for payment of the amount due the plaintiff after the accounts were taken:—Held, on appeal, that as the defendants filed an account on the trial shewing that the balance they claimed in their favour as against the plaintiff was $604, the stay should be removed except as to this sum. *Scuilli* v. *Planta and A. E. Planta, Limited*, (1918) 39 B.C.R. 450.

4. Pending criminal proceedings.]—The Court will not stay proceedings in a civil action against a company until criminal proceedings against certain members of that company are disposed of. *MacKee* v. *Solloway Mills & Co., Ltd.*, (1931) 44 B.C.R. 401; (1931) 4 D.L.R. 417; (1931) 2 W.W.R. 926.

5. Action upon foreign judgment upon which appeal is taken.]—The defendants obtained judgment in an action in the State of Oregon and then sued upon that judgment and obtained judgment in British Columbia where certain mining properties in dispute are situate. Later the plaintiffs brought action in the State of Oregon to set aside the judgment obtained there on the ground that it was obtained through fraud practised on the Court, and obtained judgment in their favour. The defendants appealed from this judgment to the Supreme Court of Oregon and proceedings in the Court below were stayed pending the disposition of the appeal. The plaintiffs also brought action in British Columbia to set aside the judgment obtained here that was based on the original Oregon judgment on the ground of fraud and the defendants then applied for a stay of proceedings in the action pending the result of the appeal in the State of Oregon:—Held, that there should be a stay of the action here until the Supreme Court of Oregon has decided whether or not a fraud was practised on their Circuit Court in order to obtain the judgment which is attacked. *May and May* v. *Roberts et al.* (*No. 2*), (1929) 41 B.C.R. 185; (1929) 3 D.L.R. 370; (1929) 2 W.W.R. 449.

XXIV. EXECUTION, DISCOVERY IN AID OF.

1. Order for examination — Return of nulla bona.]—An order for the examination of a judgment debtor will not be made until execution issues and a return of nulla bona is made. *In re Prudential Life Insurance Co.*, (1919) 27 B.C.R. 402; (1919) 3 W.W.R. 428.

2. Unsatisfactory answers — Committal.]—After examination of a judgment debtor before the registrar the Court of Appeal is in the same position as the judge of the Court below to decide whether the judgment debtor has acted in such a manner as to warrant his commitment to prison. *Cutler* v. *Chiffey*, (1920) 29 B.C.R. 120; (1921) 1 W.W.R. 686.

XXV. JUDGMENT, INTEREST ON.

1. Interest on costs.] — The plaintiff recovered judgment which was affirmed by the Court of Appeal, but reversed by the Supreme Court of Canada. The plaintiff's costs of the trial and before the Court of Appeal had been paid by the defendant. The Supreme Court ordered that these costs be refunded but made no mention of interest on the sums so paid:—Held, on appeal, that it is the duty of the Courts of the Province to enforce the judgment of the Supreme Court of Canada as entered. As no mention of interest is made in the judgment, and there is no statutory provision for the same, interest will not be charged. *Royal Bank of Canada* v. *Whieldon & Ball*, (1916) 23 B.C.R. 436; (1917) 2 W.W.R. 58.

2. From what date.]—A judgment when drawn up should be dated as of the date when the decision was given and interest at the statutory rate runs from that date. *McKinnon* v. *Campbell River Lumber Co. (No. 2)*, (1922) 31 B.C.R. 18; 66 D.L.R. 266; (1922) 2 W.W.R. 556.

See 64 S.C.R. 396; (1922) 3 W.W.R. 1069; (1923) 1 D.L.R. 29.

3. Marine insurance — On amount recovered.]—When an assured succeeds in an action under a policy of marine insurance he may be allowed interest under 3 and 4 William IV., cap. 42, on the amount recovered even when the action is tried by a jury. *Pacific Coast Coal Freighters Ltd. & Westchester Fire Insurance Co. of New York. Pacific Coast Coal Freighters, Ltd.* v. *Western Assurance Co.*, (1926) 38 B.C.R. 20; (1926) 4 D.L.R. 963; (1926) 3 W.W.R. 356; (1927) 38 B.C.R. 315; (1927) 2 D.L.R. 590; (1927) 1 W.W.R. 878.

XXVI. TIME.

1. Month's notice to proceed.]—On an application to consolidate two actions where it appears that no proceeding has been taken in the first action for one year, the notice required under marginal rule 973 must be given. *Buscombe Securities Co.* v. *Hori Windebank and Quatsino Trading Co.*, (1918) 26 B.C.R. 323; (1918) 3 W.W.R. 897.

See (1919) 27 B.C.R. 507; 48 D.L.R. 301; (1919) 3 W.W.R. 485.

2. Notice must be served.]—In any cause or matter in which there has been no proceeding for one year, notice by the party desiring to proceed under marginal rule 973 must be not only filed but served on the opposite party. *Buscombe Securities Co.* v. *Hori Windebank and Quatsino Trading Co.*, (1919) 26 B.C.R. 486.

3. Notice by letter.]—Delivery of a letter by a solicitor stating that he would get a certain case under way and bring it to trial, is sufficient notice under marginal rule 973 that the action is to proceed. *Bird* v. *Greenhow*, (1919) 27 B.C.R. 160; (1919) 2 W.W.R. 320.

4. Statement of claim — Time for delivery of.]—Where twenty-one days have elapsed after notice of appearance, leave must be obtained for the filing of the statement of claim. *Nelson* v. *Balderson*, (1917) 3 W.W.R. 448.

XXVII. IRREGULARITIES.

1. Application to set aside.]—On an application to set aside proceedings for irregularity the objections should be stated in the summons. *Victoria (B.C.) Land Investment Trust, Ltd.* v. *White*, (1920), 28 B.C.R. 30.

2. Evidence admitted on motion for judgment after verdict of jury—Capacity of plaintiff.]—In an action for damages by the father of a girl killed in a collision between an automobile and tram-car, the defendant admitted negligence, and after the jury assessed the damage and was discharged, on motion for judgment counsel

for the defence moved for dismissal on the ground that the father of deceased was not shewn to be her executor:—Held, that as the defendant admits negligence and the trend of the trial turned on the question of the reasonable probability of a pecuniary benefit to the parents during the girl's life, and the quantum of damages upon which all available evidence was adduced and placed before the jury which could not be affected in any way by evidence as to whether or not there was an executor, evidence of the plaintiff as to executorship (which was to the effect that there was no executor), should be allowed in. *Wood* v. *British Columbia Electric Railway Company, Limited*, (1925) 34 B.C.R. 527; (1925) 1 D.L.R. 1093.

See ADMIRALTY.

See APPEAL.

See ARBITRATION.

See BANKRUPTCY.

See CERTIORARI.

See COMPANIES.

See COSTS.

See COUNTY COURT PRACTICE.

See COURTS.

See CRIMINAL LAW.

See DIVORCE.

See EVIDENCE.

See EXECUTION.

See EXECUTORS AND ADMINISTRATORS.

See GARNISHMENT.

See HABEAS CORPUS.

See INJUNCTIONS.

See INTOXICATING LIQUORS.

See JUDGMENTS AND ORDERS.

See JURY.

See MANDAMUS.

See NEW TRIAL.

See PLEADINGS.

PRESCRIPTION.

See LIMITATION OF ACTIONS.

See POSSESSION.

PRINCIPAL AND AGENT.

I. FORMATION OF RELATION, 896.
II. RELATIONS BETWEEN PRINCIPAL AND AGENT, 899.
A. Rights of principal against agent, 899.
1. In general, 899.
2. As to care and diligence, 902.
3. Disclosure by agent, 902.
B. Rights of agent against principal, 902.
1. Remuneration, 902.
2. Injunction, 911.
III. RELATIONS BETWEEN PRINCIPAL AND THIRD PERSONS, 911.
A. In general, 911.
B. Holding out, 914.
C. Liability for torts committed by agents, 915.
D. Liability for fraud of agent, 915.
IV. RELATIONS BETWEEN AGENT AND THIRD PERSONS, 916.
A. Rights of agent, 916.
B. Liabilities of agent, 916.
1. On contracts, 916.
2. On warranty of authority, 917.
V. DURATION AND TERMINATION OF RELATION, 917.

I. FORMATION OF RELATION.

1. Power of attorney.]—A power of attorney authorizing the attorney to "draw, accept, make, sign, indorse, negotiate, pledge, retire, pay or satisfy any bills of exchange, promissory notes, cheques, drafts, orders for payment on delivery of money, securities, goods, warehouse receipts," etc., confers no general power to borrow money. The power to borrow money in the capacity of partner cannot be validly exercised where the transaction appears to be foreign to the firm's business. *Tai Sing Company* v. *Chim Cam et al.*, (1916) 23 B.C.R. 8; 27 D.L.R. 528; 10 W.W.R. 460.

2. Sole agent.]—A principal who contracts to give an exclusive right of sale of a certain article within a specified area will not, where there is no express negative stipulation, be enjoined from giving others the right to sell within such area. *W. L. Macdonald & Company* v. *Casein, Limited*, (1917) 24 B.C.R. 218; 35 D.L.R. 443; (1917) 2 W.W.R. 1132.

3. Authority to exchange land and grant mortgage.]——An agent under power of attorney inter alia "to sell and absolutely dispose of or mortgage real estate" entered

into an agreement to exchange certain lands, shares, and $6,000 in cash for two town lots. The transaction was completed by delivery of documents with the exception of the cash payment. Subsequently the vendor of the lots agreed to accept in lieu of the cash payment the sum of $1,000 in cash and a mortgage for $5,000 secured upon the two lots conveyed by the vendor:—Held, that there were two transactions, the mortgage having been accepted under the latter and distinct agreement and the agent had power under his power of attorney to execute the mortgage which could be enforced by foreclosure. *Dinsmore* v. *Philip*, (1918) 26 B.C.R. 123; (1918) 3 W.W.R. 457.

4. Seal.]—Authority to execute an instrument which must be under seal must itself be given by instrument under seal unless the maker is personally present and asks someone to execute the instrument for him. *Ibid.*

See McKee v. *Philip*, (1916) 55 S.C.R. 286; 38 D.L.R. 731; (1917) 1 W.W.R. 690.

5. Mortgage — Payment of principal and interest—Agent.]—The plaintiff, holding a mortgage for $1,000, called at the mortgaged premises shortly before principal and interest were due, when he was told by one of the mortgagors that the interest and part of the principal would be paid in a few days and the balance in the fall of the year. The mortgagor then made the suggestion that the payment should be made to one S. to which the mortgagee agreed. The interest and part of the principal were paid shortly after to S. who, after deducting his commission, paid the balance over to the mortgagee. In the autumn the balance due on the mortgage was paid in two payments to S. without further authorization from the mortgagee and a few days later S. absconded without paying the mortgagee:—Held, that as it was at the mortgagor's suggestion that he should pay S. the money, S. was his nominee and if his nominee did not pay it over to the mortgagee the mortgagor is responsible and must pay the mortgagee the balance that he had not received. *Corsini* v. *Palm et al.*, (1925) 35 B.C.R. 417.

See Thom v. *Walker, infra*, p. 914.

6. By ratification.] — In order that an act shall constitute a binding ratification of unauthorized conduct it must be done with full knowledge of the facts and amount to an adoption of the agent's unauthorized act done in the principal's behalf. The loss through misappropriation of money deposited with a trust company by a purchaser of land pending the approval of the title to land and the conveyance thereof must fall upon the purchaser. *Hayes* v. *Pacific Great Eastern Ry. Co.*, (1916) 10 W.W.R. 831; 34 W.L.R. 819.

7. Receiver.] — A receiver is not the agent of any party but is an officer of the Court; consequently one who secures the appointment of a receiver is not liable for his acts. *Bottoms* v. *Pacific Northwest Lumber Co. et al.*, (1929) 4 D.L.R. 415.

8. By circumstances.]—An invitation to do an act which if refused will probably result in material loss to the person invited to do it, to the knowledge of the other person, may in some circumstances amount to a command and therefore if acted on will be sufficient in law to create the relation of principal and agent. *Orchardson* v. *Dominion Bank*, (1923) 32 B.C.R. 348 at p. 352; (1923) 2 W.W.R. 958 at p. 961.

9. Individual contract with common party — Reciprocal obligations—Privity.] —The defendant entered into a sales contract with the Studebaker Company for the sale of automobiles within a specified area, the contract containing the following clause: "If a dealer sells a Studebaker automobile outside of his territory, or if a Studebaker automobile sold by dealer, shall be taken from dealer's territory by purchaser within 90 days from the date of delivery, and remains in the other dealer's territory for a period of four months of more, dealer in either event shall pay one-half of dealer's discount profit to the Studebaker dealer into whose territory the automobile is taken." Shortly after the plaintiff entered into a similar contract with the Studebaker Company covering an adjoining area to that of the defendant and while so employed the defendant sold a car to a firm having its place of business within the plaintiff's area and into which area the car was immediately taken:—Held, that the Company may be regarded as the agent of the several dealers to bring about privity of contract between them, and the plaintiff was entitled to bring action against the defendant for recovery of half of the commission paid to him on the sale of the car. *McCannell* v. *Mabee Maclaren Motors Ltd.*, (1926) 36 B.C.R. 369; (1926) 1 D.L.R. 282; (1926) 1 W.W.R. 353.

10. By ratification.] — To constitute a binding adoption or ratification of an act done without previous authority in the name of a supposed principal, it must be established that the principal unequivocally adopted the act after full knowledge of the

essential facts relating to the transaction, unless the circumstances warrant the clear inference that the principal was assuming all risk from the acts of the agent. The onus of proving such ratification rests upon the person alleging it, who must also prove full knowledge on the part of the principal. Ratification of an act may be expressed or implied. It must be intentional. By it the principal is bound because he intends to be bound. *Overn* v. *Strand*, (1931) S.C.R. 720; (1932) 1 D.L.R. 490.

II. Relations Between Principal and Agent.

A. *Rights of Principal Against Agent.*

1. In General.

1. Employee of agent.]—R. listed property for sale with the stenographer of G. knowing that she would thereby share the commission on a sale. The property was sold to S. a member of G.'s staff, at the listed price and on the same day was sold by S. to W. at an advance of $100. In an action by R. for the $100 as secret profit and the recovery of $90 he had paid as commission judgment was given in his favour for $100:—Held, on appeal, that the stenographer of G., and not G. was R.'s agent and that secret profits could not be recovered from G. *Roach* v. *Gray*, (1916) 22 B.C.R. 553; 27 D.L.R. 726; 10 W.W.R. 813.

2. Stock-broker.]—Stock-brokers bought wheat for the plaintiff on margin. On the first transaction the plaintiff signed a printed buying order, which provided that "it is further understood and agreed that on all marginal business the right is reserved to close the transactions when margins are running out without further notice," and on several subsequent transactions the notices confirming orders and containing these words were sent by the defendants to the plaintiff. The prices having fallen, the brokers notified the plaintiff that money was required to cover and if not paid before the opening of the market on the following day he would be sold out. On the following morning no money being paid the wheat was sold at a loss:—Held, on the facts, that the plaintiff must be taken to have assented to this condition and that it must be regarded as a term of the contract between him and the defendants; and the broker's decision that his margins had run so low that they were justified in selling him out was a reasonable one on the facts as they then existed. Held, further, that the brokers were not bound to give the plaintiff reasonable notice before selling but even if they were so bound, reasonable notice had, in fact, been given. *Patterson* v. *Branson, Brown & Co., Ltd.*, (1930) 43 B.C.R. 26; (1930) 4 D.L.R. 222; (1930) 2 W.W.R. 236.

3. Original certificate.] — An agent of the defendant Company advised the plaintiff to purchase Weymarn Petroleum stock. The plaintiff had no money but delivered the agent a certificate for 500 shares of Silver Cup (Hazelton) Mining Co. Ltd. with instructions to sell it at not less than 30 cents per share and then buy with the proceeds 100 shares of Weymarn Petroleum at $1.50 per share, the certificate to be returned to him in case the shares were not sold at the named price. The shares were at 28 cents on the market when delivered. The price never reached 30 cents but gradually diminished afterwards. On the plaintiff demanding the return of his certificate the defendant tendered him another certificate for the same number of shares in said stock which was refused. In an action for conversion, the defendant claimed that by local usage it could use the certificate for its own purposes which it did by selling the stock:—Held, that the arrangement between the plaintiff and the agent was that the certificate should not be parted with unless the shares were sold at the named price but should be kept and redelivered to the plaintiff. A local usage cannot displace an actual contract between the parties. The plaintiff is entitled to the market price of the stock at the time of conversion. *MacInnes* v. *Cartwright & Crickmore, Limited*, (1930) 43 B.C.R. 265; (1931) 1 D.L.R. 572; (1931) 1 W.W.R. 81; Affd. (1931) S.C.R. 425; (1931) 3 D.L.R. 693.

4. Power of attorney—Agents purchase from principal under.]—An assignment of a mortgage to himself by the donee of a power of attorney, without proof of acquiescence by the donor, does not establish a prima facie title, and the registrar of titles will be justified in refusing to receive such instrument for registration. A power of attorney to sell or assign a mortgage does not authorize the donee of the power to exercise that power in favour of himself. *Re Land Registry Act and Shaw*, (1915) 22 B.C.R. 116; 24 D.L.R. 429; 32 W.L.R 85; 8 W.W.R. 1270.

See Stahl v. *Miller*. *Infra*.

5. Stock-broker — Unauthorized sale.] —In assessing damages where stock-brokers were held liable to a customer for selling shares they held for him without his authority:—Held, that the date when the customer would have sold had he not been prevented by the brokers' prior sale, should be determined on the assumption that he would have done what a prudent person would do, and in this case the date is fixed when, after objecting to a statement of his account which shewed his shares were sold, the customer requested that they be placed to his credit as he wanted to sell them. He was allowed the difference between the low market price on that day and the price at which the brokers had previously sold. *Sunderland* v. *Solloway Mills & Co.*, (1930) 43 B.C.R. 297; (1930) 3 W.W.R. 641; (1931) 44 B.C.R. 241; (1931) 2 W.W.R. 393.

6. Stock-broker — Right of customer to claim specific shares—Bankruptcy.]—Where an agent is entrusted by his principal with money to buy shares, the money will be considered as trust funds in his hands and the principal has the same interest in the shares when bought as it had in the funds which were used to purchase them. On the bankruptcy of a stock-broker, where there are sufficient shares of any particular description to satisfy orders given by customers to the debtor, they should be delivered to such customers who have purchased shares of that description. If these customers have paid in full for their shares no trouble arises except that a splitting of the share certificates might become necessary to deliver certificates representing the proper number of shares. If, however, any of these customers have not paid in full, pursuant to their several orders for purchase, then, aside from any liability to make payment before being entitled to the certificates representing the shares so purchased, they should be required to make payment of the balance payable by them in respect of their purchase with interest as well as making payment of any other indebtedness by them to the debtor. If there are not sufficient certificates available of a particular description to satisfy the purchases by the different customers, there should be awarded to them "their pro rata parts" of the shares, so insufficient to satisfy the claims of the customers. *In re R. P. Clark & Company (Vancouver), Ltd.*, (1931) 44 B.C.R. 301; (1931) 3 W.W.R. 79; 13 C.B.R. 118.

2. As to Care and Diligence.

1. Management of property.] — An agent entrusted with the care and management of property is bound to use reasonable care in looking after the property and is liable for any loss that may occur unless he can shew that he has used such reasonable care. *Hyland* v. *Costerton*, (1927) 1 D.L.R. 1166; (1927) 1 W.W.R. 340.

2. Negligence.]—A broker and agent for a mortgagee is liable for negligence in failing to protect his principal's interest in respect of money which the agent invested for him in a mortgage on a building under construction without seeing that existing liens were discharged. *Lefevre* v. *Andrews*, (1931) 44 B.C.R. 516; (1932) 1 D.L.R. 805; (1932) 1 W.W.R. 122.

3. Disclosure by Agent.

Fiduciary relationship.]—A trustee for the sale of land is not competent to purchase the trust property as agent for a stranger. If the principal repudiates the purchase as soon as the facts come to his knowledge, he is entitled to rescission of the contract. *Stahl* v. *Miller*, (1918) 56 S.C.R. 312; 40 D.L.R. 388; (1918) 2 W.W.R. 197.

B. Rights of Agent Against Principal.

1. Remuneration.

1. Sale of ship — Action for commission—Premature.]—An agent for the sale of a steamship having procured an agreement to be entered into between the owner and the proposed purchaser is not entitled to recover his commission on the sale where the agreement was conditional and the terms were never carried out and the moneys paid on account were paid by way of deposit to be returned in the event of the terms of the sale not being carried through. *Greer* v. *Godson (No. 1)*, (1918) 25 B.C.R. 229; 40 D.L.R. 218.

2. Payable out of purchase money.]—Where a contract provides that if a sale shall be effected though the intervention of one of the parties and carried to completion, the other party will safeguard his right to a commission to be paid out of purchase money, there is no obligation to pay the commission where the fund out of which the purchase money is to be paid does not come

into existence and no part of it is paid. *Thorndyke Realty Co. Inc.* v. *Lyall Shipbuilding Co. Ltd.*, (1921) 59 D.L.R. 490; (1921) 3 W.W.R. 333; Affg. (1920) 29 B.C.R. 376; 59 D.L.R. 490; (1921) 2 W.W.R. 244.

3. Joint agents.]—M. & D. and T. claimed that the Alberni Pacific Lumber Company (which subsequently dissolved) engaged them jointly to sell its assets and agreed to pay them jointly a commission. A sale was brought about through their efforts and M. & D. brought action for the commission. T. while not a party to the action, actively assisted in it and was examined for discovery as a party interested. Finding they could not obtain the evidence they required they filed a notice of discontinuance and the Alberni Pacific Lumber Company obtained judgment disposing of the action. The said company then dissolved and later M. & D. having found the evidence required to pursue their action, petitioned for an order under sec. 245 of the Companies Act declaring the dissolution of the Alberni Pacific Lumber Company void. The petition was refused and an appeal therefrom was dismissed. T. then on behalf of M. & D. and T. petitioned for an order to declare void the dissolution of the company alleging that they alone have a cause of action as joint claimants:—Held, that the rule that there is but one cause of action in the case of joint contractors applies and the judgment against two of the joint claimants is a bar to an action by the third. Where a person interested has had full notice and has had the opportunity of taking part in the suit, he will be bound by the decision. *Thomas* v. *Lawson and Gyles*, (1927) 39 B.C.R. 1; (1927) 3 D.L.R. 1126; (1927) 2 W.W.R. 662.

4. Effective cause.]—The plaintiff having assisted the defendant in the reconstruction of a ship, the defendant promised him a commission if he procured a purchaser. The plaintiff employed a sub-agent who negotiated with another broker, and through him the matter was passed on through four other brokerage firms. After a lapse of about nine months a broker to whom the matter was last mentioned came to the defendant and made an arrangement directly with him, resulting in a purchaser being obtained. The plaintiff continued his services as a broker, with the acquiescence of the defendant, up to the time of the sale, and also materially assisted in procuring the Government's consent to a transfer of the ship to a foreign registry:—Held, that the plaintiff found the purchaser and continued to assist at the request of the defendant up to the time of the sale on the implied promise of remuneration on the basis of his original employment. *Greer* v. *Godson (No. 2)*, (1920) 28 B.C.R. 175; 52 D.L.R. 374; (1920) 2 W.W.R. 217; 60 S.C.R. 653; 56 D.L.R. 696; (1921) 2 W.W.R. 209.

5. Sale of land.]—An agent claiming commission on a sale of land must shew clearly that he had his principal's authority to bring about the sale. *Kennedy* v. *Victory Land & Timber Co.*, (1922) 3 W.W.R. 145; 68 D.L.R. 201.

6. Sale of mining property—Effective cause.]—If the relation of buyer and seller is really brought about by the act of the agent, he is entitled to a commission although the actual sale has not been effected by him, but he must shew that some act of his was the causa causans or the efficient cause of the sale. *Bunting* v. *Hovland and Watkins*, (1924) 33 B.C.R. 291.

7. Effective cause — Principal's ignorance of.]—Where the agent has been the effective cause of a sale the fact that the owner had proceeded with his negotiations with the purchaser in ignorance of the fact that the agent was instrumental in bringing the purchaser to him, was not sufficient to deprive the agent of his right to commission. *Graves* v. *McLean*, (1931) 2 W.W.R. 895.

8. Effective cause.]—An agent is not entitled to a commission unless he was the effective cause of the sale upon which he is claiming commission. *Trenwith* v. *International Harvester Co., Ltd.*, (1928) 2 D.L.R. 121.

9. Procuring loan.]—The plaintiff, a solicitor, was engaged by the defendant company to visit Montreal and assist in negotiations for sale of the defendant's assets. While there he was instructed to withdraw from these negotiations and endeavour to procure a loan to enable the defendant to undertake the construction of four steel ships. The plaintiff arranged a loan for the purpose and stated to the defendant that he would charge a commission thereon. The defendant's manager without expressly acquiescing instructed the plaintiff to proceed. The defendant subsequently withdrew from the shipbuilding contract without the plaintiff's consent and the money arranged for was not borrowed:—Held, that assuming the defendant's contention to be correct that the payment of commission was contingent upon the ship-

building contract being carried out, the plaintiff having performed his part in obtaining the loan, and being in no way responsible for the defendant's failure to proceed, was entitled to his commission. *Whiteside* v. *Wallace Shipyards, Limited,* (1919) 27 B.C.R. 40; 45 D.L.R. 434.

10. Sale of timber — Special employment.]—The articles of association of a company owning timber lands contained a provision that the property should not be sold for less than $640,000 without the consent of the shareholders. The managing director of the company offered the plaintiff a commission of $35,000 if he should bring about the sale of the property for $685,000. The plaintiff endeavoured to arrange such a sale introducing to the managing director one of the eventual purchasers. A sale was eventually arranged through other agents, the purchase price being based upon board measurement to be paid as the timber was removed with a final payment of $25,000 when logging was completed. The shareholders gave the required assent to the sale and the payment of a commission to the agents who brought about the transaction, but appeared to have no knowledge of the plaintiff's arrangement with the managing director:—Held, that the contract with the plaintiff was one of special employment and the eventual sale was not within the contract, but the managing director in view of the provision in the articles of association had no authority to enter into a contract of general employment and in order to claim commission the plaintiff was bound to see that recognition by the company of his employment had been obtained and this could not be implied under the circumstances. *Roray & Yeaman* v. *Nimpkish Lake Logging Co., Ltd.,* (1919) 27 B.C.R. 64; 47 D.L.R. 395; (1919) 2 W.W.R. 105.

11. Liability of principal after judgment against co-owner.] — R., living in British Columbia, and H., living in New York, owned all the shares in a mining company that they contemplated selling. R. wrote the plaintiff "referring to our conversation about your having a purchaser for the Hidden Creek Copper property. I will give you a commission providing your purchaser takes up the property, of not to exceed $10,000," etc., and later H. write R., "referring to our conversation about the sale of the Hidden Creek Copper Company, B.C., I am agreeable to and authorize you to pay a commission of $10,000 to R. P. Williams or others upon sale of the same," and a copy of this letter was sent by R. to the plaintiff. The plaintiff procured a purchaser and a sale was made. The plaintiff then, upon the advice of R., brought action against H. and recovered judgment for $10,000, but failed in an attempt to enforce same in the State of New York. The plaintiff then brought action against R. to recover $10,000:—Held, that in view of the correspondence, the proper construction to be placed on the letter from H. to R. is not that it authorized R. as the agent of H. to enter into an executory agreement with the plaintiff to pay him a commission, but that it merely expressed the consent of H. to the payment to plaintiff of the sum mentioned "upon a sale" of the property. The contract to pay commission was the contract of R., and there was no question of agency or joint liability, the attempt of the plaintiff to enforce payment from H. not being a ground for depriving him of his rights against R. *Williams* v. *Rodgers,* (1920) 60 S.C.R. 664; 56 D.L.R. 691; (1921) 2 W.W.R. 185; Affg. (1920) 28 B.C.R. 161; (1920) 2 W.W.R. 944.

12. Sale effected through another agent at lower price.]—The defendant listed a property with the plaintiffs, real estate brokers, with instructions to find a purchaser at the price of $5,000. The plaintiffs advertised the sale and interested prospective purchasers to whom they shewed the property. A month later the defendant listed the property with a rival broker at $4,750, the second broker having his offices across the hall from the plaintiffs' offices in the same building. The plaintiffs interested S. in the property and brought her to view it. Shortly after S. went to the plaintiffs' offices with a view to purchasing and when about to enter the offices saw a picture of the property in the window across the hall marked for sale at $4,750. She went into the plaintiffs' offices, discussed the sale but went out without making the purchase, crossed the hall and purchased the property from the second broker at $4,750: —Held, that there was a general authority to obtain a purchaser, that the plaintiffs obtained the purchaser whose offer the owner accepted at a lower price, and they were entitled to their commission. *Turner Meakin & Co.* v. *Field,* (1923) 33 B.C.R. 56.

13. Negotiation of loan — Proceeds applied to another project.]—Where an agent is employed on a commission basis to obtain a loan for a certain project, and a loan is obtained but for an entirely different project, the agent is not entitled to com-

mission. *Thomas* v. *Gale*, (1927) S.C.R. 314; (1927) 1 D.L.R. 593.

14. General employment.]—Upon the employment of an agent to sell a property the price being named, the question of whether it was to be a hard and fast price the obtaining of which from a purchaser was intended by the parties to be a condition of the agent's right to a commission is an inference of fact to be drawn from the evidence. *Prentice* v. *Merrick, Beech and Thomson*, (1917) 24 B.C.R. 432; 38 D.L.R. 388; (1917) 3 W.W.R. 1060.

15. Sale of timber — Special employment.]—At the solicitation of the plaintiff by wire for an option from the defendant on certain timber limits the defendant replied "will give option until July 30th Topaz Harbour timber $500,000 allowing you ten per cent. commission. If any reduction from this price is made such reduction will be from your commission as I would accept not less than $450,000 net and not less than $125,000 cash. Your commission to be paid by deferred payment." The plaintiff then introduced to the defendant the proposed purchasers who, after inspecting the property, declined to purchase but made a proposal to the defendant for logging the timber limits. The defendant declined to make any arrangement at the time, but after subsequent correspondence a contract was entered into whereby the proposed purchasers obtained the right to cut and sell the timber, the amount which the defendant was to receive to vary with the market value of timber. The plaintiff did nothing further to bring about a sale of any kind after the first introduction. In an action for commission on the contract or in the alternative upon a quantum meruit:—Held, that the plaintiff as an agent could not found on the introduction of the contemplated purchasers a claim upon a quantum meruit: the introduction was not made under such circumstances as would lead the owner to know he was expected to pay a commission on such a contract as was eventually made, as in order to found a legal claim for commission there must be a direct relation between the introduction and the ultimate transaction of sale. *Weeden* v. *Turner*, (1921) 30 B.C.R. 289; (1921) 3 W.W.R. 544; (1922) 3 W.W.R. 623; 68 D.L.R. 748.

16. Special employment—Sale subject to confirmation.]—E. & A., general agents in British Columbia for the defendant, interviewed the plaintiffs and gave them a general listing of the defendant's property for sale at $15,000 fixing the terms upon which payment should be made. Later they wrote the plaintiffs giving them the exclusive right to sell the property upon the terms previously arranged but subject to confirmation by the local board of the defendant Company. Two days later the plaintiffs obtained a purchaser upon the terms arranged, $1,000 being paid on account of the purchase price and delivered over by the plaintiffs to E. & A. Subsequently the defendant's local board refused to confirm the sale:—Held, that the arrangement was that the sale be subject to confirmation by the local board of the defendant, and neither the board nor E. & A. had done anything which precluded the board from rejecting the offer of the purchaser. *Turner, Meakin & Co.* v. *The Caledonia and British Columbia Mortgage Company, Limited*, (1927) 38 B.C.R. 103; (1927) 2 D.L.R. 395.

17. Special employment—Price named —Inference.]—Where an agent is employed to sell property at a certain figure, but it is clear by inference from the fact that the vendor sold shortly afterwards at a lower figure than the price named to the agent was only to be the basis of negotiations, and the real price was for the sale at a price acceptable to the vendor, the agent is entitled to commission if the property is eventually sold to a purchaser introduced by him. *Carr* v. *La Dreche*, (1927) 38 B.C.R. 97; (1927) 2 D.L.R. 480; (1927) 1 W.W.R. 574.

18. Special employment.]—The defendant listed a property for sale with the plaintiff and with another firm of brokers at $3,500. The plaintiff introduced Z. to the defendant as a purchaser who offered to pay $3,000 for the property. The defendant would not accept less than $3,500 and Z. with the plaintiff went away without coming to terms. Six days later the other firm of brokers brought Z. to the defendant and after negotiations a sale was made to Z for $3,350:—Held, that there was no evidence of collusion to deprive the plaintiff of his commission and when on Z.'s first visit to the house with the plaintiff they failed to come to terms the defendant was justified in concluding that the transaction as between the plaintiff and the defendant was completely ended. *Wallace* v. *Westerman*, (1928) 40 B.C.R. 35; (1928) 3 D.L.R. 939.

19. Special employment—Quick sale.] —The holder of property under agreement for sale, being pressed for payment, employed a broker to whom he explained his

position as to the property, and the necessity of a quick sale. A prospective purchaser was introduced but no sale was made and the property reverted to the original owners. Some months later he obtained another option on the property from the owners and sold to the person who had been previously introduced to him by the broker:—Held, that the contract with the broker was a special one for a quick sale and was determined when the defendant had lost the property which was the subject-matter of the contract. *Curtis* v. *Cruickshank*, (1929) 40 B.C.R. 546; (1929) 2 D.L.R. 35; (1929) 1 W.W.R. 851.

20. Trade expression as affecting remuneration.]—An agent having found a prospective purchaser for a refrigerating plant communicated with a distributor thereof and a telegram in reply, after fixing the price at $1,200, stated: "Your commission 10 per cent, if we finance, 25 per cent. if you handle cash basis." After correspondence the buyer and the seller entered into a written contract of purchase and the seller installed the plant. As the installation was nearing completion the agent, fearing his commission was in jeopardy, persuaded the buyer to deliver to him the cheque (which was made payable to the seller) for the purchase price. On the agent refusing to deliver the cheque unless he received his 25 per cent. commission, the seller sued the buyer for the purchase price but later the agent, on advice of counsel, delivered the cheque to the seller and the action was settled after certain costs had been incurred by him:—Held, that the phrase "handle cash basis" could not be given an alleged trade meaning that the agent should buy from his principal and resell to the prospective purchaser and assume full responsibility for the installation and the agent is entitled to his 25 per cent. commission. Extrinsic evidence of the trade meaning of the phrase "handle cash basis" failing a proper foundation therefor is not admissible. Held, further, that the seller was not entitled in this action to recover the costs he incurred in the first action from the agent. *Trenwith, Limited* v. *The Jarvis Electric Company, Limited*, (1929) 41 B.C.R. 328; (1929) 4 D.L.R. 400; (1929) 2 W.W.R. 489.

21. Effective cause—Rejection of offer—Subsequent sale — Intervention of new agent.]—A real-estate agent who procures a prospective purchaser to make an offer which is rejected by the prospective vendor, cannot claim commission on a sale of the property which is later brought about by another agent. *Macaulay, Nicolls, Maitland & Co.* v. *Bell-Irving*, (1931) S.C.R. 276; (1931) 1 D.L.R. 381.

22. Real-estate Agents' Licensing Act—Unlicensed salesman.] — A contract to pay commission based on an illegal act is not enforceable. A real-estate agent who employs an unlicensed salesman whose services in conducting transactions for the sale of land are the efficient cause of sale, is not entitled to recover a commission therefor. *Anderson* v. *Lake*, (1928) 40 B.C.R. 189; (1928) 4 D.L.R. 220; (1928) 3 W.W.R. 136.

23. Real-estate Agents' Licensing Act—Individual transaction.]—The plaintiff, a store-keeper, brought about the sale of certain lands of the defendant to another person. In an action for 5 per cent. commission for bringing about the sale:—Held, that the provisions of sec. 21 of the Real-estate Agents' Licensing Act do not apply to the plaintiff. The inclusion of the words "as a real-estate agent or real-estate salesman" in the section shews it was the intention of the Legislature to limit the operation of the Act to the regulation of a class; it was not to apply to individual transactions. *Goodall* v. *Cousins*, (1923) 32 B.C.R. 440; (1923) 3 D.L.R. 718.

24. Real-estate Agents' Licensing Act—Completion of sale after obtaining license.]—On the 1st of September, 1924, the defendant employed the plaintiff as agent to find a purchaser for his ranch. She immediately proceeded to negotiate with a prospective purchaser but did not obtain a real-estate agent's license until the 16th of September. The purchaser assented verbally to purchase at the price stipulated on the 20th of September and the purchase was finally completed on the 27th:—Held, that the right of action arose when the sale was completed. It was not completed in a binding fashion until the 27th of September and not even assented to verbally until the 20th, four days after she had obtained a license. She had therefore a right of action for her commission. *Cudworth* v. *Eddy*, (1926) 37 B.C.R. 407; (1927) 1 W.W.R. 583.

25. Sales agency—Breach by principal—Damages.]—Where a principal contracts with an agent to give the latter an exclusive right of sale of a certain manufactured article within a specified area, the agent to be entitled to a percentage of the proceeds of sales, the contract containing the words "We are willing to give you the agency as

long as you like on a small minimum turnover," there being nothing in the contract to fix any definite time during which the agency was to continue, reasonable time was allowed for the performance of the contract which the Court fixed at two years, the agent being allowed the profits he would reasonably have made during that period. *W. L. Macdonald & Co.* v. *Casein, Ltd.*, (1918) 26 B.C.R. 204; (1919) 1 W.W.R. 293.

26. Sale prevented by principal.]—Where a real-estate broker employed as exclusive agent to sell his principal's land has procured a purchaser, ready, willing and able to carry through a sale upon the terms specified, but the vendor has, during the negotiations, leased a portion of the property, which prevented the sale going through, the agent must shew, on a claim for commission, that if it had not been for the lease the proposed purchaser was prepared to carry out the purchase on the terms originally agreed upon. *Dunphy & Rolph* v. *Cariboo Trading Co.*, (1915) 21 B.C.R. 484; 22 D.L.R. 658; 8 W.W.R. 716; 9 W.W.R. 1180.

27. Solicitor — Costs of Agent.] — A solicitor employed as agent by a firm of solicitors in another Province is entitled to recover his costs from the employing firm, when it is clear that they instructed him as principals and not as agents for their client. *Gow* v. *MacInnes & Arnold*, (1923) 33 B.C.R. 1; (1923) 4 D.L.R. 1012; (1923) 3 W.W.R. 828.

2. Injunction.

Sole agency—Breach of contract.]—A principal who contracts to give an exclusive right of sale of a certain article within a specified area will not, where there is no express negative stipulation, be enjoined from giving others the right to sell within such area. *W. L. Macdonald & Co.* v. *Casein, Ltd.*, (1917) 24 B.C.R. 218; (1917) 2 W.W.R. 1132; 35 D.L.R. 443.

III. Relations Between Principal and Third Persons.

A. In General.

1. Sale by local manager.]—The local manager of a branch garage of the defendant Company sold a car to H. on the instalment plan. When $384 was still due, H. left the car with said local manager to be disposed of at best possible price. Shortly after and when one of H.'s instalments was overdue, the local manager sold the car to R. for $550 and absconded with this money. The defendant Company then seized the car to cover the balance due from H.:—Held, the local manager was acting for his employers in selling the car to R. *Rogers* v. *Nanaimo Motors, Limited*, (1926) 37 B.C.R. 326.

2. Illegal contract by agent.]—It is not within the apparent scope of an agent's authority to enter into an illegal contract and if he does so without his principal's knowledge the principal is not bound thereby. *Ford Motor Co.* v. *Union S.S. Co. of New Zealand*, (1925) 36 B.C.R. 127; (1925) 3 D.L.R. 1169; (1925) 2 W.W.R. 708.

3. Unauthorized purchase of land.]—When an agent without authority pays the money of his principal entrusted to his care upon the purchase price of land in his principal's name the principal may recover the amount so paid from the owner of the land. *McKee* v. *Philip*, (1916) 55 S.C.R. 286; 38 D.L.R. 731; (1917) 1 W.W.R. 690.

4. Notice to agent.]—A partnership of three was dissolved and a limited company formed by two of them which took over the assets and assumed the liabilities. A selling agent of the plaintiff was notified of the change. The plaintiff supplied goods after the change for which certain payments were made:—Held, that notification to the selling agent of the change was sufficient notification to the plaintiff and he could charge only the company for goods thereafter supplied. *W. H. Malkin Co., Ltd.* v. *Crossley*, (1923) 32 B.C.R. 207; (1923) 3 D.L.R. 1189; (1923) 1 W.W.R. 1348.

5. Manager — Scope of authority — Responsibility of bank.]—The manager of a local branch of the defendant bank suggested an investment to the plaintiff who had an account in the savings bank department. The plaintiff signed a cheque payable to cash or bearer for the amount required and gave it to the manager to complete the investment when he approved of it. Some time later the manager told the plaintiff that the investment was unsatisfactory and that the money was still in the bank. About two months after he was given the cheque the manager paid it in to his own account to cover shortage for money he had taken from the bank. In an action to recover the amount of the cheque from the bank:—Held, that the bank cannot take

advantage of its own manager's improper use of the cheque to make good his thefts from it. *McDonald* v. *Royal Bank of Canada*, (1929) 41 B.C.R. 450.

6. Agency—Manager of bank—Scope of employment—Misappropriation of customer's funds.]—R., a branch manager of defendant bank, suggested to plaintiff that some part of plaintiff's money on deposit with the bank should be invested, stating that an investment could be found which would return interest at 8 per cent. For the purpose of such an investment, plaintiff handed to R. two cheques one payable to cash or bearer, and the other payable to self or bearer and endorsed by plaintiff. R. used the money for his own purposes. Plaintiff sought to recover the amount from the bank. This Court found on the evidence: that plaintiff believed, and R. intended him to believe, that R., in making the proposal, was acting as agent of the bank; that plaintiff believed he was placing his money at the disposal of the bank, and R. was fully aware of this; that unrestricted discretion was committed by plaintiff to R. as to the nature of the investment:—Held, the bank was not liable. In this transaction R. was not doing something of a kind that, as agent of the bank, he was authorized to do, in the sense that such a transaction would fall within the general scope of his employment. It could not be said that an undertaking of the duty to invest a customer's money for him at the bank's discretion falls within the scope of the business of a bank, according to the intendment of the Bank Act. There was no evidence justifying or even pointing to the conclusion that the business of an investment agent or trustee is one which "appertains to the business of banking" (sec. 75 (1) (d)); nor did the transaction in question fall under any class of transactions comprehended within the dealings authorized by sec. 75 (1) (c) of the Act. *Mack* v. *Royal Bank of Canada*, (1932) S.C.R. 488; (1932) 1 D.L.R. 753.

7. Undisclosed principal — Breach of contract — Election by third party.] — Where an agent enters into a contract without disclosing the identity of the principal the person with whom he contracts may elect whether he will sue the principal or the agent, but he cannot have judgment against both. *Dennis* v. *Independent Lands, Ltd. and Hale*, (1930) 43 B.C.R. 65.

8. Release—Mortgagee neglecting to collect from third party—Onus of loss.]—Where a mortgagee agrees to release a mortgage and the mortgagor places money for that purpose in the hands of a third party, with the knowledge of the mortgagee, and the release is regularly executed, but the mortgagee neglects to collect the release money from the third party, who later absconds with it, the mortgagee must bear the loss, having put it in the power of the third party to commit the wrong. *Thom* v. *Walker*, (1930) 43 B.C.R. 142; (1930) 3 D.L.R. 915; (1930) 3 W.W.R. 33.

See Corsini v. *Palm*, (1925) 35 B.C.R. 417.

9. Negotiable securities pledged by agent—Liability of pledgee.]—Where share certificates transferred in blank are left by the owner with another person for the purpose of being used by the latter in a certain contingency only and before such contingency arises the person who so received them pledges them to his bank as collateral security for his own account and the circumstances are such when the bank receives them as should arouse the suspicion that the pledgor has no authority, or only a limited authority, to deal with the certificates, but the bank takes them without enquiry, although in the belief that it has a legal right to do so, it obtains no title to them as against the owner. *Patrick* v. *Royal Bank of Canada*, (1931) 44 B.C.R. 448; (1931) 3 W.W.R. 100; Revd. (1932) 45 B.C.R. 437; (1932) 3 D.L.R. 532; (1932) 2 W.W.R. 257.

B. Holding Out.

1. Agent for sale—Implied authority to collect proceeds.]—Although an agent may have authority to sell chattels the Court will not therefrom infer authority to receive the proceeds, and payment to an agent who has not authority to receive payment does not discharge the debtor. *Aikman* v. *Burdick Bros.*, (1923) 33 B.C.R. 23; (1923) 4 D.L.R. 852; (1923) 3 W.W.R. 785.

2. Action commenced against agent, principal added as party.]—P., acting as an agent, purchased food for M.'s poultry farm from the plaintiff with whom he kept a running account upon which from time to time he made payments. The plaintiff brought action against P. for the balance of the account but before entering judgment obtained an order adding M. as a party defendant:—Held, that the agent not having been sued on to judgment, the plaintiff may pursue the principal. As, however, he cannot get judgment against both, he may, upon filing discontinuance against P., obtain judgment against M. for the amount claimed.

Vancouver Milling & Grain Co., Ltd. v. *Perkins and McLeod,* (1930) 42 B.C.R. 557.

3. Authority of agent to carry on business—Endorsement of notes for accommodation of others — Guaranty.] — An authority given by a company to its agent to make contracts on its behalf and to sign negotiable instruments in the ordinary course of its business will not be construed as holding out the agent as being authorized to endorse notes or give any guarantee for the accommodation of others. *National Pole & Treating Co., Ltd.* v. *Blue River Tie & Pole Co., Ltd.,* (1930) 43 B.C.R. 98; (1930) 3 D.L.R. 996.

C. Liability for Torts Committed by Agents.

See NEGLIGENCE.

See TORT.

D. Liability for Fraud of Agent.

1. Innocence of agent—Knowledge of principal.]—A principal is liable for material representation made by an agent in the course of a sale, even though such agent when he made the statement believed it to be true, if as a fact it is untrue to the knowledge of the principal. *Gibson* v. *Cottingham,* (1916) 23 B.C.R. 392; 32 D.L.R. 213; (1917) 1 W.W.R. 496.

2. Agreement for sale of land—Misrepresentation — Constructive notice.] — A person who is induced by misrepresentation of an agent to enter into an agreement for the purchase of land, is not debarred from relief from the principal because he appoints as his agent the agent who deceived him immediately after the agreement was entered into; he will not be assumed to have had notice of the deceit. *Stewart* v. *Canadian Financiers Trust Co.,* (1915) 22 B.C.R. 133; 23 D.L.R. 707; 9 W.W.R. 82; 32 W.W.R. 121.

3. Dealer in motor-vehicles — Injury caused by salesman.]—Where a dealer in motor-cars permits another person to take out a car for the purpose of demonstrating it to a prospective purchaser, agreeing to pay a commission if he succeeds in selling it, the relationship of principal and agent is established, and the principal is responsible for injury caused to a pedestrian by the agent while driving the car to the place at which it was to be shewn. *Katz* v. *Consolidated Motor Co.,* (1930) 42 B.C.R. 214; (1930) 2 D.L.R. 241; (1930) 1 W.W.R. 305.

IV. RELATIONS BETWEEN AGENT AND THIRD PERSONS.

A. Rights of Agent.

1. Contract on behalf of disclosed principals.]—When a purchaser made an offer for the purchase from the publishers of a series of books and the offer was accepted and the books delivered by the publishers' agents as distributors the agents are not parties to the contract and have no status for bringing an action against the purchaser. *Wm. H. Wise & Co.* v. *Kerr,* (1925) 35 B.C.R. 161; (1925) 1 W.W.R. 849.

2. Breach of duty.]—In an action for goods sold and delivered the plaintiff was held to be entitled to recover notwithstanding that it was alleged that the plaintiff entered into the transaction in question in breach of his duty to his employer. *Maddison* v. *Donald H. Bain, Ltd.,* (1930) S.C.R. 299; (1930) 1 D.L.R. 63; Affg. (1929) 40 B.C.R. 499; (1929) 1 D.L.R. 483; (1929) 1 W.W.R. 437.

B. Liabilities of Agent.

1. On Contracts.

1. Sale of land — Want of title.] — Where an agent for the sale of land having disclosed to a purchaser the existence and the name of his principal as vendor, received the purchase price on his principal's behalf, he is not liable in an action for breach of the vendor's covenant for title in the absence of fraud. *Campbell* v. *Rogers,* (1917) 31 D.L.R. 244.

See Dennis v. *Independent Lands, Ltd. and Hall,* (1930) 43 B.C.R. 65.

2. Carriage of goods.]—The defendants contracted with three Japanese shippers to carry certain goods from Vancouver and connect with a steamer in Seattle. Not having a steamer available at the time the defendants wrote a letter to the plaintiff Company confirming a telephone conversation as follows: "Kindly have your S.S. 'Salvor' load the following shipments of salt herring and salt salmon, to connect with the S.S. 'Shidzuoko Maru,' Pier 41, Seattle [shipments set out in detail]. Please

arrange to handle this cargo as quickly as possible, as the fish is required in Seattle at the earliest possible moment. Kindly forward us freight bills covering this cargo," etc. The plaintiff carried the goods to Seattle but was too late to connect with the S.S. "Shidzuoko Maru" and the goods were brought back to Vancouver where they were shipped on another steamer:—Held, that as there is absence of satisfactory evidence that the Japanese shippers authorized the defendants to act as their agents to make the contract with the plaintiff or that they adopted the contract, the defendants must be held liable. *Galt* v. *Frank Waterhouse & Co. of Canada, Limited*, (1927) 39 B.C.R. 241; (1927) 4 D.L.R. 1005.

2. On Warranty of Authority.

1. Unauthorized retainer of solicitor.]—One who represents himself to a solicitor as being the properly authorized agent of certain parties on behalf of whom he retains the services of the solicitor, makes himself liable for the solicitor's costs as upon a warranty of authority if the agent has in fact no such authority. *Cunliffe* v. *Planta*, (1920) 28 B.C.R. 490; (1920) 54 D.L.R. 196; (1920) 3 W.W.R. 898.

2. Agent exceeding authority — Liability.]—Where the transfer agent and registrar of a company undertakes to give a subscriber shares of the company but procures a transfer to him of shares of a member of the company instead of procuring the allotment of unsubscribed shares, the agent having exceeded its authority as transfer and registrar is liable to repay the amount of the subscription to the purchaser. *Witcomb* v. *The Toronto General Trusts Corporation*, (1931) 2 W.W.R. 545.

V. Duration and Termination of Relation.

Period of agency indefinite.] — The plaintiff, a resident of Vancouver, and the defendant, an English manufacturing company, entered into an arrangement by correspondence whereby the plaintiff was to be the sole agent of the defendant for the sale of its goods in the four Western Canadian Provinces. A letter from the defendant setting out proposed terms of agreement after stating the percentage allowed on sales was followed by the words "this offer to be firm for one year." The letter then continued with advice as to development of sales and wound up with the words, "we are willing to give you the agency as long as you like on a small minimum turnover." There was nothing elsewhere in the correspondence fixing any definite time during which the contract was to continue. The plaintiff accepted the offer and devoted his time and attention in developing the agency and incurred considerable expenditure in advertising. The defendant Company repudiated the contract about four months later. In an action for damages it was held that it was not the intention of the parties to limit the contract to one year and as no time was stated a reasonable time should be allowed for the performance of the contract which was fixed at two years, allowing the plaintiff the profits he reasonably would have made during that period. *W. L. Macdonald & Co.* v. *Casein, Ltd.*, (1918) 26 B.C.R. 204; (1919) 1 W.W.R. 293.

See Banks and Banking.
See Building Contracts.
See Carriers.
See Companies.
See Contracts.
See Husband and Wife.
See Infants.
See Master and Servant.
See Misrepresentation and Fraud.
See Negligence.
See Sale of Goods.
See Vendor and Purchaser.
See Tort.

PRISONS.

See Criminal Law.

PRIZE COURT.

1. Perishable cargo.]—The Prize Court has jurisdiction, both statutory and inherent, to take all necessary steps to preserve property in its custody, and, therefore, an order will be made that the cargo of a seized ship should be unladen, inventoried and warehoused to protect it from damage by damp and heat. This jurisdiction begins from the "moment of seizure," and may be

exercised before the issue of a writ. *The Oregon*, (1916) 23 B.C.R. 53; 31 D.L.R. 161; (1917) 1 W.W.R. 139.

2. Appearance.]—Where leave is given to enter an appearance after the expiration of eight days after service of the writ, it is not a condition precedent to the granting of the application that an alien enemy should then file an affidavit stating the grounds of his claim. *The Oregon* (*No. 2*), (1916) 23 B.C.R. 56; 31 D.L.R. 163; (1917) 1 W.W.R. 141.

3. Examination of witnesses.] — The examination of witnesses, officers of a seized ship, who are about to leave the jurisdiction, will not be postponed until a petition is filed by the Crown. Pleadings and particulars of the grounds for condemnation will only be ordered in very special cases. Where the grounds of condemnation are not given in the writ particulars will be ordered. *The Oregon* (*No. 3*), (1916) 23 B.C.R. 57; 31 D.L.R. 164; (1917) 1 W.W.R. 142.

4. Identical application to two judges.] —Where an application is pending to a judge of the Prize Court with complete jurisdiction a concurrent and identical application to the President of the Court is improper and an order made under such circumstances will be ignored as "a thing of naught." *The "Leonor,"* (1916) 3 P. Cas. 91; (1917) 3 W.W.R. 861.

5. Decision—Law of nations.]—A Prize Court should decide judicially in accordance with what it conceives to be the law of nations and must not receive even an "intimation" from the Crown or the Executive in the discharge of its duty. *Ibid.*

See ADMIRALTY.

PROHIBITION.

1. Inferior Court—Jurisdiction.] — On the question of jurisdiction the rule is that nothing shall be intended to be out of the jurisdiction of a Supreme Court but that which specially appears to be so; and nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged. *In re Nowell and Carlson* (1919), 26 B.C.R. 459; (1919) 1 W.W.R. 387.

2. Waiver and acquiescence—Laches.] —Where the want of jurisdiction is apparent on the face of the proceedings waiver or acquiescence cannot create jurisdiction; nor can delay or laches operate to defeat the right to prohibit. *Ibid.*

See Maple Crispette Co. v. *National Brokerage*, (1919) 27 B.C.R. 501; (1920) 1 W.W.R. 332.

3. Amendment.]—If the plaint in an action in the County Court does not disclose the territorial jurisdiction of the Court, an amendment may be allowed to do so if the facts in evidence disclose that the Court has actual jurisdiction. *Hahn* v. *Seibel*, (1920) 28 B.C.R. 387; (1920) 2 W.W.R. 595.

4. County Court — Jurisdiction — Account.]—In an action in the County Court where the plaint asks for an account, the case is not ex facie beyond the jurisdiction of the County Court as that Court has jurisdiction in such actions up to $1,000. An application for a writ of prohibition will therefore be refused, especially when it appears that the plaintiff has filed a waiver of any claim over $1,000. *Neary* v. *Credit Service Exchange*, (1929) 41 B.C.R. 223; (1929) 3 D.L.R 107; (1929) 2 W.W.R. 287.

5. Public Inquiries Act — Commission of inquiry.]—The Lieutenant-Governor in Council, under the provisions of the Public Inquiries Act, appointed a judge of the Supreme Court sole commissioner to inquire whether intoxicating liquor had been unlawfully imported into the Province, if so, as to the names of the persons or corporations engaged in such unlawful importation, the disposition of the liquor, and all unlawful sales of intoxicating liquor within the Province in respect of which no prosecution was had:—Held, that the commissioner was not acting judicially in holding the inquiry; that he had no power to impose any legal duty or obligation on any person, and was, therefore, not subject to control by a writ of prohibition. *In re Gartshore. The King* v. *Clement*, (1919) 27 B.C.R. 121; 32 C.C.C. 384.

6. Prospective amendment.]—An application for a writ of prohibition, sought upon defects claimed to exist upon the face of the proceedings, should not be affected by the prospect of any change being made by way of amendment, and where such a defect appears, the issuance of a writ of prohibition is a matter of right, and not merely discretionary. *In re Army and Navy Veterans in Canada. In re Government Liquor Act*, (1921) 30 B.C.R. 164; 61 D.L.R. 416; (1921) 3 W.W.R. 29; 36 C.C.C. 83.

7. Criminal charge—Assent of Attorney-General.]—Where the assent of any person in authority is necessary to the prosecution of a criminal offence prohibition will lie to the magistrate to prevent the hearing in the absence of such assent or where the assent is not specific as to the particular person charged or the offence alleged. *Rex* v. *Seto Kin Kui*, (1919) 27 B.C.R. 416; (1919) 3 W.W.R. 318.

8. Criminal charge — Withdrawal of information—New charge—Plea of autrefois acquit.]—On the hearing of a criminal charge before a magistrate unless it can be said that there has been an adjudication and acquittal on the merits, the permission of the Court to withdraw a charge is not equivalent to a dismissal which can be pleaded in bar of subsequent proceedings, and prohibition will not lie to prevent the magistrate from proceeding with the hearing on a second information. *Rex* v. *Somers*, (1929) 41 B.C.R. 190; (1929) 3 D.L.R. 772; (1929) 2 W.W.R. 366; 51 C.C.C. 356.

9. Jurisdiction of stipendiary magistrate.]—A stipendiary magistrate has no jurisdiction to try an offence alleged to have been committed in the City of Vancouver except at the request or in the absence or illness of the police magistrate of the city and prohibition will lie accordingly. *Rex* v. *Harry Fong*, (1930) 3 W.W.R. 479.

10. Extradition.]—Prohibition will be granted in respect of judicial proceedings only and will not lie to an extradition judge. *In re Sieman* (*3*), (1930) 2 W.W.R. 411.

PROHIBITION ACT.

See CONSTITUTIONAL LAW.
See INTOXICATING LIQUORS.

PROMISSORY NOTE.

See BILLS OF EXCHANGE.

PROMOTER.

See COMPANY.

PUBLIC BODIES AND OFFICERS.

I. OF THE DOMINION, 922.
II. OF THE PROVINCE, 923.

I. OF THE DOMINION.

1. The Governor-General in Council—Order in Council — Document executed without authority of Governor in Council.]—The Crown in right of the Dominion granted a lease under authority of 57 & 58 Vict. (Can.) cap. 26 which provided that the Governor in Council might authorize the sale or lease of certain lands. Subsequently an indenture duly executed under seal was endorsed thereon varying its terms. It was held that the fact of the second indenture being executed by the Minister, although affording some ground for presuming that he had authority, was not conclusive and as the only evidence tendered of an order in council having been passed approving of the amendments was of certain conversations with Government officials in one of which the Minister told the witness it had been passed, and the evidence for the Crown shewed that there was no record of such an order in council or of any recommendation from the department for any such modification, the Court must find that the making of the second indenture lacked the necessary authority, and was a nullity. *Rex* v. *Vancouver Lumber Co.*, (1919) 50 D.L.R. 6; (1920) 1 W.W.R. 255; (1914) 17 Ex. C.R. 329; 41 D.L.R. 617.

2. Minister of Finance—License to foreign insurance company.] — The question as to whether a license should be granted to a foreign company or not is to be determined by the Minister of Finance for the Dominion and the Courts have no jurisdiction to interfere with the exercise of the statutory powers granted to him. *Guardian Assurance Co., Ltd.* v. *Matthew*, (1918) 58 S.C.R. 47; 45 D.L.R. 32; (1919) 1 W.W.R. 67.

3. Customs officer.]—A customs collector for the port of Vancouver pursued the master and engineer of a launch which had arrived at the port without making an inward entry and departed without making outward entry, and captured them in the Gulf of Georgia outside the Port of Vancouver and within one marine league from the shore. They resisted capture and were convicted of resisting the officer in the execution of his duty:—Held, that the customs collector was not acting in the execution of his duty since he had gone outside

the limits of his jurisdiction over the port of Vancouver. Under the Criminal Code proceedings for the trial and punishment of a person not the subject of His Majesty and charged with an offence committed within the jurisdiction of the Admiralty of England shall not be instituted in any Court in Canada except with the leave of the Governor-General and on his certificate, and the definition of proceedings in sec. 3 of the Territorial Waters Jurisdiction Act, 41 & 42 Vict., cap. 73 (Imp.) makes the commitment the initial proceeding in the trial. The conviction is bad as the leave of the Governor-General was not obtained until after the commitment. *Rex* v. *Johanson & Lewis*, (1922) 31 B.C.R. 211; (1922) 2 W.W.R. 1105; 38 C.C.C. 60.

4. Immigration officer.]—The appointment of an immigration officer under sec. 22 (2) of the Immigration Act is valid when signed by the acting deputy minister of immigration and colonization by authority of sec. 31 (1) of the Interpretation Act and sec. 48 of the Civil Service Act. In the case of an order of deportation being insufficient in form, the officer making it may, at any time before the return is made to the writ, issue an amended order. *Re Pappas*, (1921) 29 B.C.R. 318; (1921) 1 W.W.R. 949.

5. Minister of Fisheries — Cannery license.]—Secs. 7a and 18 of Fisheries Act (Dom.) 1914 requiring persons who operate for commercial purposes a fish cannery, and in British Columbia a salmon cannery or salmon curing establishment, to obtain a license from the Minister of Fisheries of Canada are ultra vires of the Parliament of Canada. They purport to confer powers upon the Minister in relation to matters which prima facie fall under the subject "Property and Civil Rights in the Province" and which are not covered directly or incidentally by any of the subjects enumerated in sec. 91 of the B.N.A. Act. *Attorney-General for Canada* v. *Attorney-General for B.C.*, (1929) 99 L.J.P.C. 20; 142 L.T. 73; 46 T.L.R. 1; (1929) 3 W.W.R. 449; (1930) A.C. 111; (1930) 1 D.L.R. 194.

II. Of the Province.

1. Lieutenant-Governor in Council.]—The Vancouver Island Settlers' Rights Act, B.C. Statutes, 1904, cap. 54, requires that before the authority to issue a Crown grant under sec. 3 is acted upon, the Lieutenant-Governor in Council shall decide the question whether or not there is "reasonable proof" of "improvement" or occupation and of intention to reside. Their Lordships held that the function of the Lieutenant-Governor in Council in deciding upon such questions is judicial in the sense that he must preserve a judicial temper and perform his duties conscientiously with a proper feeling of responsibility, but he is not bound to govern himself by the rules of procedure regulating proceedings in a Court of Justice, and is not bound by the technical rules of law touching the reception of hearsay evidence. *Esquimalt & Nanaimo Ry. Co.* v. *Wilson*, (1921) 91 L.J.P.C. 21; 126 L.T. 451; 61 D.L.R. 1; (1921) 3 W.W.R. 817; (1922) 1 A.C. 202.

2. Minister of Lands—Coal and Petroleum Act.]—There is no appeal from the discretion of the Minister of Lands in granting or refusing a prospecting license under sec. 3 of the Coal and Petroleum Act; the intention of the Legislature is shewn by the substitution of "may" for "shall" in the amendment of that section in cap. 33 of the Statutes of 1910. *Johnston* v. *The Minister of Lands*, (1919) 27 B.C.R. 257; (1919) 3 W.W.R. 81.

3. Public Works Department.]—A contract for the sale of land to the Crown for the purpose of construction of a public work under sec. 3 of the Public Works Act must be authorized by Order-in-Council in order to be enforceable against the Crown. *In re Public Works Act and N. F. Mackay*, (1921) 30 B.C.R. 1; 58 D.L.R. 332; (1921) 2 W.W.R. 821; (1922) 1 A.C. 457; 91 L.J.P.C. 193; 127 L.T. 81; 63 D.L.R. 171; (1922) 1 W.W.R. 982.

4. Water Act—Board of Investigation.]—The powers conferred on the Board of Investigation under the Water Act, 1914, to investigate into and adjudicate on conflicting claims for the use of water is confined to claims of persons holding or claiming to hold records under any former Act or ordinance and upon any other claims and rights to the use of water under such Act or ordinance. The Board has no jurisdiction to grant a license to the Department of Indian Affairs to divert water for use on the Indian Reserve where the right of the Department is not founded upon such an Act or ordinance. *Western Canada Ranching Co., Ltd.* v. *Department of Indian Affairs*, (1921) 30 B.C.R. 25; 60 D.L.R. 360; (1921) 2 W.W.R. 834.

5. Water Board — Comptroller—Jurisdiction.]—While the Comptroller of Water Rights has power to amend a water license

by changing the point of diversion of water it is inconsistent with the Water Act to change it to a point in a different body of water, and the Board of Investigation has power to amend the final water license by changing the point of diversion to its original position. *The Buonaparte Ranch Ltd.* v. *Schneider*, (1928) 40 B.C.R. 1; (1928) 2 D.L.R. 993; (1928) 2 W.W.R. 106.

6. Liquor Control Board.]—An action claiming mandamus should not be brought against the Liquor Control Board. If there is any remedy by way of mandamus such remedy must be by application for a prerogative writ. *Castleman* v. *Johnson*, (1921) 30 B.C.R. 354; 70 D.L.R. 862; (1921) 3 W.W.R. 830.

7. Liquor Control Board.]—The Liquor Control Board is not a corporate body either actually or by implication, it being merely an agent of the Government in the carrying out of the Government Liquor Act and does not come within the definition of "person" in the Interpretation Act or the Attachment of Debts Act. *Callow* v. *Hick*, (1923) 32 B.C.R. 71; (1923) 2 D.L.R. 1185; (1923) 2 W.W.R. 439.

8. Workmen's Compensation Board.]—The Workmen's Compensation Board is a servant or agent of the Crown within the meaning of sec. 2 of the Crown Costs Act and an order for costs cannot be made either for or against it. *Rosebery Surprise Mining Co., Ltd.* v. *Workmen's Compensation Board*, (1920) 28 B.C.R. 284; 51 D.L.R. 470; (1920) 2 W.W.R. 676.

9. Land Settlement Board.]—The Land Settlement Board created by the Legislature under the Land Settlement and Development Act is a department of State in its real constitution and cannot be sued in an action for tort in its official capacity. *Rattenbury* v. *Land Settlement Board*, (1928) 39 B.C.R. 523; (1928) 3 D.L.R. 382; (1928) 2 W.W.R. 475; (1929) 1 D.L.R. 242.

10. Soldier Settlement Board.] — In an action against the Soldier Settlement Board discovery will not be ordered against the Board as it is a branch of a department of the Crown. *Wright* v. *Peters and The Soldier Settlement Board*, (1920) 2 W.W.R. 696.

11. Royal Commission—Witness fees.]—The right of a witness in a civil proceeding to prepayment of conduct money and expenses to and from the place at which he is ordered to be in attendance is well settled, and the same principle which applies to civil proceedings in one of His Majesty's Superior Courts of Record must a fortiori apply to a Royal Commission in the absence of express statutory power. *Rex* v. *McAdam*, (1927) 39 B.C.R. 101; 50 C.C.C. 31.

12. Special Commission—Adjudication—Alteration by Attorney-General.]—Once the Attorney-General, acting under sec. 6 of the Special Surveys Act, R.S.B.C. 1911, cap. 221, has referred a claim for compensation to a special commissioner for adjudication he is functus officio, and, if he varies the commissioner's adjudication and the change is embodied in the Order in-Council passed in pursuance of his report, the Court should order that the Order-in-Council be made to conform to the commissioner's decision. *City of Vancouver* v. *Smith*, (1922) 30 B.C.R. 311; (1922) 1 W.W.R. 344.

13. Commissioner under Succession Duty Act.]—There is no jurisdiction to interfere with the valuation made by a commissioner appointed by the Auditor-General to determine the value of the estate of a deceased person for the purpose of fixing the amount of succession duty to be payable thereon where the commissioner's valuation is less than that of the executor under the will of the deceased. *The King* v. *The United States Fidelity & Guaranty Co. and Quagliotti*, (1923) A.C. 808; 93 L.J.P.C. 26; 130 L.T. 161; (1923) 3 D.L.R. 701; (1923) 3 W.W.R. 295; Affg. (1922) 64 S.C.R. 48; 68 D.L.R. 297; (1922) 3 W.W.R. 180; Affg. (1922) 30 B.C.R. 440; 63 D.L.R. 469; (1922) 1 W.W.R. 389.

14. Produce Marketing Act—Committee of Direction.]—The marketing of produce is a trade or business carried on within the Province and the local Legislature in imposing restrictions upon it is dealing with the property and civil rights of individuals within the Province and concerns produce grown within the Province, and because it affects trading in the products of the farm or even regulates that domestic operation it is not "regulation of trade and commerce" as contemplated by sec. 91 (2) of the British North America Act. To operate under an Act of the Provincial Legislature enabling producers to market the products of the soil by orderly methods and under such restrictions as will tend to insure a fair return, cannot be said to constitute an indictable offence under secs. 49C and 498 of the Criminal Code. The grower is prevented by the Act from taking orders for the sale of produce within or without the Province without written permission, a transaction with a purchaser outside the Province being

simply subsidiary and incidental to the main purposes of the Act which deals with "property and civil rights" and refers to matters "of a merely local or private nature in the Province." It cannot lose that character and be regarded as legislation dealing with "the regulation of trade and commerce" whether the produce shipped is contracted for within or without the Province. *Rex* v. *Chung Chuck*. *Rex* v. *Wong Kit*. *Rex* v. *Sales Service Ltd*. *Rex* v. *Associated Growers Ltd.*, (1929) 40 B.C.R. 512; (1929) 1 D.L.R. 756; (1929) 1 W.W.R. 394; 51 C.C.C. 260; 99 L.J.P.C. 71; 142 L.T. 266; 46 T.L.R. 134; (1929) W.N. 269; 53 C.C.C. 14; (1930) A.C. 244; (1930) 2 D.L.R. 97; (1930) 1 W.W.R. 129.

15. Dairy Produce Sales Adjustment Act — Committee of Adjustment — Quo warranto.]—On the hearing of an information in the nature of quo warranto proceedings to oust the respondent from his office as one of the Committee of Adjustment under the Dairy Products Sales Adjustment Act, the onus is on the respondent to prove that he is entitled to hold the office so attacked. *The King* v. *Shannon*, (1930) 43 B.C.R. 129.

16. Chief of police — Interdiction order.]—The requirements of sec. 66 of the Government Liquor Act, R.S.B.C. 1911, cap. 146, are obligatory and where a chief of police makes an interdiction order in the absence of evidence of excessive drinking by the interdicted person the order is made without jurisdiction and is a nullity and a conviction against her for having liquor in her dwelling house being an interdicted person will be set aside. *Rex* v. *Grant*, (1926) 37 B.C.R. 423; (1926) 4 D.L.R. 784; (1926) 3 W.W.R. 253; 46 C.C.C. 182.

17. Chief of police.]—A chief of police is an officer, servant or agent of and acting for the Crown within the meaning of the Crown Costs Act. *Matson* v. *Leask*, (1919) 2 W.W.R. 59.

18. Fire marshal.] — The owner of a moving-picture theatre having refused to make certain alterations to comply with the order of a fire marshal made in order to reduce risk of fire, is liable to a lessee of the theatre for the cost of such alterations made in compliance with the order. The Fire Marshal Act and the Moving Pictures Act in so far as they apply to fire hazards in moving-picture theatres are intended to be complementary. *McMordie* v. *Ford*, (1930) 42 B.C.R. 486; (1930) 3 D.L.R. 398; (1930) 2 W.W.R. 203.

19. District registrar of titles.]—A district registrar of titles is an officer of the Crown within the meaning of the Crown Costs Act and the Court is prohibited from making any order or direction as to costs for or against him. *In re Land Registry Act and Scottish Life Insurance Co.*, (1919) 26 B.C.R. 504; (1919) 2 W.W.R. 125.

20. Supreme Court — Acting deputy district registrar.]—A person appointed as acting deputy district registrar of the Supreme Court is empowered to exercise the powers of a deputy district registrar. *Fusarelli* v. *Ioco Townsite Co.*, (1922) 1 W.W.R. 1238.

See MARKETING ASSOCIATIONS.

PUBLIC LANDS.

I. CROWN GRANT, 928.
II. LEASE, 929.
III. PRE-EMPTION, 930.
IV. LOCATION AND SURVEY, 931.
V. TIMBER, 931.
A. Leases and licenses, 931.
B. Seizure for contravention of Act, 932.

I. CROWN GRANT.

1. Attack upon.]—In an ordinary suit between subject and subject irregularities alleged to have occurred leading up to documents of title, such as Crown grants, cannot be set up unless the Crown be made a party. This particularly applies where the defendant is a purchaser for value without notice of such irregularities. *North Pacific Lumber Co.* v. *Sayward*, (1918) 25 B.C.R. 322; (1918) 2 W.W.R. 771.

2. Inconsistency with prior grant.]—A grant from the Crown which is totally or in part inconsistent with a previous grant is void unless the previous grant is recited in it. The rule is qualified to this extent that if the grantee named in the second grant had no actual or constructive notice of the previous grant, the second grant will be good to the extent to which it may be consistent with the first grant though void as to the rest. *Esquimalt & Nanaimo Ry. Co.* v. *McLellan*, (1918) 26 B.C.R. 104; 44 D.L.R. 697; (1918) 3 W.W.R. 645.

3. Reservation.]—An unsigned marginal note appearing upon a Crown grant of land issued to a pre-emptor has no legal effect as the pre-emptor is entitled under his pre-emption to a Crown grant in the form prescribed by the Act. *Clark* v. *Milligan*, (1920) 28 B.C.R. 22; (1920) 1 W.W.R. 1044.

4. Error — Rectification.] — Where an error has been made in a Crown Grant of public lands by inserting the name of the wrong Crown grantee the grant will be rectified upon a petition of right. *Larson* v. *Montgomery*, (1930) 43 B.C.R. 89; (1930) 3 D.L.R. 966; (1930) 2 W.W.R. 796.

II. LEASE.

1. Settlement Act, 1883—Great Northern Railway land grant.]—Under the Settlement Act passed in 1883 (B.C.S. 1884, cap. 14) the Province granted to the Dominion a tract of land including coal and other minerals and the plaintiff held a grant thereof from the Crown in the form of letters patent under the Great Seal of Canada. The defendant held a subsequent lease from the Crown through the Provincial Government of a portion of the same lands for the purpose of extracting coal lying thereunder: —Held, that as the lands in question do not come within the reservations and exceptions contained in the Settlement Act (cap. 14 of 1884) the defendant's lease is void. *Esquimalt & Nanaimo Ry. Co., Ltd.* v. *McLellan*, (1918) 26 B.C.R. 104; 44 D.L.R. 697; (1918) 3 W.W.R. 645.

2. Registration of.]—A lease from the Crown may be registered under sec. 29, Land Registry Act, R.S.B.C. 1911, cap. 127, although the Crown has not been registered as owner of the fee. The words "any less estate" in sec. 29 of the Act include leaseholds. *In re Land Registry Act and Canadian Explosives, Ltd.*, (1918) 1 W.W.R. 399; 39 D.L.R. 764.

3. Approval of Order in Council.]—Where the Crown in the right of the Dominion granted a lease under the authority of a statute which provided that the Governor-in-Council might authorize the sale or lease of certain lands, a subsequent indenture varying its terms and executed by the Minister without the authority of a second Order-in-Council was held to be void. *Rex* v. *Vancouver Lumber Co.*, (1919) 50 D.L.R. 6; (1920) 1 W.W.R. 255; (1914) 17 Ex. C.R. 329; 41 D.L.R. 617.

4. Application for—Objection to mandamus.]—A lumber company applied for a lease of a waterfront lot in the Comox district for booming purposes. S. who owned six lots across a road but fronting on the lot in question, wrote the department of lands, objecting to the granting of the lease and received a reply that his complaint would be considered. The lot was leased to the applicant without notice to S. who applied for and obtained an order for a writ of *mandamus* to determine the rights of the parties in accordance with section 139 of the Land Act:—Held, that the section is confined to cases in which the objector claims a right to or in the subject-matter itself. S.'s objection to the granting of the lease is not founded on an interest either legal or equitable in the subject-matter and his application should have been refused. *The King* v. *The Minister of Lands*, (1926) 37 B.C.R. 106; (1926) 2 D.L.R. 249; (1926) 1 W.W.R. 819.

III. PRE-EMPTION.

1. Contract to sell.]—A contract to sell an interest in a pre-emption claim entered into before the Crown grant therefor has been issued comes within the definition of the word "transfer" in sec. 159 of the Land Act, R.S.B.C. 1911, cap. 129, and is therefore void under the provisions of that section. *Burns* v. *Johnson*, (1917) 25 B.C.R. 35; (1918) 1 W.W.R. 180.

2. Bargain.]—A father entered into an agreement to exchange his homestead for that of his son's. At the time of the agreement the son had not obtained a Crown grant for his homestead. After the son had received his Crown grant two letters passed between them with reference to the exchange that contained all the elements necessary to create a binding agreement. On the death of the son, his wife, who became administratrix of his estate, brought action to enforce the agreement: — Held, that the original agreement was void under sec. 142 of the Land Act but that as the letters that passed between father and son after the son obtained a Crown grant to his homestead, contained all the elements necessary to create an enforceable contract, they should be treated as a new bargain, and the exchange of the properties should be enforced. *Cotton* v. *Leighton*, (1917) 24 B.C.R. 253.

IV. LOCATION AND SURVEY.

Coast line.]—The term "coast line" as descriptive of the Eastern boundary of the block of land granted by the Province to the Dominion, and by the latter granted to the plaintiff to aid in the construction of the Esquimalt and Nanaimo Railway means the detailed coast line fixed by the high-water mark. *Esquimalt & Nanaimo Ry. Co.* v. *Treat*, (1918) 26 B.C.R. 275; (1918) 3 W.W.R. 685; 43 D.L.R. 653; (1919) 121 L.T. 657; 35 T.L.R. 737; 48 D.L.R. 139; (1919) 3 W.W.R. 356.

V. TIMBER.

A. Leases and Licenses.

1. Application for — Interest acquired by.]—An advertisement or application for a timber lease confers no interest in the land on the applicant. *Clark* v. *Milligan*, (1920) 28 B.C.R. 22; (1920) 1 W.W.R. 1044.

2. Renewal of lease.]—The plaintiff's predecessors in title obtained a 30-year timber lease in 1888. Under the provisions of section 7 of the Land Act Amendment Act, 1901, this lease was surrendered and a renewal thereof issued in 1902. The defendant's predecessors in title recorded pre-emptions of a portion of the same lands in 1891 and 1892, for which Crown grants were issued in 1893 and 1894:—Held, that the surrender of the old lease and taking the renewal thereof under the Act operated as a matter of law to destroy the priority which the first lease gave, and the timber thereby became the property of the defendant. *North Pacific Lumber Co., Ltd.* v. *Sayward*, (1918) 25 B.C.R. 322; (1918) 2 W.W.R. 771.

3. Sufficiency of description.] — The statute governing the granting of timber licenses requires the applicant to describe as accurately as possible the land over which he seeks to obtain such license, especially with reference to the nearest known point or to some creek, river, stream or other water, and an application for such a license containing an erroneous description of a stream to which reference is made in order to determine the location of the ground applied for does not comply with section 13 of the Crown Lands Act, B.C. Stats. 1907, cap. 25, sec. 13, and the location is therefore invalidated. *Orde* v. *Rutter*, (1917) 25 B.C.R. 45; 39 D.L.R. 456; (1918) 1 W.W.R. 735; Affd. 59 S.C.R. 658; 49 D.L.R. 691.

4. Timber leases—Renewal—Construction of statute.]—Where it is clear that a situation has arisen which the Legislature intended to deal with in a statute, but the wording of the statute is inapt to cover the situation, the statute will be construed as though containing apt words to cover the situation. Therefore as it is clear that sec. 14 of the Forest Act, 1912 (B.C.) under 1901 (B.C.), cap. 30, the word renewed in the first line of such section will be read as renewable so as to cover such leases. *Cameron* v. *The King*, (1927) 38 B.C.R. 191; (1927) 2 D.L.R. 383; (1927) 1 W.W.R. 624.

B. Seizure for Contravention of Act.

1. Removal of timber.] — Timber had been lawfully cut upon lands which before removal of timber had become Crown lands: —Held, that sec. 7 of the Forest Act, B.C. Stats. 1912, cap. 17, prohibits the removal of the timber. *Royal Bank of Canada* v. *Gustafson*, (1924) 33 B.C.R. 379; (1924) 1 W.W.R. 544.

2. Trespass.]—The plaintiff trespassed upon a mineral claim and cut timber therefrom which he sold to the defendant. The ties were seized by the Forest Branch of the Department of Lands claiming royalty and a penalty for wilful trespass. The defendant paid the sum demanded and deducted the amount from the plaintiff's account:—Held, that as the contract contained the terms that Government and all other dues shall be paid by the contractor and that the company reserves the right to retain Governdent dues from contractor until clearance has been furnished, the money paid by the defendant to furnish clearance must be regarded as paid on behalf of the plaintiff to fulfil his contract and therefore chargeable against him. *Keane* v. *Canadian Pacific Ry. Co.*, (1924) 34 B.C.R. 127.

3. Seizure of unmarked timber.] — Where the Crown has seized and sold scattered timber in a certain area under sec. 85 of the Forest Act, the presumption arises that the sale was regularly made until the contrary is shewn. Timber cut on Dominion Crown lands being within the scope of matters of regulation, is subject to the terms of the Forest Act and must be marked before it is put in the water. *Harrison Bay Company Limited* v. *Gauthier*, (1925) 35 B.C.R. 498.

See CONSTITUTIONAL LAW.

See FIRE.
See HIGHWAYS.
See MINES AND MINING.
See POSSESSION.
See REGISTRATION OF LAND.
See WATERS AND WATERCOURSES.

QUO WARRANTO.

1. Municipal election.] — Where six aldermen were to be elected to the Council of a Municipality and it is alleged that eight were nominated and that the returning officers after publicly declaring the names of the candidates and the place and time for a poll issued a notice purporting to disqualify two of the candidates and declaring the other six elected by acclamation, proceedings by quo warranto may be taken to determine by what authority the persons declared to be elected exercise the office of aldermen. As this is not a contested election within the meaning of sec. 92 of the Municipal Elections Act, R.S.B.C. 1911, cap. 71, relief by way of quo warranto is still open. *Rex ex rel.. McFarlane* v. *Balment,* (1915), 8 W.W.R. 111.

2. Onus on respondent.]—On the hearing of an information in the nature of quo warranto proceedings to oust the respondent from his office as one of the committee of adjustment under the Dairy Products Sales Adjustment Act, the onus is on the respondent to prove that he is entitled to hold the office so attacked. *The King ex rel. Whittaker* v. *Shannon,* (1930) 43 B.C.R. 129.

RAILWAYS.

I. RIGHTS AND DUTIES UNDER PRIVATE ACTS, 934.
A. British Columbia Electric Railway Company — Consolidated Railway and Light Company, 934.
B. Canadian Northern Pacific Railway Company, 935.
C. Esquimalt and Nanaimo Railway Company, 936.
II. CONSTRUCTION AND OPERATION, 938.
A. Highways, 938.
B. Injuries to persons on or near tracks, 938.
C. Animals at large, 939.
D. Watercourses, 940.
E. Operation of train, 940.

I. RIGHTS AND DUTIES UNDER PRIVATE ACTS.

A. British Columbia Electric Railway Company—Consolidated Railway and Light Company.

1. Negligent construction — Railway Act.]—The negligent construction of a culvert obstructing the flow of a natural watercourse and causing the flooding of lands is a continuing cause of action arising from time to time as damage is done, and the limitations under sec. 267 of the Railway Act (B.C.) 1911, cap. 44, will not begin to run until after the doing or committing of such damage ceases. *McCrimmon* v. *B.C. Electric Railway Co., Ltd.,* (1915) 22 B.C.R. 76; 24 D.L.R. 368; 32 W.L.R. 81; 8 W.W.R. 1289; 19 C.R.C. 329.

—2. Consolidated Railway Company's Act—Damages for personal injury.]—An action against a street railway company to recover damages for injury to a person, who was not a passenger, while crossing the street, is one for "damages or injury sustained by reason of the tramway or railway, or of the works or operations of the company" within the meaning of sec. 60 of the Consolidated Railway and Light Act, 1896, and is barred unless commenced within six months. *Viney* v. *B.C. Electric Ry. Co. Ltd.,* (1923) 32 B.C.R. 468; (1923) 4 D.L.R. 159; (1923) 3 W.W.R. 329.

3. Consolidated Railway Company's Act —Damages to property.]—The statutory obligation of an electric railway company to supply lighting to customers within a certain distance of the company's lines makes its negligence in allowing a dangerous current to set fire to the customer's premises one in relation to the works or operations of the defendant, and the customer's action therefor must be brought within the period of limitation which is provided for that class of action by its special Act. *Union Assurance Co.* v. *B.C. Electric Ry. Co., Ltd.,* (1915) 21 B.C.R. 71; 21 D.L.R. 62; 30 W.L.R. 717; 8 W.W.R. 327

4. Consolidated Railway Company's Act —Injury to passengers.]—An action based upon the company's duty to carry passengers in safety is included in "actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway or the works or operations of the company" as set forth in sec. 60 of the Consolidated Railway Company's Act, 1896, and must be commenced within six months after the cause of action arises. *Pribble* v. *B.C.*

Electric Ry. Co., Ltd., (1926) A.C. 466; 95 L.J.P.C. 51; 134 L.T. 711; 42 T.L.R. 332; (1926) 2 D.L.R. 865; (1926) 1 W.W.R. 786; 31 C.R.C. 418.

B. Canadian Northern Pacific Railway Company.

1. Exemption from taxation.]—Lands acquired by a railway company for railway purposes, contingent upon the approval of the plans by the Minister of Railways, are not, until definitely appropriated as part of the railway and taken from other uses "properties and assets which form part or are used in connection with its railway," so as to be exempt from taxation under clause 13 (e), cap. 3, B.C. Statutes 1910. *Canadian Northern Pacific Railway Co.* v. *City of New Westminster*, (1915) 22 B.C.R. 247; 25 D.L.R. 28; 32 W.L.R. 779; 9 W.W.R. 425; (1917) A.C. 602; 86 L.J.P.C. 178; 117 L.T. 581; 36 D.L.R. 505.

2. Exemption from taxation.]—Where by an agreement between the Government and a railway company exemption is granted to the railway company from taxation of its property and assets which form part of or are used in connection with the operation of its railway, the approval by the Minister of Railways of a plan of the proposed line designated as the company's right-of-way deposited under the provisions of the British Columbia Railway Act does not bring such right-of-way within the meaning of the exemption clause, where there is nothing in the use to which the lands are devoted or in the circumstances of their occupation to mark them in a physical sense as part of a railway constructed or in process of construction. The reason for remission of taxation is the benefit to the public from the railway and does not arise when the public are neither getting the actual railway nor having it in process of construction for their benefit. *Canadian Northern Pacific Railway Co.* v. *City of Armstrong; Canadian Northern Pacific Railway Co.* v. *City of Vernon*, (1919) 88 L.J.P.C. 147; 122 L.T. 11; 36 T.L.R. 5; 48 D.L.R. 268; (1919) 3 W.W.R. 352; (1920) A.C. 216.

3. Exemption from taxation.] — The lands of the Canadian Northern Pacific Railway within a municipality of which no plan has been filed or submitted for the approval of the minister under sec. 17 of the British Columbia Railway Act, are not exempt from taxation under paragraph 13 (e) of the agreement of the 17th of January, 1910, between the railway and the Province (B.C. Stats. 1910), cap. 3, Sch.). *Canadian Northern Pacific Railway Company* v. *Corporation of the City of Kelowna*, (1917) 25 B.C.R. 514; 44 D.L.R. 315; (1918) 3 W.W.R. 845.

C. Esquimalt & Nanaimo Railway Company.

1. Exemption from taxation—Order in Council for — Municipality—Prior incorporation of.]—Ten days after the date of letters patent incorporating the defendant Municipality an Order in Council was passed under sec. 196 of the Taxation Act exempting the plaintiff railway for ten years from taxation under sec. 193 of the Act, in respect of a portion of the plaintiff's line including, prima facie, the portion lying within the bounds of the defendant Municipality:—Held, that the Crown will do nothing in derogation of the grant of corporate powers; and any subsequent Act of the Crown will be treated as done without intent to break faith with those benefited by the earlier grant. The Order in Council was therefore construed as not intended to apply to that portion of the plaintiff's line which lies within the defendant Municipality. Construed otherwise the Order in Council would be pro tanto void. *Esquimalt & Nanaimo Railway Co.* v. *City of Courtenay*, (1915) 22 B.C.R. 362; 25 D.L.R. 821; 32 W.L.R. 914; 9 W.W.R. 618.

2. Vancouver Island Settlers' Rights Act, 1904.]—Upon the passing by the Parliament of Canada of an Act of 1905, cap. 90, declaring the Esquimalt & Nanaimo Railway to be a work for the general advantage of Canada, the Legislature of British Columbia ceased to possess the authority theretofore vested in it under the British North America Act to deprive the railway company of its legal title to any of the subjects actually forming part of the "railway" so declared to be a work for the general advantage of Canada, and to vest that title in another, but lands acquired by the railway company as a subsidy granted for the purpose of aiding in the construction of the railway company and not held by the company as part of its "railway" are not withdrawn from the legislative jurisdiction of the Province in relation to property and civil rights. *Esquimalt & Nanaimo Railway Co.* v. *Wilson; Esquimalt & Nanaimo*

Railway Co. v. *Dunlop*, (1921) 91 L.J.P.C. 21; 126 L.T. 451; 61 D.L.R. 1; (1921) 3 W.W.R. 817; 28 C.R.C. 296; (1922) 1 A.C. 202.

3. Vancouver Island Settlers' Rights Act—Effect of disallowance.]—By sec. 56 of the B.N.A. Act a power of disallowance in respect of Dominion Acts is vested in the Queen in Council, and by sec. 90 the provisions of sec. 56 are, inter alia, made applicable to statutes passed by Provincial Legislatures, the Governor-General in Council being substituted as disallowing authority for the Queen in Council, and the period of two years mentioned in sec. 56 being reduced to one year. The words in the section "shall annul the act from and after the day of such signification" disclose with sufficient clearness an intention that, at all events as to private rights completely constituted and founded upon transactions entirely past and closed, the disallowance of a provincial statute was inoperative, and therefore where a patent to lands had issued under the Vancouver Island Settlers' Rights Act of 1904 and the Amending Act of 1917, the subsequent disallowance of the Act of 1917 was inoperative in regard to the patent issued. *Ibid.*

See In re Granby Consolidated Mining, Smelting & Power Co., Ltd., (1919) 26 B.C.R. 523; (1919) 2 W.W.R. 321.

4. Lands excluded from subsidy grant.] The plaintiff held a grant from the Crown through the Parliament of Canada for a tract of land including minerals from which was excluded certain portions thereof that had previously been alienated by the Crown. The defendant held a subsequent lease from the Crown through the Provincial Government of a portion of the same lands, claiming that the lands so leased were a portion of what had previously been alienated and were not included in the plaintiff's grant:—Held, that the question of whether the land in dispute passed under the grant to the plaintiff was one of fact, and the onus of proof that it fell within the portion previously alienated lies on the defendants, and they having failed in this the plaintiff should succeed. Held, further, that the Attorney-General was not a necessary party to the action. *Esquimalt and Nanaimo Railway Company* v. *McLellan and Wenborn*, (1918) 26 B.C.R. 104; 44 D.L.R. 697; (1918) 3 W.W.R. 828.

5. Esquimalt & Nanaimo Railway Grant—Coast line.]—The words "coast line" defining a boundary of land granted to the Esquimalt & Nanaimo Railway Company by the Dominion Government on April 21st, 1887, indicate the actual and normal boundary of the land which was divided from the sea by high-water mark. There is no presumption or other reason for construing words purporting to be words of grant in any other than their natural and strict sense. *Esquimalt & Nanaimo Railway Co.* v. *Treat*, (1918) 26 B.C.R. 275; 43 D.L.R. 653; (1918) 3 W.W.R. 685; (1919) 121 L.T. 657; 35 T.L.R. 737; (1919) 3 W.W.R. 356; 48 D.L.R. 139.

II. Construction and Operation.

A. Highways.

1. Right-of-way.]—The Board of Railway Commissioners will not invoke their compulsory powers to compel a railway company to supply a right-of-way across its own lands for a municipal highway to be used for highway purposes quite irrespective of railway purposes. *Town of Courtenay* v. *Esquimalt & Nanaimo Ry. Co.*, (1914) 28 D.L.R. 381; 18 C.R.C. 384.

2. Automatic bell alarm.—In the absence of statutory requirement, failure on the part of a railway company to maintain an automatic bell alarm on a railway crossing is not negligence. *Moore* v. *B.C. Electric Ry. Co.*, (1916) 22 B.C.R. 504; 34 W.L.R. 469; 10 W.W.R. 631.

B. Injuries to Persons On or Near Tracks.

1. Cars left in dangerous position.]—It is the duty of a railway company to take precaution against the escape of cars left standing on a grade siding knowing that there is a likelihood that boys may be attracted to them and may meddle with the brakes and start the cars down the incline. *Green* v. *B.C. Electric Ry. Co., Ltd.*, (1916) 10 W.W.R. 614; Affg. (1915) 25 D.L.R. 543; 9 W.W.R. 75; 32 W.L.R. 393.

2. Train—Definition of.] — A single passenger car containing its motor power, a gasoline engine under the fore part, is within the definition of a "train" under the British Columbia Railway Act. *Ullock* v. *Pacific Great Eastern Ry. Co.*, (1921) 30 B.C.R. 31; (1921) 2 W.W.R. 837.

C. Animals at Large.

1. Cattle on range.]—Cattle running at large on the range are lawfully at large and if the cattle are killed on a railway track the railway company is liable under the Railway Act. *Bardgett* v. *Canadian Pacific Railway Co.*, (1916) 10 W.W.R. 810.

2. Leaving poisonous material on unguarded track.]—A mining company in the course of its business loaded lead ore on cars of a railway company and at other times unloaded oats from cars at the same spot, the right-of-way not being inclosed. In the course of its operations particles of lead ore were allowed to drop on the right-of-way and a small quantity of oats was allowed to drop, mixing with the ore. The plaintiff's cows which were allowed to run at large strayed on the right-of-way, and eating the oats mixed with lead ore died from lead poisoning:—Held, that the evidence did not disclose liability on the part of the shipper or the railway company. *Dawson* v. *Paradise Mine and Canadian Pacific Railway Co.*, (1919) 26 B.C.R. 487; (1919) 1 W.W.R. 499.

3. Indian reserve.]—The plaintiff's cow which was pastured on an enclosed area within an Indian Reservation and adjoining the defendant Company's right-of-way, made its way through the fence onto the right-of-way and was killed by a passing train. The cow was pasturing on the enclosed area by reason of a bargain made by the plaintiff with an Indian who had no authority to deal with the property:—Held, that the animal was "at large" within the meaning of sec. 210 (4) of the British Columbia Railway Act and being at large by the wilful act of the plaintiff he cannot recover. *Merriman* v. *Pacific Great Eastern Railway Company*, (1922) 30 B.C.R. 457; (1922) 1 W.W.R. 935.

4. Wilful opening of gate leading to track.]—Where in an action against a railway company for damages for the loss of an animal killed upon the railway track the company adduces evidence from which the trial judge infers that the gate leading to the track has been wilfully opened by a stranger the further inference may be drawn that it has been wilfully left open and the action fails. *Brown* v. *Great Northern Railway Co.*, (1927) 38 B.C.R. 115; (1927) 2 D.L.R. 316; (1927) 1 W.W.R. 516; 32 C.R.C. 326.

5. Animal killed on right-of-way — Presumption.]—Where the evidence establishes that a servant of the owner of an animal killed on a railway company's right-of-way has on a previous occasion wrongfully taken down a part of a fence between the owner's land and the right-of-way, the presumption arises that in replacing the fence it was not made sufficiently secure, resulting in the animal straying to the right-of-way at the time that it was killed. Such presumption is sufficient in the absence of other evidence to relieve the Company from liability under sec. 386 (c) of the Railway Act 1919 (Can.) *B.C. Fruit Lands Ltd.* v. *Canadian Northern Pacific Railway Co.*, (1923) 1 D.L.R. 104.

D. Watercourses.

Negligent construction of.]—A railway company is liable in damages to an adjoining owner for the flooding of land resulting from negligent construction or insufficient working of a culvert. *McCrimmon* v. *B.C. Electric Ry. Co., Ltd.*, (1915) 22 B.C.R. 76; 24 D.L.R. 368; 32 W.L.R. 81; 8 W.W.R. 1289; 19 C.R.C. 329.

E. Operation of Train.

Defective appliances.]—A coal company which operates wholly on its own lands in connection with its mines a railway, and on it carries passengers and freight, may properly be found negligent in operating its cars with a "link and pin" coupling long after the general introduction of safer and better methods, although the company may not be subject to the Railway Act, sec. 264. *Cook* v. *Canadian Collieries*, (1915) 21 B.C.R. 64; 21 D.L.R. 215; 8 W.W.R. 41; 30 W.L.R. 750.

See ARBITRATION.
See CARRIERS.
See COMPULSORY PURCHASE.
See CONSTITUTIONAL LAW.
See FIRE.
See LIMITATION OF ACTIONS.
See NEGLIGENCE.
See TORT.

RAPE.

See CRIMINAL LAW.

REAL PROPERTY.

1. Unregistered Crown grant—Owner in possession.]—Actual possession under grant from the Crown coupled with the statutory right to register the grant creates an estate or interest within the meaning of the word "owner" in sec. 2 of the Mechanics' Lien Act upon which a mechanic's lien may attach. An unregistered Crown grant is admissible in evidence when it is not sought to set it up against a registered instrument. *Dorrell* v. *Campbell*, (1916) 23 B.C.R. 500; 32 D.L.R. 44; (1917) 1 W.W.R. 500.

2. Unrestricted power of sale.] — An unrestricted power of sale over real estate given to executors does not confer upon them in ownership in such real estate, and their interest should be registered merely as a charge. *In re Land Registry Act*, (1917) 1 W.W.R. 667.

3. Mortgagee's interest in land—Subject to judgment.]—A mortgagee's interest in the lands held under his mortgage is subject to the charge of a judgment registered against him, and intending purchasers of the mortgage and the mortgagor when making payments should search and determine whether any judgments exist against the mortgagee before dealing with him. *In re Land Registry Act; In re Mandeville*, (1917) 24 B.C.R. 137; 36 D.L.R. 292; (1917) 1 W.W.R. 1522.

4. Easement — Reservation of minerals.]—Reservations in a conveyance of "all coal, coal oil, petroleum, oil springs, iron and fire clay within, upon or under the same" are exceptions and reservations from the grant, and not easements, and should not be registered as such. A certificate of title may issue subject to these reservations, a memorandum of which should be endorsed on the certificate. Rights of entry and rights of way are easements and not subject to reservation, but if they are easements of necessity incidental to the getting of the minerals it is not necessary to register them as a charge. *Alberni Land Co., Ltd.* v. *Registrar-General of Titles*, (1918) 25 B.C.R. 273; 40 D.L.R. 142; (1918) 2 W.W.R. 537.

5. Water record — Appurtenant to land.]—A conveyance in pursuance of the Real Property Conveyance Act or a mortgage in pursuance of the Mortgages Statutory Form Act includes not only the water privileges enjoyed in connection with the land, but also a proportionate interest in the works used for diverting and conveying the water. *Dalton* v. *The West Shore and Northern Land Co., Ltd.*, (1920) 28 B.C.R. 384; (1920) 2 W.W.R. 1022.

6. Unregistered easement.]—The plaintiff sold a lot to R., reserving to himself in the conveyance a right of way across the lot. The conveyance was duly registered, and subsequently R. sold the lot to the defendant without reservation. A certificate of indefeasible title was issued to the defendant. After the defendant had purchased, the plaintiff continued to use the right of way for over four years, when the defendant prevented its further use by the plaintiff by fencing it:—Held, that the indefeasible title in fee simple held by the defendant was a bar to any claim by the plaintiff to a right of way over the land. *Sorenson* v. *Young*, (1919) 27 B.C.R. 335; (1920) 1 W.W.R. 189.

7. Lost deed—Presumption of reservations.]—By deed dated in 1890 the Esquimalt & Nanaimo Railway Co. granted to G. certain lands reserving the coal and other minerals. The land was within the Railway Belt and in February, 1904, the Vancouver Island Settlers' Rights Act, 1904, was passed by virtue whereof G.'s executors became entitled to a grant in fee simple of the land including coal. In March, 1904, the executors entered into an agreement to sell the land to the plaintiff and in 1905 executed a deed in his favour. The time having passed in which the executors could apply for a grant under the Settlers' Rights Act, the Legislature in 1917 extended the time by an amendment to the Act and the executors then applied for a grant of the two sections of land under the provisions of the Act and obtained the same in 1918. The plaintiff brought action against the executors for a declaration that he was entitled to the coal and other minerals. His agreement and deed had been lost. It was held by the Judicial Committee of the Privy Council that from the evidence and the probabilities it could not be assumed that the agreement and conveyance to the plaintiff purported to cover the coal and other minerals reserved in the original deed from the Railway Company to G. *Bing Kee* v. *McKenzie*, (1919) 3 W.W.R. 221; 48 D.L.R. 287; Revg. (1919) 26 B.C.R. 509; 47 D.L.R. 43; (1919) 2 W.W.R. 172.

8. Disallowed statute — Prior Crown grant under.]—Where private rights have been acquired by Crown grant under a Provincial statute founded upon transactions entirely passed and closed the disallowance

of the Provincial statute by the Governor-General in Council does not affect such private rights and therefore where a Crown grant to lands had issued under the Vancouver Island Settlers' Rights Act, 1904, and the amending Act of 1917 the subsequent disallowance of the Act of 1917 is inoperative in regard to the Crown grant issued. *Esquimalt & Nanaimo Railway Co.* v. *Wilson. Esquimalt & Nanaimo Railway Co.* v. *Dunlop,* (1921) 91 L.J.P.C. 21; 126 L.T. 451; 61 D.L.R. 1; (1921) 3 W.W.R. 817; 28 C.R.C. 296; (1922) 1 A.C. 202.

9. Legal estate in mortgagee.]—The Land Registry Act, 1921, does not affect the law that a mortgage transfers the legal estate in the mortgaged property to the mortgagee subject to an equity of redemption in the mortgagor. *District of North Vancouver* v. *Carlisle,* (1922) 31 B.C.R. 372; 70 D.L.R. 527; (1922) 3 W.W.R. 811.

10. Mortgagor in possession — Lease by.]—A mortgagor in possession may make a lease of his equitable estate and may stipulate for right of re-entry to that estate in the same way as an owner of a legal estate may stipulate for right of re-entry to the legal estate. *B.C. Thoroughbred Association, Ltd.* v. *Brighouse,* (1922) 31 B.C.R. 381; 70 D.L.R. 130; (1922) 3 W.W.R. 665.

11. Lateral support.]—Though an owner of land is entitled to have his soil supported in its natural state and as an incident to the land itself, yet if he artificially imposes upon it an additional weight by the erection of a building he is not entitled to the lateral support of the adjacent land of another owner to sustain that additional weight unless he has acquired a right thereto by an easement or otherwise. *Linnell* v. *Reid,* (1923) 32 B.C.R. 87 (Martin, J.A. at p. 93); (1923) 2 D.L.R. 445; (1923) S.C.R. 594; (1923) 3 D.L.R. 966; (1923) 3 W.W.R. 422.

12. Declaration of title—Estoppel.]—Under and by virtue of a survey made in 1872 the defendant Municipality claimed the right to open up a public road through the plaintiff's property. When the old survey was made the land was a pre-emption and on the issue of a Crown grant no reservation was made for a road nor was it even used as such since the formation of the defendant Municipality in 1895. A former owner of the land had agreed to give the Municipality another strip for a road in lieu of portion set off for that purpose in the old survey and in accordance with this agreement a road was constructed and has been continuously in use as a public highway. The assertion of the right to open the road in accordance with the old survey the plaintiff contended was a cloud on the title which should be removed:—Held, that irrespective of whether the Municipality had the power to make the exchange when the present road was built it is a highway used by the public, and in view of the length of time which has elapsed since the old survey was made the Municipality is estopped from opening up a road in accordance with the old plans. *British Columbia Hop Co.* v. *Corporation of Kent,* (1925) 35 B.C.R. 380; (1925) 3 D.L.R. 171; (1925) 2 W.W.R. 31.

13. Tenant in common—Trustee for co-tenant.]—A simple trustee of property is not bound to collect the rents thereof. Therefore he is not accountable to the cestui que trust for rents not collected. On an accounting between a trustee of land and cestui que trust the trustee is entitled to an allowance of the amounts expended by him in improving the property, or the amount by which the improvements have enhanced the value of the property, whichever is the less. *Sproule* v. *Clements,* (1927) 39 B.C.R. 28; (1927) 3 D.L.R. 955; (1927) 2 W.W.R. 825.

14. Transfer executed in blank—Deposit as security.]—Where an owner of land delivers an instrument of transfer thereof executed without the insertion of the name of the transferor, and the person to whom it is delivered deposits it with another as security for an advance, the latter does not acquire an equitable mortgage of the land as against the owner. *Tom* v. *Trustee of Hans C. Christensen, Ltd. and Everett,* (1928) 40 B.C.R. 383; (1928) 4 D.L.R. 668; (1928) 3 W.W.R. 314.

15. Vendor's representation as to location—Estoppel.]—Where a vendor goes on the land with the prospective purchaser and points out and defines by his surveyor then present for the express purpose the exact boundaries of the lot he is selling, and after the surveyor has then and there located the lot and a wrong description of it supposed to define and represent the actual location is inserted in the deed and the purchaser receives his deed and takes possession of the lot which has been pointed out to him, and retains peaceable possession thereof for sixteen years and makes valuable improvements thereon during that period, the vendor is estopped from disputing the purchaser's right to possession and title. *McDonald* v. *Knudsen,* (1928) 40 B.C.R. 25; (1928) 3 D.L.R. 242; (1928) 2 W.W.R. 577.

16. Timber.]—The sale of standing timber for the removal of which the purchaser is to have as much time as he desires, is the sale of an interest in land, and subject to the provisions of the Land Registry Act. *Carlson* v. *Duncan*, (1931) 44 B.C.R. 14; (1931) 3 D.L.R. 570; (1931) 2 W.W.R. 343.

See BOUNDARIES.
See CONSTITUTIONAL LAW.
See JUDGMENTS.
See LIENS.
See MINES AND MINERALS.
See PRESCRIPTION.
See PUBLIC LANDS.
See REGISTRATION OF LANDS.
See VENDOR AND PURCHASER.

RECEIVER.

I. APPOINTMENT, 945.
A. *Jurisdiction*, 945.
B. *Officer of Court*, 945.
II. PRACTICE, 946.
III. CLAIMS AND PRIORITIES, 946.

I. APPOINTMENT.

A. *Jurisdiction.*

Small Debts Court.]—The sections of the Small Debts Court Act which provide for an appeal do not apply to matters of practice or procedure in that Court but to final decisions and an appeal does not lie from a dismissal by the magistrate of an application for appointment of receiver by way of equitable execution. *Davis* v. *Yoshida*, (1931) 3 W.W.R. 703.

B. *Officer of Court.*

1. Relation to.]—A receiver is not the agent of any party but is an officer of the Court; consequently one who secures the appointment of a receiver is not liable for his acts. *Bottoms* v. *Pacific Northwest Lumber Co. et al.*, (1929) 4 D.L.R. 415.

2. Chartered accountant—Salaried employee.]—It is wrong in principle for the Court to pay its officer a salary which does not go to him, but to a third person, where such third person has assumed no legal responsibility in the matter. *Marshall* v. *Can. Pac. Lumber Co.*, (1923) 2 D.L.R. 356.

II. PRACTICE.

1. Leave to commence action.]—A receiver, being an officer of the Court, cannot be sued without leave in a separate action in respect of acts done in discharge of his office. *Stephens* v. *Royal Trust Co.*, (1917) 25 B.C.R. 77.

2. Expiry of writ of summons—Prior appointment.]—A writ of summons that has not been served or renewed within twelve months of its date is invalid only for purposes of service and a receiver appointed thereunder does not cease to be receiver at the end of the twelve months. *Canada Permanent Mortgage Corporation* v. *Dalgleish*, (1928) 39 B.C.R. 300; (1928) 1 D.L.R. 1113; (1928) 1 W.W.R. 473.

3. Receiver's expenses.]—A receiver is the servant or officer of the Court and not the agent of any party to the action, and should look for indemnity to the assets which are under the control of the Court. As a rule there is no liability of a party for a receiver's expenses. *Johnston* v. *Courtney*, (1920) 2 W.W.R. 459.

4. Application by plaintiff in another action.] — Where a receiver has been appointed in one action the plaintiff in another action against the same defendant may move in the former action for an order that the receiver held all property subject to the order of the Court. *Standard Bank of Canada* v. *Wade*, (1924) 33 B.C.R. 493; (1924) 3 D.L.R. 251; (1924) 2 W.W.R. 497.

5. Receiver's bond — Liability of surety.]—Where sureties execute a bond to insure the due performance of a receiver's duty on the condition that the bond shall be executed by the receiver, and this is not done, the surety is discharged. *Larbonne* v. *Shore*, (1928) 39 B.C.R. 508; (1928) 2 D.L.R. 977; (1928) 2 W.W.R. 8.

III. CLAIMS AND PRIORITIES.

1. Equality of creditors.]—The appointment of a receiver is by way of equitable relief and upon the principle of equality is equity, must be for the benefit of all creditors at the date of the receiving order. *Standard Bank* v. *Wade*, (1924) 33 B.C.R. 493; (1924) 3 D.L.R. 251; (1924) 2 W.W.R. 497.

2. Power to charge lands in priority over existing mortgages.]—A receiver of an estate is not entitled to create a mortgage to secure an advance to him for the

purpose of paying taxes in priority to a mortgage existing and registered before his appointment. *Ashworth* v. *Vancouver Trust Co.*, (1922) 68 D.L.R. 746.

See BANKRUPTCY.
See COMPANY.
See EXECUTION.
See PRACTICE.

REGISTRATION OF TITLE TO LAND.

I. REGISTRATION, 947.
A. *What interests registrable*, 947.
B. *Unregistered instruments*, 948.
C. *Deposit of documents*, 949.
D. *Execution and acknowledgment of instruments*, 950.
II. CHARGE, 950.
III. JUDGMENTS, 951.
IV. LIS PENDENS, 952.
V. MAPS AND PLANS, 952.
VI. REGISTRAR, 953.
A. *Powers of*, 953.
B. *Costs against*, 954.
VII. VALUATION, 954.

I. REGISTRATION.

A. *What Interests Registrable.*

1. Power of sale to executors.]—An unrestricted power of sale over real estate given to executors does not confer upon them an ownership in such real estate, and their interest should be registered merely as a charge. *In re Land Registry Act and Prefontaine*, (1917) 1 W.W.R. 667.

2. Reservations and exceptions.]—Reservations in a conveyance of land of "all coal, coal oil, petroleum, etc., within, upon or under the same" are exceptions and reservations from the grant and not easements, and should not be registered as charges against the fee simple. A certificate of indefeasible title may issue subject to these reservations, a memorandum of which should be endorsed on the certificate. The incorporeal rights, such as rights of entry and rights of way, are easements, and not subject to reservation, but if they are easements of necessity incidental to the getting of the minerals there is no need to register them as a charge against the fee simple. *Alberni Land Co.* v. *Registrar-General of Titles*, (1918) 25 B.C.R. 273; 40 D.L.R. 142; (1918) 2 W.W.R. 537.

3. War Relief Act — Registration of foreclosure.]—On the 19th of April, 1916, an order absolute of foreclosure was made in an action in which one of the defendants was a volunteer for active service. On the 28th of April following an application was made to register the plaintiff as owner in fee by virtue of the order absolute, when the registrar of titles required tnat the plaintiff give 30 days' notice under sec. 134 of the Land Registry Act to all persons interested. The notice was duly given. On the 29th of May, 1916, the War Relief Act came into force, being after the date of the order absolute and the application to register but before the expiry of the aforesaid 30 days. In the meantime the district registrar of titles notified the plaintiff under sec. 63 of the Land Registry Act Amendment Act, 1914, declining to register the plaintiff as owner in fee on the ground that "no proof is filed here that the defendants in the foreclosure action are not protected by sec. 2 of the War Relief Act." On an application to compel the registration of the foreclosure order absolute:—Held, that the plaintiff's application should be accepted by the registrar. *In re War Relief Act and Land Registry Act*, (1916) 23 B.C.R. 255; 30 D.L.R. 278; 10 W.W.R. 1329.

4. Will—Trust — Power of sale.] — A testator devised all his real and personal property to trustees "upon trust to sell and convert into money such real and personal estate." The trustees sold an undivided three-eighths part or share of a block of the land so devised:—Held, that the power given the trustees did not authorize the sale of an undivided interest in real property and the registrar of titles was justified in refusing to recognize the conveyance as valid. *In re Land Registry Act and Anthony*, (1916) 22 B.C.R. 535; 10 W.W.R. 863.

5. Timber.]—A sale of standing timber for the removal of which the purchaser is to have as much time as he desires is a sale of an interest in land and the conveyance of the timber should be registered. *Carlson* v. *Duncan*, (1931) 44 B.C.R. 14; (1931) 3 D.L.R. 570; (1931) 2 W.W.R. 343.

B. *Unregistered Instruments.*

1. Assignment—Second assignment.]—The assignee of an assignee of the holder of a registered mortgage may have his title

registered without the necessity of registering the first assignment. *In re Land Registry Act and the Standard Trusts Company,* (1916) 22 B.C.R. 538; 10 W.W.R. 877.

2. Registration of lease from Crown.]—A lease of foreshore from the Crown should be registered notwithstanding that the fee which is vested in the Crown has not been registered. *In re Land Registry Act and Canadian Explosives Ltd.,* (1918) 39 D.L.R. 764; (1918) 1 W.W.R. 399.

3. Unregistered trust deed—Priority of judgment.]—Where a judgment is recovered against a defendant who had previously executed a trust deed covering all his lands, his only interest remaining being an equity of redemption in said lands, such equity only is liable to satisfy the judgment, notwithstanding that the trust deed was not registered. *Gregory* v. *Princeton Collieries,* (1918) 25 B.C.R. 180; 40 D.L.R. 739; (1918) 1 W.W.R. 265.

See JUDGMENTS—*Infra,* p. 951.

C. Deposit of Documents.

Decree of specific performance—Registration without production of certificate of title.]—M. & P. purchased lands under agreement for sale in 1921, went into possession, and paid taxes. In August, 1925, they learned for the first time that two weeks before the date of their agreement for sale the vendor deposited the certificate of title of said lands with T. as security for a loan of $350 and delivered him a conveyance of the lands. Up to this time none of the parties had registered their respective interests in the lands. On the 4th of November, 1925, M. & P. lodged a caveat in the Land Registry office and on the 29th of December following having paid for the property in full they brought action for specific performance against the vendor and a lis pendens. Certificate of lis pendens was then filed in the Registry office and upon a decree for specific performance being granted they applied to register the decree but it was refused by the registrar of titles on account of the non-production of the certificate of title. M. & P. then appealed to a judge in Chambers under sec. 230 of the Land Registry Act:—Held, that M. & P. are entitled to registration of the decree notwithstanding the non-production of the certificate of title. *In re Land Registry Act. Morrison & Pollard* v. *Taylor,* (1926) 37 B.C.R. 324; (1926) 2 W.W.R. 371.

D. Execution and Acknowledgment of Instruments.

1. Execution by company.]—Article 76 of Table A of the Companies Act, R.S.B.C. 1911, cap. 39, requires that the company seal shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for such purpose; and these two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence. The deed in question was in fact signed by two directors and by one of such directors as secretary:—Held, that as the article requires three distinct persons to be present who join in signing the instrument the deed in question was not properly executed. *In re Land Registry Act and Studd,* (1916) 22 B.C.R. 507; 28 D.L.R. 354; 34 W.L.R. 466.

2. Acknowledgment by telephone.]—Acknowledgment of a signature to an instrument taken by a solicitor over the telephone is not in compliance with the provisions of the Land Registry Act. *Simmons* v. *Royal Bank of Canada,* (1915) 22 B.C.R. 369; 33 W.L.R. 363; 27 D.L.R. 723.

II. CHARGE.

1. Mortgage foreclosure — Personal judgment.]—A personal judgment for the mortgage debt duly registered will not prevent the mortgagee from registering his title in fee under a decree absolute without first discharging the judgment. *Scottish Temperance Life Assurance Co.* v. *District Registrar of Titles,* (1917) 24 B.C.R. 232; 36 D.L.R. 152; (1917) 3 W.W.R. 30.

2. Attorney—Assignment to himself.]—An assignment of a mortgage to himself by the donee of a power of attorney, without proof of acquiescence by the donor, does not establish a prima facie title, and the registrar of titles will be justified in not receiving such instrument for registration. A power of attorney to sell or assign a mortgage does not authorize the donee of the power to exercise that power in favour of himself. *Re Land Registry Act and Shaw,* (1915) 22 B.C.R. 116; 24 D.L.R. 429; 8 W.W.R. 1270; 32 W.L.R. 85.

3. Mortgage—Legal estate.]—The Land Registry Act, 1921, does not affect the law

that a mortgage transfers the legal estate in the mortgaged property to the mortgagee subject to an equity of redemption in the mortgagor. *District of North Vancouver* v. *Carlisle*, (1922) 31 B.C.R. 372; 70 D.L.R. 527; (1922) 3 W.W.R. 811.

III. Judgments.

1. Against mortgagee.]—Where a judgment against a mortgagee is registered against the mortgaged lands an assignment of the mortgage should not be registered except as subject to the judgment. *In re Land Registry Act and Mandeville, Hagman and McIntosh*, (1917) 24 B.C.R. 137; 36 D.L.R. 292; (1917) 1 W.W.R. 1522.

2. Priority as against unregistered mortgage.]—A judgment registered in the Land Registry office on an application made after the date of the execution of a mortgage by the judgment debtor, but before the application for the registration thereof, takes priority over the mortgage by virtue of sec. 73 of the Land Registry Act. *Bank of Hamilton* v. *Hartery*, (1918) 26 B.C.R. 22; 43 D.L.R. 14; (1918) 3 W.W.R. 551; (1919) 58 S.C.R. 338; 45 D.L.R. 638; (1919) 1 W.W.R. 868.

3. Priority as against unregistered trust deed.]—Where a judgment is recovered against a defendant who had previously executed a trust deed covering all his lands, his only interest remaining being an equity of redemption in said lands, such equity only is liable to satisfy the judgment, notwithstanding the fact that the trust deed was not registered. *Gregory* v. *Princeton Collieries*, (1918) 25 B.C.R. 180; 40 D.L.R. 739; (1918) 1 W.W.R. 265.

4. Registration—Tax sale deed—Notice to judgment creditor.]—On an application to register a tax-sale deed, service of notice under sec. 137B of the Land Registry Act, 1911, upon judgment creditors is not required where the executrix of the owner has filed a declaration of insolvency. *In re The District of North Vancouver. In re Estate of J. C. Keith, Deceased*, (1918) 1 W.W.R. 626.

5. Supreme Court of Canada — Judgment of.]—A certificate issued by the District Registrar of the Supreme Court of British Columbia stating that a judgment has been obtained in the Supreme Court of Canada against the defendant for a sum of money but omitting to set forth that the judgment has been entered and become a judgment of the Supreme Court of British Columbia will not be registered against the lands of the judgment debtor. *Komnick System Sandstone Brick Machinery Co.* v. *B.C. Pressed Brick Co., Ltd.*, (1921) 1 W.W.R. 207.

IV. Lis Pendens.

1. Cause of action.]—The filing of a lis pendens in the Land Registry office does not per se afford a cause of action to a purchaser of the land affected by the lis pendens, who has registered his agreement to purchase before the filing of the lis pendens. *Bostwick and Curry* v. *Coy*, (1915) 21 B.C.R. 478.

2. Not a charge.]—A certificate of lis pendens registered against land in an action in which the Crown grant of such land is attacked is not a charge within the meaning of the Land Registry Act, but creates a cloud on the title and the registrar of titles properly exercises the discretion conferred on him by the Land Registry Act in refusing to issue a certificate of indefeasible title until he is satisfied that the title shewn by the person applying for registration is a good safe holding and marketable title. *In re Land Registry Act. Granby Consolidated Mining Smelting & Power Co. Ltd.* v. *Esquimalt & Nanaimo Railway Co.*, (1919) 88 L.J.P.C. 199; 122 L.T. 199; 48 D.L.R. 279; (1919) 3 W.W.R. 331; (1920) A.C. 172; Affg. (1918) 25 B.C.R. 531; 41 D.L.R. 335; (1918) 2 W.W.R. 626.

V. Maps and Plans.

Conflicting registered plans—Description—Assurance fund.]—On the 5th of February, 1890, map No. 263 representing the survey of sec. 4 of the City of Victoria was filed in the Land Registry office. On the 4th of October, 1907, map No. 858, representing a survey of sec. 48 immediately adjoining sec. 4 on the east was filed pursuant to an order of the Supreme Court under the City of Victoria Official Map Act, 1893. In 1909 the city surveyor of Victoria brought to the attention of the Registrar-General of Titles that plan 858 encroached about 100 feet on plan 263 but after some correspondence and investigation the Registrar-General decided that both maps were properly filed. The land in question under

plan 858 was purchased by Lee Mong Kow in January, 1910, and on the 20th of June following a certificate of indefeasible title was issued from the Registrar's office to him. In 1913 the British Columbia Electric Railway Co. fenced in a strip of about 100 feet of the western portion of the land included in plan 858, claiming that it was part of sec. 4 within plan 263, and in an action between Lee Mong Kow and the Railway Company it was held that map 858 was wrongfully filed and null and void in so far as it conflicted with map 263:—Held, that the Registrar-General of Titles was not guilty of any "omission, mistake or misfeasance" so as to render the assurance fund liable for damages under sec. 99 of the Land Registry Act. Held, further, that in any case sec. 105 of said Act provided against the assurance fund being liable in such a case. *Lee Mong Kow and Chetham* v. *The Registrar-General of Titles*, (1923) 32 B.C.R. 148; (1923) 2 W.W.R. 545.

VI. Registrar.

A. Powers of.

1. Discretion.]—On petition for the registration of a conveyance, the Court will not review the registrar's exercise of discretion under subsec. (7) of sec. 80 of the Land Registry Act unless he has refused, or has not in fact exercised his discretion. *In re Land Registry Act and Clancy*, (1915) 21 B.C.R. 1; 25 D.L.R. 536.

2. Discretion.]—The statutory duty of the Registrar of Titles in respect of registration of instruments is not merely ministerial but carries with it a certain amount of discretion which he may exercise in order to ascertain the legality of instruments, and the apparent right or title of parties seeking their registration. *Re Land Registry Act and Shaw*, (1915) 22 B.C.R. 116; 24 D.L.R. 429; 32 W.L.R. 85; (1915) 8 W.W.R. 1270.

3. To refuse registration of conveyance by insolvent person.]—The grantor being insolvent executed a conveyance to a trustee for her creditors. The registrar took the position that under sec. 9 (1) of The Bankruptcy Act, 1919, the conveyance was void and refused registration:—Held, that the conveyance is voidable only at the instance of some person entitled and that if no one of the persons entitled to complain has done so and has had the conveyance declared null and void the registrar must accept the same for registration. *In re Land Registry Act and In re Bull Estate*, (1926) 3 W.W.R. 263; 7 C.B.R. 729.

4. Caveat filed by registrar.]—A caveat filed by the registrar under sec. 62A of the Land Registry Act is not subject to the provisions of sec. 69 as to a caveat lapsing unless evidence of proceedings to establish the right claimed is filed within two months. The provisions in sec. 63 of the Act that caveats shall be verified by the affidavit of the caveator or his agent and shall contain an address for service does not apply to a caveat filed by the registrar under sec. 62A, nor is such caveat required to give the nature of the estate or interest claimed. An issue should be directed to determine the "question of right of title," as sec. 60 is wide enough to cover such a direction where it is raised on the affidavits filed. *Hamilton & Wragge* v. *Stokes*, (1921) 30 B.C.R. 65; 62 D.L.R. 282; (1921) 2 W.W.R. 921.

B. Costs Against.

Application of Crown Costs Act.]—A district registrar of titles is an officer of the Crown within the meaning of the Crown Costs Act, and the Court is prohibited from making any order or direction as to costs for or against him. This rule applies to cases where by statute the costs are to follow the Court and on the dismissal of an appeal taken by him to the Court of Appeal. *In re Land Registry Act and Scottish Temperance Life Assurance Co.*, (1919) 26 B.C.R. 504; (1919) 2 W.W.R. 125.

VII. Valuation.

Conveyance from Crown to railway company.]—Upon an application to register a conveyance of land to a railway company the estimated "market value" of the land should be the sum which the company might reasonably be expected to pay for the purposes of the railway. The cost of a tunnel passing through the land being part of the railway system as a going concern will not be taken into consideration in computing the market value for the purpose of fixing the registration fee. *McMullen* v. *District Registrar of Titles*, (1922) 30 B.C.R. 415; 68 D.L.R. 218; (1922) 1 W.W.R. 392.

See CONSTITUTIONAL LAW.
See DEEDS AND OTHER INSTRUMENTS.
See EXECUTION.
See HIGHWAYS.
See JUDGMENTS.
See MECHANIC'S LIEN.
See REAL PROPERTY.
See VENDOR AND PURCHASER.

REPLEVIN.

1. Valuation.]—An affidavit in support of an application for an order of replevin set forth precisely a list of the articles claimed, and placed a valuation on each of a majority of the articles mentioned, but no valuation was placed on the balance, consisting of several articles:—Held, that there was not a sufficient compliance with the statute. *Clough* v. *Greenwood and Clough,* (1919) 27 B.C.R. 140.

2. Bond—Indefinite amount—Ambiguity.]—A bond for "the sum of $2,000 of lawful money of British Columbia" is invalid as there is nothing in the document to assist in construing these words, and the ambiguity is patent and not curable by extrinsic evidence. *Maritime Motor Car Co., Ltd.* v. *McPhalen,* (1920) 28 B.C.R. 168; (1920) 2 W.W.R. 213. Affg. (1919) 27 B.C.R. 244; (1919) 2 W.W.R. 811.

3. Notice of assignment.]—In a notice of assignment of a bond the persons named in the assignment itself and the notice was of an assignment of a bond "bearing date on or about the 18th day of September, 1915," whereas the bond sued on was dated "this eighteenth day of September, one thousand eight hundred and fifteen":—Held, that the notice was not sufficient to enable the assignee to maintain an action in his own name and the Court refused to add the assignor as a party after so finding. *Ibid.*

4. Action against surety—Delivery to claimant.]—In an action against one of the sureties on a replevin bond it was found the sheriff made the seizure of the article to be replevied but did not hand it over to the claimant:—Held, not to be a defence to the action where it does not appear that the claimant asked for delivery. *Winterburn* v. *Andernach,* (1922) 31 B.C.R. 343; (1923) 1 D.L.R. 1157.

5. Liquor under seizure.]—A replevin order should not be granted against a chief of police for the return of intoxicating liquor in his custody which has been seized in a place other than a private dwelling-house. *Lim Jim* v. *McRae,* (1918) 1 W.W.R. 404.

REPRESENTATION.

See MISREPRESENTATION AND FRAUD.

RES JUDICATA.

See ESTOPPEL.

RESPONDEAT SUPERIOR.

See MASTER AND SERVANT.
See NEGLIGENCE.
See PRINCIPAL AND AGENT.

RESTRAINT OF TRADE.

See CONTRACT.
See MARKETING ASSOCIATIONS.

REVENUE.

See TAXATION.

RIGHT OF WAY.

See EASEMENT.

RIPARIAN RIGHTS.

See BOUNDARIES.
See COMPULSORY PURCHASE.
See CONSTITUTIONAL LAW.
See WATERS AND WATERCOURSES.

RIVERS.

See WATERS AND WATERCOURSES.

ROBBERY.

See CRIMINAL LAW.

SALE OF GOODS.

I. IN GENERAL, 957.
II. PASSING OF PROPERTY, 959.
III. CONDITIONS, 961.
IV. WARRANTY, 964.
V. NON-ACCEPTANCE, 967.
VI. NON-DELIVERY, 968.
VII. INSPECTION, 971.
VIII. CONDITIONAL SALE, 972.
A. In general, 972.
B. Validity, 973.
C. Rights of third parties, 974.
D. Rights and remedies of vendor, 975.
E. Rights and remedies of purchaser, 980.
IX. SALE BY MERCANTILE AGENT, 980.

I. IN GENERAL.

1. Sale or barter.]—Where the consideration for the transfer of the property in goods consists partly of goods and partly of money, the transaction is a sale and not a barter. *Olympic Stone Construction Co. Ltd.* v. *Morrison & Rowe*, (1915) 21 B.C.R. 120; (1915) 21 D.L.R. 271; 30 W.L.R. 711; 8 W.W.R. 79.

2. Sale—Essence of.]—The essence of a sale is the transfer of the property in a thing from one person to another for a price. *Rex ex rel. Miller* v. *Gold Seal, Ltd.*, (1922) 31 B.C.R. 177; (1922) 2 W.W.R. 1219; 38 C.C.C. 1.

3. Misrepresentation.]—A material misrepresentation made innocently by an agent inducing a sale of goods and known to the principal to be false entitles the purchaser to rescission. *Gibson* v. *Cottingham*, (1916) 23 B.C.R. 392; 32 D.L.R. 213; (1917) 1 W.W.R. 496.

4. Market price—Co-operative marketing corporation.] — Where the plaintiff agreed to sell to the defendant, a co-operative corporation engaged in marketing and selling fruit of the orchards of which the shareholders of the corporation were owners, the whole of the fruit crop of his orchard for a period of seven years, the purchase price to be the market price of such fruit in each year, in the absence of agreement the price is to be ascertained by taking the average price realized by the defendant for fruits sold for each kind and grade furnished by the plaintiff, and from that should be deducted the expenses incurred in handling the fruit received from the plaintiff and a sum representing a reasonable profit. *Kidston* v. *Stirling & Pitcairn, Ltd.*, (1920) 61 S.C.R. 193; 55 D.L.R. 366; (1921) 1 W.W.R. 162.

5. Current market price.]—The plaintiffs, proprietors of a gas station, entered into an agreement with the defendant to purchase from it exclusively for three years, gasoline, distillate and other petroleum products, in consideration for which the defendant paid the plaintiffs $1,500 cash and agreed to furnish the petroleum products at the same current market price as furnished to the trade generally, and in addition to the usual and current trade discount allowed to dealers of the company an additional sum of one cent per gallon of gasoline sold. At the time the contract was entered into the current trade discount was four cents per gallon, but shortly after the defendant company entered into contracts with other dealers who agreed to purchase from them exclusively whereby they allowed them the usual discount of four cents and an additional discount of two cents per gallon. The plaintiffs brought this action for specific performance, claiming that by virtue of this the current discount was raised to six cents per gallon:—Held, that the company may enter into special contracts with retailers who agree to buy from it exclusively as to the discount to be allowed and this does not affect the "usual and trade discount allowed to dealers." *Jackson & Jackson* v. *Shell Oil Company of British Columbia, Ltd.* (1931) 43 B.C.R. 449; (1931) 1 W.W.R. 477.

6. Canning company and fishermen—Agreement to sell fish exclusively to company.]—The defendant company, through an agent, engaged a group of men to fish exclusively for the company in a certain area on the terms that the company would pay the men the same price for fish as "any other cannery" in that area; that they would be allowed free bluestone to treat their nets, four gallons of gasoline per week free to each boat, free mending twine, and

be furnished nets for the use of which one-fifth of the price paid for fish would be deducted, boats and line and all necessary equipment to be provided by the men themselves. The men proceeded to the fishing area but on their arrival demanded that they be paid 35 cents per fish, which the company refused to pay:—Held, that the contract was not one of service or employment but a contract for the sale of fish within sec. 11 of the Sale of Goods Act, and the plaintiffs cannot recover not having complied with the said section. *Salo* v. *Anglo-British Columbia Packing Co.*, (1929) 40 B.C.R. 481; (1929) 1 D.L.R. 874; (1929) 1 W.W.R. 385.

7. Particulars of amount due—Right of interested party to demand.]—Sec. 8 of the Conditional Sales Act, R.S.B.C. 1924, cap. 44, imposes a duty on the holder of a conditional sale agreement to furnish to any party interested particulars of the amount remaining due to the seller and give to such interested party a right of action to have determined what is the correct amount due the seller in case of dispute between them. *Bottoms* v. *Pacific Northwestern Lumber Co. Ltd.*, (1929) 2 W.W.R.. 495.

8. Legality of—Sale of device—Game of skill.]—The plaintiff, an expert checker player, designed and patented a problem checker board and sold a number of these articles to the defendant. On the board were indicated and described a number of checker problems and each of 1,000 sealed punch holes at the foot contained the name of a problem to be solved by the contestants. A certain sum was payable by each contestant for the privilege of drawing and upon solving a problem a prize was awarded to him:—Held, that the only element of chance was involved in selecting the game to be played which was done by the player purchasing the board, but the result of the draw did not affect the character of the game as all the problems were capable of solution by the player provided that he had sufficient skill. As the problems were games of skill only the use of the boards did not constitute gaming in violation of the Criminal Code and the defendant was liable to pay for the boards. *D'Orio* v. *Leigh & Cuthbertson, Ltd.*, (1929) 41 B.C.R. 153; (1929) 2 W.W.R. 171.

II. Passing of Property.

1. Burden of proof.]—The defendant purchased goods subsequent to the issue of execution by a judgment creditor of the vendor and moved them to his warehouse where they were later seized under the execution. The purchase price was $400 and there was evidence of their being worth nearly $2,000 on a forced sale. The sheriff had previously to the sale seized other goods of the vendor and advertised them for sale in two newspapers:—Held, that before the purchaser can invoke the protection of sec. 2 (24) of the Laws Declaratory Act he must prove that the sale was bona fide and for valuable consideration. *Island Amusement Company, Limited* v. *Parker & Kippen and Price*, (1920) 28 B.C.R. 43. *(Sub nom. Island Amusement Co.* v. *Quagliotti)*. (1920) 28 B.C.R. 43; 61 D.L.R. 28; (1920) 1 W.W.R. 1015.

2. Sale of logs—Scale bill not a document of title.]—In the general course of the logging business although the possession of the original scale bill may be the means of facilitating a sale, it is not a document of title nor is there in existence a custom of the trade to that effect. *Lee & Rutherford* v. *Canadian Puget Sound Lumber & Timber Co.*, (1924) 34 B.C.R. 557.

3. Delivery on credit.]—Where a seller delivers goods and agrees with the buyer to call back later for the price the seller gives credit to the buyer and the property in the goods passes to the buyer. There is a debt owing by the buyer to the seller attachable by a creditor of the seller during the period of credit. *Coupland* v. *Elmore et al.*, (1928) 2 D.L.R. 308; (1928) 1 W.W.R. 380.

4. Lex loci contractus.]—The right to damages for breach of contract is a substantive right and not a question of procedure. The rate of damages to be recovered for breach of contract for the sale of goods is a part of the right to which the injured party is entitled and is totally distinct from the remedy provided for in enforcing it. Where a contract for the sale of goods is made abroad the damages recoverable by the seller in an action for a breach of the contract will be determined by the lex loci contractus, that is to say, the law which the parties intended should govern the rights and liabilities. *Horst* v. *Livesley*, (1924) S.C.R. 605; (1925) 1 D.L.R. 159. Affg. (1923) 34 B.C.R. 19; (1924) 2 D.L.R. 1002; (1924) 2 W.W.R. 443.

5. Unascertained goods—Contract for sale of poles.]—When the individuality of goods agreed to be sold depends upon their being weighed, separated, counted or having

similar acts done in relation to them, the doing of such an act is, in the absence of a contrary intention, the first condition precedent to the passing of the property in the goods. Applying the above principle, held, that under the contract in question herein for the sale of cedar poles to be manufactured by the seller, the "individuality" or identity of the goods could not be finally determined until after the final count and inspection provided for by the agreement, and that, therefore, it was not until then that the property in the poles would pass. *Naugle Pole & Tie Co. of Canada, Ltd.* v. *Wilson*, (1929) 3 W.W.R. 730.

6. Acceptance.]—Where a purchaser executes a conditional sale contract wherein he acknowledges acceptance of a motor-bus in good order, there is no statutory or other authority for the assumption that the plaintiff has the right to put the motor-bus to a test of actual performance by using it, and he is bound by his written acknowledgment. *Reevie* v. *The White Company, Ltd.*, (1929) 41 B.C.R. 345; (1929) 4 D.L.R. 296; (1929) 3 W.W.R. 33.

III. CONDITIONS.

1. Measure of damages.] — The true measure of damages for breach of warranty as to the standard of a motor-truck is the difference between the price paid for the truck and its market value at the date of the sale. *Victoria and Saanich Motor Transportation Company* v. *Wood Motor Company, Limited*, (1915) 21 B.C.R. 515; 23 D.L.R. 79; 31 W.L.R. 853; 8 W.W.R. 1124.

2. Resale by consignee — Waiver.]—Defendant sold a car-load of spruce lumber to the plaintiff graded No. 1 common and better, to be shipped from Vancouver to Minnesota Transfer, State of Minnesota, by C.P.R. or G.N.R. The car was billed over the Canadian Pacific Railway. In the meantime the plaintiff resold to one Cook in Chicago and on receipt of invoice the plaintiff paid the purchase price of the lumber and procured a fresh bill of lading from the railway company by which the lumber was shipped to Cook in Chicago, the plaintiff grading the lumber as No. 3 clear and better (a higher grade). The car arrived in Cook's yard in Chicago and was rejected by him. The defendant was not advised of this until three months later. The plaintiff obtained judgment in an action for damages for breach of warranty:—Held, that the appeal should be allowed and the action dismissed. That the plaintiff had not sufficiently proved that the lumber shipped was not of the grade of No. 1 common and better. The measure of damages, if the plaintiff was entitled to any, would be the difference between what No. 1 common and better was worth on its arrival in Chicago and what the lumber received would sell for at that date. But there is no evidence on which a finding on this issue can be based so the plaintiff has failed to make out a case. That the evidence of the lumber shipped from Vancouver materially differs from the evidence as to the class of lumber received in Chicago. The plaintiff took charge of the shipment and the onus is cast upon it to satisfy the Court that there was no interference with the car from that time until it reached Chicago. This onus has not been satisfactorily discharged. A purchaser of lumber under a contract who accepts the same without examination and makes delivery to a sub-purchaser shipping by a different bill of lading and to a changed point of destination, deals with it in a manner inconsistent with the ownership of the seller and loses his right to reject the lumber on the ground that it is not up to grade. *Pioneer Lumber Co.* v. *The Alberta Lumber Co., Ltd.*, (1923) 32 B.C.R. 442.

3. Economic operation of plant.] — Where after the installation of new machinery or plant, it fails to operate as economically as warranted at the time of the sale, and the work performed proves of no value and less economical than the old equipment, which necessitates the removal of the new plant and the re-installing of the old system, the buyer may rightfully recover all expenses incurred and damages suffered in connection with the construction of the new plant and the re-instatement of the old one, against which no counterclaim for the price is maintainable. *British America Paint Company* v. *Fogh*, (1915) 22 B.C.R. 97; 24 D.L.R. 61; 32 W.L.R. 142; 8 W.W.R. 1331.

4. Work and labour.]—A verbal agreement for the sale and installation of an oil plant which involves the work of ripping out an old plant and affixing to the freehold the substituted equipment is a contract for work and labour and not for goods sold and delivered, which is not governed by the provisions of the Sale of Goods Act (B.C.). *Ibid.*

5. Right of repudiation — Delay.]—Where under sec. 60 of the Sale of Goods Act (R.S.B.C. 1911, cap. 203) acceptance is inferred after the lapse of a reasonable time for the rejection of goods, a breach of condition entitling to the right of repudiation, particularly in a sale of specific goods, may be treated as a breach of warranty under sec. 19, which will entitle the buyer under sec. 67 to further damages in consequence thereof in addition to the extinction or diminution of the price. *Ibid.*

6. Loss of profit—Burden of proof.]—The defendants entered into contracts with plaintiffs to supply "Manchurian white beans, hand-picked." The defendants tendered beans that the plaintiffs refused to accept as beans of Manchurian origin and brought action for damages for breach of contract:—*Held*, that the burden was on the defendants to prove the beans tendered were of Manchurian origin and having failed in this they were liable in damages for the difference between the market price of "Manchurian white beans, hand-picked" at the time of the breach and contract price. *Radovsky et al.* v. *Creeden & Avery*, (1919) 27 B.C.R. 303; (1920) 28 B.C.R. 331; 52 D.L.R. 618; (1920) 3 W.W.R. 234.

7. Agreement to repurchase.] — The plaintiffs purchased an engine from the defendants, the defendants agreeing to buy it back if they did not get shipping space to Japan within one month of its arrival in Vancouver. The goods arrived in Vancouver towards the end of July, 1918, and after the expiration of one month both parties continued on a mutual understanding until late in November and endeavours to obtain space which was an essential feature of the contract and no request was made by the plaintiffs:—Held, that there was an implied extension of time in which repurchase could be demanded and there was no unreasonable delay in exercising it. *Mitsui* v. *Brown*, (1920) 28 B.C.R. 516.

8. Liquidated damages.]—Where a contract for the sale of eggs contains a stipulation fixing the damages in case of sale to persons other than the plaintiff at a stated amount a dozen an interim injunction will not be granted to restrain the defendant from selling eggs to any person other than the plaintiff as money will fully compensate him. *B.C. Poultry Association* v. *Allanson*, (1922) 2 W.W.R. 831.

9. Consideration — Sale of wheat—Wheat Board regulations.] —A plaintiff who has sold wheat to a union of which he is a member, and which has never had a license under the Canadian Wheat Board regulations, although subsequently to the sale of the wheat an interim permit was issued, the vendor being perfectly satisfied at the time of sale with the price received, will not afterwards be allowed an additional sum on the ground that the purchaser had not complied with the Order in Council and the regulations of the Wheat Board framed thereunder, and that had it done so he would have received more for his wheat. *O'Neal* v. *Vernon Fruit Union*, (1922) 68 D.L.R. 556.

10. Sale of lumber—Payment of shortage on affidavit of consignee.]—Plaintiffs ordered lumber from the defendant, stipulating "that in consideration of our waiving a personal inspection that you guarana specified standard, "also that you will pay promptly all claims for shortage of count, inferiority of grades"—and shipped the lumber to dealers in Toronto, who alleged shortage and poor quality and made an affidavit setting out this claim:—Held, that under the contract the consignees were the dealers in Toronto, and, notwithstanding evidence submitted by defendant that the lumber when it left its yard was good and according to contract, that, in the absence of evidence of lack of bad faith by plaintiffs or the consignees, the plaintiffs had fulfilled their obligation in procuring the affidavit and were entitled to judgment for the allowance claimed. *Provincial Lumber Company, Limited* v. *Tyee Lumber Company, Ltd.*, (1922) 2 W.W.R. 1330.

11. Goods subject to mortgage.]—Where goods are sold subject to a chattel mortgage the purchaser taking the goods with knowledge of the mortgage is liable in equity to indemnify the vendor against liability thereunder. *Walker* v. *Woodyatt*, (1931) 44 B.C.R. 110; (1931) 3 D.L.R. 516; (1931) 2 W.W.R. 306.

IV. Warranty.

1. Goods not in accordance with contract — Payment to agent — Return of moneys paid.]—R. agreed to buy from M. well-smoked haddies at the request of H. who purported to act for N. R. paid M.'s draft for the price of the fish and the freight charges in order to facilitate H. in getting the fish as speedily as possible into cold storage:—Held, that the haddies proving upon examination not to be well smoked, R. was entitled to the return of the money paid

by him. *Royal Fish Co.* v. *Maritime Fish Corporation,* (1915) 9 W.W.R. 169.

2. Implied warranty as to fitness.]—The defendant purchased from the plaintiff three consignments of coal, the first being lump coal, the second steam lump coal and the third washed slack coal. The first consignment after it became the property of the defendant was lost at sea but the balance was received and used in mixture by the defendant for steaming purposes. On plaintiff suing for purchase price the defendant counterclaimed in damages on an implied warranty for fitness:—Held, that while the plaintiff knew the purpose for which the coal was intended, it was reasonably fit for that purpose if properly used, and owing to the defendant's improper use of the coal by mixing the different grades together, the implied warranty that might otherwise have existed and rendered the plaintiff liable, was in the circumstances inoperative. *Western Fuel Company* v. *Rainy River Pulp & Paper Company,* (1919) 26 B.C.R. 442; (1919) 1 W.W.R. 323.

3. Warranty of soundness — Amendment of counterclaim.] — The defendant purchased two carloads of potatoes from the plaintiff, there being an express warranty in the contract that the potatoes were to be sound and marketable. It further provided that acceptance was to take place at warehouse in Vancouver. Upon the arrival of the first car in Vancouver the defendant Companys' manager opened the car and immediately tried to sell the contents but failing in this he ordered the car to the warehouse. On arrival of the second car he examined the potatoes, and finding them defective, immediately wired non-acceptance. The contents of both cars were found not to be sound and marketable potatoes. In an action for balance of purchase price of the potatoes:—Held, that having attempted to sell the contents of the first car and taken it to the warehouse, the defendant Company thereby treated the potatoes as its own, and must be held to have accepted them, but could, nevertheless, counterclaim for breach of warranty. The defendant counterclaimed in the action for breach of warranty in respect of the second car of potatoes, but not as to the first car:—Held, that the pleadings should be amended by extending the counterclaim to the first car, and that there be a reference as to damages on the counterclaim as amended. *Symonds* v. *The Clark Fruit and Produce Company, Limited, and Clark,* (1919) 26 B.C.R. 548; (1919) 1 W.W.R. 587.

4. Misrepresentation by purchaser to subsequent purchaser.]—The vendor under a simple contract for the sale of a "job lot" of lumber, that is a sale by general as distinguished from specific description, is not liable for misrepresentations as to dimensions and quality made by the purchaser to a subsequent purchaser which the lumber will not satisfy, such representations being no part of the original contract, and there being no privity of contract between the original vendor and the subsequent purchaser who is unable to prove any legal assignment enforceable against the vendor. *Pioneer Lumber Co.* v. *Dominion Lumber Sales Co.,* (1923) 2 D.L.R. 1194.

5. Resale by buyer—Waiver.]—That a purchaser of lumber under a contract who accepts same without examination and makes delivery to a sub-purchaser shipping by a different bill of lading and to a changed point of destination deals with it in a manner inconsistent with the ownership of the seller and loses his right to reject the lumber on the ground that it is not up to grade. *Pioneer Lumber Company* v. *The Alberta Lumber Company, Ltd.,* (1923) 32 B.C.R. 442.

6. Implied warranty—Particular purpose.]—Where a buyer of goods orders them by their trade description but at the same time tells the seller the purpose for which he requires them, he may reject them although they comply in a way with the trade description but are not suitable for the purpose for which required. So where oak f.a.s. (firsts and seconds) is ordered for interior decoration purposes, the buyer may reject lowland oak f.a.s. as not suitable, only highland oak f.a.s. being suitable for this purpose. *Imported Hardwoods, Ltd.* v. *Robertson & Hackett Sash & Door Co.,* (1925) 36 B.C.R. 258; (1925) 4 D.L.R. 650.

7. First-class mechanical condition.]—Under a contract for the sale of a second-hand truck in first-class mechanical condition, if the vendor fails to supply a truck of the standard contemplated by the parties, he is liable in damages to the purchaser for breach of warranty although the contract contained a clause providing that "the whole agreement between the parties is contained herein and no representations warranties or conditions expressed or implied other than those herein contained shall be binding upon the vendor." *Hayes Manufacturing Co.* v. *Perdue & Cope,* (1931) 43 B.C.R. 545; (1931) 2 D.L.R. 610.

8. Manufacture of machines—Particular design.]—Where the plaintiff contracted to manufacture for the defendant at an agreed price a machine of a certain specified design and another machine which was to be an improvement upon a specified design, and to supply the patterns, castings and machine work necessary in the manufacture thereof at an agreed price, and the machines supplied were not in accordance with the contract, the defendant is not liable to pay for them, whether the contract is to be considered one for the sale of goods or for work and labour. Even if one of the machines had been built in accordance with the contract and the other not, the plaintiff could not succeed as the contract is to supply both machines for one price and is not severable. *Simplex Machine Co., Ltd.* v. *McLennan, McFeely & Co.*, (1928) 3 W.W.R. 255.

V. NON-ACCEPTANCE.

1. Portion rejected.]—Where a purchaser of goods wrongfully refused to accept a portion of them and returned the same to the vendor who resold the returned goods after asking the purchaser repeatedly to take delivery of same, the vendor is entitled to sue for and recover the balance of the price of all the goods sold after giving credit for the amount received by him upon the resale of the portion returned. *Johnston* v. *Salmon*, (1917) 36 D.L.R. 796; (1917) 2 W.W.R. 644.

2. Condition precedent — Waiver.]—Under an agreement to deliver cedar poles, cribbed and sorted at ship's tackle, at a harbour to be selected by the buyer, to be fully paid for when finally inspected on board ship, there is no default on the part of the seller for not making deliveries at the stipulated time when the buyer was unable to furnish ship to receive them, and has given no notice, as required by the contract, of his readiness to take deliveries. The preliminary inspection was the right of the seller, which was to be made, not when the poles were cribbed and sorted, but when they were in the water, for the purpose of entitling him to final payment. *Thurlow Logging Co.* v. *National Pole Co.*, (1923) 4 D.L.R. 655; Affg. 31 B.C.R. 491; (1923) 3 D.L.R. 958.

3. Sale of motor-bus—Acceptance.]—Where the plaintiff and defendants entered into a conditional sale contract whereby the defendants agreed to sell a motor-bus to the plaintiff subject to the terms and conditions therein contained, a contract including a clause that "the purchaser hereby purchases the goods complete with standard attachments and equipment, delivery and acceptance of which in good order is hereby acknowledged," there is no statute or other authority for the assumption that the plaintiff had the right to put the motor-bus to a test of actual performance by using it for ten days upon his passenger route before accepting it, and he is bound by the acceptance expressed in the contract. *Reevie* v. *The White Co., Ltd.*, (1929) 41 B.C.R. 345; (1929) 4 D.L.R. 296; (1929) 3 W.W.R. 33.

4. Onus of proof on seller.]—In an arbitration as to the loss suffered by a seller of coffee, because of its non-acceptance by the buyer, on motion to set aside the award, objection was taken that the seller did not prove as part of his case, that the coffee tendered was in accordance with the contract and the arbitrator erred in allowing him to give evidence as to the quality of the coffee after the buyer had called his witnesses on the point:—Held, that there was error in allowing the seller to "split" his case, yet as he had exercised his discretion in the matter, and no substantial injustice was occasioned thereby the course adopted did not invalidate the award. *Wood* v. *W. H. Malkin Co.*, (1928) 40 B.C.R. 255; (1928) 4 D.L.R. 511; (1928) 2 W.W.R. 674.

VI. NON-DELIVERY.

1. Specific performance of contract.]—K. contracted with F. to sell to him and deliver five carloads of potatoes, 20 tons each at $13 per ton, f.o.b. Kamloops, potatoes to be No. 1 marketable potatoes and inspection to be made in or at the car at Kamloops. The potatoes were in the cellars at K.'s ranch and F. had made a number of visits to the cellars and inspected the potatoes. K. delivered four of the cars but refused to deliver the fifth, except upon the condition that inspection should take place at the cellars:—Held, upon the facts, that the parties had contracted with specific potatoes in mind and that specific performance of the contracts to deliver the fifth carload at the specific place should be directed, that damages should be given in default of immediate specific performance and an injunction granted to restrain the defendant from selling the potatoes to any person other than the plaintiff. *Fraser* v. *Sam Kee*, (1916) 9 W.W.R. 1281.

2. Acceptance by purchaser notwithstanding delay.]—A contract being ambiguous in its terms and a construction having been placed upon it by the conduct and language of the parties that construction will be accepted by the Court as the true one. *Meadow Creek Lumber Co.* v. *Adolph Lumber Co.*, (1919) 58 S.C.R. 306; (1919) 1 W.W.R. 823; 45 D.L.R. 579.

3. Reasonable time.]—The plaintiff who was a chauffeur, purchased an automobile from the defendants which he used as a taxi. Trouble almost immediately arose and the car was repaired by the defendant on a number of occasions. The plaintiff then contracted with the defendant to purchase a new car and delivered his old car to the defendant as part of the purchase-price, the new car to be ordered from the factory and delivered "as soon as possible," three weeks being mentioned as about the time required for delivery. In the meantime the plaintiff was without a car although the defendant offered him the use of another car which he refused. More than six weeks elapsed before the new car was on hand for delivery, and the plaintiff then refused to accept it, the old car in the meantime having been sold by the defendant:—Held, that considering the urgency and the inadequate efforts of the defendant to deliver the car sooner, the delay justified the plaintiff in repudiating the contract upon the expiration of the three weeks, but he was not entitled to damages for loss of profits in the meantime. *Keays* v. *Shell Garage, Limited*, (1920) 28 B.C.R. 527; 54 D.L.R. 265; (1920) 3 W.W.R. 859.

4. Monthly delivery in quantities less than contracted for.]—A company contracted with an oil company for the purchase of 80,000 barrels (35 gallons each) of fuel-oil for its steamers at a fixed price, the oil to be delivered between the 1st of March, 1915, and the 1st of March, 1918, and to be made "in fairly equal monthly quantities as the purchaser's business should require and as it in writing should order." By the end of January, 1928 (one month from the close of the contract period) the purchaser had only requested and received deliveries aggregating slightly less than two-thirds of the quantity contracted for. The market price of oil having increased the purchaser made provision for storage beyond its ordinary requirements and notified the vendor to deliver 30,000 barrels, the balance of the 80,000 barrels contracted for and remaining undelivered:—Held, that the systematic request and receipt each month by the navigation company of a much smaller amount than could have been demanded would not only create an inference that any right to further delieveries beyond the monthly amount so established (or at any rate not in excess of 2,222 barrels which is the monthly delivery required during the contract period to exhaust the 80,000 barrels) was abandoned, but would be in accordance with the true intent of the parties under the contract. The purchaser is not entitled to delivery of the balance of the 80,000 barrels nor to continue receiving deliveries at the previous rate per month beyond the contract period in order to receive the full amount contracted for. *Terminal Steam Navigation Company, Limited* v. *Imperial Oil, Limited*, (1920) 28 B.C.R. 393; (1920) 2 W.W.R. 689.

5. Limitation of liability — Ejusdem generis.]—A clause in a contract for the sale of salmon of a season's pack, limiting the seller's liability "in the event of packing being interfered with or stopped, or falling short through the failure of fishing, or through strikes or lockouts of fishermen or workmen or from any cause not under the control of the sellers," refers only to matters ejusdem generis and does not apply to an inability to make deliveries owing to an inadequacy in the supply of tins in which to pack, the run of salmon meantime ceasing. *Crispin & Company* v. *Evans, Coleman & Evans, Limited*, (1922) 31 B.C.R. 328; 68 D.L.R. 623; (1922) 3 W.W.R. 264; Aff'd. (1923) 32 B.C.R. 132; (1923) 3 D.L.R. 1190; (1923) 2 W.W.R. 616, 1050.

6. Damages — Interest and costs incurred by buyer.] — Interest and costs incurred in defending an action in consequence of a breach of contract of sale on the part of a seller, are recoverable as damages arising from the breach in an action against the seller. *Ibid.*

7. Shortage—Theft by servant.] — In pursuance of an agreement the plaintiff supplied the defendant with flour for her retail business. She sent orders for delivery as required and acknowledgment of receipt of each delivery was signed by the workman in charge and returned to the plaintiff. Accounts were rendered to the defendant regularly and the business proceeded for a considerable period without dispute until it was discovered that the delivery man had stolen a certain amount of flour from each delivery. In an action to recover the balance due estimated on the full amount sent out from the plaintiff's warehouse:—Held,

that the defendant's actions were such as to prevent her from disputing the delivery of all the flour for which payment was claimed. *Lake of the Woods Milling Company, Limited* v. *Gold*, (1925) 34 B.C.R. 481; (1925) 1 D.L.R. 778; (1925) 1 W.W.R. 386.

8. Mistake in delivery — Liability for delivery of wrong article.]—Where a purchaser ordered rock salt for cattle and the merchant by mistake delivered nitrate of soda which was fed to the cattle causing their death, although neither the question of warranty expressed or implied nor of negligence arose in the circumstances of the case, the defendant must be held responsible for the loss which resulted from giving the wrong article to the plaintiff. *Carlin and Strickland* v. *McAusland and Spence*, (1921) 30 B.C.R. 351; 70 D.L.R. 769.

9. Shares in company—Delay—Measure of damage.]—The plaintiff a broker agreed to sell to the defendant certain shares of a company and upon entering into the contract warned the defendant that there might be considerable delay in delivering certificates for the shares. The defendant thereupon signed an order for the shares on a stock exchange form. Some months later the plaintiff received the share certificates and advised the defendant accordingly by telephone and the defendant said he would call at the plaintiff's office. Shortly afterwards the manager of the stock department in the plaintiff company called on the defendant and advised him of the receipt of the certificates when the defendant said he would call at the office and settle. The defendant did not go to the plaintiffs' office and later he told the plaintiffs he would not take the stock. After the 14th of May the market value of the stock fell steadily. The plaintiffs recovered judgment for the difference between the contract price of the shares and the market price at the time of the breach of the contract:—Held, that although there had been delay in delivering the certificates the defendant waived any objection on this ground by his conduct in the first week in September when he agreed to go to the plaintiff's office and take the shares and pay for them. *R. P. Clark & Co. (Victoria), Ltd.* v. *Robinson*, (1930) 42 B.C.R. 409; (1930) 4 D.L.R. 158.

VII. Inspection.

Sample and description.]—The defendant purchased from the plaintiff wooden kegs to be used, as the plaintiff knew, for holding cider made by the defendant by a special process. The defendant alleged they were not up to sample and not fit for the purpose intended:—Held, that the sale was by "description" as well as by "sample," the kegs supplied were up to "sample" and whether or not the kegs were fit for the purpose intended the purchaser undertook a thorough examination and did not rely upon the seller's skill or judgment, and did not exercise the diligence he should have to ascertain that the alleged defective condition existed and that the kegs supplied would not properly hold the cider, and it further appeared that the process of manufacture of the cider had an effect different from that represented to the plaintiff, and this with the manner of filling the kegs caused the loss complained of and the plaintiff was entitled to recover the price thereof. *Canadian Western Cooperage, Limited* v. *Vernon Growers, Limited*, (1923) 32 B.C.R. 29; (1923) 1 W.W.R. 631.

VIII. Conditional Sale.

A. In General.

1. Owner.]—An insured under an automobile liability policy who is in possession of the automobile under a conditional sale agreement is the sole and unconditional owner thereof within the meaning of a condition in the policy which provides that the insurers shall not be liable if the interest of the insured is other than unconditional and sole ownership. *Forsythe* v. *Imperial Guarantee & Accident Ins. Co. of Canada*, (1925) 36 B.C.R. 253; (1925) 4 D.L.R. 479; (1925) 3 W.W.R. 669.

2. Nature of purchaser's interest.]—A conditional sale of goods gives the purchaser an interest that may be mortgaged. *Sharp* v. *Ingles*, (1915) 21 B.C.R. 584; 23 D.L.R. 636; 32 W.L.R. 150; 8 W.W.R. 1325.

3. Remedy of buyer—Default—Refusal of vendor to deliver—Purchaser's remedy.]—Where a seller of goods under a conditional sale agreement takes possession of the goods on default by the buyer and refuses to deliver them, on the ground that the amount tendered to redeem is not correct, there is not a repudiation of the contract, and the remedy of the buyer is replevin or an action for damages for breach of contract. *B.C. Independent Undertakers, Limited* v. *Maritime Motor Car Co. Ltd.*, (1917) 24 B.C.R. 305; 35 D.L.R. 551; (1917) 3 W.W.R. 22.

B. Validity.

1. Description of goods — Promissory note taken as additional security.]—In order to comply with subsec. (2) of sec. 2 of the Sale of Goods Act Amendment Act, 1916, which requires that chattels included in a conditional sale agreement be so described "that they may be clearly identified":—Held, that there must be such material on the face of the instrument as would indicate how the property may be identified if proper inquiries are instituted. Where a promissory note is taken as security contemporaneously with a hire receipt, and the promissory note is not mentioned in the hire receipt, the hire receipt is not void by reason of the non-registration of the note. *Brandon* v. *Plimley*, (1917) 24 B.C.R. 441; (1918) 1 W.W.R. 831.

2. Fixture.]—A contract for the erection of a building is for work and labour and not for the sale of goods, the owner not being a "purchaser" within the meaning of the Conditional Sales Act of materials such as a refrigerating plant, which was provided for in the contract for the construction of the building, and where materials are bought by the contractor after entering into the contract with the owner, the owner is not a "subsequent purchaser." A refrigeration system installed in an apartment block on its erection with the object of equipping each apartment with an "ice box" is a fixture. *Welch et al.* v. *General Refrigeration Limited*, (1929) 42 B.C.R. 107; (1929) 3 W.W.R. 660; (1930) 2 D.L.R. 672.

3. Conditional sale agreement as security—Fictitious transaction.]—A purchaser of a motor-car being unable to pay the full purchase price borrowed the necessary money from the plaintiff and entered into a conditional sales agreement whereby the plaintiff who had not come into possession of the car purported to sell it to the purchaser. The purchaser being in possession of the car exchanged it for another car and the transferee obtained a loan from the defendant giving him a chattel mortgage of the car as security for the money advanced. The mortgagor being in default the defendant seized the car and sold it. In an action by the plaintiff for conversion:—Held, that the conditional sale agreement was a fictitious transaction. The car did not come into possession of the plaintiff and the conditional sale agreement was ineffective to give the plaintiff ownership thereof. *Albutt & Co., Ltd.* v. *Riddell*, (1930) 43 B.C.R. 74; (1930) 4 D.L.R. 111; (1930) 2 W.W.R. 623.

4. Hire-purchase agreement as security.]—C. purchased an automobile, paying for it partly in cash and the balance with post-dated cheque. Later, requiring money to finance his business, he borrowed $1,400 from the plaintiff, giving in return a hire-purchase agreement as to the automobile. C. continued in possession of the car and later sold it to the defendant, who was a bona fide purchaser for value. In an action to recover possession of the car under the hire-purchase agreement:—Held, that the transaction is not one that comes within the purview of the Sale of Goods Act, as it was never the intention of the plaintiff to become the owner of the car except in the event of its requiring to invoke the agreement. The document was an assurance and came within the Bills of Sale Act, but as registration and the other necessary essentials required by the Act had not been complied with, the action should be dismissed. *R. P. Rithet & Co.* v. *Scarff*, (1920) 29 B.C.R. 70.

See In re International Motors, Ltd., Trustee v. *Telford*, (1921) 2 C.B.R. 314; (1924) 2 D.L.R. 528.

C. Rights of Third Parties.

1. Lien for repairs.]—Where the vendor under a hire-purchase agreement to secure the purchase price of a chattel has not taken possession and where there has been no default in payment, the purchaser has the right and duty to have the property repaired although it may create a lien in favour of the workman engaged in carrying out the repairs. *Gurevitch* v. *Melchoir*, (1921) 29 B.C.R. 394.

2. Lien for repairs.]—Where a conditional sale agreement for the sale of an automobile contains a clause in effect as follows: "And we shall not at any time suffer or permit any charges or lien whether possessory or otherwise to exist against the said automobile" the purchaser cannot authorize the undertaking of repairs of the automobile in such a way as to create a lien therefor upon the automobile. *Alliance Finance Co.* v. *Simons Garage*, (1925) 36 B.C.R. 117; (1928) 3 W.W.R. 621.

3. Equitable mortgage.]—An agreement between the vendor and purchaser of mineral claims that if mechanics' liens should be filed against the property the vendor should have the right to enter and "possess himself of all machinery, fittings,

etc., upon the mineral claims and to sell the same" and so recoup himself for any moneys paid by reason thereof, held to cover after-acquired property, and to constitute an equitable mortgage. The vendor under such an agreement is a "mortgagee" within the meaning of sec. 28, Sale of Goods Act, R.S.B.C., cap. 203. *Sullivan Machinery Company* v. *Bank of Montreal*, (1918) 3 W.W.R. 16.

4. Goods pledged under Bank Act—Possession.]—Under an agreement for sale the owner of timber sold to a timber company certain timber licenses with trees and timber standing, lying and being thereon, at a stumpage rate to be paid by instalments as the timber was shipped, the title in the timber cut to remain in the vendors until payment. The timber company borrowed money from the plaintiff bank giving security on cut timber under sec. 88 of the Bank Act. The conditional sale agreement was not registered as provided in the Conditional Sales Act:—Held, that the timber company is the owner of the timber within the meaning of sec. 88 of The Bank Act and was in possession within the meaning of sec. 3 of the Conditional Sales Act. *Royal Bank of Canada* v. *Hodges*, (1929) 42 B.C.R. 44; (1929) 3 W.W.R. 605; (1930) 1 D.L.R. 397.

D. Rights and Remedies of Vendor.

1. Wrongful seizure — Lien note — Accommodation.] — M. bought a motor-truck from B. giving a promissory note for the balance of purchase price. Afterwards at B.'s request and for his accommodation, M. gave a new note and also a lien note both payable on the same day as the old note. The lien note authorized B. on M.'s default to take possession of the truck and hold it as a pledge or to sell it and apply the proceeds of sale in payment of the notes. On M. being in default B. took possession of the truck, used it for his own purposes and mortgaged it to another. M. sued B. for wrongful seizure of the truck:—Held, that there was no consideration for the lien note and that even if there had been there was a clear conversion of the truck and further that there should be a new trial for the purpose of assessing the damages, the proofs of damage not having been gone into at the trial. *Mellis* v. *Blair*, (1916) 22 B.C.R. 450; 27 D.L.R. 165.

2. Acceleration clause.] — Where an agreement for the conditional sale of goods provides that on default in payment of an instalment the whole amount remaining unpaid shall become immediately due and payable and the vendor takes possession of the goods on default by the buyer, such default operates under such provision to make the whole sum remaining unpaid "the full amount then in arrear," within the meaning of sec. 32, Sales of Goods Act, R.S.B.C., cap. 203, on payment of which within twenty days the buyer may redeem the goods. *B.C. Independent Undertakers, Ltd.* v. *Maritime Motor Car Co., Ltd.*, (1917) 24 B.C.R. 305; 35 D.L.R. 551; (1917) 3 W.W.R. 22.

3. Alteration of construction—Replacement subject to lien.]—Where a motor-vehicle is sold under a conditional sale agreement which sets out that the vehicle is required for a particular purpose and to meet such purpose the body is removed by the seller and, at the buyer's expense, a new one substituted, the new body becomes part of the vehicle and subject to the lien. *Ibid.*

4. Action for delivery—Seller's counterclaim for amount due.]—Where a seller of goods under a conditional sale of goods rightfully takes and retains them and is in a position to re-deliver them to the buyer on payment of the amount due, he is entitled in an action brought by the buyer to counterclaim for the amount due under the agreement. *Ibid.*

5. Repossession by vendor—Action for balance due after resale.]—The defendant, who was a dentist, purchased from the plaintiff Company a quantity of office supplies under a conditional sale agreement for $2,063. He paid $513 cash and after paying $102.80 on account of the balance he became in default. The plaintiff then took possession under the agreement and after giving the defendant notice resold the goods. There still being a balance due of $402.75 after the sale the plaintiff brought action: —Held, that where powers are granted by statute only upon compliance with certain prescribed formalities, substantial compliance is necessary, and as the notice of resale given by the plaintiff to the defendant claims a larger sum than was actually due and fails to meet the requirements of sec. 10 of the Conditional Sales Act the plaintiff cannot recover. *The Ash-Temple Company, Limited* v. *Wessels*, (1926) 36 B.C.R. 424; (1926) 1 W.W.R. 654; (1926) 1 D.L.R. 1063.

6. Equitable rights—Surplus proceeds.]—Where by a conditional sale agreement by which the possession passes to the purchaser and the property is also to pass upon compliance with the stipulated conditions the vendor in the meantime by express provisions retains the property as security, the legal ownership is that of the debtor subject to the security afforded to the creditor for the debt. The relationship between the parties does not differ essentially from that of mortgagor and mortgagee and if the seller repossesses the goods and resells for an amount in excess of the balance owing the surplus proceeds of the sale belong to the purchaser. *C.C. Motor Sales, Ltd.* v. *Chan*, (1926) S.C.R. 485; (1926) 3 D.L.R. 712; Affg. 35 B.C.R. 488; (1926) 1 D.L.R. 1065; (1926) 1 W.W.R. 508.

7. Motor-car—Return of car after part payment—Sale by local manager.]—The local manager of a branch garage of the defendant Company sold a car to H. on the instalment plan. When $384 was still due, H. left the car with said local manager to be disposed of at best possible price. Shortly after and when one of H.'s instalments was overdue, the local manager sold the car to R. for $550 and absconded with this money. The defendant Company then seized the car to cover the balance due from H.:—Held, that the local manager was acting for his employers in selling the car to R. *Rogers* v. *Nanaimo Motors, Limited*, (1926) 37 B.C.R. 326.

8. Abortive sale—Subsequent private sale without notice.]—The defendant being in default in payments due under a conditional sale agreement for a motor-car, the plaintiff caused the car to be repossessed under the terms of the agreement and after making repairs, advertised the car for sale by auction, notice of which was given the defendant. The sale proved abortive and after commencing action against the defendant for the balance of the purchase price and cost of repairs and other expenses in connection with taking the car over, he sold the car by private sale without notice to the defendant:—Held, that the words "the intended sale" in subsec. (3) of sec. 10 of the Conditional Sales Act import that there was a sale in view and notice of the private sale must be given the defendant to enable him to defend his interest, as he is liable for the balance in case of deficiency. *Motorcar Loan Company, Limited* v. *Bonser*, (1928) 40 B.C.R. 55; (1928) 3 D.L.R. 875; (1928) 1 W.W.R. 801.

9. Failure to register agreement—Right of execution creditor.]—Although a conditional sale agreement has not been registered as required by the Conditional Sales Act, 1924, the goods are not subject to seizure by a creditor of the buyer under an execution with respect to a debt which was outstanding prior to the making of the conditional sale. *United Electric Co., Ltd.* v. *Watson*, (1927) 1 W.W.R. 87.

10. Title after seizure under vendor's execution.]—A conditional seller after suing and recovering judgment for the balance owing and obtaining the seizure of the goods by the sheriff upon the execution thereunder, cannot claim title to the goods under the conditional sales contract. *Russell* v. *Reid*, (1928) 1 D.L.R. 628.

11. Repossession.]—Sec. 10 (3) of the Conditional Sales Act, R.S.B.C. 1924, cap. 44, which provides that "if the seller intends to look to the buyer for any deficiency on a resale, the goods shall not be resold until after notice in writing of the intended sale has been given to the buyer," does not require a notice thereunder to be given the buyer in a case where the seller merely exercises his right under the contract of repossessing the goods on the buyer's default and continues to hold them without a resale or without making any use of them for his own purposes. Where the goods were found by the seller in an exposed place and apparently abandoned by the buyer the taking possession of them by the seller was held to be merely putting of them in a safe place for the benefit of both parties and not a retaking possession pursuant to the contract. *Watkins Garage, Limited* v. *McKoryk*, (1928) 3 W.W.R. 429.

12. Assignment of agreement—Surrender to original vendor—Subsequent resale—Notice.]—The buyer of a motor-car being unable to pay instalments of the purchase price under a conditional sale agreement surrendered the car to the dealer from whom he bought it and it was resold to the plaintiff. The assignee of the first conditional sale agreement caused the car to be seized to satisfy its claim. In an action by the second buyer it was held that as the assignee of the first agreement did not know that the buyer had turned the car back to the dealer and that the car was sold the second time without consent, the plaintiff was not entitled to recover possession thereof. *Kerr* v. *Motorcar Loan Co., Ltd.*, (1930) 2 W.W.R. 367.

13. Judgment for unpaid purchase money.]—The vendor of goods under a conditional sale agreement does not waive or release his right of ownership of the goods by obtaining judgment against the purchaser for unpaid purchase moneys. *Edward Renneberg & Sons Co.* v. *Albion Fisheries, Ltd.*, (1931) 1 W.W.R. 231.

14. Motor-car—Abortive sale—Wrecking car.]—In an action for the deficiency on a resale of a motor-car repossessed by the vendor after default by the purchaser under a conditional sale agreement, the notice to the purchaser of the resale must be in strict accordance with the requirements of sec. 10 (3) of the Conditional Sales Act, notwithstanding the provision in the conditional sale agreement that the vendor can exercise the power of resale "by public or private sale with or without notice." The attempt to resell the car by auction after repossession being abortive, the vendor "wrecked" the car after notifying the buyer that he was doing so and would allow him "the price of $45":—Held, that the purchaser was thereby relieved from further liability. *Marsh* v. *Simpson*, (1928) 40 B.C.R. 114; (1928) 1 W.W.R. 956.

15. Seizure and sale—Action for balance.]—Where a vendor under a conditional sale agreement sold a motor-car the purchase price thereof being payable in instalments and upon default in payment seized the car and sold it after giving notice which did not comply with the Conditional Sales Act in that it did not specify the time and place of sale he has lost his right to recover the balance of the purchase price remaining unpaid, due notice under the Act being a condition precedent to his right to recover the balance. *Healman* v. *Pryce*, (1929) 42 B.C.R. 104; (1930) 2 D.L.R. 608.

16. Illegal seizure—Measure of damages.]—The plaintiff purchased a motor-car from the defendant Company under a conditional sale agreement, one of the terms being that he was not to take the car out of the Province. About seven months later, wishing to go to Aurora in the Province of Ontario, he obtained leave from the vendor to take the car to Ontario and then proceeded on his trip. All payments on the car had been made but on arrival at Aurora his car was seized by a bailiff and sent back to Vancouver where, after being reconditioned, it was sold by the defendant. At the time of seizure the plaintiff had paid $685 on the purchase price. In an action for damages for illegal seizure and conversion of the car the plaintiff recovered $1,000:—Held, on appeal, that there was sufficient evidence to support the award in the unusual circumstances of the case. *Griffiths* v. *Fordyce Motors, Limited*, (1930) 43 B.C.R. 119; (1930) 2 W.W.R. 698; (1930) 4 D.L.R. 451.

See Bennett v. *Kent Piano Co.*, (1921) 29 B.C.R. 465; *Roman* v. *Motorcar Loan Co.*, *ante*, p. 709.

E. Rights and Remedies of Purchaser.

Sale of shares in company — Specific performance.]—A purchaser of shares in a company who has never in fact abandoned or receded from his contract, but, by reason of laches or otherwise, from causes not falling within abandonment or rescission, has deprived himself of the right to specific performance is, in case the vendor refuses to accede to specific performance, prima facie entitled to a return of the deposit or part payment, unless some facts are shewn that would render this inequitable. *Mosdell* v. *Jardine*, (1929) 41 B.C.R. 487; (1929) 4 D.L.R. 617; (1929) 3 W.W.R. 95.

IX. Sale by Mercantile Agent.

1. Ordinary course of business.] — The meaning of the expression "when acting in the ordinary course of business of a mercantile agent" in sec. 69 (1) of the Sale of Goods Act is when acting within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead a pledgee to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent had no authority to make. An owner of goods placed with a mercantile agent, sued an alleged purchaser for wrongful conversion. The purchaser relied on sec. 69 (1) of the Sale of Goods Act:—Held, that the actual payment of money by the defendant to the agent does not displace mala fides, but the fact that the transaction is found not to be an ordinary sale, i.e., a sale to one desirous either of using the goods or disposing of them to advantage, has a bearing on the question of good faith, and the proof of dishonesty of the agent is not sufficient. It must be shewn that the defendant acted in bad faith and the evidence should be such as to prove to the hilt the mala fides of the alleged sale.

Acme Steel Goods Company of Canada, Limited v. *Walsh Construction Company, Limited*, (1922) 30 B.C.R. 539; 63 D.L.R. 529; (1922) 1 W.W.R. 689.

2. Sale of Goods Act—Garage—Holding for repairs—Title.]—Holding possession of a truck for the purpose of storage and repairs pending a sale under seizure is not possession as a "mercantile agent" for purposes of sale within the meaning of sec. 69 of the Sale of Goods Act (R.S.B.C. 1911, cap. 203), so as to pass title thereto to a purchaser from the person thus in possession. *Whitney-Morton & Co., Ltd.* v. *A. E. Short, Limited*, (1922) 31 B.C.R. 275; 67 D.L.R. 573; (1922) 2 W.W.R. 1014.

3. Title of innocent purchaser.]—The general manager of a company engaged in the business of selling motor-cars purchased a car from his company under a conditional sale agreement. The vendor assigned the agreement to the plaintiff, a financing company, the agreement and assignment being duly registered. The car was left in the vendor's premises for resale to the plaintiff's knowledge, and was sold to the defendant, an innocent purchaser who had no notice or knowledge of the agreement and believed that he was buying from the vendor. In an action against the defendant for conversion it was held that having purchased the car in good faith from a mercantile agent in the ordinary course of business and having given valuable consideration therefor he is protected by sec. 60 (1) of the Sale of Goods Act, R.S.B.C. 1924, cap. 64. *Commercial Securities (B.C.), Limited* v. *Johnston*, (1931) 43 B.C.R. 381; (1931) 1 D.L.R. 861; (1931) 1 W.W.R. 420.

4. Conditional sale agreement—Repossession and resale without notice.]—Under a conditional sale agreement a vendor of a motor-car sold a car and assigned the purchaser's agreement to the plaintiffs. The purchaser defaulted in her payments and the car was taken back by the original vendor and with the plaintiff's consent was resold to another purchaser and the new conditional sale agreement was assigned to the plaintiffs. The second purchaser defaulted in his payments and the car was then taken back and sold by the original vendor without the knowledge or consent of the plaintiffs to the defendant under a conditional sale agreement, which was discounted and assigned to a finance company which took the assignment in good faith. All the agreements were duly registered:—Held, that the plaintiffs are the owners and entitled to possession of the car. *W. J. Albutt & Co.* v. *Continental Guaranty Corporation of Canada*, (1929) 41 B.C.R. 537; (1929) 3 W.W.R. 292; (1930) 1 D.L.R. 26.

See BILLS OF SALE.
See BULK SALES.
See CONTRACT.
See LIEN.
See MOTOR-VEHICLES.

SALVAGE.

1. Hazardous circumstances.] — An amount was awarded plaintiff trawler against defendant tug on the basis of salvage services (rather than of towage services) as the services, while not in the strict sense unusually hazardous, were skilful, considerable and meritorious. *The "Andrew Kelly"* v. *The "Commodore,"* (1919) 27 B.C.R. 439; 48 D.L.R. 213; (1919) 1 W.W.R. 1059; 19 Ex. C.R. 70.

2. Transferring passengers, baggage and mail.]—Ship A. had run aground on a reef near the lighthouse at Georgina Point in a dense fog with an appreciable list to starboard and in such a position that the apprehension as it then appeared of her sliding off to her own peril could not though slight be wholly ignored. She had a large number of passengers and there was the uncertainty of an unfavourable wind springing up. The salving vessel I. stood alongside and placed herself at the disposal of the P. A. for the purpose of transferring passengers, baggage and mail from 3.30 until 7.30 when that service was completed:—Held, that under the circumstances there was a reasonable apprehension of risk or danger and the possible contingency that serious consequences might have ensued. The services of the ship I. constitute a salvage. *Clayoquot Sound Canning Co.* v. *S.S. "Princess Adelaide,"* (1919) 27 B.C.R. 526; 48 D.L.R. 478; 19 Ex. C.R. 128; (1919) 3 W.W.R. 241.

3. Local custom — Voluntary assistance.]—Every usage must have acquired such notoriety in the business or amongst the class of persons affected by it that any person in that business or amongst that class, who enters into a contract affected by the usage must be presumed to have intended

that the usage should form part of the contract, and no one who is ignorant of an alleged usage can be bound by it if it appears to be unreasonable and he can only be assumed to have acquiesced in a reasonable usage:—Held, that the custom on the Pacific of British Columbia that all vessels engaged in the fishing industry afford to each other in the common interest, and for their joint benefit, voluntary and gratuitous assistance to crews and vessels in distress in any of the various accidents which are incidental to vessels of various descriptions engaged in that industry, was not sufficiently established to deprive the owner of a boat engaged in buying and marketing fish, who was ignorant of any such custom, from recovering salvage under sec. 759 of the Canada Shipping Act (R.S.C. 1906, cap. 113). *The "Freiya"* v. *The "R. S.,"* (1922) 65 D.L.R. 218; (1922) 1 W.W.R. 409; 21 Ex. C.R. 232.

4. Danger remote whether salvage or towage.]—A gas-boat had got adrift from her moorings and was picked up by a tug and towed to a wharf. In all the circumstances of the case it was held that it could not reasonably be regarded as an apparent derelict; the element of danger was too remote and speculative to permit the service to be regarded as salvage. Remuneration was allowed for towage services. *Larsen* v. *The Gas Boat,* (1923) 31 B.C.R. 558; (1923) Ex. C.R. 104; (1923) 2 D.L.R. 281; (1923) 1 W.W.R. 958.

5. Contract for salvage.]—In determining whether an agreement for salvage services is to be upheld, one must look at the service contemplated by the parties at the time, and the circumstances under which the agreement was entered into. If the agreement was just and reasonable when entered into, it will be enforced and will not be disregarded or set aside because something has happened subsequently or some contingency of which one party or the other has taken the risk, has occurred, to make it more onerous on one or the other than was anticipated when it was entered into. An agreement was entered into between an insurance company on behalf of the owner of a vessel, and a salvage company that if the company could raise the vessel and bring her to dock at Vancouver they were to be paid 90 per cent. of her value, but if they failed they were to get nothing:—Held, that as the raising of the vessel from a depth of 350-400 feet required skill and salvage operations of a high order at the lowest depth ever undertaken by the company, the operations being ever attendant with the uncertainty of success, there is nothing that would warrant the Court in disturbing the agreement entered into. *Pacific Salvage Company, Limited and Vancouver Drydock & Salvage Company, Limited* v. *The M.S. "Tex." Home Insurance Company of New York* v. *The M.S. "Tex,"* (1930) 43 B.C.R. 434; (1931) 2 D.L.R. 657; (1931) 1 W.W.R. 153.

SAVINGS AND LOAN ASSOCIATIONS.

1. Application for certificate — Non-compliance with conditions—Mandamus.]—Mandamus will not lie to a registrar of companies to compel the issue of a certificate under the Savings and Loan Associations Act where the period of three months has expired within which a general meeting should be called pursuant to sec. 80 of the Act. Mandamus will not lie to compel the performance of a discretionary act where there is nothing to shew that the discretion was wrongly exercised. A statute providing that within a certain period a general meeting of an incorporated society shall be called for the purpose of passing an extraordinary resolution is not complied with by sending out notices of the meeting for a date within that period which is adjourned sine die without passing the resolution which is not passed until a meeting is convened on a date after the expiry of the period. *In re Pioneer Savings & Loan Society and The Registrar of Companies,* (1928) 39 B.C.R. 372; (1928) 1 D.L.R. 830; (1928) 1 W.W.R. 361.

2. Arbitration.]—To bring a dispute within sec. 20 of the Savings and Loan Associations Act it must be one which arises between the association and a party who is a member of the association. When the question at issue is whether the party is or is not a member of the association it is a matter for the Court and does not come within the section. *Furness* v. *Guaranty Savings and Loan Association,* (1928) 40 B.C.R. 61; (1928) 3 D.L.R. 175; (1928) 2 W.W.R. 337.

3. Instalment shares—Savings shares.]—Where a subscriber applies for shares in a security & loan association relying upon the representations of the agent of the association that the shares applied for are "savings shares" and the directors of the

association allot to the subscriber shares of another class namely "instalment shares" he is entitled to repudiate the transaction and obtain a refund of the money. *Baker* v. *Guaranty Savings & Loan Assn.*, (1931) S.C.R. 199; (1931) 1 D.L.R. 968.

SCHOOLS AND SCHOOL DISTRICTS.

1. Mechanics' Lien Act — Exemption from execution.]—The provisions of the Mechanics' Lien Act extend to property held by public school trustees for school purposes, the express exemption from execution in the Public Schools Act shewing that the Legislature had in mind the subject-matter of exemption of school property from forced sale, there being nothing apart from the express exemption to indicate that the Legislature intended that the rights of the lien holders should not attach to the property of such bodies, the existence of such express exemption shewing an intention not to make any further exemption. *Hazell* v. *Lund*, (1915) 22 B.C.R. 264; 25 D.L.R. 204; 9 W.W.R. 749; 32 W.L.R. 818.

2. Municipal school — Non-resident children.]—There is no duty cast upon a school board to receive within its schools children who are not resident within its own municipal district. *Patterson* v. *Victoria School Trustees*, (1917) 24 B.C.R. 365; (1917) 1 W.W.R. 526.

3. Municipal school — Non-resident children.]—In the case of children residing in a district municipality and attending a public school in a city municipality the latter may compel the former to pay for the education of the children under sec. 15 of the Public Schools Act. A high school is a public school within the meaning of the section. *Corporation of the City of Victoria* v. *District of Oak Bay*, (1917) 24 B.C.R. 516; 38 D.L.R. 238; (1918) 1 W.W.R. 158.

4. Negligence—School sports—Failure to provide competent supervision.]—It is the duty of school boards to prevent the use of school premises in a manner dangerous to the children under their jurisdiction. Where therefore they authorize a rifle competition it is their duty to provide competent inspection and supervision of the competition, and if tney fail to do so they are liable for accidents arising as a result of their default. *Walton* v. *Vancouver Board of School Trustees*, (1924) 34 B.C.R. 38; (1924) 2 D.L.R. 387; (1924) 2 W.W.R. 49.

5. Limitation of actions.]—A pupil of a high school suffered an injury from an explosion of chemicals in a class-room on November 17th, 1921. He attained the age of 21 years in November, 1927, and brought action against the trustees of the school for damages in April, 1929:—Held, that the action was barred by sec. 81 of the Public Schools Act which provides that no action shall be brought against any school trustee unless within three months after the act was committed. *Duncan* v. *Ladysmith Board of School Trustees*, (1930) 43 B.C.R. 154; (1931) 1 D.L.R. 176; (1930) 3 W.W.R. 175.

SECURITY FRAUDS PREVENTION ACT.

See COMPANIES.

SET-OFF.

See COUNTY COURT PRACTICE.

See PLEADING.

See PRACTICE.

SETTLED ESTATES.

Voluntary Deed—Rectification.]—Mere alteration of intention or change of mind is not sufficient to induce the Court to interfere with or vary a voluntary trust settlement which was fully understood and deliberately executed by the grantor. *Goodwin et al.* v. *The Royal Trust Company*, (1927) 39 B.C.R. 113; (1928) 1 D.L.R. 309.

See TRUSTS.

SHERIFF.

I. Rights, 987.
II. Duties, 987.
III. Proceedings Against, 989.

I. Rights.

1. Possession by execution debtor.]—A sheriff seizing goods under execution who leaves them in the care of the execution debtor and his wife under their agreement to care for the goods as his bailees, and supervises the goods under agreement that he be paid for his services, has a claim for keeping "possession" of the goods, or on a quantum meruit for services rendered. *Rankin* v. *Bell*, (1923) 3 D.L.R. 907; (1923) 2 W.W.R. 922.

2. Poundage—Writ of possession.]—Where a sheriff has executed a writ of possession, he is entitled to poundage on the yearly rental value of the premises to which possession is given, which is the "sum made" within the meaning of item 38 of Schedule No. 4 of Appendix M to the Supreme Court Rules. *Bell* v. *Nicholls*, (1918) 26 B.C.R. 102.

3. Irregularities — Sale of mineral claims.]—The sale by the sheriff under execution of a mineral claim under the Mining Act, is not invalid because the purchaser was not the holder of a free miner's certificate at the time of making his bid at the sheriff's sale, if he had a certificate at the later date when the sheriff made a bill of sale of the claim to him; the Court will uphold sheriff's sales bona fide made, notwithstanding mere irregularities. *Roundy* v. *Salinas*, (1915) 21 B.C.R. 323; 22 D.L.R. 315; 31 W.L.R. 338; 8 W.W.R. 912.

4. Goods seized under fi. fa.—Costs of execution.]—A sheriff seizing goods under a writ of fieri facias is only entitled to the costs of execution until such time as he receives notice of an assignment for the benefit of creditors. *Baker* v. *Richards*, (1918) 59 S.C.R. 656. Affg. (1918) 25 B.C.R. 397; 40 D.L.R. 351; (1918) 2 W.W.R. 902.

II. Duties.

1. Writ of capias ad respondendum—Escape of prisoner—Negligence.]—A deputy sheriff having arrested a debtor under a writ of capias ad respondendum permitted the debtor to go into an adjoining room where he escaped. In an action against the sheriff and his deputy for damages for allowing the escape and against the guarantee company on a bond given for the due fulfilment of their duties:—Held, that as the sheriff is paid a salary and has no interest in fees other than to collect them, and does not select, appoint or pay his deputy, whose authority to act is by virtue of his appointment by the Executive, there is no personal liability to be attached to the sheriff. Held, further, that although there was no evidence of the deputy touching B., from what occurred, B. knew he was under detention and acquiesced in the situation, constituting an arrest in law. The deputy did not display reasonable care after he had secured B. and he was guilty of negligence. Held, further, that under sec. 13 of the Sheriffs Act, the plaintiff is entitled to maintain this action against the bonding company. The bond covers the acts of the deputy as well as the sheriff and the plaintiff is entitled to judgment as against the company. *H. N. Higgins* v. *Macdonald*, (1928) 40 B.C.R. 150; 50 C.C.C. 353; (1928) 4 D.R.L. 241; (1928) 3 W.W.R. 115.

2. Error in selection of jury.]—Where upon the selecting of jurors by ballot for a trial with a petit jury due notice having been given to the parties who did not appear the sheriff by inadvertence selected the jurors from the grand jury list instead of the petit jury list a new trial was refused and it was held that the duties of the sheriff were directory only and that the parties have not been prejudiced by the error, and sec. 59 of the Jury Act was operative to prevent impeachment of the verdict. *Shaw* v. *McDonald*, (1921) 29 B.C.R. 230; (1921) 1 W.W.R. 498; 56 D.L.R. 354.

3. Homestead exemption — Sale after claim for.]—A sheriff's sale under execution of property upon which exemption has been claimed under secs. 17 and 18 of the Homestead Act is an unlawful act in defiance of the statute and void, and the owner can treat the purchaser who has taken possession of it as a trespasser, and either recover the goods or damages for their conversion. *Fletcher* v. *Pendray*, (1916) 22 B.C.R. 566; 27 D.L.R. 637; 10 W.W.R. 444; 34 W.L.R. 310.

4. Costs—Man in possession—Proper charge.]—Where a sheriff makes a seizure under execution he is not entitled to incur the costs of placing a man in possession (1)

where there is no danger of the property being removed as in the case of a building or land or (2) where the property can be conveniently secured by storing it. A sheriff is not entitled to make profit out of possession money, when not personally in possession of the goods seized. In a proper case for putting a man in possession, possession money can only be charged when he is in actual possession and only for the period in which he is in actual possession. The amount charged shall not exceed the sum paid out by the sheriff in that connection and he must produce vouchers for the sums so paid out by him. *Li Din* v. *Chow Toy Dong*, (1923) 32 B.C.R. 296; (1923) 3 D.L.R. 957; (1923) 2 W.W.R. 799.

III. PROCEEDINGS AGAINST.

1. Execution against—Writ of fi. fa. directed to coroner.]—A writ of fieri facias against the goods of a sheriff issued in his own county may be directed to and executed by the coroner. This practice is not affected by secs. 8 or 9 of the Sheriffs Act or by the fact that there is a deputy sheriff appointed by the Crown. *Williams* v. *Richards*. (1923) 32 B.C.R. 58; (1923) 1 W.W.R. 1021.

2. Wrongful seizure.] — A judgment creditor is not responsible for the seizure by a deputy sheriff of goods in possession of the debtor but not his property, where no specific direction was given to seize the goods, and in such a case the judgment creditor cannot ratify the deputy sheriff's act and make it his own. *Ballantyne* v. *McCulloch & Co.*, (1927) 39 B.C.R. 97; (1927) 4 D.L.R. 525; (1927) 3 W.W.R. 148.

3. Money in hands of sheriff.]—Money in the hands of a sheriff is not subject to seizure under execution. The sheriff's return admitting possession of surplus funds in his hands but not levied on under the execution is not a return of a seizure and not conclusive as an estoppel of record. *Palmer* v. *Richards*, (1921) 30 B.C.R. 321; 70 D.L.R. 732.

See BILLS OF SALE.

See EXECUTION.

See LIEN.

See SALE OF GOODS.

See VENDOR AND PURCHASER.

SHIPPING.

I. OWNERSHIP, 990.
II. HIRE OF SHIP, 990.
III. MASTERS AND SEAMEN, 991.
A. In general, 991.
B. Wages, 993.
IV. LIENS, 994.
V. TONNAGE, 995.
VI. TOWAGE, 996.
VII. DAMAGE TO PROPERTY, 997.
VIII. FORFEITURE UNDER CUSTOMS AND FISHERIES PROTECTION ACT, 999.

I. OWNERSHIP.

Interpleader.] — Although the policy of the law is that no foreign subject may own any share in a British ship, the transaction of purchase is not void, the only consequence being that the ship ceases to be British with all the consequential disadvantages of that loss to her owners including the risk of forfeiture. *Walls* v. *Hansen*, (1921) 29 B.C.R. 552; (1921) 2 W.W.R. 250.

II. HIRE OF SHIP.

1. Charter party — Liability of owner for charterer's debts.] — Where actual agency of a charterer for the owner of a vessel has been negatived, the owner cannot be held liable for the debts of the charterer unless either ostensible authority or holding out by the owner of the charterer as agent is shewn, or some custom is established upon which such ostensible authority may be predicated. *Canadian Stevedoring Co.* v. *Robin Line Steamship Co.*, (1928) S.C.R. 423; (1928) 3 D.L.R. 856.

2. Delay owing to stress of weather.]—Under the terms of a charter of a tug for towing three rafts it was held that the charter money was payable although, owing to weather conditions and in the exercise of proper judgment by the master of the tug, the rafts were never towed. *The B.C. Mills, Tug and Barge Co.* v. *Kelley*, (1923) 32 B.C.R. 1; (1923) 1 D.L.R. 1015; (1923) 1 W.W.R. 597.

3. Charter party—Termination.]—The defendant chartered the plaintiff's vessel for 60 days for fishing north of Vancouver, the charter-party containing an extension clause should the defendant require it longer. The plaintiff's engineer was kept by the defendant on the boat, he having instructions from

the plaintiff what to do with the vessel on the termination of the contract. The principals resided in Vancouver and at the end of the 60 days the defendant notified the plaintiff personally that he would require the boat no longer and that he would notify his cannery manager in the North to that effect. The notification did not arrive at the cannery until the boat had left for another cannery the cannery manager having told the engineer to get his instructions as to extension of the charter-party from the cannery manager on his arrival there. Upon his arrival the cannery manager told him he had no instructions but would keep the boat until he received instructions. The engineer continued to fish for an additional 32 days and deliver to the defendant's canneries:—Held, that the principals themselves having on the termination of the 60 days declared the charter-party at an end, a local manager at a cannery would not, without instructions, have authority to continue the contract. *Peterson* v. *Millerd Packing Company, Limited*, (1928) 40 B.C.R. 314; (1928) 4 D.L.R. 833; (1928) 3 W.W.R. 279.

III. Masters and Seamen.

A. In General.

1. Desertion—Final port of discharge.]—A fireman signed articles of agreement for a "voyage from Halifax to Vancouver via Newport News, thence to any port or ports between the limits of 75 degrees north and 65 degrees south latitude to and fro as required for a period not to exceed twelve months, final port of discharge to be in the Dominion of Canada." The vessel touched at Newport News and Galveston, and Nanaimo and Ocean Falls in British Columbia, where the accused left the ship against the expressed will of the master, and where her cargo was entirely discharged and she loaded a fresh cargo; she also put into English Bay, but did not enter Vancouver Harbour:—Held, that on the true construction of the clause, the master was entitled to require the fireman to proceed on the ship to any ports within the prescribed limits and for any period not exceeding a year, for the discharge of the cargo at Ocean Falls did not determine the agreement as the voyage was that of the ship and not of the cargo. The master had a right of election as to which of the ports within the Dominion of Canada, should, within the period of twelve months, be the final port of destination of the ship, and the agreement did not contravene the provisions of sec. 152, subsec. 2 (*a*) of the Canada Shipping Act. *Rex* v. *Queen*, (1921) 30 B.C.R. 256; (1921) 3 W.W.R. 123.

2. Final port of discharge—Discretion of master.]—According to articles signed at Halifax, N.S., on February 2nd, 1931, the plaintiff agreed "to serve on board the S.S. 'Canadian Carrier' . . . on a voyage from Halifax, N.S., to New York, U.S.A., thence to any port or ports between the limits of 75 degrees north, and 65 degrees south latitude to and fro as required for a period not to exceed twelve months. Final port of discharge to be in the Dominion of Canada." The ship received and discharged cargo at different foreign ports, and her first arrival in Canada was on June 3rd, at Vancouver. She left Vancouver on June 5th for Nanoose Bay when part of a cargo was loaded upon which she returned to Vancouver to complete a cargo for Montreal, her home port, where she finally discharged cargo and paid off the crew. The plaintiff claimed to have been entitled to his discharge and payment of his wages on the ship's first arrival at Vancouver:—Held, that the voyage contemplated by the articles was a twelve months' tramp "to and fro" within certain latitudes and that the final port of discharge was at Montreal. *Crombie* v. *Canadian Government Merchant Marine*, (1921) 30 B.C.R. 260; 68 D.L.R. 314; 21 Ex. C.R. 299; (1922) 1 W.W.R. 805.

3. Investigation into master's responsibility for wreck—Assessors.]—The minister of marine and fisheries has no power to delegate to a local wreck commissioner the authority to select assessors on an investigation into the loss of a ship. The power so to select is given to the minister only under secs. 783 and 784 of the Canada Shipping Act. Under secs. 795 and 801 (3) of said Act there must be, at some time during inquiry proceedings, definite charges formulated and after notice, an opportunity afforded to meet them, before a certificate can be suspended. Certain general questions with relation to the stranding and submitted before the hearing, were held not to be definite charges such as to enable one who is under inquiry to controvert the matters in respect of which he was in jeopardy of being found in default. *In re Bradley*, (1921) 30 B.C.R. 280; (1921) 3 W.W.R. 385.

4. Wreck commissioner — Fair trial—Excess of jurisdiction.]—The decision of a wreck commissioner sitting as a "Court"

under Part X. of the Canada Shipping Act suspending and fining the master of a ship was quashed as being in excess of the jurisdiction of said Court on the ground that the captain had not been given a fair trial as the nature and form of the charges against him were such as prevented him from presenting a complete defence. *In re Berquist*, (1925) 35 B.C.R. 368; (1925) 2 D.L.R. 696; (1925) 1 W.W.R. 1084.

5. Wreck commissioner — Suspension of master's certificate by.]—A formal investigation may be held by a wreck commissioner sitting as aforesaid in which power of cancellation or suspension of the certificate of a master may be exercised, although a preliminary investigation has not been held. *Ibid.*

B. Wages.

1. Master's action for wages—Necessity for certificate.]—In an action for wages as master of a gas-boat the evidence disclosed that the plaintiff did not "possess a valid certificate" under sec. 96 of the Canada Shipping Act:—Held, that the interpretation of sec. 72 (*c*) of said Act is wide enough to cover vessels of this class, said vessel not being within the exceptions mentioned in sec. 100 of said Act and amendments thereto, but as the managing owner of the boat, after he knew that the plaintiff was not certificated, continued to employ him, he elected to waive the disqualification and the plaintiff is entitled to judgment. *Jansen et ux.* v. *"The Tex,"* 37 B.C.R. 399 (1926) 4 D.L.R. 288; (1926) 3 W.W.R. 225.

2. Minimum amount recoverable.]—Under section 191 of the Canada Shipping Act, the plaintiff must recover at least the minimum amount specified or the action will be dismissed, as the Court has no jurisdiction to entertain actions for less than such prescribed amount. *Cowan* v. *The "St. Alice,"* (1915) 21 B.C.R. 540; 32 W.L.R. 17; 8 W.W.R. 1256; 17 Ex. C.R. 207.

3. Minimum amount recoverable.]—A master of a ship is put upon the same basis as a seaman in respect of recovery and remedy, as well as of substantive rights under the provisions of the Canada Shipping Act. The claim of a master for wages, where the amount is less than $200 is, therefore, within the restrictive provisions of section 191 of the Act, and the Admiralty Court has no jurisdiction to entertain it. *Beck* v. *The "Kobe,"* (1915) 22 B.C.R. 169; 32 W.L.R. 351; 24 D.L.R. 573; 17 Ex. C.R. 215; 9 W.W.R. 89.

4. Minimum amount recoverable.]—Where a seaman is employed under a monthly contract, for a certain period, and deserts before the end of any month, he loses all claim to wages for the part of the month during which he worked. Where a seaman's wage claim is under $200 the Provincial Admiralty Court has no jurisdiction and the action must be dismissed by virtue of the Canada Shipping Act, R.S.C. 1906, cap. 113, sec. 191, *Ostrom* v. *The "Miyako,"* (1924) 34 B.C.R. 4; (1924) 2 D.L.R. 200; (1924) 1 W.W.R. 1098; (1924) Ex. C.R. 86.

See also *Jorgensen* v. *The "Chasina,"* (1925) 37 B.C.R. 24; (1926) 1 D.L.R. 1193; (1926) 1 W.W.R. 632; (1926) Ex. C.R. 110. *Coffin and O'Flynn* v. *The "Protoco,"* (1930) 42 B.C.R. 347; (1930) 2 D.L.R. 421; (1930) 1 W.W.R. 558; (1930) Ex. C.R. 153.

IV. LIENS.

1. Fishermen.]—Persons employed on a salmon fishing "lay" performing work on a fishing launch in the double capacity of sailors and fishermen though most of their time is occupied in fishing (they not having any sleeping quarters on board the vessel) are nevertheless "seamen" and are entitled to their maritime lien for seamen's wages; but the lien will not attach if the use of the vessel is no part of the agreement on which the lay is based, it having been merely lent by the owner as a matter of convenience. *Morrissette* v. *The "Maggie" et al.*, (1916) 22 B.C.R. 424; 34 W.L.R. 39; 27 D.L.R. 464; 10 W.W.R. 228; 16 Ex. C.R. 494.

2. Caretaker.]—The caretaker of a ship not in commission is not a seaman and has no lien for wages. *Jorgensen* v. *The "Chasina,"* (1925) 37 B.C.R. 24; (1926) 1 D.L.R. 1193; (1926) 1 W.W.R. 632; (1926) Ex. C.R. 110.

3. Consideration of Claim.] — Where several seamen by consolidation join their individual claims in one action for wages against the owner of one or more ships engaged in a common enterprise with resulting liens on different ships, each claimant is not thereby liable for costs consequent upon the failure of another claimant to

establish a specific lien, which the former never set up. *Morrissette* v. *The "Maggie" et al., supra.*

4. Priority.]—The lien of the mate of a vessel for wages cannot be preferred against the claim of a mortgage where the payment of the mortgagee has been guaranteed by the mate; there is no distinction to be made between the position of a master and mate in this respect. A lien claimed by an engineer of a vessel for wages in priority to the claim of a mortgage was disallowed, the Court holding that, on all the evidence, although the registered owner of the vessel was a company, the engineer and two others were the true owners thereof. *Stone et al.* v. *S.S. "Rochepoint,"* (1921) 30 B.C.R. 113; 68 D.L.R. 651; (1921) 2 W.W.R. 701; 21 Ex. C.R. 143.

5. Maritime Lien for damages—Proceedings to enforce.]—A maritime lien for damages done by a ship attaches that instant upon the vessel doing it, and notwithstanding any change of possession travels with her into the hands of a bona fide purchaser though without notice, and being afterwards perfected by proceedings in rem relates back to the moment when it first attached. Such proceedings, however, to be effectual must be taken with reasonable diligence and followed up in good faith. *Attorney-General for British Columbia* v. *S.S. "Bermuda,"* (1923) 32 B.C.R. 76 (1923) 2 D.L.R. 272; (1923) 1 W.W.R. 956; (1923) Ex. C.R. 107.

6. Effect of arrest upon possessory lien.]—A possessory lien is destroyed if the party entitled to it gives up his right to possession of the subject of the lien. A person claiming a possessory lien at common law for repairs done on a vessel loses his lien if he causes the vessel to be arrested in an action for the value of the repairs as this proceeding involves the transfer of his right of possession to the marshal whose assistance is invoked. *Rumely* v. *The "Vera M.,"* (1922) 31 B.C.R. 472; (1923) 2 D.L.R. 867; (1923) 1 W.W.R. 253; (1923) Ex. C.R. 36.

V. Tonnage.

Engine-room space.]—In estimating the tonnage of a ship the term "engine-room space" in sec. 922 of The Canada Shipping Act, R.S.C. 1906, cap. 113, as amended by 1923, cap. 35, sec. 9, covers the space occupied by the boilers appurtenant to the engines whether the boilers are in the same compartment with the engines or not. *East Asiatic Company, Ltd.* v. *The "Chilkot,"* (1925) Ex. C.R. 172; (1925) 2 W.W.R. 543.

VI. Towage.

1. Negligence.]—In all contracts for towing there is an implied obligation that competent skill and the best endeavours shall be used in the work and the act of a master of a tug in venturing out from shelter in stormy weather is negligence which will render the owners of the tug liable for the consequences of the wrongful act. *Neno* v. *The Canadian Fishing Company, Limited,* (1916) 22 B.C.R. 455 26 D.L.R. 714; 10 W.W.R. 97.

2. Mooring boom—Negligence.]—The plaintiff, a master mariner, was in the employment of the defendants, the captain and chief engineer of a tug with which they were towing a boom of logs. Deciding to moor the boom to a buoy in a bay which they approached head on with the tide, the captain ordered the chief engineer and the plaintiff to go to the buoy in a dinghy to moor the boom. The wire rope supplied for mooring was short and required that the boom should be almost touching the buoy before the connection could be made. The plaintiff stepped from the dinghy to the buoy to put the wire rope through the ring in the centre of the buoy and then attach it to the boom. The boom overran the buoy, threw the plaintiff and crushed him against another tug that was moored to the buoy, causing him injury:—Held, that the defendants had not discharged the onus which was upon them of shewing that they had not been guilty of negligence in bringing a boom up to a buoy (head on with the tide) in such a way as not to cause the accident complained of. *Steves* v. *Kinnie and Kinnie,* (1917) 24 B.C.R. 130; 33 D.L.R. 776; (1917) 1 W.W.R. 1250.

3. Liability of tug for loss.]—A tug, in taking a scow on a river, is bound to meet such requirements of her service as will enable her to render it with safety to the scow and to exercise adequate skill and care. A tug is liable for loss of scow and cargo through collision of scow with corner boom stick in going through a drawbridge passage, because, although in sliding through with the drift of the tide the tug was doing what had been customary and unobjectionable in ordinary circumstances, a portion of the permanent approach structure had been

carried away and a temporary arrangement provided which in its structure left a situation of danger in the then set of the tide, known to the master of the tug, and which could have been avoided by lashing the scow to the other side of the tug. *Patterson, Chandler & Stephen, Limited* v. *The "Senator Jansen,"* (1919) 30 B.C.R. 97; 49 D.L.R. 166; (1919) 3 W.W.R. 458; 19 Ex. C.R. 105.

4. Stress of weather—Delay.]—Under the terms of the charter of a tugboat for towing three rafts it was held that the charter money was payable although owing to weather conditions and in the exercise of proper judgment by the master of the tugboat the rafts were never towed. *B.C. Mills Tug and Barge Co.* v. *Kelley,* (1923) 32 B.C.R. 1; (1923) 1 D.L.R. 1015; (1923) 1 W.W.R. 597.

VII. Damage to Property.

1. Tort on high seas — Submarine cable.]—The Exchequer Court of Canada in Admiralty has jurisdiction to entertain an action against a ship arrested in Canadian waters for a tort committed on the high seas. The licensee or bailee of a submarine cable and in sole control thereof is entitled to damages for injury done to the cable by the wrongful use of it by a ship for deep sea anchorage. *Commercial Pacific Cable Co.* v. *The "Prince Albert,"* (1925) 37 B.C.R. 434; (1926) 4 D.L.R. 543; (1926) 3 W.W.R. 309; (1927) Ex. C.R. 44.

2. Negligence in dropping anchor—Submarine cable.]—In an action for damages for injury caused by the defendant ship to the plaintiff's telephone cable at North Vancouver, such damage being alleged to be due to the negligent manœuvres of the ship in dropping her port anchor when berthing, as those in charge knew or should have known that it would foul the said cable, the evidence submitted included a number of charts, plans, documents and a large body of evidence technical and otherwise which upon the pivotal point of where the anchor was actually dropped is sharply in conflict:—Held, that the onus is on the plaintiff and as in the particular circumstances the onus of establishing negligence has not been discharged, the action should be dismissed. *British Columbia Telephone Co.* v. *The "Arabien,"* (1924) 34 B.C.R. 319.

3. Damage to bridge.]—A ship may be sued and condemned in damages in the Admiralty side of the Exchequer Court by a municipality whose bridge over a tidal and navigable river has been injured by the ship colliding with it through careless navigation amounting to negligence. *City of New Westminster* v. *The "Maagen,"* (1915) 21 B.C.R. 97; 21 D.L.R. 73.

4. Grounding of vessel at pier.]—A coasting vessel of the plaintiffs, in approaching the defendant Company's pier to discharge cargo, was directed and assisted by the defendant's servants to tie up near the shore end of the pier, the berth which the vessel first intended taking being required for an ocean-going vessel. The wharfinger of the defendant informed the officer in charge of the vessel that there was sufficient depth of water for the ship at the point where it tied up. The ship grounded on a falling tide, filled with water and foundered:—Held, that the defendant Company was liable for the damage sustained by the plaintiff. *Coast Steamship Co.* v. *Canadian Pacific Ry. Co.,* (1921) 30 B.C.R. 283; (1921) 3 W.W.R. 631.

5. Damage to bridge.]—The reasonable use by vessels of a channel depends upon the circumstances in each case. Where there is no sound ground for holding that the master of a tug with a scow in tow navigated her in a narrow channel in a way which was not proper and seamanlike in the circumstances the tug will not be held liable for damages for injury caused by coming into contact with a bridge over the channel. *Attorney-General for British Columbia* v. *The "Pacific Foam,"* (1928) 40 B.C.R. 100; (1928) 2 D.L.R. 877; (1928) 1 W.W.R. 965.

6. Damage to bridge.]—When a vessel passing through a bridge collides with it causing damage to the bridge, the owners of the bridge can only recover such damage upon proof that the vessel was negligently navigated. *The "Eurana"* v. *Burrard Inlet Tunnel and Bridge Co.,* (1929) 41 B.C.R. 225; (1929) 3 D.L.R. 161; (1929) 2 W.W.R. 275.

7. Bridge—Obstruction to navigation—Special and general Acts.]—The owners of a bridge over navigable waters which does not comply with statutory requirements and constitutes a public nuisance are liable to a ship suffering "special damage" by reason of colliding therewith. Where a special Act of the Dominion Legislature has authorized the construction of a bridge carrying a railway over a navigable channel

"so as not to interfere with navigation" and has incorporated the Railway Act, an order made by the Railway Board under sec. 268 of that Act, which empowers the Board to authorize the construction of a bridge over navigable waters according to plans approved by the Governor in Council, affords no defence to a claim in respect of damage caused to a ship by reason of the bridge constructed being a substantial interference with navigation and therefore a public nuisance. The protection of the public right of navigation being dealt with both in the special Act and in the general Act, the express provisions of the special Act override those of the general Act, both having regard to sec. 3 of the Railway Act. *The "Eurana"* v. *Burrard Inlet Tunnel and Bridge Co.*, (1931) A.C. 300; 100 L.J.P.C. 68; 144 L.T. 556; (1931) 1 D.L.R. 785; (1931) 1 W.W.R. 325.

VIII. FORFEITURE UNDER CUSTOMS AND FISHERIES PROTECTION ACT.

1. Purpose not permitted by statute.]—Where a judgment has been given against fishing vessels, declaring them forfeited to His Majesty for violation of the provisions of section 10 of the Customs and Fisheries Protection Act, a claim under a conditional sale contract and mortgage on the engine of a vessel cannot be asserted against the vessel in these proceedings directed to her forfeiture for violation of "statutes passed for the protection of the revenue or of public property," for in such cases the vessel itself is the offender. *The King* v. *The "Sunrise." The King* v. *The "Tillie M." The King* v. *The "Queen City,"* (1930) 43 B.C.R. 494; Affd. (1931) S.C.R. 387; (1931) 3 D.L.R. 147.

2. Fishing within territorial waters.]—Where a foreign fishing vessel was seized by a Canadian fisheries protection officer because of an alleged infraction of section 10 of the Customs and Fisheries Protection Act, the defence disclosed that the sole man in command during the illness of the master, anchored at a place which he believed was within the territorial waters of Canada and it appearing that he had become exhausted, having only had two or three hours' sleep in 72 hours, it was held that in the special circumstances of the case the mistaken position of the vessel can be deemed to be an "unavoidable cause" within section 183 of the Customs Act. The Court must look upon their position with a "lenient eye" as being the misfortunes of innocent and much distressed mariners, and the ship must be released. *The King* v. *The "Mary C. Fischer,"* (1929) 41 B.C.R. 461; (1929) 4 D.L.R. 679; (1929) Ex. C.R. 207; 52 C.C.C. 273.

See ADMIRALTY.
See CARRIERS.
See COLLISION.
See CONSTITUTIONAL LAW.
See PRIZE COURT.
See SALVAGE.

SLANDER.

See DEFAMATION.

SMALL DEBTS COURT.

See COURTS.

SOCIETIES.

See BARRISTERS.
See COMPANIES.
See CO-OPERATIVE SOCIETIES.
See CRIMINAL LAW.
See MARKETING ASSOCIATIONS.
See MEDICINE.
See NOTARIES PUBLIC.
See PARTNERSHIP.
See PUBLIC BODIES AND OFFICERS.
See SOLICITORS.
See TRADE UNIONS.

SOLDIERS' RE-ESTABLISHMENT AND SETTLEMENT.

See PUBLIC BODIES AND OFFICERS.

SOLDIERS' RELIEF.

See WAR RELIEF.

SOLICITORS.

I. Duty and Liability, 1001.
A. *Retainer*, 1001.
B. *Privileged communications*, 1002.
C. *Liability*, 1003.
II. Costs, 1005.
A. *Agreements as to*, 1005.
B. *Recovery of*, 1007.
C. *Lien for*, 1008.

I. Duty and Liability.

A. *Retainer.*

1. Court of Appeal.]—A solicitor's retainer in the Court below does not entitle him to take an appeal to the Court of Appeal, and where an unsuccessful litigant has not employed a solicitor after the disposition of the case in the Court below he may file a notice of appeal in person and his neglect to give an address for service does not affect the validity of the notice. *Langan* v. *Simpson*, (1919) 27 B.C.R. 504.

2. Disputed retainer — Acceptance of services.]—Where a client has accepted a solicitor's services and has sought to be benefited thereby, an implied contract is created that he should pay the solicitor according to the fees chargeable by a solicitor, and this implied contract can only be destroyed by satisfactory evidence that the usual fees are not payable, the burden of shewing that the usual result would not follow from such employment resting on the client. *In re Legal Professions Act and A. E. Beck, a Solicitor*, (1925) 36 B.C.R. 76; (1925) 3 W.W.R. 64.

3. Disputed retainer.] — The plaintiff, who was a member of the Narcotic Squad of the Royal Canadian Mounted Police, was arrested and charged with an infraction of The Opium and Narcotic Drug Act. On the advice of his superior officer, who stated that if he cleared himself to the satisfaction of his superior officers the police department would pay his costs, he consulted the defendant and retained his services as counsel. The defendant appeared as counsel for the plaintiff on the above charge, and subsequently on a charge of perjury, also before a Royal Commission. The plaintiff cleared himself to the satisfaction of his superior officers and on the defendant submitting his bills to the police department at Ottawa they were taxed and paid. During the proceedings the plaintiff advanced the defendant $450 for disbursements and on the perjury charge he paid the defendant $2,000 to be deposited as bail, but the bail was otherwise provided and the defendant paid back $1,000, but retained the other $1,000, the defendant claiming that the costs paid by the police department did not cover all his costs:—Held, that as the defendant submitted his bill of costs against the plaintiff to the department of justice, the plaintiff having been in the Government employ, the proper inference from the whole evidence is that his bill was paid on the assumption that it was his whole bill against the plaintiff and that its payment entirely relieved the plaintiff from any responsibility for the costs of the proceedings therein set out. *Eccles* v. *Russell*, (1929) 41 B.C.R. 161; (1929) 3 D.L.R. 321; (1929) 2 W.W.R. 143.

4. Disputed retainer — Authority by assignee to assignor's solicitor.] — Where an assignee of a debt has given the assignor's solicitor authority to bring an action in his (the assignee's) name he is responsible for the costs unless in giving the authority he expressly excepts such liability. *Earle* v. *Continental Guarantee Corporation of Canada*, (1927) 4 D.L.R. 939; (1927) 3 W.W.R. 784.

5. Disputed retainer — Ratification.]—Where solicitors being assured by the husband of a party to an action that she expected them to act for her, wrongly proceeded upon the assumption that they were authorized to appear on her behalf, the fact that she retained other solicitors to appeal from the judgment given against her is not conclusive of an election on her part to ratify the unauthorized acts of the solicitors. *Overn* v. *Strand*, (1931) S.C.R. 720; (1932) 1 D.L.R. 490.

6. Termination of authority—Acceptance of notice of appeal.]—The rule in British Columbia following the English rule is that so long as sometning remains to be worked out under a judgment, a solicitor's retainer continues so as to entitle him to accept notice of appeal, but where there remains nothing to work out under the judgment the solicitor in the action cannot without fresh instructions from his client accept service of a notice of appeal. *Sunder Singh* v. *Macrae*, (1922) 31 B.C.R. 67; 65 D.L.R. 392; (1922) 2 W.W.R. 392.

B. *Privileged Communications.*

Solicitor for both parties to action.]—The privilege of a client to object to the disclosure by his solicitor of a confidential

communication does not apply when the communication was made by both parties to the action in the form of instructions to their common solicitor. *Wilson* v. *McLennan*, (1918) 27 B.C.R. 262; (1919) 3 W.W.R. 62.

C. Liability.

1. Negligence.]—In an action by a client against his solicitor for neglect of duty, the burden of proving negligence is primarily on the plaintiff, but when once established the burden then falls on the solicitor to shew that the client was not injured thereby. *Marriott* v. *Martin*, (1915) 21 B.C.R. 161; 21 D.L.R. 463; 7 W.W.R. 1291; 30 W.L.R. 899.

2. Error of judgment.]—The conduct of the plaintiff's solicitor in continuing an action after an opportunity of accepting a fair offer of settlement even where the case appears to be a weak one, is not sufficient ground to render him personally liable for the costs of the action. There must be clear evidence of misconduct or default on the part of the solicitor going further than error of judgment or miscalculation as to the chances of success. *Bell* v. *Green*. *In re Martin*, (1920) 28 B.C.R. 462; (1920) 3 W.W.R. 900.

3. Undertaking—Personal liability.]—In an action for an accounting a settlement was arranged and the defendant's solicitors gave the following written undertaking: "On behalf of our client G. we undertake to have the agreement arranged between us executed by S. or some third person acceptable to you and to pay you forthwith the cash payment of $300 as arranged":—Held, that they were personally liable on their undertaking. *In re Killam & Beck*, (1916) 23 B.C.R. 442; (*sub nom. Re Solicitors*) 32 D.L.R. 387; (1917) 1 W.W.R. 529.

4. Undertaking—Personal liability.]—An oral undertaking was given by a solicitor on a trial in a County Court and set forth in the judge's notes as follows: "Mr. B. for his client says that his client will pay the wife $20 a week in future, first payment today. Mr. K. (the client) confirms his counsel":—Held, that this is not a personal undertaking by the solicitor and he is not liable to committal for contempt for breach thereof. *Kean* v. *Kean*, *Ex p. Bird*, (1927) 39 B.C.R. 169; (1927) 4 D.L.R. 561; (1927) 3 W.W.R. 369; 48 C.C.C. 363.

5. Solicitors acting on instructions of agent.]—The plaintiff, a solicitor, was instructed by the defendant, as agent of absentee landlords, to distrain for rent goods that were removed from the premises. A chattel mortgagee claimed the goods and the plaintiff under instructions from the agent unsuccessfully contested the claim in interpleader proceedings. The authority of the agent was then repudiated by the landlords and the plaintiff was ordered to pay all costs incurred subsequent to seizure of the goods:—Held, that the solicitor was justified in accepting the agent's assumption of authority as genuine and in carrying out his instructions wthout questioning the extent of his authority. The agent made himself liable as upon a warranty of authority and the solicitor was entitled to recover. (*Per* Macdonald, C.J.A.) *Cunliffe* v. *Planta*, (1920) 28 B.C.R. 490; 54 D.L.R. 196; (1920) 3 W.W.R. 898.

6. Retaining agent—Liability for costs.]—A solicitor retaining the services of an agent abroad is liable as a principal to pay the agent's costs unless it is clear under the circumstances that the agent was to look to the client. *Gow* v. *MacInnes & Arnold*, (1923) 33 B.C.R. 1; (1923) 4 D.L.R. 1012; (1923) 3 W.W.R. 828.

7. Contract on client's behalf.] — A solicitor acting for his client to the knowledge of the other contracting party is in the same position as an agent in a commercial transaction; he speaks for his client and binds his client, but not himself. *Shaw, Salter & Plommer* v. *Phipps & Cosgrove*, (1926) 37 B.C.R. 184.

8. Negligence of agent.]—A solicitor in B.C. employing a solicitor in Alberta to prosecute an action on behalf of a client is not responsible to the client for negligent acts of the Alberta solicitor. *Perry* v. *Hornby*, (1925) 1 D.L.R. 1133; (1925) 1 W.W.R. 761.

9. Purchase of property of judgment debtor of client.]—A solicitor is not guilty of fraud in purchasing the property of a judgment debtor of a client whose judgment is for interest where the property when offered at public sale by the sheriff under execution to recover the judgment debt could not realize sufficient to justify a sale, and where the solicitor does not discharge the registration of the judgment against it, and the transaction realizes for the client who wants money and not property, a sum sufficient to cover the judgment and the solicitor's costs and disbursements; under

such circumstances the solicitor will not be declared a trustee of the property for the client. *White* v. *X.*, (1917) 3 W.W.R. 332.

10. Breach of undertaking—Contempt of Court—County Court jurisdiction.]—A County Court judge has power to hear and dispose of a motion for committal for contempt alleged to consist of the breach of a solicitor's undertaking given to that Court, and the Supreme Court will not interfere. *Kean* v. *Kean, Ex p. Bird,* (1927) 39 B.C.R. 169; (1927) 4 D.L.R. 561; (1927) 3 W.W.R. 369; 48 C.C.C. 363.

11. Appeal.]—An alleged contempt for breach of an undertaking to pay money is a civil matter and an appeal lies from a committal order for such contempt. *Ibid.*

II. Costs.

A. Agreements as to.

1. Absence of special agreement.]—On the collection of certain moneys for the defendant from the Canadian Government in respect to damages after an award by the Royal Commission for the investigation of Illegal Warfare Claims, the plaintiffs, who were barristers and solicitors, claimed that in the absence of special agreement, they were entitled to charge the defendant a commission in lieu of costs on the collection of the claim according to the scale provided for by the Rules of Court, Order LXV., r. 29. The plaintiffs recovered judgment for the amount claimed but as they did not, before deciding to let the matter stand without determining the scale of the commission, draw the defendant's attention to the said Supreme Court rule, and give him to understand that in the absence of the scale of commission being determined they intended to exact payment according to the rule, it was held that this was sufficient ground for depriving them of the costs of the action. *Cameron & Cameron* v. *Boulton,* (1930) 43 B.C.R. 39; (1930) 4 D.L.R. 1021; (1930) 3 W.W.R. 61.

2. Agreement for lump sum—Mutual releases.]—A firm of solicitors carried on an extensive litigation for A, defendant in an action commenced in 1915. The case was carried to the Privy Council, and later, on appeal from a reference, it again reached the Privy Council being finally disposed of in December, 1920. In January, 1922, a mutual release was executed by the solicitors and A. reciting that the former had acted for the latter in various matters including the litigation referred to, and had not rendered accounts for their services; that it was agreed that all accounts between them should be settled by A. paying a certain sum to the solicitors and it was thereupon agreed that each should release and discharge the other from all claims and demands. In September, 1925, A. applied by way of originating summons for an order to compel the solicitors to deliver and submit to taxation a bill of costs in respect of the action commenced in 1915, on the ground that when he signed the release he was not aware and had not been advised that the solicitors had received from the plaintiffs in said action the costs ordered by the Court of Appeal when he had been successful before that Court. It was ordered that the following issues be tried: (a) Did A. execute the release referred to? (b) If A. executed the release under what circumstances did he so execute it?:—Held, that an order directing an issue was not the proper course to pursue and it should be set aside. The application for an order for delivery of a bill for taxation should be dismissed not only on the ground that the application was not made within three months as required by sec. 101 of the Legal Professions Act but also on the general law applicable to the facts disclosed even if the section should not be regarded as a bar. *In re Legal Professions Act and Barnard. Robertson, Heisterman & Tait,* (1926) 37 B.C.R. 161; (1926) 3 W.W.R. 63.

3. Agreement for amount exceeding taxed costs.]—An agreement by a client to pay his solicitor a sum as a retaining fee over and above his taxed costs while good as between the parties is not capable of taxation as part of the taxed costs. *Enfante* v. *Enfante,* (1931) 44 B.C.R. 472; (1932) 1 D.L.R. 788; (1932) 1 W.W.R. 93.

4. Legal Professions Act—Champerty.]—Champerty is an offence under the criminal law of England introduced into British Columbia in 1858, and sec. 100 of the Legal Professions Act, R.S.B.C. 1924 (being sec. 97 of the Act of 1911) in so far as this section permits a barrister or solicitor to contract with his client for a share of the proceeds of, or property the subject of litigation, as his fee, is ultra vires of the Legislature, as being an invasion of the field of criminal law occupied exclusively by the Federal Parliament. Such a contract, being champertous, is void. *Taylor* v. *McIntosh,* (1924) 34 B.C.R. 56; (1924) 3 D.L.R. 926; (1924) 3 W.W.R. 97; 42 C.C.C. 327. *In re*

Constitutional Questions Act and In re Sec. 100 of the Legal Professions Act, (1927) 39 B.C.R. 83; (1927) 4 D.L.R. 195; (1927) 2 W.W.R. 808; 48 C.C.C. 278.

5. Client — Implied contract to pay usual fees.]—Where a client has accepted a solicitor's services an implied contract is created that he will pay the solicitor the usual fees and the burden of proof that the usual fees are not payable rests on the client. *In re Legal Professions Act and A. E. Beck, a Solicitor*, (1925) 36 B.C.R. 76; (1925) 3 W.W.R. 64.

B. Recovery of.

1. Question of fact—Decision of registrar.]—The decision of the registrar on a question of fact on a reference with regard to a bill of costs as between solicitor and client will not be interfered with by the Court of Appeal unless convinced that he is clearly wrong. *In re Dickie, DeBeck & McTaggart and Sherman*, (1916) 23 B.C.R. 538.

2. Solicitor and client bill—Appendix M.]—In the taxation of a bill of costs as between solicitor and client the registrar is not bound by the scale of fees in Appendix M to the Supreme Court Rules, 1912, but can allow a reasonable sum for the services rendered, using the scale only as a guide to enable him to determine what amount is reasonable. *In re Boscowitz*, (1916) 27 D.L.R. 721; 10 W.W.R. 948.

3. Solicitor a party to action.]—If a solicitor is a party in an action and his partner appears as his solicitor therein he cannot tax unnecessary costs against the opposite party, such as instructions, counsel fees not actually paid, consultations with client and preparation of minutes of evidence. *Arnold* v. *Goldstein*, (1920) 2 W.W.R. 424.

4. Taxation—Consultation — Meaning of.]—In the course of a solicitor's business a consultation means either advising a client as to a course of action or receiving instructions to act for the client in a certain matter. Where a vendor named in an agreement for sale of land on which default had been made by the purchaser, enters a solicitor's office and asks him how much he would charge for clearing his title, but not getting a satisfactory answer leaves him and engages another solicitor to do the work, the solicitor first mentioned is not entitled to charge a consultation fee. *Woodworth* v. *Allan*, (1925) 36 B.C.R. 20.

5. Warranty of authority.]—One who represents himself to a solicitor as being the properly authorized agent of certain parties on behalf of whom he retains the services of the solicitor, makes himself liable for the solicitor's costs as upon a warranty of authority if the agent has in fact no such authority. *Cunliffe* v. *Planta*, (1920) 28 B.C.R. 490; 54 D.L.R. 196; (1920) 3 W.W.R. 898.

6. Liability of client.]—Where a retainer or employment of solicitor or counsel by a client is proved, coupled with services rendered, the burden of proof that some person other than the client is to pay for the services, rests upon the party asserting such mode of payment. *McGeer, McGeer & Wilson* v. *Fletcher*. *McLelan* v. *Fletcher*, (1929) 41 B.C.R. 437; (1929) 4 D.L.R. 348; (1929) 2 W.W.R. 500.

7. Action dismissed by reason of non-delivery of bill—Right to sue again.]—If a solicitor's action for fees for professional services, though heard on the merits, fails on the ground of non-delivery of his bill before action as required by sec. 75 of the Legal Professions Act, he may deliver a bill and bring a new action, to which the defence of res judicata would not apply. *Banton* v. *Amar Chand*, (1921) 3 W.W.R. 368.

8. Defence of payment — Onus of proof.]—The onus is upon the defendant to prove payment of a bill of costs rendered by a solicitor. *Banton* v. *Amar Chand*, (1922) 1 W.W.R. 929.

9. Compromise by client without knowledge of solicitor.]—Where a solicitor has brought an action for his client and a sum of money is paid into Court pursuant to a garnishing order issued in the action, the solicitor is entitled to an order charging the fund in Court with payment of his costs, where the client has compromised the action without the knowledge of the solicitor and without providing for his costs. *Enfante* v. *Enfante*, (1931) 44 B.C.R. 472; (1932) 1 D.L.R. 788; (1932) 1 W.W.R. 93.

C. Lien For.

1. Personal actions—Property relieved from mechanic's lien.]—Personal actions do not come within the meaning of the words "property recovered or preserved" in sec. 104 of the Legal Professions Act. In a

mechanic's lien action being an action in rem, a lien in favour of the defendant's solicitor attaches on the property against which the mechanic's lien was registered to the extent to which the mechanic's lien was relieved, and for that amount or so much thereof as may be taxed the solicitor is entitled to rank as a preferred creditor under the Bankruptcy Act. *Miller* v. *Wollaston*, (1929) 41 B.C.R. 145; (1929) 3 D.L.R. 348; (1929) 2 W.W.R. 136.

2. Books of company.]—The solicitor of a company cannot acquire a lien for costs upon such books of a company as under the provisions of the Companies Act ought to be kept at the registered office of the company. *Re Alpha Mortgage and Investment Co. Ltd.*, (1916) 22 B.C.R. 513; 34 W.L.R. 483; 10 W.W.R. 652.

3. Money in Court.]—A solicitor has a lien for his costs upon money paid into Court by his client as security pending an appeal in which he was successful, and the lien is not displaced but is prior to a lien resulting from a judgment obtained against the client in a subsequent action between the same parties. *Ray* v. *Ruby Hou*, (1928) 40 B.C.R. 438.

See (1927) 39 B.C.R. 128; (1928) 1 D.L.R. 177.

4. Equitable charge — Land Registry Act.]—Solicitors held a certificate of title of certain lands of R. as security for R.'s debt to them. R. conveyed the lands together with other lands for value to his daughter, the defendant. Her agent obtained from the solicitors the certificate of title, agreeing that on registration of the conveyance the new certificate of title should be handed to the solicitors to be held as security for R.'s debt. Defendant claimed that her agent was unauthorized to make such agreement, but, as found by the Court, she knew of R.'s debt and of the original certificate of title being held as security therefor. After a long delay defendant's agent, on being reminded of the agreement, handed to the solicitors the new certificate of title, which was in the name of defendant and embraced five separate parcels of land, whereas the original certificate had embraced only one:—Held, (1) The solicitors should be held to have been always in constructive possession of the new certificate and to have retained a solicitor's lien thereon. (2) Under the agreement made when the solicitors handed over the original certificate of title and the implementing of that agreement by the later deposit with them of the new certificate of title, there had been created in their favour an equitable charge on the lands covered by the new certificate of title; the actual deposit took the agreement out of the Statute of Frauds on the doctrine of "part performance," even were the Statute of Frands otherwise available. (3) Secs. 34 and 35 of the Land Registry Act, B.C. Stats. 1921, cap. 26 had no application to defeat the solicitors' claim. *Cochrane* v. *Phillips*, (1924) 34 B.C.R. 465; (1924) 3 D.L.R. 996; (1924) 3 W.W.R. 285.

SPECIFIC PERFORMANCE.

I. In General, 1010.
II. Of What Agreements, 1010.
III. Vendor, When Entitled to, 1011.
IV. Purchaser, When Entitled to, 1012.

I. In General.

1. After rectification.]—A decree for rectification of a written agreement and for specific performance of the agreement as rectified may be made in one and the same action. *Frey* v. *Floyd*, (1922) 30 B.C.R. 488; 63 D.L.R. 614; (1922) 1 W.W.R. 651.

2. Mutual mistake.] — A defence of mutual mistake without a claim for rectification may be pleaded to an action for specific performance of an agreement where all that remains to be done under the agreement is the payment of admitted amounts of which the defendant was ignorant when the action was begun. *Clark* v. *Appleby*, (1928) 2 D.L.R. 95; (1928) 1 W.W.R. 784.

II. Of What Agreements.

1. Judgment on settlement of action.]—Where an action coming on for trial is settled by the parties, and the terms of settlement are incorporated in a formal judgment providing for an exchange of properties which the plaintiff has failed to comply with, the defendants' remedy is by an action for specific performance and not by an order directing an assessment of damages. *McTavish* v. *McLeod*, (1916) 26 D.L.R. 272; 9 W.W.R. 1121.

2. Contract with co-operative marketing association.]—Where the defendant, a farmer, contracts to market all her fruit and vegetables with a co-operative association and subsequently obtains the lease of additional land, the lessor expressly refusing to give her leave to market the fruit and vegetables raised on the land comprised in the lease, specific performance of the agreement with the co-operative association with an injunction against its breach will be ordered, it being the defendant's duty to obtain, if she can, the lessor's consent to the sale of her produce to the plaintiff. *Associated Growers of British Columbia Ltd.* v. *Roddick*, (1926) 36 B.C.R. 475.

3. Right to arise in future—Declaration.]—The plaintiff, an elderly person, entered into an oral agreement with the defendant's niece and the latter's husband to grant them possession of certain land during her lifetime and also to leave it to them by her will in consideration of personal services to be rendered to her during the remainder of her life. The defendants took possession of the land and built a house and made other improvements thereon. In an action by the plaintiff to recover possession of the land:—Held, that the defendants were entitled to retain possession but a declaration that the defendants are entitled upon counterclaim to specific performance on the plaintiff's death would be premature and cannot be granted during the lifetime of the plaintiff. *Lyell* v. *Cormack*, (1928) 40 B.C.R. 345; (1928) 4 D.L.R. 902; (1928) 3 W.W.R. 284.

III. VENDOR, WHEN ENTITLED TO.

1. Sale of land — Description — Encroachment.]—Where an agreement of sale sufficiently describes the land, a minor encroachment upon the land does not prevent the vendor from making title in accordance with the contract, and specific performance will be decreed. *Foster* v. *Goodacre*, (1917) 2 W.W.R. 636; 34 D.L.R. 42.

2. Sale of fruit—Market price indefinite.]—Where a fruit grower agrees in writing to sell the crop of fruit in his orchard for a period of several years the price being "the market price of such fruit in each year" the parties are not ad idem as to the market price and have not arrived at a contract in terms of which specific performance can be decreed but the vendor is entitled to recover a reasonable price for the goods sold. *Kidston* v. *Stirling & Pitcairn*, (1920) 61 S.C.R. 193; 55 D.L.R. 366; (1921) 1 W.W.R. 162.

3. Agreement for sale to Crown — Order in Council.]—An agreement for the sale of land to His Majesty as represented by the Minister of Public Works for British Columbia, for a purpose within the provisions of the Public Works Act, R.S.B.C. 1911, cap. 189, sec. 3, cannot be enforced when not founded upon an Order in Council. *Mackay* v. *Attorney-General of British Columbia*, (1922) 63 D.L.R. 171; (1922) 1 A.C. 457; 91 L.J.P.C. 193; 122 L.T. 81; 63 D.L.R. 171; (1922) 1 W.W.R. 982.

4. Agreement complete in terms—Possession by purchaser.]—A vendor can obtain specific performance of a parol agreement for the sale of land where the agreement is complete in all its terms and the purchaser has taken possession with the consent and knowledge of the vendor, and despite the fact that the vendor has not registered his title but offers a conveyance from the registered owner. *Haddock* v. *Norgan*, (1924) 34 B.C.R. 74; (1924) 3 D.L.R. 644; (1924) 2 W.W.R. 943.

5. Purchase price — Mortgage to secure.]—One of the terms of a written agreement for the sale of an interest in a farm was that the purchaser should give the vendor a mortgage for $2,000 upon the property for the balance of the purchase price. The vendor transferred the property to the purchaser but the purchaser refused to deliver a registrable mortgage to the vendor. In an action for specific performance:—Held, that the word "mortgage" in the agreement means a registrable mortgage that would give the vendor a first charge upon the property free from encumbrances. *Basant Singh and Jagat Singh* v. *Kehar Singh Gill*, (1929) 41 B.C.R. 256; (1929) 2 W.W.R. 431; (1929) 4 D.L.R. 396.

IV. PURCHASER, WHEN ENTITLED TO.

1. Lease from Crown of tidal lands—Agreement to assign.]—An action for specific performance with injunction in aid will lie to enforce an agreement for the assignment of a lease from the Crown of tidal lands for the purpose of planting oyster beds. *Parsons* v. *Norris*, (1917) 24 B.C.R. 41; (1917) 2 W.W.R. 606; 33 D.L.R. 593.

2. Incomplete agreement.]—A contract for the sale of standing timber fixing the price "on a basis of 50 cents per thousand stumpage net" but making no provision for the method by which or the persons by whom measurement is to be made is not enforceable by specific performance. *McMillan* v. *Cameron*, (1917) 24 B.C.R. 176; (1917) 2 W.W.R. 946; Aff. 24 B.C.R. 509; (1918) 1 W.W.R. 836.

3. Agreement for sale of mineral claim —Delay in payment.]—The plaintiff, who lived in Prince Rupert, agreed in writing to purchase an interest in mineral claims, the purchase price to be paid in a certain bank in Vancouver on or before a certain date. The money did not arrive until the following day but the parties met at the bank with a view to carrying out the sale, when the plaintiff's agent refused to sanction payment owing to a flaw in the defendant's title. The parties again met later but the title not being perfected to the satisfaction of the plaintiff's agent he still refused to sanction payment. The defendant then declared that the sale was off. In an action for specific performance:—Held, that the plaintiff cannot recover on the contract contained in the correspondence as he failed to leave the purchase price in the bank within the time specified, and as there is no memorandum to shew that the defendant had, subsequently to the breach, agreed to go on with the deal as required by the Statute of Frauds, the action must be dismissed. *Beaumont* v. *Harris* (*No. 2*), (1920) 28 B.C.R. 144; 59 D.L.R. 628.

4. Agreement to devise property — Violation of—Election—Compensation.]—Where a testator for good consideration agreed to devise property to his daughter and made his will accordingly but later specifically devised the property in question to a third person, the agreement is enforceable against the latter but the devisee who is forced to give up the property is entitled to compensation out of the other property of the testator, and compensation should be made before the devisee's interest in the property should be affected by any judgment declaratory or otherwise, and where impossible of enforcement by reason of the trustee under the will not being a party to the action, specific performance of the agreement will be refused, but without prejudice to a further action by the plaintiff. *Stoddard* v. *Williams*, (1923) 32 B.C.R. 43; (1923) 1 D.L.R. 1113; (1923) 1 W.W.R. 688.

5. Sale of shares.] — The defendants (husband and wife) agreed to sell a block of shares to the plaintiff for $3,000 of which $250 was paid on the date of the agreement, the balance payable at the plaintiff's office on a fixed day. The defendants did not appear at the plaintiff's office on the day so fixed for final payment and ten days later the plaintiff tendered the balance due to the defendants which was refused:—Held, that the defendants not having appeared at the plaintiff's office on the day fixed for final payment either to demand payment or put themselves in a position to accept payment, they could not claim that the plaintiff was in default and he is entitled to specific performance of the agreement. *Dornberg* v. *Somerville*, (1928) 40 B.C.R. 415; (1929) 1 D.L.R. 811.

6. Specific performance not available—Alternative remedy.]—A purchaser who has never in fact abandoned or receded from his contract, but has by reason of laches or otherwise, from causes not falling within abandonment or rescission, deprived himself of the right to specific performance, is, in case the vendor refuse to accede to specific performance, prima facie, entitled to a return of the deposit or part payment, unless some facts are shewn that would render this inequitable. *Mosdell* v. *Jardine*, (1929) 41 B.C.R. 487; (1929) 4 D.L.R. 617; (1929) 3 W.W.R. 95.

7. Sale of specific goods—Refusal of delivery.]—K. contracted with F. to sell to him and deliver five carloads of potatoes, 20 tons each, at $13 per ton, f.o.b. Kamloops, potatoes to be No. 1 marketable potatoes and inspection to be made in or at the car at Kamloops. The potatoes were in the cellars at K.'s ranch, and F. had made a number of visits to the cellars and inspected the potatoes. K. delivered four of the cars but refused to deliver the fifth, except upon the condition that inspection should take place at the cellars:—Held, upon the facts, that the parties had contracted with specific potatoes in mind and that specific performance of the contract to deliver the fifth carload at the specified place should be directed, that damages should be given in default of immediate specific performance and an injunction granted to restrain the defendant from selling the potatoes to any person other than the plaintiff. *Fraser* v. *Sam Kee*, (1916) 9 W.W.R. 1281.

See CONTRACT.

See SALE OF GOODS.

See VENDOR AND PURCHASER.

STATUTE OF FRAUDS.

See CONTRACT.
See SPECIFIC PERFORMANCE.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTES.

I. EFFECT OF FORMAL PARTS, 1015.
II. CONSTRUCTION, 1015.
A. In general, 1015.
B. General words, 1020.
C. Particular words and phrases, 1020.
D. Ejusdem generis, 1022.
E. General and Special Acts, 1023.
F. Retroactivity, 1024.
G. Imperative or directory, 1025.
III. CONFLICT BETWEEN PUBLIC STATUTES, 1025.
IV. PENAL ACTS, 1026.
V. EFFECT OF ONE ON ANOTHER, 1026.
VI. MISCELLANEOUS ACTS, 1027.

I. EFFECT OF FORMAL PARTS.

Schedule.]—The schedule to a statute while not conclusive, may be looked at for the purpose of ascertaining what was the intention of the Legislature in passing the enactment. *McDonald* v. *Brunette Sawmill Co., Ltd.*, (1922) 31 B.C.R. 77; (1922) 1 W.W.R. 1163.

II. CONSTRUCTION.

A. In General.

1. Meaning.]—The duty of a Court is to find out what an Act of Parliament means and not to embarrass itself with previous decisions on former Acts when the new Act is clear in its terms. *Rex* v. *Chin Mow*, (1924) 34 B.C.R. 240; (1924) 4 D.L.R. 433; 42 C.C.C. 394.

2. Clear and unambiguous language.]—If a statute professes to impose a charge the rule is that such intention must be shewn by clear and unambiguous language. The Legislature did not by the Probate Duty Act indicate an intention to impose probate duty upon real estate and such taxation should be limited to personal estate. *Bowman* v. *Attorney-General of British Columbia*, (1926) 38 B.C.R. 1; (1926) 4 D.L.R. 834.

3. Intention of Legislature.]—In enacting the amendment to the Supreme Court Act of 1915, sec. 3, it was the intention of the Legislature to confer upon the Supreme Court an additional power to meet the special cases where justice would seem to require it to be done, of those debtors who while not able to pay forthwith, yet could do so within a reasonable time by instalments. It is significant that this section was passed after the war began and is of the same nature as other beneficial sections passed during the same session of Legislature providing relief as to land contracts. It affords an indication of what the Legislature had in its mind. *Royal Bank of Canada* v. *McLennan*, (1918) 25 B.C.R. 183; 41 D.L.R. 27; (1918) 2 W.W.R. 225.

4. Intention of Legislature—How ascertained.]—There is no reason why special canons of construction should be applied to any Act of Parliament. The duty of the Court is in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely, to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. *Fowler* v. *Spallumchen*, (1930) 43 B.C.R. 47; (1930) 3 W.W.R. 12.

5. Intention—Area within which statute is to operate.]—The area within which a statute is to operate, and the persons against whom it is to operate, are to be gathered from the language and purview of the particular statute. Where the Legislature by the special Vancouver Incorporation Act, 1921 (second session) delegated to the corporation the right to tax professions, there was no intention of conferring upon the city council any power or jurisdiction beyond its corporate limits. *City of Vancouver* v. *Richmond*, (1928) 40 B.C.R. 170; (1928) 4 D.L.R. 506; (1928) 3 W.W.R. 166.

6. Enforcement of statutory obligation.]—Where a statute creates a new obligation and provides for its enforcement in a specified manner it cannot be enforced in any other manner. *Coldstream* v. *Bellevue*, (1929) 4 D.L.R. 52; (1929) 2 W.W.R. 597.

7. Motive of Legislature.]—While the conduct of those who procure an Act to be passed and their proceedings taken or assumed to be taken under it may be legitimately criticized, it is not for the Court to criticize the legislation itself. If an Act of Parliament works injustice only an Act of Parliament can apply the remedy. The Court cannot listen to a suggestion that Parliament has been misled or has acted under sinister influence or from improper motives. *Pacific Coast Coal Mines* v. *Arbuthnot*, (1916) 23 B.C.R. 267; 33 W.L.R. 487; 9 W.W.R. 1208.

8. War Relief Act.]—While the War Relief Act is to a limited extent an interference with civil rights, the object and purport of the Act is quite apparent and should receive such "fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act." *In re Land Registry Act and Smith*, (1917) 23 B.C.R. 547; (1917) 1 W.W.R. 332; 31 D.L.R. 702.

9. Error in drafting.]—Where the main object and intention of the statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law except in cases of necessity by reason of the absolute intractability of the language used. Where, therefore, the word "hereinafter" in the phrase "undertakers as hereinafter defined" in sec. 4 of the Workmen's Compensation Act is clearly a draftsman's error, it should be read "hereinbefore." *Morris* v. *Structural Steel Co.*, (1917) 24 B.C.R. 59; 35 D.L.R. 739; (1917) 2 W.W.R. 749.

10. Error in drafting.]—Where by an error in draftsmanship a word or expression is used in a section of a statute which would have an effect contrary to the apparent intention of the Legislature, and render the section futile the Court will give effect to the section as if the proper word had been inserted. The word "renewed" in the first line of sec. 14 of the Forest Act, 1912, is a draftsman's error and the word "renewable" should be substituted therefor. *Cameron* v. *Regem*, (1927) 38 B.C.R. 191; (1927) 2 D.L.R. 382; (1927) 1 W.W.R. 624.

11. Punctuation and marginal notes.]—Punctuation and marginal notes though useful as a guide to a hasty enquirer ought not to be relied upon in construing an Act of Parliament. A misplaced comma cannot be allowed to destroy the reasonable inference to be deduced from the language of the whole clause. That interpretation of the clause ought to be adopted rather than the alternative one which might lead to confusion and injustice. *In re Winding-up Act and Gibson Mining Co., Ltd.*, (1923) 32 B.C.R. 360 at p. 365; (1923) 3 D.L.R. 1052; (1923) 3 W.W.R. 171.

12. Construction of particular section.]—In construing a particular section the whole Act must be read to find whether the section must be modified or not by reference to the whole, where either of two constructions is open for adoption. *Chandler* v. *City of Vancouver*, (1919) 26 B.C.R. 465; 45 D.L.R. 121; (1919) 1 W.W.R. 605. *In re Prohibition Act and Tosey*, (1921) 29 B.C.R. 438; 57 D.L.R. 340; (1921) 1 W.W.R. 669; 35 C.C.C. 12.

13. Grammatical sense of words.]—In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context or in the object of the statute in which they occur or in the circumstances with reference to which they are used, to shew that they were used in a special sense different from their ordinary grammatical sense. *Bishop of Vancouver Island* v. *City of Victoria*, (1921) 2 A.C. 384; 90 L.J.P.C. 213; 59 D.L.R. 399; (1921) 3 W.W.R. 214.

14. As between reasonable and unreasonable construction.]—If the words of an Act are clear they must be followed even though they lead to manifest absurdity. The Court has nothing to do with the question whether or not the Legislature committed an absurdity. The rule is that if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity and the other does not, the Court will conclude that the Legislature did not intend to lead to an absurdity and will adopt the other interpretation. *Ibid.*

See also *Reid* v. *Collister*, (1919) 59 S.C.R. 275 50 D.L.R. 289; (1919) 3 W.W.R. 1083.

15. Reasonable construction.]—Sec. 3 of the Sheep Protection Act cannot be invoked by the defence in an action for damages for the wanton abuse and maltreatment of an unlicensed dog within a protected district, resulting in the dog's death, where such act is not bona fide and within the intention of the statute. In a case where two constructions may be put upon a statute, one reasonable and the other unreasonable, the Court will give effect to the former and have regard to the intention

of the Legislature in passing the Act. *Wilgress* v. *Ritchie*, (1920) 28 B.C.R. 345; 52 D.L.R. 543; (1920) 2 W.W.R. 421.

16. Reasonable construction.] — The construction which produces the greatest harmony and the least inconsistency is that which ought to prevail. *City of Victoria* v. *Mackay*, (1917) 25 B.C.R. 23; 39 D.L.R. 450; (1918) 1 W.W.R. 863. (Rev. on other points, 56 S.C.R. 524; 41 D.L.R. 498; (1918) 2 W.W.R. 610.)

17. Ambiguity—Reasonable construction.]—A statute which is ambiguous must be construed in such a way as to lead to a logical and reasonable result. Sec. 33 of the Water Act cannot be construed to mean that the injured person's right of action only accrues after notice in writing is given, and if the responsible person then fails to repair the defect. Such a construction would not be reasonable. *Elliott* v. *Glenmore Irrigation District*, (1923) 33 B.C.R. 205; (1923) 4 D.L.R. 1044; (1923) 3 W.W.R. 1384.

18. Statute in derogation of common law rights.]—A statute in restriction of the common liberty of the subject should be strictly construed. *Rex* v. *Western Canada Liquor Co., Ltd.*, (1921) 29 B.C.R. 499; 60 D.L.R. 217; (1921) 2 W.W.R. 774; 36 C.C.C. 65.

19. Repugnancy between sections.]—Where two sections of a statute are in conflict the latter prevails and a section dealing specifically with a subject prevails over a conflicting section that deals generally with the same subject. On a charge for selling beer the offence is under sec. 46 of the Government Liquor Act and not sec. 26 and the penalty to be imposed is as provided in sec. 63 of the Act and not sec. 62. *Rex* v. *Caskie and Spark*, (1922) 35 B.C.R. 78; (1923) 3 D.L.R. 295; (1923) 2 W.W.R. 451. *Rex* v. *Fleming*, (1921) 3 W.W.R. 629; 65 D.L.R. 229; 36 C.C.C. 335.

20. Taxation statutes—Strict construction.]—Under sec. 11 of the Taxation Act, R.S.B.C. 1911, it is the duty of the Government to claim the tax as between income and personal property as to which is the larger, and as the larger appears to be the income tax it cannot be considered, on a strict construction, which applies to this Act, that the tax was levied on personal property. This tax therefore is not within the provisions of sec. 90 of the Income and Personal-property Taxation Act, 1921 (Second Session) and there is no lien giving priority over the debenture holders. *Montreal Trust Co.* v. *South Shore Lumber Co. and The King*, (1923) 33 B.C.R. 144.

See (1924) 33 B.C.R. 280; (1924) 1 D.L.R. 1030.

B. General Words.

See Rex v. *Caskie and Spark; Rex* v. *Fleming. Supra.*

C. Particular Words and Phrases.

1. Statutory power of minister of Crown—"May."]—The Interpretation Act provides that in the construction of an Act of the Legislature, unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning, or calling for a different construction, "the word 'shall' is to be construed as imperative, and the word 'may' as permissive." The word "may" may be construed as imperative if it appears to be so from the intention and purpose of the Act, but otherwise it will be construed as permissive. If, however, the Legislature amends an Act by substituting the word "may" for the word "shall" in setting forth the powers exercisable by the minister of the Crown, the amendment will be taken to mean that it was the intention of the Legislature that these powers shall be discretionary instead of imperative. There must be reasons overwhelmingly strong to justify the Court in going to the length of giving to the permissive "may" the force of the compulsory "must." *Johnston* v. *The Minister of Lands*, (1919) 27 B.C.R. 257; (1919) 3 W.W.R. 81.

2. "Game—Whether dead or alive."]—Sec. 33 of the Game Act, 1914, reads as follows: "No person shall have in his possession any game, whether dead or alive, or any part thereof, during the close season." Sec. 51 provides as follows: "It shall be lawful for any game warden or constable without a warrant to search any person whom he shall suspect of having in his possession any animal, bird," etc.:—Held, that although the words "Any part of the animal" are not included in sec. 51 of the Act in construing the section regard must be had to the whole Act and the objects for which it was enacted and the magistrate was right in ordering the confiscation of the skins under said section. *Rex* v. *Kramer*, (1920) 29 B.C.R. 132; 36 C.C.C. 236.

3. "Publication."] — Publication required in the Gazette by sec. 53, subsec. 176 of the Municipal Act, R.S.B.C. 1911, cap. 170, before a by-law shall come into effect means the publication of the by-law in extenso. *City of Victoria* v. *McKay*, (1918) 56 S.C.R. 524; 41 D.L.R. 498; (1918) 2 W.W.R. 610. *City of Victoria and the Attorney-General of British Columbia* v. *Bailey*, (1920) 60 S.C.R. 38; 54 D.L.R. 50; (1920) 1 W.W.R. 917.

4. B.N.A. Act — "Royalties" — Bona vacantia.]—The word "royalties" in sec.109 of the B.N.A. Act must be construed in its primary and natural sense as the English equivalent of "jura regalia" and its scope is not limited by its association with the words "lands, mines and minerals." Bona vacantia fall within the meaning of that term and therefore belong to the provinces. *The Attorney-General for British Columbia* v. *The King*, (1922) 63 S.C.R. 622; 68 D.L.R. 106; (1922) 3 W.W.R. 269; Affd. (1923) 93 L.J.P.C. 76; 130 L.T. 231; 68 Sol. Jo. 138; 40 T.L.R. 13; (1923) 4 D.L.R. 690; (1923) 3 W.W.R. 1252; (1924) A.C. 213.

5. Supplementary assessment roll.]—The supplementary roll in sec. 103 of the Taxation Act, R.S.B.C. 1911, cap. 222, is a supplementary roll for the year current at the time when the assessment is made under the authority given by the section. This is a section under which an assessment made in July, 1921, was not "attached to" nor part of, nor an enlargement of, nor an addition to the annual roll of 1920. It was altogether a separate and different roll, and is a roll not of 1920 but of 1921, the year current when it was made, and as by sec. 104 the taxes are to be deemed to be due and collected under the roll revised during the previous year, and by sec. 105 are to be deemed to be due and payable on January 2, in each year, the tax is therefore to be collected in 1922, and if payment was made before June 30, 1922, the taxpayer was entitled to the discount of 10 per cent. Such taxes are not in arrears by reason of the fact that they are due in respect of income of 1917 and 1918; they become "arrears" only when December 31, 1932, has been passed and they have become delinquent under sec. 211 of the Act. *Granby Consolidated Mining, Smelting and Power Co.* v. *Attorney-General of British Columbia*, (1923) A.C. 247; 92 L.J.P.C. 74; 128 L.T. 677; (1923) 1 D.L.R. 1064; (1923) 1 W.W.R. 992.

6. In pari materia—"Fixtures."]—The provisions of the Municipal Act, R.S.B.C. 1924, cap. 179, relating to taxation are in pari materia with the Taxation Act, R.S.B.C. 1924, cap. 254, and therefore the construction to be placed upon "fixtures" in the former must conform to the construction given in the interpretation section of the latter, and therefore machinery which as between landlord and tenant would be trade fixtures, is not assessable, as improvements, under the former Act. *Rainier Brewing Co.* v. *City of Kamloops*, (1925) 2 D.L.R. 376.

7. Male Minimum Wage Act—"Occupation."]—The Male Minimum Wage Act is a remedial Act and should receive that wide and liberal interpretation which the Interpretation Act declares such Acts ought to receive. The word "occupations" in sec. 17 of the Act includes that of a licentiate in pharmacy. *Davenport* v. *McNiven*, (1930) 42 B.C.R. 468; (1930) 4 D.L.R. 386; (1930) 2 W.W.R. 263.

8. Income tax—Income "brought into or used within the Province."]—The Taxation Act, 1924, sec. 42, provides that "the following income shall be exempt from taxation . . . (d) All income derived from any source, without the Province, which is not brought into or used within the Province":—Held, that the money represented by cheques sent to the taxpayer from points outside the Province in payment of interest or profits arising, received, gained or acquired from bonds or shares, is income within the meaning of the said section. *Attorney-General of British Columbia* v. *B.C. Sugar Refining Co., Ltd.*, (1931) 44 B.C.R. 531; (1931) 3 W.W.R. 639; (1932) 1 D.L.R. 626.

D. Ejusdem Generis.

1. B.N.A. Act—"Royalties."]—The word "royalties," in sec. 109 of the B.N.A. Act, must be construed in its primary and natural sense as the English equivalent of "jura regalia" and its scope is not limited by its association with the words "lands, mines and minerals." *The Attorney-General for British Columbia* v. *The King*, (1922) 63 S.C.R. 622; 68 D.L.R. 106; (1922) 3 W.W.R. 269; Affd. (1923) 93 L.J.P.C. 76; 130 L.T. 231; 68 Sol. Jo. 138; 40 T.L.R. 13; (1923) 4 D.L.R. 690; (1923) 3 W.W.R. 1252; (1924) A.C. 213.

2. Municipal trades licenses—Teacher of music.]—A municipality may require a

person carrying on the profession of a teacher of music to take out a license under a by-law authorized by statute depending upon the following words contained in subclause (9) of sec. 92 of the British North America Act: "In each Province the Legislature may exclusively make laws in relation to . . . shop, saloon, tavern, auctioneer, and other licenses." *Rex* v. *Burnett*, (1930) 43 B.C.R. 207; (1930) 3 W.W.R. 347; 54 C.C.C. 405.

3. Extradition Act—"Goods" obtained by false pretences.]—The schedule to the Extradition Treaty containing extradictable offences includes, "7. Obtaining money, valuable security or other property by false pretences." The words "other property" are ejusdem generis with and are restricted and controlled in their meaning by the previous words "money" and "valuable security" and do not include "goods." *In re Rosen*, (1931) 44 B.C.R. 203; (1931) 2 W.W.R. 799; 56 C.C.C. 162.

E. General and Special Acts.

1. Municipal statutes.]—The powers and responsibilities contained in the Municipal Act, B.C. 1914, cap. 52 apply to all municipalities and should not be held to be impaired by a collateral statute with restricted application such as the Shaughnessy Settlement Act, B.C. 1914, cap. 96, unless that intention is expressly shewn. *Fletcher* v. *Point Grey*, (1915) 21 D.L.R. 819.

2. Mining case under special Act.]—Where a mining lease is granted by virtue of a special Act, the terms of which are inconsistent with an earlier general Act, the lease will be construed according to the special Act. *Quesnel Forks Gold Mining Co. Ltd.* v. *Ward*, (1919) 89 L.J.P.C. 13; 122 L.T. 206; (1919) 50 D.L.R. 1; (1919) 3 W.W.R. 946; (1920) A.C. 222; Affg. (1918) 25 B.C.R. 476; 42 D.L.R. 476; (1918) 3 W.W.R. 230.

3. Repeal of public Act—Effect on sections included in private Act.]—Where a private Act incorporates by special reference certain of the sections of a public Act, the private Act is not affected nor are the incorporated sections repealed by a subsequent repeal of the public Act. *Granby Consolidated Mining, Smelting & Power Co., Ltd.* v. *West Kootenay Power & Light Co.*, (1929) 41 B.C.R. 89; (1929) 2 D.L.R. 651; (1929) 2 W.W.R. 470; Affg. (1928) 40 B.C.R. 269; (1928) 4 D.L.R. 724; (1928) 3 W.W.R. 301.

4. Bridge obstructing navigation — Statutory authority for.]—Where a special Act of the Dominion Parliament incorporating a bridge company gave it the power to construct and maintain a certain bridge "so as not to interfere with navigation," the fact that said Act incorporated the provisions of the general Railway Act (now R.S.C. 1927, cap. 170) was held, even apart from the effect of sec. 3 (a) (b) of the latter Act, not to imply the intention that, nevertheless, the bridge might interfere with navigation if the Railway Board so permitted; and this conclusion was held to be confirmed by the provisions of said sec. 3 (a) (b). There is excellent authority for requiring statutory conditions to be strictly fulfilled if interference with public rights is to be justified. *Burrard Inlet Tunnel & Bridge Company* v. *The "Eurana,"* (1931) A.C. 300; 100 L.J.P.C. 68; 144 L.T. 556; (1931) 1 D.L.R. 785; (1931) 1 W.W.R. 325; 38 C.R.C. 263.

F. Retroactivity.

1. Construction.] — The provisions of cap. 18 of the British Columbia Statutes, 1913, amending the Drainage, Dyking and Irrigation Act, R.S.B.C. 1911, cap. 69 are not retrospective. Sec. 21 of the Drainage, Dyking and Irrigation Act, R.S.B.C. 1911, cap. 69 does not apply to work carried on under a general scheme adopted by proprietors under sec. 8 of said Act, and there being no statutory remedy open to persons who have been injured by the negligent carrying out of the works, an action of law will lie. *Hemphill and Cuckow* v. *McKinney et al.*, (1915) 21 B.C.R. 561; 27 D.L.R. 345; 33 W.L.R. 688.

2. Soldier Settlement Act.]—Sec. 61 of the Soldier Settlement Act, 9-10 Geo. V., 1919 (Can.), cap. 71, which forbids the enhancing of the price of land sold to the Crown by the adding of commission fees by agents, or the collection of such commissions, is not retrospective, and does not deprive a real-estate agent of his right to collect a commission on a sale completed before the Act came into force. *Rowlands and Johnstone* v. *Holland*, (1920) 53 D.L.R. 652.

3. New liability — Interpretation.] — Where a retrospective taxation statute may be construed either so as to impose a new

liability, or so as not to do so, and each construction is equally admissible, the latter is the construction which ought to be adopted. *Kent* v. *The King*, (1924) S.C.R. 388; (1924) 4 D.L.R. 77.

G. Imperative or Directory.

1. Municipality—Taxation — Compulsory purchase.]—Where a statute empowers taxation or the exercise of eminent domain, a strict compliance with the terms in which it authorizes the exercise of the rights conferred may properly be exacted. The Municipal Clauses Act which provides "that every by-law shall before coming into effect be published in the British Columbia Gazette and in some newspaper published in the municipality is imperative and not merely directory and the by-law must be published in extenso. *City of Victoria* v. *Mackay*, (1918) 56 S.C.R. 524; 41 D.L.R. 498; (1918) 2 W.W.R. 610. *City of Victoria and the Attorney-General of British Columbia* v. *Bailey*, (1920) 60 S.C.R. 38; 54 D.L.R. 50; (1920) 1 W.W.R. 917.

2. Municipal Court of Revision — Assessment of agricultural land.] — Sec. 219 of the Municipal Act which provides that inter alia the powers of the Court of Revision shall be "to fix the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes and during such use only at the value which the same has for such purposes without regard to its value for any other purpose" is an imperative provision and does not admit of any discretionary power in the Court of Revision, and the only discretion given the Court is that of finding whether the land is solely used for agricultural purposes. *In re Shannon and Corporation of Point Grey*, (1922) 63 S.C.R. 557; 66 D.L.R. 160; (1922) 2 W.W.R. 625; Affg. (1921) 30 B.C.R. 136; 62 D.L.R. 248; (1921) 3 W.W.R. 442, 549.

III. Conflict Between Public Statutes.

Conflict between statutes—Later enactment.]—The Court of Appeal Act being subsequent in date of passage to the Summary Convictions Act (R.S.B.C. 1911, cap. 268) the Court of Appeal Act in case of conflict prevails and it continues to prevail notwithstanding the subsequent re-enactment of the Summary Convictions Act. *Rex* v. *Sit Quin*, (1918) 25 B.C.R. 362. *Rex el rel, Burrows* v. *Evans*, (1916) 23 B.C.R. 128.

IV. Penal Acts.

1. Intention of Legislature.]—The chief object in construing penal as well as other statutes is to ascertain the intention of the Legislature. A subsection relating only to penalties after conviction under a previous section of the Act, after referring to convictions under said previous section in the case of a person, proceeded with the words "and if the offender convicted under this subsection be a corporation, it shall be liable," etc.:—Held, that the words "under this subsection" could be read "under this section" meaning the previous section dealt with, or could be treated as obvious surplusage. *Whimster and Owen* v. *Dragoni*. *Whimster and Owen* v. *Mills*. *Whimster and Owen* v. *Northern Club & Cafe Company, Limited*, (1920) 28 B.C.R. 132; 51 D.L.R. 503; (1920) 2 W.W.R. 185; 33 C.C.C. 39.

2. Indian Act—Possession of intoxicant—"On any reserve."]—The possession of an intoxicant by a white person in the temporary or permanent abode of an Indian is not an offence under sec. 126 (c) of the Indian Act, R.S.C. 1927, cap. 98 where such place of abode is not on an Indian reserve. The conditions "on any reserve" in said section, with the subsequent words of the subsection govern the whole subsection. *Rex* v. *Thompson*, (1929) 42 B.C.R. 77; (1929) 3 W.W.R. 333; 52 C.C.C. 278.

V. Effect of One on Another.

1. Repeal by implication.]—With reference to the purchase and acquisition of real property the provisions of the Municipal Act Amendment Act, 1915, sec. 5, amending the Municipal Act, 1914, cap. 52, as to the necessity of the assent of the electors are incompatible with the powers conferred by subsec. 155, sec. 54 of the Municipal Act, 1914, and therefore to this extent the latter must be deemed to have been repealed by implication. *Meldrum* v. *The District of South Vancouver*, (1916) 22 B.C.R. 574; 27 D.L.R. 193; 34 W.L.R. 314; 10 W.W.R. 519.

2. Revised statutes — Repeal and re-enactment.]—Where by the addition of revised statutes containing and re-enacting

provisions of a certain Act the latter is thereby repealed, there has been in truth only a nominal repeal of the relevant part of the Act in question for the express purpose of perpetuating it in a more convenient form. *Rex* v. *Quong Wong*, (1930) 42 B.C.R. 241; (1930) 2 D.L.R. 422; (1930) 1 W.W.R. 299; 53 C.C.C. 60.

VI. MISCELLANEOUS CASES.

1. Imprisonment for debt.] — The Supreme Court Act Amendment Act, 1915, sec. 3, does not give the Court power to commit a debtor for contempt of Court in not obeying an order for the payment of money by instalments where the circumstances referred to in secs. 15 and 19 of the Arrest and Imprisonment for Debt Act do not exist. *Royal Bank of Canada* v. *McLennan*, (1918) 25 B.C.R. 183; 41 D.L.R. 27; (1918) 2 W.W.R. 225.

2. Execution against lands—Interest of debtor.]—A statute authorizing a sale by an execution creditor of lands held by a judgment debtor as trustee with no beneficial ownership must be clear in its terms, and if the statute gives the judgment creditor a lien on all the lands of the judgment debtor and the interest of the judgment debtor is only an equity of redemption in the said lands, the equity only is liable to satisfy the judgment notwithstanding the fact that a trust deed formerly executed by the debtor was not registered. *Gregory* v. *Princeton Collieries*, (1918) 25 B.C.R. 180; (1918) 1 W.W.R. 265; 40 D.L.R. 739.

As between registered owners of charges: See *Bank of Hamilton* v. *Hartery*, (1919) 58 S.C.R. 338; 45 D.L.R. 638; (1919) 1 W.W.R. 868; Affg. (1918) 26 B.C.R. 22; 43 D.L.R. 14; (1918) 3 W.W.R. 551.

3. Public Inquiries Act.]—The Public Inquiries Act, R.S.B.C. 1911, cap. 110, which empowers the Lieutenant-Governor in Council to appoint a commissioner to inquire into matters connected with the good government of the Province, the conduct of public business and the administration of justice is within the Provincial legislative powers, under sec. 92 of the B.N.A. Act. *Re Public Inquiries Act*, (1919) 27 B.C.R. 361; (1919) 48 D.L.R. 237; (1919) 3 W.W.R. 115; 33 C.C.C. 119.

4. Habeas corpus—Release of person in custody—Appeal.]—Where the Court below has ordered the release of a detained person from custody, the legality of whose custody was in question, and that person is at large, there is no right of appeal from the order under sec. 39 (c) of the Supreme Court Act. Granting of the right of appeal in such a case would amount to a sudden reversal of the policy of centuries in regard to the summary determination of the right of personal freedom and such a reversal of policy ought not to be inferred from general language which, having regard to the context is reasonably open to another view as to its effect. *In re Immigration Act. Rex* v. *Jeu Jang How*, (1919) 59 S.C.R. 175; 50 D.L.R. 41; (1919) 3 W.W.R. 1115; 32 C.C.C. 103.

5. Colonial Courts of Admiralty Act, 1890—Effect.]—The effect of the Colonial Courts of Admiralty Act, 1890 (Imp.), cap. 27, was to define as a maximum of jurisdictional authority for the Courts to be set up thereunder, the Admiralty jurisdiction of the High Court in England as it was at that date and to leave to independent legislative action of the particular Colony or Dominion the extension or diminution of that jurisdiction. Therefore additions to the jurisdiction of the Admiralty Court in England do not extend the Admiralty jurisdiction of the Exchequer Court of Canada. *Snia Viscoha Societa Nazionale Industria Applicazioni Viscosa* v. *The "Yuri Maru." Canadian American Shipping Co., Ltd.* v. *S.S. "Woron,"* (1927) A.C. 906; 96 L.J.P.C. 137; 137 L.T. 747; 71 Sol. Jo. 649; 43 T.L.R. 698; 17 Asp. M.C. 322; (1927) 4 D.L.R. 69; (1927) 3 W.W.R. 465.

6. Vancouver Incorporation Act — Classification of motor-vehicles.]—Where by the Vancouver Incorporation Act power is given to the City Council to assign stands for motor-vehicles in the public streets and to provide the class of vehicle which may stand in a particular place prohibiting any other class of vehicle from occupying such stand, and the council by by-law divides motor-vehicles into seven classes, one of which, Class "C," includes "every motor-vehicle used exclusively as a taxicab or touring-car," etc., the sections of a by-law re-classifying class "C" by distinguishing between metered cars and non-metered cars and allowing more space for the former is intra vires and in accordance with the intention of the Legislature. *Rex* v. *Johnston*, (1931) 44 B.C.R. 367; 56 C.C.C. 358.

See ADMIRALTY.

See CONFLICT OF LAWS.

See CONSTITUTIONAL LAW.

See CRIMINAL LAW.
See MINES AND MINERALS.
See MUNICIPAL CORPORATIONS.
See SUCCESSION DUTY.
See WATERS AND WATERCOURSES.

STOCK-BROKERS.

See PRINCIPAL AND AGENT.

SUCCESSION DUTY.

I. IN GENERAL, 1029.
II. IN RESPECT OF WHAT PROPORTY, 1030.
III. AS TO BENEFICIARIES, 1034.
IV. RATE, 1034.
V. PROCEDURE, 1036.
VI. CROWN LIEN, 1037.

I. IN GENERAL.

1. Executor's calculation.]—An executor under a will having made valuation of the estate on application for probate and the Auditor-General determined the amount of succession duty based on said valuation, a bond was then given to secure payment of the succession duty under the Succession Duty Act. A commission appointed under the Act valued the estate at a sum less than the valuation placed thereon by the executor:—Held, that as the valuation of the commissioner was less than the executor's valuation there was no jurisdiction to review. Held, further, that the words "coming into the hands" in the condition of the executor's bond are satisfied if the lands are under their control or saleable at their instance. *The King* v. *The United States Fidelity & Guaranty Co. and Quagliotti*, (1921) 30 B.C.R. 440; 63 D.L.R. 469; (1922) 1 W.W.R. 389; 64 S.C.R. 48; 68 D.L.R. 297; (1922) 3 W.W.R. 180; (1923) A.C. 808; 93 L.J.P.C. 26; 130 L.T. 161; (1923) 3 D.L.R. 701; (1923) 3 W.W.R. 295.

2. Affidavit of value not conclusive.]—Affidavits of value filed under the Succession Duty Act, R.S.B.C. 1911, cap. 217, are not conclusive and on an application under sec. 43, the executors may shew that the valuation in the affidavits was erroneous in exactly the same way as the Crown may go behind the affidavits to ascertain the true value. Where it was necessary to obtain letters probate to bring an action to find out if certain property had any value, and a bond for succession duties was necessary before the letters probate could issue, the executors were allowed to shew that nothing was recovered by the action and the lands valueless although valued for $16,000 in the affidavits filed. *Blackman* v. *The King*, (1924) S.C.R. 406; (1924) 4 D.L.R. 123.

3. Extension of time for payment.]—An extension of time for payment of succession duty free from interest may be granted upon an application made after the expiry of the time fixed for payment. *In re Farmer, deceased*, (1926) 36 B.C.R. 334; (1926) 1 D.L.R. 894; (1926) 1 W.W.R. 366.

II. IN RESPECT OF WHAT PROPERTY.

1. Foreigners or resident outside of Province.]—Under sec. 5 of the Succession Duty Act duty is payable in respect of the share of a deceased partner in partnership lands and timber leases situate within the Province, though the head office of the partnership place of business and the domicil of the deceased are situate elsewhere. *Re Succession Duty Act and Estate of Mossom Martin Boyd, deceased*, (1916) 23 B.C.R. 77; 28 D.L.R. 193; 34 W.L.R. 811; (1917) 54 S.C.R. 532; 36 D.L.R. 266; (1917) 2 W.W.R. 242.

2. Domicil of testator.]—The expression "net value" as used in para. (a) (b) and (c) of the Succession Duty Act, R.S.B.C. 1911, cap. 217, is properly and naturally to be referred to the property described in the words immediately preceding these paragraphs, that is to say to the property within the Province passing to the near relatives mentioned in the section, and the sums of $100,000 and $200,000 afterwards referred to are to be treated as constituent parts of that net value; and the rate of taxation is therefore to be ascertained with reference to the net value of the property within the Province only, and not the total net value of the estate wherever situated. *In re Estate of Sir William Van Horne, Deceased; Royal Trust Company* v. *Minister of Finance of British Columbia*, (1921) 91 L.J.P.C. 8; 126 L.T. 207; 61 D.L.R. 194; (1921) 3 W.W.R. 749; (1922) 1 A.C. 87.

3. Net value.]—A testator, whose estate was valued at over $60,000, bequeathed it all to his wife and children with the exception of two small legacies aggregating less

than $5,000 left to two strangers in blood: —Held, that the expression "net value" in sec. 9 of the Succession Duty Act as re-enacted by sec. 4 of the Succession Duty Act Amendment Act, 1917, applies to the whole estate and is not limited to the amount passing under the section. The amount passing under the two legacies is therefore subject to the tax imposed by said section. *In re Thomas D. Jones, Deceased,* (1920) 28 B.C.R. 481; (1920) 3 W.W.R. 425.

4. Agreement for sale of land by testator—Balance of purchase price due.]—H. sold a property under agreement for sale and died before the final payment was made on the purchase price. Shortly after his death the balance due was paid to the executor who conveyed to the purchaser. After mesne conveyances a certificate of indefeasible title was issued to A. He mortgaged to the petitioner who subsequently took foreclosure proceedings and obtained final order for foreclosure. The Minister of Finance then registered a caution claiming succession duty in respect of the lot:—Held, that when the valuation of a deceased person's estate is settled and a surety bond in favour of the Crown for payment of the succession duty is obtained and accepted by the Crown the estate is freed from any claim by the Crown in respect of duty. *Minister of Finance* v. *Caledonian Insurance Company. In re Land Registry Act and Higginson,* (1923) 33 B.C.R. 29; (1923) 4 D.L.R. 439; (1923) 3 W.W.R. 925; (1924) S.C.R. 207; (1924) 2 D.L.R. 649.

5. Deceased domiciled in British Columbia—Property outside of Province.]—Deceased at the time of his death was domiciled in British Columbia and his estate consisted of property within and without the Province the outside property consisting largely of stocks in companies in China and in England. His whole estate was assessed under the Succession Duty Act:—Held, that under the Succession Duty Act the tax is a direct one within the powers conferred upon the Province by the British North America Act, and is in terms effective to impose succession duty upon the estate both within and without the Province. *In re Succession Duty Act and Inverarity, Deceased,* (1924) 33 B.C.R. 318; (1924) 1 D.L.R. 1020; (1924) 1 W.W.R. 901.

6. Property outside of Province—Beneficiary domiciled in British Columbia.]—J. C. Sproule, deceased, who died in September, 1922, domiciled in Vancouver, left his wife executrix and sole beneficiary under his will. The estate consisted of $42,600 in land and a mortgage in Manitoba, 61 shares in the Commercial Loan & Trust Company, Winnipeg, valued at $2,287.50 and $15,350 land in British Columbia. The debts were $376.50 funeral expenses and a mortgage debt in British Columbia of $5,000. After the executrix had applied for probate and filed affidavit of value and relationship, the Commercial Loan & Trust Company, aforesaid, brought action against her in British Columbia on two promissory notes made by deceased for the accommodation of one W. H. Sproule in Manitoba aggregating with interest $3,886.58:—Held, that assuming the claim of the Commercial Loan & Trust Company will succeed, there is an asset in the claim for the amount involved against W. H. Sproule the principal debtor which is subject to taxation and the order should contain a term directing payment of duty upon $3,886.58 should it be determined the respondent be not liable on the promissory notes, and a further term that she should pay duty upon her claim against W. H. Sproule, if necessary by the determination of the Trust Company's claim. Further, the date of payment should be postponed to a time certain. *In re Succession Duty Act and Estate of J. C. Sproule, Deceased,* (1924) 34 B.C.R. 110; (1924) 2 W.W.R. 1087.

7. Property outside of Province—Testator domiciled in British Columbia.]—The British North America Act limits the power of the Province taxing only such property as has its situs in the Province and the situs is the sole test of its right to tax and not the domicil of the owner, or in other words the question should be decided by ascertaining the domicil of the property rather than that of the owner. In the case of a simple obligation to pay, there being no place of payment named, by reason of the rule of law that the debtor must seek his creditor the situs of the debt will be the domicil of the creditor at the time of death. *In re Parker Estate,* (1925) 36 B.C.R. 299; (1926) 1 D.L.R. 783; (1926) 1 W.W.R. 559.

8. Mobilia sequuntur personam.]—The owner of certain agreements for sale and promissory notes that were made and were payable in another Province and had never been brought into this Province, died domiciled in British Columbia:—Held, that succession duties were payable on said assets in British Columbia by virtue of the maxim mobilia sequuntur personam. *In re Succession Duty Act and J. H. Walker, Deceased,* (1922) 30 B.C.R. 549; 63 D.L.R. 397; (1922) 1 W.W.R. 803.

9. Shares in company—Situs.]—Where a company is registered and has its property and head office and place of share registration in British Columbia the situs of its shares is in the same Province irrespective of the domicil of the owner. "Mobilia sequuntur personam" does not apply. *Executors of Estate of Isaac Untermyer, Deceased* v. *Attorney-General of British Columbia*, (1929) S.C.R. 84; (1929) 1 D.L.R. 315; Affg. (1928) 39 B.C.R. 533; (1928) 3 D.L.R. 311; (1928) 2 W.W.R. 209.

10. Personal property outside of Province—Testator dying abroad.]—Under sec. 5 (1) (a) of the Succession Duty Act, R.S.B.C. 1924, cap. 244, personal property of a person dying abroad but domiciled within the Province which is locally situate abroad though by fiction of law situate within British Columbia is not taxable. *In re Wilson Estate*, (1926) 37 B.C.R. 336; (1926) 4 D.L.R. 139; (1926) 3 W.W.R. 265.

11. Testator domiciled in British Columbia.]—Land situate outside the Province, being immovable, is not subject to succession duty in British Columbia. *In re Estate of Robert Alexander, Deceased*, (1926) 38 B.C.R. 28; (1927) 1 D.L.R. 602; (1927) 1 W.W.R. 143.

12. Gift inter vivos.]—Succession duty is payable on a gift inter vivos made within one year of death by a person domiciled at the time of death in the Province of British Columbia. *In re Littridge*, (1927) 3 D.L.R. 250.

13. Gift inter vivos—Securities—Dividends retained.] — Where the deceased shortly after their marriage transferred to his wife certain stocks and bonds deposited in a bank the dividends whereof were thereafter paid to the credit of the husband, it was held that the deceased retained an interest in the gift to his wife to the extent of the dividend to be derived therefrom and the stocks and bonds were subject to succession duty. *Fowkes* v. *Minister of Finance*, (1927) 38 B.C.R. 395; (1927) 2 D.L.R. 717.

14. Life Policy—Proceeds at disposal of testator to time of death.]—Insurance moneys subject to be disposed of by the deceased as he saw fit up to the time of his death are subject to succession duty under subsec. (1) (f) of sec. 5 of the Succession Duty Act amended in 1929. *In re Estate of J. D. Byrne, Deceased*, (1931) 43 B.C.R. 396; (1931) 1 W.W.R. 228.

III. As to Beneficiaries.

1. Polygamy.]—A domiciled Chinaman contracted two lawful marriages in China to Chinese women of Chinese domicil. He had two business establishments, one in China and one in British Columbia and travelled back and forward between the two countries in his business interests but always retained his Chinese domicil. He died in Victoria, British Columbia, in September, 1910, and by his will bequeathed an annuity of $1,000 to each of his wives:—Held, that both women should be recognized as wives of deceased, and they are entitled to the benefits extended to wives under the Succession Duty Act. *In re Lee Cheong, Deceased. Lee Sheck Yew* v. *The Attorney-General for the Province of British Columbia*, (1923) 33 B.C.R. 109; (1924) 1 D.L.R. 1166; (1924) 1 W.W.R. 753.

2. Bequest of unpaid legacy—Resealing probate.]—F. died in British Columbia and by his will left one-third of his residuary estate to L. F.'s executors paid all the succession duty on his estate but L. died in England before her share of F.'s estate was delivered over. After probate was issued to her executor in England he petitioned for the resealing of the probate in British Columbia. This was refused until succession duty was paid upon the portion of F.'s estate that was bequeathed to her:—Held, that under the Succession Duty Act of British Columbia succession duty was payable on the sum to be received by L.'s executor from F.'s estate. *In re Estate of Sophia Lunn, Deceased*, (1925) 35 B.C.R. 411; (1925) 2 W.W.R. 608.

3. Strangers in blood.]—Property passing by will to strangers in blood is taxable under sec. 9 of the Succession Duty Act (as re-enacted by the Succession Duty Act Amendment Act, 1917) in any case where the net value of the whole estate exceeds $5,000, and according to the net value of the whole estate even though the amounts passing to strangers in blood are less than $5,000. *In re Jones Estate. In re Succession Duty Act*, (1920) 28 B.C.R. 481; (1920) 3 W.W.R. 425.

IV. Rate.

1. Principle of calculation.]—The proper course to find the tax on personalty within the Province is to take the gross value of the estate from which are deducted the debts

wherever incurred, then follow sec. 7 of the Succession Duty Act by charging 1½ per cent. on the first $100,000, 2½ per cent. on the second $100,000 and 5 per cent. on the balance amounting in all in this estate to $6,064 as the total duty. Ten thousand dollars of the estate being in this Province it is charged with an equal proportion of the duty. The surtax is charged on the same basis. *In re Joseph Hecht, Deceased,* (1923) 33 B.C.R. 154; (1924) 1 W.W.R. 1153.

2. From what date chargeable.]—Interest on succession duty is chargeable only from the date on which the final assessment of the value of an estate is arrived at, as the executors although they may wish to dispute the assessment, have no longer any excuse for non-payment of the duties, as the statute provides for a refund of overpayments. *In re Estate of John Henry Oldfield, Deceased. Minister of Finance* v. *Oldfield and Gardner,* (1927) 39 B.C.R. 119; (1927) 4 D.L.R. 711; (1927) 3 W.W.R. 361.

3. Shares — Fair market value.]—Neither a sale of shares en bloc on the date of the testator's death nor a sale to underwriters at the best price obtainable is a sound test of "fair market value." The commissioner may take into consideration all the evidence surrounding the stock including the market quotations on the date of death, the quotations for a year prior and subsequent to death, the number of sales that took place on the market and the dividends paid. *Executors of Estate of Isaac Untermyer, Deceased* v. *Attorney-General of British Columbia,* (1928) 39 B.C.R. 533; (1928) 3 D.L.R. 311; (1928) 2 W.W.R. 209; (1929) S.C.R. 84; (1929) 1 D.L.R. 315.

4. Interest—From what date payable.]—Sec. 20 of the Succession Duty Act provides that duty is payable at the death of the deceased "unless otherwise herein provided for." Where under sec. 17 of the Act the duty is made payable by an order of the Lieutenant-Governor in Council two years after the death of a testator, interest is not payable thereon until after the date fixed for payment. *In re Estate of D. H. Wilson, Deceased. Wilson* v. *Minister of Finance,* (1928) 40 B.C.R. 14; (1928) 3 D.L.R. 253; (1928) 2 W.W.R. 585.

5. Testator in loco parentis.] — The testator and his wife living apart from one another ten years before his death adopted a child who remained in the custody of the wife. The testator provided for the maintenance and education of the child who visited him several times a year, and by his will bequeathed to the child one-half of the residue of his estate:—Held, that the deceased having stood in the acknowledged relationship of a parent to the adopted child the amount of succession duty should be governed accordingly. *In re Redmond; Attorney-General for British Columbia* v. *Royal Trust Company,* (1931) 44 B.C.R. 390; (1931) 3 W.W.R. 18.

V. Procedure.

1. Judge—Persona designata.]—Under sec. 43 of the Succession Duty Act, R.S.B.C. 1911, cap. 217, a "judge of the Supreme Court is persona designata." *In re Estate of Edward H. Grunder, Deceased; Blackman* v. *The King,* (1924) S.C.R. 406; (1924) 4 D.L.R. 123.

2. Judge — Persona designata.] — A judge who issues a summons under sec. 34 of the Succession Duty Act is acting as persona designata and the hearing on the return of the summons must be before the judge who issued it. *In re Leonora Clapham, Deceased. Minister of Finance* v. *Burke-Roche,* (1925) 36 B.C.R. 175; (1925) 4 D.L.R. 325.

3. Judge—Persona designata.]—A summons was taken out in the Supreme Court for the defendant to appear before a judge of the Court upon an application of the Minister of Finance of British Columbia who claimed $1,601.41 being succession duty payable by the defendant as administratrix of an estate. It was held on the application that the proceedings were obviously meant to be taken under sec. 34 of the Succession Duty Act; that under that section the judge is persona designata and the proceedings should not have been instituted in the Supreme Court, and the application should therefore be dismissed:—Held, on appeal, that as it appeared that after the proceedings taken, Crown counsel gave notice to the defendant that he would apply and duly made an application to another judge for a summons in accordance, as he thought, with the provisions of the Succession Duty Act, but the learned judge refused to issue a summons, this was an entirely distinct proceeding which amounted to an abandonment of the original proceedings, and the appeal should be quashed. *The King* v. *Burke-Roche,* (1926) 37 B.C.R. 313.

4. Costs.]—On appeal from a judge's decision on a petition under sec. 43 of the Succession Duty Act to ascertain the duty taxable on an estate, the Court is governed by the Crown Costs Act and has no power to order costs against the Crown. *In re Estate of Sir William Van Horne, Deceased,* (1919) 27 B.C.R. 372; (1919) 3 W.W.R. 598.

See 27 B.C.R. 269; 47 D.L.R. 529; (1919) 3 W.W.R. 76.

VI. CROWN LIEN.

Time of payment.]—The phrase "unless otherwise herein provided for" in sec. 20 of the Succession Duty Act refers to the succeeding clause "shall be due and payable at the death of the deceased." It deals with the time of payment, not with the method. The lien of the Crown under said section continues after the issue of probate and until payment. *In re Crawford Estate,* (1918) 25 B.C.R. 178; (1918) 1 W.W.R. 267.

SUNDAY.

1. Sale of fruit.]—The sale of fruit by a merchant from his store on Sunday is in contravention of the provisions of 29 Car. II., cap. 27, and also of the Lord's Day Act. *Rex ex rel. Robinson* v. *Dimond,* (1916) 23 B.C.R. 325; 31 D.L.R. 556; 27 C.C.C. 28.

2. Farmers.]—Farmers do not come within the exceptions to sec. 5 of the Lord's Day Act aforesaid as neither the Sunday Observance Act nor 29 Car. II., cap. 7, has any provision expressly making it lawful for a farmer to work on Sunday. *Rex* v. *Sam Bow,* (1919) 27 B.C.R. 234; (1919) 3 W.W.R. 315; 31 C.C.C. 269.

3. Discharge of firearms.]—A municipal bye-law purporting to prohibit the discharging of firearms on Sunday within the municipal limits and providing a punishment purporting to be passed under sec. 142 of subsec. 54 of the Municipal Act, 1914, is ultra vires of the municipality being legislation dealing with observance of the Lord's Day Act. *Rex* v. *Slowin,* (1923) 1 W.W.R. 252.

See CONTRACT.

SUPPORT OF LAND.

See REAL PROPERTY.

SURETY.

See GUARANTEE.

SURVEYS.

See BOUNDARIES.

TAXATION.

I. POWERS OF TAXATION: WHAT TAXABLE, 1038.
A. *In general,* 1038.
B. *Income tax,* 1039.
C. *Revenue taxes,* 1042.
D. *Priority,* 1043.
II. EXEMPTION, 1043.
III. ASSESSMENT, 1045.
IV. COURTS OF REVISION, 1045.
V. TAX SALE, 1046.

I. POWERS OF TAXATION: WHAT TAXABLE.

A. In General.

1. Liquor imported by Provincial Government.]—The Government of the Province of British Columbia in the exercise of its powers of control and sale of intoxicating liquors under the Government Liquor Act, 1921 (B.C.), cap. 30, cannot import such liquors into the Province for the purposes of sale without paying customs duties thereon to the Dominion of Canada. *Attorney-General for British Columbia* v. *Attorney-General for Canada,* (1923) 93 L.J.P.C. 129; 130 L.T. 257; 68 Sol. Jo. 58; 40 T.L.R. 4; (1923) 4 D.L.R. 669; (1923) 3 W.W.R. 1249; 42 C.C.C. 398; (1924) A.C. 222; Aff. (1922) 64 S.C.R. 377; 38 C.C.C. 283; (1923) 1 D.L.R. 223; (1923) 1 W.W.R. 241.

2. Fuel oil tax—Direct or indirect tax.]—A provincial tax that may be intra vires in respect of one person at the present time may be declared ultra vires if it appears that looking at the matter prospectively it may be reasonably assumed that business conditions will make the tax indirect in the near future. The Fuel Oil Tax Act, 1923,

cap. 71, is therefore ultra vires the Provincial Legislature. In deciding whether a tax is direct or indirect a Court must look at the general trend of the taxation and not at particular instances. Where therefore a tax is imposed on the first purchaser of a marketable commodity although the purchaser in the particular instance buys for his own consumption only, the Court cannot overlook the fact that he might purchase for resale and the general trend of the taxation is indirect. *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.*, (1927) A.C. 934; 96 L.J.P.C. 149; 137 L.T. 745; 71 Sol. Jo. 761; 43 T.L.R. 750; (1927) 4 D.L.R. 113; (1927) 3 W.W.R. 460; Affg. (1927) S.C.R. 185; (1927) 2 D.L.R. 257; Affg. (1926) 37 B.C.R. 481; (1926) 4 D.L.R. 147; (1926) 3 W.W.R. 154.

3. Timber exported from Province—Direct or indirect tax.]—The tax imposed by the Forest Act on timber which is cut within and exported from the Province is an indirect tax and its imposition is therefore ultra vires of the Provincial Legislature. *Macdonald Murphy Lumber Company, Limited* v. *Attorney-General of British Columbia*, (1930) A.C. 357; 99 L.J.P.C. 113; 143 L.T. 1; 46 T.L.R. 266; (1930) 2 D.L.R. 721; (1930) 1 W.W.R. 830; Aff. (1929) 41 B.C.R. 473; (1929) 4 D.L.R. 954; (1929) 2 W.W.R. 529.

4. Produce Marketing Act—Levy for expenses.]—Sec. 10, sub-sec. (k) of the Produce Marketing Act provides that the Committee of Direction shall have power for the purpose of defraying the expenses of operation to impose levies on any product marketed:—Held, that a levy authorized by said section is a tax and therefore invalid on the ground that it is an indirect taxation. *Lawson* v. *Interior Fruit Committee*, (1931) S.C.R. 357; (1931) 2 D.L.R. 193. Revg. (1930) 42 B.C.R. 493; (1930) 4 D.L.R. 1027; (1930) 2 W.W.R. 23. *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ltd.*, (1931) 44 B.C.R. 508; (1931) 3 W.W.R. 384.

B. Income Tax.

1. Profits on sale of assets.] — A steamship company formed for the purpose of carrying on a coastwise trade, operated two vessels, its sole assets, for six years. The vessels were then sold at a profit and the company went into voluntary liquidation:—Held, that the profit on the sale should not be assessed as income under said Act. *In re Taxation Act and the All Red Line, Limited*, (1920) 28 B.C.R. 86; (1920) 1 W.W.R. 1030.

2. Taxation derived from mines—Non-resident.]—Sec. 155 of the Taxation Act, R.S.B.C. (1911), cap. 222, as re-enacted by sec. 25 of cap. 89, 1918, has not the effect of making taxable the income of non-residents, as well as the income of residents, derived from the working of mines. The words therein "as provided in Part I.," have reference not only to the manner and machinery of taxation of incomes but also to the persons to be taxed; and, by Part I., the non-residents are expressly not assessable for income tax. *The King* v. *Kent*, (1924) S.C.R. 388; (1924) 4 D.L.R. 77.

3. Retrospective taxation.]—Sec. 19 of cap. 89 of B.C. Statutes of 1920, making the re-enactment of sec. 155 of the Taxation Act retrospective so as to make any person who earned income from mines in the years 1915 and 1917 liable to taxation under its provisions, is ultra vires. *Ibid.*

4. Failure to make return—Proceedings.]—An information for failing to make a return of income within 30 days after demand under sec. 8 of The Income War Tax Act, 1917, as amended by sec. 11, cap. 49 of 1920, must be laid within six months from the day or days as to which the accused is charged with being in default, sec. 1142 of the Criminal Code being applicable thereto. Sec. 135 of the Inland Revenue Act does not apply to proceedings based on an infraction of any of the provisions of The Income War Tax Act, 1917. Where a magistrate dismissed a charge punishable by summary conviction and is reversed by appeal to the County Court the accused may seek redress by certiorari. Where such a charge is not laid by the Crown the Crown Costs Act does not apply and if on certiorari proceedings the order of the County Court judge allowing the appeal from the magistrate is quashed, costs may be given the accused. *Rex* v. *Meehan*, (1925) 35 B.C.R. 363; (1925) 2 D.L.R. 411; (1925) 1 W.W.R. 819; 43 C.C.C. 325.

5. Balance sheet—Estimated profits.]—The mere fact of shewing an estimated profit in a balance sheet does not make that profit assessable as income tax. The only profits assessable are those actually earned and a profit is earned when it is dealt with as a profit. *The King* v. *The Anderson Logging Co., Ltd.*, (1925) 95 L.J.P.C. 43; 134 L.T. 386; (1926) A.C. 140; (1926) 1 D.L.R. 785; (1926) 1 W.W.R. 488.

6. Logging company—Sale of timber limits.] — When a company incorporated with the object of acquiring the assets of another company and carrying on the business of cutting and getting out logs, shingle bolts and other timber, sells part of its timber limits, the profit derived from the sale is an accretion of capital by realizing securities and is not to be regarded as assessable for income tax. *Attorney-General of British Columbia* v. *Standard Lumber Co.*, (1925) 36 B.C.R. 481; (1926) 2 W.W.R. 167.

7. Insurance agents—Commission and bonus.]—Seeley & Company Limited solicited insurance as agents for several insurance companies. They were paid a commission for the business they did, and it was arranged that at the end of each year a bonus or contingent commission was payable to them only in the event of the parent company making a profit of a certain amount on the year's operations. Seeley & Company were assessed on their income derived from the contingent commissions paid them:—Held, that there is no difference between the two means of remuneration. The fact that one is contingent and payable out of the net profits while the other is not contingent and is payable out of gross profits does not differentiate them. They are both liable for income tax. *In re Taxation Act. Seeley & Company, Limited* v. *Brown*, (1926) 37 B.C.R. 514; (1927) 1 W.W.R. 185.

8. Co-operative association.] — Money deducted from the proceeds realized from the sale by an alleged co-operative association of milk received from its members, and retained by the association from such proceeds and subsequently distributed by it among its members in the form of dividends on its shares is profit of a profit making business and assessable to income tax, and not merely returns received by the association as an agent and subsequently handed over to its principals in a co-operative scheme. *Fraser Valley Milk Producers Assn.* v. *Minister of National Revenue*, (1929) S.C.R. 435; (1929) 3 D.L.R. 19.

9. Deferred payments in lieu of interest.]—The City of Victoria expropriated the Esquimalt waterworks system, the price agreed upon being $1,450,000. The City assumed a mortgage of $625,000 and it was agreed that the balance of $825,000 might be paid at any time upon giving three months' notice failing which the sum of $40,000 per annum was to be paid the Company during the currency of the mortgage (12 years) and thereafter semi-annual payments of $40,000 to be allotted one-half to the Company and one-half to a sinking fund for paying off the debt. The sum of $40,000 was received by the Company in 1928, and the same amount in 1929:—Held, that these sums should be assessed as income under Part III. of the Taxation Act. *Esquimalt Water Works Co.* v. *Leeming, (No. 2)*, (1930) 43 B.C.R. 251; (1931) 1 D.L.R. 615; (1931) 1 W.W.R. 148.

See Esquimalt Water Works Co. v. *Leeming (No. 1)*, (1930) 42 B.C.R. 163; (1930) 2 D.L.R. 37; (1930) 1 W.W.R. 401.

10. Real estate—Company.]—Any person or company making a trade of purchasing and selling will be liable for income on any profit which is made by that trade. *In re Hastings Street Properties, Limited*, (1930) 43 B.C.R. 209; (1930) 3 W.W.R. 561; (1931) 1 D.L.R. 604.

11. Money recovered from an insurance company for loss of profits—"Use and occupancy" policy.]—Where a company insures against loss or damage which might be sustained in the event of its plant being shut down and business suspended in consequence of fire and damage, and the company's plant is destroyed by fire, the moneys received from the insurance company as indemnity for profits not earned are not taxable income nor subject to taxation under the Taxation Act. *The King* v. *B.C. Fir and Cedar Lumber Co. Ltd.*, (1931) S.C.R. 435; (1931) 3 D.L.R. 354.

C. Revenue Taxes.

1. Sales tax — Action against wholesaler.]—Notwithstanding sec. 19, B.B.B. (1) of the Special War Revenue Act, 1915, the Crown is not entitled to recover from the wholesaler the amount of sales tax that the wholesaler has neglected to collect from the purchaser. *Attorney-General of Canada* v. *Reed*, (1925) 36 B.C.R. 366; (1926) 1 D.L.R. 821.

2. Sales tax—Plants for cut flowers.]—Flowering plants raised for production of cut flowers and potted plants raised for the same purpose are not nursery stock within sec. 19 B.B.B. of the Special War Revenue Act, 1915. *The King* v. *Bradshaw*, (1927) 38 B.C.R. 558; (1927) 4 D.L.R. 278; (1927) 3 W.W.R. 85; (1928) S.C.R. 54; (1928) 2 D.L.R. 352.

3. Release of charge in favour of Crown —Effect of.]—The release by the Minister of National Revenue, in consideration of the payment of a sum agreed upon, of certain property charged with the payment of overdue taxes, is not a breach of the principle that no officer of the Crown can pay out moneys or give up any valuable property belonging to the Crown without statutory authority. *Keill & Purdy* v. *Hunter*, (1928) 39 B.C.R. 396.

4. Transfer of shares and bonds—Stamp tax.]—Sec. 58 of the Special War Revenue Act authorizing a stamp tax on the sale or transfer of stocks, bonds, etc., is intra vires and within the power of the Parliament of Canada to enact. *Rex* v. *Miller Court & Co.*, (1930) 3 D.L.R. 745.

D. Priority.

Over debenture holders.]—Under sec. 11 of the Taxation Act, R.S.B.C. 1911, it is the duty of the Government to decide whether it will tax income or personal property having regard to which will yield the larger tax, and having chosen to tax income it cannot be considered upon strict construction that the tax was levied on personal property. This tax therefore is not within the provisions of sec. 90 of the Income and Personal Property Taxation Act, B.C.S. 1921 (Second Session) and there is no lien giving priority over debentures secured by a trust deed covering all the assets of the taxpayer a company. *Montreal Trust Co.* v. *The King*, (1923) 33 B.C.R. 144.

II. EXEMPTION.

1. Land taken for railway purposes.]—By an agreement between the Government of British Columbia and the Canadian Northern Railway Company properties and assets "which form part of or are used in connection with the operation of its railway shall be exempt from all taxation":—Held, that the approval by the Minister of Railways of a plan of a proposed line designated as company's right-of-way deposited under the provisions of the B.C. Railway Act, did not bring such right-of-way within the meaning of the exemption clause, where there was nothing in the uses to which the lands were devoted or in the circumstances of their occupation to mark them in a physical sense as part of a railway constructed or in the process of construction. The reason for the remission of taxation was the benefit to the public from the railway, and did not arise when the public were neither enjoying the actual railway nor having it in process of construction for their benefit. *Canadian Northern Pacific Railway Co.* v. *City of Armstrong*, (1919) 88 L.J.P.C. 147; 122 L.T. 11; 36 T.L.R. 5; (1919) 48 D.L.R. 268; (1919) 3 W.W.R. 352; (1920) A.C. 216.

2. Land taken for railway purposes.]—Lands acquired by a railway company for railway purposes, contingent upon the approval of the plans by the Minister of Railways, are not, until definitely appropriated as part of the railway and taken from other uses, "properties and assets which form part or are used in connection with its railway," so as to be exempt from taxation under clause 13 (e), cap. 3, B.C. Statutes 1910. *Canadian Northern Pacific Railway Co.* v. *City of New Westminster*, (1915) 22 B.C.R. 247; 25 D.L.R. 28; 32 W.L.R. 779; 9 W.W.R. 425; (1917) A.C. 602; 86 L.J.P.C. 178; 117 L.T. 581; 36 D.L.R. 505. *Canadian Northern Pacific Railway Co.* v. *Corporation of the City of Kelowna*, (1917) 25 B.C.R. 514; 44 D.L.R. 315; (1918) 3 W.W.R. 845.

3. Income derived from mines.]—Money paid out by a company in keeping alive an option which money is a percentage of the returns obtained by working the property optioned, under the terms of the option, is a proper deduction from the amount of income upon which the holder of the option should be assessed. But a lump sum paid under similar circumstances is a capital expenditure and cannot be so deducted. *The King* v. *The Rosebery-Surprise Mining Co.*, (1924) S.C.R. 445; (1924) 4 D.L.R. 197.

4. Income brought into the Province.]—Money represented by cheques sent into the Province in payment of interest or profits arising from investments in bonds or shares is income "brought into" the Province within the meaning of sec. 42 (d) of the Taxation Act, R.S.B.C. 1924, cap. 254. *Attorney-General for British Columbia* v. *B.C. Sugar Refining Co.*, (1931) 44 B.C.R. 531; (1931) 3 W.W.R. 639; (1932) 1 D.L.R. 626.

5. Ground held for cemetery purposes —Actual use.]—Land set aside but not actually in use solely for the purposes of a cemetery is not exempt from payment of taxes under sec. 202 (2) of the Municipal

Act as enacted by B.C. Stats. 1919, cap. 63, sec. 7. The Cemetery Companies Act only applies to companies registered thereunder. *Corporation of District of Burnaby* v. *Ocean View Development, Limited,* (1923) 32 B.C.R. 413; (1923) 3 D.L.R. 1073; (1923) 3 W.W.R. 1078.

III. ASSESSMENT.

Supplementary assessment roll.] — The "supplementary roll" in sec. 103 of the Taxation Act, R.S.B.C. 1911, cap. 222 is a supplementary roll for the year current at the time when the assessment is made under the authority given by the section. This is a section under which an assessment made in July, 1921, was not "attached to" nor part of, nor an enlargement of, nor an addition to the annual roll of 1920. It was altogether a separate and different roll, and is a roll not of 1920 but of 1921, the year current when it was made, and as by sec. 104 the taxes are to be deemed to be due and collected under the roll revised during the previous year, and by sec. 105 are to be deemed to be due and payable on January 2, in each year, the tax is therefore to be collected in 1922, and if payment was made before June 30, 1932, the taxpayer was entitled to the discount of 10 per cent. Such taxes are not in arrears by reason of the fact that they are due in respect of income of 1917 and 1918; they become "arrears" only when December 31, 1922, has been passed and they have become delinquent under sec. 211 of the Act. *Granby Consolidated Mining, Smelting and Power Co.* v. *Attorney-General of British Columbia,* (1923) A.C. 247; 92 L.J.P.C. 74; 128 L.T. 677; (1923) 1 D.L.R. 1064; (1923) 1 W.W.R. 992; Revg. (1922) 31 B.C.R. 262; 70 D.L.R. 299; (1922) 3 W.W.R. 153.

IV. COURTS OF REVISION.

1. Appeal.]—Where the assessor has acted honestly and has arrived at a valuation of property without any mistake in principle or law great weight ought to be given to his valuation by a Court of Appeal. *In re Mackenzie, Mann & Co., Ltd.,* (1915) 22 B.C.R. 15.

2. Appeal — Rehearing.] — An appeal from the decision of a Court of Revision under the Taxation Act is a rehearing and fresh evidence may be adduced. *Ibid.*

3. Depreciation of plant—Discretion of minister.]—The language of sec. 29 of the Income and Personal Property Taxation Act, 1921 (Second Session) making final the decision of the minister as to allowances at his discretion for depreciation, contemplates the actual personal decision of the minister, as distinguished from the ordinary acts of his departmental officers; otherwise the assessment is open to correction by the Court of Revision in such way "as to the Court may seem just." *Brown* v. *The Columbian Co., Ltd.,* (1923) 32 B.C.R. 425; (1923) 3 D.L.R. 727.

4. Petition for refund — Manifest error.]—A taxpayer cannot petition the Court of Revision under sec. 138 of the Taxation Act, R.S.B.C. 1924, cap. 254, in respect of an overpayment of taxes, as that section only covers errors apparent on the face of the assessment roll in respect of taxes due. *B.C. Hop Co.* v. *The King,* (1926) 37 B.C.R. 130; (1926) 3 D.L.R. 182; (1926) 2 W.W.R. 440.

V. TAX SALE.

Tax sale deed—Premature execution of.]—The execution and delivery of a tax sale deed before the statutory period of two years allowed for redemption has expired will render the deed voidable but not a nullity. When the full period for redemption has expired without tender by the owner the deed prematurely executed ceases to be voidable except upon the grounds of the invalidity of the sale proceedings. *Heron* v. *Lalonde,* (1915) 22 B.C.R. 180; 24 D.L.R. 851; 9 W.W.R. 440; 32 W.L.R. 861; Revd. (1916) 53 S.C.R. 503; 31 D.L.R. 151; 10 W.W.R. 1241.

See CONSTITUTIONAL LAW.

See MUNICIPAL CORPORATION.

See PROBATE DUTY.

See SUCCESSION DUTY.

TENANT.

See LANDLORD AND TENANT.

TENDER.

1. Payment into Court.]—The defendant made a payment into Court in satisfaction of the plaintiffs' claim, of which notice was given the plaintiffs, but did not amend its defence accordingly. Leave was given to amend at the commencement of the trial and the trial proceeded. On judgment being given for less than the amount paid into Court it was held that the plaintiff was entitled to the costs up to the application for leave to amend the defence and the defendant should have the costs subsequent thereto. *Isitt* v. *Grand Trunk Pacific Ry. Co.*, (1918) 26 B.C.R. 90; (1918) 3 W.W.R. 500; (1919) 59 S.C.R. 686; 49 D.L.R. 687.

2. Payment into Court.]—In an action for money had and received the defendant paid into Court a sum he considered sufficient to satisfy the plaintiff's claim but denied any liability. The action was dismissed but on appeal the plaintiff recovered a sum less than the amount paid in:—Held, that the plaintiff is entitled to the costs of the issue as to liability and the defendant to the costs of the issue as to the amount recoverable. Held, further, that the same rule applies if at the time of payment in there was no denial of liability but subsequently by amendment the defendant denies liability. *Aghion* v. *T. M. Stevens & Co.*, (1921) 30 B.C.R. 77; 60 D.L.R. 395; (1921) 2 W.W.R. 961. *Bottoms* v. *Pacific Northwestern Lumber Co.*, (1929) 2 W.W.R. 495; 3rd C.E.D. Supp. 1926-1931, p. 504.

3. Payment into Court.]—Payment into Court of a sum of money in satisfaction of the cause of action is proper, but it is not so to pay in and plead in satisfaction of a right or claim not sued on. *Atkinson* v. *Pacific Stevedoring & Contracting Co., Ltd.*, (1915) 22 B.C.R. 109; 24 D.L.R. 400; 32 W.L.R. 154; 8 W.W.R. 1339.

4. After payment into Court during action.]—In determining the scale on which a plaintiff's costs should be taxed in the County Court, where the defendant with his dispute note pays into Court less than the plaintiff is held entitled to receive, regard should be had to the amount in dispute at the trial. Plaintiff sued for $602. Defendant paid into Court with his dispute note $97 which the plaintiff did not accept. At trial it was held plaintiff was entitled to $152:—Held, the costs up to the time of payment in should be taxed on the scale applicable to $152 and after that on the scale applicable to $55. *Page* v. *Mitchell Motor Agency*, (1921) 1 W.W.R. 1107.

See Costs.

See Pleadings.

See Practice.

TIMBER.

See Public Lands.

TIME.

See Appeal.

See Practice.

TITLE.

See Real Property.

See Specific Performance.

See Vendor and Purchaser.

TORT.

I. In General, 1048.
II. Parties to, 1049.
III. Effect of Death, 1049.
IV. General Exceptions to Liability, 1050.
1. Injury by authorized works, 1050.
V. False Imprisonment, 1050.
VI. Conspiracy, 1051.
VII. Trade Marks and Trade Names, 1052.
VIII. Conversion, 1053.
IX. Railway Companies, Duty to Passengers, 1055.
X. Duties Connected with the Ownership, Use or Occupation of Real Property, 1056.
XI. Licensees, Duty to, 1057.

I. In General.

1. Civil remedy—Concurrent criminal prosecution.]—A civil remedy for any act or omission is not affected by reason of the fact that such act or omission amounts to a criminal offence. *Standard Bank* v. *Shuen*

Wah, (1919) 26 B.C.R. 441; (1919) 1 W.W.R. 586.

2. Burden of proof.]—In an action for damages for indecent assault the burden of proof is on the plaintiff, and substantially the same degree of proof is required as in a criminal case because if the facts the plaintiff alleges did occur, a criminal offence was perpetrated. Where the evidence in such a case throws such an atmosphere of doubt about the facts, that it is impossible to come definitely to any one conclusion the action should be dismissed. *Montgomery* v. *McKenzie*, (1923) 32 B.C.R. 232.

II. Parties to.

1. Damages.]—In an action against husband and wife for damages to an automobile caused by wrongful trespass on the part of the wife the plaintiff claimed damages for deterioration in the value of the car; for costs of repairs; and loss of the use of the car during repairs. The husband did not claim in his defence the benefit of sec. 30 of the Married Women's Property Act:—Held, that there should be judgment against both defendants. *Paten* v. *Sigmore*, (1919) 27 B.C.R. 157.

2. Infants—Deceit.]—Infants are liable to be sued for torts of all kinds and, except where the action is founded upon malice or want of care, the tenderness of the infant's age is immaterial. An action of deceit will lie against an infant whose misrepresentations have enabled another to make a fraudulent contract with a third party. *Continental Guaranty Corporation of Canada, Ltd.* v. *Mark*, (1926) 37 B.C.R. 453; (1926) 4 D.L.R. 707; (1926) 3 W.W.R. 428.

III. Effect of Death.

Families' Compensation Act—Proof of damage.]—In an action by parents of a child killed by the alleged negligence of a driver of a motor-truck application was made by the defendant for an order for particulars as to what benefits were expected to be derived by the plaintiffs if the deceased had not been killed:—Held, that sec. 6 of the Families' Compensation Act specifies all that is required to be set forth by the plaintiffs. This section has been complied with and nothing further is required, the question of pecuniary injury being a matter of evidence only. *Leslie* v. *Clarke & Buzza, Ltd.*, (1928) 40 B.C.R. 441; (1929) 1 D.L.R. 903.

IV. General Exceptions to Liability.

1. Injury by Authorized Works.

1. Defective irrigation ditch.] — The defendant, a body corporate under Letters Patent pursuant to the Water Act, operated a water ditch traversing a hill above the plaintiff's lands which were flooded with water escaping from the ditch. The plaintiff gave formal notice of his loss through the defendant's neglect to repair the ditch:—Held, that sec. 33 of the Water Act, B.C. Stats. 1914, cap. 81, should be interpreted as giving a complainant the right to recover damages for all injury sustained both before and after giving notice, and on this case which shews that the crops were ruined by water from the defendant's ditch, the repairs being of no effect, the written notice that was given after the injury had occurred and after failure to repair was sufficient to entitle him to all damages suffered by him in respect of his crop. *Elliott* v. *Glenmore Irrigation District*, (1923) 33 B.C.R. 205; (1923) 4 D.L.R. 1044; (1923) 3 W.W.R. 1384.

2. Bursting of water main.]—Where a water main, being part of the waterworks system of a city, bursts, flooding and causing damage to the property of a private owner, the municipal corporation is not liable in damages therefor, in the absence of negligence, the construction of the waterworks having been authorized by Act of Parliament. *Renahan* v. *City of Vancouver*, (1930) 43 B.C.R. 147; (1930) 4 D.L.R. 1018; (1930) 3 W.W.R. 166.

V. False Imprisonment.

Accusation of shop-lifting — Detained without force.]—Where the plaintiff after having made some purchases in the defendant's shop was accused by a detective of having stolen a cake of soap and asked to go to a room and after demurring he accompanied the detective and an assistant and was searched but the goods not being found he was allowed to go:—Held, that this constraint coupled with the subsequent searching, constituted false imprisonment for

which the defendant is liable in damages. *Conn* v. *David Spencer, Limited,* (1929) 42 B.C.R. 128; (1930) 1 D.L.R. 805; (1930) 1 W.W.R. 26.

See MALICIOUS PROSECUTION.

VI. CONSPIRACY.

1. Malicious proceedings.]—No action lies for conspiracy unless it can be shewn that legal damage has been sustained. In an action for damages by reason of the defendants conspiring to injure the plaintiffs, it appeared that legal proceedings previously brought by one of the defendants against the plaintiffs were dismissed with costs, but no order had been taken out, or any attempt made, to collect the costs from the unsuccessful party:—Held, that although party and party costs of the former proceedings may be recovered in an action of conspiracy it must first be shewn that the costs could not have been recovered from the unsuccessful party, and that as the damages particularized in the jury's verdict "fares and expenses to Vancouver and return, loss of time on farm" refer to losses caused by the former civil proceedings, they come within the term "extra costs" and are not recognized by law. *Armishaw and Armishaw* v. *Sacht, Waugh and Sacht,* (1917) 24 B.C.R. 53; 30 D.L.R. 288; 34 W.L.R. 1180.

2. Common design.]—In an action for conspiracy the plaintiff must prove a design common to the defendant and others to do him damage without just cause or excuse. It must be plainly established, but conspiracy may be arrived at by inference from the proved facts. Such facts must, however, be such that they cannot fairly admit of any other inference being drawn from them. *Humphrey* v. *Wilson,* (1917) 25 B.C.R. 110; (1917) 3 W.W.R. 529, 937.

3. Conspiracy to injure business.]—The plaintiff and the defendant Z. were partners in a restaurant business. Z. sold his interest to the plaintiff and covenanted that he would not during the following three years "carry on or be engaged in, either directly or indirectly, and whether as principal, agent, director of a company, servant, or otherwise or take part in the business of a restaurant or cafe, or hotel, within the City of Victoria, . . ." The defendants P. and Z.'s wife opened a combined cafe and candy store a few doors from the plaintiff's restaurant and about five months after the dissolution they employed Z. to manage it:—Held, that the said covenant is sufficient to prevent the defendant from taking part as manager in the conduct of the business carried on by the defendant P. and Z.'s wife, and that there was evidence of conspiracy on the part of the defendants to injure the plaintiff by setting up a competitive business in breach of the covenant. *Lerik* v. *Zaferis,* (1929) 41 B.C.R. 526; (1930) 1 D.L.R. 634; (1929) 3 W.W.R. 422.

VII. TRADE MARKS AND TRADE NAMES,

1. Trade mark improperly registered—Description of goods.]—The plaintiffs sued for an alleged infringement of their trade mark which was the word "O-Cedar" as applied to the sale of furniture polish and polishing mops and was registered as a trade mark under the Trade Mark and Design Act:—Held, that it should not have been registered as it was a word descriptive of the character of the goods in connection with which it was used, and the word "cedar" even with the prefix "O" is not an "arbitrary" or "inventive" word such as was essential to entitle it to be registered. The plaintiffs were therefore not entitled to the statutory protection given by reason of registration. Even if there is the presumption that the minister had considered and passed upon the trade mark as provided in sec. 11 of the Act, it could not be successfully contended that improper registration conferred any benefit upon the proprietor of such a trade mark. When the "essentials" of a trade mark are being considered English decisions, even with the difference in the statutes, afford not only assistance but guidance. The principle to be applied in cases of alleged infringement of trade marks aside from statutory protection, is that one is not to be allowed to use names, marks, letters or other indicia whereby to induce purchasers to believe that the goods he is selling are the manufacture of another person. The onus, however, is on the plaintiffs to prove fraud. *Channell, Limited and Channell Chemical Company* v. *Rombough,* (1923) 33 B.C.R. 65; (1923) 3 W.W.R. 1041; (1924) 1 D.L.R. 54; (1924) 33 B.C.R. 452; (1924) 2 D.L.R. 622; (1924) 2 W.W.R. 28; (1924) S.C.R. 600; (1925) 1 D.L.R. 233.

2. Business outside Canada—Assignment.]—The registration of a trade mark under the Trade Mark and Design Act does

not entitle the applicant to protection if he is not or does not propose to be engaged in business in Canada in the goods to which it is applicable, further, the applicant must be the proprietor and when he has assigned the right to use a trade mark and agreed not to use it, he cannot obtain registration thereof. *Seattle Brewing and Malting Co.* v. *Rainier Brewing Company of Canada, Limited*, (1924) 34 B.C.R. 334; (1924) 4 D.L.R. 940; (1924) 3 W.W.R. 502.

3. Appeal to Supreme Court.] — An action for infringement of a trade mark is a private matter between the plaintiffs and defendants and that the plaintiffs have half a dozen suits for infringements in as many Provinces does not make the matter of public importance. An application for leave to appeal to the Supreme Court was refused. *Channell* v. *Rombough*, (1924) 34 B.C.R. 52; (1924) 3 W.W.R. 169.

VIII. Conversion.

1. Possessory lien.] — The defendant hauled a piano, under contract, from one house to another. He took the piano from the dray on a piano-truck into the house, left it in a room and brought the truck back to the verandah when a dispute arose as to carriage charges. He then went back into the house and placing the piano on the truck took it away claiming a possessory lien on the piano for his charges:—Held, that the defendant lost his lien when he parted with possession of the piano and he cannot by retaking it become again vested with the lien and is liable for wrongful conversion. *Welch* v. *Scott*, (1920) 28 B.C.R. 349; (1920) 2 W.W.R. 510.

2. Fraudulent purchase.]—The words "acting in the ordinary course of a mercantile agent," in sec. 69 of the Sales of Goods Act, R.S.B.C. 1911, cap. 203, means a mercantile agent acting within business hours, at a proper place of business and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the pledgee to suppose that anything wrong is being done or to give him notice that the disposition is one which the mercantile agent had no authority to make. Applying this test the Court held that certain sales by a company of shingle bands which the company held as agent for the plaintiff and for sales of which it was bound to account to the plaintiff and which were evidently purchased under a special arrangement by a brother of the manager of the company making the sale for the purpose of accommodating his brother, could not be said to be within the meaning of the words of the section, and the evidence shewing that the goods were not acquired through a bona fide purchase for value in the ordinary course of business, it could not be said that a sale had taken place, and the purchaser was liable for conversion of the goods. An application for the proceeds of the goods and shewing the amount claimed to be due, is not an election to affirm the transaction and does not estop the plaintiff from seeking redress from the fraudulent purchaser. *Acme Steel Goods Co. of Canada* v. *Walsh Construction Co.*, (1922) 30 B.C.R. 539; 63 D.L.R. 529; (1922) 1 W.W.R. 689.

3. Co-ownership.]—Certain fishermen, including the plaintiff and defendant, built a float that was moored to Government land on a slough on the Fraser River. It was held by piles driven into the bed of the slough and was used by the fishermen for landing purposes. After it had been so used for nine years the defendant moved it to another slough a quarter of a mile away:—Held, that the float ought to be regarded as a chattel and not as affixed to the soil and that its removal being an infringement of the rights of the plaintiff as a joint owner thereof was an actionable wrong. *Hendersonn* v. *Rouvala*, (1923) 31 B.C.R. 515; (1923) 1 W.W.R. 467.

4. Motor - car — Conditional sale—Wrongful seizure.]—The plaintiff was the purchaser of a motor-car from the defendant under a conditional sale agreement, one of the terms being that he was not to take the car out of the Province. Subsequently the plaintiff obtained leave from the defendant to take the car to Ontario. On arrival in Ontario the motor-car was seized by the defendant's bailiff and returned to Vancouver where after being reconditioned it was sold by the defendant for $1,000, the plaintiff at the time of the seizure having paid $685 on the purchase price:—Held that the plaintiff was entitled to recover exemplary damages for illegal seizure and conversion of the car and that the circumstances were sufficient to support the verdict of $1,000 damages. *Griffiths* v. *Fordyce Motors, Ltd.*, (1930) 43 B.C.R. 119; (1930) 4 D.L.R. 451; (1930) 2 W.W.R. 698.

5. Trespass and conversion.]—In an action for trespass where the question arises as to whether any trespass took place within the statutory limitation period, it is misdirection to charge the jury to ignore the

Statute of Limitations unless questions are put to the jury from which it may be ascertained whether they find that any trespass took place within the necessary time. *Hughes* v. *Beban*, (1928) 39 B.C.R. 132; (1928) 1 D.L.R. 244; (1928) 1 W.W.R. 35.

6. Improper removal of machinery by unpaid vendor—Measure of damages.]—At a sheriff's sale the defendant purchased a stamp mill and machinery on a mineral claim. Shortly after, one G. obtained an option to purchase an adjoining claim from the plaintiff and he purchased from the defendant all the material obtained at the sheriff's sale and moved it to his property where he re-erected the stamp mill building and built other buildings. G. worked under his option for about two years (the end of 1904) when he abandoned the property and left without paying the defendant for the material taken from the adjoining claim. In 1919 the defendant proceeded to pull down the stamp mill and other buildings on the plaintiff's property and took the material away:—Held, that the defendant was liable for conversion and that the assessment of damages should not be on the basis of the defendant being a trespasser but should be the true value of the property taken. *Miller* v. *Knight*, (1925) 36 B.C.R. 362; (1926) 1 D.L.R. 764.

IX. Railway Companies—Duty to Passengers.

1. Railway passenger—Assault by conductor.]—It is the duty of a railway company to safeguard its passengers and protect them from injury at the hands of its servants. Where the conductor of a railway train assaults a passenger while collecting his ticket the two acts being part of the same transaction he is acting within the scope of his employment, and the railway company is liable. *Jennings* v. *Canadian Northern Railway Co.*, (1925) 35 B.C.R. 16; (1925) 2 D.L.R. 630; (1925) 1 W.W.R. 918; 30 C.R.C. 219.

2. Assault on passenger.]—The forcible attempt of a conductor to eject a passenger for his refusal to move up in a crowded car is an unjustifiable assault for which the company is liable, particularly where such passenger is an elderly person. *Raines* v. *B.C. Electric Ry. Co.*, (1921) 30 B.C.R. 340; 70 D.L.R. 738.

X. Duties Connected With the Ownership, Use or Occupation of Real Property.

1. Poisonous material on unguarded railway track.]—The defendant company in the course of its business loaded lead ore on cars of a railway company and at other times unloaded oats from cars at the same spot, the right of way not being enclosed. In the course of these operations particles of lead ore were allowed to drop on the right of way and a certain amount of oats fell in the unloading. The plaintiff's cows which were allowed to run at large, strayed on the right of way and eating the oats mixed with the lead ore, died from lead poisoning:—Held, that the evidence did not disclose any duty on the defendant's part towards the plaintiff. *Dawson* v. *Paradise Mine*, (1919) 26 B.C.R. 487; (1919) 1 W.W.R. 499.

2. Animal destroyed on railway track.]—Where the evidence establishes that a servant of the owner of an animal killed on a railway right of way has on a previous occasion wrongfully taken down a part of the fence between the owner's land and the right of way where such animal subsequently strayed on to the railway track, the presumption arises that in replacing the fence it was not made as secure as it was before, and that this is the reason of the animal being on the right of way at the time it was killed, and such presumption is sufficient in the absence of other evidence to relieve the company from liability under sec. 386 (c) of the Railway Act, 1919 (Can.), cap. 68. *B.C. Fruitlands, Ltd.* v. *Canadian Northern Pacific Ry. Co. and The Canadian National Railways*, (1923) 1 D.L.R. 104.

3. Gate leading to railway — Animal destroyed.]—Where there is evidence justifying the inference that a gate leading to a railway track had been wilfully opened by a stranger within the meaning of sec. 386 (1) (b) of the Railway Act the further inference may be drawn without further proof that it had been wilfully left open. *Brown* v. *Great Northern Railway Co.*, (1927) 38 B.C.R. 115; (1927) 2 D.L.R. 316; (1927) 1 W.W.R. 516; 32 C.R.C. 326.

4. Decayed forest tree.]—The occupier of land on which there is standing a decayed forest tree which has grown there naturally is not responsible for damages done by its falling either on a neighbour's premises or on a highway adjoining. *Patterson* v. *Canadian Robert Dollar Co., Ltd.*, (1929) 41

B.C.R. 123, 133; (1929) 3 D.L.R. 33; (1929) 2 W.W.R. 181.

5. Noxious vapours from ammonia plant.]—In an action for damages for the loss of theatrical business caused by the emission of noxious vapours from the defendant's ammonia plant that spread about the theatre site:—Held, that as there was evidence of several other sources from which offensive odours may have reached the theatre and there was no satisfactory proof of the creation or maintenance of an actionable nuisance by the defendant; further, the books of the company and the amusement tax records shewed that the theatre proved a failure before the establishment of the ammonia plant and this was due to its becoming submerged in the murk and squalor of an industrialized district where people would not resort for theatrical amusement, and the defendant is not liable. *Avenue Theatre, Limited* v. *Vancouver Gas Company*, (1928) 40 B.C.R. 275.

6. Unguarded excavation on private property.]—The plaintiff on a dark and foggy night missed his way and fell into an excavation on the defendant's property unguarded by a fence or otherwise:—Held, that as there was no fence the plaintiff in straying upon the defendant's land was not a trespasser and there was a duty upon the defendant not to maintain a trap such as the one in question. *Blanchard* v. *Vaughan*, (1930) 42 B.C.R. 446.

XI. LICENSEES, DUTY TO.

1. Public amusement device.] — The owners of an amusement device are liable to members of the public who patronize them for personal injury caused by a defect in construction of the device. *Jamieson* v. *B.C. Amusements Co., Ltd.*, (1930) 43 B.C.R. 317.

2. Dangerous stairway.]—In an action by a servant of a tenant of an office building against the owner for injuries sustained by falling down a stairway the accident occurring as he alleged by reason of the balustrade being of an unsafe height, it was held that the plaintiff knew or ought to have known the height of the balustrade and accepted the risk of using the access to the stairway in the form in which it was provided, and was therefore not entitled to damages. *Kynoch* v. *Bank of Montreal*, (1923) 3 D.L.R. 877; (1923) 3 W.W.R. 161.

3. Dark corridor.] — The plaintiff entered a corridor of which she had previous knowledge, leading to a sample room of an hotel and fell in the entrance. In an action against the owner of the hotel in respect of her injury she alleged that upon opening the door of the corridor in question it appeared like a "dark hole":—Held, that the corridor was not a trap or place of unusual danger and as the plaintiff knew the condition and assumed the risk of the danger such as it was, the doctrine of "volenti non fit injuria" applied and she was not entitled to recover. *Way* v. *Leland Hotel Co., Ltd.*, (1927) 3 W.W.R. 224.

4. Dark corridor.]—The plaintiff had been working for two weeks as a chambermaid on the first floor of a hotel of which the defendants were proprietors and at about 2.30 on the afternoon of the 22nd of December, 1925, after she had finished making up a room at the end of a corridor she walked out of the room and after taking about four steps she fell over a man lying on the floor, breaking her arm and suffering other injuries. The corridor was fairly dark at the time and although there was an electric light in the ceiling at the middle of the corridor it was not lit:—Held, that the defendants were negligent in not having the corridor properly lighted. *Booth* v. *Ford and Shaw*, (1927) 38 B.C.R. 279.

5. Excavation.]—There is a duty incumbent upon both the owner of property and the contractor for the erection of a building thereon to guard and light an excavation made on such property which extends to the boundary line, and they are liable in damages to the occupant of the adjoining property who on a dark night, in walking to the end of his own lot, falls into such excavation and is injured, such excavation not being properly lighted and guarded. *Reid* v. *Linnell*, (1923) 32 B.C.R. 87; (1923) 2 D.L.R. 445; (1923) S.C.R. 594; (1923) 3 D.L.R. 966; (1923) 3 W.W.R. 422.

6. Dangerous premises — Trap.]—Where a guest in an hotel was directed to a balcony in the floor of which there was an unguarded drop or depression to the knowledge of the proprietor and his servants, and without warning stepped into the depression, causing personal injury:—Held, that there was a trap, an unexpected danger known to the proprietor or discoverable by him with reasonable care and not known to the plaintiff, and the plaintiff is entitled to damages. *Gordon* v. *Blakely*, (1931) 2 W.W.R. 902.

7. Latent defect—Trap.]—The owner of premises is only liable for injuries to a licensee using the same where such injuries occurred by reason of some trap or latent danger or defect of which such owner knew or ought to have known, and in such a case evidence is admissible to shew that no accident similar to the one sued on had occurred before. *Way* v. *Leland Hotel Co., Ltd.*, (1928) 2 D.L.R. 235; (1927) 3 W.W.R. 224.

8. Defective repairs.]—In the absence of an agreement on his part to repair, a landlord is not liable to a tenant of a furnished house for an injury caused by an ordinary defect of repair, which could easily be remedied. *Kelpon* v. *Stewart*, (1928) 40 B.C.R. 369; (1929) 1 D.L.R. 480; (1928) 3 W.W.R. 640.

9. Defective repairs—Concealed danger.]—The plaintiff lived with her daughter whose husband was a monthly tenant of the house in which they lived. The landlord covenanted to keep the premises in repair, and on the morning of an accident which resulted in this action, he repaired one of the supports of the back porch by raising it up and putting cement under it. In so raising the porch he loosened the nails in the railing around the floor above and shortly after he had finished his work the plaintiff walked out onto the porch and leaning against the railing it gave way precipitating her to the ground and injuring her severely for which she recovered damages:—Held, that the landlord making the repair created a concealed danger which entrapped the plaintiff who, having the right to be there, was ignorant of the danger. *Fraser* v. *Pearce*, (1928) 39 B.C.R. 338; (1928) 2 D.L.R. 54; (1928) 1 W.W.R. 837.

10. Defective premises—Trap—Landlord's duty to public.]—A landlord is not responsible for injury to a stranger who entered his building intending to visit a tenant's rooms, and by mistake, took an unlighted passageway not connected with the tenant's premises, and fell down the stairs leading to a basement. The stairway in question being at least three feet from a door opening on a street sidewalk cannot be deemed a public nuisance. (An appeal was dismissed, the Court being equally divided.) *Smith* v. *Mason*, (1921) 30 B.C.R. 174; 60 D.L.R. 258; (1921) 2 W.W.R. 614.

11. Dangerous condition of elevator.]—A landlord is not liable in damages for injury suffered by the employee of its tenant resulting from the defective state of an elevator in the premises occupied by the tenant, there being no covenant for repairs in the lease, notwithstanding that the landlord from time to time sent its own engineer to examine and make necessary repairs to the elevator. *Terainshi* v. *Canadian Pacific Ry. Co.*, (1918) 25 B.C.R. 497; (1918) 2 W.W.R. 1034.

12. Unlighted stairway — Trap.]—Where the lease of rooms in an office building does not contain a covenant on the part of the landlord to keep the halls and stairways lighted, the landlord will not be responsible in damages for injury to a licensee of the tenant resulting from a fall in a dark stairway. A municipal by-law requiring owners of buildings to provide fire escapes with necessary lights in public halls, stairways and passageways to assist occupants to find the exits from the buildings in case of fire cannot be invoked in the case of an accident not connected with or referable to a fire. *McKinlay* v. *Mutual Life Assurance Co.*, (1918) 26 B.C.R. 5; 43 D.L.R. 259; (1918) 3 W.W.R. 1002.

See ADMIRALTY.
See CARRIERS.
See COLLISION.
See DAMAGES.
See DEFAMATION.
See FIRE.
See HIGHWAYS.
See INFANTS.
See INJUNCTION.
See LANDLORD AND TENANT.
See LIMITATION OF ACTIONS.
See MALICIOUS PROSECUTION.
See MASTER AND SERVANT.
See MISREPRESENTATION AND FRAUD.
See MUNICIPAL CORPORATIONS.
See NEGLIGENCE.
See NUISANCE.
See PLEADINGS.
See PRINCIPAL AND AGENT.
See TRADE UNION.
See TRESPASS.

TOWAGE.

See SHIPPING.

TRADE MARKS AND TRADE NAMES.

I. TRADE MARKS, 1061.
II. TRADE NAME, 1062.

I. TRADE MARKS.

1. Trading in bottles.]—Trading in bottles to which are affixed paper labels bearing the name of the owner is in contravention of sec. 490 of the Criminal Code. *Rex* v. *Wittman*, (1917) 25 B.C.R. 108; (1917) 3 W.W.R. 438.

2. Nature of.]—A word descriptive of the character of the goods in connection with which it is used should not be registered as a trade mark. *Channell, Ltd.* v. *Rombough*, (1923) 33 B.C.R. 65; (1923) 3 W.W.R. 1041; (1924) 1 D.L.R. 54; 33 B.C.R. 452; (1924) 2 D.L.R. 622; (1924) 2 W.W.R. 28; (1924) S.C.R. 600; (1925) 1 D.L.R. 233.

3. Infringement.]—The principle to be applied in cases of alleged infringement of trade marks aside from statutory protection is that one is not to be allowed to use names, marks, letters or other indicia to induce purchasers to believe that the goods he is selling are the manufacture of another person. *Ibid.*

4. Appeal to Supreme Court of Canada.]—An action for infringement of a trade mark is a private matter between the plaintiffs and defendants and that the plaintiffs have half a dozen suits for infringements in as many Provinces does not make the matter of public importance. An application for leave to appeal to the Supreme Court was refused. *Channell, Ltd.* v. *Rombough*, (1924) 34 B.C.R. 52; (1924) 3 W.W.R. 169.

5. Business outside Canada — Assignment.]—The registration of a trade mark under the Trade Mark and Design Act does not entitle the applicant to protection if he is not or does not propose to be engaged in business in Canada in the goods to which it is applicable; further, the applicant must be the proprietor and when he has assigned the right to use a trade mark and agreed not to use it, he cannot obtain registration thereof. *Seattle Brewing and Malting Co.* v. *Rainier Brewing Company of Canada Limited*, (1924) 34 B.C.R. 334; (1924) 4 D.L.R. 940; (1924) 3 W.W.R. 502.

6. Secret formulæ — Misrepresentation.]—The statement that a trade mark was registered when it was not, is a material misrepresentation upon which rescission of a contract will be ordered:—Held, further, in respect to restitution of the secret formula, that if a person makes a contract and in pursuance thereof puts a secret document in the hands of the other, and it afterwards turns out that the contract should be rescinded because of innocent misrepresentation, he has only himself to blame and cannot claim he is entitled to the formula back in the same condition as he held it before entering into the contract. *Sceats* v. *Young*, (1930) 43 B.C.R. 321.

II. TRADE NAME.

Geographical name.]—A company cannot acquire the exclusive use of a name which is merely geographical and in no sense fanciful either as attached to its manufactured products or its business associations. Where a foreign company applies to be registered in British Columbia, if its name is identical with that of a company already incorporated in the Province its application should be refused. A foreign company may, however, in a proper case attack the name adopted by the domestic company and is not debarred by the Companies Act from obtaining redress if the use of the name under which the domestic company has been incorporated belongs to the foreign company. *Northwest Trading Co.* v. *Northwest Trading Co.*, (1920) 27 B.C.R. 546; (1920) 1 W.W.R. 353; (1920) 29 B.C.R. 17; (1920) 3 W.W.R. 729.

TRADING STAMPS.

See CRIMINAL LAW.

TRADE UNIONS.

I. CHARTER AND REGULATIONS, 1062.
II. INTERFERENCE WITH OCCUPATION OF MEMBERS, 1064.
III. STRIKES AND LOCKOUTS, 1064.

I. CHARTER AND REGULATIONS.

1. Revocation.]—There is no inherent right in the executive board of an international craft brotherhood to revoke the

charter of a local union thereof for violations of its constitution. Such right must be found in the constitution in order to be exercisable. A provision giving power to "regulate" any controversy or difficulty and a provision that the brotherhood shall consist of a limited number of local unions acknowledging its jurisdiction and "subject to its laws and usages" do not give a power to revoke. The fact that charters had previously been so revoked does not make it a "usage" if not so brought to the knowledge of the local union or its members as to become incorporated in or part of the constitution. If the power exists in officials of a craft brotherhood to revoke the charter of a local union the Court will not interfere to review the decision to revoke if the power has been exercised in good faith and legally. If it has been exercised by an unauthorized procedure, without adequate and sufficient notice to the local union of the charges against it and of the possibility of revocation should they be established and an opportunity of being heard in defence, such procedure being not in accordance with natural justice the power has not been exercised "legally" and the Court will interfere against the carrying out of such revocation, and in doing so will not consider the merits of the question whether the local union has in fact so violated the constitution as to have justified the revocation if a fair trial been had. The fact that the local union has taken and pressed an appeal through the proper channels of the organization does not prevent it from obtaining redress through the Courts, nor does the fact of its being heard on such appeal overcome the objection that it did not have a fair trial in the first instance. In a suit on behalf of the members of a local union the Court delivered a judgment stating that their charter was restored and had been improperly suspended and revoked and that they were entitled to all the rights and privileges of membership in the brotherhood and were not affected by the suspension and revocation of the charter, and granting an injunction against one of the officials of the brotherhood, as a resident of the Province, restraining the depriving of the local union of its rights and privileges. *Morrison* v. *Ingles*. *Ingles* v. *Woodside*, (1920) 2 W.W.R. 50.

2. Revocation of branch—Charter—Interference with agreement with employer.]—An injunction will be granted to restrain a parent labour organization from revoking without legal justification the charter of one of its branches and thus prejudicially affecting the position of an employee of labour under its agreement with the branch ratified by the parent organization. *British Columbia Telephone Co.* v. *Morrison et al.*, (1921) 29 B.C.R. 289; (1921) 1 W.W.R. 694.

II. Interference With Occupation of Members.

Just cause — Depriving member of employment.]—A combination of two or more, without justification or excuse, for the purpose of injuring a workman by inducing employers not to employ him, is, if it results in damage to him, actionable. Wrongful interference may, however, be negatived by shewing that the exercise of the defendants' own rights involved the interference complained of. (*Quinn* v. *Leathem*, (1901) A.C. 495, followed.) If the officials of a trade union seek to enforce the payment of a fine on a fellow workman by issuing an order that the workman fined shall cease work under his employment for a period of six months, the result of which is that his fellow workmen, through fear of fines, refuse to work with him, their action resulting in his dismissal, a defence of "just cause" for the interference cannot be entertained. *Sleuter* v. *Scott*, (1915) 21 B.C.R. 155; 22 D.L.R. 900; 27 W.L.R. 698; 8 W.W.R. 714.

III. Strikes and Lockouts.

1. Illegal interference with contractual relation between employer and trade union.]—The plaintiff Company, employer of labour, entered into an agreement with the local union of the defendant Brotherhood, providing, inter alia, for certain working conditions, rates of pay, and that members of the Brotherhood only should be employed. The agreement was approved by the International office of the Brotherhood. The charter of the local union was subsequently revoked:—Held, that the revocation of the charter was illegal, because it was done without right or done under a right improperly exercised, as no opportunity had been given the local union of defending itself, and as it unjustifiably interfered with the agreement with the plaintiff they were entitled to an injunction restraining the Brotherhood and its officials from a repetition within the Province of such revocation.

A parent labour organization, in pursuing its policy of requiring obedience of its orders from its branches, must have regard to the rights of others. To revoke a branch's charter without legal justification, and thus prejudicially affect the position of an employer of labour under its agreement, ratified by the parent labour organization, with such branches, gives a right of action to the employer; malice on the part of the organization is not an essential element for such right of action; but malice may be evidenced by conduct adopted to forward one's own interests by destroying the rights of others. Where it is apparent to an industry, especially one serving the public, that damage may result from interference with its employees it is not required to wait until damages ensue before taking action but may apply at once for an injunction. Where judgment for illegal interference was given against some defendants but not against others, the latter are given their general costs, although they had joined with the others in pleading fraud and other defences which were not established, but they are required then to pay the costs of such unsuccessful issues, to be set off against their general costs. *British Columbia Telephone Company* v. *Morrison, The International Brotherhood of Electrical Workers, Local Union 213, and Local Union 310 of such Brotherhood et al.*, (1921) 29 B.C.R. 289; (1921) 1 W.W.R. 694.

2. Watching and besetting—Distribution of pamphlets—Injury to business.]—The distribution by a trade union of pamphlets at the door of a theatre and displaying of advertisements thereabout stating not facts but matters of opinion, is not protected by the Trade-Unions Act, R.S.B.C. 1924, cap. 258, and is a watching and besetting contrary to the Criminal Code, and the theatre proprietor may recover damages from the union for such unlawful acts. *Schuberg* v. *Local International Alliance Theatrical Stage Employees*, (1927) 38 B.C.R. 130; (1927) 2 D.L.R. 20; (1927) 1 W.W.R. 548; 47 C.C.C. 213; Affg. (1926) 37 B.C.R. 284; (1926) 3 D.L.R. 166; (1926) 2 W.W.R. 254.

TRESPASS.

I. Who May Sue, 1066.
II. Nature of Act, 1066.
III. Defences, 1069.
IV. Damages, 1070.

I. Who May Sue.

1. Possessory title.]—An action in trespass is maintainable upon proof of a possessory title not registered under the Land Registry Act. *Kilby* v. *Municipality of Point Grey*, (1917) 24 B.C.R. 107; (1917) 2 W.W.R. 206.

2. Mortgagee and municipal corporation.]—An action against a municipality for trespass to land must be commenced within six months after the cause of action arises under sec. 484 of the Municipal Act, 1914, provided that the municipality might lawfully have expropriated the land if acting in the manner prescribed by law. *Cameron Investment Co.* v. *Victoria*, (1920) 3 W.W.R. 1043.

II. Nature of Act.

1. Injury from floods.]—A person holding a lot under an agreement for sale that is not registered but who has cleared the lot and paid taxes has a possessory title upon which to found an action for damages against those who permit water to escape from drains onto and to the injury of the lot. The measure of damages is the diminished value of the lot, or if the plaintiff's interest is less, then the plaintiff's interest, in it. *Kilby* v. *Municipality of Point Grey*, (1917) 24 B.C.R. 107; (1917) 2 W.W.R. 206.

2. Removing gravel.]—In an action for damages against a railway company for entering upon land and removing gravel for grading purposes, the trial judge found that there was at least a tentative arrangement whereby the company proceeded as they did; that it did not ignore the plaintiffs nor defiantly or contemptuously enter upon their lands, and was reasonably justified in assuming it had the consent of the plaintiffs or at any rate that there would be little or no difficulty in making a satisfactory adjustment of the price to be paid for the gravel removed:—Held, that there was no trespass and that the proper basis for compensation was the value to the seller of the property in its actual condition at the time the gravel was taken with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the gravel was taken. *Isitt* v. *Grand Trunk Pacific Ry. Co.*, (1918) 26 B.C.R. 90; (1918) 3 W.W.R. 500; (1919) 59 S.C.R. 686; 49 D.L.R. 687.

3. Boom of logs.]—The owner of a boom of logs cannot justify damaging another's wharf to which the boom was tied without leave, on the ground that the building of the wharf was unauthorized and constructed in navigable waters. *Wallace Foundry Co.* v. *Dominion Shingle & Cedar Co.*, (1920) 28 B.C.R. 147.

4. Forcible entry.]—The plaintiff, a music teacher, purchased a piano at an auction sale and placed it in her studio. Eight years previously the defendant a piano company had entered into a hire-purchase agreement for a sale of the identical piano with A., but the piano had been removed from A.'s house and eventually came into possession of the auctioneer from whom the plaintiff purchased. The plaintiff had no notice or knowledge of the defendant's right under the agreement. The defendant company's bailiff forced his way into the plaintiff's studio and forcibly removed the plaintiff from the piano and with his men took it away against the plaintiff's protest:—Held, that there being no contractual relationship between the parties the forcible entry was illegal and the plaintiff was entitled to exemplary damages. *Bennett* v. *Kent Piano Co.*, (1921) 29 B.C.R. 465.

5. Building encroaching on adjoining land.]—Where an owner of land had in good faith erected valuable buildings upon his own property and it afterwards appeared that his walls encroached slightly upon his neighbour's land he will not be compelled to demolish the walls which extend beyond the true boundary line but should be allowed to retain the land upon which he has encroached upon payment of reasonable indemnity. *Clark* v. *McKenzie*, (1929-30) 42 B.C.R. 71, 449; (1930) 2 D.L.R. 843; (1930) 1 W.W.R. 67, 785.

6. Forcible entry—Bailiff independent contractor.]—A licensed bailiff employed to make a lawful seizure of goods is an independent contractor, and his employer is not liable in damages if the bailiff commits trespass or assault in effecting the seizure. *Roman* v. *Motorcar Loan Co.*, (1930) 42 B.C.R. 457; (1930) 3 D.L.R. 296; (1930) 1 W.W.R. 775.

7. Unguarded excavation on private property.]—The plaintiff on a dark and foggy night missed his way and fell into an excavation on the defendant's property unguarded by a fence or otherwise:—Held, that as there was no fence the plaintiff in straying upon the defendant's land was not a trespasser and there was a duty upon the defendant not to maintain a trap such as the one in question. *Blanchard* v. *Vaughan*, (1930) 42 B.C.R. 446.

8. Eviction of wrongful occupier.]—An owner having a right of entry on property is not liable to an action for trespass when he makes a forcible entry and evicts an occupier wrongfully in possession, even though he has rendered himself liable to be indicted under 5 Rich. II., Stat. 1, cap. 8. *Allan* v. *Kirk*, (1917) 24 B.C.R. 153; (1917) 2 W.W.R. 527.

9. Cutting trees on highway.] — An action is not maintainable against a municipality by a landlord for damages for the cutting by the municipality of trees on the highway adjoining his land. *Attorney-General for British Columbia* v. *The District of Saanich*, (1921) 29 B.C.R. 268; 56 D.L.R. 482; (1921) 1 W.W.R. 471.

10. Leave and license.]—An action for trespass will not lie where it is clear on the evidence that there was leave and license which was never revoked. *Ibid.*

11. Cutting overhanging tree.]—A land owner who cuts off a portion of a tree overhanging his land, the trunk of which is on the adjoining owner's land, is not under obligation to deliver the cut portion to the neighbour although the latter has the right to enter and take the fallen portion away. If he cuts any portion of the tree beyond his own line and over the property of his neighbour he is a trespasser. *Loverock* v. *Webb*, (1921) 30 B.C.R. 327; 70 D.L.R. 748.

12. Waste by mortgagee.] — An agent of the mortgagee of the plaintiff's land entered and removed therefrom and sold two greenhouses and one boiler. In subsequent foreclosure proceedings credit was given for the proceeds. Plaintiff was held entitled to recover from defendant damages for trespass, as neither the mortgagee nor his agent had any right to make such removal and sale. *Ferris* v. *Hardy*, (1923) 32 B.C.R. 78; (1923) 1 W.W.R. 1483.

13. Chattel mortgagee in possession of premises.]—Where a mortgagee takes possession of the contents of a rooming house comprised in his mortgage he is not entitled to remain on the premises in which the seizure was made for longer than a reasonable time required for the removal of the goods, and if he does remain on the premises without the consent of the tenant after a reasonable time has elapsed for the purpose he becomes a trespasser on the premises and is liable in damages by reason thereof.

Stubbert v. *Scott*, (1931) 43 B.C.R. 496; (1931) 1 W.W.R. 598

14. Search warrant — Reasonable and probable cause.]—Where a police officer upon receiving a telephone message from an informant who refused to give her name to the effect that intoxicating liquor was being stored in a certain dwelling house, laid an information before a magistrate, setting forth "that he suspects and believes that liquor is unlawfully kept" in a dwelling house and obtained a search warrant thereupon entered and searched the plaintiff's house but found no liquor therein, it was held that notwithstanding sec. 73 of the Government Liquor Act, R.S.B.C. 1924, cap. 146, the police officer cannot escape liability without shewing that he took reasonable care to inform himself as to the facts and that he honestly believed in the case laid before the magistrate and was not actuated by malice, and that in the absence of reasonable and probable cause a jury may reasonably infer malice meaning in such cases an improper motive. *Manning* v. *Nickerson*. (1927) 38 B.C.R. 535; (1927) 3 D.L.R. 728; (1927) 2 W.W.R. 623; (1928) S.C.R. 91; (1928) 3 D.L.R. 494.

15. Prohibition Act—Seizure by police officer without search warrant.]—Where police officers have the right to search export warehouses under sec. 48 of the Prohibition Act, 1916, but could not legally seize and carry away money and books without the authority of a search warrant, they having done so did not make them trespassers ab initio. *Canadian Pacific Wine Company* v. *Tuley*, (1921) 29 B.C.R. 472; 60 D.L.R. 315; (1921) 1 W.W.R. 265; (1921) 2 W.W.R. 433; (1921) 2 A.C. 417; 90 L.J.P.C. 233; 126 L.T. 78; 37 T.L.R. 944; 60 D.L.R. 520; (1921) 3 W.W.R. 49.

See INTOXICATING LIQUORS.

III. DEFENCES.

1. Coal miner—Entry through adjoining mine—Consent of manager.]—In an action for damages for the value of coal taken in trespass from the plaintiff's mine through the defendant's adjoining mine, two witnesses whose credibility is not questioned and who are men of standing in their respective callings, gave explicit evidence that the acts complained of were assented to by the plaintiff's manager, and the evidence was not contradicted by other witnesses, and was not rebutted by other fact or document:—Held, that the evidence must be accepted and the action dismissed. *Wellington Colliery Co.* v. *Pacific Coast Coal Mines, Ltd.*, (1919) 27 B.C.R. 404; 48 D.L.R. 703; (1920) 60 S.C.R. 651; 56 D.L.R. 697; (1921) 2 W.W.R. 363.

2. Removal of timber—Right of mortgagee.] —A mortgagor in possession may cut timber on his land and give other persons a license to do so unless it is shewn that the security is thereby impaired, and the onus is on the party seeking to establish impairment to plead and offer proof of it. *Reid* v. *Galbraith*, (1927) 38 B.C.R. 287; (1927) 2 D.L.R. 857; (1927) 1 W.W.R. 780.

3. Immunity of public officers—Ejusdem generis.]—In an action brought against the Deputy Minister of Marine and Fisheries and other public officers of the Fisheries Department of Canada for damages for trespass and loss of profits by reason of the seizure of the plaintiff's cannery by the officers acting in execution of their duty, it was held that the term "officer" in sec. 9 of the British Columbia Magistrates Act should not be limited in such a way as to exclude all officers who are not judicial officers from its denotation; such interpretation would involve the contention that an act or thing done by any person in order to fall within the ambit of the section, must be an act or thing in its nature judicial. Any public officer, not belonging to any of the specific classes of officers enumerated, is, when performing executive duties, within the descriptive words of the section, and, subject to the conditions prescribed, entitled to claim the benefit of it. *Canadian Credit Men's Trust Association* v. *Johnston et al.*, (1932) S.C.R. 219; (1932) 2 D.L.R. 462; 58 C.C.C. 1.

IV. DAMAGES.

1. Exemplary damages.]—In an action for damages for trespass on lands, for the taking of timber and injury to the soil, where the defendants are unable to substantiate a plea of leave and license, they may not necessarily be assessed in exemplary damages. *Wilson* v. *Keystone Logging & Mercantile Co.*, (1918) 25 B.C.R. 569; 52 D.L.R. 678; 59 S.C.R. 685.

2. Measure of.]—Where a company in working its mine enters upon and works the coal on adjoining property without the consent or knowledge of the owners, and takes

it for the purpose of sale, the proper estimate of damages is the value of the coal without deducting any of the necessary expenses of working and taking it out. *Wellington Colliery Co.* v. *Pacific Coast Coal Mines,* (1918) 26 B.C.R. 315.

3. Timber lands—Exemplary damages.]—Where under an agreement for sale of timber the timber not removed by the purchaser before a certain date became the property of the vendor, exemplary damages were awarded the vendor against the purchaser for the timber cut after that date and also for building a log road and chute in trespass on the vendor's land. *Clark* v. *Milligan,* (1920) 28 B.C.R. 22; (1920) 1 W.W.R. 1044.

4. Recurring damage.]—Where land is damaged by the construction of a railway and there is a probability of recurring damage from time to time, the latter damage does not give a continuing right of action once the question of the original damage has been litigated, as future damage is taken into account in assessing the depreciation of the value of the land and the cause of action is gone. *Matheson* v. *Thynne,* (1925) 34 B.C.R. 541; (1925) 1 D.L.R. 936; (1925) 1 W.W.R. 703; (1926) 36 B.C.R. 376; (1926) 2 D.L.R. 157; (1926) 1 W.W.R. 645.

See ANIMALS.
See DAMAGES.
See FIRE.
See HIGHWAY.
See INJUNCTION.
See MINES AND MINING.
See NEGLIGENCE.
See NUISANCE.
See TORT.

TRIAL.

See CRIMINAL LAW.
See NEW TRIAL.
See PRACTICE.

TROVER AND CONVERSION.

See TORT.

TRUSTS.

I. EXPRESS TRUSTS, 1072.
II. RESULTING TRUSTS, 1074.
III. CONSTRUCTIVE AND IMPLIED TRUSTS, 1075.
IV. NEW TRUSTEES, 1077.
V. RIGHTS AND POWERS OF TRUSTEES, 1078.
A. Accounts and remuneration, 1078.
B. Powers, 1079.
VI. BREACH OF TRUST, 1079.
VII. MISAPPROPRIATION OF TRUST FUNDS, 1080.
VIII. ACTIONS BY AND AGAINST TRUSTEES, 1080.

I. EXPRESS TRUSTS.

1. Funds on deposit—Withdrawal of cheque.]—A trustee authorized to hold money on deposit pending investment and to pay interest on same, may enter into an arrangement with its cestui que trust that pending such investment the cestui que trust may withdraw such sums as he wishes by cheque and even after investment continue to do so. *In re Dominion Trust Company and U.S. Fidelity Claim,* (1918) 26 B.C.R. 339; (1918) 3 W.W.R. 1023.

2. Garnishment—Voluntary assignment of trust fund.]—A voluntary assignment of a fund in trust to cover moneys taken from a trust account, made in good faith with the intention of the parties carried out cannot be attacked by an attaching creditor of the assignor. It is not necessary that the trust should be mentioned in the assignment. *Bank of Hamilton* v. *Black,* (1917) 24 B.C.R. 394; 37 D.L.R. 801; (1917) 3 W.W.R. 909.

3. Power to sell — Real property — Undivided interest.]—Power given to a trustee to sell and convert into money real and personal estate does not authorize the sale of an undivided interest in real property. *In re Land Registry Act and Anthony,* (1916) 22 B.C.R. 535; 10 W.W.R. 863.

4. Investments—Authorized by Trustee Act.]—The setting out in a will of specific modes of investment does not operate to prevent the executor, in the absence of a negative direction, from investing trust funds in the securities referred to in sec. 12 of the Trustee Act. *In re McCormick, Deceased,* (1915) 22 B.C.R. 327; 25 D.L.R. 735; 33 W.L.R. 190; 9 W.W.R. 199.

5. Trusteeship—Oral agreement—Proceeds of sale—Laches.]—An oral agreement between a free miner and two prospectors whereby the latter were to perform on a certain mineral claim whatever work was necessary to keep up all assessments, record the same, manage and look after the claim, place it under Crown grant, handle, option and sell it, is no mere contract for work and labour, but makes the prospectors agents of the free miner in what they are to do, and establishes a fiduciary relationship whereby the prospectors must in equity be held to have become trustees for the miner, and they or their representatives must account to him for all sums of money received thereunder. Under such arrangement, an action by the free miner for a share of the proceeds received and a declaration of trusteeship in respect to the moneys paid to the prospectors is not "asserting an interest in a mineral claim which has been located and recorded by another free miner" and sec. 19 of the Mineral Act (R.S.B.C. 1924, cap. 167) does not apply. Nor is the action barred by the Statute of Frauds (R.S.B.C. 1924, cap. 95), the agreement being one only for the division of the proceeds of the sale of land, does not come within the 4th section of the statute. When the action is not barred by any statute of limitations mere lapse of time is not sufficient to deprive one of his equitable rights. In order to decide whether the remedy should be granted or withheld, the Courts must examine the nature of the acts done in the interval, the degree of change which has occurred, how far they have affected the parties, and where lies the balance of justice and injustice. Under an agreement for a division of the proceeds of a sale, the claimant can wait until the sale is completed by the payment of the price before starting his action for an account and for his share of the proceeds. *Harris* v. *Lindeborg*, (1931) S.C.R. 235; (1931) 1 D.L.R. 945.

6. Bankruptcy of trustee — Following trust investments.]—Where an agent is entrusted by his principal with money to buy goods, the money will be considered trust funds in his hands and the principal has the same interest in the goods when bought as it had in the funds purchasing it. On the bankruptcy of a stock-broker, where there are sufficient shares of any particular description to satisfy orders given by customers to the debtor, they should be delivered to such customers who have purchased shares of that description. If these customers have paid in full for their shares no trouble arises except that a splitting of the share certificates might become necessary to deliver certificates representing the proper number of shares. If, however, any of these customers have not paid in full, pursuant to their several orders for purchase, then, aside from any liability to make payment before being entitled to the certificates representing the shares so purchased, they should be required to make payment of the balance payable by them in respect of their purchase with interest, as well as making payment of any other indebtedness by them to the debtor. If there are not sufficient certificates available of a particular description to satisfy the purchases by the different customers, there should be awarded to them "their pro rata parts" of the shares, so insufficient to satisfy the claims of the customers. *In re R. P. Clark & Co. (Vancouver) Ltd.*, (1931) 44 B.C.R. 301; (1931) 3 W.W.R. 79.

7. Voluntary trust settlement—Intention—Ratification.] — Mere alteration of intention or change of mind is not sufficient to induce the Court to interfere with or vary a voluntary trust settlement which was fully understood and deliberately executed by the grantor. *Goodwin* v. *The Royal Trust Co.*, (1927) 39 B.C.R. 113; (1928) 1 D.L.R. 309.

8. Verbal agreement.]—In an action for a declaration that the defendants are trustees for the plaintiffs and other members of a syndicate formed by the plaintiffs and defendants, of certain mineral claims under a verbal agreement entered into by the said parties, the defence of the Statute of Frauds and sec. 75 of the Mineral Act will not be given effect to where to do so would be to permit the defendant to perpetrate a fraud both on the plaintiffs and on all other parties who became members of the syndicate agreement. *Devine and Bonness* v. *Somerville*, (1931) 44 B.C.R. 502; (1931) 3 W.W.R. 264.

II. Resulting Trusts.

1. Land purchased in the name of another.]—There is no presumption of a gift where a man buys real estate in the name of a woman with whom he is cohabiting. The bare fact of payment of the purchase price is sufficient to raise a presumption of resulting trust in his favour, which is not necessarily rebutted by his admission

that he had the title put in her name "to keep peace in the house." Where a gift is alleged, it must be shewn that the alleged donor fully intended to make a gift, and realized the legal effect of the transaction in question. *Stagg* v. *Ward and Ward*, (1921) 30 B.C.R. 385.

2. How arising]—A resulting trust is one in which the person in whose favour the trust arises is the person who provided the property or equitable interest vested in the person bound by the trust. *Baird* v. *The Columbia Trust Co. The Columbia Trust Co.* v. *Baird*, (1915) 22 D.L.R. 150.

3. Mineral claim.]—Where a person suggested to the owner of certain mineral rights that the latter should transfer same to the former, and said that "if anything came of it" he would give the owner "a share," nothing being said as to the time when such share would be given, and the owner accordingly transferred the rights without any other consideration, it was held that the transferor was owner of one-half of the property subject to the transferee being repaid certain outlay, and subject to an option for sale entered into by the transferee with a third person. Notwithstanding the agreement was only verbal and within the Statute of Frauds, and sec. 19 of the Mineral Act (B.C.) it was enforced, as these will not be allowed to be made instruments of fraud. Where a trust is so indefinite as to make its terms incapable of determination, a resulting trust of the whole property affected arises in favour of the creator of the trust, but in the present case the agreement to give "a share" was held in equity to mean one-half, on the rule in equity that "equality is equity." *Roberts* v. *Roberts*, (1923) 2 W.W.R. 137.

III. Constructive and Implied Trusts.

1. Trustee's profits.]—The right of a trust company to retain as its remuneration part of the profits realized from investments, creates a trust coupled with an interest, which, upon the winding-up of the corporation passes to the liquidator as an asset for the general benefit of creditors, and the Court will not compel the liquidator, before the final winding-up, to surrender the securities to the cestui que trust, nor appoint a special trustee to carry the trust into effect. *Re Dominion Trust and Harper*, (1915) 24 D.L.R. 670; 32 W.L.R. 832; 9 W.W.R. 503.

2. Land purchased in wife's name—Protection against creditors.] — In an action by a husband to recover property standing in the name of his deceased wife, on the ground that the vesting of the property in her was in the nature of a trust for his benefit, the Court must be satisfied not only that the property was not purchased with her money, but that it was not intended as a gift to her, and in view of her death, the Court will require strict proof and must be thoroughly satisfied as to the truth of the evidence. Where it appears that a person transferred property to his wife for the purpose of protection against creditors, although it did not result in any loss or injury to any creditor, the Court will not assist such person in the recovery of his property. *Trumbell* v. *Trumbell et al.*, (1919) 27 B.C.R. 161; (1919) 2 W.W.R. 198.

3. Agreement for sale of land—Assignment of purchase price.]—A vendor under an agreement of sale of land who assigns the instalments of purchase price accruing to him is a trustee for the assignee of such moneys as are thereafter paid to him under his agreement, and the unpaid purchase moneys are not subject to a judgment registered against his lands. *Canadian Bank of Commerce* v. *Royal Bank of Canada*, (1921) 29 B.C.R. 407; 60 D.L.R. 275; (1921) 2 W.W.R. 462.

4. Mineral claim—Agreement for sale—Purchaser relocating.]—If by an agreement for sale of a mineral claim the purchasers agree to perform and record the assessment work, but do not do the work, and on the claim expiring, restake it, the restakers or purchasers therefrom with knowledge of the facts, will in equity be held to be trustees for the vendor. *Stewart and Hayes* v. *Molybdenum Mining and Reduction Company, Limited et al.*, (1921) 30 B.C.R. 51; 60 D.L.R. 497; (1921) 2 W.W.R. 954.

5. Limitation of action.]—The Statute of Limitations does not apply to a constructive trust arising from the receipt of property by one person on behalf of another. *Mattice* v. *Mattice*, (1925) 34 B.C.R. 474; (1925) 1 D.L.R. 755; (1925) 2 W.W.R. 203.

6. Statute of Frauds.]—A person to whom land is conveyed as trustee and who is aware of that fact, cannot plead the Statute of Frauds to deny the trust and claim the land as his own. Therefore a claimant may prove the trust by parol evidence, and obtain a declaration thereof. *Sproule* v. *Clements*, (1925) 2 D.L.R. 784.

7. Unregistered trust estate—Effect of registered judgment.]—The plaintiff, a married woman, having purchased certain lands and paid for the same with her own money, a conveyance of the land was made to her husband and duly registered. Later one of the defendants registered a judgment against the husband in the Land Registry Office. In an action against her husband and the judgment creditor for a declaration that there was a resulting trust in her favour:—Held, that under sec. 40 of the Land Registry Act the registered owner of a charge is entitled to the estate or interest in respect of which he is registered with liberty to sell the property registered in the name of the judgment debtor subject only to such expense and registered charges as appear on the register, and sec. 37 (2) of the Land Registry Act does not assist the plaintiff as she was not adversely in actual possession of the land at any time. *Morris* v. *Morris and French*, (1931) 44 B.C.R. 166; (1931) 3 D.L.R. 325; (1931) 3 W.W.R. 427.

IV. New Trustees.

Change of trustee.]—In an agreement for sale of certain property of the American Securities Corporation, Limited, it was provided that the purchase price should be paid in instalments to the American Savings Bank and Trust Company on behalf of the vendor. The vendor upon issuing bonds entered into a trust deed whereby all the property of the vendor was transferred to the trustee for bondholders. The Royal Trust Company was later appointed trustee as successor to the original trustee named in the trust deed. The bank having improperly devoted to its own purposes a proportion of the proceeds of the instalments of purchase money under the agreement the Royal Trust Co. as trustee for the bondholders petitioned the Supreme Court for directions in respect of a payment made by one of the bondholders that notice should be given to the holder of the property to make all future instalments to the Royal Trust Company. Upon the petition an order was made directing that such notice should be given:—Held, on appeal, that the trustee has been required to take measures for the protection of the trust property and it was its duty and its right to do so. There was a breach of trust and the trustee must protect the money from diversion from the purpose for which the trust was created. The rules confer a wide discretion in the learned judge hearing the motion which should not be interfered with unless in very strong and special circumstances based upon the absence of any material to ground a discretion or error in principle. *American Securities Corporation* v. *Woldson*, (1927) 39 B.C.R. 145; (1927) 4 D.L.R. 1087; (1927) 3 W.W.R. 756; (1928) S.C.R. 432; (1928) 3 D.L.R. 687.

V. Rights and Powers of Trustees.

A. Accounts and Remuneration.

1. Remuneration of trustees.] — By order of the Court, trustees were allowed as remuneration for their services five per cent. of the gross value of the estate. The registrar, upon taking accounts, allowed five per cent. on an item of $97,221.50, being an amount outstanding and unrealized, consisting of arrears of principal and interest due the estate under agreements for sale of land: Held, that the value of the estate must be taken as of the time when the accounts are passed, and evidence of the value of the realized assets should be taken, and five per cent. allowed on that amount only. Held, further, that the trustees cannot charge the estate with commission paid another party for the collection of interest on mortgages belonging to the estate, nor can any charge be made for rent of offices and hire of clerks in connection with the administration of the estate. *Stephen et al.* v. *Miller et al.*, (1918) 25 B.C.R. 388; 40 D.L.R. 418; (1919) 2 W.W.R. 1042; 59 S.C.R. 690; 49 D.L.R. 698.

2. Employment of solicitors and agents.]—Trustees are entitled to employ the services of solicitors or agents where the circumstances render it reasonable that they should do so, and the costs thereby incurred may be charged in the accounts as a disbursement. *In re Estate of Louis Level, Deceased*, (1926) 38 B.C.R. 211; (1927) 1 D.L.R. 900; (1927) 1 W.W.R. 1000.

3. Accounting—Improvements to trust land.]—On an accounting between a trustee of land and cestui que trust the trustee is entitled to an allowance of the amounts expended by him in improving the property, or the amount by which the improvements have enhanced the value of the property, whichever is the less. *Sproule* v. *Clements*, (1927) 39 B.C.R. 28; (1927) 3 D.L.R. 955; (1927) 2 W.W.R. 825.

4. Collection of rents.]—A bare trustee of property is not bound to collect the rents thereof. Therefore he is not accountable to the cestui que trust for rents not collected. *Ibid.*

5. Account—Mingling funds of trustee and cestui que trust.]—A trustee is entitled to all just and proper allowances for services and expenditures made by him and for all costs charges and expenses properly incurred by him in the management of the trust estate. Where a trustee has been encouraged and authorized by his cestui que trust to dispense with a separate account and to keep the trust moneys along with his own in his individual bank account, it would be inequitable that the trustee should be held accountable for deposits not admitted or identified as belonging to the trust. *Morton* v. *Brighouse,* (1929) S.C.R. 512; (1929) 3 D.L.R. 91.

B. Powers.

1. Power to contract for personal benefit.]—A trustee may not make a contract for his own benefit in regard to the trust estate without disclosure to his cestui que trust. *Stephen* v. *Miller,* (1918) 25 B.C.R. 388; 40 D.L.R. 418; (1918) 2 W.W.R. 1042; (1919) 59 S.C.R. 690; 49 D.L.R. 698.

2. Trustee for sale—Acting as agent for purchaser.]—A trustee for the sale of land is not competent to purchase trust property as agent for a stranger. If the principal repudiates the purchase as soon as the facts come to his knowledge he is entitled to rescission of the contract. *Stahl* v. *Miller and Kildall,* (1918) 56 S.C.R. 312; 40 D.L.R. 388; (1918) 2 W.W.R. 197.

VI. Breach of Trust.

Direction to trustees to sell property when expedient—Liability.]—Where trustees, under a will which authorizes them to sell the testator's real and personal property, if they think it expedient, think it necessary to sell, but the beneficiaries object to a sale, the trustees should either sell the property or apply to the Court for direction, otherwise they may be held liable for a breach of trust. In the circumstances of the present case however the trustees having acted honestly and reasonably were excused for the breach of trust by virtue of sec. 88 of the Trustee Act. *Duthie et al.* v. *Gallagher et al.,* (1930) 2 D.L.R. 582.

VII. Misappropriation of Trust Funds.

Insolvent trustee—Equitable priorities.]—Where the trust funds in the hands of an insolvent company are insufficient to satisfy the cestuis que trust whose interests in the fund are founded on express trusts they have a better right to call for the legal estate than the possessor of an equitable interest not founded on an express trust and their rights must prevail. *Dalton* v. *Dominion Trust Co.,* (1918) 25 B.C.R. 240; (1918) 3 W.W.R. 42.

VIII. Actions By and Against Trustees.

Costs.]—Where the course of litigation concerning the rights and duties of the trustee of an estate and involving his right as a beneficiary has been signalized by much difference of judicial opinion, and where there are exceptional circumstances, the Court will order that the costs of all parties as between solicitor and client as well as all other charges and expenses of or incidental to the action and appeal properly incurred will be payable out of the trust estate. *Morton* v. *Brighouse* (*1*), (1927) S.C.R. 118; (1927) 1 D.L.R. 1009.

See also *Morton* v. *Brighouse* (*2*), (1929) S.C.R. 512; (1929) 3 D.L.R. 91.

See Bailment.
See Bankruptcy.
See Banks and Banking.
See Companies.
See Costs.
See Executors and Administrators.
See Fraudulent and Voidable Conveyances.
See Infants.
See Mines and Minerals.
See Mortgage.
See Partnership.
See Real Property.
See Receivers.
See Specific Performance.
See Vendor and Purchaser.
See Will.

VENDOR AND PURCHASER.

I. THE CONTRACT AND MATTERS RELATING THERETO, 1081.
A. *Agreements for sale,* 1081.
1. In general, 1081.
2. Parties, 1082.
3. Statute of Frauds, 1083.
4. Mistake, 1084.
5. Assignment, 1086.
B. *Options,* 1087.
II. RIGHTS AND LIABILITIES ARISING OUT OF CONTRACT, 1088.
A. *Vendor's duties,* 1088.
B. *Purchaser's duties,* 1090.
III. PERFORMANCE OF THE CONTRACT, 1090.
A. *Conveyance,* 1090.
B. *Compensation,* 1090.
IV. DISSOLUTION OF THE CONTRACT, 1093.
A. *Cancellation,* 1093.
B. *Rescission,* 1093.
C. *Forfeiture of moneys paid,* 1102.
D. *Foreclosure,* 1103.

I. THE CONTRACT AND MATTERS RELATING THERETO.

A. *Agreements for Sale.*

1. In General.

1. Uncertainty.]—Where a contract for the purchase and sale of land does not provide for a price beyond stating that it is to be a price to be mutually agreed upon in a particular manner, and the price has never been fixed accordingly, there is no enforceable contract and specific performance cannot be granted. *Townley* v. *City of Vancouver,* (1924) 34 B.C.R. 201; (1924) 3 D.L.R. 948; (1924) 3 W.W.R. 78.

2. Defeasance.]—Where an hotel was sold subject to the transfer to the purchaser of a beer license which depended upon the assent of the Liquor Board, the purchaser entering into possession, it was held that the transaction was one of a completed sale subject to defeasance or resale and return of the purchase price in the assent of the Board should be withheld. *Carr* v. *La Dreche,* (1927) 38 B.C.R. 97; (1927) 2 D.L.R. 480; (1927) 1 W.W.R. 574.

3. Standing timber.]—The sale of timber standing growing or lying upon land with the right of entry on the land for the purpose of removing it, where the purchaser is to have as much time as he desires for removal, is the sale of an interest in land. *Carlson* v. *Duncan,* (1931) 44 B.C.R. 14; (1931) 3 D.L.R. 570; (1931) 2 W.W.R. 343.

4. Interest in land—Proceeds.] — An agreement for the division of the proceeds of the sale of land does not come within the 4th section of the Statute of Frauds. *Harris* v. *Lindeborg,* (1931) S.C.R. 235; (1931) 1 D.L.R. 945.

2. Parties.

1. Contract—Description of parties.]—The description of one of the parties to a contract for an exchange of land as a "client of A" is insufficient to satisfy the Statute of Frauds. The rule is that the description must be such that there can be no reasonable doubt as to who the parties are, or, such that their identity cannot be fairly disputed. Semble, the word "exchange" does not import more of ownership than the word "sell." *Newberry* v. *Brown,* (1915) 21 B.C.R. 556; 23 D.L.R. 627; 8 W.W.R. 1283; 32 W.L.R. 118.

2. Power of attorney—Sale—Trustee selling to himself.]—A person authorized by a power of attorney to sell or assign a certain piece of land cannot sell to himself without the sanction of the owner, unless the instrument expressly confers such a right, and a district registrar may refuse registration of a transfer when it is apparent from the documents presented to him that the transfer was made by an attorney for sale to himself. *In re Land Registry Act and Shaw,* (1915) 22 B.C.R. 116; 24 D.L.R. 429; 8 W.W.R. 1270; 32 W.L.R. 85.

3. Liability of person not party to agreement.]—An agreement under seal for the purchase of land was entered into between Y. and A. A. and S. in fact joined in making payment under the agreement:—Held, that as S. was not a party to the agreement which was under seal he could not be sued upon it. *Alexander and Smith* v. *Yorkshire Guarantee Co.,* (1916) 23 B.C.R. 1; 27 D.L.R. 412; 34 W.L.R. 410; 10 W.W.R. 475.

4. Sale to the Crown—Order in Council necessary.]—A contract for the sale of land to the Crown for the purpose of construction of a public work under sec. 3 of the Public Works Act, in order to be enforceable against the Crown must be authorized by Order-in-Council. *In re Public Works Act and N. F. Mackay,* (1921) 30 B.C.R. 1; 58 D.L.R. 332; (1921) 2 W.W.R. 821; (1922) 1 A.C. 457; 91 L.J.P.C. 193; 127 L.T. 81; 63 D.L.R. 171; (1922) 1 W.W.R. 982.

5. Undisclosed principal.]—Where a contract for the sale of land to which sec. 4 of the Statute of Frauds applies, has been made by an agent in such terms as not to render the agent liable as one of the contracting parties, the principal can sue on it only if his name appears in the memorandum or such description of him that his identity cannot fairly be disputed. The connection of the plaintiff with the memorandum containing the offer of purchase, as vendor of the property cannot be established by oral evidence. *Mahler* v. *Barker*, (1924) 34 B.C.R. 136; (1924) 3 D.L.R. 292; (1924) 2 W.W.R. 796.

6. Joint covenants.]—An agreement for sale of land to two purchasers contained the following clauses: "The purchasers covenant with the vendor that they will pay to the said vendor the said sum with interest" and "the terms vendor and purchasers in this agreement shall include the executors, administrators and assigns of each of them": —Held, that the first mentioned clause contains a joint covenant and not the separate obligation of each purchaser, and the character of the obligation is not changed by the second clause. *Robert Porter & Sons, Ltd.* v. *Foster*, (1925) 36 B.C.R. 222; (1925) 4 D.L.R. 669; (1926) S.C.R. 328; (1926) 2 D.L.R. 340.

3. Statute of Frauds.

1. Uncertainty—Contract contained in letters.]—The defendant by letter gave the plaintiff a fifteen days' option on seven timber licenses on a basis of 50 cents a thousand stumpage net, adding that if the plaintiff approved of the timber he (the plaintiff) should have the timber surveyed and pay all back licenses and all future payments and that an agreement of sale will be entered into if he takes his option up. In answer by letter the plaintiff stated that he had inspected the timber comprised in the seven timber licenses upon which he held a fifteen days' option and agreed to purchase same on lines of said option:—Held, that the two letters do not constitute an enforceable agreement, it being void for uncertainty. *McMillan* v. *Cameron*, (1917) 24 B.C.R. 176, 509; (1917) 2 W.W.R. 946; (1918) 1 W.W.R. 836.

2. Memorandum or note in writing—Agreement contained in correspondence.]—Where the correspondence in negotiations for the sale of land contains all particulars essential to a final and complete contract it is binding, although it appears from the correspondence that the parties desired an agreement in writing for the purpose of convenience. *Horsnail* v. *Shute*, (1919) 27 B.C.R. 474; (1920) 1 W.W.R. 21.

3. Oral agreement — Possession.] — Where a defendant paid a deposit on the purchase price of a dwelling house and obtained the key thereto and entered into possession with his furniture he is precluded from setting up the Statute of Frauds as the taking possession constitutes an act of part performance and opens the door to parol evidence of the agreement. *Haddock* v. *Norgan*, (1924) 34 B.C.R. 74; (1924) 3 D.L.R. 644; (1924) 2 W.W.R. 943.

4. Part performance—Consideration.]—The plaintiff, an elderly person, entered into an oral agreement with the defendant's niece and the latter's husband to grant them possession of certain land during her lifetime and also to leave it to them by her will in consideration of personal services to be rendered to her during the remainder of her life. The defendants took possession of the land and built a house and made other improvements thereon. In an action by the plaintiff to recover possession of the land: —Held, that the defendants were entitled to retain possession but a declaration that the defendants are entitled upon counterclaim to specific performance on the plaintiff's death would be premature and cannot be granted during the lifetime of the plaintiff. *Lyell* v. *Cormack*, (1928) 40 B.C.R. 345; (1928) 4 D.L.R. 902; (1928) 3 W.W.R. 284.

5. Novation—Sufficiency of writing.]—A written memorandum on the foot of an assignment of an agreement for the sale of land, substituting the defendant in lieu of the original purchasers, agreed to by the defendant but not signed by him, is not an acknowledgment in writing of the defendant's liability with respect to the novation as will satisfy the Statute of Frauds; nor can such writing be connected up with a quit-claim deed of the defendant containing no reference to the memorandum. *Waddington* v. *Bush*, (1923) 32 B.C.R. 434; (1923) 3 D.L.R. 884.

See also 1 and 2, *supra*.

4. Mistake.

1. Falsa demonstratio.]—On the sale of a lot which was generally referred to by the house number, an interim receipt issued by

the vendor's agent recited "East 33 ft. A," the lot in fact having a frontage of 25 feet only. The evidence shewed the vendor knew nothing of the dimensions of the lot and the deed which he signed and sent to his agents recited 25 feet frontage:—Held, that the phrase "East 33 ft. A" was a falsa demonstratio and must be discarded, as no importance was attached to the frontage, the subject of the sale being generally referred to by the house number, and an action for compensation should be dismissed. Held, further, that the purchaser by entering into possession, having the house moved forward and making other improvements had so dealt with the property as to preclude herself from the right to compensation. *Dowding* v. *Brown*, (1919) 27 B.C.R. 513; (1920) 1 W.W.R. 698.

2. Omission of parcel from particulars of sale.]—Where a sale of the assets of a company is directed to satisfy a claim for money advanced to the company, and the purchaser believes that he is purchasing all the property of the company, but through a mistake on the part of the solicitor preparing the particulars of sale, a certain lot is not included, although belonging to the company, the purchaser under the sale may rescind the purchase on the ground of mistake, but the Court will not rectify the mistake by ordering a conveyance of the lot to the purchasers. *Marshall* v. *Canadian Pacific Lumber Co., Ltd.*, (1921) 30 B.C.R. 270; 61 D.L.R. 268; (1921) 3 W.W.R. 209; (sub nom. *Dominion Bank* v. *Marshall*), (1922) 63 S.C.R. 352; 65 D.L.R. 461; (1922) 2 W.W.R. 266.

3. Rectification.]—A decree for rectification of a written agreement and for performance of the agreement as rectified may be made in the same action. *Frey* v. *Floyd*, (1922) 30 B.C.R. 488; 63 D.L.R. 614; (1922) 1 W.W.R. 651.

4. Making title—Description.]—Where the owner of a considerable piece of land being requested to sell a part of it goes with the respective purchaser or his agent upon the ground and then and there points out and defines by his surveyor then present for that express purpose the exact boundaries of the lot he is selling to the purchaser, and which the purchaser is buying from him, and after the surveyor had then and there located that lot, the description of it, supposed to define and represent the actual location, is inserted in the deed, and the purchaser takes his deed and also possession thereunder and remains by himself and successors in quiet enjoyment of the lot for sixteen years in the course of which valuable improvements have been made thereupon in building and otherwise:—Held, that the purchaser is entitled, notwithstanding an error in the survey to the strip so surveyed, as against the vendor or any person to whom the vendor subsequently transfers adjoining portions of the quarter section. *McDonald* v. *Knudsen*, (1928) 40 B.C.R. 25; (1928) 3 D.L.R. 242; (1928) 2 W.W.R. 577.

5. Agreement for sale—Mutual mistake as to area—Abatement of price.]—Where the purchasers of a group of unsurveyed mineral claims after payment of a large portion of the purchase price become aware that the claims are encroached upon to a serious extent by mineral claims held by other persons under Crown grant, no fraud being alleged or proved, it was held that the agreement was entered into under a mistake common to both parties and the purchasers are entitled to an abatement of the purchase price. *Barron* v. *Morgan*, (1930) 43 B.C.R. 84; (1930) 4 D.L.R. 985; (1930) 3 W.W.R. 65.

5. Assignment.

1. Action by vendor—Assignee necessary party.]—In an action by the assignee of a vendor's agreement for sale of land against the purchaser, the assignee to whom the purchaser has assigned his interest under the agreement is a necessary party when said assignment was made to the knowledge of the vendor and his assignee. *Gale* v. *Powley*, (1915) 22 B.C.R. 18; 24 D.L.R. 450; 32 W.L.R. 65; 8 W.W.R. 1312.

2. Novation—Original purchaser discharged.]—The defendant purchased a property under agreement for sale and after paying four instalments of the purchase price with interest assigned the agreement to M. who covenanted to pay the remaining instalments with interest and entered into possession and paid interest, water rates and insurance for a period, after which he made no further payments and gave the vendor an order to collect the rents, the vendor going into possession and exercising rights of ownership. The defendant after assigning the property immediately advised the vendor of the assignment and there was no further dealing between the vendor and the defendant until the commencement of the action five years later:—Held, that the vendor having taken possession and exercised

other acts of ownership, and M. having been accepted as debtor in place of the defendant, a novation was established. *Hoag* v. *Kloepfer*, (1918) 26 B.C.R. 181; (1918) 3 W.W.R. 633.

3. Novation—Sufficiency of writing.]—A written memorandum on the foot of an assignment of an agreement for the sale of land, substituting the defendant in lieu of the original purchasers, agreed to by the defendant but not signed by him, is not an acknowledgment in writing of the defendant's liability with respect to the novation as will satisfy the Statute of Frauds; nor can such writing be connected up with a quit-claim deed of the defendant containing no reference to the memorandum. *Waddington* v. *Bush*, (1923) 32 B.C.R. 434; (1923) 3 D.L.R. 884.

4. Covenant against assignment—Receiver.]—A notice given by vendors to purchasers under a contract, of intention to cancel it by reason of alleged breach of a stipulation therein against assigning without leave, the alleged default consisting in a dissolution of partnership of the purchasers and vesting of the partnership assets in the receiver (which was held not to justify the notice, the purchasers not having contracted as partners) was held to be such a declaration of intention as entitled the purchasers to accept and treat it as a final repudiation and as the foundation of a claim for damages for an anticipatory breach. *Clausen* v. *Canada Timber and Lands, Limited*, (1923) 4 D.L.R. 751; (1923) 3 W.W.R. 1072.

5. Assignment of instalments—Priority over registered judgment.]—An assignment of moneys due under an agreement of sale of land is not a transfer of an interest in land within the meaning of the Land Registry Act or Execution Act and registration thereof is not required and it takes priority over a subsequent registered judgment. *Canadian Bank of Commerce* v. *The Royal Bank of Canada*, (1921) 29 B.C.R. 407; 60 D.L.R. 275; (1921) 2 W.W.R. 462.

B. Options.

1. Option to purchase—Time extended by oral agreement.]—The plaintiff, who lived in Prince Rupert, agreed in writing to purchase an interest in mineral claims, the purchase price to be paid in a certain bank in Vancouver on or before a certain date. The money did not arrive until the following day but the parties met at the bank with a view to carrying out the sale, when the plaintiff's agent refused to sanction payment owing to a flaw in the defendant's title. The parties again met later but the title not being perfected to the satisfaction of the plaintiff's agent he still refused to sanction payment. The defendant then declared that the sale was off. In an action for specific performance:—Held, that the plaintiff cannot recover on the contract contained in the correspondence as he failed to leave the purchase price in the bank within the time specified, and as there is no memorandum to shew that the defendant had, subsequently to the breach, agreed to go on with the deal as required by the Statute of Frauds, the action must be dismissed. *Beaumont* v. *Harris* (*No. 2*), (1920) 28 B.C.R. 144.

2. Terms incomplete.] — Where an option for the purchase of land provides for the purchase price, with the payment of so much down and "balance to be arranged" specific performance cannot be granted on the ground of uncertainty. *McSorley* v. *Murphy*, (1928) 40 B.C.R. 403; (1928) 4 D.L.R. 790; (1928) 3 W.W.R. 589; (1929) S.C.R. 542; (1929) 4 D.L.R. 247.

II. Rights and Liabilities Arising Out of Contract.

A. Vendor's Duties.

1. Undisclosed mortgage.]—The existence of a mortgage on land contracted to be sold does not constitute a defect of title such as to give the purchaser the right to repudiate the contract; nor does it prevent the vendor from recovering instalments of the purchase price which have accrued due prior to the discharge of the mortgage, although the vendor may be required to give security for the ultimate conveyance of the lands contracted to be sold free from encumbrances. *Bostwick and Curry* v. *Coy*, (1915) 21 B.C.R. 478.

2. Registration of agreement.]—Failure on the part of a vendor to register an agreement for sale in compliance with subsecs. (4) and (5) of sec. 28, Land Registry Act Amendment Act, does not debar him from recovering upon the covenants contained in the agreement. *McDonnell* v. *McClymont*, (1915) 22 B.C.R. 1; 8 W.W.R. 990.

3. Title prevented by purchaser.]—An agreement for the sale of mill site lands, under which the balance of the purchase price was to be withheld until a Crown grant is procured, entitles the vendor, the purchaser having taken possession of the lands, to claim the balance, without any abatement where, owing to the conduct of the purchaser, the Crown grant is refused. *Nicola Valley Lumber Co.* v. *Meeker*, (1917) 1 W.W.R. 556; 31 D.L.R. 607; Affd. 55 S.C.R. 494; 39 D.L.R. 497.

4. Vendor's title.]—A vendor of land must be in a position to shew that he can give a good title at the time for completion, but upon it being demonstrated before that time that the vendor is devoid of and not able to obtain title, the purchaser may then repudiate. *Rogerson* v. *Cosh*, (1917) 24 B.C.R. 367; 37 D.L.R. 694; (1917) 3 W.W.R. 911.

5. Delay in providing title.]—After a conveyance has been made under a contract of sale of land, damages may be claimed for breach of covenant of title in respect of any portion of the land bargained for not conveyed, and the grantee is also entitled to rectification; the value of the land not conveyed would be the measure of damages, in addition to any special damage within the contemplation of the parties when the contract was made; loss of profits through delay in registration of title caused by the vendor's negligence is too remote to be recovered as damages on a covenant for good title. *Bagley* v. *B.C. Southern Railway Co.*, (1917) 24 B.C.R. 400; 37 D.L.R. 733; (1919) 2 W.W.R. 250.

6. Description — Encroachment.]—Where an agreement of sale of land sufficiently describes the land, a minor encroachment upon the land does not prevent the vendor from making title in accordance with the contract, and specific performance will be decreed. *Foster* v. *Goodacre*, (1917) 2 W.W.R. 636; 34 D.L.R. 42.

7. Timber limit — Duty of vendor to maintain title pending renewal.] — The defendant held a timber limit under a license that expired in June, 1923. In January, 1923, he sold the timber to the plaintiff there being no time fixed within which the timber was to be removed. The license fee for the year following June, 1923, was not paid and the plaintiff did not complete the removal of the timber until late in 1923, when as trespasser he was obliged to pay the penalties provided for in the Forest Act:—Held, that the defendant was bound to maintain the title to the timber for such time as the plaintiff would reasonably require to remove the timber, and the time taken to remove it not being unreasonable the plaintiff was entitled to recover the amount of the penalties imposed on him. Held, further, that on the question of mitigation of damages there was no obligation on the plaintiff to renew the timber license. *Caine* v. *Schultz*, (1926) 38 B.C.R. 332; (1927) 1 W.W.R. 600.

B. Purchaser's Duties.

1. Search of title.]—A person acquiring land ought to see if there is anything registered against such land and for that purpose he is assumed to make a complete search in the Land Registry Office. *Robinson* v. *Holmes et al.*, (1914) 5 W.W.R. 1143; 17 D.L.R. 372.

2. Default in purchaser's covenant.]—If by an agreement for sale of a mineral claim the purchasers agree to perform and record the assessment work, but fail to do the work, and on the claim expiring, restake it, the restakers or subsequent purchasers with knowledge of the facts, will in equity be held to be trustees for the vendor. *Stewart* v. *Molybdenum Mining & Reduction Co.*, (1921) 30 B.C.R. 51; 60 D.L.R. 497; (1921) 2 W.W.R. 954.

III. Performance of the Contract.

A. Conveyance.

Covenant for right to convey.]—A limited covenant for the right to convey in pursuance of the Real Property Conveyance Act does not constitute a warranty of title; it only operates as to the vendor's own acts. If the vendor has no title at all to the property conveyed, there would be no breach of such covenant. *Amar Singh* v. *Mitchell*, (1916) 23 B.C.R. 248; 30 D.L.R. 719; 35 W.L.R. 201; (1917) 1 W.W.R. 201.

B. Compensation.

1. Easement — Deficiency in area — Agency.]—A vendor is not liable upon an agreement to make compensation for the loss of a quasi-easement made by her agent with a purchaser unless it be shewn that

the vendor authorized the agent or held him out as having authority to make such an agreement. *Hayes* v. *Goddard*, (1915) 21 B.C.R. 389; 22 D.L.R. 566; 31 W.L.R. 424.

2. Misrepresentation — Burden of proof—Damages.]—In an action for damages suffered through the complainant having purchased property relying on statements made by the vendor, the burden is on the complainant to convince the Court that the statements were made falsely, either with knowledge of their falsity, or with such recklessness as to amount to moral guilt, and that the statements were in regard to some material fact and an inducing cause leading him to enter into the contract. *Langley* v. *Hammond*, (1915) 21 B.C.R. 175; 22 D.L.R. 42.

3. Repudiation by vendor.]—Where a vendor refuses to carry out an executory contract for the sale of land and later sells the land to another the measure of damages recoverable is not limited to the difference between the contract price and the value of the land at the date of repudiation; the purchaser may recover the difference between the contract price and the value at the time of the resale; or if the resale is unknown to him, the value at the time of his discovery thereof. He may also recover the net profits that have been realized from the land since the time when he should have had possession under his contract. *Horsnail* v. *Shute*, (1921) 30 B.C.R. 189; 62 D.L.R. 199; (1921) 3 W.W.R. 270.

4. Assumption of vendor's agreement —Interest.]—Where in an agreement for purchase and sale of land a price is mentioned and it is clear that the purchaser did not intend to pay more, interest accrued prior thereto, upon the agreement under which the vendor claims title, must be paid by the vendor, and the fact that adjustments have been made and a receipt in full given therefor not accounting for the accrued interest will not prevent the purchaser from claiming the amount of such accrued interest. *Parker* v. *Kogos*, (1925) S.C.R. 513; (1925) 3 D.L.R. 337.

5. Breach of covenant for title.]—The defendant, the owner of four lots adjoining a lake and through which a stream as an outlet from the lake flowed, sold a right of way across one of the lots to a railway company. In 1920 the railway built an embankment along the right of way which held the water back and flooded the lots in the rainy season and the defendant brought action against the railway for damages to his crops. On the 16th of July, 1921, the defendant under agreement for sale sold the four lots to the plaintiff and on the 26th of July following he entered into an agreement with the railway company on behalf of himself, his executors, administrators and assigns settling all claims for present or future damages by reason of the construction of the railway across the said lot and agreeing to the rescission of an order of the Railway Board compelling the railway company to clear the outlet from the lake. In pursuance of the agreement for sale to the plaintiff the defendant executed a conveyance on the 6th of May, 1922, in which he covenanted that he had the right to convey, that the plaintiff should have quiet possession free from encumbrances and that defendant had done no act to encumber said lands:—Held, that an easement was created by the agreement of the 26th of July, 1921, with the railway, affecting the defendant's title. There was a breach of covenant on the execution of the conveyance of the 6th of May, 1922, and the measure of damages is the difference in value of the property free from the easement and its value subject thereto. *Matheson* v. *Thynne*, (1926) 36 B.C.R. 376; (1926) 2 D.L.R. 157; (1926) 1 W.W.R. 645.

6. Delay in payment — Interest.] — Where a vendor and purchaser have agreed upon the time for payment, and the purchaser has been in full possession, the vendor is entitled to interest on the purchase money, notwithstanding that delay in completing has been caused by the plaintiff's failure to make title, and the right being equitable and not statutory the rate of interest is in the discretion of the Court. *Nimpkish Lake Logging Co.* v. *Wood and English*, ~~(1926) 36 B.C.R. 237~~; [1927] 3 D.L.R. 926.

7. Contract to build and sell house—Specifications.]—When one party agrees to erect a house after certain specifications for another in a lot belonging to the former, the latter agreeing to buy the premises when the house is completed, and there is a material departure from the building specifications in matters of primary importance, and the house is not protected from mechanics' liens as agreed upon, the prospective purchaser is entitled to repudiate the contract and recover instalments paid by him on the purchase price. *McInnis* v. *Gray*, (1930) 3 D.L.R. 337.

IV. DISSOLUTION OF THE CONTRACT.

A. Cancellation.

1. Option after quit claim deed.]—A purchaser of land under agreement for sale after making substantial payments upon the purchase price and being in default of payment of the balance requested the vendor to accept a quit claim deed and release the purchaser from her covenant in the agreement. The vendor accepted the quit claim deed and thereupon agreed that if the purchaser would serve notice of intention to repurchase and pay a certain instalment on a stated date thereafter an extension of time would be granted for payment of the unpaid balance of purchase price. The purchaser gave the notice of intention to repurchase but failed to pay the instalment when due. After default the purchaser tendered the amount which the owner refused to accept. In an action to enforce the acceptance of the payment and for the right to carry out the purchase under the proposed extension of time:—Held, that time was of the essence of the contract and default in payment of the instalment disentitled the plaintiff to the relief sought. *Harris* v. *Bethune*, (1921) 29 B.C.R. 485; (1921) 2 W.W.R. 259.

2. Payments expressed in rent—Application of Landlord and Tenant Act.]—The plaintiff sold a property in Vancouver to the defendants under agreement for sale for $40,000. The defendants went into possession and after paying $21,000 were in default. The parties then entered into a further agreement whereby the option to purchase was still in force but the payments to be made were expressed in rent. After making further payments amounting to $2,500 the defendants were again in default and the plaintiff applied for and obtained a writ of possession under the overholding sections of the Landlord and Tenant Act:—Held, that in a case so involved and in which if action had been brought relief against forfeiture might be considered, the section of the Landlord and Tenant Act invoked does not apply. The summary remedy should not be invoked except in cases of the ordinary relationship of landlord and tenant. *Ray* v. *Ruby Hou et al.*, (1927) 39 B.C.R. 128; (1928) 1 D.L.R. 177.

B. Rescission.

1. Misrepresentation—Finding of fact.]—In an action for rescission of a contract for the sale of land on the ground of misrepresentation it must be proved that the misrepresentation complained of was the inducing cause of the purchase, and whether it was or not is a question of fact to be determined by the trial judge and his decision will not be interfered with by the Court of Appeal without strong reason. *Gagnon* v. *Nelson; Nelson* v. *Gagnon*, (1915) 21 B.C.R. 356; 22 D.L.R. 179; 8 W.W.R. 907; 31 W.L.R. 346.

2. Waiver—Restitution.]—A purchaser under an agreement for sale knowing the state of title, must be taken to have waived all objections thereto when he goes into possession, subdivides the property, and enters into an agreement for sale of an interest therein. A purchaser is not entitled to rescission unless he is in a position to make restitution. *Boydell* v. *Hames*, (1915) 21 B.C.R. 171; 21 D.L.R. 371; 8 W.W.R. 17.

3. Misrepresentation of agent.]—A person who is induced by misrepresentation of an agent to enter into an agreement for the purchase of land, is not debarred from relief from the principal because he appoints as his agent immediately after the agreement was entered into the agent who deceived him; he will not be assumed to have had notice of the deceit. *Stewart* v. *Canadian Financiers Trust Company*, (1915) 22 B.C.R. 133; 23 D.L.R. 707; 32 W.L.R. 121; 9 W.W.R. 82.

4. Materiality of representations.]—In an action for the recovery of certain instalments payable under an agreement for sale of land the defendants claimed rescission of the contract and return of the instalments paid on the ground that the plaintiff (vendor) misrepresented the property in that the land was level, and as to its locality:—Held, that on the evidence the directions as to the locality were nothing more than general indications thereof and that the contract had been affirmed by the defendants after they had notice of the true quality of the land. *Stewart* v. *Cunningham and Sprott*, (1915) 21 B.C.R. 255; 22 D.L.R. 845; 8 W.W.R. 579.

5. Materiality of representations.]—The plaintiff purchased a farm after negotiations with the defendant's agents and an examination of the property. During negotiations the agents made representations as to the annual hay crop, the quality of the dyking protecting the land and the underdraining. The plaintiff on taking possession paid $13,000 on account of the purchase price of $30,000. Subsequently there being

default in the payments due on the purchase price the vendor (defendant) foreclosed, and the plaintiff was obliged to give up possession. The plaintiff then brought action for damages suffered through his having purchased the property relying on the statements of the vendor's agents, alleging that the hay crop was not as represented, that the dyking was defective, having broken while he was in possession, and that the underdraining was not as represented:—Held, that although the misrepresentations complained of may have been made, they may have been innocently made and there was nothing in the evidence to disclose anything in the nature of fraud, or that the statements and representations were made so recklessly as to bring the case within what amounts to actual fraud. *Anderson* v. *Fuller*, (1915) 21 B.C.R. 509.

6. Expropriation during purchase.]—The plaintiff purchased certain lands under an agreement for sale and entered into possession, the purchase price to be paid by instalments, the vendor covenanting that, upon completion of the payments, he would convey the lands by deed containing the usual statutory covenants. An action for rescission on the ground that part of the land was expropriated by a railway company under statutory powers was dismissed. *Mauvais* v. *Tervo*, (1915) 22 B.C.R. 207; 25 D.L.R. 192; 9 W.W.R. 434; 32 W.L.R. 811.

7. Fraud.]—In an action for rescission of four agreements for sale of lands on the ground of fraudulent misrepresentation, and for damages, the trial judge found fraud on the part of the defendant, but also found that the plaintiff had, before launching the action, elected to abide by the contracts after full knowledge of the fraud. He refused rescission and assessed damages at the amount of the difference between the purchase price and the actual value of the lands when purchased. There was no plea for specific performance of the agreements for sale, but a reference was ordered to inquire into the title to the lands and to take accounts on the basis of deducting from the amount of damages found the balance due on the purchase price under the agreements for sale, and it was directed that there be judgment for the plaintiff for the balance, and that the defendant execute a conveyance of the land in question in the plaintiff's favour:—Held, on appeal, that the judgment below be affirmed with the variation that there should be no order as to specific performance of the agreements for sale, as there was no such plea in the statement of claim, nor was it raised on the trial. An action for specific performance lies only where there has been a refusal to perform; there has been no refusal to perform. *Williams* v. *Shields*, (1918) 25 B.C.R. 198.

8. Waiver of objection to title.]—A purchaser of land who takes possession and exercises acts of ownership by ploughing the land and making improvements waives any objection to the title of the vendor. *Rogerson* v. *Cosh*, (1917) 24 B.C.R. 367; 37 D.L.R. 694; (1917) 3 W.W.R. 911.

9. Election—Fiduciary relationship.]—In an action by a purchaser for rescission of an agreement for the sale of land executed by the defendant on behalf of the plaintiff under power of attorney, the land in question having been previously vested by an order of tne Court in the defendant and another as trustees of the estate of a deceased person with power to sell for benefit of the estate:—Held, that as the transaction appeared to be a fair and honest one and the evidence shewed that the plaintiff had knowledge of the defendant's position five years previously to the action, the action should be dismissed. *Stahl* v. *Miller*, (1918) 56 S.C.R. 312; 40 D.L.R. 388; (1918) 2 W.W.R. 197.

10. Executed contract.]—In an action for rescission of a contract for the sale of timber licenses upon the ground of misrepresentation where no fraud is alleged, it must be shewn that the difference in substance between what was understood to be taken under the contract and what was in fact obtained constituted a total failure of consideration. *Alberta North West Lumber Co., Ltd.* v. *Lewis*, (1917) 24 B.C.R. 564; 38 D.L.R. 228; (1917) 3 W.W.R. 1007.

11. Right to acquire and sell land.]—A company which acquires an indefeasible title to land in pursuance of an ultra vires transaction is entitled to enter into an agreement of sale of the land and to enforce such agreement, particularly against a purchaser who entered into the agreement with full knowledge of the company's title. *Hudson Bay Insurance Company* v. *Creelman*, (1919) 88 L.J.P.C. 197; 122 L.T. 198; 48 D.L.R. 234; (1919) 3 W.W.R. 9; (1920) A.C. 194; Affg. (1918) 25 B.C.R. 307; 40 D.L.R. 274; (1918) 2 W.W.R. 448.

12. Waiver of right to rescind.]—A purchaser of land under an agreement for sale who, upon discovering that statements by the land agent, which led him to make

the purchase are untrue, writes, through his solicitor, a letter to the brokers, enclosing money on the purchase and stating that he was completing it rather than lose the money already paid on the purchase price before he learned of the false and fraudulent representations made to induce him to purchase, and stating also that he does not waive his right to insist on reparation for the deceit practised upon him, and that he proposes to bring an action on account thereof; and who subsequently makes additional payments and offers to exchange the lots for others, elects not to rescind the contract. Discovery later of other false representations does not entitle him to rescission, but entitles him to damages for deceit. *Barron* v. *Kelly*, (1918) 56 S.C.R. 455; 41 D.L.R. 590; (1918) 2 W.W.R. 131.

13. Sale subject to agreement.] — The fact that a vendor, after having sold land to S. under an agreement for sale, subsequently, and before final payment was due, sold the land to H., subject to the agreement with S., is not a sufficient ground to support an application by S. for judgment on admissions in an action for rescission. *Solton* v. *Northern Loan and Mortgage Guarantee Corporation*, (1918) 25 B.C.R. 529.

14. Concurrence of third party.] — Where a vendor is unable to make title to land he has sold without the concurrence of a third party over whom he has no control, the purchaser is entitled to the return of all moneys paid on the sale, with interest. *Metcalfe* v. *Van Houten*, (1919) 27 B.C.R. 138; (1919) 2 W.W.R. 410.

15. Vendor's misrepresentations.]—The rescission of an agreement for sale may be decreed notwithstanding considerable delay in bringing action therefor where there is evidence of the vendor's misrepresentations as to the drainage of the land and its fitness for agricultural purposes; the findings of the trial Court based on such evidence cannot be disturbed on appeal. *Higgins* v. *Creech*, (1920) 31 D.L.R. 110.

16. Misrepresentation.]—The plaintiff purchased a house, made a substantial payment on account of the purchase price, entered into possession and made improvements, adding on a kitchen. She then brought action for rescission, on the grounds of misrepresentation as to the construction of the house, as to the dampness of the locality, and other matters:—Held, that as there was no claim for damages for deceit the action is for rescission and the plaintiff having exercised acts of ownership and carried out material structural alterations and being unable to restore the subject matter of the contract, the action must fail. *Cusick* v. *Taylor*, (1920) 28 B.C.R. 241; (1920) 2 W.W.R. 579.

17. Delay in payment.]—Plaintiff contracted to buy certain land, it being understood he was doing so through a loan from the Soldier Settlement Board:—Held, a delay incident to the approving of the loan and inspection and searching title by the Board did not justify the vendor in rescinding the contract. Damages for breach of contract by the vendor were allowed to the amount of the difference between the market price and purchase price of the land. *Muirhead* v. *Atkin*, (1920) 2 W.W.R. 228.

18. Laches.]—The plaintiff sold to the defendant a parcel of lands believed to comprise 2.81 acres, the defendant giving the plaintiff a mortgage to secure part of the purchase price. Upon survey the parcel was found to contain only 1.33 acres and the defendant was so advised but continued in possession for eight years and made improvements without taking any action. In an action by the plaintiff to recover the principal and interest due on the mortgage the defendant claimed rescission on the ground of mutual mistake:—Held, that apart from the question of laches, after eight years of possession and extensive changes in the corpus, the market for such property having in the meantime materially fallen, the parties cannot be restored to their original respective positions and the action must fail. *Loewen* v. *Duncan*, (1921) 30 B.C.R. 295; 62 D.L.R. 152; (1922) 2 W.W.R. 1131.

19. Secret profit on sale—Foreclosure.] —In an action for foreclosure of a mortgage given for the balance of the purchase price of land, purchased by a syndicate and afterwards turned over to a joint stock company which subsequently divided the lands into townsite blocks, the Court held that the collusion of the plaintiff with one of the members of the syndicate whereby such member was enabled to obtain a secret profit of $25 per acre was sufficient ground on which to grant rescission of the contract, and the fact that the vendor had parted with the land and the vendee had changed its character by subdividing it into town lots, and as a consequence had given the Government of British Columbia an interest in it did not preclude a judgment for conditional rescission. The burden of procuring cancellation of the plan of subdivision and

reconveyance of the lots transferred to the Provincial Government should rest on the defendants, the plaintiff being required to deposit with the registrar of the Supreme Court his consent as mortgagee to such cancellation and reconveyance duly verified. *Greenizen* v. *Twigg*, (1922) 63 S.C.R. 158; 65 D.L.R. 101; (1922) 2 W.W.R. 71.

20. Vendor's title unregistered.]—Where it is found on the evidence that the purchasers under an agreement for sale of land had failed to pay or tender the last instalment of the purchase money, in an action for rescission of the agreement and a return of the purchase money paid on the ground of lack of title in the vendor, they cannot avail themselves of non-compliance by the vendor with subsec. (5) of sec. 28 of the Land Registry Act Amendment Act, 1914, in failing to register his title. *Frost* v. *Welch*, (1923) 32 B.C.R. 535; (1923) 3 W.W.R. 834.

21. Sale by executors — Purchaser's solicitor — Notice to purchaser.] — The plaintiff, a trading company with head office in Toronto, desirous of acquiring a new location for a branch store in Victoria, its general manager, in 1921, made a brief inspection of lots 418 and 419 View Street, and called on the defendant J. one of the executors of the Vernon Estate to which the lots belonged regarding the price. The plaintiff then engaged the defendant solicitors by telegram from Toronto to negotiate for the purchase of the property which was vested in the defendants J. and L. as trustees and executors of the Vernon Estate. The solicitors did not disclose to the plaintiff that one of the firm was the same person as the trustee, but it was stated that J., the other trustee, had himself verbally mentioned to the plaintiff's general manager that his co-trustee was a man named L. The negotiations resulted in an offer by the trustees at $150,000 and an option later at $140,000, which amount the plaintiff after attempting to reduce, paid early in 1922, and thereafter made extensive alterations to the existing building and erected a new building. Later, the plaintiff, on hearing that the solicitors had always acted for the estate, and that one of the firm was also one of the trustee vendors, brought action for rescission of the sale, or alternatively for damages for the non-disclosure by the solicitors and the trustees of the above and other facts as to the financial condition of the estate and as to taxes:—Held, on the facts, that the plaintiff's general manager had knowledge before the sale was actually completed in February, 1922, of the fact that the member of the firm of solicitors was also one of the trustee vendors, such knowledge being deduced from the circumstances of his name being on the printed letter-heads of the firm and from the name being an unusual one and from the tenor of telegrams sent by the plaintiff before closing the sale. Held, further, that in any event the price of $140,000 was a fair price for the property in question. Held, further, that even if a technical right of action existed against the solicitors for non-disclosure of their relationship with the vendors, still no damages had accrued to the plaintiff therefrom. Held, further, that the plaintiff by the alterations to the building and by giving leases had elected to ratify the sale, and could not make restitutio in integrum. *F. W. Woolworth Co., Limited* v. *Pooley et al.* (*No. 2*), (1925) 35 B.C.R. 386.

22. When granted.]—Rescission may be granted where it is not possible to restore the parties precisely to the position in which they were before the contract, provided that there has not been such a change that the position of the parties cannot substantially be restored. *Legg* v. *Parcells*, (1925) 3 D.L.R. 1121.

23. Conveyance delivered—Default in payment—Action for rescission.]—Under agreement for sale made in 1923, H. agreed to sell certain lands to the Mainland Portland Cement Company for which he was to be paid from the proceeds of the sale of bonds issued by the Company. He delivered a conveyance of the lands to the Company which was duly registered. The sale of bonds then proceeded but the proceeds were wrongfully used for other purposes and the Company became bankrupt in 1926. On a motion for rescission of the agreement and reconveyance of the lands:—Held, that if any action lay it was not for a reconveyance as upon failure of consideration but for the amount of the purchase money. Held, further, that a claim as possessor of a vendor's lien in priority over the claims of other creditors is inconsistent with the claim for rescission and in the circumstances he has abandoned his lien if it ever existed. *In re Mainland Portland Cement Company Limited*, (1927) 38 B.C.R. 417; (1927) 2 D.L.R. 742.

24. Laches.]—In June, 1912, the defendants formed a syndicate for the purpose of purchasing a block of land. Upon the formation of the syndicate the land was purchased by way of agreement for sale and

a first payment on the purchase price was made. The defendants took a share in the syndicate themselves and shortly afterwards sold their interest to the plaintiff at a small profit. All subsequent payments under the agreement for sale were made, of which the plaintiff paid his share. Mr. Cross of the firm of Cross & Company who carried on all negotiations with the plaintiff with reference to the sale, died in 1923. This action was commenced in 1926 to set aside the contract and for repayment of all moneys paid by the plaintiff on the purchase of the land on the ground of non-disclosure of the fact that the interest sold the plaintiff belonged to Cross & Company. It was held on the trial that it did not appear that the vendor failed in any duty he owed the plaintiff, his duty to disclose not extending beyond the facts material to the contract:—Held, on appeal, that the questions raised on the appeal are purely of fact and the decision of them depends very largely upon the impressions made upon the trial judge by the plaintiff himself, whose memory was most unreliable and unsatisfactory. The documents are against him, and the action was not commenced until long after the death of the other party to the transaction. In these circumstances it is hopeless to ask the Court to say that the trial judge came to a wrong conclusion. *Young* v. *Cross & Co. and O'Reilly*, (1927) 38 B.C.R. 200; (1927) 2 D.L.R. 373; (1927) 1 W.W.R. 537; Affg. (1926) 37 B.C.R. 188; (1926) 2 D.L.R. 374; (1926) 1 W.W.R. 878.

25. Taxes payable by vendor.]—In an action to recover the balance of the purchase price of a property, the defence was raised that certain taxes which were due, had not been paid. Previously an action had been brought against the vendor for the amount of taxes due and judgment was obtained for $8,506.88. The plaintiffs then made a settlement whereby the minister of national revenue in consideration of the payment of $4,000 released the property in question for the unpaid balance, reserving all rights and remedies against the plaintiffs for the balance. On the contention that no officer of the Crown can give up property belonging to the Crown without statutory authority:—Held, as the minister merely fixed upon the sum which was agreed upon as the value of the charge in question, and received such sum in consideration of the release, the defence fails. *Keill and Purdy* v. *Hunter*, (1928) 39 B.C.R. 396.

26. Waiver.]—The plaintiff sold the defendant a lease of an hotel with the furniture and fixtures on the understanding that a beer license attached to the property was an important part of the consideration although the total consideration appeared by the documents to be the transfer of the goods chattels and fixtures in the hotel. The defendant after becoming aware that he could not lawfully acquire the beer license decided to abandon the purchase and stopped payment of a cheque given on account of the purchase price. It was held that the purchaser was estopped from asserting that there was any contract between himself and the plaintiffs other than the bill of sale and assignment of the lease, and by his action severed from the consideration for the cheque the transfer of the license. *Engleblom and Erickson* v. *Blakeman*, (1929) 41 B.C.R. 456; (1929) 4 D.L.R. 377; (1930) 42 B.C.R. 259; (1930) 2 D.L.R. 824; (1930) 1 W.W.R. 565.

27. Sale of land and building—Specifications.]—When one party agrees to erect a house after certain specifications for another in a lot belonging to the former, the latter agreeing to buy the premises when the house is completed, and there is a material departure from the building specifications in matters of primary importance, and the house is not protected from mechanics' liens as agreed upon, the prospective purchaser is entitled to repudiate the contract and recover instalments paid by him on the purchase price. *McInnis* v. *Gray*, (1930) 3 D.L.R. 337.

C. Forfeiture of Moneys Paid.

1. Election of remedy.]—An unpaid vendor cannot have the land and the instalments of the purchase money; he must elect either remedy. *Gale* v. *Powley*, (1915) 22 B.C.R. 18; 24 D.L.R. 450; 32 W.L.R. 65; 8 W.W.R. 1312. *Prince Rupert Devt. Syndicate* v. *Lustig*, (1919) 26 B.C.R. 497; (1919) 1 W.W.R. 496.

2. Voluntary payment with knowledge of facts.]—A claim for repayment of moneys paid under an agreement for sale of timber on the ground that there was misrepresentation as to title, will be refused when it is found on the evidence that the purchaser paid the money voluntarily with knowledge of the facts and received benefits under the contract. *Clark* v. *Milligan*, (1920) 28 B.C.R. 22; (1920) 1 W.W.R. 1044.

3. Default in payment.]—The plaintiff sold certain lands to the defendants under an agreement for sale which provided that upon default of payment of any portion of the purchase price for 30 days the lands should at the option of the vendor upon 30 days' notice in writing to the effect that the vendors intended to exercise their rights in consequence of default belong absolutely to the vendors. The vendors gave the required notice in consequence of default by the purchaser:—Held, that the vendors are entitled to sue for and obtain judgment and in case of continuation of default in payment the agreement shall be deemed to be cancelled and the sale null and void and the vendor is entitled to recover possession and retain the moneys paid under the agreement. *Lee Dye* v. *Eliot*, (1920) 29 B.C.R. 103 (*sub nom. Kum Jow* v. *Eliott*) 55 D.L.R. 622; (1921) 1 W.W.R. 785.

4. Agreement for sale—Time of essence—Forfeiture.]—In adjudicating upon an agreement for sale of mining leases, the property being of a speculative nature, it is essential to hold the parties strictly to the time provided for performance and particularly where the parties have placed their mining leases in escrow and have put their agreement in the form of an option for the purpose of avoiding litigation and delay in reselling. In such a transaction the Court will deem time to be of the essence even if it is not so stipulated in the agreement, but while directing forfeiture of the option will in the absence of express agreement relieve against the forfeiture of an instalment paid immediately before the default in performance by the optionee. *Cronholm* v. *Cole*, (1928) 39 B.C.R. 405; (1928) 2 D.L.R. 65; (1928) 3 D.L.R. 321.

5. Relief against.]—A purchaser who has never in fact abandoned or receded from his contract, but has by reason of laches or otherwise, from causes not falling within abandonment or rescission, deprived himself of the right to specific performance, is, in case the vendor refuse to accede to specific performance, prima facie, entitled to a return of the deposit or part payment, unless some facts are shewn that would render this inequitable. *Mosdell et al.* v. *Jardine and Nanaimo Reduction Works, Limited*, (1929) 41 B.C.R. 487; (1929) 4 D.L.R. 617; (1929) 3 W.W.R. 95.

D. Foreclosure.

1. Personal judgment.]—A vendor under an agreement for sale is not entitled to both personal judgment and foreclosure. *Boydell* v. *Hames et al.*, (1915) 21 B.C.R. 171; 21 D.L.R. 371; 8 W.W.R. 17. *Prince Rupert Development Syndicate* v. *Lustig*, (1919) 26 B.C.R. 497; (1919) 1 W.W.R. 496.

2. Possession or registration.]—In an action for the foreclosure of a contract for the purchase of land, the Court will not order the recovery of the possession of the land and the cancellation of the agreement of sale in the absence of any allegations that possession of the land was given to the purchaser, or that the agreement of sale, or the vendor's title, had been registered. *Gale* v. *Powley*, (1915) 22 B.C.R. 18; 24 D.L.R. 450; 32 W.L.R. 65; 8 W.W.R. 1312.

3. Redemption — Time for.] — In an action for foreclosure under an agreement of sale there is no hard and fast rule as to the time to be given the purchaser in which to make good his default, but each individual case must be dealt with on its own merits, having regard particularly to the question of whether or not the vendor is secured, and whether there is any probability of the purchaser being able to pay. *Singer* v. *Garrett*, (1929) 41 B.C.R. 160; (1929) 4 D.L.R. 132; (1929) 2 W.W.R. 201.

See CONTRACT.
See EQUITY.
See MISREPRESENTATION AND FRAUD.
See REAL PROPERTY.
See REGISTRATION OF LAND.
See SPECIFIC PERFORMANCE.

VENUE.

See CRIMINAL LAW.
See PRACTICE.

WAIVER.

See APPEAL.
See ARBITRATION.
See BUILDING CONTRACT.
See COURTS.
See CRIMINAL LAW.
See EQUITY.
See INSURANCE.

See LANDLORD AND TENANT.
See MISREPRESENTATION AND FRAUD.
See NEW TRIAL.
See PLEADING.
See POSSESSION.
See PRACTICE.
See SALE OF GOODS.
See SPECIFIC PERFORMANCE.
See VENDOR AND PURCHASER.
See WAR LEGISLATION.

WAR LEGISLATION.

I. WAR RELIEF ACT, 1105.
A. *In general*, 1105.
B. *Persons entitled to benefit of*, 1108.
C. *Procedure*, 1109.
II. MORATORIUM ACT, 1110.
III. MILITIA ACT, 1111.
IV. ALLIED FORCES EXEMPTION ACT, 1111.

I. WAR RELIEF ACT.

A. *In General.*

1. Retroactive provisions.] — The expression "such person" occurring in the preamble and in sec. 2 of the War Relief Act clearly refers only to residents of British Columbia who have within the terms of the Act joined the forces. The protection expressly extends to the family or dependent member of the family of any such person. When however it proceeds to deal with a pending action it stays it only against such person and in this respect the provision is retroactive. By sec. 10 evidence must be furnished that the parties interested in land which is subject to an action, are not volunteers, reservists, or dependants in order that proceedings "taken or continued" be valid and binding. *Copethorne* v. *Elliott*, (1916) 28 D.L.R. 773; (1916) 10 W.W.R. 1023; 34 W.L.R. 943.

2. Goods and chattels—Certificate of title.]—A certificate of title is not goods or chattels within the meaning of those words in the War Relief Act, 1916. *Illingsworth* v. *Brown*, (1916) 10 W.W.R. 1024.

3. Mortgage—Foreclosure before Act in force.]—On the 19th of April, 1916, an order absolute of foreclosure was made in an action in which one of the defendants was a volunteer for active service. On the 28th of April following an application was made to register the plaintiff as owner in fee by virtue of the order absolute, when the registrar of titles required that the plaintiff give 30 days' notice under sec. 134 of the Land Registry Act to all persons interested. The notice was duly given. On the 29th of May, 1916, the War Relief Act came into force, being after the date of the order absolute and the application to register but before the expiry of the aforesaid 30 days. In the meantime the district registrar of titles notified the plaintiff under sec. 63 of the Land Registry Act Amendment Act, 1914, declining to register the plaintiff as owner in fee on the ground that "no proof is filed here that the defendants in the foreclosure action are not protected by sec. 2 of the War Relief Act." On an application to compel the registration of the foreclosure order absolute:—Held, that the plaintiff's application should be accepted by the registrar. *In re War Relief Act and Land Registry Act*, (1916) 23 B.C.R. 255; 30 D.L.R. 278; 10 W.W.R. 1329.

4. Mortgage—Incorporated club.]—The War Relief Act Amendment Act, 1917, does not apply to a foreclosure action on a mortgage on the property of a club incorporated under the Benevolent Societies Act, a number of whose members are on active service in His Majesty's forces. The club being a legal entity, its assets are the property of the club and not of its members. *Inman* v. *Western Club*, (1918) 25 B.C.R. 276; 40 D.L.R. 9; (1918) 2 W.W.R. 583.

5. Mortgagee—Right to possession—Rentable value.]—On an application, under sec. 9, War Relief Act, cap. 74, 1916, for leave to a mortgagee to enter into possession unless paid the rentable value of the mortgaged premises, the Court will have regard, not to the ability of the mortgagor to pay, but to the question whether there exists at the time of the application a sufficient equity in the mortgagor to make it reasonably certain, in the opinion of the Court, that the mortgagee will ultimately recover his principal and interest. If there is, leave will be refused; if not, it will be granted. In deciding what is the rentable value the Court has no discretion to fix an arbitrary rent, but must on evidence adduced decide what is the rentable value as fixed by the market at the time of the application. *In re War Relief Act*: *In re Lot 18, Subdivision F. Block 174, Vancouver*, (1918) 26 B.C.R. 255; (1918) 3 W.W.R. 475.

6. Tax sale deed.]—The War Relief Act operates to prevent the issue of a tax sale deed of land of a soldier upon active service and the collector of the municipality is not bound to refund the amount paid at the tax sale of the land in question. *Hunter* v. *Corporation of Point Grey*, (1917) 1 W.W.R. 1244.

7. Libel action.]—A plaintiff in a libel action need not comply with the provisions of the War Relief Act. *Nelson* v. *Balderson*, (1917) 3 W.W.R. 448.

8. Application to action in England.]—The War Relief Act Amendment Act, 1917, of British Columbia relates to procedure only and therefore is no defence to an action in the English Courts against a volunteer who enlisted in the Province but upon whom service of process is made in England. Quaere, whether a resident of British Columbia could be penalized for bringing an action in the English Courts in direct opposition to the terms of the B.C. War Relief Acts, or an injunction could be obtained in that Province to restrain him from so violating the prohibition of the statute. *Merchants Bank of Canada* v. *Eliot*, (1918) 1 W.W.R. 698.

9. Enforcement of judgment for damages.]—The term "liabilities" in sec. 2 of the War Relief Act Amendment Act, 1917, does not include damages recovered in an action arising in tort. *Bouch* v. *Rath*, (1918) 25 B.C.R. 445.

10. Companies winding-up.]—Upon an application for the winding-up of a company it was held that inasmuch as the proceedings were taken under the Dominion Statutes and all procedure thereunder was governed by the Act and by the winding-up rules, the War Relief Act has no bearing or effect and its provisions need not be recognized or taken into account in dealing with matters under the Winding-up Act. *Re Winding-up Act and The Robson Investment Company Ltd.*, (1918) 1 W.W.R. 779.

11. Divorce proceedings waiver.]—On motion for the appointment of a receiver of a co-respondent's business after judgment in a divorce action, and after an adjournment of the motion at the instance of the co-respondent for further material, the co-respondent at a further hearing raised the preliminary objection that he was entitled to relief under the War Relief Act:—Held, that there had been waiver, and the objection was overruled. *Shorting* v. *Shorting*, (1918) 25 B.C.R. 351.

12. Guarantor — Action against.] — A bank may recover against an indorser of a promissory note notwithstanding the fact that the action is stayed as against the principal debtor under the War Relief Act. *Royal Bank of Canada* v. *Gold*, (1917) 25 B.C.R. 409; 41 D.L.R. 276; (1918) 2 W.W.R. 745.

13. Injunction.]—The War Relief Act does not apply to an action for an injunction. *Hunt* v. *Royal Bank of Canada*, (1919) 27 B.C.R. 236; (1919) 2 W.W.R. 547.

14. Appeal—Waiver.]—Where the parties to an action take part in the proceedings without insisting upon compliance with the provisions of sec. 8 of the War Relief Act Amendment Act, 1917, they are afterwards estopped from invoking the statute as to any proceedings taken in the Court of Appeal. This section is for the protection of volunteers who are made defendants; it does not apply to plaintiffs, nor does it apply to any proceedings taken in the Court of Appeal. *John Hing* v. *Sit Way*, (1917) 25 B.C.R. 153; (1918) 1 W.W.R. 978.

B. Persons Entitled to Benefit of.

1. Commissioned officer.]—A commissioned officer is a "volunteer" within the protective provisions of the War Relief Act, and an application for registration of a final order for foreclosure is a "proceeding outside the Court" which should not be taken to the prejudice of any person entitled to protection under the Act. *In re Land Registry Act and Smith*, (1917) 23 B.C.R. 547; (1917) 1 W.W.R. 332; 31 D.L.R. 702.

2. Dependants—Parents of soldier.]—The parents of a soldier in receipt from him of $15 per month for their support, and who depend upon that sum and the father's salary of $79 per month to supply them with the necessaries of life are "dependants" within the meaning of the War Relief Act. *Barker* v. *Eadie*, (1917) 2 W.W.R. 1013.

3. Mother of volunteer.]—The words "dependent members of the family of a volunteer" in sec. 2 of the War Relief Act include the widowed mother of the volunteer if she is a dependant of such volunteer. The protection afforded the wife and dependent members of the family of a volunteer by the War Relief Act extends to immunity from actions at law against their own property as well as that of the volunteer. *Parsons* v. *Norris and Hovelaque*, (1917) 24

B.C.R. 41; (1917) 2 W.W.R. 606; 33 D.L.R. 593. *The North American Life Assurance Co.* v. *Gold*, (1917) 24 B.C.R. 50; 34 D.L.R. 735; (1917) 2 W.W.R. 613.

4. Manager munition factory.] — An applicant for relief under the War Relief Act went to England in June, 1915, as a volunteer and applied for a commission in the Engineers but owing to his doing special building construction work on a munition factory at the time, his application was suspended. In August, 1915, he became manager of a munition factory, at which work he is still engaged. In July, 1916, he was placed in Army Reserve Section B. exempting him from service while employed in a munition factory. An action was brought against him for foreclosure of a mortgage:—Held, that he is entitled to relief under the War Relief Act. *Walker et al.* v. *British Canadian Securities, Limited et al.*, (1917) 24 B.C.R. 119.

5. Discharged soldier.]—A person enlisted for overseas service continues to be entitled to protection under the War Relief Act after he has received his discharge. Where a volunteer against whom an action for foreclosure has been brought had previously assigned for the benefit of his creditors he has thereby divested himself of all interest, legal and beneficial, in the lands in question, and the provisions of the War Relief Act do not apply. *Buntyn* v. *Hill-Tout*, (1917) 24 B.C.R. 303; 33 D.L.R. 383; (1917) 2 W.W.R. 286.

6. Wife not supported by husband.]—In the case of a husband enlisting for active service, although his wife may not be actually dependent upon him for support she is nevertheless entitled to the benefit of the War Relief Act. *Mortgage Company of Canada* v. *Hall*, (1918) 25 B.C.R. 280.

7. Widow of deceased soldier.]—The War Relief Act does not apply in an action for foreclosure brought against a defendant whose husband died at the front although she was a dependant before his death and thereafter in receipt of a pension. *Anderson* v. *Stollery*, (1918) 3 W.W.R. 580.

C. Procedure.

1. Application to proceed—Application for rents included.] — On the plaintiff applying for leave to proceed under subsec. (4) of sec. 5 of the War Relief Act Amendment Act, 1918, the registrar referred the application to the judge in Chambers when the plaintiff included in his summons an application that he be at liberty to collect the rents of the premises in question in the action:—Held, that the application as framed should be dismissed and that the application for rents should be the subject of a substantive application. *Mariacher* v. *Gray*, (1918) 26 B.C.R. 332; (1919) 1 W.W.R. 505.

2. Local judge.]—A County Court judge as Local Judge of the Supreme Court has no jurisdiction to make an order dispensing with the restrictions of the War Relief Act. *Hanna* v. *Costerton*, (1918) 26 B.C.R. 347; 44 D.L.R. 478; (1919) 1 W.W.R. 930.

3. Leave to take step in action pursuant to sec. 8 of the War Relief Act.]—It is only when the plaintiff proposes to take a step in the action that he is required to obtain leave. Provisions of the Act do not apply to a defendant giving notice of and bringing on an appeal. *Bell* v. *Johnston Brothers, Limited*, (1917) 25 B.C.R. 82; (1918) 2 W.W.R. 549.

4. Application for order for substitutional service.]—Sec. 13 of the War Relief Act, B.C. Stats. 1916, cap. 74, as enacted by B.C. Stats. 1917, cap 74, sec. 9, may be invoked in an action at any stage of the proceedings. *McLennan, McFeely & Co.* v. *Colpitts*, (1918) 25 B.C.R. 459.

5. Further step.]—The delivery of a statement of claim with the writ of summons is the taking of a "further step" within the meaning of sec. 10 of the War Relief Act as amended in 1917. *Blackett* v. *Westcott*, (1917) 3 W.W.R. 460.

6. Registrar's order — Application to set aside.]—Any application dealing with a registrar's order under subsec. (4) of sec. 5 of the War Relief Act Amendment Act, 1918, must be made to the Court. *Pilkington* v. *Kent*, (1918) 25 B.C.R. 432; (1918) 3 W.W.R. 584.

7. Execution of trusts—Attorney of executor.] — An appointee by power of attorney under the Execution of Trusts (War Facilities) Act, B.C. Stats. 1916, cap. 68, has power to make the usual affidavits required from the executor on an application for probate. *In re Benson*, (1918) 25 B.C.R. 458; (1918) 3 W.W.R. 583.

II. MORATORIUM ACT.

Mortgage—Stay of extra judicial proceedings.]—In an application by a mortgagor in respect of sale proceedings, it was

held that no relief or stay of extra judicial proceedings could be granted under The Moratorium Act, Statutes of B.C., 1915, cap. 35, where the moneys owing were in respect of interest or principal and interest. Held, also that the failure of the mortgagee to give the notice required by sec. 2, subsec. 1 (c), gave no jurisdiction to relieve on an application under said Act, but (semble) an injunction might be applied for to restrain the mortgagee from proceeding with the sale. *In re Canada Permanent Mortgage Corpn. and Dalgleish,* (1915) 9 W.W.R. 180.

III. MILITIA ACT.

Soldier—Action for foreclosure against.]—Sec. 144 (4) of the Army Act, 1881 (44 & 45 Vict., cap. 58) as brought into force by the Militia Act, R.S.C. 1906, cap. 41, sec. 74, with relation to the issue of process against a soldier upon affidavit, applies only where it is proposed to take the person of a soldier, or to compel him to appear in person, and does not apply to such procedure as an action for the recovery of money or forfeiture under an agreement for sale. *Gale and Gale* v. *Powley,* (1915) 22 B.C.R. 18; 24 D.L.R. 450; 8 W.W.R. 1312; 32 W.L.R. 65.

IV. ALLIED FORCES EXEMPTION ACT.

Mineral claims.]—The benefits under the Allied Forces Exemption Act, 1915, with relation to mineral claims owned by enlisted men, are confined to claims so owned at the date of the declaration of war. This limitation was not removed by the amending Act in 1916, which was intended to provide for cases not covered by the former Act and which, upon proof of bona fides on the part of the enlisted man and of other circumstances proper to be considered, should, in the opinion of the Lieutenant-Governor in Council, merit relief. *Stewart* v. *Molybdenum Mining & Reduction Co.,* (1921) 30 B.C.R. 51; 60 D.L.R. 497; (1921) 2 W.W.R. 954.

WARRANTY.

See CONTRACTS.
See DAMAGES.
See SALE OF GOODS.
See VENDOR AND PURCHASER.

WASTE.

See MORTGAGE.
See REAL PROPERTY.
See TORT.

WATERS AND WATERCOURSES.

I. NAVIGABLE WATERS, 1112.
A. *In general,* 1112.
B. *Riparian owner,* 1113.
C. *Foreshore rights and access to sea,* 1114.
II. WATER ACTS, 1114.
A. *Rights under,* 1114.
1. In general, 1114.
2. How acquired and lost, 1114.
B. *Records and licenses under,* 1115.
C. *Board of investigation,* 1116.
D. *Officials under,* 1117.
1. Powers and duties of, 1117.
III. LIMITATION OF ACTION, 1118.

I. NAVIGABLE WATERS.

A. In General.

1. Ownership.]—The grant to the Federal Parliament of legislative power over the subject-matter of navigation and shipping in no way implies Federal ownership of the rivers, lakes, and sea-coast waters upon which ships may ply, or in regard to which there may exist rights of navigation, either on the part of the public or on the part of private owners. *Fort George Lumber Co.* v. *Grand Trunk Pacific Ry. Co.,* (1915) 24 D.L.R. 527; 9 W.W.R. 17; 32 W.L.R. 309.

2. Unlawful construction of bridge.]—The upper waters of the Fraser River being navigable the public have the unrestricted right of navigation thereon and a railway company which constructs a bridge across the river interfering with the free navigation thereof is liable in damages. *Ibid.*

3. Obstruction by railway company—When action arises.]—Sec. 306 of the Railway Act applies to an action for damages owing to the illegal obstruction of access to the sea by a railway company, and it must be brought within one year from the completion of the obstruction. *Westholme Lumber Co.* v. *Grand Trunk Pacific Ry. Co.,* (1918) 25 B.C.R. 343; 41 D.L.R. 42; (1918) 2 W.W.R. 551; 25 C.R.C. 136.

4. Interference with navigation.]—Neither the Navigable Waters Protection Act, R.S.C. 1906, cap. 115, as a whole, nor sec. 20 thereof in particular appears to be aimed at preventing the filling in by a riparian owner of the foreshore in front of his property. The filling in of False Creek did not create a nuisance or an illegal obstruction to navigation within the meaning of sec. 7 of the said Act. *Woods* v. *Opsal*, (1918) 1 W.W.R. 985.

B. Riparian Owner.

1. Obstruction of navigation.] — The owners of a warehouse and wharf on a river bank, enjoyed by them not in common with others navigating the stream but for their own personal use, which use is interfered with and rendered impossible of access by the unlawful erection of a low level bridge, thereby suffer a special injury as distinguished from the public at large and are entitled to maintain an action for the wrongful obstruction. In an action for unlawfully obstructing a private right of navigation, the losses in respect of a warehouse and wharf and the wood piled thereon for steamer use, as well as the loss of business and profits are recoverable as elements of damage; but a depreciation in the value of the steamer is too remote and not a special damage as distinguished from the damage occurring to the others of the public plying on such waters. *British Columbia Express Co.* v. *G.T.P.R.*, (1916) 27 D.L.R. 497; 10 W.W.R. 477, 583; 34 W.L.R. 361, 459; Revsd. 55 S.C.R. 328; 38 D.L.R. 29; (1918) 44 D.L.R. 1; (1919) 1 W.W.R. 497 (P.C.).

2. Interference with access to navigable waters.]—The title of a riparian owner whose land extends to the bank of an inland non-tidal, navigable, large body of fresh water, extends to the water's edge at its low water mark, and such owner has a right to protect his riparian privilege against trespass by the erection of boat houses on his land above such low water mark. *Kennedy* v. *Husband; Kennedy* v. *Ellison*, (1923) 1 D.L.R. 1069.

3. Boundary of lands abutting on navigable lake.]—Where the letters patent incorporating a British Columbia municipality describe one of its boundaries as the "shore" of a certain navigable lake, the limits of the municipality extend to low-water mark, although the lake in question is non-tidal water. *Rex* v. *Lakeside Orchards Limited*, (1929) 1 W.W.R. 870; 51 C.C.C. 182.

4. Altering natural flow of stream.]—An upper riparian owner is liable to a lower riparian owner for all damage done to the latter's land by reason of material dumped in the watercourse altering the natural flow thereof. *Salvas* v. *Bell*, (1927) 4 D.L.R. 1099.

C. Foreshore Rights and Access to Sea.

See CONSTITUTIONAL LAW and NUISANCE.

II. WATER ACTS.

A. Rights Under.

1. In General.

1. Municipal power plant — Tolls—Priority of.]—Tolls imposed by a municipality under the Water Act, 1914, cap. 81, sec. 151, are a charge on the lands upon which the commodity in respect of which such tolls are levied is used, and sec. 150 of that Act has no application to municipalities. Therefore, a municipality that has levied such tolls is a secured creditor in the subsequent bankruptcy of the customer. *Re Kamloops Copper Co. Ex P. City of Kamloops*, (1925) 35 B.C.R. 243; (1925) 3 D.L.R. 896; (1925) 2 W.W.R. 733.

2. How Acquired and Lost.

1. Indian reserve.]—The authority of the Chief Commissioner of Lands and Works and the approval of the Lieutenant-Governor in Council are conditions precedent to the power of the Assistant Commissioner of Lands to make a record of water for the benefit of Indians located in an Indian reserve and a record issued prior to the date of such approval will take precedence. *The Department of Indian Affairs* v. *Board of Investigation Under Water Act*, (1925) 36 B.C.R. 62.

2. Indian reserve — Water rights—Board of Investigation.] — The Board of Investigation under the Water Act, 1914, is without jurisdiction to grant a license to the Department of Indian Affairs to divert water for use on an Indian reserve. The powers conferred on the Board as to adjudicating on claims under sec. 288 of the Act do not extend to a claim not founded upon

a record or a right obtained pursuant to an Act or ordinance, and the parties are left in respect of their rights in the position which they occupied respectively at the date of the initiation of proceedings before the Board. *The Western Canada Ranching Co. Ltd.* v. *Department of Indian Affairs*, (1921) 30 B.C.R. 25; 60 D.L.R. 360; (1921) 2 W.W.R. 834.

B. Records and Licenses Under.

1. Water records appurtenant to land.]—The owner of a certain block of land obtained a water record authorizing the use of certain water for domestic and agricultural purposes on said land and constructed works including dam, pipe-line and other accessories for such purpose. Two of the plaintiffs subsequently became owners of parts of the lands, one by conveyance in pursuance of the Real Property Conveyance Act, and the other by foreclosure of a mortgage in pursuance of the Mortgages Statutory Form Act. In an action for a declaration that the dam, water-pipe and other works were appurtenances of the block of land and belonged to the owners of the various parcels of said block of land:—Held, that a conveyance in pursuance of the Real Property Conveyance Act or a mortgage in pursuance of the Mortgages Statutory Form Act includes not only the water privileges enjoyed in connection with the land but also a proportionate interest in the works used for diverting and conveying the water. *Dalton et al.* v. *The West Shore and Northern Land Company, Limited*, (1920) 28 B.C.R. 384; (1920) 2 W.W.R. 1022.

2. Hydraulic leases—Works in connection with use of water on.]—The plaintiff obtained an option on several mining leases. The ground had previously been worked by one H. who constructed a water system for washing the gravel but after operating for a time abandoned the property leaving certain chattels used in connection with the water system on the ground. Upon the plaintiff commencing operations it purchased the chattels from H.'s estate and used them until it in turn abandoned the properties. The owners took possession and refused to give up the chattels claiming that the water licenses authorizing the plaintiff to use water are together with all works constructed appurtenant to the lease and cannot be separated from the property:—Held, that the defendants have not satisfied the burden of proof which is upon them to shew that these chattels were in fact to be regarded as part of the works which are appurtenant to the leases. They are in fact parts of the mining machinery and appliances for recovering the gold, not of the water system, and are quite separate and distinct from those works and not attached in any way to them or to the soil. *Ennis Gold Mining Company, Limited* v. *Henderson et al.*, (1927) 39 B.C.R. 76.

3. Private Act—Limited area.]—Private Acts of Legislature incorporating companies with the object of generating and transmitting power within a limited radius do not deal with the matter of the Crown conferring upon the corporations thereby created the right to use water power in their respective areas, except to the extent that each of them clothes its creation with the capacity to make application for such right. The Water Clauses Consolidation Act, 1897, deals with the manner in which a corporation is to proceed to obtain the right to use water power and confers authority for the granting of such rights. Where in pursuance thereof the defendant Company obtained five conditional water licenses but under these licenses the use of water thereby granted is confined to such area as is within 50 miles of the City of Rossland the defendant Company has no right and is not compelled to supply power for use in mining operations outside this area. *Granby Consolidated Mining &c. Co.* v. *West Kootenay Power and Light Co.*, (1929) 41 B.C.R. 89; (1929) 2 D.L.R. 651; (1929) 2 W.W.R. 470; Affg. (1928) 40 B.C.R. 269; (1928) 4 D.L.R. 724; (1928) 3 W.W.R. 301.

4. Amendment—Point of diversion.]—In issuing a final water license the Comptroller of Water Rights has power to change a point of diversion but not to a point in a different body of water. The Board of Investigation may properly amend the final license by changing the point of diversion to its original position. *The Buonaparte Ranch, Ltd.* v. *Schneider*, (1928) 40 B.C.R. 1; (1928) 2 D.L.R. 993; (1928) 2 W.W.R. 106.

C. Board of Investigation.

1. Conditional license — Non-user — Extension of time by Board of Investigation.]—Where the Board of Investigation under the Water Act, 1914, makes an order allowing an appellant a certain period of time in which to make a beneficial use of

water for the purposes for which his license was granted, it has no power to cancel his record and license because he did not make beneficial use of the water for a period of time preceding the expiration of the period allowed him. *In re Florence Mining Co., Ltd.*, (1921) 29 B.C.R. 558; 60 D.L.R. 575.

2. Powers of.]—The Board of Investigation has power to readjust water privileges under the Water Act. A licensee, diverting water the right to which while formerly enjoyed by him was not included in the license issued to him by the Board of Investigation, is liable for any damages by reason of the diversion suffered by a licensee whose license issued under the authority of the Board includes the diverted waters. *Kenworthy* v. *Bishop*, (1925) 36 B.C.R. 38; (1925) 3 W.W.R. 183.

3. Fixing tolls.]—The Board of Investigation has power by order pursuant to sec. 55 of the Water Act Amendment Act, 1925, cap. 61, to increase water tolls although the same were previously fixed by private agreement between the holders of the water record and the purchaser of the land affected. *Corporation of District of Penticton* v. *Sutherland*, (1928) 40 B.C.R. 8; (1928) 2 W.W.R. 145.

D. Officials Under.

1. Powers and Duties of.

Comptroller — Exercise of powers.]—Upon an application for a license to transfer a water right under sec. 13 (3) of the Water Act, B.C. Stats. 1914, cap. 81, the Comptroller of Water Rights has the same power as he has under secs. 77 and 78 to refuse to inquire further into objections filed with him within 30 days after publication of the notice of the application under Part V. relating to the acquisition of licenses in general, the procedure to be followed being directed mutatis mutandis by subsec. (3) in applications thereunder. The Court has no jurisdiction to interfere with the unlawful exercise of the comptroller's powers, the remedy being an appeal to the Minister of Lands under sec. 51 (2) of said Act. *Rucker* v. *Wilson*, (1923) 32 B.C.R. 401; (1923) 3 D.L.R. 433; (1923) 3 W.W.R. 130.

III. LIMITATION OF ACTION.

1. Foreshore — Obstruction of access to.]—Under the provisions of the Railway Act, an action for damages sustained by reason of the illegal obstruction of access to navigable waters by a railway company must be brought within one year from the completion of the obstruction. *Westholme Lumber Co., Ltd.* v. *Grand Trunk Pac. Ry. Co.*, (1916) 23 B.C.R. 323; 41 D.L.R. 42; (1917) 1 W.W.R. 170; Affd. (1918) 25 B.C.R. 343; 41 D.L.R. 42; (1918) 2 W.W.R. 551.

2. Power company — Negligence in construction works.] — A company constructing a transmission line under authority of the Water Act is entitled to the benefit of sec. 130 of the Water Act, R.S.B.C. 1924, cap. 271, and where the company having no leave or license from the owner to enter upon certain land was constructing a pole line thereon and its employees were negligent in their conduct of the fires used in clearing the right of way for the pole line, it is entitled to the benefit of sec. 130. *Vogel* v. *Vancouver Island Power Co.*, (1926) 37 B.C.R. 194; (1926) 2 D.L.R. 969.

See CONSTITUTIONAL LAW.

See MINES AND MINERALS.

See NUISANCE.

See RAILWAYS.

WILL.

I. TESTAMENTARY CAPACITY, 1119.
A. Undue influence, 1119.
B. Mental condition of testator, 1119.
II. HOLOGRAPH AND NUNCUPATIVE WILLS, 1119.
III. REVOCATION, 1120.
IV. CONSTRUCTION, 1121.
A. In general, 1121.
B. Charitable bequests, 1122.
C. Devisees and legatees, 1123.
1. Wife and children, 1123.
2. Intended wife, 1125.
D. Vested and contingent interests, 1125.
V. SPECIFIC LEGACIES, 1128.
VI. AGREEMENTS TO LEAVE PROPERTY BY WILL, 1130.
VII. ADVANCEMENT, 1132.
VIII. CONDITIONS, 1132.
IX. CHARGE OF LEGACY, 1133.

X. Cumulative Legacies, 1133.
XI. Testator's Family Maintenance Act, 1133.
XII. Trustees and Executors, 1136.

I. Testamentary Capacity.

A. *Undue Influence.*

Burden of proof.]—When it is proved that a will has been properly executed by a person of competent understanding, and apparently a free agent, the burden of proving undue influence rests upon the party alleging this. It must be shewn that a person having the power to overbear the will of the testator, duly exercised such power, and by means of the same, obtained the will. *Standard Trusts Co.* v. *Pulice,* (1922) 70 D.L.R. 145.

B. *Mental Condition of Testator.*

Daily contact of observers.] — In an action for probate of a will where the question at issue is the mental condition of the testator at the time he made his will, it is for the Court to draw inferences from the evidence, but where on the whole the testimony of the witnesses is not impugned, a Court of Appeal is free to draw its own inferences. The Court is not bound to accept the opinion of experts when it is opposed to testimony within the knowledge of observers daily coming in contact with the testator: —Held, that on the evidence the deceased was on the date of the will competent to make it. *Crabbe* v. *Shields,* (1925) 36 B.C.R. 89; (1925) 3 D.L.R. 1069; (1925) 2 W.W.R. 701.

II. Holograph and Nuncupative Wills.

1. Holograph will — Probate in Scotland.]—The testatrix, who died in Scotland, left all her estate heritable and movable by a holograph will to her sister and appointed her executrix. The will was probated in Scotland and pursuant to sec. 4 of the Probates Recognition Act was resealed under the seal of the Supreme Court in British Columbia. An application by the executrix to have certain lands in British Columbia registered in her name was granted. *In re Land Registry Act and Marjory Clazy, Deceased,* (1928) 40 B.C.R. 102; (1928) 2 D.L.R. 971; (1928) 1 W.W.R. 974.

2. Foreign holograph will—Revocation by.]—Where a person while domiciled in British Columbia and owning realty therein makes a will valid as to realty in that Province, and he acquires a foreign domicil and makes a holograph will (invalid as to realty in British Columbia) revoking all previous wills and disposing of both realty and personalty, and dies domiciled in said foreign country, the British Columbia will remains effective as to the British Columbia realty. *In re Estate of Thomas Bowhill Colville, Deceased,* (1931) 44 B.C.R. 331; (1931) 3 W.W.R. 26; (1932) 1 D.L.R. 47.

3. Nuncupative will.]—Letters of a soldier on active service containing (inter alia) the following: "I have also made out a will for which I am leaving all and everything to you but I will send it on to you from England as it has got to go through the proper channels at the War Office in England":—Held, to be a nuncupative will and not a mere expression of intention. *Smith* v. *Hubbard,* (1917) 1 W.W.R. 1237.

III. Revocation.

1. Under power of appointment.]—The words "child or children" primarily mean issue in the first generation only, sons and daughters, to the exclusion of grandchildren or other remote descendants. A testatrix had, under the husband's will, power of appointment in what proportions a moiety of her husband's estate should be divided amongst their children. By her will she declared it should be divided between them share and share alike. By a codicil she revoked said appointment, and after declaring that all the children but one (J.) should receive the same equal portions as had been appointed to them in her will, the share that J. was to have received was directed to be held by the trustees upon trust to pay the income to J. for life, and after his death the income to his children:—Held, that under the husband's will the testatrix had no power to vest any interest in her grandchildren, but as the revocation by codicil of the appointment by will had been made only for the purpose of providing what the appointor considered a better provision for the benefit of the appointee and his family, and the appointment made under the codicil having failed, the original appointment under the will remained effective. *In re Pemberton and Lewis,* (1917) 25 B.C.R. 118; (1917) 3 W.W.R. 791.

2. By foreign holograph will.]—Sec. 14A of the Wills Act Amendment Act, 1914, cap. 47, fixes a time as to when the validity of a will of the class referred to therein is determined, viz., when it was made. Therefore, if a British subject, when outside the Province, makes a will which meets the requirements of said section, its validity is not destroyed by the fact that the testator afterwards ceases to be a British subject. Where a person while domiciled in British Columbia and owning realty therein makes a will valid as to realty in that Province, and he acquires a foreign domicile and makes a holograph will (invalid as to realty in British Columbia) revoking all previous wills and disposing of both realty and personalty, and dies domiciled in said foreign country, the British Columbia will remains effective as to the British Columbia realty. Where a will has been declared by the testator to be revoked for the purpose of making a fresh will, but no fresh will is made or if made is not effectual, the original will is not revoked. *In re Estate of Thomas Bowhill Colville, Deceased,* (1931) 44 B.C.R. 331; (1931) 3 W.W.R. 26; (1932) 1 D.L.R. 47.

IV. Construction.

A. In General.

1. Presumption against intestacy.]—In construing a will there is a presumption against a testatrix dying intestate; all the surrounding circumstances must be considered, including the terms of a former will which had been revoked by the latter, in arriving at the testatrix's intentions:—Held, in the circumstances of the case under review that it was the intention of the testatrix that legacies were to be paid out of the real estate which formed substantially the whole of the assets of the estate. *In re Estate of Laura S. Miller, Deceased,* (1916) 22 B.C.R. 531; 34 W.L.R. 620; 10 W.W.R. 645.

2. Codicil inconsistent with will—Specific devises—Surrounding circumstances.]—The testatrix bequeathed her house and furniture to her daughter G. and the residue of her estate to two executors with directions to carry on at their discretion a certain business of which the testatrix was a two-thirds owner, and to divide her interest in the business one-third thereof to her grandson W. and the balance thereof to her daughter G., followed by a provision as to the division of certain company shares and a residuary devise in favour of G. Subsequently the testatrix conveyed by deed to G. her residence and furniture and gave her certain sums of money. Later by codicil the testatrix revoked the bequest to W. of a portion of the business and charged her interest in the business with the sum of $1,000 in favour of another daughter, and further provided a gift of the whole of the remaining interest in the business to her son F. and grandson W. in equal shares:—Held, that by codicil the bequest to W. of one-third share of the testatrix's interest in the business was revoked and in lieu thereof W. and F. were given her entire interest in the business to the exclusion of G. subject only to the bequest of $1,000; notwithstanding the fact that this construction might result in revoking or rendering impossible of performance other dispositions in the original will not so treated in the codicil, the Court is entitled to consider the surrounding circumstances at the time of the execution of the codicil in case of any ambiguity which is thereby removed; and the gift to F. and W. was a specific legacy subject to the right of the legatee of $1,000, and further the beneficiaries named in the will other than F. and W. had no right to intervene or seek any redress in connection with the business. *Nimmo* v. *Adams,* (1922) 30 B.C.R. 527; (1922) 1 W.W.R. 1284.

3. Application to Court for advice.]—Sec. 79 of the Trustee Act is not intended to provide for the decision of any intricate questions as to the construction of the terms of a will. *In re Dougan Estate,* (1921) 30 B.C.R. 334; (1922) 1 W.W.R. 1105.

B. Charitable Bequests.

1. Bequest for charitable or benevolent institutions.]—The following bequest "And whereas I am desirous of applying part of my trust estate for charitable purposes in the Nicola Valley, British Columbia, now I hereby will and declare that my trustees shall have power in their absolute discretion to pay out any sum or sums of money out of my trust estate, not exceeding in the whole the sum of one hundred thousand dollars ($100,000) in aid of each or any of such charitable or benevolent institutions situated in the Nicola Valley as my said trustees shall consider to be deserving of

support" held to be void as not confined to charity and as otherwise too uncertain for enforcement. *In re Greaves*, (1917) 1 W.W.R. 997.

2. Construction — Charitable gift — Words ejusdem generis.]—The main clause in a testator's will was as follows: "I give devise and bequeath to Mary Ann Hogan, Knowlton, Province of Quebec, rent or benefit that may accrue from my real property on David Street known as lot 5, block D, Work Estate during her lifetime, then for the citizens of Victoria British Columbia to have it for some good public purpose. Such as one of these to build an emergency hospital, woman's home or park with urinary on it and entail. In trust to the City of Victoria, B.C. so that it will be put to some good public purpose and not to any combination of thieves":—Held, that the "good public purpose" is indicated by the words "emergency hospital, woman's home and park with urinary" so that there is nothing uncertain as to the character of the objects of the gift. Held, further, that even if there is any concern as to the land not being fit for any of the purposes named, it is fit for some of them or for purposes ejusdem generis with the charities named. *Cox* v. *Hogan and the Corporation of the City of Victoria*, (1924) 35 B.C.R. 286.

3. Uncertainty.]—A testator disposed of his residuary estate in the following words: "The balance of the estate I leave entirely in the hands of my executor to aid and help any worthy cause or causes as he shall think fit":—Held, that the words are too vague and uncertain to create a valid charitable trust, nor will they sustain a finding that the executor should take the residue beneficially. *In re Robb, Deceased. Planta and Planta* v. *Greenshields and Reifel*, (1931) 43 B.C.R. 439; (1931) 2 D.L.R. 189; (1931) 1 W.W.R. 401.

C. Devisees and Legatees.

1. Wife and Children.

1. Polygamy.]—A domiciled Chinaman contracted two lawful marriages in China to Chinese women of Chinese domicile. He had two business establishments, one in China and one in British Columbia and travelled back and forward between the two countries in his business interests but always retained his Chinese domicile. He died in Victoria, British Columbia, in September, 1910, and by his will bequeathed an annuity of $1,000 to each of his wives:—Held, that both women should be recognized as wives of deceased, and they are entitled to the benefits extended to wives under the Succession Duty Act. *In re Lee Cheong, Deceased. Lee Sheck Yew* v. *The Attorney-General for the Province of British Columbia*, (1923) 33 B.C.R. 109; (1924) 1 D.L.R. 1166; (1924) 1 W.W.R. 753.

2. Trust for benefit of wife and children — Discretion of executors.] — The testator devised certain real estate and bequeathed all his personal property to his wife. The balance of his estate he devised to his executors upon trust to dispose of same and after payment of debts to invest the proceeds in public stocks, bonds, shares or securities, and to pay the income, "one-half thereof to my wife during her life in manner hereinafter described," and later the will proceeds: "The money hereinbefore directed to be paid to my wife shall be paid by my executors only and when they are satisfied the money is required for her maintenance and support, and I give them absolute discretion as to the times when payments shall be made and these payments may be made direct to her or to others for her support or for necessaries of life supplied or to be supplied to her as my executors shall seem fit." The testator died in March, 1909, and the executors made monthly payments either to or on behalf of the wife such as in their discretion they considered she required, and when these proceedings were commenced in June, 1925, there was a surplus of $7,000 on hand from one-half of the income of the estate held by the executors for the wife:—Held, that the widow is entitled only to such payments as the executors in their discretion are satisfied is required for her maintenance and support, and after such payments any balance of one-half of the income of the estate held for the widow shall fall into the estate. Held, further, that the costs of these proceedings for all parties are to be paid out of the estate, the executors being entitled to costs as between party and party. *In re Estate of Hugh Magee, Deceased*, (1925) 36 B.C.R. 195.

3. Children.]—The words "child or children" primarily mean issue in the first generation only, sons and daughters, to the exclusion of grandchildren or other remote descendants. *In re Pemberton and Lewis*, (1917) 25 B.C.R. 118; (1917) 3 W.W.R. 791.

4. Adopted child.]—A testator who died domiciled in British Columbia, by will, made in British Columbia, bequeathed the residue of his estate, consisting of personal property, to his sister Annie who was domiciled in Massachusetts, U.S.A., "or her heirs." Annie died intestate during the testator's lifetime but she and her husband had adopted a daughter under the law of Massachusetts, who survived. The evidence disclosed that under the laws of Massachusetts "an adopted child is an heir of the adopting parents and has the rights and status of a child born in lawful wedlock":—Held, that the question is one of status, that the adopted daughter has by the law of Massachusetts the requisite status of heir or next of kin and is entitled to the residuary estate. *Purcell* v. *Hendrick*, (1925) 35 B.C.R. 516; (1925) 3 D.L.R. 854; (1925) 2 W.W.R. 689.

2. Intended Wife.

In Contemplation of Marriage.]—By his will a testator after providing for certain bequests left the residue of his estate to his trustees to be applied "for the support and maintenance of my beloved fiancee":—Held, that these words do not constitute a declaration that the will is made in contemplation of marriage according to the exception contained in sec. 15 of the Wills Act as amended by sec. 3 of the Wills Act Amendment Act, 1924, cap. 47. The last mentioned enactment is not retroactive in its effect and applies only to wills made after it came into force. *In re Sedgwick Estate*, (1931) 1 W.W.R. 837.

D. Vested and Contingent Interests.

1. Life estate—Power to grant lease.]—A testator bequeathed to his wife "all my real and personal property as long as she remains my widow. At her death she can divide it as she thinks proper among my children." Upon probate being granted she gave a twenty-one year lease of a ranch property which was part of the estate:—Held, that as she had a life estate subject to its being divested should she remarry and not having remarried she had such an estate as entitled her to give the lease under the Settled Estates Act. *Palmer* v. *Palmer*, (1919) 27 B.C.R. 401; (1919) 3 W.W.R. 1028.

2. Death of beneficiary before distribution.]—A testator provided in his will that his trustees, after paying his debts, should first set aside a sufficient portion of the trust premises to produce an income of not less than $500 per annum to be paid to his parents, and after such portion had been set aside that one-fourth of the balance should be paid to each of his two daughters. He then directed that the trustees pay his wife the balance remaining after all the foregoing bequests had been made, and in the event of his wife dying before his decease, or before receiving such bequest, then said balance was to be paid to his said daughters. His wife died more than a year after his decease without having received the bequest and before the trustees had set aside a portion of the trust premises to provide the annual income for the parents:—Held, that the wife would become entitled to receive the share mentioned in the bequest when the property required to be set aside to produce the annuity was or ought to have been set aside; that a reasonable time is intended to be allowed trustees to segregate the property to be set aside, and in applying the rule which Courts of Equity have always applied in such cases, the reasonable time is one year. As the segregation should therefore have been made in the lifetime of the wife, her share in the estate became vested in her although not actually received, and upon her death became the property of her personal representatives. *Hamilton and Abbott* v. *Hart, Tripp, and The Royal Trust Company*, (1919) 27 B.C.R. 101; 47 D.L.R. 231; (1919) 2 W.W.R. 164.

3. Devise to wife—Children's interests—Contigent on survival.]—A testator devised his estate to his wife during her life directing her to maintain, educate, and support their children out of the annual income. He then provided that after her decease his estate be devised to his brother "upon trust to pay and divide the same between and amongst such of my children as shall be living at the time of my decease in equal shares, and I direct that the share of any such child or children dying in the lifetime of my said wife leaving lawful issue him, her or them surviving shall enure to and go to the benefit of such issue and if more than one in equal shares so that such issue shall take only the share to which his, her or their parent would have taken if living at the time of the decease of my said wife":—Held, that the interest of the children does not vest in the lifetime of the widow but as to each of them is contingent upon him

or her surviving the mother. *In re Estate of J. D. Helmcken, Deceased. Helmcken* v. *Bullen*, (1924) 34 B.C.R. 184; (1924) 3 W.W.R. 172.

4. Codicil—Specific devise subject to annuity—Time of vesting.] — A testator devised the residue of his estate real and personal to trustees upon trust to pay his wife an annuity and declared that on her death annuities should be paid to his son and daughter, and later by a codicil he devised to his son "after the death of my said wife" certain real property, in addition to said annuity but directed that if at his wife's death, said real property should be of greater value than $30,000 it should be sold by the trustees and out of the proceeds $30,000 should be paid to his son in cash and the balance if any should form part of the general estate:—Held, that the said interest vested in the son at the death of the testator, the enjoyment thereof being postponed until the wife's death. *The Yorkshire & Canadian Trust Limited* v. *Morton et al.*, (1926) 38 B.C.R. 10; (1926) 4 D.L.R. 887; (1926) 3 W.W.R. 370.

5. Direction—Whether amounting to obligation.]—Where a testator by his will leaves all his property to his wife expressing a wish that the latter "being free to use her own judgment" would dispose of the estate in the manner indicated by the will there is no imperative direction amounting to an obligation and creating a precatory trust and the will should be interpreted to mean that the testator gave his property to his wife absolutely. *In re Estate of George Keyes, Deceased. Keyes* v. *Grant*, (1928) 40 B.C.R. 19; (1928) 3 D.L.R. 558; (1928) 2 W.W.R. 295.

6. Direction to divide at future time.] —A testator's will amongst other bequests directed that his trustee should stand possessed of $10,000 in trust, as to one moiety thereof for the sole and separate use of a daughter Aurelia, and as to the other moiety for a daughter Isabella, and after the decease of said daughters or either of them the trustee to stand possessed of the share of the daughter so dying in trust to be divided amongst all the children of said daughter in equal shares on their respectively attaining the age of twenty-one years. The moiety held in trust for Isabella was fully and finally distributed. Aurelia died in January, 1931. She had four children, Isabella, Annie, John and Flora. Of these Isabella only survived her mother. Flora died in infancy and by will John left all his estate to his sister Isabella. Annie was survived by two children, Cecil and Pearl Baynton. On application for disposition of the balance of the trust fund:—Held, that there are no words of present gift in favour of Annie's children to be found in the will and no language to interpret which can, consistently with the will, be made effective to vest any portion of the trust fund in them. The granddaughter Isabella therefore becomes entitled to all the trust fund still on hand awaiting distribution. *In re Estate of J. M. Yale, Deceased*, (1931) 44 B.C.R. 196.

7. Limitation as to occupation.]—A testator by will dated the 10th of June, 1913, bequeathed to B. and M. in equal shares certain property in Victoria. The will also contained the words "B. to have full use of house and land to reside in or let as he thinks fit until the year 1917, when the property must be sold at latest or earlier if the amount of not less than $8,000 can be realized. Testator was killed on May 7th, 1915. On appeal from the refusal of the Registrar-General of Titles to register B. and M. as the absolute owners of the property: —Held, that the provision as to the use of the house and land neither contracts nor limits the previous portion of the will and the applicants should be registered as absolute owners. *Re Land Registry Act and Blanchard and Morgan*, (1919) 26 B.C.R. 447; 44 D.L.R. 728; (1919) 1 W.W.R. 311.

V. Specific Legacies.

1. Share not disposed of — Intestacy.] —A testator devised a one-sixth share of his estate to each of five nephews and nieces and made no disposition of the remaining one-sixth share:—Held, that as there is nothing in the will to shew that it was the intention of the testator to dispose of the whole of his estate, there is an intestacy as to the one-sixth share. *In re Estate of W. G. Brown*, (1920) 28 B.C.R. 1; (1920) 2 W.W.R. 226.

2. Annuity payable by trustees.]—In the case of an annuity payable by trustees named, being the same persons as the executors, and direction in the will that the necessary capital be set aside to produce, inter alia, the annuity in question, and that until such capital is available the annuity be paid out of general income, though such

capital, not yet being available, has not been set aside, the annuitant is entitled to be paid the annuity without the right of set-off because of the existence of a demand mortgage debt which was owing by the annuitant to the testator. *In re Estate of W. L. Tait, Deceased,* (1921) 30 B.C.R. 363; (1922) 1 W.W.R. 73.

3. Residuary bequest to charitable societies.]—By codicil a testator left his residuary estate to "the orphanages of the City of Vancouver in proportion to the number of children under their care respectively at the time of such distribution." On application for directions:—Held, that the intention was to provide assistance to those institutions within the city by whatever name called which on the date of distribution were providing homes for destitute, abandoned, neglected or orphaned children. It was not the testator's intention to give the word "orphanage" the narrower construction, nor was he concerned with charters of incorporation or statutory powers, but with the work actually carried on among children who were intended to be the objects of his bounty, nor was he concerned with the question of whether an institute carried on other relief or rescue work in addition to its work among children. Held, further, that a charitable institution whose work is entirely in New Westminster, helpful as it is to Vancouver, does not come within "orphanage of the City of Vancouver," and its claim must be denied. *Harris* v. *The Alexandra Non-Sectarian Orphanage and Children's Home of Vancouver et al.,* (1923) 32 B.C.R. 25; (1923) 1 D.L.R. 1153; (1923) 1 W.W.R. 624.

4. Legacies subject to succession duty.]—A testator by his will gave one niece $20,000 and to another $10,000 and directed his trustees "to pay all succession duty or other taxes due under this my will out of my said estate my intention being that the legacies hereunder bequeathed are to be free from all succession or other duties." By codicil he ratified and confirmed the will "in every respect save in so far as any part is inconsistent with this codicil," and bequeathed to each of the said nieces $25,000. In former proceedings it had been held that the legacies were cumulative (31 B.C.R. 321). On the question of whether the legacies under the codicil were free of succession duty:—Held, that said legacies were not to be paid free of succession duty. Where there is a direction that legacies generally shall be paid free of duty, subsequent legacies given by a codicil will take the like benefit but the words "legacies hereunder bequeathed" indicated an intention that the legacies to be paid free of duty were confined to those bequeathed by the particular instrument, and there was nothing in the codicil that indicated an intention that the additional legacies should also be free of succession duty. *Muriel Edna Fraser and Evelyn Gladys Henderson* v. *The Montreal Trust Company and Colin Macpherson Henderson,* (1923) 32 B.C.R. 546; (1923) 4 D.L.R. 745; (1923) 3 W.W.R. 808.

VI. Agreements to Leave Property by Will.

1. Bequest to wife to fulfil separation agreement.]—A separation deed made subsequently to the husband's will, provided for an annuity of $3,000 for his wife during her life and in the event of her surviving him a sum of $30,000 to be paid forthwith by his executors. He further covenanted that in order to further secure the payment of said sum he would by his last will specifically bequeath to his wife and charge upon his lands $30,000. This sum was bequeathed to her and charged upon his lands by the then existing will, which remained unrevoked at the time of his death:—Held, that the covenant in the separation deed had been satisfied by the will and the sum referred to in each instrument applied to the same fund. *Rismuller* v. *Balcom,* (1917) 24 B.C.R. 353; (1917) 3 W.W.R. 535.

2. Separation agreement.]—A separation agreement provided for payment of a certain sum per annum by her husband to the wife for the "support and otherwise" of their child, until it should become self-supporting or attain majority, or leave the custody of the wife; the wife agreeing to accept said sum in full settlement of all claims which she then had or might thereafter have for the support and otherwise of the child. The husband's will executed four years later, disposed of all his property and directed his trustees to pay the income of the residue of his estate "towards the maintenance and education of" his child "during his minority":— Held, that in the separation agreement the husband made special provision for the "support and otherwise" of the child. With full knowledge of this and without making any reservation, he disposes of all his property by will, directing

his trustees to set apart certain income for the maintenance and education of the same child in a manner similar to the provision made by him during his lifetime. The intention to guard against a double provision is manifest in the two instruments read together. *Ross* v. *Fossum*, (1930) 42 B.C.R. 272; (1930) 2 D.L.R. 42; (1930) 1 W.W.R. 375.

3. Enforced against devisee.]—A wife having given her husband a quit claim deed to certain property, verbal evidence may be given to shew the terms of an agreement between the husband and wife which induced the wife to give the quit claim deed, and to shew that the husband was to give the property to his daughter by will. The husband having in violation of the agreement willed the property to a third person, but having amply provided for the daughter by devising other properties to her, the doctrine of election arises, and the daughter, if she wishes to retain the specific property devised to the third person, must compensate the latter out of the other properties devised to her. Where it is impossible to enforce a judgment ordering compensation to be made because the trustee has not been made a party to the action, the Court will dismiss an action for specific performance of the agreement. *Stoddard* v. *Williams*, (1923) 32 B.C.R. 43; (1923) 1 D.L.R. 1113; (1923) 1 W.W.R. 688.

4. Ante-nuptial agreement—Will made in accordance with.]—Where a husband transfers property to his wife in pursuance of an ante-nuptial agreement made in consideration of marriage and the wife pursuant to the same agreement executes a will devising the property to her husband, the will is irrevocable and the agreement will be enforced notwithstanding a subsequent will otherwise disposing of the property, and the Statute of Frauds will not apply. *Buscombe* v. *Holden*, (1924) 34 B.C.R. 289; (1924) 4 D.L.R. 744; (1925) 1 W.W.R. 47.

5. Agreement to leave property by will.]—A contract whereby the defendant agreed to leave his property by his will to the plaintiff, in consideration of the plaintiff assisting him and rendering necessary services on the defendant's farm, and in pursuance whereof the defendant made such a will and delivered it to the plaintiff, will not entitle the plaintiff to claim on a quantum meruit, where the defendant orders the plaintiff off the farm, as the action of the defendant does not amount to repudiation of the contract. *Olson* v. *Bieterilla*, (1920) 28 B.C.R. 95; (1920) 1 W.W.R. 1008.

VII. Advancement.

Gift.]—Where a husband by his will gives an immediate legacy and an additional annuity to his wife, the executors of the will are at liberty to recover against the wife the amount of instalments paid by the husband on the wife's purchase of property and the amount of mortgage moneys and interest thereon assigned to the husband and secured upon the wife's land. *Roper* v. *Hull and The Royal Trust Company*, (1921) 30 B.C.R. 405.

VIII. Conditions.

1. Agreement by donees — Condition precedent—Donees incapable of contracting—Rule against perpetuity.]—Under a testator's will, after payment of debts and funeral expenses, the balance of the estate was to be divided into two equal shares, one share to be turned over to Westminster Hall, Vancouver, upon said Westminster Hall entering into an agreement with her trustees to properly care for and keep in good condition for all time her burial ground; the other share to be paid to the Guelph Presbytery of the Presbyterian church at Guelph, Ontario, upon entering into a like agreement as to the family burying ground of her father:—Held, that in each case it is a condition precedent to the vesting of the bequest that the intended beneficiary enter into the agreement mentioned but as there is want of capacity in both donees to execute the agreements required by the will, the bequests are void and as there is no residuary clause in the will into which these bequests would fall there is an intestacy. Held, further, that as the sums bequeathed are intended to provide funds in perpetuity so far as required to keep up the burial plots mentioned, such gifts are not charitable and as they severally involve a perpetuity they are void. *In re Laing Estate*, (1927) 38 B.C.R. 449; (1927) 1 W.W.R. 699.

2. Gift chargeable with testamentary expenses.]—Where it is clearly expressed in the testator's will that the costs of executing the trusts shall be shared proportionately by the beneficiaries, it is the duty of the Court to carry out that intention,

and the costs are not to be paid out of residue. *Standard Trusts Co.* v. *Pulice*, (1924) 33 B.C.R. 250; (1924) 1 D.L.R. 985; (1924) 3 W.W.R. 771.

IX. CHARGE OF LEGACY.

Annuity—Interest on arrears.]—A testator covenanted to secure an annuity of £300, payable after his death to his niece, in consideration of her giving up her business and devoting herself to him during his lifetime. Due provision was made in the testator's will for payment and the judgment in an action by the executors for probate charged the residuary estate with payment of the annuity. Payments of the annuity fell in arrears:—Held, that testator's niece was *entitled to 5 per cent. interest on all* deferred payments from the date of the judgment. *In re Estate of Sam Brighouse, Deceased*, (1923) 33 B.C.R. 191; (1924) 1 D.L.R. 150; (1924) 1 W.W.R. 55.

X. CUMULATIVE LEGACIES.

Will and codicil.]—Where two gifts are made, one by the will and one by a codicil, they are cumulative gifts unless there be found in the codicil or in the circumstances of the parties evidence of a contrary intention. *In re Henderson, Deceased*, (1922) 31 B.C.R. 321; (1923) S.C.R. 23; (1923) 1 D.L.R. 636; (1923) 1 W.W.R. 391.

XI. TESTATOR'S FAMILY MAINTENANCE ACT.

1. Insufficient provision — Principles upon which relief granted.]—There having been inadequate provision for her maintenance under her husband's will, a widow applied for relief under the Testator's Family Maintenance Act, and it was held that the Court in exercising its discretion should consider: (1) the station in life of the parties; (2) age, health and general circumstances of the wife; (3) the testator's means at the time of his death; and (4) property or means of the wife in her own right. The Court should consider whether or not, having regard to all surrounding circumstances, the testator in dividing his property has been guilty of manifest breach of moral duty owed to his wife and if there has been a breach make such an order as appears to be sufficient, but not more than sufficient to repair it. Held, further, that there should be an investment of sufficient moneys that are in the hands of the trustees to create a certain net income which should be paid the widow quarterly for her life and that if this be accepted it should be in lieu of her benefits under the will. *In re Livingston, Deceased*, (1922) 31 B.C.R. 468; (1923) 1 D.L.R. 1167; (1923) 1 W.W.R. 628.

2. Principles upon which relief granted.]—On an application by a widow for relief under the Testator's Family Maintenance Act, it is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband owes towards his wife, and if it be found that the testator has been guilty of a breach of such moral duty, it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it. A husband conveyed his house to his wife shortly before he died and by will left her all his household effects and directed his trustees to invest $75,000 and pay her the net income therefrom. She also received $2,000 from insurance upon her husband's life. She had one son (step-son of deceased) attending a university. On an application for relief under the above mentioned Act it was held that although the estate was large enough to make a further allowance to the petitioner, in the circumstances adequate provision was made by the testator for the proper maintenance and support of his wife. *In re Estate of Hugh Ferguson, Deceased*, (1929) 41 B.C.R. 269; (1929) 2 W.W.R. 372; (1929) 4 D.L.R. 208.

3. Insufficient provision.]—If, on an application under the Testator's Family Maintenance Act, the Court is of opinion that a will does not adequately provide for the maintenance of the testator's widow, a different division of the estate may be ordered notwithstanding the fact that under the will she would have received as much as she would have been entitled to if the testator had died intestate. *In re Schmalz* (1927) 38 B.C.R. 264; (1927) 1 D.L.R. 1113; (1927) 1 W.W.R. 408.

4. No provision for wife's maintenance.]—A husband's estate at the time of his death was valued at slightly over $8,000. By his last will he left his wife $10 and his household furniture valued at about $250. The balance of the estate he left to a

nephew. Upon the application of the widow for relief under the Testator's Family Maintenance Act it was held that she was entitled to the whole estate. *Brighten* v. *Smith*, (1926) 37 B.C.R. 518.

5. No provision for wife.]—A deceased husband bequeathed to a stranger all his property which consisted of liquid assets of the net value of $13,699.37 and the wife petitioned for relief under the Testator's Family Maintenance Act, B.C. Stats. 1920, cap. 94. It was ordered that sufficient money be invested by the executor and trustee under the testator's will in securities authorized by law for trust funds to create a net income of $550 per annum payable to the wife quarterly. *In re Hall, Deceased*, (1923) 33 B.C.R. 241.

6. Widower.]—There is no difference between the application of a widower and that of a widow under the provisions of the Testator's Family Maintenance Act, for an adequate provision out of the estate in question. *In re Stigings, Deceased*, (1924) 34 B.C.R. 347.

7. Estate of small value—Circumstances of applicant.]—Where a testator by his will left an estate, the net value whereof was about $2,400 or less, to his housekeeper in consideration of her services and her agreement that she and her niece would live with the testator and care for him until death. The housekeeper performed the agreement on her part and cared for the testator for one year and nine months. The daughter of the deceased who was in receipt of a salary of $150 per month and who after keeping house for her father for a short time had left him because of his improper conduct towards her, applied by petition for relief under the Testator's Family Maintenance Act:—Held, that in the circumstances the petition should be refused. *In re Testator's Family Maintenance Act and Estate of F. Elworthy, Deceased*, (1928) 39 B.C.R. 474; (1928) 2 D.L.R. 421; (1928) 1 W.W.R. 737.

8. Whole estate bequeathed to widow —Petition by married daughter — Interpretation of Act.]—Under the Testator's Family Maintenance Act (R.S.B.C. 1924, cap. 256) the provision which the Court is authorized to make in the circumstances stated in sec. 3, is "such provision as the Court thinks adequate, just and equitable." The conditions upon which this authority rests are that the person whose estate is in question has died leaving a will, and has not made, by that will, in the opinion of the judge, adequate provision for the "proper maintenance and support" of the wife, husband or children, as the case may be, on whose behalf the application is made. What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the Court, on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view) consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the Court comes to the decision that adequate provision has not been made, then the Court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account. Applying these principles to the circumstances of this case, where the only daughter of the deceased brought an application under the Act for an order directed against his second wife, sole beneficiary under the will:—Held, that the trial judge was right in deciding that the widow should be called upon to forego part of her annual income in order to make some provision for the applicant. *McDermott* v. *Walker*, (1931) S.C.R. 94; (1931) 1 D.L.R. 662. *In re Testator's Family Maintenance Act and Hoffman*, (1931) 43 B.C.R. 463; (1931) 1 W.W.R. 293.

9. Alien — Adopted child.]—An alien non-resident adopted child is entitled to the benefit of the provisions of the Testator's Family Maintenance Act if the adoption complies with the essential requirements of the statute in force in the country where the adoption takes place. The rights and liabilities pertaining to an adoption are based upon the law of the locality in which it occurs and such rights are not lost by change of residence. *In re Mary Ann McAdam*, (1925) 35 B.C.R. 547; (1925) 4 D.L.R. 33; (1925) 2 W.W.R. 593.

XII. Trustees and Executors.

1. Appointment of by will—Discretion of Court.]—It is within the discretion of

the Court to override the express provision in a will naming the executors, but it should be exercised very sparingly. Probate will be granted an alien executor who comes within the jurisdiction and takes the executor's oath. *Smithson* v. *Smithson*, (1915) 22 B.C.R. 326; 25 D.L.R. 745; 33 W.L.R. 229; 9 W.W.R. 501.

2. Investments by.]—The setting out in a will of specific modes of investment does not operate to prevent the executors investing trust funds in the securities referred to in section 12 of the Trustee Act. *In re George McCormick, Deceased*, (1915) 22 B.C.R. 327; 25 D.L.R. 735; 33 W.L.R. 190; 9 W.W.R. 199.

3. Trust.]—A testator devised all his real and personal property to trustees "upon trust to sell and convert into money such real and personal estate." The trustees sold an undivided three-eighths part or share of a block of the land so devised:—Held, that the power given the trustees did not authorize the sale of an undivided interest in real property. *In re Land Registry Act and Anthony*, (1916) 22 B.C.R. 535; 10 W.W.R. 863.

See EXECUTORS AND ADMINISTRATORS.

See TRUSTS.

WINDING-UP.

See COMPANY.

WITNESS.

See EVIDENCE.

WOODMAN'S LIEN.

I. IN GENERAL, 1137.
II. PERSONS ENTITLED TO, 1140.
III. PROCEDURE, 1142.

I. IN GENERAL.

1. Preference for towage.]—Towage is of the same nature as freight and as such is the subject of a maritime lien which takes precedence over a lien under the Woodman's Lien Act. Sec. 3 of the Woodman's Lien Act is intended to protect holders of towage liens. *Prembo* v. *Pacific Slope Lumber Co.*, (1915) 7 W.W.R. 1195.

2. Purchase of timber.]—Secs. 37 and 38 of the Woodman's Lien for Wages Act only apply to contracts which contemplate the employment of labour after the date thereof. *Mills* v. *Smith Shannon Lumber Company*, (1916) 22 B.C.R. 579; 28 D.L.R. 40; 34 W.L.R. 358; 10 W.W.R. 454.

3. Contract between employer and lumber company.] — M., a logger, who acquired an interest in certain timber lands, entered into an agreement with a logging company whereby M. was given the right to use certain logging machinery on the said lands, and the logging company was given the first right to purchase all the logs manufactured by M. while using the machinery. M. employed the plaintiffs who, after 13 months' work filed liens for wages. The logging company under the agreement purchased all the logs manufactured but did not enforce the production of pay-rolls by M. as required by the Act:—Held, that the agreement between M. and the company is not within the scope of sec. 37 of the Woodman's Lien for Wages Act. *Ure et al.* v. *MacGregor*, (1923) 32 B.C.R. 122; (1923) 3 D.L.R. 1025; (1923) 2 W.W.R. 415.

4. Contract between employer and lumber company.]—B. brought action for services in cutting wood and hauling logs and for enforcement of a woodman's lien filed in respect thereto and S. brought two actions of the same nature, one for his own services and a second as assignee of eleven workmen who had performed a like service. The defence was that B. was working as a contractor, that S. and the eleven workmen were employed by him and that there was no proof of the assignment to S. The actions were consolidated for trial:—Held, that there was evidence from which it should be inferred that B. was working under a contract with the company and that the twelve workmen were employed by him and they had no right of action against the company. *Sheepwash* v. *Deer Mountain Lumber Co.*, (1925) 37 B.C.R. 418.

5. Logs contained in booms—Appropriation of proceeds.]—The plaintiff filed liens on the 11th of November and 29th of December, 1922, under the Woodman's Lien for Wages Act against all logs and timber cut and removed from the camp of the defendants at Thompson Sound where he was employed continuously as a logger from the 6th of June to the 9th of December,

1922. One boom of logs, cut during the term of employment was sold by the defendants on the 5th of October, 1922, from which no wages were paid. A second boom, a portion of which was cut prior to the 31st of August, 1922, and the remainder afterwards was sold on the 5th of February, 1923, by the lienholders' solicitor under an agreement with the owner and the proceeds were distributed amongst the lienholders on their wages pro rata. The solicitors without the consent of the owner applied the money so paid on the wages of the lienholders earned prior to the 31st of August, 1922. The amount received by the plaintiff from the proceeds of the second boom was sufficient to pay his wages earned after the 31st of August, 1922. A third boom of logs cut during the period of employment but after the 31st of August, 1922, was sold by the owner on the 10th of April, 1923, and he refused to pay any of the proceeds on account of the lien:—Held, that the plaintiff was entitled to a lien against the third boom of logs for work done and services rendered by him prior to the 31st of August, 1922. Held, further, that the solicitors for the lienholders including the plaintiff were entitled to appropriate the proceeds of the second boom sold by them to the wages earned by the plaintiff and the others prior to the 31st of August, 1922. *McLellan* v. *Watanabe et al.*, (1923) 33 B.C.R. 61.

6. Fraudulent preference.] — Three directors constituting the whole body of shareholders of a lumber company voted themselves salaries of $5,000 a year each as president, manager and secretary-treasurer respectively. The company shut down, but under resolution the officers' salaries were to continue for the following year, the secretary-treasurer staying in charge of the works, there being evidence of his having made one small sale of lumber and doing some piling and sawing. The plaintiff who had supplied the company with logs brought action to recover the purchase price. The secretary-treasurer upon being served with the plaintiff's writ immediately filed a lien under the Woodman's Lien for Wages Act and obtained judgment by default. The plaintiff obtained judgment in his action some dayes later:—Held, that in the circumstances of this case the defendant was not entitled to a lien under the Woodman's Lien for Wages Act. The judgment obtained by the official for the enforcement of his lien is null and void against the creditors of the company on the ground that it had been obtained by collusion with the company with the intent of defeating and delaying its creditors and giving a preference. *Vipond* v. *Galbraith*, (1922) 31 B.C.R. 58; 65 D.L.R. 91; (1922) 2 W.W.R. 135.

7. Priority over mortgage—Reference in mortgage action.] — Lienholders may appear upon a reference ordered in a Supreme Court action to enforce a general mortgage charge against the property of the employer, and the Court has jurisdiction to deal with the claims of the lienholders and allow a preference over the logs in respect of which the liens are filed. *Montreal Trust Co.* v. *Canadian Lumber Yards, Ltd., Riis et al., Claimants*, (1928) 39 B.C.R. 325; (1928) 2 D.L.R. 37; (1928) 1 W.W.R. 509.

8. Liability of person receiving logs or timber.]—In order to succeed in an action under secs. 37 and 38 of the Woodman's Lien for Wages Act, the plaintiff workman or labourer must prove that the defendant has received or had delivered to him or has accepted under his contract the logs or timber in question or some part thereof. *Van Koughnet* v. *Quaife and Rogers*, (1930) 1 W.W.R. 214.

II. Persons Entitled to.

1. Workman cutting cordwood.]—The Woodman's Lien for Wages Act applies in the case of logs being cut for the purpose of being converted into cordwood. *Hahn* v. *Seibel*, (1920) 28 B.C.R. 387; (1920) 2 W.W.R. 595.

2. Contractor.]—The Woodman's Lien for Wages Act was enacted for the benefit of wage-earners, and a person entering into a contract to cut logs, and furnish his own supplies, at a given price per thousand feet is not entitled to a lien under the Act. *Stephens* v. *Burns et al.*, (1921) 30 B.C.R. 60; (1921) 2 W.W.R. 513.

3. Teamster.]—A person who is hired by another to haul poles with his own team at a rate of payment calculated per lineal foot is not a bare contractor, but a wage earner and entitled to a lien under the Act. *Schmidt* v. *Stuckey*, (1928) 40 B.C.R. 161; (1928) 2 D.L.R. 928; (1928) 1 W.W.R. 913.

4. Teamster.]—A workman hired with his team of horses for the purpose of skidding and hauling timber is within the purview of sec. 3 of the Woodman's Lien for Wages Act and is entitled to a lien for the amount agreed to be paid him for himself

and his team. *Rothery* v. *Northern Construction Co.*, (1921) 30 B.C.R. 324; 70 D.L.R. 771; (1921) 2 W.W.R. 853.

5. Contract.]—The defendant, a sawmill company, contracted with L. and F. whereby the latter agreed to log all suitable timber on a certain claim and deliver it boomed at the mouth of the Lillooet River. On the following day L. and F. entered into a contract with the plaintiffs whereby the plaintiffs agreed to fall and buck all timber on said claim at 85 cents per thousand "to the satisfaction of their employers," the employers to furnish all tools for the work and the plaintiffs to be allowed to draw wages at $4.50 a day. The plaintiffs on completion of the work brought action for the sums due, against the company because of its non-compliance with the provisions of secs. 37 and 38 of the Woodman's Lien for Wages Act:—Held, that the plaintiffs were contractors and not labourers, that the payments due them were not "wages" within the meaning of the Act and the action should be dismissed. *McDonald et al.* v. *Brunette Sawmill Company, Limited*, (1922) 31 B.C.R. 77; (1922) 1 W.W.R. 1163.

6. Indian.]—An unenfranchised Indian may claim a lien under said Act though the lien is upon property of some person other than the one who employed him to work and without the Crown being made a party. *Douglas* v. *Mill Creek Lumber Co.*, (1923) 32 B.C.R. 13; (1923) 1 D.L.R. 805; (1923) 1 W.W.R. 529.

7. Assignee of workmen.]—A claim as assignee of workmen cannot be allowed in the absence of necessary legal proof of the assignment or of notice thereof which must be strictly proved if traversed. In actions of this kind for wages the provisions of sec. 2 (25) of the Laws Declaratory Act respecting "absolute assignments" of "any debt or other legal chose in action" apply. *Sheepwash* v. *Deer Mountain Lumber Co. Ltd.*, (1925) 37 B.C.R. 418. *Dempsey* v. *Kurek*, (1923) 3 W.W.R. 1007, overruled.

8. Contractor paid by the piece.]—A "gippo contractor," i.e., a person paid by the piece for cutting, hauling, etc., logs or timber with an equipment supplied by the employer, is not an independent contractor, even though he is charged for the use of the equipment, but a workman; and is, therefore, entitled to a lien under the Woodman's Lien for Wages Act. *Boyd & Anderson* v. *Superior Spruce Mills Ltd.*, (1927) 2 W.W.R. 54.

9. Right of contractor to lien.]—The fact that a person is a contractor does not prevent his being entitled to a lien under the Woodman's Lien for Wages Act. The test of his right is whether he comes within sec. 3 of the Act, as one who has performed "any labour" service or services in connection with any logs or timber." A sub-contractor who had hired other men and worked with them in his contract was held entitled to a lien for the amount of his claim under the contract less the sum paid to his employees, such balance being his own remuneration for his own services. *Ross* v. *McLean and Peterson*, (1921) 1 W.W.R. 1108.

III. PROCEDURE.

1. Consolidation.]—Separate claimants for liens under the Woodman's Lien for Wages Act joined together in issuing one writ of attachment under secs. 10 and 13 of the Act, each claim being under $100 but more than that sum in the aggregate. The claims were consolidated for trial and judgment was given setting out the respective amounts to which each claimant was entitled:—Held, there was no appeal from the judgment on said claims. *Douglas* v. *Mill Creek Lumber Co. Ltd.*, (1923) 32 B.C.R. 13; (1923) 1 D.L.R. 805; (1923) 1 W.W.R. 529.

2. Affidavits — Evidence Act.] — The affidavits of claim under said Act were resworn without the jurat being rewritten and were received and acted upon in the Court below but no memorandum of their acceptance was made on them under sec. 62 of the Evidence Act:—Held, that sec. 62 of the Evidence Act is merely directory and the affidavits having been received and acted upon they should not be disturbed. *Ibid.*

3. Statement of claim — Form of.]—On objection to the form of the statement of claim under the Woodman's Lien for Wages Act with respect to the statement of "claimant's residence," the "kind of logs and timber and where situate," the "name and residence" of the owner of the logs, the "name and residence of the person upon whose credit the work was done," it was held, that a substantial and not meticulous compliance with the statute is required, the test being, whether the parties concerned were misled. *Ibid.*

4. Particulars of work.]—Where in the statement under Schedule A of the Woodman's Lien for Wages Act all the information given of "work" is "to two months and ten days at $70 per month $160":—Held, not to be a sufficient compliance within sec. 5 of the Act; there must be something to shew in what capacity the "labour or service" was performed so that an interested inquirer could decide whether the claim comes within the Act. *Ibid.*

5. Jurisdiction.]—If the plaint in an action in the County Court to establish a woodman's lien for wages does not disclose the territorial jurisdiction to the Court an amendment may be allowed to do so if the facts in evidence disclose that the Court has actual jurisdiction. *Hahn* v. *Seibel*, (1920) 28 B.C.R. 387; (1920) 2 W.W.R. 595.

6. Contents of statement.] — It is a sufficient compliance with the Act if the name and residence of the debtor omitted from the statement is set forth in the affidavit of verification attached to and registered with the statement of lien. *Foreman* v. *Mutch*, (1923) 33 B.C.R. 100; (1924) 1 W.W.R. 392.

7. Affidavit — Sufficiency of.] — The Woodman's Lien for Wages Act should be literally construed. An affidavit in support of a lien under the Woodman's Lien for Wages Act, 1924, made by one workman on behalf of himself and other workmen who have authorized him to act for them is a sufficient compliance with the Act to enable the lien to be held valid for all the said workmen. The Act is not intended to protect "contractors" distinguishing them by that term from "workmen." *Nelson* v. *Person*, (1927) 3 W.W.R. 161.

8. Loading — Incidental services.]—Under the employment of the defendant D. the plaintiff performed various services in connection with logging during the winter of 1926-7 and duly filed a lien for his wages under the Woodman's Lien for Wages Act. In an action on the lien:—Held, that the lien attached for his wages in loading poles and logs at Erie which were shipped to the defendant company and for such wages the company was liable. Held, further, that as to other services performed at the instance of D., namely, (1) moving poles and fence posts to provide room; (2) pulling down a building for the lumber in it; (3) cutting car sticks for loading timber on cars and (4) freighting gasoline to the camps; do not come within the Act so as to give a right of lien, but the plaintiff is entitled to judgment for such services as against the defendant D. *Haglund* v. *Derr et al.*, (1927) 38 B.C.R. 435; (1928) 1 W.W.R. 232.

9. Amendment.] — The County Court judge has no power to amend a statement of claim of lien so as to reform the description of the location of logs upon which the lien is claimed. *Montreal Trust Co.* v. *Canadian Lumber Yards, Ltd.*, (1928) 39 B.C.R. 325; (1928) 2 D.L.R. 37; (1928) 1 W.W.R. 509.

WORK AND LABOUR.

See BUILDING CONTRACT.
See CONTRACT.
See MASTER AND SERVANT.
See MECHANIC'S LIEN.
See WOODMAN'S LIEN.

WRIT.

See PRACTICE.

YUKON COURTS.

I. CONTRACT, 1144.
II. MINING RIGHTS, 1145.
III. TRESPASS, 1146.

I. CONTRACT.

1. Dredging contract.] — Under the terms of a contract to work out certain placer ground the contractor was to work and mine the property in a thorough and minerlike manner until the same was worked out, and out of the gold recovered retain 30 cents per cubic yard for every yard of dirt mined. The contractor worked out the property in a minerlike manner with a dredge, but in order to complete the work it was necessary to work over a portion of the ground a second time:—Held, that the removal of material which had previously passed through the dredge and was deposited as tailings, should not be charged for, although the removal of such tailings was necessary in order to complete the mining

operations. *Olsen* v. *Canadian Klondyke Mining Co.*, (1917) 24 B.C.R. 114; 34 D.L.R. 529; (1917) 2 W.W.R. 640.

2. Contract — Electrical energy—Breach of—Damages.]—Where a power company entered into a contract to supply electric power to a mining company for the purpose of operating its mining dredges and to maintain a minimum voltage during the periods set forth in the contract constructing the necessary stations and equipment, upon breach of the contract by the power company by default in maintaining the required voltage and by interruptions in the supply of power according to the terms thereof, the purchasing company is entitled to damages in the excess of cost incurred in obtaining the required supply of electrical power elsewhere. *Yukon Gold Co.* v. *Canadian Klondyke Power Co.*, (1919) 27 B.C.R. 81; 47 D.L.R. 146; (1919) 2 W.W.R. 814.

II. Mining Rights.

1. Lease of river-bed.]—A creek placer mining claim cannot include or pass over the submerged bed of a river. The policy of the mining laws in force at that time in the Yukon Territory would exclude the acquisition of mining rights in the river-bed except under dredging leases. The side boundaries of a river-bed held under a dredging lease issued pursuant to the Dredging Regulations of the 18th of January, 1898, are fixed by low-water mark on the 1st of August of the year in which the lease is issued and the boundaries are not affected by erosion of the banks of the river during the existence of the lease, the mining rights and areas secured by the due location of river claims being fixed by said location once and for all. *Yukon Gold Company* v. *Boyle Concessions, Limited*, (1916) 23 B.C.R. 103; 27 D.L.R. 672; 34 W.L.R. 436; 10 W.W.R. 585; 50 D.L.R. 742; (1919) 3 W.W.R. 145.

2. Placer mining lease—Right to challenge.]—An ex facie regular mining lease, followed by possession and impeachable only upon the extrinsic grounds that the granting thereof was contrary to a statutory provision and that the applicant for the lease had not complied with the regulations is, as between the parties to it, not void but voidable; and, the lessee being willing to continue in possession and to comply with its stipulations, it is the privilege of the lessor to determine whether he shall be permitted to do so or not. The right to interfere with the possession of a tenant under a formal lease, independently of the lessor, and in derogation of his rights, is not one of the natural incidents of a mere license, which carries no legal or equitable interest in the soil. When a mining lease is merely voidable, the principle of law to be applied is that the title of the person seeking to avoid it is not a general one in the public and such a title is not in fact extended to anyone except to (1) those who are in contractual relations; or (2) those who have, by convention between those who are so, a title to challenge; or (3) those upon whom by statute a right of challenge is conferred. If the lease be not in itself void, but voidable on just cause shewn by the lessor, an attempt by the Crown brought to declare it void, twenty years after possession has been taken, after payment of rent and royalties has been made, and after great expenditure upon the subject of the lease by the lessee, cannot be successfully maintained. *Boyle* v. *Seguin*, (1922) 1 A.C. 462; 91 L.J.P.C. 137; 127 L.T. 198; 63 D.L.R. 369; (1922) 1 W.W.R. 1169.

III. Trespass.

Nuisance — Abatement of.] — For the purpose of abating a nuisance caused by the plaintiff directing the flow of water through his claims in such a manner as to carry tailings from his claims into those of the defendant, thereby damaging and interfering with the defendant's mining operations, the defendant, at the instance of the mining inspector, entered on to the plaintiff's claims, closed one gate in the plaintiff's dam and opened another, in order to divert the flow of the water and abate the nuisance:—Held, that where the nuisance is one of commission, entry may be made on the claims of the wrongdoer without notice for the purpose of abatement. This rule applies whether there is an emergency or not. The defendant was justified in that he acted under the direction of the mining inspector in pursuance of secs. 15 and 16 of the Placer Mining Act, and the fact that sec. 89 of said Act provided for a penalty in no way precluded the defendant from insisting on acting by reason of the special damage that was occasioned by the plaintiff's wrongful act. *Suttles* v. *Cantin*, (1915) 22 B.C.R. 139; 24 D.L.R. 1; 32 W.L.R. 101; 8 W.W.R. 1293.