

The letter and the spirit of the Rules of practice go to keep separate the principal and the cross-demand, and to give to the incidental defendant the same delays, which he would have had, if the incidental demand had been brought as a demand in chief. The rule to plead therefore to this incidental demand, expired only in vacation and before the Appellant could have been shut out from his right to plead, a demand of a plea must have been served upon him.—See Rules & Orders, sect. 7. §. 8. & §. 28.

The Respondent however, without previous notice to the Appellant, obtained, on the nineteenth of the same month of October, a rule to proceed *ex parte* on the incidental demand. This proceeding came to the knowledge of the Appellant in the subsequent vacation, and on the very first day of the ensuing term, the Appellant pointed out this irregularity, and moved that the rule to proceed *ex parte* might be set aside. The Court below, on the fifth of the month of February, discharged the Appellant's rule. The order of the Court of the 19th October and that of the 5th February following, are the first and second Judgments appealed from.

The Appellant immediately moved to discharge the rule to proceed *ex parte* upon payment and costs, filing pleas *instanter* and taking short notice of trial. The parties were heard and twice reheard upon this rule, and it was only on the 19th of April following that the Court below pronounced its Judgment discharging the rule with costs. This is the third Judgment appealed from.

The Respondent having thus excluded the Appellant from the cause, proceeded, on the 10th of May 1816, to the adduction of evidence. He examined Thomas Majoribauks, David Robertson, Pierre Langlois & Pierre Allard.

No continuance of the enquete was asked or ordered. By the rules of the Court below and by the practice of the Courts of every civilized country, he could not be admitted to offer any further testimony.—See Rules & Orders, sect. 8. §. 8. & 9.

Yet finding that he had not made out his case, he, on the 12th of June following, produced and examined another witness. Feeling still that his evidence was not sufficient, he, on the 19th of June, without having obtained any further continuance of the enquete, produced and examined two other witnesses, and filed a great variety of documents.

With the aid of these irregular proceedings, the Respondent obtained, on the 13 October 1817, a Judgment condemning the Appellant to pay the enormous sum of £250.—From this Judgment also the Appellant appealed.

On the part of the Appellant it is contended, 1. That the rule to proceed *ex parte*, of the 19th October, was obtained prematurely and contrary to the letter and spirit of the general rules and orders of the Court.

2. That if this were otherwise, that rule ought to have been discharged upon the Appellant's offer to pay costs, plead *instanter* and take short notice of trial.—Courts are unwilling to adjudge upon the rights of parties, without first hearing them, and wherever they can without delaying the Plaintiff give to the Defendant the opportunity of being heard and cross-examining the Plaintiff's witnesses, this opportunity is afforded.

In the English Courts, notwithstanding the extreme strictness which prevails in their proceedings, the rule to proceed *ex parte*, is uniformly discharged upon the Defendant offering the terms, which were in this instance offered by the present Appellant.

3dly. The evidence, as well parole as written, produced and filed by the Respondent in the Court below, subsequently to the day upon which the Respondent entered upon his enquete, was received contrary to the letter and spirit of the general rules and orders of the Court.

4thly. There is no sufficient evidence in the cause to warrant the finding of the Court, for so large a sum as that awarded to the Respondent, by the final Judgment in the cause.

Quebec, 12 January, 1819.