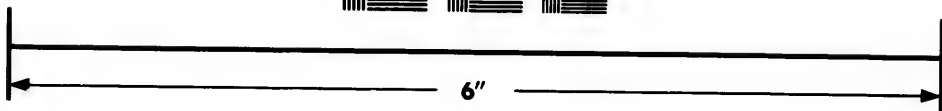
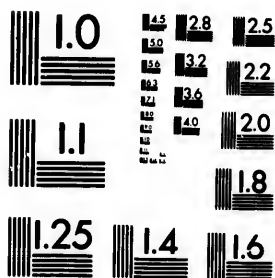


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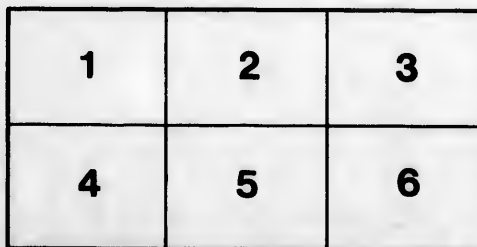
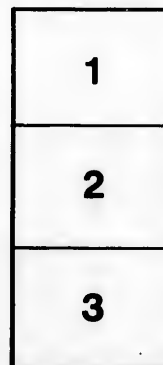
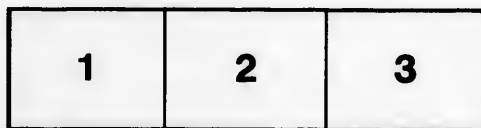
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*Honour's Minutes*

*1 decembre 1866*

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To 1863.

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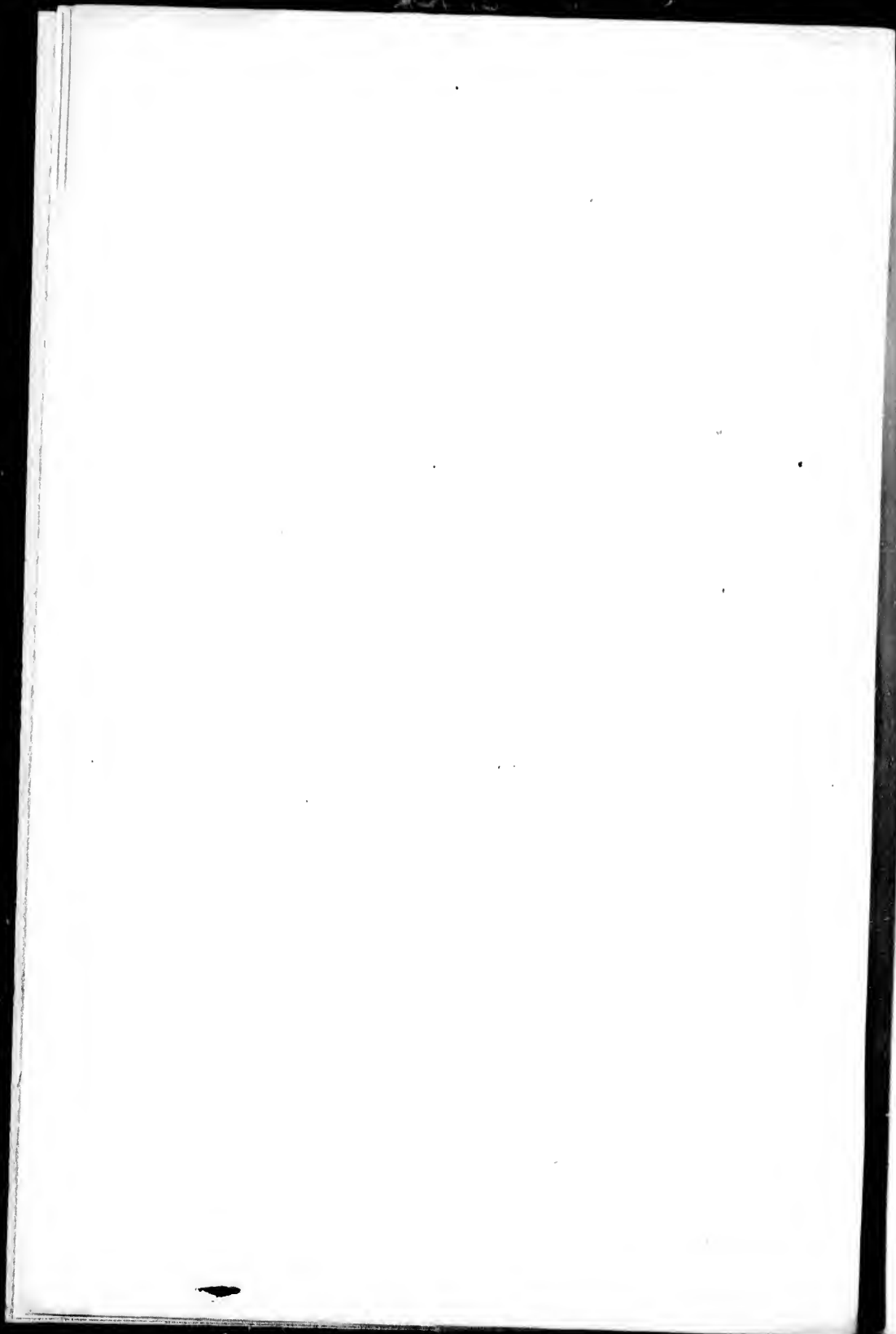
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## PREFACE.

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This volume is published in the hope that it will be of use, by bringing together, in small compass, the decisions of the Courts in Lower Canada, as reported to the date when this work was completed, thereby affording the means of comparing these decisions, and aiding, in some degree, in establishing a settled and uniform Jurisprudence. The Student of Law is here furnished with the application to decided cases of the general principles laid down in the text books, and the Practising Advocate with easier reference to the Reports themselves, and the authorities there cited.

The points adjudged have been adopted as given in the Reports when they appeared to be stated accurately; in other cases they have been re-written.

The headings or titles might have been increased, and many cases usefully put under more than one heading, and in French as well as in English, but this would have added to the size as well as to the cost of the volume. It is hoped, however, that the

references as given will be found sufficient to indicate the more important subjects.

The cases from the PRÉVOSTÉ and CONSEIL SUPÉRIEUR are given, because M. Perrault's volumes are now rarely to be met with, and as shewing the admirable simplicity and equity of the administration of justice in these Courts, when Attorneys and Advocates were unknown in the Province. Many of these cases will be recognised as authority at this day; some of them are of curious interest to the profession.

The List of Cases at the end of the volume, although not usually given in a mere Digest or Index, will contribute to the main end and value of such a work—that of finding soon what one is looking for.

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## DIGEST.

# LOWER CANADA REPORTS.

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### ACTION.

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#### ASSUMPSIT AND DEBTS.

Held, That an action on an obligation payable on *demand* cannot be maintained if the obligation produced in evidence is payable *à terme*. *Leroux vs. Winter*; K. B., Q. 1813.

Held, That an action on an implied promise for board, lodging, and washing, can be maintained in assumpsit. *Spatz vs. Meyers*; K. B., Q. 1816.

Held, That when various sums have been received by an agent, the principal may sue in account, or for money had and received. *Leclerc vs. Ross*; K. B., Q. 1809.

Held, That if there be a special agreement between the parties, a general *indebitatus assumpsit* cannot be maintained. *Hitchcock vs. Grant*; K. B., Q. 1817.

Therefore in an action of general *indebitatus assumpsit* for work and labor, in which, at the trial, it was proved that the work had been performed under a written contract, the action was dismissed. *Fielders vs. Blackstone*; K. B., Q. 1818.

Held, That if one receives advances in money upon his contract for work, and does not execute it, his conduct as to the person with whom he contracts is *fraudulent*, and such person may either affirm the contract, and sue in damages for non-performance, or may disaffirm it, and sue for money had and received in assumpsit. *Dumas vs. Patouelle*; K. B., Q. 1818.

Held, That an action of *assumpsit* or of debt will lie for a liquidated or acknowledged balance of account settled between co-partners, but until their account

is settled, the action must be founded on the *contrat de société*, and be in account. *Delagrave vs. Hanna*; K. B., Q. 1818.

Held, That the amount of an undertaking to pay *salvage* in the Court of Admiralty of another British Province may be recovered in Canada. *Moore vs. Muir*; K. B., Q. 1818.

Held, That a contractor for a public building can maintain an action for money had and received against the commissioners with whom he contracted for the execution of such building, if they have received from Government the money which is due to him. *Larue vs. Crawford*; K. B., Q. 1819.

Held, That when a balance has been struck between co-partners, an action of assumpsit can be supported. If no balance has been struck, the action must be in account. *Robinson vs. Reffenstein*; K. B., Q. 1821.

Held, That the 194th Article of the *Custom* enables a proprietor to compel his neighbor to build a *mur mitoyen* between them; therefore, where the plaintiff brought his action in *assumpsit* for money laid out and expended in erecting a *mur mitoyen*, with his neighbour's implied consent, it was held that he was entitled to recover. *Latouche vs. Latouche*; K. B., Q. 1821.

Held, That an action in assumpsit for rent cannot be maintained if there be a lease. *Burns vs. Burrell*; K. B., Q. 1816.

Held, That in an action for the use and occupation of a farm, the *quantum valebat per annum* may be proved by witnesses, also the possession of the defendant. *Langlois vs. Darryson*; K. B., Q. 1820.

In an action for £90 for goods sold; plea, that on the day of the alleged indebtedness, defendant executed a notarial obligation for the goods with a mortgage, and that the demand was novated. Answer, that the obligation was only as collateral security. The plaintiff proved the sale and delivery of the goods; the defendant merely filed a copy of the obligation.

Held, That without express mention of novation, the presumption was in favor of the creditor, and his right to sue upon the original cause of action remained. 1 L. C. Rep., p. 250, *McFarlane vs. Patton*; S. C., Montreal; Day, Vanfelson, Mondelet, J.

Held, In an action of assumpsit, that where it is proved that the work was performed under a written contract, the plaintiff cannot recover. 1 Jurist, p. 193, *McGinnis vs. McClosky*; S. C., Montreal; Day, Smith, Chabot, J.

Held, That money paid to a contractor in advance, on account of the consideration money of a contract for building, cannot be recovered back by the ordinary action of assumpsit. 3 Jurist, p. 282, *Ingham vs. Kirkpatrick*; S. C., Sherbrooke; Day, Meredith, Short, J.

Held, That for goods sold to a married man and his mother by a trader, both will be condemned jointly, but not *solidairement*, under the proof made in this case, *Laberge vs. Delorimier*; S. C., Montreal; 1854; Day, Smith, Mondelet, J.; Cond. Rep., p. 87.

Held, That an action lies to recover back monies paid as a tax, under a by-law of a municipal corporation, when the by-law has been declared void, the payment being made by *erreur de droit*. 2 L. C. Rep., p. 180, *Leprohon vs. Corporation of Montreal*. In Appeal: Rolland, Panet, Aylwin, J.

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## QUANTUM MERUIT.

Held, That in an action on a special contract for work and labor, if the contract be not proved, evidence of a *quantum meruit* cannot be received unless there be a count for a *quantum meruit* in the declaration. *Barry vs. Deacon*; K. B., Q. 1820.

Held, That if, in an action on a *quantum meruit* for work and labor, with the common counts only in the declaration, it appears that the work was done under a written contract, the action will be dismissed. *Huot vs. Crémazie*; K. B., Q. 1819.

Held, 1. That assessors, appointed under a statute authorizing the Corporation of Montreal to appoint such assessors, and to grant them such remuneration for their services as the Council may deem fitting, cannot recover in an action on a *quantum meruit* against such Corporation.

2. That it is the right of a witness to be taxed in the court in which he is examined as a witness, and he cannot bring an action on a *quantum meruit* for attendance and loss of time as such witness. 8 L. C. Rep., p. 236, *Gorrie vs. the Mayor, &c., of Montreal*; S. C., Montreal; Smith, J.

Held, That a witness cannot sue for the amount of his taxation, but must proceed by execution against the party who summoned him, under the 12 Vict., c. 5, sect. 9. 9 L. C. Rep., p. 6, *Veilleux vs. Ryan*; Circuit C., Quebec; Chabot, J.

Held, 1. That a carpenter cannot maintain an action of assumpsit for work and materials for *extra* work, if such work was to be valued according to the contract price in a written contract.

2. That the plaintiff ought to have alleged the contract in pursuance of which the *extra* work was to be valued. 1 Rev. de Jur., p. 297, *Stuart, App., Trépannier, Resp.* In Appeal: Rolland, Mondelet, Day, Gairdner, J.

See *Puffer, App., Gauvreau, Resp.* 3 Rev. de Jur., p. 108. 1847

ASSUMPSIT FOR NOTARIES' SERVICES.—See NOTARY.

## ARCHITECT.

Held, That an architect named in a contract for the building of houses, has a right to recover from the proprietor as compensation for services, a certain commission charged and shown to be a *quantum meruit* for such services. 11 L. C. Rep., p. 94, *Footner, App., Joseph, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Bruneau, J.

See this case in the S. C., 3 Jurist, p. 253. In Appeal: 5 Jurist, p. 225.

## ACTION PETITORY.

Held, That a petitory action can be brought by the heir against a party in possession of an immovable, and claiming to hold an undivided portion thereof à titre de douaire. 1 L. C. Rep., p. 160, *Cannon ès qualité vs. O'Neil et ux.*; S. C., Quebec; Bowen, C. J., Duval, J.

Held, in S. Court, St. Francis (Gairdner, Meredith, J.), that as the plaintiff, in a petitory action, had not had possession or delivery of the lot, and had not filed any title anterior to defendant's possession, his action must be dismissed.

In Appeal, *Ex parte*, that there was no proof of any possession, by defendant, previous to plaintiff's title; and that the production of such title was sufficient to sustain a petitory action, as against all persons who could claim no better title, or any right under an actual possession *animo domini* anterior to such title, the more so, as in the present case, defendant claimed title derived through his vendor, from the same *auteur* as the plaintiff. 1 L. C. Rep., p. 211, *Stuart vs. Ives*. In Appeal: Rolland, Panet, Aylwin, J.

#### TRADITION.

Held, That as the plaintiff had not obtained tradition of the *emplacement* sued for, from his vendors, proprietors of the seigniorie whose property and possession were proved, "that the simple convention contained in the contract of cession, not followed by tradition, could not transfer the *domaine de propriété*, "and that by reason thereof the plaintiff was not proprietor, and action dismissed." 2 L. C. Rep., p. 7, *Brochu vs. Fitzback et al.*; S. C., Quebec; Bowen, C. J., Duval, J.

Held, 1. That in sales of wild lands, tradition is necessary to convey the right of property.

2. That where the purchaser, by private sale of such lands, does not take possession of the same, they may be legally seized and sold as belonging to the vendor.

3. That in such case, the *adjudicataire* becomes seized of such lands, to the exclusion of the purchaser who has neglected to take possession.

4. That a partition among co-heirs, duly homologated, is evidence as against third parties, of the quality assumed by such heirs, and it is not necessary that certificates of marriage and of baptism should be produced. 2 L. C. Rep., p. 345, *Mallory vs. Hart*. In Appeal: Stuart, C. J., Rolland, Panet, J.

Held, In the S. C., Montreal, that a purchaser who has not had, either by himself or his *auteur*, possession of real estate, cannot revendicate the same upon a third party, in possession at the time of such purchase.

Held, In Appeal, 1. That a judicial sale operates a real tradition, and that the purchaser is duly seized, and may transmit possession.

2. That such purchaser of an undivided part may obtain a licitation.

3. That a minor of the age of twenty cannot dispose of his immoveables by will.

4. That, in the case submitted, the defendants had not, and could not oppose, any legal title to the land in dispute. 9 L. C. Rep., p. 385, *Loranger, App., Boudreau et ux., Resp.*; Lafontaine, C. J., Aylwin, Duval, Meredith, J.

Held, 1. That to maintain a petitory action it is not necessary that the purchaser should have had the possession or actual tradition of the immoveable claimed, if the title of his vendor is alleged in the declaration, and the possession of the vendor anterior to defendant's possession is proved.

2. That in such case the court will correct a clerical error in the description of the immoveable property as given in the judgment of the court below. 12

L. C. Rep., *Bilodeau*, App., *Lefrançois*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, 1. That the plaintiff in a petitory action cannot obtain a judgment in his favor upon a deed of sale to him, dated *subsequently* to the defendant's occupation of the land in dispute, the plaintiff's *auteur* not having been in possession of the land at or previous to the date of such deed.

2. That the plaintiff could derive no advantage from a sheriff's deed of the land to his *auteur* dated 17 years previous to the plaintiff's title, inasmuch as such sheriff's deed was only fyled at *enquête*, and was not set up or pleaded, so as to afford the defendant an opportunity of answering it.

Semble, That a copy of a sheriff's deed certified by the registrar is not evidence of the deed, but simply of its registration. 12 L. C. Rep., p. 98, *Gibson*, App., *Weare*, Respondent. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J. Same case, 6 Jurist, p. 78.

Held, That the plaintiff in a petitory action cannot obtain a judgment in his favour upon a deed of sale to him, dated subsequently to the defendant's occupation and peaceable possession of the land in dispute, the plaintiff's *auteur* not having been in possession of the land at, or previous to, the date of such deed. 12 L. C. Rep., p. 200, *Foisy* vs. *Demers*; S. C., Arthabaska, Stuart, J.

The plaintiff brought a petitory action for a lot of land, alleged to have been acquired by him by deed of 21st of January, 1856, setting up no other title in his declaration.

The defendant pleaded, that before the date of the plaintiff's title, he had been in possession of the lot, as proprietor, for more than ten years, setting up no title.

The plaintiff was permitted to file a special answer, in which he set up anterior titles.

Held, 1. That the action of the plaintiff must be dismissed, and both parties put out of court, each party paying his own costs, on the following grounds:

1. Because the plaintiff failed to establish, in evidence, his title to the lot in manner and form as set up in his declaration; and because his rights depended on a possession and claim of title, anterior to that asserted by him.

2. Because the plea was irregular, and insufficient in law, failing to allege, with sufficient certainty, an adverse title in defendant.

3. Because the issue between the parties was irregular, and they ought not to have been permitted to proceed to evidence; and because the evidence taken was not warranted by the pleadings. 10 L. C. Rep., p. 22, *Osgood*, App., *Kellam*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Meredith, Mondelet, J.

Held, That in an action by the heirs of a wife *commune en biens* against their father, praying to be declared proprietors of one-half of a farm belonging to the *communauté*, it is necessary to specify which half, if a partition has taken place; and if not, to pray for such partition by their declaration. 5 L. C. Rep., p. 97, *Lalonde et al.* vs. *Lalonde*; S. C., Montreal; Day, Vanfelson, Mondelet, J.

Held, That the law *quoties* was not received in 'customary France;' and the actual taking of possession was not necessary to insure to the purchaser the property he had acquired by deed of sale, as against another purchaser of the



same property; and that this is law in Lower Canada. 2 Rev. de Jur., p. 102, *Bowen, App., Ayer, Resp.* In Appeal: Sewell, C. J., *et al.* 1836.

Held, 1. That the civil laws of England were not introduced into Lower Canada by the Proclamation of 1763, nor by the Imperial Act of 1774.

2. That by the Imperial Act, 6 Geo. IV., c. 59, the English laws were introduced into Lower Canada, in respect of lands held in free and common soccage, in the particulars of conveyance, descent or inheritance, and dower.

3. That in order to acquire a valid title to real estate, there must be an actual delivery (*tradition*).

4. That to acquire a title by prescription under the French law, there must be a *possession naturelle*. 2 L. C. Rep., p. 369, *Stuart vs. Bowman*; S. C., Montreal; Smith, Vanfelson, Mondelet, J.

In Appeal: Rolland, Panet, Aylwin, and D. Mondelet, J.—Held, 1. That in this case the appellant's title was good and valid, by the law of England and by the law of France.

2. That the rules of the law of France are applicable to the present case.

3. That actual tradition, according to the old law of France, is not absolutely necessary to convey to the purchaser the right of property; that the feigned or symbolical tradition, such as the delivery of titles, letters patent, and plans, may be sufficient, as in the deed set up in this case, from John Robertson to Patrick Robertson, in 1804.

4. That the said John Robertson and representatives, and particularly the appellants, had in fact possession of the lands in dispute in the cause.

5. That the deed from the widow and children of John Robertson, in 1833, to the respondent, was null by reason of the absence of title in the vendors, and by reason of fraud and collusion between the parties to the sale.

6. That the registration of a title which is void will not render it valid, against the rights of a lawful proprietor, even when the latter has not registered his title. 3 L. C. Rep., p. 310, *Stuart, App., vs. Bowman, Resp.*

#### ACTION—PARTAGE.

Held, That in an action of *partage d'hérédité*, all the co-heirs must be parties to the suit, and if any are omitted, and no steps are taken by either party to bring them into the suit, the Court, upon final hearing on the merits, will dismiss the action *quant à présent*. *Laverdière vs. Laverdière*; K. B., Q. 1816.

Held, That if a right of way is granted without any designation of its precise situation, over a lot held by two joint proprietors in common, and if by a *partage de fait* the passage is located and used by both for a period of time, each party must abide by it, and an action of *partage* will not be maintained to effect a new location. *Duhamel vs. Bellanger*; K. B., Q. 1817.

Held, That in an action of *partage*, the Court can enforce the payment of a *soulte*.—*Bedigart vs. Hamel*; K. B., Q. 1820.

Held, That the action of *partage* between co-heirs can be maintained, while any property of the ancestor remains to be divided. *Tremblay vs. Girard*; B., Q. 1820.

Held, That a petitory action cannot be maintained when the defendant is a co-proprietor of the land, but the plaintiff's remedy is by action *en partage*. 1 Jurist, p. 287, *McAdam vs. Kingsbury*; S. C., Montreal; Day, Smith, Mondelet, J.

Held, That although a *usufruitier* be in possession, an action *en partage* will lie for the assignment of the portion which belongs to each heir in the property which is so possessed. *Poulin vs. Falardeau*; K. B., Q. 1821.

As to whether an action *en partage* is necessary to recover immoveables claimed to be possessed by defendant *à titre de douaire*. See ACTION PETITORY.

Held, 1. That the widow, being seized of all the property of the community, may proceed, and is bound to proceed and make inventory; and that an action to have such inventory made, is unnecessary and uncalled for.

2. In an action by the widow for a *partage* of the community, the minors, issue of the marriage, must be represented by a Tutor *ad hoc*, specially appointed to answer such demand *en partage*.

3. As to the matrimonial rights of parties where the husband residing at a post in the Hudson Bay Company's Territories comes to Lower Canada, and marries a person resident therein, and returns with her into the Company's Territories. 3 L. C. Rep., p. 101. *McTavish vs. Pike et al.*; In Appeal: Stuart, C. J., Panet, Aylwin, J.; Rolland, J., *dissenting*.

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#### ACTION—LICITATION.

Held, 1. That an action *en licitation* always contains a demand *en partage*.

2. That in actions *en licitation* the parties, plaintiff and defendant, are in the same relative positions, each party at the same time being plaintiff and defendant.

3. That in such action, the cause of action is the joint ownership *par indivis*, and not the alleged indivisibility of the property itself.

4. That in the case submitted, litispendance existed and was properly pleaded, although the present action simply contended for a sale by licitation, whilst the previous action contended for a *partage* or *licitation*.

5. That litispendance must be reckoned from the service of the writ, and not from the day of the return. 12 L. C. Rep., p. 447, *Boswell vs. Lloyd et al.*; S. C., Quebec, Stuart, J.

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#### ACTION—REVENDEICATION.

Where the King claims possession in right of the Crown, in an action of *revendication* or information of intrusion, the defendant must prove title in himself specially, and if he does not, judgment will be entered against him. *Rec vs. Lelièvre*; K. B., Q. 1812.

Held, That *revendication* for property attached, and tortiously abstracted, can be maintained. *Merkley vs. Cuwillier*; K. B., Q. 1812.

Held, That goods sold for cash, and not paid for when taken away, may be followed and recovered from the purchaser in an action of *revendication*, if it be

instituted in eight days, and the goods are in the identical state and condition in which they were taken away. *Aylwin vs. McNally*; K. B., Q. 1812.

Held, That *lettres de rescision* are not required to set aside a sale made by a tutor on behalf of his ward, without the authority of an *assemblée de parens*. *Normandeau vs. Amblement*; K. B., Q. 1813.

Held, That in *revendication*, if defendant is in possession as a *lessee* of the property demanded, he must plead his lease by *exception dilatoire*. *Clément vs. Hamel*; K. B., Q. 1817.

Held, That an action of *revendication* may be maintained for the recovery of title deeds. *Perrault vs. Hausseman*; K. B., Q. 1817.

Held, That in an action of *revendication* for an ox, it is no justification to plead that he was seized *dommage faisant* on the defendant's soil, and no more. *Reilly vs. Chandler*; K. B., Q. 1817.

Held, That in *revendication*, if the defendant pleads by *exception temporaire* that he holds the property demanded as *gardien*, appointed by a justice of the peace, and prays that the plaintiff's action may be dismissed, it is irregular. He can only stay proceedings until the person from whom he derives his authority to occupy the property claimed is made a party to the suit. His exception, therefore, should be an *exception dilatoire*. *Pacaud vs. Bégin*; K. B., Q. 1818.

Held, That *revendication* will lie against a bailiff who, under the authority of a justice of the peace, holds in his custody the goods of the plaintiff, if the cause of the detention be a matter over which the justice has no jurisdiction. *Pacaud vs. Bégin*; K. B., Q. 1818.

Held, That in *revendication*, the title on which the plaintiff rests his demand must be specifically set forth in the declaration. *Pouliot vs. Scott*; K. B., Q. 1820.

Held, That a legatee can maintain an action of *revendication* against a *tiers détenteur* of his legacy before he has obtained *délivrance de legs*. *Morrin vs. Peltier*; K. B., Q. 1820.

Held, That a person charged with felony cannot maintain an action for bank notes supposed to be stolen, or taken from him when he was arrested, until the charge preferred against him has been disposed of. *Carlisle vs. Sutherland*; K. B., Q. 1821.

Held, That an affreighter cannot proceed by way of *revendication*, as in the case of an unlawful detention, against the master of a ship, when such affreighter and master cannot agree as to the quantity of goods shipped, and as to the bill of lading to be signed.

Query, As to the responsibility of ships in relation to goods put on board lighters, to enable such ships to pass the shallows between Montreal and Quebec. 1 L. C. Rep., p. 313, *Gordon et al. vs. Pollock*; Q. B., Quebec; Stuart, C. J., Bowen, J.

Held, In an action *en revendication* for timber taken from wild lands without authority, the plaintiffs sufficiently establish their proprietorship, by proving acts of possession of the land at different times, without producing title deeds. 3 L. C. Rep., p. 90, *B. A. Land Co. vs. Stimpson*; S. C., Montreal; Day, Smith, J.

Held, In an action *in factum quasi trover*, the material inquiries are, touching conversion and possession by defendant; and as to his possession, whether he got

it by finding or otherwise matters not, was he in possession being the *gist* of the inquiry. *Fongère vs. Boucher*; K. B., Q. 1821.

Held, In an action *en revendication* for saw logs alleged to be cut within the limits of plaintiff's license, 1. That a license under the signature of an officer styling himself "Surveyor of Crown Timber Licenses," dated 10th July, 1851, is inoperative, inasmuch as up to the 8th August, 1851, the "Collector of Crown Timber Duties" was the only officer authorized by law to issue such licenses.

2. That in such licenses, by "*lots occupied by squatters for three years excepted*" are intended township lots, as stated in the returns of surveys, and not merely those portions of lots improved by such *squatters*. 3 L. C. Rep., p. 466, *Hall vs. Thompson*; S. C., Ottawa; Bowen, C. J., Day, J.

Held, in an action *en revendication* of moveables,

1. That the son of the plaintiff is not a competent witness for the plaintiff.

2. That where a party is asked on *faits et articles* whether he has not received the originals of certain letters, addressed to him by the adverse party in the suit, it is irregular to produce, with his answers, other letters not inquired of.

3. That where goods are seized by revendication, on the premises formerly occupied by the plaintiff and defendant as co-partners, and no proof is made of a demand, or of a refusal to deliver them up, and the goods are delivered up under an interlocutory order of the Court, the defendant alleging by his plea that he never claimed the goods, and praying *acte* of his readiness to deliver them: the plaintiff's action will be dismissed with costs, it appearing that the seizure was made without necessity. 11 L. C. Rep., p. 290, *Hearle, App., Date, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, and Meredith, J.; Mondelet, J., *dissenting*.

Held, That *main levée* may be granted in a *saisie revendication* by a judge in chambers, on the return made by the sheriff before the return day, and on affidavits. 3 Jurist, p. 185, *Canadian Building Society vs. Lamontagne*. In Chambers: Smith, J.

Held, That the plaintiff, whose horse had been stolen in the Eastern Townships, may revindicate his property, although sold to the defendant at "Tattersall's" in the city of Montreal, and bought in good faith. *Morrill vs. Unwin*, Inf. T. M., Rolland, J.; Cond. Rep., p. 60.

Held, 1. Where A. B. & Co., of the State of New York, agreed to tan a quantity of hides, the property of C. D. & Co., of New York, and to deliver the leather when tanned to the latter, who were to have the exclusive right of selling it, and a commission for such sale, A. B. & Co. being entitled to a share of the profits: and where one of the firm of A. B. & Co., instead of delivering the leather as agreed, conveyed it into Canada without the knowledge of his partner, under a fictitious name, and sold it for his own benefit: such facts do not constitute the goods "*stolen goods*," as alleged in the declaration.

2. That the goods not being stolen goods, C. D. & Co. have no right to revindicate them from a party in Canada who purchased the same for value, unless such purchaser acted in bad faith.

3. That proof that the leather came in loose, and without inspection weights, marks, or stamps, instead of in rolls with the inspector's weights, stamps, and

marks, as is the case where leather is bought in a market where there are Inspectors of leather, as in the city of New York; and that by some of the witnesses the price paid was stated to be low, whilst others stated it to be the market price, is not evidence of bad faith sufficient to justify the plaintiff's action, which was dismissed. 4 Jurist, p. 234, *Fuwsett et al. vs. Thompson et al.*; S. C., Montreal; Smith, J. Confirmed in Appeal. Lafontaine, C. J., Aylwin, Duval, Meredith, J.; Mondelet, *dissenting*; 6 Jurist, p. 139.

#### BY VENDOR—LIEN.

A. sells a quantity of timber to B., a part of the price only to be paid on the delivery of the timber. A. makes a delivery, and B. omits to pay any part of the price; thereupon A. brings an action to rescind the contract of sale, and by process of revendication attaches the timber.

Held, That this action could be maintained, and that the timber, so far as it could be identified, should be delivered over to A. Stuart's Rep., p. 538, *Moor et al.*, App., *Dyke et al.*, Resp. In Appeal, 30th April, 1833. See also *Aylwin vs. McNally*, note p. 541. ib.

Held, 1. That the vendor of goods sold on credit, *avec terme*, may revendicate the goods in the possession of the vendee, who has become insolvent.

2. That the privilege exists, although the goods have ceased to be unbroken *en totalité* in the hands of the vendee.

3. That an affidavit is not necessary to obtain a writ of revendication in such case.

4. That service of the declaration may be made at the sheriff's office, under the 7th Geo. IV., c. 8. 8 L. C. Rep., p. 239, *Robertson et al. vs. Ferguson*; S. C., Montreal; Mondelet, J. See the cases cited in note at p. 245; see also 2 Jurist, p. 101.

Held, That a merchant cannot claim to be collocated by privilege upon the proceeds of goods sold by him, if such goods at the time of the seizure had been taken out of the bales, distributed on the shelves of the purchaser, and mixed up with other goods. 6 L. C. Rep., p. 269, *Tétu vs. Fairchild et al.*, and *Divers*, Opp.; S. C., Quebec; Bowen, C. J., Badgley, J.

Held, 1. That a plaintiff, in an action of *revendication* of moveables, will not be permitted to take supplementary conclusions praying a condemnation for £25, value of the moveables, and £10 for damages.

2. That the only remedy was by motion for leave to amend. 10 L. C. Rep., p. 322, *Poulin vs. Langlois*; Circuit C., Quebec; Taschereau, J.

Held, That a vendor has a privilege on goods sold *à terme*, and delivered to the vendee, and which are still in his possession, he being insolvent, and that such goods may be seized by conservatory process to prevent their disappearing. 2 Jurist, p. 99, *Torrauce et al. vs. Thomas*; S. C., Montreal; Mondelet, J.

Held, 1. That the vendor selling without credit, and not paid, may revendicate his merchandize in the hands of a third party purchaser.

2. That such third party must prove that the sale was made on credit, and in default of so doing, the Court will presume the sale to have been for cash.

3. That the fact that the grain revendicated had been mixed in a barge with other grain will not prevent revendication. 4 Jurist, p. 307, *Sénécal vs. Mills et al.*, and *Taylor et al. Interg.*; S. C., Montreal; Berthelot, J.

Held, That a vendor *à terme* may, under the 177th Article of the Custom of Paris, issue a *saisie conservatoire*, and this without affidavit. 5 Jurist, p. 123, *Leduc vs. Tourigny*; S. C., Montreal; Badgley, J.

Held, That the vendor *à terme* of goods seized in his debtor's possession may prevent the sale, and is to be preferred upon the price, in preference to other creditors. 2 Rev. de Jur., p. 126, *McClure, App., Kelley, Resp.* In Appeal, 1826.

Held, That a carriage maker, who has had the care of a vehicle during the winter, has a right of retention, *lien*, for his *frais de garde*. 3 Rev. de Jur., p. 300, *Ryland vs. Gingras*; Q. B., Quebec, April, 1848.

Held, That coals seized by *revendication* will not be delivered up, unless the amount of defendant's lien for wharfage be deposited in court. 5 L. C. Rep., p. 491, *Bell vs. Wilson*; S. C., Quebec; Stuart, Taschereau, Parkin, J.

Held, That a hotel keeper has no lien on a piano brought into the hotel by a permanent boarder, for his board, as against the owner of the piano, by whom it had been leased. 2 Jurist, p. 281, *Nordheimer et al. vs. Hogan et al.*; S. C., Montreal; Smith, J. See same case, Cond. Rep., p. 86.

Held, Nor has a lessor of a concert room such a lien on a piano hired temporarily to the person giving the concert. 3 Jurist, p. 122, *Pearce vs. the Mayor, &c., of Montreal*; S. C., Montreal; Smith, J.

Held, 1. That a hotel keeper or boarding-house keeper cannot detain the effects of his boarder for his board, if such board is by the week or month.

2. That such privilege is given to the hotel keeper upon the baggage and effects of a traveller, passer, or *pèlerin*. 4 Jurist, p. 356, *Bleau vs. Belliveau*; S. C., Montreal; Monk, J.

Held, In an action *en revendication*, to attach in the hands of a *tiers saisi* the goods of the defendant, that a merchant's clerk has no privilege or lien upon goods of his employer for salary accrued after the institution of his action. 6 L. C. Rep., p. 463, *Poutré vs. Poutré, and Laviolette, T. S.*; S. C., Montreal; Day, Smith, Mondelet, J.

Held, 1. That a proprietor of goods cannot recover them by revendication, without payment or tender of the advances made upon them to a third party.

2. That the party making such advances is not in bad faith, although aware that the goods did not belong to the pledgor, and that the advances were for his own private purposes.

3. That the lien exists, notwithstanding the pledgor gave for the advances his promissory notes, which were negotiated by the defendant, but came back into his hands unpaid. 4 Jurist, p. 30, *Clark vs. Lomer et al.*; S. C., Montreal; Badgley, J.

Held, Where an affidavit in an action of revendication is manifestly bad, it will be quashed on motion; but where it invites an issue upon the allegations, the proper proceeding is by *exception à la forme*. 9 L. C. Rep., p. 413,

*Routh et al. vs. McPherson*; S. C., Montreal; Badgley, J. Same case, 4 Jurist, p. 45.

Held, That the vendor of a horse with term of payment, has a privilege upon the proceeds of the horse when sold (in the hands of the purchaser) at a judicial sale: and that there was no novation of the debt, by the vendor having taken a mortgage for the price. 12 L. C. Rep., p. 142, *Douglas vs. Parent and Larue*, Opp.; C. C., Quebec, Taschereau, J.

Held, That the *saisie revendication* by the vendor, à terme under the 177 article of the Coutume de Paris, cannot validly issue without an affidavit. 12 L. C. Rep., p. 252, *Ponton et al. vs. Thompson*; C. C., Quebec; Stuart, J.

Held, That the *saisie conservatoire* by the vendor of goods sold à terme may validly issue without affidavit. 6 Jurist, p. 24, *Leduc vs. Tourigny dit Beaulin*; S. C., Montreal, Badgley, J.

Held, That according to the Jurisprudence of Lower Canada, the vendor à terme has a right to seize goods sold in the hands of a vendee, en déconfiture. 6 Jurist, p. 324, *Leduc vs. Tourigny dit Beaulin*; S. C., Montreal, Monk, J.

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## ACTION—POSSESSORY.

### RÉINTÉGRANDE.

Held, That to maintain an action en réintégration the plaintiff must have had a possession of a year and a day, more especially if this possession was the result of a *voie de fait*: 3 Rev. de Jur. p. 361, *Samson vs. Bolduc*; Q. B., Quebec. 1848.

Held, That a judgment of réintégration and of damages may be asked and awarded in one and the same action. *Coté vs. Riome*; K. B., Q. 1818.

Held, On demurrer to a count in a declaration en réintégration, that an allegation of possession by plaintiff of the land claimed, for a long space of time next before the trespasses complained of, is sufficient without alleging a *possession annale*. 1 L. C. Rep., p. 328, *Stuart vs. Longley*; S. C., Montreal; Day, Vanfelson, Mondelet, J.

Held, That a possessory action cannot, after return into court, be by consent changed into an action au pétitoire. 4 Jurist p. 42, *Richard vs. Denison*. In Appeal: Lafontaine, C. J., Aylwin, Duval, J.

Held, That possession of a parcel of land acquired for a mill site, and once formally delivered, is not lost, nor is an adverse possession acquired, by such parcel not being separated from the rest of the farm, and that a *trouble* will be considered to date from the time the defendant took possession of it for the purpose of making a dam, thereby preventing plaintiff from using it for the purpose for which it was acquired. 4 Jurist, p. 53, *Elwin vs. Royston*; S. C., Sherbrooke; Day, Short, Caron, J.

### COMPLAINTE.

Held, That possession for a year and a day antecedent to the day on which the action is instituted must, en complainte, be alleged in the declaration and proved. *Jourdain vs. Vigoureux*; K. B., Q. 1809.

Held, That *complainte* will not lie against a *sous-voyer* for an act done by him pursuant to the provisions of an homologated *procès-verbal*. *Dogene vs. Auctil*; K. B., Q. 1820.

Held, That an action of *complainte* cannot lie against the *Fabrique* by a parishioner for a trouble to the plaintiff's possession of his pew in the parish church; for the possession of the pew is in the *Fabrique*, and he holds it for them; *Werter vs. Fabrique de Québec*; K. B., Q. 1820.

Held, That *complainte* cannot be maintained by one parishioner against another for disturbance by entering his pew; *Anger vs. Gingras*; K. B., Q. 1819.

Held, That *complainte* will not lie against a *sous-voyer* for an act done in obedience to a *procès-verbal* of the Grand Voyer in a matter within the limits of his authority. *Moisan vs. Gauvin*; K. B., Q. 1821.

Nor against a defendant who carries his drain into that of his neighbor, both being within the limits of a public street; *Robitaille vs. Campbell*; K. B., Q. 1821.

Held, That no individual can maintain an action of *complainte* for a *voie de fait* committed for the opening of a drain in a public street. *Robitaille vs. Campbell*; K. B., Q. 1821.

#### RIGHT OF FISHING.

Held, That a *consitaire*, who has been in possession of the right of fishing in the St. Lawrence, in front of his property for thirty years and upwards, and whose titles declare he is the proprietor of such rights, may bring a possessory action when disturbed in his possession, without being obliged to produce a title from the Crown, such title, so far as the parties are concerned, being presumed. 6 L. C. Rep., p. 242, *Gagnon, App., Hudon, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Meredith, J.

Held, That to maintain an action *en complainte* for a trespass of a fishery on the beach of the River St. Lawrence, it is necessary to prove possession under title from the Crown. 1 Rev. de Jur., p. 354, *Morin vs. Lefevre dit Bélanger*; K. B., Quebec. 1816.

#### TITLE—DESCRIPTION.

Held, That title deeds of property which do not describe its extent cannot give or determine limits to acts of possession, but the alleged possessor will be in the same position as if he had no title whatever. 8 L. C. Rep., p. 140, *Naud dit Labrie vs. Clément dit Labonté*; S. C., Quebec; Meredith, J.

#### ACTION—COMMENCEMENT OF.

Held, That actions are decided according to the state of facts at the time they were commenced. *Robichaud vs. Fraser*; K. B., Q. 1817.



## ACTION—BORNAGE.

Held, That the action *en bornage* cannot be maintained, if the lands of the plaintiff and defendant are separated by a public highway. *Blanchet vs. Jobin*; K. B., Q. 1817.

Held, That a *mur mitoyen* erected by agreement by two proprietors of adjoining lots of land, is a bar to an action of bornage instituted by either of them. *Fortier vs. Rhinart*; K. B., Q. 1817.

Held, That the defendant in an action of *bornage*, if he holds in right of another, must set forth the fact by exception, and the name and residence of the person from whom he holds. *Fortier vs. Rhinart*; K. B., Q. 1818.

Held, If the declaration *en bornage* shows that the estates of the plaintiff and defendant are not contiguous, the action must be dismissed. *Thériault vs. Leclerc*; K. B., Q. 1818.

Held, That in *bornage* the defendant may claim and prove title by prescription and possession *outré son titre*, but he cannot claim *contre son titre*. *Thériault vs. Leclerc*; K. B., Q. 1820.

Held, That evidence of an existing *borne*, without any further testimony, affords no proof of title of any description. *Thibault vs. Rancourt*; K. B., Q. 1820.

Held, That in an action *en bornage* the defendant cannot be compelled to take proceedings to compel his neighbors to *borner* with him, and a declaration with conclusions to that effect will be held bad on demurrer. 8 L. C. Rep., p. 218, *Fradet vs. Labrecque*; S. C., Quebec; Chabot, J.

Held, That in the case submitted, an action *en bornage* might be brought, inasmuch as no traces of a previous *bornage* remained, the lands being only separated by a *clôture d'embaras*. 7 L. C. Rep., p. 362, *Lanouette et al*, App., *Jackson*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, 1. That the prescription of ten years with title, does not run during the minority of the party to whom it is opposed.

2. That the existence for twenty years of a fence between two properties can not defeat an action *en bornage*.

3. That the want of publication and insinuation of a will, cannot be opposed to the possessor *animo domini* suing *en bornage*, nor by a party deriving title under the will. 1 Jurist, p. 137, *Devoiau*, App., *Watson*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, In an action *en bornage* where the defendant pleads that he has always been ready to *bound*, and prays *acte* of his willingness to do so, but also prays that plaintiff's action be dismissed with costs, that the defendant must pay the costs of suit; cost of *bornage* to be divided. 1 Jurist, p. 283, *Danseray vs. Privé*; S. C., Montreal; Day, Smith, Mondelet, J.

Held, In an action of *bornage* without previous notice, when the defendant declares himself ready to *bound*, the plaintiff will be condemned to pay the costs of the action. 2 Jurist, p. 81, *Slack vs. Short*. In Appeal: Lafontaine, C. J., Duval, J., for maintaining judgment; Aylwin, J., Caron, J., for reversal. Confirmed by operation of law.

Held 1, That in an action *en bornage*, the existence, for upwards of ten years, of a *mur mitoyen* along a portion of a division line between two city properties, and of a fence along the remaining portion of such division line, is no bar to the action.

2. That where it is established by a surveyor's report, that the wall and fence encroach on the plaintiff's property, the defendant must pay the costs of the action; the costs of survey to be borne equally by both parties. 2 Jurist, p. 204, *McFurlane vs. Thayer*; S. C., Montreal.

Held, That under the circumstances of this case, an expertise will be ordered to run a line so as to give defendant his full quantity of land according to his title. 3 Jurist, p. 115, *Lambert vs. Bertrand*; S. C., Montreal; Badgley, J.

Held, In Circuit Court, Quebec, Power, J., where a defendant in an action *en bornage* pleaded: 1. A general issue; 2. An exception that he was always ready to have the lines run, but was not requested to do so, and where a consent motion was filed, naming a surveyor to draw the line of division, that the costs of survey would be divided, and plaintiff condemned to costs of suit. Judgment confirmed on appeal to the Superior Court, (Bowen, C. J., dissenting) Baquet, Duval, J.

In appeal to Q. B., Stuart, C. J., Rolland, Panet, Aylwin, J. Held, That the defendant should have been condemned to costs, his defence having denied plaintiff's right of action. 2 L. C. Rep., p. 486, *Weymess et al.*, App., vs. *Cook*, Resp.

## ACTION—HYPOTHECARY.

Held, That a *tiers détenteur* is never presumed to bind himself personally. 2 L. C. Rep., p. 243, *Banque du Peuple vs. Gingras*; S. C., Three Rivers; D. Mondelet, Vanfelson, Moredith, J.

Held, That under the Imperial Act, 9 Geo. 4, c. 77, in force in this Province, no general mortgage can be created against lands in the Townships held in free and common soccage. 2 L. C. Rep., p. 449, *Boston vs. Classon*; S. C., Montreal; Day, Smith, Vanfelson, J.

Held, That conclusions praying that certain lands be declared hypothecated for the amount demanded, without praying that the land be sold in the ordinary course, are technically defective. 1 Jurist, p. 183, *Platt et al. vs. Platt et al.*; S. C., Montreal; Smith, Chabot, J.

Held, That an hypothecary action against several defendants jointly, as *détenteurs* of a lot of land, cannot be maintained if the defendants do not possess *par indivis* but separately, as to parts of the lot. 1 Rev. de Jur., p. 232, *Panet et al. vs. Lorin et al.*; Q. B., Montreal, 11 Feb., 1832.

Held, That in an hypothecary action the plaintiff must prove a mortgage debt, and that the land mortgaged is in possession of the defendant. *Beaubien vs. Sirey*; K. B., Q. 1817.

## DISCUSSION.

Held, In an hypothecary action, that a special mortgage is no bar to an exception of discussion, and that a *tiers détenteur* sued by the original vendor, may validly plead that exception.

2. That the *détenteur* cannot claim to hold the property till his improvements and ameliorations are first paid. 2 L. C. Rep., p. 455, *Price vs. Nelson* and *McKay*; Inter. S. C., Montreal, Day, Smith, Mondelet, J.

#### DÉLAISSEMENT.

Held, That a tutor may, in an hypothecary action, file a plea of *déguerpissement* for his pupil, but it must be founded on an *avis de parens*. *Tasché vs. Levasseur*; K. B., Quebec, 1812.

Held, That the *délaissement* in an hypothecary action may be made at the office of the prothonotary, and that notice thereof need not be given to plaintiff. 3 L. C. Rep., p. 426, *Greaves, App.*, vs. *McFarlane, Resp.* In Appeal: Rolland, Panet, Aylwin, J.

In an hypothecary action, the defendant was condemned to pay the plaintiff's debt, unless he preferred to abandon the land within fifteen days from the signification of the judgment, and in default thereof, he was condemned purely and simply to pay the debt. The judgment was signified on the 15th March, and a *délaissement* made on the 18th May, 1858, *de plano*, and without leave of court. A motion was made to reject the *délaissement*, but was dismissed:

Held, On an opposition to the sale of defendant's moveables, that the *délaissement* was duly made, and that the opposition must be maintained. 9 L. C. Rep., p. 430, *Bélanger, App.*, vs. *Durocher, Resp.* In Appeal: Aylwin, Duval, Meredith, Mondelet, J.

Held, That the purchaser of real property who has accepted an assignment of the price of sale, cannot set up, in answer to the claim of the assignee, a demand *en délaissement* made against him, so long as he has not been judicially dispossessed. 11 L. C. Rep., p. 38, *Lacombe, App.*, *Fletcher, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That a *délaissement* filed after the expiration of fifteen days from the signification of the judgment, will not be rejected on motion. 2 Jurist, p. 283, *Bélanger vs. Durocher*; S. C., Montreal; Day, J.

Held, 1. That a judgment in an hypothecary action, condemning a defendant to *délaisser*, and which is appealed from, has not the force of *chose jugée*.

2. That a conditional *délaissement*, as made in the court below, was not legal, but that a *délaissement* might be validly made after a judgment in appeal, confirming the judgment appealed from.

3. That security in appeal for "costs and damages" only, and not to satisfy the condemnation, is null and must be rejected. 2 Jurist, p. 303, *Mettrissé et al.*, App., vs. *Brault, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That where a vendee the plaintiff has been obliged to *délaisser* in consequence of an hypothecary action, he can recover against the defendants who have given him a warranty to hold him harmless from the action of any of the hypothecary creditors of the original vendors, the moneys paid on account of his purchase, a *délaissement* being an eviction.

*Hutchins vs. Dorwin et al.*; S. C., M., Cond. Rep., p. 84.

## DEBT NOT DUE.

Held, That to support an hypothecary action, the plaintiff's debt must be due and payable, (*exigible*.)

2. That costs in an action *en garantie* will be given against a plaintiff suing before his debt is exigible, when the defendant calls in his *garant formel*. 7 L. C. Rep., p. 128, *Aylwin vs. Judah*; *Judah*, plaintiff *en gar.* vs. *Rolland*, def. *en gar.*; S. C., Montreal; Smith, Mondelet, Chabot, J., Appealed.

## SECURITY AGAINST HYPOTHÈQUES.

Held, That the purchaser of real estate, who is bound to discharge certain hypothecary claims, equal to the value of the property, cannot, when sued *en déclaration d'hypothèque* by a creditor other than those he has undertaken to pay, demand that the plaintiff, a *posterior* creditor, should give him security that the property, when sold, will realize enough to satisfy the claims he has undertaken to discharge. That such security could only be demanded in case he had actually paid hypothecary debts, equal to the value of the property, and superior in rank to the claim of the plaintiff. 6 L. C. Rep., p. 163, *Tossier vs. Fulardeau*; S. C., Quebec; Meredith, Morin, Badgley, J.

## RATIFICATION.

Held, In an hypothecary action, that a defence founded upon a ratification of title in which the defendant's name is given as "Bracknon" instead of "Blacknon," is a valid defence, the property being described in the notices, and the name of the vendor correctly given, and the identity of the property admitted on the record. 6 L. C. Rep., p. 408, *Redpath et al. vs. Blacknon et al.*; S. C., Montreal; Day, Smith, Mondelet, J.

## ACTE EN BREVET.

Held, In an hypothecary action, that a notarial *acte* executed *en brevet* does not create a mortgage, the *acte* having no date certain, and being no better than an *acte* executed before witnesses, *Belair vs. Gendreau et uc.*; Pykes' Rep., p. 57; Sewell, C. J., 1810.

## UNDER £10.

Held, That a writ *de terris* in an hypothecary action under £10, should direct the sheriff to seize no other land than the one declared to be hypothecated; although no *délaissement* has been made. 1 Jurist, p. 173, *Gorrie vs. Herbert & Herbert*, Opp.; S. C., Montreal; Day, Smith, Chabot, J.

Held, That the Court of King's Bench had jurisdiction in hypothecary actions under £10 sterling, notwithstanding the passing of the 4th and 5th Viet, c. 20. 3 Rev. de Jur., p. 402, *Delery*, App., *Lemieux*, Resp. In Appeal: 1843.

Held, That the District Court, established by the 4th and 5th Vic., c. 20, had no jurisdiction in hypothecary actions. 3 Rev. de Jur. p. 405, *Talon vs. Cloutier*; District Court, St. Thomas: Morin, J., 1842.

## TENANS ET ABOUTISSANS.

Held, That in an hypothecary action the plaintiff must, in his declaration, describe the premises which he avers to be mortgaged by metes and bounds (*à peine de nullité*) and if he omits to do so; upon an exception *à la forme*, his action will be dismissed. *Perrault vs. Levesque*; K. B., Q. 1819.

## ACTION—ACCOUNT.

Held, That in an action of account, if the defendant does not render his account, the plaintiff cannot *de plano* obtain judgment for the sum he demands. He must prove what is due to him, or move for an attachment. *Wilson vs. McClure*; K. B., Q. 1809.

Held, That where the rent is to be determined by the value of articles manufactured by the lessee annually, in the premises leased, the lessor cannot maintain an action of account. *Young vs. Meiklejohn*; K. B., Q. 1809.

Held, That in an action of account against a tutor, the oath of the defendant as to *dépenses modiques* is sufficient voucher. *Racine vs. Racine*; K. B., Q. 1810.

Held, That where various sums have been received by a defendant, and the facts of the case are such that his creditor may sue him in account, still, if he sees fit, he may bring his action for money had and received; for, in this action, the plaintiff takes the *onus probandi* on himself, and of this the defendant cannot complain. *Leclerc vs. Roy*, K. B., Q. 1817.

Held, That all joint executors (who have acted) must, in an action of account against them, be made parties to the suit and be jointly summoned. *Dame vs. Grey*; K. B., Q. 1812.

Held, That in the action of account, the defendant must not only file an account, but must plead to the action; and if he does not, the plaintiff, on motion, will obtain leave to proceed *ex parte*, for want of a plea. *Charron vs. Lizotte*; K. B., Q. 1818.

Held, That when a farm is leased and the rent is to be one half of the annual produce, and is to be paid and delivered to the landlord, an action of account can be maintained against the tenant. *Bainbridge vs. Demers*; K. B., Q. 1819.

Held, That the heir at law can maintain an action of account against the executor of the will of his ancestor. *McClellan vs. McCord*; K. B., Q. 1820.

Held, That the Roman Catholic Bishop has no authority to compel the *Marguilliers* of a parish to render an account of their gestion in office; but an action of account can, for that purpose, be maintained by the *Fabrique*. *Fabrique de St. Jean Port Joly vs. Chouinard*; K. B., Q. 1820.

Held, That when between co-partners a balance has been struck, an action of assumpsit or of debt will lie for the amount; but if no balance has been so struck, the action must be in account. *Robinson vs. Reiffenstein*; K. B., Q. 1821.

Held, That in an action of account, a jury may be had for the trial of any issue or issues raised by the *débats* and *soutenements*, which in other actions they would be entitled to have so tried by the 25th Geo. 3, c. 1. *Hays vs. Woolsey*; K. B., Q. 1821.

Held, That a principal may sue his agent in account, or for moneys had, &c., at his option; K. B., Q. 1818.

Held, That a *fi. fa.* for a sum ordered by a provisional judgment, to be paid in default of rendering an account, may be superseded, if it appears that the account has been fyled, and that delay beyond the time has not been occasioned by the *comptable*. *Sergerie vs. Rouleau*; K. B., Q. 1818.

Held, In an action by a part owner of a vessel against his co-proprietor :

1. That it is not competent to the defendant to plead that he acknowledges himself bound to render an account, that he therefore renders such account, by which he acknowledges to owe a certain balance for which he confesses judgment. The plea as made being held to be merely the preamble to the account furnished.

2. The Court, pending the action, will not order the defendant to pay to the plaintiff the balance so acknowledged. 4 L. C. Rep., p. 225, *Aubin dit Mignault vs. Lisleis*; S. C., Quebec; Bowen, C. J., Duval, J.

In an action to account, on an agreement to advance moneys (for the building of a ship) to be reimbursed out of the proceeds of the sale of the ship (which the lender was authorised to send to his friends in Liverpool or London, and for that purpose, to appoint and substitute attorneys or agents,) together with all expenses and charges attending such sale, and also a commission of 5 per cent.

Held, 1. That such account need not be in the form of a *compte de tutelle*, and may be in the usual commercial form.

2. That in addition to the 5 per cent. commission, the lender may charge the commission of the agent in England, on the sale of the ship at four per cent., the usual charge there when such sale is made on credit, although part was paid within a few days after the sale, and also a bank commission of  $\frac{1}{4}$  per cent. charged by the sub-agent, and which is usual in England on similar transactions.

3. That the lender is not liable by reason of the bankruptcy of his substitutes for moneys due by them; and the principal must bear such loss, inasmuch as under the circumstances, the substitutes were his own attorneys or agents, there being no evidence that the agent was not justifiable in appointing the said sub-agents. 5 L. C. Rep., p. 17, *Symes, App., vs. Lampson, Resp., and vice versa*. In Appeal: Lafontaine, C. J., Panet, Aylwin, Mondelet, J.

Held, In an action *pro socio*, that where the plaintiffs allege that they have rendered an account annually, to the defendants, of the portion of the partnership business under their control, it is not necessary to offer and fyle, with their declaration, such account; but, in order to maintain the action, the rendering of such account must be proved. 8 L. C. Rep., p. 214, *McDonald et al. vs. Miller et al.*; S. C., Quebec; Meredith, J.

Action to account against a curator. See CURATOR Desherance—Crown.

Held, 1, That a *mandataire* who does not execute the *mandat* committed to him, must notify the *mandant* of the inexecution of the mandate.

2. That in an action to account by a creditor, party to a deed of assignment from insolvent debtors to the defendants, the defendants who pleaded that they had sold the trust estate to one of the insolvents who had undertaken to pay the creditors, were not thereby absolved from liability to account.

3. That the Court will order an account, reserving, until a later stage in the case, the question of the liability of defendants for the whole or a part of the demand of the plaintiff. 6 Jurist, p. 32, *Torrance vs. Chapman et al.*; S. C., Montreal; Berthelet, J.

ABSENCE under coutume.—*See* PRESCRIPTION.

ABSENTEES.—*See* CURATOR.

ACCROISSEMENT.—*See* USUFRUCT—WILL.

ACCOUNT.—*See* ACTION ACCOUNT—TUTELLE.

ACTION AGAINST TUTOR.—*See* TUTOR.

ACTION, CAUSE OF.—*See* PLEADINGS Exception Déclinatoire.

ACTION, CAUSE OF.—*See* PLEADINGS Exception Déclinatoire.

ACTION EN DÉCHÉANCE.—Not necessary in commercial cases.

ACTION EN RÉINTÉGRANDE, judgment reversed for vagueness.—*See* ENQUÊTES, Notice of.

ACTION, NOTICE OF.—*See* OFFICER PUBLIC—JURY Coroner's.

ACTION RESCISOIRE, duration of, *See* INVENTORY when null.

ACTION QUI TAM.—*See* PENAL STATUTE.

ACTION, Return of before Return day.—*See* CAPIAS.

ACTION RÉVOCATOIRE.—*See* FRAUD Revocation—REGISTRATION, Bailleur de Fonds,—LANDLORD AND TENANT, Resiliation.

ACTION, SERVICE OF.—*See* DOMICILE.

ADJUDICATAIRE'S RIGHTS.—*See* DECRET défaut de Contenance—OPPOSITION.

ADULTERY.—*See* HUSBAND AND WIFE, Adultery.

AFFIDAVIT, for capias.—*See* CAPIAS—ACTION REVENDICATION.

AFFIDAVIT, for attachment.—*See* MOTION TO QUASH.

AJOURNEMENT.—*See* PLEADINGS—Exception à la Forme.

ALIMENTARY ALLOWANCE BY EXECUTOR.—*See* WILL—Executor.

AMELIORATIONS.—*See* IMPENSES ET AMÉLIORATIONS—ACTION PETITORY—ACTION Hypothecary.

AMEUBLEMENT.—*See* MARRIAGE—DOUAIRE.

ARCHITECT.—*See* ASSUMPSIT Architect—PLEADINGS—JOINER,—SERVICES.

ASSIGNMENT.—*See* CESSION.

ATTACHMENT, against body.—*See* CONTRAINTE—CAPIAS.

ATTORNEY, POWER OF.—*See* ACTION PETITORY—EVIDENCE Power of Attorney,—COSTS.

AUCTIONEER.—*See* PRINCIPAL AND AGENT—SALE OF GOODS, Auction.

AVEU JUDICIAIRE.—*See* EVIDENCE Admission; also BILLS AND NOTES Indorsation.

## AINESSE, DROIT DE.

Held, That the *droit d'ainesse* being a proprietary right, cannot be claimed under a will, by the eldest son of the testator as usufructuary legatee, but only as *héritier ab intestat*. 6 Jurist, p. 128, *Cuthbert vs. Cuthbert*; S. C., Montreal; Badgley, J.

## ALIEN.

Held, That aliens cannot sue in *forma pauperis*. *Barry vs. Harris*; K. B., Q. 1810.

Held, That an alien being guardian to children, who are minors resident in a foreign country, can support an action of account on their behalf. *Allen vs. Cottman*; K. B., Q. 1811.

Held, That aliens cannot take lands by descent and inheritance. *Rex vs. Berthelot*; K. B., Q. 1811.

Held, That if a submission to *arbitres* be of all matters in difference, they must decide upon all the points in dispute between the parties; but the Court will not presume that any point has been left undecided; and if such be the fact, it must be shown. *Fairfield vs. Butchart*; K. B., Q. 1821.

Held, That an alien domiciled in Canada, but not naturalized, is incapable of taking real property by devise. *Stuart's Rep.*, p. 143. *Pacquet vs. Gasparid*; K. B., Quebec, 1811.

Held, That an alien can inherit the personal estate of a British subject. *Stuart's Rep.*, p. 345. *Sarony vs. Bell*; K. B., Quebec, 20th April, 1828.

Held, 1. That an alien cannot devise by last will and testament.

2. That the succession of an alien will devolve to his grandchildren, natural born subjects, to the exclusion of his own children who are aliens. *Stuart's Rep.*, p. 460. *Donegani et al. vs. Donegani*; K. B., Quebec, 1831.

Held, 1. That the question of who is an alien, is to be decided by the law of England; but when alienage is established, the consequences which result from it are to be determined by the law of Canada.

2. If an alien dies without issue, his lands belong to the crown, but if he leaves children, some born in Canada, and others not, the former exclude the crown, and then all the children inherit as if they were natural born subjects.

3. Where an alien has a son who is also an alien, the children of the latter inherit from the grandfather, to the exclusion of their father.

4. Although an act of the legislature, passed after judgment rendered in an original jurisdiction, may affect the rights of a party as they existed at the institution of a suit, this circumstance cannot be taken advantage of in an appeal from the judgment. *Stuart's Rep.*, p. 605. *Donegani, App., vs. Donegani et al.*, *Resp.* In the Privy Council: 2nd Feb., 1835.

Held, That the plaintiff is an alien enemy, must be pleaded by an exception *peremptoire temporaire*. *Bellinghurst vs. Lee*; K. B., Q. 1813.

Held, 1. That under the 12th Vict., c. 197, which enacts that every alien shall have the same capacity to take, recover, and transmit "real estate" in all parts



of the province as natural born or naturalized subjects, the alien is placed in the same position as the natural born subject, and can claim conjointly with a naturalized heir, both real and personal property.

2. That although moveable property be not mentioned in the 12th section of the act, it must be taken to be included in the larger term "real estate." 4 L. C. Rep., p. 310. *Corse et al. vs. Corse*; S. C., Montreal; Day, Smith, Mondelet, J.

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#### ALIMENT.

Held, 1. That a debtor arrested on *capitis* by several plaintiffs, is entitled to an alimentary allowance from the plaintiffs in each action.

2. That tender of payment made in gold, silver, or copper coin, defaced or stamped (by bending or stamping) is illegal.

3. That the provisions of the Imperial Statute 16 and 17 Vict., c. 102, respecting such current coin, apply to this country. 2 Jurist, p. 105. *Warner vs. Tyson*; *Crawford vs. Tyson*; *Merritt vs. Tyson*; S. C., Montreal; Day, J.

Held, That tender of an American gold dollar is not a legal tender. 2 Jurist, p. 189. *Bruncau vs. Miller*; S. C., Montreal; Smith, J.

Held, That children who are in law bound to furnish aliment to their parents will be condemned jointly and severally, and that the action may be directed against such of the children as the parents may select. 5 Jurist, p. 99. *Lauzon vs. Connoissant et vir.*; C. C., Montreal; Monk, J.

Held, In an action by a father against a son for aliment, that the action will be dismissed on proof of an offer by the defendant to receive and lodge the plaintiff in his own family. 3 Rev. de Jur., p. 83, *Vallières vs. Vallières*. Inf. Term, Quebec, 1847.

See RENTE *Viagère*.

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#### AMENDMENT.

Held, 1. That amendments to a declaration which change the nature of the action will not be allowed.

2. That the amendments allowed in the present case, by the court below, did not change the nature of the action. 6 Jurist, p. 287, *Lambe, App., Mann, Resp.* In Appeal: Lafontaine, C. J., Duval, Mondelet, Berthelot, J.

Held, That on allowing a material amendment to plaintiff's declaration, after issue joined and during *enquête*, full costs will be allowed as in a cause settled at the stage it then was at. 6 Jurist, p. 311, *Syme et al. vs. Heward*; S. C., Montreal; Day, Smith, Mondelet, J., 1856.

Held, That a plaintiff cannot amend his declaration to such an extent as to substitute one action for another, *Casgrain vs. Fay*; K. B., Q. 1817.

Held, That process *ad respondendum* may be amended. *Patterson vs. Berme*; K. B., Q. 1809.

Held, That a bill of particulars is in the nature of an *articulation de faits*, but it is also a confession. Therefore, although it may be amended as to mere error, it cannot be amended in an essential matter of substance. *Reiffenstein vs. Robinson*; K. B., Q. 1821.

Held, That an amendment of a declaration based upon a fact posterior to the action will not be allowed. 1 Jurist, p. 42, *Marsalais vs. Lesage*; S. C., Montreal; Day, Smith, Mondelet, J.

Held, Where it results from the proof that the facts proved do not correspond precisely with the allegations, that the declaration may be amended on payment of costs without prejudice to the evidence, and with right to defendant to re-plead within eight days. 2 Jurist, p. 194, *Boudreau vs. Lavender*; S. C., Montreal; Day, J.

Held, That an amendment of a declaration will be permitted by changing the date of a lease set up as of the 22nd, instead of the 23rd February, 1856, on payment of costs. 3 Jurist, p. 136, *Frothingham vs. Gilbert*; S. C., Montreal; Smith, J.

Held, That a writ of summons, as well as a declaration, may be amended. 1 L. C. Rep., p. 399, *Bank of B. N. A. vs. Taylor*; S. C., Montreal; Day, Smith, Mondelet, J.

Amendment by setting up notice of action. See OFFICER PUBLIC, Customs.

Held, That the amount of costs payable on the amendment of a declaration, is in the discretion of the court. 4 L. C. Rep., p. 425. *D'Aoust vs. Deschamps*; S. C., Montreal; Day, Vanfelson, Mondelet, J.

Held, That after the filing of an *exception à la forme*, the plaintiff's motion that the sheriff be allowed to amend his return, should have been granted, inasmuch as one party should not profit, nor the other suffer, by an error inadvertently committed by the sheriff.

*Scemle*, That the sheriff, on motion or petition, may be allowed to amend his return. 9 L. C. Rep., p. 217, *Molson et al., App., vs. Burroughs, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, J.; Same case, 3 Jurist, p. 220.

Held, That a motion to amend the indorsement of the number of the case on the back of an opposition will be rejected, and plaintiff's motion to reject opposition on account of this error granted. 1 Jurist, p. 2, *Joseph vs. Cay, and Cay, Opp.*; S. C., Montreal; Day, Smith, Mondelet, J.

Held, That the conclusions on a new declaration filed in an action evoked, must be such as the action instituted in the inferior term will warrant. *Patris vs. Bellanger*; K. B., Q. 1809.

AMENDMENT in date of pleading: See "Wages."

## APPEAL.

## BOND.

Held, That an action upon an appeal bond cannot be maintained until the appeal has been determined. *Kerr vs. Munro*; K. B., Q. 1808.

Held, That an appeal disallowed for want of security, does not stay proceedings. *Perrault vs. Borgia*; K. B., Q. 1816.

Held, That the production of a copy of a bond in appeal (to the Queen's Bench) certified by the prothonotary of the Superior Court, is sufficient proof of the execution of the bond, and of the liability of the sureties without further evidence. 6 L. C. Rep., p. 35, *Gosselin vs. Chapman*; S. C., Quebec; Bowen, C. J., Morin, Badgley, J.

A Bond for Costs and Damages only, is illegal. See "ACTION HYPOTHECAIRE Delaissement.

#### JUDGE.

Competency of Judge Caron. As to the question whether Mr. Justice Caron's appointment as commissioner under the 20th Vict., c. 43, had rendered him incompetent to sit in the Court of Appeals, the court was divided. Lafontaine, C. J., and Aylwin, J., held that he was incompetent; Caron and Duval, J., contra. 5 Jurist, p. 79.

Held, That the omission in a recognizance of special bail, of the following condition, required by the 5th Geo. 4, c. 2, "It being nevertheless expressly provided in conformity to the statute in such case made and provided, that we the cognizers for the said defendant in this cause, shall not by virtue of the undertaking hereinbefore stated, become liable unless the said defendant shall leave the province without having paid the debt, interest, and costs," makes such recognizance null and void. 1 Rev. de Jur., p. 212, *Stewart, App., Hamel et al. Resp.* In Appeal: Gale, Day, and Gardener, J.; Rolland, Mondelet, J., dissenting.

#### FACTUMS.

Held, That *factums* will be received when a motion is being made to dismiss an appeal in consequence of appellant's having neglected to file them within the delay prescribed, the party in default to pay the costs of motion. 3 Jurist, p. 256, *Dawson, App., Belle, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Rules of practice in Appeal. 1. Requiring printed factums in appeals from the Circuit Court, and dispensing with copies of the petition in appeal.

2. That in all appeals the verbal evidence of each party is to be printed by him. 4 Jurist, p. 29.

#### TO QUEEN'S BENCH.

Held, That no appeal lies to the Court of Queen's Bench, under the act of 1794, sec. 27, on a demand for £22 10s. cy., such demand "not exceeding £20 sterling." 6 L. C. Rep., p. 184, *Rh aume, App., Fortier, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That the appeal given by the 6th sub-section of the 5th section of the 22nd Vict., c. 82, is not given to electors whose names are entered in the amended list of voters, unless a complaint shall have been filed by such electors before the board or authority for revising such list, as required by such sub-section. 9 L. C. Rep., p. 415, *Clereux et al. vs. Iavoix et al.*; S. C., Montreal; Smith, J.

Held, That an appeal does not lie to the Court of Queen's Bench from a judgment of the Superior Court rendered under the prerogative writ Act. 12th Vict.,

c. 41. 4 Jurist, p. 283, *Bristow*, App., *Rolland*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

Held, That the Court of Queen's Bench, appeal side, has no power after judgment rendered by it in appeal, to take cognizance of the case. 5 Jurist, p. 164, *Montreal Ass. Co.*, App., vs. *McGillivray*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

#### TO THE PRIVY COUNCIL.

An act of the parliament of Great Britain declared that all laws passed by the legislature of a colony should be valid and binding within the colony, and directed that the colonial court of appeals should be subjected to such appeal as it was, previous to the passing of such act, and also to such further and other provisions as might be made in that behalf, by any act of the colonial legislature.

Held, That an act having been passed by the colonial legislature, limiting the right of appeal to causes where the sum in dispute was not less than £500 stg., a petition for leave to appeal in a cause where the sum was of less amount, could not be received by the King in council, although there was a special saving of the rights and prerogatives of the crown. Stuart's Rep., p. 527, *Cuillier*, App., *Aylwin*, Resp. In the Privy Council; 29th Nov., 1832.

On a motion by a defendant, opposant below, for an appeal to Her Majesty in Her Privy Council from a judgment in the Queen's Bench, appeal side, it appeared that judgment was rendered below for £944, but that execution issued for £200, balance of the judgment under which the defendant's goods were seized. The opposition set up compensation, and alleged an indebtedness, by the respondent to the extent of £10,000 on judgments.

Held, That the security to be given on an appeal to the Privy Council under the 343, Geo. 3, c. 6, sec. 30, must be regulated by the execution which must be held as the *demande* and not by the opposition, which was to be considered as an exception, or plea to the *demande*. 1 L. C. Rep., p. 273, *Gugy* vs. *Gugy*; Q. B. In Appeal: Stuart, C. J., Rolland, Panet, Aylwin, J.

Held, That a motion made by a defendant, opposant below, for leave to appeal to the Privy Council, from a judgment rendered in appeal, dismissing an opposition *à fin d'annuler* to the seizure and sale of immoveables, will be rejected as not falling within the provisions of the Statute 34 Geo. 3, c. 6, and containing no demand of money. 1 L. C. Rep., p. 274, *Lespérance*, App., vs. *Allard*, Resp. In note. In Appeal: Stuart, C. J., Rolland, Panet, Aylwin, J.

Held, 1. That a respondent, who has filed his reasons of appeal and consented to an inscription for hearing, has thereby waived all objections as to the return of the writ.

2. That the return to a writ of appeal may be signed by one judge although addressed to two or more judges under the 25 Geo. 3, c. 2, sec. 44. 1 L. C. Rep., p. 401, *Heury* vs. *Holland*. In Appeal: Rolland, Panet, Aylwin, J.

Held, In Appeal: That there is no appeal from an interlocutory judgment of the Superior Court dismissing an exception of *litispendance*, which merely suspends proceedings. 1 L. C. Rep., p. 411, *Donegani* vs. *Quesnel*. Rolland, Panet, Aylwin, J.

Held, That an appeal does not lie to Her Majesty in Her Privy Council, from a judgment of the Court of Appeals, reversing the judgment of the court below, by which the appellant's action was dismissed on a *défense en droit* to the declaration. 6 L. C. Rep., p. 147. In Appeal: *Simard*, App., *Toussaint*, Resp.; Lafontaine, C. J., Aylwin, Duval, Caron, J.

The plaintiff produced a copy of a decree of Her Majesty in her Privy Council, reversing a judgment of the Court of Queen's Bench, appeal side, which confirmed a judgment of the Superior Court, Montreal, dismissing the plaintiff's action. This decree ordered the Superior Court to cause judgment to be entered up for the original plaintiff, which was prayed for by petition.

Held, 1. That the Superior Court must comply with such order and enter up judgment for the sum demanded by the plaintiff's declaration.

2. That the Court will grant the defendants *acte* of their declaration of the decease of one of the defendants, but not that part of their motion which prayed that all proceedings be suspended until a *reprise d'instance* be made. 11 L. C. Rep., p. 495, *Bank of B. N. A. vs. Cuillier et al.*; S. C., Montreal; Smith, J. Appealed.

Held, That in determining the question of the value of the object in dispute, upon which the right to appeal to Her Majesty in her Privy Council depends, the rule to adopt is, to look at the judgment as it affects the interests of the party who is prejudiced by it, and who seeks relief in appeal. 12 L. C. Rep., p. 154, *McFarlane et al.*, App., *Leclaire et al.*, Resp. In the Privy Council: *Lord Chelmsford et al.* Same case, 6 Jurist, p. 170.

Held, 1. That notwithstanding the 34th Geo. 3, c. 6, sect. 30, and the 12th Viet., c. 37, sect. 19, the judgment of the Court of Queen's Bench is not final in all cases "where the matter in dispute does not exceed the sum or value of £500 sterling, and does not relate to any fee of office, duty, rent, revenue, or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents, or such like matters or things, where the rights in future may be bound," and that the Privy Council will, in its discretion, allow appeals in such cases.

2. That the case of *Cuillier vs. Aylwin* (2 Knapp, p. 72), did not receive that full and deliberate consideration which its great importance demanded, and is overruled. 6 Jurist, p. 85, *Marois*, App., *Allaire*, Resp. In the Privy Council: *Lord Chelmsford et al.*

#### MANDAMUS.

Held, That under the 12th Viet., c. 41, sec. 20, an appeal will lie to the Court of Appeals from a judgment of the Superior Court refusing to grant a writ of *mandamus*. 1 L. C. Rep., p. 65, *Wurtele vs. The Bishop of Quebec*. In Appeal: Rolland, Panet, Aylwin, J.

#### WRIT OF.

Held, That a writ of appeal, and not a writ of error, must be taken in the case of a jury trial where the matter complained of is not merely an error in matter of law, there being no plea determined by the jury but a final adjudication on law and fact. 2 L. C. Rep., p. 212, *Cusej vs. Goldsmid et al.* In Appeal: Rolland, Panet, Aylwin, J.

Held, 1. That the part of the 7th rule of practice in appeal, "That all writs of appeal and error shall bear the signature of the attorney suing out the appeal," is merely directory, and, where a motion is made to supply the signature, it will be granted, and a motion to dismiss the appeal for irregularity will be discharged.

2. That the rules of a court are within its control, and will be relaxed where a rigid enforcement of them will operate an absolute injustice. 9 L. C. Rep., p. 270, *Ross*, App., *Scott*, Resp. In Appeal: Aylwin, Duval, Meredith, Mondelet, J.

Held, That an appeal will be dismissed if the writ of appeal is returned after the fifteen days. 3 Rev. de Jur., p. 107, *City Bank vs. Saurin*. In Appeal: 1847. Judges in appeal equally divided on the same question in *Gibb vs. Scully*. 3 Rev. de Jur., p. 108.

Held, That the omission on the part of the attorney, to sign a writ of appeal, is not an absolute nullity, and may be remedied with the permission of the court. 12 L. C. Rep., p. 405, *Viger*, App., *Belliveau*, Resp. In Appeal: Lafontaine, C. J., Duval, Meredith, Mondelet, J. Same case, 6 Jurist, p. 177.

Held, That a writ of appeal must be served on the respondent, or personally on his attorney. 6 L. C. Rep., p. 429, *Dupuis*, App., *Dupuis*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That an appeal by one of four defendants suspends the execution of the judgment whilst such appeal is pending. 6 L. C. Rep., *Brush et al. vs. Wilson*; S. C., Quebec; Bowen, C. J., Morin, Badgley, J.

## INTERLOCUTORIES.

Held, That an appeal lies from an order of the Superior Court discharging an inscription for hearing in vacation of an *exception à la forme* as being made without the consent, in writing, of the parties for such hearing out of term. 2 L. C. Rep., p. 227, *Dease*, App., vs. *Taylor*, Resp. In Appeal: Rolland (dissenting), Panet, Aylwin, J.

Held, 1. That an appeal will not lie from a judgment dismissing an *exception à la forme* as being filed too late, if the grounds raised by the exception might have been made grounds of a *défense en droit*, and if copy of such *défense* is not produced in appeal, because without such copy the court cannot determine whether the grievance complained of is irremediable or not. 3 L. C. Rep., p. 53, *Moreau vs. Motz*. In Appeal: Rolland, Panet, Aylwin, J.

Held, 1. That a judgment quashing a writ of *capias ad respondendum* is an interlocutory judgment which cannot be appealed from *de pleno*.

2. That the transcript is conclusive evidence of the nature of the proceedings, and the Court of Appeal will not go beyond it to consider the effect of a subsequent judgment not comprised or referred to therein. 10 L. C. Rep., p. 195, *Berry*, App., *May*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, Badgley, J.

Held, That proceedings at *enquête* in a cause will be suspended, to allow a defendant whose *défense en droit* to the declaration has been dismissed, time to apply to the Court of Appeals for the allowance of an appeal, of which notice has been given to the plaintiff. 3 Jurist, p. 132, *Scott et al. vs. Scott et al.* S. C., Montreal: Mondelet, J.

Held, That no appeal will lie from an interlocutory judgment of a judge of the Superior Court rejecting the summary petition of a defendant arrested by *capias* for a discharge in terms of the 12th Viet., c. 42, sec. 2. 3 Jurist, p. 292, *Blankensee, App., Sharpley, Resp.* In Appeal: Lafontaine, C. J., Aylwin, J.

Held, 1. That a motion for a rule to obtain a writ of appeal from an interlocutory judgment, will be rejected if the court be against the party moving, on the merits of his application.

2. That where two causes of action are combined in one suit, the one commercial and the other not, the action is not susceptible of a trial by jury.

3. That an action *en reddition de compte* is not to be referred to a jury. 6 Jurist, p. 75. In Appeal: Lafontaine, C. J., Duval, Mondelet, J.; Aylwin, dissenting.

Held, That an appeal from an interlocutory judgment must be applied for, during the term in appeal next after the rendering of the judgment. 6 Jurist, p. 138, *The Seminary of Quebec vs. Vinet et al.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That an application to be permitted to appeal from an interlocutory judgment which is not made during the next subsequent term to the rendering of the judgment, is not too late, when the applicant had previously sued out a writ of appeal *de plano* which was set aside. 6 Jurist, p. 221, *Wardle, App., Bethune, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

#### JUDGMENT IN VACATION.

Held, That an appeal lies from a judgment rendered by a judge of the Superior Court in vacation, ordering the discharge, under the provisions of the 12th Viet., c. 42, of a defendant in custody under a writ of *capias ad respondendum*. 12 L. C. Rep., p. 254, *Guy, App., Ferguson, Resp.* In Appeal: Lafontaine, C. J., Duval, Meredith, J.; Mondelet, J., dissenting.

#### ENQUÊTE IN.

Held, That the Court of Appeals may order and take an *enquête* upon the allegations contained in a petition *en reprise d'instance*. *McKillop et al., App., Kuuntz et al., Resp.*; Stuart, C. J., *et al.*, J. 10th Nov., 1845.

#### INSCRIPTION.

Held, That an inscription on the role for hearing made by a respondent waives all objections as to form. 2 Rev. de Jur., p. 229, *Douglas, App., Dupré, Resp.* In Appeal: 1844.

#### FROM CERTIORARI.

Held, That no appeal will lie from a judgment rendered on a writ of certiorari. 3 Rev. de Jur., p. 401. *Bazin et al., App., Crevier et al., Resp.* In Appeal: 1848.

#### FROM CIRCUIT COURT.

Held, Where a plaintiff had obtained judgment in the Circuit Court for a sum exceeding £15, and sued out a writ of *saisie arrêt* on which judgment was also rendered for a sum over £15, that an intervening party claiming £4 13s. 6d.

from the moneys had no right of appeal under the 12th Vict., c. 38, sect 53. 2 L. C. Rep., p. 494, *Russell et al., App., vs. Grovdey, Resp.*; S. C. Quebec; Bowen, C. J., Duval, J.

Held, 1. That when the delay of twenty-five days allowed by law, for the service of a petition and notice of appeal from the Circuit Court, expires on a legal holiday, the service may be made on the following day.

2. That it is no valid objection, that service of a copy of the petition and notice has not been made upon the clerk of the Circuit Court, nor that the copy served on the attorney of the respondent bears date previous to the rendering of the judgment, appealed from. 5 L. C. Rep., p. 164, *Dean vs. Jackson*; S. C., Quebec; Bowen, C. J., Meredith, Morin, J.

Held, That security in an appeal from the Circuit Court is validly given under the 12th Vict., c. 39, sect. 54, by two sureties who justify on real estate without describing it. 6 L. C. Rep., p. 149, *Lynch vs. Blanchet*; S. C., Montreal; Smith, Mondelet, Chabot, J.

Held, That on such appeal, the real estate of the surety must be described. 6 L. C. Rep., p. 150, *Hitchcock, App., Monnette, Resp.*; S. C., Montreal; Day, Mondelet, Badgley, J.

Held, 1. That, on such appeal, security by one person who justifies on real property described, is sufficient.

2. That the transmission of the record subsequently to the day when the allowance of the appeal would be prayed for, is no ground for dismissing the appeal. 6 L. C. Rep., p. 150, *Hilaire dit Bonaventure, App., Lizotte, Resp.*; S. C., Montreal; Day, Badgley, J.; Mondelet, J., dissenting.

Held, That an appeal from the Circuit Court will be dismissed, when the petition in appeal contains no special reasons. 6 L. C. Rep., p. 476, *Maillé vs. Chapeau*; S. C., Montreal; Smith, Vanfelson, J.

Held, That where an appeal from a Circuit Court rests on evidence, the court will not disturb the judgment, if the evidence be doubtful. 6 L. C. Rep., p. 488, *Poutré, App. vs. Chapdelaine, Resp.*; S. C., Montreal; Day, Smith, Mondelet, J.

Held, That an appeal from the Circuit Court will be dismissed if the copy of the appeal bond to be served, is certified by the attorney of the appellant, and not by the clerk of the court in whose office the bond is fyled, under the 20th Vict., c. 64, sec. 65. 9 L. C. Rep., p. 42, *Pentland et al., App., Drolet, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That on an appeal from the Circuit Court the original petition in appeal notice, &c., must be fyled in the office of the clerk of the Circuit Court within twenty-five days from the rendering of the judgment appealed from, otherwise the appeal will be dismissed on motion, under the 20th Vict., c. 46, sec. 66. 9 L. C. Rep., p. 114, *McGillis et al., App., Pearce et al., Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, 1. That an appeal lies to the Court of Queen's Bench under the 12th Vict., c. 38, sec. 53 and 95; 18th Vict., c. 108, sec. 15, and 20th Vict., c. 44, sec. 60, in an action by a lessor in ejectment instituted in the Circuit Court when the annual rent is under £25.



2. That in such appeal, where two sureties are furnished, it is not necessary that either of them should be proprietor of real property of the value of £50; that this is only necessary where one surety only is furnished under 20th Viet., c. 44, sec. 61, 62. 10 L. C. Rep., p. 400, *Hearn*, App., *Lampson*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, 1. That in appeals from the Circuit Court, service of a copy of the petition, bond, and notice of appeal, at the *domicile* of the attorney *ad litem*, is sufficient under the 20th Viet., c. 44, sec. 65.

2. That affidavits setting forth that the property described in the bond is not of the value of £50, will be received in support of a motion to dismiss the appeal for want of sufficient security, and that the appeal will be dismissed on such motion, unless the appellant deposits the sum of £50 together with the sum of £1 5s. to cover the costs of such motion. 10 L. C. Rep., p. 429, *Bedard*, App., *The Parish of St. Charles Borromée*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That a bond by one surety, having real property of the value of £50, but without describing the property, is insufficient, and the appeal dismissed under 20th Viet., c. 44, sec. 61, 62. 10 L. C. Rep., p. 431, *Charost*, App., *Rompfé*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, 1. That an appeal will lie from a judgment of a Circuit Court dismissing a demurrer to a declaration.

2. That no action will lie for payment in cash, of clothing specified in a deed of donation, but not required by the donee at the times specified in the donation 1 Jurist, p. 176, *McGinn*, App., *Brawlers*, Resp. S. C., Montreal; Day, Smith, Chabot, J.

The parties proceeded in the Circuit Court as in a non-appealable case, although the case was in fact appealable, and judgment was rendered in favor of plaintiff:

Held, On appeal by the defendant, founded on the irregularity of the proceedings, no evidence having been taken in writing, and no articulation of facts, or inscription for enquête, or for hearing on the merits, that the Court will not disturb the judgment of the court below. 11 L. C. Rep., p. 282, *Osgood*, App., *Cullen*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

Held, That a signification of a petition in appeal is null, if the bailiff returns that he served it at the *greffe* of the Circuit Court, and does not make a return that the attorney of the respondent had no domicile or elected domicile within the circuit. 2 Jurist, p. 67, *Groom*, App., *Boucher*, Resp. S. C., Montreal; Day, Smith, Mondelet, J.

Held, 1. That an action in the Circuit Court for less than £25, is an appealable case, if the defendant sets up title to real estate in his plea.

2. An appeal lies to the Court of Queen's Bench from a judgment rendered in the Circuit Court in vacation under the lessor and lessee's act of 1855. 4 Jurist, p. 18, *Gould vs. Sweet*. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, J.; Mondelet, J., dissenting.

Held, That if an appeal from the Circuit Court is returned on the first day of the term, a motion to reject the appeal for insufficient security, made on the first

day of the following term, will be rejected as too late. 5 Jurist, p. 20, *McKay*, App., *Simpson*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That where a party gave notice of an appeal from the Circuit Court but failed to present the petition in appeal on the day fixed, the Court will not interfere to declare the appeal abandoned with costs, it being enough that no record has been transmitted. *Imbault vs. Bourque*; S. C., Montreal; Cond. Rep., p. 75.

#### APPEAL FROM TRINITY HOUSE.

In appeals from the *Trinity House* the appellant is not bound, under the 12th Viet., c. 114, to give notice of the security he intends to offer. 10 L. C. Rep., p. 434, *Laprise vs. Armstrong*; S. C., Quebec; Taschereau, Asst. J.

APPEAL lies from Contrainte.—See CONTRAINTÉ.

APPEALS to High Court of Admiralty.—See DAMAGES—Judges.

APPEALS, parties to.—See VENTILATION.

APPEALS, new points in.—See INSURANCE Certificate.

APPEALS, security in.—See SURETY.

#### APPEAL FROM THE COURT OF PRÉVOTÉ.

Appeal from Bailiff de Beauport, Prévosté, Case No. 49.

Appeal dismissed for want of diligence, Cons. Sup., No. 8.

Appeal, foreclosure against respondent, Ib. No. 9.

Appeal, form of proceeding in, Ib. No. 10.

Appeal, converted into opposition, Ib. No. 12.

Appeal, désistement from, Ib. No. 47; also Prévosté, No. 100.

Appeal, costs of first appeal, Cons. Sup., No. 50.

Appellant's power declared sufficient to carry on the action, Cons. Sup.; No. 53.

Appellant discharged from condemnation below on oath that he owed nothing, Ib. No. 54.

#### ATTORNEY GENERAL.

Held, That an information in the name of the attorney general *pro Regina* will be dismissed with costs on an exception *à la forme*, it being signed by certain attorneys styling themselves "procureurs de procureur général," inasmuch as the attorney general, when appearing for Her Majesty, cannot act by attorney. 6 Jurist, p. 309. *Attorney General (Cartier) pro Reg. vs. Laviolette et al.*; S. C., Montreal; Monk, J.

See "SHIPS AND SHIPPING, *Attorney General*."

#### ARBITRATORS.

##### POWERS OF ARBITRATORS.

Held, That arbitrators named in a suit who report a sum of money as due to the plaintiff, have no right to adjudicate on the costs of suit, and to decide that each party pay his own costs, and that so much of the award as respects the costs will be rejected. 2 Jurist, p. 190, *McKenna vs. Tubb*. C. C. Montreal; Badgley, J.

Held, That upon a reference to three arbitrators, or specifically to any two of them, an award by two is good, if the third has had due notice of the matters referred, and of the several meetings; but if the reference be made to three generally, all should be present at the meetings, especially when the award is made, and then the award of two is valid, even if the third refuses to assent to it. *Stuart's Rep.*, p. 43, *Meiklejohn vs. Young et al.* K. B., Quebec; April 10, 1811.

Held, That if a submission to *arbitres* be of all matters of difference, they must decide upon all the points in dispute between the parties, but the court will not presume that any point has been left undecided, and if such be the fact it must be shown. *Fairfield vs. Butchard.* K. B., Q. 1821.

Held, That arbitrators must not only hear the parties, but must decide the matters in dispute before the expiration of the rule of reference. Their proceedings are otherwise void. *Gilley vs. Miller.* K. B., Q. 1811.

#### NOTARIAL AWARD.

Held, That in Lower Canada, Notaries have power to receive the award of arbitrators, and to give certified copies of the oath of arbitrators annexed thereto, and that such power is specially recognized as belonging to them, by the 2nd Wm. 4, c. 58, and 14th Vict., c. 114. 6 L. C. Rep., p. 277, *Roy, App.*, *Champlain and St. Lawrence R. Co.*, Resp. In Appeal: Lafontaine, C. J., Duval, Caron, Meredith, J.

#### AWARD INVALID.

Held, That when several matters are in dispute and are referred, the arbitrators must decide *pro* or *con* upon the whole, and must hear the parties on all of them. For want of these steps the court set aside the award, in this case. *Fairfield vs. Butchard.* K. B., Q. 1821.

Held, That an award of arbitrators named in a cause will be rejected on motion, because the original or *minute* of the report was not produced. *Rodier vs. Mercile.* S. C. Montreal, 1850; Day, Smith, Mondelet, J. Cond. Rep., p. 57.

Held, In an action on an award of arbitrators and *amicales compositeurs*, the defendant may contest the validity of the award which does not set forth that the witnesses were heard, by alleging that the arbitrators refused to hear his witnesses, and will be allowed to prove such refusal. 9 L. C. Rep., p. 440, *Ostell, App.*, *Joseph, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J. See Case in S. C. 1 Jurist, p. 265.

Where arbitrators who were required by the rule to be "duly sworn," made a report that after being duly sworn they proceeded, &c., but without producing certificate of oath, or evidence taken.

Held, On motion by plaintiff, that the arbitrators were not bound to produce the notes of evidence, taken by, and papers produced, before them and on motion of defendant to homologate the report, the court will order the report to be sent back to the arbitrators to produce evidence of their having been sworn. L. C. Rep., p. 499, *Joseph vs. Ostell.* S. C. Montreal; Smith J. Same case, 6 Jurist, p. 40.

Held, 1. That a judgment homologating an award of arbitrators is an interlocutory judgment and can be revised.

2. That an award will be set aside, which does not embrace all the material points submitted to arbitration, or which shows that the arbitrators have exceeded their authority. 1 Jurist, p. 151, *Tate et al. vs. Janes et al.* S. C. Montreal; Day, Mondelet, Chabot, J.

Held, That the want of signification of an award of arbitrators, renders such award a nullity. 4 Jurist, p. 8, *Blanchet et ux. vs. Charron.* Q. B. Montreal; Vallières de St. Réal, Rolland, Gale, Day, J.

Held, That in a report of arbitrators named in court, it is not sufficient for the arbitrators to state in their award, in terms of the rule, that they had "examined the proceedings of record in this cause, examined the witnesses of the parties under oath and deliberated;" but the award must state that the parties received notice of the meetings of the arbitrators, or were heard in support of their allegations; in default whereof, it will be set aside on motion. 6 Jurist, p. 126, *Broun et al. vs. Smith et al.* S. C. Montreal; Day, Smith, Mondelet, J. 1856.

Held, That upon its being established by the affidavit of the plaintiff, that an award of arbitrators (under a rule of court) purporting to be made after notice to the parties, was in fact made without such notice, the award will be set aside. 6 Jurist, p. 257, *McCulloch vs. McNevin.* C. C. Montreal; Badgley, J.

#### OATH.

Held, That an award of arbitrators, under a rule of court will not be set aside on a motion (supported by the affidavit of the defendant) on the ground that the award was not accompanied by satisfactory evidence that the parties or their witnesses were legally sworn, it appearing that the oath was administered to the parties and their witnesses, by one of the arbitrators. 6 Jurist, p. 242, *Daly et al. vs. Cunningham.* S. C. Montreal; Badgley, J.

#### IN INSURANCE.

Held, That under the clause, or condition in policies of insurance, that in case of any dispute between the parties it shall be referred to arbitration, the courts are not ousted of their jurisdiction, nor can they compel parties to submit to a reference in the progress of the suit. Stuart's Rep., p. 152, *Scott, App., vs. The Phoenix Ass. Co., Resp.* In Appeal; 20th Jan., 1823.

#### PENALTY.

Held, 1. That a party who has submitted a matter to arbitration, cannot, after award rendered, call for the decision of the ordinary tribunals on the same matter, without first paying the penalty stipulated in the arbitration bond, unless the award be absolutely null.

2. That an award is not absolutely null, although the witnesses examined have not been legally sworn. 3 L. C. Rep., p. 482, *Tremblay vs. Tremblay*; S. C., Quebec; Bowen, C. J., Meredith, Caron, J.

Held, That the penalty stipulated in an *acte* of compromise is only comminatory, and the party in whose favor the award is rendered must prove the damages sustained by the non-execution of the compromise and of the award. 3 Jurist, p. 50; *Bouthillier vs. Turcot*; S. C., Montreal; Mondelet, J.

#### AWARD REFERRED BACK.

Held, That if an award is not sufficiently explained, so as to enable the court to give a judgment upon it, the court will refer it back to the arbitrators for further explanation. *Duff vs. Hunter*. K. B. Q. 1818.

ARBITRATION, effect of clause to refer to. See FRAUD between parties.

AWARD of RAILWAY ARBITRATORS. See RAILWAY Co. Award.

ARBITRATION, In *Prévosté* and *Conseil Supérieur*. Accounts between merchants sent to arbitrators. *Prévosté*, No. 45.

AWARD SET ASIDE for arbitrators eating and drinking with plaintiff and not making their report *sur les lieux*. *Prévosté*, No. 67.

AWARD HOMOLOGATED. *Prévosté*, No. 58.

Parties ordered to name arbitrators in a commercial case. *Prévosté*, No. 96.

Judgment setting aside part of judgment below, and ordering parties in a commercial matter before *arbitres*. Cons. Sup., No. 71.

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#### ATTORNEYS.

##### ASSOCIATED—SUBSTITUTION.

Held, That proceedings signed by one of two associated attorneys, in his own name, after his associate has ceased to practice, will not be rejected in any case, unless the adverse party move without delay for their rejection. 6 L. C. Rep., p. 194, *Tidmarsh vs. Stephens et al.* S. C. Montreal; Day, Smith, Badgley, J.; See 1 Jurist, p. 16.

Held, That notice of motion received by one of two attorneys after the elevation of his previous partner to the bench is sufficient. 5 L. C. Rep., *Dubois vs. Dubois*. S. C. Montreal, Smith, Vanfelson, Mondelet, J.

Held, That where two attorneys are associated in partnership, and one is elevated to the bench, service on the remaining partner is sufficient, although no substitution has been made. 9 L. C. Rep., p. 395, *McCarthy vs. Hart*. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J.; Mondelet dissenting.

Held, That under the circumstances of this case, the substitution of an attorney for the appellant, in lieu of the one who previously represented him, is an acquiescence in all the proceedings of the first attorney, there being no *désaveu*, and this, notwithstanding any irregularities in the said proceedings. 8 L. C. Rep., p. 494, *Burroughs, App., Molson et al., Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That where a suggestion of the death of one of the defendants is filed of record, a motion to compel the remaining defendants to substitute an attorney

in the place of the attorneys of record, one of whom has been promoted to the bench, will not be granted until such suggestion is disposed of. 9 L. C. Rep., p. 224, *Savageau vs. Robertson et al.* S. C. Quebec; Chabot, J.

Held, That a substitution of new attorneys in a cause, will not be permitted unless there be a full revocation of the authority of the attorney of record. 5 Jurist, p. 98, *Mann et al. vs. Lambe.* S. C. Montreal; Berthelot, J.

#### APPEARANCE—VACATION.

Held, 1. That a plaintiff has no right to question the authority of an attorney to appear for a defendant not served with the writ and declaration, the return of service being, that service was made at the defendant's last domicile, and that he had left the province and had no domicile therein.

2. That such appearance being of record, no steps can be taken to call in the defendant through the newspapers, nor to proceed *ex parte*. 6 L. C. Rep., p. 311, *McKercher, App., Simpson, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Carou, J.

Held, That no appearance need be fyled by an attorney on behalf of a defendant between the 10th July and 31st August, both inclusive. 1 Jurist, p. 17, *Bell vs. Leonard.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, Nor any plea fyled in vacation, even in cases of ejection, where it is alleged that the lease has expired, and defendant refuses to quit. 3 Jurist, p. 255, *Clairmont et al. vs. Dickson.* In Chambers, Montreal; Smith, J.

Held, That a preliminary plea need not be fyled in vacation, within the four days referred to in the 16th Vict., c. 194. 4 Jurist, p. 296, *Booth vs. The Montreal and Bytown Railway.* Montreal; Mondelet, J.

Held, That where an attorney has acted for a party in a cause after judgment, proceedings had in the cause by another attorney, will be rejected from the record, on motion of the first attorney. 6 Jurist, p. 28, *Gillispie et al. vs. Spragg* and divers intervening parties. S. C. Montreal; Badgley, J.

Held, That where a defendant, not served with a writ of summons, appears by attorney, such appearance will be considered valid, and will not be rejected on plaintiff's motion. 6 Jurist, p. 30, *Whitney vs. Dunning, & T. S.* S. C. Montreal; Smith, J.

#### PRESCRIPTION AGAINST.

Held, 1. That by the 12th Vict. c. 44, sect. 2, the prescription against the fees and disbursements of an attorney *ad litem* is not an absolute prescription, *fin de non recevoir*.

2 That a plea invoking such prescription will be dismissed upon demurrer, if by such plea, the defendant does not allege payment, and tender his oath. 11 L. C. Rep., p. 175, *Ross vs. Quinn.* S. C. Quebec; Taschereau, J.

Held, That the prescriptions under the 12th Vict., c. 44, are absolute prescriptions. 1 Jurist, p. 275, *Lepailleur vs. Scott et al.*, S. C. Montreal; Day, Smith, Mondelet, J.

Held, That where an attorney, party to a cause, appears in person, he is entitled to his fees against his adversary. 11 L. C. Rep., p. 483, *Brown vs. Gugg* and *Gugg*, Opp. S. C. Quebec; Taschereau, J.

Held, That the attorney's costs are not subject to the prescription of two years. 1 Rev. de Jur., *Andrews vs. Birch*. Comr's. Ct. Quebec; W. K. McCord, J. 1845.

So held in *Huot vs. Parent et al.* Q. B. Quebec; Bowen, Panet, Bedard, J. 1840.

Held, That an opposition will be maintained against an execution by an attorney for costs, founded upon a note given by the attorney to a third party, and endorsed to the opposant; but the opposant will get no costs awarded but will be condemned to pay the costs of execution, not having notified the attorney that he was the holder of the note. 1 Rev. de Jur., p. 334, *Cotterill vs. Gormley et al.* K. B. Montreal; Oct., 1838.

#### COSTS—PRIVILEGE.

Held, That the costs in a case cannot be attached by a creditor during the pendency of a cause as belonging to the party, to the prejudice of his attorney. 2 L. C. Rep., p. 273, *Gauthier vs. Lemieux*. S. C. Quebec; Bowen, C. J. Duval, Meredith, J.

Held, That a plaintiff has a privilege upon the defendant's movables for the whole of the costs, and this in preference to the landlord claiming his rent by opposition. 4 L. C. Rep. p. 75, *Jeves vs. Kelly and Marquis*, Oppost. S. C. Quebec; Bowen, C. J. Duval J.

Held, That an advocate may recover a *quantum meruit* for fees and professional services, which are of a nature sufficiently defined to come under a general rule of charge, but not for services of an indefinite kind, such as consultations, for which the rate of charge is arbitrary. 2 Jurist, p. 182, *Devlin vs. Tumblety*. S. C. Montreal; Day, J.

#### BAIL.

Held, That a practising barrister or attorney cannot become bail or surety in any proceedings in the Superior Court 3 L. C. Rep., p. 57, *Routier vs. Gingras*. S. C. Quebec; Bowen, C. J., Meredith, J.

See also 10 L. C. Rep., p. 190, *Lemelin vs. Larue*. In Appeal; Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

#### WITNESS FEES.

Held, That an attorney is not liable for expenses, taxed in favor of a witness summoned by him at request of his client. 3 L. C. Rep., p. 109, *Laroche vs. Holt et al.* C. C. Quebec; Power, J.

#### SHERIFF'S FEES.

Held, That the attorney *ad litem* is responsible to the sheriff for his fees and disbursements on writs of execution issued on the fiat of such attorney. 7 L. C. Rep., p. 329, *Boston et al.*, App., *Taylor*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J. Same case, 1 Jurist, p. 60.

## TAX.

Held, That under the act 13 and 14 Viet., c. 37, sect. 15, advocates not practising are not liable to the tax thereby imposed for paying reporters. 1 L. C. Rep., p. 13, *Monk et al. vs. Viger*. S. C. Montreal; Smith, Vanfelson, Mondelet, J.

## WITHDRAWAL OF ACTION.

Held, That the "withdrawal" of an action by plaintiff's attorneys, signed by the defendant personally, who also signed a motion to the effect that he consented to the dismissal of his incidental demand, and authorized and directed his attorneys of record to countersign such consent, and requiring them to desist from all further proceedings therein, and who also appeared before two of the justices of the Superior Court when his attorneys prayed for a writ of appeal and objected to the allowance of the writ, declaring himself satisfied with the judgment, is valid. That a party can desist from his demand without the consent or concurrence of his attorneys. 6 L. C. Rep., p. 201, *Ryan*, App., *Ward et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Caron, Badgley, J.

## COUNSEL FEE.

No action can be maintained for a fee paid to counsel. *Bergeron vs. Panet*. K. B. Q. 1809, No. 53.

ATTORNEYS condemned personally to costs of an opposition to a judgment. Cons. Sup., No. 73.

ATTORNEY'S power to certify copy of judgment served. See "JUDGMENT."

ATTORNEY'S costs. See COSTS, Privilege.

ATTORNEY, Action for slander against. See DAMAGES, Slander.

ATTORNEY, dominus litis. See ENQUETE, Reopening.

ATTORNEY, Competency of, as witness. See EVIDENCE, Competency.

ATTORNEY. See OFFICER OF COURT, Desaveu.

## BANKRUPTCY.

## ASSIGNEES.

In an action by a vendor of timber against the assignees of insolvent vendees, in which the timber was seized by right of stoppage *in transitu*, as if there had been no delivery.

Held, That the rule applicable to cases of constructive delivery and possession was not applicable, there having been an actual delivery to, and possession by the vendees, although the timber had not been culled or counted. 1 L. C. Rep., p. 21, *Levey vs. Turnbull et al.* S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

The plaintiffs, as assignees of a *bankrupt*, brought an action to obtain an account of goods consigned to defendants' firm, and the defendants pleaded that the consignment was made by one of the plaintiffs, as assignee, formerly defendants' partner, with whom a settlement was made by note, which was paid.

Held, S. C. Montreal. That no valid discharge was given by one assignee, and judgment rendered for plaintiffs.



Held, In Appeal; Rolland, Panet, Aylwin, J. That the consignment was made by one of the assignees, and that the accounting and settlement with one assignee being without fraud, were valid, and action dismissed. 1 L. C. Rep., p. 495. *Molson, App., Renaud et al., Resp.*

Has the assignee the right of claiming property acquired by the bankrupt subsequent to the issuing of the commission of bankruptcy, and before the granting of a discharge? 3 L. C. Rep., p. 61. *Blanchard, App. vs., Whiteford, Resp.* In Appeal; Stuart, C. J., Rolland, Panet, Aylwin, J.

Held, That in case of removal or resignation of an assignee, a new assignee will be appointed by the creditors whose claims have not been contested. 1 Rev. de Jur., p. 188. In Re., *Gibeau*; Bankrupt Ct., Montreal, Mondelet; J., 14th May, 1845.

ASSIGNEE Contrainte against. See Contrainte par Corps.

#### CERTIFICATE.

In an action against the principal debtor on a Custom house bond, and also against his surety, the latter pleaded that he had subsequently obtained his certificate of discharge in bankruptcy. The answer, that the Crown was not barred by the certificate, was maintained, and judgment rendered against both defendants. 1 L. C. Rep., *The Atty. Genl., Informant, vs. White. Day, Vanfelson, J.; Mondelet, J., dissenting.*

Held, That a notary's bill for making a *livre terrier*, being provable under a commisson of bankruptcy issued against the defendant, a seignior, is discharged by the effect of the certificate. 10 L. C. Rep., p. 453, *David vs. Hart.* S. C. Montreal; Monk, J.

Held, That the party opposing the ratification of a certificate of discharge is bound to adduce evidence of the fraud alleged. 1 Rev. de Jur., p. 47, *ex parte Courtney.* Q. B. Montreal, July, 1844.

Held, That the discharge given by two thirds in number and value of the creditors, who have proved under the commission, by a composition in virtue of the 7th Vict. c. 10, sect. 41, is not binding upon those of the remaining creditors who have hypothecary claims, and who have not required that the real estate should be sold for the payment of their claims, and who have not released to the assignees the property hypothecated; and such creditors have still their personal action against the bankrupt. 1 Rev. de Jur., p. 89, *Ferguson et al. vs. Cairns et al.* Q. B. Quebec; 29th July, 1845.

Held, 1. That a certificate will be refused when the bankrupt has not conformed to section 25 of the bankrupt law, the schedule furnished and sworn to not containing the *residence* of some of his creditors.

2. The bankrupt will not be allowed to amend the schedule, after his certificate has been refused. 1 Rev. de Jur., p. 235, In Re., *Lanctot and McFurlane, Opp.* In Bankruptcy, Montreal; Mondelet, McCord, J.

Held, 1. That a bankrupt, who discovers an error in the taking of his examination, will be allowed, even on the day fixed for granting or refusing his certificate, to correct it, reserving, however, the opening of the enquête *de novo*.

2. That the bankrupt may be compelled to declare if he has retained anything. 1 Rev. de Jur., p. 236, *Lippé*, bankrupt., and *Perrin et al.*, assignees. In Bankruptcy, Montreal; Mondelet, J., 12th Dec., 1845.

## ENGLISH COMMISSION.

Held, 1. That an English commission of bankruptcy operates in Canada as a voluntary assignment by the bankrupt.

2. That the assignees, therefore, may sue for debts due to the bankrupt, or for his property and may take the share of the proceeds of the bankrupt estate which belongs to the English creditors, but such proceedings of the assignees cannot deprive provincial creditors of any acquired rights or privileges as to the property of the bankrupt, or the proceeds thereof, to which they may be entitled by the law of Canada, nor can such rights or privileges be affected by the commission, or by the assignment. *Stuart's Rep.*, p. 127, *Bruce vs. Anderson and Randall et al.*, assignees, Opp. K. B. Quebec, 20th Oct., 1818.

## COMPOSITION.

Held, That a composition in bankruptcy between a bankrupt and two thirds of his creditors in number and value who have filed their claims, although binding upon the remaining third of the proved creditors, is not binding upon a creditor who has not proved his claim, or otherwise submitted it to the jurisdiction of the Bankrupt Court. 1 Rev. de Jur., p. 273, *Radenhurst, App., McFurlane*, Resp. In Appeal; *Stuart, C. J., Gairdner, J.; Panet, and Bedard, J.*, dissenting, 10th March, 1846.

## EVIDENCE IN.

Held, That in bankruptcy, contested claims will be governed, as to evidence, either by the English rules of evidence, or by the *Ordonnance de Moulins* and the *Ordonnance de 1667*, according as they are of a mercantile nature or not. 1 Rev. de Jur., p. 187, *Bates vs. Beaudry and Tuafe*, assignees. Bankrupt Ct. Montreal; Mondelet, J. July, 1845.

## SALE BY ORDER OF JUDGE.

Held, That in an action by the *Cessionnaire* of the assignees of a bankrupt estate, of the outstanding debts of the estate, it is necessary to allege in the declaration that the sale was made by the order of the judge, and that the formalities required by the 67th section of the Bankrupt Act have been complied with. 2 L. C. Rep., p. 452, *Warner vs. Mernagh*. S. C. Montreal; *Smith, Vanfelson, Mondelet, J.* See also *Murray vs. McCready*, *Ib.*, p. 454 note.

## FRAUDULENT SALE.

Held, That under the 7th Vict., c. 30, all sales or transfers of property by a bankrupt within thirty days prior to the bankruptcy, are *prima facie* void; and that in an action, by the assignees, to recover such property, the burden of proof lies with the defendant to show his good faith, and that the transaction was in the usual course of dealing. 1 Rev. de Jur., p. 40, *Webster vs. Footner*. Q. B. Montreal; *Gale, J.*, and a Jury.

## EXECUTION OF JUDGMENT.

Held, That the assignees of a bankrupt cannot stop the execution of a judgment in the Court of Queen's Bench by alleging the issuing of a commission of bankruptcy since the seizure. 1 Rev. de Jur., p. 45, *McParlane vs. Lanctot* and *Brault*, assignee. Q. B. Montreal; May, 1845.

## JURISDICTION.

Held, That in order to give jurisdiction to the Bankrupt Court, the debtor must not only be a merchant and trader, but the debt must be a commercial debt. 1 Rev. de Jur., p. 232, *Regnier*, bankrupt, and *Lorimier et ux.*, creditors. In Bankruptcy, Montreal; Mondelet, J., 19th Feb., 1846.

## SALE OF REAL ESTATE.

Held, That under the provisions of the Bankrupt Act, 2nd Vict., c. 36, sect. 5, 7, 14 and 28, the sale by the assignees, before notaries, of real estate of the bankrupt, does not purge any *hypothèques* upon it, notwithstanding the hypothecary creditors have filed their claims in bankruptcy, unless they expressly renounce to their *hypothèques*, and that without such renunciation the creditors can file their opposition to a petition *en ratification* by the vendee. 1 Rev. de Jur. p. 265, *Chabot*, App., *Farois*, Resp. In Appeal; Nov. 1845.

Held, That on the seizure of the real estate of a bankrupt, an opposition *à fin de conserver* by a tutor to the bankrupt's minor children, for customary dower will not be maintained, even if not contested, the dower not being open. 1 Rev. de Jur., p. 288, *Robertson et al.*, vs. *Perrin*, and *Perrin*, Opp. K. B. Montreal; Oct. 1838.

## CONSTRUCTION OF ORDINANCE.

As to effect of 22nd clause of 2nd Vict., c. 36, See 2 Rev. de Jur., p. 407, In *Re Gordon*, 1845.

## BANK.

Held, That under the 24th Vic., c. 91, sect. 4, the Bank of Montreal is not entitled to submit to the Superior Court the question of the quality or right of the representatives of shareholders to receive shares or dividends, except in cases where a reasonable doubt exists as to such quality or right. Petition dismissed with costs. 12 L. C. Rep., p. 348, *Bank of Montreal*, petitioners, *Glen et al.*, *mises en cause*. S. C. Montreal; Smith, J. Same case, 6 Jurist, p. 248.

BANK, statement given to depositor. See EVIDENCE, Admission.

BANK SAVINGS. See PLEADING, Compensation.

BANK, SHARES, Transfer of. See TUTELLE.

BANK CASHIER, Action by. See Bills and Notes.

BORNAGE. See ACTION, Bornage.

## BILLS AND NOTES.

## TIERS SAISI.

A *tiers saisi* made a declaration that he had given the defendant three promissory notes, not yet due, the interest upon which had been demanded by a third party. The defendant contested the declaration on the ground that the *tiers saisi* had not declared that he owed any sum of money; or that the defendant had negotiated the notes, and that the offer of the *tiers saisi* to have a condemnation against him on security being given, ought not to prejudice defendant's rights.

Held, On demurrer to the contestation, that no judgment could be rendered on the declaration, and the demurrer dismissed. 1 L. C. Rep., p. 107, *Banque du Peuple vs. Doncegni*, and *Martin*, T. S. S. C. Montreal; Day, Smith, Vanfelson, J.

## FORM OF

Held, That a note payable to A or order *on account of* B may by A be endorsed to C, and C can recover as indorsee. *Moir vs. Allan*. K. B. Q. 1817.

Held, That a promise, in writing, to pay, on a certain day, £250 to A B or order, with an engagement to pay in cash, or in goods, if the holder should choose to demand the latter, is a promissory note; for the engagement is no more than a power given to the holder to convert a promissory note into an order for merchandise, if he see fit so to do. *McDonnell vs. Holgate*. K. B. Q. 1818.

Held, That no action lies upon a certificate given by an officer of government, certifying a balance of pay due to him, and directing a third officer of the department to pay the amount; such a certificate is not a bill of exchange. *McLean vs. Ross*. K. B. Q. 1818.

Held, That on a note payable to A or order, to the use of B, payment must be made to A or to A's indorsee and not to B. *Clark vs. Esson*. K. B. Q. 1820.

Held, That the want of the words "for value received" does not prevent a plaintiff from recovering, on a note, if it is in evidence that value was given; therefore in an action on such a note, the defendant having made default to answer on *fuits et articles* which stated value as given, the Court gave judgment for the amount of the note. *Duchesnay vs. Everts*. K. B. Q. 1821.

Held, That the indorser of a note given to a Mutual Insurance Co., is an ordinary *caution solidaire*. *Montreal Mutual Ins. Co. vs. Dufresne et al.* C. C. McCord, (I.S.,) 1854, Cond. Rep., p. 56.

Held, That no set form of words is requisite to constitute a promissory note; and an instrument called a writing obligatory or *bon* payable to order for value received, may be considered as a note *in writing* within the meaning of the Provincial Statute 34th Geo. 3, c. 2, though it does not follow the very words of the act, and though it is described in the plaintiff's declaration, as a writing obligatory or *bon*. 1 Rev. de Jur., p. 180, *Hall*, App., vs. *Bradbury et al.*, Resp. In Appeal; Bowen, Panet, Bedard, J.; Gairdner, J., dissenting.

Held, That an action (under the 34th Geo. 3, c. 2, sect. 5) on a promissory note which is not expressed to be for value received, cannot be maintained if there be but one count on the note, and no other evidence than the note itself, *Saul vs. Kemble*; K. B. Q. 1813.

Held, That an imperfect note, in an action by the payee against the maker, may be evidence on the money counts, on an *insimul computassent*. *Arnold vs. Farran*, K. B. Q. 1817. So in *Bellet vs. Dageny*. K. B. Q. 1813. But not so, if the counts are only for goods sold, and on a *quantum meruit* without other counts. *Patterson et al. vs. Stor.* K. B. Q. 1817.

Held, That a note "promising to pay A £20 on account of B" is a good note, and enables A to recover on it. *Newton vs. Allen*. K. B. Q. 1817.

Held, 1. That a letter acknowledging the receipt of money from plaintiff and promising to repay it on demand with interest, is not a promissory note within the meaning of the 12th Vict., c. 22, sect. 31.

2. That in an action for the recovery of the money so loaned, and in which the letter is referred to as a paper writing *sous seign privé*, given as an acknowledgment of such loan, the prescription of five years, applicable to promissory notes, cannot be invoked.

3. Nor can the limitation of six years, under the 10th and 11th Vict., c. 11, sect. 1, be invoked, the loan being made by a non-trader. 6 Jurist, p. 319, *Whishaw vs. Gilmour et al.* S. C. Montreal; Monk, J.

#### NOT NEGOTIABLE.

Where defendant indorsed a note not negotiable made in his favor, to plaintiff, and plaintiff indorsed it to S who sued the defendant, and the action was dismissed, and afterwards sued the defendant as his immediate indorser.

Held, That the action of S. was rightly dismissed, inasmuch as the second indorser of a note not negotiable cannot, by his indorsement, give his indorsee an action against the first indorser, but that the plaintiff, as second indorser could sue the defendant as first indorser on the indorsement made by the latter to the former. 9 L. C. Rep., p. 191, *Jones vs. Whittly*. S. C. Quebec; Meredith, J.

Held, That a paper writing, undertaking to pay A B or bearer, a certain sum of money, one half in cash, and one half *in grain*, is not a promissory note and therefore is not negotiable. 1 Jurist, p. 277. *Gillin, vs. Cutler*. S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, That in a declaration on note the words "for value received" need not be used, the fact of such value being given, being matter of proof. 4 Jurist, p. 308. *Whitney vs. Burke*. S. C. Montreal; Mondelet, J.

#### WITH A CROSS.

Held, That a promissory note payable to order, cannot be assigned by an indorsement with a mark although made in the presence of two witnesses. *Lageux vs. Casault*. K. B. Q. 1813.

Held, That a note executed by the maker's mark, if indorsed, gives no action to the indorsee against the maker, but the indorser is answerable for money had and received. *Jones vs. Hart*. K. B. Q. 1819.

Held, That a note with the mark only of the maker gives no action (if indorsed) to the indorsee against the maker, but the indorser is liable upon his indorsement to the indorsee. 2 Rev. de Jur., p. 58, *Jones vs. Hart*. K. B. Quebec; 1819.

Held, That an indorsement signed with a cross, in the presence of two witnesses, gives a right of action to the bearer against the maker and indorser. 1 Rev. de Jur., p. 229, *Noud vs. Chateauvert*. Q. B. Quebec; 29th Jan. 1846.

Held, That a promissory note, signed with a cross, in presence of one witness, is a valid note. 10 L. C. Rep., p. 366, *Collins vs. Bradshaw*. Circuit Ct. Quebec; Stuart, Asst. J.

Held, That an action lies against the indorser of a note payable to order and indorsed with his cross. *Thurber vs. Desève*. Circuit Ct. St. Hyacinthe. McCord, J. 1854. Cond. Rep., p. 103.

Held, That an action can be maintained against the widow of the maker of a note signed with a cross payable to M. & Co., or order, and by them indorsed in blank to the plaintiff, the maker, indorser, and plaintiff being described as traders. 6 L. C. Rep., p. 479, *Anderson vs. Park*. S. C. Montreal; Monk, Pelletier, Berthelot, Asst. J.

## I. O. U.

Held, That where a *tiers saisi* made a declaration that he had paid the defendant a certain sum for horses sold by him to the *tiers saisi* and had given a "I. O. U." for the balance, the *tiers saisi* will be condemned to pay only after getting security for the delivery of the acknowledgment or being held harmless from it. 6 Jurist, p. 307, *Beaudry vs. Lafamme, Davis*, T. S. S. C. Montreal; Badgley, J.

## EN BREVET.

Held, That a note passed *en brevet* before notaries, is prescribed by the lapse of five years. 6 Jurist, p. 257, *Crevier vs. Sauriol dit Sanssouci*. Circuit Ct. Montreal; Smith, J.

Held, That a promissory note *en brevet*, made before notaries, payable to a person or his order, is negotiable by indorsement in the ordinary way. 3 Jurist, p. 55, *Morrin vs. Legault dit Deslauriers*. Circuit Ct. Montreal; Smith, J.

Note *en brevet* when prescribed. See "PRESCRIPTION."

## AVAL.

Held, That in contracts of a commercial nature, an *aval* may be legally made by signature *sous croix*. 1 L. C. Rep., p. 219, *Paterson et al. vs. Pain*. S. C. Quebec; Bowen, C. J., Meredith, J.

Held, 1. In an action against L, whose signature was on the back of a note signed by B, and payable to plaintiff or bearer, that L was not entitled to notice of protest.

2. That the *donneur d'aval* is not entitled to notice of protest, but is liable *solidairement* with the principal debtor.

3. That a motion for a new trial cannot be received after the first four days of the term next following the verdict of a jury.

4. *Seemle*. That it is the province of a jury to determine whether the defendant's signature indorsed on a note, was intended as an ordinary indorsation, or whether it was *pour aval*. 9 L. C. Rep., p. 353, *Merritt vs. Lynch*. S. C. Montreal; Berthelot, J. Same case, 3 Jurist, p. 276.

Held, That an indorser *pour aval* is liable without presentation of the note. *Pariseau vs. Ouellet*; McCord, J., Cond. Rep., p. 57.

#### ACCOMMODATION.

Held, 1. That the order of indorsements on a note is merely a presumption of the undertakings of the indorsers towards each other, which may be destroyed by proof of a contrary understanding or agreement.

2. That in the case submitted, the indorsement of the appellant was made on the express condition it should be preceded by that of the respondent, who was notified of such condition by the maker, who was to be considered as the agent of the indorser, and that, therefore, no action lay against the appellant by the respondent, whose indorsement was put below that of the appellant, in violation of the condition. 11 L. C. Rep., p. 269, *Day, App., Sculthorpe*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

#### ACCEPTANCE.

Held, That a verbal acceptance of an inland bill of exchange is valid, and binds the acceptor. *Lagueux vs. Everett*. K. B. Q. 1817.

Held, That an acceptance on sight, of a bill of exchange, admits the signature of the drawer. *Jones vs. Goudie*. K. B. Q. 1820.

Held, That in an action upon an acceptance of an order to pay money, made in writing, the acceptance must be produced in evidence. *Esson vs. Everett*. K. B. Q. 1820.

Held, That a verbal acceptance, by a secretary of a corporation, of a draft of the defendant, and a like acceptance by the accountant of another such draft, is sufficient to prevent the attachment, by *saisie arrêt* after judgment, of the money covered by such drafts. 2 Jurist, p. 203, *Rym vs. Robinson and Champlain R. R. Co.*, T. S. S. C. Montreal; Mondelet, J.

Held, In Appeal. That such acceptances were unauthorized and void, and that the moneys covered by such drafts were legally attached. *Ryan, App., The Montreal and Champlain R. R. Co.*, Resp., 4 Jurist, p. 38. Lafontaine, C. J., Duval, Meredith, Guy, J.

#### BY AGENT.

Held, That where a note is indorsed by an agent, his agency must be proved; as such case does not come within the provisions of the 20th Vict., c. 44, sect. 87. 9 L. C. Rep., p. 299, *Joseph et al. vs. Hutton*. Circuit Ct, Quebec; Chabot, J.

Held, 1. That a promissory note payable to the order of an Insurance Co., and given in payment of a premium of insurance is negotiable, and a memoran-

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dum at the foot of the note indicating the consideration, does not limit its negotiability.

2. That the indorsement of such a note by the secretary of the company, in that capacity, is sufficient to pass the note to the plaintiffs, an implied authority in him to do so, having been proved by the ordinary course of the company's business, and that the directors had effected the arrangement with the plaintiff, of which the transfer of the note formed part, and that the company had received the consideration of the transfer.

3. That the holder of negotiable paper, (as collateral security,) before it becomes due, is not affected by any equities between the original parties.

4. That an exchange of negotiable paper is sufficient to constitute each party to such exchange a holder, for value, of the paper he receives. 3 Jurist, p. 169, *Wood et al. vs. Shaw*. S. C. Montreal; Badgley, J.

Held, That the acceptance of a bill of exchange by the treasurer of a friendly society, if not within the regular scope of his duty, and not specially authorized by the society is not binding upon it. *Phillips vs. B. A. Friendly Society*. S. C. Montreal; Badgley, J.

Held, That where the plaintiff sued the defendant, his former agent authorized to draw and indorse promissory notes, and set up that whilst agent, a particular note had been improperly made and given by defendant to a mercantile firm in exchange for another note, the plaintiff will not be allowed to single out one transaction, but must bring an action to account, there being nothing to show concealment, or wrongful taking of money, or that defendant had overdrawn his account. *Johnson vs. Clarke*. S. C. M.; Cond. Rep., p. 88.

#### DEMAND OF PAYMENT

Held, 1. That as against the maker of a note, no demand of payment is necessary, although the note is payable at a particular place.

2. That evidence of no funds at the place of payment, will excuse the plaintiff from proving a previous demand.

3. That a partial payment on the day the note became due, is a waiver of all objection arising from want of demand of payment. 3 L. C. Rep., p. 305, *Rice vs. Bowker et al.* S. C. Montreal; Day, Smith, Vanfelson, J.

Held, 1. That in a suit against the maker of a note, payable at a certain place, to the order of a party named, proof of demand of payment at the place, is not necessary.

2. That when funds were provided at the place, the party must urge the same specially by exception, and adduce evidence thereof. 4 L. C. Rep., p. 348, *Mount vs. Dunn*. In Appeal; Lafontaine, C. J., Panet, Aylwin, J.

Held, That a *bon* payable on demand by a Lower Canada debtor to a foreign creditor, is recoverable with costs, without proof of any demand before action. 5 Jurist, p. 55, *Shuter et al. vs. Paxton et al.* Circuit Court, Montreal; Monk, J.



## PROTEST AND NOTICE.

Held, That a *verbal notice*, to an indorser, of the non-payment of a note is insufficient. 1 Rev. de Jur. p. 231, *Cowan vs. Turgeon*. Q. B. Montreal, 1832.

Held, In the Supreme Court, N. Y., 3rd circuit. That when the maker of the note is a resident of another state at the time of the making of the note, and also at the time it falls due, it is not necessary to make demand of payment at his residence, for the purpose of charging the indorser. 2 Rev. de Jur., p. 99, *Taylor vs. Snyder*. Sept. 1845. Parker, J.

See as to formality of, in case of a bill made and sued in England and indorsed in France. 2 Rev. de Jur., p. 329, *Bordier vs. Barnett et al.* Q. B. (England) Feb. 23, 1847.

Held, That a promise to pay a protested bill of exchange, when no notice of protest had been given, if it be made with a knowledge of that fact, is a waiver of the want of notice. *Ross vs. Wilson*. K. B. Q. 1812.

Held, That an omission to give notice of the non-acceptance of a bill of exchange is not cured by a notice of non-acceptance given with a notice of non-payment. *Jones et al. vs. Wilson*. K. B. Q. 1813.

Held, That in an action against an indorser of a note, an omission to state in the declaration that the note was protested, can only be taken advantage of, by *exception à la forme*, or special demurrer. *Jones vs. Pellison*. K. B. Q. 1818.

Held, That the indorser of a bill of exchange is, in all cases, entitled to notice whether the drawer had or had not, effects in his hands, and, on this ground, the court non-suited the plaintiff, and refused his motion for a new trial. *Griffin vs. Phillips*. K. B. Q. 1821.

Held, That in an action by the indorsee of a note against the indorser, protest, demand, refusal by the drawer, and notice to the defendant must be proved, or that he is not entitled to notice. *Sutherland vs. Oliver*. K. B. Q. 1821.

Held, That there must be evidence of diligence upon a protest for non-payment of a bill of exchange to charge the drawer. *Brent vs. Lees*. K. B. Q. 1820.

Held, That if the plaintiff neglect, in an action against an indorser of a note, to state a protest in his declaration, advantage of such neglect cannot be taken on a *défense en droit*. K. B. Q., *Jones vs. Pelisson*.

Held, That a notary is inadmissible to contradict the notice of protest filed by plaintiff. When examined he stated that he notified John Edward Evans, the indorser, and left a copy of the notice filed, in which he inadvertently inserted the name of Robert Evans (the maker of the note) as indorser; action dismissed as to John Edward Evans. 1 L. C. Rep., p. 101, *Dorwin vs. Evans et al.* S. C. Montreal; Day, Smith, Mondelet, J.; Smith, J., dissenting, held the notary competent to explain the notice.

Held, That under the 14th section of the 12th Vict., c. 22, (The Promissory Note Act) the omission to state, in a protest, that it was made in the *afternoon* of the day of protest of the note, is fatal, and that the indorser is discharged. 1

L. C. Rep., p. 244, *Joseph vs. Delisle et al.* S. C. Montreal; Smith, Vanfelson, Mondelet, J.

In an action on an inland bill of exchange, against the drawers and indorsers, it was proved that the bill was presented at the bank where it was made payable, and who were plaintiffs in the cause, on the day after the last day of grace, and notice of dishonor given the same day to the defendants; and that there were no funds there, of the drawers or acceptors for the payment of the bill:

Held, In the Q. B. Montreal; Rolland, C. J., Day, Smith, (Chief Justice Rolland dissenting): That there being no funds, the bank, as the holder of the bill, was excused from making presentment of the bill for payment, or protest for non-payment, and judgment given against defendants jointly and severally. On appeal by the indorsers.

Held, 1. That by the law of Lower Canada, foreign and inland bills of exchange are governed by the same general rules, and that the holder, in the absence of legislation or usage to the contrary, would be under the obligation of presenting the bill at the time and place appointed in the bill for the payment of it, or in default thereof, would lose his recourse against drawer and indorsers.

2. That there was, in Lower Canada, a well-established usage, which had acquired the force of law, allowing three days grace for the presentment of bills for payment, and protest for non-payment to be on the third day of grace; that, in this case, such presentment and protest were on the day after such third day of grace.

3. That the appellants, as indorsers, were therefore discharged.

4. That the indorsers could not, legally, be held liable, from there being no funds at the bank for the payment of the bill, they being discharged for want of due diligence on the part of the holders, and because there were sufficient effects in the hands of the drawee to justify the drawer in drawing the bill. Action dismissed as to indorsers. 1 L. C. Rep., p. 252, *Knapp et al.*, App., *Bank of Montreal*, Resp.; Stuart, C. J., Panet, Aylwin, J.

Held, 1. That in the case of a note dated at Montreal, and payable at a bank in Albany, in the State of New York, a notice of protest mailed by a notary at Albany, in conformity with the law of that state, and addressed to an indorser at Montreal is not sufficient, the postal arrangements being such that letters could not pass without pre-payment of postage from Albany to the province line.

2. Notice sent to the indorser at Montreal, where the note was dated, is sufficient, although the residence of the indorser was not at Montreal but at Longueuil, and that the place where the note was dated was sufficient indication of the indorser's domicile to warrant the holder in sending such notice, the indorsement being unrestricted. 2 L. C. Rep., p. 121, *Howard vs. Sabourin et al.* S. C. Montreal; Day, Smith, Mondelet, J.

The above judgment confirmed in appeal, Sir L. H. Lafontaine, Bart., C. J., Panet, Aylwin, Meredith, J. See remarks of the C. J., as to the notice of protest being regulated by the *lex loci contractus*. 5 L. C. Rep., p. 45.

Held, That under the 12th Vict., c. 22, sect. 12, the duplicate notice of protest must be produced, and that the certificate of the notary that he served due notice upon the indorser is not sufficient. 3 L. C. Rep., p. 303, *Seel vs. Courteney et al.* S. C. Montreal; Day, Smith, Vanfelson, J.

Held, In an action against the maker and indorser of a note made by Courteney to his own order, and indorsed to the other defendant, Moore, that the following notice addressed to both, was sufficient in the absence of any proof of the existence of another note. "Your (W. V. Courteney's) promissory note for £30 currency, dated at Montreal the 2nd September, 1856, payable three months after date, to you or order and endorsed by you, was, this day, at the request of H. & Co. (the plaintiffs) duly protested by me, for non-payment." 1 Jurist, p. 250, *Hindlyside et al. vs. Courteney & Moore.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, That if the protest for non-payment of a note be premature, or if time be given by the holder to the maker, the indorser is discharged, but if with a knowledge of the protest having been so made, or of the giving of time, the indorser subsequently promises to pay, his liability is revived. 2 Rev de Jur., p. 171. *City Bank vs. Hunter and Maitland,* T. S. Q. B. Quebec, 1847.

#### PROTEST—AFFIDAVIT.

Held, 1. In an action on note against the payee and indorser: That although the protest was on its face irregular, and the defendant had pleaded the irregularity, he could derive no advantage from it, having failed to fyle the affidavit required by the 20th Vict., c. 44, sect. 87.

2. That parol evidence could not legally be adduced, to prove an alleged agreement, that the defendant should incur no liability by reason of his indorsing the note, inasmuch as such evidence tends to vary and defeat a contemporaneous written contract.

3. That the judgment below, founded on the irregularity of the protest and on such parol evidence, must be reversed. 11 L. C. Rep., p. 50, *Chamberlin, App., Ball, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J. Same case, 5 Jurist, p. 88.

Held, That an indorser, pleading want of notice of protest, is not bound to fyle an affidavit under the 20th Vict., c. 44, sect. 87, when it appears from the notary's certificate that the notice was sent to a wrong place, and is therefore useless and void. 5 Jurist, p. 52, *Hobbs, Jr. vs. Hart, et al.* Circuit Ct. Montreal; Monk, J.

Held, 1. That where an indorser of a note was appointed executive councillor and provincial secretary, and proceeded to Toronto to fulfill the duties of his office, leaving his family at his former place of residence in the City of Montreal, he has not lost his domicile at Montreal, and notice of protest left at his domicile at Montreal is valid.

2. That to enable him to invoke such means of exception, the indorser was bound to make the affidavit required by the 20th Vict., c. 44, sect. 87. 12 L. C. Rep., p. 8, *Ryan et al, App., Malo, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J.; Mondelet, J., dissenting.

Held, That in an action on note, a defendant who pleads that the note was obtained by surprise and without sufficient value, but without denying his signature, is not bound to file the affidavit mentioned in the Consol. Stat. of L. C., c. 83, sect. 86. 6 Jurist, p. 130, *McCarthy et al. vs. Barthe*. S. C. Montreal; Berthelot, J.

Held, That indorsers of a note are not liable for costs incurred on an appeal from an exception filed by their co-defendant the maker of the note, although all the defendants appeared by the same attorney, and the writ of appeal was served on such attorney. 6 Jurist, p. 269, *Boucher*, App., *Latour et al.*, Resp. In Appeal; Lafontaine, C. J., Duval, Meredith, Mondelet, J.

## INDORSATIONS.

Held, 1. That a party who indorses a note is liable, although he intended to do so as the attorney of another, the error not being pleaded.

2. That in this case (the sole proof of the indorsement being the defendant's answers to interrogatories *sur faits et articles*) the answers may be divided, and that part which explained the indorsation rejected, the facts not having been pleaded.

3. That notice of protest to a female indorser beginning "Sir," is bad; action against such indorser dismissed. 3 L. C. Rep., p. 454, *Seymour et al. vs. Wright et al.* S. C. Montreal; Smith, Vanfelson, Mondelet, J.

Held, That indorsements in blank can be validly made only by bankers, traders, brokers, and merchants. 3 Rev. de Jur., p. 88, *Bank of Montreal vs. Langlois*. Q. B. Q. 1847.

Held, That a tavern-keeper (*aubergiste*) is a trader and dealer, and his note to a merchant, payable to his order, may be transferred by a blank indorsement. It is a commercial note. *Patterson vs. Walsh*, K. B. Q. 1819. So in *McRoberts vs. Scott*. K. B. Q. 1821.

## COMPENSATION.

Held, That in an action by a bank against an accommodation indorser, the defendant can set up in compensation all sums paid by the bank to the maker of the note, subsequent to the protest; and that the salary thus paid to the maker, an officer of the bank, can be thus set up in compensation. 1 L. C. Rep., *The Quebec Bank vs. Molson*. S. C. Montreal; Smith, J.

## DAMAGES.

Held, on demurrer, That an allegation in a declaration of plaintiff's having suffered damages by defendant's refusing to accept a bill whereby it was protested, is sufficient. 5 L. C. Rep., p. 489, *Henry vs. Mitchell*. S. C. Q.; Stuart, Taschereau, Parkin, J.

Held, That the drawer of a bill of exchange is liable to the damages provided by the laws of the country in which it is drawn, and to no other. *Stuart's Rep.*, p. 69, *Astor vs. Benn et al.* K. B. Q. April, 1812.

## PROOF OF.

Held, That in action on note contested, the plaintiff may inscribe the cause for hearing on the merits, without *enquête* under the 20th Viet., c. 44, sect. 87. 2 Jurist, p. 73, *Jamieson vs. Larose*. S. C. Montreal; Mondelet, J.

Held, That the signature of the drawer of a note, or of an indorser, or of both, is well proved by one witness to either signature. *Hoogs vs. Blackstone*. K. B. Q. 1818.

Held, That a note in English, is no evidence of a note in the French language. *Stanfield vs. Turcotte*. K. B. Q. 1821.

Held, That if a defendant, by exception, admits his signature to a note and pleads a term for payment, it is not necessary for the plaintiff to prove the signature, even if the exception be dismissed, and there is a *defense en fait*. *Vallières vs. Roy*. K. B. Q. 1820.

As to necessity of proof when payment is pleaded. See "PLEADINGS, Payment."

Held, That in an action by the indorser of a bill of exchange against the acceptors, the plaintiff cannot, at the hearing on the merits, move to reject the evidence of the drawer, who proves the bill to have been accepted for his own accommodation, the interrogatories proposed by the defendants, and annexed to a commission *rogatoire* for the examination of the drawer, having been allowed by consent, and the witness swearing he has no interest in the event of the cause. 4 L. C. Rep., p. 415, *Taylor vs. Arthur et al.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That the maker of a note, payable to the order of the defendant, and by the defendant indorsed to the plaintiff, is a competent witness for the defendant.

2. That the maker is not liable for the costs of an action against the indorser. 6 L. C. Rep., p. 102, *McDonald et al. vs. Seymour*. S. C. Montreal; Smith, Vanfelson, Mondelet, J.

Proof of value given for note. See CORPORATION, Foreign.

Held, That the maker of a note is a competent witness for the defendant to prove usury; so where he was indorser on some of the notes. 1 Jurist, p. 21, *Malo vs. Nye*. S. C. Montreal; Day, Smith, Mondelet, J.

## PRESCRIPTION.

Held, That where a defendant pleads prescription against a note, and tenders his oath that it has been paid, it is the duty of the plaintiff to call up the defendant to appear on a day certain to swear. *Durand vs. Geneste*. K. B. Q. 1817. *Lizotte vs. Caron*. K. B. Q. 1817.

Held, That when it appears, on the face of the pleadings, that a note is of more than five years' standing and prescription is pleaded, the court, on oath, made by the defendant, will dismiss the action. *Benton vs. Stiles*. K. B. Q. 1812.

Held, That a promissory note payable on demand, is due from the day of its date, and that prescription runs against it from that time. 2 L. C. Rep., p. 335. *Larocque et al. vs. Andres et al.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That the maker of a note may set up, in compensation against the payee, another note made by the same payee more than five years previously, but indorsed (to the maker of the first note) before the expiry of the time required for prescription thereof.

2. That prescription in such case cannot be invoked.

3. That such compensation takes place without notice of the indorsement and transfer being given to the maker.

4. That the date indorsed on the note is sufficient *prima facie* evidence of the time of the indorsement, in the absence of proof to the contrary, and when it is not specially denied. 3 L. C. Rep., p. 112, *Hayes, App.*, vs. *David*, Resp. In Appeal; Stuart, C. J., Panet, Aylwin, J.; Rolland, J., dissenting.

Held, That no prescription exists as to notes due and payable more than five years before the coming into force of the 12th Viet., c. 22. 4 L. C. Rep., p. 261, *Wing vs. Wing*. S. C. Montreal; Day, Smith, Vanfelson, J.; *McFurlane vs. Rutherford*. S. C. Montreal; Cond. Rep., p. 11.

Held, That the prescription of five years, acquired before the 12th Viet., c. 22, may be validly pleaded notwithstanding the repeal of the statute 36th Geo. 3, under which such prescription was acquired. 4 L. C. Rep., p. 397, *Glackmeyer et al. vs. Perrault*. In Appeal; Lafontaine, C. J., Panet, Aylwin, J.

Held, That an action on a note, with count for goods sold and delivered will not be dismissed on a plea of five years prescription, if the count for goods sold be proved; and that in such case an unpaid promissory note is no payment. 7 L. C. Rep., p. 47, *Beauloin vs. Dalmissc*. S. C. Q.; Bowen, C. J., Meredith, Badgley, J.

Held, In an action, brought in Dec., 1853, on a note dated in 1824, the plea that at the institution of the action, more than five years had elapsed since the note became due, and that the note must be taken and considered as paid and discharged, is a good plea under the 12th Viet., c. 22. 7 L. C. Rep., p. 312, *Hoyle, App.*, *Torrance et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That the prescription of five years under the first part of the 31st sect. of the 12th Viet., c. 22, applies to all notes due and payable previous to the passing of that statute. 8 L. C. Rep., p. 252, *Côté et al. vs. Morrison*. S. C. Montreal; Smith, J. Same case, 2 Jurist, p. 206.

Held, in Appeal, 1. That the evidence in this case did not establish the capacity of the plaintiffs as heirs at law of their deceased father.

2. That letters of administration from a Court of Probate in the State of Michigan, produced in the case, as well from the terms thereof, as from principles of international law, do not extend beyond the limits of the state wherein they were granted.

3. That the statute 12th Viet., c. 22, is inapplicable to a cause in which judgment was rendered previous to the passing of that statute. 9 L. C. Rep., p. 424, *Côté et al.*, App., *Morrison*, Resp. In Appeal; Aylwin, Duval, Meredith, Mondelet, Badgley, J.

Held, 1. That the prescription of five years under the 12th Viet., c. 22, is applicable to non-negotiable notes previously made, and that it is not necessary to tender the oath to support payment thereof.

2. That a party, in an action for goods sold and delivered, will obtain no advantage from a plea that he delivered to the plaintiff a promissory note at long date, (2 years,) unless he proves that it was accepted by plaintiff. 9 L. C. Rep., p. 418, *Lavoie, App., Crevier, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, J.; Meredith, J., dissenting.

Held, 1. That payment on account of a promissory note within five years, interrupts the statutory prescription, although no action be brought within the five years.

2. That where there was a book account, and also a note, and accounts had been rendered including both and interest, the court will not strike off the interest where the defendant has not pleaded an imputation of his payments against the note. 4 Jurist, p. 287, *Torrance vs. Philbin.* S. C. Montreal; Smith, J.

#### LOST NOTE.

Held, That an action on a note lost or destroyed may be maintained. *Wante vs. Robinson.* K. B. Q. 1816.

Held, That an action on a note mislaid, payable to order and indorsed, and not proved to be lost or destroyed, cannot be maintained. *Wante vs. Robinson.* K. B. Q. 1816.

Held, That an action on a note payable to order and lost, cannot be maintained under any circumstances, without an indemnity to the drawer. *Beaupré vs. Burn.* K. B. Q. 1821.

#### FRAUD.

Held, That proof of fraud in the making of a note, casts on the plaintiff the burden of showing that he is a *bona fide* holder for valuable consideration. 7 L. C. Rep., p. 399, *Whitall vs. Ruston et al.* S. C. Q.; Meredith, Morin, Badgley, J.

Held, That a note to a creditor for the balance of his claim in consideration of his having signed a deed of composition is void. *Blackwood vs. Chinic.* K. B. Q. 1809.

#### BRIBERY IN ELECTION.

Held, That an action on note cannot be maintained if the note was given, and the proceeds applied, to bribe the electors of a county. 7 L. C. Rep., p. 7. *Gugy, App., Larkin, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Bribery in municipal elections. See "CORPORATION, Elections."

#### MERCANTILE MATTER.

Held, That the drawer of an inland bill of exchange is, *quoad hoc*, a merchant and a *capias ad satisfaciendum* may be had upon a judgment thereupon obtained against him, under the ordinance 25th Geo. 3, c. 2, sect. 38. Stuart's Rep., p. 53, *Georgen vs. McCarthy.* K. B. Q.; Oct. 2, 1811.

## JOINT AND SEVERAL.

Held, That a note of three persons promising jointly and severally to pay, is equivalent to a promise to pay *solidairement*, and the holder may sue one or all of the makers. *McNider vs. Whitney*. K. B. Q. 1817.

Held, on demurrer, That an action against the maker of a note, by two joint indorsers to whom the note was indorsed by the payee, is good, although it was not alleged in the declaration that the plaintiffs were co-partners, or had the right to sue jointly. 8 L. C. Rep., p. 191, *Stevenson et al. vs. Bissett*. S. C. Q.; Meredith, J.

## RECOURSE LOST.

Held, That if the holder of a bill of exchange locks it up for two years, he makes it his own, and cannot have recourse to the person from whom he receives it. See *Rouleau vs. Fourangeau*. K. B. Q. 1820.

## NOT DUE.

Held, That an action on a note may be maintained against the drawer before it becomes due and payable, if he absconds. *Shepherd vs. Henricson*. K. B. Q. 1819.

## TRANSFERRED AFTER DUE.

Held, 1. That the makers of a note may plead by exception against the holder who received it after it became due, and who in fact is a mere agent, all matters which might have been pleaded against the owner of the note; and obtain a reduction of the usurious interest included in the note, and also of payments made on account of it.

2. That payments made without express imputation must be first deducted from a debt for which there is security, and which bears interest. 12 L. C. Rep., p. 461, *Brookes et al.*, App., *Clegg*, Resp. In Appeal; Lafontaine, C. J., Duval, Meredith, Mondelet, J.

## PAYMENT BY ERROR.

Held, That the amount voluntarily paid on a protested bill of exchange by the drawer, cannot be recovered back, on the ground of an error in the payment in point of law. *Caldwell vs. Patterson*. K. B. Q. 1811.

## PROMISE TO PAY.

Held, That a promise to pay to the holder, a note which is not indorsed, is sufficient to enable the holder to recover, if the drawer knew that it had not been indorsed. *Aylwin vs. Crittenden*. K. B. Q. 1820.

## DATED ON SUNDAY.

Held, 1. That a promissory note, or agreement in writing, dated on a Sunday, and given in payment of a horse bought the same day, is null and void under the 45th Geo., c. 10, and 18th Viet., c. 117.

2. That a written undertaking to pass, on a subsequent day, a notarial obligation for an amount named, is not a promissory note, but an agreement, and



must be sued upon as such, and an action brought as upon a promissory note will be dismissed. 9 L. C. Rep., p. 221, *Côté vs. Lemieur*. S. C. Q.; Stuart, A., Assist. J.

#### ERROR IN DATE.

Held, That in an action on note at three months, against the indorser where the date of the note was, in the declaration, set up as of the 11th, instead of the 16th July, and the protest was alleged as of the 19th Oct., 1860, the error will not be covered by an allegation of a promise of the indorser to pay after protest, and that a demurrer to the declaration is well founded. Amendment permitted. 5 Jurist, p. 71, *Hellivell vs. Mullin*. S. C. Montreal; Badgley, J.

#### AS SECURITY.

Held, 1. That a promissory note made as indemnity for assuming liability for a third party, at the request of the maker, is valid as such indemnity.

2. That the holder may sue as soon as troubled and before paying the debt for which he has become liable. 5 Jurist, p. 121, *Perry vs. Milne*. S. C. Montreal; Berthelot, J.

#### FOR COLLECTION.

Held, That the indorsee and holder of a promissory note, for the purpose of collection, may recover against the maker and indorser. 3 Rev. de Jur., p. 255, *Mills vs. Philbin et al.* Q. B. Montreal; Jan., 1848.

#### FOR SHARES.

C received from D a note signed by him for £250, and indorsed by the other defendant, and entered into an agreement with D, of the same date, to the effect that he had that day sold to D 1000 shares of stock in certain slate works, and that, on payment of the note, he would execute a transfer of the shares in the books of the company, C to hold the stock as collateral security for the payment of the note, and that, if it was not paid at maturity, to be at liberty to sell the stock, and apply the proceeds on the note.

In part satisfaction of the note, two other notes of the same parties were given to C, and the balance of the first note was paid.

A suit was brought on these two notes, in the name of H, the clerk of C, who was admitted to stand in C's place. The declaration set forth the making of the two notes and their indorsement to C, and that they were delivered by him (*remis et délivrés*;) to the plaintiff for value received, without alleging any indorsement by C. The defendants pleaded that the plaintiff was bound to offer to transfer the stock, but had refused to do so.

Held, 1. That the plaintiff having failed by his declaration to offer, and having refused to give a transfer of the stock, his action must be dismissed.

2. That the allegation as to the delivery of the notes was insufficient to constitute the plaintiff the creditor, the notes not being payable to bearer, and not being indorsed by C. 10 L. C. Rep., p. 27, *Hempsted, App., Drummond et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Berthelot, J.; Meredith, J., dissenting.

## COMPOSITION.

In an action on a promissory note, made by defendant in favor of plaintiffs, the defendant pleaded that subsequently to the date of the note, the plaintiff had signed an *acte* of composition, between the defendant and his creditors for 10s. in the £, that if the amount of the note was not included in the schedule of debts, it was from the plaintiff's neglect, and a fraud upon the other creditors.

The plaintiffs answered that the note was given for a debt due them by a *third person*, guaranteed by defendant, and was signed on the express agreement that the composition was not to apply to it, and that plaintiffs became parties to the composition, only for the debt directly due to them by the defendant, and at the defendant's request, and to facilitate a settlement with his creditors.

Held, in the Superior Court, That the taking of the note and the omission of the amount of it in the schedule, and withholding the knowledge of it from the other creditors, was a fraud upon them, and that the action therefore could not be maintained.

Held, in Appeal, That the note taken under the agreement mentioned, was valid and binding on the defendant, the note not being prejudicial to the other creditors nor complained of by them, and the defendant having frequently acknowledged to owe and promised to pay the same. Judgment for amount of the note. 10 L. C. Rep., p. 251, *Greenshields et al.*, App., *Plamondon*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Mondelet, J. See case in the S. C. Montreal, 3 Jurist, p. 240.

## TO GET BACK NOTE.

Held, 1. That an action will lie against the executors of the payee of a note to get possession of the note paid by one of the makers, plaintiffs in the cause, partly to the payee during his lifetime, and partly to the executors.

2. That in such action the evidence is to be governed by the law of England, and parol evidence of such payment is legal evidence. 10 L. C. Rep., p. 255 *Carden et al.* App., *Finlay et al.*, Resp. In Appeal; Lafontaine, C. J. Aylwin Duval, Badgley, Monk, J.

## FORGERY.

In an action against an indorser, the defendant pleaded by exception, that the signatures indorsed on the notes were not his signatures, and were written thereon without his knowledge, consent, or authority, and that he was not aware of the existence of the notes until notified of their being protested. He also pleaded a *défense en fait*. At the bottom of the exception there was an affidavit of the defendant that all the facts articulated therein were well founded.

After evidence adduced, it was argued on behalf of the plaintiffs, that under the 87th sect. of the 20th Viet., c. 44, the plaintiff was entitled to judgment, the affidavit not being in the form required by the statute; upon this, a motion was made by the defendant, to discharge the cause from *délibéré*, and to have it truck from the roll, and to be permitted to file an affidavit which was produced with the motion in support of his pleas.

Held, That the motion was inadmissible; that the right of the plaintiff to have the signatures taken as genuine and to judgment, was a *droit acquis*, and ought not to be interfered with by the court, the genuineness of the signatures not having been legally put in issue. 10 L. C. Rep., p. 442, *Dow vs. Browne*. S. C. Montreal; Smith, J.

Held, in Appeal, 1. That the affidavit was sufficient.

2. That the indorsement of the appellant's signature was forged. 11 L. C. Rep., p. 273, *Browne*, App., *Dow*, Resp. Lafontaine, C. J., Duval, Meredith, Mondelet, J.; Aylwin, J., dissenting.

#### RETIREMENT BEFORE DUE.

Held, That the retirement of note by a prior indorser before it became due, does not discharge a subsequent indorser as against a holder for value, if there was no real payment, but a mere exchange of securities, with the express retention of the liability of the parties to the note. 5 Jurist, p. 127, *Bull vs. Cuwillier et al.* S. C. Montreal; Smith, J.

#### INDORSEMENT FOR LESS THAN NOTE.

Held, That in an action, by the indorsee against the indorser, upon a note indorsed for a sum less than that made payable by the note, the plaintiff cannot recover. Stuart's Rep., p. 456, *McLeod vs. Meek*. K. B. Q. 1831.

#### RENEWAL.

In an action on note, the defendant pleaded that he had sent a renewal note to the plaintiffs, who had not returned it. The plaintiffs answered, that they had refused to accept it as a renewal:

Held, That the defendant was bound, on such refusal, to send and get back the note, and that the fact of the plaintiffs not returning it, could not be construed into an agreement to renew. 1 Jurist, p. 285, *Lyman et al. vs. Chamard*. S. C. Montreal; Day, Smith, Mondelet, J.

#### OF MARRIED WOMEN.

Held, That a note by a married woman is void. *Guay vs. Peltier*. K. B. Q. 1812.

Held, That a married woman's note is an absolute nullity as regards her, but the indorser may be liable to the indorsee. *Leblanc vs. Rollin et ux.* McCord, (J. S.) J. Cond. Rep., p. 56.

Held, That a promissory note, signed by a wife, *séparée des biens* from her husband is null, if she has not been authorized by him, although the goods for which the note was given, were purchased by her. 1 Jurist, p. 171, *Badeau vs. Brault, Leonard et ux.* S. C. Montreal; Day, Smith, Chabot, J.

Held, That a promissory note, signed by a woman, *séparée des biens* is a valid note although not authorized by her husband. 1 Jurist, p. 172, *Rivet et al. vs. et ux.* S. C. Montreal; Rolland, Day, Smith, J.

Held, That a note of a woman *séparée des biens* made jointly and severally with her husband, but in reality as his surety, is null as respects her, under the 4th Viet., c. 30. 5 Jurist, p. 47, *Shearer vs. Campain et n.c.* S. C. Montreal; Badgley, J.

Held, That a note of a married woman, *séparée des biens*, without the authority of her husband is valid, she being at the time a *marchande publique*. Judgment confirmed. 12 L. C. Rep, 147, *Baubien*, App., *Husson*, Resp. In Appeal; Lafontaine C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That a promissory note of a married woman, separated as to property from her husband, for provisions and necessaries used in the family, in favor of her husband and by him indorsed, is valid without proof of express authority to her to sign the same. 12 L. C. Rep., p. 303, *Cholet vs. Duplessis*. S. C. Montreal; Badgley, J. See this case, 6 Jurist, p. 81.

## EXECUTION CA-SA.

Held, That a *ca-sa* may be had on a foreign bill protested. *Bowie vs. Skinner*. K. B. Q. 1809. So on an inland bill of exchange. *George vs. McCarthy*, K. B. Q. 1811.

Held, That a *ca-sa* does not lie on a note to order, given by an officer in the army, for value received. *Herald vs. Skinner*, K. B. Q. 1810.

## WHEN DUE.

Held, That where a note is assigned after the time appointed for payment, and there is fraud in the transaction, the law, on slight grounds, will presume that the indorsee had had knowledge of the fraud, if it appears that he omitted to satisfy himself as to the validity of the note. *Hunt vs. Lee*. K. B. Q. 1813.

Held, That an action lies on a note payable by instalments, as soon as the first day of payment is past; but it lies only for the amount of the first instalment, each of them being considered as a separate debt. *Clearihue vs. Morris*, K. B. Q. 1820.

Held, That a promissory note at four years' date, and having yet about two years to run, becomes immediately exigible by the insolvency of the defendant. 2 Jurist, p. 69. *Lovell vs. Meikle*. S. C. Montreal; Day, Smith, Vanfelson, J.

## TO ABSENTEES.

Held, That a note to one who is absent, and who (as it happens) is dead, is not void, and his executors may maintain an action upon it. *Grant et al. vs. Wilson*. K. B. Q. 1814.

## GOOD FAITH.

The defendant gave a promissory note for £1000, payable twelve months after date to C. L. or order "as treasurer of the House of Industry, established in Montreal," for money lent, which note was indorsed over by C. L., whilst warden and treasurer, after it became due, to P., for a sum of money lost to him at billiards. P's agent delivered the note, indorsed in blank, to the defendant, who

gave him two notes of £500 each, which were transferred and sued upon by third parties. An action being brought against the defendant, the maker, to recover the £1000, and alleging that the defendant had fraudulently obtained possession of the note :

Held, That the defendant having acted in good faith without notice or knowledge of want of authority from the wardens of the House of Industry to C. L. to make the indorsement, or of any breach of trust or duty on his part, the note was discharged, and the action must be dismissed. 1 Rev. de Jur., p. 27, *Ferrie*, App., *The Wardens of the House of Industry*, Resp. In Appeal; Sir James Stuart, C. J., Bowen, Panet, Bedard, Gairner, and Mondelet, J.

**BILLS AND NOTES, INTEREST. See USURY.**

“ “ **NOVATION OF.** See **CONTRACT**, Novation.

“ “ **COMPENSATION AGAINST.** See **PLEADING**, Compensation.

“ “ **POWER OF AGENT TO MAKE.** See **PRINCIPAL AND AGENT**, Agent's Power.

“ “ **TRANSFER OF BY A DEBTOR en deconfiture.** See **EXECUTION**, Saisie-Arrêt.

“ “ **FOR GOODS SOLD.** See **ACTION**, Assumpsit

“ “ **ON DEMAND when due.** See **BILLS AND NOTES.**

Judgment, Oct. 14, on a note payable “ in the month of October.” *Prévosté*, No. 72.

Judgment dismissing action on note made to order, transferred after a knowledge of a *saisie arrêt*. *Prévosté*, No. 106.

Drawer of *lettre de change* discharged *quand à présent* until proof of diligence, by holder. Cons. Sup., No. 16.

*Contrainte* for payment of bill of exchange. *Prévosté*, No. 20. Cons. Sup. No. 20.

Conditional note ordered to be paid in money. Cons. Sup., No. 41.

**BANK CASHIER, PLAINTIFF.**

Can an action by a cashier of a bank in his own name “ as cashier of the Bank of G.” be maintained? 2 Rev. de Jur., p. 303. *Ferrie*, App., *Thompson*, Resp. In Appeal; July, 1838.

**BAILLEUR DE FONDS.** See **REGISTRATION**, Bailleur de Fonds.

**BANALITÉ.** See **SEIGNIORIAL RIGHTS**, Banalité.

**BANC D'HONNEUR.** See *do.* Banc d'Honneur.

**BILL OF LADING.** See **SHIPS AND SHIPPING**, Bill of Lading, see also “ **CARRIERS.**”

**BOOKS OF ACCOUNT NOT SAISSABLES.** See **EXECUTION.**

**BRIDGE TOLLS.** See **CROWN MAIL.**

**BROKERS.** See **PRINCIPAL AND AGENT**, Broker.

**BUBBLE ACT.** See **SHIPS AND SHIPPING**, Bottomry.

## CAPIAS.

## AFFIDAVIT.

Held, That a *capias ad resp.* may be had *pendente lite*, upon the usual affidavit that the defendant is about to leave the country. *Collis vs. Hunter*. K. B. Q. 1813.

Held, That a *capias ad resp.* cannot be obtained in an action on a judgment of the King's Bench, Montreal. *Hay vs. Caddy*; K. B. Q. 1817; but it may for pre-liquidated damages. *Patterson et al. vs. Farran*. K. B. Q. 1811.

Held, That a *capias ad resp.* sued out without a judge's order, may be set aside on motion, and the defendant discharged from custody on fying a common appearance. *Desbarrés vs. Chesner*. K. B. Q. 1820.

Held, That an affidavit to hold to bail, although bad in part, may be efficient for the remainder. *Patterson et al. vs. Bowen*. K. B. Q. 1809.

Held, That an affidavit to hold to bail, cannot be contradicted by counter affidavits. *Lawrence vs. Hinckley*. K. B. Q. 1810.

Held, That no advantage can be taken of any defect in an affidavit to hold to bail, by an *exception à la forme*. *Patterson et al. vs. Hart*. K. B. Q. 1811.

Held, That an affidavit to hold to bail sworn before one of the judges is sufficient. *Ermatinger vs. Seguin*. K. B. Q. 1814.

Held, That an affidavit to hold to bail sworn to by plaintiff's wife is sufficient. *Chretien vs. McLane*. K. B. Q. 1811.

Held, That an affidavit to hold to bail must be positive that the debt is due; the words "as appears by the plaintiff's books," or "as the plaintiff believes" are not sufficient, and the defendant, in such case, will be discharged on fying a common appearance. No counter affidavit can be fyled. *Hodgson vs. Oliva*. K. B. Q. 1821.

Held, That an affidavit as to the existence and amount of the plaintiff's debt, made by his attorney, *ad negotia*, if it be positive, is sufficient to hold the defendant to bail. *Sunderson vs. Robertson*. K. B. Q. 1821.

Held, That if in an affidavit to hold to bail, the cause of action is not stated, or is so expressed as to show a cause of action different from that which is set forth in the declaration, the court will discharge the defendant on common appearance. *Miville vs. Miville*. K. B. Q. 1819.

Held, That in an action commenced by *capias ad respondendum*, the plaintiff may be ruled and compelled to return the action into court before the return day. 1 L. C. Rep. *Kelly vs. Hornu*. S. C. Q.; Bowen, C. J., Duval, Meredith, J.

Held, That an affidavit to obtain a *capias* stating "that the defendant is indebted to the plaintiff in a sum of money mentioned, for board and lodging during the space of six months, and for articles of clothing furnished to him," is insufficient. As to the necessity of an indebtedness "*personally*." 1 L. C. Rep., p. 212. *Cuthbert vs. Barret*. S. C. Q.; Duval, Meredith, J.

Held, That the omission in an affidavit for a *capias* upon the ground that the defendant was about to leave the province of Canada, of the words "with intent to defraud his creditors generally, or the plaintiff in particular," is fatal. 1 L. C. Rep., p. 215, *Lamarque vs. Lebrocq*. S. C. Q.; Bowen, C. J., Duval, Meredith, J.

Held, That an affidavit under 12th Viet., c. 42, "that deponent hath reason to believe, and doth verily believe, that the said F. A. W. is immediately about to leave the province of Canada, with intent to defraud his creditors, inasmuch as the said F. A. W. told this deponent this morning that he was leaving, as deponent understood, on his way to California, and deponent has been told by others that the said F. A. W. was about to leave for California," was sufficient and motion to quash the *capias* rejected. 1 L. C. Rep., p. 351, *Benjamin vs. Wilson*. S. C. Montreal; Day, Smith, Vanfelson, J.

Held, That an affidavit, under the 12th Viet., c. 42, to the effect that the defendant had, without plaintiff's knowledge, taken away goods placed with plaintiff as security for the payment of a note; that the defendant had promised to deliver a horse to plaintiff to indemnify him, but refused to deliver the horse, that defendant was a stranger, and had failed to keep his appointments, and promises to pay, and had withdrawn himself from his creditors; and that deponent had been informed that the defendant was likely to clear out, and leave this province,—will be considered insufficient. 1 L. C. Rep., p. 352, *Leeming vs. Cochran*. S. C. Montreal; Day, Mondelet, J.

Held, That an affidavit that deponent has been credibly informed "that the defendant," between certain dates mentioned, "hath secretly removed, and is still removing his personal property, furniture, and effects from his dwelling house in S. aforesaid, with an intent suddenly to depart this province, and to defraud the deponent and his creditors generally," will be held insufficient, on the ground that the name of the party from whom the information was derived, should have been disclosed. *Capias* quashed. 1 L. C. Rep., p. 357, *Cornell vs. Merrill*. S. C. Montreal; Day, Smith, J.

Held, That a *capias ad respondendum* will be quashed where the cause of action set forth in the affidavit, is different from that set forth in the declaration. 1 L. C. Rep., p. 389, *Malthot vs. Bernier*. S. C. Q.; Duval, Meredith, J.

Held, That the 2nd Geo. 4, c. 2, requiring that a plaintiff residing in Upper Canada, in order to obtain a *capias* should make oath, that his debtor, also residing in Upper Canada, has no property there, out of the proceeds of which he can reasonably expect to be paid, is virtually repealed by the Acts 8th Viet., c. 48, and 12th Viet., c. 42, applying to both sections of the province. 3 L. C. Rep., p. 100. *Whitly vs. Bourke*. S. C. Q.; Bacquet, Duval, J.

Held, That an affidavit is insufficient in an action for damage to goods on board ship, unless it states that the goods were so damaged while in the custody and safe keeping of the defendant, and before delivery. 3 L. C. Rep., p. 148, *Gale et al. vs. Brown*. S. C. Q.; Bowen, C. J., Duval, Meredith, J.

Held, That in an affidavit for *capias* the grounds of belief that the defendant was about to leave the province, with intent to defraud; namely that the defend-

ant's vessel is loaded and ready for sea, and that the defendant intends sailing in her, and has told the defendant that he would not return to Canada, are sufficient. 4 L. C. Rep., p. 157. *Wilson vs. Reid*. S. C. Q.; Duval, Caron, J.

Held, That in an affidavit for *capias* it is necessary to state that the defendant is immediately about to leave the province *with an intent to defraud his creditors in general, or the plaintiff in particular*. 4 L. C. Rep., p. 159, *Wilson vs. Ray*. S. C. Q.; Bowen, C. J., Duval, Meredith, J.

Held, That an affidavit for *capias*, stating as the grounds of the fraudulent intent, that the defendant is a sea-faring man about to leave the province with his vessel, and may never return; and that he has made no provision for the payment of the debt, is sufficient. 4 L. C. Rep., p. 218. S. C. Q.; Duval, Meredith, Caron, J.

Held, 1. That a creditor for a sum under £10 may obtain a cession of other debts and sue out a writ of *capias* against the defendant, if the amount in all exceeds £10 ey.

2. That signification of such cession before suit, is not necessary.

3. That an affidavit, stating as the grounds of fraudulent intent, that the vessel of which the defendant is master, is loaded and ready to go to sea with the defendant as master, and that the defendant has stated that he was immediately about to sail to parts beyond sea, is sufficient. 4 L. C. Rep., p. 378, *Quinn vs. Atcheson*. S. C. Q.; Duval, Meredith, Caron, J.

Held, That an affidavit for a *capias*, that the defendant, who resided at Rouse's Point, in the United States, is upon the point of immediately leaving the province to go to the United States, and giving the name of plaintiff's informant, discloses no intention of fraud, and is insufficient. 4 L. C. Rep., p. 402, *Laroque vs. Clarke*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That an affidavit stating as the ground of the fraudulent intent, that the defendant refuses to pay the sum sworn to be due; that the vessel, of which the defendant is master, is immediately about to sail for Europe, and the defendant is to sail therein, is sufficient. 5 L. C. Rep., p. 42, *Lefevre dit Vermette vs. Tullock*. S. C. Q.; Duval, Meredith, Caron, J.

Held, That an affidavit for a *capias* made by the bookkeeper of a branch of a bank, is sufficient. *Bank of Upper Canada vs. Atain et al.* 5 L. C. Rep., p. 318. S. C. Q.; Bowen, C. J., Morin, Badgley, J.

As to what allegations will be sufficient in an affidavit for *capias*, see 5 L. C. Rep., p. 422, *Tessier vs. Pelletier*. S. C. Q.; Stuart, J., Parkin, Asst. J.

1. Held that an affidavit for *capias* is sufficient if it alleges (as the ground of deponent's belief that the defendant is about to leave the province) that defendant is a mariner, having no domicile in the province, and is about to sail with his ship.

2. That it is not necessary to state that defendant has been asked to pay the debt and has refused to do so.

3. An allegation "that without the benefit of a writ of *capias* the creditor will lose his debt or sustain damage" is sufficient without the words "will lose his



"remedy." 6 L. C. Rep., p. 15, *Hasset vs. Mulcahey*. S. C. Q.; Stuart, J., Parkin, Asst. J.

Held, That a *capias ad respondendum* may issue as well after as before judgment, against a debtor about to leave the province with intent to defraud his creditors. 3 L. C. Rep., p. 456, *Gale vs. Allen*. S. C. Quebec; Bowen, C. J., Meredith, J.

Held, That it was not necessary to make oath that the plaintiff, without the benefit of a writ of *capias ad respondendum* against the body of the defendant may be deprived of his remedy. 6 L. C. Rep., p. 32, *Tetu et al. vs. Pettier*. S. C. Q.; Stuart, J., Parkin, Asst. J.

So held also in *Lelievre vs. Donnelly*. 4 L. C. Rep., p. 247. S. C. Quebec; Bowen, C. J., Meredith, Morin, J.

Held, That under the 12th Viet., c. 38, a writ of *capias* signed "F. Marchand, Clerk of the Circuit Court," attested with the Seal of the Circuit Court, St. Johns, headed in the margin, "In the Superior Court," and returned into Superior Court, Montreal, is irregular. That such writ is not a writ in the Superior Court, as required by the Judicature Act. 6 L. C. Rep., p. 175, *Hitchcock vs. Meigs*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That an affidavit for *capias* shows no legal indebtedness in alleging that the defendant is personally indebted to the plaintiff "in the sum of £150 cy. for the amount of the penal sum or penalty stipulated and specified, in and by his bond, made and executed at Stanbridge on the 29th April, 1843, contingent and conditioned the said penalty, upon him the said defendant, giving to the said deponent, one S. J. Allen, a good and sufficient warranted deed of two lots (described) to be divided between them," notwithstanding the allegation of a division of the lots as agreed on, and a granting a deed of one of the lots to said Allen by the defendant, and the refusal of the defendant, when called upon, to give the plaintiff a deed of the other lot.

2. That plaintiff's right is to sue to obtain a deed, and, in default thereof, the sum stipulated as damages. 6 L. C. Rep., p. 478. *Allen vs. Allen*. S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, 1. That an affidavit for *capias* in which the creditor's name is "Joutras" is good, although styled "Justras" in the writ and declaration.

2. That an allegation in such affidavit, that the defendant is personally indebted to the plaintiff for work done by the plaintiff for the defendant, and for wages and salary earned by plaintiff in the service of the defendant, is good, although it is not stated that the work was done "at the instance and request of the defendant." 7 L. C. Rep., p. 420, *Joutras vs. Dunlop*. S. C. Q.; Meredith, Morin, Badgley, J.

Held, 1. That in an affidavit for *capias*, which shows a personal cause of action, the allegation that the defendant is "personally indebted," is unnecessary.

2. That in such affidavit the allegation that the plaintiff "may lose his said debt, or sustain damage is sufficient," and is equivalent to the allegation "that he may be deprived of his remedy." 7 L. C. Rep., p. 425, *Lampson vs. Smith*. S. C. Q.; Meredith, Morin, Badgley, J.

Held, That the petition for *capias* in this case could not be dismissed on demurrer. 8 L. C. Rep., p. 152, *Foster et al. vs. Dorion et al.* S. C. Q.; Bowen, C. J.

Held, That the affidavit for *capias*, for refusal to make an assignment under the 22nd Vict., c. 5, made in this case, was sufficient. 9 L. C. Rep., p. 261, *McFarlane vs. Bellevue*. S. C. Montreal; Badgley, J.

Held, That an affidavit for *capias ad respondendum* which alleges "that the defendant is about to leave the province, and that the belief of deponent that he is about to leave the province, with intent to defraud the plaintiff is founded, &c.," is insufficient under the 12th Vict., c. 42, sect. 2, and that the affidavit must specifically allege that the defendant is about to leave the province, *with intent to defraud*, &c. 10 L. C. Rep., p. 204, *L'Hoist vs. Butts*. S. C. Q.; Stuart, Asst. J.

The plaintiff in an affidavit for *capias ad respondendum* gave as the grounds of his belief "that he was this day informed, by A. and B., that the defendant has all his goods packed for a start from Canada, and that he will leave this province to-morrow, and will not return again, and that he intends leaving with the fraudulent intent aforesaid." On a petition by the defendant to be released from custody, the two parties A. and B. examined on his behalf, deposed in effect, that they only said, that the defendant was going to leave for New York.

In cross examination of the petitioners witnesses, the plaintiff went into proof of other facts, tending to show the fraudulent intent.

Held, 1. That such proof may legally be made, and that the plaintiff is not restricted to the precise matters set up in his affidavit.

2. That, in the case submitted, although the affidavit was directly contradicted by the two parties from whom the plaintiff declared he had received his information, yet there was sufficient of record to show that the defendant was about to leave the province with fraudulent intent. 1 L. C. Rep., p. 240, *Blankensee*, App., *Sharpley*, Resp. In Appeal; Aylwin, Duval, and Bruneau, J.; Lafontaine, C. J., Mondelet, J., dissenting. Same case, 6 Jurist, p. 288.

Held, That an affidavit for *capias*, which sets forth the essential allegations as required by the 12th Vict., c. 42, but in the disjunctive and not in the conjunctive form, is bad and the *capias* must be quashed. 11 L. C. Rep., p. 5, *Talbot vs. Donnelly*. S. C. Q.; Stuart, J.

Held, That the affidavit must state that defendant is *personally* indebted to plaintiff. 1 Jurist, p. 5, *Alexander vs. McLachlan*. S. C. Montreal; Day-Smith, Badgley, J.

Held, 1. That the sufficiency of an affidavit for *capias* will not be tried on petition.

2. That a petition to discharge a defendant from arrest, under the 12th Vict., c. 42, may be made after issue joined. 2 Jurist, p. 71, *Chapman vs. Blannerhasset*. S. C. Montreal; Mondelet, J.

Held, That exception cannot be taken to the affidavit for *capias*, or to the matter therein disclosed after final judgment in the cause. 2 Jurist, p. 163, *Hogun et al. vs. Gordon*. S. C. Montreal; Mondelet, J.

Held, That a *capias* will not be quashed on the ground that the *reasons of belief* in the affidavit do not specifically allege any fraudulent intent on the part of the defendant. 2 Jurist, p. 186. *Henderson vs. Enness*. S. C. Montreal; Smith, J.

Held, That a reference (made in an affidavit for *capias*) to the declaration, for the cause of debt, is sufficient. 2 Jurist, p. 194, *Mulo vs. Labelle*. S. C. Montreal; Day, J.

Held, 1. That fraudulent preferences to creditors by a defendant after his insolvency, do not amount to secretion, and therefore form no ground for *capias*.

2. That the defendant's intention to go to Boston, coupled with the fraudulent preferences, and his treatment of the plaintiff's agent when he called upon him to make an assignment, by telling him not to bother him, were circumstances sufficiently strong to show that his intention was to defraud plaintiff. 4 Jurist, p. 48, *Tremain vs. Sansum*. S. C. Montreal; Monk, J.

Held, That the words, "bookkeeper, clerk, or legal attorney," in the 25th Geo. 3, c. 2, are not *sacramentels*, and that an affidavit by A. S. "Cashier of the Branch of the Montreal Bank at Quebec" was sufficient. 2 Rev. de Jur., p. 328, *Cotes, App., vs. Bank of Montreal*, Resp. In Appeal; July, 1840.

Held, That an affidavit for *capias* is sufficient which alleges that defendant has sold his saw mill and all his wood, and was keeping himself and his property concealed, and had taken no steps to satisfy plaintiff's demand. *Perrault vs. Desève*. S. C. Montreal, 1854; Day, Smith, Mondelet, J; Cond. Rep., p. 19.

Held, 1. That a claim arising out of a contract made in Scotland to deliver passengers luggage in Montreal, where delivery failed to be made, is not a cause of action arising in a foreign country under the Consolidated Statutes of Lower Canada, c. 87, sect. 7.

2. That judgment having been rendered in the District of Montreal, on a breach of such contract in favor of a passenger whose baggage was not delivered, a *capias ad respondendum* will lie against the defendant, in Lower Canada.

3. That an affidavit for *capias* is sufficient which alleges, that the grounds of belief of fraud are, that the defendant is a sea-faring man, resident without Canada and in Great Britain, and temporarily within the province, as master of a sea-going vessel which is immediately about to leave, and from the defendant having made and making no attempt to pay the plaintiff's debt, and having absented himself from the province in 1860 immediately after the rendering of the judgment against him, although in each of the three years next preceding he had been in the province as master of a ship. 5 Jurist, p. 148, *McDougall vs. Torrance*. S. C. Montreal; Monk, J.

Held, 1. That in an affidavit for *capias* it is not necessary to allege that without the issuing of the *capias* the plaintiff will suffer damage, or lose his debt, nor to ask for the issuing of such writ, a *fiat* for the writ being sufficient.

2. That it is not necessary to allege that the deteriorations (under the Consolidated Statutes of Lower Canada, c. 47,) have been made *wilfully*, if it appears they did not occur by accident, nor in the usual course of events.

3. That the affidavit which contains allegations, as required by law, makes proof *prima facie*, and the plaintiff is not bound to adduce other proof on a general denial, contained in the petition for release.

4. A defendant arrested is not entitled to his liberation, by reason that the real estate of which he became *adjudicataire* at a sum less than the hypotheques upon it, was afterwards sold for a sum greater than the amount of such hypotheques. 5 Jurist, p. 158, *Doutre vs. McGuinness*. S. C. Montreal; Monk, J.

Held, That in the case of a *capias* for deteriorations to real estate under the statute, it is not sufficient that all the terms and expressions of the statute be found in the petition or motion for a rule, but they must be found also in the rule itself. 5 Jurist, p. 160, *Varin vs. Cook, and McGuinness et al. misis en cause*. S. C. Montreal; Badgley, J.

Held, That where an affidavit for *capias* sets out a debt of £10 cy., amount of two obligations due by defendant, and transferred to plaintiff without *signification* of the transfer, the motion to quash the *capias* will be granted, on the ground that everything necessary to give a right to the writ, should be alleged. *Nye vs. McAllister*. Cond. Rep., p. 28.

Held, That an affidavit for *capias* setting out that the defendant was of Burlington in the United States of America, and that he was informed that the defendant was about to leave the province, and that he verily believed that it was with intent to defraud him, the plaintiff, was held insufficient. *Larocque vs. Clark*. S. C. Montreal; Cond. Rep., p. 67.

Held, That an affidavit commencing "J. S. of the City of Montreal, book-keeper of H. H., the plaintiff, being duly sworn, doth depose and say," is sufficient without any statement in the body of the affidavit that he is such book-keeper. 12 L. C. Rep., p. 84, *Hogan vs. Hoskins*. S. C. Montreal; Badgley, J.

Held, That an affidavit for a *capias* may contain several different averments of debt inconsistent with one another, and is not void because one of them is insufficient. 12 L. C. Rep., p. 115, *Green vs. Hatfield*. S. C. Q.; Taschereau, J.

Held, That a *capias ad respondendum* issued against a defendant by reason of his having concealed his goods and effects, with intent to defraud his creditors in general, and the plaintiff in particular, will be quashed, if it be established that the defendant has not done away with his effects; that at the time he had no goods; and that the goods done away with were the property of his wife, notwithstanding these goods were responsible for plaintiff's rent. 12 L. C. Rep., p. 222, *Gendron vs. Lemieux, and Lemieux*, Petitioner. S. C. Q. 1857; Morin, J.

#### FOREIGN COUNTRY.

Held, 1. That the colony of Barbadoes is a foreign country within the meaning of the Consolidated Statutes of Lower Canada, c. 87, sect. 8; and consequently that a party arrested for a debt alleged to have been contracted at Barbadoes will be discharged.

2. That a notice of petition for release served on a Saturday between 4 and 5 o'clock P. M. for Monday at 10 o'clock A. M., is sufficient. 6 Jurist, p. 312, *Trobridge et al. vs. Morange*. S. C. Montreal; Smith, J.

## AFFIDAVIT UNDER 22ND VICT., c. 5.

Held, That an affidavit for *capias* under the 22nd Vict., c. 5, sect. 48, which does not disclose the grounds for the allegation "that the defendant is a trader, and that he is notoriously insolvent, and has refused to compromise, or arrange with his creditors," and omits the allegation that he has refused to make a *cession de biens* to them, is bad, even although it be alleged, as required by the 12th Vict., c. 42, that "he has secreted his estate, debts, and effects, with intent to defraud," &c., and that the *capias* will be quashed on motion. 9 L. C. Rep., p. 305, *Warren et al.*, App., *Morgan*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J.

Held, That in such affidavit, it is necessary to allege:—1. The insolvency of the debtor; 2. That he refuses to make an assignment of his effects in favor and for the advantage of his creditors. 11 L. C. Rep., p. 446, *Hamel et al.* vs. *Côté et al.* S. C. Q.; Stuart, J.

## SECOND ARREST.

Held, 1. That a defendant must be completely and fully restored to liberty before he can be arrested on a second *capias* by the same plaintiff.

*Semble*, that by another party a re-arrest would be good.

2. That a service upon a defendant, on his arrest *entre deux guichets*, is a service upon, or arrest of a party, still remaining under the charge of the jailor. 11 L. C. Rep., p. 479, *Hamel et al.* vs. *Côté et al.* S. C. Q.; Stuart, J.

## SURRENDER.

Held, under the 12th Vict., c. 42, sect. 12, That two years after judgment against a defendant arrested by *capias*, notwithstanding an action brought by plaintiff against the bail to the sheriff, on assignment of bail bond, the court will, on cause shown, allow security to be given, for the surrender of the defendant, as provided by the 8th section of that act. 9 L. C. Rep., p. 49, *Lefevre vs. Vallée*. S. C. Montreal; Badgley, J.

## JURISDICTION.

Held, 1. That the quashing of a *capias* in an action for less than £15, does not deprive the Superior Court of jurisdiction over future proceedings in such action.

2. That a question of jurisdiction cannot be tried on motion. 1 Jurist, p. 188, *Elwes vs. Francisc.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a petition for liberation from arrest, under a *capias ad respondendum*, concluding that the *capias* be quashed, cannot be entertained by a judge in vacation for want of jurisdiction. 2 Jurist, p. 167, *Hogan et al.* vs. *Gordon*. S. C. Montreal; Day, J.

## RETURN OF WRIT.

Held, That the delay to appear is established in favor of the defendant, and a writ of *capias* may be ordered to be returned before the return day. *Mackie vs. Cox*. S. C. Montreal; Cond. Rép., p. 44.

## CAPIAS AD SATISFACIENDUM.

UNDER 25TH GEO. 3, c. 22.

Held, That no *ca. su.* can be issued on a judgment obtained by the payee of a note against the maker, although the note is made payable to order, the parties not being merchants or traders, and the note not purporting to be for value received in goods, wares, or merchandise. *Herold vs. Skinner*. Pyke's Rep., 1801; Sewell, C. J.

Held, That by the 12th Vict., c. 42, execution against the body by writ of *capias ad satisfaciendum* has been abolished. 6 L. C. Rep., p. 462, *U. C. Bank vs. Kerk*. S. C. Q.; G. O. Stuart, Gauthier, J., Taschereau, Asst. J.

Held, 1. That after judgment declaring a *capias ad respondendum* valid, a *capias ad satisfaciendum* will issue on proof by plaintiff, petitioner, that the defendant under bail, has not, according to the 12th Vict., c. 42, filed in the prothonotary's office a statement, under oath, of all his credits, property, and effects, and such defendant will be imprisoned for a space of time not exceeding one year.

2. That defendant need not have notice of such petition. 4 Jurist, p. 367, *McFarlane vs. Belliveau*. S. C. Montreal; Badgley, J.

CAPIAS, Appeal. See APPEAL, Interlocutories.

" See APPEAL, Judgment in Vacation.

## CARRIER.

## LUGGAGE—VALUE.

Held, 1. That where a steamboat running between Quebec and Montreal, as a tow-boat, takes the place of a passenger boat, the owner is subject to the liabilities and duties of a common carrier, with respect to the luggage of the passengers.

2. That where a passenger on board such boat leaves luggage outside of the cabin door, and is told by an *employé* on board the boat, that it is safe there, the owner of the steamboat, in the event of the luggage being taken away and lost, is liable for the value thereof. 5 L. C. Rep., p. 203, *Bankier et ux. vs. Wilson*. C. C. Q.; Power, J.

Held, 1. That common carriers are responsible for money *bonâ fide* taken for travelling expenses and personal use, to such reasonable amount as a prudent person would deem necessary and proper to be placed in a traveller's trunk.

2. That where a traveller is a ship-master, common carriers are responsible for a dressing case, and for night glasses or telescopes, upon the presumption that he may reasonably have thought they would be useful to him, in the course of his intended voyage across the Atlantic.

3. That the traveller's oath to establish the value of the contents of his lost trunk is admissible in such cases, as no one but himself is likely to be acquainted with its contents.

4. That in such case, carriers are not responsible for articles of jewellery, as they cannot be regarded as part of a man's luggage. 9 L. C. Rep., p. 169, *Cadwalladder vs. The Grand Trunk Co.* S. C. Q.; Meredith, J.

Held, That the owner of a trunk which was lost by the negligence of a common carrier, will be allowed in an action against the carrier, and *ex necessitate rei*, to prove by his own oath the contents of the trunk and their value. 3 Jurist, p. 86, *Robson vs. Hooker et al.* C. C. Montreal; Berthelot, J.

Held, 1. That in an action against a carrier, the plaintiff's oath will be received as to the contents of a trunk which had been broken open.

2. That the captain of a ship is liable for a lady's jewellery, stolen out of one of her trunks during the voyage. 4 Jurist, p. 132. S. C. Montreal; Badgley, J.

Held, That in an action against a carrier for the value of goods lost, the oath of the plaintiff will be taken when the defendants are unable to answer on interrogatories as to what that value was. 1 Jurist, p. 93, *Hobbs vs. Sénécal et al.* S. C. Montreal; Smith, Mondelet, Chabot, J.

As to oath of passenger to contents of a box, see 2 Rev. de Jur., p. 330, *Pador vs. Boston & Maine R. R.* State of Maine S. C., 1847.

To an action brought, by a lady passenger, against the owners of a sea-going vessel, trading between Glasgow and Montreal, for the value of jewellery in a trunk placed in the hold of the vessel, and not delivered at Montreal, the defendants pleaded, that the loss happened without any fault or privity on their part, but by reason of robbery, embezzlement, or secreting thereof; that the plaintiff did not insert in the bill of lading, or in any way declare in writing, to the master of the vessel, the true nature and value of the articles.

Held, On demurrer to the plea by the plaintiff, on the ground that she was a passenger, and entitled to carry such articles:

That, as owners of sea-going vessels and common carriers, the defendants were liable, and also on the ground that the 50th clause of *The Merchants' Shipping Act of 1854* was not applicable to the luggage of passengers, that the plea could not be rejected as bad in law. 12 L. C. Rep., p. 321, *McDougall vs. Allan et al.* S. C. Montreal; Badgley, J. Same case, 6 Jurist, p. 233.

#### NEGLECTENCE.

Held, That a carrier by water is answerable for negligence. *Bruneau vs Cormier.* K. B. Q. 1816.

Held, That a carrier by water is answerable for negligence; if therefore he carelessly quits his ship, and she is lost during his absence, he must be answerable for the cargo. *Borne vs. Perrault et al.* K. B. Q. 1821.

Several packages of goods were shipped in London to a merchant at Quebec, where, upon the arrival of the vessel, and after delivery of the packages, it was ascertained that some of the goods were missing from one of the packages, but notice of this was not given for several months:

Held, That the master was not responsible for the deficiency. Stuart's Rep., p. 569, *Swinburne, App., Messuc et al., Resp.* In Appeal; April, 1834.



Held, 1. That if merchandise, in good order, is intrusted to a carrier, and arrives at its destination in a damaged state, where he holds it for the freight, he is liable for its value.

2. That if he pretends that fraud or concealment has been practised, the *onus* of proof lies upon him. Stuart's Rep., p. 589, *Hart, App., Jones et al., Resp.* In Appeal; Nov., 1834.

Held, That the owners of river craft are responsible for losses occasioned by their own want of care, attention or experience, or that of their servants. Stuart's Rep. p. 591, *Note, Borne vs. Perrault et al.* 1821.

The respondent, as master of a vessel, had brought from Liverpool a quantity of galvanized metal, deliverable at the port of Quebec to "order or assigns," and no consignee being found, the respondent sent, amongst others, to the appellant to ascertain if he was the importer; the latter answered that he expected a quantity of metal, but not having received any advice of its arrival, he would not take it.

The statute regulating the Customs requires that importers should, within five days after the arrival of the vessel, land the goods and pay the duties thereon, and that in default thereof, it shall be lawful for the officers of the Customs to convey such goods to the Customs Warehouse. The metal was kept on board twelve days after arrival, and by authority of the Collector of Customs, conveyed in an order to the officer of the department on board, directing him to land the metal and convey it to the Customs Warehouse, was landed on the wharf where it lay for some days, exposed to the rain and weather, and was thereby damaged.

Held, In an action by the appellant for these damages, that the respondent had fully complied with the terms and conditions of the bill of lading; that there was no negligence or carelessness on his part, and that he was not responsible for the damages. 5 L. C. Rep., p. 271, *Scott, App., Hescroff, Resp.* In Appeal; Rolland, Panet, Aylwin, J.

#### DELIVERY.

Held, That where three chains attached together were shipped at Liverpool for delivery at Quebec, they compose one whole, and delivery will not be held perfect until all three are delivered; and an action was maintained against the master, part of the chain having been lost in delivering it into the plaintiff's batteau. 8 L. C. Rep., p. 171, *McMaster, App., Walker et al., Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, 1. That a common carrier is liable for the value of goods delivered by error to the vendee, after notice by the shipper (vendor) not to deliver them.

2. That the right to stop the goods *in transitu* is not interfered with, by the plaintiff taking the promissory note of the vendee for the goods, at the time the goods were sold. 9 L. C. Rep., p. 10, *Campbell et al. vs. Jouis et al.* S. C. Montreal; Smith, J. Same case, 3 Jurist, p. 96.

Held, That a clause in a bill of lading, giving the carrier the option to tranship at Quebec, and forward goods to Montreal at ship's expense, and merchant's



*risk*, does not relieve the carrier from liability from negligence and want of care in handling and landing of the goods from lighters at Montreal. 1 Jurist, p 89. *Samuel vs. Edmonstone et al.* S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, That where a defendant is sued for storage of wheat, and urges as a defence that a part of the wheat was not delivered, the proof must be clearly made out; action dismissed. *Jones et al. vs. Young.* Cond. Rep., p. 83.

Held, 1. That a common carrier is "liable for all loss or damage, except that occasioned by the act of God and the king's enemies, and by inevitable accident" and *vis major*."

2. That proof to the effect, that goods placed by plaintiff in defendant's custody, were destroyed by fire in a railway station, which fire could only be accounted for as being the result of spontaneous combustion, does not amount to inevitable accident "*vis major*."

3. That proof, that the defendant had previous to, and at the time of the fire, posted up notices at all the company's stations, with other printed conditions, that the company would not be responsible "for damages occasioned by delays "from storms, accidents, or unavoidable causes, or from damages from fire, heat," &c., and that a similar notification, and printed conditions were printed on the back of the company's advice notes, to consignees, of the arrival of goods, and that the plaintiff had been seen on a previous occasion reading such conditions and notifications, does not constitute an agreement between plaintiff and defendant that the goods in question were to be carried on these terms, particularly in the face of a simple unconditional receipt, as given in this instance, for the goods.

4. That a common carrier cannot be exempted from liability, even where such an agreement is proved, if he be guilty of negligence. 3 Jurist, p. 269, *Huston vs. Grand Trunk Railway Co.* S. C. Montreal; Smith, J.

Held, That a clause in a bill of lading, that the carrier shall not be "liable for leakage, breakage, and rust," does not relieve such carrier from liability arising from negligence. 4 Jurist, p. 40, *Harris et al. vs. Edmonstone et al.* C. C. Montreal; Berthelot, J.

Held, 1. That in case of damage to cargo, the carrier is bound to prove that the cause of damage falls within the exceptions of the bills of lading.

2. That salt ought not to be carried on deck between Quebec and Montreal, unless such mode of carriage is expressly provided for by the bill of lading. 4 Jurist, p. 371, *Gaherty vs. Torrance et al. and contra.* S. C. Montreal; Badgley, J.

Held, in Appeal, That a carrier is liable in damages to a shipper for delay in conveying the cargo (grain and potatoes) by reason whereof the cargo was injured. Damage allowed, £275. *Orvis vs. Voligny.* S. C. Montreal; Cond. Rep., p. 35.

Held, That where goods placed in a station of a railway company to be forwarded, were destroyed by fire, together with the station, before, from the state of the snow, they could be so forwarded, the company is liable for the loss, notwith-

standing public notices that they would not be responsible "for damages occasioned by delays from storms, accidents, or unavoidable causes, or from damages from fire, heat," &c., and that the fire having originated from "waste" kept in the station, which was built of wood, there was negligence and carelessness on the part of the company, and not a fire from *cas fortuit* or *force majeure*. 6 Jurist, p. 173, *Grand Trunk Company, App., vs. Mountain et al., Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J.; Badgley, J., dissenting.

Held, 1. That the liability of a carrier for a quantity of wheat shipped on board a barge, established by an acknowledgment in writing of its receipt, cannot be affected by parol evidence, that the barge was not his, or that he acted only as agent for the owner.

2. When the measurement and delivery of a cargo of wheat have been properly commenced in presence of the carrier and the consignee, or their representatives, it is their duty to attend until the delivery is completed; and if either party absents himself, the other may proceed without him. 2 Jurist, p. 169, *Syme et al. vs. Jones et al.* S. C. Montreal; Day, Smith, Mondelet, J.

## SURVEY.

Held, 1. That in general a consignee who complains of short delivery or damage of goods, ought at once to protest, in order that the disputed facts may be investigated.

2. That in general a survey ought to be had upon goods delivered in a damaged state, and this after notice to the parties interested, especially in cases where the consignee intends to keep the goods.

3. That in the case in question, as the respondents were not bound, and did not intend to keep the goods, and as the extent of the loss could be rightly ascertained by a public auction, and as the damage was admitted, no protest and survey were necessary.

4. That the burden of proof was upon the carrier, to show that the damage was occasioned by dangers of the navigation, which he had failed to do; and that the preponderance of evidence was in favor of the respondents. 6 Jurist, p. 313, *Gaherty, App., vs. Torrance, et al., Resp.* In Appeal; Lafontaine, C. J., Duval, Meredith, Mondelet, J.; Aylwin, J., dissenting.

## LIEN OF.

Held, That goods when landed at a wharf are delivered, but they cannot be removed from thence, without the master's consent, until the freight be paid, for he has a lien for his freight upon the whole cargo. *Patterson vs. Davidson.* K. B. Q. 1810.

Held, That a common carrier by water has a lien upon every part of the goods carried in his vessel, for the payment of the whole freight, and that a tender of the freight upon each load as discharged and loaded on a cart is insufficient. 7 L. C. Rep., p. 55, *Brewster vs. Hooker et al.* S. C. Montreal; Smith, Mondelet, Chabot, J. Same case, 1 Jurist, p. 90.

A railway company, on service of a writ of *saisie arrêt*, made a declaration, claiming a privilege on the proceeds of goods belonging to the defendant, for a balance of freight due, according to a printed condition on certain receipt notes used by the company. The goods having been sold by consent of the defendant, after his insolvency, for the benefit of whom it might concern :

Held, 1. That proof of the defendant having received, from the company, many such receipt notes, containing the condition referred to, and that such notes had been used by the company, for years, and had not been objected to by the defendant, did not constitute an agreement that the company should have such general lien.

2. That the proceeds of the sale of such goods were properly attached in the company's hands, and were available to the creditors of the defendant.

*Query.* Whether a *general lien*, even if expressly consented to by the owner, or consignee, would be valid as against creditors, in case of insolvency of such owner or consignee. 12 L. C. Rep., p. 306, *Fitzpatrick vs. Cusack, and the Grand Trunk Railway Company, P. S.* S. C. Montreal; Smith, J.

## NOTICE.

Held, 1. That a common carrier can limit his liability by conditions inserted in a bill of lading.

2. That where goods are received on board the carrier's lighter at Montreal, to be conveyed to England, by his steamer from Quebec, and only a part of the goods were put on board the steamer, the carrier is not liable for the delay where the bill of lading contained a clause, that if, from any cause, the goods did not go forward by the first steamer, they should be forwarded by the next steamer of the same line. 5 Jurist, p. 190, *Torrance et al. vs. Allan et al.* S. C. Montreal; Berthelot, J.

## TRANSHIPMENT BY.

Held, That a carrier who undertakes to convey goods from Quebec to Chicago, with power to tranship at Kingston, complies with the usago of the port by transhipping at Kingston into a sailing vessel from a steamer, and is therefore not responsible for the loss of such goods, occasioned by tempestuous weather in which such sailing craft was wrecked. 8 L. C. Rep., p. 108, *Warren vs. Henderson et al.* S. C. Q.; Meredith, J.

CARRIERS. See SHIPS AND SHIPPING.

## CERTIORARI.

## JURISDICTION.

Held, That the Superior Court, Montreal, has no jurisdiction to grant a writ of *certiorari* to bring up a conviction had before a justice of the peace in the district of Three Rivers. 3 L. C. Rep., p. 100, *Ex parte Cumming.* S. C. Montreal; Day, Mondelet, J.

Held, That the powers exercised by commissioners under the 2nd Viet., c. 29, sect. 4, as to election of parishes, are not judicial powers, subject to revision by *certiorari*.

*Semble*, That the majority of interested parties mentioned in the said ordinance ought to be understood of the inhabitants of the new parish or division. 3 L. C. Rep., p. 123, *Ex parte Lecours*. S. C. Q.; Duval, Meredith, J.

Held, That mere irregularities in the proceedings of the Superior Court are not sufficient to justify the granting of a writ of *certiorari*; there must be the proof that actual injustice has been done. 3 L. C. Rep., p. 498, *Ex parte Gauthier et al.* S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That a justice of the peace has no authority to issue a writ of *saisie arrêt* after judgment. *Ex parte Corporation of St. Phillippe*. S. C. Montreal; Day, Smith, Badgley, J.

Held, That the Recorder of Montreal, being exempted by statute from making any record of his proceedings, the Superior Court has no means of testing a question of jurisdiction which depends for its solution upon the precise evidence adduced. 1 Jurist, p. 162, *Ex parte Gould*. S. C. Montreal; Day, Mondelet, Chabot, J.

Held, That where a case is heard before two justices of the peace and taken *en délibéré*, it is incompetent for one justice to render judgment alone. 2 Jurist, p. 97, *Ex parte Brodeur*. S. C. Montreal; Smith, J.

Held, That a conviction will be quashed if it appears that the offence was for a felony, and that the defendant was not put on his defence or allowed to cross examine the witnesses. Fo. 8784, *Ex parte Lindsay*. S. C. Montreal; Cond. Rep., p. 84.

Held, That under the 14th and 15th Viet., c. 97, a conviction by a magistrate awarding imprisonment for the penalty and also for damages and costs, will be sustained. No. 83, *Ex parte Moquin*. S. C. Montreal; Cond. Rep., p. 84.

## INSPECTORS.

Held, That inspectors of fences and ditches will not be relieved from the costs of setting aside by *certiorari* a judgment of the justices of the peace, homologating, on the petition of such inspectors, a *procès verbal*, relating to a water course, notwithstanding the inspectors' tender and offer that the applicant shall not be troubled in future by reason of such *procès verbal*. 6 L. C. Rep., p. 112, *Ex parte Dogenais*. S. C. Montreal; Day, Smith, Mondelet, J.

## WRIT—RETURN.

Held, That on *certiorari*, a return of affidavit and warrant only is insufficient. *Rec vs. Desgagné*. K. B. Q. 1819.

Held, That delegates named by several municipalities to determine upon the opening of a road in which several corporations are interested under the 8th Viet., c. 40, sect. 44-45, may make a return to a writ of *certiorari* by their principal officer, either mayor or president, and that it is not necessary, *à peine de nullité* that the return should be under the seal of such officer. 2 Rev. de Jur., p. 46. *The Queen ex relations Talbot*. S. C. Q.

Held, That a writ of *certiorari* allowed before the expiration of six months from the day of the conviction, but not sued out till after the expiry of the six months, will be quashed. *Ree vs. Chillas*. K. B. Q. 1819.

Held, That the writ of *certiorari* issuing under the provisions of the 12th Vict., c. 41, must be addressed to the convicting magistrate, and not to the bailiff sending the writ; and if addressed to a bailiff it will be set aside. 1 L. C. Rep., p. 320, *The Queen vs. Barbeau*. S. C. Q.; Duval, Meredith, J.

Held, That a magistrate has no right to refuse to make a return to a writ of *certiorari*, because the fees due in such case have not been paid; but a rule *nisi* for attachment will not be issued *de plano* without previous notice to the magistrate. 3 L. C. Rep., p. 60, *Ex parte Davies*. S. C. Q.; Bowen, C. J., Duval, Meredith, J.

Held, That a writ of *certiorari* will be quashed, a copy only of the writ having been served on the magistrate and his return made thereon. 6 L. C. Rep., p. 486, *Ex parte Lahayes*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a motion to compel a magistrate to return the original papers under a writ of *certiorari* will be granted, but without costs against the magistrate. 7 L. C. Rep., p. 428, *Ex parte Demers*. S. C. Q.; Bowen, C. J., Badgley, Caron, J.

Such a motion granted with costs against a magistrate. 7 L. C. Rep., p. 429, *Ex parte Ferrier*. S. C. Q.; Meredith, Morin, Badgley, J.

#### LICENSES.

Held, That a conviction under the 14th and 15th Vict., c. 100, for retailing spirituous liquors, and not alleging such sale to have been made "without license," discloses no offence and cannot be sustained. 3 L. C. Rep., p. 93. *Ex parte Woodhouse*; *Ex parte Hogue*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That an information charging several offences against a penal statute in the disjunctive is bad, and the defect will not be cured by the confession of defendant.

2. That the conviction must be of the offence charged in the information and not of a different offence, or of several offences in the conjunctive, charged in the *disjunctive*.

3. A conviction adjudging the defendant guilty of the several offences therein enumerated, and condemning him "for his said offences" to but one penalty, is bad. 3 L. C. Rep., p. 94, *Ex parte Hogue*; *Ex parte Monette dit Bellehumeur*. S. C. Montreal.

Held, That a revenue inspector, suing in the Queen's name under the 14th and 15th Vict., c. 100, for penalties, is not liable for costs. 3 L. C. Rep., p. 237, *Ex parte Hogue and Murray*. S. C. Montreal; Day, Smith, Mondelet, J.

#### PARISHES, ERECTION OF.

Held, That an ecclesiastical decree of the Archbishop of Quebec for the erection of a parish, is not a civil proceeding, subject to revision by *certiorari*, so

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long as no proceedings have been taken for obtaining a ratification of such decree by the civil authorities. 2 L. C. Rep., p. 292., *Ex parte Guay*. S. C. Q.; Bowen, C. J., Duval, J.

## PROCEDENDO.

Held, That the defendant cannot, by motion, compel a petitioner for *certiorari* to proceed upon such writ, but in such case must proceed by means of a *procedendo*. 2 L. C. Rep., p. 302, *Ex parte Morisset*. S. C. Q.; Bowen, C. J., Duval, Meredith, J.

Held, That where a petitioner allows more than six months to elapse before adopting some proceeding to set aside the condemnation, he may be declared *dechu* of his right to do so, on a motion to that effect by the plaintiff in the court below. 2 Jurist, p. 188, *Ex parte Laderonté*. S. C. Montreal; Day, Smith, Mondelet, J. So in *Ex parte Prefontaine*. 2 Jurist, p. 202. S. C. Montreal; Smith, J.

Held, That such motion might be made by the commissioners of the court below. 2 Jurist, p. 189, *Ex parte Loreau*. S. C. Montreal; Smith, J.

Held, That conviction will be quashed if it appears that the offence was for a felony, and that the defendant was not put on his defence, or otherwise to cross-examine the witnesses. No. 8784, *Ex parte Laundry*. S. C. Montreal; Cond. Rep., p. 3.

Held, That under the 14th and 15th Viet., c. 95, a conviction by a magistrate awarding imprisonment, and also for damages and costs, will be sustained. No. 83, *Ex parte McQuin*. S. C. Montreal; Cond. Rep., p. 84.

## COMMISSIONERS' COURT.

Held, That where a judgment of a Commissioners' Court is bad in form, the Superior Court will not grant a writ of *certiorari*, unless it appears there has been excess of jurisdiction. 3 L. C. Rep., p. 111, *Ex parte Gibault*. S. C. Montreal; Day, Mondelet, J.

Held, That clerks of Commissioners' Courts have no authority, under the 14th and 15th Viet., c. 18, to receive the necessary affidavit, and issue writs of attachment before judgment. 4 L. C. Rep., p. 319, *Ex parte Carpenter*. S. C. Montreal; Day, Smith, Mondelet, J. Same Case, Cond. Rep., p. 66.

Held, That there is no exception of jurisdiction in a Commissioners' Court, for granting a delay of eight days to plead, although the service of the writ was not personal. 6 L. C. Rep., p. 476, *Ex parte Goodman*. S. C. Montreal; Smith, Mondelet, J.

Held, That *certiorari* will lie from a judgment of a Commissioners' Court, on the ground that the action was brought by a party styling himself president of a committee to collect the salary of the Rev. J. Desnoyers, curate, &c., and to receive a tax for the support of such missionary. 6 L. C. Rep., p. 476, *Ex parte Saltry*. S. C. Montreal; Smith, Mondelet, J.

Held, That a judgment in a Commissioners' Court will be quashed, the action praying for a condemnation for £6 5s., or for an account of the defendant's

gestion as tutor. 6 L. C. Rep., p. 484, *Ex parte Demontigny*. S. C. Montreal; Day, Smith, Badgley, J.

Held, That Commissioners' Courts have no jurisdiction in cases of damages; and a judgment awarding damages was quashed on *certiorari*. *Legendre vs. Lemay*. K. B. Q. 1820.

Held, That a writ of *certiorari* to remove a judgment of a Commissioners' Court will be refused if it does not appear that the ground upon which it was applied for is true, viz., that the judgment was rendered on a day on which the court could legally sit. *Ex parte Bottinian*. S. C. Montreal, Cond. Rep., p. 3. So in *Ex parte Bellanger*, No. 131. S. C. Montreal, Cond. Rep., p. 31.

Held, That a judgment of the Commissioners' Court for damages for not entering into a co-partnership, although an extraordinary judgment, will not be set aside, it not appearing that the partnership was to include matters of a greater value than £6 5s. cy. No. 882, *Ex parte Allère*. S. C. Montreal, Cond. Rep., p. 8.

#### CHURCHES.

Held, That to constitute an offence, under the 3rd section of the 7th Geo. 4, c. 3, providing for the maintenance of good order in churches, the act complained of must have been committed "during Divine service." 3 L. C. Rep., p. 493, *Ex parte Dumouchel*; *Ex parte Dalton*. S. C. Montreal; Day, J.

Held, 1. That an information setting out that the defendant had conducted himself in a disorderly manner at a church door by keeping his hat on his head during the procession of the Holy Sacrament, discloses no offence.

2. That in matters of *certiorari* the original writ, and not a copy, must be served upon the convicting magistrate; and that it is not necessary to serve a copy of such writ upon the complainant. 4 L. C. Rep., p. 129, *Ex parte Fliau*, S. C. Q.; Bowen, C. J., Duval, Meredith, J.

Held, 1. That service of a copy of a summons, issued by a magistrate, certified by the clerk of the peace, followed by the appearance of the defendant is sufficient.

2. A complaint may be made, and summons issued for two offences, provided the defendant be not arrested in the first instance.

3. A conviction for one of such offences, specifying it, is valid.

4. In a complaint for breach of a by-law, it is not necessary to insert the by-law itself, or to make a distinct allegation that it is in force.

5. A conviction may be returned before one justice of the peace, and adjourned from day to day by one or more justices. It is sufficient if the trial and conviction take place before one and the same justice; but,

6. A conviction inflicting but one penalty for two offences is bad. 5 L. C. Rep., p. 479, *Carignan vs. Harbor Commissioners*, Montreal. S. C. Montreal; Berthelot, J., Pelletier, Asst. J.

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## SERVANTS.

Held, That under the 12th Viet., c. 55, sect. 3, to punish servants for desertion, a justice of the peace has no jurisdiction except in cases where there is a contract. 5 L. C. Rep., p. 495, *Ex parte Rose*. S. C. Montreal; Day, Vanfelson, Mondelet, J.

## MALICIOUS INJURY.

Held, 1. That a summons for malicious injury to property, under the 4th and 5th Viet., c. 26, must be upon complaint under oath.

2. That a conviction stating that the offence complained of was committed "*depuis environ huit jours*," is void for want of certainty. 3 L. C. Rep., p. 496, *Ex parte Hook*. S. C. Montreal; Day, Vanfelson, Mondelet, J.

## ASSAULT.

Held, That a conviction for assault will be quashed, there being nothing to show that such assault was made unlawfully. 6 L. C. Rep., p. 481, *Ex parte Holden*. S. C. Montreal; Smith, Vanfelson, J.

## ROADS.

Held, 1. That an overseer of roads has no authority to sue for penalties under a by-law of a municipal corporation imposing a road tax.

2. That by the 10th and 11th Viet., c. 7, the powers formerly vested in overseers of roads have been transferred to the municipal councils. 3 L. C. Rep., p. 497, *Ex parte Rocheleau*; *Ex parte Eisenhart*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a *procès verbal* for the repair of a front road or a *route* is not required by the 36th Geo. 3, c. 9, and a judgment of the Quarter Sessions rejecting an application to homologate a *procès verbal* of this description, was held, on *certiorari*, to be correct. *Rex vs. Grand Voyeur*. K. B. Q. 1819.

Held, That the Court of Quarter Sessions has a right to reject a *procès verbal* for a road if necessary to do so; the sole question is whether it deems the Court has exceeded its authority or not. *Rex vs. Caron et al.*

Held, That a conviction asked for by a *Grand Voyeur* and quashed must be with costs, the court having no discretion as to the costs. *Ex parte Trudeau*. S. C. Montreal; Day, J. Cond. Rep., p. 66.

Held, That a road inspector will be condemned to costs on the conviction being quashed. *Ex parte Verrouneau*. S. C. Montreal, Cond. Rep., p. 79.

## PLACE OF OFFENCE.

Held, That a conviction will be quashed if the summons states no place where the offence was committed, although the place appear on the face of the conviction. 6 L. C. Rep., p. 480, *Ex parte Leonard*. S. C. Montreal; Driscoll, Asst. J., dissenting; Monk, Pelletier, Asst. J.



## CESSION.

## SIGNIFICATION.

Held, That a *cessionnaire* can bring an action without previous signification of the assignment to the debtor, and that the service of process is equivalent to such signification. 1 L. C. Rep., p. 239, *Martin vs. Côté*. S. C. Q.; Bowen, C. J., Bacquet, Meredith, J.

Held, That an action will lie by the assignee *cessionnaire* of a road officer against an absentee proprietor, to recover the amount due for making a road through his lands. 1 L. C. Rep., p. 340, *Ellison vs. Dunn*. S. C. Montreal; Day, Smith, Vanfelson, J.

Held, That signification of transfer before notaries is not established by a bailiff's certificate. 1 L. C. Rep., p. 150, *St. John vs. Delisle*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That where a *cessionnaire* sues for a debt assigned to him without previous notification of such assignment no costs will be allowed him, and he will be condemned to pay costs, if the debtor has tendered the amount due and paid the same into court. 6 L. C. Rep., p. 411, *Paré vs. Derousselle*. S. C. Q.; Duval, Meredith, J.

Held, That a person confined in the provincial penitentiary, under a conviction of forgery, is not civilly dead, and that signification of a transfer, during that period, on his wife at her domicile, is valid. 2 Jurist, p. 208, *Rowell vs. Darah*. S. C. Montreal; Badgley, J.

## PAYMENT—SIGNIFICATION.

To an action by a vendor for a balance of the price of a farm sold by him to the defendant, the defendant pleaded certain payments (made before action brought) to the *cessionnaires* of the plaintiff under an assignment *not signified*; the plaintiff replied, praying *acte* of his readiness to deduct the sums so paid, and to give security against any demand for the balance due.

Held, That notwithstanding the facts above mentioned, and the defendant's admission that the *cessionnaires* had absconded from the province, the exception must be maintained and the action dismissed. 12 I. C. Rep., p. 401, *Orr vs. Herbert*. S. C. Montreal; Monk, J.

Held, That *cessionnaires* of different portions of the same claim of debt must rank concurrently in the order of distribution, without respect to the date of each assignment, unless the term of the assignment provide otherwise. 12 L. C. Rep., p. 439, *Giroux vs. Gauthier and divers*, Opp. S. C. Montreal; Berthelot, J. Same case, 6 Jurist, p. 249.

Held, 1. That where several creditors have transferred their claims against their debtor to a third party without specifying in the *acte* of cession the total amount of the sums so transferred, the *cessionnaire* being bound to pay 5s. in the £, and without all the creditors named in the *acte* having signed the same, the *cessionnaire* is not bound.

2. That the *cedant* cannot in such case compel the *cessionnaire* to pay, without putting him in possession of the *titres de créance* against him

3. As to the validity of notarial agreements based on sums expressed in figures only. 4 L. C. Rep., p. 88, *McFarlane vs. Aimbault*. In Appeal; Rolland, Panet, Aylwin, J.

## INDEMNITY.

Held, That under the circumstances of this case, the assignor of an indemnity for rebellion losses granted by the Provincial government under the 12th Vict., c. 48, is not liable to make good the amount transferred, the claims having been reduced by the commissioners named under the said act. 6 L. C. Rep., p. 284, *Barrett, App., Workman, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That a transfer of a claim under the Rebellion Losses Act is valid, being assignable. No. 1714, *Picaud vs. Bourdages*. S. C. Montreal, 1854; Bowen, Day, Smith, J. Cond. Rep., p. 101.

## OFFICER'S PENSION—HALF-PAY.

Held, That in the case submitted, the assignment of part of a pension granted to a militiaman for military service is null:—1. By reason of fraud. 2. For want of consideration. 3. Because such pension is not assignable. *Chrétien vs. Roy dit Desjardins*. S. C. Q.; Bowen, C. J., Meredith, Badgley, J. Confirmed in Appeal; Lafontaine, C. J., Aylwin being in favor of sustaining the judgment; Duval, Caron, J., dissenting. 6 L. C. Rep., p. 465.

Held, That half-pay of an officer is not assignable, but although the assignment is null, it can be guaranteed, and an action maintained upon such *guarantee*. 3 Rev. de Jur., p. 248, *Dorwin vs. Waldorff*. Q. B. Montreal; Jan. 1848.

## DISCHARGE BY CEDANT.

Held, That the *cedant* of an hypothecary claim may effectually discharge the same to the prejudice of the *cessionnaire* by registering a discharge thereof, notwithstanding signification of the transport to the defendant and acceptance thereof by him previous to the registration of the discharge. 7 L. C. Rep., p. 119, *Morrin et al. vs. Daly et al., and Derousell, Opp.* S. C. Q.; Bowen, C. J., Meredith, Badgley, J.

## RIGHTS OF CEDANT—FERRY.

Held, That in a contract between several persons as to the keeping of a ferry, with power to any one to sell or convey his right therein, a *cessionnaire* cannot act so as to injure the business, and that the others have a personal and direct action against such *cessionnaire* for damages arising from the breach of the original contract, and for the recision of the contract in future. 8 L. C. Rep., p. 174, *Lalunette dit Lebeau et al. vs. Delisle et al.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

## RIGHTS OF CESSIONNAIRE.

Held, 1. That the assignee of a debt is entitled to intervene on the seizure of the debtor's real estate, in the name of the assignor, before signification of the assignment, and also to be declared proprietor of the debt, and *dominus litis*.

2. That the assignor has no right to contest such a demand, nor to claim to be first reimbursed the costs of suit and seizure.

3. That in the case in question the assignee was proprietor of the debt. 8 L. C. Rep., p. 305, *Berthelot*, App., *Guy et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J. Same case, 2 Jurist, p. 209.

*Query.* Whether the delay given by a *cedant* to a debtor by an *acte* subsequent to the date of the *titre originnaire* but before the transport, can be pleaded by the debtor to an action by the *cessionnaire*? 2 Rev. de Jur., p. 177, *Longlois vs. Verret*. Q. B. Q. 1847.

## RESTRICTION OF.

Held, 1. That when an assignment to trustees for the benefit of the assignor's creditors, is subsequently resiliated by the payment of his debts, the assignor is entitled to be placed in full possession of the remainder of the effects and property assigned, as well those that remain, as the proceeds of those sold by the trustees, and can recover a *prix de vente* from the purchaser on a sale to him from the trustees, without notification of the judgment *en resiliation*, saving the question of costs.

2. The defendant, having made no tender, is condemned to costs, having contested the whole claim. 11 L. C. Rep., p. 92, *Hagan*, App., *Wright*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Where a contract of 3rd August, 1853, for the tanning of leather for three years, was modified subsequently by two *actes* of 11th February, 1854, one of which permitted the resiliation of the contract on three months' notice, and the other bound the party resiliating to pay £50, and a transfer was made by one of the parties to the defendant, of all his rights under the obligation in which it was stated that the obligation might be resiliated as mentioned in the *acte* of 11th February, 1854, *without mentioning which acte*.

Held, That the *cessionnaire* may invoke the *acte* most favorable to him, and that an action for £50 for resiliating the deed will be dismissed, the defendant having set up the first of the two *actes*. 1 Jurist, p. 151, *Monaghan vs. Benning*. S. C. Montreal; Smith, Mondelet, Chabot, J.

CESSION BY CURATOR. See CURATOR.

CEDANT AND CESSIONNAIRE, Collocation of. See JUDGMENT.

SIGNIFICATION, Allegation of an affidavit for Capias. See CAPIAS.

CESSION. See EXECUTOR, Saisie Arret.

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## CAUSE OF ACTION.

See PLEADING, Compensation.

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## CAUTION.

See APPEAL, Bond.

“ SURETY.

“ CAUTION JURATOIRE.

“ HUSBAND AND WIFE.

“ LIABILITY FOR COSTS.

“ COSTS on Proceedings against Surety.

## CERTIFICATE OF BANKRUPTCY.

See BANKRUPTCY CERTIFICATE.

## CHOSE JUGÉE.

See JUDGMENT, Res judicata.

## CHILDREN.

CUSTODY OF. See HUSBAND AND WIFE.

CHILD WITNESS. See CRIMINAL LAW, Murder.

## CHURCH.

## ASSESSMENT FOR BUILDING.

Held, That a defendant who has become a Protestant, cannot be assessed for the construction of a Roman Catholic church. *Syndics de Lachine vs. Lafumme*. C. C. Montreal; Monk, J.

Held, 1. That a person born of Roman Catholic parents cannot escape from contributing to the erection of a Roman Catholic church, within his parish, simply from having ceased to follow the religious duties of his faith, or from attending worship at a Protestant church, he having married a Protestant wife, and bound himself, by the marriage contract, that the children should be brought up as Protestants.

2. That he may be examined on interrogatories as to his belief, and his refusal to answer will be conclusive that he has not abandoned the Roman Catholic faith. 6 Jurist, p. 258, *Syndics of Lachine vs. Fallon*. C. C. Montreal; Monk, J.

## FABRIQUE—ACTION.

Held, That a *Marguillier en exercice* cannot maintain an action for the *Fabrique* solely in his own name. *Chouinard vs. Fortin*. K. B. Q. 1819.

Held, That the Roman Catholic Bishop of Quebec has no authority to compel the *Marguilliers* of a parish to account. He can require (ministerially) a statement of their proceedings for his information, as to the manner in which they have expended the money of the parish; but it belongs to the secular power exclusively to compel judicially a *reddition de compte* in an action by the *Œuvre et Fabrique* of the parish for that purpose. *Fabrique of St. Jean vs. Chouinard*. K. B. Q. 1820.

Held, That an action *en complainte* cannot be supported against the *Fabrique* for the disturbance of a parishioner, in the possession of his pew. A parishioner cannot have possession of a pew. *Wrexler vs. Fabrique of Quebec*. K. B. Q. 1820.

Held, That a workman who has contracted with a parish as a *corps et communauté d'habitans*, represented by syndics for the erection of a church, cannot direct his action against the *Fabrique*. Action dismissed below (*Vullières de St. Réal*, dissenting). Confirmed in Appeal; Stuart, C. J., D. Mondelet, Guirdner, J.; Bowen, Panet, Bedard, dissenting. 2 Rev. de Jur., p. 127, *Comte vs. Curé et Marguilliers de St. Edouard*. In Appeal; March, 1847.

Held, That a judgment rendered in a Commissioners' Court at the suit of "*La Fabrique de St. Anne des Plaines, agissant par son procureur Racine, Marguillier en charge*," will be quashed on *certiorari*, the legal name of the corporation not having been used, but costs will not be given, there being no plaintiff in the cause liable to be condemned. 6 Jurist, p. 200, *Ex parte Lefort*. S. C. St. Scholastique; Berthelot, J.

Marguillier ordered to collect dues. *Prévosté*, No. 14.

Held, 1. That by the 12th Vict., c. 41, the formalities of the English law, in matters relating to the preservation of corporate rights, and to prerogative writs, have been done away with.

2. That parties styling themselves *citoyens notables*, without taking the quality of *fabriciens* or *paroissiens*, cannot maintain an application to oust a person who is alleged to have usurped the office of *Marguillier de l'Œuvre et Fabrique*. 1 L. C. Rep., p. 247, *Cribassa vs. Peloquin et al.* S. C. Montreal; Day, Smith, Vanfelson, J.

Held, on petition for a writ of *quo warranto*, That the *Marguillier en charge* has alone the right to receive moneys due to the *Fabrique*, and that the appointment of a *procureur fabricien* by the *anciens Marguilliers* is illegal, and the *procureur* so appointed ordered to abstain from acting under such procuracy. 1 L. C. Rep., p. 322, *Taillefer vs. Belanger*. S. C. Montreal; Smith, Vanfelson, Mondelet, J.

#### FABRIQUE—ELECTION.

Held, 1. That under the Act 23rd Vict., c. 67, sect. 4, "To regulate the presidency at *Fabrique* meetings in the Catholic Churches of Lower Canada," a regular proposal is required to nominate, as candidate, a person to fill the office of *Marguillier*.

2. That in the case submitted, the simple expression of the desire of one or more parishioners that another person than the one first proposed and seconded, should be chosen *Marguillier* did not import a regular nomination of such person according to the requirements of the act above referred to. 12 L.C. Rep., p. 470, *Belanger et al. vs. Cyr*. S. C. Montreal; Berthelot, J.

See CERTIORARI, CHURCH.

#### FABRIQUE—PRESIDENCE.

Held, That the *curé* has the right of presiding at meetings of the *Fabrique*. 4

Jurist, p. 213, *Sénetcal*, App., *Jarret dit Beauregard*, Resp. Lafontaine, C. J. Aylwin, Duval, Mondelet, J.

FABRIQUE'S power to transfer a debt. See "INSURANCE."

As to power of an *ancien Marguillier* to name a *procureur fabricien*.

See "PREROGATIVE WRIT, QUO WARRANTO."

## CHURCH PEWS.

Held, That the eldest son of a *cessionnaire* of a pew is entitled to have it, on the re-marriage of his father's widow, at the price at which it may be adjudged to the highest bidder. Stuart's Rep., p. 143, *Borne vs. Wilson et al.*; *Churchwardens of the R. C. Parish Church of Quebec vs. Bellenger*. K. B. Q. Feb. 1819.

Held, That a *mandamus* will issue to oblige a *Fabrique* to reinstate a public officer, the oldest captain of militia in possession of a *banc d'honneur*. 2 Rev. de Jur., p. 53, *Regina vs. Fabrique de la Pointe aux Trembles*. K. B. Q. 1821.

Held, That *complainte* cannot be maintained for a disturbance by entering a pew in a church, by one parishioner against another. Stuart's Rep., p. 135, *Auger vs. Gingras*. K. B. Q., April, 1819.

Held, That an action of *complainte* cannot lie against a *Fabrique* by a parishioner for a *trouble* to the plaintiff's possession of his pew in the parish church; for the possession of the pew is in the *Fabrique*, and he holds it for them. *Werter vs. Fabrique de Québec*. K. B. Q. 1820.

Held, 1. That the purposes for which a pew in a church has been used, cannot be changed, without the consent, after deliberation, of the body of the *Fabrique*.

2. That a meeting of the parishioners to authorize the *Fabrique* to take proceedings to recover a pew illegally sold or granted, can be called, and presided over by the *Curé*. 6 L. C. Rep., p. 290, *Reed*, App., *Curé et Marguilliers de Chateauguay*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That an agreement in the lease of a pew, that in default of payment of rent to accrue at the period fixed by the lease, the lease should immediately become null and void, and the lessors might take and relet the same without notice, is not comminatory, but will be enforced. 5 L. C. Rep., p. 3, *Richard vs. The Curé et Marguilliers de Québec*. In Appeal; Lafontaine, C. J., Panet, Aylwin, C. Mondelet, J.

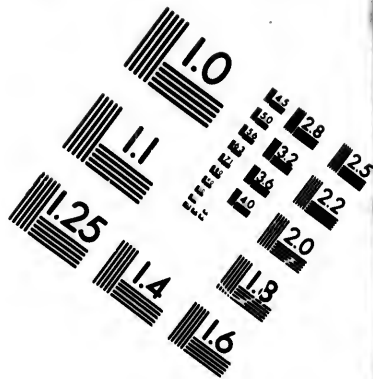
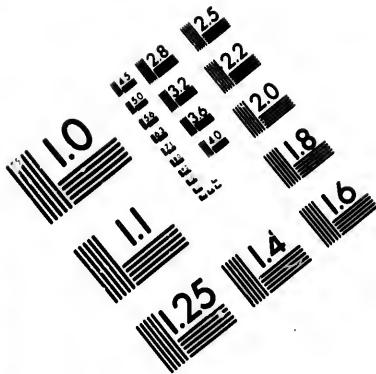
## CHURCH REGISTERS.

Held, That a dissenting minister of a Protestant congregation, not being a public officer nor a person in public holy orders, recognized as such by the law, is not entitled to keep, and cannot keep, a parish register, for baptisms, marriages, and burials. Stuart's Rep., p. 90, *Ex parte The Rev. George Spratt*. 1816.

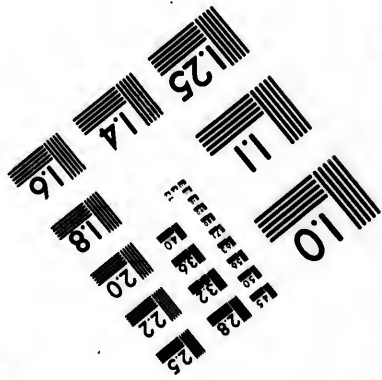
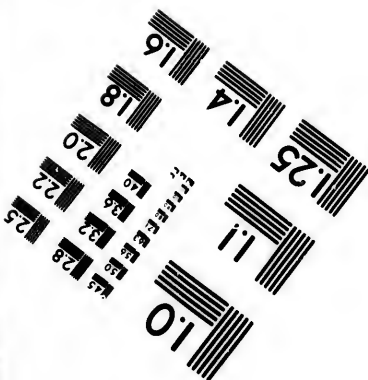
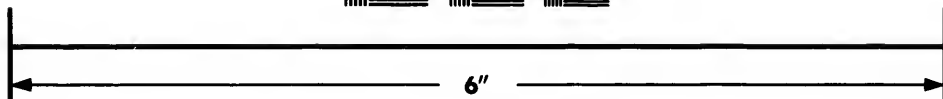
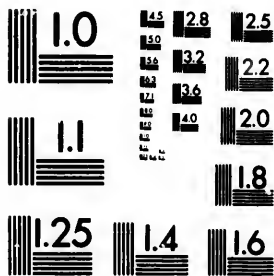
Held, That the words "Protestant Churches or Congregations," used in the Statute 25th Geo. 3, c. 4, which requires rectors of parishes, &c., from 1st January, 1796, to keep two registers, both of which are to be authentic, embrace only such churches and congregations as had their existence in the Province when the statute was passed. Stuart's Rep., p. 149, *The Rev. Geo. Spratt*, App., and *The King*, Resp. In Appeal, 1821.

Held, That a minister of a Presbyterian congregation, in communion with the





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Church of Scotland, is entitled to registers for marriages, baptisms, and burials, notwithstanding that in the place where he officiates, another church, also in communion with the Church of Scotland, has been previously established, under the authority of the government.

*Query?* As to the right of the minister to fees for entries in such register, Stuart's Rep., p. 448. *Ex parte, Clugston*, K. B. Q. 1831.

## PAIN BENI.

Held, That the *capitaine de la cote* is entitled to be presented with the *pain beni* immediately after the seignior, but ought to occupy the *banc d'honneur* reserved for his office, if such banc exists; otherwise it may be presented to him in his turn with the other parishioners. 2 Rev. de Jur., p. 63, *Ange vs. Curé de la Pointe aux Trembles*. K. B. Q. 1821.

CHURCHES, order in. See CERTIORARI.

PAIN BÉNIT ET CIERGE, ordered. *Prévosté*, No. 13.

CURE, possession of Cure. Cons. Sup., No. 46.

## PARISHES, ERECTION OF.

Held, That a *certiorari* will lie for excess of jurisdiction and illegality in the proceedings of the commissioners appointed by the governor of the province, under the Ordinance 31st Geo. 3, c. 6, for the building and repairing of churches. Stuart's Rep., p. 560, *The King, App., Gingras et al. Resp.* In Appeal; 29th July, 1833.

Held, 1. That commissioners for the civil erection of parishes have no right, under the 2nd Vict., c. 29, or under any previous or subsequent law, to delegate to one of their number the power of taking an *enquête*.

2. That such delegation is an excess of jurisdiction, and that all the proceedings subsequent to such delegation and consequent upon it, will be set aside. 4 Jurist, p. 316, *Ex parte Robert et al., Viger et al., Commissioners, and Allard et al., Syndics*.

Held, 1. That there is no appeal from judgments rendered by commissioners for the *erection civile des paroisses*, but the writ of certiorari lies in cases of excess of jurisdiction.

2. That irregularities and illegalities in the proof and proceedings in a cause before such commissioners, and the refusal of proof on the part of the opposants, or the admission of illegal evidence on the part of the *Syndics*, do not constitute excess of jurisdiction. Writ of certiorari quashed. 6 Jurist, p. 333, *Ex parte. Boucher et al., Dessaulles et al., Commissioners, and Langelier et al., Syndics* S. C. St. Hyacinthe; McCord, J.

## TRUSTEES.

Held, That the ordinance 2nd Vict., c. 26, was intended to vest property in religious bodies, and their powers must extend to the performance of acts necessary for the preservation of their rights. 3 Rev. de Jur., p. 246, *Leslie et al. vs. Shaw et al.* Q. B. Montreal, January, 1848.

Held, That under the Religious Congregation Act, 2nd Vict., c. 26, one member of a congregation cannot bring an action to compel the trustees of church pro-

erty, to take steps to cause vacancies in the number of trustees to be filled up in the manner set forth in the deed of trust, but must proceed under the 12th Viet., c. 41, under which the Court could compel specific performance. 2 Jurist, p. 74, *Smith vs. Fisher et al.* S. C. Montreal; Smith, Mondelet, Chabot, J.

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 CLERK.

*See* LIEN—PRIVILEGE—WAGES.  
 OF CROWN, powers of. *See* INFORMATION, Libel.

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 COLLISION.

*See* SHIPS AND SHIPPING, Collision.

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 CONTEMPT.

*See* CONTRAINTE.

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 COMMENCEMENT DE PREUVE.

*See* EVIDENCE, Interrogatories.  
*See* ACTION TO ACCOUNT.  
 " USURY.  
 " PRINCIPAL AND AGENT, Commission.

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 COMMUNATOIRE.

*See* ARBITRATION.  
 " CONTRACT—COMMUNATOIRE.

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 COMMANDEMENT DE PAYER.

*See* EXECUTION, Formalities of.

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 COMMUNAUTÉ.

*See* HUSBAND AND WIFE.  
 " MARRIAGE.  
 " ACTION PETITORY.

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 CONFESSION.

*See* EVIDENCE, Admission.  
 OF JUDGMENT. *See* JUDGMENT, Confession.  
 CONFESSION BY CRIMINAL LAW. *See* CRIMINAL LAW, Confession.

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 CONFIDENTIAL COMMUNICATION.

*See* DAMAGES—SLANDER.

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 CONVICTION.

*See* CERTIORARI.

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 COUNTER LETTER.

EFFECT OF. *See* FRAUD BETWEEN PARTIES.

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 CORONER'S JURY.

PROTECTION OF. *See* JURY, Coroner's.

## COURT MARTIAL.

See HABEAS CORPUS.

## COMPANY.

## JOINT STOCK COMPANY.

Held, That a Joint Stock Company incorporated by Statute is not a *main morte*, and that the acquisition, by such company, of land does not give rise to indemnity or *amortissement* in favor of seignior. 3 L. C. Rep., p. 76, *Seminary of Quebec vs. The Quebec Exchange*. S. C. Quebec; Bowen, C. J., Duval, J.

See CORPORATION, Formation of.

## CONSEIL SUPERIEUR.

For cases in this Court, see end of this volume.

## CONTRACT.

## ACCEPTANCE OF OBLIGATION.

Held, That an obligation with mortgage is valid when consented to by the debtor, without the creditor being present to accept it. 6 L. C. Rep., p. 61, *Ryan, App., Halpin, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

## BUILDER'S LIABILITY.

In an action by a builder against a proprietor for a balance due upon a contract for the excavation, mason's, and bricklayer's work of certain houses, and for *extra* work, the proprietor set up, by exception and incidental demand, that three of the houses were placed upon an insufficient foundation, and sunk, in consequence whereof he suffered damage to an amount exceeding the amount sued for; the plaintiff answered that the houses were built according to the plans and specifications, and under the superintendence and directions of the plaintiff's architect.

Held, in Superior Court, Montreal; Day, Vanfelson, Mondelet, J., That the plaintiff, notwithstanding the houses were built as alleged in his answer, was nevertheless liable for the *vice du sol* and to be condemned in damages by reason of the omission and neglect to take the usual and proper means and precautions, for ascertaining the nature of the ground, and for rendering the foundations fit to support the houses. 1 L. C. Rep., p. 343, *Brown, vs. Laurie*. Judgment confirmed in Appeal. 5 L. C. Rep., p. 65; Rolland, Panet, Aylwin J.

## BUILDER—SUB CONTRACT.

Held, 1. That a contractor who has a sub-contract, is not liable to the *proprietor* for damages caused by the non-execution of the contract for the building of a house.

2. In an action by a contractor for the price of stone sold and delivered by him to the proprietor, such proprietor cannot set up damages caused in the execution of another part of the work, which he contracted should be done by a third party, with whom the plaintiff agreed to do the work. 1 Jurist, p. 190, *Saucisse et al. vs. Hart*. S. C. Montreal; Day, Smith, Chabot, J.

## BUILDER'S PRIVILEGE.

Held, 1. That the mason has an especial privilege, in the nature of a mortgage upon any building erected by him, and for repairs.

2. This privilege, however, will not be allowed to the prejudice of other creditors, of the proprietor, unless within a year and a day, there be something specific to shew the nature of the work done, or the amount of the debt due thereon. Stuart's Rep., p. 263, *Jourdain*, App., *Miville*, Resp. Q. B. Quebec, 1827.

BUILDER'S PRIVILEGE: See SHIPS AND SHIPPING, BUILDER'S PRIVILEGE.

## CONSIDERATION.

Held, That a promise by one to sell a lot of land to another, without naming a price, or providing a price to be named, and without any undertaking on the part of the person to whom the promise was made, to pay, or fix any price whatever, or to buy or accept the land, was a *nudum pactum*, and that no action for breach of contract could be maintained upon it. *Belair vs. Pelisson*. K. B. Q. 1816.

Held, That an agreement between persons interested in a bill before the Legislature (for the inspection of ashes) that one of them should forbear to oppose the bill is not void as against public policy, but will be enforced. 7 L. C. Rep., p. 124, *Henshaw vs. Dyde*. S. C. Montreal; Day, Smith, Badgley, J.

Same case, 1 Jurist, p. 124.

See BILLS AND NOTES, Fraud; also FRAUD.

## COMMINATORY.

A clause to this effect "cette promesse de vendre faite à la charge par celui des deux, qui contreviendra à ces présentes, de payer à l'autre la somme de £100 de dédit," was held to be a covenant for liquidated damages in case of non performance, and judgment given for £100. *Rochet vs. Gérard*. K. B. Q. 1818.

Held, That comminatory clauses are not to be enforced *à la rigueur*. 1 Jurist, p. 12, *Homier vs. Demers*. S. C. Montreal; Day, Smith, Badgley, J.

Held, That a covenant in an obligation, that in default of payment of interest within thirty days, from the period at which such interest became due, the whole of the debt, with the interest, should immediately become exigible, is not comminatory; and that on such default, judgment will be rendered for principal and interest 12 L. C. Rep., p. 335, *McNevin vs. The Board of Arts and Manufactures for Lower Canada*. S. C. Montreal; Berthelot, J.

Same case, 6 Jurist, p. 222.

Held, That in a donation from father to son, the following clause is not comminatory: "que si le donataire venait à vendre, échanger, ou donner les dits terrains à des étrangers, ou à faire quelque autre acte équipollent à vente, il sera tenu et obligé, tel qu'il le promet en ces présentes, de bailler et payer aux dits donateurs, seulement la somme de deux mille livres ancien cours, le jour de la passation, soit des actes de vente, échange, donation, et autres actes équipollent à vente," but that this must be considered as a *charge de la donation*, so soon

as the land was sold to the defendant, a stranger. 6 Jurist, p. 229, *Cheval d'Is* *St. Jacques vs. Morin*. S. C. Ste. Scholastique; Badgley, J.

## COMPOSITION.

Held, That an agreement between a debtor and his creditors that they will accept a composition in satisfaction of their respective debts, may be pleaded to an action by one of the creditors for his whole debt, if he has received the composition. *Fruzer vs. Munroe et al.* K. B. Q. 1820.

Held, That a deed of composition in which it is stipulated that all the creditors must sign within a fixed period, is not binding upon any of the creditors, unless all have signed within the period limited. 1 Rev. de Jur., p. 109, *Cuvillier et al., App., vs. Buteau*, Resp. In Appeal, 1842.

Held, That the failure to pay an instalment as agreed upon in the deed of composition, renders the composition null *de plein droit*, and the creditors may urge their recourse for their whole debt, without taking an action *en résolution*. 1 Rev. de Jur., p. 110, *Atkinson vs. Nesbitt*. Q. B. Q. 1845.

Held, That in the case submitted, upon an agreement in a deed for a composition, founded on the delivery at a certain time and place, of two notes, endorsed by a third party to whom the amount due should be assigned, the delay of two days in delivering the notes, will not deprive the debtor of the benefit of the composition, the creditor not having presented himself to receive the notes and execute the assignment, but having, on the contrary, made known his intention to present himself to receive the notes later, by reason of his residing at a place distant from that where the notes were to be delivered. 7 L. C. Rep., p. 306, *King, App., Breakey*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

In 1852, the plaintiff and her sister sold to the defendant certain real property, the deed containing a clause that if the defendant failed to pay a certain life rent, the vendors might get the deed set aside, and resume possession. In 1857 a deed was passed reconveying a certain part of the property, there being then eight quarters arrears; and by this deed the privilege of *baillieur de fonds*, existing under the deed of 1852, was preserved. The rent stipulated under the deed of 1857 having fallen into arrear, the plaintiff in 1859 brought her action to rescind the deed of 1852, under the clause contained therein above mentioned.

Held, That the covenant or *pacte commissoire* in the deed of 1852 had ceased to exist by the *transaction* contained in the deed of 1857. 11 L. C. Rep., p. 337, *Evans vs. Smith*. S. C. Quebec; Stuart, J.

Held, That a deed of composition will not be set aside for default of payment within the delays agreed upon, if the creditor has altered the deed without the consent of the debtor. 3 Jurist, p. 124, *Boudreau vs. D'Amour*. S. C. Montreal; Smith J.

Held, 1. That the insertion in a deed of composition of the amount of a creditor's claim, with parol evidence of plaintiff's book-keeper that such amount had been agreed upon on an examination of accounts between plaintiff and the debtor, is sufficient evidence of the amount being due, on an account stated.

2. An agreement to pay 10s. in the £ at 6 and 12 months, the creditors

agreeing "on receipt of the same to give a full discharge," if only one instalment is paid, will not prevent the creditor suing for the whole amount of his original claim less the amount paid.

3. That the return to the debtor after the composition was signed, and before the instalments fell due, of the debtor's paper overdue, to an amount exceeding the balance compounded for, will not be considered proof of the creditor's intention to discharge absolutely the original debt whether the notes representing the instalments be paid or not. 5 Jur., p. 41, *Brown et al. vs. Hartigan*. S. C. Montreal; Smith, J.

Held, That where by a deed of composition, it was agreed that on non-payment of any of the instalments *at the times specified* the creditors "should resume their rights and have full power to enforce their several claims to the full amount, after deduction of instalments paid" that the creditor has a right to recover such full amount, if the date of the instalment had passed without payment, and this notwithstanding tender of the instalment before action brought. 1 Rev. de Jur., p. 33. Q. B. Montreal, 1845.

See BILLS AND NOTES, Composition.  
See BANKRUPTCY, do.

#### ILLICIT—VOID.

Held, That a deed of sale in execution of a *tirage au sort* or lottery, is invalid, and the action, for the recovery of the purchase money, dismissed. Case carried into appeal, and appeal dismissed for irregularity. 2 Rev. de Jur., p. 305, *Ferguson et al. vs. Scott*. K. B. Q. 1843.

Held, That an arrangement by a public officer (clerk of the crown) to resign his office in favor of his son, on condition of sharing the revenues and emoluments of the office, is illegal and void. 3 Jurist, p. 244, *Delisle, App., vs. Delisle*, Resp. In Appeal, Nov. 1847.

Held, That a bet as to the result of an approaching election of a member of Parliament is illicit and void, as also a note given for the amount of the bet. 5 Jurist, p. 278, *Dufresne vs. Guévremont*. Circuit C. Richelieu; Bruneau, J.

Held, That the value of liquors sold to travellers who stop at an hotel, can be recovered by suit. 5 Jurist, p. 337, *Mercier vs. Brillon*. Circuit C. Montreal; Berthelot, J.

#### DISCHARGE—REMISE.

Held, That in a writing in the nature of a *remise*, the consideration need not be expressed; and that, with respect to such contract, the formalities required with respect to donations are not necessary. 8 L. C. Rep., p. 368, *Robertson vs. Jones*. S. C. Quebec; Meredith, J.

#### OF MARRIAGE.

Held, in the Queen's Bench, in Appeal, 1. That in an action for the recovery of a sum of money, promised to a certain person by an instrument in writing,

in the event of such person marrying another person named, the defence being the general issue, it was sufficient for the plaintiff, who was in possession of the instrument, in order to obtain judgment, to prove that the signature was authentic.

2. That in the case submitted, the two witnesses examined for plaintiffs were neither allied or of kin to the parties, so as to render them incompetent as such witnesses.

In the Privy Council: Held, That under the circumstances of this case, it was incumbent on the plaintiff to prove all the facts, alleged by such party, to enable her to obtain her demand,—namely, the signing of the instrument, the delivery of the same to the plaintiff, either by the person signing it, or by his consent, and the accomplishment of the condition precedent. 8 L. C. Rep. p. 369, *McCarthy, App., Judah, Resp.*

## NOVATION.

Held, That the acceptance of a note in renewal of one previously made, is not a novation, unless there be an express intention to effect such novation. 10 L. C. Rep., p. 476, *Noad et al., Bouchard et al.* S. C. Quebec; Stuart, J.

In an action for £90 for goods sold, plea, that on the day of alleged indebtedness, defendant executed a notarial obligation for the goods, with a mortgage, and that the demand was novated. Answer, that the obligation was only as collateral security. The plaintiff proved the sale and delivery of the goods; the defendant merely filed a copy of the obligation :

Held, That without express mention of novation, the presumption was in favor of the creditor, and his right to sue upon the original cause of action remained. 1 L. C. Rep., p. 250, *McFarlane vs. Patton.* S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That the acceptance of a note for rent does not operate as a novation. 2 Rev. de Jur., p. 317, *Jones, App., Lemesurier et al., Resp.* In Appeal; Jan. 1840.

Held, That an extension of delay given by the creditor to the principal debtor, operates as a novation and liberates the surety. 3 Rev. de Jur., p. 293, *St. Aubin vs. Fortin.* Q. B. Q. 1848.

Held, 1. That to constitute a novation there must be some difference between the old and the new contract, and that one promissory note will not operate as a novation of another note previously given.

2. That one defendant, although insolvent, is incompetent to prove that he subsequently gave the plaintiff a note in payment of the one sued on, on the ground that he is a party to the issue. 9 L. C. Rep., p. 252, *Brown vs. Milloux et al.* S. C. Q.; Stuart, J.

The defendant made a transfer to the plaintiffs, and one Brazeau, his creditor, of certain debts due to him, and the transferees agreed to give a full discharge for their respective claims, on condition that the sums transferred were paid *when they became due*, and not otherwise: the defendant handed over the *titres de créance*. In an action by plaintiffs on certain notes, made by the defendant in their favor, previous to the transfer :

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Held, 1. That there was no novation operated by the transfer.

2. That as this was a commercial matter, an action by plaintiffs *en déchéance* of the rights acquired under the transfer was unnecessary.

3. That the act of Brazeau, in giving delay of payment for one of the transferred debts, bound the plaintiffs, and that each transferee was bound to the defendant as *garant* for the acts of the other. Action dismissed. 9 L. C. Rep., p. 330, *Boudreau et al. vs. D'Amour*. S. C. Montreal; Smith, J.

See PRIVILEGE OF VENDOR.

#### PAYMENT.

Held, 1. That the payment of money in a non-commercial case, may be proved by the witnesses to a receipt signed with a cross.

2. That in the examination of such witnesses, it is irregular to begin by asking whether the amount had not been paid. 3 Jurist, p. 87, 88, *Neveu père et ux vs. DeBligny*. S. C. Montreal; Smith, Mondelet, Badgley, J.

Held, That if one of two *co-donataires* pay the whole of an annuity to the *donateur*, he can maintain an action against the other, for one half of the sum paid. *Patris vs. Bégin*. K. B. Q. 1813.

Held, That if there be two hypothecary debts, both payable by instalments. but with the privilege of acquitting the older debt before it became due, and payments be made without any application whatever, such payments will be applied, *first*, on the interest of the older debt; *secondly*, on the principal of that debt; *thirdly*, on the interest of the more recent debt, and *lastly* on its principal. 1 Jurist, p. 156, *Cusson vs. Thompson*. S. C. Montreal; Day, Mondelet, Chabot, J.

Held, That when the parties have not made imputation of payments, they are supposed to be made upon the interest due. 2. Rev. de Jur., p. 258. *In re Dumouchelle and Opp*. In Bankruptcy, Montreal, 1845.

See PLEADING, PAYMENT.

#### PLACE OF CONTRACT.

Held, That the law of the country in which a contract is made, and its usage, must govern in mercantile matters; *Locus regit actum*. Stuart's Rep., p. 105 *Allen vs. Scaife et al.* K. B. Q. 1816.

#### PRIVITY.

That a person (defendant) who enters into an agreement with a contractor for the performance of certain works, will not be held responsible to third persons who furnish materials to the contractor, unless on proof that the sale and delivery of such materials were made to the defendant himself. 9 L. C. Rep., p. 445, *Bridgman, App., Ostell, Resp.* In Appeal; Lafontaine C. J., Aylwin, Duval, Caron, J.

#### SOUS SEIGN PRIVÉ.

Held, That a contract *sous seign privé* is not null, because not made *en double*. 4 L. C. Rep., p. 176, *Shaw vs. McConnell*. S. C. Quebec; Bowen, C. J., Duval, Caron, J.

## SUBROGATION.

Held, 1. That a deed by which it is declared that the payment made by a debtor, was so made with the monies of a third person (opposant in the cause), borrowed on the condition of subrogating such person in the rights of the creditor, and that such declaration is made for the purpose of effecting such subrogation, does not effect the subrogation, the opposant not being party to the deed, and there being no acceptance on his behalf, and by reason of the absence of an authentic instrument, as evidence of the loan, and of its object, anterior to the payment.

2. That an allegation in an opposition of an anterior parol contract showing the loan, and the conditions as to subrogation, is not sufficient, although the opposition is not contested; such a contract requiring to be proved by an authentic instrument rendering certain the conditions and date of the loan.

3. That a notarial assignment (of the rights of the creditor) of the 19th October, 1847, accepted by the lender (opposant) before notaries on the 17th November, 1847, is inoperative to effect the subrogation, because the original debt was extinguished completely at the time of payment. 2 L.C. Rep., p. 130, *Filmer vs. Bell*. In Appeal; Rolland, Panet, Aylwin, J.

## TRANSACTION.

Held, That an agreement in the nature of a *transaction* cannot be set aside for fraud. *Trigge et al. vs. Lavallée*. S. C. Montreal; Cond. Rep., p. 87.

CONTRACT, as to Arbitration. See ARBITRATION.

- " Alcaitoire. See USUFRUCT, Sale.
- " of Agent. See BILLS AND NOTES, Agent.
- " " See PRINCIPAL AND AGENT.
- " of Assignment and Cession. See CESSION.
- " " See FRAUD.
- " of Donation. See DONATION.
- " of Exchange. See FRAUD IN EXCHANGE.
- " of Hire of Services. See CARRIER.
- " " See SERVICES—WAGES.
- " " See RAILWAY COMPANY.
- " " See SHIPS AND SHIPPING.
- " of Insurance. See INSURANCE.
- " of Lease. See LANDLORD AND TENANT.
- " of Marriage. See MARRIAGE—HUSBAND AND WIFE.
- " of Married Women. See HUSBAND AND WIFE.
- " of Sale. See SALE OF GOODS.
- " " See SALE OF IMMOVEABLES.
- " with Public Officer. See OFFICER, PUBLIC.
- " Corporation. See CORPORATION—RAILWAY COMPANY.
- " Partnership. See PARTNERSHIP.
- " Bankrupt. See BANKRUPTCY.
- " Minor. See TUTELLE.

CONTRACT, BUILDER'S. See EVIDENCE, Extra Work.

" Damages for breach of. See DAMAGES.

" Delivery of. See CONTRACT, CONSIDERATION, MARRIAGE.

" Fraud in. See FRAUD.

" Joint and several conclusions. See PLEADINGS, Defense en droit.

" made on Sunday. See BILLS AND NOTES dated on Sunday.

" NOTES. See PRINCIPAL AND AGENT, Broker.

" PAYMENT. See PLEADING, Payment.

CONTRACTORS, RAILWAY. See RAILWAY CO., Damages.

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### CUMULATION.

See PLEADING, Joinder.

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### CONTRAINTE PAR CORPS.

#### AGAINST ADJUDICATAIRE.

Held, That *contrainte* will not be granted against an *adjudicataire* for non-payment of the purchase money, whilst proceedings are pending on an intervention by a third party, to have the adjudication declared null and void. 1 L. C. Rep., p. 241, *Meath et al. vs. Monagan and Charlton*, Inter. S. C. Quebec; Bowen, C. J., Duval, Mcredit, J.

#### AGAINST ASSIGNEE IN BANKRUPTCY.

Held, That an assignee who neglects to conform to a judgment ordering him to pay money which he has in his hands, is *contraignable par corps*. 1 Rev. de Jur., p. 360, *Bates vs. Beaudry*, and *Twiffe*, Assignee. In Bankruptcy, Montreal; Mondelet, J., 1846.

#### AGAINST DEFENDANT.

In the case of an execution, where a defendant, who was outside his dwelling house, the door of which was locked, and within which were his wife and family, who were visible from the outside, and who neglected to open the door, on being called upon by the bailiff to do so :

Held, by Mondelet, J., That a return of a bailiff, that the defendant stated to him that he could not open the door, amounted to a refusal to do so, and *inscription en faux* was dismissed.

Held, by Badgley, J., 1. That the return of the bailiff that defendant refused to open the door of his house is only *prima facie* evidence of the fact, and not sufficient to justify a condemnation for *contrainte*.

2. On proof of the facts above stated, that the neglect to open the door did not amount to a *rebellion en justice*. 2 Jurist, p. 279, 280. *Kemp vs. Kemp*. S. C. Montreal.

Held, That a writ of attachment, *contrainte par corps*, may issue against a defendant refusing to open his doors to a bailiff charged with a writ of execution *de bonis*, even where force and violence have not been used. 4 L. C. Rep., p. 43, *Desharnais vs. Amiot dit Boccage*. C. C. Q.; Caron, J.

Held, That *contrainte* will be granted against a defendant with whom a *proces verbal* of the *saïsie gagerie* was left at his domicile in his absence, unless he can establish that when the *saïsie gagerie* first became known to him, the effects were no longer in his possession. 1 L. C. Rep., p. 170, *Munn vs. Halferty*. S. C. Quebec; Duval, Meredith, J.

In the Court of Quarter Sessions, a defendant makes affidavit of his intention to remove the indictment into the King's Bench, because it involved important questions of law, and because certain of the Justices were personally interested in the prosecution; thereupon he is ordered to show cause why an attachment for a contempt against him should not issue; this he declines, but rests his case upon the prudence and discretion of the Court; he is then declared guilty of two contempts, apprehended, and imprisoned.

Held, That a *certiorari* will not lie to remove this conviction. Stuart's Rep., p. 593, *Ex parte Vallières de St. Réal*. K. B. Quebec, 1834.

#### AGAINST GARDIEN.

Held, That a *gardien* failing to represent the effects seized, must remain under *contrainte* until he produce them, or their value. 1 Jurist, p. 158, *Quimet vs. McCullum and Clark*. S. C. Montreal; Day, Mondelet, Chabot, J.

Held, That a rule for *contrainte* against a *gardien* will be discharged on proof that the goods have been sold under other executions. 5 Jurist, p. 56, *Blackiston vs. Patton*, and *Patton, mis en cause*. C. C., Montreal; Bruneau, J.

Held, That *contrainte* will not be granted against a *gardien*, or against a defendant, where no proceedings have been had for more than two months after the execution might have been enforced. 5 Jurist, p. 332, *Scholefield et al. vs. Rodden*. S. C. Montreal; Berthelot, J.

See dissertation as to *contrainte*, 2 Rev. de Jur., p. 356.

Held, 1. That by law, a *gardien* of effects seized is *contraignable par corps* to the payment of the debt in default of producing the effects seized.

2. That from motives of equity the Courts have, in some cases, restricted the obligation to the payment of the value of the effects seized, the proof of value being thrown on the *gardien*.

3. That a judgment condemning a *gardien* to pay a sum less than the debt, on proof made by the creditor will be maintained. 12 L. C. Rep., p. 3, *Higgins et al.*, App., *Robillard*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That a proceeding against a *gardien* who fails to represent the effects placed in his charge, should be by rule for *contrainte par corps*, and not by rule for contempt of court. 1 Jurist, p. 253, *Wilson vs. Pariseau*, and *Phillips*. S. C. Montreal; Day, Smith, Mondelet, J.

*Contrainte* against *gardien* for not producing effects seized; Prévosté, No. 107; also Cons. Sup., No. 13.

*Gardien* discharged after the lapse of the two months; Prévosté, No. 29.

Held, That in proceedings for a *contrainte* against a witness in default, notice of the motion *en contrainte* must be given to the witness; 6 Jurist, p. 85, *Roy vs. Beaudry*. S. C. Montreal; Monk, J.

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## AGAINST SHERIFF.

Held, That a rule ordering Boston and Coffin, sheriff, to deliver up certain machinery seized, cannot be made executory against Boston alone, he having since the judgment become sole sheriff, and the judgment not having been signified or made executory against him. Rule for *contrainte* discharged. 2 L. C. Rep. p. 313, *McPherson vs. Irwin*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That a rule on the sheriff to produce goods seized, and in default of so doing that he be imprisoned, and held *contraignable par corps*, until he produce the goods, or until he pay the plaintiff the sum of £448 16s. 2d. with interest, as the balance of plaintiff's judgment, is illegal and must be discharged.

2. That the rule should have been that in default of producing the goods, he be declared *contraignable* until he pays their value. 7 L. C. Rep., p. 215, *Leverson et al. vs. Cunningham*; and *Boston, mise en cause*. S. C. Montreal; Smith, Mondelet, Chabot, J. Same case, 1 Jurist, p. 86.

In proceedings for *contrainte par corps* against the sheriff, the Court of Appeals ordered proof to be made in the Court below, (before the pronouncing of the *contrainte*) of the value of the goods seized and not represented by the sheriff, and gave the alternative of paying the value of the goods, in order to liberate the sheriff from such *contrainte*; such proof was made, and the Court below dismissed the rule for *contrainte* on the ground that the proof was not applicable to the rule as taken, which was simply for *contrainte* without reference to the money value of the goods:

Held, 1. That there was error in the judgment of the Court below.

2. That the appellants must pay the costs of the appeal inasmuch as the sheriff had tendered to their attorney the value of the goods, the appellants not residing in the province, such tender having been made after judgment, but before the appeal. 9 L. C. Rep., p. 238, *Leverson et al.*, App., *Cunningham*, Defdt., and *Boston*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J. Same case, 3 Jurist, p. 223.

Held, 1. That the sheriff is *gardien* of goods seized, when no *gardien* is offered by defendant.

2. That in a rule for *contrainte* it is not necessary to offer any alternative, in default of producing the movables seized.

3. That when the *gardien* sets up, by way of answer to the rule, that the goods are only worth a certain amount, it becomes the duty of the Court, *avant faire droit*, to order proof as to this fact.

4. That the *onus probandi* in such case falls upon the *gardien*.

5. That the sheriff although over seventy years of age is *contraignable par corps* in such a case as this. 2 Jurist, p. 297, *Leverson et al.*, App., vs. *Boston*, Resp. In Appeal; Lafontaine, C. J., (dissenting as to costs), Aylwin, Duval, Caron, J. See judgment in S. C. Montreal, 3 Jurist, p. 97.

## AGAINST WIFE.

Held, That a *contrainte par corps* against a married woman upon a judgment

for principal, interest and costs, cannot be obtained. Stuart's Rep., p. 467, *Scott et ux.*, App., vs. *Prince*, Resp. In Appeal, 1831. See note to p. 470.

Held, That a rule for *contrainte par corps* against a woman *sous puissance de mari*, although separated from him as to property, will be rejected, unless notice of the rule is given to the husband. 11 L. C. Rep., p. 6. *McDonald vs. McLean* and *Wilson*, Opp, and *Doyle*, adjud. S. C. Quebec; Taschereau, J.

#### AGAINST WITNESS.

Held, That a rule for contempt against a witness for not obeying a *subpœna* will not be granted, unless proof be made of personal service, tender of reasonable expenses, and of wilful disobedience. 5 Jurist, p. 334, *Sexton vs. Boston*, and *Egan*, Interv'g. S. C. Montreal; Badgley, J.

#### APPEAL FROM.

Held 1. That, in the case submitted, the returns of the bailiff are sufficient proof to justify the issuing of the *contrainte* which is in the nature *a capius ad satisfaciendum*.

2. That an appeal lies from a judgment of *contrainte par corps*, as from any other judgment from which an appeal is granted by law. 5 L. C. Rep., p. 168, *Mercure*, App., vs. *Laframboise et al.* Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That in case of a *rebellion en justice* by a defendant, no mitigating circumstances will prevent the issuing of a *contrainte*. 3 Jurist, p. 108, *Campbell et al.* vs. *Beattie*. S. C. Montreal; Badgley, J.

#### DEFENDANT, GARDIEN.

Held, 1. That a defendant who is named *gardien*, and fails to produce the effects seized, is liable to *contrainte par corps*.

2. That there is no error in a judgment, condemning the defendant to be committed to jail, until he pay the debt, interest and costs, and also the subsequent costs, without giving him the alternative of producing the effects seized. 10 L. C. Rep., p. 244, *Brooks*, App., *Whitney*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, J.; Mondelet, J., dissenting. Same case, 4 Jurist, p. 279.

Held, That the Court cannot, in the absence of a positive law to that effect, condemn a person to imprisonment until he does some specific act, such as bringing back effects taken away after seizure. 2 Rev. de Jur., p. 121, *Early vs. Moon*. Quebec Inf. Term; Stuart, C. J., 1846.

#### FOR COSTS.

Held, That the plaintiff has no right to an attachment for contempt against a defendant, for non-payment of costs upon an incidental proceeding, but may obtain an execution for such costs during the pendency of the case. 5 L. C. Rep., p. 421, *Ferguson vs. Gilmour*. S. C. Q.; Bowen, C. J., Meredith, J.

Held, That the *contrainte par corps* for damages and costs, under the Ordinance of 1667, tit. 34, art. 2, has been abolished by the 12th Vict., c. 42. 4 Jurist, p. 211, *Whitney vs. Dansereau*. S. C. Montreal; Berthelot, J.

## FOR LIBEL.

Held, by Bowen, C. J., and Chabot, J., That the Court has discretionary power to grant or refuse a *contrainte* against a defendant for non-payment of judgment in an action of damages for libel.

Held, by Chabot, J., That where the formality prescribed by the judgment, of serving a copy of the judgment for *contrainte*, on the defendant, has not been complied with, the defendant will be discharged from custody on motion. 9 L. C. Rep., p. 274, *Gugy vs. Donaghue*. S. C. Q.

## NOTICE IN.

Held, That under the 12th Vict., c. 42, the defendant could not be imprisoned, without personal service of the motion, for failing to produce statement of his effects. 1 Jurist, p. 4, *Benjamin vs. Wilson*. S. C. Montreal; Day, Smith, Mondelet, J.

## OPPOSITION UNFOUNDED.

Held, That to fyle an unfounded opposition *à fin d'annuller* is a false plea, to impede the due course of justice, and is therefore a contempt, and an attachment may be granted. *Quirouet vs. Wilson*. K. B. Q. 1818. *Hunt vs. Perrault*. K. B. Q. 1820.

Held, That a rule for contempt of court will be issued against a party who fyles several oppositions of the same nature, with a view to retard the sale of the goods under execution. 5 Jurist, p. 70, *Thomas vs. Pepin*, and *Pepin, fils*, Opp. C. U. Montreal; Badgley, J.

CONTRAINTE AGAINST CURATOR. See CURATOR.

CONTRAINTE FOR COSTS. See COSTS, Contrainte.

CONTRAINTE granted for payment of bill of exchange; *Prévosté*, No. 20; Cons. Sup., No. 20.

CONTRAINTE granted for payment of *billet* amending the judgment below; Cons. Sup., No. 22.

CONTRAINTE on a debt due by merchant; *Ib.*, No. 31.

CONTRAINTE refused against the widow of a merchant; *Ib.*, No. 23.

## CORPORATION.

## MEMBERS OF.

Held, That individual members of a corporation cannot be impleaded in respect of the affairs of such corporation. 1 Jurist, p. 289; *Atty. Genl. Pro Reg. vs. Yule*. S. C. Montreal Day, Smith, Meredith, J.

## FORMATION OF.

Held, 1. That a declaration tyled in pursuance of the 12th Vict., c. 57, sec. 1, which the parties signed, but to which they omitted to affix their seals, is never-



theless sufficient, and answers the object of the statute, that of making known the names of the persons originally composing the society.

2. That the legal existence of a society cannot be questioned by an incidental proceeding, such as a plea, but must be attacked by proceedings under the 12th Vict., c. 41. 8 L. C. Rep., p. 276, *The Union Building Society vs. Russell* and *Moran*, Opp. S. C. Q.; Chabot, J.

Held, That an association, which during the progress of a suit has become incorporated, is entitled to take up the instance as a corporation. 3 Jurist, p. 51. *Faribault vs. Richelieu Company*. S. C. Montreal; Day, J.

#### FOREIGN, SERVICE UPON.

Held, That in an action upon insurance policies issued in Upper Canada, service in Montreal, at the defendant's office there, is not sufficient, the Company being incorporated in Upper Canada, and having its chief place of business there, the Montreal office not being for the transaction of the Company's business generally and without limitation. 5 L. C. Rep., p. 403, *McPherson et al. vs. The Inland Marine Insurance Co.* S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, 1. That service upon a Foreign Insurance Co., at their agency or office, within the jurisdiction of the Court, is a valid service on the Company.

2. Such Company may, on such service, be condemned to pay the amount of a policy effected at another agency, in Upper Canada.

3. A judgment maintaining a *saisie arrêt* and ordering the T. S. to pay the plaintiff, when served upon the T. S., operates as a *transport forcé*, and vests the debt in the plaintiff, to the exclusion of the creditors of the defendant, even although he be insolvent. 3 Jurist, p. 159, *Chapman vs. Clarke*, Cur., and *The Unity Life Insurance*. S. C. Montreal; Badgley, J.

Held, 1. That a Corporation duly constituted in a Foreign country, may sue for the recovery of its debts in Lower Canada.

2. That in an action on a promissory note, the holder need not prove that value was given. 8 L. C. Rep., p. 328, *LaRocque et al.*, App.; *The Franklin County Bank*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That the 14th and 15th Vict., c. 128, does not give the corporation of the City of Montreal power to impose a duty or tax on the agents of a Foreign Insurance Co. doing business in the city, and that any by-law imposing such duty is null and void. 9 L. C. Rep., p. 449, *The Mayor, &c., of Montreal vs. Wood*; S. C. Montreal; Mondelet, J. Same case, 3 Jurist, p. 230.

#### SERVICE UPON.

Held, 1. That service of process may be made upon a Municipal Corporation by leaving copy of the summons with the Secretary-Treasurer.

2. That on a contract for work, the contractor may bring his action of damages, upon default of payment of the advances agreed on. 9 L. C. Rep., p. 436, In Appeal; *Corporation of Terrebonne*, App., Valin, Resp. Lafontaine, C. J., Aylwin, Duval, Meredith, J.

Held, That service of process upon the Secretary-Treasurer of a School Muni-

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unicipality is null. 3 Jurist, p. 189, *School Commissioners of St. Pierre de Sorel vs. School Commissioners of Wm. Henry*. S. C. Montreal; Mondelet, J.

Held, That a service of process on the "last President," on the "late Secretary," and on the "last Secretary" of a Railway Co., in the absence of any known or discoverable office of such Company, is insufficient. 3 Jurist, p. 196, *Booth vs. The Montreal and Bytown R. Co.* S. C. Montreal; Smith, J.

## ACTIONS BY.

Held, That the *Supérieure* of the *Hotel Dieu*, cannot sue alone for the Convent. *La Supérieure de l'Hotel Dieu vs. Dentchaud*. K. B. Q., 1816.

Held, That the Quebec Benevolent Society can sue in an action by their president, and vice president. *Neilson vs. Munroe*. K. B. Q., 1817.

Held, That an action in damages brought against a secretary-treasurer of a local council "acting for and in the name of the corporation," for illegally planting posts on a vacant ground, is badly brought, and will be dismissed. *Bourassa, App., Garipey*, Resp. C. C. Montreal; Guy, J., Cond. Rep., p. 55.

Held, That a *sous voyer* has no right of action in his own name, to recover the cost of maintaining a part of a road which defendant had neglected to maintain. *Muir, App., Decelle, (sous voyer)*, Resp. C. C. St. Hyacinthe; McCord, J., 1854. Cond. Rep., p. 75.

Held, That an action cannot be brought in the name of "The Corporation of the Parish of St. Jerusalem, represented by the Municipal Council of the Parish of St. Jerusalem," but will be dismissed, inasmuch as the suit must be in the name of the Corporation. In such case there is nothing to amend by. 3 Jurist, p. 234, *Corporation of St. Jerusalem, &c., vs. Quinn*. C. C. Lachute; Smith, J.

Held, 1. That the secretary-treasurer of a municipality, on his refusal to render an account, will be condemned to pay the amount established by the plaintiffs' proof, with interest at twelve per cent., with *contrainte par corps*.

2. That a rule to obtain such condemnation may be served at the *Greffe*, if the defendant has left the Province. 4 Jurist, p. 125, *Corporation of County of Chambly vs. Longpret*. S. C. Montreal; Badgley, J.

Held, 1. That an action brought by order of a municipal council, must be brought, not in the name of the Council, but in the name of the Corporation it represents.

2. That in the case submitted, the action being brought by a body having no legal existence, and the members of that body not being named in the proceedings, no costs can be awarded by the appellant on the reversal of the judgment appealed from. 12 L. C. Rep., p. 314, *Lesmesurier, App., The Municipal Council of the Township of Chester West, Resp.* In Appeal; Lafontaine, C. J., Meredith, Mondelet, Badgley, J.

*Arret* ordering the execution of the *actes de fondation* of the Seminary of Quebec. Cons. Sup., No. 83.

ACTIONS, LIMITATION OF.

In an action against the Corporation of the City of Montreal for damages resulting from the destruction of fences and the absence of fences on the lands acquired for the Montreal Water Works under the 16th Vict., c. 127, and 7th Vict., c. 44 :

Held, That the limitation of six months referred to in the Statute 7th Vict., c. 44, sect. 26, applied to the action in question and was fatal to it, although such limitation was not pleaded nor insisted on, either at the argument in the Court below, or in Appeal. 9 L. C. Rep., p. 334, *Pigeon, App., The Mayor, &c., of Montreal, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J. Same case, 3 Jurist, p. 294.

ASSESSMENTS.

Held, That the Corporation of the City of Quebec has no privilege on real property for assessments thereon, such privilege not being granted by their act of incorporation, and having no existence at common law. 3 L. C. Rep., p. 289, *Ensor vs. Orkney and Opp.* S: C. Q.; Bowen, C. J., Duval, J.

Held, That the lessees of canal lots on the Lachine Canal within the City of Montreal, under leases for 21 years, renewable on certain conditions, are owners of the land, and liable to assessment in respect of such lots. 2 Jurist, p. 260, *Gould vs. The Mayor, &c., of Montreal*; Badgley, J.

See Cond. Rep., p. 73, *Ex parte Gould.*

Held, That a stipulation in a lease that the tenant shall pay the assessments for the current year, binds the tenant to pay the amount of five cents on the dollar levied under the provisions of the 22nd Vict., c. 15, *Pinsonnault vs. Ramsay.* C. C. Montreal; Monk, J.

Held, That the Circuit Court has no right to take cognizance of nullities in an assessment roll (for the construction of a church), resulting from the omission of the names of some of the *contribuables*, and of fraud on the part of the syndics, but must render judgment against the *contribuables* according to the roll, duly homologated. 6 Jurist, p. 290, *Syndics of the Parish of St. Norbert vs. Pacaud.* C. C. Arthabaska; Stuart, J.

ASSESSORS.

The Statute 14th and 15th Vict., c. 128, consolidating the acts incorporating the city of Montreal, enacts, section 34, "That at any quarterly or special meeting \* \* \* the said council shall appoint as many assessors for the said city as may be necessary, not exceeding nine in number, and the said council may grant the said assessors such remuneration for their services as the said council may deem fitting." The council voted a remuneration to certain assessors at the rate of £225 per annum each.

Held, In an action for a larger sum, 1. That the decision of the council was not final as to such remuneration, and that the assessors, under the section above referred to, had a right of action for a reasonable remuneration to be established by witnesses, and based upon the value of the services rendered.

2. That a plea tendering an amount as due to the plaintiff, and praying *acte* of its deposit into Court, entitled the plaintiff to a judgment for the sum tendered. Judgment below reversed and the value of service awarded in Appeal. 9 L. C. Rep., p. 363, *Boulinget vs. The Mayor, &c., of Montreal*. In Appeal; Lafontaine, C. J., Aylwin, Duval, J.; Meredith, J., dissenting.

ASSESSORS, action by. See ASSUMPSIT QUANTUM MERUIT.

## BY-LAW.

Held, 1. That under the 16th Vict., c. 138, a by-law of a municipal corporation, authorizing a subscription for shares of stock in a railway to pass through the county, and the issuing of debentures to pay for such shares, is void, if no provision is made in the by-law for imposing an annual rate or assessment for the payment of interest, and the establishment of a sinking fund.

2. That in passing a by-law without making such provision, the corporation exceeds its powers, and exercises franchises and privileges not conferred on it by law.

3. That under the 12th Vict., c. 41, the Superior Court, on petition in the name of the Attorney General, has jurisdiction over corporations, and to set aside such by-law. 5 L. C. Rep., p. 155, *The Attorney-General pro Regina vs. The Municipality of the County of Two Mountains, and the Montreal and Bytown R. R. Co.*, Interv'g. S. C. Montreal; Day, Smith, J.

So held, also, in Atty. Gen. *pro Reg.* in Municipality of the County of Shefford, S. C. Montreal; Day, Smith, Vanfelson, J. 5 L. C. Rep., p. 200. And in two cases against the Township of Shefford and the Township of Farnham. *Ib.*, p. 202 *note*.

Held, That a by-law imposing an annual tax will only take effect for the future and not during the financial year then begun. 3 Rev. de Jur., p. 424, *The Mayor, &c., of Quebec vs. Colford*. Weekly Sessions, W. K. McCord, and Anderson, J.

In the Recorder's Court, Montreal, the applicant was condemned to pay a fine and to imprisonment, for having sold fresh pork in his shop within the city, contrary to the by-law of the Corporation, No. 196.

Held, That the by-law was not applicable to the case in question, but only prohibited the exhibition and sale of provisions, &c., "in the streets, squares, lanes, and other public places, other than the public markets of the city." 11 L. C. Rep., p. 289, *Ex parte Daigle*. S. C. Montreal; Berthelot, J. Same case, 5 Jurist, p. 224; and Cond. Rep., p. 66.

Held, That the Corporation of the City of Quebec, cannot legally make a by-law imposing a water tax, on any of the wards within the city, until it is ready to furnish to the inhabitants of such ward a continuous and abundant supply of pure and wholesome water. 11 L. C. Rep., p. 436, *Ex parte Dullimore*. S. C. Q.; Taschereau, J.

Held, That a stockholder in a joint stock company can bring an action of account against the Corporation, and thereby contest the validity of a by-law

made by a board of directors. Stuart's Rep., p. 425, *Keys vs. The Quebec Fire Ass. Co.* K. B. Q. 1830.

BY-LAW, Setting aside. See CORPORATION—ROADS.

#### BUILDING SOCIETIES.

Held, That the right of calling general meetings to make or alter rules and regulations, resides, in the case of building societies organized under the 12th Vict., c. 57, 14th and 15th Vict., c. 23, and 18th Vict., c. 116, in the president or secretary of the society.

2. That the requisition for such meeting should be addressed to the president and directors, and should indicate the special objects of such meeting.

3. That the 7th sect. of the 18th Vict., c. 37, is not abrogated by the seventh sect. of the 18th Vict., c. 116.

4. That the rules and regulations should be enregistered as provided by the 5th section of the 12th Vict., c. 57.

5. That directors should be elected one by one, and not all by one vote.

6. That the president of the society should preside at all meetings for the passing of rules and regulations. 3 Jurist, p. 325, *Jodoin vs. Dubois.* S. C. Montreal; Smith, J.

#### CAPITATION TAX.

Held, 1. That students in public schools are exempt from the capitation tax, and that the Corporation of the City of Quebec have simply the power to extend this exemption to other classes of citizens, but not to deprive such students of its benefit.

2. That the Corporation has power to increase such capitation tax from 2s. and 6d. to 7s.

3. That the Laval University is a public school, and its students are exempted from such tax.

4. That a law student studying at the University, and under indentures as an advocate, is not deprived of his immunity as a student in a public school. 11 L. C. Rep., p. 457, *Ex parte Bourdages.* S. C. Q.; Taschereau, J.

#### DAMAGES AGAINST.

Held, That the Corporation of the City of Montreal is not liable in damage to a person falling into the cellar of a house burned down, and not rebuilt, the lot being uninclosed, contrary to the by-law of the Corporation; the cause of such damage being too remote. 8 L. C. Rep., p. 228, *Bellanger et ux. vs. The Mayor, &c., of the City of Montreal.* S. C. Montreal; Day, J.

Held, That the Corporation of the City of Montreal is liable for damages caused by water to goods in a cellar, the water having entered by a service pipe being left open during repairs made by defendants to the street. 6 L. C. Rep., p. 89, *Belliveau vs. Corporation of Montreal.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, That the Corporation of the City of Montreal is liable for damages occasioned by a mob riotously entering into the plaintiff's house, in the city, and breaking windows and furniture and spilling liquors. 9 L. C. Rep., p. 463, *Carson et al. vs. The Mayor, &c., of Montreal*. S. C. Montreal; Smith, J.

Held, That the Corporation of the City of Montreal is liable for loss occasioned by the burning of property within the city by persons riotously assembled therein. 10 L. C. Rep., p. 426, *Watson, App., vs. The Mayor, &c., of Montreal*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

Held, That an action in damages for bodily injuries and loss of clothing during a riot, will not lie against the Corporation of the City of Montreal, although the City Police is raised by, and is under the control of the Corporation. 1 L. C. Rep., p. 408, *Drolet vs. The Mayor, Aldermen and Citizens of Montreal*. S. C. Montreal; Smith, Vanfelson, Mondelet, J.

Held, That the Corporation of Montreal is liable to fill up an old *cours d'eau* which does injury to property within their jurisdiction; and in default of doing so, to pay damages. 1 Jurist, p. 166, *Voyer vs. Corporation of Montreal*. S. C. Montreal; Day, Mondelet, Chabot, J.

Held, That the Corporation of the City of Montreal is liable for damages caused by the overflowing of their drains, when these drains are obstructed; that where packages of bottled porter and ale are rendered unmerchable, damages may be claimed, although the contents of the bottles are not injured. 2 Jurist, p. 78, *Kingan vs. The Mayor, &c., of Montreal*. S. C. Montreal; Mondelet, J. So also in *Walsh vs. The Mayor, &c., of Montreal*. 5 Jurist, p. 335; Smith, J. Also *Mercier et al.* Same case. Cond. Rep., p. 54.

Held, That municipal corporations are liable by a statute of the state of Massachusetts to pay damages for injury received by reason of any defect or want of repair in any highway, &c. 3 Rev. de Jur., p. 257, *Hall vs. City of Boston*. Com. Pleas, U. S., 1847.

## ELECTION.

Held, That although two elections of City Councillors took place the same day, the one to fill an ordinary vacancy, and the other a vacancy caused by the retirement of a member of the Council, yet the candidate having the less number of votes must fill the ordinary vacancy, and remain in office for the longer period, if he was nominated to fill that vacancy; because the nomination by the electors stamps the character of the election; and all votes given at such election must be held to have been given in accordance with the requisition of the electors. 12 L. C. Rep., p. 425, *Lee vs. Burns*. S. C. Q.; Taschereau, J.

Held, On proceedings by *requête libellée* for usurping the office of councillor for the City of Montreal, before two justices in vacation, that under the 12th Viet., c. 41, sect. 1, and the 14th and 15th Viet., c. 123, sect. 27, the justices, in vacation, had no jurisdiction. 10 L. C. Rep., p. 14, *Adams vs. Duhamel*. S. C. Montreal; Smith, Badgley, J.

Held, That where the person, named by the warden of the county, to preside at a meeting of electors assembled for the election of councillors for a

municipality, absents himself, after the commencement of the meeting, the electors present have no right to name another president in his stead, and that the election made under the presidency of the person so named by the electors, is null and void. 10 L. C. Rep., p. 111, *Perrault vs. Brochu*. S. C. Arthabaska; Stuart, J.

Held, 1. That under the 12th Vict., c. 126, sect. 8 and 41, a person is not qualified as a councillor of the City of Montreal, who is not possessed to his own use and benefit of real and personal estate within the city, after the payment of his just debts, of the value of £500 currency.

2. That a councillor who becomes insolvent during the period for which he is elected, is thereby disqualified to act as such councillor. 4 Jurist, p. 281, *Roland vs. Bristow*. S. C. Montreal; Smith, J.

Held, 1. That a municipal election is void, because the votes were taken upon loose sheets, and without a poll book stating the purpose of the election, giving the names of the candidates, and those of the electors, with their additions, and places of residence, and because the votes were given without naming the candidates for whom they were given, but merely by indicating the party for whom such votes were given.

2. That petitioners, in like cases, who pray that they be declared duly elected, are bound to allege and prove that they are duly qualified and eligible for municipal councillors. 8 L. C. Rep., p. 181, *Guay et al., Petrs., Blanchet et al., Resp.* S. C. Q.; Chabot, J.

Held, 1. That the law of Lower Canada being silent upon the subject, "bribery" in municipal elections does not annul the votes of the persons bribed, nor disqualify the party by whom they were bribed.

2. That the respondent cannot by a special answer, be called upon to answer charges not specified in the petition, *requête libellée*, under the 12th Vict., c. 41, sect. 3.

3. That the petitioner having prayed for a judgment upon the right of T. M. to the contested office of City Councillor, the defendant had a right to raise an issue to try the right of T. M. to hold such office, and to show that his claims were unfounded. 8 L. C. Rep., p. 332, *Wood, Petr., Hearn, Resp.*; C. C. Quebec; Meredith, J.

Held, That a person elected a City Councillor for the City of Montreal, will be ousted from his office, on *requête libellée*, if it appears that he was not a resident householder in the city for 12 months next previous to the election, but a boarder and lodger in a boarding house. *Lynch vs. Pupin*. S. C. Montreal; Smith, Vanfelson, Mondelet, J. Con. Rep., p. 109.

Held, That the Corporation of the City of Quebec has a right to delegate to a committee the power of investigating the facts in case of a contested election, and that the resolution of the council on the report of such committee, annulling the election of a councillor, and declaring his opponent elected, is legal and within the authority of the council. 4 L. C. Rep., p. 177, *Binet vs. Giroux*. In Appeal; Rolland, Panet, Aylwin, Mondelet, J.

Held, That in inquiring into the legality of the votes given at a municipal election for the City of Quebec, the Judges are bound by the list of electors prepared by the council, and have no right to scrutinize the same. 4 L. C. Rep., p. 457, *McDonald vs. Quinn*. S. C. Q.; Bowen, C. J., Duval, Meredith, J.

Held, That a municipal election presided over by a senior justice of the peace, who installed himself forcibly as president, was void, even admitting that the appointment of the warden of the county, by himself, as president, was illegal.

2. That the senior justice of the peace can only preside in the absence of the person appointed by the warden.

3. That the election in question was void, it having taken place in the absence of the majority of the electors assembled, and having been prematurely ended after the polling had commenced. 8 L. C. Rep., p. 125, *Pacquet et al.*, vs. *Robitaille et al.*; Chabot, J.

#### EXPROPRIATION.

Held, 1. That in the exercise of powers conferred on a corporation by statute, affecting the property of individuals, such as the power conferred on the City of Quebec by the 10th Viet., c. 113, and 13th and 14th Viet., c. 100, sect. 7, of acquiring the right of way, or servitude for the construction of the Quebec Water Works, the course pointed out by the statute must be strictly pursued, and any departure from such course will vitiate the proceedings; and the taking of land for such purpose, must be under the conditions mentioned in the statute, and not under any other conditions, if such taking be compulsory.

2. That in the present case, the conditions contained in the tender of the Corporation, the award of the arbitrators, and in the verdict of the jury, not being in accordance with the statute, the whole of the proceedings, brought up under writ of *certiorari*, will be quashed and set aside. 4 L. C. Rep., p. 429, *McPherson vs. The Mayor, &c., of Quebec*. S. C. Q.; Bowen, C. J., Duval, Meredith, J.

Held, That, in the case submitted, the Court cannot be called upon to enquire as to the validity or invalidity of the proceedings before the special jurisdiction of a justice of the peace, nor of the verdict of the jury, summoned in a matter of land taken for the Water Works of the City of Montreal, under the 14th and 15th Viet., c. 128. 6 L. C. Rep., p. 328, *Beaudry, App.*, vs. *Corporation of Montreal*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, 1. That on proceedings by the Corporation of Montreal for taking land for public use under the 14th and 15th Viet., c. 128, sects. 66, 68 and 69, the justices of the peace could not legally refuse to swear, nor the jury to hear, witnesses produced before them.

2. That such refusal invalidated the verdict or assessment of the jury.

3. That the appearance and attendance of the proprietor at the proceedings had subsequently to such refusal, cannot be taken as a waiver of his right, to complain of such illegal decision, there being no act of express acquiescence therein.



4. That, in the case submitted, recourse could be had to a direct action, against the taking of the land in question, by reason of the verdict being illegal and null. 8 L. C. Rep., p. 104. In the Privy Council, *Beaudry, App., The Mayor, Aldermen, &c., of Montreal*, Resp.

Held, That where the plaintiff had sold a piece of land to the defendant a few days before proceedings were taken by the opposants, to expropriate a portion of it to widen a street, the opposition could not be maintained for the strip of land expropriated on proceedings against the plaintiff. Opposition dismissed. *Beaudry vs. Guenotte*, and *Corporation of Montreal*, Opp. S. C. Montreal; Cond. Rep., p. 46.

#### LICENSES.

Held, 1. That the Mayor and Councillors of the City of Quebec under the 14th and 15th Vict., c. 100, sects. 5 and 6, have a discretionary power as to confirming, or refusing to confirm certificates for tavern licenses.

2. That in the exercise of this discretion, they are not liable to be controlled by the Superior Court, or the judges thereof in vacation. 2 L. C. Rep., p. 274, *Ex parte Lawlor*. S. C. Q.; Duval, Meredith, J.

#### MARKETS.

Held, That it is within the powers of a municipal corporation, to make by-laws concerning markets, and to expel from the markets persons offending against such by-laws, and that such powers were conferred on the Corporation of the City of Quebec, under the 8th Vict., c. 58, sect. 7. 1 L. C. Rep., p. 473, *Dumortier vs. Baudou dit Larivière*. C. C. Q.; Duval, J.

#### MORTMAIN-BEQUEST.

Held, 1. That the declaration of the King of France, which requires a license in mortmain in certain cases, is repealed by the Provincial Statute 41st Geo. 3, c. 17, so far as respects "The Royal Institution for the Advancement of Learning."

2. The bequest of a sum of money to trustees for the benefit of a corporation not *in esse*, but in apparent expectancy, is not to be considered a lapsed legacy.

3. On a similar bequest to be applied towards defraying the expenses to be incurred in the erection and establishment of a University or College upon condition that the same be erected and established within ten years of the testator's death, such condition is accomplished, if a corporate and political existence be given to such University or College by Letters Patent, emanating from the Crown, although a building, applied to the purposes of such University or College, may not have been erected within that period of time. Stuart's Rep., p. 218, *Des-Rivières, App., Richardson*, Resp. In Appeal, 29th April, 1826.

Held, 1. If the declaration, in a petitory action, contain a designation of the land by its name, that of the borough, village, or hamlet, and of the parish where it is situated, this will be sufficient, if the boundaries are correctly stated.

2. Proof of a letter of attorney, executed *sous seign privé*, is not required when a deed executed by the attorney in virtue thereof is proved, if the principal by any subsequent use he has made of the deed, has ratified it.



3. The head of a Corporation may bind the body corporate by any contract from which it may derive a benefit.

4. A devise of real estate was made to a Corporation, upon condition that it should within the period of ten years "erect and establish, or cause to be erected and established upon the said estate a University or College:" Held, that the words "erect and establish" extend only to the erection and establishment of the corporation or body politic forming the University or College, and not to the erection of a building in which the University or College is to be established.

5. To maintain a petitory action against a residuary legatee, a *delivrance de legs* from the heir-at-law is not required, the Quebec Act, and the Provincial Statute 41st Geo. 3, c. 4, sec. 2, having, as respects testamentary donations in cases where the heir-at-law has been entirely excluded from the succession by will, abrogated the rule of the French law, "*La mort saisit le vif.*"

*Semble.* That the heir-at-law only could avail himself of the exception (if pleaded) that the plaintiff had never obtained *delivrance de legs*.

6. A license in mortmain under the declaration of the King of France of 1745 is not required to enable "The Royal Institution for the Advancement of Learning," to accept of a devise of real estate.

7. If a corporation, to be composed of certain trustees to be subsequently named by the Crown, is established by statute, the existence of the corporation will commence at the time when the statute was passed, and not when the trustees were named.

8. The condition of a devise to the Royal Institution for the Advancement of Learning that it should within ten years cause to be erected and established a University or College bearing the testator's name, is accomplished, if a University of Royal and not of private foundation, be erected and established within that period. Stuart's Rep. p. 224, note. *The Royal Institution, &c., vs. Des-Rivières.* K. B. Montreal; 19th Oct. 1822. Confirmed in the Provincial Court of Appeals, 20th Nov. 1823, and in The Privy Council, 7th May, 1828.

See COMPANY Joint Stock.

See SEIGNIORIAL RIGHTS—INDEMNITÉ.

#### CORPORATION-ROADS.

Held, 1. That municipal councils, making by-laws for the opening of roads, are bound in compliance with the provisions of 36th Geo. 3, c. 9, to give the notices required by that act.

2. That if the road authorized to be opened is a by-road (*route*) it is necessary that indemnity for the land should be paid or tendered to the proprietor, before the road be opened.

3. That however long a road may have been opened and used by the public, no right is thereby acquired, and the proprietor of the soil can, at any time, when a *proces verbal* is made, recognizing the road as a public road, claim to be indemnified for the value of the land. 4 L. C. Rep., *Ex parte Foran et al.* C. C. Ottawa, McCord (W. K.), J.

Held, That the making and maintaining of a *street*, is not a "county work" within the meaning of the 2nd subsection of the 39th section of the Lower Canada Municipal Act of 1855, but is a "local work" within the meaning of the third subsection, for which the County Council cannot levy a rate. 11 L. C. Rep, p. 57, *The Grand Trunk Co., App., Corporation of County of Levis*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That a by-law imposing an annual tax will only take effect for the future and not during the financial year then began. 3 Rev. de Jur., p. 424, *The Mayor, &c., of Quebec vs. Colford*. Weekly Sessions, W. K. McCord, and Anderson, J.

Held, That an action for not cutting down *cahots* should not be brought in the name of a *sous voyer*, but by the municipal council. Conviction quashed on *certiorari*. *Ex parte Archambault*. S. C. Montreal; Cond. Rep., p. 68.

Held, In the Superior Ct. St. Hyacinthe; McCord, J. That the Superior Court has no jurisdiction to alter, amend, revise, or disallow a by-law of a municipal corporation, although passed illegally, and contrary to the just rights of parties interested, unless redress is sought under the 12th Viet, c. 41.

Held, 1. In Appeal, That under the Municipal and Road Act of 1855, a municipal council is not authorized to cause a sale by auction *aux rabais* to be made of the road work of a proprietor of lands, within the municipality, and to cause such lands to be sold after notice in the *Canada Gazette* for the price of making such road, without judicial proceedings.

2. That such proprietor has a right of action in the Superior Court, to prevent the corporation from so illegally advertising and selling his lands.

3. That in such action, the Court will declare the advertisements illegal, and condemn the corporation to desist from troubling the plaintiff in the possession and enjoyment of his lands, by causing the sale thereof to be made without judicial authority, and to nominal damages for its illegal acts. 11 L. C. Rep., p. 353, *McDougall vs. The Corporation of St. Ephrem d'Upton*. Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J. Same case, 5 Jurist, p. 229.

Held, 1. That upon conviction, by a justice of the peace, under the Municipal and Road Act of 1855, it must appear (1) That the magistrate had jurisdiction; (2) Whether the road was a front road, or a by-road, and (3) whether there was or was not a *proces verbal*.

2. That the conviction will be quashed, if it appears that the complaint is in relation to a road, and the conviction to a bridge.

3. That bridges of over ten feet long are public bridges.

4. That under the above act, a magistrate has no jurisdiction in a case for money laid out and expended for repairs; but only in cases for the recovery of fines or penalties. 11 L. C. Rep., p. 443, *Mutte vs. Brown*. C. C. Q.; Taschereau, J.

Held, 1. That under the Municipal and Road Acts of 1855, a Municipal Council must abolish a street by *proces verbal* and not by *reglement* (by-law).

2. That a by-law for the establishment of a public pound, which if made, would include part of a public street, is null. 2 Jurist, p. 115, *Corporation of Verchères vs. Boutillet*. S. C. Montreal; Smith, J.

Held, That a contract "to open, level, form, and make" certain streets and squares in the City of Montreal, necessarily involves the making of side walks, but not the making of fences, along the line of such streets, and around such squares, nor the repairing of roadway. 3 Jurist, p. 157, *Anderson vs. The Mayor, &c., of Montreal*. S. C. Montreal; Smith, J.

Held, 1. That no municipality of "La Cote des Neiges" exists.

2. That the roads under the Trustees of the Montreal Turnpike Roads are exempt from the operation of the 23rd Vict., c. 61.

4. That an appeal lies from a judgment of the Inspector of Police at Montreal, to the Circuit Court in the case submitted. 4 Jurist, p. 326, *Trustees of Montreal Turnpike Roads vs. Bernard*. C. C. Montreal; Baigley, J.

Held, That under the Municipal and Road Act of 1855, sect. 42, a winter road cannot be laid out across a field enclosed with a rough stone fence *de pierres brutes*, without the consent of the proprietor. 6 Jurist, p. 113, *Lavoie vs. Gravel*. C. C. Montreal; Berthelot, J.

Held, 1. That when a proprietor who has been notified to do certain road work, is not in delay to do the work the *sous voyer* is not justified in doing it on his account.

2. That neither the *sous voyer* nor the inspector of roads is authorized under the municipal law to do such road work themselves. 6 Jurist, p. 166, *De Beaujeu, App., Groux, Resp. In Appeal*; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelot, J. Judgment reversed.

Held, That an inspector of roads has no right to sue in his own name for the recovery of a penalty under the Cons. Stat. of L. C., chap. 24, sect. 48, par. 6, against a defendant for neglecting to maintain his front road, but such action should be brought by the inspector in the name of the municipality. Action dismissed with costs. 6 Jurist, p. 200. C. C. Ste. Scholastique; Berthelot, J.

See CORPORATION, Actions by.

See CERTIORARI—ROADS.

#### STREETS, OBSTRUCTION OF.

Held, That the proprietor of a lot of land adjoining a street cannot complain of obstructions to it, if he has no title establishing his right of way, and the street has never been legally established as a public street. 12 L. C. Rep., p. 138, *Johnson et al. vs. Archambault*. S. C. Montreal; Smith, J.

#### RESPONSIBILITY FOR VOTES.

Held, That a municipal councillor cannot be condemned to the penalty referred to in the 45th and 62nd sections of the Municipal Act of 1860, for having proposed and voted for a motion to set aside plaintiff's petition for the nomination of a special superintendent to report on the said petition. 6 Jurist, p. 41, *Souigny vs. Vezina*. C. Ct. L'Assomption; Bruneau, J.

#### WOODEN BUILDINGS.

Held, That a by-law of the City of Montreal "that no person shall hereafter construct any wooden building of any sort or description whatsoever, within the

"limits of the city, and any person infringing any of the said provisions shall be liable to a penalty," &c., must be so interpreted as to make it applicable only to the proprietors of lots or buildings, and not to the workmen employed in erecting such buildings. 6 L. C. Rep., p. 482, *Ex parte Lahaye et al.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, In a case under the by-law above mentioned, That a conviction will be quashed, no notes of evidence having been transmitted to the Court above, to show whether the applicant fell within the provisions of the by-law, as being a proprietor, or whether, as sworn to in the affidavit, he was merely as workman employed by the proprietor. 8 L. C. Rep., p. 255, *Ex parte Ledoux.* S. C. Montreal; Smith, J.

Held, 1. The Court will examine into the legality of a by-law on motion to quash a conviction under it.

2. Power given to a corporation to impose by by-law penalties "not" exceeding £5 or sixty days' imprisonment, is exceeded by passing a by-law imposing a penalty of £5, and imprisonment for sixty days in default of payment, and such by-law is illegal. 1 Jurist, p. 47, *Ex parte Rudolph and Harbour Commissioners.* S. C. Montreal; Day, Smith, Mondelet, J.

## COSTS.

### TAXATION OF.

Held, That the Court will revise the taxation of a prothonotary who refused to allow bailiff's fees for service of subpoenas, in consequence of more than four names being inserted in the original subpoena. Such insertion of more than four names cannot prejudice the rights of a party in any way. 9 L. C. Rep., p. 393, *Couillard vs. Lemieux.* S. C. Q.; Chabot, J.

Held, That taxation by the prothonotary, refusing full costs to plaintiff's attorney on the ground that the only plea filed (a demurrer,) was not a plea to the merits, will be revised, such plea being a plea to the merits. 9 L. C. Rep., p. 405, *Normand vs. Huot dit St. Laurent.* S. C. Q.; Chabot, J.

Held, That in an action over £50, where £50 and interest are awarded by the judgment, the plaintiff is only entitled to costs of a first class case in the Circuit Court. 10 L. C. Rep., p. 433, *Vallée vs. Latouche.* S. C. Q.; Stuart, J.

Held, That the prothonotary has no right to the entrance fee of £1 3s. 9d, on the filing of a petition by the curator to a vacant estate, under the 23rd Vict., c. 57, sect. 52, *Ex parte Langlois.* S. C. Q.; Taschereau, J.

Held, That where a judgment for £10 was obtained in an action for personal wrongs, costs will be taxed as on a judgment for that amount in the Circuit Court. 1 Jurist, p. 266, *Wilson vs. Morris.* S. C. Montreal; Day, Smith, Mondelet, J.

Held 1, That the Court will look at the judgment of the Court of Appeals to ascertain the class of costs thereby awarded.

2. That where in an action for £5000 damages for libel, the Court of Appeals awarded the plaintiff £2 10s. and costs, the plaintiff is only entitled to costs as in an action in the Circuit Court for £2 10s.

3. That under the 12th Vict., c. 38, sect. 82, the costs will be regulated by the amount of the judgment, unless from the judgment itself it appears that it was the intention of the Court to award costs of a higher class.

4. That a party who moves to revise certain items only in a bill of costs, waives his right to object to others; and a second motion to revise will be rejected, although the party moving offers to pay the costs of his second motion. 10 L. C. Rep., p. 478, *Kerr vs. Gogy*. S. C. Q.; Taschereau, J.

Held, That where an action was brought for £16 8s. 0½d., of which £2 2s. was due *personally*, which the defendant offered with costs of the inferior term, and the balance *hypothecarily*, against which prescription was pleaded, judgment will be given for £2 2s. with costs of inferior term, and the rest of the action will be dismissed with costs of the superior term. 1 Rev. de Jur., p. 250, *Sanguinèt et al. vs. Lecuyer*. Q. B. Montreal, 1832.

Held, 1. That copies of old plans produced by a party in support of his pretension will be considered as exhibits and taxed as such.

2. That when the costs of bringing a witness from Upper Canada is not greater than the expense of a *commission rogatoire*, the party requiring his evidence may examine the witness in Quebec, and his travelling expenses will be allowed in taxation. 12 L. C. Rep., p. 413, *Brown vs. Gogy*. S. C. Q.; Taschereau, J.

## SECURITY FOR.

Held, That a plaintiff, resident out of the Province, cannot sue in *forma pauperis*, in consequence of the 41st Geo. 3, c. 7, sect. 2, which compels all plaintiffs resident without the Province (without distinction) to give security for costs. *Barry vs. Harris*. K. B. Q. 1809.

Held, That a seaman, not resident in the Province, must give security for costs. *Heardsman vs. Harrowsmith*. K. B. Q. 1809.

Held, That an officer, stationed with his regiment in the Province, cannot be held to give security for costs. *Sutherland vs. Heathcote*. K. B. Q. 1808.

Held, That an affidavit of belief that the plaintiff resides without the Province is not sufficient to obtain security for costs. *Willey et al. vs. Mure et al.* K. B. Q. 1809.

Held, That householders, resident in the Province, are good security for costs, and one is sufficient if he justifies. *Colver et al. vs. Darreau et al.* K. B. Q. 1810.

Held, That an incidental plaintiff, resident without the Province, must give security for costs. *McCallum vs. Delana*. K. B. Q. 1812.

Held, That where a defendant files an *exception à la forme* after a rule for security for costs made absolute, staying proceedings until security shall have been put in, the plaintiff is not entitled to a hearing on the merits of such exception, until he shall have put in such security. 5 L. C. Rep., p. 342, *Easton vs. Benson*. S. C. Quebec; Stuart, Gauthier, Taschereau, J.

Held, That where the plaintiff has left the Province after judgment obtained, he must give security for costs to an opposant on contesting his opposition. 9 L. C. Rep., p. 72, *Mahoney et al. vs. Tomkins, and Geddes et al.*, Opp. S. C. Montreal; Badgley, J.

Held, That a plaintiff residing out of the Province, and suing in *forma pauperis*, is bound to give security for costs under the 41st Geo. 3, c. 7, sect. 2. 10 L. C. Rep., p. 234, *Gagnon vs. Woolley*. C. C. Q.; Stuart, J.

Held, That the sheriff cannot demand security for costs, before obeying the order of the Court. 1 Jurist, p. 3, *Leveson vs. Cunningham*, and *Boston, misc en cause*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a plaintiff residing without the Province, who contests an opposition, is not bound, under the 41st Geo. 3, c. 7, sect. 2, to give security for costs, inasmuch as he occupies the position of *defendant*. 10 L. C. Rep., p. 452, *Brigham vs. McDonnell et al.*, and *Devlin*, Opp. S. C. Q.; Stuart, J.

Held, That the plaintiff, having failed to give security for costs within the delay fixed by the Court, the action will be dismissed with costs on defendant's motion. 2 Jurist., p. 109, *Adams vs. Sutherland*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That an opposant *à fin de conserver*, resident out of the Province, is bound to give security for costs, on contesting the opposition of another opposant. 2 Jurist, p. 287, *Benning vs. The Montreal Rubber Co.*, and *Young*, Opp. S. C. Montreal; Mondelet, J.

Held, That a defendant who is summoned to appear in vacation, and who has appeared, has a right to demand security for costs, on the first juridical day of the following term, although he did not give notice of such motion within the four days next after his appearance. 2 Jurist, p. 306, *Comstock et al. vs. Lesieur*. S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, That to comply with an interlocutory judgment ordering security for costs to be given by a non-resident plaintiff, *two* sureties must be furnished. 4 Jurist, p. 127, *Donald vs. Becket*. Monk, J.

Held, That a non-resident plaintiff who contests the declaration of a *garnishee*, will be ordered, on motion of the garnishee, to give security for costs. 4 Jurist, p. 146, *Mayer et al. vs. Scott*, and *Benning et al.*, T. S.; C. C. Montreal; Smith, J.

Held, That it is competent for an opposant *before* filing a contestation of the opposition of another non-resident opposant, but not after contestation, to call upon the latter to put in security for costs. 4 Jurist, p. 148, *Bonacina vs. Bonacina*, and *McIntosh et al.*, Opp. S. C. Montreal; Badgley, J.

Held, That a motion for security for costs is too late, when notice is given thereof after the fourth day from the date of the appearance. 5 Jurist, p. 25, *Tiers et al. vs. Trigg et al.* C. C. Montreal; Monk, J.

Held, That a non-resident intervening party, is bound to give security for costs. 5 Jurist, p. 73, *Scott et al. vs. Auston*, and *Young et al.*, Intervening party. C. C. Montreal; Monk, J.

Held, That a motion for security for costs is in time, although notice thereof has been given after the four days from the appearance, if the motion be made on the first day of the ensuing term. 5 Jurist, p. 252, *Perry vs. St. L. Elevating Co.* S. C. Montreal; Smith, J.

Held, That where a plaintiff does not give security for costs within a delay fixed by the Court, the action will be dismissed. 1 Jurist, p. 196, *Adam vs. Sutherland*. S. C. Montreal; Smith, Mondelet, Chabot, J.



Held, That a non-resident plaintiff will be permitted to give security for costs by deposit of a sum of money. 4 Jurist, p. 300, *Mann et al. vs. Lambe*. S. C. Montreal; Berthelot, J.

Held, That a motion for security for costs, of which notice was given on the 18th May, the appearance being filed on the 12th May, is too late, notwithstanding the return was made in vacation. Motion rejected. *Williams vs. Arthur et al.* S. C. Montreal; Cond. Rep., p. 82.

Held, That where a plaintiff neglects to put in security for costs within the delay fixed by the Court, his action will, on motion of the defendant, be dismissed with costs. 12 L. C. Rep., p. 404, *Castongué vs. Mason et al.* S. C. Montreal; Monk, J.

Same case, 6 Jurist, p. 121.

Held, That the offer of one person as security for costs is insufficient. 6 Jurist, p. 40, *Powers vs. Whitney*. S. C. Montreal; Monk, J.

Held, That a non-resident plaintiff contesting an opposition, is not bound to give security for costs. 6 Jurist, p. 40, *Morrill vs. McDonald*, and *Ross et al.*, Opp. S. C. Montreal; Smith, J.

#### TARIFF OF FEES.

In an action by attorneys against a sheriff.

Held, 1. That the 100th sect. of the Judicature Act, (12th Viet., c. 38,) which empowers the judges of the Superior Court to make a tariff for the officers of justice, speaks only of uniformity in the practice and proceedings, and not in the fees.

2. That the uniformity spoken of in the preamble to the section in question, directs a general, and not such an absolute uniformity as that the slightest variance would produce a nullity in the whole.

3. That the tariff of fees of the several officers of justice can be promulgated at different times, and that the order affecting the fees of the prothonotary being complete and distinct by itself, cannot affect the tariff of fees of the sheriffs, bailiffs, and other officers. Action dismissed. 1 L. C. Rep., p. 436, *Chabot et al. vs. Sewell*. S. C. Quebec; Bowen, C. J., Meredith, J.

In Appeal of the above case,

Held, That an action to recover 3s. 4d., a fee received by the sheriff of the district of Quebec under a tariff promulgated by six Judges of the Superior Court under the said 100th sect. of the Act, cannot be maintained. 1 L. C. Rep., p. 664; Rolland, Panet, Aylwin, J.

#### DISTRACTION OF.

Held, That if *distraktion de frais* is not demanded when judgment is rendered, it cannot afterwards be awarded without the presence of the parties. 2 Rev. de Jur., p. 62, *Ireland vs. Stevens*. K. B. Q. 1819.

Held, That where an attorney has demanded *distraktion de frais*, the parties cannot arrange or settle between themselves as to such costs. *Stigny vs. Stigny et al.* K. B. Q. 1842.

## DISTRACTION OF.

Held, That the attorney's right to *distraktion de frais* is personal, and is vested in him. *Esson vs. Black*. K. B. Q. 1821.

Held, That a motion made in the Court of Appeals for *distraktion* of the costs incurred in the Court below, will be granted. 12 L. C. Rep., p. 402, *Converse*. App., *Clarke*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Distraktion of costs and disbursements granted. *Prévosté*, No. 119.

## PRIVILEGE FOR.

In an action *en separation des biens*.

Held, That a plaintiff should be collocated by privilege for all costs in the suit, where such costs are necessarily incurred in the seizure and sale of defendant's real estate. Costs awarded. 2 L. C. Rep., p. 115, *Garneau vs. Fortin*. and Opp. S. C. Quebec; Bowen, C. J., Meredith, J.

Held, That a seizing creditor is only entitled to be collocated by privilege upon the proceeds of a judicial sale for the costs of an ordinary action, by *default*, in this case, taxed at £4 9s. 6d. 5 L. C. Rep., p. 386, *Denis vs. St. Hilaire*. S. C. Quebec; Bowen, C. J., Meredith, Morin, J.

Held, That a plaintiff has a privilege for all costs of action and execution according to the class of the case, to be taxed as in a case decided upon the merits *ex parte* after *enquête*. 6 L. C. Rep., p. 95, *Michon vs. Hugh*, and *Gagnon*, Opp. S. C. Quebec; Stuart, Gauthier, J., Parkin, J.

See the various cases quoted in *note*, p. 96. *Ib.*

Held, On distribution of moneys, that the costs of action are not privileged, if the debt is not privileged. 1 Jurist, p. 274, *Lalande vs. Rowley*, and Opp. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That an attorney has no privilege for costs of suit on the proceeds of real estate, but only for the costs of suing out, seizing, and bringing to sale the property. 6 L. C. Rep., p. 192, *Lalande vs. Rowley*, and *Lafrenaye et al.* Plaintiffs *par distraktion*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That the costs of action, as accessory of the principal, rank before an hypothecary claim registered subsequent to the obligation on which judgment was rendered, but before the rendering of the judgment. 8 L. C. Rep., p. 122, *Murchildon vs. Mooney*, and *Divers*, Opp. S. C. Quebec; Bowen, C. J.

Held, That a report of collocation and distribution which collocates the plaintiff for his full costs of action, to the prejudice of the landlord's claim for rent, will be set aside. 6 Jurist, p. 293, *Kerry et al. vs. Pelly et al.* C. C. Montreal; Smith, J.

## CONTRAINTE FOR.

Held, That the *code civile*, tit. 34, art. 2, provides a *contrainte par corps* for costs exceeding 200 livres, but the redaction provides that this *contrainte* shall, in such cases, be in the discretion of the court, and a special case must therefore be



shewn to the court, whenever this extraordinary remedy is asked. *Woodrington vs. Taylor*. K. B. Q. 1821.

## COSTS—DISCRETIONARY.

Held, That costs in matters of certiorari are discretionary on setting aside a conviction. 1 Jurist, p. 255, *Ex parte Leonard*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That the costs of expertise are in the discretion of the court, and will, at least, be divided between the parties where the report has the effect of materially reducing the plaintiff's demand. 2 Jurist, p. 208, *Gardner vs. McDonald*. S. C. Montreal; Smith, J.

## PREVIOUS COSTS.

Held, That non-payment of costs in a former action, cannot be the subject of an *exception dilatoire* or *peremptoire*. *Robichaud vs. Fraser*. K. B. Q. 1817.

Held, "That the costs due on a former action are unpaid," cannot be pleaded by exception, but a motion to stay proceedings will be allowed, if it appears that the former action was for the same cause, and was heard upon the merits. *Chartier vs. McLeish*. K. B. Q. 1821.

Held, That to entitle a defendant to a suspension of proceedings, on the ground of costs being due on a previous action, it must appear that the causes of both actions are identical, and between the same parties. 1 Jurist, p. 290, *Lalonde vs. Lalonde*. S. C. Montreal; Day, Smith, Mondelet, J.

## ON AMENDMENT.

Held, That a plaintiff on being allowed to amend his declaration after exception *à la forme* filed, must pay the full costs of the action. 6 L. C. Rep., p. 474, *Boudreau vs. Richer*. S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That a defendant will be allowed to appear and plead in an action of damages after a lapse of five months, and after service of interrogatories, (although his failing to appear was owing to his own fault,) but on payment of full costs of the action. 1 Jurist, p. 9, *Hayden vs. Fitzsimmons*. S. C. Montreal; Day, Smith, Badgley, J.

Held, That a judgment rendered in appeal, setting aside the verdict of a jury and condemning the respondent to pay "the costs in the court below," includes all the costs of the trial by jury, and not merely the costs upon the motion for setting aside the verdict. 9 L. C. Rep., p. 268, *Ouimette et al., App., vs. Papin*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J.

See *Beaudry vs. Papin*, and *Papin*, Opp. S. C. Montreal; 3 Jurist, p. 46.

In an action of damages a judgment was given on the verdict of a jury for 46s. with "costs of the action."

Held, That in interpreting this judgment, only 46s. costs should be allowed under the 7th Geo. 4, c. 6, and the Judicature Act of 1849, sect. 91. 1 Jurist,

p. 191, *Leduc vs. Busseau*. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That where judgment is rendered for 10s. more than the amount tendered, but the defence is sustained in the main, the plaintiff must pay the costs of contestation. 2 Jurist, p. 286, *Routh vs. Dougall*. S. C. Montreal; Day, J.

See "BILLS AND NOTES," Error in date.

"CORPORATION, Actions by.

#### OF PROCEEDINGS AGAINST SURETY.

Held, In the Superior Court, Montreal; Berthelot, J., in an action against the maker of a note and two indorsers, to recover the costs incurred on an appeal by the creditor, whose action, on the note against the three defendants, was dismissed on an *exception à la forme* fyled by the maker alone, which judgment was reversed in appeal; That the indorsers were not liable for the costs in appeal, there being no proof of collusion between them and the maker, in respect of such exception, and inasmuch as the writ of appeal was not held to be signified to the indorsers, who appeared and pleaded separately, in the original action, by the same attorney, who appeared for the maker of the note, and upon whom the writ of appeal was served. Confirmed in Appeal. 6 Jurist, p. 269, *Boucher*, App., *Latour et al.*, Resp. Duval, Meredith, and Mondelet, J.; Lafontaine, C. J., dissenting.

Held, That a surety for rent is not bound to pay the costs of a suit against the principal debtor, which was not notified to him. 6 Jurist, p. 117, *Nye vs. Isaacson*. C. C. Montreal; Berthelot, J.

#### OF OPPOSITION.

Held, That a party collocated *ultra petita* must pay the costs of the contestation of such collocation, although on notice of such contestation he immediately acquiesced in it, and consented that judgment should be given as demanded in the contestation, but without costs against him. 11 L. C. Rep., p. 172, *Adams vs. Hunter*, and *Evans*, Opp. S. C. Quebec; Stuart, J.

Held, That where plaintiffs declare they do not contest an opposition, *main levée* will be granted with costs against defendant. 3 Jurist, p. 167, *Corse vs. Taylor*, and *Taylor*, Opp. S. C. Montreal; Badgley, J.

Held, 1. That on fying an opposition to a judgment rendered in vacation, the opposant is bound to deposit at the *Greffe*, under the 14th sect. of the 22nd Vict., c. 5, and the 46th sect. of the 23rd Vict., c. 57, only the plaintiff's disbursements since the return of the action, exclusive of the costs of return, up to judgment inclusive, but no advocate's fee.

2. That, in such case, the opposant is not bound to furnish to the plaintiff a copy of the affidavit. 5 Jurist, p. 101, *Gauthier vs. Marchana*. C. C. Montreal Badgley, J.

Held, That costs will not be awarded against an opposant, claiming under a general mortgage, who restricts the conclusions of his opposition so soon as he dis-

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## OF OPPOSITION.

covers that part of the property upon which he claims, is held in free and common socage. 12 L. C. Rep., p. 170, *The Quebec Building Society vs. Jones*, and *Divers Opp.* S. C. Quebec; Stuart, J.

Held, In Appeal, That an attorney, *ad lites*, may recover his fees and disbursements from his own client without the production of a taxed bill of costs, there being a tariff made by rule of practice, under a statute. 1 L. C. Rep., p. 402, *Cherrier vs. Titus*. Rolland, Panet, Aylwin, J.

Held, That the plaintiff may recover the costs of a former action not returned into court, notwithstanding a prayer for *distraktion* by the attorney *ad litem* in that cause, the defendant having on settlement agreed to pay them. 1 Jurist, p. 82, *Rolland vs. Larivière*. S. C. Montreal; Smith, Mondelet, Chabot, J.

## REGISTRAR'S CERTIFICATE.

Held, That on a contestation of the registrar's certificate, the party overcollocated by the prothonotary, will be condemned to pay the costs of contestation, unless he shall have fyled a *remittitur* for the amount over collocated. 12 L. C. Rep., p. 174, *Marois vs. Bernier*, and *Larivière*, Opp. S. C. Quebec; Stuart, J.

## FRAUD.

Held, That when the plaintiff and defendant have settled a case between them, with a view to defraud the plaintiff's attorney of his costs, the action will be dismissed with costs against the defendant. 6 L. C. Rep., p. 98, *Richard vs. Ritchie et al.* S. C. Quebec; Stuart, Gauthier, Taschereau, J.

## GENERALLY.

Held, That a plaintiff who sues in *formâ pauperis* may recover costs. *Giroux vs. Ménard*. K. B. Q. 1819.

Held, That costs must be asked, or they cannot be obtained. *Stilson vs. Anderson*. K. B. Q. 1812.

Held, That no costs can be obtained for an attorney's letter before the commencement of the action; it is a voluntary *courtesy*, and not a necessary proceeding. *Bowen vs. Lee*. K. B. Q. 1812.

Held, That a plaintiff may, in some instances, recover the costs of the Superior Term, although judgment is rendered for £5 only. *Godbout vs. Giroux*. K. B. Q. 1816.

Held, That where two defendants join in their defence, in an action of trespass, if one is acquitted, he is entitled to his costs against the plaintiff, notwithstanding his co-defendant is found guilty. *Henderson vs. Thompson et al.* K. B. Q. 1819.

Held, That an attorney prosecuting his own action for costs due in a former cause, cannot have judgment for costs; he is entitled to the amount of his disbursements and no more. *Vallières vs. Duhamel et al.* K. B. Q. 1819.

Held, That where a plaintiff recovers no more than is paid into Court, and the sum so paid was tendered before institution of the action, the action must

be dismissed, with costs against the plaintiff. *Woodrington vs. Taylor*. K. B. Q. 1820.

Held, That where the defendant, before the return of the writ of summons, paid the plaintiff his debt, but no costs, the court will condemn the defendant to pay costs up to the day on which he paid the debt. *Gagnon vs. McLeash*. K. B. Q. 1820.

Costs in appeal divided, although the judgment below was reversed, the pleas of the defendant, as well as his reasons of appeal, being held to be defective. 1 L. C. Rep., p. 84, *Desbarats vs. Fabrique de Québec*. Rolland, Aylwin, Panet, Ross, J.

Held, That all fees of the clerk of the Circuit Court, in cases instituted previously to the promulgation of the new tariff, (17th Dec., 1850), must be taxed according to the provisions of the previous tariff. 1 L. C. Rep., p. 105, *Mouk et al.*, Petrs. C. C. Montreal; McCord, J.

So held in the Superior Court, Montreal. 1 L. C. Rep., p. 476, *Tunstall vs. Robertson*. Smith, Vanfelson, Mondelet, J.

So held as to *opposition*. 1 L. C. Rep., p. 483, *Delery vs. Quig*.

Held, That an action settled as to the principal debt only, before return into court, on condition that the defendant should pay the costs, may be returned and proceeded with for costs only, no delay having been given for the payment of the costs. 1 L. C. Rep., p. 238, *Darche et al. vs. Dubuc*. S. C. Quebec; Bowen, C. J., Meredith, J.

COSTS, as to prescription against. See PRESCRIPTION.

COSTS of *voyage et séjour* allowed. Cons. Sup., No. 2.

COST of affixing seals, inventory, and personal expenses, and *deuil de la veuve*, declared privileged. Cons. Sup., No. 27.

COSTS not granted against a body having no legal existence. See CORPORATION, Name of.

COSTS against Crown. See CROWN.

“ against Public Officer. See OFFICER, PUBLIC, Costs.

“ assessed by arbitrators. See ARBITRATION. See RAILWAY Co., award oath.

“ Attachment of. See ATTORNEY, Costs.

“ Attachment for non-payment of. See CONTEMPT, Costs.

“ in Bornage. See ACTION BORNAGE.

“ in suits by Revenue Inspector. See CERTIORARI, Licenses.

“ open. See COSTS, discretionary.

“ on amendment. See AMENDMENT.

“ of Attorney. See ATTORNEY, Costs.

“ against Surety. See BILLS AND NOTES, proof of.

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## CONSIGNMENT.

Consignee of goods could not before the 10th and 11th Vict., c. 10, pledge them for their own debt, and the consignor might revendicate the goods in the hands of a third party. 1 L. C. Rep., p. 318, *Rochon et al. vs. Walker*; Q. B. Quebec; Stuart, C. J., Bowen, Panet, Aylwin, J.

See CARRIERS.—SALE OF GOODS, Commission.

## COMMISSION ROGATOIRE.

See ENQUÊTE.

## CROWN.

## PREROGATIVE OF.

Held, That when the King claims possession of a lot of land, in right of the Crown, the defendant must plead title and prove it; and if he does not do so, judgment will be entered against him. *Rez vs. Lelièvre*. K. B. Q. 1821.

Held, 1. That the Crown can recover interest where a private individual would be entitled to it, as in an action for money paid under a written contract on account of a third person, in which it may be recovered from the date of service of process of the court.

2. Where the greater rights and prerogatives of the Crown are in question, recourse must be had to the public law of the empire, by which alone they can be determined; but, where the minor prerogatives and interests are in question, they must be regulated by the established law of the place where the demand is made. Stuart's Rep., p. 324, *Atty. Gen. pro Rege*, App., *Black*, Resp. In Appeal; 30th July, 1828.

Held, That on an indictment for murder instituted by the Crown, the law officers of the Crown, and those who represent them, are in strictness entitled to the reply, although no evidence is produced on the part of the prisoner. 1 L. C. Rep., p. 317, *The Queen vs. Quatre Pattes*; Panet, J.

Held, That the Crown does not receive nor pay costs. 3 Rev. de Jur., p. 371, *Chandler*, App., *Atty. Gen. pro Rege*, Resp. In the Privy Council; 1835.

As to effect of Bankruptcy certificate against the Crown. See BANKRUPTCY Certificate.

LETTERS PATENT: See REGISTRATION BY CROWN.

CROWN'S Rights of *en Dëshérance*: See CURATOR, DÊSHÉRANCE.

## PRIVILEGE AS TO DEBENTURES.

Held, That such persons only as had themselves suffered loss by fire at Quebec in 1845, and were owners of lots on which they intended to rebuild, were entitled to a loan under the statutes in aid of the city of Quebec, 9 Vict., c. 62, 10 and 11 Vict., c. 35; and that the Crown has no privilege, or mortgage without enregistrement, over a subsequent mortgagee whose obligation has been

registered. 1 L. C. Rep., p. 310, *Tetu et al. vs. Glackmeyer*, and Oppts S. C. Quebec; Bowen, C. J., Duval, J.

See FIRE.

#### BEACH LOTS.

Held, That riparian proprietors are not entitled, as a matter of right, to a grant of beach lots on the River St. Lawrence fronting their property, in preference to any other; and that, in particular cases, the Crown will grant beach lots to persons not riparian proprietors. 4 L. C. Rep., p. 325, *The Queen vs. Baird*. S. C. Quebec; Bowen, C. J., Meredith, J.

CLERGY LOT; Purging Crown Rights by Sheriff's sale, Certificate of Crown Land Commissioner. See OPPOSITION à fin d'annuler; CROWN LANDS Certificate.

#### INFORMATION.

Held, 1. In an information by the solicitor general *pro Regina*, that the allegation that the goods sought to be forfeited had been seized as having been imported into the province without the duties being paid, is insufficient, and that there must be a substantive allegation that they were imported, and brought in, in violation of law.

2. That the omission of the words "against the form of the statute" is fatal. 1 L. C. Rep., p. 20, *The Sol. Gen. vs. Carter*. S. C. Montreal; Day, Smith, Vanfelson, J.

#### MAILS.

Held, That mail carriers, conveying passengers and effects across a toll bridge erected under the 6th Geo. 4, c. 29, are not exempted by that statute from payment of tolls. 4 L. C. Rep., p. 427, *Fuller vs. Jones*. S. C. Montreal; Day, Smith, Mondelet, J.

CROWN, Pension, Half pay. See CESSION.

" Privilege for Fire Debentures. See FIRE.

" Dëshérance. See CURATOR.

" Presumed grant. See ACTION POSSESSORY, Fishery.

" Effects of Bankrupt's Certificate. See BANKRUPTCY, Certificate.

#### CURATOR.

##### TO VACANT SUCCESSION.

Held, That a curator to a vacant estate cannot be sued by a party to whom he has assigned his claim against such vacant estate, inasmuch as the curator cannot sue himself, or be sued by his own *cessionnaire*. 1 L. C. Rep., p. 63, *Tessier vs. Tessier*; S. C. Quebec; Bowen, C. J., Duval, J.

Held, That an action against a party sued personally by a creditor who had obtained a judgment against him as curator to a vacant estate, and praying that the defendant be condemned to render account, and that plaintiff be paid from the

moneys of the succession, is well brought. Sir James Stuart dissenting on the ground that he should, as *curator*, have been made a party to the cause. 2 L. C. Rep., p. 462. *Valleau vs. Oliver*. In Appeal; Stuart, C. J., (*dissenting*); Rolland, Panet, Aylwin, J.

Held, 1. That a curator to the vacant estate of an *absentee* cannot be impleaded in his quality of curator, for debts due by the absentee.

2. That the absentee must be called in by advertisement under the 94th section of the judicature act, 12th Vict., c. 38. 3 L. C. Rep., p. 431, *Whitney vs. Brewster*. S. C. Montreal, Day, Smith, Vanfelson, J.

Held, 1. That in an action to account by the plaintiff as curator to a vacant succession, against the defendant as being in possession of the estate, a plea is unfounded in law, which set forth that the deceased died in one of the United States, that the plaintiff was named curator without notice, and on petition of a party not a relation or creditor of the deceased, nor interested in her estate, and on the advice of parties not related, or creditors, or interested in the estate, and without any necessity being shewn for such appointment.

2. That the defendant had no right to contest the quality of the curator, having no interest, inasmuch as the plaintiff could give him a valid discharge. 6 L. C. Rep., p. 180. *Sexton vs. Boston*; S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, That a curator to a vacant estate who has been ordered to deposit with the prothonotary the balance shown on the face of his account to be in his hands, before contestation of the account, or final judgment thereon, is not *contraignable par corps* for non-compliance with such order. 5 Jurist, p. 253, *Wood vs. McLennan*; S. C. Montreal; Smith, J.

See COSTS, Taxation of.

#### TO ABSENTEE.

Held, That the court will refuse to name a curator to an absentee to effect (as it was alleged) due service of a writ of summons, in an action to be instituted against an absentee, it appearing that a curator to the property of the absentee had been already appointed. *Bowen vs. Molson*. K. B. Q. 1820.

Held, In an action against a curator to an absentee: 1. That an action to account lies at the instance of any of the creditors, the curator being the *mandataire* of all the creditors.

2. That in such case, it is not necessary to call in the absentee by advertisement, but that service on the curator is sufficient. 4 L. C. Rep., p. 94, *Murphy vs. Knapp et al.* S. C. Montreal; Day, Smith, Vanfelson, J.

Held, That a curator to an absentee, who contests and defends, is personally liable to the costs of the action. 4 Jurist, p. 298, *Whitney vs. Brewster*. S. C. Montreal; Driscoll, Pelletier, J.

Held, That the practice of the Superior Court in the District of Montreal has always been to call in a defendant, living out of the jurisdiction of the court, on proof that he has property within the jurisdiction of the court. *Darling vs. Cowan*. S. C. Montreal, 1854; Smith, Vanfelson, Mondelet, J. Cond. Rep., p. 105.



## DÉSHERANCE—CROWN.

Held, Where an estate is claimed *à titre de dés hérance*, or *à titre de bâtardise* by the Crown, that the creditors of the estate have a right to make good their claims, by proceedings for an account against the curator of the estate, before it can be placed beyond their reach by a transfer to the Crown. 9 L. C. Rep., p. 12, *The Atty. Gen., pro Reg., vs. Price*, Curator, and *McGill et al.*, Inter. parties. S. C. Quebec; Moredith, J.

## TO SUBSTITUTION.

Held, That a plaintiff who has obtained a judgment against a curator to a substitution, will not be allowed to take supplementary conclusions by petition setting up a return of *nulla bona* against the defendant, *es qualitt*, and praying for judgment against defendant personally. 6 L. C. Rep., p. 485, *Warner vs. Gerrard*. S. C. Montreal; Day, Smith, Mondelet, J.

## TO DEAF AND DUMB.

Held, That a person (deaf and dumb) to whom a curator has been appointed, cannot bind himself in a contract (on notes) while the curatorship is in existence. 7 L. C. Rep., p. 239, *Emerick vs. Paterson et al.* S. C. Quebec; Bowen, C. J., Meredith, Badgley, J.

CURATOR to Interdicted person. See INTERDICTION.

## CURRENCY.

Held, That no silver coin of the United States of America is legal current money in the Province of Canada. 5 L. C. Rep., p. 337, *Sauwette vs. Scott*; S. C., Quebec; Stuart, J.

CURRENCY, Legal tender. See ALIMENT.  
See CUSTOMS, Tender—Coins.

## CUSTOMS.

Held, That West India rum necessarily transhipped in New Brunswick on its arrival there from Jamaica, and from thence brought to Lower Canada without being landed, is liable, under the 14th Geo. 3, c. 88, to the duty of six pence per gallon only. *Scott vs. Blackwood*. K. B. Q. 1809.

Held, That by the words "first or sterling cost" in the Provincial statute, 53d Geo. 3, c. 11, imposing duties on the importation of certain goods, is to be understood the price paid for them at the place whence they were exported.

Held, That upon importation of goods from a foreign country into Canada, duty may be charged, under the Customs Acts of 1847, 1849, and 1853; either on their value at the time of the purchase of the same, or upon the value at the time of export, on the contingency of a rise in the interval. 5 L. C. Rep., p. 235, *Moffatt et al.*, App., *Bouthillier*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.



See this case, S. C. Montreal; Cond. Rep., p. 48.

That an action on the case may be maintained against a collector of customs who refuses to admit the goods to an entry, until duties as calculated upon the price of the goods without a deduction of discount, have been paid. Stuart's Rep., p. 215, *Patterson et al. vs. Percival*. K. B. Q. 1826.

Held, 1. In Appeal, That an action of trespass on the case for a misfeasance, can be maintained against a collector of customs for exacting a larger sum of money for duties than the law authorizes, unless some reasonable ground of excuse for his conduct be shown, or such facts be laid before the court, as will exclude every imputation of malice or wilful intent.

2. If the declaration in such action contain a statement of all the material facts it will be sufficient.

3. Where special damage is the gist of the action, and if it be not alleged, or if alleged, not proved, the action must be dismissed. But where the law gives a right of action for an injury, it presumes that damages are the consequence, and a conclusion for general damages will be sufficient. Stuart's Rep., p. 270, *Percival*. App., *Patterson et al.*, Resp. In Appeal, 1828.

#### FORFEITURE.

Held, That forfeiture for not entering or reporting goods imported from abroad, can be incurred, even without such goods being landed. 3 Rev. de Jur., p. 252, *Leggett, qui tam, vs. Four Gold Watches and Garrett*, Claimant. Q. B. Montreal; January, 1848.

#### TENDER—COINS.

By the 14th Geo. 3, c. 88, duties upon goods imported into Lower Canada are in sterling money of Great Britain, and the uniform standard of value at which foreign coins are to be received in payment, is their contents in pure silver at 5s. 6d. sterling per ounce.

Held, 1. A tender of the Spanish dollar at 4s. 6d. sterling, the value fixed by the Provincial Statute, 48th Geo. 3, c. 8, for the payment of all debts and demands, is not a legal tender in payment of duties.

2. The value of the Spanish dollar in sterling is 4s. 4d. Stuart's Rep., p. 365, *Gillespie vs. Percival*. K. B. Q. 1829.

CUSTOMS OFFICER. See OFFICER PUBLIC, Customs.

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#### CRIMINAL LAW.

##### ARSON.

True Bill for, Effect on Civil Suit. See PLEADING, Exception Dilatoire, Indictment.

##### BIGAMY.

Held, That in an indictment for bigamy, committed in the United States, it is necessary that the indictment should contain allegations that the accused is a

British subject, that he is, or was, resident in the Province, and that he left the Province with intent to commit the offence.

*Semble*, That the word "elsewhere" in the Provincial Statute, 4th and 5th Vict., c. 27, sect 22, extends to bigamy committed in a foreign jurisdiction. Q. B. Montreal; *The Queen vs. McQuiggan*; Rolland, Aylwin, J.

Held, 1. That upon the trial of an indictment for bigamy, the admission of the first marriage by the prisoner, unsupported by other testimony, is sufficient to support a conviction.

2. That in criminal cases, American authorities will not be received.

3. That a soldier convicted of bigamy is not thereby discharged from the military service. 10 L. C. Rep., p. 404, *Regina vs. Creamer*. Q. B. Crown side; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

#### CONFESSION.

See as to CONFESSION. *The Queen vs. Caird*. 3 Rev de Jur., p. 225.

#### CONSTABLE.

Held, That a sheriff is not bound to pay the expenses of a constable for bringing to jail a prisoner charged with a criminal offence, and sent to jail by a magistrate in the county to await his trial. 2 Jurist, p. 79, *Champagne vs. Boston*. C. C. Montreal; Bruneau, J.

#### EVIDENCE.

Held, That to render the proof of a declaration admissible as a dying declaration, there must be proof that the person who made it was at the time under the impression of almost immediate dissolution, and entertained no hope of recovery; that vague and general expressions, such as, "I will die of it," "I will not recover," "It is all over with me;" are insufficient to allow the proof of the declarations of a deceased person. 4 L. C. Rep., p. 3, *The Queen vs. Peltier*. Q. B. Kamouraska; Panet, J.

Held, 1. That a private prosecutor, upon the trial of an indictment for a forcible entry and detainer, cannot be examined as a witness for the prosecution, if the court may order restitution.

2. But he may be examined, if he has been restored to the possession of his property. 2 Rev. de Jur., p. 54, *Regina vs. Hughson et al.* Quarter Sessions. Quebec, January, 1847.

See MURDER, post.

#### EXTRADITION.

Held, That the executive government may deliver up to a foreign state any fugitive from justice, charged with having committed any crime within its jurisdiction. Stuart's Rep., p. 245, *Case of Joseph Fisher*. K. B. Q. 1827.

#### FALSE PRETENCES—LARCENY.

Where a prisoner, who had been discharged from A's service, went to the store of O & S, and representing himself as still in the employ of A, who was a

customer of O & S, asked for goods in A's name, which were sent to A's house, whither the prisoner preceded the goods, and, as soon as the clerk delivered the parcel, snatched it from him, saying; "this is for me, I am going in to see A," but instead of doing so, walked out of the house with the parcel.

Held, That under the 4th and 5th Vict., c. 25, sect. 45, the prisoner was rightly convicted of having obtained goods from O. & S. under false pretences. *The Queen vs. Robinson.* Q. B. Crown side; Aylwin, Duval, Meredith, J.; Mondelet, J., dissenting.

A, a shareholder in an unincorporated company, and acting as its agent, gave a promissory note at one month to B, another shareholder, for \$250, to meet a protested draft on the company for \$200, and A afterwards stated, at a meeting of the committee of management of the company, that he gave the note for \$250 because B told him that M, a broker, had discounted the note for \$50, and that he B, could not get it discounted for a less sum; and B himself stated at the meeting that he had been obliged to pay M the \$50 for discounting the note, and that M had entrusted him with the collection of it; upon which representations he obtained from the treasurer of the company the money to pay the note; and it was afterwards discovered that M had never discounted the note, and that shortly after the note was paid, B himself admitted that it was he himself, and not M, who had discounted it, and that he had charged \$50 for doing so; whereupon both A and B were convicted on an indictment for obtaining "by false pretences" the \$50—the moneys of D and others, the shareholders in the company,—“with intent to defraud.”

Held, 1. That the conviction was bad, and that this did not constitute a false pretence under the 4th and 5th Vict., c. 25, sect. 45, nor under the 18th Vict., c. 92, sect. 12.

2. That a shareholder, in such company, cannot commit larceny from the company, nor be guilty of obtaining moneys under false pretences, inasmuch as, being a shareholder, he is joint owner of the funds and property of the company. 10 L. C. Rep., p. 34, *Regina vs. St. Louis et al.* Q. B. Crown side; Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

#### FELONY.

As to criminal prosecution for, before proceeding in damages. See DAMAGES, Assault.

#### FORCIBLE ENTRY.

Held, That the defendant and persons with him having entered a dwelling house through an open door, and one of the persons having been sent to push out the windows, the defendant himself taking them off the hinges, the conviction ought not, under the circumstances disclosed, to be disturbed. 10 L. C. Rep., p. 435, *Regina vs. Martin.* Q. B. Crown side: In Appeal; Lafontaine, C. J.; Aylwin, Duval, Mondelet, J.

#### INFORMATION, LIBEL.

Held, 1. That in an application for criminal information for libel, the court is placed in the position of a grand jury, and must have the same amount of information as would warrant a grand jury in returning a true bill.

2. That a grand jury would not be justified in returning a true bill for libel unless the libel itself were laid before them.

3. The application for a criminal information for libel must be rejected unless the libel itself is filed with the affidavit upon which the application is based. 8 L. C. Rep., p. 353, *Ex parte Gagy*. Q. B. Crown side; Caron, J.

Held, 1. That the remedy by criminal information obtains in Lower Canada, and the duties and powers of the clerk of the Crown, in such cases, are analogous to those of the master of the Crown office in England.

2. That a motion for a rule for criminal information once discharged for irregularity or insufficiency of proof, cannot be renewed by amending the irregularity or supplying the deficiency of proof.

3. That the person in whose behalf the application is made, cannot move the rule in person.

4. That he must declare that he waives all other remedies whether by civil action or otherwise.

5. That the court is in the position of a grand jury, &c., as above, No. 1.

6. That in this case there was no sufficient evidence to justify the granting of the rule. 9 L. C. Rep., p. 51, *Ex parte Gagy*. Q. B. Crown Side; Caron, J.

#### INTRODUCTION OF CRIMINAL LAW—LOTTERY.

Held, 1. That the Statute 14th Geo. 3, c. 83, has introduced into this Province that portion of the criminal law of England only, which was of universal application there, and not such parts as were merely municipal, and of local importance only.

2. By that statute, the 9th Geo. 1, c. 19, and 6th Geo. 2, c. 35, which impose certain penalties on persons selling tickets in a foreign lottery, have been made to form a part of the criminal law of Lower Canada. Stuart's Rep., p. 321, *Ex parte Rousse*. K. B. Q. 1828.

#### MACHINE.

Held, That an apparatus for manufacturing potash, consisting of ovens, kettles, tubs, &c., is not a "machine" or "engine" within the meaning of the 4th and 5th Vict. c. 26, sect. 5, the cutting, breaking, or damaging of which is felonious. 2 L. C. Rep., p. 255, *The Queen vs. Doherty*. Q. B.; Aylwin, J.

#### MURDER.

Held, 1. That the description given by a person of his sufferings, whilst laboring under disease and in pain, is not hearsay evidence, but will be admitted.

2. Confessions to a constable by an accused in his custody, not admitted in this cause, as the prisoner might be under the influence of hopes held out; but admissions made the same day, to a physician in the absence of the constable, were admitted.

3. A child of six years of age was examined; on being interrogated by the judge, and making answers that there was a God; that people would be punished in hell, who do not speak the truth; and that it was a sin to tell a falsehood under

oath, although he stated he did not understand what an oath was. 3 L. C. Rep., p. 212, Q. B.; *The Queen vs. Berumé et ux.*; Panet, J.

MURDER, Bail on charge of. See "HABEAS CORPUS."

#### NUISANCE.

Held, 1. That in the case submitted, (where the defendant was convicted for a nuisance for setting up a manufactory for animal manures) evidence to prove the advantage accruing, and likely to accrue, from the sale and use of the manure, could not be admitted, inasmuch as it is settled that the circumstance that the thing complained of furnishes, upon the whole, a greater convenience to the public than it takes away, is no answer to an indictment for nuisance.

2. That the rule *sic utere tuo, ut alienum non ledas*, is a familiar maxim of the common law of England, as well as a maxim of the civil law. 10 L. C. Rep., p. 117, *Regina vs. Bruce*. Q. B. Crown side; Aylwin, J.

#### PERJURY.

Held, That where a true bill for perjury is found against a defendant, this is no reason for suspending the civil suit. 3 Rev. de Jur., p. 364, *Fortier vs. Mercier*, 1847.

Held, That on an indictment for perjury, the defendant must submit to the jurisdiction of the court before he can be allowed to plead. 10 L. C. Rep., p. 45, Q. B. Crown side; *Regina vs. Maxwell*; Duval, J.

#### RAPE.

Held, That a prisoner on a charge of felony (rape) being tried and convicted only of an attempt to commit such felony, cannot be tried for any other offence founded upon the facts upon which the verdict is given; and a motion for setting aside the verdict of guilty, and for empannelling a new jury will not be granted. 9 L. C. Rep., p. 196, *The Queen vs. Webster*. Q. B. Crown side; Lafontaine, C. J., dissenting; Aylwin, Duval, Caron, J.

#### REGISTRY ORDINANCE, VIOLATION OF.

Held, That the punishment prescribed by the 4th Vict., c. 30, sect. 1, is cumulative, and that sentence of imprisonment and fine will be pronounced on conviction had against defendant. 4 Jurist, p. 276, *Regina vs. Palliser*. Q. B. Crown Side; Lafontaine, C. J., Aylwin, Duval, J.; Mondelet, J., dissenting.

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#### DAMAGES.

##### AGAINST AGENT.

Held, That defendant was liable in an action of damages personally, for having, as agent or attorney of another party, caused an illegal seizure to be made of plaintiff's property, by a *saisie arrêt* before judgment issued on the affidavit of now defendant. 8 L. C. Rep., p. 177, *Warren vs. Noad*. S. C. Q.; Meredith, J.

## ANIMALS.

Held, That where a defendant designedly took down his own fence, and his neighbor's cattle strayed into his field, and he seized and detained them, that the seizure being fraudulent, malicious and illegal, an action of damages will be maintained. *Turcotte vs. Basin*. K. B. Q. 1813.

Held, That an action of damages lies, for exciting a dog to bite the plaintiff's horse, whereby the horse was injured, and plaintiff's cart broken. *Davidson vs. Cole*. K. B. Q. 1821.

Held, That where a defendant hired a horse to go to a certain place, and went farther, and the horse died on his hands, that the onus of proving that the horse was not in a condition to make the trip lay on the defendant. Judgment for value of the horse. *Desautels vs. Perrault*. 1849, Cond. Rep., p. 60.

Held, That a person who keeps a dangerous dog, is liable in damages, in case a passer-by be bitten, even although walking off the road and near the plaintiff's barn. Damages £50. *Dandurand vs. Pinsonmault*. Cond. Rep., p. 80.

See post DAMAGES, Exemplary.

## ARREST—ATTACHMENT.

Held, That where a minor offering goods for sale was arrested by the defendant under the mistaken belief that the goods were his stolen property, the defendant is liable in damages in an action by the father, although not actuated by malice, and is not entitled to notice under the 14th and 15th Viet., c. 54. 1 Jurist, p. 237, *Wilson vs. Morris*. S. C. Montreal; Day, Smith, Chabot, J.

Held, In an action of damages, for illegally issuing a writ of *saisie arrêt* before judgment, that the court will give only nominal damages where there were suspicious circumstances, not amounting to a complete justification of the process. 2 Jurist, p. 120, *Déloge dit Pariseau vs. Rochon*. S. C. Montreal; Day, J.

Held, That in an action for false imprisonment, the admission by defendant, in one of his pleas, that he caused the arrest, is sufficient, although a general issue is filed; and that plaintiff is thereby relieved from proving the arrest. 5 Jurist, p. 50, *Monty vs. Ruiter*. S. C. Montreal; Berthelot, J.

Held, That words used by a defendant, sued for false arrest, in giving the party in charge, cannot also be made a ground of damages for slander. *McCann vs. Benjamin*. S. C. Montreal; Cond. Rep., p. 13.

See post MALICIOUS ARREST.

## ASSAULT.

Held, That a plaintiff may, for an assault, proceed against the defendant, by action, and by an indictment. *Duganay vs. Hunter*. K. B. Q. 1812.

Held, 1. In an action of damages for assault and battery, that words in the declaration charging the defendant with a design to do grievous bodily harm to plaintiff, do not necessarily constitute an accusation of felony.

2. That even if the charge amounted to a felony, the plaintiff may sue in damages without first prosecuting criminally. 4 L. C. Rep., p. 160, *Lamothe vs. Chevalier et al.* In Appeal; Rolland, Panet, Aylwin, J.

## ASSAULT AND SLANDER.

Held, That a party may, by the same action, claim damages for slander and for assault. In this case the plaintiff alleged that the defendant calumniated him, "et joignant les coups aux paroles a assailli, battu," &c. 6 L. C. Rep., p. 185, *Paquette*, App., *Globenski*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

## CONTRACT, BREACH OF.

Held, That where a third person promises to one of the parties to a contract, that he will assume it, that promise can only be binding on him as to the person to whom it was made, and a contract to deliver to certain persons, during a fixed period, all the malt they may require for their brewery, can only be binding so long as malt may be required for the brewery, and therefore the insolvency of such persons, and their ceasing to employ the brewery, terminates the contract, and no damages can be claimed on the ground of subsequent non-performance. *Oakley vs. Morrogh et al.* Fyke's Rep., p. 74, Sewell, C. J. 1810.

Held, That if a man contracts to do a thing, and receives money in advance, and does not do it, he who has paid the money may either affirm the contract, and institute an action of damages for non-performance, or he may disaffirm it, and sue for money had and received. *Brunel vs. Lee.* K. B. Quebec, 1812.

Held, That an action on a personal contract (for building a wharf) will be dismissed, it appearing that the contract was made with a third party, and that the defendants were merely a committee to superintend the work. *Mandigo vs. Hoyle et al.* S. C. Montreal; Cond. Rep., p. 4.

## EXEMPLARY.

Held, In an action of damages in consequence of plaintiff's child being severely bitten by a dog, which was kept as a fighting dog, and suffered to run unmuzzled, that exemplary damages will be given. 2 Jurist, p. 96, *Falardeau vs. Couture.* S. C. Montreal; Mondelet, J.

## FROM FALLING BEAM.

Held, 1. That a contractor is liable to a person passing through a public street, for injuries sustained by the falling upon him of a beam from a building in process of erection by such contractor.

2. That the *onus* is upon the contractor, to prove that such injuries were not caused by negligence.

3. That a builder is liable for the negligence of his workmen and other persons under his control, in and about the erection of a building. 5 Jurist, p. 271, *Holmes vs. McNevin.* S. C. Montreal; Badgley, J.

## FATHER, AGAINST.

Held, That where a father bound his son as apprentice to plaintiff for five years, representing him to be sixteen years of age, he being really over sixteen, he



is liable in damages, the son having left plaintiff's service on attaining his majority. 1 Jurist, p. 10, *Rice vs. Coe*. S. C. Montreal; Day, Smith, Badgley, J.

See TUTELLE, Tutor.

#### JOINT AND SEVERAL.

Held, That if two persons arrest a third, both are answerable *solidairement* in damages. *Pouliot vs. Stanley*. K. B. Q. 1813.

Held, In an action *d'injure* for torts committed by several persons, each and every of the perpetrators may be sued jointly and severally. A *remise* by reconciliation may be proved by witnesses. *Peltier vs. Minville*. K. B. Q. 1818.

Held, That in an action against several persons for an alleged *voie de fait* in driving the plaintiff from his house, it is not necessary, in order to obtain a condemnation in damages against the defendants, jointly and severally, to prove specifically the part taken by each, but that their participation might be inferred from the circumstances proved in the case. 10 L. C. Rep., p. 399, *Nianentsiasa*, App. *Akwirente*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Mondelet, Bruneau, J. Same case, 4 Jurist, p. 367.

See PLEADING, Joinder.

#### JUDGE AGAINST.

Held, That an action of damages will not lie against a judge for any act done by him within the extent of his jurisdiction. *Stuart's Rep.*, p. 292, *Gugy vs. Kerr*. K. B. Q. 1828.

Held, That the court has no jurisdiction, in an action against a judge of the Vice-Admiralty, to recover back money paid to him as fees in a suit determined in that court, but the remedy is by appeal to the High Court of Admiralty in England, or to the king in his privy council.

*Semble*, That the right of the judge of Vice-Admiralty to exact fees is of immemorial usage, introduced into this country after the conquest. *Stuart's Rep.*, p. 341, *Wilson vs. Kerr*. K. B. Q. 1828.

In an action of trespass for assault and imprisonment against the provincial judge of the inferior district of St. Francis, for issuing process of attachment for contempt, against the editor and printer of a public newspaper for publishing certain papers: Held, That as the acts complained of were performed by the judge in his judicial capacity, the court could not take cognizance of them, and therefore had no jurisdiction. *Stuart's Rep.*, p. 276, *Dickerson vs. Fletcher*. K. B. Three Rivers; 1828.

#### JUSTIFICATION.

Held, That in an action against the captain of a ship chartered by the East India Company, for an assault and false imprisonment, a justification, on account of mutinous, disobedient, and disorderly behavior, will be sustained. *Stuart's Rep.*, p. 518, *Coldstream vs. Hall*. Vice-Admiralty Court; Kerr, J., 1832.



## LEGAL RIGHT, EXERCISE OF.

Held, 1. That no responsibility in damages is incurred by the exercise of an absolute right; that such is the right of a lessor to proceed by *saisie gagerie* against his tenant; and "such proceedings cannot give rise to damages, whatever may have been the landlord's motive, and however rigorously such right may have been exercised.

2. In the court below, a verdict was given against the landlord in damages, and a judgment entered thereon, and the defendant's motion for a new trial, and also a motion for judgment *non obstante veredicto* dismissed.

In Appeal; Judgment reversed, and action below dismissed with costs. 1 Jurist, p. 69, *David*, App., *Thomas*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

## LIBEL.

Held, That newspaper proprietors are liable in damages to an unmarried woman, for inserting in their paper a notice sent to them, of the birth of children of plaintiff, describing her as a married woman, although there is no evidence of malice or knowledge on the part of the defendant, that the notice was untrue, and although an apology, not communicated to the plaintiff, was made, and a reward offered for the discovery of the party sending such notice. 6 L. C. Rep., p. 410, *Starnes vs. Kinnear et al.* S. C. Montreal; Day, Smith, Mondelet, J.

Same case; S. C. Montreal; Cond. Rep., p. 45.

Held, That an action *d'injure* for a libel set forth in proceedings had in a court of justice can be maintained. *Tullée vs. Munroe*. K. B. Q. 1816.

See "CONTRAINTE, Libel."

## LIVERY STABLE KEEPER.

Held, In an action by a livery stable keeper to recover £5 for four days' hire of a horse, and £25 for the value of the horse, that the refusal of the defendant to return the horse did not create a debt for the £25, but only gave plaintiff a right to recover the horse with the damages for his detention, and for the value of the horse as damages in case of his non-delivery after judgment. 6 L. C. Rep., p. 477, *Dumaine vs. Guillemet*. S. C. Montreal; Day, Vanfelson, Mondelet, J.

## PLAINTIFF'S IMPRUDENCE.

Held, That no damages can be recovered for an injury which has been sustained in consequence of an accident produced by imprudence on the part of the person injured. *Toussignant vs. Boisvert*. K. B. Q. 1820.

## MALICIOUS ARREST.

Held, In an action for malicious arrest of property by *arrêt simple*, that it is not necessary to set forth in the declaration, that the action in which the arrest was made has been terminated. Stuart's Rep., p. 40, *Whitfield et al. vs. Hamilton et al.* K. B. Q., 1811.

Held, That in an action for malicious arrest, the plaintiff must allege and show in evidence, that he was arrested without reasonable or probable cause. *Ritchie vs. Flower*. K. B. Q. 1813.

Held, That an action lies for a malicious arrest of the person, and for a false imprisonment; and for a malicious arrest and seizure of property. *Sims vs. Schotefield*. K. B. Q. 1820.

Held, That in an action for a malicious arrest upon a *capias ad respondendum*, on the ground that the defendant was about to leave the Province, it is not necessary to allege in the declaration, that the action in which he was so arrested has been decided. *Boyle vs. Arnold*. K. B. Q. 1821.

#### MEASURE OF.

Held, That in case of a breach, by the lessor, of a contract of lease, the lessee can only recover such damages as are the immediate result of such breach, and not the consequential damages, which the parties could not have foreseen; that the plaintiff having leased a building for a theatre, cannot claim, in the shape of damages, what he might have received from the government for giving up his lease, the legislative buildings having, since such lease, been destroyed by fire, and the building so leased being the only building to be had, fit for the sittings of the legislature. 5 L. C. Rep., p. 134, *Lee vs. The Quebec Music Hall*. S. C. Quebec; Bowen, C. J., Morin, Badgley, J.

By act of dissolution of co-partnership F received, as part of his interest in the firm, two promissory notes, the *acte* containing a clause that F should be at liberty, within three weeks, to return the notes, and take such goods from the stock of the partnership as he should select, (to an amount equal to such notes and interest) at 65 per cent. advance upon the cost thereof. In an action by F to recover damages against E for refusing to permit such selection, the notes having been duly tendered,

Held, 1. That F was not restricted to any description of goods, nor obliged to allege or prove what particular kind of goods he would have selected.

2. That he was entitled, as damages occasioned by such refusal, to a sum equal to the profit on the sale of the goods if delivered according to the terms of the *acte*.

3. That the interrogatories *sur faits et articles* were properly taken *pro confessis*. 9 L. C. Rep., p. 349; *Elliott*, App.; *Foley*, Resp.; Lafontaine, C. J., Aylwin, Duval, Caron, J.

MEASURE OF, For not registering transfer of Railway shares. See RAILWAY COMPANY, Transfer of Shares.

SOLATIUM, To widow and next of kin for death of husband by railway. See RAILWAY COMPANY, DAMAGES, Death.

#### TO REAL ESTATE.

Held, An action *d'injure* for damages done to the plaintiff's real property, may be supported by evidence of constructive possession. *Hunter vs. Oviatt*. K. B. Q. 1811.

Held, That every proprietor is answerable in damages to his neighbor, for an injury which he occasions to the property of the latter, by the improper use of his own, and for such an injury, an action will lie. *D'Estimauville vs. Têtu*. K. B. Q. 1817.

Held, That an action in *factum* lies for a *chemin de sortie*. *Dionne vs. Esmond*. K. B. Q. 1817.

Held, That an action in *factum* can be maintained where a building, erected on the property of another, is a private nuisance to his neighbors, whether it be occasioned by the building, or by the use to which it is applied. *Côté vs. Measum*. K. B. Q. 1819.

## RECONCILIATION.

Held, That a *remise* by reconciliation may, in an action *d'injure*, be proved by witnesses. *Peltier vs. Meville*. K. B. Q. 1818.

See DAMAGES, Joint and Several.

## SEDUCTION.

Held, That in an action for seduction, the plaintiff must prove a promise of marriage and breach thereof, or the birth of a child, from which the law presumes a promise of marriage and breach thereof. *Poulin vs. Plante*. K. B. Q. 1820.

Held, That an action for damages by reason of seduction, and for an alimentary provision for the child, can be maintained by the mother alone, if she is of age. *Mathieu vs. Letourneau*. K. B. Q. 1821.

Held, That as the declaration for seduction and *declaration de paternité* did not, as was contended, charge a felony, the demurrers, which were general, must be dismissed, but that the plaintiff might find that the absence of an allegation of a promise of marriage would preclude damages being given. *McElwee vs. Darling*. S. C. Montreal; Cond. Rep., p. 8.

Held, In an action by husband and wife, for aliment of a child born five months after marriage, and, *en déclaration de paternité*, that no such action lay. Action dismissed on demurrer. *Lamirande et ux. vs. Dupuis*. S. C. Montreal, 1853; Smith, Vanfelson, Mondelet, J.; Cond. Rep., p. 58.

## SETTING FIRE.

Held, That an action *d'injure* can be maintained for damages occasioned by imprudently setting fire to the woods, in a dry season, and during a high wind. *Guay vs. Labelle*. K. B. Q. 1820.

Held, That a person setting fire to clear his land, at an improper and unfitting time, is, by that mere fact, responsible for the burning of a threshing machine which had been brought upon his land by the appellant to thresh respondent's grain. 10 L. C. Rep., p. 502, *Hynes*, App., *McFarlane*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Meredith, Mondelet, J.; Duval, J., dissenting.

## SLANDER.

Held, That for words spoken *bonâ fide* and confidentially, an action *d'injure* cannot be maintained. *Boucher vs. Casgrain*. K. B. Q. 1810.

Held, That an action *d'injure* for scandalous words spoken of a married woman cannot be released by her alone, during coverture. *Fraser et al. vs. Peltier*. K. B. Q. 1816.

Held, That in action for slander, whether the words spoken or written were spoken or written maliciously, is a question of fact to be decided by the jury, if there be one. *Burns vs. Goudie*. K. B. Q. 1818.

Held, That in an action for slander, it is sufficient if the substance of the words laid is proved. *Hooper vs. Arnold*. K. B. Q. 1819.

Held, That in an action for slander, every fact which rebuts the inference of malice may be proved by the defendant upon a *défense en fait*. They shew that he was not guilty. *Dupont vs. St. Pierre*. K. B. Q. 1819.

Held, That the time and place where the words were spoken must be stated, and if not stated, the action will be dismissed on an *exception à la forme*. *Goudie vs. Legendre*. K. B. Q. 1820.

Held, That to call a woman a whore is actionable, and requires no proof of special damage. *Langlois vs. Taché*. K. B. Q. 1820.

Held, That the contents of a confidential letter are not the subject of an *action d'injure*. *Smith vs. Binét*. K. B. Q. 1821.

In an action of damages for slander, one witness proved that the defendant, speaking of the plaintiff, had used the word "whore," and said "that she had been kept by a gentleman," whose name the witness gave; a second witness proved that the defendant, speaking of the plaintiff, said "she has been frequently seen in company with a gentleman," mentioning the same name as that used by the former witness:

Held, 1. That there was not sufficient proof to warrant the verdict of a jury for the plaintiff; and that the testimony of the second witness was not corroborative of the first.

2. That a communication by a merchant to his clerk, in his private office, affecting the character of a third person, made in the course of a conversation occasioned by the absence from his duties of another clerk of the merchant, is a privileged communication. 5 L. C. Rep., p. 145, *Ferguson vs. Gilmour*. S. C. Quebec; Bowen, C. J., Meredith, Badgley, J.

Held, That a plea to an action of damages for slander, which repeats, and at the same time retracts, the slanderous words used, is bad on demurrer.

Query? Whether in such an action, the truth of the slander can, by the law of Lower Canada, be pleaded in bar of the action, even where the publication is alleged to have been made from good motives and for a justifiable end. 8 L. C. Rep., p. 211, *Noel es qualité vs. Chabot*. S. C. Quebec; Meredith, J.

Held, 1. That an action of damages lies where a defendant has used words, or made insinuations, which have the effect of injuring the character of plaintiff.

2. That such plaintiff is not bound to prove that the imputations against him are false, and is entitled to judgment, on the verdict of a jury, for damages. 6 L. C. Rep., p. 415, *Bélanger, App., Papineau, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

In an action for *injures verbales* the defendant declared his option of a trial by jury, by an exception which was dismissed on demurrer, but made no option

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by his second plea; he afterwards moved that he be allowed to renew his option for a jury trial, which motion was rejected.

Held, 1. In Appeal; That the option, made by the exception, still subsisted, and entitled the defendant to a trial by jury.

2. That the motion as made was, in effect, a motion for *acte* which could not injuriously affect the defendant, and should have been granted. 9 L. C. Rep., p. 228, *Whyte*, App., *Nye*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J.

Held, That in an action for slander, the expressions complained of must be proved.

*Semble*. That where an attorney, in the conduct of a suit, remarks on the character of a witness in accordance with instructions from his client, his defense in an action of slander will be favorably received. 10 L. C. Rep., p. 185, *Lavoie*, App., *Gagnon*, Resp. In Appeal; Lafontaine, C. J., Duval, Mondelet, Badgley, J.; Aylwin, J., dissenting.

Held, 1. That an exception will not be rejected because it is argumentative, or because it sets forth facts which could have been proved under the general issue.

2. That a plea in the nature of a plea of justification will not be dismissed, because it does not admit the use of the words intended to be justified.

3. That an attorney, conducting his own case, cannot recover fees as if acting for another. 11 L. C. Rep., p. 409, *Guy*, App., *Ferguson*, Resp. Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.; the C. J. and Duval, J., dissenting as to the merits; Meredith and Mondelet, J., as to the costs.

Held, That an action of damages for slander will be dismissed, the words laid not having been proved, nor anything equivalent to them; and that there being no intent laid in the declaration, no proof of the meaning of the words could be made. Appeal from Circuit Court maintained, and action dismissed. *McCarthy*, App., *Laurier*, Resp. S. C. Montreal; Cond. Rep., p. 36.

Held, That a statement by an owner of a vessel, that the plaintiff, a pilot, had been paid to run a vessel ashore and destroy her, is highly slanderous, and injurious to plaintiff's business. 12 L. C. Rep., p. 333, *Morissette vs. Jodoin*. S. C. Montreal; Smith, J.

Held, That damages awarded by a judgment in an action of slander (brought by a wife) are *insaisissables*. 6 Jurist, p. 305, *Chef vs. Leonard et vir*, and *T. S.* S. C. Montreal; Smith, J.

*Réparation d'honneur* ordered. *Prévosté*, No. 94; No. 140; Cons. Sup., No. 56; Form of judgment; Cons. Sup. No. 79.

#### SLANDER AND LIBEL.

An action of damages for libel and slander, containing three counts, was brought against three persons, described as all of the city of New York, mercantile agents and co-partners, carrying on business in the city of Montreal, under the firm of R. G. Dun & Co. Exceptions to the form were filed by two of the defendants, on the ground that the service of process was insufficient and irregular, inasmuch as it had been made at the office of the defendants in Montreal; that the defen-

dants were entitled to be served personally, or at their domicile; that the action should have been directed against the co-partners guilty of the malicious acts complained of, and could not be brought against a co-partnership for words spoken by one or more of the co-partners, and, further, because the causes of action were insufficiently libelled, inasmuch as it was alleged that the defendants falsely and maliciously did compose and write in a certain book, kept in the office of the defendants, &c., a certain false, scandalous, and malicious libel, "to the effect, " that the said plaintiff was not reliable, or that the plaintiff was insolvent, or " words to that effect, but as the defendants have refused to let the plaintiff see " the book, he is unable to state the exact words therein written."

Held, That the exceptions were well founded, and that the action must be dismissed, with costs, as to the two defendants' pleading. 12 L. C. Rep., p. 345, *McDonald vs. Dun et al.* S. C. Montreal; Smith, J.

Held, That the allegation of fraud in a plea is not libellous, and such allegation will not support an action for libel, unless it be also alleged that the plea complained of was merely used to cover the libellous matter which was irrelevant to the issue. 12 L. C. Rep., p. 390, *Fitzsimmons vs. Byrne et ux.* S. C. Quebec; Stuart, J.

DAMAGES, Action by father as natural tutor. See TUTELLE.

DAMAGES BY LE.SEE. See LANDLORD AND TENANT.—Voic de Fait.

DAMAGES LIQUIDATED. See PENALTY, Penal Statute.

DAMAGES, for Non-delivery of goods destroyed by *Vis Major*. See SALE, Delivery, Risk.

DAMAGES against Captain of Vessel. See SHIPS AND SHIPPING.

DAMAGES for words spoken by witness. See EVIDENCE, Witness.

DAMAGES for words spoken by attorney. See DAMAGES, Slander.

DAMAGES against Railway Company. See RAILWAY CO., Damages.

DAMAGES for Slander. See DAMAGES, Slander.

DAMAGES against Corporation. See CORPORATION, Damages.

DAMAGES by Bill being Protested. See BILLS AND NOTES, Damages.

DAMAGES set off in Compensation. See PLEADING, Compensation.

DAMAGES against Jurors. See JURY, Action vs. Jurors.

DAMAGES, *capias* for. See CAPIAS, Affidavit.

DAMAGES for non-payment of advances agreed on. See CORPORATION, Service upon.

DAMAGES against Collector of Customs. See CUSTOMS.

DAMAGES set up against Freight. See SHIPS AND SHIPPING, Freight.

DAMAGES too remote. See CORPORATION, Damages.

DAMAGES. See CERTIORARI, Malicious Injury.

DAMAGES against curé. See MARRIAGE, Minor.

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#### DEFAULT DE CONTENANCE.

Opposition for. See "OPPOSITION."

See DECRET, Default de Contenance.

## DEATH, CIVIL.

See HUSBAND AND WIFE, *Communauté*.

Held, That a person condemned to death by court martial in 1839, and who obtained Her Majesty's pardon on the 27th Jan., 1844, cannot bring an action, and cannot revendicate his property, inasmuch as the pardon does not remove the effect of the *attainder*. 1 Jurist, p. 253, *Rochon vs. Leduc*. S. C. Montreal; Smith, Vanfelson, Mondelet, J.

## EFFECT OF.

Held, That an action *d'injure* for assault or defamation is lost if the party assaulted or defamed dies before the suit is commenced; *aliter* if he dies pending the suit. *Salbert vs. Chcuinard*. K. B. Q. 1812.

DEATH OF ANCESTOR. See PLEADING, DECLARATION. See also APPEAL.

DYING DECLARATION. See CRIMINAL LAW, Evidence.

DEATH OF PARTNER. See PARTNERSHIP, DEATH.

" See HUSBAND AND WIFE.

" of PARTY TO SUIT. See PEREMPTION.

" RAILWAY vs. DAMAGES. See CESSION, Signification.

## DECLARATION.

See PLEADINGS.

" OF T. S. See EXECUTOR, Tiers Saisi.

## DECONFITURE.

ITS EFFECTS ON CONTRACTS.

See BILLS AND NOTES when due.

" FRAUD.

" DOCTOR OF MEDICINE.

" PRESCRIPTION.

" DOWER.

## DÉCRET.

## ADJUDICATAIRE, TITLE OF.

Held, That where a sale of property is stopped by the sheriff, the last and the highest bidder does not become the *adjudicataire*, or acquire any right to the property put up for sale, although the sheriff may have acted illegally in discontinuing the sale. Nor can there be any sale, unless the bidding has been accepted by the knocking down of the hammer, or some act equivalent to it. Nor can a defendant by opposition stop the sale of his property, upon the ground that the sum bid was not near the value of the property, unless the plaintiff and the



several opposants à fin de conserver consent thereto. *Baker vs. Young*, and *Blackwood*, Intervening, and divers, Opps. Pyke's Rep., p. 26. Sewell, C. J., 1810.

Held, That if a sheriff's sale is interrupted, and no adjudication is made, the contract of sale is imperfect, and the last bidder is not an *adjudicataire*. *Baker vs. Young*. K. B. Q. 1810.

Held, That an *adjudicataire* may, under some circumstances, be permitted to retain the capital of a dower not yet open. *Roberts vs. Lavaux*. K. B. Q. 1815.

Held, That a tenant who has paid rent to his landlord in advance, will be condemned to pay to the *adjudicataire* if the property is adjudicated during the lease and the engagement of the tenant. *Hart vs. Bourgette*. Bowen, J.; K. B. Q. Inferior Term, 1846.

Held, 1. That the title to an *adjudicataire* at sheriff's sale, granted subsequent to the adjudication, has a retroactive effect, and confers the right of property and all the advantages resulting therefrom, from the day of adjudication.

2. That there was sufficient proof of the use and occupation of the property by the respondent, to warrant a judgment in favor of the *adjudicataire* founded on such use and occupation. 11 L. C. Rep., p. 449, *Laterrière*, App., *Houde et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That the adjudication *par décret* transfers the property *ipso jure*, and that the *adjudicataire* is entitled to the rents from the date of the adjudication. 4 Jurist, p. 1, *Harwood vs. Shaw*. S. C. Montreal; Badgley, J.

#### ADJUDICATION—WRIT OF POSSESSION.

Held, That to obtain an order for a writ of possession by an *adjudicataire*, there must be a return of the sheriff that he has not, and cannot put him in possession. *Reinhart vs. Hausseman*. K. B. Q. 1821.

Held, That a writ of possession will be granted to an *adjudicataire* against a defendant who refuses to give up possession. 1 Jurist, p. 15, *Lewis vs. O'Neil*, and *Holbrook*, Adjud. S. C. Montreal; Day, Smith, Badgley, J.

Held, That the *adjudicataire*, when a year has elapsed, is entitled to be put in possession by a petitory action against defendant, and not by writ of possession. 4 Jurist, p. 8, *Hart vs. McNeil*. S. C. Sherbrooke; Day, Short, Caron, J.

#### DECRET, EFFECT OF.

Held, That a sale by *décret* does not affect the property of a third person who has been publicly in possession, and remained in possession of such property from the seizure to the adjudication. *Wilson vs. Coldwell*. K. B. Q. 1813.

#### DÉFAUT DE CONTENANCE.

Held, That the *défait de contenance*, in a real property sold by the sheriff, entitles the *adjudicataire* to demand a proportionate reduction of the price, but not the nullity of the adjudication. 2 Rev. de Jur., p. 57, *Grey vs. Todd et al.* K. B. Q. 1809.



Held, 1. That an action by an *adjudicataire* of real property against a party plaintiff *poursuivant le décret* to recover the value of a deficiency in the land, cannot be brought *de plano*, until such deficiency shall have been established in an action to reform the sheriff's title granted to the *adjudicataire*, and to correct the description of the quantity of land, to which action the *poursuivant* and the *saisi* must be parties.

2. That until such deficiency is so ascertained, the sheriff's title is a bar to any action against the *poursuivant le décret* as having received the proceeds of the sale, and is conclusive evidence, as between the plaintiff and defendant, until it is legally set aside and reformed. 9 L. C. Rep., p. 108, *Desjardins vs. La Banque du Peuple*. S. C. Montreal; Smith, J. Same case 3 Jurist, p. 75.

In November, 1853, the plaintiff became *adjudicataire* for £1100 of a *fief* sold at sheriff's sale, in a suit by the *Banque du Peuple vs. Donegani*, the proceeds of the sale being paid to the bank as opposant, by judgment of distribution.

By a survey of the 15th January, 1857, made on behalf of the *adjudicataire*, it appeared that the property described as containing 400 acres, contained only 188 acres. On the 15th Sept., 1857, the plaintiff brought his action, against the bank, to recover £583, being the proportionate deduction for the deficiency.

Held, 1. That the action was brought within a reasonable delay, notwithstanding Donegani's insolvency, and that the bank had, on the 27th March, 1857, recovered £4,053 13s. from Quesnel, *cessionnaire* of Donegani, as the balance of the debt due by Donegani to the bank, and had recognized and accepted the transfer of 392 shares of stock in the said bank, held in Donegani's name, which shares, by the terms of the act incorporating the bank, Donegani, as a shareholder, could not have transferred without first paying all he owed to the bank.

2. That the defendant in the previous case, Donegani, need not be put *en cause*.

3. That the *adjudicataire* having paid the full price to the bank as opposant, through error as to the extent of the land, had a right to recover back the excess demanded. 10 L. C. Rep., p. 325, *Desjardins, App., La Banque du Peuple*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Mondelet, J.; Duval, J., dissenting.

Held, That an *adjudicataire* claiming a reduction in the price, by reason of a *defaut de contenance*, must, proceed by petition, and not by opposition *à fin de conserver*, and must give notice of his proceedings to all the parties in the cause. 11 L. C. Rep., p. 430, *Quebec Building Society vs. Jones et al.*, and divers Opp. S. C. Quebec; Stuart, J.

See OPPOSITION.

#### FOLLE ENCHÈRE.

Held, That no motion for an order to sell the property at the *folle enchère* of the *adjudicataire* can be granted, unless notice thereof has been given to the *adjudicataire*. *Baker vs. Young*, and divers Opp. Pyke's Rep., p. 22. Sewell, C. J., 1810.

Held, That a *folle enchère* cannot be ordered on terms and conditions different from those of the original sale. 1 L. C. Rep., p. 151, *Evans vs. Nichols*. In Appeal; Stuart, C. J., Rolland, Panet, Aylwin, J.

Held, That a *folle enchère* will not be ordered pending the proceedings on an intervention of a third party to have the adjudication declared null and void, nor will a *contrainte par corps* be issued against the *adjudicataire* for non-payment of the purchase money pending such proceedings. 1 L. C. Rep., p. 241, *Meath vs. Monaghan*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That any opposing creditor may move for a *folle enchère*. 2 L. C. Rep., p. 64, *Guenette vs. Blanchet*, and *Opp*. S. C. Quebec; Duval, Meredith, J.

Held, That after a *folle enchère* has been ordered, the *adjudicataire* may get the order set aside, by paying his purchase money and costs of the *folle enchère*. 2 L. C. Rep., *Langevin vs. Garon*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, 1. That a motion for *folle enchère* against an *adjudicataire* (a woman separated as to property from her husband) will be rejected unless notice of the motion has been served upon her husband, as well as herself.

2. That an opposant will not be allowed to make a motion for *folle enchère*, until after a delay of a few days allowed to plaintiff to make the motion, after which delay it may be made by any of the parties in the cause. 10 L. C. Rep., p. 457, *Cloutier vs. Cloutier*, and *Opp*. S. C. Quebec; Taschereau, J.

Held, That a rule for *folle enchère* against an *adjudicataire* described in the sheriff's return as residing in Upper Canada, may be declared absolute on the mere return of a bailiff, certifying that he has no domicile in Lower Canada, and cannot be found in the district of Montreal. 1 Jurist, p. 193, *Guy vs. Clarkson*, and *McLean*, *Adjud.* S. C. Montreal; Day, Smith, Chabot, J.

Held, That where, on the face of the proceedings, the *adjudicataires* are residents in Upper Canada, but have paid the capital of their purchase, a rule for *folle enchère* for interest, served upon the "agent and attorney at law" of the *adjudicataires* will not be maintained. 2 Jurist, p. 276, *Hall vs. Douglas*, and *McDougall et al.* *adjud.* S. C. Montreal; Smith, J.

Held, That the *adjudicataire* is not liable for the costs of a re-sale at his *folle enchère*, but only for the difference in the price between the two adjudications. 3 Jurist, p. 302, *The Trust and Loan Company of U. C. vs. Doyle*, and *Stanley*, *Adjud.* S. C. Montreal; Badgley, J.

Held, That a rule for *folle enchère* must contain a description of the lands to be re-sold. 4 Jurist, p. 119, *Dickinson vs. Bourque* and *Blanchard*, *Adjud.* S. C. Montreal; Smith, J.

Held, 1. As above, as to the description of the property.

2. That the *adjudicataire* will be allowed to pay the purchase money, if he applies to be permitted to do so, before the rule for a re-sale at his *folle enchère* is made absolute. 5 Jurist, p. 21, *Nye vs. Potter* and *Brown*, *Adjud.* S. C. Montreal; Monk, J.

Held, That a sale by *folle enchère* will be ordered, at the instance of the plaintiff, against an *adjudicataire* of a steamer duly registered, who has not paid the price of his adjudication, notwithstanding the existence of mortgages on the vessel, which, it was contended, would still remain on the vessel after such judicial sale, 12 L. C. Rep., p. 207. *Lavoie vs. Plante* and *Blouin*, *Adjud.* S. C. Quebec; Stuart, J.

## NULLITY OF.

Held, That a deed of sale *décrot* cannot be set aside because the sheriff advertised the sale for Thursday the 21st February, when the 21st was a Wednesday. The designation of the day is complete. It is added that it falls on a Thursday, but that is *surplusage*, and it is therefore immaterial whether it be or be not erroneous. *Languedoc vs. White*. K. B. Q. 1821.

Held, That a petition *en nullité de décret* filed by a plaintiff will be dismissed on an exception *à la forme* by the *adjudicataire*, on the ground that he was brought into the cause by simple notice on the petition. 6 L. C. Rep., p. 486, *Joseph vs. Brewster, Haldane, Adjud.*

Held, That an *adjudicataire* who has purchased a farm, together with buildings, at sheriff's sale, cannot claim a reduction of the price because such buildings are not upon the premises; he ought to demand the nullity of the sale. 2 Rev. de Jur., p. 179, *Lloyd, App., Clapham, Resp.* In Appeal, 1847.

Held, 1. That the sale, by the sheriff, of an immovable, in a district other than that in which the immovable is situated is void, and is *prima facie* evidence of fraud on the part of those who were concerned in it.

2. That in the case of a note given to the appellant for a pretended debt to an estate of which he was attorney, he could not bring an action in his own name, but the suit should be in the name of the trustees of the estate, to whom the money belonged. 12 L. C. Rep., p. 408, *Phillips, App., Sanborn, Resp.* In Appeal; *Lafontaine, C. J., Davel, Meredith, Mondelet, J.* Same case, 6 Jurist, p. 252.

*Décrot* of real estate ordered, by consent, without sale of movables. *Prévosté*, No. 141.

Land of small value allowed to be sold by three *affiches* instead of by *décrot*. Cons. Sup. No. 3.

*Reglement* prohibiting such sales. Cons. Sup. No. 12.

## VILITÉ DE PRIX.

Held, That an opposition to a sale by *décrot*, on the ground of *vilité de prix*, cannot stay the sale, except by the consent of all parties. *Baker vs. Young*. K. B. Q. 1810.

## DÉFAUT CONGÉ.

## CONGÉ DÉFAUT.

Held, That *congé défaut* cannot be granted in the Superior Court. 4 L. C. Rep., p. 320, *Ballantyne vs. Warden*. S. C. Quebec.; *Bowen, C. J.; Duval, Caron, J.*

Also refused in *Petit vs. Lucas*; 2 Rev. de Jur., p. 177. Q. B. Quebec 1847.

## DEGUERPISSEMENT.

See ACTION HYPOTHECARY.

## DELAISSEMENT.

See ACTION HYPOTHECARY, DISCUSSION.  
See PLEADING *Exception Dilatoire*.

## DELEGATION.

See REGISTRATION, *Baillieur de fonds*.

## DELIVERY.

See ACTION HYPOTHECARY, *delaissement*.  
" SALE OF GOODS.  
" CARRIER, Delivery.  
" ACTION PETITORY, Tradition.

## DELIVRANCE DE LEGS.

See CORPORATION, Mortmain bequest.  
" WILL.  
" DOWER.

## DEMEURE.

See LEASE EMPHITEOTIQUE.

## DEMURRER.

See PLEADING.

## DEPOT.

Held, 1. That a paid warehouseman (*depositeaire salarié*) is liable for slight negligence (*faute légère*) respecting goods placed in his charge.

2. That if he pleads that the goods were stolen by his store being broken into, the *onus* of proof rests upon him, and he must prove the robbery clearly and satisfactorily.

3. That it is his duty to take immediate steps, after such robbery, to ascertain the extent of the property stolen, and to endeavor to recover the same, or to inform the owner, so as to afford him an opportunity of taking steps to recover the goods stolen. 7 L. C. Rep., p. 472, *Roche vs. Fraser et al.* S. C. Quebec; Meredith, Morin, Badgley, J.

The above case confirmed in Appeal. See 8 L. C. Rep., p. 288, Lafontaine, C. J., Aylwin, Duval, Caron, J.

See EVIDENCE, *Depôt*.

" EXECUTION *Saisie Arrêt*.

## DESCENTE SUR LES LIEUX.

See SERVITUDE *droit de vue*.

## DESAVEU.

In an action by an attorney *ad lites*, for costs and disbursements, the defendant pleaded, that in certain of the actions for which costs were sought to be recovered, he had never instructed the plaintiff to sue, and that these actions, although brought in the defendant's name, were brought without his knowledge, and the costs paid. A notarial power of attorney *en desaveu* was filed, but no mention was made of it in the exception.

Held, That the exception should have expressed that the *desaveu* was made either by the defendant personally, by the aid of his attorney, or by his *fondé de procuration*, and the parties ordered to proof as to the other allegations of the exception. 1 L. C. Rep., p. 307, *Hart vs. Hart*. S. C. Three Rivers; Bowen, C. J., Mondelet, Vanfelson, J.

Held, 1. That a demand *en desaveu* will not be received before the return day of such demand, if notice of its production is given for such return day.

2. Nor will it be received when the case is *en délibéré* although regularly returned. 3 Jurist, p. 235, *Canada Building Society vs. Lafrenaye*. S. C. Montreal; Mondelet, J.

See WILL, Executor.

## DISCHARGE.

See CONTRACT, Discharge.

" do. NOVATION.

" do. PAYMENT.

" PLEADING, PAYMENT.

" do. COMPENSATION.

## DIXMES.

See TITHES.

## DOMICILE.

Held, in the case of a Scotchman, who abandoned his original domicile in Scotland, and established a new domicile in Jamaica, and finally gave it up, and left Jamaica with the intention of returning to Scotland, but died before reaching it, that his domicile at the time of his death was in Scotland. 3 Jurist, p. 127, *Ferguson vs. Pow et al.* Court of Sessions, Edinburgh; Lord Ardmillan.

DOMICILE. See RETRAIT LIGNAGER.

DOMICILE OF HUSBAND. See ACTION PARTAGE.

See SHERIFF, Bailiff.

" DOWER.

## OF PARTNERS.

Held, That plaintiffs, being merchants and partners, may describe themselves as being of the place where they carry on their business. 6 L. C. Rep., p. 177,

*Janvrin et al. vs. Lemesurier et al.* S. C. Quebec; Bowen, C. J.; Morin, Badgley, J.

Held, The plaintiff, a merchant, described himself as of the city of Quebec, where he had his office, but resided at *La Canardière* within a mile and a half of Quebec; *exception à la forme* maintained, and action dismissed. 6 L. C. Rep., p. 178, *Dinning vs. Bell et al.* S. C. Quebec; Bowen, C. J., Meredith, Badgley, J.

Held, That the true domicile of a debtor is at his place where he resides and does his business, although his family resides elsewhere. 1 Jurist, p. 167, *Kay, App., vs. Simard, Resp.* S. C. Montreal; Day, Mondelet, Chabot, J.

ELECTION OF. See OPPOSITION A FIN D'ANNULLER.

See ATTORNEY, Domicile.

#### SERVICE AT.

Held, That service at an elected domicile is valid, if by the contract which constitutes the ground of action, it is stipulated that such service shall be sufficient. *Baldwin vs. Fitzgibbon.* K. B. Q.

Held, That in an action brought at Montreal, one defendant residing there, and one in Quebec, service at their respective domiciles is sufficient under the 12th Vict., c. 38, sect. 14. 6 L. C. Rep., p. 413, *The City Bank vs. Pemberton et al.* S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That a writ and declaration are not legally served by leaving copies thereof with a servant girl, at the boarding house where defendant lived. 6 L. C. Rep., p. 477. *The Champlain and St. L. R. R. vs. Russell.* S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That an action *en séparation de biens*, between parties married and having their domicile in the district of Three Rivers, cannot be brought in the district of Montreal, but must be brought in the district of Three Rivers. 9 L. C. Rep., p. 344, *Kennedy vs. Bedard.* S. C. Montreal; Berthelot, J.

Same case, 3 Jurist, p. 284.

Held, That an action of damages by landlord against the defendants, co-partners, for breach of covenants in lease, was well served at the place of business of the firm, and was a partnership liability. *Berthelet vs. Galarneau et al.* S. C. Montreal; Cond. Rep., p. 109.

DOMICILE. See BILLS AND NOTES.

" See HUSBAND AND WIFE, Authorization, Domicile.

" OF MINORS, conflict as to. See TUTELLE, conflict as to Tutors.

#### DONATION.

##### ACCEPTANCE OF.

Held, When a donation of real estate was made to a minor accepting by a stranger, and the donee and his wife (still minors) retroceded the property of the donor, for a sum of money payable by instalments, such retrocession was equivalent to a valid acceptance of the donation, and the donor is bound to pay the instal-

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ments due. 6 L. C. Rep., p. 12, *Judd*, App., vs. *Esty et ux.*, Resp. In Appeal; Lafontaine, C. J. Aylwin, Duval, Caron, J.

Held, That on a donation by the father and mother of the plaintiff, to the defendant, plaintiff's brother, charged with a payment of a sum of money to plaintiff, an action lies in favor of the *tiers gratifié*, although not a party to the donation. *Durand vs. Durand*. Rolland, C. J.; Day, Smith, J.; 1849, Cond. Rep., p. 59.

## DEBT OF DONOR.

Held, That a donee bound to pay the debts of the donor, may be condemned to pay the amount of a judgment rendered against the vacant estate of the donor, posterior in date to the donation, on the mere production of such judgment, and without its being necessary to prove that the debt existed prior to the passing of the donation, otherwise than by what is stated in the judgment. Meredith, J., held, that the debt for which the judgment was rendered, having no date certain, and there being no proof of its existence prior to the donation, the donee was not liable, and the action ought to be dismissed. 5 L. C. Rep., p. 367, *Aylwin et al. vs. Alsopp et al.* S. C. Quebec; Bowen, C. J., Morin, Meredith, J.

## DELIVERY.

Held, That a donation of movables without tradition is a nullity. *Gauvin vs. Caron*. K. B. Q. 1821.

Held, That a donation of movables made by a husband to his wife, by contract of marriage, does not require actual delivery. 5 L. C. Rep., p. 420, *White vs. Atkins*, and *Smith et al.*, Opp. S. C. Quebec.; Bowen, C. J., Meredith, Morin, J.

## DISCHARGE OF RENTE.

The plaintiff made a donation of real and personal estate to his son, subject to a *rente viagère*, and afterwards made another donation to the same donee, for life, of other real property, subject also to a *rente viagère*, with a clause that the donation should avail to the donee's wife, so long as she remained a widow, but no longer; and in the latter donation, the donor gave a discharge for all rents due and to become due, under the first donation.

The donee having died, and his widow remarried:

Held, 1. That the donations must be read together, and that the second having become void, the discharge contained in it did not take away the plaintiff's recourse for the *rente* stipulated by the first donation.

2. That an evocation will be allowed in a suit for a *rente viagère* brought in a Commissioners' Court. 9 L. C. Rep., p. 56, *Daliphé dit Pariseau vs. Brodeur et ux.* S. C. Montreal; Mondelet, J.

## DROIT D'HABITATION.

Held, That a stipulation in a donation of a right of habitation on a property to be acquired by the donee, is only valid when granted by an *acte* subsequent to



such acquisition. 1 Jurist, p. 84, *Verdon vs. Groulx*. S. C. Montreal; Day, Smith, Chabot, J.

## INSINUATION OF.

Held, That a donation in which the charges exceed the value of the property, is not null for want of insinuation. 3 Jurist, p. 183, *Rochon et al. vs. Duchêne et ux.* S. C. Montreal; Badgley, J.

Held, That a hypothec resulting from a donation *entre vifs* of a *rente et pension viagère* specially secured on an immovable, will be declared posterior to the *hypothec* resulting from an obligation subsequently made by the donor affecting the same immovable; it not appearing that the donation had been insinuated before the passing of the obligation. 2 Rev. de Jur., p. 299, *Ex parte The Respective Officers of Ordinance*, Opps. Q. B. Quebec, 1847.  
See DONATION, Resiliation of Ant.

## LÉGITIME.

Donee condemned to give *légitime*. Prévosté, No. 33; Confirmed; Cons. Sup., No. 26.

Held, That a donation *inter vivos* is not subject to reduction by reason of the *légitime*, if the donor has subsequently disposed of his estate by will. 8 L. C. Rep., p. 317, *Quentin dit Dubois*, App., *Gerard et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J. Same case, 2 Jurist, p. 141.

## PROHIBITION FROM SELLING.

Held, That a deed of donation, from father and mother to a son, containing a clause "that this donation is made upon the express condition that the lands given shall remain *propres* to the donee, and to his immediate heirs, *de son côté et éstoc* without the power of either selling or mortgaging the same," is obligatory, and that, therefore, *hypothèques* created by the donee are null. 4 L. C. Rep., p. 215, *Fafard vs. Bellanger*. S. C. Quebec.; Duval, Meredith, Caron, J.

## RESILIATION, REVOCATION.

Held, That a donation *onéreuse*, containing charges equal to the value of the immovable given, cannot be rescinded by reason of the subsequent birth of a child, such donation being in the nature of a sale. 2 L. C. Rep., p. 177, *Sirois vs. Michaud*. S. C. Quebec; Duval, Meredith, J.

Held, That a donation can legally and rightfully be revoked and annulled before acceptance. 6 L. C. Rep., p. 51, *Lalonde*, App., vs. *Martin*, Resp. S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That the revocation of a *donation onéreuse* does not extinguish *hypothèques* created upon the land, by the donee.

2. That such donations do not require to be insinuated, and that the absence of registration cannot be invoked by the donor or his *ayant cause*, as against a creditor of the donee. 2 Jurist, p. 90, *Lafleur vs. Girard*. S. C. Montreal; Smith, Vanfelson, Mondelet, J.



Held, 1. That the *resiliation* of a donation for *ingratitude* cannot be demanded against a third person *cessionnaire* of the donee, although he may have assumed the payment of the charges in the donation.

2. That non-payment of arrears of a *rente viagère*, although not a cause of *resiliation* under the French *code*, is so under the law of Lower Canada, but cannot be demanded unless all the parties to the donation are put into the cause. 3 Jurist, p. 307, *Martin vs. Martin*. S. C. Montreal; Berthelot, J.

Held, That constant and habitual intoxication is a good cause for the *resiliation* of a donation by a father to his son. 2 Rev. de Jur., p. 60, *Couture vs. Begin*. K. B. Q. 1819.

Held, That a donation may be resiliated for non-payment of an annuity for which the donor and donee have stipulated. *Migné vs. Migné*. K. B. Q. 1811.

For *démence*. Prévosté, No. 22; Confirmed in Appeal Cons. Sup., No. 17.

For non-compliance with charges in. *Ib.*, No. 104, Confirmed in Appeal; Cons. Sup., No. 52.

Donation set aside for non-compliance with charges. Prévosté, No. 104. Confirmed in Appeal; Cons. Sup., No. 52.

#### TO A PRIEST.

Held, That a donation to a priest by his *pénitente*, à la charge, that he will say 2600 masses for the repose of her soul, is null and void *ab initio*. *Fournier vs. Poulin*. K. B. Q. 1817.

DONATION in Fraud of Donors' Creditors. See FRAUD, Donation.

DONATION, Fraud in, See FRAUD, Donation.

DONATION, Where it gives rise to *lods et ventes*, See SEIGNIORIAL RIGHTS, Lods et Ventes.

DONATION. See MARRIAGE Donation.

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#### DOWER.

##### ADULTERY.

Held, That a widow, guilty of adultery during the first year of her widowhood, will be deprived of her dower, but a judgment to that effect as to the rents, issues, and profits will be prospective only. 7 L. C. Rep., p. 391, *J. vs. R.* S. C. Quebec; Bowen, C. J., Meredith, Morin, J.

See HUSBAND & WIFE, Adultery.

##### GENERALLY.

Held, That an action *en délivrance de douaire coutumier* is an action of *partage*, and all the co-heirs must, therefore, be parties to the suit. *Turcot vs. Drouin*. K. B. Q. 1817.

Held, That a widow, condemned as *commune en biens*, to pay a debt of the community, may claim her dower in preference to the creditors of the community, and without renouncing such community, on the principle that she is only bound for debts to the extent she benefits from such community. 6 L. C. Rep., p. 37, *Delisle vs. Richard*, and *Richard*, Opp. S. C. Quebec; Bowen, Meredith, Badgley, J.

Held, That under the 4th Vict., c. 30, sect. 27, the dower to which children are entitled attaches:

1. To lands, tenements, &c., in the possession of their father at the time of his decease.

2. To those which have been in the possession of the father, and in relation to which the mother has not barred or released her dower, under the 35th section of the act above cited. 11 L. C. Rep., p. 344, *Adams vs. O'Connell*, and *O'Connell es qual.*, Opp. S. C. Quebec; Stuart, J.

Held, 1. That dower in a marriage contract stipulated to be "such as is established by the Laws of Lower Canada," is legal and customary dower; not *douaire préfixé*.

2. That registration of such contract is not necessary, to preserve the rights of the widow and children on real estate subject to such dower.

*Query*, Is registration of "hypothecary rights" which are not evidenced by writing, possible under the Registry Ordinance? 4 Jurist, p. 311, *Sims et al. vs. Evans* and divers, Opp. S. C. Montreal; Monk, J.

Held, 1. That signification of an *original* instead of a *copy* of a writ of summons is sufficient.

2. That three of the plaintiffs having done acts of heirship, their renunciation of their father's succession will be set aside, and they will not be allowed to claim their share in the customary dower created by their father.

3. That the husband's insolvency, at the date of his marriage, does not prevent real estate then held by him from being subject to dower.

4. That the dower of children of a second marriage consists only in the *fourth* part of the immovables acquired during a former *communauté*; although by a *partage* of such *communauté*, made after the second marriage, the husband became proprietor of the whole of the immovables charged with the dower; and that the *partage* has no retroactive effect so as to change the amount of the dower.

5. That the 279th Article of the Custom of Paris is not applicable to the customary dower of the second wife, or of the children of the second marriage.

6. That reunion to the domain, or a voluntary retrocession made by reason of the clauses of the original deed of concession not having been complied with, does not purge the immovable, so reunited to the domain, from the customary dower, with which it was charged.

7. That municipal and other annual taxes, are charges or burdens on the enjoyment and possession of the immovable, and the *tiers détenteur* cannot demand to be reimbursed for these charges during his occupation.

8. That the defendant having denied the plaintiff's right of action, is liable to costs. 5 Jurist, p. 128, *Filion vs. DeBeaujeu*. S. C. Montreal; Berthelot, J.

Held, That an *acquêt*, the price of which was paid out of the community, is nevertheless subject to the *douaire* of the wife who is not held liable for ameliorations done on the immovable, by the community. 2 Rev. de Jur., p. 210, *In re Martigny*, a bankrupt, and *Archambault*, Opp. In Bankruptcy, Montreal, 1846, Vallières de St. Réal presiding in appeal.

Held, That a *douairière* of a signiory *en usufruit*, cannot maintain an action for the *recommandation nominale aux prières*. *Hausseman vs. Panet*. K. B. Q. 1816.

Held, That the children who are proprietors of an estate on which the dower of their mother is charged, cannot maintain an action to recover the possession of that estate, from a *tiers détenteur* who holds under title derived from her, so long as she survives. *Lemieux vs. Dionne*. K. B. Q. 1817.

## ON SOCCAGE LANDS.

Held, 1. That before the Imperial Act, 6 Geo. 4, c. 59, commonly called the Canada Tenures Act, became law in Lower Canada, the customary dower of the Custom of Paris was claimable on lands granted and held in free and common soccage tenure.

2. That by the Imperial Act, the law of England, as to dower, descent, and alienation was introduced into Lower Canada, as an incident of the tenure of lands held in free and common soccage.

3. That the defendant, Sophia Blodget, being married to Joseph Wilcox on the 31st January, 1825, before the above act became law, while the said Joseph Wilcox was proprietor of lands in Lower Canada, held by the tenure of free and common soccage, was entitled to claim, on the lands in question, her customary dower under the Custom of Paris. 8 L. C. Rep., p. 34, *Wilcox et al. vs. Wilcox*. In Appeal; Lafontaine, C. J., Duval, and Caron, J.; Aylwin, J., dissenting.

See same case 2 Jurist, p. 1.

See Appendix to the second volume of the Jurist for opinions of Chief Justice Hay, Sir William Grant, and the opinions of the various Judges in relation to the matters involved in this case.

## PRÉFIX.

Held, That a widow, upon her marriage, may maintain an action against the heirs of her deceased husband for her *douaire préfix*, although she has re-married, but she is bound to give security as provided by the 264th Article of the Custom. *Elci dit Julien vs. Touchette*. K. B. Q. 1821.

Held, That in an hypothecary action for *douaire préfix*, a plea which sets up that the plaintiff is bound to urge his recourse against the last purchaser, and so on up to the first, is bad, and that this exception can only be invoked as to customary dower. 1 Jurist, p. 168, *Benoit vs. Tanguay*. S. C. Montreal; Day, Mondelet, Chabot, J.

Held, That an *ajudicataire* of real property may be allowed to retain in his hands the capital of a *douaire préfix* which is charged thereon, but which is not open, unless the plaintiff, or some of the opposants, are mortgagee creditors for debts contracted by the husband prior to his marriage, in which case, as the *décret* purges the dower, he cannot retain it. *Roberts vs. Lavauz*. K. B. Q. 1816.

Held, That an action by a *cessionnaire* of a *douaire préfix*, where the *douairière* had renounced the succession, after the cession, but before action brought, will be maintained. *Lefebvre vs. Demers*. S. C. Montreal, 1850; Cond. Rep., p. 56.

## WHEN OPEN.

Held, That the wife's dower becomes open by the husband's death only, unless there be a formal stipulation to the contrary, and an express renunciation to the

dispositions of the Custom of Paris. 1 Rev. de Jur., p. 122, *Mercier vs. Blanchet; Bignell vs. Henderson*. Q. B. Quebec, 1844; Stuart, C. J., Rolland, Bowen, J.; Panet, Bédard, J., dissenting.

*Douaire coutumier* is excluded by a clause of ameublissement in a marriage contract. 1 L. C. Rep., p. 25, *Touissant et al. vs. Leblanc*. S. C. Quebec.

DOWER, Registration of. See REGISTRATION, rights of married women.  
DOWER, Registration of. See REGISTRATION.

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### EASEMENT.

See SERVITUDE.

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### ELECTION.

Bribery in. See BILLS AND NOTES, FRAUD.

Of Municipal Officers. See CORPORATION, ELECTION.

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### ENQUETE.

Held, That the Court will not compel a party to proceed to *enquête* during the weekly sessions of the Court. 1 L. C. Rep., p. 475, *Quesnel vs. Donegani*. S. C. Montreal; Day, Smith, Vanfelson, J.

Held, That in the absence of any rule of practice or order confining *enquête* days in term to *ex parte* cases, the Court has no power, under the judicature act, (12 Vict., c. 38) to prevent a party from proceeding with a contested case during *enquête* days in term. 2 L. C. Rep., p. 239, *La Banque du Peuple vs. Roy et al.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, That where an objection had been taken at *enquête* and maintained, and the opposing counsel has proceeded with the examination of the witness, and the deposition has been closed without reserve, a motion to revise the ruling at *enquête* will not be entertained by the Court. 3 L. C. Rep., p. 89, *Wrigley vs. Tucker*. S. C. Montreal; Day, Mondelet, J.

Held, That the Court will not, in a particular case, order that a defendant proceed with his *enquête* from day to day until it be completed, *enquête* being governed by rules applicable to all cases. 4 L. C. Rep., p. 46, *Brown vs. Guy*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

In this case plaintiff declared upon a donation of a certain date, and at the *enquête* proved another of a different date; before the cause was heard he had moved to amend his declaration by inserting the true date by consent, and set down his cause for hearing, and contended that the law would allow him to use the *enquête* taken in a prior suit upon the same cause of action.

Held, That when a cause has been out of court by a *peremption d'instance* if an *enquête* has been taken, it is allowed to subsist, and may be used in a second action, founded upon the same grounds of action, and that this appeared to be reasonable, but that the Court was not aware of any authorities which would justify the reception of an *enquête* in a subsequent cause under other circumstances. *Leclere vs. Roy*. K. B. Q. 1818.

Held, That after *enquête* closed, no witness can be examined except as to new facts. *Latterrière vs. Simon*. K. B. Q. 1821.

Held, That no papers can be produced in evidence after *enquête* closed. If a party means, therefore, to interrogate his opponent on receipts or other papers, he must file them before he moves for leave to examine on *faits et articles*. *Ryan vs. Chaffers*. K. B. Q. 1821.

Held, That a judge in chambers has no power to restrict the evidence to proof of *choses jugées*, set up in a special answer to a plea, when the inscription for *enquête* is general, and there are several issues. 4 L. C. Rep., p. 451, *Brush et al. vs. Wilson et al.*

Held, 1. That a witness about to leave the Province, can, under the 25th Geo. 3, c. 2, sect. 12, be examined before the return of the action.

2. That irregularities, in themselves fatal, are waived, if uncomplained of for a year.

Query? As to revising judgments in vacation, not complained of in the Court below. 10 L. C. Rep., p. 458, *Supple, App., Kennedy*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J.; Mondelet, J., dissenting.

Held, That a defendant is not obliged to proceed with his *enquête* in the absence of certain exhibits of plaintiffs attached to a commission *Rogatoire*, issued but not returned; and is entitled, under any circumstances, to adduce evidence after the return of the commission. 2 Jurist, p. 285, *Foster et al. vs. Chamberlain et al.* S. C. Montreal; Smith, J.

Enquête days in term fixed for the 24th, 25th and 26th days of each month; and the 6th, 7th and 8th of each month for the adduction of evidence and hearing on the merits at the same time. 2 Jurist, p. 287.

Held, That the proper course for a party closing his *enquête* is to call on the opposite party to fix a day for his *enquête*, and in case of no one appearing or fixing a day, to have the *enquête* of the party in default, closed on application to the Court. *Bowker vs. McCorkill*. S. C. Montreal, 1853; Cond. Rep., p. 1. Day, Smith, Mondelet, J.

Held, That a party who has contested an opposition on the ground of insolvency and fraud, may file, at *enquête*, copies of documents in support of such allegations. *Bruneau vs. Moquin*. S. C. Montreal; Cond. Rep., p. 29.

Held, That defendant's motion to discharge plaintiff's inscription for *enquête*, for want of replication to general answers, will be dismissed. *Tate et al. vs. Torrance*. S. C. Montreal, 1851; Cond. Rep., p. 57. Day, Smith, Mondelet, J.

*Contra, Torrance vs. Stephens et al.* S. C. Montreal; Cond. Rep., p. 65. Same judges.

Held, That a motion to set aside plaintiff's *enquête* on the ground that the case was inscribed on the merits at the time of plaintiff's *enquête*, will be dismissed. Same case, Cond. Rep., p. 107.

Held, That *enquête* may be had preliminarily, on an answer setting up interruption of prescription. *Mère vs. Letourneau*. S. C. Montreal; Smith, Vanfelson, Mondelet, J., 1853. Cond. Rep., p. 28.

## COMMISSION ROGATOIRE.

Held, That a commission in the nature of a *commission rogatoire* may be issued to the judges of another district for the purposes of a *compulsoire*. *Hart vs. Duquet*. K. B. Q. 1820.

Held, That if no step has been taken by the adverse party, a *commission rogatoire* may be had after the four days from issue joined. *Paterson vs. Bourne*; K. B. Q. 1810.

Held, That a *commission rogatoire* may issue on motion therefor, without affidavit of any kind. 2 Jurist, p. 77, *Willis et al. vs. Pierce*. S. C. Montreal; Day, J.

Held, That a *commission rogatoire* asked for on the day the case was fixed for evidence and final hearing, without affidavit of any kind cannot be granted. 4 Jurist, p. 295, *Lane et al. vs. Ross et al.*, and *Ross et al.*, Opp. S. C. Montreal; Smith, J.

Held, That a defendant cannot be held to proceed with his *enquête* in the absence of the return of a *commission rogatoire* issued at the instance of plaintiff, 2 L. C. Rep., p. 238, *McFarlane vs. Bresler*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a motion by a defendant, for a *commission rogatoire* to New York will be granted without an affidavit, with the condition added that it be returned within a delay fixed. 6 Jurist, p. 29, *Johnston vs. Whitney*. S. C. Montreal; Berthelot, J.

Commission ordered to issue to receive plaintiff's oath in France, and to be returned, at his diligence, within a delay fixed. *Prévosté No. 37*.

COMMISSION ROGATOIRE. See BILLS, AND NOTES, proof of.

## INSCRIPTION FOR.

Held, That an inscription for proof and hearing on the merits of an exception of prescription and sale of litigious rights, is irregular, it being a partial inscription made without leave of court. 11 L. C. Rep., p. 73, *Lionnais, App.*, *Guyon, dit Lemoine, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

## NOTICE OF.

Held, 1. That a party foreclosed from pleading, is entitled to one juridical day's notice of the inscription for *enquête* under the 12th Viet., c. 38, sect. 25.

2. That a judgment in an action in *réintégrande* which does not describe the property affected by the judgment, will be reversed in appeal, on the ground of vagueness. 8 L. C. Rep., p. 470, *Renaud, App.*, *Gugy, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, The notice for inscription for *enquête* and hearing to be given to a party foreclosed under the 12th Viet., c. 38, sect. 25, must specify the day on which the *enquête* and hearing will take place. 9 L. C. Rep., p. 392, *Smith et al. vs. O'Farrell*. S. C. Québec; Chabot, J.

Held, That the notice of an inscription for *enquête* and hearing on the merits at the same time must be, in all cases, of at least eight days. 5 Jurist, p. 43,

*Shuter vs. Guyon dit Lemoine.* S. C. Montreal; Badgley, J. Contrary held by Berthelot, J.

Held, 1. That an inscription for *enquête* on plea of a defendant to a *saisie arrêt* after judgment for the 5th March, made on the 1st March, does not allow sufficient delay.

2. That notice of such inscription is necessary.

3. That, under the circumstances, such inscription, and all proceedings thereunder, will be set aside with costs. 5 Jurist, p. 128, *Whitney vs. Badeaux* and *Dutusac et al. T. S.* S. C. Montreal; Smith, J.

## RE-OPENING OF.

The plaintiff's attorney moved to be allowed to re-open his *enquête*, on the ground that he had an understanding with the mayor as representing the defendants, that the proceedings in the cause should be suspended for a time, and therefore that he did not attend the *enquête*, which was closed in his absence:

Held, That such arrangement or understanding was not binding on the defendant's attorney, whose management, as *dominus litis*, could not be interfered with. 10 L. C. Rep., p. 19, *O'Connell vs. The Mayor, &c., of Montreal.* S. C. Montreal; Smith, J. Same case, 4 Jurist, p. 56.

Held, In the S. C. That a plaintiff will not be permitted to file new answers to interrogatories *sur faits et articles* on an affidavit made by him, that from the arguments of counsel, and the disturbance and conversation going on in the Court at *enquête* where his examination was taken *viva voce*, he became perplexed and confused; and that the action will be dismissed on the answers as made, no witnesses having been examined.

In Appeal; That the record will be remitted to the Court below, for further proceedings at *enquête*, each party paying his own costs in appeal. 10 L. C. Rep., p. 248, *Moss, App., Douglas et al., Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Mondelet, Badgley, J.

Held, 1. That a party who examines his adverse party as a witness, is bound at the close of the *enquête*, to declare his intention to avail himself or not of such evidence, otherwise he can derive no advantage from the evidence.

2. That where the *articulation* of facts of an opposant concerning the facts of the case, is not answered by the plaintiff contesting, the opposition will be maintained. 12 L. C. Rep., p. 399, *Owens vs. Dubuc, and Campbell, Opp.* S. C. Montreal; Badgley, J. Same case, 6 Jurist, p. 121.

Held, That a plaintiff in an action *en bornage* will be allowed to re-open his *enquête* to examine relations, inasmuch as the defendant, by the coming in force, during his *enquête*, of the statute 22nd Viet., c. 27, sect. 51, had an opportunity of examining his relatives on the issues raised. 6 Jurist, p. 251, *Vannier vs. Falkner.* S. C. Montreal; Badgley, J.

Held, 1. That the contestant, an attorney, having appeared by his attorney *ad litem*, will not be allowed personally to conduct the examination of the opposant as his witness.

2. Nor can he do so, although as a practising barrister, he files an appearance



as counsel at *enquête*. 6 Jurist, p. 295, *Ramsay vs. David*, and *Walker*, Opp. S. C. Montreal; Badgley, J.

Held, That where a plaintiff, pending his *enquête*, has obtained leave to amend his declaration, he will not be allowed to proceed further with his *enquête* until the amendment has been made, and the defendant has had an opportunity of pleading *de novo*. 6 Jurist, p. 301, *Mann et al. vs. Lambe*. S. C. Montreal; Badgley, J.

ENQUÊTE ordered to be taken before the lieut.-gen. of the *Prévosté*. Cons. Sup., No. 70.

## REVISION.

Held, 1. That a judge sitting in term, may revise a ruling of another judge made at *enquête*.

2. That a ruling at *enquête* is illegal, which allows a defendant time to apply to the Court of Appeals from a judgment dismissing his *defense en droit* to the declaration, by granting a suspension of *enquête* for that purpose after notice given of such application. 2 Jurist, p. 134, *Scott et al. vs. Scott et al.* S. C. Montreal; Smith, J. D. See EVIDENCE Commercial Facts.

ENQUÊTE, on exceptions wrongly dismissed below. See 3 L. C. Rep., p. 65.

" Suspension of to allow time for appeal. See APPEAL Interlocutory.

" In Appeal. See APPEAL, *Enquête* in.

" Inscription for hearing without *enquête*. See BILLS AND NOTES, payment of.

ENQUÊTE, Limitation of. See JUDGMENT, *Res Judicata*.

## ENVOI EN POSSESSION.

Held, That the period at which the heirs of an absentee are entitled to an *envoi en possession* must be determined by the legal direction of the court, according to circumstances. *Ex parte Bellet*. K. B. Q. 1817.

Held, That an action *en revendication* cannot be maintained by the presumptive heir to the estate and succession of an absentee, if he be not curator to the estate of such absentee, or entitled to the possession thereof by virtue of an *envoi en possession* or the death of the absentee. *Gauvin vs. Caron*. K. B. Q. 1819.

## ERREUR DE DROIT.

See ACTION, ERROR.

## ERROR.

See BILLS AND NOTES, error in date.

## EVIDENCE.

## ACCOUNT AT BANK.

Held, That the private account of a party in a cause sued as curator, at a banker's, may be proved and shown, where it is established that the money in

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dispute has been lodged at the banker's to the credit of his private account. 6 Jurist, p. 83, *McKenzie vs. Taylor*. S. C. Montreal; Monk, J.

## ACTS OF ENJOYMENT.

Held, That acts of enjoyment can only be used to explain the terms of a grant, supposing such terms to be ambiguous. 3 Rev. de Jur., p. 371, *Chandler*, App., *Attorney General pro Rege.*, Resp. In the Privy Council, 1845.

## ADMISSION.

Held, That the *aveu judiciaire* is indivisible, and that in the case submitted, the special answers of plaintiff contained a denegation of defendant's exceptions. *Holland vs. Wilson et al.* 1 L. C. Rep., p. 60. In Appeal; Stuart, C. J., Panet, Aylwin, J.

Held, That an *aveu* made in a pleading cannot be divided. 2 Jurist, p. 79, *Lejevre vs. De Montigny*. S. C. Montreal; Day, J.

See also EVIDENCE, Parol.

Held, That a written statement furnished by a savings bank to a depositor, of his account in the bank, will be taken as evidence against the bank, where there is no evidence to show error. 4 L. C. Rep., p. 235, *Morris et al. vs. Unwin et al.* S. C. Montreal; Day, Smith, Moudelet, J.

Held, That no admission of facts can be inferred from the contents of an exception to serve as evidence. Such admission must be express. *Brochu vs. Bourgo*. K. B. Q. 1811.

ADMISSION of Agent. See PRINCIPAL AND AGENT.

ADMISSION of former partner. See PARTNERSHIP.

" See INTERROGATORY, *sur faits et articles*.

## AS TO PARTICULAR WORDS.

Held, That witnesses may be called to shew that a particular expression, in a commercial contract, is understood, in the mercantile world, in a sense which differs from its ordinary import. *Scholefield vs. Leblond*. K. B. Q. 1821.

## BEFORE LORD MAYOR OF LONDON.

Held, That evidence taken before the Lord Mayor of London, is admissible in proof of goods sold in London, under the Imperial statute 5th Geo. 2, c. 7. *Savvyer vs. Newton*. K. B. Q. 1820.

Held, That an affidavit before the chief magistrate of a town in Scotland is lawful evidence under the statute 5th Geo. 2, c. 7, if it be in other respects according to that statute. *Denniston vs. Wilson*. K. B. Q. 1821.

## BEYOND PARTICULARS.

Held, That a plaintiff cannot give evidence beyond his bill of particulars, but the defendant must object to such evidence when it is offered at *enquête*. *Clarke vs. Forsyth*. K. B. Q. 1813.

Held, That a bill of particulars which is applicable to any count in the declaration is sufficient, but the plaintiff in his evidence must be strictly confined to that count only (if there is but one) to which his bill of particulars can apply. *Craig vs. James*. K. B. Q. 1817.

## COMMENCEMENT DE PREUVE.

Held, 1. That answers to *faits et articles*, or a refusal to answer, will be considered, as in commercial cases, an equivalent to the memorandum in writing required by the statute of frauds.

2. That a clerical error in a judgment of the Superior Court, by which a defendant was condemned to pay £54 4s., instead of £50 4s. will be corrected in appeal, and the judgment affirmed with costs against the appellant, if, on the other reasons of appeal, the Court is against the pretensions of the appellant. 6 Jurist, p. 183. In Appeal; *Levy, App., Sponza, Resp.* Lafontaine, C. J., Aylwin, Caron, Duval, J.

Judgment below (Morin, J.) confirmed.

Held, In an action of assumpsit for money lent, that the plaintiff may examine a party defendant as to his signature to a note in his (Plaintiff's) favor, although proscribed. 6 Jurist, p. 30. *Bagg et vir. vs. Wurtele*. S. C. Montreal; Badgley, J.

Judgment interlocutory ordering a plaintiff (a merchant) to prove his claim by *pieces authentique et suffisantes*. Prévosté, No. 63.

## COMMERCIAL FACTS.

Held, That hiring river craft is a fact of a commercial nature, within the meaning of the ordinance 25th. Geo. 3, c. 2. *Brehaud et al. vs. Meran*. K. B. Q. 1811.

So are all dealings which in France were cognizable in the consular jurisdiction. *Pozzer vs. Meckeljohn*. K. B. Q. 1809.

Held, That the sale of a waggon and harness by an hotel keeper (cedant of plaintiff) to the defendant, described as *cultivateur et commerçant*, is a fact of a commercial nature, and can be proved by parol evidence. 6 L. C. Rep., p. 475. *Vandal vs. Grenier*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, In an action on written agreement by plaintiffs, bricklayers and masons, against the defendants, contractors in chief on a railroad, the evidence of plaintiff's brother to prove extra work was declared inadmissible at *enquête*, and parol evidence of payment was admitted and plaintiff's action dismissed by another judge. Held, That parol evidence of extra work was admissible, and the ruling at *enquête* set aside and also the final judgment, and the case sent back for the examination of plaintiff's witness, although the ruling at *enquête* had not been submitted for revision to the court below. 7 L. C. Rep., p. 27. *Fahey et al., App., Jackson et al., Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, In an action by contractor for work and materials on a contract for building a house, that the rules of evidence are to be according to the English law. 1 Jurist, p. 17. *McGrath vs. Lloyd*. S. C. Montreal; Day, Smith, Badgley, J.

Held, That in an action of damages for injury done to plaintiff's wharf by a raft striking it, the evidence of the pilot was not admissible for the defendant, he being the party guilty of the alleged negligence, and liable over. *Laurin vs. Pollock et al.* S. C. Montreal; Cond. Rep., p. 43.

Held, That the engagement of a merchant's clerk is a commercial fact, and that the time of the engagement and the salary can be proved by parol evidence. *Perrigo, App., Hibbard, Resp.* S. C. Montreal; Cond. Rep., p. 34.

#### COMPETENCY OF WITNESS.

Held, 1. That an attorney is a competent witness for the party on whose behalf he is conducting a suit. So of a counsel.

2. The objection to an attorney or counsel rests upon his bias and favor towards his client. It goes to his credit, and not to his competency.

3. The practice of attorneys and counsel testifying for clients in suits under their charge reprobated—it is an evil which will work its own cure, in the loss of character of those indulging in it. 3 Rev. de Jur., p. 366, *Little vs. McKeon.* S. C. New York; June, 1848. N. Y. Legal Obs.

Held, That in revendication, the son of the plaintiff is not a competent witness for the plaintiff. 11 L. C. Rep., p. 290. In Appeal; See ACTION REVENDICATION.

Held, In an action of damages for excavating on a lot adjoining plaintiff's house, that the father of plaintiff's daughter-in-law is not a competent witness for plaintiff. 1 L. C. Rep., p. 306, *McPherson vs. Bank of B. N. A.* S. C. Quebec; Duval, J.

Held, That where relations may be examined, as in damages for the birth of an illegitimate child, to prove facts occurring in the interior of the family, yet if any other of the facts in the cause can be established by witnesses who are not relations, and such witnesses are not examined, the proof will be held insufficient. 2 L. C. Rep., p. 192, *Caron vs. Michaud.* S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That a person who is to be paid for services to an incorporated company, out of the shares of the company, which shares have not been delivered to him, is a good witness for the company, in an action against them to enforce a commercial contract, his interest being contingent and not absolute. 4 L. C. Rep., p. 86, *Kennedy vs. The Aylmer Mutual Steam Mill Co.* S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That relations within the prohibited degree, such as sisters and brother-in-law are not *temoins necessaires* admissible to prove seduction in an action *en declaration de paternité.* 4 L. C. Rep., p. 422, *Stewart vs. McEdward.* S. C. Montreal; Day; Mondelet, J.; Vanfelson, dissenting.

Held, In an action against a defendant as having been partner in a firm alleged to have been dissolved and insolvent, that the evidence of the other partner is inadmissible, to prove that the defendant was a member of the firm. 8 L. C. Rep., p. 225, *Chapman vs. Masson.* S. C. Montreal; Smith, J. Same case, 2 Jurist, p. 216.

In Appeal, 1. Judgment below confirmed.

2. That a dormant partner could only, under any circumstances, be held responsible for the debts of the co-partnership, in so far as he had profited by such co-partnership. 9 L. C. Rep., p. 422. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J. Same case, see Jurist, p. 285.

Held, That, as between traders, a clerk who had given a receipt on behalf of his employer is a competent witness to prove the circumstances under which it was given, and that it was given in error, and made applicable to a wrong note. 9 L. C. Rep., p. 339, *Whitney*, App., *Clark*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Caron, J.; Duval, J. dissenting.

See case in Superior Court, 3 Jurist, p. 89.

To prove a *faux*. See INSCRIPTION DE FAUX.

WITNESS FEES, Attorney *ad litem* not liable for. 3 L. C. Rep., p. 109.

Held, 1. That in an action by a servant against his master for wages, the master is incompetent as a witness to prove acts of insolence and negligence on the part of the servant.

2. That the master's oath must be restricted to the engagement and wages paid, or advances of money or value to the servant. 10 L. C. Rep., p. 28, *Stuart*, App., *Sleeth*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Mondelet, Badgley, J.

Held, That under the statute 22nd Vict., c. 57, sect. 51, a co-defendant may be examined as a witness for another co-defendant. 11 L. C. Rep., p. 116, *David vs. McDonald et al.* S. C. Montreal; Berthelot, J.

Same case, 5 Jurist, p. 164.

Held, 1. That a liability of a witness to a party to a suit disqualifies the witness from being examined for such party.

2. That a person who receives money from the defendant before the maturity of the note sued on to pay it, is not a competent witness for the defendant, the maker of the note, to prove that he paid it; for, in the event of a judgment for the plaintiff, he would be liable over to the defendant for the costs of suit, as damages for the non-fulfilment of his undertaking to pay. 2 Jurist, p. 110, *Fraser vs. Bradford*. S. C. Montreal; Smith, Mondelet, Badgley, J.

Held, That in an action by persons, not traders, the evidence of the plaintiff's nephew is inadmissible to prove the sale and delivery of firewood. 3 Jurist, p. 27, *Desbarats vs. Murray*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a stockholder may be a witness for the corporation, if it appears that he has no interest in the event of the suit. 3 Jurist, p. 166, *Moss vs. Carmichael* and *The Montreal Railroad Car Co.*, Opp. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a party to the record cannot be a witness, although not interested. 3 Jurist, p. 179, *Ouimet et al. vs. Sénécal et al.* S. C. Montreal; Mondelet, J. Contrary held in same case. Badgley, J., p. 182.

Held, That a bankrupt, father of the claimant, and who has not obtained his certificate of discharge, cannot be examined as a witness, on contestation of the claim, being interested. 1 Rev. de Jur., p. 335, *Murphy vs. Murphy*, and *Mathewson*, assignee, contesting. In Bankruptcy, Montreal; Feb. 27, 1846.

Held, That in an action by a *Fabrique* for damages, parishioners are compe-

ent witnesses for the plaintiff. *Fabrique de Vaudreuil vs. Pagnuelo*. S. C. Montreal; Cond. Rep., p. 33.

COMPETENCY of maker as witness for indorser. See EVIDENCE Parol.

## DEPOSITION.

Held, That a deposition closed after the rising of the Court, and in the absence of the plaintiff's attorney, will be rejected as irregularly closed. 6 L. C. Rep., p. 478, *McDougall vs. McDougall*. S. C. Montreal; Monk, Pelletier, Berthelot, J.

Held, 1. That marginal notes in a deposition paraphed, but not mentioned at the close of the deposition, do not render such deposition a nullity.

2. But the omission to state whether the witness is related, allied or of kin to either of the parties is fatal. 4 Jurist, p. 126, *Lauzon vs. Stuart*. S. C. Montreal; Badgley, J.

Held, That the omission to state in a deposition that the witness is not interested does not vitiate his deposition. *Larivé vs. Bruneau*. K. B. Q. 1821.

## FORMER DEPOSITION.

Held, That the former deposition of a witness may be placed in his hands to refresh his memory, though taken in a different case. 1 L. C. Rep., p. 16, *City Bank vs. Boswell*. S. C. Quebec; Meredith, J.

## DEPOT.

Held, That parol testimony in an action of *depot* is admissible, but not without a *commencement de preuve par écrit*. *Smith vs. Galeskill*. K. B. Q. 1812.

## EXPERTISE.

Held, That a report of experts will be set aside, it appearing that the defendant was not notified of the day fixed for the *expertise*, and that the experts heard the plaintiff's witnesses, and proceeded *ex parte* against the defendant. 6 L. C. Rep., p. 482, *Waters vs. Verroneau*. S. C. Montreal; Day, Smith, Mondelet, J.

## EXTRA WORK.

Held, That in a contract in writing for the building of a house, the stipulation that no charge for extra work shall be made unless ordered in writing, does not exempt the proprietor from answering on *faits et articles* as to verbal orders given for such work, and that such contract being of a commercial nature, parol evidence is admissible. 6 L. C. Rep., p. 260, *Kennedy, App., Smith, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

## OF FOREIGN LAW.

Held, In an action *en separation de biens*, the parties being married in England, that where there is no evidence of foreign law it will be taken to be the same as ours. Judgment for plaintiff. *Parker vs. Cochrane*. S. C. Montreal; Cond. Rep., p. 53.

## IDENTITY.

Held, In an action for a *prix de vente* it is not necessary to prove by parol evidence the identity of the property, to sustain a plea of payment, provided such

identity sufficiently appears from the deed of sale and receipts. 1 L. C. Rep., p. 106. *Moreau vs. Richer*. S. C. Montreal; Day, Smith, Mondelet, J.

Held. That a registrar's copy of a deed of sale of real estate is not sufficient evidence of such sale, in an action, brought hypothecarily, against the purchaser under such deed. 3 L. C. Rep., p. 97, *Nye, App., vs. Colville et al.*, Resp. In Appeal; Stuart, C. J., Panet, Aylwin, J.; Rolland, dissenting.

#### IMPERFECT NOTE.

Held, That an imperfect note of hand may, in an action by the payee against the maker, be evidence on the money counts. *Arnold vs. Farran*. K. B. Q. 1811.

#### NOTARIAL ACTE.

Held, That a copy of a notarial *acte* before one notary cannot be received in evidence as an *acte authentique*. *Mivelle vs. Roy*. K. B. Q. 1809.

Held, That a copy of a notarial *acte* duly certified is evidence, in Canada, under the law of England, in cases in which the English rules of evidence are applicable. *Moses vs. Henderson*. K. B. Q. 1809.

#### ONUS PROBANDI.

An opposant, resident in Scotland, fyled an opposition claiming a legacy out of the proceeds of a farm belonging to the estate of the testator, and was collocated in the *projet* of distribution. The report of distribution was contested, on the ground that the opposant had died before the testator.

Held, In the S. C. Montreal; That the *onus probandi* lay on the contesting party to prove the alleged death. In Appeal; That it lay on the opposant to establish his existence. 11 L. C. Rep., p. 327, *Bonacina, App., McIntosh, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

See JURY. Non obstante.

" WILL, LEGACY.

" DAMAGES, Falling Beam.

" DEPOT.

" EXECUTION to another District.

On Carriers. See CARRIERS, Negligence.

As to value of goods seized. See CONTRAINTE AGAINST SHERIFF.

See CONTRAINTE AGAINST BAILIFF.

#### PAROL.

The plaintiff, as representing his deceased wife, defendant's daughter, brought an action for the value of the use and occupation of a farm purchased by the plaintiff's wife. The defendant pleaded compensation, alleging that the purchase money of the farm in question, was paid by him in discharge of his daughter, and at her request. The plaintiff fyled a special answer, setting up that the defendant had bought the farm for his daughter, and paid the purchase money, but not to discharge, nor at the request of his daughter, but to carry out his, the defen-

defendant's wish, to give her about as much as had been given to the defendant's other children, in his future succession and in that of his late wife. By the deed, the vendor acknowledged the purchase money as received from the purchaser, the daughter.

Held, 1. That verbal evidence could not be received to prove that the bargain for the farm was made by the defendant, and that he bought and paid for it, and that such evidence, taken under objection, must be rejected.

2. That the special answer could not be divided, or taken as an admission of the payment of the purchase money by the defendant, irrespective of the other allegations in such answer, as to the purchase having been made, and the money paid to equalize his daughter's share. 9 L. C. Rep., p. 233, *Lefebvre dit Villeneuve vs. Thétard dit Montigny*. S. C. Montreal; Day, J.

Held, On exceptions pleaded by a woman, separated as to property from her husband, alleging that the obligation upon which she is sued was given by her, for debts contracted by her husband in violation of the 4th Vict., c. 30, sect. 36, that oral evidence may be given against a notarial deed. 9 L. C. Rep., p. 300, *Mercile, App., vs. Fournier et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Meredith, J.; Duval J., dissenting. See Mr. Justice Meredith's opinion at page 347. *ib.*

Same case, 2 Jurist, p. 205. Confirmed in appeal; 4 Jurist, p. 51.

To control or add to written document. See GOODS, SALE OF, Warranty.

See BILLS AND NOTES, Protest, Affidavit.

Held, 1. That the holder of a note payable to order and under protest, who has received another note from the maker at three months' date, retaining the first note as security for the second, does not lose his recourse against the indorsers of the first note, who have assented to the transaction, notwithstanding the insolvency of the maker of the first note.

2. That under such circumstances, parol evidence may be received to explain a receipt, and the circumstances under which it was given.

3. That the maker of a note impleaded with the indorser, may be a witness for such indorser. 9 L. C. Rep., p. 438, *Woodbury, App., vs. Garth*, Resp. In Appeal; Lafontaine, C. J.; Aylwin, Duval, Caron, J.

Held, That in the case submitted, witnesses present were inadmissible to prove a settlement by parol evidence between the parties, or admissions made by one of them. 10 L. C. Rep., p. 437, *Rowell, App., Newton*, Resp. In Appeal; Lafontaine, C. J., Duval, Mondelet, J.; Aylwin, J., dissenting.

Held, 1. That two creditors, not partners, may sue together for the recovery of their debt.

2. That a contract of an executory nature (to furnish cordwood in the course of the following winter) cannot, under the French jurisprudence, be proved by parol evidence without a commencement of proof *par écrit*. 3 Jurist, p. 52. *Trudeau et al. vs. Menard*. S. C. Montreal; Smith, J.

Held, 1. That the omission of the "y persiste," at the end of a deposition of a witness, is not fatal.

2. That the payment of a promissory note as between parties not traders, cannot be proved by witnesses. 3 Jurist, p. 232, *Carden et al. vs. Finlay et al.* S. C. Montreal; Mondelet, J.



## POWER OF ATTORNEY.

Held, That a petitory action must be dismissed, the notarial deed to plaintiff of the land in question being made under a power of attorney, executed before witnesses in England, and affirmed before the Lord Mayor of London, produced in the case, but not proved. 7 L. C. Rep., p. 481, *Purington vs. Higgins*. S. C. Montreal; Day, Smith, Mondelet, J.

As to what will constitute a power of attorney sufficient for sale of land. See this case, in which it was held *inter alia* that a sale of soeage land by B in the name of a firm, under a power of attorney to his partner, was valid although not signed by the purchasers, and although not executed in presence of witnesses nor under seal. 7 L. C. Rep., p. 139, *Cummings*, App. vs. *Quintal*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, In a petitory action where the plaintiff's title depends on the validity of a power of attorney *sous seign privé* executed in Upper Canada, and attested by a notary public of Upper Canada under his seal of office, with a certificate of the administrator of the government of this province annexed, that the production of such power and certificates is not sufficient proof of its execution. 2 Jurist, p. 109, *Nye vs. McDonald*. S. C. Montreal; Day, Smith, Mondelet, J.

POWER OF ATTORNEY, Ratification of. See CORPORATION, Mortmain, Bequest.

## QUALITY.

Held, That in *ex parte* cases, the quality and capacity in which the plaintiff sues, and in which the defendant is sued, are admitted by the default of the latter, and evidence of the debt only is required. *Berthelot vs. Robitaille*. K. B. Q. 1813.

Held, That a defendant who does not appear, admits, by his default, the character in which he is sued. *Auld vs. Milne*. K. B. Q. 1819.

Held, That a woman sued as the widow of A B, admits her marriage and the death of her husband if she does not plead, by exception, to the quality and capacity in which she is sued. *Gesseron vs. Canac*. K. B. Q. 1820.

## RECEIPTS.

Held, That in a commercial matter, witnesses may be examined to explain a receipt which is ambiguous in its terms. 1 Jurist, p. 43, *Garth vs. Woodbury et al.* S. C. Montreal; Day, Smith, Mondelet, J.

See also 3 Jurist, p. 89; 9 L. C. Rep., p. 339, *Whitney vs. Clark*.

Held, That a receipt in full, given by a clerk only empowered to give receipts for money which he receives, is not conclusive evidence. *Munroe et al. vs. Higgins*. K. B. Q. 1810.

Held, That in an action for moneys paid, receipts dated after the service of the summons *ad respondendum* are not evidence of the *demande*. *Robichaud vs. Fraser*. K. B. Q. 1817.

Held, That it is the business of the creditor, when his debtor pays in coin, to examine and establish the value of what he receives, and he cannot, after his



receipt, dispute the *quantum* received; the receipt is evidence against him. *Rivers vs. Whitney*. K. B. Q. 1816.

## OF RECEIPT WITH A CROSS.

Held, That a receipt, signed with a cross, in presence of witnesses, for a sum exceeding one hundred livres, is valid. 12 L. C. Rep., p. 117, *Neven et ux.*, App., *DeBleury*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Bruneau, J.

Same case 6 Jurist. p. 151.

## RECORD.

Held, That the records of the court are higher evidence than a deed of sale by its officer, the sheriff. *Hôtel Dieu vs. Roxburgh*. K. B. Q. 1811.

Held, That if the record says that the parties were heard, it proves that they were present. *Fillieau vs. Garlet*. K. B. Q. 1817.

Held, That a copy of an original paper deposited of record in the archives of the King's Bench, certified by the prothonotary, is legal evidence of its contents. *Tremblay vs. Cole et al.* K. B. Q. 1820.

## REGISTRAR'S COPY.

Held, That a copy taken from the enregistered copy of a donation is not evidence. *Beaudet vs. Beaudet*. K. B. Q. 1810.

## SUBSCRIBING WITNESS.

Held, That evidence of the handwriting of a subscribing witness, who is proved to be without the jurisdiction of the court, is sufficient if there be also evidence of the handwriting of the parties. *Cuvillier vs. Fraser et al.* K. B. Q. 1810.

Held, That two witnesses, where the question relates to two independent facts, are required to each fact, but when the question relates to one general consequence, which is to be derived from several facts, one witness to each separate fact is sufficient. *Robichaud vs. Nadeau*. K. B. Q. 1817.

## TAX OF WITNESS.

Held, That it is the right of a witness to be taxed in the court in which he is examined as a witness; and he cannot bring an action on a *quantum meruit* for attendance and loss of time as such witness. 8 L. C. Rep., p. 236, *Gorrie vs. The Mayor, &c., of Montreal*. S. C. Montreal; Smith, J.

Held, That a witness cannot sue for the amount of his taxation, but must proceed by execution against the party who summoned him, under the 12th Viet., c. 5, sect. 9. 9 L. C. Rep., p. 6, *Veilleux vs. Ryan*. C. C. Quebec; Chabot, J.

Held, That the taxation of a witness, whose taxation appears on his deposition, cannot subsequently be revised by the Court. 1 Jurist, p. 251, *The Grand Trunk vs. Webster*. S. C. Montreal; Day, Smith, Mondelet, J.

## TEMOIN NECESSAIRE.

Held, That a cousin-german may be examined as a witness to prove acts of heirship, which ordinarily takes place in the interior of families, and in presence

of relations, who, to a certain extent, are necessary witnesses. 4 Jurist, p. 36, *Filion et al. vs. Binette*. S. C. Montreal; Monk, J.

## VARIANCE.

Held, That an action on an obligation payable à demande (if the defendant makes default) is not supported by evidence of an obligation payable à terme. *Laroux vs. Winter*. K. B. Q. 1813.

## VERIFICATION D'ECRITURES.

Held, That a verification d'ecritures by witnesses cannot be allowed, until all other modes of proof have been tried, and have failed. *Fournel vs. Duvert*. K. B. Q. 1810.

## WITNESS.

Held, That if a witness eats and drinks at the expense of the party by whom he is summoned, it is not an objection to his competency, but to his credit. *Bacon vs. Caron*. K. B. Q. 1817.

So with the objection that witness is a servant. *Casgrain vs. Peltier*. K. B. Q. 1821.

Held, That if the deposition of a witness does not state that he is, or is not, of kin to either of the parties, it may be set aside. *Slack vs. King*. K. B. Q. 1821.

Held, 1. That the defendant cannot be compelled to appear before the return of a writ of summons, to show cause why certain witnesses, about to leave the Province, should not be examined.

2. That depositions taken in such case, before the appearance of the defendant, are illegal, and the Court below should have determined on the validity of the evidence, so as to afford the party an opportunity of substituting legal evidence in lieu thereof.

3. That, under such circumstances, the party whose evidence has been rejected should be allowed to re-open his *enquête*, and, inasmuch as the adverse party did not move *in limine* to reject such evidence, each party shall pay his own costs. 2 L. C. Rep., p. 99, *Malone vs. Tate*. S. C. Quebec. In Appeal; Rolland, Panet, Aylwin, J.

Held, That if a witness is beyond the jurisdiction of the Court, his deposition, taken in a former suit between the same parties, the matters in issue being the same, may be produced. 3 L. C. Rep., p. 58, *Roe vs. Jones*. S. C. Quebec; Duval, Meredith, J.

Held, That a witness cannot be sued in damages for words used in the course of his evidence in court. 3 L. C. Rep., p. 87, *Roche vs. Fraser*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That motions for leave to examine witnesses about to leave the Province, are exempted from the operation of the 11th rule of practice (that no fractions of a day, nor any Sunday or holiday shall be reckoned) and that notice of such motion, served on a Saturday, is sufficient for the presentation of motion on the Monday. 10 L. C. Rep., p. 383, *Byrne et al. vs. Fitzsimmons, and Fisher*, Opp. S. C. Quebec; Taschereau, J.

Held, That there is nothing illegal in examining the same witness twice on behalf of the same party, and that, in this case, the second deposition would not be rejected. 2 Jurist, p. 93, *St. Denis vs. Grenier et vir.* S. C. Montreal.

Held, That a witness cannot be examined a second time, in the same case, by the party producing him, unless with leave of the court, on special application. 4 Jurist, p. 238, *Joseph vs. Morrow et al.* S. C. Montreal; Badgley, J.

Held, That a party to a suit, who has answered interrogatories *sur faits et articles*, may be examined as an ordinary witness. 5 Jurist, p. 223, *Bailey vs. McKenzie et al.* S. C. Montreal; Monk, J.

WITNESS, Contrainte against. See CONTRAINTE against Witness.

“ about to leave. See ENQUÊTE.

“ number of. See PENALTY, Penal Statute.

EVIDENCE of Partage. See ACTION PETITOIRE, Tradition.

“ Bankruptcy. See BANKRUPT, Evidence.

“ Bills and Notes. See BILLS AND NOTES, Proof of.

“ Slander. See DAMAGES, SLANDER.

“ value of lost goods. See OATH; also CARRIERS, proof of value.

“ in Qui Tam. actions. See PENAL STATUTE.

“ of Publication of Newspaper. See NEWSPAPER.

“ of Notes and Protest of Bills. See BILLS AND NOTES.

“ to vary written contract. See BILLS AND NOTES, Protest, Affidavit.

“ of payment of note. See BILLS AND NOTES, to get back note.

“ as to value of missing goods. See CARRIER—OATH.

“ of Remise. See DAMAGES, joint and several:

“ against third party. See FRAUD, Insolvency.

“ Corroborative. See DAMAGES, Slander.

“ how governed. See LEX LOCI.

“ of relations. See ENQUÊTE, reopening.

“ See CRIMINAL LAW, Evidence.

“ Admission in Pleading. See DAMAGES, Arrest, Attachment.

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EVOCATION.

FEE OF OFFICE.

Held, That the words “fee of office,” do not apply to cases of costs of action alleged to have been taken too high, so as to give ground for evocation. 6 L. C. Rep., p. 474, *Derome vs. Lafond.* S. C. Montreal; Day, Vanfelson, Mondelot, J.

RENTE VIAGÈRE.

Evocation from Commissioners' Court allowed in an action for *rente viagère*. See DONATION.

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EXCEPTION A LA FORME.

See PLEADING.

## EXCHANGE.

Fraud in. See FRAUD, EXCHANGE.

## EXECUTION.

## EXEMPTION FROM SEIZURE.

Held, That books of account, *titres de creance*, and papers of the defendant, in his possession, are not liable to attachment, *sont non saisissables*. 5 L. C. Rep., p. 299, *Fraser vs. Loiseleur*. S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That moneys payable by the revenue inspector, for services rendered by an informer, under the 14th and 15th Vict., c. 100, are not liable to seizure in the inspector's hands. 8 L. C. Rep., p. 287, *Leclere vs. Caron and Lenoine*, T. S. C. C. Quebec; Chabot, J.

Held, That the sword of a military officer is exempt from seizure as being part of his necessary military equipments. 8 L. C. Rep., p. 511, *Wade vs. Hussey* and *Hussey*, Opp. C. C. Quebec; Chabot, J.

## FORMALITIES OF.

Held, That the old formalities of the *saisie execution* against immovables are no longer required. *Volante vs. Drapeau*. K. B. Q. 1818.

Held, That the formalities of the *commandement* required by the code civil upon a *saisie* of movables, are not now required upon the execution of a *fi fa de bonis*. *Robinson vs. Williams et al.* K. B. Q. 1818.

Held, That an opposition à fin d'annuller, founded on the want of a *proces verbal* of seizure of immovables cannot be maintained. *Pozet vs. L'Esperance*. K. B. Q. 1812.

Held, That if an opposant is ruled to fyle his *moyens* in three days, and does not fyle them, his opposition will be dismissed on motion. *Henderson vs. Galarneau*. K. B. Q. 1813. *Dallow vs. Blackstone*. K. B. Q. 1819.

Held, on opposition, That the absence of a date in a *proces verbal* of seizure of real estate is fatal. *Russette vs. Dalrymple and Dalrymple*, Opp. S. C. Montreal; Cond. Rep., p. 54.

The adjudication of a floating dock was held illegal and voidable, the party upon whom it was seized not having been previously requested to pay, and a copy of the *saisie* not being left with the party *saisi*, and the bailiff who gave the notice of sale not being authorized to do so by the sheriff, the purchaser being the agent of the *saisi*, and the place of sale not being indicated. The action was *en revendication* by the assignees of a bankrupt. The defendant, the *adjudicataire*, set up title under a sheriff's sale; the plaintiffs, by their special answer, alleged fraud and the want of the formalities referred to. The sheriff's sale was illegal and voidable, and was set aside in the court below. Stuart, Bowen, Panet, J. In Appeal; Rolland, Chabot and Angers, J. held the title absolutely null and void, by reason of the informalties in the seizure, the insufficient notice, the mode and manner of the sale, and the unjustifiable conduct of the *adjudicataire*, defendant. 1 L. C. Rep., p. 71, *Longman vs. Ross et al.*

Held, That shares in the stock of an unincorporated company cannot be taken in execution in the manner provided by the 12th Vict., c. 34, for the seizure and sale of shares in incorporated companies. 1 L. C. Rep., p. 92, *Bruneau vs. Fosbrooke*. S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That in the execution of a writ of *saisie revendication* it is not necessary that a bailiff should be accompanied by a *recors*. 1 Jurist, p. 81, *Desjardins vs. Dubois*. S. C. Montreal; Day, Mondelet, Chabot, J.

Held, As above, in case of a *saisie execution*. 1 Jurist, p. 188, *Guilfoye vs. Tate et al.* and *Tate*, Opp. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That an execution issued on a judgment against several defendants jointly, directed against one of them for the whole debt is illegal, and will be set aside on opposition, without even a tender of the amount justly due by such defendant. 3 Jurist, p. 118, *McBean vs. DeBartch et al.* and *Drummond*, Opp. S. C. Montreal; Badgley, J.

Held, That where two executions issue at the suit of different plaintiffs against the same defendant, it is irregular to unite both seizures in one *proces verbal*. 3 Jurist, p. 119, *Sanderson vs. Roy dit Lepensée* and Opp. S. C. Montreal; Smith, J.

So held in Appeal, *Pulliser*, Opp., vs. *Roy dit Lepensée*, Resp. 4 Jurist, p. 208. Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That on a *venditioni exponas* as to movables, a *proces verbal de recollement* is not necessary, and is useless under the ordinance of 1785, sect. 32. Opposition dismissed. 1 L. C. Rep., p. 279, *Lesperunce vs. Langevin*. S. C., Montreal; Smith, Vanfelson, Mondelet, J.; Mondelet, J., dissenting.

#### LEVY.—POUNDAGE.

Held, that moneys received by the sheriff from the defendant, after seizure of effects, but without sale thereof, are not liable to distribution amongst defendant's creditors, who, by their oppositions alleged defendant's *deconfiture*. 1 Jurist, p. 85, *Ryan et al. vs. Woods et al.* S. C. Montreal; Smith, Mondelet, Chabot, J.

On motion against the sheriff, *Semble*, That under the Consolidated Statutes of Lower Canada, c. 95, the sheriff is entitled to poundage of 2½ per cent. on the judicial sale of property in all cases, whether he receives the money, or whether a bond is given as provided by law.

Held, That the court could make no order against the sheriff on a rule, and that if he takes more than the law allows him, an action to recover the sum overpaid is the proper remedy. Motion dismissed. 12 L. C. Rep., p. 189, *Blake et al. vs. Panet et al.* S. C. Quebec; Stuart, J.

#### SAISIE ARRÊT.

The firm of S. & W. H., in Lower Canada, being indebted to J. W., transferred 75 promissory notes to a factor on his account. At the time of the transfer, S. & W. H. were *en deconfiture*; a *saisie arrêt*, having subsequently issued by other of creditors of S. & W. H., the 75 notes in the hands of the debtor were attached.

Held, 1. In the Privy Council, That the transfer having taken place before the execution of the *saisie arrêt* was valid by the French law in force in Lower Canada.

2. A commission for the examination of witnesses in Canada to prove such *decomfiture* refused.

*Seemle*, By the old French law prevailing in Lower Canada, all *ordonnances* not registered are void. 3 Rev. de Jur., p. 427, *Hutchinson, App., Gillespie et al.*, Resp.

Held, That a seizure under a writ of *feri facias* of movables, deposited with and in possession of plaintiff is bad, that the proceeding should have been by *saisie arrêt*. 1 L. C. Rep., p. 114, *Morris vs. Antrobus and Antrobus*, Opp. S. C. Montreal; Day, Smith, Vanfelson, J.

Held, That a *tiers saisi* may be permitted, on cause shown, to make his declaration, after execution issued against him by default. 1 L. C. Rep., p. 140, *Andrews vs. Robertson*. S. C. Quebec; Bowen, C. J., Meredith, J.

See 3 L. C. Rep., p. 80, *Roy vs. Scott and Lesmesurier et al.*, T. S. S. C. Montreal; Day, Smith, Vanfelson, J.

Held, That the signification of a *saisie arrêt* on defendant by a creditor of plaintiff will not stay proceedings on execution against defendant, but the defendant, to stay proceedings, must tender or deposit the amount of the judgment against him in debt, interest and costs. 4 L. C. Rep., p. 142. *Duvernay vs. Dessaulles*. In Appeal; Rolland, Panet, Aylwin, J.

Held, That where a defendant has left the Province after judgment, and has no domicile therein, it is necessary that the writ of *saisie arrêt* after judgment be served on him. 10 L. C. Rep., p. 21, *Hogan vs. Geron and The Bank of Montreal*, T. S. S. C. Montreal; Berthelot, J.

Held, On demurrer to an *exception à la forme* which set up the irregularity of the affidavit, and denied the allegations contained in it, as to the concealing or doing away with the property to defraud, and affirmed that defendants had always acted in a legal and open manner in their business.

Held, 1. That the defendants might legally attack the validity of the *exploit de saisie arrêt*, by an exception to the form.

2. That the court below should have ordered proof before deciding on the answer in law.

3. That not having done so, the judgment below maintaining the answer in law, will be reversed, and the parties ordered to an *enquête*. 12 L. C. Rep., p. 265, *Leslie et al.*, App., *Molsons Bank*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, As in No. 1 above, and exception to the form maintained, and *saisie arrêt* set aside. Judgment for plaintiff for debt. *Biroleau dit Lafleur vs. LeBel*. C. C. St. Scholastique; Badgley, J.

Held, That a *saisie arrêt* before judgment for the recovery of a debt, part of which, at the institution of the action was not due, but which became due during the pending of the action, will be maintained under the circumstances of this case, and the judgment of the court below, condemning the defendant to pay the whole debt maintained. 1 Jurist, p. 104, *Prefontaine*, App., *Prevost et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

The ruling as given in the Jurist was declared inaccurate by Mr. Justice Aylwin at the hearing of a subsequent cause.

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Held, That a *saisie arrêt*, after judgment, will not be dismissed *on motion*, for being returned into court a day too late. 3 Jurist, p. 97, *Molson vs. Burroughs* and *The Bank of Montreal*, T. S. S. C. Montreal; Mondelet, J.

Held, That a writ of *saisie arrêt* after judgment, cannot be issued and served upon a *tiers saisi* resident in Upper Canada. 5 Jurist, p. 329, *McKenzie et al. vs. Douglas*, and *Bonn et al.*, T. S. S. C. Montreal; Smith, J.

Held, That a writ of *saisie arrêt* after judgment, must be served upon the defendant within the same delay as an ordinary writ of summons. 6 Jurist, p. 45, *McLaren et al. vs. Hutcheson and Fraser*, T. S. C. C. Montreal; Berthelot, J.

Made without title or *ordonnance de justice* set aside. *Prévosté*, No. 95.

Not to be made on *billets ou promesses sous seign privé*. Cons. Sup., No. 25.

*Saisie arrêt* declared valid, for the revenues present and future, of a seignior. Cons. Sup., No. 30.

## TIERS SAISI.

Held, That a *tiers saisi*, condemned by default, may be relieved from the condemnation at the next following term. *Craig vs. Cannon and Hudson*, T. S. C. B. Q. 1846.

Held, That the declaration of a *tiers saisi* is conclusive until it is contested and disproved. *Smith vs. Bourne*. K. B. Q. 1809. So in *Robertson vs. Refenstein*. K. B. Q. 1821.

Held, That an answer by a *tiers saisi*, which would be no answer to a *demande* by his creditor, is no answer to the *saississant*. *Brehaut vs. Loupret et al.* K. B. Q. 1818.

Held, That a *tiers saisi* who refuses to deliver up articles seized in his possession is guilty of contempt. *Ferguson vs. Millar and Hooker*, T. S. C. B. Q. 1813.

Held, That the amount of a note payable to order cannot be attached in the hands of the maker as *tiers saisi*. *Shore vs. Hoyt et al.* K. B. Q. 1813.

Held, That unless a *tiers saisi* be liable as to his creditors to a *contrainte par corps*, no application on the part of the *saississant* for such *contrainte* could be made in France; a motion for a *ca. sa.* on a notarial obligation was therefore rejected. *Perrault vs. Leblond and Quinn*, T. S. C. B. Q. 1821.

Held, That in every case of *saisie arrêt*, the defendant must be summoned, otherwise no proceedings can be had even against a *tiers saisi* by default. *Prior vs. Dolamar and Heath*, T. S. C. B. Q. 1816.

Held, That proceedings against a *tiers saisi* will not be suspended by an appeal by defendant, if the appeal was not allowed for want of security. *Perrault vs. Borgia*. K. B. Q. 1816.

Held, That the declaration of a *tiers saisi* must be positive, "I do not owe," or "I shall owe at a time certain," not "I may owe;" therefore when it was sworn that the debt depended upon a contingency, the *tiers saisi* was discharged. *Arnold vs. Uppington*. K. B. Q. 1821.

Held, That if the sheriff seizes property in the hands of A, under a writ which authorizes him to seize property in the hands of B only, the seizure is null. *Lee vs. Taylor*. K. B. Q. 1811.



Held, That an opposition à fin d'annuler cannot (generally speaking) be maintained by a *tiers saisi*. *Martel vs. Constantin*. K. B. Q. 1821.

Held, That under the 94th rule of practice, a contestation by plaintiff of a declaration of a *tiers saisi*, on an attachment after judgment, will be rejected, if not made within the eight days limited by the rule. 6 L. C. Rep., p. 71. S. C. Montreal; Day, Smitu, Mondelet, J.

So in *Warner vs. Blanchard*. 2 Jurist, p. 73. S. C. Montreal; Smith, J. See contra, note, p. 72, *Dubé vs. Dubé*.—*Ib.*

Held, 1. That, in contesting the declaration of a *tiers saisi*, allegations that the *tiers saisi* received from his debtor goods for sale on commission, and for safe keeping and custody until public sale, according to the usage and custom of trade and of merchants of a particular place, and that by such usage and custom the *tiers saisi* was bound to insure the goods, are sufficient, if proved, to render the *tiers saisi* liable to the contesting party, in case of loss by fire without such insurance.

2. So also in case an agreement is alleged between the debtor as consignor and the *tiers saisi* as consignee, that such goods were to be insured. 6 L. C. Rep., p. 89, *Elliot et al.*, App., vs. *Ryan et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron J. Same case. S. C. Montreal; Cond. Rep., p. 69.

Held, That where a defendant has left the province after action brought, and has no domicile therein, it is unnecessary to serve him with a writ of *saisie arrêt* afterwards issued, the writ being a proceeding in the nature of an execution. 6 L. C. Rep., p. 148, *Mettayer et al.* vs. *McGarvey* and *Mettayer et al.* T. S. S. C. Montreal; Day, Smith, Mondelet, J.

A *tiers saisi* made a declaration to the effect that certain moneys collected under an assignment from one of the defendants, were placed in his hands for distribution among the creditors rateably, who should grant such defendant a discharge, and that the respondents refused to accept their proportion on these terms, was condemned to pay over, to the plaintiffs, the balance mentioned in his declaration, without notice of inscription, or contestation of his declaration.

In Appeal, Held, That such judgment was properly rendered, there being no evidence of the insolvency of the assignor, or of the existence of other creditors, and no application by the *tiers saisi* to have the moneys paid into court. *McFarlane*, App., *Roy et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That in the case submitted, the respondents were in possession of the effects seized by the appellant, as belonging to the defendant, and that therefore the seizure by *saisie arrêt* issued in the cause, was null and void. 8 L. C. Rep., p. 340. *Tremblay*, App., and *Noad et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That a *tiers saisi*, with whom the defendant had deposited notes in his (defendant's) favor, will be ordered to deliver the notes into the hands of the prothonotary of the court. 11 L. C. Rep., p. 284, *McKay et al.* vs. *Demers* and *Fauteux*, T. S. S. C. Montreal; Badgley, J.

Held, 1. That a contestation by plaintiff of the declaration of three *tiers saisi*, the three declarations being one and the same, may be made by one contestation.

2. That *saisi*, who answer the jointly and jointly and

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*tiers saisi* at *Semble*, p. 56, *Brun* Caron, J.

Held, TH *saisi*, on th amount adr contestation p. 299, *Con* thelot, J.

Held, 1.



2. That a *saisie arrêt* is a mode of citing parties to appear; and that a *tiers saisi*, whose declaration is contested, becomes a defendant in the cause, bound to answer the contestation of his declaration, and liable to be condemned alone, or jointly and severally with others, according as the debt is due by him solely, or jointly and severally with others.

3. That, in the case submitted, the allegation of acts of dol and fraud common to the three *tiers saisis* and to the defendant, committed by concert and collusion between them, and carried out to the prejudice of the plaintiff, is sufficient, if proved, to warrant a joint and several condemnation against them. 7 L. C. Rep., p. 318, *McFarlane*, App., *Whiteford*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Same case, 1 Jurist, p. 49; In S. C.; see 3 Jurist, p. 163.

Held, That where the declaration of a *tiers saisi* refers to documentary evidence, he may be required to produce and file copies in support of his declaration. 2 Jurist, p. 167, *Forsyth vs. The Canada Baptist Missionary Society and Leeming et al.*, T. S. S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That a bank is not responsible on a contestation of its declaration as a *tiers saisi* for a sum of money received from government, by its cashier at Toronto, in his capacity of attorney, and which was by him transmitted through his bank at Toronto to the branch at Montreal, by a draft made in favor of the firm of which he was attorney, which was paid in good faith at Montreal to one of the partners, although such payment was made after the death of one of the partners.

2. That where a bank has paid away money in good faith, it cannot be held responsible by contestation of its declaration as *tiers saisi*, but must be sued by direct action.

*Seemle*, That a bank cannot be an attorney. 9 L. C. Rep., p. 257, *Lynch vs. McLeman and Bank of Upper Canada*, T. S. S. C. Montreal; Smith, J.

Same case 3 Jurist, p. 84.

Held, That in case of a *saisie arrêt* after judgment, it is not necessary to signify the writ upon a defendant who is absent from Lower Canada. 2 Jurist, p. 80, *Jones vs. Saumur and Leroux*, T. S. S. C. Montreal; Day, Smith, J.; Mondelet, J., dissenting.

Held, That by the 98th rule of practice, a contestation of the declaration of a *tiers saisi* after judgment, must be filed within the eight days.

*Seemle*, That with leave of court, it may be filed after the delay. 3 Jurist, p. 56, *Bruneau vs. Charlebois*. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That a defendant has no interest in contesting the declaration of a *tiers saisi*, on the ground that the goods of the *tiers saisi* are under seizure for the amount admitted by him in his declaration as due to defendant, and that such contestation will be dismissed, on a demurrer filed by the *tiers saisi*. 4 Jurist, p. 299, *Constable vs. Gilbert and Simpson et al.*, T. S. S. C. Montreal; Berthelot, J.

Held, 1. That a voluntary assignment by an insolvent debtor, with the sanc-

tion of all his creditors but one, which contains a clause that the debtor is to have a full discharge, is inoperative against such dissenting creditor.

2. That such dissenting creditor may attach by *saisie arrêt* the debtor's estate as well in the hands of the assignees, as in the hands of a *vendee* to whom they have sold the whole estate.

3. That such *vendee* is accountable to the dissenting creditor, notwithstanding the assignees have acknowledged payment in full of the price stipulated, and that he and the assignees must make a declaration stating the goods and moneys received.

4. That the declarations in such deeds make proof against the parties thereto, but not against the dissenting creditor. 5 Jurist, p. 106, *McFarlane et al.* App. vs. *McKenzie et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Mondelet, Bruneau, J.

Held, That, in the Circuit Court, a contestation of the declaration of a *tiers saisi* may be made after the lapse of the eight days from the time of making such declaration. 5 Jurist, p. 284, *Lovell vs. Fontaine and Arnton*, T. S. C. Montreal; Monk, J.

Held, That the contestation of a declaration of a *tiers saisi* need not be accompanied by an affidavit. 2 Rev. de Jur., p. 436, *McKenzie et al.*, App. *Nersyth et al.*, Resp. In Appeal; 1840.

Held, That a *tiers saisi*, with whom the defendant had deposited funds or debentures of certain municipalities, will be ordered to deposit the same with the prothonotary of the court. 6 Jurist, p. 301, *Ferry vs. Milne and Ontario Bank*, T. S. S. C. Montreal; Badgley, J.

*Tiers saisi* discharged for want of signification to the defendant of the *saisie arrêt*. Cons. Sup., No. 28.

*Tiers saisi* relieved from a condemnation given by default. Cons. Sup., No. 57.

*Tiers saisi* condemned for refusing to take the oath. Prévosté, No. 26, No. 129.

*Tiers saisi* ordered to keep the amount of a note to bearer, in his hands. Cons. Sup., No. 57.

#### TO ANOTHER DISTRICT.

Held, That under the 40th section of the Consolidated Statutes of Lower Canada, c. 83, a defendant, opposant, is bound to allege and prove that he has property in the district wherein the judgment was rendered, in order to suspend the execution of the writ in another district. 12 L. C. Rep., p. 403. *Rose vs. Coutlee*. S. C. Montreal; Badgley, J.

#### WRIT OF POSSESSION.

Held, That a writ of possession will not be granted to an *adjudicataire* of the undivided half of an immovable property, it appearing that the property is indivisible, and the whole in the possession of the proprietor of the other undivided half, the remedy in such case being by *licitation*. 12 L. C. Rep., p. 102, *McBain vs. Hull et al.* and *Boswell et al.*, *adjudicataires*. S. C. Quebec; Stuart, J.

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“ “ several defendants stayed by an appeal by one of them.

“ “ See **APPEAL**, Stay of execution.

“ “ goods and lands. See **OPPOSITION**.

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**EXECUTORS OF WILL.**

See **WILL**.

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**EXEMPTION FROM SEIZURE.**

See **EXECUTION**, Exemption from Seizure.

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**EXHIBITS.**

Costs of, allowed in the taxable costs. See **COSTS**, Taxation of.

See **PLEADING**, Exhibits.

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**EXPERT.**

**ACCOUNTANT.**

In the report of an accountant, the Superior Court condemned the defendant to pay £46 2s. the amount demanded by the action with costs, including the costs of the accountant; the judgment was reformed in appeal and reduced to £36 10s. 5d., but maintained as to the costs awarded by the judgment below, but without costs of appeal, and

Held, 1. That the reference to an accountant was not sanctioned under the 20th Vict. c. 44, sect. 92, the case being brought on a bill of particulars for board furnished and cash advanced, and not involving the settlement of accounts.

2. That the report was irregular, and should have been rejected, and that under the section referred to, reports of accountants must be acted upon, and homologated in the same way as reports of *experts*. 10 L. C. Rep., p. 317, *Elliott, es qualité*, App., *Howard*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

**ACTION BY.**

Held, That an *expert*, appointed on the suggestion of one of the parties to a suit, has a right of action for his services against both, jointly and severally. 10 L. C. Rep., p. 189, *Wallace vs. Brown et al.* S. C. Quebec; Stuart, J.

Held, In Appeal, That an *expert* appointed by the court, at the suggestion of one of the parties, can only look to such party for payment of his services as *expert*. 11 L. C. Rep., p. 182, *Brown*, App., *Wallace*, Resp. Aylwin, Duval, Mondelet, J.; Lafontaine, C. J., and Meredith, J., dissenting.

Same case, 5 Jurist, p. 60.

**BUILDER'S CLAIM.**

Held, 1. That on a distribution of moneys the *expertise* made by the architect and builder may be attacked by the *baillieur de fonds*, who may obtain a contradictory *expertise*, if the two privileges come into conflict.

2. That the valuation ought to be made with regard to the value of the buildings and lot at the date of the *décret*, and not at the date of the enregistrement by the builder; and that the *bailleur de fonds* is entitled to the whole value of the land at the date of the *décret*, and not to a proportional part only.

3. That in case the creditor (builder) has collateral security, he can only be collocated conditionally, and until it be ascertained whether he can realize his debt, and other less privileged or posterior creditors will be admitted to take the moneys on giving security that they will restore them to the creditor in case he fails in recovering his collateral security. 5 Jurist, p. 152, *Doutre vs. Green*, and *Elvidge, Opp.* S. C. Montreal; Monk, J.

## IN INSURANCE.

Held, 1. That the insured can insist strictly upon the clause in the policy, that the works be seen and examined by *experts*, and that if this is not done even for inconsiderable works, he is not bound to receive his house in that state, and can sue the insurer to compel the surrender of his house in the state in which it ought to be, and after compliance with the conditions as to an *expertise*.

2. That the proprietor is not deprived of his right to such *expertise* by suggestions made to the builder as to the mode of reconstruction, or as to partitions in the house. 11 L. C. Rep., p. 394, *Alleyn vs. The Québec Assurance Company*. S. C. Quebec; Taschereau, J.

## NOTICE TO PARTIES.

Held, That parties must be present, or duly notified, when *experts* proceed to operate, even if the rule does not expressly state that they must be notified; and that a report which does not state their presence, or that they were notified to attend, is null. 5 Jurist, p. 336, *Lamarche vs. Johnson*, and *Johnson en gar vs. Masson*. S. C. Beauharnois; Polette, J.

## REPORT OF.

Held, That *experts* cannot detain their report till their fees are paid, but they may move that a sum be paid into court to secure their fees and expenses, before they begin to operate. *Hoyt vs. Todd*. K. B. Q. 1809.

Held, That a report of *experts* cannot be amended on motion of either party, but either party may move for a new visit by the same *experts*, or for new *experts* and a new report. *Dumontier vs. Couture*. K. B. Q. 1812.

Held, That if *experts* are by a judgment ordered to visit works, in the presence of the parties, and yet make their visit without the parties, the report will be set aside. *L'Ablée vs. Ritchie*. K. B. Q. 1818.

Held, That it is not necessary that the parties should be present when the oath is administered to *experts*. *Paquet vs. Demers*. K. B. Q. 1814.

Held, That if one of the parties die pending an inquiry by *experts*, their proceedings must be stayed until there is a *reprise d'instance*. *Tasché vs. Levasseur*. K. B. Q. 1810.

Held, That a reference, in a surveyor's report, to a plan not of record, on a point of importance, is bad, and the report will, in consequence, be set aside. 2 Jurist, p. 203, *Adams vs. Gravel*. S. C. Montreal; Mondelet, J.

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Held, That the court will order a report of *experts* to be opened, notwithstanding the *experts* endorse upon it that it is not to be opened until after payment of their fees, and a detailed account is produced with the report. 4 Jurist, p. 9, *Duchesnay vs. Giard*. S. C. Montreal; Smith, J.

## RE-NAMING OF.

Held, That a person who acted as an *expert* cannot, if objected to, be named *expert* a second time in the same cause. 5 Jurist, p. 223, *Auclair vs. Low*. S. C. Montreal; Berthelot, J.

EXPERTS, Costs of. See COSTS discretionary.

" See EVIDENCE, Expertise.

## EXPROPRIATION.

See CORPORATION, Expropriation.

## EXTRA WORK.

See EVIDENCE, EXTRA WORK.

" ASSUMPSIT.

## FABRIQUE.

See CHURCH.

## FAITS ET ARTICLES.

See INTERROGATORIES sur faits et articles.

## FAUX.

See INSCRIPTION DE FAUX.

## FEES.

Tarif of. See COSTS, FEES.

## FELONY.

See CRIMINAL LAW.

## FENCES AND DITCHES.

See CERTIORARI,

" MUR MITOYEN.

" ACTION BORNAGE.

## FERRY.

Held, That the defendant, proprietor of a toll bridge, is bound, under the Municipal and Road Act of 1855, to maintain the by-road leading to such bridge.

2 Jurist, p. 118, *Corporation of St. Ross vs. Leprohon*. S. C. Montreal; Badgley, J.

So held in appeal, and further that the proprietor in default will be held liable for damages occasioned by the bad state of the road. 3 Jurist, p. 295, *Grenier*, App., *Leprohon*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, J.

Held, That the conveyance of persons over a river within the limits of another's right of ferry and transport, although done gratuitously, if it ultimately turns to the benefit of the party so conveying, as for example, to his grist mill, is a crossing for hire and gain, within the meaning of the statute 10 and 11 Vict., c. 99, and is an infringement of the rights created thereunder. 3 Jurist, p. 310, *Leprohon vs. Globensky*, tutor. S. C. Montreal; Badgley, J.

See **CESSION**, Rights of cedant Ferry.

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#### FIRE.

See **INSURANCE**.

" **CRIMINAL LAW**, SETTING FIRE.

" **CROWN**, Privilege as to Debentures.

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#### FOLLE ENCHERE.

See **CONTRAINTE**.

" **DECRET**.

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#### FOREIGN COUNTRY.

Held, 1. That the colony of Barbadoes is a foreign country within the meaning of the Consolidated Statutes of Lower Canada, c. 87, sect. 8, and consequently, that a party arrested for a debt alleged to have been contracted at Barbadoes will be discharged.

2. That a notice of petition for release served on a Saturday between 4 and 5 o'clock P. M. for Monday at 10 o'clock A. M., is sufficient. 6 Jurist, p. 312, *Trobridge et al. vs. Morange*. S. C. Montreal; Smith, J.

**FOREIGN LAW**, Proof of. See **EVIDENCE**, Foreign Law.

" **MARRIAGE**, See **HUSBAND AND WIFE**, MARRIAGE, Foreign.

" **CORPORATION**. See **CORPORATION**, Foreign.

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#### FORFEITURE.

See **CUSTOMS**, Forfeiture.

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#### FORGERY.

See **BILLS AND NOTES**, Forgery.

" **CRIMINAL LAW**, Forgery.

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#### FORTIFICATIONS OF QUEBEC.

See **PREScription**, Thirty years.

## FRAIS.

See COSTS.

## FRAIS DE GARDE.

See GARDIEN, Frais de Garde.

## FRAUD.

## AS BETWEEN PARTIES.

Held, 1. In the Privy Council, That where parties have entered into an agreement with a view to defraud third persons, the agreement will nevertheless be valid, as between the parties themselves.

2. That where a deed contains a clause stipulating a reference to arbitration in case of dispute, such clause is not to be construed so as to defeat an essential object of the parties to the deed.

3. That where an absolute deed of sale is made, and simultaneously with it another deed is passed, whereby the purchaser agrees to re-assign to his vendor, upon the performance of a certain condition not complied with, the deed of sale remains in full force, and the purchaser is absolute owner and proprietor of the effects transferred to him by virtue thereof. 10 L. C. Rep., p. 340.

## IN ASSIGNMENT.

Held, 1. That a creditor is not bound to submit to the condition of a deed of composition entered into between a debtor and the majority of his creditors.

2. That all the effects of an insolvent debtor are the common property of his creditors, and cannot be taken from their control by the acts of the debtor.

3. That any assignment made by an insolvent debtor, with a view of withdrawing his effects from the whole or any part of his creditors, is absolutely null under the provisions of the Edict of the month of May, 1609.

4. That in the case submitted, the title invoked by the respondents was tainted with fraud.

5. That moreover the deed, which was an assignment of all the effects of the insolvent debtor, to the respondents (opposants) was not followed by legal tradition, or by a *deplacement*, so as to vest in them the effects assigned.

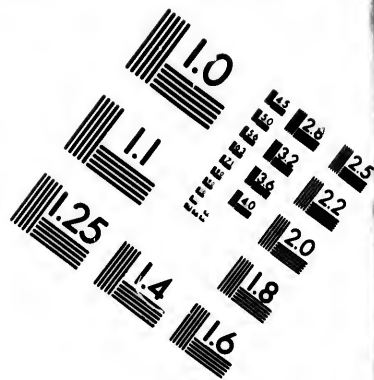
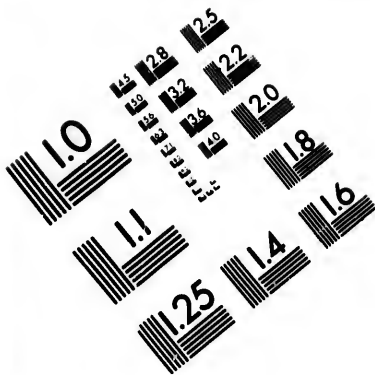
6. That notwithstanding the word "agent" was added, by the defendant, upon his sign, the circumstances of the case showed that he remained in possession.

7. That the respondents did not pay the price stipulated in the deed of assignment from their own funds, but out of the proceeds of the goods sold, paid only a portion of the price.

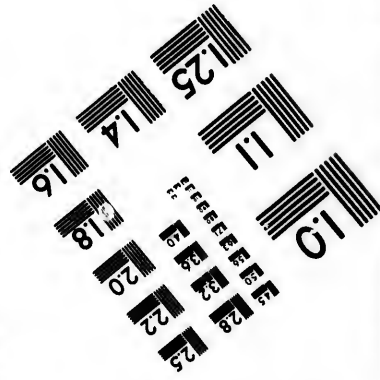
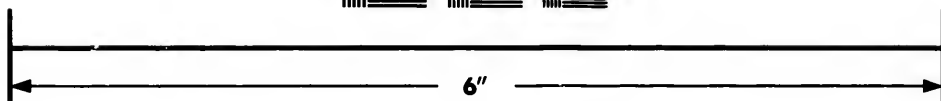
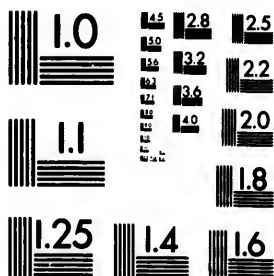
8. That the nullity of the assignment might be prayed and determined upon by a contestation of the opposition without the necessity of a direct revocatory action. 10 L. C. Rep., p. 122, *Cummings et al., App., vs. Smith et al., Resp.* In Appeal; Lafontaine, C. J., Aylwin, Mondelet, J.; Duval and Meredith, J., dissenting.







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See case in the court below. 2 Jurist, p. 195. In Appeal, 5 Jurist, p. 1. 10 L. C. Rep., p. 122.

Held, 1. That an insolvent debtor cannot transfer or assign over his stock in trade to two of his creditors, in trust for the benefit of the whole, without the sanction of all the creditors.

2. That where such an assignment is made without the consent of the whole of the creditors, and the assignees, having obtained the key from the assignor, look up the shop and take an inventory, and advertise the goods for sale for the benefit of the creditors generally; any of the non-consenting creditors may, notwithstanding, seize the goods as being still in the possession of the debtor, there being no sufficient transfer or delivery in law, to transfer the property to the assignees. 10 L. C. Rep., p. 149, *Withall*, App., vs. *Michon*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

The respondents brought a suit against one Delesderniers, in which the appellants were *tiers saisis*; the respondents contested the declaration made by the appellants, it appearing that the appellants claimed certain effects by assignment from one Prevost to the appellant McFarlane, under an assignment from the latter to his co-appellant.

Held, In the Superior Court, Montreal, That the contestation must be dismissed, inasmuch as Prevost had not been made a party to the proceedings to set aside the assignment to the appellant, McFarlane.

In Appeal; Judgment of the Superior Court set aside, and the assignment held to be fraudulent, and the appellants ordered to make a declaration of all the effects sold by Prevost to McFarlane, and by McFarlane to his co-appellant.

In the Privy Council, Held, That in the case submitted, the assignments were not fraudulent; that the fact of the assignments being made by notarial deed was not evidence that the sales were not *bonâ fide*; that the circumstance of the sales being made without warranty did not raise a presumption that the sales were fraudulent; and that because a vendor refuses to warrant, it must not therefore be taken for granted that the purchaser knew that there was fraud, or that there was no title.

*Semble*, That by the law of Lower Canada, in the case of a sale without a warranty, the vendor would still be liable to the purchaser, if he sold with knowledge that he had no title. Their lordships declared that they gave no opinion as to whether Prevost should have been put *en cause*. 12 L. C. Rep., p. 374, *McFarlane. et al.*, App., *Leclair et al.*, Resp. In the Privy Council; Lord Kingsdown, *et al.*

Held, 1. That the assignment of an unfinished contract will not be set aside on allegations of fraud by a creditor of the assignor, such fraud consisting in the assignment of money due on that part of the contract completed at the date of the assignment, it appearing that the assignment was made in good faith, to procure means of completing the works.

2. That in such case, if the amount transferred exceeds the value of the work still to be done, the creditors of the assignor may compel the assignee to reimburse the surplus. 12 L. C. Rep., p. 432, *Berlinguet*, App., *Drolet*, Resp. In Appeal; Lafontaine, C. J., Duval, Mondelet, J.; Meredith, J., dissenting.

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## IN DONATION.

Held, That a donation made by an aged and weak person, in consideration of a small annuity for life much inferior to the amount of the annual issues and profits of the estate given, may be set aside in an action of *rescision* if the inference of fraud is not rebutted by evidence. *Bernier vs. Boisseau*. K. B. Q. 1813.

Held, That if a donee wilfully frustrates the objects intended to be effected by the donation, his misconduct is a cause of rescission. *Lagacé vs. Courberon*. K. B. Q. 1817.

Held, That a donation which (as in this case) is tainted with fraud towards the creditors of the donor, is inoperative. 6 L. C. Rep., p. 404, *Marion*, App., *Perrin*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, 1. That a bankrupt purchaser of real property belonging to his estate, sold in bankruptcy, cannot revive an hypothecary claim which had existed upon the property, and which had been extinguished by the judicial sale.

2. That a subsequent purchaser, sued hypothecarily by reason of such claim, may urge, by way of exception, any fraud with which such claim may be tainted in consequence of its revival.

3. That, in the case submitted, a donation of the pretended arrears of a life-rent to the minor children of the bankrupt, such rent being payable by the bankrupt, who accepted for his children after the granting of his certificate of discharge, and after the sale of the property, is inoperative as against the purchaser, and the donation declared fraudulent, although the minors had not personally been participators in the fraud. 3 L. C. Rep., p. 446, *Cadieux* App., *Pinet et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That a donation from father and mother to their son, of all their property, will be set aside as in fraud of creditors, notwithstanding that it is made subject to the maintenance of the donors during their lifetime. 10 L. C. Rep., p. 224, *Lavallé vs. Laplante dit Champagne*, and *Laplante dit Champagne*, Opp. S. C. Montreal; Berthelot, J.

Query, As to whether a donation by the husband was made in fraud of the wife's rights or not. 1 Rev de Jur., p. 417, *Desbarats*, App., *DeSales Laterrière* Resp. In Appeal; Vallières de St. Real, C. J., Rolland, Gale, Mondelet, Day, Gairdner, J. 1846.

Held, That, in the case submitted, the donation of movables contained in a marriage contract, by the husband in favor of his wife, still a minor, with stipulation of *separation de biens*, is a fraud with respect to a person having a claim against the husband, by reason of seduction, and that the wife cannot claim *main levée* of the seizure of such movables made upon the husband in satisfaction of such claim. 12 L. C. Rep., p. 172, *Chaput en qualites vs. Birry and Sanscartier dit Boisseau*, Opp. S. C. Montreal; Badgley, J.

## IN EXCHANGE.

Held, That an action *en restitution* and rescission may be maintained in case of an exchange of real estate. *Laperrière vs. Thibodeau*. K. B. Q. 1821.

## IN JUDICIAL SALE.

Held, That a direct action will lie to have a sale of movables set aside for fraud, and this, although a judicial sale has been resorted to. 3 Jurist, p. 35, *Ouimet et al.*, App., *Sénetcal et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

In Appeal; Lafontaine, C. J., Aylwin, Duval, J.; Mondelet, J., dissenting. 4 Jurist, p. 133, same ruling on another appeal between same parties.

## INSOLVENCY.

Held, 1. That open and declared insolvency and bankruptcy vests in the creditors the exclusive property of the insolvent's estate; that a confession of judgment by such insolvent, is no evidence of a debt as against other creditors, and on contestation of such a claim on the plea of fraud and collusion, the creditor must prove his debt and the consideration of it, at *enquête*.

2. That payment by a third person of debts due by such insolvent or bankrupt debtor without transfer or *subrogation*, thereby creating a debt to such third party subsequent to the insolvency, confers no right on such person to rank on the estate of the insolvent debtor as held at the date of his insolvency or bankruptcy.

3. That evidence of such claim not having been made when the cause was at *enquête* cannot be adduced subsequently, when proof was ordered by the Court of Appeals, on exceptions which had been wrongly overruled by the court below. 3 L. C. Rep., p. 65, *Bryson et al.*, App., *Dickson*, Resp. In Appeal; Stuart, C. J., Rolland, Panet, Aylwin, J.

Held, That the rescision of deeds set forth in an opposition to the sale of immovables cannot be prayed for, unless all the parties to the deeds are joined in the proceedings. 2 L. C. Rep., p. 251, *Mignier vs. Mignier* and Opps. S. C. Quebec; Bowen, C. J., Meredith, J.

As to tradition and nullity of sale in respect of posterior creditors. See SALE OF GOODS, Fraud.

Held, That in order to set aside a deed of assignment on the ground of fraud, the insolvency of the assignor must be alleged and proved. 8 L. C. Rep., p. 286, *Bernier vs. Vachon et al.* and *Boucher*, T. S. C. C. Quebec; Chabot, J. Assignment by insolvent. See FRAUD, In Assignment *supra*.

Held, That the disposal of real estate by an insolvent person with a view to defraud his creditors is a sufficient reason for obtaining a writ of *capias ad respondendum*. 5 Jurist, p. 49, *Langley vs. Chamberlain*. S. C. Montreal; Badgley, J.

## OF THE LAW.

Held, In an action on two notarial obligations by a wife *separée de biens* in which she acknowledged herself personally indebted to the plaintiff, it is competent for her to plead, and prove by verbal testimony, that the indebtedness was really that of her husband, and that she was his security, on the ground that such contracts are in fraud of the law. 4 Jurist, p. 51, *Mercille*, App., vs. *Fournier et vir*. Resp. In Appeal; Lafontaine, C. J., Aylwin, Meredith, J.; Duval, J., dissenting.

## OF REVENUE.

Held, That pure grain spirits imported from Holland into this country, where it can be proved that they were so imported with the necessary ingredients to make Holland gin, and for that purpose, are subject to the same duty as gin; and that the importation of the same, as whiskey or grain spirits, is, in such case, a fraud upon the revenue. 7 L. C. Rep., p. 106, *Torrance*, App., *Bouthillier*, Resp. In Appeal; Aylwin, Duval, Caron, Badgley, J.

See OFFICER PUBLIC, Customs.

## REVOCATION.

Held, That a vessel fraudulently sold by an insolvent debtor after action brought against him, could not legally be seized on execution *de plano* in the hands of a third party a purchaser; and that it was necessary that the contract should, in the first place, be set aside as fraudulent, by means of a revocatory action. 6 L. C. Rep., p. 489, *Chaillt*, App., vs. *Brunell*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

See FRAUD, Assignment.

Held, That an action *en rescision* of a deed of sale, on account of *dol*, where the defendant pleads prescription of ten years, that an answer to the effect that the *dol* was only discovered within the ten years, is good in law. 2 Jurist, p. 207, *Picault vs. Demers*. S. C. Montreal; Mondelet, J.

## TRADITION.

Held, That if there be no delivery upon a sale of movables, and they are seized in the possession of the defendant, fraud will be presumed, and the seizure will be maintained. *Miville vs. Fay*. K. B. Q. 1813.

Held, That if a sale of movables is made by a defendant after an action is commenced against him, and no delivery is made by the purchaser, fraud (*prima facie*) is presumed. *Lageux vs. Everett*. K. B. Q. 1818.

## TRADITION—CONSIDERATION.

Held, 1. That the sale of movables, by the defendant to the opposant, whom he subsequently married, was, under the circumstances in this cause, a fraudulent sale.

2. That the want of possession and of consideration are strong indications of fraud; that delivery of the goods is only presumptive evidence of good faith, but non-delivery is strong evidence of fraud.

3. That an assignment without consideration is only a donation; and fraud on the part of the debtor, the assignor, is sufficient to dispossess the donee.

4. That the law presumes personal property in the possession of married persons to be common property, unless disproved by strict proof of individual property in the wife.

5. That a subsequent creditor may plead simulation of a previous deed of property which never passed from the debtor.

6. That marriage is a good consideration for *bona fide* stipulations in a marriage contract in favor of the wife. 6 L. C. Rep., p. 114, *Barbour vs. Fairchild and Milligan*, Opp. S. C. Quebec; Bowen, C. J., Badgley, J.

As to what constitutes fraud. See 7 L. C. Rep., p. 250, *Sharing vs. Meunier et al.* Same Case, 1 Jurist, p. 142.

FRAUD in making inventory. See INVENTORY when null.

" BANKRUPT. See BANKRUPTCY, FRAUD, SALE.

" Joint and several liability for. See TIERS SAISI.

" Against a Statute. See EVIDENCE, Parol.

" Damages set off against *prix de vente*. See PLEADING, Compensation.

" Statute of. See STATUTE OF FRAUDS.

" •In transaction. See CONTRACT, Transaction.

" in Insurance. See INSURANCE, Fraud.

" in Bills and Notes. See BILLS AND NOTES, Fraud.

" " " " COMPOSITION.

" " " " WHEN DUE.

" " " " GOOD FAITH.

FRAUDULENT COMPOSITION. See FRAUD, In Assignment.

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#### GAMBLING DEBT.

See BILLS AND NOTES, Good Faith.

" CONTRACT, Illicit, Void.

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#### GARANTIE.

##### CORPORATORS.

Held, on demurrer, That where parties are sued as if they were common *co-partners*, for debts of a corporation, they cannot call in their co-corporators to indemnify them against their proportionate share of the loss; and that if there was any thing defective in the organization of the corporation, it should have been alleged, and made the basis of the action *en garantie*. 1 Jurist, p. 160, *Howard et al. vs. Childs et al.* S. C. Montreal; Day, Mondelet, Chabot, J.

Held, That it is competent for defendants *en garantie* who are impleaded as being "contractors, manufacturers, and co-partners" with the plaintiff *en garantie*, to deny that quality by a preliminary exception, as well as the names and designations assumed by the plaintiffs *en garantie*, and on proof to obtain the dismissal of the action *en garantie*. 1 Jurist, p. 249, *Edmonstone et al. vs. Chapman et al.* and *Childs et al.*, Pltfs. *en garantie* vs. *Chapman et al.*, Defts. *en garantie*. S. C. Montreal; Day, Smith, Mondelet, J.

##### DIVISIBILITY OF.

The defendant in an hypothecary action brought an action *en garantie* against four only out of six of his vendors, liable to the *garantie*, and the action was discontinued as to one of them.



Held, 1. That under the deed of sale, each co-vendor sold only his own share, or *portion hereditaire* and was only liable *en garantie* to that extent, the obligation of *garantie* being divisible *quoad damnationem*, and the three defendants were condemned to indemnify the plaintiff *en garantie*, to the extent of one-half of the hypothecary debt, being one sixth for each defendant, with costs of the principal demand, and with costs on the demand *en garantie* only up to the filing of the plea, inasmuch as the defendants offered by their plea to allow judgment to go against them for one half of the hypothecary debt.

2. That the *hypothèque* is indivisible in so far as respects the immovable hypothecated. 11 L. C. Rep., p. 41, *McCarthy vs. Sencal*, and *Sencal*, Pltf. *en garantie*, vs. *Bonneau et al.*, Defts., *en garantie*. S. C. Montreal; Berthelot, J.

Held, That the *garantie* of co-vendors who sell undivided but determinate shares in their real estate without stipulation of solidarity, is divisible. 1 Jurist, p. 245, *Marteau es-qual.*, vs. *Tetreau*. S. C. Montreal; Day, Smith, Chabot, J.

Held, 1. That a purchaser who has agreed to pay a sum of money in discharge of his vendor, cannot be called *en garantie* by the vendor, when sued for this sum by the creditor.

2. That it is the duty of the vendor to pay, before having recourse against the purchaser. 1 Jurist, p. 42, *Gauthier et al. vs. Darché*. S. C. Montreal; Day, Smith, Mondelet, J.

Same case in Appeal. Held, That the action *en garantie simple* may be brought against a *garant* who was not a party to the contract which gave rise to the original action. 1 Jurist, p. 291. Lafontaine, C. J., Aylwin, Duval, J.; Caron, J., dissenting.

Held, 1. That an action *en garantie simple* will lie by a proprietor, for damages caused to his tenant by a third person, by reason of the demolition of a mitoyen wall, and this although the plaintiff *en garantie* may himself be liable for a part of the damages.

2. That such action will be maintained to facilitate procedure, and avoid a circuitry of actions. 3 Jurist, p. 226, *Delvecchio vs. Joseph*. S. C. Montreal; Berthelot, J.

Held, That a *garant formel* or *simple* must be called into the case by writ. *Gauthier vs. Tremblay*. K. B. Q. 1811.

Held, That a simple *garantie de fait* in a transport, is a warranty of the debtor's solvency at the time of the assignment, and that he will continue solvent, and also that the debt is the property of the assignor. *Belanger vs. Binét*. K. B. Q. 1820.

Held, That in an action for rent, where the tenant calls in the lessor as his *garant*, who pleads property under a deed of donation, that the plaintiff cannot set up nullities in the donation, in answer to the plea of the defendant *en garantie*. Special answer dismissed. *Brossard vs. Murphy*, and *St. Hilaire*, Deft. en Gar. S. C. Montreal, 1853; Smith, Vanfelson, Mondelet, J. Cond. Rep., p. 29.



## IN EXCHANGE.

Held, That the *garantie* in an exchange of real property confers no *hypothèque* if no sum of money is stipulated by which the amount of the *hypothèque* can be ascertained. 2 Jurist, p. 139, *Ex partie Casavant and Lemieux*, Opp. S. C. Montreal; Smith, J.

## FORMELLE.

Held, That one who binds himself with a vendor *solidairement* to defend the purchaser against all claimants, is necessarily, a *garant formel*. *Peltier vs. Puizic*. K. B. Q. 1818.

Held, That a purchaser condemned, in an action *en déclaration d'hypothèque*, to deliver up an immovable, has his action of indemnity from the period of his abandonment of the property, against those who are bound to hold him harmless, although the property has not yet been seized, nor the *garans* put into the original demand. 12 L. C. Rep., p. 68, *Dorwin et al.*, App., *Hutchins*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondcelet, J.

## OF DEBT PRESCRIBED.

Query, Whether a *garantie de faits et promesses*, implies a *garantie* of the existence of a debt prescribed before the date of the transport. 2 Rev. de Jur., p. 301, *Donegani*, App., *Choquette*, Resp. In Appeal; 1841.

## RATIFICATION OF TITLE—OPPOSITION TO.

Held, That on petition for ratification of title, an action lies to cause an opposition to be removed, unless an express stipulation to the contrary is inserted in the deed of sale. 8 L. C. Rep., p. 501, *Douglas*, App., *Dinning*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Same case, 3 Jurist, p. 32.

Held, 1. That an opposition to an application for ratification of title, is a *trouble*, and entitles the opposant to sue his vendor *en garantie* to cause such opposition to be removed, and hold him harmless therefrom, although no such stipulations are contained in the deed.

2. That in such action *en garantie*, where the writ has been sued out under the same number as the original procedure, and as if it were in that cause, it is not necessary for the plaintiff *en garantie* to produce either a copy of the deed, or any portion of the record *en ratification*. 1 Jurist, p. 194, *Ex parte Judah*, and *Judah vs. Ralland*. S. C. Montreal; Day, Smith, Chabot, J.

GARANTIE of debt not assignable. See CESSION, Half-Pay.

“ Letter of. See SURETY.

## GARDIEN.

## ACTION AGAINST.

In an action against a *gardien*, by a plaintiff who had seized effects by writ of *caisie arrêt*, which were sold on an execution by another party, praying that the *gardien* produce the effects or pay the value thereof.

Held, On demurrer, That the plaintiff's remedy, if any be had under the circumstances, was not by an action, but by a rule. 11 L. C. Rep., p. 476, *Berry vs. Cowan et al.* S. C. Quebec; Stuart, J.

## DELIVERY TO.

Held, That a *gardien* of movables will not obtain an order that the defendant deliver them up to him, unless on clear proof of their being deteriorated by improper use. 3 Jurist, p. 116, *Palgrave vs. Sénécal*, and *Prieur, gardien*. S. C. Montreal; Mondelet, J.

## FRAIS DE GARDE.

Held, That a *gardien* of goods seized, under a writ of revendication addressed to the sheriff, has a right of action as well against the plaintiff as against the sheriff, for moneys expended as such *gardien*. 2 L. C. Rep., p. 360, *Dinning vs. Jeffrey*. In Appeal; Stuart, C. J., Rolland, Panet, Aylwin, J.

Held, In an action by a *gardien volontaire* against the plaintiff *en revendication* for moneys expended as *gardien* of a vessel seized, that the action must be dismissed, inasmuch as the vessel had remained *de facto* in the possession of the defendants, *en revendication*, and there was no sufficient evidence that the *gardien* had expended any money in and about the safe keeping of the vessel and effects seized. 5 L. C. Rep., p. 182, *Dinning vs. Jeffrey*. S. C. Quebec; Bowen, C. J., Meredith, Badgley, J.

Held, That a defendant in an action of revendication has no lien, (*droit de retention*) until he be paid his fees and expenses *frais de garde*, as *gardien judiciaire* in an action of revendication against the plaintiff as defendant, the action having been dismissed and the judgment notified to the *gardien*. 9 L. C. Rep., p. 360, *Poutré vs. Laviolette*. S. C. Montreal; Mondelet, J.

Held, That the sheriff has a right to retain such property as he may have lawfully seized until the *frais de garde* are advanced by the plaintiff. He has also the right to demand, in advance, all necessary expenses for the safe keeping of what he has seized. *Reed vs. Desnoyers*. K. B. Q. 1819.

A *gardien* who has delivered to the defendant the things he had in charge, cannot maintain an action against the sheriff for his *salaire*. *Tardiff vs. Shepherd*. K. B. Q. 1813.

## OPPOSITION BY.

Held, In *revendication*, if the defendant pleads by *exception temporaire* that he holds the property demanded, as *gardien*, appointed by a justice of the peace, and prays that the plaintiff's action may be dismissed, it is irregular. He can

only stay proceedings until the person from whom he derives his authority to hold the property claimed, is made a party to the suit. His exception, therefore, should be an *exception dilatoire*. *Pacaud vs. Bégin*. K. B. Q. 1818.

Held, That a *gardien* to movables can oppose a second seizure of the same effects, so long as the first seizure has not been disposed of. 12 L. C. Rep., p. 158, *Langlois vs. Gauvreau et al.*, and *Gauvreau*, Opp. S. C. Quebec; *Tasche-reau*, J.

Held, On demurrer, that a *gardien* has a right to file an opposition to a second seizure of movables in his charge as *gardien*. 9 L. C. Rep., p. 495, *Smith et al. vs. O'Farrell and Coleman*, Opp. S. C. Quebec; *Chabot*, J.

Contrary held, 3 Jurist, p. 135, *Donally vs. Naigle*, and *McDonald*, Opp. S. C. Montreal; *Badgley*, J.

GARDIEN, Contrainte against. See CONTRAINTE.

## HABEAS CORPUS.

### BAIL.

Held, That on application to admit to bail a person charged with murder, the judge will look to the gravity of the offence, the weight of evidence, and the severity of the punishment, and may refuse bail. 6 L. C. Rep., p. 249, *Ex parte J. B. Corriveau*. Power, Cir. J.; In Chambers, Quebec.

Held, That a prisoner confined upon a charge of capital felony (arson) may be admitted to bail after bill found by a grand jury, if the depositions against him are found to create but a very slight suspicion of the prisoner's guilt. 7 L. C. Rep., p. 57, *Ex parte McGuire*. Power, Cir. J., Quebec.

### CIVIL SUIT, EFFECT ON.

Held, by Duval and Meredith, J., That a writ of *Habeas Corpus* cannot be granted to liberate a prisoner charged with process in a civil suit (*contrainte par corps* for libel) even although the writ of execution under which he is arrested is irregular.

By Duval, J., That the writ of *Habeas Corpus* is not granted for the purpose of reviewing the judgment of a civil court, or of questioning the regularity of the proceedings, either before or after judgment, but merely to keep courts within their jurisdiction, and not to correct their errors.

By Meredith, J., That even if the writ of arrest is irregular, yet if it does not appear to be out of the scope of the jurisdiction of the court from which it issued, it cannot be declared void, and the prisoner, consequently, cannot be liberated on *Habeas Corpus*.

By Stuart, Asst. J., That where an application for a writ of *Habeas Corpus* has been made to a judge in chambers and refused, judicial comity will prevent another judge from entertaining it. 9 L. C. Rep., p. 285, *Ex parte Donaghue* In Chambers, Quebec.

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## COURT MARTIAL.

The petitioner was tried, by court martial, for firing without orders on a crowd of people in the streets of the city of Montreal, such conduct being insubordinate, unsoldierlike, and to the prejudice of good order and military discipline, and a writ of *Habeas Corpus* being moved to discharge him from the custody of the military authorities :

Held, That it appearing that the written charge against the prisoner is one of felony, he must first be held to answer to the constituted tribunals in the colony, proceeding under the common law of England, before a military court, under the mutiny act, and the articles of war, can legally take cognizance of the charge. 4 L. C. Rep., p. 467, *Ex parte McCulloch for Habeas Corpus* Aylwin, J.

Held, That a writ of *Habeas Corpus* will not be granted in the case of a person confined in jail on civil process (*capias ad respondendum*). 8 L. C. Rep., p. 216, *Barber et al. vs. O'Hara*. S. C. Montreal; Smith, J.

Held, That a judge has no jurisdiction to liberate a person found guilty of simple larceny, and sentenced to be imprisoned in the penitentiary for life, although it might appear that the sentence was illegal; and that the judge ought therefore to abstain from giving an opinion upon the legality or illegality of such sentence. 6 L. C. Rep., p. 106, *Ex parte Plante*. In Chambers, Quebec; Bowen, C. J.

## MEMBER OF PARLIAMENT.

Held, 1. On a motion for a writ of *Habeas Corpus* to produce the body of a person in custody (under a warrant of three members of the Executive Council for treasonable practices) founded upon "his privileges" as a member of the Provincial Parliament, two papers purporting to be two indentures of election, produced in support of the motion, are not sufficient evidence of his being such member, to entitle him to the benefit of the writ.

2. A member of the Provincial Parliament held at Quebec, the place where he is resident, arrested eighteen days after its dissolution for "treasonable practices" and during his confinement elected a member of a new parliament, is not entitled to privilege from such arrest by reason of his election to either parliament. Stuart's Rep., p. 1, Case of *P. Bedard*. K. B. Q., 1810.

DEPUTY RETURNING OFFICER. See PARLIAMENT.

## HOLIDAY.

See BILLS AND NOTES dated on Sunday.

## HUISSIER.

## ACTION BY.

Held, That a Bailiff has no action for the price of goods sold *en justice* against a purchaser to whom they were delivered without payment. 5 L. C. Rep., p. 394. *Pelletier vs. Lajoie*. C. C., Kamouraska; Taschereau, J.

## CONTEMPT.

Held, That a bailiff who retains money he has levied, is liable to an attachment for contempt. *Rex vs. Ready*. K. B. Q., 1813.

## DAMAGES AGAINST.

Held, In an action of damages against a bailiff: 1, That under the 12th Vict., c. 38, sect. 79, a writ of *saisie arrêt*, after judgment, in an appealable case, may be made returnable in vacation.

2. That it is the duty of a bailiff executing such writ, to deliver it to the attorney or party from whom he received it, or to file it in court on or before the return day, without being specially requested to do so.

3. That having received the writ as bailiff to serve the same, he will not be permitted to urge the want of proof, in an action against him, of his being a bailiff.

4. That proof of the amount due to defendant by a *tiers saisi*, also proof of the service of the writ of attachment, and the payment of this amount to others than the plaintiff, (the plaintiff's debt remaining unsatisfied), is sufficient proof of damage to the extent of the amount due by such *tiers saisi*, without direct evidence of defendant's insolvency. 1 L. C. Rep., p. 77. *Lampson vs. Barrett*. C. C. Quebec; Duval, J.

## DOMICILE.

Held 1, That in a seizure of movables, the election of domicile by a bailiff in a particular parish, without specifying in what part of it, is insufficient, and the seizure is consequently null.

2. That a notice of sale at the foot of the *procès verbal* of seizure, for a specified day of the month, without mention of the year is null, although the *procès verbal* is correctly dated: 2 Jurist, p. 276. *Beaupré vs. Martel*, and *Martel*, opp. S. C. Montreal; *Mondelet*, J.

## FEES.

Held, On *certiorari*, that a conviction against a bailiff for exacting more than his legal fees, will be quashed, on the ground that the magistrate permitted an amendment in the information, and because no precise date of the offence was given. 6 L. C. Rep., p. 489. *Ex parte Nutt*. S. C. Montreal; Smith, Mondelet, Chabot, J.

## PRESCRIPTION.

Held, That the limitation of actions for bailiff's fees, under the 12th Vict. c. 44, is absolute; and the oath of the defendant as to payment is not necessary. 6 L. C. Rep., p. 59. *Lepailleur vs. Scott et al.* S. C. Montreal, Smith, Mondelet, J.

## RELATIVE OF.

Held, That a bailiff may execute a writ (of *fi-fa de bonis*) against his brother-in-law, or other relative, notwithstanding the provisions of the 12th Vict., c. 38. 10 L. C. Rep., p. 184. *Lemieux vs. Cott, and Cott*, Opp. C. C. Quebec; Stuart, J.

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Held, That a writ of summons cannot legally be served by the son of the Plaintiff. *Exception à la forme* maintained. 6 Jurist, p. 88. *Birs vs. Aubertin*. C. C. Montreal; Monk, J.

## RETURN.

Held, That where a writ of summons was returned into Court without any return of service, an application by bailiff to be allowed to make a return will not be allowed, there being nothing before the court. *Tidmarsh vs. Stephen et al.* Cond. Rep., p. 16.

Held, 1. That in his return of service of a motion (for a *folle enchère*) the Bailiff must certify that he *personally* served such motion and a return "Je huissier juré de, &c., certifié par le présent sous mon serment d'office, avois signifié, &c.," is insufficient.

2. That the return must be upon the motion itself, and not upon a paper annexed to the motion. 12 L. C. Rep., p. 176. *Jobin vs. Hamel, and Hamel*, adjud. S. C. Quebec; Stuart, J.

## REVENDEICATION AGAINST.

Held, That revendication will lie against a bailiff who, under the authority of a Justice of the Peace, holds in his custody the goods of the plaintiff, if the cause of the detention be a matter over which the justice has no jurisdiction. *Pacaud vs. Bégin*. K. B. Q., 1818.

## SHERIFF'S.

Held, That an opposition *à fin d'annuller* will not be maintained, on the ground that the bailiff making the seizure was not a sheriff's bailiff, the writ of execution having been delivered to him by the sheriff. 8 L. C. Rep., p. 256. *Freligh vs. Seymour*. S. C. Montreal; Smith, J.

Offers made to bailiff declared valid. Cons. Sup., No. 19.

Defense to bailiffs and judges against *saisie arrêt* being made on *billet ou promesse, sous seing privé*. Cons. Sup., No. 25.

Bailiff condemned to costs for omitting the date of seizure. *Prévosté*, No. 17.

Bailiff, service of writ in a sealed envelope. See "INSCRIPTION DE FAUX."

Bailiff's return, recourse against. See "INSCRIPTION DE FAUX."

## HUSBAND AND WIFE.

## ADULTERY.

Held, 1. That adultery of a wife during her marriage cannot be set up by the heir to cause her to lose her rights in the community.

2. It can only be set up by the husband, and if he has taken no steps to have her declared deprived of her rights, the heir cannot do so.

3. That absence of the wife from the conjugal domicile for legitimate cause will not deprive her of her rights, after the death of her husband.

4. That the fact of the husband keeping a concubine in his house, is such cause, and the wife may live separate from him, and her absence, even at his



death-bed, is justified thereby. 5 Jurist, p. 257, *Gadbois vs. Bonnier dit Laplante*.

Held, In an action *en separation de corps et de biens* where the husband sets up adultery, that the separation will be granted on proof of *sevices*, but the wife will be deprived of her matrimonial rights. *G. vs. L.* S. C. Montreal; Cond. Rep., p. 71.

See SEPARATION, *Infra*.

#### AUTHORIZATION.

A married woman cannot sue as a *marchande publique* without her husband. Rolland, C. J., Day, Smith, J. Cond. Rep., p. 60.

So also in *Young vs. Feehan*. K. B. Q. 1813.

Held, That a wife can bind her husband for that which relates to her household; where, therefore, they live together, and keep a boarding house, evidence of payment to the wife, of a sum due for board and lodging, is evidence of payment to the husband. *Fortier vs. Laforce*. K. B. Q. 1821.

Held, That the express authorization of the husband to his wife, *separée de biens*, to become bound as his surety, is sufficiently proved by a notarial deed signed by them, in the beginning of which the wife appears, with other creditors of her husband, and is declared to be "*autorisée en justice* and otherwise "hereby specially authorized by her husband, testified by his signature thereto" as party of the *first part*, and also appears, with another as surety for her husband, and as party of the *fourth part*, although no words of authorization are contained in that part of the deed where they appear, or where she binds herself as such surety. 5 L. C. Rep., p. 320, *Joseph, Petr., vs. Leslie, Opp., and Auldjo*, Inter. S. C. Montreal; Smith, Vanfelson, Mondelet, J.

Held, That a married woman, although separated as to property, and having the administration of her property, cannot, without the express authority of her husband, validly do anything tending to affect and hypothecate her real property. 1 Rev. de Jur., p. 406, *Hertel de Rouville, App., vs. The Commercial Bank of the M. D. Resp.* In Appeal; Stuart, C. J., Bowen, Bedard, Mondelet, Gairdner, J. 1846.

#### AUTHORIZATION—LESION.

Held, 1. That a married woman (*commune en biens*) and a minor, who afterwards renounced the community, may, under the authority of her husband, ratify a deed of exchange, made by the husband only, of a property liable to her *douaire préfix* and *reprises*, such rights being of a movable nature only.

2. That the authority of the husband for the purpose of this deed of ratification, is sufficiently apparent by the declaration of the wife that she is "*duement assisté et d'abondant autorisée*" without stating by whom, the husband being a party to the deed and declaring, after the reading thereof, that he cannot sign.

3. That upon a deed of exchange in like cases, there cannot be *lesion* with respect to the wife, the mortgage for her matrimonial rights being transferred from one property to another.

5. That in the case submitted, there was no fraud with respect to the wife.

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10 L. C. Rep., p. 157, *Métrissé et al. App., Brault*, Resp. In Appeal; Aylwin, Duval, Meredith, Bruneau, J.; Guy, J., dissenting.

Same case, 4 Jurist, p. 60.

## AUTHORIZATION—DOMICILE.

Held, 1. That the rights of husband and wife domiciliated, and married in Lower Canada, are regulated by the law of Lower Canada, although they fix their residence afterwards in a foreign country.

2. That a sale by a woman so married, made in the state of New York, jointly with her husband, but without statement of authorization on his part, of immovables situated in Lower Canada, is absolutely null and void, as well under the *statut personnel* in respect to the wife's rights, as under the *statut reel* as to immovables, although by the law of the State of New York no such authorization is necessary there. 11 L. C. Rep., p. 254, *Lavolette*, App., *Martin*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Bruneau, J.

Same case in the S. C. See 2 Jurist, p. 61. In Appeal; See 5 Jurist, p. 211.

Held, That a married woman may also set forth in her declaration specially that she is authorized to sue alone (if she does so sue) and must state particularly the means by which her incapacity to sue without her husband has been removed. *Perrault vs. Cuvillier*. K. B. Q. 1817.

AUTHORIZATION as to notes. See BILLS AND NOTES of married women.

## COMMUNAUTÉ.

Held, 1. That there is no community of property between parties domiciled, and married in England, who have removed to Lower Canada and died there. 3 Rev. de Jur., p. 255, *Rogers et al. vs. Rogers*. Q. B. Montreal; 1848.

Held, That a widow for a debt due to her by the *communauté*, cannot support an hypothecary action against the *deteneur* of her husband's *propres* without proving that the *communauté* cannot satisfy her demand. *Hausserman vs. Casgrain*. K. B. Q. 1817.

Held, That a widow, as *chef de la communauté continuée*, may, in a default action, have judgment for the amount of an obligation to her and her husband jointly. *Hausseman vs. Jevésque*. K. B. Q. 1813.

Held, That a widow, *commune en biens* and executrix of her husband's will, may maintain an action, after his decease, for a debt *mobiliaire* due to their *communauté*. *Drouin vs. Beaulieu*. K. B. Q. 1820.

Held, That a widower may, in like case, maintain a similar action. *Blouin vs. Lebrun*. K. B. Q. 1821.

Held, That the *communauté de mariage* enjoys the benefit of the rents, issues and profits, of the *propres* on either side, and is therefore bound to pay the *rentes constituées* with which they are charged during its continuance, and an action for their amount will therefore lie. *Girard vs. Lemieux*. K. B. Q. 1820.

Held, On a *defense en droit* to an action for a specific sum as the proceeds of a *communauté* between the plaintiff and his late wife, that the action should have been an action of *partage*, and action dismissed. 6 L. C. Rep., p. 475, *Dupuis vs. Dupuis*. S. C. Montreal; Day, Smith, J.



The real estate of a *communauté* formerly existing between defendant and his late wife, was sold by the sheriff, in an action by plaintiff representing the *baillieur de fonds*, and defendant was condemned personally and as tutor, jointly and severally, to pay one half of the capital with interest and costs. The children, as representing their mother, intervened by a *tutor ad hoc*, and contested plaintiff's collocation, on the ground that one half of the moneys belonged to them, and that they were only liable for one half of the capital and interest, and not for any costs.

Held, That the contestation was unfounded. 11 L. C. Rep., p. 79, *Doutre vs. Green and Pollico*, Inter. S. C. Montreal; Badgley, J.

Held, That the court will not take cognizance of the civil death of the husband in an action of *separation de biens*, if the wife, in subsequent dealings between her and her husband has not treated the community as dissolved. 1 Jurist, p. 44, *Cartier vs. Bechar*. S. C. Montreal; Smith, Badgley, J.; Mondelet, J., dissenting.

Held, In an action *en separation de corps et de biens* between parties domiciliated in a township, soccage lands purchased during the marriage will be considered as forming part of the community. 2 Jurist, p. 70, *Magreen vs. Aubert*. S. C. Montreal; Smith, Mondelet, Badgley, J.

Held, That there is no community of property according to the custom of Paris, between persons married in England, their then domicile, without any ante-nuptial contract, who afterwards changed their domicile, and settled and died in Lower Canada. 3 Jurist, p. 64, *Rogers et al. vs. Rogers*. Q. B. Montreal 1848. Roland, Day, Smith, J.

Same case, 3 Rev. de Jur. p. 255.

Held, That a *communauté de biens* is by law presumed, until the contrary is shown. *Roy vs. Yon*. K. B. Q. 1812.

#### FOREIGN MARRIAGE:

Held, 1. That a marriage contracted in the United States, between persons domiciled in Lower Canada, is valid in law, although one of them (the wife) was a minor, and had not the consent of her tutor, and that, under such marriage, community of property is created.

2. That subsequent articles of marriage executed in Lower Canada, with the consent and in presence of the tutor, acting for and in the name of the minor, and stipulating *separation des biens* and followed by a marriage duly solemnized, can have no effect, and that such nullity may be opposed by the tutor himself, in an action *en reddition de compte* against him by the minor separated as to property from her husband, who was personally indebted to such tutor. 8 L. C. Rep., p. 257, *Languedoc et al.*, App. vs. *Laviolette*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

See same case in Sup. Court, 1 Jurist, p. 240.

#### HARBOURING WIFE.

Held, That in an action to compel the defendant to send back the plaintiff's wife, alleged to have been enticed away and harboured by the defendant, her

brother, it is no defence to set up the bad treatment, personal violence, and threats of the plaintiff towards his wife after action brought, nor to allege generally that the wife was obliged by the *services* of the plaintiff to take refuge with her brother. 6 L. C. Rep., p. 73, *Cuisé vs. Hervieux*. S. C. Montreal; Day, Smith, Mondelet, J.

## INTESTACY.

Held, That the father is the heir of his child, dying intestate and without issue, for the movables left by the child at the time of his decease, and will take also *en propriété* a legacy, made by a testator in favor of the mother of the child, dying without heirs, and intestate. 1 Jurist, p. 320, *Reid, App., Prevost, Resp. Lafontaine, C. J., Aylwin, Duval, Caron, J.*

## LIABILITY FOR HUSBAND.

Held, That a wife who undertakes with her husband, the husband being a trader, becomes the *caution solidaire* of such trader, in so far as the undertaking concerns his trade, and this without mentioning the *solidité*, or that she is authorized by her husband. 1 Rev. de Jur., p. 186, *Pozet vs. Green*. Q. B. Q.

Held, That an obligation contracted by a wife, separated as to property from her husband, jointly and severally with her husband is null, in so far as respects her, under the 4th Vict., c. 30, sect. 36. 1 Rev. de Jur. p. 333, *Bertrand vs. Saindoux*. Q. B. Q. 1845.

Held, 1. That a woman who has obtained a *séparation de biens*, cannot exercise any mortgage for her matrimonial rights upon property of the husband sold (in 1848) during the community, notwithstanding a registration of her marriage contract before the sale, if she has, during the community, approved of and ratified the deed of sale.

2. Distinction recognized between binding herself for her husband contrary to the registry ordinance, and waiving or releasing her own rights. 12 L. C. Rep., p. 135, *Boudria, App., McLean, Resp.* In Appeal; Lafontaine, C. J., Duval, Meredith, J.; Aylwin, Mondelet, J., dissenting.

Same case, 3 Jurist, p. 65.

*Deuil de la veuve* declared privileged. Cons. Sup., No. 27.

Widow ordered to have possession, on her *caution juratoire*. Cons. Sup., No. 81.

## MARRIAGE CONTRACT.

Held, That a clause of *ameublissement* in a marriage contract excludes customary dower. 1 L. C. Rep., p. 25, *Touissant et al. vs. Leblanc*. S. C. Quebec.

Held, 1. That a married woman is entitled to claim the proceeds of an immovable sold, upon the representatives of her deceased husband, such property having been given to her, during the community, by her father and mother, notwithstanding a clause of *ameublissement* in her contract of marriage; provided she has the right, by the terms of the contract, to renounce to the community, and take back what she brought to it; and notwithstanding the contract (executed before the coming into force of the 4th Vict., c. 30,) was never registered.

2. That her claim in such a case is rather in the nature of a right of property, than in the nature of an hypothecary right. 1 L. C. Rep., p. 47, *Labreque vs. Boucher*, and *Fleury*, Opp. S. C. Quebec; Bowen, Duval, Meredith, J.

Held, 1. That the donation by an *ascendant* of one of the conjoints, in a marriage contract, of an immovable destined to enter into the community, is an *ameublissement* within the meaning of the law.

2. That such *ameublissement* has no effect, except as regards the community, and between the conjoints themselves.

3. That the immovable preserves its quality of *propre* up to the time of *partage*.

4. That, the other conjoint being dead, and the child born of the marriage afterwards dying without issue, and before *partage*, the *ameublissement* has no longer any effect; and the collateral heirs of the conjoint, in whose favor it was stipulated, can claim no right in such immovable. 2 L. C. Rep., p. 213, *Charlebois*, Tutor, vs. *Headley*. In Appeal; Panet, Aylwin, Vanfelson, Mondelet, J.

Held, That a clause of separation of debts, in a marriage contract between *conjoints*, stipulating community, is of no avail as against creditors of the wife, unless followed by an inventory of the effects of the wife at the time of the marriage. 5 Jurist, p. 150, *McBean vs. Desbartch*, and *Drummond*, Opp. S. C. Montreal; Berthelot, J.

Held, That a party who contracts a second marriage cannot dispose, by marriage contract, in favor of his second wife, of any portion of the *conquêts* of the first community, or of a greater portion of the *acquêts* than that accruing to the child taking the least share. 2 L. C. Rep., p. 175, *Keith vs. Bigelow*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a marriage contract may, in Canada, be valid under certain circumstances, although it is not regularly executed as a notarial acte, and is in fact no more than an *acte sous seign privé* signed by the contracting parties in presence of a notary, and left in his custody and keeping. *Hausseman vs. Perrault*. K. B. Q. 1814.

Held, That a clause in a marriage contract that "the parties take one another with the property and rights to each of them respectively belonging, and such as may hereafter accrue, of what nature soever, which said property, movable or immovable, shall enter into the community," is a covenant of *ameublissement* of all the property belonging to the parties, notwithstanding a subsequent clause of *realization*, and that consequently the customary dower cannot be claimed out of the husband's *propres*. 4 L. C. Rep., p. 436, *Moreau vs. Matthews and Fisher*. S. C. Montreal; Day, Mondelet, J.; Vanfelson, J., dissenting.

See report of this case. 5 L. C. Rep., p. 325.

Held, That an action against husband and wife for a debt due by the wife previous to her marriage, will be dismissed on demurrer, after plea by the wife that she is sued as *commune*, when, in fact, she was *séparée de biens* by marriage contract produced. 6 L. C. Rep., p. 485, *Gagnier vs. Crevier et al.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, That in the case of a marriage contract, with a covenant of *ameublissement* and a clause of *realization* in the event of renunciation of the community

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by the wife, the wife separated as to property cannot claim, by way of *reprises*, the enjoyment of the proceeds of the sale of an immovable given by the mother to her adopted daughter and her husband, during the community, with condition that such property could not be seized, but would serve to procure aliment.

2. That the property given by such donation does not become a *propre* of the wife.

3. That the report of the notary awarding the same to the wife, and the judgment homologating such report, is not binding upon third parties contesting the claim of the wife.

4. That in the case submitted, the respondents had a right to be collocated in preference to the appellant. 11 L. C. Rep., p. 7, *Jarry, App., vs. The Trust and Loan Company, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That to establish a *séparation de biens* the wife must stipulate, in the marriage contract, for the gestion and administration of her property. 1 Jurist, p. 164, *Wilson vs. Pariseau*, and *Simard, Opp.* S. C. Montreal; Day, Mondelet, Chabot, J.

Held, In an hypothecary action for a *douaire préfix* constituted in favor of plaintiff's mother, that a *tiers détenteur* who acquired the property previous to the 1st Nov., 1844, cannot set up the non-registration of the contract of marriage previous to the (1st Nov. 1844) date of registration fixed by the 4th Vict., c. 30, sect. 4. 1 Rev. de Jur., p. 146, *Lauzon et al. vs. Belanger.* C. C. Terrebonne; Mondelet, J. 1845.

As to the validity of a clause in a contract of marriage stipulating that the marriage rights of the parties should be governed by the laws and customs of Great Britain, and whether such stipulation be not too vague and indefinite. See 2 Rev. de Jur., p. 431, *Wilson, App., vs. Wilson, Resp.* In Appeal; 1840.

MARRIAGE, CONTRACT, Fraud in. See FRAUD.

#### RENUNCIATION.

Held, 1. That a woman, *sous puissance de mari*, cannot validly renounce to a *hypothèque* in her favor on real estate belonging to her husband, for a *rente viagère* given by her contract of marriage in lieu of dower.

2. That such renunciation is in contravention of the 4th Vict., c. 30, sect. 36, as being an indirect *cautionnement*. 3 Jurist, p. 324, *Russell vs. Fournier*, and *Rivet, Opp.* S. C. Montreal; Smith, J.

#### SEPARATION.

Held, That a wife *séparée de biens*, by her marriage contract, may sue for the preservation of her personal estate, without the assistance or authority of her husband. 3 L. C. Rep., p. 132, *Cary vs. Ryland*, and *Gore, Opp.* S. C. Quebec, Bacquet, Duval, J.

Held, That in general, nothing less than future danger to life and limb will support an action *en séparation de corps*, yet under peculiar circumstances, such as disparity of age, if the general conduct of the husband exhibits violent treat-

ment, contempt, hatred, or neglect, although danger to life or limb cannot be inferred, it is, in an aggravated form, sufficient. *Chalon vs. Trahan*. K. B. Q. 1820.

Held, That a general allegation of ill-treatment will not support an action *en séparation de corps*. The facts on which the *demande* is founded must be set forth specially as to time, place, and circumstance. *Boulangier vs. Wheat*. K. B. Q. 1821:

Held, That a confirmed habit of intoxication is a menace of danger in its consequences, and, as such, a legal ground for *séparation de corps*. *Craven vs. Craven*. K. B. Q. 1821.

Held, That long absence is not a sufficient cause for *séparation de corps*, but is so for a *séparation de biens*. *Gravel vs. Girard*. K. B. Q. 1821.

Held, That a married woman forfeits her matrimonial rights, in an action *en séparation de corps et de biens*, by adultery on her part. 3 L. C. Rep., p. 418, *Cherrier*, App., vs. *Bender*, Resp. In Appeal; Rolland, Panet, Aylwin, J.

Held, In an action of *séparation de corps et de biens*, a doctor's bill for attendance on the plaintiff, was properly charged as a debt due by the *communauté*. 6 L. C. Rep., p. 474, *Jannot vs. Allard*. S. C. Montreal; Day, Smith, Mondelet, J.

Held. On demurrer, 1. That a contestation of an opposition *à fin d'annuler*, founded on a judgment *en séparation de biens* which attacks the validity of the grounds on which such judgment *en séparation* was rendered, is bad.

2. That one count in a plea may be demurred to, although the remaining counts are good. 10 L. C. Rep., p. 206, *Routh vs. McGuire*, and *McGuire et al. Opps.* S. C. Quebec; Bowen, J.

Held, That a creditor of the husband is not entitled to contest a demand *en séparation de biens* by the wife, and can intervene in such action only for the preservation of his rights. 10 L. C. Rep., p. 375, *Marchand*, App., *Lamirande*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J.

Held, That in an action against a married woman as *séparée des biens*, the production of notarial deeds, in which she takes the quality of *femme séparée de biens* from her husband, is not sufficient evidence of such separation, if the separation is denied by the plea. 11 L. C. Rep., p. 118, *Wheeler et al. vs. Burkitt et al.* S. C. Montreal; Monk, J.

Held, That the renunciation to the *communauté* duly insinuated is a valid execution of a judgment *en séparation de biens*. 1 Jurist, p. 273, *Sénécal*, App., *Labelle et al.*, Resp. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That an action against husband and wife to recover the price of goods sold and delivered to a woman separated as to property from her husband, will not be maintained without proof that the husband expressly authorized the purchase by the wife. 3 Jurist, p. 121, *Benjamin et al. vs. Clarke et vir.* S. C. Montreal; Smith, J.

Held, 1. That service of a writ of summons on a woman separated as to property, at her husband's domicile, during his temporary absence, is valid.

2. That service must be made by delivering the writ to defendant personally, at her domicile to some person for her, and the return must state in terms of

the ordinance of 1667, title 2, art. 3, to whom it was so delivered. 2 Jurist, p. 154, *The Trust and Loan Company of U. C. vs. McKay et vir.* S. C. Montreal; Badgley, J.

Held, That a motion for a *fille enchère* against a woman separated as to property from her husband, and the duly authorized *adjudicataire* of the lands sold, will be dismissed with costs, if notice of such motion is not given to the husband. 12 L. C. Rep., p. 33, *Jordan, App., vs. Ladrière dit Flumand, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

See also in *Jurry, App., The Trust and Loan Company of U. C.* In Appeal; 12 L. C. Rep., p. 421.

Held, That where an action *en séparation de corps et de biens* is brought by a wife, but not sustained by proof, her action will be dismissed with costs; and, on proof of open and continuous adultery and prostitution on her part, the incidental demand of the husband for *séparation de corps* will be maintained and the children placed under the care of the father. 12 L. C. Rep., p. 81, *Beaucuire vs. Lepage.* S. C. Montreal; Badgley, J.

Held, That in the case submitted, the husband, the attorney under a general power of his wife *séparée de biens*, and signing as agent, is supposed to act in the name of his wife, it being established that by reason of his position and his insolvency, he could not contract in his own name, and that the work undertaken was made in the tailoring shop kept in the name of his wife. 12 L. C. Rep., p. 454, *Giltner et vir. App., Gorrie, Resp.* In Appeal; Lafontaine, C. J., Duval, Meredith, J.; Mondelet, J., dissenting.

Held, Where a defendant who was sued as *séparée de biens* from her husband, pleaded she was not so separated, such allegation, in the plea, will not be struck out on motion of the plaintiff, because the allegation is a matter of exception *à la forme.* 4 Jurist, p. 309, *Wheeler et al. vs. Burkitt et al.* S. C. Montreal; Badgley, J.

Held, In same case, That the plaintiff was bound to prove a separation, either by marriage contract, or by judicial sentence. *Ib.*, p. 309. Monk, J.

In this case a wife had obtained a *séparation de biens*, and a transaction was entered into, suspending the execution of the judgment on certain conditions, and amongst others, on the payment by the husband of an alimentary allowance to the wife, which payment was made for a time, but discontinued.

Held, That the *transaction* only suspended the execution of the judgment, but did not destroy or annul it; and that the right of executing the judgment could only be barred by the lapse of 30 years. 1 Rev. de Jur., p. 321, *Bender, App., Jacobs, Resp.* In Appeal; Bowen, Panet, Bedard, Gairdner, J.; Stuart, C. J., dissenting.

Judgment *en séparation de biens*, and declaring valid a seizure made by the wife. Prévosté, No. 87.

## SEPARATION—SEIZURE.

Held, That a wife, in case of her husband's insolvency, cannot sue by her tutor for what she has brought in marriage. Her remedy is by an action *en séparation de biens* in her own name. *Melvin vs. Ireland.* K. B. Q. 1820.



Held, That in an action for *séparation de corps et de biens*, a writ of *saisie gagée* will be ordered against the estate of the husband, on an affidavit that he is making away with, and secreting his estate and effects, with intent to frustrate plaintiff's action and rights. 11 L. C. Rep., p. 490, *Idler vs. Clarke*. S. C. Montreal; Smith, J.

Judgment allowing a voluntary *séparation de corps et de biens* reversed. *Prévosté*, No. 126.

## WIFE-PENALTY.

Held, That the husband, although absent, is liable for the penalty under the Lower Canada Game Act, 22nd Vict., c. 103, on the ground that his wife, acting as his agent in the ordinary course of his business, must be presumed to have had his authority for the illegal act complained of. 5 Jurist, p. 104, *Regina ex relatione Campbell vs. O'Donaghue*. Quebec; Stuart, J.

HUSBAND'S bequest of Wife's share in the Community. See WILL AND TESTAMENT.

Husband's sale to an Opposant whom he afterwards marries, when fraudulent. See FRAUD.

WIFE, Interrogatories upon. See Interrogatories *sur faits et articles*, motion for.

HUSBAND AND WIFE, Service upon. See INSCRIPTION DE FAUX.

WIFE Adjudicataire. See DECRET, FOLLE ENCHERE.

" *Contrainte* against. See CONTRAINTE PAR CORPS, Wife.

HUSBAND AND WIFE, BILLS AND NOTES. See Bills and Notes of married women.

HUSBAND, Interrogatories. See Interrogatories.

" Adultery. See DOWER.

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Powers of. See SHIPS AND SHIPPING.

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 HYPOTHEQUE.

## SOCCAGE LANDS.

Held, That a general *hypothèque* does not affect lands held in free and common soccage. *Paterson et al.*, App., *McCallum et al.*, Resp. In Appeal, 17th Nov., 1830.

See ACTION Hypothecary.

" MORTGAGE, REGISTRATION.

DIVISIBILITY OF. See GARANTIE, Divisibility of.

## IMPENSES ET AMELIORATIONS.

Held, That on the distribution of moneys from the sale of an immovable, a *ventilation* will be ordered, and the value of the immovable *fonds* will be divided between the creditors of the vendor, and the value of the *impenses et améliorations* between the creditors of the purchaser. 1 L. C. Rep., p. 173. *Bedard vs. Dougal* and *Opp*. S. C. Quebec; Bowen, C. J.; Bacquet, Meredith, J.

Held, That a defendant, in an hypothecary action, cannot demand to be paid for his ameliorations before he be obliged to abandon the property, but he may demand security that the property will be sold for an amount sufficient to pay such ameliorations. 4 L. C. Rep., p. 358, *Withall vs. Ellis*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That a lessee of land cannot set up as against his lessor, plaintiff in a petitory action, ameliorations made by the lessee on the land sought to be recovered. 5 L. C. Rep., p. 96, *Peltier vs. Larichelière*. S. C. Montreal; Day, Smith, Vanfelson, J.

## IN PETITORY ACTION.

Held, 1. That a defendant who has made permanent improvements on a lot, has a right to be indemnified to the extent of the increased value thereby given to the lot, before being compelled to abandon it.

2. That a defendant in possession of the rights of the original lessee of the crown, under a lease for 21 years from the 12th Feb., 1818, is entitled to hold possession until the expiry of the lease (12th Feb., 1839) and the plaintiff is only entitled to the rents, issues, and profits of the lot, from the last mentioned date, notwithstanding he holds the lot by a transfer made in 1835, of the rights of a patentee of the crown under letters patent of 1827.

3. That from the proof in this case, the court below should have ordered an *expertise* to ascertain the value of the ameliorations and the amount of the rents, issues, and profits; such ameliorations to be valued from the date of the lease, and the rents, issues, and profits from the expiry thereof, the *experts* also to ascertain the value of the lot apart from the increased value given to it, by the ameliorations. 6 L. C. Rep., p. 294, *Lawrence, App., Stuart, Resp*. In Appeal; Lafontaine, C. J., Duval, Caron, J.; Aylwin, J., dissenting.

Held, 1. That a squatter who has made substantial improvements (*impenses et améliorations utiles*) on a lot occupied by him, without the consent of the proprietor, is entitled to judgment against the proprietor for the excess of the value of such improvements beyond the rents, issues, and profits, and to retain possession until paid for such excess.

2. That the only legal mode of ascertaining the value of such improvements in a contested petitory action is by an *expertise*.

3. That the eldest son, as heir at law of his father who died intestate, is seized, as proprietor, of soccage lands by virtue of the right of primogeniture as one of the incidents of that tenure, and can maintain a petitory action for such lands. 8 L. C. Rep., p. 113, *Stuart vs. Eaton*. C. C. Stanstead; Short, J.



Held, That in a petitory action, the possessor in bad faith has no lien, *droit de retention*, upon the land for his improvements. 1 Jurist, p. 3, *Lane et al. vs. Deloge*. S. C. Montreal; Day, Smith, Badgley, J.

IMPENSES. See ACTION PETITORY.

" See USUFRUCT. Ameliorations.

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ICE.

LOSS OF SHIP BY. See SHIPS AND SHIPPING.

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IMPUTATION OF PAYMENT.

See BILLS AND NOTES, transferred after duo.

" PROTEST.

" PLEADING, Payment.

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INDEMNITY.

See SEIGNIORIAL RIGHTS, Indemnity.

" RAILWAY COMPANY.

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INDIAN.

Power to sell wood. See SALE OF GOODS.

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INFORMATION.

Pro Regina. See ATTY. GENERAL.

" CRIMINAL LAW, Information.

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INJUNCTION.

Held, That a writ of injunction may be issued; and issued *pendente lite*. *Dupré vs. Hamilton*. K. B. Q. 1816.

Held, That judgment in an *action negatoire* is in the nature of an injunction in chancery. *Savard vs. Morsan*. K. B. Q. 1820.

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## INSCRIPTION DE FAUX.

## PROOF OF.

Held, That on an *inscription de faux* the subscribing witnesses to a forged deed, and also witnesses who are related to the parties, may be examined. *Pacquet vs. Deniers*. K. B. Q. 1810.

Held, That the *témoins instrumentaires* to an *acte* alleged to be *faux* cannot, when unsupported, establish the *faux*. *Meunier vs. Cardinal*. S. C. Montreal; Smith, Vanfelson, Mondelet, J. Cond. Rep., p. 28.

Held, That if the party who files an *acte* impeached *en faux* omits to declare, when called upon, that he means to make use of it, he is not foreclosed, but may still be admitted to make his declaration, on payment of costs. *Proux vs. Proux*. K. B. Q. 1818.

Held, That the original minute of a notarial *acte* impeached *en faux* is to be filed in most cases by the defendant *en faux*. *Pacquet vs. Demers*. K. B. Q. 1810.

Held, That if *moyens de faux* be such as will not, if proved, affect the *acte* impugned, the Court will set them aside, and proceed with the cause in chief. *Baby vs. Bernard*. K. B. Q. 1810.

Held, That in the case of a will, a suggestion that only one notary was present at the execution of the instrument, is a *moyen de faux pertinent*. *Proux vs. Proux*. K. B. Q. 1819.

Held, That a notary cannot be compelled, on an *inscription de faux*, to give evidence touching the validity of any instrument executed before him. Stuart's Rep., p. 440, *Routier*, App., *Robitaille*, Resp. In Appeal, 17th Nov., 1830.

Held, That notaries or *témoins instrumentaires* to a will, or other authentic instrument, are competent witnesses on an *inscription de faux* impugning the validity of such instrument. 4 L. C. Rep., p. 228, *Welling vs. Purant*. S. C. Quebec; Duval, Meredith, J.

So also in *Taillfer vs. Tuillfer et al.* S. C. Montreal; Cond. Rep., p. 32.

Held, That upon a special demurrer (*exception à la forme*) alleging the want of service of the writ and declaration, the Court will, on consent given to that effect by the plaintiff, order proof on such demurrer, without an *inscription de faux*. 6 L. C. Rep., p. 268, *Charlton vs. Cary*. S. C. Quebec; Bowen, C. J., Meredith, Badgley, J.

Held, That on *inscription de faux* against a *testament solennel*, the witnesses to the will may be examined, but that their evidence, unsupported by other proof or presumption, will not be sufficient to maintain such inscription. 4 Jurist, p. 47, *Lavallé vs. Demontigny*. S. C. Montreal; Badgley, J.

See *Stem*, App., vs. *Jamieson*, Resp. 3 Rev. de Jur., p. 243.

Held, That on an *inscription en faux* against an *extrait baptistaire*, the curé, by whom the entry purported to have been made, may be examined on behalf of the defendant *en faux*. *Languedoc et al. vs. Laviolette*. S. C. Montreal; Day, Smith, Mondelet, J. Cond. Rep., p. 63.

Held, That it is not necessary to the authenticity of a *billet en brevet* that both notaries should be present, but that it may be countersigned by the second

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notary, in the absence of the parties. 5 Jurist, p. 77, *Dalpe dit Pariseau vs. Pelletier dit Bellefleur*. C. C. Montreal; Badgley, J.

Held, That an *extrait de baptême* from a book kept by the minister of the American Presbyterian Church, Montreal, before, as such minister, he was authorized by law to keep a register, will not be set aside, on an *inscription de faux*, unless its falsity and incorrectness are alleged and proved; that although the *inscription de faux* is dismissed, the *extrait* is not *authentic* in itself, but rights as to proof of such *extrait* will be reserved to the party producing it. 5 Jurist, p. 123, *Shaw et vir. vs. Sykes*. S. C. Montreal; Smith, J.

Held, That when a draft of judgment has been altered by erasures in an essential part, an *inscription de faux* will not lie, but the remedy is by petition to the Court to have the judgment entered in the registers as it was pronounced. 5 Jurist, p. 141, *Ross, App., Palgrave, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, J.; Caron, J., dissenting.

Held, On an *inscription de faux* against the return of a bailiff to a writ of summons, and on an *exception à la forme*.

1. That the deposition of a witness, not certified by the prothonotary, cannot be read.

2. That an exhibit fyled by a party in a cause, becomes common to all the other parties.

3. That a defendant who receives copy of a writ and declaration in a sealed envelope, cannot set up that it has been impossible for him to answer the action.

4. That an *inscription de faux* against the return of a bailiff who certifies that he has left copy of the writ and declaration when he did not know the contents of the envelope, cannot be maintained, the production of the sealed envelope being found to establish the truth of the return.

5. That in the case submitted, the exhibition to the defendant of the original writ and declaration was unnecessary. 9 L. C. Rep., p. 483, *La Banque du Peuple, App., Gogy, Resp.* Lafontaine, C. J., Aylwin, Duval, J.; Caron, J. dissenting.

Held, Where defendant's pleas and exhibits were inscribed against *en faux* as not being fyled on the day endorsed on them, that the defendant might withdraw them, and substitute others in their place, on payment of the costs of the proceedings *en faux* and thirty shillings additional on fyling new pleas. 1 Jurist, p. 280, *Mayer vs. Thompson et al.* S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, That an *inscription de faux* will not be permitted against a copy of declaration in another case, fyled as exhibit and certified by the attorneys producing it. 2 Jurist, p. 72, *Molson vs. Burroughs*. S. C. Montreal; Smith, Mondelet, J.

Held, That the *procès verbal* of the *pièce arguée de faux* should be made immediately after the *compulsoire*. 2 Jurist, p. 186, *Moreau et vir. vs. Leonard*. S. C. Montreal; Smith, J.

Held, That an election of domicile by the plaintiff *en faux* is not necessary. 3 Jurist, p. 190, *Martineau vs. Kerrigan*. S. C. Montreal; Badgley, J.

Held, That the plaintiff (defendant *en faux*) is not bound to answer a plea to the action, before the *inscription en faux* is disposed of. 3 Jurist, p. 263, *Martineau vs. Kerrigan*. S. C. Montreal; Berthelot, J.

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Held, 1. That the Court will, on cause shown, allow an *inscription de faux* to be made after the lapse of four days from the fying of the *pièce arguée de faux*, and that sufficient cause had been shown, in the case submitted.

2. That leave will be granted to inscribe *en faux* against the copy of a judgment served on the defendant arrested on *copias*, ordering him to surrender within one month, the word "ninth" having been inserted in the copy, instead of the word "month."

*Semble*, That copies of judgment served must be certified by the prothonotary of the Court, and not by attorneys. 12 L. C. Rep., p. 90, *Seymour vs. Horner et al.* S. C. Montreal; Monk, J.

Held, That a party will not be allowed, unless on cause shown, to inscribe *en faux* against a bailiff's return later than four days after the return. 6 Jurist, p. 243, *Perry vs. Milne*, and T. S. S. C. Montreal; Monk, J.

Held, That the return of a bailiff of service made by him of a true copy of a judgment, when such copy was certified by attorneys, and not by the prothonotary, is not a *faux* so known and recognized by law, and *moyens de faux* as to such certificate and return are inadmissible and irrelevant. *Perry vs. Milne*, and T. S. S. C. Montreal; Badgley, J.

Note ordered to be deposited in Court. Prevosté, No. 36.

## WHEN MAINTAINABLE.

Held, That an *inscription de faux* cannot be maintained against a notarial copy of an instrument containing a slight alteration, as in the case submitted, in the word *parties* being altered so as to make it *party*. 5 L. C. Rep., p. 430, *Halpin*, App., *Ryan*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, 1. That in an action to set aside a will for *suggestion, défaut de liberté*, &c., the plaintiff, who has discovered, since the institution of the action, grounds of *fausseté*, may, by motion, pray to be allowed to inscribe *en faux* against the *acte* he has himself produced.

2. That the *inscription de faux* may also be brought by a direct action. 6 L. C. Rep., p. 17, *Perrault*, App., *Simard et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, In same case in Appeal, 3. That in the case of an *inscription de faux* and after closing of the *enquête*, the plaintiff *en faux* is entitled to amend his *moyens de faux* by adding new *moyens* brought out by the evidence. 6 L. C. Rep., p. 24.

Held, That a sheriff's return can only be contested by *inscription de faux*, 1 L. C. Rep., p. 154, *Lesperance vs. Allard et vir.* In Appeal; Stuart, C. J., Rolland, Panet, Aylwin, J. So in *Belanger vs. Holmes*. K. B. Q., 1820.

Held, That where a defendant, opposant, fyled a petition *en inscription de faux* and did not move to set aside the inscription for hearing on the merits of the opposition, he thereby virtually renounced all pretensions to proceed on his petition *en faux*. 1 L. C. Rep., p. 305, *Phillips vs. Hart*. S. C. Three Rivers; Bowen, C. J., Mondelet, Vanfelson, J.

Held, 1. That a bailiff's return is an authentic *acte*, the validity of which can only be impugned by an *inscription de faux*.

2. No proof against such return will be permitted without an *inscription de faux*.

3. That service of one copy of a writ and declaration is sufficient to bring husband and wife *séparés de biens* before the Court. 9 L. C. Rep., p. 465, *Trust and Loan Co., App., McKay, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

As to *inscription de faux* in case of variance between original and copy of writ.

See PLEADINGS, Exception à la forme.

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### INSINUATION.

See DONATION, Insinuation.

“ DAMAGES, Slander.

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### INSOLVENCY.

See FRAUD, Insolvency.

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### INSURANCE.

#### AGAINST FIRE.

In an action brought by an insurance company against the owner and master of a steamer on the St. Lawrence, the plaintiff alleged in effect that the company had effected an insurance on the parish church and sacristy of Boucherville for £3300, that by the negligence of the defendant fire had been communicated, by sparks from the chimney of the steamer, to the adjacent houses, and thence to the church, causing damage to an extent beyond the sum insured; that this insurance was paid to the extent of £3045 15s. by the company to the *curé* and the *marguillier en charge*, who acknowledged the receipt of the money, and in the same *acte* assigned to plaintiffs “all right, title, interest, property, claim, and “demand whatsoever,” which they or the parish could be supposed to have in the sum so paid. Plea general issue. After evidence adduced, it was held (Rolland, C. J., Gale, Day, J.) in the Queen's Bench, Montreal:

That the company was subrogated in the rights of the parish, and had an action against the owners of the boat and their agents, and that negligence and default were proved. Judgment for the sum paid to the *Fabrique*.

Held, In the Provincial Court of Appeal, Stuart, C. J., Bowen, Panet, Bedard, Mondelet, Gairdner, J., That the action, as brought, imported only a demand by the company in their own right as insurers, and not as assignees of the parish, that the assignment was not made by parties competent in law to make it, and was made only of a part of the damage claimed by the *Fabrique*, and that no subrogation was alleged or proved.

Held, In the Privy Council, 1. That the declaration was substantially good,

and disclosed a derivative title, under the *Fabrique*, of a definite part of the damage, and that such damage was caused by the neglect of the defendant.

2. That if the title set up were to be considered merely as an assignment *cession transport* from the curé and marguillier, it would clearly be bad, the consent of the *bureau* being necessary to its validity.

3. That the title set up was one of subrogation, and was validly made by the party entitled to receive the money, and give a discharge.

4. That insurers against fire have a legal right, on paying the loss, to be subrogated in the actions of the insured against the originators of the fire and loss.

5. That the plaintiffs, who, on payment of the loss, were subrogated to a part of the claim for damages, can sue without joining the *Fabrique* as co-plaintiffs, notwithstanding the reasonableness of the rule that the defendants should not be liable to a double action, inasmuch as this ground of defence is not available under the plea of not guilty, or general denial. Judgment in Appeal reversed.

Held, in the Queen's Bench in same case, Rolland, C. J., Gale, Day, J., 1. That interest is an objection to the credibility, and not to the competency of a witness.

2. That the curé and marguillier, although members of the *fabrique* or corporation of the parish, were competent witnesses in the cause. 1 L. C. Rep., p. 223, *The Quebec Fire Assurance Company vs. Molson et al.*

An action was brought on a policy of insurance against fire, for loss on goods in a building and premises described as "bounded in rear by a stone building covered with tin, occupied by the assured as a store, stable, and coach-house, and by a yard, in which yard there was being erected a first class store, which would communicate with the building insured (carpenters allowed to be at work for one month)." The plea set forth, 1. That the building in rear was fraudulently described as covered with tin, whereas it was covered with wood; that the fire originated in this rear store, and communicated by the door, which was falsely and fraudulently omitted to be mentioned at the effecting of the insurance; and that by means of such false and fraudulent representations and suppression the plaintiff had no right of action.

2. That the carpenters were at work more than a month.

The policy was dated the 21st June the fire occurring on the 27th July, 1850.

Under the Jury Law, 14th and 15th Vict., c. 89, questions were submitted to the jury, under which the jury found:

1. The value of the goods insured.

2. Amount of loss.

3. Quest. "Was the description given by the insured of the aforesaid building containing the said goods, wares, and merchandise, correct? If not, in what particular was it incorrect?"

Ans. Yes.

4. Quest. "Was there, at the time of the aforesaid fire, a door or aperture communicating between the stone store given as a boundary in the said policy, and another store in the yard in the rear of the said building?"

Ans. "Yes, there was a door as mentioned in this interrogatory."

5. Found that the fire originated in a brick building in the rear adjoining the stone hangar, and communicated from one of the said hangars to the other by the door mentioned.



6. Qucst. "Did this door or aperture alter or increase the risk in the said policy contained?"

Ans. "The door increased the risk, as stipulated in the said policy of insurance."

*Judgment.* The Court "having heard the parties upon the plaintiff's motion, that judgment be rendered pursuant to said verdict," considering that it was established by the verdict that there was a door not disclosed, that this door increased the risk, and that there was a brick building covered with wood between the building in which the goods were, and the stone hangar covered with tin, of the existence of which no mention is made in the policy, doth dismiss said action with costs. 2 L. C. Rep., p. 200, *Casey vs. Goldsmid et al.* S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, In Appeal; 1. That no inference prejudicial to the insured could be drawn from the answers as given.

2. That there was nothing in the verdict to show that the existence of the door was not declared, and that it was the duty of the insurers to prove the fraud and deceit alleged.

3. That it was the duty of the insurers, if there was ambiguity or error in the questions or answers, to move for a new trial.

4. That not having so moved they must abide by the verdict, and no other question can arise than "whether the Respondents have made out their plea in evidence, and this Court is of opinion that they have not." Judgment for £429 10s. 7d., and costs. 4 L. C. Rep., p. 107. Rolland, Panet, Aylwin, Mondelet, J.; Aylwin, dissenting, would have sent the case back to be tried by another jury, the fraud and concealment being omitted in the questions.

#### AVERAGE.

Held, That in the case of an insurance against fire effected by the inspector of ashes, Montreal, as required by law, on ashes (in the inspection stores) belonging to various persons, which were damaged by water and were subsequently consumed by fire, the inspectors are justified in so apportioning the insurance, as that each of the parties interested is bound to bear his proportion of the reduction made on the amount insured by reason of the loss caused by water, inasmuch as there were no means of ascertaining to whom the ashes belonged which were so damaged by water. 12 L. C. Rep., p. 337, *Gilmour et al. vs. Dyde et al.* S. C. Montreal; Smith, J.

#### CONSTRUCTION OF POLICY.

Held, That policies of insurance are to be constructed by the same rules as other instruments. *Scott vs. Quebec Fire Insurance Company.* K. B. Q. 1821.

#### CERTIFICATE—CONDITION PRECEDENT.

Held, That the furnishing of a certificate (as required by a condition of the policy against fire) of three respectable persons, that they believed that the loss had not occurred by fraud, is a condition precedent, without compliance with

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which the insured cannot recover. 6 Jurist, p. 89, *Racine vs. The Equitable Company*. S. C. Montreal; Berthelot, J.

## CERTIFICATE OF LOSS.

Held, 1. That the Court of Appeals may hear an objection not argued in the court of original jurisdiction.

2. That if a condition in a fire policy requires, in the event of loss, and before payment thereof, a certificate, to be procured under the hand of a magistrate or sworn notary of the city or district, importing that they are acquainted with the character and circumstances of the persons insured, and do know, or verily believe, that they have really and by misfortune, without fraud, sustained by the fire loss or damage to the amount therein mentioned, such certificate is a condition precedent to a recovery of any loss against the insurers on the policy, and if a certificate be procured in which a knowledge or belief of the amount of the loss is omitted, it will be insufficient. Stuart's Rep., p. 354, *Scott et al.*, App., *The Phoenix Assurance Company*, Resp. In Appeal; May, 1829.

## DESCRIPTION OF PROPERTY.

Held, 1. That the error of an insurance company's agent, in making and transmitting to the head office a diagram of the buildings insured, by means of which the premises are described in the policy as "detached" instead of as "connected with other buildings" cannot deprive the insured of his remedy on the policy.

2. That to a plea setting up that the policy was obtained through false and fraudulent misrepresentations as to the buildings being "detached" and as to the number of occupants, and that thereby the conditions of the policy were broken, and the plaintiff deprived of all remedy under it, the plaintiff is entitled to answer, denying such misrepresentations, and alleging the visits of the company's agent to the insured premises, and his doings as to the making and transmitting of an erroneous diagram. 9 L. C. Rep., p. 61, *Somers vs. The Athenæum Insurance Company*. S. C. Montreal; Smith, J.  
Same case, 3 Jurist, p. 67.

Held, 1. That the insurance effected in this case on a certain quantity of coals in a yard, covered not only the coals deposited at the date of the insurance, but those deposited since.

2. That it covers risk arising from spontaneous combustion. 9 L. C. Rep., p. 448, *B. A. Insurance Company*, App., *Joseph*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

## DOUBLE INSURANCE.

Held, That where by the by-laws of an insurance company indorsed on the policy, notice of a second insurance must be given and endorsed upon such policy *à peine de nullité*, that a notice of second insurance given after the fire, and as a consequence not endorsed on the policy, is sufficient. 1 Jurist, p. 197. *Soupras vs. Mutual Insurance Company, Chambly*. S. C. Montreal; Day, Mondelet, Chabot, J.



Held, That the condition of notice usually indorsed on policies of fire insurance, as to double insurance, will not be held to be waived by the company if their agent, on being notified of such double insurance, *after the fire*, made no specific objection to the claim of the assured on that ground. 1 Jurist, p. 278, *Atwell vs. The Western Assurance Company*. S. C. Montreal; Day, Smith, Mondelet, J.; Day, J., dissenting. Confirmed in Appeal. See 2 Jurist, p. 181.

Held, That the mere substitution of one office for another in a case of fire insurance, does not necessitate the giving of notice, as in a case of new or double insurance. 1 Jurist, p. 284, *Pascaud vs. The Monarch Insurance Company*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That the 23rd section of the Act 4 Wm. 4, c. 33, respecting double insurances on *houses and buildings* does not apply to insurances on goods.

2. That an endorsement on the policy under the said act, consenting to the removal of the goods insured from the building described in the policy to another building, and signed by the secretary, is binding on the company. 3 Jurist, p. 2, *Chalmers vs. The Mutual Insurance of Stanstead and Sherbrooke Counties*. In Appeal; Lafontaine, C. J., Duval, Caron, J.; Aylwin, J., dissenting.

#### FRAUD IN.

Held, That the condition of a policy imposing the penalty of a forfeiture of all remedy upon it, in case of a fraudulent overcharge, is not comminatory, but will be enforced if the fraudulent overcharge be proved. 3 Jurist, p. 162, *Thomas et al. vs. The Times and Beacon Insurance Company*. S. C. Montreal; Smith, J.

#### INSURABLE INTEREST—CONSIGNEE.

Held, 1. That an indorsement, upon an open policy, of a cargo for insurance, is incomplete if the name of the vessel by which such cargo is shipped is in blank, but it is perfected by a notice to the insurers of the name of the vessel, whether they fill up the blank or not.

2. The provision in a policy that a vessel must not be below "class B 1" without reference to any particular classification, will not render it necessary that such vessel should not be below class B 1, in a classification of vessels made on behalf of lake underwriters and for their information, but it will be construed as meaning that the vessel must not be below the class of vessels recognized by mariners as B 1, if there be any such class.

3. A person who insures as agent for another cannot sue for indemnity for a loss in his own name, as principal.

4. And if a consignee sue for indemnity, under a policy in his own name, upon goods belonging to another and consigned to him, he must show an insurable interest in such goods to entitle him to recover, and he can only recover the amount of his interest.

5. The possession of the bill of lading is *prima facie* evidence of proprietorship, but it is insufficient to show an insurable interest in the consignee, if it be shown *aliunde* that he is not the proprietor of the goods.

6. To entitle a consignee to recover under a policy of insurance in his own name for goods lost or damaged *in transitu*, he must show a pecuniary and ap-

preciable interest in such goods, arising from a lien upon them, which lien may be for advances in respect of them, or for a general balance; but, however created, it must attach specifically upon the goods covered by the policy. 6 Jurist, p. 98, *Cusack vs. Mutual Insurance Company of Buffalo*. S. C. Montreal; Smith, J.

## INSURANCE, MARINE.

Held, 1. That in an action on a marine policy of insurance, the plaintiff must prove that the loss accrued from some peril of the sea insured against.

2. That the mere fact that the goods were damaged by sea water to a trifling extent, does not constitute such proof.

3. That a survey of goods alleged to be damaged, made without notice to the underwriters, and followed by a sale at 9 o'clock a. m., on the second day after the survey, at which the claimant bought in the goods, is irregular, and such sale affords no criterion as to the extent of damage suffered. 4 Jurist, p. 23, *The Sun Mutual Insurance Company vs. Damasse Masson et al., and E. contra*. S. C. Montreal; Monk, J.

## LOSS—VALUE.

Held, That in insurance against fire, the insurers must pay the whole of any loss which does not exceed the amount insured, although the goods insured be of greater value. Stuart's Rep., p. 174, *Peddie vs. Quebec Fire Insurance Company*. K. B. Q. 1824.

Held, That an insurance company is liable to a person whose stock in trade is insured, for the actual market value of such stock at the time of the fire, and not for the cost price thereof made, or the sum which it may have cost the insurer to manufacture the stock, and this although the profits were not specifically insured. 11 L. C. Rep., p. 190, *The Equitable Company, App., vs. Quinn*, Réa. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

## NOTICE OF LOSS.

Held, 1. That in order to obtain a new trial on the ground of evidence, it must appear that the verdict is clearly against the evidence.

2. That the delay fixed by the regulations of an insurance company for giving notice of the fire and the circumstances connected with it, is not in all cases so fatal as to deprive a party who has not complied literally with the regulations, from all recourse. 1 Rev. de Jur. p. 113, *Dill vs. The Quebec Assurance Company*. Q. B. Quebec; Stuart, C. J., Panet, J. 1844.

## OF DEBT—LOSS.

M. sells to L. a lot of land on a constituted rent of £60 per annum on a capital of £1000, the purchaser, by the deed, binding himself to erect buildings on the lot, and to insure them to the extent of £400 as collateral security.

The plaintiff, to whom the debt is transferred, insures the buildings to the extent of £600 to cover the *constitut*; and whilst the policy is in force, the buildings are destroyed by fire, but are rebuilt and restored to their original value by the purchaser L. before action brought.

Held, 1. In an action by the insured, to recover the amount of the policy, that the insured could not recover, inasmuch as he had the same security for the payment of the *constitut* as before the fire, and that no loss has been occasioned by reason of which an action could be maintained.

2. That the principle that the contract of insurance is a contract of indemnity applies to this case, and is a bar to any recovery, there being no loss sustained. 10 L. C. Rep., p. 8, *Mathewson vs. Western Assurance Company*. S. C. Montreal; Smith, J.

Same case, 4 Jurist, p. 57.

#### ON LIFE.

Held, That the amount of a policy of insurance upon the husband's life, the premiums on which have been paid by him, and which has been received by the curator to his vacant estate, by reason of his insolvency, may nevertheless be claimed on behalf of the wife, by two *trustees* who accepted the donation of the amount of such policy made by the contract of marriage, for the purpose of paying over the interest to the wife, and the principal to the children, notwithstanding that the donation and assignment were not noted in the books of the company, notification having been given at a place other than the place where the insurance was effected. 9 L. C. Rep., p. 450, *Ex parte Spiers and Attorney General and others*, claimants. S. C. Montreal; Monk, J.

#### POLICY—INSURABLE INTEREST.

Held, 1. That a contract of insurance on real estate, against fire, may be made and proved without writing.

2. That a notarial transfer of a mortgage the subject of insurance, does not destroy the insurable interest then existing, a *contre lettre sous seign privé* showing that the transfer was merely nominal.

3. That a clause in the acts constituting the charter of an incorporated insurance company, enacting, "that all policies of assurance whatever, made under the authority of this act (6th Vict., c. 22) which shall be subscribed by any three directors of the said corporation, and countersigned by the secretary and manager, and shall be under the seal of the corporation, shall be binding upon the corporation though not subscribed in the presence of a board of trustees, provided such policies be made and subscribed in conformity to a by-law of the corporation," does not exclude other means of proving a contract of assurance made by them.

4. That interest on the amount assured may be awarded from the day of the loss. 8 L. C. Rep., p. 401, *The Montreal Assurance Company, App., vs. McGillivray*, Resp. In Appeal: Lafontaine, C. J., Duval, Caron, J.; Aylwin, J., dissenting.

Same case, 2 Jurist, p. 221.

Held, In the Privy Council, That the appellants, under the provisions of their acts of incorporation, cannot make any contracts for fire insurance except by policy. 9 L. C. Rep., p. 483, *Montreal Assurance Company, App., McGillivray*, Resp.

Held, That in the case submitted, inasmuch as the appellants could only become liable to a party insured by a regular policy of insurance in writing and the judgment rendered against the company, founded on the verdict of a jury having been reversed in the Privy Council simply, the court will alter the judgment of reversal, and order the case to be remitted to the Superior Court with directions to issue a *venire de novo*. 11 L. C. Rep., p. 325, *The Montreal Assurance Company, App., McGillivray, Resp.* In the Privy Council; Knight, Bruce, Turner, Coleridge, J.

## REPRESENTATION—WARRANTY.

Held, 1. That letters written by the agent of the defendant, a fire assurance company, to his principals after the loss, cannot be used in evidence against the company.

2. That contemporaneous representations made by the insured to other insurers of the same subject, may be legally proved by the defendants.

3. That the loss under a policy which stipulated "That the loss or damages shall be estimated according to the true and actual cost value of the property at the time the loss shall happen" must be ascertained from proof of the money value of the subject in the existing market.

4. That the following words upon the face of the policy, stating the insurance to be "of the steamer *Malukoff*, now lying in Tate's dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter at a place to be approved of by the company, who will not be liable for explosions, either by steam or gun-powder," is a *warranty* and not a *representation*.

5. That such warranty not having been complied with by the insured, the policy is void, and an action for loss will be dismissed upon motion for judgment *non obstante veredicto*. 11 L. C. Rep., p. 128, *Grant vs. The Etna Insurance Company*. S. C. Montreal; Badgley, J.

Held, In Appeal, That whether the clause above cited be considered as a warranty or not, an action could not be maintained against the company, the vessel having never left the dock. 11 L. C. Rep., p. 330, *Grant, App., vs. The Etna Insurance Company, Resp.* Aylwin, Duval, Meredith, Mondelet, J.; Lafontaine, C. J., dissenting.

Same case 5 Jurist, p. 285.

Held in the Privy Council, 1. That the declaration in a policy of insurance to the effect that the vessel insured was "lying in Tate's dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec, and to be laid up for the winter in a place approved by the company," does not amount to a warranty that she shall so navigate.

2. That the words above recited meant that the assured intended to remove his vessel for the purpose of navigation, in the manner described, and that if he did, the policy should still be in force.

*Seem*, That by the rule in England, a party, defendant to a suit, cannot make a motion for judgment *non obstante veredicto*, but that the practice in jury trials in Lower Canada, differing in many and important respects from the

practice in England, their Lordships are always indisposed to interfere with the judgment of a colonial court on a question of its forms and practice. 12 L. C. Rep., p. 386, *Grant, App., The Atna Insurance Company, Resp.* In the Privy Council; Lord Kingsdown et al.

Same case, 6 Jurist. p. 224.

#### SUBROGATION OF VENDEE.

Held, 1. That the vendor's interest in a fire policy, effected on real estate previous to a sale, passed by operation of law to the purchaser, the sale being notified to the insurance company.

2. That payment by the company to the vendor, on a loss accruing after such sale and notice, of a sum greater than the balance due on the *prix de vente*, enures to the benefit of the vendee as a discharge from such balance. 5 L. C. Rep., p. 487, *Leclaire vs. Crapser.* S. C. Montreal; Day, Smith, Vanfelson, J. Same case, Cond. Rep., p. 18.

#### WARRANTY IN.

Held, That policies of insurance are to be construed by the same rules as other instruments; therefore where there is an express warranty, there is no room for implication of any kind. Stuart's Rep., p. 146, *Scott vs. Quebec Fire Assurance Company.* K. B. Q., 1821.

INSURANCE COMPANY, as to trial by jury against. See JURY.

INSURANCE on consigned goods. See EXECUTION, TIERS SAISI.

" expertise in condition of policy. See EXPERTS.

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#### INTERDICTION.

Held, That an interdiction *pour cause de prodigalité* may be suspended by the court. *Ex parte Duchenu.* K. B. Q. 1814.

Held, That a curator to an interdicted person may be removed by his consent and the consent of the relations; or upon petition by the next of kin on sufficient cause, and on *avis de parens* without his consent. *Ex relatione Cott vs. Pagot.* K. B. Q. 1812.

Held, That an attorney guilty of contempt in the face of the court, may be immediately interdicted. *Ex parte Binet.* K. B. Q. 1818.

Held, That a judgment obtained by a person interdicted, by reason of insanity, (his curator not being a party to the suit) is null *de plein droit.* *Sproat vs. Dumière.* K. B. Q. 1819.

Held, That the interdiction, and the appointment of a counsel thereupon, obtained at the instance of the party interdicted, are void with respect to a creditor with whom the interdicted party contracted without his counsel, if the interdiction was not made known to the creditor, and was not inscribed upon the register of interdictions. 2 L. C. Rep., p. 469, *Dechantal et al. vs. Dechantal.* In Appeal: Stuart; O. J., Rolland, Panet, Aylwin; J.

## INTEREST.

Held, That a promise to pay on demand £200 with interest, is a promise to pay interest from the date of the note. *Baxter vs. Robinson*. K. B. Q. 1816.

Held, That upon a note where it is said "twelve months after date I promise to pay £200 with six months' interest," no more than six months' interest before service of process can be allowed, but the plaintiff is entitled to interest from the date of the service. *Heaviside vs. Mann*. K. B. Q. 1817.

Held, That no interest can be allowed upon a judgment for the arrears of one or more years *rente constituée*. *Guenet vs. Gendron*. K. B. Q. 1818.

Held, That service of process *ad respondendum* for a partnership debt is a demand as to all. If, therefore, process is served at different times on two or more, interest is due from the first service. *Rogerson et al. vs. Thomas et al.* K. B. Q. 1818.

Held, That in an action for arrears of interest, interest upon the sum demanded may be awarded by the judgment. 2 L. C. Rep., p. 481, *Anderson et al. vs. Dessaulles et al.* S. C. Quebec, Bowen, C. J., dissenting; Duval, Meredith, J.

Held, 1. That in an obligation payable by instalments in one, two, three, four, and five years, *sans intérêt jusqu'à l'échéance* interest will be due on each instalment after it became due, without the necessity of any *mise en demeure*.

2. That partial payments will be imputed first on the interest, and secondly on the capital. 12 L. C. Rep., p. 280, *Rice et al.*, App., *Ahern*, Resp. In Appeal: Lafontaine, C. J., Duval, Meredith, Mondelet, J.

Same case 6 Jurist, p. 201.

Held, That interest runs on a note payable on demand from the day of its date. 6 Jurist, p. 88, *Dechantal vs. Pominville*. C. C. Montreal; Monk, J.

Held, That a purchaser, enjoying the real estate purchased, and the rents, issues, and profits thereof, and withholding the purchase money until his vendor shall have complied with a judgment condemning him to remove certain oppositions filed to a ratification of title, is bound to pay his vendor the interest as it falls due, although such judgment has not been complied with. 9 L. C. Rep., p. 310, *Dinning*, App., vs. *Douglas*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, J.

Held, That an applicant for ratification of title is not bound to deposit interest on the price of the land in order to obtain a judgment of ratification of title. 3 Jurist, p. 40, *Ex parte Hart*. S. C. Montreal; Day, Smith, Mondelet, J.

As to payment of interest by executors. See *Torrance vs. Torrance*. S. C. Montreal; Cond. Rep., p. 95.

INTEREST ON DOTAL SUMS OF MONEY. See REGISTRATION, Donation.

INTEREST, failure to pay. See CONTRACT, comminatory.

" at 12 per cent. against secretary-treasurer. See CORPORATION, action by.

INTEREST. See USURY.

CROWN'S RIGHT TO INTEREST. See CROWN.

INTEREST, Insurable. See INSURANCE, Marine.



## INTERLOCUTORY.

See JUDGMENT, Interlocutory.

" APPEALS, Interlocutory.

## INTERROGATORIES SUR FAITS ET ARTICLES.

## ADMISSIONS UPON.

Held, That where a party admits a fact and states a distinct fact in *avoidance* of the fact he confesses, the former is evidence against, and the latter is not evidence for him. *Hooper vs. Konig*. K. B. Q. 1813. *Stanfield vs. Massé*. K. B. Q. 1813.

Held, That a party interrogated as to his signature only, cannot add that he has paid the sum mentioned in the writing, that fact being distinct from the fact inquired of. *Hodgson vs. Hanna*. K. B. Q. 1818.

Held, That an admission of indebtedness in a sum not for "money lent" as demanded, but for balance due on land sold by notarial *acte*, was held to be a *commencement de preuve par écrit* to admit proof that the *acte* had been settled for and receipted, and the balance lent to defendant. *Blais vs. Moreau*. K. E. Q. 1818.

Held, That an answer that the signature to a note was in the handwriting of the party proved the signature, but the addition "that the note was in part an "usurious contract for compound interest" could not be received, the question being only as to the signature. *Hart vs. Barlow*. K. B. Q. 1817.

Interrogatories may be put as to extra works not ordered in writing.

See EVIDENCE, Extra Work.

## ANSWERS.

Held, In an action by the plaintiff, who was a shareholder and director of the Montreal and Bytown Railroad Company, that the plaintiff was bound to answer categorically as to facts relating to transactions with the company during the time he was a director. 3 Jurist, p. 136, *Lacroix vs. Perrault de Linivère*. S. C. Montreal; Badgley, J.

Held, That a copy of the defendant's answers to interrogatories *sur faits et articles* and of the writ and declaration in another suit, certified by the prothonotary, will be held sufficient if they support the allegations in the declaration, without interrogating the defendant anew, either as to his identity, or as to the answers in the former suit. *Clairmont et vir vs. Dickson*. 4 Jurist, p. 6., S. C. Montreal; Smith, J.

Held, That a party ordered to answer *viva voce* to interrogatories *sur faits et articles* under the 20th Vict., c. 44, sect. 86, will not be allowed to read his answers from a written paper. 4 Jurist, p. 127, *Coleman et al. vs. Fairbairn*. S. C. Montreal; Badgley, J.

Held, That a default to answer interrogatories will be taken off, and the rule and interrogatories set aside, when the rule was issued after a former and like

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rule in the same case. 4 Jurist, p. 131, *Cummings vs. Dickey, & School Commissioners of Dunham*, Opp. S. C. Montreal; Monk, J.

Held, That the answers of a party make proof only as against himself, and that, therefore, the answers of a defendant to interrogatories put by an intervening party, can be of no avail on a contestation raised between the plaintiff and the intervening party. 3 Rev. de Jur., p. 98, *Gregory, App., Henshaw et al.*, Resp. In Appeal, 1818.

DIVISIBILITY OF ANSWERS. See BILLS AND NOTES.  
See QUO WARRANTO.

## DE NOVO.

Held, That a party cannot be examined *de novo* on *faits et articles* which relate to the same facts on which he has before been interrogated. *Heaviside vs. Mann*. K. B. Q. 1817.

## MOTION FOR.

Held, That a motion for a rule for *faits et articles* to be served on plaintiff's wife, is not a motion of course, but special grounds must be assigned. 6 L. C. Rep., p. 430. S. C. Quebec, Bowen, C. J., Meredith, Morin, J.

Held, That a party cannot be examined on *faits et articles* before issue joined except in cases of necessity, as where he is about to leave the province. *Quebec Bank vs. Baby*. K. B. Q. 1821.

Intimated, That, in commercial cases, a party can, under the 25th Geo. 3, c. 2, sect. 10, examine his adversary on interrogatories *sur faits et articles*. *Oakley vs. Morrough et al.* Pyke's Rep., p. 19. Sewell, C. J., 1810.

Held, That a party interrogated *sur faits et articles* is not entitled to be paid his expenses before he is sworn and answers. 1 L. C. Rep., p. 277, *Mireau vs. Ratelle et al.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, That where a plaintiff has gone out of the jurisdiction of the court, and is domiciled in an island in Lake Huron, the court will not allow service of interrogatories *sur faits et articles* to be made at the prothonotary's office. 4 L. C. Rep., p. 140, *Bro dit Pominville vs. Bureau*. S. C. Montreal; Smith, Vanfelson, Mondelet, J.

Held, In an action *en séparation de biens*, that interrogatories served upon the husband, who made default to answer, cannot be taken as confessed, his *aveu* or consent being inadmissible in such a case. 10 L. C. Rep., p. 454, *Maloney, App., Quinn*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Badgley, J.

Held, That, in the case submitted, the answers on *faits et articles* were sufficiently categorical. 12 L. C. Rep., p. 467, *Leblanc, App., Delvecchio*, Resp. In Appeal; Lafontaine, C. J., Duval, Meredith, Mondelet, J.

Held, That, in an action for money lent, admissions made by a defendant on *faits et articles*, that he received the amount for a debt due him, without however having specially pleaded such debt, are sufficient *commencement de preuve par écrit* to justify the adduction of parol evidence. 6 Jurist, p. 132, *Ford vs. Butler*. S. C. Montreal; Smith, J.



## NOTE ANNEXED.

Held. That when a note declared upon is of one date, and a note of another date is annexed to *faits et articles*, a refusal to answer cannot be received as an implied admission of the note declared on, nor can plaintiff's motion *pro confesso* be allowed. *Manuel vs. Frobisher*. K. B. Q. 1818.

## PRO CONFESSIS.

Held, 1. That a party interrogated *sur faits et articles*, and required to state in detail the consideration of an obligation made by defendant in his favor, and to produce a detailed account of the goods, wares, and merchandizes, if such was the consideration, is bound to do so, else the interrogatories will be taken *pro confessis*.

2. That such party having refused to answer when called upon to do so, cannot, at the hearing of the merits, obtain permission to answer. 10 L. C. Rep., p. 497, *Lantier*, App., *D'Aoust et ux.*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, J.; Mondelet, J., dissenting.

See USURY, BILLS AND NOTES.

INTERROGATORIES, answer of partner. See PARTNERSHIP, SALE TO ONE PARTNER.

## SIGNIFICATION OF.

Held, That service of interrogatories *sur faits et articles* at defendant's domicile is sufficient, the writ of summons having been served personally. 1 Jurist, p. 270, *Turgeon vs. Hogue et al.* S. C. Montreal; Day, Smith, Vanfelson, J.

Held, That interrogatories *sur faits et articles* may be served and returned before the inscription of the cause for evidence. 3 Jurist, p. 168, *Moreau et vir vs. Leonard*. S. C. Montreal; Badgley, J.

Held, That a return of service must show that the rule and interrogatories *sur faits et articles* were both served. *Pozer vs. Meikle*. K. B. Q. 1819.

Held, That the rule and interrogatories must be served at the real actual domicile, and at the same time and place, otherwise a motion to take them as confessed cannot be allowed. *Buteau vs. Duchene*. K. B. Q. 1821.

## INVENTORY.

Held, That the widow, being seized of all the property of the community, may proceed, and is bound to proceed and make an inventory; and that an action to have such inventory made is unnecessary and uncalled for. 3 L. C. Rep., p. 101, *McTavish vs. Pike et al.* In Appeal: Stuart, C. J., Panet, Aylwin, J.; Rolland, J., dissenting.

Held, 1. That so long as a first *tutelle* exists, a second cannot legally be made, and that the acts of such second tutor are null.

2. That an inventory made without calling the first tutor is null.

3. That an inventory at which a minor acts as *subrogé* tutor is null.

4. That a party (a bailiff) who values the goods mentioned in the inventory, must be sworn, otherwise the inventory is null.

5. That inaccuracies, false valuation, or omissions in an inventory, render it void, and the party who makes such inventory is guilty of fraud.

6. That all transactions, acquittances and discharges, which have taken place between a tutor and minors who have become of age, founded on such fraudulent inventory, are null *de plein droit*.

7. So also if made without a faithful inventory, without accounts being rendered, and without production of vouchers.

8. That the action *rescisoire* in such a case, is not prescribed by ten years, when there is deceit and fraud.

9. When there is an absence of *registres de mariage*, the civil status of a person can be proved by the declarations of his parents, and by witnesses. 5 L. C. Rep., p. 433, *Motz vs. Moreau és quul.* S. C. Quebec, Bowen, C. J., Morin, Badgley, J.

In Appeal; Held, 1. That, in the foregoing case, there was no authentic instrument proving the date of respondent's birth; that the respondent having (on the 21st Aug., 1830) declared himself of full age, it was incumbent upon him to establish his minority by precise and undoubted proof, which he had failed to do, as also with respect to the birth of W. A. Motz.

2. That J. C., having the usufruct of the property devised to W. A. Motz, of whom he was the tutor, and never having been the tutor of the respondent, was not held to account to the three children Motz; and that therefore the want of a *reddition de compte* could not be legally invoked by the respondent, to set aside transactions which the respondent and his brother had entered into with J. C. That they being then reputed of full age, such transactions could be made legally, as well for themselves as for their deceased sister, a minor.

3. That the action *en nullité*, brought by the respondent, was prescribed by the expiry of ten years since the passing of the instruments complained of.

4. That it had not been proved that the inventory of the 31st Aug., 1830, was fraudulent, and that the errors and omissions alleged against it could only give rise to a demand for its alteration and rectification, and that therefore the respondent had no right to bring a suit praying that it should be declared void, and concluding *en pétition d'hérédité* and for an inventory, and for the rendering of an account, and that the judgment awarding these conclusions, in the court below, was erroneous. 9 L. C. Rep., p. 148, *Moreau, App., Motz, Resp.* In Appeal: Lafontaine, C. J., Caron, Mondelet, Short, J.

Mr. Justice Mondelet concurred as to the dismissal of the action on the prescription of ten years, but not on the other grounds of the judgment in appeal.

Held, In the Privy Council: That a transaction between a tutor and his ward, based upon an incorrect inventory, whilst the age of the children is still uncertain, will not be set aside, if the transaction has been confirmed by subsequent acts between the parties, at a period when the minors were of full age, had ceased to be under the control of their tutor, and had a knowledge that the inventory was incorrect. 10 L. C. Rep., p. 84, *Motz, App., Moreau, Resp.*

Held, That a defendant who has omitted to put into the inventory two debts

due by him to the deceased, will be condemned to add the same thereto, but not to a forfeiture of his interest therein, without proof of fraud. 6 Jurist, p. 38, *Shaw et vir. vs. Cooper*. S. C. Montreal; Monk, J.

Formula of closing. Prevosté, No. 9.

New inventory ordered, when. Prevosté, No. 43.

Form of *enterinement de lettres d'héritier sous bénéfice d'inventaire*. Prevosté, No. 75.

Judgment as to *effets récéllés*. Prevosté, No. 100.

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### JUDGES.

See RECUSATION.

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### JUDGMENT.

#### ABSENTEES.

Held, That the year given to absentees by the ordinance for the revision of judgments against them, commences with the execution, for the defendant "has no notice before." *McKutcheon vs. Price and Price*, Opp. K. B. Q. 1820.

#### ACTION UPON.

Held, That a new action upon a judgment formerly obtained in the same court in an action *hypothécaire* cannot be maintained. *Gagnon vs. Blagdon*. K. B. Q. 1818.

Held, That if an action can be brought at all upon a judgment rendered in the same court, which seems very doubtful, yet that such action, being commenced by a *capias ad respondendum*, can only be maintained upon proof of the allegation that the defendant is about to leave the province with intent to defraud his creditors, and such proof not having been made, action dismissed. 12 L. C. Rep., p. 199, *Pelletier vs. Freer*. S. C. Quebec; Stuart, J.

#### AMENDMENT TO.

Held, That a draft of judgment may be legally amended even after the judgment has been pronounced, provided it has not been registered. 2 Jurist, p. 95, *Pulgrave vs. Ross, and Ross*, Opp., and Pet. *en faux*. S. C. Montreal; Smith, J.

#### BY CONFESSION.

Held, That a confession of judgment, to which the defendant has set his mark, countersigned by his attorney *ad lites*, is invalid and insufficient; that the defendant must sign his name to the confession, and if unable to sign, must make the confession by a notarial instrument. 5 L. C. Rep., p. 64, *McKenzie vs. Jobin*. S. C. Quebec; Bowen, C. J., dissenting; Morin, Badgley, J.

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Held, 1. That a judgment by confession, after the entry thereof in the plaintiff, cannot be attacked by motion, on the ground of alleged irregularities in the procedure, apparent on the face of the record.

2. That the fact of the same attorney appearing both for plaintiff and defendant is not such an irregularity as to cause the judgment, after such entry, to be held an absolute nullity.

3. That the signing of a judgment by confession, by one or two attorneys, partners, who had appeared for the plaintiffs, is *prima facie* sufficient to constitute the judgment a judgment of the court. 2 Jurist, p. 107, *Molson et al. vs. Burroughs*. S. C. Montreal; Smith, J.

## BY PROTHONOTARY.

Held, That under the 22nd Vict., c. 5, sect. 11, the prothonotary cannot enter up a judgment in vacation, in a case between trader and trader, upon an action on an account stated in detail, if the demand be not for "goods sold and delivered" or for any article sold or delivered, or for money lent." Judgment set aside. 12 L. C. Rep., p. 74, *Cochran*, App., *Benson et al.*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Mondelet, J.; Meredith, Duval, J., dissenting.

Held, That a defendant may file an opposition to a judgment rendered by the prothonotary in vacation, even after the return of the first writ of execution, if it do not appear by the return of the bailiff that a day was fixed for the sale of the goods seized. 12 L. C. Rep., p. 423, *Martineau vs. Cadoret*. C. C. Quebec, Stuart, J.

## COMMON.

Held, That a judgment obtained against a married woman *commune en biens* assisted by her husband, cannot be the ground of a demand to have it declared executory against her husband, but such judgment may be invoked as an authentic acknowledgment of the debt, when the action contains conclusions to the effect that the husband, as master of the community, be condemned personally to the payment of such debt. 6 L. C. Rep., p. 152, *Berthelet vs. Turcotte*. In Appeal: Lafontaine, C. J., Duval, Caron, J.

Held, That where a plaintiff's wife before marriage had obtained judgment against the defendant and another as tutor and tutor *ad hoc*, and brought the action to have the judgment declared common and executory against defendant, the action will be dismissed, this not being a case where such judgment could be reentered. *Bisailon vs. DeBeaujeu*. S. C. Montreal; Cond. Rep. p. 17.

Held, That an action to declare executory against the defendant, a judgment obtained by plaintiff against defendant's wife alone, during her marriage with the defendant, will be dismissed on demurrer. *Berthelet vs. Turcotte et ux.* S. C. Montreal; Cond. Rep., p. 90.

## CRIMINAL JUDGMENT.

Held, 1. That the existence of a court of criminal jurisdiction, in a foreign state, by which the exercise of the civil rights of men may be suspended or

abridged, is limited in its operation to the state in which the sentence is rendered, and does not deprive a person of his natural rights beyond that state.

2. That the enforcement of such sentence by a foreign court would be a violation of public law and of the law of nations.

3. That a statute of limitations of a foreign court cannot be judicially noticed, but must be proved as a fact, before courts here can decide upon its nature and effect.

4. That a plea to the effect that the judgment of a foreign court is void, inasmuch as no service of process was made upon the defendant, and that the defendant had no domicile within such state, and was not amenable to the foreign court, is a good plea and cannot be set aside upon demurrer. 6 L. C. Rep., p. 237. *Adams, App., Worden, Resp.* In Appeal: Lafontaine, C. J., Duval, Caron, J.

#### FINALITY OF.

Held, That where final judgment is rendered in a cause, the court has no right to modify or change it in any way, either upon motion or otherwise. 9 L. C. Rep., p. 226, *Huot vs. Pagé*. S. C. Quebec; Chabot, J.

Held, That a judgment cannot be withdrawn, modified, or changed in any way after the court has once adjourned. 9 L. C. Rep., p. 260, *Bertrand vs. Gogy*. C. C. Quebec; Stuart, J.

Held, That it is not competent for parties to a suit to desist from a judgment dismissing a pleading, and obtain a readjudication of the court thereon. 2 Jurist, p. 209, *Clarke et al. vs. Clarke et ux.* S. C. Montreal; Mondelet, J.

Held, On appeal from the Circuit Court, That where a party wishes to challenge an interlocutory judgment, he must object to it at the time it is rendered. *Benjamin, App., Gore, Resp.* S. C. Montreal; Cond. Rep., p. 12.

#### IN PRIVY COUNCIL.

Held, 1. That by an appeal to Her Majesty in council from a final judgment in the Court of Queen's Bench, the latter tribunal is dispossessed of the case.

2. That a decree of Her Majesty in council, purely and simply reversing a judgment of the Queen's Bench confirming the judgment in the Superior Court, without indicating what judgment should have been rendered, does not invest the Queen's Bench with jurisdiction, which tribunal being unacquainted with the motives which determined the opinion of the judicial committee of the Privy Council, is unable to render any judgment. 10 L. C. Rep., p. 385, *Montreal Assurance Company, App. vs. McGillivray, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

#### OPPOSITION BY THIRD PARTY.

Held, 1. That a person whose interests are affected by a judgment in a case in which he was not a party, may intervene by *terce opposition* to such judgment, or may bring a direct action to be maintained in his rights.

2. That a purchaser who has been put in possession of an immovable, and who has since caused his title to be registered, may invoke the prescription and po-

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session of ten years, as against the claim of a purchaser who previously registered his title, but who was never put in possession. 10 L. C. Rep., p. 370, *Thovin*, App., *Leblanc et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Mondelet, Badgley, J.

## PROJET DE COLLOCATION.

Held, That if the plaintiff does not use due diligence in prosecuting a judgment of distribution, an opposant, on motion, may be substituted in his place, and may proceed to the distribution. *Langlois vs. Daigle*, and *Legendre*, opp. K. B. Q. 1818.

Held, That without evident *laches* on the part of the plaintiff, such substitution of an opposant will not be allowed. *Bowen vs. Molson*. K. B. Q. 1821.

Held, That a judgment of distribution cannot be homologated until the money to be distributed is in the hands of the sheriff. *Boucher vs. Beaudoin*. K. B. Q. 1821.

Held, That if a project of distribution be negligently drawn up by the prothonotaries, the court will set it aside, and order a new *projet* at the expense of the prothonotaries. *Levesque vs. Robinson*. K. B. Q. 1820.

Held, That a contestation of distinct items in a report of distribution interesting different parties, cannot be raised in one and the same paper, and that copies of contestation must be served on the parties whose claims are contested.

2. That the eight days within which, according to the rule of practice, a contestation must be filed, are not juridical days. 2 L. C. Rep., p. 9, *Ex parte Burroughs*, and Opp. S. C. Montreal; Day, Mondelet, J.

Held, That the assignee of part of a claim of the *baillieur de fonds* is entitled to rank on the proceeds of the real property concurrently with the assignor, although the assignment was made without warranty, and at the costs, risk, and peril of the assignee. 2 L. C. Rep., p. 317, *Wurtele vs. Henry*. S. C. Quebec, Duval, Meredith, J.

Held, That the contestation of the opposition of a creditor, collocated in a report of distribution, may be accompanied in the same contestation, by conclusions to have the report of collocation reformed. 4 L. C. Rep., p. 305, *Maillet* App., *Desbarats et al.*, Resp., and two other appeals. In Appeal: Lafontaine, C. J., Panet, Aylwin, J.

Held, That the prothonotary is bound to make a report of collocation of moneys, even where there is but one opposant, if the parties interested do not agree as to the form of the motion for the distribution of the moneys. 1 Jurist, p. 177, *Mead vs. Reipert et al.*, and *Bouthillier*, Opp. S. C. Montreal; Day, Mondelet, Chabot, J.

Held, 1. That the 6th Vict., c. 11, sect. 2, which exempts seigniorial rights from registration, does not apply to interest due in virtue of a subsequent special agreement.

2. That on the reformation of a judgment of collocation, the moneys taken from the party collocated will be awarded to the contestant to the prejudice of every other non-contesting opposant, whatever may be his right. 1 Jurist, p. 235, *Mogé vs. Lapré* and divers Opp. S. C. Montreal; Day, Smith, Mondelet J.



Held, That a party who, by error and inadvertence, omitted to file a contestation to a report of collocation within the delays allowed by the rules of practice, will not be allowed to file such contestation, although he makes a special application founded on affidavit. 2 Jurist, p. 59, *Forsyth vs. Morrin et al.*, and Opp. S. C. Montreal; Smith, Mondelet, Chabot, J.

Contrary held, 3 Jurist, p. 165, *Prevost vs. Deslerderniers, and Frothingham*, Opp. S. C. Terrebonne, Badgley, J.

Held, That an opposant will be allowed to contest a report of collocation after the delays, on cause shown by affidavit, to the effect that he is interested, and that the opposant collocated appears not to be entitled to the amount of his collocation. 4 Jurist, p. 286, *Clapin vs. Naigle*, and *Naigle et al.*, Opp. S. C. Montreal; Berthelot, J.

Held, That the contestation of an opposition, and subsidiarily of a *projet de collocation* cannot be made together by the same *moyens*. *Desbarats vs. Lagrange*, and *Fisher*, Opp. S. C. Montreal; Day, Smith, Mondelet, J. Cond. Rep., p. 31.

Held, That a contestation by one opposant, of the opposition of another opposant, who is collocated in the *projet* of distribution, will not be dismissed on demurrer, although the contestation does not set forth any claim or privilege on the part of the contestant to the moneys, the proceeds of certain real estate sold in the cause. 12 L. C. Rep., p. 406, *Walker et al. vs. Ferns*, and divers Opps., S. C. Montreal; Monk, J.

Same case, 6 Jurist, p. 299.

See CESSION, Payment, Signification.

See COSTS, Privilege for.

#### REJECTION OF ITEMS.

Held, That a motion to reject a contestation of three distinct items in a report of distribution interesting three distinct parties, as being made in one paper, and on the ground that the contestation had not been served upon the party moving, or any of the three parties interested, will be granted. 2 L. C. Rep. p. 9. *Ex parte Burroughs*, and divers Opp. S. C. Montreal; Day, Mondelet, J.

#### RES JUDICATA.

Held, That an interlocutory judgment adopting, without opposition, the account of a succession prepared by its order, passes *in rem judicatam*, and it is not competent to the representatives of a minor who was legally a party to the suit, to revise the proceedings, and contest any particular item in the account. The court, however, may rectify any error of calculation. Stuart's Rep., p. 470, *Prenderleath et ux.*, App., *McGillivray et al.*, Resp. In Appeal: 1831.

Held, That a judgment rendered against a principal debtor, upon an issue raised by him, is *res judicata* against a surety who was not party to the original cause. 2 L. C. Rep., p. 249, *Brush et al. vs. Wilson*. S. C. Quebec; Duval, Meredith, J.

Held, That if there are several issues, such as a plea to the action, and a special answer to such plea, and a general inscription for enquéte, although the

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proof of the matters set up in the special answer of *chose jugée* as to the facts set up in the plea, if made out, would be a bar to any further proceedings on such plea, a judge in chambers has no power to restrict and limit the proof in the first instance to the special answer, and that such limitation can only be ordered by the Court. 4 L. C. Rep., p. 454, *Brush et al. vs. Wilson et al.* S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That a judgment dismissing an hypothecary action, for want of proof of defendant's possession, cannot be set up as *res judicata* to a subsequent action founded on actual possession, possession being a fact renewed day by day. 5 L. C. Rep., p. 408, *Nye vs. Colville et al.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, In an hypothecary action at the suit of D. a *baillieur de fonds* against the defendant as *detenteur* of a lot sold by the plaintiff to C. in 1845, and by C. to the defendant in 1851.

1. That the defendant cannot invoke a judgment rendered in 1849 at the suit of the *baillieur de fonds* against C., as settling the amount due by C. as his *auteur*, such judgment being *res inter alios acta*.

2. That the defendant was only entitled to deduct a sum of money levied from the goods and chattels of C., his *auteur*, at the suit of the plaintiff in September, 1849, but only received from the sheriff in September, 1858, when the plaintiff moved for the moneys as having been paid in 1849, when the moneys came into the hands of the sheriff. 12 L. C. Rep., p. 85, *Kuthan, App., Duun, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That a plea setting up that a suit had been brought, in a competent foreign court, by the same plaintiff against the same defendant, is a good plea, more especially if it sets up payment of the judgment by defendant. 5 L. C. Rep., p. 431, *Vaughan et al. vs. Campbell.* S. C. Montreal; Day, Vanfelson, Mondelet, J.

#### REVISION OF.

Held, That where a motion in a cause was dismissed upon argument, as also a motion in revision of the judgment, the party moving will not be allowed to make a third motion aiming at the same object as the first, but such third motion will be dismissed. 6 Jurist, p. 246, *Benjamin vs. Wilson.* S. C. Montreal Berthelot, J.

#### SIGNIFICATION OF.

Held, That signification of the judgment is not required where it is given *contradictoirement*. *Rogerson vs. Begin.* K. B. Q. 1819.

#### TO EXECUTE DEED.

Held, That a person will be condemned to execute a deed of conveyance, and in case of refusal to execute the same within a certain delay, the judgment of the court will be declared to have the form and effect of such deed. 1 Rev. de Jur., p. 398, *Spalding, App., Haskill, Resp.* In Appeal.



## JUDGMENT—VAGUENESS IN.

- Held, A good cause for reversal in appeal. See *ENQUÊTE*, notice of.  
 Judgment pronounced on an account rendered. *Prévosté*, No. 64.  
 Judgment condemning a defendant to furnish plaintiff with a copy of his deed of sale. *Prévosté*, No. 65.  
 Judgment declared executory against heirs. *Prévosté*, No. 89.  
 Judgment by default, opposition maintained. *Cons. Sup.*, No. 37.  
 Judgment in appeal shortening the delay of payment given below. *Cons. Sup.*, No. 58.

JUDGMENT OF RATIFICATION, Effect of. See *VILL*, Children.

“ ON VERDICT. See *JURY*.

“ Interlocutory. See *APPEAL* interlocutory.

## JURISDICTION.

## JUDGMENT.

Held, That a judgment rendered by a circuit judge, in vacation, by consent of parties, is bad, and that no appeal can lie therefrom. 4 L. C. Rep., p. 139, *Leclair vs. Globenski*, and *Opps*. S. C. Montreal; Day, Smith, Mondelet, J.

## ON CAPIAS.

Held, 1. That the quashing of a *capias* in an action for less than £15, does not deprive the Superior Court of jurisdiction over future proceedings in such action.

2. That a question of jurisdiction cannot be tried on motion. 1 Jurist. p. 178, *Elwes vs. Francis*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a petition for liberation from arrest, under a *capias ad respondendum*, concluding that the *capias* be quashed, cannot be entertained by a judge in vacation, for want of jurisdiction. 2 Jurist, p. 167, *Hogan et al. vs. Gordon*, S. C. Montreal; Day, J.

See *PLEADINGS*, Exception declinatoire.

See *CERTIORARI*, Jurisdiction.

## JURY TRIAL.

## ACTION VS. JURORS.

Held, 1. That in an action of damages against one juror out of a coroner's jury of nineteen, empannelled to enquire into the death of several persons, where no verdict was rendered, the jury being divided ten against nine, it is sufficient for the plaintiff to allege in his declaration that the defendant with eight others, in breach of their oath of jurors, and in violation of their duty, from mere malice, hatred, and ill will to the plaintiff, and with the intent to injure him, did conspire to charge him falsely with wilful and corrupt perjury, and that the defendants aforesaid did, in pursuance of such design, draw up a libellous statement, and did maliciously and wickedly procure the same to be published.

2. That it is not competent for any one or more jurors individually, to prefer a charge of wilful and corrupt prevarication against any of the witnesses examined before the jury.

3. If such charge is so preferred, the character of juror will not protect him against an action of damages for injury suffered. 6 L. C. Rep., p. 315, *Simard*, App., *Townsend*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, 1. That where a statute requires notice of action to be given before suing out a writ, it is not necessary to allege in the declaration that such notice has been given.

2. That a coroner's jury, acting as such within their legitimate line of duty, is entitled to protection without reference to malice.

3. That an expression of opinion upon the evidence falls within the legitimate functions of jurors, and for which they are entitled to protection.

4. That the same protection which applies to twelve jurors applies equally to nine or to one. 4 L. C. Rep., p. 193, *Simard vs. Tuttle*. S. C. Montreal; Day, Smith, J.; Mondelet, J., dissenting.

See similar case before same judges. S. C. Montreal: *Simard vs. Jenkins*. Cond. Rep., p. 38.

## APPEALS.

When writ of error will not lie. See APPEALS.

## FACTS FOR.

Held, That a judgment of the Superior Court determining and defining the facts to be inquired of by a jury, is a judgment from which an appeal will lie to the Queen's Bench. 6 L. C. Rep., p. 99, *Arthur*, App., *Montreal Assurance Company*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That the issues in this cause were covered by the facts ordered to be submitted to the jury. 7 L. C. Rep., p. 88, *Montreal Assurance Company*, App., *Arthur*, Resp. In Appeal: Lafontaine, C. J., Duval, Caron, J.; Aylwin, J., dissenting.

In an action of damages brought against the defendants for refusing to fulfil an alleged agreement to receive the plaintiff as a partner into their firm, the defendants pleaded acts of immorality on the part of the plaintiff, in constantly cohabiting with a woman of profligate character, and introducing prostitutes into apartments fitted up in the defendants' premises, &c.

Held, That in defining the facts to be submitted to the jury, questions should have been put in respect to such immoral acts, as essential to the defence, also as in respect to the alleged immoral character of the plaintiff. 10 L. C. Rep., p. 392, *Lyman et al.*, App., *Higginson*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

## IN WHAT CASES.

Held, That a jury trial may be had for entering the plaintiff's house and seizing and carrying away property. *Sutherland vs. Heathcote*. K. B. Q. 1818.

Held, That a motion for a jury cannot be made until issue has been joined. *Wilson vs. Trinder*. K. B. Q. 1818.

Held, That wherever goods are committed to one for a qualified purpose, the disposal of them for other purposes is a tortious conversion, and a trial by jury may be had, and a challenge to the panel must be decided by three *triers* as in England. *Adams vs. Henderson*. K. B. Q. 1819.

Held, That if, in an action of account, any issues are raised by the *debats* which are cognizable by a jury, a jury may be empannelled to decide them. On bills of account in chancery, issues of fact are often sent to be decided by juries in the Court of King's Bench. *Hays vs. Woolsey*. K. B. Q. 1821.

Held, That in all issues which relate to the sale of merchandise between merchant and merchant, a jury may be had, even in actions of revendication. *Wood et al. vs. Casgrain*. K. B. Q. 1821.

Held, That in an action on an agreement for the sale of a cargo of coal by a merchant to an ironmonger and blacksmith, a trial by jury may be had under the 25th Geo. 3, c. 2, sect. 34. *Hart vs. Bruce et al.* Pykes Rep., p. 3. Sewell, C. J., 1810.

Held, In an action *d'injure* for maliciously killing plaintiff's dog, a jury may be had at the option of either party. *Perrault vs. Tolfry*. K. B. Q. 1816.

Held, That on a promissory note to order made by one merchant in favor of another, a jury may be had. *Hunt vs. Lee*. K. B. Q. 1812.

Held, That an action by a merchant against the master of a ship to recover the value of goods lost on a voyage from England to Quebec is a case of implied contract between a merchant and a trader, and either of the parties may have a trial by jury. If the defendant moves for a jury, it is an acknowledgment that his quality is within the meaning of the ordinance of 1785. *Rivers vs. Duncan*. K. B. Q. 1819.

Held, That a trial by jury may be had, in an action for breach of promise of marriage, as in an action for personal wrong. 4 L. C. Rep., p. 383, *Ferguson vs. Patton*. S. C. Quebec; Duval, Meredith, J.

Held, That an action against an insurance company, on a fire policy, by a person not a trader, may be tried by jury. 5 L. C. Rep., p. 406, *McGillivray, App. vs. Montreal Insurance Company*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

See also *Smith vs. Irvine*. 1 Rev. de Jur., p. 48.

Held, That an action *en declaration de paternité* and for damages is not susceptible of trial by jury. 1 Jurist, p. 5, *Clarke vs. McGrath*. S. C. Montreal; Day, Smith, Badgley, J.

Held, That an action in damages for mutilating a horse, is not triable by jury. 1 Jurist, p. 290, *Durocher vs. Meunier*. S. C. Montreal; Day, Mondelot, Badgley, J.

Held, That an action by two professional men, against three merchants for breach of a contract to buy a railroad, is not susceptible of a trial by jury. 2 Jurist, p. 283, *Abbott et al. vs. Meikleham et al.* S. C. Montreal; Day, J.

Held, That an action *en revendication* of stolen goods, although between merchant and merchant, is not susceptible of trial by jury. 3 Jurist, p. 229, *Fawcett et al. vs. Thompson et al.* S. C. Montreal; Berthelot, J.

Held, That an action of damages for malicious prosecution arising out of

mercantile transactions between merchants, is not such an action as to entitle the parties to a trial by a jury composed exclusively of merchants and traders. 5 Jurist, p. 222, *Fogarty vs. Morrow et al.* S. C. Montreal; Berthelot, J.

Held, Nor an action *to account* brought against the representatives of a deceased merchant, for consignments alleged to have been made of goods, and moneys received on plaintiffs' account. 5 Jurist, p. 330, *Mann et al. vs. Lambe.* S. C. Montreal; Berthelot, J. (*See Action to Account.*)

Held, That an action by a non trader for the recovery of a sum of money alleged to have been loaned to the defendants, a commercial firm, is not susceptible of a trial by jury, not being a mercantile contract, or one of a commercial nature, and that the issues raised are not as to facts of a mercantile nature only. 6 Jurist, p. 320, *Whishaw vs. Gilmour et al.* S. C. Montreal; Monk, J.

## JUDGMENT, NON OBSTANTE.

Held, That the verdict of a jury, finding that a creditor who, after notice of a dissolution of partnership by the retirement of one of the members, continues the business with the new firm, and on their becoming insolvent gives them delay of payment without making reference in any way to the retired partner of the old firm, thereby discharges the old firm and the retired partner, will be set aside and judgment entered for the plaintiff, *non obstante veredicto*, if the verdict was based upon correspondence produced, and if it appear to the court from such correspondence that there was no intention to discharge the old firm. 11 L. C. Rep., p. 105, *Clarke et al. vs. Murphy et al.* S. C. Quebec, Stuart, J.

Held, 1. That a verdict for the plaintiff in an action of damages for slander, rendered against law and evidence, is properly set aside by a judgment *non obstante veredicto*.

2. That a communication made by an employer in his own private office to one of his clerks respecting the conduct and character of the plaintiff in respect of another of his clerks, is a privileged communication, and cannot give rise to an action of damages.

3. That the *onus probandi* is on plaintiff, who pleads in answer to a plea of prescription of a year, that the slanderous expressions did not come to her knowledge until within a year and a day before the commencement of the action. 11 Jurist, p. 131, *Ferguson, App., Gilmour, Resp.* In Appel: Aylwin, Mondelot, Short, J.; Lafontaine, C. J., dissenting.

*Semble*, That in England a motion *non obstante veredicto* cannot be made by a defendant in a cause.

## MOTION FOR.

Held, That where a party is required by a rule of practice to proceed "by motion," a notice of a motion is equivalent to moving the court, although such notice is given on a day on which the court is sitting and during the term;— and that such notice of motion has the effect of a rule *nisi*. 11 L. C. Rep., p. 497, *Secretan vs. Foote et al.* S. C. Quebec, Taschereau, J.

## MOTION FOR JUDGMENT.

On a motion by plaintiff for judgment or a verdict of a jury (by their answers to questions under the new jury law) the court below dismissed the plaintiff's action with costs. 2 L. C. Rep., p. 200, *Casey vs. Goldsmid et al.* See INSURANCE, Fire.

On appeal from this judgment, Held, That there being no motion for new trial by the respondents, defendants below, they must abide by the verdict, that the only question was, as to whether the plea was made out, which by its judgment the Court of Appeal declared was not made out, in its opinion. Judgment reversed, and judgment for plaintiff for amount as per verdict. 4 L. C. Rep., p. 107, *Casey vs. Goldsmid et al.*

## NEW TRIAL.

Held, That a new trial may be had after verdict on a trial at bar. *Dempster vs. Lee.* K. B. Q. 1817.

Held, That where evidence has been adduced on both sides, the court will not grant a new trial, on the ground that the verdict is contrary to evidence. But where no evidence has been offered to support the verdict, a new trial may be had. *Scholefield vs. Leblond.* K. B. Q. 1820.

Held, That where conflicting evidence has been adduced, and the circumstances of the case have been fully and fairly laid before the jury by both parties, a new trial will not be allowed. *Wood vs. Duchêne.* K. B. Q. 1821.

Held, On motion for a new trial, that a verdict of the special jury is bad, and must be set aside if, in an action of slander, the question to be determined by the jury was "Were the defamatory words spoken by the defendant?" and the answer, "These words, or words to the same effect, were made use of by the defendant concerning the plaintiff," because such answer is vague and uncertain. 4 L. C. Rep., p. 57, *Ferguson vs. Gilmour.* S. C. Quebec, Bowen, C. J., Duval, Meredith, J.

Held, That in the case submitted, a motion for new trial founded on alleged misdirection of the jury must be rejected. 9 L. C. Rep., 244, *Gibb et al. vs. Tilstone.* S. C. Quebec, Chabot, J.

Held, That a motion for a new trial cannot be made after the first four days of the term next following the verdict of a jury. 9 L. C. Rep., p. 353. S. C. Montreal, Berthelot, J.

See BILLS AND NOTES *Aval.*

Held, that misdirection of the judge respecting the imputation of payments is a good ground for a new trial. 10 L. C. Rep., p. 284, *Tilstone et al., App., Gibb et al., Resp.* In Appeal: Lafontaine, C. J., Aylwin, Mondelet, Badgley, J.; Duval, J., dissenting.

Held, 1. In an action of slander, that where the findings and verdict of a jury favorable to defendant are against the proof, a new trial will be ordered.

2. That in such action, it is not necessary that the *ipsissima verba* be proved. 1 Jurist, p. 114, *Beaudry, App., Papin, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Caron, J.; Duval, J., dissenting.

As to motion for new trial or setting aside verdict, and dismissing action. Also as to power of court to decide on evidence. See PARTNERSHIP, New Partner.

Held, That on appeal from a judgment of the Superior Court dismissing defendant's motion for a new trial, and entering up judgment for the plaintiffs, on the verdict of a jury, the court will set aside the verdict and dismiss plaintiff's action *non obstante veredicto*, where it considers that, according to law and the evidence adduced at the trial, the verdict ought to have been for the defendants. 4 Jurist, p. 361, *Tilstone et al.*, App., *Gibb et al.*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Mondelet, Badgley, J.; Duval, J., dissenting.

Province of court and of jury, new trial. See 2 Rev. de Jur., p. 200, *Jobin*, App., vs. *Murison*, Resp. In the Privy Council, 1845.

Held, That in an action for malicious prosecution, if the verdict be for the defendant, the court will not grant a new trial, even although the verdict be against the evidence and against the direction of the judge. *McCullum vs. Wood*, K. B. Q. 1821.

Held, That where a verdict of a jury is contradictory and inconsistent, it will be set aside, and a new trial ordered. *Brush vs. Jones et al.* S. C. Montreal; Cond. Rep., p. 16.

## OPTION FOR.

The issues were completed on the 30th October; on the 23rd November following notice was given that a motion for a jury would be made on the 25th, and that a day be fixed for the trial.

Held, That under the 64th Rule of Practice which states "the party desiring such trial shall declare his option, either by his declaration or plea, or by motion to be made within four days after the issue is perfected," the motion is too late. 12 L. C. Rep., p. 96, *Wilson vs. The State Fire Insurance Company*. S. C. Montreal; Berthelot, J.

Held, In the S. C. Montreal; Berthelot, J. That under the 64th Rule of Practice, above quoted, when issue is perfected in vacation, a notice given by the plaintiff the next day of a motion for the first day of the ensuing term, praying *acte* of the plaintiff's option for a jury trial, is given too late. Held, In Appeal That an appeal from such interlocutory Judgment will be granted. 12 L. C. Rep., p. 97, *Lovell*, App., *Campbell et al.*, Resp. Lafontaine, C. J., Aylwin Duval, Meredith, Mondelet, J.

Same case, 6 Jurist, p. 115.

Held, That where issue was completed on the 24th January, a notice given on the 28th, of a motion for the 17th February following, declaring option of a trial by jury is sufficient. 6 Jurist, p. 38, *Arcand vs. Montreal and New York Railroad Company*. S. C. Montreal; Day, Smith, Mondelet, J., 1854.

Contrary held in *Johnston vs. Whitney*. S. C. Montreal; Berthelot, J. 6 Jurist, p. 39.

See DAMAGES, Slander.

## VERDICT.

Held, That a verdict of a jury cannot be set aside in appeal, when no motion has been made in the court below for a new trial, or in arrest of judgment, or for judgment *non obstante veredicto*. 3 Jurist p. 5, *Shaw et al.*, App., *Meikleham*, Resp. In Appeal; Lafontaine, C. J.; Duval, Caron, J.; Aylwin, J., dissenting.



Held, That the verdict of a jury will be set aside if the trial was had before issue was joined. 3 Rev. de Jur., p. 242, *Wurtele*, App., *Arcand*, Resp. In Appeal; Nov., 1847.

## VERDICT, INTERPRETATION OF.

Held, 1. That a verdict, ambiguous in its terms, may be interpreted by the court, in such manner as to give it effect; and the court, for that purpose, may look to the evidence and ascertain the interpretation given by one of the parties to the ambiguous expressions.

2. That a creditor in possession of the moneys of a third person, cannot apply them to the payment of a note on which such person is indorser, if such note has been retired by the maker, by means of a cheque without value. That the remedy in such case must be by special action. 11 L. C. Rep., p. 97, *Quebec Bank vs. Mazham et al.* S. C. Quebec, *Taschereau*, J.

See DAMAGES, Slander.

" DAMAGES, Legal Right.

" INSURANCE, Representation, Warranty.

" JURY. See APPEAL, Writ of.

" JURY IN EXPROPRIATION. See CORPORATION, Expropriation.

" JURY TRIAL, when granted. See PATENT, Invention.

" " Time of notice of. See BILLS AND NOTES, Aval.

## JUSTICE OF THE PEACE.

See OFFICER PUBLIC.

Jurisdiction of. See CERTIORARI, JURISDICTION.

" See CERTIORARI, Writ, Returnable.

## LANDLORD AND TENANT.

## ABANDONMENT OF PREMISES.

Held, That an action lies against a tenant, under a lease for a term of years, who abandons the premises for want of repairs; that the tenant is liable for the rent for the whole term, and a *saisie gagerie par droit de suite* will be maintained, although no rent was due at the time of the abandonment. 4 L. C. Rep., p. 170, *Boulanget vs. Doutre*. S. C. Montreal; *Day*, *Smith*, *Mondelet*, J.

## ASSESSMENTS.

Held, That a tenant who is bound to pay "assessments" is bound to pay the special tax or rate imposed under the 22nd Vict., c. 15. 11 L. C. Rep., p. 482, *Berthelet vs. Muir et al.* C. C. Montreal, *Smith*, J.

So in *Pinsonnault vs. Ramsay*. C. C. Montreal; *Monk*, J. 5 Jurist, p. 227.

So in *Pinsonnault vs. Henderson*. C. C. Montreal. 5 Jurist, p. 338, *Smith* J.

So in *Meyer vs. Davidson*; and *Meyer vs. Dougall*; and *Dumas vs. Vias*



*dit Lesperance*; *Judah vs. Lavoie*; and *Beaudry vs. Adams*. C. C. Montreal; Smith, J. 5 Jurist, pp. 339, 340.

Contrary held in *Courcelles dit Chevalier vs. Longpré*. C. C. Montreal; Badgley, J. 5 Jurist, p. 228.

See also CORPORATION, Assessments.

#### BAIL D'AFFERMAGE PARTIAIRE.

Held, 1. That a lease *d'affermage partiaire*, by which the lessee has undertaken to perform certain obligations as to fencing, ditching, cultivation, &c., cannot be transferred by such lessee.

2. That such transfer gives the lessor the right of demanding the rescission of the contract.

3. That the rescission of the lease having been acted upon, and the action to rescind instituted, does not deprive the lessor of his right to have the original lease set aside, notwithstanding the *cession* or sub-lease was cancelled by the parties after action brought. 1 L. C. Rep., p. 30, *Hudon vs. Hudon et al.* S. C. Quebec; Bowen, C. J., Meredith, J.

#### DROIT DE SUITE.

Held, That by the French law, and by the decisions of the courts a lessor has a right to cause the movables upon which he has a lien and privilege, and which are removed from the leased premises to be seized by *saisie gagerie*, or *par droit de suite*, and this as well for rent due, as for rent to accrue. 4 L. C. Rep., p. 360, *Aylwin vs. Gilloran*. In Appeal: Lafontaine, C. J., Vanfelson, Mondelet, Caron, J.

Held, That during the existence of a lease, a *saisie gagerie par droit de suite* may be made after the eight days. 1 Jurist, p. 276, *Mondelet vs. Power*. Q. B. Montreal; Rolland, Gale, Day, J.

Held, That a landlord has a right to the ordinary *saisie gagerie*, and to a *droit de suite* when the effects have been removed, and that he has a privilege on these effects for rent due and to become due.

2. That on a contestation of the merits of the action, a writ of *saisie gagerie* showing that the effects were seized after they had been taken away from the leased premises, is sufficient, although the place to which they were taken is not mentioned. 4 Jurist, p. 15, *Rodier vs. Joly*. S. C. Montreal; Berthelot, J.

Held, on demurrer, That the lessor, to use the right of *saisie gagerie par droit de suite*, is bound to allege and prove that the lessee hath not left sufficient furniture to secure the rent. 1 Rev. de Jur., p. 95, *Zeigler vs. McMahon*, Q. B. Montreal: July, 1845.

#### EMPHITEOTIC LEASE.

As to what constitutes a *bail emphyteotique* of a lot of land and right of water for a bannal mill for more than nine years. See *Gugy*, App., *Chouinard*, Resp. 3 Rev. de Jur., p. 308. In Appeal, 1848.

Held, 1. That the *adjudicataire* of the unexpired term of an emphyteotic

lease, described as such, is bound to pay the stipulated rent, without a condition or sale to that effect, and without opposition *à fin de charge*.

2. That consequently the creditor of the rent cannot claim any indemnity upon the price of the sale. 2 L. C. Rep., p. 331, *Methot et al. vs. O'Callaghan*, and *Lampson*, Opp. S. C. Quebec; Duval, Meredith, J.

Held, 1. That a lessor *par bail emphyteotique* may rank by opposition *à fin de conserver* for indemnity for the loss of an immovable sold upon the defendant, lessee.

2. It is not necessary, in such a case, that either the title of the lessor, or the bail emphyteotique should be registered. 2 L. C. Rep., p. 333, *Murphy vs. O'Donovan*, and *Lampson*, Opp.

Held, That immovable property held by the lessee, after the expiration of an emphyteotic lease, may be legally seized as belonging to the lessor, to whom it must revert. 8 L. C. Rep., p. 235, *Huot vs. Danais*. In Appeal: Lafontaine C. J., Aylwin, Duval, Caron, J.

Held, 1. That the lessee of a lot and water power near the Laohine canal, and within the limits of the City of Montreal, from the Commissioners of Public Works, under a lease for twenty-one years, renewable forever on the terms mentioned in the lease, has a *jus in re*, and is liable for city taxes and assessments as proprietor of the leased property.

2. That such lease is an alienation of the *domaine utile*, the Crown having only the *domaine directe*, and if made previous to the 14th and 15th Vict., c. 128, is not affected by the powers conferred upon the corporation by the 92nd section of that act. 5 L. C. Rep., p. 378, *Ex parte Harvey*. S. C. Montréal; Day, Vanfelson, Mondelet, J.

Held. That the capital of the indemnity paid into court on the expropriation, by a railway company, of land included in a *bail emphyteotique* will be awarded to the lessee on giving security, in preference to the lessor.

2. The lessee under such lease is proprietor of the land leased, and is not obliged to be content with the interest of the monies deposited in court, as indemnity for the land so expropriated. 6 L. C. Rep., p. 54, *Ex parte The Grand Trunk Railway Company*. S. C. Montréal; Day, Smith, Mondelet, J.

Held, That a person holding land in the City of Montreal, under a lease from the Commissioners of Public Works for 21 years, renewable on certain conditions, is the owner of such land, within the meaning of the by-law of the corporation imposing assessments on real property. 3 Jurist, p. 197, *Gould*, App., vs. *The Mayor, &c., of Montreal*, Resp. In Appeal: Lafontaine, C. J., Duval, Caron, J.; Aylwin, J., dissenting.

Held, That an action of *resiliation* for the non-performance of the conditions of an emphyteotique lease cannot be maintained, if the defendant has not been put *en demeure*. *Balston vs. Poyer et al.* K. B. Q. 1818.

Held, That if the rent reserved in an emphyteotic lease is in arrear and unpaid during three years, it is a cause for the resiliation of the lease. *Jamson vs. Woolsey*. K. B. Q. 1846.

So held also in *Simson vs. Woolsey*. K. B. Q. 1816.

Held, That the forfeiture of an emphyteotic lease will not be decreed for non-

payment of rent, if it be proved that before the action was instituted, the rent due was tendered and refused. *Burns vs. Richard*. K. B. Q. 1821.

REGISTRATION OF. See REGISTRATION, Bail Emphiteotique.

See CORPORATION, Assessments.

## FORM OF WRIT.

Held, 1. That a writ under the lessors and lessees' act, 18th Vict., c. 108, summoning a defendant to appear "before one or more of the justices of our Superior Court for Lower Canada in the district of Montreal, in the hall of the court house, wherein are usually held the sittings of our said court" is null; and that such writ should be returned before the Superior Court.

2. That proceedings had at the *greffe* or in chambers in such case, are *coram non iudice*, and must be vacated and annulled, and the parties put out of court 6 L. C. Rep., p. 187, *Grant*, App., *Brown*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That under the 4th Will. 4, c. 12, and 2nd Vict., c. 47, a writ should be addressed to the sheriff and not to a bailiff; that it may be in the English language only, and may be returnable in three days. 1 Rev. de Jur., p. 381. *Giguieres vs. Dessalliers*; *Defoy vs. Hart*. Q. B. Quebec, 1846.

## JURISDICTION.

Held, That a declinatory exception under the lessor and lessees' act, 18th Vict., c. 108, is valid, the action being merely for *damages* for non-delivery of the leased premises. 3 Jurist, p. 140, *Close vs. Close*. S. C. Montreal; Mondelet, J.

So in same case, Smith, J. *Ib.*

Held, That under the 18th Vict., c. 108, a lessor has an action to recover damages from breach of a covenant in his lease, although such lease has expired. The annual rent determines the jurisdiction in such cases. 3 Jurist, p. 253, *Bedard vs. Dorion*. C. C. Montreal; Monk, J.

Held, That where the term of the lease is for less than a year, and the rent for that term does not exceed £50, the Circuit Court has jurisdiction, notwithstanding the 18th Vict., c. 108, sect. 5, and that the annual rent is over £50. 4 Jurist, p. 4, *Clairmont vs. Dickson*. C. C. Montreal; Smith, J.

## LANDLORD'S LIABILITY.

Held, That a tenant cannot maintain an action against his landlord for damages done to the premises leased by a third party. *Hamilton vs. Wilson*. K. B. Q. 1817.

Held, That in an action for rent "that the defendant had not been kept sufficiently *clos et couvert*" cannot be pleaded by way of exception to the *demande*. It is a breach of contract for which the tenant is entitled to damages, and this remedy he must ask in a cross *demande*. *Weipert vs. Iffland*. K. B. Q. 1820.

Held, That a landlord receiving horses at livery, is responsible for damages occasioned by the tail and mane of a horse having been shorn in his stables, and that without proof to the contrary, such damages will be presumed to have been occasioned by his servants, or by his or their negligence. 9 L. C. Rep., p. 8. *Durocher vs. Meunier*. S. C. Montreal; Day, J.

## LEASE.

Held, That an action on rent, due under a notarial lease, will be maintained on a *defense en droit* although the declaration does not allege enjoyment or occupation by the lessee of the premises leased, or fulfilment by the lessor of his obligations as lessor. 1 L. C. Rep., p. 271, *Pierre vs. McHugh et al.* S. C. Quebec. Bowen, C. J., Duval, Meredith, J.

Held, That in an action for rent against a lessee, the lessee cannot set up damages caused by the insufficient state of the premises, or obtain the rescision of the lease, but is bound to make a *demande judiciaire*, or bring an action against the lessor to obtain an order that he make the necessary repairs. 1 L. C. Rep., p. 393, *Boulanget vs. Doure.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, That the purchaser of an immovable property, subject to a right of redemption in favor of the vendor, cannot eject the lessee whose lease has not expired. 3 L. C. Rep., p. 417, *Russell vs. Jenkins.* S. C. Quebec; Bowen, C. J., Duval, Caron, J.

## LESSORS' TITLE.

Held, That in an action for rent, the lessee cannot put the plaintiff's title in issue. 2 Rev. de Jur., p. 59; *Hullet vs. Wright.* K. B. Q. 1817.

See also GARANTIE.

## NOTICE TO QUIT.

Held unnecessary where the lease, a verbal one, was for a fixed period. 1 Rev. de Jur., p. 383, *Jobin vs. Morisset.* S. C. Quebec; Panot, Bedard, J.

Held, That a delay of three days between the service and return, instead of six days as required by the 7th Vict., c. 16, is sufficient. 1 Rev. de Jur., p. 384, S. C. Quebec; Bowen, Bedard, J., 1846.

Held, That an action for rent under £10 sterling, must be before a single judge, and that the writ should be signed by the oldest *puisné* judge. 1 Rev. de Jur., p. 385, *Murphy vs. McGill.* Quebec; Bowen, Bedard, J., 1846.

Held, That an action in ejectment before a single judge, the rent being under £10 sterling, will be maintained. 1 Rev. de Jur., p. 385, *Marcoux vs. Ritner.* Quebec, 1846.

Contrary held in *Glackmeyer vs. Day.* 1 Rev. de Jur., p. 386, Quebec, 1843.

Held, That the writ in an action of ejectment must be served by the sheriff. Bowen and Bedard below.

In same action renewed, Stuart, C. J., held, That the judge in term had no jurisdiction. Bedard, contra. Action withdrawn without costs. 1 Rev. de Jur., p. 386-387, *Plamondon vs. Farquhar.* Quebec, 1846.

The jurisdiction of the court in term held in *Defoy vs. Hurt.* 1 Rev. de Jur., p. 387. Bowen, Bedard, J. Quebec, 1846.

See p. 388, *Desallier, App., vs. Giguères,* contra. In Appeal; Rolland, Gale, Mondelet, Day, J.

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## OF MILL—REDUCTION OF RENT.

Held, In an action for several years' arrears of rent of a seigniorial mill, that such lease cannot be assimilated to a lease of *biens ruraux*, in respect to which latter property the old law authorized a reduction of the rent in case of failure of the harvest by extraordinary and unforeseen accidents. 1 Rev. de Jur., p. 184, *Corriveau*, App., *Pouliot*, Resp. In Appeal: Rolland, Mondelet, Day, Gairdner, J., 1845.

## OF MOVABLES.

Held, That where a lease of *movables* is continued by *tacite reconduction*, the lessor can terminate the lease, and can, at any time, bring an action *en revendication* to obtain possession of the movables. 5 Jurist, p. 333, *Laurent et al. vs. Labelle*. S. C. Montreal; Berthelot, J.

## OF TENANT—MUR MITOYEN.

In an action by a tenant against his landlord for damages alleged to have been suffered by reason of the demolition of a wall dividing the leased premises from the adjoining property, such demolition being alleged in the declaration to have been done and consented to by the landlord;

Held, 1. That a tenant has a right to a diminution of rent in proportion to the encroachment upon his enjoyment of the leased premises, but that no such diminution could be granted in this cause, it not having been demanded.

2. That the adjoining proprietors having exercised their right of demolishing a *mitoyen* wall (which was unfit to support new warehouses about to be built) in a legal manner, neither of the parties in the cause had any right of damages against them.

3. That the inconvenience and loss occasioned to the tenant, in so far as the same were not the necessary consequence of taking down and rebuilding the wall were, in this case, attributable to the improper conduct of the tenant himself (respondent), and to his unjustifiable demands and threats, and that therefore no damages ought to have been awarded to him in the court below. Judgment reversed and action dismissed. 12 L. C. Rep., p. 355, *Peck*, App., *Harris*, Resp. Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Same case, 6 Jurist, p. 206.

## POSSESSION OF.

Held, That in an action for rent, the tenant may plead that he did not obtain possession of the premises at the date stipulated in the lease, and he will be allowed to deduct any damages thereby suffered, from the rent due. 12 L. C. Rep. p. 40, *Belleau*, App., *vs. Regina*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

## PRESCRIPTION.

Held, That arrears of house rent are subject to a prescription of five years. 8 L. C. Rep., p. 509, *Sinjohn vs. Ross*, and *Christopherson*, Opp. C. C. Quebec; Meredith, J.

Held, 1. As above mentioned.

2. That defendant, having said within the five years immediately preceding the action, upon being asked for payment, that he *believed he had a larger account against* plaintiff, was sufficient to interrupt prescription. 4 Jurist, p. 145. *Delisle vs. McGinnis*. Badgley, J.

Held, That the prescription of five years as to rents, is an absolute prescription. 1 Rev. de Jur., p. 190, *Laurent dit Lortie vs. Stevenson*. C. C. Quebec; W. K. McCord, J., 1845.

Held, 1. That the prescription of five years against rent is in force in Canada.

2. That defendant is entitled to offer his oath as to payment, and on such oath being taken, the action will be dismissed. 1 Rev. de Jur., p. 237, *Vinet vs. Gauvin*. Commissioners Court. Mondelet, J., 1845.

#### PRIVILEGE.

Held, That goods and merchandise put on a wharf may be seized by the owner of the wharf for rent due. 2 Rev. de Jur., p. 31, *Jones, App., LeMaurier et al.*, Resp. In Appeal: 1840.

Held, That the landlord's privilege for rent does not extend to horses seized on the premises, in the case of a dwelling house leased in town. *Vallières vs. Bayley et al.* K. B. Q. 1820.

Held, That a landlord may oppose the seizure of his tenant's furniture by execution, until security be given for the rent due and to become due. *Brown vs. McHichan*. K. B. Q. 1818.

Held, That a landlord who has omitted to file his opposition to the sale of his debtor's furniture, may file an opposition *à fin de conserver* and be collocated according to his privilege. *Ross vs. Mason*. K. B. Q. 1812.

Held, That where a landlord, who has seized the movables of his tenant by *saisie gagerie* and obtained judgment in May, and sold them in Nov. 1853, an opposition by the opposant lessors of the plaintiff, claiming a preference on the ground that more than two months and fifteen days had elapsed, and that the plaintiff's privilege had lapsed by negligence, will be dismissed. *Tavernier vs. Bonneville*; and *Dechantal et ux.*, Opps. C. C. Montreal; Bruneau, J. Cond. Rep., p. 30.

A lessee had the use and occupation of opposant's premises since May without any lease, and an opposition was filed claiming rent by privilege for the three quarters to become due on the 1st May following.

Held, That opposant had a privilege for the whole year, that is to say; the quarter due the first of August, and the three quarters due the first of May following; in other words that in Quebec the privilege of the landlord extends to the expiration of the current year. 4 L. C. Rep., p. 30, *Earl vs. Casey*, and *Boisseau*, Opp. S. C. Quebec; Bowen, C. J., Duval, Caron, J.

This judgment was confirmed in appeal. Lafontaine, C. J., Rolland, Aylwin, J. 4 L. C. Rep., p. 466, *Tyre, App., Boisseau*, Resp.

Held, That proceedings by *saisie gagerie* and in ejectment under the 18th Vict., c. 108, sect. 16, cannot be maintained unless founded on a lease, or on proof

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of the defendant's occupation, by and with the consent and leave of the apparent proprietor. 8 L. C. Rep., p. 217, *Dubeau, App., Dubeau, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That by a judgment, a writ of *saisie gagerie* is converted into a *saisie execution*, and that where the landlord had not issued a *saisie par droit de suite* on the removal of the goods to other premises, he will lose his privilege as against the new landlord; and that under the 172nd article of the *Coutume* a landlord is bound to bring the goods to sale within two months after the opposition is decided upon or ended. 7 L. C. Rep., p. 80, *Johnston, App., Bonner, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Same case, 1 Jurist, p. 116.

Held, That a lessor, who has seized by a *saisie gagerie* the goods of his tenant, will be preferred on the proceeds over a second lessor into whose house the goods had been removed, and where they were sold by the sheriff. 6 L. C. Rep., p. 42, *Bonner vs. Hamilton, and Johnston, Opp.* S. C. Quebec; Bowen, C. J., Badgley, J.

So in *Gagnon vs. McLeish*. K. B. Q. 1811.

Held, That the lessor has a right to recover by opposition à *fin de conserver* arrears of rent for six months, and the whole of the current year, under a written lease, either notarial or under private seal. 5 Jurist, p. 337, *Bell vs. Conlan, and Sincennes*, Opp. S. C. Montreal; Smith, J.

#### REGISTRATION OF LEASE.

Held, That under the registry ordinance, 4th Vict., c. 30, sect. 17, mortgages resulting from deeds of lease under nine years need not be registered. 3 L. C. Rep., p. 291, *Brown vs. McInenly*. S. C. Quebec; Bowen, C. J., Duval J.; Meredith, J., dissenting.

#### RENT ACCRUING.

Held, In an action for rent, *by default*, where there is a reserve in the conclusions for rent to accrue, that such new conclusions may be taken without service thereof on the defendant. 2 Jurist, p. 94, *Dubois vs. Gauthier*. S. C. Montreal; Day, Smith, Mondelet, J.

#### REPAIRS.

Held, That where there is a covenant, by the lessee, to make all repairs *grosses et menues*, and the house leased is burnt, the tenant is not entitled to any diminution of his rent. *Rex vs. Smith*. K. B. Q. 1817.

Held, That if a tenant quits the premises for lawful cause, e. g., because for want of repairs they are no longer habitable, he is answerable only for the rent accrued during his occupation. *Wurtele vs. Brazier*. K. B. Q. 1818.

Held, That if a landlord, by necessary repairs of his leased premises, disturbs his tenant in the use of them, no action of damages can, on that account, be maintained by the tenant; but the landlord cannot recover rent for the time occupied in making repairs. *Graves vs. Scott*. K. B. Q. 1801.

Held, That a lessee cannot quietly enjoy the leased premises until rent is demanded of him, and then set off damages occasioned by the premises not



being water-tight, or from snow melting and flowing into the cellars. *Loranger, App., Perrault, Resp.* S. C. Montreal; Cond. Rep., p. 50.

See MUR MITOYEN.

## RESILIATION OF LEASE.

Held, That waste is a sufficient cause for the resiliation of a lease, especially where the parties have covenanted that the tenant shall not commit waste. *Denis vs. Burray.* K. B. Q. 1810.

Held, That where a tenant contracts not to sub-lease, it is a good ground of resiliation if he does sub-lease. *Gagnon vs. Paradis.* K. B. Q. 1819.

So in *General Hospital vs. Dunière.* K. B. Q. 1813.

Held, That sub-leasing part of a farm leased, is not sufficient cause for the resiliation of the original lease. *Cerat vs. Stephens.* K. B. Q. 1813.

Held, That cutting wood where there is an agreement not to cut any, is a good cause for the resiliation of a lease. *Hamilton vs. Constantineau.* K. B. Q. 1812.

Held, That a casual inundation of the premises, is not a cause for the resiliation of a lease. *Motz vs. Houston.* K. B. Q. 1819.

Held, That an action of resiliation for the non-performance of the conditions of an emphyteotic lease cannot be maintained, if the defendant has not been placed *en demeure.* *Balston vs. Pozer et al.* K. B. Q. 1818.

Held, That a clause in a lease by which the tenant could not sub-let without the permission of the lessor, is not comminatory, and if violated gives rise to the resiliation of the lease. 2 Rev. de Jur., p. 52, *Hunt vs. Joseph et al.* Q. B. Quebec.

Held, That a lease may be rescinded if the premises are not provided by the lessor with a privy, when from the want of it such premises become unwholesome. 10 L. C. Rep., p. 16, *Lambert vs. Lefrançois.* C. C. Quebec; Taschereau, J.

Held, That under the 18th Vict., c. 108, sect. 2, par. 4, a tenant may be ejected, who owes only one term of rent, in this case a quarter's rent. 3 Jurist, p. 41, *McDonnell et al. vs. Collins.* In Vacation. S. C. Montreal; Mondelet, J.

So for a month's rent if the terms are monthly. 5 Jurist, p. 28, C. C. Montreal; Smith, J.

Held, That a tenant will, under the 18th Vict., c. 108, be ejected if the premises are not garnished sufficiently with effects. 3 Jurist, p. 45, *Healey vs. Labelle.* In Vacation. S. C. Montreal; Badgley, J.

Held, That a tenant who owes a quarter's rent will be ejected under the 18th Vict., c. 108, sect. 2, par. 4; and that in order to invoke the lessors and lessees' act in the S. C., it is not necessary to set up the act in the declaration. 4 Jurist, p. 35, *Browne vs. Janes.* S. C. Montreal; Smith, J.

Held. That in an action against two joint lessees, to set aside the lease for non-payment of rent, an incidental demand by way of petition on behalf of the lessor, for damages resulting from the resiliation of the lease, cannot be maintained if it has not been duly served upon both lessees, one of whom had made default. 12 L. C. Rep., p. 480, *Dubois, App., Lamothe et al., Resp.* In Appeal: Lafontaine, C. J., Duval, Meredith, Mondelet, J.

Held, That under the lessor and lessees' act, Consolidated Statutes of Lower

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Canada, c. 40, the court has no authority to rescind a lease made by the defendants to the plaintiff, on account of a change in the destination of the neighboring property of the defendants, previous to the time the plaintiff's lease came into effect; and that the action which was founded upon an alleged injury arising from a leasing of the adjoining premises for military barracks, was premature as having been brought in February, whereas the lease only commenced in May, 1862. Action dismissed. 12 L. C. Rep., p. 497, *Crathern et al. vs. Les Sœurs de St. Joseph de l'Hôtel Dieu*. S. C. Montreal; Monk, J.

## SALE OF PREMISES.

Held, That a lessee who quitted the leased premises on a written notice by the lessor, who had sold the house, but without notice to quit from the new proprietor, cannot maintain an action of damages against the lessor, who had no authority to eject him. 2 L. C. Rep., p. 447, *McGinnis vs. Hodge*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a purchaser à titre singulier cannot eject the tenant without notice first given. 1 Jurist, p. 269, *Boucher vs. Forneret*. Q. B. Montreal; Rolland, Day, Smith, J.

So also in *Mountain vs. Leonard et al.* 1 Jurist, p. 272. S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That a purchaser of a house and premises at sheriff's sale, is entitled to sue the occupant for rent accrued since the *décret*.

2. That where an occupant has stripped the premises of effects, and carried them off, he will be condemned to pay the rent of the entire year. 3 Jurist, p. 42, *Lacroix vs. Prieur*. S. C. Montreal; Mondelet, J.

## SEIZURE OF LEASE.

Held, That creditors cannot seize nor sell the unexpired term of a lease of a house and premises held by their debtor; such right existing only in favor of the landlord, under the 16th Vict., c. 200, sect. 11, which is an exception to the common law. 10 L. C. Rep., p. 197, *Hobbs et al. vs. Jackson et al.*, and *Jackson, Opp.* S. C. Quebec; Bowen, C, J.

## SUB-TENANT.

Held, That a sub-tenant may sub-lease, if there be no agreement between him and his landlord to the contrary. *Cérat vs. Stephens*. K. B. Q. 1816.

Held, 1. That a sub-tenant is not entitled to the benefit of the *privilege* referred to in the 162nd article of the Coutume de Paris, unless payments are made to his immediate lessor in good faith, before the seizure, by the original lessor, under a writ of *saisie gagerie*.

2. Nor in case of a complete cession to him of all the rights of the original lessee; the privilege being confined to payments made in good faith, under a *sous location partielle*. 6 L. C. Rep., p. 196, *Wilson vs. Pariseau*, and *Barrette*, Inter. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That where a tenant who has leased to a sub-tenant without the consent of the lessor, contrary to the terms of his lease, is sued by such sub-tenant in

damages by reason of the premises not being wind and water-tight, an action *en garantie* lies against the original lessor, who has accepted and received the *extra* premium of insurance from the sub-tenant, being a tavern keeper. 11 L. C. Rep., 179, *Theberge vs. Hunt et al.* C. C. Quebec; Taschereau, J.

See RESILIATION, *supra*.

#### TENANT—VOIE DE FAIT.

That an action for a *voie de fait* was rightly brought by a tenant against a neighboring proprietor for permitting rubbish to accumulate for a number of years against a partition wall, thereby causing the partition wall between the property of the respondent and that occupied by the tenant to fall over on the premises of latter. 8 L. C. Rep., p. 156, *Gallagher, App., Allsopp, Resp.* In Appeal: Lafontaine, C. J., Duval, Caron, J.

Held, That a proprietor is not responsible for damage caused to a neighboring proprietor, by explosion in quarrying on his property by his tenant. 2 Jurist, p. 220, *Vannier et ux. Larche dit L'Archevêque.* S. C. Montreal; Badgley, J.

#### USE—OCCUPATION.

Held, That the use and occupation of a house creates between the landlord and tenant an implied contract, on which an action in debt or assumpsit can be maintained. *Burns vs. Burrell.* K. B. Q. 1816.

Held, That in an action for use and occupation of a farm, the *quantum valebat per annum* and the defendant's possession may be proved by witnesses. *Langlois vs. Darbyson.* K. B. Q. 1820.

Held, That under the 18th Vict., c. 108, sect. 16, a defendant who has occupied a house or part of a house, since the first of May to the end of July, and left it, is liable for the rent of the full year. 3 Jurist, p. 44, *Deslongchamps père et al. vs. Payette dit St. Amour.* C. C. Montréal; Mondelet, J.

#### WHARF.

In an action for rent of a wharf, the plaintiff seized by *saisie gagerie*, a quantity of fire-brick and hearth-stones, the court below maintained the defendant's plea of payment, also the intervention of a party claiming as his, the property seized.

Held, In Appeal, That the plea of payment was not made out, that the property seized was subject to the privilege of the landlord *super invecitis et illatis* as goods stored for deposit and sale upon the wharf by the factor of the owner, who, under the 10th and 11th Vict., c. 10, had power to pledge the goods of the consignee. 2 L. C. Rep., p. 154, *Jones vs. Anderson, and Carr, Inter.* Rolland, Panet, Aylwin, J.

LEASE, Damages for breach of. See DAMAGES, Measure of.

" See OPPOSITION à fin de charge.

" " APPEALS from Circuit Court.

" " REGISTRATION of Lease.

" Long. See CORPORATION, Assessments.

LESSEE, Ameliorations by. See IMPENSES ET AMELIORATIONS.

## LANDS.

See ACTION, Hypothecary.

“ “ Possessory.

“ “ Petitory.

IN SOCCAGE. See DOWER.

SALE OF. See SALE OF IMMOVABLES.

“ See DONATION.

## LEGITIME.

Held, That in a demand for balance of legitime the charges to which the lands given are subject, must be taken into account. 1 Jurist, p. 267, *Lefevre et ux. vs. Boyer*. Q. B. Montreal; Rolland, Day, Smith, J.

See DONATION, Legitime.

See WILL, Legitime.

## LEVY.

See EXECUTION.

## LEX LOCI.

*Lex loci contractus* held applicable to usury, and should be set up in the plea where the contract was made abroad. 12 L. C. Rep., p. 90, *Hart et al. vs. Phillips*. In Appeal: Stuart, C. J. Rolland, Panet, Aylwin, J.

As to rule governing notice of Protest. See *Howard vs. Subourin*. 5 L. C. Rep., p. 52.

Held, That the proof of a contract made in Upper Canada, but alleged in the declaration to have been entered into in *Montreal*, ought to be made according to the law of *Upper Canada*. 4 Jurist, p. 17, *Wilson vs. Perry*. S. C. Montreal; Berthelot, J. Confirmed in Appeal.

## LIBEL.

CONTRAINTE FOR. See CONTRAINTE, Libel.

See CRIMINAL LAW, Information, Libel.

See DAMAGES, Libel.

## LICENSE.

IN MORTMAIN. See CORPORATION, Mortmain, Bequest.

TO SELL LIQUORS. See CORPORATION, Licenses.

“ “ CONTRACT, Illicit, Void.

TO CUT TIMBER. “ ACTION REVENDICATION.

## LICITATION.

Held, That an *encherisseur*, at the second *criée* of a licitation, may apply for his discharge if the adjudication is postponed beyond the day fixed for it, without his consent, but if he does not apply for it, he agrees to the postponement, and is bound by his *enchère*. *Richard vs. Bernier*. K. B. Q. 1813.

Held, That the court will not order a sale by licitation, if a partition can be advantageously made. *Bédigart vs. Duhamel*. K. B. Q. 1820.

## LIEN.

## OF VENDOR.

A sells a quantity of timber to B, a part of the price only to be paid on the delivery of the timber. A makes a delivery, and B omits to pay any part of the price; thereupon A brings an action to rescind the contract of sale, and by process of revendication attaches the timber.

Held, That this action could be maintained, and that the timber, so far as it could be identified, should be delivered over to A. *Stuart's Rep.*, p. 538, *Moor et al.*, App., *Dyke et al.*, Resp. In Appeal, 1833. See also *Aytwin vs. McNally*, note, p. 541, *ib.*

Held, 1. That the vendor of goods sold on credit, *avec terme*, may revendicate the goods in the possession of the vendee, who has become insolvent.

2. That the privilege exists, although the goods have ceased to be unbroken *en totalité* in the hands of the vendee.

3. That an affidavit is not necessary to obtain a writ of revendication in such case.

4. That service of the declaration may be made at the sheriff's office, under the 7th Geo. IV., c. 8. 8 L. C. Rep., p. 239, *Robertson et al. vs. Ferguson*. S. C. Montreal; Mondelet, J.

See the cases cited in note at p. 245.

See also 2 Jurist, p. 101.

Held, That a merchant cannot claim to be collocated by privilege upon the proceeds of goods sold by him, if such goods at the time of the seizure, had been taken out of the bales, distributed on the shelves of the purchaser, and mixed up with other goods. 6 L. C. Rep., p. 269, *Tetu vs. Fairchild et al. vs. Divers*, Opp. S. C. Quebec; Bowen, C. J., Badgley, J.

Held, 1. That a plaintiff, in an action of *revendication* of movables, will not be permitted to take supplementary conclusions paying a condemnation for £25 value of the movables, and £10 for damages.

2. That the only remedy was by motion for leave to amend. 10 L. C. Rep., p. 322, *Poulin vs. Langlois*. C. C. Quebec; Taschereau, J.

Held, That a vendor has a privilege on goods sold *à terme*, and delivered to the vendee, and which are still in his possession, he being insolvent, and that such goods may be seized by conservatory process to prevent their disappearing; 2 Jurist, p. 99, *Torrance et al. vs. Thomas*. S. C. Montreal; Mondelet, J.

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Held, 1. That the vendor selling without credit, and not paid, may revendicate his merchandize in the hands of a third party purchaser.

2. That such third party must prove that the sale was made on credit, and in default of so doing, the court will presume the sale to have been for cash.

3. That the fact that the grain revendicated had been mixed in a barge with other grain will not prevent revendication. 4 Jurist, p. 307, *Senecal vs. Mills et al.*, and *Taylor et al. Interg.* S. C. Montreal; Berthelot, J.

Held, That a vendor *à terme* may, under the 177th Article of the Custom of Paris, issue a *saisie conservatoire*, and this without affidavit. 5 Jurist, p. 123, *Leduc vs. Tourigny.* S. C. Montreal; Badgley, J.

Held, That the vendor of goods *à terme*, seized in his debtor's possession, may prevent the sale, and is to be preferred upon the price, in preference to other creditors. 2 Rev. de Jur., p. 126; *McClure, App., Kelly, Resp.* In Appeal, 1826.

## OF CARRIERS.

Held, That goods when lauded at a wharf are delivered, but they cannot be removed from thence without the master's consent, until the freight be paid, for he has a lien for his freight upon the whole cargo. *Patterson vs. Davidson.* K. B. Q. 1810.

Held, That a common carrier by water has a lien upon every part of the goods carried in his vessel, for the payment of the whole freight, and that a tender of the freight upon each load as discharged and loaded on a cart, is insufficient. 7 L. C. Rep., p. 55, *Brewster vs. Hooker et al.* S. C. Montreal; Smith, Mondelet, Chabot, J.

Same case, 1 Jurist; p. 90.

*Query.* Whether a *general lien*, even if expressly consented to by the owner or consignee, would be valid as against creditors, in case of insolvency of such owner or consignee. 12 L. C. Rep., p. 306, *Fitzpatrick vs. Cusac, and the Grand Trunk Railway Company, T. S.* S. C. Montreal; Smith, J.

LIEN. See REVENDICATION, Lien.

" FOR PILOTAGE. See SHIPS AND SHIPPING.

## LIFE RENT.

See DONATION, RENTE VIAGERE.

## LIMITATION.

See STATUTE, Limitations.

OF ACTIONS. See RAILWAY COMPANY, Limitations.

" See PRESCRIPTION.

## LITISPENDENCE.

See PLEADINGS, Exception dilatoire.



## LODS ET VENTES.

See SEIGNIORIAL RIGHTS, Lods et Ventes.

## MACHINE.

See CRIMINAL LAW, Machine.

## MAILS.

See CROWN, Mails.

## MALICE.

See DAMAGES, Malicious Arrest.

" " Slander.

" " Libel.

## MANDAMUS.

Held, That a clergyman of the Church of England, in a parish in which there is a burying ground set apart and consecrated by the authorities of his own church, cannot be compelled to bury the dead in a place that has not been sanctioned or approved of as a burial ground by the authorities of that church. 1 L. C. Rep., p. 414, *Ex parte Wurttele*. S. C. Quebec; Duval, Meredith, J.

Held, That an Appeal lies from a judgment refusing mandamus. See APPEALS.

Held, That no writ of *mandamus* will lie to control the discretionary power as to confirming, or refusing to confirm, certificates for tavern licences, conferred on a corporation. 2 L. C. Rep., p. 274, *Ex parte Lawlor*. S. C. Quebec; Duval, Meredith, J.

Held, That under the 12th Vict., c. 41, municipal councils have exclusive jurisdiction in controverted elections of councillors, and that no *mandamus* lies in such a case. 2 L. C. Rep., p. 500, *Ex parte St. Louis*. S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That the appointment of a board of examiners under the 6th Vict., c. 7, is dependent upon the appointment of a supervisor of cullers, under the same act. 3 Rev. de Jur. p. 89. K. B. Quebec.; Stuart, J.

## AGAINST FABRIQUE.

Held, That a writ of *mandamus* will not lie against a *fabrique* to compel it to repair the fence of a grave-yard. 6 L. C. Rep., p. 484, *Vincellette vs. Fabrique of St. Athanase*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a *mandamus* may be issued against a *fabrique* for the restoration of an officer of the civil government, to the use and occupation of a *banc d'honneur*. *Rez vs. Fabrique of Pointe aux Trembles*. K. B. Q. 1821.

AGAINST SECRETARY-TREASURER. See RAILWAY COMPANY, Mandamus.

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## AGAINST SHERIFF.

Held, 1. That the court will not grant a mandamus to the sheriff to cause the lands and tenements as directed by the ordinance 25th Geo. 3, c. 33, to be advertised in a newspaper entitled "The Quebec Gazette," where it is not shown that there is no other specific legal remedy.

2. Nor will the court grant an injunction to the king's printer, enjoining him not to advertise in "The Quebec Gazette" the sale of lands and tenements under the same ordinance. Stuart's Rep., p. 168, *Ex parte Neilson*. K. B. Q., 1824.

## ELECTION—MARGUILLIER.

Held, That a peremptory writ of mandamus will not be issued until the return, as made, be declared illegal and be rejected. 1 Rev. de Jur., p. 310, *Ex parte Renouf*. K. B. Q. 1814.

Held, That it is not necessary that the *curé* specially invite the old and new marguilliers, and the notables to an election: but a notice in general terms of an assembly for the election of marguilliers is sufficient. 1 Rev. de Jur., p. 321. *Ex parte Binet for mandamus*. K. B. Q. 1845.

Held, That a return to a writ of *mandamus* (ordering an election of a marguillier) stating that a person had been duly elected according to usage and law, is a sufficient return.

*Query*, Should the *curé* give eight days' notice of such election? Should the election take place on the day fixed? 1 Rev. de Jur., p. 83, *Ex parte Turcotte*. Q. B. Q., 1846.

Held, That a petition complaining of irregularity in an election of *marguilliers* on the ground that the election had not taken place on the usual day, and that the *curé* had not given eight days' previous notice, will be maintained, and a peremptory mandamus ordered notwithstanding a return by the *curé* that another person had been duly elected. 3 Rev. de Jur., p. 480, *Ex parte Rioux*. Q. B. Q., 1848.

Held, 1. That the *curé* has no right to preside at meetings of the *fabrique*, but that such right belongs to the *marguillier en charge*, or, in his absence, to the second *marguillier*.

2. That if the *curé* does preside notwithstanding the protest of certain *notables*, the assembly is null, and also the election made thereat.

3. That the register of deliberations ought to be kept by the *marguillier en charge*, and if he cannot write, then that a *procès verbal* be made by notary as formerly practised in France. 1 Jurist, p. 94, *D'amour et al. vs. Guingue*. S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, 1. That the notables have a right to participate in the election of *marguilliers*, and are all *paroissiens contribuables*.

2. That the *curé et marguilliers* may be compelled by *mandamus* to call them to the election of *marguilliers*.

3. A return that they offered to admit certain *notables* by their estate and rank, to the exclusion of the generality of the parishioners, is insufficient and illegal.

4. One writ of *mandamus* may issue to deprive two marguilliers of their office and for the election of two others in their stead, and it is sufficient to serve the writ on the corporation.

5. That the corporation having made a return to the writ, could not legally proceed to a new election whilst the former return had not been decided upon. 1 Rev. de Jur., p. 810. S. C. Quebec; *Ex parte Renouf*.

## MUNICIPAL CORPORATION.

Held, That a *mandamus* will not be granted against the corporation of Quebec to cause Sessions of the Peace to be held, in order to investigate a claim for compensation for loss sustained by the applicant from the demolition of his house to arrest a fire. 1 Rev. de Jur., p. 394, *Ex parte McKenzie*. Q. B. Q.; 1845.

Held, 1. That a petition alleging that a municipal councillor has been allowed to take his seat as such, and has subsequently been expelled upon a contestation illegally decided, and concluding that he be reinstated in the place and stead of another councillor unduly admitted in his place, is sufficient in law.

2. That under the 10th and 11th Vict., c. 7, sect. 38, the municipal council cannot delegate to a committee, the power of hearing witnesses in the case of a contested election, and that the decision given in such case is null. 3 L. C. Rep., p. 206, *Giroux vs Binet*. S. C. Quebec; Bowen, C. J., Duval, J.

Held, In appeal, Rolland, Panet, Aylwin, J.; That under the 12th Vict., c. 41, an appeal lay to the Superior Court, and that the judges of that court must allow the writ. *Ib.*

Held, That in a proceeding, by *requête libellée*, to oust the defendant from the office of councillor for the City of Montreal, and to declare the petitioner entitled to the office, the mode of impleading the defendant is by writ of summons under the 12th Vict., c. 41, and not by a judge's order under the 14th and 15th Vict., c. 128. 4 L. C. Rep., p. 81, *Lynch vs Papin*. S. C. Montreal; Day, Smith, Mondelet, J.

Same case, Cond. Rep., p. 9.

Held, That a writ of *mandamus* may be properly directed to the mayor of Quebec alone, to rectify the minutes of the council, if the grievance to be remedied was caused by the mayor, e. g., by deciding as to a right of voting. In L. C. Rep., p. 3, *Robertson vs Robitaille*, mayor. S. C. Quebec; Bowen, C. J., Morin, J.; Meredith, J., dissenting.

Held, That the appointment of a municipal councillor, by the governor, may be considered of no effect, if the municipal council had filled up the vacancy according to the municipal act of 1854. 2 Jurist, p. 94, *Brosseau, Petr.*, and *Bissonnette*, Deft. S. C. Montreal; Mondelet, Badgley, J.

## PUBLIC WORKS.

Held, 1. That a merchant who, in compliance with instructions from the Commissioners of Public Works, purchases lands for them under the 13th and 14th Vict., c. 13, is not a mere *mandataire*, but is entitled to compensation for such services.

2. That he has a right to have his claim for such services referred to arbitration, under the 8th sect. of the said act.

3. That he is entitled to a *mandamus* to compel the commissioners to refer such claim to arbitration under the general rule of law, that a *mandamus* will lie against any public officer *charged by statute* with the performance of a duty. 9 L. C. Rep., p. 43, *Young vs. Lemieux et al*, Commissioners of Public Works. S. C. Quebec; Meredith, J.

In this case arbitrators were appointed, and the claim allowed by them and afterwards paid in full with interest and costs.

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#### MANURE.

Held, That the right of property in manure lying on a lot of land, at the date of the sale, passes by the sale of the land.

2. That manure made subsequently will be held to have passed also to the vendee, the vendor setting up no title, but pleading by denegation to the action of the vendee to recover damages for illegally removing the manure without his permission. 10 L. C. Rep., p. 17, *Wymun, App., & Edson, Resp. In Appeal*, Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

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#### MARCHANDE PUBLIQUE.

See *BILLS AND NOTES, Married Woman.*

" *HUSBAND AND WIFE.*

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#### MARKETS.

See *CORPORATION, Markets.*

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#### MARRIAGE.

##### EVIDENCE OF PROMISE TO MARRY.

Held, That a *commencement de preuve par écrit* is necessary in an action for breach of promise of marriage. 1 Rev. de Jur., p. 46, *Asselin vs. Belleau*. Q. B. Q. 1844.

##### IN EXTREMIS.

Held, 1. That a person attacked with *delirium tremens* may have a lucid interval, and may validly contract marriage during such interval.

2. It will not be reputed *in extremis* although death ensues within two days after its celebration, if the person was not, at the time, sensible that he was attacked with his last illness, and in imminent danger of death.

3. The testimony of the attending physician as to the incapacity, corroborated by the consulting physician, called in the day after the marriage, and the day before the decease, may be rebutted by that of the notary, the priest, and a

witness present at the execution of the marriage contract, and the celebration of the marriage.

4. Where the *status* of the wife is recognized, collateral relations have not the *qualité* to dispute the marriage.

5. Acknowledgments of the *status* of the children preclude a party from afterwards disputing the marriage.

6. The *status* of a family being indivisible, it cannot be recognized by certain members and disputed by other members of the same family.

7. The ordinance of 1639 depriving marriages *in extremis* of civil effects, should be strictly interpreted. 4 Jurist, p. 149, *Scott, App., Pacquet et al., Resp.* In Appeal: Duval, Caron, Meredith, J.; Aylwin, J., dissenting.

Appealed to the Privy Council.

#### OF MINOR.

Held, That a priest who celebrates the marriage of a minor is liable in damages to her parents, whose authority has thus been disowned; and this without a previous suit to set aside the marriage. 8 L. C. Rep., p. 222, *Larocque vs. Michon.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

See same case in S. C. Montreal. 1 Jurist, p. 187, and 2 Jurist, p. 267.

MARRIAGE CONTRACT. See HUSBAND AND WIFE.

" Promise of. See DAMAGES, Seduction.

" Consideration. See FRAUD, Tradition.

" Generally. See HUSBAND AND WIFE.

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#### MASTER AND SERVANT.

See WAGES.

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#### MILITARY SERVICE.

See CRIMINAL LAW, Bigamy.

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#### MILLS.

See SEIGNIORIAL RIGHTS, Banalité.

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#### MINORITY.

See TUTELLE.

" DONATION, Retrocession.

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#### MORTGAGE.

See ACTION HYPOTHECARY.

" REGISTRATION.

## MOTION.

## IN FORMA PAUPERIS.

Held, That a motion by a plaintiff who sued and obtained judgment in *forma pauperis*, to proceed to execution in *forma pauperis* will not be granted. 6 L. C. Rep., p. 426, *Harrington vs. McCaul*. S. C. Quebec; Bowen, C. J., Morin, Badgley, J.

## NOTICE OF.

Held, That notice received by one of two attorneys after the elevation of a previous partner to the bench is sufficient. 5 L. C. Rep., p. 167, *Dubois vs. Dubois*.

Held, That a motion to proceed *ex parte* is unnecessary where default to appear is duly recorded against defendant. 1 L. C. Rep., p. 494, *Kershaw vs. Delisle et al.* S. C. Montreal; Smith, Vanfelson, J.

Notice of to husband. See HUSBAND AND WIFE, Separation.

## TO QUASH ATTACHMENT.

Held, That a motion to set aside an attachment must state the ground of nullity. *Barlow vs. Richardson*. K. B. Q. 1810.

Held, That no attachment for debt can be issued before judgment, without an affidavit, except in cases of *saisie gagerie* or of the *dernier equipour*. *Tiffany vs. Derlong*. K. B. Q. 1810.

Held, That an affidavit for an *arret simple* must state the fact "that the defendant is about to secrete his effects, absolutely; or that the plaintiff is informed, and hath good reason to believe, that the defendant is about to secrete his effects." *Lamoureux vs. Kimmerly*. K. B. Q. 1819.

Held, That any irregularity in an affidavit to attach property, cannot be taken advantage of by exception to the form. In case of a *capias*, a motion to discharge the defendant from the custody of the sheriff, for want of a sufficient affidavit to hold to bail, and not an exception to the form, is the mode of taking advantage of such irregularity. *Stuart's Rep.*, p. 52, *Barney vs. Harris*. K. B. Q. 1811.

Held, That the court will quash an attachment by writ of *arret simple*, where by any other person than the defendant in an action, is divested of the possession of property. *Stuart's Rep.*, p. 536, *Wood, App., Gates et al.*, Resp. In Appeal, 30th April, 1833.

Held, 1. That the court will not quash an attachment because the jurat before the prothonotary "B. & H.," is stated to have been "before me."

2. Nor for erasures of immaterial words, not mentioned in the jurat.

3. That to obtain a writ of attachment *en main tierce* it is not necessary in the affidavit to name the *garnishee*. 2 Rev. de Jur., p. 171, *City Bank vs. Hunter, and Maitland*, T. S. Q. B. Q. 1847.

Held, That a writ of attachment under the ordinance of 1789 may be set aside.

1. If it be not, in the language of that law, against the debts and estate of

the defendant to be attached in the hands of some person in particular, and does not contain a summons to him, as well as to the defendant, to appear.

2. If it be accompanied by an injunction by a judge to the sheriff, to retain the effects seized to await the judgment of the court.

3. If it appears by the declaration that the debt sworn to has been cancelled.

Held, That it is essential to the validity of a *scellé*, under the French law, that it be exercised by a judge in person, and not by a ministerial officer of the court, and that the property and papers, which are the object of the *scellé*, remain under the seal of the court with a *gardien* to protect them. *Stuart's Rep.*, p. 376, *Richardson, App., vs. Molson et al.*, Resp. In Appeal, 1829.

Held, That a writ of summons to appear "before our justices of our said Superior Court" is bad, and that the summons must be to appear before the court. 4 L. C. Rep., p. 25, *McFarlane vs. Delesderniers*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That an affidavit, to obtain a *saisie arrêt* before judgment, stating that the sum of money due is for the price of an immovable property which plaintiff promised to sell, and defendant to purchase is sufficient.

2. That in such affidavit it is sufficient to state that deponent is credibly informed, and verily in his conscience believes, that the defendant is immediately about to secrete his estate, debts, and effects with intent to defraud his creditors, and that without the benefit of a writ of attachment he may lose his debt or sustain damage, &c. 4 L. C. Rep., p. 49, *Shaw vs. McConnell*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That an affidavit alleging "that defendant is credibly informed, hath every reason to believe, and doth verily in his conscience believe, that the defendant hath secreted, and is about to secrete his estates, debts, and effects, with intent, &c," is sufficient, and in accordance with the 27th Geo. 3, c. 4, sect. 10, and the form given in 9th Geo. 4, c. 27. 5 L. C. Rep., p. 195, *Laing et al. vs. Bresler*. S. C. Quebec; Bowen, C. J., Meredith, Morin, J.

Held, That an affidavit for attachment setting forth the debt and "that this deponent hath reason to believe that the said James Cunningham, who is now detained in jail under a writ of *capias ad respondendum* issued in the cause wherein the said George B. Levenson and this deponent are plaintiffs, and the said James Cunningham was defendant, was immediately about to leave and depart from the province of Canada, with intent to defraud this deponent and the said George B. Levenson, and that he hath secreted, and is about to secrete his property, debts, and effects, with a like intent, &c." is insufficient and will be quashed. 5 L. C. Rep., p. 198, *Levenson et al. vs. Cunningham*. S. C. Montreal; Day, Vanfelson, J.

Held, That an affidavit for attachment in which it is stated "that deponent is credibly informed, hath every reason to believe, and doth verily in his conscience believe, that the defendant is immediately about to secrete his estate, debts, and effects, with intent to defraud, &c." is sufficient. 5 L. C. Rep., p. 214, *Wurtele et al. vs. Price*. S. C. Quebec; Bowen, C. J., Meredith, Badgley, J.

Held, That an affidavit like the foregoing, omitting however the words, "that

"he hath been credibly informed," is insufficient. 5 L. C. Rep. p. 216. *Baile vs. Nelson et al.* S. C. Quebec; Bowen, C. J., Meredith, Morin, J.

Held, That an affidavit for attachment, in which it is alleged "That deponent is credibly informed and doth verily believe, that the said defendant is immediately about to secrete his estate, debts, and effects, with an intent to defraud, &c.," is insufficient and not in conformity with the 27th Geo. 3, c. 4, sect. 10, and 9th Geo. 4, c. 20. 5 L. C. Rep., p. 251. *McGuire vs. Harvey.* S. C. Quebec; Bowen, C. J., Badgley, J.

Held, That an affidavit for an attachment *saisie arrêt* "that the deponent is credibly informed, hath every reason to believe, and doth verily in his conscience believe, &c.," is sufficient, being according to the form in the 6th Geo. 4, c. 27. 5 L. C. Rep., p. 336, *Hayes vs. Kelly.* S. C. Quebec; Bowen C. J., Meredith, J.

See also 5 L. C. Rep., p. 385, *Fitzback et al. vs. Chalifour.* S. C. Quebec; Bowen, C. J., Meredith, J.

Held, 1. That a writ of *saisie arrêt* issued upon an affidavit sworn before a commissioner of the Superior Court, without a judge's order, is void and will be quashed.

2. That the deputy prothonotary will not be permitted to substitute or add the words "deputy pro., S. C.," to the words "com. S. C.," put by error in the jurat, because such act has a retroactive effect, and might prejudice the rights of the defendant. 6 L. C. Rep., p. 461, *Gagnon vs. Rousseau.* S. C. Quebec; G. O. Stuart, Gauthier, Parkin, J.

Held, On quashing a writ of *saisie arrêt* before judgment, that an affidavit sworn before a commissioner of the Superior Court is irregular. 6 L. C. Rep., p. 473, *Fleming vs. Fleming.* S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, 1. That a motion to quash a writ "*d'assignation et de saisie arrêt*" cannot be received, because it tends to dismiss the action.

2. That it came too late, the writ being returnable on the 22nd July, and the motion being of the 22nd September. 6 L. C. Rep., p. 473, *Marchand vs. Cinq Mars.* S. C. Montreal; Vanfelson, Mondelet, J.

Held, That an affidavit is sufficient in which the word "*celer*," is used instead of the word "*receler*" and the latter word erased in the body of the affidavit, and the former put in the margin and not referred to in the jurat is good, the initials of the prothonotary appearing at the marginal note. 8 L. C. Rep., p. 135, *Bourassa vs. Haws.* S. C. Quebec; Bowen, C. J.

Held, That the legality of an attachment, under the 177th article of the *Coutume de Paris*, cannot be tried on a motion to quash the attachment. 2 Jurist, p. 98, *Torrance et al. vs. Thomas.* S. C. Montreal; Mondelet, J.

Held, That an affidavit concluding in the disjunctive, that the plaintiff will lose his debt or sustain damage is not bad for uncertainty, and that if an affidavit is insufficient under the 22nd Vict., c. 5, sect. 10, but is sufficient under the ordinance of the 25th Geo. 3, c. 2, the attachment will not be quashed. 4 Jurist, p. 3, *Milne vs. Ross et al.* S. C. Montreal; Monk, J.

Held, 1. That the affidavit must state the debt with sufficient accuracy to enable the court to judge whether the debt exists or not, and that a debt alleged



" for goods, wares, and merchandizes, by the plaintiff there and then, and before that time sold and delivered (without saying to the defendant) as will appear by the account thereof to be fyled in this cause," is not sufficiently set forth, and will not be cured by the allegation in the affidavit that the defendant was so indebted.

2. A motion to quash a *saisie arrêt* made on the fourth juridical day next after return, is in time.

3. If two motions are made on notice for the same day, and one of them is taken *en délibéré*, the other will be received and fyled, and will be heard after the former motion is disposed of. 5 Jurist, p. 44, *Beaufield et al. vs. Wheeler*. S. C. Montreal; Monk, J.

Held, That an affidavit for *saisie arrêt* not alleging that the work was done " at the defendant's request," but alleging an acknowledgment of the debt, e. g. by a promissory note, is sufficient. 5 Jurist, p. 49, *Macnamara vs. Meagher*. S. C. Montreal; Smith, J.

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#### MUNICIPALITY.

See CORPORATION.

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#### MURDER.

See CRIMINAL LAW, Murder.

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#### MUR MITOYEN.

Held, That the 194th Article of the Custom enables a proprietor to compel his neighbor to build a *mur mitoyen* between them; therefore, where the plaintiff brought an action in *assumpsit* for money laid out and expended in erecting a *mur mitoyen*, with his neighbor's implied consent, it was held that he was entitled to recover. *Latouche vs. Latouche*. K. B. Q. 1821.

Held, That an action for money paid and advanced may be maintained by a proprietor of a *mur mitoyen* against his co-proprietor, for his proportion of the sum expended in the repairs of the wall, if the latter implicitly acquiesced in the making of such repairs. Stuart's Rep., p. 151, *Latouche vs. Rollman*. K. B. Q. 1822.

Held, That a neighbor who makes use of the *exhaussements* in a *mur mitoyen* is bound to pay half their value. 4 Jurist, p. 81, *Tavernier vs. Lamontagne*. C. C. Montreal; Smith, J.

Held, 1. That *mitoyenneté* between adjoining proprietors, is a presumption of law which imposes upon the objector the necessity of rebutting it.

2. That such rebuttal can only be established by titles, or in default of titles, by certain *marques*; that, in the case submitted, no original titles or *marques* exist showing *mitoyenneté* in the wall in question; but that *non-mitoyenneté* is established by title between the plaintiff and defendants, whereby the latter admit the

plaintiff's property in the wall. 12 L. C. Rep., p. 257, *McKenzie vs. Tetu et al.* S. C. Quebec; Badgley, J.

Held, 1. That in an action by a tenant against his landlord, for damages alleged to have been caused by the landlord illegally pulling down a wall dividing the leased premises, from the adjoining property, no action by the landlord will lie *en garantie* against the adjoining proprietors, who actually took down the wall, whether the allegations in the principal action be true or false.

2. That inasmuch as the wall was *mitoyen* and found quite unfit to support the warehouses intended to be built, and the proprietors (appellants) used all proper precautions, and in pulling down and rebuilding the wall exercised a legal right, in a legal manner, no claim could arise against them either on the part of the landlord, or of his tenant. *Lyman et al.*, App., *Peck*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Same case, 6 Jurist, p. 214.

Respondent condemned to furnish nine inches of ground for *mur mitoyen*. Cons. Sup., No. 89.

See GARANTIE SIMPLE.

See LANDLORD AND TENANT as to tenant's rights to demolish a *mur mitoyen*.

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#### NEW TRIAL.

See JURY, New Trial.

See CRIMINAL LAW, Nuisance.

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#### NEWSPAPER.

Held, In an action to recover the amount of subscription to a newspaper, it is sufficient to prove delivery of the paper, without proof of any order for the same, and that a verbal refusal to receive the paper and notification to the carrier to discontinue it, is not sufficient. 2 Jurist, p. 275, *Bristow vs. Johnston*. Cir. Ct. Montreal; Badgley, J.

Held, That the delivery of a newspaper at the house of the defendant is not sufficient to maintain an action for the amount of subscription to a paper, without proof that the defendant ordered it. 2 Jurist, p. 275, *Parsons et al. vs. Kelly*. C. C. Montreal; Mondelet, J.

Held, That the Quebec Gazette is authentic evidence of the publication of proceedings in the courts of this province, such as orders to call in creditors, sheriff's sales, &c. *Huppé vs. Dionne*. K. B. Q. 1818.

See DAMAGES, Libel.

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#### NOTARY.

##### ACTE AUTHENTIQUE.

Held, That a copy of a paper originally executed before one notary only, cannot be received in evidence as an *acte authentique*. *Miville vs. Roy*. K. B. Q. 1809.

Held, That an *acte en brevet* does not create a mortgage. *Belair vs. Godreau*. K. B. Q. 1810.

Held, That none but a public officer can render an act *authentique* by his presence where it is executed. *Ex parte George Sprat*. K. B. Q. 1816.

Held, That the ordinance of 1731 is not a part of the law of Canada. If therefore there be two witnesses to a notarial *acte* who do not write, this does not vitiate it, if it be executed in a country parish; for the ordinance *de Blois* requires written signatures by witnesses *en gros bourgs et villes* only. They are even not there required *à peine de nullité*. *Ruel vs. Dumas et al.* K. B. Q. 1816.

Held, That a notarial *acte* of obligation for money, can be *novated* by an *acte sous seign privé*, and the mortgage thereby created can, by the same means, be destroyed. *Madeau vs. Robichaud*. K. B. Q. 1818.

Held, That a notary can pass an *acte* for his relations, especially if the *acte* he passes be contrary to their interests; but cases of this description depend altogether on their merits. Whether they induce a presumption of fraud or otherwise, is the question. *Fournier vs. Kisonae*. K. B. Q. 1819.

Held, That relations may be witnesses to *actes* passed before a notary by those to whom they are related, and the *actes* will be valid, unless there be ground to suspect fraud, in which case they may be set aside. *Ruel vs. Dumas*. K. B. Q. 1816.

So in *Pagé vs. Charpentier*. K. B. Q. 1821.

#### COMPULSOIRE.

Held, That a commission in the nature of a *commission rogatoire* may be issued to the judges of another district for the purposes of a *compulsoire*. *Hart vs. Duquet*. K. B. Q. 1820.

Held, That the court has no power to order a notary to give up an original minute to be filed in court. *Atty.-Gen. vs. Ryan et al.* S. C. Montreal; Cond. Rep., p. 6.

#### POWERS.

Held, That notaries can receive awards of arbitrators. See ARBITRATION, Notarial Award.

Held, That *actes* passed before notaries of Lower Canada, styling themselves Notaries of Canada, are null. 1 Rev. de Jur., p. 45, *Beaudry vs. Smart et al.* Q. B. Montreal, 1845.

Held, That a notary for extra services in his profession, requiring extraordinary skill and labor, may in an action for a *quantum meruit* recover what he has fairly earned, but the court, even in such circumstances, will not allow it without strict inquiry. *Denechaud vs. Belanger*. K. B. Q. 1820.

Held, That a notary may be examined to impugn, on an *inscription de faux*, an instrument passed by him. 4 L. C. Rep., p. 228, *Welling vs. Parant*. S. C. Quebec; Duval, Meredith, J.

Notary's power to receive awards and certify swearing of an arbitrator. See RAILWAY Co., Award, Oath.

Notarial copy not *faux* for slight alteration or erasure in. See **INSCRIPTION DE FAUX**, when maintainable.

Notary's power to open holograph will. See **WILL, Holograph**.

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**NOTICE.**

**NOTICE.** See **CARRIERS, Notice**.

" " **BILLS AND NOTES, Notice**.

" to parties to expertise. See **EXPERTS, Notice**.

" of Loss. See **INSURANCE**.

" of Motion. See **MOTION, Notice**.

" as to Road work. See **CORPORATION, Roads**.

" of Action. See **OFFICER PUBLIC**.

" " See **SHERIFF**.

" of Enquête. See **ENQUETE**.

" to bring in Party. See **DECRET, Nullity of**.

" of Folle Enchère to Husband. See **HUSBAND AND WIFE**.

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**NOVATION.**

See **CONTRACT**.

" **BILLS AND NOTES, Renewal**.

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**NUISANCE.**

See **CRIMINAL LAW, Nuisance**.

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**OATH.**

**AS TO VALUE OF LOST GOODS.**

Held, That a traveller's oath to establish the value of the contents of his lost trunk, is admissible in such cases, as no one but himself is likely to be acquainted with its contents. 9 L. C. Rep., p. 169, *Cadwalladder vs. The Grand Trunk Co.* S. C. Quebec; Meredith, J.

Held, That the owner of a trunk which was lost by the negligence of a common carrier, will be allowed in an action against the carrier, and *ex necessitate rei*, to prove by his own oath, the contents of the trunk and their value. 3 Jurist, p. 86, *Robson vs. Hooker et al.* O. C. Montreal; Berthelot, J.

Held, That in an action against a carrier, the plaintiff's oath will be received as to the contents of a trunk which had been broken open. 4 Jurist, p. 132, S. C. Montreal; Badgley, J.

Held, That in an action against a carrier, for the value of goods lost, the oath of the plaintiff will be taken when the defendants are unable to answer on interrogatories as to what that value was. 1 Jurist, p. 93, *Hobbs vs. Sénécal et al.* S. C. Montreal; Smith, Mondelet, Chabot, J.

As to oath of passenger to contents of a box, see 2 Rev. de Jur., p. 330, *Pudor vs. Boston & Maine R. R.* State of Maine S. C., 1847.

## DECISORY.

Held, That where a defendant, after a demand of plea, moves to dismiss the action, for want of particulars of demand, and the plaintiff immediately afterwards moves for the *serment décisoire* of defendant, this motion must be granted, and the defendant compelled to answer on such oath. 10 L. C. Rep., p. 199, *Leffestey, App., Metivier, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

Held, That a party who defers the decisory oath, may do so by interrogatories annexed to the rule. If the party interrogated, in answering, adds matters foreign to the contestation, the court will reject such portions of his answers. 2 Rev. de Jur., p. 274, *Rusco vs. Desrivières.* K. B. Montreal, 1833.

Held, That if an authority to refer the *serment décisoire* is filed by an attorney, and is not impeached by his opponent, it must be received on the attorney's oath of office, and binds his client until the attorney is disavowed. *Jeanne vs. Caldwell.* K. B. Q. 1816.

Held, That after final hearing, the *serment décisoire* cannot be allowed. The cause has then been finally referred *ad aliud examen.* *Burns vs. Gueux.* K. B. Q. 1817.

## SERMENT JUDICIAIRE.

Held, That if a defendant is ordered to answer on the *serment judiciaire*, it is the duty of the plaintiff to serve the rule to appear upon him, and if he does not appear, the plaintiff may then move to refer the oath to himself. The court, however, if it sees fit, may order the defendant to appear on another day. *Prevost vs. Dérousseau.* K. B. Q. 1813.

OATH. See ARBITRATION, Oath.

“ of master. See PRESCRIPTION, Wages.

“ NOTARY.

## OFFICER OF COURT.

Held, That an officer of the Court (of K. B.) is well sued by petition filed in term by another officer of the same court. But all the rules of law and practice which obtain in similar cases, must afterwards be observed. *Perrault vs. Vallières.* K. B. Q. 1818.

*Perrault vs. Plamondon.* K. B. Q. 1816.

Held, That an action *d'injure* for trespass cannot be maintained against an officer who executes a writ, upon a judgment rendered by an inferior court, in a matter over which it had jurisdiction. *Goudie vs. Langlois.* K. B. Q. 1819.

Held, That the *règlement* of the parliament of Paris, which forbids the officers of the court to receive notes for their fees is not in force in Lower Canada. *Ross vs. Caron.* K. B. Q. 1819.

Held, That the court will *ex officio* notice the appointment of one of its own officers to be a judge in another district. *Fay vs. Miville.* K. B. Q.

Held, That although an attorney, grossly deficient in integrity, care, or skill, to the injury of his client, is answerable for the loss he occasions, he is not answerable for negligence when merely presumed, nor for want of skill in cases of reasonable doubt. *Vallières vs. Bernier*. K. B. Q. 1820.

Held, That if an authority *sous seign privé* to refer an issue to the *serment decisoire* is filed by an attorney, and not impeached by his opponent, it must be received on the attorney's oath of office, and binds his client until he is disavowed. *Jeanne vs. Caldwell*. K. B. Q. 1816.

Held, That a barrister appointed to the bench, cannot thereafter act as an attorney or counsel. The court will notice his promotion *ex mero motu*. *Tre-maine vs. Tonnancour*. K. B. Q. 1818.

Held, 1. That money tendered and paid into court with defendant's plea, and not accepted by plaintiff, cannot be recovered by action against the former clerk of a Circuit Court by direct action against him.

2. That the proper proceeding was by a rule. Action in the Superior Court, Bedford. (McCord, J.) dismissed. In Appeal: Judgment maintained. 6 Jurist, p. 62, *Merizzi, App., Cowan, Resp.*; Duval, Meredith, Mondelet, J.; Lafontaine, (C. J., Aylwin, J., dissenting).

## COSTS AGAINST.

Held, That the court will not give costs (on quashing a conviction) against a public officer. 1 Jurist, p. 15, *Ex parte DeBeaujeu*. S. C. Montreal; Day, Smith, Badgley, J.

See PRESCRIPTION, Prothonotary.

## FEES.

Held, That on a contestation of a registrar's certificate the prothonotary is not entitled to the fee of \$6 mentioned in the 6th item of the tariff of March, 1861, "on the contestation of any action, intervention, *requête civile*, incidental demand, "or *inscription de faux*." 12 L. C. Rep., p. 209, *Ninteau vs. Tremain*, and *Hunt, Opp.* S. C. Quebec; Stuart, J.

Held, 1. As above in *Nanteau vs. Tremain*.

2. That the prothonotary having demanded, and received the fee on contestation of a registrar's certificate, the party who has paid the same is entitled to recover it back, and the court will, on motion, order the prothonotary to refund the amount. 12 L. C. Rep., p. 236, *Langlois vs. Walton*. S. C. Quebec; Stuart, J.

See *Blake et al. vs. Panet et al. vs. SHERIFF*.

Held, That although a party has obtained leave to proceed in *forma pauperis* he is nevertheless bound to pay the tax or duty for "the building and jury fund." 12 L. C. Rep., p. 226, *Olsen vs. Forstensen*. C. C. Quebec; Stuart, J.

Held, That the prothonotary cannot insist on getting payment for a *writ* before making it. 12 L. C. Rep., p. 333, *Plamondon vs. Sawageau*. S. C. Quebec; Tasehereau, J.

Held, That the prothonotary is not entitled to the fee of \$2 on collocations in reports of distribution, if such collocations have been set aside upon contestation



and another report prepared. 12 L. C. Rep., p. 414, *Ex parte Dawson*. S. C. Quebec; Taschereau, J.

OFFICER OF COURT. See HUISSIER.

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OFFICER PUBLIC.

CONTRACTS OF.

Held, That an officer of government, who contracts for the public, is not personally liable. *Goodenough vs D'Estimauville*. K. B. Q. 1817.

Held, That where a person contracts as a public officer, he is not personally liable, without some peculiar cause to charge him. *Stuart's Rep.*, p. 68, *Scott vs. Lindsay*. K. B. Q. 1811.

Held, That a contractor for a public building can maintain an action against the commissioners with whom he contracted for the erection of such building, if they have received from government the money which is due him. *Stuart's Rep.*, p. 141, *Laurie vs. Crawford et al.* K. B. Q. 1819.

Held, That an action of damages for trespass cannot be maintained against an officer who executes a writ issued upon a judgment rendered by an inferior court, in a matter over which it had jurisdiction. *Stuart's Rep.*, p. 142, *Goudie vs. Langlois*. K. B. Q. 1819.

Held, That an action does not lie upon an order given on behalf of the government, by one officer upon another, directing him to pay a balance due by government to the person in whose favor it is given. 3 Rev. de Jur., p. 434, *McLeon vs. Ross*. K. B. Q. 1816.

Held, That an action will not lie against a person who contracts as a known public agent, for what he has done in that capacity. *Perrault vs. Baillarge*. K. B. Q. 1814.

So in *Fitzback vs. Pinguet*. K. B. Q. 1821.

So in *Herbert vs. Vallée*. K. B. Q. 1817.

CUSTOMS.

Held, In an action against a collector of customs to recover back moneys paid to him as costs due to the Judge of the Admiralty Court, under an order of the Commissioners of the Customs to stay proceedings upon a custom house seizure on payment of costs, that one month's previous notice of this action was required. *Grant et al. vs. Percival*. K. B. Q. 1817.

Held, That where by statute, an action against a custom house officer for illegal seizure, must be brought within three months, the court will permit a plaintiff to amend his declaration and allege notice of action as having been duly given, on payment of costs, although the three months have expired. 4 L. C. Rep., p. 101, *Bresler vs. Bell*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That in an action against a collector of customs to recover back money exacted by him as fees of office, he is not entitled to one month's notice of action.

2. Nor can he object that such action was not commenced within three months



from the time when such fees were paid. *Stuart's Rep.*, p. 179, *Price vs. Percival*. K. B. Q. 1824.

Held, 1. That no fee of office can be exacted by a public officer, unless established by legislative enactment, or by ancient usage, which presupposes the sanction of legislative authority.

2. That the action for money had and received will lie for exorbitant fees paid to a custom house officer, and will lie in the name of the *owner* of a vessel, although paid by the *master*.

3. The Imperial Statute, Geo. 3, c. 45, enacts that where no fees have been established in a colony of Great Britain, the custom house officers there shall be entitled to receive such fees as were received by the like officers in the nearest port in any British colony before the 29th Sept., 1764, and the court will take notice of the relative geographical positions of countries to ascertain that port. *Stuart's Rep.*, p. 180. Same case, p. 189.

## GOVERNOR.

Held, That an action cannot be maintained against a Governor of this province while in the administration of the government. *Stuart's Rep.*, p. 542, *Harvey vs. Lord Aylmer*. K. B. Q. 1833,

Held, That the Governor of a colony can be sued in a colonial court, for a cause of action wholly unconnected with his official capacity, and accruing out of the colony before his government commenced. 1 *Rev. de Jur.*, p. 76, *Hill*, App., *Bigge et al. Resp.* In the Privy Council.

## INSPECTORS OF ROADS—NOTICE OF ACTION.

Held, That in a possessory action against an inspector of roads and bridges, for trespass in making and opening a road on plaintiff's farm, the defendant is not entitled to the month's notice referred to in the 14th and 15th Vict., c. 54, upon the pretence that he acted in the performance of a public duty, and under orders received from a surveyor of roads. 6 *L. C. Rep.*, p. 456, *Eisinhart*, App., *McQuillan*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, 1. That an inspector of roads and ditches is a public officer, and entitled under the 14th and 15th Vict., c. 54, to a month's notice of action, when sued in damages, for acts within the scope of his duty.

2. That although he acted under an informal by-law and *procès verbal*, yet as he acted in good faith, and with relation to his public duty, he is entitled to such notice. 7 *L. C. Rep.*, p. 63. *Jetté*, App., *Choquette*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Same case, 1 *Jurist*, p. 148.

## JUDGE-RELATIONSHIP.

Held, That the opinion of two members of the court in the degree of relationship of brother-in-law, cannot be reckoned as one, under the edict of 1681, and a declaration of the king of France of 1708. *Stuart's Rep.*, p. 184, *Fleming*, App., vs. *Seminary of Montreal*, Resp. In Appeal, 1825.

## JUSTICE OF THE PEACE.

Held, That in an action against a justice of the peace, entitled to notice of action, such notice need not be recited at full length in the declaration. 4 L. C. Rep., p. 347, *Davies vs. McGuire*. S. C. Quebec; Duval, Meredith, Caron, J.

Held, That where a justice of the peace gives orders to troops to fire, he is not liable to the plaintiff, one of the parties wounded, in damages, if it appears that, although there was no real necessity for giving such order, yet that the circumstances were such that the magistrate might reasonably have been mistaken as to the necessity for such order. 2 Jurist, p. 254, *Stevenson vs. Wilson*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That the words "commissioners of the peace" and "justices of the peace," as used in our statute books, are synonymous.

2. That an information to be tried before two justices of the peace is good, although only signed by one, (4 Geo. 4, c. 19, sect. 71). 2 Rev. de Jur., p. 188, *Falconbridge qui tam vs. Tourangeau*. Quebec Sessions of the Peace.

Held, That an action against three magistrates for money due on a contract by the overseers of roads in Quebec, for the repairs of a street, and approved in sessions cannot be maintained. *Herbert vs. Coltman et al.* K. B. Q. 1817.

Held, 1. That an action against a justice of the peace for false imprisonment, must, under the 14th and 15th Vict., c. 54, sect. 8, be commenced within six months after the act committed.

2. That the notice of such action, required by the second section of the above act, is not a commencement of the action, but the writ itself must be issued within the six months. 9 L. C. Rep., p. 255, *Lavoie vs. Gregoire*. S. C. Quebec; Chabot, J.

Held, 1. That the declaration in this cause, which was against the mayor of Montreal for damages for causing the death of plaintiff's son by ordering Her Majesty's 26th regiment to load with ball and fire on a crowd unjustifiably, did not disclose a felony.

2. That the 10th and 11th Vict., c. 6, sect. 6, having limited the action referred to in the statute, to 12 months, precluded the necessity of taking any steps previous to instituting the action. *Clarke et al. vs. Wilson*. S. C. Montreal; Cond, Rep., p. 22.

## SOUS VOYER.

Held, That no action will lie against a *sous voyer* for an act done in obedience to a *procès verbal* of the *grand voyer* duly homologated. *Moyson vs. Gauvin*. K. B. Q. 1821.

## SURVEYOR OF ROADS—NOTICE.

Held, 1. That an action of trespass against a road surveyor who had acted under a judgment of the Court of Quarter Sessions, for entering plaintiff's close and destroying certain buildings, must be brought within three months after the right of action accrued, as provided by the statute 36th Geo. 3, c. 9, sect. 76.

2. Such action may be maintained against persons acting under the orders of the road surveyor, who do not plead a justification of their conduct. Stuart's Rep., p. 388, *Cannon vs. Larue et al.* K. B. Q. 1828.

OFFICER, Notice to Sheriff. See SHERIFF, Liability of.

" Judicial. See Damages against Judge.

" Military. See CESSION, OFFICERS' PENSION. See EXECUTION.

" Exemption from seizure.

" of Justice. See COSTS, Tariff of Fees.

" See CONTRAINTE.

" PUBLIC, Certificate of. See BILLS and NOTES, Form of.

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### ONUS PROBANDI.

VALUE OF GOODS. See CONTRAINTE against Sheriff.

" " " " against Gardien.

NEGLECTANCE. See DAMAGES from Falling Beam.

" " " Animals.

" " " Dépôt.

See EVIDENCE.

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### OPPOSITION AFIN D'ANNULER.

#### AFFIDAVIT.

Held, 1. Where the word "unnecessarily" is used instead of "unjustly to retard," in an affidavit for an *opposition afin d'annuler* and "sworn" instead of "sworn," the affidavit is bad, and the opposition will be dismissed on motion.

2. A rule to amend will be discharged if the affidavit as amended is not tendered in support of the rule. 6 L. C. Rep., p. 431. S. C. Quebec; G. O. Stuart, Parkin, J.

Held, That an *opposition afin d'annuler* will be dismissed on motion, on the ground of the insufficiency of the affidavit, which states the opposition as made in good faith and with the object of obtaining justice, if the word *sole* in the form of affidavit set forth in the rule of practice is omitted. 6 L. C. Rep., p. 479, *Scholefield vs. Rodden*, and *Rodden*, Opp. S. C. Montreal; Driscoll, Pelletier, Berthelot, J.

Held, That an opposition by defendant will be dismissed on motion, the opposition being headed "No. 363, G. B. C. Leveson, plaintiff, vs. James Cunningham, defendant, there being no number on the indorsation and the words *et al* being omitted both in the heading and indorsation. 6 L. C. Rep., p. 483, *Leveson et al. vs. Cunningham et al.* S. C. Montreal; Day, Smith, J.

#### AFFIDAVIT—PAYMENT.

Held, 1. That an affidavit made by a party "to the best of his knowledge and belief" is sufficient to sustain such opposition.

2. In certain cases such opposition may be made to a *venditioni exponas* against lands.

3. That a debtor may oppose the sale of his real estate, the seizing party not having given credit for sums received previous to the issuing of the execution, in part payment. 7 L. C. Rep., p. 130, *Fournier*, App., *Russell*, Resp. In Appeal: Lafontaine, C. J., Duval, Caron, J.; Aylwin, J., dissenting.

Held, That the affidavit of the defendant, husband of the opposant, is sufficient to support an opposition, without allegations in the affidavit that he was opposant's agent. 1 Jurist, p. 1, *Wilson vs. Pariseau*, and *Simard*, Opp. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That an *opposition à fin d'annuler* dated after the making of the affidavit appended thereto, will be dismissed on motion, 3 Jurist, p. 53, *Walker vs. Burroughs*, and *Burroughs*, Opp. S. C. Montreal; Badgley, J.

Held, That the court will not dismiss an opposition made and signed in the district of *Gaspé* for want of an affidavit, as required by the 80th rule of practice, without proof that the rules signed on the 17th December, 1850, have been registered at *Gaspé*. 5 Jurist, p. 254, *McFurlane vs. McCracken*. S. C. Montreal; Berthelot, J.

Held, That where payments have been made on account of a judgment, the execution will be staid until the exact sum due on the judgment is ascertained. 3 L. C. Rep., p. 478, *La Banque du Peuple vs. Donegani*, and *Donegani*, Opp. S. C. Montreal; Vanfelson, Mondelet, J.; Smith, J., dissenting.

See cases *contra*, p. 481-482.

When exhibits must be fyled. See PLEADING, Exhibits.

Held, 1. That an opposition to a writ of *venditioni exponas*, will be maintained with costs, if the plaintiff does not give credit upon the writ for moneys paid.

2. That the court cannot take notice of reasons of opposition which have already been invoked by a former opposition, upon which the court has already decided. 10 L. C. Rep., p. 367, *Fournier*, App., *Russell*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

Same case, 1 Jurist, p. 118.

#### A FIN D'ANNULER.

Held, That a *commandement de payer* is not necessary on the seizure of movables. 2 L. C. Rep., p. 148, *Lee vs. Lampson*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That the defendant may, by opposition *à fin d'annuler* set aside a judgment rendered against him as an absentee, when, in fact, his residence was in Lower Canada. 1 Jurist, p. 276, *Armstrong vs. Crochetière*. Q. B. Montreal; Rolland, Day, Smith, J.

Held, That an opposition *à fin de distraire* made to a writ of *venditioni exponas de bonis* will not be rejected on motion as being illegally fyled to such a writ. 4 Jurist, p. 84, *Delisle vs. Couvrette*, and *Clement dit Larivière*, Opp. S. C. Montreal; Monk, J.

Held, That an opposition *à fin d'annuler* cannot legally be fyled within the

fifteen days fixed for the sale of immovable property, even with the order of a judge, and that the sheriff was not authorised by law, and ought not to receive it. 1 L. C. Rep., p. 154, *Lesperance vs. Allard et vir.* In Appeal: Stuart, C. J., Rolland, Panet, Aylwin, J.

Held, 1. An opposition à *fin d'annuler* to a writ *de terris*, was held insufficient and dismissed, the grounds of opposition being:

1. No election of domicile by the bailiff at the time of the seizure.
2. No *commandment de payer*; such *commandment* appearing on the writ *de bonis*.

3. Absence of *recors* at the time of seizure.

4. Omission to state whether seizure was made before or after noon.

2. The return of the sheriff that the advertisements and publications have been duly made, is conclusive until such return is declared false.

3. That a party who fails to make an opposition within the fifteen days referred to in the 41st Geo. 3, c. 7, sect. 11, is precluded from setting up any irregularities in the seizure and proceedings. 1 L. C. Rep., p. 53, *Boyer vs. Slown*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That an opposition à *fin d'annuler*, upon the ground that the judgment on which an execution is issued was for a sum not due, cannot be maintained. *Chantal vs. Gendreau*. K. B. Q. 1819.

Held, That one judgment may be set off against another, by compensation and by an opposition à *fin d'annuler* for payment *pro tanto*. *Foster vs. Esson*, K. B. Q. 1821.

#### A FIN DE CHARGE.

Held, That a lessor need not fyle to preserve his right to rent. See 2 L. C. Rep., p. 331.

Held, That an opposition à *fin de charge* cannot be maintained for a simple mortgage debt. *Lymburner vs. Dick et al.* K. B. Q. 1817.

Nor for a *rente viagère*, or a *rente constituée*. *Thibodeau vs. Raymond et al.* K. B. Q. 1817.

Held, That the lessee of a property advertized for sale by the sheriff, cannot, by opposition à *fin de charge*, have the property sold subject to the unexpired term of his lease. *Bogle vs. Chinic*, and *Proux et al.*, Opp. Pyke's Rep., p. 20 Sewell, C. J., 1810.

Held, That an opposition à *fin de charge* founded on an alleged verbal lease of the land seized, to the defendant, cannot be maintained. 1 Rev. de Jur., p. 335, *Choquette vs. Brodeur*, and *Gloutney*, Opp. K. B. Montreal. Octr., 1838.

Opposition à *fin de charge* for road. See *SERVITUDE*.

#### A FIN DE CONSERVER.

Held, 1. That a proprietor may rank on the proceeds of an *immeuble* sold at sheriff's sale, as belonging to the defendant, who holds it under a *bail emphyteotique*, for an indemnity for the loss of his property.

2. That in such case it is not necessary that either the opposant's title or the

*bail* should be registered. 2 L. C. Rep., p. 333, *Murphy vs. O'Donovan*, and *Lampson*, Opp. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, 1. That a contestation raised between two opposants, forms a distinct issue *quoad* them.

2. That all documentary evidence, relative to the issues so raised, must be fyled by such oppnant, and it is not sufficient that such evidence be already fyled by other parties to the record. 2 L. C. Rep., p. 368, *Kelly vs. Fraser*, and Opps. S. C. Quebec; Duval, Meredith, J.

Held, On a contestation between opposants as to the distribution of the proceeds of a lot sold :

1. That the hypothecation of a lot described by metes and bounds, in an hypothecation of a *corps certain* although the extent of land given in the mortgage be less than that contained in the lot.

2. That in such a case the hypothecue covers the entire lot. 3 L. C. Rep., p. 155, *Labadie*, App., vs. *Truteau*, Resp. In Appeal: Stuart, C. J., Panet, Aylmer, J.

A judgment had been rendered against a *tiers saisi* declaring the attachment good and valid, and condemning the *tiers saisi* to pay the moneys in his hands to the plaintiff, being the amount of a loss by fire on an insurance effected by the defendant in the office of the *tiers saisi*: The opposant fyled, in the prothonotary's office, an opposition alleging defendant's insolvency and praying that the moneys be brought into court for distribution among his creditors generally.

Held, 1. That the opposition will be dismissed on motion as irregularly fyled.

2. That such judgment against the *tiers saisi* cannot be interfered with by other creditors of the defendant, as attempted in this case. 6 L. C. Rep., p. 169, *Masson et al. vs. Choall*, and *Merchant Ass. Co.*, T. S., and *Biron*, Opp. S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, That it is not necessary that an opposant should allege in her *opposition* that the property on which she claimed a special mortgage, created in 1848, was held in free and common soceage, that such an allegation in the *contestation* of the collocation of another opposant is in itself sufficient, and she will be entitled to the costs of *contestation* denied in the court below. 11 L. C. Rep., p. 465, *Evans*, App., *Boomer*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, 1. That a *hypothecue*, given by an insolvent party, in favor of a creditor confers no privilege, in his favor, over the contemporaneous chirographary creditors.

2. That an opposant is not bound to allege registration of his *hypothecue* to maintain his privilege as against chirographary creditors. 2 Jurist, p. 253, *Duncan vs. Wilson*, and *Wilson*, Opp. S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, That, on cause shewn, the court will allow an *opposition à fin de conserver* to be fyled at any time before the homologation of the report of collocation on payment of costs. 3 Jurist, p. 27, *Woodman vs. Letourneau*, and *Letourneau*, Opp. S. C. Montreal; Badgley, J.

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Held, That an opposition à *fin de conserver* will not be received after the delay, although before the *homologation* of the report, so as to disturb the rights of parties collocated, where the omission to file it is not owing to the negligence of the attorney, but such opposition will be received so as to give the opposant the moneys not distributed. 4 Jurist, p. 284, *Ramsay vs. Hitchins*, and *Ramsay*, Opp. S. C. Montreal; Badgley, J.

Held, That the creditor of a *rente constituée*, which has been included, without his knowledge or consent, in the list of charges subject to which an immovable has been sold by forced licitation, cannot maintain an opposition à *fin de conserver* for the payment of the capital out of the proceeds of the sale, inasmuch as the conditions of the sale could not now be changed without setting aside the sale. 12 L. C. Rep., p. 194, *Murphy et al. vs. Wall*, and *Montizambert es qual.* Opp. S. C. Quebec; Stuart, J.

## APPEARANCE.

Held, That if an opposant who has filed his opposition does not appear regularly at the return of the execution, his opposition will be dismissed on motion. *Organ vs. Bentley*. K. B. Q. 1812.

## BY ADJUDICATAIRE.

Held, On the sale of an immovable by the sheriff, that the *adjudicataire* has a right to demand a deduction in the price proportionate to the deficiency in the land sold. In this case the property was described as being 1 arpent 4 perches and 9 feet *ou environ* in front, and the deficiency was 1-17  $\frac{1}{3}$  of the whole. 2 L. C. Rep., p. 194, *Paradis vs. Alain*, and *Zeau*, Adj. S. C. Quebec; Duval, Meredith, J.

See DECRET *défaut de contenance*.

## DESCRIPTION OF PROPERTY.

Held, That a description of the land (in a sheriff's advertisement) in which the contents of the land are not stated is defective, and gives ground for an opposition à *fin d'annuler*. 2 Jurist, p. 164, *Berthelet vs. The Montreal and Bytown R. Co.* S. C. Montreal; Badgley, J.

In Appeal, Judgment reversed, *Berthelet*, App., *Bytown R. R. Co.*, Resp. 2 Jurist, p. 166, Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That a defendant may demand the nullity of a seizure with costs against the plaintiff, by reason of an inaccurate description of the immovable seized. 4 L. C. Rep., p. 227, *Dupuis vs. Bourdages*, and Opp. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That it is not necessary in a *procès verbal* of seizure of real estate, to mention the extent of the property, and that, in this case, the respondent having sold the real estate in question without mentioning its extent could not urge the absence thereof in the *procès verbal*. 8 L. C. Rep., p. 299, *Berthelet*, Opp., *Guy et al.*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held. 1. That where real property is seized under two writs of execution of



the same date, it is not sufficient to put the heading and number of both causes, and to state in one *procès verbal* the seizure of the lot under the two writs.

2. That where the boundaries of a lot are given with minuteness, and the extent of the boundary lines, so as to render it impossible to be in doubt as to the identity of the property seized, the seizure will not be set aside, although a building forming two houses is described as "a house." 9 L. C. Rep., p. 69, *Anderson et al. vs. Lapensée*; *Palmer vs. Lapensée*, and *Lapensée*, Opp. S. C. Montreal; Smith, J.

## ELECTION OF DOMICILE.

Held, That every opposition must contain an election of domicile *à peine de nullité*. *Vallières vs. Robitaille*. K. B. Q. 1821.

Held, 1. That an opposition made through the ministry of an attorney will not be dismissed on motion, on the ground that it does not contain an election of domicile.

2. That the proper way to attack such opposition on the above ground, if objectionable, is by an *exception à la forme*, and not by motion. 8 L. C. Rep., p. 477, *Murphy vs. Moffatt*, and *Levy et al.*, Opp. S. C. Quebec; Bowen, C. J.

## EN SOUS ORDRE.

Held, That an opposition *en sous ordre* to plaintiff will be dismissed unless the opposition contains an allegation that the plaintiff is *en déconfiture*. 1 L. C. Rep., p. 498, *Vennor vs. Barnard et al.*, and Opp. S. C. Montreal; Day, Mondelet, J.

So in *Lemoine vs. Donegani*. S. C. Montreal; Cond. Rep., p. 67.

The property of minors having been taken in execution, the tutor filed an opposition and was collocated for a certain sum. The appellants *on the dry fixed for the homologation of the report* moved for leave to file an opposition *à fin de conserver, en sous ordre* founded on a judgment against the father of the minors, which motion was rejected, on the ground that the judgment had ceased to be executory, and that an allegation of the insolvency of the tutor was insufficient without alleging the insolvency of the estate of the minors.

Held in appeal, That the judgment below must be maintained, and that the intended opposition came too late. 10 L. C. Rep., p. 309, *Doyle et al.*, App., *McLean es qualité*, Resp. Lafontaine, C. J., Aylwin, Duval, Badgley, J.; Mondelet, J., dissenting.

Held, 1. That an opposition *en sous ordre*, being in the nature of a *saisie arrêt*, must be founded on judgment, or be supported by the affidavit required in the case of an attachment before judgment.

2. That money paid by the defendant to the sheriff without levy, was the property of plaintiff, and was not subject to the sheriff's commission or court house tax. 1 Jurist, p. 161, *Stirling vs. Darling*, and *Fowler*, Opp. S. C. Montreal; Day, Mondelet, Chabot, J.

In an action against Mary Charlotte Munroe, widow of William Day, and William Munroe, tutors to the minors Day, as defendants, the proceeds of real estate of Sarah Harriet Munroe, widow of R. W. Felton, *tiers saisi*, were

brought before the court for distribution. The appellant claimed, by opposition *à fin de conserver*, part of the moneys under a transfer, to him by the defendants of a portion of the debt due by the *tiers saisi* to the defendants; the respondent claimed to be collocated *en sous ordre* to Thompson and his assignors for £41 12s. for bills of costs due him by the *defendants*, and £29 11s. 3d.. due under a hypothec granted in his favor by the said R. W. Felton, alleging that Mary Charlotte Munroe was insolvent at the time of the transfer, and that the assignment was fraudulent. To the opposition of the respondent the appellant pleaded by *defense en droit* on the ground:

1. That the costs were a debt against the defendants, and not against the appellant.

2. That the opposition should have been *à fin de conserver*, and not *en sous ordre*.

3. That if the transfers were illegal, the moneys belonged to the defendants, and could not be granted to the respondent even if the appellant's opposition were dismissed, and if legal, the proceeds belonged to the appellant.

This *defense* was dismissed by the S. C. Quebec, but the judgment was set aside in appeal, and the *defense* maintained on the grounds therein mentioned. 12 L. C. Rep., p. 11, *Thompson, App., Martel, Resp.* Aylwin, Duval, Meredith, Mondelet, J.; Lafontaine, C. J., dissenting.

#### NULLA BONA.

The plaintiff sued out execution in an hypothecary action, and, on being told by the defendant, that he had no goods, the bailiff seized the hypothecated property, making his return of defendant's declaration that he had no goods.

Held, That an opposition *à fin d'annuler* on the ground that the opposant had movables which should have been first seized, will be dismissed on demurrer, the opposant not having *in limine* attacked the sheriff's return alleging the opposant's declaration that he had no goods. 9 L. C. Rep., p. 33, *Arnold, App., Campbell, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That, after a return of *nulla bona*, a defendant cannot oppose the sale of his land on the ground that he has sufficient movables to satisfy the judgment. 2 Jurist, p. 290, *Soupras vs. Boudreau*, and *Boudreau, Opp.* S. C. Montreal; Smith, J.

#### ON CROWN LAND CERTIFICATE.

Held, 1. That an opposition to the seizure of real estate founded on a certificate of payment to a crown land agent of an instalment of the price of a clergy lot is insufficient.

2. The holder of such certificate is entitled under the 4th and 5th Vict., c. 100, sect. 18, and 12th Vict., c. 31, sect. 2, to maintain actions only against wrong doers or trespassers.

*Semble*, That if wild lands of the crown are sold at sheriff's sale without opposition, the rights of the crown may be purged. 6 L. C. Rep., p. 420, *Ross, App., Berthelet et al., Resp.* In Appeal; Rolland, Panet, Aylwin, J.

## RÉTRAIT CONVENTIONNEL.

Held, 1. That the abolition of the *retrait conventionnel* by the 18th Vict., c. 103, sect. 4, has no retroactive effect, and that the *retrait* may be exercised as to immovables sold before the passing of the act.

2. That the advertisement of the sheriff stating that the immovables would be sold subject to the *cens et rentes* and other seigniorial and conventional charges and dues according to the original titles of concession, is sufficient to secure such *droit de retrait*, and that, in such case, an opposition à *fin de charge* was not necessary. 8 L. C. Rep., p. 397, *Caron, App., Cusgrain, Resp.* In Appeal; Aylwin, Duval, Caron, J.; Lafontaine, C. J., dissenting.

## RULE TO CONTEST.

Held, That a rule by an opposant à *fin de distraire* calling on plaintiff to contest his opposition, and praying that in default *main levée* be granted, is irregular, and will be dismissed. 2 Jurist, p. 279, *McGrath vs. Lloyd, and Keith et al. Opp.* S. C. Montreal; Smith, J.

## SEIZURE OF GOODS AND LANDS.

Held, That the seizure of goods and lands on the same day, under the same writ, will not be set aside on opposition, there being nothing in the statute (25th Geo. 3, c. 2, sect. 31,) prohibiting such seizure. 7 L. C. Rep., p. 359, *Kierskowsky vs. Tulon dit Lespérance, and Tulon dit Lespérance, Opp.* S. C. Montreal; Day, Smith, Chabot, J.

Same case, 1 Jurist, p. 193.

Held, 1. That the immovable property of the defendant may be seized at the same time as the movables, but the movables must be first sold.

2. That where the return of the bailiff sets forth that the defendant has no movables, proceedings to set aside the return must be taken before an opposition can be fyled to set aside the seizure of the immovable property, on the ground that the movables should be first seized and sold. 11 L. C. Rep., p. 4, *Paige vs. Savard.* S. C. Quebec; Stuart, J.

## TIME OF FYLING.

Held, That an opposition à *fin de distraire* not fyled previous to the fifteen "days next before the day fixed for the sale," of an immovable, but within such delay, will be rejected on motion, notwithstanding that such opposition has been produced, with an order of a judge to receive the same, and upon the affidavit of one of the opposants. 12 L. C. Rep., p. 106, *Joseph vs. Donnelly, and Monaghan et al., Opp.* S. C. Quebec; Stuart, J.

## TO VENDITIONI EXPONAS.

Held, That an opposition, by a defendant, to a *venditioni exponas* for the sale of movables will be rejected on motion, if fyled without leave. 6 L. C. Rep., p. 72, *Boudreau et al. vs. Poutré, and Poutré, Opp.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, That an opposition to a *venditioni exponas* of real estate, will be dis-

dismissed on motion, if the defects set up in the opposition existed in the proceedings under the *feri facias*, or if the conclusions demand the setting aside of the proceedings under the *feri facias*. 6 L. C. Rep., p. 428, *Abbott vs. Bytown R. Co.* S. C. Montreal; Day, Smith, Mondelet, J.

Same case, 1 Jurist, p. 1.

Held, That an opposition to a *venditioni exponas* of movables, will be dismissed on motion, there being no grounds alleged in support of it. 9 L. C. Rep., p. 73, *McDonald vs. Grenier*, and *Grenier*, Opp. S. C. Montreal; Badgley, J.

Held, That an opposition to a *venditioni exponas* will be rejected on motion, if filed without the permission of a judge. 9 L. C. Rep., p. 447, *Quebec Building Society vs. Atkins et al.*, and *Atkins et al.*, Opp. S. C. Quebec; Chabot, J.

Held, That an opposition to a *venditioni exponas*, which had become unnecessary by reason of an amendment, will be dismissed on motion, but without costs. 3 Jurist, p. 138, *The Trust and Loan Company of Upper Canada vs. Doyle*. S. C. Montreal; Badgley, J.

Held, 1. That an opposition to a writ of *venditioni exponas de terris* may be made when founded on the alleged nullity of the writ itself, or the irregularity of the proceedings thereunder.

2. That, in such case, an order of the judge is not necessary, before the opposition is received. 10 L. C. Rep., p. 333, *Atkins et ux.*, App., *The Quebec Building Society*, Resp. In Appeal; Lafontaine, C. J., Duval, Mondelet, Badgley, J.; Aylwin, J., dissenting.

Held, That an opposition *à fin d'annuller* containing frivolous or insufficient grounds, will be dismissed on motion. 3 Jurist, p. 72, *McDonell vs. Grenier*, and *Grenier*, Opp. S. C. Montreal; Badgley, J.

Held, 1. That an opposition may be filed to a *venditioni exponas* if credit be not given on the writ for payments on account of the judgment.

2. And will be maintained when land *en roture* has been advertised for sale in another parish than that within which it is situated. 3 Jurist, p. 73, *Esty vs. Judd et vir*, and *Judd*, Opp. S. C. Montreal; Badgley, J.

Held, That an opposition to a *venditioni exponas de bonis* will be dismissed on motion, when the goods seized were afterwards sold without any delivery. 5 Jurist, p. 71, *Lovell vs. Fontaine*, and *St. Armand*, Opp. C. C. Montreal; Badgley, J.

See AFFIDAVIT, Payment, *supra*.

OPPOSITION BY GARDIEN. See GARDIEN, Opposition.

" See COSTS.

" Unfounded is a contempt. See CONTRAINTE, Opposition.

" to judgment by default maintained. Prévosté, No. 70.

" *main levée* ordered. Prévosté, No. 8.

APPEAL converted into opposition. Cons. Sup., No. 32.

OUSTER.

See CORPORATION.

See RAILWAY CO.

## PAIN BENI.

See CHURCHES, Pain Beni.

## PARDON.

EFFECT OF. See DEATH CIVIL, effect of.

## PARISH.

Décret Canonique for erection of. See CERTIORARI.

ERECTION OF. See CHURCHES, Erection of.

" See CERTIORARI, Parishes.

NAME OF. See PLEADING, Exception à la forme.

## PARLIAMENT.

## BREACH OF PRIVILEGE.

Held, That the Legislative Council has a right to commit, as for breach of privilege in cases of libel, and the court will not notice any defect in the warrant of commitment for such an offence after conviction. *Stuart's Rep.*, p. 478. *Case of Tracy*. K. B. Q. 1832.

## ELECTIONS.

Held, 1. That upon an application to a judge for the taking of evidence, he has a right to hear and decide all questions respecting the validity of the application. Amongst these are comprised :

1. The sufficiency of the recognizance, the sureties, and their affidavits.
2. The regularity of the services.
3. The sufficiency of the allegations to warrant the taking of evidence upon them.
4. The general conformity of the proceedings, in substance and form, to the requirements of the statute.

And in settling such questions the judge acts judicially.

2. A recognizance which does not state in the body of it the place where it was executed, is insufficient.

3. And this defect is not covered by the insertion in the magistrate's certificate of the words "at the place above mentioned," the place so mentioned being the indication of the magistrate's residence in his descriptive addition.

4. In the attestation to a recognizance, the statute requires the magistrate signing it, to state for what place he holds his office, and an attestation signed by a person styling himself "J. P.," without saying for what place is insufficient.

5. So also with regard to the *jurat* to an affidavit of sufficiency appended to a recognizance.

6. On an application, by a sitting member, for the taking of evidence, he must produce with his recognizance his own affidavit as to the sufficiency of the sureties, and the absence of such affidavit is fatal.

7. The copy of notice of contestation delivered to the judge must be sworn to, and although the form and manner of such swearing is immaterial, the appending to the copy a copy of the affidavit of service of the original is entirely insufficient. Election Reports (appended to 2 Jurist), p. 1. *Wm. Bristow et al., Petrs., against return of John Rose.*

*Jean Louis Beaudry et al., Petrs., vs. A. A. Dorion, Esq., Thomas D'Arcy McGee, Esq.*

Held, 1. That the French and English versions of the Provincial Statutes have equal force. Where they directly contradict they destroy each other; but if one be only ambiguous, the other may be resorted to for explanation of the intent and meaning of the law.

2. The words "superior or circuit judge" used in the controverted elections act of 1857, mean a judge of the Superior Court, or of the Circuit Court.

3. An affidavit appended to the copy of notice filed with the judge, containing the name and description of the deponent, and all necessary and material averments, purporting by the *jurat* and by the signature thereto, to have been sworn before a justice of the peace and an officer of the court, and stating in the conclusion of it, that the deponent hath signed it, form a sufficient compliance with the requirements of the statute of 1857 that such copy shall be "sworn," although the signature of the deponent was inadvertently omitted.

3. The contestant is not bound to produce, with his application, a copy of a second answer served on him by the sitting member, after the delay by the statute for such service had expired; and such answer, if produced by the sitting member, will be rejected from the record.

5. The judge commissioner has the power of limiting the evidence to be taken to such averments as have been legally made by the parties, in accordance with the statute, and upon an answer by the sitting member purporting to be a protest against answering, and containing no sufficient substantive averments of any facts upon which he could rest the validity of his election, he will be restricted to evidence in rebuttal of that of the contestant.

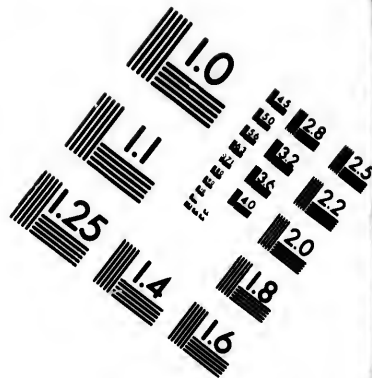
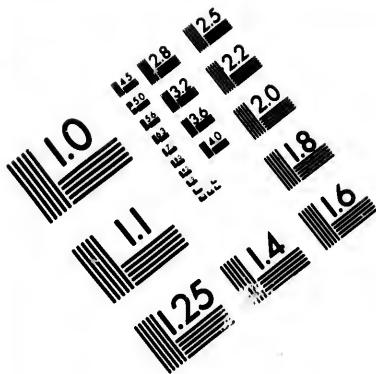
6. The judge commissioner acts judicially in the examination of, and decision upon, the validity of the application to him to take evidence, and upon the matter and things incident to such application. Election Reports, p. 13. *John J. C. Abbott, Petr., vs. Sydney Bellingham, Esq.*

#### PENALTY—QUALIFICATION.

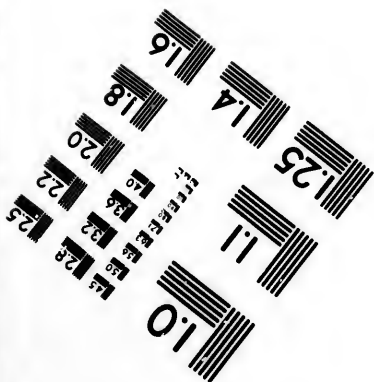
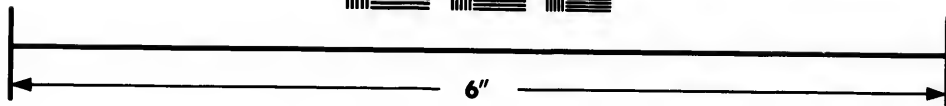
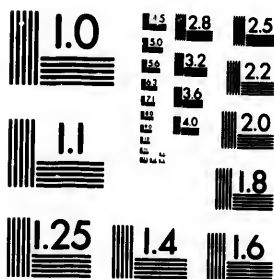
Held, That the penalty imposed by the chap. 3 of the Consolidated Statutes of Canada, sect. 7, does not apply to a person disqualified as to property as a member of the legislative council or legislative assembly, but only to persons disqualified under section 5 of said act, and where election is *radically null* according to the 6th section of the act. 5 Jurist, p. 113, *Morasse vs. Guévremont*. S. C. Richelieu; Bruneau, J.







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## PROROGATION—EFFECT OF.

Held, That a prisoner committed by the House of Assembly to the common jail "during pleasure" is discharged by a prorogation. *Stuart's Rep.*, p. 120, *Ex parte S, W. Monk*. K. B. Q, 1817.

## PROVINCIAL.

Held, 1. That the privilege of exemption from arrest does not attach to members of the Canadian legislature by virtue of any law or usage, nor as a legal incident, or by analogy between it and the Imperial Parliament.

2. That it does attach on the ground of necessity, but the member must show that the arrest would interfere with his legislative functions, and his duties to the country.

3. That the case of the defendant does not fall within the rule of such necessity. 4 L. C. Rep., p. 146, *Cuwillier et al. vs. Munro*. Q. B. Montreal; Roland, C. J., Day, Smith, J.

The defendants presented petitions to the House of Assembly, against the election of a member, and applied for a commission to examine witnesses. The committee to whom the petitions were referred appointed the plaintiff a circuit judge for Lower Canada, commissioner under the statute. The plaintiff performed the duties, but before the commission made their final report, the house was dissolved, and the committee thereby forever precluded from making their final report. The statute enacts that the commissioner shall, immediately after the committee shall have rendered their final report, be entitled to receive from the party upon whose application to the select committee such commissioner shall have been appointed, 50s. per diem, and his travelling expenses.

Held, In a suit to recover the sum from the defendant, that the plaintiff has no right of action, either under the statute or at common law. 5 L. C. Rep., p. 253, *Power vs. Bezeau et al.* S. C. Quebec; Morin, Badgley, J.

Held, 1. That by the 12th Vict., c. 27, and 14th and 15th Vict., c. 1, returning officers and their deputies have been, and are, subject to punishment by the House of Assembly for malversation; that malversation on their part is a special breach of the privilege of the house, as an attempt to put in or keep out a member unjustly, and that the general power accorded in cases not specially provided for in the statutes, must almost always relate to the returning officer or his deputy or to some person, not a member, in respect of whom the house is authorized to make such orders, as to the house may seem proper, necessarily implying a power in the house to enforce such order.

2. That the House of Assembly has the power, as a power necessary to its existence and the proper exercise of its functions, of determining judicially, all matters touching the election of its own members, including therein the performance of the duty of the returning officers and deputy returning officers.

3. That courts of law cannot inquire into the cause of commitment by either house of parliament, nor discharge nor bail a person, who is in execution by the judgment of any other tribunal; yet if the commitment should not profess to be for a contempt, but is evidently arbitrary, unjust, and contrary to every principle

of positive law or natural justice, the court is not only competent, but is bound to discharge the party.

4. That a commitment by either house of parliament may be examined upon a return to a writ of *habeas corpus*.

5. That the justices here as well as in England, profess, and have exercised the power to issue writs of *habeas corpus* in matters of commitment by either house of parliament.

6. That the statutes 12th Vict., c. 27, and 14th and 15th Vict., c. 1, invest the House of Assembly with power to punish, by imprisonment, a deputy returning officer for malfeasance or breach of privilege. 5 L. C. Rep., p. 99, *Ex parte Lavoie*. In vacation; S. C. Quebec; Badgley, J.

Forbearing to oppose Bill. See CONTRACT, Consideration.

Held, That a commissioner under the elections act 14th and 15th Vict., c. 1, has a right of action against the party or parties on whose application he was appointed, for fees due him as such commissioner. 1 Jurist, p. 174, *McCord vs. Bellingham et al.* S. C. Montreal; Smith, Mondelet, Chabot, J.

Same case on the merits. Held, 1. That the fees allowed by the act to a commissioner are assignable.

2. If the party contesting an election and the sitting member join in applying for a commissioner, they are jointly and severally liable for his fees. 2 Jurist, p. 42. S. C. Montreal; Smith, Mondelet, Badgley, J.

Held, 1. That an application to take the evidence will be rejected if the affidavits of the sureties are insufficient.

2. But an application to take evidence which the judge commissioner has refused, may be afterwards received and acted upon, if the defect be corrected and the application renewed within the time fixed by the statute for the making of such application.

3. Same ruling as to French and English versions of the statute, and the words "superior or circuit judge," as in the case of *Abbott vs. Bellingham, ante*.

4. That there are grave doubts whether the powers conferred upon a judge commissioner by the statute of 1857, are sufficient to enable him to appoint a deputy, and in the face of these doubts the Quebec judges unanimously decided not to do so. *Noel de Tilly et al., Petrs., vs. O'Farrell*, sitting member.

Held, 1. The judge applied to for the taking of evidence has a right to decide upon the sufficiency of the recognizance.

2. That he stands in the place of a select committee, *quoad* the evidence, and has a right to limit the testimony to such facts and circumstances only as he considers are validly alleged in the notice and answer.

3. A general allegation of bribery and intimidation is insufficient.

4. A general allegation of keeping open houses is insufficient.

5. A general allegation that more than 200 illegal votes were given for an opponent, is insufficient.

6. A general allegation that a great number of persons voted twice, is insufficient.

7. A general allegation that several persons under the age of majority voted, is insufficient.

8. A general allegation that the sitting member's votes were not qualified, and that the contestant's were qualified, is insufficient.

9. The evidence of the returning officer that the contestant was a candidate was refused.

10. In the absence of the poll books, the judge will grant a delay to produce them.

11. A list of voters objected to not served with the notice, nor referred to in it, nor forming any part of it, tendered to the commissioner after the day for taking evidence had been fixed and had arrived, was refused.

12. The judge commissioner will not receive and take down evidence *de bene esse* upon insufficient allegations in the manner prescribed in the 120th section of the election petition act to be done in certain cases, for there is no issue created by such allegations. Election Reports, p. 34, *McDougall, Petr., vs. Dawson*, sitting member.

Held, 1. That the judge applied to for the taking of evidence has no right to hear or decide questions arising upon the sufficiency of the conclusions of the petition, a copy whereof is filed before him.

2. It is not necessary for the petitioners, prior to obtaining an order for the taking of evidence, to prove that they were candidates, and had filed their declaration of qualification with the returning officer.

3. That upon an application being made to a judge for the taking of evidence, he has a right to hear the parties upon objections to the validity of the security.

4. Security to the amount of £200 is sufficient, although the petition be against the return of three members. Election Reports, p. 39, *Plamondon et al., Petrs., vs. Alleyn et al.*, sitting members.

Held, That an election agent has no action against a candidate for election to parliament, to recover a sum of money as the value of his services without an undertaking on his part to pay. 3 Jurist, p. 1, *Grouard vs. Beaudry*. C. C. Montreal; Smith, J.

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## PARTNERSHIP.

### ACCOUNTING.

Held, That the action *pro socio* is an action of account and partage, and each co-partner must be plaintiff or defendant in the suit, and if he be a defendant must be summoned: service also in this action on one co-partner is service on the other, and proceedings will be stayed till those who have not been summoned, or their representatives, have been made parties to the suit. *Alwin vs. Cuvillier*. K. B. Q. 1816.

Held, That where, between co-partners in trade, a balance is struck, an action of *assumpsit* may be maintained. If no balance be struck, the action must be to account. *Robinson vs. Reffenstein*. K. B. Q. 1821.

Held, That an action to account cannot be maintained by a person claiming a right to a share in a partnership business, in virtue of an agreement under which he was to receive a certain portion of the profits as a salary for his services, when he has broken the contract by withdrawing himself from the partnership

business, before the expiry of the time stipulated in the agreement, and before the business of the partnership was closed. 10 L. C. Rep., p. 304, *Miller, App., Smith, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, Badgley, J.

Held, That the only action by one partner against the other, after the dissolution of the partnership to regulate their rights, is the action *pro socio*, and not an action in damages on the ground that one partner has taken possession of all the partnership property. 1 Jurist, p. 170, *Bouthillier vs. Turcotte*. S. C. Montreal; Day, Mondelet, Chabot, J.

Held, That one co-partner cannot, after the dissolution of the firm, sue another co-partner to render an account, without himself offering and tendering an account. 3 Jurist, p. 119, *Pepin vs. Christin dit St. Amour*. S. C. Montreal; Smith, J.

Held, 1. That a partner cannot bring an action of assumpsit against his late co-partner after dissolution, for moneys alleged to have been taken out of the partnership and not accounted for, and that the transfer made by the defendant of his rights in the late firm to the plaintiff, subject to being discharged from liability and kept indemnified by plaintiff, gave no right of action as brought.

2. In this cause the court decided on the merits of the action, although the inscription was only on the first exception, which raised the points decided by the judgment. 4 Jurist, p. 37, *Thurber vs. Pilon*. S. C. Montreal; Monk, J.

Held, That payment by a partner of a judgment obtained for his personal debt, against himself and his co-partner, jointly and severally, liberates his co-partner, and that he cannot obtain subrogation against his partner, but must bring an action *pro socio* if he pretends to have claims against him. 5 Jurist, p. 96, *Leduc vs. Turcotte et al.*, and *Legendre et vir, Opp.*, and *Turcotte et vir*, Inter. C. O. Montreal; Badgley, J.

#### CONFESSION—ADMISSION.

Held, That a partner, after dissolution of the partnership, cannot confess judgment in an action against the late co-partnership, and that such judgment will be set aside on an opposition *à fin d'annuller*.

*Semble*, That it is doubtful whether a partner can validly give a confession of judgment for the co-partnership even while it subsists. 11 L. C. Rep., p. 433, *The Canada Lead Mine Co. vs. Walker et al.*, and *Steiven, Opp.* S. C. Quebec; Stuart, J.

Held, That the admissions on *faits et articles* by a partner after the dissolution of the co-partnership, are binding on all the members of the firm. 2 Jurist, p. 191, *Fisher vs. Russell et al.* S. C. Montreal; Day, J.

Contrary held in *Bowker et al., App., Chandler, Resp.* S. C. Montreal; Cond. Rep., p. 12.

*See SALE TO ONE PARTNER, post.*

#### CREDITORS OF.

Held, That the effects of co-partners, sold under execution, are not liable to creditors of one of the co-partners, until after the payment of the partnership creditors. 5 L. C. Rep., p. 388, *Moody vs. Vincent*, and *Hutchins, Opp.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a creditor of a co-partnership may sue any one of the co-partners without having first brought an action against the co-partnership. *Tator et al. vs. McDonald*. S. C. Montreal; (Smith, J., dissenting.) Cond. Rep., p. 68.

## DEATH OF PARTNER.

Held, In an action on note where one of two plaintiffs, co-partners, dies during the pendency of a suit, it is not necessary that the instance should be taken up on behalf of the deceased, where the cause is *en état d'être jugée*. 2 Jurist, p. 122. *Burry et al. vs. Shepston et al.* C. C. Montreal; Badgley, J.

## DISSOLUTION—ATTACHMENT.

Held, That if after the dissolution of a partnership any part of the goods fall into the hands of one of the partners, who is on the point of converting them to his own use, the other partner cannot recover by an action *en revendication* his undivided share in such goods. 1 Rev. de Jur., p. 367, *McGuire vs. Bradley*. K. B. Q. 1845.

## DISSOLUTION BY MARRIAGE.

Held, That a co-partnership is dissolvable by the marriage of a female partner, and the action *pro socio* lies against her and her husband. *Antoine vs. Dallaire*. K. B. Q. 1816.

## DISSOLUTION—NOTICE.

Held, That the dissolution of a partnership without particular notice to persons with whom it has been in the habit of dealing, and of general notice in the Gazette to all with whom it has not had dealings, does not exonerate the several members of the partnership from the payment of debts to third persons not notified, and who contracted with any of them in the name of the firm, either before or after the dissolution. Stuart's Rep., p. 49, *Symes, App., Sutherland et al.* Resp. In Appeal, 1811.

## IN SPECIAL CONTRACT.

Held, 1. That where three parties contracted to supply the defendant with stone, and an action was brought by one of them in his own name, in damages, against the defendant for refusing to allow the contract to be completed, that the action could not be maintained, and that all the three must join in the action.

2. That where persons join in a particular speculation or contract, they are to all intents and purposes co-partners, and must all join in the action for the recovery of damages for a breach of the contract. 9 L. C. Rep., p. 266, *Bosquet vs. McGreevy*. S. C. Quebec; Stuart, J.

## PARTNER'S DEBT.

Held, That partnership property is not liable for the debts of any of the partners individually. Stuart's Rep., p. 437, *Montgomery, App., Gerrard et al.* Resp. In Appeal, 1830.

See PLEADING, Corporation.

## NEW PARTNER.

Held, That where two co-partnerships associate themselves together as a



composite firm, it is not in the power of one partner to retire and substitute another in his place, without the consent of each individual partner; and that a judgment rendered against the composite firm is null *quoad* the non-assenting co-partners. 1 Jurist, p. 121, *Mullins vs. Miller*, and *McDonald et al.*, Opp. S. C. Montreal; Smith, Badgley, J.; Day, J., dissenting.

Held, 1. That a written promise by one partner, in the name of his firm, but without authority from his partners to receive a stranger into it, is not binding upon the other members of the firm, and, *semble*, that even silence or inaction on their part would not amount to an implied sanction of such promise, although such sanction might be inferred from circumstances.

2. Such a promise to take a person into partnership at a specified time "upon terms that shall be mutually satisfactory," but containing no specifications as to conditions, share, duration, and the like, affords no basis for the assessment of damages for a breach of it.

3. That a motion to set aside a verdict and dismiss the action, or grant a new trial, is regular, and in accordance with the practice of the court.

4. The Superior Court has the power of appreciating for itself the evidence adduced before the jury, and if the verdict be not sustained by the evidence, will set it aside upon a motion to that effect, and render such judgment as shall be justified by the record.

*Semble*, That immoral conduct, by keeping a mistress, or frequenting brothels, is a sufficient justification for a refusal to fulfil such promise.

*Semble*, Also, that one partner, a defendant examined under the recent statute, may be a good witness for his co-partners, defendants, any objection going only to his credibility. 4 Jurist, p. 329, *Higginson vs. Lyman et al.* S. C. Montreal; Monk, J.

#### PROOF OF.

A charitable institution, founded for the relief of the poor, appointed delegates to establish a savings bank. These delegates appointed a president and directors who adopted certain regulations, and amongst others one prohibiting any profit to the officers of the institution. Deposits were received to be repaid with interest, and promissory notes were discounted upon the credit of individuals. Upon these discounts, a *percentage* was taken by the directors, and a portion of the fund was appropriated to their own use for their services. The bank, or business so established, was ultimately closed as insolvent, and a portion of the debts due as special deposits was bought up by the directors at a composition in the £. In an action of assumpsit against the president and several of the directors, by one of the depositors, (who had been one of the above mentioned *delegates*) for the full amount of his deposit:

Held, 1. That without reference to the question of fraud, *delit* or *quasi-delit* the president and directors had become traders by mixing themselves up with a commercial banking business, and were jointly and severally liable to such depositor for the amount of his deposit, and that, had the plaintiff approved of the proceedings of the directors, submitted annually at meetings of the depositors,

his approval, obtained by means of false statements, could not operate to his prejudice.

2. That the charitable institution had no interest in the matter, and consequently no action of account *pro socio* for or against it would lie.

3. That the president and directors had become a co-partnership, or an unincorporated company, and that the action was properly brought against any one or more of them, under the provisions of the 12th Vict., c. 45. 11 L. C. Rep., p. 293, *Prevost et al.*, App., *Allaire*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Mondelet, J.; Duval, Badgley, J., dissenting.

Held, That it is competent to defendants who are sued as co-partners carrying on trade under the name of "The Montreal Railway Car Company," to prove under the general issue, that the company was a joint stock company, and that the debt was a debt of the corporation. 2 Jurist, p. 192, *Edmonstone et al.* vs. *Childs et al.* S. C. Montreal; Badgley, J.

Held, That where one of two co-partners purchases, in the way of his trade, it must be *prima facie* presumed that he buys for the co-partnership; if he says nothing to the contrary, he tacitly holds out the assurance of their joint responsibility. *Rose vs. Melvine et al.* K. B. Q. 1819.

Held, That evidence that the firm of a co-partnership is A B & C, does not prove that the co-partnership is composed of three or more persons. *Chinic Vezina & Co.* vs. *Gervais.* K. B. Q. 1820.

#### PROOF OF—BETWEEN PARTNERS.

Held, 1. That as between partners themselves, the partnership must be proved by writing.

2. That sales, even under the 10th and 11th Vict., c. 10, must be made according to the usual course of business and for cash, unless the usage of their trade justifies the giving of credit. 6 Jurist, p. 134, *Bewudry vs. Lafamme*, and *Davis*, Inter. S. C. Montreal; Smith, J.

#### REGISTRATION OF.

In an action for penalty against a shareholder in the "Navigation Company" of Three Rivers for not registering the names of all the members of the company at Montreal, where it was alleged the company did business:

Held, That under the statute (12th Vict., c. 45) such registration was not necessary, and action dismissed on a declinatory exception. 4 Jurist, p. 239, *Sénécal vs. Chenevert.* C. C. Montreal; Monk, J.

Held, In such an action, that there is no prescription under the 52nd Geo. 3, c. 7, intituled "an act for limiting the time during which penal actions may be brought in the courts of the province," although the offence is alleged to have been committed five years since and over; the offence being held to be continued from day to day. 5 Jurist, p. 54, *Handsley vs. Morgan.* C. C. Montreal; Smith, J.

Held; That partners who have filed a certificate of partnership continue liable after the dissolution, if they omit to file a certificate of dissolution. 5 Jurist, p. 335, *Murphy vs. Page et al.* S. C. Montreal; Smith, J.

Held, 1. That where partners have registered the formation of their co-partnership, but not its dissolution, although such dissolution is by notarial deed, one partner is liable for debts contracted by the other, under the same partnership name, after the dissolution.

2. That in an attachment under the 177th article of the *coutume* where the insolvency of the debtor is alleged, the affidavit of the plaintiff will be held sufficient evidence of insolvency unless it be specially denied. 6 Jurist, p. 105, *Jackson vs. Paige et al.* S. C. Montreal; Monk, J.

## REGISTRATION OF—PENALTY.

In an action in the Circuit Court, Montreal, for a penalty of £50 for not registering at the prothonotary's office at Montreal, an act of co-partnership of "The Three Rivers Navigation Co.," made at Three Rivers; the defendant having his domicile at Three Rivers, was served with process there to appear at Montreal.

Held, In the Circuit Court, on *exception declinatoire*, that the company having its principal seat of business at Three Rivers, was not bound to enregister at Montreal.

In Appeal confirming the judgment, That the whole course of action must arise within the district where the suit is brought in order to give the court jurisdiction. 12 L. C. Rep., p. 145. *Sénécal, App., Chenevert, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Same case, 6 Jurist, p. 46.

## SALE TO ONE PARTNER.

Held, 1. That a vendor who sells to one partner in his own individual name, and upon his credit and responsibility, has a right to recover against the firm of which such partner is a member, provided the firm has benefitted by the transaction, and although the vendor was ignorant of the existence of the partnership at the time he sold the goods.

2. That, in such case, answers to interrogatories on *faits et articles* of such partner to the effect that he applied the goods so purchased to the purposes of the firm, are not only admissible, but conclusive evidence to bind the firm. 7 L. C. Rep., p. 451, *McGuire, App., Scott, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, J.; Caron, J., dissenting.

In an action brought for the price of goods alleged, in the declaration, to have been sold and delivered to the defendant personally, the defendant pleaded that the goods were not sold to him, and that he had nothing to do with the purchase except as the agent of a glass company then in operation, to which company they were sold; the plaintiffs were allowed to amend their special answer to this plea by adding thereto an allegation to the effect that the defendant was a partner in the said glass company, and that his plea that he was simply an agent was false:

Held, 1. That even if it were established that the defendant was a member of said company, as alleged in the special answer, no judgment could be rendered against the defendant, it appearing from the allegations and admissions of the plaintiffs, that the action should have been brought against the company.

2. That the special answer was in contradiction with the declaration, and that the action must, on that ground, be dismissed, and also because the sale and delivery alleged in the declaration had not been proved. 12 L. C. Rep., p. 92, *Gault et al., vs. Cole*. S. C. Montreal; Monk, J.

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PASSENGERS' LUGGAGE.

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See CARRIER.

PATENT.

FOR INVENTIONS.

Held, That LETTERS PATENT, for an invention, granted under Her Majesty's Privy Seal, in England, are of no force or effect in Canada; and the patentees have no other remedy in Canada than that given by the Provincial Statute in that behalf. 1 L. C. Rep., p. 130, *Adams vs. Peel*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That Letters Patent issued for an improvement in fire engines, whereby greater results are obtained, are valid. 2 L. C. Rep., p. 305, *Muir vs. Perry*. S. C. Montreal; Day, J.

Held, That in an action for an infringement of Letters Patent for Lower Canada, the allegation of such infringement "in the county of Montreal" is sufficient. 2 L. C. Rep., p. 311, *Prowse vs. Panuelo*. S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That in an action for infringement of Letters Patent for an invention, it is sufficient to set out in the declaration the granting of the Letters Patent in favor of the plaintiff, with their date and tenor, without alleging compliance with the formalities pointed out by the statute to entitle the plaintiff to obtain such patent. 8 L. C. Rep., p. 297, *Bernier vs. Belliveau*. S. C. Montreal; Day, J.

Same case, 2 Jurist, p. 289.

Same ruling in *Bernier vs. Beauchemin*, 2 Jurist, p. 193.

Same case, 5 Jurist, p. 29.

Held, That the certificate to be appended to Letters Patent for an invention, conformably to the 6th Wm. 4, c. 34, sect. 2, must be given by the attorney general, or, in his absence, by the solicitor general, and such certificate given by a Queen's Counsel, renders the letters patent invalid. 1 Rev. de Jur., p. 185, *Bellanger vs. Levesque*. K. B. Q. 1845.

Held, That where the jury found, in an action for infringement of letters patent for an invention, that the plaintiff was not the first and true inventor, that the invention was previously discovered and made known by another, and that the plaintiff had suffered no damage, the court will not disturb the judgment dismissing plaintiff's action on the verdict of the jury. 12 L. C. Rep., p. 49, *Ritchie, App., Joly, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

## PATENT—CROWN LANDS.

Held, 1. That the writ of *scire facias* is not indispensable to the revocation of letters patent for lands, and that in the present instance, the Crown, represented by the officers of the ordnance, could waive the remedy, which, by law, she hath as her royal prerogative to repeal the letters patent by a writ of *scire facias* and adopt the common remedy open to all Her Majesty's subjects in that behalf, as done in this case by the conclusions of the exception.

2. That a defendant may, by exception, invoke the nullity of the title set up by the adverse party, without proceeding directly by action or by incidental demand to obtain the rescision of such title. 1 L. C. Rep., p. 481, *Officers of Her Majesty's Ordnance vs. Taylor*. In Appeal: Rolland, Panet, Aylwin, J. Registration of Letters Patent. See REGISTRATION BY CROWN.

Held, That a writ of *scire facias* to annul letters patent will be refused on the ground that such writ can only issue at the instance of the Crown, the statute providing otherwise in Canada having been repealed. Cond. Rep., p. 65, *Ex parte Paradis*. S. C. Montreal; Day, J.

## PATERNITÉ.

See EVIDENCE, Competency.

See DAMAGES, Seduction.

## PAUPER,

Execution. See Motion in *formâ pauperis*.

## PAYMENT.

IMPUTATION OF INTEREST. See BILLS AND NOTES.

BY ERROR. See BILLS AND NOTES, Payment by Error.

TO CEDANT. See CESSION, Payment, Signification.

RECEIPT. See EVIDENCE, Receipt.

See PLEADING, Payment.

## PENALTY.

## PENAL STATUTES.

Held, That in an action of damages for the non-performance of a special agreement in which a penalty is stipulated to be paid by the party failing, the penalty is not to be considered as stipulated damages, and therefore whatever loss is proved to have been sustained, whether above, below, or equal to the penalty, the plaintiff will have judgment for such loss *Mure et al., Pliffs., Weley et al., Defts.* Pyke's Rep., p. 61. Sewell, C. J., 1810.

Held, That a sum fixed by way of penalty in case of non-performance of a contract, cannot be considered as proliquidated damages if it is not distinctly stated to be so. *Patterson vs. Farran*. K. B. Q. 1811.

Held, That where the plaintiff demands the amount of stipulated damages, he affirms the contract, and consequently cannot call on the defendant to refund any sums of money advanced or paid by the plaintiff on execution of the contract on his part. *Patterson et al. vs. Conant*. K. B. Q. 1819.

Held, That costs may be awarded in a *qui tam* action, and that two witnesses speaking to different breaches of the statute are sufficient. *Puizé qui tam vs. Fay*. K. B. Q. 1812.

Held, That in an action grounded on the *arrêt* of 1711, the case stated in the declaration must lie within the letter of the *arrêt*, it being a penal statute which may operate the forfeiture of real estate. *Dubois vs. Caldwell*. K. B. Q. 1820.

Held, That in a *qui tam* action for a penalty for practising physic without a license, two witnesses to different acts of such practice is sufficient evidence to support the action. *Puizé qui tam vs. Fay*. K. B. Q. 1812.

Held, That a defendant cannot be arrested for the amount of a penalty incurred for an offence against a penal statute. *Graham vs. Whitby*. K. B. Q. 1818.

Held, In an action by the proprietor of a toll bridge, in damages, for ferrying persons across the river to defendant's mill, that the action will lie, and that the penalty given by the 10th and 11th Vict., c. 99, (the charter for the bridge) was to the informer. That the only thing that takes away a common law remedy would be a specific remedy given by statute. *Leprohon vs. Globenski*. Cond. Rep., p. 90.

Held, That a laborer counting and sorting deals for his employer is not liable to the penalty imposed upon persons culling deals without being duly authorized under the 8th Vict., c. 49 3 Rev. de Jur., p. 241. *The Supervisor of Cullers, App., Gagnon*. Resp. In Appeal, Nov., 1847.

Penalty for non-registration of co-partnership. See PARTNERSHIP, Registration of.

Penalty for breach, by wife, of L. C. game act. See HUSBAND AND WIFE.

PENALTY. See ARBITRATION.

In Arbitration Bond. See ARBITRATION.

See CERTIORARI, Roads.

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### PEREMPTION.

Held, That a petition for *peremption d'instance* could not be made in the Court of Appeals without a certificate from the clerk of the court, stating the date of the last proceeding. 1 L. C. Rep., p. 89, *Les Dames Religieuses Ursulines vs. Botterell*. In Appeal: Rolland, Aylwin, Ross, Angers, J.

Held, That *peremption d'instance* is interrupted by service on the defendant of a notice of motion for the rejection of a report of arbitrators, before the sig-



nification, on the plaintiff, of the rule for peremption. 1 L. C. Rep., p. 109, *Dinning vs. Bates*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That notice of motion for *peremption d'instance* received by one of two attorneys, after the elevation of a previous partner to the bench, is sufficient. 5 L. C. Rep., p. 167, *Dubois vs. Dubois*. S. C. Montreal; Smith, Vanfelson, Mondelet, J.

Where an interlocutory judgment was rendered discharging an inscription for hearing on the merits of a *demande en garantie* as premature, inasmuch as judgment could not be rendered until the cause, in the declaration of the plaintiff *en garantie* as principal plaintiff, was decided upon:

Held, That the proceedings *en garantie* were suspended by this judgment, and that therefore there was error in a judgment declaring such action *perimée*, on motion by one of the defendants *en garantie*. 9 L. C. Rep., p. 219, *Archambault, App., Busby, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J.

Same case, 3 Jurist, p. 222.

Held, That a proceeding in a cause, made by a plaintiff's attorney, after service on him of a rule *nisi*, for *peremption d'instance*, and before the return of the rule, will not prevent the peremption being declared, and the action dismissed. 10 L. C. Rep., p. 20, *Farnam vs. Joyel*. S. C. Montreal; Berthelot, J.

Same case, 4 Jurist, p. 128.

Held, That the *peremption d'instance* cannot be invoked in the case of an opposition filed by an hypothecary creditor, in a proceeding for ratification of title, there being no *instance* pending. 11 L. C. Rep., p. 235, *Ex parte Robertson*, and *Pollock et al. Opp.* S. C. Montreal, Smith, J.

Same case, 5 Jurist, p. 150.

Held, That, on sufficient cause being shewn, the court will not grant costs on *peremption d'instance*. 1 L. C. Rep., p. 494, *DeBleury vs. Gauthier*. S. C. Montreal; Smith, J.

Same case, 5 Jurist, p. 330.

Held, That in the absence of the original record, it is not competent for the court to pronounce *peremption d'instance*. 2 Jurist, p. 96, *Turner vs. Boyd*. S. C. Montreal; Smith, J.

Held, That a motion praying that the action be dismissed for want of proceedings during three years, and not praying that it be declared *perimée*, is irregular, and will be rejected. 2 Jurist, p. 221, *Peck et al. vs. Murphy*, and *Mayor, &c., of Montreal, T. S.* S. C. Montreal; Smith, J.

Held, That *peremption d'instance* may be preserved by a valid proceeding, made after service of a motion *en peremption*. 3 Jurist, p. 237, *Beaudry vs. Plinguet*. S. C. Montreal; Mondelet, J.

Held, That a cause will be declared *perimée* notwithstanding the plaintiff has not been represented in consequence of his attorneys having abandoned their profession. 3 Jurist, p. 283, *New City Gas Co. vs. Macdonnell*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That where the defendant dies, the *mandat* of his attorney *ad litem* ceases.



2. That the time for peremption does not run during the three months and forty days allowed the heirs to deliberate as to accepting or renouncing his succession. 5 Jurist, p. 331, *McKay et al. vs. Gerrard et al.* S. C. Montreal; Monk, J.

Held, That the death of a plaintiff interrupts peremption. 4 Jurist, p. 148, *Tate et al. vs. McNevin.* S. C. Montreal; Badgley, J.

Held, That a rule for peremption will be granted notwithstanding the time of vacation has been counted to make up the three years, the stoppage of time under the 16th Viet., c. 194, sect. 10, not being applicable. *Benoit vs. Pelouquin.* S. C. Montreal; Cond. Rep., p. 31.

Held, That *peremption d'instance* will be granted notwithstanding an inscription made by the defendant after signification of the motion *en peremption*. 6 Jurist, p. 293, *Charlebois vs. Bostien.* C. C. Montreal; Monk, J.

#### COSTS ON.

Held, That in a judgment declaring a suit *perimée*, the court may condemn the plaintiff to pay the costs of the action. 8 L. C. Rep., p. 54, *Gore et al.*, App., *Gugy*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Carou, J.

Held, That peremption will be granted with costs, on a certificate of last proceeding by the prothonotary, although a part of the record missing was not produced. 1 Jurist, p. 264, *Chapman vs. Ayles.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, That in cases of *peremption d'instance* the action must be dismissed, each party paying his own costs. 6 L. C. Rep., p. 97, *Fournier vs. Quebec Ins. Co.* S. C. Quebec; Bowen, C. J., Meredith, Badgley, J.

See also 10 L. C. Rep., p. 382, *Turner vs. Lomas.* S. C. Quebec; Taschereau, J.

Held, That the action in case of peremption will be dismissed with costs. 1 Jurist, p. 264, *Mongeau et ux. vs. Turrenne dit Blanchard.* Day, Smith, Mondelet, J.

So in *Gore vs. Gugy.* 1 Jurist, p. 264. Same judges.

See 2 Rev. de Jur., p. 319.

#### OPPOSITION.

Held, That an opposition is subject to *peremption d'instance*. 3 Jurist, p. 195. *Blackburn vs. Walker*, and *Walker, Opp.* S. C. Montreal; Berthelot, J.

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#### PERJURY.

See CRIMINAL LAW, Perjury.

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#### PILOT.

See SHIPS AND SHIPPING, Pilot.

## PLEADING.

## APPEARANCE AND DEFAULT.

Held, The default day or *tertius dies post* is the third juridical day, the return day not included. *TroisMaisons vs. Grant*. K. B. Q. 1809.

*Tasché vs. Berubé*. K. B. Q. 1809.

Held, That in taking off a default 10s. must be paid into the hands of the prothonotary. *Fortier vs. Berthier*. K. B. Q. 1810.

*Vernet vs. Consigny*. K. B. Q. 1817.

Held, That if a party summoned to admit or deny his signature does not appear in person, or by attorney, the signature must be taken *pro confesso*. *Bryson vs. Hooker*. K. B. Q. 1811.

Held, That in such case an appearance by attorney is sufficient. *Allison vs. Deblois*. K. B. Q. 1811.

Held, That the court will not allow a motion for the benefit of a default, if it appears that the defendant was not called on the return day. *Ritchie vs. Flower*. K. B. Q. 1812.

Held, That the court will set aside the default and dismiss the action, if it appears on the *délibéré*, or at the hearing, that the defendant has not been legally summoned. *Shephard vs. Tounancour*. K. B. Q. 1818.

Held, That the appearance of an applicant for ratification of title dates from the presentment of the petition. *Ex parte Wood*. S. C. Montreal; Cond. Rep., p. 107.

## ARTICULATION OF FACTS.

Held, That an articulation of facts which contains matter not to be found in the pleading, or matters admitted by the pleading, is nevertheless good. 8 L. C. Rep., p. 154, *Rouleau vs. Bacquet*. S. C. Quebec; Bowen, C. J.

As to effect of not answering articulation of facts. See PLEADING, Compensation.

Also 4 Jurist, p. 284.

Held, That the want of an articulation of facts by one party cannot prevent the other party from proceeding in the cause. 6 Jurist, p. 61, *Bélanger*, App., *Mogé*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That an articulation of facts denying "all the matters, allegations and facts" contained in a pleading, will be rejected on motion. 6 Jurist, p. 120, *Molsons' Bank vs. Falkner*, and Opp. S. C. Montreal; Badgley, J.

See COMPENSATION, *post*.

## COMPENSATION.

Held, In an action by the Montreal Provident and Savings Bank, on a notarial obligation for moneys lent, that the defendant could not set up in compensation sums of money transferred to him by depositors in the bank, when the bank was insolvent. 1 L. C. Rep., p. 110, *Montreal Provident and Savings Bank vs. McGinn*. S. C. Montreal: Day, Vanfelson, Mondelet, J.

Held, That an accommodation indorser can set up in compensation against a bank, plaintiff in the cause, all salary paid by plaintiff to the maker, an officer of the bank, subsequent to the protest of the note. 1 L. C. Rep., p. 116. *Quebec Bank vs. Molson*. S. C. Montreal; Smith, J.

Held, That compensation must be specially invoked, and the conclusions of a plea to that effect should be special and pray that compensation be declared to have taken place. The judgment of the court below confirmed in its *dispositif* in appeal, and the plea further declared to set up matter which could not be pleaded in compensation, the debt not being *claire et liquide* and being also vague. 1 L. C. Rep., p. 478, *Gugy vs. Duchesnay*. Q. B. Montreal; In Appeal. Rolland, C. J., Panet, Aylwin, J.

Held, That a general issue is waived, when fyled with a plea of payment or compensation. 1 L. C. Rep., p. 487, *Casey vs. Villeneuve*. C. C. Quebec; Power, J.

Held, 1. That in an action by a party, indicated in a deed of sale as the person to whom the *prix de vente* of an immovable shall be paid, the *indication de paiement* not having been accepted by plaintiff, will be dismissed on proof of a plea of compensation by notes held by the defendant, which were previously made by the vendor.

2. That the registration of the deed by the plaintiff does not affect defendant's rights in such a case. 8 L. C. Rep., p. 221, *Seaver et al. vs. Nye*. S. C. Montreal; Badgley, J.

Held, That in an action for work and labor done by plaintiff with his steamer, etc., the defendant can set up in compensation damages suffered by negligent and careless towage, nor is it necessary that such damages be claimed by incidental demand. 6 L. C. Rep., p. 33, *Beaulieu vs. Lee*. S. C. Quebec; Stuart, Gauthier, J.

Held, That a debt need not be absolutely *claire et liquide* in order to be set up in compensation against a notarial obligation, provided it be easily proved, so that compensation for goods sold and delivered may be so pleaded. 6 L. C. Rep., p. 75, *Hall*, App., *Beardet*, Resp. In Appeal; Aylwin, Mondelet, Badgley, J.; Lafontaine, C. J., dissenting.

Held, That in an action on a notarial obligation, a claim for unliquidated damages (from non-delivery of brick) cannot be set up in compensation. 6 L. C. Rep., p. 491, *Chapdelaine vs. Morrison*. S. C. Montreal; Day, Smith, Badgley, J.

Held, That a claim which is not founded on authentic deed cannot be set up in compensation against a claim founded upon such deed, notwithstanding the default of the party, plaintiff, to answer the articulation of facts fyled by the defendant.

In Appeal: That the default to answer the articulation of facts, having the effect of an admission of the facts alleged, the claim set up in compensation became *claire et liquide* and extinguished the adverse claim. 10 L. C. Rep., p. 422, *Archambault*, App., *Archambault*, Resp. Lafontaine, C. J., Mondelet, Badgley, J.; Aylwin, Duval, J., dissenting.

Same case, 4 Jurist, p. 284.

Held, In an action on note the defendants pleaded that at the time the note

became due the plaintiffs had in their possession goods belonging to the defendants of the value of the note, and therefore that there was compensation. Plea overruled on demurrer, there being no debt *claire et liquide* set up. 10 L. C. Rep., p. 474, *Ryan et al. vs. Hunt et al.* S. C. Quebec; Taschereau, J.

Held, That where there is evident fraud and *dol*, damages may be set up in compensation against an action for the price of an immovable sold. 3 Jurist, p. 321, *Prévost vs. Leroux.* S. C. Terrebonne; Badgley, J.

Held, That upon a note not payable to order, but assigned by a notarial *acte* at a time when a larger sum was due and owing by the payee to the maker, an action cannot be supported; the claims having been mutually compensated at the date of the assignment. *Gibson vs. Lee.* K. B. Q. 1814.

Held, That a debt due by an auctioneer to a purchaser at auction, who knows that the seller is the agent for another, and not the principal, cannot be set off by way of compensation against the price of the goods so bought. *Rex vs. Melvin.* K. B. Q. 1819.

Held, That damages cannot be pleaded by way of compensation; but where compensation can be urged, it should be pleaded by *exception peremptoire.* *Brunet vs. Lee.* K. B. Q. 1812.

Held, That a judgment may be compensated, but that can only be done by another judgment, or by a debt as "*claire et liquide*" as the judgment to which it is opposed, and contracted after the date of the judgment, *e. g.*, a debt due on a notarial obligation. K. B. Q. Anonymous.

Held, That a judgment which a defendant might have pleaded by way of compensation to the original demand, cannot be received as ground of an opposition *à fin d'annuller.* This would be permitting the trial of the merits *de novo.* *Miville vs. Fay.* K. B. Q. 1814.

Held, That where an action was commenced by the executors of the will of deceased person, on notes made by the defendant payable to them in their quality, and the defendant pleaded compensation by a debt due him by the deceased, an insolvent debtor, such plea will be maintained, the heirs of the debtor having taken up the *instance* after a year and a day, and being, as such heirs, responsible for his debts. 12 L. C. Rep., p. 202, *Moss et al. vs. Brown, and Hardy,* Plif. *par reprise.* S. C. Quebec; Stuart, J.

Held, That a debt of one of the plaintiffs, a member of a firm, cannot be set up in compensation against a debt of the defendant personally. *Ballou vs. Desbarats.* S. C. Montreal; Cond. Rep., p. 4.

Held, That a plea setting up a debt due by plaintiff to one of the defendants will be dismissed. *McFarlane vs. Rodden et al.* S. C. Montreal; Cond. Rep., p. 37.

COMPENSATION against freight for damage to goods. See SHIPS AND SHIPPING, Freight.

#### DECLARATION.

Held, That interest and costs must be asked for in the conclusions of the declaration, otherwise the court cannot give judgment for them or either of them. *Stilson vs. Anderson.* K. B. Q. 1811.

Held, That if a declaration against two or more defendants, does not conclude for judgment *solidairement*, it cannot be so awarded. *Tram vs. Godin et al.* K. B. Q. 1812.

Held, That in an action by an heir for a debt due to his ancestor, the death of the latter must be alleged in the declaration, otherwise, on an *exception à la forme*, the action will be dismissed. *Ross vs. Wyse.* K. B. Q. 1820.

Held, That in an action in which the law directs the *tenans et aboutissans* to be set forth in the declaration, it is not sufficient that the land is so described that the defendant must necessarily know it. The description must be such as will enable the court to award judgment as to what is asked. *O'Connor vs. Couture.* K. B. Q. 1821.

Held, That in a declaration for the price of real property sold, it is not necessary to allege the delivery (*tradition*). If it has not been delivered the defendant must allege the fact, and to that the plaintiff may reply by denial, or by an offer to deliver. *Larivière vs. Bruneau.* K. B. Q. 1817.

Held, That what is omitted in the conclusions of a declaration cannot be supplied by the court. *Perrault vs. Vallières.* K. B. Q. 1820.

Held, That if the defendant appears, the non-service of a copy of the declaration will only authorize the defendant to move for a copy, and that the rule to plead should date from the day of service. *Monminy vs. Tappin.* K. B. Q. 1820.

Held, That a declaration on a bill of exchange drawn by plaintiff in favor of C, and accepted by defendant, which alleges the bill was not paid to C, who "returned it to plaintiff," is sufficient. Demurrer dismissed. *Rowbottom vs. Scott.* S. C. Montreal; Cond. Rep., p. 32.

Held, That pleas which only answer part of the demand and yet conclude for the dismissal of the whole action will be dismissed on demurrer. *McDougal vs. Morgan.* S. C. Montreal; Day, Smith, Mondelet, J. Cond. Rep., p. 8.

#### DEFENSE EN DROIT.

Held, That to a demand *en reprise d'instance forcée* in an action of *revendication de meubles*, a *defense en droit* by an executor, is no answer. *Idle vs. Shepherd.* K. B. Q. 1817.

To an action for rent on a lease before notaries, setting up the lease for a year, of the house and premises to the lessee, in consideration whereof the lessee promised to pay the rent (£230) in the manner and at times specified in the lease, the defendants, sureties under the lease, filed a *defense en droit* to the declaration, on the ground that there was no allegation that the lessee had entered upon or enjoyed the premises, or that the lessor had fulfilled the obligations binding on him under the lease. Defense en droit dismissed. 1 L. C. Rep., p. 271. *Pirrie vs. McHugh et al.* S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That an action in damages against several defendants for breach of contract to convey a raft, cannot be dismissed on a *defense en droit*, although the conclusions of the declaration are for a joint and several condemnation. 5 L. C. Rep., p. 180, *Ranger et al. vs. Chevalier et al.* S. C. Montreal; Day, Smith, Vanfelson, J.

See BANKRUPTCY.

## DENIAL ON OATH.

Held, That under the judicature act of 1857, sect. 87, in an action on a bond alleged to have been made by the defendant's agent, the bond is a writing contemplated by the statute, and that where the agent's authority is denied, an affidavit as to such authority should have been filed with the plea. 2 Jurist, p. 121, *Atty. Gen. pro Reg. vs. McPherson et al.* C. C. Montreal; Badgley, J.

See **BILLS AND NOTES, Forgery.**

## DEPARTURE.

The opposant set up title to an immovable seized, under the will of her husband; contestation that subsequently to the will, the testator and opposant had made a donation of the land to defendant; answer, resiliation of the donation before the husband's death by the consent of all parties thereto.

Held, That such special answer could not be set aside on a *défense en droit*, as invoking a different title from that alleged in the opposition, the object of the answer being to show, that in consequence of the resiliation, the opposant's title under the will had revived. 8 L. C. Rep., p. 209, *Romain vs. Dugal*, and *Jobin* Opp. S. C. Quebec; Morin, J.

See **CORPORATION, Election.**

Held, That allegations which form the chief support of plaintiff's action must be set out in the declaration, and cannot be pleaded by way of special answer to exceptions. 1 Jurist, p. 39, *McGoey vs. Griffin*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That in an action to oblige defendant to make an inventory, where the defendant pleaded he had made one, and the plaintiff answers by a *debut* d'inventaire, that the answer is a departure. *Bates vs. Foley*. S. C. Montreal; Cond Rep., p. 108.

The plaintiff brought a petitory action for a lot of land, alleged to have been acquired by him by deed of 21st of January, 1856, setting up no other title in his declaration.

The defendant pleaded that, before the date of the plaintiff's title, he had been in possession of the lot, as proprietor, for more than ten years, setting up no title.

The plaintiff was permitted to file a special answer, in which he set up anterior titles.

Held, That the action of the plaintiff must be dismissed, and both parties put out of court, each party paying his own costs, on the following grounds:

1. Because the plaintiff failed to establish, in evidence, his title to the lot in manner and form as set up in his declaration; and because his rights depended on a possession and claim of title, anterior to that asserted by him.
2. Because the plea was irregular, and insufficient in law, failing to allege with sufficient certainty, an adverse title in defendant.
3. Because the issue between the parties was irregular, and they ought not to have been permitted to proceed to evidence; and because the evidence taken was not warranted by the pleadings. 10 L. C. Rep., p. 22, *Osgood, App., Kellam*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Meredith, Mondelet, J.



## EXCEPTION À LA FORME.

Held, That service of process cannot be made in the night. 1 Rev. de Jur., p. 44, *McGibbon vs. St. Louis dit Lalampe*. K. B. Q. 1843.

Held, That a breach of contract insufficiently alleged must be pleaded by exception à la forme. *Pacaud vs. Hooker*. K. B. Q. 1811.

Held, That in actions on contract, the contract must be set forth in the declaration. *Simard vs. Mathurin*. K. B. Q. 1812.

Held, That an exception à la forme cannot be received after a motion for particulars. Every motion is an act of submission to the jurisdiction of the court, and consequently a waiver of all objections to the form of the summons and service, and a motion for particulars admits the sufficiency of the declaration. *Munroe et al. vs. Laliberté*. K. B. Q. 1810.

Held, That on an exception à la forme pleaded because the writ of summons is in French, and ought to be in English, or vice versa, the defendant must set forth the time and place of his birth. *Jones et al. vs. Morin*. K. B. Q. 1812.

Held, That the want of intermediate days on the service of process may be pleaded by an exception à la forme. *Hunter vs. Dagenay*. K. B. Q. 1813.

So held, and that the action will be dismissed *quand à present*, on such exception. *Irvine et al. vs. Perrault*. K. B. Q. 1819.

Held, That if in the declaration there are material omissions or blanks left for the insertion of what ought to have been stated, the court will maintain an exception à la forme. *Dallaire vs. Corriveau*. K. B. Q. 1819.

Held, That in an action of revendication, the title on which plaintiff claims must be distinctly stated in the declaration, and if not, it is a good cause for an exception à la forme. *Pouliot vs. Scott*. K. B. Q. 1820.

Held, That if the breach of a contract be imperfectly alleged, an exception à la forme is the proper plea, but if the breach is not at all alleged, advantage may be taken of the omission by a *défense en droit*. *Wagner et al. vs. Farran*. K. B. Q. 1811.

Held, That misnomer cannot be pleaded by exception à la forme. *Simoneau vs. Campbell*. K. B. Q. 1818.

*Contra* in *Sharples vs. Dumas*. In Appeal, 1846.

Held, That the want of a sufficient affidavit to hold to bail is not a subject for an exception à la forme. *Patterson vs. Hart*. K. B. Q. 1811.

Held, That it is no ground for an exception à la forme that the sheriff did not certify the copy of the writ of summons served on the defendant. *Wilson vs. Arnold*. K. B. Q. 1817.

Held, That a plea which in substance states that the defendant is not the person who is responsible to the plaintiff, is (if the matter be pleaded affirmatively) *une fin de non recevoir*, and not *une fin de non procéder*. *Campbell vs. Peltier*. K. B. Q. 1820.

Held, That if the notice indorsed on a declaration be irregular, the irregularity is cured by the appearance on the return day, notwithstanding an exception à la forme. *Chamberland vs. Raymond*. K. B. Q. 1820.

Held, That advantage must be taken of an irregular incidental demand by an exception à la forme. *Turner vs. Whitfield*. K. B. Q. 1811.



Held, That the description of a defendant, resident in the town of Sherbrooke, as being "of the Township of Orford," is sufficient, inasmuch as that township comprehends within its limits the part of the town of Sherbrooke where the defendant resided. 2 Jurist, p. 39, *Morse vs. Brooks et al.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That the designation of defendant's residence in a writ of summons as "St. Jean Baptiste," when in fact he resided in "St. Jean Baptiste de Rouville," is sufficient. 2 Jurist, p. 193, *Gigon vs. Hotte*. S. C. Montreal; Day, J.

Held, That it is necessary that an exception *à la forme* be certified as a "true copy" by the attorney pleading it. 2 Rev. de Jur., p. 38, *Jacques vs. Roy et ux.* K. B. Q. 1845.

Contrary held in *Dubord vs. Germain*. 2 Rev. de Jur., p. 40. K. B. Q. 1846.

Held, That on an exception *à la forme* pleaded because the writ of summons is in French, and ought to be in English, or *vice versa*, the defendant must set forth the time and place of his birth. *Gagné vs. Bernier*. K. B. Q. 1819.

Held, That misnomer cannot be pleaded by an exception to the form. Stuart's Rep., p. 56, *Jones vs. McNally*. K. B. Q. 1811.

Held, That an exception *à la forme* on the ground that the summons should have been in the language of the defendant will be dismissed. 3 Rev. de Jur., p. 400, *Hamel vs. Joseph*. K. B. Montreal; Pyke, J.

Held, That service of a writ and declaration after sunset is valid, if made before eight of the clock in the evening. 1 L. C. Rep., p. 27, *Robinson vs. McCormack*. S. C. Quebec; Bowen, Duval, Baquet, J.

Held, That an exception *à la forme* on the ground that the bailiff who served the writ and declaration had styled himself a "Bailliff of the Superior Court for the Circuit of Quebec" will be dismissed. 1 L. C. Rep., p. 40, *McCallum vs. Pozer*. S. C. Quebec; Bowen, Duval, Meredith, J.

Under the 12th Vict., c. 38, sect. 25, an exception *à la forme* was dismissed on motion, it being filed with an exception of payment, which latter exception was held to have waived all vices of form in the process and declaration. 1 L. C. Rep., p. 364, *Dubé vs. Proulx*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That a variance between the original writ and the copy, omitting in the former the word "*père*" in describing the plaintiff, is a nullity which cannot be amended without the consent of the defendant.

2. That in such a case it is not necessary to inscribe *en faux* against the bailiff's return. 2 L. C. Rep., p. 110, *Theberge vs. Puttonaude*. S. C. Montreal; Vanfelson, Mondelet, J.; Smith, J., dissenting.

Held, That an exception *à la forme*, in which it is alleged that the contents of a paper writing purporting to be a copy of a declaration served upon defendant, are wholly different from the contents of the original declaration, and are disconnected, absurd, and unintelligible, is sufficient. 5 L. C. Rep., p. 98, *Doutre vs. The Montreal and Bytown Railway Company*. S. C. Montreal; Day, Smith, Vanfelson, J.

Held, 1. That in an action by a railway company against a stockholder for calls, it is sufficient that, in the heading of the declaration, the plaintiffs take the

quality of a body politic and corporate, duly incorporated by act of parliament, without a specific allegation, in the body of the declaration, of such incorporation.

2. An objection in such case should be raised by *exception à la forme*, and not by a *défense en droit*. 5 L. C. Rep., p. 140, *The St. Lawrence and Ottawa Grand Junction Railway Company vs. Frothingham*. S. C. Montreal; Day, Smith, Vanfelson, J.

#### EXCEPTION DECLINATOIRE—CAUSE OF ACTION.

Held, That under the judicature act of 1857 (12th Vict., c. 38) a Circuit Court has jurisdiction in actions the cause of which have arisen in such circuit, although the defendants reside, and have been served with process in another circuit. 1 L. C. Rep., p. 286, *Hardy et al. vs. Trottier et al.* In Appeal: S. C. Quebec; Bowen, C. J., Baequet, Meredith, J.

Held, That a sale effected by means of a correspondence between the plaintiff residing at Quebec, and the defendant at Montreal, delivery made within the district of Quebec, and payment by means of a note payable at Montreal, do not constitute a cause of action arising within the district of Quebec, so as to enable the plaintiff to sue in his district. 6 L. C. Rep., p. 492, *Warren vs. Kay et al.* S. C. Quebec; Meredith, Badgley, J.

Held, That the jurisdiction of the court is to be determined by the amount demanded, and not by the amount due. 1 Jurist, p. 285, *Genereux vs. Leroux*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That where an *exception declinatoire* which requires proof is inscribed for hearing on the merits, instead of for enquête, it will be dismissed for want of proof. 2 Jurist, p. 202, *Elliott vs. Bastien et al.* S. C. Montreal; Smith, J.

Held, That the Inferior Term, King's Bench, has jurisdiction over actions served on persons domiciled within its limits and residing within the jurisdiction of a circuit court. *Roy vs. Pouliot*. Bowen, J. K. B., Inferior Term, 1846.

The defendant agreed verbally at Nicolet, in the district of Three Rivers, his place of residence, with the plaintiff, to tow defendant's raft from Nicolet to Quebec. The plaintiff telegraphed his agent at Quebec to send up one of his (plaintiff's) steamers which was done, and the raft was towed to Quebec.

Held, In an action served on the defendant at his residence, that this did not constitute a cause of action arising in the district of Quebec so as to give the Superior Court there jurisdiction under the 12th Vict., c. 38, sect. 14; that the cause of action there referred to means the *whole cause of action*. 8 L. C. Rep., p. 187, *Rousseau vs. Hughes*. S. C. Quebec; Meredith, Morin, Badgley, J.

A writ of *saisie arrêt* issued before judgment against a railroad company in Upper Canada, upon an Upper Canada judgment, and Dickinson, one of the *tiers saisis*, was served personally with the writ at his office in the City of Montreal, and a writ was also served upon one Cameron at Quebec, described "as of Quebec, in Lower Canada, trader, as well in his individual capacity as in his "capacity of agent of the said Moss K. Dickinson;" admissions were given that the railroad iron in Dickinson's possession at Montreal had been transferred by the defendants to the Grand Trunk Company before the issuing of the writ, and

was not the property of the defendants, "and that the railway iron mentioned in the said agreement as being in the possession of the said Dickinson at Quebec so remained until after the issuing of the writ and the filing of the exceptions."

Held, That exceptions *declinatoire* and *à la forme*, on the ground that the defendants had no domicile and no property, real or personal, in Lower Canada, and that the cause of action arose in Upper Canada, must be maintained, and the action dismissed. 9 L. C. Rep., p. 345, *Frothingham et al. vs. The Brockville and Ottawa Railroad Co.*, and *Dickinson et al.*, T. S. S. C. Montreal; Berthelot, J.

See case in the S. C., 3 Jurist, p. 252.

The plaintiff, residing within the district of Montreal, sued the defendants, resident in other districts, in damages for maliciously and without probable cause making affidavit at Three Rivers, charging the plaintiff with obtaining money under false pretences, and procuring a true bill and having him tried at Three Rivers, but alleging his arrest within the district of Montreal, under a bench warrant from the court at Three Rivers.

Plea, That the court at Montreal had no jurisdiction, the defendants being domiciled in other districts, and not having been served with process within the district of Montreal, and that the cause of action did not arise within the district. Plea dismissed. 10 L. C. Rep., p. 419, *Sénécal vs. Pucoud et al.* S. C. Montreal; Berthelot, J.

The plaintiff sued the defendant, a resident of Upper Canada, in the Superior Court at Montreal, and the action was commenced by a writ of *saisie arrêt* in the hands of the Phoenix Assurance Company, whose head office is at Montreal; the defendant being called in through the Gazette, appeared and pleaded by exception *à la forme* and *exception dilatoire*.

Held, That the garnishees appearing to be indebted to the defendant on the day the writ issued, the plaintiffs had a right to sue in Montreal. Exceptions dismissed. 11 L. C. Rep., p. 90, *Chipman et al. vs. Nimmo*, and *The Phoenix Ass. Co.*, T. S. S. C. Montreal; Berthelot, J.

The defendant agreed at Three Rivers to convey wood to the port of Montreal, and did so, and there sold it, and on being sued in the court at Montreal for the value of the wood, pleaded that the cause of action arose within the district of Three Rivers. The contrary was held by the court, and the exception dismissed. 1 Jurist, p. 100, *Richer vs. Mongeau*. S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, That in a hypothecary action, the cause of action arises in the circuit wherein the land hypothecated is situated, and not where the obligation is made. 4 Jurist, p. 7, *Morkill vs. Cavanagh*. In Appeal: S. C. Sherbrooke; Bowen, C. J., Smith, J.

Held, That where an obligation was made in the district of Quebec, the cause of action arose there, although by its terms the money was payable in England. 12 L. C. Rep., p. 416, *Jackson et al. vs. Coxworthy et al.* S. C. Quebec; Taschereau, J.

Held, That under the lessors' and lessees' act, the jurisdiction of the court will be determined by the annual rent of the property, and not by the amount

of damages demanded. 6 Jurist, p. 44, *Barbier vs. Vennor*. S. C. Montreal; Badgley, J.

Held, That in an action under the common law, for seven years' arrears of rent, at \$100 per annum, the Superior Court has jurisdiction, irrespective of the annual rent being under \$200, but it would be otherwise under the lessor and lessees' act. 6 Jurist, p. 189, *Fisher et al. vs. Vachon*. S. C. St. Scholastique, Badgley, J.

See CAPIAS, Affidavit.

#### ANSWER TO.

Held, That an inscription for hearing on the merits of an *exception declinatoire*, will be set aside on motion, there being no answer filed thereto. 6 L. C. Rep., p. 480, *Richard vs. The Champlain and St. Lawrence Railroad*. S. C. Montreal; Driscoll, Peltier, J.

#### EXCEPTION DILATOIRE.

Held, That an *exception dilatoire* founded on the benefit of discussion claims by a surety, ought to be decided before the merits of the case, and that the *enquête* should be confined to the facts in such exception, notwithstanding that pleas to the merits were filed, and the inscription was for evidence generally. 2 Rev. de Jur., p. 169, *Ferrie, App., Cunningham et al.*, Resp. In Appeal, 1842.

Held, That *cumulation* of actions must be pleaded by *exception dilatoire*. *Bellanger vs. Desjardins*. K. B. Q. 1816.

Held, That exceptions of division and discussion must be specially pleaded and demanded. *Pot-de-vin vs. Miville*. K. B. Q. 1816.

Held, That an action of damages for seizure of goods alleged to have been illegally imported, may be stayed by *exception dilatoire* until the question of forfeiture or non-forfeiture (if pending in the Court of Admiralty) be determined. *Hartshorne vs. Scott et al.* K. B. Q. 1810.

Same case, Pyke's Rep., p. 5.

Held, That on a plea of *discussion* the defendant is bound to advance to plaintiff such sum as may be necessary to pay the expenses of discussion. *Gauthier vs. Morriset*. K. B. Q. 1821.

Held, That in *revendication*, if defendant is in possession as a *lessee* of the property demanded, he must plead his lease by *exception dilatoire*. *Clement vs. Hamel*. K. B. Q. 1817.

Held, That to support a plea of litispence the first and second action must be between the same parties, and the cause of action must be the same, not only as to the thing demanded, but as to the grounds on which it is asked. It cannot otherwise be maintained. *Voyer vs. Jugon*. K. B. Q. 1817.

Held, That the plea of litispence is the proper plea where another cause, on the same ground and between the same parties, is pending in another jurisdiction, and it is founded on the fact that another jurisdiction is already seized of the cause. When both causes are pending in the same court, the exception, if there be any necessity for an exception, should not be peremptory, but dilatory; but a motion to stay proceedings is the better course. *Racey vs. Oliva*. K. B. Q. 1821.

Held, That non-payment of costs of a former action cannot form the subject of an *exception dilatoire*. *Lynch vs. Papin*. S. C. Montreal; Smith, Mondelet, J.; Day, J., dissenting. Cond. Rep., p. 27.

Held, That litispence must be pleaded from the service of the writ and not from the day of the return. 12 L. C. Rep., p. 447, *Boswell vs. Lloyd et al.* S. C. Quebec; Stuart, J.

Held, That litispence in a foreign court is no bar to an action instituted in this province. Stuart's Rep., p. 558, *Russell et al. vs. Field*. K. B. Q. 1833.

Held, That there is no appeal from a judgment on an exception of *litispence*. 1 L. C. Rep., p. 411, *Donegani vs. Quesnel*.

Held, 1. That a declaration and writ fyled in the prothonotary's office without a return of action cannot support a plea of *litispence* in a suit for the same causes of action between the same parties.

2. Where a case was called *à tour de rôle* and an exception dismissed in the absence of defendant's attorney, the case having been before the court on a motion, and *en délibéré* until the day when judgment was rendered on such motion, and the exception was so dismissed after judgment on the motion, the Court of Appeals will not interfere with the discretion exercised by the court below. 6 L. C. Rep., p. 4, *Stephens et al. App., Tidmarsh*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That *discussion* must be pleaded by an *exception dilatoire*, and not by a peremptory *exception en droit temporaire*. 5 Jurist, p. 102, *Noad et al. vs. Vonexeter*. S. C. Quebec; Taschereau, J.

Held, 1. In an hypothecary action, that a special mortgage is no bar to an exception of discussion, and that a *tiers détenteur* sued by the original vendor, may validly plead that exception.

2. That the *détenteur* cannot in such action claim to hold the property till his improvements and ameliorations are first paid. 2 L. C. Rep., p. 455, *Price vs. Nelson*, and *McKay, Inter*. S. C. Montreal; Day, Smith, Mondelet, J.

See PLEADINGS, JOINDER.

#### EXHIBITS.

Held, That an opposant *à fin d'annuller*, who has omitted to fyle his titles to movables seized, will not be allowed to fyle them afterwards at *enquête*. 4 L. C. Rep., p. 126, *Major et al. vs. Baby*, and *Selby*, Opp. S. C. Montreal; Vanfelson, Mondelet, J.

Held, That a defendant who objects to the sufficiency of one of plaintiff's exhibits, should not move to reject it, but for delay to plead, until a sufficient exhibit be fyled. 1 Jurist, p. 53, *Strother vs. Torrance*. S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, That an action will not be dismissed for want of particulars of demand, under the third rule of practice, even when a defendant is detained in jail, because a detailed statement of the whole of the demand was not fyled with the declaration, but consisted in part of an item for "balance of account rendered." 2 Jurist, p. 187, *Henderson vs. Enness*. S. C. Montreal; Smith, J.

Held, That where the particulars of plaintiff's demand are not disclosed by

the declaration, and no bill of particulars is therewith fyled, such bill of particulars may be fyled at *enquête*, if the defendant, instead of moving to dismiss the action, pleads to it. 2 Jurist, p. 194, *Westrop vs. Nichols et al.* S. C. Montreal; Day, J.

Held, That the 76th section of the Judicature Act of 1857 has virtually repealed the 24th rule of practice, as to the fyling of exhibits *with the declaration or other pleading*. 4 Jurist p. 147, *Denis vs. Crawford*. S. C. Montreal; Smith, J.

Held, That exhibits offered in evidence to a jury at the trial of the cause are not to be sent up to the Court of Appeals on a writ of error. *Flower et al. vs. Dunn*. K. B. Q. 1810.

Held, That exhibits fyled at the *enquête* or previous to it, may be detained and impounded if there be cause to doubt their authenticity, and if justice requires it. *Allen vs. Harris*. K. B. Q. 1811.

Held, That the court will permit another copy of a notarial *acte* to be fyled, if it plainly appears that a copy was fyled with the declaration and was mislaid. *Osgood vs. Lelièvre*. K. B. Q. 1818.

#### FIGURES IN.

Held, That where in a declaration the amount demanded is in *figures*, an exception to the form will lie, and the action will be dismissed on such exception, although in a non-appealable case. 11 L. C. Rep., p. 493, *Rivet vs. Poisson*. C. C. Arthabaska; Stuart, J.

#### FORECLOSURE.

Held, 1. That in the Circuit Court, a defendant can foreclose a plaintiff who neglects to fyle answers to defendant's pleas within the delay allowed by the statute, after demand thereof duly made.

2. That he may then inscribe the cause for *enquête*, and where one of the pleas is a *défense en fait* may declare that he has no witness to examine, and can then inscribe the cause on the roll *de droit*.

3. That the plaintiff's action must then be dismissed as being unsupported by proof. 5 L. C. Rep., p. 58, *Mead vs. Battle*. C. C. Quebec; Power, J.

Held, That an application for delay to plead cannot be entertained whilst an *acte* of foreclosure subsists, and that notice of an application for delay to plead, served before the expiry of the delay for pleading, does not interfere with plaintiff's right to foreclose. 8 L. C. Rep., p. 303, *Miller et al. vs. McDonald et al.* S. C. Quebec; Chabot, J.

Held, That a defendant foreclosed from pleading and afterwards allowed, on affidavit, "to fyle a plea to the merits," may fyle a plea denying the fraud and *deconfiture* set up by plaintiff in his affidavit for *saisie arrêt* before judgment, and that such plea will be deemed a plea to the merits. 11 L. C. Rep., p. 492, *Leeming et al. vs. Robertson*. S. C. Montreal; Monk, J.

Held, That where a preliminary plea has been fyled, and the plaintiff has demanded a plea to the merits under the 72nd section of the 20th Vict., c. 44, he may foreclose after the eighth day, without serving the demand of plea required



by the 12th Viet., c. 38, sect. 25. 2 Jurist, p. 290, *McGill vs. Wells*. S. C. Montreal; Badgley, J.

Held, That a plea filed within half an hour of the filing of the foreclosure will not be rejected on motion, no further proceedings having been taken by plaintiff. 4 Jurist, p. 122, *Ostell vs. O'Brien*. S. C. Montreal, Monk, J.

So held in *Molson vs. Reuter et al.* S. C. Montreal; Berthelot, J., 4 Jurist, p. 299.

Held, 1. That a plaintiff cannot proceed *ex parte* until a valid foreclosure has been made, and that can only be on application in writing for *acte* of foreclosure and the granting of such *acte* by the prothonotary.

2. A foreclosure stating that the "defendant" forecloses the defendant from pleading, is null. Judgment set aside on motion. 5 Jurist, p. 21, *Beaufield et al. vs. Wheeler*. S. C. Montreal; Smith, J.

Held, That the court at *enquête* has no power to reject a foreclosure and inscription for *enquête*, and to allow defendant to plead. 5 Jurist, p. 48, *Mucnamari vs. Meagher*. S. C. Montreal; Smith, J.

Held, That notice must be given of a motion to foreclose plaintiff from filing answers and replication to pleas, notwithstanding the rules of practice, art. 3, sect. 7, and art. 2, sect. 8. 1 Rev. de Jur., p. 48, *Dillon vs. Chabot*. Q. B. Montreal, 1845.

Held, That the prothonotary is entitled to a fee for a certificate of no plea being filed. 1 Rev. de Jur., p. 48, *Lurocque vs. Dumouchel*. Q. B. Montreal, 1845.

Held, That where the affidavits of counsel are contradictory, a party foreclosed from pleading will not be relieved where the plea tendered does not appear to be a good one. *Galarneau vs. Robitaille*. S. C. Montreal; Cond. Rep., p. 10E.

#### FORMER RECOVERY.

Held, 1. That a plea of former recovery for the same offence in a penal action, without setting out that the first action was instituted before the second, is bad, and is no bar to the action.

2. Such plea will be held bad on demurrer.

3. That no matter of defence, arising after action brought, can properly be pleaded in bar of the action generally, but should be pleaded in bar of further maintenance of the action.

4. That one action not going on to judgment is no bar to another action for the same offence. 7 L. C. Rep., p. 439, *Mountain vs. Dumus*. S. C. Quebec; Bowen, C. J., Morin, Badgley, J.

#### GENERAL ANSWER.

Held, Where a plaintiff files a general answer to an exception, he cannot obtain a hearing on law, but must proceed to proof. 2 L. C. Rep., p. 178, *Tradelle vs. Allard*. S. C. Quebec; Duval; Meredith J.

Held, That one general answer cannot be pleaded to four several exceptions. 6 L. C. Rep., p. 488, *Bradford vs. Henderson*. S. C. Montreal; Day, Smith, Mondelet, J.



## HYPOTHETICAL.

Held, Where defendant was sued as having been *commune en biens* with her deceased husband, and a plea was filed to the effect that she was married in the United States, and that therefore she was not *commune*, but that if she had been so, then that she had renounced the plea, will be dismissed on demurrer as being hypothetical. 2 Jurist, p. 250, *McFarlane vs. Scriver*. S. C. Montreal; Day, Smith, Vanfelson, J.

## INCIDENTAL DEMAND.

Held, "That a deed was fraudulently obtained," cannot be pleaded as matter of defence in the action founded upon it. It must be rescinded by an incidental demand, and the proceedings stayed until that is determined. *Bradly vs. Blake*. K. B. Q. 1812.

Held, If an incidental plaintiff does not, on the face of his demand, show that such demand is connected with the demand in chief, the incidental defendant must avail himself of this omission by an exception as to form; if he does not, but answers, he waives the irregularity of the proceedings, and admits that he is *rectus in curiâ*. Stuart's Rep., p. 46, *Turner vs. Whitfield*. K. B. Q. 1811.

Held, That a claim which has no connection with the demand in chief cannot be the subject of an incidental cross demand. *Lafleur vs. Mura*. K. B. Q. 1810.

Held, That an incidental cross demand must be founded on, and must set forth something more than the matter pleaded by exception to the demand in chief. *Dussault vs. Stuart*. K. B. Q. 1816.

Held, That in an action for work and labor in building vessels, where the defendant pleaded want of skill, and filed an incidental demand, this was held to be the correct course of proceeding. *Galarneau vs. Marette*. K. B. Q. 1818.

Held, That if the rule to plead upon the demand in chief be a six day rule, the rule to plead upon an incidental cross demand will also be a six day rule. *Plamondon vs. Shepherd*. K. B. Q. 1813.

## INDICTMENT FOUND.

Held, That in an action against an insurance company, an *exception dilatoire* alleging that a true bill has been found by a grand jury and is pending against the plaintiff, on a charge of arson with a view to defraud the defendants, and that therefore, all proceedings should be stayed until trial on the indictment, will be dismissed. 7 L. C. Rep., p. 343, *McGuire, Jr., vs. Liverpool & London Assurance Company*. S. C. Quebec; Meredith, Morin, Badgley, J.

Held, That in an action of damages for an assault, an exception stating that the defendant had been prosecuted criminally, is not a valid defence. *Peltier vs. Miville*. K. B. Q. 1818.

## INTERVENTION.

Held, That a third person cannot intervene in an action of *complainte* on the ground that he is proprietor of the soil to which the action refers. *Puizé vs. Miville*. K. B. Q. 1813.

Held, 1. That an intervention which does not disclose any interest or right in the intervening party, will be dismissed on motion.

2. That a new inscription is not necessary where the case has not lost its place on the roll. 2 L. C. Rep., p. 321, *Seymour vs. St. Julien*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That an intervening party, whose intervention has been allowed, is entitled to plead to the merits of the action for the conservation of his rights, and this although another and separate issue is raised on the intervention by the plaintiff pleading thereto. 3 Jurist, p. 263, *Beaudry vs. Lafumme*, and *Davis*, Inter. S. C. Montreal; Berthelot, J.

Held, That an intervention by an indorser, in an action against the maker of a note, setting up that the note was given by him to another party as collateral security for a consignment not accounted for, and was transferred to plaintiff after due, and was a note given to the intervening party for his accommodation, will be maintained and the action dismissed. *Delisle vs. McDonald*, and *McDonald* Inter. S. C. Montreal; Cond. Rep., p. 52.

Held, That an intervening party who claims payment by the prothonotary, of a sum of money, under a judgment in his favor, is bound to give notice of his application for the moneys to all the parties in the record. 6 Jurist, p. 25, *Gillespie et al. vs. Spragg*, and *divers Inter.* S. C. Montreal; Bowen, C. J., Vanfelson, J.

Held, That after a final judgment in a cause in which there are several intervening parties, a motion by parties representing themselves to be the universal legatees of one of the intervening parties, deceased, to be allowed to take up the instance, will be rejected as not being in accordance with the procedure and practice of the court. 6 Jurist, p. 29, *Gillespie et al. vs. Spragg*, and *divers Inter.* S. C. Montreal; Badgley, J.

Held, That a petitioner praying to be allowed to appear and take up the instance in place of a deceased person, will be allowed in the first stage, simply to appear and file his petition. 6 Jurist p. 117, *Gillespie et al. vs. Spragg et al.*, and *Mann et al.*, *Petrs.* S. C. Montreal; Badgley, J.

Creditor allowed to intervene. *Prévosté*, No. 83.

## JOINDER.

Held, That every co-partner in a mercantile firm must be a co-plaintiff by name. *Morrough vs. Huot*. K. B. Q. 1811.

Held, That if it be pleaded by exception that there are other heirs, such plea must name them, indicate their place of residence, and state them to be alive. 3 Rev. de Jur., p. 395, *Pagé vs. Carpenter*. K. B. Q. 1810.

Held, That in an action *in rem* all joint owners must be joint plaintiffs. *Bellet vs. Allison et al.* K. B. Q. 1812.

Held, That two distinct actions cannot be joined in one declaration. *Gagnon vs. Tremblay*. K. B. Q. 1817.

Held, That cumulation of actions must be pleaded by *exception dilatoire*. *Bellanger vs. Desjardins*. K. B. Q. 1816.

Held, That if the plaintiff states in his declaration that he is proprietor, and in possession of a lot of land, but concludes *en complainte* only, this is not a cumulation of the *petitoire* with the *possessoire*. *Bouchette vs. Tasché*. K. B. Q. 1820.

Held, That a possessory and a petitory action cannot be joined. *Trepannier vs. Dupuis*. K. B. Q. 1810.

Held, That in commercial matters, if it appears, in an action of assumpsit, at the trial, that the plaintiff has a partner who was a party to the contract, and is not a party to the suit, the action will be dismissed although the defendant has not pleaded the facts. *Stuart's Rep.*, p. 122, *Pozer et al. vs. Clapham*. K. B. Q. 1817.

Held, That issue must be joined on a *défense en droit* before the case can be inscribed for hearing on such *défense*. 4 L. C. Rep., p. 175, *Tremblay vs. Tremblay*. S. C. Quebec; Duval, Meredith, J.

Held, In an action against a person in his private capacity for damages, that acts committed by him in such capacity cannot be joined with other acts done in his capacity of justice of the peace. 9 L. C. Rep., p. 442, *O'Neil, App., Atwater, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That an exception setting up that the allegations of the declaration are unfounded in fact and in law, and then going on to set up facts, is irregular and will be rejected. 1 Jurist, p. 196, *Addison vs. Bergeron et al.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, That *cumulation d'action* cannot be pleaded by a preliminary plea or *exception à la forme*, but by a plea *au fonds*. 1 Jurist, p. 287, *Hunter vs. Dornwin*. S. C. Montreal; Day, Smith, J.; Mondelet, J., dissenting.

Held, That an action *en délivrance de douaire coutumier* is an action of *partage*, and therefore all the heirs must be parties to the suit. *Turcot vs. Drouin*. K. B. Q. 1817.

Held, That the fact that all the persons who ought to be joined as defendants in an action *ex contractu* are not parties to the suit, is rightly pleaded by an exception *peremptoire temporaire* in which those to be added must be named. *Fraser et al. vs. Dunn et al.* K. B. Q. 1812.

Held, That all joint owners in an action *in rem* must be joint plaintiffs. *Bellet et al. vs. Alison*. K. B. Q. 1818.

Held, That possessory and petitory actions cannot be joined, and the vice is not cured by the consent of parties. Proof ordered on the possessory part of the action only. *Trepannier vs. Dupuis*. Sewell C. J.; Pyke's Rep., p. 24, 1810.

Held, That in an action *en partage d'hérité*, all the co-heirs must be parties to the writ, as plaintiffs or defendants. *Laverdière vs. Laverdière*. K. B. Q. 1816.

Held, That if a debt is due to co-partners in trade, all of them must join in the action, for if it appears that there is one who is not a party to the suit, the action will be dismissed, *sauf à se pourvoir*. *McLeish vs. Lees*. K. B. Q. 1818.

Held, That in an action on *torts*, each and every of the perpetrators may be sued jointly and severally. *Peltier vs. Miville*. K. B. Q. 1818.

Held, That if the interest of several parties, entitled to any debt, be joint, and not several as well as joint, they must all be co-plaintiffs. A widow, therefore, cannot sue alone for a debt due to her and her deceased husband jointly, if there be a will and an executor. *Coupeau vs. Chamberland*. K. B. Q. 1818.

Held, That if a written agreement be made with one person only, and solely

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in his own name, that person must bring his action alone, although others may be jointly interested with him. *Garipey et al. vs. Rochette*. K. B. Q. 1818.

See DAMAGES, Joint and Several.

" PARTNERSHIP, Accounting.

" PARTAGE.

" FRAUD, Insolvency.

" EVIDENCE, Parol.

## JOINT PLEAS.

Held, Where defendants appeared and pleaded a joint plea, and also each a separate plea, that, on motion, the separate pleas will be dismissed as irregularly pleaded. *Stephens et al. vs. Watson et al.* S. C. Montreal; Day, Smith, J. Cond. Rep., p. 82.

## LANGUAGE OF.

Held, 1. That under sects. 86 and 87 of the 12th Viet., c. 38, it is sufficient, in a pleading, to set out in plain and concise language the facts relied on, to the interpretation of which the rules of construction, applicable to such language in the ordinary transactions of life, may apply.

2. The nullity of a deed may be pleaded by exception without incidental demand or direct action.

3. That such nullity may be pleaded at any time by exception according to the rule of law *quæ temporaria sunt ad agendum, perpetua sunt ad excipiendum*, 2 L. C. Rep., p. 325, *Hulero*, App., *Delesderniers*, Resp. In Appeal: Panet, Aylwin, Mondelet, J.; Rolland, J., dissenting.

## NON NUMERATÆ PECUNIÆ.

Held, That to a written contract to pay money, *non numeratæ pecuniæ* may be pleaded under some circumstances. *Fortier vs. Beauvieu*. K. B. Q. 1809.

## NUMBER OF PLEADINGS.

Held, 1. That a party who has demanded special answers to his exceptions is thereby barred from moving to reject them.

2. That it is lawful for a defendant whose exception has been answered specially, to reply specially to such answer, and this without obtaining permission to that effect. 12 L. C. Rep., p. 151, *Atty. Gen. pro Reg. vs. Belleau*. S. C. Quebec; Taschereau, J.

Held, That an exception to matter pleaded by exception may be filed even under the ordinance 25th Geo. 3, c. 2, sect. 3. *Stuart's Rep.*, p. 106, *Pacquet vs. Gaspard*. K. B. Q. 1817.

Held, That a special replication cannot, under the 25th Geo. 3, c. 2, sect. 13, be filed by a defendant to a special answer of the plaintiff. 4 L. C. Rep., p. 419. See note, p. 421, *Morrison vs. Kierskowski*. S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That a special replication may be pleaded to an answer by plaintiff containing facts not stated in the declaration, and this without first obtaining the

leave of the court. 6 L. C. Rep., p. 159, *Kierskowski, App., Morrison, Resp.*  
In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

## PARTICULARS.

Held, That a bill of particulars is in the nature of an *articulation de faits*, but it is also a confession. Therefore, although it may be amended as to a mere error, it cannot be amended in an essential matter of substance. *Reiffenstien vs. Robinson*. K. B. Q. 1821.

Held, That in an action for the recovery of "£20 10s., balance of account "acknowledged and admitted," the plaintiff will be obliged to furnish particulars, notwithstanding his declaration that he relies wholly upon the acknowledgment. 10 L. C. Rep., p. 77, *Labbé vs. McKenzie*. C. C. Quebec; Stuart, J.

## PAYMENT.

A plea of general issue was filed with an exception of payment of the note sued for. Neither party adduced evidence, and judgment was rendered for plaintiff, on the ground that the plea of general issue was not compatible with the exception, and that the allegations of the exceptions were divisible, and exempted plaintiff from proof of the note. 1 L. C. Rep., p. 360, *McLean vs. McCormack*. C. C. Quebec; Power, J.

Held, That a plea of general issue is waived, when filed with a plea of payment or compensation. 1 L. C. Rep., p. 487, *Cusey vs. Villeneuve*. C. C. Quebec; Power, J.

Held, That payment made during pendency of the action, cannot be set up by intervention but by plea. Such an intervention dismissed on motion. 2 L. C. Rep., p. 304. *Lyman et al. vs. Perkins*. S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That a plea of payment alleged to have been made at different periods previous to the institution of the action, but without stating the dates and amounts of such payments, will be dismissed on demurrer. 10 L. C. Rep., p. 194, *Les Dames Religieuses Ursulines de Québec vs. Perry*. S. C. Quebec; Stuart, J.

Held, That a plea of payment may be pleaded with a *défense en fait*. 3 Jurist, p. 137, *Sarault vs. Ellice*. S. C. Montreal; Badgley, J.

Held, That in an action for work and labor, proof that the defendant and other workmen employed by the defendant were paid weekly, and that the plaintiff had not been heard to complain of non-payment is sufficient presumptive proof of payment against a stale *demande*. *Bonneau vs. Goudie*. K. B. Q. 1819.

Held, That where goods are sold on credit for a fixed period, the term of payment must be pleaded affirmatively by an exception *peremptoire temporaire*. *Racey vs. Stephenson*. K. B. Q. 1821.

PAYMENT by unpaid note. See BILLS AND NOTES, Prescription.

PAYMENT. See OPPOSITION, Affidavit, Payment.

See CONTRACT, Payment.

## REPLEADER.

Held, That where the issue is immaterial or informal, the court will order a replender. *Forbes vs. Atkinson*. K. B. Q. 1810.

Held, That a replender may be awarded at the trial, if the issue taken is there found to be immaterial. *Vocelle vs. Faucher*. K. B. Q. 1818.

## REPLICATION TO GENERAL ANSWER.

Held, That such replication is waived by the consent of defendant to subsequent proceedings. See cases in note where court set aside all subsequent proceedings for want of such replication. 2 Jurist, p. 288, *Greenshields vs. Gauhier*. S. C. Montreal; Smith, J.

Held, That a special replication, by a defendant, to the special answer of a plaintiff is irregular, and that the special matter will be rejected on motion, where it could have been regularly put into defendant's plea. 5 Jurist, p. 75, *Torrance vs. Chapman et al.* S. C. Montreal; Monk, J.

Held, That upon a rule to reply to a plea or opposition, if the replication is not fyled in time, the opposition will be dismissed on motion. *Tremain vs. Tétu*. K. B. Q. 1821.

Held, That defendant's motion to discharge an inscription on the merits, for want of a replication to plea, plaintiff being foreclosed from fyling it, will be dismissed. *Genier vs. Charlebois*. S. C. Montreal; Cond. Rep., p. 1.

Held, That a replication to a plea is necessary. *Boudreau vs. Gascon*. S. C. Montreal; Smith, Mondelet, J.; Cond. Rep., p. 106.

SPECIAL ANSWER. *See* CORPORATION, Elections.

## STRIKING FROM FYLES.

Held, That the court, on account of the revision to which their proceedings are subject in appeal, will not take the pleadings from the fyles, but leaving them there, will proceed as if they were not fyled, if they are irregular, or order a replender as circumstances may require. *Wolff vs. Amiot*. K. B. Q. 1812.

## TENDER.

Held, That a plea of tender (*offres recées*) must offer what it admits to be due in principal and interest with one shilling costs *sauf à parfaire*. *Boucher vs. Asselin*. K. B. Q. 1813.

Held, That in an action to compel a party to execute a deed of sale, the plaintiff is not bound to tender by his action and deposit in court the purchase money, more particularly if the defendant pleads that he is unable to execute the deed. 4 L. C. Rep., p. 449, *Perrault vs. Arcand*. S. C. Quebec; Duval, Caron, Meredith, J.

Held, That a tender of principal and interest after the issuing of the writ, but before service of it, is insufficient without a tender of costs. 4 Jurist, p. 310, *Boucher et al. vs. Lemoine et al.* S. C. Montreal; Badgley, J.

Held, 1. That a tender by notaries is null unless it sets forth in detail the different moneys which were so tendered.



2. That the execution of a judgment in an action for a *prix de vente* will be stayed until the plaintiff shall have fyled at the *greffe* security in the ordinary form (*en la forme ordinaire*) against mortgages affecting the property 6 Jurist, p. 241, *Perras vs. Beaudin*. S. C. Montreal; Berthelot, J.

TENDER to bailiff declared valid. Prévosté, No. 31. Confirmed in Appeal: Cons. Sup., No. 19.

TENDER into court; action for money against clerk of court. See OFFICER OF COURT.

#### TIME OF FYLING.

Held, That by the 25th section of the Judicature Act (12th Vict., c. 33,) all pleas, whether as to form or merits, are required to be fyled at one and the same time, within the delay specified in that section. 1 L. C. Rep., p. 157, *The British Fire and Life Insurance Company vs. McCuaig et al.* In Appeal: Stuart, Panet, Aylwin, J.; Rolland, J., dissenting.

Held, That pleas to the merits must be fyled at the same time with the *défenses au fonds en droit*, and the court will not enlarge the delay of pleading to the merits until a *défense en droit* to the declaration has been disposed of. 1 L. C. Rep., p. 216, *Pirrie vs. McHugh et al.* S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That the eight days within which contestations of reports of distribution must be made are not juridical days. 2 L. C. Rep., p. 9. *Ex parte Burroughs*.

Held, That where a motion to quash a writ of summons has been taken *en délibéré* and dismissed, the defendant will not be allowed, after the expiry of the four Jays mentioned in the 16th Vict., c. 194, sect. 21, to fyle an *exception à la forme*, the delay not being suspended by the *délibéré*. 4 L. C. Rep., p. 97, *McFarlane vs. Worrall*, and *The Officers of Her Majesty's Ordnance, T. S.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a *défense en droit* is not a preliminary plea within the meaning of the 21st section of the 16th Vict., c. 194, and need not, therefore, be fyled within the four days fixed by that section. 4 L. C. Rep., p. 156, *Benson vs. Ryan*. S. C. Quebec; Bowen, C. J., Duval, Caron, J.

Held, That an *exception à la forme* fyled on the fifth day after the return of the action, the fourth being a Sunday, will be rejected on motion. 9 L. C. Rep., p. 231, *Brck et al. vs. Thèberge*. S. C. Quebec; Stuart, J.

Held, That if a rule to plead expires in vacation and the plaintiff does not demand a plea, he must move in term for leave to proceed *ex parte*. *Scholefield vs. Fortier*. K. B. Q. 1821.

Held, That if a bill of particulars, which is ordered in term, is not delivered until the vacation, the rule to plead expires in vacation. *James vs. Goudie*. K. B. Q. 1819.

Held, That copies of pleas fyled, must be served on the plaintiff's attorneys; if not, the plaintiff may move to proceed *ex parte*. *Sinclair vs. White*. K. B. Q. 1816.

Held, That if a rule to plead expires in vacation, a demand of plea must be made before a foreclosure can be fyled. *Lee vs. Whitfield et al.* K. B. Q. 1812.



## UNION OF CAUSES.

Held, That it is not competent to unite two causes between the same parties, on the ground that the matters in contest in both are identical. 1 Jurist, p. 249, *Simard vs. Perrault*. S. C. Montreal; Day, Smith, Mondelet, J.

## WRIT—SERVICE.

Held, That if an application be made to compel the sheriff to return a writ of *fi ri fici us* before the day fixed in the body of the writ, the court will not grant the application if there be no evidence that the sheriff has actually been guilty of some neglect or omission. Stuart's Rep., p. 57, *Dorval vs. L'Esperance*. K. B. Q. 1811.

Held, That the defendant must be called on the return day of a writ, but the writ and declaration may be brought in at any time afterwards during the day upon motion of either party. 1 Rev. de Jur., p. 400, *Dalton vs. Sanders*. K. B. Q. 1846.

Held, That the court not having sat until half-past eleven o'clock at night (on the 7th January, 1847) the return of a writ calling the defendant at that hour was insufficient to enable the plaintiff to proceed *ex parte*, and the action was dismissed. 2 Rev. de Jur., p. 48, *City Bank vs. Laurin*. Q. B. Quebec; Panet, Bedard, J.; Stuart, C. J., dissenting.

Held, On demurrer, that under the 12th Vict., c. 38, a writ of summons addressed to any of the bailiffs *residing* in a district, will be valid if served by a bailiff only *appointed* for such district. 3 L. C. Rep., p. 194, *Têtu vs. Martin*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That the court at Montreal has jurisdiction over a defendant served within the new district of Bedford, the writ being the commencement of the action, and having been issued before the proclamation of the new district. 3 Jurist, p. 26, *Montz vs. Ruiter*. S. C. Montreal, Smith, J.

Held, That the declaration must be accompanied by a writ of summons, notwithstanding that the defendant has appeared by attorney. 3 Jurist, p. 53, *Taylor vs. Sénécal et al.* S. C. Montreal; Day, J.

Held, That a writ of summons addressed to any of the bailiffs of the S. C. for the district of Montreal or Richelieu, there being defendants in both districts, is good, and that two original writs are not necessary. 5 Jurist, p. 253, *Guvremont vs. Leandre fils et al.* S. C. Montreal; Smith, J.

Held, That a writ addressed "to any of the bailiffs in and for the District of Montreal," is not null, the writ, on its face, showing that it issued from the Superior Court, Montreal. 4 L. C. Rep., p. 28, *Castle vs. Wrigley*. S. C. Montreal; Smith, Vanfelson, Mondelet, J.

Held, That a writ addressed "to any of the bailiffs in and for the District of Montreal, in the Province of Canada" is bad. 4 L. C. Rep., p. 29, *Davidson et al. vs. Perkins*. S. C. Montreal; Day, Smith, J. See note.

Held, That service of a writ of summons, by leaving a copy with the book-keeper of the hotel where the defendant usually stops, is insufficient. 4 L. C. Rep., p. 355, *McDonald et al. vs. Seymour*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That service of a writ of summons upon a defendant, under a sealed envelope, by a bailiff who is ignorant of the contents of such envelope, is illegal. 6 L. C. Rep., p. 281, *People's Bank vs. Gugg*. S. C. Quebec; Bowen, C. J., Meredith, Badgley, J.

Held, An exception *à la forme* on the ground that one of the plaintiffs was styled "Rickard" instead of "Ricard" will be dismissed on motion. 6 L. C. Rep., p. 483, *Lutour et al. vs. Musson*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a summons to appear "before our justices of our said Superior Court" is sufficient. 3 Jurist, p. 306. *McFarlane vs. Belliveau*. S. C. Montreal; Badgley, J.

Held, 1. That the exhibition by the bailiff, of the original pleading, or paper, at the time of service of the same is not necessary.

2. That where by the copy of the writ served, the defendant was summoned to appear on the 24th April, 1860, instead of on the 24th April, 1861, as in the original, the court has no power to permit the plaintiff to amend the writ. Motion to dismiss *exception à la forme* dismissed; also a motion to amend the writ "*en faisant signifier au défendeur une vraie copie du dit bref de sommation originale*." 12 L. C. Rep., p. 23, *Blais vs. Lumpson*. S. C. Quebec; Stuart, J.

Held, That the delay for filing an *exception à la forme*, when security for costs is demanded, will run from the day when security is given. 5 L. C. Rep., p. 199, *Smith vs. Merrill*. S. C. Montreal; Day, Smith, Vanfelson, J.

Held, That an *exception à la forme* setting up that the defendant, described in the writ and declaration as *prêtre et curé* of the parish of *St. Jean Baptiste*, instead of *St. Jean Baptiste de Rouville*, the name by which the parish was erected, is sufficient, the description in the writ not being shown to be erroneous and false. 8 L. C. Rep., p. 271, *Gign vs. Hotte*. S. C. Montreal; Day, J.

Held, That an *exception à la forme* which contains erasures and marginal notes, not referred to at the bottom of the plea, is, nevertheless, good. 10 L. C. Rep., p. 399, *Blackiston vs. Rosa*. S. C. Quebec; Taschereau, J.

Held, Where an *exception à la forme* was filed on the ground that the defendant, styled in the writ *menuisier*, was in fact a "contractor and trader."

1. That the defendant was proved to be a *menuisier*, and had so styled himself in authentic deeds.

2. That the quality of contractor (*entrepreneur*) is reconcilable with that of *menuisier*. Judgment reversed. 10 L. C. Rep., p. 456, *Boucher vs. Lemoine et al.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

Held, That an *exception à la forme* on the ground that the bailiff had styled himself a "bailiff of the Superior Court" without adding "for the district of Montreal" will be dismissed on the ground that the court was bound to know the signature of its own officer. *Rowbotham vs. Scott*. S. C. Montreal; Day, Smith, Mondelet, J. Cond. Rep., p. 2.

Held, That the four days for filing an *exception à la forme* run while the case is *en délibéré*. *McFarlane vs. Worrall*. S. C. Montreal; Cond. Rep., p. 6.

Held, That an *exception à la forme* will be maintained on proof that the plaintiff had left the house where process was served, and gone to California a month before

the service. *Kelton vs. Manson*. S. C. Montreal; Day, Smith, Mondelet, J. Cond. Rep., p. 79.

Held, That a plaintiff is bound to know his own name, and to tell it to defendant. Action dismissed. *Paradis vs. Lumère*. S. C. Montreal; Cond. Rep., p. 81.

Held, That an exception *à la forme* setting up service of process at six o'clock in the morning, will be maintained and the action dismissed, the rule of practice requiring that service be made between 8 o'clock a. m. and 7 o'clock, p. m., *McFarlane vs. Jamieson*. S. C. Montreal; Cond. Rep., p. 89.

Held, That a second preliminary plea filed after the four days, and after dismissal of a first preliminary plea, will be dismissed on motion. *Cowan vs. Darling*. S. C. Montreal; Cond. Rep., p. 105.

Held, That an exception *à la forme* filed by parties not styling themselves defendants cannot legally be pleaded. Exception rejected on motion. 1 Jurist, p. 84, *Grinton vs. Montreal Steamship Company*. S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, That the merits of an exception *à la forme* cannot be tested on a motion to dismiss it. 1 Jurist, p. 99, *Clarke et al. vs. Clarke et al.* S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, 1. That a plaintiff may set up new facts to shew that defendant cannot avail himself of his exception *à la forme*.

2. The sufficiency of these facts cannot be tried on motion to reject plaintiff's answer. 1 Jurist, p. 178, *The Beacon Company vs. Whyddon*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That an exception *à la forme* setting forth that defendant is described as of "St. Hyacinthe" simply, whereas he lives in the parish of "St. Hyacinthe le Confesseur," and that there are three distinct places in the district of Montreal, known respectively as the town of St. Hyacinthe, the parish of St. Hyacinthe, and the parish of St. Hyacinthe le Confesseur, is bad in law. 1 Jurist, p. 183, *Lynn et al. vs. Chamird*. S. C. Montreal; Day, Smith, Chabot, J.

Held, That irregularities and informalities in a *saisie arrêt* after judgment cannot be attacked by exception *à la forme*. 3 Jurist, p. 93, *Molson vs. Burroughs*, and *Bank of Montreal, T. S.* S. C. Montreal; Badgley, J.

Held, That service of process *ad respondendum* at the last domicile is not good. *Caldwell vs. Moffatt*. K. B. Q. 1809.

Held, That there must be an intermediate day for every five leagues of distance on service of process *ad respondendum*. *Hamilton vs. Beauher*. K. B. Q. 1810.

So in *Poulin vs. Plante*. K. B. Q. 1819.

Held, That the defendant in a *reprise d'instance forcée* must be called into the cause by process *ad respondendum*. *Tusché vs. Levasseur*. K. B. Q. 1811.

So with a *garant simple*. *Gauthier vs. Tremblay*. K. B. Q. 1811.

Held, That service of process at an elected domicile is good if it is stipulated in the contract on which the suit is founded, that such service shall be valid.

*Oriatt vs. McNabb*. K. B. Q. 1811.

Held, That the omission of the county or parish (in which process *ad respon-*

*dendum* has been served) in the sheriff's return, is not a *nullité d'exploit*. *Lambert vs. Roberge*. K. B. Q. 1813.

Held, That a return of service at the domicile of defendant without saying that the officer spoke to any person, is no service in a default cause. *Clouet vs. Brugg*. K. B. Q. 1818.

Held, That service upon a "growing person" is no service; a growing person may be a child of an hour's age. There is no certainty in the description. *Perault vs. Bin*. K. B. Q. 1820.

Held, That a return of service of process *ad resp.* upon a grown person on the timber attached, is no service, and cannot be proceeded upon. *McDonald vs. McDonell*. K. B. Q. 1811.

Held, That upon process *ad resp.* returnable in a preceding term, no rule upon the sheriff to make a return will be allowed if the writ has been fyled. *Fielders vs. Hoyt*. K. B. Q.

Held, That the rule of practice which requires the plaintiff to indorse upon a writ of *capias ad resp.* the sum for which bail is to be taken is only directory to the sheriff, and if it be not obeyed, the omission does not operate a *nullité d'exploit*. *Fitzgerald vs. Ellis*. K. B. Q. 1818.

#### PLEADING—GENERALLY.

Held, That a defendant may, by *exception*, invoke the nullity of his adversary's title, without an action or incidental demand to rescind the same. 1 L. C. Rep., p. 481, *Officers of Her Majesty's Ordnance vs. Taylor et al.* In Appeal.

Held, That under the 12th Vict., c. 38, sect. 85, which enacts that in any pleading "every allegation of fact, the truth of which the opposite party shall not expressly deny or declare to be unknown to him, shall be held to be admitted "by him," it is necessary in a *défense au fonds en fait* expressly to deny every fact alleged in the plaintiff's declaration, otherwise such facts will be held to be admitted. 2 L. C. Rep., p. 105, *Copps vs. Copps*. In Appeal: Panet, Aylwin, J.; Rolland, J., dissenting.

See note, p. 109, *St. John vs. Delisle*, where the judges of the Superior Court, Montreal, declared they did not agree with the judgment, and did not consider themselves bound by it, there being a dissenting judge, and the Chief Justice not being present.

Also report of *St. John vs. Delisle*, 2 L. C. Rep., p. 150, and note, p. 143, citing case of *McGregor vs. McKenzie et al.*, where a similar decision was given.

Held, In Appeal: Rolland, Aylwin, J., That an affirmative plea, such as set off, may be fyled together with the general issue. Judgment below reversed. 3 L. C. Rep., p. 421, *Clarke, App., Johnston, Resp.*

Held, That defendant will not be allowed to plead specially that which amounts to no more than a general issue, and payment and tender must be pleaded by way of peremptory exception *perpétuelle en droit*.

See also as to principles of pleading generally. *Forbes et al. vs. Atkinson*. Pyke's Rep., p. 40, Sewell, C. J. 1810.

Same case, Stuart's Rep., p. 106, note.

- EXCEPTION A LA FORME. See CAPIAS, Affidavit.  
 " " " See DAMAGES, Slander.  
 " " " appeals from. See JUDGMENT, Interlocutory.  
 PLEADING Argumentative. See DAMAGES, Slander.  
 " CAUSE OF ACTION. See CAPIAS.  
 " " " " Exception declinatoire.  
 " See AMENDMENT.  
 " AMENDMENT IN DATE. See BILLS AND NOTES, Error in date.  
 " DISCUSSION. See ACTION HYPOTHECAIRE.  
 " Rules of. See STUART'S REPORTS, p. 106, note.  
 " Cumulation. See PLEADING, Joinder.  
 " FORGERY. See BILLS AND NOTES, Forgery.

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POLICY OF INSURANCE.

See INSURANCE.

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POUND.

See CORPORATION, Roads.

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POWER OF ATTORNEY.

See EVIDENCE, Power of Attorney.

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PREScription.

AGAINST WAGES.

Held, In an action against the representatives of a person, deceased, brought within a year of his death, for eleven years, wages (as *menagère et gouvernante*) accrued down to the time of the death, that the prescription, under the 127th article of the Custom of Paris, even if the article were in force, is not applicable. 8 L. C. Rep., p. 295, *Glouteney vs. Lussier et al.* S. C. Montreal; Smith, J.

Held, In Appeal: That the prescription of the article was applicable, and that the heirs of the master had a right to tender their oath, as well in respect to the rate of wages, as in respect of payments, not only of arrears, but of the wages of the last year. 9 L. C. Rep., p. 433, *Lussier et al.*, App., *Glouteney*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, J.

Same case 2 Jurist, p. 185.

Same case, 3 Jurist, p. 299.

Held, 1. In an action for wages as purser of a steamer, the plea of prescription of six years, under the 10th and 11th Vict., c. 11, is a good plea.

2. That no interruption of prescription is made out by proving that the defendant told the plaintiff that if anything was found to be due him, it would be paid.

8 L. C. Rep., p. 302, *Strother vs. Torrance*. S. C. Montreal; Mondelet, J. Same case, 2 Jurist, p. 163.

Held, That a plea of prescription to be valid, against a demand for wages by a domestic, must tender defendant's oath of payment, and aver that the employer kept regular books. 1 Jurist, p. 83, *Hogan et al. vs. Scott et al.* S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, In an action for twenty-four years' wages as servant, *menagère*, the prescription *annule* of the *coutume* was held applicable. 2 Rev. de Jur., p. 166. *Babin et ux. vs. Caron*. Q. B. Quebec, 1847.

#### ANNALE FOR GOODS.

Held, That the prescription *annule* under the 127th article of the Custom of Paris does not affect debts due to merchants, which are not barred by a less period than six years. Stuart's Rep., p. 44, *Morrrough vs. Muun*. K. B. Q. 1811.

Held, That the prescription of a year under the 127th article of the Custom, and that of six months, under the 126th article, do not extend to farmers who raise the wheat they sell. Pyke's Rep., p. 39, *Gagné vs. Bonneau*. Sewell, C. J., 1810.

#### HEARING ON.

Held, That an inscription for hearing on the merits of a plea of prescription alone, separately from the other pleadings, is irregular, and will be set aside. 6 L. C. Rep., p. 475, *Munyeau vs. Turenue*. S. C. Montreal; Day, Smith, Vanfelson, J.

#### OF TEN YEARS.

Held, That an hypothecary action against a *tiers détenteur* is prescribed by ten years' possession, if it does not appear that he had knowledge of the mortgage on which it is founded. *Blick vs. Stewart*. K. B. Q. 1817.

Held, That in an hypothecary action, the plaintiff must describe the mortgaged premises by metes and bounds, *à peine de nullité*. *Perrault vs. Lékéque*, K. B. Q. 1819.

Held, That the defendants' possession of the mortgaged premises must be proved even in a default case. *Cuntin vs. Marcoux*. K. B. Q. 1821.

In an hypothecary action the defendant pleaded the prescription of ten years, *entre presens*, the plaintiffs answered that one of them was absent during a portion of that time,

Held, That the burden of proof fell on the defendant, and no evidence having been adduced on either side, Judgment for plaintiff. 1 L. C. Rep., p. 139. *Lina et al. vs. Boyer*. S. C. Montreal; Smith, Mondelet, J.; Vanfelson, J. dissenting.

#### OF TEN YEARS—PRESENCE.

Held, That in matters of prescription under the 116th Article of the *Coutume Paris*, persons residing within the same *coutume* were reputed present, irrespective of the jurisdiction of the court, and that, therefore, the prescription of ten years, *entre presens*, runs against persons residing in Lower Canada, in



different districts from that of the adverse party, or of the property. 6 L. C. Rep., p. 433, *Stuart*, App., *Blair*, Resp. In Appeal: Lafontaine, C. J., Aylwin, J., for reversing, Duval, Caron, J., for confirming.

Judgment confirmed by operation of law.

Same case, 2 Jurist, p. 123.

Held, That the prescription of ten years for acquiring property in an immovable does not run during the minority of the party to whom it is opposed. 1 L. C. Rep., p. 137, *Devoyau*, App., *Watson*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

TEN YEARS—DOWER.

Held, 1. That the heirs-at-law of a person who had acquired an immovable charged with customary dower from a husband and wife during marriage, can invoke the prescription of ten years, reckoning from the decease of the father and mother of the *douairiers*.

2. That the payment made under a judgment obtained in favor of one of the *douairiers* by the proprietor of the immovable charged with the dower, does not interrupt the prescription with respect to other portions of the dower not claimed, and that such payment is not equivalent to a renunciation of the prescription which may already have been acquired. 12 L. C. Rep., p. 214, *Bissin et al.* vs. *Michaud et al.* S. C. Quebec; Taschereau, J.

OF THIRTY YEARS.

Held, That on proof of thirty years' possession, the defendant is not bound to produce a title, nor to offer any evidence to show that he held *animo domini* or *de bonne foi*, till the contrary is proved by the plaintiff. *Stuart's Rep.*, p. 146, *The Seminary of Quebec* vs. *Patterson*. K. B. Q. 1820.

Held, That the long prescription of thirty years against a debt due by obligation, must be calculated from the date of the instrument, if the debt be payable on demand. *Young vs. Stewart*. K. B. Q. 1820

Held, That possession for thirty years *au-delà de son titre* is a valid title. *Greves vs. Fissette*. K. B. Q. 1812.

Held, 1. By the Superior Court, That the Crown may acquire property in Canada, on prescription of thirty years and upwards, and that the real owners might have interrupted such prescription by a petition of right, a remedy which may be exercised in the colony, as well as in the mother country.

2. That in the particular case, the plaintiff had a vague and undefined title, and failed to prove the possession of his assignors.

3. That the tract of land claimed in the cause having been required for the defence of the country, and used for thirty years and upwards for the fortifications of Quebec, cannot be recovered by petitory action.

Held in Appeal: That the tract of land, having been required for the defence of the country, and used and applied for more than thirty years for the erection of the fortifications of the city of Quebec, had ceased to be *in commercium*, and could not be the subject of a petitory action. 7 L. C. Rep., p. 486, *Laporte*, App.,



*The Principal Officers, &c.*, Resp. Aylwin, D. Mondelet, J.; C. Mondelet, J., dissenting.

Held, That the personal and hypothecary action is extinguished by the prescription of thirty years and that the law *cum notissime* forms no part of our law. 1 Jurist, p. 271, *Delard vs. Paré et ux.* S. C. Montreal; Day, Smith, Mondelet, J.

The defendant, in a petitory action, pleaded possession of thirty years by himself and his *auteurs*, without alleging in his plea, or producing at *enquête*, any title in his favor, or in favor of his *auteurs*.

Held, That under the circumstances of this case, verbal evidence was sufficient to connect the possession of the defendant with that of the parties previously in possession as his *auteurs* and predecessors. 11 L. C. Rep., p. 286, *Stoddard et al. vs. Lefebvre.* S. C. Montreal; Berthelot, J. Appealed.

Held, That to acquire a title by prescription under the French law, there must be a *possession naturelle*. 2 L. C. Rep., p. 369, *Stuart vs. Bowman.* S. C. Montreal; Smith, Vanfelson, Mondelet, J.

#### PHYSICIAN.

See REGISTRATION, Physician's Fees.

Held, That the prescription of five years' for medical attendance and medicine, under the 11th Vict., c. 26, sect. 19, is an absolute prescription, a bar to the action, *fin de non recevoir*, and not a mere presumption of payment. 11 L. C. Rep., p. 200, *Bardy vs. Huot.* S. C. Quebec; Stuart, J.

Held, 1. That a plea of prescription under the 10th and 11th Vict., c. 11, cannot be invoked against the action of a physician for services and medicines.

2. The plaintiff may, by *faits et articles*, demand the oath of defendant in support of a plea of payment and prescription under the 125th article of the Customs of Paris, by which plea he tendered oath. 1 Jurist, p. 181, *Buchanan et al. vs. Cormack.* S. C. Montreal; Day, Smith, Chabot, J.

#### PROTHONOTARY OR CLERK'S FEES.

Held, That the prescription of three years established by the ordinance of 1510, declared by the 12th Vict., c. 44, to form part of the civil law of Canada, is not an absolute prescription, and that, therefore, payment must be alleged, and oath tendered. 1 L. C. Rep., p. 167, *Scott vs. Stuart.* C. C. Quebec; Duval, J.

Held, That to support a plea of prescription against a demand for prothonotary's fees, there must be evidence that final judgment was rendered in each case, for more than three years before suit. 1 L. C. Rep., p. 328, *Perrault vs. Baquet.* S. C. Quebec; Bowen, C. J., Meredith, J.

See LANDLORD AND TENANT, Privilege.

FOR COSTS. See Costs.

FOR ASSESSMENTS. See CORPORATION, Assessments.

See ACTION, Revendication.

" LIEN.

" REGISTRATION.

See SCHOOLS, Prescription.

PRESCRIPTION, against Fraud. See FRAUD, Revocation.

" Rule in respect of exceptions. See 2 L. C. Rep., p. 325.

" BILLS AND NOTES. See BILLS AND NOTES, Prescription.

" OF TITHES. See TITHES.

" Against Rent. See LANDLORD AND TENANT, Prescription.

" Against attorney's costs. See ATTORNEY, Costs.

" See RAILWAY COMPANY, Prescription.

" Of Bailiff's Fees. See HUISSIER, Prescription.

" See LANDLORD AND TENANT, Prescription.

" Of thirty years for interest. See REGISTRATION, Arrears of interest.

" AGAINST GUARANTEE. See GARANTIE, Prescription.

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PRINCIPAL AND AGENT.

ACCOUNT.

Held, That in an action against an agent to account, where the defendant pleaded that he had already accounted, and filed with his pleas copies of such accounts, the plaintiff cannot fyle *débats de compte* until the issue on such previous accounting shall have been decided; and *débats* so fyled will be rejected on motion. 4 Jurist, p. 304. S. C. Montreal; Smith, Mondelet, J.

Same case. *Ib.*, p. 306. Action will not lie when accounts had previously been rendered and received without objection. Smith, Mondelet, Chabot, J.

AGENT'S POWER.

Held, That an agent has no authority to sign and discount a promissory note, although he has a written power to manage, administer, sell, exchange, and concede, the real and personal estate of his principal, and to collect, compound and arbitrate all claims and debts, with a general clause, "to do all acts, matters, and things whatsoever, in and about the property, estate and affairs of the principal, as amply and effectually, to all intents and purposes, as the principal himself could have done in his own person, if the said power of attorney had not been made."

2. That such agent is an *administrator omnium bonorum* with no power to borrow except for purposes within the limits of his administration.

3. That the admissions of the agent to an accommodation indorser, are not evidence in a suit against the principal by the party who afterwards discounted the note. 5 L. C. Rep., p. 411, *Castle vs. Baby*. S. C. Montreal; Day, Smith, Mondelet, J.

The plaintiffs, hearing that one of their country debtors was fraudulently making away with his property, sent a clerk to the spot to make inquiries, but without special instructions or power. The clerk took the debtor's note for 5s. in the £, which was sent back to the debtor.

Held, In an action on the original debt, that the receipt and discharge of the

clerk were not binding on the plaintiffs, the clerk having exceeded his powers. 11 L. C. Rep., p. 71, *Seymour et al. vs. Woodbury*. S. C. Montreal; Badgley, J.

Held, That an attorney or agent cannot bring an action in his own name for the preservation of the rights of his principal, notwithstanding an express agreement by the debtor that such action might be brought in the agent's name. 2 Rev. de Jur. p. 43, *Nesbit et al. vs. Turgeon et al.* Q. B. Quebec, 1845.

Held, That upon a contract concluded by an agent or attorney, acting for his principal, the action must be brought in the name of the principal. *Allsopp vs. Huot*. K. B. Q. 1817.

Held, That a special undertaking to pay a note (negotiable but not indorsed) to the agent of the payee in consideration of his forbearance for a time, is sufficient to enable the agent to support an action *ex contractu* in his own name for the amount of the note. *Aylwin vs. Crittenden*. K. B. Q. 1820.

AGENT, Note of. See BILLS AND NOTES by Agent.

AGENT's right to take affidavit for Capias. See CAPIAS, Affidavit.

#### AUCTIONEER.

Held, That an auctioneer who sells a ship without naming his principal, cannot maintain an action for the sum offered by the last bidder, without tendering a valid bill of sale. *Burns vs. Hart*. K. B. Q. 1810.

Held, That an auctioneer who sells without naming his principal is liable in damages for the non-execution of his contract. *Hart vs. Burns*. K. B. Q. 1812.  
See SALE OF GOODS, Auction.

#### BROKER.

Held, That where a broker in bought and sold notes, assumes to be the mutual agent of the parties, the mere fact of his being a broker will raise no legal presumption that he was such mutual agent, and that in the absence of sufficient evidence of his being authorized by both parties to sign the bought and sold notes, they will not constitute a valid memorandum in writing within the meaning of the statute of frauds. 1 Jurist, p. 19, *Syme et al. vs. Heward*. S. C. Montreal; Day, Mondelet, Badgley, J.

#### COMMISSION.

Held, That a charge of 5 per cent. commission for the collection of debts, does not necessarily imply a warranty on the part of the agent making such charge. 3 Rev. de Jur., p. 22, *Glass vs. Joseph et al.* Q. B. Montreal, 1847.

#### PRINCIPAL.

Held, That a principal is not liable for money paid to his agent by mistake in excess of an amount actually due, unless it be shewn that he received, or benefitted by, such payment. 1 Jurist, p. 288, *City Bank vs. Harbour Commissioners of Montreal*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That the principal may sue, in his own name, upon a contract made by

his agent, in the agent's own name. 2 Jurist, p. 161, *Reud vs. Birks*. C. C., Montreal: Mondelet, J.

AGENT as to bank, being. See EXECUTION, T. S.

RATIFICATION BY PRINCIPAL. See CORPORATION, Mortmain, Bequest.

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 PRIVILEGE.

## OF HOTEL-KEEPER.

Held, That a hotel-keeper has no lien or privilege on a piano, for the rent of a room hired for a night, for the purpose of giving a concert, by a person who had hired or borrowed the piano and had left without paying for the room; and the owner has a right to revendicate the piano and obtain damages for its detention from such hotel-keeper. 4 L. C. Rep., p. 414, *Brown vs. Hogan et al.* S. C. Montreal; Smith, Mondelet, J.

## OF VENDOR.

Held, 1. That promissory notes signed by the debtor, and payable to the creditor's order, do not, if dishonored at maturity, effect a novation of the debt, if the intention to novate is not clearly expressed by the creditor at the time they are received.

2. That the words *dont quittance* in a deed of sale, do not amount to such expression of intention to novate.

3. That the vendor of a chattel sold, and for part of the price of which such unpaid notes were received, is privileged on the proceeds of the sale of it, under a writ of execution in his debtor's possession, on production of the notes, and to the extent represented by them.

4. That neither the exercise by the vendee of rights of property in the chattel sold, nor the making of repairs, will defeat this privilege if the identity can be established. 11 L. C. Rep., p. 29, *Noel et al. App., Lampson, Resp.* In Appeal: Lafontaine, C. J., Duval, Meredith, Mondelet, J.; Aylwin, J., dissenting.

See ACTION REVENDICATION by Vendor.

## WAGES.

Held, 1. That the master of a steamer has a privilege for the amount of his wages on the proceeds of the steamer, preferable to a party claiming under an assignment by way of mortgage.

2 The privilege of workmen for wages, and materials furnished, exists only so long as they retain possession of the vessel. 1 L. C. Rep., p. 145. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

For Assessments. See CORPORATION.

Of Sheriff for Poundage. See EXECUTION, Partage.

Privilege of Parliament. See PARLIAMENT.

## PRIVITY.

*See* CONTRACT, Privity.  
 " CORPORATION, Roads.

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 PRIVY COUNCIL.

*See* APPEALS, Privy Council.

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 PROBABLE CAUSE.

*See* DAMAGES, Malicious Arrest.

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 PROBATE OF WILL.

*See* WILL, Probate.

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 PROCESS.

SERVICE OF. *See* CORPORATION, Foreign service upon.  
 " AT GREFFE. *See* CORPORATION, Actions by.  
 " *See* PLEADING WRIT—Service of.  
 " " WRIT.

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 PROCES VERBAL.

*See* EXECUTION, Formalities of.  
*See* WATER, Procès Verbal.

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 PROHIBITION.

## VICE ADMIRALTY.

Held, 1. That a prohibition may issue from the Court of King's Bench to stay proceedings in the Court of Vice Admiralty.

2. That a suit for salvage of a ship stranded on a sandbank in the river St. Lawrence, the *locus in quo* being *infra corpus comitatùs*, the case was not one of admiralty jurisdiction, and a prohibition will be granted to stay proceedings therein.

3. The river St. Lawrence, from the west end of Anticosti to the eastern line of the district of Three Rivers, is within the district of Quebec. *Stuart's Rep.*, p. 21, *Hamilton et al. vs. Fraser et al.* K. B. Q.; Feb., 1811.

## COMMISSIONERS COURT.

Held, That a writ of prohibition ought to be granted as of right, when a Commissioners' Court has exceeded its jurisdiction, e. g., as when the defendant is not domiciled within its jurisdiction. 7 L. C. Rep., p. 403. In Chambers, Quebec; Meredith, Morin, J.

## QUO WARRANTO.

Held, That a petition or *requête libellée* under the 12th Vict., c. 41, for the issuing of a writ of *quo warranto*, which set forth the ground of complaint in general terms, is sufficient, without setting forth the details. 10 L. C. Rep., p. 289, *Fraser et al.*, App., *Buteau*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, Badgley, J.

Held, That on a *requête libellée* in the nature of a *quo warranto*, a defendant may be examined on faits et articles. *Lynch vs. Papin*. S. C. Montreal; Cond. Rep., p. 71.

## PROTEST

OF BILLS AND NOTES. See BILLS AND NOTES, Protest.

FOR SHORT DELIVERY. See CARRIER, Survey.

## RAILWAY COMPANY.

## AWARD.

Held, By the Superior Court, That under the circumstances of this case, the contractor of the company has power to submit to arbitrators the valuation of a piece of land, required for the construction of the railway, and award of arbitrators maintained.

In Appeal, Judgment maintained under the 12th Vict., c. 37, sect. 10. Two judges, Lafontaine, C. J., and Morin, J., being in favor of the judgment, and two, Aylwin and Badgley, J., for reversal. In Appeal: 6 L. C. Rep., p. 129.

## AWARD—OATH.

Held, That a notarial copy of an award of arbitrators under the 13th and 14th Vict., c. 154, and the certificate of the notary that the arbitrators were sworn, is not legal evidence of any oath having been taken, or award rendered, inasmuch as a notary has no authority to receive and certify such oath and award. 4 L. C. Rep., p. 189, *Roy vs. The Champlain and St. Lawrence Railway Co.* S. C.; Montreal; Day, Smith, Vanfelson, J.

Held, In Appeal, 1. That in Lower Canada notaries have the power to receive the report of arbitrators, and to give certified copy of the swearing in of the arbitrators annexed thereto, and that such power is specially recognized as belonging to them by 2nd Will. 4, c. 58, and 13th and 14th Vict., c. 154.

2. That the assessment of costs by arbitrators named under the foregoing statutes, does not vitiate their report. 5 L. C. Rep., p. 219, *Tremblay*, App., *The Champlain and St. Lawrence Railway Co.*, Resp. In Appeal: Lafontaine, C. J. Duval, Caron, Meredith, J.

## CATTLE—FENCING.

Held, That where, by the charter of a railway company, they are not bound to erect barriers at those points where the line crosses a public road, they are not answerable for injury done to cattle straying on the line from the public road, but that parties allowing their cattle so to stray are answerable to the company for damage done to cars thrown off the track by collision with such cattle. 2 L. C. Rep., p. 337, *Rochéleau vs. St. Lawrence and Atlantic Railway Co.* C. C. Montreal; Bruneau, J.

## DAMAGES.

Held. That an action for damages from the construction of a railway over plaintiff's property, must be directed against the railway company, and not against the contractors of the works, unless, by their misconduct or default they have rendered themselves personally liable. 4 L. C. Rep., p. 495, *Jackson et al.*, App., *Pacquet*, Resp. In Appeal: Lafontaine, C. J., Panet, Aylwin, J.

Held, 1. That the prescription under the 8th Vict., c. 25, sect. 49, does not extend to actions for personal injuries.

2. That the plaintiff must show how far his power of earning his livelihood is impaired, in order to obtain damages *in futuro*. 1 Jurist, p. 6, *Marshall vs. Grand Trunk Railway Co.* S. C. Montreal; Day, Smith, Badgley, J.

## DAMAGES—DEATH.

Held, That in an action of damages from a railway accident, which resulted in the death of the husband and father of the plaintiffs, and the destruction of the horse and waggon by which he was drawn, that without some proof of the value of the life of the deceased, no damages could be recovered beyond the value of the horse and waggon, and a new trial ordered, because, by the verdict, greater damages were allowed. 1 Jurist, p. 280, *Rvary vs. The Grand Trunk Co.* S. C. Montreal; Day, Mondelet, J.; Smith, J., dissenting.

Held, in Appeal, That without specific proof of the pecuniary value of the life of the deceased, damages may be assessed by a jury, and be recovered beyond the value of the horse and waggon as a *solatium* to the widow and next of kin. Judgment reversed. Lafontaine, C. J., Aylwin, Bruneau, J.; Duval, Badgley, J., dissenting.

## LIMITATION OF ACTIONS.

Held, That the provisions of the 8th and 9th Vict., c. 25, sect. 49, and 14th and 15th Vict., c. 51, sect. 20, as to the institution of actions against railway companies and others, within six months, do not apply to actions of damages arising from neglect and carelessness of the company's servants in the ordinary



management of the railroad. 5 L. C. Rep., p. 339, *Marshall vs. Grand Trunk Company*. S. C. Montreal; Day, Smith, Vanfelson, J.

Held, 1. As above under the 16th Vict., c. 46, sect. 19, as to a like limitation of actions.

2. That the breaking of a bolt, whereby the rear wheels of a railway carriage were separated from the carriage, which was thrown off the track, is sufficient proof of negligence and of the insufficiency of the carriage for conveying passengers; the train having, at the time, just left a station, and proceeding at the rate of from four to five miles an hour, there being no obstruction on the track, and nothing out of the usual course of things, notwithstanding evidence by the defendants' servants that the carriage had been recently examined, and that no indication presented itself of any defect either in the bolt or in the carriage. 6 L. C. Rep., p. 172, *Germain vs. Montreal and N. Y. Railroad Co.* S. C. Montreal; Day, Smith, Mondelet, J.

Same case, see 1 Jurist, p. 7.

Held, That the prescription of six months under the 8th Vict., c. 25, sect. 49, and 14th and 15th Vict., c. 51, sect. 25, applies to claims in damages caused by the negligence of the servants of the company in setting fire to the rubbish collected on the line of railroad, being the final act of completing the railway. 1 Jurist, p. 179, *Boucherville vs. The Grand Trunk Co.* S. C. Montreal; Day, Mondelet, Chabot, J.

Held, In an action by a *tutric* for damages in consequence of the death of the father through the negligence of the defendants, that the demand is subject to the prescription of one year. 2 Jurist, p. 97, *Filiatrault vs. The Grand Trunk Co.* S. C. Montreal; Mondelet, J.

#### MANDAMUS—DUTY OF SECRETARY.

Held, 1. That a copy of a writ of *Mandamus*, under the 12th Vict., c. 41, must be served upon the defendants, also a copy of the declaration or *requete libellée*.

2. That under the 9th Vict., c. 82, it is the duty of the clerk or secretary of the Montreal and Lachine Railroad to make an entry of the names and places of residence of the owners of stock in the company, and that the Superior Court has jurisdiction to enforce such duty under the 12th Vict., c. 41. 6 L. C. Rep., p. 232. *James Macdonald*, Applicant, vs. *The Montreal and Lachine Railway Co.* S. C. Montreal; Day, Smith, Mondelet, J.

#### ORGANIZATION OF COMPANY.

Held, That a shareholder in a railway company may, in an action to enforce payment of his subscription, plead:

1. That the number of shares of stock which were required by the act of incorporation to be subscribed before the act should be carried into effect, had not been subscribed.

2. That certain parties fraudulently, and in order to make up the required number of shares, subscribed for shares on condition that no liability should attach to them.

3. That at the time of the first meeting for election of directors the required number of shares was not subscribed, and that the fraudulent subscription took place after such first meeting; and that the company had no legal existence. Demurrer to an exception setting up the foregoing counts or chefs dismissed. 1 L. C. Rep., p. 366, *Quebec and Richmond Railway Co. vs. Dawson*. C. Court. Duval, J.

See the opinion of Lafontaine, C. J., as to the case as reported. 6 L. C. Rep., p. 350.

See SHAREHOLDERS' LIABILITY.

#### PASSENGERS.

Held, That under the provisions of the Consolidated Statutes of Canada, c. 66, the conductor of a railway is empowered to put off the train a passenger who refuses to pay his fare. 5 Jurist, p. 167, *Regina vs. Faneuf*. Q. B. Crown side, St. Francis; Short, J.

#### RENTE CONSTITUÉE.

A railway company applied for ratification of title of a piece of land mortgaged for a *rente constituée*, and deposited the price. The creditor of the *rente* filed an opposition claiming the whole capital, although only a portion of the land had been taken possession of by the company.

Held, On contestation by the debtor of the *rente*, and his creditors: That the creditor could only claim a proportion of the capital equal to the value of the portion of the land alienated, and not the whole of such capital. 1 L. C. Rep., p. 125, *Ex parte Lachine Railroad*, and Opps. S. C. Montreal.

#### SEQUESTRE.

Held, 1. That the provincial government had, under the Provincial Statutes, the first hypothecary lien and mortgage upon the road, property and works of the Grand Trunk Railway Company, and upon all its rolling stock and plant, and that first preference bondholders, under the 19th and 20th Vict., c. 111, have priority of claim therefor over the first lien of the Province.

2. That under the issues and proof in the cause the court will not declare that railway cannot legally be sold at sheriff's sale.

3. That the court has no power to appoint a *sequestre*, or receiver, as prayed for, and that the law of sequestration does not apply to the property of bodies politic incorporated by act of parliament, unless with the consent of such bodies.

4. That there was no sufficient evidence of any necessity for the appointment of a *sequestre* or that any advantage would result to the plaintiff, or to any parties interested in the railway, from such appointment. 5 Jurist, p. 315, *Morrison vs. Grand Trunk Railway Co.* S. C. Montreal; Monk, J.

#### SERVICE UPON.

Held, That service of process on the Grand Trunk Railway Company at one of its stations is insufficient, and that such service ought to be made at their principal place of business. 6 L. C. Rep., p. 105, *Legendre vs. Grand Trunk Co.* S. C. Arthabaska; D. Mondelet, J.

## SHARES ALLOTTED.

Held, That an allottee of shares in a railway scheme which has proved abortive, may recover back in an action for money had and received, the whole amount paid by way of deposit. 2 Rev. de Jur., p. 35, *Walstabb vs. Spottis-woode*. English case; Exchequer, 1846.

## SHAREHOLDER'S LIABILITY.

Held, That the action accorded to creditors against shareholders in railway companies, under the 14th and 15th Vict., c. 51, sect. 19, is not affected by the failure of the directors of the company to make calls, in accordance with the 19th section of that act. 2 Jurist, p. 114, *Cockburn vs. Starnes*. S. C. Montreal; Day, Mondelet, Badgley, J.

Held, Nor by irregularities in the nomination or appointment of directors, or in the time of holding its first meeting. 2 Jurist, p. 274, *Ryland vs. Ostell*. S. C. Montreal; Mondelet, J.

Held, 1. Nor by the transfer of shares by defendant. The fact of the defendant being owner of the shares at the time plaintiff's debt accrued, will enable plaintiff to recover.

2. That parol evidence, by the secretary of the company, to the effect that it appeared by the books of the company, that defendant's shares had been transferred before the institution of plaintiff's action, is not sufficient to prove such transfer. 2 Jurist, p. 283, *Cockburn vs. Beaudry*. S. C. Montreal; Badgley, J.

Held, Nor by irregularity in the first election of directors, who were alleged to have been named before the requisite amount of stock had been subscribed. 2 Jurist, p. 285, *Cockburn vs. Tuttle*. S. C. Montreal; Smith, J.

## TRANSFER OF SHARES BY COMPANY.

Under a clause in an agreement between a railway company and a contractor, the contractor was authorized to collect, for his own benefit, arrears due by certain stockholders for the price of their shares, to a certain specified amount.

Held, That the stockholders could not, in such case, be sued by the contractor in his own name, and that the company was not liable to warrant or defend such contractor, against a plea by a shareholder, alleging facts to show that he was not indebted to the company. 7 L. C. Rep., p. 369, *White vs. Daly*, and *Daly vs. Industry Village Railway Co.* S. C. Montreal; Day, Mondelet, Chabot, J.

Held, 1. That a shareholder in a railway company who has transferred his shares as collateral security, cannot bring an action of damages against the company for refusing to register such transfer during several months, thereby causing him great pecuniary loss.

2. That the allegations that the transferees had offered to surrender such transfers to the company, and had demanded that the company should transfer the shares (not "enter" the transfer) in their books, were insufficient. 2 Jurist, p. 291, *Webster vs. The Grand Trunk Co.* S. C. Montreal; Day, J.

Held, in Appeal, 1. That a shareholder who has transferred his shares as collateral security, can maintain an action in damages against the company for refusing during several months to register such transfer.

2. That the allegations that the transferees had offered to surrender such transfer to the company and had demanded of the company to transfer the shares in their books was sufficient to meet the requirements of the company's charter. Judgment below reversed. 3 Jurist, p. 148. In Appeal: Lafontaine, C. J., Aylwin, Duval, J.; Mondelet, J., dissenting.

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 RATIFICATION OF TITLE.

Held, That where a petitioner for ratification of title bound himself by his deed, to pay a sum of money to a *baillieur de fonds* who fyled an opposition, that the opposition would be admitted, but without costs. 10 L. C. Rep., p. 451, *Ex parte Lenoir vs. Lamothe et al.*, Opp. S. C. Montreal; Badgley, J.

Same case, 2 Jurist, p. 303.

Held, That a petitioner for ratification of title is bound to deposit the price of his acquisition, if required to do so by opposants. 1 Rev. de Jur., p. 42, *Ex parte Cantin and Dion et al.*, Opp. K. B. Q. 1840.

Can a petitioner for ratification of title desist, in any stage, from his proceedings, on paying all costs incurred? 1 Rev. de Jur., p. 224, *Chabot*, Petr. and divers Opps. K. B. Q. 1846.

Held, That proceedings for ratification of title, under the 9th Geo. 4, c. 20, are not in every respect analogous to those followed in France under the edict of 1771. That the statute only has in view the discovering of the *hypothèques* and to preserve them on the immovable, whilst the edict was intended to purge *hypothèques*, and was in that respect equal to a *décret*; that under our system creditors have not the absolute right of obtaining a deposit of the price under a *contrainte par corps*. 2 Rev. de Jur., p. 229, *Douglas*, App., *Dupré*, Resp. In Appeal, 1844.

Held, On an opposition to a ratification of title, that the party opposant was bound to have mentioned in the *acte* upon which his claim was based, the sum of money for which the *hypothèque* was created. Opposition dismissed. *Ex parte Cazelaïs and Ramsay*, Opp. S. C. Montreal; Cond. Rep., p. 34.

In this case Grace Russell sold a piece of land to the Harbor Commissioners of Montreal in 1853, who applied for ratification of title. A creditor of Hector Russell & Co. fyled an opposition, setting up that the land had formerly belonged to Hector Russell who sold it fraudulently, and by collusion to Grace Russell his sister, when notoriously insolvent and a bankrupt, that opposant's debt was unpaid and a fraudulent preference given to Grace Russell. Held, On motion of Grace Russell, an intervenent in the cause, that such an opposition will be dismissed, the subject matter not being such as could be urged against a ratification of title, and that the validity of the titles, or the fraud could not be decided upon in this way. *Ex parte The Harbour Commissioners of Montreal for Ratification*, and *Foster*, Opp., and *Russell* intervening. S. C. Montreal, 1854; Cond. Rep., p. 84.

RATIFICATION, Opposition to. See GARANTIE RATIFICATION.

See DECRET.

OPPOSITION TO. See GARANTIE.

## REBELLION LOSSES.

See CESSION, Indemnity.

## REBELLION EN JUSTICE.

See CONTRAINTE.

## RECORD.

See EVIDENCE, Record.

## RECORDER OF MONTREAL—JURISDICTION.

See CERTIORARI, Jurisdiction.

## RECORDS.

See EXECUTION, Formalities of.

## RECUSATION.

Held, 1. That in Canada, the judge recused may pronounce upon the validity of the recusation.

2. That relationship of the judge with a stockholder in an incorporated company does not render him incompetent. 3 Rev. de Jur., p. 85, *Assurance Company of Canada vs. Freeman*. K. B. Q. 1847.

Held, That if a judge declare his incompetency by reason of kindred, &c., the parties must fyle their recusation within eight days, and are *dechues de plein droit* if they do not. *Neilson vs. Union Company*. K. B. Q. 1817.

Held, 1. That the recusation contemplated by the ordinance of 1667, tit. 24, art. 23, can only be made in writing.

2. That the hatred (*inimitie capitale*) mentioned in the 8th article of the same title to give rise to a recusation, must be hatred on the part of the judge, and must be so alleged and proved, failing which, the reasons of recusation will be held impertinent.

3. That the causes of such hatred must be specifically declared.

4. That the hatred must be a decided hatred, known, manifest, the result of the killing of some near relative of the person urging such recusation, or the result of differences, personal encounters, or matters of large interest between such person and the judge, which could create a feeling of revenge tending to the use of an opportunity of destroying the life, or the honor, or the personal advantages of one's enemy. 8 L. C. Rep., p. 246, *Renaud, App., Guy, Resp.* In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

## REGISTRATION.

## ACTE DE TUTELLE.

Held, On a *défense en droit* to an action by the tutor to a minor, that under the 24th section of the registry ordinance, the declaration must contain an allegation of the enregistration of the *acte de tutelle*. 2 L. C. Rep., p. 3, *Murray vs. Gorman*. S. C. Montreal; Vanfelson, Mondelet, J.

Held, That an heir claiming his share of a community in right of his mother, will lose his rank of mortgage on the real estate of his father, appointed his tutor unless the marriage contract, *acte de tutelle*, or deed of partition, were registered. 1 L. C. Rep., p. 87, *Girard vs. Blais*, and Opps. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That the 4th Viet., c. 30, sect. 24, as to registration of the *acte de tutelle* before the maintaining of an action, does not apply to an opposition *à fin de conserver* filed by a tutor. 5 Jurist, p. 154, *Morland vs. Dorion*, and *Sauvé et ux.*, Opps. S. C. Montreal; Budgley, J.

## AFTER SEIZURE.

Held, That the registration of a title of debt after the seizure of a land, confers no *hypothèque* as against other creditors not registered. 1 Jurist, p. 266, *Gale vs. Griffin*. Queen's Bench, Montreal; Rolland, C. J., Day, Smith, J. 1848.

## ARREARS OF INTEREST.

Held, That the registration of an obligation dated before the registry ordinance, 4th Viet., c. 30, without a memorial of a claim for any specific sum for arrears of interest is sufficient to preserve the rights of the creditor, for the whole amount of interest due. 3 Rev. de Jur., p. 340, *McLaughlin et al.*, App., *Bradbury et al.*, Resp. In Appeal, 1848.

Held, That registration at full length, of an obligation executed previous to the registry ordinance (4th Viet., c. 30) will preserve a mortgage for arrears of interest, as well subsequent to, as up to the date of registration. 1 L. C. Rep., p. 284, *Regina vs. Petitclerc*, and Opp. S. C. Quebec; Duval, Meredith, J.

Held, That registration of a mortgage bearing a date subsequent to the coming into force of the registry ordinance, is effectual for interest for two years and the current year against a subsequent hypothecue duly registered, but not as to costs. 6 L. C. Rep., p. 48, *Morin vs. Daly*, and *Dercusselle*, Opp. S. C. Quebec; Bowen, C. J., Meredith, Morin, J.

*See* PROJET DE COLLOCATION.

Held, 1. That the law which existed previous to the passing of the 4th Viet. c. 30, established a prescription of 30 years, and not merely a prescription of five years against arrears of interest upon the price of an immovable sold.

2. That in the distribution of moneys, levied by the sale of real estate, the vendor, *baillieur de fonds*, under a deed passed before the 4th Viet., c. 30, came into operation, is entitled to rank for all arrears of interest due with the principal, although no memorial of such interest was ever registered.

3. That the 7th Viet., c. 22, cannot be construed as having a retroactive effect,

and that consequently it does not apply to constituted rents created before it came into force. 10 L. C. Rep., p. 379, *Brown vs. Clarke*, and *Montzambert es qual.*, Opp. S. C. Quebec; Taschereau, J.

## BAILLEUR DE FONDS.

Held, 1. That a *baillieur de fonds* is entitled to rank for all arrears of interest due with the principal, although no memorial has been registered.

2. That the enactments of the 7th Vict., c. 22, do not apply to deeds anterior to the passing of that act. 1 L. C. Rep., p. 489, *Latham vs. Kerrigan*, and Opps. S. C. Montreal; Day, Smith, Vanfelson, J.

Held, That a *baillieur de fonds* either anterior or posterior to the registry ordinance is bound to enregister. 2 L. C. Rep., p. 353, *Vondenvelde vs. Hart*. By Sir Jas. Stuart, Bart. In Appeal.

Held, In the Superior Court, That a *baillieur de fonds*, subsequent to the registry ordinance, can claim to the prejudice of a subsequent purchaser whose title has been duly registered before his.

In Appeal, That it is not now an open question whether such *baillieur de fonds* was bound before the 16th Vict., c. 206, to enregister his title to preserve his privilege, this question having, in several instances, been decided in the negative, and having now the character of *res judicata*.

By BOTH COURTS, That a *baillieur de fonds*, who has previously sued his personal debtor, and caused the sale of the immovable acquired by such debtor in exchange for that subject to the privilege of the *baillieur de fonds*, is not, in law, to be considered as having ratified the exchange, nor as having consented to the substitution of one property to the other, or as having renounced or abandoned his privilege upon the property by him sold. 4 L. C. Rep., p. 371, *Bouchard vs. Blais*. In Appeal; Lafontaine, C. J., Panet, Aylwin, J.

Held, That a *baillieur de fonds* whose claim has not been registered within the delay fixed by the 16th Vict., c. 206, will rank after a subsequent purchaser who has not assumed the debt, and who has registered his title before the *baillieur de fonds*. 3 Jurist, p. 120, *Lynch vs. Leduc*, and *Mathieu*, Opp. S. C. Montreal; Smith, J.

1. Is the *baillieur de fonds* under a title anterior to the registry ordinance, bound, under the 4th clause of the ordinance, to enregister before the 1st Nov., 1844, in order to enforce his *hypothèque* against a defendant in possession, as universal legatee of the purchaser?

2. Is such defendant, when sued hypothecarily, and without conclusions against him personally, for the payment of his portion of the debt, entitled to be considered as a *tiers détenteur* in the sense intended by the 4th clause? 3 Rev. de Jur., p. 33, *Lurivé vs. Fontaine dit Bienvenu*, Tutor. Q. B. Montreal, 1847.

Held, That the vendor of real estate prior to the registry ordinance, does not lose his privilege as against an hypothecary creditor whose claim is registered before him, the real estate being held by the purchaser. 3 Rev. de Jur., p. 56, On appeal from decision In Re Sleaven in bankruptcy, *Paton*, App., *Buchanan*, Resp. Q. B. Three Rivers, 1847.

Held, That the vendor of real estate, *baillieur de fonds*, who has neglected to



register a deed passed before the registry ordinance, 4th Vict., c. 30, within the period limited for the registration of such deeds (1st Nov., 1844) will not be allowed to rank on the proceeds of such real estate, to the prejudice of a subsequent hypothecary creditor, under a title registered before that of the vendor. 1 L. C. Rep., p. 3, *Dionne vs. Soucy*, and *Soucy*, Opp. S. C. Quebec; Bowen, Duval, Meredith, J.

Held, That a *bailleur de fonds* subsequent to the coming into effect of the registry ordinance will rank before a subsequent hypothecary creditor, whose title has been registered before that of such *bailleur de fonds*. 1 L. C. Rep., p. 5, *Shaw vs. Lefurgy, Wilson and Atkinson*, Opp. S. C. Quebec; Bowen, Meredith, J.; Duval, J., dissenting.

This judgment affirmed in Appeal, Rolland, Panet, J., Aylwin, J., dissenting on the ground that the vendor's privilege is based on a right of *quasi* retention, not affected by the ordinance, and that a different interpretation would expose the vendor to the loss of his privilege which the law evidently meant to recognize. Judgment affirmed. 2 L. C. Rep., p. 5, *Wilson*, App., *Atkinson*, Resp.

See note to this case, p. 6-7.

Held, 1. That a deed of mortgage passed (19th March, 1848) since the registry ordinance came into force, is invalid as against a subsequent purchaser, unless it be registered *before* the title of such purchaser.

2. That, in this case, the mortgage and the title having been both enregistered *at the same time*, the hypothecary creditor had not registered *before* the subsequent purchaser, and had lost his right, although the purchaser was aware of the existence of the mortgage. N. B. The deed of sale, of date 14th Nov., 1858, bore the registrar's No. 10512, the obligation 10513 and both were certified as registered on Monday the 15th Nov., 1858, at 9 o'clock a.m. The mortgage appeared by parol evidence to have been left with the registrar on Sunday the 14th Nov. 12 L. C. Rep., p. 125, *Chaumont*, App., *Grenier*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, J.; Mondelet, J., dissenting.

Held, That an hypothecary creditor prior to the registry ordinance, whose title was registered after the property mortgaged had come into the hands of a subsequent purchaser, whose title was not registered, will rank on the proceeds of the property, as against a subsequent purchaser, and also against his hypothecary creditor whose title was subsequently registered. 1 L. C. Rep., p. 20, *Pouliot vs. Lavergne*, and *Lacasse et al.*, Opps. S. C. Quebec.

Held, Under the 4th Vict., c. 30, sect. 4, that of two creditors, anterior to the ordinance, the one who first registered his claim will be preferred to the other who has registered subsequently, and whose claim is prior in date; although both registrations were made after the 1st Nov., 1844, the period fixed by the ordinance for the registration of claims anterior to the ordinance. 10 L. C. Rep., p. 42, *Normand*, App., *Crevier et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Stuart, J.

Held, That the right of *bailleur de fonds*, under a deed subsequent to the 16th Vict., c. 206, namely of 8th July, 1853, registered 18th Dec., 1853, is postponed to that of a judgment creditor whose judgment was registered on the 9th Dec., 1853, before the deed given by the *bailleur de fonds* to the defendant. 2

Jurist, p. 219, *Lesmesurier et al. vs. McCaw*, and *Dolan*, Opp. S. C. Montreal. Badgley, J.

Held, 1. That the vendor of real estate has an action *en résolution de vente*, in default of payment of the purchase money, whether such payment was to be made, with or without delay.

2. That under the 8th Vict., c. 22, sect. 6, the stipulation that the purchaser shall pay a debt due a third party, becomes a perfect delegation by the registration (at full length) of the deed.

3. That the *baillieur de fonds* who has not registered can demand the *résolution de vente* in default of payment, to the prejudice of a subsequent purchaser who has undertaken to pay him and whose deed is registered at full length. 7 L. C. Rep., p. 66, *Patenaude*, App., *Lérigé dit Laplante et al.*; Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Same case, 1 Jurist, p. 106.

Held, That the claim of a *baillieur de fonds* prior to the registry ordinance, 4th Vict., c. 30, is inoperative for want of registration, as against a subsequent purchaser for valuable consideration, and that the case submitted is not affected by the 16th Vict., c. 206. 7 L. C. Rep., p. 468. *Poliquin vs. Belleau*, and *Fissette et al.*, Opp. S. C. Quebec; Bowen, C. J., Meredith, Badgley, J.

Held, That a *baillieur de fonds* who consents to the hypothecation, in favor of another, of real estate already hypothecated in his own favor, will be held to have waived his priority of mortgage in favor of such subsequent creditor. 9 L. C. Rep., p. 182, *Symes vs. McDonald*, and divers, Opps. S. C. Quebec; Meredith, J.

Held, 1. That the loss, by the original vendor, of a deed of sale is no answer to a third party, alleging the non-registration of such title.

2. That registration by memorial only preserves the rights set forth in such memorial.

3. That the registration of a *titre nouvel* cannot be prejudicial to a third party who has registered his title. 3 L. C. Rep., p. 42, *Carrier vs. Angers* and Opp. S. C. Quebec; Duval, Meredith, J.

Held, That reference in a deed which has been registered, to a previous deed not registered, is not equivalent to a registration of the first deed, or sufficient to defeat the claim of a subsequent mortgage creditor, whose claim has been registered. 3 L. C. Rep., p. 84, *Delesderniers vs. Kingsley*, and Opps. S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, That the special privilege of the *baillieur de fonds* is preferable to the general privilege of the physician for the *frais* of the last illness, upon the proceeds of immovables, even if there be no movables out of which he can be paid. 9 L. C. Rep., p. 497, *Tuchereau vs. De Lagorgendière*, and *Proulx*, Opp. S. C. Quebec; Stuart, J.

#### BAIL EMPHITÉOTIQUE.

Held, That upon the proceeds of a sale of a *bail emphytéotique* a non-registered lessor cannot claim arrears to the prejudice of a registered creditor of the lessee. 7 L. C. Rep., p. 42, *Tetu vs. Martin*, and *Quebec Building Society*, Opp. S. C. Quebec; Bowen, C. J., Meredith, Morin, J.

## BUILDER'S PRIVILEGE.

Held, That a builder has no privilege against the registered claim of a *bailleur de fonds*, if the builder has not complied with the provisions of the 31st and 32nd sections of the registry ordinance (Consolidated Statutes of Lower Canada, p. 362-3) as to the making the *procès verbaux* therein mentioned, and the registration of the second *procès verbal* within thirty days of its date. 6 Jurist, p. 196, *Clapin vs. Naigle*, and *Mongenais*, Opp., and *Clapin*, Contest. S. C. Montreal; Berthelot, J.

## BY CROWN.

Held, That the privilege of the Crown under the 4th Vict., c. 30, sect. 4, of preserving its hypothecary rights, arising out of letters patent without registering such patent, applies only to the immovable property granted by such letters patent; and as to other property a registered hypothecary creditor will be collocated in preference to the Crown. 6 L. C. Rep., p. 279, *Morin et al. vs. Smith*, and divers, Opps. S. C. Quebec; Bowen, C. J., Meredith, Badgley, J.

Held, That the Crown, without registration, has no privilege for a loan of debentures made under the 9th Vict., c. 62, if made to a party who was not a sufferer by the fire (at Quebec). 7 L. C. Rep., p. 471, *Atty-Gen. pro Regina*, App., vs. *Bois et al.*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That the general mortgage given to the Crown by the 9th Vict., c. 62, sect. 18, for advances under that act (to sufferers by the Quebec fire) attaches without registration, although the loan was made after the borrower had rebuilt, and was not applied as contemplated. 11 L. C. Rep., p. 63, *Lavoie*, App. *Regina*, Resp. In Appeal; Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That original grants and letters patent creating a general *hypothèque* as well as a special *hypothèque* before the 4th Vict., c. 30, are subject to registration in order to preserve the general *hypothèque*. 1 Jurist, p. 55, *Solicitor-Gen. pro Regina vs. The People's Building Society*. In Appeal; Lafontaine, C. J., Duval, Caron, J.; Aylwin, J., dissenting.

## COUP DE BOIS.

Held, That a purchaser who has registered his title deed, is not bound to suffer a *coup de bois* to which the property has been subjected by a title not registered, although the purchaser had a knowledge of its existence. 5 L. C. Rep., p. 393, *Thibeault vs. Dupré*. S. C. Montreal; Day, Smith, Mondelet, J.

## DATE OF TITRE.

Held, That when neither of two *titres de créance* subsequent to the ordinance, carrying *hypothèque*, is registered, the oldest in date will be preferred. 2 Rev. de Jur., p. 210, *Méthot et al. vs. Sylvain*, and *Gibb et al.*, Opp. Q. B. Quebec, 1847.

## DONATION.

Held, That a donation may be onregistered at any time during the life of the *donateur*. *Gauthier vs. Carrier*. K. B. Q. 1809.

Held, That registration of a deed of donation dated previous to the registry ordinance, (4th Vict., c. 30) is sufficient to preserve the rights of the creditor for arrears of a *rente viagere* for twelve years without registration of a memorial for arrears. 1 L. C. Rep., p. 165, *Pelletier vs. Michaud*. S. C. Quebec; Bowen, C. J., Duval, J.

Held, That since the passing of the 16th Vict., c. 206, section 7, a *hypothèque* may subsist for a life rent payable *en nature* without mention of a specific sum of money. 3 L. C. Rep., p. 477, *Chapais vs. Lebel*, and Opps. S. C. Quebec; Bowen, C. J., Duval, Caron, J.

Held, 1. That under the 4th section of the registry ordinance 4th Vict., c. 30, the defendants, *donataires* of the land, sought, by the action, to be declared hypothecated, are not purchasers or grantees for or upon valuable consideration so as to enable them to invoke the non-registration of plaintiff's *titre de créance* or the registration of the judgment founded thereon, subsequent to the insinuation of the donation.

2. That the donation, in the case submitted, was *à titre gratuit*. 5 L. C. Rep., p. 296, *Holmes vs. Cartier et al.* S. C. Montreal; Day, Smith, Vanfelson, J.

Held, 1. That registration, by memorial, of an hypothecary claim founded on a donation, which does not state the amount of the claim, is inoperative as against a subsequent *bona fide* purchaser, whose deed is duly registered.

2. That such memorial should contain the allegations necessary to disclose all the rights sought to be preserved by such registration. 8 L. C. Rep., p. 349, *Fusco et ux. vs. Poulin*. S. C. Quebec; Chabot, J.

Held, 1. That a donation *inter vivos* containing obligations at least equal to its advantages need not be insinuated or registered to be valid.

2. That the donee cannot take advantage of, or plead want of, insinuation or registration.

3. That dotal moneys carry interest *de plein droit*.

4. That to render a delegation perfect it is enough that the will of the creditor to accept the new debtor instead of the former debtor is apparent in any manner, and anterior payments made by the *délégué* in his own name and discharge, and so accepted by the creditor, constitute a sufficient acceptance of the delegation.

5. That a debtor, in virtue of such delegation, cannot be liberated from his obligation except with consent of the creditor.

6. That a donee charged with payment of the debts of the donor, who remains in possession of the property after the donation has been resiliated, cannot avail himself of the resiliation between him and the donor, by reason of it not having been carried into execution. 6 Jurist, p. 302, *Poirie vs. Lacroix*. S. C. Montreal; Smith, J.

See DONATION, Revocation of.

#### EFFECT OF.

Held, That the registration of a title which is void, will not render it valid, against the rights of a lawful proprietor, even when the latter has not registered his title. 3 L. C. Rep., p. 310, *Stuart, App., Bowman, Resp.*

## GENERAL HYPOTHEQUE.

Held, 1. That in case of a general hypothecque dating as far back as 1815, and claimed in respect of lands in the county of Sherbrooke, and duly registered in accordance with the 4th Vict., c. 30, the want of registration whilst the 10th and 11th Geo. 4, c. 8, was in force, could not be invoked, without averment and proof that the debtor held the land whilst that statute was in force.

2. That a hypothecque duly created during the lifetime of the debtor, may be preserved by registration after his death.

3. That *hypothèques légales* are not exempt from registration under the 4th section of the registry ordinance, 4th Vict., c. 30. 2 Jurist, p. 86, *Regina*, App., *Comte et al.*, Resp. In Appeal; Aylwin, Meredith, Short, Badgley, J.

Held, That a general *hypothèque* anterior to the 4th Vict., c. 30, registered before any registration by a *tiers détenteur*, is valid. 3 Jurist, p. 138, *Mogé vs. Dupré*. C. C. Montreal; Bruneau, J.

Held, 1. That under the 4th Vict., c. 30, the priority of hypothecques anterior to the ordinance, no longer depends on the date of the instrument alone, but on its registration within the delay fixed by the statute.

2. That the registration of a transfer does not dispense with the registration of the original title of debt. 1 Rev. de Jur., p. 231, *Wurtele et al. vs. Montmigny*, and Opps. Q. B. Quebec, 1845.

## JUDGMENT.

Held, That a creditor under a judgment of the 11th April, 1834, registered before the 1st Nov., 1844, will rank previous to a judgment creditor anterior in date, but whose judgment is not registered. 1 Rev. de Jur., p. 47, *Tremblay vs. Bouchard*, and *Simon*, Opp. Q. B. Quebec, 1845.

Held, That where a person who, at the time of rendering a judgment against his *auteur*, is in open and public possession of property as proprietor under a title not registered, the registration of such judgment does not create a *hypothèque* on the property. 6 Jurist, p. 169, *Ex parte Gamble* for Ratification. S. C. Montreal; Monk, J.

## LEASE.

Held, That under the 4th Vict., c. 30, sect. 17, mortgages resulting from deeds of lease under nine years, need not be registered. 3 L. C. Rep., p. 291, *Brown vs. McInely*. S. C. Quebec; Bowen, C. J., Duval, J.; Meredith, J., dissenting.

Held, 1. That the Crown has no privilege for a loan of debentures upon an immovable property burned at the Quebec fire of 1845, if the borrower was not, at the time of such fire, the proprietor; but in the particular case, the Crown has a special mortgage, it having been stipulated, and duly registered.

2. That an ordinary lease, not registered, does not produce a general mortgage notwithstanding the 17th section of the 4th Vict., c. 30, and this because of the sections 1 and 28 of the said act, which prescribe that the mortgage must be special and must be registered, and of the 29th section which enumerates the general mortgages which will continue to subsist, and which must be registered.

7 L. C. Rep., p. 241, *Hillier vs. Bentley*, and *Primrose et al.*, Opp. S. C. Quebec; Meredith, Morin, Badgley, J.

## NOTICE—BAD FAITH.

Held, That knowledge, by a subsequent creditor, of the existence of a previous debt not registered, is not sufficient to put him in bad faith or deprive him of rights acquired by his registration, unless he be guilty of fraud or collusion. 3 L. C. Rep., p. 136, *Ross vs. Daly*, and *Killaly*, Opp. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That the non-registration of a deed of conveyance under the provincial statutes 10th and 11th Vict., c. 8, and 1st Will. 4., c. 3., and 2nd Will. 4., c. 7, does not operate as an absolute nullity, if the subsequent purchaser be not a *bonâ fide* purchaser for a valuable consideration. 2 Rev. de Jur., p. 194. *Smith vs. Terrill*, and *Phillips*, Opp. K. B. St. Francis; Bowen, C. J., Vallières, Fletcher, J., 1835.

## NOTICE TO CLAIM PROCEEDS OF SALE.

The appellants acquired real property, on which was built the Baptist college, Montreal, from Gerard, by deed of 18th March, 1842; part of the price remained *à constitut* and £2000 also remained on interest during the lifetime of one Forsyth, and M. C. Gerard, his wife, the principal payable after their death, to certain persons appointed to receive the same. Afterwards, on the 25th July, 1845, by deed not registered, the appellants, reciting that they had purchased solely *in trust* for "The Canada Baptist Missionary Society," until it should be incorporated (as it was by 8th Vict., c. 102,) assigned the property to the society in consideration of 10s., and that they should be exonerated and discharged from all claims, troubles, and demands whatsoever by Gerard, under the deed, but without a special *garantie* stipulated, and without stating the precise sums of money due to Gerard.

The society afterwards specially hypothecated the property to Hoby & Salter, and to Forsyth by deeds bearing date 28th Oct., 1845, and 18th Dec., 1848, duly registered, and the property being sold by the sheriff, Gerard, although notified, forebore to make any claim on the proceeds, under his deed of sale, and the respondent, *cessionnaire*, of Hoby, Salter, and Forsyth, was collocated. The appellants resisted this collocation unless security were given to refund if the balance of the price was afterwards claimed from them.

Held, That the appellants were entitled to such security, notwithstanding the 10th and 28th sections of the registry ordinance, and notwithstanding that the deed of the 28th July, 1845, contained no special *hypothèque* in their favor. 4 L. C. Rep., p. 277, *Try et al. App.*, vs. *The Corporation of the Bishop of Montreal*, Resp. In Appeal; Rolland, Aylwin, Meredith, J.; Panet, J., dissenting, 1854.

## REGISTRAR'S CERTIFICATE.

Held, That where the registrar's certificate discloses mortgages existing on the land referred to in a petition for confirmation of title, a motion by an intervening party praying to be allowed to file discharges, and that the mortgages be



held and considered satisfied, and discharged, *pour toutes fins requises*, cannot be granted. 12 L. C. Rep., p. 431, *Ex parte Robison*, and *Poirier*, Inter. S. C. Montreal; Berthelot, J.

See ACTION PETITORY. *Gibson vs. Weare*. 12 L. C. Rep., p. 98.

REGISTRAR'S FEES. See SHERIFF.

NON-REGISTRATION, Effect of. See SALE OF IMMOVABLES, Resiliation.

#### REGISTRAR'S COPY.

Held, That a copy, certified by a registrar, of an authentic *acte* registered at full length does not make proof. 2 Rev. de Jur., p. 58, *Dessien dit St. Pierre vs. Ross*. Q. B. Quebec, 1844.

See EVIDENCE, Registrar's Copy.

#### REGISTRAR'S LIABILITY.

Held, 1. That a registrar is responsible for damage or loss caused by his neglect to register a mortgage, or by a certificate given by him, wherein an omission occurs, from the effect of which a purchaser in good faith is troubled in his possession.

2. That the action in such case must be one *en garantie*, the registrar being the garant of the party to whom he has directly caused damage. 10 L. C. Rep., p. 269, *Montizambert*, App., *Talbot dit Gervais*, Resp. Aylwin, Mondelet, Badgley, J.; Lafontaine, C. J., Duval, J., dissenting as to the point secondly ruled.

#### RIGHTS OF MARRIED WOMEN.

Held, That a married woman is entitled to claim on the proceeds of an immovable sold on the representatives of her late husband, such property having been acquired by donation to her from her father and mother, during the community, notwithstanding a clause of *ameublissement* in her contract of marriage, provided she has, by the contract, a right to renounce the community and take back what she brought to it, notwithstanding that the contract, executed before the coming into force of the 4th Vict., c. 30, was never registered. 1 L. C. Rep., p. 47, *Labreque vs. Boucher*, and *Fleury*, Opp. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That a marriage contract (of 24th May, 1841,) assigning a life rent to a wife, must be registered to preserve a mortgage according to the date of such contract against a creditor prior in registration. 2 L. C. Rep., p. 83, *Panet vs. Larue*, and Opps. S. C. Quebec; Duval, Meredith, J.

So as to marriage contract of 11th Nov., 1836, *Garneau vs. Fortin*, and Opp. S. C. Quebec; Bowen, C. J., Meredith, J.

Held, That a purchaser in good faith for valuable consideration, under a deed of sale prior to the registry ordinance, and registered previous to the 1st Nov., 1844, is not liable hypothecarily for a *donaire préfex* under a marriage contract before notaries, of 1817, not registered until 1853, notwithstanding the death of the husband took place in Oct., 1852. 6 L. C. Rep., p. 100, *Forbes vs. Legault*. S. C. Montreal; Day, Smith, Mondelet, J.



Held, That it is not necessary that a marriage contract containing the stipulation of *customary dower*, should be registered to confer upon the person claiming such dower, a preference over posterior creditors whose claims are registered. 10 L. C. Rep., p. 301, *Syms et al. vs. Evans*, and divers, Opp. S. C. Montreal; Monk, J.

Held, That it is not necessary to register a contract of marriage executed previous to the registry ordinance to preserve rights of ownership and not hypothecary rights, and that children, as representing their mother, may claim, by right of community, the value of one half of an immovable *propre ameubli* which they have allowed to be sold. 2 L. C. Rep., p. 196, *Nadeau vs. Dumon*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That a married woman has not lost her *hypothèque* upon the property of her husband, although her marriage contract, passed before the registry ordinance, has not been enregistered before the 1st Nov., 1844, but only on the 7th Dec., 1846. 3 Rev. de Jur., p. 478, *Ex parte Gibb*, and *Shepherd et al.*, Opps. Q. B. Quebec; Stuart, C. J., Bowen, Aylwin, J.

See DOWER.

#### TIME OF.

Held, That where a registrar's certificate shows that two deeds were registered on the same day at the same hour, and he has given precedence to number one, the claims upon both deeds must, under the 4th Vict., c. 30, sect. 11, be collocated concurrently in a report of distribution. 9 L. C. Rep., p. 298, *Lenfesty vs. Renaud*, and divers, Opp. S. C. Quebec; Chabot, J.

Held, That, in such case, it is not the number put by the registrar which gives priority, but that in this case he should have registered the older before the more recent deed. 5 Jurist, p. 78, *Grenier vs. Chaumont*. C. C. Terrebonne; Monk, J.

#### WILLS.

Held, That all wills "made and published" previous to the 31st Dec., 1841, must be registered to enable legatees to rank according to the date of their mortgage. 1 L. C. Rep., p. 435. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

REGISTRATION of acceptance of executorship. See WILL.

" OF LEASE. See LANDLORD AND TENANT, Registration.

" OF TUTELLE AD HOC. See TUTELLE, Tutor ad hoc.

" of discharge by Cedant. See CESSION, Discharge.

" OF PARTNERSHIP. See PARTNERSHIP, Registration.

" Violation of Registry Act. See CRIMINAL LAW, Registry Ordinance.

" BAIL EMPHITÉOTIQUE. See LANDLORD AND TENANT, *Opposition à fin de conserver*.

REGISTRAR'S COPY. See EVIDENCE, Registrar's Copy.

## RENTE CONSTITUÉE.

Whether the whole capital can be claimed by the creditor of a *rente constituée* on alienation to a railway company, of part of the land hypothecated for the *rente*? See RAILWAY COMPANY.

Held, That the purchaser of a *rente constituée* cannot bring an action for a *titre nouvel* before putting his debtor in *mort*, and if he does, must pay his own costs. 4 L. C. Rep., p. 27, *Guyard vs. Guay*. Q. B. Quebec; Meredith, J.

Held, That where an hypothecary creditor has been collocated as opposant on the sale of a *rente constituée* for the price of real estate, he cannot file another opposition to the sale of the *fonds*, and thereby prejudice the purchaser of the *rente*. 2 Rev. de Jur., p. 256, *Audet dit Lapointe vs. Hainel*, and Opps. K. B. Q. 1841.

See RAILWAY COMPANY, Rente Constituée.

RENTE CONSTITUÉE, Prescription against. See REGISTRATION, Arrears of Interest.

## RENTE FONCIÈRE.

## DEGUERPISEMENT.

Held, That a party, who contracts to pay a ground rent à *perpétuité* has no power to make a *déguerpissement*. 7 L. C. Rep., p. 479, *Dubois vs. Hall*, and *e. contra*. S. C. Quebec; Meredith, J.

The above case confirmed in Appeal. See 8 L. C. Rep., p. 361, *Lafontaine, C. J., Aylwin, Duval, Caron, J. Hall, App., Dubois et al. Resp.*

## RENTE VIAGÈRE.

Held, That an indigent parent can maintain an action against a child for an alimentary allowance. *Parent vs. Leduc*. K. B. Q. 1812. *Connor vs. Laforme, Ib.* 1819. *Robin vs. De Varrennes, Ib.* 1821.

See also *Allo vs. Allo et al.* S. C. Montreal; Cond. Rep., p. 11.

Held, That if a husband turns his wife out of doors, she can maintain an action against him for an alimentary allowance. *Chamland vs. Jobin*. K. B. Q. 1814.

Held, That a general undertaking to lodge and feed a donor is accomplished, if the donee provides a lodging for the donor in his own dwelling, and feeds him sufficiently at his own table. *Gagnon vs. Tremblay*. K. B. Q. 1818.

Held, That where a heritage is sold by *décrot* the proprietor of a *rente constituée* secured by mortgage upon it, may demand the capital of his *rente*, but the proprietor of a *rente viagère* can only demand what will purchase an annuity of equal value. *Thibaudeau vs. Raymon*. K. B. Q. 1821.

The value of the *rente viagère* was ordered to be ascertained by *experts* and the mode of ascertaining the amount of *lods et ventes* by multiplying the rent by ten and taking the product as the capital, was disapproved of. 1 L. C. Rep., p. 84, *Desbarats vs. Fabrique de Québec*. In Appeal; Rolland, Aylwin, Panet and Ross.

Held, 1. That the 17th section of the 16th Vict. c. 206, applies only to a *rente viagère* in donations *entre vifs*, and not to those created by will.

2. That those created by will do not carry a *hypothèque* as against third parties, purchasers in good faith, unless the immovable is described and specially hypothecated for a determinate sum of money in conformity with the 4th Vict., c. 30, sect. 28. 3 Jurist, p. 184, *Grégoire vs. Laferrière*. S. C. Montreal; Berthelot, J.

As to registration of memorial for arrears of *rente viagère*. See REGISTRATION, As to mortgage when *rente* is payable *en nature*. See REGISTRATION, Donation.

As to the effect of a discharge from a *rente viagère* given in a second donation which became void. See DONATION, *Rente Viagère*.

As to payments in cash for clothing not required. See Appeals from Circuit Court.

As to resolution for non-payment of arrears and for ingratitude. See DONATION, Revocation.

See ALIMENT.

See DONATION, Resiliation.

“ “ Discharge of Rente.

RENUNCIATION.

Held, 1. That a renunciation by a son to the future succession of his father does not extend to particular legacies.

2. That such renunciation is applicable only to a succession *ab intestat*, and not to succession by will. 6 Jurist, p. 329, *Fréchette vs. Fréchette*, S. C. Sorel; Bruneau, J.

See DOWER—SUCCESSION.

REQUETE CIVILE.

Held, That a *requête civile* cannot be received against a judgment by default, when not rendered in last resort, but from which an appeal lies. 4 Jurist, p. 14, *Valin vs. The Corporation of the County of Terrebonne*. S. C. Montreal; Mondelet, J.

Held, That a *requête civile* may be made against a final judgment rendered by default, and in last resort. 4 Jurist, p. 121, *Martin vs. Moreau*. S. C. Montreal; Day, Smith, Mondelet, J.

RESILIATION—REVOCATION.

See FRAUD, Resiliation.

“ FRAUD in assignment, Donation.

“ “ in exchange, LANDLORD and TENANT, Resiliation of Lease.

## RETENTION.

RIGHT OF. *See* ACTION, REVENDICATION, Lien.

" " CARRIERS, Lien.

BY GARDIEN. *See* GARDIEN, Frais de Garde.

## RETRAIT LIGNAGER.

Held, 1. That in an action of *retrait lignager* the omission, in a bailiff's return certifying the service of the writ and the "*offres*" therein mentioned, to state the residence or domicile of the bailiff, or the names, surnames, and *qualités* of the persons who accompanied him as his *recors*, is fatal to the plaintiff's demand.

2. That such omissions may be pleaded *au fonds*, in an action *en retrait lignager*, and not merely by an exception *à la forme*. 5 Jurist, p. 71, Q. B. Montreal; Rolland, Gale, Day, J.

## REVENDICATION.

*See* ACTION, Revendication.

## RIOT.

*See* CORPORATION, Damages.

## ROADS.

POWERS OF OVERSEERS. *See* CERTIORARI, Roads.

*See* CORPORATION, Municipal.

INSPECTOR OF. *See* OFFICER PUBLIC, Inspector.

*See* OFFICER PUBLIC, Sous Voycr.

" " SERVITUDE.

" " CORPORATION, Roads.

## ROYAL INSTITUTION.

*See* CORPORATION, Mortmain, Bequest.

## SAISIE ARRET.

*See* MOTION to QUASH.

" " BAIL TO SHERIFF.

## SALE OF GOODS.

## AUCTION.

An auctioneer who sells a ship without making known his principal, cannot support an action for the sum bid for her, without a tender of a valid bill of sale. *Burns vs. Hart*. K. B. Q. 1810.

Held, That an auctioneer who received goods of an insolvent party as *depositaire* cannot set off the proceeds against a debt due to him by the insolvent, but is liable to account to the creditors of the insolvent. *Fisher vs. Draycott*, and *Scott, T. S.* S. C. Montreal; Cond. Rep., p. 44.

Held, That where a purchaser at an auction sale refuses to pay in compliance with the conditions of sale, the goods, after notice to him, may be re-sold, and an action will lie against him for the difference of price, with all the costs and charges thereby incurred. 5 Jurist, p. 105, *Maxham et al. vs. Stafford*. S. C. Quebec; Taschereau, J.

Held, 1. That an auctioneer is bound to deliver to his principal the notes which he may have received for the goods sold, whether he guarantees the sales or not.

2. That he has no right to receive notes for sales of another party's goods, combined with goods sold for plaintiff.

3. That the most reasonable interpretation of an agreement to guarantee sales where notes are taken is, that the auctioneer shall indorse the notes. 5 Jurist, p. 247, *Sinclair*, App., *Leeming et al.*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J. See judgment in Appeal. 5 Jurist, Appendix.

See PRINCIPAL AND AGENT, Auctioneer.

Held, 1. That in the case of a purchase of salt on board of a vessel lying in the stream, without a memorandum in writing, the re-sale of the salt by the vendee is a sufficient acceptance to take the case out of the statute of frauds.

2. That the contract of sale being complete, and the property in the goods having passed to the purchaser who refused to remove them, the vendor might re-sell the same at the risk of the purchaser, and compel him to pay the difference between the price of the sale and of the re-sale. 12 L. C. Rep., p. 108, *Jackson vs. Fraser*. S. C. Quebec; Taschereau, J.

## BARGAINED AND SOLD.

Held, That it is not competent for a plaintiff to recover for goods bargained and sold for cash and not delivered in consequence of the non-payment of the purchase money, although he tendered the goods, but there must be an actual delivery. 3 Jurist, p. 166, *Gordon vs. Henry*. S. C. Montreal; Mondelet, J.

## BOUGHT AND SOLD NOTES.

Held, That in an action of damages for refusing to take delivery of, and pay for flour bargained and sold through a broker, proof of the contract cannot legally be made without the production of the *bought* note, as well as of the *sold* note,

or without notice to the defendant to produce the *bought note*. 6 Jurist, p. 296, *Gould et al. vs. Binmore et al.* S. C. Montreal; Smith, J.

Held, 1. That in an action by the vendor of flour sold and delivered, for the price, accompanied by a *saisie conservatoire* for such goods, the plaintiff has a right to demand by the conclusions of his declaration, that the defendants be condemned to pay the price of sale, that the flour seized be declared subject to and liable for the privilege in favor of the plaintiff, as the vendor thereof, for the price of sale, and be sold in due course of law and the proceeds of the sale paid to the plaintiff, in satisfaction either in whole or in part (as the case might be), of his claim as vendor.

2. That a bargain and sale of goods in the month of January for delivery, in all the month of May following, is not a gambling transaction.

3. That where goods so seized have been delivered to the plaintiff during the pendency of the suit, on his giving security that they will be forthcoming to abide the future order of the court or the value thereof accounted for by the plaintiff, such value will be held to be the value of the goods at the time of the delivery to the plaintiff, from which date the plaintiff shall be accountable therefor with interest. 6 Jurist, p. 297, *Baldwin vs. Binmore et al.* S. C. Montreal; Monk, J.

Held, That the plaintiff has a right to obtain delivery of flour seized by him as vendor under a writ of *saisie conservatoire*, on giving security that the flour will be forthcoming to abide the future order of the court, or the value thereof duly accounted for by plaintiff. 6 Jurist, p. 299, *Baldwin et al. vs. Binmore et al.* S. C. Montreal; Berthelot, J.

#### BY SAMPLE.

Held, That where there is a sale by sample and the goods delivered do not agree with the sample, the vendee must make known the defect within a reasonable delay, and cannot rescind the sale and return the goods after a delay of six months. 4 Jurist, p. 288, *Joseph vs. Morrow et al.* S. C. Montreal; Smith, J.

#### COMMISSION.

Held, That an agreement that a certain commission should be a *del credere* commission may be inferred from the fact that the rate charged has been shown to be recovered by merchants examined in the case, as a *del credere* commission. 6 Jurist, p. 156, *Rankin, App., Foley, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

#### DELIVERY—RISK—TIME OF.

If property, after a sale perfected, is burnt by accident, before delivery, the loss falls on the purchaser. Stuart's Rep., p. 101, *McDougall vs. Fraser*. K. B. Q. 1816.

Advances in goods under a written agreement, are made by A, a merchant in Upper Canada, to enable B, a contractor for lumber, to cut and convey to the Quebec market a quantity of timber upon the conditions that, as soon as dressed, it should be considered as belonging and delivered to A, and conveyed to market

at the risk and expense of B. That A should have the sale of the timber, pay disbursements and account to B for any balance remaining after a deduction of his advances and including ten per cent. on the latter, with a commission of 2½ per cent on the sale.

Held, That after delivery to A, before it reaches the market, without fraud or collusion with B, the timber could not be attached at the suit of B's creditors in payment of his debts; but the balance, if any, after a sale by A, could alone be arrested in his hands under process of the court. *Stuart's Rep.*, p. 357. *Vankoughnet, App., Maitland et al., Resp.* In Appeal, 1829.

Held, Upon the sale of goods by admeasurement, (a raft of timber) which may happen to be destroyed before measurement, the loss is cast upon the vendor; stipulation of admeasurement and delivery at a particular time and place renders the sale conditional and incomplete, until the occurrence of these events, and in the meantime the risk, *periculum rei vendite* must be borne by the vendor. 1 *Rev. de Jur.*, p. 176. *Lesmesurier et al., App., Logan et al., Resp.* In Appeal, 1845.

The defendant contracted to deliver and the plaintiff to receive 14,000 feet of birch timber, merchantable, and averaging a certain size, to be piled on defendant's wharves during the winters of 1844-5, and to be delivered as required by the plaintiff during the ensuing season of navigation. A quantity of timber piled up on defendant's wharves was burned during the winter, before it had been measured as between the plaintiff and defendant. In an action of damages by the buyer against the seller for the recovery back of moneys paid in advance.

Held, That there had been no delivery:

1. Because there had been no measurement.
2. Because the timber had not been ascertained to be of the requisite average size.
3. Nor of the required quality. 2 *L. C. Rep.*, p. 257, *Levy vs. Lowndes*. S. C. Quebec; Bowen, C. J., Meredith, J.

Held, In Appeal: *Stuart, C. J., Rolland, Panet, J.*, That the timber above mentioned having been destroyed by *vis major*, without fault of the vendor, and which could not be replaced, that the action for restitution of moneys paid in advance would lie, but not for damages for non-execution of the contract, and the judgment of the S. C. Quebec, confirmed as to the restitution, but reversed as to the damages. 2 *L. C. Rep.*, p. 457, *Russell et al. (repreneur l'instance for) Lowndes App., Levy, Resp.*

In an action by a vendor of timber against the assignees of insolvent vendees in which the timber was seized by right of stoppage *in transitu* as if there had been no delivery:

Held, That the rule applicable to cases of constructive delivery and possession was not applicable, there being an actual delivery to and possession by the vendees, although the timber had not been culled or counted. Action dismissed. 1 *L. C. Rep.*, p. 21, *Levy vs. Turnbull et al.* S. C. Quebec; Bowen, Duval, Meredith, J.

Held, 1. That although an agreement only provides for the delivery of a raft to the advancers in their booms in the River St. Charles, at Quebec, an actual delivery



to them before the arrival of the raft in consequence of the *laches* of the contractor establishes possession.

2. That a seizure in the autumn of the raft by raftsmen for their wages, they being discharged in the spring, cannot be maintained after such actual delivery. 12 L. C. Rep., p. 149, *Ruel vs. Henry*, and *Anderson et al.*, Inter. C. C. Quebec; Taschereau, J.

Held, That the word "summer" used in a contract to indicate the period within which timber should be delivered in Quebec, means, under the circumstances disclosed in this case, the season of navigation, which begins in the commencement of May and terminates about the end of November, and is not limited to the three summer months of the calendar. Judgment below reversed. 7 L. C. Rep., p. 230, *Thibaudière et al.*, App., vs. *Lee*, Res. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That if a purchaser receives goods which are not in conformity to his order, by directing them to be sold for the benefit of the shippers, he makes them his own, and renders himself liable for their intrinsic value. *Anderson vs. Ross*. K. B. Q. 1820.

Held, That if goods are sold without term of payment, and a bill is taken payable at a future day which is dishonoured, the purchaser may be immediately sued on his original contract without regard to the time the bill has to run. *Preston vs. Johnston*. K. B. Q. 1813.

See ACTION REVENDIGATION.

#### IN TRANSITU.

Held, That where the evidence shows that a delivery of goods has been knowingly made and perfected, there can be no stoppage *in transitu*. *Horner vs. Johnston*. K. B. Q. 1812.

#### LIEN.

Held, 1. That the vendor of a horse with term of payment has a privilege upon the proceeds of the sale *en justice* of the animal, in the hands of the purchaser, by a third party.

2. That no novation was created by the vendor's having at the time of the sale taken an obligation with *hypothèque* for the price of the horse. 12 L. C. Rep., p. 142, *Douglas vs. Parent*, and *Larue*, Opp. C. C. Quebec; Taschereau, J.

#### LOST GOODS.

Held, That the purchaser of a lost horse, *bona fide* in the usual course of trade, in a hotel yard in Montreal where horse dealers are in the habit of congregating and selling daily a large number of horses, acquires no right of property therein as against the owner who lost it; and although the purchaser is a resident of the United States, and in possession there of the horse claimed, he may nevertheless be sued in Montreal, on being personally served with process there, and will be condemned to pay such value. 6 Jurist, p. 294, *Hughes vs. Reid*. C. C. Montreal; Smith, J.

See ACTION REVENDIGATION.

## MACHINE.

Held, 1. That in this case, the privilege of an unpaid vendor of a paper machine sold, subsisted while it remained unchanged in form and in the purchaser's possession, until payment of the price.

2. That it maintained its mobiliary character whilst it was susceptible of removal without injury to itself, or to the mill in which it was put up.

3. That its mere placement in the mill did not make it an *immeuble par destination* or change its original form or character.

4. That the purchaser held it precariously and only as tenant until payment of the price. 7 L. C. Rep., p. 374, *Union Building Society vs. Russell*, and *Goddard et al.*, Opp. S. C. Quebec; Bowen, C. J., Morin, Badgley, J.

## ORDER FOR GOODS.

Held, That an action for goods sold and delivered cannot be maintained if a note, payable to order, has been taken for their amount, and is not produced. *Casgrain vs. Fay*. K. B. Q. 1814.

## PERFORMANCE OF CONTRACT.

In an action upon a contract for the sale and delivery of five tons of good merchantable hops, the plaintiffs averred that they were ready and willing, and had offered, to deliver five tons of hops; it appeared that the plaintiffs sent to the defendant a quantity of hops greatly exceeding the weight of five tons, and that the defendant refused to accept them upon the ground that they were not good merchantable hops. Nothing had been done by the plaintiffs to distinguish the quantity intended to be tendered from the rest of the hops.

The court below dismissed the action, treating it as brought to enforce the performance of the contract, no offer being made in the declaration to deliver the hops.

The Court of Appeals reversed this judgment, condemning the defendant to pay the contract price of the hops within fifteen days from the service of the judgment upon him.

Held, In the Privy Council, 1. That neither judgment could be sustained; that of the Inferior Court, because the action was merely in damages for breach of the contract, in refusing to accept the hops, and not an action brought for the performance of the contract; and the judgment of the Court of Appeals because:

1. The judgment was not adapted to the form of action chosen by the plaintiffs.

2. Because, by the contract, delivery was to precede payment; by the judgment, payment was to be made not merely before, but without delivery.

3. That if in a sale, by weight or measure, some further acts remain to be done to regulate the identity and individuality of the thing to be delivered, it is not in a state fit for immediate delivery, and that therefore to constitute a valid offer of delivery it was necessary to separate and distinguish the hops sold from the larger quantity in the possession of the plaintiffs. 12 L. C. Rep., p. 161,

*Boswell, App. Kilborn, et al., Resp.* In the Privy Council: Lord Chelmsford *et al.* See same case, 6 Jurist, p. 108.

## TENDER BACK.

Held, That no damages can be recovered by a vendee, by reason of the bad quality of the thing purchased, if he neglects to tender it back so soon as he has discovered the defect. 1 Jurist, p. 87, *Clement vs. Puge et al.* S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, That a *vice redhibitoire* must be of a character not to be at once perceptible, and that it was for the jury to say whether the purchaser had examined the oil sold within a reasonable time (seven days). Judgment that the defendant take back the oil and pay back the price. 1 Rev. de Jur., p. 92, *Footner vs. Heath.* Q. B. Montreal; Day, J., and special jury, 1845.

Held, That as soon as the purchaser ascertains that the goods delivered do not answer the order given, he must return them to the vendor, or give him notice to take them back, else he cannot afterwards rest his defence upon the ground that the goods were quite unfit for the purpose for which he intended to use them. 3 Rev. de Jur., p. 193, *Wurtele et al. vs. Boswell.* Q. B. Q. 1847.

## TRADITION.

Held, That if there be no evidence of tradition upon a contract for the sale of goods, and if there be no tradition, and the articles intended to be transferred are seized in the possession of the vendor, the purchaser cannot maintain an opposition *à fin de distraire.* *Hunt vs. Perrault et al.* K. B. Q. 1821.

Held, 1. That the sale of movables (furniture) by notarial deed which declared that *tradition* of the whole took place by delivery of a chair and a table, does not vest the property in the vendee, and that a creditor of the vendor, posterior to the sale, may seize and sell the same effects upon the vendee.

2. That such sale is null on account of fraud. 3 L. C. Rep., p. 446, *Bonacina, App., Secl, Resp.* In Appeal: Panet, Aylwin, J.; Rolland, J., dissenting as to the nullity of the sale.

Where A bought of B goods which were weighed, measured and paid for, and it was agreed that the goods should remain in B's store till A should send a carter for them, and B's creditors seized them on execution before A sent for them:

Held, That the creditors had rightly seized them, as there had not been a delivery to A, so as to pass the property to him. 9 L. C. Rep., p. 193, *Nesbit, App., Bank of Montreal, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

Held, 1. That where goods are bought at a judicial sale, no delivery is necessary to pass the property.

2. That *tacite reconduction* as to movables arises only where the lessor is a dealer and makes a business of letting movables.

3. That parties remaining in possession after the expiry of lease, will be deemed to hold as owners. *Bell vs. Rigney et al., and Milne, Opp.* S. C. Montreal; Smith, J.

Held, That to entitle opposants, who claimed as proprietors by purchase, to withdraw from sale and execution, machinery in a woollen factory, seized as belonging to defendants, an actual *deplacement* and delivery must be proved. 4 Jurist, p. 301, *Ash et al. vs. Willett*, and *Seymour et al.*, Opp. S. C. Montreal; Berthelot, J.

## QUALITY OF.

Held, That the bad quality of goods purchased and delivered, is not a defence to an action for the price, if the defendant, when they were purchased, had it in his power to examine them. *Marquis vs. Poulin*. K. B. Q. 1813.

## WARRANTY.

Where A, by a written memorandum, sold B a cargo of coals, and verbally warranted them to be of the best quality, and delivered and was paid for them, and four days afterwards sold another cargo by a similar written memorandum, and verbally warranted them to be of the best quality and the same as the former cargo, but delivered coal of an inferior quality :

Held, 1. In an action for the price of the coal, that the second memorandum, being drawn in the same terms as the first, was not an implied warranty that the coals would be of the same quality as those first delivered.

2. That parol testimony could not be admitted to prove a verbal warranty, as it would tend to control the terms of the written memorandum, and that B must pay the full contract price. 9 L. C. Rep., p. 406, *Fry, App.*, vs. *The Richelieu Company*. In Appeal: Aylwin, Duval, Meredith, Mondelet, J.

## WOOD BY INDIANS.

Held, 1. That Indians have not, by law, any right or title by virtue whereof they can sell wood growing upon their lands, set apart for the use of their tribe.

2. That such wood is held in trust by the Commissioner of Indian Lands for Lower Canada. 3 Jurist, p. 313, *The Commissioner of Indian Lands for L. C. vs. Payant dit St. Onge*. S. C. Montreal; Mondelet, J.

SALE OF GOODS. See ACTION REVENDICATION by Vendor.

“ “ “ ASSUMPSIT.

“ “ Constructive Delivery. See BANKRUPTCY, Assignees.

“ “ by Sample. See SALE OF GOODS, ante.

## SALE OF IMMOVABLES.

## DEFENSE D'ALIENER.

Held, 1. That the sale of an immovable charged with a *rente viagère* is susceptible of the same *modalités* as an onerous donation.

2. That in such a sale, a prohibition from selling may be validly imposed on the purchaser with a clause stipulating the resolution of the contract in case of contravention.

3. That in this case, the retrocession and resiliation of the sale were validly

made, and the *hypothèque* consented to by the original purchaser, contrary to the prohibition in his deed, cannot avail as against the original vendor, and the hypothecary action of the plaintiff, founded on such *hypothèque*, will be dismissed. 5 Jurist, p. 306, *Lynch*, App., *Hainault*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, J.; Mondelet, J., dissenting.

See DONATION, Prohibition from selling, Registration.

#### DEFAULT DE CONTENANCE.

Held, That a purchaser who has obtained a judgment against his vendor reducing the *prix de vente pour défaut de contenance*, may bring an action *en déclaration de jugement commun* against a *cessionnaire* of the balance of the price, whose transfer has been signified. 7 L. C. Rep., p. 385, *Ryan*, App., *Idler*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J. See 1 Jurist, p. 9.

Same case, 1 Jurist, p. 257.

Held, That the purchaser of real estate may claim from the *cessionnaire* of the *prix de vente* a reduction in proportion to the deficiency, and this notwithstanding that he had accepted the transfer. 2 Jurist, p. 140, *Masson et al. vs. Corbeille*. S. C. Montreal; Smith, J.

See DECRET défaut de contenance.

#### FAILURE TO DELIVER—DAMAGES.

Held, That where five lots of land in different ranges of a township were sold in one deed, for one price, and the purchaser obtained possession of only four of the lots, the purchaser sued for a balance of the price, cannot obtain a deduction proportioned to the *value* of the lot of which he was not put in possession, but only a deduction of one-fifth of the purchase money, irrespective of the value of the lots. Incidental demand dismissed. 6 Jurist, p. 188, *Lussier vs. McVeigh*. S. C. Montreal; Smith, J. Appealed.

Land ordered to be paid for, deducting *cens et rentes due*. Cons. Sup., No. 44.

#### INCUMBRANCES.

Held, That an action cannot be maintained by a vendor against a vendee, to recover an instalment of the *prix de vente*, the deed containing a stipulation that the vendor should furnish to the purchaser, before payment of the instalment, a certificate from the registrar of the county within which the land was situated, that there were no incumbrances on the land, and there being no proof that such certificate was furnished, notwithstanding proof adduced with the plaintiff's answers to the pleas, of a notarial receipt not registered, dated previous to the sale, discharging the *baillieur de fonds*'s claim, alleged by the defendant's pleas to exist upon the land. 5 L. C. Rep., p. 291, *Bunker vs. Carter*, and *Richardson*, *reprent. l'instance*. S. C. Montreal; Day, Smith, Mondelet, J.

Sale of immovables set aside for non-payment of price. See REGISTRATION, *Baillieur de fonds*.

Held, In an action for the price of an immovable, that a plea setting forth the existence of a mortgage, and the filing of an opposition to a petition *en ratifica-*

*tion de titre*, is a good plea. 7 L. C. Rep., p. 424, *O'Sullivan vs. Murphy*. S. C. Quebec; Meredith, Morin, Badgley, J.

## PROMISE OF SALE.

An action was brought for two instalments of purchase money due under a deed purporting to be a promise of sale from plaintiff to defendant, which contained clauses to the following effect :

" To have, use and enjoy the aforesaid bargained premises, with their rights \* \* \* to the said purchaser, his heirs and assigns, as his and their own proper freehold for ever, and to enter upon and take possession \* \* \* \* from the present day.

" The present promise of sale is made \* \* \* in consideration of £60, payable to the said vendor, £30 in one year, the other £30 in two years.

" And the said W. K. doth hereby promise, bind, and oblige himself \* \* \* to pass a deed of sale in favor of the said purchaser when the first £30 will be paid.

" And in consideration of the aforesaid promise of sale, the said vendor doth hereby transfer and set over, to the said purchaser, all right of property which the said vendor can have in or upon the aforesaid lot of land." The case being inscribed *ex parte* was dismissed.

Held, In the Queen's Bench in Appeal: Stuart, C. J., Rolland, Panet, Aylwin, J., That the instrument declared upon, notwithstanding the use of contradictory terms and stipulations therein, was, in character and effect, a deed of sale, and judgment was rendered for the £60 sued for.

Attachment before judgment for price due on promise of sale. See MOTION TO QUASH.

As to the effect of a verbal sale, or promise of sale of immovables. See 3 Rev. de Jur., p. 261, *Gaulen et ux.*, App., *Pichette et al.*, Resp. In Appeal:

Held, That a verbal promise of sale of real estate is binding and valid. 3 Jurist, p. 176, *Pinsonnault*, App., *Dubé*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, J.

## TROUBLE.

Held, That to a suit for the price of a land sold, the defendant may plead that " he is troubled or molested," but that " he may be troubled " is not a good plea. *Morin vs. Arcan*. K. B. Q. 1819.

## VENDOR'S RIGHTS.

Held, 1. That where the purchaser stipulates that he shall obtain a ratification of title before making payments, the vendor thereby becomes a party to the proceedings for ratification, and that consequently the purchaser is not bound to call in the vendor *en garantie* to give him an opportunity of contesting claims filed.

2. That long pending contestations arising out of over-bids and the delays arising from contestations of oppositions, do not discharge the purchaser from

payment of interest, which interest becomes payable after the lapse of the four months' notice, which interest the purchaser is bound to pay up to the day when the moneys were paid into court, although the contestations had not then been disposed of.

3. That the omission of some of the formalities required by the 9th Geo. 4, c. 20, to be permitted to overbid, does not entail the nullity of the proceedings. 5 L. C. Rep., p. 390, *Ruston vs. Blanchard*. S. C. Quebec; Morin, Badgley, J.

#### VENDOR'S RIGHTS—RESILIATION.

In an action by the vendor of a lot of land against the vendee and a third party to whom the land had afterwards been sold, praying for the resiliation of both deeds of sale by reason of the non-payment of the balance of the purchase money due under the first deed:

Held, That the action could not be maintained, inasmuch as there was no offer by the plaintiff to reimburse to the second purchaser certain sums paid by him on account of a debt indicated in both deeds as due to the seignior, and also a certain sum paid on account of a joint and several obligation of the vendee and the plaintiff, for the payment of which the land in question was mortgaged by the first purchaser. 12 L. C. Rep., p. 397, *Surprenant vs. Surprenant et al.* S. C. Montreal; Smith, J.

Held, 1. That in the case submitted, no sufficient cause was shown for the resiliation of a deed of sale.

2. That the exclusion of the testimony of a witness, on the ground that he violated the order of the court, made at the commencement of the *enquête*, ordering the witness out of court during the *enquête*, is illegal. 6 Jurist, p. 285, *Irvin, App., Maloney, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That the action *en resolution de vente* by a vendor of real estate for non-payment of the price is not affected by the non-registration of the deed, or by the vendor having been an opposant to an application for ratification of title on a sale made by his immediate vendee. 12 L. C. Rep., p. 79, *David vs. Girard et al.* S. C. Montreal; Berthelot, J.

Held, That in an action to resiliate a verbal promise of sale on an immovable admitted by defendant, but on terms different (as to price) from those set up by plaintiff, the latter, who has adduced no evidence, has a right to judgment conformably to the conditions and the admission in defendant's articulation of facts. Judgment below dismissing action (Bruneau, J.,) reversed. 12 L. C. Rep., p. 229, *Lacroix, App., Lambert dit Finon, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, J., Mondelet, J., dissenting.

Held, That a vendor who files an opposition to a petition for ratification of title does not thereby lose his right to obtain a resiliation of the deed of sale for non-payment of the purchase money. 6 Jurist, p. 122, *David vs. Girard et ux.* S. C. Montreal; Berthelot, J.

Judgment declaring null a deed of sale for want of ratification as agreed on. Prévosté, No. 69.

See REGISTRATION, *Baillieur de fonds*.



Held, 1. That a promise of sale followed by possession is equivalent to an absolute sale, and an hypothecary claim created against the vendor subsequently to such promise of sale, does not affect the property so sold.

2. That where such purchaser sues a third party to whom he has re-sold a portion of the property, as well in his capacity of proprietor as in his capacity of attorney for his vendor, judgment for the price of the portion of land so re-sold will be rendered in his favor, and his selling as such attorney cannot affect his right to recover as proprietor. 9 L. C. Rep., p. 315, *Gosselin*, App., *The Grand Trunk Company*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, J.

Held, That it is not necessary in an action for the price of an immovable sold, to prove by parol evidence the identity of the property, to sustain a plea of payment, provided the identity sufficiently appears by the *actes* of sale and receipts. 1 L. C. Rep., 106, *Moreau vs. Richer*. S. C. Montreal; Day, Smith, J.; Mondelet, J., dissenting.

As to the necessity of tradition or seizin. See ACTION PETITORY.

Held, That the concession by a seignior of a lot of land at a fixed rate per arpent, cannot be extended beyond the precise quantity mentioned, (3 arpents by 20,) notwithstanding the description thereof by metes and bounds, and is not to be considered as a concession of a *corps certain*. 3 L. C. Rep., p. 458, *Sanche et al.*, App., *Longpré*, Resp. In Appeal: Stuart, C. J., Panet, Aylwin, J.; Rolland, J., dissenting.

Prohibition from selling land given. See DONATION, Prohibition.

Held, In an action for a portion of the price of real estate sold *franc et quitte*, the plaintiff will obtain judgment if there will remain in the hands of the purchaser a sufficient sum, after payment of the part sued for, to indemnify the purchaser against a *hypothèque* proved to exist on the real estate. 4 Jurist, p. 310, *Paquet vs. Miclette*. S. C. Montreal; Badgley, J.

Held, 1. In an action for a *prix de vente* of real estate the purchaser in possession under a sale *franc et quitte*, may retain possession, and no execution can issue until all mortgages are removed by the vendor or security given, according to the Consolidated Statutes of Lower Canada, c. 36, sect. 31.

2. That in such case the plaintiff will be condemned to the costs of the action. 6 Jurist, p. 247, *Bruneau vs. Robert*. S. C. Montreal; Smith, J.

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## SCHOOLS.

### ACTION TO ACCOUNT.

Held, 1. That no action to account lies against a secretary-treasurer of a school municipality, who has already rendered an account and been discharged.

2. The action should have been brought *en réformation de compte*. 1 Jurist, p. 189, *School Commissioners of Chambly vs. Hickey*. S. C. Montreal; Day, Smith, Chabot, J.

Held, 1. That school commissioners are bound to respect the resolutions of their predecessors in office.

2. That an action against the secretary-treasurer to account, where a discharge has previously been given him, cannot be brought without alleging fraud or error.

3. That by the 12th Vict., c. 50, sect. 12, the superintendent of education has a right to settle disputes of this nature, and that his decision has the force of an award of arbitrators. 4 Jurist, p. 123, *School Commissioners of Vaudreuil vs. Bastien*. S. C. Montreal; Smith, J.

## ASSESSMENTS.

Held, That a seigniorial *domaine* cultivated as a meadow is assessible under the 9th Vict., c. 27, for the maintenance of elementary schools. 3 Rev. de Jur., p. 360, *Caldwell Petr. vs. School Commissioners of St. Patrice*. Q. B. Q. 1847.

Held, That a defendant who complains of the amount imposed on his property for school assessments must do so within the thirty days during which the roll of assessment lies with the secretary-treasurer, and cannot urge the excess as a defence to an action. *School Commissioners of Acton vs. Grand Trunk Company*. C. C. Montreal; McCord, J. Cond. Rep., p. 77.

Held, That in the case of sale of immovables, under the municipal act for 1855, for taxes due to a school municipality by the vendor of a party in possession as proprietor, such proprietor disturbed in his possession by the *adjudicataire*, may bring an action *en complainte* against him, without, in the first place, obtaining the rescission of the sale by adjudication.

Query? Whether the same rule would obtain since the passing of the 8th sub-section of the Consolidated Statutes of Lower Canada, c. 24. 12 L. C. Rep., p. 488, *Corporation of the County of Yamaska, App., Rheume*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J. Judgment confirmed.

Judgment ordering the Seminary of Quebec to keep plaintiff's son in the seminary until he finished his studies. *Prévosté*, No. 7.

Judgment ordering the execution of the *actes de fondation* of the Seminary of Quebec. Cons. Sup., No. 83.

## POWERS OF SCHOOL CORPORATIONS.

Held, That under the 9th Vict., c. 27, sect. 21, sub-sect. 3, school commissioners can only assess the municipality to the extent of £150 for building a model school house, and that an obligation binding them to a contractor for a greater sum is inoperative and void, and contractor's action will be dismissed. 11 L. C. Rep., p. 46, *Adams, App., School Commissioners of Barnston*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Same Case, 4 Jurist, p. 363.

Held, That the court will inquire into the sufficiency of the causes for the removal of a schoolmaster under the provisions of the 9th Vict., c. 27, sect. 21, sub-sect. 4, and if found insufficient will grant damages. 11 L. C. Rep., p. 486, *Gaudry vs. Marcotte et al.* S. C. Quebec; Stuart, J.

So also in *Brown vs. School Commissioners of Laprairie*. 1 Jurist, p. 40. S. C. Montreal; Day, Smith, Badgley, J.

## PRESCRIPTION.

Held, That the action of a teacher of a public school against a defendant for his son's board (*pension*) is prescribed at the end of one year. 1 Rev. de Jur., p. 112, *College St. Anne vs. Taschereau*. Q. B. Q. 1845.

## SALARY OF TEACHERS.

Held, That the secretary-treasurer cannot recover from the school commissioners out of the school funds, any salary or payment for *extra services* by him rendered to such commissioners. 4 L. C. Rep., p. 394, *Pelletier vs. School Commissioners of St. Philomene*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That the salary of a school teacher cannot be seized. *Roy vs. Codère*, and *School Commissioners of St. Ours*, and *J. B. Meilleur, T. S.* K. B. Montreal; Rolland, C. J., Day, Smith, J. Cond. Rep., p. 59.

## SURRENDER TO.

Held, 1. That a certain surrender by "The Royal Institution for the Advancement of Learning" to the school municipality of the town of Wm. Henry (or Sorel) of a lot of land within the territorial limits of the *parish St. Pierre de Sorel* was null and void, and that a new surrender must be made in favor of the parish within whose limits the lot is situated. 11 L. C. Rep., p. 68, *School Commissioners of St. Pierre de Sorel vs. School Commissioners of Wm. Henry et al.* S. C. Montreal; Smith, J.

## SECRETARY-TREASURER.

SERVICE UPON. See CORPORATION, Service upon.  
" " " Action by.

## SEDUCTION.

See DAMAGES, Seduction.

## SEIGNIORIAL RIGHTS.

## BANALITÉ.

Held, That the right of banalité carried with it that of preventing the erection of any grist mill, and that of causing such mill to be demolished, notwithstanding it was intended to grind the produce of parties not subject to banalité. 1 L. C. Rep., p. 31, *Larue et al. vs. Dubord*. S. C. Quebec; Duval, Meredith, J.

Held, 1. That the right of banalité exists throughout seigniorial Canada independently of any conventional title.

2. That the right of preventing the erection of other mills within the limits of

a seignior, and of causing them to be demolished when erected, is a component and essential part of that right.

3. That the right of *banalité* extends as well to mills driven by steam power as to other mills, and that grain ground for manufacturing and commercial purposes falls within the prohibition equally with that ground for the *cessitaires*.

4. That the seignior who neglects to protest against the erection of mills within his seignior does not thereby lose his right of *banalité*.

5. That the right of *banalité* is not extinguished by a sheriff's sale. 3 L. C. Rep., p. 3, *Monk vs. Morris*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That the lessee of a *banal* mill may recover from a *cessitaire* the toll (*montures*) upon grain ground by the *cessitaire* at a mill without the limits of the seignior.

2. That it is sufficient to prove that the *cessitaire* has had a crop of grain and has carried grain to be ground elsewhere, without establishing that the grain so ground is grain gathered upon his land.

3. That the *cessitaire* residing within the seignior is presumed to be subject to *banalité*, unless he establishes the contrary. 1 L. C. Rep., p. 381, *Lognon vs. Audy*. C. C. Quebec; Power, J.

An action was brought by a seignior, setting up his rights of *banalité*, and the concession to one of the defendants of a lot in his seignior, with a clause in the deed, that no mill of any kind should be erected, that the defendants, copartners, had built a new saw mill on a non-navigable river, bordering on the conceded lot, with a dam across the river, and thereby thrown the water back on a saw mill and grist mill of the plaintiff, used for more than thirty years, thereby impeding the working of the mills, and praying for the demolition of the dam and for damages, and that it be declared the defendants had no right to erect any mills.

Held, That by the 20th Vict., c. 104, the plaintiff was precluded from his conclusions *en demolition*; that he had no right to the exclusive use of the water, but had a right to damages, and an *expertise* was ordered to determine the amount of damages, if any. 11 L. C. Rep., p. 76, *Pungman vs. Bricot dit Lamarche*. S. C. Montreal; Smith, J.

#### BANC D'HONNEUR.

Held, That the *banc d'honneur* granted to seigniors, was only granted to them as seigneurs *haut-justiciers*, that by the effect of the conquest of Canada, their jurisdiction as *haut justiciers* having ceased, they are no longer entitled to such *banc d'honneur*. 1 L. C. Rep., p. 175, *Larue et al., vs. The Curé et Marguilliers of St. Paschal*. S. C. Quebec; Bowen, C. J., Meredith, J.

Held, That although the seignior is no longer entitled to the free use of a pew in church as *haut-justicier*, he may claim it as patron, if he has granted the land to build the church, and if he has a title to that effect and possession. 4 L. C. Rep., p. 321, *The Curé et Marguilliers of Cap St. Ignace vs. Beaubien et al.* S. C. Quebec: Duval, Meredith, J.

Held, That the eldest son, on the re-marriage of his father's widow, is entitled to his pew in the parish church. *Borne vs. Wilson*. K. B. Q. 1819.

See CHURCH.

## CENSITAIRE.

Held, That a *censitaire* cannot demand the reduction of a rent stipulated in the deed of concession at *four peuce* per arpent, nor the rescision in part of such a deed. 3 L. C. Rep., p. 475, *Langlois vs. Trudel*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

## INDEMNITÉ.

None due by a joint stock company. See JOINT STOCK COMPANY.

As to rights of lessee in the indemnity for lands expropriated by a railway company. See LANDLORD AND TENANT, *bail emphytéotique*.

Held, 1. That the mortmain restrictions upon the acquisition of real estate by corporations in mortmain, originated in the property so acquired, thereby becoming inalienable, not by the existence of the corporation being perpetual or continuous.

2. That these restrictions applied to corporations aggregate, the clergy in general, religious bodies, fraternities, municipal guilds, and others of the same nature, which form the class of mortmain corporations, *gens de main-morte*.

3. That modern civil corporations established for commercial and trading purposes, as joint stock or incorporated banking, manufacturing, railway companies, &c., cannot be included in such class, nor do mortmain restrictions apply to them.

4. That two or more such civil corporations may unite to form one incorporated company, without such union being, in itself, a sale or equivalent thereto, and without subjecting the company so formed to liability for payment of seigniorial dues.

5. That the deed of agreement set forth in plaintiff's declaration was, in law, only in the nature of preparatory articles of union, not in itself a sale, or its equivalent, and not *translatif de propriété*, and in law did not, and could not, by itself, establish the resulting company as a corporation.

6. That the defendant is not, in law, a mortmain corporation, nor subject to mortmain restrictions, and does not, in law, hold the lands in question in mortmain, as alleged in plaintiff's declaration.

7. That the defendant, the existing Grand Trunk Railway Company, was incorporated by the 18th Vict., c. 33, when the seigniorial act of 1854 was in existence, by which all seigniorial dues were abolished, and which relieved the defendant's acquisition from all seigniorial dues.

8. That the sums of money claimed in this cause are not for arrears of seigniorial dues accrued to the plaintiff previous to the seigniorial act of 1854, the recovery whereof is provided for by that act.

9. That if the defendants were *gens de main-morte*, and had acquired the land in question previous to the seigniorial act of 1854, the declaratory provision of that act applies retrospectively to such acquisition, and relieves the defendant from liability to the seigniorial *indemnité* claimed by the plaintiff from such acquisition made directly from another mortmainor.

10. That the undertaking of the Grand Trunk Railway of Canada is a work of public utility, including therein the realty acquired and in question in this case, and is therefore not in law liable to the *lods et ventes* claimed by the plain-

tiff. 8 L. C. Rep., p. 3, *Kierskowski vs. The Grand Trunk Railway Company*. S. C. Montreal; Mondelet, Badgley, J.; Smith, J., dissenting.

Same case, 4 Jurist, p. 86.

Held in Appeal, 1. That the Grand Trunk Company does not hold in mortmain.

2. That the act of union or amalgamation referred to, has had the effect of transferring the right of property of the different companies united into the new company, and was an absolute mutation, having the effect of an *exchange* so far as respects the shares assigned to the shareholders, and being a *sale* so far as respects the payment of £75,000 to the St. Lawrence and Atlantic Railway Company.

3. That the seignior is entitled to claim *lods et ventes* upon that portion of the £75,000 which, upon appraisement, may be found to represent the value of the lands within the seignior of the plaintiff, and assigned to the new company, defendants.

4. That in appraising such lands the value of the buildings, fences, rails, and other improvements of a permanent character must be taken into account. 10 L. C. Rep., p. 47, *Kierskowski*, App., *The Grand Trunk Railway Company*, Resp. Aylwin, Duval, A. Lafontaine, J.; Lafontaine, C. J., Meredith, J., dissenting.

For the opinion of Mr. Justice Duval see 10 L. C. Rep., p. 481.

#### LODS ET VENTES.

Held, That a *dation en paiement* gives rise to *lods et ventes*. 1 L. C. Rep., p. 50, *Gugy vs. Chouinard*. In Appeal: Stuart, Rolland, Panet, Aylwin, J.

Held, That *lods et ventes* are due upon a deed in the form of a donation *pure et simple* (of an immovable) which was held to be simulated and made to defendant in consideration of his resignation of his office of Clerk of Appeals, with a view to the appointment of the donor in his place. 1 L. C. Rep., p. 69, *Desbarats vs. Fabrique de Quebec*. In Appeal: Aylwin, Panet, Ross, J.; Rolland, J., dissenting.

Held, That *lods et ventes* are due upon a *donation à rente viagère*, and the value of the *rente* ordered to be ascertained by *experts*. 1 L. C. Rep., p. 84, *Desbarats vs. Fabrique de Quebec*. In Appeal: Rolland, Aylwin, J.; Panet and Ross, J.

Held, That *lods et ventes* are not due on a purchase by the Principal Officers of Her Majesty's Ordinance, of land, it being made for public purposes, *pour l'utilité publique*.

1 L. C. Rep., p. 91, *Grant vs. Principal Officers of Her Majesty's Ordinance*. In Appeal: Stuart, C. J., Panet, Aylwin, J.

*Lods et ventes* from railways. See INDEMNITÉ.

*Lods et ventes* held not to be due on a donation in a marriage contract. *Baby vs. Letellier*. K. B. Q. 1821.

Judgment for, on a sale from father to son. *Prévosté*, No. 93.

Held, 1. That *lods et ventes* are due on the sale of an immovable held under a *bail emphytéotique* when, over and above the annual rent, there are *deniers d'entrée*.



2. That the clause in the lease in question, giving the lessee the right to take away his buildings at the expiration of the lease, did not deprive the seignior of his right to *lods et ventes* on the price of the buildings, which were sold for a separate price. 1 L. C. Rep., p. 295, *Dionne vs. Méthot*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That a seignior cannot claim *lods et ventes* on a sale to defendant who has *délaissé* the property on an hypothecary action; nor can he claim *lods et ventes* at his option on the price of the voluntary sale, or of the judicial sale made upon the curator to the *délaissement*: *Secus* if he had received the *lods et ventes* before the *délaissement*. 3 L. C. Rep., p. 150, *Bellanger vs. Mann*, and *Opps*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That *lods et ventes* are not recoverable from a *femme séparée des biens* on a purchase at sheriff's sale of an immovable acquired during her community with her husband. 3 L. C. Rep., p. 476, *Paton vs. Fournier*. C. C. Quebec; Power, J.

Held, 1. That it is lawful, if there are two different ways of effecting a purchase of lands, to adopt that which is free from, or less productive of, *lods et ventes*, provided the contract be serious, and made in good faith and without deceit.

2. That in this case there was deceit, inasmuch as the exchange was said to have been made without any return (*soulte*), it being proved that a *soulte* of 11,000 francs was stipulated; that the exchange being thus mixed with sale, *lods et ventes* were due on the said *soulte*. 5 L. C. Rep., p. 75, *Rolland vs. Lureau*. In Appeal: Lafontaine, C. J., Aylwin, Caron, J.

Held, That a donation from father to son, with the charge of paying the father a life rent and certain debts of the father, does not give rise to *lods et ventes*. 6 L. C. Rep., p. 86, *Drapeau et al. vs. Campeau*. S. C. Quebec; Bowen, C. J., Morin, Badgley, J.

Held, That such donation will give rise to *lods et ventes* in respect of a sum payable to the donor, but not for the usual charges in a donation. Same case, p. 87.

Held, 1. That no *lods* are due on the resiliation of a donation which had not its perfect execution.

2. That the non-signification of an assignment (of seigniorial dues) does not deprive the assignee of his right to file an opposition à *fin de conserver* for the debt assigned. 7 L. C. Rep., p. 49, *Lamothe et al.*, App., *Fontaine dit Bienvenue et al.*, Resp. In Appeal: Duval, Caron, Badgley, J.; Lafontaine, C. J., dissenting.

Held, That *lods et ventes* are due on a promise of sale accompanied by delivery, the same being equivalent to a sale. 9 L. C. Rep., p. 272, *Seminary of Quebec vs. Maguire*. S. C. Quebec; Stuart, J.

Held, That *lods et ventes* are not due on allegations of fraud in deeds between *consitaires* sustained only by the juxtaposition and contents of the deeds themselves. 1 Jurist, p. 13, *Sisters of General Hospital vs. Primeau*. S. C. Montreal; Day, Smith, Badgley, J.

Held, 1. That double *lods* are not due upon an onerous donation followed by a retrocession; but *lods* are due on the donation only.



2. That the *cessionnaire* of the *lods* may oppose the distribution of the moneys arising from the proceeds of the immovable given, and this without signification of the transport, the opposition being a conservatory act. 1 Jurist, p. 101, *Lamothe*, App., *Talon dit Lesperance*, Resp. In Appeal: Duval, Caron, Badgley, J.; Lafontaine, C. J., dissenting.

Where a proprietor of soccage lands and of lands *en censive*, sold the soccage lands to the defendant, and immediately exchanged the lands in free and common soccage for his lands *en censive*:

Held, That these deeds will be presumed to be simulated and to cover a fraud on the seignior. 1 Jurist, p. 200, *Sisters of Charity General Hospital*, App., *Primeau*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That *lods et ventes* are due on a deed of sale annullable, by reason of a nullité relative. 4 Jurist, p. 290, *Seminary of Quebec vs. Labelle*. S. C. Montreal; Monk, J.

Held, That *lods et ventes* may be fixed either by the value of the property sold, or by an estimation of the probable duration of the *rentier's* life, in addition to the *lods* on the principal sum of the purchase money. 1 Rev. de Jur., p. 184, *Cuthbert vs. McInstry*. Q. B. Montreal, 1845.

Are *lods et ventes* due on a *bail emphyteotique à longues années*? 2 Rev. de Jur., p. 304, *De LaNaudière*, App., *Jobin*, Resp. In Appeal, 1837.

Held, In an action for *lods et ventes* that proof of simulation of deeds may be presumed from the deeds themselves, where there is an evident object to injure third parties, even although no one of the deeds taken separately discloses the simulation. *Ramsay vs. Guilmette*. S. C. Montreal; Cond. Rep., p. 24.

#### RETRAIT CONVENTIONNEL.

Abolition of by 18th Viet., c. 103, held not retroactive.

See OPPOSITION à fin de charge.

Held, That the *retrait conventionnel* is not *de droit*. It is a matter of convention, or must be stipulated in the original contract of concession, otherwise no action *en retrait* can be maintained. *Desprès vs. Fortin*. K. B. Q. 1811.

#### RETRAIT FÉODALE.

Held, 1. That the reserve of the right of *retrait féodal* in a concession does not render such right *conventionnel*, but leaves it its character of *retrait legal* according to the *Coutume*.

2. That an action *en retrait féodal* brought before the passing of the seigniorial act of 1854, subsists, notwithstanding the abolition of *retrait* by that statute, which has not a retroactive effect. 12 L. C. Rep., p. 294. In Appeal: Lafontaine, C. J., Duval, Mondelet, Bruneau, J.

Same case, 6 Jurist, p. 259.

*Retrait lignager* dismissed for omission in *offres* of the words '*loyaux couts*'. Cons. Sup., No. 63.

#### RIVERS.

Held, 1. That a seignior, by his grant from the Crown, acquires a right of property in the soil over which a river not navigable flows, but in the running

water he has only a right of servitude while it passes through, or before, the land he retains in his possession, which does not authorize him to divert the stream, or use the water, to the prejudice of other proprietors above or below him.

2. An action by a seignior against his co-seignior for improper use of the common estate, can be maintained. Stuart's Rep., p. 575, *St. Louis et al.*, App., *St. Louis et al.*, Resp. In Appeal, 1834.

See WATER.

## SALE AND CONCESSION.

Held, 1. That an exception which only answers a portion of the declaration is bad, and will be dismissed on motion.

2. That *erreur de droit* must be pleaded by exception, and not by a *defense en droit*.

3. That there is nothing in the old law of France nor in the law of Lower Canada, which prohibits seigniors from conceding lands in their seigniories subject to *rentes*, and by the same deed stipulating a *prix de vente* for the same land; and a *censitaire* or purchaser cannot apply to the court to set aside such deed for *erreur de droit*. 4 L. C. Rep., p. 404, *Boston vs. L'Eriquer dit Laplante*. S. C. Montreal; Smith, Vanfelson, Mondelet, J.

Held, 1. That the *arrêt* of the King of France, of the 6th July, 1711, applies only to cases where the seignior has refused to grant his unconceded lands.

2. That the *arrêt* of 17th March, 1732, merely enjoins the clearing of forest lands, interdicting the sale of such lands, but that the two *arrêts* afford no remedy to a *censitaire* who complains that the rate of *cens et rentes* is too high, there being no law to limit such *cens et rentes*.

3. That a deed of concession, imposing one *sol* of *cens et rentes*, and seven *sols* of *rente constituée* is not a deed of sale, and is consequently not void or voidable, and that in the case submitted, the court has no power to reduce the rate of *cens et rentes*. 1 L. C. Rep., p. 36, *Langlois vs. Martel*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

See Cond. Rep., p. 93. See Seigniorial Court Judgment *post*.

## SEIGNIORIAL COMMISSIONERS.

Held, That moneys paid into a bank by the receiver general, to the credit of the seigniorial commissioners, upon which they can draw *cheques* for the purposes of the commission, payable to the order of the lawful recipient, are not moneys in their hands. 2 Jurist, p. 251, *Ramsay vs. Judah et al.* S. C. Montreal; Badgley, J.

## TITRE NOUVEL.

Held, That in an action *en exhibition de titre*, the defendant, if he be not a *censitaire* of the plaintiff, must plead by exception, and set forth what he is, *e. g.* that he is a lessee, and what he alleges affirmatively, he must prove. *Blanchet vs. Periau*. K. B. Q. 1817.

Held, That by the 73rd and 77th articles of the Custom, to maintain a plea that the title was exhibited before action brought, it is necessary to prove that

the original title was left with the seignior, or that a copy thereof was delivered to him. *Rey vs. Caron*. K. B. Q. 1820.

Is the presence of the seignior and *censitaire* required to pass a *titre nouvel*? 3 Rev. de Jur., p. 244, *Cuthbert*, App., *Tellier*, Resp. In Appeal, 1847.

Held, That reservations of *coup de bois &c.*, contained in a *titre nouvel* between seignior and *censitaire*, are null and void if they have not been made in the original title of concession. 6 L. C. Rep., p. 5, *Trigge et al.*, App., *Geoffroy*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That the action for exhibition *des titres* is abolished by the Provincial Statute 18th Vict., c. 103, sect. 3. 1 Jurist, p. 186, *Dumont et al. vs. Chaurette*. S. C. Montreal; Day, Smith, Chabot, J.

SEIGNIOR bankrupt. See BANKRUPTCY, Certificate.  
See SEIGNIORIAL COURT Judgment of, *post*.

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#### SCIRE FACIAS.

See LETTERS PATENT.

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#### SEAMEN.

See SHIPS AND SHIPPING, Wages.

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#### SEPARATION.

See HUSBAND AND WIFE.

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#### SERMENT DECISOIRE.

See OATH.

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#### SERVANTS.

DESERTION OF. See CERTIORARI.

WAGES. See WAGES.

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#### SERVICE OF PROCESS.

See DOMICILE, Service.

“ CORPORATION, Service upon.

“ WRIT.

“ PLEADING, *exception à la forme*.

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#### SERVITUDE.

#### ACTION NEGATOIRE.

Held, That judgment in an *action negatoire* is in the nature of an injunction in Chancery. *Savard vs. Moisan*. K. B. Q. 1820.

## COUP DE BOIS.

Held, That an action *negatoire* will not lie, although the land on which a *coup de bois* was imposed has been enlarged by acquisition, if the servitude has not thereby been rendered more onerous. 8 L. C. Rep., p. 356, *Blais*, App., *Simon-eau et ux.*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That a reservation of a *coup de bois* is extinguished when it has once been exercised over the whole extent of the land. 1 Jurist, p. 14, *Croteau vs. Quintal*. S. C. Montreal; Day, Smith, Badgley, J.

As to use of water for mill. See WATER AND WATER COURSES.

## DROIT DE VUE.

In an action by a proprietor of a lot of land in the city of Montreal, against adjoining proprietors, to oblige them to close up an opening alleged to be in their gable wall, and as having a *vue droite* upon plaintiff's premises, it appeared that the lower story of defendant's house was at about nine feet from an old division fence between their respective properties, but that the second story, recently built, came up to the division fence with a passage underneath from the street. No opening was found in the second story looking into the plaintiff's lot, but beneath and between it and the top of the fence, was an opening which looked directly upon it:

Held, 1. That the opening was contrary to the 202nd article of the Custom of Paris.

2. That a judge, in a case of this description, will make a *déscente sur les lieux* when requested by the parties. 11 L. C. Rep., p. 74, *Robert vs. Davis et al.* S. C. Montreal; Berthelot, J.

## PASTURAGE.

Held, 1. That the right of pasturing cattle upon a land, created in favor of the owner of an emplacement, is a *servitude réelle*.

2. That a bequest of the emplacement has the effect of transferring the servitude as an accessory, although such servitude is not mentioned in the will.

3. That such servitude being *réelle*, and having been created previous to the registry laws, may subsist, although the deed creating the same be not registered.

3. That the servitude may be divided, and that the emplacement, *heritage dominant*, having been divided, and one-half thereof having become the property of the proprietor of the servitude, the proprietor of the other half of the *heritage servant* is liable to one-half of the burden, and that in this case his half shall be subject to the right of pasture every second year. 7 L. C. Rep., p. 257, *Dorion et al.*, App., *Rivet*, Resp. In Appeal: Lafontaine, C. J.; Aylwin, Duval, Caron, J.

Same case, 1 Jurist, p. 308.

## ROAD.

Held, That the undertaking of a person, in a deed of partition, to suffer a roadway upon his portion of land, and to make and macadamize the same to the extent

of thirty feet in width, is a *servitude et charge réelle*, for the preservation of which the party in whose favor it is stipulated has a right to make an opposition *à fin de charge* on a judicial sale of the property. 5 L. C. Rep., p. 359, *Murray*, App., *McPherson*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Carou, J.

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SHERIFF.

## ACTION BY.

Held, That the sheriff can maintain an action in his own name for the price of movables sold upon *fi. fu.* and delivered to the *adjudicataire*. *Shepherd vs. Pacquet*. K. B. Q. 1813.

## BAIL TO SHERIFF.

As to liability of. See SURETY, *Bail to Sheriff*.

Held, That bail to the sheriff on a *capias ad resp.* are only liable for the amount stated in the bail bond, and not for the full amount of the judgment rendered against the party arrested. 5 L. C. Rep. p. 94, *Joseph vs. Cavillier et al.* S. C. Montreal; Day, Smith, Vanfelson, J.

## JOINT SHERIFF.

Held, That an attachment will lie against two persons appointed by commission from the Crown to the office of sheriff, for the non-payment of moneys levied by one of them, although the other may not have assumed the duties of the office, or acted in any manner under their commission. *Stuart's Rep.*, p. 298, *Black vs. Newton*, and *Budden*, Opp. K. B. Q. 1828.

Held, That a rule on Boston sheriff alone, to pay over moneys received by Boston and Coffin as joint sheriff must be dismissed, although made after Mr. Coffin ceased to be sheriff. 6 L. C. Rep., p. 472, *Lefebvre vs. Meyers*, and *Boston mise en cause*. S. C. Montreal; Smith, Mondelet, J.

## LIABILITY OF.

The sheriff seized, by attachment, a large quantity of timber, and appointed a single guardian to take charge of the whole, in whose absence, during a sudden storm, a portion of the timber, not being moored or otherwise secured, went adrift and was lost:

Held, 1. That the sheriff was guilty of ordinary neglect, and responsible for the loss.

2. That the sheriff might have employed as many persons as were necessary for the security of the timber, and have demanded of the plaintiff, at whose instance the seizure was made, in advance, the sums required for this purpose; and in case of refusal, would have been exonerated from the charge and custody of the timber. *Stuart's Rep.*, p. 75, *McClure vs. Shepherd*. K. B. Q. 1813.

Held, That an action does not lie against a sheriff for seizing property under a writ of attachment, although it be proved there was no ground for the attachment. *McNally vs. Shepherd*. K. B. Q. 1813.

Held, That no action *en garantie* lies against the sheriff or against the defendant on a sale by *decret forcé*. *Frees vs. Martineau*. K. B. Q. 1809.

Held, On motion for attachment against a sheriff for having returned that the purchaser of movables had not paid the amount of his bid, that the sheriff is responsible for the amount of all sales of personal effects, whether he does or does not receive it, for in such cases he ought not to part with any article he sells until he has received the price. *Guay vs. Boily*. K. B. Q. 1818.

Held, That if a surrender by bail is not such that an action lies upon it against the sheriff for an escape, the bail remains liable on the bail bond. *Harvey vs. Dennie et al.* K. B. Q.

Held, That a party whose property has been attached by *saisie revendication*, of which he has obtained *main levée* may proceed against the sheriff for the recovery of the property, or its value, as well by rule of court in the cause, as by action against the sheriff, and also for damages by reason of the non-delivery of the property. 5 L. C. Rep., p. 397, *Irwin, App., Boston et al. Resp.* In Appeal: Lafontaine, C. J., Duval, Caron, J.

Held, 1. That in such an action against the sheriff, the respondents were not entitled to the thirty days' notice of action, under the provincial act 14th and 15th Viet., c. 54, for the protection of magistrates and others acting in the performance of public duties.

2. That the statute has reference only to actions brought for damages, *dommages et intérêts*, simply, and not to actions where damages are claimed for the non-fulfilment of a contract, or of an obligation imposed either by law or by stipulation.

3. That the sheriff, as seizing officer and as *gardien* of effects seized, is subject to the same liability as the *huissier* and *gardien* under the French law, and that the responsibility did not arise from the act of 1836, but existed from the time he was appointed to perform such duties in civil matters. 7 L. C. Rep., p. 433, *Irwin, App., Boston et al., Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Same case, 2 Jurist, p. 171.

Under a writ of *saisie revendication* the sheriff seized movables in the possession of the defendant, which, on the plaintiff's petition, before the return of the writ, were sold by the sheriff, and the proceeds, £208 18s. 5d., returned into court. Part of this sum was paid, by order of the court, to an intervening party, as a privileged creditor of the defendant, and the balance, £84 2s. 7d., remained in the sheriff's hands. The parties, plaintiff and defendant, afterwards entered into a settlement before notaries, by which the plaintiff agreed to withdraw his suit, and all matters in dispute were put an end to. Upon this, judgment was rendered, putting the parties out of court, without costs.

The defendant then brought an action against the sheriff for the £84 2s. 7d., and the sheriff brought into court £9 19s. 11d., which he tendered as the balance after deduction of his costs, as well on the execution of the writ, as on the sale.

Held, 1. That the sheriff had a right to deduct these costs.

2. That the *saisi* could not, under these circumstances, recover more than the sum tendered.

*Scmble*, That the abstract question of the sheriff's *droit de retention*, or lien upon property seized *en revendication*, where the action is dismissed, was not decided upon. 11 L. C. Rep., p. 367, *Quintin dit Dubois*, App., *Boston*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, J.; Mondelet, J., dissenting.

#### LIABILITY OF CLERK OF.

Query, As to the liability of a sheriff's clerk for malfeasance? 3 Rev. de Jur., p. 327, *Perry*, App., *Guy*, Resp. In the Privy Council.

#### PERISHABLE GOODS.

Held, That during a contestation as to the proprietorship of perishable articles, the sheriff may be authorized to sell them. 3 Rev. de Jur., p. 391, *Wurtelc vs. Vreault*. Q. B. Q. 1848.

See EXECUTION.

#### REGISTRAR'S FEES.

Held, 1. That a rule by an opposant against the sheriff, to appear to have the registrar's fees (£131 6s.) for a certificate under the Consolidated Statutes of Lower Canada, c. 26, sect. 36, taxed, and that he bring into court any excess over the amount so taxed, will not be granted.

2. That the registrar is not an officer of the court, liable to have his fees taxed on a simple *requête*. 6 Jurist, p. 107, *Masson vs. Mullins*, and *The Seminary of Montreal*, Opp. S. C. Montreal; Monk, J.

#### RETURN OF.

Held, That the sheriff's return is an *acte authentique*, and cannot be impeached as a false return without an *inscription en faux*, and a case must be made out, by affidavit, before the court will permit an *inscription en faux* to be filed. *Belanger vs. Holmes*. K. B. Q. 1820.

#### SALE BY.

Is illegal and voidable for fraud and want of formalities. 1 L. C. Rep., p. 71, *Lequair vs. Ross et al.* In Appeal: Stuart, Panet, Aylwin, J.

A petition against the sheriff by a defendant, praying that the sheriff be compelled to refund £13 10s. for costs incurred by his having seized the defendant's lands on the 7th Feb., the 9th Feb., and 31st July, under three several writs, was dismissed.

Query, As to the right of sheriff to seize the same land, a second time, under a second writ? 8 L. C. Rep., p. 94, *McFarlane vs. Draper*. S. C. Montreal; Day, Smith, J.; Mondelet, J., dissenting.

Held, That on a sale of immovables the sheriff cannot deduct from the proceeds the cost of the deed of sale and registration in the sheriff's register, such charges being against the purchaser, *uljudicataire*. 1 L. C. Rep., p. 163, *Boisseau vs. Pilot*. S. C. Quebec; Bowen, C. J., Duval, Meredith, J.



Held, That under the 5th clause of the 12th Vict., c. 112, for the erection of court houses and jails, and the order of the Governor in Council of 26th April, 1850, the sheriff is entitled to levy a tax of one per cent. for a court house tax in addition to the one per cent. paid under the 4th clause of the same act. 1 L. C. Rep., p. 395, *Molson vs. McAulay*. S. C. Montreal; Smith, Mondelet, J.

Held, That the sheriff, and not the plaintiff, is liable to the printer of the Quebec Official Gazette for advertisements of sheriffs' sales therein. 1 L. C. Rep., p. 17, *Stevenson et al. vs. Boston et al.* S. C. Montreal; Day, Smith, Vanfelson, J.

Held, That the court, on application of the sheriff, will order the plaintiff *en revendication* to make all advances necessary for the safe keeping of movables seized, and in default of such payment, that the sheriff and *gardien* be discharged from liability. 1 Jurist, p. 92, *Price vs. Wilkinson et al.* S. C. Montreal; Smith, Mondelet, Chabot, J.

Held, That the court has no power to order the sheriff to sell goods seized before judgment, and which are of a perishable nature. 1 Jurist, p. 158, *Larochelle vs. Piché*, and *Piché*, Inter. S. C. Montreal; Day, Mondelet, Chabot, J.

Held, That it is not competent for the sheriff to refuse to return a writ *de terris* (when notified to do so by an opposant) unless his fees and disbursements are first paid. 1 Jurist, p. 284, *Wilson vs. Brown*, and *Brown*, Opp. S. C. Montreal; Day, Smith, Mondelet, J.

FRAIS DE GARDE. See GARDIEN.

CONTRAINTE AGAINST. See CONTRAINTE PAR CORPS, Sheriff.

LIABILITY OF ATTORNEYS TO. See ATTORNEY, Sheriff's Fees.

FEES. See GARDIEN, Frais de Garde.

See EXECUTION, Formalities of.

SALES. See FRAUD in judicial sale.

NOTICE OF ACTION. See OFFICER PUBLIC.

ACTION AGAINST. See COSTS, Tariff of Fees.

## SHIPS AND SHIPPING.

### ADMIRALTY.

Held, That a writ of prohibition to the Court of Vice-Admiralty may be issued by the Court of King's Bench. *Hamilton vs. Fraser*. K. B. Q. 1811.

Held, That the *code maritime* of France, if it ever was in force in Canada, was not a part of the common law, but of the *droit public*, and consequently was superseded by the effect of the conquest, and if it was law in the admiralty jurisdiction of that time, whether it was a part of the public law, or of the common law, it was abolished by the marine law of England. *Baldwin vs. Gibbon*. K. B. Q. 1815.

Held, That moneys in the hands of a judge or marshal of the admiralty, by virtue of his office, cannot be attached by process issued out of the King's Bench. *Ferrault vs. McCarthy*, and *Ker and D'Estimauville, T.S.* K. B. Q. 1816.

## ADMIRALTY—COMMISSION.

Commission of vice-admiral, under the great seal of the High Court of Admiralty of England, to James Murray, captain-general and governor-in-chief in and over the province of Quebec, in America, dated 19th March, 1764. Stuart's Ad. Rep., p. 370.

Commission under the great seal of the High Court of Admiralty of England, appointing Henry Black judge of the Vice-Admiralty Court for Lower Canada, dated 27th Oct., 1838. Stuart's Ad. Rep., p. 376.

Commission under the great seal of Great Britain, for the trial of offences committed within the jurisdiction of the admiralty of England, dated 30th Oct., 1841. Stuart's Ad. Rep., p. 380.

## ADMIRALTY—JURISDICTION.

Held, 1. That the Admiralty Court has jurisdiction in cases of possession to reinstate owners of ships who have been wrongfully displaced from their possession.

2. That where the admiralty has original cognizance of the principal matter, it has also cognizance of the incidents thereto.

3. That where a limited jurisdiction is given to justices of the peace, they cannot extend their jurisdiction to objects not within it, by finding as a fact that which is not a fact; and their warrant, in such cases, will be no protection to the officer who acts under it.

4. That under the 190th section of the Merchant's Shipping Act, no seaman engaged for a voyage or engagement to terminate in the United Kingdom, can sue in any court abroad for wages, unless he is discharged with such sanction as is required by that act.

5. That under the 526th section of that act, a ship cannot be seized upon an order made against a person who, at the time, is neither owner nor entrusted with the possession of her.

6. That a maritime lien is not indelible, but may be lost through delay to enforce it when the rights of other persons have intervened. 10 L. C. Rep., p. 101, *The Haidee—Kempthorn*. Vice-Admiralty Court, L. C. Black, J.

Held, 1. That the Court of Admiralty, except in prizes, exercises an original jurisdiction only on the ground of established usage and authority.

2. That it has no jurisdiction of any contract upon land, and the general rule is, that if a contract be made on land to be executed at sea, or be made at sea to be executed on land, the common law has the preference, and excludes the admiralty.

3. The cause must arise wholly on the sea, and not within the precincts of any county to give the admiralty jurisdiction.

3. The cases where the admiralty has jurisdiction by reason of the subject matter and where the proceedings are *in rem*, are a class by themselves.

5. The admiralty jurisdiction as to torts, depends upon the locality, and is limited to torts committed on the high seas.

6. Personal torts committed in the harbor of Quebec are not within the juris-

diction of the admiralty. 10 L. C. Rep., p. 101, *The Haidee—Kempthorn*. Vice-Admiralty Court, L. C. Black J.

Held, That the admiralty entertains jurisdiction of personal torts committed by the master of a vessel on a passenger, if arising on the high seas. *The Toronto—Collinson*. Stuart's Ad. Rep., p. 181.

Held, 1. That the jurisdiction of the court in cases of pilotage is undoubted.

2. That it has no jurisdiction in cases where there has been a previous judgment of a court of concurrent jurisdiction upon the same cause of demand.

*The Phoebe vs. Raltray*. Stuart's Ad. Rep., p. 60.

Held, That it has jurisdiction in relation to claims of pilots for extra pilotage in the nature of salvage for extraordinary services rendered by them. *The Adventure—Peverley*. Stuart's Ad. Rep., p. 101.

Held, 1. Also in suits for damage to a ship by collision, notwithstanding the cause of action may have arisen out of the local limits of the court.

2. Also in matters of possession at the suit of the owner or owners of a majority of interests in a ship to obtain possession thereof. *The Mary and Dorothy—Teesdale*. Stuart's Ad. Rep., p. 187.

Held, 1. That by the 3rd and 4th Viet., c. 55, sect. 6, the High Court of Admiralty has jurisdiction to decide all claims of salvage and damage to any sea-going ship or vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of a county or on the high seas at the time when the cause of action accrued.

2. Ancient jurisdiction restored by the same statute with respect to claims of material men, for necessaries furnished to foreign ships.

3. It has no authority to enforce demands for work done, or materials furnished in England to ships owned there.

4. Nor has the Vice-Admiralty of Lower Canada jurisdiction with respect to claims of material men for materials furnished to ships owned there. *The Mary Jane—Trescowthick*. Stuart's Ad. Rep., p. 267.

Held, That the Court of Vice-Admiralty, L.C., exercises jurisdiction in a case of a vessel injured by collision in the river St. Lawrence near the city of Quebec. *The Camillus—Baird*. Stuart's Ad. Rep., p. 383.

Held, That all admiralty suits in the British courts are summary causes, and justice is administered *levato velo*. *The Wernham—Robson*. Stuart's Ad. Rep., p. 70.

Additional rules for courts of Vice-Admiralty abroad, established by Her Majesty's order in Council, of date 6th July, 1859. See 10 L. C. Rep., p. 209.

See also COLLISION. See PRÉVOSTÉ No. 80.

#### APPEAL—ADMIRALTY.

Held, That the appellate jurisdiction of the High Court of Admiralty from courts of Vice-Admiralty is, by the 3rd and 4th Will. 4, c. 41, transferred to the judicial committee of the Privy Council. Stuart's Ad. Rep., p. 5.

Held, That all appeals from decrees of the Vice-Admiralty Courts are to be asserted within fifteen days after the date of the decree, which is to be done by the proctor declaring the same in court, and a minute thereof is to be entered in

the assignation book, and the party must also give bail within fifteen days from the assertion of the appeal to answer the costs of such appeal. *Ib.*, p. 44.

#### AMENDMENT—ADMIRALTY.

Amendment in the warrant of attachment not allowed for an alleged error not apparent in the acts and proceedings in the suit. *The Aid—Nuthall*. Stuart's Ad. Rep., p. 210.

#### ARREST OF SHIP.

Held, That a vessel loaded and ready for sea can be arrested for a civil debt of the owner unconnected with the ship. Stuart's Rep., p. 453, *Parent vs. Grenier*. K. B. Q. 1831.

#### ATTACHMENT.

Attachment awarded against a master for taking out of the jurisdiction of the court his vessel, which had been regularly attached. *The Friends—Duncan*. Stuart's Ad. Rep., p. 72.

Application for an attachment for contempt, for resisting the process of the court, rejected; the statement of the affair being contradicted by the affidavits of two other persons present at the arrest. *The Sarah—Sinclair*. Stuart's Ad. Rep., p. 86.

Applications for an attachment for a contempt against a magistrate first seized of a seaman's suit, for having issued a warrant and arrested the seaman whilst attending his proctor for the purpose of bringing the suit, rejected. *The Isabella—Miller*. Stuart's Ad. Rep., p. 134.

Attachment decreed for contempt in obstructing the marshal in the execution of the process of the court. *The Delta—Murray*. Stuart's Ad. Rep., p. 267.

#### ATTORNEY-GENERAL.

Held, That during the absence of the attorney-general the powers and duties of the office devolve upon the solicitor-general. *The Dumfrieshire—Gowan*. Stuart's Ad. Rep., p. 245.

#### BILL OF LADING.

Held, That the placing of goods on board a vessel by a debtor, addressed to his creditor without a previous sale or agreement to that effect, does not transfer the property or possession to the consignee; and such goods may be seized before they reach the hands of the consignee, notwithstanding a bill of lading has been signed. 5 L. C. Rep., p. 211, *Frchette vs. Corbet*, and *Opp*. S. C. Quebec; Bowen, C. J., Meredith, J.

#### BOTTOMRY.

Held, 1. That maritime interest at the rate of 25 per cent. on a bottomry bond, given at Quebec, will not be considered exorbitant.

2. The 6th Geo. 1, c. 18, commonly called the South Sea Bubble Act, does not extend to the American Colonies. Stuart's Rep., p. 130, *White et al. vs. Ship Dædalus*. High Court of Admiralty; Sir W. Scott.

## BUILDER'S PRIVILEGE.

Held, 1. That a builder's privilege on a ship of his own construction is lost if he delivers her to the owner and suffers her knowingly to be sold to a third person by public auction without opposition.

2. The *code marine*, if it ever was in force, was no part of the common law of Canada, but a part of the public law, and consequently was superseded by the effect of the conquest; and if it was law in the admiralty jurisdiction alone, whether it was public or common, the introduction of the English admiralty law abolished it. Stuart's Rep., p. 72, *Baldwin vs. Gibson*, and *McCallum*, Opp. K. B. Q. 1812

A mercantile house at Newry directs a house at Quebec to contract for the building of a ship for which they, the Newry house, would send the rigging. The Quebec house enters into a contract with some ship-builders accordingly. The Newry house then direct their correspondent at Liverpool to send out the rigging; he does so, and it having been actually delivered to the Quebec house:

Held, That the property in it was vested in the Newry house, and that the Quebec house had a right to retain it against the Liverpool correspondent, on account of their lien on it for advances made to the builders, and payment of custom house expenses, although previously to the delivery, they had obtained an assignment of the ship to themselves from the builders, and had registered it in the name of one of the partners of their house. Stuart's Rep., p. 412, *Rogerson et al. vs. Reed*. In the Privy Council, 1830.

## COLLISION.

Held, That there are four probabilities under which a collision may occur:

1. It may occur from the fault or misconduct of the vessel suffering from the collision.

2. Or the accident may have happened from unavoidable circumstances without fault on the part of either vessel.

3. Or both parties may be to blame, as where there has been a want of skill or due diligence on both sides.

4. Or the loss or damage may be owing, to the fault or misconduct of the vessel charged as the wrong-doer.

In the first two cases, no action lies for the damage arising from the collision.

In the third case, the law apportions the loss between the parties as having been occasioned by the fault of both of them.

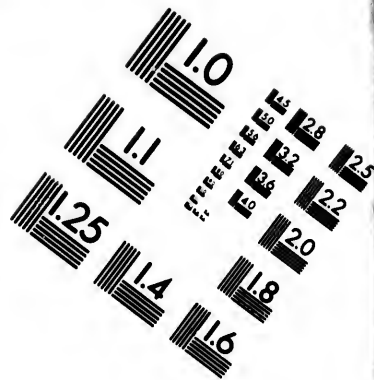
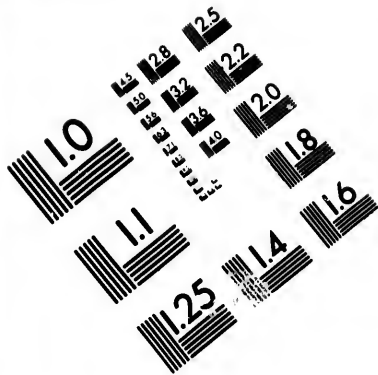
In the fourth case, the injured party is entitled to full compensation from the party inflicting the injury. *The Cumberland—Tickle*. Stuart's Ad. Rep., p. 75.

*The Nelson Village—Power*. *Ib.*, p. 156.

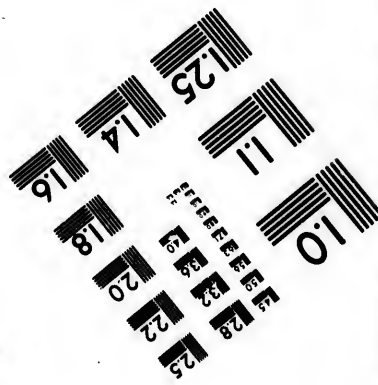
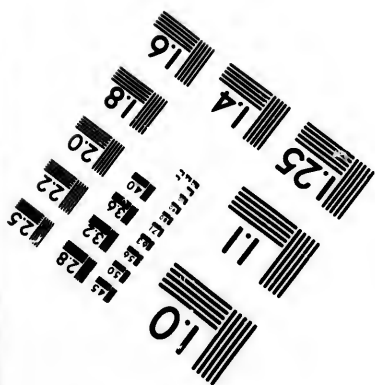
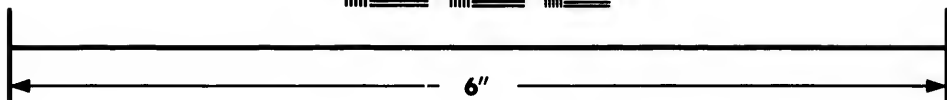
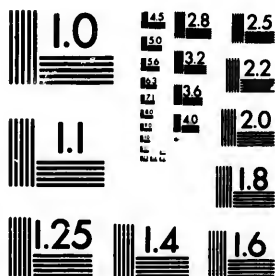
Held, 1. That owners of vessels are not exempt from their legal responsibility, notwithstanding that their vessel was under the care and management of a pilot.

2. A vessel giving a foul berth to another vessel is liable in damages for collision to the vessel to which such foul berth was given by her, although the immediate cause of the collision was a *vis major*, and no unskilfulness or misconduct was imputable to the offending vessel after giving such foul berth. *The Cumberland—Tickle*. Stuart's Ad. Rep., p. 75.





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Held, That in a case of collision between two ships ascending the river St. Lawrence, the court, assisted out by a captain of the royal navy, pronounced for damages, holding that when two vessels are crossing each other in opposite directions, and there is doubt of their going clear, the vessel upon the port or larboard tack is to bear up, and heave about for the vessel on the starboard tack. *The Nelson Village—Power*. Stuart's Ad. Rep., p. 156.

Held, That the Court of Admiralty has jurisdiction in the case of a vessel injured by collision in the river St. Lawrence near the city of Quebec. Stuart's Rep., p. 158, *Howard vs. The Camillus*. Vice-Admiralty Court; Kerr, J., 1823.

So held in K. B. Q.; *Ritchie vs. Orkney et ux.* Stuart's Rep., p. 613.

Held, That under the words "court or session having jurisdiction in the port" or place at which a ship shall arrive" contained in the 57th Geo. 3, c. 10, sect. 6, the Court of Vice-Admiralty claims jurisdiction in proceedings for penalties and forfeitures under that act. Stuart's Rep., p. 163, *Wilson vs. Norris*. Vice-Admiralty Court; Kerr, J., 1823.

Held, In a case of collision by one steam vessel against another, where the loss was charged to be owing to the negligence of defendants, and so held by the court, damages and costs will be awarded.

Query? Whether, under certain circumstances, one moiety of the aggregate amount of damage should not be borne by each party. Stuart's Rep., p. 441, *Maitland et al., vs. Molson et al., Resp.* In Appeal, 1830.

Held, That in a case of collision, if the damages have been occasioned by accident or by a *vis major*, the loss must be borne by the party who has suffered it. 1 L. C. Rep., p. 485. Case of the *Sarah Ann*. Vice-Admiralty Court, L. C.; Black, J.

Held, 1. That the nautical rule long established is, that if two sailing vessels, both upon a wind, are so approaching each other, the one on the starboard the other on the port tack, as that there will be danger of collision if both continue their course, it is the duty of the vessel on the port tack immediately to give way.

2. That the vessel on the port tack is to bear away so early as to prevent all chance of a collision occurring. 4 L. C. Rep., p. 38, *The Roslin Castle vs. The Glencairn*. Vice-Admiralty Court, L. C.; Black, J.

Held, That if it appear in evidence that there was no proper and sufficient look-out on board of a ship, and a collision occur between such ship and another towed by a steamer, because the steamer was not seen by such vessel in time to enable her to make the necessary manœuvres to avoid a collision, that the want of such look-out is sufficient neglect to make her liable in damages, although she adopted the most seamanlike and proper course when the collision was all but inevitable. 4 L. C. Rep., p. 264, *The Niagara—The Elizabeth*. Vice-Admiralty Court, L. C.; Black, J.

Held, 1. That where a vessel at anchor is run down by another vessel, the vessel under way is bound to show, by clear and indisputable evidence, that the accident did not arise from any fault or negligence on her part.

2. That neither by the maritime nor the common law is a vessel or a carriage

justified in not taking proper precautions against a collision with another, by the fact that such other is not in its proper position or side of the road, or is in any way contravening any rule of the sea or of the road.

3. That it is no defence on the part of the vessel under weigh, to say that the vessel at anchor had not complied strictly with all the Trinity House regulations in relation to hanging out lights at night, if it appear that the collision took place in consequence of the fault or negligence of the vessel under weigh. 10 L. C. Rep., p. 5, *The Martha—Sophia Berichot*. Vice-Admiralty Court, L. C.; Black, J.

Held, 1. That where a collision occurs without blame being imputable to either party, the misfortune must be borne by the party on whom it happens to light.

2. The practice of the court is, not to give costs on either side where a collision has occurred from inevitable accident. 10 L. C. Rep., p. 113, *The Margaret—Clarke*. Vice-Admiralty Court L. C.; Black, J.

Held, That in a case of collision, where the evidence on both sides is conflicting and nicely balanced, the court will be guided by the probabilities of the respective cases which are set up, and owners of the vessel proceeded against dismissed without costs. 10 L. C. Rep., p. 362, *The Aisla—Alexander*. Vice-Admiralty Court. L. C.; Black, J.

Held, 1. That the Court of Admiralty has jurisdiction in cases of collision occurring on the high seas, where both the vessels are the property of foreign owners.

2. That questions of collision are *communis juris*, and in cases where both parties are foreigners, the important distinction is whether the case be *communis juris* or not.

3. In a case of damage by collision it was held that the damage was the result of inevitable accident arising from foggy weather, and the vessel proceeded against was dismissed accordingly.

4. Where damage is occasioned by unavoidable accident, the loss must be borne by the party on whom it has fallen.

5. The law imposes upon a vessel having the wind free, the obligation of taking proper measures to get out of the way of a vessel close hauled. 10 L. C. Rep., p. 411, *The Anne Johanne—Larsen*. Vice-Admiralty Court, L.C.; Black, J.

Held, 1. That as between a British and a foreign ship within Canadian waters, the act regulating the Canadian waters must be the rule of the court, and that the duty and the right of both parties must be determined by it.

2. That the power of the Canadian Legislature extends to foreigners when within Canadian jurisdiction.

3. If a collision occur in the night time between two sailing vessels on the St. Lawrence, by the non-observance of the rule respecting lights, the owner of the vessel by which such rule has been infringed cannot recover for any damage sustained in the collision. 10 L. C. Rep., p. 445, *Aurora—Morrison*. Vice-Admiralty Court, L. C.; Black, J.

Held, That in a case of collision between two vessels on the Lachine canal, where the injured vessel in violation of the rules and regulations of the canal, was on the wrong side of the canal, the owner of the other vessel is not liable in

damages in the absence of proof of any wilful act or negligence on the part of his crew. 3 Jurist, p. 225, *Leger vs. Jackson*. S. C. Montreal; Smith, J.

Held, In an action for collision, that the regulation of the Trinity House requiring that light should be exhibited on all rafts, is applicable to cribs or small rafts attached to vessels when loading them. 2 Rev. de Jur., p. 155, *Dickey vs. McKenzie*. Q. B. Q. 1847.

Held, 1. In a case of collision, that the history of the ship proceeded against for some days previous to collision was admissible as being usual and convenient in a plea or responsive allegation.

2. Such only of the statements made by the mate and seamen of the ship proceeding as formed part of the *res gestæ* were admissible.

3. The age of the ship proceeding might be pleaded to account for her loss.

4. Inasmuch as the protest itself was to be brought in, the statements contained in it need not be pleaded.

5. The delay appearing on the face of the proceedings, and not being accounted for in the libel, it was not necessary to set it up in the responsive allegation. 2 Rev. de Jur., p. 288, *The Mellora*. Before Lushington. 1846.

Held, 1. The meaning of the act respecting the navigation of Canadian waters is, that wherever two vessels are seen from each other, even in parallel courses, provided they are close to each other, or in any course, so that there is reasonable probability of a collision, it is their duty, unless there be some impediment, to obey the law.

2. Where a steamer, coming down the river in a dark night, meets a sailing vessel, and those in charge of the steamer are in doubt what course the sailing vessel is upon, it is their duty to ease her engine and slacken her speed until they ascertain the course of the sailing vessel.

3. The rule of the Admiralty Court, that in case of mutual blame the damage will be divided, is superseded by section 12 of the act respecting the navigation of Canadian waters, and the penalty imposed on a party neglecting the rules enjoined by sect. 8 of that statute, will be construed as the like clauses (296 and 298) in the British Merchant Shipping Act, as preventing the owner of one vessel recovering damages from the other, although also in fault. 12 L. C. Rep., p. 238, *The Arabian—Simard; The Alma—Brodie*. Vice-Admiralty Court, L. C.; Black, J.

Held, 1. That if in case of collision between two vessels in a canal, the plaintiff's vessel was on the wrong side of the canal, and had not the light usually carried, he will be allowed no damage, even if there were doubt as to the cause of the collision.

2. That, in the case submitted, there was evidence of negligence on the part of the plaintiff, and that therefore no damages could be awarded to him. 12 L. C. Rep., p. 304, *Bertrand vs. Dickinson*. S. C. Montreal: Badgley, J.

A steamer going up the St. Lawrence on a voyage from Quebec to Montreal saw the light of another steamer coming down the river, distant about two miles, and when at the distance of rather more than half a mile took a diagonal course across the river in order to gain the south channel, starboarding her helm, and then putting it hard to starboard. The steamer coming downwards having put her helm to port, a collision ensued :

Held, That the vessels were meeting each other within the meaning of the act for the navigation of the waters of Canada, (22nd Viet., c. 19) and the steamer going up the river was solely to blame for the collision, in not having put her helm to port. Damage allowed. 12 L. C. Rep., p. 393, *The James McKenzie*. Vice-Admiralty Court, L. C.; Black, J.

Held, 1. That in cases of collision arising from negligence or unskillfulness in the management of the ship doing the injury, the pilot having the control of the ship is not a competent witness for such ship, without a release, although the master is.

2. Ship held liable for collision notwithstanding there being a pilot on board.

3. Where one ship is at anchor it augurs great want of skill and attention, in a harbor like that of Quebec, for a ship under sail to be so brought to as to run foul of her.

4. Damages awarded in case of a collision in the harbor of Quebec. *The Lord John Russell—Young*. Stuart's Ad. Rep., p. 190.

Held, 1. That a pilot act, which obliges vessels going out or coming into port to receive a pilot under a penalty or forfeiture of half pilotage is not compulsory, but is optional. The ship need not take a pilot if it prefer to pay the penalty or forfeiture.

2. The circumstance of having a pilot on board and acting in conformity with his directions does not operate as a discharge of the responsibility of the owner. *The Croole*. Stuart's Ad. Rep., p. 199.

Held, 1. That vessels are required on a dark night to show their position by a fixed light while at anchor in the harbor of Quebec, and the want of such light will amount to negligence so as to leave a claim for any injury received from other vessels running foul of them.

2. Master may avail himself of the wind and tide and sail into port by night as well as by day.

3. By-laws of Trinity House respecting lights are not abrogated by desuetude or non-user?

4. The hoisting of a light in a river or harbor at night amid an active commerce is a precaution imperiously demanded by prudence, and the omission cannot be considered otherwise than as negligence *per se*.

5. That the by-law of the Trinity House of 12th April, 1850, requires a distinct light in the fore-rigging "during the night." *The Mary Campbell—Simons*. Stuart's Ad. Rep., p. 222.

Held, 1. That in a case of collision against a ship for running foul of a floating light vessel, the court will pronounce for damages.

2. In such a case the presumption is gross negligence or want of skill and the burthen is cast on the ship master to repel that presumption. *The Miramichi—Grieve*. Stuart's Ad. Rep., p. 237.

How ships moored are protected against the intrusion of ships under sail. Stuart's Ad. Rep., p. 241.

Held, 1. That the omission to have a light on board in a river or harbor at night, amounts to negligence *per se*.

2. Every night, in the absence of a moon, is a dark night in the purview of the Trinity House regulations of the 28th June, 1805.

3. More credit is to be attached to the crew that are on the alert, than to the crew of the vessel that is placed at rest.

4. The regulations of the Trinity House require a strict construction in favor of their application.

5. Having a light on board in such case is an indispensable precaution. *The Dahlia—Grossard*. Stuart's Ad. Rep., p. 242.

Held, 1. That in a case of collision, where the loss was charged to be owing to negligence, malice, or want of skill, the court, with the assistance of a captain in the royal navy, being of opinion that the danger was occasioned by accident, chiefly imputable to the imprudence of the injured vessel, and not to the misconduct of the other vessel, dismissed the owners of the latter vessel with costs.

2. The general rule of navigation is when a ship is in stays or in the act of going about, as she becomes for the time unmanageable, it is the duty of any ship that is near her, to give her sufficient room.

3. But when a ship goes about very near to another and without giving any preparatory indications from which that other can, under the circumstances, be warned in time to make the necessary preparations for giving room, the damage consequent upon want of sufficient room may arise from the fault of those in charge of the ship going about at an improper time or place.

4. Or, in the case of darkness, fog or other circumstances, rendering it impossible for the ships to see each other so distinctly as to watch each other's evolutions, the fault may be with neither. *The Leonidas—Arnold*. Stuart's Ad. Rep., p. 226.

Held, That if it be practicable for a vessel which is following close upon the track of another to pursue a course which is safe, and she adopts one which is perilous, then, if mischief ensue, she is answerable for all consequences. *The John Munn—Richardson*. Stuart's Ad. Rep., p. 265.

Held, In a case of collision between two steam vessels, the court, assisted by a captain in the royal navy, pronounced for damages and costs, holding that the one which crossed the course of the other was to blame. *The Bytown—Humphrey*. Stuart's Ad. Rep., p. 278.

Held, 1. That where it appeared that the collision was the effect of mere accident or that overriding necessity which the law designates by the term *vis major*, the action will be dismissed with costs.

2. In order to support an action for damages in a case of collision, it is necessary distinctly to prove that the collision arose from the fault of the persons on board of the vessel charged as the wrong doers, or from the fault of the persons on board of that vessel, and of those on board of the injured vessel.

3. Where both parties are mutually blamable in not taking measures to prevent accidents, the rule is to apportion equally the damage between the parties according to maritime law as administered in the Admiralty Court. *The Sarah Anne—Hocker*. Stuart's Ad. Rep., p. 294.

Two steamers were coming from Montreal to Quebec, and when opposite the

city of Quebec, the one took the course usual on such occasions, and passed down below the lowermost wharf at the mouth of the river St. Charles, where she turned to stem the tide, and come to the wharf at which she was to land her passengers, and the other did not descend so low but made a short and unusual turn with the intention of passing across the course of the former, and ahead of her after she had turned and was coming up against the tide:

Held, 1. That the collision complained of resulted from a rash and hazardous attempt on the part of those on board of the steamer which made such short and unusual turn, to cross the course of the other, contrary to the usual practice and custom of the river, and the rules of good seamanship, for the purpose of being earlier at her wharf.

2. That manœuvres of this dangerous kind, which might, in a crowded port like that of Quebec, result in the most serious loss of property and of life, ought to be discountenanced.

3. In this case, the objectionable manœuvre appeared to have proceeded from a spirit of eager competition and from miscalculation, and not from any attempt to injure the competing vessel. *The Crescent—Tute. The Rowland Hill—Ryan.* Stuart's Ad. Rep., p. 289.

Held, That the settled nautical rule is, that if two sailing vessels, both upon a wind, are so approaching each other, the one on the starboard, and the other on the port tack, as that there will be danger of a collision if each continue her course, it is the duty of the vessel on the port tack immediately to give way, and the vessel on the port tack is to bear away so early and effectually as to prevent all chance of collision occurring. *The Roslin Castle;—Saddler. The Glencairn—Crawford.* Stuart's Ad. Rep., p. 303.

1. The court pronounced for damages against a vessel sailing down the river St. Lawrence on her homeward voyage to Liverpool, running foul of another coming up in tow of a steamer, the night at the time being reasonably clear and sufficiently so for lights to be seen at a moderate distance.

2. There is no rule of law preventing vessels from entering or leaving the harbor of Quebec at any hour, or obliging them to keep any particular track, or part of the channel in so doing.

3. On this occasion the outgoing vessel had the wind large, and as steamers are to be considered in the light of vessels navigating with a fair wind, the steamer and the outgoing vessel were considered in this respect as on an equality.

4. A vessel in tow with a headwind and no sails, and fast to the steamer, so that she could only steer to a certain distance on either side of the course in which she was towed by the steamer is powerless, to a very great extent.

5. The general rule is, that where two vessels are approaching each other both having the wind large and approaching each other so that if each continued in her course there would be danger of collision, each shall port helm so as to leave the other on the larboard hand in passing.

6. But it is not necessary that because two vessels are proceeding in opposite directions, there being plenty of room, the one vessel should cross the course of the other, in order to pass her on the larboard.

7. If a vessel take every precaution against approaching danger, it is not suffi-



cient to subject her to damage for injury to another by collision, that in the moment of danger those on board such vessel did not make use of every means that might appear proper to a cool spectator. There must be gross negligence.

8. If the collision arose solely from the misconduct of those on board the steam tug, both the other vessels are exempt from responsibility, and the action on the part of each must be dismissed, leaving them to their recourse against the steamer.

9. The law in such case is, that the tow is not responsible for an accident arising from the mistake or misconduct of the tug.

10. Upon points submitted for the professional opinion of assessors, their opinion should be as definite, as in a complicated case of this nature it is possible it should be.

11. In certain cases, the court will direct the questions to be reconsidered and more definitely answered.

12. If there was no proper and sufficient look-out, and if the proper means were not adopted for avoiding collision after the time when the other vessel's lights were seen, her having taken the most seamanlike and proper course when the collision was all but inevitable does not exempt a vessel from liability.

13. Although there may be a rule of the sea, yet a man who has the management of one ship is not allowed to follow that rule to the injury of the vessel of another when he could avoid the injury by pursuing a different course. *The Niagara—Taylor. The Elizabeth—Nowell.* Stuart's Ad. Rep., p. 308.

Held, 1. That the harbor master has authority to station all ships or vessels which come to the harbor of Quebec, or haul into any wharf within the same, and to regulate the mooring and fastening and shifting and removal of such ships or vessels.

2. Where berths had been assigned or confirmed by the harbor master to several vessels in a dock in the harbor of Quebec, and the harbor master expressly directed the vessel proceeded against to remain in the position she then occupied for the night, warning the master at the same time of the damage which would be incurred if he attempted to haul further in, because there was not room enough in the dock; and the master hauled his vessel forward, and, as the water fell in the dock, and the space between the wharves at the water level diminished, the vessels became tightly jammed together so that it was impossible to move them, and as the water continued to fall the pressure became so great that one of the other vessels was completely crushed and another was suspended between the crushed vessel and the wharf and thrown over nearly on her beam ends, thereby receiving great damage, the owner of the vessel so contravening the harbor master's orders will be condemned in damages and costs. *The New York Packet—Marshead.* Stuart's Ad. Rep., p. 325.

Held, That by the Merchant Shipping Act (17th and 18th Vict., c. 104, sects. 296 and 297) and the Steam Navigation Act (14th and 15th Vict., c. 79) as well as by the rule of the Trinity House of Quebec, when a steamer meets a sailing vessel going free, and there is danger of collision it is the duty of each vessel to put her helm to port and pass to the right unless the circumstances are such as to render the following of the rule impracticable or dangerous.

2. No sufficient excuse being found for not following this rule, a sailing vessel was condemned in damages and costs for putting her helm to starboard and passing to the left of a steam tow boat, thereby causing collision with the vessel in tow, the steamer and her tow coming down the channel nearly or exactly upon a line with the course of the sailing vessel.

3. Conflict of English and American law how to steer. *The Inga—Eilertsen*. Stuart's Ad. Rep., p. 335.

1. Liability of steamboat for collision between vessels one of which is towed by the steamboat.

2. Cases may occur in which an accident may arise from the fault of the tow, without any error or mismanagement on the part of the tug, and in such case the tow alone must be answerable for the consequences.

3. Cases also may occur in which both are in fault, and in such cases both vessels would be liable to the injured vessel, whatever might be their responsibility *inter se*. *The John Counter—Miller*. Stuart's Ad. Rep., p. 344.

Held, 1. That where two ships, close hauled on opposite tacks meet, and there would be danger of collision if each continued her course, the one on the port tack shall give way, and the other shall hold her course.

2. She is not to do this, if by so doing, she would cause unnecessary risk to the other.

3. Neither is the other bound to obey the rule, if by so doing she would run into unavoidable or imminent danger, but if there be no such danger the one on the starboard tack is entitled to the benefit of the rule.

4. The circumstances of the case examined, and no sufficient excuse being found for not following the rule, the vessel inflicting the injury condemned in damages and costs. *The Mary Bannytine—Ferguson*. Stuart's Ad. Rep., p. 350.

Held, That the Court of Vice-Admiralty exercises jurisdiction in the case of a vessel injured by collision in the river St. Lawrence near the city of Quebec. *The Camillus—Baird*. Stuart's Ad. Rep., p. 383.

Doubts which had arisen on this head removed by 2nd Will. 4, c. 51, sect. 6.

#### CONSOLATO DEL MARE.

The 148th and 149th capitolo of the Consolato Del Mare declare that the sale of the ship, or the change of the master, operates as a discharge of the seamen. *The Scotia—Risk*. Stuart's Ad. Rep., p. 166.

#### COSTS IN ADMIRALTY.

Held, That the Court may exercise a legal discretion as to costs. Costs refused in this case. *The Agnes—Taylor*. Stuart's Ad. Rep., p. 57.

Held, That if a suit be brought by a seaman for wages, a settlement without the concurrence of the promoter's proctor does not bar the claim for costs. The court will inquire whether the arrangement was or was not reasonable and just, and relieve the proctor if it were not so. *The Thetis—Watkinson*. \*Stuart's Ad. Rep., p. 363.

#### DEMURRAGE—DETENTION.

Held, 1. That, in the absence of an express agreement, no demurrage can be

claimed by the master of a vessel detained beyond a proper time for loading and unloading.

2. That damages for such detention can be claimed, and must be proved.

3. That the consignee is not bound to discharge cargo of a sailing vessel loaded with grain, according to the Consolidated Statutes of Lower Canada, c. 160, at a greater rate than two thousand *minots* per day. 6 Jurist, p. 119, *Marchand vs. Renaud*. S. C. Montreal; Badgley, J.

#### DAMAGE, PERSONAL—ADMIRALTY.

1. Damages awarded to a steward for assault committed upon him by the master without cause.

2. Those who have the command of ships are not, under the color of discipline, to inflict unnecessary, wanton, and unlawful punishment upon those under their control. *The Sarah—Sinclair*. Stuart's Ad. Rep., p. 89.

Responsibility of master for any abuse of his authority at sea.

Suit for personal damage by a passenger against the master. *The Friends—Duncan*. Stuart's Ad. Rep., p. 118.

Suit for personal damage by a cabin passenger against the master for attempting to exclude him from the cabin. *The Toronto—Collinson*. Stuart's Ad. Rep., p. 170.

Suit for, by a mariner against the master, dismissed. *The Coldstream—Hall*. Stuart's Ad. Rep., p. 386.

#### DESUETUDE—STATUTE.

Held, That the mode of abrogating or repealing statute law by desuetude or non-user, is unknown in the English law. *The Mary Campbell—Simons*. Stuart's Ad. Rep., p. 223.

#### DISCRETION OF JUDGES.

What is understood by the term of "discretion" which courts are said to exercise. *The Agnes—Taylor*. Stuart's Ad. Rep., p. 57.

#### EVIDENCE—ADMIRALTY CASES.

Held, That in a suit for wages, service and good conduct are to be presumed until disproved. *The Agnes—Taylor*. Stuart's Ad. Rep., p. 56.

As to the evidence of the master in suits with seamen or in a case of pilotage. *The Sophia—Easton*. Stuart's Ad. Rep., p. 96.

Held, That in a suit for personal damage brought by a passenger against the master of a vessel, the court will look to the education and condition in life of the persons who gave the evidence, not only as entitling them to full credit for veracity, but also to greater accuracy of observation, and a greater sense of the proprieties of life. *The Toronto—Collinson*. Stuart's Ad. Rep., p. 179.

Held, 1. That an agreement varying the contract of wages in the ship's articles cannot be proved by parol evidence.

2. The testimony of the bail of the defendant was rejected, he being an incompetent witness. *The Sophia—Weatherall*. Stuart's Ad. Rep., p. 219.

Held, That persons who have the control and direction of vessels, or who are interested in clearing themselves of fault and throwing it upon the other party, are incompetent to give evidence. *The Mary Campbell—Simons*. Stuart's Ad. Rep., p. 224.

Held, That more credit is to be attached to the crew that are on the alert, than to the crew of the vessel that is placed at rest. *The Dahlia—Grossard*. Stuart's Ad. Rep., p. 242.

Held, That in cases of collision it is necessary to prove fault on the part of the persons on board of the vessel charged as the wrong doer, or fault of the persons on board of that vessel and of those on board of the injured vessel. *The Sarah Ann—Hoeker*. Stuart's Ad. Rep., p. 300.

Held, That where a ship at anchor is run down by another vessel under sail the *onus probandi* lies with the vessel under sail to show that the collision was not occasioned by any error or default upon her part. *The Miramichi—Grieve*. Stuart's Ad. Rep., p. 240.

Held, That where a vessel at anchor is run down by another, the *onus* lies on the latter to prove the collision arose from some cause which would exempt her from liability. *The John Munn—Richardson*. Stuart's Ad. Rep., in note, p. 266.

#### EXCEPTION DECLINATOIRE—ADMIRALTY.

In a suit for an injury done on the waters of the St Lawrence near the city of Quebec, a declinatory exception in which it was averred that the *locus in quo* of the pretended injury was within the boundary of the county of Quebec, and solely cognizable in the Court of Queen's Bench for the district of Quebec, was dismissed with costs, and a decree pronounced maintaining the ancient jurisdiction of the Admiralty over the river St. Lawrence. *The Camillus—Baird*. Stuart's Ad. Rep., p. 383.

Parties sent out of Court, the fact in dispute being *un fait maritime*. *Prévost*, No. 80.

#### FEEs.

Held, 1. That all fees of office, properly so called, are presumed to have a legitimate foundation in some act of a competent authority, originally assigning a fair *quantum meruit* for the particular service.

2. Where the fee is established by or under the authority of an act of Parliament, the statute is conclusive as to the *quantum meruit*.

3. Where settled by the authority of the court, the subject is not concluded thereby, but may try the reasonableness of the sum claimed as a *quantum meruit*, before a court of competent jurisdiction, and obtain the verdict of a jury thereon, when, and when alone, they become established fees.

4. Since the passing of the act of the Imperial Parliament, 1st Will. 4, c. 51, the establishment of fees in the Vice-Admiralty Court is exclusively in the King and Council; and the table of fees established under the statute having been revoked without making another, it is not competent to the court to award a *quantum meruit* to its officers. *The John and Mary—Marshall*. Stuart's Ad. Rep., p. 64.

Held, 1. That the order in Council of the 20th November, 1835, passed to repeal the table of fees established under the authority of the 2nd Will. 4, c. 51:—1st. Had the effect of repealing the same; 2nd. Did not give force or validity to the table of fees of 1809; 3rd. Nor did it authorise the judge to grant fees as a *quantum meruit*.

2. By the ancient law of England, none having any office concerning the administration of justice, shall take any fee or reward of any subject for the doing of his office.

3. All new offices erected with new fees, or old offices with new fees, are within the statute 34 Edward I., for that is a *tallage* upon the subject which cannot be done without common assent by an act of parliament.

4. Officers concerned in the administration of justice, cannot take any more for doing their office than has been allowed to them by act of Parliament;

Or by immemorial usage, referred to by Lord Coke in this instance; as in so many others, considered as evidence of a statute or other legal beginning of the fee.

5. These principles have been at all times recognised as fundamental principles of the law and constitution of England. *The London—Dodson*. Stuart's Ad. Rep., p. 140.

#### FREIGHT.

As to liability of ships for goods put on board lighters. See 1 L. C. Rep., p. 313.

Held, That merchandise imported from abroad, is delivered to the consignee, when placed on the wharf, and is thereafter at his risk, provided notice of the arrival of his goods has been given to him. Stuart's Rep., p. 139. *Rivers vs. Duncan*. K. B. Q., 1819.

Held, That where goods deliverable to "order or assigns" are landed from a vessel, after the expiration of the delay allowed by law to the importer to land the same, the captain is not liable for damages accruing thereto, after they have been placed upon the wharf. 2 L. C. Rep., p. 477, *Scott vs. Hescroff*. S. C. Quebec; Duval, Meredith, J.

Held, That an affreighter cannot proceed by way of *revendication*, as in the case of an unlawful detention against the master of a ship, when such affreighter and master cannot agree as to the quantity of goods shipped, and as to the bill of lading to be signed.

Query, As to the responsibility of ships in relation to goods put on board lighters, to enable such ships to pass the shallows between Montreal and Quebec. 1 L. C. Rep., p. 313, *Gordon et al. vs. Pollock*. Q. B. Quebec; Stuart, C. J., Bowen, J.

Held, That freight is the mother of wages; and that if the ship becomes a total loss, the seamen cannot recover wages; and that consequently the liability of a third party to pay them their wages is at an end. 5 L. C. Rep., p. 425, *Bernier vs. Langlois*. S. C. Quebec; Bowen, C. J., Meredith, Morin, J.

Held, That under the circumstances of this case, notwithstanding the respondent had not indorsed the bill of lading made out in his name, to the owner of the goods, the respondent was not liable for the freight of the goods. 7 L. C.

Rep., p. 367, *Fowler, App., Meikleham, Resp.* In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That the non-performance of a stipulation in a charter party, which does not amount to a condition precedent, cannot be pleaded as an answer or bar to an action for the freight. *Coltman vs. Hamilton.* K. B. Q. 1819.

Held, That a consignee who has received goods shipped to be delivered on payment of freight, may be sued for the amount of such freight, and can support an incidental cross demand for damages occasioned to such goods by the master's negligence. *Oldfield vs. Hutton.* K. B. Q. 1812.

Held, That if on a charter party, in which a gross sum is stipulated for the freight, part of the cargo is delivered and accepted, an action will lie *pro tanto* for the freight, and damages for the non-delivery of the residue of the cargo cannot be set off. They must be claimed by an incidental cross demand, or by a distinct action. *Guay vs. Hunter.* K. B. Q. 1810.

Same case, Pyke's Rep., p. 36.

#### HARBOR MASTER, QUEBEC.

Held, That if any person having the charge or command of any ship or vessel in the harbor of Quebec, refuse or neglect to obey the directions of the harbor master, in respect to the berth to be taken by such ship or vessel, or in respect to the mooring or fastening, shifting or removing the same, and loss be thereby incurred, then such ship or vessel shall bear the loss. 4 L. C. Rep., p. 343, *New York Packet—Marshead*, Vice-Admiralty Court; L. C. Black, J.

Held, 1. That the rules of the Trinity House of Quebec empower the harbor master to station all ships or vessels which come to the harbor of Quebec, or haul into any of the wharves within the limits of the same; and to regulate the mooring and fastening and shifting and removal of such ships and vessels; and to determine how far, and in what instances, it is the duty of masters and other persons having charge of such ships or vessels, to accommodate each other in their respective situations, and to determine all disputes which may arise concerning the premises.

2. Owner of vessel contravening harbor master's order condemned in damages for a collision. *New York Packet—Marshead.* Stuart's Ad. Rep., p. 325.

#### JUDGMENT.

Held, That the merits of a judgment can never be overhauled in an original suit, either at law or in equity. Till the judgment is set aside or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes. *The Phoebe—Raltray.* Stuart's Ad. Rep., p. 63, in notes.

#### JUSTICES OF THE PEACE.

Held, 1. That although justices of the peace, exercising summary jurisdiction, be the sole judges of the weight of evidence given before them, and no other of the Queen's courts will examine whether they have formed the right conclusion from it or not; yet other courts may and ought to examine whether the premises stated by the justice are such as will warrant their conclusion in point of law.



2. Justices of the peace cannot give themselves jurisdiction in a particular case, by finding that as a fact which is not a fact. *The Scotia—Risk*. Stuart's Ad. Rep., p. 160.

Where a justice of the peace, acting under the authority of the Merchant Seamen's Act, (5th & 6th Will. 4, c. 19, s. 17) had awarded wages to a seaman, on the ground that a change of owners had the effect of discharging the seaman from his contract, this court, considering that the proceedings had before the justice of the peace did not preclude it from again entering into the inquiry,

Held, 1. That the contract of the seaman was a subsisting contract with the ship, notwithstanding the sale of her.

2. In no form can this court be made auxiliary to the justice's court, still less be required to adopt, without examination as legal premises on one demand, the premises which the justice's court may have adopted as legal premises on another demand.

3. In a suit for the recovery of wages under the sum of fifty pounds, justices acting under the authority of the Merchant Shipping Act, 1854, (17th & 18th Vict., c. 104, ss. 188 & 189) may refer the case to be adjudged by this Court. *The Varuna—Davies*. Stuart's Ad. Rep., p. 387.

#### LIEN.

Held, That persons furnishing supplies to ships in this country, technically called material men, have no lien upon ships for such supplies; and that the Vice-Admiralty Court of Lower Canada has no jurisdiction to enforce their claims. 3 Rev. de Jur., p. 436, *The Mary Jane—Trescowthick*. Vice-Admiralty Court, L. C.; Black, J.

Held, That salvors have a right to retain the goods saved until the amount of the salvage be adjusted and tendered to them. *The Royal William—Pennel*. Stuart's Ad. Rep., p. 197.

Held, That in the civil and maritime law of England, no hypothecary lien exists, without actual possession, for work done or supplies furnished in England for ships owned there. *The Mary Jane—Trescowthick*. Stuart's Ad. Rep., p. 267.

Held, 1. That a maritime lien does not include or require possession.

2. It is defined by Lord Tenderden to mean a claim or privilege upon a thing to be carried into effect by legal process.

3. Where reasonable diligence is used, and the proceedings are in good faith, the lien may be enforced into whosoever possession the thing may come. *The Hercyna—O'Brien*, in notes. Stuart's Ad. Rep., p. 275.

#### LOSS BY ICE.

Held, That in a charter party "*les avaries de la mer et de la saison*" are excepted from a general covenant of responsibility for the chartered vessel, and that the charterer is not liable for her loss by ice. *Fougère vs. Boucher*. K. B. Q. 1821.

#### MARINERS.

Held, 1. That if a mariner be disabled in the performance of his duty, he is



to be cured at the expense of the ship; but if the injury which he sustained be produced by drunkenness on his part, he must bear himself the consequences of his own misconduct.

2. Abandoning seamen, disabled in the service of the ship, without providing for their support and cure, is equivalent to wrongful discharge. *The Atlantic—Hardenbrook*. Stuart's Ad. Rep., p. 125.

Held, That the seaman owes obedience to the master, which may be enforced by just and moderate correction: but the master, on his part, owes to the seaman, besides protection, a reasonable and direct care of his health. *The Recovery—Simkin*. Stuart's Ad. Rep., p. 130.

Held, 1. That where a seaman can safely proceed on his voyage, he is not entitled to his discharge by reason of a temporary illness.

2. Mere sickness does not determine the contract of hiring between him and the master. *The Tweed—Robertson*. Stuart's Ad. Rep., p. 132.

Held, That a seaman going into hospital for a small hurt not received in the performance of his duty, is not entitled to wages after leaving the ship. *Captain Ross—Marton*. Stuart's Ad. Rep., p. 216.

Held, 1. That mariners, in the view of the admiralty law, are *inopes consilii*, and are under the special protection of the court.

2. The jealousy and vigilance and parental care of the Admiralty, in respect to hard dealings, under forbidden aspects, with the wages of mariners.

3. The Court of Admiralty has power to moderate or supersede agreements made under the pressure of necessity, arising out of the situation of the parties. *The Jane—Custance*. Stuart's Ad. Rep., p. 258.

Held, 1. That while acting in the line of their strict duty, they cannot entitle themselves to salvage.

2. For services beyond the line of their appropriate duty, or under circumstances to which those duties do not attach, they may claim as salvors. *The Robert and Annie—Richmond*. Stuart's Ad. Rep., p. 253.

Held, 1. That seamen are regarded as essentially under tutelage, and every dealing with them personally by the adverse party, in respect to their suits, is scrutinised by the court with great distrust.

2. Negotiations with them, even before suit is brought, is more to the satisfaction of the court when entrusted to their proctors.

3. A seaman is entitled to his costs as well as his wages; and a settlement after suit brought, obliging him to pay his own costs, is in fact deducting so much from his wages. *The Thetis—Watkinson*. Stuart's Ad. Rep., p. 365.

Held, That articles not signed by the master, as required by the General Merchant Seamen's Act, 7th and 8th Vict., c. 112, s. 2, cannot be enforced. *The Lady Seaton—Spencer*. Stuart's Ad. Rep., p. 260.

Held, That promise made by the master, at an intermediate port on the voyage, to give an additional sum, over and above the wages stipulated in the articles, is void for want of consideration. *The Lockwoods—Lawton*. Stuart's Ad. Rep., p. 723.

Held, That a change of owners, by the sale of the ship at a British port, does not determine a subsisting contract of the seamen, and entitle them to wages

before the termination of the voyage. *The Scotia—Risk*. Stuart's Ad. Rep., p. 160.

Held, That where a voyage is broken up by consent, and the seamen continue, under new articles, on another voyage, they cannot claim wages under the first articles, subsequent to the breaking up of the voyage. *The Sophia—Weather-all*. Stuart's Ad. Rep., p. 219.

Whether, when a merchant ship is abandoned at sea *sine spe revertendi*, in consequence of damage received and the state of the elements, such abandonment taking place *bonâ fide* and by order of the master, for the purpose of saving life, the contract entered into by the mariners is by such circumstances entirely put an end to; or whether it is merely interrupted, and capable, by the occurrence of any and what circumstances, of being again called into force. *Florence in notes*. Stuart's Ad. Rep., p. 254.

Where seamen, shipped for "a voyage from the port of Liverpool to Constantinople, thence (if required) to any port or places in the Mediterranean or Black Seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months," and the ship went to Constantinople in prosecution of the contemplated voyage, and then returned to Malta, whence, instead of going to a final port of destination in the United Kingdom, she came direct to Quebec in search of freight, which she had failed to obtain at the ports at which she had previously been :

Held, That coming to Quebec could not be considered a prosecution of the voyage, under the 94th section of the Mercantile Marine Act of 1850, re-enacted by the 190th section of the Merchant Shipping Act, 1854. *The Varuna—Davies*. Stuart's Ad. Rep., p. 357.

#### MASTER, POWER OF.

As to the authority of the master of a merchantman to inflict punishment on a passenger who refuses to submit to the discipline of the ship. *The Friends—Duncan*. Stuart's Ad. Rep., p. 118.

1. Assault and battery and aggressive treatment by the master of a ship upon a cabin passenger. Charge sustained.

2. No words or provocation whatever will justify an assault.

3. If provoking language be given, without reasonable cause, and the party offended be tempted to strike the other, and an action is brought, the Court will be bound to consider the provocation in assessing the damages.

4. To constitute such an assault as will justify moderate and reasonable violence in self-defence, there must be an attempt or offer, with force and violence, to do a corporal hurt to another.—*The Toronto—Collinson*. Stuart's Ad. Rep., p. 170.

Held, In an action against the captain of a ship chartered by the East India Company, for an assault and false imprisonment, a justification on the ground of mutinous, disobedient, and disorderly behavior was sustained. *The Coldstream—Hall*. Stuart's Ad. Rep., p. 3.

Held, 1. That the power of the master to displace any of the officers of

the ship is undoubted; but he must be prepared to show that he had lawful cause for so doing.

2. The party discharged from his office is not bound to remain with the ship after her arrival at the first port of discharge. *The Sarah—Sinclair*. Stuart's Ad. Rep., p. 87.

Held, That the master will be admitted as a witness in a case of pilotage. *The Sophia—Easton*. Stuart's Ad. Rep., p. 96.

Held, That upon the death of the master during the voyage, the mate succeeds him as *hæres necessarius*. *The Brunswick—Tully*. Stuart's Ad. Rep., p. 139.

Held, 1. That the possession of a ship will be awarded to the master appointed by the owner, to the exclusion of the master named by the shippers of the cargo.

2. By the 17th and 18th Vict., c. 104, s. 240, power is given to any court having admiralty jurisdiction in any of her Majesty's dominions to remove the master of any ship, being within the jurisdiction of such court, and to appoint a new master in his stead, in certain cases. *The Mary and Dorothy—Teasdale*. Stuart's Ad. Rep., p. 187.

Held, That the master of a merchant vessel may apply personal chastisement to the crew whilst at sea, the master thereby assuming to himself the responsibility which belongs to the punishment being necessary for the due maintenance of subordination and discipline, and that it was applied with becoming moderation. *The Coldstream—Hall*. Stuart's Ad. Rep., p. 386.

Held, That a change of master, not endorsed on the ship's register, and no bond given by the new master, according to the 26th Geo. 3, c. 60, s. 18, and 27th Geo. 3, c. 19, s. 7, operates a forfeiture. Stuart's Rep., p. 80, *Percival et al. vs. Schooner Harrower*. K. B. Q. 1816.

#### MATE.

Held, 1. That the mate of a vessel is chargeable for the value of articles lost by his inattention and carelessness, and the amount may be deducted from his wages.

2. A chief mate suing for wages in the Court of Admiralty is bound to show that he has discharged the duties of that situation with fidelity to his employers.

3. Amongst the most important of these duties is to preserve the cargo. *The Papineau—Maxwell*. Stuart's Ad. Rep., p. 94.

Held, That where a second mate is raised to the rank of a chief mate by the master during the voyage, he may be reduced to his old rank by the master for incompetency; and thereupon the original contract will revive. *The Lydia—Brunton*. Stuart's Ad. Rep., p. 136.

Held, That the death of the master, and substitution of the mate in his place, does not operate as a discharge of the seamen.

By the maritime law, upon the death of the master during the voyage, the mate succeeds as *hæres necessarius*.—*The Brunswick—Tully*. Stuart's Ad. Rep., p. 139.

## MERCHANT SHIPPING ACT, 1854.

Rule as to ships meeting with each other, in 296th section, cited. *The Inge—Eilertsen*. Stuart's Ad. Rep., p. 340.

Construction of the act, as to agreements to be made with seamen. *The Varuna—Davies*. Stuart's Ad. Rep., p. 357.

## OPTION.

Held, That where a party had his option to proceed either before the Trinity House, or before the Admiralty, and made his option of the former, by that he must abide as well in respect of the execution of the judgment as in the obtaining of it. *The Phæbe—Raltray*. Stuart's Ad. Rep., p. 59.

## PASSENGER.

Held, 1. That the relation of master and passenger produces certain duties of protection by the master analogous to the powers which the law vests in him as to all the persons on board his ship, and wilful violation of which duties to the personal injury of the passenger entitles the latter to a remedy in the Admiralty, if arising on the high seas.

2. Unless in cases of necessity the master cannot compel a passenger to keep watch.

3. Master may restrain a passenger by force, but the cause must be urgent and the manner reasonable and moderate. *The Friends—Duncan*. Stuart's Ad. Rep., p. 118.

Held, 1. That the authority of the master will always be fully supported by the courts so long as it is exercised within its jurisdiction.

2. Damages awarded against a master of a vessel for having, in a moment of ill-humour, attempted to deprive a cabin passenger of his right to the use of the quarter deck and cabin, and to separate him from the society of his fellow passengers. *The Toronto—Collinson*. Stuart's Ad. Rep., p. 179.

## PENALTY.

Held, That if any act be prohibited under a penalty, a contract to do it is void. *The Lady Seaton—Spencer*. Stuart's Ad. Rep., p. 263.

## PILOTS.

Held, 1. That a pilot is a mariner, and as such may sue for his pilotage in the Vice-Admiralty Court. See 2nd Will. 4, c. 51, sect. 4.

2. A pilot who has the steering of a ship is liable to an action for an injury done by his personal misconduct, although a superior officer be on board. *The Sophia—Easton*.

3. Damage occasioned to the ship by the misconduct of the pilot may be set off against his claim for pilotage. Stuart's Ad. Rep., p. 96.

Held, That in cases of pilotage where there has been a previous judgment of the Trinity House upon the same cause of demand, the court has no jurisdiction. *The Phæbe—Raltray*. Stuart's Ad. Rep., p. 59.

Held, 1. That persons acting as pilots are not to be remunerated as salvors.  
2. Pilots may become entitled to extra pilotage, in the nature of salvage, for extraordinary services rendered by them.

3. The jurisdiction of the court is not ousted in relation to claims of this nature by the provisional statute 45th Geo. 3, c. 12, sect. 12. *The Adventurer—Pevery*. Stuart's Ad. Rep., p. 101.

Held, That owners of vessels are not exempt from their legal responsibility though their vessel was under the care and management of a pilot. *The Cumberland—Tickle*. Stuart's Ad. Rep., p. 75.

Held, 1. That it is the exclusive duty of pilot in charge to direct the time and manner of bringing a vessel to anchor.

2. Pilot having control of a ship is not a competent witness for such ship without a release.

3. Ship held liable for collision notwithstanding there being a pilot on board. *The Lord John Russell—Young*. Stuart's Ad. Rep., p. 190.

Held, That having a pilot on board and acting in conformity with his directions, does not discharge the responsibility of owner. *The Creole*. Stuart's Ad. Rep., p. 199.

#### PILOT ACTS.

The English cases by which the owners are exempted from responsibility where the fault is solely and exclusively that of the pilot, nor shared in by the master or crew, are based upon the special provision of the English Pilotage Acts. *The Cumberland—Tickle*, in note. Stuart's Ad. Rep., p. 81.

Construction and validity of Pilot Acts. *Id.*, pp. 88, 199.

#### PILOT—DAMAGE.

Held, 1. In an action against the master of an ocean steamer, that a branch pilot in charge of the steamer is not a competent witness for the defendant, the action being for damage caused by the steamer striking against a wharf and injuring it.

2. That the damage in question was caused by the negligence of the respondent and of his crew.

3. That the master in general under the maritime law is the agent, *institor et préposé* of the owners, and is by the 20th section of the 18th Vict., c. 143, together with all other ship masters, expressly declared to be liable to the Harbor Commissioners of Montreal, Appellants, for injury done to wharves under their charge.

4. That the wharf not being in good order, the rule for two-thirds new for old may be regarded as a guide to the discretion of the court in awarding damages. 10 L. C. Rep., p. 259, *The Harbor Commissioners of Montreal, App., Grange*, Resp. *The Harbor Commissioners of Montreal vs. McMaster*. In Appeal: Lafontaine, C. J., Aylwin, Duval, Mondelet, J.

Held, 1. That the vessel is not liable for a collision occasioned by the mismanagement of a pilot taken under the requirements of the law, enforced by a penalty.

2. That the mode, time, and place of bringing a vessel to anchor is within the peculiar province of the pilot in charge.

3. That when a vessel is lying at anchor and another vessel is placed voluntarily, by those in charge, in such a position as that danger will happen if some event, not improbable, should arise, those in charge of the latter vessel must be answerable.

4. That it is the practice of the Admiralty Court not to give costs on either side when the damage has been found to proceed from the fault of the pilot alone. 11 L. C. Rep., p. 342, *The Lotus—Clark*. Vice-Admiralty Court L. C.; Black, J.

#### PILOTAGE—LIEN.

Held, That a lien for pilotage attaches to the vessel, although she may have changed owners between the performance of the pilotage, and the institution of the action. 6 L. C. Rep., p. 493, *The Premier—Heard*. Vice-Admiralty Court L. C.; Black, J.

Held, That the Court of Vice-Admiralty has no jurisdiction in an action by a pilot for moving a vessel from one part of the harbor of Quebec to another. 7 L. C. Rep., p. 427, Vice-Admiralty Court, L. C.; Black, J.

#### PILOT—PENSION.

Held, That a pension granted under the 45th Geo. 3, c. 12, sect. 11, to decayed pilots and to the widows and children of pilots, cannot be seized or attached. 3 L. C. Rep., p. 420, *Lelievre vs. Baillargeon*, and *The Trinity House, T. S.* C. C. Quebec; Duval, J.

Held, 1. That a pilot in charge of a vessel is entitled to remuneration from the owner (in addition to the usual pilotage) for loss of time and for services rendered in saving some of the spars and rigging of such vessel carried away, owing to the defective quality of the materials.

2. That where the owner obtains indirectly from the underwriters the amount of such claim of the pilot, the pilot may recover from such owner in an action for "work and labor and loss of time," without a count in the declaration for money had and received. 8 L. C. Rep., p. 229, *Russell vs. Parker*. S. C. Quebec; Chabot, J.

#### PILOT—CONTINUED.

Held, That a master of a ship is not personally liable for damage done to plaintiff's wharf by his ship whilst sailing out of the harbor of Quebec with a branch pilot on board having the management of the vessel, in obedience to the 12th Vict., c. 114, sect. 53. 8 L. C. Rep., p. 193, *Lampson vs. Smith*. S. C. Quebec; Meredith, J.

Held, 1. That the provincial statute 12th Vict., c. 114, renders it compulsory to take pilots for vessels navigating the St. Lawrence from Quebec to Montreal.

2. That in consequence of its being compulsory, the master is not liable for damage done by the vessel to a wharf when in charge of a pilot.

3. That the fact of striking the wharf under the circumstances of this case was *prima facie* evidence that it was occasioned by the fault of the pilot. 9 L. C. Rep., p. 3, *The Harbor Commissioners of Montreal vs. Grange*. S. C. Montreal; Smith, J.

Held, Judgment and ruling *supra* confirmed in Appeal: Also, That the presence of the pilot on board in charge of the vessel, and the consequent release of the master from responsibility, need not be specially pleaded but may be proved under a *defense en fait*. 9 L. C. Rep., p. 160, *Lampson*, App., *Smith*, Resp. In Appeal: Lafontaine; C. J., Aylwin, Duval, Caron, J.

#### PLEADING IN VICE-ADMIRALTY, L. C.

##### LIBEL.

Held, That all that is required in a libel for seamen's wages is to state the hiring, rate of wages, performance of the service, determination of the contract, and the refusal of payment. *The Newham—Robson*. Stuart's Ad. Rep., p. 71.

Held, 1. That the allegations of a party must be such as to apprise his adversary of the nature of the evidence to be adduced in support of them.

2. Less strictness is required in pleading in admiralty than in other courts.

3. All the essential particulars of the defence should be distinctly set forth in the pleadings.

4. The evidence must be confined to the matters put in issue, and the decree must follow the allegations and the proofs.

5. The defendant not pleading a judgment rendered in another court, waives such ground of defence.

6. Where the misconduct of a mariner is relied on as a ground of defence in an action for wages, it should be specifically put in issue. *The Agnes—Taylor*. Stuart's Ad. Rep., p. 56.

Held, That a demand for watch, &c., taken by the master from the seaman's chest may be joined to the demand for wages. *The Sarah—Sinclair*. Stuart's Ad. Rep., p. 87.

Held, That in a cause of damage, in which the proceedings were by plea and proof, acts appearing on the face of the libel to have been committed at a place which is not within the jurisdiction of the court will be rejected as inadmissible. *The Friends—Duncan*. Stuart's Ad. Rep., p. 112.

#### PRACTICE IN VICE-ADMIRALTY, L. C.

Held, That the practice to be observed in suits and proceedings in the courts of Vice-Admiralty abroad is governed by certain rules and regulations established by an order in council under the 2nd Will. 4, c. 51. Stuart's Ad. Rep., p. 1 to p. 52.

Held, That the court will require the libel to be produced at a short day, if the late period of the season or other cause renders it necessary. *The Newham—Robson*. Stuart's Ad. Rep., p. 70.

Held, That when the judge has any doubts in regard to the manner of navigating, ship's course, position, and situation, he will call for the assistance of



persons conversant in nautical affairs to explain. *The Cumberland—Tickle*. Stuart's Ad. Rep., p. 78.

Held, That probatory terms are in general peremptory, but may be restricted for sufficient cause. *The Adventure—Feverley*, Stuart's Ad. Rep., p. 99.

Held, An amendment in the warrant of attachment not allowed for an alleged error not apparent in the acts and proceedings in the suit. *The Aid—Nuthall*. Stuart's Ad. Rep., p. 210.

Suppletory oath ordered in a suit for subtraction of wages. *The Josepha—McIntyre*.—Stuart's Ad. Rep., p. 512.

Held, That where the court has clearly no jurisdiction, it will prohibit itself. *The Mary Jane—Trescowthick*. Stuart's Ad. Rep., p. 267.

Held, That in salvage cases the protest made by the master containing a narrative of facts when they are fresh in his memory, should be produced. *The Electric—Molton*. Stuart's Ad. Rep., p. 333.

Held, That in courts of civil law, the parties themselves have strictly no authority over the cause after their regular appearance by an attorney or proctor. *The Thetis—Watkinson*. Stuart's Ad. Rep., p. 365.

Held, That the attorney or proctor is so far regarded as the *dominus litis* that no proceeding can be taken except by him, or by his written consent, until a final decree or revocation of his authority.—*The Thetis—Watkinson*. Stuart's Ad. Rep., p. 365.

#### PROCTOR.

Held, That the settlement without the concurrence or knowledge of the promoter's proctor, does not bar the claim for costs, and the court will enquire whether the arrangement was, or was not, reasonable and just, and relieve the proctor if it were not. *The Thetis—Watkinson*. Stuart's Ad. Rep., p. 363.

#### PROXIES.

Held, That in order to prevent proctors from proceeding in causes on instructions from parties not having a legal right to prosecute a cause, the court may require the production of proxies. *The Dumfriesshire—Gowan*. Stuart's Ad. Rep., p. 245.

#### REGISTRY.

Held, That a certificate of registry with an indorsement to another person, which refers to a bill of sale of the vessel so registered, is no evidence of property in the indorsee without the bill of sale. *Prevost vs. Faribault*. K. B. Q. 1818.

#### REGISTRY—TITLE.

Held, That an auctioneer who sells a ship without naming his principal, cannot maintain an action for the sum offered by the last bidder, without a tender of a valid bill of sale. *Burns vs. Hart*. K. B. Q. 1810.

Same case, Pyke's Rep., p. 63.

Held, That a bill of sale of a ship in which the register is inserted but not the indorsements on the register, is nevertheless a bill of sale under the 26th Geo. 3, c. 60, sect. 17. *Meyrand vs. Boudreau*. K. B. Q. 1812.

Held, That the register must be transcribed or inserted in a bill of sale of a ship, unless she be under circumstances which constitute an exception to the general provision of the registry acts, and that such circumstances must be specially pleaded. *Peltier vs. Blagdon*. K. B. Q. 1813.

Held, That in an action for goods sold to two persons as joint owners of a ship, when it appeared that one had been owner and ordered the goods, and that he afterwards sold the ship to the other, the new owner was not liable for the goods, and that the plaintiff could not recover, having declared upon a joint contract of which there was no evidence. *Ray vs. Blagdon et al.* K. B. Q. 1817.

Held, That the defendants, who were the registered owners of a steamer plying on the St. Lawrence, are not liable for firewood supplied by plaintiff to the steamer; the credit being shown to have been given to a person running the steamer on his own account. 9 L. C. Rep., p. 225, *Morgan vs. Forsyth et al.* S. C. Montreal; Smith, J.

Same case, 3 Jurist, p. 98.

## SALE OF SHIP.

Held, That the sale of ship has not the effect of discharging seamen from their engagement. *The Scotia—Risk*. Stuart's Ad. Rep., p. 160.

## SALVAGE.

Held, That the amount of an undertaking to pay salvage in the Court of Admiralty of another British province may be recovered in Canada. *Moore vs. Muir*. K. B. Q. 1818.

Held, 1. A vessel struck on Red Island shoal in the River St. Lawrence in the end of November, 1853, and being abandoned by the crew was subsequently carried off by the ebb tide. She was followed by four young men, who with great perseverance, skill and courage, and with great peril of their lives, forced their boat through the ice, got on board of the vessel and brought her back to the bay of Tadousac where she remained in safety during the winter and proceeded on her voyage the following spring. On a value of £3000 currency the court awarded £500 currency and costs.

2. Rule laid down by the court respecting the production of protests, viz., that in all cases of salvage they ought to be produced. 5 L. C. Rep., p. 53, *The Electric—Molton*. Vice-Admiralty Court L. C.; Black, J.

The *Palmyra* sunk in the river St. Lawrence, was raised and saved by the very ingenious, novel, and excellent machinery on board the *Dirigo*, and the great skill and experience of her master and crew, most of whom were picked men and excellent mechanics:

Held, That £1,500 sterling was a reasonable salvage.

Held, That a bond for salvage in a Court of Admiralty in Nova Scotia can be recovered in Canada. *Moore vs. Muir*. K. B. Q. 1818.

Held, Upon a value of £6,700 the sum of £400 was awarded as salvage to a schooner for towing a vessel disabled in her masts and rigging in the lower part of the St. Lawrence to a place of safety, the mere *quantum* of service performed

not being the sole criterion for a salvage remuneration. 12 L. C. Rep., p. 309, *The Royal Middy—Davison*. Vice-Admiralty Court, L. C.; Black, J.

Held, That persons acting as pilots are not to be remunerated as salvors.

Held, That under extraordinary circumstances of peril or exertion, pilots may become entitled to an extra pilotage, as for a service in the nature of a salvage service such extra pilotage decreed to a branch pilot for the river St. Lawrence for services by him rendered to a vessel which was stranded at Mille Vaches, in the river St. Lawrence, on her voyage to Quebec.—*The Adventure—Peverley*. Stuart's Ad. Rep., p. 101.

Held, 1. That in a case of wreck in the river St. Lawrence (Rimouski), the court has jurisdiction of salvage.

2. In settling the question of salvage the value of the property and the nature of the salvage service are both to be considered.

3. The circumstances of the case examined and the service declared to be a salvage service, and not a mere *locatio operis*, though an agreement upon land was had between the parties in relation to such service.

4. Salvors have a right to retain the goods saved until the amount of the salvage be adjusted and tendered to them.—*The Royal William—Pennel*.—Stuart's Ad. Rep., p. 111.

Held, That compensation will be decreed to seamen out of the proceeds of the materials saved from the wreck by their exertions. *The Sillery—Hunter*. Stuart's Ad. Rep., p. 182.

Held, That seamen while acting in the line of their strict duty, cannot entitle themselves to salvage, but extraordinary events may occur in which their connexion with the ship may be dissolved *de facto* or by operation of law, or they may exceed their proper duty, in which cases they may be permitted to claim as salvors. *The Robert and Anne—Richmond*.—Stuart's Ad. Rep., p. 253.

Salvage allowed by Judge Kerr to the chief and second mates and carpenters, for their meritorious services, out of the proceeds arising from the sale of the articles saved from the wreck. *The Flora—Wilson*.—Stuart's Ad. Rep., p. 255.

In a case of very meritorious service rendered by two seamen and two young men to a vessel in the river St. Lawrence, the court awarded one-sixth part of the property saved, and also their costs and expenses. *The Electric—Molton*.—Stuart's Ad. Rep., p. 330.

#### SEIZURE OF REGISTERED VESSELS.

Held, 1. That in order to render valid the seizure and sale of a registered vessel, the formalities pointed out by the act 8th Vict., c. 9, must be complied with.

2. That the sale of the schooner "Paton" by the name of "John Paton" is bad, and inoperative to pass the title to the purchaser.

*Quid*, If the title of the purchaser were duly registered at the Custom house? 3 L. C. Rep., p. 471, *Cusack vs. Paton, and Rogers*, Opp. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That an advancer under the act to encourage ship building, 19th Vict., c. 50, to whom the register of the vessel has been granted, is not, therefore,

necessarily to be deemed the owner, so as to be liable for wages of seamen engaged in navigating it, or of mechanics employed in completing or repairing the vessel. 11 L. C. Rep., p. 150, *Dickey et al.*, App., *Terriault*, Resp. In Appeal: Lafontaine, C. J., Duval, Meredith, Mondelet, J.; Aylwin, J. dissenting.

See SHIPS AND SHIPPING, Wages.

#### STATUTE.

Held, That the repeal of a repealing statute has generally the effect of reviving the original statute. *The London—Dodson*. Stuart's Ad. Rep., p. 151.

Held, That a statute does not lose its force by desuetude or non-user. *The Mary Campbell—Simons*. Stuart's Ad. Rep., p. 223.

#### TRINITY HOUSE.

See COLLISION, Harbor Master.

By-laws of Trinity House not abrogated nor repealed by desuetude. *The Mary Campbell—Simons*. Stuart's Ad. Rep., p. 223.

By-laws construed strictly in favor of their application.—*Ib.*, p. 242.

#### VOYAGE.

Where a seaman shipped for a "voyage from London to Sunderland, thence to Rio Janeiro, and any port in South or North America, West Indies, Cape of Good Hope, Indian or China Seas, Australia, and back to a final port of discharge in the United Kingdom, or continent of Europe between the Elbe and Brest, voyage not to exceed twelve months," and the ship went from London to Sunderland, thence to Rio Janeiro, thence to the Cape of Good Hope, thence to St. Helena, and the Island of Ascension, and thence to Quebec:

Held, 1. That the articles were bad as being vague and uncertain.

2. That the voyage as actually performed was not a prosecution of the voyage described in the articles, and amounted in effect to a deviation under the Merchant Shipping Act of 1854, sect. 190. 8 L. C. Rep., p. 293, *The Prince Edward—Diaper*. Vice-Admiralty Court, L. C.; Stuart, A., J.

Where a voyage is described in the shipping articles as one to North and South America:

Held, That such description is too indefinite to set forth "the nature of the voyage" as required in the Merchant Shipping Act of 1854. 10 L. C. Rep. p. 356, *The Marathon—Horst*. Vice-Admiralty Court, L. C.; Black, J.

Held, That a description of a voyage in the shipping articles as one to the United States is a good description, and that more general terms following are to be construed as subordinate to the principal voyage in the preceding terms, and restricted to a reasonable distance from the United States, under the words "nature of the voyage," in the Merchant Shipping Act of 1854. 10 L. C. Rep., p. 359, *The Ellersley—Vickerman*. Vice-Admiralty Court, L. C.; Black, J.

Held, That in interpreting the act of parliament, the words "nature of the voyage" must have such a rational construction as to answer the main and leading

purpose for which they were framed, namely, to give the mariner a fair intimation of the nature of the service in which he was about to engage himself when he signed the ship's articles. *The Varuna—Davies*. Stuart's Ad. Rep., p. 361.

#### WAGES.

Held, That an action upon a note for £20 to a seaman for wages for the run, payable on the arrival of the ship in England, cannot be maintained if it appear that the ship was lost on its voyage home. *Wood vs. Higginbotham*. K. B. Q. 1813.

Held, That a supercargo is entitled to a *quantum meruit* if there be no specific agreement to pay him wages, or to allow him a commission on the value of the cargoes exported and imported. *Tugo vs. Jones*. K. B. Q. 1820.

In an action by a seaman for wages from the port of London to Quebec, the master set up an agreement that plaintiff should proceed on a voyage from London to Quebec and Montreal, and "back to a port of discharge in Great Britain."

Held, That the agreement was null because it had not been signed by the master as required by the Merchant Seaman's Act. Judgment for plaintiff. 3 Rev. de Jur., p. 420, *The Lady Seaton—Spencer*. Vice-Admiralty Court, L. C.; Black, J.

Held, That seamen brought to Quebec under articles of engagement expressed in the following terms, are entitled to, and can sue for, their wages, and cannot be compelled to return in the ship to a final port of discharge in the United Kingdom:

"The several persons whose names are herein subscribed, hereby agree to serve on board the said ship in the several capacities expressed against their respective names, on a voyage from the port of Liverpool to Constantinople, thence (if required) to any port and place in the Mediterranean and Black seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port in the United Kingdom, or for a term not to exceed twelve months. *The Varuna—Davies*. 5 L. C. Rep., p. 312, Vice-Admiralty Court, L. C.; Black, J.

Held, That under the provisions of the Merchant Shipping Act of 1854, a seaman cannot institute a suit in the Superior Court for the recovery of his wages, notwithstanding the action was commenced by *capias*. 6 L. C. Rep., p. 460, *Smith vs. Wright*. S. C. Quebec; Bowen, C. J., Meredith, Morin, J.

Held, That under the Merchant Shipping Act of 1854, a seaman who has contracted and signed articles for a voyage to British North America and back to a final port of discharge in the United Kingdom, is not entitled to recover wages here, on the ground of apprehension of danger to life in consequence of the unseaworthiness of the vessel. 8 L. C. Rep., p. 99, *The Pilot—Collins*. Vice-Admiralty Court, L. C.; Black, J.

Held, 1. That a title to a steamer derived from a sale of the vessel and tackle under a warrant of distress issued by justices of the peace, under the 6th Will. 4, c. 28, for the recovery of seamen's wages, is insufficient to maintain an action *en revendication*, the steamer not being shown to belong to, or to be registered in Lower Canada.

2. That the statute cannot be extended to vessels not belonging to, or registered in Lower Canada.

3. That where the statute authorizes the sale of a vessel or the tackle and apparel thereof, a warrant for the sale of the vessel and of the tackle and apparel thereof, is illegal. 8 L. C. Rep., p. 266, *Kerr vs. Gildersleeve*. S. C. Montreal; Badgley, J.

Same case, 3 Jurist, p. 304.

Held, That an agreement made subsequent to the execution of the mariner's contract, by the master of a vessel, with his crew, to discharge and pay them off at Quebec, not being the final port of discharge is not binding upon him. 8 L. C. Rep., p. 350, *The Winscales—Innis*. Police Court, Quebec; Power, J.

Where a seaman shipped for a voyage "from Shields to Barcelona, thence to any port or ports in the Mediterranean, Black Sea, Sea of Azof, or any port or ports on the coast of Africa, West Indies, South America, United States or British North America, from thence to a port of final discharge in the United Kingdom, or continent of Europe, the voyage to terminate in the United Kingdom and not to exceed —" and the ship went from Shields to Barcelona, and thence to Quebec to load for a final port of discharge in England:

Held, 1. That no right of action accrued to such seamen for wages in Quebec; and that the Admiralty Court there had no jurisdiction in such an action, under the provisions of the 17th and 18th Vict., c. 104, sect. 190, the voyage according to the contract not terminating at Quebec.

2. That it is not essentially necessary to insert the probable duration of the voyage in the mariner's contract. 8 L. C. Rep., p. 272, *The British Tar—Charleson*. Vice-Admiralty Court, L. C.; Black, J.

Held, 1. That the prescription established by the 127th article of the Custom of Paris does not apply to seamen's wages.

2. That a plea of prescription under that article is insufficient, if it does not contain an allegation of payment. 4 Jurist, p. 297, *Barbeau vs. Grant*. S. C. Montreal; Monk, J.

In an action for wages as a sailor on board of a barge:

Held, 1. That the Inspector and Superintendent of police for the city of Montreal has the same powers as two justices of the peace.

2. That as seamen have a *lien* and a right *in rem* for their wages, the registered owner is liable for wages accrued up to the date of his purchase.

3. That moreover the applicant for *certiorari* was bound to have set forth in his plea the name of the person from whom he bought the barge.

4. That the defect in the summons, which set forth that the barge was duly registered in the province of Canada, was cured by the *conviction* which stated the barge to be duly registered in *Lower Canada*. 10 L. C. Rep., p. 115, *Ex parte Warner*. S. C. Montreal; Smith, J.

Same case, 5 Jurist, p. 120.

The *Jane* sailed from Quebec on the 28th Nov., and was stranded about 100 miles below Quebec, where she remained for the winter; the master represented that the vessel had been condemned, and prevailed on the crew to accept their



discharge with wages to the 16th Dec., and obtained receipts *in full*, but made no tender of an indemnity, or of the means of travelling to an open Atlantic port.

Held, 1. That the settlement and receipts were obtained under undue and oppressive influence, and were no bar to an action by the crew.

2. Wages were allowed including the expense of board and lodging until the opening of the navigation of the St. Lawrence. 1 Rev. de Jur., p. 355, *The Jane—Custance*. Vice-Admiralty Court, L. C.; Black, J.

Held, That a promise to pay a seaman in advance, on condition that he proceeds to sea in a ship, is an agreement to pay so much absolutely upon the performance of the condition, whether the ship and cargo be afterwards lost upon the voyage or not. 1 Rev. de Jur., p. 362, *Mullen vs. Jeffrey*. Commissioners Court, Quebec; Power, J. 1846.

Held, In Maine, U. S., That the arrest and imprisonment of a seaman in a foreign port, and the sending him home by the public authority, charged with an indictable offence, does not necessarily constitute a bar to a claim for wages for the voyage, nor preclude the court from inquiring into the merits of the case, and making such a decree as justice requires.

2. The master is not ordinarily justified in dissolving the contract of a seaman, and discharging him for a single fault, unless it be of a high and aggravated character.

3. The causes for which a seaman may be discharged are ordinarily such as amount to a disqualification, and show him to be an unsafe and unfit man to have on board the vessel. 2 Rev. de Jur., p. 91, *Smith vs. Treat*. Ware, District J.

Held, That the court will entertain suits for wages brought by foreign seamen against the master of their vessel lying here, and will notice the *lex loci* to ascertain whether there is a legal and subsisting contract to prevent the mariner from enforcing payment of what is earned. 12 L. C. Rep., p. 247, *Carroll vs. Ballard*, C. C. Quebec; Taschereau, J.

Summary tribunal for the trial of seamen's suits for the recovery of their wages by complaint to a justice of the peace under the 5th and 6th Will. 4, c. 19, sect. 15.

No suit or proceeding for the recovery of wages under the sum of fifty pounds shall be instituted by or on behalf of any seaman, or apprentice, in any Court of Admiralty or Vice-Admiralty, or in the Court of Session in Scotland, or in any Court of record in Her Majesty's dominions, unless the owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of such court aforesaid, or unless any justices, acting under the authority of this act, refer the case to be adjudged by such court, or unless neither the owner nor master is, or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore. (17th and 18th Vict., c. 104, sect. 189.)

Summary tribunal for the trial of seamen's suits for the recovery of their wages for any amount not exceeding fifty pounds, before any two justices of the peace acting in or near to the place at which the service has terminated.—*The Agnes—Taylor*. Stuart's Ad. Rep., p. 58.



Held, That it is a good defence to a suit for wages, that the plaintiff could neither steer, furl nor reef. *The Venus—Butters*. Stuart's Ad. Rep., p. 92.

Discharge and wages demanded on the ground that the vessel was not properly supplied with provisions on the voyage to Quebec, whereby seamen's health had been impaired, and they were unable to return. The circumstances of the case examined and the master dismissed from the suit, the seamen returning to their duty. *The Recovery—Simkin*. Stuart's Ad. Rep., p. 128.

Held, That imprisonment of a seaman by a stranger for assault does not entitle him to recover wages during the voyage and before its termination. *The General Hewit—Sellers*. Stuart's Ad. Rep., p. 186.

Held, That the detention of a vessel during the winter by stranding in the river St. Lawrence, on her voyage to Quebec, where she arrived in the succeeding spring, does not defeat the claim of the seamen to wages during the winter. *The Factor—Price*. Stuart's Ad. Rep., p. 183.

Held, 1. That in cases arising out of the abrupt termination of the navigation of the St. Lawrence by ice, and a succession of storms in the end of November, seamen shipped in England on a voyage to Quebec and back to a port of discharge in the United Kingdom, are entitled to have provision made for their subsistence during the winter, or their transport to an open seaport on the Atlantic, with the payment of wages up to their arrival at such port.

2. The master is not at liberty to discharge the crew in a foreign port without their consent; and if he does, the maritime law gives the seamen entire wages for the voyage, with the expenses of return.

3. Circumstances, as a *semi-naufragium*, will vest in him an authority to do so upon proper conditions, as by providing and paying for their return passage, and their wages up to the time of their arrival at home.

4. It is for the court to consider what would be most just and reasonable; as whether the wages are to be continued till the arrival of the seamen in England, or to the nearest open commercial port, say Boston, or until the opening of the navigation of the St. Lawrence.

5. Under the peculiar circumstances of this case, wages decreed, including the expense of board and lodging until the opening of the navigation of the St. Lawrence.—*The Jane—Custance*. Stuart's Ad. Rep., p. 256.

Three of the promoters shipped on a voyage from Milford to Quebec and back to London, the eight remaining promoters shipped at Quebec for the return voyage, and all had signed articles accordingly. The ship came in ballast to Quebec, and, after taking in a cargo, sailed from Quebec on her return voyage, and was wrecked in the river St. Lawrence, and abandoned by the master as a total loss.

Held, 1. That the seamen who shipped at Milford were entitled to wages for services on the outward voyage from Milford to Quebec, and one half the period that the vessel remained at Quebec, notwithstanding that the outward voyage was made in ballast.

2. That the seamen who shipped at Quebec having abandoned, were not entitled to claim wages.

3. In cases of wreck, the claim of the seamen upon the parts saved is a claim

for salvage, and the *quantum* is regulated by the amount which would have been due for wages. *The Isabella—Dixon*. Stuart's Ad. Rep., p. 281.

But see "The Merchant Shipping Act," 1854, (17th and 18th Vict., c. 104, sect. 183) which came into operation on the first of May, 1853, and by which wages are no longer to be dependent on the carrying of freight.—*Id.*, in note. Stuart's Ad. Rep., p. 288.

SHIPS, advances to build. See ACTION TO ACCOUNT.

" fraudulent sale of. See FRAUD, Revocation.

" Bill of Lading. See Carrier.

" Sale of. See DECRET, Folle Enchère.

Loss of wages by total loss of vessel. See SHIPS AND SHIPPING, Freight.

Registered owner's liability for wages. See SHIPS AND SHIPPING, Registered Vessels.

## SCELLÉ.

### SEALS—AFFIXING OF.

Held, That the Superior Court in Weekly Session has no jurisdiction, under the 74th section of the 12th Vict., c. 38, to revise an order of a circuit judge, ordering *le scellé*, but that under the 18th section of the 41st Geo. 3, the authority of the court in term must be invoked. 3 L. C. Rep., p. 435, *Ex parte Cardinal and Bellinge*. S. C. Montreal; Day, Smith, Vanfelson, J.

Held, That it is essential to the solidity of a *scellé* under the French law, that it be executed by the judge in person, and not by a ministerial officer of the court; and that the property and papers which are the object of the *scellé*, remain under the seal of the court. *Richardson*, App., *Molson et al.*, Resp. Stuart's Rep., p. 376.

Held, That if a motion to set aside an attachment by the sheriff, of books of account and papers, be rejected in a court of original jurisdiction and its judgment to that effect is reversed in appeal, the Court of Appeals will not grant a rule for an attachment against a judge for putting a *scellé* upon such books and papers before they are restored by the sheriff, to the person in whose possession they were seized, against the sheriff for delivering them to the judge for that purpose, or against the party, or his attorney, at whose instance the *scellé* was carried into execution. See note to above case, Stuart's Rep., p. 393, note.

See WILL, Inventory.

## SEQUESTRE.

Held, In an action against the executors of a last will for a sum of money bequeathed to plaintiff, that a *sequestre* cannot be brought into the cause and obliged to take up the *instance*, he having no quality to do so. *Corporation of Portuguese Jews vs. David et al. Executors, and Holmes, sequestre*. S. C. Montreal; Cond. Rep., p. 51.

See RAILWAY COMPANY, Sequestre.

## SINKING FUND.

See CORPORATION, By-law.

## SLANDER—LIBEL.

See DAMAGES, Slander.

## SLAVERY IN LOWER CANADA.

See 3 Jurist, p. 257.

## STATUTE.

## CONSTRUCTION OF.

Held, That a typographical or clerical error in the English text of a statute, by the insertion of the word "these" instead of "third" parties, cannot be corrected by a reference to the French text, and that the court will not presume what meaning the Legislature intended, but will take the text as it finds it. 1 L. C. Rep., p. 25, *Archambault vs. Roy dit Picotte*, and Opps. S. C. Montreal; Day, Vanfelson, Mondelet, J.

## EFFECT OF.

Held, That where an act of Parliament declares that the banks of a river on which the abutments of a bridge erected by an individual rest, are to be public property, the right of the former owner is entirely extinguished, whether he has or has not been indemnified. *Hausseman vs. Casgrain*. K. B. Q. 1821.

## OF FRAUDS.

Held, That the statute of Frauds (29th Chas. 2, c. 3, sect. 17), is in force as a rule of evidence in commercial cases, as being part of the rules of evidence laid down by the laws of England in such cases; and that under the 25th Geo. 3, c. 2, sect. 10, a sale of goods for more than £10 is not good, if no part of the goods contracted for has been delivered, no earnest given, nor any memorandum thereof made in writing. *Hunt vs. Bruce et al.* Pyke's Rep., p. 8. Sewell, C. J. 1810.

Same case, K. B. Rep. 1810.

So also in *Pozzer vs. Meiklejohn*, Pyke's Rep., p. 11, where it was also held, that under the ordinance 25th Geo. 3, c. 2, English rules of evidence are applicable in all cases which, by the law of France, were cognizable by the consular jurisdiction.

## OF LIMITATIONS.

Held, That the statute of limitations is a good plea of exception *peremptoire perpetuelle* to a debt contracted in London, without reference, direct or indirect,

to the law of a foreign country. Stuart's Rep., p. 145, *Hogan vs. Wilson*. K. B. Q. 1820.

Held, That the Provincial statute of limitations 10th and 11th Vict., c. 11, is not applicable to debts created before the passing of the act, or, in other words, that it is not a declaratory law, nor retrospective. 3 Rev. de Jur., p. 469, *Brown vs. Gogy*. Q. B. Quebec, 1848.

Held, That the English statute of limitations was never in force in Lower Canada, and that the Provincial statute 10th and 11th Vict., c. 11, has no retro-active effect. 4 L. C. Rep., p. 237, *Russell, App., Fisher, Resp.* In Appeal: Rolland, Panet; Meredith, Aylwin, J., dissenting.

Judgment below confirmed, the judges in Appeal being equally divided.

The same doctrine held in *Langlois vs. Johnston*. 4 L. C. Rep., p. 367. S. C. Quebec; Duval, Meredith, Caron, J.

So in *Butler vs. McDougal*. 2 Rev. de Jur., p. 70. In Appeal: Reid, C. J., Smith, Delery, Stuart, Heney, Cochran, J.

Held, That the statute of limitations does not apply to an action for money lent, between parties not traders. 5 Jurist, p. 26, *Asselin vs. Mongeau*. C. C. Montreal; Smith, J.

Held, That the statute applies to an action for goods sold and delivered between traders. 5 Jurist, p. 26, *Molson et al. vs. Walmsley*. S. C. Montreal; Smith, J.

Held, That partial payments upon an open account interrupt the prescription under the statute of limitations. 5 Jurist, p. 168, *Benjamin et al. vs. Duchesnay et vir*. C. C. Montreal; Monk, J.

#### REPEAL OF.

Held, That an act of the legislature generally, if it be temporary has no more than a temporary effect, yet that a temporary act may repeal a permanent statute, if the intention of the legislature to effect such a repeal be manifest. Stuart's Rep., p. 311, *Chasseur vs. Hamel*. K. B. Q. 1828.

See ACTION REVENDICATION.

See EVIDENCE, Commencement de Preuve.

See PRESCRIPTION.

See RAILWAY COMPANY, Limitation.

REPEAL OF by implication. See WATER Beaches.

STATUTE (qui tam actions). See PENAL STATUTE, Penalty.

" RETROACTION OF. See SEIGNIORIAL RIGHTS, Retrait.

" REPEAL of. See BILLS AND NOTES, Prescription.

" PENAL. See CERTIORARI, Licenses.

" ERROR in. See 2 L. C. Rep., p. 25.

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#### STREET.

See CORPORATION, Roads.

" " Streets, Obstruction to.

## SUBROGATION.

See CONTRACT, Subrogation.

## SUBSTITUTION.

See CURATOR to substitution.

## SUCCESSION.

## RENUNCIATION.

Held, That in the case submitted, the presumptive heiress, who had collected moneys due to the deceased, and kept in her hands moneys left by him, could not afterwards legally renounce to his succession. 6 L. C. Rep., p. 23, *Orr*, App., *Fisher es qual.* Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

See case in S. C. Montreal; Cond. Rep., p. 87.

Held, 1. That a mere abstaining from intermeddling with the estate of the father, does not relieve his heirs from an action for his debts, but an *acte* of renunciation is necessary.

2. That an heir who pleads a renunciation, which is made only before the hearing on the merits, will be condemned only to costs. 4 Jurist, p. 54, *Montreal Building Society Kerfut et al.* S. C. Montreal; Berthelot, J.

## HEIR PRESUMPTIVE.

Held, That no action *en revendication* can be maintained by the presumptive heir to the estate and succession of an absentee, if he be not curator to the estate of such absentee, or entitled to the possession by virtue of an *envoi en possession* or a final *delivrance* of the estate and succession. Stuart's Rep., p. 36, *Gauvin vs. Caron.* K. B. Q. 1819.

See ACTION, various titles.

" WILLS, Husband and Wife.

## SUNDAY.

CONTRACT ON. See BILLS AND NOTES dated on Sunday.

## SURETY.

## APPEAL TO PRIVY COUNCIL.

The respondents served a notice upon the attorney for the appellants, that they would put in security upon an appeal to the Privy Council on Saturday the 18th

August, in the judge's chambers, in the court house; security was not put in on that day, but notice was given later on the Saturday that security would be put in in chambers on the Monday, which was done, not in chambers, but at the judge's house. One of the sureties signed the bond in the forenoon, and the other in the afternoon:

Held, On motion to set aside the bond for irregularity, and want of sufficient notice, that the bond must remain, but allowing the parties moving to make such objections to the sufficiency of the security as they might legally have made when the security was put in. 10 L. C. Rep., p. 402, *Gibb et al. App., The Beacon Assurance Company, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.*

#### BAIL—CRIMINAL.

In an action against bail, founded on the non-appearance of the accused in the Court of Queen's Bench, Crown side:

Held, 1, That after the accused has pleaded not guilty to an indictment, no default can be recorded against him without notice, unless it be on a day appointed for his appearance.

2. That it is the duty of the Court of Queen's Bench to estreat the recognizance in cases like the present, but only after notice has been duly given. 9 L. C. Rep., p. 67, *The Queen vs. Croteau*. S. C. Montreal; Badgley, J.

See a like judgment, *Regina vs. Beaulieu*. 3 Jurist, p. 117. Badgley, J.

Held, That on motion, a plaintiff will be allowed to substitute and fyle in the cause a notarial *acte* of cautionnement with a new surety in place of one produced with the action, the first surety being alleged to have desisted from his *cautionnement*. 12 L. C. Rep., p. 94, *Mongeau vs. Dubuc*. S. C. Montreal; Monk, J.

SURETY'S liability to costs of suit against principal. See *COSTS, Boucher vs. Latour*.

#### BAIL TO SHERIFF.

Held, 1. That the liability of the bail to the sheriff on a writ of *capias ad respondendum*, is for the amount indorsed on the writ, and no more.

2. That where the sheriff has taken bail for double the amount of the debt sworn to in the affidavit, and judgment has been obtained for an amount greater than that sworn to and indorsed on the writ, the bail are not liable for such excess.

3. An assignment under the ordinary signature, and in the form used in England, is sufficient.

4. That a motion to be allowed to put in special bail which was rejected, is not a sufficient compliance with the writ to relieve the bail to the sheriff. 2 L. C. Rep., p. 231, *Torrance et al. vs. Gilmour*. S. C. Montreal; Day, Vanfelson, Mondelet, J.

Held, 1. That a bail bond to the sheriff is null, if it contains a clause that the party shall put in special bail on the day of the return, and not at any time before or after judgment.

2. That the death of the defendant liberates the bail. 3 Rev. de Jur., p. 297, *Raymond vs. Walker*. Q. B. Quebec, 1848.

## CONSTRUCTION OF.

Held, In the Superior Court, 1. That an *acte* of suretyship will not cover a class of debts not contemplated by the parties at the time it was executed, although the terms of the deed are so general as to extend to all debts whatsoever.

2. If the introductory or recital portion of the *acte* indicates the purpose for which it is executed, it will be restricted to that purpose, notwithstanding the general terms in which the sureties contract.

3. An *acte* reciting that M. C. proposed to carry on business in Montreal and elsewhere, and that to enable him to do so, and to meet the engagements in liquidation of a firm of which he had been a partner, he would require bank accommodation, and that the sureties were willing to become his security with a view of making the bank perfectly secure with respect to any debts then due, or which might thereafter become due by him, and containing an agreement by which the sureties bound themselves for all the present and future liabilities of the said M. C., jointly and severally, whether as maker or drawer, endorser or acceptor of negotiable paper, or otherwise whatsoever, will not render the sureties liable for debts contracted by M. C. by indorsing or procuring the discount of paper in his own name, for the benefit of a firm of which he became a member subsequent to the execution of the deed of warranty, although such paper was discounted and placed to his individual credit at the bank.

4. A defendant may be a witness for his co-defendants if he be not interested, or if his interest be removed by a discharge. 2 Jurist, p. 154, *Bank of British North America vs. Cuwillier et al.* S. C. Montreal; Smith, J.

Confirmed in Appeal. Lafontaine, C. J., Duval, Mondelet, Monk, J.; Aylwin, J., dissenting. 4 Jurist, p. 241.

Held, In the Privy Council, That the recital in a deed of warranty, indicating the motive which prompted the execution of the deed, will not control the engagement, when such engagement is general and more extensive than the limited object for which it is supposed to be given, and that therefore the deed above referred to, will make the sureties liable for debts contracted by M. C. by indorsing or procuring the discount of paper in his own name, for the benefit of a firm of which he became a member subsequently to the execution of the deed of warranty. 5 Jurist, p. 57, *Bank of British North America, App., Cuwillier et al.*, Resp.

## CONTRIBUTION.

Held, That a *fidejusseur* has his action against his *co-fidejusseur* for his proportion of the sum which he has paid for their common principal, but if there be no convention to the contrary in the deed by which he became security, his action is only for money paid, and consequently he can have no mortgage upon the property of his *co-fidejusseur* until he has obtained a judgment, and then only from the date of the judgment. Stuart's Rep., p. 125, *Jones vs. Laing*, and *Herbert*, Opp. K. B. Q. 1818.

Held, That one of several co-debtors who has paid the debt for which they were all bound, without taking a subrogation from the creditor, can maintain an action *negotiorum gestorum* for money paid and advanced against each of his co-



debtors, and recover from each his *portion virile*. *Audy vs. Ritchie*. K. B. Q. 1820.

See APPEALS.

#### DISCHARGE OF.

Held, That a simple neglect on the part of the creditor to receive his debt from his principal debtor, does not discharge the sureties. *Berthelot vs. Aylwin*. K. B. Q. 1819.

#### FOR OFFICER.

Held, That the sureties for a paymaster, "if default shall be made in all or "any of the conditions of his bond" are liable, upon proof of the breach of any one of the conditions. *Rez vs. Burns*. K. B., 1819.

Held, That a bond conditioned upon the due fulfilment of the duties of an officer (paying teller) of a bank, is void as against sureties by the reduction of his salary below that stipulated in the bond, without consent of sureties. 2 L. C. Rep., p. 246, *City Bank vs. Brown et al.*

Held, That the security given for a debt not in existence cannot be of any avail to a party making a loan, unless it be shown that the loan was made upon the faith of such security, and that there was privity between the parties. 1 L. C. Rep., p. 41, *Derousselle vs. Beaudet*. S. C. Quebec; Bowen, Duval, Bacquet, J.

In an action against a surety to recover £3010 advanced under notarial obligation to a firm for the purpose of getting out timber:

Held, That the defendant can set up in compensation and payment the proceeds realized by the plaintiff of timber delivered by the principal debtors, and have the amount imputed on the original advances, unless an agreement to the contrary was made at the time of payment. 1 L. C. Rep., p. 136, *Symes vs. Perkins*. S. C. Montreal; Smith, J.

#### IN APPEAL.

In Appeal from the Circuit Court, under the 12th Vict., c. 38, sect. 53,

Held, That the Appeal bond is insufficient if the surety has not sworn that the property declared to be mortgaged belongs to him. 1 L. C. Rep., p. 218, *Stuart vs. Scott*. S. C. Quebec; Bowen, C. J., Meredith, J.

In an action brought against the principal debtor and his sureties under a notarial obligation, the sureties pleaded that a lot of land, mortgaged in plaintiff's favor, had been sold to the principal debtors and a judgment of ratification obtained subsequently, without opposition by plaintiffs to preserve their mortgage; that the obligation was not even enregistered, and that under a clause in the obligation it was stipulated that the sureties "shall be substituted and subrogated "in all and every the claims, privileges, and mortgages hereby created in favor "of the bank (plaintiffs) for the amount which the said sureties may pay."

Held, That this clause enunciated only the common law right of subrogation, and that the loss of the security by the inaction of plaintiffs did not affect their right against the sureties. 1 L. C. Rep., p. 354, *Redpath et al. vs. McDougall et al.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, On appeal from the Circuit Court, that the omission to annex a certified copy of the security bond to the petition presented in appeal, is fatal under the 12th Vict., c. 38, sect. 85, and the court will not permit a copy to be afterwards filed. 2 L. C. Rep., p. 299, *Germain vs. Vezina*. S. C. Quebec; Bowen, C. J., Duval, J.

Sureties in appeal, proof of bond. See APPEAL, Bond.

Held, On an appeal *ex parte*, 1. That where a notice of security in appeal was given for the "28th Feb.," and the date erased (*raturé*) and "3rd March" next put in the margin and paraphed but without the marginal note being mentioned at the bottom of the notice, or in the bailiff's certificate, that the return is not necessarily void, and the court, according to circumstances, may maintain the validity of the notice, and service.

2. That in an action *en garantie d'éviction* against joint and several sureties, the condemnation will be joint and several. 5 L. C. Rep., p. 36, *Demers*, App., *Parent et al.*, Resp. In Appeal: Lafontaine, C. J., Panet, Caron, J.; Aylwin, J., dissenting.

Held, In an action against sureties in a bail bond on appeal, that the question as to the necessity of discussing the property of the principal debtor, ought not to be raised by a *défense en droit*, but by an exception of *discussion*.

*Semble*, That in such case *discussion* is not necessary. 9 L. C. Rep., p. 403, *Thorn vs. McLennan et al.* S. C. Montreal; Badgley, J.

Held, That an appeal bond given before the issuing of the writ of appeal is null and void. 11 L. C. Rep., p. 72, *Barroughs*, App., *Simpson*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Same case, 5 Jurist, p. 20.

Notice of security in appeal was given on the 15th, to be put in on the 17th; another notice was given that security would be put in on the 18th May, 1858, nevertheless security was put in under the first notice, which security was set aside in the Court of Appeal as irregular and insufficient, the first notice having been rendered of no effect by the second:

Held, That an action will not lie against the sureties on the bail bond so set aside in appeal. 10 L. C. Rep., p. 238, *Smith vs. Egan et al.* S. C. Montreal; Smith, J.

Held, That the notice in the above case for the 18th is a waiver of the previous notice for the 17th. 2 Jurist, p. 160, *Sullivan vs. Smith*. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Held, That a security bond in appeal, given by Indians, is valid in the present case, inasmuch as the sureties, as appeared by affidavits, were in possession as proprietors, according to the Indian customary law, of certain real estate lying within the tract of land appropriated to the use of the tribe to which they belonged. 3 Jurist, p. 316, *Nianentsianu*, App., *Akwérente*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J.

Held, That sureties in appeal are not liable for the condemnation money where the appellant has filed a declaration that the judgment appealed from might be executed, although, by the appeal bond, they were liable for *debt and costs*. 4 Jurist, p. 293, *Chaurette vs. Rapin*. S. C. Montreal; Monk, J.

Held, 1. That where a judgment orders a writ of *contrainte par corps* against a defendant and imprisonment until he shall have paid debt, interest, and costs, in the cause, and on appeal, the sureties give the usual bond that the appellant (defendant) shall effectually prosecute the appeal, and pay such condemnation money, costs, and damages, as shall be adjudged in case the judgment of the S. C. be affirmed; the sureties are not, on the confirmation of the judgment, immediately liable to the plaintiff for more than the costs of the appeal, and not for the condemnation money, until the plaintiff has first enforced the order for *contrainte* against the defendant.

2. That the plaintiff will be liable for the costs of the contestation, although the defendant pleaded only the general issue. 5 Jurist, p. 161, *Whitney vs. Brooks et al.* S. C. Montreal; Badgley, J.

Held, That a defendant whose opposition has been dismissed, is bound, on an appeal, to give security for the debt, and that security for costs only will be declared insufficient. *Lampson vs. Wurtele.* In Appeal, 1847.

#### PAYMENT ANTICIPATED.

Held, That a surety who, under a clause in a deed of composition, paid moneys by anticipation to one of the creditors on an instalment not due, cannot claim to be collocated on the proceeds of the debtor's goods in preference to other creditors, parties to the deed of composition. 7 L. C. Rep., p. 272, *Whitney et al. vs. Craig*, and *Craig*. Opp. S. C. Montreal; Smith, Mondelet, Chabot, J. Same case, 1 Jurist, p. 97.

#### PAYMENTS.

Held, That a letter of *garantie* for a fixed amount and for a time to be determined by the revocation of it, is not extinguished by payment of a sum equal to that guaranteed, if made by the debtor without special imputation, if the *caution* be *solidaire*. 3 Jurist, p. 186, *Masson vs. Desmarteau et al.* S. C. Montreal; Badgley, J.

Held, That payments made by a debtor without imputation have the effect of extinguishing a letter of *garantie* for a fixed sum. 3 Jurist, p. 191, *Leblanc vs. Rousselle.* C. C. Montreal; Smith, J.

Held, 1. That a letter of guaranty given to one of the members of a firm, gives a right of action to the firm.

2. That the surety is not bound to pay the costs of discussing the principal debtor. 3 Jurist, p. 249, *Rolland et al. vs. Loranger.* C. C. Montreal; Badgley, J.

#### SPECIAL BAIL.

Held, That a motion to put in special bail (by a defendant arrested on *capias*) after the expiration of eight days from the return day, which does not set forth special grounds, cannot be granted. 8 L. C. Rep., p. 138, *Begin et al. vs. Bell et al.* S. C. Quebec; Chabot, J.

Held, That special bail may be put in even after judgment, and after the bail to the sheriff have been sued, and this on petition of the bail themselves. 3 Jurist, p. 117, *Lefebvre vs. Vallée.* S. C. Montreal; Badgley, J.

Held, By the S. C. Quebec, That a defendant arrested under a *capias* may put in special bail at any time after the judgment, although the bond to the sheriff has been assigned by the sheriff to the plaintiff, and by the latter to a third party who brought an action on the same.

The judges in appeal being equally divided, the judgment below stood confirmed. 9 L. C. Rep., p. 74, *Campbell*, App., *Atkins et al.*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

By ATTORNEY. See ATTORNEY, Bail.

LIBERATION OF. See CONTRACT, Novation.

SURETY not liable for costs of an action against principal debtor. See COSTS.

In APPEAL ON BILLS AND NOTES. See BILLS AND NOTES, as security for Shares.

SURETY discharged by delay given to principal. See CONTRACT, Novation.

SURETY under 264th Article of *Coutume*. See DOWER.

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### TAX.

See CORPORATION, Assessments.

“ “ Capitation Tax.

See SCHOOLS, Assessment.

“ LANDLORD AND TENANT, Assessment Fees.

For Court House. See OFFICER OF JUSTICE.

See DOWER.

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### TENANS ET ABOUTISSANS.

See PLEADINGS, Declaration.

“ ACTION Bornage.

“ “ Hypothecary.

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### TENANT.

See LANDLORD AND TENANT.

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### TENDER.

See PLEADING, Tender.

Of American Gold. See ALIMENT.

See CURRENCY.

Effect of. See CORPORATION, Assessors.

To Bailiff. See HUISSIER.

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### TENURES.

See DOWER.

PRIMOGENITURE. See IMPENSES in Petitory Action.

## TIERS SAISI.

See EXECUTION, Saisie Arrêt, Tiers Saisi.

## TITHES.

Held, That the action for tithes in Lower Canada is not subject to the prescription of a year. 3 L. C. Rep., p. 81, *Brunet vs. Desjardins*. C. C. Terbonne; C. Mondelet, J.

Held, 1. That in Lower Canada tithes do not run in arrears *ne s'arreragent pas*.

2. That the action for tithes is subject to the prescription of a year, and that a tender of the oath of payment is not required. 3 L. C. Rep., p. 196, *Théberge vs. Vilbon*. S. C. Montreal; Day, Smith, Vanfelson, J.

See 3 Rev. de Jur., p. 73, *Blanchet vs. Martin dit St. Jean*. Q. B. Montreal, 1833.

Held, That a Roman Catholic is not bound to pay tithes of the produce of lands held in free and common socage in the townships. 4 L. C. Rep., p. 411, *Refour vs. Sénécal*. C. C. St. Hyacinthe; J. S. McCord, J.

Same case, Cond. Rep., p. 104.

Held, 1. That the *dixme* must be divided *pro rata* amongst the curés during the time they officiated in the parish.

2. That the ecclesiastical year as respects *dixme*, runs from the *St. Michel* of one year to the same time of the following year, and that payment of *dixme* becomes due at Easter. 4 Jurist., p. 16, *Filiatrault vs. Archambault*. C. C. Sorel; Bruneau, J.

Held, 1. That notification to a *curé* of withdrawal from the Church of Rome, will discharge the person giving such notification from tithes thereafter.

2. Such notification need not be by notarial *acte* but may be otherwise proved. 5 Jurist., p. 27, *Gravel vs. Bruneau*, C. C. Montreal; Badgley, J.

## TOLLS.

See CROWN, Mails.

See PENAL STATUTE.

## TRADITION.

In Petitory Action. See ACTION PETITOIRE.

Of movables in donation by husband to wife. See DONATION, Delivery.

" SALE OF GOODS.

" FRAUD, Tradition.

## TRANSACTION.

See CONTRACT.

WITH TUTOR. See INVENTORY.

## TRANSPORT.

See **CESSION. CARRIER**—Railway Co.

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## TRINITY HOUSE.

REGULATIONS. See **SHIPS AND SHIPPING.**

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## TROUBLE.

See **SALE OF IMMOVABLES.**

See **GARANTIE.**

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## TURNPIKE ROADS.

See **CORPORATION, Roads.**

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## TUTOR.

## BANK STOCK.

Held, In the Superior Court and in Appeal, 1. That by law, the power of a tutor over the property of a minor does not extend beyond that of simple administration.

2. That he has no right, without sufficient authority first obtained, to sell "*les immeubles réels ou fictifs, ou réputés tels, ou choses précieuses.*"

3. That shares in a bank must be held to be *immeubles fictifs, ou choses précieuses*, and that the sale and transfer thereof by a tutor *en deconfiture*, without any formality or authorization, whereby the proceeds were wholly lost, is an absolute nullity, in so far as the minor is concerned.

4. That in an action by the minor against the bank, such minor is entitled to recover all the dividends accrued from the date of the transfer, although such dividends have been paid previously by the bank to the transferees.

5. That in such action the transferees of the stock need not be joined. 10 L. C. Rep., p. 225, *The Bank of Montreal, App., Simpson et al., Resp.* In Appeal: Lafontaine, C. J., Duval, Mondelet, Badgley, J.; Aylwin, J., dissenting. Same case, 5 Jurist, p. 169.

Held, In the Privy Council, 1. That the power of a tutor does not extend, without the sanction of the court, to selling any portion of the immovable property of his ward, or any property of a mixed character, and further that his power is also restricted from selling, without such sanction, any of the movable property except such portion as is unproductive of revenue, or such portion also, as being of a perishable character, will necessarily cease to exist, or will, from permanent causes, become deteriorated in value at the majority of his ward; and even this qualified power of disposing of unproductive property is still further limited by a restric-

tion from disposing of articles in the nature of heirlooms, as to which an hereditary *pretium affectionis* is attached; and that shares in a bank, or bank stocks fall within the description of movable property which the tutor cannot dispose of, without such authority.

2. That the sale of shares in a bank by a tutor, must be treated, not as a *voidable* transaction, but as actually *void*; and that therefore the persons who bought the shares need not be included in any action brought in relation to such shares 11 L. C. Rep., p. 377, *The Bank of Montreal*, App., *Simpson et vir*, Resp. In the Privy Council: Lord Kingsdown, Sir Edward Ryan, and the Master of the Rolls.

#### BEQUEST BY MINOR.

Held, That a minor of the age of twenty can bequeath personal property to his tutor. Stuart's Rep., p. 307, *Durocher et al.*, App., *Beaubien et al.*, Resp. In Appeal to the Privy Council, 1828.

MINOR, marriage of. See MARRIAGE.

#### CHANGE OF.

Held, 1. That a tutor must be superseded in the manner directed in the 41st Geo. 3., c. 7, sect. 18, but an appeal is the proper remedy if the appointment of tutor has not been regularly made.

2. The action *en destitution* lies for subsequent *misconduct* of the tutor. 3 Rev. de Jur., p. 365, *Darvault vs. Fournier*. K. B. Q. 1819.

#### CONFLICT AS TO.

Held, 1. That in Lower Canada a *tutelle* is *dativæ*, and is conferred by the judge, and not by the advice of the relations, such advice being only a mode of inquiry to aid the judge in the exercise of his attributes.

2. That a *tutelle* is not null *de plein droit* by reason of one of the grandfathers not having been called to the meeting of relations, and that such *tutelle* ought not to be set aside, if the interests of the minors be not affected by such omission.

3. That the *tutelle* must be conferred by the judge of the last domicile of the deceased father, which continues to be the domicile of the minors.

4. That, in the present case, the father had continued his domicile in the district of Montreal, although he had of late resided in another district, and died in Bermuda.

5. That in the event of two *tutelles* being conferred in two distinct jurisdictions, the court called upon to adjudicate upon the one conferred in its jurisdiction, may, and is bound, to adjudicate upon the validity of the other if the same is brought into question. 5 L. C. Rep., p. 344, *Beaudet*, App., *Dunn*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

Same case, S. C. Montreal; Cond. Rep., p. 14.

See *Inventory* as to legality of a second *tutelle* while the first is in existence.



Held, That a stranger in no way related to the minors has no right to bring an action *en destitution de tutelle*. 1 Jurist, p. 195, *Ex parte O'Meara*. S. C. Montreal; Day, Smith, Chabot, J.

Held, That a person not of kin, or a relative of the minor has a right to present a petition *en destitution de tutelle*, when the minor has no kin or relative in Canada. 3 Jurist, p. 72, *Dooley vs. Wardley et al.* S. C. Montreal; Smith, J.

## LESION.

Held, 1. That in an action of indemnity for *lesion*, a minor will not be obliged to deduct what he has received, unless it be pleaded and proved that he profited by it.

2. That positive proof of lesion in such case is not required, but may be inferred.

3. That the action of rescision for *lesion* will be maintained, notwithstanding proof that the minor managed his own affairs to a considerable extent.

4. In such action the minor is only bound for *impenses necessaires*, but will obtain the fruits and revenues from the date of the deed attacked, if no other proof of defendant's good faith is adduced than that the minor managed his own affairs to a considerable extent. 5 Jurist, p. 320, *Larivière vs. Arsenaull*, and *Larivière*. S. C. Montréal; Monk, J.

## MINORITY.

Held, That a minor may be sued for necessaries without his tutor. 4 Jurist, p. 146, *Thibodeau vs. Magnan*. C. C. Montreal; Monk, J.

Held, That a minor may plead the want of assistance by a tutor or curator. 5 Jurist, p. 48, *Crumph vs. Middlemiss*. S. C. Montreal; Berthelot, J.

Held, That an action for money paid and advanced for a minor must be instituted against his tutor. *Martinuccio vs. Jaconelli*. K. B. Q. 1819.

Held, That a minor, who is a merchant, may sue alone and without his tutor upon a contract made in the course of his trade. *Black vs. Esson*. K. B. Q. 1820.

Held, That a minor cannot be a *caution*, and if he does become bail for another, and is sued, and pleads his minority, the action must be dismissed. *Dérussel vs. Binet*. K. B. Q. 1820.

Held, That a contract of a minor is not null *de plein droit*. *Casgrain vs. Chapais*. K. B. Q. 1820.

Held, That a minor cannot be impleaded in his own name for necessaries for which he is liable, but the action must be brought against his tutor. 4 L. C. Rep., p. 224, *Cooper vs. McDougall*. S. C. Quebec; Duval, Meredith, J.

Held, That a minor, *marchand*, can be sued and condemned for debts contracted in the transaction of his business, without the appointment of a tutor, such minor being, with respect to such business, by law held as if of full age. 5 L. C. Rep., p. 193, *Danais vs. Coté*. S. C. Quebec; Bowen, C. J., Morin, Badgley, J.

Held, That where a writ of summons is issued previous to, but is served after, the majority of the defendant, the action will be dismissed on an *exception à la forme*. 9 L. C. Rep., p. 71, *Chalifoux vs. Thouin dit Roche*. S. C. Montreal; Mondelet, J.

Same case, 2 Jurist, p. 187.

In an action for haberdashers' wares (\$14.85) against a party who was only eighteen years old at the time of the contracting of the debt, the defendant pleaded minority at the time, the plaintiff replied setting up a promise to pay since his majority:

Held, That such promise to pay even a commercial debt must be in writing. Action dismissed. 3 Jurist, p. 337, *Munn vs. Wilson*. C. C. Montreal; Berthelot, J.

Held, That a minor who is proved to have lodged at an hotel, and to have offered to sell goods (gold pens) will be liable by *capias* for his *board and lodging* at such hotel, as for goods bought for the purposes of his trade. 12 L. C. Rep., p. 292, *Browning vs. Fule*, and *Wales Tutor*, Inter. S. C. Montreal; Smith, J.

Same case, 6 Jurist, p. 251.

#### NATURAL TUTOR.

Held, That a father cannot sue for his minor child as his natural tutor, nor maintain his own action if he has joined it to that brought for his son as such natural tutor. 2 L. C. Rep., p. 367. *Petit vs. Bichette*. C. C. Quebec; Duval, J.

In an action brought against a minor *en déclaration de paternité* and against his father, as well in his own name and as *tuteur naturel*, the minor child is not legally represented, nor can he be impleaded or called upon to answer to such action. 9 L. C. Rep., p. 203, *Hislop*, App., *Emerick et al.*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J.

See case in the S. C. Montreal; Cond. Rep., p. 106.

Held, That an opposition cannot be filed by a father as *tuteur légitime* of his children. 1 Jurist, p. 100, *Fletcher vs. Gatignan*, and *Gatignan*, Opp. S. C. Montreal; Smith, Mondelet, Chabot, J.

See DAMAGES, Arrest, as to action for arresting minor.

*Tutor ad hoc* necessary *en partage* when. See ACTION Partage.

#### POWERS OF.

Held, That a tutor or guardian to children resident in a foreign country, if duly appointed according to the laws of that country, can support an action on their behalf. *Allen vs. Cottman*. K. B. Q. 1811.

Held, That no action lies against a tutor personally, upon a contract entered into by him solely on behalf of his pupil. *Turcotte vs. Garneau*. K. B. Q. 1821.

Held, That an action of damages for breach of contract cannot be maintained against a tutor personally, who stipulates for his pupil that she will marry the plaintiff. *Chabot vs. Morisset*. K. B. Q. 1812.

Held, That a contract of sale executed by a tutor on the behalf of his pupil is null *de plein droit*, without an *avis de parens*. *Normandeau vs. Amblement*. K. B. Q. 1813.

Held, That a tutor may, in an hypothecary action, file a plea of *déguerpissement* for his pupil, but it must be founded on an *avis de parens*. *Tasché vs. Levasseur*. K. B. Q. 1812.

## TAX OF WITNESS.

Held, That a witness summoned to give evidence in a case wherein the defendant was tutor to a substitution, could not recover the amount of his taxation in an action against the tutor personally. 11 L. C. Rep., p. 281, *Dagenais vs. Gauthier*. C. C. Montreal; Smith, J.

## TUTOR AD HOC.

Held, That when a tutor *ad hoc*, appointed to protect the interest of minors, in a usufruct bequeathed to them, is sued in an action relating to such usufruct, it is not necessary that a tutor *ad hoc* be appointed expressly for that suit. *Forstyth et al. vs. Williams et al.* S. C. Montreal; Day, Smith, Vanfelson, J.

Held, That an opposition to the sale of real estate by a tutor *ad hoc* authorized to act for minors, is maintainable without registration of the *acte de tutelle*, and that the 4th Vict., c. 30, sect. 24, is not applicable to such opposition. 5 L. C. Rep., p. 401, *Chouinard vs. Demers*, and *Gareau*, Opp. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a minor wife, assisted by her husband, can maintain an action for movable rights arising out of the succession of her mother, without being assisted by a tutor *ad hoc*. 1 Rev. de Jur., p. 288, *Prevost et ux vs. Breux*. Q. B. Montreal, 1832.

Held, In an action by a widow for a *partage* of the community, the minors, issue of the marriage, must be represented by a tutor *ad hoc*, specially appointed to answer such demand *en partage*. 3 L. C. Rep., p. 301, *McTavish vs. Pike et al.* In Appeal: Stuart, C. J., Panet, Aylwin, J.; Rolland, J., dissenting.

As to registration of *acte de tutelle*. See REGISTRATION, *Acte de Tutelle*.

## TUTOR'S ACCOUNT.

Held, In an action against a tutor to render an account, he may plead that he rendered an account before action brought, renew his account in court, and conclude that it be declared good and valid and the plaintiff condemned to costs. 4 L. C. Rep., p. 222, *Trudel et al. vs. Roy dit' Audy*. S. C. Quebec; Duval, Meredith, Caron, J.

Held, That an account rendered by a tutor to his ward *en bloc* after majority, is null *ipso jure*, and constitutes no bar when pleaded against an action to account. 2 Jurist, p. 104, *Ducondu vs. Bourgeois*. S. C. Montreal; Smith, J.

Held, That a judgment may be rendered against a tutor to satisfy a preliminary condemnation, or to render an account; or he may be condemned to render an account by a *contrainte par corps*. 3 Rev. de Jur., p. 245, *Hayes*, App., *David*, Resp. In Appeal, 1847.

See ACTION TO ACCOUNT.

Tutrix ordered *de prendre qualité* within fifteen days. Prévosté, No. 86.

Tutor condemned to remain tutor. Prévosté, No. 105.

Confirmed in appeal; Cons. Sup., No. 51.

Tutor discharged from *tutelle*. Cons. Sup., No. 5.

Discharged having five children. Cons. Sup., No. 42.

Injunction to inferior jurisdictions not to name tutors without presence of Procureur General or his substitute. Cons. Sup., No. 24.

Tutelle declared null on account of the tutor not having been called to an *assemblée*. Cons. Sup., No. 55.

Tutor's account, form of presenting and affirming it. Prévosté, No. 10.

Tutor, opposition by. See OPPOSITION *en sous ordre*.

## USUFRUCT.

### ACCROISSEMENT.

Held, That *accroissement* takes place in the donation of a usufruct, even by *acte entre vifs*, if by its disposition and clear terms, it creates a *substitution réciproque*, and that the substitutions created by donation and by will are regulated by the same rules of law. 3 Jurist, p. 141, *Joseph vs. Castonguay et al.* S. C. Montreal; Smith, J.

### AMELIORATIONS.

Held, 1. Where a usufruct only of real estate was seized, a proportion of the ameliorations and improvements made on the real estate will be allowed, according to the increased value given to such usufruct.

2. That in cases of contestation or distribution of moneys, the opposant whose claim is reduced, must pay the costs of contestation. 9 L. C. Rep., p. 263, *Fauteux*, App., Boston, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, J.

Held, 1. That the usufructuary can only recover, in the case submitted, from the proprietor the *grosses réparations* and the repairs necessary for the preservation and enjoyment of the immovables subject to the usufruct.

2. And can only claim the value of the useful improvements, *améliorations utiles*, so far as the immovables derive value from them at the time of the opening of the substitution.

3. That the *impenses grosses et nécessaires* were payable in the entire, even although they should have ceased to exist at the opening of the substitution, provided they have not so ceased to exist by the fault of the usufructuary, by reason of his want of care.

4. That *impenses voluptuaires* are not payable by the proprietor. 11 L. C. Rep., p. 388, *Lafontaine vs. Suzor et al.* S. C. Quebec; Taschereau, J.

### DECHÉANCE.

Held, That an action does not lie *en déchéance d'usufruit*, in favor of a tutor appointed *en justice* to a substitution under a will. 3 Jurist, p. 54, *Gauthier vs. Boudreau et al.* S. C. Montreal; Day, Smith, Mondelet, J.

### RÉPARATION.

Held, That the proprietor of land has no action against the usufructuary to compel him to make specific *réparations*, or in default thereof to pay damages. 5

Jurist, p. 99, *McGinnis vs. Choquet*. S. C. Montreal; Day, Smith, Mondelet, J. Same case, Cond. Rep., p. 89.

## SALE OF.

Held, That a sale of the usufruct of a farm for a sum certain, but to be held for a period depending on an uncertain event, is a *contrat aleatoire* upon which an action will lie. *Lagassé vs. Dion*. K. B. Q. 1820.

## SEIZURE AND SALE OF.

Held, That a transfer of a right of usufruct of real estate for seven years vests in the assignee only the right of exercising the usufruct, and will not support an opposition to the sale of the usufruct upon an execution against the assignor. 9 L. C. Rep., p. 59, *Simpson et al. vs. Delisle*, and *Dorion*, Opp. S. C. Montreal; Badgley, J.

Held, That where a judgment was rendered against a husband, condemning him to pay an annual rent and pension to his wife, separated as to *corps et habitation*, and a *usufruit viager* was seized, that an opposition will not be maintained to such seizure, founded on a bequest to the defendant, opposant, by his father, by the following clause in the will, "Je défends expressément que ces biens soient en aucune manière engagés, aliénés, hypothéqués, non plus que la jouissance, intérêt, ou usufruit d'iceux, qu'ils (les grévés) retireront pour leur pension et leur subsistance, et pour la subsistance et éducation de leurs familles, sous peine de nullité de tous actes qu'ils feront contraires à mon intention, pour que ces biens retournent à leurs enfants, etc." 1 Rev. de Jur., p. 81, *Dame M. L. E. F., dite M. vs. L. E. C., dit C.* In Appeal: Stuart, C. J., Bowen, Panet, Bedard, Mondelet, J.

Held, 1. That the building of a house upon real estate subject to a usufruct does not cause such a change in the property as to put an end to the usufruct.

2. That a wife *separée des biens* from her husband cannot bind her real estate for a debt due by her husband, for the payment of which she could not bind herself personally.

*Semble*, That on proper pleadings, an expertise might have been had to ascertain to what extent the usufruct of the wife was increased in value by the moneys derived from the obligation given to the husband, and that, to this extent, the obligation would have been binding on her. 12 L. C. Rep., p. 178, *Little*, App., *Diguard*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Meredith, Mondelet, J.

USUFRUCT. See PARTAGE.

## USURY.

Held, That if a debt contracted in England be tainted with usury, the law of England ought to be alleged in the plea. 1 L. C. Rep., p. 90, *Hurt et al. vs. Phillips*. In Appeal: Stuart, Rolland, Panet, Aylwin, J.

The plaintiffs were in the habit of advancing supplies of goods, cash and negotiable securities, as required from time to time by customers, to support them

in their dealings, returns being made by such customers, at their convenience, in the freight of produce from the upper country, and in the transfer of vessels and barges, and in the payment of cash and negotiable securities, and charged a commission of *five per cent.* on all advances made by them, when the customers had no funds in their hands, and interest from the time the different items of their account became due, under a previous agreement to that effect :

Held, That the commission in this case was not usurious, or a cover for a usurious transaction, but a customary allowance for the trouble and inconvenience of transacting the business. 3 L. C. Rep., p. 171, *Pollock et al. App., Bradbury, Resp.* In the Privy Council : Lord Justice Knight Bruce, and others.

In an action on an obligation, the defendant pleaded that he gave the plaintiff two promissory notes for £60 each, on account of the amount due and had paid them, and had given another note for £60 which was still in plaintiff's hands. The plaintiff answered that the first note had been received and paid, and that the other notes were given on an agreement to pay 12 per cent. interest on the obligation. The defendant, examined on *faits et articles*, admitted his promise to pay the 12 per cent., stating that he had been forced to do so, being unable to pay the capital when it became due :

Held, That the amount of the *second* note must be deducted from the principal and interest at 6 per cent, and that the *third* note did not operate as a novation, and must be given back to defendant. 10 L. C. Rep., p. 236, *Beaudry vs. Proulx.* S. C. Montreal ; Berthelot, J.

Held, That in an action on an obligation for \$400, the plaintiff, in the case submitted, can only recover the amount of money actually received by the defendant (\$252), the difference being shown to be a *bonus* for the loan. 11 L. C. Rep., p. 166, *Belleau vs. Degourdelle.* S. C. Quebec ; Stuart, J.

Held, That under the 16th Vict., c. 86, a notarial obligation will be reduced to the capital actually loaned, and legal interest thereon. 4 Jurist, p. 302, *Morson vs. David.* S. C. Montreal ; Monk, J.

#### IN BILLS AND NOTES.

Held, That an exception of usury to an action on note, will be dismissed on demurrer, the remedies under the 17th Geo. 3, c. 3, having been done away with by the 16th Vict., c. 80. *McFurlane vs. Rodden et al.* S. C. Montreal ; Cond. Rep., p. 3.

Held, 1. That the only effect of the statute of 1855, c. 80, is the repealing of the penalties and nullity of the contract, enacted by the ordinance 17th Geo. 3, c. 3, sect. 3.

2. That the legal rate of interest is six per cent., and that a maker of a note or other instrument in writing, whenever a greater rate has been retained or paid, has the right to have such excess deducted from the principal debt. 7 L. C. Rep., p. 405, *Nye, App., Malo, Resp.* In Appeal : Lafontaine, C. J., Aylwin, Duval, Caron, J.

In an action on note against the defendant as one of a firm who were the payees and indorsers of the note, it appeared that the plaintiff had discounted for the firm

the note in question, with two other notes made in their favor, and retained as discount an amount equal to *sixty* per cent. per annum on the three notes; the defendant pleaded usury and that the excess of interest over six per cent. should be deducted from the note sued on, the two others having been paid in full:

Held, That the plea could not be maintained; *first*, inasmuch as the defendant had not established the precise excess retained over the legal interest on the *note in suit*; and *second*, because the defendant's firm were indorsers of the notes, and the two notes might have been paid by the makers, and not by the indorsers. 9 L. C. Rep., p. 327, *Malo vs. Wurtele*. S. C. Montreal; Smith, J.

Held, 1, That any excess of interest over *six* per cent. is usurious and illegal, and can be claimed by the debtor by exception.

2. That where a party interrogated on *fait et articles* on a matter which he should know, answers that he does not remember, as in this case where the plaintiff when asked what amount he had advanced and what sums he had received, answered that he did not keep a journal, memorandum, or account book, and that he had forgotten the amounts advanced or received, the interrogatories will be taken *pro confessis*. 2 Jurist, p. 43, *Nye*, App., *Malo*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Caron, J.; Duval, J., dissenting.

INTERROGATORIES.

Held, That a plaintiff cannot be compelled to answer on *faits et articles*, or on the decisory oath, to any question which tends to charge him with usury. *Hodgson vs. Hanna*. K. B. Q. 1818.

USURY, Proof of. See **BILLS AND NOTES**, proof of.

“ as to Plea of. See **LEX LOCI**.

“ See Interrogatories *sur faits et articles*.

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VACANT ESTATE.

See **CURATOR** to.

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VACATION.

APPEARANCE IN. See **ATTORNEY**, Appearance.

PLEA IN. “ “ “

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VARIANCE.

IN PROOF. See **EVIDENCE**, Variance.

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VENDITIONI EXPONAS.

See **EXECUTION**.



## VENDOR'S RIGHTS.

- See SALE OF IMMOVABLES.  
 " SALE OF GOODS.  
 " ACTION, Revendication.  
 " LIEN.  
 " PRIVILEGE.
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## VENTILATION.

Held, 1. That the parties interested in the contestation or issue joined, are alone to be made parties to an appeal.

2. That in a demand for ratification of a deed of sale of several lots of land (affected with distinct charges and mortgages) for one price, the hypothecary creditors cannot be foreclosed from overbidding until the price of each lot has been ascertained by *ventilation*, and that the petitioner cannot obtain the ratification of his title until such *ventilation* has been made.

3. That the *ventilation* must be homologated by the court before the moncy deposited can be distributed. 5 L. C. Rep., p. 70, *Dewitt, App., Burroughs, Resp.* In Appeal: Rolland, Panet, Aylwin, J.

See IMPENSES ET AMELIORATIONS.

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## VERDICT.

See JURY, Verdict.

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## VERIFICATION D'ECRITURE.

See EVIDENCE, Verification d'écriture.

" *Rouillard vs. Lavasseur.* Cons. Sup., No. 35.

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## VERITAS CONVICTI.

See DAMAGES, Slander.

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## VICE DU SOL,

Builders liability for. See CONTRACT, Builder.

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## VOTES.

See CORPORATION, Election.

## VOYER GRAND.

See CERTIORARI, Roads.

" OFFICER PUBLIC, Sous Voyer.

" CORPORATION, Actions by.

" " Roads.

## WAGES.

Held, That a servant, who leaves the employ of his master before the expiration of his term of hire, does not thereby forfeit wages previously earned. 4 L. C. Rep., p. 26, *Belliveau vs. Sylvain*. C. C. Quebec; Meredith, J.

Held, That in a contract of hiring, the words, " your remuneration shall be at the rate of £300 per annum," do not constitute a hiring for a year, and that such contract is determinable at the option of either party. 4 L. C. Rep., p. 91, *Lennan vs. The St. Lawrence and Atlantic Railway Company*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That the privilege of a clerk for wages, is confined to wages due at the time of the sale of the goods by the sheriff. 4 L. C. Rep., p. 174, *Eurl vs. Casey*, and *Opps*. S. C. Quebec; Duval, Meredith, Caron, J.

Held, That a servant engaged by verbal or written contract, and dismissed without cause, is entitled to wages for the residue of the term for which he was engaged, and to the value of his board and lodging for the same period. *Fortier vs. Allison*. K. B. Q. 1811.

Held, In an action for salary on account of wrongful dismissal, when there have been irregularities and errors proved in the plaintiff's accounts, his discharge will be held justifiable and the plaintiff will not recover wages beyond the date of his dismissal, although the disobedience of orders, prevarication, and defalcation pleaded, be not proved. 1 Jurist, p. 223, *Webster vs. Grand Trunk Company*. S. C. Montreal; Smith, Mondelet, Badgley, J.

Held, That a clerk's wages not due, cannot be seized on a writ of *saisie arrêt*. 1 Jurist, p. 270, *Malo vs. Adhemar*. C. C. Montreal; Bruneau, J.

So held in *Sternberg vs. Dresser & Evans, T. S.* Berthelot, J. 4 Jurist, p. 120.

Held, That a merchant is justified in dismissing his clerk before the termination of his engagement for a breach of duty or discipline, such as absence without leave, and that the clerk cannot, in such case, recover any subsequent salary. 2 Jurist, p. 103, *Charbonneau vs. Benjamin*. S. C. Montreal; Mondelet, J.

Held, 1. That a servant refusing to obey a lawful order of his master, and who is in consequence discharged, can only recover wages to the date of his discharge, notwithstanding proof of uniform good conduct previously.

2. That a clerical error of date in a pleading can be amended at the hearing on the merits. 2 Jurist, p. 277, *Hastie vs. Morland*. S. C. Montreal; Mondelet, J.

Held, That a merchant's clerk, engaged by the year, if dismissed without cause, may sue for his wages during the time he was out of employment, instead

of suing in damages. 6 Jurist, p. 118, *Ouellet vs. Fournier dit Prefontaine*. C. C. Montreal; Berthelot, J.

DÉDOMMAGEMENT given for extra mason work. Cons. Sup., No. 67.

MASTER'S OATH. See EVIDENCE, Competency of.

Prescription of. See PRESCRIPTION, Witness, Wages.

Wages of Seamen. See SHIPS AND SHIPPING, Wages.

Privilege of master of steamer for wages, and of material men. See PRIVILEGE.

#### WAIVER.

Of objection as to form. See APPEAL, Inscription.

Of mortgage. See REGISTRATION, *Baillieur de Fonds*.

See PLEADING. See SURETY, In Appeal.

#### WAREHOUSEMAN.

See LIEN, Carrier.

See DEPOT.

#### WARRANTY.

In Insurance. See INSURANCE, Warranty.

See GARANTIE.

#### WATER AND WATER COURSES.

##### ACCESSION.

Held, That an accession to a lot of land situate on the borders of the river St. Lawrence, by alluvial deposits, belongs to the riparian proprietor. 3 L. C. Jur., p. 93, *Newton et al., App., Roi, Resp.* In Appeal, 1834.

##### BEACHES.

Held, That the beach of the river St. Lawrence is in the king's possession. *Morin vs. Lefebvre*. K. B. Q. 1816.

Held, That the beaches of the north shore of the river St. Lawrence are now vested in the Quebec *Harbor Commissioners*, and that they alone have the control and management of the same, as also the right of punishing any person who may encroach upon or encumber them, and that the *Trinity House Act* in so far as it conferred any control or management over these beaches, is repealed by implication. 11 L. C. Rep., p. 453, *Ex parte Lane*. S. C. Quebec; Stuart, J.

Held, 1. That the 16th Vict., c. 24, does not give the Harbor Commissioners of Montreal the right of bringing an action in the nature of a petitory action against the emphyteotic lessees of canal lots at the Lachine canal, complaining

*Prefontaine. C.*

No. 67.

See PRIVILEGE.

of encroachment made by them upon the bed of the river St. Lawrence within the harbor, the bed of the river, even within the harbor, being vested in the Crown.

2. That even if they had such right they could not maintain a petitory action against such lessees inasmuch as they were *propriétaires limitrophes*, and therefore only an action of *bornage* could be maintained. 5 Jurist, p. 155, *Harbor Commissioners vs. Hall et al.* Same vs. *Lyman et al.* S. C. Montreal; Smith, J.

#### IMPEDING WATER COURSE.

Held, That an action *in factum* can be maintained against a neighboring proprietor for impeding a water course, or an aqueduct, by acts done on his own property. *Harrower vs. Babin.* K. B. Q. 1817.

#### MILLS.

Held, That the owner of a mill site is entitled to a judgment affirming his right to the enjoyment of the use of the water of a stream in its natural course, which has been diverted by a neighbor for a mill on his land, although, at the date of the action, the plaintiff had no mill, and did not require the use of the water. 7 L. C. Rep., p. 245, *Bussière vs. Blais.* S. C. Quebec; Bowen, C. J., Meredith, Badgley, J.

Held, That where two proprietors of lots upon the same stream possess water powers, one of which cannot be improved without the destruction of the other, the first occupant is entitled to have the dam of the other taken down. 8 L. C. Rep., p. 132, *Dunkerley vs. McCarty.* S. C. Sherbrooke; Day, Short, Driscoll, J.

Held, That a superior mill owner has no right to obstruct a river which is *navigable et flottable* and used for floating lumber, by constructing a boom across such river; and that an inferior mill owner, whose logs are detained by such boom, has a right, after reasonable notice, to demand to be allowed to pass his logs, and to open the boom for that purpose, and is not responsible for damages caused by the logs of the other party being carried down the river. 8 L. C. Rep., p. 147, *Chapman et al. vs. Clark et al.* S. C. Sherbrooke; Short, J.

Held, In the Privy Council, 1. That by the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream.

2. That he has a right further to the use of it for any purpose, or what may be called the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purposes of a mill, or direct the water for the purposes of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a serious injury.

*Semble*, That for the purposes of this case, it does not appear that any material distinction exists between the French and the English law. 9 L. C. Rep., p. 115, *Minor, App., Gilmour, Resp.*

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The judgment on the particular facts of this case is not here given.

Held, That under the provisions of the 20th Vict., c. 104, a proprietor has no right to erect a dam, across a river, abutting on the land of the opposite proprietor, and if a dam so erected, it will be demolished at the instance of the latter. 9 L. C. Rep., p. 166, *Joly vs. Gagnon*. S. C. Quebec; Chabot, J.

#### PROCÈS VERBAL.

Held, On *certiorari*, that the original *procès verbal* of a *cours d'eau* must be homologated and not a copy thereof. 6 L. C. Rep., p. 487, *Ex parte Vincent*. S. C. Montreal; Smith, Vanfelson, J.

#### RIVERS—NAVIGABLE.

Held, That the banks of navigable rivers belong to the riparian proprietors, subject to a servitude in favor of the public for all purposes of public utility. Stuart's Rep., p. 427, *Fournier, App., Oliva, Resp.* In Appeal, 1830.

Held, That navigable rivers have always been regarded as public highways and dependencies of the public domain, and flottable rivers are regarded in the same light. In both the public have a legal servitude for floating down logs or rafts, and the proprietors of the adjoining banks cannot use the beds of such rivers to the detriment of such servitude. Stuart's Rep., p. 524, *Oliva vs. Bissonnault*. K. B. Q. 1832.

Held, In Appeal, 1. That rivers whether navigable or not, are vested in the Crown for the public benefit; and no person, seigneur or other, can exercise any right over them without a grant from the Crown.

2. In an action of damages for stopping of communication on a navigable river with a boom and chain, it appearing from an agreement between the parties, after the commencement of the suit, that the placing of the boom and chain tended to their mutual benefit, the action was dismissed. Stuart's Rep., p. 564, *Boissonnault, App., Oliva, Resp.* In Appeal, 1833.

#### RIVERS—NOT NAVIGABLE.

Held, That the rights of the seigneur in Lower Canada to the water of an un-navigable river flowing through his fief, does not entitle one of several co-seigneurs to divert for his exclusive use the waters which had for eleven years been used to supply the mills of another of his co-seigneurs. 3 Rev. de Jur., p. 329, *St. Louis, App., St. Louis et al., Resp.* In the Privy Council, 1841.

Held, 1. That rivers *non navigables et non flottables* are the private property of the riparian proprietors, who have consequently exclusive control over them.

2. That the *Jacques Cartier* is such a river, and the riparian proprietors have consequently the exclusive right of fishing therein. 10 L. C. Rep., p. 294, *Boswell, App., Denis, Resp.* In Appeal: Lafontaine, C. J., Duval, Meredith, Mondelet, J.; Aylwin, J., dissenting.

#### SERVITUDE.

As to right of property in water courses. See 1 L. C. Rep., p. 31, *Larue et al. vs. Dubord*. S. C. Quebec; Duval, Meredith, J.

An hypothecary action was brought by the executors of Mme. Tashereau, after the year and a day, under a notarial obligation by the seignior D., hypothecating (in 1836) all his property, including an immovable alleged to have been acquired by defendant from the seignior in 1839, for a constituted rent of £50. The deed thus given to defendant conveyed only a right to make use of the water of the river Beauport to turn certain mills on a lot acquired by the defendant from third parties named in the deed. The defendant made a *délaissement* of the right of servitude mentioned, on the contestation of an intervening party, *cessionnaire* of the *rente constituée*, who had also sued the defendant personally for the rent, and had been met with an exception *en garantie*.

Held, That the rights acquired by the defendant were not susceptible of being hypothecated and the action dismissed.

*Semble*, That an hypothecary action cannot be brought by executors. 1 L. C. Rep., p. 43, *Duchesnay et al. vs. Bedard*, and *Boisseau*, Inter. S. C. Quebec; Bowen, C. J., Bacquet, Meredith, J.

## WATER PIPES.

DAMAGE BY. See CORPORATION, Damages.

## WHARF—DAMAGES.

In an action, by one riparian proprietor against another, in damages for building a wharf on the river Beauport, and praying for the demolition of the wharf:

Held, 1. That if the erection of the wharf caused damage to the plaintiff, he had suffered none at the commencement of the action, which was brought in the same month in which the wharf was erected.

2. That the demolition of the wharf could only be ordered on proof that the wharf was built in whole or in part on the bed of the river.

3. That a riparian proprietor has a right to protect his property, and to reclaim land, by the construction of wharves or otherwise, which may have been encroached upon by the water, provided no change is caused in the course of the river which may be prejudicial to his neighbor.

4. No attorney's or other fees to be allowed to the respondent in either court he being a practising attorney conducting his own case. 11 L. C. Rep., p. 401, *Brown*, App., *Gugy*, Resp. In Appeal: Lafontaine, C. J., Aylwin, Duval, Meredith, Mondelet, J. Aylwin and Duval dissenting as to the merits; Meredith and Mondelet, as to the costs.

## WILL.

## ACCROISSEMENT.

Held, That a legacy of a universality of effects to husband and wife, such effects to be considered as belonging to the community and as *conquêts* thereof, will pass to the survivor by right of *accroissement*, the deceased having died before the testator. 4 Jurist, p. 128, *Dupuy vs. Surprenant et al.* S. C. Montreal; Monk, J.

## CHILDREN.

Held, That a legacy by a testatrix to all her children living at the time of her decease, by equal portions, of all her property, includes her grand-children, issue of one of the children of the testatrix, such child having died before the opening of the legacy. 7 L. C. Rep., p. 351, *Lee vs. qual. vs. Martin et al.* S. C. Quebec; Bowen, C. J., Morin, Badgley, J.

Confirmed in Appeal: Lafontaine, C. J., Aylwin, Duval, Caron, J. 9 L. C. Rep., p. 376.

In the Privy Council, Held, 1. That the paramount duty of courts in construing wills is to ascertain and give effect to the intention of the testator, to be collected from the whole will, and not from any particular word or expression in it.

2. That in the case submitted, a legacy "to all her children *living at the time of her decease*" does not include the *grand children* of testatrix, issue of one of her children who died before the making of the will.

*Semble*, That a more extensive signification is often given by the old French law to the word "*enfants*" than is generally given in the English law to the word "*children*." 11 L. C. Rep., p. 84, *Martin et al.*, App., *Lee*, Resp.

Held, That in the case submitted, the terms *children still living*, comprehend the grand-children, direct descendants of the testatrix, who hold directly under their grandmother by representation, and not from their mother, the right to the legacy of the immovable property by them claimed.

2. That the only effect of a judgment of confirmation is to do away with mortgages, without in any way fortifying the title deed, which remains notwithstanding such ratification, with all its imperfections. 11 L. C. Rep., p. 18, *Glackmeyer vs. Mayor, &c., of Quebec*, and *Lemieux*, Inter. S. C. Quebec; Taschereau, J.

## DELIVRANCE—LEGACY.

Held, That "*Le mort saisit le vif*." A legacy therefore vests in the heir at law and must be divested by the action *en delivrance de legs*, or by his own voluntary delivrance. *Campbell vs. Shepherd*. K. B. Q. 1819.

Held, That a widow cannot maintain an action, under her husband's will, for a debt left to her, payable to him solely, until she has obtained a *delivrance de legs*. *Coupeau vs. Chamberland*. K. B. Q. 1818.

Held, That when the testator, by his will, disposes of the whole of his estate and succession, and leaves legacies to his heirs, it is not necessary for them to renounce his succession, and their action *en delivrance* must be brought against the executor of the will, whose duty it is, if there be other heirs, to call them into the suit. *Gesserou vs. Cunac*. K. B. Q. 1816.

Held, That a legatee can maintain an action of *revendication* against a *tiers detenteur* of his legacy, before he has obtained *delivrance de legs*. *Morin vs. Peltier*. K. B. Q. 1820.

Held, That a *legataire universel* who is also executor, can maintain an action as *legataire* for a debt due to the testator against a third person without proving a *delivrance de legs*. *Duclos vs. Dupont*. K. B. Q. 1820.



Held, That an executor, after the expiration of his executorship and after account rendered, cannot be sued *en delivrance de legs*. *Gotron vs. Corrivaux*. K. B. Q. 1820.

Held, That in an action *en exhibition de titres*, conclusions upon the titles exhibited must be fyled and an issue raised thereon. *Rex vs. Saul*. K. B. Q. :

Held, That in *exhibition de titres* the defendant, if he be not a *consitaire* of the plaintiff must plead the fact by exception and show what he is, *ex. grâ.* that he is tenant, &c. *Blanchet vs. Thérien*. K. B. Q. 1817.

As to *delivrance de legs* and interest being payable by executors and heirs. See *Torrance vs. Torrance*. Cond. Rep., p. 95.

Held, That since the passing of the 41st Geo. 3., c. 4, the *delivrance de legs*, required by the French law under the operation of the Custom of Paris, has ceased to be necessary. 11 L. C. Rep., p. 204, *Blanchet et al.*, App., *Blanchet*, Resp. Aylwin, Mondelet, Badgley, J.; Lafontaine, C. J., Duval, J., dissenting.

Held, That the effect of a universal legacy is such as that no demand *en delivrance de legs* is necessary. 3 Jurist, p. 12, *Robert et al. vs. Dorion et al.* S. C. Montreal; Smith, Mondelet, Badgley, J.

Held, That *le mort saisit le vif*, and therefore a common legacy vests in the heir at law and he is not divested of the same until a *delivrance de legs* has been obtained. Stuart's Rep., p. 138, *Campbell vs. Shepherd*, and *Chartier*, Opp. K. B. Q. 1818.

See case of *Royal Institution vs. Desrivieres*.

See CORPORATION, Mortmain.

Held, 1. That *delivrance de legs* by the executor is essential to vest the legacy in the legatee, and that in an action by the *cessionnaire* of such legacy, such *delivrance* must be proved.

2. That the rights of co-vendors, selling in different qualities, will not be presumed to be equal. Action dismissed. 4 L. C. Rep., p. 121, *Holland vs. Thibodeau*. S. C. St. Francis; Day, Short, Caron, J.

Held, In an action by plaintiff, claiming £666 13s. 4d. under the clause in the will, quoted, against the defendant as *curator* to the substitution created by the will, that plaintiff was not entitled to the sum of money sought to be recovered, the bequest giving her only *the interest* of the sum and the power of disposing of it *by will*, but not vesting in plaintiff the sum of money absolutely as proprietor,

Bequest, " I also bequeath to Margaret McGillivray, my natural daughter, " now at Quebec, the yearly interest of £1666 13s. 4d. currency, to be paid to " her yearly, and every year, in quarterly payments, during her natural life, " which said sum of £1666 13s. 4d. I will and direct, that my said executors " shall place out on securities at legal interest at their discretion, for the benefit " of the said Magdalen McGillivray, as aforesaid, and after the death of the said " Magdalen McGillivray, if she shall leave alive any children or child lawfully " begotten in marriage, I then give and bequeath the said £1666 13s. 4d. to " such child or to such children, to each their just and equal proportion thereof, " share and share alike; but in case the said Magdalen McGillivray shall die, " leaving alive no children or child lawfully begotten in marriage, I then and on " that contingency will and direct that the sum of £1000 part and parcel of the

" aforesaid sum of £1666 13s. 4d, shall belong to and form part of my residuary estate, and shall be as such, the property of my residuary legatees, hereinafter named, and the remainder of the sum aforesaid of £1666 13s. 4d., shall be by her disposed of by will as she may think proper."

The declaration contained an allegation that at the time of the institution of the action plaintiff was fifty-five years of age, and that it was not possible in the course of nature that she should have children. 5 L. C. Rep., p. 301, *McGillivray vs. Gerard*, curator. S. C. Montreal; Day, Vanfelson, J.; Smith, J., dissenting.

#### DISINHERITANCE.

Held, In an action by a son to set aside his father's will by which so small a sum was bequeathed to him that it amounted to disinheriting him, that such an action could not be maintained unless on proof that the aversion of the testator was without cause, and amounted to insanity. Action dismissed. *Phillips vs. Anderson*. S. C. Montreal; Cond. Rep., p. 71.

#### DROIT D'AINESSE.

Held, 1. That the *droit d'ainesse* in a testamentary succession cannot exist except in the case where it is made the object of a special legacy.

2. That in the case submitted, the will, containing a substitution, such *droit d'ainesse* bequeathed to the eldest of the children charged with the substitution, and by him accepted, not having been bequeathed to the eldest of those called to the substitution, (*les appelés*), cannot be claimed in the subdivision between them.

3. That if such right could be so claimed in such subdivision, it could only be on the eldest son taking the quality of heir of the party charged with the substitution, his father and mother; but in the present case the eldest son having renounced the succession of his mother, could not acquire, and consequently could not transmit such *droit d'ainesse*. 3 L. C. Rep., p. 161, *DeBellefeuille vs. DeBellefeuille et al.* S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That in matters of testamentary successions, the *droit d'ainesse* in the partition of *bien nobles* can only exist in virtue of a specific provision.

2. That, in the case submitted, a clause in the will to the effect that the surplus of the *bien nobles* shall be divided between the testator's two children in such a way as to give the elder *two-thirds* and the younger *one-third*, according to the law of *fiefs*, charging them nevertheless with the payment of the debts in proportion to their legacies, the whole subject to an entail (*substitution*) does not contain a legacy of a *droit d'ainesse*, and cannot give rise to the exercise of that right by any of the parties claiming under the entail. 4 L. C. Rep., p. 384, *Globenski vs. Laviolette et al.* In Appeal; Panet, Aylwin, Meredith, Caron, J.

#### EXECUTOR.

Held, That all joint executors who have acted, must, in an action of account against them, be made parties to the suit, and be jointly summoned as such. *Dame vs. Grey*. K. B. Q. 1812.

Held, That if a testator directs his executor to pay his debts, an action may be maintained against him by a creditor of the estate. *Bernier vs. Bossé*. K. B. Q. 1819.

So also in *Iffland vs. Wilson*. K. B. Q. 1820.

Held, That the heir at law can maintain an action of account against the executor of the will of his ancestor. *McLean vs. McCord*. K. B. Q. 1820.

Held, That if the legal interest of a deceased husband in a note, is vested in the executor, his widow, though *commune en biens*, cannot sue alone. *Coupeau vs. Chamberlain*. K. B. Q. 1818.

Held, That a widow *commune en biens* and executrix of her husband's will can support an action for a *dette mobiliare* due to the *communauté*. *Drouin vs. Beaubien*. K. B. Q. 1820.

Held, That an executor, if he sells the estate of the testator, may warrant the title in his own name. *Messan vs. Gauvreau*. K. B. Q. 1821.

Held, In an action by a minor, that where an executor, with powers beyond the year and a day, has become insolvent and is making away with the estate, the court will deprive him of the control of the property, and oust him from his office.

2. The court has no power to appoint a receiver or sequestrator to administer or manage the estate. 1 L. C. Rep., p. 74, *McIntosh et al. vs. Dease*. S. C. Montreal; Day, Smith, Mondelet, J.

*Seemle*, That an hypothecary action cannot be brought by executors. 1 L. C. Rep., p. 143, *Duchesnay et al. vs. Bedard & Boisseau Inter*.

Held, 1. That hypothecation is only created on the property of an executor from the time of his acceptance by authentic *acte* of the executorship. Will dated 1815, registered 1849.

2. That the acceptance must be registered to enable a party claiming under the will to rank by privilege on the estate of the executor over a mortgage creditor whose claim was registered in 1848. 3 L. C. Rep., p. 440, *David vs. Hays*, and *Hays et al.*, Opp. S. C. Montreal; Day, Smith, Mondelet, J.

Held, That a mortgage on the lands of an executor does not date from the registration of the will, but from the registration of an authentic *acte* showing that he has accepted the executorship. 9 L. C. Rep., p. 7, *Lamothe vs. Hutchins*, and Opp. S. C. Montreal; Day, J.

Held, 1. That it is not competent for one of two joint executors to bring an action without the consent of his co-executor.

2. That in case such executor could proceed without the concurrence of his co-executor, he must do so in his own name alone. 4 L. C. Rep., p. 103, *Clement et al. vs. Geer*, and *Pettis*, plaintiff *en desaveu*, and *Drummond et al.*, defendants *en desaveu*. S. C. Montreal; Day, Smith, Mondelet, J.

Same case, Cond. Rep., p. 23.

Held, That during the pendency of an action to account against an executor, the court will order an alimentary allowance to be paid to plaintiffs, the heirs of the testator, notwithstanding the declaration of the executor that he has no funds in his hands, in consideration of the length of time (sixteen years) elapsed since the death of the testator, and that the legacies were for aliment. 4 L. C. Rep.,

p. 127, *Hart et al. vs. Molson et al.* S. C. Montreal; Smith, Vanfelson, Mondelet, J.

Held, That, in the case submitted, the action was rightly brought, although one of the plaintiffs, who sued as executrix, under a will made in Ireland, did not allege in her declaration that by the law of Ireland an action accrued to her as such executrix. 10 L. C. Rep., p. 350, *Grainger et al.*, App., *Parke*, Resp. In Appeal: Aylwin, Mondelet, Badgley, J.; Lafontaine, C. J., and Duval, J., dissenting.

Held, That the administration of a testamentary executor is a mandate of a private character which can only be delegated by a testator, and is not a trust of a public nature which can be imposed by a judge. 1 Rev. de Jur., p. 169, *Gugy*, App., *Gilmor*, Resp. In Appeal: Rolland, Mondelet, Day, Gairdner, J. 1845.

Held, A claim of a legacy by privilege of *hypothèque* by an ante-nuptial contract, against a fund in the hands of the sheriff, the proceeds of a sale under execution of real estate belonging to the husband who was the sole executor and residuary legatee of his wife, was dismissed, it not appearing that the fund was the produce of any portion of the property included in the marriage contract, or that the legatee had any right of priority to a judgment creditor. 2 Rev. de Jur., p. 474, *Smith*, App., *Brown*, Resp. In the Privy Council, 1837.

#### EXECUTOR'S ACCOUNT.

See ACTION to account. See EXECUTOR.

Held, That executors of a will who have not, by its terms, control over immovables, cannot intervene to take up the *instance* in a petitory action, the plaintiff being dead. Intervention dismissed. *Ball vs. Lambe*, and *Scriver et al.*, Inter. S. C. Montreal; Cond. Rep., p. 36.

#### HOLOGRAPH.

A testator possessed, at the time of his decease, of property belonging to the succession of his wife, deceased, by a holographic will, bequeathes all the property of which he might die seized to his heirs and legatees, who were also his wife's heirs, under the penalty, if any of them contested his will, that their share in his succession should be forfeited. In the making of such partition he directs his executors to act for some of the legatees who were minors, and for another who was married, without the authority of her husband for that purpose being requisite, and whose share they should administer during the husband's life, paying her the rents, &c.

Held, 1. That the will was valid, but that its dispositions could only be carried into effect so far as they affect the succession of the testator, and that they could not in any manner apply to the succession of the testator's wife, of which his legatees were the heirs, and of which they were in law seized from the day of her death, and that one of the executors having renounced the execution of the will, the other had *saisine* of the testator's succession, to carry his will into effect.

2. In an action against several heirs, it is not a valid objection that all of them were not originally made defendants, if, in the progress of the suit, they have been

made parties by an interlocutory judgment of the court. *Stuart's Rep.*, p. 394, *Viger et ux.*, App., *Pothier*; Resp. In Appeal, 1830.

## HOLOGRAPH—NOTARY.

Held, 1. That if a paper writing, contained in a sealed envelope, purporting to contain a holograph will, be opened by a notary public and retained by him after the decease of the testator, such notary cannot keep it of record in his office but must produce the same before a judge that probate may be made, and the will is then to remain deposited with the records of the Court of King's Bench.

2. A notary public has no authority to unseal a holograph will unless in the presence, and by the order, of a judge.

3. A holograph will of personal and movable property is valid by the law of England, and probate may be made thereof according to the Provincial statute, 41st Geo. 3, c. 4. *Stuart's Rep.*, p. 60, *Ex parte Grant et al. vs. Planté*, Notary. K. B. Q. 1811.

Held, That it is essential to the validity of a devise of real estate that the holograph will, in which it is contained, should be entirely written by the testator, and closed by his signature. *Stuart's Rep.*, p. 327, *Caldwell*, App., vs. *Atty-Gen. pro Rege*. In Appeal, 1828.

## IN FAVOR OF WIFE.

Held, That a will by a husband to his wife, after the passing of the 14th Geo. 3, c. 83, is valid. *Des Isles vs. Dupuis*. K. B. Q. 1821.

## INVENTORY.

Held, That where a testatrix bequeathed all her property to her husband *en pleine propriété*, exempting him from making an inventory, but on condition that he does not remarry, in which case he is bound to account to the heirs; the order of a circuit judge that an inventory shall be made before taking off the seals, which have been affixed at the instance of the heirs, is a prudent judgment consistent with the interests of all parties and not to be disturbed. 3 L. C. Rep., p. 435, *Ex parte Cardinal and Bélinge*, tutor. S. C. Montreal (Weekly Sessions); Day, Smith, Vanfelson, J.

## LEGACY.

Held, 1. That a bequest of a farm with all the stock, implements and cattle, is a special legacy, and that to charge such legatee with the payment of debts of the testator, *the plaintiff* must prove that the testator had no other estate or effects.

2. In the absence of such proof, parol evidence of a promise by the legatee to pay the debt sued for, is inadmissible. 1 Jurist, p. 286, *McMartin vs. Gareau*. S. C. Montreal; Day, Smith, Mondelet, J.

Held, 1. That a legacy by a father to his daughter conditioned upon her not doing certain things is forfeited by her doing such things.

2. That it is a fatal variance to allege in a declaration an absolute legacy when

it was only conditional as above mentioned. 2 Jurist, p. 91, *Freligh vs. Seymour*. S. C. Montreal; Day, Mondelet, Chabot, J.

#### LEGACY—FIDEI-COMMIS.

On a bequest by a testator of real estate to his wife during her natural life and after her decease to the testator's son, George, during his natural life, and after his decease, or if he and testator's wife should both have died before the testator, then to the eldest son of the body of said George, lawfully begotten, and the heirs of the body of such eldest son, and in *default of such issue*, to the second, third, fourth, and all and every other son or sons of the said George, one after another, by priority of birth, and to the children of such sons; the elder of such sons and his heirs always preferred to a younger son, and in default of such male issue, a similar bequest to the daughters:

Held, That the eldest son of George having survived him and the testator's wife, took the said bequest in full property without being charged with any *fidei-commis* or trust in favor either of his children or of his brothers and sisters, who could have claimed the said bequest only conditionally, and in default of the eldest son taking the bequest. 8 L. C. Rep., p. 481, *Platt, App., Charpentier*, Resp. In Appeal: Lafontaine, C. J., Duval, Caron, J.; Aylwin, J., dissenting.

#### LEGACY—INTEREST.

A testator bequeathed to his son William and his heirs male for ever, so far as the laws of the Province would permit, one-half of a specified farm described, and the other half to Duncan, another son, and his lawful male heirs for ever, naming the two his universal legatees, giving the share of the one dying without lawful issue to the survivor, and, after enumerating the moneys belonging to him, bequeathes "to Jane McIntosh, Church street, Inverness, the sum of £50 sterling out of the above moneys, annually, during her natural life, which my executors will regularly transmit to her."

The will was not registered. William died without issue before Duncan, and the real estate of Duncan, also deceased, being brought to sale, Jane McIntosh filed an opposition *à fin de conserver*, claiming the proceeds as having a mortgage under the will for payment of the arrears of the £50 bequeathed to her.

On contestation by the defendant, widow of Duncan, and tatrix to a minor child, issue of her marriage with Duncan, and by two chirographary creditors:

Held, 1. That the *contestants* having alleged the death of Jane McIntosh previous to the death of the testator, and that the legacy thereby lapsed, were bound to prove this allegation.

2. That the bequest to Jane was a general legacy chargeable upon the estate generally, and not a particular legacy.

3. That no interest could accrue on this legacy before a *demande judiciaire* was made.

4. That no mortgage existed, in favor of the opposant, on the real estate sold. 10 L. C. Rep., p. 79, *Bonacina vs. Bonacina* and *McIntosh*, Opp. S. C. Montreal; Monk, J. The first point was reversed in Appeal.

Held, That a bequest by will of a farm to be held by the male heirs of the testator's family in manner thereafter limited, and then giving one half to William and his lawful male heirs, and in the event of William and Duncan dying without lawful heir or issue, giving the share of him so dying to the survivor; and if both should die without lawful issue, giving the farm to Sophia McIntosh and to her eldest son on taking the name of McIntosh, and to prevent all misconstruction declaring that the eldest son of William, and the eldest son of Duncan, and no other, could inherit the farm, does not constitute a bequest to the eldest son of Sophia McIntosh, Duncan dying leaving no son and only a daughter, and William dying without issue. 3 Jurist, p. 80, *Bonacina vs. Bonacina*, and *Gunlack*, tutor, Opp. S. C. Montreal; Mondelet, J.

## LEGACY IN TRUST

Held, 1. That a bequest in *trust* is valid in Lower Canada.

2. That it is not necessary in a will that the words *tu et relui* be expressed, if it be apparent, by the context, that the formality was observed.

3. That in this case the respondent having taken possession of the estate of the testator, under the will appointing him executor, the appellant, heiress at law of the testator, could not claim the estate by reason of the respondent having so taken possession without a previous demand *en delivrance de legs*; and that such a demand by the executor, made more than a year after the testator's death was properly made. 5 L. C. Rep., p. 492, *Freligh*, App., *Seymour*, Resp. In Appeal: Aylwin, Duval, Caron, Meredith, J.

See LEGACY, Fidei Commis.

## LEGACY TO CONFESSOR.

Held, 1. That a confessor may receive a legacy from his penitent.

2. That any disabilities which may have existed with regard to the confessor in such case, under the old French law, have been removed by the 41st Geo. 3, c. 4. 11 L. C. Rep., p. 119, *Harper vs. Billodeau*. S. C. Quebec; Tasche-reau, J.

## LEGACY—USUFRUCT.

A wife, separated as to property from her husband, makes a legacy to her husband of all her property, "pour dependant n'en pouvoir disposer en plein propri  t  , qu'en faveur de leurs deux enfans, lui laissant n  anmoins le pouvoir de les avantager tr  s in  galement, et de la mani  re qu'il croira et jugera convenable," and constituting the husband her universal legatee:

After the death of his wife, the husband makes to his son, the defendant, a donation *entre vifs* of three immovables, two of which were *conqu  ts*, and also of certain movables, and by his last will confirms this donation, and bequeathes to him all the other property "which may belong to him at the day of his death."

*Query*, 1. Whether this will and donation include the property of the wife, although no mention is made of such property?

2. Whether the legacy of the wife was of the *propri  t  * or only of the *usufruct*? 1 Rev. de Jur., p. 140, *Marquet et ux. vs. Marcile*. Q. B. Montreal, 1845.



## LEGACY—UNIVERSAL.

Held, 1. That a universal legatee cannot refuse to pay a particular legacy upon pretext of the insufficiency of the movable property, if he has not rendered an account of the estate and offered to give up the same.

2. That he may in such case be condemned to such payment individually and in his own name. 3 L. C. Rep., p. 133, *Lenoir vs. Hamelin et al.* S. C. Montreal; Smith, Vanfelson, J.

Held, That legatees cannot bring an action against a third party, purchaser from the universal legatee of real estate included in the will, although the purchaser be charged by his deed to pay them, there being no privity of contract.

*Query?* Whether several legatees can join in the same action as plaintiffs. 3 Rev. de Jur., p. 250, *Rainford et al. vs. Clarke et al.* Q. B. Montreal, 1848.

Held, That an action against a *légataire universel* is good without an averment that he is sole *légataire*. It is the business of the defendant, if there be another, to plead the fact. *Gagnon vs. Pagé.* K. B. Q. 1818.

## LÉGITIME.

Held, That where a will exists, a *demande en légitime* is thereby excluded. 1 Jurist, p. 163, *Quentin vs. Girard et ux.* S. C. Montreal; Day, Mondelet, Chabot, J.

## PROBATE.

Held, 1. That a judge of the Superior Court at Montreal has no jurisdiction either to receive the affidavits of the subscribing witnesses to a will, or to grant probate thereof, it appearing that the testator died in another district.

2. That application must be made to a judge or to the prothonotary of the court within the limits of its jurisdiction. 10 L. C. Rep., p. 451, *Ex parte Sweet.* S. C. Montreal; Smith, J.

## PUBLICATION OF.

Held, That the want of publication and insinuation of a will, cannot be opposed to the possessor *animo domini* suing *en bornage*, nor by a party deriving title under the will. 1 Jurist, p. 137, *Devoyau, App., Watson, Resp.* In App: Lafontaine, C. J., Aylwin, Duval, Caron, J.

## REGISTRATION OF.

Held, That under the registry ordinance 4th Vict., c. 30, all wills "made and published" previous to the 31st December, 1841, must be registered to enable the legatees to rank according to the date of mortgage as against other registered mortgages. 1 L. C. Rep., p. 435, *Duchesnay vs. Bedard, and Opps.* S. C. Quebec; Bowen, C. J., Duval, Meredith, J.

Held, That no *hypothèque* attaches to the property of an executor by reason of the registration of the will. 2 Jurist, p. 278, *Lamothe vs. Ross, and divers Opp.* S. C. Montreal; Day, J.

## REVOCATION OF.

Held, That the birth of a posthumous child revokes the will of its father partially. *Stuart's Rep.*, p. 103, *Hanna vs. Hanna*. K. B. Q. 1816.

Held, That a testator may revoke a will by any writing signed by him; such writing need not be written by him nor possess the formalities of a will. 1 *Jurist*, p. 88, *Fisher vs. Fisher*. S. C. Montreal; *Smith, Mondelet, Chabot, J.*

## RIGHT OF THIRD PARTY.

Held, That a debtor sued by the heir of his creditor cannot set up against such demand the bequest of the debt by the creditor to a third party, notwithstanding notice to the defendant by the executor that he would demand such bequest. 3 *L. C. Rep.*, p. 145, *Deneau vs. Frothingham*. S. C. Montreal; *Day, Smith, Mondelet, J.*

## SUBSTITUTION.

Where A bequeathed property to B with substitution at B's death in favor of his eldest son, who died without issue before B:

Held, 1. That B's surviving son, though second in point of birth, was entitled to claim under the substitution as the eldest son.

2. That a sale of the property in question by B and his deceased eldest son was null and void *quoad* the claim of the surviving son of B under the substitution, the substitution not being open until the death of B. 9 *L. C. Rep.*, p. 23, *McCarthy, App., Hart, Resp.* In Appeal: *Lafontaine, C. J., Aylwin, Duval, Caron, J.*

Same case, 3 *Jurist*, p. 28.

Held, That the sale of real estate substituted, cannot be opposed so long as the substitution is not open. 4 *Jurist*, p. 358, *Trust and Loan Company of Upper Canada vs. Vadebonceur, and Vadebonceur, Opp.* S. C. Montreal; *Berthelot, J.*

## SUGGESTION—INCAPACITY.

Held, In an action to set aside a will for suggestion and incapacity by reason of unsoundness of mind, that clear proof is necessary of the facts alleged, and that where the evidence is contradictory, the presumption is always in favor of the testator. Action dismissed. *Clarke vs. Clarke et al.* S. C. Montreal; *Cond. Rep.*, p. 20.

## TO BASTARD.

Held, 1. That a devise to a bastard, *adulterin*, not competent by the French law, when the will was made or when the divisor died, to accept such bequest, is good and valid if it be a conditional one, as a *substitution*, and if at the period when the entail took place (*à l'ouverture de la substitution*) the disqualification of the divisor has been removed. (42nd Geo. 3, c. 6.)

2. That executors have no quality to make a *reprise d'instance* if such will relates to real property. 2 *Rev. de Jur.*, p. 1, *Hamilton et al., App., Prenderleath, Resp.* In Appeal, 1845.

## WILL—FORM OF.

Held, That a will executed by a notary in presence of two witnesses, one of them under the age of twenty, is not valid as a notarial will, but is valid according to the English law, followed in that respect in Lower Canada, the notary and witnesses being considered as sufficient witnesses for the attestation of the will. 7 L. C. Rep., p. 277, *Lambert, App., Gauvreau et ux.*, Resp. In Appeal; Lafontaine, C. J., Duval, Caron, J.

Same case, 1 Jurist, p. 206.

Held, 1. That a notary who receives a *testament solennel* is not bound to mention that he wrote the will.

2. That a person prohibited from alienation during his life, may alienate by will. 3 Jurist, p. 48, *Bourassa vs. Bedard*. S. C. Montreal; Smith, J.

Held, That the absence of express mention that the witnesses were present at the reading of a *testament solennel* does not render the testament null, if it appears by terms equivalent to have been so read. 5 Jurist, p. 255, *Dubé et ux. vs. Charron dit Ducharme*. S. C. Montreal; Smith, Vanfelson, Mondelet, J.

The Quebec Act having provided that every owner of lands, goods, or credits, who has a right to alienate the said lands, goods, or chattels, in his or her lifetime, may devise or bequeath the same at his or her death, according to the laws of Canada, or according to the forms prescribed by the laws of England:

Held, That a will invalid according to the French law, and not executed according to the statute of frauds, so as to pass freehold lands in England, will not pass lands in Canada, although it would pass copyhold or leasehold property in England. Stuart's Rep., p. 581, *Meiklejohn, App. The Atty.-Gen. and Sir John Caldwell*, Resp. In the Privy Council, 1834.

## GENERALLY.

Held, That a clause in a will that the usufruct of certain property left to the testator's wife, should become null and void on her re-marriage, is not *contra bonos mores*, and will be enforced. 1 L. C. Rep., p. 102, *Forsyth et al. vs. Williams*. S. C. Montreal; Day, Smith, Vanfelson, J.

Held, 1. That the clause in a will, that the testatrix was *saine d'entendement*, is matter of style merely, and may be contradicted by evidence.

2. That the notary is not bound to write the original will with his own hand. 1 L. C. Rep., p. 11, *Clarke vs. Clarke et al.* S. C. Montreal; Smith, Vanfelson, Mondelet, J.

Held, That a devise by a husband of his wife's share in the *communauté*, on charge of paying her a life rent is valid, if she accept the condition annexed to such devise. 3 L. C. Rep., p. 45, *Roy vs. Gagnon*. In Appeal: Stuart, C. J., Panet, Aylwin, J.; Rolland, J., dissenting.

TESTAMENT FAUX. See INSCRIPTION DE FAUX.

OF IMMOVABLES BY MINOR, invalid. See ACTION PETITOIRE, Tradition. 9 L. C. Rep., p. 385.

FOREIGN LETTERS OF ADMINISTRATION, EFFECT OF. See BILLS AND NOTES, Prescription.

UNLIMITED POWER in. *See* DONATION. Legitime.  
 EXECUTORS, Action against. *See* BILLS AND NOTES to absentee.

## WRIT.

RETURN OF, before return day. *See* CAPIAS, Affidavit.  
 IRREGULARITY IN. *See* CERTIORARI, Writ, Return.  
 SERVICE OF ORIGINAL, valid. *See* WRIT OF POSSESSION. *See* DECRET,  
 Writ of Possession.  
 TO CALL IN *Garant*. *See* GARANTIE, Divisibility of.  
 FORM OF. *See* LANDLORD AND TENANT, Form of Writ.  
 LANGUAGE OF. *See* " " " "

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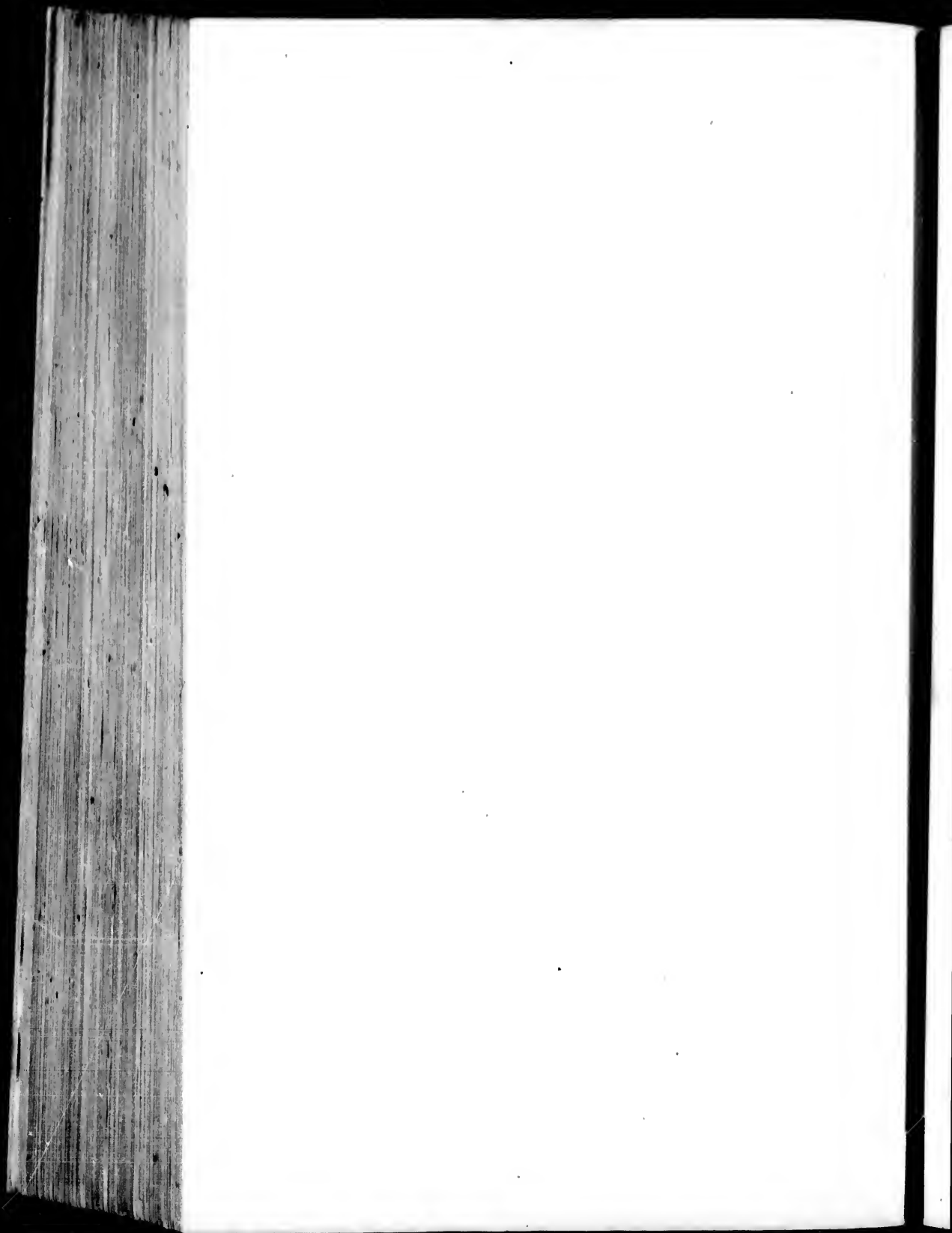
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BILLS AND NOTES,



## SUMMARY OF JUDGMENT

L.ANDERED UNDER

"THE SEIGNIORIAL ACT OF 1854."

*Quebec, 11th of March, 1856.*

Present:—The Honble. SIR LOUIS HIPPOLYTE LAFONTAINE,  
*Bt. Chief Justice of the Court of Queen's Bench.*

The Honble. EDWARD BOWEN,  
*Chief Justice of the Superior Court.*

The Honble. Mr. Justice AYLWIN,	}	<i>Puisné Judges of the said Court of Queen's Bench.</i>
" Mr. Justice DUVAL,		
" Mr. Justice CARON,		
" Mr. Justice DAY,	}	<i>Puisné Judges of the said Su- perior Court.</i>
" Mr. Justice SMITH,		
" Mr. Justice C. MONDELET,		
" Mr. Justice MEREDITH,		
" Mr. Justice SHORT,		
" Mr. Justice MORIN,		
" Mr. Justice BADGLEY,		

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CENS ET RENTES.

1 & 2. (1)—Under the Custom of Paris, the effect of the feudal contract, whether by subinfeudation, or *accensement*, was to divide the estate between the seignior of the *fief* or his subfeudatory or tenant, *centsitaire*, in such manner as to retain, in the former, the immediate demesne, *dominium directum*, and to convey the useful demesne, *dominium utile*, to the latter. "The subfeudatory could dispose of his useful demesne, *dominium utile*, and convert it into an immediate demesne, *dominium directum*." (\*) (2) (V. 3 & 4, § 3.)

3 & 4.—§ 1. The immediate demesne consisted of the duties or dues, obligations or *redevances*, to which the subfeudatory or tenant, *centsitaire*, was subjected; the useful demesne consisted of the produce of the land or thing subinfeudated or *accensé*. Previous to the subinfeudation or *accensement*, both the useful and immediate demesnes were united in full demesne in the seignior. (\*)

§ 2. Woods and waters not navigable might form part of the useful demesne. (For the affirmative, 11; for the negative, 1.) †

§ 3. The subfeudatory, in like manner, before his infeudation or *accensement* had the full demesne, saving the rights of the *dominant* seignior, and also retained an immediate demesne over what he had himself infeudated or *accensé*. (F. 11, A. 1.)

5.—Under the Custom of Paris, the seignior was not obliged to alienate his lands held *en fief*, but when he did alienate them, subinfeudation or *accensement*

(1) These figures correspond with the numbers of the questions and answers.

(2) \* This indicates that the proposition was adopted unanimously.

† P. for affirmative, A. against it.

were of the essence of the feudal system, according to the 51st article of the Custom of Paris. (\*)

6.—The 6th question, “ was it necessary to render subinfeudation or *accensement* binding in Canada,” presenting no legal point for decision, this Court abstains from an answer to it. (\*)

7.—The intention of the French Kings was to promote the settlement and cultivation of the lands of the country ; but the concession of lands for that purpose was not made obligatory by any law anterior to the *arrêt* of the 6th of July, 1711, (F. 8, A. 4.)

8.—The concession of lands to settlers for cultivation, was rendered obligatory by the *arrêt* of the 6th of July, 1711. (\*)

9.—Before the cession of the country, the laws obliged the seigniors to grant (*concéder*) their lands, on demand, at a rent charge, (*à titre de redevances*), and this obligation limited the exercise of the rights of the seigniors in the disposal of their lands. (\*)

10.—§ 1. This obligation did result from special laws affecting Canada, particularly the *arrêt* of the 6th of July, 1711. (\*)

§ 2. The obligation to concede was not contained generally in the grants of seigniories ; but it was stipulated in a few of them. (F. 8, A. 4.)

§ 4. It extended to every seignior, without regard to the motives of the grant, but might be controlled by a special derogation in the royal grant to the seignior. (\*)

§ 5. The *arrêt* of 1711 applied to royal grants already made at the time of its promulgation, as well as to those made subsequently. (\*)

11 & 12.—The laws did provide means for compelling seigniors to concede their lands ; the governors and intendants were invested with the necessary powers for compelling them, in cases where they refused, and upon complaints to that effect, according to the dispositions of the *arrêt* of the 6th of July, 1711, of that of the 15th of March, 1732, and of the declaration of the 17th of July, 1743. (\*)

13.—§ 1. The rates of the concession of lands in the seigniories were not regulated by special laws nor by custom ; (F. 10, A. 2.)

§ 2. Nevertheless, whenever the governor and intendant were called upon to concede upon the seignior's refusal, the *arrêt* of 1711 decided that the concession should be made “ upon the same rights as imposed upon the other conceded lands in the same seigniories.” (\*)

§ 3. The grants to the seigniors did not regulate the act of concession, except in four of those which have come to the knowledge of the court. (F. 10, A. 2.)

§ 4. Upon the question “ were the concessions to be made at an annual rent charge (*à titre de redevances annuelles*) only ?” the court is equally divided. (F. 6, A. 6.) It will be seen further on, that the majority of the court agreed

to this proposition, so far as the reservations are concerned, with one exception ; (No. 39, § 1. F. 7, A. 5.) This explains the reason why the court did not adopt it here in the strongest terms, "for an annual rent charge only."

§ 5. The rate of dues was not established by custom, except in the case of a concession made by the governor and the intendant. (C. 10, A. 2.)

14.—The dues varied in amount at the promulgation of the *arrêt* of the 6th of July, 1711 ; this *arrêt* does not establish any fixed rate ; the dues have varied since the promulgation of that *arrêt*, but have gradually increased. (F. 10, A. 2.)

15.—The *arrêt* of the 6th of July, 1711, does not establish any fixed rate, except in case of the refusal of the seignior to concede. (F. 10, A. 2.)

16.—§ 1. The *arrêt* of the 6th of July, 1711, the *arrêt* of the 15th of March, 1732, and the declaration of the 17th of July, 1743, were in force at the time of the cession of the country ; (\*)

§ 2. And these laws were generally observed up to that time. (F. 11, A. 1.)

17.—§ 1. According to the laws of the country, the proprietors of *fiefs* had the full and entire property in their lands, before they had conceded them. (F. 11, A. 1.)

§ 2. That is to say, that the useful and full demesne were united in them. (F. 11, A. 1.)

§ 3. The *arrêt* of 1711 required seigniors to concede without exacting a money price for the concession (*deniers d'entrée*). The *arrêt* of 1732 prohibited the sale of wild lands (*terres en bois debout*), under the penalty of nullity. (\*)

§ 4. The seigniors were required to concede at a rent charge. (F. 11, A. 1.)

§ 5. The prohibition to exact a money price applied only to uncleared lands (*terres non défrichées*.) (\*)

18, 19 & 20.—§ 1. In so far as those laws have relation to the tenure, and regulated the essence of the contract, they were laws of public policy, (*d'ordre public.*) (F. 7, A. 5.)

§ 2. Taking them in that sense, individuals could not contravene them. (F. 8, A. 4.)

§ 3. Contracts in contravention of those laws, in so far as they were thus of public policy, were not binding, but were null, (*pleno jure.*) (F. 8, A. 4.)

21.—Those laws were in force at the passing of the Seigniorial Act of 1854. (F. 9, A. 3.)

22.—Upon the question, "since the cession, did there exist a tribunal competent to exercise the power conferred on the governor and intendant by the *arrêt* of the 6th of July, 1711, relating to the concession of seigniorial lands," the court is equally divided. (F. 6, A. 6.)

23.—All the JUDICIARY powers, exercised by the intendant in civil matters, before the cession of the country, have devolved upon the civil tribunals of the province. (\*)

24.—These same tribunals were competent to declare the nullity of contracts made between private individuals in contravention to the laws above mentioned. (F. 11, A. 1.)

25.—The tenants (*censitaires*) to whom concessions have been made, since the cession, at higher rates than those which were customary before that time, have no right to be relieved from the excess of those dues. (F. 11, A. 1.)

#### NAVIGABLE RIVERS.

26.—Seigniors had no other rights over navigable rivers than those specially conveyed to them by their grants, provided these rights were not inconsistent with the public use of the water of those rivers, which is inalienable and imprescriptible. (F. 11, A. 1.)

27.—§ 1. In seigniorics bounded by a navigable river, seigniors could lawfully reserve to themselves the right of fishing therein, or impose dues on their tenants (*censitaires*) for the exercise of that right, when the right of fishing in the same had been granted to them; but they could not make the reservation, or impose the dues, without grant and as seigniors only. (F. 11, A. 1.)

§ 2. Where the right of fishing in navigable rivers was granted to seigniors, the tenants (*censitaires*) could not have that right without special concession. (F. 11, A. 1.)

§ 3. The rights of seigniors in tidal navigable rivers over the space of ground covered and uncovered by the tide, are derived from special grant, and without that, extend to high water mark only; in navigable rivers not subject to the tidal flow, the rights of seigniors extended to the water line, saving all legal servitudes, and without prejudice to the special grants in navigable rivers above mentioned. (F. 11, A. 1.)

§ 4. The mutation of beaches, between high and low water mark, on the river St. Lawrence, or in other navigable rivers, held by seigniors by virtue of grants, as aforesaid, and conceded by them, entitles seigniors to the mutation fine (*lods et ventes*) in the same cases in which it would have accrued in other sales. (F. 11, A. 1.)

#### NON-NAVIGABLE RIVERS.

28.—§ 1. By the grant of the *fief* to the seignior, he became proprietor of the non-navigable rivers, rivulets and other running waters, which passed through or were wholly or in part within the *fief*; the same principle applied to the property in such rivers and rivulets to the middle of the stream. It is also in virtue of the same grant, that he became proprietor of non-navigable lakes as well as of ponds. (F. 10, A. 2.)

§ 2. He was thus proprietor of these waters in manner aforesaid, as belonging to and forming a portion of the *fief*; unless they were excluded by the grant; subject nevertheless to legal servitudes. (F. 10, A. 2.)

29.—§ 1. At the cession of the country, the seigniors of Canada were lawful proprietors of these non-navigable and non-floatable waters, in whole, or to the

middle of the stream as the case might be, on the whole of their unceded lands, and might make use of them for industrial or other purposes, to the exclusion of all other persons. (F. 11, A. 1.)

§ 2. The subfeudatory or tenant, (*censitaire*), by the subinfeudation or *accensement* became in the same manner proprietor in whole, or to the middle of the stream, according to the several cases mentioned of these non-navigable and non-flottable waters, which passed through or which bordered on the conceded land, unless they were excluded by the title; the grantee (*cessionnaire*) becoming proprietor of them, was also subjected to legal servitudes. (F. 9, A. 3.) "Nevertheless the general reservations of the waters which the seigniors might have made, are declared to be null; (V. No. 39, § 3, art. 4.) from which we must understand by these words, 'unless they were excluded by the title,' that they meant the exclusion of the soil or land as well as the exclusion of the waters."

30.—The right of property in rivers was not a right of *justice* (*droit de justice*), it resulted from the conveyance of and followed the estate granted; when the estate was conveyed in seignior, the right resulted from the general laws of property in force in the country, and not from the text of the Custom of Paris, nor from any law specially promulgated for Canada. (F. 10, A. 2.)

31.—It was not a right of *justice* (*droit de justice*.) (F. 11, A. 1.)

32.—§ 1. The property of seigniors in non-navigable and non-flottable waters was susceptible of division into the immediate demesne and the useful demesne like the property in the soil. (F. 11, A. 1.)

§ 2. The concession operating this division, conveyed to the tenant (*censitaire*) the possession and enjoyment of these waters which were within the limits of the concession. (F. 11, A. 1.)

37 & 38.—There has been no established jurisprudence in Lower Canada, since the cession of the country, in relation to the rights in the waters which pass through or border upon their lands. (\*)

#### RIGHT OF BANALITÉ.

33.—§ 1. At the passing of the Seigniorial Act of 1854, the seigniors in Canada who had erected grist mills (*moulins à farine*), had the right of preventing all others from building such mills within the extent of their *banalité*. (F. 11, A. 1.)

§ 2. They had also the right of demanding the demolition of all mills of that kind built within the extent of their *censive* by other persons. (F. 11, A. 1.)

At this part of the subject, the court has not been asked if the suppression of the rights mentioned in the two preceding sections should be a reason for indemnifying the seignior, but in relation to prohibitions the court has stated elsewhere: (41, § 1 and 2. "The disappearance of prohibitions made for the protection of other legitimate seigniorial rights, although legal, does not give rise to any indemnity, because those prohibitions were only accessory to a principal right for which the seignior has indemnity."

34.—§ 1. These rights extended to all seigniorics. (F. 10, A. 2.)

§ 2. The seigniors could not demand the demolition of grist mills built upon lands whose tenure had been commuted into that of *franc-aleu roturier*, or that of free and common soccage, within the limits of their respective *fiefs*. (F. 11, A. 1.)

35.—These rights did not extend to other than grist mills, nor to any works (*usines*) of any kind; they are comprehended in and form part of the law of *banalité*, and have their origin in the civil laws of France on the subject. (F. 11, A. 1.)

36.—§ 1. The right of *banalité*, as established in the coun'ry, obliged seigniors to build banal mills, and tenants (*censitaires*) to bring their grain to the mill to be ground, which was necessary for the sustenance of their families, whether the grain was raised or brought within the extent of the *banalité*, and ground for that purpose. (F. 11, A. 1.)

§ 2. This right, which was conventional in the origin, was afterwards rendered general and obligatory upon all seigniors and tenants (*censitaires*). (F. 11, A. 1.)

§ 3. The *arrêt* of the 4th of June, 1686, was the first law which rendered *banalité* general and obligatory upon seigniors and tenants. (F. 11, A. 1.)

§ 4. In this country *banalité* was feudal as being attached to a *fief*. (F. 11, A. 1.)

§ 5. *Banalité* was only conventional under the Custom of Paris, (\*)

§ 6. Seigniors who had no mills built at the passing of the Seigniorial Act of 1854, have no right, under the provisions of the said act, to any indemnity for *banalité*. (\*)

Nos. 37 and 38 are given on previous page.

#### RESERVATIONS.

39.—§ 1. The obligation to concede at a rent charge, (*à titre de redevances*) imposed upon seigniors, must be understood as being exclusive of all reserves which cannot be comprehended within the term dues (*redevances*), and which were not otherwise rendered legal. (F. 7, A. 5.)

§ 2. All reserves must be held to be legal, the object of which was the obligation upon the tenant (*censitaire*) to allow the accomplishment by the seignior, on his part, of the obligations of that nature stipulated by the king in the grant of the *fief*. (F. 11, A. 1.)

§ 3. The following reservations or other analogous to them, were illegal, and do not give to the seignior a right to any indemnity by reason of their suppression:

Art. 1. A reservation of firewood for the use of the seignior:

Art. 2. A reservation of all marketable timber:

Art. 3. A reservation of all mines, quarries, sand, stone and other materials of the same kind:

Art. 4. A reservation of all rivers, rivulets, and streams for all kinds of mills, works and manufactures:

Art. 5. A reservation of the right of diverting and directing the course of streams and of intersecting lands by channels for that purpose :

Art. 6. A reservation of the right of taking the land requisite for the building of any kind of mills or manufactures, with or without indemnity. (F. 7. A. 5.)

§ 4. A reservation of indemnity for the value of the lands of the *censitaire* required for the construction of railroads, is also illegal and gives no right to indemnity. (F. 9, A. 3.)

§ 5. Reservation of the right of changing the place and time of payment of the *cens et rentes* and other seigniorial dues, the seigniors might make the reservation, provided the place newly indicated was within the limits of the seignior. (\*)

§ 6. The reservation of timber for the construction of churches without indemnity, and the reservation of the right of fishing and hunting on the lands conceded, are illegal, and give no right to indemnity. (F. 8, A. 4.)

§ 7. The question being put : " is the reservation of timber for the building of the manor house and mills without indemnity, legal, and does it give to the seignior a right to an indemnity for its suppression ? " the court is equally divided. (F. 6, A. 6.)—But it is stated at § 1 : " All reservations which cannot be comprehended within the term dues (*redevances*) are illegal."

40.—The 40th question is too general, the court does not answer it.

#### PROHIBITIONS.

41.—§ 1. When prohibitions were made for the protection of other legal seigniorial rights they might be legal. (F. 11, A. 1.)

§ 2. But their disappearance, by virtue of the seigniorial Act of 1854, does not give rise to any indemnity, because they were only accessory to a principal right for which the seignior has indemnity. (\*)—Can this rule of law apply to the legal prohibition to build flour mills, which is one of the accessories of the right of *banalité* ?

§ 3. The following were nevertheless illegal and do not give rise to any indemnity :

Art. 1. The prohibition to build any kind of mills, manufactures or other works, (*usines*) moved by water, wind, or steam. (F. 9, A. 3.) :

Art. 2. The prohibition to sell marketable timber, to make deals, to grind grain not subject to *banalité*, grown beyond the *censive* and intended for market. (F. 9, A. 3.) :

Art. 3. The prohibition to use streams passing over or bordering upon the lands of the *censitaires* to propel mills, manufactures or other works (*usines*). (F. 9, A. 3.)

#### PERSONAL LABOR (CORVÉES.)

42.—The covenants contained in some deeds of concession, imposing personal days' labor (*journées de corvées*) upon the tenants (*censitaires*), for the advantage of the seigniors, are legal and give rise to indemnity. (F. 11, A. 1.)

#### LODS ET VENTES.

43.—At the time of the passing of the Seigniorial Act, the seigniors subject



to its operation could not lawfully demand the mutation fine (*droit de lods et ventes*) upon the exchange, without *soulte* of lands within their seigniory for others held in *franc-alleu roturier*, or in free and common soccage, beyond their seigniory. (\*)

#### RIGHTS OF THE CROWN.

44.—The rights of the crown, the value of which is to be deducted in the schedule to be made under the Seigniorial Act of 1854, from the price to be paid by the tenants (*censitaires*) to the seigniors for the redemption of the seigniorial dues, are those of *quint* and *relief* in the cases under which they were due under the Custom of Paris, unless the lucrative rights of the crown, to be deducted, should have been otherwise regulated by the particular grant of each seigniory, to which reference must be had; but it is the duty of this court to observe that it has not come to the knowledge of this court that the crown has ever exercised the right of *relief*, except that due under the Custom of Vexin-le-Français, included within that of Paris, by which some grants *en fief* are governed. (F. 8, A. 4.)

45.—Whenever, by the abolition, under the Seigniorial Act, of the obligation to subinfeudate the lands, an additional value may be given by it to the unceded lands, that value must be ascertained and inserted in the schedules in deduction of the price of redemption. (F. 11, A. 1.)

#### RIGHTS TO BE VALUED.

46.—The rights, dues, duties and reservations, the legality whereof is acknowledged, and which are appreciable in money, should be valued in making up the whole price of redemption of the seigniorial rights. (\*)

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#### SUMMARY OF THE JUDGMENT UPON THE COUNTER-QUESTIONS SUBMITTED BY THE HONORABLE JOHN PANGMAN.

1. (†) § 1. At the period of the introduction of the Custom of Paris into Canada, the legal effect of the contract whereby a person, holding lands *en franc-alleu noble*, granted therefrom a part *en fief* or *en censive*, was to divide the property into a *domaine directe* and into a *domaine utile*. (\*)

§ 2. Under the law of that custom, the *noble alleutier* was under no obligation to alienate the said lands. (\*)

2.....3.....4.....5.....

6. The concession *en fief*, before or after the enregistration of the two *arrêts* of 1711 and 1732, did not operate a division of the estate between seignior and vassal or tenant (*censitaire*), of what might be afterwards subgranted: but the division was effected by the subsequent deed of subinfeudation or *accensement*.

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(†) This figure corresponds with the numbers of the questions and answers; the numbers followed by . . . are those to which there is no answer, the point under consideration being comprised in the preceding decisions, &c., &c.

7.....8.....

9.—§ 1 and 2. The *arrêt* of 1732 did not make any distinction between the sale of wild lands (*terres en bois debout*), by a proprietor holding *en fief*, *en censive* or *en franc-aleu*. (\*)

10.—According to the *arrêt* of 1732, the penalty of nullity was attached to the sale of wild lands (*terres en bois de bout*), held either *en fief* or *en censive* or *en franc-aleu*, even if the prohibition had not been specially imposed by the crown on the original grant. (\*)

11.....12.....

13.—§ 1. Seigniors will have the right to invoke, for all legal purposes, before the commissioners acting in virtue of the Seigniorial Act, whether in the first resort, or in the revision of the schedules, as well as before the *experts*, and before courts of law, having jurisdiction over and cognizance of the matter (*saisies de sujet*), the terms of the original grant by which they hold their seigniories, whether the grants have proceeded from the crown of France, or from the British crown. (\*)

§ 2. With reference to the tenor of the *aveux et dénombremens*, and of the acts of fealty and homage and of the crown acquittances for *quint* and other dues granted to them or their predecessors (*auteurs*), the same legal effect must be given to them in relation to the obligation of the seigniors to the crown, according to the circumstances of each case; but they cannot affect the relative position of seigniors and tenants (*censitaires*), because the *aveux et dénombremens*, acts of fealty and homage, and acquittances of dues, only have legal effect between the dominant seignior and the vassal, as executed between them, and do not affect others not parties to them. (\*)

§ 3. The character and terms of the possession and enjoyment of any rights, either between the seigniors and the crown, or the seigniors and any tenants (*censitaires*), in so far as that possession may have a known legal effect, with a view to the seigniorial law and the present decisions of this court in particular, may also be taken into consideration. (\*)

§ 4. The commissioners may order the adduction of any evidence which they may require to enable them to judge correctly in all cases. This court cannot be called upon to lay down in its decision all the rules applicable to the admissibility and appreciation of evidence; the application of the rules enunciated in this answer are subject nevertheless, in all cases, to the observance of the decisions of this court. (\*)

#### SUMMARY OF THE JUDGMENT UPON THE COUNTER-QUESTIONS OF SIR EDMUND FILMER ET AL.

1.....2.....3.....

4.—The introduction of the criminal laws of England into Canada, since the cession of the country, has not had the effect of abrogating the penal enactments of 1711 and 1732; those questions were merely of a civil nature. (\*)

5.....

6.—These *arrêts* have not fallen into desuetude. (F. 9, A. 3.)

7.—These *arrêts* have not been repealed by the Imperial Act, 3 Geo. 4, c. 19, (commonly called the Canada Trade Act,) nor by the Imperial Act, 6 Geo. 4, c. 59, (commonly called the Tenures Act.) (F. 10, A. 2.)

SUMMARY OF THE JUDGMENT UPON THE COUNTER-QUESTIONS OF DAME MARIE LOUISE CHARTIER DE LOT-BINIÈRE, MRS. HARWOOD

1.—§ 1. The acts of the Imperial Parliament, commonly called the Trade Act and the Tenures Act of Canada, have effected changes in seigniories for which a commutation of tenure has been obtained under their provisions, with reference to the portions of these seigniories not conceded at the time of the commutation. (F. 11, A. 1.)

§ 2.—These portions were by the commutation subjected to the tenure of free and common socage, and relieved from rights and dues to the crown, and generally withdrawn from seigniorial laws and obligations. (F. 10, A. 2.)

§ 3.—At the time of the commutation, tenants (*censitaires*) and the seigniors, on their part continued to be subject to their obligations towards their tenants (*censitaires*), although the seigniors had obtained a regrant of the entire seigniority under the tenure of free and common socage. (\*)

§ 4.—The laws which regulate the relations between the seigniors and the tenants (*censitaires*), apply equally to the case where a commutation has been demanded by the seignior, in virtue of the Imperial acts, but not obtained at the passing of the Seigniorial Act of 1854. (F. 11, A. 1.)

§ 5.—They apply also to the case when a commutation has not been demanded by the seignior, under the provisions of the Imperial acts. (F. 11, A. 1.)

2. A contract or a clause of a contract, touching the terms of any alienation of lands, which might be contrary to the laws of Canada, although not in itself immoral, or prohibited by British public law, can be held to be null or annulable. (F. 11, A. 1.)

3. The commissioners may not lawfully assume to treat any contract touching the terms of alienation of any lands, unless such nullity has been pronounced by the judgment of a court of competent jurisdiction, or such contract, or such clause of a contract has been declared illegal by the special court. (\*)

4. In any *fief* or seigniority, for which it was possible to demand a commutation in virtue of the Imperial acts above mentioned, the commissioners have a right to enforce the Seigniorial act of 1854, even if the seignior or the tenant (*censitaire*) should elect to maintain the application of the provision of the Imperial acts. (F. 8, A. 3.)

• Judge Day abstains from pronouncing on this question.

The judgment upon the counter questions of Dame Marie Charlotte Chartier De Lotbinière, (Mrs. P'ingham,) is contained in the preceding answers.

## SUMMARY OF THE JUDGMENT UPON THE COUNTER-QUESTIONS OF THE HONORABLE MALCOLM FRASER.

1.—Grants in *fief* in this country, made by the British crown, from the cession to the passing of the Seigniorial Act of 1854, are subject to the same laws as the other grants made under the same tenure, unless the grant contains certain special dispositions by which a derogation in certain respects shall be established. (F. 9, A. 3.)

## SUMMARY OF THE JUDGMENT UPON THE COUNTER-QUESTIONS OF THE HONORABLE JEAN ROCH ROLLAND.

Seigniors cannot flood the lands granted to their tenants (*censitaires*), in virtue of their right of *banalité*; if they possess the right, it commonly proceeds from valid titles, the effect of which cannot be changed by the Seigniorial Act of 1854. (F. 11, A. 1.)

The results determined by this judgment are :

- 1, That since the *arrêt* of 1711, the seigniors were obliged to concede their lands.
- 2, That they were bound to concede them at a rent charge, (*à titre de redevances*).
- 3, That neither the law nor custom had fixed the rates of *cens et rentes*, except in the case of a concession by the governor and the intendant upon the seignior's refusal.
- 4, That the *cens et rentes* should be maintained in conformity with the stipulations contained in the deeds of concession.
- 5, That the seigniors had no right in the navigable rivers, unless they held such right by virtue of a special title.
- 6, That when they had such a title, they might subinfeudate or *accenser* those rights at a rent charge (*à titre de redevances*).
- 7, That the non-navigable rivers form part of the private demesne and follow the property, no matter into whose hands it may pass.
- 8, That the non-navigable rivers, upon conceded lands, belong to the tenants (*censitaires*), and in such a case, any reservation which might be made of them would be illegal.
- 9, That since the *arrêt* of 1686, *banalité* was legal and universal in Canada, and consisted, on the part of the seigniors, of the obligation to build mills, and on that of the tenants (*censitaires*) to bring the grain, for the use of their families, to be ground in them.
- 10, That the right to prevent the building flour mills, was an accessory to the right of *banalité* which it was intended to protect.
- 11, That such prohibition does not give a right of indemnity, if the principal due (*droit principal*) be paid.

3.)  
3 Geo. 4, c. 19,  
Act, 6 Geo. 4,

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Charlotte Chartier  
answers.

12, That all the charges, reservations and prohibitions, which cannot be comprised within the meaning of the word "dues" (*redevances*), and which would have the effect of retaining a portion of the useful domain, are null and illegal.

13, That the imposition of personal days' labor, (*journees à corvées*) is legal.

14, That it is requisite to ascertain the increase in the value of unconceded lands given to the seigniors in *franc-aleu*.

15, That the imperial acts, commonly called the Canada Trade Act and the Tenures Act, do not impose any limit upon the working of the Seigniorial Act of 1854.

16, That those seigniories which were conceded both before and since the conquest, are equally subject to the enactment of this law, except in the case where unconceded lands have been duly converted into free and common socage.

17, That the parties interested will be allowed to produce every kind of legal evidence, in support of their pretensions, before the commissioners.

## CASES FROM PRÉVOSTÉ DE QUÉBEC.

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The following cases are condensed from a small volume published at Quebec in 1824, by Joseph François Perrault, one of the prothonotaries of the Court of Queen's Bench at Quebec, intitled "Extraits ou Précédents tirés des Registres de la Prévosté de Quebec." The decisions were given by Messrs. Deleigne and Dain, two of the most eminent of the Lieutenants civils et criminels of the prévosté under the French government, from 1726 to 1759, M. Deleigne having been installed in 1717, and M. Dain in 1744. It appears from the dedication "Aux honorables juges, et à messieurs les gens du roi, avocats, procureurs, et praticiens du Bas Canada," and from the preliminary observations by Mr. Perrault, that the Court of Prévosté sat every Tuesday and Friday; that, in addition [it held special sittings (*des audiences particulières*) on other days of the week when required; that there was only one judge for all matters civil and criminal and for those of police; that this judge was appointed by the king; that an appeal lay to this court from judgments given in the seigniorial jurisdictions, and from its decisions to the Conseil Souverain.

That it was of the essence of the Court of Prévosté to be assisted by the *Procureur de roi*, also named by the king, who was constantly in court, "lequel portant la parole dans toutes les causes," watched over the interests of the king and of the widow and orphan, and demanded the punishment of persons wanting in respect for justice.

That there was but one Greffier of the court also named by the crown.

That in cases where these officers were recused or were *recusables* for relation-ship or interest, or were sick or absent, the intendant named others *ad hoc*, and that sometimes the lieutenant general named a *procureur du roi* or a *greffier* in these cases.

That the Custom of Paris, the general laws of France, the Ordinance de Commerce, the Code Civile with the redactions of the *Conseil*, and certain edicts and declarations of the kings of France relative to Canada, were the fundamental basis of the procedure, and judgments of the court.

That as there were not in the country at that time *avocats* or *procureurs reconnus d'office*, proceedings were conducted by notaries, or by *huissiers* who acted by special powers of attorney.

That the entries in the registers were signed by the judge; that insinuations were read and made in court; that inventories were closed in the presence of the *subrogés tuteurs*, and accounts in presence *des oyants*; that *acte* was given of a default, and after the eight days, judgment followed without any *preuve testimoniale*, simply *sur la contumace*.

That, in commercial matters, contested accounts were referred to merchants, the judge deciding definitively on their report; that for debts *liquides*, proceedings were had by execution and *saisie arrêt*.

That on judgments on promissory notes and bills of exchange *contrainte par corps* was always granted; that damages from whatever cause were always fixed by *experts*, as also accounts of tradesmen, and contestations as to the erection and repairs of buildings; and that the liquidation of rights of succession and divisions of property were invariably referred to *praticiens*.

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| Appeal, No. 49.                                     | Interdiction, No. 44.  |
| Aliment, No. 134.                                   | Inscription de Faux, No. 36.                                       |
| Admiralty, No. 80.                                  | Inventory, No. 9, 43, 75, 100.                                     |
| Action to account, No. 42, 60.                      | Intervention, No. 83.  |
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| Execution, No. 17, 24, 141.                         | Saisie Arrêt, No. 95, 102.   |
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| Fine, No. 103, 122.                                 | Tutelle, No. 10, 86, 105.  |
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| Garantie, No. 61.                                   | Will, No. 131, 135.  |
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### PRÉVOSTÉ DE QUÉBEC,

(From 1726 to 1759.)

No. 1. 1726, Oct. 22. Judgment confirming *le rhumb de vent* of the 2nd concession of the seignior of Neuville although it was not in conformity with



that of the first concession. *Peltier vs. Peltier*, and *Magué, Inter.*, p. 7. See judgment, Cons. Sup. In Appeal.

- No. 2. October 22. Judgment ordering a notary to produce in court the minutes of two contracts between the parties in the cause. *Leclerc vs. Labrie. Prévosté*, p. 7.
- No. 3. 1727, February 4. Judgment reducing certain seigniorial rents to thirty instead of forty *sols* per arpent, in conformity with the declaration of The King, of 5<sup>th</sup> July, 1716. *Amiot, seignior of Vincellotte vs. Fortin et al. Ib.*, p. 8.
- No. 4. July 11. Judgment discharging a husband from paying a *billet* made by his wife, without his authority. *Jeremie vs. Bellorget. Ib.*, p. 8.
- No. 5. December 23. Judgment for the amount of a lost note, and declaring the note null in case of its being found. *Trépagny vs. Dauteuil. Ib.*, p. 9.
- No. 6. 1728, February 24. Judgment adjudging to a plaintiff, wood cut by defendant upon plaintiff's ground, and forbidding defendant to take it away under the penalty mentioned in the ordinance of the intendant. *Ains vs. Deguise. Ib.*, p. 9.
- No. 7. March 11. Judgment condemning the Seminary of Quebec to keep the plaintiff's son in the seminary to finish his studies, or to pay for his board annually elsewhere, 450 livres *suiwant l'acte de foundation. Hausseur et al. vs. Superior of the Seminary of Quebec. Ib.*, p. 9.
- No. 8. March 11. Judgment giving *main levée* of certain goods seized, and ordering them to be delivered to the plaintiff as her property, and the rest of the goods to be sold and the proceeds paid to plaintiff for rent. *Voyer vs. Pichet, gardien of effects seized upon Trépagny. Ib.*, p. 10.
- No. 9. March 15. Formule of closing an inventory, the *procureur du roi* and the *subrogé* tutor present. *Ib.*, p. 10.
- No. 10. April 14. Formule of the presentation and affirmation of the account of a tutor. *Ib.*, p. 11.  
Of renunciation at *greffe. Ib.*, p. 39.
- No. 11. April 15. Judgment ordering a tenant to furnish (*garnir*) the apartments leased, and to quit the premises in case of complaint of the noiso made by him in the exercise of his *profession (faiseur de galoches). Léger (faiseur de galoches) vs. Moufils. Ib.*, p. 11.
- No. 12. April 16. Acte given with costs of a first default to appear. *Lenormand vs. Garnier. Ib.*, p. 11.
- No. 13. July 6. Judgment condemning the defendant to furnish, in his turn, a *pain bénit*, also à *cierge et une quêteuse* to the church on pain of ter

- livres amende. *Boutin, Marguillier en charge Ancienne Lorette vs. Reopel, habitant. Ib., p. 12.*
- No. 14. July 6. Judgment condemning defendant to bring the actions (*poursuites*) necessary to recover what was due to the *Fabrique. Boutin (marguillier) vs. Bonhomme et al., habitants. Ib., p. 12.*
- No. 15. July 27. Judgment entering a second default, and ordering an *adjudicataire* to pay the price of his acquisition, in default whereof the property to be sold at her *folle enchère. Lemoyen et al. vs. Lemoine. Ib., p. 13.*
- No. 16. 1729, March 15. Judgment condemning a father to give up his daughter to her grandfather, who had offered to bring up and educate her. *Normand vs. Marcou. Ib., p. 13.*
- No. 17. March 15. Judgment declaring a seizure invalid for want of a date in the *exploit de saisie*, and the *huissier* condemned to pay back (*rendre et restituer*) the costs occasioned by the seizure. *Cunac vs. Gatiou. Ib., p. 13.*
- No. 18. 1729, October 19. Judgment in an action against a defendant resident at Montreal, and only temporarily at Quebec, ordering the parties *à se pourvoir pardevant le Licut. Général de la juridiction de Montréal*; costs divided. *Rugeots vs. Le Frère Gereais au nom et comme procureur des Frères Charon de Montréal. Ib., p. 14.*
- No. 19. December 6. Judgment to relieve a defendant from the execution of a *sentence par défaut* on payment of costs. *Marandeu vs. Boillard. Ib., p. 14.*
- No. 20. 1730, July 18. Judgment condemning the drawer of a bill of exchange to pay it *par corps. Vaillant vs. Hiché. Ib., p. 14.*
- No. 21. July 12. Judgment admitting the prescription of thirty years against a *billet. Vallé vs. Riverin. Ib., p. 15.*
- No. 22. 1731, March 2. Judgment declaring a donation null *pour cause demence* of donor, and ordering a *partage* of the property. *Hiché au nom et comme fondé de procuration de S. Hainard vs. Guillot, and Gosselin, Inter. Ib., p. 15.*
- No. 23. 1731, June 12. Judgment ordering two stoves leased by plaintiff to defendant to be given up to plaintiff. *Maillou, pltf., vs. Leger et ux, and le Frère Turc dit Chrétien d'autre part, def. Ib., p. 16.*
- No. 24. July 1. Judgment condemning a commissaire to a *saisie réelle* to accept the charge. *Levasseur vs. Bouin dit Dufrene. Ib., p. 17.*
- No. 25. 1732, February 5. Judgment for the price of goods sold at auction. *Fortier, tuteur, vs. Leclair. Ib., p. 17.*
- No. 26. March 11. Judgment rendered against a *tiers saisi* who refused to make his declaration on oath. *Amiot vs. Couillard. Ib., p. 17.*

- No. 27. March 26. Judgment for twenty-nine years arrears of a *rente foncier* against a *détenteur* of a lot. *Peuvret vs. Roussel. Ib., p. 18.*
- No. 28. April 22. Judgment condemning the defendant to pay the capital and five years arrears of a *constitut* for non-payment of the *rente. Hiché vs. Lajoue. Ib., p. 18.*
- No. 29. May 6. Judgment discharging a *gardien* to movables by reason of the plaintiff not causing them to be sold within the two months mentioned in the 172nd article of the *Coutume de Paris. Duburon vs. Chaumereau, Ib., p. 19.*
- No. 30. November 25. Judgment condemning a *cessionnaire* to pay the *cens et rentes* on a land conceded to him in 1711 and sold by him to another in 1718 *sauf recours. Duchesnay vs. Turgeon. Ib., p. 19.*
- No. 31. 1733, January 20. Judgment condemning a *habitant* to pay the *rentes* of his lands at 30 sols per arpent, and declaring valid the *offre* made by him to the *huissier*, also reducing the costs of service (there being another case in which a service was made at the same time) and taxing the costs of defendant's *voyage, séjour, et retour* against plaintiff, he having instructed the bailiff not to take any money if offered. *Amiot de Vincelotte vs. Dupéré. Ib., p. 20.*
- No. 32. February 3. "Parties ouïes, ensemble le procureur du Roi, vû notre sentence du vingt-huit Janvier dernier, portant qu'avant faire droit, le demandeur ferait signifier au défendeur, copies des requêtes par lui portées tant à l'officialité qu'au conseil, et de l'arrêt obtenu sur la dernière requête pour, par le défendeur, fournir ses moyens d'opposition dans trois jours, pour tout délai, à compter du jour de la signification de la dite sentence, sinon et le dit temps passé, sera fait droit; vû aussi la promesse de mariage donnée par Claude Lonet, fils aîné, à la fille du demandeur, en date du vingt de Juin dernier, les lettres missives par lui écrites au défendeur, les 19, 22 et 24 de Janvier dernier, à lui signifiées les mêmes jours en forme de soumissions respectueuses, et l'arrêt du conseil supérieur de cette ville, en date du vingt-six du dit mois de Janvier, qui renvoie les parties à se pourvoir par devant nous, sauf l'appel au dit conseil, nous, attendu la circonstance, et l'état où Thérèse Willitt se trouve, que le dit Claude Louet, fils, est âgé d'environ vingt-neuf ans, et que, d'ailleurs, il consent d'exécuter la promesse de mariage qu'il a faite à cette dite fille, comme il paraît que les dites lettres signifiées au défendeur, *ordonnons que, sans avoir égard à l'opposition formée par le dit Louet, père, et à ses moyens et défenses représentées par Desaline, son procureur, et de nous paraphées, ne varietur, suivant sa requisition y contenue, qu'il sera passé outre à la célébration du mariage d'entre le dit Claude Louet, fils, et de la dite Thérèse Willitt, par devant leur euré, en gardant les solennités requises et l'ordonnance, en la manière accoutumée, et condamnons le défendeur aux dépens. Willitt vs. Louet. Ib., p. 21.*

- No. 33. February 20. Judgment condemning a donee to deliver a portion of land as *légitime* to an heir of the donor. *Maufet vs. Metot. Ib., p. 21.*
- No. 34. August 4. Judgment declaring *lods et ventes* due on a piece of land sold by one co-heir to another, although the land was alleged to be undivided *Guillard (seigneur de l'isle et comté d'Orleans) vs. Roberge. Ib., p. 22.*
- No. 35. 1734, May 18. Judgment declaring a contract of marriage executory against a tutor *ad hoc* for 6000 franes *douaire*, also 1000 *de préciput* and 300 *pour le deuil de la veuve. Rouer de Villery vs. Perrault. Ib., p. 23.*
- No. 36. 1735, Nov. 25. Judgment ordering the deposit in the *greffe* of a note declared to be *faux* by the defendant, and the consignment of sixty livres by defendant, being the sum required before an inscription *en faux* could be received. *Voyer vs. Michelon. Ib., p. 23.*
- No. 37. 1736, April 10. Commission rogatoire ordered to be issued and to be addressed to the lieut.-gen. *du Baillage de Bordeaux* to receive the oath of plaintiff as to what was paid on the note in suit, which oath the plaintiff was bound to take, at his own diligence, in the course of the then current year, to come out by the vessels of the year 1737, in default whereof judgment would be rendered definitively on the condemnation demanded. *Jean de Graves vs. Lafontaine de Belcourt. Ib., p. 24.*
- No. 38. July 19. Form of *sentence d'ordre* showing the preference given for *frais de poursuite, les honoraires des officiers, et le droit de dépôt de deux et demi pour cent. Taché vs. Lacroix and divers opp. Ib., p. 24.*
- No. 39. October 16. Judgment discharging an indorser of a *lettre de change* for want of a demand within the delay prescribed by the *ordonnance du commerce*, four years having elapsed since the indorsement to plaintiff. *Havy vs. Perrault. Ib., p. 26.*
- No. 40. October 17. Judgment against a *marchande publique* to pay 3494 livres *même par corps. Corbière, négociant, vs. Magdeleine Laverdière, femme de Charles Demers, faisant profession de marchande publique, défendresse. Ib., p. 26.*
- No. 41. 1737, July 16. Order to create a curator to presumptive heirs absent. *Ib., p. 27.*
- No. 42. Judgment ordering an account with *pièces justificatives* to be returned *sous peine d'y être contraint par corps. Maufait vs. Chapeau, veuve Maufait. Ib., p. 27.*
- No. 43. A new inventory ordered to be made for want of notice to the tutor of the minor children of the first marriage, with injunction to proceed in his presence and in that of the *subrogés* tutors of the minors of both marriages. *Lanoix vs. Girard. Ib., p. 27.*
- No. 44. Form of rehabilitating an interdicted person. *Ib., p. 28.*

- No. 45. July 23. Judgment interlocutory ordering accounts between merchants to be submitted to *arbitres*. *Fournel vs. Bruguère*. *Ib.*, p. 28.
- No. 46. July 23. Judgment on confession with delay of payment. *Maranda vs. Gigon*. *Ib.*, p. 28.
- No. 47. July 24. Judgment on a second default without proof of debt. *Lemire vs. Romain*. *Ib.*, p. 29.
- No. 48. July 27. Judgment condemning tenants to pay their rents to a *commissaire* established over the leased property under seizure. *Couteleau, Commissaire, vs. Clement et al.* *Ib.*, p. 29.
- No. 49. August 2. Judgment on appeal from decision by the judge *Bailliff de Beauport*. *Guyon vs. Gravelle*. *Ib.*, p. 30.
- No. 50. August 6. Judgment ordering, *avant faire droit*, that the repairs necessary to a house be established by an architect. *Simon vs. Larue*. *Ib.* p. 30.
- No. 51. August 6. Judgment forbidding defendant from passing over a land, on pain of fine. *Lainé vs. Chamberland et al.* *Ib.*, p. 30.
- No. 52. August 6. Judgment ordering a verification by experts of the lines of the lands in question, with a plan establishing on which land the trees had been cut, with their value. *Rouleau vs. Labreque*. *Ib.*, p. 31.
- No. 53. August 6. Form of *bail judiciaire*.
- No. 54. August 9. Interlocutory to establish whether a barn was built according to agreement. *Mouffe vs. Delorme*. *Ib.*, p. 33.
- No. 55. August 9. Interlocutory ordering the wife of the plaintiff to appear to be examined. *Caplier vs. Petitchaire*. *Ib.*, p. 33.
- No. 56. August 9. Interlocutory ordering a surveyor to replace *bornes* taken up by him. *Rouer vs. Pagé*. *Ib.*, p. 33.
- No. 57. August 13. *A tiers saisi* ordered to keep in his hands the amount of a note payable to order until ordered to pay to the bearer of the note. *Lefèvre vs. Castillon, and Lafontaine, T. S.* *Ib.*, p. 34.
- No. 58. August 20. Judgment ordering payment by instalments. *Lanoie vs. Bellerose*. *Ib.*, p. 34.
- No. 59. August 20. Interlocutory ordering defendant to serve copy of pleas on the plaintiff, and granting *acte* of election of domicile by defendant. *Chaplain vs. Prevost*. *Ib.*, p. 35.
- No. 60. August 23. Form of judgment on a *débats d' compte*. *Haimard vs. Guillot*. *Ib.*, p. 37.
- No. 61. August 27. Interlocutory to put a *garant formel* into the cause. *Gagnon et ux. vs. Belonger*. *Ib.*, p. 37.

- Judgment ordering merchandize *sous halle* to be returned until paid for à dire d'experts et négociants. *Cordier vs. Guignière. Ib., p. 37.*
- No. 62. August 27. Interlocutory ordering a renunciation to be made in the greffe in the ordinary manner. *Prevost vs. Sedillot. Ib., p. 38.* Form of p. 38.
- No. 63. September 17. Interlocutory ordering plaintiff (a merchant) to prove his claim by *pièces authentiques et suffisantes.* *Turdif vs. Guignière. Ib., p. 39.*
- No. 64. September 17. Judgment ordering 250 livres to be paid to plaintiff *par provision* on an account rendered by defendant. *Haimard vs. Guillot. Ib., p. 39.*
- No. 65. September 24. Judgment condemning a defendant to furnish plaintiff with a copy, *en forme exécutoire*, of his deed of sale, and to pay the *rente duc.* *Desmeloises vs. Armand dit Maison de Bois. Ib., p. 40.*
- No. 66. September 24. Judgment ordering a curator to a vacant succession to pay a sum of money on plaintiff's obtaining order of the creditors *saisissants* and opposants. *Pacaud vs. Guignière. Ib., p. 40.*
- No. 67. October 1. Judgment setting aside an award of arbitrators for eating and drinking with plaintiff, and not making their report *sur les lieux.* *Delorme vs. Mouyle. Ib., p. 41.*
- No. 68. October 1. Judgment condemning the defendant to pay a sum to be fixed by an expert. *Desmeloises vs. Deguise. Ib., p. 41.*
- No. 69. October 1. Judgment declaring null a deed of sale for want of ratification thereof by defendant according to its stipulations. *Chavigny vs. Desprès. Ib., p. 42.*
- No. 70. October 5. Opposition maintained to the execution of a judgment by default. *Hiché vs. Denis. Ib., p. 42.*
- No. 72. October 9. Action dismissed for want of a signature to the *requête*, by the plaintiff or his *procureur fondé.* *Nouchel vs. Greysac. Ib., p. 43.*
- No. 72. October 14. Judgment condemning the defendant in the amount of a note as payable "in the month of October," and not in all the month of "October." *Guignière vs. Foucher. Ib., p. 43.*
- No. 73. October 15. Order to strike out (*razer et biffer*) from the *requête* the term *extorqué* applied to a deed of *transaction* sought to be rescinded, and ordering a new election of domicile in the city of Quebec. *Churest vs. Charly. Ib., p. 44.*
- No. 74. October 17. Judgment dismissing an action for payment of *un envoi de marchandises* for want of proof *par écrit*, and ordering the goods to be delivered to plaintiff on demand. Costs compensated. *Dazanette vs. Charly. Ib., p. 44.*

- No. 75. October 26. Form of *entérinement de lettres d'héritier sous bénéfice d'inventaire*. *Ib.*, p. 45.
- No. 76. October 29. Judgment declaring good and valid a *saisie* made on a *fermier pour droits de fermage*, and resiliating the lease *route de paiement*. *Hazeur vs. Philibot*. *Ib.*, p. 46.
- No. 77. November 19. Delay granted on the demande of defendant's wife until the return of her husband (a *navigateur*) to enable a plea to be made. *Decouange vs. Beaulieu*. *Ib.*, p. 47.
- No. 78. November 19. Judgment discharging a defendant on his oath that he had paid for wine sued for. *Sombrun vs. Chalou*. *Ib.*, p. 47.
- No. 79. November 19. Interlocutory ordering plaintiff to be examined as to lost receipts. *Normand vs. Besançon*. *Ib.*, p. 47.
- No. 80. December 4. Parties sent out of court, the fact in dispute being *un fait maritime*. *Doumerc, armateur, vs. Olivier, capitaine de navire*. *Ib.*, p. 48.
- No. 81. December 13. A *huissier audiencier* named and sworn in court as curator to a vacant succession. *Gastonguay vs. Lajus*. *Ib.*, p. 48.
- No. 82. December 31. Judgment in favor of a father for wages of his son *Fortin vs. Amiot de Vincelotte*. *Ib.*, p. 48.
- No. 83. 1738. January 14. A creditor allowed to intervene in a suit against a curator to a vacant succession. *Lajus vs. Pilote*. *Ib.*, p. 49.
- No. 84. February 7. A defendant discharged from paying a *lettre d'échange*, on himself and his wife making, within a month, oath that it had been paid. *Taché vs. Debergères*. *Ib.*, p. 49.
- No. 85. 1738. February 11. A *reprise d'instance* allowed. *Fournier vs. Malbœuf*. *Ib.*, p. 50.
- No. 86. February 11. Order to a tatrix *de prendre qualité* within fifteen days. *Prevost vs. Sedillot*. *Ib.*, p. 50.
- No. 87. February 25. Judgment *en séparation des biens* and declaring valid a seizure made by the wife. *Renaud vs. Doyon*. *Ib.*, p. 51.
- No. 88. February 23. Homologation of a judgment of arbitrators made under a *compromis sous seign privé*. *Lemoyné vs. Lemoyné*. *Ib.*, p. 51.
- No. 89. February 23. An obligation of a deceased person declared executory against his heirs *solidairement*. *Lefebvre vs. Blouin*. *Ib.*, p. 52.
- No. 90. March 4. Form of *entérinement de lettres de rescison et restitution en entier*. *Charest vs. Charly*. *Ib.*, p. 52.
- No. 91. March 4. Judgment by default on an *assignation au dernier domicile* with *déclaration d'hypothèque*. *Poisset vs. Larchevesque, fils*. *Ib.*, p. 53.



- No. 92. March 11. Judgment on oath of plaintiff against an heir *sous bénéfice d'inventaire*. *Perrault vs. Ruette*. *Ib.*, p. 54.
- No. 93. March 11. Judgment for *lods et ventes* on a sale from father to son. *Gaillard vs. Fontaine*. *Ib.*, p. 54.
- No. 94. April 15, 22. In an action *d'injure* for stating that the plaintiffs "*étaient de races de pendus*," defendants condemned to retract and make *réparation d'honneur* before three persons to be chosen by plaintiffs and to pay a fine of three livres to the poor of the *Hôtel Dieu*. *L. Liard, tailleur d'habit, et François Dupont vs. Legris, forgeron, and Lagarenne, menuisier*. *Ib.*, p. 55.
- No. 95. April 25. A *saisie arrêt en main tierce* declared null as having been made *sans titre ni ordonnance de justice*. *Boutin vs. Lebreton et al.* *Ib.*, p. 56.
- No. 96. October 6. Ordered that the parties in a commercial suit name each a person *au fait de commerce* to report as arbitrators. *Havy et al. vs. Desautiers*. *Ib.*, p. 56.
- No. 97. November 25. Judgment on an account taken from the books of plaintiff, a merchant, in presence of Le Juge Bailif de Louisbourg et du Procureur Général du Roi au Conseil de Louisbourg, 4th November, 1737. *Ducarotte vs. Courtin, curateur*. *Ib.*, p. 57.
- No. 98. December 2. Interlocutory that experts should examine the natural course of a *cours d'eau*, and the damage caused by plaintiff's dam, and to give their opinion as to what would be for the common benefit of the parties. *Drolet vs. Hurnois et al.* *Ib.*, p. 57.
- No. 99. 1739, September 9. Subrogation of plaintiff in place of a seizing creditor who neglect to proceed with (*poursuivre*) the seizure. *Perrault, créancier de Lepulme, vs. Charests et al., créanciers saisissants*. *Ib.*, p. 58.
- No. 100. 1740, February 19. Judgment as to effects *récelés* at the making of an inventory and depriving the widow of her half in these effects, and of her usufruct therein under a donation. *Crenet et al. vs. Vergeat*. *Ib.*, p. 58.
- No. 101. July 19. Judgment in damages against a defendant for having by imprudence injured plaintiff's child with a harness. *Courtant vs. Sert, charretier*. *Ib.*, p. 59.
- No. 102. 1741, October 20. Judgment declaring valid a seizure of *pelletteries* in the hands of the debtor's brother, and that the plaintiff be paid by privilege and preference, the debtor having agreed by obligation to pay a sum fixed, "*en castor au prix de bureau, ou bonnes pelletteries au prix de Québec.*" *D'Aillebout Sieur de Coulanges vs. Henry Campeau fonde de pouvoir de Louis Campeau son frère*. *Ib.*, p. 59.
- No. 103. November 14. Fine of 20 livres against a defendant for offering, contrary to good faith, to make oath that he owed nothing to plaintiff:—

Half of the fine to the Hotel Dieu, and half to the General Hospital. *Arguin vs. Tourangeau. Ib., p. 60*

No. 104. November 24. Donation revoked for non-compliance with the charges contained in it. *Leblond vs. Drouin. Ib., p. 60.*

No. 105. 1742, March 13. A tutor condemned to remain tutor, and to appear and take oath in his said quality before the court. *Voyer vs. Dolbec. Ib., p. 61.*

No. 106. 1743, January 4. Judgment dismissing an action on a promissory note payable to order and transferred after knowledge of a *saisie arrêt*. *Liquart vs. Nouette. Ib., p. 61.*

No. 107. December 3. Judgment of *contrainte* against a *gardien* to represent the effects, or to pay the plaintiff's debt with interest and costs. *Gourdeaux vs. Desmoliers. Ib., p. 62.*

No. 108. 1745, October 5. Judgment condemning the heir of a syndie of the creditors of an insolvent debtor to bring in a sum of money received by his father for division rateably among the creditors, with costs. *Havy et al. vs. Lamorille. Ib., p. 62.*

No. 109. 1747, October 10. Judgment founded upon the 121st article of the Custom of Paris, declaring *rentes foncières* in the city and *faubourgs* of Quebec *rachetables à toujours* and ordering defendant to receive the capital. *Boisclerc vs. Les Dames Religieuses de l'Hôtel Dieu. Ib., p. 63.*

No. 110. December 12. See curious case against the father of a bastard child not born, where the plaintiff's daughter was examined on oath: Judgment condemning the defendant "à avoir soin de l'enfant qui naîtra de la dite Marie Joseph Roi; qu'il sera tenu d'avertir le dit procureur du roi de la naissance, aussitôt qu'il sera venu au monde, et de l'endroit où il aurait été mis en nourrice et ensuite en avoir soin suivant son état, et l'élever dans la religion Catholique, Apostolique et Romaine: et sera tenu d'en rapporter un certificat tous les trois mois au dit procureur du roi; condamnons le dit Sieur Louis et par corps en cent vingt livres pour tenir lieu à la dite Roi tant de dommages, intérêts que frais de gésine, et faisant droit sur les conclusions du procureur du roi, condamnons le dit Sieur Louis, defendeur, en douze livres d'aumône, applicables aux religieuses de l'Hôpital-Général de cette ville, dont il sera tenu de rapporter un reçu de la dépositaire du dit Hôpital-Général au procureur du roi dans huitaine, et le condamnons en outre aux dépens, liquidés à trois livres dix sols, ces présentes non comprises." *Louis Roi, stipulant pour Marie Joseph Roi, sa fille mineure, vs. Le nommé Sr. Louis, habitant de L'Islet. Ib., p. 63.*

No. 111. 1748, January 24. Tutelle inventaire and partage declared null. *Lalaguye vs. Terrien et Blayé, tuteur et subrogé tuteur. Ib., p. 65.*

No. 112. April 2. Judgment forbidding, *sous les peines de droit*, a person not

- a notary from receiving any instrument or acting as notary, it appearing that he was in the habit of going about receiving marriage contracts and even inventories and causing them to be signed by his brother, a notary who was unable to act from illness. *Procureur du Roi vs. Bellevue. Ib., p. 66.*
- No. 113. May 14. Action of an *aubergiste* for ten livres ten sols *dette de cabaret*, dismissed. *Rouillard vs. Déchamp. Ib., p. 66.*
- No. 114. 1749, December 30. Cabaretier condemned to pay a fine to the General Hospital *pour avoir donné à boire pendant le service divin* contrary to the regulation of police. *Procureur du Roi vs. Perche et ux. Ib., p. 67.*
- No. 115. 1750, March 11. Contract of concession ordered to be taken before notaries by a *censitaire porteur d'un billet de concession. Roi, seigneur de Vincenne, vs. Girard. Ib., p. 67.*
- No. 115b. April 14. Congé to leave leased premises declared valid. *De Chenaux vs. Lecler. Ib., p. 68.*
- No. 116. April 14. Expertise ordered to establish the divisibility or indivisibility of an immovable. *Chapeau vs. Chapeau. Ib., p. 68.*
- No. 117. April 28. A notary authorized to receive the oath to an account. *Vignaud vs. Lamalette. Ib., p. 69.*
- No. 118. June 16. Descente de justice sur les lieux with the procureur du roi and a mason to establish whether the chimney of a *four* was sufficiently high, or might be prejudicial to the public or to plaintiff. *Chalou vs. Montigny. Ib., p. 69.*
- No. 119. July 21. Distraction granted of costs and disbursements. *Barbel vs. Pérot. Ib., p. 70.*
- No. 120. July 28. Arpentage and bornage ordered, with power to a curé to administer the oath to the surveyor. *Anetil vs. Leclerc. Ib., p. 70.*
- No. 121. July 28. Bornage and arpentage declared null for not mentioning the titles (*titres*) of the parties. *Anetil vs. Grondin. Ib., p. 71.*
- No. 122. August 11. A fine, payable to the General Hospital, imposed on a plaintiff for want of respect to justice in saying "qu'il arriverait malheur si le dit Breton restait dans la dite maison. *Abel vs. Breton. Ib., p. 71.*
- No. 123. 1751, January 12. A seignior ordered to provide a practicable road to his mill. *Roi vs. Turgeon. Ib., p. 71.*
- No. 124. February 2. A purchaser condemned to pay *lods et ventes* on his own purchase and that of his *auteur. Vallé vs. Mouisset. Ib., p. 72.*
- No. 125. 1754, November 5. Moneys ordered to be paid over to the party first seizing, the defendant not being *en déconfiture. Lajus vs. Barthélemy and T. S. Ib., p. 72.*
- No. 126. 1755, January 28. A judgment of "la jurisdiction de Notre Dame des Anges" awarding a voluntary separation *de corps et des biens* for incompatibility of temper was appealed from, and in appeal it was urged that the separation had been sought for by the appellant, and a division of the community made after judgment :

Judgment in Appeal. "Parties ouies et le procureur du roi, nous, sans nous arrêter aux exceptions proposées par l'intimé, disons, qu'il à été

" mal jugé et bien appellé, en conséquence ordonnons qui l'intimée sera tenu de retourner avec l'appelant, son mari, lequel sera tenu de la recevoir et la traiter en bon mari; dépens compensés." *Coulombe vs. Renaut. Ib., p. 73.*

No. 127. May 16. Judgment ordering the defendant to contribute with the plaintiff to make, at common cost and each party furnishing half the ground, a " cloture de division pour séparer la cour jusqu'à la hauteur de dix pieds du rez de chaussée compris le chaperou conformément à la Coutume de Paris." *Berthelot vs. Sabourin. Ib., p. 72.*

No. 128. May 13, Judgment for *dixmes*. *Recher, curé de Québec vs. Gauvreau. Ib., p. 74.*

No. 129. July 16. A *tiers saisi* condemned for not appearing to make his declaration. *Grenet vs. Marin and T. S. Ib., p. 74.*

No. 130. August 5. *Congé* to leave the premises on payment of two quarters' rent for two years of the lease unexpired. *Pouliot vs. Vocel. Ib., p. 75.*

No. 131. 1756, February 13. Judgment that a will be executed according to its form and tenor, and that the executor be put in possession in conformity to the Custom of Paris. *Ib., p. 75.*

No. 132. March 30. Order that creditors file at the *greffe* the documents in support of their respective claims, for the purpose of proceeding to a distribution or *sentence d'ordre*. *Langevin vs. Girard. Ib., p. 76.*

No. 133. June 30. Prescription pour fournitures faites par un ouvrier " attendu que le demandeur n'a fait aucun arrêté de compte avec le feu Sieur De Léry, depuis le 2 avril, 1654, jusqu'au 20 sept., 1755, ce qui est contraire à la coutume." *Fournier vs. De Léry. Ib., p. 76.*

No. 134. 1758, April 11. Alimentary pension ordered, on giving up certain effects by the plaintiff to the defendant. *Sedillot vs. Couture. Ib., p. 77.*

No. 135. May 9. Delivrance de legs ordered, and executor to deliver one half of the effects to the plaintiff. *Rouel vs. Laurent. Ib., p. 77.*

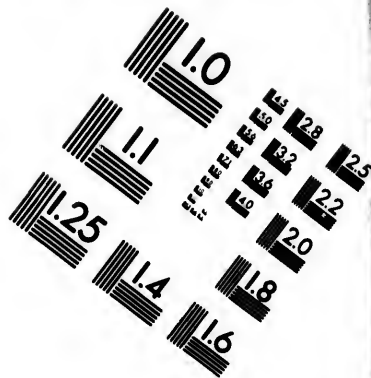
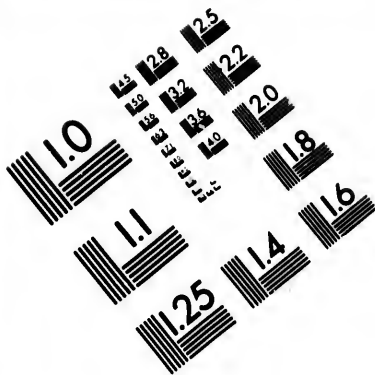
No. 136. A widow, *commune en biens*, condemned to pay only one half of arrears of *rente de titres cléricaux*. *Brassard et al. vs. Hupé. Ib., p. 78.*

No. 137. August 22. Wages not allowed by reason of deserting service before the expiration of time agreed on. *Clesse vs. Gatel. Ib., p. 78.*

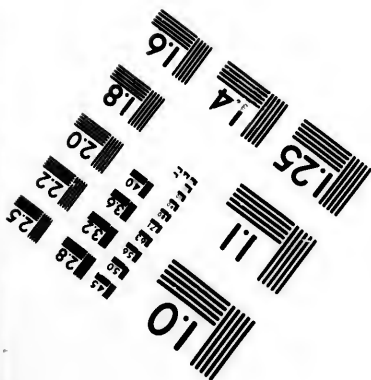
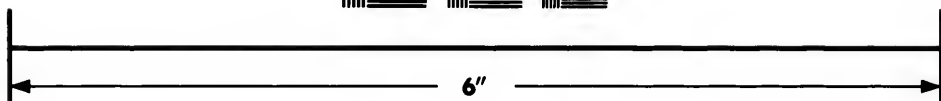
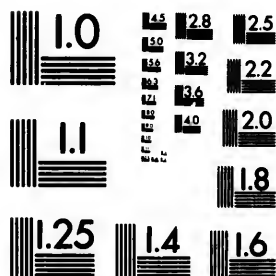
No. 138. August 21. Judgment ordering tenant to leave a house within eight days, on receiving a *dédommagement* at the rate of one quarter's rent per year, on the unexpired term. *Tourangeau vs. Toussaint. Ib., p. 79.*

No. 139. September 12. Judgment for *cens et rentes et lods et ventes* with a fine (*amende*) of three livres, fifteen sols. *Jacreau vs. Dasilva. Ib., p. 79.*





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- No. 140. October 6. Defendant condemned to make a public reparation d'honneur, and to declare that he acknowledges the plaintiff "pour honnête homme incapable d'avoir volé, &c.," with payment of fine and damages, and liberty to plaintiff to affix the judgment to the door of the Bonsecours church. *Dupont vs. Bélanger. Ib., p. 79.*
- No. 141. October 24. The sale of an immovable ordered, by consent of parties, without proceeding to the sale of movables. *Leglisse vs. Trudel. Ib., p. 80.*
- No. 142. 1759, February 6. Sentence pour decouvert, cloture mitoyenne, et fossés de ligne. *Demers vs. Corbin. Ib., p. 80.*

## CASES IN THE CONSEIL SUPÉRIEUR, QUÉBEC.

The following decisions are condensed from another volume, published also in 1824, by M. Perrault, one of the prothonotaries of the Court of Queen's Bench, Quebec, as extracted by him from the registers of the "*Conseil Supérieur de Québec*," from 1727 to 1759.

It appears from the preliminary observations of M. Perrault, that the Conseil held sittings once every week, and was composed of *gens de loi*, presided over by the Intendant.

That an appeal lay from any cause, however small might be the amount in dispute.

That no security was required, and that the fine of an *écu* was the penalty of a *fol appel*, with the costs.

That leave to appeal was granted on a simple *requête* to the president of the Conseil, who put at the bottom of the *requête*, "*Permis d'appeler en déposant l'amende, et soit signifié pour en venir au Conseil Supérieur, au premier jour compétent.*"

If the respondent apprehended that the appellant would not press forward the appeal with sufficient diligence, he the respondent presented a *requête pour être reçu anticipant*; and on depositing the amende of an *écu*, might then press on the proceedings, which consisted of a simple statement in writing of the *griefs* complained of, followed by answers.

In this way, a cause might be got ready for hearing in a day or two, when it was handed to one of the members of the Conseil, and judgment speedily followed.

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## CONSEIL SUPÉRIEUR.

JUDGMENTS RENDERED IN CONSEIL SUPÉRIEUR, QUEBEC,  
FROM 28TH APRIL, 1727, to 1ST MAY, 1759.

- No. 1. 1727, April 28. *Rhumb de Vent* of the second concession of Neuville, different from that in the first concession, confirmed in appeal. *Peltier*, App., *Peltier*, Resp. Cons. Sup., p. 7. See case below *Prévosté*, ante No. 1.
- No. 2. August 26. Costs of *voyage* and *séjour* allowed as well as interest omitted below. *Mercereau*, App., *Vidol*, Resp. Cons. Sup., p. 8.
- No. 3. 1728, July 12. Permission granted to sell a land in St. François de Sales, by three *affiches* published at the door of the parish church at the close of high mass, and also at the principal manor house nearest the land, on three consecutive Sundays, the land being of too little value to bear the costs of a *décret*. *Bazil*, App., *Barbel*, Resp. Cons. Sup., p. 9.
- No. 4. August 9. Order to furnish with movables apartments leased confirmed, reserving to the *conseil à faire droit* in case of complaint as to noise made by the tenant. *Leger et ux*, App., *Maufils*, Resp., p. 10. See case below. *Prévosté*, No. 11.
- No. 5. August 9. Petitioner discharged from being tutor to the children of a second marriage, he being *subrogé tuteur* to the children of a first marriage. *Gratis*, Petr. Cons. Sup., p. 10.
- No. 6. 1729, February 25. Voluntary appearance of parties without *assignation* recognised, and *acte* granted of the naming of arbitrators. *Amariton et al.* vs. *Leduc*. Cons. Sup., p. 11.
- No. 7. April 25. Daughter ordered to be given back to her father, who was charged with her board and education, without charge or diminution of her property. *Marcou*, App., *Normand*, Resp. Cons. Sup., p. 11. See case below. *Prévosté*, No. 16.
- No. 8. June 27. Appeal dismissed for want of diligence on the part of the appellants. *Mainville et al.*, App., *Parent et al.*, Resp. Cons. Sup., p. 12.
- No. 9. August 22. Foreclosure against a respondent. *Landron et ux.*, App., *Gaillard et ux.*, Resp. Cons. Sup., p. 12.
- No. 10. August 22. Form of proceedings in appeal. The appeal of defendants dismissed, on oath of the plaintiff, the appellant being master of a vessel about to sail before the vacation of the *Conseil Supérieur*. Appellant condemned to three sols amende *pour fol appel*, and to costs. *Barolet*, marchand, App., *Galocheau*, capitaine de navire, Resp. Cons. Sup., p. 13.

- No. 11. 1730, August 28. Order that a surveyor who had refused to operate without *consignation* of twenty livres, do act at the request of the parties, or in default thereof that another surveyor be employed. *Laberge et al. vs. Lamorille, arpenteur.* Cons. Sup., p. 14.
- No. 12. 1731, January 8. *Règlement* prohibiting the lieutenant-general of the *Prévosté* and all other inferior judges, from taking cognisance in future of demands to be allowed to sell real estate on *simples affiches et publications*, on pretence of the small value of the lands to be sold. Cons. Sup. p. 14.
- No. 13. March 19. Condemnation *par corps* against a *gardien* who failed to produce goods under seizure. *Gilbert, App., Joignet, Resp.* Cons. Sup., p. 15.
- No. 14. 1732, July 28. Injunction from entering a first default, and order to give new *assignation*. *Gazon, App., Religieuses de l'Hôtel Dieu, Resp.* Cons. Sup., p. 15.
- No. 15. September 9. Appeal dismissed. Judgment amended, and on a goat being given up, abandoned, for damage done by it, parties put out of court, the respondent paying costs of both courts. *Normand, App., Lajou, Resp.* Cons. Sup., p. 16.
- No. 16. October 13. The drawer of a *lettre de change* discharged *quant à présent* until proof of diligence by holder. *Lefevre, App., vs. Sorbes.* Cons. Sup., p. 16.
- No. 17. December 11. Nullity of a donation *pour cause de démence*. Confirmed in appeal. *Guillot et al., App., Haimard, Resp.* Cons. Sup., p. 17. See case below. *Prévosté, No. 22.*
- No. 18. 1733, Feb. 9. Confirmation of a judgment dismissing an opposition to a marriage. *Louet, App., Willitt, Resp.* Cons. Sup., p. 18. See case below, *Prévosté, No. 32.*
- No. 19. February 9. Offers made to a bailiff declared valid. *Amiot, App., vs. Dupéré.* Cons. Sup., p. 19. See case below, *Prévosté, No. 31.*
- No. 20. May 11. Judgment amending a judgment of the court below granting delay for payment of a *lettre de change*, and *contrainte par corps* ordered. *Corbière, App., Guilmin, Resp.* Cons. Sup., p. 20.
- No. 21. July 6. Lease resiliated. Condemnation of respondent to pay the current quarter's rent, and also to pay four months' rent as *dommagement*. Judgment below amended. *Davienne, App., David, Resp.* Cons. Sup., p. 20.
- No. 22. July 13. Judgment amending a sentence giving delay of payment for a *billet*, and omitting to grant *contrainte par corps*. *Jayat, App., Marsal, Resp.* Cons. Sup., p. 21.

- No. 23. July 20. Judgment not admitting *contrainte par corps* against the widow of a merchant. *Gouze*, App., *Lambert Veuve*, Resp. Cons. Sup., p. 21.
- No. 24. 1734, January 11. Injunction to the lieutenant-general of Montreal, and all other jurisdictions, not to proceed to the nomination of tutors to minors, or to any other acts affecting them, without the presence of the procureur-général or his substitute, or in their default by sickness, &c., in that of the oldest praticien. *Daillebout*, App., *Charly*, Resp. Cons. Sup., p. 22.
- No. 25. March 15. Défense to all bailiffs and judges from paying attention to *saisie arrêt* made on *billets ou promesses sous seign privé*. *Palin*, App., *Guillemain*, Resp.
- No. 26. Dec. 6. Judgment condemning a donee to give a *légitime*. *Metot*, App., *Maufait*, Resp. Cons. Sup., p. 23. See case below, *Prévosté*, No. 31.
- No. 27. 1735, July 4. Judgment ordering that on the proceeds of an insolvent estate, and after payment by privilege of the costs of affixing seals, inventory, funeral expenses, and *le deuil de la veuve*, (fixed at 150 livres), the dower and preciput should rank *pro rata* with a creditor of the deceased. *Lapointe*, App., *Depleine*, Resp. Cons. Sup., p. 24.
- No. 28. December 5. A *tiers saisi* discharged for want of signification, to the defendant, of the seizure made in the hands of such *tiers saisi*. *Coriveaux*, App., *Levasseur*, Resp. Cons. Sup., p. 25.
- No. 29. 1736, January 16. *Congé* given to a tenant declared good and valid, on condition that the proprietor himself was to occupy the leased premises. *Rouillard*, App., *Dassilva*, Resp. Cons. Sup., p. 26.
- No. 30. March 5. A *saisie arrêt* declared valid for the revenues *present and future*, of a seignior. *Coriveaux*, App., *Levasseur*, Resp. Cons. Sup., p. 26.
- No. 31. March 26. Judgment amending the judgment below for not giving *contrainte par corps* for a note against a merchant. *Veyssiere*, App., *Buteau*, Resp. Cons. Sup., p. 27.
- No. 32. 1737, March 25. An appeal converted into an opposition, and the parties sent back to the Court of *Prévosté*. *Maisonbasse et ux.*, App., *Dupéré*, Resp. Cons. Sup., p. 28.
- No. 33. April 8. Judgment condemning the respondent to purge from hypothecs a land sold by him to the appellant. *Duprac*, App., *Girard*, Resp. Cons. Sup., p. 28.
- No. 34. April 18. Judgment in favor of a soi-disant chirurgien, and ordering him to take out *lettres de chirurgien* from Sr. Lajus. *Phlem*, App., *Turgeon*, Resp. Cons. Sup., p. 29.

- No. 35. June 17. Judgment confirming the proceedings of the Court below, which ordered proof of signature by comparison of handwriting. *Rouilland, et al., App., Lefasseur, Resp.* Cons. Sup., p. 30.
- No. 36. June 25. Judgment evoking the principal of a cause appealed, and deciding on the merits. *Cotté, App., Philibert, Resp.* Cons. Sup. p. 31.
- No. 37. October 14. Confirming an opposition to a judgment by default. *Denis, App., Hiché, Resp., procureur du roi.* Cons. Sup., p. 31. See case below, *Prévosté*, No. 70.
- No. 38. November 25. Judgment condemning appellant for *rebellion en justice*, in threatening bailiffs to eject them by *coups de baton*, and to pay fifteen livres to the General Hospital, and thirty livres in damages to the bailiffs, with all costs. *Normand, App., Clesse et al., Resp.* Cons. Sup., p. 32.
- No. 39. 1738, July 7. Judgment condemning respondent to furnish nine inches of ground for building a wall three feet two inches in thickness, and to contribute to build it in the proportion of nine inches to the height of ten feet only. *Boisseau, App., Hubert et al., Resp.* Cons. Sup., p. 33.
- No. 40. October 6. Interlocutory as to proof of a consignment of merchandise and rejection of the demand that they be delivered to the consignors. *De Cussy et al., App., Guigniere, Resp.* Cons. Sup., p. 34.
- No. 41. October 13. Judgment condemning respondent to pay a conditional note in money. *Cosse, App., Philibert, Resp.* Cons. Sup., p. 35.
- No. 42. 1740, February 2. Judgment discharging the appellant from being tutor, because he had five children living. *Fornel* appealing from *acte* naming him tutor *ad hoc*, and *Lauoullier de Boiscler, Resp.* Cons. Sup., p. 36.
- No. 43. April 11. Judgment confirming judgment below, condemning appellant to pay to the respondent for *pains sur des tailles*, on the oath of the respondent. *Descarreau, App., Voyer, Resp.* Cons. Sup., p. 37.
- No. 44. April 11. Confirming the judgment below ordering payment of the price of a land, deducting arrears of *cens et rentes*. *Arnould dit Villeneuve, App., Michaud et al., Resp.* Cons. Sup., p. 37.
- No. 45. August 1. Judgment reducing the damages given in the Court below for injuring respondent's child with a harness, from fifty livres to six livres with all costs. *Serte, App., Courtant, Resp.* Cons. Sup., p. 38. See case below, *Prévosté*, No. 101.
- No. 46. Nov. 14. Judgment relating to two curés as to the possession of the cure of Chateau Richer, and dismissing the demand of the respondent. Costs compensated *de grace sans amende*. *Soupiran, App., Lechasseur, Resp.* Cons. Sup., p. 38.

No. 47. November 23. Désistement from an appeal. *Marchand, veuve Crenét, App., Vergat, Resp.* Cons. Sup., p. 39. See case below, *Prévosté*, No. 100.

No. 48. 1741, June 12. CELEBRATION OF MARRIAGE.—“ Le conseil a reçu  
 “ et reçoit le procureur-général du Roi appelant comme d’abus de la dis-  
 “ pense des trois bans accordée par le dit vicaire-général du diocèse de  
 “ cette ville, au dit Sieur de Rouville, mineur, pour épouser la Dmlle. André,  
 “ fille majeure, tient le dit appel pour bien relevé, et faisant droit tant sur  
 “ icelui que celui de la Dame veuve de Rouville, mère et tutrice du dit Sieur  
 “ de Rouville mineur, de la célébration du dit mariage, dit qu’il a été mal,  
 “ nullement, et abusivement procédé et célébré; déclare le dit mariage non  
 “ valablement contracté, fait défense au dit Sieur de Rouville et à la dite  
 “ Dmlle. André de prendre la qualité de mari et de femme, et de se  
 “ hanter et fréquenter, sous les peines de droit; déboute les dits Sieur  
 “ et Dmlle. André de leur demande en réparation portée tant par leur  
 “ requête du deux de ce mois, que par leur acte du sept de ce dit  
 “ mois de restriction de la dite requête, et les condamne solidairement  
 “ en tous les dépens de la plainte et appel comme d’abus envers la dite  
 “ Dmlle. de Rouville : *faisant droit* sur le requisitoire du dit procureur-  
 “ général du Roi, fait défense à tous notaires de passer des contrats de  
 “ mariage de mineurs, que les dits mineurs ne soient duement assistés et  
 “ autorisés de leurs pères, mères, tuteurs et curateurs, qui signeront aux dits  
 “ contrats, ou qu’en vertu de procuration en bonne et due forme des dits  
 “ pères, mères, tuteurs ou curateurs, dont la minute ou expédition demeu-  
 “ rera annexée au dit contrat, sans pouvoir par les dits notaires recevoir  
 “ seulement ni la déclaration des dits mineurs de se porter fort de leurs  
 “ dits pères, mères, tuteurs, ou curateurs, ni leur promesse de leur faire  
 “ agréer, approuver et ratifier le dit contrat de mariage; enjoint au vicaire-  
 “ général du diocèse de cette ville, et à tous autres vicaires-généraux d’ob-  
 “ server les ordonnances et constitutions canoniques, concernant la publi-  
 “ cation et dispense des bans, laquelle dispense ne pourra être accordée pour  
 “ marier des mineurs, sans le consentement des pères et mères, tuteurs ou  
 “ curateurs, ou qu’il n’y ait un jugement rendu en connaissance de cause, sur  
 “ les oppositions, ou défaut de consentement des dits pères et mères, tuteurs  
 “ ou curateurs; enjoint pareillement à tous curés et prêtres tant séculiers  
 “ que réguliers de marquer dans les actes de célébration de mariage, si les  
 “ contractants sont enfants de famille, en tutelle, ou curatelle, ou en la  
 “ puissance d’autrui, d’y énoncer pareillement les consentements de leur  
 “ pères et mères, tuteurs, ou curateurs, ou jugements rendus sur les dites  
 “ oppositions, ou défaut de consentement, et d’y faire appeler et assister,  
 “ non pas seulement deux témoins, mais quatre témoins, suivant les ordon-  
 “ nances, édits, déclarations, et réglemens. Ordonne qu’en conformité des  
 “ articles viii et ix de la déclaration du Roi du 9 Avril 1736, les actes de  
 “ célébration de mariage seront inserits sur les registres de l’église parois-  
 “ siale du lieu où le mariage sera célébré, et en cas que pour des causes



"justes et légitimes, il ait été permis de le célébrer dans une autre église, ou chapelle, les registres de la paroisse dans l'étendue de laquelle la dite église ou chapelle seront situées, seront apportés lors de la célébration du mariage pour y être l'acte de la célébration inserit. Fait défense d'écrire et signer, en aucun cas, les dits actes de célébration sur des feuilles volantes, à peine d'être procédé extraordinairement contre le curé et autre prêtre qui aurait fait les dits actes, lesquels seront condamnés en telle demande, ou autres plus grande peine qu'il appartiendra, suivant l'exigence des cas, et à peine contre les contractants de déchéance de tous les avantages et conventions portés par le contrat de mariage, ou autres actes, même de privation d'effets civils, s'il y échet; et sera le présent arrêt lu et publié, l'audience tenante, et enregistré aux greffes de la prévosté de cette ville et des juridictions de Trois-Rivières et de Montréal. Enjoint aux substituts du procureur-général du Roi d'en certifier le conseil dans les délais ordinaires." *Baudouin vs. Rouville*. Cons. Sup., p. 40.

- No. 49. November 27. Judgment confirming judgment below, ordering payment of the principal of a *rente constituée* of 2,400 livres, on failure to pay 377 livres for arrears. *Louet, fils*, App., *Louet*, Resp. Cons. Sup., p. 41.
- No. 50. December 18. Judgment discharging an appellant from the payment of twenty livres to the Hotel Dieu and the General Hospital, and condemning him to three livres for *fol appel*, and to costs of appeal. *Tou-rangeau*, App., *Arguin*, Resp. Cons. Sup., p. 103. See case below, *Prévosté*, No. 103.
- No. 51. 1742, April 3. Judgment confirming judgment below, that appellant remain tutor to minors. *Dolbec*, App., *Voyer*, Resp. Cons. Sup., p. 42. See case below, *Prévosté*, No. 105.
- No. 52. April 16. Confirming judgment below, which set aside a donation for non-compliance with the *charges* contained in it. *Drouin, fils*, App., *Leblond et ux.*, Resp. Cons. Sup., p. 43. See case below, *Prévosté*, No. 104.
- No. 53. October 17. Judgment declaring the powers of the appellant sufficient to carry on the action, and sending the parties back to the Prévosté to proceed on the merits. *Martel de Belleville stipulant par le Sr. Jean Dumont son procureur fondé*, App., *Petrimoultz*, Resp. Cons. Sup., p. 44.
- No. 54. November 19. Judgment discharging appellant from the condemnation below, against him on the oath of appellant (taken in appeal) that he owed respondent nothing,—with costs of both courts against the respondent. *Dussaut*, App., *Moron*, Resp. Cons. Sup., p. 44.
- No. 55. November 19. *Tutelle* declared null, on account of the tutor not having been called (*appelé*) to the assembly, and also because he had six children living. *Valin*, tutor, App., *Delorme, subrogé* tutor, Resp. Cons. Sup., p. 45.

- No. 56. 1743, April 22. Confirming a judgment for *réparation d'honneur*. *Sinard*, App., *Cotton*, Resp. Cons. Sup., p. 45.
- No. 57. June 12. Discharging a *tiers saisi* condemned below as personal debtor by default, and ordering the goods pledged to the appellant to be sold *en justice*. *Elizabeth Prut*, femme de *Mereier*, absent, App., *Petrimoule*, Resp. Cons. Sup., p. 46.
- No. 58. 1744, July 27. Judgment shortening the delay of payment for three months given by the judgment rendered below *du quatorze de ce mois*, and ordering half to be paid in a month from service of the judgment in appeal, and the other half on the 15th of September next,—the whole to be exigible, if the first half was not duly paid, with costs, against respondent. *Rouillard*, App., *Roberge*, Resp. Cons. Sup., p. 47.
- No. 59. August 3. Discharging a tenant from the judgment below, which ordered him to furnish security for the fulfilment of his lease, and condemning the appellant to deliver to the respondent certain movables, on the oath of respondent submitted to him by the appellant (in the Court of Appeal), that he had not received these movables. *Fortier*, fermier, App., *Gourdeau*, seigneur. Cons. Sup., p. 47.
- No. 60. August 3. Confirming a judgment *de dépouillement des factures* of merchandise sent from Europe. *Dezaunier*, App., *Dugard*, négociant à Rouen, stipulant pour lui par les Sieurs H. et L., Resp. Cons. Sup., p. 48.
- No. 61. December 1. Judgment discharging an *adjudicataire* from the consignation at the *greffe* of his purchase money within twenty-four hours, as ordered by the court below, and the price to remain in his hands, on payment of the interest from the day of the adjudication, to the signification of the judgment (*ordre*) of distribution, and on payment on the day of such signification to each of the creditors collocated of the sums due them. *Contrainte* in default of such payment without any further judgment, costs compensated, and the appellant to be paid his costs in appeal out of the *prix d'adjudication*. *Fournel*, adjudicataire, App., *Dumont*, Resp. Cons. Sup., p. 50.
- No. 62. December 7. Confirming judgment below, that lessee should leave the house leased, on the proprietor taking oath that he will occupy it himself, and pay two hundred livres *de dommagement* for each year the lease had to run, the appellant to be allowed to take away, *les emménagements et commodités qu'il y a pratiqués, sans rien détériorer; si mieux n'aiment les parties s'accorder à l'amiable*. *Jehanne*, App., *Dusautoy et al.*, Resp. Cons. Sup., p. 51.
- No. 63. 1745, February 15. Confirming judgment below, which dismissed an action *pour retrait lignager* for omitting in the offers the words "*Loyaux couts*" lesquels sont essentiels et de rigueur en matière de retrait. *Fagot*, App., *Turpin*, Resp. Cons. Sup., p. 52.

- No. 64. February 22. Setting aside judgment below, which condemned a *habitant* to make and maintain his ditches alone, and declaring that they should be made à *frais communs*. *Mercier*, App., *Désautier*, Resp. Cons. Sup., p. 52.
- No. 65. 1746, January 24. Setting aside judgment *d'entérinement de lettres de rescision*. *Baillargeon*, fils, App., *Rouletu*, Resp. Cons. Sup., p. 53.
- No. 66. 1747, May 19. Confirming a judgment, ordering a tenant to leave the premises leased, and discharging the lessor from the oath that she wished to occupy the house herself, and from the condemnation to pay three months' rent as a *dédommagement*. *Louis Petitbois*, App., *Geneviève Cartier*, veuve Parent, intimée et appellante. Cons. Sup., p. 54.
- No. 67. July 31. Judgment awarding a *dédommagement* for extra mason work. "*François Moreau*, maître maçon, faisant tant pour lui que pour ses "associés, App., *Louis Parent*, négociant, au nom et comme marguillier en charge de," etc. Cons. Sup., p. 55.
- No. 68. 1748, February 19. Condemnation confirmed and amended against the father of a bastard :
- "Où le procureur-général du Roi, le conseil a reçu et reçoit le dit procureur-général du Roi, appellant, en ce que l'intimée n'a point été condamnée en "une aumône, faisant droit sur les dites appellations, vu la déclaration faite "par la dite Marie Joseph Roy le trente Août dernier, devant M<sup>r</sup>. Dolbec, "curé de la paroisse de Notre Dame de Bonsecours, en présence du Sieur "Pierre Bélanger, co-seigneur du dit Bonsecours, Joachim Gamache et de "la femme de François Dubé, matrone, la dite déclaration signée Dolbec et "Pierre Bélanger, les autres ayant déclaré ne savoir signer, sur l'appella- "tion du dit Fabas, a mis et met l'appellation au néant, ordonne que ce "dont est appel sortira effet; quand à l'appel du dit procureur-général du "Roi a mis et met l'appellation, et ce au néant, émendant, condamne la dite "Marie Joseph Roy en trois livres d'aumône, la sentence au résidu sortis- "sant effet, et cependant à réduit l'aumône prononcée contre le dit appelant "à la somme de trois livres, condamne le dit appelant aux dépens des "causes principal et d'appel." *François Fabas dit St. Louis*, App., *Roi*, Resp. Cons. Sup., p. 56. See case below, *Prévosté*, No. 110.
- No. 69. February 29. Confirming the judgment below ordering an expertise as to a canal to carry off water to the beach. See the conclusions taken by the appellants in their *griefs d'appel* in this cause. *Damour et al.*, App., *Jehanne*, Resp. Cons. Sup., p. 57.
- No. 70. 1749, March 17. Judgment ordering an enquête to be taken before the *lieut.-général de la Prévosté*, who should decide until a definitive judgment; "sans l'appel au conseil si le cas y échet; et cependant le conseil "fait défense aux parties de se médire, ni méfaire." *Halé*, App., *Buisson*, et ux., Resp. Cons. Sup., p. 58.

- No. 71. September 15. Judgment setting aside the portion of the judgment in a commercial matter, which ordered the parties to go before *arbitres Portes*, App., *Devienne*, Resp. Cons. Sup., p. 59.
- No. 72. October 9. Judgment setting aside an ordonnance of the lieutenant-general of the *prévosté*, giving *surcis* to an execution issued. *Huey*, App., *Lucroix et ux.*, Resp. Cons. Sup., p. 60.
- No. 73. 1750, February 15. A *procurateur* condemned personally to costs of an opposition to a judgment. See conclusions taken by the parties, *Thomas Coté*, on requête, demandeur, *Etienne Simard*, sur la dite requête défendeur. Cons. Sup., p. 61.
- No. 74. September 14. Judgment confirming offers accepted by the parties in an action *en revendication de marchandises*, and ordering the goods to be returned by the appellant for the amount due, at an advance of twenty per cent. on the price of purchase. *Chaumont*, App., *Goguet*, Resp. Cons. Sup., p. 62.
- No. 75. 1752. Confirming the judgment below for the payment of a debt on proof by the merchant's books (*livres de compte*) and on his oath, that they were *sincères et véritables*. *Briard*, cabaretier, App., *Payès*, négociant, Resp. Cons. Sup., p. 64.
- No. 76. 1753, November 26. Setting aside the judgment below, which ordered payment of a *deuaire et remploi* on a house and property described. *Lauoie*, tutor, App., *Hermier et ux.*, Resp. Cons. Sup., p. 65.
- No. 77. 1754, September 2. The judgment of the court below dismissing an action to cause *les enduits* of a house to be made, on the ground that in the contract between the appellant and the late husband of the respondent, it was only stated that "la maçonnerie sera faite et parfaite," set aside, and *les enduits* ordered to be made. *Berlinguet*, App., *Lambert*, veuve de J. M., entrepreneur de maçonnerie, Resp. Cons. Sup., p. 65.
- No. 78. 1755, February 24. Judgment ordering to take the advice of neighbors or friends (*voisins ou amis*), for want of relations (of a *mineure*), on a projected marriage, and that such advice be mentioned in the contract of marriage, and in the parish register. The judgment of the court below dismissed the opposition of the appellant to the marriage of the respondent with the minor, and permitted the publication of the banns, and the celebration of the marriage. *Jean Ruffio* App., *Joseph Ruffio*, Resp. Cons. Sup., p. 66.
- No. 79. 1756, January 12. Confirming the judgment below for réparation d'honneur, and ordering further "à tous huissiers sous peine de six livres d'amende, que lorsque les parties à qui ils feront des significations entendront faire dans l'instant, quelques réponses, de transcrire en entier les dites réponses, tant dans l'original des dites significations, que dans la

" copie qu'ils laisseront des dites significations aux dites parties, de manière " que la copie soit totalement conforme à l'original ; lesquelles réponses seront " signées tant dans la copie, que dans l'original ; si la partie sait signer, ou " qu'il sera déclaré qu'elle ne le sait, on ne peut signer, de ce interpellé ;" and ordering the publication and registration of this arrêt in the prévosté of Quebec and *jurisdictions royales* of Montreal and Three Rivers, and that the substitutes of the procureur-général in these jurisdictions see to its execution, and certify to the Conseil such publication and registration within the usual delays. *André Lacroix*, habitant, App., *M. Paul Antoine Lanouillier*, juge de Prévosté de Notre Dame des Anges, Resp. Cons. Sup., p. 67.

- No. 80. April 10. Judgment below (6th April, 1756,) ordering *avant faire droit*, that the appellant appear in court " pour faire sa déclaration s'il n'a " pas promis au Sr. Charly d'avertir le dit Sr. *Revol six mois avant la " demande dont il est question* " set aside, and judgment rendered condemning the respondent to pay the amount mentioned in the authentic acts on which the action was founded, with costs in both courts. *Cugnet*, App., *Revol*, Resp. Cons. Sup., p. 68.
- No. 81. April 10. Judgment below, which condemned a widow to give good and sufficient security for the property mentioned in her inventory, of which she had the usufruct, set aside, and ordering that she should have the enjoyment of the *don mutuel* mentioned in her marriage contract à *sa caution juratoire*. *Boissel*, App., *Dufrene*, Resp. Cons. Sup., p. 68.
- No. 82. 1759, April 2. Confirming a judgment below, of the 14th November, which ordered that the appellant restore to the respondent a stove and stove pipe as set forth in a judgment of the 24th October last within three days, or to pay the value thereof à *dire des experts*. *Minet*, App., *Eker*, Resp. Cons. Sup., p. 69.
- No. 83. April 2. LOUIS, par le grâce de Dieu, roi de France et de Navarre, au premier huissier de notre Conseil Supérieur de la Nouvelle-France, ou autre huissier ou sergent sur ce requis. *Savoir faisons*: Qu'entre les Srs. Supérieur, Directeurs et ecclésiastiques du séminaire des missions étrangères établies en cette ville, stipulant par Messire Jaureau, etc., Appellants, le Sieur Louis Soumande, négociant à Varennes, intimé. Vu la sentence de la prévosté de cette ville du 29 Décembre 1758, dont est appel, prononcée en ces termes: " Nous, sans avoir égard aux conclusions subsidiaires prises par le " dit Sieur Soumande par sa requête du 17 Novembre dernier, en ce qui " concerne le remboursement de la somme de dix-huit mille livres, ni aux " offres faites par les dits Sieurs du séminaire par leur écrit signifié le neuf " Décembre, ordonnons que la sentence du 12 Mars 1728, sera exécutée " selon sa forme et teneur, en conséquence condamnons les dits Sieurs du " séminaire à recevoir, à la première présentation, le fils du dit Sieur Sou- " mande dans le séminaire pour y achever ses études jusqu'à l'état ecclé- " siastique, faute de quoi les condamnons, dès à présent, en vertu du

" présent jugement, et sans qu'il en soit besoin d'autre, à payer quatre cent  
 " cinquante livres de pension annuelle pour chacun des deux enfants qu'ils  
 " doivent prendre; et à recevoir dorénavant et à perpétuité au dit sémi-  
 " naire ies deux enfants qui seront présentés par les héritiers Soumande, et  
 " à défaut de présentation des dits héritiers par ceux à qui il appartiendra  
 " de les présenter; sauf à faire droit sur la capacité ou incapacité de  
 " ceux qui seront présentés, lorsqu'il en sera question: condamnons le  
 " dits Sieurs du séminaire aux dépens liquidés à trente neuf livres,  
 " le coût de la sentence compris, etc. . . . Encore une expédition de la  
 " sentence de la prévosté du 12 Mars 1728, rendue par défaut contre  
 " Messire Lyon de St. Féréol, prêtre, supérieur du séminaire de cette ville,  
 " qui le condamne au dit nom à garder le fils de Mtre. François Hazeur,  
 " conseiller au dit séminaire, pour y achever ses études jusqu'à l'état ecclé-  
 " siastique inclusivement, si mieux n'aime lui payer pour sa pension an-  
 " nuelle ailleurs la somme de quatre cent cinquante livres, suivant l'acte de  
 " fondation; condamne en outre le dit Sieur Lyon au dit nom à recevoir  
 " dorénavant et à perpétuité au dit séminaire les enfants que les héritiers  
 " présenteront de la famille du feu Sieur Soumande au nombre de deux pré-  
 " férablement à tous autres, étant l'intention du dit acte de fondation fait  
 " par le dit Sieur Soumande, et est le dit Sieur Lyon condamné aux  
 " dépens," et toutes les autres pièces sur lesquelles la sentence dont et appel est  
 " survenue, oui Mtre. Joseph Perthuis, conseiller faisant fonction de procureur-  
 " général du roi, auquel les pièces des parties ont été communiquées, suivant  
 " l'arrêt de ce conseil du 22 Janvier dernier, le conseil a mis et met l'appellation  
 " et sentence de la prévosté du 19 Décembre 1758, dont est appel, au néant,  
 " émendant, *ordonne* que les actes de fondation des 17 Juin 1693, 20 Jan-  
 " vier 1795, 15 Octobre 1701, et 27 Septembre 1702, seront exécutés selon  
 " leurs formes et teneurs; ordonne pareillement que le dits Srs. supérieur et  
 " directeurs du dit séminaire de cette ville seront tenus de recevoir à perpé-  
 " tuité au dit séminaire, pour y occuper les deux places dont est question, les  
 " enfants de la famille Soumande qui leur seront présentés par ceux de cette  
 " famille, et ce préférablement à tous autres; en conséquence condamne les  
 " dits Srs. supérieur et directeurs à recevoir au dit séminaire les enfants du  
 " dit intimé pour y faire leurs études et y être enseignés, aux clauses, con-  
 " ditions et exceptions portées aux susdits contrats, jusqu'à l'état ecclési-  
 "astique inclusivement; sur le surplus des prétentions et conclusions des  
 " parties le conseil a mis hors de cours; condamne les appelants en l'amende  
 " de trois livres pour leur fol appel, et aux dépens des causes principales et  
 " d'appel; *Si te mandons* de mettre le présent arrêt à due et entière exé-  
 " cution; car tel est notre plaisir. Donné en notre dit Conseil Supérieur,  
 " séant à Québec, assemblé le lundi, deuxième Avril, l'an de grâce, mil sept  
 " cent cinquante-neuf, et de notre règne le quarante-troisième.

(Signé,) FOUCAULT.

Les Directeurs \* \* \* Ecclésiastiques du Séminaire des Missions  
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