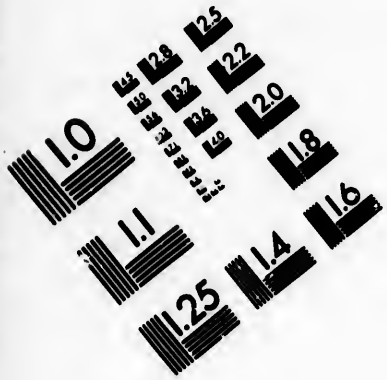


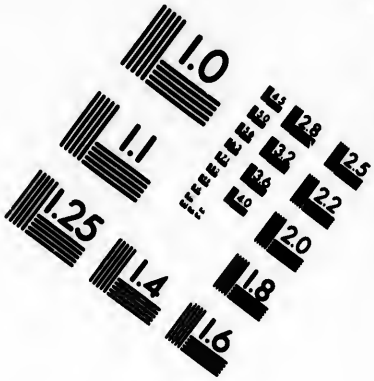


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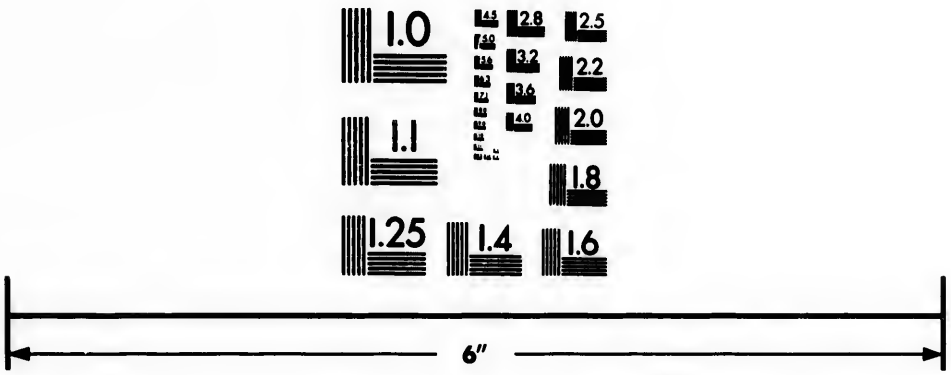



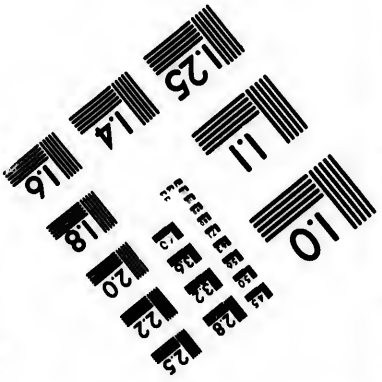


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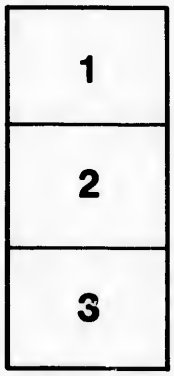


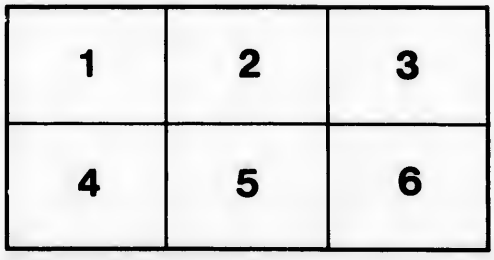

THE

# CODE OF CIVIL PROCEDURE

OF

# LOWER CANADA;

TOGETHER WITH THE AMENDMENTS THERETO MADE SINCE ITS PROMULGATION; THE AUTHORITIES, AS REPORTED BY THE COMMISSIONERS;

## ALL STATUTES REFERRING TO PROCEDURE;

THE RULES OF PRACTICE OF THE SEVERAL COURTS; A CLASSIFIED DIGEST OF ALL REPORTED DECISIONS, ARRANGED UNDER APPROPRIATE ARTICLES; TABLES OF THE TARIFF OF FEES PAYABLE TO ADVOCATES;

AND

## AN ANALYTICAL INDEX.

BY

THOMAS P. FORAN, M.A., B.C.L.,
OF THE BAR OF MONTREAL.


Toronto, Canada:
CARSWELL & CO., 26 & 28 ADELAIDE STREET EAST.
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1879.

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# PREFACE.

THE reader may be surprised to find in this work several decisions which are no longer applicable, owing to the changes effected in our laws of Procedure by the Code and its amendments; but the compiler deemed it expedient to insert them, in order to show at a glance the successive development of our present laws, and to anticipate, if possible, any future legislative enactments which may bring us back again to the system in force before the promulgation of the Code.

Reliance may be placed on the fidelity of the references to the Decisions, as the proof-sheets were corrected from the original volumes of the Reports, and not from the manuscript.

*Montreal, July, 1879.*

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" 274.
" 410.
" 518.
" 552.
" 562.
" 670.

# ERRATA.

Page 21. 12th line, read 3 Rev. de Lég. 38.
" 21. Omit "*Méthot et al.* v. *Perrin et al.* 5 R. L. 695, S. C. 1874," on the 6th line from bottom.
" 23. No. 10, read *fatal* instead of *formal.*
" 23. No. 12, for *Regina* v. *Daly*, *8 L. C. J.*, read *Renaud* v. *Gugy*, *8 L. C. R.*
" 24. No. 1, 482 instead of 483.
" 26. No. 7, read "That he was entitled," in lieu of "That he was *not* entitled."
" 26. No. 12, for *magistrate* read *municipality.*
" 83. No. 11, for *writ of declaration*, read *writ and declaration.*
" 91. In the 8th paragraph of the article, read *indivisible* for *invisible.*
" 101. No. 30, after *requiring*, insert *the demand for.*
" 102. 2nd line, for *irregular* read *regular.*
" 111. No. 52, for *the same*, read *some* circumstances.
" 123. 2nd line, for 38 read 83.
" 163. Art. 232, read *expense* for *expenses.*
" 182. No. 3, 2nd line, read *Writ* for *Suit.*
" 274. For 7, read *1* Legal News.
" 410. No. 27, for *A suit*, read *A writ.*
" 518. 5th line, for *Art. 972*, read *792.*
" 552. Omit No. 7.
" 562. Omit Nos. 1, 3, and 4.
" 670. Last line, for *1870*, read *1854.*

Anc.
Arch
Bour
c.
C. C
C. C.
C. N
C. P.
Cou.
C. P.
C. P.
C. S.
C. S.
Den.
Dur.
Ed.
Fer.
Genè
Guy.
Her.
Houy
Hyp.
Lac.
Lau.
L. C.
L. C.
L. D
L. C.
Ord.
P. C.
Pig.
P. R.
Poth.
P
Prop.
Q. B.
Q. B.
Q. L.
Rep.
Rev.
R. L.
R. C.
R. of
S. C.
S. C.
S. C.
S. R.
s. Se
ss. S
Ser.
Stu. F
V. or

# TABLE OF ABBREVIATIONS.

Anc. Den. Ancien Denizart.
Arch. Archbold.
Bour. Bourjon.
c. Chapter.
C. C. Civil Code, Circuit Court.
C. C. P. Code of Civil Procedure of Lower Canada.
C. N. Code Napoleon.
C. P. C. Code de Procédure Civile of France.
Cou. Couchot.
C. P. L. Code of Procedure of Louisiana.
C. P. Gen. Code de Procédure de Genève.
C. S. C. Consolidated Statutes of Canada.
C. S. L. C. Consolidated Statutes of Lower Canada.
Den. Denizart.
Dur. Duranton.
Ed. et Ord. Edits et Ordonnances, edition in 8vo.
Fer. Ferrière.
Genève. Code de Procédure de Genève.
Guy. Guyot, Répertoire de la Jurisprudence.
Her. Vte. des Im. Héricourt, Vente des Immeubles.
Houy. Houyvet.
Hyp. Hypothèque.
Lac. Lacombe.
Lau. Laurière.
L. C. J. Lower Canada Jurist.
L. C. L. J. Lower Canada Law Journal.
L. Dict. Law Dictionary.
L. C. R. Lower Canada Reports.
Ord. Ordonnance.
P. C. Procédure Civile, Privy Council.
Pig. Pigeau.
P. R. Pike's Reports.
Poth. Pothier; and where no other abbreviation follows, Pothier de la Procédure Civile.
Prop. Propriété.
Q. B. Queen's Bench.
Q. B. C. Queen's Bench Chambers.
Q. L. R. Quebec Law Reports.
Rep. Répertoire.
Rev. de Lég. Revue de Législation et de Jurisprudence.
R. L. Revue Légale.
R. C. Révue Critique.
R. of P. Rule of Practice.
S. C. Superior Court.
S. C. R. Court of Review.
S. C. Rep. Supreme Court of Canada Reports.
S. R. Stuart's Reports.
s. Section.
ss. Sections.
Ser. Serpillon.
Stu. R. Stuart's Reports.
V. or Vict. Victoria.

GENERA

Prelimin
TITLE I
CHAP.
CHAP. I
Sec.
" I
" II
" IV
" V
" V
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" I
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# STATUTES AND PROCLAMATIONS.

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# AN ACT

## Respecting the Codification of the Laws of Lower Canada relative to Civil Matters and Procedure.

*(Consolidated Statutes for Lower Canada, Chapter II.)*

WHEREAS the laws of Lower Canada in Civil Matters, are mainly those which, at the time of the cession of the country to the British Crown, were in force in that part of France then governed by the Custom of Paris, modified by Provincial Statutes, or by the introduction of portions of the Law of England in peculiar cases; and it therefore happens, that the great body of laws, in that division of the Province, exist only in a language which is not the mother tongue of the inhabitants thereof of British origin, while other portions are not to be found in the mother tongue of those of French origin; and whereas the laws and customs in force in France, at the period above mentioned, have there been altered and reduced to one general Code, so that the old laws still in force in Lower Canada are no longer re-printed or commented upon in France, and it is becoming more and more difficult to obtain copies of them, or of the commentaries upon them: and whereas the reasons aforesaid, and the great advantages which have resulted from Codification, as well in France as in the State of Louisiana, and other places, render it manifestly expedient to provide for the Codification of the Civil Laws of Lower Canada: Therefore, Her Majsty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. The Governor may appoint three fit and proper persons, Barristers for Lower Canada, to be Commissioners for

Codifying the Laws of that division of the Province in Civil Matters, and two fit and proper persons, being also such Barristers, to be Secretaries to the Commission, one of whom shall be a person whose mother tongue is English but who is well versed in the French language, and the other a person whose mother tongue is French, but who is well versed in the English language. 20 V. c. 43, s. 1.

**2.** Any Judge or Judges of the Court of Queen's Bench or of the Superior Court for Lower Canada may be appointed a Commissioner or Commissioners under this Act; and if any such Judge is so appointed, the Governor may appoint any Barrister of at least ten years' standing at the Bar of Lower Canada, to be and act as an Assistant Judge of either of the said Courts,—or any Judge of the Superior Court to be and act as Assistant Judge of the Court of Queen's Bench, and a Barrister as aforesaid to supply his place as Judge of the Superior Court, as an Assistant Judge thereof, —for and during the time that the Judge, appointed a Commissioner under this Act, continues to be such Commissioner.

2. Every Assistant Judge so appointed shall, during the said time, have and exercise all the powers and authority and perform all the duties by law vested in or assigned to a Judge of the Court of which he is appointed an Assistant Judge, as if he had been appointed a Judge of such Court, and shall reside at the place to be named for that purpose from time to time by the Governor; and in case of the vacancy of the office of any such Assistant Judge, another may be appointed in his stead in like manner and with like effect. 20 V. c. 43, s. 2.

**3.** The said Commissioners and Secretaries shall hold their offices during pleasure, and in cases of vacancy, the Governor may appoint another or others to fill the same, and so on until the work is completed. *Ibid*, s. 3.

**4.** The said Commissioners shall reduce into one Code, to be called the *Civil Code of Lower Canada*, those provisions of the Laws of Lower Canada which relate to Civil Matters and are of a general and permanent character, whether they relate to Commercial Cases or to those of any other nature; but they shall not include in the said Code, any of the Laws relating to the Seigniorial or Feudal Tenure. *Ibid*, s. 4.

**5.** The said Commissioners shall reduce into another Code, to be called the *Code of Civil Procedure of Lower Canada*, those provisions of the Laws of Lower Canada which relate to Procedure in Civil Matters and Cases, and are of a general and permanent character. *Ibid*, s. 5.

**6.** In framing the said Codes, the said Commissioners shall embody therein such provisions only as they hold to be then actually in force, and they shall give the authorities on which they believe them to be so; they may suggest such amendments as they think desirable, but shall state such amendments separately and distinctly, with the reasons on which they are founded. *Ibid*, s. 6.

**7.** The said Codes shall be framed upon the same general plan, and shall contain, as nearly as may be found convenient, the like amount of detail upon each subject, as the French Codes known as the *Code Civil*, the *Code de Commerce*, and the *Code de Procédure Civile*. *Ibid*, s. 7.

**8.** The Commissioners shall, from time to time, report to the Governor their proceedings and the progress of the work entrusted to them, and shall, in all matters not expressly provided for by this Act, be guided by the instructions they receive from the Governor; and whenever they think any section or division of the work sufficiently advanced for the purpose, they shall cause the same to be printed, and transmit a sufficient number of printed copies thereof with their Report to the Governor:

2. And if the Governor in Council thinks it advisable, he shall cause one or more of such copies to be transmitted to each of the Judges of the Court of Queen's Bench and Superior Court for Lower Canada, with a request that he will return the same, with his remarks thereon, by a day to be named in the letter containing such request. 20 V. c. 43, s. 8.

**9**. Each of the said Judges shall examine the portion of the Commissioners' work so submitted to him, and return the same by the day named as aforesaid, with his remarks, and he shall more especially examine carefully that part of the work purporting to state the Law then in force, and report distinctly his opinion, whether the Law as it then stands is correctly stated therein, and in what paragraph or paragraphs (if any) it is incorrectly stated, with his reasons and authorities, and a draft of the amendments which ought in his opinion to be made in such paragraph or paragraphs, in order that the Law may be correctly stated therein. *Ibid*, s. 9.

**10**. The Judges or any of them may, in their Report on any portion of the said work referred to them, make suggestions for the amendment of the Law contained in such portion, with the reasons on which such suggestions are founded. *Ibid*, s. 10.

**11**. At any time when any portion of the said work is before the Judges for their report, they or any of them may confer with the Commissioners or any of them, touching the same; and the Commissioners shall, in any such conference, give all such information and explanation as it is in their power to afford and as the judges may require, relative to any statement of the Law as it then stands, or any suggestion for its amendment, which the Commissioners have made in such portion of their work as aforesaid. *Ibid*, s. 11.

**12.** The reports of the Judges shall be communicated to the Commissioners, who shall make such corrections in their work as they find advisable after having taken into consideration the reports and suggestions of the Judges; but if any of the Judges do not send in their reports by the day named for that purpose, this shall not prevent the Codes from being completed and submitted to the Legislature as hereinafter provided. *Ibid*, s. 12.

**13.** The Commissioners shall, from time to time, incorporate with the proper portions of the said Codes, such amendments of the actual law as the Governor in Council thinks it right to recommend for adoption by the Legislature, after considering the Reports of the Commissioners, and those of the Judges, if any; but such amendments shall be carefully distinguished from the actual law. 20 V. c. 43, s. 13.

**14.** When the said Codes, or either of them, are completed, with such amendments as last mentioned, printed copies thereof and of the Reports of the Commissioners, and of the Judges, if any, shall be laid before the Legislature, in order that such Code or Codes may be made Law by enactment; and if it is found advisable that either of the said Codes be completed and submitted to the Legislature before the other, the *Civil Code of Lower Canada* shall be the first so completed and submitted:

2. Either House may propose any amendments to either Code, but such amendments shall be proposed by resolutions which may be passed by one House and sent to the other for its concurrence, and shall be subject to amendment by the other, and to be otherwise dealt with as a Bill might be, until finally agreed to by both Houses, and shall then be communicated to the Commissioners, who shall, with all possible despatch, incorporate the substance of the amendments so agreed to, with the proper Code, which may then be passed as a Bill, at the same or any future session. *Ibid*, s. 14.

**15.** The said Codes and the Reports of the Commissioners shall be framed and made in the French and English languages, and the two texts, when printed, shall stand side by side. *Ibid*, s. 15.

**16.** Any two of the Commissioners may make any Report or do any other thing which the Commissioners are hereby empowered to do; saving the right of the third Commissioner, if so advised, to make a separate report or enter his dissent and the reasons thereof in the minutes of the proceedings of the Commission. *Ibid*, s. 16.

**17.** The Commissioners shall be remunerated for their services at such rate as the Governor in Council shall determine, not exceeding sixteen dollars per diem to each Commissioner while employed in the performance of his duties, nor five thousand dollars per annum to any Commissioner; and the said Secretaries shall be remunerated for their services at such rate not exceeding three thousand four hundred dollars per annum, as the Governor in Council shall determine, but the said Secretaries shall give their whole time to the duties of their office. *Ibid*, s. 17.

**18.** If any Judge of the Court of Queen's Bench or Superior Court for Lower Canada is appointed such Commissioner as aforesaid, he shall, while acting as such, receive no remuneration as Commissioner except the excess (if any) of the remuneration of a Commissioner over his salary as Judge; and any Assistant Judge to be appointed to supply the place of any such Judge while acting as Commissioner, shall receive a salary to be fixed by the Governor in Council, but not to exceed the highest salary of a Puisne Judge of the Court to which he is appointed; so that the charge upon the Province shall not be increased by the appointment of a Judge or Judges as Commissioners. 20 V. c. 43, s. 18.

**19.** The Commissioners shall hold their meetings at such place as shall be appointed by the Governor, and the Secre-

taries shall keep minutes of the proceedings at such meetings. *Ibid*, s. 19.

**20**. The remuneration of the Commissioners and Secretaries, with such expenses as may be incurred by them for travelling expenses, printing, stationery and other things necessary to the due performance of their duties under this Act, shall be paid by warrant of the Governor, out of the Consolidated Revenue Fund, as shall also the rent of their place of meeting, if such place be not in any public building. *Ibid*, s. 20.

**21**. All moneys expended under this Act shall be accounted for to Her Majesty and to the Legislature, in the manner provided by Law. *Ibid*, s. 21.

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## AN ACT

### Respecting the Code of Civil Procedure of Lower Canada.

(29-30 *Vict., Chap.* 25.)

WHEREAS the Commissioners appointed under the second Chapter of the Consolidated Statutes for Lower Canada, to codify the Laws of that division of the Province in Civil Matters, have completed that portion of their work mentioned in the said Act as the *Code of Civil Procedure of Lower Canada*, embodying therein such provisions only as they hold to be now actually in force, and giving the authorities on which they believe them to be so, and have suggested such amendments as they think desirable, stating such amendments separately and distinctly, with the reasons on which they are founded; and have in all respects

complied with the requirements of the said Act as regards the said Code and amendments; and whereas the said Code with the amendments suggested by the said Commissioners, has, by command of the Governor, been laid before the Legislature in order that the said Code, with such amendments as may be adopted by the Legislature, may be made law by enactment; And whereas such of the amendments suggested by the Commissioners and such other amendments as are mentioned in the resolutions contained in the Schedule hereunto annexed, have been finally agreed to by both Houses: Therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

**1.** The printed roll attested as that of the said *Code of Civil Procedure of Lower Canada*, under the signature of His Excellency the Governor General, that of the Clerk of the Legislative Council, and that of the Clerk of the Legislative Assembly, and deposited in the office of the Clerk of the Legislative Council, shall be held to be the original thereof reported by the Commissioners as containing the existing law without amendment; but the marginal notes, and the references to existing laws or authorities at the foot of the several articles of the said Code, shall form no part thereof, and shall be held to have been inserted for convenience of reference only, and may be omitted or corrected.

**2.** The Commissioners under the Act mentioned in the preamble of this Act, shall incorporate the amendments mentioned in the resolutions contained in the schedule to this Act, with the said Code of Civil Procedure as contained in the roll aforesaid, adapting their form and language (when necessary) to those of the said Code, but without changing their effect, inserting them in their proper places, and striking out of the said Code any part thereof inconsistent with the said amendments.

**3.** The Governor may also select any Acts and parts of Acts, passed during the present session, which he may deem it advisable to be incorporated with the said Code, and may cause them to be so incorporated by the said Commissioners, in the manner hereinbefore prescribed with respect to the amendments above mentioned, striking out of the Code or amendments any part thereof inconsistent with the Acts or parts of Acts incorporated therewith.

**4.** The Commissioners may alter the numbering of the Titles and Articles of the said Code or their order if need be, and make the necessary changes in any reference from one part of the Code to another, and may correct any misprint or error whether of commission or omission, or any contradiction or ambiguity, in the original Roll, but without changing its effect.

**5.** So soon as the said work of incorporation and correction shall have been completed, the said Commissioners shall cause the Code to be reprinted as amended and corrected, carefully distinguishing in such reprint the substantive amendments and additions made in or to the original Roll, and shall submit the same to the Governor, who may cause a correct printed Roll thereof, attested under his signature and countersigned by the Provincial Secretary, or one of the Assistant Provincial Secretaries, to be deposited in the office of the Clerk of the Legislative Council, which Roll shall be held to be the original thereof; any such marginal notes or references thereon as are mentioned in section one, being held to form no part thereof, but to be inserted for convenience of reference only.

**6.** The Governor in Council may, after such deposit of the Roll last mentioned, declare by Proclamation the day on, from and after which the said Code as contained in the said Roll shall come into force and have effect as law, by the designation of "The Code of Civil Procedure of Lower

Canada," and upon, from and after such day the said Code shall be in force accordingly.

**7**. The laws relating to the distribution of the printed copies of the Statutes shall not apply to the said Code, which shall be distributed in such numbers and to such persons only as the Governor in Council may direct.

**8**. This Act and the proclamation mentioned in section six shall be printed with the Copies of the said Code printed for distribution as aforesaid.

**9**. So much of the Act cited in the preamble as may be inconsistent with this Act is hereby repealed.

PROVINCE OF CANADA. } J. MICHEL.

VICTORIA, by the Grace of GOD, of the United Kingdom of Great Britain and Ireland, QUEEN, Defender of the Faith, &c., &c., &c.

To all to whom these presents shall come, or whom the same may in any wise concern—GREETING:

GEO. ET. CARTIER, *Att.-Genl.* WHEREAS in and by a certain Act of the Legislature of the Province of Canada, passed in the session thereof held in the twenty-ninth and thirtieth years of Our Reign, intituled: "An Act respecting the Code of Civil Procedure of Lower Canada," it is amongst other things in effect enacted that the printed roll attested as that of the said *Code of Civil Procedure of Lower Canada*, under the signature of His Excellency the Governor General, that of the Clerk of the Legislative Council, and that of the Clerk of the Legislative Assembly, and deposited in the office of the Clerk of the Legislative Council, shall be held to be the original thereof reported by the Commissioners as containing the existing Law without amendment; but the marginal notes, and the references to existing laws or authorities at the foot of the several articles of the said Code, shall form no part thereof, and shall be held to have been inserted for convenience of reference only, and may be omitted or corrected; that the Commissioners appointed under the second Chapter of the Consolidated Statutes for Lower Canada, to codify the Laws of that Division of the Province in civil matters shall incorporate the amendments mentioned in the resolutions contained in the Schedule to that Act with the said Code of Civil Procedure, as contained in the roll aforesaid, adapting their form and language (when necessary) to those of the said Code, but without changing their effect, inserting them in their proper places, and striking out of the said Code any part thereof inconsistent

with the said amendments; that the Governor may also select any Acts and parts of Acts passed during that session, which he may deem it advisable to be incorporated with the said Code, and may cause them to be so incorporated by the said Commissioners, in the manner hereinbefore prescribed with respect to the amendments above mentioned, striking out of the Code or amendments any part thereof inconsistent with the Acts or parts of Acts incorporated therewith; that the Commissioners may alter the numbering of the Titles and Articles of the said Code or their order, if need be, and make the necessary changes in any reference from one part of the Code to another and may correct any misprint or error whether of commission or omission, or any contradiction or ambiguity in the original roll, but without changing its effect; that so soon as the said work of incorporation and correction shall have been completed, the said Commissioners shall cause the Code to be reprinted as amended and corrected, carefully distinguishing in such reprint the substantive amendments and additions made in or to the original Roll, and shall submit the same to the Governor, who may cause a correct printed Roll thereof, attested under his signature and countersigned by the Provincial Secretary or one of the Assistant Provincial Secretaries to be deposited in the office of the Clerk of the Legislative Council, which Roll shall be held to be the original thereof; any such marginal notes or references thereon as are mentioned in Section one, being held to form no part thereof, but to be inserted for convenience of reference only; and that the Governor in Council may, after such deposit of the Roll last mentioned, declare by Proclamation the day on, from and after which the said Code as contained in the said Roll shall come into force and have effect as law, by the designation of "The Code of Civil Procedure of Lower Canada," and upon, from and after such day the said Code shall be in force accordingly; AND WHEREAS the said Commissioners have incorporated the amendments mentioned in the resolutions contained in the schedule to the said Act with the said Code of Civil Procedure as contained in the Roll aforesaid, having adapted their form and language to those of the said Code but without having changed their effect, having inserted them in their proper places, and having struck out of the said Code any part thereof incon-

sistent with those amendments; AND WHEREAS the said Commissioners have been duly directed to incorporate, and have incorporated with the said Code such Acts and parts of Acts passed during the last session of the Legislature of Canada, as were deemed advisable to be incorporated therewith, and have struck out of the said Code and amendments any part thereof inconsistent with such Acts or parts of Acts so incorporated; AND WHEREAS the said Commissioners have altered the numbering of the Titles and Articles of the said Code and have made the necessary changes in any reference from one part of the Code to another, and have corrected any misprint or error, whether of commission or omission in the original roll, but without changing its effect; AND WHEREAS so soon as the said work of incorporation and correction was completed, the said Commissioners have caused the Code to be reprinted as amended and corrected, having carefully distinguished in such reprint the substantive amendments and additions made in or to the original Roll and have submitted the same to the Administrator of the Government of Our said Province of Canada; AND WHEREAS all the provisions of the first five sections of the above Act have been duly carried into effect; AND WHEREAS the Administrator of the Government of Our said Province of Canada, after the provisions contained in the first five sections of the said Act had been as above and in every other particular duly carried into effect, hath caused a correct printed roll of the said Code of Civil Procedure attested under his signature and countersigned by the Provincial Secretary, to be deposited in the office of the Clerk of the Legislative Council; AND WHEREAS the said Administrator of the Government of Our said Province of Canada, after such deposit of the said printed roll of the said Code of Civil Procedure hath, by and with the advice and consent of Our Executive Council for the said Province, fixed the TWENTY-EIGHTH day of JUNE instant, as the day on, from and after which the said Code as contained in the said Roll shall come into force and have effect as law, by the designation of "The Code of Civil Procedure of Lower Canada;" NOW KNOW YE, that by and with the advice of Our Executive Council for the said Province of Canada, We do, by this Our Royal Proclamation, declare that on, from and after the TWENTY-EIGHTH day of JUNE instant, the said last mentioned Roll attested under the

signature of the Administrator of the Government of Our said Province of Canada, countersigned by the Provincial Secretary and deposited in the office of the Clerk of the Legislative Council of the said Province as aforesaid, shall come into force and have effect as law by the designation of "THE CODE OF CIVIL PROCEDURE OF LOWER CANADA;" Of all which Our loving subjects, of Our said Province, and all others whom these presents may concern, are hereby required to take notice and to govern themselves accordingly.

IN TESTIMONY WHEREOF, We have caused these Our Letters to be made Patent, and the Great Seal of Our said Province of Canada to be hereunto affixed: WITNESS, Our Trusty and Well-Beloved SIR JOHN MICHEL, K.C.B., Administrator of the Government of Our Province of Canada and Lieutenant General Commanding Our Forces therein, &c., &c., &c. At Our Government House, in Our CITY of OTTAWA, in Our said Province of Canada, this TWENTY-SECOND day of JUNE, in the year of Our Lord, one thousand eight hundred and sixty-seven and in the Thirty-first year of our Reign.

By Order,

WM. McDOUGALL, *Secretary.*

# CODE OF CIVIL PROCEDURE

OF

# LOWER CANADA.

## FIRST PART.

### GENERAL PROVISIONS.

**1.** The place, time and duration of the terms and sittings of the different courts are regulated by particular statutes.

The court may, according to circumstances, shorten the terms thus fixed, or it may prolong them by adjournment, either from day to day, or to any subsequent day before the following term; and at any sitting held in virtue of such adjournment, the court may hear and determine all cases brought before it, whether such cases were begun before or since such adjournment.

Courts cannot sit on non-juridical days. Nor can they sit between the ninth of July and the first of September, except as regards proceedings concerning corporations and public offices, oppositions to marriages, applications for writs of *habeas corpus* in civil matters, suits before commissioners' courts for the summary trial of small causes, suits between lessors and lessees, the proceedings regulated by the first title of the second book of part second, and as regards the districts of Gaspé, of Saguenay, and of Chicoutimi, and the Court of Queen's Bench. C. S. L. C. c. 78, ss. 16, 17, 18; c. 82, s. 4; c. 83, ss. 15, 37, 79; c. 40, ss. 5, 6.

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NOTE.—The changes and additions made in virtue of the statute of 1866, intituled: *An Act respecting the Code of Civil Procedure of Lower Canada*, and those contained in the Schedule of Resolutions appended to the said statute, are, in this Code, inserted between brackets [ ].

1. Dur[illegible]he long vacation, a Judge has the same power that he has at an[illegible]er time of the year with respect to matters to be done out of term.—*Nolan v. Dastous*, 4 *Q. L. R.*, *335*, *S. C. R.*, 1878.

**2.** The following days are non-juridical:

1. Sundays;

2. New Year's Day, the Epiphany, the Annunciation, Good Friday, the Ascension, *Corpus-Christi*, St. Peter and St. Paul's Day, All Saints' Day, [the Conception,] and Christmas Day;

3. [The Birthday of the sovereign;]

4. Any day appointed by royal proclamation or by proclamation of the governor as a day of general fast or thanksgiving; [but any writ of summons, or other proceeding, which before such proclamation, has been made returnable on a day so fixed, may be returned on the next following juridical day.]—12 *V.*, *c.* 10, *s.* 5; *c.* 22, *s.* 26;—*C. S. L. C.*, *c.* 64, *s.* 32;—*C. S. C.*, *c.* 5, *s.* 6, § 12;—*C. P. L.* 207.

Easter-Monday and Ash-Wednesday were added by *31 Vic.*, *c. 7*, *s. 2*, § *25* (*Que*).

1. Where a party has fixed a day for a proceeding which afterwards turns out to be a non-juridical day he cannot avail himself of art. 2 of the Code of Procedure. *Deseve* v. *Whyte*, 4 R. L. 656, S. C. 1872.

**3.** If the day on which anything ought to be done in pursuance of the law is a non-juridical day, such thing may be done with like effect on the next following juridical day.—*C. S. L. C.*, *c.* 82, *s.* 5.

**4.** Persons present at sittings of the courts must remain uncovered, and in silence.—*C. P. C.*, 88.

**5.** All orders given by the court or a sitting judge for the maintenance of good order during the sittings must be instantly obeyed.

The word "judge" used alone, either in this code or in the Civil Code, means in like manner, the chief-justice, or any assistant judge of the same court, unless the contrary is expressed.—*Ibid.*

1. A judge of the Superior Court of Lower Canada may act as such in any of the courts of Lower Canada. —*Talbot & Limeau*, 7 L. C. J. 67, S. C. 1862.

**6.** The provisions of the two last preceding articles must likewise be observed wherever judges are in the exercise of their functions.—*Ibid.*

**7.** Any person who, during the sitting of the court or of a judge, disturbs order, utters signs of approbation or disapprobation, or refuses to withdraw or to obey the orders of the judge, or the admonitions of the criers or other officers of the court, may be condemned at once to a fine or imprisonment, or both, according to the discretion of the court or judge.—*Ibid.* 89.

1 Tidd's Practice, 479, 480; 41 Geo. III. c. 7, s. 16; C. P. L. 130, 131, 132;—Morin, Discip. des Cours, Nos. 113, 151, 231, 604.—Guyot, Rep. V. Audience 733.4;—Merlin. Rep. V. Audience, § 3;—Tomlins, L. Dict. V. Contempt, V. Courts.

**8.** If the disturbance is caused by a person discharging any function before the court, he may, in addition to the punishment imposed in the preceding article, be suspended from such function.—*C. P. C.* 80.

1. An attorney in such a case may be immediately suspended.— *Binet, Exp., 2 Rev. de Lég., 438 K. B., 1818.*

**9.** The courts, in all cases brought before them, may, according to circumstances, even of their own accord, pronounce orders or reprimands, and suppress writings, or declare them libellous. *C. P. C.* 1036.

**10.** The court or presiding judge may appoint an interpreter, and allow him a reasonable compensation, which forms part of the costs of the suit. *C. S. L. C. c.* 83 *s.* 36.

**11.** Any court or any judge thereof, may require an oath when it is deemed necessary, and may, in such case, as well as in any case when an oath is required by law, or the rules of practice, administer the same.

**12.** Whoever seeks to obtain a thing or right which is denied him, must sue for it before the proper court.

*C. P. Genève*, 1; *Pothier, P. C.*, 2, *C. P. L.* 75.

**13.** No person can bring a suit at law unless he has an interest therein.

2. *Prevôt la Jannes*, 367, 1 *Pig. pp.* 41, 61, 62, *C. P. L.* 15.

**14.** No person can be a party to a suit, either as claimant or defendant, in any form whatever, unless he has the free exercise of his rights, saving where special provisions apply.

Those who have not the free exercise of their rights must be represented, assisted or authorized in the manner prescribed by the laws which regulate their particular status or capacity.

All foreign corporations or persons, duly authorized under any foreign law to appear in judicial proceedings, may do so before any court in Lower Canada.

Any person who, according to the laws of a foreign country, is authorized to represent a person who has died or made his will therein, leaving property in Lower Canada, may also appear as such in judicial proceedings before any court in Lower Canada.

1 *Pig.* 63 *et seq.*, *C. P. Genève*, 2; *C. P. L.* 5, 6; *C. S. L. C.*, *c.* 91, *ss.* 1, 2.

1. A married woman, if a plaintiff, must set forth in her declaration that she is authorized to sue alone, and must state particularly the means by which her incapacity has been removed. *Perrault* v. *Cuvillier et al.*, 3 Rev. de Lég. 39, K. B. 1817.

**15.** Several causes of action may be joined in the same suit, provided they are not incompatible or contradictory,

that they seek condemnations of a like nature, that their joinder is not prohibited by some express provision, and that they are susceptible of the same mode of trial.

A creditor cannot divide his debt for the purpose of suing for the several portions of it by different actions.

1 *Pig.* 38; *Ord.* 1667, *tit. xx. art.* 6; *C. P. L.* 148, 149, 150, 151; *O'Neil* v. *Atwater*, 28 *June*, 1855, *Montreal*; *Philips & Napier*, *Montreal*, 30 *Dec.*, 1854; *Tidd's Practice*, 9-12; *Donegani & Ross*, *Montreal*, 15*th April*, 1850, *C. N.* 1346.

1. The conclusions of two distinct actions cannot be joined in one and the same declaration. *Gagnon & Tremblay*, 3 Rev. de Lég. 28, K. B. 1811.

2. Several counts in a declaration for one hundred pounds each, founded on promises which are within the scope of one and the same action, with conclusions for £100 only, are allowable. *Casey & Brown*, 3 Rev. de Lég. 39, K. B. 1817.

3. Judgment *en réintégrande* and for damages may be asked and awarded in one and the same action. *Côté* v. *Rioux*, 1 Rev. de Lég. 505, K. B. 1818.

4. Two actions may be united and prosecuted under the same procedure by order of the Court on the demand of one of the parties when there is a connection between the two. *Hébert* v. *Quesnel*, 10 L. C. J., 83, S. C., 1866; *Foley et al.* v. *Tarratt et al.* 9 L. C. J. 108, and 15 L. C. R. 245, Q. B. 1865. Contra: *Simard* v. *Perrault*, and *Perrault* v. *Simard*, 1 L. C. J. 249, S. C. 1857.

5. An action *en déclaration de paternité* may be joined to a demand of damages due the mother, and of a pension for the child, and the mother may bring the action in her own name without having been named tutrix. *Kingsborough & Pownd*, 4 Q. L. R. 14, Q. B.

6. Where the plaintiff brought action for slander and for personal injury in the shape of violence, &c., and the defendant pleaded cumulation, the plea was dismissed. *Paquette* v. *Globenski*, 6 L. C. R., 185, Q. B. 1856; *Méthot et al.* v. *Perrin et al.* 5 R. L. 695, S. C. 1874.

7. A possessory and a petitory action cannot be joined, even with the consent of the defendant. *Trepannier* v. *Dupuis*, P. R. 24, and 1 Rev. de Lég. 351.

8. If the plaintiff state in the declaration that he is proprietor and possessor of a certain lot of land, but concludes *en complainte* only,

that is not a cumulation of the petitoire and the possessory. *Bouchette* v. *Tuché*, 1 Rev. de Lég. 351.

Vide *Post.* Art. 120.

**16.** No judicial demand can be adjudicated upon unless the party against whom it is made has been heard or duly summoned.

1 *Pig.* 489; *C. P. Genève*, 3; 1 *Seligman*, 24.

**17.** The court cannot adjudicate beyond the conclusions of a suit, but it may reduce them and grant them only in part.

*Ord.* 1667, *tit* 35, *art.* 34; *C. P. L.*, 155.

1. Interest and costs must be asked in the conclusions of the declaration, otherwise the court cannot give judgment for them or either of them. *Silson* v. *Anderson*, 3 Rev. de Lég. 39, K. B. 1811; *Coupal* v. *Bonneau*, 10 L. C. J. 177, Q. B. 1865.

2. The conclusions of a new declaration filed in an action evoked must be such as the action instituted in the inferior tribunal will warrant. *Patris* v. *Belanger*, 3 Rev. de Lég. 39, K. B. 1809.

3. And if a declaration does not conclude for judgment jointly and severally against two or more defendants it cannot be so awarded. *Train* v. *Godin et al.*, 3 Rev. de Lég. 39, K. B. 1812.

4. What is omitted in the conclusions of a declaration cannot be supplied by the court. *Perrault* v. *Vallières*, 3 Rev. de Lég. 40, K. B. 1820.

5. In an action *en exhibition de titres*, conclusions upon the titles must be filed and an issue raised thereon. *Rex* v. *Saul*, 3 Rev. de Lég. 198, K. B. 1811.

6. Where, in an action for the recovery of a special legacy, the declaration, after praying for the personal condemnation of the defendant, asked that a certain piece of land therein described "be declared mortgaged, hypothecated and affected for the payment of the said debt with interest and costs" without asking that it be sold—*Held*, to be technically defective, and rejected accordingly. *Platt et al.* v. *Platt et al.*, I. L. C. J. 183, S. C. 1857.

7. The writ and declaration in an action in the Circuit Court constitute the *exploit de citation*, and conclusions in the writ to the effect that the "plaintiff prays judgment accordingly" supply the omission of such conclusions in the declaration annexed to the writ. *Childerhouse* v. *Bryson et al.*, 15 L. C. J. 246, S. C. R. 1871.

8. In an action against two persons on a contract alleged to be joint and not several, if it appear, on the contrary, that it is several and not joint, and the declaration contain no other counts, no judgment can be given against either of the defendants. *Roy* v. *Blaydon & Boucher*, 2 Rev. de Lég. 123, K. B. 1817 ; *Ritchie* v. *Thomas et al.*, 3 Rev. de Lég. 390, K. B. 1818 ; *Fletcher* v. *Forbes et al.*, 22 L. C. J. 24 ; S. C. 1869.

9. When the plaintiff had brought an action *en bornage*, instead of a petitory action, and the action had been maintained—*Held*, in appeal, that the judgment would not be disturbed, as the question had not been raised by the pleading, and as the judgment had settled correctly the rights of the parties. *Atkinson et al.* v. *Hall et ux.*, 19 L. C. J. 192, Q. B. 1874.

10. In an action for certain annual payments of a legacy under a will —*Held*, to be a formal variance to allege an absolute legacy, as had been done in the declaration, when the legacy was really conditional, as proved by the will. *Freleigh* v. *Seymour*, 2 L. C. J. 91, S. C. 1857.

11. In cases of simple contract where there is no written agreement, a variance between the pleading and the proof is not fatal ; it is sufficient that the substance of the matter in issue be proved. *Guerin* v. *Mathe*, 15 L. C. J. 253, S. C. R. 1871.

12. A judgment on an action *en réintegrande*, which does not describe the property affected by the judgment, will be reversed in appeal on account of vagueness. *Regina & Daly*, 8 L. C. J. 470, Q. B. 1858.

13. It is not in the power of the parties to change the nature of the action from that in which it was originally instituted. *Richard* v. *Denison*, 4 L. C. J. 42.

14. In an action to revendicate a piano purchased at a judicial sale —*Held*, that the Court had power to declare the sale null without any conclusion to that effect in plaintiff's declaration or special answers. *Nordheimer et al.* and *Duplessis et vir.*, 2 L. C. L. J. 105, Q. B. 1866.

15. A fraudulent deed will not be annulled by the Court on the contestation of an opposition, unless asked for by the conclusions. *Blouin* v. *Langelier & Langelier*, 3 Q. L. R. 272, S. C. R. 1875.

**18**. A party who brings a suit for less than he is entitled to, upon the same cause of action, may remedy the omission by an incidental supplementary demand in the same suit before judgment rendered.

*C. P. L.* 156, 157 ; 1 *Pig.* 337.

**19**. No person can use the name of another to plead, except the Crown through its recognized officers. Tutors

curators and others representing persons who have not the free exercise of their rights, plead in their own name in their respective qualities. Corporations plead in their corporate name.

2 *Loisel, Inst., liv.* 4, *tit. iii. art.* 5; *liv.* 3, *tit. ii. art.* 4.

1. The tranferee has a right of suing in the name of his assignor for the recovery of the claim transferred. *Cremazie* v. *Cauchon*, 16 L. C. R. 483.

2. The Attorney-General, in appearing for her Majesty, cannot appear by attorney. *Cartier* v. *Laviolette et al.*, 6 L. C. J. 309, S. C. 1862.

3. Church fabriques have a collective name as a corporation, which they are bound to use in judicial matters. *Lefort exp.*, 6 L. C. J. 200, S. C. 1862.

4. An agent or attorney cannot bring an action in his own name on behalf of his principal, even when there is an agreement to that effect between the principal and the other contracting party. *Alsopp* v. *Hart*, 2 Rev. de Lég. 29, K. B. 1817; *Nesbitt et al.* v. *Turgeon et al.*, 2 Rev. de Lég. 43, Q. B. 1845.

**20.** In any judicial proceeding it is sufficient that the facts and conclusions be distinctly and fairly stated, without any particular form being necessary, and such statements are interpreted according to the meaning of words in ordinary language.

*C. S. L. C. c.* 83, *ss.* 77, 78; *C. P. L.* 161.

See *art.* 144 *post.*

1. In an action for the infringement of a right of patent for Lower Canada, the allegation of an infringement "in the County of Montreal" was held to be a sufficient indication of the place where the infringement occurred. *Prowse* v. *Pagnuelo*, 2 L. C. R. 311, S. C. 1852.

2. In an action for the infringement of a patent right to which the defendant demurred on the ground that the declaration failed to set out at length the preliminary formalities required to be observed in order to obtain the patent—*Held*, to be unnecessary and the demurrer was dismissed. *Bernier & Beauchemin*, 2 L. C. J. 193, S. C., & *Bernier & Beliveau*, 8 L. C. R. 297, S. C. 1858.

3. A motion to set aside an attachment must state the cause of nullity. *Barlow* v. *Richardson*, 3 Rev. de Lég. 304, K. B. 1810.

**21.** All provisions and rules concerning procedure, are interpreted with reference to each other and in such a manner as to give them all the effect intended; and whenever this code does not contain any provision for enforcing or maintaining some particular right or just claim, or any rule applicable thereto, any proceeding adopted which is not inconsistent with law or the provisions of this code is received and held to be valid.

*C. S. L. C. c.* 82, *s.* 1.

**22.** No public officer, or other person fulfilling any public duty or function, can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such suit has been given him at least one month before the issuing of the writ of summons.

Such notice must be in writing, it must specify the grounds of the action, must be served upon him personally, or at his domicile, and must state the name and residence of the plaintiff's attorney or agent.

*C. S. L. C., c.* 100, *s.* 1.

1. Where an action of damages was brought by a retired corporal of the British Service against his commanding officer on the ground of illegal arrest and imprisonment, and the defendant pleaded by peremptory exception, the want of a month's notice—*Held*, on demurrer, that such exception did not lie, even though it be proved that defendant acted legally, without malice and with reasonable or probable cause. *Barnes & Mostyn*, 17 L. C. J. 288, S. C. 1873.

2. The notice is not required in an action *en garantie* against a corporation, by the purchaser of land sold for taxes, on account of errors and illegalities by the secretary-treasurer, even though damages be asked for. *Bartley* v. *Boon & Armstrong & The Corporation of the County of Beauce*, 19 L. C. J. 10, S. C. R. 1874.

3. Where a municipal corporation was sued in demolition of a bridge which it had constructed to the prejudice of the plaintiff, and for damage resulting therefrom—*Held*, that it was not entitled to the month's notice. *Bell* v. *The Corporation of Quebec*, 2. Q. L. R. 305, S. C. 1876.

4. An inspector of roads and ditches is a public officer, and is entitled

to a month's notice of action, when sued in damages, for acts within the scope of his duty. *Jetté & Choquette*, 7 L. C. R. 63, Q. B. 1857.

5. In an action for trespass for making and opening a road, where the defendant pleaded that he did so by order of the road surveyor—*Held*, that he was not entitled to a month's notice of action. *Esinhart & McQuillan*, 6 L. C. R. 456, Q. B. 1855.

6. In an action against a sheriff for goods seized by him—*Held*, that he could not plead want of notice of action under 14 & 15 Vic. cap. 54. *Irwin & Boston et al.*, 2 L. C. J. 171, & 7 L. C. R. 433, Q. B. 1857.

7. Where an action of damages for false imprisonment was brought—*Held*, on the defendant's plea that he acted in good faith and was authorized by statute, that he was not entitled to a month's notice of action. *McNamee* v. *Himes*, 3 L. C. J. 109, S. C. 1859.

8. In an action in which a municipal corporation called in its councillors as guarantors, but neglected to give a month's notice—*Held* that a public officer was entitled to a month's notice of action, although at the time of the institution of the action, he had ceased to be such public officer, even if he is accused of fraud or bad faith. *Leclerc* v. *La Corporation de la Paroisse de St. Joachim de la Pointe Claire & Valois et al.*, 7 L. C. J. 83, S. C. 1862.

9. Where money had been paid to a collector of customs as duty upon goods to be imported, upon condition that a certain portion of the money so paid should be remitted in the event of the goods arriving before a rise of duty took place, by virtue of an Act of the legislature then about to come into force—*Held*, that such a payment was not in the nature of a deposit in the hands of a private individual, but was paid to him in his capacity of collector in the performance of his duty as such, and therefore the collector was entitled to a month's notice of action. *Stephens et al. & Bouthillier*, 9 L. C. J. 309, Q. B. 1864.

10. In an action against the collector of customs to recover back costs which had been paid to him—*Held*, that he was entitled to a month's notice of action. *Grant et al.* v. *Percival*, 2 Rev. de Lég. 670, K. B. 1816.

11. But in another action of the same kind—*Held*, that he was not entitled to a month's notice. *Price* v. *Percival*, S. R. 179, K. B. 1824.

12. In an action against a magistrate for damages caused by the bad state of the roads, a month's notice must be given. *Craig* v. *The Corporation of Leeds*, 3 R. L. 444, S. C. R. 1871.

13. In an action against school commissioners, a month's notice must also be given. *Basin* v. *The School Commissioners of St. Anselme*, 3 R. L. 454, S. C. R. 1871.

14. A municipal corporation is not an officer or a person possessing public functions in the sense of art. 22. *Blain* v. *The Corporation of Granby*, 5 R. L. 180, & 18 L. C. J. 182, S. C. R. 1873.

15. And in an action *en réintégrande*, where damages are also prayed for, the notice of one month is not necessary. *Dion & The Corporation of the Parish of St. Joseph*, 17 L. C. J. 193, Q. B. 1873.

16. A public officer is not entitled to the notice when sued for damages on account of bad faith. *Ferland et vir.* v. *Latour*, 6 R. L. 77, S. C. 1874; *Pacaud* v. *Quesnel*, 10 L. C. J. 207, Q. B. 1866.

17. And where such notice has not been given, it is for the Court or jury to decide if the officer has acted in good faith, and consequently if he has a right to such notice. *Pacaud* v. *Quesnel.*

18. A Catholic priest who, in the exercise of his public functions, celebrates a marriage, is entitled to a month's notice of action when being sued in damages for having married a minor without the consent of her parents. *Robert et al.* v. *Bean*, 1 R. L. 150, and 13 L. C. J. 225, Q. B. 1869.

19. A day labourer working for a municipality is not a public officer, nor entitled to notice. *Holton* v. *Aikens*, 3 Q. L. R. 289, Q. B. 1875.

20. A bailiff is not entitled to notice of action. *Major* v. *Chartrand*, 21 L. C. J. 303, 1 Legal News, 212, C. C; and *Major* v. *Boucher*, 21 L. C. J. 304, 1 Legal News, 212, C. C.

21. Where the defendant, a constable, received a notice of action under 14 & 15 Vic. cap. 54, sec. 2, & C. S. L. C. cap. 101, for malicious arrest and imprisonment, which omitted to mention the place where the party was arrested and imprisoned—*Held*, confirming the judgment of the Court below, that such notice was insufficient, and the action was dismissed. *Bettersworth & Hough*, 10 L. C. J. 184, & 16 L. C. R. 419, Q. B. 1866.

**23.** Any party to a suit may appear and plead either in person or through the ministry of an attorney-at-law.

25 *Geo. III. c.* 2, *ss.* 1-36.

**24.** Neither the day of service nor the terminal day is counted in the delays fixed for summoning.

Delays continue to run upon Sundays and holidays; but if a delay expires on a holiday it is of right extended to the next following day.

The same applies to all other delays in procedure.

*C. S. L. C. c.* 110, *s.* 1 §2; 1 *Carré et Ch. lij., No.* 109; 1 *Pig.* 393; *Guyot Rep. Vo. Délai, p.* 344; *Ord.* 1667, *tit. iii. art.* 6; *Lavielle, Etudes sur la Proc. p.* 95; *C. P. C.* 1033; *C. P. L.* 318.

1. The delay required on the service of motions is at least one clear day, and a notice of motion given on Saturday to be presented on the next juridical day is insufficient. *Boucher* v. *Bertrand*, 5 R. L. 292, C. C. 1869.

2. A non-juridical day may be computed in the delay on a petition. *Crebassa* v. *Ethier*, 2 R. L. 332, S. C. 1870.

**25**. Whenever a record is required by law to be transmitted from one court to another, or to a different place, the transmission may be effected through the post-office, and the party requiring it is bound to advance the postage to the person charged to make such transmission; and for any delay caused by the neglect of such party to pay such postage, he is deemed to be in fault. With the consent of all the parties, the record may be transmitted by any other means. *C. S. L. C.*, *c.* 82, *s.* 6.

**26**. [The provisions of article 17 of the Civil Code apply to this code.

Any copy of this code whether designated as *Code of Civil Procedure of Lower Canada*, or as *The Code of Civil Procedure of Lower Canada*, or any copy of the Civil Code whether designated as *Civil Code of Lower Canada*, or as *The Civil Code of Lower Canada*, or any extract of either of the said codes, printed by the printer duly authorized by Her Majesty, is deemed authentic.]

Any abbreviated form of reference to any Act or part of an Act is sufficient if it is intelligible.

**27**. Exceptional provisions concerning certain matters and proceedings in the districts of Saguenay, Chicoutimi, Gaspé and the Magdalen Islands are contained in chapters 77, 78, 79, 80 and 83 of the Consolidated Statutes for Lower Canada. *C. S. L. C.*, *c.* 77, *s.* 50; *c.* 78, *s.* 17, § 4; *c.* 79; *c.* 83 *ss.* 15, 79, 188;—*c.* 85, *s.* 28.

# SECOND PART.

## PROCEDURE BEFORE THE DIFFERENT COURTS.

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# BOOK FIRST.

## SUPERIOR COURT.

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### PRELIMINARY PROVISIONS.

**28**. The Superior Court has original jurisdiction in all suits or actions which are not exclusively within the jurisdiction of the Circuit Court, or of the Admiralty. *C. S. L. C., c.* 78, *ss.* 2, 3.

1. The Superior Court has jurisdiction over an arbitrator appointed by the Government of the Dominion of Canada, under section 142 of the British North America Act, while acting as such within the Province of Quebec, and may inquire whether such arbitrator is in the regular exercise of his office. *The Attorney General* v. *Gray*, 15 L. C. J. 306, S. C. 1871.

2. The Superior Court has no jurisdiction to hear suits for the recovery of school-taxes. *The School Commissioners of Hochelaga* v. *Hogan et al.*, 20 L. C. J. 298.

**29**. The Judges of the Superior Court, or any ten or more of them, may, from time to time, make any rules of practice that may be necessary for regulating proceedings, in or out of term, in causes and matters brought before them, whether in the Superior or in the Circuit Court, and all other matters of procedure not regulated by this code; provided such rules be not inconsistent with the provisions of this code. *C. S. L. C. c.* 83, *ss.* 38, 108, § 13, *s.* 148.

All rules of practice thus made by such judges and signed by them, are, without any other formality and immediately upon receipt thereof, or of a copy thereof certified by the prothonotary of the Superior Court having custody of the original thereof, entered in the registers of each of the said courts respectively, at each place where it is held, and have then full force and effect in the district or circuit where it has been so registered. *Ibid.*, *c.* 83, *s.* 148, § 2.

The Judges of the Superior Court, or any ten or more of them, may also make any tariff of fees for the counsel, advocates and attorneys, examiners and other officers appointed by the Superior Court, whose salaries are not, by law, fixed by the Governor-in-Council; and all such tariffs must be promulgated in the manner prescribed by the rules of practice.

The Governor-in-Council may make, modify, revoke or amend the tariffs of fees payable to prothonotaries, clerks, sheriffs, coroners, and criers in accordance with the provisions of chapter 93 of the Consolidated Statutes for Lower Canada. And any officer or other person receiving any other or greater fees or emoluments than are specified in the tariff for the Circuit Court, for the discharge of the duties and services therein mentioned, is liable to a penalty of eighty dollars for each offence, as mentioned in chapter 83 of the Consolidated Statutes for Lower Canada.

1. The rules of practice of a Court are within its control, and it may relax them when a rigid enforcement of them would operate an absolute injustice.—*Ross* v. *Scott*, 9 L. C. R. 270, Q. B. 1859.

**30**. Every judge, prothonotary and clerk, and every commissioner authorized for that purpose as hereinafter mentioned, has a right to administer and receive the oath, whenever it is required by law, by rules of practice, or by order of a court or judge, or the affirmation in the cases which admit of it, unless such right be restricted by some provision of law.

Any Judge of the Superior Court may, in the district in which he discharges his functions, empower, by one or more commissions under the seal of the court, as many persons as may be necessary in any district, as commissioners to receive affidavits therein, to be used in the Superior Court or the Circuit Court.—*C. S. L. C.* c. 82, s. 10.

The Chief-justice of the Superior Court and any other judge of the same court, and, in the case of the death of the chief-justice, or of his absence from the province, any two judges of the said court may, by one or more commissions under the seal of the court, appoint as many persons as they think necessary within the limits of Upper Canada, as commissioners to receive affidavits therein to be used in any court of record in Lower Canada.—*C. S. C. c.* 79, *s.* 2.

The Governor may likewise, from time to time, appoint fit persons residing in any part of Great Britain and Ireland, or in any of the English colonies, as commissioners for receiving such affidavits.— *C. S. L. C. c.* 82, *s.* 12.

Every deposition or affidavit thus received has the same force and effect, and is entitled to the same credence as if it had been received in open court.—*C. S. L. C. c.* 82, *s.* 10, *sub-s.* 2.

The provisions of the 26th Vic. chapter 41, give like force and effect to all affidavits received before a commissioner authorized by the Lord Chancellor to administer affidavits in chancery in England; or before a notary public under his hand and official seal; or before the mayor or chief magistrate of any city, borough, or incorporated town in Great Britain or Ireland, in any of Her Majesty's colonies or in any foreign country, under the common seal of such city, borough, or incorporated town; or before any judge of a superior court in any of Her Majesty's colonies or dependencies; or before any consul, vice-consul, temporary consul, pro-consul, or consular agent of Her Majesty exercising his functions in a foreign country.

The words "Commissioner of the Superior Court," when-

ever they are used in this code, mean a commissioner appointed under any of the provisions of this article.

1. An affidavit to an opposition sworn before a commissioner for the district of Quebec, the jurat of which does not show where the affidavit was sworn, is insufficient. *Robertson et al.* v. *Fontaine & Fontaine*, 20 L. C. J. 195, S. C. 1876.

2. The joint prothonotary has a right to receive an affidavit intended to make proof in another district, in the same way as if such affidavit had been received before a judge of the Superior Court. *Traham* v. *Gagnon & Gagnon*, 17 L. C. J. 333, S. C. 1873.

3. An affidavit to an opposition in the Circuit Court may be sworn before a Commissioner of the Superior Court, and the prefix "*Commissaire C. S.*" is sufficient, even when the affidavit is made out of the district in which the opposition is filed. *Wood* v. *Ste. Marie & Ste. Marie*, 21 L. C. J. 306; 1 Legal News, 212 C. C.

4. The initials "C. C. S." do not suffice; the Commissioner should state the name of the district for which he has been appointed. *Leclerc* v. *Blanchard*, 12 L. C. J. 236; *Duhaut* v. *Lacombe*, 16 L. C. J. 111.

**31.** If a party establishes under oath that he does not possess sufficient means to make the necessary disbursements, the Court or a Judge, on being satisfied by affidavit that such party has a good cause of action or a good defence, may grant him leave to plead *in forma pauperis*, and may order all officers of justice to afford him their services without any remuneration; but such party, if he fails in the suit, is not exempt from condemnation to pay costs to the other party. *C. S. L. C. c.* 82, *s.* 24; 1 *Tidd's Prac. p.* 97, *Edit. of* 1837, *p.* 63-4, *Laya*, 393.

36 *Vic.*, *c.* 20 (*Que.*).

1. But the Court or judge cannot grant leave to any party to institute *in formâ pauperis* any suit to recover a penalty.

2. Where the plaintiff, who was in a foreign country, had been allowed to plead *in forma pauperis*—*Held*, that this did not prevent the adverse party from demanding security for costs. *Arpin* v. *Riopel*, 4 R. L. 385, C. C. 1872.

3. Where a defendant petitioned to be released from capias and the petition was rejected—*Held*, that he could not appeal from such judg-

ment *in forma pauperis*. *The Canadian Bank of Commerce & Brown*, 19 L. C. J. 110, Q. B. 1874.

3. A plaintiff resident without the Province cannot sue *in forma pauperis* in consequence of the statute 41 Geo. III. cap. 7, which compels all plaintiffs resident without the Province to give security for costs. *Barry & Harris*, 3 Rev. de Leg. 304, K. B. 1810.

4. An application of a plaintiff who had obtained judgment *in forma pauperis* to be allowed to proceed to execution *in forma pauperis* was rejected. *Harrington* v. *McCull*, 6 L. C. R. 426, S. C. 1856.

5. Where a party had obtained permission to proceed *in forma pauperis—Held*, that he nevertheless was compelled to pay the taxes imposed by law in aid of the "building and jury fund." *Olsen* v. *Forstersen*, 12 L. C. R. 226, C. C. 1862.

6. Leave to proceed *in forma pauperis* cannot be granted in appeal. *Legault & Legault*, 16 L. C. R. 163, Q. B. 1866.

7. Permission to proceed *in forma pauperis* does not absolve the party so proceeding from making the deposit for costs due to the other side. *Duhaut & Lacombe et al.* and *Brunel & Tranchemontagne*, 15 L. C. J. 43, S. C. 1870.

**32.** Such leave may, however, be revoked by the court or judge, upon proof that the party was or has since become able to make the necessary disbursements. *Ibid.* § 2.

1. The permission to proceed *in forma pauperis* should be revoked, when the creditor has conveyed the right to another to take a certain sum for the amount of the judgment and on other claims.—*Duhaut* v. *Lacombe et al.*, and 15 L. C. J. 43 and 105 L. C. J., S. C. 1870.

2. The court may revoke the permission to proceed *in forma pauperis* when it appears by procedure or by proof that the plaintiff is worth more than five pounds sterling.—*Montferant* v. *Bertrand*, 9 L. C. J. 170, C. C. 1865.

**33.** [If a party proceeding *in forma pauperis* obtains judgment in his favour, the other party may be condemned to pay costs, including those of the officers of justice who are then entitled to an execution to obtain payment thereof from such party by way of distraction.

No more than one execution can, however, be issued for all the taxed costs remaining unpaid; it is issued at the in-

stance of the prothonotary, or of any party interested, and the moneys are returned into the office of the prothonotary, who pays the same free of charge to the parties entitled thereto.] *Tidd's Prac., p.* 98–9.

**34.** In matters purely personal, other than those mentioned in articles 35, 36, 38, 40 and 42, the defendant may be summoned either, 1. Before the court of his domicile, 2. Before the court of the place where the demand is served upon him personally, or 3. Before the court of the place where the right of action originated. *C. S. L. C. c.* 82, *s.* 26.

The words "cause of action" mean the whole cause of action, *i. e.*, everything that is requisite to show that the action is maintainable. *Gault et al.* v. *Wright et al.*, 13 L. C. J., 60, S. C. 1868; *Connolly* v. *Brannen*, 1 Q. L. R. 204; *Rousseau* v. *Hughes*, 8 L. C. R. 187; *Sénécal* v. *Chenevert*, 4 L. C. J. 239, S. C.; 6 L. C. J. 46, 12 L. C. R. 145, Q. B., 1861. *Ricard* v. *Leduc et al.*, 6 L. C. J. 116, C. C., 1862.

2. In an action by a creditor of a Railway Company against a shareholder to recover the amount unpaid on his shares, the cause of action arose in Montreal where the Company had its principal office, and where judgment was rendered for the debt due by the Company and execution was issued, and not at Bedford where the shareholder subscribed for his shares. *Welch* v. *Baker*, 21 L. C. J. 97, S. C. 1876.

3. The cause of action arises where the note sued on was made, and not where it is made payable. *Mulholland et al.* v. *The Company, &c. of A. Chagnon et al.*, 21 L. C. J. 114, S. C. 1877.

4. A sale effected by correspondence between the plaintiff and the defendant, residing in different districts, delivery to be made in plaintiff's district and payment to be by note payable in defendant's district, does not give rise to a right of action in plaintiff's district. *Warren* v. *Kay et al.*, 6 L. C. R. 492, S. C. 1856.

5. Action on promissory notes made in one district and payable in another, may be brought in the place where they are made payable. *Claxton et al.*, v. *McLean et al.*, 4 Rev. Lég. 654, S. C. 1873.

6. When a promissory note bearing date at Montreal is proved to have been made in Sorel in another district, the cause of action arose in Sorel. *The National Insurance Co.* v. *Cartier*, 22 L. C. J. 336, S. C. 1878; *Hudon* v. *Champagne*, 17 L. C. J. 45, S. C. 1873.

7. The defendant resided in Ontario, and the plaintiff impleaded him in Montreal, the action being commenced by an attachment by garnishment in the hands of garnishees having a place of business in Montreal. The declinatory exception was dismissed. *Chapman* v. *Nimmo and the Phœnix Assurance Company*, 11 L. C. R. 90, S. C. 1860.

8. The plaintiff, residing at Montreal, sued the defendants, whose domiciles were in other districts, for having falsely, &c., made affidavit at Three Rivers charging him with a felony, and for procuring a true bill against him and causing him to be tried at Three Rivers, but alleging his arrest to have been made within the district of Montreal under a bench-warrant from the Court at Three Rivers. It was held that the Courts at Montreal had no jurisdiction. *Senecal* v. *Pacaud et al*, 10 L. C.R. 419, S. C. 1860.

9. Where the defendant in Ontario consigned to plaintiff at Montreal 2,000 barrels of flour, to be sold by him, and in anticipation of the sale drew on the plaintiff for $6,000, who accepted and paid the draft, but the flour, on being sold, did not realize so much, and the plaintiff sued for the difference; it was held that the cause of action arose in Montreal. *O'Connor* v. *Raphael*, 11 L. C. J. 123, Q. B. 1867.

10. Where two defendants were brought into the case for the purpose apparently of giving the Court jurisdiction, and of bringing the defendants proper from their own district to Montreal, it was held that this was a violation of the law, and the action was dismissed. *Davis* v. *Kimpton et al.*, 2 R. L. 118, Q. B. 1870.

11. The Court at Montreal has no jurisdiction to compel a defendant to answer a suit on a draft made there, but accepted and payable at St. Hyacinthe. *Greene et al.* v. *Blanchette*, 20 L. C. J. 196, S. C. 1876.

12. Where a life insurance company, having its home-office in New York, and its principal office for this Province at Montreal, and a local office in Quebec, had, upon application made in Quebec, issued a policy to a person residing in that city, and, being sued thereon, was required by process served at the Montreal office to appear and plead before the Superior Court at Quebec, and declined the jurisdiction, it was held that it was incumbent on the plaintiff to show that the policy had been executed at Quebec, that the proof adduced was insufficient for that purpose, that, on the contrary, there was reason to presume that the policy had been made and executed at the home-office, and that the exception must, in consequence, be maintained. *Vezina* v. *The New York Life Insurance Company*, 1 Q. L. R. 207, S. C. 1876.

13. The cause of action upon an acceptance of an application for a

policy of life insurance does not arise where it was taken by an agent, but where the office of the Company is situated. *Pattison* v. *The Mutual Insurance Co. of Stanstead, &c.* 16 L. C. J. 25, S. C. R. 1872; 38 Vic. cap. 20, sec. 11 (Ca.).

14. An Insurance Company whose domicile is at Montreal, whose policies issue from Montreal, but which takes risks at Quebec through its agent who resides there, may be sued on such risks at Quebec. *O'Malley* v. *The Scottish C. Insurance Co.* 4 Q. L. R. 226, S. C. 1878.

15. A suit brought in the district of Quebec against a defendant residing in the Saguenay district for work done there under a verbal hiring at Quebec, will be dismissed on exception. *Trudel* v. *Duval*, 4 Q. L. R. 180, S. C. 1878.

16. The defendant, domiciled at Montreal, wrote to the plaintiff, a resident at Arthabaska, requesting him to take charge of his, the defendant's lands, at the latter place, and promised to indemnify him for his services. *Held*, that an action for the value of such services brought in the district of Arthabaska was properly dismissed on exception. *Cloutier* v. *Lapierre*, 4 Q. L. R. 321, S. C. R. 1878.

17. The delivery at the Montreal post office of a newspaper addressed to a person residing in another district, gives rise to a right of action to recover the price thereof in the former district. *Penny et al.* v. *Berthelot*, 9 L. C. J. 104, C. C. 1865.

18. The mailing of a newspaper in the Quebec post office does not give rise to a right of action there, though it might do so if the paper were ordered. *Foote* v. *Freer*, 15 L. C. R. 46, C. C. 1864.

19. Where a contract for the sale of goods was made in Montreal with the agents of the plaintiffs, who were a foreign company, and the moneys were sent to the agent, so that the defendant could not have got the goods from the Custom House in Montreal without applying to the plaintiff's agent there, though these were at the defendant's risk from the time they were shipped at Boston, it was held that the cause of action arose here. *Gregory & the Boston, &c. Glass Company*, 9 L. C. J. 134, and 15 L. C. R. 475, and 1 L. C. L. J. 37, Q. B. 1865.

20. The plaintiffs sued in Montreal on a contract made at Verchères for a balance of money which they had advanced to the defendant for the purchase of grain; the action was maintained. *Amiot et vir* v. *Martineau*, 1 L. C. L. J. 26, S. C. 1865.

21. Where a resident in Toronto ordered goods by letter from a merchant in Montreal, and also gave verbal orders for goods to the travelling agent of the merchant at Toronto, the cause of action was

held to have arisen in Montreal. *Clark* v. *Ritchey*, 9 L. C. J. 234, 14 L. C. R. 48, S. C. 1863.

22. An action in Quebec upon an obligation made there but payable in England, was maintained. *Jackson et al.* v. *Coxworthy et al.*, 12 L. C. R. 416, S. C. 1862.

23. The Circuit Court sitting in any given circuit has jurisdiction in actions the cause of which has arisen within the limits of such given circuit, although the defendant reside in a district other than that in which such given circuit is situated, and has been served with process in such other district. *Hardie et al. & Trottier et al.*, 1 L. C. R. 286, S. C. 1851.

24. R. agreed verbally with H. at Nicolet to tow his raft thence to Quebec, whereupon H. telegraphed to his agent in the latter place to instruct R.'s agent to send up R.'s steamboat to perform the towage in question, which was done, and the raft was towed to Quebec accordingly,—*Held*, that the cause of action did not arise in Quebec, that the cause of action meant the whole cause, or all the circumstances giving rise to the right of action. *Rousseau* v. *Hughes*, 8 L. C. R. 187, S. C. 1857.

25. The master of a steamer from Glasgow to Montreal failed to deliver a passenger's luggage shipped on board of the vessel,—*Held*, that the cause of action arose in Montreal. *Macdougall* v. *Torrance*, 5 L. C. J. 148, S. C. 1861.

26. An action of damages for libel may be brought in any district where the newspaper is circulated through the post-office. *Irvine* v. *Duvernay et al.*, 1 Legal News, 138 ; 4 Q. L. R. 85, S. C. 1878.

27. Where a commercial traveller had commissions to act for various houses in Montreal, and to sell goods, and he took an order at Kamouraska for one of the houses he represented, and such order was accepted at Montreal, it was held that the right of action did not arise in Kamouraska. *Lapierre* v. *Gauvreau*, 17 L. C. J. 241, S. C. R. 1873.

28. A debtor is liable to be sued where the debt was contracted, but not where it was made payable, merely on account of the debt having been made payable there. *Wurtele* v. *Lenghan*, 1 Q. L. R. 61, S. C. 1874.

29. Where a contract though bearing date at Montreal, was proved to have been made in Ontario, the right of action was held to have arisen in Ontario. *The Railway, &c. Advertising Co.* v. *Hamilton et al.*, 20 L. C. J. 28, S. C. 1875.

**35.** In every suit for separation from bed and board, or for separation of property only, the defendant must be summoned before the Court of the domicile of the husband. *C. C.* 192.

1. An action in separation of property must be brought before the Court of the district in which the parties had their domicile, and not where the husband is residing temporarily. *Kennedy* v. *Bédard*, 3 L. C. J. 284; 9 L. C. R. 344, S. C. 1859.

**36.** Every suit in damages against a public officer, by reason of any act done by him in the exercise of his functions, must be brought before the Court of the place where such act was committed. *C. S. L. C.*, *c.* 101, *s.* 3.

**37.** In every real or mixed action the defendant may be summoned before the Court of his domicile or before that of the place where the object in dispute is situated. *C. S. L. C.* *c.* 82, *ss.* 27, 28, 30.

**38.** In matters purely personal, if there are several defendants in the same suit, residing in different jurisdictions, they may all be brought before the Court of the jurisdiction where one of them has been summoned in conformity with article 34.

In real actions, they should all be summoned before the Court of the place where the object in dispute is situated.

In mixed actions, before the Court of the place where the object in dispute is situated, or before the Court of the domicile of one of the defendants. *Ibid.*

1. In an action on a bond directed against two defendants, one of whom resided in Montreal, and the other in Quebec, and who were served at their respective domiciles—*Held*, that the Superior Court at Montreal had jurisdiction. *The City Bank* v. *Pemberton et al.*, 6 L. C. R. 413, S. C. 1855.

2. If several defendants reside in the same district, service of process on one of them in another district, does not render the other defendant amenable to the jurisdiction of the Court in the last-mentioned

district. *Lemesurier & Garon et al.*, 1 Q. L. R. 88, S. C. 1874; *De la Ronde* v. *Walker et al.*, 20 L. C. J. 297, S. C. 1876.

3. In a personal action against several defendants they may be legally sued in the district where one of them has been served personally. *Ford* v. *Auger et al.*, 18 L. C. J. 296, S. C. 1874.

See *Davis & Kimpton et al.*, supra, Art. 34.

**39.** In matters of succession, the parties are summoned before the court of the place where the succession devolves, if it opens in Lower Canada, otherwise, before that of the place where the property is situated, or that of the domicile of the defendant or of some one of the defendants. *Ibid.*

**40.** In actions in warranty and actions in continuance of suit, the defendants are summoned to the place where the principal action was brought, wheresoever their domicile may be. *Ibid., c.* 82, *ss.* 31, 33; *C. P. C.* 59.

**41.** When a real action has for its object an immoveable or immoveables, situated partly in one district or circuit, and partly in another, the suit may be brought in either. *Ibid., c.* 82, *s.* 29.

**42.** If the sole Judge administering justice in any district is liable to be recused or must be a party to the suit, the action may be brought in one of the adjoining districts, the grounds of recusation or disability being alleged in the demand; and if these grounds are insufficient or not proved, the court may order the case to be sent back to the court before which it would have been brought in the ordinary course. *C. S. L. C., c.* 78, *s.* 20; *c.* 79, *s.* 19.

# TITLE FIRST.

## OF THE SUIT.

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## CHAPTER FIRST.

### OF SUMMONS.

**43**. Every action before the Superior Court is instituted by means of a writ of summons, in the name of the sovereign; saving the exceptions contained in this code, and other cases provided for by special laws. *C. S. L. C., c.* 83, *ss.* 1, 43; *C. P. L.* 179.

**44**. Writs of summons are issued by the prothonotary, upon the written requisition of the plaintiff. *Ibid., c.* 82, *ss.* 31, 33; *C. P. C.* 59.

1. The defendant being arrested on a capias pleaded that the issue of the writ had not been demanded in the affidavit—*Held*, that the fiat was all that was necessary for the purpose. *Doutre* v. *McGinnis*, 5 L. C. J. 158, S. C. 1861.

**45**. They may be drawn up either in the French or in the English language. *C. S. L. C., c.* 83. *s.* 2.

**46**. They are attested and signed by the prothonotary. *Ibid., s.* 1.

**47**. The absence of the seal of the court does not invalidate the writ. *Ibid., ss.* 1, 2.

**48**. Saving the particular exceptions hereinafter mentioned, writs of summons are directed to any bailiff of the Superior Court, commanding him to summon the defendant

to appear before the court on the day and at the place therein mentioned.

If there are several defendants residing in different districts, several writs must issue addressed, as the case may require, either to a sheriff or to a bailiff of each of such districts. *Ibid.*, *ss.* 3, 4.

33 V. c. 17 (Que.)

"1. Notwithstanding the provisions of articles 48, 84, 248, 461, 555, 559, 809, 836, 857, 899, 1081 and 1082 of the code of civil procedure of Lower Canada, all writs of summons, of attachment for rent, of attachment in revendication, of attachment before or after judgment, seizure in execution, capias, subpœna or order, issuing either from the Superior or Circuit Court, may be addressed either to the sheriff or to any bailiff of the district in which such writ issues, and may be by them served or executed in such district or in any other district, or to the sheriff or to any bailiff of such other district in which such writ is to be served or executed."

1. The service of a writ of summons addressed to any of the bailiffs residing in the district would be good if served by a bailiff appointed for such district. *Tetu* v. *Martin*, 3 L. C. R. 194, S. C. 1853.

2. A writ of summons requiring the defendant to appear before "our *judges* of our said S. C." is bad, as the summons should be to appear before a Court. *Macfarlane* v. *Delesderniers*, 4 L. C. R. 25, S. C. 1853.

3. A writ summoning the defendant "before our justices of our S. C." is good. *Macfarlane* v. *Beliveau*, 3 L. C. J. 306, S. C. 1859.

4. Writs out of the C. C. need not be addressed to the sheriff or to a bailiff. *Laurence* v. *Chaudiere*, 17 L. C. J. 83, C. C. 1873; *Mathieu* v. *Brosseau*, 4 R. L. 525, C. C. 1873. Contra: *Reeves* v. *Archambault*, 15 L. C. J. 83, C. C. 1871.

5. They may be addressed to the defendant. *Mathieu* v. *Brosseau*, 4 R. L. 525, C. C. 1873.

**49**. The writ must state the names, the occupation or quality and the domicile of the plaintiff, and the names and actual residence of the defendant.

In actions upon bills of exchange or promissory notes [or any other private writings, whether negotiable or not,] it is

sufficient to give the initials of the Christian or first names of the defendant, such as they are written upon such bills, notes or instrument.

When a corporate body is a party to the suit, it is sufficient to insert its corporate name and to indicate its principal place of business. *Ord.* 1667, *tit. ii., arts.* 2, 6; 25 *Geo. III. c.* 2, *s.* 1; 12 *V. c.* 38, *s.* 50; *C. S. L. C. c.* 64, *s.* 29; *C. S. C. c.* 63, *s.* 1, *c.* 65, *s.* 4; *C. P. Geneve*, 34; *C. P. C.* 61.

1. In an action against the master of a vessel then in Quebec, it was held sufficient to describe him by the initials of his Christian name as he had given them at the Custom-house, especially as his occupation, &c., were correctly given. *Cloony* v. *Nett*, 17 L. C. R. 262, S. C. 1867.

2. Where exception to the form was filed in an action, on the ground that the defendant was described as residing in the village of St. Jean Baptiste, whereas the proper name of the parish in which he resided was St. Jean Baptiste de Rouville, and it was proved that there were two parishes of that name, one of Rouville and one of Roxton, the description was held to be sufficient. *Gigon & Hotte*, 2 L. C. J. 193 and 8 L. C. R. 271, S. C. 1858.

3. On a capias, where motion was made to quash the writ on the ground of irregularities in the affidavit—*Held*, that the plaintiff being described as "of the city of Kingston, Canada West," was a sufficient indication of his domicile. *Berry & May*, 13 L. C. R. 1, S. C. 1859.

4. A defendant, styled in the writ and declaration, *menuisier*, pleaded by exception to the form that he was not and never had been a *menuisier*, but that he was a contractor and trader, and on proof the exception was maintained in the Court below, but in appeal it was held, that the quality of *menuisier* was made out in evidence, the defendant having in authentic deeds designated himself by such quality, and that, even if he were a contractor, such quality is reconcilable with that of a *menuisier*. *Boucher & Lemoine et al.*, 10 L. C. R. 456, Q. B. 1860.

5. Where a writ of summons described the defendant as of St. Hyacinthe, whereas he in fact lived in the parish of St. Hyacinthe le Confesseur, and there were 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—*Held*, on an exception to the form, that such description was quite sufficient, and the exception was dismissed. *Lyman et al.* v. *Chamard*, 1 L. C. J. 183, S. C. 1857.

6. Where, in an action on a promissory note against two defendants, one of them residing in the town of Sherbrooke was described as of the township of Orford—*Held*, reversing the judgment of the Court below on an exception to the form, that as the township of Orford included that part of Sherbrooke in which the defendant lived, that he had been properly described, and the exception to the form must therefore be dismissed. *Morse & Brooks et al.*, 2 L. C. J., 39, Q. B. 1857.

7. Where the writ sets forth only one of plaintiff's three names and indicates the others by initial letters, the action will be dismissed on exception to the form. *Gauthier* v. *Callaghan*, 3 Q. L. R. 384, C. C. 1877.

8. Where plaintiff gives his Christian name as "Thomas," proof that he sometimes signed "Thomas J." and sometimes "Thomas," is not sufficient to support an exception to the form alleging that he had *two* Christian names. *Hearn* v. *Molony*, 3 Q. L. R. 339, Q. B. 1877; 1 Legal News, 43.

9. The description of plaintiff as carrying on the trade and business of banking in the city and district of Montreal and elsewhere without stating where it had its *principal* office is sufficient. *Bureau & The Bank of British North America*, 21 L. C. J. 261, Q. B. 1876.

10. Plaintiff may maintain an action in the name (Henry *S.* Scott) specified in the lease without any further designation of his second Christian name. *Scott* v. *Hardy et vir*, 4 Q. L. R. 215, S. C. 1878.

11. Where the writ of summons sets forth the *domicile* instead of the actual residence of the defendant, the action will be dismissed upon exception being filed. *Martel* v. *Plamondon*, 22 L. C. J. 107, S. C. 1878.

**50.** The causes of action must be stated in the writ or in a declaration annexed to it. *C. S. L. C. c.* 83, *ss.* 84, 170, *Ord.* 1667, *tit. iii. art.* 1; *C. P. C.* 61.

1. An action will be dismissed on exception if the amount demanded is expressed in figures in the declaration. *Rivet* v. *Poisson*, 11 L. C. R. 493, S. C. 1861.

2. Where persons are sued as partners, and a cause of action is established only against one individually, the action will be dismissed *in toto*. *Fletcher* v. *Forbes et al.* 22 L. C. J. 24, S. C. 1869; and *Ritchie* v. *Thomas et al.*; *Roy* v. *Blagdon & Boucher:* supra art 17.

3. If there be a special agreement, an action *indebitatus assumpsit* will

not lie. *Hitchcock* v. *Grant, Fielders* v. *Blackstone*, 2. Rev. de Leg. 80; *McGinnis* v. *McClosky et al.*, 1 L. C. J. 193; *Ingham* v. *Kirkpatrick*, 3 L. C. J. 282.

4. But where a balance has been struck and a settlement made between partners, an action in assumpsit will lie. *Robinson* v. *Reiffenstein*, 1 Rev. de Leg. 352; *Delagrave* v. *Hanna*, 1 Rev. de Leg. 353; *Marcoux* v. *Morris*, in appeal, 1872.

5. In an action in which the law directs the *tenans* and *aboutissans* to be set out 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* v. *Couture*, 3 Rev. de Leg. 40, K. B. 1821.

6. In a hypothecary action the plaintiff in his declaration must describe the premises which he claims to be mortgaged by metes and bounds *à peine de nullité*. *Perrault* v. *L'Evesque*, 3 Rev. de Leg. 72, K. B. 1819.

7. And if he omits to do so his action will be dismissed upon exception to the form. *Ib.*

8. The details of an action need not be annexed to or mentioned at length in the declaration, nor has any change been effected in this respect by the Code. *La Banque Nationale* v. *The City Bank*, 3 R. L. 28 and 17 L. C. J. 197, S. C. R. 1871.

9. In an action *d'injures* the time and place when and where the words were spoken must be stated, otherwise the action may be dismissed on exception to the form. *Goudie* v. *Legendre*, 3 Rev. de Leg. 39, K. B. 1820.

10. In an action on a contract, the contract must be set out in the declaration. *Simard* v. *Mathurin*, 2 Rev. de Leg. 208, K. B., and 3 Rev. de Leg. 39, K. B. 1812.

11. In an action on a promissory note payable at a particular place therein mentioned—*Held*, that presentation at such place must be alleged. Plaintiff allowed to amend. *Partridge* v. *McLeod*, 2 R. C. 237, S. C. 1872.

12. But it is not necessary to allege in the declaration that the note is stamped according to law. *Doyle & Clement*, 10 L. C. J. 332, S. C. 1866.

13. In an action of damages for libel and slander containing three counts 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 name, style and firm of R. G. Dun &

Co., exceptions to the form were filed by two of the defendants on the ground *inter alia* that the cause of action was insufficiently libelled, inasmuch as it was alleged that the defendant falsely and maliciously did compose and write in a certain book kept in the office of the defendants 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 had refused to allow the plaintiff to see the book he was unable to state the exact words therein written—*Held*, that the exception was well founded, and the action must be dismissed. *McDonald* v. *Dun et al.*, 12 L. C. R. 345, S. C. 1862.

14. Plaintiff brought a hypothecary action against the defendant as the holder of an immoveable hypotheeated by a third party for a debt due by him to the firm of which plaintiff was a member, the partnership having been dissolved and plaintiff having become proprietor of all the debts due the partnership—*Held*, that the conclusions of the declaration praying that the holder be condemned to pay the amount of the mortgage against the said immoveable unless he preferred to abandon it, were illegal. *Renaud* v. *Proulx*, 16 L. C. R. 476, S. C. 1866.

15. A hypothecary action which concludes by asking that the defendant be condemned to pay the claim or abandon the property is sufficient. *Homier* v. *Lemoine*, 14 L. C. J. 58, S. C. 1869.

16. The plaintiff in a hypothecary action is well founded in demanding a personal condemnation against the *tiers detenteur* unless he prefers to give up, &c. *La Societé de Construction Metropolitaine* v. *Bourassa*, 20 L. C. J. 304, S. C. 1876.

17. In an action in revendication the title on which the plaintiff claims must be distinctly stated in the declaration, and if it is not it is a good cause of exception to the form. *Poulhiot* v. *Scott*, 3 Rev. de Leg. 195, K. B. 1820. Contra: *Tourigny* v. *Bouchard*, infra art. 866.

18. And where the defendant pleaded that the plaintiff did not ask by his declaration to have the attachment in revendication declared good and valid and that the effects seized be delivered up to him—*Held*, confirming the judgment of the Court below, to be unnecessary, as, by the writ, the defendant was called upon to show cause why the attachment should not be declared good and valid, which was equivalent to a demand that the effects seized be delivered to the plaintiff, and the writ and declaration should be considered as one. *Jackson & Filteau*, 15 L. C. R. 60, Q. B. 1864.

19. When the particulars of plaintiff's demand are not disclosed by the declaration, and no bill of particulars is therewith filed, such bill

of particulars may be filed at the enquete, if the defendant, instead of moving to dismiss, pleads to the action. *Westrop & Nichol et al.* 2 L. C. J. 194, S. C. 1858.

20. In a case of capias—*Held*, that the 30th Rule of Practice, allowing the defendant to move to dismiss the action when the particulars of the demand are not disclosed by the declaration, and no bill of particulars is filed therewith, does not apply, even in the case when the defendant is in jail under capias, where a paper purporting to be a bill of particulars is filed with the declaration, though such paper do not contain a detailed statement of the whole of plaintiff's demand. *Henderson & Ennis*, 2 L. C. J. 187, S. C. 1858.

21. The filing of a declaration with a writ of attachment in compulsory liquidation under the Insolvent Act of 1869 is irregular. *McIntosh & Davis et al.*, 14 L. C. J. 235, S. C. 1870.

**51.** The formalities mentioned in articles 46, 48, 49 and 50 are required on pain of nullity.

*Ord.* 1667. *tit. ii., arts.* 1, 2.

**52.** If the object of the demand is a thing certain, it should be described in such a manner as clearly to establish its identity.

If it relates to a corporeal immoveable, the nature of such immoveable, the city, town, village, parish or township, street, range or concession wherein it is situated, and also the lands conterminous to it, should be mentioned.

If it is a body of land, known under a particular name, it is sufficient to give its name and its situation.

If the immoveable forms part of a township, parish, city, town or village, the lots in which are numbered, it is sufficient to state its number.

If the demand relates to rents constituted for the redemption of seigniorial rights or to rights relating to any seigniory, they must be described according to the provisions of the Act 27 and 28 Vict., ch. 39.

*Ord.* 1667, *tit. ix., arts.* 3, 4; *C. S. L. C. c.* 41, *ss.* 26, 28 § 2; *c.* 37, *s.* 74; *C. P. C.* 64; *C. P. L.* 173.

**53.** The writ of summons and the declaration served upon the defendant and filed in the office of the prothonotary may be amended or altered with the leave of the Court. The amendment cannot be allowed if it changes the nature of the demand.

*C. S. L. C. c.* 83, *s.* 67; *Powell, p.* 188.

1. A plaintiff cannot amend his declaration so as to substitute one action for another. *Casgrain & Fay*, 3 Rev. de Leg. 40, K. B. 1817.

2. In an action of damages against a custom house officer, where the declaration omitted to state that the notice had been given to defendant as required by law—*Held*, that although the three months had expired within which the action could be brought, the plaintiff would be permitted to amend his declaration on payment of costs. *Bressler & Bell*, 4 L. C. R. 101, S. C. 1853.

3. Where the plaintiff was allowed to amend his declaration during *enquête*—*Held*, that he could not proceed with his *enquête* until the defendant had been allowed to plead *de novo*. *Mann et al.* v. *Lambe*, 6 L. C. J. 301, S. C. 1862.

4. The plaintiff may amend the declaration in order to make it agree with the facts proved, and the costs are at the discretion of the Court. *Frothingham* v. *Gilbert*, 3 L. C. J. 136, S. C. 1836.

5. It is not competent for the plaintiff to move on a final hearing on the merits of an exception to the form to amend his written declaration. *Clemow et al.* v. *McLaren et al.*, 17 L. C. J. 328, and 4 R. L. 658, S. C. 1872.

6. Where the plaintiff, after examining several witnesses, moved that he might amend his declaration so that it should agree with the facts proved—*Held*, that the motion was premature, and that the provisions of the article of the Code relied on applied only when the case was upon the merits. *Beard* v. *McLaren*, 18 L. C. J. 78, S. C. 1874.

7. Where in an action to recover the value of three hundred bushels of grain, the plaintiff, by the prayer of his declaration, only claimed for three bushels—*Held*, that judgment for more than three bushels might be rendered, as it was manifest from the preceding portion of the declaration that the plaintiff really claimed three hundred bushels. *Lamoureux* v. *Molleur*, 19 L. C. J. 110, S. C. R. 1874.

8. Where the plaintiff, in an action in revendication, had omitted to include in his prayer all that was necessary to obtain his demand—

*Held*, that he would not be allowed to make supplementary conclusions, but must proceed by motion to amend. *Poulin & Langlois*, 10 L. C. R. 322, C. C. 1860.

9. Where, in an action against the endorser of a note, the plaintiff, in his declaration, alleged that the note was made on the 12th of July instant, instead of the sixteenth—*Held*, on demurrer, that the subsequent allegation in the declaration that the defendant had promised to pay since the protest of the note would not cover the defect, and the plaintiff was allowed to amend on payment of costs. *Helliwell* v. *Mullin*, 5 L. C. J. 76, S. C. 1861.

10. And in a case where the plaintiffs moved to amend their declaration during the *enquête*, the motion was granted on payment of full costs, as in an action settled at the stage where the action then was, viz., after the inscription for enquête. *Syme & Heward*, 6 L. C. J. 311, S. C. 1856.

11. Where the declaration asked for a judgment for goods sold, etc., and the plaintiff desired to extend the action to one of account and for promissory notes, bills, rents and interest, etc.—*Held*, that these amendments would change the nature of the action and therefore could not be granted. *Lamb* v. *Mann et al.*, 6 L. C. J. 287, S. C. 1862; *Venner* v. *Segui*, 4 Q. L. R. 6, S. C. 1878.

12. Where a motion to amend a declaration has been made, the amendment must be made on the face of the declaration, and an opportunity must be given to defendant to replead before judgment can be rendered. *Cournoyer* v. *Tourquin*, 1 L. C. L. J. 110, S. C. R. 1865.

13. Where a female was sued as a widow, when in reality she was the wife of the other defendant, who was sued in his quality of executor to a will, and the return of service established that the copy of the writ and declaration for the female defendant was left with the male defendant personally, plaintiff was allowed to amend the writ and declaration so as to describe the female defendant correctly. *Connolly* v. *Bonneville et al.*, 11 L. C. J. 192, S. C. 1866.

14. Motion to amend the writ and declaration after hearing of an exception to the form, may be allowed on payment of all costs, and the exception be dismissed. *Bousquet* v. *Jodoin et al.*, 10 L. C. J. 199, S. C. 1866.

15. A plaintiff cannot increase the amount of his demand by a motion to amend his declaration to that effect. *Senecal* v. *Lemoine*, 13 L. C. J. 56, S. C. 1869.

16. Where an opposant moved to amend his opposition by altering

a number on the endorsation, and the plaintiff moved to reject the opposition as having been filed under a wrong number, the former motion was dismissed, and the latter granted with costs. *Joseph* v. *Coy & Coy*, 1 L. C. J. 2, S. C. 1856.

17. The defendant was summoned to appear by his copy of the writ on the 24th April, 1860, instead of 1861, and pleaded by peremptory exception to the form—*Held*, that the defendant not having been properly summoned, the Court had no power or jurisdiction to permit the plaintiff to amend his writ. *Blais & Lampson*, 12 L. C. R. 23, S. C. 1861.

18. A motion to amend a writ by inserting the proper domicile of the plaintiff, who has been described as living in a parish different from that in which he really resided, will be granted, on payment of costs of the exception to the form. *Giguere* v. *Beauparlant et al.*, 5 R. L. 51, C. C. 1873.

*Vide infra Arts.* 117, 320.

*For Amendment of Return, vide Arts.* 80, 159.

*For Delay to Answer Amended Pleading, vide Art.* 142.

19. Action was brought by a widow against the executors of her husband in destitution of their quality. After plea no proceedings were taken for a considerable time, but at last the plaintiff moved to be allowed to file a supplementary declaration, based on facts that had since arisen. The application was granted in the Superior Court, but on appeal, the judgment was reversed, on the ground that it was not competent to add to the declaration facts which had arisen since the institution of the action. *Gadbois* v. *Trudeau et al.*, 3 R. C. 52, Q. B. 1872.

*Marsolais* v. *Lesage*, 1 L. C. J. 42, S. C. 1856; *Contant* v. *Lamontagne et al.*, 17 L. C. J. 24, S. C. 1873.

**54**. No party can be summoned on a Sunday or a holiday without the express leave of a judge.

*Pothier, Proc.* 7; 1 *Pig.* 134, *notes a, b*; *C. P. C.* 63, 1037; *C. P. L.* 207.

*See Art.* 2 *supra as to* "*Holidays.*"

**55**. No summons can be served before [seven o'clock in the morning, or after seven o'clock in the afternoon].

This provision does not apply however to cases of *capias ad respondendum.*

*Poth., Proc.* 7; *Pig.* 134; *Laws XII. Tables tit.* 7, L. 8; *C. P. C.* 1037.

*Robinson* v. *McCormack*, 1 *L. C. R.* 27; 1 *Rev. de Leg.* 44.

1. The rule with regard to the hours of service is *à peine de nullité*. —*Kinney & Perkins*, 13 L. C. R. 302, Q. B. 1863.

**56.** Service is effected by leaving with the defendant a copy of the writ of summons, and of the declaration, if there is one.

The copy must be certified either by the prothonotary or by the attorney for the plaintiff, or by the sheriff, when the service is to be made by him.—*C. S. L. C. c.* 83, *s.* 3, § 3; *s.* 6, § 3; *s.* 44; *C. P. C.* 65.

1. A duplicate declaration is equivalent to a certified copy.—*Gugy & Brown*, 3 R. L. 446, S. C. 1871.

2. Where a copy of the declaration, having the original writ of summons annexed, had been served upon the defendant, instead of the copy of the writ, and the bailiff having made his return on the copy, the plaintiff obtained another original writ, which he substituted for the copy, and the defendant took exception to the service—*Held*, that on default of the defendant to produce the writ left with him, to compare with that on which the return was made, the service was good and sufficient, and the exception was dismissed. *Filion et al* v. *DeBeaujeu*, 5 L. C. J. 128, S. C. 1860.

3. Where in an inscription *en faux* the question arose as to the effect of the omission of the word "deputy" before the letters P. S. C. after the signature of the deputy prothonotary to a copy of a writ—*Held*, that not only the word deputy but the letters P. S. C. were entirely unnecessary, and the omission of them in the copy of the writ could not in any way affect the writ or service. *McLimont* v. *Robin*, 15 L. C. R. 101, S. C. 1865.

4. The exhibition of the original pleading or paper, at the time of the service of the same, is not necessary. *Blais* v. *Lampson*, 12 L. C. R. 23, S. C. 1861.

5. But a bailiff serving a writ of summons issued out of the Circuit Court must inform the defendant of the nature and contents of the action. *Laidlaw* v. *Jamieson et vir.*, 15 L. C. R. 271, C. C. 1865.

For service out of district, *see* Art. 461 *Post.*

**57.** Service must be made either upon the defendant in person, or at his domicile, or at the place of his ordinary residence, speaking to a reasonable person belonging to the family.

In the absence of a regular domicile, service may be made upon the defendant at his office or place of business, if he has one.—*C. S. L. C. c.* 83, *ss.* 44, 173; *C. P. Chitty's Arch. Practice*, 184; *C. P. L.* 190.

1. A return of service of process *ad respondendum* upon a grown person on the timber attached, is no service, and cannot be proceeded upon. *McDonald* v. *McDonnell*, 3 Rev. de Lég. 305, K. B. 1811.

2. Service of a writ of summons by leaving a copy with the bookkeeper of the hotel, where the defendant usually stops, is insufficient. *McDonald et al.* v. *Seymour*, 4 L. C. R. 355, S. C. 1854.

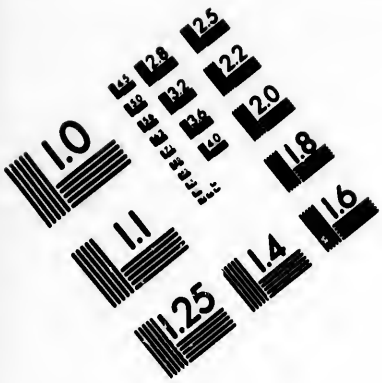
3. *Held*, on an exception to the form, that service of a writ and declaration could not be legally made by leaving copies thereof with a servant girl at a boarding-house where defendant was stopping, inasmuch as, by the law of this country and by the Provincial Ordinance of 1785, the writ and declaration ought to be served on the defendant personally, or left at his house with some grown and reasonable person there. *The Champlain and St. Lawrence Railway Company* v. *Russell*, 6 L. C. R. 477, S. C. 1855.

4. Service of process "at the late domicile" is not good. *Caldwell* v. *Moffatt*, 3 Rev. de Lég. 304, K. B. 1809.

5. Return of service at the domicile of the defendant, without saying that the officer spoke to any person, is no service in a default case. *Clouet* v. *Bragg*, 3 Rev. de Lég. 307, K. B. 1818.

6. Where the return described the service as upon a "growing person,"—*Held*, to be no service, as such a person might be a child of an hour old, and there was therefore no certainty in the description. *Perrault* v. *Binet*, 3 Rev. de Lég. 307, K. B. 1820.

7. A defendant lodging at the private dwelling house of another, but in rooms partly furnished by himself, and taking his meals elsewhere, is validly served by leaving the copies of writ and declaration at the door of the house where he is lodging, speaking to a servant employed and living there. *Hearn & Malony*, 3 Q. L. R. 339, Q. B. 1877.





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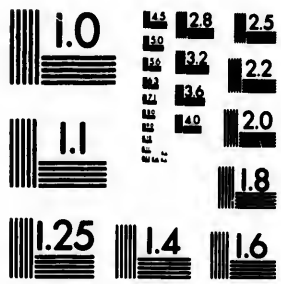


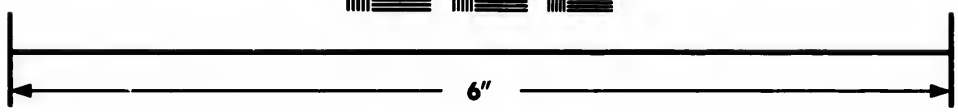



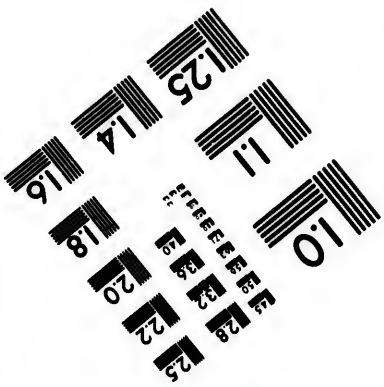


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**58.** [In all cases in which the defendant resides in the same domicile with the plaintiff he must be served personally, unless the court grants leave to serve him otherwise.]

**59.** If there are several defendants, they are served in the manner above mentioned, separately and distinctly, and a copy of the summons is left with each of them, except in the cases hereinafter provided. *Pothier, Proc.*, p. 7.

**60.** Service upon a general partnership may be made at its place of business, if it has one, and if it has not, upon one of the partners.

*Anc. Deniz., Vo. Ajournement, No.* 27; *Vo. Société, No.* 27; *Encyclop. de Droit, Vo. Ajournement, p.* 257; *Nouv. Deniz. Vo. Assignation,* § 7, *No.* 13; 12 *Vict. c.* 45, *s.* 4; *C. P. C.* 59, § 6;

*Berthelot v. Galarneau, Law Reporter,* 109; *C. S. C. c.* 60, *s.* 12; *C. S. L. C. c.* 65, *s.* 4, § 3; 4 *Pardessus, No.* 796; *Nouv. Pig., pp.* 194, 12; *Code:* "*Société,*" *Art.* 6; *Hinckley v. Smith et al.,* 22 *April,* 1848, *at Montreal: C. P. L.* 198.

1. The service of an action at the place of business of a firm or partnership, in a different district from that in which the writ issued, even when one of the members of such firm is domiciled in the district in which such action is brought, is insufficient. *Poston et al.* v. *Hall et al.*, 13 L. C. R. 127, S. C. 1863.

2. Personal service on one of the members of a co-partnership is binding upon the whole firm, in like manner as a service made at the office or place of business of the firm. *Dechene* v. *Faucher et al.*, 13 L. C. R. 415, C. C. 1863.

**61.** Service upon a joint stock company may be made at its office, speaking to a person employed in such office, or elsewhere, upon its president, secretary or agent.

23 *Vict., c.* 31, *s.* 55; *C. P. C.* 69, § 6.

1. A public joint stock company, like the Montreal Telegraph Company, may be legally served at any one of its business offices. *Pacaud* v. *The Montreal Telegraph Company,* 2 R. L. 601, C. C. 1871.

2. And the service in such case must be made where the contract was entered into. *Ib.*

3. A corporation cannot be legally served at the office of a person who does business for the corporation, out of the district where the office of the company is. *Pattison v. The Mutual Insurance Company of Stanstead & Sherbrooke*, 16 L. C. J. 25, S. C. R. 1870.

4. Incorporated companies must be served at their principal office and place of business where their books are kept and their meetings held. *Toupin* v. *The St. Francis Mine Company*, 5 R. L. 209, S. C. 1873.

5. In an action on an insurance policy issued in Upper Canada, where the chief office and place of business of the company was situated, service having been made on the agent at Montreal—*Held*, insufficient, the agent not having charge of an office of the company for the transaction of business generally. *McPherson et al.* v. *The St. Lawrence and Inland Marine Insurance Company*, 5 L. C. R. 403, S. C. 1853.

6. Service of a process against the Grand Trunk Railway Company, made at one of its stations, was *held* to be insufficient; such service should have been made at their principal place of business. *Legendre* v. *The Grand Trunk Railway Company of Canada*, 6 L. C. R. 105, C.C. 1856.

**62.** If the partnership has no known office or place of business, nor any known president, or secretary or agent, upon a return to that effect, the court or judge may order it to be summoned by a notice to be inserted during one month in at least one newspaper, and such notice is held to be a sufficient service. *Ibid.*

1. A service of process on the "last president," on the "late secretary" and on the "last secretary" of a corporate company, in the absence of any known or discoverable office, was, on an exception to the form, held insufficient. *Booth* v. *The Montreal & Bytown Railway Company*, 3 L. C. J. 196, S. C. 1859.

**63.** Service upon a body corporate is made in the manner provided by its charter, and in the absence of such provision, in the manner prescribed in the two preceding articles. *Ibid.*

31 Vict., c. 24 (Que.).

"The Joint Stock Companies General Clauses Act."

"41. Service of all manner of summons or writ whatever upon the company, may be made by leaving a copy thereof at the office or chief place of business of the company, with any grown person in charge thereof, or elsewhere with the president or secretary thereof; or, if the company have no known office or chief place of business, and have no known president or secretary, then, upon return to that effect duly made, the Court shall order such publication as it may deem requisite to be made in the premises, for at least one month, in, at least, one newspaper; and such publication shall be held to be due service upon the company."

Section 50 of 31 Vict. c. 25, "An Act respecting the incorporation of Joint-Stock Companies," is similar.

1. In an action against the school commissioners of a municipality—*Held*, that the service of the writ of summons made at the domicile of the secretary-treasurer of the defendants was null. *The School Commissioners for the Municipality of the Parish of St. Pierre de Sorel* v. *The School Commissioners for the Municipality of the Town of William Henry*, 3 L. C. J. 189, S. C. 1857.

2. Service on a municipal corporation may be made by leaving a copy of the summons with the secretary-treasurer. *The Corporation of the County of Terrebonne & Valin*, 9 L. C. R. 436, Q. B. 1859.

**64.** Foreign companies or corporations, and all executors of wills, administrators, or representatives of the succession of persons having had property in wer Canada, may, if they have an office or an agent in er Canada, or carry on business therein, be summoned there, in the manner provided in article 61, and, if they have no such office, in the manner prescribed in article 62.

*C. S. L. C. c.* 91, *s.* 3; 5 *L. C. R.* 403.

35 Vict. c. 6 (Que.):

"1. Foreign railway companies who control, either as owners or lessees, any line of railway extending to or passing through the Province of Quebec, and who have no office, president, secretary, or agent therein, are sufficiently summoned by service made upon any of their station-agents or depot-masters in charge of such stations or depots, belonging to or under the control of said companies, as are situated within this Province."

1. Where a *saisie arrêt* after judgment was served upon an insurance company (having its principal place of business and head office in England, but its chief agency in Montreal) at the agency in Montreal where the writ of summons issued, and the *tiers saisis* doubted whether there was any service binding upon them, more especially as the policy had been granted out of the Province, and as the amount of the policy was payable in England—*Held*, on the contestation of the declaration that the service was good and valid, and the *tiers saisis* were ordered to pay the amount to the plaintiff. *Chapman* v. *Clarke & The Unity Life Insurance Association*, 3 L. C. J. 159; S. C. 1859.

2. A travelling insurance agent cannot legally represent the company in judicial matters for such company. *Pattison & The Mutual Insurance Company of Stanstead and Sherbrooke*, 16 L. C. J. 25, S. C. R. 1872.

**65.** [Church *fabriques* and vestries are served by leaving copies of the summons separately with the *curé* or rector, or person performing his functions in the parish, and with the then acting church-warden.]

**66.** [Service upon masters or captains of ships or other mariners, who have no domicile in Lower Canada, may be made on board the ship they belong to, speaking to a person in the ship's employ.]

*Carré et Ch. p.* 404, *note* 2; *Favard de Langlade, p.* 144, *No.* 8; 7 *Dalloz, p.* 779, *No.* 9; *C. P. C.* 68, 419; *C. P. L.* 199.

**67.** A wife separated from bed and board must be served separately from her husband.

A wife not separated from bed and board is sufficiently summoned by service made upon her husband.

1 *Rogron, pp.* 313-14; *Code "Domicile," Arts.* 6, 8; 1 *Carré et Ch. p.* 400; *C. P. L.* 192-3.

1. In an action against a wife, separate as to property from her husband, plaintiff served a copy for the husband upon the husband himself at his domicile, and was informed by the husband that his wife was out of town, whereupon the bailiff left without leaving a copy for the wife, and next day another bailiff was sent with another copy for the wife, and the door being opened by the husband again, that person, as soon as he

recognised the bailiff, immediately closed it in his face. The bailiff then left the copy intended for the wife on the floor of the porch where he was standing, informing the husband at the same time through the door of his doing so. The defendant appeared and attacked the service and return by exception to the form, alleging the absence of the wife from town and want of actual service. The plaintiff did not answer, but, at the argument, urged, among other things, that the nullity of service, if any, was covered by appearance.—*Held*, that though such was the jurisprudence and practice of the court, prior to the Ordinance of 1667, that the practice in this respect was now entirely changed, and, as it was necessary to appear at some time to urge a ground of nullity in the proceedings, that it was much better to do so before the case had gone to judgment and a large amount of costs incurred; and also that the service at the domicile of the husband for the wife was sufficient where the wife was only separated as to property and not *de corps*; that the return of the bailiff should have stated upon whom he served it and, not having done so, it must be held to be null. *The Trust and Loan Company of Upper Canada & McKay et vir.*, 3 L. C. J. 154, S. C. 1859.

2. Service of one copy is sufficient to bring husband and wife, separate as to property, before the court. *The Trust and Loan Company of Upper Canada and Mackay*, 9 L. C. R. 465, Q. B. 1859.

*Contra: Dansereau v. Archambault et al.*, 21 *L. C. J.* 302; 1 *Legal News*, 212 & 327 *S. C.*

**68.** *If the defendant has left or has never had his domicile in Lower Canada, and has property therein, the court, or judge, or the prothonotary, upon a return stating that he cannot be found in the district, may order him to appear within two months from the last publication of such order.*

The order must be published in the French and English languages, and be twice inserted in a newspaper published in each language respectively in the district where the court is held; and in default of either of such newspapers in such district, then it is inserted in a similar newspaper of the nearest locality; and such newspapers are indicated in the order by the court or judge, or the prothonotary. *C. S. L. C. c.* 83, *ss.* 58, 61, *C. P. C.* 69, 73.

35 *Vict. c. 6. (Que.)*

2. The first paragraph of Article 68 is amended so as to read as follows:

"If the defendant has left his domicile in Lower Canada, or has never had any such domicile, but has property therein, the court or judge, or the prothonotary, upon a return stating that he cannot be found in the district, may order him to appear within two months from the last publication of such order."

1. In an action against the curator of an absentee's estate, the only mode of impleading the absentee is by calling him in by advertisement. *Whitney* v. *Brewster*, 3 L. C. R. 431.

2. In an action against the curator to an absentee to account—*Held*, to be unnecessary to call in the absentee by advertisement, and that service on the curator was sufficient. *Murphy* v. *Knapp*, 4 L. C. R. 94, S. C. 1853.

3. A bailiff's return on a writ of summons, setting forth that he had taken the necessary information for the purpose of finding the defendant and serving him, and that he was informed that he had left the Province of Quebec, and had no longer any domicile within the village of Sorel, was insufficient, where the writ showed that the defendant was formerly of the Town of Sorel and was now absent from the Province of Quebec, but possessing real estate in the said Town of Sorel, sufficient to authorize the calling in of the said defendant by means of advertisement, and the action would be dismissed on exception to the form. *The Mayor, &c., of Sorel* v. *Newton*, 3 R. L. 394, C. C. 1871.

4. An absentee cannot legally be summoned by advertisement on the ground that he has property in this district, when such property consists merely of a *bon* not produced, nor proved to be in the defendant's possession. *Poirier* v. *Lareau*, 21 L. C. J. 48, Q.B. 1876.

5. Where the plaintiff obtained judgment against the defendant by default as an absentee, whereas he resided in Lower Canada, and the defendant brought opposition to the judgment *afin d'annuller—Held*, that the opposition must be maintained with costs. *Armstrong* v. *Crochetiere & Crochetiere*, 1 L. C. J. 276, S. C. 1849.

**69.** *Nevertheless, and without prejudice to the mode of summons mentioned in the preceding article, when a defendant, having property in Lower Canada, has no longer or has never had any domicile therein, or when the cause of action arose in Lower Canada and the defendant resides*

*in Upper Canada, the judge or the prothonotary, upon proof of the fact by affidavit or otherwise, may grant leave to serve the writ of summons in Upper Canada, and such leave is endorsed in writing upon the writ, which may then be served by any bailiff of a County Court in Upper Canada, or any literate person, either of whom makes an affidavit of service sworn to before any justice of the peace of the county in which the service was made, or before a commissioner of the Superior Court for Lower Canada, or by any bailiff of the Superior Court for Lower Canada.*

22 *Vict. c.* 5, *s.* 58; *C. S. L. C. c.* 83, *s.* 63, §§ 1, 2.

38 Vict. c. 9, (*Que.*):

1. Article 69 of the Code of Civil Procedure of Lower Canada is amended so to read as follows:

"69. Nevertheless and without prejudice to the mode of summons mentioned in the preceding article when a defendant, having property in the Province of Quebec, has no longer, or has never had any domicile therein, or when the cause of action arose in the Province of Quebec, and the defendant resides in the Dominion of Canada, the judge, or the prothonotary, upon proof of the fact by affidavit or otherwise, may grant leave to serve the writ of summons at the domicile of the defendant, and such leave is endorsed in writing by him upon the writ, which may then be served by any bailiff of a court of superior jurisdiction in the place in which the service is to be made, or any literate person, either of whom makes an affidavit of service, sworn to before any justice of the peace, having jurisdiction in the place where the service was made, or before a commissioner of the Superior Court, for the Province of Quebec, or by any bailiff of the Superior Court for the Province of Quebec."

## FORM No. 27.

In connection with article 69.

*Affidavit of Service under article sixty-nine of the Code of Civil Procedure, to be indorsed on the Writ of Summons.*

A. B., of , being duly sworn, doth depose and say, (that he is a Bailiff entitled to serve process of the

County Court of the County of , in Upper Canada), and that he served the within Writ of Summons on C. D., the Defendant (*or as the case may be*) therein named, on the day of , 18 , at o'clock in the , at in the said County, by delivering to *him* personally a true copy of the said Writ (*or as the case may be*) by leaving a true copy thereof for the said C. D. with a grown up person of *his* family at *his* domicile in the said County: and Deponent hath signed.

A. B.

Sworn before me, at , this day of , 18 , } J. P.

*Signature of the Commissioner or Justice of the Peace.*

[N. B.—*Omit the words* "that he is a Bailiff entitled to serve process of the County Court of the County of in Upper Canada,"—*when the service has been made by a person who is not a Bailiff, or being a Bailiff is not entitled to serve process of the County Court in such County.*

1. Where a writ was addressed "to any of the bailiffs of the Supe- "rior Court for Lower Canada appointed for the district of Quebec," but the defendant being a resident of Upper Canada it was endorsed by the prothonotary "this writ may be served in Upper Canada," and the return of service shewed that it had not been served by a bailiff but by a literate person, the service, on exception to the form, was held to be sufficient, and the exception was dismissed. *Morgan & Benjamin*, 13 L. C. R. 235, S. C. 1863.

**70**. Persons imprisoned may be summoned by personal service between the wickets. 1 *Carré et Ch. p.* 414, *citing Richard.*

**71**. A summons cannot, on pain of nulity, be served in church, nor in court, nor upon a member of the legislature on the floor of the house.

*Rodier on Art.* 3 *of tit. ii. Ord.* 1667; *Papon. liv.* 18, *tit.* 5, 20, 27; 1 *Pig. p.* 136; 1 *Carré et Ch. p.* 395; *sed vide* 1 *Chitty's Arch. Practice* 180.

1. Service of writ upon the clerk of the recorder's court, at his office attached to the court, during office hours, and while he is engaged in his official duties, but not à *l'audience*, is a valid service. *Wilson* v. *Ibbotson*, 13 L. C. J. 186, S. C. 1869.

2. Where a sale under a writ of execution was made of things belonging to the high constable of the district, in his office in the court house, and the defendant opposed on the ground that the seizure had been made within the limits of the court house, it was *held*, that having been made outside the hall of the court (*l'audience*), it would not be set aside. *Bussiere* v. *Faucher*, 14 L. C. R. 87, C. C. 1864.

**72.** A summons may be served at any domicile elected by the party for such purpose.

1. Service of process at an elected domicile is good, if it be stipulated in the contract on which the suit is founded that such a service should be valid. *Oviat* v. *McNabb*, 3 Rev. de Leg. 305, K. B. 1811.

**73.** Persons may be summoned to appear upon any day in the year other than a Sunday or holiday. *C. S. L. C., c.* 83, *ss.* 7, 74.

**74.** Bailiffs cannot make services in cases in which they are interested, nor in those which concern their relations by birth or affinity, to the degree of cousin-german inclusively.

*Guyot, Rep. Vo. Huissier, p.* 588; 1 *Pig.* 109; *Anc. Deniz. Vo. Huissier,* 69; *C. S. L. C., c.* 81, *s.* 3; *C. P. C.* 66.

1. A service of a writ of summons made by a bailiff who is related to the plaintiff is null. *Desmarteau & Aubertin*, 6 L. C. J. 88, S. C. 1861. Contra: *Lemieux* v. *Coté & Coté*, 10 L. C. R. 184, S. C. 1859.

2. A service of process *ad respondendum* by the sheriff is good, if the sheriff is not directly interested or concerned in the suit in which it is served. His interest must be positive, not contingent. *Laurent* v. *Vallier*, 3 Rev. de Lég. 307, K. B. 1820.

*Vide Post, Art.* 466.

**75.** In ordinary cases the delay upon summons is ten intermediate days between the day of service and the day fixed for the appearance, when the distance from the domi-

cile of the defendant to the place where the court is held does not exceed five leagues.

In demands by reason of usurpation of office, and in those for writs of *mandamus*, of prohibition, and of *scire facias*, the delay is three days.

In suits between lessors and lessees the delay upon summons is one day only.

When the distance exceeds five leagues the delay is increased one day for each additional five leagues.

*C. S. L. C. c.* 83, *s.* 8; *c.* 88, *s.* 1, § 2; *c.* 40, *s.* 10, *C. P. C.* 72.

1. *Held*, reversing the judgment of the court below (14 L. C. J. 138), that when a defendant is personally served at a place other than his domicile, the delay is computed according to the distance from the place of such service to the place where the court is held, and not according to the distance from his domicile. *Smith & Donovan*, 19 L. C. J. 336, Q.B. 1875, & 14 L. C. J. 222, S. C. R. 1870. *Currier & Lafrance*, 13 L. C. J. 329, S. C. R. 1869.

2. Where a Superior Court writ was served on the defendant at his domicile, which was 192 miles from the court house, on the fourth, and was returned on the fifteenth—*Held*, on exception, that the delay between the service and the return of the writ was sufficient, and that there must be five full leagues, over and above the first five leagues, to entitle the defendant to additional delay. *Poulin & Wurtele*, 3 R. L. 453, Q.B. 1871. *Poulin & Plante*, 3 Rev. de Lég. 307, K. B. 1819.

*Vide post*, *Art.* 890, as to summons in suits between lessors and lessees; and *Arts.* 1000, 1017, for summons in cases against corporations illegally formed and of usurpation of office.

**76.** Writs of summons must be returned into the office of the clerk of the court on or before the day fixed. *C. S. L. C. c.* 83, *s.* 9.

**77.** The writ must be accompanied with a return or certificate of service. *Ord.* 1667, *tit.* 2, *Arts* 1, 2.

**78.** Such return of service, if made by a bailiff, must state:

1. His names, his residence, and the district for which he is appointed;

2. The day and hour of the service;

3. The place where and the person with whom a copy of the writ was left;

4. The distance from the bailiff's residence to the place of service;

5. The distance from the court-house to the defendant's domicile, or the place of service;

6. The amount of the costs of service.

If the return is made by the sheriff, it must contain the same statement, with the exception of what is mentioned in the first paragraph.

*Ord.* 1667, *tit.* 2, *Arts.* 2, 3, 5; *C. P. C.* 61, 67; *C. P. L.* 201-2.

1. A bailiff's return of the service of a notice of motion for a writ of *certiorari* is sufficient without being otherwise proved under oath. *Roy exp.*, 7 L. C. J. 109, S. C. 1863.

2. A bailiff is subject to a fine and imprisonment if he makes overcharges. *Deguire* v. *Despins et al. & Désormeau*, 6 R. L. 736, S. C. 1874.

3. A bailiff cannot charge mileage from the Court House when his own place of residence is closer to the place of service.

*Election Lists of Berthier in re & Ralston*, 8 R. L. 748, S. C. 1878. *Lozeau* v. *Coté*, 1 R. L. 49, S. C.

4. A bailiff cannot charge mileage from his place of residence to the place where a writ served by him is returnable, nor can he charge mileage in the same manner for remitting money levied under execution, his duty being in the first place to transmit his return by mail, and in the second to transmit the money by post office order. *Boswell* v. *Belfian*, 15 L. C. R. 22, C. C. 1864.

5. A bailiff is entitled to a double fee when he is obliged to return a second time and effect a service, in consequence of the absence of the defendant from his domicile, provided he waits a reasonable time for his return. *Brunelle* v. *Chagnon*, 2 R. L. 129, C. C. 1870.

6. The service of a writ of summons to the defendant in a sealed envelope, by a bailiff who is ignorant of the contents of such envelope, is insufficient and illegal. *La Banque du Peuple* v. *Gugy*, 6 L. C. R. 281, S. C. 1856.

7. But *held*, in appeal, that, where the defendant was served with a copy of the writ and declaration in a sealed envelope, he could not plead want of notice of action, nor would an inscription in improbation lie against such return of service, when the sealed envelope enclosing the copy of the writ and declaration is produced as evidence of the service. Ib., and 9 L. C. R. 484, Q. B. 1857.

8. The omission in the Sheriff's return of the county or parish in which the process *ad respondendum* has been served does not amount to a nullity *d'exploit*. *Lambert* v. *Roberge*, 3 Rev. de Leg. 306, K. B. 1813.

9. The bailiff who serves an action must make mention, in his return, of the district for which he was appointed. *Dorion* v. *Dorion*, 5 R. L. 249, C. C. 1871.

10. He must also state in what year the service was made, and what was the distance from his domicile to the place of service. Ib.

11. A return of a bailiff may be dated in figures. *Lamothe* v. *Garceau*, 7 L. C. J. 115, Q. B. 1862.

12. A bailiff's return, stating that he made the service between eleven o'clock and noon is sufficient. *St. Denis* v. *Bélanger*, 15 L. C. J. 84, S. C. 1870.

13. Where the bailiff, in his return, styled himself a bailiff of the Superior Court "for the Circuit of Quebec"—*Held*, not to vitiate the return. *McCallum* v. *Pozer*, 1 L. C. R. 40, S. C. 1850.

14. Where the defendant is described as being of the City of Quebec, and service is alleged to have been made at his domicile, Quebec, such mention is a sufficient indication that the City of Quebec is intended.

The omission to state the distance from the bailiff's residence to the place of service, and from the Court House to the defendant's domicile, or place of service, does not invalidate the return. *Hearn & Molony*, 3 Q. L. R. 339, Q. B. 1877.

**79.** The truth of the return can only be contested by improbation [unless the court orders otherwise].

1. On a special demurrer alleging the want of service of the writ and declaration in the case—*Held*, that the court would, on consent given to that effect by the plaintiff, order proc upon such demurrer, without any inscription *en faux*. *Charlton* v. *Carey*, 6 L. C. R. 268 S. C. 1856.

2. In an action *en retrait lignager* on an exception by the defendant —*Held*, that the omission to state in plaintiff's return of service the residence or domicile of the bailiff or of the persons accompanying him as *recors* was fatal to the demand, and such omissions might be pleaded in such actions by a plea *au fonds*, and not merely by preliminary exception. *Dansereau* v. *Collette*, 5 L. C. J. 71, Q.B. 1847.

3. The only way evidence can be admitted to impeach the return of a bailiff alleged to be false is by an inscription *en faux*. *McLimont* v. *Robin*, 15 L. C. R. 37, S. C. 1864.

4. A bailiff's return remaining unimpeached by testimony of record, will be held conclusive. *Moss et al v. Ross & Ross & Monk*, 9 L. C. J. 328, S. C. 1865.

5. The return of a bailiff can only be contested and set aside on an inscription in improbation. *The Trust & Loan Company of Upper Canada & McKay*, 9 L. C. R. 465. Q.B. 1859.

6. A bailiff's return of service may be contested on motion without improbation. unless the court otherwise orders. *McMillan & Buchanan*, 17 L. C. J. 13, Q. B. 1873.

7. A bailiff's return made under his oath of office may be contested by summary petition without improbation, unless the court otherwise orders, and by such petition one may pray, not only that the return be set aside as false, but that the action of which it is the return may be dismissed with costs. *Brosseau* v. *Alves & David*, 17 L. C. J. 228 S. C. 1873.

8. And *held*, also, that contestation may be joined on such petition. Ib.

9. A bailiff's return cannot be attacked by exception to the form *Irish* v. *Brome*, 1 L. C. L. J. 111, S. C. 1865.

10. A sheriff's return of service of a writ of summons may be contested on motion without improbation. *Hudon et al.* v. *Solman et al.*, 12 L. C. J. 120, S. C. 1868.

But see Art. 159 *post*.

**80.** The court may grant leave to amend any error in the return.

1. In an action of *saisie gageris par droit de suite*, on an exception to the form—*Held*, reversing the judgment of the court below, on the motion of the sheriff himself, that he might be allowed to amend his return on a writ in the cause, and that he was competent to make

such motion himself. *Molson et al. & Burroughs*, 3 L. C. J. 220 & 9 L. C. R. 217, Q.B. 1859.

2. But where the bailiff moved to be allowed to amend his return of service of a writ after inscription in improbation had been filed against it, the motion was rejected with costs. *Hobbs* v. *Seymour*, 7 L. C. J. 46 & 13 L. C. R. 75, S. C. 1862.

3. But subsequently, on a petition to the same effect—*Held*, that, though the bailiff could not come into the case by motion, the court might, nevertheless, grant the petition on payment of all costs occasioned by the error. Ib.

4. A bailiff's return may be amended on motion of the advocate interested, but, as the bailiff himself only can amend it, the notice should be simply that he be authorized to do so. *Bowie* v. *Kelly*, 4 R. L. 389, S. C. 1872.

5. A bailiff's return may be amended on verbal testimony. *Bickell* v. *Richard*, 1 Legal News 130 Q. B., 1878.

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## CHAPTER SECOND.

### OF THE RETURN.

**81.** Every writ of summons, and every writ of capias or attachment, must be filed in the office of the clerk, on or before the day on which the defendant is therein summoned to appear, or upon the next following juridical day, in the case of article 3. *C. S. L. C.*, *c.* 83, *ss.* 5, 9.

1. The failure on the part of the plaintiff to pay the entrance fee on the day of return of a writ does not vitiate the return. *Lee et al.* v. *Kinsman et al.*, 14 L. C. R. 156, S. C. 1863.

**82.** [If the writ is not returned, as hereinabove provided, the defendant may obtain the benefit of a default against the plaintiff, and be discharged from the suit, with costs, upon filing the copy of the writ served upon him.] *C. S. L. C. c.* 83, *ss.* 66, 189, § 4; *C. P. C.* 154.

1. On motion the court will accord *congé défaut*. *Garièpy & Couvrette*, 15 L. C. J. 82, S. C. 1871.

2. On a motion for *congé-défaut* no notice is necessary. *Gagnon & Sénécal & Gouin*, 4 R. L. 537, S. C. R. 1873. *Chalut* v. *Valade et al.*, 21 L. C. J. 218, S. C. 1877.

3. *Congé-défaut* on a *rule* will be granted without costs. *Larin* v. *Deslorges & Séré*, 21 L. C. J. 206, S. C. 1877.

## SECTION I.

## OF APPEARANCE.

**83.** The defendant, when duly summoned, must appear, either in person or by attorney, and must file a written appearance in the office of the clerk of the court, on the day fixed, or on the next following juridical day. *C. S. L. C., c.* 83, *s.* 9; 22 *Vict. c.* 5, *s.* 31; *C. P. C.* 149.

1. Where two defendants have appeared separately, but by the same attorney, they may, nevertheless, join in their defence and file the same pleas. *Arsenault* v. *Rousseau et al.*, 3 R. L. 28, S. C. 1871.

2. When an action had been taken by a firm of two attorneys as of record, but the return was signed by one of them only, while the other appeared for the defence, and confessed judgment—*Held*, on motion to set aside the judgment, that the fact of the same attorney appearing for both plaintiff and defendant was not such an irregularity as would involve an absolute nullity in the proceedings. *Molson et al.* v. *Burrough*, 2 L. C. J. 107, S. C. 1858.

3. Where the defendant appeared, though not served with a copy of the writ and declaration, and the plaintiff moved to reject the appearance on that ground—*Held*, that an attorney *ad litem* has a right to appear, even where the defendant was not served with a copy of the writ and declaration. *Whitney* v. *Dunning et al. & Mulholland et al.*, 6 L. C. J. 30, S. C. 1861.

4. An appearance and plea by a person who was not served in the cause though the writ purported to be addressed to him, will be rejected with costs, where the evidence showed that he was aware of the error in the writ. In such a case if a party fears that judgment may be erroneously rendered against him, his proper course is to come in by

an intervention. *The Exchange Bank* v. *Napper et al.*, 21 L. C. J. 278, S. C. 1877.

*Vide Grinton* v. *The Montreal Ocean S. S. Co.*, *post Art.* 116.

5. A judge in chambers has no power to reject from a record an appearance irregularly filed. *Duvernay et al.* v. *The Corporation of the Parish of St. Bartholomew*, 10 L. C. J. 136, S. C. R. 1866.

6. The defendant had left the Province, and the service was made at the place of his last domicile in the Province. Appearance, however, was filed for him by attorney, which the plaintiff ignored, and after having called in the defendant by advertisement proceeded *ex parte*—*Held*, in appeal, that all the proceedings had must be set aside, as the service was covered by the appearance which the plaintiff had no right to question. *McKercher & Simpson*, 6 L. C. R. 311, Q. B. 1856.

Where two attorneys *ad litem* had appeared for the same party in the same cause—*Held*, that the Court would not take cognizance of the case until it was decided who was the attorney *ad litem* representing the party in question. *Giguère & Beauparlant et al.*, 4 R. L. 685, C. C. 1873.

## SECTION II.

## OF ELECTION OF DOMICILE.

**84.** Every party appearing in person is held, by reason of such appearance, to have elected domicile in the office of the prothonotary in which his appearance is filed.

Whenever one of the parties has, since the commencement of the suit, left Lower Canada, or has no domicile therein, all orders, rules, notices or other proceedings, may be served upon him at the prothonotary's office, as being his legal domicile, provided the bailiff alleges in his return that he has made fruitless endeavours to find him, and that to the best of his belief, he is not within the limits of Lower Canada. *C. S. L. C. c.* 83, *s.* 64.

*See* 33 *V. c.* 17, *s.* 1 (*Que.*), *ante Art.* 48.

**85.** Advocates and Attorneys are bound to elect domicile within a distance of one mile from the building in which the court is held, and to have the same, as well as any subse-

quent change thereof, registered in the prothonotary's office, in the register kept for that purpose.

In default of making such election of domicile, or of registering the same or any change thereof, such attorneys are held to have elected domicile at the prothonotary's office, where all services upon them may be validly made.

*C. S. L. C. c.* 83, *ss.* 11, 64; *Rules of Practice*, 2, 87.

1. Where the bailiff had made his return of service of a petition for appeal to the Circuit Court, stating that he had served it upon the attorneys of the respondent, by leaving a copy with the clerk of the court, omitting to state that the said attorneys had no domicile within the limits allowed by law—*Held*, to be null, on the ground of such omission, and the petition was dismissed. *Groom* v. *Boucher*, 2 L. C. J. 69, S. C. 1857.

2. In an action against a corporation, where the question arose as to the authorization of the attorney of the defendants—*Held*, confirming judgment of court below, that neither according to the English nor the French law was the attorney *ad litem* bound to produce his authority when pleading and acting for a corporation, and such a question could only arise between the attorney and the corporation itself. *Duvernay* v. *The Corporation of St. Barthelemy*, 1 R. L. 714, Q. B. 1868.

3. Where the attorney of record has duly elected a domicile, he is bound to have some one to represent him at such domicile. *Aimbault et vir* v. *Bates et al.*, 13 L. C. J. 139, S. C. 1869.

4. Where a bailiff served the attorney of the defendant at the office of the prothonotary, but made his return to state merely that he made the service speaking to the prothonotary, the service was *held* to be null. *Molleur* v. *Marchand & The Attorney-General*, 5 R. L. 379, S. C. 1874.

5. A defendant has no right to except to or deny the right of the plaintiff's attorney to bring the action. *Leary et vir* v. *Plamondon et al.*, 17 L. C. J. 75, S. C. 1870.

6. Personal service upon the attorney *ad litem* who resides in another district, is good though he have an elected domicile where service could be made, in the district where the action was pending. *McCallum* v. *Harwood et al.*, 22 L. C. J. 279, S. C. 1878.

See Art. 462, *post.*

## SECTION III.

## OF NON-APPEARANCE.

**86.** If the defendant does not appear within the delays prescribed, the prothonotary, on the next following juridical day, must enter a default against him, and the plaintiff, upon obtaining a certificate of such entry, may proceed to judgment *ex parte*.

*C. S. L. C. c.* 83, *ss.* 9, 189, 196; 22 *V. c.* 5, *s.* 31; *C. P. C.* 149.

1. A defendant who does not appear admits, by default, the character in which he is sued. *Auld* v. *Milne*, 3 Rev. de Leg. 351, K. B., & 2 Rev. de Leg. 333, K. B., 1819.

**87.** Notwithstanding the entry of such default, the defendant may, at any time before judgment, upon special application and sufficient cause shown, be relieved from it, upon such conditions as the Court may think proper to impose. *C. S. L. C. c.* 83, *s.* 10.

**88.** This application must be served upon the plaintiff at least one clear day before it is presented. *Ibid.*

1. A judge in chambers has power on petition to set aside a default entered against the defendant. The "one clear day" mentioned in Art. 88, must be a juridical day. *Crebassa* v. *Ethier*, 2 R. L. 332, S. C. 1870.

2. Where the defendant had made default—*Held*, that he could not have the default set aside for the purpose of obtaining peremption of the *instance*. *Courville* v. *Levar & Levar*, 6 L. C. J. 256, S. C. 1862.

3. Where default has been entered in an action and judgment pronounced *ex parte* during term, such judgment and default may be set aside, and defendant allowed to appear and plead, on motion to that effect, supported by an affidavit that it was through error or neglect on the part of the defendant's attorney that an appearance and plea had not been filed. *Derepentigny* v. *Doherty*, 7 L. C. J. 287, S. C. 1863.

4. Where, in an action on a capias, the defendant had failed to appear, owing to an accident, his instructions to appear not being com-

municated to his attorney until after default was entered, he was allowed, on motion, supported by affidavit, to appear and plead to the action, on payment of fifty shillings costs. *Brisson* v. *McQueen*, 7 L. C. J. 70, S. C. 1862.

5. Where the defendant, five months after the service of the action, moved to be allowed to appear and plead—*Held*, that, as the action was one of damages, he would be allowed to do so on paying full costs of the action. *Hayden* v. *Fitzsimmons*, 1 L. C. J. 9, S. C. 1856.

6. The Court will set aside a default and dismiss the action, if it appears on the *délibéré* or at the hearing that the default has not been regularly obtained, and the defendant has not been regularly summoned. *Shepherd* v. *Tonnancour*, 3 Rev. de Leg. 350, K. B. 1818.

## SECTION IV.

### OF JUDGMENT BY DEFAULT FOR NON-APPEARANCE.

**89.** If, in any action founded upon a bill of exchange, promissory note, *cedule*, cheque, act or private writing, the defendant fails to appear or to plead, judgment may be rendered out of term, upon the written application of the plaintiff, without its being necessary to prove the signatures to such documents [or to make any other proof]. *C. S. L. C. c.* 83, *ss.* 86, 113.

**90.** Judgment may be rendered in the same manner when the action is founded upon an authentic document. *Ibid.*, *s.* 113.

1. Where a defendant has not appeared and default has been entered, a motion to proceed *ex parte* is not necessary. *Kershaw & Delisle et al.*, 1 L. C. R. 494, S. C. 1851.

2. Where, in an action against partners on a promissory note, the defendants have failed to plead, judgment may be rendered without the necessity of proof. *Foley et al.* v. *Forrester*, 16 L. C. R. 441, Q. B. 1866.

**91.** In actions founded upon verbal agreements to pay specific sums of money, or upon detailed accounts, or for goods sold and delivered, or for money lent, judgment may

likewise be rendered forthwith, upon production, together with the inscription for judgment, of an affidavit of the plaintiff or one of the plaintiffs, or of any other credible person, whether competent or not to be a witness in the case, duly made before a judge, or the prothonotary, or a Commissioner of the Superior Court, and establishing that, to the knowledge of the deponent, the amount claimed is due by the defendant to the plaintiff. *Ibid.*

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FORM No. 28.

In connection with the Article 91.

*Affidavit of the Plaintiff (or one of the Plaintiffs).*

Lower Canada,
District (*or* Circuit) of } In the Superior (*or* Circuit) Court.

A. B., Plaintiff, *vs.* C. D., Defendant.

A. B., of , the plaintiff (*or* one of the plaintiffs) in this cause, being duly sworn, doth depose and say, that the sum of , being the amount demanded of the defendant in this cause, is justly due by him to the plaintiff (*or* plaintiffs) therein, for the causes in his (*or* their) *demande* mentioned: and the said deponent hath signed (*or* hath declared himself unable to sign, being thereunto duly required).

*Signature,* A. B.

Sworn before me, at , this day of 18 .

J. S. P.

*Signature of the Judge, Prothonotary, Clerk or Commissioner.*

FORM No. 29.

In connection with Article 91.

*Affidavit of a person other than a plaintiff.*

Lower Canada,
District (*or* Circuit) of } In the Superior (*or* Circuit) Court.

A. B., Plaintiff, *vs.* C. D., Defendant.

E. F., of , being duly sworn, doth depose and say, that to his personal knowledge, the sum of being the whole (*or* part, *as the case may be*) of the amount demanded of the defendant in this cause, is justly due by him to the plaintiff (*or* plaintiffs) for the causes in his (*or* their) *demande* mentioned; and the said deponent hath signed, (*or* hath declared himself unable to sign, being thereunto duly required.)

*Signature,* A. B.

Sworn before me, at , this day of 18 .

J. S. P.

*Signature of the Judge, Prothonotary, Clerk or Commissioner.*

1. The affidavit on which judgment by default is granted by the clerk of the court is equivalent to the deposition of a witness in court, and holds the place of proof by enquête. *D'Amour et al.* v. *Bourdon*, 17 L. C. J. 85, C. C. 1873.

2. In a case brought under the Lessor and Lessee Act in which judgment had been rendered by default—*Held*, on opposition and appeal, that the deputy prothonotary had power to render such judgment by default in vacation and in the absence of the judge. *Waggoner & Ricker et al.*, 13 L. C. R. 102, Q. B. 1862.

**92.** In every such case, the prothonotary in vacation, upon the case being inscribed for judgment, draws up a judgment in the name of the Court, conformably to the demand

and to the amount which appears to be due; and such judgment is held to be the judgment of the Court, and is recorded accordingly.

No such judgment can, however, be rendered or recorded against any absentee defendant, who has been summoned as such. *Ibid. ss.* 113, 127.

**93.** The plaintiff may, at any time before executing such judgment, renounce the same, and upon filing with the prothonotary his renunciation in writing, he may proceed in the ordinary form, in the same manner as if it had not been rendered; he must, however, bear the costs of such judgment. *Ibid. s.* 126.

## SECTION V.

## OF CONFESSION OF JUDGMENT.

**94.** The defendant may, at any stage of the proceedings, file, or cause to be taken down in writing at the prothonotary's office, a confession of judgment for the whole or any part of the demand.

The confession must be signed by the defendant, or be made by his special attorney, whose power of attorney, in authentic form, must be filed with such confession.

25 *Vict. c.* 10, *s.* 10.

1. Action was taken against the members of a dissolved partnership on a promissory note, and one of the defendants confessed judgment for both jointly and severally—*Held*, that a partner after dissolution could not confess judgment in an action brought against the late partnership, and judgment entered upon such confession would be set aside on opposition. *The Canada Lead Mine Company & Walker et al. & Steiven*, 11 L. C. R. 433, S. C. 1861.

2. A confession of judgment to which the defendant has set his cross, countersigned by his attorney *ad litem*, is invalid and insufficient, as the defendant must attach his signature to the confession, and, if unable to sign, the confession must be made by means of a notarial instrument. *McKenzie & Jolin*, 5 L. C. R. 64, S. C. 1855.

**95.** [If the person who appears as defendant in order to confess judgment, is unknown to the prothonotary, the latter must require him to produce the copy of the summons, or to procure the counter-signature of an attorney-at-law.]

**96.** If the plaintiff accepts such confession, he may inscribe the case forthwith for judgment, and the prothonotary draws up, in conformity with such confession, a judgment, which is held to be the judgment of the court, and is recorded and executed accordingly.

The judgment thus drawn up need not mention the presence of a judge, but it must contain a recital of the confession, as it was given, and of the inscription by the plaintiff, and, lastly, the condemnation in the name of the court against the defendant. *Ibid.*

**97.** If the confession of judgment is not accepted, the plaintiff must give the defendant notice to that effect, and after such notice the case is proceeded with in the ordinary course; and if the plaintiff does not obtain more from the court than he would have had upon the confession, he is not entitled to more costs than if the confession had been accepted; saving the power of the court to grant the defendant whatever costs of contestation it may think proper.

1. The defendant admitted a part of the amount claimed, and tendered the same with his plea. After contestation judgment was rendered for a larger sum than that tendered, but not for the full amount of plaintiff's demand—*Held*, that the plaintiff must pay the costs of contestation from the time of filing the plea. *Routh* v. *Dougall*, 2 L. C. J. 286, S. C. 1858.

2. But where the defendant had not tendered the amount which he acknowledged to be due, although the court awarded no larger amount to plaintiff than that admitted by defendant, the latter was condemned to pay the necessary costs of action. *McFarlane* v. *Rodden et al.*, 2 L. C. J. 286, S. C. 1854.

3. An admission in a plea of a portion of plaintiff's demand, unaccompanied by an actual confession of judgment, will not entitle the defendant to the costs in case the plaintiff does not obtain judgment

for more than the amount admitted, and under any circumstances a prayer in such plea that the defendant be condemned to pay costs as in an uncontested case only, is irregular. *Latham* v. *Martin*, 18 L. C. J. 287, S. C. R. 1874.

**98.** [If there are several defendants in the same suit, some only of whom confess judgment, the plaintiff may proceed upon such confession to recover against those who have acknowledged their indebtedness, saving his right to continue the suit against the others.]

## SECTION VI.

## OF THE FILING OF EXHIBITS.

**99.** The plaintiff must, at the time that he returns the writ, file in the prothonotary's office the written proofs which he has alleged in support of his demand, together with a list or inventory of such exhibits. *Ord.* 1667, *tit. XI., Art.* 6.

1. A party to a case may at any time produce and file at enquête, without notice to the adverse party, papers and documents not proved, provided they appear to bear on the case, and the materiality of such documents will be adjudicated upon at the final hearing. *Mills* v. *The Granby Red Slate Company*, 13 L. C. J. 166, S. C. 1869.

2. No papers can be filed or produced in evidence after the enquete is closed. If a party intends 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* v. *Chappers*, 3 Rev. de Lég. 353, K. B. 1821.

3. Exhibits offered at the enquête before a jury are by law referred to the consideration of the jury and not to the consideration of the court, and upon writ of error are not to be sent up to the Court of Appeals. *Flower et al.* v. *Dunn*, 3 Rev. de Lég. 353, K. B. 1820.

4. Exhibits produced at the enquête, or filed before, may be detained and impugned if there be cause to doubt their authenticity. *Allen* v. *Harris*, 3 Rev. de Lég. 353, K. B. 1811.

5. Where a copy of a notarial act filed as an exhibit had been mislaid—*Held*, that the court would permit another copy to be filed. *Osgood* v. *Lelievre*, 3 Rev. de Lég. 353, K. B. 1818.

6. Where in the declaration of certain garnishees they referred to certain documents—*Held*, on motion of plaintiff, that they would be required to file such documents at their own expense, as exhibits in support of their declaration. *Forsyth* v. *The Canada Baptist Missionary Society & Leeming et al.*, 2 L. C. J. 167, S. C. 1852.

7. Where the defendant objected to the sufficiency of an exhibit, and moved to reject it from the record—*Held*, that the proper recourse was to demand delay to plead, until a sufficient exhibit had been filed. *Strother* v. *Torrance*, I L. C. J. 83, S. C. 1857.

8. Where the plaintiff had inscribed *en faux* against a notarial receipt, the defendant notified the notary to produce his minute of the document, and the minute being produced, the plaintiff moved that a list be filed of such exhibit by the defendant before he be compelled to proceed with his *moyens de faux*, the motion was granted with costs. *Moreau et vir* v. *Leonard*, 2 L. C. J. 136, S. C. 1859.

9. Motion was made by the defendant to reject from the record certain exhibits which were filed with the articulation of facts as having been filed too late—*Held*, that the 76th sec. of the Judicature Act of 1857 had virtually repealed the 24th Rule of Practice, requiring the filing of exhibits with the declaration, and the motion was rejected. *Denis* v. *Crawford*, 4 L. C. J. 147, S. C. 1860.

10. Copies of old plans produced by a party in support of his pretensions will be considered as exhibits, and taxed as such. *Brown* v. *Gugy*, 12 L. C. R. 413, S. C. 1862.

11. An admission by defendant's attorney of the existence of a will referred to in plaintiff's declaration, and the consent that an authentic copy thereof should be considered filed in the cause as plaintiff's exhibit No. 1, is null and void and of no effect. *Hynes* v. *Lennon et al. es qual.*, 12 L. C. J. 53 and 4 L. C. L. J. 61, S. C. 1867.

12. Where exhibits were filed c . the return of the action which were not mentioned in the declaration, and the defendant made motion at the hearing on the merits to have them rejected from the record—*Held*, that, even if they were not regularly produced, the motion to reject them was too late. *Chevrefils* v. *Les Syndics de la Paroisse de Ste. Hélène*, 2 R. L. 161, S. C. 1869.

13. Exhibits filed in one case cannot be transferred to another without special permission from the court. *Aimbault et vir* v. *Dunlop*, 13 L. C. J. 140, S. C. 1869.

See *Kelly* v. *Fraser*, 2 L. C. R. 368, under Art. 718, *Post.*

14. Where a party opposant has omitted to file his titles with his

opposition, he will not be allowed to file them afterwards at the enquête. *Major et al.* v. *Baby & Selby*, 4 L. C. R. 126, S. C. 1851.

15. Where in an opposition alleging payment, if the plaintiff have contested the opposition without requiring the production of the exhibits relied on, the opposant may produce them at the enquête if necessary by paying any costs which may result therefrom. *Dawson & Desfosses*, 6 R. L. 334, Q. B. 1874.

16. In an action on an account it is not necessary to serve a copy of the account with the action, it being sufficient to produce such copy when the action is returned into court. *Moffat es qual. & Ouimette*, 6 R. L. 744, C. C. 1875.

**100.** If the exhibits are private writings, or notarial originals, the party may retain them until the articulation of facts, provided he files copy thereof, certified by him or by his attorney. *Bell* v. *Knowlton, Montreal, March*, 1855, 24 R. *of Practice.*

**101.** Exhibits filed cannot be taken out of the office, unless the opposite party consents and a receipt is given. *C. P. C.* 189.

**102.** [Any person in possession of a document filed and forming part of a record, or having taken or received it, may, upon motion, be coerced by imprisonment to return the same, without prejudice to his liability for damages.] *C. P. C.* 107.

1. On a rule against the prothonotary or clerk of the court for contempt because of the non-production of a record, the parties will be ordered to purge themselves of all knowledge in the matter. *Morgan* v. *Valois*, 9 L. C. J. 169 C. C. 1865.

**103.** Until the exhibits have been filed, in the manner hereinbefore prescribed, the plaintiff cannot proceed with his demand; *Ord.* 1667, *tit.* xi, *Art.* 33, *C. P. L.* 321.

1 An action on a promissory note which is not filed will be dismissed. *Hudon* v. *Girouard*, 21 L. C. J. 15, Q. B., 1 *Legal News*, 212.

See *post* Art. 141, and *Foster* v. *Chamberlin*, 2 L. C. J. 285, under Art. 299, *post.*

**104.** Every exhibit filed in a cause becomes common to all the parties to the suit, and they may obtain copies thereof from the prothonotary so long as it remains in his hands.

*Serpillon sur tit.* xi *Art.* 16, *p.* 168; *sur tit.* xvi., *Art.* 9, *p.* 188; *Pothier, Proc.* 44.

*La Banque du Peuple* v. *Gugy*, 9 *L. C. R.* 484, *Q. B.* 1857.

**105.** The prothonotary cannot receive any exhibit in blank, nor any list of exhibits in which the designation of any exhibit is not filled up. *Ord.* 1667, *tit.* xi., *Art.* 32.

**106.** If the exhibits in support of the demand have not been filed on the return day, they cannot be filed afterwards without giving notice to the opposite party; saving the provisions of Article 100.

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## CHAPTER THIRD.

### OF CONTESTATION.

#### SECTION I.

#### GENERAL PROVISIONS.

**107.** All declinatory and dilatory exceptions, and exceptions to the form, which the defendant intends to plead, must be filed within four days from the return of the writ, except in the case mentioned in article 121. *C. S. L. C. c.* 83, *s.* 12.

1. Where motion had been made to reject certain preliminary pleas because they had not been filed within the four days next after the return of the action—*Held*, that as the action was returned in vacation the delay did not run. *Booth & the Montreal and Bytown Railway Company*, 4 L. C. J. 296, S C. 1858.

2. An exception to the form filed on the fifth day after the return day of the action, the fourth being a Sunday, will be rejected on motion under the statute 16 V. cap. 194, sec. 21. *Brock et al. & Théberge*, 9 L. C. R. 231, S. C. 1859.

3. *Held*, that, where a motion was made to quash the writ and dismissed, the defendant will not, after the four days allowed by the statute, be allowed to file an exception to the form, and that in such case the *délibéré* does not suspend the rule requiring all preliminary pleas to be filed within four days after the return of the writ. *Macfarlane* v. *Worrall & The Principal Officers of Her Majesty's Ordnance*, 4 L. C. R. 97, S. C. 1853.

4. Judgment in vacation was taken on an attachment before judgment and afterwards set aside, and the defendant made motion to quash the seizure—*Held*, that a motion to quash made on the fourth judicial day next after return of writ was in time. *Beaufield et al.* v. *Wheeler*. 5 L. C. J. 44, S. C. 1860.

5. An exception may be produced after four o'clock p.m. of the fourth day. *The Carillon & G. R. Co.* v. *Burch*, 21 L. C. J. 46, Q. B. 1876.

*Vide post* Art. 463, as to long vacation, and Art. 128.

**108.** The plaintiff is bound to answer any such exception within eight days after it is filed; excepting where he is himself obliged to call in warrantors; the delay then begins only from the expiration of the delays to which such warrantors are entitled to answer the demand brought against them. *Ibid.*

1. Where the defendants, to an action in which they appeared on the first of August, filed an exception to the form on the fifth of September, and on the eleventh of October plaintiff served a motion on defendant's attorneys to reject the exception, on the ground that it should have been served and filed during the first four days of September, being the first four days after vacation—*Held*, that the exception was irregular, but the motion to reject not having been made within the delay required by law, the plaintiffs were foreclosed from filing by the mere lapse of time. *McDonald et al.* v. *Gamble*, 7 L. C. J. 77, C. C. 1862.

2. A special answer may be filed to an exception to the form. *Reg. ex rel. O'Farrel* v. *Garneau et al.*, 4 Q. L. R. 206, S. C. 1878.

**109**. The defendant, when he is entitled to reply, must file his replication within eight days from the filing of the plaintiff's answer. *Ibid.*

**110**. A like delay of eight days is allowed for the filing of any other pleading that may be necessary, or is permitted by the Court, in order to complete the issues. *Ibid.*

**111**. The party failing to file any such preliminary exception, answer or replication, or other pleading, within the delays prescribed, is by law forclosed from doing so, unless the Court, upon cause shown, has extended the delay, or has otherwise ordered. *Ibid. ss.* 14, 75; 23 *Vict. c.* 27, *s.* 37.

**112**. [No plea containing a preliminary exception can be filed unless it is accompanied with a deposit of such sum of money as is fixed by the rules of practice of the Court.]

1. In cases under $60 no deposit is required with a preliminary exception. *Alie* v. *Pamelin*, 14 L. C. J. 134, C. C. 1869, and *Desjardins* v. *Chretien*, 15 L. C. J. 56, C. C. 1871; *La Compagnie d'Assurance* v. *Beaulieu*, 9 R. L. 432, 22 L. C. J. 267, S. C. 1878.

2. Nor in actions under $100, in the Cities of Quebec and Montreal. *Kennedy* v. *McKinnon*, 3 Q. L. R. 358, C. C. 1877.

3. But *held* that a deposit is required with such preliminary pleas. *Lusher & Parsons*, 17 L. C. J. 196, C. C. 1873.

4. And that in such cases a copy of the exceptions must be served on the plaintiff's attorney. *Ibid.*

5. Where a party has answered without reserve a preliminary exception which has not been accompanied by the necessary deposit, he is foreclosed from demanding its rejection on that ground. *Quintal & Roy et al.*, 14 L. C. J. 57, S. C. 1868.

## SECTION II.

## OF DECLINATORY EXCEPTIONS.

**113**. When a declinatory exception, filed by the defendant, is maintained, the parties must be dismissed, saving

their recourse before a competent Court. *C. P. C.* 168; *C. P. L.* 321.

1. Where a declinatory exception filed to an action requires proof, and the defendant, instead of inscribing for proof, inscribes for hearing on the merits of the exception, it will be dismissed for want of evidence. *Elliott* v. *Bastien et al.*, 2 L. C. J. 202, S. C. 1858.

2. In proceedings affecting corporations or public offices, the defendant may set up against the information a declinatory exception and at the same time pleas to the merits of the petition. *The Attorney-General* v. *Gray*, 15 L. C. J. 255, S. C. R. 1871.

3. A plea which invokes want of jurisdiction *ratione loci* must be pleaded by declinatory exceptions. *Fisher et al.* v. *McKnight et al.* 1 *Legal News* 350, S. C. 1878; 22 L. C. J. 146.

4. Every motion is an act of submission to the jurisdiction of the court, and therefore a service of motion for particulars, admits the jurisdiction. *Monroe et al.* v. *Laliberté*, 3 *Rev de Lég.* 72, K. B. 1810; *Brisson* v. *McQueen*, 7 L. C. J. 70, S. C. 1862.

5. The appellants, as one of their grounds of appeal, urged that the Superior Court had no jurisdiction—*Held*, to have been waived by non-pleader. *Gray et al. & Dubuc*, 2 Q. L. R. 234, Q. B. 1876.

**114.** The parties must also be dismissed by the court, even though no such exception has been pleaded, if the action is manifestly beyond the jurisdiction of the court. *C. P. C.* 170.

**115.** The court, in declaring itself competent, may award costs, according to circumstances. 1 *Pig.* 155.

## SECTION III.

## OF EXCEPTIONS TO THE FORM.

**116.** The following grounds must be pleaded by exception to the form:

1. Informalities in the writ or service;

2. Informalities in the declaration, when it contravenes the provisions contained in articles 14, 19, 50, 52 and 55. 1 *Pig.* 160 *et seq.*

1. Misnomer must be pleaded by peremptory exception, because it relates to the defendant and not to the court, by putting in issue the plaintiff's right of action against him. *Simoneau* v. *Campbell*, 3 Rev. de Lég. 196, K. B. 1818.

2. But that the declaration is not sufficiently libelled, must, on the contrary, be pleaded by exception to the form because it relates to the court, and inasmuch as it avers the declaration to be imperfect, that it is null and void, and the court cannot proceed. Ib.

3. Misnomer cannot be pleaded by exception to the form. *Jones* v. *McNally*, S. R. 56, K. B. 1811. Contra: *Sharples* v. *Dumais*, 3 Rev. de Lég. 195, note, 1846.

4. Where the defendants *en garantie* were employed by the plaintiffs *en garantie* as contractors and manufacturers and co-operators with the plaintiffs *en garantie*—*Held*, competent for them to plead by preliminary exception that they were not such contractors and manufacturers and co-partners, and also by the same exception to attack the correctness of the names and designation assumed by the plaintiffs, and on proof of the truth of such allegations to be entitled to a dismissal of the action of the plaintiffs *en garantie*. *Edmonston et al.* v. *Childs & Childs et al.* v. *Chapman et al.*, 1 L. C. J. 249, S. C. 1857.

5. Where in an action by a Municipal Corporation it was described as the Corporation of St. Martine instead of the Corporation of the Parish of St. Martine, an exception to the form was maintained and the action dismissed with costs. *The Corporation of St. Martine* v. *Henderson*, 4 R. L. 568, C. C. 1873.

6. An exception to the form, filed on the ground that, in the copy of the writ served on the defendant, one of the plaintiffs was styled *Rickard* instead of *Ricard*, was dismissed on motion. *Latour et ux.* v. *Masson*, 6 L. C. R. 483. S. C. 1856.

7. Where a commercial firm plead by exception to the form that the partners are wrongly described in the writ, they must give their correct designation. *Dunning et al.* v. *Girouard et al*, 9 R. L. 177, Q. B. 1877.

8. An exception to the form, denying that the defendant is or ever was domiciled as stated in the writ, but not furnishing the name of defendant's true domicile, will be dismissed with costs. *Barnes* v. *Baras*, 2 Q. L. R. 146, S. C. 1875.

9 An exception to the form, alleging that the defendant is described in the action as having his domicile in one district, and that he was served in another, when it was proved that at the time of the issuing

of the writ, and previous thereto, the defendant had his domicile in the district where he was served, will be maintained. *Hainault* v. *Lynch*, 5 R. L. 472, S. C. 1874.

10. In a case in appeal from a judgment dismissing an exception to the form on several grounds—*Held*, confirming the judgment of the Court below, that the declaration need not necessarily contain the domicile and description of the parties when it is annexed to the writ. *Guyon* v. *Donaghue*, 11 L. C. R. 421, Q. B. 1861.

11. An exception to the form of the service of a writ of declaration was filed in a cause wherein the defendant was described as "of Toronto, in the Home District of Canada West," and the affidavit was to the effect that the service had been made on the defendant by delivering copies of the writ and declaration to the wife of the defendant "of the Township of York, in the County of York, at his place of residence in the said township of York."—*Held*, maintaining the exception, that the service was bad, and the action was dismissed. *The Montreal Assurance Company & McPherson*, 16 L. C. R. 122 and 1 L. C. L. J. 84, S. C. & Q. B. 1865.

12. Action was brought by a wife separate as to property by her marriage contract, and such contract was not alleged in the declaration —*Held*, that the defendant must proceed by exception to the form and not by demurrer. *Walker & the Mayor, &c., of the Town of Sorel*, 5 R. L. 66, Q. B. 1866.

13. Want of authorization of a married woman, party to an action, can only be invoked by preliminary exception and not by demurrer. *Antaya et vir & Dorge et al.*, 6 R. L. 727, S. C. 1873.

14. Where, in the writ and declaration, it was alleged that the female plaintiff was duly authorized by her husband, party to the action —*Held*, that an exception to the form did not lie calling in question such authorization. *Levy et vir & Plamondon et al.*, 17 L. C. J. 75, S. C. 1873.

15. Where the female defendant was described in the declaration as being separate as to property from her husband, and she pleaded that she was not separate as to property, and the plaintiff moved that that portion of the plea should be struck out on the ground that it should have been pleaded by exception to the form, the motion was dismissed. *Wheeler et al.* v. *Burkitt et al.*, 4 L. C. J. 309, S. C. 1860.

16. Action to recover £20,000, balance alleged to be due on advances for building of ships, brought in the name of the sole and surviving partner, and of the wife or widow of the creditor deceased, as his executrix, under his will. Demurrer on the ground that, inasmuch as it

appears by the declaration that the quality of executrix claimed by one of the plaintiffs accrued to her under the laws of a foreign country, the declaration should have shewn what her rights were as executrix in that country—*Held*, reversing the judgment of the Court below, that the action was rightly brought, and also that the grounds of the demurrer ought to have been brought by exception to the form. *Grainger et al. & Park*, 10 L. C. R. 350, Q. B. 1860.

17. In an action by an heir for a debt due to his ancestor, the death of the latter must be alleged in the declaration, and, if it be not, the action upon an exception to the form will be dismissed. *Ross* v. *Wyse*, 3 Rev. de Leg. 39, K. B. 1820.

18. In an action by a railway against a stockholder for calls upon the stock—*Held*, to be sufficient for the plaintiffs to state in the caption of the declaration that they were a body politic and corporate, without a special allegation to that effect, and that the proper mode of raising such an objection is by exception to the form, and not by demurrer. *The St. Lawrence and Ottawa Grand Junction Railway* v. *Frothingham et al.*, 5 L. C. R. 140, S. C. 1855.

19. A firm, originally composed of two partners, admitted a third. The change was not registered, and the firm was sued as if composed of the first two partners only. Service was made at the place of business of the new firm—*Held*, that the plaintiffs were entitled to amend the writ by inserting the name of the new partner, and an exception to the form pleaded by the new member of the firm when thus brought into the case, was dismissed. *The Eastern Townships Bank & Morrill*, 1 Legal News 30, Q. B. 1877.

20. In an action of damages for libel brought against three persons, described as "all of the City of New York, mercantile agents, co-partners carrying on business in the City of Montreal, under the name, style and firm of "R. G. Dun & Co.," exceptions to the form were filed by two of the defendants on the ground, among other things, that the service of process was insufficient and irregular, inasmuch as it had been made at the office of the defendants in Montreal, and that the defendants were entitled to be served personally, or at their domicile, the exception was maintained, and the action dismissed with costs. *McDonald* v. *Dun et al.*, 12 L. C. R. 345, S. C. 1862.

21. Two defendants cannot by exception to the form filed by them jointly plead causes of nullity applicable to only one of them. *The Union Bank of Lower Canada* v. *McDonald et al.*, 19 L. C. J. 275, S. C. 1875.

22. Where the words "Province of Canada" were used instead of

"Dominion of Canada"—*Held*, that the former was sufficient, and the Court would understand that thereby was meant the heretofore Province of Canada. *Milligan* v. *Mason*, 17 L. C. J. 159, S. C. R. 1872.

23. It is no ground for an exception to the form that the sheriff did not certify the copy of the writ of summons which was served on the defendant. *Wilson* v. *Arnold*, 3 Rev. de Leg. 195, K. B. 1817.

24. Where the plaintiff omitted to certify the copy of the declaration served upon the defendant, and the defendant filed an exception to the form—*Held*, that the exception would lie, and that, although the bailiff had returned, that he had served a true and certified copy of the declaration on the defendant, it was not necessary to inscribe *en faux* against the return, it being apparent from the copy admitted by the plaintiff to be the copy served, that it never was certified. *Scantlion* v. *Barthe*, 8 L. C. J. 138, S. C. 1864.

25. An exception to the form which states that no proper service has been made upon the defendant is not libelled as required by law, inasmuch as it did not state the particulars of the defect in the service which is complained of, and such exception to the form should be dismissed. *Beaufoy & Feek*, 20 L. C. J. 182, Q. B. 1875.

26. Where, in a declaration, the amount demanded was expressed in figures—*Held*, that an exception to the form would lie, and the action be dismissed on such exception, though not appealable. *Rivet* v. *Poisson*, 11 L. C. R. 493, S. C. 1861.

27. The defect of insufficient delay upon the service of process *ad respondendum* may be pleaded by exception to the form. *Hunter* v. *Dagenais*, 3 Rev. de Lég. 72, K. B. 1813. *Irvine et al.* v. *Perrault*, 3 Rev. de Lég. 72, K. B. 1819.

28. An exception to the form, based on the fact that at the time of the service on the defendant the bailiff did not inform the latter of the contents of the papers served, will be dismissed on motion to that effect, as the Ordinance on which such formality is based is obselete. *Delorimier* v. *Hurtubise*, 9 L. C. J. 280, C. C. 1865.

29. A defendant has a right to object by exception to the form to the sufficiency of the return made upon process *ad respondendum*, but he cannot plead that no return has been made. *Jones et al.* v. *Morin*, 3 Rev. de Leg. 72, K. B. 1812.

30. Matter essential *omitted* is the subject of a demurrer, but matter essential *imperfectly stated* is the subject of an exception to the form. *Wagner* v. *Farran*, 3 Rev. de Leg. 196, K. B. 1811.

31. And *held*, in another case, that where matter essential is merely imperfectly alleged and not entirely omitted, the defendant should attack the declaration by an exception to the form and not by demurrer. *Walker et vir & The Corporation of Sorel*, 2. L. C. L. J. 22, Q. B. 1866.

32. An exception to the form in which it is alleged that the contents of a paper writing, purporting to be a copy of a declaration, are different from the contents of the original declaration, and are disconnected, absurd and unintelligible, is sufficient. *Doutre* v. *The Montreal and Bytown Railway Company*, 5 L. C. R. 98, S. C. 1854.

33. In an action against an endorser of a note of hand, the omission to set up the protest in the declaration can only be taken advantage of by exception to the form or special demurrer. *Jones* v. *Pelisson*, 2 Rev. de Leg. 29, K. B. & 3 Rev. de Leg. 72, K. B. 1818.

34. A breach of contract insufficiently alleged must be pleaded by exception to the form. *Pacaud* v. *Hooker*, 2 Rev. de Leg. 207, K. B. 1811.

If the breach of contract be imperfectly alleged in the declaration an exception to the form is the proper plea, but if the breach is not at all alleged, advantage may be taken of the omission by demurrer. *Wagner et al. & Farran*, 3 Rev. de Leg. 195, K. B. 1811.

35. The allegations of an affidavit upon which an attachment before judgment has issued may be contested or denied by means of an exception to the form. *Giroux* v. *Gareau & O'Brien*, 8 L. C. J. 164, S. C. 1864.

36. Where an affidavit in an attachment before judgment was attacked by exception to the form on the ground that the allegations in the affidavit were false—*Held*, reversing the decision of the Superior Court, that the exception was the proper proceeding and must be maintained. *Leslie et al. & The Molsons' Bank*, 8 L. C. J. 1, & 12 L. C. R. 265, Q. B. 1861.

But see *Post*, Art. 819.

37. And where the defendant pleaded a cumulation of actions by exception to the form, the pleading was *held* to be bad, and the exception was dismissed. *Hunter* v. *Dorwin*, 1 L. C. J. 287, S. C. 1857.

38. To an irregular incidental demand exception may be taken by exception to the form. *Turner* v. *Whitfield*, 3 Rev. de Lég. 196, K. B. 1811.

39. A petition in nullity of an adjudication filed by a plaintiff to a sale of immovables, will be dismissed on an exception to the form filed

by the *adjudicataire* on the ground that he is not a party to the *instance*, and that he could not legally be brought into the case by a notice, such notice being in the following terms: "To John Boston, "Esquire, sheriff for the district of Montreal; William Brewster, "defendant, and James Haldane, *adjudicataire*. Gentlemen,—Take "notice of the above petition, which will be presented to the Judge "of the said Superior Court, sitting the court, on Friday, the 27th "April instant, at half past ten o'clock, or so soon thereafter as counsel "can be heard." *Joseph* v. *Brewster et al. & Haldane*, 6 L. C. R. 486, S. C. 1856.

40. Where, between the issue and the service of the writ, the jurisdiction of the court was taken away by the erection of a new district—*Held*, that even if the plaintiff had no right to serve the writ, proceedings should have been attacked by an exception to the form and not by a declinatory exception as had been done. *Monty & Ruiter*, 3 L. C. J. 26, S. C. 1858.

41. Where the evidence on a preliminary exception is identical with that which must arise on the merits, it will still be allowed. *Lamb & Brewster et al.* v. *Conners et al.*, 5 R. L. 531, S. C. 1873.

42. An exception to the form cannot be received after a motion for appeal: 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 a motion for particulars admits the sufficiency of the declaration. *Monroe et al.* v. *Laliberté*, 3 Rev. de Lég. 71, K. B. 1810.

43. Where to an action against a corporation three individuals appeared and filed an exception to the form as being the parties at whose office the writ and process were served—*Held*, that, not being the parties to the suit, they could not appear and plead as they had done, and the exception was dismissed. *Grinton* v. *The Montreal Ocean Steamship Company*, 1 L. C. J. 84, S. C. 1857.

*Vide The Exchange Bank* v. *Napper et al.*, *ante*, Art. 83.

44. On a motion to dismiss an exception to the form—*Held*, that the merits of such an exception could not be brought before the court by motion. *Clark et al. & Clark et ux.*, 1 L. C. J. 99, S. C. 1857.

45. An exception to the form will be dismissed upon motion, and held to be not served, if the copy left with the plaintiff bears a different number from, and is not an exact copy of, the original filed. *McMillan & Buchanan et al.*, 17 L. C. J. 13, Q. B. 1873.

46. Where in a motion to dismiss an exception to the form, the plaintiff urged, amongst other things, that it was endorsed with a wrong

number—*Held*, that the exception would not be dismissed on that ground, as the proper number was not required on pain of nullity, but only to facilitate the proceedings. *Leslie & Fraser*, 15 L. C. R. 43, S. C. 1864.

47. An exception to the form containing erasures and marginal notes which were not referred to at the bottom of the paper was *held* nevertheless to be good. *Blackiston* v. *Rosa*, 10 L. C. R. 399, S. C. 1860.

48. Where the plaintiff made a motion to reject an exception to the form as not filed within the proper delays, and afterwards answered the exception in law without reserve of the motion—*Held*, that the answer was a waiver and *desistement* of the motion. *Copland et al.* v. *Cauchon et al.*, 14 L. C. J. 242, C. C. 1869.

49. Where an exception to the form had been filed to plaintiff's action—*Held*, that the plaintiff might plead new facts in estoppel to such exception, but that the merits of such estoppel could not be heard upon motion. *The Beacon Fire and Life Insurance Company of London & Whyddon*, 1 L. C. J. 178, S. C. 1857.

**117**. The plaintiff, upon an exception to the form, as well as at any other time before judgment, may, by leave of the court, amend either the writ or the declaration, on payment of such costs as the court determines. *C. S. L. C. c.* 83, *s.* 67.

1. A declaration cannot be so amended as to change the nature of the action.

An amendment whereby the plaintiff would set up a promissory note as an acknowledgment of a loan, would change the nature of the action which had been brought for the recovery of the amount of the loan. *Venner* v. *Seguy et al.*, 4 Q. L. R. 6, S. C. 1878.

2. Where an amendment of the declaration is of such a nature as materially to alter the allegations and conclusions, an opportunity of answering the declaration as amended should be afforded the defendant, and therefore a judgment granting a motion to make such alterations and pronouncing finally on the merits of the cause at the same time, will be reversed. *Montrait & Williams*, 22 L. C. J. 19, Q. B. 1877.

3. The failure to state in the writ the plaintiffs' names in full, and the giving a wrong name to the defendant, are not mere irregularities subject to amendment, but absolute nullities. *Parent* v. *Pacaud*, 4 Q. L. R. 73, S. C. 1878.

4. The amount of costs payable on the amendment of a declaration is within the discretion of the court. *Daoust* v. *Deschamps*, 4 L. C. R. 425, S. C. 1854.

5. And where the plaintiff was allowed to amend his declaration during enquête, it was on payment of costs as of an action settled at the stage at which the action then was, viz., after inscription for enquête. *Syme et al.* v. *Heward*, 6 L. C. J. 311, S. C. 1856.

6. A plaintiff on being allowed to amend his declaration after exception filed, must pay the full costs of action. *Boudreau* v. *Richer*, 6 L. C. R. 474, S. C. 1856.

7. The court will, if demanded, grant a motion to suspend all proceedings until the costs are paid. *Miville* v. *Caron*, 3 Rev. de Lég. 392, K. B. 1817.

And see Art. 53 *ante* and Art. 320 *post.*

**118.** If the copy of the writ or of the declaration is incorrect, or different from the original, the plaintiff may, upon leave of the court, and on payment of costs, furnish the defendant with a correct copy. 2 *L. C. R.* 110.

1. Where an exception to the form has been filed on the ground that the copy of the declaration served on the defendant was not certified, and the plaintiff has obtained permission of the court to serve a properly certified copy on payment of costs, the defendant cannot proceed any further with his exception. *Mallette* v. *Tremblay*, 14 L. C. J. 209, S. C. 1869.

2. If the defendant appears, the non-service of the copy of the declaration will only authorize the defendant to move for a copy, and the right to plead should date from the day of service of such copy. *Montminy* v. *Tappin*. 3 Rev. de Lég. 308, K. B. 1820.

**119.** Nullities in the writ or service, and informalities in the declaration, are waived by the appearance of the defendant and his failure to take advantage of them within the delays prescribed. *C. P. C.* 175.

1. Where the defendant had left the Province before the service of the writ which was made at his last domicile, and appearance was filed for him by an attorney—*Held*, that such appearance covered the irregularity of service, and all proceedings had afterwards by the plaintiff *ex parte*, who called in the defendant by advertisement and ignored

the appearance, were null, and must be set aside. *McKercher & Simpson*, 6 L. C. R. 311, Q. B. 1856.

2. Where a real action was brought in a different district to that in which the immoveable in question was situated—*Held*, that an appearance by a defendant without pleading to the form or to the merits of the action was a waiver of an exception to the jurisdiction. *Whyte es qual. & Lynch et al.*, 17 L. C. J. 76, S. C. 1870.

3. The appearance of the defendant without pleading a defect in the service of the summons is a waiver of the irregularity. *Bélanger* v. *Perrault*, 3 Rev. de Lég. 350, K. B. 1817.

4. If the notice endorsed on the declaration be irregular, the irregularity is cured by the appearance on the return day, notwithstanding an exception to the form. *Chamberland* v. *Raymond*, 3 Rev. de Lég. 195, K. B. 1820.

5. Where the Court, on the point of rendering judgment, perceived that there was no writ in the record and no evidencee of summons, but the defendant had appeared—*Held*, dismissing the *délibéré*, that though the defendant by his appearance had the right to waive a want of service, still it is necessary that a writ of summons should have issued, and that it should appear so by the record, in order to give jurisdiction to the Court. *Taylor* v. *Sénécal et al.*, 3 L. C. J. 53, S. C. 1858.

## SECTION IV.

## OF DILATORY EXCEPTIONS AND SPECIALLY OF ACTIONS IN WARRANTY.

**120.** The defendant may stay the suit by dilatory exception:

1. If the delays to which he is entitled for the purpose of making an inventory and deliberating, whether as heir, or legatee, or in the case of community of property, have not expired;

2. If he has a right to demand security from the plaintiff, or the execution of some precedent obligation;

3. When the plaintiff contravenes the rule that the parties should remain in their respective positions until these are changed by judicial authority;

4. When the defendant has a right to exercise a recourse in warranty against a third party;

5. When he has a right to demand the discussion of the principal or original debtor;

6. When the plaintiff has joined in his action several claims which are incompatible, or susceptible of different modes of trial; and in such case the defendant cannot be bound to defend the action until the plaintiff has declared his option;

7. If the plaintiff does not reside in the Province, and a power of attorney from him is not produced;

8. If, in the case of an invisible right or claim, all the parties interested, and whose presence is necessary, are not made parties to the suit.

1 *Pig.* 166, 170, 173, 179, 188, 197, 200; *Pothier Proc*, 28, 29; *Ord.* 1667, *tit.* viii., *Arts.* 1, 2; *tit.* ix, *Art.* 2; *C. P. C.* 174; *C. P. L.* 152, 392.

1. In an action for the payment of the price of a lot of land, the fulfilment of the condition that the vendor should furnish to the purchaser, within one year, the letters patent from the Crown which constitute the former's title, was a "precedent obligation," and the non-execution of the same was properly pleaded by dilatory and not by temporary exception. *Bouchard* v. *Thivierge*, 4 Q. L. R. 152, S. C. 1878.

2. On an action for thirty-six dollars, balance of salary claimed by the plaintiff, a clerk—*Held*, on a dilatory exception by the defendant, that where the clerk has collected money for his employer, for which he has not accounted, the defendant is entitled to stay of proceedings until such account be rendered. *Thompson* v. *Bourget*, 17 L. C. R. 269, C. C. 1867.

3. That costs due on a former action are not paid cannot be pleaded by exception, but a motion to stay proceedings will be allowed, if it appear that the former action was for the same cause, and was heard upon the merits. *Chartier* v. *McLeish*, 3 Rev. de Lég. 70, K. B. 1821.

4. Non-payment of costs in a former action cannot be the subject of a dilatory or peremptory exception. *Robichaud* v. *Fraser*, 3 Rev. de Lég. 71, K. B. 1817.

See cases under Art. 453, *post*.

5. Where a defendant, sued for the price of an immovable which he has purchased, and which was burdened with a hypothec, pleads his right to have such hypothec discharged before being compelled to pay, he must do so by a dilatory exception and not by a peremptory one. *Grammant* v. *Lemire*, 5 R. L. 67, C. C. 1873; *Wainwright et ux. & The Mayor, &c., of Sorel*, 5 R. L. 668, S. C. 1874.

6. Where a suit was pending in the Admiralty against certain goods seized as forfeited, and an action of trespass was brought against the seizors for illegal seizure—*Held*, that the defendants were entitled to an *exception dilatoire* to stay the proceedings until the first action was decided. *Hartshorn et al.* v. *Scott & Somerville*, P. R. 5, K. B. 1810.

7. A foreign plaintiff is not bound to give notice of the filing by him of a power authorizing his attorney *ad litem* to act for him, in order to save himself from costs of an *exception dilatoire*. *The Bank of Commerce* v. *Papineau*, 20 L. C. J. 306, S. C. 1876.

8. A power of attorney may be demanded when the plaintiff, a foreigner, contests an opposition. *Baltzar et al.* v. *Grewing et al. & Hutchison et vir*, 13 L. C. J. 297, S. C. 1869.

9. Where the power of attorney is not filed before the exception demanding it, costs will be allowed defendant. *Westcott et vir* v. *Archambault et al.*, 21 L. C. J. 307, S. C. 1877, 1 Legal News, 211.

10. Where the plaintiff resides out of the Province of Quebec, and fails to furnish security for costs and the power of attorney required by the Code of Procedure, the defendant may, by a declinatory exception, have all further proceedings stayed until such security and procuration are furnished. *Calvin et al.* v. *Bertrand*, 17 L. C. J. 226, C.C. 1873.

11. When security for costs is claimed by exception, the costs thereof will be reserved to abide the issue of the suit. *Akin* v. *Hood*, 21 L. C. J. 47, S. C. 1877. *Symes et vir* v. *Voligny*, 1 Legal News, 542, S. C. 1878, 22 L. C. J. 246.

*Vide* Art. 128 *post*.

12. The plaintiff brought action for conventional dower, and the defendant called in the actual holders of the property on which the dower was claimed, pretending that the plaintiff was bound to proceed in the first place against the holders of such portions of the property as had been alienated last—*Held*, that such an exception could only be pleaded with regard to customary dower. *Benoit* v. *Tanguay & Tanguay & Bouthillier*, 1 L. C. J. 168, S. C. 1857.

13. The endorser of a promissory note, sued for the amount due under it, is entitled to a dilatory exception to enable him to call in the maker of the note in guarantee. *Beaulieu* v. *Demers*, 5 R. L. 244, C. C. 1874.

14. An exception of discussion which fails to indicate the property to be discussed, or to allege even the existence of property liable to discussion, and which does not contain an offer to defray the expenses of discussion, and is not accompanied by an actual deposit of funds to that end, is bad in law and will be dismissed on demurrer. *Panton et al.* v. *Woods et al.*, 11 L. C. J. 168, S. C. 1866.

15. That all the persons who ought to be defendants in an action *ex contractu* are not parties to the suit is rightly pleaded by *exception peremptoire temporaire*, in which those who ought to be joined in the suit must be named. *Fraser et al.* v. *Dunn et al.*, 3 Rev. de. Lég. 196, K. B. 1812.

16. The benefits of division and discussion cannot be allowed if they are not pleaded by dilatory exception. *Tanguay* v. *Ducrow*, 3 Rev. de Lég. 71, K. B. 1816.

17. An action may be instituted against a security or *caution* before the discussion of the principal debtor, and in such case the defendant must allege by dilatory exception that the principal debtor should be first discussed. *Potdevin* v. *Miville*, 3 Rev. de Lég. 71, K. B. 1816.

18. On an *exception dilatoire* claiming the right of discussion, the excipient is bound to advance to the plaintiff such sum of money as may be necessary to pay the expenses of discussion. *Gauthier* v. *Morisette*, 3 Rev. de Lég. 71, K. B., 1821.

19. In a commercial matter if it appear in an action of assumpsit that the plaintiff has a partner who is a party to the contract and is not a party to the suit, the action will be dismissed, although the defendant has not pleaded such fact. *Pozer et al.* v. *Clapham*, S. R. 122, K. B. 1817.

20. A dilatory exception to call in a *garant formel* must show that the excipient is within the delays, and that he has taken the necessary steps to call in his *garant*. *Belle* v. *Dolan*, 20 L. C. J. 302. S. C. 1876.

21. Where an hypothecary action was brought against a third holder —*Held*, that he might validly plead the exception of discussion, notwithstanding the mortgage sued on was a special mortgage, but that he had no right to claim to hold the property until his improvements and ameliorations had been paid for. *Price* v. *Nelson & MacKay*, 2 L. C. R. 455, S. C. 1851.

22. In an action against sureties on a bail bond in appeal, the question as to the necessity of discussing the property of the principal debtor ought not to be raised by demurrer, but by an exception *de discussion*. *Thorne* v. *McLennan et al.*, 9 L. C. R. 403, S. C. 1858.

23. Where the defendant pleaded the discussion of the principal debtor by a peremptory exception *en droit temporaire*—*Held*, that such a plea should be urged by dilatory exception. *Noad et al.* v. *Von Exter*, 5 L. C. J. 102, S. C. 1860.

24. In revendication of immovable property, if the defendant holds the estate demanded merely as a tenant, he must plead the fact by dilatory exception and set forth the name and residence of the proprietor. *Clement* v. *Hamel*, 3 Rev. de Lég. 71, K. B. 1817.

25. A dilatory exception founded on the benefit of discussion, claimed by a surety, must be decided before proceeding with the pleas to the merits, and the proof must be limited to the facts set up in such exception. *Cunningham et al.* v. *Ferrie et al.*, 2 Rev. de Lég. 169, Q. B. 1842.

26. And where the defendant pleads by *exception temporaire* that he held the property demanded as guardian appointed by a justice of the peace and prays that the plaintiff's action be dismissed, it is irregular. *Pacaud* v. *Begin*, 1 Rev. de Lég. 507, K. B. 1818.

27. And *held*, also, that he could only stay proceedings until the person from whom he derived authority to keep the property claimed is made a party to the suit, and his exception, therefore, should be an exception *dilatoire*. Ib.

28. All joint owners in an action *in rem* must be joint plaintiffs in the process *ad respondendum*. *Bellet et al.* v. *Allison*, 3 Rev de Lég. 305, K. B. 1818.

29. Co-partners, parties to a contract, must be co-plaintiffs. *Morrogh* v. *Huot*, 2 Rev. de Lég. 207 K. B. 1811.

30. And where a landlord took an attachment in revendication against a piano belonging to a third person, after it had been removed from the house of his tenant, but neglected to join his debtor or tenant in the action—*Held*, that the action must be dismissed. *Auld* v. *Laurent et al.*, 7 L. C. J. 49, S. C. 1863.

31. If the legal interest of several persons who are parties to a contract be joint they must join in an action which in form is *ex contractu*. *McLeish* v. *Lees*, 2 Rev. de Lég. 123, K. B. 1811.

32. An exception which states that there are other heirs who ought to be made defendants must name them, aver them to be alive, and point out their residence. *Pagé* v. *Carpentier*, 3 Rev. de Lég. 395, K. B. 1810.

33. To an action against several heirs it is not a valid objection that all of them have not been made parties to the suit if, during the progress of the suit, they have been made parties by an interlocutory judgment of the court. *Viger et ux. & Pothier*, Stu. Rep. 394, K. B. 1830.

34. A cumulation of actions should be pleaded by a dilatory exception. *Belanger* v. *Desjardins*, 3 Rev. de Lég. 70 K. B. 1816. *Méthot esqual.* v. *Perrin et al.*, 5 R. L. 695, S. C. 1874.

35. A demand for damages in an action for the removal of an encroachment upon property does not amount to a cumulation, and does not vitiate the rest of the action. *La Corporation de St. Martin* v. *la Compagnie de Chemin de Fer de l'Isle Jesus*, 15 L. C. J. 106, Q. B. 1870.

36. The plaintiff brought action for damages, setting up, by way of declaration, assault and battery and defamatory language and throwing stones with intent to injure, and the defendant pleaded by way of demurrer that the declaration contained several causes of action which could not be joined in the same suit, and asked that the plaintiff be held to choose between said causes of action—*Held*, that the different causes of action referred to were not contradictory or even incompatible, and were properly laid in the declaration. *Méthot esqual.* v. *Perrin et al.* 5 R. L. 695, S. C 1874.

37. There is no incompatibility between the allegation of a verbal lease and an account for lease and occupation. *Hanower & Wilkie*, 1 L. C. L. J. 37, Q. B. 1865.

38. Where the plaintiff by his declaration (or petition) alleged that the person elected and holding the position of mayor of Montreal was, at the time of his election, disqualified from being so elected, and was in consequence illegally occupying the position, and alleged also by the same declaration that the election in question was null and void for reasons therein stated, and asked that it be so declared, and that the petitioner be declared duly elected—*Held*, on dilatory exception, that such allegations and conclusions were incompatible with each other, within the meaning of the provisions of the Code of Procedure. *Beaudry* v. *Workman*, 13 L. C. J. 15 S. C. 1869.

39. Where the plaintiff by his declaration set up a deed of sale by him to the defendant and complained of the defendant for having en-

croached upon his property, asking that he be condemned to remove such encroachment, and also that he be condemned to fill up an excavation which he had made and remove the trap-door, and to lower the passage, so that it could be conveniently used, and to pay $250 damages—*Held*, that these conclusions contained three different and incompatible actions, and, although arising out of a deed of sale from him to defendant, could not be joined. *Robertson & Stuart*, 13 L. C. R. 462, S. C. 1863.

See Art. 15 *ante*.

40. In an action brought to recover upon a policy of insurance, the defendant pleaded by dilatory exception that a true bill had been found by a grand jury against the plaintiff, and was still pending, charging him with arson with a view to defraud them, the defendants, and that therefore all proceedings in the case must be stayed and suspended until the plaintiff should have been tried upon the indictment—*Held*, that the indictment of a criminal charge against the plaintiff could not operate as a suspension of the proceedings in an action against the defendant. *Maguire* v. *The Liverpool and London Fire and Life Insurance Company*, 7 L. C. R. 343, S. C. 1857.

41. Demolition of works completed may be demanded in a petitory action. *Joyce* v. *Hart*, 1 S. C. Rep. 321.

**121**. If the dilatory exception is founded upon the legal delay for making an inventory and deliberating, the delays for pleading to the action, and even for setting up other preliminary pleas, do not begin to run against the defendant until after the time allowed him to make such inventory and to deliberate. *Ord.* 1667, *tit.* viii., *art.* 3.

**122**. If the defendant has warrantors to call in, he may, by means of a dilatory exception, obtain that his delay to plead to the action be not computed until the warrantors have been called in and held to plead to the merits.

**123**. [The delay allowed to call in warrantors is eight days after service of the principal demand, exclusive of whatever time may be required to summon the warrantors pursuant to the provisions of article 75.] *Ord.* 1667, *tit.* viii., *art.* 2.

**124.** The demand in warranty must be special and contain a summary statement of the grounds upon which it is made, with a copy of the principal demand and of the pleadings which require the calling in of the warrantors. *Ibid. art.* 4.

1. Where the writ had issued under the same number and the same name as the original proceedure, and as it were in the same cause, it was not necessary to produce either a copy of the title-deeds or any portion of the original record. *Judah exp. & Judah & Rolland*, 1 L. C. J. 194, S. C. 1857.

**125.** In cases of simple or personal warranty, the warrantor cannot take up the defence of the defendant, but can merely intervene and contest the principal demand, if he thinks proper. *Ibid. art.* 12.

**126.** In cases of real warranty, the purchaser who is disturbed or evicted, is not bound to call in first his immediate warrantor, but he may summon in warranty any more remote warrantor who may eventually be bound to intervene in the suit. *C. S. L. C. c.* 82, *s.* 32.

**127.** In cases of real warranty, the warrantor may take up the defence of the warrantee, who is relieved from the contestation, if he requires it.

Nevertheless, although relieved from the contestation, he may remain in the suit, and act in it for the protection of his rights. *Ord.* 1667, *tit.* viii., *Arts.* 9, 10, *C. P. C.* 184.

Judgments rendered against the warrantor may be executed against the warrantee.

It is sufficient, in any case, that the judgment be served upon the warrantee, without any other demand or procedure being necessary. *Ord.* 1667, *tit.* viii., *art.* 7.

**128.** Whenever, according to article 29 of the Civil Code, a person who does not reside in Lower Canada is bound to give security, all proceedings in the case may be stayed upon application of the adverse party, until such security has been

given. *C. S. L. C. c.* 83, *s.* 68; *Jones* v. *Kerr, Montreal, 4th May,* 1852.

35 *Vict. c.* 6 (*Que.*)

6. "The delays for filing preliminary exceptions and pleas to the merits do not begin to run until after the date of the service, upon the defendant's attorney, of a notice, informing him that such security has been given."

1. An officer stationed with his regiment in the Province cannot be compelled to give security for costs. *Sutherland* v. *Heathcote et al.* 3 Rev. de Lég. 347, K. B. 1808.

2. But the master of a foreign vessel who has no domicile here must give security. *Grace* v. *Crawford*, 3 R. L. 447, S. C. 1871.

3. And a seaman. *Heardsman* v. *Harrowsmith*, 3 Rev. de Lég. 347, K. B. 1809. *Anderson* v. *Brusgaard*, 3 Q. L. R. 287, C. C. 1877.

4. And foreign corporations. *The Columbia Ins. Co.* v. *Henderson*, 1 L. C. L. J. 98. S. C. 1865.

5. Even if they have an office in the Province, and have made a deposit with the Government under the Insurance Act. *The Niayara &c. Co.* v. *Mullin*, 21 L. C. J. 224; *The Globe Mutual Ins. Co.* v. *The Sun Mutual Ins. Co.*, 1 Legal News, 139, but see this latter case, 1 Legal News 53, S. C. 1878.

6. And a foreigner suing *in formâ pauperis*. *Arpin* v. *Riopel*, 4 R. L. 385, C.C. 1872; *Gagnon* v. *Wooley*, 10 L. C. R. 234, C. C. 1860; *Duhaut* v. *Lacombe*, 15 L. C. J. 43, S. C. 1870. See Art. 31 *ante*, case of *Barry* v. *Harris*, 3 Rev. de Leg. 304, K. B. 1810.

7. An opposant who is a non-resident must give security. *Beausoleil* v. *Bourgoin*, 22 L. C. J., 227, S. C. 1878; *Bonacina* v. *Bonacina et al.*, 4 L. C. J. 148, S. C. 1859; *Benning* v. *The Montreal R. Co. & Young & Corning et al.* 2 L. C. J., 287, S. C. 1859.

Even though he has a domicile here: *Gravelle* v. *Mallette & Mallette*, 21 L. C. J. 162, 1877.

Contra: *Dupré* v. *Cantara & Cantara & Larochelle*, 1 R. L. 40, S. C. 1869.

8. And an intervening party. *Scott et al.* v. *Austin & Young et al.* 5 L. C. J. 53, S. C. 1860.

Contra: *Marais* v. *Brodeur & Brodeur*, 1 Legal News, 554, S. C. 1878, 22 L. C. J. 255.

9. And an incidental plaintiff. *McCallum* v. *Delano & é. contra*, 3 Rev. de Lég. 199, K. B. 1810; *Davidson* v. *Cameron*, 15 L. C. J. 217 S. C., 1871.

10. And a Plaintiff contesting an opposition. *Baltzar et al.* v. *Grewing et al. Hutchison et vir,* 13 L C. J. 297, S. C. 1869; *McAdams* v. *Smart & Fraser,* 1 Q. L. R. 354, S. C. 1875; *Manoney et al.* v. *Tompkins & Geddes et al,* 9 L. C. R. 72, S. C. 1858.

Contra: *Brigham* v. *McDonell et al. & Devlin,* 10 L. C. R. 452, S. C. 1860; *Morrill* v. *Donald et al. & Rose et al.* 6 L. C. J. 40, S. C. 1861; *Webster* v. *Phillbrick & Wilkie,* 15 L. C. J. 242, S. C. 1871.

11. And a Plaintiff contesting a Garnishee's declaration. *Meyer et al.* v. *Scott & Benning et al.* 4 L. C. J. 146, C. C. 1860.

12. An opposant before filing a contestation of a claim of another opposant, described as residing beyond the limits of the Province, is entitled to call upon such other opposant to put in security for costs. *Bonacina* v. *Bonacina et al.* 4 L. C. J. 148, S. C. 1859.

13. But it is not competent for him to demand security for costs after filing such contestation.—Ib.

14. A guardian against whom a rule for *contrainte par corps* has issued at the instance of a party no longer a resident of Lower Canada is entitled to security for costs. *Miller* v. *Bourgeois & Holland,* 16 L. C. J. 196, S. C. 1872.

15. And a foreign intervening party who has given security for costs to the plaintiff *par reprise d'instance* can demand security for costs from him, on producing affidavits to show that the latter has left the Province permanently since the institution of the action. *McCulloch* v. *Routh & Hensman,* 11 L. C. J. 25, S. C. 1866.

16. And that, although it appears that the plaintiff *par reprise d'instance* had left the Province before the intervening party came into the suit.—Ib.

17. Security for costs can only be demanded by a citizen from a foreigner, but when the foreigner has put in a security he becomes purged of his quality of foreigner, and is on a par with the citizen, and can demand security for costs from the latter, if he change his domicile to a foreign country during the pendency of the action.—Ib.

18. When a defendant, after Judgment by default has been entered against him, is allowed to appear by opposition and plead to the action, he cannot afterwards make a motion for security for costs on the ground of the plaintiff being an absentee, unless in his opposition he has reserved the right to make such motion. *Booth* v. *Lawton & Lawton,* 13 L. C. J. 59, S. C. 1869.

19. On a motion for security it does not suffice to allege that plaintiff has left his domicile in this Province. *Prentice* v. *The Graphic Co.* 1 Legal News, 484, S. C. 1878.

20. Where, of two co-plaintiffs, not co-partners, and between whom no *solidarité* exists, one leaves the country after suit brought, security for costs can be demanded only from the absent plaintiff. *Humbert et al.* v. *Mignot*, 18 L. C. J. 217, Q. B. 1874; *Beaudry et al.* v. *Fleck*, 20 L. C. J. 304, S. C.

21. When two or more defendants severally move for security, separate bonds must be given, but the same sureties in each bond will suffice. *Bell et al.* v. *Knowlton et al.*, 13 L. C. R. 232, S. C. 1863.

22. Security for costs cannot be exacted from any person residing in Lower Canada, even supposing he is not a householder therein, and has another domicile out of Lower Canada. *Ryland* v. *Ogilvie*, 10 L. C. J. 200, S. C. 1866.

23. The temporary absence of the plaintiff from the Province, while his family continues to reside therein, does not render him liable to security for costs. *Mountain* v. *Walker*, 5 R. L. 747, S. C. 1874; *Prentice* v. *Graphic Co.*, 1 Legal News, 555, S. C. 1878.

24. A demand for security for costs from an insolvent will not be granted, unless the insolvent is such under the Act. *Niagara, &c. Co.* v. *Mullin*, 21 L. C. J. 221, S. C. 1877.

25. An application for security for costs may be legally made by dilatory exception. *Graham* v. *Gervais*, 17 L. C. J. 295, S. C. 1873.

26. Where plaintiff does not reside in the Province of Quebec, he is bound to give security for any costs which may be occasioned to the defendant by his action. *Calvin et al.* v. *Bertrand*, 17 L. C. J. 226, C. C. 1873.

27. Where the plaintiff left his domicile in Lower Canada, and went to reside in the United States, upwards of two months after the return of his action—*Held*, that a motion for security of costs would lie, notwithstanding the rule of practice providing that motion for security for costs must be made within four days from the return of the writ, if motion was made on the first day of the term next after the discovery by the defendant of the change of residence, and the facts are established by affidavit. *Stalker* v. *Hammond*, 8 L. C. J. 137, S. C. 1864.

28. And, in a similar case, *held* that security for costs may be demanded, although it be shown by affidavits that the plaintiff has a place of business containing valuable stock, and a domicile in the city, and his absence is believed to be temporary, namely, for about three months. *Davis* v. *Jacobs*, 9 L. C. J. 25, C. C. 1864.

29. Notice of demand for security must be *served* within four days after the return. *Rousseau* v. *Trudel et al.*, 13 L. C. J. 138, S. C. 1869;

*Mellis* v. *Swales*, 22 L. C. J. 271, S. C. 1878; *Lynch* v. *Guimond*, 6 R. L. 743, S. C. 1875; *Tiers et al.* v. *Trigge et al.* 5 L. C. J. 25, C. C. 1860.

30. The rule requiring security for costs to be made within four days after return of action, is not complied with by making a motion for a rule *nisi* within four days, but returnable after the four days. *The Newark Patent Leather Co.* v. *Wolff*, 14 L. C. J. 18, S. C. 1869; *Batten* v. *Stone*, 1 R. C. 247, S. C. 1871; *Sproul* v. *Coriveau*, 1 Legal News, 130, S. C. 1878; 22 L. C. J. 55.

31. Where notice of motion for security for costs is not given within four days after the return of action, the motion must be rejected though made in the first term after the return. *Carson* v. *Carlisle et al.* 15 L. C. J. 78, S. C. 1870. Contra: *Mantha* v. *Coghlan*, 3 R. L. 447, S. C. 1871; *Perry* v. *The St. Lawrence Grain, &c., Co.*, 5 L. C. J. 252, S. C. 1861.

32. Where a defendant files an exception to the form in a case where a rule has been made absolute, staying all proceedings until the plaintiff shall have put in security for costs, the plaintiff is not entitled to a hearing upon the merits of such exception until he puts in security for costs. *Easton* v. *Benson*, 5 L. C. R. 342, S. C. 1855.

33. Upon the death of a party giving security, the defendant is entitled to another surety, and no waiver of this right can take place until defendant has been notified of the death of the surety in the ordinary manner *Grainger* v. *Parke*, 15 L. C. R. 134, S. C. 1865.

34. The personal undertaking of one person as security is insufficient.—*Powers* v. *Whitney*, 6 L. C. J. 40, S. C, 1861.

Two sureties should be furnished, *Donald* v. *Becket*, 4 L. C. J. 127, S. C. 1859.

35. For the purpose of ordinary security for costs, it is not necessary that the surety be proprietor of immoveable property. *Utley et al.* v. *McLaren et al.* 17 L. C. R. 267, S. C. 1866.

36. A deposit of a sum of money will be accepted in lieu of sureties. *Mann & al.* v. *Lambe*, 4 L. C. J. 300, S. C. 1860. *Canada Tanning Extract Co.* v. *Foley*, 20 L. C. J. 180, Q. B. 1875.

37. But Plaintiff will not be allowed to give security by hypothec, nor by deposit where no amount is specified. *Canadian Copper Pyrite Co.* v. *Shaw*, 19 L. C. J. 99, S. C. 1874.

38. The plaintiff is bound to notify the defendant that security for costs has been given, and a demand of plea and foreclosure without such notice are irregular, and will be set aside, as also a judgment

of the prothonotary rendered in the cause in favour of the plaintiff treating such foreclosure as valid and irregular. *Jersey & Rourk*, 13 L. C. R. 172, Q. B. 1862.

39. And where judgment has been so taken, the defendant may obtain relief by opposition or *simple requête afin d'opposition*, or by an appeal to the Court of Queen's Bench, but if he take his remedy by appeal, the court will only grant the costs of the court below and the disbursements in appeal. *Ib.*

Contra: *Tuckett* v. *Forrester et. al.* 13 L. C. J. 179, S. C.; *Graves* v. *Denison et al.* 13 L. C. J, 178. S. C. R. 1869.

40. Where a plaintiff is ordered to give security for costs by the first day of next term, he cannot, by furnishing security in the intervening vacation and giving notice thereof, compel the defendant to plead even preliminary pleas, before the said first day of term. *Kennedy* v. *McKinnon*, 3 Q. L. R., 358, C. C. 1877.

**129.** [*If such person fails to put in security within such time as the court may fix, the opposite party may obtain a judgment of non-suit.*] *Prevost* v. *Bisson, Montreal, 26th May*, 1860.

33 Vic., c. 17, (Q.) 1st February, 1870.

1. Article 129 of the code is amended, so as to read as follows:

"The application for security for costs may be made before the court or before a judge, or prothonotary in vacation, and may be adjudicated upon forthwith.

"If the person bound to give security fails to do so within such time as the court, judge or prothonotary may fix, the opposite party may obtain a judgment of non-suit.

"Saving the foregoing provision, any person from whom security may be demanded in virtue of article 29 of the civil code, may at any time, whether the same has been demanded or not, put in such security after one clear day's notice to the opposite party."

1. Where the plaintiff failed to give security for costs within the delay fixed by the court—*Held*, on motion to that effect, that the action would be dismissed. *Adam* v. *Sutherland*, 2 L. C. J. 109, S. C. 1857.

**130.** The exception of discussion, whenever it lies, is subject to the general rules contained in this section and to the special provisions contained in articles 1941, 1942, 1943, 2066 and 2067 in the Civil Code.

**131.** Before answering a dilatory exception, or any other preliminary plea filed, the plaintiff may, if he thinks the exception is filed solely in order to retard the suit, require the defendant, in writing, to plead to the merits, and may foreclose him if such plea to the merits is not filed within eight days from the demand thereof; in which case the court takes cognizance of no other issues than those raised upon the preliminary exceptions.—*C. S. L. C. c.* 82, *s.* 73.

1. When a preliminary plea had been filed, and the plaintiff had demanded a plea to the merits under 20 Vic. cap. 44, sec. 72—*Held*, that the plaintiff might foreclose the defendant after the eight days from such demand without serving the demand of plea required by 12 Vic. cap. 38. *McGill* v. *Wells*, 2 L. C. J. 290, S. C. 1858.

2. A demand of plea to the merits may be made after the expiration of eight days from the filing of a preliminary plea, in the absence of any answer to such plea. *The Canada Tanning Extract Company* v. *Foley*, 20 L. C. J. 180, Q. B. 1875.

3. The production of pleas to the merits at the same time as preliminary pleas, without their having been demanded, is not a renunciation of the benefit of the preliminary plea. *The Attorney-General & Gray*, 3 R. L. 451, Q. B. 1871.

4. A plea to the merits in an action under sixty dollars, in which a preliminary exception has already been filed, must be received by the clerk without fee, if the fee required by law has been paid on the preliminary exception. *Thibault* v. *Coderre*, 15 L. C. J. 330, C. C. 1871.

5. Pleas to the merits filed by the defendant after an exception to the form, and before demand of such pleas, will be rejected from the record on motion of the plaintiff to that effect. *Boucher* v. *Barthe*, 5 R. L. 50, C. C. 1873.

**132.** If the defendant files his pleas to the merits, proof takes place upon all the issues, unless the Court otherwise orders; and if he succeeds upon the preliminary exception, he may recover from the plaintiff the costs incurred upon the contestation of the merits to which he was forced under the provisions of the preceding article. *C. S. L. C. c.* 83, *s.* 74.

1. Where there are several issues, such as a plea to the action and a special answer to such plea, and a general inscription for the adduction of evidence, although the proof of the special answer alleging *chose jugée* as to the matters contained in the plea to the action if made out would be a bar to any further proceedings upon such plea, a judge in chambers has no power to restrict and limit the proof in the first instance to the special answer, as such limitation can only be ordered by the court. *Brush et al.* v. *Wilson*, 4 L. C. R. 454, S. C. 1854.

2. In a case where it was argued or urged that as the action had been inscribed only for hearing on the merits of the first peremptory exception, there being others, no judgment could be rendered—*Held*, that the inscription was good, and judgment was rendered accordingly. *Thurber & Pilon*, 4 L. C. J. 37, S. C. 1850.

3. On the contestation of an attachment before judgment to which an exception to the form had been filed by the defendant, and subsequently a petition was filed against the validity of the seizure in the manner provided for the contestation of writs of capias—*Held*, that the enquête on the petition might be proceded with independent of the contestation on the exception to the form. *The Quebec Bank* v. *Steers et al. & Seymour et al.* 12 L. C. J. 227, S. C. 1868.

**133.** When the defendant has pleaded a dilatory exception which is afterwards maintained, the foreclosure from pleading to the merits, obtained against him under article 131, is without effect; but he is bound to file his pleas to the merits within eight days after the expiration of the delays granted upon his exception, and in default of his so doing the foreclosure holds good.

If, upon being required to do so by the plaintiff, the defendant has pleaded to the merits, he may, after the judgment maintaining his dilatory exception, and within eight days, amend his pleas or plead anew, without thereby incurring any costs; in default of his doing so he is presumed to abide by the pleas filed. *C. S. L. C. c.* 83, *s.* 74, §§ 2, 3.

**134.** When the object of the dilatory exception maintained is the calling in of warrantors, the defendant in the principal suit cannot be foreclosed from pleading until after the expiration of eight days, counting from the day on which

the warrantor could himself have been foreclosed from pleading to the action in warranty.

The warrantor may, within the delays granted to the warrantee, plead to the action brought against the latter, whether the warrantee has already pleaded to it or not. *Ibid.* § 3.

**135.** Grounds of preliminary exception may, in certain cases, be urged by motion, according to the practice of the courts.

1. Where a party is required to proceed by motion a notice of motion is equivalent to moving the court, although such notice of motion be given on a day upon which the court is in session and during the term, and such notice of motion has the effect of a rule *nisi*. *Secretan* v. *Foote et al.* 11 L. C. R. 497, S. C. 1861.

2. A question of jurisdiction cannot be tried upon motion. *Elwes* v. *Francisco*, 1 L. C. J. 188, S. C. 1857.

3. A writ of summons in the nature of a prohibition cannot be quashed on motion. *Reg. ex Rel. O'Farrell* v *Garneau et al.* 4 Q. L. R. 206, S.C. 1878.

## SECTION V.

## OF CONTESTATION UPON THE MERITS.

**136.** The defendant may plead by peremptory exception:

1. *Lis pendens;*

2. The non-completion of the time, or the non-fulfilment of the condition upon which the right of action depends;

3. The extinction, in whole or in part, of the right claimed by the plaintiff. 1 *Pig.* 198; *C. P. L.* 158.

1. To support a plea of *litispendence*, 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* v. *Guyon*, 3 Rev. de Lég. 197, K. B. 1817.

2. The plea of *litispendence* is the proper plea when another cause on the same grounds 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 case. When both cases are depending 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 & Oliva*, 3 Rev. de Lég. 197, K. B. 1821.

3. *Litispendence* in a foreign state is no bar to an action instituted in this province. *Russel et al. & Field*, S. R. 558, K. B. 1833.

4. A declaration and writ of summons filed in the prothonotary's office without a return of service cannot support a plea of *litispendence* in a suit or demand containing the same grounds and causes of action. *Stephens et al.* v. *Tidmarsh*, 6 L. C. R. 3, Q. B. 1856.

5. *Litispendence* may exist though the parties, plaintiff and defendant, occupy different positions in the two actions, and although the first action concludes for a sale and licitation, while the second concludes for a *partage en licitation*. *Boswell* v. *Lloyd et al.* 12 L. C. R. 447, S. C. 1862.

6. And *held*, also, that *litispendence* must be reckoned from the service of the writ and not from the day of the return. Ib.

7. A plea of *litispendence* which does not cover the whole cause of action cannot be maintained. *Miller et al.* v. *Dutton*, 11 L. C. J. 287, S. C. R. 1866.

8. In an action of damages for assault—*Held*, that a plea of criminal prosecution for the same offence was no bar to the action. *Peltier* v. *Miville*, 3 Rev. de Lég. 70, K. B. 1818.

9. A judgment dismissing a hypothecary action for want of proof of possession by the defendant cannot be opposed by exception of *rei judicatæ* to a subsequent demand founded on an actual possession, possession being a fact which is renewed day by day. *Nye* v. *Colville et al.* 5 L. C. R. 408, Q. B. 1855.

10. *Held*, that a plea alleging that a suit has already been brought and decided in a foreign competent tribunal, by the same plaintiff against the same defendant, for the same cause of action, was a good plea, more especially if it sets up payment of the judgment by the defendant. *Vaughan et al.* v. *Campbell*, 5 L. C. R. 431, S. C. 1855.

11. In an action for the penalty provided by 12 Vic. cap. 45—*Held*, that a plea of former recovery for the same offence in a penal action, which does not set out that the first action was instituted before the second, is bad, and will be held so on demurrer, as no matter of defence arising after action brought can properly be pleaded in bar of further

maintenance of the action. *Mountain* v. *Dumas*, 7 L. C. R. 130, S. C. 1857.

12. Nor is an action which does not proceed to judgment any bar to another action for the same offence. Ib.

13. In an action to recover the amount of three judgments against the defendant which had been transferred to the plaintiff—*Held*, that *res judicata* might be properly pleaded to such action, and the action was accordingly dismissed. *Whelan* v. *Keeler*, 13 L. C. R. 363, C. C. 1863.

14. Where in an action against a minor for damages the defendant pleaded, by peremptory exception, the lack of assistance of a curator, and the plaintiff moved to dismiss the plea on the ground that it should be pleaded by exception to the form—*Held*, that the exception was properly brought, and the motion was rejected with costs. *Crump & Middlemas*, 5 L. C. J. 48, S. C. 1860.

15. Where to an action on a promissory note the defendant pleaded minority simply, the plea was *held* to be insufficient on the ground that he should have pleaded lesion and asked to be released from the obligation. *Cartier* v. *Pelletier*, 1 R. L. 46, S. C. 1868 : *Bluteau* v. *Gauthier*, 1 Q. L. R. 187, C. C. ; *Boucher* v. *Girard*, 20 L. C. J. 134, C. C. 1875.

16. It is for the defendant to plead unnecessary delay in bringing a redhibitory action, as it is a plea of prescription, and will not be supplied by the court. *Danis* v. *Taillefer*, 5 R. L. 404, C. C. 1874.

17. Where to establish a plea of prescription the possession of predecessors is necessarily invoked, the names of such predecessors must be duly set forth in the pleadings. *Lampson & Taylor et al. & Hughes et al.*, 13 L. C. R. 154, S. C. 1862.

18. A plea of prescription is not necessarily brought before every other plea or other exception. *Beaudry* v. *Brouillet et vir*, 11 L. C. J. 50, S. C. 1866.

19. Pleas of prescription cannot be pleaded by demurrer but by peremptory exception. *Faucher* v. *Bélanger*, 4 R. L. 388, S. C. 1872.

20. Where on the face of the pleadings it appears that a note of hand is of more than five years' standing, and prescription is pleaded, the court, on oath made by the defendant, will dismiss the action. *Benton* v. *Styles*, 3 Rev. de Lég. 38, K. B. 1812.

21. Where to an action for seaman's wages the defendant pleaded prescription, under the 127th Art. of the Coutume de Paris—*Held*,

that such plea was insufficient as not containing an affirmation of payment or offer of payment. *Barbeau* v. *Grant*, 4 L. C. J. 297, S. C. 1860.

22. Where a buyer, who is sued for the purchase money, pleads fear of eviction or trouble in his possession, he must do so by peremptory exception and not by dilatory exception. *Matthieu* v. *Vigneau*, 6 R. L. 514, S. C. 1875.

23. In an action for the price of land sold, the defendant may plead that he is troubled or molested, but that he *may be* troubled is not a good plea. *Dubé & Miville*, 3 Rev. de Lég. 70, K. B.; *Morin* v. *Arcand*, 3 Rev. de Lég. 70, K. B. 1819.

24. The non-performance of a stipulation contained in a charter party which does not amount to a condition precedent cannot be pleaded as an answer to an action of *indebitatus assumpsit* for freight. *Coltman & Hamilton*, 2 Rev. de Lég. 74, K. B. 1819.

25. Where action is brought against a purchaser for the price of sale, and he pleads grounds for the rescision of the contract, he must not only pray for the dismissal of the action but also that the contract be rescinded. *Frigon* v. *Russell*, 5 R. L. 559, S. C. 1874.

26. That a deed was fraudulently obtained cannot be pleaded as matter of defence; it must be rescinded by an incidental demand, and the proceedings suspended until such demand is determined. *Bradley* v. *Blake*, 3 Rev. de Lég. 38, K. B. 1812.

27. Where an action is commenced by part instead of the whole firm the defendant by *exception peremptoire temporaire* may plead it or avail himself of the objection at the trial. *Chinic* v. *Gervais*, 3 Rev de Lég. 197, K. B. 1820.

28. If it appear by the evidence that the plaintiff has a partner who is not a party to the suit in an action on behalf of the partnership the court will dismiss the action *quant à présent*. *Rodger* v. *Chapman*, 3 Rev. de Lég. 352, K. B. 1817.

29. A defendant may by exception invoke the nullity of the title set up by the adverse party without proceeding directly by action or incidental demand to rescind such title. *The Principal Officers of Artillery & Taylor et al.* 1 L. C. R. 481, Q. B. 1851.

30. Where the parties had agreed to submit their differences to arbitrators, and to abide by the decision of the latter under a penalty of $100, and one of the parties, after the award was made, refused to accept the decision, and sued the other for a settlement without paying the forfeit, and the defendant filed a peremptory exception *en droit*

*temporaire—Held*, that the defence was a correct one, and that a dilatory exception would not lie. *Allard* v. *Benoit*, 16 L. C. J. 79, S. C. 1870.

31. Where goods are sold on credit for a fixed period the term of payment must be pleaded by *exception péremptoire temporaire*. *Racey Stephenson*, 3 Rev. de Lég. 196, K. B. 1821.

32. That the plaintiff is an alien must be pleaded by peremptory temporary exception. *Bellinghurst* v. *Lee*, 3 Rev. de Lég. 197, K. B. 1813.

33. The lessee in an action against him for rent cannot put the plaintiff's title in issue. *Hullet* v. *Wright*, 2 Rev. de Lég. 59, K. B. 1817.

34. In an action against the sureties of a tenant for amount of rent due under a notarial lease, the defendant pleaded that the contract was *synallagmatique* imposing obligations on either party, and that it was not alleged in the declaration that the plaintiff had performed the duties incumbent on him in order to enable him to demand from the defendant a fulfilment of their promise—*Held*, that the plaintiff was not bound to allege in his declaration the use and occupation by the lessee of the premises, or that the plaintiff had fulfilled the obligation incumbent upon him under the lease. *Pirrie & McHugh et al.* 1 L. C. R. 271, S. C. 1851.

35. If the declaration contain a statement of all the material facts it will be sufficient; but where special damage is the gist of the action, and it be not alleged, or, being alleged, be not proved, the action will be dismissed. *Percival & Paterson et al.* S. R. 270, K. B. 1828.

36. But where the law gives a right of action for injury it presumes that damages are the consequences, and a conclusion for general damages will be sufficient. Ib.

37. Where to an action for the amount of insurance the defendants pleaded *inter alia* "that no contract of insurance could be made under "the powers possessed by the appellants except in the mode fixed by "their charter and by-laws, and no such contract had been made with "the plaintiff, and that if any such contract had been made it could "only have been so made upon conditions usual in the company's as-"surances, and that those conditions had not been fulfilled by the ap-"pellant"—*Held*, confirming the judgment of the court below on a demurrer raised by the plaintiff, that this latter part of the plea was hypothetical and must be dismissed. *Montreal Assurance Company & McGillivray*, 2 L. C. J, 221, Q. B.; *McFarlane & Scriver*, 2 L. C. J. 250, S. C. 1850.

? plea to an action on a promissory note to the effect that the pro... was illegal, as having described the maker as E. B. Perry instead of Joseph B. Perry, is bad, and will be dismissed. *Scullion & Perry et al.* 9 L. C. J. 174 & 1 L. C. L. J. 64, S. C. 1865.

39. If an action be instituted upon a notarial deed, fraud and the consequent nullity of the deed cannot be pleaded by exception, but an incidental demand *in rescission* must be filed. *Bradley* v. *Blake*, 1 Rev. de Lég. 505, K. B. 1812.

40. In an action to recover the amount of an obligation executed by defendant, to which he pleaded that at the time it was entered into he was of unsound mind—*Held*, reversing the judgment of the court below, that such cause of nullity could be pleaded at any time by exception, and that neither an incidental demand nor direct action was necessary for that purpose. *Halcro* v. *Delesderniers*, 2 L. C. R. 325, Q. B. 1852.

41. A universal usufructuary legatee against whom a creditor of the succession sets up the value of the revenue of his legacy cannot demand the details of such revenue which he himself alone can know, and it is sufficient if the creditor in such case gives some approximate idea of its value. *Destimauville* v. *Tousignant*, 1 Q. L. R. 39, S. C. 1874.

42. Damages cannot be pleaded by way of compensation, but where compensation can be urged it should be pleaded by peremptory exception. *Brunet* v. *Lee*, 3 Rev. de Lég. 197, K. B. 1812.

43. Where compensation is pleaded it must be specially invoked, and the conclusions of a plea to that effect must be special, and ask that the compensation be declared to have taken place. *Gugy* v. *Duchesnay*, 1 L. C. R. 478, Q. B. 1851.

44. A plea of perpetual exception, by which it is alleged that the sum claimed by the plaintiff is set off by a sum claimed by defendant for damages suffered by him in consequence of the neglect and carelessness of the plaintiff in the doing of certain works and labour by the plaintiff for the defendant, the value of which he claims by his action, is a good plea and well founded if proved; and it is not necessary in such a case that such damages should be claimed by an incidental cross-demand. *Beaulieu* v. *Lee*, 6 L. C. R. 33, S. C. 1856.

45. And where the defendant pleaded that the plaintiff's claim was extinguished by a still larger amount due by the plaintiff, but neglected to pray for compensation.—*Held*, on demurrer, that the plea was bad and must be dismissed, with power to defendant to plead *de novo*. *Beaudry* v. *Vinet*, 7 L. C. J. 44, S. C. 1862.

46. And in an action of damages for slander—*Held*, that a plea in the nature of a plea in justification would not be dismissed because it did not contain an admission of the use of the words intended to be justified. *Gugy & Ferguson*, 11 L. C. R. 409, Q. B. 1861.

47. And where the defendant pleaded that what he actually said concerning the plaintiff differed from what was alleged in the plaintiff's declaration and that what he did say was true—*Held*, that the plea was good. *Delisle* v. *Beaudry*, 12 L. C. S. 221, S. C., 1868; C., 37 Vic. cap. 38, sec. 5 *et seq.*

48. *Held*, on demurrer, that a plea to an opposition *afin d'annuler* founded on a judgment in separation of property, which attacks the validity of the ground upon which such judgment is rendered, is bad. *Routh* v. *Maguire & Maguire et al.*, 10 L. C. R. 206, S. C. 1860.

49. Where the defendant pleaded to an action on an obligation contracted in London, England, that the debt was tainted with usury—*Held*, that the law of England in relation to usury ought to be set up in the plea. *Hart et al.* v. *Phillips*, 1 L. C. R. 90, Q. B. 1851.

50. An action against a husband and wife merely setting up a debt due by the wife previous to her marriage and the fact of the marriage, will be dismissed on demurrer upon plea by the wife to the effect that she has been sued as common as to property, when in fact she was separate as to property from her husband by marriage contract produced. *Gagnier* v. *Crevier et al.*, 6 L. C. R. 485, S. C. 1855.

51. In an action against a universal legatee—*Held*, that the plaintiff need not set up in his declaration that the defendant was the sole legatee, it being the business of the defendant if there be another to plead the fact. *Gagnon* v. *Page*, 1 Rev. de Lég. 348, K. B. 1818.

52. To a written contract to pay money, *non numeratæ pecuniæ* may be pleaded under the same circumstances. *Fortier* v. *Beaubien*, 2 Rev. de Lég. 78, K. B. 1809.

53. While an action on a bill of exchange was pending, the plaintiff received from the bankrupt estate of the acceptor of the bill a portion of the sum demanded by the action. The defendant thereupon filed a proceeding called an intervention, and the plaintiff, after filing a retraxit for the amount received, moved to reject the intervention on the ground that the proceeding was not an intervention but simply an application to replead—*Held*, that there was no matter for intervention, but for a supplementary plea which in England is known as a plea *puis darrein continuance*. *Lyman* v. *Perkins & Perkins*, 2 L. C. R. 304, S. C. 1852.

54. While an action for tithes was proceeding at enquête the plaintiff filed, as exhibit, his certificate of appointment from the bishop, and the defendant, taking advantage of the information he had gained thereby, and without leave of the court, filed a plea *puis darrein continuance* which was on motion of the plaintiff, rejected from the record, and the judgment rejecting it was subsequently confirmed in review. *Duhault* v. *Pacaud*, 17 L. C. R. 178, S. C. R. 1866.

55. Payment and tender must be pleaded by way of perpetual peremptory exception. *Forbes et al. & Atkinson*, P. R. 40, K. B. 1810.

56. A plea of payments alleged to have been made at different periods which does not shew the dates and amounts of such payments is bad, and will be dismissed on demurrer. *Les Dames Religieuses Ursulines de Quebec* v. *Perry*, 10 L. C. R. 194, S. C. 1860.

57. An agreement between a debtor and his creditor 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 have received the composition. *Fraser* v. *Munroe & Guishand*, 2 Rev. de Lég. 75 and 334, K. B. 1820.

58. A plea of peremptory exemption admitting the making of the promissory note, or the sale and delivery of goods, and alleging payment of the same, is necessarily divisible, otherwise no issue can be raised upon it. *McLean* v. *McCormick*, 1 L. C. R. 369, C. C. 1851.

59. Where, in an action for goods sold, the plea was of payment—*Held*, that, as the only proof of payment was an acknowledgment of $10 on account, and a statement signed by plaintiff that the balance had been settled by note, the plea was bad, and judgment went for plaintiff. *Mercier* v. *Bousquet et vir*, 5 R. L. 352, S. C. 1874.

60. Where, to an action to account against a tutor, the defendant pleaded that he had already rendered an account *en bloc* which had been accepted—*Held*, that such a plea did not constitute *une fin de non recevoir*. *Ducondu* v. *Bourgeois*, 2 L. C. J. 104, S. C. 1858.

61. A plea which states in substance that the defendant is not the person who is responsible to the plaintiff for the sum he demands is, if the matter be pleaded affirmatively, *une fin de non recevoir*, and not *une fin de non procéder*. *Campbell* v. *Peltier*, 3 Rev. de Lég. 195, K. B. 1820.

62. Where defendant, after being foreclosed, was allowed on affidavit to file a plea to the merits on payment of costs—*Held*, that a plea denying the fraud and *déconfiture* set up by the plaintiff would be deemed a plea to the merits. *Leeming et al.* v. *Robertson*, 11 L. C. R. 492, S. C. 1861.

63. The plea of general issue is waived when it is filed with a plea of payment or compensation. *Casey* v. *Villeneuve*, 1 L. C. R. 487, C. C. 1851.

64. Under the statute 12 Vic. cap. 38, s. 85, it is necessary in a *défense au fonds en fait* expressly to deny every fact alleged in plaintiff's declaration, otherwise such facts will be held to be admitted. *Copps & Copps*, 2 L. C. R. 105, Q. B. 1851.

65. Where the defendants, calling themselves the Montreal Car Company, were sued as co-partners on a note signed by one of the defendants, who styled himself trustee of the company, and the defendants urged that they were a corporation duly incorporated, of which they made proof—*Held*, that they had a right to prove so under the general plea, and the action was dismissed. *Edmondston et al.* v. *Childs et al.* 2 L. C. J. 192, C. S. 1858.

66. In an action for damages occasioned to a wharf by the defendants' vessel, to which the defendants pleaded the general issue—*Held*, that the absence of responsibility on the part of the master, there being a pilot on board, could be invoked without being specially pleaded. *Lampson & Smith*, 9 L. C. R. 160, Q. B. 1858.

67. A defendant cannot be allowed to plead specially that which amounts to no more than the general issue. *Forbes et al.* v. *Atkinson*, P. R. 40, Q. B. 1810.

68. An exception which answers only portions of a declaration is bad, and will be dismissed on motion. *Boston* v. *L'Eriger*, 4 L. C. R. 404, S. C. 1854.

69. A pleading that is good in part and bad in part should be rejected on demurrer. *Miller* v. *Bourgeois & Holland*, 17 L. C. J. 158, S. C. 1871.

70. Each distinct pleading must be followed by a conclusion. *Johnson* v. *Gauthier*, 13 L. C. J. 163, S. C. 1869.

71. Several defendants, though they have appeared separately, but by the same attorney, may join in and file but one plea. *Arsenault* v. *Rousseau et al.* 1 R. C. 247, S. C. 1871.

72. A plea cannot be rejected on motion because it contains matters foreign to those in litigation. *Guevrer..ont* v. *Wilbrenner*, 6 R. L. 12, S. C. 1870.

73. The Court will not allow a trivial irregularity in the service of a copy of a plea to prevail, if it appear that the plaintiff's attorney was aware of its contents. *Couillard* v. *Eschambault*, 3 Rev. de Lég. 303, K. B. 1818.

74. Words in a plea, charging generally gross errors and omissions in plaintiff's account, without specifying clearly what those errors and omissions are, will, on plaintiff's motion, be ordered to be struck out. *Longtin* v. *The Mount Royal Permanent Building Society*, 20 L. C. J. 297, S. C. 1876.

75. In a petitory action—*Held*, that the plaintiff could not succeed upon a title which had not been pleaded, and which, consequently, the defendant had had no opportunity of answering. *Gibson & Wear*, 6 L. C. J. 78 and 12 L. C. R. 98, Q. B. 1863.

76. Where the defendant in a petitory action 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, and set up no title, the plea was *held* to be irregular and insufficient in law, as failing to allege with sufficient certainty an adverse title on his part. *Osgood & Kellam*, 10 L. C. R. 22, Q. B. 1859.

77. In a petitory action, pleas by the defendant setting up title to the lot in dispute, by an instrument in favour of himself and another, were held to be good pleas, although the power of attorney under which the title was conveyed was in one plea set up as in favour of A, and, in the other, as being in favour of A and B, co-partners, and although the title was executed by B in the name of the firm. *Cummings* v. *Quintal*, 7 L. C. R. 139, Q. B. 1857.

78. Where to a hypothecary action the defendants filed a confirmation of title which they had obtained, but in which the name of one of them was written "Brockmon," instead of "Blackmon," the variance was held not to be material, and the action was dismissed. *Redpath et al. & Blackmon et al.* 6 L. C. R. 408, S. C. 1852.

79. Where the defendant pleaded a peremptory exception which commenced by saying that the allegations of the plaintiff's declaration were unfounded in law and in fact, and then went on to state the grounds of his defence, founded entirely on fact, the plea was rejected as irregular and inadmissible. *Addison* v. *Bergeron et al.* 1 L. C. J. 196, S. C. 1857.

80. Motion that the defendants file a draft or copy of their peremptory exception which was lost, or a plea to the same effect, and that, in default, the plaintiff be permitted to proceed to trial and judgment on the issues raised and perfected by the general issue and the statement of facts. Motion granted. *The City Bank* v. *The Montreal Bank*, 2 R. C. 237, S. C. 1872.

81. When the issue is immaterial or informal, the Court will order a repleader. *Forbes* v. *Atkinson*, 3 Rev. de Lég. 200, K. B. 1810.

A repleader may be ordered at the trial if the issue taken is there found to be immaterial. *Vocelle* v. *Faucher*, 3 Rev. de Lég, 200, K. B. 1818.

82. Where the defendant to an action on a bill pleaded the want of stamps as required by law, and the plaintiff was allowed to affix stamps on payment of costs, the defendant was allowed to plead *de novo*. *Lemesurier* v. *Ritchie*, 3 R. L. 455, S. C. 1871.

83. Where plaintiff was allowed to amend his declaration, he was not allowed to proceed to *enquête* until defendant had had an opportunity of pleading *de novo*. *Mann et al.* v. *Lambe*, 6 L. C. J. 301, S. C. 1862.

**137**. All pleas to the merits, whether by exception or otherwise, must be filed within eight days after the appearance, except in the cases otherwise provided for in the preceding section.

If they are not filed within such delay the adverse party may demand them, and if they are not filed within the three next following juridical days, the prothonotary may grant the plaintiff a certificate of foreclosure. *C. S. L. C. c.* 83, *s.* 12, § 2.

1. Delay may be given to a defendant to plead if it appear that he is under a criminal charge which may be influenced by pleading within the required delays. *Burn* v. *Fontaine*, 15 L. C. J. 144, S. C. 1871.

2. If a rule to plead expires in vacation, a demand of plea must be made before a foreclosure can be filed. *Lee* v. *Whitfield et al.* 3 Rev. de Lég. 303 K. B. 1812.

3. A demand of plea, though irregularly made, cannot be rejected from the record on motion, as it does not affect the case, and the recourse of the defendant will only arise on the subsequent proceedings. *Armstrong* v. *Barthe*, 1 R. L. 49, S. C. 1868.

4. The prothonotary cannot grant foreclosure of the defendant in certain cases. *Tracey* v. *Isaacson et al.* 14 L. C. J. 236, S. C. 1870.

5. A defendant who has been foreclosed from pleading within the ordinary delays, and who moves to be relieved from such foreclosure, must produce with such motion an affidavit in support thereof, and also the plea which he wishes to file. *Corbeil & Dumouchel*, 4 R. L. 389, S. C. 1872.

6. A defendant foreclosed from pleading to a writ of *saisie arrêt* after judgment will, on special motion, be allowed to answer the plaintiff's

contestation of the declaration of a garnishee made in obedience to such writ, if he have interest in the matters raised by the contest. *Kingston* v. *Torrance & Torrance & Kingston*, 9 L. C. J. 20, S. C. 1864.

7. A defendant who has been regularly foreclosed will not be allowed to come in and plead when the plea offered is not considered good. *The Corporation of Montreal & Manson*, 1 L. C. L. J. 100, S. C. R. 1865.

8. The court in its discretion permitted the defendant to file his plea after foreclosure on payment of costs where the plea was ready and deposited on the day of foreclosure. *Sheridan et al.* v. *Bourne*, 2 L. C. L. J. 40, S. C. R. 1866.

9. On motion of plaintiff to reject a plea filed half an hour after foreclosure and before any further procedure had been had—*Held*, that under such circumstances the motion must be rejected and the plea allowed to stand. *Ostell* v. *O'Brien*, 4 L. C. J. 122, S. C. 1859.

10. Where the plaintiff, after the delay for pleading had expired, took judgment in vacation before the prothonotary without any formal demand of foreclosure, such as is required by 12 Vic. cap. 38, sec. 25 —*Held*, that the prothonotary had not the power to grant a judgment, and it was accordingly set aside. *Beaufield et al.* v. *Wheeler*, 5 L. C. J. 21, S. C. 1860.

A foreclosure stating that "*defendant* forecloses defendant" is null. Ib.

11. A plea filed by defendant half an hour after foreclosure has been entered by the prothonotary will not be rejected on motion to that affect made by the plaintiff, though the latter support his motion by an affidavit that the defendant has no defence to his action, and that the pleas are sham pleas, and though the defendant does not resist the motion by counter affidavit to the effect that the pleas are filed *bonâ fide*. *Molson et al.* v. *Reuter et al.*, 4 L. C. J. 299, S. C. 1860.

See Art. 463, *post*, as to "Long Vacation," and Art. 3, *ante*.

**138.** The same delay of eight days is allowed the plaintiff to answer the pleas, unless such answer is in the nature of a declinatory or dilatory plea, or of an exception to the form, in which case the delay is four days only, pursuant to article 107. *Ibid.* s, 12.

1. A general answer to a plea is sufficient to put the defendant to a proof of the allegations of such plea. *St. John* v. *Delisle et al.* 2 L. C. R. 150, S. C. 1851.

2. In an action on an agreement *sous seing privé*—*Held*, that the allegations which form the chief support of the action must be set out in the declaration, and cannot be pleaded by way of special answer to defendant's exception. *McGoey* v. *Griffin*, 1 L. C. J. 39, S. C. 1856.

3. The immovable property seized was claimed by the opposant in virtue of the will of her deceased husband. The plaintiff pleaded that, subsequently to the date of the will, the testator and the opposant by him duly authorized had made donation of the property seized to the defendant. The opposant replied specially that the deed of donation was, subsequently to its execution and prior to the death of her late husband, resiliated by consent of all the parties thereto—*Held*, that such special answer was not demurrable on the ground that it invoked a different title from that alleged in the opposition, and that in fact the opposant by her special answer did not invoke the resiliation as a title to the property, but the object of the allegation was to show that, in consequence of the resiliation of the donation in question, her title under the will had revived. *Romaine* v. *Dugal & Jobin*, 8 L. C. R. 209, S. C. 1857.

4. The plaintiff cannot, by special answer to a plea founded upon a deed to which he is a party, and which deed would defeat his action, set up grounds of nullity against such deed, and ask the rescission thereof, as the nullity of the deed should have been asked by the declaration. *Martin et vir* v. *Martin*, 7 L. C. J. 293, S. C. 1868.

5. *Held*, that the plaintiff, in alleging as a special answer that part of the right which he claimed came from his deceased wife in virtue of her will that he invoked, did not add anything to his original demand or change the nature of his action, but only indicated the source of a right of which he alone was seized at the institution of the action. *Dubeau & La Fabrique de Deschambeault*, 2 Q. L. R. 6, S. C. 1868.

6. An exception to matter pleaded by exception may be filed even under the Ordinance 25 George III. cap. 2, sec. 13. *Paquet* v. *Gaspard*, 3 Rev. de Lég. 40, K. B. 1811.

7. If by special replication the plaintiff admits the facts which the exception sets forth, he may, under the Ordinance of 1785, rebut the facts which he so admits by pleading affirmatively such other facts as in law will avoid them, and upon these the issues may be raised as the Ordinance directs. *Paquet* v. *Gaspard*, 3 Rev. de Lég. 198, K. B. 1811.

8. Where the plaintiffs' special answer after amendment was found to be contradictory to their declaration—*Held*, that the action on that ground alone must be dismissed. *Gault et al.* v. *Cotté*, 12 L. C. R. 92, S. C. 1862.

9. In an action by a municipality for encroachments on a public road, where the defendants pleaded that the encroachment in question was committed by persons possessing the property on the other side of the road—*Held*, on demurrer, that the defendant could set up that the encroachment was made by third parties. *The Corporation of St. Jean Baptiste, Isle D'Orleans*, v. *Lachance*, 16 L. C. R. 315, C. C. 1866.

10. In the Circuit Court the defendant can foreclose a plaintiff who neglects or refuses within the delays prescribed to file answers to his pleas, after demand thereof duly made, and can thereupon inscribe the case upon the role for enquête on his plea, declare that he has no witnesses to examine, proceed to hearing, and obtain judgment *ex parte*. *Meade* v. *Battle*, 5 L. C. R. 58, C. C. 1854.

11. *Held*, on motion, that one general answer cannot be pleaded to four separate exceptions. *Bradford* v. *Henderson*, 6 L. C. R. 488, S. C. 1856.

12. A plaintiff who has failed to file an answer to an affirmative plea is not under 23 Vic. cap. 57, sec. 37, in consequence of that failure, to be considered in the same condition as he would have been had he been formally foreclosed under 12 Vic. cap. 38, sec. 85, from answering such plea. *LaGrange & Carlisle*, 8 L. C. J. 182, Q. B. 1863.

13. An answer in law does not lie to a plea denying the allegations of fact. *Lynch* v. *Laframboise*, 5 R. L. 547, C. C. 1874.

14. And an answer in law based on new facts which require evidence cannot be heard before the hearing on the merits. Ib.

**139.** A like delay of eight days is allowed for the filing of any other pleading necessary to complete the issues.
*Ibid.*

1. A special answer to which no replication has been filed within the delay fixed, may be attacked by motion, and certain allegation therein be struck out. *Delbar* v. *Landa*, 21 L. C. J. 247, 1 Legal news, 212 S. C.

2. A special answer cannot be filed to a special answer without leave of the court, and where such answer has been filed and been demurred to, and the demurrer has been inscribed for hearing, the court will discharge the inscription and order a repleader. *Hart et al. & The Northern Insurance Company*, 18 L. C. J. 189, S. C. 1873.

3. Where the plaintiff after plea replied by general answer and replication, and the case was inscribed for enquête by consent of parties.

*Held*, that the defendant had thereby waived the necessity of replication to the general answer of plaintiff. *Greenshields et al. & Gauthier*, 2 L. C. J. 288, C. C. 1858.

4. But where there was no consent on the part of the defendant—*Held*, that the subsequent proceedings would be set aside. Ib.

5. On a motion by the plaintiff to strike out a special replication by the defendant to a special answer of plaintiff—*Held*, that such special matter therein was irregular, and would be rejected where such matter could have been pleaded by the plea of defendant. *Torrance* v. *Chapman et al.*, 5 L. C. J, 75, S. C. 1860.

**140.** After the expiration of these delays, the party failing to file a pleading is by law foreclosed from doing so without the consent of the opposite party, or leave of court.

1. A motion to be allowed to plead will only be granted upon production of a plea with the motion. *Scheffer et ux.* v. *Fauteux*, 5 R. L. 351, S. C. 1873.

2. A defendant who has been foreclosed from pleading within the ordinary delays, and who moves to be relieved from such foreclosure, must produce with such motion an affidavit in support thereof, and also the plea which he wishes to file. *Corbeil* v. *Dumouchel*, 4 R. L. 389, S. C. 1872.

**141.** Such foreclosure does not, however, take place without an order from the court if the opposite party has not filed with his pleading, in the manner prescribed, the exhibits or written proofs upon which it is founded; and if such exhibits and written proofs are not filed with such pleading, they cannot afterwards be filed without the consent of the opposite party or leave of court.

A judge may, in term or in vacation, extend the delay for filing such exhibits or written proofs.—*C. S. L. C. c.* 83, *s.* 180, § 3.

1. An application by the defendant to enlarge the delay to plead, presented after act of foreclosure granted, cannot be entertained by a judge while the foreclosure exists, and notice of such application, served on the plaintiffs before the expiration of the delay to plead, does not suspend the plaintiff's right to obtain foreclosure. *Miller et al.* v. *McDonald et al.* 8 L. C. R. 303, S. C. 1858.

2. Where a defendant set up by affidavit that it would be necessary for him to search for papers in several registry offices, and that such search would occupy him six months, to the best of his belief, without which delay he would be unable to prepare his defence in a proper manner—*Held*, that he was entitled to a delay accordingly to plead. *Bell et al.* v. *Knowlton et al.* 13 L. C. R. 232, S. C. 1863.

*See art.* 103 *ante.*

**142.** When an amendment of any pleading has been allowed, the delay to answer such pleading is reckoned, according to the foregoing rules, from the day on which the amendment is made and served, without any demand of answer being necessary.

**143.** When the defendant is foreclosed from pleading, the plaintiff may proceed *ex parte*, and may, if the case admit of it, proceed to judgment, according to the provisions contained in articles 89, 90, 91, 92 and 93.

**144.** [No particular form of words is required in any pleading; but every fact, the existence or truth of which is not expressly denied or declared to be unknown, is held to be admitted.] *C. S. L. C. c.* 83, *ss.* 76, 116, § 3; *C. P. L.* 327.

1. 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 character and quality in which she is sued. *Gesseron* v. *Canac*, 2 Rev. de Lég. 334, K. B. 1820.

2. Where the defendant by his exception admits his signature to a note of hand, but pleads a term of payment, it is not necessary for the plaintiff to prove the defendant's signature to the note, notwithstanding the exception has been dismissed and a *défense en fait* filed. *Valliéres* v. *Roy*, 3 Rev. de Lég. 38 K. B. 1820.

3. In an action to recover the value of the use and occupation of a certain property, in which the plaintiff replied specially to the defendant's plea of payment that true it is "that money was paid, as alleged "by defendant, but not at the request of the party deceased, but was "paid by defendant merely to place such party, who is his daughter, "on the same footing as his other children"—*Held*, that the admission contained in such answer could not be divided, and that the plaintiff

was entitled to judgment. *Lefebvre & Demontigny*, 2 L. C. J. 279 & 9 L. C. R. 233, S. C. 1858.

4. And in an action brought against the City of Montreal by an assessor for the value of his services—*Held*, reversing the judgment of the court below, that the plea in the cause which admitted that the sum of £107 18s. 1d. with interest and costs, was due to the plaintiff, praying acte of a deposit of that sum in court, and also praying that the plaintiff's action for the surplus be dismissed entirely, entitles the plaintiff to a judgment for the sum tendered. *Boulanget & The Mayor, &c.. of Montreal*, 9 L. C. R. 363, Q. B. 1869.

5. An admission in a factum in review in the nature of a *désistement* binds the party producing it. *Carden* v. *Lennen*, 2 R. C. 232, S. C. R. 1872.

6. A plea of payment or compensation is a sufficient admission of the plaintiff's demand, but a plea of prescription alleging payment, and accompanied by a *déjense en fait*, is not such an admission. *Thayer* v. *Wilscam*, 9 L. C. J. 1, Q. B. 1861.

7. The allegations of a declaration founded on notarial deeds of sale seeking to fasten a personal liability upon defendant toward plaintiff cannot be proved by a declaration made by defendant in another deed to a third party, and no *lien de droit* is thereby created between plaintiff and defendant. *Pelletier* v. *Rattelle*, 18 L. C. J. 75, S. C. 1874.

8. It is sufficient in any pleading to allege the facts upon which the party intends to rely in plain and concise language, to the interpretation of which the rules of construction applicable to such language in the ordinary transactions of life may apply, no particular form of words being necessary to express the same. *Halcro & Delesderniers*, 2 L. C. R. 325, Q. B. 1852.

*Vide* Art. 20, *ante*.

**145.** Every denial of a signature to a bill of exchange, promissory note or other private writing or document upon which any claim is founded, must be accompanied with an affidavit of the party making the denial, or of some person acting as his agent or clerk and cognizant of the facts in such capacity, that such instrument or some material part thereof is not genuine, or that his signature or some other on the document is forged, or, in the case of a promissory note or bill of exchange, that the necessary protest, notice and ser-

vice have not been regularly made, stating in what the irregularity consists; without prejudice, however, to the recourse of such party by improbation. *C. S. L. C. c.* 83, *s.* 86, § 2.

[In the case of promissory notes, or bills of exchange payable at a particular place, they are presumed, as against the maker or acceptor, to have been presented at that place at maturity, unless the exception founded upon such want of presentation is accompanied with an affidavit that, at the time they became due, provision had been made for their payment at the specified place.]

The denial of any document specified in article 1220 of the Civil Code, must be accompanied by the giving of security for the costs of the commission required to obtain the proof of such document. In the case of paragraphs 5 and 6 of the same article, the denial of the original deposited, must moreover be accompanied by an affidavit of the party making the denial, stating that he doubts and does not believe that the original in question has been signed by the person or executed in the manner therein mentioned. The party wishing to make use of the copy filed is then bound to prove the original, and for this purpose the person who has charge of the original, is bound, upon the order of a judge, to deposit it in the court in which its genuineness is contested; and the prothonotary is bound to furnish him, at the expense of the contesting party, with a copy thereof certified by such prothonotary.

The original, the genuineness of which is thus denied, may be annexed to the commission required to obtain its proof.

1. A *défense en fait* to an action on a promissory note will be rejected on motion, if unsupported by affidavit. *Laprise* v. *Méthot*, 4 Q. L. R. 328, S. C. 1877.
Contra: *The Mechanics' Bank* v. *Seale*, 20 L. C. J. 196, S. C. 1876.

2. The defendant pleaded that the note sued on had been obtained from him by surprise and false representations, and for insufficient

consideration—*Held*, that he was not bound to produce with such plea an affidavit under C. S. L. C., cap. 38, sec. 86. *McCarthy et al.* v. *Barthe*, 6 L. C. J. 130.

3. The defendant pleaded want of notice of protest, but produced no affidavit in support of such plea—*Held*, that the action would be maintained, notwithstanding that no protest had been given. *The Bank of Upper Canada & Turcotte*, 15 L. C. R. 276.

4. The defendant pleaded want of consideration—*Held*, that he was bound to produce with such plea an affidavit under C. S. L. C. cap. 83, sec. 86. *Kelly et al.* v. *O'Connell*, 16 L. C. R. 140.

5. When the defendant pleads that the note was not stamped at its date, he must file an affidavit or declaration uuder oath. *Desilets* v. *Trahan*, 5 R. L. 52.

6. If a party who is summoned to admit or deny a signature appears and files a *défense en fait*, that is a denial of the signature. *Hart* v. *Burn*, 3 Rev. de Lég. 38, K. B., & *Perrault* v. *Girard*, 3 Rev. de Lég. 196, K. B. 1820.

7. In an action against the endorser of a promissory note the defendant pleaded that the signature which purported to be his was not written by him or with his knowledge, consent or authority, and that he was not aware of the existence of the promissory note until notified of the protest. At the hearing it was urged by the plaintiff that he was entitled to judgment as the affidavit was not in the form required by law. The defendant thereupon made a motion that the *délibéré* be discharged, and that he be permitted to file another affidavit. This motion was rejected, and judgment went for plaintiff, but on appeal—*Held*, that the affidavit was sufficient and the allegations of the plea being proved, the judgment of the court below was reversed, and judgment went for the appellant. *Browne & Dow*, 11 L. C. R. 273, Q. B. & 10 L. C. R. 442, S. C. 1861.

8. Where a defendant to an action on a promissory note pleaded want of notice of protest, and the plaintiff contended that the plea should be dismissed on the ground that it was filed without the affidavit accompanying it under sec. 87 of the Act of 1857—*Held*, that as the certificate of the notary showed that the notice he served was utterly useless, an affidavit such as provided by the statute was unnecessary. *Hobbs in re et al. & Harte et al.* 5 L. C. J. 52, C. C. 1860.

9. Where to an action against the endorser of a promissory note by the endorsee, the defendant pleaded that no sufficient protest of the note had been made, and, moreover, that at the time he endorsed it,

the endorser, that is the plaintiff, verbally agreed to accept it on the credit of the maker alone without recourse against defendant—*Held*, reversing the judgment of the court below, that although the protest appeared to be insufficient on the face of the note, it would, nevertheless, be held to have been regularly and legally made, unless with the plea an affidavit had been produced that such notice was not regularly made. *Chamberlain & Ball*, 5 L. C. J. 88 & 11 L. C. R. 50, Q. B. 1860.

10. In an action on a promissory note, where want of notice of protest was invoked—*Held*, that the party pleading such want of notice was bound to produce therewith the affidavit required by 20 Vic. cap. 44, sec. 87. *Ryan et al. & Malo*, 12 L. C. R. 8, Q. B. 1861.

11. An action was brought in Montreal on a promissory note dated in Montreal but really made in another district—*Held*, that a declinatory exception would lie, even though not accompanied by affidavit, and the action was dismissed. *Hudon* v. *Champagne*, 17 L. C. J. 45, S. C. 1872.

**146.** When a party has pleaded incompatible or contradictory grounds [in the same plea,] he may be required by the opposite party to choose between such grounds or plead anew, and in default of such choice, the incompatible grounds are held to be of no effect, and are set aside.

1. Where a plea to the merits contained allegations and conclusions inconsistent with one another, and belonging to two different classes of pleas—*Held*, on demurrer, that those which did not properly belong to the plea must be dismissed. *Chapman* v. *Nimmo*, 8 L. C. J. 42 & 14 L. C. R. 103, S. C. 1863.

2. In an action against a wife separate as to property by a grocer for necessaries for family use—*Held*, that pleas of compensation and prescription are inconsistent with pleas of "never indebted." *Elliot & Grenier et ux.* 1 L. C. L. J. 91, S. C. 1865.

3. In an action to be re-instated in a church pew (*banc patronal*) of which the plaintiff had been deprived by the Fabrique—*Held*, that there was no cumulation of the petitory with the possessory, in alleging, as defendants had done in their exception, grounds which referred solely and directly to the right of property in the pew in question. *La Fabrique de Deschambeault et al. & Dubeau*, 2 Q. L. R. 6, Q. B. 1875.

4. A *défense en fait* and an exception of payment may be pleaded together, and are not contradictory, nor can the defendant be bound by admissions in his plea of payment. *Leclerc* v. *Durand*, 1 Q. L. R. 382, C. C. 1873.

5. Where the defendant with a plea of payment filed also a *défense au fonds en fait*, and the plaintiff made motion that he be held to choose between them, they were *held* to be not incompatible, and the motion was dismissed, *Sarault* v. *Ellice*, 3 L. C. J. 137, S. C. 1859.

6. *Held* reversing the judgment of the court below, that an affirmative plea, such as a plea of compensation, may be filed with the general issue. *Clark* v. *Johnston*, 3 L. C. R. 421, Q. B. 1853.

7. Under 12 Vic. cap. 38, sec. 25, an exception to the form and an exception of payment cannot be pleaded at one and the same time. *Dube & Proulx & Paquin et al.*, 1 L. C. R. 364, S. C. 1851.

8. The plea of general issue is incompatible with a peremptory exception admitting the making of a promissory note, or the sale and delivery, but alleging payment of the same, and the allegations of such exception are not necessarily divisible, otherwise no issue can be raised upon it. *McLean* v. *McCormick*, 1 L. C. R. 369, S. C. 1851.

9. In a plea to an action of damages, where the defendant specially denies, and in the same plea avers affirmative matter which is not a justification, such matter will be struck out on motion by plaintiff. *St. Jean* v. *Bleau*, 1 Legal News, 211 ; 21 L. C. J. 37, S. C.

**147.** A demurrer may be pleaded, when the facts alleged in the declaration do not give rise to the right of action which the plaintiff seeks to exercise. 1 *Pig.* 204.

1. Matter essentially necessary which is omitted is subject to a demurrer, but matter essentially necessary which is imperfectly stated is subject to an exception to the form. *Wagner* v. *Farran*, 3 Rev. de Lég. 196, K. B. 1811.

2. An objection to the legality of an exception or plea cannot be urged but by demurrer containing the grounds against such exception or plea. *Trudelle & Allard*, 2 L. C. R. 178, S. C. 1852.

3. The proper way of raising objections to the sufficiency of the description of the parties in plaintiff's declaration is by exception to the form and not by demurrer. *The St. Lawrence and Ottawa Grand Junction Railway* v. *Frothingham et al.*, 5 L. C. R. 140, S. C. 1855.

4. Prescription is not pleaded by demurrer but by peremptory exception. *Faucher* v. *Boulanger*, 4 R. L. 388, S. C. 1872.

5. An allegation of foreign matter in a declaration, as also the absence of allegations necessary to give rise to the conclusions of the action, must be attacked by demurrer, and not by exception to the form. *Destimauville & Tousignant*, 1 Q. L. R. 39, S. C. 1874.

6. The want of authorization of a married woman can only be invoked by preliminary exception and not by demurrer. *Antaya* v. *Dorge et al.* 6 R. L. 727, S. C. 1873.

7. Where a demurrer was filed to an action on the ground that the declaration was irregular and contradictiory, and that no amount of damage was specified as suffered by the plaintiff, and the plaintiff did not pray for the amount of such damages if any, the demurrer was dismissed for the reason that the grounds alleged should be pleaded by exception to the form and not by demurrer. *Chevrefils* v. *Les Syndics de la Paroisse de Ste. Hélène*, 2 R. L. 161, S. C. 1869.

8. Where the defendant was sued *es qual.*, and pleaded by demurrer the want of such quality—*Held*, that such plea should be by preliminary exception and not by demurrer. *Breault* v. *Barbeau et al.*, 2 R. L. 130, S. C. 1879.

9 Error at law must be pleaded by exception and not by demurrer. *Boston* v. *L'Eriger*, 4 L. C. R. 404, S. C. 1854.

10. A plea which is good in part and bad in part should be rejected on demurrer. *Millar* v. *Bourgeois & Holland*, 17 L. C. J. 158; S. C. 1873.

11. And in an action for customary dower by children against a third holder, to which the defendant pleaded that the plaintiffs had not alleged in their declaration that their father had not left in his succession property of sufficient value to satisfy their right of dower—*Held*, that such a plea could not be maintained, and that in order to set aside the action it was necessary to proceed by exception and prove that the father had left in his succession property of sufficient value for that purpose. *Lepage et al. & Chartier*, 11 L. C. J. 29, S. C. 1866.

And *held*, also, that such objection could not be made by demurrer but must be made by peremptory exception. Ib.

12. An allegation in a plea in law denying the allegations in the plaintiff's declaration is bad, and must be struck out. *Dubois et vir* v. *Stoll*, 17 L. C. J. 24, S. C. 1872.

13. One count in a plea can be demurred to although the other counts may be held to be good. *Routh* v. *McGuire & McGuire et al.* 10 L. C. R. 206, S. C. 1860.

14. When a law issue is raised by demurrer, the demurrer must be heard before the case can be inscribed for enquête. *Burroughs* v. *Bourget*, 2 R. C. 238, S. C. 1872.

15. A *défense au fonds en droit* should be argued previous to the hearing on the merits, and where, by consent, the hearing of the de-

murrer was reserved until the hearing on the merits—*Held*, that it should be rejected but without costs. *Roy et al.* v. *Gauthier*, 17 L. C. J. 227, S. C. 1873.

16. In cases of demurrer founded on the fact that the registration of the conveyance which forms the basis of the action is not alleged in the plaintiff's declaration, the court has the right to reserve judgment until the parties are heard on the merits. *Desbarats et al.* v. *Lemoine et al.* 15 L. C. J. 81, S. C. 1871.

17. But *held*, in another case, that proof *avant faire droit* cannot, under the Ordinance of 1536, be ordered by the court. *Hart* v. *Rose*, 15 L. C. J. 133, S. C. R. 1871.

18. A judgment on the merits leaving a demurrer undisposed of is bad. Ib.

19. The use of the present tense *has*, instead of the past tense *had*, was under the circumstances of the case held to be good ground of demurrer. *Stephens* v. *Hopkins*, 1 L. C. L. J. 93, S. C. 1865.

20. A demurrer will lie to a petition to quash a capias when the petition is grounded on irregularities such as should give rise to exception to the form. *Lemay* v. *Lemay*, 3 R. L. 32, S. C. 1871.

21. In an action of damages against several defendants, charged with breach of contract to convey a raft—*Held*, that the action could not be dismissed on demurrer because by the conclusions it was prayed that the defendants be condemned jointly and severally. *Ranger et al. & Chevalier et al.*, 5 L. C. R. 180, S. C. 1855.

22. A plea of want of notice of action is a general issue, and cannot be touched by demurrer. *McNamee* v. *Himes*, 3 L. C. J. 109, S. C. 1859.

23. The plaintiff leased to the defendant for several years certain premises for the sum of £570, the receipt whereof was acknowledged, and action was afterwards brought to have the lease set aside as fraudulent, the plaintiff alleging that the only amount which he had ever received was £37, and that the contracts were usurious, and that there was *lésion d'outre moitié*, and the defendant pleaded by demurrer—*Held*, that the parties must proceed to proof before adjudication on the demurrer. *Perrault* v. *Malo*, 11 L. C. R. 81, S. C. 1860.

24. Where demurrer was brought to an action for the recovery of $100, advanced in consideration of a transfer to be made by defendant, and the agreement was never carried out, the demurrer alleging that the action should be one for damages for breach of contract—*Held*, that the action was properly brought, and the demurrer was dismissed. *Bougie* v. *Leduc*, 5 R. L. 548, S. C. 1874.

25. And where the declaration set up a contract, and then claimed more than was stipulated in the contract without asking that it be set aside, a demurrer was maintained. *Gough & Greaves*, 1 L. C. L. J. 93, S. C. 1865.

26. A demurrer to a declaration which sets up a promissory note as made by one of the defendants, *St. Julien, tuteur*, and prays for judgment against him *personally* and the other defendant as endorser, will not lie. *Darling et al.* v. *St. Julien et al.* 18 L. C. J. 190, S. C. R. 1873.

27. A demurrer is a plea to the merits. *Normand* v. *Huot*, 9 L. C. R. 405, S. C. 1859.

28. Where a defendant on the last day of the delay to plead to the merits made a motion to have the delay enlarged as he was about to file a special demurrer, and could not plead to the merits without prejudice until the demurrer was disposed of—*Held*, that *défenses en droit* should be accompanied by pleas to the merits, but, as this was the first time the question had been raised, the court would allow the defendant the rest of the day to file such pleas. *Pirrie* v. *McHugh et al.* 1 L. C. R. 216, S. C. 1851.

29. A demurrer is not a preliminary plea, and need not therefore be filed within four days laid down by the statute. *Benson* v. *Ryan*, 4 L. C. R. [illegible]. 1853.

30. In an action against the maker of a note payable on demand and generally, want of presentment is not a ground of demurrer. *Archer* v. *Lortie*, 3 Q. L. R. 159, S. C. R. 1877.

31. Where a statute requires notice of action to be given to defendant before issuing the writ, it is not necessary to allege in the declaration that such notice has been given. *Simard* v. *Tuttle*, 4 L. C. R. 193, S. C. 1854.

32. And in another case—*Held*, that such notice need not be recited at full length in the declaration. *Davies* v. *McGuire*, 4 L. C. R. 347, S. C. 1854.

33. In an action by a tutor to a minor—*Held*, to be essential that the declaration contain an allegation that the appointment of the said tutor or a memorial of such appointment has been registered. *Murray es qual.* v. *Gorman*, 2 L. C. R. 3, S. C. 1851.

34. Opposition was filed for the amount of a hypothec, and the opposition was contested on the ground that no registration of the hypothec was alleged—*Held*, that where the hypothec was opposed to chirographic claims the allegation of registration was unnecessary.

*Duncan & Wilson & McClennan & Wilson & Wood*, 2 L. C. J. 253, S. C. 1857.

35. Where in an action for dower dependent upon an option arising out of a contract of marriage the defendant demurred on the ground that the plaintiff's declaration did not allege the registration of such contract, the action was dismissed in the court below, but re-established in review on the ground that the allegation referred to was specifically made. *Leroux* v. *Leroux*, 5 R. L. 188, S. C. R. 1873.

36. And where in the same action the defendant filed an exception on the ground that there really was no registration of the contract of marriage, and the plaintiff demurred, the demurrer was dismissed. Ib.

37. In an action against a public officer for a *saisie revendication* of goods seized—*Held*, that proof *avant faire droit* would be ordered upon a demurrer alleging the omission of one month's notice. *Bathgate* v. *Delisle*, 15 L. C. J. 250, S. C. 1870.

38. In an action brought by a registrar against the sheriff for the value of certain certificates, but in which action the plaintiff omitted to allege that the sheriff had received the fees therefor—*Held*, that the validity of the declaration could not be tested by demurrer, but must be attacked by a plea to the merits. *Lambly et al.* v. *Quesnel*, 15 L. C. R. 148, C. C. 1864.

39. In an action by the transferee of the assignee of a bankrupt estate who had purchased the outstanding debts of the estate—*Held*, to be necessary to allege in the declaration that the sale was made by order of the judge, and that the formalities required by the 67th section of the Bankrupt Act have been complied with. *Warner* v. *Mernagh*, 2 L. C. R. 452, S. C. 1851; Ins. Act, 1875, sec. 69.

40. In a personal action by a transferee—*Held*, unnecessary to allege that he had served on the defendant a copy of the registration required by Art. 2127 of the Civil Code, and an allegation that the service required by Art. 1571 was made is sufficient. *Dumont & Laforge*, 1 Q. L. R. 159, S. C. 1874.

41. Where a wife, separate as to property, and alleged to have been carrying on business as A. & Co., was sued, and her husband brought into the case for the purpose of authorization only—*Held*, that an allegation in the declaration that the defendants under the name of A. & Co. made *their* certain promissory note was sufficient, and a *défense en droit*, on the ground that no debt against the wife was set up in the declaration, would be dismissed with costs. *Adams* v. *Fleming et vir*, 13 L. C. R. 78, S. C. 1862.

42. The plaintiffs, not having alleged the insolvency of the defendant in their declaration, could not base their right to sue for the whole of the debt on such insolvency, and the allegation of defendant's insolvency in their special answer could not avail to supply the deficiency in their declaration. *Gibson et al.* v. *Moffat & Young*, 2 L. C. L. J. 60, Q. B. 1866.

43. And in another action for the infringement of a patent right to which the defendant demurred on the ground that the declaration failed to set out at length the preliminary formalities required to be observed in order to obtain the patent—*Held*, to be unnecessary, and the demurrer was dismissed. *Bernier* v. *Beauchemin*, 2 L. C. J. 193, S. C. ; *Bernier* v. *Belivean*, 8 L. C. R. 297, S. C., 1858.

44. In an action of damages for malicious arrest upon a capias 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 was dismissed. *Boyle* v. *Arnold*, 1 Rev. de Lég. 503, K. B. 1821.

45. In an action for malicious arrest of property *meditatione fugæ*, it is not necessary to state in the declaration that the action under which the arrest was made is determined. *Whitfield* v. *Hamilton*, 3 Rev. de Lég. 40, K. B. 1811.

46. In an action for the price of sale of certain real property it is not necessary to aver the delivery of the property sold. If it has not been delivered the defendant must plead that fact, and the plaintiff may reply by a delivery or by an offer to deliver. *Larivée* v. *Bruno*, 3 Rev. de Lég. 40, K. B. 1817.

47. Action was taken to recover the price of 1000 barrels of flour sold to the defendant, and the plaintiff joined to such action an attachment by conservatory process, praying in ordinary form that the goods be seized to wait the decision of the Court—*Held*, that the action was good and valid and would be maintained. *Baldwin & Binmore et al.*, 6 L. C. J. 297, S. C. 1861.

48. In an action in which the husband is joined only for the purpose of authorizing his wife, judgment can only be demanded in favour of the wife. *Lefort & vir* v. *Desmarais & al.*, 11 L. C. J. 122, S. C. R. 1848.

49. In an action by a wife separate as to property by a marriage contract, such contract must be alleged in the declaration. *Walker & The Mayor et al. of the Town of Sorel*, 5 R. L. 66, Q. B. 1866.

50. Where the defendant demurred to an action on a promissory note on the ground that the declaration did not allege that the defendants signed the note, and it did not allege that they delivered the said note, etc.—*Held*, that the allegation that the defendant made the note was sufficient without alleging that the note was signed by him, and as to the delivery, although it would have been better to have alleged the delivery by the maker to the payees, the declaration must be considered to have been sufficient. *Bullitt et al.* v. *Shaw et al.*, 7 L. C. J. 47, S. C. 1863.

51. Information was laid on the part of the Crown to cause two casks of planes seized by the customs officers for an infraction of the revenue law to be condemned, the goods having been imported without the payment of duties—*Held*, that in such an information the allegation that the goods ought to be forfeited, as having been imported into the Province without the duties having been paid, was insufficient, and that there must be a substantive allegation that they were imported and brought into the Province in violation of the customs regulations. *The Solicitor General & Darling et al.* 2 L. C. R. 20, S. C. 1851.

52. And the omission of the words "against the form of the statute" was fatal. Ib.

53. Where a lessee brings action in ejectment under the statute 18 Vic. cap. 108, it is not necessary to invoke such Act in the declaration. *Brown* v. *Janes*, 4 L. C. J. 35, S. C. 1860.

54. In an action by the heirs of a wife, common as to property, against their father, praying to be declared proprietors of one-half of a farm belonging to the community, it is necessary to specify which half if a partition have taken place, and if not, to pray for a partition by the declaration. *Lalonde et al.* v. *Lalonde*, 5 L. C. R. 97.

## SECTION VI.

## OF ISSUE JOINED.

**148.** The issues are completed:

1. By declaration, pleas and replications, if there are no perpetual exceptions;

2. By declaration, exceptions, answers to exceptions and replications to answers, if the answers contain facts that are not alleged in the declaration;

3. They are also held to be completed by foreclosure from filing, or by failure to file answers or replications.

Nevertheless, if the proceedings secondly enumerated are not sufficient to fully set out the grounds of the parties, the court may grant leave to file further pleadings.—*C. S. L. C.*, *c.* 83, *s.* 72; 25 *Vic. c.* 57, *s.* 37.

1. Before a party to a suit can inscribe for hearing in law upon a demurrer he must join issue upon such demurrer by the usual joinder. *Tremblay* v. *Tremblay*, 4 L. C. R. 175, S. C. 1853.

2. On motion to set aside an inscription for hearing on the merits of a declinatory exception as irregular, there being no answer or replication filed—*Held*, that the issue was complete without such answer or replication. *Richard* v. *The Champlain and St. Lawrence Railway Company*, 6 L. C. R. 480, S. C. 1855.

3 There can be but one issue on the merits between the parties plaintiff and defendant, or defendants who have not severed in their defence, and issue is joined by the filing of all the answers to all the pleadings or on the expiration of the delay for filing the same. *Boswell* v. *Lloyd*, 13 L. C. R. 476, S. C. 1863.

4. The issue is completed by declaration, exceptions and answers to exceptions, if the answers to the exceptions be general. *Cochrane et al.* v. *Bournae et al.* 13 L. C. J. 168, S. C. 1869.

5. Issue is joined by a general answer to an exception, and no reply will be allowed. *Hutchins et al.* v. *Fraser et al.* 14 L. C. J. 280, S. C. R. 1870.

6. Issue is joined by declaration, exception and general answer. *La Compagnie de Moulins à Coton de Hudon* v. *Valois*, 20 L. C. J. 299, S. C. 1876.

7. A special replication is admissible without the permission of the court. *Kingley* v. *Dunlop*, 3 R. L. 448, S. C. R. 1871.

8. A special replication cannot be filed by defendant to the special answer of the plaintiff. *Morrison* v. *Kierzkowski es qual.*, 4 L. C. R. 419, S. C. 1854.

9. But, *held*, in appeal, that a special replication may be pleaded to an answer containing facts not stated in the declaration, and that without obtaining the leave of the court. *Kierzkowski & Morrison*, 6 L. C. R. 159, Q. B. 1856.

10. It is competent for the defendant, whose exception has been specially answered, to reply specially to such special answer, and that without it being necessary that he should obtain permission to that effect. *Regina* v. *Belleau*, 12 L. C. R. 151, S. C. 1862.

11. Plaintiff brought a petitory action againstthe defendant to recover possession of a lot of land acquired by him by deed of such a date, but setting up no other title. The defendant pleaded that, before the date of the plaintiff's title, he had been in possession as proprietor for more than ten years, but setting up no title. To this the plaintiff was permitted to file a special answer in which he set up anterior titles. The defendant objected to this special answer, as being in fact a new action, to which his plea would not apply, and also to an interlocutory judgment setting aside the closing of the plaintiff's *enquête*, previously made, and the evidence taken on the defendant's inscription for *enquête*.—*Held*, that the action must be dismissed, and both parties put out of court, paying their own costs in both courts, because, among other things, the plaintiff had failed to establish his title to the lot in manner and form as set up in the declaration, and because the issue was altogether irregular, and the parties ought not to have been allowed to proceed to *enquête*. *Osgood & Kellam*, 10 L. C. R. 22, Q. B. 1859.

*See* cases under Art. 139.

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# CHAPTER FOURTH.

## OF INCIDENTS.

### SECTION I.

### OF INCIDENTAL DEMANDS.

**149.** The plaintiff may, in the course of the suit, make an incidental demand:

1. In order to add to the principal demand something he has omitted to include in it;

2. In order to claim a right accrued since the service of

the principal suit and connected with the right claimed by such suit;

3. In order to demand something which he requires for the purpose of avoiding the ground of defence set up by the defendant.—1 *Pig.* 337; *Ord.* 1667, *tit.* xi., *art.* 26.

1. A claim which had no connection with the demand in chief cannot be ground of an incidental cross demand. *Lafleur* v. *Mure*, 3 Rev. de Lég. 199, K. B. 1810.

**150**. This incidental demand is made by a petition, accompanied by the documents in support thereof, and served upon the opposite party.

*Ord.* 1667, *tit.* ix. *art.* 26.

1. In an action for rent, in which the plaintiff reserved his right to new conclusions for the rent then accruing and that actually became due before the case was ready for judgment—*Held*, after deliberation, that such new conclusions could be added and judgment rendered thereon without any further service on the defendant. *Dubois* v. *Gauthier*, 2 L. C. J. 94, S. C. 1857.

2. In an action against two joint lessees to set aside the lease for non-payment of rent—*Held*, confirming the judgment of the court below, that an incidental demand for damages could not be entertained, not having been served upon both lessees, notwithstanding one of them had made default. *Dubois* v. *Lamothe et al.* 12 L. C. R. 480, S. C. 1862.

**151**. The defendant may set up, by incidental demand, any claim of his arising out of the same causes as the principal demand, and which he cannot plead by exception.

When the principal demand is for the payment of a sum of money, the defendant may also make an incidental demand upon any claim for money arising out of other causes; but such an incidental demand is distinct from and cannot retard the principal action.

The court, whenever it renders judgment upon both demands at the same time, may order compensation, if the case admits of it.

*Pothier, Proc.* 39, 40; 1 *Pig.* 337; *Paris*, 106, 37*th Rule of P.*

1. In an action *en bornage* the defendant pleaded the thirty years' prescription, and filed an incidental demand *en bornage* on the same ground, viz., of title by prescription, to which the incidental defendant took no exception. The incidental demand was dismissed as an unnecessary pleading, each party paying their own costs. *Dussault* v. *Stuart & e contra*, 3 Rev. de Lég. 392, K. B. 1816.

2. The court will not reject as irregularly filed an incidental demand filed by the defendants along with their pleas, merely because the defendants have not petitioned the court for permission to file such incidental demand. *Lionais* v. *Lamontagne et al. & e contra*, 20 L. C. J. 303, S. C. 1876.

3. In an action for rent a plea that the defendant has not been kept *clos et couvert* cannot be pleaded by exception to the action, as such failure on the part of the landlord amounts to a breach of contract, and the tenant must seek his remedy in damages by an incidental cross demand. *Weippert* v. *Iffland*, 3 Rev. de Lég. 199, K. B. 1820.

4. In an action for work and labour done the defendant pleaded want of skill on the part of the plaintiff, and filed an incidental cross demand for damages, and that was *held* to be the proper proceeding. *Galarneau* v. *Marette*, 3 Rev. de Lég. 199, K. B. 1818.

5. If part of a cargo be delivered and accepted, an action for freight *pro tanto* will lie, but damages for the non-performance of the rest of the contract can only be demanded, on the part of the freighter, by an incidental cross demand. *Oldfield* v. *Hutton*, 3 Rev. de Lég. 200, K. B. 1812.

**152.** Incidental demands by the defendant are likewise made by petition, accompanied by the documents in support thereof, and served and filed at the same time as the pleas to the merits.

36*th Rule of P.*

**153.** Issue is joined upon incidental demands in the same manner as upon the principal demand, and their contestation is subject to the same rules, delays and foreclosures.

## SECTION II.

## OF INTERVENTIONS.

**154.** Every person interested in the event of a pending suit is entitled to be admitted a party thereto, in order to maintain his rights.

*Poth. Proc.* 40; 1 *Bornier. Proc. Civ.* 258; 27-28 *V. c.* 17, *s.* 4, § 9; *C. S. L. C. c.* 83, *s.* 71.

1. Goods belonging to a third person and which have been seized under an attachment before judgment must be reclaimed by intervention and not by an opposition. *Ste. Marie* v. *Brown es qual. & Brown*, 4 R. L. 527, S. C. R. 1872; *Anderson* v. *Walsh & Ross*, 3 R. L. 445, S. C. 1871.

2. A person claiming land under seizure cannot do so by means of an intervention pending proceedings upon an opposition *to withdraw* filed by another person, and such intervention may be rejected on motion. *Bethune* v. *Chapleau et al. & Fraser*, 17 L. C. J. 33, S. C. R. 1873.

3. An intervention allowed, filed and served between the service and the return of the principal action is not premature, the action being *pending* from the moment of service. The service of the intervention upon the plaintiff's attorney is a sufficient service upon the plaintiff. *Rees* v. *Morgan & Baillie*, 4 Q. L. R. 184, S. C. 1878.

**155.** An intervention is formed by a petition, containing the grounds which justify the party in intervening, with conclusions to that effect, and must be accompanied with the exhibits in support thereof.

*C. S. L. C. c.* 83, *s.* 71; *Ord.* 1667, *tit.* xi, *art.* 28; 22 *Isambert*, 81; *C. P. C.* 339.

1. An intervention may be allowed by the Court without being supported by an affidavit. *Coates et al.* v. *The Glen Brick Co. & Welsh*, 14 L. C. J. 112, S. C. 1869.

**156.** The demand in intervention may be made in court or filed in the prothonotary's office; but it cannot stay pro-

ceedings upon the principal demand unless it is allowed by the court, or by a judge in vacation, upon application made at any time before judgment in the cause.—*C. S. L. C. c.* 83, *s.* 81.

1. An intervention by a party interested in a contestation between defendant and a guardian *mis en cause*, after determination of the principal suit, is regular. It will not be rejected from the record on motion because it was filed without the allowance of the court. *Semble* that the allowance thereof by a judge in chambers during term is not a compliance with Art. 156.—*Millar & Bourgeois & Holland & The Montreal R. Mills*, 16 L. C. J., 335, S. C. 1872.

**157**. When the intervention is allowed by the court or judge, the suit is suspended during three days; and if the intervening party fails within that period to have it served upon the parties in the case and to file a certificate of such service, it is held not to have been filed and has no effect; and the filing of the prothonotary's certificate of such default is equivalent to a judgment dismisssing the intervention.—*Ibid.*, *s.* 2.

1. An intervening party is bound within eight days from the admission of his intervention, either to furnish any further grounds he may have to set up in the principal suit, or to notify the parties that he has no further grounds to offer. *McGreevy* v. *Gingras & Coté*, 4 Q. L. R. 203, S. C. R. 1876.

2. The Court may extend the delay of three days allowed for service of petition in cases of intervention. *Fraser* v. *Pouliot & Lavoie*, 3 R. L. 446, S. C. 1871.

3. A petitioner for intervention must give notice of his petition to all the parties in the case, as well those who have appeared as those who have made default, and the reasons of intervention must be served both upon the plaintiff and the defendant. *Fraser* v. *Pouliot & Lavoie*, 3 R. L. 446, S. C. 1871; *Gillespie et ul.* v. *Spragge et al. & Hutchison et al.* 6 L. C. J. 25, S. C. R. 1855.

4. An intervention must be served upon the parties, otherwise it can have no effect. *Cournoyer* v. *Tranchemontagne et al. & Barthe*, 18 L. C. J. 335, 5 R. L. 327, S. C. R. 1874.

5. Plaintiff obtained a certificate that the intervention had not been filed within the three days, whereupon the intervening party moved without notice, but upon affidavit, for a further delay to file his reasons, which motion was allowed—*Held*, in review, that the further delay should not have been granted. *Beaudet & ux. & Martel & Ethier*, 15 L. C. R. 457, 1 L. C. L. J. 29, S. C. R. 1865.

**158.** If the demand in intervention is served within the delay prescribed, the parties to the suit are bound to answer it within eight days after such service, in default of which, the intervention is held thenceforward to be admitted by the parties who have not contested it. The intervening party is bound, within eight days from the admission of his intervention, to furnish any grounds he may have to set up in the principal suit.

The subsequent proceedings are the same as in an ordinary suit. 1 *Couchot*, 78; 25 *Vic. c.* 57, *s.* 36.

1. On the reasons and grounds of an intervention a new issue is raised, and proceedings must be taken and followed as in ordinary cases. *Walcott* v. *Robinson & Johnson & Barnes*, 11 L. C. J. 303, S. C. R. 1867.

2. An inscription on the role *d'enquête ou de droit*, without having regularly demanded a plea in contestation of the intervention, and without having allowed the legal delays to elapse will, on motion to that effect, be struck. Ib.

3. An intervening party cannot foreclose a party already *en cause* without a regular demand of plea and the lapse of the regular delays allowed for similar pleadings in ordinary suits, and such foreclosure will be raised on motion. *Walcott* v. *Robinson & Johnson & Barnes*, 11 L. C. J. 303, S. C. R. 1867.

4. Although a seizure corporeally effected of property in the hands of the *tiers saisi* be null, an intervening party cannot, by motion made immediately after he is allowed to intervene, and before any issue is joined on the intervention, claim the quashing of the seizure. *Fleck & Brown*, 9 L. C. J. 216 and 15 L. C. R. 416, and 1 L. C. L. J. 32, Q. B. 1865.

See *McGreevy* v. *Gingras & Côté*, under Art. 157.

## SECTION III.

## OF IMPROBATION.

**159.** Besides the action of improbation which may be brought as a principal and direct action, any party in a suit may proceed by improbation against any authentic document produced by the opposite party, [and even against a return of the sheriff or of any other judicial officer. *Poth. Proc.* 333; *Serpillon, Code du Faux*, 153; *C. P. C.* 214.

Nevertheless, as regards simple service of summons or of notice, the return may be contested on motion, without an improbation, unless the court otherwise orders.

If the contestation be deemed frivolous the contesting party may be condemned to pay double costs.

The Court may, according to circumstances, grant leave to amend the return, by supplying any omissions or correcting any errors therein which might be grounds of improbation.]

1. A sheriff's return is an authentic act, and cannot be impeached without an inscription *en faux* and an incidental demand in recission founded on affidavit. *Bélanger & Holmes*, 3 Rev. de Lég, 198, K. B. 1818.

2. Where it is shown that a paper filed in a case has been ante-dated, and in reality filed on a different day from its date and after the proper delay, it will be struck from the files of the court on motion to that effect, and it is not necessary to inscribe *en faux* against the plumatif or register of papers filed. *Beaudry* v. *Ouimet*, 8 L. C. J. 126, S. C. 1863.

3. Where inscription *en faux* was taken against the defendant's pleas and exhibits as not being filed on the day on which they purported to have been filed—*Held*, that defendant might withdraw such pleas and exhibits and substitute others on payment of costs of procedure *en faux*, and thirty shillings additional on filing the new pleas. *Mayer* v. *Thompson et al.* 1 L. C. J. 280, S. C. 1857.

4. Where a document produced in a case before experts was alleged to be false—*Held*, that it might be attacked *en faux* by summary petition. *Brunet* v. *Brunet*, 17 L. C. J. 51, S. C. 1871.

5. The certificate of the prothonotary can only be attacked by improbation. *DeBeaujeu* v. *Massé, jun.*, 7 L. C. J. 105, S. C. 1863.

6. The correctness of a duly certified copy of a notarial deed may be attacked otherwise than by improbation, and therefore the procedure by way of an *inscription en faux* should be dismissed. *Dufresne et al.* v. *Lalonde et al.* 21 L. C. J. 105, S. C. 1876.

See *ante*, Arts. 79, 80.

**160.** A party may also proceed by improbation against any document filed by himself, and which he is seeking to have declared null.

*Perrault* v. *Simard, L. C. R.* 24.

**161.** Incidental improbation is begun by a petition, praying that the party be allowed to proceed by improbation against the document therein designated, and that the opposite party be held to declare whether he intends to make use of such document.

The petition must, under pain of nullity, be signed by the party himself, or by his attorney, under a special power filed with the petition.

*Imbert, p.* 788; *Ord.* 1670, *art.* 6; *Ord.* 1737, *tit.* ii. *art.* 3; *Serpillon, Code du Faux*, 153; *C. P. C.* 215.

1. On an inscription in improbation—*Held*, to be unnecessary to make an election of domicile. *Martineau* v. *Karrigan*, 3 L. C. J. 190, S. C. 1859.

2. A party will not be allowed to inscribe *en faux* against a bailiff's return after the expiration of the four days from the day of return, except on cause shown by affidavit. *Perry* v. *Milne & The Ontario Bank*, 6 L. C. J. 243, S. C. 1862; *Seymour* v. *Horner et al.* 12 L. C. R. 90, S. C. 1862.

3. A party was held to have waived all pretensions to proceed on his inscription *en faux* where he omitted to move to set aside an inscription on the merits of the suit. *Phillips* v. *Hart & Hart*, 1 L. C. R. 305, S. C. 1851.

**162.** The petition must be served upon the opposite party before it is presented.—*C. P. C.* 215.

**163.** [The petition must be accompanied by a deposit in the prothonotary's office of a sum fixed by the court, to meet the costs to be incurred, in whole or in part, in the event of the improbation being dismissed.]

**164.** Improbation may be begun at any stage of the suit until the closing of the evidence, and even afterwards before judgment, upon proof that the falsity was not ascertained until after evidence was closed.

All proceedings in the principal suit are suspended until the improbation is adjudicated upon.—3 *L. C. J.* 268.

1. An inscription *en faux* may be made at any stage of the proceedings, Art. 164 having abrogated all rules to the contrary.—*Lynch* v. *Duncan*, 12 L. C. J. 220, 15 L. C. J. 36, S. C. R. 1868.

2. But a party cannot proceed by improbation against any document produced in a case after the closing of the *enquête*, when the facts on which he relies were known to him before he pleaded to the merits. —*Desilets* v. *Trahan*, 5 R. L. 52, S. C, 1873.

**165.** The opposite party must declare whether or not he intends to make use of the document impugned, and file in the prothonotary's office a precise declaration to that effect, previously served upon the plaintiff in improbation.

The declaration must also, on pain of nullity, be signed by the party or by his attorney, under a special power to that effect, filed with the declaration.

The declaration must be made within eight days from the filing of the petition, unless the delay is extended by the judge.

*Serpillon* 169; *C. P. C.* 216.

1. If the party who files an *acte* or deed which is impeached *en faux* omits to declare that he means to make use of it, he is not foreclosed from doing so, but may still be admitted to make his declaration on payment of costs. *Proulx* v. *Proulx*, 3 Rev. de Lég. 198, K. B. 1818.

**166.** If the defendant in improbation fails, within the delay prescribed, to make such declaration, or declares that

he does not intend to make use of the document, it is rejected from the record, and if the conclusions demand it, is also declared null.

*Serpillon*, 173, 179; *Cod. L.* 3 *de fide instrum.*; *C. P. C.* 217.

**167**. If the defendant in improbation declares that he intends to make use of the document, the court, or a judge in vacation, upon the demand of either of the parties, orders that such document, and the original thereof if necessary, be deposited in the prothonotary's office, at the diligence of the party who relies upon it, and that the parties in charge thereof be compelled by all legal means to deposit it.

*Imbert loco cit.*; *C. P. C.* 219, 220, 221.

**168**. As soon as the document impugned has been deposited in the office of the prothonotary, he proceeds to draw up a descriptive statement of its condition; this is done at the instance of either party, the other party being either present or duly notified.

The descriptive statement must mention and describe the first and last word of each page, the erasures, words written over, interlineations, marginal notes, paraphs and signatures upon the document, and all other similar circumstances; the document is initialed and the statement is signed by the prothonotary and by the parties or their attorneys, or else mention is made of the reasons why the parties refused to sign upon being required to do so. *C. P. C.* 225-6-7.

**169**. The parties take communication of the impugned document from the hands of the prothonotary, and without removing it. *C. P. C.* 228.

**170**. Eight days after the making of the descriptive statement, the plaintiff must file his articles of improbation and serve the same on the defendant. *C. P. C.* 229.

**171.** The defendant is allowed a like delay of eight days to file and serve his answers. *C. P. C.* 230.

1. Under the Code, a motion to declare the grounds of improbation inadmissible will not be received,—the 108th Rule of Practice S. C. being abrogated by this article. *Mathieu* v. *Barthe & Barthe*, 5 R. L. 304, C. C. 1874.

**172.** In other respects the issues are joined and tried as in ordinary suits and are subject to the same rules and the same foreclosures.

**173.** The judgment which decides upon the improbation likewise determines to whom of right the document shall be handed over. *C. P. C.* 242.

**174.** While the document impugned remains in the prothonotary's office, no copies thereof can be delivered without an order from the court, after the parties have been heard or have been notified.

**175.** [The provisions of this section, except those of article 163, are observed, in so far as they apply, with regard to direct actions of improbation.]

## SECTION IV.

## OF RECUSATIONS.

**176.** Any judge may be recused:

1. If he is related or allied to one of the parties within the degree of cousin-german inclusively. *C. S. L. C.* c. 81, s. 3.

2. If he has a suit depending upon the same question as that in issue in the case. *Ord.* 1667, *tit.* xxiv. *art.* 5.

2. If he has given advice upon the matter in dispute, or has previously taken cognizance of it as an arbitrator; if he has acted as solicitor for either of the parties, or has made known his opinion extra-judicially. *Ibid. art.* 6.

4. If a suit is pending in his name before a court in which one of the parties will sit as judge. *Ibid. art.* 7.

5. If he has made verbal or written threats against one of the parties since the beginning of the suit, or within six months previous to the recusation; or if there has been mortal enmity between them without reconciliation. *Ibid. art.* 8;

6. If he is the manager or patron of any order, corporation or community which is a party to the suit, or the tutor, honorary tutor, subrogate-tutor, or curator, heir or donee of either of the parties. *Ibid. art.* 10;

7. If he has any interest in favouring either of the parties. 1 *Pig.* 365-6.

1. The fact that a judge is related to a shareholder in an incorporated body, party to a suit, does not render him liable to be recused. *La Cie d' Ass. du Canada* v. *Freeman*, 3 Rev. de Lég. 85, K.B. 1847.

2. The recusation contemplated by the Ord. of 1667 can be made in writing only; and the hatred mentioned in the 8th Art. must be hatred on the part of the judge, and must be so alleged and proved, failing which, the grounds of recusation will be held to be impertinent. *Renaud* v. *Gugy*, 8 L. C. R. 246, Q.B. 1858.

3. The hatred mentioned in the Ord. of 1667 (*inimitié capitale*), must be a decided hatred, known and manifest, such as would result from the killing of some near relative of the person urging such recusation, or the result of differences or personal encounters between such person and the judge, which would create a feeling of revenge that might lead to the use of the opportunity of destroying the life, the honour or the personal advantage of one's enemy. Ibid.

4. Where the judge had formerly been a member of an association of persons which had never deposited a declaration of partnership, and against which a *qui tam* action was brought, the demand in recusation was set aside as it appeared that he had no longer any interest in the association. *Leclerc* v. *Bilodeau*, 12 L. C. J. 20; 4 L. C. L. J. 42, C.C. 1867.

5. Where a judge had in an action between the same parties, but in another court, expressed his opinion and delivered judgment in accordance therewith on the pretensions of the parties, which pretensions were to be urged in the second case, it was held that he should refrain from sitting. *Hall* v. *Brigham*, 13 L. C. J. 252, Q.B. 1869.

6. Roman Catholic judges, in cases involving the right of the civil power to entertain an appeal in the nature of an *appel comme d'abus*, cannot be recused on the ground that they acknowledge the authority of Rome. *Brown* v. *The Curé, etc., of Montreal*, 20 L. C. J. 228, P. C. 1874.

**177**. A judge is disqualified if he is interested in the suit, either personally or on account of his wife, or of his wife, when separated from him as to property, is interested in the suit. *Ibid.*

**178**. A judge who is liable to be recused cannot refuse to sit in the case until after he has declared the grounds of recusation that may be invoked against him and the court has ordered that he should not sit. *Ord.* 1667, *tit.* xxiv., *art.* 18.

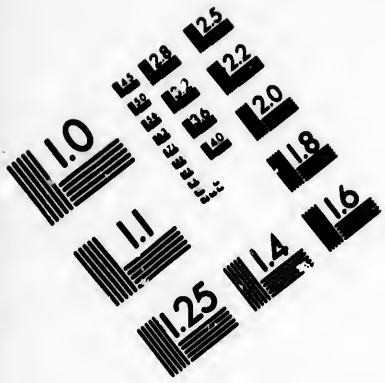
**179**. Any judge who is aware of a ground of recusation to which he is liable, is bound, without waiting until it is invoked, to make a written declaration of it to be filed in the record. *Ibid, art.* 17.

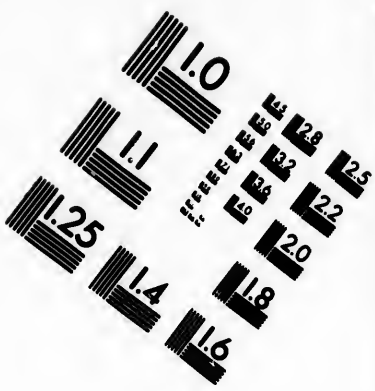
**180**. Any party to a suit who is aware of a ground of recusation against a judge, is bound to make it known as soon as it comes to his knowledge. *Ibid, art.* 19.

**181**. After the declaration of the judge or one of the parties, the party desirous of recusing the judge is bound to do so within eight days from the service of such declaration; after which he cannot do so, unless the court, for sufficient reasons, has extended the delay. *Ibid, art.* 20.

1. If a judge declare his incompetency by reason of kindred, &c., the parties must file their recusation within eight days, and are *déchues de plein droit* if they do not. *Neilson* v. *The Union Co.*, 2 Rev. de Lég. 472, K. B. 1817.

**182**. If no declaration as above mentioned has been made, the judge may be recused at any stage of the case before judgment, upon the affidavit of the party that the grounds

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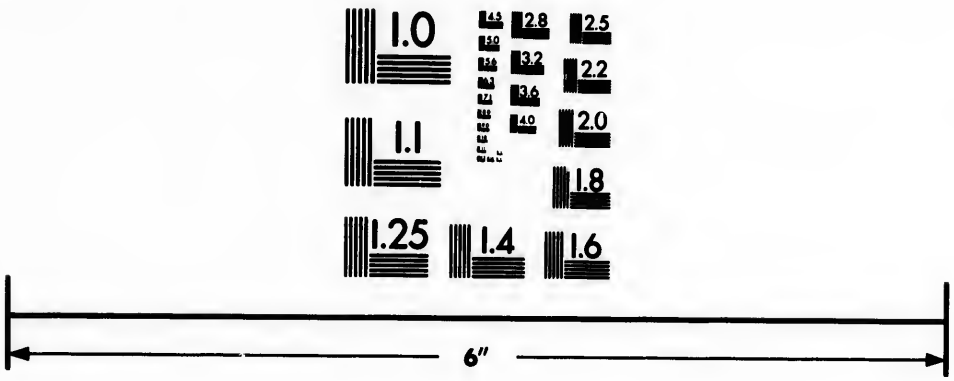



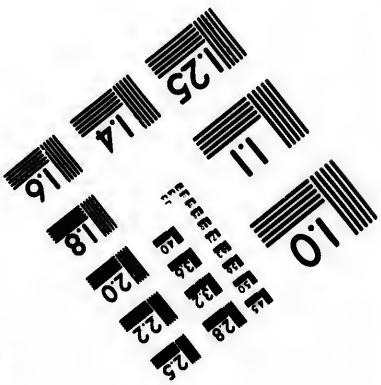


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of recusation have only recently come to his knowledge. *Ibid, art.* 21.

**183.** A recusation is proposed by means of a petition containing the grounds thereof, and it must be signed by the party himself or by his attorney under a special power.

If the party is absent from the province, his attorney *ad litem* may, without special power, sign the petition asking that the judge do abstain from sitting. *Ibid, art.* 23; *Poth. Proc.* 30.

**184.** When the recusation is made before the judge has made his declaration, communication of it must be given to him, and he must declare in writing whether the grounds are true or not; another judge then proceeds to determine whether the recusation is founded or not, without the recused judge having a right to be present. *Ibid, art.* 24.

**185.** If the recusation is proposed against the sole judge residing in a district, it is carried to the chief-place of a neighbouring district, designated by the judge who is recused, and the record is forthwith transmitted to such place by the prothonotary. *C. S. L. C., c.* 79, *s.* 19, § 2; *c.* 78, *s.* 20, § 1.

**186.** If the recusing party has no written proof in support of his recusation, the judge's declaration is conclusive, and the recusing party cannot produce oral testimony nor even obtain delay to produce written evidence. *Ibid, art.* 15.

**187.** If the recusation is maintained, the judge cannot, for any cause or under any pretext whatever, be present in court during the hearing of the case or the rendering of the judgment.

**188.** If the recusation has been carried before a court of another district and is maintained, such court remains seized

of the case, and the record from that period forms part of its records. *C. S. L. C., c* 78, *s.* 20, § 2; *c.* 79, *s.* 19, § 3.

**189**. But if the recusation is dismissed, the case is sent back to the former judge, to be by him tried and determined. *Ibid.*

**190**. A party who has a right to recuse a judge may renounce his right, by filing a written consent that the judge should hear and decide the case, except in the case mentioned in article 177.

**191**. In such case, however, as also when the party fails to recuse, the judge is not bound to sit, unless the grounds of recusation have been declared insufficient.

## SECTION V.

## OF DISAVOWAL.

**192**. Any party may disavow his attorney *ad litem* who has exceeded his powers. He may also disavow an attorney whom he has not employed; without prejudice to his rights if he does not do so. 1 *Pig.* 349; *C. P. C.* 382.

1. The substitution of attorney by the party in this particular cause, in place of the one who previously represented him was an acquiescence in all the proceedings of the first attorney, there being no disavowal, and that notwithstanding any irregularities in the proceedings. *Burroughs* v. *Molson et al.* 8 L. C. R. 494.

2. Proceedings in disavowal are in the nature of a suit between client and attorney, and the matter to be adjudged is, had the attorney a right to act or not. *Moss et al. & Ross & Ross* v. *Monk*, 9 L. C. J. 328, S. C. 1865.

3. And a plaintiff in disavowal is bound to prove all the allegations of his declaration, and particularly that no authority or power to act was given by him to the attorney. Ib.

4. An attorney *ad litem* in possession of papers is not required to justify or prove his authority, but the presumption is that he has a general mandate from the party for whom he acts. Ib.

**193**. A disavowal may take place during the suit or after judgment.

The latter kind is mentioned in the chapter on petitions in revocation of judgment. *Ibid.*

1. A demand for disavowal cannot be heard or received by the court before the day of the return, unless notice have been given to the opposite party, nor can it be received when the principal cause is *en délibéré*. *The Canadian Building Society of Montreal & Lafrenaye*, 3 L. C. J. 235, S. C. 1859.

*Vide post* Art. 505.

**194**. A disavowal can only be made by the party himself or his attorney under a special power, and the party himself must declare that he did not authorize the act of procedure which he repudiates. *Ibid.* 350.

1. A party who excepts by way of disavowal must state that the disavowal is made by himself personally, with the aid of his attorney, or by his *fondé de procuration*. *Hart* v. *Hart*, 1 L. C. R. 307, S. C. 1851.

**195**. Disavowal is made by filing a declaration, in the office of the prothonotary of the Court before which the case is pending, that the party disavows the act in question, as never having authorized the same. *Pig. ibid.*; *C. C.* 253.

**196**. The party disavowing is bound to proceed without delay to have the disavowal declared valid, and this is done by a petition served upon both the attorney, or his heirs, and the opposite party. *Pig.* 350; *Lacombe Vo. Proc. ad lites, No.* 2; *C. P. C.* 354.

**197**. After notice of the disavowal has been given, all proceedings in the principal action are stayed. *Pig. ibid.*; *Guertin & O'Neil, Appeal, Dec.* 1865; *C. P. C.* 198.

**198**. The procedure upon the disavowal is the same as in ordinary suits.

**199.** If the disavowal is maintained, the acts disavowed are annulled, and the parties are placed in the same position as they were in at the time that the acts were done. *C. P. C.* 360.

## SECTION VI.

## OF CHANGE OF ATTORNEYS.

**200.** If the case has not been heard upon the merits, all proceedings had or judgments rendered since the death of the attorney of one of the parties, or when such attorney can no longer act, or has withdrawn, are null, unless such party has appeared in person, or appointed another attorney, or after being called upon to do so, has made default. *Ord.* 1667, *tit* 26, *art.* 2; *C. P. C.* 341.

1. A motion made in the name of three attorneys, one of whom is deceased, will be rejected on the ground that such motion might be made in the name of the two surviving attorneys without substitution. *De Beaujeu* v. *Rodrigue*, 7 L. C. J. 43, S. C. 1862; *Terrill* v. *Haldane*, 15 L. C. J. 245, S. C. 1870.

2. *Held*, confirming judgment of court below, that the substitution of an attorney by a party in place of the one who previously represented him was an acquiescence in all the proceedings of the first attorney, there being no disavowal, and that notwithstanding any irregularity in the proceedings. *Burroughs & Molson et al.* 8 L. C. R. 494, Q. B. 1858.

3. The death of one of plaintiff's attorneys does not invalidate proceedings had in the case as if both were still such attorneys; the plaintiff being really represented by the surviving attorney.—*Morin* v. *Henderson*, 21 L. C. J. 83, 1 Legal News, 211 S. C.

**201.** An attorney who desires, of his own accord, to cease representing a party, must give notice to such party and to the opposite party.

**202.** If the attorney of one of the parties ceases to act as such, either in consequence of being appointed to a public office incompatible with the profession, or of suspension or

death, the opposite party, when represented by an attorney-at-law, is sufficiently informed without further notice. *C. P. C.* 344.

**203**. When one of the parties ceases to be represented before the case is submitted to the consideration of the court, the opposite party must notify him to appoint another attorney. 1 *Pig.* 348.

**204**. If the defendant thereupon fails to appoint another attorney or appear in person, the plaintiff may proceed with the suit *ex parte*.

If the plaintiff is the party thus in default he may be non-suited. *Poth. Proc.* 74.

**205**. A party's revocation of the powers of his attorney will not be received unless he pays him his fees and disbursements, taxed after hearing or notice given to the party.

**206**. A party who revokes the powers of his attorney must immediately appoint another, without being notified to that effect by the opposite party, and in default of his doing so the case may be proceeded with as provided in article 204. 1 *Pig.* 349.

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## CHAPTER FIFTH.

### OF ARTICULATIONS OF FACTS.

**207**. Within two days after the issues are perfected according to the prescribed rules, each party is bound to file in the prothonotary's office an articulation of the facts which he has alleged and intends to prove, if the opposite party has not admitted them in his pleadings.

*C. S. L. C.* c. 83, s. 87; *C. P. C.*, 252.

1. A motion to reject articulation of facts must be presented at the enquête. *The Quebec Bank & Rolland et al.* 14 L. C. R. 95, S. C. 1863.

2. An articulation of facts which contains matters not to be found in the pleadings, or admitted by such pleadings, is nevertheless good. *Rouleau & Bacquet*, 8 L. C. R. 153, S. C. 1858.

3. In cases instituted under the Code of Civil Procedure between lessors and lessees, articulations of facts are not allowable. *Mitchell & Gaucher et al.* 17 L. C. J. 66, S. C. 1872.

4. Nor upon issue joined on a preliminary plea. *Rees* v. *Morgan & Baillie*, 4 Q. L. R. 184, S. C. 1878.

5. Where the defendant moved that an inscription for proof and hearing be discharged, inasmuch as no articulation of facts had been filed by the parties in the case—*Held*, that the omission to file articulation of facts did not prevent the case from being heard in term. *Bélanger & Mogé*, 6 L. C. J. 61, Q. B. 1861.

6. A case may be inscribed for *enquête* and hearing on the merits without the filing of articulations of facts and answers, when the delay for filing them had expired before the date of the inscription.

An appeal will lie from an interlocutory judgment rejecting such inscription.

Upon a *désistement* of a judgment without a tender of costs, the Court of Appeal will condemn the respondent to pay the costs of both Courts. *Bellay* v. *Guay*, 4 Q. L. R. 91, Q. B. 1874.

**208.** This articulation of facts must consist of separate and distinct articles upon each fact, numbered in regular order.

The articles must be in the form of interrogatories, clear and explicit, so as to call for an admission or a denial, and so that the default to answer them will establish an admission of the facts.—*C. S. L. C. c.* 83, *s.* 87, § 2; *C. P. C.* 252.

1. A general articulation of facts will be rejected from the record as contrary to law, which requires all articulations to be clear and distinct. *The Molsons Bank & Falkner et al. & Falkner et al.* 6 L. C. J. 120, S. C. 1862.

2. An articulation of facts in the words: "Is it not true that the "allegations, matters and things set forth in the plaintiff's declaration "in this cause filed are true and well founded in fact," will be rejected

with costs, as being no articulation of facts under the statute, and as insufficient and irregular. *Day* v. *Harte*, 16 L. C. R. 397, S. C. 1866.

3. No costs of articulation of facts, or of answer thereto, will be granted, when they are general. *Guerin* v. *Mathe*, 15 L. C. J. 253, S. C. R.; *Desautels et vir* v. *Ethier*, 15 L. C. J. 301, S. C. R. 1871.

**209.** The articulation of facts must be served upon the opposite party within the same delay of two days. *Ibid.*, *s.* 87.

**210.** Any document or writing of which a party intends to avail himself at the proof, must be filed with the articulation of facts, if it has not been filed sooner. *Ibid.*, *s.* 88.

**211.** Within the three days which follow the filing of any articulation of facts, the opposite party is bound to answer each article separately and categorically, admitting or denying each fact articulated, or declaring it not to be within his knowledge.

After this delay of three days the party who has failed to answer cannot be relieved from his default, except upon application made to the court or judge, and upon payment of the costs occasioned by such default and taxed by the judge. *Ibid.*, *s.* 87; 29 *V. c.* 43; *C. P. C.*, 252.

**212.** The facts set forth in any articulation of facts are held to be proved:

1. If the opposite party does not answer it within the proper delay;

2. If the opposite party does not deny them in an express manner, or does not declare that they are not within his knowledge. *Ibid.*

1. Where the plaintiff has neglected to answer the articulation of facts filed by the defendant in support of a plea of compensation, such statement should be taken as admitted by the plaintiff under 29 Vic. cap. 44, sec. 74. *Archambault & Archambault*, 4 L. C. J. 284, Q. B. 1860.

2. *Held*, reversing the judgment of the court below in a case in which compensation was pleaded, that the default of the plaintiff to answer the articulations of facts of the defendants was an admission of the facts alleged so as to make the claim set up in compensation *claire et liquide*, and extinguish the adverse claim. Ib., & 10 L. C. R. 422, Q. B. 1860.

3. Where a party in a cause has failed to answer the articulations of facts filed by the opposite party, such articulations of facts will be taken *pro confessis*. *Owens & Dubuc & Campbell*, 6 L. C. J. 121 & 12 L. C. R. 399, S. C. 1862.

**213**. If a document not produced with or before the articulation of facts, is afterwards filed in evidence by a party who should have filed it sooner, the costs resulting therefrom must be borne by such party, whatever may be the issue of the suit.—*Ibid.*, *s.* 88.

**214**. If a fact denied in an answer to an articulation of facts is afterwards proved, the party who denied it must pay the costs incurred by such proof, whatever may be the issue of the suit.

A party who has declared that a fact is not within his knowledge may also be condemned to pay the costs incurred in proving it, if the court is of opinion that he must have had knowledge of it. *Ibid.*, *s.* 87, § 3.

**215**. A party who has neglected to file his articulation of facts, or who has declared that he had no evidence to adduce and afterwards adduces evidence, must bear the costs occasioned thereby.

The same rule applies if he proves any fact not mentioned in his articulation, whatever may be the result of the trial. *Ibid.*, *s.* 90.

1. On a petition to quash a capias, the defendant, though he succeed, will not be entitled to costs of *enquête* unless he have filed articulation of facts. *Ogilvy et al.* v. *Jones*, 17 L. C. J. 25, S. C. 1872.

2. A party failing to produce articulations of facts must bear the expenses of his enquête even if successful. *Atkinson & Noad*, 14 L. C. R. 159, S. C. 1863.

3. A party will not be allowed to file answers to articulations of facts after the case has been inscribed for review by the opposite party. *Sicotte* v. *Reeves*, 1 L. C. L. J. 107, S. C. R. 1865.

4. A party will be allowed to produce and file answers to articulations of facts, even after the final hearing of the case, upon payment of costs, the motion for leave being founded on an affidavit to the effect that such answers were not produced through oversight or inadvertance. *Boswell & Lloyd*, 13 L. C. R. 121, S. C. 1862.

**216.** If the court is of opinion that the opposite party has been taken by surprise by the abduction of evidence as mentioned in the preceding article, it may postpone the proof or trial, or make such other order, or impose such terms on the party in fault as it deems just. *Ibid.*, *s.* 90.

**217.** The articulation of facts may, with the consent in writing of all the parties, be dispensed with; and in such case every allegation of facts by one party, which the other party in his pleadings has not denied or declared not to be within his knowledge, is held to be admitted, and the court may award the costs of such proof, according to its discretion. *Ibid.*, *ss.* 76, 93.

**218.** [In the case of articles 213, 214 and 215, the party who desires to be paid such costs must make a special application for that purpose, at the time of the hearing on the merits, and accompany his application with a statement of the facts he has been obliged to prove, and of his costs of proof.]

**219.** [In rendering judgment upon the merits, the court also adjudicates upon the application for such costs.] *Ibid.*, *s.* 87, § 3; *s.* 91.

# CHAPTER SIXTH.

## OF TRIAL.

### SECTION I.

### PRELIMINARY PROVISION.

**220.** After the expiration of the three days allowed to answer the articulation of facts, cases may be tried, according to circumstances, either by evidence taken before the court or by a jury. *Ibid., s.* 89.

### SECTION II.

### OF INTERROGATORIES UPON ARTICULATED FACTS.

**221.** The parties in any suit may, at any time during the trial, and without retarding either trial or judgment, be examined upon articulated facts pertinent to the issues.

*Ord.* 1667, *tit. x., art.* 1; *Code Obl. Art.* 265; *C. S. L. C. c.* 82, *s.* 19; *C. P. C.*, 325.

1. In an action between traders for goods sold, *faits et articles* are admissible under the English rules of evidence. *Mathon et al. & Martin*, 3 Rev. de Lég. 353, K. B. 1809.

2. A motion for *faits et articles* must be made before the enquête is closed. *Vallerand* v. *Harte*, 3 Rev. de Lég. 354, K. B. 1810.

3. On a rule for *faits et articles* served on the defendant—*Held*, that the service and return of such rule must be made before the case has been inscribed on the role for enquête. *Moreau et vir* v. *Leonard*, 3 L. C. J. 168, S. C. 1859.

4. A party cannot be examined on *faits et articles* before issue joined, unless he is about to leave the Province, or in case of like necessity. *The Quebec Bank* v. *Baby*, 3 Rev. de Lég. 356, K. B. 1821.

5. A party has not the right to examine his adversary on facts and articles before trial.

When a case has been *recently* inscribed for enquête and hearing, though the issues and articulations have been completed some months before, and a party has, two days before the day fixed for trial by the inscription, served for the day of trial an order for facts and articles upon the Attorney of his absent adversary, he is still in proper time.

The words in Art. 231 "without retarding either trial or judgment" mean, "so long as, in the opinion of the court, the right is used without intent to retard, &c." And therefore where the application is made as above, without such manifest intent according to the opinion of the court, the exercise of the right will be allowed, although the practical effect is to retard the trial.

When the attorney of an absent party upon whom an order for facts and articles has been served, declares the residence of his client, and his option to have him examined upon a *Commission rogatoire* there, such commission will be at the diligence and expense of the party submitting the interrogatories, and will be made returnable within a fixed delay. *Knox* v. *Lafleur et al.* 22 L. C. J. 225, S. C. 1878.

6. Where an action has been taken to appeal—*Held*, that the court would discharge the *délibéré*, and order the case to be inscribed on the enquête roll in order to allow the plaintiff to complete his answers to interrogatories, where such interrogatories had not been answered properly at first. *Jones et al. & Guyon*, 2 L. C. L. J. 16, Q. B. 1866.

**222.** [Parties are summoned to answer interrogatories upon articulated facts, by means of a process, issued in the name of the sovereign by the prothonotary, upon a written requisition to that effect, and ordering the party to appear before the court, or the prothonotary, to answer the interrogatories to be put to him.]

*Ord.* 1667, *tit.* x., *art.* 2; *C. P. C.* 325.

1. A motion for a rule for *faits et articles* to be served upon plaintiff's wife is not a motion of course, and such motion must assign special grounds in support thereof. *Jamieson et al.* v. *Boswell et al.*, 6 L. C. R. 430; S. C. 1855.

**223.** The order to answer upon articulated facts is served upon the person or at the domicile of the party, and not upon his attorney, unless such party is absent or absconding;

and a copy, both of the order and of the interrogatories, must be left with him.

If the party is absent, the attorney who has been served may apply to have delay given to him to appear, or, upon indicating the place where such party then is, to have him examined under a commission. *Ibid. art.* 3; *C. P. C.* 326, 329.

1. The service of a rule for interrogatories *sur faits et articles* made upon the clerk of the court for an absentee is insufficient. *Lamoureux* v. *Boisseau*, 8 L. C. J. 133, S. C. 1864.

2. Where a rule for *faits et articles* was served on the attorney of one of the parties who was an absentee—*Held*, that a mere indication by such attorney of the residence of his client was a sufficient compliance with art. 223 of the Code, and that he was not bound to take steps to have his client examined under a commission. *Walters & Lyman et al.* 17 L. C. J. 246, S. C. 1873.

3. Where the plaintiff had gone out of the limits of the jurisdiction of the Court, and was domiciled on an island in Lake Huron, the Court would not allow service of interrogatories *sur faits et articles* to be made at the prothonotary's office. *Brault* v. *Bureau*, 4 L. C. R. 140, S. C. 1851.

4. The service of a rule for examination of an absentee upon interrogatories *sur faits et articles* made at the prothonotary's office is insufficient. *Fenn* v. *Fowker*, 7 L. C. J. 297, S. C. 1863; *Tarratt et al.* v. *Foley et al.*, 11 L. C. J. 139, S. C. 1865.

5. The service of interrogatories at the defendant's domicile is not sufficient to entitle the plaintiff to judgment on default of the defendant to appear if the writ of summons was not served personally. *Darling* v. *Henderson*, 15 L. C. R. 432, S. C. 1865.

6. The service of a rule for the examination of an absentee on interrogatories *sur faits et articles* made at the prothonotary's office is sufficient, and the Court may in its discretion prolong the rule to the first day of the next term for the defendant to answer the same. *McDonald et al.* v. *Lafaille*, 9 L. C. J. 98, S. C. 1865.

7. A certificate of service of interrogatories *sur faits et articles* must state that the interrogatories and the order to appear and answer were both served. *Pozer & Meikle*, 3 Rev. de Lég. 355, K. B. 1819.

8. *Faits et articles* must be served at the real and actual domicile of the party to be interrogated, and the rule to appear and answer

must be served at the same time and place, or a motion *pro confessis* cannot otherwise be granted. *Buteau & Duchene*, 3 Rev. de Lég. 355, K. B. 1821.

9. The service of interrogatories *sur faits et articles* made at the domicile of the defendant is sufficient if the writ of summons has been served upon him personally. *Turgeon* v. *Hogue et al.* 1 L. C. J. 270, S. C. 1850.

See *Knox* v. *Lafleur et al.* 22 L. C. J. 225, art. 221 *ante*.

**224.** A party summoned to answer interrogatories upon articulated facts must appear in person at the prothonotary's office, in order to give his answers after being previously sworn.

Nevertheless, if the party be a corporation or legally recognised body or community, it must, by special resolution, name an attorney to answer in its place, and specify the answer he must give and swear to as being that which such incorporation intends to give. *Ibid., arts.* 9, 4, 5; *C. P. C.* 330, 331, 336.

**225.** If the party served with the rule fails to attend or to answer the questions put to him, a default is recorded against him, and the facts may be held to be admitted.

The party who thus makes default may, however, answer the interrogatories afterwards, before the hearing of the case, but he must bear whatever costs are occasioned by his default.

If any dispute arises as to the pertinency of the interrogatories, it is settled at once by the judge, when the answers are taken by a judge; otherwise, the parties must go before the Court in order to have it decided. *Poth., Proc.* 63.

1. A party interrogated upon *faits et articles*, who failed to give in detail the consideration furnished to the defendant, by reason of which an obligation had been given by the latter, and to produce a detailed account of the goods and merchandise, if such was the consideration, was bound to do so, and upon default the interrogatories would be taken *pro confessis*. *Lantier* v. *Daoust et ux.*, 10 L. C. R. 497, Q. B. 1860.

2. Nor can such party afterwards at the hearing obtain permission to answer. Ibid.

3. A default to answer interrogatories *sur faits et articles* upon the part of the plaintiff will be taken off, and the rule and interrogatories set aside, where the rule is issued during the pendency of a former rule. *Cumming* v. *Dickie & The School Commissioners of Durham and Winchester.* 4 L. C. J. 131, S. C. 1860.

4. The default of the defendant to answer interrogatories *sur faits et articles* does not conclude the case, if it is susceptible of further testimony. *Guyon* v. *Lionais*, 7 L. C. J. 294, S. C. 1863.

5. And such party may answer the interrogatories at any time before the case is concluded. Ibid.

6. Where a party interrogated *sur faits et articles* concerning a matter which he should know about, answers that he does not remember, as where the plaintiff, being asked what amounts he had advanced, and what sums had been received by him, answered that he did not keep journal, memorandum or account books, and further stated, as excuse, that he had forgotten the amounts of the sums advanced or received—*Held*, reversing the judgment of the Court below, that such interrogatories would be taken *pro confessis*. *Nye & Malo*, 2 L. C. J. 43 and 7 L. C. R. 405, Q. B. 1857. See *Foley & Elliott*, 9 L. C. R. 349, Q. B. 1863.

7. A director of a joint stock company is bound to respond to interrogatories on *faits et articles* which have been proposed to him concerning the acts of the directors. *Lacroix & Perraut de Linière*, 3 L. C. J. 136, S. C. 1859.

8. A party interrogated on *faits et articles* cannot call upon the Court to decide as to the pertinency of the questions that are proposed to him, if he has not refused to answer those which he deems objectionable. *Leight* v. *Guay*, 3 Rev. de Lég. 353, K. B. 1809.

9. A plaintiff cannot be compelled to answer on *faits et articles*, or the decisory oath, any question that tends to charge him with usury. *Hodgson & Hannah*, 3 Rev. de Lég. 355, K. B. 1818.

10. A rule for interrogatories *sur faits et articles* cannot be held good against a plaintiff who is in the cause merely to authorize his wife who is the actual plaintiff, and is separated from him as to property. *Mathieson et al* v. *Whitlock*, 17 L. C. J. 67, S. C. 1873.

11. Interrogatories *sur faits et articles* may be taken *pro confessis* without any motion to that effect. *Douglass et al. & Ritchie et al.* 18 L. C. J. 274, Q. B. 1874.

12. And when so taken, may supply the want of a memorandum in writing required by art. 1235 of the Civil Code. Ibid.

13. In an action for separation from bed and board, by reason of the adultery of the husband, the admissions of the husband arising from his default to answer interrogatories *sur faits et articles* will be considered by the Court, if the Court is of the opinion that they are not the result of collusion between the plaintiff and defendant. *Stark & Massey*, 17 L. C. J. 242, S. C. 1873.

**226.** A party may also be summoned to answer *viva voce*, in open court, or at proof sittings, or before a jury; and his answers are then taken down by the judge or the prothonotary; and the judge may put any other interrogatories he may deem necessary and pertinent. If the party refuses to answer such interrogatories, the judge causes them to be written out and placed in the record, and they are held to be admitted, *C. S. L. C. c.* 83, *s.* 100.

1. Where the plaintiff summoned the defendant to answer certain interrogatories *sur faits et articles viva voce*, and the defendant wished to make use of a paper in doing so on which he had previously written his answers—*Held*, that he could not be allowed to do so, but must answer without reference to the paper. *Coleman et al.* v. *Fairbairn*, 4 L. C. J. 127, S. C. 1859.

2. Where the defendant had been served with a notice to answer certain interrogatories *viva voce*, and the presiding judge refused to allow him to read his answers from a paper previously prepared—*Held*, subsequently, considering the number of the questions put, and the number of questions in issue, that defendant might be permitted, in the discretion of the Court, to read answers prepared in advance. *Guyon* v. *Lionais*, 8 L. C. J. 91, S. C. 1863.

3. But where the plaintiff was summoned to answer interrogatories *viva voce*, and had been interrupted by the attorney of the other side, who refused to allow him to consult notes, and the plaintiff made a motion to be allowed to answer *de novo*, by filing the writ and answers in question, on the ground that, owing to the confusion and embarrassment created by the attorney for the other side, he had been unable to answer properly, the motion was dismissed. *Moss* v. *Douglass et al.* 8 L. C. J. 92 and 10 L. C. R. 248, S. C. 1859.

4. A party, where he has been ordered to answer interrogatories *sur faits et articles viva voce*, may read his answers from a paper previously prepared. *Fenn & Bowker*, 7 L. C. J. 28, S. C. 1863.

**227**. The interrogatories must be drawn up in a clear and precise form, in such a manner that the absence of an answer shall be an admission of the fact sought to be proved.

**228**. The answers must be direct to the question, categorical and precise, and free from injurious or libellous terms. *Ord.* 1667, *art.* 8.

**229**. Every answer which is not direct, categorical and precise, may be rejected, and the facts mentioned in the interrogatory declared and held to be proved.

1. A note was declared upon of one date, and a note of another date was annexed to interrogatories upon *faits et articles*, which the defendant did not answer. This refusal to answer cannot be received as an implied admission of the note declared on, nor can the plaintiff's motion *pro confessis* be allowed. *Manuel & Frobisher*, 3 Rev. de Lég. 355, K. B. 1818.

2. A party interrogated who is requested to answer the question, "is the signature of this note of your writing?" may admit or deny the signature, but if he admits, he cannot add that he has since paid it, for that is a fact separate and distinct from the question propounded. *Rochette & Laberge*, 3 Rev. de Lég. 355, K. B. 1817.

**230**. The party who applied for the interrogatories upon articulated facts may refrain from putting them, or may, after they are answered, declare that he does not intend to avail himself of the answers; and upon his so refraining, or upon such declaration being made, the Court cannot take cognizance of the answers, which are thereupon held not to have been given.

**231**. The answer of any party to a question put to him may be divided in the following cases, according to circumstances and in the discretion of the Court:

1. When it contains facts which are foreign to the issue;

2. When the part of the answer objected to is improbable or invalidated by indications of fraud or of bad faith, or by contrary evidence;

3. When the facts contained in the answers have no connexion with each other.

*ff. De interrog. in jure faciendis ;* 10 *Toul. pp.* 444 *et seq.*

1. When a party interrogated on *faits et articles* confesses the facts charged, and states a distinct fact in avoidance of what he confesses, the former is evidence against him, and the latter is not evidence for him ; but if the fact charged is by such party stated in his answer to be other than that which is alleged, as when the plaintiff asks whether he, the defendant, did not on a certain day receive from him £100 as a loan, and the defendant answers that on that day he did receive £100, which the plaintiff there and then *gave* him, the answer manifestly must be taken *in toto* as it is given, and cannot be divided, because none of the fact charged, namely, the loan of £100, is admitted, and, consequently, his answer affords no evidence against him. *Hooper* v. *Konig*, 3 Rev. de Lég. 354, K. B. 1813 ; *Stanfield & Massey*, Ib.

2. A party cannot be examined *de novo* upon new interrogatories which relate to the same facts, or upon which he has been already interrogated. *Heavyside & Mann*, 3 Rev. de Lég. 354, K. B. 1813.

3. The defendant on *faits et articles* had answered that "the note is in my handwriting, but it is part of a usurious contract for compound interest"—*Held*, that the signature to the note was proved, but the Court could not receive the defendant's declaration of usury as evidence, the question being merely, did you sign the note? *Hart & Barlow*, 3 Rev. de Lég. 354, K. B. 1817.

4. The answer of a party *sur faits et articles* may be divided according to circumstances in the discretion of the Court, when the part of the answer objected to is improbable. *Legault* v. *Viau*, 14 L. C. J. 56, C. C. 1869.

5. Where, on action against the endorser of a promissory note, the sole proof of the endorsement was the defendant's answers to interrogatories on *faits et articles*, and the defendant sought to explain that he had endorsed the note in question, or had intended to endorse it, simply as the attorney of another—*Held*, that the plaintiff was entitled to have the answers divided, so as to reject the explanation as not having been pleaded. *Seymour et al.* v. *Wright et al.* 3 L. C. R. 454, S. C. 1852.

*See Rochette & Laberge*, 3 Rev. de Lég. 355, under art. 229 ante.

6. The answers make proof against the party examined only. *Gregory & Henshaw* v. *Fowler*, 3 Rev. de Lég. 98, K. B. 1818.

7. A sale of greenbacks, to be delivered at a future date, may be proved by admissions on *faits et articles* without any proof in writing, although no part payment have been made. *Nichols* v. *Hios*, 2 R. C. 475, S. C. R. 1872.

8. An admission that the price of sale was not really paid, as stated in the deeds, coupled with the statement that the deed was really a donation and not a sale, cannot be divided. *O'Brien* v. *Molson*, *O'Brien* v. *Thomas*, 21 L. C. J. 287, S. C. 1877.

**232.** The expenses of interrogatories upon articulated facts is borne by the party requiring them, and cannot be included in his taxed costs. *Ord.* 1667, *art.* 10.

**233.** Any party, on being served with a rule to answer interrogatories upon articulated facts, may demand the necessary funds to pay his travelling expenses; but when he is before the Court he cannot claim to be paid before he is sworn or before answering.

He has a right to have his expenses taxed, and such taxation may be enforced by execution against the opposite party.

1. A defendant from the country who has been summoned to Montreal to answer interrogatories *sur faits et articles* cannot refuse to answer because his expenses have not been paid. *The Unity Fire Insurance Company* v. *Hickey et al.* 7 L. C. J. 299, S. C. 1862.

2. A person against whom a rule has been taken to answer to interrogatories is not entitled to demand that a sum of money be paid to him for his expenses before he is sworn and answers. *Mireau & Ratelle et al.* 1 L. C. R. 277, S. C. 1851.

3. A party who has answered a rule for interrogatories on articulated facts has a right to have his expenses taxed under art. 233 of the Code. *Cholette* v. *Beriault*, 12 L. C. J. 264, S. C. 1868.

## SECTION III.

## OF PROOFS.

### § 1. *Of inscription for proof.*

**234.** When the case is not to be tried by a jury, either of the parties may inscribe it upon the roll for the adduction of evidence.

It cannot, however, be so inscribed, before the expiration of the three days allowed for filing answers to the articulations of facts of the parties.

If there be no articulation of facts and the case is susceptible of trial by jury, the inscription cannot take place until five days after issue joined. *C. S. L. C. c.* 83, *s.* 89.

1. Where an objection was taken that the word "I" or "We" had been omitted in the beginning of an inscription for enquête, and also that no consent in writing that the enquête be taken under the old system had been filed, and motion was made to set aside the proceedings under the inscription—*Held*, that the irregularity had been waived by consent of the parties, as implied by their proceeding and examining witnesses, and the motion was rejected. *Bonnell* v. *The Drummondville Bark Extract Manufacturing Company*, 15 L. C. J. 144, S. C. 1870.

2. An inscription of an intervention on the role of enquête *ou de droit*, without having regularly demanded a plea or contestation to the intervention, and without having allowed the legal delays to elapse, will, on motion to that effect, be struck. *Wallcott & Robinson & Johnson & Barnes.* 11 L. C. J. 303, S. C. R. 1867.

**235.** Notice of the inscription must be given to the opposite party, at least eight days before that fixed for the proof. *Ibid.*; 41 *Rule of P. S. C.*; *C. P. C.* 261.

1. An inscription for enquête for the fifth of March, made on the first of March, does not allow sufficient delay according to law. *Whitney* v. *Badeau & Dutrisac et al.* 5 L. C. J. 128, S. C. 1861.

2. And under such circumstances, such inscription will be set aside with costs on motion by defendant to that effect. Ib.

3. In an action on a promissory note the defendant pleaded generally a *défense en fait*, and the plaintiff inscribed for hearing without going to enquête—*Held*, that under 20 Vic. cap. 44, sec. 87, the plaintiff had a right to inscribe for hearing as he had done, and the motion of the defendant to reject the inscription was dismissed with costs. *Jamieson* v. *Larose*, 2 L. C. J. 73, S. C. 1857.

4. In an inscription for enquête a delay of three days is sufficient, when the inscription is made during a special term regularly fixed by the court. *Barthe & Champagne*, 2 R. L. 113, S. C. R. 1870.

5. An inscription for enquête must be *fyled* at least eight days before the day fixed for the trial. *Latour* v. *Gauthier*, 21 L. C. J. 39, S. C. 1877.

See *post* 462, as to notice of inscription for hearing in law or upon the merits.

**236.** The evidence is taken down in writing, either at length or in notes, according to the provisions contained in this section. *C. S. L. C. c.* 83, *s.* 95 *and* 18.

**237.** For the purpose of such inscriptions, the prothonotary must keep a roll on which the cases set down for proof are inscribed. 40 *Rule of P. S. C.*

**238.** *The majority of the judges, in the districts of Quebec and Montreal, or the judge in each of the other districts, from time to time, may, by a rule of practice, promulgated in open court, set apart such days, in or out of term, as may be deemed convenient for proceeding to proof.*

*In the districts of Quebec and Montreal, not less than six days in each month must be set apart for such proof out of term. C. S. L. C. c.* 83, *s.* 15.

34 Vic., cap. 4, *(Que.)*:

1. Article 238 is amended so as to read as follows:

"In the districts of Quebec, *Montreal* and Ottawa, every juridical day, except days between the ninth of July and the first of September, and between the twenty-fifth day of December and the tenth day of January, and days on which any term of the Court of Queen's Bench, Appeal side, or of the Superior Court, or of the Circuit Court is being therein held, shall be a day on which parties to a suit may be

compelled to proceed to proof; in each of the other districts the judge may, from time to time, by a rule of practice promulgated in open court, set apart such days in or out of term as may be deemed convenient for proceeding to proof."

35 Vic., c. 6, *(Que.)*:

7. "Section one of the Act 34*th Victoria*, c. 4, is amended by striking out therefrom the word "Montreal."

8. Notwithstanding anything contained in Art. 238 as amended by section one of the Act 34*th Victoria*, c. 4, and by the next preceding section of this Act, the following days shall be days on which parties may be compelled to proceed to proof in all actions or proceedings instituted or had, at the city of Montreal, in the Superior or Circuit Court, unless any such days are days fixed for the holding of the Court of Queen's Bench, Appeal-side, namely:

The first sixteen days of the months of February, March, April, May, June, September, October, November, December;

The first nine days of the month of July; and

The last sixteen days of the month of January."

**239.** In the cities of Quebec and Montreal, parties cannot proceed to proof during term, except in the following cases:

1. When the case is inscribed at the same time for proof and hearing according to article 243.

2. In summary matters, when the court or judge has given special order to that effect.

3. In *ex parte* cases.

*Ibid.*, s. 94.

33 Vict., c. 18, *(Que.)*:

1. "Notwithstanding any provisions of articles 239, 240, 263, 280, 284, 285, 287, 288 and 1075, all depositions of witnesses in cases before the Superior Court, or before the Circuit Court, may, as regards default cases, and also by consent of the parties or of their attorneys as regards contested cases, be taken at any stage of the proceedings, at any place, on any juridical day, in or out of term, and may, after being so taken, be sworn to before a commissioner of the Superior Court."

1. During the sittings of the Superior Court in Montreal, a party may be compelled to proceed at enquête sittings. *The Molsons Bank & Converse*, 20 L. C. J. 302, S. C. 1876.

2. In the absence of anything to the contrary in the Rules of Practice, or of any order confining enquête days in term to cases *ex parte*, the court has no power to prevent a party from proceeding with a contested case during the enquête days in term. *La Banque du Peuple* v. *Roy et al.*, 2 L. C. R. 239, S. C. 1852.

**240.** In any case wherein it is established upon oath that a witness is about to depart from Lower Canada, and that thereby one of the parties may be deprived of his testimony, one of the judges of the court may, at any stage of the proceedings after [service of summons,] receive the deposition of such witness, in presence of, or after due notice to, the parties; and such deposition has the same effect as if it was taken at proof.

The same thing may be done, after issue joined, in cases of evident necessity, when it is established upon oath that the witness is prevented, by serious illness or infirmity, from attending before the court.

If the witness is still alive and in the province, and his attendance can be procured, at the time of the proof being taken, he must be examined anew in the ordinary time and manner, if it be required by either party. *C. S. L. C. c.* 83, *s.* 101.

*See* 33 *V. c.* 17, *s.* 1 (*Que.*), *under Art.* 239 *ante.*

1. Motions for leave to examine witnesses about to leave the Province are exempt from the provisions of the Rules of Practice which declare that, in the computation of time, no Sunday or binding holiday shall be reckoned, and a notice of such motion served on Saturday is sufficient for the presentation of such motion on the following Monday. *Byrne et al.* v. *Fitzsimmons & Fisher*, 10 L. C. R. 383, S. C. 1860.

2. In a matter of urgency, as when the witness is about to leave the country, notice given in the evening for the following morning is sufficient. *Molson* v. *The Moisic Company & Dufresne*, 13 L. C. J. 255, S. C. 1869.

3. A defendant cannot be compelled to appear before the return day, to show cause why certain witnesses about to leave the Province should not be examined. *Malone & Tate*, 2 L. C. R. 99, Q. B. 1851.

4. An application to be allowed to examine a witness who is about to depart will not be granted if the record is before the Court of Review upon an inscription for revision of an interlocutory judgment. *St. Jemmes* v. *de Montigny*, 12 L. C. J. 343, S. C. 1868.

**241.** The court or judge may, if deemed advisable, and without any commission or other formality, order the proof to be taken, or any person, even if he be a party, to be examined either under the decisory oath, or upon articulated facts, or otherwise, at any place where sittings of the Superior Court or of the Circuit Court are held, before any judge at such place. And in such cases after the record has been four days in the hands of the prothonotary, or clerk, at the place to which it has been sent, the parties may proceed as if the case were there pending. *Ibid. ss.* 24, 154.

*See art.* 300, *post.*

1. Where a motion was made to open an enquête before a private individual in another district the court *held* that it had no power to delegate an enquête to any one but to a judge. *McVittie & Cutting & Clarke*, 5 R. L. 465, S. C. 1874.

**242.** A copy of such order is transmitted to the prothonotary or the clerk of the court at the place mentioned, together with such part of the record as may be necessary; and the prothonotary or clerk may thereupon take the necessary proceedings to compel the witnesses or the parties to appear at the place named on any proof day, or any day, fixed by the judge, on which a judge will be present at such place, and in the cases of this and of the preceding article the rules contained in articles 248, 249 and 480 apply. *Ibid.* §3.

**243.** Any party may, either in his declaration or in any other pleading, or by a notice served upon the opposite party, declare his option that the case shall be inscribed at the same time for proof and for final hearing immediately after proof; and in such case the cause cannot afterwards be inscribed otherwise.

Cases may be inscribed for any day, in term or during

proof sittings, set apart by the court for that purpose, or if no such days have been set apart, then for any day whatever, in term or during proof sittings.

Cases inscribed for proof and hearing have precedence, on days appointed for that purpose, over those inscribed otherwise and fixed for such days.

The days set apart in term or during proof sittings, as above provided, are deemed to be consecutive; and if proof and hearing in any case commenced upon one of such days is not completed on that day, it may be adjourned to any other day thus set apart, and judgment may be rendered on any such day, either in term or in vacation.

The special days for proof and hearing are fixed or changed by rules of practice made and promulgated in the districts of Quebec and Montreal, by a majority of the judges residing in the district, and, in any other district, by the judge holding court therein. *C. S. L. C.*, *c.* 83, *ss.* 19, 20, 21, 22, 23.

1. Under the terms of the 51st Rule of Practice it is necessary that in the inscription upon the *rôle de droit* for hearing upon the pleadings the day upon which such hearing will take place be indicated, as well as in the notice thereof, without which such inscription will be declared null, and the case struck from the rôle. *Evanturel et vir* v. *Evanturel*, 14 L. C. R. 151, S. C. 1864.

2. A party has no right to inscribe for enquête and merits for a day certain, even upon giving notice to the adverse party, unless it be by consent, and upon filing such consent the case will be fixed by the court. *Lemieux* v. *Brochu*, 16 L. C. R. 48, C. C. 1865.

3. Where a party has inscribed a case generally on the merits he cannot afterwards say that he only intended to inscribe it in part, and a final judgment on the whole case will not be disturbed. *Kathan & Kathan*, 1 L. C. L. J. 107, S. C. R. 1865.

4. Notice that a case has been inscribed on the rôle for enquête and merits, given within the prescribed delay before the day fixed is sufficient, provided the case is actually inscribed before the day fixed. *Dionne et al. & Valleau et al.* 2 L. C. L. J. 112, Q. B. 1866.

5. At least eight days' notice must be given of an inscription for enquete and hearing at the same time. *Tremblay* v. *D'Aubreville*, 17 L. C. J. 75, S. C. 1873; *Shuter* v. *Guyon*, 5 L. C. J. 43, S. C. 1860; *Kent* v.

*Cranwell*, 8 L. C. J. 12, S. C. 1863; *Voss et al.* v. *Coffin*, 8 L. C. J. 120, S. C. 1864; *Allaire* v. *Mortimer*, 17 L. C. J. 168, S. C. R. 1873.

6. And a simple receipt of copy of such inscription is not a waiver of the right hereafter to object to the shortness of the notice. *Allaire* v. *Mortimer*, 17 L. C. J. 168, S. C. R. 1873.

See *post.* art. 462 for notice of inscription in law or upon the merits; and *ante*, art. 235 for notice of inscription for proof.

7. To inscribe for enquête and final hearing on the merits the party so inscribing must have notified his adversary of his option so to inscribe, previous to the inscription for enquête alone. *Wood* v. *Swinburne*, 14 L. C. R. 152, S. C. 1864.

8. The option of a party that the case should be inscribed for proof and hearing in terms of article 243 is sufficiently made by service on the opposite party of an inscription upon the *rôle de droit* for enquete and hearing on the merits at the same time. *Simpson et al.* v. *Bowie et al.* 17 L. C. J. 28, S. C. 1873.

9. A party inscribing for enquete and merits at the same time will be sustained in his option although the other party has inscribed for enquete in the ordinary way. *Bourgoin et al.* v. *The Montreal & O. & Q. Ry. & Hon. A. R. Angers*, 1 Legal News 131, S. C. 1878, 22 L. C. J. 42.

10. 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 the court. *Lionais & Guyon*, 11 L. C. R. 72, Q. B. 1860; *Mangeau* v. *Turenne et al.* 6 L. C. R. 475, S. C. 1855.

## § 2. *Of summoning witnesses.*

**244.** Witnesses, if they do not appear voluntarily, are summoned at the instance and diligence of the party requiring their attendance, by means of a writ of subpœna, a copy of which is served upon them one clear day at least before that fixed for their examination, the delay being increased at the rate of one day for every additional five leagues, when the distance exceeds five leagues. *C. P. Genève*, 181; *C. P. C.* 260; *C. P. L.* 134.

1. Where the prothonotary refused to allow the plaintiff bailiff's fees in the taxation of his bill of costs, on the ground that he had inserted more than four names in the original subpœna, and the plaintiff made

motion to revise the taxation—*Held*, that the motion must be granted, as the insertion of more than four names could not prejudice the party in any way. *Couillard* v. *Lemieux*, 9 L. C. R. 393, S. C. 1859.

**245.** Witnesses may be summoned either to declare what they know, or to produce some document in their possession, or to do both. 1 *Starkie on Evid.*, 87; *C. S. C. c.* 79, *s.* 4; *C. S. L. C. c.* 79, *s.* 3; *C. P. L.* 139, 140, 141.

Where the plaintiff brought action to set aside a deed of transfer obtained from her by fraud, and filed as an exhibit a copy of the transfer paper, certified to be such and to be exact by the lawyer who drew the original, and also brought up the lawyer at *enquête* to prove that the exhibit was a true copy.—*Held*, that the English rules of evidence requiring notice to produce had not the force of law in Lower Canada, and that the following articles of fact submitted to the defendant by the plaintiff, viz: "Is it not a fact that the original paper-writing, sale and assignment which is set forth in the plaintiffs' declaration is now and has been since the execution thereof in the defendant's possession, and that the paper-writing filed by the plaintiffs as their exhibit No. 12, is a true and exact copy thereof," were a sufficient notice to defendants that plaintiffs would produce a copy of the said paper-writing at *enquête*, and then prove it to be true, and also a sufficient notice to the defendant to produce the original thereof if he thought fit. *Herriman et ux. & Taylor*, 9 L. C. J. 253, Q. B. 1865.

**246.** Any person residing in Upper Canada may be compelled to appear as a witness, if the court or judge deems it necessary; provided an action for the same cause be not pending in Upper Canada. *C. S. C. c.* 79, *ss.* 4, 5, 6.

**247.** The witness in the case mentioned in the preceding article cannot be summoned without a special order granted by the court or judge, if deemed necessary, and such order must be mentioned upon the subpœna *Ibid s.* 7.

**248.** Subpœnas are served in Lower Canada by a bailiff of the jurisdiction in which the witness then is, or according to the provisions of article 461, and in Upper Canada by any person whatever, who must return an affidavit of such service. *Ibid s.* 10.

*See* 33 *Vic. c.* 17, *s.* 1, under art. 48, *ante.*

**249.** Any witness, duly summoned, who, without sufficient cause, fails to attend at the place and time appointed, may, upon a rule served upon him, be condemned, by the court or judge presiding at proof sittings, to a fine not exceeding forty dollars, to be recovered, for the use of the crown, in the same manner as any other sum awarded by judgment, independently of any recourse the party who summoned him may have for damages caused by such default, and of imprisonment for contempt, if it lies; provided that at the time he was served with the subpœna a sufficient sum was tendered to him for travelling expenses, at the rate usually allowed by the court of his domicile.

If the person summoned to appear as a witness resides in Upper Canada, he can only be punished for his default by the court within whose jurisdiction he resides, upon a certificate transmitted by the former court of his default to appear according to the foregoing provisions. *C. S. L. C. c.* 83, *ss.* 104, 109; *C. S. C. c.* 79, *ss.* 8, 9; *C. P. Genève* 182; *C. P. C.* 263; *C. P. L.* 135.

1. In order to hold a witness for default for non-appearance. it is necessary to offer him his expenses going and returning. *Paulet* v. *Lariviere*, 3 R. L. 446, S. C. 1871.

2. A rule of contempt will not lie unless it is proved by affidavit of personal service, tender of reasonable expenses, and wilful disobedience. *Seaton* v. *Boston & Egan*, 5 L. C. J. 334, S. C. 1861.

3. It is not necessary to prove the personal service by affidavit, nor that the original writ was exhibited to the witness, nor that tender was made of fees and expenses. *Joseph* v. *Joseph*, 8 L. C. J. 41, S. C 1863.

4. Writs of protection will be issued upon cause shown to protect a witness from arrest on civil process, such protection to be within the discretion of the court. *Miller* v. *Shaw et al.* 15 L. C. J. 218, S. C. 1871.

**250.** Any person who is present in the room in which the proof is being taken may be examined as a witness, and is bound to answer, under the same penalties as if he had been regularly summoned.

**251.** Any party to a suit may be subpœnaed, examined, cross-examined, and treated as any other witness; but his evidence cannot avail himself; [the adverse party may however declare, before he closes his proof, that he does not intend to avail himself of his testimony and in such case it is deemed not to have been given.]

[The answers given by a party thus examined as a witness may be used as a commencement of proof in writing.] *C. S. L. C., c.* 82, *s.* 15; *c.* 83, *ss.* 100, 108, § 11; 12 *L. C. R.* 399.

1. The answer of a party to interrogatories *sur faits et articles* has a retroactive effect, and, as a *commencement de preuve par écrit*, will legalise oral evidence previously produced. *Beaudry* v. *Ouimet et al.*, 9 L. C. J. 158, S. C. R. 1865.

2. The evidence of a party in a case who has assigned during its pendency can be taken on behalf of the assignee, who has taken up the instance. *McFee* v. *Bowie & Brown*, 13 L. C. J. 335, C. C. 1869.

3. An insolvent may be a witness for the assignee, even when the insolvent himself was a party before the assignment. *Barthe esqual. & Millet*, 3 R. L. 525, C. C. 1872.

4. Action was brought against the defendant as having been a secret partner in a firm to which the goods were sold—*Held*, confirming the judgment of the Court below, that the evidence of one of the other partners was inadmissible on behalf of the plaintiff, and was accordingly rejected. *Chapman* v. *Masson*, 2 L. C. J. 216 & 8. L. C. R. 225, Q. B. 1858.

5. The evidence of co-defendants who have pleaded separately may be taken separately, the one for the other. *Borthwick* v. *Bryant et al.*, 5 R. L. 449, S. C. R. 1874, & *Close* v. *Dickson*, 4 R. L. 141 & 17 L. C. J. 59, S. C. 1874. *The Bank of B. N. A.* v. *Cuvillier et al.*, 4 L. C. J. 241, Q. B. 1859. *David* v. *McDonald et al.*, 11 L. C. R. 116, S. C. 1860.

**252.** Relationship, or connection by marriage, except that between consorts, and interest, are not objections to the competency of a witness, but only to his credibility.

Upon the improbation of an authentic deed, the testimony of the notaries, attesting witnesses, or other functionaries who witnessed the deed may be received.

*C. S. L. C. c.* 82, *s.* 14; 4 *L. C. R.* 228.

35 Vict. c. 6. (*Que.*)

"9. Nevertheless, if consorts are separated as to property, and one of them, as agent, has administered property belonging to the other, the consort who has so administered may be examined as a witness in relation to any fact connected with such administration; provided the court or judge shall, in view of the circumstances of the case, deem it just and advisable to order such examination. Whenever such examination shall be allowed, it shall be as unrestricted as would have been that of the other consort, whether as regards the admissibility of verbal evidence or otherwise."

1. The provisions of 35 Vic. c. 6, s. 9 (*Que.*) do not mean that a party may examine his own wife as a witness when she has had the administration of his property, but that he may examine the wife of the adverse party in such case. *Foisy* v. *Lefebvre*, 4 R. L. 564, S. C. 1872; *Brush* v. *Stephens & vir & Stephens & vir*, 17 L. C. J. 140, S. C. 1873; *Lareau* v. *Beaudry*, 22 L. C. J. 336, S. C. 1878.

2. The husband may be examined by the defendant where the wife declares that it is he manages her property. *Johnson* v. *Martin*, 5 R. J. 336, S. C. 1872.

3. In commercial cases, a solicitor in law may be a witness for a party for whom he transacted. *Melancon* v. *Beaupré*, 6 R. L. 509, S. C. 1874.

**253.** If the person to be summoned as a witness is in prison, the party requiring him may, upon petition, obtain a writ of *habeas corpus ad testificandum*, ordering the gaoler to bring him before the Court to give his evidence. *Languedoc* v. *Laviolette*, 18 *April*, 1854; 1 *Pig.* 227.

### § 3. *Of the examination of witnesses.*

**254.** Any party may demand that during the examination of any witness, the other witnesses should be out of the room in which the examination is taken. *C. P. C.* 262; 1 *Pig.* 280; *Ord.* 1667, *tit. xxii. art.* 15.

1. An order that all the witnesses withdraw from the Court-room except the one under examination, is not demandable of strict right. *Guay* v. *Donoghue*, 11 L. C. R. 421, Q. B. 1861.

**255.** Before the deposition of a witness can be taken, he must swear before the judge or the prothonotary to tell the truth, or in the case of a Quaker, the word *swear* is replaced by the words *solemnly, sincerely, and truly declare and affirm.*

**256.** The form of oath and the manner of taking it may be changed, according to the religious creed of the witness, in such a manner, however, as to bind him to declare nothing but the truth. 1 *Pig.* 262.

**257.** Any witness refusing to take the oath or affirmation is deemed to refuse to give evidence. 1 *Starkie,* 91; *C. P. L.* 137.

**258.** A witness who is present cannot refuse to give evidence, under pretext that the necessary amount to defray his travelling expenses has not been paid to him.

**259.** Before the witness is admitted to be sworn he may be examined by either of the parties as to his religious belief; and he cannot make the oath or the affirmation, nor give evidence, if he does not believe in God, and in a state of rewards and punishments after death. 1 *Starkie,* 21, 94.

**260.** No person can be a witness who does not know the importance of an oath, or who is not in the exercise of his mental faculties. *C. P. C.* 285.

**261.** [Deaf mutes, who can read and write, may be admitted as witnesses, their oath or affirmation and their answers being written down by themselves.] 1 *Pig.* 283; 3 *Bioche, No.* 428.

**262.** No bailiff who has served the writ of summons in any suit or action can be a witness in support of the plaintiff's demand, except in respect of such service. *C. S. L. C. c.* 83, *s.* 168.

§ *Of proofs taken by a judge.*

**263.** In contested cases, the witnesses are examined in presence of a judge, the opposite party being either present or duly notified, and the judge may ask the witnesses any questions he may deem necessary. He takes down or causes to be taken down in writing, under his direction, notes of the material parts of the evidence, and of all objections insisted upon by either of the parties, and of his decision thereupon. *C. S. L. C. c.* 83, *s.* 95.

34 Vic., c. 4, (*Que.*)

2. "And the Judge may order as many cases to proceed before him at the same time as in his discretion, he deems expedient."

See also 33 Vic., c. 18, s. 1, under Art 239, *ante.*

And 35 Vic., c. 6, ss. 10, 11, 12, Art 398, *post*, as to evidence taken by stenography.

**264.** The notes of evidence are read, and, if necessary, explained to the witness, who may make the necessary additions or alterations in order to express correctly the material parts of his evidence; they are then signed by him, if he can write, if not, that fact is mentioned; they are finally signed by the judge, and constitute and are held to be the evidence of the witness. *Ord.* 1667, *tit.* 22, *Art.* 16; *C. S. L. C. c.* 83, *s.* 95, § 2; *C. P. C.* 272, 274.

**265.** *If one of the parties requires it, either verbally or in writing, the judge himself is bound to take down the notes of the evidence and of the objections, as mentioned in article* 263, *and the prothonotary afterwards makes a fair copy thereof, which is certified by the judge and deposited in the record and is held to be the true record of the evidence.*

*C. S. L. C. c.* 83, *s.* 94, § 3.

34 Vic., c. 4, (*Que.*)

"3. Article 265 is hereby repealed."

**266.** The judge takes down, or causes the prothonotary to take down, notes of all admissions made verbally by the

parties; and such notes, signed by the judge, make proof in the same manner as if they were signed by the parties. *Ibid.* s. 97.

**267.** The witness must first be asked and must declare his name, surname, age, quality or occupation, and domicile. *Ord.* 1667, *tit.* xxii., *art.* 14; *C. P. Genève*, 193; *C. P. C.* 262.

**268.** The opposite party may establish, by a preliminary examination of any witness, or in any other manner, whatever grounds he may have for objecting to such witness. *Ord.* 1667, *tit.* xxiii., *art.* 2; 1 *Starkie*, 211; *C. P. C.* 289.

**269.** A party cannot impeach the credit of a witness produced by himself, but he may prove by others the contrary of what such witness has stated, or, by leave of the judge, he may prove that at other times he has made a statement inconsistent with his present testimony; provided, in the latter case, the witness be first questioned upon the subject. 1 *Couchot*, 90; 1 *Starkie*, 215, *et seq.*; 2 *Powell*, 379, 380; *Contra*: *Méthot* v. *Lalonde dit Ganivas*, 11 *L. C. J.* 301.

1. Copies of depositions of witnesses examined in another case may be filed in a cause proceeding at enquête, for the purpose of discrediting a witness examined therein. *O'Connor* v. *Brown et al.* 12 L. C. J. 28 & 4 L. C. L. J. 42, S. C. 1866.

2. They may be used by the witness to refresh his memory. *The City Bank* v. *Coles & The City Bank & Boswell*, 2 L. C. R. 16, S. C. 1851.

3. A witness cannot be contradicted on collateral matters. *Courtney* v. *Bowie et al.*, 17 L. C. J. 47, S. C. 1873.

**270.** Witnesses are examined by the party producing them, or his counsel, but only touching the facts in issue; and the questions must not be leading, unless the witness evidently attempts to elude the question or to favour the other party.

1 *Starkie*, 169, 170; 2 *Powell*, 376-9.

1. Where the plaintiff, himself an advocate, contested the opposition of the opposant and, though represented by an attorney *ad litem*, wished to conduct the examination of the witnesses himself—*Held*, maintaining the objection of the adverse party, that, having appeared by counsel, the examination could only be conducted through such attorney *ad litem*, *Ramsay & David & Walker & Ramsay*, 6 L. C. J. 295, S. C. 1862.

**271.** When a party has ceased examining a witness he has produced, the opposite party may cross-examine such witness in every shape, upon the facts referred to in his examination in chief; or he may require an entry to be made of his declining to cross-examine. 1 *Starkie*, 186; 2 *Powell*, 30, 380 *et seq.*

1. When plaintiff had closed his enquête he was not allowed to cross-examine a witness so as to adduce facts which he has an interest in establishing, unless such cross-examination fairly arise from the examination in chief. *Morrison* v. *De Lorimier*, 16 L. C. J. 157, S. C. 1872.

2. When the plaintiff had examined a witness a certain length, and the examination was interrupted to obtain the opinion of the court on a question, it was *held* that the witness was subject to cross-examination, and the deposition should be regularly closed on behalf of defendant. *Cox* v. *Patton*, 17 L. C. J. 18, S. C. 1872.

**272.** A witness may be re-examined by the party producing him, when new facts have been elicited on the cross-examination, or for the purpose of explaining his answers to the cross-questions. *Webster* v. *The Grand Trunk Ry. Co.*, 23*rd Oct.*, 1854.

1. A motion to reject certain evidence on the ground that a party could not examine a witness twice in his own favour, was dismissed, as the Court could in its discretion allow it. *St. Denis* v. *Grenier et vir*, 2 L. C. J. 93, L. C., 1857.

2. Special leave of the Court is necessary to examine a witness twice. *Benning* v. *Malhiot*, 9 L. C. J. 213, S. C., 1864; *Jackson* v. *Filteau*, 15 L. C. R. 60, Q. B. 1864.

**273.** [When witnesses are called to prove the identity of any object in the possession of one of the parties, the court

or judge may order that the party shall, either in court or at any other convenient place or time, exhibit such object to the witnesses thus called to give evidence concerning it; and in default of so exhibiting the object. it will be held to have been identified.

The court may likewise order any witness who is in possession of any object which is the subject of the litigation, to produce it, under the same penalties, in case of default, as for refusing to answer pertinent questions.]

**274.** A witness may object to answer questions put to him, if his answering would expose him to a criminal prosecution.

This objection can only be made by the witness himself.

1 *Starkie*, 192-8; 2 *Powell*, 388.

1 *Greenleaf*, 545; *C. P. L.* 136.

1. Where an attorney *ad litem* is witness for his client, and objection is taken to a question put to him, he cannot himself appear before the court to maintain the pertinency of the question, but his client must be represented by another counsel. *Angers* v. *Lozeau et vir & Lozeau et vir*, 12 L. C. J. 214, S. C. 1868.

2. In a *qui tam* action, the defendant may refuse to answer the questions put to him on the ground that any answer he would give would have a direct tendency to criminate him. *Burton* v. *Young et al.* 17 L. C. J. 379, S. C. R. 1867.

3. A witness's knowledge of the law enabling him to decline answering questions is always presumed. *Reg* v. *Coote*, 18 L. C. J. 103, P. C. 1873.

4. A witness is not liable to an action for slander based on words uttered by him as a witness. *Rochon* v. *Fraser*, 3 L. C. R. 87, S. C. 1851.

**275.** He cannot be compelled to declare what has been revealed to him confidentially in his professional character as religious or legal adviser, or as an officer of state where public policy is concerned.

*Parfait Notaire*, 83; 1 *Starkie*, 184-5-6; 2 *Powell*, 60; 1 *Chitty's Arch.* 67; 1 *Pig.* 278.

1. *Held*, confirming the judgment of the court below, that the provincial secretary could not be compelled to produce official documents connected with the affairs of state, if their production would be injurious to the public service, of which he was the sole judge, and the power of the secretary of state to withhold such documents was not waived by the fact that a copy of the paper in question had already been delivered to one of the parties by the assistant secretary of state. *Gugy* v. *Maguire*, 13 L. C. R. 33, Q. B. 1863.

2. An advocate or attorney cannot refuse to declare in an answer to a writ of attachment by garnishment, what money or effects he has in his hands belonging to the defendant, on the ground that his doing so would be a betrayal of professional confidence. *McKenzie et al.* v. *McKenzie et al.* 9 L. C. J. 67, S. C. 1864.

3. A physician cannot refuse to disclose information acquired by him confidentially in his professional character. *Brown* v. *Carter*, 9 L. C. J. 163, S. C. 1865.

4. An attorney *ad litem* is not obliged as a witness to disclose what has been communicated to him professionally by his client. *Forsyth et al.* v. *Charlebois & Forsyth et al. & Lefebvre*, 12 L. C. J. 264, S. C. 1868.

5. But such communication is not privileged where the attorney is himself a party to the transaction as well as adviser. *Ethier* v. *Homier*, 18 L. C. J. 83.

6. A private telegraphic despatch is not a privileged communication, notwithstanding the provisions of C. S. C. cap. 67, sec. 16. *Leslie* v. *Hervey*, 15 L. C. J. 9, S. C. 1871.

Even where the telegrams were between the principal and his agent. Ib.

7. On an inscription in improbation of a will—*Held*, in appeal, that the notaries before whom it was passed could not be compelled to give evidence to controvert the truth of what they had certified in such deed. *Routier* v. *Robitaille*, S. R. 440, K. B. 1830.

8. In an action on a promissory note, the evidence of the notary who made the protest is inadmissible to contradict the evidence filed by the plaintiff. *Dorwin & Evans et al.* 1 L. C. R. 100, S. C. 1850.

9. The notaries to a will or other authentic instrument are competent witnesses in proceedings in improbation impugning the validity of such will or authentic instrument. *Welling* v. *Parent*, 4 L. C. R. 228, S. C. 1854.

**276**. A witness is bound to produce any document in his possession touching the matter in issue, and to allow a copy or extracts thereof to be taken, if it is a private writing; and such copies or extracts, certified by the prothonotary, are entitled to the same credence as would be given to the originals.

**277**. Any witness, who, without valid reason, refuses to answer or to produce documents or other things connected with the suit and in his possession, may be held by coercive imprisonment to do so.

**278**. A witness cannot withdraw without the permission of the judge. *C. P. Genève*, 198.

**279**. If the examination of a witness cannot be completed on the day he appears, he is bound to attend again on the next following juridical day, or on such other day as is assigned to him by the judge, which day is mentioned in the notes of his evidence or entered upon the registers of the court, and in default he is liable to the same penalties as for refusing to attend upon the subpœna.

**280**. It is the duty of the judge to ask the witnesses if they require taxation, and if they do to tax their expenses, with due regard to the nature of the voyage and the duration of their stay. *Ord.* 1667, *tit.* xxii.. *art.* 19; *C. P. C.* 274, 277.

*Vide* 33 *Vic. c.* 18, *s.* 1, *under art.* 239 *ante.*

**281**. The taxation may be enforced by execution against the party who summoned the witness, after the delay, and in the manner prescribed for any judgment of the court. And execution may be sued out by the witness against the opposite party condemned to pay the expenses of such witness, provided that no execution has already been sued out by the party who obtained the judgment, or that the amount allowed the witness has not already been paid to such party

or his attorney, in virtue of a duly receipted bill of costs. *C. P. Genève.* 200; *C. S. L. C. c.* 83. *s.* 153.

1. The attorney is not responsible for the indemnity due to the witnesses summoned by him at the request of his client. *Laroche* v. *Holt et al.*, 3 L. C. R. 109, C. C. 1853.

2. The right of a witness is to be taxed in the Court in which he is examined, and not to sue on a *quantum meruit* for attendance and loss of time as such witness. *Gorrie* v. *The Mayor, &c., of Montreal*, 8 L. C. R. 236, S. C. 1858.

3. A witness cannot maintain an action for the amount of his taxation, his proper course being a suit of execution against the effects of the party who summoned him under 22 *V. c.* 5 *s.* 9. *Veilleux* v. *Ryan*, 9 L. C. R. 6, C. C. 1858; *De Beaumont* v. *Papineau & Gauthier*, 11 L. C. J. 49, S. C. 1866.

**282.** When one party has closed his proof, the other party may enter upon his counter-proof and have his witnesses examined.

1. The court on cause shewn will discharge a case from the rôle for hearing on the merits, and permit the enquête to be re-opened for the examination of a witness, and will also permit the plaintiff to file his declaration that he intends to make use of the defendant's deposition, notwithstanding that a declaration to that effect has been previously rejected from the record on the defendant's motion as irregularly filed. *Beaudry* v. *Ouimet et al.* 14 L. C. R. 449, S. C. 1864.

2. Where the attorney of the plaintiff had discontinued his enquête on the word of the adverse party that the cause would be settled, and being foreclosed in his absence, moved to have the foreclosure set aside—*Held*, rejecting the motion, that the attorney in a case is *dominus litis* with regard to the procedure, and that the plaintiff's attorney should not have discontinued without the consent of the attorney of the opposite party. *O'Connell & The Corporation of Montreal*, 4 L. C. J. 56 & 10 L. C. R. 19, S. C. 1859.

**283.** If on the day fixed for proof, the party who is bound to proceed does not produce any witnesses, or give any valid reason for their absence, his proof may be declared closed.

1. Where a deposition is missing from the record, and the judge is satisfied on the evidence of the prothonotary or otherwise that it cannot be found, an order may be issued for the examination of the witness *de novo*. *Macfarlane et al.* v. *Court*, 14 C. L. J. 235, S. C. 1870.

See *O'Connell* v. *The Corporation of Montreal* under preceding Article.

### § 5. *Of proofs taken down at length.*

**284.** Upon the consent in writing of all the parties to a case, and subject to such additional costs and fees as may from time to time be fixed by tariff, the proof may be taken down in writing in the manner hereinafter provided, either before a judge or before the prothonotary, who, in such case, may exercise all the powers of a judge, except as to the objections which must be reserved for the decision of the latter.

If the judge is unable to attend court on the day fixed for taking proofs, the prothonotary may preside over them, and in such case he exercises all the powers of the judge except as regards the objections made by either party, which must be taken down in writing and reserved for the decision of the court at the final hearing of the case. *C. S. L. C. c.* 83, *s.* 18; 27-28 *Vic. c.* 39, *ss.* 16, 17.

See 33 *Vic. c.* 18, *s.* 1 (Que.) *under art.* 239 *ante.*

**285.** With the consent of the parties proofs may be taken on any juridical day during term or vacation, before the prothonotary, who presides over them and acts in the manner hereinbefore provided with respect of proof sittings.

See 33 *Vic. c.* 18, *s.* 1, *under art.* 239 *ante.*

**286.** The court or judge may assign the different rooms wherein proofs may be taken in the court house. *C. S. L. C. c.* 83, *s.* 17.

**287.** The witnesses must take the necessary oath or affirmation before they are examined, and the prothonotary must make a note of the fact of their having done so. 1 *Pig.* 279.

See 33 *Vic. c.* 18, *s.* 1, *under art.* 239 *ante.*

**288.** The deposition of each witness is written out at full length by the prothonotary, or by some person employed by him for the purpose.

The commencement of the deposition must mention: the name of the person presiding over the proof; the designation of the parties; the names, surname, age, quality or occupation and place of residence of the witness; and the fact of his being sworn. *Ord.* 1667, *tit.* xxii., *art.* 14; *C. P. C.* 262.

See 33 *Vic. c.* 18, *s.* 1, *under art.* 239 *ante*; and also 35 *Vic. c.* 6, *ss.* 10, 11, 12 (as to evidence taken by stenography), *under art.* 398, *post.*

1. The omission of the age of a witness from a deposition is not a cause of nullity in his evidence. *Barsalo* v. *Massicotte*, 5 R. L. 526, S. C. R. 1873.

2. If the deposition do not state the witness is or is not of kin to the parties, it may be set aside. *Stack* v. *King*, 3 Rev. de. Lég., 357, K. B. 1821; *Lauzon* v. *Stuart*, 4 L. C. J. 126.

**289.** The deposition must contain all that the witness declares concerning the matter at issue between the parties, without omitting any of the circumstances, and as much as possible in the words used by the witness; unless, upon objection by one of the parties, the judge orders otherwise. *Ibid, art.* 17; *C. P. C.* 271.

**290.** If the parties disagree as to the pertinency of any question or cross-question, it must be written down in the body of the deposition, either to be submitted for the decision of the judge or to guide the witness in his answer.

1. A motion to reject evidence taken at enquête under a reserve of objections cannot be made until the final hearing of the case. *Millar* v. *Darling et al.* 14 L. C. J. 111, S. C. 1869.

2. Objections decided at enquête cannot be revised until the final hearing on the merits, if the deposition has been closed. *Cayley* v. *Camyré*, 16 L. C. J. 126, S. C. 1872.

3. A judge of the Superior Court sitting in *banco* may revise and reverse the rulings of another judge in the same court sitting at enquête. *Scott et al.* v. *Scott et al.*, 3 L. C. J. 134, S. C. 1859.

4. And *held*, also, in the same case in *banco*, revising the ruling of the judge at enquête, that proceedings would not be suspended, in order to enable one of the parties who wished to appeal from an interlocutory judgment, to apply to the Court of Appeals for the allowance of an appeal of which he has given notice to the other side. Ib., & 3 L. C. J. 132, S. C. 1859.

5. Nor when, by the ruling in question, the evidence objected to was admitted. *Mousseau* v. *Picard et al.* 17 L. C. J. 67, S. C. 1873.

**291.** The objections made by the parties must likewise be inserted in the body of the deposition, as well as the decision thereon, or any consent of the parties concerning the same.

**292.** The witnesses are examined in the manner provided in § 3 of this section.

**293.** When the deposition of a witness is concluded, it is read to or by him, he is asked to declare whether it contains the truth, whether he persists therein, and whether he knows anything further, and he must sign it. If he cannot sign, that fact is mentioned, as well as the reading of the deposition. *Ord.* 1667, *tit.* 22, *art.* 16; *C. P. C.* 271; 2 *Bioche*, 233-4.

1. The deposition of a witness not certified by the prothonotary cannot be read in Court. *La Banque du Peuple* v. *Gugy*, 9 L. C. R. 484, Q. B. 1857.

2. A deposition closed after the rising of the Court, and in the absence of the plaintiff's attorney, will be rejected. *McDougall* v. *McDougall*, 6 L. C. R. 478, S. C. 1856.

3. The omission of the words "*y persiste*" (*persists therein*) at the end of the deposition is not fatal. *Carden et al.* v. *Finlay et al.* 3 L. C. J. 232, S. C. 1859.

**294.** If the witness adds to, strikes out, or alters any portion of his deposition, the changes must be inserted in

the margin or at the end, before the closing and acknowledgment of the deposition. *Ord.* 1667, *tit.* 22, *art.* 18, *C. P. C.* 272, 273.

**295.** No credence is given to unauthenticated marginal notes, nor to words written upon others, nor to interlineations. The number of words struck out and of marginal notes must be mentioned in the jurat.

1. On a motion to reject certain depositions as containing erasures and marginal notes in material portions of the depositions not noted or certified in the jurat—*Held*, that where they were duly paraphed, the deposition would not be rejected for want of mention of such marginal notes in the jurat. *Lauzon* v. *Stuart*, 4 L. C. J. 126, S. C. 1859.

**296.** At the examination of each witness, either the parties or their attorneys or counsel must be present or have been duly called. The other witnesses cannot be present if either of the parties objects. *Ord.* 1667, *tit.* 22, *art.* 15.

1. The fact that witnesses who were ordered to withdraw from the court during the examination of other witnesses, disobeyed such order will not prevent their being examined. *Irvin & Mahoney*, 6 L. C. J. 285, Q. B. 1862.

**297.** Articles 259, 260 and 261 apply likewise to proofs written down at length.

**298.** When one of the parties has closed his proof, the other party may proceed with his counter-proof and have a subsequent day fixed for that purpose; a sufficient delay being allowed to summon his witnesses.

**299.** If on the day fixed for his proof a party fails to appear or to produce witnesses, and furnishes no valid excuse for their absence, or for not proceeding, his proof may be declared closed, and the opposite party may, if he thinks proper, have a day fixed for his own proof.

43*rd Rule of P.*

1. On a motion by the defendants in the action to re-open an enquête —*Held*, that it was not competent for the plaintiffs to compel the de-

fendants to go on with the enquête, in the absence of certain of plaintiffs' exhibits, attached to a *commission rogatoire* issued by them and not returned, and that defendants were, under any circumstances, entitled to adduce evidence after the return of the commission. *Foster et al.* v. *Chamberlain*, 2 L. C. J. 285, S. C. 1858.

### § 6. *Of proofs before examiners.*

**300**. The court may appoint a competent person as an examiner to take the proof when, by reason of the nature of the dispute, or the number and distance of the witnesses to be examined, or the intricacy or multiciplity of the facts to be proved, or any other sufficient cause, it is shown to the court, by any of the parties concerned, that the ends of justice will be better attained by the appointment of such examiner. *C. S. L. C. c.* 83, *s.* 108.

**301**. The rule appointing an examiner must specify the place where the proof shall be taken, and the delay within which it must be concluded. This delay may be extended by the court or judge upon sufficient cause shewn. *Ibid.*

**302**. The examiner, before entering upon his functions, must be sworn before a judge, or a Commissioner of the Superior Court, to fulfil his duties faithfully and impartially; and such oath must be in writing and be annexed to his return. *Ibid.*

**303**. He must give the parties at least eight days' notice of the time and place at which he will begin the examination. *Ibid.* § 4.

**304**. The witnesses are summoned, by means of a writ of subpœna issuing from the Court before which the suit is pending, to appear before the examiner, who may administer the oath to them, may receive any documentary evidence produced by the parties, and has all the powers of a judge presiding over proofs stated in § 4 of this section. *Ibid.* § 5-6-7-8-9-10.

**305**. Any party to the suit may also be summoned to answer interrogatories upon articulated facts *viva voce* before the examiner. The latter may administer the necessary oath, and put such further questions as he may deem necessary and pertinent.

If the party refuses to answer any such questions, they are reduced to writing, and the facts contained in them are held to be proved.

If the party summoned fails to appear, the party who took out the order cannot take advantage of the default unless he has caused him to be served with the interrogatories which he intends him to answer. *Ibid.* § 11.

**306**. After completing the proof, the examiner must make a return of his proceedings, on or before the day fixed by the court or judge. *Ibid.* § 12.

§ 7. *Of commissions for the examination of witnesses.*

**307**. When any of the witnesses or the parties reside beyond Lower Canada, or even within Lower Canada at a distance of more than thirty miles from the place where the Court is held, the party who requires to examine them may obtain a commission appointing one or more persons to receive the answers of such witnesses or parties. *C. S. L. C. c.* 83, *ss.* 25, 105, 106; *C. P. L.* 138.

**308**. Application for that purpose must be made [by the plaintiff,] within four days after the articulations of facts are completed; except under particular circumstances, left to the discretion of the court or judge. Such an application by the defendant must be made within the same delay if the case is to be tried by a jury or is inscribed at the same time for proof and hearing; [but if the proof is taken in writing, at length, the defendant may make the application within the four days after the closing of the plaintiff's proof. It may be granted by the court or by a judge in vacation,

upon its being satisfactorily shewn by affidavit that the commission is necessary, and after notice to the adverse party. *Ibid. ss.* 106, 107, § 2.

1. In a case of capias—*Held*, that a consent motion for a *commission rogatoire* to examine witnesses in Upper Canada would be granted in chambers. *Moss et al.* v. *Wilson*, 14 L. C. R. 26, S. C. 1863.

2. A *commission rogatoire* may issue *de plano* on motion therefor without affidavit of any kind. *Willis et al.* v. *Pierce*, 2 L. C. J. 77, S. C. 1858.

3. An application for a *commission rogatoire* to adduce evidence against the validity of a power of attorney, not attacked by any pleading, cannot be allowed. *The Canada Tanning Extract Company & Foley*, 20 L. C. J. 180, Q. B. 1875.

4. An application by a defendant for a *commission rogatoire* must be made within the delay specified in art. 308, and will not be granted afterwards except on special cause shown, and in the discretion of the judge. *Harvey* v. *Philips*, 14 L. C. J. 279, S. C. 1869.

**309.** The commissioners are chosen as follows:

If both parties join in the commission each furnishes four names. From the list thus formed each party alternately strikes out two names; this is done in the presence of the judge, who out of the four remaining names chooses three, to whom the commission is addressed.

If both parties do not join in the commission it is addressed to the persons chosen by the party who applies for it. *Ibid. s.* 105, § 3.

**310.** The court or judge fixes the number of commissioners who must be present in order to execute the commission, and gives direction and authority for swearing witnesses. *Ibid. s.* 107.

1. Where a writ of *commission rogatoire* has been addressed to six commissioners of whom three have been named by each party, and the writ directs that any two of the commissioners may execute it, the execution of the writ by two of the plaintiff's commissioners, without explanation why the others did not join, is sufficient. *Tarrat et al. & Foley et al.* 11 L. C. J. 140, S. C. 1865.

**311**. Annexed to the commission are the interrogatories and cross-interrogatories of each party, which shall have been allowed by the judge after due notice to the other party. *Ibid. s.* 105, § 2.

**312**. The commission must also be accompanied with instructions addressed to the commissioners, under the signature of the judge, to guide them in its execution *Ibid. s.* 107.

**313**. The return consists of a certificate of the commissioners who acted, endorsed upon the commission, and stating that the execution appears by the schedule thereto annexed.

The return must be under a sealed envelope, upon which are endorsed an indication of its contents and the name of the cause. It cannot be opened and published without an order from the court or judge. *Ibid. s.* 105, § 2.

**314**. The party who applies for a commission must himself see to its being transmitted and executed. *Ibid.*, § 3.

**315**. If both parties have joined in the commission, both are equally bound to have it transmitted and executed. *Ibid.*

**316**. A failure to return the commission will not prevent the court from proceeding with the hearing in the following cases:

1. If it appears that the party applied for the commission solely in order to retard the judgment;

2. If the return has been delayed longer than justice and equity required. *Ibid.*, *s.* 107, § 3.

1. The mere order for a *commission rogatoire* granted to defendant is sufficient to prevent plaintiffs inscribing the case for judgment, although the plaintiffs formally notify the defendant in writing to use due diligence, and although an interval of fifteen days have elapsed

between the date of the order and the day named in the inscription for hearing, without any attempt being made by defendant to sue out the commission so allowed to issue. *Tarrat et al. & Barber et al.*, 10 L. C. J. 27, S. C. 1865.

2. In the absence of a *commission rogatoire* issued by the plaintiff the defendant cannot be compelled to proceed with the enquête. *McFarlane* v. *Bresler*, 2 L. C. R. 238, S. C. 1852.

## § 8. *Of proofs* ex parte.

**317**. When the defendant fails to appear or to plead to the action, the plaintiff, in suits other than those mentioned in articles 89, 90 and 91, may inscribe his case for proof in term or out of term, if any is necessary, and such proof is then proceeded with before a judge, or before the prothonotary who must swear the witnesses, take notes of their evidence, and do whatever else it would be the duty of a judge of the court to do in matters of proof.

A defendant foreclosed from pleading is entitled to at least one clear day's notice before proof; and he may cross-examine the witnesses, and make such objections as he thinks proper, of which the prothonotary must take notes; but he is not entitled to produce witnesses.

Proofs *ex parte* may be taken at any time, except between the ninth of July and the first of September. *C. S. L. C. c.* 83, *ss.* 13, § 2, 16, 98, 99.

1. A party foreclosed is entitled to one juridical day's notice of inscription for enquête. *Renaud & Gugy*, 8 L. C. R. 470, Q. B. 1858.

2. And the notice of inscription must specify the particular days on which the enquête and hearing respectively will take place. *Smith & O'Farrel*, 9 L. C. R. 392, S. C. 1859.

**318**. All evidence offered by the plaintiff is filed and remains in the record in the same manner as if the defendant had appeared and pleaded to the action *Ibid*, *s.* 102.

## § 9. *Of the incidents of proofs.*

**319.** All applications to the court upon any incident of the proof may be made by motion, stating succinctly the object and reasons of the application.

**320.** The court may, at any time before judgment, in its discretion and under such conditions as it deems just, allow any pleading to be amended so as to agree with the facts proved; and any pleading is sufficiently sustained if the facts alleged agree sufficiently with the facts proved, and if in the opinion of the court the opposite party has not been led into error as to the real nature of the facts intended to be alleged and proved. *Ibid s.* 77, § 2.

1. A clerical error of date can be amended at the final hearing. *Hasty* v. *Morland*, 2 L. C. J. 277, S. C. 1858.

2. Where the defendant moved before enquête to amend his plea on payment of costs, supported by an affidavit to the effect that, owing to absence from the country and sickness, he had been unable to give proper instructions to his attorneys, and afterwards moved a similar motion at the hearing, both of which were rejected—*Held*, in review, that the final judgment would be reversed, and the defendant allowed to plead *de novo* on payment of all costs, considering that sufficient cause had been shown to authorize the amendment. *Lasell* v. *Brown*, 16 L. C. R. 151, S. C. R. 1865.

3. In an action in improbation—*Held*, reversing the judgment of the court below, that after enquête the plaintiff was entitled to amend *moyens de faux* by adding thereto new facts brought out by the evidence adduced. *Perrault* v. *Simard*, 6 L. C. R. 24, Q. B. 1856.

4. Where it results from the proof that the allegations of the declaration do not accord precisely with the facts proved, the declaration may be amended on payment of fifty shillings costs without prejudice to the evidence, and with power to the defendant to replead within eight days. *Boudreau* v. *Lavender*, 2 L. C. J. 194, S. C. 1858.

5. Where, in a rule for peremption, the first name of one of the parties was written "*Louis*" instead of *Lewis* in the endorsation of the rule—*Held*, not to be a fatal error as the names were *idem sonans*. *Farnam* v. *Joyal*, 4 L. C. J. 128, S. C. 1859.

6. In cases of amendment of the declaration to make it agree with the fact proved, the costs are at the discretion of the court. *Frothingham* v. *Gilbert*, 3 L. C. J. 136, S. C. 1858.

7. On an opposition to a judgment, after argument, certain receipts were found, showing that the whole of the amount had been paid. The opposant then asked to be entitled to amend on payment of costs. Motion granted. *Johnston* v. *Watts & Watts*, 1 L. C. L. J. 122, S. C. 1866.

8. If a copy be taken from a register in the archives of the court by the prothonotary, and he has omitted to sign the certificate, the court will direct it to be perfected. *De Veau & Shephard*, 2 Rev. de Lég. 335, K. B. 1820.

See arts. 53, 118, 142 *ante*.

## SECTION IV.

## OF EXPERTS, VIEWERS, REFERENCES IN MATTERS OF ACCOUNT, AND ARBITRATORS.

**321**. Before deciding upon the merits of the case, the court may, if necessary, order an extraordinary investigation in the cases hereinafter mentioned, either before, during, or after the proof. *C. S. L. C. c.* 83, *s.* 81.

1. Where a question arose concerning the signature to a promissory note, and motion was made to refer the matter to experts—*Held*, that the twelfth title of the Ordinance of 1667 was in force in Lower Canada, although not employed for many years, and that the inobservance of a law or ordinance for any length of time did not effect its abrogation. *Lord* v. *Laurin et al.* 15 L. C. R. 452, C. C. 1865.

### § 1. *Of viewers and experts.*

**322**. Whenever the facts in contestation between the parties can only be verified by view of the object or premises, or whenever the evidence produced by each party is contradictory, or when the nature of the contest requires it, the court may, of its own accord or upon the application of either party, order the facts to be verified by experts and persons skilled in the matter.

The order for experts must specify clearly and distinctly the matters to be verified. 1 *Pig.* 298; *Poth. Proc.* 44; *C. S. L. C. c.* 83, *s.* 81; *C. P. C.* 302.

1. Experts may be appointed for the purpose of examining accounts and ascertaining their correctness, and may furnish a balance-sheet of the expenses and receipts of the business. *Taplin & Becket et al.*, 15 L. C. J. 26, S. C. R. 1869.

2. In an action of damages for trespass and for cutting timber, etc. on the property of the plaintiff, the question turned upon the boundary line, the property of the one being in Ontario and the other in Quebec. The court ordered an *expertise* to establish whether the timber alleged to have been cut was so cut on one side or other of the line—*Held*, reversing this judgment, that the court had no power to name experts for the purpose mentioned, the line to be established being in the province of Ontario. *Skead & McDonnell*, 3 R. C. 43, Q. B. 1872.

3. A motion to refer a case to experts, before any proof has been adduced, will be rejected, as the court cannot be relieved of the case without necessity. *Rankin* v. *Lay*, 5 R. L. 226, S. C.; *Simons* v. *Bougie*, 5 R. L. 472, S. C. 1874.

**323.** [The investigation must be made by three experts agreed upon by the parties, unless they agree to its being made by one only.] *Ord.* 1667, *tit.* 21, *Arts.* 9, 13; 1 *Bornier*, 172, *C. P. C.* 303; 1 *Couchot*, 88.

1. Under the Code, the appointment of *two* experts only is irregular, and their report though unanimous, will be rejected. *Ouimet* v. *Picotte*, 4 R. L. 702, C. C. 1872.

**324.** If, at the time of the order for experts, their appointment has been agreed upon by the parties, the order records such appointment. 1 *Couchot*, 88; *C. P. C.* 304.

**325.** If the experts are not agreed upon by the parties, the court fixes a day on which the latter must attend before the court or judge in order to appoint them; and in default of an order to that effect either party may summon the other to attend as aforesaid, within reasonable delay, for the purpose of such appointment. *Ord.* 1667, *tit.* 21 *art.* 9; *Pothier, Proc.* 44; *C. P. C.* 305.

**326.** [The parties are bound to attend on the day appointed, and if they then fail to agree upon the three experts the court appoints such experts for them.

In the case of any of the experts being validly recused others are appointed in their stead, in the manner above prescribed.] *Ord.* 1667, *tit.* 21, *art.* 9, *Pothier*, 45, *C. P. C.* 306—309.

**327.** The grounds for recusing an expert are:

Relation or alliance, to the degree of cousin-german inclusively;

Intimacy;

Enmity;

Subornation;

Interest;

Being in the domestic service or other employ of one of the parties;

Being a party in a similar suit, or the attorney or agent of a party in the case;

And, generally, the grounds of exclusion applicable to witnesses. *Pothier, Proc.* 45; *C. P. C.* 310.

1. A person who has acted as expert in a case, and whose report has been rejected, cannot act a second time if his appointment be objected to on a new *expertise*. *Auclaire* v. *Low*, 5 L. C. J. 223, S. C. 1861.

**328.** As soon as the experts are named, either party may have the order served upon them, together with a requisition calling upon them to be sworn. *Ord.* 1667, *tit.* 21 *art.* 10.

**329.** If any one of the experts neglects or refuses to be sworn or to act, either of the parties may summon the other to attend before a judge in order that another person may be named in the proper manner to replace such expert. *Pothier*, 48, *C. P. C.* 316.

**330.** The experts, before taking any proceedings in the investigation, must, on pain of nullity, be sworn to perform

their functions with impartiality and to the best of their ability.

This oath must be in writing, and be certified by the person who administers it.

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## FORM No. 30.

In connection with article 330.

*The oath to be administered to Experts.*

I, A. B., of the parish of , in the county of (*if there be two or more persons to be sworn, say,* I, A. B., of , and I, C. D. of ) do make oath and swear, that in the presence of E. F., the plaintiff, and G. H., the defendant, named in an interlocutory judgment pronounced in (*here insert the name of the court*) in the district of , bearing date the day of , or in their absence, after due notification shall have been given them, to attend at a place to be designated, and on a day and hour to be specifically named to them respectively, I will faithfully proceed as an expert to the view and examination required by the said interlocutory sentence; and that I will truly report my opinion in the premises, without favour or partiality towards either of the said parties: So help me God.

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## FORM No. 31.

In connection with article 330.

*Certificate to be made and signed by the Commissioner, of the due administration of the Oath.*

Sworn before me, , a commissioner of the Superior Court in the district of , (*or* sub-

delegate authorized by the commission, *or* the judgment, *as the case may be*, hereunto annexed, *as the case may be*) at on the day of the month of , in the year .

1. A declaration in the report of arbitrators that they have been sworn, is not of itself proof of such fact, and the report will be rejected unless a certificate be filed from the person before whom they have been sworn. *Joseph* v. *Ostell*, 6 L. C. J. 40, & 11 L. C. R. 499, S. C. 1861.

**331**. The oath must be taken before a judge, or the prothonotary, before a commissioner of the Superior Court, before an expert already duly sworn, or before any other person indicated in the order for experts. *Poth. Proc.* 46; *C. S. L. C. c.* 83, *ss.* 82-3.

**332**. A copy of the order for experts, together with the necessary papers, must be given to them, after the prothonotary has taken a receipt therefor. *Ord.* 1667, *tit.* 21, *art.* 10.

**333**. The experts are bound to fix the time and place at which they will proceed with the investigation, and to notify the parties, allowing a delay of at least three days when the distance from the domicile of the parties respectively does not exceed five leagues, and one day more for every additional five leagues. *Pothier, Proc.* 46.

1. A motion to set aside a report of experts, on the ground that one of the parties had not been notified to attend, was granted. *Brodie et ux.* v. *Cowan*, 7 L. C. J. 96, S. C. 1852; *Wardle* v. *Bethune*, 2 L. C. L. J. 18, Q. B. 1866; *Waters* v. *Veronneau*, 6 L. C. R. 482, S. C. 1856.

2. If the experts are ordered to visit works in the presence of the parties, and they make such visit without the parties, their report will be set aside. *L'Abbé* v. *Ritchie*, 3 Rev. de Lég. 358, K. B. 1818.

3. When two of the arbitrators change the place of meeting or deliberating, notice of such change must be given to the third. *O'Connell* v. *Frigon*, 9 L. C. J. 173, & 1 L. C. L. J. 65, S. C. 1865.

**334.** The experts must hear the parties and the witnesses in accordance with the terms of the order naming them; each of them is authorized to administer the oath to the witness or the parties, as the case may be, and the witnesses are summoned to attend before the experts, whatever may be the distance. *C. S. L. C. c.* 83, *s.* 83.

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## FORM No. 32.

In connection with article 334.

*The oath to be administered to witnesses.*

I , (*insert the name, profession or quality and place of residence of the witness,*) do make oath and swear that I am not related or allied to, or a servant or domestic of E. F., the plaintiff, or G. H., the defendant, and that I am not interested in the event of the cause depending between them, (*or, if witness says he is, state in what degree he declares himself to be related or allied to either and which of the parties, or what situation he holds in the family of either of them,*) and I do also swear that the evidence which I shall give between the said parties before the experts (*or* arbiters *or* arbitrators, *as the case may be,*) named in the interlocutory judgment pronounced by (*here insert the name of the court*), in the said cause, shall be the truth, and the whole truth, and nothing but the truth; so help me God.

1. On a motion to annul and set aside a report of arbitrators—*Held*, not sufficient for the arbitrators to report, in the terms of the rule by which they were appointed, that they had examined the proceedings of record in the cause, examined the witnesses of the party under oath, and deliberated, but such report must allege that the parties had received due notice of the meetings of the arbitrators, or were heard in support of their allegations, and a report omitting to allege such notice of meeting will be annulled and set aside on motion to that effect. *Brown et al. & Smith et al.* 6 L. C. J. 126, S. C. 1856.

**335.** The evidence of the witnesses must be taken down in writing, certified and annexed to the report of the experts, and it must mention whether the witnesses are related or allied to the parties, and in what degree, and whether they are in the employ of either party, or interested in the suit. *Ibid, s.* 85.

1. Where the award was made in favour of the plaintiff, and the defendant moved to set aside the award on the ground that none of the witnesses were sworn, inasmuch as the arbitrators had no legal capacity to swear the witnesses—*Held*, that under C. S L. C. cap. 83, sec. 84, they had such power, and the motion was dismissed. *Daly et al.* v. *Cunningham*, 6 L. C. J. 242, S.C. 1862.

2. A report of arbitrators will be set aside and annulled on motion when it appears that a material witness gave evidence before the arbitrators without having been previously sworn. *O'Connell* v. *Frigon*, 9 L. C. J. 173, S. C. 1865.

3. And such evidence afterwards reduced to writing and signed and sworn to by the witness is irregular, and cannot be filed of record or used, even where two or three of the arbitrators consent to such a course. *Ib. & 1* L. C. L. J. 65.

**336.** [If all the experts agree, they make one and the same report, if not, each of them makes his separate report, if he thinks proper.] *Ord.* 1667, *tit.* 21, *art.* 13; *Pothier, Proc.* 47; 1 *Couchot*, 88.

**337.** The report of the experts must be made on or before the day fixed by the court. It must contain reasons and details, so as to enable the court to appreciate the facts; it must also be signed by the experts or be in the form of a notarial original. *Law Reporter*, 57; *Rodier* v. *Mercile, Montreal*, 16*th Sept.*, 1850; *Ord.* 1667, *art.* 12.

1. Arbitrators must not only hear the parties but must decide the matter in dispute before the expiration of the rule of reference; their proceedings are otherwise void. *Gilley* v. *Miller*, 1 Rev. de Lég. 510, K. B. 1811.

2. A material reference in a surveyor's report to a plan which is not filed, suffices to cause the report to be set aside. *Adams* v. *Gravel*, 2 L. C. J. 203, S. C. 1858.

3. When the report of *experts* has once been made, they are *functi officio*, and cannot of their own motion make a new report on the ground that the first is imperfect or defective. *Beckham* v. *Farmer*, 21 L. C. J. 38, S. C. 1877.

**338.** If the experts delay or refuse to file their report, they may be summoned, with the same delays as in ordinary procedure, by rule of court, to shew cause why they should not be condemned, and even held by coercive imprisonment, to do so. *C. P. C.* 320.

**339.** The court is not bound to accept the opinion of the experts nor that of a majority of them. *C. P. C.* 323.

1. Where justice has been done to the parties, the court ought not to set aside the report because of formal irregularities, or because the adoption of the report had never been demanded. *La Fabrique de Ste. Julie de S. & Paquet*, 1 R. L. 430, Q. B. 1869.

### § 2. *Of references in matters of account to accountants and practitioners.*

**340.** In matters where accounts have to be rendered or adjusted, or which require calculations to be made, and in matters of separation of property, or partition of community or succession, the court may refer the case to one or more persons skilled in such matters; and such persons are subject to the rules above prescribed concerning experts.

Such accountants and practitioners have the powers given to experts by the foregoing articles, and are bound to follow the directions of the court; and their reports are adopted, homologated or rejected in the same manner as reports of experts. *C. S. L. C. c.* 83, *s.* 80.

### § 3. *Of arbitrators.*

**341.** The court may, of its own motion or upon the application of one of the parties, refer to the decision of arbitrators any case of dispute between relations, concerning

partitions, or other matters of fact which it is difficult for the court to appreciate; and also any other case, if the parties consent to it. *Ord.* 1566, *art.* 83; 1 *Pig.* 248.

1. The court may refer to arbitration disputes between relations when the facts are difficult of appreciation without its being necessary that the contestation should be the result of relationship. *Robert & Robert*, 21 L. C. J. 18, Q.B.

**342.** The preceding provisions relating to experts apply to arbitrators, in so far as they are compatible with those of the present paragraph. Nevertheless, arbitrators need not be sworn unless the order appointing them requires it. 1 *Pig.* 249.

**343.** Arbitrators can only adjudicate upon the matters submitted to them.

They are bound to observe the same formalities as experts in the investigation of facts, according to articles 334 and 335, unless they are at the same time appointed mediators, but they are not bound to give the reasons of their decision.

They cannot award costs, unless the court has empowered them to do so. 1 *Pig.* 248.

1. Where the matter in issue in a suit was referred to arbitrators—*Held*, on motion to homologate the award, that where the award did not embrace all the material points submitted to the arbitration or if it showed that the arbitrators had exceeded the limits of their powers, it would be set aside. *Tate et al.* v. *James et al. & E. contra*, 1. L. C. J. 151, S. C. 1857.

2. Arbitrators have no right to pass upon costs. *Urquhart* v. *Moore*, 18 L. C. J. 71, S. C. 1874.

3. So much of the award as pretended to decide on the question of costs will be rejected. *McKenna* v. *Tabb*, 2 L. C. J. 190, C. C. 1858.

4. Where the rule appointing arbitrators authorizes them to settle the question of costs the court will not disturb their award as to costs. *McGibbon* v. *Dalton*, 1 L C. L. J. 93, S. C. 1865.

## § 4. *General provisions applicable to the three preceding paragraphs.*

**344.** [Experts, accountants, practitioners, and arbitrators, may demand that the amount of their remuneration, costs and disbursements be paid into court previously to the opening of their report and subject to the order of the court.

If they do not demand this deposit they have a recourse against all the parties of the suit jointly and severally.]

1. An arbitrator cannot claim his fees as such if he have not made his report within the delays mentioned in the agreement, and if he have not named his award, and notified the parties thereto, and that, even when at the time of the agreement to refer the matter in dispute to arbitration, the party for whom he was acting verbally promised to pay him so much a day for all the time he would act as such arbitrator. *Maynard* v. *Marin*, 16 L. C. J. 140, C. C. 1873.

2. A surveyor is entitled to his fees although his report is set aside on the ground that he had not been sworn. *Brady* v. *Atchison*, 1 L. C. L. J. 112, S. C. 1865.

3. An expert named by one of the parties or by the court at the request of one of the parties has no recourse for his fees against the other parties. *Brown* v. *Wallace*, 3 L. C. J. 60, 11 L. C. R. 182, Q. B. 1860.

4. When a surveyor commits a notable error, on account of which his report is set aside, he cannot claim fees. *Beaudry* v. *Tomalty et al.* 17 L. C. J. 175, C. C. 1873.

5. Experts cannot detain their report until their fees are paid, but they may move that a sum be paid into court to secure their fees before they begin to report. *Hoyt* v. *Todd*, 3 Reg de Lég. 357, K. B. 1809.

**345.** The party who intends to avail himself of a report of experts, practitioners or accountants must make application to have it received; and if the opposite party desires to take advantage of any informalities or causes of nullity therein, he must do so by a counter-application. *Poth. Proc.* 47; *Contra. Ord.* 1667, *tit.* 21, *art.* 14.

1. A report of experts cannot be amended on motion by either party; but either party may move for a new visit by the experts, or for a new expert and a new report. *Dumontier* v. *Coutière*, 3 Rev. de Lég. 358, K. B., 1812.

**346.** If a report of experts, practitioners or accountants is free from informalities or causes of nullity, it is received, together with the depositions and documents annexed, as part of the evidence in the case. *C. de Paris*, 184.

**347.** In the case of an award of arbitrators, the party intending to avail himself of it may apply for its homologation and for judgment in conformity with it. The other party cannot oppose it except by an application to have the report declared inadmissible on the ground of informality or some other cause of nullity.

1. Where motion was made to homologate a report of arbitrators, and the adverse party moved to set it aside on the ground that he had not had notice, and filed an affidavit to that effect, which was uncontradicted—*Held*, that his motion must be granted. *McCulloch* v. *McNevin*, 6 L. C. J. 257, 1862.

## SECTION V.

## OF TRIAL BY JURY.

### § 1. *Preliminary provisions.*

**348.** A trial by jury may be had in all actions founded on debts, promises, or agreements of a mercantile nature, either between traders or between traders and non-traders; and also in all suits for the recovery of damages resulting from personal wrongs, or from offences or quasi-offences against moveable property. 5 *L. C. R.* 406; *C. S. L. C. c.* 82, *s.* 26; *C. P. L.* 313.

*Fulton* v. *Stevenson*, 13 *L. C. J.* 112.

1. Where a trial by jury was had before issue was joined the verdict was set aside on a writ of error. *Wurtelle* v. *Arcand*, Rev. de Lég. 242, Q. B. 1848.

2. In an action for non-delivery of a cargo which the defendants, who were merchants, had, as alleged in the declaration, bargained and sold to the plaintiff, a blacksmith, a trial by jury might be had. *Hunt* v. *Bruce*, P. R. 3.

3. In an action *en déclaration de paternité*, coupled with damages, trial by jury will not be granted. *Clarke* v. *McGrath*, 1 L. C. J. 5, S. C. 1856.

4. Nor in an action for damages caused to the plaintiff's horse, as the wrong is not personal. *Derochar* v. *Meunier*, 1 L. C. J. 290, S. C. 1857.

5. An action of damages by two professional men against two merchants for breach of contract to purchase real estate is not of a commercial nature, and therefore not susceptible of trial by jury, and so much of the pleadings as pray for a jury trial will be rejected on motion. *Abbott et al.* v. *Meikleham et al.*, 2 L. C. J. 283, S. C. 1858.

6. In an action between two merchants for the revendication of goods which had been stolen, a jury trial was not allowed. *Fawcett et al* v. *Thompson et al.* 3 L. C. J. 229, S. C. 1859; *Davidson* v. *Moffatt et al.* ibid.

7. Trial by jury may be had in an action by a printer arising out of matter connected with his business. *Lovell* v. *Campbell et al.* 6 L. C. J. 115, S. C. 1861.

8. An action *en reddition de compte* between two successions is not susceptible of trial by jury. *Mann et al.* v. *Lambe*, 5 L. C. J. 330, S. C. 1861.

9. In an action on acknowledgment of a loan made by a non-trader to a commercial firm, a trial by jury was refused. *Wishaw* v. *Gilmour et al.* 6 L. C. J. 320; 13 L. C. R. 94, S. C., 15 L. C. R. 177, Q. B. 1862.

10. Where action was brought by a non-commercial corporation against a trading firm for the recovery of an over-charge on freight, the same judge granted a jury-trial. *Her Majesty's Principal Secretary of State for the War Department & Edmonston et al.* 6 L. C. J. 322, 13 L. C. R. 79, S. C. 1862.

11. And where two actions are joined in the one suit—the one commercial and the other non-commercial—a trial by jury will be refused. *Mann et al.* v. *Lambe*, 6 L. C. J. 75, Q. B. 1862.

12. A demand by a husband for possession of his wife who had gone to live with her father coupled with a demand for damages, may be

tried by a jury. *Compte* v. *Garceau*, 8 L. C. J. 131 ; 14 L. C. R. 446, S. C. 1864.

13. In an action on a promissory note when some of the endorsers sued were traders and others non-traders, and when the defendants severed in their defence, trial by jury was allowed on all the issues at once. *Evanturel* v. *Withal*, 15 L. C. R. 126, Q. B. 1864.

14. An action against a trader by a carter for the drowning of the latter's horses is not triable by a jury. *Toland* v. *Spencer*, 15 L. C. J. 221, S. C. 1871.

**349**. It is had at the option of either of the parties, when the amount claimed by the suit exceeds two hundred dollars, and only upon the issues raised upon the merits of the case. *C. S. L. C. c.* 83, *s.* 26, § 2, *and s.* 29 ; *C. P. L.* 494.

**350**. The option is made either in the declaration or in the pleas, or by a special application to the court within four days after issue joined, or, if these four days expire out of term, the application may be made on the first day of the next term, provided notice be given to the opposite party within four days after issue joined. 64th *Rule of P.* ; *C. P L.* 494-5 ; *6th L. C. J.* 115, 116, 38, 39.

If there is no articulation of facts, the inscription cannot take place until five days after issue joined.

1. Where under the 64th Rule of Practice of the Superior Court requiring option of trial by jury to be made by declaration, pleas or motion within four days after issue joined, issue had been joined on the twenty-fourth day of January and notice of motion of option had been given to the opposite attorney on the twenty-eighth of January, and motion had been accordingly made on the seventeenth of February following, being the nearest day when such motion could be made—*Held*, that the parties moving had substantially complied with the requirements of the said Rule of Practice. *Arcand* v. *The Montreal and New York Railway Company*, 6 L. C. J. 38, S. C. R. 1854.

2. A motion for a jury trial cannot be granted until after the issues are perfected. *Hart et al* v. *The Northern Insurance Company*, 18 L. C. J. 189, S. C. 1873.

3. Motion for a special jury made after the delays prescribed by the Rules of Practice will be rejected. *Wilson* v. *The State Fire Insurance Company*, 12 L. C. R. 96, S. C. 1861.

4. The option of trial by jury made in the plaintiff's answer can avail him only as a notice to the opposite party; and must be followed by a special application to the court within four days after issue joined, or not later than the first day of the following term. *Matthews* v. *The Northern Insurance Company.* 14 L. C. J. 138, S. C. 1870.

5. The service within four days after issue joined on amended pleadings, of a notice of motion praying *acte* of the option of the maker to have a trial by jury, and the making of such motion subsequently, are a sufficient compliance with this article of the Code. *Brown* v. *The Imperial Fire Insurance Company.* 20 L. C. J. 179. Q.B. 1875.

**351.** The jury is composed and summoned in the manner hereinafter provided. *C. S. L. C. c.* 83, *s.* 30, *C. P. L.* 493.

**352.** No trial by jury is fixed until the court or judge, upon the motion and suggestion of the party claiming the same, has assigned the fact or facts to be enquired into by the jury, and has decided all issues raised respecting the quality of the parties. *C. S. L. C. c.* 83, *ss.* 29, 31.

**353.** Each party must furnish the judge with a statement of the facts which he considers ought to be submitted to the jury. *Ibid. s.* 31.

**354.** The assignment of the facts may, however, be dispensed with, by consent in writing of all the parties to the suit. *Ibid. s.* 32.

**355.** The trial must be had at the place where the suit is brought, unless, for sufficient cause, the court or judge orders that it shall be held in another district; and in such case the verdict is returned with the record to the place where the suit was commenced.

**356.** In any suit for damages brought against a public officer by reason of any illegal act done by him in the performance of his functions, he may apply to have the trial take place in another district, upon shewing that the case

cannot be tried impartially and without prejudice in the district in which the suit is brought.

This application may be granted either by the court or by a judge, and the venue changed accordingly. *C. S. L. C.*, *c.* 83, *s.* 28; *c.* 101, *s.* 3, § 3.

## § 2. *Of the jury.*

**357**. The prothonotary of the Superior Court in each district is bound to make a list of the persons qualified to serve as jurors in civil causes, by taking from the list deposited in his office of persons qualified, according to the terms of the statute, to serve as grand jurors in criminal cases, and in the order in which they then are, the names of all persons residing within a distance of five leagues from the court. 27 & 28 *Vic.*, *c.* 41, *s.* 9, § 1, 2.

1. Where the prothonotary had prepared a list of jurors in obedience to an order, and the order was subsequently set aside on account of irregularities, and the list was used in another case, it was *held* in review that the jury, on a subsequent order in the first case, should be taken from the same list. *Phillipstall* v. *Duval*, 3 R. L. 29, S. C. R., 1871.

**358**. The qualification required for such jurors is that they must be males of full age, proprietors of real property of the assessed value of two thousand dollars, or tenants of real property of the assessed annual value of two hundred [1] dollars, in cities or towns of at least twenty thousand souls; and in any other municipalities they must be owners of real property, of the assessed value of one thousand [2] dollars, or tenants of real property of the assessed annual value of one hundred [3] dollars. Any justice of the peace may be a juror. *Ibid. s.* 2, § 2, 3.

[1] Now $300;—32 *V. c.* 22, *s.* 2 (*Que.*) [2] Now $1,500. *Ibid.* [3] Now $150. *Ibid.*

**359**. Persons cannot be jurors:

1. Who have not the qualifications and conditions required by the two preceding articles;

2. Who are afflicted with blindness, deafness or any other physical infirmity incompatible with the discharge of the duties of a juror.

3. Who are arrested or under bail upon a charge of treason or felony, or who have been convicted thereof.

4. Who are aliens, except in cases where, according to law, one half of the jury must be composed of aliens. *Ibid.* s. 2, § 3.

**360**. The following persons are exempt [absolutely] from serving as jurors:

Members of the clergy;

Members of the Executive Council, of the Legislative Council, or of the Legislative Assembly;

Practising advocates and attorneys;

Prothonotaries, clerks of the Peace and clerks of the Circuit Court;

Sheriffs and coroners;

Officers of Her Majesty's courts;

Gaolers and keepers of houses of correction;

Officers of the army and navy, on full pay;

Pilots duly licensed;

Schoolmasters not exercising any other profession;

[All persons employed in the running of railway trains;]

The following persons are exempt from serving as jurors provided they have given notice of their intention to claim such exemption in the manner provided by the Act 27 & 28 Vic., c. 41, s. 3:

Persons above sixty years of age;

All persons in the civil service of the government, acting under imperial or provincial appointment;

Officers of the customs;

Persons employed in the public offices;

Persons in the service of the Post-office;

All persons who have been in military service for a period of seven years;

Physicians, surgeons, and apothecaries;

Cashiers, tellers and accountants of incorporated banks;

Masters and crews of steamboats;

All persons employed in the working of grist-mills;

Firemen and Volunteers.

33 Vic., c. 13 (*Que.*)

"The following shall likewise be absolutely exempt:

1. Members of the Privy Council, or of the Senate or of the House of Commons of Canada, or persons in the employ of the Government of Canada;

2. Members of the Executive Council, Legislative Council or Legislative Assembly of Quebec, or persons in the employ of the Government of Quebec, or the Legislature thereof;

3. The Clerk, Treasurer, and other municipal officers of the Cities of Quebec and Montreal;

4. Officers, non-commissioned officers, and privates, of the active militia;

5. Registrars;

6. The persons mentioned in section twenty-three of the Act fourth and fifth Victoria, chapter ninety" (Members of the Council and Board of Arbitration of the Montreal Board of Trade).

**361**. The list of jurors for civil cases is revised from time to time by the prothonotary according to the list of grand jurors for criminal cases, by striking out the names of deceased, absent or disqualified persons, and adding the names of new persons qualified to serve as jurors, [and also by striking out the names of all those whom the sheriff returns in any case pending as dead, absent, or incompetent, or who are declared by the court to be so.] 27, 28 *V. c.* 41, *s.* 9, § 1, 2. *See also*, 32 *V. c.* 22 (Que.)

§ 3. *Of the special list and the striking of the panel.*

**362**. The court, upon motion of either of the parties, may fix a day for striking the panel and another day for the

trial, either in term or in vacation, and may order the summoning of a jury to try the issues, either at the place where the court is held or in any other district, according to circumstances, and may, in the latter case, order the record to be sent to the prothonotary of the court in such district. *C. S. L. C. c.* 83, *s.* 27; 64*th Rule of P.*

**363.** If the suit be of a mercantile nature, the jurors to be summoned are taken and selected only from amongst the persons speaking the required language, who are designated in the jury-list as merchants or traders, and in the order in which they stand upon the list; and in cases where one of the parties is not a trader, and objects to a jury composed wholly of traders, the court or judge may order that one-half only of the jury be composed of traders.

If there are not upon the jury-list the number of merchants or traders that ought to be summoned to form the jury, the special list is completed by taking other names from the jury-list in the order hereinbefore prescribed. 27, 28 *V. c.* 41, *s.* 9, §§ 4, 5, 6, 11.

**364.** Upon the application of either of the parties, if the opposite party does not object, the court or judge may order the jury to be composed exclusively of persons speaking the French language or of persons speaking the English language. If the parties are of different origins, and one of them demands a jury *de medietate linguæ*, the court or judge orders the jury to be composed in equal numbers of persons speaking the French language and of persons speaking the English language. *Ibid.* §§ 7-8.

**365.** The motion for the fixing of a day for trial must be accompanied with a deposit in the hands of the prothonotary, of the amount fixed by the court. 65*th Rule of P.*

1. The deposit need not be made before the motion for a *venire facias*, and the motion will not be entertained until after the facts to be submitted to the jury have been defined. *Glass* v. *Denis et al.* 16 L. C. R. 299, 1866.

**366**. After the granting of such motion by the court or judge, the prothonotary takes from the list of jurors for civil matters, commencing with the name of the first juror having the required qualifications, following that of the last juror [included in the special list last previously made] the names of forty-eight jurors, whose names are first on the list, having, in the special cases, the qualifications required according to the order of the court or judge, and makes a special list thereof, to form part of the record in the case. *C. S. L. C c.* 84, *s.* 43; 27-28 *V. c.* 41, *s.* 9, § 3; 3 *Blackstone*, 358.

**367**. Upon the day and at the hour fixed for striking the panel, the parties must attend for that purpose at the prothonotary's office. *69th and 71st Rule of P.*

**368**. Each party strikes alternately from the special list prepared by the prothonotary the name of one of the persons therein designated, to the number of twelve each, paraphing each name struck out, and the twenty-four names then remaining form the panel from which the twelve jurors who are to serve in the case are taken. 3 *Blackstone*, 359; 27-28 *V. c.* 41, *s.* 9, § 9.

**369**. In the case of articles 363 and 364, neither party can strike out the names of more than six persons speaking the French language nor more than six persons speaking the English language, or the names of more than six traders or non-traders, as the case may be. 27-28 *V. c.* 41, *s.* 9, § 10.

**370**. If either of the parties fails to attend for the purpose of striking the panel, the prothonotary may strike twelve names from the special list on his behalf, observing the rules prescribed in the preceding article. *Lush's Practice*, 447; *71st Rule of P.*

**371**. [If the party who has demanded a trial by jury fails to proceed upon his demand, the opposite party may either adopt the necessary proceedings for summoning a jury or

may obtain leave from the court or a judge to inscribe the case for proof in the manner indicated in the chapter on proof.]

1. An action for damages arising out of a malicious prosecution, is not of a mercantile nature, and the parties will not be entitled to a jury composed exclusively of merchants. *Fogarty* v. *Morrow et al.* 5 L. C. J. 222, S. C. 1860.

### § 4. *Of the summons of jurors.*

**372.** As soon as the panel is formed in the manner prescribed in the preceding section, the prothonotary delivers to the party who applies for it a writ of *Venire Facias*, in the name of the sovereign, signed by such prothonotary and sealed with the seal of the court, ordering the sheriff to summon the twenty-four persons whose names compose the panel; and a copy of such panel is annexed to the writ. *Lush's Practice*, 173; 3 *Blackstone*, 358.

**373.** The jurors must be summoned at least four days before the time fixed for the trial. *C. S. L. C. c.* 84, *s.* 44; 27-28 *V. c.* 41, *s.* 9, § 12.

**374.** The sheriff is not bound to leave a copy of the writ of *Venire Facias* with each person, but merely a notice under his signature, summoning him in virtue of such writ, to appear upon the day and at the hour fixed for the trial.

This notice must give the names of the parties to the case, the names, occupation and residence of the person summoned as a juror, the day, place and hour fixed for the trial, the summons to appear as juror, the date of the writ of *Venire Facias*, the date of the notice, and the signature of the officer to whom the writ is addressed.

**375.** A return of service of such writ must be made in the same manner as that of ordinary summonses.

§ 5. *Of the formation of the jury and of challenges.*

**376.** On the day fixed for the trial, the persons summoned as jurors must appear at the appointed hour, at the place where the court is held, under a penalty not exceeding [twenty-five* dollars,] which may be immediately imposed by the court, and is levied by the sheriff on the goods and chattels of the person so fined; and in default of sufficient goods and chattels, such person may be imprisoned for a period not exceeding fifteen days.

The court may, however, for good cause shewn, reduce or entirely remit such penalty or imprisonment. 27-28 *V. c.* 41, *s.* 21, § 2.

33 Vic. c. 13 (*Que.*).

"3. When more than one member of any commercial firm have been summoned to attend as jurors, before any court, or upon any trial in civil or criminal cases, the court or judge presiding at such trial may, in his discretion, exempt all the members except one of such firm, notwithstanding that no notice may have been given of the intention to claim exemption."

**377.** As soon as the case is called on the appointed day, the writ of *Venire Facias* is returned, and after the jurors summoned have been called and a sufficient number to form a jury are in attendance, either party may challenge the array, either on the ground that the officer to whom the *Venire Facias* was addressed is interested or concerned in the suit, or on the ground of such causes of nullity as may be found in the summoning of the jurors or the making up of the lists or panel. *C. S. L. C. c.* 84, *s.* 45; *Arch. Prac.* 204–7; *Kennedy Jury Trials*, 101; 3 *Blackstone*, 359; *C. P. L.* 497–500–501.

**378.** This challenge must be in writing, stating the causes of nullity relied upon, and must conclude by demanding that the panel be quashed. *Archbold*, 207.

* Now $100 by 33 V. c. 13, s. 2 (*Que.*).

**379.** The presiding judge decides the challenge, and may, if necessary, order the facts upon which it is based to be substantiated on oath. *Ibid.* 208.

**380.** If the challenge is pronounced to be valid, the party who applied for a trial by jury must obtain the issuing of another *Venire Facias.*

**381.** If there is no challenge to the array, or if such challenge is overruled, the prothonotary, in order to form the jury, proceeds to the calling and swearing of twelve of the persons summoned, following the order in which they appear on the panel, unless the judge orders otherwise, saving the cases mentioned in article 393. *C. S. L. C. c.* 84, *s.* 43.

**382.** Either of the parties may challenge for cause, any person called to form part of the jury, before such person is sworn. 3 *Blackstone*, 359; *C. P. L.* 500.

**383.** The causes of challenge to the polls are either principal or to the favour. *Archbold*, 205; 3 *Blackstone*, 361 *et seq.; C. P. L.* 502.

**384.** The causes of principal challenge are:

1. Want of qualification of the person summoned; *C. S. L. C. c.* 84, *s.* 22; *Kennedy*, 95; *Archbold*, 202.

2. Relation or affinity with one of the parties to the degree of cousin-german inclusively; *Archbold*, 205-6.

3. Interest in the suit; *Ibid.* 206.

4. That he has examined into the matter in dispute as an arbitrator named by one of the parties; *Ibid.*

5. That one of the parties has wrought upon the juror and given him money or other things, in order to obtain a verdict in his favour; *Ibid.*

6. That the juror is infamous, or attainted of felony or convicted of perjury. *Archbold & Kennedy, loc. cit.*

**385**. Jurors may be challenged for causes of lesser importance, which indicate a probability or give rise to a suspicion that they are biassed in favour of or against one of the parties, and such challenges are to the favor. *Archbold*, 207 ; *Kennedy*, 98.

**386**. Principal challenges are tried by the court ; challenges to the favour are tried in the manner hereinafter explained. *Archbold*, 207-8.

**387**. If two jurors or more have already been sworn, they try all challenges to the favour ; if two have not been sworn, the Court appoints two disinterested persons, who are sworn to try the challenge impartially, and who, together with the first juror sworn, if one has been sworn, decide upon it and upon any other challenges, until two jurors have been sworn. *Archbold*, 208 ; 3 *Blackstone*, 363.

**388**. The juror himself may be examined on oath as to the matter of the challenge, provided it does not tend to his dishonour or discredit. *Archbold*, 208 ; 3 *Blackstone*, 364 ; *C. P. L.* 509.

**389**. A challenge founded upon a judicial condemnation must be accompanied with an authentic certificate of such condemnation.

**390**. In cases of a mercantile nature, the names of the merchants or traders summoned as jurors must be called first, and if they are not in sufficient number, the jury is completed from among the other persons summoned. 27-28 *V. c.* 41, *s.* 9, § 11.

**391**. If several of the jurors summoned are challenged or fail to attend, so that the number of twelve duly qualified jurors cannot be completed, the court or sitting judge may, upon consent of the parties, but not otherwise, order the sheriff or the officer acting in his stead, to make up the num-

ber by taking forthwith from among the persons present in court the requisite number of individuals qualified to serve as jurors; but the jury cannot be wholly composed of tales, and if all the jurors summoned fail to attend, or are lawfully challenged, the trial cannot then proceed. *C. S. L. C. c.* 84, *s.* 46; *Archibald*, 190-1; 3 *Blackstone*, 365; *C. P. L.* 513; 27–28 *V. c.* 41, *s.* 9, § 13.

**392**. When a juror called is not challenged, or the challenge is overruled, he must be sworn to try the matter at issue, and to give his verdict in a just and impartial manner, according to the evidence. *C. P. L.* 514.

§ 6. *Of the proceedings before a jury.*

**393**. Two days at least before that fixed for the trial by jury each of the parties must, under a sealed cover, deliver to the prothonotary, for the use of the judge who is to preside at the trial, a *factum* or case, containing a statement of the facts of the case and the authorities which he cites in support of his pretensions. 72*nd Rule of P.*; *Archbold*, 190.

**394**. After the return of the *Venire Facias*, on the day fixed for the trial, if neither party appears, the jurors are discharged; if the plaintiff appears and the defendant makes default, such default is recorded, and the plaintiff may proceed *ex parte*.

If the plaintiff alone fails to appear, his default is recorded and judgment of nonsuit is entered against him, with costs to the defendant. 73*rd Rule of P.*; 1 *Archbold*, 189, 190.

Upon granting an application to postpone a trial by jury, where absence of good faith is apparent—*Held*, that costs would be given against the party acting in bad faith, although the motion to postpone came from the other side. *The Quebec Bank* v. *Roland et al.*, 15 L. C. R. 23, S. C. 1863.

**395**. The plaintiff may also, at any time before verdict, withdraw from court or abandon his suit, and a like judgment of nonsuit, with costs, is rendered against him by the judge. *74th Rule of P.;* 1 *Archbold,* 197, 211, 212.

**396**. No paper can be read to the jury without leave from the judge; and if it be not authentic it must first be proved.

**397**. The witnesses give their evidence orally, in presence of the jury, and the judge is bound to make, or cause to be made under his supervision, full notes of the testimony thus adduced, of all oral admissions, and of all exceptions taken or objections made orally in court. These notes are read out by the judge or by the prothonotary, at the oral request of any party in the suit, during the trial or immediately after it, in order to correct and remedy any errors or omissions that may be found therein. *C. S. L. C. c.* 83, *ss.* 34–97.

**398**. A fair copy of such notes is made out by the prothonotary, and, after being certified by the judge, is filed of record, and in case of appeal is held to be the true record of the evidence adduced and of all other proceedings mentioned therein, and stands in lieu of any bill of exceptions by either of the parties against the evidence adduced, or the trial, which bills can no longer be filed. *Ibid. s.* 35.

35 Vic., c. 6 (*Que.*)

"10. In all suits to be tried by a jury, or which are inscribed for proof and hearing at the same time either in the Superior Court or in the Circuit Court, either of the parties may, by a demand in writing, accompanied by a deposit of a sufficient sum of money to pay a stenographer, require that the evidence in the case shall be taken by means of stenography. In every such case the stenographer shall be named by the prothonotary, unless the parties mutually agree upon one, and the said stenographer shall be sworn, before the Court or Judge, or the prothonotary, or the Clerk of the Circuit Court, and he shall, at the conclusion of each testimony, read over the same to the witness, and

such testimony shall, when afterwards transcribed in ordinary writing, form the record of the evidence in the cause; and in the case of trials by jury, the requirements of Articles 397 and 398 may be fulfilled through the intervention of the stenographer.

In cases inscribed for proof and hearing at the same time, such evidence taken by means of stenography shall be a sufficient fulfilment of the last part of Article 263 and of Article 264; and the sufficiency of the deposit required to pay a stenographer shall be determined by the court or judge, or by the prothonotary.

11. In any case in the Superior or the Circuit Court, the parties may, by consent, employ the services of a stenographer, and cause him to be sworn, and the evidence to be taken in the manner mentioned in the next preceding section.

12. The expense of employing a stenographer shall form part of the taxed costs of the case."

**399**. When the witnesses cannot attend before the court, their evidence may be taken by means of a commission for the examination of witnesses, which must be obtained and executed in the manner prescribed in the section concerning such commissions, and must be returned before the jury; but no such commission can issue for the examination of witnesses who are within the circuit in which the jury trial takes place, unless with the consent of both parties, which is entered in the record. *Ibid. ss.* 105–6–7.

**400**. When the facts to be proved before the jury have been assigned by the judge, the proof is limited to the facts thus submitted. *Ibid. s.* 31.

**401**. When, upon the written consent of the parties, the assignment of facts by the judge has been dispensed with, proof may be gone into upon all the facts of the case. *Ibid. s.* 32.

**402**. Either party may examine the other by interrogatories upon articulated facts, the answers to which are taken either orally, in the presence of the jury, or in writing in the prothonotary's office. *Ibid. s.* 100.

**403**. [The plaintiff first opens his case, and adduces his evidence.

The defendant next proceeds with his defence, having the option of addressing the jury either before or after adduction of his evidence.

The plaintiff is afterwards entitled to reply, but if he adduces evidence in rebuttal, the defendant may comment upon such evidence before the reply of the plaintiff.] 1 *Archbold*, 191–195.

1. The defendants who examine no witnesses have not the right to address the jury in reply. *Philipstall* v. *Duval*. 3 R. L. 455, S. C. R. 1871.

**404**. When each party has stated his case and adduced his evidence, the judge, if he deems it necessary, sums up the evidence to the jury. *Ibid.* 195 ; 3 *Blackstone*, 375.

**405**. If either party objects to the judge's charge, the judge must, either immediately or so soon as he conveniently can, reduce to writing the portion of his charge which is objected to, mentioning the objection made, and what is thus written, after being signed by the judge, forms part of the record in the case. *C. S. L. C. c.* 83, *s.* 33.

### § 7. *Of the provinces of judge and jury.*

**406**. It is the province of the judge to declare whether there is any evidence and whether that evidence is legal, and it is that of the jury to say whether the evidence admitted is sufficient. 2 *Powell, Practice of Law,—of Jury, Rule* 1, *p.* 15.

1. When defendant pleaded want of notice of action (*Art.* 22), the point involved was held to be matter for the jury and not the judge to decide. *McNamee* v. *Himes*, 3 L. C. J. 109, S. C. 1859.

**407**. The jury finds the facts, but must be guided by the directions of the judge as regards the law. *Ibid. Rule* 2.

1. Action was brought to recover the value of a quantity of wheat, etc, which had been shipped on the steamship St. Patrick, and which had been lost by the sinking of the vessel in the harbour of Montreal. The defendants pleaded, among other things, that they were not liable if the goods were capable of being covered by insurance, and that the loss which accrued was one which was capable of being covered by insurance. On motion for judgment *non obstante veredicto*, and for judgment on the verdict—*Held*, that the question whether the loss was one capable of being covered by insurance or not, was one of law and not of pure fact. *Butters et al. & Allan et al.* 20 L. C. J. 137, S. C. R. 1875.

### § 8. *Of the verdict.*

**408**. If the jury, when charged with the case, cannot immediately agree upon a verdict, they must retire to a place set apart for them, in charge of some bailiff appointed by the court or judge, until they are ready to render their verdict.

The court or judge may, however, in such case, and also during the trial, permit them to depart for the night, subject to the obligation of attending again on the next following juridical day. 1 *Archbold*, 197.

**409**. If the jurors fail so to attend again, they are liable to the penalties attached to contempt of court, without prejudice to the recourse of the parties against them for damages.

**410**. The jury may, at any time, even after the summing up by the judge, but in his presence and with his permission, in open court, examine again the witnesses already heard; they may also ask the opinion of the judge upon any questions of law which present themselves. *Kennedy* 49.

**411**. The agreement of nine of the twelve jurors is sufficient to return a verdict. *C. S. L. C. c.* 83, *s.* 26, § 3.

**412**. If nine of the jurors cannot agree upon the verdict to be returned, the jury may, in the discretion of the court, be discharged, and another jury may be summoned.

**413.** The prothonotory, after ascertaining that all the jurors are present, receives their verdict and enters the same in the registers of the court, inserting their names, and stating the number of those who concur in the verdict if it is not unanimous. *Ibid.*

**414.** When there is an assignment of facts the verdict must be special and articulated upon each fact submitted, and be explicitly affirmative or negative. *Ibid, s.* 31; *C. P. L.* 519, 521.

1. In an action for slander, in answer to the question, "Were the defamatory words spoken by the defendant?" the jury returned as answer: "These words, or words to the same effect, were made use of by the defendant concerning the plaintiff." *Held*, that the verdict must be set aside as being vague and uncertain. *Ferguson* v. *Gilmour*, 4 L. C. R. 57, S. C. 1854.

2. The verdict being in terms which were ambiguous, the court would interpret it in such a way as to give it effect, and would for that purpose look to the evidence, and ascertain the interpretation which one of the parties had given to the expressions which were the cause of the apparent ambiguity. *La Banque de Quebec & Maxham*, 11 L. C. R. 97, S. C. 1860.

3. Where a special case is put to the jury on written questions, a general question such as "do you find for the plaintiff or defendant" is irregular and illegal. *Grant* v. *The Ætna Ins. Co.*, 5 L. C. J. 285, Q. B. 1861.

**415.** When the parties have agreed to dispense with an assignment of facts, the verdict is general, either in favour of the plaintiff for a specific sum, or in favour of the defendant. *Ibid. s.* 32; *C. P. L.* 519, 522.

**416.** The jurors are not bound to render their verdict until the party demanding the trial by jury has paid the sum of one dollar for each of them, for each day that the trial has lasted.

In default of payment by either party, the jury are discharged without rendering a verdict, with costs against the party who demanded a trial by jury; such costs including

both the costs incurred upon the trial and the allowance for the jurors, to whom the same is paid as soon as it is recovered by the prothonotary [and if the trial by jury was demanded by the defendant, the plaintiff may proceed according to article 371]. *C. S. L. C. c.* 84, *s.* 47; 27–28 *V. c.* 41, *s.* 10, §§ 3, 4.

1. A juror is not entitled to remuneration when he has been summoned and discharged without serving on the jury. *Sylvester* v. *Manseau*, 2 R. L. 93, C. C. 1870.

**417**. The prothonotary, in the case of such default to pay, must immediately issue against the party liable for costs, a writ of execution, to be enforced by the sheriff, for the recovery of the allowance due the jurors.

**418**. The verdict must be given upon all the issues submitted to the jury. 1 *Archbold*, 213; *Buller*, 178 *a*.

**419**. The verdict cannot in any manner pronounce upon the costs of suit. *C. P. L.* 523.

**420**. The presiding judge may order the amendment of any clerical errors that have occurred in any proceeding in the case before the jury or in the verdict.

If the verdict cannot be rendered, by reason of the death, illness or withdrawal of a juror, the jury must be discharged, saving the right of the parties to have another jury summoned.

The judge may, however, in the case of illness or withdrawal of a juror, adjourn the case, in order to give the jury the opportunity to reunite and render their verdict.

### § 9. *Of judgment after verdict and of remedies against a verdict.*

**421**. The party in whose favour a verdict has been rendered cannot move for judgment upon the same until the

expiration of four days in term after the rendering thereof. *75th rule of P.; Lush's Practice*, 485.

**422.** The motion for judgment on the verdict can only be opposed by means of a motion for a new trial, a motion in arrest of judgment, or a motion for judgment *non obstante veredicto*. 14-15 *V. c.* 89, *s.* 4; *Lush's Practice*, 485; *Shaw* v. *Meikleham*, 3 *L. C. J.* 5.

Vide 34 *Vic., c.* 4, *s.* 10 (*Que.*) under art. 494, *post.*

1. In an action of damages where motion was made either to set aside the verdict of the jury, dismissing the action, or grant a new trial—*Held*, that such a motion was regular, as having been sanctioned both by the Superior Court and the Court of Appeal. *Higginson* v. *Lyman et al.*, 4 L. C. J. 329, S. C. 1860.

**423.** *Motions for new trial, or for judgment "non obstante veredicto," must be made on or before the fourth day in term after the rendering of the verdict, and cannot be received after. 76th Rule of P.*

35 *Vic. c.* 6. *(Que.)*

"13. Article 423 is hereby amended so as to read as follows: "Motions for new trial or for judgment *non obstante veredicto* must be made before the Superior Court, sitting in review, on or before the second day of the next term of such sittings, following the tenth day after the rendering of the verdict, and cannot be received after."

See 34 *Vic. c.* 4, *s.* 10 (*Que.*), under art. 494, *post.*

1. *Held*, on a motion for a new trial that such motion could not be received after the first four days of the term next following the day on which the verdict was rendered. *Merritt* v. *Lynch*, 3 L. C. J. 276, & 9 L. C. R. 353, S. C. 1859.

**424.** Motions in arrest of judgment must be made within the same delay, unless the party has adopted either of the two other recourses mentioned in the preceding article, in which case it may be made within the two days in term next after the judgment upon the former motion. *77th Rule of P.*

**425.** None of the motions hereinbefore mentioned can be adjudicated upon unless the opposite party has been heard or duly notified.

*Of motions for new trial.*

**426** The court may grant a new trial in the following cases:

1. If the assignment of facts submitted to the jury does not comprise all the facts necessary to be proved;

2. If the judge has admitted illegal evidence;

3. If he has rejected legal evidence;

4. If has wrongly directed the jury upon a point of law;

5. If the jury, not agreeing, have settled their verdict by casting lots, even though it be conformable to the evidence and to the direction of the judge;

6. If the jurors have accepted refreshments from the successful party;

7. If one of the jurors had expressed his intention of favouring the successful party;

8. If he has committed any act of a nature to warrant a suspicion of partiality of the verdict;

9. If anything has been done to bias the opinion of a juror in favour of the successful party;

10. If the judge, while summing up the case in favour of one of the parties, was stopped by the jury declaring themselves satisfied, and they afterwards rendered a verdict in favour of the other party;

11. If the amount awarded be so small or so excessive that it is evident that the jurors must have been influenced by improper motives, or led into error;

12. If the jurors, or any of them, have received affidavits or evidence out of court;

13. If the verdict is unsupported by proof, or contrary to the evidence adduced;

14. If the party was taken by surprise;

15. If the case was irregularly called in the absence of either of the parties; or if the record was not complete; if an important witness was absent at the time of the trial without any fault on the part of the party who had summoned him, and his evidence is still obtainable; and in all cases where the merits of the case could not be discussed, and the party aggrieved and his attorneys are free from blame in that respect;

16. In some particular cases, when new evidence has been discovered since the trial;

17. If the verdict is informal or defective;

18. If the writ of *Venire Facias* is wrongly addressed or executed, or if a challenge of the array or of any juror has been erroneously maintained or overruled;

19. If, for other causes, there is manifest injustice in the verdict. *Lush's Practice*, 531, *and seq.* 543, 560.

1. Objections which might have been taken, but were not taken during the progress of a jury trial, cannot be urged in support of a motion for a new trial. *Cannon* v. *Huot et al.*, 1 Q. L. R. 139, S. C. R. 1875.

2. When the verdict and finding of the jury are, in the opinion of the court, contrary to the evidence adduced at the trial, the court will set aside the verdict, and grant a new trial. *Matthewson* v. *The Royal Insurance Company*, 13 L. C. J. 6, S. C. 1868.

3. When contrary to law and evidence the verdict will be set aside and a new trial granted. *Senecal* v. *The Richelieu Company*, 15 L. C. J. 1, Q. B. 1869.

4. Where defendant, in an action for damages before a jury had examined no witnesses, and had been refused permission to address the jury in reply—*Held*, that this did not give rise to a ground for a new trial. *Phillipsthal* v. *Duval*, 3 R. L. 455, S. C. R. 1871.

5. And where the plaintiff had purchased a number of barrels of oil not yet identified and separated from other barrels among which it was stored—*Held*, that he had an insurable interest, and that the verdict of the jury, based on a charge of the judge to the contrary, should be set aside and a new trial granted. *Matthewson & The Royal Insurance Company*, 16 L. C. J. 45, Q. B. 1872.

6. A new trial can only be granted where there is evident injustice. *Borthwick* v. *Bryant et al.*, 5 R. L. 449, S. C. R. 1874.

7. 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 granted. *Scholfield* v. *Leblond*, 3 Rev. de Lég. 359, K. B.; *Wood* v. *McCallum*, 3 Rev. de Lég. 360, K. B. 1820.

8. An action *d'injures* lies for a malicious arrest of a person, and though the court may, in any case, grant a new trial for excess of damages, they will not exercise the right unless the quantum awarded may be such as to indicate prepossession and partiality of the jury. *Wood* v. *McCallum*, 3 Rev. de Lég. 360, K. B. 1820.

9. In an action for a malicious prosecution, if the verdict be for the defendant, the court will not grant a new trial, even if the finding be against the evidence or against the direction of the judge. *McCallum* v. *Wood*, 1 Rev. de Lég. 503, K. B. 1821.

10. Plaintiff brought action before a jury for damages for verbal slander, and the verdict went against him. He then made a motion for a new trial on the ground that the verdict of the jury was contrary to the evidence, and that the jury had been misled by the court. The motion was dismissed, and the plaintiff appealed, when it was *held*, reversing the judgment of the court below, that, when the verdict is contrary to the proof, it must be set aside. *Beaudry* v. *Papin*, 1 L. C. J. 114, Q. B. 1857.

11. Where the jury had found for the plaintiff in an action for damages, and the defendant had not moved for a new trial, the court could not take into consideration the question whether the damages awarded were excessive or not. *Benning* v. *Grange*, 14 L. C. J. 284, Q. B. 1870.

**427.** The causes mentioned in paragraphs 2, 3, 4 and 10, in the preceding article can only be ascertained by means of the judge's notes filed in the record, and when the party has caused his objections to be entered therein. *Lush's Practice*, 540; *Blackstone*, 391; *Beller*, 325 *c.*; *C. S. L. C. c.* 83, *s.* 34.

**428.** The affidavit of a juror as to the reasons and motives which influenced him cannot be received in any case. *Lush's Practice*, 536.

**429**. Nor can the affidavits of jurors or any other evidence be received for the purpose of establishing that the verdict rendered and recorded is not that which the jurors intended to give. *Ibid.*

**430**. A new trial must be granted when the judgment upon the verdict has been reversed by a higher court.

34. The plaintiff sued for the amount of an alleged insurance and obtained judgment on a verdict of a jury, and the judgment was confirmed in the Queen's Bench, but reversed in the Privy Council, with orders to send the record back to the Queen's Bench. Ordered, on another petition to the Privy Council, that the Queen's Bench should send the cause back to the Superior Court with orders to issue a writ of *venire de novo*. *The Montreal Assurance Company & McGillivray*, 11 L. C. R. 325, P. C. 1851.

*Of arrest of judgment.*

**431**. The defendant has a right to move in arrest of judgment upon the verdict whenever it appears on the face of the record that, notwithstanding the verdict, the plaintiff has no right to recover any sum, or that the verdict differs materially from the issues joined, or that the judgment would be reversed in appeal. *Lush's Prac.* 527; 3 *Blackstone*, 393.

**432**. Arrest of judgment has the effect of annulling the verdict of the jury, which can no longer be carried out.

*Of judgment* non obstante veredicto.

**433**. [Whenever the verdict of a jury is upon matters of fact in accordance with the allegations of one of the parties, the court may, notwithstanding such verdict, render judgment in favour of the other party if the allegations of the former party are not sufficient in law to sustain his pretensions.] *Lush's Prac.* 529; *C. S. L. C. c.* 83, *s.* 31.

1. Where the verdict is contrary to law and the evidence, it may be set aside by a judgment *non obstante veredicto*. *Ferguson & Gilmour*, 1 L. C. J. 131, 4 L. C. R. 57, S. C., Q. B. 1857.

2. The Court of Queen's Bench may set aside the verdict and dismiss the action altogether *non obstante veredicto*, if it be of opinion that according to law and the evidence, it should have been set aside, notwithstanding the fact that the appeal was from a judgment on a motion for a new trial. *Tilstone et al. & Gibb et al.* 4 L. C. J 361; 10 L. C. R. 284, Q. B. 1860.

3. Though the defendant, after verdict awarding damages against him, did not move for a new trial, nor for judgment *non obstante veredicto*, the Court arrested the judgment and set aside the verdict, but would not non-suit. *Gugy & Brown*, 16 L. C. J. 225, Q. B. 1872.

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# CHAPTER SEVENTH.

## OF DIVERS OTHER INCIDENTAL PROCEEDINGS.

### SECTION I.

### OF CONTINUANCE OF SUITS.

**434.** When a case is ready for judgment, it cannot be retarded either by change of the civil status of the parties or by loss of the quality in which they were acting. 1 *Pig.* 339; *C. P. C.* 342.

1. In an action on a promissory note against co-partners, where one of the defendants died during the pendency of the suit—*Held* that, as the case was *en état d'être jugée*, a *reprise d'instance* was unnecessary. *Burry et al.* v. *Shepstone et al.* 2 L. C. J. 122, S. C.

2. And *held*, that after a final judgment in a cause, in which there are several intervening parties, as well as the plaintiff and defendant, 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* in place of the deceased, would be rejected as opposed to the procedure and practice of the Court. *Gillespie et al. & Sprague*, 6 L. C. J. 29, S. C. 1861.

**435**. The case is ready for judgment, when the trial is completed and the case is under advisement.

**436**. The attorney who is aware of the death or change of civil status of his party, or of the loss of the quality under which he was acting, is bound to notify the opposite party; and all proceedings had up to the day when such notice is given are valid. *Ord*, 1667, *tit.* 26, *art.* 3; 1 *Pig.* 344-5.

1. On a rule of the defendants for improbation—*Held*, that, one of the defendants having died during the pendency of the suit, the mandate of his attorney *ad litem* ceased. *Mackay et al. & Gerrard et al.* 5 L. C. J. 331, S. C. 1861.

**437**. In cases which are not ready for judgment, all proceedings had subsequently to notice given of the death or change of status of one of the parties, or of the loss of the quality in which he was acting, are null; and the suit is suspended until its continuance by those interested, or until the latter have been called in to continue it. 1 *Pig.* 339 *et seq.*; *C. P. C.* 344-5.

1. The death of one of the parties pending an inquiry by experts stays all proceedings on the expertise until the suit is continued. *Taché* v. *Levasseur*, 3 Rev. de Lég. 358, K. B. 1810.

2. An action *ex delictu* against several persons jointly and severally, is not suspended as to the survivors by the suggestion of the death of one or more of the defendants. Such action might have been brought against any one or more of the persons jointly and severally liable. *Allan et al. & McLagan*, 1 Legal News, 4, Q. B. 1877.

**438**. A suit may be continued:

1. By the heirs or representatives of a deceased party:

2. By a minor who has attained full age;

3. By the husband who has married a spinster or a widow, party in the suit;

4. By a wife who has obtained separation of property from her husband, when the suit affects her private property;

5. By the person who replaces the party who has lost the quality in which he was acting. 1 *Pig.* 340.

1. Where a party in a case becomes insolvent, all the proceedings will be suspended on motion to that effect until the case has been taken up by the assignee to the insolvent's estate. *Burland & Larocque*, 12 L. C. J. 292, Q. B. 1867.

2. Where the plaintiffs having been incorporated during the pendency of the suit petitioned to be allowed to take up the *instance* as such corporation—*Held*, that as by their act of incorporation all the property, rights and actions belonging to them as a joint stock company should be transferred to the Richelieu Company, as they were styled after incorporation, they were entitled to the prayer of their petition. *Fairbault* v. *St. Louis et al. & The Richelieu Company*, 3 L. C. J. 51, S. C. 1858.

3. An insolvent defendant cannot stay proceedings to allow the assignee to take up the instance. *Wilson et al.* v. *Brunet*, 21 L. C. J. 209, S. C. R. 1876.

**439.** The continuance may be effected upon petition, filed in the prothonotary's office, after being served upon the opposite party. 1 *Pig.* 345.

This petition may be contested in the same manner as any suit.

1. A person cannot be held to appear in a case and to take up the *instance* in place of a defendant deceased, by a rule *nisi*, but must be summoned by petition and rule in the ordinary form. *Lafond et al.* v. *Chagnon & La Chambre d'Agriculture & Wood*, 7 L. C. J. 112, C. C. 1863.

2. A demand *en reprise d'instance* must be made by petition or motion, and not by action against the other party in the cause. *Côté & Masse et al.*, 16 L. C. R. 138, Q. B. 1865.

3. Where the petitioner prayed to be allowed to appear and take up the *instance* in place of a party deceased—*Held*, that in the first stage he could only be allowed to appear and file his petition. *Gillespie et al.* v. *Spragg & Mann et al.*, 6 L. C. J. 117, S. C. 1861.

**440**. If the continuance is not contested within the delays prescribed, it is held to be admitted, and in such case, as also when it is declared by the court to be well founded, the opposite party may continue on from the last proceedings originally taken. *Ibid.* 348.

**441**. If the persons interested do not continue the suit, the party remaining in it may compel them to do so by a demand in the usual form which is joined to the original suit. 1 *Pig.* 347.

**442**. In all cases, whether the continuance is voluntary or ordered by the court, it is effected by following up the last valid proceedings originally had in the suit. *Ibid.* 348.

1. There must be judgment on a *reprise d'instance* before proceeding with the principal demand, unless there is a consent by the defendant *en reprise d'instance* that the continuance take place. *Ellice & Haineau*, 5 R. L. 549, S. C. 1874.

## SECTION II.

## OF THE DECISORY OATH AND THE OATH PUT BY THE COURT.

### § 1. *Of the decisory oath.*

**443**. A party whose case is not proved may refer its decision to the oath of the opposite party, either upon the whole or upon a distinct portion of the matter in dispute. 1 *Pig.* 256.

1. Where the defendant after demand of plea moved to dismiss the action for want of particulars, and the plaintiff immediately afterwards moved to defer his claim to the decisory oath of the defendant—*Held*, reversing the judgment of the court below, that plaintiff's motion should be granted. *Lenfesty & Metivier*, 10 L. C. R. 199, Q. B. 1860.

2. The Court of Queen's Bench has the same right to submit the decisory oath to one of the parties in the case as a court of original jurisdiction. *Ferrier & Dillon*, 12 L. C. J. 202, S. C. 1868 ; *post* art. 1177.

3. The decisory oath cannot be withdrawn after the party to whom it has been deferred, accepts the reference and declares that he is ready to answer. *O'Farrell* v. *O'Neil*, 17 L. C. R. 80.

4. After final hearing the decisory oath cannot be allowed. *Burns & Giroux*, 3 Rev. de Lég, 356, K. B. 1817.

**444**. The decisory oath cannot be offered by an attorney, without a special power from the party he represents.

The offer must be in writing, and the party obtains, of course, a rule ordering the opposite party to appear before the judge to answer the questions which will be put to him. *Pothier Obl.* 914.

1. If any authority to defer the decisory oath is filed by the attorney, and is 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 & Caldwell*, 3 Rev. de Lég. 356, K. B. 1816.

**445**. This rule is served with the same delays as those required in summoning witnesses. *Vide ante, art.* 244.

**446**. If the party served fails to appear or refuses to answer, he is held to admit whatever the opposite party seeks to prove by offering the oath. *Ibid.* 915.

If the party to whom the oath is offered, or referred, is a corporation, the answers must be given in the manner provided in article 224 with regard to interrogatories upon articulated facts.

1. If the defendant is ordered to answer on the decisory oath, it is the duty of the plaintiff to serve the rule upon him, and if he do not appear, the plaintiff may then move the court to refer the oath to himself. *Prévost & Derousseau*, 3 Rev. de Lég. 356, K. B. 1813.

2. The court, however, if it sees fit may order the defendant to appear on another day. Ibid.

**447**. The party served may, however, when he refuses to answer, refer the oath back to the opposite party. This is done in writing, and thereupon the party who offered the oath is bound to attend before the court, without further notice. *Ibid., loc. cit.*

### § 2. *Of the oath put by the court.*

**448**. The court may, of its own motion, order either of the parties, or both, to appear and answer such questions as it deems necessary to elucidate the matters in dispute; according to the provisions contained in article 1254 of the Civil Code. 1 *Pig.* 259, 260.

1. When the judiciary oath is deferred by the court, the parties will be heard anew if they desire. *Syndics de St. Henri* v. *Carrier* 4 Q. L. R. 205, S. C. 1878.

**449**. The court may order that the party shall appear without notice, or that the rule shall be served upon him at the diligence of the opposite party.

## SECTION III.

## OF DISCONTINUANCE.

**450**. A party may, at any time before judgment, discontinue his suit or proceeding on payment of costs. *C. S. L. C. c.* 82, *s.* 25; *C. P. C.* 402, 403.

1. After a case has been submitted to the court on the merits, the plaintiff is not entitled to discontinue the suit on payment of costs. *Williamson* v. *Rhind* 22 L. C. J. 166, Q. B. 1877.

2. The withdrawal of an action by a plaintiff personally, in the absence of and without the intervention of his attorney, is good and valid, although the attorney may have prayed for distraction of costs. *Ryan & Ward et al.* 6 L. C. R. 203, Q. B. 1856.

3. As a general rule, a plaintiff can discontinue his action only on payment of costs. *Greenshields* v. *Leblanc et al.* 12 L. C. J. 343, S. C. 1868.

4. Where a wife suing for separation from bed and board desisted from the first part of her action but adhered to the demand for separation of property, the discontinuance was *held* good, and the separation of property was granted. *Dudevoir & Turcot*, 8 L. C. J. 153, S. C. 1854.

5. An answer to an exception to the form is a waiver and discontinuance of a motion previously made to reject the exception. *Copeland et al. & Cauchon et al.* 14 L. C. J. 242, C. C. 1869.

6. The abandonment of part of a claim sued on is a discontinuance. *Salvas & Guévremont*, 4 R. L. 233, S. C. R. 1870.

7. A discontinuance is not a *chose jugée*, and does not deprive the plaintiff of his right to bring another action. Ib.

8. A party may proceed in virtue of a settlement arrived at in a case before discontinuing the action, and it is sufficient that he offers to discontinue if the other party carries out the settlement. *King & Pinsonneault*, 6 R. L. 703, P. C. 1875.

9. Where acte is granted of a discontinuance it becomes executory. *Latour v. Campbell*, 1 Legal News, 163, S. C. 1878.

**451**. Discontinuance may be effected by a simple declaration to that effect, signed by the party or his attorney, and delivered into court or filed in the prothonotary's office. It has no effect, however, against the opposite party unless it has been served upon him.

1. The attorney of one of the parties in the case, as such, may renounce the whole or part of the judgment given in his favour, but such renunciation to be valid must be signed by the party himself or by his attorney *ad hoc*. *Préfontaine & Brown*, 1 Q. L. R. 60, S. C. R. 1875.

2. An application for leave to withdraw at the moment when the judgment is being pronounced will not be granted. *Dorly & Ryarson*, 1 Q. L. R. 219, C. C. 1875.

**452**. Discontinuance replaces matters as of course in the state in which they would have been, had the suit or proceeding not been commenced. *C. P. C.* 403.

**453**. A party who has effected a discontinuance cannot begin again unless he previously pays the costs incurred by the opposite party upon the suit or proceeding discontinued. *C. S. L. C. c.* 82, *s.* 25.

1. The non-payment of costs on an incidental proceeding in a suit cannot entitle the party to whom the costs are due to a stay of pro-

ceedings until the costs are paid. *Cutting* v. *Jordan*, 19 L. C. J. 139, Q. B. 1875.

2. An action by a foreign plaintiff was dismissed, security for costs not having been given within the delay fixed, and the plaintiff brought a second action on the same ground—*Held*, that the proceedings on the second action would be suspended until the costs of the first action were paid. *Dunlop et al.* v. *Jones*, 11 L. C. J. 316 and 4 L. C. L. J. 42, S. C. 1867.

3. Where an action or proceeding has been discontinued, or has been dismissed, the party proceeding may bring a new action before paying the costs of the first, but the defendant or adverse party may demand that the proceedings be suspended until the costs of the first are paid. *Gaudette* v. *Laliberté*, 1 R. L. 747, S. C. 1861.

4. A plaintiff who has discontinued must pay the costs incurred by the other side before he can bring a new action, and that, by actual payment and not by compensation. *Shepherd* v. *Dawson & Dawson*, 3 R. L. 454, S. C. R. 1871.

5. Where to an action for a sum of money the plaintiff added the amount of the costs of a previous suit for the same amount, which was settled before return, and of which the defendant promised to pay the costs—*Held*, that the plaintiff was justified in adding them to the amount of his claim in the second suit, notwithstanding the attorney *ad litem* had prayed distraction of such costs for himself. *Rolland* v. *Larivière*, 1 L. C. J. 82, S. C. 1857.

6. Where motion was made to have all the proceedings in a case suspended until the costs were paid of a former action which was dismissed on demurrer, and wherein the plaintiff in the present cause was only one out of a number of plaintiffs, and wherein the causes of action were not identical—*Held*, that the motion could not be granted, unless an identity of parties and causes could be shown. *Lalonde* v. *Lalonde*, 1 L. C. J. 290, S. C. 1857.

7. An opposition to a *vend. ex.* will be dismissed unless opposant pay the costs of his former opposition. *Dalton* v. *Doran & Doran*, 8 R. L. 372, 1 Legal News, 220, 22 L. C. J. 103; S. C. 1877.

8. The proceedings upon a second appeal will be suspended until the costs of the former appeal be paid, and if such costs be not paid on a day certain, the second appeal will be dismissed with costs. *Bouvier & Reeves*, 12 L. C. J. 291, Q. B. 1863.

And *see* cases under Art. 120 *ante*.

## SECTION IV.

## OF PEREMPTION OF SUITS.

**454.** Suits are perempted when no proceeding has been had therein during three years.

1 *Couchot*, 75, *Ord. de Fev.* 1563, *Art.* 15.
*Ord. de Jan.* 1628, *Art.* 91 ; *C. P. C.* 397.

1. Where the record is missing, it is not competent for the court to accord peremption. *Turner* v. *Boyd*, 2 L. C. J. 96, S. C. 1857.

2. On a motion to discharge an opposition, on the ground that the opposant had failed to proceed within three years, the motion was granted. *Blackburn* v. *Walker & Walker*, 3 L. C. J. 195, S. C. 1859.

3. Peremption will not be granted of an opposition to a ratification of title. *Robertson exp. & Pollock et al.*, 5 L. C. J. 150 & 11 L. C. R. 285, S. C. 1861.

4. A petition for *contrainte par corps* against a person who deteriorates a property seized is not a suit, and is not subject to peremption. *Chaffers es qual.* v. *Petrin*, 3 R. L. 71, S. C. 1871.

5. *Held*, that defendant was entitled to have judgment declaring a suit *perimée*, though the plaintiff who had been originally represented by two attorneys practising in partnership had not, since the nomination of one of them to a station in the civil service, appointed a new attorney, even though the office held by the one so appointed be incompatible with the practice of his profession, the mandate of the other still continuing, and the party being still represented by him. *Valin* v. *Anderson*, 2 R. C. 110, S. C. 1871.

6. A motion for a rule *nisi* for peremption made by a defendant in person, who has ceased to be represented by his attorney *ad litem*, and who has not subsequently appeared by another attorney or in person, is irregular, null and void. *Johnston* v. *Rimmer & Lockwood et al.*, 13 L. C. J. 131, S. C. R. 1869.

**455.** Peremption, however, does not take place :

1. When the party has ceased to be represented by his attorney, in the cases mentioned in articles 201 and 202 ;

2. When the party himself dies, or has changed his civil status ;

3. When proceedings are compulsorily stayed by any incidental proceeding or by an interlocutory judgment.
1 *Couchot*, 75; 9 *L. C. R.* 219.

1. Peremption cannot be granted in a case where the proceedings have been suspended by proceedings in improbation. *Anderson* v. *Sanborn*, 3 Q. L. R. 206, S. C. R. 1877.

2. The parties to a cause must be put in default to answer the petition *en réprise d'instance* before judgment can be given upon it, *i. e.*, there must be a demand of plea. *Hamel* v. *Laliberté*, 3 Q. L. R. 242, S. C. 1875. *Murphy* v. *Campbell*, S. C. 1875, ibid.

3. *Pourparlers* for the compromise of a case interrupt peremption, but proof thereof must be made by writings. *Phaneuf & Elliott*, 21 L. C. J. 221, S. C. 1871, 1 Legal News, 211.

**456.** Peremption takes place against corporations and against all individuals, even against minors, when they are represented, saving their recourse against those who represent them.

It does not take place against the crown. 3 *Anc. Deniz. p.* 662; *C. P. C.* 398.

**457.** Peremption must be declared by the court, upon a motion of which the attorney, if there is one, has had notice; otherwise the notice must be given to the party himself. *C. P. C.* 480.

1. Peremption will be granted on the certificate of the clerk of the court, that no procedure has been taken in the case for upwards of three years, and that, notwithstanding the non-production of part of the record which has been misplaced. *Chapman* v. *Aylen*, 1 L. C. J. 264, S. C. 1857.

2. The defendant who has made default cannot obtain permission to set aside the default for the purpose of obtaining peremption of the suit. *Courville & Levar* v. *Levar*, 6 L. C. J. 256, S. C. 1862.

3. A defendant who has not appeared may ask and obtain peremption of the suit. *Day* v. *Decasse & Dorval*, 12 L. C. J. 265, S. C. 1868.

4. And, in such case, may sign the demand for peremption and present it himself to the court. Ib.

5. A demand in peremption is indivisible, so that where one defendant in a case has asked for peremption which is granted, it is granted in favour of all the defendants. Ib.

6. Where, on a motion for peremption, the conclusions were that the action be dismissed instead of declared *perimée—Held*, to be irregular, and rejected, but without costs. *Peck et al.* v. *Murphy et al. & The Mayor, &c., of Montreal*, 2 L. C. J. 221, S. C. 1858.

7. The defendant in three similar cases, filed motions asking for peremption of the suits on the ground that three years had elapsed since the last proceeding therein, and the plaintiff opposed the granting of the motions on the ground that they were not sufficient, and that a rule was necessary—*Held*, that the service and notice of motion are equivalent to a rule. *Charlebois* v. *Bastien*, 6 L. C. J. 293, S. C. 1862.

8. A motion for peremption made in the name of three attorneys, one of whom is deceased, will be rejected, on the ground that such a motion might be made in the name of the two surviving attorneys without a substitution. *DeBeaujeu* v. *Rodrigue*, 7 L. C. J. 43, S. C. 1862.

9. A motion for peremption may be legally made by two out of three members of a legal firm, being attorneys of record of defendant, without any substitution of attorneys previously allowed by the court, and without evidence that the other member of the firm is either dead or has ceased to practice. *Terrill* v. *Haldane et al.*, 15 L. C. J. 245, S. C. 1871.

10. A demand for peremption should be served upon all the parties to the suit, and in default of such service it cannot be granted. *Moreau et vir* v. *Leonard & Lapierre*, 9 L. C. J. 100, S. C. 1865.

11. Peremption will be granted in cases not contested, and in which the defendant only appeared, if the plaintiff allows the proceedings to lie over for three years. *McBean* v. *Cullin*, 7 L. C. J. 117, S. C. 1851.

12. A petition claiming peremption ought to be accompanied by a certificate of the clerk of the court, showing the date of the last proceeding. *Les Dames Religieuses Ursulines* v. *Botterell*, 1 L. C. R. 89, Q. B. 1851.

**458.** Peremption is covered by any useful proceeding taken after the lapse of three years and before the service of the motion to have it declared; but it cannot be prevented or

affected by any proceeding taken subsequently to the service of such motion. *C. P. C.* 399.

1. On appeal from a judgment granting peremption—*Held*, that an interlocutory judgment discharging a *délibéré* suspends so long as it is in force the proceedings in an action *en garantie*, and that there was error in the judgment declaring such action *perimée* on motion of one of the defendants *en garantie*. *Archambault* v. *Busby*, 9 L. C. 219, Q. B. 1859.

2. A proceeding in a cause made by the plaintiff's attorney after service on him of a rule *nisi* for peremption, and before the return of the rule, will not prevent the peremption being declared and the action dismissed. *Farnam* v. *Joyel*, 10 L. C. R. 20, 1859.

3. No interruption of peremption can be had after service of notice of motion. Ib., & 4 L. C. J. 128, S. C. 1859.

4. On motion for peremption of the *instance* where the plaintiff had, between the notice and the presentation of the motion, filed a paper in the cause—*Held*, to be a rule in this province that the notice was not equivalent to the demand, and that any useful proceeding taken between the two would be sufficient to interrupt the peremption. *Beaudry* v *Plinguet*, 3 L. C. J. 237, S. C.; *McDonald et al. & Roy*, 3 L. C. J. 302, S. C. 1859.

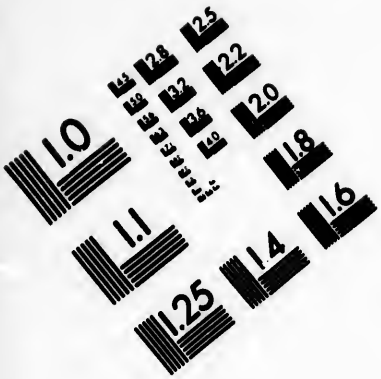
5. The plaintiff urged that the peremption had been interrupted by the fact that the attorneys of record had abandoned the profession and become merchants—*Held*, that the rule was peremptory, and that the fact urged did not interrupt peremption. *The New City Gas Company of Montreal & McDonnell*, 3 L. C. J. 283, S. C. 1860.

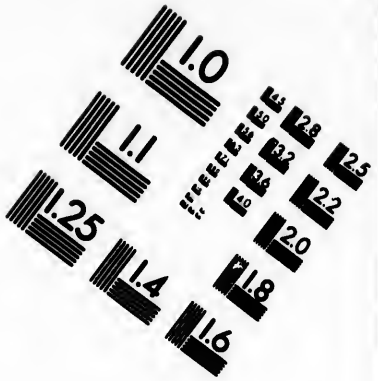
6. Where a motion was made for peremption on the part of the defendant, and the plaintiff answered that one of his attorneys *ad litem* had, during the three years, ceased to practise as attorney to the knowledge of the defendant—*Held*, that the plaintiff was sufficiently represented by one of his attorneys. *Tassé* v. *Laberge*, 4 R. L. 699, S. C. 1871.

7. The death of the plaintiff in the case interrupts peremption. *Tate et al.* v. *McNiven*, 4 L. C. J. 148, S. C. 1860.

8. Where one of the defendants died during the pendency of the suit the peremption did not run during the three months and forty days allowed to the heirs to deliberate. *McKay et al.* v. *Gerrard*, 5 L. C. J. 351, S. C. 1861.

9. The defendants served a motion on the plaintiff for peremption,

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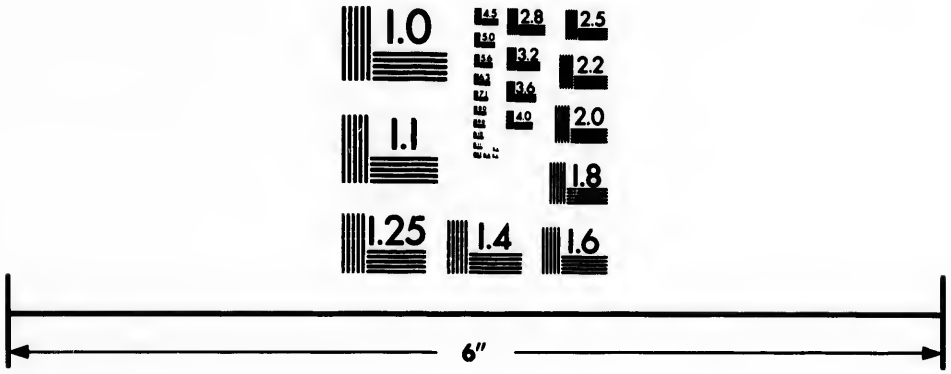



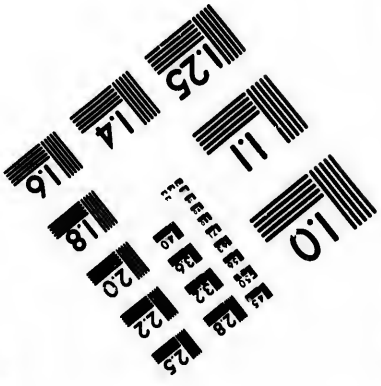


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and the plaintiff pleaded that, having entered into solemn and perpetual vows as *a religieuse*, she was civilly dead before the peremption had accrued, and also that the pleading mentioned as the last proceeding in the case, instead of having been filed on the 17th of May, 1859, was filed during the month of April, 1862, as appeared by affidavits produced by her, and before the day on which the motion for peremption was served she had taken useful proceedings as required by law —*Held*, supposing the plaintiff were civilly dead (a point which the court would not decide) by taking the vows of a *religieuse* before the peremption was acquired, that as the defendant had not been notified of the fact it could not take away the right of peremption. *DeBeaujeu* v. *Massé, jr.*, 7 L. C. J. 105, S. C. 1863.

10. With regard to the filing of the pleading referred to, the date of which had been certified by the prothonotary, his certificate could only be attacked by improbation, and *held*, also, that peremption could not be affected by a proceeding taken between the service of the motion and its presentation to the court. Ib.

11. The death of one of the plaintiffs interrupts the peremption. *Brewster et al.* v. *Childs et al.* 9 L. C. J. 21, S. C. 1863.

12. And the death of one of the defendants. *Howard et al.* v. *Childs et al.* 9 L. C. J. 22, S. C. 1863.

13. The service of a notice of motion to be made by the plaintiff is a valid interruption of the peremption in the cause under art. 458. *The Mayor, &c., of Montreal & Ranson*, 13 L. C. J., 234, C. C.

14. Service of a notice of motion not filed or presented to the court does not interrupt peremption. *Terrill & Haldane et al.*, 15 L. C. J. 245, S. C. 1871.

15. The death of two of the defendants does not interrupt peremption. Ib.

16. But *held*, reversing the decision in the court below, that a requisition by plaintiff for a process to examine defendant on *faits et articles*, filed the same day as service is made by the defendant of motion for peremption, is a useful proceeding, and will operate as an interruption of the peremption. Ib., & 17 L. C. J. 69, Q. B. 1872.

17. To call a case on the *enquête role* is not a useful proceeding, such as to interrupt peremption. *Cook* v. *Miller*, 3 R. L. 446, S. C. 1871, & 4 R. L. 240, S. C. R. 1872.

**459.** Peremption does not extinguish the right of action, but only the suit or proceeding. *C. P. C.* 401.

**460**. The court, in declaring the peremption of the suit, may, according to circumstances, condemn the plaintiff to pay all costs.

1. Where peremption is granted the action will be dismissed, with costs. *Mongeon et ux. & Larin*, 1 L. C. J. 264, S. C.; *Chapman* v. *Aylen*, Ib.; *Gore & Gugy*, Ib., & 8 L. C. R. 445, 1857.

2. The costs on a demand for peremption are at the discretion of the court. *DeBleury & Gauthier & Paris*, 5 L. C. J. 330, S. C. 1861.

3. And on sufficient cause, on affidavit, the court will not grant costs. Ib., 11 L. C. R. 494, S. C. 1861.

4. The action will be dismissed, each paying his own costs. *Fournier* v. *The Quebec Fire Insurance Co.*, 6 L. C. R. 97, S. C. 1856.

5. No costs will be awarded. *Turner* v. *Lamas*, 10 L. C. R. 382, S. C. 1860.

6. The action will always be declared *périmée* with costs, unless under very special circumstances. *Sinclair* v. *McLean et al.* 22 L. C. J. 107, S. C. 1877.

## SECTION V.

## MISCELLANEOUS PROVISIONS.

**461**. When any writ or paper whatever requires to be served out of the district, the service may, in the absence of any provision to the contrary, be made either by a bailiff of the district in which the court is held, or by a bailiff of the district in which such service is to be made; but no more costs can be allowed in the former case than in the latter; and this provision applies also to executions against movable property and to attachments before or after judgment. *C. S. L. C. c.* 83, *s.* 65, §§ 1, 2, 3, 4.

*Vide* 33 *Vic. c.* 17, *s.* 1 (Que.), *under art.* 48 *ante.*

1. A bailiff of the district of Montreal may execute a writ of execution from the court in an adjoining district. *Duhaut* v. *Lacombe & Tranchemontagne*, 13 L. C. J. 308, S. C. 1869.

**462**. Every written proceeding in the case must be served

upon the opposite party, otherwise it is not deemed to be regularly filed.

Every notice of inscription for hearing in law or upon the merits must be given by serving a copy of the inscription at least one clear day in term, and four days in vacation, before the day fixed for such hearing. *Ibid.*, *s.* 184.

1. *Held*, on an appeal from a judgment ordering a rule for *contrainte par corps* against a defendant, who had become voluntary guardian of the things seized, that notice of such rule to the defendant is not required by the Rules of Practice. *Brooks & Whitney*, 4 L. C. J. 279, Q. B. 1860.

2. In cases in the Circuit Court under $60, copies of preliminary exceptions must be served on the plaintiff's attorney. *Lusher* v. *Parsons*, 17 L. C. J. 196, C. C. 1873.

3. When an opposition is made by a third party to a seizure, and the opposition is contested by the other parties in the cause, the defendant has a right to be notified of all the proceedings on the opposition, and no final judgment can be rendered maintaining such opposition unless the defendant has been called upon to declare whether he intend to contest it or not. *Kelly & The Mayor et al. of Sorel, & La Banque du Peuple*, 1 R. L. 168, Q. B. 1869.

4. Where an opposition is being contested, the contestation itself must be served on the defendant, but it is not necessary that it be accompanied by a writ of summons. *Trahan* v. *Gadbois & McCaffrey et al.* 5 R. L. 690, S. C. 1874.

5. An intervening party who claims payment by the prothonotary of a sum of money under a judgment in his favour, is bound to give notice to all the parties to the record of his application to the court for such moneys. *Gillespie et al.* v. *Spragg et al. & Hutchinson et al. & Maitland et al. & Gordon et al.*, 6 L. C. J. 25, S. C. R. 1855.

6. Where application was made to the Superior Court for payment of moneys claimed by parties in the case, notice must be given to the other parties interested of the judgment or order pronounced in the case. *Mann et al. & Monk*, 8 L. C. J. 55, Q. B. 1862.

**463.** In reckoning the delays in matters of pleading or trial, the first day of September is deemed to be the next day after the ninth day of July; and no party to a cause

can be obliged to proceed between those two days, without a special order of the court or judge.

34 Vict. c. 4, *(Que)*.

4. "Notwithstanding Article 463, any days between the ninth of July, and the first of September shall be reckoned in the delays of eight days fixed by Articles 497 and 500 of the said code."

**464.** [*Any two or more judges residing in the same district must sit at the same time and at the same place, but in separate apartments, in term or in vacation; and each of such judges has the same jurisdiction for hearing and determining all cases and matters submitted to him, and has the same powers as if he were the only judge sitting at such place.*] *Ibid. c.* 78, *s.* 24.

40 Vict. c. 13. (*Que.*)

2. Article 464 is repealed, and the following substituted therefor:

"464. Two or more judges of the Superior Court discharging their duties in the same district, may, and shall, whenever the despatch of business requires it, sit at the same time and at the same place, in separate apartments, in term or in vacation; and each of such judges has jurisdiction for hearing and determining all cases and matters submitted to him, and has the same powers as if he were the only judge sitting in such place."

**465.** In the absence of the judge from the chief-place of any district in vacation, his duties may be performed by the prothonotary, in cases of evident necessity, or where by delay a right might otherwise be lost or a wrong sustained.

But no judgment or order can be made by the prothonotary unless notice of the application has been given to the opposite party, except in cases by default, and such order may be afterwards revised by the court at its next sitting, or by any judge present in the district, provided the party requiring the revision files in the prothonotary's office, on or before the third following juridical day, an exception thereto, accompanied by the grounds upon which such revision is demanded.

The judgment or order of the prothonotary cannot be executed until the delay for filing such exception has expired; and after the filing of the exception, the execution of such judgment or order remains suspended until the decision of the judge. *Ibid. s.* 25.

36 Vict. c. 10 (*Que.*)

"7. Whenever at least one judge of the Superior Court shall have his domicile in the *chef lieu* of any district the prothonotary of such district shall not, in any case hereafter, exercise any of the judicial functions mentioned in Art. 465 (*unless such judge be ill or absent from the district,* 40 V. c. 13, s. 5, Que.)"

1. On an exception to the form filed on the ground that the female plaintiff had been authorized *à ester en justice* by the deputy prothonotary—*Held*, that as the said authorization did not set forth that it was granted in the absence of the judge of the district, in accordance with art. 465 of the Code of Procedure, it was *ultra vires*, and the exception was maintained. *Dubé* v. *Mazurette*, 5 R. L. 247, S. C.; *Filion* v. *Lacombe*, 5 R. L. 248, C. C. 1871.

2. A deputy prothonotary in the absence of a judge has no power to fix the amount of unliquidated damages and interest upon which to base the issue of a writ of capias. *Worthen* v. *Holt*, 3 R. L. 702, S. C. R. 1872.

3. The prothonotary of a district, the judge of which is bound by law to reside in another district, may grant a petition without setting forth the absence of the judge. *Lynch* v. *Duncan & Duncan & Lynch*, 15 L. C. J. 222, S. C. R. 1871.

4. A deputy prothonotary has power to authorize a tutor to take up the *instance* in and prosecute an action *en partage* already begun by the *auteur* of the minor. *Cutting & Jordan*, 19 L. C. J. 139, Q. B. 1875.

5. The clerk of the Circuit Court cannot exercise the functions of the judge of the district even in his absence, and when the parties would necessarily suffer by delay, and where the clerk had granted the petition of the plaintiff who demanded possession of a horse he had attached by *saisie revendication*, it was held, on inscription before the judge in term that the clerk's order should be annulled. *Larose* v. *Larose*, 3 R. L. 33, S. C. 1871.

**466.** Whenever the sheriff is interested or personally concerned in any suit or action, any writ which ought to

be served by him, must be addressed to and served by the coroner of the district. *Ibid. c.* 83, *s.* 45; *see art.* 74. *ante.*

**467.** If the sheriff is also coroner, then the prothonotary, or his deputy, acts in the place and stead of the sheriff, as if the writ had been addressed to him personally. *C. S. L. C. c.* 78, *s.* 22.

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# CHAPTER EIGHTH.

## OF FINAL JUDGMENT.

### SECTION I.

### OF JUDGMENT ON THE MERITS.

**468.** Judgment in a suit which is under advisement cannot be stayed by reason of the death of the parties or of their attorneys. *Ord.* 1667, *tit.* 26, *Art.* 1.

[If any judge or assistant judge before whom a case has been heard is appointed chief-justice or judge of the same court, or chief-justice or judge of another court, or has obtained leave of absence, he may render judgment as if no changes had taken place.]

**469.** In all contested cases, and in those not provided for by articles 89, 90, 91, 92 and 96, judgment must be rendered in open court. *Ibid., art.* 5.

The court may, during term, appoint days out of term for rendering judgment in cases taken under advisement.

32 Vict., c. 20, *(Que.)*:

1. "Whenever any judge of the Superior Court, who has heard a cause in the said court, is unable by reason of sickness, or other rea-

son, to render judgment in the said cause in person, he may transmit the draft of the judgment certified by himself to the prothonotary, who shall be thereupon bound to record the same, and to read it in open court on the next juridical day in term after he shall have received such draft; and the judgment shall then have the same force and effect as if it had been pronounced by the judge on the day on which it was so read."

38 Vict., c. 10, (*Que.*):

1. "At any time, when a judge who has heard a cause in the Superior or in the Circuit Courts, is incapable, on account of illness, absence or other cause, of rendering judgment in person, he may transmit the draft of the judgment, certified by him, to the prothonotary or to the clerk, as the case may be, with instruction to enregister such judgment and to read it, or to give communication of it on demand to the parties or their attorneys *ad litem*, on the day previously fixed for that purpose by the court which shall have taken the cause *en délibéré*.

The prothonotary or the clerk, on receiving the draft of judgment and the instructions accompanying it, is obliged to conform to such instructions: and the judgment so enregistered, shall have the same effect as if it had been rendered by the judge, during the sitting of the court.

2. The provisions of the preceding section shall take effect notwithstanding article 1080 of the Code of Civil Procedure, section 1 of the Act of this Province, 32 Vict., chap. 20, and any other provision of the law, and without prejudice to such article, section, or provision of law.

3. In the absence of the judge who should preside over the Superior or the Circuit Court, the prothonotary or clerk, as the case may be, may adjourn the court from day to day during the term."

1. The courts cannot adjourn to any day between the 9th of July and the 1st of September for the purpose of rendering judgment in cases heard and taken under advisement during term, and art. 469 gives the court the right to adjourn only to a day which is not prohibited by art. 1. *The Richelieu Co. & Anderson*, 20 L. C. J. 219, Q. B. 1876.

**470.** In cases inscribed at the same time for proof and hearing, judgment may be rendered during the days set apart in vacation for proof and hearing in such cases. *C. S. L. C. c.* 83, *s.* 37.

32 *Vict.*, *c.* 20 *(Que.)*:

2. Article 470 is hereby amended by adding the words "and also during term and on any day out of term appointed by the court, for rendering judgment in cases taken under advisement."

**471.** Every judgment for damages must contain a liquidation thereof. *Ord.* 1667, *tit.* 26, *art* 6; *C. P. C.* 128.

**472.** Every judgment must mention the cause of action, and must be susceptible of execution.

In contested cases it must moreover contain a summary statement of the issues of law and of fact raised and decided, the reasons upon which the decision is founded, and the name of the judge by whom it was rendered. *C. S. L. C. c* 83, *ss.* 39, 110.

1. A judgment on an action *en réintegrande* which does not describe the property affected by the judgment, will be reversed in appeal on account of vagueness. *Renaud* v. *Gugy*, 8 L. C. R. 470, Q. B. 1858.

2. An error in the date upon which a judgment is rendered is not a ground of nullity. *Naud & Smith*, 10 L. C. J. 217, Q. B. 1866.

3. A judgment is not necessarily null because it is not conformable to all the provisions of art. 472 concerning the *motivés*. *La Fabrique de Ste. Julie de S. & Paquet*, 1 R. L. 430, Q. B. 1869.

4. The judge who renders the final judgment may reverse all interlocutory decisions in the case. *Archer* v. *Lortie*, 3 Q. L. R. 159, S. C. R. 1877.

**473.** The judgment must be entered without delay in the register of the court, in conformity with the draft paraphed by the judge.

1. An inscription *en faux* cannot be made against a judgment of the S. C. or of any court even if the judgment have been altered in any manner since it was rendered, nor can any such inscription be made against a copy of such judgment. *Healy et al.* v. *The Mayor, etc., of Montreal*, 17 L. C. R. 409, S. C. 1867. See *Ross & Palsgrave*, 5 L. C. J. 141, Q. B. 1858.

**474.** In the case of difference between the draft and the entry thereof in the register, the draft is to be followed; and

the court may, without any formality, order the rectification of the register.

1. The draft of a judgment as paraphed by a judge is the true record of such judgment, and cannot be contradicted by verbal evidence offered in support of a *requête civile* attacking the correctness of the entries therein so paraphed by the judge.

A judgment so recorded cannot be set aside on a *requête civile* by another judge of the same court on the ground of error in such record. *Carter* v. *Molson & Holmes*, 21 L. C. J. 210, S. C. 1877.

2. Where rent due and to accrue was demanded, and judgment was given for the part due, but was entered for the full amount demanded, and the prothonotary entered up the proper judgment on another page, *semble* that he was not authorized to do so by Art. 474. *Hardy & Scott*, 1 Legal News, 278, Q. B. 1878.

3. The court will not interfere to change or modify in any way a final judgment which has been rendered. *Huot* v. *Pagé*, 9 L. C. R. 226, S. C. 1859.

4. Nor can a judgment be changed or modified in any way after the court has adjourned. *Bertrand* v. *Beaudry*, 9 L. C. R. 260, C. C. 1859.

5. A variance between a judgment on a rule and the rule itself is not a ground for setting it aside. *Brooks* v. *Whitney*, 4 L. C. J. 279, 10 L. C. R. Q. B. 1860.

6. An interlocutory judgment may be revised or reformed. *Plenderleath & ux.* v. *McGillivray et al.* S. R. 470, K. B. 1831. *Tate et al.* v. *Janes et al.*, *& é contra* 1 L. C. J. 151, S. C. 1857. *Quintal* v. *Roy et al.* 14 L. C. J. 57, S. C. 1868.

**475.** Every judgment condemning a party to the restitution of rents, issues and profits, must order the liquidation thereof; and this is done by experts if the case requires it; and the party condemned is bound for that purpose to produce all accounts and documents shewing the receipts, all leases of immoveables, and a statement of the cost of tilling, sowing and harvesting incurred by him.

**476.** Unless it is expressly ordered, it is not necessary to have the judgment served on the party condemned, except judgments in recognition of hypothecs, rendered against de-

fendants having a known domicile in the Province. *C. S. L. C. c.* 49, *s.* 15; *c.* 83, *s.* 114; *Ord.* 1667, *tit* 27, *Art.* 1; 25 *Geo. III. c.* 2, *s.* 29.

1. Signification of a judgment is not required where it has been given *contradictoirement*. *Rogerson & Begin*, 3 Rev. de Lég, 391, K. B. 1819.

**477.** [Any party may, on giving notice to the opposite party, renounce either a part only or the whole of any judgment rendered in his favour, and have such renunciation recorded by the prothonotary; and in the latter case the cause is placed in the same state it was in before the judgment.]

1. Where the plaintiff had desisted from a judgment on a demurrer, obtained in the absence of defendant's counsel from the court, and the case was inscribed for another hearing, the court was of opinion that, as judgment had once been rendered, there was an end of the matter, and the inscription was discharged. *Clark et al. & Clark et ux.* 2 L. C. J. 209, S. C. 1858.

2. Where there is a manifest error in a judgment and the plaintiff (in whose favour the error was), desisted, before appeal brought, from the benefit of such error, and served notice thereof on the defendant —*Held*, that the *désistement* was good, and the appeal was dismissed with costs. *Brown et al. & Wood*, 8 L. C. J. 53, Q. B. 1863.

3. Where one desists from a judgment rendered in the Superior Court, and which has been inscribed in revision, the Court of Review will discharge the *délibéré* and return the record to the Superior Court. *Ward & Newhall*, 3 R. L. 445, S. C. R. 1871.

4. The attorney of one of the parties in a case, as such, may renounce the whole or part of the judgment given in his favour, but such renunciation to be valid must be signed by the party himself or by his attorney *ad hoc*. *Prefontaine & Brown et al.*, 1 Q. L. R. 60, S. C. R. 1875.

## SECTION II.

## OF COSTS.

**478.** The losing party must pay all costs, unless for special reasons the court thinks proper to reduce them or compensate them, or orders otherwise.

**Nevertheless, in actions of damages for personal wrongs, if the damages awarded do not exceed forty shillings, sterling, no greater sum can be allowed for costs than the amount of such damages.**

*Ord.* 1667, *tit.* 31, *art.* 1; 25 *Geo. III.*, *c.* 2, *s.* 4.
*C. S. L. C. c.* 82, *s.* 23; *C. P. C.* 130, 131.

1. The plaintiff's attorney cannot claim costs from the defendant for any proceeding before the issue of the writ and consequently no costs arise on the mere lodging of a fiat. *White* v. *Foster*, 4 R. L. 565.

2. No costs can be asked for an attorney's letter sent before the commencement of the action, as it is a voluntary courtesy, and not a necessary proceeding. *Bowen* v. *Lee*, 3 Rev de Lég. 391, K. B. 1812.

3. The defendant who tenders the principal and interest claimed, after issue of a writ of summons, but before service, is still liable for the costs incurred. *Boucher* v. *Lemoine et al.* 4 L. C. J. 300, S. C. 1860.

4. Where the parties have settled the action before return, the attorney for the plaintiff cannot recover his costs against the defendant who was led to believe proceedings were ended. *Watkins et al.* v. *Denman*, 4 R. L. 383, C. C. 1872.

5. Where an action was settled as to the principal only and defendant afterwards neglected to pay the costs—*Held*, that the action might be returned into court and proceeded with for the costs only. *Darche et al.* v. *Debuc & Debuc*, 1 L. C. R. 238, S. C. 1851; *Gagnon* v. *McLeish*, 3 Rev. de Lég. 393, K. B. 1821.

6. Where the parties had settled the case after the return of the action without the knowledge of the plaintiff's attorney—*Held*, that the latter was entitled to proceed to judgment for his costs. *Charlebois* v. *Coulombe*, 7 L. C. J. 300, S. C. 1863; *Williams* v. *Montrait*, 1 Legal News, 339, S. C. 1878.

7. But *held*, that where the parties have settled the suit between themselves the attorney cannot continue it for costs although he have prayed distraction thereof in his declaration. *Lafaille* v. *Lafaille*, 14 L. C. J. 262, S. C. R. 1869; *The Quebec Bank* v. *Paquet*, 13 L. C. J. 122, S. C. R. 1869; *Castongué* v. *Perrin et al.* 14 L. C. J. 304, S. C. 1870.

8. Where the plaintiff compromises with the defendant, the latter agreeing to pay costs, the plaintiff cannot enter his action for the costs, nor does the demand for distraction of costs in the conclusion of the

plaintiff's declaration take away from him the right to compromise. *Hébert & La Fabrique St. Jean*, 13 L. C. R. 66, Q. B. 1861.

9. A shipper had taken out a writ of attachment in revendication against the master of a vessel in consequence of his refusal to sign bills of lading for the goods shipped, and the defendant thereupon signed and delivered the bills of lading but refused to pay costs—*Held*, that the plaintiff had a right to return the action and proceed to judgment for his costs. *McCulloch et al. & Hatfield*, 7 L. C. J. 220 & 13 L. C. R. 321, Q. B. 1863.

10. Where certain costs under a writ of *contrainte par corps* had been overlooked—*Held*, that that did not free the debtor from the obligation of paying them when demanded. *Beauchêne* v. *Pacaud*, 13 L. C. J. 135, C. C. 1869.

11. Where to an execution for debt, interest, and costs, an opposition is filed under which it is proved that the costs were paid before seizure, the defendant is entitled to costs on his opposition. *Berthelot* v. *Lalonde & Lalonde*, 14 L. C. J. 28, C. C. 1869.

12. The plaintiff who sues *in forma pauperis* may recover costs. *Giroux* v. *Menard*, 3 Rev. de Lég. 391, K. B. 1819.

13. An attorney prosecuting in 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. *Valliers* v. *Duhamel*, 3 Rev. de Lég. 392, K. B. 1819.

14. Where a case has been inscribed in review, and after hearing it has been discovered that it is not susceptible of revision, and the court has therefore no jurisdiction, the party inscribing must pay costs. *Becket* v. *Bonallie*, 14 L. C. J. 54, S. C. R. 1868.

15. In a case before the Circuit Court—*Held*, that where the case is within the jurisdiction of the Commissioner's Court, the Circuit Court, upon confession of judgment of the defendant, would only render judgment for costs of the Commissioner's Court, particularly if there exist and be in operation such a court in the township wherein the defendant resides. *Pacaud* v. *St. Hilaire*, 15 L. C. R. 211, C. C. 1865.

16. Where a defendant has pleaded in a case as if it were an appealable one, he must be held to have waived any objection to the form of the action, and must pay costs as though it were appealable. *La Corporation de la paroisse de St. Aimé & Cotnoir*, 1 R. L. 666, C. C. 1868.

17. On the contestation of the garnishee's declaration—*Held*, that, where the declaration does not fully disclose the facts of the case, the

garnishee must pay the costs of the contestation. *Macfarlane* v. *Delisle & Mackenzie*, 3 L. C. J. 163, S. C. 1859.

18. In an action of damages arising out of an accident where each side is to blame, each will pay his own costs. *Ware* v. *Carsley*, 5 R. L. 238, S. C. 1873.

19. In an action for damages for £5,000, the Court of Appeal reversed the judgment of the court below and granted plaintiff £2 10s. and costs. The prothonotary taxed the costs as of a first class action in the Superior Court. On motion by defendant to revise—*Held*, that the court would look at the language of the judgment of the Court of Appeal to ascertain the class of costs awarded, and in this case the plaintiff was only entitled to costs as in an action for £2 10s. in the Circuit Court. *Kerr* v. *Gugy*, 10 L. C. R. 478, S. C. 1860.

20. In an action on assumpsit, where an *expertise* was ordered—*Held*, that the costs of such *expertise* were in the discretion of the court, and that they would be divided, where the report has the effect of materially reducing the plaintiff's demand. *Gardner* v. *McDonald*, 2 L. C. J. 208, S. C. 1858.

21. And where the plaintiff by her action claimed certain shares of stock, as belonging to her first husband, in the estate of the defendant, and the defendant pleaded that, at the time of the marriage of the plaintiff with her first husband, the latter was already married to a person in England then still living, and a commission rogatoire issued to establish the fact of such marriage—*Held*, that the costs must be paid by the plaintiff, inasmuch as these facts were within her knowledge, and should have been admitted by her.—*Cathcart* v. *The Union Building Society*, 15 L. C. R. 467, S. C. 1864.

22. Where a report of collocation, made according to a registrar's certificate, was contested, and the contestation was maintained—*Held*, that the party over-collocated would have to pay the costs of the contestation, unless he has filed a *remittitur* for the amount over-collocated. *Marois* v. *Bernier & Lariviere*, 12 L. C. R. 174, S. C. 1861.

23. A party erroneously collocated must pay the costs of the contestation of such collocation, although on receiving it he immediately give notice of acquiescing in it, with a consent that judgment should be given as demanded in the contestation, but without costs. *Adams* v. *Hunter & Evans & McKenzie*, 11 L. C. R. 172, S. C. 1861.

24. Where a person has been collocated for a portion of the amount which he claimed by his opposition, and the collocation is contested, the costs will be the same as if the opposition itself had been contested. *Doutre* v. *Gosselin & Gabouriault*, 7 L. C. J. 290, S. C. 1863.

25. And the class of costs in such cases must be governed, not by the amount of the collocation, but by the amount of the claim. Ib.

26. And the opposant must be considered as plaintiff, and the contestant as defendant, in order to determine the costs due to each party. Ib.

27. Where two hypothecary creditors had been collocated in a report of distribution, in accordance with the registrar's certificate, and it was discovered that they had been paid their respective claims some time previously—*Held*, on the contestation by two interested parties of such collocations, where the creditors in question admitted the payment of their claims, that the costs should be divided between the two parties contesting in equal shares, but that the costs of one contestation only should be allowed. *Cournoyer* v. *Plante et al.* 1 R. L. 38, S. C. 1868.

28. A hypothecary creditor who has been collocated for more than remains due to him, the balance having been paid by a previous judgment of distribution, cannot be held for the costs of the contestation of such collocation, if he have filed with the prothonotary after contestation a declaration of the amount so remaining due.—*Globensky & Daoust, & Moreau & Globensky*, 2 R. L. 608, 1870.

29. A judgment setting aside the verdict of a jury, and condemning the respondent to pay the costs incurred in the court below, includes also the costs of the trial by jury, and not only the costs upon the motion for setting aside such verdict. *Ouimet et al. & Papin*, 9 L. C. R. 268, Q. B. 1859.

30. On a contestation concerning the costs of a jury trial where the verdict of the jury had been set aside and a new trial granted in appeal, though refused in the court below—*Held*, that the party who succeeded in the first place, and in whose favour the verdict of the jury was rendered, is not, according to the practice of the courts, liable for the costs of the trial. *Beaudry* v. *Papin & Papin*, 3 L. C. J. 46, S. C. 1857.

31. Where a defendant *en garantie* confesses judgment for a portion only of the principal demand, and contests the principal action as regards the balance, and judgment is rendered for the amount confessed, the defendant must nevertheless pay all the costs of both demands, including those of contestation, and that according to the conclusions of the principal demand. *Mongenais* v. *Pilon & Pilon* v. *Brasseur*, 9 L. C. J. 88, S. C. 1864.

32. When a plaintiff recovers no more than is paid into court, and the sum so paid in was tendered before the action was instituted, the

action must be dismissed with costs against the plaintiff. *Woodrington* v. *Taylor*, 3 Rev. de Lég. 393, K. B. 1820.

33. Where action had been brought against a municipal corporation attacking one of its resolutions the court cannot condemn the councillors who passed such resolution to pay the costs, unless they have been made parties to the case. *The Attorney General* v. *The Corporation of Iberville*, 6 R. L. 241, S. C. 1874.

34. The costs on a petition to set aside a municipal by-law should be taxed as in a first-class non-appealable case in the Circuit Court. *Bourbonnais et al.* v. *The Corporation of the County of Soulanges*, 17 L. C. J. 69, C. C. 1872.

35. A revenue inspector suing in the Queen's name for penalties is not liable for costs. *Hogue exp. & Murray*, 3 L. C. R. 287, S. C. 1853.

36. In rendering judgment in a cause brought before the court on certiorari—*Held*, that costs would not be granted against a public officer who prosecutes in pursuance of his duty. *DeBeaujeu exp.*, 1 L. C. J. 15, S. C. 1856.

37. And on an application for certiorari from a conviction under the license law—*Held*, that no costs would be given against the collector of inland revenue prosecuting in the execution of a public duty. *Slack exp. & Bellemare*, 7 L. C. J. 6, S. C. 1862; 34 Vict. cap. 2, sec. 87 (Que.).

38. Where a writ of prohibition was maintained against the collector of inland revenue it was without costs as being a public officer. *Dubord* v. *Boivin*, 14 L. C. J. 203, S. C. 1866.

39. A curator to the estate of an absentee, who defends and contests an action against such estate, is personally liable for the costs of the action. *Whitney* v. *Brewster*, 4 L. C. J. 298, S. C. 1855.

40. And where action was brought by a curator to an absentee, in his quality as such, and the action was dismissed as unfounded in law —*Held*, that the curator was personally liable for the costs. *St. Jacques* v. *Parent*, 2 R. L. 95, C. C. 1868.

41. Defendants who have pleaded separately to a joint and several action may be jointly and severally condemned in costs. *Perkins* v. *Leclaire et al.* 7 L. C. J. 78, C. C. 1865.

42. The endorser of a promissory note, though sued with the maker, is not liable to the costs incurred by the maker on an exception to the form, where he has pleaded separately. *Boucher & Latour et al.*, 6 L. C. J. 269, Q. B. 1862.

43. The parties to a suit are not jointly and several bound to the payment of the costs of an *expertise* ordered at the instance of one of the parties. *Brown & Wallace*, 5 L. C. J. 60, Q. B. 1860.

44. Where several persons have been condemned to pay different sums of money individually as damages, they are liable for the costs jointly and severally. *Genier* v. *Woodman et al.*, 13 L. C. J., 201, S. C. 1868.

45. The Court of Review cannot afford relief against the condemnation for costs in the court below. *Macdonald et al.* v. *Molleur*, 13 L. C. J. 189, S. C. R. 1868.

46. A defendant who succeeds in review in obtaining a reversal of a considerable part of the judgment complained of may, nevertheless, be condemned to pay the costs in review. *Lynch* v. *Bertrand*, 13 L. C. J. 189, S. C. R. 1869.

47. The Court of Review will not give costs to parties who seek to rectify a trifling error which had already been rectified by *retraxit*. *Souliere* v. *Heron*, 1 Legal News, 87, S. C. R. 1878.

48. Costs will be given against a party who succeeds in review and in the Superior Court on a technicality, if fraud is proved against him. *Blouin* v. *Langelier & Langelier*, 3 Q. L. R. 272, S. C. R. 1877.

49. In an action *en bornage*, if the defendant deny the plaintiff's right of action, he must be condemned to pay costs. *Weymess et al. & Cook*, 2 L. C. R. 486, Q. B. 1852.

50. In an action *en bornage* where the defendant pleads that he had been always ready to have the boundaries established, and prays *acte* of his willingness to do so, and prays also that plaintiff's action may be dismissed with costs, the defendant will be condemned to pay the costs of the suit, although the costs of the bornage be divided. *Dansereau et al.* v. *Privé*, 1 L. C. J. 283, S. C. 1857.

51. But where in another action of *bornage* the defendant pleaded that he had no previous notice, and that he had always been ready to have the boundaries in question established, the plaintiff was held liable for the costs of the action. *Black* v. *Short*, 2 L. C. J. 81, Q. B. 1857.

52. But where in a later case the defendant prayed for the dismissal of the action, while offering to re-establish the old boundaries, he was condemned in costs. *Thibault & Lavallée*, 6 R. L. 80, S. C. 1874; *Patenaude* v. *Charron*, 17 L. C. J. 85.

53. The costs of an action *en garantie* will be given against a plaintiff suing before the expiry of the delay of payment, when the defend-

ant calls in his *garant formel*. *Aylwin* v. *Judah & Judah* v. *Rolland*, 7 L. C. R. 128, S. C. 1857.

54. Where the heirs to a succession were allowed to renounce on the day fixed for the hearing of an action against them—*Held*, that the plaintiff was entitled to costs up to the time of renunciation. *Mulholland* v. *Halpin et al.* 5 R. L. 184 & 17 L. C. J. 318, S. C. 1873.

55. Where to an action for the balance of the price of sale of an immoveable, the defendant pleaded fear of eviction, and the plaintiff was ordered to give security before payment of such balance, costs were given against the plaintiff. *Bernesse* v. *Madore*, 7 L. C. J. 32, S. C. 1862.

56. In a case where the defendant had pleaded his right to security against trouble, etc., and the plaintiff with his answer filed discharges duly registered of the mortgages complained of, he was granted full costs of the contestation. *Tétreau* v. *Bouvier*, 15 L. C. R. 76, S. C. & S. C. R. 1863.

57. And in a similar case where the defendant set up trouble by mortgages registered against the immoveable, some of which were discharged after the filing of the plea—*Held*, that the plaintiff would obtain judgment for the amount due, with costs up to the filing of the plea, and that costs after the filing of the plea would be granted to defendant. *Collette* v. *Dansereau*, 15 L. C. R. 83, S. C. 1864.

58. Where the defendant was sued for an instalment of the purchase money of an immoveable, and pleaded right to security against mortgages, etc.—*Held*, that the plaintiff should pay costs. *Bruneau* v. *Robert*, 6 L. C. J. 247, S. C. 1862.

59. Where the defendant pleads trouble to an action for instalments of purchase money, and offers to pay on security being given, the plaintiff should be condemned to pay the costs of contestation. *McDonald et al.* v. *Molleur et al.* 1. L. C. L. J. 108, S. C. R. 1865.

60. Where a person sold through an agent to one who had reason to believe that the agent was acting for himself, and afterwards brought action for the price of sale—*Held*, that he would get judgment only for the debt, and the costs would go against him. *Labelle* v. *Patris*, 4 R. L. 530, C. C. 1873.

61. The Crown does not receive or pay costs. *Chandler & The Attorney-General*, 3 Rev. de Lég. 371, K. B. 1835.

62. A surety cannot be called upon to pay costs of an action against the principal debtor where he has not been notified of the action. *Nye* v. *Isaacson*, 6 L. C. J. 117, C. C. 1861.

63. In an action of damages before a jury, where a verdict had been returned for the plaintiff for an amount under forty shillings sterling, and costs were awarded generally—*Held*, confirming judgment of court below, that the judgment for costs would be interpreted as meaning a sum equal to that awarded by the jury for damages. *Leduc* v. *Busseau*, 1 L. C. J. 191, Q. B. 1857.

64. And in another case—*Held*, that in an action of damages for personal wrong, instituted in the Superior Court, where judgment is rendered for £10 and costs, the costs are taxed as in a judgment for that amount in the Circuit Court. *Wilson* v. *Morris & Ravaria*, 1 L. C. J. 266, S. C. 1857.

65. In an action of damages for libel where a verdict was rendered for $100, and a question as to costs arose—*Held*, that the amount of damages given, even where it exceeded forty shillings sterling, regulated the class of action as to costs, if the judgment of the court ratifying the verdict have not otherwise fixed it. *Desaulles* v. *Taché*, 8 L. C. J. 342, S. C. 1864.

66. But where, as in the above case, the costs, under that rule, were reducible to the tariff of a Circuit Court action—*Held*, that the disbursements necessary for a trial by jury would be allowed to the plaintiff. Ib.

67. And where the court awarded damages to the extent of $5 only —*Held*, that no greater amount than $5 for costs could be allowed. *Warner et al.* v. *Rolf*, 17 L. C. J. 292, S. C. R. 1873.

68. In an action of ejectment, where no rent is due, the costs will be taxed according to the amount of the annual rent. *Smith* v. *Noad*, 1 L. C. L. J. 67, S. C. R. & 2 L. C. L. J. 59, Q. B. 1866.

69. Where two defendants join in an action of trespass, if one be acquitted, he is entitled to his costs against the plaintiff, notwithstanding that his co-defendant be found guilty. *Henderson* v. *Thompson & Thompson*, 3 Rev. de Lég. 392, K. B. 1817.

**479.** Costs are taxed by the prothonotary upon production of a bill thereof, and according to the tariffs in force, and if the amount awarded by the judgment is such that it might have been recovered before an inferior court, the plaintiff is entitled to such costs only as would have been allowed in such inferior court, unless the court otherwise orders; such taxation may, within six months, be submitted

for the revision of a judge after the adverse party has received such notice as the judge may deem sufficient.

Neither the application for revision, however, nor the delay allowed for such revision, can suspend the execution of the judgment; saving the debtor's recourse in the event of the amount being levied or paid before such revision. *Ord.* 1667, *tit.* 31, *art.* 1; 25 *Geo. III., c.* 2, *s.* 4; *C. S. L. C. c.* 82, *s.* 23; *C. P. C.* 130-131.

1. An attorney *ad litem* to be entitled to receive his fees and disbursements from his own client need not produce a taxed bill of costs. *Cherrier & Titus*, 1 L. C. R. 402, Q.B. 1851.

2. The Court of Review has no jurisdiction to revise the taxation of a bill of costs in revision. *Belleisle* v. *Lyman et al.*, 14 L. C. J. 137, S. C. R. 1870. *Ryan* v. *Devlin*, 21 L. C. J. 28, S. C. R., 1876.

3. Where the Superior Court dismissed the plaintiff's action, but without costs—*Held*, that the Court would not interfere in a mere matter of costs. *O'Halloran* v. *Sweet*, 16 L. C. J., 318, S. C. R. 1872.

4. Where a party in revision succeeds in obtaining a modification of the costs only, he will not have costs of revision, but each party will pay his own. *The Intercolonial Coal Company* v. *Shaw*, 4 R. L. 539, S. C. R. 1873.

6. When a party moves to revise certain items of taxation in a bill of costs by the prothonotary, he thereby waives his right to object to the other items of taxation, and a second motion to revise these will be rejected although the party moving offers to pay the costs of his second motion. *Kerr* v. *Gugy*, 10 L. C. R. 478, S. C. 1860.

6. The issue of an execution for the amount of a judgment and costs previous to the taxation of the costs is illegal. *Audet* v. *Asselin & Asselin*, 15 L. C. R. 272, C. C. 1864.

7. The costs in a contested case must be taxed before execution can issue for them. *Langevin* v. *Martin*, 3 R. L. 447, S. C. 1871.

8. The prothonotary has power to tax an Assignee's bill of costs in the absence of a judge. *Lynch et al. & Tyre & St. Amour*, 5 R. L. 417, S. C. 1874.

9. But a bill of costs taxed by the prothonotary may be revised by a judge. Ib.

10. Where a party had failed to stamp certain of his depositions, the prothonotary may refuse to draw, certify or tax such party's bill of costs while the depositions remain so unstamped. *Emond* v. *Blais*, 2 Q. L. R. 184, S. C. 1876.

11. Where judgment was rendered in the Superior Court for £50 interest and costs—*Held*, on motion to revise the taxation of the prothonotary, that the plaintiff was entitled to costs only as of the first class in the Circuit Court, and not of the action in the Superior Court. *Vallée* v. *Latouche*, 10 L. C. R. 433, S. C. 1860.

**480**. Whenever witnesses are summoned from beyond the jurisdiction, their expenses cannot be taxed, against the opposite party, for more than it would have cost to examine them by means of a commission, unless the court or a judge otherwise orders. *C. S, L. C. c.* 79, s. 11.

**481**. In the cases of articles 69 and 246, no greater costs of service can be allowed than if such service had been made by a bailiff residing in the county. *C. S. L. C. c.* 83, *s.* 63 ; §5, *s.* 65.

**482**. Attorneys *ad lites* may demand and obtain distraction of their fees and of all disbursements actually made by them.

If such demand be not made on or before the day on which the judgment was rendered it can only be granted after the opposite party has been notified to shew cause against it. 1 *Pig.* 420-1 ; C. P. C. 133.

1. The attorney's right to distraction of costs is personal and vested in him. *Esson* v. *Black*, 3 Rev. de Lég. 393, K. B. 1821.

Costs in a case cannot be attached by a creditor during the pendency of the case as belonging to the party, to the prejudice of the attorney. *Gauthier* v. *Lemieux*, 2 L. C. R. 273, S. C.

2. An attorney has a right to include in his bill of costs the taxation of the witnesses of his party, if he have obtained distraction of costs, and to exact payment of costs from the party condemned to pay them, and in default to take execution in his own name for the amount of the taxation. *Beauchêne* v. *Pacaud & Desprès & Leclerc*, 15 L. C. R. 193, S. C. 1865.

3. Costs were allowed defendant in an action on a promissory note upon proof that plaintiff agreed after the institution of the action to withdraw the same upon payment of the debt alone, although the debt was not paid at the rendering of the judgment, and under the circumstances plaintiff's attorney was not allowed *distraction de frais*. *Eastman* v. *Roland*, 2 L. C. L. J. 216, C. C. 1866.

4. A party who has succeeded in a cause may take execution for the costs *distraits* to his attorney, if it appear that he has paid such attorney, or that the attorney has abandoned such distraction, or has given a consent that execution should be sued out in his name. *Beauchêne* v. *Pacaud & Desprès & Leclerc*, 15 L. C. R. 193, S. C. 1865.

5. Where it appeared that the parties, plaintiff and defendant, had settled a case between them with a view to defrauding the plaintiff's attorney of his costs—*Held*, that the action would be dismissed with costs against the defendant. *Richards* v. *Ritchie et al.*, 6 L. C. R. 98, S. C. 1856.

6. If *distraction* of costs be not demanded when the judgment is pronounced it cannot afterwards be awarded without the presence of the parties. *Ireland* v. *Stephens*, 2 Rev. de Lég. 62 & 3 Rev. de Lég. 392, K. B. 1819.

7. Where the attorney has demanded *distraction* of costs by his action the parties cannot settle the costs between them. *Stiguy* v. *Stiguy*, 2 Rev. de Lég. 120, Q. B. 1842.

8. No distraction of costs can exist, or does take place, until ordered by a judgment of the court. *Hébert & La Fabrique St. Jean*, 13 L. C. R. 66, Q. B. 1861.

9. The attorney has not an incontestable right to distraction of costs unless he moves for it on or before the day on which judgment is given. After that, if he wants it, he must notify the other party who may set up a plea of compensation founded on a debt due by the client or party to the suit. *Latour* v. *Campbell*, 1 Legal News, 163, S. C. 1878.

10. Where a party has failed to stamp certain of his depositions, the prothonotary may refuse to draw, certify, or tax such party's bill of costs, while the depositions remain so unstamped. *Emond* v. *Blais*, 2 Q. L. R. 184, S. C. 1876.

11. An attorney conducting his own case is entitled to the usual fees. *Gugy & Brown*, 11 L. C. J. 141, 17 L. C. R. 33, 14 L. C. R. 213, 2 L. C. L. J. 222, P. C. 1866.

12. Payment of costs to an attorney who has not obtained distraction of costs, and who has no special authority to receive them, is nevertheless valid. *Young* v. *Baldwin*, 16 L. C. R. 70, S. C. 1865.

13. An attorney *ad litem* cannot recover costs from his client in a cause still pending. *Maloney* v. *Fitzgerald*, 3 Q. L. R. 381, C. C. 1877; *Atwell* v. *Browne*, 9 L. C. J. 155, Q. B. 1865.

14. An attorney who has been paid costs for which he has obtained distraction cannot be obliged to return them if the judgment under which he was paid is reversed in appeal. *Holton* v. *Andrews et al.*, 3 Q. L. R. 19, S. C. 1869.

15. The formality of a judgment declaring the case ended is not necessary to enable an attorney to recover costs against his client if it appear that the suit has been settled. *O'Farrell* v. *Reciprocity M. Co.*, 4 Q. L. R. 190, S. C. 1876.

# TITLE SECOND.

## OF REMEDIES AGAINST JUDGMENTS.

## CHAPTER FIRST.

### OF REVISION.

#### SECTION I.

#### OF THE REVISION OF JUDGMENTS BY DEFAULT.

**483.** The defendant may apply by petition, within a year and a day, for the revision of any judgment rendered against him by default, in the following cases:

1. In all cases of simple attachment, or attachment by garnishment, when the service has been effected under the provisions of article 68.

2. Whenever he has not been served personally or at his real domicile, or ordinary and actual place of residence. *C. S. L. C., c.* 83, *ss.* 111, 112.

**484.** The defendant may seek relief against any judgment rendered in conformity to the provisions of articles 89, 90, 91 or 92, by means of an opposition, made either before or after seizure, but before sale, or within ten days from the date of a return of *nulla bona*, if there is one, or within ten days from the service upon him of any seizure by garnishment, issued in virtue of such judgment. *Ibid.*, *ss.* 115, 116; 23 *V.*, *c.* 57, *ss.* 43, 46.

1. A defendant may file an opposition to a judgment rendered against him in vacation, even after the return of the writ of execution, if it do not appear by the return of the bailiff to the writ that a day has been fixed for the sale of the effects seized. *Martineau* v. *Cadoret*, 12 L. C. R. 423, S. C. 1862.

2. Where judgment was rendered against the defendant by default for a larger sum than was due, and the proper delay between service of summons and return was not allowed—*Held*, reversing the judgment of the court below, that the rule as to opposing judgments within eight days after service, is not law in Lower Canada, and that the defendant had the right, especially under the peculiar circumstances of the case, to file his opposition any time within thirty days after judgment. *Cushing* v. *Hunter, & The Eastern Townships Bank & Hunter & Cushing*, 1 L. C. L. J. 114, S. C. R. 1866.

3. When the *procès-verbal* of *nulla bona* was neither returned nor filed, and the judgment was rendered under art. 89 *et seq.* of the Code of Procedure—*Held*, that the defendant might validly oppose the sale of the effects seized by simple opposition, without even an order from the judge or court. *Leprohon* v. *Crebassa & Crebassa*, 14 L. C. J. 159, S. C. R. 1869.

4. An opposition to a judgment made after ten days from the return of *nulla bona*, but before the sale of immoveables, will be rejected on motion. *Shepherd* v. *Morin & Morin*, 5 R. L. 245, C. C. 1873.

5. One cannot proceed by an opposition against a judgment rendered in term by the Circuit Court, and such opposition will be dismissed on simple motion. *Bowie & Murray & Murray*, 4 R. L. 566, C. C. 1872; *& Lareau et al.* v. *Archambault*, 6 R. L. 348 & 19 L. C. J. 56, C. C. 1874; *Parisseau* v. *Grenier & Grenier*, 17 L. C. J. 177, C. C. 1874.

6. And an opposition to a judgment rendered on the evidence of the plaintiff during term by the Circuit Court will be rejected on simple motion. *Lord* v. *Bazinet et al. & Bazinet et al.*, 18 L. C. J. 9, S. C. 1874.

**485.** The petition for revision mentioned in article 483, and the opposition mentioned in article 484, must contain, on pain of nullity, all grounds whether in support of such petition or opposition, or against the judgment, with an election of a domicile within one mile from the place where the court is held, and be accompanied by all documents in support of it. *C. S. L C. c.* 83, *s.* 116.

**486.** The petition or opposition must, moreover, be accompanied with an affidavit of the defendant, or of one of the defendants, or of some other credible person, that the allegations contained in such petition or opposition are, to his knowledge, true; and, in the case of article 484, a sufficient sum must be deposited with the prothonotary to meet the costs incurred after the return of the writ up to the judgment, including the service thereof; which costs must be paid to the plaintiff as soon as they are taxed, out of the sum so deposited. *Ibid.*, s. 117.

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FORM NO. **33**.

In connection with article 486.

*Affidavit of an Opposant or of some other person.*

Lower Canada, District (*or* Circuit) of } In the Superior (*or* Circuit) Court.

A. B., Plaintiff, *vs.* C. D., Defendant,
and
G. H. Opposant.

G. H., of , the opposant, (*or* one of the opposants in this cause, (*or other person, as the case may be*) being duly sworn doth depose and say, that the facts articulated and set forth in the annexed opposition, and each and every of them, is and are true; and that the said opposition is not made with any intent unjustly to retard or delay the execution of the judgment recorded in this cause, but that the same is made in good faith for the sole purpose of obtaining justice, and the said deponent hath signed (*or* hath declared himself unable to sign, being thereunto duly required).

*Signature,* G. H.

Sworn before me, at , this day of , 18 .

J. P.
*Signature of the Judge, Prothonotary, Clerk or Commissioner.*

1. Where the defendant sought to set aside a judgment obtained in vacation—*Held*, that he was bound to deposit only the amount of costs incurred by the plaintiff after the return of the action up to obtaining judgment inclusively, and that without the fees of the plaintiff's attorney, and that he was not bound to furnish to the plaintiff a copy of the affidavit filed with his opposition. *Gauthier* v. *Marchand*, 5 L. C. J. 101, S. C. 1861.

2. The omission to deposit with an opposition to a judgment a sufficient sum to pay the costs incurred by the plaintiff from the return of the writ is not a sufficient cause for the rejection of the opposition. *Venner* v. *Lamontagne & Lamontagne*, 15 L. C. R. 49, C. C. 1864.

3. The affidavit accompanying an opposition to a judgment must set forth that the facts therein stated are true "to the knowledge of the deponent." *Shepherd* v. *Morrin & Morrin*, 5 R. L. 245, C. C. 1872.

4. And where an opposition to a judgment by default was filed by the defendants on the sole ground that one of them had been summoned by a wrong name—*Held*, that such an opposition was in the nature of a preliminary exception to the action, and must consequently be accompanied by the deposits for costs required in such cases, in addition to that required by article 486. *Jubinville & The Bank of British North America*, 18 L. C. J. 237, Q. B. 1874.

**487.** The opposition mentioned in article 484 is filed in the prothonotary's office; but the prothonotary must not receive it unless a copy thereof is at the same time left for the plaintiff. *Ibid. s.* 118.

**488.** The filing of such opposition has the effect of suspending the sale under the seizure until it is decided by the court. The prothonotary must grant a certificate in duplicate of the filing of the opposition mentioned in the preceding article; and one of the duplicates must be given to the officer making the seizure, who must give a receipt therefor, in default of which it is served upon him at his own cost. The officer is thereupon bound to stay his proceedings, and to return into court the writ of execution and the certificate which he has received. *Ibid. s.* 115, § 3.

**489.** If the opposition is filed before the issuing of a writ of execution, notice of the filing thereof must be given to the plaintiff, and the delays for contesting the same are computed from the date of the service of such notice. *Ibid.* *s.* 116.

**490.** The petition for revision, and the opposition, are held to form part of the proceedings upon the original suit, and to be a defence to the action, and as such are subject to the provisions concerning the contestation of ordinary suits. *Ibid.*, *ss.* 116, § 3,—119, 120.

**491.** If the opposition is maintained, in whole or in part, the costs incurred upon the execution are borne by the plaintiff. *Ibid.*, § 123.

**492.** If the opposition is maintained by reason of any irregularity in the proceedings of the plaintiff, the court, in maintaining the opposition with costs, may condemn him to such further costs as it may think fit, but not exceeding in amount the sum deposited by the defendant. *Ibid.*, *s.* 124.

**493.** If no opposition is made to a judgment rendered in vacation, the allegations of the declaration are held to be admitted and proved. *Ibid.*, *s.* 122.

## SECTION II.

## OF REVIEW BEFORE THREE JUDGES.

**494.** *A review may be had:*

1. *Upon every final judgment from which an appeal lies;*
2. *Upon every interlocutory judgment ordering something to be done that cannot be remedied by the final judgment;*
3. *Upon every interlocutory judgment, whereby the matter in contestation is in part decided;*

4. *Upon every interlocutory judgment which unnecessarily retards the final hearing or decision of the case;*

5. [*Upon every judgment or order rendered by a judge in summary matters, under the provisions contained in the third part of this code.*]

27-28 V., c. 39, *s.* 20.

34 Vict., c. 4 *(Que.):*

5. "Article 494 is hereby repealed, and the following Article is substituted in lieu thereof:

494. A review may be had:

1. Upon every final judgment from which an appeal lies;

2. Upon every judgment or order rendered by a judge in summary matters under the provisions contained in the third part of this code;

3. Upon any judgment rendered on any petition or motion to set aside or quash an attachment before judgment or *capias ad respondendum.*

10. The judges of the Superior Court, at their sittings in review, shall also have exclusive original jurisdiction to hear and determine all motions for judgment upon a verdict, or for new trial, or for judgment *non obstante veredicto* or in arrest of judgment, in cases in the Superior Court, in the districts of Quebec and Montreal."

See 35 *Vict.*, c. 6, *s.* 13 (*Que.*), under Art. 423 *ante.*

37 Vict., c. 6, *(Que.):*

1. "No person who shall have inscribed in review before three judges, any cause in the Circuit Court susceptible of appeal to the Court of Queen's Bench, or any cause in the Superior Court, and shall on such inscription have proceeded to judgment, shall be entitled to appeal to the Court of Queen's Bench from the judgment of the Superior Court sitting in review, if such judgment confirms that rendered in the first instance.

2. Causes adjudicated upon in review, which are susceptible of appeal to Her Majesty in her Privy Council, but the appeal whereof to the Court of Queen's Bench is taken away by this Act, may nevertheless be appealed to Her Majesty by observing the same formalities and provisions and subject to the same conditions, as in the case of judgments rendered by the Court of Queen's Bench (appeal side), and with the same effect, as if every provision of law, in relation to appeal to Her Majesty from judgments of the Court of Queen's Bench was anew enacted with respect to the Superior Court sitting in review, its officers or their office."

3. Repeals 36 Vict., c. 12 *(Que.).*

1. A judgment maintaining a demurrer to part of a declaration is an interlocutory judgmont, and cannot be revised by three judges in review. *Lottinville* v. *McGrcevy*, 4 Q. L. R. 242, S. C. R. 1878.

2. The decision of a judge out of term upon a *contrainte par corps* is susceptible of being reviewed. An error in the date of the writ is not fatal. *Nolan* v. *Dastous*, 4 Q. L. R. 335, S. C. R. 1878.

3. A writ of prohibition issued to prevent a judgment by the Court of Quarter-Sessions in the matter of an infraction of the License Act. The judgment of the Superior Court was confirmed in review, and the magistrate who resisted the prohibition was refused the right to appeal as there was *chose jugée* between tho parties, although it was not he who had inscribed in review. *Doucet & St. Amand*, 4 Q. L. R. 146, Q. B. 1878.

4. A judgment rendered in the C. C. under the provisions of Art. 698 *et seq.* of the Municipal Code is subject to appeal, and consequently to be reviewed. *McLaren & The Corporation of the T. of Buckingham*, 17 L. C. J. 53, S. C. R. 1872.

5. The Superior Court has no jurisdiction in revision of a judgment which is not appealable. *Taylor* v. *Mullen*, 11 L. C. J. 48, & 17 L. C. R. 397, S. C. R. 1866.

6. The Court of Review cannot afford relief against a condemnation to costs in the court below. *Macdonald et al.* v. *Molleur*, 13 L. C. J. 189, S. C. R. 1868.

7. An inscription for review in an action under the Lessor and Lessee Act, in which the amount of rent or annual value does not show any jurisdiction, will on motion of the respondent be discharged. *Robinson et al.* v. *Watson es qual.* 12 L. C. J. 215, S. C. R. 1868.

8. The Court of Review has no jurisdiction in revision of an interlocutory judgment which is not appealable. *Beaudry* v. *Workman*, 12 L. C. J. 219, S. C. R. 1868.

9. The Court of Review has no jurisdiction to revise the taxation of a bill of costs in revision. *Belleisle* v. *Lyman et al.* 14 L. C. J. 137, S. C. R. 1870.

10. The Court of Review has no jurisdiction to hear an appeal from an order of a judge in chambers, empowering a married woman to borrow a sum of money on the security of her real estate without the consent of her husband. *Dufaux exp. & Robillard*, 20 L. C. J. 305, S. C. R. 1876.

11. The plaintiff whose action has been dismissed *sans recours* may in

revision seek that it be dismissed only *sauf à se pourvoir*. *Pillar et al.* v. *Larue*, 3 R. L. 704, S. C. R. 1871.

12. In matters pertaining to municipal corporations there is no appeal from the Superior Court to the Court of Review. *Beaudry & Workman*, 12 L. C. J. 214, S. C. R. 1868; *Fiset* v. *Fournier*, 3 Q. L. R. 334, S. C. R. 1877.

13. A judgment homologating a report of distribution may be inscribed for revision or appealed from even when no contestation has been filed. *Eastern Township Bank & Pacaud*, 17 L. C. R. 126, 9 L. C. J. 156, 2 L. C. L. J. 270, S. C. & Q. B. 1866.

14. A party may inscribe in Review from a judgment rendered on a writ of *habeas corpus* by a Judge in Chambers. *Reg.* v. *Hull*, 3 Q. L. R. 136, S. C. R. 1876.

15. No right of revision exists in favour of the Crown when the right of appeal is denied by law. *The Atty.-Gen.* v. *The Corporation of the Co. of Compton*, 15 L. C. J. 258, S. C. R. 1871.

16. No personal action in which the amount demanded exceeds $500 can be brought to review under 36 V. c. 12 (Que.), which is an amendment of Art. 494, although such article is not expressly designated as required by the Act 31 V. c. 7, s. 10 (Que.). *Gibson et al.* v. *Lindsay*, 17 L. C. J. 244, S. C. R. 1873.

17. When the amount of a judgment does not exceed $100 and the creditor acquiesces in the judgment, there is no right of revision, although the amount demanded may have exceeded that amount. *Lefebvre* v. *Murdoch*, 13 L. C. J. 328, S. C. R. 1869.

**495**. *The review takes place before three judges of the Superior Court, and the judge who rendered the judgment complained of may be one of them.*

*Ibid.*, *ss.* 20-25.

36 Vict., c. 10, *(Que.)*:

8. Art. 495 is repealed, and the following substituted therefor:

495. "This revision takes place before three judges of the Superior Court, and the judge who has rendered the judgment complained of, cannot sit at the same."

**496**. The review of judgments rendered in the districts of Montreal, Ottawa, Terrebonne, Joliette, Richelieu, St. Francis, Bedford, St. Hyacinth, Iberville and Beauhar-

nois, takes place at the city of Montreal; that of judgments rendered in the districts of Quebec, Three Rivers, Saguenay, Chicoutimi, Gaspe,. Rimouski, Kamouraska, Montmagny, Beauce and Arthabaska, at the city of Quebec. *Ibid.*, *s.* 26.

**497.** This review cannot be obtained until the party demanding it has deposited, in the office of the prothonotary of the court which rendered the judgment, and within eight days from the date of such judgment, a sum of twenty dollars, if the amount of the suit does not exceed four hundred dollars; or of forty dollars if the amount of the suit exceeds four hundred dollars, or if it be a real action; together with an additional sum of three dollars for making up and transmitting the record, when the judgment has been rendered elsewhere than in the cities of Quebec and of Montreal.

The amount thus deposited is intended to pay the costs of the review incurred by the opposite party, if the court should grant them, if not, it is returned to the party by whom it was deposited. *Ibid.*, *s.* 21.

See 34 *Vict.*, *c.* 4, *s.* 4 (*Que.*), under Art. 463 supra.

1. The court will not order the prothonotary to refund a deposit of $40 made by a party to whom the deposit has been refunded on his succeeding in review, although the judgment in review be reversed, and the judgment reviewed be re-established in its entirety. *Reg. ex rel.* v. *O'Farrell & Brassard et al.*, 4 Q. L. R. 93, S. C. 1878.

2. When the delay for inscribing a case for review would expire on a Sunday it is prolonged until the next juridical day. *Scatcherd & Allan*, 1 L. C. L. J. 96, S. C. R. 1865; *Lenoir* v. *Desmarais et vir*, 17 L. C. J. 81, S. C. R. 1872.

3. The delay of eight days mentioned in art. 497, runs during the long vacation. *Fournier & Ledoux*, 13 L. C. J. 332, S. C. R. 1869.

4. An inscription for review and deposit made on the eighth day after judgment is sufficient, though notice of them be only given on the following day. *Jacques* v. *Lussier*, 12 L. C. J. 215, S. C. R. 1868.

5. In an inscription for review by the Superior Court it is not necessary to say "by three judges of the Superior Court." *McLaren* v. *The*

*Corporation of the Township of Buckingham*, 17 L. C. J. 53, S. C. R. 1872.

6. Where an inscription has been discharged on application of the opposing party in the absence of the inscribing party—*Held*, that it may be replaced on the role during the same term and before the actual remission of the record on sufficient cause shewn. *Sheppard* v. *Buchanan*, 17 L. C. J. 191, S. C. R. 1873.

7. Where an inscription for review ran "from the judgment rendered in this cause by the Superior Court," and the judgment was actually rendered by the Circuit Court—*Held*, that the inscription must be discharged, and could not be amended on motion. *McPherson et al. & Barthe*, 5 R. L. 259, S. C. R. 1873.

8. When application was made to oblige the prothonotary to receive the inscription without a deposit by consent of the other party, it was refused on the ground that the prothonotary was liable for the deposit as the law says it must be made. *Loiselle* v. *Loiselle*, 2. L. C. L. J. 37, S. C. R. 1866.

9. One inscription and one deposit in review by the defendant and incidental plaintiff is sufficient. *Clement* v. *Blouin*, 16 L. C. J. 156, S. C. R. 1872; *Morrison* v. *Wilson*, 16 L. C. J. 196, S. C. R. 1872.

10. Where two defendants have raised separate contestations in the Superior Court, and in review made one inscription and one deposit—*Held*, that, on plaintiff's motion, a double deposit under 497, C. C. P. would be ordered. *Leavitt* v. *Moss et al.* 16 L. C. J. 156, S. C. R. 1872.

11. When several defendants have severed in their defence in the first court, and intend to go to review, the party demanding revision is bound to make as many deposits as there are contestations. *Lacombe* v. *Ste. Marie et al.* 15 L. C. J. 268, S. C. R. 1871.

12. Where a case is inscribed for review from the Circuit Court, under the provisions of the Municipal Code, a deposit of $20 is sufficient. *McLaren* v. *The Corporation of the Township of Buckingham*, 17 L. C. J. 53, S. C. R. 1872.

13. In a hypothecary action, the amount of which does not exceed $400, the deposit required on an inscription for review is only $20. *Forsyth et al.* v. *Charlebois*, 13 L. C. J. 328, S. C. R. 1869.

14. The inscribing party is entitled to withdraw his deposit so soon as the judgment has been reversed in his favour. *Bousquet* v. *Brown*, 1 Legal News, 554, S. C. 1878.

15. The deposit will not be paid over to the successful party when an appeal is taken from the decision in review. *Ryland* v. *Routh*, 2 L. C. L. J. 44, S. C. 1866.

**498**. As soon as the necessary deposit has been made, and not before, the party may file, in the same office, an inscription for review, notice of which must be given to the opposite party, and the prothonotary is then bound to transmit the record, without delay, together with a copy of the judgments and orders rendered in the case, to the prothonotary of the Superior Court at the place where the case is to be heard, if it is not there already. *Ibid. ss.* 21-23.

1. *Held*, that it was not necessary for the party to tell the court that he was aggrieved, the fact of his being aggrieved being sufficiently shown by his asking for a revision of the judgment. *Harte* v. *Alie & Harte*, 1 L. C. L. J. 64, S. C. R. 1865.

2. An inscription for review may be served upon a party personally or at his attorney's office. *Duvernay & The Corporation of Barthélémie*, 1 R. L. 714, Q. B. 1868. *Scatcherd* v. *Allan*, 10 L. C. J. 201, S. C. R. 1865.

3. A case may be inscribed for revision by an advocate other than the attorney of record, and that without substitution. *Desrosiers* v. *Macdonald*, 3 R. L. 445, S. C. R. 1871.

4. A party who inscribes in review and makes the required deposit within eight days, is not bound to give notice thereof within the same delay, the law not determining within what time such formality is to be observed. *Lewis* v. *Levis & Kennebec R. R. Co.* 3 Q. L. R. 372, S. C. R. 1877. *Sed vide sup.* art. 462.

**499**. The deposit and inscription have the effect of staying the execution of the judgment and the appeal. *Ibid.*, *s.* 22.

1. While a case is before the Court of Review, for the purpose of obtaining the revision of a judgment of the Superior Court, no proceeding in the case can be had in the Superior Court. *Meigs et al.* v. *Aiken*, 14 L. C. J. 84, C. S. 1869.

**500**. The inscription need not be for any particular day, but the case must be heard, in its order, on the day in term

next after the expiration of a delay of eight days from the day on which the notice of inscription was filed in the office of the prothonotary of the court in which the judgment was rendered.

The court may appoint special days for such review. *Ibid.*, *ss.* 20, 24.

See *supra* 34 *Vict.*, *c.* 4, *s.* 4 (*Que.*), under Art. 463.

1. A defendant under bail in a case of capias, and being the party inscribing in review, has a right to have his case heard as a privileged one. *Toland* v. *Spencer*, 15 L. C. J. 145, S. C. R. 1871.

**501**. The prothonotary to whom the record is transmitted is bound, so soon as he has received it, to set down the case on the roll for hearing, and if the case be pending in the Superior Court at Quebec or Montreal, he is bound to place it on the roll as soon as the inscription and notice are filed. *Ibid.*, *s.* 23.

1. Where a party in a case has asked for revision, and has made the deposit required by law, the prothonotary is bound to put it on the role, notwithstanding that the other party is in default to pay the fees and tax required of him. *Leprohon* v. *Crebassa*, 14 L. C. J. 55, S. C. R. 1869.

2. Where the inscribing party fails to file a factum as required by the rules of practice, and to show cause why the inscription should not be dismissed, the case will be remitted to the court below. *Ellis* v. *Gould*, 16 L. C. R. 168, S. C. R.

**502**. The judgment in review may be rendered in term or in vacation, by all the judges who heard the case, or by a majority of them; and the judges may confirm, reverse or alter the original judgment, as the case may require; and their decision, together with the record, must be sent back to the court in which the case was first decided, to be there registered as being the judgment in the suit, at the same place, in the same manner and with the same effect as if it had been rendered on the day upon which it was received by the prothonotary.

[Whenever any cause has been heard in review by three judges, and at the least one of the judges who heard the same is present in court and ready to render an interlocutory or final judgment therein, then if any judge who heard the cause and would be competent to sit in judgment therein, be absent by reason of his appointment to another court, of sickness, or any other cause, but has addressed a letter to the prothonotary of the court, containing his decision in the case and signed by him, or has, in testimony of his concurrence therein, signed a judgment to be delivered and delivered by a judge so present, such judge is deemed to be present for the purpose of such judgment; and the decision so transmitted and signed by him has the same effect as if delivered or concurred in by him in open court.] *Ibid. s.* 25.

1. The Court of Review may send a case back to the Court below in order that the *serment supplétoire* may be deferred. *The Canadian Navigation Co. & McConkey*, 7 Legal News, 23, Q. B., 1877.

**503.** [No change in the personal composition of the court, by the appointment of any assistant judge as puisne judge, or by the appointment of a puisne judge as chief-justice, or by the resignation, death, or appointment to another court of any chief-justice or of a puisne judge, or of an assistant judge, can have alone the effect of rendering a rehearing of any case necessary, if a sufficient number of judges who heard the case remain to render a judgment, either interlocutory or final.]

**504.** [If a judge or an assistant judge, who has heard a case, together with other judges, is removed to another court, or is appointed Chief-Justice or a Judge of the same Court or of another Court or obtains leave of absence, he may render judgment, whether interlocutory or final, together with the other judges, as if no such change had taken place.]

## CHAPTER SECOND.

### OF PETITIONS IN REVOCATION OF JUDGMENT.

**505.** Judgments which are not susceptible of being appealed from or opposed, as hereinabove provided, may be revoked, upon a petition presented to the same court, by any person who was a party to or was summoned to be a party to the suit, in the following cases:

1. Where fraud or artifice has been made use of by the opposite party;

2. When they have been rendered upon documents which have been only subsequently discovered to be false, or upon any unauthorized tender or consent disavowed after judgment;

3. When, since they were rendered, documents of a conclusive nature have been discovered, which had been withheld or concealed by the opposite party. *Ord.* 1667, *tit.* 35, *art.* 34; *Pothier, Proc.* 153; *C. S. L C. c.* 86, § 3; *C. N.* 2057; *C. P. C,* 480.

1. A direct action may be maintained to set aside a judgment obtained by fraud. *Kellond* v. *Read,* 18 L. C. J. 309, Q. B. 1874.

2. If a party has been precluded from adducing important evidence owing to a misunderstanding between his attorneys and the attorneys of his adversary, he may be released from the consequences by filing a *requête civile. Lusk et al. in re & Riddell* v. *Ross,* 19 L. C. J. 104, S. C. 1874.

3. It is only by means of a *requête civile* or of an appeal, as the case may be, and not by means of an opposition *à fin d'annuller* that the reformation or setting aside of an interlocutory judgment can be obtained. *Gibsone & Jamieson et vir. & Healey,* 16 L. C. R. 351, C. C. 1866.

4. An affidavit in support of a *requête civile* cannot be amended but the petition itself may be amended as no affidavit is necessary in support thereof. *Voligny* v. *Corbeille & Corbeille,* 1 Legal News, 130, S. C. 1878.

5. A *requête civile* which does not on its face come within the provisions of art. 505 may be rejected on motion. *Macdougall et al.* v. *The Union Nav. Co.*, 21 L. C. J. 63, 1 Legal News, 213, Q. B.

6. A *requête civile* praying for a revocation of a judgment of distribution on account of fraud will be granted, and the petitioner allowed to contest the report of collocation. *Doutre et al.* v. *Bradley et al. & Allison et vir.*, 17 L. C. J. 42, S. C. R. 1873.

7. Where a firm of two advocates had appeared for the plaintiff and taken action, and subsequently the action was returned signed by one of them only, while the other appeared for the defendant and confessed judgment—*Held*, on a motion to set aside the judgment as based on proceedings which were wholly irregular, that the judgment could not be set aside for irregularities which had accrued previous to judgment having been entered. *Molson et al. & Burroughs*, 2 L. C. J. 107, S. C. 1858.

**506.** It can be received only during the six months after the discovery of the fraud or the falsity, or of the documents withheld, and in all other cases only during the six months after the judgment, or a notice thereof has been served.

*Ord.* 1667, *tit.* 35, *Arts.* 16, 5, 18.

1. A *requête civile* after judgment may be served upon the attorney in the case. *Lang* v. *Clark & Clark*, 20 L. C. J. 184, S. C. 1876.

**507.** Petitions for revocation of judgment cannot prevent or stay execution, [unless an order to suspend is granted by the court or judge.]

**508.** The attorney who acted for a party in the cause or suit may also represent him upon the petition in revocation of judgment, without a new power being required. *Ord.* 1667, *tit.* 35, *Art.* 6.

**509.** If there are sufficient grounds for a petition in revocation of judgment, the court may replace the parties in the same position as they were in before the judgment, and the proceedings are the same as in ordinary suits. The court may also give judgment at the same time upon the petition

and upon the merits of the original suit. In all cases it adjudicates upon the costs of the first judgment, according to circumstances. *Ord.* 1667, *tit.* 35, *Art.* 33; *Décl. de Mars*, 1685.

1. A *requête civile* may be granted by the prothonotary in vacation in the absence of the judge. *Lambert* v. *Saucier*, 1 R. L. 47, C. S. 1867.

2. A motion to reject the *requête* on the ground that the reasons alleged in support thereof are insufficient will be rejected, the proper procedure being a demurrer. Ib.

3. Reasons that might be urged against an action or opposition by an exception to the form may be opposed to a petition by a motion to set aside. *Maguire* v. *Stride & Stride*, 14 L. C. R. 105, S. C. 1864.

4. A petition will not lie if a right of appeal exists. *Valin* v. *The Corporation of the County of Terrebonne*, 4 L. C. J. 14, S. C. 1858.

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## CHAPTER THIRD.

### OF OPPOSITIONS BY THIRD PARTIES.

**510.** Any person whose interests are affected by a judgment rendered in a case in which neither he nor persons representing him were made parties, may file an opposition to such judgment.

*Décl.* 22 *April* 1732, *Art.* 5; *Code, Donations, Art.* 213 *a*; *Pothier, Proc.* 126; *Ord.* 1667, *tit.* 35, *Art.* 2; *C. P. C.* 474.

1. A person whose interests are affected by a judgment in a case to which he is not a party, may intervene by opposition to such judgment or by direct action with a view to be maintained in all his rights. *Thouin & Leblanc*, 10 L. C. R. 370, Q. B. 1860.

2. From the moment that the interests of a third party are affected

by a judgment rendered in a case in which he is not a party he may protect his interests by an opposition. *Molleur* v. *Marchand & The Attorney General*, 5 R. L. 379, S. C. 1874.

3. And where the Crown possesses a privilege on the property of an individual it may exercise its privilege by such opposition, provided it be first regularly served on all the parties in the case. Ib.

4. An opposition to a sale of real estate by a tutor *ad hoc*, authorized to act for the minors, is maintainable without registration of the *acte* of tutorship and the Registry Ordinance 4 Vic. cap. 30, sec. 24, does not apply to such opposition. *Chouinard* v. *Demers & Gareau es qual.* 5 L. C. R. 401, S. C. 1855.

5. The fact that one of the *tiers opposants* (who claim as co-partners) is a defendant in the cause, is no bar to their right to file an opposition. *McDonald et vir* v. *McDonald & Dodds*, 14 L. C. J. 307, S. C. R. 1869.

6. The proprietor of a property which has been expropriated, and the valuation of which has been set aside by the court, cannot proceed by opposition against such judgment, notwithstanding that he was not a party to the first instance. *The Corporation of Montreal & Wilson*, 2 R. L. 624, S. C. 1870.

7. The notice given to the parties of a petition for an opposition by third parties, in order to suspend the execution of the judgment, does not constitute of itself the production and presentation of an opposition. *Molleur* v. *Marchand & The Attorney General*, 5 R. L., 379, S. C. 1874.

8. Where payment of an amount of a judgment attacked by opposition is made by the defendant before an order has been granted to suspend the execution, it must be considered as final, both as regards the opposant and the other parties therein. *Molleur* v. *Marchand & The Attorney General*, 5 R. L. 379, S. C. 1874.

**511.** This opposition is formed by means of a petition to the court, which must contain an election of domicile on pain of nullity, the grounds of opposition, and proper conclusions, and must be served upon the parties in the cause, or upon the attorneys who represented them, if it is made within a year and a day after the judgment.

35 Vict. c. 6 (*Que.*).

"14. The opposition must, moreover, on pain of nullity, be accom-

panied with an affidavit of the opposant, or of some other credible person, that the allegations contained in such opposition, are, to the best of his knowledge, true."

**512.** The proceedings upon oppositions by third parties are the same as upon ordinary suits.

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## CHAPTER FOURTH.

### OF APPEALS.[1]

**513.** An appeal from all judgments rendered by the Superior Court lies to the Court of Queen's Bench, as hereinafter provided in the fourth book.

*See arts.* 1114 *et seq. infra.*

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# TITLE THIRD.

## OF THE EXECUTION OF JUDGMENTS.

## CHAPTER FIRST.

### OF THE VOLUNTARY EXECUTION OF JUDGMENTS.

#### SECTION I.

#### OF PUTTING IN SECURITY.

**514.** Every judgment ordering security to be given must fix the time within which sureties shall be offered. *C. P. C.* 517.

**515.** Sureties are offered after notice served upon the opposite party, and, when not objected to, they enter into a bond at the prothonotary's office. *Ord.* 1667, *tit.* 28, *art.* 2; *Pothier, Proc.* 147; *C. P. C.* 518.

31 Vict. c. 7 (*Que.*).

"1, § 24: The word "security" means sufficient security, and one surety is sufficient therefor, unless two or more are expressly required."

**516.** Except in cases where the law requires only personal justification, if a surety is objected to he may be required to give in a declaration of his real property, together with his titles thereto.

Sureties may, in all cases, be required to justify on oath their sufficiency, and the judge or prothonotary may receive and administer the necessary oath. *Ord.* 1667, *tit.* 28, *art.* 3; *C. P. C.* 518.

**517**. A surety may be objected to:

1. If he has not the qualifications required according to the title *Of Suretyship* in the Civil Code;

2. If he is not sufficient. *Pothier, Proc.* 148.

**518**. The sufficiency of a surety is decided upon the documents and affidavits produced, without a proof being ordered. *Ord.* 1667, *tit.* 28, *art.* 3; *Pothier, Proc.* 148, *C. P. C.* 521.

**519**. If the surety is accepted, the bond is drawn up and entered into in conformity with the judgment, and remains in the prothonotary's office as part of the record in the case. *Ord.* 1667, *tit.* 28, *art.* 4; *C. P. C.* 522.

**520**. The acceptance of sureties is decided upon summarily, without any petition or writings, and the bond is entered into notwithstanding oppositions or appeals, and without prejudice thereto. *Ord.* 1667, *tit.* 28, *art.* 3; *Pothier, Proc.* 148, *C. P. C.* 521.

## SECTION II.

## OF ACCOUNTING.

**521**. Every judgment ordering an account must fix a delay for rendering it. *Ord.* 1667, *tit.* 28, *art.* 8; *Pothier. Proc.* 89; *C. P. C.* 530.

**522**. The account must be rendered nominately to the party entitled to it: it must be sworn to and filed in the prothonotary's office within the delay fixed, together with the vouchers in support thereof. *Ord.* 1667, *tit.* 29, *art.* 8; *Pothier, Proc.* 89, *C. P. C.* 534.

The court may, however, upon motion of which notice has been duly given, extend the delay for rendering the account. *Pothier, Proc.* 89.

**523.** The account must contain, under separate heads, the receipts and expenditure, and close with a recapitulation of such receipts and expenditure, establishing the balance; whatever remains to be recovered being reserved for a separate head. *Ord.* 1667, *tit.* 29, *art.* 7; *C. P. C.* 533.

1. An account rendered and fyled under a judgment will be rejected as irregular if it does not exhibit the three heads of receipts, expenditure, and balance remaining to be recovered. *Les Curé &c. de Beauharnois* v. *Robillard*, 21 L. C. J. 122, S. C. 1877.

**524.** Under the head of receipts must be placed all sums which the accounting party has received, and all those that he ought to have received during his management. *Pothier, Proc.* 90.

**525.** The accounting party cannot place under the head of expenditure the costs of the judgment ordering him to account, unless he is authorized to do so by the court; but he may charge under that head his travelling expenses, the attendances of the attorney who made up the account, the cost of presenting and verifying it, and of whatever copies thereof are required. *Ord.* 1667, *tit.* 29, *art.* 19; *C. P. C.* 532.

1. In an action to account, an account unsustained by vouchers will not be rejected on motion when it is established by affidavit that the vouchers are in the possession of third parties. *Chevalier* v. *Cuvillier et al.* 21 L. C. J. 308, S. C. 1877.

**526.** If the account shows an excess of receipts over expenditure, the party to whom it is rendered may provisionally demand execution for the balance, saving his right to contest the remainder of the account. *David* v. *Hayes, Montreal, 29th July*, 1846, *in appeal* 10*th Nov.*, 1847; *C. P. C.*, 535.

**527.** Parties accounted to are bound to take communication of the account and vouchers at the prothonotary's office, and to file their contestations of the account, if they

contest it, within a delay of fifteen days, which may be extended by the court or a judge upon application pursuant to notice. *Ord.* 1667, *tit.* 29, *art.* 13; *Poth. Proc.* 91.

**528.** Parties accounted to, whose interests are the same, must name the same attorney; if they do not agree in their choice, the attorney first in the case remains attorney of record, saving the right of the other parties accounted to to employ attorneys of their own, upon payment of all costs occasioned thereby. *Ord.* 1667, *tit.* 29, *art.* 11; *C. P. C.* 529.

**529.** The accounting party has a delay of eight days after the filing of the contestation to file his answers in support of the account, and the other party has a similar delay to file his replications. *Ord.* 1667, *tit.* 29, *art.* 13; *Poth. Proc.* 91.

**530.** In default of filing the contestations, answers or replications within the delay, the party bound to file them is held to admit whatever is contained in the document he fails to contest. *Pothier. loc. cit.*

**531.** After the issues are completed upon the account rendered, the court may order the parties to proof respectively, according to the ordinary course, or may refer the case for settlement to arbitrators, or to a practitioner or an accountant, according to its nature. *Ord.* 1667, *tit.* 28, *art.* 22; *Ord.* 1566, *art.* 83; *Edit* 1560, *art.* 2; 1 *Pig.* 248.

**532.** The judgment upon the account must contain a computation of the receipts and expenditure, and establish the balance if there be any. *Ord.* 1667, *tit.* 29, *art.* 20; *C. P. C.* 540.

**533.** If the defendant fails to render an account, the plaintiff may proceed to have one made out in the manner mentioned in the article 523.

## SECTION III.

### OF SURRENDER.

**534.** The voluntary execution of any judgment ordering the restitution and delivery of any moveable or immoveable thing is effected, unless the judgment makes other provisions, by delivering the moveable object, and surrendering the possession of the immoveable, in such a manner that the party entitled thereto may take possession of it; and this must be done in conformity with the judgment, and the provisions contained in the title *Of Obligations* in the Civil Code. *Pothier, Proc.* 149.

1. Where a motion was made to reject a *délaissement* filed after the fifteen days allowed by law—*Held* to be premature, and that the plaintiff should proceed with his execution and test the matter in that way. *Bélanger* v. *Durocher*, 2 L. C. J. 283, S. C. 1858.

**535.** The voluntary execution of a judgment ordering the surrender of an hypothecated immoveable, is effected by means of a declaration of the defendant, filed in the prothonotary's office, to the effect that he surrenders it in compliance with the judgment and by his relinquishing his possession. 1 *Pig.* 594; *Pothier, Proc.* 149; *Ord.* 1667, *tit.* 27, *art.* 1.

**536.** When an immoveable is thus surrendered, the court or judge, upon application of the plaintiff, names a curator to the surrender, against whom all ulterior proceedings are directed. *Pothier, Proc.* 185.

**537.** The curator has a right to collect the rents, issues and profits due and accrued from the time of the surrender, and may even grant leases if the sale is prevented during any considerable time.

The rents, issues and profits of the immoveable surrendered are treated as realty, and are distributed in the same

manner as the price. *Stowe & Richer, appeal*, 1848; *Pothier, Proc.* 193; *Couchot*, 139.

## SECTION IV.

### OF TENDER GENERALLY AND PAYMENT INTO COURT.

**538.** A tender, or a putting in default to accept, must describe the object offered; and if it be of money, it must contain an enumeration and description thereof. *C. P. C.* 812.

**539.** Tender may be made by an authentic document, or in any other manner which admits of its being legally proved.

Tender may be made in a suit by demanding record thereof, and must be accompanied with payment into court. 1 *Pig.* 435.

1. Where the defendant to an action for the balance of the price of a ba[illegible]etween him and the plaintiff pleaded notarial tender of the amount—*Held*, that the deed of tender should specify and enumerate the different kinds and species of money offered, and, in default of doing so, the tender was null. *Perras* v. *Beaudin*, 6 L. C. J. 241, S. C. 1862.

**540.** Tender may be made at the domicile elected in a contract. *Ibid.*, 2 *Pig.* 135.

**541.** The authentic document recording the tender, if there is one, must state the answer made by the creditor, or the person representing him, the fact of his being called upon to sign such answer, and in default of his signature, the reason why it was not signed. *Ibid.*, *C. P. C.* 813.

**542.** A debtor who has made a tender and is afterwards sued, may renew it by his pleadings and pay the amount into court. *C. C.*, *art.* 1162.

1. In an action against an endorsor of a promissory note, where the defendant pleaded tender of the amount—*Held*, that he was bound to renew his tender with his plea and deposit the amount in court. *Bove* v. *McDonald et al.* 16 L. C. R. 191 & 1 L. C. L. J. 55, Q. B., 1865.

2. Tender without deposit does not prevent interest from accruing. *Dumont* v. *Laforge*, 1 Q. L. R. 159, S. C. 1874.

**543.** Moneys paid into court cannot, without the authorization of the court, be withdrawn by the party who paid them in.

Unless the tender is conditional the party to whom it is made is entitled to receive the moneys paid in, without prejudicing his claim to the remainder. *Rule of P. 4th Jan.*, 1854.

1. Where the defendant had with his plea tendered a certain amount and deposited the money in court, which was not accepted, and the action proceeded, and the plaintiff recovered a greater amount than that tendered, and the clerk of the court had been replaced, and the money deposited with him was not forthcoming at the time of the execution of the judgment—*Held*, on an action to recover the money, that an action for money had and received would not lie against the former clerk of the court for money so deposited. *Merizzi & Cowan*, 6 L. C. J. 62, Q. B. 1861.

2. And *held* also, that the proper mode of proceedure in such case was by rule upon the former clerk ordering him to pay over the money. Ib.

**544.** The expense of the tender is borne by the debtor; but, if it is declared sufficient, the costs attending the payment into court are borne by the creditor. *Pothier, Ob.* 550, 573, 574, 580.

# CHAPTER SECOND.

## OF COMPULSORY EXECUTION OF JUDGMENTS.

### SECTION I.

### GENERAL PROVISIONS.

**545.** The judgments of a court can only be put into execution by means of a writ issuing in the name of the sovereign and addressed to the sheriff of the district [in which it is to be executed.]

The writ is attested and signed in the same manner as original writs, it must bear the seal of the court and must mention the date of the judgment to be executed and the day on which it is returnable. *C. S. L. C. c.* 83, *s.* 139; *c.* 85, *s.* 2, § 4; 25 *Geo. III., c.* 2, *s.* 30; *C. P. C.* 545

35 Vict. c. 6 (*Que.*):

"26. Whenever in any suit, a writ of execution has issued, and by reason thereof a demand of payment has been made upon the defendant, no other demand of payment need be made in such suit previous to the further execution of any other such writ, whether in the same or in any other district."

1. By article 545 a writ of attachment after judgment should be addressed to the sheriff of the district in which it is to be executed, being the district where the judgment was rendered, and not to a bailiff. *Ryland* v. *Delisle & Workman et al.* 14 L. C. J. 17, S. C. 1869.

**546.** Judgments can only be executed upon the party against whom they are rendered.

If he changes his civil status or dies before execution, judgment cannot be executed against him nor against his representatives, unless another judgment is obtained, declaring that the former may be enforced by execution against

him in the one case, or his representatives or assigns in the other.

But if the party dies or changes his civil status after execution has commenced, the execution continues.

*C. P. C.* 168; *Pothier, Proc,* 152.

1. A demand to make a judgment executory against the representative of a deceased defendant, and others against whom it was rendered, does not necessitate the calling in of the others who are not affected by it. *Destimauville* v. *Tousignant,* 1 Q. L. R. 52, S. C. 1874.

2. The execution of a judgment must be suspended in the event of the death of the defendant during the seizure, and before continuing the proceedings, the judgment must be made executory against the representatives of the defendant. *Dorion* v. *Dagenais et al.* 9 L. C. J. 139, S. C. 1865.

3. Where the plaintiffs opposed a seizure for costs on the ground that some of them had changed their status since the institution of the action—*Held,* that as the seizure was made only on the effects of two of the plaintiffs, who had not in any way changed their status, there was no ground of opposition whatever. *DeGaspé et al. & Asselin & De Gaspé et al.* 5 R. L. 240, S. C. 1874.

**547.** If the judgment does not order a thing that is purely personal to the plaintiff, it may be executed in his name, even after his death; but if any contestation arises upon the execution, the representatives of the deceased party must intervene.

No. 848, *Sevigny* v. *Bertrand & Mercier, at Montreal, 24th Sept.,* 1850; 2 *Loisel, Inst. liv. vi. tit.* 5, *art.* 2; *Pothier, Proc.* 153.

1. The purchaser of a judgment-claim belonging to the estate of an insolvent has a right to execute such judgment in the name of the original plaintiff, notwithstanding he has not received his discharge. *Kittson* v. *Delisle & L'Ecuyer & Delisle & Vaasal,* 3 R. L. 69, C. C. 1871.

2. A judgment debt is legally susceptible of transfer, and where it has been legally transferred, the transferee has the right to enforce the execution of the judgment in the name of the judgment creditors. *Bergevin* v. *Persillier et vir & Persillier et al. & Meloche,* 9 L. C. J. 78 S. C. 1865.

**548.** When the judgment orders the performance of some physical act, the officer charged with its execution may use the necessary force for that purpose; observing, however, at the same time, all necessary formalities. 1 *Couchot*, 123.

## SECTION II.

## OF EXECUTION IN REAL ACTIONS.

**549.** When a party condemned to surrender or restore an immoveable refuses to do so within the delay prescribed, the plaintiff may obtain a writ of possession to eject him and to be placed in possession. *Ord.* 1667, *tit.* 27, *art.* 1; *Pothier, Proc.* 148.

1. Where the possession of certain property then in licitation was in dispute, and a bill of indictment was found against the defendant at a term of the court of general session of the peace for forcible detainer, and upon such indictment being found the plaintiff by petition and affidavit sought to be put in possession of the premises—*Held*, that a judge out of sessions could not grant a writ of restitution or possession, which could only be awarded in sessions and in the discretion of the court. *Boswell et al. & Lloyd*, 13 L. C. R. 6, Q. S. 1862.

See decisions under Art. 712, *post.*

**550.** The officer intrusted with the execution of such writ must be accompanied by two witnesses, and draw up a minute of his proceedings. *Ord.* 1667, *tit.* 23 *art.* 2; *Couchot*, 123.

## SECTION III.

## OF EXECUTION IN PERSONAL ACTIONS.

**551.** Judgments for the payment of a sum of money cannot be executed before the expiration of fifteen days from their date.

Nevertheless upon an application of the plaintiff accompanied by an affidavit establishing circumstances under

which simple attachment might issue before judgment, the judge may allow execution to issue before the expiration of fifteen days, but the sale cannot take place any sooner than if the writ of execution had issued after the ordinary delay. *C. S. L. C. c.* 77, *s.* 27; *c.* 83, s. 201; 1 *Pig.* 411.

1. The sureties in appeal, against whom action is brought for costs, are not entitled to fifteen days' delay from the day of judgment. *Larose et al. & Wilson*, 16 L. C. J. 29, Q. B. 1873.

2. The issue of an execution for the recovery of the amount of a judgment and costs previous to the taxation of costs is null. *Audet* v. *Asselin & Asselin*, 15 L. C. R. 272, S. C. 1864.

3. The execution of a judgment rendered in appeal cannot take place before the expiration of fifteen days from the date of judgment. *Duhaut* v. *Lacombe et al. & Morrison*, 13 L. C. J. 230, S. C. 1869.

4. Article 551 of the Code of Civil Procedure relating to the execution of judgments, applies equally to interlocutory judgments and to final judgments; and such execution of an interlocutory judgment may issue fifteen days from the date of such judgment, and even before the rendering of the final judgment, and by motion for a *rule nisi* the prothonotary may be compelled to issue such execution. *Trudel* v. *Desautels et al.* 4 R. L. 701, & 17 L. C. J. 56, C. C. 1871.

**552.** In all suits accompanied with attachment, either in the hands of the defendant or of third persons, in which the defendant has only been summoned through newspapers, a judgment rendered by default cannot be executed within a year, unless the plaintiff, in the presence of and to the satisfaction of a judge, gives good and sufficient sureties to pay back the moneys levied, in the event of the judgment being reversed upon revision, together with the costs of such revision.

This provision does not apply, however, to judgments rendered for wages, or salaries due for the manufacture or conveyance of rafts attached for the payment of such wages. *C. S. L. C. c.* 83, *s.* 111, §§ 1-2.

**553.** A creditor may cause to be seized in execution the moveable or immoveable property of his debtor, in the pos-

session of such debtor, or moveables of his in the possession either of such creditor himself, or of third persons, if the latter do not object; if they do, the creditor must adopt a seizure by garnishment. *C. S. L. C. c.* 83, *ss.* 134, 139; *Pothier, Proc.* 153, 174, 178, 1 *Couchot*, 125; 1 *Pig.* 659.

1. Where the goods seized in execution were already in possession of the plaintiff—*Held*, that the seizure was bad, inasmuch as the proceedings should have been by *saisie arret*. *Morris et al.* v. *Antrobus & Antrobus*, 1 L. C. R. 114, S. C. 1850.

2. Where, under an attachment to seize property in the hands of one person, the sheriff attached property in the hands of another, the attachment was declared null. *Davis* v. *Beaudry*, 6 L. C. J. 163 & 13 L. C. R. 18, Q. B.

3. In an action of damages for the illegal attachment of a vessel on a promissory note, the attachment having been dismissed because the note was not yet due—*Held*, that a vessel laden and ready for sea could be attached for a civil debt unconnected with the ship. *Parant et al.* v. *Grenier*, S. R. 453, K. B. 1831.

4. A plaintiff seizing *bona fide* property in the possession of his debtor is not liable in damages toward a third person, owner thereof. *McDonald* v. *Lalonde*, 13 L. C. J. 331, S. C. 1869.

5. Seizure made of property in the hands of persons who have no legal title thereto, is absolutely null and void. *Rivard* v. *Belle*, 1 R. L. 571, S. C. 1866.

**554.** A creditor may exercise at the same time the different means of execution which the law allows him. He may cause the moveable property and the immoveables to be seized under the same writ, but he cannot proceed to the sale of the immoveables until after the moveables have been discussed; saving, nevertheless, the special provisions of law concerning building-societies, cases of pledge, and the case mentioned in article 907; and saving also the cases of judgments rendered for the recovery of rents constituted under the Seigniorial Act of 1854, and of judgments declaring hypothecs. *C. S. L. C. c.* 85, *s.* 1; *c.* 69, *s.* 14; 1 *Couchot*, 125.

1. A collocation, as long as it has not been paid, cannot be opposed as payment, and, in the exercise of the different means of execution accorded to the creditor by art. 554 of the Code of Procedure, the creditor need not take any notice of a collocation which is not paid. *Wilson* v. *Leblanc es qual. & Doutre et al. & Leblanc es qual. & Leblanc*, 16 L. C. J. 209, S. C. R. 1872.

2. The plaintiff caused a writ of execution to issue against the immovables of the defendant, who filed an opposition on the ground that previous to the issue of such writ, the plaintiff had attached property belonging to him in the hands of third parties, who had made default, and asked that the seizure *de terris* be annulled until the plaintiff had exhausted the other means which he had adopted—*Held*, dismissing the opposition, that the creditor could exercise every mode of seizure and execution which the law permits to enforce payment of what is due him. *Lalonde* v. *Lalonde & Lalonde*, 16 L. C. R. 395, S. C. R. 1866.

3. An attachment in revendication may be joined with an action for the resiliation of a deed of donation. *Méthot es qual.* v. *Perrin et al.* 5 R. L. 695, S. C. 1874.

4. Where a creditor of the plaintiff, before execution had issued against the defendant, caused a writ of attachment in garnishment to be served on the defendant—*Held*, that this did not suspend the proceedings under an execution, and to produce that effect, the defendant must have deposited the amount of the judgment with interest and costs. *Duvernay & Dessaulles*, 4 L. C. R. 142, Q. B. 1851.

5. On an opposition by the defendant to the seizure and sale of his land on the ground that he had sufficient moveable property to satisfy the judgment, a return of *nulla bona* having been made before the issue of the writ against the land, the opposition was dismissed. *Soupras* v. *Boudreau & Boudrvau*, 2 L. C. J. 290, S. C. 1858.

6. Execution having issued against the goods of the defendant, the bailiff made a return of *nulla bona*, and a writ issued, in virtue of which his immoveables were seized. The defendant filed an opposition *afin d'annuller*, alleging that he had moveable property, which he specified in his opposition, and asked that the seizure of the immoveables be set aside—*Held*, that the moveable and immoveable property of the defendant could be seized at the same time, but the moveables must be first sold, and that, when the return of the bailiff sets forth that the defendant has no moveables, proceedings must be taken to set aside the return, before an opposition can be filed to set aside the seizure of immoveables. *Paige* v. *Savard*, 11 L. C. R. 3, S. C. 1860.

7. Where the defendant himself told the officer charged with the

execution that he had no moveables, and afterwards brought opposition on the ground stated above, exactly the same decision was rendered. *Arnold* v. *Campbell*, 9 L. C. R. 33, Q. B. 1858.

8. A seizure of moveable and immoveable property on the same day is good, there being nothing in the statute prohibiting such seizure. *Kierzkowski* v. *Talon & Talon*, 7 L. C. R. 359, S. C. 1857.

**555.** [Seizure of moveables in execution takes place under a writ addressed to the sheriff of the place where the defendant's moveable property is situated, ordering him to levy the amount of the debt, interest, if any is due, and the costs, both of the suit and of the execution, and such writ is made returnable on a day certain or sooner if possible.

If there be no moveable property to seize, the writ may be addressed either to the sheriff of the district in which judgment was rendered or to the sheriff of the district in which the defendant has his domicile.]

If the creditor has received any part of his judgment claim, he is bound to make mention of it on the back of the writ of execution.

When the moveable property to be seized is at a distance of more than nine miles from the place where the writ issues, the party suing out a writ, or his attorney, may, by a written notice, require the sheriff to employ for the seizure, a bailiff residing in the locality where it is to take place, and the sheriff is bound to comply, and in doing so he is freed from any liability resulting from irregularities or informalities in the execution of the writ. *C. S. L. C. c.* 83, *s.* 129; 27-28 *V. c.* 39, *s.* 12; 25 *Geo. III. c.* 2, *s.* 30.

See 33 Vict. c. 17, s. 1 (*Que.*) *supra* under art. 48.

1. The plaintiff in a suit has no right to accompany the bailiff when the latter is executing the writ. *Hubert et ux.* v. *Renaud*, 2 L. C. L. J. 41, S. C. R., 1866.

2. Upon the seizure of moveables under a writ of *fi. fa.* no demand of payment is necessary. *Lee* v. *Lampson & divers*, 2 L. C. R. 148, S. C. 1851.

3. Where the defendant resided in a district other than the one in which judgment was rendered against him, and to an *alias* writ of execution issued against his goods and effects in the former district, filed an opposition *dfin d'annuller* on the ground that no demand of payment had been made upon him in virtue of the writ—*Held*, that no such demand was necessary. *Masnue* v. *Crebassa & Crebassa*, 7 L. C. J. 225, S. C. 1863. 35 V. c. 6, s. 26 (*Q.*) under art. 515 *ante*.

4. A judgment rendered in a district other than that in which the defendant resides may be executed *de plano* in the district in which the defendant resides, unless he establishes that he possesses property in the district where the judgment was rendered. *Ibid. & Terroux* v. *Hart et al. & Hart*, 10 L. C. J. 199, S. C. 1866.

5. On an opposition *dfin d'annuller* of a seizure—*Held*, that where the bailiff has declared in the *procès-verbal* that he had elected his domicile in such a parish, without specifying in what part of the parish, and seizure was null. *Beaupré* v. *Martel & Martel*, 2 L. C. J. 276, S. C. 1858.

6. Where a writ of execution apparently irregular in every respect had been issued and addressed to a certain bailiff—*Held*, that it was his duty to proceed under it, notwithstanding it may have really contained causes of nullity. *Regina* v. *Morrison & Pagnuelo*, 3 R. L. 525, Q. B., 1872.

7. Where a defendant has paid sums of money on account of a judgment, the seizure of his land afterwards, under a writ of execution for the whole amount of the judgment, is illegal, and the defendant has the right to have the writ stayed until the exact amount due upon the judgment is determined. *La Banque du Peuple* v. *Donagani & Donagani*, 3 L. C. R, 478, S. C. 1853.

8. A creditor suing out a writ of execution, must give credit upon the writ for any amount he may have received thereon, and an opposition of the defendant founded upon such omission, will be maintained with costs. *Fournier & Russell*, 10 L. C. R. 367, Q.B. 1860.

9. And that without depositing or tendering the balance due under the judgment. *Lafleur* v. *Verveille & Verveille*, 1 R. L. 45, S. C. 1869. *Patenaude* v. *Guertin & Guertin*, 1 Legal News, 131, S. C. 1878, 22 L. C. J., 57.

10. An opposition based on a partial payment of the amount claimed will be rejected. *Hall* v. *St. Julien & St. Julien*, 5 R. L. 476, S. C. 1873.

See cases under art. 581.

## § 1. *Of seizure of moveables.*

**556.** The debtor may select and keep from seizure:

1. The bed, bedding and bedsteads in use by him and his family;

2. The ordinary and necessary wearing apparel of himself and his family;

3. One stove and pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six teacups, six saucers, one sugar basin, one milk jug, one teapot, six spoons, all spinning wheels and weaving looms in domestic use, one axe, one saw, one gun, six traps, such fishing-nets and seines as are in common use, and ten volumes of books;

4. Fuel and food, not more than sufficient for thirty days, and not exceeding in value, twenty dollars.

5. One cow, four sheep, two hogs, and food therefor for thirty days;

6. Tools and implements or other chattels ordinarily used in his trade to the value of thirty dollars;

7. Bees, to the extent of fifteen hives;

Nevertheless, the things and effects mentioned in paragraphs four, five, and six, are not exempt from seizure and sale when the suit is to recover the price of their purchase, or they have been given in pawn. *Ord.* 1667, *tit.* 33, *art.* 14; 2 *Bour.*; *Pothier, Proc.* 154-5; 1 *Pig.* 611-12; *C. S. L. C. c.* 85, *s.* 3; 24 *V., c.* 27, *s.* 1; *C. P. C.* 592; *C. S. L. C. c.* 83, *s.* 142; 16 *Guy. Rep.* 78; 29 *V., c.* 8, *s.* 2.

32 Vict. c. 37 *(Que.)*:

4. No one shall, between the first of May and the first of November, seize or attach any boat or vessel, tackle, net, seine or other fishing utensils, or any provisions belonging to any fisherman and necessary for his subsistence, or his fishing operations; except only for the recovery of penalties imposed under this Act.

31 Vict., c. 20 (*Que.*):

1. From and after the passing of this Act, public lands, which shall be conceded or granted to *bona fide* settlers in virtue of and in conformity with the provisions of chapter 22 of the Consolidated Statutes of Canada, intituled "An Act respecting the sale and the management of the public lands," and in conformity with the orders in council and regulations arising from the said Act shall not, except for the price of such lands, be mortgaged or hypothecated by judgment or otherwise, nor seized nor sold under authority of law, for any debt or debts contracted previous to the grant or concession of such lands, articles 2034 and 2?21 of the code of civil procedure* to the contrary notwithstanding; and further, no one shall seize or sell under authority of law, for any such debt, the right, title or interest of any settler, in or upon any land which shall have been so conceded to him.

2. From the time of the occupation of any lot of land, and during the ten years following the issue of patents for the lands of settlers, conceded and granted as aforesaid, the following chattels shall, without prejudice to article 556 of the code of civil procedure, be exempt from seizure under any writ of execution issued out of any court whatsoever, in this Province, viz.:

1. The bed, bedding, and bedsteads, in ordinary use by the debtor and his family.

2. The necessary and ordinary wearing apparel of the debtor and his family.

3. One stove and pipes, one crane and its appendages, and one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six teacups, six saucers, one sugar basin, one milk jug, one tea pot, six spoons, all spinning wheels and weaving looms in domestic use, and ten volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use.

4. All necessary fuel, meat, fish, flour and vegetables, provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for three months.

5. Two horses or two draught oxen, four cows, six sheep, four pigs, eight hundred bundles of hay, other forage necessary for the support of these animals during the winter, and provender sufficient to fatten one pig, and to maintain three during the winter.

6. Vehicles and other implements of agriculture.

* The Civil Code (?).

7. The debtor may select, from any larger number of the same kind of chattels, the particular chattels to be exempt from seizure, in virtue of this section.

But nothing in this section contained shall exempt from seizure any of the chattels enumerated in subsections three, four, five or six, of this section, in payment of any debt contracted in respect of such said chattels.

3. Nothing in this Act shall be held as exempting any land from the payment of, or being sold for the rates or taxes, which now are, or in future shall be, legally imposed thereon.

36 Vict., c. 19, s. 2 (*Que.*), extends the provisions of this Act to grants made under 32 Vict., c. 11, and to all grants of lands made by the Crown.

1. Where a clause in a lease declares that all the moveables furnishing the house shall without exception be liable for the rent and may be attached therefor, the tenant cannot claim that they are exempt under arts. 557 and 558. *Robitaille* v. *Bolduc*, 4 Q. L. R. 179, C. C. 1878.

2. Where the defendant opposed the seizure of his sword on the ground that it was a part of his necessary military equipment and appointments, and as such was not liable to seizure for his personal debts, the opposition was maintained under the authority of the Ordinance of 1639. *Wade* v. *Hussey & Hussey*, 8 L. C. R. 511, S. C.

3. Where a defendant filed an opposition alleging that certain tools seized formed part of his implements of trade—*Held*, that the allegation was insufficient and the opposition was dismissed. *Yon* v. *O'Connor & O'Connor*, 7 L. C. J. 126, C. C. 1863.

4. And in his *procès-verbal* of seizure it was not necessary for the bailiff to allege that he had left with the defendant the effects exempt by law. *Ibid.*

5. The moveables of an Indian are exempt from seizure under 39 V. c. 18 (Ca.). *Lepage* v. *Watzo & Watzo & Lepage*, 22 L. C. J. 97, 4 Q. L. R. 81, 8 R. L. 596, 1 Legal News 322, S. C. 1878; *Hannis* v. *Turcotte & Maurault*, 8 R. L. 708, S. C. 1878; *Durand* v. *Sioui*, 4 Q. L. R. 93. C. C. 1878.

**557.** Books of account, titles of debt, or other papers in the possession of the debtor, are exempt from seizure, saving what is mentioned in article 565.

1. Under a writ of attachment before judgment the sheriff, among other things, seized a chest of drawers, which the defendant alleged contained books of accounts and papers which were not attachable. On a petition to have them restored to him, he was ordered to open the chest and allow an inventory to be made of the things contained in it, which having been done—*Held*, that books of account, titles and papers belonging to the defendant were exempt from attachment, and must be restored. *Fraser* v. *Loiselle*, 5 L. C. R. 299, S. C. 1855.

**558.** The following are also exempt from seizure:

1. Consecrated vessels and things used for religious worship;

2. Alimentary allowances granted by a court;

3. Sums of money or objects given or bequeathed upon the condition of their being exempt from seizure;

4. Sums of money or pensions given as aliment, even though the donor or testator has not expressly declared that they should be exempt from seizure;

5. Wages and salaries not yet due.

Alimentary allowances and things given as aliment may however be seized and sold for alimentary debts. *Pothier Proc.* 154-175; 3 *Anc. Deniz.* 417, 419, 420; 2 *Bour.* 670-1; 6 *Bioche*, 26; 1 *Pig.* 651; *C. P. C.* 581-582.

1. Moneys payable on account of a pending contract with the war department, for the erection of fortifications in the Province, are not liable to attachment. *Fitts* v. *Piton et al. & Her Majesty's Secretary of State for the War Department et al.* 12 L. C. J. 289, S. C. & 13 L. C. J. 165, S. C. 1869.

2. Where an attachment was taken against a pension granted to a widow of a pilot from what is known as the Decayed Pilots' Fund the pension was *held* to be exempt from attachment and the attachment dismissed. *Lelièvre et al. & Baillargeon & The Trinity House*, 3 L. C. R. 420, C. C. 1853.

*See post.* art. 628.

**559.** The seizure of moveables and moveable property is established by an inventory made by the sheriff, or his deputy, or by a bailiff authorized by him to that effect. *Ord.* 1667, *tit.* 33, *art.* 6; *Pothier, Proc.* 156-7; *C. P. C.* 586.

*See* 33 *Vict. c.* 17, *s.* 1 (*Que.*), *ante under art.* 48.

**560.** The inventory must contain:

1. Mention of the actual domicile of the creditor;

2. Mention of the writ of execution, its date and its purport;

3. A description of the things seized, their number, weight and measure according to their nature, *and in the case of a registered vessel of fifteen tons burthen or over, the recital required by section* 13 *of chapter* 41 *of the Consolidated Statutes of Canada. C. P. C.* 586; 2 *L. C. R.* 471.

4. The appointment of a guardian or the name of the depositary furnished by the debtor;

5. The signature of the guardian or depositary, and of the witnesses, in the case of article 569, or mention that they cannot sign and the signature of the seizing officer;

6. Mention of the day on which the seizure is made, and whether it was made before or after noon.

The sheriff or officer making the seizure is bound to accept a solvent depositary offered by the debtor, and in such case he is not answerable for the acts of the depositary, if he proves that when he accepted him such depositary was solvent to the amount of the property entrusted to his care.

Sheriffs or bailiffs cannot take their relations or connections to the degree of cousins-german, as guardians or depositaries of the things seized. Nor can they take as such the judgment debtor nor his wife or children, on pain of being liable for all costs and damages.

Brothers, uncles or nephews of the judgment debtor may be appointed guardians, if they consent to be so.

*The debtor must also be called upon to sign the inventory, and his refusal or inability to do so must be stated. C. S. L. C. c.* 92, *s.* 10; *Ord.* 1667, *tit.* 33, *arts.* 1, 8; *Pothier*, 159-160-161; *Ord.* 1667, *tit.* 19, *art.* 13.

35 Vict. c. 6 (*Que.*):

15. Article 560 is amended by substituting the following for the last sentence of the last paragraph thereof:

"The debtor must also, if he is present, be called upon to sign the

inventory, and his refusal or inability to do so, or his absence must be stated."

And the same article is further amended by striking out, from paragraph three of the same, all the words after the word "Nature," and by adding at the end of the said article the following paragraph :

"In the case of the seizure of a registered vessel of fifteen tons burthen, or over, the recital required by section 13 of Chapter 41 of the Consolidated Statutes of Canada must be returned and filed together with the inventory."

1. A declaration in a *procès verbal* that the guardian had signed when he had only made his mark, is not a cause of nullity, and the guardian only can avail himself of it. *Perrault* v. *Chartrand & Chartrand*, 6 R. L. 276, C. C. 1874.

2. A defendant under execution may be appointed guardian of his own things with his consent, and in such case is liable to imprisonment if he does not produce them on the day of sale. *Carley* v. *Hutton & Hutton*, 15 L. C. J. 140 ; *Munn* v. *Halferty*, 1 L. C. R. 170, S. C. 1850.

Contra : *Patoille* v. *Guilmette & Guilmette*, 1 R. L. 51, S.C. 1865.

3. Where the bailiff declared in the *procès-verbal* that he had elected his domicile in the parish of D., without specifying in what part of the parish, the seizure was held to be null. *Beaupré* v. *Martel & Martel*, 2 L. C. J. 276, S. C. 1858.

4. A sheriff or bailiff executing a writ of *fi. fa.* is bound to give immediate written notice of the time and place of the sale to defendant. *Scott et al.* v. *Alain et al. & Alain*, 4 C. L. J. 60, 1868.

5. An error in the notice at the foot of the *procès-verbal* of seizure will give rise to an opposition by the defendant, but does not necessarily involve the nullity of the seizure. *Manseau & Bernard & Bernard*, 2 R. L. 242, S. C. 1870. But see *Beaupre* v. *Martel loc. cit.*

6. On an opposition *à fin d'annuler* to an execution—*Held*, that the presence or co-operation of a *recors* is not necessary to render an execution valid. *Guilfoyl* v. *Tate et al. & Tate et al.*, 1 L. C. J. 188, S. C. 1857; *La Banque du Peuple* v. *Daoust & Daoust*, 15 L. C. R. 464, S. C. 1864.

7. The fact of a voluntary guardian being a minor does not invalidate the seizure when the defendant remains in possession of the effects. *Côte* v. *Jacob & Jacob*, 3 Q. L. R. 5 C. C. 1876.

8. The omission to mention in a *procès verbal* of seizure that the person seized had refused to sign, or that he was absent from his domicile at the time of the seizure, is not a cause of nullity. *Duquette* v. *Ouimet & Ouimet*, 6 R. L. 167.

**561.** The inventory must be, at least, in triplicates, one of which must be given to the guardian or depositary, and another to the debtor, and each triplicate must be signed by all those whose signatures are required by the preceding article. *Ord.* 1667, *tit.* 33, *art.* 7; 1 *L. C. R.* 71.

**562.** The guardian or depositary has a right, at the time of his appointment, to remove the property in order to keep it in charge, and to place guards, if necessary, in the place where it is.

If the seizing officer cannot find a responsible guardian or depositary, he may, after serving the inventory upon the debtor, have the things taken away and removed to a place of safety, until he finds such guardian or depositary.

If the person appointed guardian or depositary becomes, while the seizure lasts or is suspended, insufficient to be responsible for the property seized, the judge may, upon the application of the prosecuting creditor, authorize the appointment of another person sufficiently solvent or reliable, and may order that the property seized be placed under his care, or in his possession, by the sheriff, after a verification and inventory of the whole has been made. *Pothier, Proc.* 161-168; 1 *Pig.* 623, *note; C. C. art.* 1828.

1. A guardian of moveable property under seizure cannot demand that the defendant deliver to him the property in question, in the absence of positive proof that the defendant was deteriorating it by improper use. *Palsgrave* v. *Sénécal et al. & Prieur*, 3 L. C. J. 116, S. C. 1858.

**563.** The sheriff or the bailiff [upon an order from the judge, granted for cause shewn, upon application in writing by the creditor,] may have effects seized in the country parts removed to the nearest town, or some other place specified, in order that he may there sell them. *C. S. L. C. c.* 85, *s.* 2, § 2.

**564.** [If current money is seized, mention of its kind and quantity must be made in the inventory, and the sheriff must return it with the other moneys levied.] *C. P. C.* 590.

**565.** [Debentures, promissory notes, whether negotiable or not, shares in banks, or other commercial or industrial associations, and other documents of commercial value, payable to order or to bearer, bank-notes included, are liable to seizure, and may be sold like all other moveable effects belonging to the debtor.] *C. P. C.* 855.

**566.** The seizure of shares in any financial, commercial or industrial company or association, duly incorporated, is made by serving such company with a copy of the writ of execution, together with a notice that all the shares held by the defendant in such company are placed under execution. A similar notice is served upon the debtor.

**567.** If there is more than one place at which the company may be served, the service hereinabove mentioned, when made elsewhere than at the place where the transfer of shares and the payment of dividends may be validly made, has no effect against subsequent purchasers until a sufficient time has elapsed to allow notice of the service to be transmitted from the place where it was made to the place where transfers of shares should be entered; and the company is bound to effect such transmission.

The seizure of such shares includes all benefits and profits attached to them. *C. S. C. c.* 70, *ss.* 3, 4.

**568.** The sheriff has a right to demand from the party seizing whatever sums of money may be necessary for the safe-keeping of the property seized, according to the provisions contained in articles 847 and 848. 1 *L. C. J.* 92.

1. The sheriff having seized a large quantity of timber, and appointed a single guardian to take charge of the whole, in whose absence, during a storm, a portion of the timber went adrift and was lost, it

was *held* that he was guilty of neglect and must bear the loss. *McClure* v. *Shepherd*, S. R. 75, K. B. 1813.

2. The sheriff might have employed as many persons as were necessary for the security of the timber. *Ibid.*

**569.** If the debtor is absent, or if there is no person to open the doors, cupboards, trunks, or other closed places, or if he refuses to open them, the seizing officer must draw up a minute of the fact, and thereupon the judge may order the opening to be effected by all necessary means, in the presence of two witnesses and with such force as may be required, without prejudice to coercive imprisonment in case of refusal, violence or other physical impediment. *Ord.* 1667, *tit.* 33, *art.* 5; *C. P. C.* 587-591.

34 Vict. c. 4 (*Que.*):

6. Article 569 is hereby amended by inserting after the word "Judge" therein, the words "or in his absence the prothonotary."

The said article so amended shall apply to all cases in the Circuit Court, and, in such cases, the clerk of the said court shall have the power hereinabove given, instead of the prothonotary.

1. Under an attachment in revendication where the defendant refused to open his doors—*Held*, that upon the return of the bailiff to that effect the judge may order, on petition of plaintiff, that the doors be opened by all necessary means in the presence of two witnesses and with such force as may be required. *Moreau* v. *Mathewson et al.*, 12 L. C. J., 285, C. C. 1868.

2. On the return of a bailiff to a writ of execution that the defendant who was outside of his house, while his family were inside, refused to open the doors upon being called upon to do so, saying that he would not, this was *held* to amount to a refusal to do so, but the return was insufficient without further evidence to justify the issuing of a rule for *contrainte par corps*. *Kemp* v. *Kemp*, 2 L. C. J. 279, 280, S. C. 1858.

3. And on another hearing—*Held*, that it did not amount to *a rebellion à justice*. Ib.

4. But *held*, later, that a rule for *contrainte par corps* may issue against a debtor refusing to open his doors to the sheriff charged with an execution against him. *Massue & Crebassa*, 8 L. C. J., 122, S. C. 1864. *Desharnois* v. *Amiot*, 4 L. C. R. 43, C. C. 1853.

5. Where a defendant against whose goods an execution had issued, carried off some of them while the bailiff was in the act of entering them in his *proces verbal*, and used violence towards that officer while so removing them, it was held that he could not be condemned as in contempt of court, but only to costs, and the bailiff was ordered to proceed anew to the seizure and sale of the effects. *Terroux* v *Dupont* 10 L. C. J. 143, S. C. 1866.

**570.** If the debtor has no domicile in the Province, the triplicate of the inventory of seizure is left for him at the office of the prothonotary of the court. *C. P. C.* 602; *C. S. L. C. c.* 83, *s.* 64.

35. Vict. c. 6 (*Que.*):

16. Article 570 is amended by inserting therein immediately after the word "Province" the words, "Or has ceased to reside within the district in which the judgment was rendered."

**571.** Immediate notice must be given to the debtor, and to the guardian or depositary, of the place and time at which the moveables will be offered for sale.

*Pothier, Proc.* 168.

35 Vict. c. 6 (*Que.*):

17. "If the debtor has no domicile in the province or has ceased to reside within the district in which the judgment was rendered, the notice may be left for him at the office of the prothonotary of the court."

1. *Held*, that a notice at the foot of the *procès-verbal* that the sale would take place on such a day of the month, without mentioning the year, would annul the seizure, although the *procès-verbal* was fully and correctly dated. *Beaupré* v. *Martel & Martel*, 2 L. C. J. 276, S. C. 1858.

2. A sale of goods under execution *de bonis* may be validly made on the day fixed for the return of the writ into the court. *Elliott* v. *St. Julien es qual. & St. Julien*, 18 L. C. J. 11, S. C. 1874.

**572.** Saving the exception contained in the following article, the sale of moveables must be published by posting and reading a notice, in a loud and distinct manner, at the door of the church of the place where the seizure has been

made, immediately after morning service on the Sunday next after the seizure; and if such seizure was not made within a parish, the publication must be made at some public place in the municipality, and the sale cannot take place before the expiration of eight days, reckoning from the day of such publication, and a certificate of such publication must be annexed to the record of the execution.

See 41 Vict. c. 9 (*Que.*) under art. 1320 *post*, as to the sale of moveables belonging to successions of which some of the co-heirs are minors.

**573.** In the cities of Quebec and Montreal, the sale of moveables seized is advertized only by a notice, stating summarily the names of the parties, the nature of the effects and the time and place of sale, inserted in French in a newspaper published in that language, and in English in a newspaper published in the English language; and if there should be but one paper in the place, or if all the papers are published in but one of such languages, then the notice must be inserted in both languages in one paper; and a duplicate of such notice must be posted in the sheriff's office from the time of such advertisement in a newspaper until the day of the sale, which cannot take place until after the expiration of eight days from the day of such publication.

No more than two dollars is allowed for the cost of such advertisement. 27-28 *V. c.* 39, *ss.* 9, 10, 11.

1. A writ of *vend. ex.* was made returnable on the 28th April, 1870, and the newspaper in which the notice of sale was being published ceased to issue, and the date of the return was changed in consequence. *Held*, that neither in law nor in fact did these circumstances afford ground for an inscription *en faux*, although irregularities were committed which were reprehensible. *Duchesnay et al.* v. *Vienne & Vienne*, 16 L. C. J. 138, S. C. R. 1871.

**574.** [Seizures in execution can only be made between the hours of seven in the morning and seven in the evening, except in cases of fraudulent removal, and may if necessary be continued on following days, affixing seals or placing guards.]

**575.** Seizures cannot be made on Sundays or holidays, except in cases of fraudulent removal, where the property is found upon the highway. *Pothier, Proc.* 156.

**576.** If the property has been attached before judgment, it is not necessary to proceed to a verification, but it is sufficient to give notice to the debtor and guardian or depositary of the place and time of sale, as prescribed in article 571, and to give the notice required by article 572 or 573, as the case may be. 1 *L. C. R.* 279.

**577.** [If the moveables have already been seized and the debtor dispossessed, any creditor making a second seizure is bound to name the same guardian, who can only be discharged by the sale of the property so seized, the consent of all the seizing parties, or the order of a judge,] *Pothier, Proc.* 166-7; 1 L. C. R. 94.

1. When the effects seized have been sold under another execution, the guardian is not liable to imprisonment on his failure to produce. *Blackiston* v. *Patton & Patton*, 5 L. C. J. 56, S. C. 1851.

See *Berry* v. *Cowan et al.* 11 L. C. R. 476, S. C. 1851.

**578.** The party first seizing, who does not proceed with proper diligence, cannot prevent the sale by the next seizing creditor.

[If, when there is no opposition, the seizing party does not bring the moveable to sale within the delay fixed for the return of the writ, the seizure lapses, unless the delay for the return of the writ is extended by order of a judge to a certain subsequent day, which order the prothonotary must make a note of in the entry book of executions.]

**579.** A creditor who has made a seizure of the effects of his debtor cannot obtain a second writ of execution, unless the previous writ has been returned or accounted for.

*Pothier, Proc.* 167.

See 35 Vict. c. 6, s. 26 (*Que.*), *supra* under art. 545.

## § 2. *Of oppositions to the seizure of moveables.*

**580.** A seizure of moveables in execution may be contested by opposition, either by the debtor himself, or by third parties.

*Pothier, Proc.* 163 *et seq.*

1. The opposant moved to amend his opposition by altering a number on the endorsation, and the plaintiff moved to reject the opposition, it having been filed under a wrong number—*Held*, that the former motion must be dismissed and the latter granted with costs. *Joseph* v. *Cay & Cay*, 1 L. C. J. 2, S. C. 1856.

2. An unfounded opposition is a contempt of court, for which attachment may be granted. *Quirouet* v. *Wilson*, 3 Rev. de Lég. 472, K. B. 1818; *Hunt* v. *Perrault*, 3 Rev. de Lég. 475, K. B. 1820; *Thomas* v. *Pepin & Pepin*, 5 L. C. J. 76, S. C. 1861.

**581.** The debtor may demand the nullity of a seizure of moveables in execution:

1. On the ground of informalities in the seizure, or of the exemption of some of the articles seized, under articles 556, 557 and 558;

2. On the ground of the extinction of the debt;

3. For any reason of a nature to affect the judgment sought to be executed.

If a part only of the debt is extinguished, the opposition has the effect of preventing the sale for more than is due.

*Ibid.*

1. The fact that partial payments have been made upon a judgment does not justify the conclusions of an opposition by the debtor demanding the total nullity of the seizure. *Grange et al.* v. *McDonald & McDonald*, 15 L. C. J. 252, S. C. R. 1871.

But the opposition must be maintained in proportion to the amount paid. Ib.

2. A defendant has the right to oppose the sale of his effects in consequence of an error in the notice at the foot of the *procès-verbal*, though the error does not necessarily involve the nullity of the seizure. *Manseau & Bernard & Bernard*, 2 R. L. 242, S. C. 1870.

See *ante* art. 555.

**582.** The execution may also be opposed by any party who has a right of ownership or of pledge in the property seized.

A lessor cannot, however, oppose the seizure and sale of the moveables subject to his claim, and he can only exercise his privilege upon the proceeds of the sale.

*C. S. L. C., c.* 83, *s.* 146.

1. Where, during the contestation of an opposition to a seizure and sale of moveables, the effects were seized a second time under another writ, and the guardian under the first writ opposed the sale under the second, which the plaintiff contested, the opposition of the guardian was dismissed as unfounded. *Donnelly* v. *Nagle & McDonald*, 3 L. C. J. 135, S. C. 1858.

2. A guardian of effects seized has a right to file an opposition to a second seizure of the same effects. *Smith* v. *O'Farrel & Colburn*, 9 L. C. R. 495. S. C. 1859.

3. The guardian of a seizure of moveables can oppose a second seizure of the same effects, so long as the first seizure has not been disposed of. *Langlois & Gauvreau et al. & Gauvreau*, 12 L. C. R. 158, S. C. 1862.

4. Where the defendant was made guardian over his own goods under seizure, and they were sold out of his possession by another seizure—*Held*, that although he might have opposed the sale under the second seizure, he was nevertheless not bound to do so. *Shelton* v. *Kerns et al. & Holland*, 7 L. C. J. 139, S. C. 1863.

5. But a guardian might be bound to do so. *Warren* v. *Douglas & Smith*, 7 L. C. J. 140, C. C. 1863.

6. If a landlord omits to file an opposition to the sale of the furniture liable for his rent he may file an opposition *à fin de conserver* on the proceeds, and will thereon rank according to his privilege. *Ross & Mason*, 3 Rev. de Lég. 474, K. B. 1812.

**583.** Oppositions to the seizure and sale of moveables must contain an election of domicile by the opposant, and they stay proceedings, provided they are accompanied with an affidavit that the allegations contained in them are true, and that they are made not with the intent of unjustly retarding the sale, but with the sole view of obtaining justice.

80*th and* 87*th Rule of P.*

1. An opposition containing unauthenticated marginal notes and erasures will be dismissed on motion. *Dalton* v. *Doran & Doran*, 3 R. L. 371, 1 Legal News 220, S. C. 1877.

2. If an opposition does not contain an election of domicile it will be dismissed. *Lizotte* v. *Caron*, 3 Rev. de Lég. 472, K. B. ; *Vallieres* v. *Robitaille*, 3 Rev. de Lég. 476, K. B. 1821.

3. An opposition made through the ministry of an attorney will not be dismissed on the ground that it does not contain an election of domicile, and the proper way to raise such an objection is by exception to the form and not by motion. *Murphy* v. *Moffatt & Levy et al.*, 8 L. C. R. 477, C. C. 1858.

4. An election of domicile by an opposant at the office of his attorney must state where the office is situated. *Leclaire et al.* v. *Dagle & Richard*, 1 L. C. L. J. 93, S. C. 1865.

5. An opposition *à fin de conserver* made through the ministry of an attorney must contain an election of domicile. *La Banque Jacques Cartier & The Canadian Rubber Company & Kavanagh*, 10 L. C. J. 200, S. C. 1866.

6. And on exception to the form to such opposition, motion to amend, by inserting the election of domicile, will be granted on payment of forty shillings costs. Ib.

7. An opposition containing an election of domicile at a place not within a mile of the court house, will, on motion, be rejected with costs. *Boyer* v. *Migneault & Migneault*, 5 R. L. 473, S. C. 1873.

8. On motion to reject an opposition *à fin de distraire* not founded on title, on the ground that the affidavit in support of it was made by the opposant's husband, who was himself a defendant in the case, and that he did not show that he was his wife's agent for that purpose—*Held*, that the affidavit was sufficient, as being within the Rules of Practice. *Wilson* v. *Pariseau & Simard*, 1 L. C. J. 1, S. C. 1856.

9. An opposition will be dismissed on motion on the ground of the insufficiency of the affidavit when it states that the opposition was 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 be omitted. *Schofield et al. & Rodden et al.*, 6 L. C. R. 479, S. C. 1856.

10. An affidavit in support of an opposition *à fin d'annuller*, in which the word "unnecessary" instead of the word "unjustly" appears, and in the jurat of which the word "sworm" is printed in lieu of the word "sworn," is bad and not in accordance with the Rules of Prac-

tice, and an opposition founded on such affidavit will be dismissed. *Morin et al.* v. *Daly et al. & Daly et al.*, 6 L. C. R. 431, S. C. 1856.

11. And where a rule was obtained to file a correct affidavit in support of such opposition—*Held*, that such rule must be discharged where the correct affidavit was not filed in support of it. Ib.

12. In appeal from a judgment on an opposition—*Held*, that where the affidavit for such opposition alleged that the facts therein contained were "true to the best of the opposant's knowledge," it was sufficient. *Fournier & Russel*, 1 L. C. J. 118 & 7 L. C. R. 130, Q. B 1857.

13. An opposition founded on a title if not accompanied by an affidavit regularly and legally sworn, such as is required by art. 583 of the Code of Civil Procedure, must be dismissed with costs, notwithstanding the provisions of the 82nd Rule of Practice, which is abrogated by the operation of the Code. *Duhaut & Lacombe*, 16 L. C. J. 111, S. C. R. 1872.

14. An opposition by a defendant will be dismissed on motion, the opposition being headed "No. 363 G. B. C. Leverson, plaintiff, v. James Cunningham, defendant," there being no number on the endorsation, and the words "*et al.*" being omitted in the heading of the opposition and the endorsation. *Leverson et al.* v. *Cunningham et al.* 6 L. C. R. 483, S. C. 1854.

15. Where an opposition is not stamped according to law, the court will, upon motion of the plaintiff, give leave to proceed with the sale of the effects seized, notwithstanding such opposition. *Gibson* v. *Jamieson et vir & Healey*, 16 L. C. R. 351, C. C. 1866.

16. Where, in an opposition accompanied by an affidavit, the affidavit was found to be dated two days before the opposition, the irregularity was held to be fatal, and the opposition was dismissed. *Walker* v. *Burroughs*, 3 L. C. J. 53, S. C. 1858.

**584.** Such affidavit is not necessary if the opposition is accompanied with a judge's order to stay proceedings. 9 *L. C. R.* 447; 82 *Rule of P.*

**585.** Oppositions are served upon the sheriff by leaving with him the original thereof, which he is bound to return into court without delay. *C. S. L. C. c.* 85, *s.* 14, § 2.

**586.** After the return of the opposition, the opposant moves upon the other parties to the suit to declare whether

they intend to admit or to contest it, and in default of such declaration the opposant has a right to be relieved from the seizure, with costs against the judgment debtor, unless the court otherwise orders. *84th Rule of P.*

1. An opposant may demand a plea from plaintiff at once instead of moving upon him to declare whether he contests the opposition or not. *Bertrand* v. *Pouliot & Pouliot*, 4 Q. L. R. 200, S. C., 1878.

2. The court will not order that the parties declare within the period to be fixed, whether they admit or contest the opposition of an opposant, unless notice have been given of the application. *Saxton & Shepperd & Péloquin et al.*, 13 L. C. J., 308, 1869.

3. On an opposition *à fin de distraire*—*Held*, that a rule by the opposant calling on the plaintiff to contest his opposition would be dismissed, as it should have given the option to admit or contest. *McGrath* v. *Lloyd & Keith et al.*, 2 L. C. J., 279, S. C. 1858.

4. In an opposition *à fin de distraire* the opposant called upon the plaintiff to declare whether he intended to contest or not, but no rule was served upon the defendant. The plaintiff replied that he intended to contest, but the delays having expired without his having done so, default was entered and judgment rendered maintaining the opposition. On appeal had—*Held*, setting aside the judgment, that, the opposant was not entitled to judgment *de plano*, but should have proceeded to proof *ex parte*, and given notice to the party who intended to contest, of the inscription for such proof, without which he could not obtain judgment. *McBlaine & Oliver*, 13 L. C. R. 417, Q.B. 1862.

5. Where the procedure to an opposition is attacked, it must be by motion and not by exception to the form. *Lamothe & Garceau*, 7 L. C. J. 115, Q. B. 1862.

6. Where the opposant issues a rule calling upon the plaintiff and defendant to declare whether they intend to contest the opposition or not, and that in default of doing so the conclusions of the opposition be granted—*Held*, to be irrregular the proper course being for the opposant to take a rule on the plaintiff, and if he fails to contest, to proceed *ex parte*. *Limoges* v. *Marsant & Labelle*, 13 L. C. R. 244, S. C. 1863.

7. If the opposant does not file an appearance the opposition will be dismissed. *Lizotte* v. *Careau*, 3 Rev. de Lég. 472, K. B. 1818.

8. If an opposant who has signed his own opposition does not regularly appear at the return of the execution, his opposition will be dismissed on motion. *Organ* v. *Bentley*, 3 Rev. de Lég. 473, K. B. 1812.

9. Where *main levée* of a seizure was granted to the opposant on the declaration of the plaintiff that he did not intend to contest the opposition, it was granted with costs against the defendant. *Corse* v. *Taylor & Taylor*, 3 L. C. J. 167, S. C. 1859.

**587.** If the other parties, or any of them, declare that they intend to contest the opposition, the contestation is subject to the rules which apply in ordinary suits.

1. A contestation of an opposition must be served on the defendant, but it is not necessary that it should be accompanied by a writ of summons. *Trahan* v. *Gadbois & McCaffrey et al.*, 5 R. L. 690, S. C. 1874.

2. Where opposition *d fin d'annuler* was filed against a writ of *venditioni exponas*, on the ground that an error existed in a rule for *folle enchère* granted against the opposant under the writ, and the plaintiff was allowed to amend the rule—*Held*, that after the amendment there was no longer any reason for the opposition, and it would be dismissed and without costs. *The Trust and Loan Company of Upper Canada & Doyle and Stanley*, 3 L. C. J. 138, S. C. 1859.

3. Where a guardian has opposed a sale under a second seizure the right to make such second seizure cannot be contested by a motion, but ought to be tried on a law pleading. *Warren* v. *Douglas & Smith*, 7 L. C. J. 140, C. C. 1863.

4. Where an opposant has been collocated and the collocation was contested and a question arose as to costs—*Held*, that the opposant must be considered as plaintiff, and the contestant as defendant, in order to determine the amount of costs due to each party. *Doutre* v. *Gosselin & Gabouriault*, 7 L. C. J. 290, S. C. 1863.

5. The opposant in an opposition *d fin de conserver* occupies the position of a plaintiff and the contestant that of a defendant. *Beaudry* v. *Desjardins & Desjardins & Thomas*, 4 R. L. 555, S. C. R. 1871.

6. *Held*, on demurrer, that a plea to an opposition *d fin d'annuler* founded on a judgment in separation of property, which attacks the validity of the grounds on which judgment was rendered, is bad. *Routh* v. *Maguire & Maguire et al.*, 10 L. C. R. 206, S. C. 1860.

7. In the case of a seizure of immoveables which had been previously sold by defendant, and the sale of which had been registered, the plaintiff was condemned to pay the costs of the opposition to the seizure and sale filed by the purchaser. *Robert* v. *Fortin et Société P. de C. de Jacques Cartier*, 22 L. C. J. 106, S. C. 1877.

**588.** The rules concerning peremption of suits apply equally to oppositions. 2 *Bour.* 664, *et seq.*

### § 3. *Of the sale of moveables under execution.*

**589.** If there is nothing to prevent the sale of the moveables seized, it takes place at the time and place mentioned in the notice.

If the sale has been retarded by any obstacle, subsequently removed, or if there were no bidders, new notices or publications must be given, but the sale cannot take place after the day fixed for the return of the writ, except in the case mentioned in article 578.

*Pothier, Proc.* 168; *C. S. L. C., c.* 85, *s.* 2, § 4.

**590.** The guardian or depositary is bound, at the time fixed for the sale, to produce all the effects seized, which were placed in his charge.

*Pothier, Proc.* 162, 168.

1. A motion for a rule to compel a guardian of things to produce them is not a motion of course, but must be made with the usual delays and after service upon the guardian *mis en cause*. *Lebœuf* v. *Plouffe & Desormeau*, 4 R. L. 564, S. C. 1872.

See art. 597 *post*.

**591.** The sheriff or other seizing officer cannot, either directly or indirectly, bid upon the property put up for sale nor become purchaser thereof. *Ibid.* 169; *C. S. L. C. c.* 85, *s.* 7.

**592.** The officer conducting the sale must make minutes thereof, specifying each article put up for sale, the name and residence of each purchaser, and the price of each purchase.

*Ord.* 1667, *tit.* 33. *art.* 18; *C. P. C.* 625.

**593.** The things seized are adjudged to the last and highest bidder, subject to immediate payment of the price, and

in default of such payment the thing adjudged is immediately put up again. *Ibid. art.* 17; *C. P. C.* 624.

1. It is necessary that more than one person bid to make the sale valid. *Poirier* v. *Plouffe & Calvi*, 21 L. C. J. 103, S. C. 1877.

**594**. The officer conducting the sale cannot, either directly or indirectly, receive anything beyond the price of the adjudication, under pain of being liable for extortion. *Ibid. art.* 18.

**595**. The sale must not proceed beyond the amount necessary to pay the debt, in principal, interest, and costs. To this end, the judgment debtor has a right to determine the order in which the effects are to be put up for sale. *C. P. C.* 622.

**596**. The guardian or depositary has a right to a discharge or receipt for the effects which he produces, and the minutes of sale must make mention of any effects which have not been produced. *Pothier, Proc.* 168; *C. P. C.* 695.

**597**. The guardian or depositary may be condemned, even on pain of coercive imprisonment, to produce the property he took in charge or pay the amount due to the seizing creditor. He may however upon establishing the value of the effects which he fails to produce be discharged upon payment of such value. *Pothier, Proc.* 168, 2 *L. C. J.* 297.

1. Where a rule had been taken against a bailiff, charged with a writ of execution, ordering him to appear and show cause why he should not be declared in contempt of court, and condemned to be imprisoned until he paid the debt, for neglecting to make his return to the writ—*Held*, that as he could not be held responsible for more than the value of the effects seized, the court could not grant a rule, but would order the bailiff to make his return within forty-eight hours after the service of the order. *Rolland & Reuger & Lafontaine*, 7 L. C. J. 48, C. C. 1862.

2. Were cattle and hay were seized together under the same writ, the guardian has a right to feed the cattle with the hay although it be

afterwards proved that the cattle did not belong to the defendant. *Johnson & O'Halloran*, 18 L. C. J. 221; Q. B. 1873.

3. *Held*, on a motion for a rule of *contrainte par corps* against the sheriff, that he was the guardian of the goods when the defendant offered none, and, as such was liable therefor, and on a rule for *contrainte par corps* it was not necessary to offer any alternative on defa lt of producing the moveables seized. *Leverson et al.* v. *Boston* 2 L. C. J. 297, Q. B. 1858.

4. And where the guardian, by way of answer to such rule, pleads that the property was only worth so much, it becomes the duty of the court, *avant faire droit*, to order proof of the fact. Ib.

5. But where the defendant became the guardian of the effects seized at the instance of the plaintiff under a writ of attachment, and subsequently the same effects were seized and sold under a writ of execution, and the plaintiff brought action against the defendant, praying that he be held to produce the effects or pay the value thereof—*Held*, that he had no such action, and that his only remedy was by process of attachment against the guardian. *Berry* v. *Cowan et al.*, 11 L. C. R. 476, S. C. 1861.

6. A guardian under an execution, where the effects seized have been sold under another execution, is not liable to imprisonment on his failure to produce. *Blackiston* v. *Patton & Patton*, 5 L. C. J. 56, S. C. 1851.

7. But where a guardian simply fails to produce the goods entrusted to him, without showing any such reason therefor, he may be imprisoned until he do so, or pay the value of them. *Ouimet* v. *McCallum & Clark*, 1 L. C. J. 158, S. C. 1857.

8. And where the defendant had become voluntary guardian of the things seized—*Held*, in appeal from a judgment ordering a rule against him for refusal to produce, that he was liable to *contrainte par corps*. *Brooks & Whitney*, 4 L. C. J. 279, 10 L. C. R. 244, Q. B., 1860. Contra: *Pattoille* v. *Guilmette*, 1 R. L. 51.

9. The voluntary guardian is liable to *contrainte par corps*, though from motives of equity, when the value of the things is less than the debt, the courts have restricted the liability of the guardian to such value, and proof of such value rests on him. *Higgins et al.* v. *Robillard*, 12 L. C. R. 3, Q. B. 1861.

10. A guardian is not bound to deliver up the effects placed in his custody to any one but the person by whom he has been appointed. *Frechette* v. *St. Laurent*, 13 L. C. R. 20, C. C.

11. In a case in which the guardian had ignorantly signed a *procès verbal*, whereby he undertook, in default of producing the goods, to pay to the plaintiff his debt, interest and costs—*Held*, to be signed by error, and that the bailiff seizing had no power to insert such a stipulation in the *procès verbal*. *Dupuis* v. *Bell*, 15 L. C. R. 435, S. C. 1865.

2. A guardian who refuses to deliver up the goods seized by a bailiff under a writ of *venditioni exponas*, cannot be imprisoned before he has been condemned by the court to give them up within a delay fixed, or before the order of the court has been served upon him. *Exp. Gauvreau* v. *Longobardi*, 3 Q. L. R. 195, C. C. 1877.

See art. 590, *ante*.

**598**. The adjudication of moveable property under execution transfers, by law, the ownership of the things thus adjudged.

In the case of seizures of shares in any financial, commercial or industrial company or association, duly incorporated, the sheriff is bound within ten days after the sale, to serve such company or association, in the manner mentioned in article 567, with a certified copy of the writ of execution, endorsing thereon a certificate designating the person to whom he adjudged the shares seized, and such purchaser thereupon becomes a shareholder in the company and has all the rights and obligations of one, and may require an entry to be made to that effect, in the manner prescribed by law, by the officer appointed for that purpose by the company. *C. S. L. C. c.* 70, *ss.* 2, 3, 4; 3 *L. C. J.* 122.

**599**. No demand for the annulling or rescinding of a sale of moveables under execution can be received against a purchaser who has paid the price, saving the case of fraud or collusion, and without prejudice to the recourse of the party aggrieved against the seizing creditor and those acting in his behalf. *Ouimet & Sénecal*, 3 L. C. J. 35; Gen. 457.

**600**. [Immediately after the sale, the costs thereof, including the pay of the appointed guardian, must be taxed by a judge or by the prothonotary, subject in the latter case to revision, if required.]

*Pothier, Proc.* 169.

1. A voluntary guardian is not entitled to any fees. *Miller* v. *Bourgeois & Holland*, 17 L. C. J. 158, S. C. 1873.

2. The defendant is not liable for the guardian's fees. *Dooly* v. *Ryerson*, 1 Q. L. R. 219, S. C. 1875; *Dansereau* v. *Girard*, 16 L. C. R. 380, C. C. 1866.

3. A voluntary judicial guardian who has become a necessary guardian by force of circumstances, and has been obliged to remove the goods seized under his immediate care, has a right to an opposition *afin de conserver* for the payment of his costs on the proceeds of his sale, and to be paid according to proof made of such costs. *Boucher et vir* v. *Brault et al. & Grenier*, 4 R. L. 237, S. C. 1872.

4. The costs to be paid under a judgment ordering the payment by plaintiff of the costs of a former action, as a condition precedent to proceeding with a new suit, are the taxed costs, and a guardian's fees not being by law claimable from defendant, cannot be included in such costs. *Dooly* v. *Ryarson*, 1 Q. L. R. 219, C. C. 1875.

5. Neither the attorney nor the bailiff is personally liable to the guardian who has been appointed and has voluntarily accepted the charge, for the costs of his guardianship. *Plante* v. *Cazeau & Cazeau & Langois et al.*, 1 Q. L. R. 203, S. C. 1875.

6. The bailiff was held liable in *Courchêne* v. *Genereux*, 1 R. L. 433, C. C. 1865.

## § 4. *Of the payment and distribution of the moneys levied.*

**601.** The moneys seized or levied, after deducting the duties thereon and taxed costs, may be paid by the sheriff to the seizing creditor, if no opposition for payment has been placed in his hands; otherwise, he must return them into court, to await such judgment as to right shall appertain. *Ibid.*, 170; *C. S. L. C. c.* 83, *s.* 146, § 2.

1. Where the lessor had got judgment by *saisie gagerie* and execution issued, but before the day of sale the money was paid and deposited in court, and another creditor by opposition claimed a dividend on the money paid in on the ground that there was no privilege on money paid in that manner, but only on the proceeds of the sale—*Held*, that the opposition must be dismissed on the ground that the money paid represented the goods which had been seized, and which were the lessor's pledge for his rent. *Wilson* v. *Spencer & Smith*, 3 R. L. 456, S. C. 1828.

**602.** When the moneys levied have been returned into court, the plaintiff has a right to be paid in preference to all other chirographic creditors; saving the right of a prior seizing party for his costs, the case of the insolvency of the debtor, and the case of privileged claims. *Pothier, Proc.* 174.

**603.** When the moneys are returned into court, as well as in all other cases where moneys of which an account has been rendered into court or moneys other than the proceeds of immoveables are to be distributed, and insolvency of the debtor is alleged, the distribution of the moneys cannot take place until his creditors generally have been called in.

The creditors are called in upon the order of the court or a judge, published twice in the French and English languages in the *Canada Gazette*,* requiring them to file their claims within fifteen days from the date of the first insertion.

23 *V. c.* 57, *s.* 52; *C. S. L. C. c.* 83, *s.* 147, §§ 3-4.

**604.** The claims may be made out in a summary manner, and it is sufficient for them to state the names, occupation and residence of the claimant, and the nature and amount of his claim.

They must be accompanied with vouchers, if there are any, or, if not, with an affidavit that the sum claimed is lawfully due. *Ibid.*

**605.** The moneys are distributed according to the order prescribed in the title *Of Privileges and Hypothecs*, and the title *Of Merchant Shipping* in the Civil Code, and in the provisions hereinafter contained.

1. A particular pledge given by a debtor to his creditor as security for the debt does not deprive the latter of his privilege on the other moveables of the debtor, if he have any. *Terroux* v. *Gareau et al.*, 10 L. C. J. 203, C. C. 1866.

* Now "The Quebec Official Gazette," 31 V. c. 13, s. 4. (*Que.*)

**606.** The following order is observed as regards the collocation of judicial costs:

1. Costs of seizure and of sale;

2. The duty payable upon moneys levied or paid into court;

3. The fees of the officer receiving moneys levied or paid in;

4. The fees upon the report of distribution;

5. The fees of the attorney prosecuting the distribution;

6. Costs, subsequent to judgment, incurred in order to effect the seizure and sale, and according to the priority of date or of privilege when there are several seizing creditors;

The costs of a prior seizing party have a preference over those of a subsequent one.

Nevertheless, if two or more writs of execution issue upon judgments rendered on the same day against the same debtor, the costs thereon are paid concurrently.

7. Costs of affixing seals, or of inventories, when ordered by the court.

[The plaintiff is next paid his costs of suit, *taxed as in an uncontested case not inscribed for proof.*]

33 Vic. c. 17, Q.:

2. Paragraph eight of article 606, of the said code, is amended by striking out all the words thereof after the words, "costs of suit."

1. The sheriff is entitled to poundage whether he receives the money or a bond is given in the manner provided by the Court. *Blake et al.* v. *Panet et al.*, 12 L. C. R. 189, S. C. 1862.

**607.** The Crown has a preference over all other creditors upon the proceeds of executions against moveable property which, under particular statutes, is subject to any of the following duties:

Customs dues;

Excise duties;

Duties imposed upon timber cut;

Tolls;

Inspection dues, on vessels, railways, or others similar. *C. S. C.*, *c.* 17, *ss.* 10, 11, 14, 41, §§ 3, 80, 84; *C.* 19, *ss.* 8. 10, 23, 24, § 2 *c.* 23, *ss.* 1, 3, 4, 8 ; *C. N.* 2098.

**608**. The owner of a thing, who has lent, leased or pledged it, and who has not prevented its sale, has a right to be paid the proceeds of its sale, after the claims mentioned in articles 1995 and 1996 in the Civil Code, and the privileged rights of the crown mentioned in the preceding article, and the claim of the lessor have been collocated. *Pothier, Proc.* 173.

**609**. The same rule applies to the owner of a thing which has been stolen, who would not have lost his right to revendicate it had it not been judicially sold.

**610**. Persons who have preserved the right of being collocated upon the price of the thing sold, by reason of a right of pledge or of retention which they had upon such thing, rank according to the nature of the pledge or of their claim.

The following is the order amongst them :

Carriers ;

Hotel-keepers ;

Mandataries and consignees ;

Borrowers, in loan for use ;

Depositaries ;

Pledgees ;

Workmen, upon things repaired by them ;

Purchasers, against whom the right of redemption is exercised, for the reimbursement of the price and the moneys laid out upon the property. *Pothier, Proc.* 343 ; *Dep.* 74 ; *Vente*, 323, 326 ; *Prêt. à us.* 43, *Charte-Partie*, 90, *Proc.* 192 ; *Paris* 181-2 ; *Ferr. sur l'art.* 181 ; *no.* 1, 2 ; 2 *Grenier, Hyp.* 298 ; 18 *Dur.* 509 ; *Tropl. Nant.* 100 ; *C. S. C. c.* 20, *s.* 90, § 3, *s.* 91 ; *Den. Actes de Not.* 108-9 ; *C. N.* 2102.

**611**. In the absence of any special privilege, the crown has a preference over chirographic creditors for sums due to it by the defendant.

## SECTION IV.

## OF SEIZURE BY GARNISHMENT.

**612.** Execution upon the moveable effects of a debtor, which are in the possession of a third party, may, in all cases, and must, when such third party does not consent to their immediate seizure, be effected by means of seizure by garnishment.

The same means must be adopted in executing upon debts due to the debtor other than those mentioned in article 565. *Pothier, Proc.* 156, 174, 180, 182; *Gen.* 472; *Pig.* 645-6, 663; *C. P. C.* 557-8; 1 *L. C. R.* 114.

1. An attachment in the hands of a third party is valid without the consent of such third party, his failure to object being sufficient. *Brossard & Tison et al.*, 18 L. C. J. 54, Q. B. 1874.

2. An attachment by garnishment will lie against a curator to an interdict under a judgment rendered against the interdict and the curator as such. *Crébassa* v. *Fourquin et al.*, 3 R. L. 57, S. C. 1871.

3. But where a mother had been appointed tutrix to her minor children, and afterwards renounced the community, and she was called upon personally by means of a writ of *saisie arrêt* to declare what money she had belonging to said minor children or owed in her personal capacity to them—*Held*, that the amount of indebtedness, if any, of the *tiers saisie* in her quality of tutrix to her minor children could not be enquired into by means of an attachment by garnishment but must be settled by direct action. *Dorion & Drummond es qual. & Dumont & Dorion*, 3 R. L. 60. Q. B. 1871.

4. Where the plaintiff caused a quantity of timber to be attached in the hands of a third party who was not responsible for the debt, but as a means of securing him (the plaintiff)—*Held*, on an appeal, that such an attachment, whereby any other person than the defendant was divested of the possession of property would not lie. *Wood & Gates et al.*, S. R. 536, K. B. 1833.

5. The sheriff under a writ of attachment by garnishment seized a quantity of railroad iron corporeally in the hands of a third party—*Held*, that such a proceeding was entirely illegal, and the seizure under such circumstances was a nullity. *Fleck* v. *Starnes et al.*, 7 L. C. J. 256, S. C. 1863.

**613.** Seizure by garnishment is made by means of a writ issuing from the court which rendered the judgment, ordering the garnishees not to dispossess themselves of the moveable effects belonging to the debtor which are in their possession, nor of such moneys or other things as they owe him or will have to pay him, until the court has pronounced upon the matter; and to appear on a day fixed, to declare under oath what effects they have belonging to the debtor, and what sums of money or other things they owe him or will have to pay him. *Pothier, Proc.* 176.

1. A justice of the peace has no authority to issue a writ of attachment after judgment. *The Corporation of the Parish of St. Philippe Exp.* 6 L. C. R. 484. S. C. 1856.

2. On an exception to the form of an attachment after judgment—*Held*, that such attachment could not be issued to take effect in Upper Canada. *McKenzie et al.* v. *Douglas & Brown et al.*, 5 L. C. J. 329, S. C. 1861.

3. Wages not due at the time of the service of the writ could not be attached. *Malo* v. *Adhemar & La Banque du Peuple*, 1 L. C. J. 270, C. C. 1851. *Sternberg et al.* v. *Dresser & Evans*, 4 L. C. J. 120, S. C. 1859. *Wurtele et al.* v. *Douglas & The Mayor, &c.*, 14 L. C. J. 17, S. C. 1869.

4. On appeal from a judgment on a writ of attachment—*Held*, that an attachment under the Ordonnance of 1787 could be set aside, if it be not, in the language of the law, against the estate, debts and effects of the defendant to be attached in the hands of some person in particular, and do not contain a summons to him as well as to the defendant to appear, and if it be not accompanied by an injunction from the judge to the sheriff to retain the effects seized to abide the judgment of the court, and if it appear in the declaration that the debt sworn to have been cancelled. *Richardson & Molson et al.*, S. R. 376, K. B. 1829.

5. The clerk of the court is responsible for damages caused by the issue of an illegal writ of attachment. *McLennan* v. *Hubert et al.* 4 R. L. 140, S. C. 1872.

**614.** This writ also summons the debtor to shew cause why the seizure should not be declared valid, and mentions the date and amount of the judgment in satisfaction of

which it is issued, and is moreover clothed with the formalities of ordinary writs of summons. *Pothier, Proc.* 176; *C. P. C.* 559, 563.

1. In every case of *saisie arrêt* the defendant must be summoned, and if the defendant, in an action against him, and the *tiers saisi* be not summoned, no proceeding can be had against the *tiers saisi*, not even if he neglect to appear. *Prior* v. *Dalamar & Heath*, 3 Rev. de Lég. 306, K. B. 1816.

2. Where the defendant had left the Province after action brought and had no domicile therein and attachment issued—*Held*, to be unnecessary to serve him with a copy of the writ of attachment, the writ being in such case a proceeding in the nature of an execution. *Mettayer et al.* v. *McGarvey & Mettayer et al.*, 6 L. C. R. 148, S. C. 1856.

3. Where in a case of attachment after judgment the defendant was found to be absent—*Held*, that service upon him was unnecessary. *Jones* v. *Saumur & Leroux*, 2 L. C. J. 60, S. C. 1857.

4. And in another case where the defendant had left the district of Montreal since the service of the original process—*Held*, that a service of a writ of attachment after judgment made on a clerk in the office of the clerk of the Circuit Court is valid. *Kearney* v. *McHale & Pariseault*, 7 L. C. J. 227, C. C. 1862.

**615.** The rules concerning the service of ordinary writs of summons apply to seizures by garnishment.

Nevertheless, the garnishee cannot be condemned by default, unless the writ of summons or other order to appear has been served upon him personally.

Upon satisfactory proof that a garnishee conceals himself in order to avoid such personal service, service at his domicile is held to be sufficient.

If the defendant upon the principal demand has been summoned as an absentee, the summons upon the garnishment may be served upon him at the prothonotary's office, but if he did not leave the province until after service of the principal demand, he must be summoned upon the garnishment according to the provisions of article 68.

The defendant is bound to answer the proceedings by

garnishment within the same delays as upon a principal demand. 6 *L. C. R.* 148; *C. S. L. C. c.* 83, *ss.* 59, 62.

1. A writ of attachment after judgment must be served within the same delay as an ordinary writ of summons. *McLaren et al.* v. *Hutchison Fraser*, 6 L. C. J. 45, S. C. 1861.

2. The omission to mention in a *procès-verbal* of seizure that the person seized had refused to sign the *procès-verbal* or that he was absent from his domicile at the time of the seizure is not a cause of nullity. *Duquette* v. *Ouimette & Ouimette*, 6 R. L. 167, C. C. 1874.

3. On an attachment after judgment—*Held*, that service upon the defendant who was absent was unnecessary. *Jones* v. *Saumur & Leroux*, 2 L. C. J. 60, S. C. 1857.

4. *Held*, in a later case, where the defendant had left the Province after judgment was rendered against him, and had no domicile therein, that the writ of attachment issued should nevertheless be served upon him. *Hogan* v. *Gordon and The Bank of Montreal*, 10 L. C. R. 21, S. C. 1859.

**616.** The effect of seizure by garnishment is to place the effects and debts of which the garnishee is debtor, under judicial control, and to sequestrate in his hands all corporeal things, in the same manner as if he had been specially appointed guardian. *Pothier, Proc.* 177.

**617.** The garnishee is bound to make his declaration in the office of the prothonotary of the court which issued the writ, before such prothonotary, who is authorized to administer to him the necessary oath.

Nevertheless, if the garnishee resides in another district than the one in which the writ of seizure by garnishment has issued, he may, on or before the day fixed for the return of the writ, make his declaration before the judge or the prothonotary of the district where he resides, and such prothonotary is bound to transmit the same to the court where the suit is pending.

When a seizure by garnishment is made in the hands of a corporation, the declaration is made by an attorney authorized in the same manner as for answering interroga-

tories upon articulated facts, as provided in article 224. *C. S. L. C. c.* 83, *s.* 136, § 3; *s.* 137; *C. P. C.* 571.

1. An advocate or attorney, being garnishee in a case, cannot refuse to declare what money or effects he has in his hands belonging to the defendant, his client, on the ground that his doing so would be a betrayal of professional confidence. *McKenzie et al.* v. *McKenzie & McKenzie et al.*, 9 L. C. J. 87, S. C. 1864.

2. An answer of a *tiers saisi* which would be no answer to a demand by his creditors is no answer to the attaching creditor. *Brehaut* v. *Loupré et al.* 3 Rev. de Lég. 305, K. B. 1812.

3. The declaration of a *tiers saisi* must be positive "I do owe" or "I shall owe" at a time certain, not "I may owe." Therefore, where it was sworn that the debt of a *tiers saisi* depended upon a contingency he was discharged. *Arnold* v. *Uppington et al.*, 3 Rev. de Lég. 347, K. B. 1821.

**618**. The garnishee's declaration must be made on the day appointed by the writ, or on the next following juridical day. It may be made at any time before the return day, at the prothonotary's office from which the writ issued, but in such case it cannot be received unless it is accompanied with a bailiff's return, certifying that previous notice of at least twenty-four hours has been given to the plaintiff of the garnishee's intention to make his declaration before the return of the writ. *Ibid. s.* 138 § 2.

1. Where the garnishee makes his declaration before the return day mentioned in the writ, a bailiff's certificate must be produced showing that notice has been given to the plaintiff or his attorney, at least twenty-four hours previously, that he intended to make his declaration before the return of the writ, and a declaration made without such notice will be rejected on motion. *Versailles* v. *Bailey & Kershaw et al.*, 8 L. C. J. 315, S. C. 1864.

**619**. The garnishee must declare in what he was indebted at the time of the service of the writ upon him, in what he has become indebted since that time, the cause of debt, and any other seizures made in his hands.

If the debt is not yet payable, he must declare when it will be.

If his indebtedness is conditional or suspended by any hindrance, he must also declare it.

He must furnish a detailed list of the moveable effects in his possession belonging to the debtor and declare by what title he holds them.

[The judgment creditor has a right to be present when the garnishee makes his declaration, and to put him any questions tending to prove any obligation of the garnishee towards the judgment debtor, saving all objections, which a judge, if present, may decide at once, or which, otherwise, the prothonotary must note down for subsequent decision thereon by the Court. *Pothier, Proc.* 176; *Gen.* 475; *C. P. C.* 573-4, 578; 2 *L. C. J.* 167.

1. Where a garnishee made a declaration to the effect that he had given to the defendant three negotiable promissory notes which were not due yet, but the interest upon which had been demanded from him by a third party—*Held*, that no judgment could be rendered against the garnishee upon such a declaration. *La Banque du Peuple & Martin*, 1 L. C. R. 107, S. C. 1850.

2. A *tiers saisi* with whom a defendant had deposited promissory notes in his favour was ordered to deliver up the notes into the hands of the prothonotary of the court. *McKay et al.* v. *Demers* v. *Fauteux*, 11 L. C. R. 284, S. C. 1861.

3. Where in the declaration of the garnishees, they referred to certain written documents, they were required to furnish such documents at their own expense as exhibits in support of the declaration. *Forsyth* v. *The Canada Baptist Missionary Society & Leeming et al.*, 2 L. C. J. 167, S. C. 1852.

**620.** The garnishee is entitled to his travelling expenses, which must be taxed by the judge or by the prothonotary who receives his declaration, and he may retain the amount thereof out of the sums in which he is indebted; and, if he owes nothing, such taxation may be enforced against the party suing out the writ, by an execution emanating from the court from which the writ issued.

1. Where the plaintiff sued the defendant for the amount of his tax-

ation as garnishee in a case—*Held*, that the amount allowed by way of taxation of a garnishee is recoverable by suit at law, but only after being demanded. *Plante* v. *Parke*, 15 L. C. R. 152, C. C.; *Brunelle* v. *Sampson*, 14 L. C. R. 12, C. C. 1863.

See authorities under art. 281 *ante*.

**621.** If the declaration of the garnishee is not contested, and he has not declared that any other seizure has been made in his hands, the court, upon an inscription for judgment, orders him to pay to the plaintiff, on account or to the extent of his debt, the moneys seized, according to their sufficiency.

This judgment must be served, and the delay for executing it dates only from the day of such service. 1 *Pig.* 658.

**622.** If there are several seizures at the suit of different creditors in the hands of the same garnishee, each seizure has a preference over the subsequent seizures, according to the date of its service upon the garnishee, except in cases of privilege, unless the insolvency of the common debtor is alleged, in which case proceedings must be taken upon the first seizure to call in the creditors, in the manner provided in article 603, and the garnishees, in such case, are condemned to pay into court the amounts they acknowledge to owe.

*Pothier, Proc.* 179; *Gen.* 477, 479, 480, 1 *Pig.* 659.

1. Where a creditor intervened and asked that the moneys due by the garnishee should be paid into court to be distributed, but before the allowance of the intervention judgment was rendered maintaining the attachment and ordering payment, judgment went against the intervening party in accordance with *Masson & Choall*, 6 L. C. R. 169, S. C. 1856; *Chapman* v. *Clark & The Unity Life Ass.*, 3 L. C. J. 159, S. C. 1859.

2. The existence of a previous *saisie arrêt* in the hands of the defendants as garnishees does not prevent the plaintiff (defendant in a previous suit), from seizing moneys due to defendants in the hands of other garnishees. *Mackay* v. *Routh & The Bank of Montreal*, 1 Legal News 161, S. C. 1878; Confirmed in Review, 1 Legal News 266, 22 L. C. J. 22; *Cadieux* v. *Cana. Mutual Fire Ins. Co.*, 1 Legal News, 340.

**623.** If the moneys or other things due by the garnishee are only payable at a future time, he may be condemned to pay them when such time arrives, and if they are due under conditions which are not yet fulfilled, the court may, upon motion of the seizing party, maintain the seizure until such conditions are fulfilled.

1. The delay stipulated in favour of *tiers saisis* that they should not be held to pay what they owed until after six months' notice had been given, could not affect the rights of the creditors who were entitled under their judgment to attach all the debts and property of their debtor, however held or in whatever manner due. *Frost et al. & Cameron & Gray et al.*, 3 R. L. 457, Q. B. 1830.

**624.** Garnishees who do not make their declaration in the manner hereinabove prescribed are condemned as personal debtors of the seizing party, to the payment of his claim.

They may, however, obtain leave to make their declaration at any time, even after judgment, upon payment of all costs incurred upon the seizure. *C. S. L. C. c.* 83, *s.* 137, § 2, *s.* 138; *Pothier Proc.* 176; *C. P. C.* 577; *Tailhades* v. *Talon & Fabre*, 1 *L. C. R.* 140.

1. A garnishee who has been condemned under an erroneous declaration by him made, may be relieved from the judgment, and may be permitted to make a new declaration by paying the costs incurred on the first one. *Atkinson* v. *Walker & Sincennes*, 14 L. C. J. 60, S. C. 1869.

2. The garnishees made a declaration by their secretary-treasurer that they owed the defendant $1,264.30. They subsequently alleged error in such declaration and made application to be allowed to make a new declaration, alleging that, at the time of the seizure, they owed defendant nothing—*Held*, admissible for them to make a new declaration on payment of costs occasioned by the alleged error, and that any new declaration could be contested like the original one. *Richard et al.* v. *Piché & La Société Canadienne Française de Construction*, 20 L. C. J. 290, S. C. 1876.

3. The garnishee who has not made his declaration within the delay prescribed by the code, may, nevertheless, make it at any time, even after judgment, on paying the costs occasioned to the plaintiff by his negligence, and notwithstanding 624 C. C. P., he cannot be held for all

costs of the attachment, but only those thus incurred. *Beaudoin* v. *Ducharme & Bellefleur*, 20 L. C. J. 223, C. C. 1876; 8 R. L. 663.

4. A garnishee may be permitted to make his declaration as such, after judgment rendered against him by default, and even after execution has issued to levy the amount of such judgment. *Andrews* v. *Robertson*, 1 L. C. R. 140, S. C. 1851; *Roy* v. *Scott*, 3 L. C. R. 80, S. C. 1852.

**625.** The judgment rendered upon a garnishee's declaration of indebtedness is equivalent to a judicial assignment to the seizing creditor of the judgment debtor's title of debt, and effects subrogation. 6 *L. C. R.* 170-1.

1. A creditor cannot recover against his debtor, if the latter have been condemned as garnishee in another case in which the creditor is defendant, and that more especially when he has commenced to satisfy the judgment rendered against him as such garnishee. *Parent* v. *Talbot*, 14 L. C. R. 127, C. C. 1863.

2. The service of a petition by a party not in the cause on the attorneys of the plaintiff who obtained the judgment condemning the garnishee to pay plaintiff a certain sum of money, asking for a special order to prevent the garnishee paying over the amount, is bad. *Booth* v. *Lacroix et al., & Rolland & Duprey*, 21 L. C. J. 307, 1 *Legal News*, 212, S. C.

**626.** The seizing party must declare within eight days whether he intends contesting the garnishee's declaration, unless a further delay be granted to him by the court or judge, and he must at the same time file his grounds of contestation, after serving them upon the garnishee, and notifying the latter to answer the same within the same delay as is allowed for answering exceptions and pleas.

He cannot, however, forfeit his right to contest without an order of the court to that effect. 98*th Rule of P.*

1. A contestation by the plaintiff of the declaration of the garnishee on an attachment after judgment will be rejected if not made within eight days. *Masson et al.* v. *Tassé et al. & Tassé*, 6 L. C. R. 71, S. C. 1856.

2. Where the plaintiff after the expiration of eight days allowed to contest the declaration of the *tiers saisi* made motion that the *tiers*

*saisi* be ordered to make a new declaration—*Held*, to be too late, and dismissed with costs. *Warner* v. *Blanchard & The Mayor et al.*, 2 L. C. J. 73, S. C. 1857.

3. According to the 98th rule of practice a contestation of the declaration of the garnishee cannot be filed after eight days from the making of the declaration. *Bruneau* v. *Charlebois*, 3 L. C. J. 56, Q. B. 1857.

4. *Held*, that possession taken by the plaintiff of the debtor's property in the hands of the garnishee was a matter which should be brought into discussion by the contestation of the garnishee's declaration, and as that possession was in fraud of the creditors, the plaintiff was liable to pay to the creditors the full value of the property. *Montgomery & Price*, 3 R. L. 458, K. B. 1830.

**627**. In other respects, contestations of garnishees' declarations are subject to the same rules as those of ordinary suits.

1. Where exception to the form was filed against a writ of attachment on the ground that it had been returned the day after the return day, and motion was made to reject the exception—*Held*, that the attachment after judgment was in the nature of an execution and could not be attacked in that way. *Molson* v. *Burroughs & The Bank of Montreal*, 3 L. C. J. 93, S. C. 1858.

2. And where the defendant subsequently moved to quash the same writ of attachment—*Held*, that the irregularities complained of could not be tried by motion, which was accordingly dismissed. Ib. 3 L. C. J. 97, S. C.

3. A defendant may contest an attachment after judgment as an action, without affidavit. *O'Neil* v. *Fontaine & Filion*. 1 Q. L. R. 222, S. C. 1876.

4. The court cannot look into accounts between the garnishee and a party not in the record in order to determine what may be due by the garnishee to the defendant. *Ireland* v. *Gregory & Mills*, 2 L. C. L. J. 132, S. C. 1866.

**628**. Besides the things enumerated in articles 557 and 558, the following are also exempt from seizure:

Pay and pensions of persons belonging to the Army or to the Navy;

Salaries of public officers;

Contingent emoluments and fees due to ecclesiastics and ministers of worship, by reason of their actual services, and the income of their clerical endowment.

[The salary of school teachers.]

*Pothier, Proc.* 186-7; *C. P. C.* 580.

38 Vict. c. 12 (*Que.*):

1. In future, the salaries due and to become due of all public servants or employees, in the Province of Quebec, shall be liable to seizure in the proportions hereinafter set forth, for any debt incurred subsequently to the coming into force of this Act, notwithstanding any provision to the contrary contained in articles 558 and 628 of the code of civil procedure of Lower Canada.

2. The portions of such salaries liable to seizure shall be:

(1.) A fifth of every monthly salary, not exceeding one thousand dollars per annum;

(2.) A fourth of every monthly salary, exceeding one thousand dollars but not exceeding two thousand dollars per annum;

(3) A third of every monthly salary, exceeding two thousand dollars per annum.

3. The seizure of each such portion of the said salaries shall be made and adjudicated upon in the manner usual in relation to attachments by garnishment after judgment, before any competent court.

4. A copy of the writ of attachment shall be served upon and left with the head or deputy-head of the department or office, in which the public servant or employee, defendant, is employed and paid.

The bailiff or seizing officer must endorse on such copy a declaration of the day of service and affix his signature at the foot of such declaration.

5. The head or deputy-head of the department or office, in which the salary attached by garnishment is paid, in lieu of making a declaration under oath, shall make a report to the court under his signature, establishing the amount of the salary due at the time of the service of the writ of attachment and the amount of the salary to become due each month, if such servant or employee continues his employment under the same conditions.

6. Notwithstanding what precedes, it shall be lawful for any creditor of any public servant or employee before entering an action or issuing a writ of attachment by garnishment, to produce a sworn statement of his debt or a copy of judgment, at the office or department in which such public servant or employee receives his salary.

If such public servant or employee acknowledges himself to be indebted in the sum demanded, and, in writing, authorizes the payment thereof out of the portion of his salary liable to seizure, the head or deputy-head of such office or department shall pay the creditor according to the authorization, at each period of payment of salaries.

If several creditors present themselves at the same time, they shall be paid concurrently, in proportion to their claims.

7. Nothing in the preceding section shall have the effect of preventing the attachment by garnishment of the part of the salary liable to seizure under section one of this Act; and in the event of such attachment, the authorization given under the preceding section shall become null and of no effect.

1. An attachment by garnishment of moneys in the hands of the revenue inspector belonging to the defendant as an informer under the revenue laws was dismissed. *Leclerc* v. *Caron & Lemoine*, 8 L. C. R. 287, C. C. 1858.

2. Money in the hands of the officers of the Admiralty cannot be attached. *Perrault* v. *McCarthy*, 3 Rev. de Lég. 306, K. B. 1816.

3. Under a judgment against a defendant it was sought to attach a pension granted to her as widow of a pilot, from what is known as the "Decayed Pilots' Fund"—*Held*, to be exempt. *Lelievre et al.* v. *Baillargeon & The Trinity House*, 3 L. C. R. 420, C. C. 1853.

4. Moneys payable on account of a contract pending with the War Department for erection of fortifications in this province are not liable to attachment. *Fitts* v. *Piton et al. & H. M. Secretary of State for the War Department et al.*, 13 L. C. J. 165, S. C. 1869, & 12 L. C. J. 289, S. C. 1868.

5. No attachment in the hands of the Secretary of War will lie under any circumstances. Ib.

6. Pensions granted to infirm pilots under 45 Geo. 3, c. 12, ss. 11 and 12 Vict., c. 114, s. 61, are not seizable. *Shaw* v. *Bourget & The Corporation of Pilots*, 4 Q. L. R. 181, C. C. 1878.

7. The salary of an officer of the Inland Revenue cannot be seized in the hands of the collector of Inland Revenue having an office in the City of Montreal, because he is not the head or the deputy-head of department but a mere employee himself. *Evans et al.* v. *Hudon & Browne*, 22 L. C. J. 268, S. C. 1877.

8. The exemption from seizure of the salaries of public employees is a matter of public order, and the Legislature of the Province of Quebec has not the power to declare the salaries of employees of the Federal government seizable. Ib.

**629.** If a garnishee declares that he has in his possession moveable effects, the judgment orders that they shall be sold, and the garnishee is bound to deliver them to the officer charged with selling them.

If the garnishee has in his hands negotiable paper or titles of debt payable to bearer, he may be condemned to deposit them in the prothonotary's office or to deliver them to a person named by the court, according to circumstances.

1 *Pig.* 660; 11 *L. C. R.* 28

1. A plaintiff cannot by motion after the issue of a writ of *saisie arret* ask that the garnishee be ordered to pay over the amount attached in deduction of his claim against the defendant. *Februyer* v. *Poirier & Decaré*, 7 L. C. J. 44, S. C. 1863.

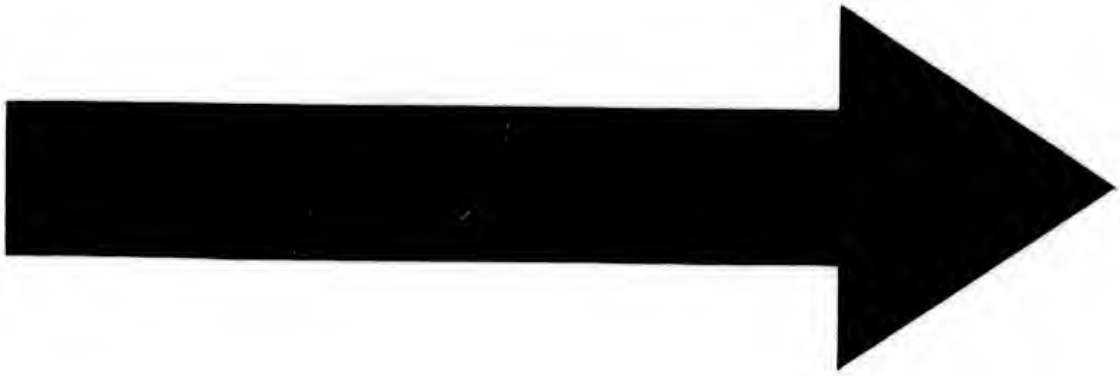
2. Where the garnishees made a declaration that the defendant had deposited with them three debentures of the city of Hamilton, &c., it was ordered that the garnishees do deposit the same in the hands of the prothonotary within fifteen days after service upon them of the judgment, to abide the decision of tho court. *Perry* v. *Milne & The Ontario Bank & Milne*, 6 L. C. J. 301, S. C. 1862.

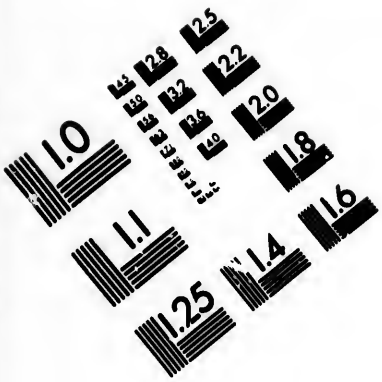
3. When a plaintiff who has obtained judgment against a garnishee neglects or refuses to enforce payment from him, the defendant will be empowered to cause the issue of a writ of execution for the levy of the amount due by the garnishee, which amount will be held by the sheriff subject to the order of the court. *The Quebec Bank* v. *Stuart et al. & The Quebec Fire Assurance Co.*, 14 L. C. R. 101, S. C. 1863.

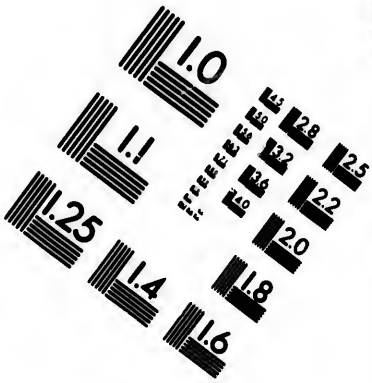
4. Where moneys attached by a writ of *saisie arret avant jugement* have been deposited in the hands of the prothonotary, an official assignee has a right to claim them as *tiers opposant*, in which case the plaintiff has only a lien, for costs up to the date of the publication of the attachment in insolvency under which the assignee was appointed. *Macfarlane et al.* v. *Bell & Dougall et al. & Burn*, 10 L. C. J. 26, S. C. 1865.

5. A *tiers saisi* who refuses to deliver up articles seized in his possession is guilty of contempt. *Ferguson* v. *Millar & Hooker*, 3 Rev. de Lég. 305, K. B. 1813.

6. Where a person upon whom a writ of attachment *en main tierce* had been served, declared on oath that he had nothing in his possession belonging to the defendant, but afterwards, when examined as a witness, admitted having a number of articles of value—*Held*, that he



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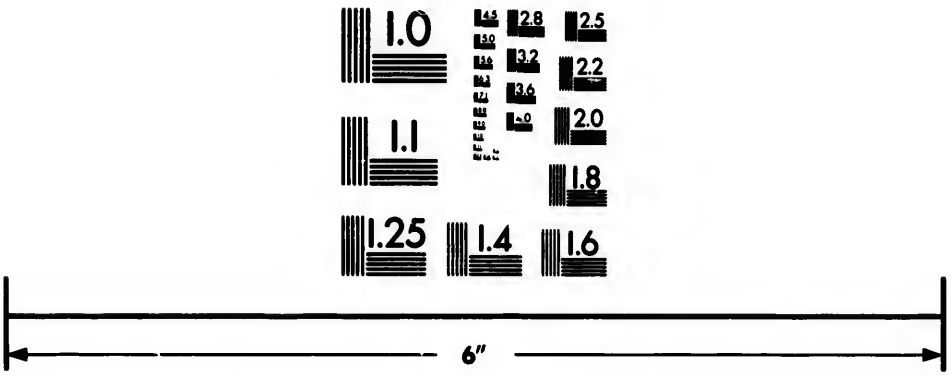



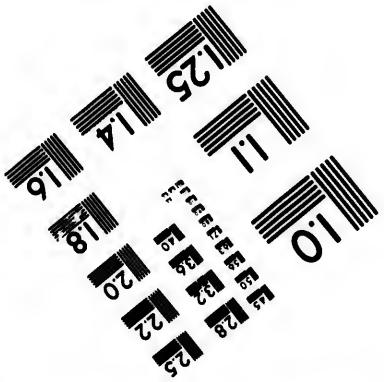


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was bound to give a detailed statement of the value of such articles, and must be condemned as the personal debtor of the plaintiff to the extent of their value. *Grant et al.* v. *Teasel & McShane*, 17 L. C. J. 163, S. C. 1873.

**630.** The proceeds of the sale of such moveable effects are afterwards distributed in the same manner as other moneys levied under execution against moveables. 1 *Pig.* 664.

**631.** If a garnishee declares that he is not indebted, and he cannot be proved to be so, the court orders him to be discharged from the seizure, and condemns the seizing party to pay the costs.

*Pothier, Proc.* 176.

## SECTION. V.

## OF EXECUTION UPON IMMOVEABLES.

### § 1. *Of the seizure of immoveables in execution.*

**632.** The seizure of immoveables can only be made against the judgment debtor, and he must be, or be reputed to be, in possession of the same, *animo domini*.

No seizure can be made of immoveables declared by the donor or testator thereof, or by law, to be exempt from seizure.

Constituted rents representing seigniorial dues are seized and sold with the formalities prescribed by the Act 27-28 Vict. ch. 39.

1. The railway of an incorporated company cannot be seized in execution of a judgment, or sold at sheriff sale. *The Co. of Drummond* v. *The South E. R. Co. and The South E. R. Co. and The Co. of Drummond*, 22 L. C. J. 25, S. C. 1878.

2. A sheriff acting under special instructions from the attorney of a seizing creditor and without malice, seized the land of several parties not in the case. Oppositions were filed, and maintained with costs for the payment of which the sheriff was held responsible. *McDonald* v. *Taché*, 2 R. C. 475, S. C. R. 1872.

**633.** The seizure of immoveables can only be made in virtue of a writ, clothed with the same formalities as writs of execution against moveables, ordering the sheriff to seize the immoveables of the defendant and to sell them in satisfaction of the condemnation pronounced against him in principal, interest and costs.

The date of the judgment must be inserted in or written and certified upon the writ, under the signature of the prothonotary.

Exceptional provisions regulate the sale of immoveables for the payment of municipal taxes and assessments. 25 *Geo. III. c.* 2, *s.* 30; *C. S. L. C. c.* 83, *ss.* 139-140.

**634.** [The writ is addressed to the sheriff of the district in which the immoveables belonging to the judgment debtor are situated, and is executed by the sheriff himself or by one of his officers.] *C. S. L. C. c.* 83, *s.* 40; 12 *L. C. R.* 403.

**635.** When any of the immoveables to be seized is situated at more than nine miles from the place where the writ of execution issues, the sheriff, upon the written demand of the creditor or of his attorney, is bound to employ for making the seizure, the publications and the adjudication, such bailiff residing in the locality in which the immoveable is situate as the creditor indicates, and in such case the sheriff is discharged from any liability resulting from the acts of such bailiff, and the seizing creditor becomes alone responsible. The seizing creditor, in order to avoid costs, may also undertake the transmission of the documents belonging to the execution, and the bailiff is bound to return them to him, and on doing so is discharged from any consequent responsibility.

The other provisions of article 555 apply likewise to writs of execution against immoveables. 27-28 *Vict., c.* 39, *s.* 12.

**636.** When an immoveable is situated partly in the district in which the judgment was rendered and partly in

another, it may be wholly seized in execution, in the same manner as if it were wholly in the district in which the judgment was rendered.

**637.** Before proceeding to seize immoveables, the seizing officer calls upon the defendant to declare and specify his immoveable property, except the case of immoveables surrendered in a suit and the cases mentioned in article 641; and upon his failure so to declare and specify, the executing officer may seize the property in possession of the defendant, at the risk and peril of the latter. *C. S. L. C. c.* 85, *s.* 5.

**638.** The seizure of immoveables is recorded by minutes, which must contain:

1. Mention of the title under which the seizure is made;

2. Mention of the defendant having been called upon, as required by the preceding article;

3. A description of the immoveables seized, indicating the city, town, village, parish or township, as well as the street, range or concession in which they are situated, and the number of each immoveable, if there exists an official plan of the locality; if not, it must me[illegible] the coterminous lands;

If the property to be seized c[illegible]sts of incorporeal rights, such as rents, leases, or other real charges, mention must be made of the title under which they are due, with a description as above mentioned, of the real property charged with the same;

4. Mention that the minutes are made in duplicate, and that one duplicate thereof has been delivered to the judgment debtor, either personally or at his actual or legal domicile. 8 *L. C. R.* 299; *C. S. L. C. c.* 37, *s.* 74, § 4; *Pothier, Proc.* 190-1.

1. In consequence of a clerical error committed in the seizure of immoveables by the sheriff, a petition to annul the sale presented by the *saisi* was granted with costs against the sheriff. *Baudry* v. *Raymond.* 14 L. C. J. 112, S. C. 1869.

2. In the case of the seizure of real estate it is not necessary to mention in the *procès-verbal* and notices, the contents of the property seized, and in the case submitted, the respondent having sold the real estate mentioned without having mentioned its contents, could not urge the absence thereof in the *procès-verbal*. *Berthelot* v. *Guy et al.*, 8 L. C. R. 299, & 2 L. C. J. 166 Q. B. 1858.

3. It is not necessary that the *procès-verbal* of seizure of immoveables should be made and signed on the place where the immoveables are situated, but it may be legally made at the domicile of the *saisi*. *Sénécal* v. *Vienne & Vienne*. 3 R. L. 523, S. C. R. 1871.

4. The absence of a witness to the seizure, the want of an election of domicile by the party seizing and by the bailiff, the omission to state whether the sale was effected before or after twelve o'clock, and that demand of payment was made at the time of the seizure, were not held sufficient to invalidate the seizure. *Boyer* v *Sloane et al.*, 2 L. C. R. 53, S. C., 1852.

**639**. The seizing party's domicile is elected at the sheriff's office, without its being necessary to elect another or to mention it in the minutes.

**640**. The judgment debtor, as well as his seizing creditor, may cause the ground rents and charges upon the immoveables seized to be mentioned in the minutes; but it is not necessary to mention rents established in redemption of seigniorial rights, and any oppositions filed for that purpose cannot retard the sale, but must be returned by the sheriff, and no costs can be obtained thereon by the opposants. *C. S. L. C. c.* 41, *ss.* 54, 55; *c.* 85, *s.* 6, § 2.

**641**. No minutes are necessary in suits instituted by building societies for bringing to sale the immoveables subject to their hypothec or right of pledge, nor in the case of article 907. *C. S. L. C. c.* 69, *s.* 14, § 2.

**642**. [When the sheriff has seized an immoveable upon a defendant, he cannot seize it again at the suit of another creditor, or of the same creditor for another debt, as long as the first seizure subsists; but he is bound to note any subsequent writ of execution as an opposition for payment upon

the first writ; and in such case the first seizure cannot be abandoned nor suspended, except in consequence of oppositions applicable as well to the seizing creditor as to those whose writs of execution have been noted as oppositions, or with their consent, or by an order of a judge.] 9 *L. C. R.* 69, 456.

1. Where a writ of execution is presented to the sheriff against the curator of a substitution, while the goods of the substitution are under seizure on a previous writ against the institute, the sheriff must note this second writ as an opposition *à fin de conserver*. *Wilson* v. *Leblanc & Doutre et al. & Leblanc et al.*, 16 L. C. J. 209 S. C. R. 1872.

2. Where two executions issue at the suit of different parties against the same defendant, different *procés verbaux* must be made by the sheriff for each seizure, and he cannot unite both seizures in one *procés verbal*. *Sanderson* v. *Roy & Roy*, 3 L. C. J. 119, S. C. 1858; *Palliser & Roy*, 4 L. C. J. 208, 9 L. C. R. 456, Q. B. 1859.

**643.** [In the event of the seizing creditor abandoning the seizure, or receiving payment of his claim, the sheriff is bound to continue the proceedings in the name of the seizing creditor and at the cost of the judgment creditors whose writs have been noted, in order to satisfy the claims specified in the subsequent writs of execution, provided the seizure was made with all requisite formalities.]

1 *L. C. R.* 95; *Pothier, Proc.* 210; 1 *Pig.* 756.

**644.** From the moment that immoveables have been seized, the debtor cannot, on pain of nullity, alienate them.

The alienation avails, however, if the seizure is declared null, or if, before the day fixed for the sale, the purchaser or the debtor pays into the hands of the sheriff a sufficient sum to discharge the claims of the creditor in whose name the seizure was effected, as well as the claims of any creditors whose writs of execution have been noted, and the amount thus deposited is forthwith paid by the sheriff to the creditors entitled to it. *C. S. L. C. c.* 47; *C. P. C.* 686-7.

**645**. The immoveables seized remain in possession of the judgment debtor until the adjudication.

[But if the sale is prevented by any opposition, the seizing creditor may, according to circumstances, and in the discretion of the court, obtain the appointment of a sequestrator to receive the rents, issues and profits of the immoveables.] *Ord.* 1626, *art.* 157; 1 *Pig.* 755; *C. P. C.* 685.

**646**. The judgment debtor cannot, nor can any other person, cut timber on the property seized, or in any manner deteriorate the same, on pain of being imprisoned for a term not exceeding six months, under a rule of court or the order of a judge in vacation. *C. S. L. C. c.* 85, *s.* 29; *C. P. C.* 683.

**647**. The sheriff may, before seizing immoveables, exact from the party who places the writ in his hands the sum of four dollars, to meet the first expenses of the advertisements hereinafter required. *C. S. L. C. c.* 85, *s.* 6.

### § 2. *Of advertisements.*

**648**. The sheriff is bound to advertise in the *Canada** *Gazette*, in the French and English languages, three separate times within the space of four months from the date of the first publication, the sale of immoveables seized.

The advertisement must contain:

1. The number of the cause and the nature of the writ, whether *fieri facias* or any other;

2. The names and surname of the plaintiff in the suit, or if there are several plaintiffs, a designation of the first named in the writ, with an indication that there are others;

3. The names and surname of the defendant in the suit, or if there are several defendants, a designation of the one first named in the writ, with an indication that there are others;

* Now "The Quebec Official Gazette," 31 *V. c.* 13, *s.* 4 (*Que.*).

If the plaintiff or defendant is acting as tutor to minors, it is sufficient to state that he is acting as tutor to the minor children of the deceased person, without designating the minors by name;

4. A designation of the immoveables, or of the rents, as the case may be, as inserted in the minutes, of the charges therein mentioned, and of those also which the seizing party has requested in writing to have inserted, and mentioning upon which of the defendants the property is seized;

5. The time and place at which the immoveables or rents will be put up for sale and adjudged;

6. The date at which the writ of execution is returnable into court.

*C. S. L. C. c.* 85, *ss.* 4-6, § 2, 10, 11 & *Schedule A; C. P. C.* 690-1-2-3-6.

**649.** The advertisements of sheriff's sales must be printed consecutively and be preceded by a notice according to form 34 in the appendix to this code, or any other form of like effect. *C. S. L. C. c.* 85, *Schedule A.*

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FORM NO. **34.**

In connection with article 649.

*Advertisement of Sheriff's sale.*

Public notice is hereby given, that the undermentioned lands and tenements have been seized and will be sold, at the respective times and places mentioned below. All persons having claims on the same which the registrar is not bound to include in his certificate under article 700 are hereby required to make them known according to law. All oppositions to withdraw, to annul, to secure charges, or other oppositions to the sale, except in cases of *venditioni exponas*, are required to be filed with the undersigned, at

his office, previously to the fifteen days next preceding the day of sale. Oppositions for payment may be filed at any time within six days next after the return of the writ.

No. *Fieri Facias.*

A. B., of the city of , in the county of , in the district of , against C. D., of , in the county of , in the district of (*as the case may be*), (*insert the description of the land or other immoveable property, the parish, seigniory or township, and the county and district in which the same is situate,*) in the county, &c., bounded, &c. To be sold, at , on the day of , at o'clock in the (forenoon); the said writ returnable on the day of next.

A. B., Sheriff.

No. *Venditioni Exponas.*

No. *Alias fieri facias.*

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41 Vict., c. 15 *(Que.)*:

An Act to provide for the giving notice of Sheriff's sales to hypothecary creditors.

*(Assented to 9th March, 1878.)*

WHEREAS it would tend to increase the security afforded by hypothecs that notice of advertised Sheriff's sales should be given to hypothecary creditors; Therefore Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. Every registrar shall keep a register for the addresses of hypothecary creditors.

2. Any hypothecary creditor or any transferee, heir, donee or legatee of a hypothecary creditor, may give notice to the registrar of the registration division wherein the immoveables hypothecated are situate, of his address, and if he afterward changes his residence of his new address.

The registrar shall enter such address in the register of addresses, and shall note the number of the entry of the same in the index to immoveables in the page or space allotted for the lot or sub-division hypothecated in favour of the person giving the notice.

3. Within one month after having advertized the sale of immoveables, the sheriff shall apply to the registrar of the registration division wherein such immoveables are situate, for a list of the addresses which may have been notified to him ; and the registrar shall forthwith transmit such list to the Sheriff.

4. The sheriff shall send a printed copy of the advertisement prescribed by article 648 of the Code of Civil Procedure, to each hypothecary creditor, whose address is given in the list furnished by the registrar, through the post, at least one month before the day fixed for the sale.

5. The omission to obtain such list of addresses or to send a copy of the advertisement to all or any of the persons whose addresses are given in a list, shall not invalidate or affect a sheriff's sale.

6. The sheriff and the registrar shall be entitled to such fees, for the performance of the duties imposed by the preceding sections, or may be established by order of the Lieutenant-Governor in Council.

7. The person giving notice of his address shall pay the registrar's fees, and shall also deposit in his hands, an amount equal to the fees allowed to the sheriff for the notice to be sent to such person ; such amount shall be paid to the sheriff by the registrar when he transmits the list of addresses.

On the cancellation of an hypothecary claim, the deposit shall be refunded ; and the address of the creditor shall be struck off the register of addresses.

1. The sheriff is alone liable to the printer for the price of the advertisements, as there is no contract between the printer and the seizing creditor. *Stevenson et al.* v. *Boston et al.*, 2 L. C. R. 17, S. C. 1851.

**650.** The sheriff must also, if the seizure is made in a parish, cause the advertisement prescribed by the two preceding articles to be published and posted, on the third Sunday before the day fixed for the sale, at the door of the church of the parish in which the property seized is situated, immediately after morning service. *C. S. L. C. c.* 85, *ss.* 4, 10; 27-28 *Vict., c.* 39, *s.* 1.

1. In an action to set aside a sale made by the sheriff on the ground that the formalities required by law precedent to the sale of immoveables had not been observed, that the announcement had not been made at the church doors, but that the sale having been first stayed by an opposition *à fin de charge* which was maintained, the property

was subsequently sold by the sheriff with the ordinary formalities, under a writ of *venditioni exponas*—*Held*, confirming the judgment of the court of review, that the plaintiff having known all along that announcement had not been made, and having taken no proceedings to stop the sale, had waived any objection that he might have had thereto, and had no right of action afterwards to set it aside. *Bouvier & Brush et al.*, 1 R. L. 641 & 1 L. C. L. J. 110, Q. B. 1865.

2. And *held*, also, that the failure or neglect to make the announcements at the church doors after oppositions filed, is not a ground of absolute nullity of an execution in every case. *Ibid.*

## § 3. *Of oppositions to the seizure and sale of immoveables.*

**651.** The sheriff, in the absence of any consent on the part of the seizing creditors, cannot stop the sale of immoveables except upon a judge's order, or upon the filing of an opposition, accompanied with an affidavit on the part of the opposant that all the allegations in the opposition are true, to the best of the deponent's knowledge and belief, and that the opposition is not made with intent unjustly to retard the sale but solely to obtain justice. 6 *L. C. R.* 431, 479; 7 *L. C. R.* 130, 8*th Rule of P.*

1. In default of obtaining an order to suspend proceedings, previous to filing an opposition, the judgment remains executory, and the defendant is obliged to pay the amount within the delay fixed by law. *Molleur & Molleur & The Attorney General*, 5 R. L. 379, S. C. 1874.

2. A judge in the exercise of his discretion may grant a *sursis* of proceedings under execution for the purpose of allowing an appeal to the Privy Council. *DeGaspé et al.* v. *Asselin & DeGaspé*, 18 L. C. J. 112, S. C. 1873.

3. Where a creditor of the plaintiff, before execution had issued against the defendant, caused a writ of attachment in garnishment to be served on the defendant—*Held*, that this did not suspend proceedings under an execution, and to produce that effect, the defendant must have deposited the amount of the judgment with interest and costs. *Duvernay & Dessaulles*, 4 L. C. R. 142, Q. B. 1851.

4. An execution cannot be issued on a judgment rendered against four defendants, if one of them have instituted an appeal, and such

appeal is still pending. *Brush et al. & Wilson et al.* 6 L. C. R. 39, S. C. 1856.

5. An order to the sheriff to suspend all proceedings on a writ of *fi. fa. de terris* causes the writ to lapse. *Ranger et vir & Seymour et al.* 16 L. C. J. 42, Q. B 1872.

**652.** Every opposition to the seizure and sale of immoveables or rents must be filed at the latest on the fifteenth day before that fixed for the sale.

No opposition filed after this period can stop the sale; but if the object of the opposition is to withdraw, in whole or in part, the immoveable or the rent under seizure, or to impose upon the purchaser some charge which would be destroyed by a sheriff's sale, such opposition has the effect of an opposition for payment out of the moneys levied.

The sheriff in all cases is bound to return such oppositions into court. *C. S. L. C. c.* 85, *s.* 15.

1. An opposition to annul the seizure of real property cannot be received within the fifteen days fixed for the sale, even with the order of a judge. *Lespérance & Allard et vir*, 1 L. C. R. 154, Q. B. 1851.

2. Where an opposition *à fin d'annuler* had been filed to the sale of an immoveable within the fifteen days preceding the sale, and the plaintiff made motion that the opposition be dismissed under C. S. L. C. cap. 85, s. 15—*Held*, that as the court had the power to grant the prayer of an opposition thus filed the motion would be rejected. *The Trust and Loan Company of Upper Canada* v. *Julien & May*, 7 L. C. J. 129, S. C. 1863.

3. An opposition produced too late, namely, within and not previous to the fifteen days next before the day fixed for the sale, may be rejected upon motion, notwithstanding that such opposition has been produced with the order of the judge to receive the same, and upon the affidavit of one of the opposants. *Joseph & Donnelly & Monahan*, 12 L. C. R. 106, S. C. 1861.

**653.** Notwithstanding the filing of any opposition to the seizure or sale of immoveables or rents, the sheriff is bound to continue the publication hereinabove prescribed; but he cannot in such case proceed with the sale without an order from the court.

Nevertheless when the opposition is founded upon grounds which only go to reduce the amount claimed, the plaintiff, upon giving the opposant notice that he admits his opposition, may proceed to the sale in conformity with the conclusions of such opposition. *C. S. L.C. c.* 85, *s.* 17, § 3.

**654.** Every opposition must be delivered to the sheriff, and the return of its service upon him, if it is required, must be made at the foot of a copy thereof.

**655.** Saving the provision of articles 652, the sheriff is bound to return into court, within twenty-four hours, any oppositions to the seizure and sale duly served upon him, together with the writ of execution, all his proceedings, including a duplicate of the advertisement published in the *Canada Gazette*,* and a certificate of the oral publication, if it has taken place. *Ibid. s.* 16.

**656.** Every party who opposes unsuccessfully the sale of an immoveable or of a rent under seizure, is liable towards the party seizing and the defendant, not only for the costs incurred upon his opposition, but also for all damages resulting therefrom, including interest upon the amount due to the plaintiff, for the time during which the sale was stopped. *Ibid. s.* 17.

1. To file an unfounded opposition *à fin d'annuler* is a false plea intended to impede the due course of justice, and is, therefore, a contempt, and attachment may be granted therefor. *Quirouet* v. *Wilson*, 3 Rev. de Lég, 472, K. B. 1818 ; *Hunt* v. *Perrault*, 3 Rev. de Lég, 475, K. B. 1820.

2. Where the opposant had filed three oppositions consecutively, and the plaintiff moved for a rule for contempt on the ground that the oppositions were filed only with a view of retarding the sale of the property, the rule was granted with costs. *Thomas* v. *Pepin & Pepin*, 5 L. C. J. 76, C. C. 1861.

* Now "The Quebec Official Gazette." 31 *V. c.* 13, *s.* 4 (*Que.*).

*Of oppositions to annul.*

**657.** The party whose immoveables or rents are seized may oppose the seizure or the sale thereof, whether his opposition be founded on matters of form or on matters of substance.

Third parties may likewise file similar oppositions when they have an actual interest therein. *Pothier Proc.* 206-7.

1. An opposition *à fin d'annuler* alleging a previous seizure, and that *saisie sur saisie ne vaut*, will not be set aside on motion. *Fraser* v. *Burnstein & Burnstein*, 9 L. C. J. 215, S. C. 1865.

2. An opposition *à fin d'annuler* may be dismissed on motion. *La Banque du Peuple & Daoust & Daoust*, 9 L. C. J. 215, S. C. 1865.

3. The payment of an amount for which judgment has been recovered, made anterior to such judgment, may be successfully pleaded by an opposition *à fin d'annuler* to a seizure made under such judgment. *Doyle et al. & McIver et al. & McIver et al.*, 19 L. C. J. 308, S. C. R. 1875. *See* Arts. 555 and 581 *ante*.

4. On motion to reject an opposition—*Held*, reversing the judgment of the court below, that an opposition *à fin d'annuler* issued out of the Circuit Court does not require to be registered or entered in the books of the court before it is placed in the hands of the bailiff. *Lamothe* v. *Garceau*, 13 L. C. J. 88, Q. B. 1862.

5. An opposition *à fin d'annuler*, for want of a *procès-verbal* on a writ of *fieri facias* against immoveables cannot be maintained. *Pozer* v. *Lespérance*, 3 Rev. de Lég. 474, K. B. 1812.

6. A judgment which the defendant might have pleaded by way of compensation of the original demand cannot be received as the ground of an opposition *à fin d'annuler*, as it would be permitting the trial of the merits *de novo*. *Miville* v. *Fay*, 3 Rev. de Lég. 474, K. B. 1814.

7. An opposition *à fin d'annuler* cannot, generally speaking, be maintained by a *tiers saisi*. *Martel* v. *Constantin*, 3 Rev. de Lég. 475 K. B. 1821.

8. One judgment may be set up against another by opposition *à fin d'annuler* for payment *pro tanto*. *Frost* v. *Esson*, 3 Rev. de Lég. 475, K. B. 1821.

9. An opposition cannot be maintained on the ground that the person making the seizure was not a sheriff's bailiff, where the writ of

execution was delivered to him by the sheriff. *Freleigh* v. *Seymour*, 8 L. C. R. 256, S. C. 1858.

10. Where opposition *à fin d'annuler* was made by defendant to a writ of *venditioni exponas* on the ground that there was already a seizure of the goods, and that the amount claimed by the writ was more than was due—*Held*, that it must be rejected, as made on entirely insufficient grounds, and that the only question was whether it could be rejected on motion instead of demurrer, which was also allowed. *McDonald* v. *Grenier & Grenier*, 3 L. C. J. 72 & 9 L. C. R. 73, S. C. 1858.

11. But where an opposition *à fin d'annuler* was filed on the ground that an amount already levied on a previous seizure was not credited on the second writ, and that the lots seized were advertised to be sold in a parish different from that in which they were situated, the opposition on both these grounds was maintained with costs. *Esty et ux. & Judd et vir & Judd et vir.*, 3 L. C. J. 73, S. C. 1858.

12. An opposition will not lie which is based on averments which have been already set up in a previous opposition on which the court has decided. *Fournier* v. *Russell*, 10 L. C. R. 367, Q. B. 1860.

### *Of oppositions to withdraw.*

**658**. Oppositions to withdraw may be filed by third parties who claim as their property part of any immoveable or rent under seizure. *Pothier, Proc.* 208.

1. On the contestation of an opposition *à fin de distraire*—*Held*, that such an opposition may be filed to a writ of *venditioni exponas de bonis*. *Delisle* v. *Couvrette & Clément*. 4 L. C. J. 84, S. C. 1859.

2. A mere allegation in an opposition *à fin de distraire* that the tools seized form part of the defendant's implements of trade is insufficient to maintain such opposition. *Yon* v. *O'Connor & O'Connor* 7 L. C. J. 126, C. C. 1863.

3. If there be delivery of moveables assigned and they are taken in execution in the possession of the assignor, the assignee cannot maintain an opposition *à fin de distraire*. *Hunt* v. *Perrault*, 3 Rev. de Lég, 475, K. B. 1821.

4. An opposition *à fin de distraire* cannot be filed by a person who has made himself voluntary guardian to a *saisie gagerie* of the effects claimed, and allowed judgment to go (without opposition) declaring

the *saisie* good and valid. *Poirier* v. *Plouffe & Calvi*, 21 L. C. J. 103, S. C. 1877.

5. A document not alleged in an opposition *à fin de distraire* and not produced at the filing of the opposition, cannot be produced and filed later.—Ibid.

6. An opposition *à fin de distraire* to a seizure of moveables, seized in the possession of the party condemned, will be dismissed on motion, if the allegations fail to set out any specific title and do not set up a possession in the opposants. *Duhamel et al.* v. *Duclos & Duclos*, T. S. & *Perreault et vir*, 21 L. C. J. 308, S. C. 1877.

*Of oppositions to secure charges.*

**659**. Oppositions to secure charges may be filed by a third party when an immoveable under seizure is advertised to be sold without mention being made of some charge with which the immoveable is burthened in his favour, and from which it might be discharged by a sheriff's sale.

Such oppositions are unnecessary and cannot be received:

1. For the purpose of securing servitudes;

2. For the purpose of securing dues or rents created in the place of seigniorial rights.

*C. S. L. C. c.* 36, *s.* 37; *c.* 41, *s.* 54.

1. An opposition *à fin de charge* cannot be maintained either for a constituted life rent or *a rente constituée perpétuelle*. *Thibodeau* v. *Raymond et al.*, 3 Rev. de Lég. 475, K. B. 1821.

*Of oppositions to charges upon immoveables under seizure.*

**660**. Any person aggrieved by reason of an immoveable being advertised as subject to a charge which prejudices his claim, may file an opposition to the end that the property be not sold subject to such charge, unless good and sufficient sureties be given him that it will be sold at a sufficient price to ensure payment of the amount due him.

This opposition may likewise be made either by the seizing creditor, or by the judgment debtor when the mention of such charge has been made without the participation of the opposant.

### § 4. *General provisions.*

**661.** The proceedings upon oppositions to the seizure or sale of immoveables or rents are the same as those upon oppositions to the seizure or sale of moveables.

**662.** When oppositions are decided before the day fixed for sale, if the seizure is not set aside, the sheriff on the day of sale may proceed upon the writ in accordance with the judgment of the court.

But if the oppositions are not decided until after the day fixed for the sale, the sheriff can only proceed to sell under a writ of *venditioni exponas*, and in conformity with the conditions therein mentioned.

*C. S. L. C. c.* 85, *s.* 22.

1. When the sheriff has not proceeded to the sale of immoveables seized under a *fi. fa. de terris* on account of the notices at the church-doors having been omitted, the plaintiff may proceed to the sale by a writ of *vend. ex.* without renewing the advertisement in the Official Gazette. Where the defendant knew that such procedure was going on, he should have opposed the sale. *Bouvier* v. *Brush*, 10 L. C. J. 194, 1 L. C. L. J. 110, S. C. R. 1865.

**663.** *The writ of venditioni exponas orders the sheriff to proceed with the sale of the immoveable or of the rent under seizure, after a publication in French and in English at the church door, on the third Sunday before the sale, and two advertisements in a public newspaper, with the formalities prescribed by article* 648.

It contains moreover such other conditions as the court directs respecting the sale of the immoveable or the rent. *Ibid.* 27-28 *V., c.* 39, *s.* 1.

34 Vict., c. 4 *(Que.)*:

7. The first paragraph of article 663 is hereby amended so as to read as follows: "The writ of *venditioni exponas* orders the sheriff to proceed "with the sale of the immoveable or of the rent under seizure after one "publication in French and English at the church door, on the third

"Sunday before the sale, and two advertisements in the Quebec Official "Gazette; each such advertisement containing the information re- "quired by article 648."

1. On a writ of *venditioni exponas* against moveables, it is not necessary to have a *procès-verbal de recolement*, and no opposition can be maintained grounded upon the nullity of such proceeding. *Lespérance* v. *Langevin*, 1 L. C. R. 279, S. C. 1851.

**664.** When all the advertisements and publications required by law upon the first writ have been duly published and made, the execution of a writ of *venditioni exponas* cannot be stopped by opposition, unless for reasons subsequent to the proceedings by which the sale was stopped in the first instance, and upon a judge's order. *C. S. L. C. c.* 85, *s.* 15, § 2; 6 *L. C. R.* 428; 7 *L. C. R.* 130; 9 *L. C. R.* 447; 10 *L. C. R.* 333.

34 Vict., c. 4 (*Que.*):

8. "Article 664 shall apply to executions against moveables."

1. An opposition to a writ of *venditioni exponas* will be rejected on motion if filed without the permission of a judge. *The Quebec Building Society & Atkins et al. & Atkins et al.*, 9 L. C. R. 447, S. C. 1859.

2. An opposition filed by a defendant to the sale of his moveables under a writ of *venditioni exponas* will be dismissed on motion if filed without leave of the court. *Boudreau et al.* v. *Poutré & Poutré*, 6 L. C. R. 72, S. C. 1856.

3. The sheriff cannot suspend proceedings upon an opposition to a *venditioni exponas* without a judge's order. *Beauquaire* v. *Durrell & Durrell et al.*, 1 L. C. L. J. 93, Q. B., S. C. 1865.

4. Where a railway taken in execution was advertised under a writ of *venditioni exponas*, and the defendant obtained an order of the judge to stay the sale on the ground that the property seized, consisting of real estate, *en roture*, should be sold at the church doors, and that the whole of the railway should have been taken in execution at once, the opposition was rejected on the ground that the objection contained in it might have been urged by an opposition filed within the ordinary delay to a writ of *fieri facias*, and that the conclusions urged were inapplicable to a sale under a writ of *venditioni exponas*. *Abbott* v. *The Montreal and Bytown Railway Company*, 1 L. C. J. 1 & 6 L. C. R. 428, S. C. 1856.

5. In appeal—*Held*, that an opposition *à fin d'annuler* would lie to a writ of *venditioni exponas* in certain special cases. *Fournier & Russell*, 1 L. C. J. 118 & 7 L. C. R. 130, Q. B. 1857.

6. An opposition *à fin d'annuler* may be filed to a writ of *venditioni exponas* when such opposition is founded upon the alleged nullity of the writ itself or the irregularity of the proceedings thereon, and in such case the opposant does not require the order of a judge before his opposition can be received. *Atkins et al. & The Quebec Building Society*, 10 L. C. R. 333, Q. B. 1860.

### § 5. *Of bidding and sale.*

**665**. Bids may be given in writing at the sheriff's office at any time after the seizure, except during the eight days previous to the day fixed in the sheriff's advertisement for the sale of the immoveable or rent, either upon the writ of *fieri facias* when the sale has not been stopped, or upon the *venditioni exponas*, if the sale was prevented from taking place according to notice under the *fieri facias*. 27 & 28 *V.*, *c.* 39, *s.* 4.

**666**. Such bids, if made by a creditor of the judgment debtor, must be accompanied with an affidavit, sworn to before a judge, the prothonotary, a commissioner of the Superior Court, or before the sheriff, who is authorized to administer such oath, stating the nature and amount of his claim, and declaring that they are made in good faith, and not to delay the proceedings. *Ibid.*, *s.* 2.

**667**. Such bids by a person who is not a creditor, must be accompanied with an affidavit, sworn to in the manner stated in the preceding article, stating that they are made in good faith, and not for the purpose of delaying the proceedings; and the sheriff may, if he thinks fit, require security from such bidder, or a deposit of a sufficient sum to cover the costs incurred by the seizing party up to the time of such bid, and the costs of a resale upon false bidding, in case it should be necessary. *Ibid.*, *s.* 3.

1. A promise by one bidder at a judicial sale to another, to pay him a sum of money if he refrains from bidding, is an illegal obligation. *Perrault* v. *Couture*, 16 L. C. J. 251, S. C. 1872.

**668**. Every such bid must be in writing, and must indicate:

1. The name of the case in which it is made, and the names, quality and residence of the bidder;

2. The immoveable or rent bid upon;

3. The amount offered.

It must be signed by the bidder, or be in the form of a notarial original.

*Ibid*, §§ 4, 5.

1. At a sale under execution the sheriff cannot oblige a bidder to renew the declaration of his domicile, etc., at each bid. *Morrison* v. *Cyr & Perron*, 14 L. C. J. 265, S. C. R. 1870.

2. Nor has the sheriff a right to allow a contestation of such declaration made by a bidder. *Ib.*

**669**. The sheriff is bound to endorse on each such bid the date of its filing, and to return it into court with all his other proceedings. *Ibid*, § 6.

**670**. The sheriff is bound to furnish the officer by whom the sale is to be made, with a list of such bids as have been filed under the provisions of the above articles. *Ibid*, § 12.

**671**. Immoveables under seizure, that are held in free and common soccage, or otherwise than *en roture* or *en franc alleu roturier*, and those which are situated in the District of Gaspé, under whatever tenure they are held, can only be offered for final bidding and adjudication at the registry office for the registration division in which they are situate.

Those which are situated in the city, town, or chief-place where the sheriff's office is kept, or within the suburban limits (*banlieue*) thereof, must be bid upon and sold at the sheriff's office.

All other immoveables must be bid upon and sold at the door of the parish church of the locality where they are situated. *C. S. L. C. c.* 85, *s.* 4; 27-28 *V. c.* 39, *s.* 3.

1. A sale of an immoveable by the sheriff, in a district other than that in which the property lies is null. *Phillips & Sanborn*, 6 L. C. J. 252, 12 L. C. R. 408, Q. B. 1862.

See *Fauteux & The Montreal Loan & M. Co.*, 22 L. C. J. 282, Q. B. 1878, under Art. 714 *post.*

**672.** The sale cannot take place on a Sunday, on pain of nullity. *C. S. L. C. c.* 23, *s.* 1, § 2.

**673.** On the day and at the place appointed for the sale, the officer conducting the same, after reading the notice, the charges and conditions of the sale, and the bids filed in the sheriff's office, offers the immoveables for sale, taking as an upset price the highest bid filed with the sheriff, if any were so filed. 27-28 *V. c.* 39, *s.* 4, § 7.

**674.** No bid can be received unless the bidder declares his names, quality or occupation, and residence, and minutes are taken of the bids received.

Every bid implies an undertaking to buy the property at the price of such bid, subject to the condition that no higher valid bid will be given.

*Pothier, Proc.* 218; *C. P. C.* 704; *Héric. Vte. des Imm.* 184-5.

**675.** The conditions of the sheriff's sale must express all those contained in the preceding article, in articles 687, 688, 707, 708, and in the advertisements.

**676.** The party upon whom the property is sold, if personally liable for the debt, cannot become purchaser nor bid, neither can the persons mentioned in article 1484 in the Civil Code, nor can the sheriff or other officer entrusted with the sale. *Pothier, Proc.* 218-220; *Héric. Vte. des Imm.* 180-1; *C. P. C.* 711.

**677.** Verbal bids may be made by proxy. *Pothier, Proc.* 223.

**678.** The officer conducting the sale must require from every bidder, before he receives his bid, a deposit of a sum of money equal to the costs then due to the seizing party upon the judgment and seizure, in the following cases:

1. In all cases wherein the sale has been stopped by an opposition;

2. In cases of resale upon false bidding, if the court has imposed that condition at the instance of some party to the suit. *C. S. L. C. c.* 85, *ss.* 18, 22.

**679.** The court may also order such deposit or payment in any case where the party seizing, or his attorney, declares upon oath that he is credibly informed, and believes that the defendant, with a view to retard the sale, will cause the immoveable to be adjudged to some insolvent or unknown person. *Ibid ss.* 18, 20.

**680.** In any case wherein two resales upon false bidding have taken place, the court may, upon application of any interested party, order that every bidder shall be required to deposit or pay a sum equal to one-third of the debt due to the seizing party, in principal, interest and costs, but not in any case exceeding four hundred dollars. *Ibid. s.* 20.

**681.** In the cases mentioned in the three preceding articles, the officer conducting the sale may, with the consent of the plaintiff, or of any person authorized by him, receive the bid of any bidder without requiring the prescribed deposit; and such consent must be in writing or given in presence of two competent witnesses whose names such officer must enter in his return. *Ibid. ss.* 21-23.

**682.** If the bidder fails to deposit forthwith the amount required, his bid is disregarded, and the proceedings are resumed upon the previous bid. *Ibid. s.* 19.

1. On an *opposition afin de distraire* filed on the ground that the only bidders present at the sale were the crier and the plaintiff—*Held*, that the defendant had no right to complain of there being no bidders as he could have produced them. *Olivier* v. *Bélanger*, 3 R. L. 457, S. C. 1828.

**683**. The sheriff, or other officer conducting the sale, is bound, immediately after the adjudication, to refund to every bidder except the purchaser, the amount deposited by each, and the deposit made by the purchaser is retained as part of the purchase money. *Ibid. s.* 24.

1. Inscription *en faux* was filed by the plaintiff against a return of the sheriff to a writ of execution directed against property in the district of Beauharnois, on the ground that one Cameron, who testified to that effect, had bid immediately after the defendant, but his bid was refused and the property was adjudged to the defendant—*Held*, confirming the judgment of the court below, that the sale was null and that there should have been some formal intimation of the close of the sale. *Woodman et al. & Genier*, 10 L. C. J. 87, S. C. 3 L. C. L. J. 120, Q. B. 1867.

2. At a sale under execution by the sheriff there can be no sale and adjudication unless the bid have been accepted by the knocking down of the hammer, and therefore where a sale has been suspended, though without sufficient cause, the highest bidder cannot claim as adjudicataire. *Baker* v. *Young et al. & Backwood et al.*, P. R. 26, & 3 Rev. de Lég. 393, K. B. 1810.

**684**. [The adjudication of an immoveable cannot be made before the expiration of a quarter of an hour from the time at which it was put up for sale, and after that delay, the officer before adjudging it must receive all other bids offered.] *Héric. Vte. des Imm.* 187; *C. P. C.* 706.

**685**. The property must be adjudged to the highest and last bidder. *Pothier, Proc.* 220.

**686**. A person who has purchased as proxy for another, is bound to furnish the sheriff, within three days, with the names, quality and residence of his principal, and his power of attorney, or a ratification of his bid and purchase; in

default whereof he is held to have purchased in his own name.

He is likewise held to have purchased in his own name, if the person for whom he acted is not known, cannot be found, is notoriously insolvent, or is incapable of being purchaser. *Pothier, Proc.* 223; *Héric.* 188.

**687.** The purchaser is bound to pay the purchase money, or the balance thereof, within three days, after which delay he is bound to pay interest. *C. S. L. C. c.* 85, *s.* 18; *Pothier, Proc.* 225.

**688.** Nevertheless, the plaintiff or any other creditor whose claim is mentioned in the certificate of hypothecs hereinafter mentioned, or who has filed an opposition in the hands of the sheriff, may, on becoming purchaser, retain the purchase money to the extent of his claim, until the judgment of distribution, provided he furnishes the sheriff with good and sufficient sureties for all damages that might result to any party interested, in the event of the non-payment of such sum as the court may order such purchaser to pay into the hands of the sheriff. *C.S. L. C., c.* 85, *ss.* 12, 13.

**689.** Upon payment by the purchaser of the price of the adjudication, or, if he is a creditor, of so much thereof as he is not entitled to retain, the sheriff is bound to give such purchaser a deed of the sale made to him.

Such deed must contain:

1. A designation of the writ under which the sale took place;

2. The number of the cause, and the names, surnames, additions and residence of the parties;

3. A description of the immoveable seized;

4. A statement that all the formalities prescribed by law have been observed;

5. The time and place at which the property was adjudged;

6. The conditions of the sale, including those mentioned in articles 707 and 708;

7. A statement of the price at which the property was adjudged and how it was paid;

8. A conveyance of all the rights of the judgment debtor upon the immoveable.

### § 6. *Of resale for false bidding.*

**690.** Upon the sheriff's return that a purchaser has not paid the whole or a balance of his purchase money, nor given security when he may lawfully do so, the plaintiff may demand that the immoveable of which the purchase money thus remains due be resold for false bidding upon the purchaser thus in default. This is done by a petition served upon the latter with the delays required for ordinary summonses; and if the purchaser does not reside or has no domicile in the district where the adjudication took place, the service may be effected at the office of the prothonotary of the court from which the seizure issued. *Ibid., ss.* 18, 26.

1. A false bidder is not relieved from his liabilities by a subsequent false bid higher than his, and sufficient to cover the first bid with interest and the costs incurred by the sale. *Blais* v. *Learmonth et al.* v. *Gowen*, 4 Q. L. R. 251, S. C. R. 1878.

2. No motion for an order to sell real property at *folle enchère* can be granted, unless notice of the motion has been given to the adjudicataire. *Baker & Young et al. & divers*, P. R. 22, K. B. 1810.

3. It is not necessary that the service of a rule for *folle enchère* be made personally upon the adjudicataire, nor that the motion be served upon him. *Lafond* v. *Guibord & Malo & Guibord*, 10 L. C. J. 139, S. C. 1866.

4. A motion for a rule for *folle enchère* against a married woman separate as to property will be rejected, unless notice of the motion has been served upon the husband as well as upon the wife. *Cloutier* v. *Cloutier & Rhéaume & Dion*, 10 L. C. R. 457, S. C. 1860.

5. Where a rule for *folle enchère* obtained against a married woman separate as to property has not been served upon the husband, all the

proceedings upon the application will be set aside as null and void. *Jarry et vir & The Trust & Loan Company of Upper Canada*, 8 L. C. J. 29, 12 L. C. R. 421, Q. B. 1862.

6. But a rule for *folle enchère* obtained against a married woman, separate as to property, which has been served upon the husband is good and will be declared absolute, even though in the proceedings upon the application the husband was not *mis en cause*, nor any mention made of him for the purpose of authorizing his wife. Ib., & 9 L. C. J. 300, Q. B. 1864.

7. A rule for *folle enchère* may be granted, notwithstanding the death of the creditor prosecuting. *Russell* v. *Fournier et al. & McBain*, 7 L. C. J. 299, S. C. 1863.

8. The motion for *folle enchère* must contain a description of the property to be resold. *Nye* v. *Potter & Brown & Anderson*, 5 L. C. J. 23, S. C. 1860.

9. A rule *nisi* for *folle enchère* must contain a description of the land sought to be sold at the *folle enchère*. *Dickinson* v. *Bourque & Banchard*, 4 L. C. J. 119, S. C. 1860; *Nye* v. *Potter & Brown*, 5 L. C. J. 23, S. C. 1860.

10. The service must have been made personally, and the return or certificate of service should be written on the motion itself, and not on a sheet of paper annexed to the motion. *Jobin* v. *Hamel & Hamel*, 12 L. C. R. 176, S. C. 1862.

11. A *folle enchère* cannot be ordered on terms and conditions different from those of the original sale and adjudication. *Evans & Nichols et al.* 1 L. C. R. 151, Q. B. 1851.

12. A rule for *folle enchère* against an adjudicataire, described in the sheriff's return as residing in Upper Canada, may be declared absolute on a simple return of a bailiff that he had no domicile in Lower Canada, and cannot be found in the district of Montreal. *Guy* v. *Clarkson & McLean*, 1 L. C. J. 193, S. C. 1857.

13. Where an intervention by a third party is allowed, a rule for *folle enchère* will not be ordered pending the proceedings thereon. *Meath et al.* v. *Monaghan & Charlton*, 1. L. C. R. 241, S. C. 1851.

14. Any opposing creditor can move for a *folle enchère* against a purchaser who has failed to pay his purchase money. *Guenet* v. *Blanchette & Ray et al. & Boutin*, 2 L. C. R. 64, S. C. 1851.

15. A party has no *status* to move for a *folle enchère* because as mortgage creditor he has been collocated in a report of distribution, but is not otherwise a party in the cause. *Lanthier* v. *McCuaig et al.* 8 L. C. J. 221, S. C. 1863.

16. A purchaser of immoveables having failed to pay the price, one B. produced an opposition *à fin de conserver*, and moved for a *folle enchère*. B.'s claim did not appear in the registrar's certificate, and he had given notice of his motion before filing his opposition—*Held*, that as his claim was not in the record at the time he gave notice, it must be rejected with costs. *Fraser* v. *Garant*, 4 Q. L. R. 224, S. C. 1878.

**691**. If the seizing party fails to proceed against the purchaser within a reasonable time, any other creditor whose claim appears upon the record, or the defendant, may demand the resale; but the purchaser cannot be held liable for the costs of more than one of such proceedings, and that of the seizing party, or, in his default, the one first served, has the preference over the others, provided the creditor follows it up with proper diligence. 10 *L. C. R.* 457.

**692**. The proceedings upon an application for resale for false bidding are summary, and no written contestations can be had thereon without leave of court.

**693**. In all cases the false bidder is liable for all damages and interest accruing to the judgment creditors or to the defendant, from his failure or delay to pay the purchase money, and he is moreover bound to pay the difference between the amount of his bid and the price brought by the actual sale, if such price be less, without any right, if the price be greater, to the excess, which goes to the benefit of the judgment debtor and his creditors. *C. S. L. C. c.* 85, *ss.* 18, 25; *Pothier, Proc.* 225-6.

**694**. The purchaser may prevent the resale for false bidding by paying into the hands of the sheriff, before such sale, the amount of the purchase money, with the interest accrued thereon since the purchase, and all costs incurred by reason of his default. *Pothier, Proc.* 226.

1. Where a rule was taken against a purchaser, and it was proved that he had paid into the hands of the sheriff, by authority of the court, the full amount of the purchase money, leaving nothing but a

claim for interest on the part of the plaintiff, the rule was discharged. *Hall* v. *Douglas & McDougall et al.*, 2 L. C. J. 276, S. C. 1858.

2. The proceedings upon a *folle enchère* may be stayed and annulled even after the rule has been granted, when the purchaser pays the purchase money and the costs incurred up to date. *Langevin* v. *Garon & Garon*, 2 L. C. R. 125, S. C. 1851.

3. And where before such rule was made absolute the purchaser offered to pay the purchase money, the court would in its discretion permit him to do so. *Nye* v. *Potter & Brown & Anderson*, 5 L. C. J. 23, S. C. 1860; *Dickenson* v. *Bourque & Blanchard*, 4 L. C. J. 119, S. C. 1860.

**695**. If the price of the resale is not sufficient to cover the amount of the first purchase, with interest thereon, and the costs incurred on the resale, the false bidder may be held, even by coercive imprisonment, to pay the difference, upon an application to that effect, made by any party to the suit, in the same form and manner and under the same conditions as that for a resale. *C. S. L. C. c.* 85, *ss.* 18, 25, 26; *Poth. Proc.* 226; *C. P. C.* 710.

1. Where a rule for *contrainte par corps* against the purchaser of a property subsequently sold at his *folle enchère* was applied for—*Held*, that a rule could not be granted against the adjudicataire for the costs but only for the difference of price. *The Trust and Loan Company of Upper Canada* v. *Doyle et al. & Stanley*, 3 L. C. J. 302, S. C. 1859.

**696**. Resale for false bidding can only take place upon a writ of *venditioni exponas*, ordering the sheriff to proceed with the sale upon such conditions as are fixed by the court.

The writ is subject to the formalities mentioned in article 663, and must contain a summary of the judgment ordering the resale for false bidding.

### § 7. *Of the return of writs of execution.*

**697**. [The sheriff in whose hands a writ has been placed in order to the sale of the immoveables of a debtor, is bound, on pain of being liable for all costs and damages, to return

such writ on the day appointed, together with a certificate of his proceedings, the minutes of seizure, a duplicate of the advertisements, with a certificate of their publication and of the oral publications, the minutes of the bidding, the conditions of sale, a statement of his fees and disbursements taxed in conformity with article 705, the certificate of the hypothecs charged upon the immoveable seized, and all oppositions and claims placed in his hands, or writs of execution which he has noted as oppositions.

If there be a return of *nulla bona* it must be made forthwith without waiting until the day fixed for the return of the writ.

If the debtor is an insolvent trader, the moneys must, on application to that effect, be given into the hands of the assignee lawfully appointed, together with the certificate of hypothecs.

*C. S. L. C. c.* 36, *s.* 26; *c.* 85, *s.* 8.

1. The sheriff cannot refuse to make his return on the ground that his fees have not been paid. *Wilson* v. *Brown & Brown*, 1 L. C. J. 284, S. C. 1857.

2. A rule will not be granted against a sheriff to compel him to return a writ before the day fixed. *Dorval* v. *L'Esperance*, 3 Rev. de Lég. 471, K. B. 1811.

3. The sheriff's return can be contested by improbation only. *L'Esperance & Allard et vir*, 1 L. C. R. 154, Q. B. 1851.

**698.** If the sheriff has been unable to procure a certificate of the hypothecs before the day fixed for the return of the writ, he must mention the fact and file the certificate afterwards as soon as he obtains it. *Ibid.*

**699.** As soon as immoveables have been adjudged, the sheriff must procure from the registrar of the registration division in which each immoveable is situated, a certificate of the hypothecs charged upon such immoveable, and registered up to the day of sale; which certificate the registrar is bound to furnish on payment of the fee established by order of the Governor in Council.

The word "hypothec," as regards this certificate, includes privileges and all other charges upon real estate. *C. S. L. C.*, *c.* 36, *ss.* 26-32.

**700**. The certificate must contain:

All hypothecs registered against the property, as soon as hypothecs shall be thus registered, when the plan and book of reference shall be in force in the registration division; all hypothecs registered against the parties who, during the ten years previous to the sale, were owners of the immoveable; and all such anterior hypothecs as were registered anew during that period.

It must also contain the date of the act registered as creating or evidencing such hypothec, the date of its registration, the names, occupation and residence of the creditor, and the name of the notary or notaries before whom the act was passed, if it is notarial; it must specify, when several immoveables are seized, which of them is affected by each hypothec, mentioning, as regards each hypothec, every partial payment registered, and the amount in principal and preserved interest which appears to be due; and if the registration of a hypothec has been renewed, the certificate must mention both the registration and the renewal.

But the registrar must not include hypothecs which appear by his books to have been extinguished or wholly discharged; and in searching for the hypothecs the registrar must not go beyond the date of a sheriff's title, a sale in bankruptcy or by forced licitation, or of any other sale having the effect of a sheriff's sale, or of a judgment of confirmation of title, with regard to the immoveable in question, and which has been registered; except as to hypothecs which are not by such means discharged or extinguished.

If there is no hypothec registered, or if all the hypothecs registered appear to have been extinguished or discharged, he must state so in his certificate.

*C. S. L. C. c.* 36, *ss.* 7, 26, 27 *and Schedule B*; 25 *V. c.* 11, *s.* 4.

1. A hypothec inserted in a registrar's certificate, and created by a person who had not been proprietor within ten years will be struck from the certificate on petition to that end, made by any of the parties to the suit. *Armstrong* v. *Hus*, 5 R. L. 397, S. C. 1874.

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FORM No. **36**.

In connection with articles 700, 935, 955.

*Certificate of the Registrar.*

Lower Canada,
County (*or* Registration Division) of }

Privileges and Hypothecs registered in my office, which do not appear by the books therein to have been wholly discharged, and of which I am, under the provisions of the Code of Civil Procedure of Lower Canada, required to grant a certificate, at the instance of A. B. of
(Esquire, *or as the case may be*) the applicant named in the annexed Notice of application for the confirmation of Title —*or* of C. D., &c., Sheriff of the District of having the execution of the annexed Notice of Sheriff's Sale,—*or* of E. F., &c., the party prosecuting the Licitation mentioned in the annexed Notice,—*or* of G. H. applying for such certificate :—

*First.* Against the property to which the judgment of confirmation—*or* the said Notice of Sheriff's sale—*or* the said Notice of Licitation is to apply,—*or* described in the application of the said G. H. ; the following, viz :—a hypothec (*or as the case may be*) created by a (*description of instrument*) between and (*names and qualities of parties*) bearing date the day of 18 , and registered on the day of 18 , passed (*if the instrument be Notarial*) before Notary Public and his

Colleague, at , as to which no discharge is registered (*or as the case may be, mentioning any partial discharge registered*), and the sum which appears to be due for principal and interest secured by which hypothec appears to be $ , and the registration of which hypothec has not been renewed (*or* was renewed on the day of 18 , *as the case may be.*) *And so on in the same form for any other privileges or hypothecs registered against such property.*

*Secondly.* Against parties who, within ten years next preceding the date of the registration of the title sought to be confirmed as aforesaid,—*or* next preceding the date of the Notice of Sheriff's sale,—*or* next preceding the date of the Notice of sale by Licitation (*as the case may be*),—*or* next preceding the date of the application of the said G. H.—have been owners of the said property, the following, viz. :—

A hypothec created, &c., (*as under next preceding head.*)

*Thirdly.* (*In case of demand of certificate under article* 2177 *of the Civil Code.*) Against G. H., of , &c., , the immediate author of the party who owned the said property at the commencement of the said ten years, the following, viz. :—

A hypothec created, &c., (*as under preceding heads.*)

*If there is no privilege or hypothec required to be certified under any one or more of the foregoing heads, the Registrar will, instead of the words,* " the following, viz," *insert the word* " None."

*Until plans and books of reference, under articles* 2168 *and* 2169 *of the Civil Code, are in force in the County or Registration Division, the Registrar may omit the first head.*

*If the Registrar was not able to ascertain, from the books and documents in his office, who were the owners of the property during the ten years aforesaid, or who was the author of the party who was the owner thereof at the commencement of the said ten years, he will add:*

And inasmuch as I was not able to ascertain, from the books and documents in my office, who all the owners of the property during the ten years aforesaid were (*or* who was the author, &c., *stating the requisite fact or facts which he was not able to ascertain from the books or documents in his office*),—I have, therefore, as required by the said Act, ascertained by the affidavits of and , hereunto annexed, that was the owner of the said property in the year 18 (*or, as the case may be, mentioning all the facts so ascertained*); all which I hereby certify to all whom it may concern.

Witness my hand at this day of , 18 .

O. K.,
Registrar of the County *or* Registration Division of .

**701.** If the registrar cannot ascertain from the books and documents in his office, what persons were owners of the immoveable during the ten years which preceded the sale, he must diligently inquire of the neighbouring proprietors and other persons well acquainted with the property, and such persons are bound to give him, in writing and under oath, such information as they are possessed of. The registrar, in his certificate, must mention the information he has thus obtained, and take care that every fact upon which his certificate is thus based is attested by two witnesses,

whose affidavits, duly sworn to before him or any other competent officer, are annexed to such certificate. *C. S. L. C. c.* 86, *s.* 8.

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FORM No. **37**.

In connection with article 701.

Lower Canada,
District of }

A. B., of , in the County (*or* Registration Division of (*Farmer*) maketh oath (*or* solemn affirmation) as follows :—

That to the personal knowledge of this deponent (*or* affirmant) A. B., of , was, in or about the year 18 in possession as owner of the following property (*describe the property as in the foregoing Form*), *or if such party was so in possession of part only of the said property, say*, was in or about the year 18 in possession as owner of (*describe the part*), forming part of the following property (*describe the property as in the foregoing form, and if the property was in the possession of several persons during the ten years, declare in the same manner the time during which each of them has possessed the property or only portion of it*, and the deponent (*or* affirmant) hath signed

E. F.

Sworn (*or* solemnly affirmed) before me at this day of , 18 .

L. M.
Registrar *or* Justice of the Peace for District of

*The words of the foregoing are to be varied so as to meet the circumstances of the cases in which they are used.*

**702.** If the immoveable in question was, during the ten years which preceded the sale, in another county or registration division, of which neither the books, entries and documents relating to such immoveable, nor copies thereof have been transmitted to the registry office of the county or registration division in which the immoveable was situate at the time of the sale, the registrar states the fact in his certificate; and in every such case the sheriff shall obtain from the registrar of such other county or registration division, a certificate of all hypothecs registered while the immoveable was within such county or registration division, and the latter registrar likewise is subject to the provisions of the two preceding articles. *Ibid. s.* 10.

**703.** [After the plan and book of reference have been deposited in any registry office, conformably to the provisions of articles 2168 and 2169 of the Civil Code, the Governor may, by an Order in Council, change the form of certificate to be given by the registrar as hereinabove prescribed; and every such order is published in the *Canada** *Gazette*, and takes effect from and after the day therein named, provided such day be not less than one month after the publication of such order.

**704.** In the case of resale for false bidding, the sheriff need not obtain a certificate of hypothecs if one has already been filed with the return made upon the first sale.

**705.** The sheriff is allowed, out of the moneys which he has levied, all costs incurred by him to effect the sale, and all fees belonging to his office, after they have been taxed by a judge or the prothonotary, and the cost of the certificates of hypothecs; and he must hold the balance subject to the order of the court. *C. S. L. C. c.* 85, *s.* 9; *c.* 36, *ss.* 2, 6, § 3, 7, 8.

* Now "The Quebec Official Gazette." 31 Vict. c. 13, s. 4. (Que.)

1. The sheriff after a sale under execution of an immoveable has a right to place in his bill of costs the tax of one per cent. imposed by C. S. L. C. cap. 109, & 28 Vict. cap. 12; *Armstrong* v. *Hus*, 5 R. L. 396, S. C. 1874.

2. Where the sheriff after a sale of immoveables made his report, accompanied by the registrar's certificate and the bill of charges therefor, and the opposants considering the charges too high, asked for a rule against the sheriff, ordering him to appear to have the charges taxed—*Held*, that he could not be proceeded against in consequence of the excessive nature of such charges. *Masson* v. *Mullins & The Seminary of Montreal*, 6 L. C. J. 107, S. C. 1862.

3. *Held*, on appeal from the Circuit Court, that a sheriff conducting a judicial sale is liable for the cost of the registrar's certificate if he have ordered it before the day of sale, notwithstanding the provisions of C. S. L. C. cap. 36, sec. 18. *Lambly et al. & Quesnel*, 17 L. C. R. 264, Q. B. 1867.

4. The attorney *ad litem* upon whose fiat a writ of execution issues, is liable towards the sheriff for his fees and disbursements. *Boston et al.* v. *Taylor*, 1 L. C. J. 60, 7 L. C. R. 329, Q. B. 1857.

5. The sheriff can exact the fees of one contract only for all property sold to the same person at the same sale. *Müller* v. *Lambert*, 3 R. L. 447, S. C. 1871.

6. The sheriff cannot deduct from the proceeds of an immoveable the cost of the deed of sale and registration, such charges being payable by the purchaser. *Boisseau* v. *Pilot*, 1 L. C. R. 163, S. C. 1850.

*See Sterling et al.* v. *Darling & Fowler*, 1 L. C. J. 161, under art. 753 *post*.

## § 8. *Of the effect of sheriff's sale.*

**706.** No adjudication is perfect until the price is paid, and then it conveys ownership from the time of its date. *Pothier, Proc.* 226-7; *Héric. Vte. des Imm.* 118; 6 *N., Deniz.* 45-46.

1. An obligation in favour of a sheriff by which an *adjudicataire* promises to pay him the purchase price with interest, is against public order and the laws regulating the office of sheriff, and is therefore null. *Berard* v. *Mathieu*, 21 L. C. J. 234, Q. B. 1876.

**707.** The purchaser takes the immoveable in the condition in which it is at the time of the adjudication, without

regard to deteriorations or improvements subsequent to the seizure. *Poth. Proc.* 218-9.

**708.** The adjudication is always without any warranty as to the contents of the immoveable, but it conveys all rights which belong to it, and which the judgment debtor might have exercised, and also all active servitudes attached to it, even though they are not mentioned in the minutes of seizure. *Contra:* 2 *L. C. R.* 194; 9 *L. C. R.* 108; *Desjardins & La Banque du Peuple*, 10 *L. C. R.* 325.

1. A purchaser at a sale of real estate under execution, cannot claim to be collocated on the proceeds of the sale for a portion of the price paid, on the ground that the property proved to be of considerable less extent than advertised, and the knowledge by the purchaser when bidding that the adjoining property did not belong to the defendant, and was included in the description by error, would be a complete bar to such a claim. *Melancon & Hamilton*, 16, L. C. J. 57, Q. B. 1872.

2. Under the Code of Civil Procedure, the adjudication of an immoveable at sheriff's sale does not imply any warranty of its contents, and the purchaser cannot fyle an opposition à *fin de conserver* on the proceeds of the sale for the value of any deficiency. *Pelletier* v. *Chasse & Castonguay*, 3 Q. L. R. 65, S. C. 1876; *Douglas* v. *Douglas & The Seminary*, 3 Q. L. R. 197, S. C. 1877; See *Thomas & Murphy*, 8 R. L. 231, Q. B. 1877.

**709.** A sheriff's sale does not discharge immoveables from servitudes with which they are charged. *C. S. L. C.* c. 36, s. 27.

**710.** A sheriff's sale does not discharge property from hypothecs resulting from the commutation of seigniorial rights, excepting arrears accrued previously to the sale.

Nor does it discharge property from the right of emphyteusis, or from substitution not yet open, or customary dower not yet open, except when it appears on the face of the proceedings that there exists a prior or preferable claim. *Poth*, 227-8; *C. S. L. C. c.* 44, ss. 49. 50, 54; *Héric.* 46-47, *et seq.*; 148, *et seq.*; 7 *N. D.* 223.

**711.** A sheriff's sale discharges property from all other real rights not mentioned in the conditions of sale. *Pothier, Proc.* 227; *Héric. Vte. des Imm.* 46-47, 59 *& seq.*; 1 *Pig.* 779; *C. S. L. C. c.* 85, *s.* 4, § 3.

1. Immoveables sold under execution are freed from all incumbrances with which they are charged except such as are clearly expressed in the sheriff's advertisements; and where the property sold had been twice leased for a term of years by emphyteutic lease, and the first lease only was adverted to in the notices of sale, the property sold was *held* to be released from the charges to which it was subject by virtue of the second lease. *Têtu* v. *Chinic*, 14 L. C. R. 147, S. C. 1858.

2. And where three lots of land belonging to a succession were sold under execution, in the possession of a third party, who refused to deliver, and the purchaser brought action to revendicate them—*Held*, in appeal, reversing the decision of the court below, that the judicial sale effected a real tradition of the property, and that, under the circumstances, therefore, the defendant could oppose no legal title to the action. *Loranger* v. *Boudreau et ux.* 9 L. C. R. 385, Q. B. 1859.

3. And in a similar case—*Held*, that the sale under execution of an immoveable extinguishes all right of property, except when the proprietor is in possession at the time of the adjudication *pro non domino*. *Patton & Morin*, 16 L. C. R. 267, Q. B.

4. And *held*, also, that to preserve his rights the proprietor, if not in possession at the time of such sale, must oppose it in the ordinary manner, or otherwise he is, by the effect of the sale, purged of all his rights thereto. *Ib.*

**712.** A purchaser who cannot obtain the delivery of the property from the judgment debtor, must demand it of the sheriff, and upon the sheriff's return or certificate of the refusal to deliver, the purchaser may apply to the court by petition, of which the debtor has received notice, and obtain an order commanding the sheriff to dispossess the debtor, and to put the purchaser in possession, without prejudice to the recourse of the latter against the debtor for all damages and costs resulting from his refusal. *C. S. L. C. c.* 85, *s.* 27.

1. To obtain an order for a writ of possession for an adjudicataire

there must be a return by the sheriff that he has not, and cannot, put him in possession. *Reinhardt & Hausseman*, 3 Rev. de Lég. 473, K. B. 1821.

2. The purchaser cannot obtain a writ of possession before he has paid the price, and he must give notice of his petition to the defendant. *Convey* v. *Smiley & Carpenter*, 4 Q. L. R. 183, S. C. 1878.

3. A purchaser may obtain a writ of possession after the expiry of a year and a day from the date of the adjudication, provided he move for the same within the year and day from the judgment of distribution. *Sewell* v. *Bourk & Langlais*, 4 Q. L. R. 246, S. C. R. 1878. See art. 549, *supra*.

**713.** The proceedings upon this application are the same as upon that for a resale for false bidding.

### § 9. *Of the vacating of sheriff's sales.*

**714.** Sheriff's sales may be vacated:

1. At the instance of the judgment debtor, or of any creditor or other interested person:

If fraud or artifice was employed, with the knowledge of the purchaser, to keep persons from bidding;

If the essential conditions and formalities prescribed for the sale have not been observed; but the seizing party cannot vacate the sale for any want of formalities attributable to himself or his attorney;

2. At the suit of the purchaser:

If he is liable to eviction by reason of some customary dower, substitution, or other right from which the property is not discharged by sheriff's sale;

If the immoveable differs so much from the description given of it in the minutes of seizure, that it is to be presumed that the purchaser would not have bought had he been aware of the difference. *Poth. Proc.* 236, 240; *Héric.* 187; 1 *Pig.* 780.

1. Where real property is sold under execution the ajudication can only be attacked by a person who was a creditor at the time of the sale,

and, consequently, the transferee of a creditor, previous to the sale, could not demand the nullity of the adjudication unless notice of the transfer had been duly signified to the debtor. *Berard* v. *Barrette et ux. & Lambert & Salvas*, 6 R. L. 703, S. C. 1874.

2. No such notice of the transfer need be served upon the other purchasers. Ibid.

3. A demand in nullity of the adjudication must be presented within a year subsequent thereto. Ibid.

4. The petition in nullity must show that the claim of the petitioner would probably have been paid, if the property had been sold at a higher price; that the property was worth more than the price for which it was sold; that the manner in which it was sold was in law fraudulent; and that the creditors, and especially the petitioner himself, will necessarily thereby suffer serious loss and injury unless the adjudication is annulled. Ibid.

5. An agreement by a purchaser to pay a creditor the amount of his claim on condition that he refrains from bidding, is not a fraud such as will annul the adjudication. *Berard* v. *Barette & ux.* 5 R. L. 703, S. C. 1874.

6. A sale by the sheriff of Montreal, at his own office, of land situate in the parish of *L'enfant Jesus*, a duly erected parish for all civil purposes formed out of the parish of Montreal, is null and void, as such sale could be legally effected at the church door of the P. of *L'enfant Jesus* only.

Such nullity can be invoked by a hypothecary creditor by petition (without a writ of summons) duly served on all the parties interested.

It can also be invoked by means of an opposition filed after the sale and served on all parties interested, and containing all the allegations essential to a petition *en nullité de décrèt*. *Fauteux* v. *The Montreal Loan & M. Co.*, 22 L.C. J. 282, Q. B. 1878. See *Phillipse & Sanborn*, 6 L. C. J. 252, 12 L. C. R. 408, *Supra under art.* 671.

**715.** The application must be made in the suit by a special petition, it must be served upon the seizing party and upon all other interested parties in the suit, and in other respects is subject to the rules of ordinary procedure.

The party who prosecuted the seizure and sale has a preferable right to contest any suit brought to vacate such sale; and if he fails to do so within the prescribed delays any

other party may take up the contestation; but the purchaser cannot, in any case, be condemned to pay the costs of more than one contestation.

1. The sheriff must be made a party to an action to set aside a sale under execution made by him. *Drapeau* v. *Fraser*, 1 L. C. L. J. 95, S. C. 1865.

**716.** Applications on behalf of the judgment debtor to vacate sheriff's sales must be made within the same delays as are prescribed for appealing from judgments of the Superior Court.

*Pothier, Proc.* 125, 265; *Bowman* v. *Dawson & Dawson, Montreal, 26th Sept.*, 1845, *Le Prestre* 2 *Cent. p.* 149, *No.* 9; 4 *Henrys, p.* 63.

1. Where a property, which had been judicially sold some time previously, was about to be sold again in the hands of the purchaser, and the defendant in the first case by opposition *à fin de distraire* opposed the second sale on the ground of nullities in the first—*Held*, that an opposition would not lie to the second sale on account of nullities in the first, except where the nullity of the first has been regularly pronounced, and then only within the year from such first sale. *Armstrong & Barrette & Crebassa & Armstrong*, 2 R. L. 98, S. C. R. 1870.

**717.** Grounds of nullity of a sheriff's sale may likewise be set up by the purchaser against whom an application is made for a resale for false bidding.

### § 10. *Of oppositions for payment.*

**718.** The prothonotary is bound to keep a register in which are entered all returns by the sheriff to writs of execution issued by the court, with mention of the amounts levied, of the oppositions made to the distribution thereof, [and of all claims filed as well in the hands of the sheriff as in the prothonotary's office.] 86*th Rule of P., S. C.*

1, Where there were two opposants *à fin de conserver* and the one contested the opposition of the other—*Held*, that such contestation

formed a distinct issue *quoad* such parties, and that all documentary evidence raised by the issue, relative to such contestation, must be filed by the opposants, and it is not sufficient that such evidence be already filed by parties to the record. *Kelly* v. *Fraser & divers*, 2 L. C. R. 368, S. C. 1852.

**719.** Oppositions for payment are necessary only for such claims as the registrar is not bound to insert in his certificate of the hypothecs charged upon the immoveable sold, as required by article 700.

[They are not necessary for claims resulting from municipal or school taxes, or assessments for the building or repairing of churches, parsonages and church-yards; and it is sufficient that a statement of such claims, certified by the secretary-treasurer, or other authorized agent of the corporation, be filed in the hands of the sheriff or prothonotary.

Claims for arrears of *cens et rentes* or other rents constituted in their stead, may likewise be made by filing with the sheriff or prothonotary a statement thereof under the signature of the seignior, or creditor, or of his agent.]

**720.** Oppositions for payment may be filed with the sheriff, if he has not yet made his return, or in the office of the prothonotary where the return is made, within six days after the return.

After this delay, they cannot be filed without permission of the court, and upon such conditions as it imposes. 83*rd Rule of P., C. S. L. C. c.* 85, *s.* 4, § 3, *and Schedule A.*

1. An opposition *à fin de conserver* may, on payment of costs, be filed at any time before the homologation of the report of distribution. *Thivierge* v. *Boivin*, 3 Rev. de Lég. 474, K. B. 1812.

2. On an opposition *à fin de conserver* by a transferee of seigniorial rights—*Held*, that such an opposition was merely a conservatory process, and did not require that notice of such transfer should have been made. *Lamothe et al. & Talon*, 1 L. C. J. 101, Q. B. 1857.

3. On the contestation of an opposition *à fin de conserver*—*Held*, that such an opposition could be filed by permission of the court at any time before the homologation of the report of collocation, on the

opposant paying such costs as would be incurred by the reformation of the report and twenty shillings currency. *Woodman* v. *Letourneau & Letourneau & Hubert & Lemieux & Rapin*, 3 L. C. J. 27, S. C. 1858.

4. A claim cannot be received after the delay fixed without permission of the court. *Shortis & Normand*, 3 Q. L. R. 382, Q. B. 1877, *post*. under art. 761.

**721**. No costs are allowed the opposant upon oppositions for the payment of any of the claims mentioned in article 719. 27-28 *V., c.* 39, *s.* 6.

**722**. All oppositions for payment must contain an election of domicile, as prescribed in article 583. 87*th Rule of P.*

**723**. When there is no opposition, and the certificate does not establish the existence of any hypothec, a judgment may be rendered by the prothonotary in the name of the court, upon application made in vacation, ordering the moneys to be paid to the seizing party, according to their sufficiency and to the amount of his claim. *C. S. L. C. c.* 83, *s.* 147.

§ 11. *Of collocation and the distribution of moneys.*

**724**. Between the sixth and the twelfth day after the sheriff's return, certifying that he has levied moneys, the prothonotary is bound to prepare a scheme of collocation or distribution, and to report the same. 90*th R. of P.*

If, however, the sheriff has been unable to return the certificate of hypothecs, the delay above prescribed is only reckoned from the filing of such certificate.

**725**. The report of distribution must mention the names and designation of the parties plaintiff, defendant and opposant, the amount levied, the person in whose hands it is, and the filing of the certificate of hypothecs. 1 *Pig.* 816.

**726**. Each collocation must form a separate article, in numerical order, and must mention whether the claim bears

upon all the moneys to be distributed or only upon the price of a particular immoveable or part of an immoveable, the nature of the claim, and the date of the title and of its registration. *Ibid,* 818.

**727.** In preparing the report of distribution the prothonotary must act according to the apparent rights of the parties, as shewn by the certificate of hypothecs filed by the sheriff, by the oppositions, claims and the other documents forming part of the record, and in conformity with the rules contained in the Civil Code, in the titles *Of Privileges and Hypothecs,* and *Of Registration of real rights,* and with those hereinafter declared. *Ibid.*

**728.** Law costs must, however, be collocated in the following order:

1. Costs of the report;

2. Commission on amounts deposited, and tax upon the amount levied, if any is due, and costs of seizure and sale, if they have not been retained out of the moneys levied;

3. Costs incurred upon the writ of execution against immoveables, and such as may remain due upon the discussion of the moveables;

4. Costs of cancelling hypothecs, or of establishing that they are extinguished;

5. Costs of affixing seals, and of making any inventory required by law;

6. Costs incurred either in the court below or in appeal, upon proceedings incidental to the seizure and necessary to effect the sale of the immoveables;

7. Costs of suit, as provided in article 606.

1 *Pig.* 810; *Poth. Proc.* 232; *Hyp.* 451; *Couchot,* 153; *Héric. c.* 11, *s.* 1, *Nos.* 3-4; *Grenier sur l'Edit de* 1771, *p.* 371; *C. S. L. C. c.* 37, *s.* 8; *C. N.* 2101-4.

1. An opposant cannot be collocated for and paid by privilege in preference to a duly registered hypothecary creditor, the costs of his

opposition which was maintained, and for the payment of which the property of the adverse party was seized and brought to sale. *Bruneau* v. *Gagnon & Gagnon*, 4 Q. L. R. 316, S. C. R. 1878.

2. Where the plaintiff in an action had been collocated for his full costs in preference to his landlord's privilege for rent—*Held*, on a contestation of a collocation, that the practice has been to refuse the plaintiff such privilege for costs. *Kerry et al. & Pelly et al. & Watson*, 6 L. C. J. 293 & 13 L. C. R. 163 S. C. 1862.

3. A plaintiff in a case has a right to be collocated by privilege for all the costs of his suit, when such costs are necessary to obtain the seizure and sale of the defendant's real estate. *Garneau* v. *Fortin et al.* 2 L. C. R. 115, S. C. 1852.

4. On the contestation of the report of collocation in a personal action—*Held*, that the plaintiff was entitled to be collocated for the whole of his costs, and that in preference to the lessor of the house in which the goods were seized. *Jervis* v. *Kelly & Marquis*, 4 L. C. R. 75, S. C. 1853.

5. A seizing creditor of an unprivileged debt is only entitled to be collocated by privilege upon the proceeds of a judicial sale for the costs of an ordinary action by default settled at the sum of £4 9s. *Denis* v. *St. Hilaire*, 5 L. C. R. 386, S. C. 1855.

6. There is no privilege for costs of suit in the distribution of moneys levied by the sale of an immoveable property at the suit of the plaintiff whose claim is not privileged. *Lalonde* v. *Rowley & Lafrenaye & Papin*, 6 L. C. R. 192, S. C. 1856.

7. And on a report of collocation and distribution, where the attorneys of the plaintiffs claimed to have their costs of judgment rank as a privileged claim—*Held*, that the costs were not privileged unless the claim were, and that in all cases the costs followed the nature of the claim. Ib., 1 L. C. J. 274, S. C. 1856.

8. *Held*, that the plaintiff was entitled to be collocated by privilege for his costs, according to the class in which his action came to be decided, as in a case decided upon the merits *ex parte* after enquête. *Michon* v. *Leigh & Gagnon*, 6 L. C. R. 95, S. C. 1856.

9. The registration of an ordinary conventional hypothec, bearing date subsequently to the coming into force of the registration ordinance, confers no privilege for the costs incurred in recovering the amount thereof. *Morin & Daley & Derousselle*, 6 L. C. R. 48, S. C. 1856.

10. Upon the distribution of the moneys arising from the sale of the

moveables of the defendant—*Held*, that the seizing creditor has a privilege only for the costs of seizure, and not for the costs of obtaining judgment. *Kerry et al.* v. *Pelly et al.*, 13 L. C. R. 163, C. C. 1862.

11. Where the corporation of Quebec filed an opposition for payment against the proceeds of the sale of the property of the defendant, claiming to be paid by privilege, the amount of the assessments on property, and the prothonotary in the report of distribution collocated the plaintiff for the whole of his costs taxed in the cause, which the opposants contested—*Held*, maintaining the contestation, and confirming the judgment of the court below, that he was only entitled to be paid by privilege the costs as in an action decided upon the merits *ex parte* with enquête. *Alfourd & The Mayor, &c., of Quebec*, 14 L. C. R. 143, Q. B. 1863.

12. *Held*, reversing the judgment of the Court of Review, that the party at whose instance the immoveable property was sold, had a privilege for his costs of suit taxed as in an *ex parte* case without *enquête*. *The Eastern Townships Bank & Pacaud*, 17 L. C. R. 126 & 2 L. C. L. J. 270, Q. B. 1866.

13. The costs of action, as accessory to the principal, rank before a hypothecary claim registered subsequently to the obligation for the amount of which judgment has been rendered, but previously to the judgment condemning the defendant to the payment of costs. *Marchildon* v. *Mooney & The Quebec Building Society & Little*, 8 L. C. R. 122, S. C. 1858.

14. The costs of a sale by authority of justice of certain lots of land are not divided equally on each immoveable, but according to the price of sale of each lot. *Paccud* v. *Dubé & Les Syndics, &c.*, 7 L. C. J. 279, S. C. 1862.

And the costs of distribution of the moneys arising out of such sale are distributed also in the same way. Ib.

**729.** After law costs, those claimants must be collocated in their respective order who had some right of property in the immoveable sold, and who failed to set up their rights in due time by opposition to annul, opposition to withdraw, or opposition to secure charges, but have filed oppositions for payment; after, however, deducting such debts as they may be bound to pay and as have become payable in consequence of the sale of the immoveable, and the costs mentioned in the preceding article. 2 *Bour.* 725-6; *Pothier*, 236; *Héric.* 204; *C. S. L. C. c.* 85, *s.* 15, § 3.

**730**. Conditional hypothecs are collocated in the report according to their rank, but the amounts thereof are made payable to subsequent creditors whose claims are exigible, or. in default of these, to the defendant, upon good and sufficient sureties being given for the return of the money, in the event of the condition being fulfilled; and upon failure of the latter to give such security, within the delay fixed by the court, the amounts may be paid to the conditional creditors, upon their giving good and sufficient sureties to return the moneys in the event of the condition failing, or becoming impossible and paying interest, when the case requires it to such persons as the court may order.

[In the case of neither party furnishing the requisite security, the amount of the conditional claim may be placed in the hands of a sequestrator or depositary upon whom the parties agree, or whom the court names of its own accord.]

*Pothier, Proc.* 234-235; 12 *Guy. Rép.* 433; 2 *Bour.* 722; *Héric.* 157; *Pothier*, 263; *Houyvet*, 351.

1. A creditor who has a special hypothec on an immoveable has the right to demand being collocated in proportion to the amount raised by giving security that he will return the amount for which he is collocated in case the immoveables not yet seized and sold, and which are specially hypothecated for the payment of other creditors by general hypothec should be found insufficient to satisfy their claim. *Delagrave* v. *Dessaulles & Delagrave & Deneshaud* 9. L. C. J. 89, S. C. 1865; *Laframboise & Berthelot* v. *Kernich, &c.*, 9 L. C. J. 89.

**731**. When a prior claim is undetermined and unliquidated, the prothonotary, out of the disposable moneys, must reserve a sufficient sum to cover it; and such sum remains in the sheriff's hands until the claim is liquidated, or until the court otherwise orders. *Houyvet, No.* 193; *C. S. L. C. c.* 36, *s.* 20.

**732**. Hypothecary claims due with a term of payment become exigible in consequence of the discussion and sale of the immoveable subject to them, and are beneficially collocated, but if they do not bear interest, the creditor is then

collocated and receives the amount of his collocation on condition that he shall give and after he has given security to pay interest, until the term expires, to the subsequent creditors mentioned in the report; and if he is collocated for a part only of his claim, he is not liable for interest towards such subsequent creditors until the full amount of his claim is completed. 2 *Bour.* 722; 15 *Guy. Rep.* 433; *Lac. Vo. Intérêt No.* 7; *Poth. Cond. indeb, No.* 152; *Héric.* 157.

**733**. Claims for the capital of life-rents are determined and collocated according to articles 1914, 1915, 1916 and 1917 of the Civil Code.

**734**. Interest and arrears of rents preserved by registration of a claim are collocated in the same rank with such claim, up to the day on which the immoveable was adjudged.

[A creditor whose name is registered is collocated, in the same rank, for such taxed costs only as are incurred in the court in which he originally obtained judgment for the recovery of his claim. His costs in appeal rank only according to the date of their registration.] 7 *V. c.* 35; *Lac. Vo. Intérêt, No.* 7; *Poth. Proc.* 252-3.

**735**. When several immoveables, or pieces or parcels of land separately charged with different claims are sold for one and the same price;

When a vendor's claim comes in concurrence with a builder's privilege; or,

When a creditor has some preferential claim upon part of an immoveable, by reason of improvements or other cause;

And the disposable moneys are insufficient;

The prothonotary, if the record does not afford him sufficient data to perform the relative valuation himself, must suspend the distribution and report the facts to the court.

**736**. Upon the application of one of the parties interested, after notice given to the others, the court orders experts to be named in the ordinary manner, in order to establish the

respective values of the immoveables, pieces of land, or improvements, and the proportion which should be allotted to each out of the moneys to be distributed.

**737.** The relative valuation being established upon the report of the experts, the case is sent back to the prothonotary, in order that he may proceed to determine the order of collocation and the distribution of the moneys. 1 *Pig*, 810, 811.

**738.** The registrar's certificate is *primâ facie* evidence of the facts therein mentioned; but it may be contested on the ground of error or fraud on the part of the registrar or in his books; and in such case the court may, if the ends of justice require it, order any interested person to be called in to answer the contestation, which must also be served upon the registrar.

Such interested parties are called in by being served with a rule of court; and this service may be either personal or at domicile, or by advertisement in newspapers if the persons are absent, in the same manner as upon ordinary summons. *C. S. L. C. c.* 36, *s.* 19; 25 *V. c.* 11, *s.* 5.

**739.** Any party to the cause, or any person appearing voluntarily, may produce any acquittance or document of a nature to establish the discharge or extinction of a claim mentioned in the certificate of hypothecs, provided it is accompanied with such proof as would be required to justify the registrar in receiving it; and the court or judge may thereupon correct the certificate, or order it to be sent back to the registrar for correction, or else the registrar may transmit to the prothonotary a supplementary certificate in amendment of the former one. 25 *V. c.* 11, *s.* 5.

**740.** The registrar is deemed to be an officer of the court for all that concerns such certificate of hypothecs, as also for the taxation of his fees and expenses for services rendered in regard thereto. *Ibid. s.* 6.

**741.** Any person interested in the distribution of moneys may, either in term or in vacation, even before contestation, cause the defendant or the creditor, or the debtor of any hypothecs mentioned in the registrar's certificate or in any opposition, or any other person having cognizance of the facts to be examined before the judge, or in his absence, before the prothonotary, in order to establish whether such hypothec has not been discharged, in whole or in part, or otherwise extinguished, or to prove any other fact material to the case; and any person thus examined is bound to disclose the existence of any receipt, account, document or writing, relating to such discharge or extinction, and to produce the same if it be in his power; and if it appears by the certificate of hypothecs, or by any opposition in the case, that such person is the creditor of the hypothec, his admissions constitute proof.

A person thus examined cannot ask to be taxed as a witness if he is interested in the distribution, nor can he ask to be paid his travelling expenses before answering. 27-28 *V. c.* 30, *s.* 7.

If the hypothecary creditor of the person who was in possession of the immoveables in question at the commencement of the ten years next preceding the day of the judicial sale, or his legal representatives, cannot be found so as to be summoned and examined, then upon the affidavit of any person swearing that he has reason to believe, and verily believes, that the hypothec has been paid, discharged or extinguished, the court or a judge may order such creditor, or his representatives, to be summoned in the same manner as absentee defendants, and if such creditor or absentee defendants fail to appear the distribution takes place in the same manner as if the hypothec had not been mentioned in the certificate of the registrar.

*See Leduc & McCarthy*, 19 *L. C. J.* 107, *post under art* 751.

**742.** The parties are allowed eight days to contest the report of distribution, reckoning from the day on which it

was entered on the posted list, if such day be a Monday, if not, the delay is reckoned from the Monday following. 92 *Rule of P.*, 2 *L. C. R.* 9.

1. A person opposing will be allowed to contest the report of collocation and distribution after the delays have expired, where it is established by affidavit that he was interested, and that the party collocated appears on examination of his opposition not to be entitled to the amount of his collocation. *Clapin* v. *Nagle & Nagle*, 4 L. C. J. 286, S. C. 1860.

2. Permission to contest after the delays have expired will not be granted because of the omission having been due to another's inadvertence or oversight. *Forsyth* v. *Morin et al.*, 2 L. C. J. 59, S. C. 1857.

3. On cause shown and on payment of costs, an interested party will be allowed at any time to contest. *Prevost* v. *Delesderniers & Frothingham*, 3 L. C. J. 165, S. C. 1859.

4. The order of collocation under a judgment of distribution can only be changed by contesting the judgment itself within eight days from the notice, or after permission of the court, but before homologation. One cannot by simple petition ask that a collocation made of a claim by an homologated judgment be reduced, and that a supplementary distribution be granted, when such demand is based on the fact that the creditor has been collocated for more than two years' interest besides the current year, and to the prejudice of the subsequent creditors. The petition for a supplementary distribution can only be allowed when it is alleged and proved that a creditor has been collocated for that which is not due him, or for that which he has already received. *Lamoureux* v. *Peloquin & Roy et al. & Duport*, 15 L. C. J. 216, S. C. 1871.

5. Proceedings for the purpose of testing the validity of hypothecary claims in a report of distribution can only be had in cases where the moneys levied are still before the court, and are not paid over to the party whose collocation is contested. Judgment of court below reversed. *Leduc* v. *McCarthy*, 1 Q. L. R. 1, Q. B. 1874.

**743.** The contestation may relate to the report itself and to the order or rank of the collocations, or it may go to the merits or substance of any of the claims beneficially collocated, and in this case the report becomes impliedly contested and stayed, to the extent of such contestation, with-

out its being necessary to file a special contestation of the report to that end.

The contestation in all cases must be accompanied with the reasons and documents in support thereof, if there are any, and a copy of such contestation must be left with the party interested, either at his elected domicile or at the prothonotary's office, if there is no such domicile. 4 *L. C. R.* 305; 1 *Pig.* 818.

1. It is not necessary that an opposant who contests the collocation of another person should set up in his grounds of contestation his own title or interest to or in the proceeds of the sale of the lands, collocation of the proceeds of which has been made in favour of the other opposant. *Walker et al.* v. *Ferns & The Montreal Permanent Building Society & Sheridan*, 6 L. C. J., 299, S. C. 1862.

2. On motion, a contestation was rejected on the ground that three separate items of collocation concerning three different parties were contested thereby, and that no notice thereof had been served on any of the three parties interested. *Burroughs & divers*, 2 L. C. R. 9, S. C. 1851.

3. The contestation of the opposition of a collocated creditor may be joined in the same plea or act of contestation with a demand or claim tending to have the report reformed. *Mallet* v. *Desbarats et al.*, 4 L. C. R. 305, Q. B. 1854.

4. The contestation of a report of distribution is in the nature of a demurrer, under which no matter of fact can be inquired into, and if the contestation rests upon matters of fact, the parties contesting should have pleaded to the opposition. *Dorion* v. *Grant, & Patterson, et al.*, 14 L. C. R. 227, S. C. 1864.

**744.** Contestations of the report or of the order of collocation may be inscribed forthwith upon the roll for hearing, after notice given to the parties interested, without the necessity of any written answer to such contestation.

**745.** If the contestation of the report is maintained without being opposed by any party, the costs thereof are taken out of the moneys levied.

In the event of the costs being adjudged against one of the parties, the contesting party is still entitled to be paid

them out of the moneys levied, saving to the creditor who is prejudiced by such collocation, his right to demand subrogation against the party condemned to pay them.

1. The prothonotary is not entited to the fee upon a report of collocation, if the report have been set aside and another report prepared. *Dawson exp.*, 12 L. C. R. 414, S. C. 1862.

2. A hypothecary creditor who has been collocated for more than remains due to him (the balance having been paid by a previous judgment of distribution), cannot be held for the costs of the contestation of such collocation, if he have, after contestation, filed with the prothonotary a declaration of the amount so remaining due. *Globensky v. Daoust, & Moreau & Gobensky*, 2 R. L. 608, Q. B. 1870.

**746**. When a contestation of the report, or of a collocated claim is maintained, it is so maintained for the benefit of the mass of the creditors, and the court orders the prothonotary to prepare a new report according to the rights of the parties. *Houyvet* 409-10; 1 Pig. 821.

**747**. [The right of contesting claims, oppositions or collocations belongs to whichever of the interested parties is first to use it.

A party whose claim or collocation is contested is not bound to answer more than one of several contestations founded on the same grounds, and he may apply to have such contestations united and the proceedings thereon conducted between him and the first contesting party, all notices required being served upon the other contesting parties, who have a right to watch the proceedings and even to be put in the place of the party who has taken up the contestation, in the event of his withdrawal or of his neglect or refusal to proceed.] Poth. 231; 1 Pig. 805.

**748**. Contestations upon the merits of oppositions or claims are subject to the rules of procedure which apply in ordinary suits.

**749.** After the delay for contesting the report has expired, the prosecuting party, or upon his failure to do so within two days, any other party interested, may move for the homologation of the whole report, if there is no contestation, or of the part which is not contested or is not affected by the contestations, when these are only to a part.

Such motion cannot, however, be made until after notice thereof has been posted up in the prothonotary's office during at least four days.—*Rule of P.*; 1 *Pig.* 819; *Héric.* 198; *C. S. L. C. c.* 83, *s.* 147.

1. Upon the distribution of money levied in execution,—*Held*, that the attorney of the seizing creditor was entitled to the fee allowed upon homologation of the report of distribution.—*Kerry et al. & Pelly et al.* 13 L. C. R. 163, & 6 L. C. J. 293, S. C. 1862.

2. No collocation can be homologated which has not been previously contained in a report of distribution regularly made and filed, so as to enable the parties to contest it. *The Eastern Townships Bank* v. *Pacaud*, 17 L. C. R. 126, 2 L. C. L. J. 270, Q. B. 1866.

**750.** The homologation may be granted either by the court, or by the prothonotary, in term or in vacation, unless there is a counter-application or a contestation, in which case the court alone can decide. *C. S. L. C., c.* 83, *s.* 147.

1. The court will not homologate the report if the price have not been paid into the hands of the sheriff. *Lebois* v. *Gagné*, 3 Rev. de Lég. 472, K. B. 1818; *Boucher* v. *Beaudoin*, 3 Rev. de Lég. 475, K. B. 1821. See *Eastern Township Bank* v. *Pacaud*, under art. 494 *ante*.

**751.** [If in any distribution, whether homologated or not, a creditor is collocated for any sum that is not due to him, the court, upon a declaration of the creditor to that effect, may order a supplementary distribution of the sum thus allowed him.

If the person thus collocated fails to declare what he has previously received, the judge may, upon the application of any party interested and on production of an authentic dis-

charge, order a supplementary distribution of the amount of such collocation.

If there be no authentic discharge the person thus collocated must be called in, upon application to the court or judge, and in such case the provisions of article 741 apply.

If the person collocated has no known domicile in Lower Canada, or if he is dead and his legal representatives are not certainly known, the judge may, upon a certificate of the fact, order them to be called in in the manner provided in article 68.]

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FORM No. **38**.

In connection with article 751.

Lower Canada, } In the Superior Court.
District of } (*Date.*)

Present: X. Y., Judge.

A. B., Plaintiff,
*vs.*
C. D., Defendant,
and
E. F., Collocated Creditor.

It is ordered that the said E. F. (*his quality and domicile*) or his legal representatives do appear before this court on the day of in order to answer the contestation of his claim.

By order,

R. S., Prothonotary.

1. A supplementary distribution will be ordered after homologation of the report on proof of error in the registrar's certificate and of the fact that no hypothec exists in favour of the party collocated. *Tardif & Gingras & Jobin*, 3 R. L. 455, S. C. 1871.

2. Articles 741 & 751 of the Code, authorizing any person interested in the distribution of moneys to come in and make proof of the discharge of any hypothec mentioned in the registrar's certificate, or in any opposition, do not apply where the creditor, who is alleged to have been collocated for a sum not due, has actually received the money, after judgment homologating the report of distribution. *Leduc & McCarthy*, 19 L. C. J. 107, Q. B. 1874.

**752.** When no opposition for payment has been filed and no claim appears by the registrar's certificate, or when all the parties consent, the moneys levied may, without the formality of a report of distribution, be adjudged by the prothonotary to the parties entitled to them, upon a motion to that effect made either in term or in vacation. *C. S. L. C. c.* 83, *s.* 147, § 3.

36 *Vict. c.* 14 (*Que.*):

5. At the expiration of fifteen days from the date at which any report of collocation and distribution of moneys shall have been homologated, in whole or in part (as the case may be), whether by a judgment of any court, or by the order of a prothonotary or a clerk of a court in Lower Canada, the prothonotary or clerk of the court, within the office of which the said judgment, or order of homologation, is filed and of record, if no notice of appeal from such judgment or order of homologation shall have been served upon him, or, if no opposition has been made to such judgment or order of homologation, as hereinafter set forth, within the said delay of fifteen days from the date of the said judgment or order of homologation, shall transmit, without delay, to the Treasurer of the Province of Quebec a copy of the said judgment or order of homologation, and a certificate under his signature, and the seal of the court establishing and setting forth that no notice of appeal from the said judgment or order of homologation, nor any opposition to the same has been served upon him, within the said delay of fifteen days, and on receipt of such judgment and certificate, the treasurer shall immediately pay the moneys so distributed, by delivering to the sheriff or to the officer to whom the same belongs, his orders or cheques in favour of each of the parties mentioned in the judgment or order, for the amount awarded to each.

And if an appeal has been taken from the said judgment or order of homologation, or an opposition made thereto in relation to one or more of the said collocations, which shall be established by the certificate of the prothonotary or clerk, the treasurer shall not pay the amount of the

collocations so contested until after a definite sentence has been pronounced upon such contestation, or until after such contestation shall have been settled as hereinafter provided.

Any person or corporation desirous of instituting an appeal from the judgment or order of homologation before mentioned, or of making any opposition thereto, if by law any such opposition can be made, must, within fifteen days from the date at which such judgment or order of homologation shall have been rendered, produce at the office of the court where such order or judgment is filed, and of record, by causing the same to be served upon the prothonotary or clerk of such court, a copy of the writ of appeal which he has caused to be issued, or of his opposition (if an opposition has been made), and it shall be the duty of the prothonotary or clerk to make an entry of such document in the registers of the court, and the same shall form part of the record; and in the event of the said opposition or writ of appeal not having been served within the aforesaid fifteen days, upon the prothonotary or clerk of the court, the sums of money mentioned in the judgment or order of homologation shall be paid; but the foregoing provisions shall not deprive any one who shall have omitted to prosecute his appeal or opposition within the fifteen days as hereinabove set forth, from the right of so doing, within the delays established by law, or of filing his opposition within the delays established by law, and in the event of his succeeding, of recovering by action at law, the moneys paid under the former judgment. Whenever any appeal shall have been instituted to the Court of Queen's Bench, or any opposition put in within the fifteen days as aforesaid, and that the prothonotary or clerk shall have been notified of such appeal or opposition as herein above set forth, the moneys affected by such appeal or opposition shall not be paid until the contestation raised thereby shall have been definitely settled, either by the Court of Queen's Bench, by the Superior Court, or Her Majesty's Privy Council; in the event of the matter being susceptible of being appealed to the latter jurisdiction, and the prothonotary or clerk of the court shall not grant his certificate for the payment of the moneys until a copy of the judgment rendered by the Court of Queen's Bench, by the Superior Court, or by Her Majesty's Privy Council, if the cause has been carried into such latter jurisdiction, or a discontinuation of such appeal or opposition, or a certificate of the clerk of appeals in the said province, establishing that such appeal has been given up and abandoned, or a certificate of the prothonotary or clerk of the court establishing that such opposition has been discontinued shall have been filed in the office of the Superior Court.

In all cases whenever a consent in writing, signed by all the parties interested in the cause and attested by the prothonotary or clerk, shal have been filed with him, the treasurer shall immediately pay or dis

tribute the moneys so deposited, by delivering to the sheriff or other officer entitled thereto, his cheques or orders in favour of any person mentioned in such consent for the amount therein set forth.

## § 12. *Of sub-collocation.*

**753.** Any creditor of a person who is entitled to be collocated, or is beneficially collocated upon moneys levied, has a right to file a sub-opposition, demanding that, to the extent of his claim, the sum accruing to his debtor be not paid to such debtor, but to him.

He cannot, however, exercise this right unless his debtor is insolvent, or his claim carries execution. *Poth. Proc.* 235; 2 *Pig.* 737-822; 1 *L. C. R.* 498; 10 *L .C. R.* 309.

1. Property of certain minors having been taken in execution, the tutor of the minors filed an opposition, and was collocated for a certain sum. The appellant, on the day 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. The motion was rejected on the ground that the judgment had ceased to be executory, and that being presented at so late a stage of the proceeding it was calculated unjustly to deprive the minors of the use of moneys of which they were in need. *Doyle et al.* v. *McLean es qual.*, 10 L. C. R. 309, S. C. & Q. B. 1860.

2. An opposition *en sous ordre* cannot be received unless a *titre executoire*, or the insolvency of the party against whom such opposition is made be set up and alleged in the opposition. *Venner* v. *Bernard et al. & Patton*, 1 L. C. R. 498, S. C. 1851.

3. On a motion to reject an opposition *en sous ordre—Held*, that such opposition is a proceeding in the nature of a *saisie arrêt* and must be either founded on a judgment or supported by an affidavit, as in a case of an attachment before judgment, and also that money paid by the defendant to the sheriff in satisfaction of an execution was the property of the plaintiffs, and not susceptible of being treated as money levied under such a writ, and that the sheriff had no right in such case to deduct his commission and court house tax. *Stirling et al.* v. *Darling & Fowler*, 1 L. C. J. 161, S. C. 1867.

4. An opposition *en sous ordre* which is not based on a judgment cannot be maintained. *The Mayor, &c., of Montreal & Bissonette & Grand & Bissonette*, 9 L. C. J. 280, S. C. 1865.

5. In the absence of an allegation of insolvency in an opposition *en sous ordre*, and of proof of that fact, the court will dismiss the opposition with costs, although no distinct issue be raised on the point by the contestation filed. *Charbonneau & Gladu & Paquette et al.*, 9 L. C. J. 107, S. C 1865.

**754**. Sub-oppositions must be served upon the party whose moneys are thus stopped.

**755**. The sub-collocation may follow the collocation, and be included in the general report, or it may form a separate report, and is subject to the same rules and formalities; but the costs thereof are borne by the creditor whose collocation is thus opposed. *Poth. Proc.* 235.

**756**. If a debtor fails to exercise his rights and claims, his creditors may intervene in the distribution in order to exercise the rights of such debtor, and in the same manner and with as little expense as the debtor himself could have done. *Ibid.*

## § 13. *Of the payment of moneys levied.*

**757**. At the expiration of fifteen days after the date of the judgment homologating a report of distribution, the sheriff is bound to pay to the parties entitled thereto, the moneys which he has received. 25 *Geo. III.*, *c.* 2, *s.* 29.

**758**. The amount of the collocation of a creditor mentioned in the registrar's certificate and who has not filed an opposition, remains in the hands of the sheriff until such creditor or his legal representatives demand the same, and give a valid acquittance therefor. *C. S. L. C. c.* 36, *s.* 22.

See art. 597 *ante*.

1. On a rule for *contrainte par corps* against the sheriff as guardian of things seized, where the latter had been allowed to make proof of the value of the things seized by the admission of the plaintiff himself—*Held*, that a tender to the attorneys *ad litem* of the plaintiff, where the latter resides beyond the limits of this province, of the

value so proved and of the costs of the rule (which has been discharged and an appeal sued out in consequence), made before service of appeal, would entitle the sheriff to the costs of the appeal, where the judgment in appeal does not award a larger amount than that tendered. *Leverson et al. & Boston*, 3 L. C. J. 223 & 9 L. C. R. 238, Q. B. 1859.

2. Where a bailiff resident in another district, and charged with the execution there, of a writ of execution issued out of the district of Montreal, fails to comply with the exigencies of the writ, he is liable to coercive imprisonment in the latter district. *Gnœdinger et al.* v. *Derouin et al.*, 21 L. C. J. 220, 1 Legal News, 212 S. C.

3. The sheriff is responsible for goods seized by him in the same way as the guardian, except where a solvent guardian has been appointed by the defendant whose property has been seized, and the sheriff proves that such guardian was solvent or reputed so to the extent of the value of the goods seized at the time of his appointment. *Irwin & Boston et al.*, 2 L. C. J. 171 ; 5 L. C. R. 397, 7 L. C. R. 433, Q. B. 1857.

4. The sheriff is responsible for all sales of personal effects whether he received the money or not, for he ought not to part with an article he sells until he receives the price. *Guay* v. *Baily*, 2 Rev. de Lég. 473, K. B. 1819.

**759**. The sheriff, or other officer performing his functions, may be held by coercive imprisonment to the payment of the moneys by him levied and received. *C. S. L. C. c.* 87 *s.* 24.

**760**. If the moneys levied, or a portion thereof remain in the hands of the purchaser, the judgment of distribution must be served upon him, and upon his failure to pay to the sheriff, or to the parties interested, within fifeen days from such service, the amounts necessary to satisfy the claimants who have priority over him, the latter may demand the resale of the immoveable upon him for false bidding.

**761**. [Any party aggrieved by a judgment of distribution may seek redress by means of an appeal, or a petition in revocation, if there are grounds for it, whether he has ap-

peared in the suit, or, his claim being mentioned in the certificate of hypothecs, he has not appeared.]

Any creditor mentioned in the registrar's certificate who has not appeared in the cause, may, moreover, within fifteen days, seek redress by means of an opposition to the judgment.

1. The right of opposition given by this article does not take away the right of appeal. *Shortis* v. *Normand*, 3 Q. L. R., 382, Q.B. 1877.

2. Persons whose mortgages are mentioned in the Registrar's certificate, are entitled to appeal from the judgment homologating the report of collocation, although they had not contested the report in the Court below.

A party whose claim was filed after the delays fixed, should not have been collocated. *Shortis et al.* v. *Normand*, 1 Legal News, 86, Q. B., 1877.

See *ante*, Art. 494, and *post* Art 1116, as to right of appeal.

**762.** [In the event of a judgment of distribution being reformed, or of the adjudication being set aside, or of the eviction of the buyer or his representatives by reason of any right from which the property was not discharged by the sale, whatever sums may have been unduly paid must be returned to the sheriff, and the parties are bound to pay back such moneys upon an order from the court to that effect.] *Poth. Proc.* 227; *Héric.* 294.

## SECTION VI.

## OF ABANDONMENT OF PROPERTY.

**763.** Any debtor arrested under a writ of *capias ad respondendum*, may make a judicial abandonment of his property for the benefit of his creditors.

**764.** This abandonment is effected by filing in the prothonotary's office a statement, sworn to by the defendant, and making known:

1. All the moveable and immoveable property of which he is possessed;

2. The names and addresses of all and each of his creditors, the amount of their claims, and the nature of each cla whether privileged, hypothecary or otherwise.

Such statement must be accompanied with a declaration by the debtor that he consents to abandon all his property to his creditors. *C. S. L. C. c.* 87, *ss.* 12, 13.

1. *Held*, on petition of defendant that cause being shown he would be permitted, even five months after judgment, to file the statement of affairs required by C. S. L. C., cap. 87, sec 12, and that plaintiff's petition for imprisonment would be dismissed in consequence of such permission. *Henderson* v. *Lemieux*, 17 L. C. R. 414, S. C. & S. C. R. 1867.

2. The mere filing of the statement in conformity with art. 764 does not entitle the party arrested to be released from custody, such statement being subject to attack by any creditor. *Bruckert* v. *Moher*, 21 L. C. J. 26, S. C. 1876.

**765**. [The debtor must give the plaintiff notice of the filing of the statement and of his declaration of abandonment.]

**766**. A debtor who has been admitted to bail is bound to file this statement and declaration within thirty days from the date of the judgment rendered in the suit in which he was arrested.

Any person condemned to pay a sum exceeding eighty dollars, exclusive of interest from service of process and costs, for a debt of a commercial nature, is likewise, after such moveable and immoveable property as he appears possessed of have been discussed, bound, upon being required to do so, to file a similar statement. *Ibid. ss.* 12, 18.

FORM No. **39.**

In connection with article 766.

To C. D., of (*state here the address and calling of the party*), Defendant in the cause wherein the Judgment, an authentic copy whereof is hereunto affixed, has been rendered.

Take Notice that the undersigned, A. B., Plaintiff in the said cause, hereby demands of you, under and by virtue of the provisions contained in article 766 of the Code of Civil Procedure of Lower Canada, a copy of which article is hereunto subjoined for your further information in the premises —that, within thirty days from the personal service to be made upon you of the foregoing certified copy of the said Judgment, together with this Notice, you do make and file the statement prescribed in the said article, in the manner and under the penalties therein set forth.

Done at , this day of , 18 .

A. B. Plaintiff.

(*Here insert a copy of the said Article.*)

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**767**. If the debtor is in gaol he may file such statement and declaration at any time. *Ibid. s.* 13.

**768**. Immediately after the filing of the statement and declaration of abandonment by the debtor, the prosecuting creditor may apply to the court or judge for the appointment of a curator to the property thus abandoned, after a notice, however, of such application has been given in the Canada Gazette,* fifteen days at least before presenting the same, calling upon the creditors to be present. *Ibid. s.* 14.

* Now the "Quebec Official Gazette," 31 V. c. 13, s. 4. (Que.)

FORM No. 40.

In connection with article 768.

Lower Canada,
District of }

In the Superior Court.

No. (*here state the number of the action.*)

A. B., Plaintiff;

*vs.*

C. D., Defendant.

Public Notice is hereby given, in pursuance of the provisions of article 768 of the Code of Civil Procedure of Lower Canada, that at the hour of in the noon of the day of next (*or* instant, *as the case may be*), or as soon after that hour as may be, at the Court House at (*or, as the case may be*), at the Chambers of the Judge (*sufficiently describing the same*), the said A. B., Plaintiff in this cause, will apply to (*naming the Court, and indicating whether the application is to be made to such Court, or to a Judge thereof*), for the appointment of a fit and proper person to be curator to the property, real and personal, of the said C. D., Defendant in this cause, who has made and filed in the office of the Prothonotary of the said Court, a statement under oath of the same, and also of his creditors and their claims, together with a declaration that he is willing to abandon his property for the benefit of his creditors—the whole as by the said Code required.

And all persons, creditors of the said C. D., are hereby notified then and there to attend, to make to the said Court (*or* Judge. *as the case may be*) such representation or statement in the premises as they may see fit to make.

Given at , this day of , 18

A. B., Plaintiff.

**769.** [If the plaintiff fails to take steps for the appointment of a curator, the defendant or any other party in the suit may do so, with the observance of the same formalities.]

**770.** The curator appointed is bound to make his appointment known by an advertisement inserted during one month in the *Canada Gazette*,* and in any other newspaper that the court or judge may designate.

If the curator fails to do so, the plaintiff or the defendant may cause such publication to be made. *Ibid.*, *ss.* 14, 15.

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FORM No. **41**.

In connection with article 770.

Lower Canada, District of } In the Superior Court.

No. (*here state the number of the action.*)

A. B., Plaintiff;

*vs.*

C. D., Defendant.

and

E. F., Curator to the property and effects of the said Defendant.

Public Notice is hereby given, in pursuance of the provisions of article 770 of the Code of Civil Procedure of Lower Canada, that on the day of instant (*or* last past, *as the case may be*), the said E. F., of (*state here the address and calling of the Curator*), was by order of (*describe here the Court or Judge in question*), appointed to be Curator to the property and effects, of every kind,

* Now "The Quebec Official Gazette." 31 *V.*, *c.* 13, *s.* 4 (*Que.*).

real and personal, of the said C. D., Defendant in this cause, abandoned by the said C. D. for the benefit of his creditors —the whole as by the said Code provided.

And all persons, creditors or debtors of the said C. D. are hereby notified and required to govern themselves in the premises accordingly.

Given at , this day of , 18 ,

E. F., Curator.

(*Or* A. B., Plaintiff, *or* C D., Defendant, *as the case may be.*)

**771**. The curator takes possession of all the property mentioned in the statement, and administers it until it is sold in the manner hereinafter mentioned. *Ibid.*, *s.* 17, §§ 1, 2.

**772**. The curator has likewise a right to receive, collect and recover any other property belonging to the debtor, and which the latter has failed to include in his statement.

He may sell the moveables comprised in the statement, but the immoveables can only be sold under a seizure obtained at the instance of a creditor. *Ibid.*

**773**. Within four months after the filing of the statement, when the debtor is in prison, and within two years after the filing of such statement when the debtor is at large under bail, it may be contested by any creditor, by reason:

1. Of the omission to mention property of the value of eighty dollars;

2. Of any secreting by the debtor within the thirty days immediately preceding the institution of the suit, or since, of any portion of his property, with intent to defraud his creditors;

3. Of fraudulent misrepresentations in the statement, in respect of the number of his creditors, or the nature or amount of their claims. *Ibid.*, *s.* 12; *s.* 13, § 2, *s.* 15.

**774.** The contesting party is bound, within the same delay, to prove his allegations by all legal means. The court may, however, prolong the delay for making such proof, but not beyond two months. *Ibid.*, *s.* 13, § 3.

**775.** The debtor is bound to attend before the court or before a judge, under the penalty hereinafter imposed, in order to answer all questions which may be put to him concerning such statement. *Ibid. s.* 12, § 2, *s.* 15.

**776.** If the contesting party establishes any one of the offences mentioned in article 773, or if the defendant refuses to attend or to answer, as required under the preceding article, the court or judge may condemn him to be imprisoned for a term not exceeding one year.

If the debtor so ordered to be imprisoned, does not surrender himself, or is not surrendered for that purpose according to such order, then the sureties are liable to pay the plaintiff the debt, together with interest and all costs.

*Ibid. s.* 12, §§ 2, 3; *s.* 13, §§ 2, 4, *s.* 15, *s.* 18.

**777.** If the allegations of the contestation are not proved, within the delays above mentioned, the court or judge may order the discharge of the debtor; and the latter cannot again be imprisoned for any debt due the plaintiff, or any other creditor, by reason of any cause of action anterior to his statement and declaration of abandonment; and in case of such imprisonment he may obtain his discharge either from the court or from a judge, upon petition and sufficient proof. *Ibid. s.* 13, § 3, *s.* 16, §§ 1, 2.

**778.** The abandonment of his property deprives the debtor of the enjoyment of such property, and gives his creditors the right to have it sold under execution for the payment of their respective claims. *Poth.* 269; *C. N.* 1269.

**779.** The abandonment of his property discharges the debtor from his debts to the extent only of the amount

which his creditors have been paid out of the proceeds of the sale of such property. *Poth.* 269; *C. S. L. C. c.* 87, *s.* 20; *C. N.* 1270.

**780.** Other special provisions concerning insolvent traders are contained in the statute intituled: *The Insolvent Act of* 1864.

## SECTION VII.

## OF COERCIVE IMPRISONMENT.

**781.** Coercive imprisonment cannot be carried into execution without a special rule granted by the court, after personal notice given to the party liable to it, unless such party absconds in order to avoid it. *C. P. C.* 780.

1. Notice mu ' be given a witness against whom proceedings for contempt are taken, of all the proceedings. *Roy* v. *Beaudry & Laferrière* 6 L. C. J. 85, S. C. 1861.

2. Notice is not required in the case of a guardian. *Rodier* v. *McAvoy*, 20 L. C. J. 305, S. C. 1876.

3. But *held*, that no man could be imprisoned without previous notice to himself personally. *Benjamin et al.* v. *Wilson*, 1 L. C. J. 4, S. C. 1856.

4. An application for *contrainte* cannot be granted on simple motion; the proper course is to take a rule of court. *Higgins* v. *Bell*, 17 L. C. J. 274, S. C. 1873.

5. On an application for a rule for *contrainte par corps* against a curator under the Ordinance of 1667—*Held*, that the Ordinance does not give that remedy as a means of enforcing an interlocutory judgment but merely as a final rule. *Wood* v. *McLennan*, 5 L. C. J. 253, S. C. 1861.

**782.** In all cases of resistance to the orders of the court respecting the execution of the judgment by seizure and sale of the property of the debtor, as well as in all cases in which the defendant conveys away or secretes his effects, or uses violence or shuts his doors to prevent the seizure, a

judge out of court may exercise all the powers of the court, and order the defendant to be imprisoned until he satisfies the judgment. *C. S. L. C. c.* 83, *ss.* 143-4-5.

1. On a rule for imprisonment against the defendant by *contrainte par corps* for refusing to open his doors to a bailiff—*Held*, that by the Ordinance of 1785 the defendant was liable to a writ of *capias ad satisfaciendum*, and that there was error in the judgment of the Superior Court dismissing the rule. *Mercure & Laframboise et al.*, 5 L. C. R. 168, Q. B. 1855.

2. No mitigating circumstances could prevent the issue of the writ where the *rebellion* was established. *Campbell et al.* v. *Beattie*, 3 L. C. J. 118, S. C. 1858.

3. Where a writ of prohibition has issued addressed to "The Corporation of the Village of L." forbidding it to proceed with, or to take any action under, a certain by-law under any form or pretext, it was *held* that a rule for contempt would not lie against a person who had caused certain works to be done at the request of the corporation, and in fulfilment of such by-law; and the rule was dismissed with costs. *Archambault et al. exp.*, v. *The Corporation of the V. of L'Assomption & Archambault*, 2 R. L. 105, S. C. 1870.

4. A person cannot be held to be in contempt of court for having filed a fraudulent opposition until after a judgment on the merits of his opposition. *Dawson* v. *Ogden Ogden*. 8 R. L. 716, Q. B. 1877.

**783**. Coercive imprisonment cannot be granted against tutors or curators for any balance of account due by them, until after the expiration of four months from the service upon them of the judgment establishing such balance. *Ord.* 1667, *tit.* 34, *arts.* 3, 10, 11.

**784**. Coercive imprisonment can only be effected in the time during which summonses may be served. *Poth.* 259, *C. P. C.* 781.

**785**. The debtor cannot be arrested:

1. On a legal holiday;

2. In a place of public worship, during divine service;

3. In a court of justice when the court is sitting, or before any privileged tribunal. *Poth.* 260; *C. P. C.* 781.

**786**. Notwithstanding what is contained in the two preceding articles, the court may order the arrest to be made on a holiday, or at any time, if it is established that the defendant is acting in such a manner as to escape it. *Poth.* 259, 260; *C. P. C.* 781.

1. The execution of writs of capias on Sunday is not governed by article 786 C. C. P. *The Moisie Iron Co. & Olsen*, 18 L. C. J. 29, Q. B. 1874.

2. Notwithstanding C. S. L. C. cap. 83, sec. 7, which says "that every day not being a Sunday or holiday shall be deemed a juridical day for the purposes of this act"—*Held*, that, where a party declares that he will sustain damage or lose his debt by waiting until Monday, the judge is justified in causing a writ of capias to issue on Sunday. *Redpath* v. *Giddings*, 9 L. C. J. 225, S. C. 1863.

**787**. Coercive imprisonment can only be executed in virtue of a writ or order from the court or judge, which may be addressed to the same officers, and is clothed with the same formalities, and contains the same matters of recital as those required in writs of execution. *C. S. L. C. c.* 83, *s.* 141.

**788**. Whenever the person condemned to coercive imprisonment resides in another district, the writ must be addressed to and executed by the sheriff of such district. *Ibid. s.* 209.

**789**. Coercive imprisonment is effected by arresting the debtor and placing him in custody of the keeper of the common gaol of the district in which the writ issued.

If there is no gaol in the district he must be imprisoned in the nearest gaol. *Poth.* 261; *C. S. L. C. c.* 110, *s.* 13.

**790**. Any person thus imprisoned, may, upon petition to the court or to a judge, previously served upon the creditor, and accompanied with an affidavit that he is not worth [fifty] dollars, obtain an order commanding the creditor to pay him, as an alimentary allowance, during the period of

his imprisonment, a sum not less than seventy cents, and not exceeding one dollar, per week. *C. S. L. C. c.* 87, *s.* 6.

1. Where the defendant was arrested under three different writs of capias, and made application for an alimentary allowance—*Held*, that the allowance referred to in C. S. L. C. cap. 87, sec. 6, will be divided, and the plaintiffs ordered to pay a share each, according to the number of suits pending under which the defendant is detained. *Moss et al.* v. *Wilson*, 14 L. C. R. 26, S. C. 1863.

2. In an action of capias by three different plaintiffs against the same defendant—*Held*, that each of the plaintiffs was bound to furnish the defendant with an alimentary allowance. *Warner et al.* v. *Fyson*, 2 L. C. J. 105, S. C. 1858.

3. Where it was proved that the agent of one of the plaintiffs had tendered him ten English shillings and seven English sixpences for all the plaintiffs, but was unable to indicate the coins composing the payment of each of plaintiffs, and that one of the shilling pieces was defaced by a mark across it, and another had a cross drawn by a knife or other sharp instrument upon it, and one of the sixpences had also been defaced—*Held*, that the tender was bad, and the defendant was discharged from custody. *Crawford et al.* v. *Fyson*, 2 L. C. J. 105, S. C. 1858.

4. *Held*, also, that the provisions of the Imperial Statute 16 & 17 Vic. cap. 102, respecting the legality of such tender, applied to this country. Ib.

5. Where a defendant under capias, being confined in gaol, obtained an order for the payment to him by the plaintiff of five shillings a week as alimentary allowance, and the plaintiff in pursuance of such order tendered to the defendant an American gold dollar—*Held*, that such tender was not a legal tender. *Bruneau* v. *Miller*, 2 L. C. J. 189, S. C. 1858.

**791.** If however the debtor afterwards becomes owner of property exceeding in value the amount above mentioned, the creditor may be relieved from paying the weekly allowance.

**792.** The debtor may, if he has grounds for doing so, seek redress against such imprisonment, by petition or motion to the court or judge served upon the creditor. *C. P. C.* 795.

1. Where a rule for *contrainte par corps* has been made absolute, the party condemned cannot, by a subsequent petition, allege payment and non-indebtedness previous to the judgment on the rule. *Genereux* v. *Howley et al. & Jones*, 21 L. C. J. 162, S. C. 1877.

2. Where motion is made for a rule of contempt the party resisting it may urge immediately all the grounds he might urge against the rule itself. *Crevier dit St. Jean* v. *Crevier dit St. Jean*, 9 R. L. 313, S. C. 1877.

**793**. The debtor may obtain his discharge:

1. By paying into the hands of the sheriff or of the prothonotary, the amount of the condemnation, in principal, interest and costs;

2. With the consent of or a release from the creditor;

3. Upon the failure of the creditor to pay in advance into the hands of the gaoler the alimentary allowance granted to him;

4. By the abandonment of his property, as mentioned in the preceding section;

5. By means of the discharge from liability, obtained under the provisions of law concerning insolvent traders;

6. If he has completed his seventieth year.

**794**. Such discharge must, however, be ordered by a judge upon application, of which notice has been given to the prosecuting creditor. *Poth.* 263-4-5; 1 *Pig.* 837 *et. seq.*; 27-28 *V., c.* 17, *ss.* 9 *et seq.*; *C. P. C.* 800.

**795**. When the debtor has been discharged by reason of default of payment of the alimentary allowance, he is no longer liable to coercive imprisonment for the same debt.

# BOOK SECOND.

## TITLE FIRST.

### OF PROVISIONAL PROCEEDINGS WHICH ACCOMPANY SUMMONS IN CERTAIN CASES.

#### GENERAL PROVISION.

**796.** A plaintiff may, in certain cases, simultaneously with the summons, or pending the suit and before judgment, have the person or the property of his debtor, or the object in dispute, placed in judicial custody, as explained in the following chapters [subject to a right of action by the latter to recover damages, upon establishing by proof against the creditor a want of probable cause]. *C. P. L.* 208-237.

## CHAPTER FIRST.

### OF CAPIAS AD RESPONDENDUM.

#### SECTION I.

#### OF THE ISSUING OF THE CAPIAS.

**797.** When the amount claimed exceeds forty dollars, the plaintiff may obtain, from the prothonotary of the Superior Court, a writ of summons and arrest against the defendant, if the latter is about to leave immediately the Province of

Canada, or if he secretes his property with intent to defraud his creditors. *Ibid.* 210; *C. S. L. C.*, *c.* 87, *s.* 1.

1. The Province of Manitoba does not make part of Canada in the terms of art. 797 C. C. P., and consequently the debtor who leaves the Province of Quebec for that part of the Dominion cannot claim to be exempt from arrest under capias on that ground. *Lainé et al.* v. *Clarke*, 2 R. C. 232, S. C. R. 1872.

**798.** This writ is obtained upon an affidavit of the plaintiff, his bookkeeper, clerk, or legal attorney, declaring that the defendant is personally indebted to the plaintiff in a sum amounting to or exceeding forty dollars, and that the deponent has reason to believe and verily believes, for reasons specially stated in the affidavit, that the defendant is about to leave immediately the Province of Canada, with intent to defraud his creditors in general, or the plaintiff in particular, and that such departure will deprive the plaintiff of his recourse against the defendant; or upon an affidavit establishing, besides the existence of the debt as above mentioned, that the defendant has secreted or made away with, or is about immediately to secrete or make away with his property and effects with such intent. *C. P. L.* 212-14.

1. On a motion to quash a capias, on the ground that the affidavit did not show that it had been sworn to by the plaintiff, or by his bookkeeper, clerk or legal attorney, as required by 25 Geo. 3, cap. 2—*Held*, confirming the decision of the court below, that the rule obtained on such motion should be dismissed. *Coates & the Bank of Montreal*, 2 Rev. de Lég. 328.

2. An affidavit made by the bookkeeper of a branch of the Upper Canada Bank was held to be sufficient. *The Bank of Upper Canada* v. *Alain*, 5 L. C. R. 318, S. C. 1855.

3. An affidavit commencing, "T. S., of the City of Montreal, bookkeeper of H. H., the plaintiff, being duly sworn, doth depose and say"—was *held* to be sufficient without any statement in the body of the affidavit that he was such bookkeeper. *Hogan* v. *Hoskins*, 12 L. C. R. 84, S. C. 1861.

4. The president of an incorporated company may make the affidavit. *The Moisic Iron Co.* v. *Olsen*, 18 L. C. J. 29, Q. B. 1874.

5. Action of capias was taken by several plaintiffs for debts due to each of them, and the affidavit was made by one of them, setting out that the defendant was indebted to him in a sum exceeding £10 currency, and action was brought for the whole amount due—*Held*, that the capias must be quashed, the deponent not appearing to act as the agent or legal attorney of the other legatees, his co-plaintiffs. *Bourassa* v. *Brosseau et al.* 14 L. C. R. 23, S. C. 1863.

6. Where the cause of action as stated in the affidavit differs from the cause of action as stated in the declaration—*Held*, on motion, that the writ must be quashed. *Malhiot* v. *Bernier*, 1 L. C. R. 389, S. C. 1851

7. The affidavit upon which a capias issued stated that the defendant was indebted to the plaintiff in the sum of £24 13s. 10½d., whereof the sum of £4 16s. 10½d. was for work and labour done and performed by the plaintiff for the defendant, and the balance was the amount of a claim transferred to him by another, by a deed of assignment or transfer before notaries. On motion to quash—*Held*, notwithstanding that no notice of such transfer had been given to defendant, except by the service of the action, that it was sufficient to support the writ, and the motion was dismissed. *Quinn* v. *Atcheson*, 4 L. C. R. 378, S. C. 1854.

8. In an action to recover damages for malicious arrest under capias where it was proved that the plaintiff's claim amounted only to £9 11s. 7d., and that in order to make up the necessary amount he procured the transfer to him of a sum of fourteen shillings due to another party, and without any notice to the defendant of the transfer, caused the capias to issue—*Held*, confirming court below, that such proceeding was altogether illegal, and would justify an action of damages for false arrest. *Laidlaw* v. *Burns*, 16 L. C. R. 318, Q. B. 1866.

9. Where the plaintiffs by their evidence showed that two notes, constituting the greater part of their claim, were obtained merely for the purpose of enabling them to adopt any course they might think proper against the defendant, and without their becoming actual owners of the notes—*Held*, that they nevertheless had the right to arrest defendant by capias as their personal debtor for the whole sum by them demanded. *Winning et al.* v. *Fraser*, 13 L. C. J. 167, S. C. 1869.

10. A writ of capias will be quashed on motion if the place where the debt was contracted is not mentioned in the affidavit. *Brison* v. *McQueen*, 7 L. C. J. 70, S. C. 1862.

11. An affidavit may contain several different averments of debt inconsistent with one another, and is not void because one of them is insufficient. *Green* v. *Hatfield*, 12 L. C. R. 115, S. C. 1862.

12. On motion to quash a writ of capias, on the ground that there was no sufficient statement of the debt, inasmuch as it was stated to be due in sterling money—*Held*, that the amount due may be legally so stated, as the value of the pound sterling was defined by the Canada Currency Act. *The Bank of Montreal* v. *Brown*, 17 L. C. R. 144, S. C. 1867.

13. The debt is sufficiently set forth in the affidavit by stating that the defendant is indebted to the plaintiff in the sum of £39, without stating the cause of debt, or the place where it was contracted. *Debien* v. *Marsan*, 14 L. C. R. 89, S. C. 1863.

14. Where the affidavit alleged that the deponent was agent at Montreal of the plaintiffs, and that the defendant was justly and personally indebted to the plaintiffs in a sum exceeding $40, to wit in a sum of $2,500, being as and for the price of a large quantity of glass sold by the deponent as agent of the plaintiffs to the defendant—*Held*, that the cause of action was sufficiently set forth. *Gregory & The Boston & Sandwich Glass Co.*, 9 L. C. J. 134 & 15 L. C. R. 475 & 1 L. C. L. J. 37, Q. B. 1865.

15. The allegations 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 the plaintiff in the service of the defendant, is sufficient, although it is not stated that the work was done at the instance or request of the defendant. *Joutras* v. *Dunlop*, 7 L. C. R. 420, S. C. 1857.

16. The statement that the defendant is personally indebted to the plaintiff in the sum of $300 for the balance of an account for various transactions which the said defendant had with the plaintiff in their business as wood merchants, which sum defendant had acknowledged to owe the plaintiff is a sufficient statement of the cause of debt to entitle the plaintiff to the capias. *Kenny* v. *McKeown*, 9 L. C. J. 104, S. C. 1864.

17. An affidavit for capias is insufficient if, being taken for damage suffered by goods on board ship, it does not state with certainty that the goods were so damaged while in the custody and safe-keeping of the defendant, and before delivery. *Gale et al.* v. *Brown*, 3 L. C. R. 148, S. C. 1852.

18. An affidavit to obtain a capias, which states that the defendant is indebted to the plaintiff in a certain sum for board and lodging during the space of six months and for articles of clothing furnished him, is bad. *Cuthbert* v. *Barrett*, 1 L. C. R. 212.

19. An affidavit for capias must set forth the cause of action and the nature of the defendant's indebtedness. *Rolland* v. *Guilbault*, 12 L. C. J. 276, S. C. 1868.

20. On a motion to quash a capias on the ground that the word "personally" was omitted in the affidavit—*Held*, that the affidavit must contain the allegation that the party sought to be detained is personally indebted to the plaintiff. *Alexander* v. *McLachlan*, 1 L. C. J. 5, S. C. 1856.

21. Where the affidavit shows a personal cause of action, the allegation that the defendant is personally indebted is not essentially necessary, and the allegation that the plaintiff may lose his said debt and sustain damage, is equivalent to the allegation that he may be deprived of his remedy. *Lampson & Smith*, 7 L. C. R. 425, S. C. 1857.

22. 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," is not sufficient, and the defendant in such case will be discharged on filing a common appearance. *Hodgson* v. *Oliva*, 3 Rev. de Lég. 349.

23. In an affidavit for capias, the plaintiff stated that the defendant was indebted to him in the sum of £15, *pour effets d'épiceries vendus et livrés à Quebec*, and gave no other statement as to the indebtedness. The reason given for his belief that the defendant was about to leave the country was certain information he had received, but the names of his informants were not given—*Held*, that the affidavit was insufficient on both these points, and the capias was quashed. *Lebel* v. *O'Brien*, 2 R. C. 238, S. C. 1872.

24. Where an affidavit alleged a personal indebtedness of $155,000, value of certain American bonds, etc. "stolen from the plaintiffs in New York and then in the possession or under the control of the defendants in Montreal, and also that the defendants had secreted said bonds, etc., and were about immediately to leave the province of Canada," etc., giving as reasons of belief the character of the defendants who were professional thieves, and the information of the New York detectives to that effect—*Held*, that although the person making the affidavit had no absolute personal knowledge of the facts set forth in it, the affidavit was, nevertheless, in itself sufficient. *The Royal Insurance Co.* v. *Knapp & Griffin*, 11 L. C. J. 1, S. C. & 2 L. C. L. J. 189 & 201, 1867.

25. But *held*, also, that under such circumstances the cause of action arose in a foreign country, and the defendant must be discharged. Ib.

26. An affidavit alleging a debt to exist need not state when the same was contracted, nor show that it was contracted within the five years next preceding ;

Nor that the sale and delivery were made *to the defendant*, when they are alleged to have been made "at his instance and request."

When the facts upon which his *belief* is based, are sworn to directly, and not as hearsay, deponent need not disclose the name of any informant. *Maguire* v. *Rockett*, 3 Q. L. R. 347, S. C. 1877.

27. A suit will not lie where the defendant is domiciled in the United States and is merely returning home after a temporary sojourn here, and where there is no allegation of any special circumstances of fraud. *Renaud & Vandusen*, 21 L. C. J. 44, Q. B. 1872.

28. Where the plaintiff in his affidavit for a capias after judgment deposed, as the ground of his belief, that the defendant was about to leave the Province of Canada with intent to defraud, that he, the defendant had made no attempt to pay the amount of the judgment against him, and was a seafaring man, resident out of the Province of Canada, and was only temporarily in Montreal as master of a sea-going vessel, and was about to depart from Montreal in command of said vessel—*Held*, that the grounds of belief were sufficient to maintain a capias. *Macdougall* v. *Torrance*, 5 L. C. J. 148, S. C. 1861.

29. *Held*, that the plaintiff was justified in his belief that the defendant was about immediately to leave the Province of Canada, with intent to defraud the plaintiff, in that the defendant had bought from the plaintiff a large quantity of wheat of the value of $8,293.75, payable cash on delivery, and had received delivery of the wheat, but had only paid portion of the price, leaving a balance of $2,993.57 unpaid ; and that the defendant, upwards of two months afterwards, was about to go abroad to Scotland, his original domicile, where his family had resided for five years, without paying the plaintiff the said balance, and without leaving any property in Canada out of which the plaintiff could be paid, and after repeated applications to him for payment. *Ross et al.* v. *Burns*, 7 L. C. J. 35, S. C. 1862 & 10 L. C. J. 89, Q. B. 1864.

30. An affidavit contains sufficient grounds for belief of the defendant's departure with fraudulent intent if it be stated that he refuses to pay the sum sworn to be due, that the vessel of which he is master is immediately about to sail for Europe, and that the defendant is to sail therein. *Lefebvre* v. *Tullock*, 5 L. C. R. 42, S. C. 1854.

31. An affidavit in which it is stated that the reasons for believing that the defendant is about to leave the Province with a fraudulent

intent are, that he is the master of a vessel which is loaded and ready for sea, with the defendant as master, and that the defendant himself had stated that he was immediately about to sail to parts beyond the the sea is sufficient. *Quinn* v. *Atcheson*, 4 L. C. R. 378, S. C. 1854.

32. Where an affidavit stated that the deponent's grounds for believing that the defendant was about to leave the Province with intent to defraud his creditors were that the defendant's vessel was loaded and ready for sea, and that he, the defendant, intended sailing in her, and had told the deponent that he would not return to Canada, it was held to be sufficient. *Wilson* v. *Reid*, 4 L. C. R. 157, S. C., & *Berry* v. *Dixon*, 4 L. C. R. 218, S. C. 1854.

33. Defendant had by false pretences obtained possession of 400 bags of the value of $80 belonging to plaintiff, and, being master of a ship on board of which they were carried, was about to leave the port—*Held*, that the plaintiff was entitled to a writ of capias for the recovery of the value of the bags. *Milligan* v. *Masson*, 17 L. C. J. 159, S. C. R. 1872.

34. Where the plaintiff had set up as ground for capias "that the defendant was about to sail in his said vessel for Europe or other parts of the world" it was held insufficient. *Paquet* v. *McNab*, 3 R. L. 456, S. C. 1871.

35. On a motion to quash a writ of capias on various grounds—*Held*, with regard to the departure of the defendant, that, where the deponent alleged as his ground of belief that the defendant was about to leave the province, the fact that the defendant was a mariner, having no domicile in the province, and was about to sail with his ship, it was sufficient. *Hasset* v. *Mulcahey*, 6 L. C. R. 15, S. C. 1856.

36. It is not necessary to state in such affidavit that the defendant has been asked to pay the debt and refuses to do so. *Ib.*

37. The grounds of the deponent's belief are sufficiently set forth by a statement to the effect that defendant stated to deponent at a time and place mentioned that he was about to go to California, one of the United States of America, to make money, and asked the deponent to procure him money for the voyage, and afterwards made the same statements to persons named in the affidavit. *Debien* v. *Marsant*, 14 L. C. R. 89, S. C. 1863.

38. In an affidavit on the ground that the defendant is about to leave the province, the omission of the words "with intent to defraud his creditors generally or the plaintiff in particular" is fatal. *Lamarche* v. *Lebrocq*, 1 L. C. R. 215, S. C. 1851.

39. The allegation in an affidavit that the defendant himself stated that he was leaving for California was held to be sufficient to justify the issuing of a writ of capias. *Benjamin et al.* v. *Wilson*, 1 L. C. R. 351, S. C. 1850.

40. The allegation that the defendant had taken away goods placed with the plaintiff as security for the payment of a note, that he had refused to deliver a horse, and that he was a stranger and had failed to keep appointments, and that he had withdrawn himself from his creditors, are not sufficient to justify a capias. *Leeming* v. *Cochrane*, 1 L. C. R. 352, S. C. 1851.

41. The allegation "that the plaintiff has been credibly informed that the defendant had secretly removed his goods in the night time, with intent to depart the province," is not sufficient to support a writ of capias, the name of the party from whom the information is obtained not being disclosed. *Cornell* v. *Merrill*, 1 L. C R. 357, S. C. 1851.

42. In an affidavit for a capias, on the ground of intention to depart, though the omission to disclose the names of defendant's informants as to his ground of belief would be fatal if his belief rested on information only, yet the affidavit is good if the deponent swears directly to another of his grounds of belief, which is in itself sufficient. *Milligan* v. *Mason*, 17 L. C. J. 159, S. C. R. 1873.

43. And it is sufficient if deponent swear as one of his grounds that defendant was master of a ship, and that said ship was entered at the custom house, though without saying that this was done by defendant or that he was going in her, or naming her destination. *Ib.*

44. If the plaintiff swears he believes the defendant is about to leave the province from his own knowledge, he must state the cause of his belief, because that is the best criterion for the exercise of the judge's discretion. If he founds his belief on the information of others, he must swear that he is credibly informed and hath just reason to believe, and in his conscience doth verily and sincerely believe, that the defendant is immediately about to leave the province. *Chretien* v. *McLane*, 3 Rev. de Lég. 348.

45. An affidavit to hold to bail made by the plaintiff's wife is sufficient. *Ib.*

46. The affidavit is not bad because it states that the debtor is about to leave the Dominion of Canada, when it can be gathered from the other allegations of plaintiff that the departure is really for a point within the limits of the former Province of Canada. *The Moisie Iron Co. & Olsen*, 18 L. C. J. 29, Q. B. 1874.

47. It is not necessary that it should be stated positively that at the time of making the affidavit the debtor is actually within the limits of the former Province of Canada. *Ib.*

48. *Held*, that in such affidavit it was necessary that the party making it should swear defendant was immediately about to leave the province with intent to defraud the plaintiff in particular or his creditors in general. *Wilson* v. *Roy*, 4 L. C. R. 159, S. C. 1854.

49. The allegation that the defendant, who resides at Rouse's Point, in the United States, is on the point of immediately leaving the province to go there, and giving the names of plaintiff's informants, discloses no intention of fraud, and is insufficient. *LaRocque* v. *Clarke*, 4 L. C. R. 402, S. C. 1854.

50. In an affidavit for capias it is necessary to disclose the name of the parties from whom the information "that the defendant was immediately about to abscond" was obtained. *Cameron* v. *Brega*, 10 L. C. J. 88 & 1 L. C. L. J. 65, 1865.

51. Where the affidavit for a capias did not disclose the name of the deponent's informant, the capias was quashed. *Roberts* v. *West*, 1 L. C. L. J. 94, S. C. 1865.

52. Where the affidavit set out that the defendant was immediately about to leave the province "with the intention of defrauding his creditors in general, *or* the plaintiff in particular, and has secreted, *or* is about to secrete, &c."—*Held* bad, and capias quashed. *Talbot* v. *Donnelly*, 11 L. C. R. 5, S. C. 1860.

53. *Held*, that it is not necessary that it be sworn that the plaintiff, without the benefit of a writ of attachment against the body of the defendant, may be deprived of his remedy. *Têtu et al.* v. *Pelletier*, 6 L. C. R. 32, S. C. 1856; *Leliévre & Donnelly*, 6 L. C. R. 247, S. C. 1856; *Berry & May*, 13 L. C. R. 3, S. C. 1859.

54. An affidavit which does not allege that the departure of defendant *will* deprive plaintiff of his recourse, but is worded "whereby the said plaintiff *may be* deprived of his remedy," is bad, and will be set aside. *Boyd* v. *Freer*, 15 L. C. J. 109, S. C.

55. It is sufficient if the deponent swear that, without the benefit of a writ of capias, the creditor will lose his debt or suffer damage, and the omission of the words "will lose his remedy" is not fatal. *Hasset* v. *Mulcahy*, 6 L. C. R. 15.

56. Where the affidavit stated the cause of debt fully, the insolvency of the defendant, a trader, and that he refuses to make an assignment

and carries on trade—*Held*, to be sufficient, and a motion to quash was dismissed. *Macfarlane* v. *Beliveau*, 9. L. C. R. 261, S. C. 1859.

57. An affidavit for capias, which alleges "that the defendant is about to leave the province, and that the belief of the deponent that he is about to leave the province with intent to defraud, is founded," is insufficient, as the affidavit must specifically allege that the defendant is about to leave the province *with intent to defraud*. *L'Hoist* v. *Butts*, 10 L. C. R. 204, S. C. 1860.

58. The words "may lose his debt or sustain damage" suffice. *Anderson* v. *Brusgaard*, 3 Q. L. R. 287, C. C. 1877.

59. Contra, *Stevenson* v. *Robertson*, 21 L. C. J. 102. S. C. 1877; *Ford* v. *Leger*, 21 L. C. J. 191, S. C.

60. The omission to set forth an intent to defraud is fatal. *Ford* v. *Leger*, 21 L. C. J. 191, S. C. 1877.

61. Where the grounds alleged in an affidavit are that the defendant has concealed or is concealing his property with intent to defraud, it is not necessary to give reasons. *Casavant* v. *Patenaude*, 3 R. L. 446, S. C. 1871.

62. The allegation that deponent believes and is informed that defendant is about to secrete "*ses biens meubles et effets mobiliers*" is bad. *Auge & Mayrand*, 21 L. C. J. 216, S. C. R. 1876.

63. An affidavit in the alternative "Has secreted *or* made away with *or* is about to secrete" is defective. *McMaster* v. *Robertson*, 21 L. C. J. 161, S. C. 1877.

64. On motion to quash a capias—*Held*, that under Art. 798 C. C. P. an affidavit for capias should set up directly that the defendant had secreted or made away with, or was immediately about to secrete or make away with his property and effects, with intent to defraud, etc., and that the old formality, that "deponent is credibly informed, hath every reason to believe, and doth verily and in his conscience believe," is not sufficient. *Hurtubise et al.* v. *Leriche*, 13 L. C. J. 83, S. C. 1868.

65. And the secretion must be affirmed of the property and effects generally and not merely of "the moveable property and effects." Ib.

66. A fraudulent preference given by a debtor to one of his creditors by selling him goods as security for a debt is not a secreting, and does not constitute a sufficient ground for a capias. *Gault* v. *Donnelly*, 1 L. C. L. J. 119, S. C. 1866, & 3 L. C. L. J. 56, Q. B. 1867.

67. A writ of capias issued against the defendant, charging him with secreting his estate and effects by disposing of his immoveable property

—he being at the time insolvent, and having no other estate—and in the deed of which sale defendant had made a statement that he had received only $198 on said sale, whereas he had actually received $466 *Held*, that the fact of the defendant alienating his real estate was not of itself a sufficient ground for issuing the writ, but as there was evidence of fraud in the transaction, the motion would be rejected without costs. *Dumont* v. *Court*, 7 L. C. J. 110, S. C. 1862.

68. Where an affidavit for capias set forth that the defendant had secreted and made away with his individual estate, debts and effects with intent to defraud his creditors, and it was proved that the property which he had disposed of was immoveable property—*Held*, that that was a secretion with intent to defraud sufficient to support the capias. *Langley* v. *Chamberlain*, 5 L. C. J. 49, S. C. 1858.

69. Where it was proved that the defendant had no effects of his own, and that the goods he was disposing of were his wife's, the capias was set aside and quashed. *Gendron* v. *Lemieux & Lemieux*, 12 L. C. R. 222, S. C. 1857.

70. The defendant appealed from a judgment of the Superior Court dismissing his petition to be released from custody under capias, on the ground that the allegations of plaintiff's affidavit had been disproved—*Held*, although the special ground of plaintiff set out in the affidavit had been disproved, yet if the plaintiff establish that his pretensions as to defendant's intended departure from the province with fraudulent designs were well founded, the capias would be maintained. *Blackensee & Sharpley*, 6 L. C. J. 288 & 10 L. C. R. 240, Q. B. 1860.

71. Circumstances which amount to fraudulent preference by the debtor insolvent do not amount to secretion, and were not, therefore, sufficient grounds for a capias; but where there was satisfactory evidence of the intention of the defendant to abscond as well, a capias would lie. *Tremain* v. *Sansum*, 4 L, C. J. 48, S. C. 1860.

72. The fact that defendant purchased a quantity of flour from plaintiff for cash, to be paid immediately after delivery, and then obtained advances on the flour and pledged the same for such advances, and wholly failed to pay the vendor, asserting as his reason for not doing so that he was insolvent, is a sufficient ground for the issuing of a writ of capias. *Raphael* v. *McDonald*, 9 L. C. J. 336, S.C.

73. Where the defendant moved to quash on the ground that no fraudulent intent whatever was disclosed by the reasons given in the affidavit, and also on the ground of vagueness—*Held*, that there was nothing in the act which required that the fraudulent intent on the part of the defendant should be alleged in the reasons of plaintiff. *Henderson* v. *Enness*, 2 L.C.J. 186, S.C. 1858.

74. In an affidavit the deponent must state specially the reasons that lead him to believe that the debtor is making away with or secreting his goods with the intention of defrauding his creditors, without being obliged however to state who gave him the information or when he received it, provided that it appear by the terms of the affidavit and the circumstances therein related that the information was given to him at a time sufficiently recent to support an affidavit. *Bell* v. *Vigneault & Houliston*, 5 R.L. 697, S.C. 1874.

75. An affidavit for capias alleging in the alternative that the defendant has secreted *or* made away with his property and effects is insufficient. *Ostell* v. *Peloquin*, 20 L. C. J. 48, S. C. 1875. *McMaster* v. *Robertson*, 21 L. C. J. 161, S. C. 1877.

76. Application was made by the defendant to be discharged from imprisonment under capias, on the ground that he had made an assignment of his estate for the benefit of his creditors, previous to the issuing of the capias—*Held*, that, as the Insolvent Act did not expressly take away the right of capias after assignment, and as the circumstances showed systematic fraud on the part of the defendant, the application must be refused. *Stevenson et al.* v. *McOwan*, 3 L. C. L. J. 38, S. C. 1867.

77. A creditor who brings action against the insolvent, accompanied by capias for a sum of money due at the time, is not bound to proceed in the name of the assignee. *Roy et al.* v. *Beaudin*, 5 R. L. 232, S. C. 1873.

78. And such an action after assignment is good, under the Ins. Act 1869. *Beaudin & Roy et al.*, 20 L. C. J. 308, Q. B. 1875.

79. *Held*, reversing the judgment of the Superior Court, that a capias on the ground of fraud and secretion may issue at the suit of a creditor after the assignment by the debtor in insolvency and the appointment of an assignee; but an attachment of the debtor's effects *en main tierce* will not be maintained. *Nield* v. *Ferland & Ferland & Nield*, 1 Q. L. R. 228, S. C. R. 1875.

80. Proof of undue preference and insolvency does not constitute secretion or making away with property so as to justify a capias. *Emmanuel et al.* v. *Hagens & Hagens*, 6 R. L. 209, S. C. 1874.

81. Where motion was made to quash the writ on the ground of irregularities in the affidavit—*Held*, that, where the plaintiff was described as "of the city of Kingston, Canada West," it was a sufficient indication of his domicile. *Berry* v. *May*, 13 L. C. R. 3, S. C. 1859.

82. And the words "maketh oath and saith," were held to be a suf-

ficient averment that the deponent was sworn, and that it was consequently unnecessary to say that he had been duly sworn. Ib.

83. And *held*, also, that it is unnecessary in describing a promissory note as the cause of debt to state where the same was made. Ib.

84. The words "at Quebec" in the *jurat* show sufficiently where the deponent was sworn, and where the day of the month and the year in such *jurat* were written in figures it was held to be sufficient. Ib.

85. A writ of capias will lie against a debtor resident in Ontario, on the ground of secreting property in Ontario, if he be found in this Province. *Galt et al.* v. *Robertson*, 21 L. C. J. 281, S. C. R. 1877.

86. A capias may lie against a debtor who has made an assignment under the Insolvent Act. *Robertson et al.* v. *Hale & Hale*, 21 L. C. J. 38, S. C. 1877.

87. Plaintiff brought action of damages for malicious arrest, commencing by a capias which was allowed by a judge to issue for $1500. The defendant moved to quash on the ground of insufficiency of the affidavit, and especially because the declaration contained no averment that the criminal proceedings complained of were determined. Plaintiff replied that, as defendant was about to leave the country, he was forced to take his action before the determination of the charge—*Held*, that the capias was properly issued; and, as the criminal proceedings had since ended, plaintiff's motion to amend the declaration to that effect was granted. *Fraser* v. *Gerrie*, 2 R. C. 477, S. C. 1872.

88. On the 5th December, the appellant was arrested on a *capias* issued on the 2nd, and returnable on the 14th of the same month. Finding that a sufficient delay for the return was not allowed, the plaintiff took out an *alias* writ, returnable later—*Held*, on an exception to the form, that the proceeding was valid and the judgment *a quo* was confirmed. *Richard* v. *Wurtele*, 1 Legal News, 32, Q. B. 1877.

89. Where the defendant, having been arrested on a capias, pleaded that the issue of the writ had not been demanded in the affidavit—*Held*, that the fiat was all that was necessary for that purpose. *Doutre* v. *McGinnis*, 5 L. C. J. 158, S. C. 1861.

90. The affidavit for a capias may be sworn before the deputy prothonotary. *The Moisie Iron Co. & Olsen*, 18 L. C. J. 29, Q. B. 1874.

91. An affidavit for capias is sufficient if it contain all the allegations required by the statute though in a different order. *Gregory & Ireland*, 9 L. C. J. 131, Q. B. 1865.

92. An affidavit to hold to bail though bad in part may be efficient for the remainder. *Patterson et al.* v. *Burne*, 3 Rev. de Lég. 347.

93. The amount may be stated in dollars, without any qualification as to a particular currency. *Hall* v. *Zernichon*, 4 Q. L. R. 268, S. C. 1878.

94. It is no ground of petition to quash that the initials only of defendant's Christian names are given. *Ib.*

95. The fact that the day of the month or the year is expressed in Arabic figures in the *jurat* is not sufficient to quash the writ. *Berry* v. *May*, 13 L. C. R. 3, S. C. 1859.

96. Where a party has been arrested under a capias, and the arrest declared illegal, he must be completely and fully restored to his liberty before he can be arrested under a second capias, and consequently the service of a writ of capias or the arrest of a party already in custody is illegal. *Hamel et al.* v. *Côté et al.* 11 L. C. R. 479, S. C. 1861.

97. Where the affidavit on which a *capias* issued disappears from the record, the *capias* cannot be maintained, though the contestation is manifestly unfounded. *Hatte* v. *Currie & McDonald & Gordon et al.* 1 Legal News. 53, S. C. 1877 ; 22 L. C. J. 34.

98. It is not necessary that deponent should give the name of the person who informed him that the defendant was secreting or about to secrete, nor the special reasons which lead him to believe that the facts are true. *Ib.*

99. In an affidavit for capias where the creditor's name was written "Justius" instead of "Joutras—*Held*, to be good. *Joutras & Dunlon*, 7 L. C. R. 420, S. C. 1857.

*See* art. 834 *infra.*

**799.** The writ may also be obtained if the affidavit establishes, besides the debt, that the defendant is a trader, that he is notoriously insolvent, that he has refused to arrange with his creditors, or to make an assignment of his property to them or for their benefit, and that he still carries on his trade. *C. S. L. C. c.* 83, *s.* 47 ; *c.* 87, *s.* 9.

1. In an affidavit for a writ of capias it is necessary to allege the insolvency of the debtor, and that such debtor being insolvent refuses to make an assignment of his estate for the benefit of his creditors. *Hamel et al.* v. *Côté et al.*, 11 L. C. R. 446, S. C. 1861.

2. An affidavit to hold to bail which does not disclose any ground 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 does not allege that he has refused to make a *cession de biens* to them, is bad, even although it be alleged, as required, that he had secreted his estate, debts and effects with intent to defraud, and the capias issued in virtue of such affidavit will be quashed on motion. *Warren et al.* v. *Morgan*, 9 L. C. R. 305, Q. B. 1859.

3. Where both parties are domiciled in Upper Canada, the affidavit must also declare that the defendant does not possess within the limits of Upper Canada any immoveable property out of which the plaintiff can reasonably expect to be paid. *C. S. L. C. c.* 87, *s.* 2; 3 *L. C. R.* 100.

**800.** The writ of capias may likewise be obtained by any creditor having an hypothecary or privileged claim upon an immoveable, upon an affidavit establishing that his claim exceeds forty dollars, and that the defendant, whether he is the original hypothecary debtor or simply the holder of the property, is, with the intent of defrauding the plaintiff, damaging, deteriorating or diminishing the value of the immoveable, or is about to do so himself or by others, so as to prevent the creditor from recovering the whole or any part of his claim, to the amount of forty dollars, as provided by chapter 47 of the Consolidated Statutes for Lower Canada. *C. S. L. C. c.* 43, *s.* 3.

1. Where the defendant had been arrested on a capias under C. S. L. C. cap. 47, on the ground that he was wilfully damaging and deteriorating a certain immoveable property of which the plaintiff was a hypothecary creditor, but the allegation that he was doing so wilfully was omitted in the affidavit—*Held*, that it was not actually necessary to allege in the affidavit that it was so done. *Doutre* v. *McGinnis*, 5 L. C. J. 158, S. C. 1861.

2. It is not necessary in the affidavit to ask for the issue of the writ, the fiat being all that is necessary for that purpose. Ib.

**801.** [If the demand be founded upon a claim for unliquidated damages, the writ of capias cannot issue without a judge's order, after examining into the sufficiency of the affidavit; and the affidavit in such case must state the nature and, moreover, amount of the damages sought, and

the facts which give rise to them, and the judge may, in his discretion, either grant or refuse the capias, and may fix the amount of the bail upon giving which the defendant may be released.]

1. A capias sued out without a judge's order may be set aside on motion and the defendant discharged from custody on filing a common appearance. *Des Barres* v. *Chesner*, 3 Rev. de Lég. 307, K. B. 1820; *Goyette* v. *McDonald*, 4 R. L. 538, S. C. R. 1873.

2. A writ to hold to bail for unliquidated damages may be had, but not for a penalty. *Patterson et al.* v. *Farran*, 3 Rev. de Lég. 348, K. B. 1811.

**802.** The writ of capias may be joined with the writ of summons, or may be issued afterwards as an incident in the cause. In the latter case it must be accompanied with a summons for a fixed day to shew cause why the writ should not be declared valid and joined with the principal demand.

The writ may also issue after judgment has been obtained for the recovery of the debt.

1. A capias to hold to bail may be had *pendente lite* upon the usual affidavit that the defendant is about to leave the Province. *Collins* v. *Hunter*, 3 Rev. de Lég. 349.

2. Where the capias was taken against the defendant during the action, and motion was made to quash on the ground that it did not appear by the affidavit that any legal or sufficient cause of debt existed to justify the issuing of the capias, or in other words that there was no declaration.—*Held*, that a reference to the declaration filed with the original action was sufficient. *Malo* v. *Labelle*, 2 L. C. J. 194, S. C. 1858.

3. A capias founded on a debt for which judgment has been rendered is good and that even where the capias is made the commencement of a new action, it being perfectly indifferent to defendant whether he was arrested under the old action or under a new one. *Perry* v. *Milne*. 8 L. C. J. 222, S. C. 1864.

**803.** The amount for which the writ of capias has issued and the name of the person who made the affidavit must be endorsed upon the writ. 10-11 *Geo. IV. c.* 26.

**804**. It is not necessary that the declaration or statement of the demand should be served upon the defendant at the time of his arrest, but it suffices to leave a copy of it either with him, or at the office of the prothonotary, within the [three days which follow the service.] *C. S. L. C. c.* 83, *s.* 57.

1. Where a question arose as to the service of the declaration on the defendant—*Held*, that a service made by filing a copy at the prothonotary's office was sufficient, provided a certificate of such service was written by that officer on the original. *Gaudette* v. *Laliberté*, 1 R. L. 747, S. C. 1869.

2. In an action commenced by capias also, which was served on the thirty-first of May, and returnable on the twelfth of June—*Held*, that a service of the declaration by depositing it in the prothonotary's office on the seventh June was a legal service of the declaration on defendant, and that a delay of ten days between the service and return of declaration was not required. *Raphael* v. *McDonald*, 10 L. C. J. 19, S. C. 1865.

See art. 850 *infra*.

**805**. Saving the exceptions contained in articles 2272 and 2273 in the Civil Code, a writ of capias cannot issue:

1. Against priests or ministers of any religious denomination whatever;

2. Against septuagenarians;

3. Against females.

*C. S. L. C. c.* 87, *s.* 7, § 1.

1. A minor carrying on trade may legally bind himself for his board and lodging, and in such case may be arrested under a writ of capias. *Browning* v. *Yule & Wales*, 12 L. C. R. 292, S. C. 1862.

**806**. It cannot issue for any debt created out of the Province of Canada, nor for any debt under forty dollars. *Ibid.*, *s.* 2.

1. Barbadoes is a foreign country within the meaning of C. S. L. C. cap. 87, sec. 8. *Trobridge et al. & Morange*, 6 L. C. J. 312, S. C.

2. England must be considered to be a foreign country, and a defendant arrested in Lower Canada for a debt contracted there, and for

which defendant had accepted a bill of exchange drawn upon him at his other place of business at Toronto, but made payable at a bank in England, must be discharged and the capias quashed, notwithstanding the disclosure of evident fraud. *Bottomley & Lumley*, 13 L. C. R. 227, S. C. & 15 L. C. R. 213, Q. B. 1863.

See *Gault et al.* v. *Robertson*, *supra*, No. 85, under *art.* 798.

**807**. The affidavit required in the above articles may be made by one person only, or by several persons swearing each to a portion of the necessary facts, and it may be received and sworn to before a judge of the Superior Court, or a commissioner of the Superior Court, or by the prothonotary who certifies the writ of capias. *C. S. L. C. c.* 83, *s.* 6 ; *c.* 87, *s.* 1.

1. An affidavit for capias may be sworn before a deputy prothonotary. *The Moisie Iron Company et al. & Olsen*, 18 L. C. J. 29, Q. B. 1874.

**808**. The Superior Court alone has jurisdiction in matters of capias. 12 *V. c.* 38, *ss.* 32, 47 ; *C. S. L. C. c.* 78, *s.* 5.

1. In a case of capias in an action for less than £15—*Held*, that the quashing of the writ did not deprive the Superior Court of jurisdiction over such action with regard to subsequent proceeding thereon. *Elwes* v. *Francisco*, 1 L. C. J. 188, S. C. 1857.

2. But in another case in which a capias had issued for a claim of $68, but had not been executed—*Held*, that the Superior Court had no further jurisdiction in the matter. *Tessier* v. *Legault*, 5 R. L. 472, S. C. 1874.

3. Where the plaintiff discontinues proceedings on the capias, he cannot proceed in the Superior Court to recover the $67 which he claims. *Turcotte* v. *Rémier*, 1 Legal News, 351, S. C. 1878 ; 22 L. C. J. 132.

**809**. When the capias is issued by the prothonotary of the Superior Court it is addressed to the sheriff of the district where it is to be executed. 12 *V.*, *c.* 38, *s.* 47 ; *C. S. L. C. c.* 83, *s.* 3, § 2.

See 33 *Vict.*, *c.* 17, *s.* 1 *(Que.)* under Art. 48 *supra*.

1. A writ of attachment in revendication addressed to "one of the bailiffs of our Superior Court for the district of," etc., must be executed

by one of such bailiffs, and the writ may not be served by a bailiff and the declaration by a sheriff. *Brassard* v. *Turgeon*, 5 R. L. 123, S. C. 1873.

**810**. It may be issued by a clerk of the Circuit Court, in which case it is addressed to the sheriff or to any bailiff of the district in which it is to be executed. 12 *V. c.* 63; *C. S. L. C. c.* 83, *s.* 6.

**811**. The clerk of the Circuit Court acts in such case as an officer of the Superior Court, and the writ of capias must be worded throughout as if it was issued by the prothonotary.—*Ibid.*

1. A writ of capias signed "F. H. Marchand, Clerk of the Circuit Court," attested with the seal of the Circuit Court, St. Johns, returnable into the Superior Court, and headed in the margin "in the Superior Court," is irregular, and such writ is not a writ in the Superior Court as required by the Judicature Act. *Hitchcock* v. *Meigs*, 6 L. C. R., 175, S. C. 1856.

**812**. In all cases in which a writ of capias may issue, a warrant of arrest may be granted by a commissioner of the Superior Court and be addressed by him either to the sheriff or a bailiff or any other peace officer in his vicinity. *C. S. L. C. c.* 83, *s.* 53.

**813**. Such warrant is in the name of the commissioner who grants it: it orders the arrest of the person therein designated and his delivery over to the gaoler of the district, who is commanded to keep him in his custody during forty-eight hours, and no longer, unless before the expiration of that time the plaintiff has obtained and caused to be executed against such defendant a writ of capias in the ordinary course. 9 *Geo. IV.*, *s.* 27.

FORM No. **42**.

In connection with articles 812, 813.

*Affidavit for Warrant of Arrest.*

A. B., of &c., being duly sworn, doth depose and say, that C. D., of is personally indebted to in a sum exceeding forty dollars, to wit: in the sum of

That this deponent is credibly informed, hath every reason to believe, and doth verily and in his conscience believe, that the said is immediately about to leave the Province of Canada (*allege specially the reasons which lead to the belief that the defendant is about to leave the Province of Canada*), whereby the said , without the benefit of a warrant of attachment against the body of the said , may be deprived of remedy against the said : and this deponent hath

Sworn before me, this day of

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FORM No. **43**.

In connection with articles 812, 813.

*Warrant to arrest the person.*

Lower Canada, district of

A. B., Esquire, Commissioner of the Superior Court in the district of

To and to the keeper of the common gaol of the said district, greeting:

I command you, that you take of in the county of in the district of if he be found in and him, with all due diligence,

convey to the common gaol of the said district, and deliver to the keeper thereof, together with this warrant; and I do hereby command you, the said keeper, to receive the said and him safely keep for the space of forty-eight hours, and no longer, unless, before the expiration of that time, a writ of *capias ad respondendum* be duly served upon him, to compel him to be and appear personally in the Superior Court for the said district on the day of the return of such writ, to answer of of a certain debt, interest and costs, amounting to the sum of

Given under my hand and seal, this day of in the year of Her present Majesty.

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1. A defendant was committed by a commissioner under a warrant which empowered the gaolor to detain him for 48 hours and no longer, unless before the expiration of that time a writ of *capias* be served on him. No writ of *capias* was served within that time, but the defendant was, nevertheless, detained two days longer, and then a *capias* was served. *Held*, that the detention of defendant after the 48 hours had elapsed was illegal, and that the arrest under the *capias* while defendant was detained was void. *Hingston* v. *McKenty*, 12 L. C. J. 25, 4 L. C. L. J. 42, S. C. 1867.

**814.** The debtor cannot be detained in prison in virtue of such warrant any longer than forty-eight hours. *Ibid.* s. 54.

**815.** The commissioner granting such warrant must, without delay, transmit a duplicate of it, together with the original affidavit upon which it was granted and a certificate of his proceedings, to the prothonotary of the Superior Court of the district, who must file the same and keep them as part of the record in the case. *Ibid.* s. 55.

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## SECTION II.

### OF THE EXECUTION OF WRITS OF CAPIAS.

**816.** If the writ of capias is addressed to a bailiff, the bailiff who is charged with it arrests the defendant and delivers him over, together with the writ, to the sheriff, who thereupon becomes responsible. *C. S. L. C. c.* 83, *s.* 6, § 2.

**817.** If the writ of capias is addressed to the sheriff he is then bound to execute it or to cause it to be executed by his officers.

**818.** The sheriff is bound to keep the defendant in the common gaol of the district, until the latter gives security or is discharged as hereinafter provided. *Ibid. c.* 87, *s.* 1.

## SECTION III.

### OF THE CONTESTATION OF WRITS OF CAPIAS.

**819.** Upon a petition presented to the court, or to a judge in term or in vacation, the defendant may obtain his discharge by establishing that he is not liable to be imprisoned, or by shewing that the essential allegations of the affidavit upon which the capias is founded are false or insufficient. *Ibid. ss.* 8, 9, §§ 1-2; *c.* 47, *s.* 3, § 3; *C. P. L.* 218.

1. A defendant must raise all his objections against the sufficiency of the affidavit *in limine litis*, and not merely in appeal. *Heyneman* v. *Smith*, 21 L. C. J. 298, Q. B.

2. The want of a sufficient affidavit to hold to bail is not a subject for an exception to the form. *Patterson* v. *Hart*, 3 Rev. de Lég. 195. *Chapman & Blennerhasset*, 2 L. C. J. 71.

3. No advantage can be taken of any defect in the affidavit to hold to bail by an exception to the form. *Ibid.*, 3 Rev. de Lég. 348, K. B. 1811.

4. In case of any irregularity in issuing a capias, a motion to discharge the defendant from the sheriff's custody 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. *Barney* v. *Harris*, S. R. 52, K. B. 1811.

5. A petition to quash a capias cannot allege irregularities such as would found an exception to the form, and [illegible]es, will be rejected on demurrer. *Lemay* v. *Lemay*, 3 R. L. 32.

6. A judge in chambers cannot render ju[illegible]shing a capias, but may order the release of the defendant o[illegible] petition to that effect. *Hogan et al.* v. *Gordon*, 2 L. C. J. 161, S. C. 1858; *Emmanuel et al., Hagens & Hagens*, 6 R. L. 209, S. C. 1874; *The Canadian Bank of Commerce* v. *Browne et al.* 6 R. L. 26, S. C. 1874.

7. Petition was brought for the release of the defendant after issue joined—*Held*, that there was no presumption of waiver of right to petition for release arising from delay or from pleading to the action. *Chapman* v. *Blennerhasset*, 2 L. C. J. 71, S. C. 1857.

8. Defendant, after filing a plea to the merits, may disprove the allegations of the affidavit upon which the capias issued. *Perry* v. *Milne*, 8 L. C. J. 222, S. C. 1864.

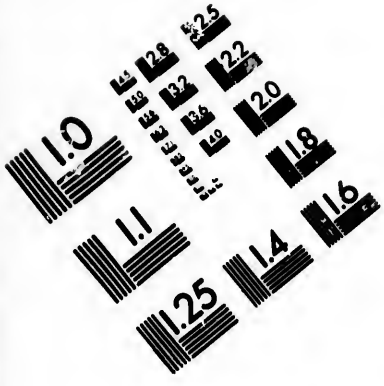
9. A defendant may apply by petition in term for the quashing of a writ of capias, and such proceeding is more regular under the Code than to apply by motion. *Worthen* v. *Holt*, 15 L. C. J. 161, S. C. 1871.

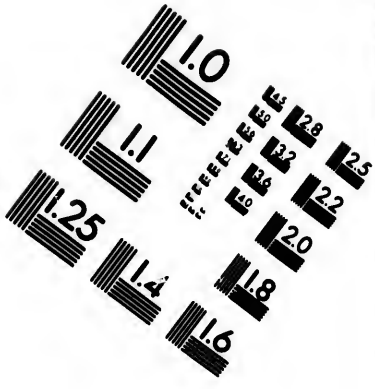
10. When the writ is issued on the order of the prothonotary, acting in the absence of the judge, on a claim for unliquidated damages, a petition concluding with a general prayer to quash the writ and to discharge the defendant includes an application to revise the order of the prothonotary. Ibid.

11. Where to an action of capias the defendant by petition after judgment set up that the allegations of the affidavit on which the capias issued were false, and prayed for his release—*Held*, that exception to the affidavit could not be taken after final judgment rendered. *Hogan et al.* v. *Gordon*, 2 L. C. J. 162, S. C. 1858.

12. A notice on a petition to be released from custody under a capias, served on Saturday between four and five o'clock in the afternoon for presentation on Monday at ten o'clock in the forenoon, was *held* to be sufficient. *Trobridge et al.* v. *Morange*, 6 L. C. J. 312, S. C. 1862.

13. Affidavits to procure revendication, capias or attachment are completely exhausted by the issue of the writ, and are of no value as proof in the case. *Crehen* v. *Hagerty*, 3 Q. L. R. 322, C. C. 1877.

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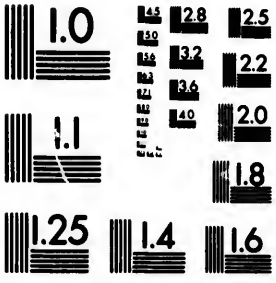


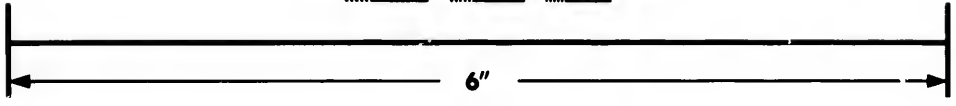



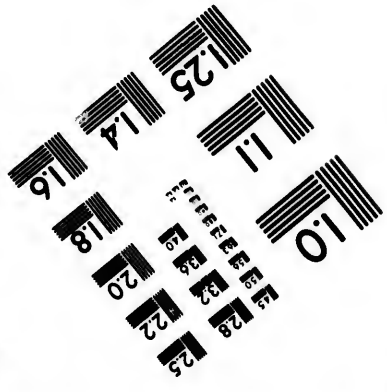


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**820.** In order to decide upon this incidental proceeding the court or judge may order the immediate return of the said writ of capias and of the proceedings had upon it, although the day fixed for the return should not yet be arrived. 1 *L. C. R.* 143.

1. A defendant need not present a petition to have a writ of capias returned immediately, but a judge may order such return upon simple motion to that effect. *The Moisic Iron Co.* v. *Olsen et al.* 17 L. C. J. 322, S. C. 1873.

**821.** If the contestation is merely as to the sufficiency of the allegations of the affidavit, the judge or the court may dispose of it after hearing the parties.

But if the contestation is founded upon the falsity of the allegations, issue must be joined upon the petition of the defendant, in the ordinary course and independently of the contestation upon the principal demand, unless the exigibility of the debt depends upon the truth of the allegations of the affidavit, in which case the writ may be contested together with the merits of the case. 10 *L. C. R.* 241.

1. An affidavit to hold to bail cannot be contradicted by counter affidavits. *Lawrence* v. *Hinckley*, 3 Rev. de Leg. 348.

2. In an attachment before judgment where an exception to the form and, subsequently, a petition were filed against the validity of the seizure in the manner provided for the contestation of writs of capias—*Held*, that the *enquête* on the petition might be proceeded with, independent of the contestation on the exception to the form. *The Quebec Bank & Steers et al. & Seymour et al.* 12 L. C. J. 227, S.C. 1868.

3. Under art. 821 C. C. P. the contestation of an attachment before judgment should be made with the contestation upon the merits, and not on petition when the debt is not yet due or exigible. *Metresse* v. *Brière & Guilbault*, 15 L. C. J. 259, S. C. 1871.

4. The pretensions of a defendant, who, after arrest, leaves the country and refuses to appear for examination, will not be favourably regarded by the court. *The Molson's Bank* v. *Campbell*, 21 L. C. J. 280, S. C. 1877.

**822.** A defendant whose application to be discharged is rejected may appeal from the decision.. 3 *L. C. J.* 292.

1. Where a defendant under capias petitioned to be released, and the petition was rejected—*Held*, that he had a right to appeal from such judgment *de plano*, and therefore an application by him to be permitted to appeal was dismissed on that ground. *Blackensee & Sharpley*, 3 L. C. J. 292, 1859; *Gugy & Ferguson*, 12 L. C. R. 254, Q. B. 1862; *The Canadian Bank of Commerce & Browne et al.*, 19 L. C. J. 110, Q.B. 1874.

2. An appeal may be had from a judgment dismissing a petition for release under a capias without obtaining the previous permission of the court. *Phillips & Sutherland*, 19 L. C. J. 134, Q. B. 1875.

See art. 494 *ante*, and art. 1116 *post*.

**823**. [If the court or judge orders the defendant to be discharged, the plaintiff may obtain a suspension of the order, by declaring immediately that he intends to have the decision reviewed and depositing the amount required by article 497. He may likewise appeal from the judgment in review, if he declares immediately his intention of doing so, and causes the writ of appeal to be served within three juridical days from the rendering of the judgment in review.

If the plaintiff fails to comply with these formalities the defendant is discharged.]

## SECTION IV.

## OF DISCHARGE UPON BAIL.

**824**. The defendant may obtain his discharge upon giving two good and sufficient sureties that he will not leave the province of Canada, and that, in case he does so, such sureties will pay the amount of the judgment that may be rendered, in principal, interest and costs, or the amount fixed by the judge in the case of article 801.

But this bail cannot be received after the expiration of the eighth day from the day fixed for the return of the writ of capias, unless with leave of the court, expressly granted upon sufficient cause shewn. *C. S. L. C. c.* 87, *s.* 3.

1. The temporary absence of the debtor from the province is a violation of the bond, and gives the creditor the right to proceed against

the sureties. *Thompson et al.* v. *Lacroix et al.* 4 Q. L. R. 312, S. C. 1878.

2. In an action upon a recognizance of special bail—*Held*, that the omission in such recognizance of the conditions required in the provincial statute 5 Geo. IV. cap. 2, regarding the liability of the cognizor, makes the recognizance null and void. *Stewart* v. *Hamel et al.*, 1 Rev. de Lég. 212, Q. B. 1845.

3. The bail given to the sheriff in a case of capias is null if it contain a clause that the party should furnish a special bail on the day of the return, and not at any time before or after judgment. *Raymond* v. *Walker*, 3 Rev. de Lég. 297, Q. B. 1848.

4. *Held*, also, that the decease of the defendant before judgment liberates the surety. Ib.

5. A defendant arrested on capias can put in special bail at any time after judgment, although the bond to the sheriff has been assigned to a third party who has brought action on it. *Campbell* v. *Atkins et al.* 9 L. C. R. 74, S. C. & Q. B. 1857.

6. The bailsman even when sued, and two years after judgment, may be allowed to put in special bail. *Lefebvre* v. *Vallée*, 3 L. C. J. 117, S. C. 1858.

7. On a motion to be permitted to be put in special bail after eight days from the return day, where the motion did not set forth especial grounds in support thereof—*Held*, that it could not be received. *Begin et al. & Bell et al.* 8 L. C. R. 138, S. C. 1853.

8. On cause shewn, a defendant will on petition be allowed to give special bail after eight days from return, and even at any reasonable time thereafter, and that without his surety joining in the petition. *Miles* v. *Aspinwall*, 7 L. C. J. 124, S. C. 1862.

9. The bond to be given by a special bail is the same as was required by the laws of Lower Canada, in force before the passing of the 12th Vict. cap. 42, viz. by the 5 Geo. IV. cap. 2. *Sewell & Vannevar*, 14 L. C. R. 239 & 9 L. C. J. 265, Q. B. 1864.

10. And *held*, also, that the defendant may put in such special bail or security at any time, and even after judgment rendered in the original suit, upon special application therefor, and on satisfactory cause shown for extending the time for putting in such special bail. Ib.

11. And in default of the defendant putting in such special bail his sureties who have given bail to the sheriff for his appearance may do so at any time upon application for that purpose and sufficient cause shown. Ib.

12. Where judgment was rendered in the Superior Court, maintaining a writ of capias, and the defendant presented a petition supported by affidavit, praying to be allowed to put in bail or security that he would surrender himself to the sheriff within a month after service upon himself or his sureties of a judgment requiring such surrender—*Held*, that he would on cause shewn be allowed to put in such bail in place of the bail given to the sheriff. *Henderson* v. *Lamoureux*, 17 L. C. R. 414, S. C. 1867.

13. The bail entered into by a defendant for release under capias should not be reduced. *Winning et al.* v. *Fraser*, 13 L. C. J. 167, S. C. 1869.

14. Bail may be put in by leave of the Court even after judgment. *Bélanger* v. *Balfour*, 2 R. C. 237, S. C. 1872.

15. Where the sureties of a party originally arrested under capias have caused him to be imprisoned by means of a writ of *contrainte par corps* issued at their instance, in order that he should undergo the imprisonment imposed by C. S. L. C. cap. 87, sec. 12, s. s. 2, they cannot for that reason alone claim that their bail bond should be cancelled and discharged. *Macfarlane* v. *Lynch*, 10 L. C. J. 26, S. C. 1865.

16. In action against the sureties of a person arrested under capias, where the plaintiff sought to hold them for an amount greater than that originally sued for—*Held*, that notwithstanding the sureties had given bail for double the amount endorsed on the writ and sworn to in the affidavit, and although the plaintiff had afterwards obtained judgment for an amount greater than that sworn to in the affidavit, that he could recover for the amount thus sworn to with costs and no more. *Torrance et al. & Gilmour et al.* 2 L. C. R. 231, S. C. 1851.

17. The bail to the sheriff for a defendant arrested on capias are only liable for the amount stated in the bail bond, and not for the full amount of the judgment rendered. *Joseph* v. *Cuvillier*, 5 L. C. R. 94, S. C. 1855.

18. The sureties for a defendant arrested under capias are judicial sureties, and as such are liable to imprisonment to compel payment of a judgment against them on their bond. *Winning et al. & Leblanc et al.* 14 L. C. J. 298, S. C. 1870.

19. The sureties of a defendant arrested under capias who have bound themselves that the defendant will surrender himself when required to do so by an order of the court or judge within one month from the service of such order upon defendant or his sureties, and in default thereof to pay the debt, will not be held liable because of the service of a copy of the judgment served upon the defendant and them,

rendered on the contestation of the statement filed under 764 & 776 C. C. P., condemning the defendant to be imprisoned for three months, and the service of such copy of judgment is not service of an order such as mentioned in the bond, or such as is required by 825 C. C. P. *Brossard* v. *Bertrand*, 20 L. C. J. 125, Q. B. 1875.

20. Where the defendant made motion to be allowed to put in special bail and the motion was rejected—*Held*, that this was no compliance with the requirements of the writ, so as to release the bail to the sheriff. *Torrance et al.* v. *Gilmour et al.* 2 L. C. R. 231, S. C. 1851.

**825**. The defendant may also obtain his discharge at any time before judgment, by giving good and sufficient sureties to the satisfaction of the court or judge, or prothonotary, that he will surrender himself into the hands of the sheriff, when required to do so by an order of the court or judge, within one month from the service of such order upon him or upon his sureties, and that in default they will pay the amount of the judgment in principal, interest and costs, or the amount fixed by the judge in the case of article 801. *Ibid. s.* 10.

The Insolvent Act of 1875, s. 127, does not repeal art. 825 C. C. P. *McMaster et al.* v. *Robertson*, 1 Legal News, 77, S. C. R. 1878.

**826**. This bail is offered after a notice served upon the plaintiff or his attorney, with one intermediate day's delay.

**827**. The sureties offered must, if required, justify their sufficiency upon oath, but need not justify upon real estate. *Ibid. s.* 10 § 2.

**828**. A defendant arrested upon a capias may obtain his provisional discharge by giving good and sufficient sureties to the sheriff to the satisfaction of the latter, before the return day of the writ, that he will pay the amount of the judgment that may be rendered upon the demand, in principal, interest and costs, if he fails to give bail pursuant to article 824 or to article 825. *Ibid. s.* 22, *and form No.* 4, *Henderson* v. *Lamoureux*.

## FORM NO. 44.

In connection with article 828.

*Form of Bail-bond.*

Know all men by these presents, that we, (*name here the Defendant and his bail,*) are held and firmly bound to (*name here the Sheriff,*) Sheriff of the District of , in Lower Canada, in the sum of (*state here the amount sworn to and endorsed on the Writ, with twenty-five per centum added for interest and costs,*) to be paid to the said Sheriff or his certain attorney, executors, administrators or assigns; for which payment, to be well and faithfully made, we bind ourselves, and each of us by himself for the whole and every part thereof, and the heirs, executors and administrators of us, and every of us, firmly by these presents, sealed with our seals, and dated this day of , in the year of the Reign of Our Sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and in the year of our Lord one thousand eight hundred and

Whereas the above bounden (*name here the Defendant*) has been by the said Sheriff arrested under and by virtue of a certain writ sued out of the Superior Court in the District of , at the instance of (*name here the Plaintiff,*) and to the said Sheriff in due course of law delivered;

The condition of this obligation is such that if the said (*name here the Defendant*) do on (*state here the return day of the Writ,*) or at any time previously thereto, or within eight days thereafter, give good and sufficient security to the satisfaction of the Superior Court in the said District or of any one of the Judges of the said Court, that he, the said (*name here the Defendant,*) will surrender himself into the custody of the said Sheriff whenever required so to do by any order of the said Court, or of any Judge thereof, made

as by law provided, or in default thereof, will pay to the said (*name here the Plaintiff,*) the debt for which he, the said (*name here the Defendant,*) has been arrested as aforesaid, with interest and costs; or do on (*state here the return day of the Writ,*) or at any time previously thereto, or within eight days thereafter, put in special bail, as by law provided, to the action wherein the said Writ has been sued out as aforesaid, then this obligation shall be void and of no force, but otherwise shall stand in full force, vigour and effect.

Signed, sealed and delivered in the presence of

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1. Where a capias has been declared good and valid, and the defendant in appeal gives security for the costs only, and files a declaration that he does not object to the execution of the judgment, the appeal does not suspend proceedings against the bail on their bond to the sheriff. *Lajoie* v. *Mullin et al.*, 21 L. C. J. 59, Q. B. 1876; 9 R. L. 48.

**829**. The sheriff in such case is responsible only for the sufficiency of the sureties at the time when bail was given. *Ib.*

**830**. He may free himself by offering an assignment of the bail-bond he has taken.

This assignment may be effected by simply endorsing his name upon the bail-bond. *Ibid. Asselin* v. *Mason*, *9th November*, 1848.

**831**. The sureties may at any time arrest the defendant and surrender him into the hands of the sheriff, and thus discharge themselves from their bond. *C. S. L. C. c.* 87, *s.* 5.

1. Where the sureties of a party, originally arrested under capias, had caused him to be imprisoned under a writ of *contrainte par corps*, issued at their instance, in order that he should undergo the imprisonment imposed as a punishment by C. S. L. C. cap. 87, sec. 12, ss. 2, the sureties cannot for that reason alone claim that their bail-bond should be cancelled and discharged. *Macfarlane* v. *Lynch*, 10 L. C. J. 26, & 1 L. C. L. J. 99, S. C. 1865.

**832.** [The sheriff however, is not bound to receive the defendant, without a written requisition to that effect signed by the sureties or by one of them, or by their authorized attorney.

The requisition must contain the title of the court, the names of the parties to the suit, and of the sureties, and must require the sheriff to take the debtor into his custody; and it is the duty of the sheriff to give the sureties a certificate of such surrender.]

**833.** [If the sureties apprehend resistance, then upon an affidavit of one of them, alleging their suretyship, sworn to before a judge, the prothonotary, a commissioner of the Superior Court, or a justice of the peace of the district in which the debtor then is, and upon a requisition to that effect written upon the back of the affidavit, any bailiff or constable may arrest the debtor with such forcible assistance as may be necessary, and hand him over to the sheriff.]

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# CHAPTER SECOND.

## OF ATTACHMENT BEFORE JUDGMENT.

### SECTION I.

### OF SIMPLE ATTACHMENT.

**834.** A creditor has a right, before obtaining judgment, to attach the goods and effects of his debtor:

1. In the case of the *dernier équipeur*;

2. In all cases where, as plaintiff, he produces an affidavit establishing: that the defendant is personally indebted to him in a sum exceeding five dollars, that the defendant

absconds or is about immediately to leave the province, or is secreting his property, with the intent to defraud his *creditors and the plaintiff* in particular; or that the defendant is a trader; that he is notoriously insolvent; that he has refused to arrange with his creditors or to make an assignment of his property to them or for their benefit, and that he still carries on his business; and in either case, that the deponent verily believes that without the benefit of the attachment the plaintiff will lose his debt or sustain damage. *C. S. L. C. c.* 83, *ss.* 46-7, 58 & 175; *Poth.* 180-1; *C. P. L.* 240.

35 Vict., c. 6. (*Que.*):

18. Article 834 is hereby amended by inserting therein, immediately after the word "secreting," the words "or is about to secrete," and by substituting in place of the words "creditors and the plaintiff" the words "creditors or the plaintiff."

1. The *dernier équipeur* is entitled to a writ of attachment before judgment for the amount of his claim on the vessel subject to it, even when several months have elapsed since the debt was incurred, and the proprietor has been in possession of his vessel. *Girard* v. *St. Louis*, 6 R. L. 45, C. C. 1874.

2. Where the affidavit for an attachment before judgment stated that the sum of money due was for the price of immoveable property which the plaintiff promised to sell and the defendant promised to purchase—*Held*, to be sufficient. *Shaw* v. *McConnell*, 4 L. C. R. 49, S. C. 1854.

3. The omission to state in the affidavit that the defendant is *personally* indebted to the plaintiffs and, to state also the cause of debt, and that the defendant hath or had an intent to defraud his creditors and the plaintiff in particular, is fatal, and the attachment by garnishment in such case will be quashed on motion. *Lynch* v. *Ellice et al.*, 12 L. C. J. 209, S. C. R. 1867.

4. An affidavit in an action for money paid out and expended, and lent and advanced by the plaintiff to the defendant, and at his request, is bad for not distinctly stating that the money "paid, laid out or expended" was so paid, &c., to the use of the defendant and at his request. *Maguire* v. *Link*, 16 L. C. R. 372, S. C. 1865.

5. And where such affidavit embraces several causes of action and one of them is defectively stated, it vitiates the whole affidavit. Ib.

6. An attachment before judgment was founded upon an affidavit setting forth that the defendant was indebted to the plaintiff in a sum of money mentioned therein "for the price and value of goods, wares and merchandise, by the said plaintiff then and there sold and delivered as will appear by the account thereof to be filed in this cause"—*Held*, on a motion to quash, that the affidavit must state the cause of indebtedness with sufficient accuracy to enable the court to judge whether the defendant is indebted to the plaintiff or not, and if any fact material to such judgment be omitted, its absence will not be cured by the assertion by the creditor of the indebtedness of the debtor. *Beaufield et al.* v. *Wheeler*, 5 L. C. J. 44, S. C. 1860.

7. Where an affidavit for an attachment before judgment, founded on a claim for work done, omitted to allege that the work was done at the request of the defendant, but alleged an acknowledgment of the debt in the shape of a promissory note—*Held*, to be sufficient. *McNamara* v. *Meagher*, 5 L. C. J. 49, S. C. 1861.

8. On a contestation arising out of the seizure of a quantity of timber—*Held*, that raftsmen have no privilege or right of retention as to the raft upon the timber of which they have been employed. *Duguay* v. *Fleurant & Bennett et al.*, 1 Q. L. R. 87, S. C. 1872.

9. Where a creditor was notified by his debtor that she was about to leave the Province for a short time, and the creditor consented thereto, but just as she was on the point of departure placed an attachment before judgment on her effects at the railway station.—*Held*, that the attachment would not lie as there was no intent to defraud. *Riopel* v. *Arpin*, 4 R. L. 270, C. C. 1872.

10. An affidavit for an *arrêt 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 plaintiff is about to secrete his effects." *Lamoureux* v. *Kimmery*, 3 Rev. de Lég. 307, K. B. 1819.

11. An affidavit made before the passing of Q. 35 Vict. c. 6, sec. 18, to the effect merely that the defendant is immediately about to secrete his property is insufficient. *Griffith & McGovern*, 16 L. C. J. 336, S. C. R. 1872.

12. An affidavit affirming, after setting out the indebtedness of the defendant, "that the deponent is credibly informed, hath every reason to believe and doth verily and in his conscience believe that the defendant is secreting," &c., with the grounds of belief, is sufficient to obtain a warrant of attachment before judgment. *Clement* v. *Moore*, 13 L. C. J. 163, S. C. 1869.

13. Nor is the omission of the word "verily," in the conclusion of the affidavit, "doth verily believe that, without a warrant of attachment," &c., fatal. Ib.

14. And the deponent should state specially his reasons for believing that the debtor is secreting or making away with his goods, with the intention of defrauding his creditors, but need not state from whom he received the information. *Bell* v. *Vigneault & Houliston*, 5 R. L. 697, S. C. 1874.

15. An attachment before judgment will be quashed and set aside upon motion if the affidavit does not aver that "the defendant is secreting or is about to secrete his estate, debts and effects." *McNeven* v. *McAndrew*, 18 L. C. J. 70, S. C. 1873.

16. The article of the Code of Procedure which provides for the issuing of writs of attachment before judgment, has not in any way altered, with respect to the affidavit required for such writs, the law as previously in force, and in such affidavit it is sufficient to state that the defendant is about to leave Lower Canada, or that he is about to leave the Province with intent to defraud his creditors, without stating that he is about to leave the *heretofore* Province of Lower Canada with such intent. *Beaulieu* v. *Linklater*, 17 L. C. R. 406, C. C. 1867.

17. The deponent must follow the words of the statute and swear "that he is credibly informed, hath every reason to believe and doth verily and in his conscience believe that the defendant is secreting his estate, and that without the benefit of a writ of *saisie arrêt* he will lose his debt, &c. *Boudrot* v. *Locke et al.* 13 L. C. R., 469 C. C.; *Jobin & Symmons*, 14 L. C. R. 14, C. C. 1863.

18. If the deponent swears "that he is credibly informed and verily in his conscience believes that the defendant is immediately about to secrete his estate, and that without the benefit of a writ of attachment he *may* lose his debt or sustain damage," it is sufficient. *Shaw* v. *McConnell*, 4 L. C. R. 49, S. C. 1854.

19. An affidavit for a writ of attachment before judgment in which it is alleged "that the deponent is credibly informed, has every reason to believe and doth verily in his conscience believe, that the defendant has secreted and is about to secrete his estate, debts and effects with intent, &c.," is sufficient. *Laing et al.* v. *Bresler*, 5 L. C. R. 195, S. C. 1855.

20. An affidavit for attachment before judgment in which it is said "that the deponent is credibly informed, hath every reason to believe and doth verily and in his conscience believe, that the defendant is immediately about to secrete his estate, debts and effects with intent to

defraud," is sufficient. *Wurtele et al.* v. *Price*, 5 L. C. R. 214, S. C.; *Hayes* v. *Kelly*, 5 L. C. R. 336, S. C.; *Fitzback et al.* v. *Chalifoux*, 5 L. C. R. 385, S. C. 1855.

21. Where the words "is credibly informed" and "in his conscience" were omitted, the affidavit was held to be insufficient. *Baile* v. *Nelson et al.* 5 L. C. R. 216, S. C. 1855.

22. Where the words "hath every reason" and "in his conscience" were omitted, the affidavit was held to be insufficient. *Maguire* v. *Harvey*, 5 L. C. R. 251, S. C. 1855.

23. Where the affidavit alleged that "without the benefit of a writ, &c., the plaintiffs *may* lose their debt and sustain damage," it was, on motion of defendant, declared bad and set aside for want of certainty. *Robertson et al.* v. *Attwell & McDougall*, 7 L. C. J. 48, S. C. 1862.

24. *Held*, also, that the writ issued on such affidavit, must be quashed on motion. Ib.

25. The omission of the words "will lose his debt" does not vitiate the affidavit, or entitle the defendant to have the writ quashed. *Godin* v. *McConnell*, 13 L. C. R. 465, C. C. 1863.

26. The words "*may* be deprived of his remedy and *may* lose his debt and sustain damage" are insufficient to justify the issuing of a writ of attachment before judgment. *Ferres* v. *Rutherford et al. & The Montreal and Champlain Railway Company*, 9 L. C. J. 102, S.C., 1864.

27. On a motion to quash a writ of attachment on the ground that the allegation in the affidavit was "that without the benefit of such a writ the plaintiffs *may* lose their said debt"—*Held*, that the use of the word *will* was unnecessary, and that the affidavit as it stood was sufficient. *Sharples et al.* v. *Rasa*, 17 L. C. R. 39, S. C. 1867.

28. *Held*, that where the affidavit for such attachment concluded with the averment in the disjunctive that "the plaintiff without the benefit of a writ of attachment would lose his debt *or* sustain damage" it was not bad for uncertainty. *Milne* v. *Ross et al.* 4 L. C. J. 3, S. C

29. An affidavit for attachment before judgment in which the word "*celer*" instead of the word "*receler*" was used and the latter word erased in the body of the affidavit and the former put in the margin, without reference thereto in the jurat, was held to be good. *Bourassa* v. *Haws*, 8 L. C. R. 135, S. C. 1858.

30. The omission to state in the affidavit that the defendant "is secreting" his property, or (in the case of a trader alleged to be insolvent), "that he still carries on his business" is fatal. *Osborn et al.* v. *Nitsch & Nitsch*, 21 L. C. J. 252, 1 Legal News, 213, S. C.

31. The Court will not quash a writ of attachment because in the jurat of the affidavit upon which it issues, subscribed by the prothonotary of the court (the office, being held by two persons), the oath is stated to have been taken before *me*;" nor will the affidavit be held bad by reason of erasures not mentioned in the jurat of immaterial words, words without which the affidavit is otherwise complete. *The City Bank* v. *Hunter & Maitland*, 2 Rev. de Lég. 170, Q. B. 1847.

32. *Held*, confirming judgment of court below, that the omission of the words "before us" in an affidavit for an attachment against goods, sworn to before the prothonotaries of Montreal, is a fatal irregularity, and a writ of attachment before judgment issued upon such affidavit will be quashed on motion. *Heugh et al. & Ross et al.* 13 L. C. R. 32, S. C. & 8 L. C. J. 96, Q. B. 1864.

33. No attachment for debt can be obtained before judgment without an affidavit, except in cases of *saisie gagerie* of the *dernier équipeur*. *Tiffany* v. *Derling*, 3 Rev. de Lég. 304, K. B. 1810; *Dubeault* v. *Robertson*, 8 L. C. J. 334, C.C. 1864.

34. Whether the person doing the last repairs to a ship be the *dernier équipeur* or not, he cannot obtain process of attachment before judgment, without affidavit. *Plante* v. *Clark*, 17 L. C. R. 75, C. C. 1866.

35. An attachment before judgment will not lie against a tenant without an affidavit charging him in the usual form with intent to defraud. *Bélanger* v. *McCarthy & The Imperial Insurance Co.*, 18 L. C. J. 138, S. C. 1874.

36. An affidavit for a writ of attachment before judgment sworn before a commissioner of the Superior Court is irregular. *Fleming* v. *Fleming*, 6 L. C. R. 473, S. C. 1854.

37. Where a writ of attachment before judgment was issued upon an affidavit sworn before the deputy prothonotary, but which purported to be sworn before a commissioner of the Superior Court—*Held*, to be null and that the deputy prothonotary would not be permitted to correct the error, inasmuch as such act having a retroactive effect might prejudice the interests of the defendant. *Gagnon* v. *Rousseau*, 6 L.C.R. 461, S. C. 1855.

38. The affidavit when founded on a note not yet due, must allege, beside the ordinary allegations, the insolvency of the debtor. *Trempe* v. *Vidal*, 5 R. L. 539, C. C. 1874.

39. Where the affidavit for an attachment before judgment was attacked by exception to the form on the ground that the allegations of the affidavit were false, and the plaintiffs demurred on the ground that

the allegations of the affidavit could not be put in issue by an exception to the form, the exception was maintained and the demurrer dismissed. *Leslie et al & The Molson's Bank*, 8 L. C. J. 1, & 12 L. C. R. 265, Q. B. 1861.

40. Where the affidavit set up that "the defendant was concealing his property with intent to defraud his creditors, &c." and the defendant contested the truth of the affidavit by exception to the form—*Held*, that the exception was properly brought and, being proved, was maintained with costs. *Biroleau* v. *Lebel*, 6 L. C. J. 168, C. C. 1862, & *Chapman* v. *Nimmo*, 8 L. C. J. 42, & 14 L. C. R. 103, S. C. 1863.

41. No reasons for quashing a writ of attachment before judgment other than those set forth in the motion can be taken into consideration by the court. *Godin* v. *McConnell*, 13 L. C. R. 465, C. C. 1863.

42. The facts set forth in the affidavit and sworn to there cannot be traversed by exception to the form. *Asselin* v. *Kemp*, 15 L. C. R. 191, C. C. 1864.

43. The affidavit for a writ of attachment before judgment and the writ itself may be attacked by exception to the form. *Giroux* v. *Gareau*, 14 L. C. R. 447, & 8 L. C. J. 164, S. C. 1864.

44. On appeal from a judgment dismissing a contestation of an attachment before judgment—*Held*, confirming court below, that the affidavit on which the attachment issued was proof sufficient of fraud or fraudulent intent or concealment on the part of the debtor, and that the plaintiff was not bound to make any further proof of such allegation in order to obtain judgment against the defendant, and that, notwithstanding that part of the claim on which the attachment issued was not yet due or exigible at the time of the action. *Préfontaine & Prévost et al.*, 1 L. C. J. 104, Q. B. 1857.

But see *Crehan* v. *Hagarty*, *ante*, Art. 819.

45. The process of attachment before judgment cannot be made use of as a means of compelling dilatory debtors to pay doubtful debts, it being allowed by law only against debtors guilty of fraud. *Powell* v. *Patterson*, 4 Q. L. R. 192, S. C. 1878.

46. A prothonotary is not liable for the damages caused by the illegal issue of a Writ of Attachment before judgment, unless he acted in bad faith or without reasonable and probable cause. *McLennan et al. & Hubert et al.* 22 L. C. J. 294, Q. B. 1874.

And see art 798, *supra*.

**835.** [If the claim is founded on unliquidated damages, the writ of attachment cannot issue without the order

of a judge, after examining into the sufficiency of the affidavits, which, moreover, must state the nature and amount of the damages claimed and the facts which gave rise to them, and the judge may, in his discretion, either grant or refuse the writ, and fix the amount of the bail upon giving which the property may be released.] *Art.* 801 *ante.*

**836.** Simple attachment is effected by means of a writ addressed, when in the Superior Court, to the sheriff of the district in which it is to be executed, or, when in any other court, to any bailiff, requiring such sheriff or bailiff to seize the moveables and effects of the defendant, and to summon him to appear on a day fixed at the office of the prothonotary or clerk, to answer the demand and shew cause why the attachment should not be declared valid. *C. S. L. C. c.* 83, *s.* 5.

Vide 33 Vict. c. 17 s. 1 (*Que.*) *ante* under art. 48.

The forms of a writ of attachment, like those of a writ of execution, are *de rigueur*, and must be strictly observed on pain of nullity. *Brossard* v. *Turgeon* 5 R. L. 123, S. C. 1873.

**837.** The amount of the plaintiff's claim must be endorsed upon the writ, or the sum for which security may be given. 10-11 *Geo.* IV., *c.* 26 ; *C. S. L. C. c.* 83, *s.* 52.

**838.** The writ is issued by the prothonotary, or by the clerk of the Circuit Court, as the case may be, upon a written requisition from the plaintiff.

It may be either in the French or English language.

It is tested in the same manner as writs of summons. *C. S. L. C. c.* 83, *s.* 1.

**839.** The writ may also be issued for the Superior Court, according to the amount claimed, by any clerk of the Circuit Court, who, in such case, may likewise receive the necessary affidavit. *Ibid. s.* 6, § 4.

**840**. The provisions contained in articles 810 and 811 concerning writs of capias, apply likewise to simple attachment.

**841**. The seizure of the goods of the defendant is effected in the same manner as upon the execution of a judgment. *Pothier, Proc.* 180-1.

The sheriff or bailiff may make the seizure in another district if the debtor has conveyed his property there or has withdrawn there himself.

**842**. A warrant of attachment may also be issued, in the case of Article 834, by any commissioner of the Superior Court, addressed to the sheriff of the district where the warrant is to be executed, or to the bailiff or peace officer nearest to his residence, commanding him to seize and detain the effects of the debtor. *C. S. L. C. c.* 83, *s.* 53.

**843**. This warrant of attachment is in the name of the commissioner who issues it; it orders the moveables and effects of the defendant to be attached, with the ordinary formalities of seizures, and that they be kept and detained for the period of twelve days from the seizure, and no longer, unless before the expiration of such twelve days a writ of attachment, pursuant to the above provisions, issues from the proper court. *Ibid. s.* 54 & *Form D.*

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FORM NO. **45**.

In connection with articles 842, 843.

*Affidavit to obtain Warrant of Attachment.*

A. B., of being duly sworn, doth depose and say that C. D., of is indebted to of in a sum exceeding forty* dollars, to wit: in the sum of

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*Five? See French Version.

That this deponent is credibly informed and hath every reason to believe, and doth verily and in his conscience believe, that the said now about immediately to secrete estate, debt and effects and do abscond and do intend suddenly to depart from Lower Canada, with an intent to defraud the said and creditors.

This deponent further saith, that he doth verily believe, that without the benefit of a warrant of attachment against the said the said will lose his debt and sustain damage, and hath

Sworn before me, at this

1. Form number 45 of the Code of Procedure is sufficient to meet the requirements of art. 834 of said Code. *Dallimore & Brooke et al & Brooke*, 6 R. L. 657, Q. B. 1874.

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FORM NO. **46**.

In connection with article 843.

*Warrant of Attachment.*

A. B. Esquire, Commissioner of the Superior Court in the district of

To greeting:

I command you, at the instance of , to attach of and belonging to , if the same shall be found in the , to the value of and the said keep and detain in your charge and custody for the period of twelve days, from the date hereof, and no longer, unless before the expiration of twelve days, the said shall be seized by writ of attachment issuing from the Superior or Circuit Court (*as the case may be*) at at the suit of the said

Given under my hand and seal, at this day of in the year of the reign of Her Majesty.

**844.** The effects so seized cannot be detained for a longer period than twelve days under such warrant of a commissioner. *Ibid.*

**845.** The commissioner who granted such warrant must, without delay, transmit a duplicate thereof, together with the original affidavit upon which the warrant was granted and a certificate of his proceedings, to the prothonotary, or clerk of the Circuit Court, who must file and keep the same as part of the record in the case. *Ibid. s.* 55.

**846.** When in the Superior Court the writ or the warrant is addressed to a bailiff or any other officer than the sheriff, such bailiff or other officer is bound to make a return of his proceedings to the sheriff, and to deliver to him the effects seized, in order that they may be disposed of by the court according to law. *Ibid. s.* 6, § 2.

**847.** The sheriff or bailiff may also demand in advance from the party suing out the writ or his attorney *ad litem*, such sum as may be deemed sufficient by the judge or the prothonotary of the Superior Court from which the writ issued, for the safe-keeping of the effects seized. *Ibid. s.* 49.

**848.** The sheriff or bailiff may renew such demand as often as the sum so advanced is expended, by presenting a petition, of which notice has been given to the party seizing or his attorney *ad litem;* and if the amount fixed by the judge or prothonotary is not paid within twenty-four hours, the seizure is discharged, and the sheriff or bailiff is exonerated from any liability whatever. *Ibid. s.* 49, § 2.

**849.** The writ of attachment must be returned with an inventory of the seizure, and a certificate of service both of the writ and of the declaration, in the same manner as upon a writ of capias.

**850.** A copy of the writ of attachment must be left with the defendant, as well as a duplicate of the inventory of the

seizure, as soon as it is completed. As regards the declaration, it may either be served at the same time as the writ, or within the [three days which follow the seizure,] by leaving a copy thereof either with the defendant or at the prothonotary's or clerk's office. *Ibid. s.* 57.

1. Where the defendant agreed to pay a debt due by him to the plaintiffs in four instalments, and to give security, on condition that he should be allowed to cut timber on certain timber limits of the plaintiffs, and having subsequently cut the timber he transferred it to another firm which had made advances to him—*Held*, on an attachment before judgment of the timber as being still in the possession of the defendant, that the right to sue for the whole of the debt, for the first instalments of which two notes had been taken by plaintiffs, could not be based on the alleged fraud of the defendant in transferring the timber to another, unless such fraud were alleged in the declaration, the allegations of fraud in the affidavit being alone insufficient. *Gibson et al. & Moffatt & Young*, 2 L. C. L. J. 60, Q. B. 1866.

2. The payees of a promissory note declared on it as payable to their order and in an affidavit for attachment, alleged it to be payable to themselves. On motion by the defendant to quash the writ of attachment—*Held*, that this was not a material variance so as to destroy the action. *Sharpley et al.* v. *Rosa*, 17 L. C. R. 39, S. C. 1863.

3. And in an attachment by revendication the omission to leave with the defendant a copy of the *procès verbal* of seizure is not fatal, inasmuch as the Ordinance of 1667 only requires that formality in cases of seizure in execution. *Moison* v. *Jorgensen*, 13 L. C. R. 399, S. C. 1863.

See art. 804 *ante*.

4. The usual delay between the service of a declaration and the return of an action must be allowed between the service of the declaration at the prothonotary's office and return of writ in cases of attachment under C. S. L. C. cap. 83, sec. 57. *Brahadi* v. *Bergeron et al.*, 10 L. C. J. 18, S. C. 1865.

5. But *held*, in appeal, reversing this decision, that no such delay was necessary. Ib., & 8 L. C. L. J. 67, Q. B. 1865.

6. In an action commenced by *saisie gagerie* the declaration must be served either by depositing a copy with the clerk of the Court within the eight days after service of writ, or if served by ordinary course must be served on defendant giving the usual delay before return. *Ward* v. *Cousine*, 9 L. C. J. 28, S. C. 1864.

7. The declaration need not be served by the bailiff, but may be left at the prothonotary's office. *Brahadi & Bergeron et al.* 10 L. C. J. 117, Q. B., 1866; C. S. L. C. cap. 83, sec. 57; *Hearle & Rhind* 22 L. C. J. 239, 1 Legal News, 101 Q. B. 1878; *Raphael* v. *McDonald*, 10 L. C. J. 19, S. C. 1865.

**851.** The effects seized must, in every case, be placed in the custody of a responsible person offered by the defendant, or, in default of such offer, in the custody of a responsible person appointed by the sheriff, bailiff, or other officer making the seizure, subject to the provisions respecting guardians and depositaries in cases of execution against moveables.

*Pothier, Proc.* 180.

1. In a case of attachment before judgment the appointment of the plaintiff as guardian of the effects seized would not vitiate the seizure. *Boudrot* v. *Locke et al.* 13 L. C. R. 469, S. C. 1863. See *Patoille* v. *Guilmette*, 1 R L. 51.

**852.** If the defendant is absent from Lower Canada, or conceals himself so as to prevent the service of the writ of attachment, the court, or a judge, upon proof of the fact by one credible witness, may dispense with the service, and order the defendant to be summoned in the manner provided in article 68. *C. S. L. C. c.* 83, *s.* 58.

**853.** A defendant whose effects have been seized may get them restored to him by the sheriff within the forty-eight hours from the service of the inventory of seizure:

1. By depositing with the sheriff, bailiff, or other officer charged with the writ, the amount endorsed on the writ and costs; or

2. By giving the sheriff, bailiff or other officer charged with the writ, who is bound to accept them, good and sufficient sureties, who justify under oath to the amount endorsed upon the writ with interest and costs, that he will satisfy the judgment that may be rendered.

In default of his doing so within the specified delay the

effects remain under seizure to satisfy the judgment, unless the court or a judge orders otherwise.

*Ibid. s.* 52.

1. Under a *saisie arrêt* before judgment the plaintiff in the interest of all the parties moved the court that the sheriff be authorised to sell the goods seized, on the ground that they were of a perishable nature and were not insured, and moreover the lease of the premises in which they were stored would expire before judgment could be obtained, and that the goods would then have to be removed at a loss and sacrifice to the creditors—*Held*, that under such a seizure, the court had no power to grant the order, and that it could only be granted in cases of attachment in revendication, where the question was one of property, but here the goods virtually belonged to the defendant and, until judgment was had, no such order could be given. *Larochelle* v. *Piché & Piché*, 1 L. C. J. 158, S. C. 1857.

**854.** Simple attachment may be contested in the same manner as writs of capias.

1. Where one motion was made to set aside a judgment granted by the prothonotary in vacation, and another in the same case at the same time to quash the attachment on which judgment was granted—*Held*, that the second motion would be received and filed, pending the *délibéré* upon the first, so as to be proceeded with as soon as the first was disposed of. *Beaufield et al.* v. *Wheeler*, 5 L. C. J. 44, S. C. 1860.

2. Goods belonging to a third party which have been seized under attachment before judgment must be reclaimed by an intervention and not by an opposition. *Anderson* v. *Walsh & Ross*, 3 R. L. 445, S. C. 1871.

3. An irregularity in an affidavit to attach property cannot be taken advantage of by an exception to the form. *Barney* v. *Harris*, S. R. 52, K. B, 1811.

4. An attachment before judgment may be attacked by a *défense au fonds*. *Rodden* v. *Olier & Baulne et al.* 8. L. C. J. 134, S. C. 1864.

5. A *saisie arrêt avant jugement* may be contested by a simple petition *à fin d'opposition*. *Mailloux* v. *Somerville*, 9 L. C. J. 80, C. C. 1864.

6. An attachment on a vessel before judgment may be contested on petition like a simple attachment. *Girard et al.* v. *St. Louis*, 6 R. L. 45, C. C. 1874.

See *ante* Art. 819, *et seq.*

## SECTION II.

## OF ATTACHMENT BY GARNISHMENT.

**855.** In all the cases where a writ of simple attachment may be granted as hereinabove explained, a creditor may also attach any moveable property belonging to his debtor which may be in the hands of third persons, and also whatever sums they may owe him, subject to the restrictions mentioned in articles 558 and 628. *C. S. L. C. c.* 83, *ss.* 46, 47; *C. P. C.* 558.

1. To obtain a writ of attachment *en main tierce* it is not necessary in the affidavit to name the garnishee. *The City Bank* v. *Hunter & Maitland*, 2 Rev de Lég. 171, Q. B. 1847.

**856.** This attachment is effected by means of a writ commanding the attachment in the hands of the garnishees of whatever sums of money, things or effects they have or may have belonging or due to the defendant, ordering the garnishees not to dispossess themselves thereof without an order of the court, and to appear at the office of the prothonotary or clerk to make their declaration, and summoning the defendant to answer the demand of the plaintiff.

1. A plaintiff in his contestation cannot allege himself to be the proprietor of certain effects in the possession of the garnishee, and ask that the same be sold to satisfy the amount of a judgment against the defendant. *Nordheimer et al* v. *Roy & Lemelin*, 16 L. C. R. 298, C. C. 1866.

**857.** It may be addressed either to the sheriff or to a bailiff, when it issues from the Superior Court, and in any other case to a bailiff. *Ibid. ss.* 3, 133.

See 33 Vict., c. 17, s. 1 (*Que.*) under art. 48 *supra*.

**858.** It is clothed with all the formalities required for ordinary writs of summons, and is subject to the provisions of articles 838, 839, 840, 842, 845, 846, in so far as they can be applied.

**859.** A statement of the amount for which the attachment is made or authorized is, moreover, endorsed upon the writ. *C. P. C.* 559.

**860.** The provisions contained in articles 614, 615, 616, 617, 618, 619, 620, 622, 623, 624, 625, 629, 630 and 631, are also applicable to cases of attachment by garnishment before judgment.

1. A garnishee in answer to a writ of *saisie arrêt* after judgment has no right to appear by attorney, and an appearance filed by attorney for such garnishee will be rejected from the record upon motion. *Forbes et al.* v. *Lewis & The Globe Mutual Life Insurance Co.* 8 L. C. J. 74, S. C. 1874.

**861.** If the declaration of the garnishee is not contested the court or judge, in rendering judgment upon the principal demand, adjudicates also upon the attachment and the declaration of the garnishee. *C. S. L. C. c.* 83, *s.* 135; *C. P. C.* 576.

1. On the hearing of a contestation of the declaration of the *tiers saisis* in an attachment by garnishment against three garnishees—*Held*, that as the garnishee must be considered a party in the cause and not a witness, the nature of the debt due by several garnishees must determine the nature and form of the contestation of their respective declarations; and that a contestation by one act of three separate but similar declarations of garnishees who are joint debtors of the defendant is good and valid. *Macfarlane & Delisle & Mackenzie et al. & Whiteford*, 1 L. C. J. 49, & 7 L. C. R. 318, Q. B. 1857.

**862.** The plaintiff or the defendant may contest the declaration of the garnishee, upon leave of the court to that effect.

Such contestation is served upon the garnishee, together with a summons to appear on a day fixed to answer the same, the ordinary delays for summoning being observed. 4 *Will.* IV. *c.* 4, *s.* 4; *C. S. L. C. c.* 83, *s.* 136 § 2.

1. Where a plaintiff had been led to contest a garnishee's declaration owing to its vagueness—*Held*, that he might discontinue the contesta-

tion without being subjected to costs. *Bonnell* v. *Miller et al. & Woods*, 1 L. C. L. J. 122, S. C. 1866.

2. If a *tiers saisi* when examined deny that he is indebted to the defendant, it is conclusive, if his declaration be not contested and disproved. *Robinson* v. *Reiffenstein*, 3 Rev. de Lég. 347, K. B. 1821.

3. The contestation of a garnishee's declaration should be accompanied by a notice to the garnishee in order that he may answer it. *Pearce* v. *Kelly & Massé et al.*, 10 L. C. J. 249, S. C. R. 1866.

4. The declaration of a *tiers saisi* is conclusive until contested and disproved. *Smith* v. *Bourne*, 3 Rev. de Lég. 304, K. B. 1809.

**863**. In other respects the contestation is subject to the rules of ordinary procedure.

**864**. If the plaintiff fails to contest the declaration of the garnishee within eight days after the principal judgment, he is foreclosed from doing so, unless the delay is extended by the court. *98th Rule of P.*

1. A contestation of the garnishee's declaration can only be had after the expiration of the delay fixed by law, or the rules of practice, on sufficient cause shewn. *Lynch* v. *McLennan et al. & The Bank of Upper Canada*, 3 L. C. J. 114, S. C. 1857.

**865**. The defendant may contest the attachment made upon him or in the hands of a garnishee, in the manner provided for cases of capias. 12 *L. C. R.* 265 *&* 6 *L. C. R.* 473; 7 *L. C. J.* 48.

1. A defendant foreclosed from pleading will be allowed to answer the plaintiff's contestation of the garnishee's declaration if he have an interest in the matters raised by the contestation. *Kingston* v. *Torrance & Torrance & Kingston*, 9 L. C. J. 20, S. C. 1864.

2. Where the defendant contested the declaration of the garnishee, which acknowledged a certain amount to be due by him to defendant, on the ground that, at the time the attachment was served, the effects of the garnishee were actually under seizure, in virtue of an execution issued on a judgment—*Held*, on demurrer by garnishee that the contestation must be dismissed as without interest in the party raising it. *Constable et al.* v. *Gilbert et al. & Simpson et al.* 4 L. C. J. 299, S. C. 1859.

3. The Court may order the writ to be returned before the day of return. *Lynch* v. *Ellice*, 12 L. C. J. 209.

See arts. 819 and 854 *ante*.

## CHAPTER THIRD.

### OF ATTACHMENT IN REVENDICATION.

**866.** Whoever has a right to revendicate a moveable may obtain a writ for the purpose of having it attached, upon production of an affidavit setting forth his right and describing the moveable so as to identify it.

The right of attachment in revendication may be exercised by the owner, the pledgee, the depositary, the usufructuary, the institute in substitutions and the substitute. *Poth. Proc.* 182, *Guy. Rep. Vo. Revendication*, 619; *C. P. L.* 269.

1. The legality of an attachment in revendication cannot be tried on motion to quash. *Torrance et al.* v. *Thomas*, 2 L. C. J. 98, S. C. 1857.

2. Where an attachment in revendication of a vessel was issued by the lessor on affidavit, to the effect that the lessee of the vessel had incurred liabilities on her at a United States port, and that he had become insolvent, and that should he run the boat to Upper Canada according to her trade, she would in due course call at such port in the United States, and would in all probability be seized there for the payment of such liabilities—*Held*, that such affidavit was sufficient, and the attachment was confirmed. *Routh et al.* v. *MacPherson*, 4 L. C. J. 45, S. 1859.

3. In an attachment in revendication—*Held*, that such attachment could not issue before judgment without affidavit. *Poston et al.* v. *Thompson*, 12 L. C. R. 252, C. C. 1862.

4. In a case of attachment in revendication by a vendor under his privilege, an affidavit was not necessary to obtain a writ. *Robertson et al.* v. *Ferguson*, 8 L. C. R. 239, S. C. 1858.

5. In a similar case—*Held*, that the affidavit was not *de rigueur*. *Sinclair et al.* v. *Ferguson*, 2 L. C. J. 101, S. C. 1858.

6. On motion to quash a writ of revendication and a seizure made thereunder, on the ground that the allegations of the affidavit were insufficient—*Held*, that where the affidavit was manifestly bad, the writ would be quashed on motion, but where the affidavit invited an issue on the allegations, the proper procedure was by exception to the form. *Routh et al.* v. *McPherson*, 9 L. C. R. 413, S. C. 1859.

7. Where the freighter and the master of the vessel in which the goods were shipped, differed with regard to the amount of goods (*i. e.*, number of barrels of flour) which had been put on board, an action was brought in revendication of the number claimed—*Held*, that he could not proceed by way of revendication under such circumstances. *Gordon et al.* v. *Pollock*, 1 L. C. R. 313, Q. B. 1849.

8. A merchant shipped a quantity of barrels of flour on a vessel of which defendant was master, and defendant refused to deliver bills of lading therefor, according to the custom of trade—*Held*, that plaintiffs were entitled to an attachment in revendication to recover the goods. *McCulloch et al. & Hatfield*, 7 L. C. J. 220 & 13 L. C. R. 321, Q. B. 1863.

9. A legatee can maintain an action in revendication of his legacy, from a *tiers détenteur*, before he has obtained *a délivrance de legs*. *Morrin* v. *Peltier*, 1 Rev. de Lég. 507, K. B. 1820.

10. A person charged with felony cannot maintain an action in revendication of bank notes supposed to have been stolen, and taken from him when he was arrested, until the charges preferred against him have been disposed of. *Carlisle* v. *Sutherland*, 1 Rev. de Lég. 507, K. B. 1821.

11. Where a waggon was held by the waggon-maker for repairs, and the owner of it became insolvent—*Held*, that the assignee of the insolvent estate could not claim the waggon without giving security for the payment of such repairs. *Stewart* v. *Ledoux*, 17 L. C. J. 167, S. C. 1872.

12. Where, after the dissolution of a partnership, part of the effects belonging to the firm fall into the hands of one of the partners, and he is about to appropriate them to himself, the other partner cannot attach them by revendication, his proper remedy being by action *pro socio*. *Maguire* v. *Brady*, 1 Rev. de Lég. 367, Q. B. 1845.

13. An action in revendication can be maintained for the recovery of title deeds. *Perreault* v. *Hausserman*, 1 Rev. de Lég. 506 K. B. 1817.

14. In an action in revendication of an ox, it is no justification to say

that he was seized *dommage faisant* on the defendant's soil and no more. *Reilly* v. *Chandler*, 1 Rev. de Lég. 507, K. B. 1817.

15. Revendication will lie against a bailiff, who, under an authority of a justice of the peace, holds in his hands goods of the plaintiff, if the cause of the detention be a matter over which the justice has no jurisdiction. *Pacaud* v. *Begin*, 1 Rev. de Lég. 507, K. B. 1820.

16. The plaintiff brought an action in revendication of an uncertain quantity of hops purchased by him, which were to be paid at a certain rate per pound on delivery, and which the seller refused to deliver—*Held*, that he had a right to a *saisie conservatoire*, but not to an attachment in revendication, as the sale had never been perfected. *Kelly et al.* v. *Merville*, 1 R. L. 194, S. C. R. 1869.

17. Where the defendant to an attachment of things in revendication, pleaded that he had no interest in the articles in question, and had never claimed them or refused to deliver them to the plaintiff, the premises in which they were having been formerly occupied by the plaintiff and defendant as co-partners, and no proof was made of a demand and refusal to deliver, and the things were delivered to plaintiff by an interlocutory order of the court—*Held*, confirming the judgment of the court below, that the action would be dismissed with costs. *Herle & Date*, 11 L. C. R. 290, Q. B. 1861.

18. In an action in revendication of certain moveables alleged to have been illegally detained by defendant—*Held*, that an action in revendication would lie to recover possession of moveables illegally seized. *Langlois* v. *The Corporation of the Parish of St. Roch South, et al.* 13 L. C. R. 317, C. C. 1863.

19. A holder of railway bonds has a right by conservatory process, to prevent rolling stock which is hypothecated for the payment of the bonds, from being removed from the road. *Wyatt* v. *Senecal*, 1 Legal News, 98 S. C. 1878.

20. The rule in petitory actions that a deed not pleaded cannot be produced at enquête as part of a claim of titles, does not apply to actions for moveables; on the contrary, title need not be alleged in such actions. *Tourigny* v. *Bouchard*, 4 Q. L. R. 243, S. C. R. 1878. Contra: *Poulhiot* v. *Scott*, suprà art. 50.

21. Revendication will lie by a judicial guardian to recover possession of property placed in his charge.

Cross, J. diss., thought the action would lie if the guardian had been in possession. *Moisan & Roche*, 4 Q. L. R. 47, 1 Legal News 33, Q. B. 1877; *Gilbert & Coindet et al.*, 4 Q. L. R. 49; 1 Legal News 42, Q. B. 1877.

22. A holder of railway bonds constituting a privileged claim on the moveable property of the company may, for the protection of his rights, proceed against such property by an attachment in revendication in the nature of a *saisie conservatoire*. *Wyatt* v. *Sénécal et al.*, 4 Q. L. R. 77, S. C. 1876.

**867**. The writ of attachment in revendication orders the seizure of the effects revendicated, and that they be placed in the hands of guardians until judgment is rendered upon the revendication.

[The name of the person upon whose affidavit the writ issues is mentioned upon the back of the writ.]

1. The guardian has no right to retain the things as security for the payment of his fees and expenses, the action having been dismissed and the judgment notified to him. *Poutré* v. *Laviolette*, 9 L. C. R. 360, S. C. 1859.

**868**. The formalities prescribed in articles 809, 836, 838, 847, 848, 849, 850, and 851, are observed in attachments in revendication in so far as they can apply.

1. The omission to leave with the defendant a copy of the *procès-verbal* of seizure in attachments in revendication is not fatal, inasmuch as the Ordinance of 1667 only requires that formality in cases of seizure and execution. *Moisan* v. *Jorgenson*, 13 L. C. R. 399, S. C. 1863.

**869**. The defendant upon a demand in revendication may have the effects returned into his possession upon giving good and sufficient sureties that he will produce them when required, which he is in such case bound to do in the same manner as any judicial sequestrator. Nevertheless the court or judge may, according to circumstances, grant possession of the effects to the plaintiff subject to the same conditions. *Guyot Vo. Revendication*, 620; *Nye* v. *Bigelow*, *Montreal*, 30*th May*, 1846; *Porter* v. *Ferrier*, 17*th Feb.*, 1852; *Knapp* v. *French*, 6*th Dec.*, 1852, *contra*.

1. No jurisdiction is given by the Code of Civil Procedure to the Court of Queen's Bench or the members thereof, to grant applications

for the delivery of goods seized under a writ of revendication. *Kelly & Hamilton*, 16 L. C. J. 140, Q. B. 1871.

2. On a petition to obtain possession of certain things seized in an action in revendication—*Held*, that a judge in chambers has power during term to grant *main levée* of a seizure, on the affidavit of the parties and the return of the sheriff. *La Société de Construction Canadienne de Montréal* v. *Lamontagne*, 3 L. C. J. 185 S. C. 1859.

3. A judge *in banco* cannot revise and amend a judgment in chambers granting possession to plaintiff of goods revendicated upon giving security, such judgment in chambers having by law the force of a decision of the court. *The Canada Paper Co. et al.* v. *Cary*, 4 Q. L. R. 215 S. C. 1878.

**870**. Before the effects are delivered to the party applying for them, the other party may require an inventory thereof to be made, establishing the condition of the effects, their description and their value, in order to settle the amount of the security to be given; and this is done by experts named in the ordinary course of procedure.

**871**. If neither of the parties applies for the effects seized, they remain in the custody of the guardian appointed; or else, at the request of either of the parties, the court or the judge may, if they are of a nature to produce fruits, order them to be placed in the hands of a sequestrator.

1. On a motion for a rule *nisi* to compel a guardian to deliver the effects seized in virtue of a writ of *saisie revendication*, the guardian, before the rule issues, may be permitted to make proof that he has delivered the effects, and that the plaintiff has been regularly put in possession of them. *Janes* v. *Martin*, 10 L. C. J. 331, S. C. 1866.

**872**. If the things seized are of a perishable nature or liable to deteriorate during the pendency of the suit, the court or judge may order them to be sold and the proceeds of the sale to be deposited in the office of the prothonotary or clerk. 1 *Couchot*, 123, *C. P. L.* 261.

1. On an attachment in revendication of effects of a perishable nature—*Held*, that during the contestation the sheriff might be authorized to sell them. *Wurtele* v. *Verrault*, 3 Rev. de Lég. 394, K. B. 1848.

# CHAPTER FOURTH.

## OF ATTACHMENT FOR RENT.

**873.** The owner or lessor may cause the effects and fruits in or upon the house, premises or land leased and subject to his privilege, to be seized for the rent, farm dues or other sums payable in virtue of the lease.

He may likewise follow and seize in reception, even for amounts not yet payable, the moveables and effects which were in the house or premises leased, when they have been removed without his consent; but he must do so within eight days after their removal.

[An attachment in reception must be served upon the new lessor, who must also be summoned to shew cause against its execution.] *Poth. Proc.* 182; *Laurin* v. *Kelly, Montreal, 25th April*, 1849.

41 Vict. c. 12 *(Que):*

1. Article 873 is amended, by adding at the end of the second paragraph thereof the following words: "but shall be subtracted from the sale, the moveables and effects mentioned in article 556."

1. A lessor has a right to follow the effects of his tenant when they have been removed from the premises subject to his privilege, and that as well for the rent due as for that to become due thereafter. *Aylwin et al. & Gilloran*, 4 L. C. R. 360, Q. B. 1854.

2. A *saisie-gagerie* may be had on the lease of a farm. *Hamilton* v. *Constantineau*, 3 Rev. de Lég. 305, K. B. 1812.

3. Where a lessor had obtained judgment under an attachment for rent against his lessee, and eight months afterwards, when the goods had been removed to the premises of another, seized under a writ of *Fi. Fa.—Held*, that the plaintiff had reserved to him a preferential claim to the prejudice of the second lessor, although the latter had not been notified of the seizure. *Bonner* v. *Hamilton & Johnson*, 6 L. C. R. 42, S. C. 1856.

4. In an action commenced by *saisie gagerie* the declaration must be served either by depositing a copy with the clerk of the court within

eight days after the service of the writ, or it may be served on defendant, giving the usual delay before return. *Ward* v. *Cousine*, 9 L. C. J. 28, S. C. 1864.

5. As between landlord and tenant the *saisie gagerie par droit de suite* may be made after eight days from the removal of the goods from the leased premises. *Serrurier* v. *Lagarde et al.*, 13 L. C. J. 252, C. C. 1869.

6. Where the lessee held under a lease for two years, and removed his goods from the premises before the term had expired—*Held*, that the lessor had a right to a writ of attachment *par voie ordinaire* and also *par droit de suite* (although the writ do not indicate the premises to which they have been removed,) to secure his rent for the balance of the term. *Rodier* v. *Joly*, 4 L. C. J. 15, S. C. 1859.

**874.** The provisions contained in article 841 apply likewise to attachments for rent or farm dues.

**875.** Effects attached for rent or for farm dues cannot, without the consent of the plaintiff, be left in the custody of the defendant, unless he gives sureties to the satisfaction of the sheriff or bailiff for the production of the effects, and such sureties incur the same obligations and are liable to the same penalties as judicial guardians. *C. S. L. C. c.* 40, *s.* 17.

1. In an action for rent, *held*, that the *procès-verbal* of seizure could be left at the domicile of the defendant although he be absent, and and that such defendant could be legally constituted the guardian of the effects seized, and be compelled by *contrainte par corps* to produce the same, unless he can establish that when the seizure first became known to him the effects were no longer in his possession. *Munn* v. *Halferty*, 1 L. C. R. 170, S. C. 1850.

## CHAPTER FIFTH.

### OF JUDICIAL SEQUESTRATION.

**876.** All demands for sequestration are made by petition to the court [or to a judge]. It may also, according to circumstances, be ordered by the court without being demanded by the parties. 1 *Couc.* 123; *Ord.* 1667, *tit.* 19, *art.* 12; 1 *Pig.* 117–170, 172, 387, 388; *Guyot Vo. Revendication*, 621; *Imbert, Enchéridion, pp.* 195-6.

1. A judge in chambers has jurisdiction to appoint a sequestrator to an immoveable seized under an execution, when its sale has been stopped by an opposition. *Sénécalet al.* v. *Vienne*, 14 L. C. J. 335, S. C. 1870.

**877.** The judgment ordering sequestration commands the parties to appear before the court or before a judge, on a day fixed, to name a sequestrator; and if the parties cannot agree, the court, or judge, names one of his own accord. *Ord.* 1667, *tit.* 19, *art.* 4.

**878.** The sequestrator must be sworn before the judge or the prothonotary to administer well and faithfully the things of which he is appointed depositary.

He is put in possession by a bailiff, who draws up a statement containing a description of the property sequestrated. This statement should be signed by the bailiff and also by the sequestrator, if he can sign; if he cannot, mention should be made that he declared he could not sign, after he was called upon to do so, and the statement had been read to him. 1 *Couc.* 123; *Ord.* 1667, *arts.* 6—9.

**879.** If among the things sequestrated some are consumable or perishable, the sequestrator may cause them to be sold, observing the formalities prescribed for the sale of moveables under execution. 1 *Couc.* 123.

**880**. If the thing sequestrated consists in a right of enjoyment, the sequestrator, if there is no conventional lease, is bound to give out the lease by auction. *Ord.* 1667, *art.* 10.

**881**. Neither party can, directly or indirectly, become lessee of the things sequestrated. *Ibid. art.* 18.

**882**. Repairs or other necessary expenditures cannot be made upon the premises sequestrated without the authorization of a court or judge, upon petition, of which the parties have received notice. *Ibid. art.* 12.

**883**. Sequestrators are subject to the duties and obligations imposed upon guardians in seizures under execution.

They are, moreover, bound to render an account of their administration when judgment has been given upon the contestation, and also whenever, pending the suit, the judge orders them to do so, at the instance of either of the parties and upon cause shown.

*Whenever moneys have been paid into Court, or are in the hands of the sheriff or the coroner, and their adjudication happens to be delayed for an indefinite time, either by contestation in the suit, or for other reasons, the Court may, upon the application of one of the parties, and after the others have been heard or duly notified, order that the moneys be placed in the hands of some other sequestrator charged with investing them until judgment, so that they shall bear interest or profits in favour of the party who eventually will be entitled to receive them, or may order the first sequestrator or depositary to invest them in like manner.*

35th Vict. c. 5. *(Que.)*:

6. The third paragraph of article 883 is hereby repealed.

36 Vict. c. 14 (*Que.*):

3. Every bailiff of the Superior Court, who shall have received any sum of money arising from a seizure or judicial sale, and exceeding in amount $100, shall, unless he has lawfully handed over, distributed, or paid such sum, before making his return, deposit the same in the

prothonotary's office of the district within the limits of which the writ has issued, together with his return.

Judicial and other deposits are regulated by the Acts 35 *V. c.* 6, and 36 *V. c.* 14 (*Que.*)

The 6th section of the latter Act provides that moneys deposited according to its provisions may be attached in the hands of the Treasurer of the Province in the usual manner by garnishment either before or after judgment.

**884.** A sequestrator is discharged by law upon his delivering the property sequestrated to the party named in the judgment of the court, and also in the manner stated in the title *Of Deposit* in the Civil Code.

**885.** Orders of sequestration are executed provisionally, notwithstanding and without prejudice to any appeal. *Ibid. art.* 19.

**886.** If either party, by violent means, hinders the appointment or the administration of the sequestrator, the other party may apply to be put provisionally in possession of the things in dispute, under the same conditions as a sequestrator. *Ibid. art* 16.

# TITLE SECOND.

## SPECIAL PROCEEDINGS.

## CHAPTER FIRST.

### SUITS BETWEEN LESSORS AND LESSEES.

**887.** Actions to annul or to rescind a lease, or to recover damages resulting from the contravention of any of the stipulations of the lease, or the non-fulfilment of any of the obligations which the law attaches to it, or arising from the relation of lessor and lessee, are instituted either in the Superior Court or in the Circuit Court, according to the value or the amount of the rent, or the amount of damages alleged. *C. S. L. C. c.* 40, *ss.* 1-2, 25 *V. c.* 12, *s.* 1.

1. Where a tenant persisted against the landlord's will in occupying the premises, an action to eject her under Art. 887 could not be maintained for want of jurisdiction, there being no lease and no occupation with the consent of the proprietors. *School Com. St. David* v. *DeVarennes*, 4 Q. L. R. 206, C. C. 1878.

2. The proceedings in an attachment for rent and ejectment cannot be maintained under the Act unless founded on a lease or on proof of occupation with the consent of the proprietor. *Dubeau & Dubeau*, 8 L. C. R. 217, Q. B. 1857.

3. A writ under the Lessor and Lessee Act, summoning a defendant to appear before "one or more of the judges for our S. C. for L. C., in the district of M. in the hall of the Court-house, wherein are usually held the sittings of our said Court," is null, as such writ should be returned before the Court. *Grant & Brown*, 3 L. C. R., 187, Q. B. 1856.

4. The writ in an ejectment case need not be specially styled such, and an order to appear on the return day is sufficient, without saying "at noon" on that day. *The Fraser Institute* v. *Moore et al.* 19 L. C. J. 133 S. C. 1875.

5. In actions in ejectment the jurisdiction of the court is determined by the amount of the annual lease, and not by the amount claimed. *Dorion* v. *Poulain*, 4. R. L. 566, C. C. 1872.

6. So also in actions to rescind a lease. *McGinnis* v. *Horsman*, 14 L. C. J. 224, S. C. R. 1870; *Beaudry & Thibaudeau*, 7 L. C. J. 137, C. C. 1863; *Guy* v. *Goudreault*, 14 L. C. R. 203, S. C. 1864; Contra: *Voisard & Saunders*, 1 Legal News 41, Q. B. 1877; *Beaudry & Denis*, 20 L. C. J. 254, Q. B. 1876; *Fisher et al.* v. *Vachon*, 6 L. C. J. 189.

7. The plaintiff claiming £500 damages from the defendant, for breach of contract in refusing to give him possession of certain premises, according to the terms of a written lease, brought his action under what is known as the Lessor and Lessee Act, and the defendant declined to the jurisdiction—*Held*, in two decisions, one on the demurrer of the plaintiff, and one on the merits of the exception, that the court had no jurisdiction. *Close & Close*, 3 L. C. J. 140, S. C. 1857.

8. In an action by a lessor against a lessee for damages occasioned to the premises, and for violation of the conditions of the lease in subletting—*Held*, on the declinatory exception of the defendant, that it was the amount of the annual rent and not the gross amount for the whole term of the lease which governed the jurisdiction. *Bedard & Dorion*, 3 L. C. J. 253, C. C. 1858.

9. In an action on a lease for a term of five months—*Held*, that where the term of a lease was less than a year, and the amount of the rent for the time specified did not exceed £50, the Circuit Court had jurisdiction, notwithstanding the 5th section of the Lessor and Lessee Act, and notwithstanding the annual value or rent of the property leased would exceed £50, if the term extended to a period of one year. *Clairmont et vir* v. *Dickson*, 4 L. C. J. 4, C. C. 1859.

10. In actions under the Lessor and Lessee Act, it is not the amount of damages claimed, but the annual amount of the rent which determines the jurisdiction of the court. *Barbier & Verner*, 6 L. C. J. 44, S. C. 1861.

11. Action was brought before the Superior Court to recover arrears of rent for seven years, at the rate of $100 per year, and the defendant excepted to the jurisdiction on the ground that, under the Lessor and Lessee Act, the Superior Court had no jurisdiction where the annual rent did not amount to $200—*Held*, maintaining the pretensions of the plaintiff, that as the action was brought under the common law and not under the Lessor and Lessee Act, and the procedure in ordinary cases had been followed, the Superior Court had jurisdiction as in an ordinary action for $700. *Fisher et al. & Vachon*, 6 L. C. J. 189, S. C. 1862.

12. But *held* at the same time, that, if the action had been for damages for the non-fulfilment of the conditions of the lease, the result would have been different. Ib.

13. Art 887 applies to cases where damages are claimed for trouble and annoyance. *Atty-Gen.* v. *Cote*, 3 Q. L. R. 235 S. C., 1877.

14. The Circuit Court has jurisdiction in a case to rescind the lease where the amount of damages laid is within the jurisdiction of the Circuit Court, although the yearly rent is in excess of the amount for which an ordinary suit may be brought in that Court. *Choquet* v. *Hart*, 21 L. C. J. 305, C. C. 1877.

15. An agreement whereby one person leases a mill to another for twelve years, who binds himself to erect certain buildings on the premises and to pay an annual rental, may form the basis of an action under the Lessor and Lessee Act. *Marett* v. *Robitaille et al.* 9 R. L. 430, Q. B. 1876.

16. An action for the recovery of rent due only does not fall within the operation of the Statute concerning Lessors and Lessees. *Waggoner* v. *Ricker et al.* 13 L. C. R. 102, Q. B. 1862.

17. Proceedings under the Lessor and Lessee Act cannot be taken in a case of emphyteutic lease. *Lepine & The Jacques Cartier P. B.* S. 20, L. C. J. 300, Q. B. 1876.

**888.** The lessor may join with his action for rescission, a demand for such rent as he is entitled to, with or without an attachment for rent, attachment in recaption, if necessary, and also an ordinary attachment in the hands of the lessee or of garnishees. *C. S. L. C. c.* 40, *s.* 1, § 6, *s.* 9.

**889.** All the powers which the Superior Court or the Circuit Court can exercise in term in such matters, may also be exercised out of term, and even during the vacation, between the ninth of July and the first of September. *Ibid. ss.* 5-6.

**890.** The delay upon summons is only one intermediate day when the place of service is within a distance of five leagues, with the ordinary extension when the distance is greater. *Ibid. s.* 10.

*Vide ante art.* 75.

1. The one day mentioned in this article must be a juridical day. *St. Onge* v. *Larichelière*, 21 L. C. J., 27, S. C. 1876.

**891.** The defendant is bound to appear before noon on the day fixed by the writ; if he does not, default is recorded against him and the plaintiff may proceed accordingly. *Ibid. s.* 11.

**892.** The defendant having appeared is bound to plead before noon on the day following, in default of which the plaintiff may proceed *ex parte*. *Ibid.*

**893.** The plaintiff is bound to file his answer before noon on the day after the filing of the pleas, on pain of being foreclosed. *Ibid. s.* 12.

Any other pleading which may be necessary to complete the issues must be filed before noon on the following juridical day, on pain of foreclosure.

**894.** As soon as issue is joined the case may be inscribed upon the roll for proof for any subsequent juridical day, and the parties proceed to proof on the day appointed and continue on from day to day until the proof is closed on both sides. *Ibid. s.* 13.

**895.** Either party's proof may be declared closed as soon as he ceases to produce evidence. *Ibid. s.* 13, § 2.

**896.** The evidence of witnesses must be taken down in writing, unless the parties agree to take it otherwise, and in the latter case, notes of such evidence must be taken down and filed in the record as forming part thereof, and such notes are considered to be the evidence adduced in the case. *Ibid. s.* 14.

**897.** When the proof is closed on both sides, the case may be inscribed on the roll for hearing on the merits on the next following juridical day, without any notice being required; but if it is inscribed for any other day, notice must be given to the opposite party. *Ibid. s.* 13, § 2.

**898.** Judgment may be rendered either in term or out of term. *Ibid. ss.* 5-6; 25 *V. c.* 12, *s.* 1.

**899.** The writs of summons, of attachment, and of execution, are addressed to the ordinary officers of the court, like all other writs of the same nature, and by them executed. Writs of possession granted by the Circuit Court are addressed to and executed by bailiffs of the Superior Court. *C. S. L. C. c.* 40, *s.* 8.

See 33 Vict. c. 17, s. 1 (*Que.*) *supra*, art. 48.

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## CHAPTER SECOND.

### HYPOTHECARY RECOURSE AGAINST IMMOVEABLES OF WHICH THE OWNERS ARE UNKNOWN OR UNCERTAIN.

**900.** When the owner of an hypothecated immoveable is unknown or uncertain, the creditor to whom the capital or two years of the interest [or two years of arrears of any constituted or other rent], secured by such hypothec is due, may present a petition to the Superior Court, praying for the sale of such immoveable. *C. S. L. C. c.* 49, *s.* 1.

**901.** Such petition must contain:

1. All allegations necessary to establish the debt and the hypothec;

2. A description of the immoveable;

3. The name of the occupier, if the immoveable is occupied, and if it is not, the name of the last known occupier, the period for which it has remained unoccupied, the names of all the known owners since the hypothec was created, and a declaration that the petitioner has in good faith made due search and used due diligence to discover the owner;

4. Conclusions praying that public notice be given to the

actual owner to appear and answer the petition, and that in default of his doing so the immoveable be brought to sale. *Ibid. s.* 1, §§ 1-2-3.

**902.** The petition must be accompanied with an affidavit of the petitioner or of a competent person attesting the truth of the facts therein alleged. *Ibid. s.* 4.

**903.** The court, upon this petition, orders such proof as it deems necessary; and if the proof offered is sufficient, it orders the publication of a notice in accordance with form number 47 in the appendix to this code. *Ibid. s.* 2.

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FORM NO. 47.

In connection with article 903.

*Form of Notice in the Newspapers.*

Lower Canada,
District of

(*Name of place.*) day of

Know all men that A. B., of the Parish of in the District of , by his petition filed in the office of the Superior Court under No. , prays for the sale of an immoveable situated in the said District, to wit: A land containing arpents in front, by in depth, in the first range of the Seigniory of , in the Parish of , in the County of , bounded as follows, to wit: which land is now occupied by D. C. (*or* has not been occupied for years, and was last occupied by N.) and the said A. B., alleging that by Deed of (entered into by D. E. of before F. G., Notary, (*or as the case may be*) at on the a hypothec was constituted upon the said immoveable hereinabove described, for the sum of , claims

from the present proprietor of the said immoveable the sum of due to him for

The said A. B. further alleges that the present proprietor of the said immoveable is unknown (*or* uncertain) and that the known proprietors since the date of the said Deed of , have been N. G. and F. .

Notice is therefore given to the proprietor of the immoveable to appear before the said Court at within two months, to be reckoned from the fourth publication of this present notice, to answer to the demand of the said A. B., failing which, the Court will order that the said immoveable be sold by Sheriff's sale.

First insertion , (*date*)

H. P.
Prothonotary.

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**904**. The notice must be inserted once a week during four consecutive weeks in one newspaper published in the English language and in one newspaper published in the French language, in the District in which the immoveable is situated, or if there be none, then in one of the nearest districts. It must moreover be read and posted up, in both languages, at the door of the church of the parish in which the immoveable is situated, on a Sunday, immediately after morning service. *Ibid. ss.* 3-4.

[If there is no church, then the notice must be posted up in the registry office of the locality.]

**905**. If, within the delay of two months from the last insertion in the newspapers, and the reading and posting up of such notice, no person appears as hereinafter provided, the petitioner proceeds as in any other suit in which the defendant fails to appear; and upon proof that the required formalities have been observed, the court declares the immoveable hypothecated, and orders that it be sold for the payment of the petitioner's claim. *Ibid. s.* 5.

FORM NO. 48.

In connection with article 905.

*Form of Writ for the sale of the immoveable.*

To the Sheriff of the District of

Whereas the following notice hath been given in conformity with article 903 of the Code of Civil Procedure of Lower Canada (*recite the notice*); and whereas judgment was rendered on the day of , ordering the sale of the immoveable described in the said notice, you are hereby enjoined to make the ordinary announcements thereof and to sell the said immoveable in order to the payment of the said A. B., of the sum of and taxed costs, and you shall make a return of this Writ and of the oppositions which have been placed in your hands, on the

H. P.

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**906**. Service of this judgment is not necessary. *Ibid.* s. 15.

**907**. Upon the judgment thus rendered, a writ issues, after the expiration of fifteen days, commanding the sheriff to seize and sell the immoveable hypothecated, observing the formalities required for ordinary seizures and sales of immoveables, saving the minutes of seizure, which are not required. *Ibid.* ss. 6–15.

**908**. Any proprietor, or any holder entitled to exercise rights of ownership, may, at any time before the rendering of the judgment ordering the sale, enter an appearance, specifying his title and the extent of his right of property, and at the expiration of a delay of two months, the petitioner is then bound to file in the prothonotary's office a demand against the party appearing, for the recognition of the hypothec,

and to serve it upon such party; and the same proceedings are had upon such demand as upon ordinary suits for the recognition of hypothecs. *Ibid. ss.* 7–17.

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FORM NO. **49**.

In connection with article 908.

*Form of Appearance.*

I, B. C., appear to answer to the petition of A. B., as proprietor of the immoveable described in the said petition, by virtue of (*state by virtue of what title you are proprietor, and give the date of the Acts or Deeds by virtue of which you are such proprietor*).

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**909**. If several persons appear, claiming to be owners, each one in opposition to the others, the petitioner cannot be prevented from proceeding by such opposite claimants, unless his application is contested by one of them, who must previously establish an ostensible right of property, or unless one of them pays the amount of his claim and costs. *Ibid. ss.* 8–9.

**910**. In the case of there being opposite claimants to the property, without any contestation of the petition, the court may, reserving its decision upon the opposite claims, grant the prayer of the petitioner, saving to the parties appearing, and to those who have not appeared, their claims upon the balance of the moneys levied, the distribution of which is made in the ordinary course. *Ibid. ss.* 11–12.

**911**. If one or more known owners are in possession, jointly with others who are unknown or uncertain, the creditor may, in the ordinary manner, sue the known owners,

as possessing jointly with others unknown, and proceed in the same suit, in the manner hereinabove provided, against those who are unknown or uncertain, modifying the notice which is to be published, so as to meet the circumstances.—*Ibid. s.* 16.

33 Vict., c. 16 (*Que.*):

1. Whenever land has been sold, under a deed of sale, and the seller is entitled, by reason of non-payment of price or any other cause, to demand the dissolution of the sale, and the buyer has abandoned the land and has left it so abandoned during two years or a longer period, then the seller may proceed in a summary manner as hereinafter provided to recover back the land so sold, and re-enter into possession of the same.

2. A notice shall be served upon the buyer stating that at a time and place therein mentioned the seller will apply to a judge of the Superior Court to recover back the land, or, if the buyer cannot be found within the district, he may be ordered to appear in the manner prescribed by article 68 of the Code of Civil Procedure.

The notice shall likewise be served upon any person then in actual possession of the land.

3. The delay between the service of the notice and the day on which the application is to be made shall be that prescribed for ordinary cases by article 75 of the said Code, or that given by the said article 68, as the case may require.

4. After notice has been so given, and at the time and place mentioned in the notice, the seller may, by a petition setting forth the facts of the case and supported by affidavit, and production of the written evidence of sale, if in his hands, apply to a judge of the Superior Court to have the deed of sale declared void, and to be put in possession of the land.

5. No contestation of the said petition shall be allowed except by counter-affidavits produced within three days after the presenting of the petition.

6. After the said delay of three days the judge may, in his discretion, either reject the petition or render a judgment declaring the deed of sale void, and authorizing the petitioner to take possession of the land. In the event of the judgment rejecting the petition, it shall not prejudice the seller in any right he may have by law of bringing an action in the ordinary manner.

7. No such judgment shall be rendered if at any time before the rendering thereof the buyer or any person for him or holding under him shall have paid either to the seller or into the office of the prothonotary of the Superior Court the full amount of any instalments of purchase money or interest due in virtue of the deed of sale, or shall have fulfilled every obligation entered into therein by the failure to fulfil which the seller had become entitled to demand the dissolution of the sale.

8. If the seller is prevented by any person or persons from taking possession of the land in virtue of the said judgment, he may demand and obtain from the prothonotary of the Superior Court a writ of possession to eject such person or persons and to place the seller in possession, and article 550 of the Code of Civil Procedure shall apply to such writ.

9. The buyer may obtain a review of the same judgment, and articles 495 to 504 inclusively of the Code of Civil Procedure shall apply to such review.

10. All documents forming part of the proceedings under this Act shall form part of the records of the Superior Court.

11. Article 2148, 2152 and 2153 of the Civil Code shall apply to the registration of any judgment rendered under this Act; and to the cancelling of the registration of any deed of sale declared void by such judgment, but article 2154 shall not apply if under section 2 of this Act, the buyer has been notified in the manner prescribed by article 68 of the Code of Civil Procedure.

12. In construing and applying this Act every buyer who having ceased to occupy the land by himself or by his family, has either made no transfer of his rights in the land, or has made a transfer but has not notified the seller in writing of such transfer, shall be deemed to have abandoned the land; and no actual possession of the land by any person shall be deemed to be a notice of any such transfer.

13. The words "deed of sale" in this Act shall mean and include not only any deed of sale but also any promise of sale or contract in the nature of a promise of sale followed by tradition and actual possession.

## CHAPTER THIRD.

### OF THE PARTITION OF TOWNSHIP LANDS HELD IN COMMON.

**912.** Any person seized as tenant in common of lands in townships originally granted, by letters-patent under the great seal of the Province of Lower Canada, to the grantees therein named as tenants in common, may demand a partition thereof according to the ordinary form of law.

Such demand may be made by petition, without the formality of a writ of summons. *C. S. L. C. c.* 14, *s.* 1.

**913.** The petition must be presented to the Superior Court in the district in which the lands are situated. *Ibid. s.* 5.

**914.** Upon proof of the petitioner's right of property, the court may order that his co-tenants shall appear on a certain day in term, but not before the expiration of one year from the date of such order, to answer such demand in partition; that such order shall be posted up in some frequented place in the township in which such lands are situated, or, if there is no such frequented place, then in some frequented place in the next adjoining township, six months at least before the day fixed for the appearance of the parties interested; and that such order be published in the *Canada Gazette** once a week during the said period of six months before the day fixed for the appearance. *Ibid. s.* 2.

**915.** The co-tenants thus notified to make their claims must do so by an ordinary intervention; and the grounds they may have to urge against the petition for partition must be pleaded, and all issues in the case must be joined in the same manner as upon ordinary suits in partition. *Ibid. s.* 3.

* Now "The Quebec Official Gazette." 31 Vict. c. 13, s. 4. (Que.)

**916**. The judgment ordering the partition is binding not only upon the parties who have appeared but upon those who have made default. *Ibid. s.* 4.

**917**. With the consent of the parties in the case, the court may, at any time before final judgment, refer the matters in dispute as well as the partition itself to be decided and finally determined by three arbitrators, one of whom is named by the petitioner, another by the intervening co-tenants, and the third by the court.

The proceedings of the arbitrators must be had in such place in the township or parish in which the lands are situate, as they or any two of them may appoint; they may examine the witnesses, or the parties, who may be sworn before a judge, the prothonotary, a commissioner of the Superior Court, or a justice of the peace, and the award of such arbitrators, or of any two of them, is final. *Ibid. s.* 5.

**918**. The court, as in all other suits, awards costs according to its discretion. *Ibid. s.* 7.

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## CHAPTER FOURTH.

### OF COMPULSORY PARTITION AND LICITATION.

**919**. When coheirs or coproprietors cannot agree upon a partition of their common property, the action at law to obtain such partition belongs to the one who is first to institute it. 1 *Pig.* 762; 2 *do.* 414; *C. P. C.* 966-7.

1. In an action in licitation of an immoveable property held *par indivis* by the parties—*Held*, that such an action always contains a demand of partition, and in such action the parties, plaintiff and defendant, are in the same relative positions, each party being at the same time plaintiff and defendant. *Boswell* v. *Lloyd et al.* 12 L. C. R. 447, S. C. 1862.

2. And the cause of action in such case is the joint ownership *par indivis*, and not the alleged indivisibility of the property itself. Ib.

3. On demurrer to an action for a specific sum as the proceeds of a community between the plaintiff and his late wife—*Held*, that the action should be one of partage. *Dupuis* v. *Dupuis*, 6 L. C. R. 475, S. C. 1854.

**920**. All the coheirs or coproprietors must be parties in the suit for a partition, without prejudice to the provisions of the preceding chapter.

1. In an action in partition of a succession all the co-heirs must be parties to the suit either as plaintiffs or defendants. *Laverdière* v. *Laverdière*, 1 Rev. de Lég. 347, K. B. 1816.

**921**. A special tutor must be named to each minor whose interests are opposed to those of any other minor. *C. P. C.* 968; *C. C. Suc.* 97.

**922**. The court, before rendering judgment upon the suit for partition, orders that the immoveables shall be viewed and valued by experts appointed according to the ordinary rules; in order to ascertain whether the whole of the immoveables can be conveniently divided, and, in such case, to form the shares according to the provisions of articles 702, 703 and 704, in the Civil Code. 2 *Pig.* 420-442; *C. P. C.* 970-1.

**923**. If all the parties have attained full age they may agree upon one expert. *C. P. C.* 971.

**924**. The same proceedings are had upon the report of such expert as upon any other report of experts. 2 *Pig.* 443 *et seq.*, *C. P. C.* 971.

**925**. After the report of the experts has been homologated, the court sends the parties before the prothonotary or some other person, to proceed with the allotment of shares, minutes of which are taken. 2 *Fig.* 444; *C. P. C.* 975–982.

**926**. If the suit is for an account and a partition, the lots are not formed until after the accounts, the returns, the formation of the mass, and the pretakings have been determined by a practitioner, who is named by the parties or by the court, and whose report must also be homologated. 2 *Pig.* 443; *C. P. C.* 976.

**927**. When immoveables cannot be advantageously divided, or when there are not as many lots of land as copartitioners, the court may order that such immoveables be put up to public auction and sold by way of licitation. 2 *Pig.* 416–7, 421; *Poth. Société*, 170–1, 194.

1. The court will not order a sale by licitation if a partition can be as advantageously made. *Bédéjaré* v. *Duhamel et al.* 2 Rev de Lég. 441, K. B. 1820.

**928**. Rules concerning voluntary licitation are contained in the third part of this code. The provisions of this chapter apply to licitations judicially ordered upon actions for partition.

**929**. When the court has ordered a licitation, the plaintiff must cause an advertisement to be published three times in the space of four months in the *Canada* Gazette*, in the French and English languages, stating that the immoveables therein designated, will be put up to auction and adjudged to the highest and last bidder, at the sitting of the Superior Court next after the expiration of four months from the first insertion of such notice, subject to the conditions mentioned in the list of charges, and giving notice that all oppositions to the sale must be filed at least fifteen days before the day fixed for the sale, and that all oppositions for payment must be filed within six days after the adjudication, on pain of being foreclosed. *C. S. L. C. c.* 48, *s.* 3, *and Schedule F.*

* Now "The Quebec Official Gazette," 31 *V. c.* 13, *s.* 4 (*Que.*).

FORM NO. **51**.

In connection with article 929.

Lower Canada, }
District of }

LICITATION.

Public notice is hereby given that under and by virtue of a judgment of the Superior Court sitting at , in the District of , on the day of , one thousand eight hundred and , in a cause in which A. B., (*description at length*) is plaintiff and C. D. (*description at length*) is defendant, ordering the licitation of certain immoveables described as follows, to wit: (*here insert the description of the property to be sold*) the property above described will be put up to auction and adjudged to the last and highest bidder on the day of next, sitting the Court, in the Court Room of the Court House in the said city (*or* town) of subject to the charges, clauses and conditions contained in the list of charges, deposited in the Office of the Prothonotary of the said Court; and any opposition to annul, to secure charges, or to withdraw, to be made to the said licitation, must be filed in the Office of the Prothonotary of the said Court fifteen days at least before the day fixed as aforesaid for the sale and adjudication, and oppositions for payment must be filed within the six days next after the adjudication, and failing the parties to file such oppositions within the delays hereby limited, they will be foreclosed from so doing.

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**930**. The notice must also be read and published on the third Sunday before the day on which the licitation is to take place, at the door of the church of the parish in which the immoveables are situated, and if there is no church or if the immoveables are not situated within the limits of a parish, then at the most frequented place in the locality,

and a copy of such notice must be posted up at the place where such publication is made. *Ibid. ss.* 2-3; 27-28 *V. c.* 39, *s.* 1.

**931**. [If the plaintiff fails to proceed with the publication of such notice within fifteen days from the judgment of licitation, any other party may do so, and the first who takes such proceedings has the preference, and has alone the right to be paid the costs of the licitation.]

**932**. Oppositions to secure charges, to withdraw, or to annul, in respect of immoveables which are to be sold by licitation, cannot be received after the fifteenth day previous to the day fixed for the licitation; if they are filed after that period the right of the opposant is converted into an opposition for payment out of the price of the immoveables. *C. S. L. C. c.* 48, *s.* 6.

**933**. If any opposition to secure charges, to withdraw, or to annul [or any other proceeding incidental to the licitation], cannot be decided before the day fixed for sale, the licitation is suspended, and, when rendering judgment upon such opposition or proceeding, the court may, if necessary, fix another day upon which the sale may be proceeded with, after the parties have caused another notice, in the same form as the first in so far as it can apply, to be published in the *Canada Gazette*,* at least three weeks before the day thus fixed. *Ibid. s.* 7.

**934**. Bids may be made in writing at the prothonotary's office, in the same manner as in cases of sale of immoveables by the sheriff, and on the day appointed bids are received at the prothonotary's office, but the adjudication is completed before the court, and minutes are drawn up of such bids and adjudication. *Ibid. s.* 2; 27-28 *V. c.* 39, *s.* 1.

Strangers are in all cases admitted to bid.

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* Now "The Quebec Official Gazette." 31 V. c. 13, s. 4 (*Que.*)

**935**. The adjudication is made in accordance with the conditions contained in the list of charges, which must have been approved by the court or judge, after hearing the parties, and must have been filed in the prothonotary's office at least [thirty days] before the day fixed for the sale, *C. S. L. C. c.* 48, *s.* 8.

After the adjudication is completed, and the purchaser has complied with the conditions by paying the moneys which are to be deposited in court, the prothonotary must prepare a deed of sale which must be drawn similarly to a sheriff's deed in so far as the provisions of article 689 are applicable.

See Form 36, *ante*, under art. 700.

1. The Court cannot alter the conditions of the sale after licitation, and thereby change the position of the purchaser. *Comte & Archambault & vir*, 8 R. L. 102, Q. B. 1876.

2. Where the conditions of sale require that the purchase-money be deposited in the hands of the prothonotary, the Court cannot authorize the retention thereof by one of the parties to the cause who has been declared *adjudicataire*, and who is apparently entitled to receive the money eventually, even on giving good security. *Stansfield & vir* v. *Stansfield* 9 L. C. J. 103, S. C. 1864.

**936**. The adjudication, after the observance of the formalities above prescribed, transfers the property with its active and passive servitudes, has the same effects as a sheriff's sale, and discharges the property in the same manner from such other charges, privileges and hypothecs, as are not mentioned in the list of charges. *Ibid. s.* 5.

1. An error as to the contents of an immoveable in a judgment ordering a partition is not a cause of nullity, and such error may be rectified in appeal by a judgment of that court with costs against the appellant. *Peloquin et al. & Brunet et al.*, 3 R. L. 386, Q. B. 1871.

2. The purchaser of an immoveable sold by licitation in open court, cannot obtain possession of it without the intervention of the Court which ordered the sale, if this possession is refused him by the occu-

pant, notwithstanding that the latter was a party to the suit. *Hus & Millette*, 9 R. L. 56, Q. B. 1876.

See arts. 706 *et seq. ante*, for effects of a Sheriff's sale.

**937**. The price of the adjudication must be paid according to the conditions of the sale, and unless otherwise provided, into the hands of the prothonotary, saving the purchaser's right to retain the moneys on giving security, as in the case of a sheriff's sale; and the purchaser failing to pay such price is subject to the same penalties and liabilities as the false bidder upon immoveables sold in execution. *Ibid. ss.* 8, 9; *c.* 85, *ss.* 12, 13.

**938**. All oppositions or claims for payment out of the proceeds of the licitation must be filed in the prothonotary's office within six days after the adjudication, after which period they cannot be received, except by order of the court and upon such conditions as it may impose. *C. S. L. C., c.* 48, *s.* 10.

**939**. The distribution of the purchase money is subject to the same formalities as in cases of confirmation of title, and of execution against immoveables, and the party prosecuting the licitation is bound to obtain the certificate of registered hypothecs which is necessary for that purpose *Ibid. s.* 38.

**940**. If any immoveable is situated partly in one district and partly in another, its licitation as a whole may be demanded and may be ordered in either district, if the jurisdiction in such case is not assigned by law to a particular court. *Ibid. s.* 11; *c.* 82, *s.* 27.

## CHAPTER FIFTH.

### OF ACTIONS OF BOUNDARY, OR TO VERIFY OR RECTIFY ANCIENT BOUNDARIES.

**941.** Whenever two contiguous lands have never been bounded, or the boundaries have disappeared, or the fences or boundary works have been wrongly placed, and one of the neighbours refuses to agree upon a surveyor to determine the boundaries, or to verify or to rectify the division line, as the case may be, the other party may bring an action against him to compel him to do so.

1. In an action *en bornage* if the defendant pleads, as he may, that he holds the land which is in his possession in right of another, he must set forth in his exception the name and residence of the person from whom he holds. *Fortier & Reinhardt*, 3 Rev. de Lég. 70, Q. B. 1818.

2. The defendant in an action *en bornage* cannot be condemned to compel his neighbour to *borner* with him, and conclusions to that effect will be held bad on demurrer. *Fradet* v. *Labreque*, 8 L. C. R. 218, S. C. 1858.

3. Where no boundary line exists an action *en bornage* should be brought by him upon whom the encroachment is made, and not a petitory action. *Graham* v. *Kempley*, 16 L. C. J. 56, S. C. R. 1871.

**942.** If the parties do not agree, the court names a sworn surveyor, whom it charges with making a plan of the locality, shewing the respective pretensions of the parties, and with making such other operations as it may deem necessary.

1. A surveyor cannot prevent the opening of his report until a sum he chooses to name has been paid. *Décary* v. *Poirier*, 21 L.C.J. 27, S. C. 1877. 1 Legal News 211.

2. The surveyor need not certify that the parties had signed or had been requested to sign. *Bouffard* v. *Nadeau*, 8 R.L. 321, Q.B. 1876.

3. Surveyors must be sworn before they can act under an order of the Court. *Melancon* v. *Venne*, 5 R.L. 185 S. C. R. 1872.

4. If not sworn, their report will be set aside though the rule appointing them does not order that they be sworn. *Aitchison* v. *Morrison*, 1 L. C. L. J. 112, S. C. 1865.

**943**. The surveyor thus named is bound, under his oath of office, to proceed in the same manner as experts.

**944**. If the parties desire it, more than one surveyor may be appointed.

**945**. The fixing of bounds, the verifying of ancient boundaries, or rectifying of division lines, is ordered in conformity with the rights and titles of the parties, and is done by the person named by the court, who proceeds in accordance with the judgment, and if necessary, places boundary marks in presence of witnesses, in accordance with the provisions contained in chapter 77 of the Consolidated Statutes of Canada, and must draw up a statement of his operations, and return the original of such statement to the court.

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## CHAPTER SIXTH.

### OF POSSESSORY ACTIONS.

**946**. The possessor of any immoveable or real right, other than a farmer on shares, or a holder by sufferance, who is disturbed in his possession, may bring an action on disturbance against the person who prevents his enjoyment, in order to put an end to the disturbance and to be maintained in his possession.

The action for repossession may be brought by any person who has had possession of an immoveable or real right for a year and a day, against any person who has forcibly dispossessed him.

1. In an action *en réintegrande* to recover possession of a lot of land from which the plaintiff alleged he had been forcibly ejected by the defendant, and for damages—*Held*, that an allegation of possession by the plaintiff is sufficient to maintain such action without alleging an annual possession. *Stuart* v. *Langley et al.*, 1 L. C. R. 338, S. C. 1851.

2. And where the conclusions contain all that is necessary for an action *en complainte*, the action must be maintained. *Doyon* v. *The Corporation of the Parish of St. Joseph*, 17 L.C. J. 193, Q. B. 1873.

3. In an action *en complainte*, possession for a year and a day antecedent to the day on which the trespass was committed must be alleged in the declaration. *Jourdain* v. *Vigoreux*, 3 Rev. de Lég. 39, K. B. 1809.

4. The procedure prescribed by the Ordinance of 1667 is still in force with regard to actions *en complainte*, by a proprietor who is troubled in his possession by the construction of works in fraud of his rights, but the Ordinance has only in view a final judgment and not a provisional remedy. *Girard* v. *Bélanger et al.*, 17 L. C. J. 36, S. C. 1873.

5. But when the possession is disputed and the *trouble* denied, the action degenerates into a simple action of damages which follows the ordinary procedure. *Girard* v. *Bélanger et al.*, 17 L. C. J. 36, S. C. 1873.

6. *Held*, reversing the judgment of the Court of Review, that the possession of a year and a day must immediately precede the *trouble* complained of, and must be continuous and decided; and that carrying away wood already cut is not a *trouble de fait* sufficient to found an action *en complainte*. *Guillemette* v. *Larochelle*, 2 L. C. L. J. 111, Q. B. 1866.

**947**. Possessory actions must be brought within a year from the disturbance.

**948**. Saving the provisions of article 1110, actions on disturbance, or for repossession, cannot be joined with the petitory claim, nor can the latter be brought until the action on disturbance or for repossession has been terminated, and the condemnation has been satisfied and executed. Nevertheless, if the party who has obtained judgment is in default with regard to the taxation of the costs and the liquidation of the damages, the other party may bring his petitory

action, on giving security that he will satisfy such condemnation.

See arts. 15 and 120 *ante*.

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## CHAPTER SEVENTH.

### OF DISCHARGE FROM HYPOTHECS, OR CONFIRMATION OF TITLE.

**949**. Any person who has acquired immoveable property by purchase, exchange, or other title of a nature to transfer ownership, may free such property from any hypothecs with which it is charged by obtaining a confirmation of his title according to the formalities hereinafter prescribed. *C. S. L. C., c.* 36, *s.* 1.

**950**. Such person must lodge the title which he seeks to have confirmed in the office of the prothonotary of the Superior Court, in the district where the immoveable is situated or in which the confirmation of title must be obatined, and obtain from the prothonotary a notice mentioning that the deed has been so lodged, containing a designation of the deed and of the parties thereto, a description of the immoveable, the date at which the application for confirmation will be presented to the court, an indication of the persons who possessed the immoveables during the three years next before such notice, and calling upon all creditors who claim to have any privilege or hypothec upon the immoveable to file their oppositions at least eight days before the day fixed for presenting the application. *Ibid. ss.* 2-4.

If the deed comprises immoveables situated in different districts, an application for confirmation of title should be made in each district, for such immoveables as are situated therein.

When the immoveable is situated partly in one district

and partly in another, the proceedings may be had in either district, and avail for the whole of the immoveable. *Ibid.* s. 5.

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FORM NO. **50**.

In connection with article 950.

Public Notice is hereby given that there has been lodged in the office of the prothonotary of the Superior Court, in the district of , a (*Deed*) made and executed before A. B. and colleague, notaries public, on the day of , between C. D. of , of the one part; and E. F. of , of the other part; being a (*sale*) by the said C. D. to the said E. F., of (*a lot or parcel of land*) situate, &c., and possessed by as proprietor, for the three years now last past; And all persons who have or claim to have any privilege or hypothec under any title or by any means whatsoever in or upon the said (*lot of land*), immediately previous to and at the time the same were acquired by the said C. D. are hereby notified that application will be made to the said court on , the day of , for a judgment of confirmation, and that unless their claims are such as the Registrar is bound by the provisions of chapter thirty-six of the Consolidated Statutes for Lower Canada, to include in his certificate to be filed in this case under the said Act, they are hereby required to signify in writing their oppositions, and file the same in the office of the said prothonotary eight days at least before the said day, in default of which they will be for ever precluded from the right of so doing.

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**951**. The notice must be in French and in English, and be inserted three times in the course of four months in the *Canada Gazette*.* *Ibid.* s. 2, § 2.

* Now. "The Quebec Official Gazette," 31 V. c. 13, s. 4. (*Que.*)

**952**. The notice must be publicly and audibly read, on the third Sunday before the day on which the application is to be presented, at the door of the church of the parish or place where the immoveable is situated, or, if there is no church, at the most frequented place in the locality, and must be posted up at the place where such publication is made. *Ibid. s.* 2, § 2;—27-28 Vict. 39, s. 2.

35 Vict. c. 6, (*Que.*):

19. Article 952 is amended by adding after the word "third" in the second line, the words "or fourth."

**953**. In the case of immoveables by fiction of law, the proceedings are had in the district where the vendor or assignor had his domicile during the three years next preceding the execution of the deed to be confirmed, or if during that period he had his domicile in more districts than one, then in the district in which he is actually domiciled, giving the same notice in the other districts in which he was domiciled during such three years. *C. S. L. C. c.* 36, *s.* 3.

**954**. Upon the day mentioned in the notice, the applicant is bound to present his application for confirmation to the court, together with certificates of the publication and posting up required, and copies of the *Canada Gazette*,* containing the advertisement.

**955**. The applicant must, moreover, file with his application a certificate from the registrar or registrars within whose divisions the immoveable is or was situated, mentioning all hypothecs not apparently extinguished, registered previously to the registration of the deed of which ratification is applied for.]

The certificate must mention all hypothecs registered against the immoveable itself, whenever hypothecs shall be so registered, when the plan and book of reference will be in force in the registration division; all hypothecs registered against any person who was owner of the land at any

time during the ten years immediately preceding the date of the registration of the deed sought to be confirmed; and all previous hypothecs the registration of which has been renewed during that period.

Such certificate must also state the date of the deed registered as creating or giving rise to such hypothec, the date of its registration, the names, occupation and residence of the creditor, the name of the notary or notaries before whom it was passed, if it is notarial, and must mention any partial discharge registered, and the sum which appears to be due, in principal and interest, and, in the case of renewed registration, such certificate must also mention the registration which is thus renewed, and the registrar is not bound to extend his searches beyond the date of a sheriff's title, a sale in bankruptcy, a judgment of confirmation, or any other deed of a judicial sale having the effect of a sheriff's sale, which has been registered, except for such hypothecs as are not discharged by such deed.

If there are no hypothecs registered, or if, by the registry books, all the hypothecs appear to have been discharged, the registrar must state the fact accordingly in his certificate. *C. S. L. C. c.* 36, *ss.* 7, 10; 25 *V. c.* 11, *s.* 4; 27–28 *V. c.* 40. *s.* 1. See Form 36, *ante*, under Art. 700.

**956.** The provisions of articles 701, 702 and 703 apply also to the certificate mentioned in the preceding article.

**957.** All hypothecary creditors, whose rights are not made known by the deed of which confirmation is sought, or by the registrar's certificate, are bound, on pain of being foreclosed from doing so, to file their oppositions on or before the eighth day next preceding the day fixed for presenting the application. *C. S. L. C. c.* 36, *ss.* 15, 16.

1. A petitioner for judgment of confirmation bound himself by his deed of acquisition to pay a sum of money to a *bailleur de fonds*, who filed opposition for the amount—*Held*, that the opposition would be admitted but without costs. *Lenoir exp. & Lamothe et al.*, 10 L. C. R. 451 & 3 L. C. J. 303, S. C. 1859.

**958.** No opposition is, however, necessary for the preservation of principal of rents created in place of seigniorial rights. *Ibid. ss.* 17, 18; 25 *V. c.* 11, *s.* 2.

The provisions of articles 719 and 721 apply also to proceedings to obtain confirmation of title.

**959.** During the four months prescribed for the publication of the notice of an application for confirmation of title, any creditor of the vendor or assignor or of his authors, may appear at the prothonotary's office and bid an increase over the sum, price, or other consideration or value, if any, mentioned in the title, and have his bid received, provided the increase be equal to at least one-tenth of the whole price, sum or other consideration, and the bidder offers, besides, to refund to the applicant all his costs and lawful disbursements, giving him security to that effect in the ordinary manner, or depositing for that purpose a sufficient sum, according to the discretion of the court or judge, reserving the subsequent completion of the precise amount. *C. S. L. C. c.* 36, *s.* 11.

1. Creditors who have tendered an overbid, need not accompany such bid with a deposit, nor is it necessary that they should give notice of putting in security, nor need the sureties of such parties justify that they are owners of immoveable property, nor need their bonds contain a description of immoveable property to be specially hypothecated; but the creditor will not be declared the purchaser until he has required the original purchaser to declare whether he will retain the property at the price offered, and paid the purchase money, nor will the original purchaser be allowed to retain the property unless he pays the whole of the price, and in default of his doing so, the creditor who has made the overbid will be allowed to deposit the price and become the purchaser. *Ruston Exp.* v. *The Quebec Building Society*, 3 L. C. R. 297, S. C. 1853.

**960.** Any other creditor of the vendor or assignor may, in like manner, and under the same conditions, outbid such creditor; and all such creditors may continue outbidding each other, provided each outbidder offers an increase of at

least one-twentieth of the price, purchase money or other consideration, over and above the costs and lawful expenses. *Ibid. s.* 11, § 2.

**961**. The applicant may, however, retain the immoveables at the amount of the highest bid legally offered. *Ibid.* § 3.

**962**. If no such outbidding takes place within the delay above mentioned, the value of the immoveable remains definitively fixed at the price and sum mentioned in the title deed, saving the provisions hereinafter made. *Ibid. s.* 11.

**963**. If the applicant desires to discharge the property from hypothecs, he must deposit in the hands of the prothonotary, together with the certificate of hypothecs, the price mentioned in his title deed, or the amount which such price has reached by the outbidding; and if it appears by the certificate of the registrar that there are no hypothecs, and if there are no oppositions or claims, or if the amount deposited is sufficient to pay all the charges which appear, then judgment of confirmation is pronounced purely and simply. *Ibid. s.* 12.

35 Vict., c. 6 (*Que.*):

20. Notwithstanding anything to the contrary contained in article 963, whenever the applicant for a judgment of confirmation of title has an hypothecary claim against the property, which appears by the certificate of the registrar, he may retain the purchase money to the extent of his claim, until judgment has been rendered, provided he furnishes the prothonotary with good and sufficient sureties for all damages that might result to any party interested in the event of the non-payment of such sum as the court may order such applicant to pay into the hands of the prothonotary; and upon such security being given, the amount so retained shall be deemed to be deposited, and the case shall be dealt with accordingly.

1. Where a purchaser demanded a ratification of title, and deposited the amount of the purchase money in Court, and filed a motion for *acte* of such deposit, describing it as £100 with interest, whereas only

£100 were lodged, and another motion was made to have the deposit declared irregular, because no sum for interest had been added, it was held that the interest was no part of the purchase-price and the £100 were declared to be sufficient. *Hart exp.* 3 L. C. J. 40, S. C. 1852.

**964.** But if the sum deposited is not sufficient to pay all the charges and hypothecs which appear, or if no price is mentioned in the deed, the court or a judge may, at the instance of the applicant, name two experts, and the applicant names a third, in order to determine the value of the property and to report thereon; the whole according to the ordinary formalities. *Ibid.* § 3.

**965.** If the value determined by the experts does not exceed the price paid in by the applicant, the judgment of confirmation is pronounced purely and simply.

If the value determined by the experts exceeds the price thus paid in, or if no price is mentioned in the title deed, the applicant cannot obtain a confirmation, unless he deposits the difference between the value thus ascertained and the price, or the whole of such value, if no price has been agreed upon. *Ibid.* § 4.

**966.** The provisions of the last two preceding articles do not apply to cases of expropriation of property by competent authority for public purposes, when the compensation or indemnity has been settled by arbitration or by experts, according to law. *Ibid. s.* 13.

**967.** Upon proof of the observance of all the formalities hereinabove prescribed, judgment is pronounced, confirming the title deed as free from all hypothecs, other than those mentioned in article 958. *Ibid. s.* 14.

1. The only effect of the judgment is to do away with mortgages without in any manner purifying the title-deed which retains all its imperfections. *Glackmeyer* v. *The Mayor, &c., of Quebec & Lagneux*, 11 L. C. R. 18, S. C. 1860.

**968.** If the applicant is willing, and files a written declaration to that effect, judgment may be rendered subject to the hypothecs mentioned in the certificate of the registrar and to the oppositions and claims filed; and in such case the immoveable is discharged from such hypothecs only as are not mentioned in such judgment. *Ibid. s.* 12.

**969.** The price deposited is distributed under an order of the court, like moneys levied upon the seizure and sale of immoveables under execution. *Ibid. s.* 19.

**970.** The prothonotary, before delivering to any person whatever a copy of any judgment of confirmation of title, is bound to cause such judgment to be registered in the proper registry office, as prescribed in the title *Of registration of real rights* in the Civil Code, and has a right to demand from the applicant the cost and expenses of such registration, and of the cancellings which it occasions. 25 *V. c.* 11, *s* 2.

**971.** The word "hypothec," in this chapter, includes all privileges affecting real estate. *Ibid. s.* 32.

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## CHAPTER EIGHTH.

### OF SEPARATION BETWEEN CONSORTS.

### SECTION I.

### OF SEPARATION OF PROPERTY.

**972.** No suit for separation of property can be brought by a married woman without the previous authorization of a judge, granted upon petition to that effect or upon con-

clusions for that purpose contained in the declaration in such suit. 2 *Pig.* 182; *C. P. C.* 865.

**973.** Suits for separation of property must be brought only in the cases and within the jurisdiction mentioned in article 1311 of the Civil Code, and in article 35 of this code. 2 *Pig.* 181.

**974.** The formalities required for summons in ordinary cases must be strictly observed in such suits; and the consort summoned has no power to dispense with the same, either directly or indirectly, even as regards the delay upon the summons.

[Notice of such suit must be given and published during one month in the *Canada Gazette*,* and in two newspapers at, or as near as possible to, the place where the defendant resides, one of which is published in the French and the other in the English language.

No proceedings can be had in such suit until after the publication of such notice.] 27–28 *V. c.* 17, *s.* 12, § 3.

**975.** Any creditor of the person sued for separation of property has a right to intervene in the suit, in order either to watch the proceedings or to contest the plaintiff's claim, and he may for this purpose set up whatever grounds and exercise whatever rights his debtor might.—*Code, Conv. Matri. art.* 60; 2 *Pig.* 180; 27–28 *V. c.* 17, *s.* 12 § 3; *C. P. C.* 871.

**976.** Separation of property thus sued for cannot be granted upon the confession or the admissions of the defendant; the allegations of the declaration must be established by some other legal proof. 2 *Pig.* 186–7; *C. P. C.* 870.

**977.** The judgment pronouncing separation of property may, at the same time, determine the reprises of the plaintiff,

* Now "The Quebec Official Gazette." 31 *V., c.* 13, *s.* 4 *(Que.)*.

or order that they shall be determined by a practitioner or by experts, if there be occasion for it. 2 *Pig.* 193–4.

**978.** The judgment of separation must be executed and published in accordance with the provisions contained in articles 1312 and 1313 in the Civil Code. *C. P. C.* 866–872.

**979.** The wife who sues for separation may accept or renounce the community, according to circumstances. If the husband fails to make an inventory, she may, upon being authorized, have one made, if she has not renounced.

If she accepts, the partition is effected in the manner provided in the Civil Code, in the title relating to marriage covenants. 2 *Pig.* 182–3, 196.

**980.** [The wife's renunciation of the community must be registered in the registry office of the division in which the husband was domiciled at the time that the suit was brought.]

**981.** The judgment of separation may be executed voluntarily or by legal means, as provided in article 1312 of the Civil Code, but without prejudice to the rights of third parties.

[No married woman, separated as to property, can carry on trade until she has delivered to the prothonotary of the district and the registrar of the county in which she intends carrying on trade, a declaration in writing stating her intention, her names and surname and those of her husband, and the style under which she proposes carrying on such business. This declaration is entered and transcribed in the same registers as the declaration concerning partnerships mentioned in chapter 65 of the Consolidated Statutes for Lower Canada.

All married women, separate as to property, and carrying on trade at the time of the coming into force of this code are bound to comply with the above mentioned formalities within six months from such time.

Any married woman failing to comply with the requirements of this article is liable to a penalty of two hundred dollars which may be recovered, before any court of competent civil jurisdiction, by any person suing as well in his own name as in behalf of the crown, and one half of such penalty belongs to the prosecutor and the other half to the crown, unless the suit be brought in the name of the crown only, in which case it is entitled to the whole of the penalty.]

**982.** When the reprises of the wife consist of moveable property, the husband may oblige her to invest the proceeds thereof, or a portion of the same, in the purchase of immoveables. 2 *Pig.* 196.

**983.** If the husband gives up immoveables to his wife in payment of her reprises, she must apply for and obtain a judgment of confirmation of the deed by which he does so, according to the formalities prescribed in the preceding chapter. *Ibid.*

**984.** If the amount at which the rights of the wife have been determined is not voluntarily paid, execution may be enforced as in ordinary cases.

Nevertheless, the husband may compel the wife to receive immoveables in payment, at a valuation by experts, provided such immoveables are available and do not prejudice her interests. *Ibid.*

## SECTION II.

## OF SEPARATION FROM BED AND BOARD.

**985.** Besides the provisions contained in the Civil Code on the subject of separation from bed and board, those of the present section also apply. 2 *Pig.* 216-7.

1. In an action in separation from bed and board it is not necessary to give notice in the *Official Gazette* or in any public journals, notwith-

standing such action entails separation of property. *Leclerc* v. *Lord*, 4 R. L. 531, S. C. 1873.

**986**. A wife who desires to obtain a separation from bed and board must, in order to bring the suit, first obtain the authorization of a judge, by means of a petition giving a summary statement of the facts which give rise to her application, with an affirmation under oath, and indicating the house where she intends to reside during the suit, and where she will convey the linen and wearing apparel necessary for her use.

The application must be served upon her husband, if the judge so orders. 2 *Pig.* 216-7.

**987**. If the wife thinks proper to demand an attachment of the moveable property of the community, she must likewise be authorized by a judge for that purpose.

The attachment is effected in the same manner as attachment for rent, but the husband remains judicial guardian of the property attached. 2 *Pig.* 184.

**988**. The wife may also join with her demand for separation an attachment in revendication of such moveables as belong to her.

**989**. The trial of the case, the judgment, its execution, and its publication are subject to the provisions contained in the preceding section.

1. When the husband sues his wife she does not require any authorization to *ester en justice*. *Lussier & Archambault*, 11 L. C. J. 53, Q. B. 1848.

## CHAPTER NINTH.

### OF OPPOSITIONS TO MARRIAGE.

**990**. [Every opposition to a marriage must be accompanied with a notice indicating the day and hour at which the opposition will be presented to the Superior Court, or to a judge of such court.]

**991**. [The opposition and notice must be served both upon the functionary called upon to solemnize the marriage and upon the intended consorts, or the persons who represent them, a delay of five intermediate days being observed, with the usual addition where the distance exceeds five leagues.]

**992**. [The proceedings upon the opposition are summary, and conducted in the same manner as those in suits between lessors and lessees.]

**993**. [If the opposant fails to present his opposition upon the day fixed, any person interested may obtain judgment of non-suit against him, upon filing a copy of the opposition served upon such person; and upon receiving a copy of such judgment the functionary called upon to solemnize the marriage may proceed.]

**994**. [If the opposant fails to proceed in the manner prescribed the opposition is declared abandoned.]

**995**. [The court or judge before rendering judgment upon the opposition may, if there be cause for it, summon the parents, or, in default of parents, the friends of the intending consorts, in order that they may give their opinion upon the intended marriage, and that such further action may be had as to law may appertain.]

**996**. [An appeal lies to the court of Queen's Bench from judgments rendered on such oppositions, the same formalities being observed as in appeals from the Circuit Court, and the proceedings on such appeal take precedence.]

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# CHAPTER TENTH.

## PROCEEDINGS AFFECTING CORPORATIONS OR PUBLIC OFFICES.

### SECTION I.

### OF CORPORATIONS ILLEGALLY FORMED, OR VIOLATING OR EXCEEDING THEIR POWERS.

**997**. In the following cases:

1. Whenever any association or number of persons acts as a corporation without being legally incorporated or recognised;

2. Whenever any corporation, public body or board, violates any of the provisions of the Acts by which it is governed, or becomes liable to a forfeiture of its rights, or does or omits to do acts the doing or omission of which amounts to a surrender of its corporate rights, privileges and franchises, or exercises any power, franchise or privilege which does not belong to it or is not conferred upon it by law:

It is the duty of Her Majesty's Attorney-General for Lower Canada to prosecute, in Her Majesty's name, such violations of the law whenever he has good reason to believe that such facts can be established by proof, in every case of public general interest; but he is not bound to do so in any

other case unless sufficient security is given to indemnify the government against all costs to be incurred upon such proceeding. *C. S. L. C. c.* 88, *s.* 9.

41 Vict. c. 13, *Que.*) :

1. Article 997 of the code of civil procedure, is amended, by adding thereto the following words: "and in such case the special information must mention the names of the person who has solicited the Attorney-General to take such legal proceedings and of the person who has become security for costs."

1. The remedy provided by art. 997 does not deprive a person of their right at common law to bring an action in his own name to annul as illegal a by-law imposing a special tax. Any person may seek redress before the tribunals of the country against corporations by whose acts his rights or property may be injuriously affected, or by whom he may be in any way aggrieved, in the same manner and to the same extent as he could do so against individuals under similar circumstances. *Hunt et al. v. The Corporation of Quebec*, 4 Q. L. *R.* 275, S. C. 1878.

**998.** *The summons for that purpose must be preceded by the presenting to the Superior Court, in term, or to a judge in vacation, of a special information, containing conclusions adapted to the nature of the contravention, and supported by affidavits to the satisfaction of the court or judge; and the writ of summons cannot issue upon such information without the authorization of the court or judge. Ibid.*

35 Vict., c. 6, (*Que.*):

21. Article 998 is amended so as to read as follows :—

"998. The summons for that purpose must be preceded by the presenting to the Superior Court, or to a judge, of a special information, containing conclusions adapted to the nature of the contravention, and supported by an affidavit to the satisfaction of the court or judge, and the writ of summons cannot issue upon such information without the authorization of the court or judge.

This writ, as well as the writs of *quo warranto*, *mandamus* and prohibition, shall be in the same form as ordinary writs of summons."

1. It is not necessary that the judge's order direct the respondent to appear at the place mentioned in the petition. *Bureau* v. *Normand & Gouin et al.*, 5 R. L. 40, S. C. 1873.

**999**. The writ of summons commands the persons acting illegally as a corporation, or the corporation complained of, to appear on a day fixed by the court or judge.

It is served, in the first case, upon some one of the persons usurping corporate rights, or at the principal office or place of business of the association, speaking to a reasonable person; and, in the second case, according to the provisions contained in articles 61, 62, 63 and 78. *Ibid. s.* 10, §§ 2, 3.

**1000**. The delay upon summons is three days, with the usual extension when the distance exceeds five leagues, as prescribed by article 75. *Ibid. s.* 1, § 2.

See *ante, art.* 75.

1. The delay after service of a writ of *quo warranto*, when in conformity with art. 1000 of the Code of Procedure, is three days. *Bureau & Normand & Gouin et al.* 5 R. L. 40, S. C. 1873.

**1001**. The defendants are bound to appear on the day fixed, and if they fail to do so the prosecutor proceeds with his case by default. *Ibid. s.* 5.

**1002**. If the defendants appear, they must, within four days, plead specially to the information; and the prosecutor is bound to answer within three days. *Ibid. s.* 2.

**1003**. Within three days from the filing of the answer, the prosecutor must proceed to prove the allegations of the information, in the same manner as proof is made in ordinary cases; and after the closing of his proof and within a further delay of two days, the defendants are bound to adduce their proof. *Ibid. s.* 3.

**1004**. As soon as the proof of the defendants is closed, the prosecutor may be allowed to produce evidence in rebuttal, if there is occasion for it; if he does not, either of the parties may inscribe the cause for hearing on the merits,

giving the opposite party notice of at least one day before the day fixed. *Ibid. s.* 4.

**1005**. The court or judge may extend the delays whenever it is necessary for the ends of justice. *Ibid.* § 2.

**1006**. Notwithstanding the provisions contained in article 1002, the defendants may set up against the information such preliminary exceptions or exceptions to the form as they deem advisable, and the plaintiff may demur to the pleas set up in defence. *Ibid.*

**1007**. If the judgment declares the association to have been illegally formed, the persons composing it are personally bound to pay the costs; and if it be rendered against a corporation, public body or board, the costs may be levied either upon the property of such corporation or upon the private property of the directors or other officers thereof. *Ibid. s.* 10, § 5.

**1008**. Whenever any corporation, public body or board, has forfeited its rights, privileges and franchises, the judgment declares it to be dissolved and to be deprived of its rights, and a curator is named in due form to administer its property and liquidate its affairs. *Ibid. s.* 10.

1. A judge in chambers has no jurisdiction to appoint a curator to a dissolved corporation, until its dissolution has been judicially pronounced in due course of law. *The Montreal Patent Guano Company in re & Maule et al.* 18 L. C. J. 129, S. C. 1874.

**1009**. The curator, after having given the security required by the court or judge, becomes seized of the property of the dissolved corporation, an inventory of which he must cause to be made in due form of law, in the presence of one or more of the persons who were members of such corporation. He must afterwards dispose of the moveable property to the best advantage. *Ibid.*—*C. C.* 371-2-3.

**1010**. [He is bound to give notice of his appointment by an advertisement to be inserted at least twice in two newspapers designated by the court or judge.]

**1011**. The curator must cause the proceeds realized to be distributed among the creditors of the corporation, by the Superior Court, in the district in which its principal place of business was situated, after giving notice of the day upon which he will make application for that purpose.

Such notice must be published at least three times in two public newspapers, named by the court, and the first publication must be made two months at least before the day fixed for such application. *C. S. L. C. c.* 88, *s.* 10, §§ 1, 2.

**1012**. If there are any debts remaining due by such corporation, its immoveable property can only be sold upon a suit brought against the curator in the ordinary form. *Ibid. s.* 3.

**1013**. [If there are no debts due by such corporation, or if such debts are not known, then the curator must proceed to the sale of the immoveables to the highest bidder, after giving notice of such sale, in the same manner as the sheriff does in executions against the immoveables of a debtor.] *Ibid. s.* 4.

**1014**. A sale thus effected by the curator after observing the requisite formalities, has all the effects of a sheriff's sale. *Ibid. s.* 5.

**1015**. The curator is then bound to account, in the same manner as curators to vacant estates.

## SECTION II.

### USURPATION OF PUBLIC OR CORPORATE OFFICES.

**1016**. Any person interested may bring a complaint whenever another person usurps, intrudes into, or unlawfully holds or exercises:

1. Any public office or any franchise or privilege in Lower Canada;

2. Any office in any corporation, or other public body or board;

Whether such office exists under the common law, or was created in virtue of any statute or ordinance. *C. S. L. C. c.* 88, *s.* 1.

1. A petition in *quo warranto* is not null by reason of the absence of stamps, and the judge to whom it is presented may allow the fixing of stamps or not in his discretion. *Bureau* v. *Normand & Gouin*, 5 R. L. 40, S. C. 1873.

2. The petition for a writ of *quo warranto* takes the place of the declaration referred to in article 50 of the Code of Procedure. Ib.

3. The petition for a writ of *quo warranto* does not require to be numbered where the writ itself bears the number given to it by the court. Ib.

4. A petition for *quo warranto* addressed to "J. P., Judge of the Superior Court, having and exercising jurisdiction in the district of Three Rivers," is an indication of the tribunal and of the judge, equivalent to that referred to by the English authors. *Bureau* v. *Normand & Gouin et al.*, 5 R. L. 40, S. C. 1873.

5. The right to a municipal office must be contested according to the provisions of and in the manner prescribed by the Municipal Code, and not by *quo warranto*. *Fiset* v. *Fournier*, 3 Q. L. R. 334, S. C. R. 1877.

**1017**. Such complaint is brought before the Superior Court, or before a judge of the said court, but the writ of summons cannot issue without leave of the court or judge, obtained in the manner mentioned in article 998; and the same delays and formalities are observed in the proceedings as in the preceding section. *Ibid. ss.* 1, 2, 3, 4.

1. It is discretionary in the court to grant or to withhold a *quo warranto* information, even where a good objection to the title is shown. *Roy et al.* v. *Thibault*, 22 L. C. J. 280, S. C. 1878.

2. The petition required for the issuing of a writ of *quo warranto*, which sets forth generally the grounds of complaint, is sufficient, without setting forth the details. *Fraser & Buteau*, 10 L. C. R. 289, Q. B. 1860.

3. In proceedings affecting corporations or public officers, the defendant may set up against the information a declinatory exception, and at the same time pleas to the merits of the petition. *The Attorney-General* v. *Gray*, 15 L. C. J. 255, S. C. R. 1871.

4. It is not necessary in an order of a judge for a writ of *quo warranto* that the respondent should be directed to appear at the place mentioned in the petition. *Bureau & Normand & Gouin*, 5 R. L. 40, S. C. 1873.

5. A *prima facie* case must be made out by affidavit before the writ will issue. *Gibb* v. *Poston*, 16 L. C. R. 257, S. C. 1866.

6. A writ under C. S. L. C. c. 88 must be addressed to a bailiff of the S. C., to be by him served and returned, and not to the defendant. *Henry* v. *Simard*, 16 L. C. R. 273, S. C. 1866.

7. A petitioner causing a writ to issue in term cannot proceed in vacation, but must proceed in term. *Henderson* v. *Loranger*, 15 L. C. J. 143, S. C. 1871.

**1018**. The complainant, in addition to the allegations concerning the usurpation and illegal detention of the office, may, in his petition, declare the name of the person who has a right to such office or franchise, and allege such facts as are necessary to shew such right, and the court may in such case adjudicate upon the claims of both parties. *Ibid.* s. 6.

**1019**. If the complaint is well founded, the judgment orders the defendant to be ousted and excluded from the office, franchise or privilege, and condemns him to pay costs to the complainant; the court or judge may also condemn the defendant to pay a fine not exceeding the sum of four hundred dollars, which must be paid over to the Receiver-General of the Province. *Ibid.* s. 7, §§ 1, 2.

**1020**. If the complaint is dismissed, the complainant must be condemned to pay all costs. *Ibid.* § 3.

**1021**. Any person whom the judgment declares to be entitled to the office, or the franchise, may, after taking the oath of office, and giving such security as may be required

by law, take upon himself the exercise of such office or franchise, and may demand of the defendant all keys, books, papers and insignia, in the possession or custody of such defendant and belonging to such office or franchise, and in the case of neglect or refusal to deliver up the same, the court may order the sheriff to take possession of such keys, books, papers and insignia, and to deliver over the same to the person adjudged to be entitled thereto, without prejudice to any criminal proceedings to which such defendant may be liable. *Ibid. s.* 8, §§ 1, 2.

## SECTION III.

## OF MANDAMUS.

**1022.** In the following cases:

1. Whenever any corporation neglects or refuses to make any election which by law it is bound to make, or to recognize such of its members as have been legally chosen or elected, or to reinstate such of its members as may have been removed without lawful cause;

2. Whenever any person holding any office in any corporation, public body, or court of inferior jurisdiction, omits, neglects or refuses to perform any duty belonging to such office, or any act which by law he is bound to perform;

3. Whenever any heir or representative of a public officer omits, refuses or neglects to do any act which, as such heir or representative, he is by law obliged to do;

4. In all cases where a writ of *mandamus* would lie in England;

Any person interested may apply to the Superior Court or to a judge in vacation and obtain a writ, commanding the defendant to perform the act or duty required, or to show cause to the contrary on a day fixed. *C. S. L. C. c.* 88, *s.* 11.

1. A *mandamus* will not lie from a judgment of a municipal council, in a matter of controverted elections. *St. Louis Exp.*, 2 L. C. R. 500, S. C. 1852.

2. Nor to compel a *fabrique* to repair the fences of a graveyard. *Vincellette* v. *The Fabrique of St. A.*, 6 L. C. R. 484, S. C. 1856.

3. But it may be issued to compel a *fabrique* to restore an officer of the Civil Government to a *banc d'honneur*. *Rex Exp.* v. *The Fabrique of Pointe aux T.*, 2 Rev. de Lég. 53 & 441, K. B. 1821.

4. Or to compel a registrar to deliver a deed registered in his office. *Doutre* v. *Gagnier*, 13 L. C. J. 305, S. C. R. 1869.

5. The Superior Court has no authority to issue a *mandamus* to compel the License Commissioners under 37 V., c. 3, (Q.) to grant a license. *Privett* v. *Sexton et al.* 18 L. C. J. 192, S. C. 1874.

6. A writ of *mandamus* will not lie to compel a railway company to deposit an amount awarded for expropriation by arbitrators. *Bourgoin* v. *The Montreal O. & O. Ry. Co.*, 1 Legal News, 210, S. C. 1877; 21 L. C. J. 217.

7. Nor to compel the City of Montreal to appoint commissioners for the purpose of fixing the amount of indemnity to be paid to the owners of property affected by the change of level of a street, although no grade for such street had been formally determined previously. *Joseph* v. *The City of Montreal*, 1 Legal News, 210, S. C. 1877; 21 L. C. J. 232.

8. The court may grant an order to restrain a person from committing an illegal act, without having recourse to a *mandamus*. *Bourgoin et al.* v. *Malhiot et al.*, 8 R. L. 396, S. C. 1876.

9. The writ will lie to compel a secretary of a corporation to allow a shareholder to have communication of its books. *Hibbard* v. *Barsalou*, 1 L. C. L. J. 98. S. C. 1865.

**1023**. *The application is made by a petition, supported with affidavits setting forth the facts of the case, and presented to the court or judge, who may thereupon order the writ to issue; and such writ is served in the same manner as any other writ of summons. Ibid, s.* 12.

35 Vict. c. 6. (*Que.*):

22. Article 1023 is amended so as to read as follows:

"1023. The application is made by a petition supported with an affidavit, affirming that the facts set forth in the said petition are true, and presented to the court or judge, who may thereupon order a writ of *mandamus* to issue; and such writ is served in the same manner as any other writ of summons."

Vide, 35 Vict. c. 6, s. 21 (*Que.*) under art. 998 *supra*.

1. A judge in chambers may, even during term, grant an application for a writ of *mandamus* under art. 1023 of the Code of Procedure as amended by Q. 35 Vict. cap. 6, sec. 22. *Smith & Sexton*, 18 L. C. J. 193, S. C. 1874.

2. The affidavit in support of the petition may be in general terms. Ibid.

3. The petition must set forth sufficiently the interest of the petitioner, and that he has no other means of procuring what he claims. *Provost* v. *Masson*, 5 R. L. 556, S. C. 1874.

4. Except in case of urgent necessity the prothonotary has no power to issue such writ, and though his proceedings have since been ratified by a judge, they will be annulled. *Auger & Coté*, 17 L. C. R. 29, S. C. R. 1866.

5. An ordinary writ of summons ordering to appear to answer a petition thereunto annexed, asking that an order do issue to oblige the defendants to do a certain act, is the regular procedure in *mandamus*. *Brown & The Curé et al. of Montreal*, 6 R. L. 379, 20 L. C. J. 228, P. C. 1874.

**1024**. The proceedings subsequent to the service are had in accordance with the provisions contained in the first section of this chapter. *Ibid. s.* 12 § 2.

**1025**. If the petition is well founded, the court or judge may order the issuing of a peremptory writ, commanding the defendant to do the thing demanded of him; and if he fails to comply he may be held by coercive imprisonment to do it, unless the defendant is a corporation, in which case it may be condemned to pay a fine not exceeding two thousand dollars, which is levied by execution in the ordinary manner against its moveable and immoveable property. *Ibid. s.* 13.

**1026**. Any person to whom, or the person representing any corporation to whom, the peremptory writ is directed, is bound to return such writ on the day specified, together with a certificate thereon of its execution.

**1027**. If the matter relates to the making by a corporation of any election to an office which is vacant by reason

of such election not having taken place within the time required, or being or having been declared null, the proceedings are the same as above mentioned; and the writ commands the proper officer, or, in his absence, such person as is appointed by the court or judge, to proceed to such election, at the place and time fixed, and to do every act to be done in order to such election, or shew cause to the contrary. *Ibid.* s. 14, § 2.

**1028**. The person to whom such writ or peremptory writ is addressed cannot, however, proceed to such election without giving public notice thereof in writing, in the French and in the English languages; and such notice must, during at least ten days previous to the day fixed for such election, be posted up at the door of the church of the locality in which the principal office or place of business of such corporation is, and if there is no church, then in one of the most public places in such locality. *Ibid.* s. 14, § 3.

**1029**. Nevertheless, every such election and every act done in order thereto is void, unless as great a number of voters are present and vote thereat as would have been required if the election had taken place at the usual time and under ordinary circumstances. *Ibid.* § 5.

**1030**. The peremptory writ is served in the same manner as writs in error or in appeal.

41 Victoria, cap. 14 (*Que.*):

An act to provide for the issue of the Writ of Injunction in certain cases, and to regulate the procedure in relation thereto.

*(Assented to 9th March, 1878.)*

Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. The Superior Court, in term, or any judge thereof, in vacation or during term, may grant a writ of injunction, ordering the suspension of any act, proceeding, operation, work of construction or demolition, according to the circumstances, in any of the cases following:

(1.) Whenever any corporation, unlawfully and without having fulfilled the formalities set forth and prescribed by law or the act of incorporation thereof, takes possession, or on its own behalf causes possession to be taken, of any land the property of other persons, or makes or causes to be made on any land the property of other persons, excavations or works of demolition or construction ; or whenever such corporation acts or takes any proceeding, beyond its power, or without having fulfilled the formalities prescribed by law, or the act of incorporation thereof ;

(2.) Whenever any person, who has not acquired the possession of one year, and who has no valid title to the property, causes work to be carried on, upon any land whereof another is proprietor through a valid title, and of which he is in lawful possession ;

(3.) Whenever any person does anything in breach of any written contract or written agreement ;

(4.) To prevent the transfer of shares in any corporation or company, when such shares belong to minors, interdicted persons, married women not separated as to property, or unauthorized, or persons legally incapacitated, or when the ownership of such share is in dispute, until the superior court or a judge thereof shall have adjudicated on the right of property in such shares or stock, or shall have granted permission for the transfer of such shares ;

(5.) To prevent one or more members of a partnership firm, either during the existence of the partnership or after its dissolution, from doing acts inconsistent with the terms of the partnership agreement, or with the duties of a partner. And this provision shall apply to persons being or holding themselves out as being representatives of a deceased partner ;

(6.) To prevent any person or corporation from trespassing on the property of the crown, or from destroying, cutting, or removing any property belonging to the crown or in which the crown has any right or interest.*

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* 1. An injunction issued at the instance of a contractor against the Commissioner of Public Works of this Province and the Government Engineer to restrain them from resuming possession of a public work which the contractor was constructing, was improperly allowed, it appearing that the Government acted under the Quebec Statute, 32 Vict. c. 15, and also that the terms of the contract permitted the Government to cancel it if the work was not duly prosecuted. *Joly et al. & Macdonald*, 2 Legal News, 2, Q. B. 1878.

2. A party suffering from an unjust expropriation by a railway company may demand a writ of injunction to prevent the company from exercising its right of expropriation and possession until the amount of indemnity be determined. *Bourgoin* v. *The Montreal N. C. Ry. Co.*, 19 L. C. J. 57, Q. B. 1875. *Vide Quebec Railway Act.*

2. The application for the writ of injunction shall be made by petition, supported by one or more affidavits setting forth the facts of the case, and accompanied by such documentary evidence as may be necessary to establish the petitioner's right to the satisfaction of the court or of a judge thereof, and the proceedings thereon shall be in conformity with articles 998 to 1006 inclusively, and with article 1023 of the Code of Civil Procedure.

3. Except in cases of urgent necessity, the court or a judge thereof may, in their discretion, order that notice of the presentation of such petition be served upon the adverse party, in the time and manner the said court or judge shall see fit to order.*

4. Nevertheless the writ of injunction shall not issue, unless the person applying therefor first gives good and sufficient security, in the manner prescribed by and to the satisfaction of the court or a judge thereof, in the sum of six hundred dollars, or any other higher sum fixed by the said court or judge, for the costs and damages, which the defendant, or the person against whom the writ of injunction is directed, may suffer by reason of the issue thereof.

Upon the return of the writ, the court or a judge thereof may order that such security shall be increased to such amount as it may be deemed expedient.

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3. A writ of injunction is synonymous with a writ of mandamus, and subject to the same procedure. *Bourgoin* v. *The Montreal N. C. Ry. Co.*, 19 L. C. J. 57, Q. B. 1875.

4. The courts and judges here have the power which existed in England and the United States under the name of injunction, and in France under another name, to restrain parties to a suit from doing anything that might change their respective positions from what it was at the beginning of the suit. *Carter* v. *Breakey et al.*, 2 Q. L. R. 232, S. C. 1876.

5. An injunction will lie under the Merchant Shipping Act of 1854 (Imp.), s. 65, with regard to a ship about to be built enregistered under the provisions of the Canada Statute 36 Vict. c. 128, s. 36. *Dinning et al.* v. *Wurtele et al.*, 1 Legal News 33, Q. B. 1877.

*1. In the affidavit in support of a demand for a writ of injunction, it is not sufficient to allege grounds of belief and information merely. *Kane* v. *Montreal Telegraph Co.*, 20 L. C. J. 120, S. C. 1876.

2. Notice should be given of an application for a writ of injunction. *Kane* v. *Montreal Telegraph Co.*, 20 L. C. J. 120, S. C. 1876.

3. The petitioner at whose instance an injunction was ordered to issue may be allowed to add to the conclusion of his prayer, "That he be reinstated in possession" if the other party has disregarded the writ. *Macdonald* v. *Joly et al.* 1 Legal News, 460, S. C. 1878.

**5.** The writ of injunction enjoins the adverse party to appear before the court or a judge thereof to answer the petition, and to suspend all acts, proceedings, operations or works respecting the matters in dispute under pain of all legal penalties.

**6.** The writ of injunction is served in the same manner as any other writ of summons; but, if found necessary, the court or judge may prescribe any other mode of service.

**7.** Proceedings commenced before the court in term may be continued before a judge in vacation, or even during term, and, in like manner, proceedings commenced before a judge in vacation may be continued before the court in term, or before any judge in chambers even during term.*

(2.) In order to avoid doubt it is hereby declared and enacted that in any proceeding commenced under this Act, any judge of the Superior Court shall, at every stage of such proceeding, have the same power to act therein as the judge before whom such proceeding was commenced.

**8.** An injunction may, in any of the cases mentioned in section one of this Act, be granted incidentally upon petition, without the formality of a writ, in a cause pending before the Superior Court, either by the Court or by a judge in chambers, even during term, upon security being given as hereinbefore provided for; and the procedure shall be thereafter conducted to judgment on the incidental proceeding in the same manner as on a writ of injunction.

(2.) And in any proceeding instituted under this Act, any additional injunction that may be deemed necessary by the court or a judge thereof may, upon petition, after due notice, be granted by an interlocutory order, for such length of time and upon such conditions, as to security or otherwise, as the court or judge may deem reasonable. And such additional injunction, as well as the injunctions contained in the original writ, may, from time to time, be suspended as the court or judge may deem necessary, and for such period and upon such conditions as to security or otherwise as the court or judge may deem reasonable, and may afterwards from time to time be renewed upon such conditions, as to security and otherwise, as by the court or judge may be deemed right.

**9.** Any judgment, rendered by a judge out of court under this Act, shall be subject to review and appeal in the same manner and to the

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* 1. Where an injunction has been granted and the parties have joined issue on the merits, it is too late to move to quash. *Bourgoin* v. *The Montreal N. C. Ry. Co.*, 19 L. C. J. 57, Q. B. 1875.

same extent that it would have been subject to appeal or review, if rendered by the court in term.

**10.** Any final judgment under this Act taken into review or appeal and any interlocutory or provisional order under this Act from which an appeal shall be allowed by the Court of Queen's Bench, shall be executed and in force provisionally, notwithstanding and without prejudice to such appeal or review; but the Superior Court, in review, or the Court of Appeals, as the case may be, may in their discretion provisionally suspend the injunction.*

**11.** The judgment, if in favour of the petitioner, pronounces the injunctions required, adjudicates as to costs, and must be served upon the adverse party.

**12.** If a party against whom the injunction is directed, violate or refuse to obey the injunctions laid upon him, either by the writ or by any interlocutory or final judgment, the court or a judge thereof may cause to be destroyed, whatever may have done in contravention to the injunction, if it be practicable; also, the court or judge thereof may punish the party contravening by an imprisonment not exceeding thirty days, but which may be repeatedly inflicted until the party obeys the mandate of the court or judge.†

(2.) If the party violating the injunction be acompany or corporation, such company or corporation may be condemned to pay a fine not exceeding two thousand dollars, but which may be repeatedly inflicted until they obey the mandate of the court or judge.

(3.) The party aggrieved by the disobedience of such person, company or corporation may also recover from the party or parties disobeying, such damages as he may show that he has sustained.

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* 1. A party seeking relief from an injunction, and whose motion to dissolve it has been rejected by the lower courts, may, in the discretion of the court, be permitted to appeal, though he appears to have disregarded the injunction, and to be in contempt of court. *Joly et al. & Macdonald*, 1 Legal News, 448, Q. B. 1878.

2. M. contractor with the Quebec Government for building a railway, learning that the Government, under 32 *Vict., c.* 15, *ss.* 179, 180 (*Que.*), was about to take possession of the road which was not completed, obtained a writ of injunction to restrain the Government from interfering. The latter proceeded to take possession, and a motion to dissolve the injunction being rejected, obtained leave to appeal to the Q. B., and an order to suspend the injunction pending the appeal was granted, although the writ had been disregarded. *Joly et al. & Macdonald*, 1 Legal News, 461, Q. B. 1878.

† 1. The court will not consider an application to revise an order for injunction which *prima facie* appears to be legal and valid, while the applicants remain in contempt. *Macdonald* v. *Joly et al.* 1 Legal News, 446 S. C. 1878.

13. All fines imposed under and in virtue of the provisions of this Act shall be the property of the Crown, and shall form part of the consolidated revenue fund of the Province.

14. This Act shall come into force on the day of the sanction thereof; but it shall not affect any pending cases.

## SECTION IV.

## OF PROHIBITIONS.

**1031.** Writs of prohibition are addressed to courts of inferior jurisdiction whenever they exceed their jurisdiction. They are applied for, obtained and executed in the same manner as writs of mandamus, and with the same formalities. *C. S. L. C. c.* 89, *ss.* 1, 2. *Wharton L. Lex.* 832.

1. A demand for a writ of prohibition will be rejected if the petition does not include a want of jurisdiction in the court below, and such a writ can only be addressed to a court and not to a municipal corporation. *Blain* v. *The Corporation of Granby*, 5 R. L. 188, S. C. R. 1873.

2. A writ of prohibition can only issue for excess of jurisdiction, and can only be addressed to an inferior court. *Beaudry & The Recorder's Court of the City of Montreal & Sexton*, 5 R. L. 223, S. C. 1873.

3. A writ of prohibition cannot issue to commissioners appointed by the corporation for the expropriation of property, at least before their report has come before the court for adjudication thereon. *Drummond* v. *Comte et al.* 1 L. C. L. J. 100, S. C. 1866.

4. But a writ of prohibition may be granted by a judge to prevent commissioners in expropriation from proceeding with an unreasonable or excessive award. *The Mayor et al. & Benny et al.* 16 L. C. J. 1, S. C. 1872.

5. A writ of prohibition against a corporation must be addressed to the corporation itself and not to the officers composing it, or each of them. *Landry* v. *Migneault et al.* 13 L. C. J. 325, S. C. R. 1869 & 15 L. C. J. 65, Q. B. 1870.

6. The petitioner applied for a writ of prohibition, ordering a commissioner's court to suspend proceedings upon a judgment obtained against the petitioner, alleging a want of jurisdiction in the court—*Held*, that he must be granted it as of right in such case. *Burk exp.*, 7 L. C. R. 403, S. C. 1857.

7. Writs of prohibition may issue to prevent the execution of a judgment of justices of the peace imposing a fine of $50 for selling liquor without a license. *Duval* v. *Hébert*, 17 L. C. J. 229, Q. B. 1870.

8. On an application for a writ of prohibition to restrain a municipal corporation from proceeding to execute the property of a corporator under the summary procedure allowed for the collection of taxes —*Held*, reversing the judgment of the court below, that a writ of prohibition does not lie where no excess of jurisdiction appears on the face of the proceedings. *The Mayor of Sorel & Armstrong*, 20 L. C. J. 171, Q. B. 1875.

9. Proceedings had against a member of the bar, before the council of the bar, are legal proceedings, and subject to a writ of prohibition. *O'Farrell & The Council of the Bar for the District of Quebec*, 1 Q. L. R. 154, Q. B., & 225, S. C. 1875. 1 Legal News 32.

10. It will not be granted against a municipal corporation for the purpose of suspending proceedings on a seizure issued by the mayor for taxes. *Blain & The Corporation of Granby*, 5 R. L. 180, S. C. R. 1873.

11. The judge whose decision is attacked may appear upon the summons which has been served upon him. *O'Farrell & Doucet*, 4 Q. L. R. 207, Q. B. 1878.

12. The court will allow the judge to plead independently of the other defendants to the petition for a writ of prohibition. *Reg. ex rel. O'Farrell & Brassard et al.* 4 Q. L. R. 62, S. C. 1875.

13. A party who has accepted the jurisdiction of a magistrate by appearing before him and pleading to the merits, cannot obtain a writ of Prohibition founded on a want of jurisdiction. *Simard & The Corporation Co. Montmorency et al.* 8 R. L. 546, Q. B. 1878.

14. The Superior Court and its judges have exclusive controlling and reforming power over all inferior courts and all corporations.

No proceedings can be inaugurated for controlling or reforming the acts of an inferior court or corporation without the authorization of the Superior Court or of one of its judges.

The Court of Queen's Bench has no power to authorize the issue of a writ of summons out of the Superior Court in any demand for prohibition.

The power vested by law in a judge of the Superior Court in Chambers to authorize the issuing of such writ is a power inherent in the judge as such, and the Court of Queen's Bench is no where vested with the power to allow such a writ, or with any power of review

over a judge in chambers. *Reg. ex rel. O'Farrell* v. *Brassard et al.*, 3 Q. L. R. 33, S. C. R. 1876.

See 35 V. c. 6, s. 21 (*Que.*) under Art. 998.

### SECTION V.

### GENERAL PROVISIONS.

**1032**. In any case wherein the rights of a municipal corporation are involved, no elector entitled to vote is incompetent, as such, to give evidence. *C. S. L. C. c.* 88, *s.* 15, *Ibid.*

**1033**. An appeal from any final judgment rendered under the provisions contained in this chapter lies to the Court of Queen's Bench, except in matters relating to municipal corporations and offices; provided the writ of appeal be issued within forty days from the rendering of the judgment appealed from. *Ibid. s.* 17.

1. There is no appeal from judgments of the Circuit Court in municipal matters, under article 1077 of the municipal code. *The Corporation of the County of Drummond* v. *The Corporation of St. Guillaume*, 4 R. L. 706, S. C. 1873; *Danjon & Marquis*, 3 Q. L. R. 335, Q. B. 1877.

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## CHAPTER ELEVENTH.

### OF THE ANNULLING OF LETTERS PATENT.

**1034**. Any letters patent granted by the Crown may be declared null and be repealed by the Superior Court:

1. Where such letters were obtained by means of some fraudulent suggestion, or where some material fact has been concealed by the patentee, or with his knowledge or consent;

2. When they have been granted by mistake or in ignorance of some material fact;

3. When the patentee, or those claiming under him, have done or omitted to do some act, in violation of the terms and conditions upon which such letters patent were granted, or for any other reason have forfeited their rights and interests in such letters patent. *C. S. L. C. c.* 89, *s.* 5.

**1035**. All demands for annulling letters patent may be made by suits in the ordinary form, or by *scire facias*, upon information brought by Her Majesty's attorney-general, or solicitor-general, or any other officer duly authorized for that purpose. *Ibid.*

1. A writ of *scire facias* is not necessary to obtain the revocation of letters patent, but—*Held*, that in the present case the Crown, represented by the officers of the ordnance, could waive the prerogative of such writ and claim, by the usual and ordinary process, the cancellation of letters patent making a grant or concession of wild lands, on which the respondents had based their action. *The Principal Officers of Artillery & Taylor et al.* 1 L. C. R. 481, Q. B. 1851.

2. Writs of *scire facias* to cancel letters patent can only issue at the suit of the Crown. *Paradis exp.* 7 L. C. J. 130, S. C. R. 1854.

3. And cannot be brought by a private individual. *Pacaud & Rickaby*, 1 Q. L. R. 245, Q. B. 1875.

4. The Crown alone has the right of demanding that letters patent granted under the great seal of the Province be annulled. *The Union Navigation Company & Rascony*, 20 L. C. J. 306, S. C. 1876.

**1036**. The information is served upon the person who holds or relies upon such letters patent, and is heard, tried and determined in the same manner as ordinary suits. *Ibid.*, *s.* 2.

**1037**. An appeal lies from the final judgment rendered upon such information, provided the writ of appeal issues within forty days from the rendering of the judgment. *Ibid.*, *s.* 6.

**1038**. *In the case of letters patent granting lands, the suit may be brought before the Superior Court by any in-*

*terested party, with the observance of the formalities of ordinary suits, as provided in chapter twenty-two of the Consolidated Statutes of Canada. C. S. C. c.* 22, *s.* 15.

**1039**. *Letters patent granting lands may also be cancelled in accordance with the provisions contained in the twenty-second chapter of the Consolidated Statutes of Canada.*

32 Vict., c. 11 (*Que.*):
33. Articles 1038 and 1039 are hereby repealed.

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## CHAPTER TWELFTH.

### OF HABEAS CORPUS AD SUBJICIENDUM IN CIVIL MATTERS.

**1040**. Any person who is confined or restrained of his liberty, otherwise than for some criminal or supposed criminal matter, or any other person on his behalf, may apply to any one of the judges of the Court of Queen's Bench, or of the Superior Court for a writ addressed to the person under whose custody he is so confined or restrained, ordering the latter person to bring him before the judge who granted the writ, or before any other judge of the same court, together with the cause of his detention, in order to examine whether such detention is justifiable. *C. S. L. C. c.* 65, *ss.* 20–25.

1. The object of *habeas corpus* is to see that no one is illegally deprived of his liberty, and not to determine the respective rights of parties over one another, and cannot therefore be used by a father to enforce his right to the custody of his child. *Stoppelben* v. *Hull*, 2 Q. L. R. 255, S. C. 1876.

2. Judgment ordering the imprisonment of a defendant until payment of debt, interest and costs, and also the costs of the rule, will not justify a commitment which includes also sheriff's costs. *Martin exp.*, 22 L. C. J. 88, Q. B. C. 1877.

3. Writs of *habeas corpus* may issue in matters of commitment by either house of parliament. *Lavoie exp.*, 5 L. C. R. 99, S. C 1855. See *Monk exp.*, S. R. 120, K. B. 1817.

4. A person who has been discharged upon a *habeas corpus* cannot be arrested a second time when no new or other cause of arrest is disclosed, though it appear that the warrant was quashed in Chambers by a judge on grounds which were subsequently held by the Court to be insufficient. *Duvernay exp., and Coté exp.*, 19 L. C. J. 248, Q. B. 1875; *Prince exp.*, 15 L. C. J. 331, Q. B. 1871.

5. A discharge may be granted upon a petition for a writ of *habeas corpus* in a case in which the defendant is detained in gaol under civil process. *Fourquin et al. exp.*, 16 L. C. J. 103, Q. B. 1871.

6. The writ will be granted when a person is confined for *rebellion à justice*. *Crébassa exp.*, 15 L. C. J. 331, Q. B. 1871.

7. A writ of *habeas corpus* will not be granted to liberate a prisoner charged with process in a civil suit, even though the writ of execution in virtue of which he was arrested appear to be irregular, if it is within the scope of the jurisdiction of the court, from which it issued. *Healy exp.*, 22 L. C. J. 138; 1 Legal News, 103, Q. B. C. 1878; *Thompson exp.*, 22 L. C. J. 89; *Ibid.* 102, Q. B. C. 1878; *Coulter exp.*, 22 L. C. J. 85, Q. B. 1877; *Donahue exp.* 9 L. C. R. 285, S. C.

8. Where a person is detained under legal process in a civil suit under C. C. P. 782, he cannot obtain the benefit of a *habeas corpus* if it involves a review of the judgment. *Saunderson exp.*, 8 R. L. 108, Q. B. C. 1876.

9. The petitioner may however show there is no judgment ordering his imprisonment, and if he does so, he will be liberated. *Cutler exp.*, 22 L. C. J. 86, Q. B. 1877.

See art. 1052 *post*.

**1041**. The application must be supported by an affidavit, shewing that there are probable and reasonable grounds for the application. *Ibid.*

1. The petitioner was imprisoned for having failed, as guardian, to produce goods seized, and he asked for *habeas corpus* in order to be liberated as he was a minor.

The judge refused the application as there was no notice to the party interested in maintaining the *contrainte;* and as the affidavit, which contained a general reference only to the allegations of the petition,

was insufficient, inasmuch as it did not disclose any reasonable or probable ground for the issue of the writ.

The petitioner was allowed to withdraw his application, and it was intimated that if it were renewed, which might perhaps not be necessary in the interests of the petitioner in view of Art. 972, C. C. P., the applicant should be prepared to meet the difficulty arising from C. S. L. C. c. 95, s. 25. *Gauverau Exp.* 1 Legal News, 53, Q. B. C. 1878.

**1042**. The writ issues in the name of the sovereign, is sealed with the seal of the court to which the judge belongs, and is attested in the same manner as any other writ. It is returnable without delay, unless a term of the court is so near that the writ cannot be executed before such term, in which case the judge may order the writ to be returned during term; and if the end of the term be so near that the writ cannot properly be executed during the term it may be made returnable during the following vacation. *Ibid. and s.* 21, § 2.

**1043**. The writ is served personally, or at the place where the person is confined or restrained, speaking to a domestic servant or an agent of the person to whom it is addressed, and leaving the writ itself; and the return of service is made upon a certified copy. *Ibid. s.* 21.

**1044**. In default of compliance with the writ of *habeas corpus*, the person upon whom it was served is held to be guilty of a contempt of the court under whose seal the writ issued, and the judge may grant a rule under the seal of the court, returnable before such judge or before the court, for his imprisonment. *Ibid.*

**1045**. Upon the return of the writ of *habeas corpus*, or of the rule mentioned in article 1044, the judge proceeds, as soon as he conveniently can, to examine, by means of depositions under oath or affirmation, into the truth of the facts alleged, and decides accordingly. *Ibid. s.* 22.

1. Where a commitment is illegal on its face, the court will not wait until the committing magistrate has been notified to produce the papers, but will order the writ to issue *instanter*. *Mesnier Exp.* 1 L. C. L. J. 71, Q. B. 1865.

**1046**. If the judge before whom the writ is returned in vacation is in doubt as to the truth of the facts alleged in the return, he may admit to bail the person so confined or restrained, upon his entering into recognizance with one or more sureties, or, in the case of infancy or coverture, upon security being given by recognizances, in a reasonable sum for his appearance before the court on a fixed day during the next term, and from day to day, to abide such order as the court may make. *Ibid.* s. 22, § 2.

**1047**. The writ of *habeas corpus* is thereupon transmitted to the court, together with the recognizance and all the papers connected with the application, and the court thereupon makes such orders as to justice may appertain. *Ibid.* § 3.

**1048**. The court may direct one or more written issues for the trial of the facts alleged in the return, and such issues are tried [either by affidavit or by the examination of witnesses before the court or judges, as such court or judge may think proper.] *Ibid.*

**1049**. The same proceedings are had in term in the Court of Queen's Bench and in the Superior Court, respectively, for controverting the truth of the return. *Ibid.* s. 23.

**1050**. The court or the judge may pronounce upon all costs incurred in the issuing, contestation or execution of the writ of *habeas corpus*. *Ibid.* s. 24.

**1051**. Whenever a writ of *habeas corpus* has been once refused by any judge, the application for it cannot be re-

newed before him or before any other judge unless new facts are alleged; but the application may be renewed before the Court of Queen's Bench at its next sitting in appeal at the place where appeals are brought from the district in which the application was made. *Ibid. s.* 28.

1. Where an application has been refused by a judge in Chambers, judicial comity will prevent another judge from entertaining it. *Donahue Exp.* 9 L. C. R. 285, S. C.

**1052.** The provisions of this chapter cannot be extended to the discharge of any person imprisoned for debt or under any action or process in civil matters. *Ibid. s.* 25.

1. A writ will issue to liberate a person charged with process in a civil suit issued out of a court of inferior jurisdiction, when it appears on the face of the proceedings that they were *ultra vires*. *Lebœuf* v. *Viau & Viau*, 18 L. C. J. 214 S. C. 1874.

See cases under *Art* 1040, *supra*.

# BOOK THIRD.

## OF THE CIRCUIT COURT

## TITLE FIRST.

### POWERS AND JURISDICTION OF THE COURT.

**1053.** The Circuit Court has ultimate jurisdiction to the exclusion of the Superior Court:

1. In all suits wherein the amount or the value of the thing demanded is less than one hundred dollars, saving the exceptions contained in the following article, and such cases as fall exclusively within the jurisdiction of the court of Vice-Admiralty;

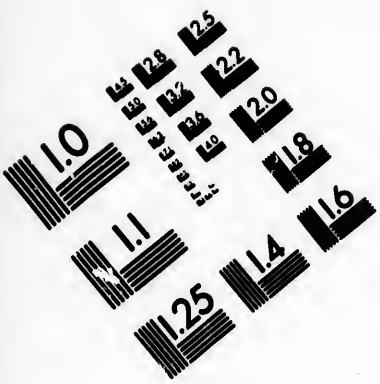
2. In all suits for school-taxes or school-fees, and all suits concerning assessments for the building or repairing of churches, parsonages and church-yards, whatever may be the amount of such suits.

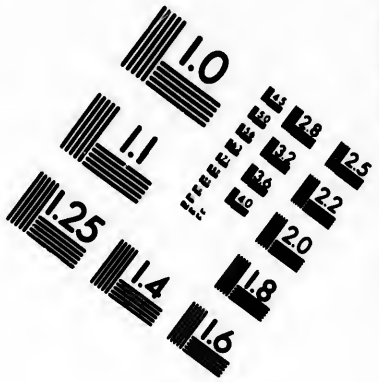
1. *Held*, on an *exception déclinatoire*, that the Superior Court has no jurisdiction to hear suits for the recovery of school taxes. *The School Commissioners of Hochelaga* v. *Hogan et al.* 20 L. C. J. 298, S. C. 1876.

**1054.** The Circuit Court has original jurisdiction, to the exclusion of the Superior Court, but subject to appeal:

1. In all suits in which the sum or the value of the thing demanded amounts to or exceeds one hundred dollars, but does not exceed two hundred dollars, saving the exception contained in the second paragraph of the preceding article;

2. In all suits for fees of office, duties, rents, revenues, or

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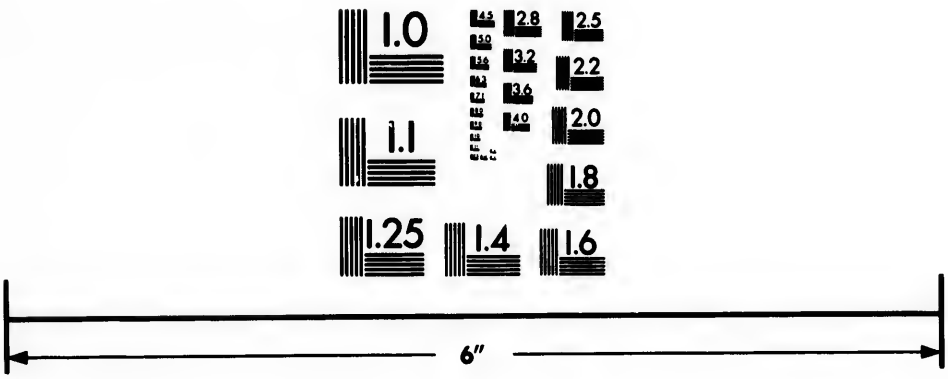



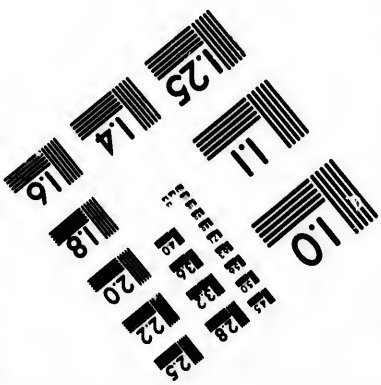


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sums of money payable to the crown, or which relate to any title to lands or tenements, to annual rents, or such like matters whereby rights in future may be bound, even though the amount claimed be under one hundred dollars. *C. S. L. C. c.* 77. *s.* 39, *c.* 79 *ss.* 1-2:—*c.* 15, *s.* 123; *Grange* v. *Dupont, Appeal, 8th Sept.* 1865.

34 Vict. c. 4, (Que.):

9. Article 1054 is hereby amended by inserting at the beginning thereof the words "Except in the Districts of Quebec and Montreal."

35 Vict. c. 6 (Que.):

31. Notwithstanding the 9th section of the act of this Province—34th Victoria, chapter 4, the Circuit Courts within the Districts of Quebec and Montreal, other than those sitting in the Cities of Quebec and Montreal, have had, since the enactment of the said 9th section, and shall continue to have the same jurisdiction in appealable suits, as they had before the said 9th section was enacted.

See 31 Vict. c. 30, s. 4 (*Que*)., as to the jurisdiction in actions for the recovery of seigniorial rents; and 31 Vict. c. 11 (*Que.*) as to proceedings for the recovery of crown lands after the revocation or cancellation of the sale.

1. Evocation of causes from the Circuit Court to the Superior Court can only be had in the cases mentioned in articles 1054 to 1058 of the Code of Procedure. *The Corporation of the County of Drummond* v. *The Corporation of the Parish of St. Guillaume*, 4 R. L. 706, S. C. 1873.

2. The Circuit Court has no jurisdiction over possessory actions. *McKay* v. *Cook*, 13 L. C. J. 321, Q. B. 1869.

3. The Circuit Court has jurisdiction conformably, with C. S. L. C. cap. 24, sec. 49, ss. 5, in an action for the removal of encroachments. *La Corporation de St. Martin & La Compagnie du Chemin de Peage de l'Isle Jésus*, 15 L. C. J. 106, Q. B. 1870.

4. An action for less than $100 asking that the defendant, who is only held hypothecarily for the payment of the debt, be condemned to pay the amount, unless he prefers to abandon the property, etc., is a demand within the jurisdiction of the Circuit Court. *Rodier* v. *Hébert*, 15 L. C. J. 269, S. C. Reversed in review: 16 L. C. J. 41, S. C. R. 1871.

5. The Circuit Court has sole jurisdiction in an action for the resiliation of a deed of sale of immoveables for non-payment of the price,

when the value of the immoveables does not exceed $200. *Gaboury* v. *Leclaire*, 4 R. L. 74, C. C. 1872.

6. The Circuit Court has no jurisdiction in an action for the resiliation of a lease where the annual rent is upwards of $200, although the amount demanded be less. *Dorion & Poulin*, 4 R. L. 566, C. C. 1872.

7. The Circuit Court cannot take cognisance of the validity of a municipal valuation roll. *Laurent* v. *The Corporation of the Village of St. Jean Baptiste*, 17 L. C. J. 192, S. C. 1873.

8. Where an action in demolition of a servitude was brought before the Circuit Court—*Held*, that the value of the servitude must be alleged and proved to be under $200, in order to establish the jurisdiction of the court. *Dorval* v. *Chevalier*, 14 L. C. J. 263, S. C. R. 1870.

9. A hypothecary action for $36 is not triable in the Circuit Court. *Masse* v. *Coté*, 3 Q. L. R. 322, C. C. 1877.

**1055.** [The Circuit Court may take cognizance, upon evocation, of any suit brought before the Commissioners' Court for the summary trial of small causes, in the cases secondly enumerated in the preceding article.] *C. S. L. C.* c. 94, *ss.* 29-30.

1. In a non-appealable case, returnable out of term, the defendant may evoke it at any time before plaintiff has obtained *acte* of foreclosure. *DeBeaujeu et vir* v. *McNamee*, 17 L. C. J. 50, S. C. 1872.

**1056.** The Circuit Court has also concurrent jurisdiction with the Superior Court, by means of *certiorari*, over judgments rendered, within the limits of the district or circuit for which it is held, by the Commissioners' Court mentioned in the preceding article, or by justices of the peace, wherever a *certiorari* lies. *C. S. L. C.* c. 79, *s.* 3, § 2.

1. The Circuit Court has no jurisdiction by means of *certiorari* over judgments other than those rendered by Commissioners' Courts or by justices of the peace. *Exp. Long* v. *Blanchard & The Magistrates' Court of Shefford*, 21 L. C. J. 331, C. C. 1877, 1 Legal News 43.

**1057.** It has also an appellate jurisdiction over judgments rendered by a Commissioners' Court or by justices of the peace for taxes, assessments or penalties, imposed under the

Municipal and Road Act of Lower Canada. *C. S. L. C. c.* 24, *s.* 67.

1. Since the coming into force of the C. C. P. there is no right of appeal from decisions of justices of the peace under the Agricultural Act. *Duffel* v. *Rochon*, 2 R. L. 572, C. C. 1870.

2. The Circuit Court, sitting as a Court of Appeal, under the Municipal Act of 1860, has the power to quash a municipal by-law and a judgment of an inferior tribunal, and that even when the nullity of the by-law has not been invoked. *Daoust* v. *Aumais*, 7 L. C. J. 110, C. C. 1861.

3. An action was brought against the defendant for the amount of assessments made upon his property for the construction of a new church and sacristy, and the defendant pleaded causes or grounds of nullity in the assessment—*Held*, that the court had no jurisdiction to take cognisance of such causes or grounds of nullity, which should form the subject of appeal from the decision of the commissioners, or of *certiorari*. *Les Syndics de la Paroisse de St. Norbert d'Arthabaska* v. *Pacaud*, 6 L. C. J. 290, S. C. 1862.

4. An appeal does not lie to the Circuit Court from the decision of a County Council which has sat in appeal on a valuation roll. *Meunier* v. *The Corporation of the County of Lévis et al.* 3 Q. L. R. 345, C. C. 1877.

**1058.** Whenever any suit or action relates to fees of office, rights, rents, revenues, sums of money payable to the crown,

Titles to lands or tenements,

Annual rents or other matters by which rights in future may be affected,

The defendant may, before pleading to the merits, evoke the suit or action, and require it to be removed to the Superior Court in the same district for hearing and judgment. *C. S. L. C. c.* 83, *s.* 178.

The declaration of evocation is filed in the record which is thereupon removed to the office of the prothonotary, and the Superior Court determines in a summary way whether the evocation is well founded or not; in the former case the court tries the cause and renders judgment therein, and in the latter case the cause is sent back to the Circuit Court.

If, in any cause susceptible of being evoked, the defendant in his defence disputes or calls in question the plaintiff's title to any immoveable, in such a manner as might impair or injuriously affect the plaintiff's rights in future, the latter may evoke the suit, and proceedings are then had as in cases of evocation by the defendant.

35 Vict., c. 6 *(Que.)*:

25. All appealable suits begun in the Circuit Court at the City of Quebec or Montreal, before the coming into force of the Act of this Province, 34th Victoria, c. 4, in which judgment has not been rendered, shall cease to be within the jurisdiction of the Circuit Court and thereafter all proceedings and judgments therein shall be had and rendered in the Superior Court, and the books, muniments and records of the Circuit Court relating to all such suits, shall, immediately upon the coming into force of this Act, appertain to the said Superior Court and be transmitted thereto.

**1059.** The rules contained in the first part of this code, and in the first book of the second part of this code, namely:—in the preliminary provisions;—in the third, fourth, fifth, sixth, seventh and eighth chapters of title first;—in the first, second and third chapters of title second;—in the first chapter, and in sections 1, 3, 4, 6, 7, and §§ 1, 12 of section 5, of the second chapter of title third;—and in the second book, in the second, third, fourth and fifth chapters of title first,—apply in like manner to the Circuit Court, except as regards trial by jury and such rules as are inconsistent with the provisions of the present book, and such as can only apply to the Superior Court.

All the powers conferred upon the Superior Court, or upon the judges and officers thereof, respectively, relatively to matters within their jurisdiction, are also conferred upon the Circuit Court, within the limits of its cognizance, and upon the judges who hold such court and upon the officers of the said court respectively, with regard to the same matters and the other matters which form the subject of the present book, or with regard to any other matter concerning

the manner of conducting suits, actions or proceedings in the Circuit Court.

Whatever may or must be done by the prothonotary as regards proceedings in the Superior Court, may or must be done in like manner by the Clerk of the Circuit Court, as regards proceedings before the latter court, except, however, the judicial powers conferred upon the prothonotary in the absence of a judge.

The clerk of the Circuit Court has the power of administering oaths whenever they are required by law or by rules of practice.

*C. S. L. C. c.* 79, *ss.* 3, 4.

An *alias* writ of *fi. fa. de terris*, in a case in which judgment was rendered in the C. C., cannot legally be issued and signed by the prothonotary of the S. C. *Macdonald et al.* v. *Prémont et ux. & Lague et al.*, 18 L. C. J. 295, S. C. R. 1874.

**1060**. All commissioners and other persons authorized to receive affidavits to be used in the Superior Court have also like powers with regard to the Circuit Court. *Ibid. s.* 26.

**1061**. The Circuit Court for any district is held at the same place as the Superior Court, and its jurisdiction extends over the whole district, and it is designated by the name of such district.

It cannot, however, grant more costs against a defendant than he would have to pay if he had been sued before the Circuit Court in the county in which he resides, and in which the cause of action originated. *Ibid. s.* 5, *c.* 83, *s.* 152.

**1062**. It may also, upon proclamation of the governor, be held in any other county than that in which the Superior Court for the district is held, excepting the counties of Hochelaga, Jacques Cartier, Laval, St. Maurice, Quebec and *Wolfe*; or in more than one place in certain counties, as provided in chapter seventy-nine of the Consolidated Statutes for Lower Canada.

The court is then designated as "the Circuit Court in and for the county of " (*naming the county*) and if there are more than one in the same county, the words at (*naming the place of sitting*) are added to such designation.

*C. S. L. C. c.* 79, *ss.* 6, 7, 9.

32 Vict. c. 21 (*Que*) :

1. Sub-section two of section six, and the section seven of chapter seventy-nine of the Consolidated Statutes for Lower Canada, and article 1062 of the Code of Civil Procedure of Lower Canada, are amended by striking out therefrom the word "Wolfe."

35 Vict. c. 6 (*Que*) :

23. The Lieutenant-Governor may, at any time, by proclamation, abolish the holding in any county, or at any place in a county, of a Circuit Court, theretofore authorized by proclamation in accordance with article 1062 ; and thereupon, the books, papers and records of the Court so abolished, shall be transmitted to such other Circuit Court as the Lieutenant-Governor shall name in the said proclamation.

**1063**. The Circuit Court for a county has jurisdiction over the whole extent of such county, even when more than one place therein is appointed for its sittings. *Ibid. s.* 11.

**1064**. When it is necessary for the dispatch of business, the Circuit Court at any place must be held by two or more judges of the Superior Court, residing in the same district, simultaneously but in separate apartments. *Ibid. s.* 15.

35 Vict. c. 6 (*Que*) :

27. There shall no longer be terms for the holding of the Circuit Court at the City of Montreal, but every juridical day shall be a day on which the Circuit Court may be held at the said city whenever business shall require it. Nevertheless, the Judge holding the said Court may adjourn the sittings thereof to some future day, and in the interval of such adjournment, the said Court shall not be held.

# TITLE SECOND.

## ORDINARY PROCEDURE.

## CHAPTER FIRST.

### OF SUMMONS.

**1065.** The provisions concerning summonses for the Superior Court apply equally to the Circuit Court, saving the provisions hereinafter contained. *C. S. L. C., c.* 83, *ss.* 42, 169, 170.

FORM No. **35**.

In connection with article 1065.

Lower Canada,
District (*or* Circuit) of } IN THE CIRCUIT COURT.

A. B., of &c. Plaintiff;
and
C. D., of &c. Defendant.

[L. S.] VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith:

To C. D., the defendant above mentioned.

Whereas A. B., the plaintiff aforesaid, demands of you the sum of due by you to him for (*state sufficiently the cause of action*) which said sum you have (as he saith) refused to pay him. (*If the action be to recover a thing wrongfully detained, &c., vary the statement of*

*the cause of action accordingly. If there be a declaration annexed, refer to it; and omitting the words after* "the plaintiff aforesaid," *say*, "hath, by his declaration hereunto annexed, made complaint against you in the manner therein set forth.") And the plaintiff prays judgment accordingly.

You are therefore required to satisfy the demand of the said plaintiff in this cause, with costs, or to appear in person or by your attorney before our said court, at the court house, at in the said circuit, at o'clock in the forenoon (*omit these words if the case be appealable*), on the day of instant (*or* next), to answer the said demand; otherwise judgment may be given against you by default.

In witness whereof, we have caused the seal of our said court to be hereunto affixed, at this day of in the year of our Lord one thousand eight hundred and

E. F.,
Clerk of the said court for the said district (*or* circuit).

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**1066**. The delay upon summons is five intermediate days, when the distance from the defendant's domicile to the place where the court is held does not exceed five leagues, with the ordinary extension when the distance is greater. *Ibid. s.* 170, § 2.

**1067**. When the writ of summons is to be served in another district, it may be addressed to the sheriff or to a bailiff of such other district.

It may also be so addressed when it is to be served in more than one district.

In the latter case, as many originals of the writ of summons must be issued as there are districts in which it requires to be served. *Ibid. s.* 170, § 4, *s.* 171.

**1068.** In the case mentioned in article 1067, the writ of summons issuing from the Circuit Court of a district may be served by any bailiff of such district; but he is entitled to no more costs than if the service had been effected by the nearest bailiff to the residence of the defendant thus summoned. *Ibid. s.* 172.

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## CHAPTER SECOND.

### PROVISIONS CONCERNING APPEALABLE CASES.

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#### SECTION I.

#### PROCEEDINGS BEFORE CONTESTATION, OR IN UNCONTESTED SUITS.

**1069.** The provisions respecting appearance and default, election of domicile, judgments by default or upon confession, filing of exhibits and proofs *ex parte*, in the Superior Court, apply also to appealable cases in the Circuit Court. *C. S. L. C. c.* 79, *s.* 27, *c.* 83, s. 42.

#### SECTION II.

#### OF CONTESTATION.

**1070.** The contestation and pleadings in appealable cases in the Circuit Court are subject to the provisions concerning the same matters in the Superior Court, except as regards the delays which are regulated as follows:

The delay for filing preliminary exceptions is four days, and that for answering the same is five days.

The delay for filing any other pleading necessary to complete the issues is five days.

The delay for pleading to the merits is five days from the appearance of the defendant. If no plea be filed within these delays or afterwards within the three days after the service of a demand of plea, the party in default is foreclosed by an act of the clerk of the court without any other proceeding. There is a like delay of five days, on pain of foreclosure, between each subsequent pleading allowed by law, without any demand of plea being necessary. *C. S. L. C. c.* 83, *s.* 180.

### SECTION III.

### OF PROOF AND HEARING.

**1071**. Proofs may be made on every day during a term of the Circuit Court. *Ibid. s.* 181.

**1072**. Contested cases are inscribed at the same time for proof and for hearing on the merits. *Ibid. s.* 182; 25 *V. c.* 10, s. 11.

**1073**. Notice of such inscription must be given to the opposite party, with one intermediate day's delay, if notice is given in term, and four intermediate days if it is given in vacation. *C. L. S. C. c.* 83, *s.* 184.

**1074**. The evidence is given orally, without notes thereof being taken, unless, before the commencement of the proof, the parties, or one of them, files a declaration in writing, requesting that notes of the evidence be taken down in writing, in which case it is taken in the manner provided for proofs before the judge in the Superior Court.

After the witnesses have been examined, the parties are heard upon the merits, unless the court deems it advisable to adjourn the case on account of the absence of some material witness or evidence. *Ibid. s.* 182; 25 V. *c.* 10, *s.* 11.

**1075**. [With the consent of all the parties the proof may take place on any juridical day in or out of term, and may be written down at length, and the clerk of the Circuit Court may receive the depositions and swear the witnesses in the absence of the judge; or it may be taken before an examiner; in each case according to the rules and in the manner prescribed for the Superior Court.]

See 33 V. c. 18, s. 1 (*Que.*), under art. 239 *ante*.

**1076**. No person residing at a distance of more than fifteen leagues from the place where the proof is to be taken, or beyond the limits of the circuit, is bound to attend as a witness, unless he is summoned in conformity with the provisions contained in articles 246 and 247. *C. S. L. C. c.* 83, *s.* 186, *C. S. C. c.* 79, *s.* 12.

**1077**. Whenever a demurrer has been filed, the case may, nevertheless, be inscribed for proof and hearing, reserving the argument upon the law issues until after the proof. *C. S. L. C. c.* 83, *s.* 183.

**1078**. The court may at any time order the proof to be had, or a witness or a party to be examined in another circuit, and may order that the record, or a part thereof, be transmitted for that purpose, according to the provisions contained in article 241. *Ibid., s.* 185.

## SECTION IV.

## OF JUDGMENTS.

**1079**. The provisions which relate to judgments and to costs in the Superior Court apply also to judgments rendered in the Circuit Court. *Ibid., s.* 42.

**1080**. Whenever the judge who heard the case is unable, by reason of sickness or other cause, to render judgment in person, he may transmit the draft of the judgment, certified

by himself, to the clerk, who is thereupon bound to record the same and to read it in open court on the next juridical day in term; and the judgment has then the same force and effect as if it had been pronounced by the judge on the day on which it was thus read. *C. S. L. C. c.* 79, *s.* 16.

See 38 Vict. c. 10 (*Que.*), *ante*, under art. 409.

## SECTION V.

## OF THE EXECUTION OF JUDGMENTS.

**1081.** [Writs of execution for the payment of a sum of money issue against the moveable property of the debtor situated either in the district in which the judgment was rendered or in any other district. In the first case it is addressed to a bailiff, *who is bound to elect a domicile for the judgment creditor in the locality within which the seizure is made, and* who is empowered to levy the amount in conformity to the rules prescribed for seizures by the sheriff, without however being entitled to demand or retain any commission on the moneys levied. In the second case the writ may be addressed either to the bailiff in like manner, or to the sheriff of such other district.] *C. S. L. C. c.* 83, *s.* 201; *Ord.* 1667, *tit.* 33, *art.* 4.

See 33 Vict. c. 17, s. 1 (*Que.*), *supra*, art. 48.

35 Vict., c. 6 (*Que.*):

24. Article 1081, is hereby amended by striking out the following words therein: "who is bound to elect a domicile for the judgment creditor, in the locality within which the seizure is made, and"

1. Art. 1081 of the Code of Civil Procedure, concerning elections of domicile by a bailiff seizing, applies only to cases susceptible of appeal. *Legaré & Desroches & Desroches*, 1 R. L. 51, S. C. 1870.

2. The Circuit Court has no power to enforce the execution of a judgment which it has rendered, reversing a judgment of the justices of the peace. *The Corporation of The Town or Bourg of William Henry & Guevremont*, 2 R. L. 44, Q. B. 1868.

**1082**. If it appears by the return to such writ that the debtor has not, in the district in which the judgment was rendered, sufficient moveables and effects to satisfy the judgment, the creditor may obtain another writ to be executed upon any moveable property and effects of the debtor situate in another district, and such writ is addressed to the sheriff or to any bailiff of such district, and executed accordingly and returned to the Circuit Court. *Ibid. ss.* 204-5. *See* 33 *Vict. c.* 17, *s.* 1 (*Que.*), *supra art.* 48.

**1083**. All oppositions to an execution against moveable property, whatever may be the amount or the value of the thing claimed, are within the jurisdiction of the court which issued the writ. *Ibid. s.* 208.

**1084**. An order to stay execution in conseqence of an opposition to the seizure and sale, may be granted by the judge, either within or beyond the limits of the circuit, or by the clerk, and for that purpose the judge and the clerk are empowered to administer the necessary oath, and the bailiff, on being notified, by the delivery to him of a copy of the opposition and of the order, is bound to return forthwith the writ and his proceedings thereon to the court from which such writ issued. *Ibid.*

**1085**. [In default of moveable property and effects, the judgment may be executed upon such immoveables of the debtor as are within the limits of the district in which the judgment was rendered, or in any other district.]

**1086**. [The writ for that purpose is addressed to the sheriff of such district, and is returnable to the Superior Court of such district.] *Ibid. s.* 203.

**1087**. In the case of an immoveable which is declared by judgment to be hypothecated, and has been surrendered, or in cases of arrears of rents constituted under the Seigniorial Act of 1854, whatever may be the amount thereof, a writ of

execution may issue immediately against such immoveable, addressed to the sheriff of the district in which it is situated. *Ibid. s.* 206, § 2.

32 Vict. c. 30 (*Que.*):

4. It shall be lawful for the proprietor of the capital of any such (*Seigniorial*) *rente* to institute a purely personal action against the holder of the immoveable hypothecated (*grevé*) for the recovery of the *rente* or the arrears thereof. These actions may be instituted either in the Circuit Court or the magistrate's court, and anything in the articles 1054, 1055 and 1058, of the Code of Civil Procedure to the contrary notwithstanding, these actions in respect of the jurisdiction of the court, the procedure and the costs shall be considered as purely personal actions and as having no relation to lands or real estate, annual *rentes* or other matters involving future rights: whatever may be the amount of the judgment rendered in all such actions, the judgment in default of sufficient moveables, may be executed, after the delay of one year, by the seizure and sale of the immoveable hypothecated (*grevé*).

**1088.** All proceedings incidental to the seizure or sale of the immoveables seized in virtue of the foregoing provisions are carried on before the Superior Court into which the writ of execution is returnable, in the same manner as if the judgment had been rendered by such court. *Ibid. s.* 203 § 2; *s.* 206.

**1089.** In other respects the formalities of the seizure and the sale of moveables are the same as upon executions of judgments of the Superior Court, and the provisions concerning seizure by garnishment after judgment in the Superior Court apply likewise to such seizures issuing from the Circuit Court.

1. In the Circuit Court a contestation of the declaration of a *tiers saisi* may be filed after the lapse of eight days from the filing of the declaration. *Lovell* v. *Fontaine & Arnton*, 5 L. C. J. 284, C. C. 1861.

**1090.** Upon the return into the Superior Court of a writ of execution against immoveables, granted by the Circuit Court, the former court may order the clerk of the latter to transmit the original record in the case, that it may serve for all legal purposes. *Ibid. s.* 207.

### SECTION VI.

### OF REMEDIES AGAINST JUDGMENTS.

**1091.** Any party who deems himself aggrieved by a judgment of the Circuit Court may obtain a rehearing of the case before three judges of the Superior Court, according to the provisions contained in articles 494 to 504. 27-28 *V. c.* 39, *s.* 20.

**1092.** Such party has likewise a remedy by appeal, in conformity with the provisions contained in the fourth book of this code. *C. S. L. C. c.* 77, *s.* 39.

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## CHAPTER THIRD.

### PROVISIONS PARTICULAR TO NON-APPEALABLE CASES.

**1093.** When a non-appealable case is returnable during term in the Circuit Court, the defendant is bound to appear in open court on the day and at the hour specified, without having a delay until the next day to file his appearance. *C. S. L. C. c.* 83, *s.* 189.

1. The court not having sat until 11.30 p. m. on the day of the return, the majority of the judges decided that plaintiff could not proceed by default although defendant made default when called; and the action was dismissed. *The City Bank* v. *Saurin*, 2 Rev de Lég. 48 *Q. B.* 1814.

**1094.** If the judge is absent the case may be called, and appearance or default recorded by the clerk. *Ibid.* § 2.

**1095.** Confessions of judgment may be given orally in open court; or out of term pursuant to the provisions con-

tained in articlds 94 and following, and judgment may be rendered accordingly. 25 *V. c.* 10 *s.* 10.

34 Vict. c. 4 (*Que.*):

11. Article 1095 of the said code is hereby amended by adding thereto the following paragraph: "On any day during a term or the time fixed for the holding thereof, if the judge is absent or cannot hold the court on that day, such confessions may be given in the same manner as out of term."

**1096**. If the defendant fails to appear, the plaintiff may forthwith proceed with his proof, and the court may thereupon render judgment accordingly. *C. S. L. C. c.* 83, *s.* 189, § 3.

**1097**. If the case is returnable in term, the defendant, upon appearing, is bound to plead forthwith. He may do do so in writing or orally, at his option, unless the court orders that the pleas shall, within a fixed delay, be made out in writing; but the plaintiff is not bound to answer in writing unless the court so orders. *Ibid.*, *s.* 190.

**1098**. If the defendant does not plead in writing, he is called upon by the court to specify what allegations of the declaration he admits, and such admissions are recorded. If he makes no such admissions he is held to have denied all the facts alleged, and is liable for the costs of proving such of them as may be proved. No other articulation of facts is required. *Ibid.*, § 2, *s.* 93, § 2.

**1099**. If the action is returnable in vacation, the proceedings with respect to appearance, default, judgment by default and relief therefrom, confession of judgment, written pleadings, and the inscription of the case, are the same as in appealable cases; but no demand of plea or of answer is necessary in order to obtain a foreclosure; the notice of inscription for proof and hearing must be given at least three days beforehand; and if the defendant fails to

appear or to plead, the plaintiff is not bound to give notice of the inscription of the case for proof, when such proof is necessary. *Ibid.*, *ss.* 193-4-5-6-7.

1. In non-appealable cases C. C. where the writ is returned out of term, the notice of inscription for proof and hearing on the merits must be given three days at least beforehand, even where such notice is given during term. *Neilan* v. *Demers*, 4 Q. L. R. 300, C. C. 1878.

**1100.** [If the defendant fails to appear or to plead in any case returnable in term, the plaintiff may at any time proceed to judgment in the same manner as if the action were returnable in vacation.]

**1101.** The proof in all cases is made orally and in open court, without its being necessary to take notes of the evidence. *Ibid.*, *s.* 191.

**1102.** Judgments for sums not exceeding forty dollars can only be executed upon the moveable property of the debtor, except in the case of hypothecary actions, or of rents created under the Seigniorial Act of 1854, in which cases the court may issue execution against the immoveable charged, according to the formalities prescribed in the preceding chapter. *Ibid.*, *s.* 202.

**1103.** The provisions concerning oppositions and stay of proceedings, contained in the preceding chapter, as well as those concerning seizures by garnishment after judgment, must also be observed in non-appealable cases. *Ibid.*, *s.* 203.

**1104.** All non-appealable suits are determined in a summary manner, and when the amount claimed does not exceed twenty-five dollars they are decided according to equity and good conscience. The provisions of article 1080 apply to non-appealable cases. *C. S. L. C. c.* 79, *s.* 2, §§ 2-3.

# TITLE THIRD.

## OF SUITS BETWEEN LESSORS AND LESSEES.

**1105**. The Circuit Court has jurisdiction in cases between lessors and lessees, whenever the rent, or the annual value, or the amount of damages claimed, does not exceed two hundred dollars. *C. S. L. C. c.* 40, *s.* 41; 25 *Vict., c.* 12, *s.* 1.

**1106**. The provisions contained in the first chapter of title second of the second part of this code apply to suits brought before the Circuit Court.

1. In cases of *saisie gagerie* in the Circuit Court a declaration need not be served by a bailiff, but may be left at the prothonotary's office. *Brahadi* v. *Bergeron*, 10 L. C. J. 117, Q. B. 1866.

# TITLE FOURTH.

## SUITS IN CASES OF ILLEGAL DETENTION OF LANDS HELD IN FREE AND COMMON SOCCAGE.

**1107.** Concurrently with the jurisdiction of the Superior Court in such matters, petitory or possessory actions against persons illegally detaining lands held in free and common soccage in the townships may be brought before the Circuit Court in the circuit within which such lands are situated, or out of term before a judge of the Superior Court who may hear and determine such suits in vacation, as the Circuit Court might also do, whatever may be the value of the lands; and the proceedings in all such cases form part of the records of the Circuit Court. *C. S. L. C. c.* 45, *ss.* 1-10.

**1108.** The plaintiff in any such suits may add conclusions for the rents, issues and profits of such lands, and for any other damages he may have suffered. *Ibid. s.* 11.

**1109.** Such suits are subject to the same provisions as other appealable cases in the Circuit Court, as regards summons, pleading and proof. *Ibid. s.* 5.

**1110.** The defendant may plead all matters of defence, even adverse title, and may also claim, by incidental demand, whatever sum he may be entitled to for improvements made upon the lands. *Ibid. ss.* 3, 12, 15.

1. In a petitory action to recover the possession of a lot of land, the defendant, by peremptory exception, pleaded, asking that the plaintiff be condemned to pay him the value of the improvements he had made on the property—*Held*, that a possessor in bad faith has no right of detention for improvements. *Lane et al.* v. *Deloge*, 1 L. C. J. 3, S. C. 1856.

2. But in a petitory action brought by the plaintiff to recover possession of a portion of lot number ten in the 8th range of the township of Ely—*Held*, that the possessor in good faith was entitled to his improvements, and was not liable for rent and profits accrued previous to the service of process. *Knowlton et al. & Clarke et vir*, 9 L. C. J. 243, Q. B. 1864.

**1111.** [If either of the parties is aggrieved by the judgment he may inscribe the case for hearing before three judges of the Superior Court, according to the provisions contained in articles 494 and following, and without prejudice to the right of appeal to the Court of Queen's Bench.] *Ibid. ss.* 1, 2.

**1112.** The judgment may, when the plaintiff is entitled to it, declare him owner of the lands in question, and order the defendant to restore them to him within twenty days from service of judgment, and such judgment may be carried into effect by means of a writ of possession, as prescribed in articles 549 and 550. *Ibid. s.* 6.

**1113.** An appeal lies from such judgment to the Court of Queen's Bench, in the same manner as any other appeal from the Circuit Court; nevertheless, the security must be by two sureties, upon real property to the value of two hundred dollars each; and the petition must be served within fifteen days after the judgment, and be presented on the first day of the term next after the expiration of such fifteen days. 25 *V. c.* 10, *s.* 7.

# BOOK FOURTH.

## COURT OF QUEEN'S BENCH (APPEAL SIDE).

## CHAPTER FIRST.

### OF ERROR AND APPEAL FROM JUDGMENTS OF THE SUPERIOR COURT.

**1114.** Error may be brought, by means of a writ of error against any judgment of the Superior Court founded upon a general verdict given by a special jury.

It must be brought before the Court of Queen's Bench sitting in appeal.

Questions of law only can be argued in error. *C. S. L. C. c.* 77, *ss.* 4, 24; *c.* 83, *ss.* 32, 41.

A writ of appeal and not a writ of error will lie in the case of a jury trial when the grievance is not merely an error in a matter of law, and when the verdict of the jury is a final adjudication of law and fact. *Casey & Goldsmid et al.* 2 L. C. R. 212, Q. B. 1852.

**1115.** An appeal lies to the same court upon any other final judgment rendered by the Superior Court, except in cases of *certiorari*, and in matters concerning municipal corporations or offices, as provided in article 1033. *C. S. L. C. c.* 77, *s.* 4; *c.* 83, *ss.* 17, 41; *c.* 89, *ss.* 6, 17.

34 Vict. c. 4 (*Que.*):

12. Article 1115 of the said code is hereby amended by adding, at the end thereof, the following words: "And except also in cases for an amount not exceeding two hundred dollars, in which the judgment has been confirmed in review before three judges."

See 37 Vict., c. 6 (*Que.*), under art. 494 *ante*.

1. There is no appeal to the Court of Queen's Bench from an order given by a judge in chambers, as a general rule, except in cases where the law by a special disposition assimilates the judge in chambers to the Superior Court as in the case of prohibition. *Belivean & Chevrefils*, 1 Q. L. R. 209, Q. B. 1876.

2. A judgment of the Superior Court, refusing to grant a writ of *mandamus* upon a petition complaining that the Bishop of Quebec had refused to read the funeral service over the dead body of an individual, is a final judgment and may be appealed from. *Wurtele & The Bishop of Quebec*, 2 L. C. R. 65, Q. B. 1852.

3. A judgment rendered on an application for a writ of *habeas corpus*, made in vacation before a judge of the Superior Court, and, on return, transmitted to the Superior Court for further proceedings thereon, is a judgment of the court and not of the judge, and as such is susceptible of review or appeal. *Barlow & Kennedy*, 17 L. C. J. 253, Q. B. 1871.

4. There is no right of appeal from a conviction of justices of the peace under the Quebec License Act. *Page & Griffith*, 17 L. C. J. 302, Q. B. 1873.

5. An action in declaration of a hypothec being of the nature of a real action is appealable, and the evidence must be taken in writing on demand of any of the parties. *Dupont et al. & Grange*, 10 L. C. J. 75, Q. B. 1865, 16 L. C. R. 147.

6. There is no appeal from judgments rendered either in chambers or *in banco* when they concern matters of summary jurisdiction which are not contested. *Andrews et ux. & Davies*, 1 R. L. 210, Q. B. 1856.

7. Where an appeal was had from a judgment confirming and adopting a verdict of a special jury in the court below—*Held*, that as no motion had been made in the court below to set aside the verdict, or for a new trial, or in arrest of judgment, the verdict could not be set aside in appeal. *Shaw et al. & Meikleham*, 3 L. C. J. 5, Q. B. 1858.

8. Where, in an action of damages for a *voie de fait* for $200, judgment was given in review for $10 and costs as in an action of $120—*Held*, that there was no appeal to the Queen's Bench by defendant. *Hyacinthe & Hart*, 14 L. C. J. 223, Q. B. 1869.

9. The amount demanded determines the right of appeal, and not the amount of the judgment appealed from. *Boudreau* v. *Sulte*, 3 Q. L. R. 336, Q. B. 1877; *The Grand Trunk Ry. Co.* v. *Godbout*, 3 Q. L. R. 346, Q. B. 1877.

See *Joyce* v. *Hart*, 1 S. C. Rep. 321, under art. 1178.

10. An appeal lies from a judgment homologating an uncontested report of distribution. *Eastern Townships Bank* v. *Pacaud*, 17 L. C. R. 126, 2 L. C. L. J. 270, Q. B. 1866.; *Shortis* v. *Normand*, 3 Q. L. R. 382, Q. B. 1877.

See cases under art. 494 and 1178.

**1116.** An appeal also lies from interlocutory judgments in the following cases:

1. When they in part decide the issues;

2. When they order the doing of anything which cannot be remedied by the final judgment;

3. When they unnecessarily delay the trial of the suit.

*C. S. L. C. c.* 77, *ss.* 23, 26, § 3.

1. An appeal from a judgment dismissing a petition for release under a capias and from various other interlocutory orders and judgments in connection with such capias, and rendered partly by the court below and partly by a judge thereof in chambers, may be instituted by one and the same writ, and without obtaining the previous permission of the Court of Appeal. *Phillips & Sutherland*, 19 L. C. J. 134, Q. B. 1875.

2. Where a defendant under arrest on a capias applied by a petition to a judge for his discharge under 12 Vict. cap. 42, sec. 2, and the petition being rejected he appealed; the appeal was allowed and the writ ordered to issue accordingly. *Blanckensee & Sharpley*, 3 L. C. J. 292, Q. B. 1859.

3. An application to be allowed to appeal from a ruling at *enquête* which is manifestly wrong will be rejected when the granting of the appeal will have the effect of retarding the case. *Le Curé, etc., de Beauharnois & Robillard*, 20 L. C. J. 294, Q. B. 1876.

4. No appeal will be allowed from a judgment dismissing a motion to revise a ruling at *enquête*, parties in such case proceeding at their own risk, and if one of them be aggrieved the case may come up on appeal at a later stage of the proceedings. *Hudon & Painchaud*, 15 L. C. R. 437, Q. B. 1865; *Ontario Bank* v. *Duchesnay*, 16 L. C. R. 194, Q. B. 1865.

5. Nor from an interlocutory judgment dismissing a demurrer to a declaration. *Benning & Grange*, 13 L. C. J. 153, Q. B. 1868.

6. Nor from an interlocutory judgment rejecting a motion to unite two suits into one. *Foley et al. & Tarratt et al.*, 9 L. C. J. 108, Q. B. 1865.

7. Nor from a judgment on an exception tending to obtain the suspension of proceedings until a decision be rendered in another cause between the same parties on similar matters. *Donegani & Quesnel*, 1 L. C. R. 411, Q. B. 1851.

8. An appeal ought to be allowed from an interlocutory judgment which cannot be remedied by the final judgment, unless the court be clearly of opinion that the judgment complained of must be confirmed. *Cheney & Frigon et al.*, 15 L. C. J. 57, Q. B. 1870.

9. On a motion by the respondent to set aside a writ of appeal—*Held*, that a judgment which determines all the matters in litigation between the parties with the exception of the amount claimed under a plea of compensation, and orders *preuve avant faire droit* on such a plea, and that the amount of compensation be settled by experts, reserving the question of costs, is not a final judgment entitling the party aggrieved to sue out a writ of appeal *de plano*, and the motion was granted. *Wardle & Bethune*, 6 L. C. J. 220, Q. B. 1862.

10. A party is not entitled to an appeal from an interlocutory judgment, rejecting an exception to the form upon the ground of its having been filed too late, if the grounds of such exception to the form might have been made the grounds of a demurrer filed in the same cause, because the Court of Appeals cannot say if the grievance complained of may be irremediable or not, the demurrer not being before the court. *Moreau & Motz*, 3 L. C. R. 53, Q. B. 1853.

11. The respondent having complained of damage caused to his property by certain provincial works, the matter was referred to arbitrators and the demand dismissed. The respondent then appealed under 22 Vict. cap. 3. sec. 60, to the Superior Court, and the decision of the arbitrators was reversed and a large amount granted him for damages. On appeal by the Attorney-General to the Queen's Bench, the respondent urged that the decision of the Superior Court was final, and there was consequently no appeal. After hearing, the exception was dismissed and the appeal allowed. *The Attorney-General & Ellice*, 16 L. C. R. 64, Q. B. 1865.

12. A judgment of the Superior Court determining and defining the facts to be inquired into by the jury is a judgment from which an appeal will lie to the Court of Queen's Bench. *Arthur & The Montreal Assurance Co.*, 6 L. C. R. 99, Q. B. 1856.

13. And a judgment granting a jury trial. *Lovell & Campbell et al.*, 6 L. C. J. 116, S. C. 1861. See *Boak* v. *Mer. M. Ins. Co.*, art. 1178 *post*.

14. An appeal does not lie from a judgment or order of a judge given in vacation appointing a *sequestre*. *Blanchard et al. & Millar*, 16 L. C. J. 80, Q. B. 1871.

15. An appeal will lie from a judgment dismissing an inscription in improbation, but not *de plano*. *Beaudry* v. *The Mayor, etc., of Montreal*, 11 L. C. J. 28 & 2 L. C. L. J. 231, Q. B. 1866.

16. An appeal lies from an order of the Superior Court discharging an inscription for hearing in vacation on the merits of an exception to the form, without the consent in writing of the parties for such hearing out in term. *Dease & Taylor*, 2 L. C. R. 227, Q. B. 1852.

17. An appeal will lie from a judgment rejecting an inscription because no articulations were filed. *Ballay & Gray*, 4 Q. L. R. 91, Q. B. 1874.

18. The Court of Appeal ought not to interfere with the rulings of the court below on points of practice. *Lepine & Musson*, 16 L. C. J. 206, Q. B. 1872.

19. An appeal to the Court of Q. B. does not lie from any judgment of the S. C. under the Insolvent Act which is not a final judgment. *McKay* v. *St. Lawrence Salmon Fishing Co.*, 21 L. C. J. 76, Q. B. 1876.

**1117**. Proceedings in error or in appeal from judgments rendered in the districts of Montreal, Ottawa, Terrebonne, Joliette, Richelieu, St. Francis, Bedford, St. Hyacinthe, Iberville and Beauharnois, are brought, heard and determined in the city of Montreal, and the writ is made returnable there, and the like proceedings against judgments rendered in the districts of Quebec, Three Rivers, Saguenay, Chicoutimi, Gaspe, Rimouski, Kamouraska, Montmagny, Beauce and Arthabaska, are brought, heard and determined in the city of Quebec, and the writ is made returnable there. *Ibid. s.* 22.

**1118**. [Proceedings in error or in appeal must be brought within a year from the date of the judgment, saving the cases provided for by articles 823, 1033 and 1037; this delay of a year is binding even upon minors, women under coverture, persons of unsound mind or interdicted, and upon

persons absent from Lower Canada, when those who represent them, or whose duty it is to assist them, have been duly brought into the suit.

If the party dies before appealing, the delay is reckoned only from the day of his death, against his heirs or legal representatives.

Proceedings in error or in appeal cannot, however, be taken during the delay allowed for demanding a review before three judges, nor during the proceedings for such review.

In cases of judgment by default in vacation, the delay for appealing runs only from the expiration of the time allowed for filing an opposition thereto.]

*Ibid. ss.* 27-55; *c.* 83, *s.* 128; 27-28 *V. c.* 39, *s.* 22. *Evanturel* v. *Evanturel*, 17 L. C. R. 223.

34 Vict. c. 4 (*Que.*):

13. Notwithstanding article 1118 of the said code, proceedings in error or in appeal may be taken during the delay allowed for demanding a review before three judges, or after proceedings in review have been commenced if the party who has taken such proceedings discontinues the same.

1. An appeal made within the period of eight days from the rendering of a judgment subject to revision as allowed by law, is premature. *Beaulieu & Charlton*, 11 L. C. J. 297, Q. B. 1866.

2. A wife, separate as to property, may appeal from a judgment rendered against her, even after a year and a day elapsing during the life of her husband. *Walker et vir & The Mayor, etc., of the Town of Sorel*, 10 L. C. J. 77, Q. B. 1865.

**1119.** If the appeal is from an interlocutory judgment, it must first be allowed by the Court of Queen's Bench, upon a motion supported with copies of such portions of the record as may be necessary to decide whether the judgment in question is susceptible of appeal, and falls within one of the cases specified in article 1116.

The motion must be made during the term next after such rendering of the judgment, and cannot be received after-

wards; saving, however, the party's right to urge his reasons against such judgment upon an appeal from the proceedings in error against the final judgment. *C. S. L. C. c.* 77, *s.* 26, § 4; *27th Rule of P. Q. B.*

1. On a motion to be permitted to appeal from an interlocutory judgment—*Held*, that such a motion, though not made during the term immediately subsequent to the rendering of the judgment, is not too late when the appellant had previously sued out a writ of appeal *de plano*, which was set aside as having issued irregularly. *Wardle & Bethune*, 6 L. C. J. 221, Q. B. 1862.

2. In order to be allowed to appeal from an interlocutory judgment, application must be made at the next term following such judgment. *The Seminary of Quebec & Vinet et al.*, 6 L. C. J. 138, Q. B. 1861.

3. The court will reject a motion to obtain a rule for writ of appeal from an interlocutory judgment, where it is against the party moving on the merits of his application. *Hann et al. & Lambe*, 6 L. C. J. 75, Q. B. 1862.

4. A judgment quashing a capias is an interlocutory judgment, and cannot be appealed from *de plano*. *Berry & May*, 10 L. C. R. 195, Q. B. 1860.

5. Where the defendant under capias petitioned to be released, and the petition was rejected—*Held*, that he had a right to appeal from such judgment *de plano*, and therefore an application by him for leave to appeal would be rejected on that ground. *The Canadian Bank of Commerce & Brown et al.*, 19 L. C. J. 110, Q. B. 1874.

See *Phillips & Sutherland*, under art. 1116.

**1120**. The motion must be served upon the opposite party, and, if required, is followed by a rule, calling upon such opposite party to give his reasons against the granting of the appeal; and the service of such rule upon him has the effect of suspending all proceedings before the court below. *Ibid.* §§ 4-5.

**1121**. Proceedings in error or in appeal are brought by means of a writ, in the English or in the French language, issued from the Court of Queen's Bench, upon the written demand of the party aggrieved, containing the names and

description of the parties in the suit before the court below, and mentioning the place and time at which the judgment was rendered.

It is addressed, in the name of the sovereign, to the judges of the Superior Court, commanding them to send up, within twenty days, the record in the case, together with a transcript of all entries made in such case in the registers of the Superior Court and of the judgment; it is signed by the clerk of appeals or his deputy, and sealed with the seal of the Court of Queen's Bench; but this latter formality is not required on pain of nullity.

If the appeal is from an interlocutory judgment, the clerk must endorse upon the writ that it is issued by order of the court. *C. S. L. C. c.* 77, *ss.* 26-28; *7th Rule of P. Q. B.*

1. A writ of appeal need not be signed by appellant's attorney. *Hope & Frank*, 16 L. C. J. 252, Q. B. 1871.

2. The rule of practice which prescribes that all writs of appeal should bear the signature of the attorney suing out the appeal is merely directory, and where a motion to amend by supplying the name was made, a motion to dismiss for illegality was discharged, and the motion to amend granted. *Ross & Scott*, 9 L. C. R. 270, Q. B. 1859.

3. And in a later case of the same nature, where the respondent moved to annul, the appellant was permitted to amend on payment of costs. *Viger & Belivean*, 6 L. C. J. 177, & 12 L. C. R. 405, Q. B. 1862.

4. Defendants who have pleaded separately may, nevertheless, proceed to appeal from judgment rendered, by the same writ. *Spelman et al. & Robidoux*, 12 L. C. J. 227, Q. B. 1868.

5. An execution cannot be issued on a judgment rendered against four defendants if one of them have instituted an appeal, and such appeal is still pending. *Brush et al.* v. *Wilson et al.* 6 L. C. R. 39, S. C. 1856.

6. Where, in an ordinary hypothecary action, the defendant against whom judgment had been rendered in the Superior Court appealed, and about the same time presented a petition to the judges of the Superior Court and to the prothonotary, praying that, inasmuch as the property in question was of less value than the amount for which judgment had been rendered, that he be allowed to abandon the property

conditionally, the abandonment to remain good if the judgment were confirmed, and, if reversed, to be null and void—*Held*, that the abandonment made in accordance with such petition was null, inasmuch as a judgment from which an appeal had been taken had not the force of a *chose jugée*. *Hatrisse & Brault*, 2 L. C. J. 303, Q. B. 1858.

7. Action was brought upon a judgment recovered by the plaintiffs against the defendant in the Court of Common Pleas of Upper Canada. The defendant pleaded by dilatory exception that the judgment having been confirmed by the Court of Error and Appeal they had appealed to the P.C. and said appeal was still pending. The parties having been heard upon the merits of such exception—*Held*, that the pendency of such appeal, when security for costs had only been given, was no defence to the action brought on such judgment in Lower Canada. *The Northern Railway of Canada & Patton*, 17 L. C. R. 71, S. C. 1867.

8. An opposition to an execution on the ground that the opponent has taken out a writ of appeal from the judgment will be rejected, unless security for the appeal precede the opposition. *Brown et al.* v. *Lionais et al. & Lionais et al.* 20 L. C. J. 280, S. C. 1876.

9. In an appeal by one writ from three different judgments rendered in the Superior Court—*Held*,—both on motion and on the hearing of the case, that one appeal could be instituted from one principal judgment and from the judgments upon oppositions in the same cause. *Waggoner & Ricker*, 13 L. C. R. 102, Q. B. 1862.

10. Where the appellant took a writ of appeal, in which the judgment complained of was said to be of the 20th March, and then, with a view of saving costs, took an *alias* writ, on which he was afterwards allowed by a judge in Chambers to affix full stamps, subject to objection, and the respondent moved to reject the appeal, on the ground that the first writ was a nullity, and the *alias* should be a copy of the first,—*Held*, that although the original writ was a nullity, the words "alias writ," on the second were surplusage, and the motion was rejected. *Bernier & Gaumond*, 18 L. C. J. 209, Q. B. 1874.

**1122.** The delay for returning the writ may be extended, according to the distance between the place where the judgment was rendered and the place where the writ is to be returned. *7th Rule of P. Q. B.*

1. A Judge of the Queen's Bench in Chambers has power to shorten the delay for return of writ of appeal. *Phillips & Sunderland*, 19 L. C. J. 134, Q. B. 1875.

**1123**. The writ of error or of appeal must be served upon the opposite party by leaving a copy with him or at his domicile, or with his attorney *ad litem* in person; and it must afterwards be deposited with the prothonotary of the court by which the judgment was rendered.

A return of such service and deposit must be made by the bailiff upon an authentic copy of the writ of appeal or error, which copy must be filed in the office of the clerk of appeals. *8th Rule of P.*

1. The certificate of service of a writ of appeal must show a personal service either upon the attorney of the respondent or upon the respondent himself. *Dupuis & Dupuis*, 6 L. C. R. 429, Q. B. 1855.

2. Where the appellant had only given notice of appeal and of security, but had neglected to serve a copy of the writ in time—*Held*, that a motion for *non pros* would lie. *Peloquin & Lamothe*, 3 R. L. 58, C. C. 1874.

3. The copies of the writs of appeal may be certified by the attorneys *ad litem*. *Morrison et al. & Dambourges et al.* 11 L. C. J. 126 & 3 L. C. L. J. 118, Q. B. 1867.

**1124**. The appellant or plaintiff in error must, before the record can be sent up, give good and sufficient security that he will effectually prosecute the appeal or proceedings in error, and that he will satisfy the condemnation and pay all costs and damages adjudged, in case the judgment appealed from is confirmed; or else he must declare in writing at the office of the prothonotary of the court, whose judgment is appealed from, that he does not object to the judgment rendered against him being executed according to law, in which case he is only bound to give security for the payment of the costs in appeal, if he fails; and if the judgment is reversed, the respondent who has caused the judgment to be executed is bound to refund to the appellant the net amount only of the moneys levied by execution, together with legal interest, or to restore the property of which he was put in possession, together with the rents, issues and profits since. *C. S. L. C. c.* 77, *ss.* 23, 42–3.

1. The sureties in appeal are held to the payment of the costs of the appeal without the right to require the previous discussion of the parties to the suit. *Larose et al. & Wilson*, 16 L. C. J. 29, Q. B. 1872.

2. The advocate who succeeds in appeal, and to whom distraction of costs is granted, may bring an action against the sureties in appeal in the name of his client for the recovery of the said costs. Ib.

3. The sureties in such case are not entitled to a delay of fifteen days from day of judgment. Ib.

4. They are judicial sureties, and as such are liable to *contrainte par corps*. *Dumont* v. *Dorion et al.* 3 R. L. 360.

5. The filing of a copy certified by the prothonotary of a bond given before a judge before the allowance of a writ or appeal is sufficient proof of the execution of the bond and of the liability incurred by the sureties without further evidence. *Gosselin* v. *Chapman*, 6 L. C. R. 35, S. C. 1856.

6. The sureties in appeal are not bound for the condemnation money when the appellant files a declaration to the effect that the judgment appealed from could be executed, although the appeal bond has been executed in the usual way. *Chaurette* v. *Rapin & Loranger*, 4 L. C. J. 293, S. C. 1859.

7. In appeals from decisions of the Trinity House under 12 Vict., cap. 114, the party appealing is not bound to give notice of the security he intends to offer. *Laprise & Armstrong*, 10 L. C. R. 434, S. C. 1860.

8. A second notice of security in appeal is a waiver of one previously given for a previous day. *Sullivan & Smith*, 2 L. C. J. 160, Q. B. 1858.

9. And where the respondents served a notice on the appellants, that they would put in security for appeal to the Privy Council on the 18th of August, in the judge's chambers, in the court house, and security was not put in on that day, but notice was given later, on the Saturday, that security would be entered in chambers on Monday, on which day security was put in, not in chambers but in the judge's house, one of the parties signing 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 objection to the sufficiency of the security as they might legally have made when such security was put in. *Gibb et al. & The Beacon Fire and Life Insurance Company*, 10 L. C. R. 402, Q. B. 1860.

10. In a notice of security in appeal the date for filing such security was changed by erasing that given in the body of the document and inserting another in the margin, no mention of such change being made at the foot of the paper—*Held*, that this was not material, so as to avoid the service, and the court would maintain it according to circumstances. *Demers & Parant et al.* 5 L. C. R. 36, Q. B. 1854.

11. On an appeal from a judgment ordering a writ of *contrainte par corps* against the defendant where the sureties guaranteed that the defendant should prosecute the appeal and pay such condemnation money, costs and damages as should be adjudged in case the judgment of the Superior Court should be confirmed—*Held*, that the sureties were not immediately liable to the plaintiff for more than the costs of the appeal, and were not liable for the balance of the condemnation money against the defendant until the plaintiff has first enforced the order for *contrainte* against the defendant. *Whitney* v. *Brooks et al.*, 5 L. C. J. 161, S. C. 1862.

12. Notice was given on the 15th that security in appeal would be given on the 17th. Another notice was given that the same security would be put in on the 18th, but security was eventually given according to the first notice. The notice first given and the security put in were found irregular and insufficient, the first notice having been rendered of no effect by means of the second—*Held*, that no action would lie against the sureties on the bond thus set aside. *Smith* v. *Egan et al.* 10 L. C. R. 238, Q. B. 1860.

13. A practising attorney cannot become bail or surety in appeal. *Lemelin* v. *Larue*, 10 L. C. R. 190, Q. B. 1860.

14. In an action against the defendants as sureties in appeal—*Held*, that they were liable for the costs of appeal where the judgment of the court below, rendered in a hypothecary action, was affirmed, although a *delaissement* was made by the defendants before signification of the judgment rendered in the court below, and although no absolute judgment was given in the court below for costs, but only a judgment condemning the defendant to pay the debt and costs unless they preferred to abandon the property. *Fisher & Provencher et al.* 13 L. C. R. 160, C. C.

15. Where an opposant appealed and by petition sought to be allowed to give security for costs alone, though the execution of the judgment on the principal demand was thereby stayed—*Held*, that he must give security to answer the principal condemnation as well as that for costs. *Coutlée & Rose*, 6 L. C. J. 186, Q. B. 1862.

16. On appeal from a judgment dismissing an opposition, where security was given only for costs—*Held*, to be insufficient. *Lampson & Wurtele*, 3 Rev. de Lég. 107, K. B. 1847.

17. The issue and service of a writ of appeal does not stay execution unless security is given. *Booth* v. *Bastien et al. & Bastien*, 1 Legal News 130, S. C. 1878.

18. In case of appeal from a judgment ordering the appellant to render an account, security for costs is sufficient. *Brooks et al. & Dallimore*, 20 L. C. J. 176, Q. B. 1875.

19. And where the bond was completed in such case without justification and in the absence of the opposite party, who was present, however, when security presented themselves (contending that they ought to justify for a sufficient amount to recover the possible balance of account), the court will not set aside the security bond as irregular or illegal, but will reserve to the respondent his right to attack the solvency of the sureties. Ib.

20. Security in appeal cannot legally be given in the absence of the opposite party, and on a day different to that stated in the notice. *Charbonneau & Davis et al.*, 20 L. C. J. 167, Q. B. 1875.

21. When security in appeal is given by one person, he should give the designation and description of his real estate. *Dawson* v. *Defosses & Dawson*, 1 Q. L. R. 121, Q. B. 1875.

22. A sum of money was attached in the hands of the *tiers saisi* by the plaintiff after judgment. The defendant pleaded that the judgment had been appealed from, and the appeal was still pending. The plaintiff answered that the appeal was not allowed for want of security, and the plea was dismissed. *Perrault* v. *Borgia & Romain*, 3 Rev. de Lég. 306, K. B. 1816.

23. A bond in appeal entered into before the issue of the writ of appeal is null and void. *Burroughs & Simpson*, 11 L. C. R. 72, Q. B. 1860.

24. Where the appellant gave security only for the *dépens et dommages*—*Held*, to be irregular and defective, but that the court would order that the appellants be permitted to prosecute the appeal on giving good and sufficient security within one month to answer the condemnation, and pay all such costs and damages as should be judged by the court. *Métrisse & Brault*, 2 L. C. J. 303, Q. B. 1858.

25. No action on an appeal bond can be maintained until the appeal be determined. *Kerr* v. *Monroe*, 1 Rev. de Lég. 345, K. B. 1808.

26. Where certain words were omitted from the surety bond in appeal, and motion was made to dismiss it on that ground—*Held*, that the Court of Appeal would allow the amendment of a bond which had been filed in the court of original jurisdiction in order to be allowed to prosecute the appeal. *Taylor* v. *Molleur*, 17 L. C. R. 376, Q. B. 1867.

27. An application to enter security for three joint appellants will be refused and rejected if one of the parties disavow the proceedings and refuse to participate therein. *Muir et al. & Muir*, 15 L. C. J. 79, Q. B. 1870.

28. An additional day's notice is not necessary for every fifteen miles of distance, when a party is about to give security in appeal.

One hypothecary surety suffices. Where a party gives security for costs alone, the consent of the attorney that the judgment of the Court below be executed, will suffice. *Fiola* v. *Hamel*, 4 Q. L. R. 52, Q. B. 1877; *Gagnon* v. *Hamel*, *Ibid.*

**1125**. The security must be received before one of the judges or the prothonotary of the court in which the judgment was rendered; and such judge or prothonotary may swear the sureties offered and ask them any pertinent questions with respect to their sufficiency. *Ibid. ss.* 29, 41.

1. An appellant will not be ordered to give new security because one of the sureties declares that he was really insolvent at the time he signed the bond, although he then declared he was solvent. *Riddell & McArthur*, 22 L. C. J. Q. B., 1877.

1. An appeal bond is insufficient if the surety has not sworn that the immoveables which he has mortgaged belong to him. *Stuart & Scott, et al.* 1 L. C. R. 218, S. C. 1850.

3. A security bond in appeal is not sufficient if based on real estate the title to which has not been registered. *Prince et al. & Morin*, 18 L. C. J. 208, Q. B. 1874.

**1126**. As soon as the sureties have been received, and the bond has been formally executed, it is the duty of the prothonotary of the court in which the judgment was rendered to make up and complete the record in the case, according to the forms prescribed by the court of appeal, with a list of all the papers which form part of it, and a transcript of all the entries in the registers, and, upon being paid

his fees, charges and costs of transmission, to send them up to the clerk of appeals; and such return shall be certified on the back of the writ by the judge or by the prothonotary. *Ibid. s.* 31; 9 & 10*th Rule of P. Q. B.*

1. The return to a writ of appeal may be signed by one judge. *Heney & Holland*, 1 L. C. R. 401, Q.B. 1851.

2. Where the delay in returning the writ of appeal was caused by the neglect of the prothonotary and not of the party appellant, the latter may nevertheless be condemned to pay the costs of the respondent's motion to have the appeal dismissed, his recourse being by direct action against the prothonotary. *Ferrier* v. *Dillon*, 2 L. C. L. J. 160, Q.B., 1866.

3. After the prothonotary has received acknowledgment of sureties to a bond in appeal, and signed and stamped the same, it is not competent for him to refuse to send up the record on the ground that the bond was executed by error and surprise. *Mallette & Lenoir*, 20 L. C. J. 293, Q.B., 1876.

**1127**. If the writ of error or of appeal is not returned on the day fixed, the appellant may obtain a rule against the prothonotary in whose hands it is, ordering him to return it.

The respondent in such case cannot be condemned if he fail to appear; and if the prothonotary is in default, a new writ must be issued and served in the same manner as the first, without lapse of the proceedings already had. *Archambault & Roy, dit Picot in appeal*, 1851.

**1128**. The appellant and the respondent are both bound, if the writ is returned within the proper delay, to file an appearance in the office of the clerk of appeals, before the expiration of the eight days next after the day fixed for the return of the writ and record, on pain of being foreclosed. 11*th Rule of P. Q. B.*

1. Where two parties have raised separate and distinct issues appeal jointly, by one and the same writ, the respondent may with leave of the court file separate appearances on each issue. *The Glen Brick Company & Walker & Shackel*, 16 L. C. J. 257, Q. B. 1871.

**1129.** In default of the writ and the record being returned on the day fixed, the respondent, upon producing the copy served upon him, may obtain judgment of non pros. and be discharged from the appeal, unless the appellant proves diligence.

1. The non-production of the copy of the writ of appeal served, in accordance with 1129 C. C. P., in support of a motion for *non pros.*, is not fatal when it is established that the writ issued and was served, and that the copy had been lost. *Harvey & Deziel*, 19 L. C. J. 280, Q. B. 1875.

2. Where the appellant had only given notice of appeal of security, and had neglected to serve a copy of the writ—*Held*, that a motion for *non pros.* would lie. *Peloquin & Lamothe*, 3 R. L. 58, C. C. 1871.

3. An appearance for the respondent need not be filed in the clerk's office, to enable the respondent to move to dismiss the appeal for want of the return of the writ. *Furniss & The Ottawa and Rideau Forwarding Co. et al.*, 20 L. C. J. 26, Q. B. 1875.

4. An appeal may be rejected on motion, on the ground that no appeal lies, notwithstanding that the record is incomplete, providing it appears that the papers wanting to complete the record cannot affect the question of the right of appeal. *Dubuc & Champagne*, 18 L. C. J. 224, Q. B. 1874.

5. But where the defendant, after obtaining leave to appeal, did not proceed with his appeal, but failed and neglected to sue out a writ of appeal, as he was bound to do in due course—*Held*, that the court would, at its next term, annul the order allowing such appeal. *Hoffmung & Porter*, 7 L. C. J. 301, Q. B. 1863.

6. Where a writ of appeal returnable on the twenty-fifth of November was returned on the twenty-fourth of February following, and the respondent moved for the dismissal of the appeal as being returned too late—*Held*, that the appeal must be declared deserted and abandoned with costs, saving the right of the appellant to cause another writ to issue within the delay fixed by law. *Bouvier & Reeves*, 15 L. C. R. 465, Q. B. 1865.

7. Held, also, that in default of payment of costs of the dismissed appeal within the delay fixed that the second appeal would be dismissed also. Ib.

8. And in another place where the appeal was returnable on the 19th December, 1863, and was only returned the following June, an excep-

tion by the respondent filed on the twenty-fifth of April was held not to be too late, and a motion to dismiss was rejected, and the respondent allowed to go to *enquête* on his exception. *Meneclier & Gauthier*, 15 L. C. R. 474, Q. B. 1865.

**1130.** [Unless the court otherwise orders, the respondent may, within eight days next after the period allowed for filing his appearance, set up by motion all grounds of exception or of demurrer, and all grounds of defence resulting from:

1. Informalities in the issuing or service of the writ;
2. Insufficiency of the appeal bond;
3. Non-existence or forfeiture of the right to proceed by error or appeal;
4. Acquiescence in the judgment;
5. The renunciation of the judgment in the court below.]

*C. S. L. C. c.* 77, *s.* 5; *McNaughton* v. *Desautels*, in appeal.

1. The fact of one of several appellants having paid part of the taxed costs of the judgment appealed from did not raise a presumption of acquiescence on his part, although he had made no reservation or protest at the time of payment. *Woodman et al.* v. *Grenier*, 16 L. C. R. 452.

2. The voluntary payment of a part of the judgment appealed from is an acquiescence, and the fact may be established by affidavit. *Charbonneau & Davis et al.* 20 L. C. J. 167.

3. A respondent who has proceeded in appeal is supposed to have renounced all formal objections. *Heney* v. *Holland*, 1 L. C. R. 401, Q. B. 1851.

4. In an appeal from the Circuit Court—*Held*, that a motion to dismiss for want of sufficient security is not too late although a term has intervened since the appearance for the respondent, especially when the return of the clerk of the court is irregular. *Beaudet & Proctor*, 13 L. C. R. 450, Q. B. 1863.

5. Where the return of a writ of appeal was made on the first day of a term, and the respondent moved to reject the appeal, on the ground of insufficient security, on the first day of the following term—*Held*, to be too late. *McKay & Simpson*, 5 L. C. J. 20, Q. B. 1860.

6. The sufficiency of the security offered in appeal cannot be questioned by preliminary exception, and such an exception will be dis-

missed on motion. *Knowlton et al. & Clarke et al.*, 13 L. C. R. 400, Q. B. 1863.

7. A garnishee made a petition to be relieved from the default registered against him and the judgment rendered thereupon, and the court granted his application, but condemned him to pay all the costs. He moved for leave to appeal, but meanwhile so far conformed to the order as to make a new declaration. *Held*, that this did not constitute an acquiescence. *Marquis* v. *Vancortlandt*, 1 Legal News, 278, Q. B. 1878.

8. A security-bond in appeal duly signed and stamped cannot be set aside by the Court on the ground that it was executed by error and surprise. *Mallette & Lenoir* 21 L. C. J. 84.

9. The Court of Queen's Bench cannot entertain a petition to have the security declared insufficient on the ground that the respondent has discovered since the completion of the bond that the securities were really insufficient at the time the bond was signed. *Lapointe & Faulkner*, 22 L. C. J. 53 *Q. B.* 1877.

**1131**. The appellant may apply by motion for a reduction of excessive security, if he has been obliged to give it. *C. S. L. C. c.* 77, *s.* 5; 27 *G. III. c.* 4, *s.* 6.

**1132**. If both parties seek redress against the judgment, their cross-proceedings in error or in appeal may be joined.

**1133**. The appellant must file his reasons of appeal or assignment of error within eight days after the return of the writ and record; he cannot, however, be foreclosed from doing so until the expiration of another delay of six days, counting from the demand thereof. *C. S. L. C. c.* 77, *s.* 33; 13 *Rule of P., Q. B.*

1. In an insurance case carried from the Court of Appeal to the Privy Council, it was decided that objections might be raised in appeal which had not been raised in the court of original jurisdiction. *Scott et al. & The Phœnix Assurance Co.*, S. R. 354, P. C. 1828.

2. When the appellants set up as one of their reasons that the S. C. had had no jurisdiction, it was *held* that they had waived their right by non-pleader to question the jurisdiction. *Gray et al.* v. *Dubuc*, 2 Q. L. R. 234, Q. B. 1876.

3. The reasons of appeal should state that the interlocutory judgment appealed from is erroneous. *Dunning et al. & Girouard et al.* 9 R. L. 177, Q. B. 1877.

**1134.** If, however, there are demurrers to the proceeding in appeal or error, the demand of reasons cannot be made before the judgment upon the demurrers.

**1135.** The respondent has a like delay of eight days to answer the reasons of appeal or error; but he cannot be foreclosed from doing so until after another delay of four days from the demand of such answer. *C. S. L. C. c.* 77, *s.* 33; 18*th Rule of P., Q. B.*

1. The delay to answer reasons of appeal runs while the case is *en délibéré* on a motion to quash the appeal. *Phillips & Sutherland*, 19 L. C. J. 138, Q. B. 1875.

**1136.** The court, or a judge in vacation, upon application, of which the opposite party has had notice, may, for good cause shewn, prolong the delays fixed by the two preceding articles. *C. S. L. C. c.* 77, *s.* 33.

**1137.** If the reasons in appeal or error are not filed within the delay prescribed, the respondent may demand the dismissal of the appeal or proceedings in error, with costs. *Ibid. s.* 32.

**1138.** If the respondent fails to file his answer within the delays prescribed, he is foreclosed from doing so, and the appellant may proceed as if the respondent had not appeared. *Ibid. s.* 33.

**1139.** The provisions concerning election of domicile by parties and their advocates and attorneys in the Superior Court apply also in matters before the Court of Queen's Bench.

Vide *ante*, arts. 84, 85.

**1140.** Within ten days after the filing of the respondent's answers, each party must file in the clerk's office a printed *factum* or case, and, in default of his doing so, the proceedings in appeal or error may be declared to have been abandoned with costs against the appellant if he is in default, or the case may be heard *exparte* if the respondent is in default. *Ibid. s.* 49; *14th Rule of P., Q. B.*

1. An appellant who has failed to file his factum within the delay prescribed by the rules of practice will be relieved from the consequences of his default by producing the factum when the respondent makes a motion to have the appeal dismissed, and on payment of costs. *Dawson & Belle*, 3 L. C. J. 256, Q. B. 1859.

**1141.** As soon as the answers are filed, either party may, after filing his *factum* or case, inscribe the case on the roll for hearing, after the delay for filing *factums* has expired, upon giving the opposite party at least two days' notice before the case is called. *15th Rule of P. Q. B.*

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## CHAPTER SECOND.

### OF APPEALS FROM THE CIRCUIT COURT.

**1142.** An appeal lies to the Court of Queen's Bench from any judgment rendered by the Circuit Court in the following cases:

1. When the sum or the value of the thing demanded amounts to or exceeds one hundred dollars; except, however, in suits for the recovery of assessments for schools or school-houses, or for monthly contributions for schools, and in suits for the recovery of assessments imposed for the building or repairing of churches, parsonages and churchyards. Cases in which the evidence has not been taken down in writing can only be appealed on points of law;

2. When the demand is less than one hundred dollars, but relates to fees of office, duties, rents, revenues or sums of money payable to Her Majesty;

3. When the demand, though less than one hundred dollars, relates to titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected;

4. In all actions in recognition of hypothecs.

Special provisions regulate appeals from judgments rendered in the Magdalen Islands. *C. S. L. C. c.* 77, *s.* 39; *c.* 15, *s.* 123, § 2; *c.* 18, *s.* 25; 25 *V. c.* 10, *s.* 7.

1. The code of procedure has not taken away the right of appeal from judgments rendered by justices of the peace in agricultural matters. *Bradford et al.* v. *Wilton*, 5 R. L. 242, C. C. 1871.

2. In an action against a proprietor for the amount assessed against him for the erection of a church parsonage, &c.—*Held*, that the right of appeal in suits for the recovery of such assessments had been allowed and exercised. *Renière & Millette et al.* 5 L. C. R. 87, Q.B. 1855.

3. There is no appeal from the decision of commissioners appointed for the erection of parishes, except by certiorari. *Boucher et al. Exp.* v. *Dessaulles et al. & Langellier et al.* 6 L. C. J. 333, S. C. 1862.

4. An appeal lies to the Superior Court from acts of the municipality, where it has sold land belonging to a proprietor without judicial process or authorization. *McDougall & The Corporation of St. Ephrem d'Upton*, 5 L. C. J. 229, & 11 L. C. R. 353, Q. B. 1861.

5. There is no appeal from judgments of the Circuit Court concerning municipalities and municipal roads in Lower Canada. *Groulx & The Corporation of the Parish of St. Laurent*, 16 L. C. R. 170 and 10 L. C. J. 74 & 2 L. C. L. J. 11, Q. B. 1866.

6. In an action by a parish beadle for three quarts of wheat or three quarters of a dollar, which he had been accustomed to receive from such parish as his emoluments of office—*Held*, that such action was appealable *ex natura rei*. *Martin* v. *Brunelle*, 1 R. L. 616, Q.B. 1865.

7. There is no appeal from a judgment under the statute 12 Vict. cap 41, concerning the election and qualification of municipal councillors. *Bristow & Rolland*, 4 L. C. J. 283, Q.B. 1860.

8. There is no appeal from a judgment of the Circuit Court on an appeal from a judgment of a justice of the peace homologating a re-

port of experts as to a water course. *Bruneau & Prévost et al.* 13 L. C. R. 498, Q. B. 1863.

9. No appeal can be had where no evidence has been taken in writing in the court below. *The Corporation of the Parish of St. Philippe & Lussier*, 13 L. C. R. 499, Q. B. 1863.

10. In cases susceptible of appeal, the evidence must be taken in writing. *Houle & Martin*, 6 R. L. 70 & 641, C. C. 1874.

11. Where appeal was had from a judgment of the Circuit Court dismissing a demurrer, the appeal was admitted without contestation. *McGinn & Browders*, 1 L. C. J. 176, S. C. 1857. But see *Benning & Grange*, under art. 1116, and *Simard & Townsend*, 6 L. C. R. 147.

12. The plaintiff obtained judgment in the court below for a sum exceeding £15, upon which a writ of attachment issued and a judgment rendered upon the attachment for a sum exceeding £15. The appellants intervened in the cause, claiming £4 13s. 6d. of the money attached, and being dissatisfied with the judgment appealed.—*Held*, that in such case, the demand of the appellants not exceeding £15, they had no right to appeal. *Russell et al. & Graveley*, 2 L. C. R. 494, Q. B. 1852. But see *Gugy* v. *Gugy*, 1 L. C. R. 273.

13. Where in an action of damages for $200, judgment was rendered for plaintiff for $10, and the defendant appealed—*Held*, that there was no right of appeal from such a judgment as being under $100. *Bellerose & Hart*, 1 R. L. 157, Q. B. 1869.

14. Where motion was made to reject an appeal from a judgment under the Lessor and Lessee Act, where the total value of the rent for the term of the lease was $50 only, on the ground that there was no appeal to the Queen's Bench from judgment under the Lessor and Lessee Act, and that as the action was for a sum less than £25, it did not fall within the description of any other case susceptible of appeal, it was *held* that as the defendant had set up an agreement on the part of the plaintiff to sell the property to him for $400 or thereabout, the action was appealable. *Gould & Sweet*, 4 L. C. J. 18.

15. Under 20 Vict. cap. 44, sec. 60, no appeal lies from the Circuit Court in ejectment cases under £25 annual rent. *Hearn & Lampson*, 10 L. C. R. 400, Q. B. 1860.

16. An action for $3.33 arrears of *cens et rentes* cannot be looked upon as appealable. *De Bellefeuille et al. & Mackay*, 3 R. L. 33.

17. A hypothecary action for an amount less than $100, accompanied by conclusions to the effect that defendant be condemned to pay the debt unless he prefers to abandon the property, is appealable. *Rodier & Hébert*, 16 L. C. J. 41.

18. An action in declaration of a hypothec, being of the nature of a real action, is appealable, and the evidence must be taken in writing on the demand of any of the parties to the suit. *Dupont et al. & Grange*, 10 L. C. J. 75, 16 L. C. R. 146, 1 L. C. L. J. 52.

19. An intervention which tends to deprive one of the parties of the possession and ownership of a property rented by him, renders the whole case appealable. *Kingsley et ux.* v. *Nixon & Sutherland*, 15 L. C. J. 271, S. C.

**1143**. The party appealing must, within fifteen days after the rendering of the judgment, but without being bound to give notice, give good and sufficient sureties, who must justify their sufficiency to the satisfaction of the person receiving their security, that he will prosecute the appeal, will answer the condemnation, and pay the costs, in the event of the judgment appealed from being confirmed. *C. S. L. C. c.* 77, *s.* 40.

1. The court will, on cause shown, prolong the delay for giving security on an appeal from the Circuit Court. *Berriau & McCorkill*, 13 L. C. R. 480, Q. B. 1863.

2. Where bail was put in by two sureties upon appeal from the Circuit Court to the Court of Queen's Bench—*Held*, to be unnecessary that either of such sureties should declare that he was the proprietor of real estate to the value of £50 over and above all charges, as in the case of one surety only. *Dupont et al. & Grange*, 15 L. C. R. 36, Q. B. 1864.

3. Security in appeal from the Circuit Court under 12 Vict. cap. 38, sec. 54, is validly given by two sureties justifying on real estate without describing it. *Lynch & Blanchet*, 6 L. C. R. 149, S. C. 1856.

4. But *held*, in a similar case, decided the following month, that the real estate must be described. *Hitchcock & Monette*, 6 L. C. R. 150, S. C. 1856.

5. On appeal from the Circuit Court it is not necessary where two sureties sign the bond that they should declare that they are proprietors of real property of the value of £50 over and above all incumbrances, such declaration being only necessary where but one surety signs. *Hearn & Lampson*, 10 L. C. R. 400, Q. B. 1860.

6. Where the failure to produce the petition for leave to appeal was due to the fault of the attorney and not of the officer of the court,

leave to file the same would not be granted after the lapse of six months. *Simard* v. *Fraser*, 1 Legal News, 130, Q. B. 1878.

**1144.** The security may be given either before a judge of the Court of Queen's Bench or the clerk of appeals, or else before a judge of the Superior Court, or the clerk of the Circuit Court, at the place where the judgment was rendered, and the bond remains deposited among the records of the court where it was given. *Ibid. s.* 41.

In cases of appeal from the Circuit Court the copy of the appeal bond to be served must be certified by the clerk of the court in whose office the bond is filed, under 20 Vict. cap. 44, sec. 65, and not by the attorney of the appellant. *Pentland et al. & Drolet*, 9 L. C. R. 42, Q. B. 1858.

**1145.** Any one surety suffices if he is the owner of real property of the value of two hundred dollars, over and above all incumbrances upon the same, saving the exception contained in article 1113; and the persons authorized to receive the security have power to administer any oath necessary for that purpose. *Ibid. s.* 2; 10 *L. C. R.* 200.

1. Security given by one person only in an appeal from the Circuit Court, who justifies upon immoveables described in the bail bond is sufficient. *Hilaire & Lisotte*, 6 L. C. R. 150, S. C. 1856.

2. An appeal from the Circuit Court, the bond would be declared to be insufficient when given by one surety without describing the property of which he declares himself to be the owner. *Charest & Rampre*, 10 L. C. R. 431, Q. B. 1860; *Beaudet & Proctor*, 13 L. C. R. 450, Q. B. 1863.

**1146.** If within the fifteen days, the appellant files with the clerk of either court a declaration in writing that he does not object to the execution of the judgment, or if he deposits the amount thereof in the hands of the clerk of appeals or clerk of the Circuit Court, he need only give security for the costs in appeal and whatever damages may be awarded. *Ibid. s.* 42.

**1147.** In the case of the preceding article, the provisions of article 1124, also apply. *Ibid. s.* 43.

**1148.** The appeal is brought by a petition, stating succinctly the grounds of appeal, and that security has been given, and praying for the reversal of the judgment, and the rendering of such judgment as ought to have been rendered.

This petition and a notice of the day on which it will be presented, must, within twenty-five days from the rendering of the judgment, be served upon the opposite party personally, or at his domicile, or upon his attorney *ad litem*, together with a copy of the appeal-bond, certified by the clerk with whom it is deposited. *Ibid. s.* 44.

1. An appeal from the Circuit Court will be dismissed when the petition in appeal contains no special reasons. *Maillé* v. *Chapleau*, 6 L. C. R. 476, S. C. 1855.

2. On an appeal from the Circuit Court—*Held*, that where the case rests on evidence and the evidence is doubtful, the court will not disturb the judgment. *Poutré* v. *Chapdelaine*, 6 L. C. R. 488, S. C. 1856.

3. Where the delay of twenty-five days allowed by law for the service of the copy of petition and notice expires on a legal holiday, the service may be made on the following day, and it is no valid objection that service of such copy had not been made upon the clerk of the Circuit Court, nor will an appeal be dismissed in consequence of such omission, nor on the ground that the copy served on the attorney of the respondent bears date previously to the rendering of the judgment appealed from. *Dean & Jackson*, 5 L. C. R. 164, S. C. 1855.

4. The parties, plaintiff and defendant, having proceeded in the Circuit Court in an appealable case as if the case were non-appealable, and judgment having been rendered in favour of the plaintiff—*Held*, upon an appeal instituted by the defendant on the ground that the proceedings were irregular, the evidence not being in writing and no articulation of facts or inscription for enquête or for hearing on the merits having been made, that the court would not disturb the judgment of the court below. *Osgood & Cullen*, 11 L. C. R. 282, Q. B. 1860.

**1149.** Within the same delay of twenty-five days, the appellant must file his petition and notice and the return of service with the clerk of the Circuit Court, together with a certificate from the clerk of appeals, stating that security has been given if the bond be in the hands of that officer; and the clerk of the Circuit Court must give the appellant a certificate of such filing, for the purpose of proving, when requisite, that the appeal has been instituted. The clerk of the Circuit Court is, moveover, bound to certify, under his hand and the seal of the Circuit Court, and to transmit to the clerk of appeals at the proper place, the said petition and the record in the case with a transcript of the entries contained in the registers of the Circuit Court in relation to such case. *Ibid.* s. 45.

1. In cases of appeal from the Circuit Court the original petition in appeal, notice &c. must be filed 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. *McGillis et al. Pearce et al.* 9 L. C. R. 114, Q. B. 1858.

2. The delay of twenty-five days mentioned in 1149 C. C. P., within which a petition in appeal from a judgment of the Circuit Court must be filed, is final and absolute. *Leduc & Ouellet*, 2 R. L. 626, Q. B. 1870.

3. In an appeal from the Circuit Court the service of a copy of the petition, notice and bond in appeal at the domicile of the opposite attorney is sufficient. *Bedard & The Corporation of the Parish of St. Charles Borromée*, 10 L. C. R. 429, Q. B. 1860

4. And affidavits setting forth that the property described in the appeal 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 the appeal will be dismissed on such motion unless the appellant deposit the sum of £50 together with the sum of five dollars to cover the costs of the motion. Ib.

**1150.** Before the day on which the appeal may be heard, each of the parties is bound to file an appearance in the office of the clerk of appeals; and the clerk of appeals is

bound to record such appearance in the register, or the default thereof, and to enter each case in which the record has been transmitted to him.

If the appellant does not appear, his appeal may be declared to have been abandoned, with costs; and if the respondent fails to appear, the appellant may proceed by default. *Ibid. s.* 46.

**1151.** The appellant may prove due diligence on his part, and if, on the day fixed, the record and proceedings have not been transmitted, he may proceed against the clerk of the Circuit Court in the manner presribed in article 1127.

**1152.** At the first term of the Court of Queen's Bench, sitting in appeal at the place to which the record has been transmitted, after the expiration of forty days from the rendering of the judgment, or at any subsequent sitting, and without any other formality than the filing of a printed *factum*, if the court requires it, the case is heard in a summary manner and judgment rendered therein as in any other appeal. *Ibid. ss.* 47, 49.

The court will not grant a delay to the appellant (the defendant) to prepare a *factum*, nor require a *factum* of the parties without some cause being shown. Parties can always make a *factum*, however, if they desire it. *Beaudet* v. *Mahoney*, 1 Legal News, 579, Q. B. 1878.

**1153.** If the appellant fails to serve and file his petition, or to effectually prosecute his appeal, he may be declared to have forfeited his right of appeal, and be condemned to pay costs. *Ibid. s.* 48.

## CHAPTER THIRD.

### GENERAL PROVISIONS.

**1154**. Proceedings in appeal or error may be brought by the legal representatives of a party to a suit who has died.

Proceedings in appeal or error, upon judgments rendered against an unmarried woman or widow who has since married, may be brought by her husband, jointly with her; or, in the case of a judgment rendered against a party represented by a tutor or curator or other person, but who has since attained full age or come into the exercise of his rights, by such party himself, without the assistance of the tutor or curator who represented or other person who assisted him in the original suit. *C. S. L. C. c.* 77, *ss.* 37-8.

1. The parties interested in the contestation or issues joined are alone to be made parties to the appeal. *De Witt & Burroughs*, 5 L. C. R. 70, Q. B. 1853.

2. In an appeal all the parties on the adverse side in the court below must be made respondents. *Brewster et al. & Starnes et al.* 18 L. C. J. 195, Q. B. 1874.

3. An appeal instituted in the name of a party who died while the case was *en délibéré* in the court below is null and void, and in such case a petition to take up the *instance* by the representatives of the party deceased cannot be allowed. *Kerby & Ross et al. & Stevenson*, 18 L. C. J. 148, Q. B. 1874.

4. But after the *instance* has been taken up in place of an appellant deceased, it is not competent for the respondent to move to quash the writ of appeal on the ground that it issued in the name of a person who was dead previous to the issue of the writ. *Haggarty & Morris & Haggarty et al.* 19 L. C. J. 103, Q. B. 1874.

5. A tutor cannot legally appeal without being specially authorized by the court. *Bessener & De Beaujeu*, 16 L. C. J. 224, Q. B. 1872.

**1155**. If one of several appellants or respondents dies after the institution of proceedings in appeal or error, such

proceedings may be continued by and between the other surviving parties. *Ibid. s.* 38; 12 *V. c.* 41, *s.* 18.

**1156.** Four judges of the Court of Queen's Bench constitute a quorum in appeal.

Any lesser number of judges, or even the clerk in the absence of all the judges, may, on any day in term, open and adjourn the court, receive returns and motions of course, call parties, record appearances and defaults, and do all acts which do not require the exercise of any judicial discretion. *C. S. L. C. c.* 77, *ss.* 7, 20, § 3.

**1157.** The judges in cases of appeal or error may be recused for the same causes and in the same manner as in the Superior Court. *Ibid. s.* 11.

Vide *ante*, arts. 176 *et seq.*

**1158.** Any judge who sat in the court below at the rendering of the final or interlocutory judgment appealed from, is incompetent to sit in appeal or error upon the same. *Ibid. s.* 8.

**1159.** No petition in recusation is necessary if the cause of incompetency appears on the face of the record. *Ibid. s.* 11.

**1160.** Every leave of absence for more than two months granted to any judge of the Court of Queen's Bench is notified to the clerk of appeals by a letter from the Provincial Secretary, which must be deposited among the records of the court and entered in the register thereof. *Ibid. s.* 12.

**1161.** When a judge of the Court of Queen's Bench is disqualified or incompetent to sit in a case, or is suspended from office, or absent from the province, or on leave, the clerk of appeals, when thereto required, must record the fact in the register, and, upon the order of a judge of the court, must notify the chief justice of the Superior Court *Ibid. ss.* 10, 11.

**1162.** The judges of the Superior Court replace those of the Court of Queen's Bench, in all cases of incompetency, absence, suspension, or leave of absence, and upon the chief justice of the Superior Court communicating with the other judges of the said court, it is arranged between them which of them individually will replace any particular judge of the Court of Queen's Bench, who is unable to sit in the case.

The foregoing provisions as well as those of the preceding article apply likewise in the case of the death, absence, disqualification or incompetency of the judge thus appointed to replace another. *Ibid. ss.* 10, 11.

1. When two judges *ad hoc* had heard the case and ordered a re-hearing, and subsequently the judges whose place they filled ceased to form part of the court, and were replaced by the appointment of two other judges—*Held*, although the judges of the court were now all competent to hear the case, that the judges *ad hoc* who sat at the first hearing should continue to form part of the court at the re-hearing. *The Mayor, etc., of Montreal* v. *Drummond*, 18 L. C. J. 76, Q. B. 1874.

2. And *held*, subsequently, that a judge who has been appointed subsequently to the first hearing might sit at the re-hearing. *Ibid.*

**1163.** The return of the judge replaced, the expiration of his leave, or his ceasing to be incompetent, do not affect the powers of the judge appointed to replace him, as regards cases of which he has taken judicial cognizance, nor are they affected by the appointment of a judge of the Court of Queen's Bench who would not be incompetent in the case. *Ibid. s.* 13.

**1164.** Nevertheless if the replacing judge has not heard the case upon the merits, the judge thus replaced may take cognizance of the case and render judgment therein. 29 *V. c.* 42.

**1165.** If the record in the case is incomplete, either by reason of the absence of any document, or of the inobservance of some important formality, the Court of Appeals

may, upon the suggestion of either party, order the court below to perfect the record, and this is done by an order in the form of a writ issuing in the name of the sovereign, addressed to the judges of the court below, commanding them to do what is necessary, and to make a duly certified return thereof. *Ibid. s.* 5.

**1166**. Interventions may take place in appeal with the leave of the court, and so may also other incidental proceedings, such as petitions for continuance, disavowals, changes of attorney, and like proceedings, according to the formalities prescribed by the court. *Ibid.*

1. Where a disavowal was raised in a case pending before the Court of Appeal—*Held*, that the court could order an enquête on the issue raised. *The Curé et al. of the Parish of St. Anne de Varennes & The Roman Catholic Bishop of Montreal*, 4. R. L. 127, Q. B. 1861.

2. The Court of Appeal may order a third party interested in the issue to be called into the case, and the record to be sent to the court below for that purpose. *Joubert et vir. & Rascony*, 12 L. C. J. 228, Q. B. 1866.

3. The Queen's Bench has the same right to submit the decisory oath to one of the parties in a cause as a court of original jurisdiction. *Ferrier & Dillon*, 12 L. C. J. 202, Q. B. 1868.

4. The Court of Appeal may order and revise an enquête on the facts contained in a *requête en réprise d'instance*. *McKillop et al. & Kauntz*, 1 Rev. de Lég. 152, Q. B. 1845.

**1167**. Discontinuance in appeal is effected in the same manner and under the same conditions as in the Superior Court. *C. S. L. C. c.* 82, *s.* 25.

Vide *ante*, arts. 450 *et seq.*

**1168**. The provisions concerning peremption of suits in the Superior Court apply also to appeals. Peremption of appeals or of proceedings in error has the effect of rendering the judgment appealed from final. *Pothier, Proc.* 124; *C. P. C.* 469.

Vide *ante*, arts. 454 *et seq.*

**1169.** The parties are bound to be present in court to be heard upon the appeal after the delay mentioned in article 1141.

**1170.** Judgment cannot be rendered in appeal unless at least three judges concur therein, and judgment may be rendered even in the absence of one judge when the case has been heard before the five judges. *C. S. L. C. c.* 77, *ss.* 9, 14; 25 *V. c.* 10, *s.* 1.

[The provisions relative to judgments, contained in articles 503 and 504 apply in similar cases as regards judgments to be rendered by the Court of Queen's Bench.

Whenever a case has been heard by the full court or by a *quorum* of judges, and at least three of the judges who heard it are present in court and ready to render judgment therein, then if any judge who heard the cause and would be competent to sit in judgment therein, be prevented by removal to another court, sickness or other cause from being present, but has addressed a letter to the clerk of the court, containing his decision and signed by him, or has, in testimony of his concurrence therein, signed a written decision, drawn up to be delivered, and delivered by any other judge, such judge shall be deemed to be present as regards such judgment; and the decision, so transmitted and signed by him, has the same effect as if delivered and concurred in by him in open court.]

1. In questions purely of practice, the Court of Appeal will not, a a rule, disturb the judgment of the court below. *Perry & De Beaujeu et al.* 14 L. C. J. 334, Q.B. 1869.

**1171.** If by reason of the absence, leave of absence, disqualification, or incompetency of any of the judges, or any other cause, the order for advisement requires to be discharged, such discharge may be ordered by the other judges or by any one of them. *C. S. L. C. c.* 77, *s.* 9.

**1172.** The court may adjourn to any day in vacation, and thence from day to day, for the purpose of rendering judgment. *Ibid. s.* 20, § 2.

**1173.** Judgment may be rendered by the court at another place, where its sittings are held, than that where the case was heard, if the judges are of opinion that otherwise the parties will be exposed to unnecessary delay; but in such case the court in term, or a majority of the judges in vacation, orders the clerk to give the parties interested notice at least six days before that on which judgment is to be rendered, and the judgment is nevertheless entered and registered at the place where judgment would have been rendered in the ordinary course. 25 *V.* c. 10, *ss.* 4, 5.

**1174.** Every judgment in appeal or error must contain a summary statement of the points of fact and of law in the case, and the reasons upon which it is founded, with the names of the judges who concurred therein and of those who dissented therefrom, and must adjudicate upon the costs. *C. S. L. C. c.* 77, *s.* 36.

1. In an action for the balance of the price of certain lands sold by the plaintiff, the defendant pleaded fear of eviction, and the court below ordered the plaintiff to give good and sufficient security within one month—*Held*, on appeal by plaintiff, that the court had power to reform such judgment, though respondent merely asked for its confirmation, and to dismiss the action purely and simply. *Dorion & Hyde et al.* 12 L. C. J. 49, Q. B. 1868.

2. Where the plaintiff prayed by his action for £50 4s., and, by error, judgment was entered for £54 4s., and defendant appealed on that and other grounds—*Held*, that the court could correct the error and at the same time confirm the judgment in other respects with costs against the appellant. *Levy & Sponza*, 6 L. C. J. 183, Q. B. 1858.

3. Where the parties, after appeal had been had, consented that the judgment should be reversed—*Held*, that, notwithstanding such consent, the court was bound to confirm the judgment if the record showed that the judgment in question was well founded, and it was actually confirmed. *McAndrews & Rowan*, 3 R. L. 439, Q. B. 1871.

4. Where appeal was had from a judgment of the superior court dismissing a motion for a new trial—*Held*, that the court could set aside the verdict always, and render judgment for defendant, *non obstante veredicto*, where they consider that, according to law and the evidence, the verdict ought to have been for the defendant. *Tilstone et al. & Gibb et al.* 4 L. C. J. 361, Q. B. 1860.

**1175.** The costs are taxed by the clerk of appeals, saving a revision of such taxation by a judge within six months, either in term or out of term, after sufficient notice given to the opposite party, but such revision cannot prevent or stay execution, and the decision of the judge in that behalf has the same effect as a judgment of the court. 25 *V. c.* 10, *s.* 6.

1. Where a party knowing of irregularities in the proceedings before the lower court failed to urge them there, but urged them before the Court of Appeal and succeeded there—*Held*, that he could not be allowed the costs of his appeal. *Daigle & Kimbal*, 15 L.C.R. 138, Q. B. 1864.

2. The proceedings on a second appeal will be suspended until the costs in a previous appeal are paid, and if such costs be not paid on a day certain, the second appeal will be dismissed with costs. *Bouvier & Reeves*, 12 L. C. J. 291 & 15 L. C. R. 465, Q. B. 1863.

3. And *held*, also, that a rule to revise the taxation of a bill of costs in appeal will be ordered to be struck from the roll and the bill laid before one of the judges in appeal. *Ib.*

4. A party is entitled to have his costs for printing in appeal taxed at the rate of two dollars per page, although he may have paid less per page to his printer. *Ogilvy et al. & Jones*, 17 L. C. J. 25, Q. B. 1873.

5. Where the counsel for respondent omitted to move for distraction of costs in appeal until the following term—*Held*, that distraction would nevertheless be granted, and it was for the appellant to prove that the respondent had received the costs personally, if such were the case. *The Water Works Co. of Three Rivers* v. *Dostaler*, 18 L. C. J. 196, Q. B. 1874.

6. A motion made in appeal for distraction of costs in the court below will be granted. *Converse* v. *Clark*, 12 L. C. R. 402, Q. B. 1862.

7. An appellant, who by cross appeal in another case might have had the same point decided, will not be allowed the costs of a sepa-

rate appeal to the Privy Council. *Gugy & Brown*, 17 L. C. R. 33, P. C. 1867.

**1176.** Judgments in appeal or error are executed both for principal and costs by the court below, and for that purpose, the record is sent back to it, unless a further appeal to a higher court has been moved for.

1. The Queen's Bench in Appeal, after having rendered judgment, has no longer any power to take cognizance of the case, the exercise of the power of the said court and its competency having terminated with the judgment on the appeal. *The Montreal Assurance Company & McGillivray*, 5 L. C. J. 164 & 10 L. C. R. 385, Q. B. 1860.

**1177.** The court sitting in appeal or error may exercise all the powers necessary for such jurisdiction and make such orders as it may deem proper for the purpose of remedying any insufficiencies of the record; of staying proceedings in the court below in cases from which appeal or error has been brought; of regulating the putting in or renewal of security; and of providing for all cases in which the law affords the party no special remedy.

Such court may also make such rules of practice as may be necessary, for governing the proceedings in all cases brought before it, provided such rules be not contrary to any existing law.

It may also make and establish tariffs of fees for the counsel, advocates and attorneys practising before it, and also for its bailiffs.

1. The Court of Appeal may order and revise an enquête on the facts contained in a *requête en reprise d'instance*. *McKillip et al.* v. *Kauntz et al.* 1 Rev. de Lég. 152, Q. R. 1845.

2. Where a disavowal was raised in a case pending before the Court of Appeal—*Held*, that the court could order an enquête on the issue raised. *Les Curé et Marguilliers de l'Œuvre et Fabrique de la Paroisse de Ste. Anne de Varennes & The Roman Catholic Bishop of Montreal*, 4 R. L. 127, Q.B. 1861.

See art 1166.

3. The rules of practice of a Court are within its control, and it may relax them when a rigid enforcement of them would operate an absolute injustice. *Ross* v. *Scott*, 9 L. C. R. 270, Q.B. 1859.

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## CHAPTER FOURTH.

### OF APPEALS TO HER MAJESTY.

**1178.** An appeal lies to her Majesty in her Privy Council from final judgments rendered in appeal or error by the Court of Queen's Bench:

1. In all cases where the matter in dispute relates to any fee of office, duty, rents, revenue, or any sum of money payable to Her Majesty;

2. In cases concerning titles to lands or tenements, annual rents and other matters by which the rights in future of parties may be affected;

3. In all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling. *C. S. L. C. c.* 77, *s.* 52.

See *ante* 37 Vict. c. 6, *s.* 2 (*Que.*), under art 494.

1. There is no appeal from the Queen's Bench to the Privy Council in a matter of Prohibition. *O'Farrell* v. *Brassard et al.* 4 Q. L. R. 214, Q. B. 1878.

2. Leave to appeal to the Privy Council will not be granted from a judgment which confirmed a judgment of the court below dismissing an inscription *en faux*. *Darling & Templeton*, 19 L. C. J. 105, Q. B.

3. Where the Court of Appeal rendered judgment confirming a judgment of the Superior Court, which quashed a writ of *mandamus* addressed to a commissioner appointed to inquire into the conduct of a certain justice of the peace, requiring him to do things which he was not legally bound to do in the course of such inquiry—*Held*, that from such judgment there was no appeal to the Privy Council. *Belleville* v. *Doucet*, 1 Q. L. R. 250, Q. B. 1875.

4. There is no appeal to the Privy Council from a judgment for a sum of $40, although in default of payment of such judgment the respondent is subject to *contrainte par corps*. *Pacaud* v. *Roy*, 16 L. C. R. 398, Q. B. 1866.

5. *Held*, dismissing a motion for leave to appeal to the Privy Council, that no such appeal lies in cases of *quo warranto*. *Pacaud & Gagné*, 17 L. C. R. 357, Q. B. 1867.

6. An application was made on the last day of the appeal term for leave to appeal to the Privy Council from a judgment rendered five days previously—*Held*, that the motion came too late. *Mullin & Archambault*, 3 L. C. L. J. 117, Q. B. 1867.

7. Under 1178 C. C. P., the amount necessary to allow of an appeal to the Privy Council is the amount mentioned in the declaration as demanded by the action, and not the amount for which judgment was rendered. *Richer & Voyer et al.* 2 R. L. 244, Q. B. 1870.

8. A party, joint appellant with others, has a right to disavow and refuse to participate in any proceeding to appeal to Her Majesty in Privy Council. *Muir et al. & Muir*, 15 L. C. J. 79, Q. B. 1871.

9. Where a party appealing to the Privy Council had given security for costs only, and had filed a declaration that he had no objection to execution going against him for the condemnation money, the court will not allow the record to be remitted to the court below in order to enforce such execution. *Painchaud et al. & Hudon et al.* 15 L. C. J. 112, Q. B. 1870.

10. After an appeal has been allowed to the Privy Council the court cannot set aside the bail bond for alleged irregularities, and dismiss the appeal. Ib.

11. Where leave to appeal to the Privy Council had been granted, and application was made by appellant that a portion of the record said to be immaterial be omitted from the transcript—*Held*, that the court had no power to interfere, and must reject the application. *Lemoine & Lionais*, 16 L. C. J. 99, Q. B. 1872.

12. The Court of Queen's Bench has no power to grant an appeal to the Privy Council when the amount is under £500, and that notwithstanding the action is for overdue instalments of money, such cases not coming under 1178 C. C. P. *Sauvageau & Gauthier*, 5 R. L. 602, P. C. 1874.

13. But when such appeal has been granted and the parties have both appeared and pleaded their case, the Privy Council may grant

leave to suspend the case in order to allow the appellant time to present a special application for appeal. Ib.

14. Where the judgment debt was for a sum less than £500 sterling but the judgment itself determined the right of the appellants, *tiers saisis*, to property amounting in value to £1600 sterling—*Held*, that, in determining the value of the matter in dispute upon which the right of appeal depends, the correct course is to regard the judgment as it affects the interests of the party prejudiced by it, and who seeks to relieve himself from it by appeal; and that. in the case in question, the larger amount must govern the right of appeal. *Macfarlane & Leclaire et al.* 6 L. C. J. 170, P. C. 1862; 12 L. C. R. 154.

15. The right of appeal to Her Majesty in her Privy Council, upon the opposition made by a defendant to the execution of a judgment, is settled by the nature and quality of the demand and not by the matters set forth in the opposition. *Guyy & Brown*, 1 L. C. R. 273, Q. B. 1851.

16. An appeal does not lie to the Privy Council from a judgment of the Court of Appeal, reversing a judgment of the court below, by which the appellant's action was dismissed on demurrer. *Simard* v. *Townsend*, 6 L. C. R. 147, Q. B. 1856.

17. Where it was alleged in the application of the appellant that the interest added to the principal sum recovered on a policy of fire insurance exceeded the sum of £500 sterling, the right to appeal was granted, but subsequently, upon petition of respondent shewing that there was an error in the calculation of the value, the leave so granted was discharged. *The Quebec Fire Insurance Co. & Anderson*, 7 L. C. J. 150 & 151, P. C. 1860.

18. In a case where the defendants were officers of a charitable institution in Quebec, and, the institution becoming bankrupt, action was brought against it for the recovery of a certain sum of money and judgment obtained—*Held*, on the appeal of one of the defendants, that, notwithstanding the provisions of the statute 34 Geo. III. cap. 6, sec. 30, & 12 Vic. cap. 37, sec. 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 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 land or tenements, annual rents, or such like matters and things where rights in future are involved, and the Privy Council, under the 40th section of the first-named statute, may, in its discretion, allow appeal in such cases. *Marois & Allaire*, 6 L. C. J. 85, P. C. 1862.

19. Where leave had been granted by the Court of Queen's Bench here to appeal to the Privy Council—*Held*, by the latter, that this did not preclude the Privy Council from entertaining a petition to rescind the leave to appeal. *Macfarlane et al. & Leclaire et al.* 6 L. C. J. 170 & 12 L. C. R. 154, P. C. 1862.

20. There is no appeal to the Privy Council from an interlocutory judgment which has gone through appeal. *Lacroix* v. *Moreau*, 15 L. C. R. 485 & 16 L. C. R. 180, Q. B. 1865.

21. An appeal may be had to the Privy Council when the amount involved in the controversy exceeds £500 sterling, though the amount actually demanded in the declaration be less than £500. *Bunting & Hibbard*, 1 L. C. L. J. 60, Q. B. 1865.

22. The verdict of a special jury awarded the Plaintiff $7,000 damages for injuries sustained by a railway accident and judgment was rendered by the Superior Court in accordance with the verdict. The judgment having been reversed, and a new trial ordered by the Queen's Bench in appeal, the plaintiff moved for leave to appeal to the Privy Council. The Queen's Bench rejected the application on the ground that the judgment being interlocutory, was not susceptible of appeal, and the Privy Council considered that though this was an interlocutory judgment, it was of such a nature that an appeal should be allowed. *Lambkin & The South Eastern R. R. Co.*, 1 Legal News, 52, P. C. 1877; 22 L. C. J. 21.

23. Leave to appeal to the Privy Council will be granted although the opposite party has already obtained leave to appeal to the Supreme Court. *The City of Montreal & Devlin & è contra*, 1 Legal News, 151, Q. B. 1878.

24. An appeal lies directly to the Supreme Court from a judgment of the Superior Court in Review in cases not under $2,000 where the judgment having been confirmed in review, no appeal lies to the Court of Queen's Bench. *Abbott* v. *MacDonald*, 21 L. C. J. 311, S. C. R. 1877.

25. The Court of Queen's Bench has discretionary power to allow an appeal to the Supreme Court after the delay mentioned by the Statute. *Caverhill & Robillard*, 21 L. C. J. 74, Q. B. 1876.

26. The penalty in a security bond on an appeal to the Supreme Court which stipulates that the penalty should become due and payable in case the appellant failed to prosecute his appeal and the judgment appealed from be affirmed, cannot be recovered when the appellant after giving security, discontinues his appeal. *The South-Eastern R. W. Co.* v. *Lambkin et al.* 22 L. C. J. 224, S. C. 1877.

27. The right of appeal to the Supreme Court does not exist in respect to any judgment rendered prior to the coming into force of the Act creating that court. *Brewster et al. & Chapman et al.*, 20 L. C. J. 295, Q.B., 1876.

28. The Court proposed to be appealed from, or any judge thereof, cannot, under section 26 of the Supreme and Exchequer Court Act allow an appeal when judgment has been signed, entered or pronounced previous to the 11th January, 1876. *Taylor v. The Queen*, 1 S.C. Rep. 65.

29. In determing the sum or value in dispute in cases of appeal by a defendant, the proper course is to look at the amount for which the declaration concludes, and not at the amount of the judgment. *Joyce* v. *Hart*, 1 S. C. Rep., 321.

30. No appeal lies from the judgment of a Court granting a new trial on the ground that the verdict was against the weight of evidence, that being a matter of discretion. *Boak* v. *The Merchants M. Ins. Co.* 1 S. C. Rep. 110.

**1179**. Nevertheless, the execution of a judgment of the Court of Queen's Bench cannot be prevented or stayed, unless the party aggrieved gives good and sufficient sureties, within the delay fixed by the court, that he will effectually prosecute the appeal, satisfy the condemnation, and pay such costs and damages as may be awarded by Her Majesty, in the event of the judgment being confirmed.

The security may be received before one of the judges of the Court of Queen's Bench, *and the sureties are not bound to justify their solvency upon real estate. Ibid. s.* 52.

34 Vict. c. 4, *(Que.)*:

14. Art. 1179 is amended by striking out the following words at the end of the said article: "And the sureties are not bound to justify their solvency upon real estate," and by substituting and adding the following: "The sureties justify their solvency upon the real estate which is described in the bail bond. One surety suffices, if he is the owner of real estate which he describes, provided that the value of such real estate is equal to the amount of the security, over and above all charges and hypothecs. The judge who receives such security may order, either on demand or otherwise, the production of the registrar's certificate, the valuation rolls and any other documents

for the purposes of the security, and is bound to put such questions as he deems advisable to the sureties, and such questions and the answers thereto may be taken down in writing. Nevertheless the party appellant may exempt himself from furnishing such security, by depositing an amount equal to that required for the security, either in money, in bonds of the Dominion, or of the Province of Quebec, or in corporation debentures, and such moneys, bonds or debentures are deposited either with the Clerk of the Court of Queen's Bench, or with the Sheriff, as the judge may direct."

1. On a motion to compel the appellant to put in new security in appeal, one of the parties being insolvent and the other having left the province—*Held*, that an appeal to the Privy Council having been allowed, an order for new security should be granted, but the court cannot dismiss the appeal in case such new security is not put in. *Johnson & Connolly*, 16 L. C. J. 100, Q. B. 1871.

2. Where appeal was allowed to the Privy Council, and £100 was ordered to be paid as security for costs—*Held*, on petition of respondent, that on account of the great length of the transcript of the proceedings, the deposit for security might be ordered to be increased. *Boswell* v. *Kilborn et al.*, 7 L. C. J. 150, & 12 L. C. R. 161, P. C. 1860.

3. And where an appeal was allowed to the Privy Council, and it was shown that the interest added to the principal sum recovered on a fire insurance policy exceeded £500 sterling, the appeal was granted upon deposit of £200 as security for costs. *The Quebec Fire Assurance Co. & Anderson et al.* 7 L. C. J. 150, P. C. 1860.

4. The respondents served a notice upon the appellants that they would put in security for appeal to the Privy Council on the 18th of August, in the judges' 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 entered in chambers on Monday. Security was put in that day, not in chambers, but in the judge's house, one of the parties signing 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 objection to the sufficiency of the security as they might legally have made when such security was put in. *Gibb et al. & The Beacon Fire and Life Assurance Co.* 10 L. C. R. 402, Q. B. 1860.

5. A judge of the Court of Queen's Bench has power in chambers to extend the delay for giving security on an appeal to the Privy Council beyond the delay ordered by the court whenever he is seized of the

matter prior to the expiration of such delay. *The Mayor, &c., of Montreal & Hubert et al.* 21 L. C. J. 85, Q. B. 1877.

6. When a deposit has been made as security on an appeal to the Privy Council, and the judgment appealed from is confirmed in the Privy Council, but without costs in that court, the deposit will nevertheless avail to liquidate the costs in the court below, and it cannot, therefore, be withdrawn by the appellant. *Lemoine* v. *Lionais*, 22 L. C. J. 23, Q. B. 1877.

**1180.** The appellant may also consent to the judgment being executed, and in such case may give security only for the costs in appeal, under the same conditions as under article 1124. *Ibid s.* 52.

**1181.** The execution of any judgment of the Court of Queen's Bench cannot be prevented or stayed after six months from the day on which the appeal was allowed, unless the appellant files in the office of the clerk of appeals, a certificate signed by the Clerk of Her Majesty's Privy Council, or any other competent officer, and stating that the appeal has been lodged within such delay and that proceedings have been had therein. *Ibid. s.* 53.

1. Where a record had been remitted by the clerk to the court below in consequence of the certificate not being lodged within six months after the granting of the appeal—*Held*, that the court could not order the prothonotary of the court below to return the record. *Brewster et al. & Chapman et al.*, 20 L. C. J. 295, Q. B. 1856.

2. Where appeal had been had to the Privy Council, and a certificate was filed setting forth that the case had been referred to the judicial committee of that body—*Held*, that, pending such reference no application in the case could be made before the Court of Appeals here. *Brown & The Mayor, etc., of Montreal*, 19 L. C. J. 140, Q. B. 1875.

3. Where appeal was had to the Privy Council, and the respondent moved to declare the appeal deserted on the ground that the record had not been transmitted—*Held*, that as a certificate of appeal to the Privy Council was before the Court, the motion would be rejected. *Whyte* v. *The Home Insurance Co.*, 19 L. C. J. 196, Q. B. 1875.

4. Where leave had been granted to appeal to the Privy Council, and a copy of the record had been transmitted by post within the delay required, but the certificate required by C. S. L. C. cap. 77, sec. 53, that the appeal had been lodged and proceedings had thereon before the Privy Council, had not been filed within that delay—*Held*, that the Court of Queen's Bench would not order the provisional execution of its judgment. *Jones & Guyon*, 17 L. C. R. 377, Q. B., 1867.

5. The delay of six months fixed by C. S. L. C. cap. 77, during which execution on the judgment is suspended, is not absolute but directory only, and the Court of Appeals may refuse to order the record to be remitted to the court below to the end that execution may be sued out, where the appellant has lodged his appeal to the Privy Council soon after the expiration of six months. *Ib.* 2 L. C. L. J. 161, Q. B. 1866.

**1182.** The Clerk of Appeals of the Court of Queen's Bench is bound to register any exemplification of a decree of Her Majesty in Her Privy Council, as soon as it is presented to him for that purpose, without requiring any order of the Court of Queen's Bench to that effect, and to send back the record in the case to the court below, together with a copy of such exemplification which has been registered as above mentioned. *Ibid.* s. 54.

# BOOK FIFTH.

## INFERIOR JURISDICTIONS.

## CHAPTER FIRST.

### COMMISSIONERS' COURT FOR THE SUMMARY TRIAL OF SMALL CAUSES.

**1183.** The commissioners cannot sit and hold their court separately and at the same time in the same locality.

The court may be held by one commissioner, and several or all of the commissioners may likewise sit together.

They must decide according to equity and good conscience, and to the best of their ability and judgment. *C. S. L. C. c. 94, ss. 4, 7, 11.*

**1184.** The commissioners have, for keeping order during their sittings, and for enforcing the execution of their warrants, orders and judgments, the same powers as the other courts of Lower Canada. *Ibid. ss. 9–44.*

**1185.** They may be recused for the same reasons as judges of other courts.

**1186.** The recusation must be in writing. *Ibid. s. 12.*

**1187.** If all the commissioners are recused by either of the parties, the case is immediately transmitted to the nearest Commissioners' Court, which decides upon the validity of the recusation, and afterwards hears and determines the merits of the case, in the event only of the recusation being maintained.

But if the recusation is overruled, the case is sent back to the former court, which may, without reference to the merits, tax the costs of such recusation against the party who made it. *Ibid.*

**1188.** The Commissioners' Court exercises an ultimate jurisdiction in all suits purely personal or relating to moveable property, which arise from contracts or quasi-contracts, and wherein the sum or value demanded does not exceed twenty-five dollars, and the defendant resides:

1. In the locality of the court;

2. In another locality, but in the same district and within a distance of five leagues, if the debt has been contracted in the locality for which the court is established;

3. In a neighbouring locality in which there are no commissioners, or in which the commissioners cannot sit by reason of illness, absence, or other inability to act, provided such locality is in the same district within a distance not exceeding ten leagues. 1 *Boitard, p.* 93-4; *Poth. int. gén. Nos.* 110-111, 119; *C. S. L. C. c.* 94, *ss.* 9, 19-20.

1. Commissioners for the summary trial of small causes have no jurisdiction in an action where the claim, amounting to more than twenty-five dollars, has been divided in order to give jurisdiction to the court. *Desparois exp. & Laberge*, 7 L. C. J. 35, S. C. 1859.

2. The Commissioners' Court has jurisdiction in an action for the recovery of the balance of a sum exceeding $25, provided such balance does not exceed that sum. *Bourbeau exp.*, 13 L. C. R. 65, S. C. 1862.

3. The jurisdiction of the Commissioners' Court for the summary trial of small causes extends to actions by creditors against the heirs of the deceased. *Charbonneau exp.*, 7 L. C. J. 122, S. C. 1863.

4. The Commissioners' Court for the trial of small causes has no jurisdiction in actions for tithes. *Roy* v. *Bergeron*, 2 R. L. 532, C. C. 1867.

5. In an action brought before the Commissioners' Court for the summary trial of small causes, the jurisdiction must appear on the face of the proceedings; and a defendant who has been condemned may demand that the judgment be set aside on the ground that neither the

service nor the judgment show the jurisdiction of the court in the matter. *Macfarlane & Bourgault*, 16 L. C. J. 221, S. C. 1872.

6. Commissioners cannot take cognizance of an action for damages *ex delictu*. *Legendre* v. *Lemay*, 2 Rev. de Lég. 337, K. B. 1820.

**1189**. It has no jurisdiction in suits for slander, or for assault and battery, or relating to civil status, paternity, or seduction, or lying-in expenses; nor in suits for the recovery of any fine or penalty whatever. *Ibid. s.* 8.

**1190**. It has jurisdiction in suits for the recovery of assessments, not exceeding twenty-five dollars, imposed for the building of churches, parsonages and church-yards. *C. S. L. C. c.* 18, *s.* 25.

**1191**. It may, in matters within its jurisdiction, grant:

Attachments for rent;

Attachments in revendication;

Attachments by garnishment after judgment;

Simple attachments or attachments by garnishment before judgment, for sums exceeding five dollars, whenever it is established by the affidavit of the plaintiff, or of his agent, that the defendant is secreting or is about to secrete his property, or absconds or is immediately about to leave the Province, with intent to defraud his creditors. *Ibid. c.* 94, *ss.* 23-4.

**1192**. [These proceedings may be executed beyond the limits of the judicial district in which they are issued, provided an order of one of the commissioners, authorizing such execution within the district where it requires to be executed, is endorsed upon the warrant.]

Every warrant of simple attachment in revendication, attachment for rent, attachment by garnishment or seizure by garnishment, must be made returnable on a day named within forty days, and the return with a certificate of the proceedings must be made on the day so named.

Such affidavit may be received either by one of the commissioners or by the clerk of the court. *Ibid. s.* 25.

37 Vict. c. 11 (*Que.*):

"1192*a*. In the case of attachment by garnishment before or after judgment, the garnishee, within three days after the writ of seizure has been served upon him, may make his declaration under oath before the clerk of the Circuit Court nearest to the place where the writ was served upon him.

"1192*b*. Such clerk is authorized to administer the oath required, and must, after having drawn up and received the declaration of the garnishee, forward the same, without delay, through the post, by a registered and stamped letter, to the clerk of the Commissioners' Court where the cause is pending. He is entitled to a fee of one dollar, payable by the garnishee, for drawing up, receiving and forwarding the declaration as required; and, on the payment of such fee, he prepares a receipt which he forwards with the declaration of the garnishee.

"1192*c*. Such sum of one dollar is taxed by the commissioners or by their clerk as an integral part of the costs of suit, and the receipt given therefor and forwarded to the clerk of the Commissioners' Court is equivalent to a judgment of such court in favour of the garnishee against the plaintiff in the suit, and may be executed by seizure, after the same delay and in the same manner as any other judgment of such court."

**1193**. Any minor above the age of fourteen years may bring a suit before a Commissioners' Court for the recovery of wages or salary, in the same manner as if he was of age. *Ibid. s.* 21.

**1194**. The delay upon ordinary summons must be at least three clear days when defendant does not reside more than two leagues from the place to which he is summoned, with the usual addition of delay when the distance exceeds two leagues, according to article 75.

But if the summons is accompanied with an attachment, the delay must be at least fifteen days and not more than forty days. *Ibid. ss.* 22-27.

**1195**. The writ of summons commands the defendant to pay the plaintiff the amount demanded or to appear before the court to answer such demand.

It must also contain:

The names, surname, residence and occupation, both of the plaintiff and of the defendant;

A summary statement of the cause of action;

The day on which the defendant must appear;

The date of the writ;

The signature of the commissioner. 7 *V. c.* 19, *sched. No.* 1.

**1196**. Ordinary writs of summons may be served by any bailiff of the Superior Court or by any sergeants of militia residing in the locality. *C. S. L. C. c.* 94, *s.* 28.

**1197**. If the summons is accompanied with an attachment it can only be served by a bailiff. *Ibid.* § 2.

**1198**. Either party may evoke the case to the [Circuit] Court in the district when the contestation relates:

To any title to immoveable property;

To any fee of office, or to any sum of money due to the Crown;

To any duty, rents, revenue, or annual rent, payment or other matter by which rights in future might be bound. *C. S. L. C. c.* 83, *s.* 178; *c.* 94, *s.* 29.

**1199**. The improbation of any act or document produced before the court has the effect of an evocation [to the Circuit Court]. *Ibid. c.* 94, *s.* 30.

**1200**. In the cases of the two preceding articles, the commissioner, or one of the commissioners, or the clerk, must, within fifteen days, transmit the record to the Circuit Court, together with a certified transcript of the entries in the register concerning the same. *Ibid. s.* 31.

Nevertheless, in the case of improbation, the record can-

not be transmitted unless the party alleging the falsity gives sufficient security for the costs to be incurred upon such improbation.

**1201**. [In default of such security being given within the delay fixed by the court the party forfeits his right of evocation, and the Commissioners' Court may proceed to hear and determine the case without regard to the improbation.]

**1202**. If the evocation is allowed, the case is heard and determined by the court to which it is evoked, as if it had originated therein. *Ibid. s.* 32.

**1203**. No person can act as attorney of either of the parties before a Commissioners' Court except he is an advocate or attorney-at-law, or the holder of a special power of attorney, or unless it is in the presence and with the consent of the party.

Bailiffs and sergeants of militia can in no case act as attorneys. *Ibid. s.* 18, § 1.

**1204**. Any person, other than an advocate or attorney-at law, who acts for one of the parties must do so gratuitously; and if such person for so acting receives, either directly or indirectly, any fee, emolument or remuneration whatever, he is deemed to have received the same under false pretences and may be punished accordingly, and is, moreover, disqualified from ever acting as attorney before a Commissioners' Court. *Ibid.* § 2.

**1205**. No clerk of such court can act as the attorney of either of the parties. *Ibid.* § 3.

**1206**. If the defendant has been served personally and makes default, or if he confesses judgment, or if the parties agree to it, the case may be heard on the day of the return and judgment may be rendered.

In any other case the suit must be postponed to a subsequent day for trial. *Ibid. s.* 33, §§ 1-2.

**1207**. By consent of the parties the case may be referred to the decision of three arbitrators, one of whom is named by each party and the third by the court.

The court may also, in its discretion, order such reference.

The arbitrators before acting, must be sworn before one of the commissioners or before a justice of the peace, to fulfil their duty faithfully and impartially.

They may hear the parties and their witnesses, who must be sworn before a commissioner or before a justice of the peace.

The decision of two of the arbitrators is final, and must be homologated and executed accordingly. *Ibid. s.* 34.

**1208**. The cases are heard, tried and determined in a summary manner, without any written pleadings being necessary. *Ibid. s.* 7.

**1209**. Oral testimony is admitted in all cases, and one witness, even if related, is sufficient.

But the bailiff or sergeant who served the writ of summons cannot be a witness for the party who employed him, except as regards the service itself. *C. S. L. C. c.* 94, *s.* 18, § 3; *s.* 36; *c.* 82, *ss.* 14, 15, 16.

**1210**. Upon the application of either of the parties, the court may compel any person residing within its jurisdiction to attend as a witness in any case, under a penalty of not less than one dollar, nor more than four dollars, for every default to attend as commanded. *C. S. L. C. c.* 94, *s.* 35.

**1211**. The court, in rendering judgment, may condemn the unsuccessful party to the costs of suit, of contestation, and of arbitration.

But if the amount of the judgment does not exceed two dollars, the court may reduce the costs to the same amount as that for which judgment is rendered. *Ibid. s.* 38.

**1212**. If the debtor fails to satisfy the amount of the condemnation against him within eight days, he may be compelled to do so by the seizure and sale of such seizable moveables as he may have within the district in which the court was held.

He is liable to the costs of such execution to the amount of one dollar and a half.

If the sale does not take place he is not bound to pay more than seventy-five cents of costs.

These costs do not in any case comprise the expense of feeding cattle, if any have been seized.

The warrant of execution must be made returnable and be returned like the other warrants mentioned in article 1192. *Ibid. ss.* 41-2.

**1213**. No opposition to the sale of moveables under seizure can stay proceedings, unless it is allowed by a commissioner and accompanied with an order to that effect. *Ibid. s.* 43.

**1214**. Oppositions thus allowed are heard and determined in the same manner as other cases before the court. *Ibid.*

**1215**. The clerk, and the bailiffs or sergeants of militia cannot demand any other emoluments than those mentioned in form number 56 in the Appendix to this Code. *Ibid. s.* 40.

## CHAPTER SECOND.

### OF JUSTICES OF THE PEACE AND OTHER INFERIOR CIVIL JURISDICTIONS.

**1216.** Justices of the peace have also jurisdiction in certain civil matters, such as the recovery of school taxes, of assessments for the building or repairing of churches, parsonages or church yards, damages caused by animals, and other matters relating to agriculture, disputes between masters and servants in the country parts, seamen's wages, claims of pawners against pawnbrokers, and other matters.

1. A justice of the peace has no jurisdiction under 12 Vict. cap. 55, in cases for the desertion of a servant, unless there is a contract. *Rose exp.* 3 L. C. R. 495, S. C. 1853.

2. An attachment after judgment issued by a justice of the peace and all proceedings thereon are absolutely null. *Dumont* v. *Laforge*, 1 Q. L. R. 159, S. C. 1874.

**1217.** In certain cities the Recorder's Court has also jurisdiction for the recovery of certain municipal claims, and in matters of dispute between lessors and lessees and master and servant.

1. The Superior Court has jurisdiction as a court of appeal from judgments of the Recorder's Court, relating to taxes imposed by the corporation of the city of Quebec under its by-laws. *Boswell & The Mayor et al. of Quebec*, 14 L. C. R. 450, S. C. 1864.

**1218.** The Trinity House also exercises a civil jurisdiction in matters connected with the shores of the river St. Lawrence and of the rivers flowing into it, and also with regard to the wages and indemnities due to pilots.

**1219.** The extent of the jurisdiction of these special courts and the manner of proceeding before them are regulated by the statutes which create them or relate to them, and in certain respects by the practice therein followed.

## CHAPTER THIRD.

### REMEDIES AGAINST THE PROCEEDINGS AND JUDGMENTS OF THE ABOVE-MENTIONED COURTS.

**1220.** In all cases where no appeal is given from the inferior courts above-mentioned, the case may be evoked before judgment, or the judgment may be revised, by means of a writ of *certiorari*, unless this remedy also is taken away by law. 1 *Wharton Law Lex.* 144.

1. A notice of application for a writ of *certiorari* given within the six months following conviction is not sufficient if the application itself be not made until after the expiration of such six months. *Palmer exp.* 16 L. C. J. 253, S. C. 1872.

2. A *certiorari* allowed before the expiration of six months from the date of the conviction to be removed, but not sued out until the six months had expired, was quashed. *Allard exp. & Chillas*, 2 Rev. de Lég. 32, K. B. 1819.

Contra: *Exp. Fiset*, 3 Q. L. R. 102, S. C. 1877.

3. Under the license law of the city of Montreal, the defendant has no right to a *certiorari* until he has made the deposit required by law. *Doray exp. & Sexton*, 6 R. L. 507, S. C. 1874.

4. The writ of *certiorari* does not lie from a conviction pronounced by a district magistrate under the License Act, even where the defendant has made the deposit required by that Act. *Duncan exp. & Marquis exp.* 4 R. L. 228 & 16 L. C. J. 188, S. C. 1872.

5. A writ of *certiorari* will lie to bring the record and proceedings of a court-martial before the Superior Court, and the fact that the petitioner has a remedy in trespass is no bar to his right to ask a reversal of the judgment by *certiorari*; and a *prima facie* case, showing want or excess of jurisdiction, or that the court was illegally convened and irregularly constituted, will be sufficient to obtain the writ. *Thompson exp.* 2 Q. L. R. 115, S. C. 1876.

6. The Superior Court at Montreal has no jurisdiction on a petition for *certiorari*, to inquire into a conviction by a justice of the peace in the district of Three Rivers. *Cumming exp.* 3 L. C. R. 110, S. C. 1852.

7. *Held*, that a *certiorari* would not lie from a judgment of a Commissioners Court, by reason of eight days being granted the defendant to plead when there was no personal service, as this did not involve an excess of jurisdiction. *Goodman exp.* 6 L. C. R. 476, S. C. 1850.

8. But a *certiorari* would lie from a judgment of the Commissioners' Court on the ground that the action was at the suit of a party styling himself president of a committee to collect the salary of the "Rev. T. D.," or to recover a tax for the support of a missionary. *Saltry exp.* 6 L. C. R. 476, S. C. 1855.

9. A *certiorari* will be granted in proceedings concerning the illegal occupation of Indian lands, provided there be ground for the belief that the conviction was had without proof; but full faith and credit will be given to the magistrate or officer's return to a writ of *certiorari*; and, if it show that a conviction was had upon the confession of the defendant, the latter will not be permitted to go outside the return, and show by affidavits of parties present, that he made no confession, that the return is false, and that the conviction was really had without proof or confession. *Morrison & DeLorimer*, 13 L. C. J. 295, S. C. 1869.

10. A *certiorari* will not lie from a decision of a commissioner appointed for the erection of parishes, the powers granted to, and exercised by, them not being of a judicial character. *Lecours exp.* 3 L. C. R. 123, S. C. 1853; *The Fabrique of Montreal exp.* 4 R. L. 271, S. C. 1872.

11. Orders or judgments which are not of a final character do not give rise to *certiorari*. *The Fabrique of Montreal et al. exp.* 4 R. L. 271, S. C. 1872.

12. Where the defendant was convicted, by default, of selling liquor without license, and the delay between the issue and return of the writ was proved to have been insufficient, a writ of *certiorari* would be granted, notwithstanding that it was especially taken away by the statute under which the conviction was had. *Church exp.* 14 L. C. R. 318, S. C. 1863.

13. Where it is not plain that the inferior tribunal had jurisdiction, the Superior Court or judge will grant a *certiorari*, notwithstanding that the right to it, as respects such inferior tribunal, has been expressly taken away by statute. *Mathews exp.* 1 Q. L. R. 353, S. C. 1875.

14. Although the right of *certiorari* has been taken away under the Agricultural Act, still there are cases in which the courts will allow it. *Tremblay et al. & Bélanger*, 15 L. C. J. 251, S. C. 1871.

15. Where a judgment was pronounced in open court, and afterwards changed in such a manner as to increase the amount which defendant had been condemned to pay, the party aggrieved may demand that the judgment be set aside by means of a writ of *certiorari*. *Macfarlane & Bourgault*, 16 L. C. J. 221, S. C. 1872.

16. Where a defendant in a case before two justices of the peace had been convicted, and, having caused a writ of *certiorari* to issue out of the Superior Court, allowed six months to elapse without proceeding with his rule thereunder—*Held*, on motion of complainant, that his rights under such rule would be declared to have lapsed, and the proceedings be remitted to the court below. *Boyer exp.* 2 L. C. J. 188, S. C.; *Chagnon & Lareau et al.* 2 L. C. J. 189, S. C.; *Prefontaine exp.* 2 L. C. J. 202, S. C. 1858.

**1221.** The remedy lies, nevertheless, only in the following cases:

1. When there is want or excess of jurisdiction;

2. When the regulations upon which a complaint is brought or the judgment rendered are null or of no effect;

3. When the proceedings contain gross irregularities and there is reason to believe that justice has not been or will not be done. *Ibid.*

1. *Certiorari* will lie for excess of jurisdiction and illegality in the proceedings of commissioners appointed by the governor in the province under 31 George III. cap. 6, for the building and repairing of churches. *Rex & Gingras et al.* S. R. 560, K. B. 1833.

2. Where the police magistrate imposed a fine of $100 for an assault, and the defendant brought *certiorari*—*Held*, that the magistrate had not exceeded his jurisdiction. *Roy exp.* 5 R. L. 452, S. C. 1874.

3. When a judgment of the Commissioners' Court is bad in form, the Superior Court will not grant a writ of *certiorari* unless it appear that there has been an excess of jurisdiction. *Gibeault exp.* 3 L. C. R. 111, S. C.; *Gauthier et al. exp.* 3 L. C. R. 498, S. C. 1853.

4. *Certiorari* can only be had for want or excess of jurisdiction, and irregularity and illegality in the proof and proceedings in a cause before the commissioners, and the fact that they refused to admit proof offered by the opposants, and admitted illegal proof on the other side do not constitute a want of jurisdiction, and a writ of *certiorari* based on such grounds must be dismissed. *Boucher exp. et al.* v. *Desaulles et al. & Langelier et al.* 6 L. C. J. 333, S. C. 1862.

5. Where the petitioner asked for a writ of *certiorari* against a conviction of a justice of the peace for selling liquor without license, on the ground that the revenue inspector prosecuting had not alleged that he, the petitioner, was not a distiller or wine merchant; and because there were no other negative averments than that the defendant was not licensed as required by law; and because the conviction did not mention the precise day on which the alleged offence was committed; and because the judgment ordered that the defendant be imprisoned in default of sufficient moveables to meet the fine and costs; and because the judgment had ordered an imprisonment of two months, counting from the day of incarceration—the judgment of the court below, rejecting the petition, was confirmed with costs. *Beauparlant* v. *Gervais et al.* 1 R. L. 467, S. C. R.

6. 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 judges were personally interested in the prosecution. Thereupon he is ordered to show cause why an attachment for contempt against him should not issue. This he declines to do, and 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 his conviction. *Vallieres de St. Réal exp.* S. R. 593, K.B. 1834.

7. On a writ of *certiorari* to quash a conviction of a justice of the peace on a charge of having disturbed the public peace by insulting a person, and by committing an assault upon him, and by crying out and threatening to beat him, the court granted the motion on the ground that the conviction did not appear to be warranted by any law or statute. *Rouleau exp.* 17 L. C. J. 172, S. C. 1872.

8. Where an order had been granted under 32 & 33 Vict. cap. 9, sec. 11, changing the place of trial from Quebec to Montreal, and directing that all the proceedings had before a coroner should be transmitted to the Queen's Bench at Montreal, and such order for transmission of inquest had been obeyed—*Held*, that a writ of *certiorari* to produce the return of the proceedings, in order that the inquest may be quashed for illegality, is unnecessary, and a potition presented in chambers, praying for the issue of such writ, would not be granted. *Regina & Brydges*, 18 L. C. J. 94, Q. B. 1874.

**1222.** The writ of *certiorari* can only be granted upon motion, supported by an affidavit of the facts and circumstances of the case.

**1223**. A previous notice of the time and place at which the motion will be presented must be served upon the functionary seized of the case, or who rendered the judgment, and a return of such service is made as in any other case. *C. S. L. C. c.* 89, *s.* 2 § 2.

1. The return of a notice of motion for a writ of *certiorari* made by a bailiff under his oath of office is not sufficient, but such a return must be proved by oath. *Adams exp.* 10 L. C. J. 176, S. C. 1865.

2. A bailiff's return of the notice of motion for a writ of *certiorari* is sufficient, and such return need not be proven on oath. *Roy exp.* 7 L. C. J. 109, S. C. 1863.

**1224**. The service of such notice has the effect of suspending all proceedings in the court below.

**1225**. The motion must be presented to the Superior Court or the Circuit Court, [or to a judge.] The opposite party is entitled to appear and make any oral objections of a nature to prevent the granting of the writ of *certiorari*.

**1226**. Writs of *certiorari* are in the name of the sovereign; they are sealed with the seal of the court, are clothed with the other formalities required for other writs, and command the functionary to whom they are addressed to certify and transmit, within a fixed delay, all the papers connected with the case, by whatever names the parties may be therein designated. 2 *Tidd's Pr.* 147.

1. On the hearing of a writ of *certiorari* issued under 12 Vict. cap. 41—*Held*, that it should be addressed to the justice of the peace making the conviction and not to the bailiff effecting the service of such writ, and if addressed to the bailiff, will be set aside. *Regina* v. *Barbeau & Barbeau*, 1 L. C. R. 320, S. C. 1851.

**1227**. Mention must be made on the back of the writ that it has issued by order of the court.

**1228**. The writ is served upon and left with the functionary, to whom it is addressed, and if it is addressed to a

court composed of several functionaries, it is left with one of them, and such service suspends all proceedings before them under pain of being liable for contempt of court.

The return of such service is made upon a certified copy of the writ. 2 *Comyn's Dig.* 340.

1. The original writ of *certiorari*, and not a copy, must be served upon the convicting justice; and it is not necessary to serve a copy of such writ upon complainant. *Filiau exp.* 4 L. C. R. 129, S. C. 1854.

2. *Held*, on motion, that a writ of *certiorari* would be quashed—a copy of the writ having been served on the magistrate and his return made thereon. *Lahaye exp.* 6 L. C. R. 486, S. C. 1866.

3. The writ of *certiorari* should be addressed to the judge and not to the prothonotary of the court, and a writ issued contrary to that rule will be quashed. *Grant* v. *Lockhead*, 16 L. C. R. 308, & 10 L. C. J. 183, Q. B. 1866.

4. A writ of *certiorari* addressed to the superintendent of police, when it ought to have been addressed to the judge of quarter sessions, would be set aside, and another rule would not be granted upon motion to rectify the error in the first. *Piton & Lemoine*, 16 L. C. R. 316, S. C. 1866.

**1229.** The persons to whom the writ is addressed are bound to comply with it, by annexing to it all the papers demanded and certifying their return on the back of the writ.

1. On a writ of *certiorari*, full credence will be given to the officer's or magistrate's return of the proceedings, and the defendant will not be permitted to go outside of the record, and show by persons present that the conviction was had without proof or confession whatever. *Morrison* v. *Delorimier*, 13 L. C. J. 295, S. C. 1869.

2. On a *certiorari* a return of affidavit and warrant only is insufficient. *Rex* v. *Desgagné*, 2 Rev. de Lég. 32, K. B. 1819.

3. 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 to the clerk of the peace, but a rule *nisi* for contempt will not issue *de plano* without notice to the magistrate. *Davies exp.* 3 L. C. R. 60, S. C. 1853.

4. Commissioners to whom a writ of *certiorari* has been addressed, and who have failed to make a proper return within the proper time, will be mulcted in costs. *Leroux exp.* 10 L. C. J. 193, S. C. 1866.

**1230**. If they fail to comply with the writ they are liable to coercive imprisonment, in the ordinary manner.

**1231**. If the opposite party has not already appeared and filed an appearance in the ordinary form, he may do so immediately after the writ is regularly returned; and thereupon the case may be inscribed on the roll by either party, to be heard in the ordinary manner. *C. S. L. C. c.* 89, *s.* 3.

1. On an inscription for hearing on the merits of a *certiorari* a motion to quash the conviction is necessary. *Whitehead exp. & Brunet*, 14 L. C. J. 267, S. C. 1870.

2. The merits of a *certiorari* may be heard on a rule to quash, without an inscription for hearing. *Marry exp. & Sexton*, 14 L. C. J. 101, S. C. 1869.

3. The hearing on the merits of a writ of *certiorari* must be had in one of the two divisions of the court appointed for such hearing in ordinary cases. *Whitehead exp.* 15 L. C. J. 43, S. C. 1870.

4. A defendant under a writ of *certiorari* cannot compel the plaintiff or petitioner to proceed under his writ by a mere motion to that effect, the proper course being by means of a *procedendo*. *Regina* v. *Carrier*, 2 L. C. R. 302, S. C. 1852.

5. On a writ of *certiorari* to quash a conviction of a justice of the peace, condemning the city inspector for pulling down a fence erected by private individuals, the court has not the power to inquire into the matters of fact contained in the evidence, or as to the amount of malice which entered into the act with which the accused is charged. *Lanier & Lanfret & Menard*, 6 R. L. 350, S. C. 1874.

6. And on a simple inscription on a writ of *certiorari*, without a rule to quash having been previously taken, the court has not the power to quash a conviction. Ib.

**1232**. All interlocutory or final judgments upon writs of *certiorari* are drawn up and served in the same manner as in ordinary suits. *Ibid. s.* 2.

**1233**. The court in rendering judgment upon the writ, may award costs in its discretion. *Ibid. s.* 4.

1. Where a conviction was set aside on *certiorari*—*Held*, that the costs were at the discretion of the court. *Leonard exp.* 1 L. C. J. 253, S. C. 1857.

2. And a motion for a writ of *certiorari* against a conviction of a justice of the peace would be rejected with costs, notwithstanding that the magistrates alone appeared by an advocate. *Beauparlant* v. *Gervais et al.* 1 R. L. 467, S. C. R. 1865.

3. On a motion to compel a magistrate to return the original papers in a case under *certiorari*, the motion will be granted, but without costs, against the magistrate. *Demers exp.* 7 L. C. R. 428, S.C. 1857.
Overruling *Terrien exp.* 7. L. C. R. 429.

**1234**. No appeal lies from the judgment on the application for the writ, or from the judgment upon the writ itself; nor are such judgments subject to review. *Ibid. s.* 6; *c.* 88, *s.* 17.

1. There is a right of revision of judgments rendered on the demand or motion for a writ of *certiorari*, and on that revision, the judgment refusing the writ, being held good, will be confirmed with costs. *Beauparlant exp.* 10 L. C. J. 102, S. C 1865.

2. But *held*, later, that there is no right of revision of a judgment rendered on an application for a writ of *certiorari*. *Spelman exp.* 10 L. C. J. 81 & 1 L. C. L. J. 115, S. C. R. 1866.

**1235**. The procedure regulated by this chapter applies also to all other cases in which the writ of *certiorari* will lie, and against any other court not mentioned in this book; but it does not apply with respect to the court of Vice-Admiralty, over which the Superior Court, as well as the Circuit Court, has no control.

# PART THIRD.

## NON-CONTENTIOUS PROCEEDINGS

39 Vict. c. 33 (*Que.*):

24. Notaries may prepare the non-contentious proceedings specified in the third part of the Code of Civil Procedure, and submit the same to the judge or to the prothonotary; and may especially sign, in the name of the applicants, without any special power, requests or petitions for the summoning of a family council, in relation to tutorships, curatorships, sale or alienation of the property of minors, interdicted persons, partition in licitation, homologation *en justice*, the affixing and the removal of seals, as also all other petitions, or proceedings in which the action of the judicial authority, or of any other public authority whatever, is to be asked for.

# TITLE FIRST.

## OF REGISTERS AND THEIR AUTHENTICATION.

### CHAPTER FIRST.

#### OF REGISTERS OF CIVIL STATUS.

**1236.** All registers intended to record births, marriages and deaths, or religious profession, must before being used, be numbered upon the first and every subsequent leaf, with the number of such leaf written in words, at full length, and be sealed with the seal of the Superior Court, by affix-

ing the same upon the two extremities of a ribbon, or other such fastening, passing through all the leaves of such registers and secured inside of the cover thereof; and upon the first leaf must be written an attestation under the signature of a judge or the prothonotary of the Superior Court of the district, or of the clerk of the Circuit Court of the county which comprises the Roman Catholic parish, Protestant Church or religious congregation or society authorized to keep such registers and for which they are to serve, and to which they belong, specifying the number of leaves contained in the register, the purpose for which it is intended, and the date of such attestation.

Such certificate cannot, however, be given until the formalities prescribed by special acts with regard to certain religious congregations have been fulfilled. *C. S. L. C. c.* 20, *s.* 2; 25 *V. c.* 16, *s.* 1. *C. C. Actes de l'Etat Civil, Art.* 3.

32 Vict. c. 26 *(Que.)*:

An Act respecting the Authentication and Custody of Registers of Civil Status.

Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. Article 1236 of the Code of Civil Procedure is hereby amended by inserting after the words, "the seal of the Superior Court," the words, "or the seal of the Circuit Court."

2. Article 45 of the Civil Code is amended, by striking out the words, "or to the clerk of the Circuit Court, instead of the prothonotary, in the case specified in the Statute 25 Vict. c. 16," in the said article, and substituting therefor the words, "or to a clerk of the Circuit Court in the county."

3. Article 47 of the Civil Code is amended so as to read as follows:

"Within the first six weeks of each year, the person who kept the said registers, or who has charge thereof, deposits in the prothonotary's office of the Superior Court of his district, one of the said duplicates, the delivery of which is acknowledged by a receipt which the said prothonotary is bound to give, free of charge."

4. Article 48 of the Civil Code is amended, by striking out the words "or clerk," in the said article.

5. Within three months after the passing of this Act, all clerks of the Circuit Court in any county shall deliver to the prothonotary of the Superior Court of the district in which such county is situate, all registers of civil status then in their possession.

6. Together with the copy of the portions of the Civil Code required, by article 1237 of the Code of Civil Procedure, to be attached to the duplicate register mentioned in the said article, a copy of this Act shall likewise be attached.

7. All registers which, since the coming into force of the Code of Civi Procedure, have been authenticated by any clerk of the Circuit Court and sealed with the seal of the said court, shall be held to have been and to be, as legally authenticated as if article 1236 of the said Code of Civil Procedure had originally been enacted as amended by section one of this Act.

**1237**. The duplicate register which is to remain in the hands of the priest, minister, or person doing the parochial or clerical duty of each Roman Catholic parish church, Protestant, or religious congregation, must be bound in a substantial and durable manner.

[A copy of the title *Of Acts of Civil Status*, in the Civil Code, and of the first, second and third chapters of the title *Of Marriage* in the same code, must be attached to such duplicate.] *C. S. L. C. c.* 20, *s.* 1, § 3.

*Vide* 32 *V. c.* 26, *ss.* 6, 7, under preceding article.

**1238**. *Curés*, churchwardens of *fabriques*, and other such administrators, in places where baptisms, marriages and deaths have taken place, and also the superior of communities in which vows of religious profession have been made, are respectively bound to fulfil the requirements of the law with regard to the registers of acts of civil status, and may be compelled to do so by such means and under such pains, penalties or damages as the law allows.

**1239**. Any person who desires to have any register rectified must present to the court a petition for that purpose, stating the error or omission of which he complains, and praying that the register may be rectified accordingly.

The petition must be served upon the depositary of such register. *C. P. C.* 855.

**1240.** The court may also order any person to be called in whom it deems interested in the application. *C. P. C.* 856.

Such person is thereupon summoned in the ordinary manner.

**1241.** Any judgment ordering a rectification must contain an order for the inscription of such judgment upon the two registers, and no copy of the act rectified can thereafter be delivered without the corrections thus ordered to be made. *C. P. C.* 857.

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## CHAPTER SECOND.

### REGISTERS OF REGISTRY OFFICES.

**1242.** Every register of which the law requires the authentication, must, before any entry is made therein, be authenticated by an attestation, written on the first page and signed by the prothonotary of the Superior Court of the district in which the register is to be used; and such attestation must mention the purpose for which such register is intended, the number of leaves contained therein, and the date of the attestation. Each leaf must be numbered in words, written at full length, and the prothonotary must write thereon the initial letters of his name. *C. S. L. C.* c. 37, *s.* 59.

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## CHAPTER THIRD.

### REGISTERS OF SHERIFFS AND CORONERS.

**1243.** The sheriff and the coroner of each district must keep a duplicate register for transcribing and registering therein all deeds or acts of sale made by them of real property in their official capacity, and when such register is filled one of the duplicates thereof must be deposited by such sheriff or coroner in the office of the prothonotary of the Superior Court for the district. *Ibid. c.* 92, *s.* 11.

**1244.** Such registers must be authenticated in the same manner as those of the registry offices mentioned in article 1242. *Ibid.* § 2.

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# TITLE SECOND.

### OF INSPECTION OF DOCUMENTS.

**1245.** Notaries are bound, upon payment of their lawful fees and dues, and without any judge's order, to give communication or copies of or extracts from any act or document forming part of their official records, to the parties or to their heirs or legal representatives. 1 *Couchot*, 84; 3 *Brillon*, 506; *Ord.* 1535, *art.* 12; 1 *Pig.* 54; *C. P. C.* 839; *sed vide Bioche t.* 4, *p.* 398, *No.* 55.

**1246.** They are not bound to give such communication, copies or extracts to other parties without an order from a judge [unless it is of such nature that it should be registered]. *Cou. loc. cit.*, 1 *Pig.* 49.

**1247**. If the notary refuses to give such communication, copies or extracts, as required, the person demanding the same may, by petition duly served upon such notary, apply to a judge for an order for inspection, which is granted upon proof of his right or his interest. 1 *Pig.* 49, 54; 1 *Lacombe*, 129; *C. P. C.* 839, 841.

**1248**. If communication only be demanded, the order fixes the day and hour when communication of the act must be given.

If a copy or extract be demanded, the order fixes the time at which it must be furnished. 1 *Pig.* 51.

**1249**. The service of the order of the judge upon the notary must give a sufficient delay for a compliance with such order. *Ibid.*

**1250**. The copy or extract must be certified to have been delivered in compliance with the order; and the notary mentions the fact at the foot of the copy of the order that was left with him. *Ibid.* 47, 52, 53; *C. P. C.* 842.

**1251**. If the notary fails to comply with the order of the judge, he is liable for all consequent damages, and to coercive imprisonment. *Ibid.* 45.

**1252**. When the original of any authentic act or a public register has been lost, destroyed or carried away, and any authentic copy or extract thereof exists, the holder of such copy or extract may apply to the court or judge for leave to deposit the same with such public officer as the court or judge will name, to be there used and considered as an original, the copies of which will be deemed authentic, *Ibid.* 54.

**1253**. [A similar application may be made by any party to a deed, in order to oblige any other party to the same, who is in possession of an authentic copy thereof, to deposit such copy for the same purpose, and such other party is

bound to comply with the order of the court or judge in that behalf, under pain of all damages. The whole, nevertheless, at the cost and expenses of the party requiring such deposit, who is obliged to furnish him with a copy of the deed and to indemnify him for all travelling and other expenses.]

**1254.** The petition must be served upon all other interested parties mentioned in the act.

**1255.** Upon satisfactory proof, the court or judge orders the document produced to be deposited in the prothonotary's or notary's office or other public office in which the original was; or if it is a notarial act, forming part of the records of a notary who is dead or has ceased to practise, then in the prothonotary's office in which the records of such notary are deposited; and every regular copy of the document thus deposited avails for proof in the same manner as if such document was the original.

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# TITLE THIRD.

## OF FAMILY COUNCILS.

**1256.** Whenever application is made to provide minors, interdicted persons, absentees or substitutes, with tutors or tutors *ad hoc*, or curators, or to authorize such tutors or curators to do some particular act, or for leave to alienate immoveables belonging to persons who have not the free exercise of their rights, or for the emancipation of minors, the judge or the court cannot act without previously taking the advice of a family council. 2 *Pig.* 6.

**1257.** Family councils are convened and composed in the manner provided in the ninth title of the first book of the Civil Code.

**1258.** Any person demanding the convocation of a family council must show that he has used due diligence to summon the nearest relatives residing in the district, and the delay for such notice is one intermediate day, when they reside at a distance less than five leagues from the place where the family council is to meet, with the usual additional when the distance exceeds five leagues, according to article 75. 2 *Pig.* 302.

**1259.** The relations and friends must be sworn before giving their advice upon the matters submitted to them. *C. S. L. C. c.* 48, *s.* 1, § 3.

**1260.** The minutes of the advice given by the relations and friends must be signed by them, or must mention the reasons which prevent them from signing.

**1261.** The Superior Court and the Circuit Court, and any judge of the Superior Court at any place where sittings of either of the said courts are held and either in or out of term,* like jurisdiction in and may decide all matters in which the advice of a family council is required, and the proceedings in such cases must remain among the records of the court in which the application was made. *C. S. L. C. c.* 78, *ss.* 3, 23.

35 Vict. c. 6 (*Que.*):

32. Ever since the coming into force of the Code of Civil Procedure, any judge of the Superior Court has had and hereafter shall continue to have the jurisdiction and power mentioned in article 1261 of the said code, at any place where the Circuit Court is held, and either in or out of term.†

1. A judge in the district of Montreal has no jurisdiction to take cognizance of an advice of relations taken in the district of Iberville, for the election of a tutor and sub-tutor to minors whose domicile is at Montreal. *Gauthier exp.* 17 L. C. J. 17, S. C. 1873.

* Have (?). †But see the French version of the statute.

# TITLE FOURTH.

## OF TUTORSHIPS AND CURATORSHIPS.

**1262.** The proceedings to be taken for the appointment of tutors to minors and of curators to interdicted persons, emancipated minors and absentees, are explained in the different titles of the Civil Code which treat of such matters respectively. *C. C. liv.* 1, *tit.* 9, *arts.* 4, 21, 74, 75; *tit.* 10, *arts.* 4-10, 14-17; *tit.* 11, *arts.* 24, 25, 250.

**1263.** The proceedings to be taken for the appointment of curators to successions that are vacant or accepted under benefit of inventory, or to property judicially abandoned by insolvent debtors, are regulated under the respective titles in this code concerning such matters.

**1264.** The proceedings for the appointment of curators to the property of corporations that have been dissolved or declared illegal, are regulated in the Civil Code, under the title *Of Corporations*, and in the eighth chapter of the second book of the second part of this code.

**1265.** The proceedings for the appointment of curators to substitutions are the same as those for the appointment of tutors to minors. 2 *Pig.* 213.

**1266.** Every curator is bound, before acting as such, to make oath that he will well and truly perform the duties devolving upon him. *Ibid. s.* 10.

# TILTE FIFTH.

## OF THE SALE OF IMMOVEABLES BELONGING TO MINORS OR OTHER DISQUALIFIED PERSONS.

**1267** No voluntary alienation of immoveable property, or of shares or stock in manufacturing or financial associations, belonging to minors or interdicted persons can be made without the order and permission of the court or of a judge. *C. C., Tutorships and Minority,* 56, 57.

**1268**. In addition to the formalities prescribed by the Civil Code, such alienation cannot take place unless, before taking the advice of a family council, the immoveable has been inspected by two experts, one of whom was named by the tutor and the other by the subrogate-tutor; and such experts must not be related either to the parties or to the persons acting for them.

**1269**. The nomination of experts may be made under the sanction of the judge or of the notary before whom the application is made to have a family council convened. *Ibid.*

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FORM No. 52.

In connection with article 1269.

On the day of in the year one thousand eight hundred and , at o'clock in the noon, before the undersigned public notaries for Lower Canada, residing in the district of came and appeared A, residing of the one part, and B, residing of

the other part, who have appointed, that is to say, the said A the person of and the said B that of as experts, for the purpose of proceeding to the inspection of the real estate belonging to described in the declaration made by the said by Act before , notary (*or one of the undersigned notaries*), to ascertain the value thereof (*and if the sale is demanded on account of indivisibility*) and whether or not it can advantageously be divided.

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FORM No. 53.

In connection with article 1269.

On the day of in the year one thousand eight hundred and at o'clock in the noon, before me, the undersigned notary public for Lower Canada, residing in the district , came and appeared , who affirms that, in conformity with the declaration made by Act before , notary, bearing date the , for the purpose of obtaining authority to sell, for the reasons therein set forth, the real estate belonging to , therein designated and described as follows, to wit: (*here describe the real estate*) he did for the said purpose cause to be summoned before us, to wit: in default of relations, requiring us, they being present, to receive their advice as to the contents of the Act of Declaration aforesaid, and the parties above named having appeared, we have caused to be read the said Act of Declaration, the report of the experts made before , notary, and his colleague, and have taken and received from them the necessary oath, and such oath having been made, they have all unanimously declared that they are of opinion that

(*Should there be a division of opinion, mention the same, and give the reasons therefor.*)

**1270.** The experts, after being sworn before the judge, prothonotary, clerk or notary, must ascertain the condition and value of each immoveable, and the truth of the other circumstances on account of which the sale is demanded, and make their report by a notarial act, delivered in original form. *Ibid.* § 2.

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FORM No. **54**.

In connection with article 1270.

I, and I, , do make oath and swear that I will faithfully proceed to the performance of what is required of me by the act of my appointment, executed before , notary, on the and that I will make a true report of my opinion on the whole matter, without favour or partiality for any of the parties interested in the matter in question. So help me God.

Sworn before me, the undersigned notary.

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FORM No. **55**.

In connection with Article 1270.

On the day of in the year one thousand eight hundred and at o'clock in the noon, before me the undersigned Public Notary for Lower Canada, residing in the District of came and appeared the experts appointed by the act above executed by the undersigned Notaries, on who declare that having previously made oath as appears by the certificate hereunto annexed, they proceeded on the day of to the inspection of the real estate,

appurtenances and dependencies mentioned and described in the declaration of received by , Notary, the , and after due examination and obtaining every information necessary for the purposes mentioned in the said Act of appointment, they value and estimate the said real estate (*if there be several immoveables, they should be valued separately*), and further, (*if the sale is made on account of indivisibility*) they declare that it cannot advantageously be divided.

The said experts further declare that they are not related to the parties interested in the matter in question, nor to their legal representatives.

Whereof act in original form is delivered at

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**1271**. If the experts cannot agree each must report his respective opinion, giving the reasons upon which such opinion is based.

**1272**. The report is submitted to the family council, together with the application to be authorized. *Ibid.* s. 1, § 3, s. 2.

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FORM No. **56**.

In connection with article 1272.

Lower Canada,
District of }

To the Honourable the Judge (*or* Judges) of the Superior Court at &c., &c.

A. (*addition and place of residence*) humbly represents that he has caused the relations and friends of to be consulted by , Notary, at on the

day of , and has caused to be fulfilled all the proceedings by law required to be had in order to and submitted for your approval. And he therefore prays that your honours will take these proceedings into consideration and homologate them, if they ought to be so homologated, and you will do justice.

At the one thousand eight hundred

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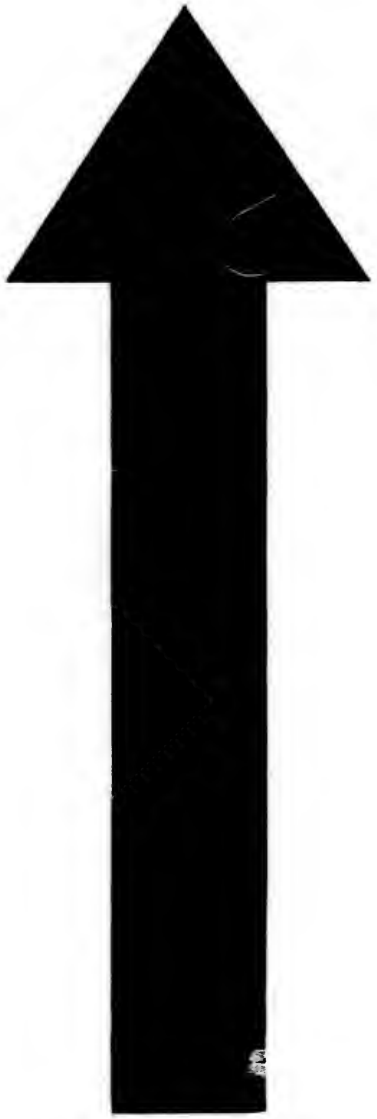
**1273.** [If the matter relates to the investment of moneys, or to shares or stock in manufacturing or financial associations, the value thereof must be ascertained.]

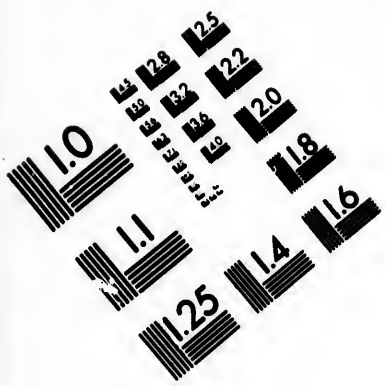
**1274.** The judge, if he authorizes the sale, must fix an upset price for each immoveable, share or stock, and, independently of the other conditions imposed upon the sale, such upset price cannot be less than the value ascertained by the experts. 2 *Pig.* 186.

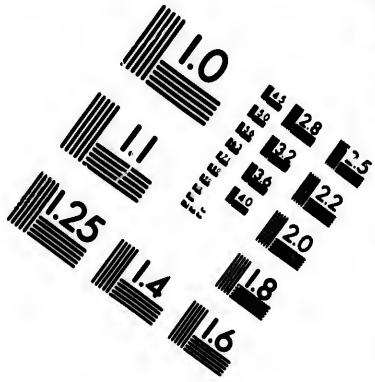
**1275.** If the judge refuses to authorize the sale, the reasons for such refusal must be given in writing, and form part of the record.

**1276.** The place and time of the sale must be published on three consecutive Sundays, at the door of the parish church of the place where the immoveables are situated; or, if there is no church, at the most public place in the locality; and notice thereof must be posted up immediately after the first publication, and such notice must contain a description of the immoveables. 2 *Pig.* 106-7-8.

**1277.** [If no higher price is offered than the upset price, the person applying for the sale may proceed to effect a private sale; but he can only do so within the four months which follow the authorization, and for a sum not less than the upset price.]



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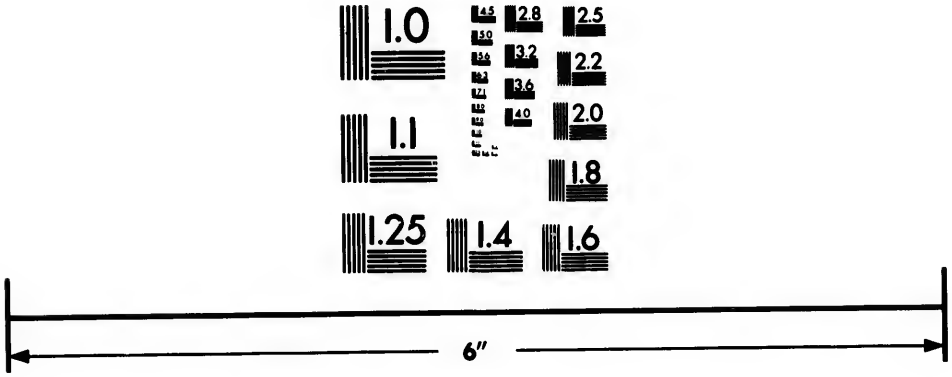



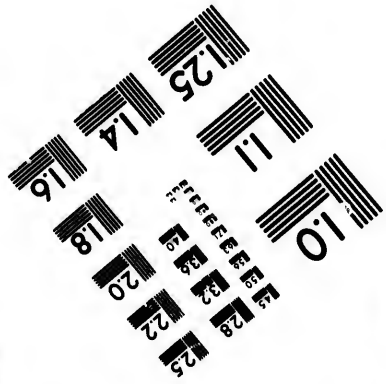


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**1278.** In the case of a voluntary licitation of an immoveable, held undividedly between a tutor and his pupil, and which cannot be advantageously divided, proceedings are had in the manner above mentioned, and no purchase of it by the tutor is valid unless the minor is represented at the sale by a tutor *ad hoc*.

35 Vict. c. 7 (*Que.*) :

Whereas the formalities prescribed for the judicial sale of immoveable property belonging to minors, and others incapable of acting for themselves, have been established solely for the protection of the latter; and whereas, in the case of the sale of immoveables of small value, the price thereof is frequently absorbed, to the detriment of minors and their creditors, by the observance of the formalities required for the sale of such immoveables : Therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows :

1. Articles 298 and 299 of the Civil Code, and the fifth title of the third part of the Code of Civil Procedure, shall not apply to the sale of immoveable property, the real value of which does not exceed the sum of four hundred dollars; the sale of such immoveables may take place in the manner set forth in the following section.

2. Whenever the real value of the totality of the immoveable or immoveables, belonging to minors or others incapable of acting for themselves, does not exceed the sum of four hundred dollars, a judge of the Superior Court may, upon petition presented to him to that effect by the tutor and subrogate tutor of such minors, or by the curator of such persons as are incapable of acting for themselves, after making summary enquiry as to the value of the said immoveables, order the sale thereof by public auction, at the prices and upon the conditions which he may deem just and reasonable to fix, in the interest of such minors or persons incapable of acting for themselves.

3. The judge shall have power to issue, under his hand, an order to compel the appearance before him, without costs, of any person whom he shall deem qualified to afford him the information necessary to determine the value of the said immoveables, and any such person refusing to comply with such order, shall be guilty of a contempt of court.

4. Notice of the place, day and hour of such sale shall be given twice in fifteen days in the *Quebec Official Gazette*, and in two newspapers indicated by the Judge, one of which shall be published in the French and the other in the English language in the district in which

the immoveables are situated, and in the event of there being no newspapers published in such district, then such notice shall be given in the newspapers of the nearest district.

5. The Judge may, when he shall deem it advisable, dispense the petitioners from the necessity of publishing the notices mentioned in the preceding section, and authorize them to proceed to the sale, by consent, of the said immoveables, to any person paying the price fixed by such Judge.

36 Vict. c. 17 (*Que*):

1. The Act of this Province, 35th Victoria, chapter 7, shall hereafter be read and interpreted as if each of the terms "immoveable" and "immoveables" and "immoveable property" included, and they shall hereafter be held to include any capital sums belonging to minors or other persons incapable of acting for themselves, and all shares and interests of minors or other persons so incapable, in any financial, commercial, or manufacturing joint-stock company.

36 Vict. c. 18 (*Que.*):

1. The Act of this Province, 35th Victoria, chapter 7, shall in future read and be interpreted as if each of the terms "immoveable," "immoveables," and "immoveable property" comprehended, and they shall be deemed to comprehend, all immoveable rights whatsoever belonging to minors.

# TITLE SIXTH.

## PROCEEDINGS RELATING TO SUCCESSIONS.

## CHAPTER FIRST.

### OF SEALS.

#### SECTION I.

#### OF THE AFFIXING OF SEALS.

**1279**. Seals can be affixed on the property of a succession so long only as an inventory thereof has not been made. 2 *Pig.* 270-1.

**1280**. Whenever seals are required to be affixed, a commissioner is named for that purpose by a judge of the Superior Court in the district, upon the application of any party interested. 1 *Pig.* 439, 440; 2 *Pig.* 271; *C. S. L. C.* c. 78, s. 23; *C. P. C.* 907-912.

**1281**. The affixing of seals may be demanded:

1. By all those who lay claim to the succession of the deceased, or to a community dissolved by the death of one of the consorts;

2. By the creditors;

3. By the testamentary executor;

4. By the Crown, when there are no heirs or when the property is confiscated. 2 *Pig.* 250 *et seq.*; 1 *Couchot*, 134; *C. P. C.* 909.

**1282.** The commissioner must draw up minutes of the proceedings, in which he must state:

1. The date;

2. A designation of the person requiring the seals, and the nature of his right;

3. The judicial order authorizing the affixing of seals;

4. The attendance of the persons concerned, and whatever they may state;

5. A description of the places, bureaus, chests or closets over the openings of which the seals are affixed;

6. A summary description of all articles found in view and placed under seals;

7. The taking, at the close of the affixing of seals, of the oath of the parties residing on the premises, that nothing has been, either directly or indirectly, taken away by them or with their knowledge;

8. The names and designation of the persons in whose custody the things under seals have been placed, and with whom a copy of the minutes must be left;

9. The signing of the parties present, or their being called upon to sign, and the reasons which prevented them from doing so. 2 *Pig.* 281-2; *C. P. C.* 914.

**1283.** The seals are affixed upon each extremity of a band passing over the keyhole of the lock, if there be one; or, if not, upon the joint of the opening of the apartment or receptacle containing the effects, in such a manner that it cannot be opened without breaking the band or removing the seals. 2 *Pig.* 280-1-2; *C. P. C.* 915.

**1284.** If, when seals are being affixed, a will made in authentic form by the deceased is found open, the commissioner enters a description of it in his minutes and delivers it to the guardian; but if the will is not in authentic form, or if it is closed or sealed, the commissioner, after sealing it himself, must deposit it in the prothonotary's office, together with his minutes, in order that the probate may be

effected at the instance of the persons interested. 2 *Pig.* 282-3-4; *C. P. C.* 916.

**1285**. When the commissioner finds the doors fastened, or is refused admittance, he must report the fact to the judge, who may authorize him to employ a locksmith and such force as may be necessary.

The commissioner may, in the mean time, place guards around the premises, in order to prevent fraudulent removals. 2 *Pig.* 284.

**1286**. If, after he has entered the house, the commissioner meets with a declaration of opposition, he must mention it in his minutes, in order that the matter may be referred to the judge; but he must place guards in the mean time to prevent fraudulent removals. *Ibid.*; *C. P. C.* 921.

**1287**. The judge decides forthwith upon the opposition, either by countermanding or restricting the affixing of seals, or by ordering the proceedings to continue on. 2 *Pig.* 285; *C. S. L. C. c.* 78, *s.* 23; *C. P. C.* 921-2.

**1288**. Whenever a reference to the judge has taken place, whatever is done or ordered thereon is certified at the foot of the commissioner's minutes. *C. P. C.* 922.

**1289**. If there are no moveable effects, the commissioner must state so in his minutes. *C. P. C.* 924.

**1290**. As soon as the commissioner has completed his minutes he is bound to deposit them in the prothonotary's office, to form part of the records thereof.

**1291**. No second affixing of seals can take place, unless the first has been impugned as null.

In affixing seals a second time the bands are placed across those of the first sealing. 2 *Pig.* 298.

## SECTION II.

### OF THE REMOVAL OF SEALS.

**1292.** All applications for the removal of seals, when contested, and all oppositions made after the affixing of seals has be encompleted, are heard summarily, unless the pleadings are ordered to be in writing. 2 *Pig.* 299.

**1293.** If the affixing of seals is declared null, an order is given at the same time commanding the commissioner who affixed them, or some other person to remove them without any inventory and to make a return of such removal; and in default of this order being complied with, any bailiff holding a copy of the order may break them and make a return of his having done so. 2 *Pig.* 299-319; *C. P. C.* 940.

**1294.** If, however, seals have been affixed a second time, the complete removal cannot take place until both sealings have been adjudicated upon.

**1295.** If seals have been affixed before the burial of the deceased, they cannot be removed before the expiration of three days after such burial, except for urgent reasons, which must be stated in the order which authorizes the removal. 2 *Pig.* 315; *C. P. C.* 928.

**1296.** The removal of seals from the whole or from a part of the property may, in all cases, be demanded by such persons as may demand to have them affixed, and also by any person claiming to be owner of the effects placed under seal, according to their respective rights; and the right to prosecute such demand belongs to him who first made it. 2 *Pig.* 316-17-18; *C. P. C.* 928.

**1297.** The removal of seals must be applied for by petition to the court or judge, in order that the inventory may

be proceeded with, after notifying all persons interested. 2 *Pig.* 317-18; 1 *Cour.* 135; *C. P. C.* 951.

**1298.** The court or judge, when authorizing the removal of seals, orders that an inventory of the effects shall forthwith be made, after summoning, by a bailiff's notice or a notice in notarial form, the heirs of the deceased, the surviving consort, the testamentary executor, and the known legatees. 2 *Pig.* 299, 313-17, 326; 1 *Couchot*, 135; *C. P. C.* 951.

41 Vict. c. 11 *(Que.)*:

1. Whenever any of the persons entitled to be present at the removal of seals, or to take part in an inventory, reside outside of the Province, they need not be summoned; but in such case a judicial procurator is named by a Judge of the Superior Court, on application of the person demanding the removal of seals or the making of an inventory, to represent such persons; and such judicial procurator must be present or have been notified to be present.

2. Notwithstanding the nomination of a judicial procurator to represent the persons mentioned in the preceding section, such persons, or any of them, may also be present and take part, or may send a power of attorney to the judicial procurator, or to any other person, should they think fit to do so; and such appearance or appointment of a mandatary shall terminate the mandate of the judicial procurator.

3. Section 24 of the Act 39 Vict., cap. 33,* shall apply to proceedings under this Act.

4. Articles 1298 and 1305 of the Code of Civil Procedure are supplemented in the particulars contained in this Act.

**1299.** If any of the persons mentioned in the preceding article have not the full exercise of their rights, they must be provided according to law, with tutors or curators as the case may be. 2 *Pig.* 299, 300; *C. P. C.* 929.

**1300.** The seals are removed in succession, as the making of the inventory progresses. If the effects contained under any seals are not all inventoried at one time, the seals are reaffixed npon the remainder. 2 *Pig.* 325; *C. P C.* 937.

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* Vide *ante* page 602.

**1301**. One or more returns of removal of seals must be made, as the inventory progresses.

**1302**. The return of removal of seals must contain:

1. The date;

2. The names, residence and occupation of the applicant, and his elected domicile;

3. A recital of the order for removal;

4. Mention that the notices required by article 1297 have been given;

5. What persons were present, and their respective allegations;

6. The names of the notary or notaries charged with making the inventory, and of the appraisers;

7. The verification of the seals, if they were unbroken; if not, the state in which they were found; saving recourse against whoever may be liable. 2 *Pig.* 325-6; *C. P. C.* 936.

**1303**. If papers or effects be found which do not belong to the succession or the community and are claimed by third persons, they are delivered over to the proper persons, after describing them in the return, if such description is demanded. 2 *Pig.* 327; *C. P. C.* 929.

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## CHAPTER SECOND.

### OF THE INVENTORY.

### SECTION III.

### OF THE MAKING OF THE INVENTORY.

**1304**. An inventory of the property belonging to a deceased person, or to a community dissolved by his death, may be demanded by any person who has an interest in it; but the following persons only can take part in it:

1. Those who represent the deceased;

2. The consort of the deceased, or such consort's representatives, if a community existed;

3. The testamentary executor.

In the case of a community of property dissolved by a judgment, the inventory may be demanded by either of the consorts. 2 *Pig.* 328-9, 333; *C. P. C.* 941.

**1305.** All persons entitled to take part in it must be present at the inventory, or have been notified to be present, in the same manner as for the removal of seals. 2 *Pig. loc. cit.*; *C. P. C.* 943.

See 41 Vict., c. 11 *(Que.)*, under Art 1298.

**1306.** The person who is bound to have the inventory made chooses the executing notary; the other parties may appoint a second notary.

In cases where seals have been affixed, the order for their removal designates the notary who is to make the inventory, subject to the above restriction. *C. P. C.* 942.

**1307.** The inventory must be in authentic form. 2 *Pig.* 331; *C. P. C.* 943.

**1308.** The inventory is composed of two parts. The first or the preamble, contains the names, occupation and residence of the persons making the inventory, of those who applied for it, of the persons present or who failed to appear, of all interested persons absent, if they are known, of the appraisers, and the respective allegations, pretensions and protestations of the parties.

The second part is the inventory proper, and contains:

1. A designation of the place where the inventory is made;

2. A description of the moveable property and effects, and a valuation thereof made according to their real value by two sworn appraisers;

3. A designation of the amounts in specie or in valuable securities;

4. A designation of all papers, which must also be numbered from first to last and be paraphed by one of the notaries;

5. All declarations of claims or indebtedness made by the parties;

6. Mention of the oath having been taken at the end of the inventory, by those who, before the inventory, were in possesssion of the things, or who inhabited the house in which such things are, to the effect that no portion of them has been fraudulently removed or carried away with their knowledge;

7. The depositing of the papers and effects in the hands and custody of the person agreed upon by the parties or named by the judge. 1 *Pig.* 334-5-9; *C. P. C.* 943.

**1309.** If, while the inventory is being made, difficulties arise between the parties as to their respective rights and pretensions, the notary is bound to record such pretensions in the inventory, together with all protestations against the same, leaving the parties their judicial recourse. 2 *Pig.* 340-1; *C. P. C.* 944.

**1310.** Any of the parties may petition the judge to oblige the notary to enter their pretensions or protestations in the inventory, and the judge is bound to decide upon such petition in a summary manner, after the other parties have had notice of it.

As soon as the order made upon such petition has been served upon the notary, he is bound to transcribe it in the inventory and to conform to it. 2 *Pig.* 341; *C. P. C.* 944.

**1311.** In the case mentioned in article 1309, the judge may order the exclusion of any of the parties when it is manifest that they have no right; or else he may order that proceedings shall be taken provisionally in their name, sub-

ject to the respective protestations of the parties and to their right to obtain a decision upon their pretensions after the inventory is completed. 2 *Pig.* 333.

**1312.** With the consent of all the parties the sale may be proceeded with at once, as the inventory is being made; and in such case no valuation of the effects by appraisers is necessary.

**1313.** The surviving consort, or other person who is bound to have the inventory made, is entitled to the custody of the inventoried effects in preference to any one else; unless upon being referred to, the judge for some important reason, orders otherwise. 2 *Pig.* 343.

**1314.** The formalities and proceedings prescribed by the present section apply to all other cases in which an inventory is required.

## SECTION II.

## OF THE SALE.

**1315.** When the sale of the moveables is demanded by any of the heirs, pursuant to article 697 of the Civil Code, or by any other copartitioner, it takes place upon a day fixed, of which public notice must have been given. 2 *Pig.* 352; *C. P. C.* 945-7.

**1316.** The sale takes place wherever the effects are situated, and for cash, unless it is otherwise agreed or ordered. *C. P. C.* 949.

**1317.** The sale is effected by a bailiff or a public crier, or by any person agreed upon by the parties, and the moneys are received by the person thus employed. 2 *Pig.* 352.

**1318.** The sale may take place either in the presence of the persons interested, or in their absence after they have received due notice of it. *Ibid.*; *C. P. C.* 950.

**1319.** Minutes of the sale are drawn up, stating who of the persons interested were present, what notice was given to those who were absent, and specifying each object put up for sale, the price for which it was sold and the name of the purchaser. 2 *Pig.* 352; *C. P. C.* 951.

**1320.** If any of the coheirs or copartitioners are minors, the notice of sale must also be published and posted up, in the same manner as in cases of sale of moveables under execution.

41 Vict. cap. 9 (*Que.*):

Whereas, in virtue of articles 1320 and 572 of the code of civil procedure, the sale of moveables belonging to a succession of which one of the co-heirs is a minor, cannot be made before the expiration of eight days to be reckoned from Sunday when such sale was announced by public notice, that is to say, the second Tuesday after the Sunday aforesaid; whereas, since the putting into force of this code, several of these sales have been made on the second Monday, instead of the second Tuesday, after the Sunday aforesaid, as was the custom previous to the code; and whereas this irregularity may be prejudicial to the interests of a large number of families, and that, in consequence, it is urgent that these sales should be made valid; Therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. Every sale of moveables belonging to successions of which one of the co-heirs was a minor, made since the coming into force of the code of civil procedure until the coming into force of this act, on the second Monday instead of the second Tuesday following the first Sunday on which such sale ought to have been announced, according to articles 1320 and 572 of the code of civil procedure, is declared valid and shall be so considered in law; provided always, that all the other formalities required by law shall have been observed.

2. This act shall not affect pending cases.

## CHAPTER THIRD.

### OF BENEFIT OF INVENTORY.

**1321.** Benefit of inventory can only be granted upon petition to the court or judge, stating that an inventory of the property of the succession will be or has been made, that the petitioner has not acted as heir, and that he believes it his interest not to confound his rights with the obligations of the succession. 3 *Ed. & Or.* 104; *C. S. L. C. c.* 78, *ss.* 2, 6, § 2.

**1322.** [The beneficiary heir is bound to give notice of his character as such, by an advertisement, as mentioned in article 1010.]

**1323.** Benefit of inventory is only granted on condition of security being given to the amount and in the manner fixed by the court or judge, that the petitioner will render an account and pay to such person as may be entitled thereto whatever moneys he may receive. 2 *Pig.* 367–8.

**1324.** An heir under benefit of inventory cannot sell the moveable property of the succession without observing the formalities required for the sale of moveables under execution. 2 *Pig.* 362; *C. P. C.* 938.

**1325.** The heir under benefit of inventory, cannot sell the immoveables without the consent of all the creditors and legatees of the deceased.

**1326.** [In cases where the beneficiary heir has any claims to exercise against the succession, he must cause a curator to be named, the same formalities being observed as are prescribed for the appointment of curators to vacant successions.]

## CHAPTER FOURTH.

### PROVISIONAL POSSESSION.

**1327**. Provisional possession, whenever it may be demanded, must be applied for by petition to the Superior Court, in the district in which the absentee or deceased person had his last domicile, or, if he had no domicile in Lower Canada, in the district in which the property is situate.

**1328**. The petition in the case of absentees must be accompanied with an act of notoriety, by three witnesses duly sworn, and establishing the facts upon which the petition is based, and also with such other proof as the court may deem necessary.

1. Where a party petitions to be put in provisional possession of an estate or succession devolved to an absentee, the petition must be accompanied by an inventory not only of the property of such succession, but of the part belonging to the absentee, in order that the Court may determine the amount of security to be given by the petitioner. *Exp. DeGrosbois*, 4 R. L. 389.

**1329**. [Provisional possession cannot be granted until after notice has been given and published, in the manner required for the summoning of absentees, calling upon all persons who may have any rights against the succession or the property in question to bring their claims before the court.]

**1330**. [The proceedings upon such claims and upon the petition for provisional possession are the same as upon ordinary suits.]

## CHAPTER FIFTH.

### OF VACANT SUCCESSIONS.

**1331**. If the natural or testamentary heir renounces the succession, and no person comes forward to accept it within the delays allowed for making an inventory and deliberating; or if there is no known heir, the succession is deemed vacant.

**1332**. When a succession is deemed vacant, any creditor or legatee, or the heir who has renounced, may demand the appointment of a curator to such vacant succession.

**1333**. The judge proceeds to such appointment after taking the advice of the relations and creditors of the deceased, convened in the manner prescribed by such judge.

**1334**. The curator is bound:

1. To make oath that he will faithfully and to the best of his ability administer the property of the succession and render an account thereof;

2. To give notice of his appointment in the same manner as curators to the property of dissolved corporations;

3. To cause an inventory to be made, observing the same formalities as in ordinary successions; 2 *Pig.* 510.

4. To cause the moveables to be sold, observing the same formalities as in the case of successions in which minors are concerned.

**1335**. He cannot sell the immoveables, nor shares or stock in manufacturing or financial associations, without the consent of all the parties interested. *Ibid.*

**1336**. He is bound to render an account of his administration, in the same manner as any other curator, and also from time to time whenever required by a competent court or by a judge to do so. *Ibid.*, 511.

# TITLE SEVENTH.

## GENERAL PROVISIONS APPYING TO THE DIFFERENT TITLES OF THE THIRD PART OF THIS CODE.

**1337**. In all proceedings under the different titles of the third part of this code, the delays upon summons are the same as those prescribed in article 890.

**1338**. All applications made or proceedings brought before a judge must remain in the records of the court and form part thereof.

**1339**. The prothonotary of the Superior Court may exercise all the powers conferred upon the court or a judge thereof; but any decision by such prothonotary is subject to be revised by a judge, upon application being made to that effect, after notice given to the persons interested. *C. S. L. C. c.* 78, *ss.* 24-5.

**1340**. [All decisions of the court or a judge are also subject to a review by three judges of the Superior Court, according to and in conformity with the provisions contained in articles 494 and following.] *C. S. L. C. c.* 86, *s.* 4; 27-28 *V. c.* 39, *s.* 20.

# TITLE EIGHTH.

## OF ARBITRATIONS IN GENERAL.

**1341.** Submission is an act by which persons, in order to prevent or put an end to a lawsuit, agree to abide by the decision of one or more arbitrators whom they agree upon. *Pothier, Proc.* 109; 1 *Couchot*, 30.

1. Under the clause or condition in policies of insurance, that, in case of dispute between the parties, it should be referred to arbitration, the courts are not ousted of their jurisdiction, nor can they compel the parties to submit to a reference during the progress of the suit. *Scott* v. *The Phœnix Assurance Co.* S. R. 152, K. B. 1823.

**1342.** Those persons only can enter into a submission who have the legal capacity to dispose of the objects comprised in it. 1 *Couc.* 30; *C. P. C.* 1003.

1. The Code does not preclude parties from stipulating that the arbitrators should hear the respective parties and their evidence, or declare them to have made default. *Breakey* v. *Carter et al.*, 4 Q. L. R. 332, S. C. 1878.

**1343.** The appointment of arbitrators by the court is regulated in the second part of this code.

See *ante* arts. 341 *et seq.*

**1344.** Deeds of submission made out of court must state the names and additions of the parties and arbitrators, the objects in dispute, and the time within which the award of the arbitrators must be given. *Poth. Proc.* 109; *contra C. P. C.* 1007.

**1345.** Submissions must be in writing. *Poth. Proc.* 109; *C. P. C.* 1005.

1. A reference to arbitrators required that they should finally adjust, settle and determine the precise state of accounts between the parties, and the precise amount which either of the parties should pay to the other; but the arbitrators by their award merely determined in a general way how the matters in dispute should be adjusted without determining anything precisely—*Held*, that no action would lie on such an award. *Colson* v. *Ash & Torrance*, 18 L. C. J. 281, S. C.

**1346.** The arbitrators must hear the parties and their proofs respectively, or establish a default against them, and decide according to the rules of law; unless by the submission they have been exempted from doing so, or unless they have been named as mediators.

[The witnesses to be examined before the arbitrators may be sworn before the prothonotary or the clerk of the Circuit Court of the locality, or before a Commissioner of the Superior Court]. *Poth. Proc.* 199; *C. P. C.* 1009, 1019.

1. The award of an arbitrator and *amiable compositeur* which does not state that he heard the parties, is illegal. *Farmer* v. *O'Neill*, 22 L. C. J., 76 S. C. 1873; 1 Legal News, 220.

2. Where a reference to arbitrators allowed the parties two days to produce papers, &c., and the award was made by the arbitrators on the day following the reference without their having had any communication with the parties—*Held*, that such award was premature and null. *Chapman et al.* v. *The Lancashire Fire Insurance Co. & Fraser*, 13 L. C. J. 36, S. C. 1868.

3. An order for execution was asked from the court upon an award made under the Corn Exchange Act. Under that Act, the Corn Exchange has power to appoint arbitrators to settle disputes between its members. Certain formalities are prescribed, and among others that the arbitrators must be sworn, and that there must be a submission in writing at the commencement of the proceedings, and all questions connected with it may be reviewed within five days after the award itself. The award, if confirmed, is then a final one, and execution may issue upon it. The arbitrators, on the 28th of June, made an award against the defendant, which was confirmed by the Board of Review. The plaintiff now moved for an *exequatur*, and the defendant answered, alleging irregularities, among others that the arbitrators had not been sworn. Defendant, however, had objected to nothing until after the award—*Held*, that as the formalities had not been complied

with, the plaintiff could not succeed, and the motion would be rejected, but without costs, as defendant had not objected until after he had seen what the award was. *Mitchell* v. *Butters*, 2 R. C. 480, S. C. 1872.

4. An award in arbitration is not absolutely null because the witnesses examined have not been legally sworn. *Tremblay* v. *Tremblay*, 3 L. C. R. 482, S. C. 1853.

5. In an action brought upon a report of arbitrators the defendant may contest the validity of the report, where it does not set forth that the witnesses have been heard, by alleging that the arbitrators refused to hear his witnesses and the defendant will be allowed to prove such refusal. *Ostell & Joseph*, 9 L. C. R. 440, Q. B. 1859.

6. When several matters are in dispute, and are referred to arbitrators, they must decide upon the whole of them, and must hear the parties on all of them, otherwise the court will set aside the award in such case. *Fairfield & Butchard*, 3 Rev. de Lég. 357, K. B. 1821.

**1347**. During the delay fixed by the submission the appointment of the arbitrators cannot be revoked, except with the consent of all the parties. If the delay is not fixed, either of the parties may revoke the submission when he pleases. 1 *Cou.* 30; *C. P. C.* 1008.

**1348**. The submission becomes inoperative:

1. In the case of the death, refusal, withdrawal or inability to act of one of the arbitrators, unless some clause provides that it shall avail notwithstanding, or that such arbitrator shall be replaced by another, chosen by the parties or by the remaining arbitrator or arbitrators, or otherwise;

2. In the case of the decision not being given before the expiration of the delay fixed;

3. By the failure to agree, if the appointment of a third arbitrator has not been provided for;

4. By the mutual consent of the parties;

5. By the loss of the object which forms the subject of the submission;

6. By the extinction of the obligation which formed the subject of the submission.

7. By revocation in the case of the preceding article. *Bonnin*, 647; *Poth. Proc.* 109; 1 *Cou.* 30; *C. P. C.* 1012.

**1349.** Arbitrators cannot be recused, except for reasons which have arisen or have been discovered since their appointment. *C. P. C.* 1014.

**1350.** If the arbitrators fail to agree and the appointment of a third arbitrator has been provided for, such appointment is made in conformity with the submission, and the case is examined over again.

**1351.** No award of arbitrators can be rendered when there are more than one, unless the two named or one of these and the third arbitrator agree upon each item of the award. 1 *Cou.* 31.

1. An award by two of three arbitrators is sufficient. *Meiklejohn* v. *Young*, 1 Rev. de Lég. 510, K. B. 1811; S. R. 43.

**1352.** Awards of arbitrators are made out in notarial form, or deposited with a notary, who draws up an authentic act of the deposit, and they must be given or pronounced to the parties, or served upon them, within the delay fixed by the submission. *Poth. Proc.* 109; 1 *Cou.* 30; 1 *Bornier*, 235; *C. P. C.* 1026.

1. The deposit of an award cannot be made by one who has ceased to be arbitrator. *Sevigny* v. *Provencher*, 1 Q. L. R. 122, S. C. R. 1875.

2. In Lower Canada, notaries have power to receive a report of arbitrators, and to give certified copies of the swearing in of the arbitrators annexed thereto. *Tremblay & The Champlain and St. Lawrence Railway Company*, 5 L. C. R. 219, Q. B. 1855.

3. And such power was specially recognised as belonging to them by the statutes 2 Will. IV. cap. 58 & 13 & 14 Vict. cap. 114. *Roy & The Champlain and St. Lawrence Railway Company*, 6 L. C. R. 277, Q. B. 1856.

4. Where to an action on an award or compromise, the defendant pleaded want of service of the award within the delay fixed by law and by the terms of the compromise—*Held*, that in consequence of such default of service, the award was absolutely null. *Blanchet et ux* v. *Charron*, 4 L. C. J. 8, Q. B. 1842.

5. An award of arbitrators and *amiables compositeurs*, not signified to the parties interested until after the delay limited by the agreement for the rendering of the award, is null and void, notwithstanding such award may have been rendered within the prescribed time. *Chapman* v. *Hodson*, 9 L. C. J. 112, S. C. 1864.

**1353.** Extra-judicial awards of arbitrators can only be executed under the authority of a competent court, upon a suit brought in the ordinary manner, to have the party condemned to execute them.

**1354.** [The court before whom such a suit is brought may examine into any grounds of nullity which affect the award, or into any questions of form which may prevent its being homologated; but it cannot enquire into the merits of the contestation; nevertheless, when a penalty has been stipulated in the submission, the court may do so whenever the party contesting has paid or tendered the amount of the penalty either to the party who accepts the award or into court.] *Poth. Proc.* 110; 1 *Cou.* 30; 3 *L. C. R.* 482.

1. A party who has submitted a matter to arbitrators cannot, after the arbitrators have made their award, call for the decision of the ordinary tribunals without previously paying the penalty stipulated in the arbitration bond, unless the award be absolutely null. *Tremblay* v. *Tremblay*, 3 L. C. R. 482, S. C. 1853.

2. The Superior Court has jurisdiction over an arbitrator appointed by the Dominion Government under section 142 of the British North America Act, while acting as such in the Province of Quebec, and may inquire whether such arbitrator is in the legal exercise of his office. *The Attorney-General* v. *Gray*, 15 L. C. J. 306, S. C. 1871.

# TITLE NINTH.

## DIVISION OF LOWER CANADA INTO DISTRICTS FOR THE ADMINISTRATION OF JUSTICE.

**1355.** [Lower Canada is divided into twenty districts, in the manner set forth in the following schedule, the first column whereof contains the name of each district;—the second column, the places which are comprised within the district;—and the third column the name of the place at or near which the sittings of the Superior Court are held, and where the district court-house and gaol are situated:]

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## SCHEDULE.

| NAMES OF DISTRICTS. | PLACES COMPRISED. | CHIEF-PLACES. |
|---|---|---|
| Ottawa..... | Counties of Ottawa, and Pontiac. | Village of Aylmer. |
| Montreal..... | Counties of Hochelaga, Jacques Cartier, Laval, Vaudreuil, Soulanges, Laprairie, Chambly, Verchères; and the City of Montreal. | City of Montreal. |
| Terrebonne..... | Counties of Argenteuil, Two Mountains, and Terrebonne. | Village of St. Scholastique. |

| NAMES OF DISTRICTS. | PLACES COMPRISED. | CHIEF-PLACES. |
|---|---|---|
| Joliette..... | Counties of L'Assomption, Montcalm, and Joliette. | Town of Industrie. |
| Richelieu..... | Counties of Richelieu, Yamaska, and Berthier. | Town of Sorel. |
| Three Rivers..... | Counties of Maskinongé, St. Maurice (including City of Three Rivers), Champlain, and Nicolet. | City of Three Rivers. |
| Quebec ..... | Counties of Portneuf, Quebec, Montmorency, Levis, Lotbinière; and the City of Quebec. | City of Quebec. |
| Saguenay..... | Counties of Charlevoix, and Saguenay. | Parish of St. Etienne de la Malbaie or Murray Bay. |
| Chicoutimi ..... | County of Chicoutimi. | Chicoutimi. |
| Gaspé..... | Counties of Gaspé, and Bonaventure. | New Carlisle, in the Co. of Bonaventure. Percé, in the County of Gaspé. |
| Rimouski..... | County of Rimouski. | Parish of St. Germain de Rimouski. |
| Kamouraska ..... | Counties of Kamouraska, and Temiscouata. | Parish of St. Louis de Kamouraska. |
| Montmagny..... | Counties of L'Islet, Montmagny, and Bellechasse. | Village of Montmagny. |

| NAMES OF DISTRICTS. | PLACES COMPRISED. | CHIEF-PLACES. |
|---|---|---|
| Beauce..... | Counties of Beauce, and Dorchester. | Pariah of St. Joseph de la Beauce. |
| Arthabaska..... | Counties of Megantic, Arthabaska, and Drummond. | Pariah of St. Christophe d'Arthabaska. |
| St. Francis..... ..... | Counties of Richmond (including the town of Sherbrooke), Wolfe, Compton, and Stanstead. | Town of Sherbrooke. |
| Bedford..... | Counties of Shefford, Missisquoi, and Brome. | Nelsonville, in the township of Dunham. |
| St. Hyacinth ..... | Counties of St. Hyacinth, Bagot, and Rouville. | City of St. Hyacinth. |
| Iberville..... | Counties of St. John, Napierville, and Iberville. | Town of St. John. |
| Beauharnois ..... | Counties of Huntingdon, Beauharnois, and Chateauguay. | Town of Beauharnois. |

**1356.** [If the name of the place which is the chief-place of a district is changed, such place nevertheless continues to be the chief-place under its new name. If the name of such place has been changed since the passing of the Lower Canada judicature acts of 1857 and 1858, and is different from that mentioned in the above schedule, the chief-place must be designated by the name given by such change.]

**1357.** [The officers connected with the administration of justice in each of the new districts created by the Lower Canada judicature acts of 1857 and 1858 are the same as in the old districts subsisting immediately before the time when such new districts were constituted, and proper persons may in like manner be appointed to fill such offices; and all the provisions of law touching such offices respectively, as well with regard to the security to be given by the persons holding the same, or the appointment of deputies, as with regard to other matters, extend to the like officers in the new districts, subject always to any provisions of any other act then in force.]

**1358.** [The *banlieue* of Quebec, as defined in chapter 75 of the Consolidated Statutes for Lower Canada, is and always has been part of the district of Quebec. The *banlieue* of Three Rivers is and always has been part of the district of Three Rivers.]

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## FINAL PROVISIONS.

**1359.** The forms contained in the appendix to this code, whether in connection with this code or with the Civil Code, or others to the same effect, may be used in the cases to which they are intended to apply.

**1360.** The laws concerning procedure in force at the time of the coming into force of this code, are abrogated:

1. In all cases in which this code contains any provision having expressly or impliedly that effect:

2. In all cases in which such laws are contrary to or inconsistent with any provision of this code, or in which express provision is made by this code upon the particular matter to which such laws relate:

Except always that as regards proceedings, matters and things anterior to the coming into force of this code, and to which its provisions could not apply without having a retroactive effect, the provisions of law which without this code would apply to such proceedings, matters and things remain in force and apply to them, and this code applies to them only so far as it coincides with such provisions.

**1361.** If in any article of this code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing laws, that version shall prevail which is most consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining such intention

END OF THE CODE OF CIVIL PROCEDURE.

# RULES OF PRACTICE

OF THE

# SUPERIOR COURT FOR LOWER CANADA.

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## CHAPTER I.

### OF THE OFFICERS OF THE COURT.

I.—That the Queen's Counsel, and barristers who practise in this Court, do appear when in Court, habited in black and in such robes and bands as are worn by the Queen's Counsel and barristers in Westminster Hall, as heretofore hath been used, and that no Queen's Counsel, or barrister, be heard in any cause who is not so habited.

II.—That every attorney practising in this Court, do file in writing, in the office of the prothonotary, an election of his domicile as such attorney, at some place within a mile of the Court House, at the place where he practises, and that in default of his so doing, he shall be considered to have elected his domicile as such attorney for all intents and purposes in the office of the prothonotary at such place. C. P. C. art. 85.

III.—That the prothonotary of this Court, do appear when in Court, habited in black and in such robes and bands, as are worn by the prothonotary in Westminster Hall, as heretofore hath been used; that the sheriff, when in court, do appear habited in black with his robe, his wand of office and sword as heretofore hath been used; and that the crier, when in court, do appear habited in black and in such robe as is worn by that officer in Westminster Hall.

IV.—That the offices of the prothonotary and of the sheriff be open on every juridical day during term, and also in the districts of Quebec and Montreal, on every Monday being a juridical day, from the hour of eight in the morning until the hour of six in the afternoon;

and in the Districts of Quebec and Montreal, during vacation (Mondays excepted) from the hour of nine in the morning until the hour of four in the afternoon of every juridical day, and in the Districts of Three Rivers, St. Francis, and Gaspé, during vacation, from the hour of nine in the morning until noon, and from the hour of two to the hour of four in the afternoon.

V.—That the sheriff, the prothonotary and the crier do personally attend in court, in their respective places, *de die in diem*, during each term from the opening until the rising of the Court, and in like manner during all sittings of the Court held in vacation.

VI.—That no barrister or attorney, prothonotary, sheriff, crier, bailiff or sheriff's officer, shall be bail or surety in any action or proceedings cognizable by this Court, or by any judge thereof.

VII.—That all orders and rules for the conduct and regulation of the sheriff in the execution of his duty, shall extend to the coroner, in all cases in which such duty shall be executed by him. *C. P. C. art.* 466.

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## CHAPTER II.

### GENERAL ORDERS.

VIII.—That the rules and orders of practice of this Court shall be fairly entered by the prothonotary in a book to be by him kept for that purpose, and all decisions of this Court on points of practice, shall also be entered by the prothonotary, when so directed by the court, in another book to be by him kept for that purpose—to each of which books there shall be an index, and all practitioners of this court shall, during office hours, have access thereto, and therefrom be allowed to take extracts and copies *gratis*. *C. P. C. art.* 29.

IX.—That all writs and other practical forms, which are or shall be settled by this court, shall in like manner be fairly entered by the prothonotary in a register to be by him kept for that purpose, to which there shall be an index, and all practitioners of this court shall at all times, during office hours, have access thereto, and therefrom be allowed to take extracts and copies *gratis*.

X.—That every wilful breach of an order or rule of practice of this court (for which no fine or other specific punishment is provided in the body of such rule or order) shall be considered a contempt of court, and punished accordingly.

XI. That in computations of time no fractions of a day be allowed, nor shall any Sunday or binding holiday (*fête d'obligation*) be reckoned unless otherwise provided for by law. *C. P. C. art.* 24.

XII.—That whenever any delay shall expire on a non-juridical day, such delay shall be enlarged to the next juridical day. *C. P. C. art.* 24.

XIII.—That no paper of any description shall be received by the prothonotary, in any cause, unless the same be regularly docketed by mentioning the title and number of the cause, the general description of such paper, and the party filing the same.

## CHAPTER III.

### OF PROCESS AD RESPONDENDUM.

XIV.—That a register of all and every process *ad respondendum* whatsoever, issued from this court, specifying the names of the parties, the amount demanded, the cause of action, and the return day of each process respectively, shall be kept by the prothonotary, to which all persons, during office hours, shall have access *gratis*.

XV.—That no process *ad respondendum*, of any description, shall issue until an appearance for the party requiring such process, and a *præcipe* for the same, be filed in the office of the prothonotary. *C. P. C. art.* 44.

XVI.—That no process *ad respondendum*, founded upon affidavit, shall issue in any suit until the affidavit upon which such process is founded be filed by the plaintiff in the office of the prothonotary.

## CHAPTER IV.

### OF CERTIFICATES OF SERVICE, ETC.

XVII.—That every affidavit or certificate of service shall particularly describe the manner, place and time of service, in letters, and also the distance from the place of service to the court house at which the party is required to appear. *C. P. C. art.* 78.

XVIII.—That all services on the attorney of any party be made between the hours of nine a. m. and six p. m., from the twenty-first of March to the twenty-first of September; and between the hours of nine a. m. and five p. m. during the remainder of the year. That every service of process and other service on any party to a suit be made between the hours of eight in the forenoon and the hour of seven in the afternoon. *C. P. C. art.* 55.

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## CHAPTER V.

### ON APPEARANCES—AND OF BAIL.

XIX.—That of every appearance which shall be filed for a defendant a duplicate or certified copy shall be served during the same day upon the plaintiff's attorney. *C. P. C. arts.* 83, 462.

XX.—That no change of attornies shall in any case be allowed without leave of court, or of a judge in vacation. *C. P. C. art.* 200 *et seq.*

XXI.—That an attorney who shall appear for any person shall not, without leave of court or a judge in vacation, be permitted to withdraw from the suit in which he shall have so appeared. *C. P. C. art.* 201.

XXII.—That in every suit in which a party shall cease to be represented by attorney he may be compelled, by rule of court, to substitute an attorney or an appearance in person; and in default of a plaintiff so doing, his action shall be dismissed with costs, *sauf à se pourvoir*; in default of a defendant so doing it shall be competent for the plaintiff to proceed *exparte*. *C. P. C. art.* 203.

XXIII.—That no surrender of any defendant, by himself or by his bail, shall be valid or effectual, or allowed as such, unless such surrender be made in open court, or before one of the judges of this court in vacation, nor unless the court or such judge before whom such surrender shall be made shall have made an entry or minute of such surrender, and shall have committed such defendant thereupon to the custody of the sheriff in discharge of such bail; and in every case of surrender made before any judge of the court, the minute of such surrender shall forthwith be returned into the office of the prothonotary and there be filed of record in the suit to which such minute shall relate, and a copy of such minute shall relate, and a copy of such minute shall, by the prothonotary, be delivered with such defendant to the said sheriff. *C. P. C. art.* 831.

## CHAPTER VI.

### OF EXHIBITS AND COMMUNICATION OF PAPERS.

XXIV.—That all paper-writings whereon any declaration or other pleading is founded, or duly certified copies of such papers, shall, with lists thereof, be filed together with such declaration or other pleading respectively, and not afterwards, unless by the special permission of the court; and that all other paper-writings which any party shall see fit to produce in evidence, together with the originals of all *actes sous seing privé*, copies of which shall have been filed as hereinbefore directed, shall be exhibited and filed with lists before the *enquête* of the party producing the same be closed. *C. P. C. art.* 99 *et seq.*

XXV.—That every list of exhibits shall be an index to all the exhibits therewith filed, by number, title, date and description, under the signature of the attorney or party filing such exhibits, and any exhibit which shall not be so mentioned in such list shall not be received. *C. P. C. art.* 99.

XXVI.—That all delays to plead shall be reckoned from the day on which the exhibits, in support of the pleading to be answered, shall have been filed. *C. P. C. art.* 103.

XXVII.—That all parties to a suit shall be entitled to communication of all exhibits and other paper-writings, filed in such suit, at the office of the prothonotary. *C. P. C. art.* 104.

XXVIII.—That of all exhibits or other paper-writings in any cause, being copies of *actes authentiques* or of papers *sous seing privé*, communication shall be given on the receipt of the party indorsed, dated and signed upon the list of exhibits, and such party shall be entitled to retain such copies in communication during forty-eight hours; it being expressly provided that no original paper-writings shall be removed from the office of the prothonotary for any cause whatsoever.

XXIX.—That no exhibit, in any cause, shall be withdrawn pending such cause, or within a year and a day from the final judgment in such cause, without an order of the court or of a judge in vacation; and before such exhibit or other paper-writing be withdrawn, a copy thereof (except of authentic instruments), certified by the prothonotary, shall be filed of record, unless otherwise ordered by the court or judge.

## CHAPTER VII.

### OF PLEADINGS.

XXX.—That whenever the particulars of any *demande* shall be disclosed by the declaration, and no bill of particulars shall be therewith filed, no proceedings shall be had upon such declaration, but the same shall upon the motion of the adverse party, be rejected, and thereupon the action of the plaintiff be dismissed, unless it be otherwise ordered by the court upon sufficient cause shewn. *C. P. C. art.* 50.

XXXI.—That of every pleading filed a certified copy shall be served upon the adverse party, and, until such service shall have been made the pleading shall not be held to have been filed. *C. P. C. art* 462.

XXXII.—That *no exception déclinatoire, péremptoire à la forme* or *dilatoire* be received unless the party offering such exception shall therewith deposit in the hands of the prothonotary the sum of two pounds one shilling and eightpence for every such exception, to answer the costs of the adverse party, if such exception be dismissed or withdrawn, in the proportion of eleven shillings and eightpence to the prothonotary, and one pound ten shillings to the attorney. *C. P. C. art.* 112.

XXXIII.—That upon every *exception déclinatoire, péremptoire à la forme* or *dilatoire*, the plaintiff may move for hearing, without an answer; it being expressly provided that every plaintiff so moving shall thereby, for the purpose of such hearing, be held to confess the allegations contained in such exception.

XXXIV.—That in every case in which an *exception déclinatoire, dilatoire* or *péremptoire à la forme* shall be filed, the delay to plead to the merits shall be computed from the day on which such exception shall have been disposed of. *C. P. C. arts.* 131, 132, 133.

XXXV.—That with every *défense au fonds en droit* shall be filed a notice assigning all the grounds of such *défense au fonds en droit;* it being expressly ordered that no party shall be permitted to urge any ground, in support of a *défense au fonds en droit*, not so set forth and particularised in such notice. *C. P. C. art.* 147.

That every demurrer to a plea or special answer shall contain an assignment of the causes on which that demurrer is founded.—(Promulgated, Quebec, June, 1854)—(*Additional rule promulgated subsequently, Quebec*, June, 1854.)—That it shall be lawful for a defendant, by leave of a judge of this court, to pay into court the sum of money

which such defendant acknowledges to owe to the plaintiff, and thereupon, unless the plaintiff shall accept thereof in full discharge of his suit, the said sum shall be struck out of the declaration and paid out of court to the plaintiff and upon the trial of the issue, the plaintiff shall not be allowed to give evidence for the sum so acknowledged to be due. *C. P. C. art.* 543.

## CHAPTER VIII

### OF INCIDENTAL CROSS DEMANDS, INTERVENTIONS, AND EVOCATIONS.

XXXVI.—That every incidental cross demand shall be filed at the same time with the plea to the action; and no such incidental cross demand shall be afterwards received. *C. P. C. arts.* 151, 152.

XXXVII.—That every incidental cross demand shall be deemed a distinct action, and shall not delay the proceedings of the plaintiff. *Ibid.*

XXXVIII.—That every cause brought by evocation before this court, and in which the plaintiff shall think fit to file another declaration, such plaintiff shall, within eight days from the allowance of such evocation, file such other declaration. *C. P. C. art.* 1058.

XXXIX.—That the rules, orders and delays prescribed by law, or by this court, with respect to the pleadings upon demands in chief, shall in all things apply to and be the rules, orders and delays, with respect to all pleadings upon incidental demands, interventions and causes brought before the court by evocation.

## CHAPTER IX.

### OF ENQUETES.

XL.—That there shall be kept in the office of the prothonotary, a roll, to be called the *rôle des enquêtes*, upon which shall be inscribed all causes laid down for the adduction of proof. *C. P. C. art* 237.

XLI.—That no proof shall be adduced in any contested cause unless two days in term, or eight days in vacation, shall have intervened between the notice of such inscription and the day appointed for the making of proof. *C. P. C. art.* 235.

XLII.—That as soon as the issues of fact shall be perfected in any cause in which no issue of law hath been raised, or if raised, hath been disposed of, either party may inscribe the cause upon the *rôle des enquêtes*. *C. P. C. art.* 234.

XLIII.—That if, on the day appointed for adducing proof, the party bound to proceed shall not appear, or appearing shall not proceed, or shew legal cause for not proceeding, his *enquête* shall, upon the application of the adverse party, be declared closed, and a day, if necessary, shall be fixed for the *enquête* of such adverse party, upon his application to that effect. *C. P. C. art.* 283.

XLIV.—That a witness shall be examined by one counsel and no more, and cross-examined by one counsel and no more.

XLV.—That any cause inscribed on the *rôle des enquêtes* shall remain thereon, until the *enquête* in such cause shall have been declared closed, and shall be held to be continued from day to day without any special application to that effect. Provided always that if more than one day shall elapse without any proceeding or application in such cause, and without the same being specially continued to a day certain, no proceeding or application shall thereafter be taken or received without notice of at least one day to the adverse party.

XLVI.—That all interrogatories to be annexed to any order or commission, in the nature of a *commission rogatoire*, unless settled by consent, shall be allowed by one of the judges. *C. P. C. art.* 311.

XLVII. That if any such order or commission shall not be returned on the day appointed for such return (if such there be) or within a reasonable time after the issuing thereof (if such order or commission be returnable without delay) it shall be competent for the parties to proceed in such cause, as if no order or commission had issued, unless good cause to the contrary be shown on motion to that effect.—*C. P. C. art.* 316.

XLVIII.—That either party shall, at any time, have a right, by application to the court in term, or to a judge in vacation, to cause the return to any order or commission to be opened, unless good cause to the contrary be shewn; but the return to an order or commission, issued at the instance of the defendant, shall not be opened until the plaintiff's *enquête* be closed. *C. P. C. art.* 313.

XLIX.—That in all cases in which the service of a rule for *serment décisoire*, or for *faits et articles* shall be made within the distance of five leagues from the court house, there shall be one intermediate juridical day between the day of service and the day of return, and when

beyond that distance, one intermediate juridical day as above, and also one intermediate juridical day for every five leagues of distance. —(Additional rule promulgated subsequently : Quebec, June, 1864.)

That a party served with a rule to answer interrogatories upon *faits et articles*, shall give his answers before the closing of the *enquête* of the party who has obtained the rule, and that no answers shall be afterwards received, except by leave of the court, obtained on a special application for the same. *C. P. C. arts.* 223, 225, 445.

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## CHAPTER X.

### OF THE INSCRIPTION OF CAUSES FOR HEARING.

L.—That there be kept in the office of the prothonotary a roll to be called the *rôle de droit*, upon which shall be inscribed all causes for hearing, upon any issue of law, or upon the merits, or other matter.

LI.—That no contested cause shall be heard upon any inscription on the *rôle de droit* unless two juridical days shall have intervened between the inscription and the day appointed for the hearing. *C. P. C. art.* 432.

LII.—That so soon as any issue of law is perfected, either party may inscribe the cause on the *rôle de droit* for hearing on such issue ; and if, on the day appointed for the hearing, the party by whom such law issue hath been raised shall not appear, and his adversary shall appear, the pleading whereby the same hath been raised shall be dismissed with costs. If neither party be present the inscription shall be discharged.

LIII.—That so soon as the *enquête* upon any preliminary exception shall be closed, either party may inscribe the same upon the *rôle de droit*, for hearing on the merits of such exception, and if on the day appointed for the hearing thereof, the party excipient shall not appear, his exception shall, on the application of the adverse party, be dismissed with costs. If neither party appear, the inscription shall be discharged.

LIV.—That as soon as the *enquête* in any contested cause shall be closed, either party may inscribe such cause on the *rôle de droit* for hearing on the merits, and if, on the day appointed for the hearing thereof, the plaintiff shall not appear, his action shall, on the application of the adverse party, be dismissed with costs. If neither party appear, the inscription shall be discharged.

# CHAPTER XI.

## OF MOTIONS.

LV.—That no motion be received or heard unless previous notice thereof, of at least one day, be given to the adverse party, excepting the motions whereupon side-bar rules may be obtained, and those hereinafter specially mentioned.

LVI.—That the parties shall not be heard on any rule unless one day shall have intervened between the service of such rule and the day appointed for the hearing thereof.

LVII.—That every motion founded on special matter shall contain the grounds on which such motion is made, and no party shall be permitted to urge any ground in support of a motion not set forth in such motion.

LVIII.—That the following motions, being motions *of course*, may be made and filed in the office of the prothonotary, and be by him received, and rules entered thereon, in the same manner as if made in open court :—

1. For the sheriff to return a writ—*nisi ;*
2. For particulars—*nisi ;*
3. For security for costs, the plaintiff being a person without that part of the province, heretofore Lower Canada, and stated so to be, in the declaration—*nisi ;* C. P. C. art. 129.
4. To give security for costs—*nisi ;*
5. For a jury trial—*nisi ;* C. P. C. art. 350.
6. To strike a cause from the *rôle de droit* or *rôle des enquêtes*—*nisi ;*
7. For a reference to *experts*—*nisi ; C. P. C. art.* 322.
8. To set aside or confirm a report—*nisi ; C. P. C. art.* 345.
9. To pay money into court—*nisi ;*
10. To file a retraxit—*nisi ;*
11. To dismiss for want of proceedings—*nisi ;*
12. To discontinue on payment of costs—*nisi ; C. P. C. art.* 450.
13. For *acte* to party that he does not contest an opposition—*nisi ; C. P. C. art.* 586.
14. For a rule on defendant for *main levée* on such opposition—*nisi ;*
15. To homologate a report of distribution—*nisi ; C. P. C. art.* 749.
16. For the sheriff to bring in the body—*nisi.*

LIX.—That the following motions may be made and adjudicated upon without notice—to the adverse party :

1. For judgment pursuant to confession, or to a verdict of jury ; *C. P. C. arts. 96 and 425.*
2. To defer or refer the *serment decisiore ; C. P. C. art.* 444.
3. For *faits et articles ; C. P. C. art.* 222.
4. To obtain *acte* of the court.

LX.—That a party intending to produce any affidavit or other paper-writing in support of any motion or rule, shall with the notice of such motion or copy of such rule, serve on the opposite party copies of the affidavits, or other paper-writings intended to be produced, and in default of his so doing, the opposite party shall be entitled to delay, until the next day, to take communication of such papers ; *C. P. C. art.* 462.

LXI.—That the validity of every report of *experts* or award of arbitrators shall be decided upon a motion, or upon a rule *nisi* to homologate the report, or to set the report aside, as the case may be. *C. P. C. art.* 347.

LXII.—That every application for security for costs shall be made within four days from the appearance of the party making such application. *C. P. C. art.* 107.

LXIII.—That all costs to which, in any case, a party is entitled upon a motion in any way, be asked for at the time at which such motion is made and heard, and not afterwards.

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## CHAPTER XII.

### OF TRIALS BY JURY.

LXIV. That in every cause wherein a trial by jury may by law be had, 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 ; and after the said four days, either party may move for the appointment of a day for trial and the issuing of a *venire facias. C. P. C. art.* 350

LXV.—That with every such motion the party shall be bound to deposit, in the hands of the prothonotary, the sum of five pounds six shillings and eight pence, to be distributed as follows :—To the prothonotary, for striking the jury, for the writ of *venire facias*, for calling

and swearing the jury, and for recording the verdict, twenty shillings; to the sheriff, for his services, according to the tariff, twenty shillings; to the crier, six shillings and eight pence; and for the jurors, the sum of three pounds, the amount allowed by law.—*C. P. C. art.* 365.

LXVI.—That the sheriff shall not be bound to summon such jury until a sum of money be placed in his hands, sufficient to pay the costs of summoning such jury.

LXVII.—That any difference respecting the amount of the sum to be so deposited be determined by one of the judges.

LXVIII.—That if the sum so deposited be more than sufficient to pay such costs, the surplus shall be returned to the party who deposited the same, and if it be insufficient, the balance shall be paid to the sheriff before the jury shall be sworn.

LXIX.—That the striking of the jury shall take place in the office of the prothonotary.—*C. P. C. art.* 367.

LXX.—That the party who obtains an order for *venire facias* shall give a notice to the opposite party, of at least one day, of the time appointed for the striking of the jury, but the want of such notice shall not prevent the striking of the jury, if the party entitled to notice do not object to such want of notice.

LXXI.—That if the attorney of either of the parties make default to appear before the prothonotary at the time appointed for the striking of the jury, or appearing, shall refuse to strike out from the list of jurors, in such cause, the names of twelve, or of any lesser number of such jurors, the prothonotary, in the absence, or on the refusal of such attorney, shall strike out of the said list of jurors, twelve on behalf of the party of such attorney, in the manner directed by law, or such lesser number as the attorney shall refuse or neglect to strike out. *C. P. C. art.* 370.

LXXII.—That in every case in which a trial by jury shall be ordered, two days at least before the day appointed for such trial, *factums* or paper-books containing a statement of the facts to be proved and of the authorities in support of the demand and of the defence, be delivered by the parties respectively, sealed up, to the prothonotary, to be by him forthwith delivered to the judge whose duty it may be to preside at the trial of such case. *C. P. C. art* 393,.

LXXIII.—That so soon as the *venire facias* shall be returned the parties shall be called, and, if neither party shall appear, the jury shall be forthwith discharged; but if the plaintiff shall appear and the defendant, being so called, shall not appear, the default of such de-

fendant shall be recorded, and thereupon the evidence of the plaintiff shall be heard *ex parte*, the verdict of the jury taken thereon, and judgment entered as to law and justice shall appertain. And if the defendant being so called shall appear, and the plaintiff, being called, shall not appear, the default of such plaintiff shall be recorded and judgment of non-suit thereupon entered in due course, dismissing such plaintiff, *sauf à se pourvoir*, with costs to the defendant. *C. P. C. art.* 394.

LXXIV.—That in every case in which a jury shall be sworn, and the plaintiff in such cause shall choose at any time before the verdict of such jury shall be given, to become non-suit, and, for that purpose, shall withdraw from the court, such plaintiff shall be called, and, not appearing, the default of such plaintiff shall be recorded, and judgment of non-suit shall be entered in due course, dismissing such plaintiff, *sauf à se pourvoir*, with costs to the defendant. *C. P. C. art.* 395.

LXXV.—That a motion for judgment upon a verdict shall not be made until after the expiration of four days in term from the day on which such verdict shall be recorded. *C. P. C. art.* 421.

LXXVI.—That every motion for a new trial, after verdict, be made on or before the fourth day in term next after the day on which such verdict shall be recorded. *C. P. C. art.* 423.

LXXVII.—That every motion in arrest of judgment after verdict be made on or before the expiration of the fourth day in term next after the day on which such verdict shall be recorded; except when a motion for a new trial shall have been made, in which case such motion in arrest of judgment shall be made on the second day next after the day on which such motion for a new trial shall have been disposed of. *C. P. C. art.* 424.

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## CHAPTER XII.

### OPPOSITIONS AND EXECUTIONS.

LXXVIII.—That no writ of execution shall issue until a *præcipe* for such writ be filed in the office of the prothonotary, and that every such writ be endorsed or signed by the attorney or person by whom such writ shall be so sued out.—*C. P. C. art.* 545.

LXXIX.—That a register of all writs of execution issued from this court, specifying the description of each writ, the parties to the cause

in which it issues, the number of such cause, the name of the attorney or person by whom such writ shall be sued out, the amount to be levied by virtue thereof, the cause of action, the date of the judgment on which such writ shall be founded, the day on which such writ shall issue, and the return day thereof be made and kept by the prothonotary in his office, to which all persons shall at all times, during office hours, have access *gratis*.

LXXX.—That to all oppositions *à fin d'annuller*, *à fin de charge* or *à fin de distraire* there shall be annexed an affidavit in the form following :—

"Lower Canada. } In the
District of } Superior Court.

Plaintiff;

*vs.*

Defendant.

"A. B., of , being duly sworn, doth depose and say that the facts articulated and set forth in the annexed opposition *à fin d* , and each and every of them is and are true, and that the said opposition is not made with any intent unjustly to retard or delay the sale of the whole, or any part, of the (*moveable* or *immoveable*) property, seized by virtue of the writ, or writs, of execution in this cause issued, but that the same is made in good faith for the sole purpose of obtaining justice.

"Sworn before me, at , this day of , one thousand eight hundred and ." *C. P. C. arts.* 583, 651.

LXXXI. And any opposition to which an affidavit in form aforesaid shall not be annexed, shall not delay the execution of any writ of *fieri facias* or *venditioni exponas* issued in any cause, and, notwithstanding the service or filing of any such opposition, the sheriff shall in such cause proceed to the due execution of such writ, in like manner as if no opposition had been served or filed. It being nevertheless provided that all such oppositions shall be returned into this court with such writ. *Ibid.*

LXXXII.—That in all cases of opposition *à fin de distraire* or *à fin de charge* founded upon title it shall not be necessary to annex to such oppositions any affidavit in support of the same. *Ibid.*

LXXXIII.—That every opposition *à fin de conserver* be filed on or before the sixth day next after the return day mentioned in the writ of execution, under which the monies claimed by such opposition shall have been levied ; provided that in case the said writ be returned into the office of the prothonotary on a day subsequent to the said return day, such opposition may be filed on or before the sixth day next after

the day on which such execution shall be so actually returned. And no opposition shall be afterwards received unless upon sufficient cause shewn, and upon such terms as the court shall adjudge. *Ibid. art.* 730. *In the districts of Three Rivers, St. Francis, Gaspé, Ottawa and Kamouraska, the following rule prevailed before the promulgation of the Code:*—That every opposition *à fin de conserver* be filed on or before the second day next after the return day mentioned in the writ of execution under which the monies claimed by such opposition shall have been levied. Provided that in case the said writ be returned in the office of the prothonotary on a day subsequent to the said return day, such opposition may be filed on or before the second day next after the day on which such execution shall be so actually returned. And no opposition shall be afterwards received, unless upon sufficient cause shown, and upon such terms as the court shall adjudge.

LXXXIV.—That in every case wherein the plaintiff shall declare that he does not intend to contest an opposition *à fin d'annuller, à fin de distraire* or *à fin de charge*, the opposant shall be entitled to judgment of *main levée*, without proof, provided that the defendant, upon the service of a rule *nisi* to that effect, shall not shew cause to the contrary, or declare that he intends to contest such opposition. *C. P. C. arts.* 586, 661.

LXXXV.—That the rules, orders and delays, prescribed by law or by this court, with respect to pleadings, *enquêtes* and hearings upon demands in chief, shall be the rules, orders and delays, with respect to all pleadings, *enquetes* and hearings upon oppositions of every description. *Ibid.*

LXXXVI.—That a register of all writs of execution, and of all oppositions filed in the office of the sheriff, containing a full description of such writs and oppositions, and of all proceedings and matters relating thereto, be made and kept by the said sheriff in his office, to which all persons shall, at all times during office hours, have access *gratis*. *C. P. C. art.* 718.

LXXXVII.—That any opposition, made without the ministry of an attorney of this court, which shall not contain an election of domicile on the part of the opposant, at some dwelling-house within one mile from the court-house, shall not be received or filed. *C. P. C. arts.* 583, 722.

LXXXVIII.—That every opposition shall contain the *moyens* upon which the same is founded, and that no other *moyen d'opposition* shall thereafter be received or filed.

LXXXIX.—That with every opposition *à fin de conserver* shall be filed all the exhibits in support thereof, with a list of such exhibits.

XC.—That within twelve days after the return day of any writ of execution, and after the sheriff's return thereto, certifying that there are monies in his hands subject to the order of the court, the prothonotary shall prepare and file a report of distribution. *C. P. C. art.* 724. *In the districts of Three Rivers, St. Francis, Gaspé, Ottawa, Kamouraska, the following rule prevailed before the promulgation of the code of civil procedure:*—That within four days after the return day of any writ of execution, and after the sheriff's return thereof, certifying that there are monies in his hands subject to the order of the court, the prothonotary shall prepare and file a report of distribution or collocation.

XCI.—That the prothonotary shall prepare a list of all such reports filed, and that such list shall be posted up in some conspicuous place in the office of the prothonotary.

XCII.—That any party intending to contest such report shall file his contestation at the office of the prothonotary, on or before the expiration of eight days next after the filing of such report; provided always, that if the report of distribution be filed on any day other than a Monday, the delay for filing the contestation shall be computed from the Monday next following the day on which such report shall have been filed. *C. P. C. art.* 742. *In the districts of Three Rivers, St. Francis, Gaspé, Ottawa, Kamouraska, the following rule prevailed before the promulgation of the code of civil procedure:*—That any party intending to contest such a report shall file his contestation (after a copy thereof has been served on the interested party) at the office of the prothonotary, on or before the expiration of two days next after the filing of such report.

XCIII.—That immediately after the delay for filing such contestation shall have expired, if no contestation has been filed, the plaintiff may move that the said report be homologated with costs; and if the plaintiff omit to make such motion, on the juridical day next following the expiration of the delay for the filing of contestations, any other party collocated may make such motion. *C. P. C. art.* 749. —(*Subsequent rule, June*, 1854):

That immediately after the delay for filing a contestation to a report of distribution shall have expired, if no contestation has been filed, the plaintiff may give notice that he will move on the first juridical day of the ensuing term, that the said report be homologated with costs; and if the plaintiff omit to give such notice on the juridical day next

following the expiration of the delay for the filing of contestation, any other party collocated may give such notice. That the said notice shall not be served on the parties; but that the same shall be posted in the prothonotary's office, at least four days.—*Ibid.*

XCIV.—That the rule obtained for the homologation of such report shall not be served on the parties, but that the same shall be posted in the prothonotary's office, as heretofore, at least four days. *Ibid.*—*In the districts of Three Rivers, St. Francis, Gaspé, Ottawa and Kamouraska, the following rule prevailed before the promulgation of the code of civil proceedure.* That the rule obtained for the homologation of any report or partial report shall not be served on the parties, but that the same shall be posted up by a bailiff of the court in the prothonotary's office, at least one juridical day.

XCV.—That in every case in which a report of distribution shall be made and filed by the prothonotary, and a contestation of such report or of any claim or opposition on which such report shall be founded, shall be made and filed, such report, upon motion to be made as hereinafter mentioned, shall be confirmed and homologated, as to all uncontested claims and oppositions which shall precede in rank the claim or opposition which, by such contestation, shall be contested, and as to all other uncontested claims or oppositions (if any there shall be) which cannot be affected by such contestation; and judgment according to such report, in so far as the same shall be so confirmed and homologated, shall be entered up and recorded, unless cause to the contrary shall be shewn. It being hereby provided that the rule for such partial homologation shall not be served upon the parties, but that the same be publicly affixed in the office of the prothonotary at least four days, and that the plaintiff shall have an exclusive right to more for the partial homologation of such report during the juridical day next following the expiration of the delay for the filing of contestations; and if the plaintiff omit to move for the partial homologation of the report, within the said juridical day, immediately thereafter, any party collocated may move for such partial homologation.

XCVI.—That none of the delays hereinbefore mentioned with respect to oppositions *à fin de conserver*, and reports of collocation and distribution, shall be held to run during the month of August.—*Ibid. arts.* 1, 463.

## CHAPTER XIV.

XCVII.—That any party requiring a notice of an application for a confirmation of title shall demand the same by *præcipe*. *C. P. C. arts.* 950, *et seq.*

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## CHAPTER XV.

### SAISIE ARRET AFTER JUDGMENT.

XCVIII.—That any party intending to contest the declaration of a *tiers-saisi*, shall file his contestation within eight days from the making of the declaration of the *tiers-saisi*, if the attachment be an attachment after judgment; and if the attachment be an attachment before judgment, then within eight days from the rendering of the judgment in the original cause. *C. P. C. arts.* 629, 864.

XCIX.—That the rules, orders, and delays prescribed by law or by the court with respect to pleadings, *enquêtes*, and hearings upon demands in chief, shall be the rules, orders and delays with respect to all pleadings, *enquêtes*, and hearings upon the contestation of the declaration of any *tiers-saisi*. *C. P. C. arts.* 627, 863.

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## CHAPTER XVI.

### INSCRIPTIONS EN FAUX.

C.—A party desirous of inscribing *en faux* against an exhibit filed shall, by motion addressed to the court, pray leave so to do. *C. P. C. arts.* 159, *et seq.*

CI.—The motion for leave to inscribe *en faux* shall be signed by the party in whose name it is made, or by an attorney specially authorized so to do, and an authenticated copy of the power of attorney given shall be filed with the said motion.—(*Subsequent promulgation, June,* 1854.)—That a motion for leave to inscribe *en faux* against an exhibit filed shall be made within four days of the filing of the exhibit, and not afterwards, unless allowed on special application for the same. *Ibid, art.* 161.

CII.—The party filing such exhibit shall, within a delay to be prescribed by the court, on motion of the plaintiff *en faux*, declare in writing whether he intends to avail himself of such exhibit in support of the allegations set forth in his pleadings. *Ibid. art.* 165.

CIII.—Should the party filing such exhibit omit to make such declaration in writing, signed by himself or his attorney *ad lites*, within the time prescribed, the said exhibit shall, by order of the court, on the motion of the plaintiff *en faux*, be taken off the files of the court, and shall thereafter be held and considered, to all intents and purposes, to have been withdrawn by the party who filed the same. *Ibid. art.* 166.

CIV.—If the defendant *en faux* declares that he does not intend to avail himself of such exhibit in support of his allegations, the said exhibit shall be taken off the files of the court, and shall be held and considered to all intents and purposes, to have been withdrawn by the party who files the same. *Ibid. art.* 167.

CV.—If the defendant *en faux* declare his intention to avail himself of such exhibit for the purpose aforesaid, he shall file the minute thereof, if there be a minute, in the office of the prothonotary, within such time as shall be prescribed by the court, and in default of so doing, the said exhibit shall, on motion of the plaintiff *en faux*, be taken off the files of the court, and held and considered, to all intents and purposes, to have been withdrawn by the party who filed the same. *Ibid. art.* 167.

CVI.—Two days after the plaintiff *en faux* shall have been notified of the filing of the said minute at the office of the said prothonotary, the said plaintiff shall file, under his own signature or that of his attorney *ad lites*, his inscription *en faux*, containing all the *moyens de faux*, a copy whereof shall be served on the attorney of the adverse party. *Ibid. art.* 170.

CVII.—If the said plaintiff omit so to do, the leave granted to him to inscribe *en faux* shall, on motion of the adverse party, be set aside, and the plaintiff on the original demand allowed to proceed as if leave to inscribe *en faux* had not been granted.

CVIII.—When the *moyens de faux* are filed, the defendant *en faux* may move that the said *moyens* be declared irrelevant and inadmissible, on which motion it shall be competent to the court, if it reject the same, to declare the *moyens de faux* relevant and admissible, and to order the defendant *en faux* to file his plea thereto within a given delay, to be computed from the day of the making of the *procès verbal* next hereinafter mentioned.

CIX.—That immediately after the rendering of the said judgment declaring the *moyens de faux* relevant and admissible, the plaintiff or defendant *en faux* may move that a *procès verbal*, descriptive of the exhibit filed, be made in the presence of the adverse party, or his attorney *ad lites*. *Ibid, art.* 168.

CX.—If the defendant *en faux* omit to file his plea, as ordered, the plaintiff *en faux* shall be allowed to proceed *ex parte*.

CXI.—The plaintiff *en faux* may, within two days from the day of filing of such plea, file a special answer thereto, if he think fit.

CXII.—Either party may inscribe the cause on the *rôle d'enquête* for the adduction of evidence. *Ibid. art.* 172.

CXIII.—The *enquête* being closed, either party may inscribe the cause for final hearing. *Ibid.*

CXIV.—The cause being inscribed on the *rôle d'enquête*, and subsequently on the *rôle de droit*, the proceedings thereon shall be regulated by the orders and rules of practice of this court. *Ibid.*

(Signed)

ED. BOWEN, Chief Justice S. C.
CHAS. D. DAY. J. S. C.
G. VAN FELSON, J. S. C.
W. C. MEREDITH, J. S. C.
CHAS. MONDELET. J. S. C.
E. BACQUET, J. S. C.
J. DUVAL, J. S. C.

Quebec, 17th Dec. 1850.

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# ADDITIONAL RULES.

## SUPERIOR COURT.

It is ordered that in all suits in which the sum or the value of the thing demanded amounts to or exceeds $100, but does not exceed $200, to be instituted in the Superior Court under the Statute of the Province of Quebec, passed in the 34th year of Her Majesty's reign, intituled "An Act to amend certain Articles of the Code of Civil Procedure respecting the practice of the Superior and Circuit Courts," the fees to be allowed to the counsel, advocates and attorneys engaged in the said suits, and also to the bailiffs employed therein, shall be the same as

according to the Tariffs now in force, are allowed in actions of the same class in the Circuit Court, which said Tariffs in the particulars aforesaid, are hereby adapted and made Tariffs of the Superior Court applicable to the cases aforesaid.—*December*, 1870.

It is ordered that the Rule of Practice of the 22nd February, 1870, fixing the 4th, 5th, 6th, 7th and 8th days of each month during the enquête as special days for proof and final hearing on the merits at the same time, be rescinded and annulled.—17*th April*, 1872.

The prothonotary shall not place any case on the rôle for hearing on the merits without having previously ascertained that the record is complete, and for this purpose the inscription should be filed at the prothonotary's office at least one clear day before the day fixed for the hearing.—30*th September*, 1873.

We, the Judges of the Superior Court, do fix and establish the amount to be paid to stenographers at the sum of twenty cents per hundred words for the taking of the notes of evidence in cases before said court.—31*st October*, 1878.

The practice court will be held on Mondays, Wednesdays and Fridays.—4*th November*, 1878.

# RULES OF PRACTICE

OF THE

# CIRCUIT COURT, PROVINCE OF QUEBEC.

## GENERAL RULES.

I.—That the court be opened at the hour of ten in the forenoon of each juridical day, unless otherwise specially adjourned.

II.—That the queen's counsel, barristers, attorneys and officers of the court be habited in the manner prescribed by the rules of practice of the Superior Court.

III.—That every attorney elect his domicile within one mile from the court house, in default whereof he shall be considered to have elected his domicile at the office of the clerk. *C. P. C. arts.* 85, 1139 *ante.*

IV.—That the office of the clerk, in the districts of Quebec and Montreal, be opened, in vacation, from the hour of eight A. M. to the hour of four P. M.; and during term from eight A. M. to six P. M. And in the district of Three Rivers, St. Francis and Gaspé, from nine A. M. till noon, and from two to four P. M. in vacation; and during term from eight A. M. till six P. M.

V.—That no attorney or officer of the court be received as bail or surety in any cause.

VI.—That the clerk shall keep a register of every process *ad respondendum* issuing from this court, specifying the names of the parties, the amount demanded, the cause of action and the day of return. *C. P. C. art.* 1059 *ante.*

VII.—That in all cases in which the defendant is entitled to a bill of particulars a copy thereof shall be annexed to the original writ or declaration and to the copy to be served on defendant, and in default thereof the plaintiff's action shall, on motion of the defendant, be dismissed with costs, *sauf à se pourvoir.*

VIII.—That all services on attorneys be made between the hours of nine in the forenoon and six in the afternoon from the 21st of March to 21st of September, and between the hours of nine A. M. and five P. M. during the remainder of the year.

IX.—That no change of attorney be allowed without leave of the court. *Ibid. arts.* 200, 1059.

X.—That when a party ceases to be represented by attorney he may, by rule of court, be compelled to name another attorney. In default of plaintiff so doing, his action shall be dismissed with costs, *sauf à se pourvoir.* If the defendant omit so to do, the plaintiff shall be allowed to proceed as if the defendant had not appeared in the cause. *Ibid.*

XI.—That all exhibits, with the list thereof, be filed with the declaration or plea, as the case may require. *Ibid. arts.* 99 *et seq.*, 1059.

XII.—That no party shall be bound to file any act *sous seing privé* before his *enquête*; but that a certified copy of such document shall be filed with the declaration or plea, as is above directed. *Ibid.*

XIII.—That if a defendant neglect to file his exhibits with his plea, such exhibits shall not be afterwards received or filed unless allowed by the court. *Ibid.*

XIV.—That either of the parties in a cause may take from the clerk's office all exhibits filed, except writings *sous seing privé*, and the same keep during one day, on signing a receipt for the same on the list filed in the cause. *Ibid.*

XV.—That every *défense au fonds en droit* shall contain an assignment of the causes of *demurrer*. *Ibid. arts.* 147, 1059.

XVI.—That all incidental cross-demands be filed with the defendant's plea, and that all rules of practice shall apply to incidental cross-demands. *Ibid. arts.* 152, 1059.

XVII.—That every such incidental cross-demand shall be considered a distinct action, and shall not delay the proceedings on the principal demand.

XVIII.—That every notice of motion or rule *nisi* shall be served one day in term and two days in vacation before the party can be called upon to show cause.

XIX.—That of all motions for attachments two days' notice shall be given, accompanied by a copy of all affidavits to be filed in support of such motion.

XX.—That all papers filed shall be regularly docketted by specifying the title and number of the cause, describing the paper filed, and stating by whom filed.

XXI.—That all applications for security for costs be made on or before the second day after the day of return. *Ibid. arts.* 107, 1059.

XXII.—That in computations of time Sundays and binding holidays or holidays, *fêtes d'obligation*, shall not be reckoned, unless otherwise provided by law. *Ibid. art.* 24.

XXIII.—That when any delay shall expire on a non-juridical day, such delay shall be held to extend to the close of the next juridical day. *Ibid.*

XXIV.—That the clerk shall not receive or file any pleading or paper-writing unless the fee allowed thereon be paid.

XXV.—That no *exception declinatoire, peremptoire à la forme*, or *dilatoire* be received unless the party offering such exception shall therewith deposit in the hands of the clerk the sum of one pound six shillings and eightpence for every such exception, to answer the costs of the adverse party, if such exception be dismissed or withdrawn, in the proportion of six shillings and eightpence to the clerk and twenty shillings to the attorney. *Ibid.* 112, 1059.

XXVI.—That every affidavit or certificate of service shall particularly describe the manner, place and time of service, in letters, and also the distance from the place of service to the court house at which the party is required to appear. *Ibid. art.* 78, 1059.

XXVII.—That it shall be the duty of the clerk to call the causes, each day, in the following order:

1. Causes returned.
2. Non-appealable causes fixed for final hearing, *exparte.*
3. Non-appealable causes in which one of the parties is to be heard on the *serment décisoire.*
4. Non-appealable causes contested.
5. Appealable causes, *exparte.*
6. Appealable causes contested.

## OF ENQUETES.

XXVIII.—That the clerk shall keep a roll of all causes inscribed for the adduction of evidence.

XXIX.—That of every inscription on the *role d'enquête* one day's notice shall be given in term and four days in vacation.

XXX.—That if the plaintiff or defendant is not ready to examine his witnesses on the day fixed for the *enquête*, his *enquete* shall, on motion, be declared closed.

XXXI.—That every application for an order or a commission, in the nature of a *commission rogatoire*, for the examination of witnesses be applied for within two days after issue joined.

XXXII.—That all interrogatories annexed to such commission, whether for the examination of witnesses or of a party on *faits et articles*, shall be allowed by a judge before the party can be called upon to answer.

XXXIII.—That either party may, at any period, cause the return to a commission by him sued out to be opened, unless good cause to the contrary be shown. But the return to a commission sued out by a defendant shall not be opened until plaintiff's enquête has been closed.

## ROLE DE DROIT.

XXXIV.—That the clerk shall keep a roll of all causes inscribed for preliminary hearing *en droit*, and another roll of all causes inscribed for final hearing on the merits.

XXXV.—That of all such inscriptions one day's notice shall be given in term, and two days in vacation.

XXXVI.—That either party may inscribe the cause for final hearing on the merits or for preliminary hearing *en droit*.

## OF OPPOSITIONS.

XXXVII.—All oppositions shall contain the reasons or *moyens d'opposition*, and none shall be admitted after the filing of any opposition.

XXXVIII.—Each opposition *à fin d'annuller* or *de distraire* shall be supported by an affidavit in the following form:

Lower Canada, Circuit. } CIRCUIT COURT.

A. B., plaintiff;

*vs.*

C. D., Defendant.

A. B., of , being duly sworn, doth depose and say, that the facts articulated and set forth in the annexed opposition *à fin d'*——— and each of them is, and are true, and that the said opposition is not

made with any intent unjustly to retard or delay the sale of the whole or any part of the moveable or immoveable property, seized by virtue of the writ of execution in this cause issued, but that the same is made in good faith, for the sole purpose of obtaining justice.

Sworn before me, at this day of 18 .

XXXIX.—No bailiff shall receive any of the oppositions above mentioned, unless supported by such affidavit; but it shall be the duty of the bailiff to proceed as if no such opposition had been presented to him.

## INSCRIPTION EN FAUX.

XL.—A party desirous of inscribing *en faux* against an exhibit filed, shall, by motion addressed to the court, pray leave so to do.

XLI.—The motion for leave to inscribe *en faux* shall be signed by the party in whose name it is made, or by an attorney specially authorized so to do, and an authentic copy of the power of attorney given shall be filed with the said motion.

XLII.—The party filing such exhibit shall, within the delay to be prescribed by the court, on motion of the plaintiff *en faux*, declare in writing, if he intends to avail himself of such exhibit in support of the allegations set forth in his pleading.

XLIII.—Should the party filing such exhibit omit to make such declaration in writing, signed by himself or by his attorney *ad lites*, within the time prescribed, the said exhibit shall by order of the court, on the motion of the plaintiff *en faux*, be taken off the files of the court, and thereafter be held and considered to all intents and purposes, to have been withdrawn by the party who filed the same.

XLIV.—If the defendant *en faux* declare that he does not intend to avail himself of such exhibit in support of his allegations, the said exhibit shall be taken off the files of the court and shall be held and considered to all intents and purposes, to have been withdrawn by the party who filed the same.

XLV.—If the defendant *en faux* declare his intention to avail himself of such exhibit for the purposes aforesaid, he shall file the minute thereof, if there be a minute, in the office of the clerk, within such time as shall be prescribed by the court, and in default of so doing, the said exhibit shall, on motion of the plaintiff *en faux*, be taken off the files of the court, and held and considered, to all intents and purposes to have been withdrawn by the party who filed the same.

XLVI.—Two days after the plaintiff *en faux* shall have been notified of the filing of the said minute at the office of said clerk, the said plaintiff shall file, under his signature, or that of his attorney *ad lites*, his inscription *en faux* containing all the *moyens de faux*, a copy whereof shall be served on the attorney of the adverse party. If the said plaintiff omit so to do, the leave granted to him to inscribe *en faux* shall, on motion of the adverse party, be set aside, and the plaintiff, on the original demand, allowed to proceed as if leave to inscribe *en faux* had not been allowed.

XLVII.—When the *moyens de faux* are filed, the defendant *en faux* may move that the said *moyens* be declared irrelevant and inadmissible, on which motion it shall be competent for the court, if it reject the same, to declare the *moyens de faux* relevant and admissible, and to order the defendant *en faux* to file his plea thereto within a given delay, to be computed from the day of the making of the *procès verbal* next hereinafter mentioned.

XLVIII.—That immediately after the rendering of the said judgment declaring the *moyens de faux* relevant and admissible, the plaintiff or defendant *en faux* may move that a *procès verbal*, descriptive of the exhibit filed, be made in the presence of the adverse party, or his attorney *ad lites*.

XLIX.—If the defendant *en faux* omit to file his plea as ordered the plaintiff *en faux* shall be allowed to proceed *ex parte*.

L.—The plaintiff *en faux* may, within two days from the day of the filing of such plea, file a special answer thereto if he think fit.

LI.—Either party may inscribe the cause on the *rôle d'enquête* for the adduction of evidence.

LII.—The *enquête* being closed, either party may inscribe the cause for final hearing.

LIII.—The cause being inscribed on the *rôle d'enquête* and on the *rôle de droit*, the proceedings thereon shall be regulated by the orders and rules of practice of this court.

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*The following Rules of Practice shall apply specially to Non-Appealable Cases.*

LIV.—That the parties shall be bound to proceed to evidence on the day named for that purpose ; should the plaintiff not be ready to pro-

ceed, his action shall be dismissed with costs, *sauf à se pourvoir;* in case the defendant is not ready to proceed the plaintiff shall be allowed to proceed *ex parte*.

LV.—The attorneys shall sign the pleadings by them filed—the clerk shall enter on the declaration the name of the defendant's attorney.

LVI.—All interrogatories upon the *serment décisoire* or upon *faits et articles* shall be served the day before that on which the party is to answer, when the party to be interrogated does not reside more than five leagues from the court-house, and when the said party resides at a distance of more than five leagues from the court-house, an additional delay of one day shall be required for every additional five leagues. But the judge may, in his discretion, allow either party to be interrogated on the *serment décisoire* without requiring the interrogatories to be in writing.

(Signed),

E. Bowen, Chief Justice, S. C.,
D. Mondelet, J. S. C.,
Chs. D. Day, J. S. C.,
G. Van Felson, J. S. C.,
Chas. Mondelet, J. S. C.,
J. Smith, J. S. C.,
E. Bacquet, J. S. C.,
J. Duval, J. S. C.,
W. S. Meredith, J. S. C.

Quebec, 17th December, 1850.

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## ADDITIONAL RULES,

### SUBSEQUENTLY PROMULGATED.

That within four days after the return of any writ of execution, and after the bailiff's return thereto, certifying that there are monies in his hands, subject to the order of the court, the clerk shall prepare and file a report of distribution.

That the clerk shall prepare a list of all such reports filed, and that such list be posted up in some conspicuous place in his office.

That any party intending to contest such report shall file his contestation at the office of the clerk, on or before the expiration of four

days next after the filing of such report: Provided always, that, if the report of distribution be filed on any other day than a Monday, the delay for filing the contestation shall be computed from the Monday next following the day on which such report shall have been filed.

That immediately after the delay for filing a contestation to a report of distribution shall have expired, if no contestation has been filed, the plaintiff may give notice that he will move on the first juridical day of the ensuing term, that the said report be homologated with costs; and if the plaintiff omit to give such notice on the juridical day next following the expiration of the delay for the filing of contestations, any other party collocated may give such notice.

That the said notice shall not be served on the parties; but that the same shall be posted in the clerk's office, at least four days.

That it shall be lawful for a defendant, by leave of a judge of this court, to pay into court the sum of money which such defendant acknowledges to owe to the plaintiff, and thereupon, unless the plaintiff shall accept thereof in full discharge of his suit, the said sum shall be struck out of the declaration and paid out of court to the plaintiff; and upon the trial of the issue, the plaintiff shall not be allowed to give evidence for the sum so acknowledged to be due.

(Signed)

EDWD. BOWEN, Ch. Justice,
J. DUVAL, J.,
W. C. MEREDITH, J. S. C.,
ED. CARON, J. S. C.,
CHS. D. DAY, J. S. C.,
CHS. MONDELET, J. S. C.

Quebec, Jan. 4th, 1870.

# RULES OF PRACTICE

OF THE

# SUPERIOR COURT FOR LOWER CANADA,

## SITTING AS A COURT OF REVIEW.

1. It is ordered that in every case of revision before the said court the party aggrieved shall make and file a statement in writing of the grounds or reasons of revision to be submitted to the said court.

II. The said statement shall be divided into distinct items or articles, each of which shall be regularly numbered in succession, and shall in a summary manner explicitly set out and state each particular ground or reason aforesaid, with the point of law or fact upon which said ground or reason shall rest.

III. The said party may, if he see fit, append to such ground or reason the authorities of law, by reference or at length, relied upon for each such ground or reason.

IV. The said party shall file in each case an original of the said statement, to remain of record therin, and a duplicate thereof, for the use of the said court, both original and duplicate to be signed by the counsel of the said party aggrieved.

The said original and duplicate shall be produced and filed of record in each case on the day on which the case shall be appointed to be heard, and no hearing shall be allowed or had until the said statement, original and duplicate, shall be so filed. No party shall be heard upon any grounds or reasons of revision other than those set out in the said statement.

(Signed) BADGLEY, J.,
STUART, J.,
TASCHEREAU, J.

### ADDITIONAL RULE.

In all cases in review, the prothonotary shall prepare and keep, when filed, the factums, the judgment *a quo*, and the judgment and proceedings in review.—*October*, 1873.

# RULES OF PRACTICE

OF THE

# COURT OF QUEEN'S BENCH,

IN THE

## EXERCISE OF ITS CIVIL APPELLATE JURISDICTION.

PROMULGATED JULY TERM, 1850.

I.—That this court, in the exercise of its appellate civil jurisdiction, be opened at the hour of ten in the forenoon of each of the juridical days on which the same is by law appointed to be held, unless an order or adjournment to the contrary be made.

II.—That the Queen's counsel and advocates, practising in this court, and the clerk of the court, when in the discharge of their respective duties in court, be habited in black, and in robes and bands, as heretofore hath been used; and that no Queen's counsel, or advocate, not so habited, and in such robes and bands, be heard in any cause.

III. That all records, registers, books and papers, belonging to and filed in the court, be kept in the places assigned for the safe custody thereof, in the court houses, respectively, at the places where this court is by law appointed to be held, and be not thence removed, or taken therefrom, on any pretence whatever, without the order of this court, or of one of the judges thereof, in writing.

IV.—That the office of the clerk of this court, in what relates to its jurisdiction as a court of appeal and error, be kept in the apartments assigned for it in the court-houses respectively, at the places where this court is by law appointed to be held; and that the said office, in the said court-houses respectively, during the present and every future term, be open, and regular and proper attendance afforded therein, from the hour of nine in the forenoon until the hour of five in the afternoon of every day (Sundays and holidays excepted), and during the

vacation after each term from the hour of ten in the forenoon till the hour of three in the afternoon of every day (Sundays and holidays excepted).

V.—That there shall be prepared and kept by the said clerk of this court, in what respects its civil appellate jurisdiction in his office, a fit and proper book, in which shall be made the entries hereinafter mentioned, that is to say: Every attorney of this court, before the first day of September next, shall make in the said book an entry, in writing and to be signed by him, of his name and of his real and elected domicile, in the cities of Quebec and Montreal respectively, that is to say, of his real domicile in one or other of the said cities, if resident in either of them, and of his elected domicile in that in which he is not resident, or of his elected domicile in each of the said cities, if not resident in either of them, at which real or elected domicile all pleadings, summonses, rules, orders and notices, of which the service on him may be required, may lawfully be made. And every attorney hereafter to be admitted shall, on his admission and before he commences practising in this court, make in the said book a like entry. And as often as any attorney of this court shall change his real or elected domicile or domiciles, of which an entry shall have been made as aforesaid, he shall make a like entry of such change; and all pleadings, summonses, rules, orders and notices, which do not require personal service, shall be deemed and taken to be sufficiently served on such attorney if a copy thereof be left at the place last entered by such attorney as aforesaid, as his real or elected domicile, with any person of competent age and discretion resident at or belonging to such place. And if any such attorney shall neglect to make such entry as aforesaid, then the fixing up of any notice, pleading, summons, rule or order for such attorney in the said office of the said clerk of this court shall be deemed and taken to be service thereof, and as effectual as if the same had been served at such real or elected domicile as aforesaid.

VI.—That a schedule of all suits depending in this court, specifying in each suit the names of the parties, the date of the writ of appeal or of the writ of error, the time when returned, or, if not returned, the fact of its not being returned, the names of the attorneys by whom appearances for the parties have been filed, and the date of such appearance, and, if not filed, the fact that they have not been filed, the days on which the reasons of appeal and the answer thereto and the cases of the parties (if filed) have been filed, and, if not filed, the fact that they have not been filed, the day on which each suit, if inscribed on the roll for hearing, hath been so inscribed, and the day which by such inscription is fixed for the hearing of such suit shall be made

and kept by the said clerk of this court on the first day of the next and of every succeeding term; and such schedule shall be deemed and taken in all parts to be an official certificate by the said clerk of this court of the state of such suits, severally and respectively, on the first day of the term, when such schedule shall be laid before the court as aforesaid.

VII.—That no writ of appeal or writ of error shall issue from this court unless a *præcipe* for the same, signed by the attorney suing out such writ, be first delivered to the proper officer, by whom the said writ is to be issued; and every such writ shall be written on parchment and shall bear the signature of the attorney, upon whose *præcipe* the same shall be issued, and shall be made returnable at the place at which this court shall be held next after the issuing of such writ, within fifteen days from the date thereof; except such writs of appeal and writs of error as may be directed to the judge of the Superior Court for the district of Gaspé, which shall be made returnable within two calendar months from the date thereof.

VIII.—That personal service of any writ of appeal or writ of error upon the attorney who has appeared in the court below, for the respondent or the defendant in error, as heretofore has been practised shall, in default of the legal service, be held and taken to be legal service.

IX.—That the writs, pleadings, motions and exhibits, and other paper-writings, comprising any record to be hereafter transmitted to this court, shall, by the prothonotary of the court from which such record proceeds, at the head of each, be separately numbered respectively from number one to the entire number thereof, and that an index of reference to the whole, by number, title and description, under the signature of such prothonotary, shall be by him annexed to such record.

X.—That the postage paid by the said clerk of this court on the return to writs of appeal and writs of error, and the records accompanying them shall, on demand, be forthwith reimbursed to him by the attorney of the appellant or plaintiff in error, and, if not so reimbursed, the payment thereof by such attorney may be immediately enforced, by resort to the summary jurisdiction of this court.

XI.—That on every writ of appeal or writ of error hereafter to be issued it shall be incumbent on the appellant and respondent, or the plaintiff and defendant, in error respectively to enter his appearance in the office of the said clerk of this court on or before the eighth day next after the day on which such writ of appeal or writ of error has

been made returnable, and, in default thereof, shall be precluded from entering an appearance in such suit, in which subsequent proceedings may be had *ex parte* against the party so in default as aforesaid.

XII.—That the reasons of appeal or the assignment of errors, as the case may require, in every suit shall be filed within eight days next after the return of the writ of appeal or writ of error, as the case may be, and the transmission of the record and proceedings from the court below, and shall contain specifically the several grounds and reasons of appeal, and the several errors for which the reversal of the judgment appealed from is sought; and if the reasons of appeal or the assignment of errors be not filed within the time aforesaid, it shall be competent to the attorney of the respondent or defendant in error, by notice in writing under his signature, directed to the attorney of the appellant or plaintiff in error in such suit, to demand the reasons of appeal or the assignment of errors, as the case may require, and, if the reasons of appeal or the assignment of errors be not filed within six days from service of such notice, every such suit in appeal or in error shall be dismissed with costs.

XIII.—That the answers to reasons of appeal in every suit in appeal, and the joinder in error in every suit in error, shall be filed within eight days after the filing of the reasons of appeal or the assignment of errors; and if not so filed it shall be competent to the attorney of the appellant or of the plaintiff in error, as the case may be, by notice in writing under his signature, directed to the attorney of the respondent or defendant in error, in such suit, to demand the answers to the reasons of appeal or the joinder in error; and if such answer or joinder in error, shall not, within four days from the service of such notice, be filed, the respondent or defendant in error, as the case may be, shall be wholly precluded from filing an answer to the reasons of appeal, or a joinder in error; and the appellant or plaintiff in error may, after notice given to the adverse party of his intention so to do, proceed to a hearing of his suit in appeal or in error *ex parte;* and to judgment therein, without the intervention of the respondent or defendant in error.

XIV.—That the cases of the appellant and respondent or plaintiff and defendant in error, in every suit in appeal or error, to the number of ten on each side, shall be delivered by the appellant and respondent, the plaintiff and defendant in error, respectively to the said clerk of this court, to be by him filed, within ten days after the filing of the answers to the reasons of appeal or the rejoinder in error. And if the case of the appellant or the plaintiff in error be not so delivered and filed the suit in appeal or in error, of such appellant or plaintiff in error,

shall be deemed to be deserted, and on motion of the respondent or defendant in error, shall be dismissed with costs. And if the cases of the respondent or defendant in error be not delivered and filed as aforesaid, such respondent or defendant in error shall be deemed to have deserted such suit in appeal or error, and the same may be heard *ex parte*, on the part of the appellant or plaintiff in error, and judgment rendered therein, without the intervention of the respondent or defendant in error.

XV.—That when and so soon as the answers to the reasons of appeal, or the joinder in error, as the case may require, shall be filed, it shall be competent to either party, by whom cases have been filed, to set down such suit for hearing, by inscribing the same on a docket roll to be kept by the said clerk of this court for that purpose, in vacation or in term, of which inscription two days' notice shall be given to the adverse party.

XVI.—That after the inscription of a cause for final hearing, it shall be the duty of the said clerk of this court, without delay, to deliver to the judges, respectively, printed cases, making part of the cases, which have been filed as aforesaid in such case, and furnish the attorney of each party, who shall have filed his case, on his demand, with a printed copy of the case of the adverse party, and he shall retain and file of record one of the printed cases of the said parties respectively.

XVII.—That it shall be the duty of the said clerk of this court to prepare and keep a docket roll of the causes which have been inscribed for hearing, in the order in which they have been inscribed; from which docket roll the causes to be heard shall be called on each day, in the order in which they stand on the said roll.

XVIII.—That in cases where a suit in appeal or in error, having been inscribed for hearing, and being called from the roll, the appellant and respondent, or the plaintiff and defendant in error, shall not appear, or shall not be ready to proceed, every such suit shall be struck from the roll; and in cases where a suit in appeal or in error, having been inscribed for hearing, and being called from the roll, the appellant or plaintiff in error, shall not appear, and the respondent or defendant in error shall appear, every such suit shall be dismissed with costs to the respondent or defendant in error; and in cases where a suit in appeal, or in error, having been inscribed for hearing, and being called from the docket roll, the respondent or defendant in error shall not appear, and the appellant or plaintiff in error shall appear, and be ready to proceed, every such suit shall be heard on the part of the appellant or plaintiff in error, so appearing, *ex parte*, and such

order and judgment thereupon made and rendered as to law and justice shall appertain, without costs in such case to the respondent or defendant in error.

XIX.—That in all suits which shall hereafter be pending in this court, no more than two counsel shall be heard in opening, or in answer, and one only in reply.

XX.—That when this court shall be moved in any suit, upon any special matter, not appearing upon the record or proceedings filed in such suit, such special matter shall be previously authenticated by affidavit; and a copy of the affidavit, and two days' notice of such motion served on the adverse party. And no such motion shall be received, until such affidavit, and an affidavit of the service of notice as aforesaid, shall be read and filed.

XXI.—That every motion for an appeal from an interlocutory judgment, shall be accompanied with copies of such interlocutory judgment and of the pleading filed in the suit, together with copies of such exhibits and proceedings therein as may be material and necessary in support of any such motion.

XXII.—That a copy of every judgment of this court, by reason whereof the record in any suit in this court shall be remitted to the court below shall be annexed to the record, and transmitted with the same under the certificate of the said clerk of this court.

XXIII.—That in the computation of time, the common rule *dies a quo non computatur termino* shall be observed; and in all cases in which a prescribed delay or period, within which something is required to be done, shall expire on a Sunday or holiday, the same shall *ipso jure* stand and be enlarged to the then next juridical day.

XXIV.—That all rules and orders heretofore made for regulating the practice in appeal and in error, and now in force in this court, be and the same are hereby rescinded and annulled.

(Signed) J. STUART, C. J.,
J. R. ROLLAND, J. B. R.,
PHI. PANET, J. B. R.,
T. C. AYLWIN, J.

Quebec, 12th July, 1850.

## ADDITIONAL RULES.

That for the future, in appeals from the Circuit Court, the parties shall each produce a printed factum, in the same manner, within the same delay, and subject to the same penalties as are prescribed and established by the rule concerning appeals from the Superior Court.

Experience having shown that the paper covers heretofore in use are insufficient to protect the records of the court from injury, it is hereby ordered, pursuant to the statute in that behalf, that, for the future, the clerk do provide proper wrappers or external covers in parchment, for each record; and to defray the expense thereof, the sum of one shilling and three pence shall be paid to him over and above the other sums now payable upon the suing out of any writ of appeal.

It is further ordered that, instead of the present number, for the future there be filed in the office of the clerk twenty-five printed copies of cases on each side, in appeal; and that the said cases be printed, as heretofore, in paper in folio form. (*11th July*, 1857.)

Doubts having arisen whether the additional number of cases in appeal made requisite by the rule of the 11th July last, should be liable to the payment of any fee or charge, it is hereby ordered that no fee or charge whatever shall be demanded or paid in respect of such additional cases. (*12th October*, 1857.)

For the future, in appeals from the Circuit Court, the parties shall each produce a printed factum in the same manner, within the same delay, and subject to the same penalties as are prescribed and established by the rule concerning appeals from the Superior Court; and the party appellant will not, for the future, be obliged to furnish copies of his petition in appeal.

For the future, in every appeal, as well from the Superior as from the Circuit Court, the evidence taken in the suit is to be printed and to form part of the factum, that is to say, that the appellant shall have printed, with his factum, the evidence adduced by him in the court of original jurisdiction, and the respondent that adduced by him. (*6th December*, 1859.)

The appellant in each cause shall insert in his factum a true copy of the judgment appealed from, and both parties, appellant and respondent, shall endorse on the said factum the name of the court from whose judgment the appeal has been instituted. (*9th December*, 1861.)

Hereafter, communication of the record in each cause shall be given to the attorney of either party, on his receipt filed with the clerk of the

court, and that the order of this court or of one of the judges thereof, required by the third Rule of Practice, be dispensed with. (*5th June*, 1862.)

At the expiration of each term, the clerk of this court shall give to each judge a list of the cases in which an appeal has been allowed to Her Majesty in Her Privy Council.

Immediately on the transcript of the record being transmitted to the first clerk of the Privy Council, the clerk of this court shall inform each judge thereof. (*4th June*, 1864.)

Appeals from judgments in actions of ejectment brought under the Lessors and Lessees' Act shall, as to hearing, have precedence in this court before other cases. (*9th March*, 1865.)

No barrister, attorney, prothonotary, sheriff, crier, bailiff, sheriff's officer or officer of this court shall be bail or surety in any action or proceeding cognizable by this court or by any judge thereof. (*9th June*, 1865.)

The clerk of this court, immediately upon the receipt of the papers transmitted in a case reserved for the opinion of the court, shall set down such case for hearing on the first juridical day of the then next ensuing term.

The plaintiff in error in all criminal cases, shall file an assignment of errors on the first juridical day after the day of the return of the said writ.

The joinder in error shall be filed on the first juridical day following the filing of the assignment of errors.

The clerk of this court, on receiving the joinder in error, shall forthwith set down the cause to be heard on the errors assigned. (*1st June*, 1867.)

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FRIDAY, *the Sixteenth day of March, one thousand eight hundred and seventy-seven.*

PRESENT:

The Honourable Mr. Chief Justice Dorion,
" " Mr. Justice Monk,
" " Mr. Justice Ramsay,
" " Mr. Justice Sanborn,
" " Mr. Justice Tessier.

## REGULÆ GENERALES.

On the first day of each term, the Clerk of Appeals shall lay before the Court a list of all cases pending before the Court, in which no pro-

ceedings have been had for more than a year, indicating the name of the parties and of their respective counsel, the nature and date of last proceeding had in such case; and such cases shall be considered to have been deserted, and the court may without any demand to that effect order the records to be transmitted to the court below.

This rule to be enforced in cases now pending as well as to future cases from and after the first day of March, one thousand eight hundred and seventy-eight.

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In all cases of appeal and error, the parties may in lieu of factums as now required, file a special case setting forth the judgment or judgments appealed from and so much of the pleadings, evidence, documents and orders in the cause as they may deem necessary to enable the Court to decide the questions at issue, together with such propositions of law or fact as may be relied upon by the parties respectively, and such special cases shall be considered as common to both parties and will entitle the counsel engaged in the case to the same fees as if separate factums had been filed.

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The cases or factums shall be printed on paper of eleven inches by eight inches and a half, the type to be small pica leaded face, and every tenth line numbered in the margin.

(Certified) L. W. MARCHAND,
*Clerk of Appeals.*

# RULES OF PRACTICE

OF

# HER MAJESTY'S PRIVY COUNCIL.

## JUDICIAL COMMITTEE,

### APPELLATE JURISDICTION.

AT THE COURT AT BUCKINGHAM PALACE,
The 13th day of June, 1853.

*Present:*

THE QUEEN'S MOST EXCELLENT MAJESTY.
HIS ROYAL HIGHNESS PRINCE ALBERT.

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| Lord President, | Earl of Aberdeen, |
| Lord Steward, | Earl of Clarendon, |
| Duke of Newcastle, | Viscount Palmerston, |
| Duke of Wellington, | Mr. Herbert, |
| Lord Chamberlain, | Sir James Graham, Bart. |

Whereas, there was this day read at the board a report from the Right Honourable the Lords of the Judicial Committee of the Privy Council, dated the 30th May last past, humbly setting forth that the Lords of the Judicial Committee have taken into consideration the practice of the committee with a view to greater economy, dispatch and efficiency in the appellate jurisdiction of Her Majesty in Council, and that their lordships have agreed humbly to report to Her Majesty that it is expedient that certain changes should be made in the existing practice in appeals and recommending that certain rules and regulations therein set forth should henceforth be observed, obeyed and carried into execution, provided Her Majesty is pleased to approve the same: Her Majesty having taken the said report into consideration, was pleased

by and with the advice of Her Privy Council, to approve thereof, and of the rules and regulations set forth therein, in the words following, *videlicet:*

I.—That any former usage or practice of Her Majesty's Privy Council notwithstanding, an appellant who shall succeed in obtaining a reversal or material alteration of any judgment, decree or order appealed from shall be entitled to recover the costs of the appeal from the respondent, except in cases in which the Lords of the Judicial Committee may think fit otherwise to direct.

II.—That the registrar, or other proper officer having the custody of records in any courts of special jurisdiction, from which an appeal is brought to Her Majesty in Council, be directed to send by post, with all possible dispatch, one certified copy of the transcript record in each cause to the registrar of Her Majesty's Privy Council, Whitehall, and that all such transcripts be registered in the Privy Council Office, with the date of their arrival, the names of the parties, and the date of the sentence appealed from; and that such transcript be accompanied by correct and complete index of all the papers, documents and exhibits in the cause; and that the registrar of the court appealed from, or other proper officer of such court, be directed to omit from such transcript all merely formal documents, provided such omission be stated and certified in the said index of papers; and that a special care be taken not to allow any document to be set forth more than once in such transcript; and that no certified copies of the record be transmitted to agents in England, by or on behalf of the parties in the suit; and that the fees and expenses incurred and paid for the preparation of such transcript be stated and certified upon it by the registrar or other officer preparing the same.

III.—That when the record of proceedings, or evidence in the cause appealed has been printed or partly printed abroad, the registrar, or other proper officer of the court from which the appeal is brought, shall be bound to send home the same in a printed form, either wholly or so far as the same may have been printed; and that he do certify the same to be correct, on two copies, by signing his name on every printed sheet and by affixing the seal, if any, of the court appealed from to these copies with the sanction of the court; and that in all cases in which the parties in appeals shall think fit to have the proceedings printed abroad, they shall be at liberty to do so, provided they cause fifty copies of the same to be printed in folio and transmitted at their expense, to the registrar of the Privy Council; two of which printed copies shall be certified, as above, by the officers of the court appealed

from; and in this case no further expense for copying or printing the record will be incurred or allowed in England.

IV.—That on the arrival of a written transcript of appeal at the Privy Council Office, Whitehall, the appellant, or the agent of the appellant prosecuting the same, shall be at liberty to call on the registrar of the Privy Council to cause it, or such part thereof as the respondent, or his agent may require, to be printed by Her Majesty's printer, or by any other printer on the same terms—the appellant or his agent engaging to pay the costs of preparing a copy for the printer, at a rate not exceeding one shilling per brief sheet—and likewise the cost of printing such record or appendix; and that one hundred copies of the same be struck off, whereof thirty copies are to be delivered to the agents on each side, and forty kept for the use of the Judicial Committee; and that no other fee for solicitors' copies of the transcript or for drawing the joint appendix be henceforth allowed, the solicitors on both sides being allowed to have access to the original papers at the council office, and to extract or cause to be extracted and copied, such parts thereof as are necessary for the preparation of the petition of appeal, at the stationer's charge, not exceeding one shilling per brief sheet.

V.—That a certain time be fixed, within which it shall be the duty of the appellant, or his agent, to make such application for the printing of the transcript, and that such time be within the space of six calendar months from the arrival of the transcript and the registration thereof, in all matters brought by appeal from Her Majesty's colonies and plantations east of the Cape of Good Hope, and from the territories of the East India Company, and within the space of three months in all matters brought by appeal from any other part of her Majesty's dominions abroad; and that in default of the appellant or his agent taking effectual steps for the prosecution of the appeal within such time or times respectively, the appeal shall stand dismissed without further order, and that a report of the same be made to the Judicial Committee by the registrar of the Privy Council, at their Lordships' next sitting.

VI.—That whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the agents of the parties, with the sanction of the registrar of the Privy Council, may submit such question of law to the Lords of the Judicial Committee, in the form of a special case, and print such parts only of the transcript as may be necessary for the discussion of the same; provided that nothing herein contained shall in any way bar or prevent the

Lords of the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit; and that in order to promote such arrangements and simplification of the matter in dispute, the registrar of the Privy Council may call the agents of the parties before him, and having heard them and examined the transcript, may report to the committee as to the nature of the proceedings.

And Her Majesty is further pleased to order and it is hereby ordered that the foregoing rules and regulations be punctually observed, obeyed, and carried into execution, in all appeals or petitions and complaints, in the nature of appeals, brought to Her Majesty or to Her heirs and successors, in Council, from Her Majesty's colonies and plantations abroad, and from the Channel Islands or the Isle of Man, and from the territories of the East India Company, whether the same be from the courts of justice, or from special jurisdiction, other than appeals from Her Majesty's Courts of Vice-Admiralty, to which the said rules are not to be applied.

Whereof the judges and officers of Her Majesty's courts of justice abroad, and the judges and officers of the Superior Courts of the East India Company, and all other persons whom it may concern are to take notice, and govern themselves accordingly.

(Signed) WILLIAM L. BATHURST.

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L. BATHURST.

# TABLES OF FEES

PAYABLE TO

# ADVOCATES

IN THE

# SUPERIOR AND CIRCUIT COURTS.

# ADVOCATES' FEES

## IN THE SUPERIOR COURT.

It is hereby ordered that the following fees be allowed to the counsel, advocates and attorneys practising in the Superior Court in actions to be instituted, and upon other proceedings to be commenced, from and after the day on which the present tariff shall be entered by the prothonotaries of this Court in the registers of the same as by law directed; and the tariff of fees for the counsel, advocates and attorneys practising in this Court, the original whereof was entered in the registers of the said Court at the City of Quebec, on the 20th day of July, 1852, is hereby repealed in so far as regards actions to be instituted, and other proceedings to be commenced, from and after the day on which the present tariff shall be so entered in the registers of this Court.

Vide *C. C. P. ante*, art. 29.

### FIRST CLASS ACTIONS CONSIST OF

1. Personal actions when the value in contest exceeds $400.
2. Real and mixed actions not otherwise specially provided for.
3. Actions for separation from bed and board, and *en declaration de paternité.*
4. Proceedings by *Mandamus*, *Scire-facias*, *Requête-Libellée* or *Prohibition*, or others under articles 997 to 1033 of the Code of Civil Procedure and upon like proceedings.

### SECOND CLASS ACTIONS CONSIST OF

1. Personal actions when the value in contest does not exceed $400.
2. Actions for separation of property.
3. Actions or petitions *en destitution de Tutelle* or *Curatelle.*
4. All actions not included in the First Class and not otherwise specially provided for.

ACTIONS NOT CONTESTED.

| | TO PLAINTIFF'S ATTORNEY. 1st Class. | 2nd Class. |
|---|---|---|
| 1. If the action be settled before return..... | $18 00 | $14 00 |
| 2. If the action be settled, or if the defendant confess judgment on the day of the return, or on the next following juridical day..... ..... | 20 00 | 16 00 |
| 3. If the action be settled or if the defendant confess judgment, after the delay mentioned in the next preceding number, but before plea filed, or inscription for proof, or inscription for final hearing on the merits where no enquête is necessary. | 22 00 | 18 00 |
| 4. If the action be settled after the inscription on the roll for proof, but before the closing of the enquête, or if the action be settled after the inscription for final hearing on the merits where no enquête is necessary, or if judgment be rendered on such last mentioned inscription. ..... | 25 00 | 20 00 |
| 5. If the action be settled after enquête closed, or if judgment be rendered in such action after enquête ..... | 30 00 | 24 00 |
| 6. In any of the above cases in which the defendant may have appeared by attorney, to defendant's attorney on actions returned, or on *congé défaut.* | 6 00 | 5 00 |

ACTIONS CONTESTED.

| | FIRST CLASS. Pltff. | Defdt. | SECOND CLASS. Pltff. | Defdt. |
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| 7. If the action be settled after the filing of any plea other than a plea to the merits and without enquête on such plea, or if the action be dismissed on such plea and without enquête..... | $30 00 | $25 00 | $25 00 | $20 00 |
| 8. If the action be settled after the filing of a plea to the merits but before the inscription on the roll for proof where an enquête is necessary or before the inscription for final hearing where no enquête is necessary | 40 00 | 30 00 | 30 00 | 25 00 |
| 9. If the action be settled after the inscription on the roll for proof, but before the inscription for final hearing..... | 50 00 | 40 00 | 40 00 | 35 00 |

| | FIRST CLASS. | | SECOND CLASS. | |
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| | Pltff. | Defdt. | Pltff. | Defdt. |
| 10. If the action be settled after the inscription for final hearing, or if judgment be rendered on such hearing..... | $60 00 | $50 00 | $50 00 | $40 00 |

11. The costs in actions in revendication for moveables to be taxed as against the plaintiff according to the value of the property claimed, and as against the defendant according to the value of the property for which judgment is rendered.

12. Hypothecary actions and actions for seigniorial dues where the title of the seignior is not contested, are to be considered in respect of costs as merely personal actions.

13. The costs in actions to account to be taxed as against the plaintiff according to the amount demanded, and as against the defendant, according to the amount for which he is accountable.

14. In any action of ejectment under the Lessor and Lessee Act, not including actions in which either rent is or damages are sued for (which actions are provided for by statute), the costs to be as in a personal action (in the Superior Court or Circuit Court, as the case may be), for a sum of money equal to the value of the premises leased for the year current at the time of the institution of the action, or if the lease shall have expired, then for the last year to which the lease extended.

15. In action of damages for personal wrongs (except in actions in which the court or jury shall find the damages to be under forty shillings sterling), the costs to be taxed as of the class to be determined by the final judgment.

16. In actions for sums of money under $200 instituted by writ of *capias ad respondendum* in the Superior Court, the costs to be as in actions over $100 in the Circuit Court.

17. In any case where the defendants sever in their defence, the plaintiff's attorney shall receive, on each additional issue, one half of the sum which he would have received had there been but one issue: the whole amount to be payable in equal proportions by the party or parties to each issue.

ADDITIONAL FEES.

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| 18. For the second and every additional copy of the plaintiff's declaration..... | $1 00 |

19. Affidavit to obtain writ of *capias ad respondendum*, attachment in revendication, simple attachment before judgment, attachment for rent, *certiorari* or other prerogative writ—when an affidavit is required and the action is commenced by such process—(this fee not to be allowed for any affidavit referring in general terms to the facts set forth in the petition or pleading in support of which such affidavit is made)..... $3 00

20. If a writ of *capias ad respondendum* or any writ of attachment against moveables be sued out at any time after the institution of the action (affidavit included) :—
To the attorney suing out the same—
In actions of first class..... 12 00
In actions of second class ..... 10 00

21. On any declinatory or dilatory exception, exception to the form or demurrer over-ruled :
To the plaintiff's attorney..... 8 00
To the defendant's attorney ..... 6 00

22. On any other plea overruled after law issue raised upon it :
To the successful party ..... 8 00
To the opposite party..... 6 00

23. On any dilatory exception maintained—
To the plaintiff's attorney ..... 10 00
To the defendant's attorney ..... 15 00

24. If the plaintiff be permitted to amend his declaration after the filing of an exception to the form—
To the defendant's attorney ..... 7 00

25. If the plaintiff be permitted to amend his declaration after the filing of a demurrer—
To the defendant's attorney ..... 10 00

26. For all proceedings on any petition, motion or rule, not specially provided for, upon which costs are ordered to be paid—
To the party to whom costs are awarded..... 3 00
(Same fee on motion or other proceedings to call in creditors, including affidavits.)

27. For putting in security for costs—
To each attorney ..... 3 00

28. For all proceedings respecting the putting in of security in any case not otherwise provided for—
To each attorney ..... 5 00

29. Enquête fee in any contested cause tried by jury or judge, to counsel (other than attorney of record,) filing appearance at, and actually conducting enquête ..... 10 00

30. In cases to be tried by jury—
    To each attorney for the preparation of factum..... $8 00
    To each attorney for statement of facts required by art. 353 C. C. P., including copy for adverse party..... 3 00
31. In every case of trial by jury, where a motion is made for a new trial, or in arrest of judgment, or for judgment *non obstante veredicto*, or for non suit, where all or any of these remedies are sought, one fee only to be allowed for the whole of the proceedings in each such case up to judgment therein—
    To each attorney (if action of 1st class)..... 14 00
    To each attorney (if action of 2nd class)..... 10 00
32. On any hearing on the merits ordered in a contested action—
    To each attorney..... 10 00
33. On any re-hearing ordered upon any pleading—
    To each attorney..... 6 00
34. On any re-hearing ordered upon any rule or other proceeding not specially provided for—
    To each attorney..... 3 00
35. For all proceedings on a continuance of suit (*reprise d'instance,*) by petition or motion—
    To the attorney continuing the suit..... 10 00
    To the attorney of adverse party..... 5 00
    Costs as in action of second-class, if the continuance of suit be contested or if it be made by action, and also on proceedings to have judgment declared executory or *jugement commun.*
36. On every copy of subpœna certified by the attorney..... 10
37. Suing out a writ of execution..... 2 00
38. Suing out a writ of attachment after judgment if declaration be not contested—
    If action of 1st class..... 10 00
    If action of 2nd class..... 7 00
39. For every garnishee above three..... 1 00
    If contested, the costs to be the same as in a contested personal action, the class to be determined by the amount of the judgment against the garnishee, if the costs be payable by him, and by the amount claimed by the contestation, if the costs be payable by the party contesting the declaration.
40. For all proceedings for a coercive imprisonment, or for the imprisonment of any party, or for a writ of possession, or

for an order for re-sale in consequence of a false bidding, or for the affixing of seals, or for the removal thereof, and for all proceedings on any application either before or after judgment to liberate any person arrested for debt otherwise than by giving bail, or to obtain possession of property seized, or contesting attachment before judgment on the ground that the allegations of the affidavit are untrue, or in cases of *rebellion à justice :*

To the attorney of applicant if no cause be shown..... $6 00

If cause be shown but without enquête—

To the attorney of applicant ..... 10 00

To the attorney shewing cause ..... 6 00

41. If it be necessary to take evidence on any of the proceedings mentioned in the foregoing number, or upon any preliminary plea, or upon any other incidental proceeding not specially provided for—

To each attorney an additional fee of ..... 8 00

42. When the proof in any contested cause is continued, the party bound to proceed not being ready, fee to adverse party (where costs are ordered to be paid).. ..... 2 00

43. For cross examining every witness over five on each side, in any contested case ..... 2 00

44. Preparing statement of facts ..... 6 00

Preparing answer..... ..... 4 00

45. For the special application required by art. 218 C. C. P.... 6 00

46. To any proof commissioner for performing all services in any case referred to him, not exceeding the examination of three witnesses ..... 10 00

For each witness over three..... 2 00

47. For all proceedings for bringing to sale the property of minors..... 20 00

48. For prosecuting to judgment a report of distribution not contested..... 10 00

49. For all proceedings upon a contestation of a report of distribution if the contestation be not withdrawn or acquiesced in before the inscription for final hearing on the merits when the amount of the collocation contested is above $400 :

To the attorney of the party contesting ..... ..... 18 00

To the attorney of the creditor claiming..... 14 00

50. If the amount of the collocation contested exceed $200, and do not exceed $400 :

To the attorney of the party contesting ..... 15 00

To the attorney of the creditor claiming..... $10 00

51. If the amount of the collocation contested exceed $80 and do not exceed $200.

To the attorney of the party contesting..... 10 00

To the attorney of the creditor claiming..... 8 00

52. If the amount of the collocation contested do not exceed $80 :

To the attorney of the party contesting..... 8 00

To the attorney of the creditor claiming..... 6 00

53. If the contestation be withdrawn or acquiesed in before the inscription for final hearing on such contestation one-half of the above fees according to the class.

54. For all the proceedings after judgment ordering an account to be rendered in any action to account, if the account be acquiesced in without *débats* :

To each attorney..... 10 00

55. If the account be contested, the costs to be the same as in a contested personal action, the class to be determined by the amount for which the accounting party shall be declared accountable beyond the amount admitted to be due by the account filed, if the costs be payable by the accounting party, and by the amount claimed by the *débats de compte* if the costs be payable by the *aryant compte.*

56. In actions for separation of property or for separation from bed and board, for all proceedings to liquidate the matrimonial rights of the plaintiff :

If not contested, to plaintiff's attorney..... 10 00

If contested, to each attorney..... 20 00

57. For all proceedings to cause a curator to be appointed to a *délaissement* in any hypothecary action..... 5 00

58. Costs on interventions and incidental cross-demands to be the same as on original demands of the same class.

59. For all proceedings on a licitation of one succession or more after judgment rendered..... 40 00

60. On a disavowal, petition in revocation of judgment, or *tiers opposition*, costs to be the same as in original demands of the same class.

61. On oppositions for payment not contested,—

If the sum do not exceed $80..... 8 00

If it exceed $80, and do not exceed $200..... 10 00

If it exceed $200, and do not exceed $400..... 14 00

If it exceed $400,..... 16 00

62. If contested, costs to be the same as in personal actions for the same amount in the Superior Court or Circuit Court, as the case may be, excepting that the costs upon the contestation of any opposition for a sum not exceeding $60 shall be the same as in contested actions in the Circuit Court, above $60 and under $100.

63. Oppositions to annul, to withdraw, or to secure charges, or any other opposition, if not contested..... $15 00

64. If contested, costs to be as in actions of the second class.

RATIFICATION OF TITLE.

65. For all proceedings to obtain a sentence of ratification of title,—

To the petitioner's attorney, if the purchase money do not exceed $400..... 14 00

If purchase money exceed $400 and do not exceed $1,000, or if the consideration be not of a pecuniary nature..... 20 00

If purchase money exceed $1,000..... 25 00

66. Fees on oppositions to sentence of ratification of title, and on contestations thereof to be the same as on oppositions to executions and contestations thereof.

EXPROPRIATIONS.

67. For all proceedings on behalf of a proprietor expropriated, to obtain an order for the payment over of the monies:

If the value of the property expropriated exceed $400... 16 00

If it does not exceed $400 ..... 12 00

For opposing successfully the homologation of a report of commissioners, where a written appearance for that purpose shall have been put in and allowed—

Where the value of the property respecting which the objection arises exceeds $400..... 40 00

Where it does not exceed $400..... 30 00

WRITS OF CERTIORARI.

68. If settled before the filing of such writ,—

To petitioner..... 10 00

If writ refused, to party showing cause..... 6 00

69. If not settled before the filing of such writ,—

To petitioner..... 16 00

To respondent ..... 10 00

COMMISSIONS ROGATOIRES AND ORDERS FOR THE EXAMINATION OF WITNESSES.

| | | |
|---|---|---|
| 70. | To the attorney suing out the same | $5 00 |
| | For the drawing of interrogatories or cross interrogatories | 4 00 |
| | For taking instructions, examining the papers, &c., &c., to each | 5 00 |
| | For examining or cross-examining any witness | 2 00 |
| | To the attorney prosecuting the execution of the writ or order, an additional fee of | 4 00 |

PROBATES, HABEAS CORPUS, ETC.

| | | |
|---|---|---|
| 71. | For all fees to obtain probate of a will or writ of habeas corpus without enquête | 10 00 |
| | If an enquête takes place an additional fee of | 8 00 |
| 72. | For all fees to obtain the appointment of tutors to minors, or curators to persons or property, or for removal of interdiction, or for emancipation or any other such proceeding: | |
| | If not contested | 5 00 |
| | If contested,— | |
| | To petitioner's attorney | 15 00 |
| | To adverse party | 12 00 |
| | If enquête necessary on such contestation | 8 00 |
| 73. | On petition of curator, &c., to render an account, including notices | 4 00 |

EVOCATIONS.

| | | |
|---|---|---|
| 74. | If maintained, the costs to be the same, as in actions of second class, which costs shall include all services in both courts. | |
| | If rejected, to each attorney | 5 00 |

IMPROBATION (*inscription en faux*).

| | | |
|---|---|---|
| 75. | To the attorney for directions for drawing a power of attorney | 4 00 |
| | Attendance at drawing up of descriptive statement of document impugned | 4 00 |
| | If settled before articles of improbation are filed, each motion required by the Rules of Practice, and also the declaration to be made by the defendant in improbation as to whether he intends to avail himself of the document impeached, shall be taxed as a motion according to the foregoing, No. 26 | 3 00 |

If settled after the articles of improbation are filed, but before the answer, the fees of the attorney of the plaintiff in improbation shall be as in No. 1 of the Table, and the fees of the attorney of the defendant shall be as in No. 6 of the Table, and if the settlement take place at any subsequent stage of the proceeding, or if judgment be rendered on such improbation, the costs shall be as in the original demand, if settled at a like stage.

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## CASES IN REVIEW.

| | | |
|---|---|---|
| 76. | Under $400— | |
| | If settled before hearing, to each attorney | $15 00 |
| | After hearing, to each attorney | 30 00 |
| 77. | In cases of $400 or over— | |
| | If settled before hearing | 20 00 |
| | After hearing | 40 00 |
| 78. | Factum in Review, to each party | 6 00 |
| 79. | On appeal from Trinity House or other tribunal to the Superior Court, if contested— | |
| | Attorney for appellant | 20 00 |
| | Attorney for respondent | 12 00 |
| | If not contested— | |
| | Attorney for appellant | 12 00 |

W. C. MEREDITH, Chief Justice S. C.
CHARLES MONDELET, J.
J. SHORT, J. C. S.
A. POLETTE, J. C. S.
A. STUART.
J. H. BERTHELOT, J. C. S.
T. J. J. LORANGER, J. C. S.
L. V. SICOTTE, J. C. S.
F. G. JOHNSON, J. S. C.
J. T. TASCHEREAU, J. C. S.
JOS. N. BOSSE, J.
J. MAGUIRE, J. S. C.
F. W. TORRANCE, J. S. C.

Quebec, 30th December, 1868.

Published in open Court, registered and entered at Quebec, the 30th day of December, 1868.

FISET & BURROUGHS, P. S. C.

# ADVOCATES' FEES

## IN THE CIRCUIT COURT.

It is ordered that the following fees be allowed to the counsel, advocates and attorneys practising in the Circuit Court in actions to be instituted, and upon other proceedings to be commenced from and after the day on which the present tariff shall be entered by the Clerk of the Court in the registers of the same as by law directed; and the Tariff of Fees for counsel, advocates and attorneys practising in this Court, the original whereof was entered in the registers of the Superior Court at the City of Quebec, on the 20th day of July, 1852, is hereby repealed in so far as regards actions to be instituted, and other proceedings to be commenced, from and after the day on which the present Tariff shall be so entered in the registers of this Court.

Vide, *ante*. C. C. P. art. 1059.

### *In cases over* $60.

ACTIONS NOT CONTESTED.

| | FIRST CLASS. Over $100. | | SECOND CLASS. Over $60 to $100 | |
|---|---|---|---|---|
| | Pltff. | Deft | Pltff. | Deft. |
| 1. If the action be settled before the return..... | $10 00 | — | $6 00 | — |
| 2. If the action be settled, or if defendant confess judgment on the day of the return, or on the next following juridical day | 12 00 | — | 8 00 | — |
| 3. If the action be settled, or if defendant confess judgment after the delay mentioned in the next preceding number but before plea filed, or inscription for enquete or inscription for final hearing on the merits where no enquête is necessary..... ..... | 15 00 | — | 10 00 | — |

| | FIRST CLASS. Over $100. Pltff. | Deft. | SECOND CLASS Over $60 to $100. Pltff. | Deft. |
|---|---|---|---|---|
| 4. If the action be settled after the inscription on the roll for proof but before the closing of the enquête; or if the action be settled after the inscription for hearing on the merits where no enquête is necessary, or if judgment be rendered on such last mentioned inscription ..... ..... | $16 00 | — | $12 00 | — |
| 5. If the action be settled after enquête closed, or if judgment be rendered in such action after enquête ..... | 20 00 | — | 16 00 | — |
| 6. In any of the above cases in which the defendant may have appeared by attorney, to defendant's attorney on actions returned, or on *congé défaut*. ..... | — | 4 00 | — | 3 00 |
| ACTIONS CONTESTED. | | | | |
| 7. If the action be settled after the filing of any plea other than a plea to the merits and without enquête on such plea or if action be dismissed on such plea without enquête..... | $20 00 | $15 00 | $12 00 | $10 00 |
| If there be an enquête on any such plea, an additional fee of $4 to each attorney. | | | | |
| 8. If the action be settled after the filing of a plea to the merits, but before the inscription on the roll for proof where an enquête is necessary, or before the inscription for final hearing where no enquête is necessary..... | 24 00 | 20 00 | 15 00 | 12 00 |
| 9. If the action be settled after the inscription on the roll for proof, but before the inscription for final hearing..... | 28 00 | 22 00 | 18 00 | 14 00 |

| | FIRST CLASS. Over $100. | | SECOND CLASS. Over $60 to $100. | |
|---|---|---|---|---|
| | Pltff. | Deft. | Pltff. | Deft. |
| 10. If the action be settled after the inscription for final hearing, or if judgment be rendered on such hearing..... | $30 00 | $24 00 | $20 00 | $16 00 |

In any case where there are more defendants than one, and where they sever in their defence: to plaintiff's attorney on each additional issue one-half of the sum he would have received had there been but one issue, the whole amount payable in equal proportions by the party or parties to each issue.

The costs in actions to account to be taxed as against the plaintiff according to the amount demanded, and as against the defendant according to the amount for which he is accountable.

In actions of damages for personal wrongs (excepting in actions in which the court shall find the damages to be under forty shillings sterling) the costs to be taxed as of the class to be determined by the final judgment.

In any action of ejectment under the Lessor and Lessee's Act, not including actions in which either rent is, or damages are, sued for (which actions are provided for by statute) the costs to be as in personal actions for a sum of money equal to the value of the premises leased for the year current at the time of the institution of the action, or if the lease shall have expired, then for the last year to which the lease extended.

In suits in this court, under $100, for fees of office, duties, rents revenues or sums of money payable to the Crown, or which relate to any titles to lands or tenements, to seigniorial or other annual rents, and such like matters and things, whereby rights in future may be bound, and in hypothecary and mixed actions under $100, there shall, except when otherwise expressly provided for, be the same fees as in merely personal actions, according to the amount or value of the thing awarded, unless there be an evocation by either of the parties, and then the fees on the evocation shall be the same as in actions of the second class in the Superior Courts, which costs shall include all services in both Courts.

ADDITIONAL FEES IN ALL CASES OVER $60.

| | 1ST CLASS. Over $100. | 2ND. CLASS. Ov. $60 to $100 |
|---|---|---|
| 11. For the second and every additional copy of the plaintiff's declaration..... | $1 00 | $1 00 |

| | 1st class. Over $100. | 2nd class. Ov. $60 to $100 |
|---|---|---|
| 12. For affidavits to obtain simple attachment before judgment, attachment in revendication, or attachment for rent when affidavit required and action commenced by such process: this fee not to be allowed on any affidavit referring in general terms to the facts set forth in the petition or pleading in support of which such affidavit is made | $2 00 | $2 00 |
| 13. If any writ of attachment against moveables be sued out at any time after the institution of the action. To the attorney suing out the same | 6 00 | 4 00 |
| 14. On every declinatory or dilatory exception, or exception to the form, and on every demurrer over-ruled, To the plaintiff's attorney | 4 00 | 2 00 |
| To the defendant's attorney | 4 00 | 2 00 |
| 15. On any other plea over-ruled, after law issue raised upon it, To the attorney of the successful party | 4 00 | 2 00 |
| To the opposite party | 4 00 | 2 00 |
| 16. To the defendant's attorney on every dilatory exception maintained | 5 00 | 4 00 |
| To the plaintiff's attorney | 3 00 | 2 00 |
| The fees allowed in the foregoing numbers 14 and 16 are exclusive of the fee allowed when the enquête takes place upon a preliminary plea, | | |
| 17. If the plaintiff be permitted to amend his declaration after filing of an exception to the form, To the defendant's attorney | 2 00 | 2 00 |
| 18. If the plaintiff be permitted to amend his declaration after filing of a demurrer, To the defendant's attorney | 4 00 | 4 00 |
| 19. For all proceedings on any petition, motion or rule not specially provided for, upon which costs are ordered to be paid, To the party to whom the costs are awarded | 2 00 | 1 00 |
| Same fee on motion or other proceeding to call in creditors, including affidavits. | | |

| | 1st class. Over $100. | 2nd class. Ov. $60 to $100 |
|---|---|---|
| 20. When the enquête in any contested case is continued, party bound to proceed not being ready, | | |
| To adverse party | $1 00 | $1 00 |
| 21. For all proceedings respecting the putting in of security, | | |
| To each attorney | 2 00 | 1 00 |
| 22. On any re-hearing upon the merits ordered by the Court in any contested case, | | |
| To each attorney | 5 00 | 3 00 |
| On any re-hearing ordered upon any pleading— | | |
| To each attorney | 3 00 | 2 00 |
| On any re-hearing ordered upon any rule or other proceeding not specially provided for— | | |
| To each attorney | 2 00 | 1 00 |
| 23. For all proceedings in continuance of suit (*reprise d'instance,*) by petition or motion of the *reprenant l'instance*— | | |
| To the attorney continuing the suit | 5 00 | 4 00 |
| To the attorney of the opposite party | 3 00 | 2 00 |
| Costs as of the original action, if the continuance of suit be contested, or if it be made by action, and also on proceedings by action to have judgment declared executory or *jugement commun.* | | |
| 24. On every copy of subpœna, certified by attorney | 10 | 10 |
| 25. For all proceedings on suing out a writ of execution | 1 00 | 1 00 |
| 26. For all proceedings on suing out a writ of attachment after judgment, if the declaration of the garnishee be not contested | 5 00 | 3 00 |
| And for every additional garnishee above the number of three | 1 00 | 50 |
| If contested, the costs to be the same as in a contested personal action, the class to be determined by the judgment against the garnishee, if the costs be payable by the garnishee, and by the amount claimed by the contestation if the costs be payable by the party contesting the declaration. | | |

| | 1st Class. Over $100. | 2nd Class. Ov. $60 to $100 |
|---|---|---|
| 27. For all proceedings for coercive imprisonment or for the imprisonment of any party, or for a writ of possession, or on any application to obtain possession of goods seized, or to contest attachment on the ground that the allegations of the affidavit are untrue— | | |
| To the attorney of the applicant, if no cause be shown | $4 00 | $3 00 |
| If cause be shown but without enquête— | | |
| To the attorney of the applicant | 6 00 | 4 00 |
| To the attorney shewing cause | 4 00 | 3 00 |
| 28. If an enquête be necessary upon any proceeding mentioned in the foregoing number, or on any preliminary plea, or upon any other incidental proceeding, there shall be allowed to each attorney | 6 00 | 4 00 |
| 29. For prosecuting to judgment a report of distribution not contested | 5 00 | 3 00 |
| 30. For all proceedings upon a contestation of a report of distribution which shall not be withdrawn or acquiesced in before the inscription for final hearing on the merits, when the amount of the collocation contested exceeds $100— | | |
| To the attorney contesting | 10 00 | — |
| To the attorney claiming | 8 00 | — |
| 31. When the amount of the collocation contested does not exceed $100— | | |
| To the attorney contesting | — | 6 00 |
| To the attorney of the party claiming | — | 4 00 |
| 32. If the contestation be withdrawn or acquiesced in before the inscription for final hearing on the merits, one-half of the above fees. | | |
| 33. For all proceedings after judgment ordering an account to be rendered in any action to account, if the account be not contested— | | |
| To each attorney | 6 00 | 4 00 |
| 34. If the account be contested, the costs to be the same as in a contested personal action, the class to be determined by the amount for which the *rendant compte* shall be declared | | |

| | 1ST CLASS. Over $100. | 2ND CLASS. Ov. $60 to $100 |
|---|---|---|
| accountable beyond the amount admitted to be due by the account filed if the costs be payable by the *rendant compte*; and by the amount claimed by the *débats de compte* if the costs be payable by the *ayant compte.* | | |
| 35. For all proceedings to cause a curator to be appointed to a *délaissement* in an hypothecary action | $3 00 | $3 00 |
| And to the curator | 3 00 | 3 00 |

INTERVENTIONS, ETC.

| | | |
|---|---|---|
| 36. Costs on interventions and incidental cross demands to be the same as on original demands of the same class. | | |

OPPOSITIONS FOR PAYMENT, ETC.

| | | |
|---|---|---|
| 37. If not contested | 6 00 | 4 00 |
| 38. If contested, costs to be the same as on an original demand for the same amount excepting that the contestation in the appealable side of the Court, of any opposition for a sum not exceeding $60 shall be the same as in a contested action for a sum exceeding $60 and under $100. | | |
| 39. On any opposition to withdraw or to annul, not contested | 6 00 | 4 00 |
| 40. If contested, the same fees as in the original action. | | |

COMMISSIONS ROGATOIRES AND ORDERS FOR THE EXAMINATION OF WITNESSES.

| | | |
|---|---|---|
| 41. To the attorney suing out the same | 2 00 | 2 00 |
| 42. For drawing interrogatories or cross-interrogatories— | | |
| To the attorneys engaged where the writ or order is executed— | 3 00 | 3 00 |
| 43. For taking instructions, examining papers, &c., &c.,— | | |
| To each attorney | 4 00 | 4 00 |
| 44. For the examination in chief or cross-examination of each witness | 1 00 | 1 00 |

| | 1ST CLASS. Over $100. | 2ND CLASS. Ov. $60 to $100 |
|---|---|---|
| 45. To the attorney prosecuting the execution of any such writ or order an additional fee of. | $3 00 | $3 00 |
| To the proof commissioner for all services in any case referred to him not exceeding the examination of three witnesses ..... | 8 00 | 8 00 |
| For each witness above three ..... ..... | 1 00 | 1 00 |
| APPEALS. | | |
| 46. On an appeal to the Circuit Court, if contested— | | |
| To the appellant's attorney ..... | 14 00 | — |
| To the respondent's attorney ..... | 10 00 | — |
| 47. If not contested— | | — |
| To the attorney of appellant ..... | 10 00 | — |
| 48. If the appeal be dismissed or settled before final hearing on the merits— | | |
| To the appellant's attorney ..... | 7 00 | — |
| To the respondent's attorney ..... | 4 00 | — |
| CONTESTED ELECTIONS. | | |
| 49. On the contestation of elections of municipal officers or school commissioners, costs to be as in an action between $100 and $200. | | |
| 50. Fees respecting writs of *certiorari* and on proceedings to obtain probate of any will, and for appointment of a tutor to minors, curator to any person or property or otherwise, or for removal of interdictions, or emancipation, same in the Circuit Court as in the Superior Court. | | |
| IMPROBATIONS. | | |
| 51. If settled before the articles of improbation are filed, each motion required by the rules of practice, and also the declaration to be made by the defendant in improbation as to whether he intends to avail himself of the document impeached, shall be taxed as a motion according to the foregoing No. 19. | | |
| 52. If settled after the articles of improbation are filed, but before answer, the fees of the attor- | | |

ney of the plaintiff in improbation and the fees of the defendant in improbation, shall be as in No. 1 of this same table, and if the settlement take place at any subsequent stage of the proceedings, or if judgment be rendered, the costs shall be the same as on the original demand at a like stage.*

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*Cases of sixty dollars, or under.*

| | 1ST CLASS. $60 or under, but above $40. | 2ND CLASS. $40 or under, but above $25. | 3RD CLASS. $25 or under. |
|---|---|---|---|
| 1. On all proceedings in actions settled before return, except those on which additional fees are hereinafter allowed— | | | |
| To the plaintiff's attorney..... | $2 50 | $1 50 | $1 00 |
| 2. On all proceedings, except as aforesaid, in actions settled after return and before contestation, or in which judgment shall be given on confession, or by default, or *ex parte* without enquête, that is to say, without the examination in court of any witness or party,— | | | |
| To the plaintiff's attorney† ..... | 4 00 | 2 00 | 1 50 |
| And to the defendant's attorney on actions returned, or on *congé-défaut* | 2 00 | 1 50 | 1 00 |
| 3. On the same, if the judgment be given by default or *ex parte*, but with enquête,— | | | |
| To the plaintiff's attorney... ..... | 5 00 | 3 00 | 2 00 |
| And to the defendant's attorney.... | 2 00 | 1 50 | 1 00 |

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* The following items of the Tariff of December 24th, 1857, are not abrogated by that of December 30th, 1868:—

1. For any statement (*articulation*) of facts..... $4 00
2. For the answer thereto ..... 3 00

† See *D'Amour et al* v. *Bourbon*, under art. 91, C. C. P. *ante*.

| | 1st class. $60 or under, but above $40. | 2nd class. $40 or under, but above $25. | 3rd class. $25 or under. |
|---|---|---|---|
| 4. On the same, in actions setteld or discontinued after contestation,— | | | |
| To the plaintiff's attorney ..... | 5 00 | 3 00 | 2 00 |
| To the defendant's attorney..... | 4 00 | 2 50 | 1 50 |
| 5. On the same, when the judgment shall be given after contestation,— | | | |
| To the plaintiff's attorney.. ..... | 6 00 | 3 50 | 2 50 |
| To the defendant's attorney..... | 5 00 | 3 00 | 1 50 |
| 6. In all hypothecary or mixed actions settled before return an additional fee,— | | | |
| To the plaintiff's attorney..... | 3 00 | 3 00 | 3 00 |
| 7. If settled after enquête, or if judgment be rendered, an additional fee— | | | |
| To the plaintiff's attorney..... | 4 00 | 4 00 | 4 00 |
| 8. In actions of damages for personal wrongs, (excepting in actions in which the court shall find the damages to be under 40 shillings sterling,) the costs to be taxed as of the class to be determined by the final judgment, unless otherwise ordered by final judgment. | | | |
| 9. On each opposition to withdraw, to annul, or to secure charges, or other oppositions or interventions not contested ..... | 3 00 | 2 50 | 1 50 |
| 10. On all oppositions (excepting oppositions for payment), and interventions when contested, the same fees as in the original actions to which the same shall be incident. | | | |
| 11. On oppositions for payment, if contested, same fees as in original actions for a like sum. | | | |
| 12. On attachment after judgment uncontested ..... ..... | 2 00 | 1 50 | 1 00 |
| 13. If the garnishee's declaration be contested, same fees as in original actions for a like sum. | | | |

| | 1st class. $60 or under but above $40. | 2nd class. $40 or under but above $25. | 3rd class. $25 or under. |
|---|---|---|---|
| 14. On suing out any writ of attachment in revendication or simple attachment before judgment or on any special declaration required by the Court— | | | |
| To the plaintiff's attorney ..... | 2 00 | 1 50 | 1 00 |
| 15. For each copy, more than one of any declaration, petition, intervention or opposition..... | 75 | 50 | 25 |
| 16. In all incidental cross-demands, the same fees that are allowed in original actions for a like sum. | | | |
| 17. For each plea required to be in writing ordered by the Court, including copy— | | | |
| To the defendant's attorney..... | 1 50 | 1 00 | 50 |
| 18. On each proceeding to continue the suit, or to declare a judgment executory or for coercive imprisonment, or in any case of *rebellion à justice*, or to set aside an attachment on the ground that the allegations of the affidavit are untrue— | | | |
| To the attorney prosecuting the same, if contested ..... | 4 00 | 3 00 | 2 00 |
| If uncontested..... | 3 00 | 2 00 | 1 00 |
| And to the attorney resisting the application ..... | 3 00 | 2 00 | 1 50 |
| 19. On a commission for the examination of witnesses, and on all proceedings relative thereto— | | | |
| To the attorney suing out the same. | 3 00 | 2 00 | 1 50 |
| And to the attorney of the opposite party..... | 3 00 | 2 00 | 1 50 |
| To the attorney employed by either party to attend to the execution of such commission..... | 3 00 | 2 00 | 2 00 |
| 20. On any demmurer maintained..... | 2 00 | 1 50 | 1 50 |

| | 1ST CLASS. $60 or under, but above $40. | 2ND CLASS. $40 or under, but above $25. | 3RD CLASS. $25 or under. |
|---|---|---|---|
| 21. When the enquête in any contested case is continued, party bound to proceed not being ready— To adverse party ..... | 1 00 | 75 | 50 |

W. C. MEREDITH, Chief Justice S. C.
CHARLES MONDELET, J.
E. SHORT, J. S. C.
A. POLETTE, J. C. S.
A. STUART.
J. A. BERTHELOT, J. C. S.
T. J. J. LORANGER, J. C. S.
L. V. SICOTTE, J. C. S.
F. G. JOHNSON, J. S. C.
J. T. TASCHEREAU, J. C. S.
JOS. N. BOSSE, J.
J. MAGUIRE, J. S. C.
F. W. TORRANCE, J. S. C.

Quebec, 30th December, 1868.

Published in open Court, registered, and entered at Quebec the 30th day of December, 1868.

FISET & BURROUGHS, P. S. C.

# APPENDIX.

## FIRST PART.

### FORMS CONNECTED WITH THE CIVIL CODE.

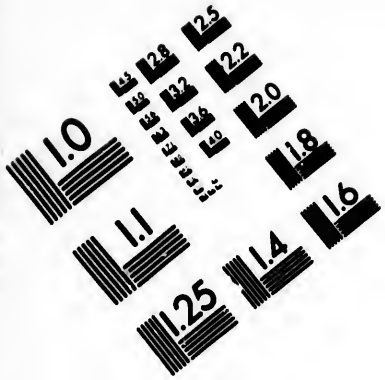
No. 1.

In connection with article 1834.

Lower Canada, }
District of }

We, of in , (*Grocers,*) hereby certify that we (have carried on and), intend to carry on trade and business, as (*Grocers*), at , in partnership, under the name and firm of (*or as the case may be,*) *or* I (*or* we) the undersigned, of hereby certify that I (or we) (have carried on and) intend to carry on trade and business as at in partnership with C. D. of and E. F. of , and that the said partnership hath subsisted since the day of one thousand , and that we (*or* I *or* we and the said C. D. and E. F.,) are and have been since the said day, the only members of the said partnership.

Witness our (*or any* of our) hands at this day of one thousand (*or as the case may be*).



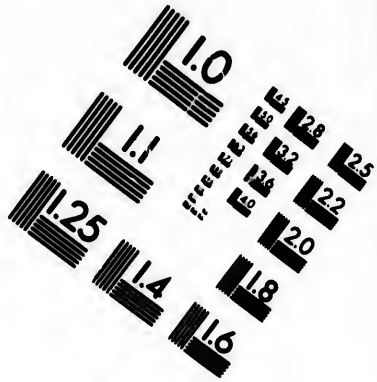
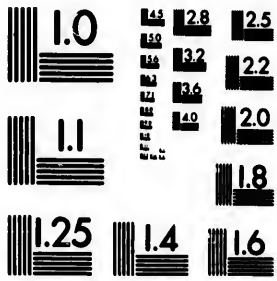
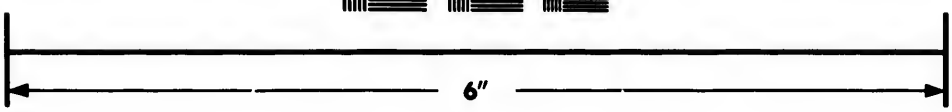
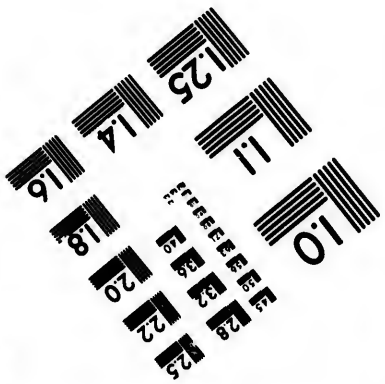




**IMAGE EVALUATION**
**TEST TARGET (MT-3)**








Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

2.8
2.5
2.2
2.0
1.8
1.0

## No. 2.

In connection with article 2299.

### NOTING FOR NON-ACCEPTANCE.

(*Copy of Bill and Endorsements.*)

On the 18 , the above bill was by me, at the request of , presented for acceptance to E. F., the drawee, personally (*or*, at his residence, office or usual place of business in the city, (town *or* village) of ,) and I received for answer, " "; The said bill is therefore noted for non-acceptance.

A. B.,
*Not. Pub.*

, 18 .

Due notice of the above was by me served upon { A. B., / C. D., } the { drawer, / endorser, } { personally, on the day of (*or*, at his residence, office or usual place of business in , on the day of ,) *or*, by depositing such notice, directed to him, at , in Her Majesty's Post Office in this city, (town *or* village,) on the day of , and prepaying the postage thereon.)

A. B.,
*Not. Pub.*

, 18 .

---

## No. 3.

In connection with article 2203.

### PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE GENERALLY.

(*Copy of Bill and Endorsements.*)

On this day of , in the year 18 , I, A. B., Notary Public, for Lower Canada, dwelling at

in Lower Canada, at the request of , did exhibit the original bill of exchange, whereof a true copy is above written, unto E. F., the { drawee / acceptor } thereof, personally, (*or*, at his residence, office or usual place of business in ,) and, speaking to himself (*or* his wife, his clerk, *or* his servant, &c.) did demand { acceptance / payment } thereof; unto which demand { he / she } answered, " ."

Wherefore I, the said Notary, at the request aforesaid have protested, and by these presents do protest against the acceptor, drawer and endorser (*or*, drawers and endorsers) of the said bill, and other parties thereto, or therein concerned, for all exchange, re-exchange, and all costs damages and interest, present and to come, for want of { acceptance / payment } of the said bill.

All which I attest under my signature.

(Protested in duplicate.)

A. B.,
*Not. Pub.*

---

## No. 4.

In connection with article 2203.

### PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE AT A STATED PLACE.

(*Copy of Bill and Endorsements.*)

On this day of , in the year 18 , I, A. B., Notary Public for Lower Canada, dwelling at , in Lower Canada, at the request of , did exhibit the original bill of exchange whereof a true copy is above written, unto E. F., the { drawee / acceptor } thereof, at ,

being the stated place where the said bill is payable, and there, speaking to , did demand { acceptance / payment } of the said bill; unto which demand he answered, " ."

Wherefore I, the said Notary, at the request aforesaid, have protested, and by these presents do protest against the acceptor, drawer and endorsers, (*or*, drawer and endorsers) of the said bill, and all other parties thereto, or therein concerned, for all exchange, re-exchange, and all costs, damages and interest, present and to come, for want of { acceptance / payment } of the said bill.

All of which I attest under my signature.

(Protested in duplicate.)

A. B.,
*Not. Pub.*

---

No. 5.

In connection with article 2320.

PROTEST FOR NON-PAYMENT OF A BILL NOTED, BUT NOT PROTESTED, FOR NON-ACCEPTANCE.

*If the protest is made by the same Notary who noted the bill, it should immediately follow the act of noting and memorandum of service thereof, beginning with the words* "And afterwards on, &c.," *continuing as in the last preceding form, but introducing between the word* "did exhibit." *the word* "again;" *and, in a parenthesis, between the words* "written, unto," *the words* ("and which bill was by me duly noted for non-acceptance on the day of last."

*But if the protest be not made by the same Notary, then it should follow a copy of the original bill and endorsements and noting marked on the bill,—and then in the protest*

*introduce in parenthesis, between the words* " written, unto," *the words* (" and which bill was on the day of last, by , Public Notary for Lower Canada, noted for non-acceptance, as appears by his note thereof marked on the said bill.")

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No. 6.

In connection with article 2320.

PROTEST FOR NON-PAYMENT OF A NOTE PAYABLE GENERALLY.

(*Copy of Note and Endorsements.*)

On this day of , in the year 18 , I, A. B., Notary Public for Lower Canada, dwelling at , in Lower Canada, at the request of , did exhibit the original Promissory Note, whereof a true copy is above written, unto , the promisor, personally, (*or* at his residence, office *or* usual place of business, in ,) and speaking to himself (*or* his wife, his clerk, *or* his servant, &c.,) did demand payment thereof; unto which demand { he / she } answered, " ."

Wherefore I, the said Notary, at the request aforesaid, have protested, and by these presents do protest against the promisor and endorsers of the said Note, and all other parties thereto or therein concerned, for all costs, damages and interest present and to come, for want of payment of the said Note.

All which I attest under my signature,

(Protested in duplicate.)

A. B.,
*Not. Pub.*

## No. 7.

### In connection with article 2320.

### PROTEST FOR NON-PAYMENT OF A NOTE PAYABLE AT A STATED PLACE.

(*Copy of Note and Endorsements.*)

On this day of , in the year 18 , I, A. B., Notary Public for Lower Canada, dwelling at , in Lower Canada, at the request of , did exhibit the original Promissory Note whereof a true copy is above written, unto , the promisor, at , being the stated place where the said Note is payable, and there, speaking to , did demand payment of the said Note, unto which demand, he answered, " ."

Wherefore I, the said notary at the request aforesaid, have protested, and by these presents do protest against the promisor and endorsers of the said note, and all other parties thereto or therein concerned, for all costs, damages and interest, present and to come, for want of payment of the said note.

All which I attest under my signature.

(Protested in duplicate,)

A. B.
*Not. Pub.*

## Form No. 8.

**In connection with articles 2303, 2326.**

**NOTARIAL NOTICE OF A NOTING, OR OF PROTEST FOR NON-ACCEPTANCE, OR OF A PROTEST FOR NON-PAYMENT OF A BILL.**

(*Place and date of noting or of protest.*)

1st.

To P. Q., (*the drawer.*)

at

Sir,

Your Bill of Exchange for $ , dated at the , upon E. F., in favour of C. D., payable days after { sight, / date, } was this day, at the request of duly { noted / protested } by me for { non-acceptance. / non-payment. }

A. B.,
*Not. Pub.*

(*Place and date of noting or of protest.*)

2nd.

To C. D. (*endorser,*)
(*or* F. G.)

at

Sir,

Mr. P. Q's Bill of Exchange for $ , dated at the , upon E. F., in your favour (*or* in favour of C. D.,) payable days after { sight, / date, } and by you endorsed, was this day, at the request of , duly { noted / protested } by me for { non-acceptance. / non-payment. }

A. B.,
*Not. Pub.*

## Form No. 9.

In connection with articles 2303, 2326.

NOTARIAL NOTICE OF PROTEST FOR NON-PAYMENT OF A NOTE.

(*Place and date of protest.*)

To

at

Sir,

Mr. P. Q's Promissory Note for $ , dated at , the , payable { days / months / on—— } after date to { you / E. F. } or order, and endorsed by you, was this day, at the request of , duly protested by me for non-payment.

A. B.,
*Not. Pub.*

---

## No. 10.

In connection with articles 2303, 2326.

ACT OF NOTARIAL SERVICE OF NOTICE OF A PROTEST FOR NON-ACCEPTANCE OR NON-PAYMENT OF A BILL, OR OF NON-PAYMENT OF A NOTE *(to be subjoined to the Protest).*

And afterwards, I, the aforesaid protesting Notary Public, did serve due notice in the form prescribed by law, of the foregoing Protest for { non-acceptance / non-payment } of the { bill / note } thereby protested upon { P. Q., / C. D., } the { drawer / endorsers } personally, on the day of (*or*, at his residence,

office, *or* usual place of business in , on the ; *or*, by depositing such notice, directed to the said { P. Q., / C. D., } at , in Her Majesty's Post Office in this city, (town *or* village), on the day of , and prepaying the postage thereon.

In testimony whereof, I have, on the last mentioned day and year, at aforesaid, signed these presents.

A. B.
*Not. Pub.*

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No. **11.**

In connection with articles 2304, 2305, 2320, 2327.

PROTEST BY A JUSTICE OF THE PEACE (WHERE THERE IS NO NOTARY) FOR NON-ACCEPTANCE OF A BILL, OR NON-PAYMENT OF A BILL OR NOTE.

(*Copy of a Bill or Note and Endorsements.*)

On this day of , in the year 18 I, N. O., one of Her Majesty's Justices of the Peace for the District of , in Lower Canada, dwelling at (*or* near) the village of , in the said District, (there being no practising Notary Public resident at or near the said village, (*or any other legal cause,*) did at the request of and in the presence of , a householder in the said District, well known unto me, exhibit the original { bill / note } whereof a true copy is above written unto P. Q., the { drawer / acceptor / promisor } thereof, personally, (*or*, at his residence, office, or usual place of business in ,) and speaking to himself, (his wife, his clerk *or* his servant,

&c.,) did demand {acceptance / payment} thereof unto which demand {he / she} answered, " "

Wherefore I, the said Justice of the Peace, at the request aforesaid, have protested and by these presents do protest against the {drawer and endorsers / promissor and endorsers / acceptor, drawer and endorsers} of the said {bill / note} and all other parties thereto and therein concerned, for all exchange, re-exchange, and all costs, damages, and interest, present and to come, for want of {acceptance / payment} of the said {bill / note.}

All which is by these presents attested under the signature of the said *(the witness)* and under my hand and seal.

(Protested in duplicate.)

*(Signature of the witness,)*
*(Signature and seal of the J. P.)*

---

## No. 12.

In connection with article 2337.

### SCHEDULE OF FEES AND CHARGES.

| | $ cts. |
|---|---|
| For presenting and noting for non-acceptance any Bill of Exchange, and keeping the same on record ..... | 1 00 |
| Copy of the same when required by the holder ..... | 0 50 |
| For noting and protesting for non-payment any Bill of Exchange or Promissory Note, Draft or Order, and putting the same on record ..... | 1 00 |

| | $ cts. |
|---|---|
| For making and furnishing the holder of any Bill or Note, with duplicate copy of any protest for non-acceptance or non-payment, with certificate of service and copy of notice served upon the drawer and endorsers ..... | 0 50 |
| For every Notice, including the service and recording copy of the same, to an endorser or drawer, in addition to the postages actually paid ..... | 0 50 |

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No. **13.**

In connection with article 2134.

FORM OF A DEED OF BARGAIN AND SALE EXECUTED BEFORE WITNESSES.

This deed, made the day of , &c., between A. B., of &c., of the one part, and C. D., of , &c., of the other part, witnesseth: That, for and in consideration of the sum of to the said A. B. in hand paid by the said C. D., at or before the execution of these presents, (the receipt whereof is hereby acknowledged by the said A. B.,) he, the said A. B. doth hereby grant, bargain, sell and confirm unto the said C. D., his heirs and assigns for ever, all that certain lot of land, &c., (*insert here a description of the property sold*): To have and to hold the said lot of land and premises hereinbefore granted, bargained and sold, or intended so to be, with their and every of their appurtenances, unto the said C. D., his heirs and assigns for ever. In witness, &c.

A. B. [L. S.]
C. D. [L. S.]

Signed, sealed and delivered
in the presence of
E. F.,
G. H.

## No. 14.

In connection with article 2139.

### MEMORIAL OF A DEED OF BARGAIN AND SALE EXECUTED BEFORE WITNESSES.

A memorial to be registered of a deed of bargain and sale, bearing date the day of , in the year of Our Lord , made between A. B., of , Esquire, of the one part, and C. D., of , &c., of the other part (*a full description of the parties to be inserted, as in the deed*), by which said deed the said A. B., for the considerations therein expressed, did grant, bargain, sell and confirm unto the said C. D., his heirs and assigns, all that, &c., (*insert a description of the property sold*): To hold to the said C. D., his heirs and assigns for ever: Which said deed is witnessed, &c., (*specify here the names of the witnesses to the execution of the deed*); and the said deed is required to be registered by the said C. D. As witness his hand, this day of , &c.

C. D.

Signed in the presence of
J. K.,
L. M.

---

## No. 15.

In connection with article 2041.

### MEMORIAL OF A DEED OF BARGAIN AND SALE, BY WAY OF MORTGAGE, BEFORE WITNESSES.

A memorial to be registered of a deed of bargain and sale, bearing date the day of , in the year of Our Lord , made between A. B. of, &c., of the one part, and C. D. of, &c., of the other part, by which

said deed, the said A. B., did grant, bargain, sell and confirm into the said C. D., his heirs and assigns, all that &c., (*Here insert a description of the mortgaged premises*) To hold to the said C. D., his heirs and assigns forever; subject, nevertheless, to redemption, upon payment to the said C. D., his heirs, executors, curators, administrators, or assigns, of the sum of dollars, and lawful interest, as in the said deed is expressed; which said deed is witnessed—(*specify here the names of the witnesses as in form* 14) And the same deed is hereby required to be registered by the said C. D. As witness his hand, this day of, &c.

C. D.

Signed in the presence of
E. F.,
G. H.

---

## No. 16.

In connection with articles 2098, 2139.

### MEMORIAL OF AN ONEROUS DEED OF GIFT INTER VIVOS.

A memorial to be registered of a notarial copy of a deed of gift *inter vivos*, bearing date at on the day of in the year of our Lord , made between A. B. of, &c., (and C. D., his wife by him in this behalf duly authorized), of the one part, and E. F. of, &c., of the other part, (*A full description of the parties to be inserted, as in the deed;*) before G. H., public notary and witnesses, (*or* before J. K., and another, public notaries, *as the case may be,*) by which said deed of gift, the said A. B. and C. D., his wife, did give, grant and confirm into the said E. F., his heirs and assigns, all that, &c., (*Insert a description of the property conveyed by the deed of gift*) to hold to the said E. F. his heirs and assigns for ever; subject, nevertheless, to a certain life-rent, consisting of &c., (*Here insert the particulars of which the life-rent is composed*) which said life-rent

is payable by the said E. F., to the said A. B. and C. D., his wife, each and every year during the term of their natural lives, and in the said deed of gift *inter vivos*, is expressed: And the said deed of gift is hereby required to be registered by (the said E. F.) As witness his hand, this day of &c.

E. F.

Signed in the presence of
L. M.
N. P.

---

No. **17**.

In connection with the articles 2098, 2139.

MEMORIAL OF A WILL, OR OF A PROBATE, OR AN OFFICE COPY, OR A NOTARIAL COPY THEREOF.

A memorial to be registered of the probate (*or*, of the original will, *or* an office *or* notarial copy, *or as the case may be*,) of the last will and testament of G. H., late of bearing date, &c., by which will the said testator did give and devise unto, &c. (*as in the will*,) to hold, &c.; which said will was executed by the said testator, in the presence of A. B. of, &c., C. D. of, &c.: And the probate of the said will, (*or* the original, *or* an office *or* notarial copy, *or as the case may be*,) is hereby required to be registered by (O. P., one of the devisees therein named). As witness his hand, this day of

O. P.

Signed in the presence of
R. S.
T. V.

---

## No. 18.

In connection with articles 2098, 2139.

### MEMORIAL OF A NOTARIAL OBLIGATION.

A memorial to be registered of a notarial copy of a notarial obligation (*or* of the original, *if it be the original*) bearing date the day of , in the year of our Lord , made and entered into by A. B. of , &c., before E. F., public notary and witnesses, (*or* before G. H. and another, public notaries, *if the case be so*) whereby the said A. B. owned himself to be indebted to C. D., of , &c., in the sum of dollars, to be paid, &c.,—and for securing the payment of the said sum of money and interest, hypothecated all that, &c., (*Insert the description of the hypothecated premises as contained in the notarial obligation*:) Which said notarial copy of the said notarial obligation is hereby required to be registered by the said C. D. As witness his hand, this day of &c.

C. D.

Signed in the presence of
J. K.
L. M.

---

## No. 19.

In connection with articles 2117, 2139.

### MEMORIAL OF THE APPOINTMENT OF A TUTOR TO MINORS FOR THE PRESERVATION OF THE LEGAL OR TACIT HYPOTHEC, RESULTING FROM SUCH APPOINTMENT.

A memorial to be registered of the appointment of A. B. of, &c., (*insert the place of abode and addition of the tutor;*) to be tutor to C. D., E. F., &c., minors under the age of

twenty-one years, issue of the marriage of the late G. H., (*the name of the father*) deceased, with the late J. K., (*the name of the mother*) also deceased, which appointment was made by and under the authority of L. M. (*Insert the name and description of the Judge by whom the appointment has been made*;) at, &c., (*the place where the appointment was made*) on the day of , in the year of our Lord : And the said appointment is hereby required to be registered, for the preservation of the hypothec resulting therefrom, on the real estate of the said A. B., situate in the of (*the name of the Registration county or division within which the registration is to be made, and describe the property*) by N. O., of &c., (*Insert the name and description of the person requiring the registration*). As witness his hand, this day of , &c.

N. O.

Signed in the presence of
O. P.
R. S.

---

FORM No. **20**.

In connection with articles 2121, 2139.

MEMORIAL OF A JUDGMENT.

A memorial to be registered of a judgment in Her Majesty's Court of , at , in the year of our Lord , between A. B., of , &c., plaintiff, and C. D., of , &c., defendant, for dollars, with interest from, &c., and costs taxed at dollars; which said judgment was rendered on the day of the said month of , and is hereby required

to be registered by (the said A. B.). As witness his hand, this day of , &c.

A. B.

Signed in the presence of
J. F.
T. P.

---

FORM No. 21.

In connection with article 2151.

CERTIFICATE OF DISCHARGE FROM A JUDGMENT WHICH HAS BEEN REGISTERED.

To the Registrar of

I, A. B., of, &c., do hereby certify that C. D., of, &c., hath paid me the sum of money due upon a judgment recovered in Her Majesty's Court of at in the year of our Lord by me, the said A. B., against the said C. D., for dollars, debt, and dollars, costs, which judgment was registered on the day of in the year of our Lord ; And I do hereby require an entry of such payment to be made, in the register wherein the same is registered, pursuant to law. As witness my hand, this day of in the year of our Lord, &c.

A. B.

Signed in the presence of
J. K., of , &c.
L. M., of , &c.

---

## FORM No. 22.

In connection with article 2151.

### A CERTIFICATE TO DISCHARGE A MORTGAGE.

To the Registrar of

I, A. B., of, &c. (*the mortgagee in the deed or his heirs, executors, curators or administrators*), do hereby certify that C. D., of, &c., hath paid the sum of money due upon a deed or mortgage, bearing date the day of in the year of our Lord made between the said C. D., of the one part; and me, the said A. B. (*or* E. F., *as the case may be*), of the other part; which was registered on the day of in the year of our Lord ; and I hereby require an entry of such payment to be made in the register wherein the same is registered, pursuant to law.

As witness my hand, this day of in the year of our Lord

A. B.

Signed in the presence of
O. P., of, &c.
R. S., of, &c.

# ADDENDA.

The following Rules of the Court of Queen's Bench (Appeal side), were received too late to be inserted at their proper place, page 680 :--

1. The case in Appeal shall contain a summary statement of the pleadings and of the questions of fact and of law on which the party filing it relies, also in an Appendix copies of the depositions of the witnesses produuced by such party, giving the date of each deposition, also copies of all admissions obtained by him and of all questions put to and answers on *Faits et Articles* by the adverse party whenever the same are relied upon.

2. In addition the appellant's case shall contain a copy of the judgment or judgments appealed from with their respective dates ; and such judgment or judgments shall appear at the beginning of the appellant's case.

3. There shall also be an index of the printed matter sent up by each party indicating the page of the case on which each document or paper begins.

4. The cases shall be printed on paper of eleven inches by eight inches and a half, the type to be small pica, leaded face, and every tenth line numbered in the margin.

5. The parties may, by a consent in writing, file a joint case or factum.

6. Such joint case or factum shall state the questions of fact and of law to be determined by the Court with a reference to such portions of the depositions, admissions and questions and answers on *faits et articles* to be printed in an appendix as are required for the proper adjudication of the questions in issue between the parties.

7. Such joint case shall be in the same form, and in other respects be subject to the same rules and will entitle the parties to it to the same fees as if separate cases had been filed.

8. Forty copies of each case or of the joint case shall be filed in each cause.

9. No case not in conformity to the above rules shall be received by the Clerk of this Court or filed in his office, nor shall it be taxed against the adverse party except by leave of the Court or of a Judge thereof, which may be granted on such terms and conditions as the Court or Judge shall direct.

10. No party shall be heard on the merits unless his case or factum shall have been filed at least forty-eight hours before the case is called for hearing.

11. The above rules shall take effect as to all cases filed from and after the tenth day of September next, from which date all other rules of practice on the subject provided for by the present rules shall be held to be revoked.

L. W. MARCHAND,
*Clerk of Appeals.*

MONTREAL, 21st June, 1879.

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ARCHAND,
*Clerk of Appeals.*

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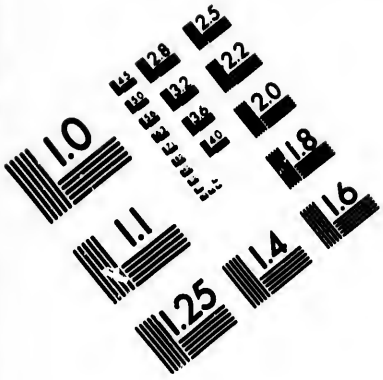


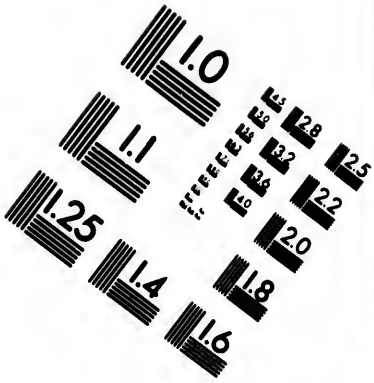


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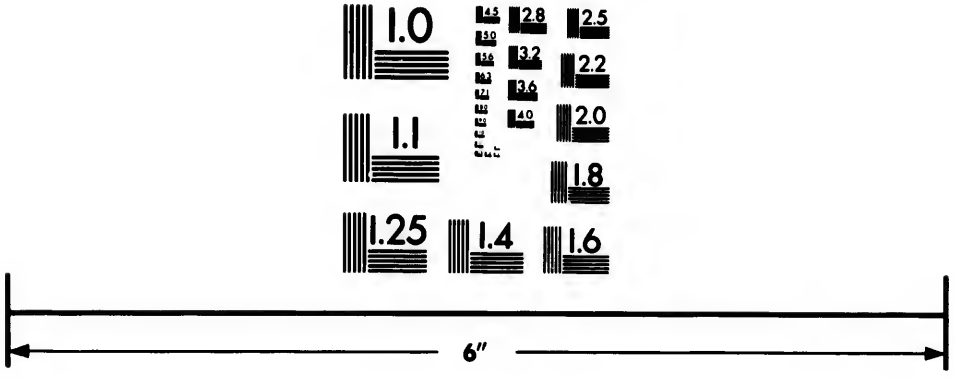



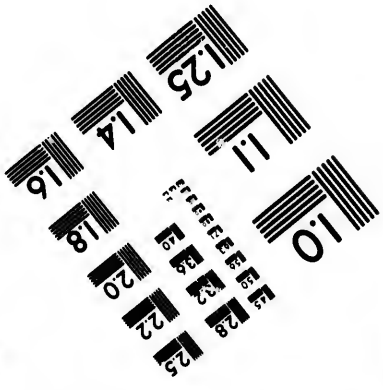


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