THE

# LEGAL NEWS.

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## *CURRENT TOPICS AND CASES.*

In *Carlill* v. *Carbolic Smoke Ball Co.* is an example of a contract created by advertisement, and performance of condition stated therein. The defendants, proprietors of a medical preparation called "Carbolic Smoke Ball," issued an advertisement in which they promised to pay £100 reward to any person who contracted the disease known as "influenza," after having used one of the balls, in a certain specified manner and for a certain specified period; and that they had deposited £1000 in a certain bank to show their sincerity in the matter. The plaintiff, upon the faith of the advertisement, purchased one of the balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza. The English Court of Appeal (Dec. 7, 1892) held that the offer in the advertisement, coupled with the performance by the plaintiff of the conditions specified therein, created a valid contract. Lord Justice Lindley said:—"We are dealing with an express promise to pay £100 in certain events. There can be no mistake about that at all. Read this how you will, and twist it about as you will, here is a distinct promise, expressed in language which is unmistakeable, that £100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts influenza after having used the ball three times daily, and so on. * * * The deposit is called in aid by the advertisers as proof of their sincerity in the matter."

Failure to assist a sick passenger to alight from a train at the place of his destination led to serious consequences in *Weightman* v. *Louisville, N. O. & T. R. Co.*, decided by the Mississippi Supreme Court, March 20, 1893. The Court held that where a railway company received a sick passenger, with the consent of the conductor of the train and the ticket agent, who were informed of his serious illness, and of the necessity of his having assistance when he should arrive at his destination, but the conductor failed to have him aroused and put off there, but carried him thirty miles beyond, where he was put off, alone, at a small station, at 2 a.m., and allowed to remain there forty hours before being returned to his destination on one of the Company's trains, and his illness was so increased during his exposure that he died, the Company was liable.

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A notable event of the past month was the completion by Mr. Strachan Bethune, Q.C., of his fiftieth year at the bar. The *tableau* shows that Mr. Bethune was admitted in May, 1843, but were it not for this evidence few would suspect from the robust appearance and active habits of the gentleman referred to that half a century had flown. We are sure that his *confrères* all join heartily in the wish that his familiar figure may long be seen in the usual haunts of active practitioners.

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## SUPERIOR COURT—DISTRICT OF OTTAWA.

AYLMER, February 24, 1887.

*Coram* WURTELE, J.

EGAN et al. v. THOMSON.

*Sale—Warranty—Constituted rents representing cens et rentes.*

HELD:—1. *A vendor of real estate is not bound by law to warrant the purchaser against rentes constituées representing cens et rentes; and therefore in the absence of a special warranty in the deed, a sale of lands situate within the limits of a seigniory is subject to such constituted rents, arrears excepted.*

2. *Words of warranty in a deed, which say that the sale is made "with promise of warranty against all gifts, dowers, debts, hypothecs, substitutions, alienations and other hindrances whatsoever," are no more than an enunciation of the ordinary warranty of law, and do not imply any conventional warranty against a constituted rent representing cens et rentes.*

The judgment was as follows :—

"The Court etc.,

"Seeing that the present action is brought to recover from the defendant the balance of $400 of the price of lots Nos. 21 and 22 of St. Amédée Range in the Parish of Ste Angélique, sold by the plaintiffs or their authors to the defendant by deed of sale passed before Mtre. E. d'Odet d'Orsonnens, Notary, on the 22nd day of November, 1881, with interest accrued and to accrue thereon;

"Seeing that the defendant pleads that the lots in question are situate in the Seigniory of Petite Nation and that they are charged under and by the *cadastre* of the seigniory with an annual constituted rent representing the *cens et rentes* of $11.80, on a capital of $196.67, and that certain arrears of such constituted rent and also certain arrears of school and municipal taxes were due at the time of the sale; that the defendant tendered and has since his tender deposited in court the balance of the plaintiffs' claim after deduction of the capital of the constituted rent and of the arrears above mentioned; and that he prays by his dilatory exception to be allowed to delay the payment of the amount representing the capital of the constituted rent until the plaintiffs cause the same to be discharged or give security that he will not be disturbed thereby, and by his peremptory exception that the action be dismissed for the present to the extent of the amount of such capital;

"Considering that by law a vendor was not bound to warrant a purchaser against seigniorial duties and charges when not declared, as no one was presumed to ignore the existence thereof, and that on the contrary lands situated in seigniories were always presumed to be conveyed subject to such seigniorial duties and charges unless there was a special conventional warranty that such lands were free and discharged therefrom;

"Considering that a constituted rent representing *cens et rentes* is a charge inherent to all lands situate within the limits of a seigniory, that every such constituted rent is substituted by the Consolidated Seigniorial Act for all seigniorial duties and charges

to which the land charged therewith was subject, and is secured by the same privileges as such duties and charges, and is further assimilated to seigniorial duties and charges by being declared by legislation subsequent to the Consolidated Seigniorial Act (32 Vic., ch. 30, s. 3,) to be imprescriptible as regards the capital notwithstanding mutations of the land charged therewith, and that a Cadastre made in virtue of the said Consolidated Seigniorial Act is a final title in favor of the seignior for all constituted rents established thereby and is a public document, recognized moreover by subsequent legislative acts, of the existence of which all persons are bound to have cognizance;

"Considering moreover that the principle, that lands charged with constituted rents created in the place of seigniorial rights are, in the absence of any express conventional warranty, conveyed subject to such rents as being a charge inherent to all lands situate in seigniories, is recognized by article 659 of the Code of Civil procedure and by section 54 of the Consolidated Seigniorial Act, which section expressly declares that in the event of a sale under a writ of execution "every such immoveable "property shall be considered as having been sold subject there-"after to all such rights, charges, conditions or reservations, "without it being necessary for the seignior to make an opposi-"tion for the said purpose before the sale;"

"Considering that in the present case the words of warranty contained in the deed of sale are simply the enunciation of the ordinary warranty of law and are purely a matter of style, and that they do not imply any conventional warranty against the constituted rent complained of;

"Considering that the lots in question were sold to the defendant subject to the constituted rent established by the cadastre and that his dilatory and peremptory exceptions are therefore unfounded; and that his tender was and deposit is insufficient;

"Considering, however, that the plaintiffs are liable for all arrears of such constituted rent and of school and municipal taxes due at the time of the sale;

"Seeing that such arrears amounted to $35.40 for the constituted rent, $6 for school taxes and $1.60 for municipal taxes, forming in all $43, that the same being deducted from the said sum of $400, leaves a balance due to the plaintiffs of $357, with interest at 7 per centum per annum from the 22nd day of November, 1881;

" Doth overrule and dismiss the dilatory exception pleaded in this cause, with costs, and doth adjudge and condemn the defendant to pay to the plaintiffs the said balance or sum of $357, with interest thereon at the rate of 7 per centum per annum from the said 22nd day of November, 1881, until payment, with costs of suit." [1]

*J. R. Fleming, Q.C.*, for plaintiffs.

*Asa Gordon*, for defendant.

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AUTHORITIES REFERRED TO.

*Pothier, Vente.*

No. 194. Les charges que l'acheteur est censé ne devoir pas ignorer, et dont en conséquence le vendeur n'est pas tenu de garantir l'acheteur, quoiqu'elles n'aient pas été expressément déclarées par le contrat, sont,—1o. toutes celles qui sont de droit commun.

No. 196. Les droits et devoirs seigneuriaux, tels qu'ils sont réglés par les coutumes, sont aussi des charges des héritiers, qui n'ont pas besoin d'être déclarées par le contrat de vente, lorsque les héritages sont situés dans les provinces où est établie la maxime, *nulle terre sans seigneur;* la présomption étant que l'héritage relève de quelque seigneur ou à fief ou à cens.

*Consolidated Statutes of L. C., ch.* 41.

Section 33, par. 2. From and after the publication of such notice, with respect to any seigniory, every *censitaire* therein shall hold his land in franc-aleu roturier, free and clear of all seigniorial rights and dues, except the *rente constituée* substituted for the *cens et rentes.*

*Consolidated Statutes of L. C., ch.* 41.

Section 54. No sale under Writ of Execution shall have the effect of liberating any immovable property theretofore held *à titre de cens* from any *rente constituée*, payable thereon under the schedule of the seigniory, but shall be considered as having been sold subject thereto, without it being necessary for the seignior to make an opposition for the said purpose before the sale.

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(1) The above judgment was unanimously confirmed by the Court of Review, Montreal, Johnson, Taschereau and Gill, JJ., April 30, 1887.

32 *Victoria, ch.* 30.

Section 1. The Schedule made and deposited for a seigniory is a final title in favor of the seignior for the constituted rents established to represent the seigniorial rights.

Section 3. The capital of constituted rents is not subject to prescription, whether the land charged has changed proprietor or not.

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## *COURT OF APPEAL ABSTRACT.*

*Loi Seigneuriale—Droit de pêche.*

*Jugé*:—1. Le droit de pêche sur les rives du St. Laurent, bornant les seigneuries, n'en était pas un accessoire et n'appartenait pas au seigneur auquel il n'avait pas été spécialement accordé.

2. Ce droit, lorsqu'il avait été accordé au seigneur, n'était pas sous-inféodé sans concession expresse et spéciale; et le seigneur, auquel le donne son titre, peut empêcher le censitaire riverain, qui n'en a pas, de tendre une pêche sur la grève du St. Laurent à laquelle sa terre aboutit.—*Fraser et al. & Fraser et al.*, Québec, Lacoste, J. C., Baby, Blanchet, Hall, Wurtele, JJ., 4 avril, 1893.

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*Community—Continuation of—Art.* 1323, *C. C.*

A community of property existed between husband and wife. There was one child, issue of the marriage. The husband dying, the surviving consort failed to have an inventory made of the common property, and (the child being then a minor) the surviving consort married a second time without marriage contract.

*Held*:—In the absence of any demand on the part of the minor for continuation of community, a tripartite community did not exist between the surviving consort, her second husband, and the child by the first marriage; and an option for continuation made by the child 45 years after the dissolution of the first community had no effect.

2. Where the consort *commun en biens* who dies first has bequeathed all his property to a person or persons other than his children, the latter, being without interest, are not entitled to demand that an inventory be made, and default to make it cannot create any right in their favor.—*Pearson & Spooner*, Montreal, Lacoste, C.J., Baby, Bossé, Blanchet, Hall, JJ., September 26, 1892.

*Expropriation—Award of arbitrators—When interfered with by the court.*

*Held:*—In the matter of a railway expropriation, an award of arbitrators who have had the advantage of viewing and examining the property taken and also the property affected by the construction of the railway, should only be altered by the court when it is shown that the arbitrators were influenced by improper motives, or when the evidence clearly and conclusively establishes that they erred in fixing an amount undoubtedly too high or undoubtedly too low.—*Compagnie du chemin de fer de Montréal & Ottawa, & Bertrand*, Montreal, Sir A. Lacoste, C.J., Bossé, Blanchet, Hall and Wurtele, JJ., April 26, 1893.

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*Expropriation—Award—Interference with.*

*Held:*—In cases of expropriation, where the arbitrators or commissioners are experienced in the valuation of real estate, and where in addition to hearing the opinion of the expert witnesses produced they have had the advantage of examining the property to be taken, the court, before making an increase or reduction of the award, will require either proof of improper motives on their part, or evidence showing conclusively that an error has been committed in fixing the amount of the compensation.—*La Compagnie du chemin de fer de Montréal & Ottawa & Castonguay*, Montreal, Lacoste, C.J., Bossé, Blanchet, Hall and Wurtele, JJ., April 26, 1893.

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*Conditions au dos de police—Courte prescription—C. C.* 2184.

*Jugé:*—Il n'est pas nécessaire que l'assuré accepte ou signe les conditions qui se trouvent au dos de la police, lorsque cette dernière contient une clause disant que ces conditions forment partie du contrat; et si l'assuré, après avoir reçu ce contrat, ne le répudie pas, mais, au contraire, en fait la base d'une action pour réclamer le montant qu'il couvre, il ne peut pas objecter à une partie de l'instrument et se servir de l'autre.

La clause dans une police d'assurance que toute poursuite doit être intentée dans les trois mois du sinistre ou du rejet de la réclamation, est licite, et ne viole pas les dispositions de l'art. 2184, C. C., qui défend de renoncer d'avance à une prescription non acquise.—*Simpson & Caledonian Insurance Co.*, Québec, Sir A. Lacoste, J. C., Baby, Bossé, Blanchet, Wurtele, JJ., 10 janvier 1893.

*Bornage—Surveyor's line—Township line.*

The plaintiff's title gave him a lot of land in the township of Upton, and the defendant's title gave him one in the contiguous township of Grantham. Both titles were posterior to the verification of the township line by a government surveyor, and to a statute confirming the line surveyed and marked out by him, and in each title the rear boundary (where the lots adjoined) was stated to be the township line.

*Held*, that, in the absence of any right acquired by either of the parties by prescription beyond the township line, that line must be their boundary, without regard to measurements given in the titles.—*Duguay & Vincent*, Quebec, Baby, Bossé, Blanchet, Hall, Wurtele, JJ., April 4, 1893.

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## *SUPERIOR COURT ABSTRACT.*

*Procédure—Piece essentielle.*

*Jugé :*—Du moment qu'à sa face même une pièce essentielle au soutien d'une cause n'appert avoir été produite qu'après que la cause a été plaidée, l'action—sur Révision,—doit être renvoyée sans réserve du droit de la recommencer; et ce, alors même qu'il n'a été fait aucune demande pour faire mettre ce document hors du dossier, et que le jugement de première instance constate que le juge qui l'a rendu s'est appuyé sur la dite pièce pour le rendre. —*Corporation de St. Henri* v. *Gagnon*, C. R., Québec, Routhier, Caron, et Andrews, JJ., 28 février, 1893.

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*Séduction—Dommages—Paternité—Aliments—C. C.* 241—*Prescription—C. C.* 2261.

*Jugé :*—L'action en déclaration de paternité et pour des aliments est un droit exclusif de l'enfant, qui ne peut pas être exercé par la mère ni par le tuteur nommé à la mère mineure, les droits de la mère n'étant qu'aux dommages que lui a causé la séduction.

L'enfant naturel ne peut faire condamner à lui fournir des aliments l'auteur réel ou supposé de la grossesse de sa mère, qu'en le faisant déclarer son père.

*Kingsborough & Pownd*, 4 Q. L. R. 11 ; *Bilodeau* v. *Tremblay*, 3 R. L. 445 ; *Giroux* v. *Herbert*, 5 R. L. 638, critiquées.

La fille séduite n'a pas d'action en dommages avant son enfantement, et par conséquent la prescription de deux ans (C. C. 2261) ne commence à courir que de ce moment.

La fille devenue mère n'a de recours en dommages contre son prétendu séducteur que lorsqu'elle n'a cédé qu'à une promesse de mariage actuelle ou présumée; lorsque (comme dans l'espèce) l'appât de sa faute n'a pas été l'espoir d'un mariage, mais celui d'échapper à la grossesse, elle n'a pas d'action en dommages.—*Mullin es qualité* v. *Bogie*, C. R., Québec, Casault, Caron, Andrews, JJ., 31 janvier, 1893.

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*Promissory note—Prescription—Interruption.*

*Held:*—A judgment obtained against the maker and first endorser of a promissory note interrupts prescription as against the other endorsers.—*Thibaudeau* v. *Pauzé*, S. C., Montreal, Davidson, J., March 15, 1892.

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*Locateur et locataire—Résiliation d'un bail—Compétence.*

*Jugé*, que quand la demande de résiliation d'un bail est intentée au milieu du terme de location, la compétence du tribunal se règle d'après la somme qui représente, à ce moment, l'intérêt des parties.—*Thivierge* v. *Moineau*, C. S., Montréal, Jetté, J., 2 avril 1892.

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*Action paulienne—Complicité du tiers acquéreur—Fraude—Saisissabilité d'un montant adjugé pour libelle—Articles* 1038 *C. C., et* 558 *C. P. C.*

*Jugé*, 1. Que pour faire maintenir l'action paulienne contre un tiers acquéreur, par contrat à titre onéreux, il faut alléguer et prouver la complicité de ce tiers-acquéreur en la fraude commise.

2. Que le débiteur, même insolvable, conserve la libre disposition de ses biens, et que l'aliénation qu'il en fait de bonne foi et sans fraude est valable même à l'encontre de ses créanciers.

3. Que le montant adjugé pour libelle est saisissable (*Archambault & Lalonde*, M. L. R., 3 Q. B. 486).—*Desrosiers* v. *Meilleur et al., & Wurtele* (mis en cause), C. S., Montréal, Jetté, J., 12 mars 1892.

*Saisies concurrentes—Art. 642, C. P. C.*

*Jugé :*—Que lorsque plusieurs brefs de saisie, contre le même débiteur, sont remis au shérif en même temps, il doit procéder d'abord sur le premier en date, et s'ils sont tous de même date, il doit procéder sur celui qui se trouve pour la somme la plus élevée.—*La Banque Nationale* v. *Aubertin*, & *Aubertin*, C. S., Montréal, Jetté, J., 2 avril, 1892.

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*Transport d'un droit litigieux—Huissier—Articles* 1486, 1583 *C. C.*

*Jugé :*—Qu'une convention en vertu de laquelle le défendeur s'était engagé à payer la somme de $500 si un tableau attribué au Corrège, dont il avait acquis la propriété pour un tiers, était prouvé authentique, crée une créance d'une nature litigieuse, et que l'acquisition de cette créance par le demandeur, huissier de la cour supérieure, était nulle.—*Reed* v. *Helbronner*, C. S., Montréal, Mathieu, J., 9 mai, 1892.

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*Corporation municipale—Ruelle privée—Responsabilité.*

*Jugé :*—Qu'une corporation municipale qui a permis au public de se servir d'une ruelle privée et y a construit un égout et numéroté les maisons qui s'y trouvaient, est responsable d'un accident arrivé par suite du défaut d'entretien du trottoir de cette ruelle.—*Gilligan et vir* v. *La cité de Montréal*, C. S., Montréal, Loranger, J., 5 mars, 1892.

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*Occupation avec permission du propriétaire—Congé—Art.* 1608, *C. C.*

*Jugé :*—Que le contrat en vertu duquel un propriétaire permet à une personne d'occuper un immeuble à charge d'exercer une surveillance sur cet immeuble, d'administrer les moulins qui s'y trouvent et de pensionner et loger ce propriétaire et sa famille de temps à autre, constitue un contrat innomé qui se rapproche plus du bail que de tout autre contrat, et que les règles du louage s'y appliquent.

Que dans ces circonstances, l'occupant a droit à un congé de trois mois avant de pouvoir être expulsé de cette propriété.—*Brunet* v. *Berthiaume*, C. S., Montréal, Jetté, J., 23 avril, 1892.

*Opposition—Frais.*

*Jugé :*—Que le créancier qui saisit imprudemment des biens qui appartiennent à un tiers, sera, malgré sa bonne foi, condamné à payer les frais de l'opposition faite par ce dernier.—*Mc Namara* v. *Gauthier, & Carle,* opposant, C. S., Montréal, Jetté, J., 21 mars, 1892.

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*Quo warranto—Marguillier, élection de—Enregistrement des votes—Inscription en faux—Dépôt en révision.*

*Jugé :*—1. Lorsqu'à une élection de marguillier, l'enregistrement des votes est demandé par deux ou plusieurs électeurs, le curé qui préside l'assemblée doit y procéder même si la chose n'a jamais été faite dans la paroisse, et s'il a toujours été d'usage d'y constater la majorité en divisant l'assemblée en deux partis ; le président de l'assemblée doit ainsi enregistrer les votes même si la demande n'en est faite qu'après que l'on a divisé l'assemblée, mais avant que le président ait proclamé aucun candidat ; et s'il n'enregistre pas les votes lorsque la demande lui en est ainsi faite, l'élection est nulle.

2. Une élection nulle pour cette cause ne peut être ensuite validée à une assemblée subséquente qui refuse d'accepter la démission du candidat ainsi élu illégalement, et l'élection doit tomber ou être maintenue sur son propre mérite d'après ce qui s'est passé à l'assemblée à laquelle elle a eu lieu d'abord.

3. On ne peut prouver par témoins, et sans le préliminaire d'une inscription en faux, contre ou outre le contenu du régistre de délibérations d'une fabrique.

4. Un seul dépôt en révision suffit, même lorsque la révision porte et sur le mérite de la cause et sur une inscription en faux, surtoût si les deux contestations ont été réunies en première instance.—*Champoux* v. *Paradis,* C. R., Québec, Casault, Routhier, Caron, JJ., 30 septembre, 1890.

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*Vente d'immeubles par femme séparée, sans autorisation—Action en déclaration de nullité par mari—Intérêt né et actuel—C. C.* 183.

*Jugé :*—Le mari séparé de corps n'a pas d'action pour faire prononcer la nullité de la vente faite par sa femme, sans son autorisation ou celle de la justice, d'un immeuble qui lui appartient, s'il n'a pas un intérêt né et actuel.

L'intérêt né et actuel de l'article 183 du code civil est un intérêt pécuniaire immédiat. Un simple intérêt moral, comme celui de faire respecter son autorité maritale, ou un intérêt pécuniaire éventuel, comme celui résultant du danger que sa femme revienne plus tard réclamer de lui une pension alimentaire, n'est pas un intérêt suffisant aux termes de l'art. 183.—*Letourneau* v. *Blouin et al.*, C. S., Québec, Andrews, J., 21 novembre 1892.

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*Pledge—Abuse of—C. C.* 1975—*Conditional obligation—C. C.* 1084.

*Held:* 1. The pledgee who applies to his own uses a sum of money pledged as security for the payment of a note, is guilty of an abuse of the pledge, within the meaning of article 1975 C. C., sufficient to justify the pledgor in demanding repayment of such money with interest.

2. Where the return of money pledged as security for the payment of a note is conditioned upon the collection by the pledgee of the amount of such note, the fact that he has been himself the means of preventing the collection of the note, (as by releasing one of the parties thereto, the others being insolvent,) will make the conditional obligation (to return the money) absolute.—*Pacaud* v. *La Banque du Peuple*, S. C., Quebec, Andrews, J., 17 January, 1893.

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*Intervention—Lien de droit—Défense en droit—Exciper du droit d'autrui.*

*Jugé:*—Le défendeur en garantie, qui se porte aussi intervenant dans l'instance principale, a intérêt et droit de rester en cause et faire décider du mérite de son intervention, même après le renvoi de l'action en garantie.

Le propriétaire riverain qui, en vertu de l'acte d'incorporation de la cité de Québec, est seul responsable de l'entretien du trottoir devant sa propriété, a intérêt à intervenir dans une action portée contre la cité pour des dommages causés par le mauvais état de tel trottoir, et n'excipe pas du droit d'autrui en soulevant, par défense en droit, le manque de lien de droit entre le demandeur et la cité.—*Séguin* v. *Cité de Quebec*, et *Drouin*, intervenant, C. S., Québec, Routhier, J., 14 février 1893.

*Dommages—Libelle dans un plaidoyer—Allegation de fraude—Bonne foi—Cause probable.*

*Jugé:*—Un plaidoyer contenant une accusation de fraude peut former la base d'une action en dommages pour libelle, si tel plaidoyer, quoique pertinent à l'issu, est produit avec malice et intention de nuire. Il en est autrement d'un plaidoyer fait de bonne foi et où la partie avait cause probable pour sa croyance que l'acte attaqué était réellement frauduleux.—*Matte* v. *Ratté*, C. S., Québec, Routhier, J., 14 février 1893.

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*Cité de Montréal—Licences de charretier—Non résidents—Mandamus.*

*Jugé*:—Qu'aux termes de ses règlements actuellement en force et de sa charte, la cité de Montréal est tenue, sur paiement des droits fixés, d'accorder, tant que les cadres ne sont pas remplis, des licences de charretiers aux non résidents, comme à ceux qui sont domiciliés dans les limites de la cité.

Qu'au cas du refus d'octroyer telle licence, on peut se pourvoir contre la cité par voie de *mandamus* pour la forcer d'accorder la licence demandée.—*Parent* v. *La cité de Montréal*, C.S., Montréal, Gill, J., 7 juin 1892.

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*Locateur et locataire—Dommages—Articles* 1614, 1627 *C. C.*

*Jugé:*—Que bien que le locateur soit garant envers le locataire de tous les vices de la chose louée qui en empêchent ou diminuent l'usage, soit que le locateur les connaisse on non, cela s'entend de la diminution du loyer ou de la résiliation du bail, mais que le locateur ne doit de dommages au locataire que lorsqu'il connaissait le vice de la chose louée.—*Juteau et al.* v. *Magor*, C.S., Montréal, Pagnuelo, J., 19 avril 1892.

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*Droit municipal—Cour de Commissaires—Recouvrement de sommes imposées pour travaux—Articles* 398 *et* 1042 *C.M.*

*Jugé:*—Que la cour des commissaires n'a pas juridiction pour le recouvrement de sommes pour travaux exécutés par l'inspecteur de voirie.—*Gauthier* v. *La Corporation de la Paroisse de Ste. Marthe*, C.S., Montréal, Jetté, J., 14 juin 1892.

*Privilège du locateur—Pensionnaire—Art.* 1622 *C. C.*

*Jugé:*—Qu'une personne qui pensionne chez le locataire d'une maison et qui a notifié le locateur de cette maison qu'il était propriétaire de certains effets qui la garnissaient, peut faire distraire ces effets de la saisie-gagerie pratiquée par le locateur, ces effets étant censés n'être sur les lieux qu'en passant, aux termes de l'art. 1622 C. C.—*Clarke* v. *J. State, & W. State,* intervenant, C. S., Montréal, Taschereau, J., 17 juin 1892.

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## *CUSTODY OF CHILDREN—THE GOSSAGE AND GYNGALL CASES.*

Of the numerous disputes in which Dr. Barnardo has been engaged with the relations of children admitted into his asylum, Gossage's is the most important from a lawyer's point of view. In that case the House of Lords decided (61 Law J Rep. Q. B. 728) that where a person charged with unlawfully detaining a child has absolutely ceased to have any control over it, a writ of *habeas corpus* ought not to issue, even though he gave up the child from the apprehension that by retaining it he might become liable to a writ. In so deciding, the House of Lords overruled the decision of the Court of Appeal in Tye's case (*Regina* v. *Barnardo,* 58 Law J. Rep. Q. B. 553), that it is no excuse for non-compliance with the writ that the defendant has wrongfully handed over the child to another, and that under such circumstances an attachment must issue for disobedience to the writ. The House of Lords said, however, that a mere colourable transfer of the child to a person acting under the direction of the defendant will not avail the latter. Furthermore, anyone parting with the possession of a child after being served with the process of the Court, and, perhaps, even after receiving notice that proceedings will be taken, is guilty of contempt. The case came again before a Divisional Court last week for further investigation of the facts. It appeared that the boy Gossage, having been found destitute, was sent to Dr. Barnardo's Home. Afterwards the mother of the lad demanded to have him given up to be placed in a Roman Catholic institution. Dr. Barnardo thereupon handed him over to a stranger, to be adopted by the latter and taken to Canada, but made no enquiries about the identity or the circumstances of this person. The Court thought that Dr. Bar-

nardo had acted thus in order that all traces of the boy might be lost, and they came to the conclusion that Dr. Barnardo did, in fact, not know where the boy was. They therefore held, in accordance with the decision of the House of Lords, that the return to the writ was sufficient. When one considers the length of time that this case has been before the Courts, one must regret that (as the House of Lords ruled) an appeal lies against an order for the issue of a writ of *habeas corpus*. The writ was issued on November 23, 1889, the matter came before the Court of Appeal in 1890, and was only disposed of by the House of Lords in July, 1892. Such a delay may sometimes defeat the purpose for which the writ has been obtained, and ought to be impossible.

Another important case relating to the custody of a child was disposed of last week by the Court of Appeal. In *Regina* v. *Gyngall* the mother of a girl, aged fifteen, sought to compel a schoolmistress, who was training the child to be a schoolmistress, to give her up, against the child's wish. The mother, who was a lady's maid, and when out of employment a dressmaker, had been obliged, in earning her livelihood, to move about from one place or country to another, and, through no fault of her own, had been unable to bring up the girl personally. The case did not fall within the Custody of Children Act, 1891, for the mother had not abandoned nor deserted the child, nor proved herself unmindful of her parental duties. On her behalf it was contended that a parent is absolutely entitled to the custody and guardianship of his or her children, unless this right is forfeited by misconduct, and the Court allowed that this right exists at common law, though it is subject to certain statutory limitations; but they said, further, that the Court of Chancery had from time immemorial exercised a parental jurisdiction, by virtue of which, even without any misconduct on the part of the parent, the rights of the latter are superseded, when in the opinion of the Court this is essential for the welfare of the child. This being the case of an intelligent girl, who in another year would be in a position to earn her living and choose where she would live, the Court thought that it would be almost cruel to take her away from her present surroundings, especially as the mother would be obliged to place her with strangers. Therefore they affirmed the order of a Divisional Court discharging the writ, on the respondent giving an undertaking to educate and maintain the girl.—*Law Journal* (*London*).

## *EDITOR AND CONTRIBUTOR.*

In *Macdonald* v. *The National Review*, his Honour Judge Lumley Smith (of the Westminster County Court) pronounced a decision which, if upheld on appeal, will materially, and as we think injuriously, affect the relations of editors and their contributors. The facts are these. The plaintiff, Mr. W. A. Macdonald, a Canadian journalist, sought to recover from the proprietors of *The National Review* the price of an article which he had written and submitted to the editor's consideration, *ex proprio motu*, and which had been set up in type, sent to him for correction, and returned revised. The article was not published within what Mr. Macdonald deemed "a reasonable time;" he complained of its non-appearance, and got back the manuscript, with an implied refusal to insert it, by return of post. The plaintiff contended that by putting his manuscript in type and sending him a proof for revision the editor had in law "accepted" his article, and was bound to publish or pay for it within a reasonable time. The defendants, on the other hand, maintained, and adduced what appears to us to have been strong evidence to prove, that this position was, according to journalistic custom, untenable. But his Honour Judge Lumley Smith agreed with the plaintiff, and held that to print a manuscript and (presumably) send the author a proof for correction is to exercise over it the *dominium* which constitutes an acceptance in law. We are far from satisfied that the judgment in this case is sound. The question at issue was one of custom, and his Honour's decision seems to us to have been against the weight of evidence. But if the learned judge is right, and if an article, ultroneously written and sent to a journal, is accepted whenever the editor puts it in type, and must be published or paid for within what a Court of law not endowed with journalistic instincts or guided by journalistic experience considers a reasonable time, we can only say that the difficulty which the free-lance or "outside" contributor at present finds in penetrating the charmed circle of journalistic success will be tenfold increased. It is stated that action in the case of *Macdonald* v. *The National Review* was taken at the instance of the Society of Authors. We doubt whether that excellent body has gained anything better than a Pyrrhic victory, in which the conquerors will ultimately lose more than the vanquished defendant. —*Law Journal* (*London*).