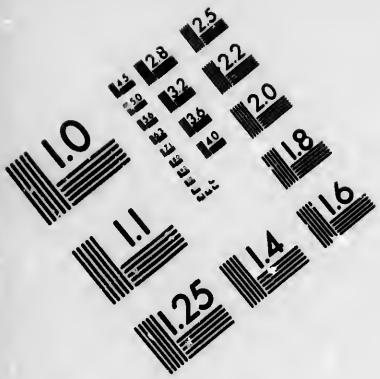

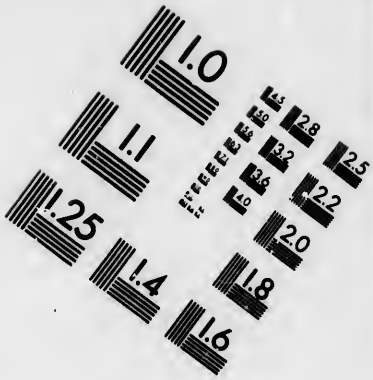

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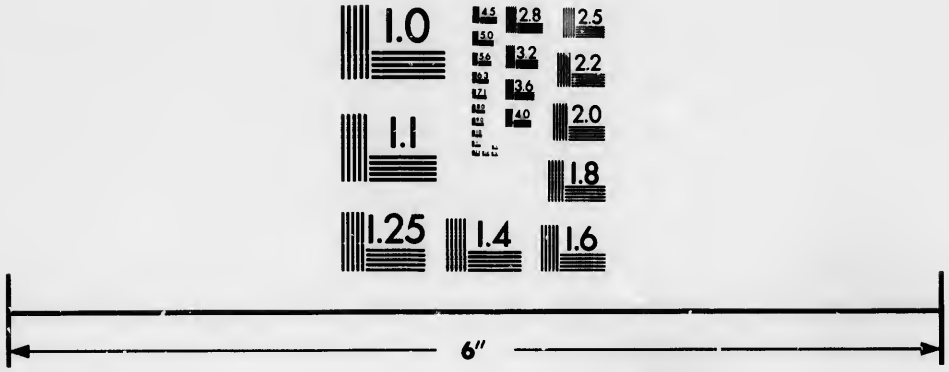

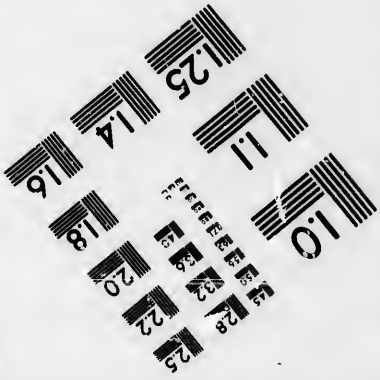

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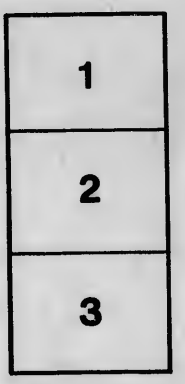

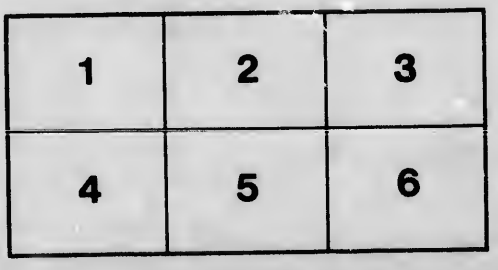

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MONTREAL

CONDENSED REPORTS.

PRÉCIS DES

DÉCISIONS DES TRIBUNAUX DU DISTRICT DE MONTRÉAL.

1854.

—o—

"peu arguments cy pure en queux il ny auoit aucun refuse."

PLOWDEN.

—o—

SECOND EDITION,

REVISED BY

MR. JUSTICE RAMSAY.

Montreal:
A. PERIARD, LAW BOOKSELLER AND PUBLISHER.
1884.

PREFACE

TO THE SECOND EDITION.

THE fact that this work has long been out of print, and that second-hand copies have been eagerly sought after by members of the profession, is ample justification for the appearance of the present edition. The Montreal *Condensed Reports* were issued in conjunction with a legal periodical called the *Law Reporter*, at a time when the decisions of the Courts of this Province existed almost exclusively in the note-books of a few gentlemen who made such memoranda of judgments as their engagements permitted, and citations were necessarily made, not from printed reports but from occasional jottings, with references to the files of the Court. It has been deemed advisable to reprint the *Condensed Reports* separately. There appear to have been but nine volumes of reports extant in 1854, viz., La Revue de Législation, Stuart's Reports, Pyke's Reports, and four volumes of the Lower Canada Reports. The *Condensed Reports* were designed to supply the deficiency, and the work was highly valued by the profession, but the number of practising advocates was then too limited to afford sufficient encouragement to its editors, and at the end of a year it was discontinued. Shortly afterwards the *Condensed Reports* were succeeded by the *Lower Canada Jurist*. In the preface to the first volume of the latter work will be found a statement that the proposal to start the *Jurist* originated with T. K. Ramsay, Esq., who, jointly with L. S. Morin, Esq., had conducted the *Law Reporter* and the Montreal *Condensed Reports*.

Thirty years have elapsed since the *Condensed Reports* first appeared. During that period the reports of our Provincial Courts

have been increased by 74 volumes, viz., 13 of the Lower Canada Reports (vols. v.—xvii.), 27 of the Lower Canada Jurist, 4 of the Lower Canada Law Journal, 12 of La Revue Légale, 9 of the Quebec Law Reports, 6 of the Legal News, and 3 of Queen's Bench Reports, besides some reports contained in other publications. Considerable changes have also been effected in the law and rules of procedure. But the reports contained in the *Condensed Reports* cover numerous questions upon which they are still authority, and the publisher in bringing out the present edition is acceding to a wish that has been very generally expressed by the members of the profession. Apart from the value of the reports as precedents the volume possesses the interest which attaches to one of the earliest compilations of adjudged cases, an interest which is not lessened by the fact that the principal editor now occupies a distinguished position on the Canadian Bench.

JAMES KIRBY.

Montreal, 14th January, 1884.

ERRATA.

Page 7, line 13, for "pour le défendeur" read "pour la défenderesse."
Page 13, line 12, for "14 Vic." read "14 and 15 Vic."
Page 20, line 14, for "certificate of return" read "certificate of service."
Page 33, line 33, for "Review" read "Revue."
Page 33, Note *, for "page 10" read "page 13."

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Superior Court.

24 *Dec.*, 1853.

Present:—Day, Smith and Mondelet (C.), *Justices.*

No. 1026.

Bowker v. *McCorkill & Graham, mise en cause.*

PROCEDURE.—RE-OPENING ENQUÊTE.

This is a motion by the *mise en cause* to strike the cause from the *Role de droit* for final hearing, and to be admitted to produce evidence in rebuttal of the evidence adduced by the plaintiff in support of his special answer.

A. & G. Robertson, in support.

Gugy, contra.

Day, J., It has been the habit in this Court for the party terminating his *enquête* to call upon the adverse party to fix a day for continuing his *enquête*, and in default of his so doing to fix a day for that purpose. The proper course, however, for the party closing his *enquête* is to call on the opposite party to go on with his *enquête*, and in case of no one appearing or fixing a day, the party present may, upon application to the Court, have the *enquête* of the party in default closed. This was the impression of the Court at the time of the argument, and we find the 43 Rule of Practice supports that impression. In this case, however, the Court will permit the *mise en cause* to re-open his *enquête*, as Counsel have been led into error by the incorrect practice that has obtained in this Court.

Motion granted.

No. 1732.

Genier v. *Charlebois.*

MOTION TO DISCHARGE INSCRIPTION, THERE BEING NO SIMILITER.

Held, *that similiter is not necessary. That Court can adjudicate on an imperfect issue.*

This case came up on a motion to discharge the Inscription for hearing on the merits, there being no *similiter.*

Henry Stuart, in support of motion, contended that the issue in this cause was not joined. The record consisting of declaration plea, and a notice to the plaintiff to file a replication, and foreclosure consequent upon his not doing so. The defendant then inscribed the cause upon the *Role d'Enquête*, and inscribed for hearing on the merits as in a contested cause.

The 25 Geo. III. imperatively directs that an issue between a plaintiff and a defendant shall be made and completed by the declaration, answer and replication *at least*.

In other sections provision has been made to meet the cases of defendant not appearing, or appearing and not pleading, and in such cases the Court is authorised and empowered to award judgment upon good and satisfactory proof having been made by the plaintiff.

There is no such power given to the Court in the event of plaintiffs not completing the issue by a replication, rendered essential by the language of a positive law. In this case the issue is incomplete, and the Court cannot supply the deficiency. It, therefore, is not a contested cause, and no power has been given to the Court to treat the case as one by default or exparte.

As to the practice of the Court having been uniformly in favour of the pretensions of the defendant, such an argument, even if founded on fact, is without weight or foundation, as power or jurisdiction depends upon the amount and degree conferred, and not upon any illegal or arbitrary exercise thereof for any period of time.

A. & G. Robertson, contra.

Day, J., It is not necessary that there should be an issue. There is no issue in *exparte* cases by default. The case is not in the best state to be heard on the merits; but there are merits. It has been the undeviating practice of this Court to allow inscription on the merits without *similiter*, and I am convinced the practice is founded on a logical rule.

Mondelet (C.), J., concurred.

Smith, J., there are imperfect issues and pleas. See Ordinance of 1785.

Motion dismissed.

27 *Dec.*, 1853.

Present :—Day, Smith and Mondelet (C.), *Justices.*

No. 2368.

Rowbotham v. *Scott.*

PROCEDURE.—EXCEPTION A LA FORME.—INSUFFICIENT CERTIFICATE OF RETURN.

A bailiff had returned a writ, and in the certificate of service had qualified himself as "bailiff of the Superior Court" only, without adding "for District of Montreal." Held, that the bailiff having taken the quality of bailiff of the Superior Court, the Court was bound to know the signature of its own officer.

To this action the defendant filed an *exception à la forme*, grounded on the insufficiency of the bailiff's return, he having styled himself, "Bailiff of the Superior Court" only, without adding "for the District of Montreal."

Cross & Bancroft, in support of exception.

Morrison, contra.

Day, J., The Court cannot maintain this exception. The writ shows that it was served on the right party, and the bailiff has taken a quality as Bailiff of the Superior Court, and we are bound to know our own officers. Had the bailiff taken no quality but merely signed, it would have been different.

Exception dismissed.

No. 1938.

Macfarlane v. *Rodden & al.*

PROMISSORY NOTE.—USURY.

Held, *that the* 16 *Vic. c.* 80 *has cut off all the remedies against usury established by* 17 *Geo. III. c.* 3.

This was an action for balance due on a promissory note, made by defendant in favour of plaintiff. The defendant met the demand by an exception of usury. To this exception the plaintiff demurred.

Bethune & Dunkin, in support of demurrer.

A. & G. Robertson, contra.

Day, J., The remedies against usury are established by 17 Geo. III. c. 3. Since then all these remedies, without reservation, have been cut off by 16 Vic. c. 80.

Demurrer maintained.

Exparte Botineau.

CERTIORARI.

The applicant had been condemned in the Commissioners Court on a Wednesday, and it was contended in support of application for a writ of certiorari, that Commissioners had no jurisdiction on that day.

Godin, for applicant.

Day, J., Commissioners Courts by the statute creating them must be held on the first Monday of each month, unless that day be a holiday, in which case they are to be held on the Tuesday; but there is nothing to prevent the Commissioners adjourning the Court to any other day they please. It does not appear that this judgment was not rendered on a Wednesday to which the Court had been adjourned.

Certiorari refused.

No. 878.

Exparte Narcisse Landry.

FOR A WRIT OF CERTIORARI.

On the 7th of April last the said Narcisse Landry was arrested on the warrant of Marcel Poirier, Esquire, one of Her Majesty's Justices of the Peace for the District of Montreal, on the accusation of one Germain Richard, for having, on the evening of the 4th April last, menaced the said Richard, calling to him to come out and fight, that he was resolved to destroy him, and that he would gain by destroying him and all his family; and for having also fired a shot into the prosecutor's house, by which two panes of glass were broken. No plea was entered on the part of Landry, but the Justice of the Peace took the depositions of several witnesses, and thereupon discharged the petitioner of the accusation of having fired the shot that broke the glass in the prosecutor's windows; but found him guilty of injurious language, for which he

condemned him to pay a fine of 10s., and costs, amounting to £2 11s. 9d., and in default of his so doing to be confined in the common gaol of the district during the space of fifteen days.

On the part of Landry it was contended, on application for a writ of *certiorari*, that in hearing the complaint of Richard at all the justice had exceeded his jurisdiction, the accusation against him being a felony —that the defendant had never been put on his defence, nor been allowed to cross-examine the witnesses—and that the alleged offence for which he was convicted was no offence at all cognizable by a justice of the peace. This petition was supported by affidavit, and the Court granted a rule for the writ demanded. Subsequently, on motion on the part of Landry, the rule to quash was declared absolute.

Moreau, Leblanc & Cassidy, for petitioner.

No. 2003.

Mandigo and al. v. *Hoyle and al.*

ACTION BY MECHANICS FOR BUILDING A WHARF.

Burroughs, for plaintiffs.

Day, J., This is an action on a personal contract for the building of a wharf, but quite another contract has been proved. It appears that certain persons wished to build a wharf, and to carry out this work they named a committee, the defendants, to get it done. The defendants had in their contract with the plaintiffs taken care to make the quality in which they were acting appear; in fact, they were the *mandataries* of other parties. A question might be raised as to whether the defendants might not be personally held liable, but the course taken by the plaintiffs was not the right one.

Action dismissed.

No. 2033.

Batten v. *Desbarats.*

COMPENSATION.

Juge, *qu'une dette due au défendeur par une société dont le demandeur faisait partie ne peut pas être offerte en compensation de la créance personnelle du demandeur.*

Le demandeur poursuit le défendeur pour le recouvrement d'une somme de £80 18 0.

Le défendeur fait différentes exceptions et entr'autres une exception péremptoire de compensation et paiement, et allégue qu'il a obtenu un jugement pour £2000 conjointement avec M. Derbishire contre une société d'ouvriers en verre dont le demandeur fesait partie. Le demandeur répondit en droit "que le défendeur ne pouvait compenser "la créance "personnelle du demandeur et de ses Cédants par la créance qu'il pour- "rait individuellement avoir contre une société dont le demandeur ou "ses Cédants auraient fait partie, que le défendeur ne peut en droit "compenser la créance personnelle du demandeur et de ses Cédants par "la créance conjointe et solidaire qu'il peut avoir en commun avec Der- "bishire contre une société dont le demandeur aurait fait partie."

Doutre, Daoust et Prairie au soutien de la réponse en droit ont cité: *Troplong Société, Vol.* 1, *Nos.* 58 *et* 79. *Toullier, Vol.* 7, *Nos.* 378 *et* 452. *Duvergier, Vol.* 5, *p.* 493 *et les deux suivantes. Dalloz, Vol.* 1, *Verbo Compensation No.* 76.

T. S. Judah, contra.

Day, J. Une dette due par plusieurs personnes sous les circonstances de cette action ne peut être offerte en compensation.

Exception de Compensation déboutée.

No. 1874.

Laurier v. *la Corporation du Petit Séminaire de Ste. Thérèse.*

Jugé, *que les mots "dépens de l'action" n'expriment pas les frais de l'action telle qu'introduite* "amount demanded" *mais seulement les frais du montant recouvré,* "amount recovered."

Cette cause était portée pour le recouvrement des honoraires du demandeur comme médecin pour avoir soigné feu le Révérend Messire Ducharme le fondateur de cet établissement, durant sa dernière maladie, pour une période de temps considérable. La défenderesse n'offrit que vingt-cinq livres courant, et prétendait que les services du demandeur ne valaient pas davantage. Le demandeur réclamait cinquante-cinq livres, deux chelins, six deniers cours actuel. La contestation fut référée à des médecins, dont un de la ville de Montréal, et deux de la campagne, pour arbitrer sur le *quantum*. Par leur rapport ils ont condamné la défendresse à payer quarante livres courant, déclarant en même

temps que le demandeur avait eu raison de présenter un compte pour le montant entier de sa réclamation ; et ils ont suggéré à la cour que la défendresse devait supporter tous les frais.

Le jugement de la cour a homologué ce rapport avec les dépens de l'action.

Plus tard sur motion de la défenderesse il fut décidé que les frais devaient être taxés comme dans une action de quarante livres courant et que les mots, "dépens de l'action" n'exprimaient pas les frais de l'action telle qu'introduite "*amount demanded*" mais seulement les "frais du montant recouvré" "*amount recovered*" *vide* le dernier acte de judicature passé en mil huit cent quarante-neuf.

Lafrenaye & Cressé, pour le demandeur.

Cartier & Cartier, pour le défendeur.

No. 1699.

Attorney General v. *Ryan and al.*

MOTION FOR RULE OF COURT ON NOTARY TO SEND UP A BOND SOUS SEING PRIVÉ THAT HAD BEEN FILED IN HIS OFFICE, AND OF WHICH HE HAD MADE A MINUTE.

The plaintiff had placed a bond *sous seing privé* in the hands of a notary for safe keeping, and the notary had made a minute of it, and granted copies. The plaintiff had taken out an action on the bond, and was desirous of procuring it to file as an exhibit in support of his action ; but the notary refused to give it up unless ordered to do so by the court. The plaintiff thereupon moved for a rule of court commanding the notary to send up the bond.

Drummond & Dunlop, for plaintiff.

Day, J., The *court* has no power to grant a rule to oblige a notary to send up one of his minutes. A *subpœna duces tecum* might perhaps answer the plaintiff's purpose.

Motion dismissed.

No. 2298.

Macfarlane v. *Worrall, and the Principal Officers of Her Majesty's Ordinance, T. S.*

PROCEDURE.—EXCEPTION A LA FORME.—FILING OF.

Motion to reject exception à la forme on the ground that four days from the return of the writ had elapsed before it was filed. Held, *that the four days allowed by the Statute amending Judicature Act count even while the records is en délibéré.*

In this case the plaintiff had arrested before judgment a certain sum of money belonging to the defendant in the hands of the Tiers Saisi. The writ of *saisi arrêt* directed the *Tiers Saisi* to come before the Justices "*of*" our Superior Court to answer in the premises.

The said writ was returnable on the 24th day of October, 1853. On the same day after the return the defendant moved to quash the writ and process, as the writ ought to have summoned the Tiers Saisi to appear before "our Justices *in* our Superior Court." This motion was taken *en délibéré*, and judgment was rendered on the 18th day of December last, dismissing the motion, the court observing that a writ could not be quashed on motion, that the only way to quash a writ was by *exception à la forme*. On the 19th of December the defendant filed an *exception à la forme*, based on the said informality, and the plaintiff moved to dismiss the said exception, the four days allowed by Statute having expired.

Bethune & Dunkin, in support of the motion, contended that the four days allowed to file an *exception à la forme* by the 16 Vic. c. 19, s. 21, had expired before the filing of the exception in question; that the wording of the section was express and could not be extended by the Court; that the defendant had chosen his remedy, and that if the time for filing his *exception à la forme* was prescribed it was by his own fault.

E. D. David & Ramsay, opposing the motion, contended that defendant had not had four days in which he could file his *exception à la forme;* that the record had been taken *en délibéré* the day after the return of the writ, and that the exception had been filed the day after the record had been sent down; that no paper could be filed while the record was before their Honours: that the taking of the record *en délibéré*

on defendant's motion was the act of the court and not of the defendant; that it could not be supposed that the Legislature had a case like the present in view in framing the section invoked by the plaintiff; that the time during which the record was *en délibéré* before their Honours could no more be counted to exclude the filing of an *exception à la forme*, than could the time during which a case was in Appeal count as part of the 6 months to exclude a party to apply afterwards for a writ of *certiorari*.

Mondelet (*C.*), *J.*, dissenting from the majority of the court said, that it is well established that no record can be touched by either party while *en délibéré*. That he could not believe that it was the intention of the Legislature that the delay should count against a party while the record was out of his reach; that no Judge being at liberty to presume such an intention in the Legislature, nothing short of a clear, distinct, imperative declaration on the subject could induce him to disregard a principle which, in his opinion, was correct, it being founded on reason and justice, and in keeping with what he considered to be *bonne procédure*.

Day, J., I quite agree with my learned brother as to the record being out of the reach of the defendant; but the terms of the 16 Vic., especially coming as they do to carry out the 12 Vic., are so express that we cannot chose but follow the strict rule there laid down. At one time in England the courts of justice interfered constantly with statutes, and great inconvenience having arisen from this practice it is now no longer done.

Smith, J., The defendant had not two remedies; he took a course to which he had no right, and by his own fault lost his opportunity of filing an *exception à la forme*. The court could not help taking the motion to quash *en délibéré*.

Motion maintained and exception à la forme rejected.

The defendant gave notice of Appeal. This Appeal has been abandoned.

Dec. 30*th*, 1853.

Present:—Day, Smith and Mondelet (C.), *Justices.*

No. 2145.

McDougal v. *Morgan.*

PLEADING.

This action was brought for two items, the 1st for £157, for salary up to the 1st May, 1853; and the 2nd for £23, for salary due since that

date, and certain credits were allowed towards each sum. The defendant met this demand by three pleas and a general answer. By his [illegible] plea he alleged that plaintiff had received £148 in goods, [illegible] balance of only £9, which he tendered and concluded for the d[illegible] of the whole action. The second plea was similar to the first. And the third plea answered the second item by pleading compensation in damages, and likewise concluded for the dismissal of the whole action.

To these pleas the plaintiff demurred, on the ground that each of them only purported to answer a part of the declaration, while they concluded for the dismissal of the whole action.

Badgley, Q. C., *& Abbott*, in support of demurrer.

Popham, contra.

Day, J., These pleadings are insufficient. Each of them meets only one part of the demand, but at the same time they all conclude for the dismissal of the whole action. *Demurrer maintained.*

No. 882.

Exparte Allère for writ of *certiorari*.

CERTIORARI.

Laberge & Laflamme, for petitioner.

Day, J., This action was brought against the petitioner in the Commissioners Court for damages for not having entered into co-partnership with the plaintiff in the court below, according to agreement, and the court had condemned petitioner. This is certainly an extraordinary judgment, but we are not made sure that there has been an excess of jurisdiction. The presumption is that partnerships include matters of greater value than £6 5s. cy., but there is nothing in the affidavit to show that it was so in this case. *Certiorari dismissed.*

No. 2133.

McElwee v. *Darling*.

DAMAGES.—SEDUCTION.—DECLARATION DE PATERNITÉ.

Action of damages for seduction—Declaration de paternité.

This action was brought by the plaintiff, who described herself as *fille majeure et usante de ses droits*, for seduction and *en déclaration*

de paternité. The declaration stated, "That the defendant with force and arms there and then, in and upon the body of the said plaintiff made an assault, and then and there did seduce, debauch, deflower and carnally know the said plaintiff, and did then and there and at divers times, since that time, abuse, lie with and carnally know her." The declaration then went on to allege that defendant became the father of a child by the plaintiff, and concluded as in an action of damages for seduction and *en déclaration de paternité*.

The defendant met this action by two demurrers—by the first of which he prayed the dismissal of the action, on the ground that the allegations of the declaration amounted to an allegation of felony, and it was not alleged that criminal proceedings had been had thereon, and by the second he likewise prayed for the dismissal of the action on the ground that a *fille majeure* could not bring an action of damages for seduction.

McCrae, in support of demurrers, cited *Lamothe* v. *Chevalier* in support of the former.

Doherty, contra.

Day, J., The declaration in this case is expressed in terms of rather an extraordinary character; but the court does not think that the allegations amount to the allegation of a felony. With regard to the other demurrer, the action is *en déclaration de paternité*, as well as for damages for seduction and the demurrer is general. Both demurrers must therefore be dismissed, but perhaps the plaintiff will find that the absence of all allegation of any promise of marriage on the part of defendant will preclude her from recovering damages.

Demurrers dismissed.

No. 961.

Lynch v. *Papin.*

INFORMATION.—ELECTION OF CITY COUNCILLOR.—EXCEPTION A LA FORME.

P. had been elected as councillor to represent a ward in the City of Montreal; L. pretended that election of P. was illegal, and that he, L., ought to be declared duly elected councillor, and brought his action by requête libellée, and judges order in consequence. Held, *that writ of summons,*

and not order of court, was the way to bring defendant before the court, in order to answer the double demand of petitioner.

This was a proceeding by requête libellée, under the 12 Vic. c. 41, and the 14 & 15 Vic. c. 128, to oust the defendant from the office of a city councillor for the St. Mary's Ward in the City of Montreal, and to declare the plaintiff or informant to have been duly elected. The petitioner alleged that defendant was incapable of being elected a councillor at the election referred to in *requête*, because he had not been a resident householder within the city during the twelve months previous. The conclusions of the *requête* were in the following terms: "that said Joseph Papin be ordered to show by what "authority he exercises said office of councillor of and for St. Mary's "Ward, in and of this City of Montreal, and that an order do issue, "according to law, to compel the appearance of said Joseph Papin in "this court, for the purposes aforesaid, and to answer, if he see fit, this "information; and informant further prays that said Joseph Papin be "declared guilty of usurping and unlawfully holding office of councillor "of and for said St. Mary's Ward, in and of this City of Montreal, and "that he be ousted and exeluded from said office, and that said Patrick "Lyneh be declared to have been and to be entitled to said office, and "that the Mayor, Aldermen and Citizens of the City of Montreal, and "the Council of the said City, be ordered to admit him, said Patrick "Lyneh, to the said office of councillor for St. Mary's Ward afore-"said, as duly elected to said office, by the election and result of the "election before referred to, and that such other orders be made as to "right and justice may appertain, &c."

An order was made upon this petition, ordering the defendant to appear on the 17th May, 1853, to answer the same.

The defendant having appeared, answered said *requête* by an *exception à la forme*, by which he contended, among other things, that the order annexed to the petition served upon him, the defendant, was null and void, and that by it defendant had not been properly brought before the court, and that for the purposes of such a *requête* he, the defendant, ought to have been summoned by writ.

Upon the argument the petitioner contended that the Acts of the 12 Vic. and 14 & 15 Vic., referred to, ought to be viewed together; that he, petitioner, required the benefit of both Acts, and had, by his petition, set up his right as a voter, under 14 & 15 Viet., to complai

of defendant's intrusion, while he claimed also, under the 12 Vict., the office usurped by the defendant, as having received, of all these qualified to be elected councillor at that election, the greatest number of votes; that the form petitioner had adopted, and the order he had procured, was regular enough, and proper to be adopted, under 14 & 15 Vic.

Cherrier, Q. C., *Dorion & Dorion*, in support of exception.

Mackay & Austin, contra.

Day, J., This question is to be decided by 12 Vic. c. 41, sect. 6. By that statute a party may demand that the occupant of an office may be ousted and name the person who should replace him; but the mode of impleading parties by that statute is by writ of summons. If the plaintiff proceeds by order, according to 14 and Vic. c. 128, the court cannot call upon defendant to show cause why plaintiff should not replace defendant; for that Act only goes to oust a party holding an office wrongfully. The court is at a loss to know why an order should ever have been substituted for a writ of summons, unless it be that the Legislature, having by the 12 Vic., introduced something new instead of the writ of *mandamus* and *quo warranto*, were determined to introduce something still more novel by the 14 & 15 Vic. The *exception à la forme* must be sustained; but the court is not surprised that counsel should have been at a loss as to which proceeding to take, such an accumulation of legislation on the same point cannot fail to lead to inextricable confusion and litigation, and is extremely embarrassing as well to the bench as to the bar.

Exception à la forme maintained. Requête libellée dismissed.

No. 2417.

Macfarlane v. *Rutherford.*

PROMISSORY NOTE.—PRESCRIPTION OF FIVE YEARS.

To an action on a promissory note matured previous to the 12 *Vic. c.* 22, *coming into force, the defendant pleaded in bar the prescription of five years established by that statute.* Held, *that* 12 *Vic. c.* 22 *is not a bar, within five years after Act coming into force, to the recovery of notes matured previous to that Act taking effect.*

Bethune & Dunkin, for plaintiff.

Larkin, for defendant.

Day, J., The prescription of five years established by the 12 Vic. c. 22 does not affect notes matured previous to its coming into force. If it was intended to invoke the prescription of five years existing previously to that time, the plea is bad in form, as, under the old statute, the party availing himself of it required to offer his oath that the note had been paid.

Answer in law dismissed.

No. 2022.

Allo v. *Allo and al.*

This was an action brought by a father against his two sons for an alimentary pension, as he was upwards of sixty-three years of age, unable to work, and almost blind.

To this action the defendants pleaded that they had always been willing to give work to support plaintiff, who was still able to work to maintain himself; and one of the defendants, John Allo, a currier by trade, offered to employ plaintiff in his trade, which was also that of plaintiff. Defendants further offered to receive plaintiff into their respective families and support him there if he should become unable to work for his own support.

Bedwell, for plaintiff.

A. & G. Robertson, for defendants.

Day, J., It appears plaintiff can only do one kind of work, which he can only procure from his son, who has shown himself unfeeling to plaintiff, he must therefore have judgment. The only difficulty is the quantum, and as the defendants do not appear to be in affluent circumstances, the court reduces the pension to £30 a year, payable quarterly in advance, instead of £50 as demanded.

Mondelet (*C.*) J., In concurring in this judgment, said that one part of the evidence had great weight with him: it had been proved that plaintiff was very nearly blind and he thought the only kind of work which it had been proved he could do exposed his life to danger; he might fall into the tan-pit.

No. 57.

Benjamin, Appt., v. *Gore, Respt.*

This was an appeal from a judgment of the Circuit Court, on an opposition *à fin de distraire.*

Carter & Kerr, for appellant.

Day, J., in dismissing the appeal, as it was purely a question of evidence for the discretion of the court below, remarked that the appellant seemed to rely upon several interlocutory judgments, rendered in the case admitting certain evidence, and from which no notice of appeal had been given at the time. If a party wishes to challenge an interlocutory judgment he must object to it at the time it is rendered.

Appeal dismissed.

No. 150.

Bowker et. al, Appt., v. *Chandler, Respt.**

PROOF OF PARTNERSHIP.—ADMISSION OF ONE PARTNER NOT SUFFICIENT.

Held, *reversing judgment of Circuit Court, that the admission on faits et articles of the existence of co-partnership by one of the alleged partners is not sufficient to make proof against the other.*

This case was an appeal from the Circuit Court. In the court below the action had been brought by the respondent on a promissory note made by the defendants in the court below, now appellants, and signed "E. & J. Bowker, Jr." In the declaration it was alleged that the defendants were *co-partners;* and the return of the bailiff showed that this action had been served personally on one of the defendants, at "their counting-house in the Township of Farnham."

The defendants met this action by an *exception à la forme*, contending that there had been no regular service on the defendants.

* There was another case between the same parties in which the same point was raised, No. 151.

The plaintiff answered generally, and tried to establish the existence of the co-partnership by the admission of one of the alleged co-partners on interrogatories on *faits et articles*.

The court below thought this admission sufficient, and dismissed the defendant's *exception à la forme*. From this interlocutory the defendants appealed.

Doherty, for appellants.

Mack, for respondent.

Day, J., Proof of co-partnership can never be made by one of the co-partners; and, also, in this case there is no evidence to show that any co-partnership existed at the time of the making the note in question.

Appeal maintained.

No. 1227.

McCann v. *Benjamin.*

FALSE IMPRISONMENT.

Held, *that words used by a party sued for false imprisonment, in giving the party in charge, cannot also become the subject of an action for slander.*

Arrest arose out of a dispute as to whether a sale of 5 dozen shirt fronts was by the lot or by the dozen. Plaintiff alleging that they were sold by the quantity for $9, and defendant, that the sale was by the dozen—and that he had made a mis-calculation in charging only $9. The goods were delivered to plaintiff by defendant and taken out of the shop, but Benjamin, discovering his error, sent immediately to recall McCann, stating that there was a mistake.—McCann, however, refused to go back, and Benjamin then followed him, snatched from him a portion of the goods, gave him in charge to a policeman passing at the time, upon a charge of robbery, and sent a clerk to prefer the accusation, but upon hearing the facts McCann was discharged by police officer —Benjamin then returned to McCann the portion of goods taken from him in the morning, and thereupon action was brought by McCann for £200 damages.

Defendant pleaded his version of the sale in justification.

The evidence of the sale, which consisted of the testimony of defendant's clerks, went to establish a sale by the dozen, with the exception of the fact that the goods were returned to McCann after the arrest

Badgley, Q. C., *& Abbott*, for plaintiff.

Carter & Kerr, for defendant, urged first, that the sale was by the dozen, and that plaintiff knew it, that taking away the goods by plaintiff amounted to larceny—and that the facts were a complete justification of defendant; second, that under the Statute 4 & 5 Vic. cap. 26, s. 40, notice was required to be given by the plaintiff to defendant before commencing proceedings. In support of this second proposition defendant urged that this was a case within the Statute, and that under a similar Statute in England notice would be required in similar circumstances.

1 M. & W. 628.—9 M. & W. 740.—15 M. & W. 344.—2 Moore and Payne 613.—9 B. & C. 806.—6 Ad. & El. 661.

Plaintiff in reply denied the defendant's first proposition, and in reply to the second argument said, that to bring defendant within the protection of the Statute he must be acting in execution of it, and under its authority; and not only must believe himself to be so acting, but must have reasonable ground for such belief; and further submitted that the Statute was only applicable to officials acting in their capacity as such.

Plaintiff cited 6 B. & C. 357.—10 Ad. & El. 282.—10 Q. B. R. 150, 151.—1 M. & W. 620—note.—15 M. & W. 344—note.—1 Car. & M. 13, 14–18.—9 Car. & P. 651.

In rendering judgment, after recapitulating the evidence, *Day*, J., said, that the evidence of record certainly went far to establish the fact that the goods were sold by the dozen, and presuming that to be the case McCann was certainly wrong in refusing to pay the balance due upon them or to return them all, and receive back his money as offered by the defendant. This, however, would constitute no justification of the imprisonment, although it would of course have an effect in mitigation of damages, and, had there existed no circumstances to create in the minds of the Judges a doubt as to the nature of the transaction between the parties, probably a farthing damages would have been given, merely as a recognition of plaintiff's right of action. But the act of the return of the goods, isolated as it was, appeared to the minds of the Judges of considerable significance, and had much influenced the judgment the court was about to render.

As to the pretension of the defendant that he was entitled to the protection of the Statute cited, there was clearly no ground for it, as

Benjamin did not act under the Statute, or in execution of it, but evidently without any reference whatever to its provisions. In fact, grave doubts existed in the minds of the court whether any but officials could claim the notice referred to. Judgment for 50s. and costs. *

No. 813.

Ex parte Dunn, Pet., v. *Beaudet, Defendant.*

APPOINTMENT OF TUTOR.—SUBSEQUENT APPOINTMENT OF ANOTHER TUTOR TO THE SAME PARTIES INVALID.

D. was appointed Tutor to the minor children of his son deceased, the mother also being dead; subsequently, the maternal grandfather was appointed Tutor by Judge in another District. Held, *that appointment of second Tutor is invalid, the first appointment being still in force, and that the court sitting in Montreal cannot revise the appointment of a Tutor in the District of Three Rivers. That the appointment of Tutor dates from the avis de parents, and not from the homologation by the Judge.*

The petitioner Dunn had been on 19th January, 1852, appointed by *avis de parents* before a Notary at St. Ursule (under 14 and 15 Vic., C. 58,) Tutor to his grand-children, the minors Dunn, then at St. Ursule, issue of the marriage of the petitioner's son and the daughter of the defendant. The Notaries *acte* was homologated by the Judge at Three Rivers on 26th March, 1852. On the twenty-seventh day of January, in the same year, the defendant was in the District of Montreal appointed Tutor to the same children under the authority of Vanfelson, J., one of the judges of the Superior Court, the former Tutorship not having been annulled. The petitioner therefore presented his petition against defendant, *en destitution de tutelle*, and for the annulling of the second *acte de tutelle*.

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* Another action had been instituted by McCann against Benjamin for slander, but as it appeared in evidence that the words complained of were used to the Police Officer who arrested McCann, and in part constituted the charge against him, it was clear that the offence of using those words merged in the more serious one of the imprisonment, and that the action of slander must be dismissed.

To Dunn's petition the defendant answered, that *tutelle* under the Coutume de Paris was *dative*; that the petitioner's *tutelle* was null, as it had not been homologated till after the appointment of the defendant as tutor; that the domicile of the parents of the minors was, at the time of their death, at Coteau du Lac, District of Montreal; that the minors were of the Roman Catholic faith, as was also the defendant, who also resided in the District of Montreal; while, on the contrary, the petitioner was a Protestant, and resided in the District of Three Rivers. He concluded for a sentence dismissing Dunn's *tutelle*.

Upon the argument, the petitioner contended that his appointment as tutor dated from the *assemblée de parents*, at which he was appointed, and not from the time of its homologation by the judge; that his place of residence, though at Three Rivers, is within the same jurisdiction as Coteau du Lac (the pretended domicile of the parents of the minors at the time of their decease); and that the children had been put under the charge of the petitioner by their deceased father prior to his death. That his (petitioner's) appointment in District of Three Rivers was well enough conferred, and could not be held radically null and void, as pretended by defendant; that the two *tutelles* could not and ought not to be allowed to subsist at one and the same time, and that the latter one was null; that the petitioner was best entitled to the *tutelle* of these minors, being their *ayeul paternel*, whereas defendant was only their *ayeul maternel*, and that, under any circumstances, the court could not, upon the present proceedings, set aside the *tutelle* of petitioner as prayed by defendant.

The defendant contended that he was the tutor first appointed to the minors, for the Dunn's *tutelle* ought to be held to date only from time of its homologation; he also contended that the *tutelle* of the minors could not be conferred in the District of Three Rivers, for their father's domicile was at Coteau du Lac, in the District of Montreal. He contended that the appointment made in the District of Three Rivers was utterly null and void, and ought to be held so by the court here upon the present proceedings.

E. D. David, for petitioner.
R. Mackay, counsel.
Cherrier, Q. C., *Dorion & Dorion*, for defendant.

Day, J., Some very interesting points have been raised in this cause, but the court does not feel itself called on to adjudicate upon them. It is admitted that the appointment of Dunn, by *avis de parents*, as tutor

was prior to that of Beaudet, and that the prior appointment has never been annulled. The existence of two general *tutelles* is incompatible. The appointment of Dunn also took place in the District of Three Rivers, and the court here has no authority to revise the appointment of a tutor in the District of Three Rivers.

The appointment of Beaudet is set aside.

Smith, J., *& Mondelet* (*C.*), J., concurred

Dorion, Does the court hold the *tutelle* of Dunn to date from the date of the homologation of his appointment, or from the time of his appointment at the *avis de parents* before the notary?

Day, J., From the time of his appointment before the notary.

No. 2490.

Tidmarsh v. *Stephens & al.*

CERTIFICATE OF RETURN.

The original writ in this case was returned into court without any certificate of service, and the bailiff petitioned to be allowed to make his certificate after the return day. Held, *that there was nothing before the court.*

The bailiff who served this action on the defendants has returned the original writ into court without any certificate of service, and came before the court with a petition praying to be allowed to make his return on payment of such costs as the court might award.

Carter & Kerr, in support of petition.

David & Ramsay, contra.

Day, J., The court has given this point a good deal of attention. It is quite clear the prayer of the petition cannot be granted—there is nothing before the court. Besides, there is another technical objection, in all these *procès verbaux* or certificates of return, it is supposed that the bailiff writes them at the time he makes the service and not sometime afterwards from memory. The court would not give costs, the bailiff did not come there to pay costs.

Petition dismissed.

No. 1563.

Brush v. *Jones & al. & e contra.*

MOTION FOR NEW TRIAL.

Motion, *on the part of the defendant that the finding of the jury be set aside and held for naught, and that a new trial be granted.*

Rose, Q. C., *& Monk*, in support of motion.
A. & G. Robertson, contra.

The *court*, considering that the findings of the jury were contradictory, and that no judgment could be given thereon, granted the motion of the defendants and incidental plaintiffs. In consequence the court set aside the findings of the jury on the twelfth of December, 1853, and granted a new trial.

The *court* in pronouncing judgment stated that the jury had found that Brush had not fulfilled his contract with Jones, and yet found Jones was indebted for the causes mentioned in the plaintiff's declaration, which finding they considered to be contradictory and inconsistent.

New trial granted.

No. 921.

Bizaillon v. *De Beaujeu.*

Before her marriage plaintiff's wife had obtained judgment against defendant and another in their capacity of tutor and tutor ad hoc, and plaintiff now brought action against defendant to have judgment declared common and executory against defendant. Held, *that this was not the case in which a jugement commun could be granted.*

Cherrier, A. R., for plaintiff.
Bethune & Dunkin, for defendant.

Day, J., This is a novel point. It appears that the wife of plaintiff, previous to her marriage with plaintiff, had obtained judgment against defendant and another in their capacity of tutor and tutor *ad hoc*, and

the husband now brings his action against defendant to have the judgment declared common and executory against the defendant. To this action the defendant pleaded the general issue upon which the law and fact of the case came before the court. With regard to the facts of the case, at the time of the argument, the court was rather disposed to think that the marriage of the plaintiff was not very satisfactorily made out; but that is of very small importance, as the court does not think that this is one of the cases in which a *jugement* can be declared *commun*. There is no reason why such a proceeding should be allowed. The plaintiff does not require it. The parties are still before the court, and judgment is even executed in a dead man's name. There is no difficulty here, there are two ways of executing this judgment; but plaintiff cannot have a new and independent action.

His Honour cited the case of *Ogden* v. *Boston* in support of principle of judgment.

The judgment of the court was as follows:

"The court, considering that the proceeding for rendering the said judgment executory ought by law to be a proceeding in the cause in which the said judgment was rendered, and that no original action, apart from and independent of the said cause, can be by law brought for rendering the said judgment executory, doth dismiss the said action, &c."

Action dismissed.

No. 2121.

Leclaire v. *Crapser.*

FIRE-INSURANCE.

L. was cessionaire of T. of bailleur de fonds claim on certain property, on which there were buildings sold by T. to C. Before said sale T. had insured said buildings for 600*l.*, 100*l.*, *of which, being the amount of purchase money paid by C., T. had transferred in the usual manner, with consent of insurer, to C., retaining the balance of the policy,* 500*l.*, *as security for payment of the balance of purchase money still due. The buildings while covered by this policy were destroyed by fire, and T. received the* 500*l.*, *balance*

of policy, being a larger sum than the balance of purchase money still due; he subsequently transferred his claim for purchase money to L., who brought this action. Held, *that the sale of insured property extinguished the contract of insurance as between the insurer and the vendor; the profit of such insurance being vested in the vendee, so soon as the insurer is notified of the sale, and acquiesces in it.*

The defendant purchased on the 6th of May, 1852, two lots of land and the buildings thereon erected from one Tavernier for the sum of 462*l.* 10*s.*, currency, on account of which sum the defendant paid 100*l.*, at the time of passing the deed; and the balance of 362*l.* 10*s.* the vendee promised to pay at different times, in the said deed mentioned, with interest from the passing of the said deed. The vendee further obliged himself, for the security of the payment of the said balance, to insure the buildings on the said lots against loss and injury by fire, and to transfer the policy of insurance to the vendor. On the 22nd of November, 1851, the vendor had insured the said buildings for the space of a y ar in the "Liverpool and London Fire and Life Insurance Company," for the sum of 600*l.*, consequently at the time of the said sale the said buildings were covered by a policy of insurance. Of this policy of 600*l.* the vendor endorsed over to the vendee in the usual manner, with the permission of the insurer, on the 7th of May, 1852, 100*l.* in consideration of the 100*l.* paid on account of the purchase money. On the 8th of July, while the said policy was still in force, the said buil lings were destroyed by fire. Tavernier presented his policy of insurance at the office of the said Insurance Company and was paid the 500*l.* insured by him on the said buildings. On the 18th July, 1853, Tavernier transferred to plaintiff the balance of the purchase money of the said lots still unpaid by the defendant, and the plaintiff brought his action on the said deed of sale and transfer for 362*l.* 10*s.*

The defendant met this action by a plea in which he alleged that he ought to have been the recipient of the 500*l.*, paid by the said Insurance Company to Tavernier, and that by the receipt of the said 500*l.*, the balance due on the said sale was more than paid, previous to the said transfer to plaintiff.

Doutre, Daoust & Prairie, for plaintiff.
A. & G. Robertson, for defendant.

Day, J., By the sale of the said lots to the defendant the contract of insurance effected by Tavernier is at end, from one of the essential conditions on which it was based having ceased to exist. The law on this point, as exposed by the best authorities, sustains the high pretension that the interest in the policy passed to the defendant on the notification of the sale to the insurers and their acquiescence in it. It became in effect an insurance in defendant's favour, and the interest of the vendor ceased in it as owner of the property, and became merely the interest held through his vendee—the owner—as his hypothecary creditor. This doctrine will be found at length, with all the reasoning upon it, in *Quenault, Assurance* Nos. 214 to 226. 1 *Boulay-Paty, Cours de Droit Commercial, p.* 309. *Dalloz* vbo. *Assurance Terrestre, Alauzet, Assurance* Nos. 139–44. *Emerigon, Traité des Assurances*, Ch. XVI., Sect. 3. The two last authorities were cited by the defendant's counsel.

Action dismissed.

Feb. 20, 1854.

Present :—Day, Smith, and Mondelet (C.), *Justices.*

No. 2624.

Perrault v. *Deseve.*

CAPIAS AD RESPONDENDUM.—MOTION TO QUASH.

Cherrier, Q. C., *Dorion & Dorion*, in support.
Sicotte & Leblanc, contra.

Day, J. This case came up on a motion to quash a *capias and respondendum* on the ground that the affidavit was insufficient. The mover said that the ground for belief that defendant was about to leave the Province was only hearsay, as the affidavit did not disclose the name of the person or persons from whom he had acquired the information. The rule has been held here that the name of the party from whom the information was received should be mentioned. This is the English rule, it is also the rule followed at Quebec, and the statute here is not against it. Where a party says he is "informed and has reason to believe, &c., this mere allegation does not disclose the real grounds, because the word "informed" does not show how he was informed; strictly con-

strued, it might be said that he was informed by a number of circumstances, and as the intention of this statute is to do away with imprisonment for debt, except in very special circumstances, very great strictness must be used in the interpretation of words. In this case however it is unnecessary to state name of party from whom the information was derived, the affidavit is sufficient as it states that the defendant had sold his saw-mill, and all his wood, and was keeping himself and his moveable property concealed, and has taken no steps to satisfy the demand of the deposant (plaintiff). This is in accordance with the statute.

Motion dismissed.

No. 2284.

Wm. Clarke v. *Elizabeth Clarke et al.*

ACTION TO SET ASIDE WILL FOR CAUSE OF SUGGESTION, AND INSANITY OF TESTATRIX.

In October, 1843, the mother of the parties in this cause made a will, in which she bequeathed all her property to the female defendant, her daughter, and this action was brought by the plaintiff's son, as heir-at-law, to set aside the said will; it appears also that testatrix has made a will, some years previous to the making of the will attacked, by which she constituted the plaintiff universal legatee.

Drummond, Atty. Gen., & Loranger, for plaintiff.
Mackay, counsel.
Cross, for defendant.

It was proved by the notaries who received the will that it was carried ready written on the day it bears date to the testatrix's house. One of the notaries had gone, a few days before, for instructions. The second one never saw the testatrix before or after the day of the date of the will.

Day, J. This is a case of great interest from the amount of property claimed by this action, which is brought by plaintiff for the purpose of setting aside a will made by Anne Eve Waldorf, in the month of October, 1853. Plaintiff comes before the court as heir-at-law of the deceased testatrix, and alleges that a former will was made in his favour, and that defendants had induced testatrix, by undue influence

in her extreme old age, and when she was imbecile, to make the will in question. It is simply a question of evidence. A motion has been made to reject the evidence of several witnesses produced on the part of the defence, on the ground of interest, they being purchasers of part of the property of the said estate, and that consequently their titles will be bad if defendants lose; in answer, they state that testatrix was a party to their deeds, so that whatever party is successful the title of these witnesses would be binding. This is the salient point, but there are other reasons why the evidence of these witnesses should not be rejected. The objection to Dr. Mount that he made himself busy in the case, and eat and drank with one of the defendants, is not sufficient cause for the rejection of his evidence. In weighing all the evidence in this case it must be borne in mind that, whenever it is to be shewn that testator has declined in strength of mind by age, the question is whether there is an intelligent volition, and if it appears that there is, the will must be sustained. It is not whether the intelligence is more or less, but it is whether there is any or not. The testatrix in this case was very old, and no doubt was subject to the infirmities common to extreme old age; but there is nothing to show that she had lost all intelligence. The answers to *faits et articles*, made by the testatrix a short time before her death, show that there was loss of memory, but no loss of general intelligence, and rather argue against the pretensions of the plaintiff. If, however, the evidence made by the plaintiff stood alone it would probably be sufficient to support his case; but it has been met by strong contradictory evidence, and even setting aside the evidence objected to, the evidence of the notaries by whom the will was drawn, shews clearly that the testatrix was far from being a person deprived of all general intelligence. Letters from the plaintiff during his absence also show that he was in the habit of corresponding with his mother and of receiving answers from her, and from the tone of those letters it would appear that he considered her as a person of perfectly sound mind. The authors, wherever there is great difficulty, have given rules by which those called upon to decide such questions should be guided,—for instance, the intrinsic character of the will itself, such as an inequality of bequests without cause. But in this case we find nothing of the sort; the will complained of by plaintiff is not more extraordinary than that under which plaintiff claims. It appears that when the previous will was made plaintiff lived in his mother's house and managed her property, but getting into pecuniary embarrassment he was obliged to leave the place, and the defendant and her husband

went to live with the testatrix and performed all the duties which the plaintiff had been in the habit of performing. The judgment must therefore be for defendants.

Mondelet (C.), J., I have only two words to add to what has just fallen from the learned President of the court. In contradictory evidence, the presumption is always in favour of the testatrix; for weak as human intelligence may be, perhaps no more than a spark from the immeasurable intelligence of the Divinity, it is not for us to presume that it has perished.

Action dismissed.

No. 2311.

Clarke & al. v. *Wilson.*

ACTION OF DAMAGES.

This action was brought by the plaintiffs against the defendant to recover from him the sum of 5,000*l.* damages for the death of their son, Crosby Hanson Clarke, who was killed by the fire of a detachment of Her Majesty's 26th Regiment of Foot, on the evening of the 9th of June, 1853. The declaration sets forth, that: "the defendant, having the said troops under his order as aforesaid, did, unnecessarily, illegally and unjustifiably command, order and cause the said detachment of Her Majesty's 26th Regiment of Foot to load their muskets with powder and ball, to wit, with ball cartridge, in a remote and secret part of the City of Montreal, and out of view of any supposed commotion whatever, and before the said troops arrived at the place where the said commotion or disturbance was anticipated. That afterwards, the said defendant did cause the said detachment of troops to fire and discharge their said muskets upon divers persons then and there being, the said persons being at the time peaceable and orderly, and there being no riot or disturbance of any kind either at the time of firing or before or after, and the said Crosby H. Clarke, though lawfully attending to his business and affairs, and being in the peace of our Sovereign Lady the Queen, was there and then, and by the said discharge of muskets, so ordered and caused by the said defendant in his capacity of Mayor and Chief Magistrate as aforesaid, fired upon and

mortally wounded, and of such wounds he, the said Crosby Hanson Clarke, immediately and instantly died, &c."

The defendant demurred to this action on the grounds that the declaration disclosed a felony.

Loranger, in support of demurrer, cited the case of *Lamothe* v. *Chevalier*.

Rose, Q. C., *& Monk*, contra.

Day, J., After briefly stating the circumstances of the case said, the court is not called upon to settle the same point as that raised in *Lamothe* v. *Chevalier*. This case is covered by 10 & 11 Vic. c. 6; in the preamble that act states "that whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although death shall have been caused under such circumstances as amount in law to felony." This action is not founded on the common law, but on a Statute to which there is no condition annexed, and the court cannot annex a condition to a Statute where none is expressed. The 6 section also, which limits the time for bringing an action to within twelve calendar months, precludes the supposition that it was necessary to take any proceeding previous to instituting this action.

Demurrer dismissed.

No. 2558.

Clement & al. v. *Geer & Pettis, Plffs. en desaveu, & Drummond & al., Defts. en desaveu, & Clement, int. party.*

DESAVEU.

C. & P. were co-executors of a will, and C. directed defendants en desaveu as attornies to take action in name of both executors, against G., P. made a demande en desaveu against attornies. Held, *that one of two co-executors cannot bring action for estate either in his own name alone or in that of both, without concurrence of the other.*

The principal action in this cause was brought in the name of one

Chancey Clement and of one James Wilson Pettis, in their quality of executors of the last will and testament of one Amy Pettis, deceased, by Messrs. Drummond & Loranger, attornies for the recovery of the sum of £100, being the balance of purchase money due by the defendant, Geer, on the sale to him by the co-executors of a lot of land, which had formed part of the estate of the said Amy Pettis. It appears that the authorisation to the said attornies to bring this action was given by Clement alone, and without the concurrence of his co-executor, and Pettis brought his *demande en desaveu* of the proceedings of the said attornies. Clement intervened in the cause *en desaveu*, and set forth in his intervention the same ground which had been already pleaded by the said attornies in a pleading by them styled a *fin de non recevoir*, and in which it was contended that his co-executor having refused to join with him in this action against Geer, and it being necessary for the execution of the will that the said action should be instituted, he, Clement, had a right to institute the said action against Geer, not only in his own name but in that of his co-executor.

Bancroft, for plaintiff *en desaveu*.
Dunlop, for defendant *en desaveu*.
Doutre, for int. party.

Day, J. This is a question more of authority than of reasoning. It may be as well here as later to state that the opinion of the court is that it is not competent for one of two co-executors to institute action without the will of the other. The doctrine of the common and also of the civil law is, that where power is confided to two or more persons it must be exercised by all, the only difference being that the wording of the civil law is less stringent. *Story on Agency*, *Nos.* 42-3. *Pothier*, *Mandat*, *No.* 63. *Domat*, *Tit. XV*, *Sect.* 3, *Nos.* 14 & 15. *Merlin*, *Rep. Vo. Executeur. Testamentaire. N. Denisart*, *Executeur Testamentaire*, *No.* 10. *Bourjon* is the only adverse authority. This doctrine is also received in the Scotch law, which, like ours, is derived from the civil law. See Erskine's Institutes of the Laws of Scotland. A case very similar to this is to be found in the *N. Denisart* vbo. *Desaveu*. But even if one of two or more co-executors could sue alone it could not be in names of both. The court is, therefore, of opinion that the authorisation of Clement is not sufficient. The court, however, would remark that this is not one of those cases that reflects any kind of imputation on the attornies. The judgment of the court must be for plaintiff *en desaveu*, but condemning Clement to guarantee defendants *en desaveu* against Pettis.

No. 253.

Ramsay v. *Guilmette.*

LODS ET VENTES.—FRAUD BY SIMULATED DEEDS.

Held, *that proof of simulation of Deeds may be presumed from Deeds themselves, when there is an evident object to injure third parties, even though no one of the Deeds taken separately discloses the fact that it was simulated.*

This action was brought by the Seignior of the Seign[illegible] Ramsay, for the recovery of 82*l.* 6*s.* 8*d.* and interest, due by the defendant for *lods et ventes.* It appears that the defendant by a deed of sale passed on the 22nd day of August, 1850, before Brodeur and Colleague, notaries public, purchased, or rather pretended to purchase, a lot of land in the Township of Upton, from one Lebœuf, for the sum of 100*l.*, payable on the 20th November then next; that on the 26th of the same month the defendant exchanged the lot of land in the Township of Upton with one Gendron, for a lot in the plaintiff's seigniory, and, on the same day, before the same notaries, the said Gendron ceded the Township lot back to Lebœuf, in consideration of his ceding to him his claim for 100*l.* from Guilmette, and to this third deed Guilmette became a party. The plaintiff alleged that these deeds were simulated, and in reality covered a verbal sale of the land within his *censive* for the sum of 100*l.*, for the *lods et ventes* on which he claimed with interest from the time of passing the said deeds. There was no *enquête* on either side.

Mondelet & Ramsay, for plaintiff, relying on the presumption arising from the three deeds above mentioned, copies of which were filed, in support of the action, cited: *Guyot*, 3 *Vol.*, pp. 233-4-5. *Guyot Repert. p.* 588. *Vo. Exchange—p.* 492. *Vo. Ret. Lignager—p.* 662, 2*nd col. Vo. Lods et Ventes.* In such a case fraud is presumed. *Pothier, Retrait Lig.* 1, *Vol.*, 4*to ed.*, *Nos.* 94-5,—*Henrion de Pansey, pp.* 181, 213. See also case of *Lacoste* v. *Lussier, No.* 1711, *C. of K. B.* Judgment for plaintiff, 23rd Feb., 1843. In giving judgment in this case, Vallière, C. J., said, that similar judgments had been given at Three Rivers. Also *Stephens and Lefebvre, No.* 671, *S. C.* Judgment for plaintiff, April 26th, 1853.

Sicotte, for defendant, contended that fraud could not be presumed, that the *censitaire* had a right to defraud the seignior of his *profits de ventes* by entering into any lawful transaction, that an exchange was a

contract which he had a right to enter into, and that it did not bear *lods et ventes*. Cited *Repert. Vo. Fraude.*

Smith, J. (dissenting), said, that not long ago he had concurred in a judgment in favour of plaintiff in a case similar to this (*Stephens* v. *Lefebvre*); but since then he had had reason to change his opinion. He found it laid down in all the books from Dumoulin down—in the authorities cited by the plaintiff—that in a case like the present where simulation is alleged against an *acte authentique*, there must be proof of simulation. The evidence arising from the deeds themselves may be a presumption of fraud, but unless some evidence be given of simulation, the deeds themselves must be taken to be what they purport to be on the face of them, and must be taken to be *bonâ fide* what they appear to be, and although the intention to defraud the seignior may be presumed, yet this mere presumption of fraud is no proof whatever of simulation. *Guyot Fiefs, p.* 232–34. *Rep. Vo. Echange, p.* 588. The presumption of fraud arising from the party remaining in possession mentioned in the last authority is under *Art.* 459 *of the Coutume de Bourbonnais, Rep. Vo. Retrait Lignager*, 492. *Pothier, Retrait, Nos.* 94–5. This authority of Pothier is founded on a special article of the *Coutume d'Orleans*, and this is shewn by Guyot, Vo. Ret. Lignager above cited. *

The learned Judge also cited Proud'hon, Fiefs, pp. 262-3, to show that the *censitaire* is allowed to make any contract that would deprive seignior of his *lods*—unless the deed be *proved* to be simulated; *lods* not being due even if it be shewn that deeds have been passed in fraud. Also, Merlin, Rep. Vo. Fraude, p. 388. *Non sufficit probare fraudem nisi etiam probetur simulatio.* Il (the plaintiff) doit prouver, *aliud actum quam scriptum.* And the authorities there cited *Dumoulin, Tiraqueau, Basnage D'Argentre, Lalande* et *Henrys.* If the plaintiff's

* Here is the authority from *Repertoire* at length: "Mais comme dans ces occasions, la fraude se pratique ordinairement par des voies sourdes et difficiles à découvrir, les coutumes et la jurisprudence la présument en deux cas.

Le premier, lorsque l'héritage donné par l'acquéreur en contr'échange lui a été revendu dans l'an du contrat. On vient de voir que telle est la disposition de la Coutume de Normandie; c'est pareillement celle des Coutumes d'Orléans, Article 386; de Vitry, Art. 30; de Melun. Art. 142; de Sens, Art. 228; d'Auxerre, Art. 159; d'Anjou, Art. 401; du Maine, Art. 412. *C'est aussi ce qu'enseignent les coutumes muettes*, Dumoulin sur Paris, Art. 33, Glose 2, no 92; Tiraqueau, *de retractu*, Art. 1; Glose 14, no 35, Loysel dans ses Institutes Coutumières, Liv. 3, Tit. 5; Pocquet de Livonnière, Traité des Fiefs, Liv. 5, Chap. 4; et Pothier, du Retrait, No. 94.

argument were good, it would be so if the allegation of a private sale were altogether omitted from the declaration, and, if not alleged, then the proof of simulation must be found in the deeds themselves.*

Day, J., There is not much difference between my learned brother and the majority of the court as to the right of parties to defraud (to use the expression of the books) the Seignior; but the question is one of simulation—whether the transaction was really performed or not. My learned brother seems to think that there must be some intrinsic evidence of the simulation, and that no intrinsic evidence is sufficient.

Smith, J., There might be intrinsic evidence on the face of the deeds, but there is not.

Day, J., What the law in France meant by the expression, "*il est permis de frauder le seigneur*, was simply that the censitaire had the right to enter into any contract that he pleased by which he might avoid paying *lods et ventes*, but he must really perform the contract and not only appear to do so. In this case nothing can be plainer than that these are simulated deeds; it is a much stronger case than *Stephens* v. *Lefebvre*. After briefly stating the transaction his Honour remarked that he could not conceive what proof the plaintiff could produce stronger than that contained in the deeds themselves. The judgment of the court is for the plaintiff, without interest claimed from the passing of the deeds.

Ramsay, for plaintiff. Counsel was not heard on the point of interest.
Day, J., There can be no doubt that interest is not due.†

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* It would seem that the plaintiff might have claimed his *lods et ventes* on the Deed of Exchange alleging that it was simulated, producing the other two deeds as proofs of its simulation. V. Fonmaur, Tr. des Lods et Ventes, No. 839.

† With all possible deference to the opinion of the court, as expressed by Mr. Justice Day, we are not altogether satisfied as to the claim of interest being so thoroughly unfounded as the court seems to hold. It will not be doubted that all *fruits civils* are due where there has been a *mala fide* retention of that which produces them. A rule of law which necessarily flows from the principle, "*nul ne doit profiter de son dol*," *Domat*, Liv. III., Tit. 5, Sect. 3, Nos. 3, 4 et 16. This principle, we admit, did not formerly extend to interest on money;—and why? Because it was declared to be illegal to charge interest at all, it being against the then received rules of religion and of morality; but these views having ceased to exist among the more enlightened portion of mankind, and the positive law having enacted a rate at which interest shall be recoverable, it may be asked, why money should not produce its "*fruit civil*" as well as every other commodity on the rule, *cessante causâ, cessat lex*. There is now no law against it.

23 *Feb.*, 1854.

Present —Day, Smith and Mondelet (C.), *Justices.*

No. 2634.

Lynch v. *Papin.*

MCTION TO REJECT EXCEPTION DILATOIRE.

Non-payment of costs in a former action cannot form the subject of an exception dilatoire.

The informant or plaintiff takes a proceeding by *requête libellée* against defendant, under the 12 Vic. c. 41. The defendant pleads by an *exception dilatoire* that the plaintiff is indebted to him in a certain sum, being the costs upon a former *requête* dismissed, that this *requête* is substantially the same as the former one, and that until payment of these costs all proceedings ought to be suspended. The plaintiff moved to reject the *exception dilatoire* as irregular, the matters set forth in it not constituting matter for an *exception dilatoire* proper, and for other reasons. Upon the argument, defendant contended that there was nothing to be found in the books which militates against his proceeding, but, on the contrary, much which justifies it;—that *Pijeau* states, as subject matter for such an *exception*, the absence of a plaintiff, which made him liable to give security for costs,—that this case was very analogous.

MacKay & Austin, in support of motion.
Cherrier, Q.C., Dorion & Dorion, contra.

The *court* (Day., J., dissenting) maintained the plaintiff's motion.†

No. 2610.

Nye v. *Macalister.*

CAPIAS.—SUFFICIENCY OF AFFIDAVIT.

Motion to quash capias, the affidavit being insufficient. Held, *that it is necessary to allege specially on face of affidavit all that is necessary to give right to the process.*

Nye, for plaintiff.
Carter & Kerr, for defendant.

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* See *Ante* C. R., page 10.

† In the Review de Législation of 1847-8, pp. 70-1, mention is made of two causes in which the like doctrine was held, but the Editor observes, in a note, "This practice is now altered;" but this note is unsustained by any precedent.

Day, J., The affidavit sets out that defendant is indebted to the deponent (plaintiff) in the sum of 10*l.*, being the amount of two obligations due by defendant and transferred to plaintiff. There is no statement of signification. The question is whether it is necessary to allege signification on face of affidavit or whether it may be inferred. It is the opinion of the court that everything that is necessary should be stated *at length* on the face of the affidavit. This is in accordance with the English authorities.

Motion granted.

CAUSES DÉCIDÉES ANTÉRIEUREMENT À LA FONDATION DE CE JOURNAL.

5 *Décembre*, 1852.

Présents :—Smith, Vanfelson et Mondelet (C.), *Juges*.

No. 454.

Meunier v. *Cardinal*.

PREUVE PAR TÉMOINS INSTRUMENTAIRES.

Jugé, *que les témoins instrumentaires à un acte contre lequel une inscription en faux est formée, ne suffisent pas pour établir le faux.*

Dans cette cause une inscription *en faux* est formée par Meunier et son épouse contre la minute du testament de l'épouse du défendeur, invoqué par ce dernier au soutien de sa défense.

Ce testament avait été reçu devant Mtre. Cadieux, notaire, et deux témoins. Les seuls témoins produits pour établir le *faux* ont été les témoins instrumentaires. Le *faux* fut établi, mais la *Cour*, (*Mondelet*, (*C.*), *dissentiente*,) a débouté la demande en faux, sur le principe que le seul témoignage des témoins instrumentaires n'était pas suffisant pour établir le *faux*, le témoignage de tels témoins étant suspect.

Vanfelson, *J.*, Si les témoins entendus en cette cause étaient des hommes instruits, il pourrait peut-être en être autrement.

DeBleury, pour le demandeur en faux.
Moreau, *LeBlanc et Cassidy*, pour le défendeur.

26 *Nov.*, 1853.

Présents:—Smith, Vanfelson, and Mondelet (C.), *Juges.*

No. 2016.

Mire v. *Létourneau.*

INTERRUPTION DE PRESCRIPTION.—DÉFENSE PRÉLIMINAIRE.

M. poursuit L. pour salaire de plusieurs années et le prêt d'une somme de £18. 0. 0. *L. plaide la prescription annale et nie le prêt de* £18. *Le demandeur ayant allégué une interruption de prescription; il fut jugé que cette question d'interruption doit être considérée comme une défense préliminaire et que les parties avaient eu droit de procéder à l'enquête sur ce fait au préalable.*

Cette demande était portée pour salaires et gages depuis plusieurs années et pour le prêt d'une somme de £18. 0. 0. Le défendeur opposa la prescription annale au chef de l'action ayant trait à salaires et nia spécialement le prêt en question. Sur ce, le demandeur ayant allégué une interruption de prescription, il fut reconnu, par le jugement de la Cour rendu subséquemment, que les parties avaient eu droit de considérer cette question d'interruption de prescription, comme une défense préliminaire et de procéder à l'enquête sur ce seul fait au préalable.

Desjardins et Morin, pour le demandeur.
Lanctôt, pour le défendeur.

No. 631.

Bonneau v. *Moquin*, et *Moquin*, fils, opposant.

PAPIERS FILÉS A L'ENQUÊTE.

Le demandeur ayant contesté l'opposition afin de distraire de Moquin, fils, sur le principe que la donation qui lui avait été faite par le défendeur, son père, des terrains saisis, l'avait été en fraude et à une époque où Moquin père, était insolvable, produisit lors de son enquête certaines copies de jugement et autres documents pour établir l'insolvabilité du défendeur.

L'opposant s'objecta à la production de ces documents sur le principe qu'ils auraient dû être filés lors de la contestation, néanmoins la Cour en terme confirma la production de ces papiers et ce en conformité aux règles de pratique, page 9, chapitre 6, sec. 24.

Lafrenaye, pour le demandeur.

Cassidy, pour l'opposant.

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30 *Nov.*, 1853.

Présents :—Smith, Vanfelson and Mondelet (C.), *Juges.*

No. 1905.

Brossard v. *Sarah Murphy*, et *Sarah Murphy*, dem. en garantie, et *St. Hilaire*, déf. en garantie.

B. demandeur principal poursuit M. pour loyer. M. appelle en garantie St. H. son locateur. St. H. plaide qu'il est propriétaire de la maison louée en vertu d'une donation de C. A. B. Le demandeur principal, invoque par une réponse spéciale la nullité relative de cette donation.

Jugé ; que la nullité ne pouvait pas être opposée par une réponse de ce genre.

La demande principale était pour loyers au montant de £125, courant, échus jusqu'au 1er février, 1853. La défenderesse qui avait payé loyers à St. Hilaire, son locateur, l'appela en garantie, et ce dernier plaida à la demande principale et y répondit en alléguant qu'il était propriétaire de la maison louée en vertu d'une donation que lui avait consentie Charles Alfred Brossard. Le demandeur principal par sa réponse spéciale invoqua la nullité relative de cette donation et conclut à ce qu'elle fût déclarée nulle.

Le défendeur en garantie répliqua qu'en droit cette réponse spéciale était plaidée irrégulièrement et illégalement ; en autant que cette nullité relative ne pourrait pas être opposée par une réponse de ce genre.

Lors de l'audition en droit, le demandeur principal prétendit qu'il était loisible à une partie d'invoquer la nullité relative d'un acte par voie d'exception et de réponse spéciale à une exception, et déclara s'appuyer sur la décision rendue en la cause de " *The Principal Officers of Her Majesty's Ordinance, appellant, and Taylor, respondent.*" Le

demandeur en garantie observa que cette décision ne pouvait s'appliquer que dans de certains cas particuliers ; et que d'ailleurs il était de jurisprudence constante que " les voies de nullité n'ont point lieu en France ; " en sorte que la nullité *respective* ne peut être alléguée que par la voie d'une demande.

La Cour a maintenu la réponse de St. Hilaire et a débouté le demandeur principal de sa réponse spéciale avec dépens.

Loranger, pour le demandeur.

Lafrenaye et Cressé, pour le défendeur en garantie.

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26 *Nov.*, 1853.

CIRCUIT COURT.

Present :—J. C. Bruneau, J.

Tavernier v. *Dame Bonneville*, et *Dechantal* et ux., opposants.

PRIVILÉGE D'UN PREMIER LOCATEUR.

Le demandeur avait fait vendre dans le cours du mois de novembre, 1853, tous les meubles de la défenderesse qui garnissaient la maison qui lui avait été louée par les opposants le 1er mai, 1853, et que le demandeur avait fait saisir-gager le 3 mai, 1853, sur la défenderesse, lorsqu'elle était encore dans la maison du demandeur.

Le demandeur après avoir obtenu jugement en mai, 1853, attendit jusqu'au mois de novembre, 1853, pour faire vendre les meubles. Les opposants prétendaient être payés par privilége de locateur et de préférence au demandeur, sur le principe qu'ayant laissé écouler le laps de *deux mois et quinze jours*, il avait perdu son privilége. Les opposants s'appuyaient sur l'art. 172 de la Coutume : " Les exécuteurs sont tenus de faire vendre les biens dedans deux mois," etc., et sur ce qu'il fallait assigner une limite à la négligence d'un premier locateur, sans quoi son privilége antérieur pourrait s'étendre pour une période indéfinie et primer celui d'un nouveau propriétaire un an ou deux ans après, et sans que le nouveau propriétaire pût en soupçonner l'existence.

Les opposants en outre s'appuyaient encore sur l'article 20 du titre 19 des Séquestres de l'Ord. de 1667. La Cour par son jugement a débouté l'opposition avec dépens ; en sorte que le privilége de premier locateur a prévalu.

Papin, pour le demandeur.

Lafrenaye et Cressé, pour les opposants.

18 *Février*, 1854.

Présents :—Day, Smith et Mondelet (C.), *J. J.*

No. 2274.

Desbarats v. *Lagrange et Fisher, Oppt.*

Jugé, *que la contestation d'une opposition et subsidiairement du projet de distribution ne peuvent avoir lieu simultanément par les mêmes moyens.*

L'opposant Fisher avait contesté l'opposition d'un autre opposant sur le principe que ce dernier n'avait aucun titre ou créance contre le défendeur, et avait conclu à ce que l'opposition fut renvoyée avec dépens, et en outre à ce que cette partie du rapport de collocation et de distribution qui avait trait à la créance de l'opposant fut réformée et mise de côté. L'opposant, dont la créance était ainsi contestée, fit motion à ce que cette contestation fut rejetée, sur le principe que l'on ne pouvait contester simultanément par les mêmes moyens l'opposition et le rapport.

La *Cour* à l'unanimité adopte cette motion et la contestation est en conséquence renvoyée *in toto* avec dépens.

T. S. Judah, pour l'opposant contesté.

Cross et Bancroft, pour le contestant.

N.B.—L'opposant Fisher a donné avis d'appel au Banc de la Reine.

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28 Feb., 1854.

Present :—Day, Smith and Mondelet (C.), *Justices.*

Benoit v. *Peloquin.*

RULE FOR PEREMPTION D'INSTANCE.

This was a rule for *peremption d'instance* taken 3 or 4 days after the expiration of the 3 years since last proceeding in the cause. The plaintiff contended that by the 10 sect., 16 Vic. chap. 194, the time from the 10th of July to the 31st August inclusive did not count; that the language of the statute being express the court could not interfere with it.

Roy, in support.

David, contra.

Day, J., The court is against the plaintiff. This is a prescription, and the stopping of time mentioned in the statute cited cannot be applied to prescriptions.

Rule declared absolute.

No. 131.

Exparte *Bélanger.*

CERTIORARI.

Pominville, for petitioner.

Day, J., This is an application for a writ of *certiorari* to bring up the record of a cause from the Commissioners Court, in which judgment had been rendered on a Thursday without adjournment. This is no ground for a writ of *certiorari*. This remedy is intended to reverse a judgment where there is a colourable jurisdiction, not to try whether a man is a judge or not. Such a judgment as the one complained of would be an absolute nullity.

Writ refused.

No. 2368.

Rowbottom v. *Scott.*

ACTION ON BILL OF EXCHANGE.

This is an action on a bill of exchange drawn by the plaintiff on the defendant in favour of one Cassels and accepted by the defendant. The bill at maturity was not paid by the defendant and Cassels returned it to the plaintiff. The defendant demurred to the declaration, on the ground that it was not alleged that the plaintiff had been called on to pay the bill or had paid it, or that he had any interest in it whatever.

Morison, for plaintiff.

Cross & Bancroft, for defendant.

Day, J., The bill having been accepted and returned to drawer in him the action rests. The word *returned* has a technical meaning.

Demurrer dismissed.

No. 991.

Taillefer et al. v. *Taillefer* et al.

Jugé que le notaire peut être examiné comme témoin pour établir la vérité des faits contenus dans l'acte argué de faux.

Cette question fut soulevée à l'enquête sur inscription de faux du testament de Taillefer père. Le juge président avait rendu jugement portant que le notaire ne pouvait être examiné comme témoin pour établir la vérité des faits contenus dans l'acte argué de faux. Les défendeurs firent motion pour faire reviser ce jugement par la cour en terme. C'est en adjugeant sur le mérite de cette motion que les juges ont permis l'examen du notaire.

Par l'inscription de faux on alléguait que le testament n'avait pas été dicté et nommé par le testateur au notaire, que le testateur était lors du testament, privé de l'usage de la parole et dans un état d'imbécilité complète.

Les défendeurs en faux se fondant sur des *précédents* pour obtenir la révision du jugement rendu à l'enquête, citèrent la cause de *Clarke* v *Clarke* et prétendirent qu'il était important d'examiner le notaire, dont le témoignage devait être aussi recevable que ceux des témoins instrumentaires déjà examinés dans la cause, d'autant plus qu'il pouvait servir à éclairer les juges.

Les demandeurs de leur côté appuyant la décision rendue à l'enquête prétendirent que le témoignage du notaire dans la cause ne pouvait valoir plus que l'acte qu'il avait fait, lequel contenait déjà l'attestation du notaire sous serment d'office sur tous les faits sur lesquels il pouvait être examiné; qu'une nouvelle déclaration de sa part n'y pouvait ajouter aucune force. En outre, on mettait le notaire dans la nécessité de se parjurer pour éviter le châtiment et l'infamie, conséquence du faux, ou d'avouer qu'il avait été parjure lors de la confection de l'acte, qu'il était dès lors dangereux et inutile de permettre son examen.

En France on examinait le notaire, comme procédé d'instruction criminelle suivi à l'égard de tous les accusés, ce qu'on ne pourrait faire ici.

R. Laflamme, pour les demandeurs en faux a cité Merlin, Repertoire Vo. Témoin instrumentaire Testament. Merlin, Questions de Droit. Carré et Chauveau, vol. 2, p. 248, q. 926, idem 431. Toullier, vol. 5, no. 410.

DeBleury, pour les défendeurs en faux.

Smith, J. Le jugement rendu à l'enquête doit être renversé, la Cour est formellement d'opinion de permettre aux demandeurs en faux de procéder à l'examen du notaire.

No. 2146.

La Fabrique de Vaudreuil v. *Pagnuelo*

Cette action fut portée pour le recouvrement de certains dommages causés à la demanderesse par le défendeur. Ces dommages sont prouvés par des paroissiens catholiques de Vaudreuil. Le défendeur a objecté lors de l'enquête à leur audition sous le prétexte que fesant partie de la Fabrique de Vaudreuil la demanderesse, ce procès se trouvait dans l'intérêt des témoins aussi bien que des autres paroissiens, et que partant ils se trouvaient intéressés dans l'événement. La question soulevée était de savoir si ces témoins pouvaient être reçus à faire preuve et s'ils sont intéressés au degré prohibé par la loi.

Hubert, Ouimet et Morin, pour la demanderesse.

Loranger, pour le défendeur.

La Cour considère la preuve de la demanderesse parfaitement légale et renvoie l'objection du défendeur.

Vide Merlin, vol. 17, Rep. 671, Vo. Témoins Judiciaires, Rep. Juris. Guyot, Vo. Témoin et Témoignage.

No. 1195.

Exparte Cazelais, Requérant, Ramsay, Oppt.

La partie qui veut acquérir une hypothèque doit spécifier dans l'Acte la somme de deniers dont se trouvera grevé l'immeuble.

Ramsay avait acquis d'une Madame Veuve Desève un immeuble dont elle avait l'usufruit seulement, la propriété en étant à ses petits enfans. Cette acquisition fut faite pour une certaine somme de deniers que Ramsay devait garder en ses mains en en payant l'intérêt jusqu'à l'âge de

majorité des enfans, époque à laquelle il devait payer le capital, sur la ratification de la dite vente par ces derniers. Au dit acte de vente est intervenu un nommé Desève qui s'est porté caution vis-à-vis de Ramsay pour l'exécution de toutes les clauses du dit contrat, et à cette fin a hypothéqué un immeuble. Subséquement Desève a vendu à Cazelais l'immeuble ainsi hypothéqué, et c'est du titre d'acquisition, que ce dernier demande ratification à la Cour.

Ramsay fait son oppo-ition à tout jugement de ratification à moins d'être maintenu dans ses droits d'hypothèque fondés sur l'inscription de son titre suivant la loi.

Cazelais a contesté par défense en droit l'opposition de Ramay, prétendant qu'il n'avait pas d'hypothèque sur l'immeuble, vû que par l'acte de cautionnement, l'immeuble n'avait été affecté à aucune somme spécifique, tel que voulu par la loi, c'est sur le mérite de cette défense en droit que la Cour avait à prononcer jugement.

Moreau, LeBlanc et Cassidy, pour Cazelais.
W. G. Mack, pour Ramsay.

Day, J. Si l'opposant Ramsay eut voulu acquérir une hypothèque sur le dit immeuble il devait faire mention d'une somme de deniers dans l'acte de cautionnement. La Cour doit maintenir la défense en droit et débouter l'opposition.

No. 189.

Perrigo, appelant v. *Hibbard, intimé.*

Jugé. *Que l'engagement d'un commis marchand est un fait commercial, qu'il a droit au bénéfice des lois qui régissent la preuve en fait de commerce pour établir le montant du salaire convenu et la durée de l'engagement.*

La présente action a été portée à la Cour de Circuit pour le recouvrement de £50 0 0, balance sur huit mois de salaire, dûs sous les circonstances suivantes.

Le 15 août, 1852, l'appelant était au service de la Corporation de Montréal comme Inspecteur et Ingénieur en chef du département du feu, moyennant une somme de £150 0 0 par année. Vers le commencement de septembre, de la même année, à la demande de l'intimé, il laissa le service de la Corporation pour celui de ce dernier moyennant

le même salaire payable mensuellement. Au commencement du mois d'avril suivant, l'intimé renvoie l'appelant. Ce dernier porte la présente action pour balance de salaire. L'intimé ayant nié avoir jamais engagé l'appelant pour aucune période de temps fixée, les parties allèrent à l'enquête. L'appelant établit l'engagement et sa durée par un temoignage verbal. L'intimé de son côté ne fit aucune preuve, mais lors de l'argument au mérite s'appuya sur l'objection entrée au témoignage verbal produit en cette cause et demanda le débouté de l'action comme n'étant supportée d'aucune preuve par écrit, seule preuve admissible dans le cas actuel.

La Cour de Circuit par son jugement du 11 novembre dernier a accordé les conclusions du défendeur et a débouté l'action. C'est ce jugement que la Cour Supérieure est appelée à réviser.

Moreau, Leblanc & Cassidy, pour l'appelant.
A. & G. Robertson, pour l'intimé.

Day, J. Cette action a été portée par un commis marchand pour le recouvrement d'une balance de son salaire. Toute la preuve de son engagement est verbal. La Cour Inférieure a considéré cette preuve comme insuffisante.

La première question qui se présente est de savoir si le commis a droit au bénéfice des lois qui régissent la preuve en fait de commerce. La Cour ne nourrit aucun doute sur ce point. C'est un fait commercial. La seconde question est de savoir si cette preuve admise comme bonne, est suffisante pour lui faire obtenir son jugement. La Cour la croit suffisante et en conséquence met de côté le jugement de la Cour Inférieure.

N. B. L'Intimé a donné avis d'appel au Banc de la Reine.

No 301.

Orvis v. *Voligny*.

LIABILITY OF COMMON CARRIER FOR DELAY.

Rose, Q. C., & Monk, for plaintiff.
Papin, for defendant.

Day, J., This is an action for the recovery of some 300*l.* damages for injury done to a cargo of grain and potatoes shipped by the plain-

tiff on board of the defendant's barge, by the default of the defendant carrying the said cargo to Burlington, the place to which the cargo was shipped, without delay. There are two counts in the declaration, by the first the plaintiff alleges that defendant undertook to deliver the cargo at Burlington on the 1st July. The first count is not proved; but by the second count the plaintiff alleges that defendant was obliged to use all due diligence in transmitting the cargo. It appears that the barge left the North Gore, on the Rideau Canal, on the 21st of June, and arrived at Montreal on the 26th, where it remained till the 6th of July. The Court is of opinion that the plaintiff has made out that the difference between the value of the articles shipped by him, had they arrived in a good state, and their value in the state they were received at Burlington, is 275*l*. The only question, therefore, that remains is as to the degree of diligence plaintiff was required to use. We are of opinion that the fact of the barge being detained ten or twelve days at Montreal sufficiently establishes a want of due diligence on the part of the defendant. The judgment is therefore in favour of plaintiff for the amount of damage that has been proved.

No 2263.

Ball v. *Lambe & Scriver and al.*, int. party.

Rose, Q. C., & Monk, for plaintiff.
A. & G. Robertson, for defendant.
Rose, Q. C., & Monk, for intervening party.

Day, J., This is a petition by executors to be allowed to intervene in a petitory action. It has been met by a *defénse en droit*, that they are not entitled to take up instance in such an action. This demurrer is well founded.

Demurrer maintained.

No. 663.

McCarthy, Appt., v. *Laurier, Respt.*

VERBAL SLANDER.

This is an appeal brought from a judgment of the Circuit Court

sitting in the Circuit of L'Assomption. The action was brought in the Court below by a sworn surveyor for the recovery of 20 damages for verbal slander, the declaration alleging that the defendant had maliciously said of the plaintiff, in presence of several persons, that he, the plaintiff, "*avait fait, inventé et forgé des contrats,*" and had used other expressions in the sense that the plaintiff had "*forgé des actes.*" The plea specially denied the facts. It appears that McCarthy and one Beaupré were engaged having the boundary lines of their lands drawn, and that the said Laurier was the surveyor employed by Beaupré. Four witnesses were examined on the part of the plaintiff, all of whom stated to the effect that plaintiff had made "*des titres*" for one Beaupré during the previous evening, and in explanation plaintiff attempted to prove what was meant by this expression. This evidence was objected to, and defendant's objection was maintained, there being no intent laid in the declaration. The judgment of the Court below was in favour of plaintiff, condemning him to pay 4*l.* damages and costs.

From this judgment the present appeal was brought.

Leblanc & Cassidy, in support.
Turgeon, attorney for plaintiff in court below.
Laflamme, counsel in appeal, contra.

Day, J., This Court is always disposed if possible to sustain the judgments of inferior tribunals, but in this case it is impossible,—neither the words alleged in the declaration nor any thing equal to them has been proved. There being no intent laid in the declaration, no proof of meaning of words could be made.

Appeal maintained.

No. 1938.

Macfarlane v. *Rodden* & al.

COMPENSATION.

This was an action brought for the recovery of the balance of a joint and several promissory note, given by the defendants to the plaintiff, the demand was met by an exception of compensation, the defendants praying to be allowed to set-off a debt due by the plaintiff to William Rodden, one of the said defendants.

Bethune & Dunkin, for plaintiff.
A. & G. Robertson, for defendants.

Day, J., This action is met by off-set of a debt alleged to be due by plaintiff to one of defendants. This exception of compensation must be dismissed.

Exception dismissed.

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20 *Feby.*

Present :—Day, Smith and Mondelet (C.), *J. J.*

No. 2087.

Simard v. *Jenkins.*

Held, *that jurors acting within the limits of their functions cannot be questioned as to whether the finding of their verdict proceeded from malice, and that if they cannot agree on a verdict any one of them is equally protected as the whole in expressing his own individual opinion of the case.*

The defendant in this case was one of the members of a coroner's jury, empannelled to investigate the cause of death of certain persons shot on the 9th of June, 1853, near Zion Church, in the City of Montreal. The plaintiff was one of the city police, present at the time these persons were shot, and was summoned to give his evidence before the coroner. The jury could not agree upon a verdict, and nine of the jurors, of whom the defendant was one, in giving their views as to the evidence, commented in particular on that of plaintiff and of four other witnesses in the following terms: "The jurors cannot omit finding that, in the course of their investigation, evidence of the most conflicting and irreconcilable character was given, which, however desirous they have been to attribute it to the mere erroneous impression of witnesses, the jurors cannot conceal, has painfully impressed them as wilful and culpable perversions of truth, so injurious and dangerous in their consequences to society, that they desire to direct the attention of the authorities to the depositions of ———, ———, ———, J. B. Simard, and ———." The plaintiff in consequence brought his action against the defendant as one of the persons who had written, signed and published the above,

alleging that the said defendant was moved by malice to return this special verdict, and that it contained a diffamatory libel. Plaintiff laid his damages at 5000*l*. There were two other counts in the declaration; on the second count it was in effect alleged that defendant was a juror on the coroner's jury, and that it was in delivering his special verdict to the coroner that he made use of the terms reflecting upon plaintiff; and the third count was for libel without alleging that the defendant was a juror.

The defendant met this action by a demurrer, in which, among other reasons, he alleged that there could be no malice,—that as a juror called upon to give his verdict he was not liable for what he said on the jury, and that the declaration disclosed no libel.

Badgley, Q. C., *& Abbott*, in support of demurrer.
Rose, Q. C., counsel.
Loranger, contra.

Mondelet (*C.*), J., dissenting, said, there are nine cases of libel against jurors of the coroner's jury empannelled to inquire into the cause of death of persons shot on the 9th of June last. The question comes up before the court on demurrer. I think the demurrer should not be maintained. As to the notice, I do not think that jurors are public officers, the statute 14 & 15 Vic. c. 54 says, "persons discharging public duties." However the majority of the Court is of opinion that this question does not arise now. The next question is, were the nine jurors engaged in the discharge of their public duty as jurors when this libel is alleged to have been published. Let us suppose they were, and that cloaking themselves under their position they had maliciously and corruptly charged plaintiff with perjury. Even in this case would they be irresponsible? Can there be such a thing as irresponsibility on the part of any one? I hold that there cannot. Neither judge nor juror is absolutely irresponsible. But plaintiff has gone further, and declared that the requisite number of jurors could not agree on a verdict, there was then no presentment; therefore, these nine persons were not acting as a "*Corps de Jury.*" For if nine jurors are irresponsible, then so is one. What would this lead to? Suppose on a jury there is a juror who would not regard his oath, and who was desirous of wreaking his vengeance on one who had been a witness, he could do so with impunity, nothing could touch him. Suppose the Bishop of Montreal, or the Chief Justice of the Queen's Beach, or one of the first merchants of this city, had been a witness, and that such an observation had been made of him, by one juror. Will it be said that

his character must be left to the counteracting influence of public opinion? I have great respect for public opinion—"*mais combien faut il de sots, pour former le public?* It has been said that judges are irresponsible; but it is not so, they are responsible to Parliament. If a judge had the audacity to use his office to wreak his vengeance on his fellow man, he would, and ought to be responsible.

In the two counts there is not a word about the coroner's jury. I therefore take it, they at all events are sufficient, and ought to go to a jury. I am surprised any one should desire to avoid going to a jury.

Rose, Q. C., I hope that observation is not intended as a reflection on counsel?

Mondelet (C.), J., I am still more surprised that you should imagine any such thing.

It is said that we shall get no more witnesses if the jury are not to remark on contradictions; but that cuts both ways. Will not witness be less likely to go, if any one juror may accuse him openly of perjury? To-day it is Simard, to-morrow it may be the first man in the community who may be thus slandered. If such things were to be permitted by Courts of Justice, the difficulties arising from them could only be settled by the bowie knife or the carabine.

It has been said that the coroner and his jury are institutions derived from England, and that their exercise must be ruled by English law. But it is a maxim of our law, founded on the Roman law, that if a man does an injury he must repair it.

It has also been contended that there is no libel. Is it no libel to accuse a man of perjury?

Day, J., This case with eight others is submitted on a *défense en droit*. It involves a question of great importance, that of the immunity of persons engaged in the administration of justice.

I shall not attempt to settle the question, on first principles, but shall refer to direct authority in support of each step of the process of reasoning. The action is for damages for defendant having, with eight others, returned into Coroner's Court a special verdict, in which they directed to the attention of the authorities the evidence given by the plaintiff as indicating perjury.

The first count of the declaration says, that the libel complained of was signed and produced by defendant, along with eight others, as jurors on a coroner's jury. That they were acting as jurors appears on the face of the declaration.

The second count also shews that defendant acted as a juror.

The third count is for libel on same day as the others, but without stating that plaintiff acted as a juror. Damages are also laid for 5000*l.* The declaration alleges that all this was done falsely and maliciously.

There is a *défense en droit* to the first count, and one to the second and third counts. It is contended that defendant falls under 14 & 15 Vic. c. 54, by which it is enacted that, "no writ shall be sent out against a justice of the peace, or other officer or person fulfilling any public duty, &c., unless in writing of such intended writ, specifying the cause of action with reasonable clearness, &c.," be given one calendar month before issuing out such writ. The Court, without deciding the question as to the necessity of notice, is of opinion that it is not necessary to allege its service in the declaration, the notice, if required, may be produced at the trial. It appears by the 9th section of this act that the notice shall be given to every person *bonâ fide* acting in the performance of a public duty, although he may have exceeded his jurisdiction. But this cannot be decided until the trial; it is not, therefore, necessary to allege it. This is the rule in England. We give no opinion as to defendant being entitled to notice.

The second point raised is that defendant was acting as a juror. He says, first, this quality of juror is a bar to every form of action, that the plaintiff cannot examine whether or not there was malice,—that the conduct of no judge or of no juror is liable to being examined in this way.

I do not think this proposition, in the unlimited way in which it is put, is supported by authority. If a judge go beyond the scope of his powers he may not be liable; but I would not extend this to jurors. The judge is a permanent officer and has jurisdiction over everything that comes within his Court, and may be called upon to express his views on something that is not directly before him. The juror has a specific function and a specific case. If he goes beyond that case he is liable. In reference to the general reasoning as to the responsibility of a judge, I may remark that there can be no doubt that no man can maliciously commit a wilful act without being responsible. But this may be infringed on. So in protecting the interest of society, the interests of the many override those of the few. Thence has grown up a rule that in certain cases the party shall not raise the question of malice under any circumstances. The immunity of the judge rests on that, so does that of a juror.

The second proposition is that defendant, acting as a juror, is not liable for any thing done within the limit of his functions; and this raises three questions:

1st. Are jurors entitled to this immunity?

2nd. Did defendant keep within the limits of his functions?

3rd. Does this immunity extend to one of twelve?

I think the authorities will satisfy most minds. But it has been said that this action must be tried by the law of France and not by the law of England. The coroner is derived from the criminal law of England, and that criminal law has been applied here. A juror is compelled to appear, and proceeds and acts, under that English law. All his powers are limited by that law. Is it not then right that he should also be protected by the system which exacted his services? If it were not so, the situation of the juror would be lamentable in the extreme. As to whether defendant while acting within the limits of his authority has this immunity, see *Sutton* v. *Johnson*, 1 Term R. 513: ".....it appears that the law raises a presumption in favour of jurors, and will not even admit of proof to the contrary; departing herein from the common maxim that the presumption shall only stand till the contrary be proved. This rule must have been adopted on the principle stated by Lord Coke, namely, that it would deter jurors from the public service if they were liable to such an action in every case, where, in the opinion of the parties against whom they had decided, their decision proceeded from malicious motives, &c." The essence of the case is that no action shall lie, that he shall not be questioned, that his office is an absolute bar. To adopt a different rule would be to fritter it away. Nobody is answerable if he shews that he had reason for saying what he did, and that it was true. The issue of slander in every case is whether the party accused acted maliciously. But the juror is put in a different position, and this is the intention of the law.

2 Hawkins P. C. c. 73, sect. 8, p. 130, "no presentment of a grand jury can be a libel," Ib. p. 123, sect. 5.

Borthwick, libel, pp. 201-2.

Starkie, libel, Preliminary Discourse, p. xxix. note K. So in the United States.

1 Traité de la diffamation, de l'injure et de l'outrage par Grellet Demazeau, pp. 165-6. Thus the rule applies in England, in Scotland, in the United States, and in France. As to malice, there is a good deal of confusion among the early writers; but now the law is settled. Malice in fact means a sentiment of malignity or ill-will.

This is not the signification in law books. Even in libel it may be jocular, and yet there may be malice, and the party would be liable. The state of the heart has nothing to do with liability. So with the man who shoots into a crowd. So in an action for malicious prosecution, if a party acted on probable cause, no matter how maliciously he acted. It is clear then that the ordinary meaning of malice is not the same as malice in law. Malice in law is the absence of legal justification. He that injures another without justification is liable. This enquiry is not as to the state of feelings but whether the defendant acted with legal justification. If he did, it does not signify whether the words alleged be true or not. *Starkie*, libel, p. 220. In cases of jurors, the justification is that they acted as jurors. This is where there is a perfect verdict—where twelve agree. In the present case there is nothing violent in the language. If what is said be true, it would be difficult to find expressions less harsh. The document shews great labour and toil in enouncing their views. It declares the result of their deliberations. It involved the necessity of enquiry into all the facts, the nature of the assemblage. It states the firing of the troops without the order of the officers, it reprobates the practice of parties carrying arms, and then comes the closing paragraph which plaintiff complains of. Suppose a grand jury in coming into Court were to say that a bill was not found, because the witnesses named were not to be believed, or that a petit jury should say so,—could they be subject to an action of damages? Must the jury be silent in the chamber? How can they express their opinion if they cannot canvass the evidence being rejected? Does not a judge give the grounds upon which his decision is based? The case of the juror and of the judge is the same. If this immunity be given to an ordinary jury, much more so should it be given to a coroner's jury.

The passage from Hawkins shews that they are exempt from prosecution in respect "of their enquiry,"—Borthwick, "in expressing the opinion of the Court." So Starkie,—"all communications by judges and jurors as such." So in Courts Martial.

There is a case which shows how far this immunity is carried, in the course of a trial a juror said to a witness, "your a d——d perjured villain," upon this an action was brought, and the juror was held not to be liable, because it was said when acting as a juror.

It therefore appears that if the words complained of by plaintiff were part of a perfect verdict, there could be no action. But has a minority the same right? It is plain that the protection is to the in-

dividual and not to the body. The responsibility and obligations are several. Each takes the oath himself and he must, therefore, be protected individually for his own opinion. It was the coroner's duty when they did not agree to ask each juror his opinion, and he was obliged to give it. If he found that twelve agreed he must have put their opinion in effect, and have made it a verdict. The protection is to each member of the body. For if they were obliged to give a full and a true opinion, and if they were not able to give a verdict, was it not their duty to express their view of the evidence? If it was their duty to express their opinion, they fall within the law.

Jarvis on Coroners, p. .—Impey Coroners, p. 519.—2 Hale, pleas of the Crown, p. 297, note C. Both reasoning and authority, therefore, show that they were justifiable.

It therefore appears that jurors acting within the limits of their functions are to be protected without reference to their motives.

2. That the expression of opinion in this case falls within the legitimate functions of defendant as a juror.

3. That the same immunity that applies to jurors rendering a perfect verdict applies to all or to one juror if he keeps within the limits of his functions.

As to the second count it also appears there that defendant was acting as a juror.

The third count is more ambiguous, it does not appear there so clearly that defendant was acting as a juror. It states that on the 11th of July defendant maliciously, &c., defamed the plaintiff. Had this count been isolated then on this count they must have gone to the jury; but, on looking at the declaration, we find that there is a long detail of facts set out as inducement, and it is uncertain whether this inducement applies to the first count or to the whole declaration. The libel is always laid as of the same day, the same charge and the same damage. There is no general allegation; each count lays damage at 5000*l.*, and the declaration asks 5000*l.* Also the word "other" is omitted; the count does not say that there were "other injuries." In England if the word other was left out the Court would order the count to be struck out. But defendant alleges that in 2nd and 3rd counts the causes are the same as in the 1st count, and plaintiff does not traverse this, he merely says that the allegations of the declaration are sufficient in law. Action dismissed.

Rose, Q. C., with double costs.

Day, J., I don't think defendant is entitled to it.

No. 178.

Laurin v. *Pollock & al.*

This was an action brought to recover 725*l.* damages for injury done to plaintiff's wharf by the raft of defendants running against it. Defendants contended that the wharf projected too far into the river, and that they were thrown against it by the force of the current. The evidence established that the wharf did not obstruct the stream, that at low water there was a space between the wharf and water, that defendants' raft was imperfectly manned, and that the wharf had never been struck before.

A. & G. Robertson, for plaintiff.
Rose, Q. C., *& Monk*, for defendants.

The *Court* is of opinion that plaintiff had made out his cause in so far that he suffered damage to the amount of 25*l.*

There was also a motion on the part of plaintiff to reject the evidence of the pilot of the raft, one of defendants' witnesses. The *Court* maintained this motion, on the ground that the trespasser could not be brought up to free his employer.

There was also a motion to reject the whole of the rebuttal evidence. The *Court* would not grant this motion, for although there was some objectionable evidence it could not for that reject the whole. The questions put should have been objected to, not the witnesses.

No. 7.

Mackie v. *Cox.*

MOTION TO RETURN WRIT OF CAPIAS AD RESPONDENDUM BEFORE RETURN DAY.

Held, *that delay to appear to answer process is established in favour of defendant. That writ of capias ad respondendum may be ordered to be returned into Court before return day.*

Motion on the part of defendant, who had been arrested under process of *capias ad respondendum* at suit of plaintiff, that the sheriff be

ordered *forthwith* to return the writ, instead of later on the return day, the 3rd of April.

A. & G. Robertson, in support, cited *Kelly* v. *Horan*, L. C. Reports, p. 143.

J. Monk, contra.

Day, J., The defendant in this case is detained in jail. The delay in the return of the writ, although established in his favour, is prejudicial to him, as he cannot come before us. The great practical evils that would arise were plaintiff allowed to fix any delay he chose would be so great that we think this motion should be granted. A similar decision has been rendered in the Superior Court at Quebec. The plaintiff's counsel argued against granting the motion that a similar motion had been refused in a case where there had been a *saisie arrêt* before judgment; but the cases are different. I do not think the Court could order a summons to be returned before the return day. The 3 section of the Judicature Act only applies to writs of summons. The judgment was *motivé* as follows:

"The Court having heard the parties, by their counsel, upon the motion made in this cause on the 17th day of March, instant, &c., on behalf of Michael Cox, &c., having examined the proceedings and deliberated, and inasmuch as the delay granted by law within which any defendant can be summoned or compelled to appear in this Court is by law established in favour of the defendant—it is ordered that the process *ad respondendum* in this cause issued, to wit, the writ of *capias ad respondendum*, returnable into this Court on the third day of April next, and under which the defendant is now detained in the Common Jail of this district, be by the sheriff of this district returned before this Court within twenty-four hours of the signification of this order."

Fisher v. *Draycott, & Scott*, garnishee.

Held, *that an auctioneer receiving the goods of an insolvent party cannot off-set the proceeds against a debt due to himself, but is liable to account to the creditors of the insolvent party.*

This was a contestation of the declaration made by the garnishee. The defendant's premises were destroyed by fire, and a portion of his goods were saved, and placed in the hands of Young & Benning. The

latter parties gave them up to the garnishee, an auctioneer, upon the order of the defendant, the garnishee undertaking to pay them a debt of £50, due by the defendant. The plaintiff having a judgment against the defendant issued a writ of *saisie arrêt* directed to the garnishee, who returned that he had no moneys or effects of the defendant in his possession. The declaration of the garnishee was contested upon the ground that the garnishee had taken possession of all the goods of the defendant, who was insolvent, and that he had never accounted for them either to defendant or to defendant's creditors as he was bound to do. The garnishee set up that he was a creditor of the defendant, and that the proceeds of the goods he had received were insufficient to pay his debt. The Court held that there was no proof of a *datio in solutum*, or of a contract by which these articles were to be taken for a debt. That the garnishee held them merely as a *depositaire*, and could not turn them to account as a set-off against his own debt; that the defendant being insolvent, and the garnishee the holder of his goods, must therefore hold them for the benefit of all the creditors. Judgment for plaintiff, maintaining his contestation, and ordering garnishee to account for the goods within fifteen days, or to pay the plaintiff the amount of his debt, and costs.

Cross & Bancroft, for plaintiff.
Muir, for garnishee.

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31 *March*.

Present:—Day, Smith and Mondelet (C.), J. J.

No 1879.

Starnes v. *Kinnear and al.*

DAMAGES.

Papin, for plaintiff.
Rose, Q. C., *& Monk*, for defendants.

Day, J., This is an action of damages brought by an unmarried lady against the proprietors of the Herald newspaper, for having inserted an announcement to the effect that plaintiff had been delivered of twins. The defence set up was that defendants had received the

notice to insert in the usual course; that they were not aware that the notice did not come from the right parties; that they did not know plaintiff or the parties who had sent this notice, and that they had inserted the notice in the usual course of their business, and without any malice or intention to injure plaintiff; that, on the contrary, defendants, as soon as they were aware of the imposition, had made all the reparation in their power, and had offered a reward of 10*l.* for the discovery of the parties who had sent the notice. The defendants, like all other persons, are liable for the damage they may even unintentionally do in the course of their business. There is no exception in the favour of printers of newspapers. In this case, however, there is little blame due to defendants. No special damages have been proved, and it is clear, from the answers of plaintiff on *faits et articles*, that there was no malice, and that defendants were unknown to plaintiff. Where there is no malice there can be no vindictive damages. The only question is, has plaintiff a right to her action? There is one point in the evidence, plaintiff did not know that reparation had been made. The Court is, therefore, of opinion that plaintiff had a right to her action; but the damages that the Court will award will be little more than nominal.

Judgment for 50*s.* damages and costs.

No. 1853.

Beaudry v. *Guenette, and Corporation of Montreal*, Oppt.

This action was brought for the recovery of 150*l.* and interest, due by the defendant as first instalment of the price of a lot of land in the City of Montreal, sold by the plaintiff to defendant on the 24th of March, 1853, just four days prior to the date of the institution of this action. The plaintiff made default, and judgment having been rendered on the 26th April, 1853, the plaintiff seized the lot of land in question in execution of his judgment. To this seizure the Mayor, &c., of Montreal filed an opposition *à fin de distraire*, claiming a strip of the lot of land in question, as having been taken *pour cause d'utilité publique*. It appears that opposant, being igornant of said sale on the 24th of March, and believing plaintiff to be still proprietor of the lot of land in question, on the 24th day of May served upon plaintiff the notice required by law, to the effect that the Corporation required a strip of the said lot of land for the public use, and that they intended, after the

delay of one month from the serving of the said notice, to take the steps required by law in order to expropriate plaintiff. In answer to this notice plaintiff, on the 25th May, wrote to opposant, styling himself proprietor of the lot in question, and requested opposant to waive the month's delay, and to proceed immediately to the valuation of the land to be expropriated. On this understanding, which was confirmed by an agreement *sous seing privé*, made on the 4th of June, a jury was chosen, and on the 8th of June they awarded to the plaintiff the sum of 633*l*. Subsequently the plaintiff refused to pass title in favour of opposant, who protested him for his refusal so to do, and deposited the amount of the award in the hands of the prothonotary of the Superior Court. This opposition was contested both by the plaintiff and by the defendant. The former by his answer contending that he was not at the time of the said award proprietor of the said lot of land, and that though he had written the letter, mentioned in the opposition as consenting to the month's notice being waived, that he had only done so as he was then in expectation of being able to purchase the said property.

The defendant contested the said opposition on the ground that ever since the 24th March last he had been sole proprietor in possession of the said lot of land, and that opposant had no legal title to the said lot of land in question. The opposant replied to both contestations to the effect that the said sale by the plaintiff to the defendant was simulated, and that the plaintiff had never ceased to be the proprietor or to have the possession of the said lot of land, but that the said deeds were passed collusively and in fraud.

The evidence adduced by the opposant showed that the plaintiff always acted as proprietor of the property in question, and that plaintiff had even purchased property adjoining subsequent to the 24th of March, in the deed of acquisition of which he styled himself proprietor of the said property of which the strip formed a part.

Peltier, for opposant.

Moreau, LeBlanc & Cassidy, for contesting parties.

The *Court* maintained the contestations and dismissed the opposition. In doing so the presiding judge took occasion to remark that the plaintiff had evidently represented himself as proprietor of the lot of land in question, in order to take the award of the jury if he liked it, and to refuse it if he was not satisfied.

The judgment, which is *motivé*, is as follows: "The Court having heard opposant and defendants, by their respective counsel, upon the

merits of the opposition, made and filed in this cause by the Mayor, Aldermen and Citizens of the City of Montreal, and the contestation thereof by defendant, having examined the proceedings and proof of record, and having deliberated; considering that the defendant had established that he acquired the land and premises in this cause seized, and in the said opposition mentioned and described, and became the owner and possessor thereof under and by virtue of a deed of sale, made and executed by the plaintiff to him on the 24th day of March, 1853, before Maitre C. E. Belle and his colleague, public notaries, as in and by his contestation of the said opposition the defendant hath alleged; and considering that the opposants have failed to establish that the defendant had been expropriated, or that they had become the proprietors of the said lot or piece of land, or of any portion thereof, by virtue of the proceeding by them had and taken for that purpose, inasmuch as no notice was by them given, one month previously, to the party seized and possessed of the said lot or piece of land of their intention to present a petition to the Justice of the Peace for the purpose of taking possession of, entering into, and appropriating to the use of the Corporation the said lot or piece of land, or a portion thereof, as by the statute, in such case made and provided, they were bound to do, maintain the contestation of the defendant with costs. And the Court having also heard the opposants and this plaintiff, by their respective counsel, upon the merits of the contestation by the said plaintiff made and filed to their said opposition, having examined the proceedings and proof of record, relating to the said opposition, and the said last mentioned contestation thereof, and having thereupon deliberated, consider that opposants have failed to establish that they have become or are the proprietors of the said lot or parcel of land in their said opposition described, or of a part thereof, and that by reason thereof, and by law the said contestation of the plaintiff ought to be maintained. But considering nevertheless that the opposants have been deceived and led into error in the proceeding by them taken in the said opposition claimed—by reason of the plaintiff having falsely pretended to be the owner and proprietor thereof—doth maintain the said contestation of the plaintiff, but without costs."

No. 2623.

Moffat et al. v. *Bouthillier.*

The plaintiffs in this cause brought their action against the defendant,

Collector of Customs at the Port of Montreal, to recover back the sum of 50*l.* 5*s.*, which they alleged to have overpaid to him (under protest), in paying the *ad valorem* duty on a quantity of French brandy imported by them, the duty on which brandy the said defendant had charged at the value thereof at the time of shipment, and not at the time of purchase.

The defendant answered this demand in law, on the ground that plaintiffs had not alleged that the price of the said brandy was the value at the time of exportation.

Dunlop, in support.
Rose, Q. C., *& Monk*, contra.

Day, J., This case comes up on hearing on law. The only question is, whether the *ad valorem* duty should be charged on the value of the goods at the time of purchase in France, or at the time of exportation. It is entirely a question of the interpretation of Statutes. The authority from Howard's Reports don't help us much, for unless statutes are word for word, one cannot reason from one case to another. Our legislation on this subject has been progressive. The first Act to which I shall refer is the 10 & 11 Vic. c. 31. At section 13 we find that where the duties imposed upon goods imported into this Province "are charged" according to the value thereof, such value shall be the "invoice value of said goods at the place whence the same were imported, with the addition of 10*l.* per centum thereon," which invoice value had to be attested to be the true invoice value by the importer or his agent upon oath. At first this would seem to support the pretension of plaintiffs; but the next statute on this subject—the 12 Vic. c. 1, s. 5—provides, that where the duty on any goods imported into this Province shall be imposed according to the value thereof, "such value shall be understood to be the actual cost value thereof in the principal markets in the country where the same were purchased and whence they were exported to this Province, or if such goods were purchased in one country and exported to this country from another country, then in the principal markets of the country where such goods were purchased by the person or persons importing the same into this Province; and it shall be the duty of each and every appraiser and of every collector when acting as such, by all reasonable ways and means in his power to ascertain, estimate and appraise the true and actual market value and wholesale price as aforesaid, of any goods to be appraised by him, any invoice or affidavit to the contrary notwithstand-

ing, in order to estimate and ascertain the value upon which duty is to be charged as aforesaid." This act established a new rule according to which duty was to be charged upon the actual cash value in the principal markets of the country from whence goods were imported by the persons importing the same.

The effect of the 12 Vic. is twofold. It takes away the rule of the invoice as a standard of value, and establishes instead the value from the principal markets in the country whence goods were imported, and it provides that value shall be final by appraisement; thus throwing over the affidavit and invoice. There is nothing special in the language which expresses that the value is to be that at which the thing was purchased, but, taken as a relaxation of the former rule, it would appear that it is the value at the time of exportation. Here we see the progressive legislation; by the first rule it was the value at the time of purchase—and now another rule is introduced which suggests the idea that it was the value at time of exportation. It was not, however, on this clause that the parties proceeded, but on the 3 sect. of the 16 Vic. c. 85, which provides, that the value on which duty is to be charged on goods imported into this Province shall be understood to be the fair market value thereof in the principal markets of the country whence the same were exported *directly* to this Province. And it shall be the duty of each and every appraiser and of every collector when acting as such, by all reason and all ways and means in his power to ascertain the fair market value as aforesaid of any goods to be appraised by him, and to estimate and appraise the value for duty for such goods at their fair market value as aforesaid; provided always, that by any departmental order authorized by the governor, it may be provided that in the cases and on the conditions to be mentioned in such order, and while the same shall be in force, goods *bonâ fide* exported to this Province from any country, but passing *in transitu* through another country, shall be valued for duty as if they were imported directly from such first mentioned country. This clause must be compared with 12 Vic. The word *directly* is not to be found in the previous statute, it would therefore seem that if goods bought in another country were brought into the United States, and from that here, that the value taken should be the value in the United States, from which they were imported directly to this Province, otherwise the proviso in this last clause would be useless. The Court is, therefore, of opinion that the value on which duty is to be charged is the value at the place whence it was directly exported to this country. The judgment of the Court is *motivé*, and is as follows:—

"The Court having heard the parties, by their counsel, upon the law issue raised by the demurrer, pleaded by the defendant to the action, and demand of the plaintiff, having examined the declaration and pleadings in this cause, and having deliberated thereon; considering that the defendant in his official capacity of collector of Her Majesty's customs at the port of Montreal was by law entitled and bound to exact and receive from the plaintiffs for and upon the goods and merchandize in their declaration mentioned the duty of customs by law established, according to the actual cash value of such goods and merchandize in the principal markets of the country whence they were imported into this Province, that is to say, in the principal markets of France, at the time the said goods and merchandize were exported therefrom. And considering that it doth not appear by the said declaration that the defendant in his said official capacity hath exacted or received from the plaintiff any other or greater sum than by law he was entitled to demand for duty of customs for and upon the said goods and merchandize, or that by reason of any matter or thing in and by the said declaration alleged, the plaintiffs are entitled to recover from the defendant any sum of money whatever, maintaining the said *défense en droit*, doth dismiss the said action, with costs."

No. 201.

Loranger, Appt., v. *Perrault*, Respt.

Held, *that lessee cannot quietly enjoy lease until rent is demanded of him, and then complain of some damage caused by landlord as reason for non-payment of rent.*

Loranger, for appellant.
Cartier & Berthelot, for respondent.

Day, J., This is an appeal from the Circuit Court. The action was originally brought for the recovery of one quarter's rent of a shop and premises leased by respondent to appellant. In the declaration plaintiff alleged that by the lease it had been stipulated that plaintiff should not be liable for repairs. Defendant met the action by two exceptions. One praying for the reduction of the rent on account of damages, and the other compensation. By both of these exceptions defendant admitted this clause in the deed of lease; but said that owing to some

fault in the construction of the buildings or from the want of proper drains the rain and water from the melting of the snow had filled the cellar and injured the goods of defendant. Plaintiff answered these exceptions in law, and the Circuit judge dismissed the exceptions, and plaintiff then went on *exparte* and got judgment for £25. This appeal was brought on ground that the judgments on demurrers were bad in law. Respondent answered that these judgments and demurrers were final judgments, and that time for appeal was over, and that the said judgments or demurrers were good and well founded in law. We are of opinion that the judgments of the Court below were correct. It is true defendant protested against plaintiff in December, but he paid rent in the February following, and went on to enjoy the premises. This Court thinks that a party cannot go on quietly to enjoy lease, and all at once, when he is asked for the rent, refuse to pay it. He should complain at once. This was the rule in *Boulanget* v. *Doutre*, No. 278 of 1851, L. C. Reports, p. 393.

The respondent also cited *Pothier, Louage, No.* 385.—*Instruction sur les conventions Louage*, 194-5.—2 *Bourjon*, c. 6, *s.* 4, *p.* 53.—*Prov. St.*, 3 *Wm. IV.* c. 1, *s.* 2.

Appeal dismissed.

No. 261.

The Corporation of the Portuguese Jews of Montreal v. *David and al., Executors, &c., and Holmes*, es qualité *par réprise d'instance.*

This was an action brought against the executors and representatives of the estate of the late Alexander Hart, for a sum of money bequeathed by the said late Alexander Hart to the said plaintiff. Holmes had been appointed *sequestre* in place of Molson, one of the testamentary executors of the last will and testament of the said late Alexander Hart. The plaintiff petitioned to have the *sequestre* brought into the cause to take up the *instance.* The *sequestre* having appeared demurred to the action *par reprise d'instance;* because he is an officer of the Court similar to the guardian, and it is not part of his duties to assume the defence of such an action, and because as *sequestre* he had only a specific duty to perform set forth in the judgment, and does not represent the defendants in the cause.

Smith, J., dissenting, said that by a judgment of that Court the estate had been ordered to be delivered over to Holmes as *sequestre*. As *sequestre* Holmes is not liable, but judgment has declared him to be so. Is this judgment a *jugement nul?* Pothier in his Obligations, No. 865, tells us what a *jugement nul* is:—it is a judgment rendered *contre la forme judiciare*. This judgment, in my opinion, binds the estate and all concerned in it.

Day, J., giving the judgment of the Court, said, that the Portuguese Jews were not parties to the judgment which constituted Holmes *sequestre*, and we have nothing to say about this judgment.

The following is the judgment of the Court:—"The *Court* having heard the plaintiff and the said William E. Holmes, by their counsel, upon the demurrer of the said William E. Holmes to that part of the demand of the said plaintiffs *par reprise d'instance*, in which they declared against the said William E. Holmes in the quality of *sequestre*, having examined the proceedings, and having deliberated thereon; considering that the said William E. Holmes hath no quality by reason whereof and by law he ought to be ordered and compelled to take up the *instance* in this cause, in manner and form as the petitioners in and by their said petition have prayed, maintaining the said answer in law in the nature of a demurrer, doth dismiss the said petition, with costs."

Mr. Justice Smith dissents from this judgment.

No. 1630.

Delisle v. *McDonald & McDonald*, Int. Party.

This action was brought on a promissory note by indorser against maker. The intervening party indorser of the note pleaded that the note was transferred to plaintiff after maturity by Cuvillier & Co., by whom it had been given as collateral security for advances made on teas consigned to that firm; that this note being an accommodation note for the intervening party, and given by him as collateral security, and no account having been rendered of the consignment, and having been transferred to plaintiff after maturity, he took it with all the equities.

Moreau, LeBlanc & Cassidy, for plaintiff.
R. Laflamme, for intervening party.

Day, J., There can be no doubt that the intervening party's law is good if his position be true. We think intervening party has made out that the note was given as collateral security, and transferred after maturity, and that no account of the teas was rendered. Judgment for intervening party.

No. 370.

Fuller, Appt., v. *Jones*, Respt.

This action was brought in the Circuit Court sitting in the St. John's Circuit, by the respondent, for the recovery of 25*l.* 7*s.* 11*d.* tolls on a bridge belonging to the respondent, built by him under the authority of the 6 Geo. c. 29, and incurred by the appellant for a stage-coach which passed on the said bridge. Defendant admitted the passing of his coach on the bridge, but said that the coach in question carried Her Majesty's mails, and was exempt from all toll on the said bridge under the 7 section of the said act.

Moreau, LeBlanc & Cassidy, for the appellant.
Badgley, Q. C., counsel.
Laberge & Laflame, for respondent.
Rose, Q. C., counsel.

Day, J., The whole case lies on the interpretation to be given to the section of the act cited by respondent. The general rule is that all carriages and passengers making use of the said bridge shall pay certain tolls according to the tariff, subject to the restriction contained in the 7 section, which is in these words: "that no person, horse or carriage, employed in conveying a mail or letters under the authority of His Majesty's Post Office, nor for the horses or carriages laden or unladen, and drivers attending officers and soldiers of His Majesty's Forces or of the Militia, whilst upon their march, or on duty, nor the said officers or soldiers, nor any of them, nor carriages and drivers, or guards sent with prisoners of any description, as well going as coming, provided they are not otherwise loaded, shall be chargeable with any toll or rate whatsoever." This statute is not quite clear, it exempts three classes, and the only question is whether the proviso at the end applies to the whole three classes or only to the last. The strictly grammatical construction doubtless would make it apply only to the last; but the intention of the law is

evident. Were it only to apply to the last of these classes a mail contractor might carry a caravan full of people under cover of a single mail bag.

Mondelet (C.), J., concurred.

Appeal dismissed.

An argument of convenience was advanced at the hearing of the case in support of the appeal, which might be considered almost as strong in favour of the appellant as that made use of by the Court in favour of the respondent. It was, that if this *proviso* were to be applied to the whole three classes exempted, Her Majesty's mails might be stopped and rifled each time they passed, and be considered loaded if the smallest article were found in the carriage.—E. L. R.

No. 2536.

Parker v. *Cochrane.*

COMMUNAUTÉ.

Held, *that if there be no evidence of foreign law it is taken to be same as ours.*

Badgley, Q. C., *& Abbott*, for plaintiff, cited *Smith* v. *Gould*, 6 Jurist 543—*Mostyn* v. *Fabrigas*, Cowp. 174.—Exparte *Cridland*, 3 Ves. & B. 99—*Bentinck* v. *Willink*, 2 Hare 1.—*Harris* v. *Alexander*, 9 Robinson (Louisiana) 151.—*Spears* v. *Turpin*, 9 Robinson 293.—*Bormean* v. *Poydras*, 2 Robinson, p. 1.

Day, J., This is an action by wife *en separation de biens ;* parties were married in England, there is no evidence of foreign law ; it must, therefore, be taken to be same as that which prevails here.

Judgment for plaintiff.

Rassette v. *Dalrymple et Dalrymple, opposant.*

Day, J. La Cour est appelée à prononcer dans cette cause sur le mérite d'une opposition, afin d'anuller, faite à la vente des propriétés saisies sous le prétexte qu'il n'y a pas de date au procès-verbal de saisie, et que la vente a été annoncée comme devant avoir lieu au bureau du

shérif, tandis qu'elle devait se faire à la porte de l'église de la paroisse. Quant à l'annonce elle ne peut avoir l'effet d'anuller la saisie, mais l'absence de date au procès-verbal est fatale:

Moreau, Leblanc et Cassidy, pour l'opposant.
Papin, pour le demandeur.

COUR DE CIRCUIT.

10 *Mars*, 1854.

Présent :—J. C. Bruneau, (J).

No. 386.

Mercier v. *le Maire et al., de la Cité de Montréal, et Rivet et Doray.*

Le demandeur qui occupait un étal dans le marché Bonsecours au-dessous du magasin que Rivet et Doray, deux des défendeurs tenaient à loyer des maire, échevins et citoyens de la cité de Montréal, les autres défendeurs, avait porté une action pour la somme de £35, montant des dommages causés à ses provisions de lard et de jambon par le *coulage (leakage)* des huiles que débitaient les dits Rivet et Doray, dans leur magasin au-dessus, alléguant que c'était par la faute et la négligence de ces derniers. Rivet et Doray défendirent à cette action en alléguant qu'ils avaient usé de leur magasin en *bon père de famille* et comme en aurait fait tout marchand épicier ; ce qui de leur part fut prouvé.

La preuve des dommages éprouvés par le demandeur ayant été faite, la Cour condamna la Corporation de la cité de Montréal à payer ces dommages, sur le principe que par la loi la corporation devait tenir le demandeur *clos et couvert*, que l'action *ex conducto* était bien portée contre elle, et en même temps débouta la demande faite contre Rivet et Doray qui avaient agi dans les justes limites de leur commerce; d'ailleurs c'était contre ces derniers une action *ex delicto* qui ne pouvait pas être jointe à la première.

Cartier et *Berthelot*, pour le demandeur.
Pelletier, pour la Corporation.
La Frenaye et *Cressé*, pour Rivet et Doray.

15 *Mars*, 1854.

Présent:—M. le juge Guy.

No. 1.

Bourassa, Appellant, et *Gariepy*, Intimé.

Le trois septembre dernier, l'appellant fut assigné a comparaitre devant L. A. Moreau, écurier, juge à paix pour répondre a une plainte portée contre lui par "*Alfred Gariepy de la Paroisse de Laprairie, District de Montreal, Secrétaire-Trésorier de la corporation du Village de Laprairie agissant pour et au nom de cette corporation*, pour avoir planté plusieurs poteaux sur un certain lopin de terre vacant, a l'usage du publie.

L'appellant comparut suivant l'assignation et répondit que cette, poursuite était illégalement et irrégulièrement portée, que l'intimé n'avait pas le droit de le poursuivre en sa qualité de Secrétaire-Trésorier, agissant pour et au nom de la corporation, que cette action aurait du être portée sous le nom collectif de la dite corporation, c'est a dire par la corporation du village de Laprairie, dûment incorporée.

La cour inférieure avant débouté la défense de l'appelant les parties procédérent à entendre des temoins, et le dix du même mois fut rendu le jugement, condamnant l'appelant à payer à l'intimé, es qualité la somme de deux livrès courant d'amende et les frais. C'est ce jugement que l'appelant a fait réviser par la cour de circuit par requête sommaire tel que pourvu par le statut 10 et 11 viet.

Le 15 mars dernier la cour de circuit, présidée par M. le juge Guy, a renversé le jugement rendu par le Magistrat, et maintenu l'appel avec dépens contre l'intimé, tant sur le présent appel que sur la dite plainte portée en cour inferieure, sur la principe que le secrétaire-trésorier, n'est que le procureur de la corporation, et ne peut pas plus que toute autre procureur porter une action sous son propre nom pour et au nom de la corporation dont il est l'officer.

Morin, pour l'appelant.

Lafrenaye et Lanctot, pour l'intimé.

"Nous publions cette décision pour mettre en garde les différents officiers préposés a l'administration de la justice dans les cours des commissaires et de magistrats, contre une irregularité assez commune. On doit se rappeler que les poursuites faites par les corporations doivent l'être sous le nom de ces corporations et non sous celui de leurs officiers. Autrement l'on s'expose dans le cas d'appel à des frais considerables."

10 *May*, 1854.

Présent :—McCord (J. S.), *Justice.*

Montreal Mutual Insurance Company v. *Dufresne & al.*

Held, *that an insurance note is not a promisory note, falling within the commercial code. That the endorser is an ordinary caution solidaire.*

McCord J., This action was brought for the recovery of proportion of loss sustained by this company during three years previous to the 19th September, 1851, on an insurance note made by Dufresne and endorsed by one Valfrois. Dufrense made default, and Valfrois pleaded laches in plaintiff not having demanded the proportionate amount of loss as it fell due. But this is not an ordinary promissory note, and it does not fall within the commercial rule. The endorser is an ordinary *caution solidaire.* A promissory note is such a note as may be put in circulation; but in looking at the statute 4 Wm. IV., c. 33, s. 8., R, St. p. 596, under which these Insurance Companies are organized, we find that these notes are "payable on demand to the order of the corporation *only*." Judgment dismissing endorser's exception.

In another case, No. 574, between the same plaintiffs and Sutherland, who raises another point, defendant says he is not liable because property has been sold, and that by such sale the policy of insurance is extinguished; this is very true, but notice of the sale and surrender of the policy by the insured must be given to the insurer, when the policy note may be redemanded, 4 Wm. IV., c. 33. s. 21.

No. 161.

LeBlanc v. *Rollin et vx.*

Held, *that married woman's note is an absolute nullity as regards her, but that endorser may be liable to the endorsee.*

McCord (J. S.), J., This was an action on a promissory note by endorsee against a married woman, the maker, and her husband, the endorser. It was contended on the part of defendant that the note was an absolute nullity, having been made by a married woman, not a *mar-*

chande publique. This is true as regards the married woman, but the endorser may be liable. V. Byles on bills, Nos. 46, 59, 107. *Jones* v. *Hart*, Revue de Legislation, Vol. 2, p. 58. *Hill* v. *Luir*, 1 Salk., 132.

Hubert, Ouimet et *Morin*, pour le demandeur.
Doutre, Daoust et *Praire*, pour le défendeur.

CAUSES DECIDES ANTERIEUSEMENT A LA FONDATION DE CE JOURNAL.

COUR SUPERIEURE.

3 *Avril*, 1850.

Présent :—Vanfelson et Mondelet, J.J.

No. 48.

Lefebvre v. *Demers.*

Cette action fut portée par le cessionnaire d'un douaire préfix. Le douairier n'avait renoncé à la succession qu'après le transport mais avant l'action. Les questions qui se présentèrent furent de savoir s'il y avait eu confusion des qualités d'héritier et de douairier avant le transport; s'il est nécessaire que le douairier renonce? Si l'option qu'il avait faite équivalait à une renonciation.

La cour a maintenu l'action avec dépens. *Vide* Pothier, Traité du Douaire, no. 332 et suivants.

No. 80.

Pariseau v. *Ouellet.*

Appel produit le 3 juin 1850, *à la Cour Supérieure.*

La question soulevée par cet appel était de savoir, si le *metteur* d'aval est déchargé de toute responsabilité par le défaut de présentation et de protêt du billet dans les délais.

La cour se prononça dans la négative sur le principe qu'il était la caution solidaire du faiseur du billet quoiqu'il eut apposé sa signature sur le dos du dit billet.

Vide Savary, 1 vol., p. 203, chap. 8. 2 vol. Parere 37, p. 261. Merlin, Quest. Vo. Aval Diction. du Cont. Commerce Vo, Aval, Ordon. 1673, Titre 5, Art. 32, "Story on bills of exchange" nos. 372, 398, 440 et 454.

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16 *Septembre* 1850.

Présents :—Day, Smith et Mondelet, J. J.

No. 1235.

Rodier v. *Mercile.*

Il s'agissait dans cette cause de l'homologation d'un rapport d'arbitres et amiables compositeurs. D'un côte les demandeurs en demandaient le rejet pour plusieurs nullités et entr'autres parce que le rapport n'avait pas été produit devant la cour en *minute ou original* et de l'autre les défendeurs en demandaient l'homologation pure et simple.

Lafrenaye, pour le demandeur a cité Pothier, Procédure Civile, Coutume de Paris, art. 185. "*Et sont tenus les dits experts de rédiger par écrit et signer la minute, etc.*"

Moreau, Leblanc et Cassidy, pour le défendeur.

La cour à l'unanimité adopta la doctrine invoquée par le demandeur et rejeta le rapport parce qu'il n'avait pas été produit en *minute.*

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27 *Oct.*, 1853.

Present :—Day, Smith and Mondelet (*C.*), *Justices.*

No. 2231.

Tate et al. v. *Torrance.*

MOTION TO DISCHARGE INSCRIPTION ON THE ROLE D'ENQUETE.

The pleadings in this cause consisted of declaration, pleas and general answers. The plaintiff then inscribed for enquête, and the defendant moved to discharge the inscription, the issues being incomplete, there being no replication to the general answers of plaintiff.

Torrance, in support, cited *The Bank of British North America* v. *Taylor*.*

Judah, T. S., contra.

The *Court* dismissed plaintiff's motion.

The rule of the *Bank of British North America* v. *Taylor* has since been affirmed in a case, No. 2627, *Tidmarsh* v. *Stephens*.

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30 *Nov.*, 1853.

Present:—Smith, Vanfelson et Mondelet, *Justices*.

No. 2197.

Lamirande et ux v. *Dupuis*.

PATERNITE.

L'épouse du demandeur était accouchée cinq mois après son mariage. Le demandeur porte une action pour nourriture de bâtard et en déclaration de paternité contre le défendeur reputé père de l'enfant. Jugé, que le demandeur n'avait pas en loi, une action de cette nature contre le défendeur.

Cette action était portée par Lamirande et son épouse contre le défendeur réputé père de l'enfant, dont la demanderesse était accouchée cinq mois après son mariage avec le demandeur. Ils concluaient à faire déclarer le défendeur père de l'enfant, et à une pension pour la nourriture *du bâtard*.

* The pleadings in this case also consisted of declaration, pleas and general answers, and the plaintiff inscribed for enquête. The defendant having moved to discharge the inscription, the Court rendered the following judgment:

"The Court having heard the plaintiff and Hugh Taylor, one of the defendants in "this cause, by their counsel, upon the motion of the said Hugh Taylor, of the twenty-"first day of June, instant, that the inscription of this cause by the plaintiff upon the "*Role des enquêtes* be declared irregular and be set aside for the reasons set forth in "the said motion, having examined the proceedings and having deliberated: con-"sidering that the inscription of the said cause for *enquête*, in as much as it was "made before the issues in the said cause were made and completed and before the "expiration of the delay within which by law the defendant was entitled to file a "replication or replications to the general answers filed by the plaintiff, and that "by reason thereof the said inscription for *enquête* was permature and irregular, "doth grant the motion of the said defendant, Hugh Taylor, and doth discharge "and set aside the said inscription with costs of the said motion."

Le défendeur répondit en droit, que la naissance de l'enfant dont la demanderesse était accouchée, ayant eu lieu pendant son légitime mariage avec Lamirande, cinq mois après sa célébration, ce dernier était en loi réputé le père de cet enfant, qu'il n'avait pas en loi une action de la nature de celle intentée contre le défendeur, que si toutefois le mari avait une action, ce ne pouvait être qu'une action de *désaveu*.

Par son jugement du 30 novembre, la cour a maintenu la défense en droit du défendeur, et a debouté l'action du demandeur avec dépens.

Hubert et Ouimet, avocats du défendeur ont cité à l'appui de leur défense en droit, Ancien Denizart, Vol. 3, Vo. père No. 1, "Les lois veulent que celui-là soit père à qui l'enfant est né en légitime mariage, *Pater est quem justæ nuptiæ demonstrant.*"

"Toullier, tome 2, p. 107, No. 784."

"Les enfants qui naissent sous le voile sacré du mariage sont les seuls légitimes. La légitimité leur confère les droits de famille et de parenté que la loi refuse aux enfants naturels."

Toullier, même vol., p. 109, No. 787.

"L'article du Code Civil de Napoléon porte article 312."

"L'enfant conçu pendant le mariage a pour père le mari."

No. 780-821, p. 130.—No. 822, p. 131.

"La seule action que pourrait avoir le mari serait l'action de *désaveu*. Car son enfant par état est légitime. étant né durant mariage.

Quand s'applique le désaveu, No. 2 1, p. 139.

"L'action de désaveu est particulière au mari, car il n'y a que lui qui soit incertain de sa paternité."

Voir No. 838-839, p. 144.

Proudhon, Traité de l'Etat Civil des Personnes, Vol. 2, p. 10, parag. 1e. Ancien Denizart, Vol. 3, p. 71 et 72, No. 30, No. 33.

"On trouve dans le "Journal des Audiences," un arrêt du cinq juillet 1665, qui en déclarant légitime un enfant, a jugé que la déclaration du père ne pouvait priver un enfant de l'état d'enfant légitime lorsqu'il était né d'un mariage contracté suivant les lois. Dans cette espèce la cour n'eut point d'égard à la déclaration du père qui disait qu'il était impuissant, ni à celle de la mère qui assurait la même chose."

Dorome, conseil des demandeurs, à l'appui de leur action a cité,

D'Agucsseau, tome 3, p. 180-181; Répert. de Jurisprudence, Vo. Légitimité, p. 379-374; Fournelle, Traité de Séduction, p. 120.

COUR DU BANC DE LA REINE.

25 *Oct.* 1848.

Présents :—Rolland, C. J., Day and Smith, J. J.

No. 789.

Roy v. *Codère et les Commissaires d'Ecole de St. Ours et J. Bte. Meilleur, T. S.*

Le demandeur avait fait émaner un writ de saisie-arrêt après jugement pour saisir-arrêter entre les mains des tiers-saisis, toutes sommes de deniers qu'ils pourraient devoir ou devraient au défendeur qui était un instituteur dans la paroisse de St. Ours.

Le défendeur contesta cette saisie-arrêt sur le principe que le salaire des instituteurs est insaisissable et la cour a maintenu la contestation.

Roy, pour le demandeur.
Cherrier et Dorion, pour le défendeur.

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16 *Avril* 1849.

Présents :—Rolland, C. J., Day et Smith, J. J.

No. 809.

Durand v. *Durand.*

Cette action était portée sur une donation entrevifs, faite par les père et mère des demandeurs au défendeur leur frère à la charge par ce dernier de leur payer *une certaine somme de deniers en différents temps.*

Le défendeur plaida entr'autres choses que les demandeurs n'avaient jamais été parties à la donation et ne pouvaient pas par conséquent exercer aucun recours contre lui jusqu'à leur acceptation dûment signifiée.

La cour rejeta ce plaidoyer et décida qu'une telle donation produit un droit d'action en faveur des tiers-gratifiés.

Vide Pothier, Obligations, No. 70, 71 et 72 où il est parlé de l'action utile sur donation à tiers-absents. Coquille. C. P. 118. Pothier, Contrat de Constitution de Rente, No. 241. Merlin, Quest. Vo. Stipulation pour Autrui.

Mai 1849. *Desautels* v. *Perrault.*

Le défendeur avait loué du demandeur un cheval pour voyager jusqu'à St. Edouard, mais néanmoins il s'était rendu à un endroit plus éloigné. Le cheval meurt en route entre ses mains. Le défendeur répondit à l'action portée contre lui par le demandeur, que le cheval n'était pas sain et n'avait pu supporter les fatigues du voyage.

La cour décida que l'*onus probandi* retombait sur le défendeur qui avait violé les termes du contrat de louage de ce cheval, et le condamna à en payer la valeur. *Vide* 11 vol. de Toullier des Délits. Pothier, Append. du Contrat de Louage, No. 471.

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23 *Oct.* 1849.

Présents :—Rolland, C. J., Day et Smith, J. J.

No. 115.

Lynch v. *Poole.*

Dans cette cause il a été décidé que la femme marchande publique mais commune en biens avec son mari ne peut pas poursuivre sans son mari. *Vide* Pothier, Puissance du Mari, No. 62.

Toullier, Communauté.
Pigeau, Proc. Civile.

TERME INFÉRIEUR.

6 *Déc.* 1844.

No. 1409.

Présent :—Rolland, J.

Morrill v. *Unwin.*

Dans cette cause une saisie-revendication avait été faite d'un cheval vendu de bonne foi à l'encan pour £15.

Par son jugement la cour ordonna au demandeur de payer et rembourser sous un délai de quinze jours, la somme de £15 payée par le défendeur acquéreur de bonne foi à l'encan *(market overt)* si non il

serait déchu de sa saisie-revendication, le tout avec dépens contre le demandeur.

Vide Pothier, donation *inter vivos* No. 66.. Livonière, liv. 4, chap. 10 et les autorités anglaises sur les ventes faites "*in market overt.*"

COUR DU BANC DE LA REINE.

Présents :—Rolland, Panet et Alywin, J. J.

Bissonnette v. *Bissonnette.*

Le demandeur a porté devant la Cour de Circuit du Circuit de Vaudreuil, son action par laquelle il alléguait :

1o. Le mariage d'Antoine Bissonnette avec Marie Josephte Dupont, décédée depuis, et duquel mariage serait né Damase Bissonnette.

2o. Leur contrat de mariage créant un douaire préfix de la somme de six cents livres en faveur de la dite Marie Josephte Dupont.

3o. Une donation de droits immobiliers du 3 juin 1833, par le dit Antoine Bissonnette en faveur de son fils Antoine, le défendeur, moyennant différentes charges qui lui sont imposées et entr'autres celles de payer au dit Damase Bissonnette le douaire assigné au contrat de mariage du donateur aussitôt que le douaire aurait lieu, lequel était de six cents livres ancien cours."

4o. L'enregistrement de cet acte, le décès d'Antoine Bissonnette et sa femme, la renonciation de Damase Bissonnette à la succession de son père et le transport par le dit Damase Bissonnette en sa faveur, de ses droits dans la dite somme de six cents livres a. c. qu'il prétendait avoir droit de réclamer du défendeur en vertu de l'acte de donation ainsi que de la signification du transport.

Le défendeur opposa à cette action différentes exceptions péremptoires par lesquelles il a soulevé les questions suivantes :

1o. Que le demandeur n'avait pas d'action personnelle pour recouvrer la somme qu'il demandait par son action, parce qu'il n'avait pas été partie à l'acte de donation du 3 juin 1833 et qu'il n'avait pas accepté la stipulation y contenue en sa faveur.

2o. Qu'à raison de l'enregistrement de l'acte de donation que lui avait fait son père Antoine Bissonnette *et du défaut d'enregistrement du contrat de mariage* invoqué par le demandeur, le défendeur n'était pas tenu de payer la somme réclamée.

3o. Que Damase Bissonnette dont le demandeur est le cessionnaire a appréhendé la succession de son père ainsi que constaté par l'acte de transport du 31 juillet 1849, fait par le dit Damase Bissonnette au demandeur et qu'en conséquence le demandeur ne peut répéter le douaire qu'il demande par son action "parce que nul ne peut être héritier et douairier tout ensemble."

Le demandeur répliqua qu'il n'était pas nécessaire d'une acceptation de la part de Damase Bissonnette pour lui donner une action personnelle contre le défendeur donataire, et qu'en supposant que cela fut nécessaire la stipulation contenue en sa faveur avait été suffisamment acceptée par le donateur Bissonnette qui était alors mineur.

Que le contrat de mariage en question n'avait pas besoin d'être enregistré.

Que Damase Bissonnette n'avait jamais fait acte d'héritier et accepté la succession de son père.

De ces chefs d'exception proposés par le défendeur quelques-uns ont été abandonnés lors de l'argument.

Les questions que la cour avait à décider étaient de savoir si le demandeur cessionnaire de Damase Bissonnstte avait une action personnelle pour recouvrer la somme qu'il demandait par son action n'ayant pas été partie à l'acte de donation du 3 juin 1883, et n'ayant pas accepté la stipulation contenue en sa faveur, et si Damase Bissonnette cessionnaire du demandeur a appréhendé la succession de son père par le transport du 31 juillet 1849, et a fait par là acte d'héritier.

Toute la difficulté consiste dans l'interprétation à donner à l'acte de donation du 3 juin 1833 et au transport du 31 juillet 1849.

Si Damase Bissonnette a fait acte d'héritier par le transport, il est clair que l'action du demandeur son cessionnaire doit être déboutée, car aux termes de l'article 251 de la Coutume il est dit: "Nul ne peut être héritier et douairier tout ensemble."

Le 2 juillet dernier la Cour de Circuit du Circuit de Vaudreuil, présidée par M. le Juge Guy, débouta avec dépens l'action du demandeur, la Cour étant d'opinion que Damase Bissonnette avait fait acte d'héritier par le transport susmentionné.

Ce jugement fut soumis par appel à la Cour Supérieure siégeant à Montréal et a été confirmé le 16 novembre dernier par la majorité de la cour, M. Juge Smith ayant différé.

Appel ayant été interjeté à la Cour du Banc de la Reine le jugement de la Cour de Circuit confirmé par la Cour Supérieure fut renversé et mis de côté le 12 octobre dernier par la dite Cour du Banc de la Reine composée des Honorables Juges Rolland, Panet et Alywin.

Cherrier, C. R., *Dorion et Dorion*, pour le demandeur en appel ont cité :

Pothier, obligation, No. 70 à 73. Ricard, des donations, t. 2 p. 122. Guy, Repert. Vo. Mode art. de M. Merlin. Pandectes Françaises, t. 10, p. 161 et 162. Duranton, t. 10, No. 231, 232, et 233. Idem, t. 10, p. 241, 245 et 253. Furgole, des Testamens, t. 3, p. 191 et 192, No. 127 et 131. Lebrun, des Successions, liv. III, CVIII, S. II, No. 6. Merlin, Quest. Vo. Stipulation pour Autrui, par. 1er, p. 271, Edit Belge. Merlin, Rep. Acte sous Seing Privé, par. 2, p. 185, art. du Code 1121. Journal du Palais, tome 1er, p. 569 et 570. Arrêt du 26 mai, 1674. Louet, lettre H. 76, No. 10, tome 1er, p. 128. Merlin, Rep. Vo. Légataire, No. 5, p. 450. Ferrière, tome 4, p. 652 G. C. No. 5, G. C. tome 3, p. 793, No. 10, 796, Furgole, tome 3.

Gédéon Ouimet, pour le défendeur a cité :

Lebrun, Traité des Successions Renonciations, liv. III, chap. 8, sec. II, p. 541 et 543. Merlin, Rep. Vo. Héritiers, vol. 7, p. 377, No. 780, vol. 14, Vo. Renonciation, p. 580, 2 colonne, no. I de la sec. 2me.

SUPERIOR COURT.

18 *April*, 1854.

Present :—Day, Smith and Mondelet (C.), J. J.

No. 34.

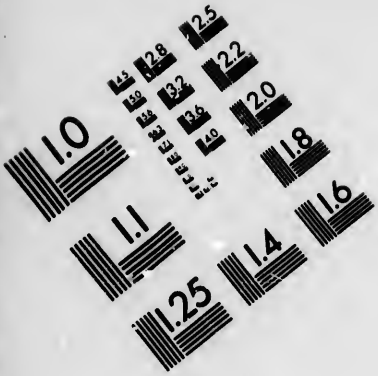
Languedoc & al. v. *Laviolette*.

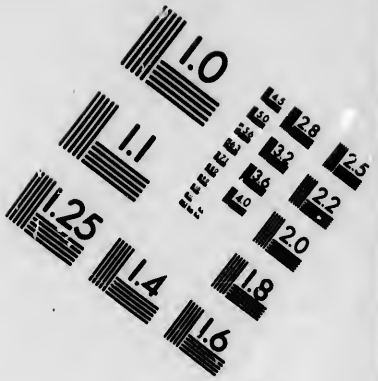
In this case the defendant had inscribed *en faux* against the parish register of marriage, and the *Curé*, by whom the entry purported to have been made, was produced as a witness in support of this inscription. The plaintiff moved to have his evidence excluded.

Cherrier, Q. C., Dorion et Dorion, in support.
Cartier & Berthelot, contra.

Day, J., This question has been decided several times by the majority of the Court. I am not disposed to disturb the judgment.

Motion dismissed.





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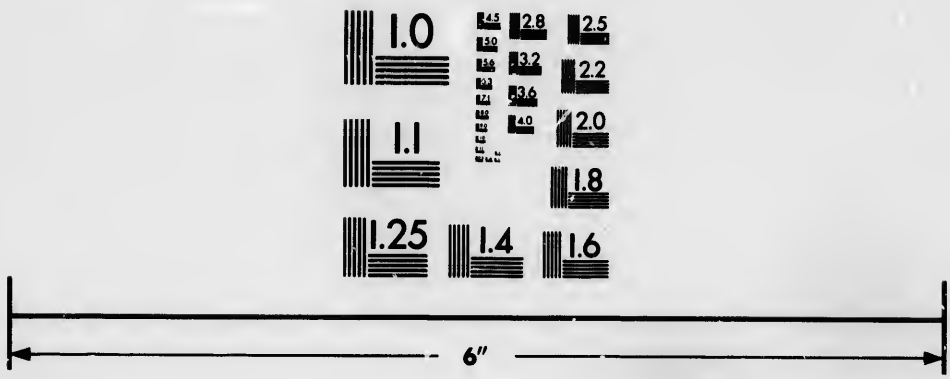

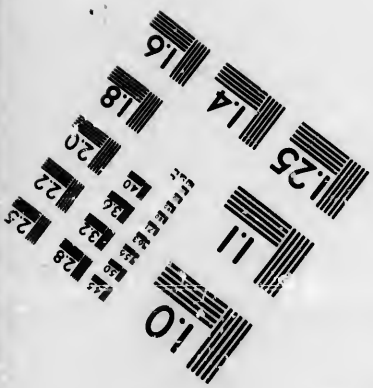

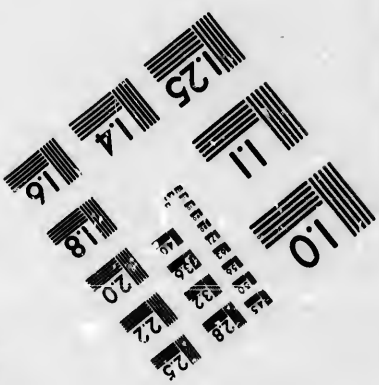

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No. 1026.

Bowker v. *McCorkill.*

Day, J., This action was brought for the recovery of 180*l.*, the price of goods sold by plaintiff to one McCorkill, now represented by his widow. Part of the goods, it is alleged, were sold by plaintiff personally to McCorkill, and partly by him and one Hall. Defendant pleads in compensation a sum of 200*l.*, price of goods sold to plaintiff, and a receipt up to 5th December, 1832. The record presents a strange appearance from the impeachment of the character of almost every witness who had been produced on the part of either plaintiff or defendant, but we attach little importance to these general attacks on the character of the witnesses. We consider the settlement of account produced by the defendant sufficiently proved. On the part of the plaintiff it has been attempted to prove that the signature to that receipt was a forgery, and the principal circumstance alleged was that it had been signed twice, J. B. & J. Bowker. This we consider as proving against the pretensions of plaintiff, for if any one had been so wicked as to forge this receipt he would not have been so foolish as to have written it twice, he would have taken another piece of paper. The *Court* considers that plaintiff is entitled to judgment for 6*l.* 17*s.* 6*d.*

Gugy, for plaintiff.
A. & G. Robertson, for defendant.

No. 43.

Hutchins v. *Dorwin & al.*

Badgley, Q. C., & Abbott, for plaintiff.
Stuart, for defendants.

Day, J., This is an action for the recovery of 275*l.*, paid on real estate purchased from one Oliver Wait, and of which real estate the plaintiff had been obliged to make a *délaissement* at the suit of an hypothecary creditor. The action sets out sale and payment of part of purchase money, and that Dorwin and Atwater became consignees of the balance. That the defendants afterwards, in order to induce the plaintiff to pay them the balance of purchase money, gave a letter of guarantee, by which they undertook to hold plaintiff harmless from

the action of any of the hypothecary creditors of the original vendor. The declaration goes on to say that an action was brought by the Savings Bank, and that plaintiff was obliged to *délaisser* the property under the judgment, and that plaintiff notified defendants, and that they agreed to *délaissement*. The evidence is documentary.

The points raised at argument were that the *délaissement* under judgment is not in law an eviction but only a *trouble*, and that the party might call on his *garant*, but could not ask him for price until after adjudication. These two points are involved in one question: whether *délaissement* warrants party to wage his action *en garantie?* We do not rest any right of plaintiff on defendants' quality of assignees, but on the undertaking of defendants at the payment of last 75*l*. Defendants by that assume the position of the vendor, and are liable to the same action that he would be. It is a pure question of law, and we have no hesitation in saying that we are with the plaintiff after having gone through all the authorities.

Loyseau draws a distinction between *déguerpissement* and *délaissement*, and holds that the first goes further than the latter, but in spite of this we think it is such an eviction as gives right to recover purchase money. Pothier Tr. de Vente, No. 83, says, "*on appelle eviction non seulement la sentence qui condamne à délaisser une chose purement et simplement, mais celle qui condamne à la délaisser, sinon à payer, ou à s'obliger à quelque chose. C'est pourquoi si l'acheteur d'un héritage, condamné sur une action hypothecaire paie les causes de l'hypothéque pour éviter les delais de l'héritage, qui vaut autant ou mieux que la créance du demandeur; cet acheteur en ce cas est censé de souffrir eviction de la chose à lui vendue, qu'il ne fait conserver qu'en donnant de l'argent, et le vendeur est tenu de la garantie de cette éviction, en l'acquitant de ce qu'il lui en a couté.* This is just a sentence to condemn plaintiff to *délaisser*, so is eviction. Plaintiff might have paid, and would have been evicted, Nos. 84—5 & 8, also Nos. 107—8 & 9. Lacombe Vo. Eviction, No. 5. An eviction, but one that may be defeated Guizot in the Repertoire Vo. Délaissement, p. 349, says, "*le délaissement opérant une veritable eviction.*" This authority applies in spirit as in terms, for in the following section he goes on to show that the difference that exists between eviction and expropriation has not been lost sight of. N. Denisart Vo. délaissement, Nos. 2 & 3. In the *nouveau droit* see:

1 Troplong, *vente.*

3 Troplong, *hypothèque.*

The new authorities thus bear out the old law. The Court, therefore, has no doubt that *délaissement* is eviction, and such as to entitle the party evicted to ask back the purchase money.

Smith, J., Judgment rests on special and specific undertaking of defendants. As plaintiff has given up (*délaissé*) the property, into what position should he be put? Why, clearly into the position of getting back his money. Plaintiff loses possession of the thing sold, and must he wait perhaps for years until the property is adjudicated?

Judgment for plaintiff.

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29 *April*, 1854.

Present:—Day, Smith and Mondelet (C.), J.J.

No. 2627.

Tidmarsh v. *Stephens & al.*

This case came up on a motion on the part of the defendants that the inscription for *enquête* and the *enquête* had thereupon been set aside, because there was no issue joined between the parties, and because the defendants had not been foreclosed from filing a replication to the general answers of the plaintiff.

David & Ramsay, in support.

E. Carter, contra.

The *Court* maintained defendants' motion.

No. 635.

Exparte, *Paradis.*

Day, J., This is an application for a writ of *scire facias* to annul letters patent. The difficulty is that these writs only issue at the instance of the Crown. In England it is incontrovertible that such was the rule, and the act by which the law was changed has been repealed.

Carter, for applicant.

Writ refused.

No. 105.

Exparte, *Trudeau*, for writ of certiorari.

Day, J., This conviction must be quashed. We have looked carefully into authorities cited, to show that conviction should be quashed without costs; but we have not the power to do so. Senecal, as *sous-voyer*, is prosecutor, and appeared and asked for judgment, and though no case is harder than that of a public officer, we cannot help him ; the statute is obligatory, and we have no discretion.

Betournay, for petitioner.

No. 919.

Exparte, *Doyle*, petitioner for a writ of *certiorari*.

Develin & Herbert, for petitioner.
Pelletier, J. F., contra.

Day, J., This is an application to quash a conviction of the Recorder's Court, by which the petitioner was condemned to pay a fine of 10*s*. and costs for having sold vegetables on the 9th of September, 1852, in St. Charles Borromée Street, of the City of Montreal, contrary to the by-law of the said city, No. 196. It is contended by petitioner that this by-law is illegal. There is no illegality about it. It is a by-law to regulate trade, and if the Corporation have any power at all they have the power to pass such a by-law as this. This power arises by implication from their having the right to assess duties, have a market and assessors. But there is another technical objection to this conviction and that is, that the by-law is not set out either in the plaint or in the conviction. The court are with the petitioner on this point. The by-law is set out very loosely, it is called by-law No. 196, and no chapter, and no section is given. The conviction must, therefore, be quashed.

Conviction quashed.

No. 587.

Exparte, *Carpentier*, application for a writ of *certiorari*.

This was an application for a writ of *certiorari* to bring up a record from the Commissioners Court, on the ground that the court below had

exceeded its jurisdiction in giving judgment in a case begun on a process of *saisie arrêt avant jugement*, which process had been granted by the clerk of the Commissioners Court, and not by one of the Commissioners.

Sicotte & LeBlanc, for petitioner.
Laberge & Laflamme, contra.

Day, J., We are very unwilling to make this Court a Court of Appeals from the Commissioner's Court, as it has become from decisions of justices of the peace: but in this case a writ of *saisie arrêt avant jugement* has been issued, signed by the clerk of the Commissioner's Court. The first statute* establishing these Courts did not give them a right to this process, but a subsequent statute† has given the clerk of the Circuit Court and the Commissioner's Court the power to issue this process in sums over 1*l.* 5*s.* It was evidently the intention of the Legislature to allow the clerk of the Commissioner's Court to sign these writs, but it has not done so. The writ, therefore, must issue.

Writ granted.

No. 1378.

Lemoine v. *Donegani.*

Day, J., This case comes up before the Court on the law issues raised on two oppositions filed by John Wolfred Donegani, against whom execution was levied, and who had deposed upwards of 600*l.* in the hands of the sheriff, with a protest stating that he did not owe this money. The sheriff returned the money with this protest into Court, and Donegani came before the Court with his two oppositions. To the first of which, an opposition *en sous ordres*, the plaintiff demurs, on the ground that it is not alleged that defendant was insolvent. This demurrer the Court is of opinion must be sustained, and the opposition *en sous ordres* must, in consequence, be dismissed. The plaintiff has likewise demurred to the 2nd opposition, an opposition *à fin de conserver*, by which the opposant claims the excess of what is due to plaintiff, on the grounds that payment to sheriff is payment to the party—that the sheriff is only his *mandataire*, and that he should have paid plaintiff. We have often held that sheriff was entitled to pay plaintiff; but in this case he has

* 7 Vic. c. 19. † 14 & 15 Vic. c. 18.

not done so, but paid money into Court, and it was before the Court for parties to bring their legal claims. This demurrer must, therefore, be dismissed.

Cherrier, Q. C., *Dorion & Dorion*, in support.
Cartier & Berthelot, contra.

No. 107.

Larocque v. *Clarke.*

The plaintiff instituted an action against the defendant on a writ of process *ad respondendum*, on which defendant was taken into custody. Plaintiff's affidavit set out that defendant was of Burlington, in the United States of America, and that he was informed that defendant was about to leave the Province of Canada, and that he verily believed that it was with intent to defraud him, the plaintiff. Defendant, by his attornies, moved to be discharged from custody, the affidavit being insufficient, there being no reasonable cause for the plaintiff's belief that defendant was about to leave the Province with intent to defraud.

Mack & Muir, in support.
Lafrenaye & Papin, contra.

Day, J., This affidavit is not what is contemplated by the law. There must be such a reason given as will be sufficient to make the Court, as well as the creditor, believe that the party arrested is going to leave the Province with intent to defraud. A reason must be a reasonable reason. In this case the affidavit sets out that the defendant was resident in the United States, there is then nothing suspicious in his leaving Canada; he might be going home.

Motion maintained.

No. 637.

Exparte, *Archambault*, applicant for writ of *certiorari*.

The applicant had been condemned at the suit of a person in his quality of *sous-voyer*, for not cutting down *cahots* on winter roads.

The *Court* held that this action should not be brought by *sous-voyer*, but by the council of the municipality.

Piché, for applicant.

Writ granted.

No. 2663.

Tator & al. v. *McDonald.*

Held, *that a creditor of a co-partnership may sue any one of the co-partners without having previously brought his action against the co-partnership.*

MacIver, in support.
Day, contra.

Day, J., This is an action for the recovery of a sum of money due by a co-partnership. The action is brought against one of the partners only. In the declaration it is alleged that the debt was incurred at Troy, to wit at Montreal. To this declaration defendant has demurred, first, that the statement that the debt was incurred at Troy and at Montreal at the same time is fatal. The Court is not of opinion that this is ground of demurrer, though it may be of *exception à la forme*. Second, the defendant objects that there is no name to the co-partnership, but it often happens in joint adventures that the partnership has no name. And 3rd, that it is not competent for the plaintiff to sue one of several co-partners. In France now it appears that a party is not allowed to sue one of several co-partners until he has brought his action against the co-partnership, V. 4, *Pardessus*, No. 1026; but it has been the practice and jurisprudence here, and we find nothing against it in the old books, and if the plaintiff cannot do so it is an exception to the rule of *solidarité*.

Smith, J., I concur with the court on the ground of practice, but I personally think no such action can lie. A co-partnership is a distinct person—*personne civile*, V. 5, *Duvergier*, No. 381, and following, also, 4 *Pardessus*, and action should be brought against the co-partnership. In the old books we find the doctrine with regard to *solidarité;* but the difference is that the contract is made with individuals who by law are reputed to be *solidaire*, whereas this is a contract with the co-partnership, and not with one of them alone.

Demurrer dismissed.

No. 747.

Elliot v. *Macdonald & Ryan*, T. S.

The *Tiers-Saisi* in this case declared that he was in possession of a certain sum of money and certain goods belonging to the defendant,

which goods had been consigned to the firm of which he was then a partner, to be sold on commission. The *Tiers-Saisi* further declared that these goods were liable to him for insurance up to that day, and other charges. Before obtaining judgment on the *Tiers-Saisi's* declaration the greater part of the goods were destroyed, and the remainder injured in a fire, by which the *Tiers-Saisi's* premises were consumed. The plaintiff afterwards obtained judgment, and the *Tiers-Saisi* came in and made a supplementary declaration. By this second declaration the *Tiers-Saisi* said that he had paid the money seized in his hands; that the bulk of the goods were consumed in a fire which had arisen without any fault on his part, and that the remainder having been damaged were sold for a certain sum of money, which, after the deduction of certain privileged charges, left a balance in his hands of 36*l.* 10*s.* 1*d.*

The plaintiff put in three contestations to this second declaration. By the first of his contestations plaintiff said, that by the usage and custom of trade, and of merchants at Montreal, the *Tiers-Saisi*, as such consignor, was obliged to take the utmost care of these goods, and to insure them, and that he had insured the said goods up to the time of making the first declaration, but had allowed the insurance to expire before the goods were burned, and that in consequence he was liable to the seizing creditors for the whole value of the goods burned.

By the third of his contestations plaintiff said, that defendant frequently had instructed *Tiers-Saisi* to insure the said goods, and the *Tiers-Saisi* had promised defendant to insure the said goods.

To both of these contestations the *Tiers-Saisi* demurred. To the first, on the ground that even if the *Tiers-Saisi* had been obliged by law or the custom of merchants to insure as consignee, that it was not shown, as alleged, that after the position of the *Tiers-Saisi* had been changed by the seizure of the goods there was any usage by which the *Tiers-Saisi* was held to insure; and to the last contestation he demurred, on the ground that even if *Tiers-Saisi* had undertaken and promised the consignor to insure before the seizure, as was alleged by plaintiff, that it was no contract with plaintiff, and that by the effect of the seizure his position was very much altered.

Bethune & Dunkin, in support.
Badgley, Q. C., *& Abbott*, contra.

Smith, J., dissenting from the opinion of the majority of the court, thought that the position and obligations of the *Tiers-Saisi* were not altered by the seizure.

Day, J., giving the judgment of the court, said, that in the first place the defendant was not represented in this matter, and that the creditor seizes no incorporeal rights. In the writ there is no form of words to cover such rights. Could it be contended that the creditor would have an action of damages for non-insurance by *Tiers-Saisi* without assignment? If not he cannot claim this. Secondly, the usage of merchants might have some force between the consignor and the consignee at the time they contracted; but the nature of the *Tiers-Saisi's* tenure of these goods was changed.

Mondelet (C.), J., concurred with Mr. Justice Day.

Demurrers maintained.

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20 May, 1854.

Present:—Day, Smith and Mondelet (C.), *J. J.*

No. 2210.

Truax v. *Hunter*

SEDUCTION.

Held, *that on the plea of general issue, general irregularities of conduct may be proved, but if particular acts are proved they must be pleaded.*

Badgley, Q. C., *& Abbott*, for plaintiff.

Bates, J. & W., for defendant.

Day, J., On the general issue general irregularities of conduct may be proved; but if particular acts are to be proved they must be pleaded.

Mondelet (*C.*), J., I think that evidence of general bad character should not be proved unless pleaded.

No. 2002.

G——— v. *L*———.

Moreau, LeBlanc & Cassidy, for plaintiff.

Berthelot, for defendant.

Day, J., This is an action *en separation de corps et de biens*, brought

by a wife on the ground of the severity of her husband's treatment. Her action is met by an allegation of ill-conduct on the part of the wife, and of conjugal infidelity, and the husband offers to take her back again. There can be no doubt as to the ill-treatment of the wife by her husband; but there is also proof of the bad conduct of the wife, and one witness detected her in the act of adultery. The *separation de corps et de biens* is declared, but the wife is *déchue* of her matrimonial rights. The judgment, however, does not go to allow her to have the children, it is against all principle to deprive the husband of the children where no cause is shown.

No. 2634.

Lynch v. *Papin.*

Day, J., This case comes up on an application on the part of the defendant to reject interrogatories on *faits et articles* deferred to him by the plaintiff, on the ground that interrogatories on *faits et articles* cannot be put in a case in the nature of a *quo warranto*.

The Court is against defendant. This is a *requête libellée*, which is a proceeding known to the French law; but even if it had not been, plaintiff would have had a right to put interrogatories on *faits et articles*. Every one has that right, even strangers coming to claim rights on contracts made out of the country and where procedure does not exist.

Cherrier, Q. C., *Dorion & Dorion*, for applicant.
Mackay & Austin, contra.

No. 1466.

Phillips v. *Anderson.*

INSANITY OF TESTATOR.

Held, *that the action* ab irato *cannot be brought in this Province; and that aversion to be a proof of insanity must be an aversion without cause.*

Mackay & Austin, for plaintiff.
Bethune & Dunkin, for defendant.

Day, J., This was an action by plaintiff to set aside his father's will

by which he was bequeathed so small a sum that it amounted to absolute disinherison of him. The declaration, after setting up the will, alleged that the late Mr. Phillips was insane, not that he was generally insane, but that he was affected with a partial insanity which manifested itself in hatred of the plaintiff.

The plea is special in name, but in effect amounts to the general issue. The questions, therefore, r ised are: was plaintiff insane, and did his insanity manifest itself in viol nt hatred of George Phillips, the plaintiff? It was, however, contended at the argument that the declaration covered more, and that it prayed that will should be set aside *ab irato*. To take this last point first, the Court does not think that this action lies under the law of the Province as it now stands. The action *ab irato* was introduced by lawyers where the state of the law was such that the deviation of property from the direct line was greatly objected to. But on looking at the two statutes, 14 Geo. III. and I Geo. III., this was done away with. By the first of these two statutes the restrictions to making wills under the custom were removed; but doubts arose as to whether this statute went so far as to do away with the old law, but the second statute, allowing every one of sound intellect and having equal use of their rights to make wills, cut off all the old law with respect to wills; and the Court cannot add nullities where the law has not attached them. There is no action *ab irato* under the *code*, V. 5. *Toullier*, p. 666, No. 717.

The next question is, was plaintiff's father partially insane at time of making the will in question? The only fact on which the plaintiff's pretension is founded was the extreme aversion to plaintiff. But would the mere fact of a parent's aversion to his child, taken without any cause soever, be sufficient to show that testator was insane, and if so would it be sufficient if a cause were shown?

Should a man be considered insane more because he was angry than because he was in love? Strong passions may be had, but the man who indulges in them is not for that reason insane. The true question that must always be considered, as proving the state of intellect, is, was he angry without a cause? If the testator had conjured up some delusion on which he grounded his hatred, as, for instance, if he had thought plaintiff wanted to poison him, then the hatred would not only be a bitter, but an insane hatred. But in this case was there any such delusion? The evidence is to be taken partly from the will and partly from the witnesses. On looking at the will it exhibits great sagacity and wisdom, but there are some provisions that

show the bitterest extent of hatred; thus, after providing for all his children, and even for his collateral relations, the testator bequeaths to the plaintiff the sum of 10*l.*, payable in five yearly installments. There is sufficient proof of anger there, if that were sufficient. The evidence for the plaintiff consists of seven witnesses, all of whom testify to the passionate character of the late Mr. Phillips. One witness goes so far as to say that he was mad on certain points. There can be no doubt of the feelings of the testator to his son; but it appears that, owing to some business transactions between the father and the son, there had been a quarrel, out of which had arisen the bad feelings of the testator. But can the Court say that that anger was too strong, and that, therefore, the testator was insane? I avoid all metaphysical considerations, as the question rests on broader grounds. If anger is not of itself to be the cause for setting aside the will, can we say how much anger is justifiable? Certainly not. Every cool man thinks anger in nine ty-nine cases out of a hundred is excessive. The evidence of the defence however assumes a different aspect. There is nothing, it is true, which tends to contradict the aversion of the testator to his son; but it shows that he felt aggrieved by his son. It is also proved that he did not always break out in violent abuse of his son every time he was named, but firmly said that he should not participate in the benefits of his estate. To the witness, Workman, he said that his son had had enough of his estate. The will exhibits a characteristic of the testator, it appears that he was always anxious to make a family, and one of the witnesses, Try, said that he was fond of money and anxious to build up a family,—this is no evidence of his being insane. In the whole testimony we may remark that there is nothing against the character of plaintiff, indeed nothing that is not most creditable to him.

Action dismissed.

No. 241.

Exparte, *Ira Gould*, petitioner for a writ of *certiorari*.

Rose, Q. C., *& Monk*, for petitioner.
Pelletier, J. F., for Corporation.

Day, J., This is a case brought up before us on *certiorari* from the Recorder's Court, where judgment had been rendered at the suit of the Corporation of Montreal, against petitioner, for a sum of money

due to the Corporation for assessment on mills within the city limits. The action in the court below was contested, and the points raised are seven in number, six of which are special. The first point is that the Recorder's Court had no jurisdiction, as the statute creating it was passed in the 8th of the Queen's reign, and that it had only jurisdiction over taxes then existing by by-laws. This is not tenable, both the letter and the spirit of the law are against such a pretension.

The second point is, that the by-law is not set out at length in plaint. We find that the plaint alludes to the by-law by number, and that the by-law forms part of the record. This is a point of pleading and practice for the Recorder's Court, and we should not feel disposed to follow the strict English rule in this case and quash the conviction, unless we found there was reason to suppose that the defendant had been led into error.

The third point is, that it was *chose jugée*. There is no proof of this.

The fourth point is, that the Provincial Statute was unconstitutional and null.

The fifth point is, that the property is not within the City of Montreal. This is incorrect, it is.

The sixth point is, that the property belonged to Government and was not taxable.

The seventh point is merely formal that the conviction was given contrary to evidence.

The points upon which petitioner's argument principally rested were the 4th. That the Provincial Statute was unconstitutional; and 6th, that the property taxed belonged to Government.

In support of the former of these two last mentioned grounds the petitioner contended that by the Provincial Statute creating the office of Recorder, the Corporation was created a judge in its own cause, which was beyond the powers of the Legislature of this Province. This is entirely unfounded. The Recorder is the officer of the Government and not the servant of the Corporation, and he has no interest in the case. But as it has been urged that this statute is one beyond the power of the Provincial Legislature to pass, we may as well state our views as to what the court will be disposed to consider as the powers of the Provincial Parliament. The Provincial Parliament is established by the Imperial Statute 3 and 4 Vic. c. 35, and by the 3rd section of this Statute Her Majesty is authorized by and with the consent of Parliament here to legislate for the peace, welfare and good government of the Province of Canada, such laws not being

repugnant to this Act or to such parts of the said Act passed in the thirty-first year of the reign of His said late Majesty as are not hereby repealed, or to any Act of Parliament made or to be made and not hereby repealed, which does or shall, by express enactment or by necessary intendment, extend to the Provinces of Upper and Lower Canada, or to either of them, or to the Province of Canada, &c. What then are the powers of Parliament? To make laws for the peace, welfare and good government of the Province. Who is to judge of what legislation is for the good government of the Province, and what not? This court cannot do so. Almost every statute interferes more or less with vested rights; but wherever a general discretion is given to any body to legislate for the peace, welfare and good government of those subjected to their rule, that body necessarily becomes the judge of what is for the peace, welfare and good government of its subjects. The powers of legislation of the Provincial Parliament are as extensive as that of the Imperial Parliament, while they keep within the limits fixed by that statute, even if they were to interfere with *Magna Charia*.

The next question is, does the property belong to Government? By statute the board of works were allowed to dispose by lease or otherwise of certain hydraulic lots on the Lachine Canal, of which the property in question is a part, and it is contended that these leases passed no right of property, that Gould had not the *jus in re*. At the time of the argument the court expressed the opinion that *baux à longues années* did pass the *jus in re*, and we find that we were not in error. These leases like *emphiteotiques* leases do not give rise to *lods et ventes* and from this Merlin contends that there is no alienation of property—no *jus in re*—conveyed to the lessee; but he admits that this opinion is contrary to that of other authors. *Troplong*, Louage, nos. 25 and 48 mentions the old authors who were of this opinion, but gives it as his opinion that it does not pass the the *domaine utile*. We, however, find one clause of these Deeds of Lease which prohibits the lessee from sub-letting, and it is held by the authors that where there is no right to sub-let there is no alienation of the property; but in this case the assessments were on buildings and they did not belong to Government.

Conviction confirmed.

No. 631.

Imbault dit Mantha, appellant. Bourque, intimé.

Day J. Dans cette cause, l'appelant Imbault a fait servir à l'intimé un avis d'appel à la Cour Supérieure d'un jugement rendu contre lui à la Cour de Circuit du Circuit de Vaudreuil, mais a négligé de produire sa requête en appel le jour qu'elle devait être produite. L'intimé a fait demande à cette Cour, de déclarer que tout droit ou réclamation fondé sur cet appel est perdu et que le dit appel est péri et abandonné. L'intimé appuie sa prétention sur la Clause LVI de l'Acte de Judicature 12 Vic., chap. 38 " *et pourvu aussi que tout appelant qui négligera de faire signifier copie de la requête et avis d'appel comme susdit et qui après les avoir fait signifier négligera de poursuivre le dit appel ainsi que ci-dessus prescrit, sera censé avoir abandonné le dit appel et sur la demande de l'intimé la Cour à laquelle il y aura appel déclarera que tout droit ou réclamation sur tel appel est perdu, accordera les frais à l'intimé et ordonnera (si le dossier a déjà été transmis) de le remettre à la Cour Inférieure.*"

La Cour ne croit pas pouvoir accorder la motion de l'intimé nonobstant cette disposition de Statut. Dans la cause actuelle le dossier n'étant pas transmis devant la Cour, la Cour se croit dispensée d'intervenir.

Hubert, Ouimet et Morin, au soutien de la motion.

R. Laflamme, contra.

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CIRCUIT DE ST.-HYACINTHE.

Février, 1854.

Présent:—J. S. McCord, *Justice.*

Muir, appelant et Decelle, (sous-voyer) intimé.

Cette cause était un appel d'un jugement de deux magistrats rendu à une Session Spéciale de la Paix, en faveur de l'intimé dans sa qualité de sous-voyer de certains chemins. La plainte sommait l'appelant " pour avoir négligé et refusé de payer sa part du coût de l'entretien de la route du second ou troisième rang dans laquelle il avait une part de route pour les terres qu'il possédait dans le troisième rang de la dite paroisse, etc.," pour laquelle il (l'intimé) demande à lui (l'appelant) la somme de quatre chelins courant, à raison de quatre deniers par arpent: 12 arpents, 4s courant, etc, et les frais. En réponse à cette demande

le défendeur en Cour Inférieure fila trois défenses dont la première, une exception déclinatoire, n'était point soutenue. Par la seconde de ses défenses le défendeur maintint que "le dit Augustin Decelle dans sa qualité de sous-voyer n'avait pas le droit d'intenter aucune action pour le recouvrement d'aucune somme d'argent pour aucune cause mentionnée dans la dite plainte et sommation." Pour la dernière de ses défenses le défendeur allégua "qu'il ne pouvait pas être légalement condamné à payer aucune cotisation ou taxe imposée sur ses dites terres qu'au pro rata de leur valeur et non à raison de leur étendue, soit en front, soit en superficie; mais que toute telle taxe devait être prélevée suivant la valeur des dites terres, établie par les trois cotiseurs nommés par le Conseil Municipal du Comté dans lequel les propriétés en question sont situées.

Nonobstant ses défenses les Juges de Paix rendirent jugement en faveur du plaignant, et c'est de ce jugement dont est appel. Les moyens d'appel sur lesquels l'appelant se fonda pour obtenir gain de cause furent essentiellement ceux que nous venons de rapporter ci-haut, au long.

Mondelet et Ramsay, pour l'appelant ont référé au Statut Provincial 10 et 11, Vic. 7, établissant les Conseils Municipaux et les différents Statuts qui l'amendent ou l'expliquent 12 Vic., c. 51—13 et 14 Vic., c. 34—14 et 15 Vic., c. 98 et 90. Au soutien de la première défense ils ont prétendu que par le premier de ces Statuts les pouvoirs anciennement exercés par le Grand Voyer du District furent transmis au Conseil; que les Conseils seuls avaient le droit d'imposer ou de percevoir des taxes, et cela seulement par moyen de leurs trois cotiseurs; que le sous-voyer et même l'inspecteur étaient simplement des employés du Conseil, incapables d'agir d'eux-mêmes. Au soutien de l'autre défense et moyen d'appel ils ont référé spécialement à la Section 17° et 25°, 10 et 11 Vic., c. 7.

Sicotte, pour l'intimé combattit la position prise par les avocats de l'appelant et prétendit que si la Cour, par sa décision, maintenait l'appel, les Conseils Municipaux fonctionneraient encore plus mal qu'auparavant.

McCord, J, a prononcé son jugement, en français, à la requisition de M. Sicotte qui désirait faire connaître la décision afin d'éclairer ceux qui sont appelés à remplir les fonctions d'inspecteur et de sous-voyer. Son Honneur dit: Qu'en lisant les Statuts cités par les avocats de l'appelant, il était évident que le sous-voyer n'avait aucune qualité pour poursuivre, et que l'appel devait être maintenu.

Qnoique ce jugement ait été rendu il y a quelque temps, nous avons été induits à le publier à la requisition de quelques-uns de nos amis, comme étant de nature à aider aux Magistrats de campagne qui ne sont que trop souvent appelés à juger des questions tout-à-fait au-dessus de la portée de ceux qui n'ont pas reçu une éducation professionnelle. Nous sommes aussi bien aise d'attirer l'attention du public sur l'état dans lequel se trouve la loi des Municipalités. Il n'y a que sept ans que le système actuel est en existence, et déjà on est obligé de feuilleter six Statuts pour s'assurer de la plus simple question.

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11 Octobre, 1854.

Present :—J. S. McCord, *Justice.*

Dans une cause No. 243, "des Commissaires d'Ecoles pour la Municipalité du Township d'Acton, dans le Comté de St. Hyacinthe," contre la Compagnie du Grand Tronc de chemin de fer du Canada.

Les demandeurs déclarent que la Compagnie du Grand Tronc, est en possession du chemin de fer qui traverse le Township d'Acton. Que le dit chemin de fer, ses terrains, terrassemens, dépots, hangards et bâtisses dans les limites du dit Township ont été légalement évalués à la somme de £1,050 courant, et le montant de la cotisation fixé pour l'année scolaire commençant le 1er juillet 1853 au 30 juin prochain, à £10 9 4½, courant, ainsi qu'il est établi par le rôle des cotisations des dits demandeurs pour la dite année scolaire, et ils demandent que la défenderesse leur paye la dite dernière somme. La défenderesse dit pour exception péremptoire à la dite action, que par la loi du pays elle n'est pas assujettie à la taxe pour les fins scolaires, mais en est exempte pour des raisons d'intérêt public.

Que la défenderesse est tenue de payer dans la valeur du rôle de cotisation pour les dépots et bâtimens qu'elle possède dans la dite municipalité, et sont prêts à payer et l'ont toujours été, la taxe scolaire sur telle valeur, mais les demandeurs ont refusé de limiter leur réclamation et imposition.

Que la défenderesse n'était pas obligée de faire valoir son exception par rapport au dit chemin auprès des autorités locales. Jugement en faveur des demandeurs motivé comme suit :

S. H. le Juge McCord concourt dans les raisons données par la défenderesse et en admet la justice, mais condamne néanmoins la dite défenderesse sur ce point, qu'elle aurait dû réclamer contre le rôle des cotisations en autant qu'elle y était concernée durant les trente jours que

le dit rôle est resté entre les mains du secretaire-trésorier pour inspection, après avis public à cet effet affiché et publié suivant la loi, et en appeler ensuite à la Cour de Circuit comme Cour de Révision.

DeBoucherville, pour les demandeurs.
Sicotte et Leblanc, pour les défendeurs.

QUESTIONS DE DROIT.

Ci-suivent quelques-unes des questions de droit les plus importantes, qui ont été décidées dans le dernier terme de la Cour du Banc du Roi du District de Québec. Elle découlent des décisions qui ont été données dans les différentes causes :—(*Mars*, 1837.)

Quand un procès par jurés a été continué pour quelque cause que ce soit, il est libre à l'une des parties de sommer les mêmes jurés de comparaître *de novo*, par un *Alias Writ* de *Venire facias*, au lieu d'un *Writ* de *Distringas* usité en Angleterre, mais inconnu ici.—Affaire *Bouchette* vs. *Felton*.

— Le défaut d'exactitude dans la citation du Statut qui règle les qualifications des Magistrats, dans une cause intentée contre un Magistrat pour avoir agi comme tel sans les qualifications requises, est une exception valable et suffisante pour faire renvoyer l'action, quoique la citation du titre ne fût pas nécessaire, même dans une action *qui tam*. —Affaire *Phillips* vs. *Russell*.

— Le shérif n'est pas garant envers l'adjudicataire qui n'a pu obtenir possession d'un bien à lui adjugé par le shérif en sa qualité de shérif. L'adjudicataire a son recours contre ceux qui ont reçu l'argent.—Affaire *Lachance* vs. *Sewell*.

— Le défaut d'énonciation que le défendeur est propriétaire, dans le corps de la déclaration, dans une action hypothécaire, quoique cette énonciation se trouve dans les conclusions, est une omission fatale.—Affaire *Potvin* vs. *Simard* et *Rodrigue*.

— Deux demandeurs non-solidaires ne peuvent poursuivre ensemble : cependant le défendeur comparaissant et ne prenant pas l'objection, la Cour ne la supplée pas, car il peut être l'intérêt du défendeur que l'action ne soit pas renvoyée, attendu qu'il aurait ensuite à payer les frais de deux actions. Dans une cause *ex parte*, la Cour aurait suppléé à l'objection.—Affaire *Fraser* et *Fraser* vs. *Gravelle*.

— Les injures réelles ne se prescrivent pas par l'an et jour, mais seulement les injures verbales.—Affaire *Peltier* vs. *Lemelin*.

— Il n'y a pas de lods et ventes sur un bail emphytéotique de 99

ans, soutenu d'un testament de la part du locateur en faveur du locataire, lorsqu'il n'y a pas preuve de fraude, et tant que le testament n'est pas ouvert par la mort du testateur.—Affaire *Lanaudière* vs. *Jobin*.

— Une donation à titre onéreux ne donne pas lieu aux droits de lods et ventes, lorsque la donation est entre père et fils par un contrat de marriage et ne contient aucun prix déterminé.—Affaire *Lanaudière* vs. *Roi*.

— Une quittance sous seing privé donnée par un cédant à son débiteur, est une exception valable et une réponse suffisante à l'action d'un cessionnaire qui n'a pas signifié son transport, s'il n'y a pas eu fraude.

— Il est permis d'émaner un *mandamus* à un curé à l'effet de faire discuter une élection de marguiller devant les tribunaux.

Le curé n'a pas de voix dans l'élection des marguillers.—Affaire *Leduc*, curé de St. François.

SUPERIOR COURT.

31 *May*, 1854.

Present :—Day, Smith and Mondelet (C.), J. J.

No. 2217.

Kelton v. *Manson*.

DOMICILE—EXCEPTION A LA FORME.

A. & G. Robertson, in support.

Devlin & Doherty, contra.

Day, J., This case came up on an *exception à la forme* that defendant had left the house where process was served a *month* before service, and had gone to California. This allegation is sustained by the evidence ; the action must therefore be dismissed.

Exception maintained.

No. 132.

Exparte, *Verroneau*, for writ of certiorari.

COSTS.

Carter, *E.*, for petitioner.

Day, J., The only question here is whether Martin, the complainant, or the inspector should pay the costs. The costs must go by the record, and Martin does not appear there, the inspector therefore must pay the costs.

No. 2617.

McDonald v. *Seymour.*

DOMICILE—EXCEPTION A LA FORME.

Fleet & Dorman, in support.
Day, contra.

Day, J., This case comes up on a question of sufficiency of service of process. Summons was served on defendant at the Ottawa Hotel by leaving a copy with the bookkeeper. Defendant contends that he was entitled to have service made personally or at his domicile. The question therefore is, was the Ottawa Hotel defendant's domicile or not ? It appears by the evidence that plaintiff was lodged there by the month, but was often away, and his room was not kept for him, he sometimes slept in one room and sometimes in another, and sometimes on the sofa. The authorities decide that service at the residence of a party is not sufficient. See *N. Denisart* Vo. Assignation, and *Jousse*, Commentaire sur l'Ord. 1667, A, p. 17. The service should have been personal.

Exception maintained.

No. 1988.

Dendurand & ux. v. *Pinsonneault.*

DAMAGES.

Drummond, At. Gen., *& Dunlop*, for plaintiffs.
Loranger, for defendant.

Day, J., This is an action of damages brought by a man and his wife for damages caused to the latter by a bite of defendant's dog. We have no doubt that Mde. Dendurand was bitten by the dog in question, although it is only proved by one witness. The wound was of great severity, and the woman was ill, and was attended by a doctor for five weeks. The only justification offered by the defendant was that the woman was a trespasser, she having left the high-road and walked near the defendant's barn. This was no trespass. We know the habits of the country, and that when the roads are bad people walk along the sides of the fields, but there is no *animus* in that to make it a trespass. A

man may keep a dangerous dog to protect his property; but if he does so, he does it at his own risk, and is liable to his last farthing for the damages it may do. The doctor's fees amount to 22*l.*, and we have assessed the damages at 50*l.*

No. 469.

Read, Applt., v. *Lefebvre*, Respt.

DAMAGES.

Doutre, for appellant.
Loranger, for respondent.

Day, J., This is a case of litigation in a very small matter. The action was brought in the Circuit Court for damages in consequence of respondent having come on appellant's land and having filled up a ditch. Defendant in Court below said that he filled up the ditch in question by virtue of a *procès-verbal*, by which he was authorized to open a new ditch. The plaintiff in the Court below answered that the said *procès-verbal* had been brought up before the Court and broken. Plaintiff proved his answer, but the Circuit Judge thought little damage was produced and dismissed the action. This was probably a good equitable view of the case; but plaintiff has shown right of action, and we must reverse the judgment of the Circuit Court, and we assess the damages at 5*l.*

Appeal maintained.

No. 815.

Campbell & al. v. *Hutchison.*

PRESCRIPTION—STATUTE OF LIMITATIONS.

Badgley, Q. C., *& Abbott*, for appellant.
Fleet & Dorman, for respondent.

Day, J., This is an appeal from the Circuit Court on the much vexed

question of the prescription of five years. We give the same decision as in the case of *Wing* v. *Wing*.*

No. 2697.

Paradis v. *Lamère.*

EXCEPTION A LA FORME—MISNOMER.

Held, *that plaintiff is obliged to know his own name, and to tell it to defendant.*

Bethune & Dunkin, in support.
Cherrier, Q. C., *Dorion & Dorion*, contra.

Day, J., This action is met by an *exception à la forme*, by which defendant alleges that his father is of the same name as himself, and is still living, and that he should have been styled the younger—that plaintiff is not a practising physician—and that plaintiff is Charles A. H. Paradis, and not Henri Paradis. We are against defendant on these first two reasons, but we are with him on the last point. Plaintiff is obliged to know his own name and to tell it to defendant. It has been said that the Ordinance of 1667 does not require the plaintiff to give more than his domicile and quality and surname, but on looking at the article 2 Tit. 2 we do not feel sure of this, and we find in the authorities that the plaintiff must give his name; now the name of the party is not Henri Paradis, but Charles A. H. Paradis. Vide *Dalloz*, Vo. Assignation, Nos. 89 & 94.†

Action dismissed.

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* Vide 4 Lower Canada Reports, p. 261.

† It would seem that although the Ordonnance of 1667 does not, in express terms, say that the name of the plaintiff shall be given; yet that it has been always interpreted to mean that plaintiff shall be sufficiently described to make defendant sure of the party by whom he is sued. *Vide* N. Denisart, Vo. Assignation, p. 457. From this it might be said that the Superior Court, in the judgment above reported, had gone a little too far; but it must be admitted that it is the safe side to err on. And we find that Guyot in the Repertoire, Vo. Ajournement, does not hesitate to say that plaintiff's name must be given, except in certain specified cases, and the name is of course the whole name.

No. 2491.

Stephens & al. v. *Watson & al.*

PLEADING.

Defendants appeared together, and pleaded together; but by the second plea one of the defendants answered the action specially for himself, and concluded that, as far as he was concerned, the action might be dismissed. By the third plea the other defendant did likewise, and plaintiffs moved to have these pleas dismissed from the record, on the ground that defendants, having appeared and pleaded together, they could not be allowed separately to defeat the action; and that, as they were bound to plead together, neither plea was an answer to the action.

David & Ramsay, in support.

Drummond, Att. Gen., *& Dunlop*, contra.

Day, J., We do not see that plaintiffs are injured by this manner of pleading; but it is certainly irregular, we therefore grant plaintiff's motions.

Smith, J., I concur in this judgment because I see no use of these pleas.

Motions granted.

No. 117.

Williams v. *Arthur & al.*

SECURITY OF COSTS.

A. & G. Robertson, in support.

Cherrier, Q. C., *Dorion & Dorion*, contra.

Day, J., This is a motion for security of costs. It is resisted by plaintiff as being made too late. It appears that defendants appeared on the 12th of May, and only gave notice of motion on the 18th. Defendants say that the return was made in vacation, and that they could not make their motion; that the rule of practice which limited them to four days must be held to mean four days in term, and that they had only had one day, the 17th, that they were entitled to security of costs by the Statute 41st Geo. III., and that the rule must yield to

the Statute. We are against the movers, the rule of practice must only yield when it is at war with the Statute.

Motion rejected.

No. 2219.

Jones & al. v. *Young.*

The plaintiffs sued the defendant for rent for the storage of wheat, which defendant refused to pay, on the ground that the wheat delivered back to defendant was not as heavy as that put into the plaintiffs' warehouse.

Rose, Q. C., *& Monk*, for plaintiffs.
A. & G. Robertson, for defendant.

Day, J., This action is brought for rent for the storage of wheat, and it is contended by the defendant that the proper weight has not been returned to him. Wheat is not delivered by weight but by quantity. Is the party storing wheat to be considered as the warrantor of its weight? There is no doubt that the wheat given back was the same as that received; but it is contended that there is a custom of trade which obliges the storer to give back the wheat in weight; no such custom has been proved; if it had been it would have been against law. Plaintiffs must recover.

Judyment for plaintiffs.

No. 2655.

Brown v. *Hogan & al.*

This was an action, begun by process of *saisie revendication*, by a piano-dealer against the defendants, described as hotel-keepers, to recover back a piano, which had been lent by the plaintiff to a person of the name of Warr for the purpose of giving a concert in a room in the hotel of the defendants. Warr left the town without paying for the use of this room, and the defendants' retained the piano, pretending they had a lien on it for the *depens d'hotelage.*

Cherrier, Q.C., *Dorion & Dorion*, for the plaintiff.
David & Ramsay, for the defendants, contended that the 175 Article

of the Coutume gave the lien under which defendants claimed to retain the piano until Warr's bill was paid,—that the Coutume having used the word "*biens*," this right covered every kind of moveable, and that they were equally liable whether the proprietor or person who had put them there had boarded in the hotel or not, and that the expression *depens d'hotelage* ought not to receive a narrow dictionary interpretation, as it was evident from the after use of the word *hôtelés* that it did not simply mean expenses of entertainment; but rather all expenses incurred by a traveller in a hotel, whether for his own entertainment or for the protection and accommodation of the *biens* placed there by him.

Dorion, in reply, contended that the lien was only acquired when the hotel-keeper was acting within the ordinary scope of his business,—that in this case Warr took the room on purpose to give a concert.

The *Court* sustained the pretensions of the plaintiff.

Mondelet (C.), J., In support of the judgment of the Court, said, that the room was let to give a concert in it, that it did not appear that Warr was even a boarder in the house, and that the plaintiff, Brown, had never lost the possession of the piano, as the key had been kept by one of his *employés*.

Judgment for plaintiff.

No. 83.

Exparte *Raphael Moquin*, for Certiorari.

This application was to remove a conviction rendered by a Justice of the Peace under the 13 & 14 Viet. c. 40, against the applicant, for trespass and cutting timber.

Carter, for applicant, contended that the conviction awarded imprisonment not only for the penalty but also for damages and costs, which was unauthorized by the Statute upon which the conviction was rendered.

Rose, Q. C., *& Monk*, contra, relied on Sections 17, 18 & 20 of 14 & 15 Viet. ch. 95, as fully authorizing the Justice in awarding imprisonment for the amount in the conviction in any case, whether for damages or costs.

Per Curiam. We have given particular attention to the clauses of the

Statute 14 & 15 Vict. ch. 95, and we are satisfied that they fully sustain this conviction.

Application rejected.

No. 1227.

SUPERIOR COURT, *Montreal, May*, 1854.

Exparte *The Harbour Commissioners of Montreal*, for Ratification of Title, v. *John Fisher*, opposant.

RATIFICATION OF TITLE—OPPOSITION BY CHIROGRAPHARY CREDITOR.

On the 16th Nov., 1853 (Smith, N.P.), Miss Grace Russel sold some real estate in the Custom House Square, Montreal, to the Harbour Commissioners, who petition in this case for a sentence of ratification of their title deed.

On the 11th of April, 1854, John Fisher opposed the rendering of a sentence of ratification. By his opposition he alleged that in the year 1830, and before, and since, he had been and was a creditor of Hector Russel, and John Mackenzie, and of the firm of H. Russel & Co., that in 1839 said firm became bankrupt; that in July, 1851, he, Fisher, instituted an action against them in the Superior Court, Montreal, for recovery of upwards of 2900*l.* due to him, which action is pending; that in fact before 1837 said Russel and Mackenzie and said H Russel & Co. were bankrupt, and that to the knowledge of Grace Russel, who is sister of Hector; that before 1837 and in that year said H. Russel was debtor as aforesaid to the opposant, and was proprietor of the lands bought by the Harbour Commissioners from Grace Russel, which lands were a fund to which, among other things, he, Fisher, looked for payment of the debts owed to him by said H. Russel and H. Russel & Co.; that on the 3rd Feburary, 1837, said Russel and H. Russel & Co., mortgaged all their estates (among them the lands sold to the Harbour Commissioners) to Lawrence Kidd as for 5000*l.*; that this was done partly with the view of securing Grace 1600*l.*, alleged to be due to her by Hector, that at date of this mortgage Lawrence Kidd, Grace Russel, H. Russel & Co. and H. Russel all knew that Hector and H. Russel & Co. were bankrupt, and that said mortgage was executed to advantage Grace unduly and fraudulently as regarded the other

creditors of the firm and of the individuals of it, and particularly was fraudulent *quoad* him, John Fisher, then creditor of s[illegible] R. and H. R. & Co.; that on 3rd February, 1837, the lands [illegible] to the Harbour Commissioners were worth 2500*l.*, and he, [illegible] Fisher, would have given that for them; that on 1st Feby., 1841, Hector sold to Grace Russel the said lands for 1600*l.*, for securing which, it was said, the aforesaid deed of 3rd February, 1837, had been executed; that on said 1st of February, 1841, said H. Russel and H. Russel & Co., were bankrupt, as Grace well knew, and he, Fisher, was creditor of said H. R. and H. R. & Co., as she also knew, and said deed was made to favour said Grace unduly and in fraud of him, Fisher; that on said 1st February, 1841, the said lands were worth 2000*l.*, and he, Fisher, would have given that for them, and said Grace was only creditor of said H. R. for 1600*l.*; that said deed of 1st Feby. was never confirmed by a sentence of confirmation, under the 9 Geo. IV., cap. 20, nor under any other law; that after said 1st Feby., 1841, said Grace has had and enjoyed the said lands and the rents and profits of them; that by the deed of sale by Grace R. to the Harbour Commissioners 1800*l.* is stipulated as the value and price of said lands; that by law, and under the circumstances aforesaid, the opposant (Fisher) might ask that the said deeds of Feby., 1837, and Feby., 1841, be declared null, and that the deed by Grace to the Harbour Commissioners be declared null; but opposant is content to let the said Harbour Commissioners retain their purchase aforesaid, subject to the rights of opposant to compel the deposit by them of the *prix de vente* in the deed to them mentioned; and opposant says that, even allowing (as he is willing to) that the said Grace was a creditor of Hector for 1600*l.* on 1st Feby., 1841, he has a right to ask that the 1800*l.*, *prix de vente* in said deed of sale by Grace to the Harbour Commissioners, be paid between said Grace and him (Fisher) *pro rata*; or, if she be entitled to 1600*l.* out of said *prix de vente*, that he, the opposant, be paid the 200*l.*, the *plus value* of said lands over and above said 1600*l.*, and this in part payment of his debt claim against H. R., and opposant says that the said *prix de vente* ought to be treated as so much money of H. Russel's, and Grace Russel and the opposant as two creditors claiming it; conclusions accordingly.

In May, 1854, Grace Russel (who had intervened in the case) moved to dismiss the opposition of Fisher, "because the subject matter of it cannot be urged in an opposition in the matter of a petition for a ratification of title." Because the question whether a deed of sale was or was not made in fraud of creditors cannot be tested upon an opposition

in the matter of an application for the ratification of a deed of sale.

"Because the said opposition is and has been irregularly and illegally filed and produced in this matter, and cannot be urged, or maintained therein."

Rose & Monk, for Grace Russel, argued, among other things, that Fisher, a mere chirographary creditor, could not maintain an opposition to an application for ratification of title.

Mackay & Austin urged that Grace Russel's motion could not be granted ;—that Fisher's opposition, if true, disclosed facts enough to warrant its conclusions, but that this the Court probably would not pronounce upon a motion such as here made ; that if her motion was granted Grace Russel would receive 200*l.* more from the common debtor than she ever had a claim for ; that this ought not to be even were she not in bad faith, here it is alleged that she was in bad faith ; they contended also that debtor's properties were the gage of all their creditors, and that the 10 Sect. of the 9 Geo. IV., c. 20, showed that even chirographary creditors might oppose in cases like the present, and they referred to *Merlin*, Rep., Vo, Opp. au Seeau des Lettres de Ratification.

They also argued that it was competent to Fisher to renounce his rights to have the deeds of February, 1837 and 1841, rescinded, and to convert his claim into such a one as made by his present opposition.

The *Court* maintained Grace Russel's motion, and rejected Fisher's opposition.

Since this decision several oppositions have been rejected because filed by mere chirographary creditors of *vendeurs*.

20th June, 1854.

Present :—Day, Smith and Mondelet (C.), J. J.

No. 1402.

Laberge v. *DeLorimier*.

Belinge, for plaintiff.
Loranger, for defendant.

This was an action by a country trader against a married man and his mother to recover the price of certain articles of household furniture alleged to have been sold them jointly and severally. The defendants

endeavoured to prove that the sale was to the mother alone, and that the son was of impaired intellect. The Court would give the plaintiff judgment against the defendants jointly, but without *solidarité*.

No. 1831.

Dewar v. *Orr & Fisher*, reprenant l'instance.

Bethune & Dunkin, for plaintiff.
Cross & Bancroft, for defendant.

This was an hypotheeary action to recover a sum of 500*l*. The defendant put in two exceptions. The exception relied on set out that the plaintiff was heiress at law of the vendors of the defendant. That there was confusion of the plaintiff's rights with those of the vendor—that in fact she was his *garant formel*. It appeared in evidence that she had renounced the estate. The question was whether the plaintiff, after renunciation, had done anything to render her liable as heiress at law? Had she done, as alleged by the defendant, any *acte d'heritier?* It was proved that she had appropriated 40*l*. belonging to the estate, but she had done so, telling the curator of the estate of it. She told him she had 40*l*., the proceeds of a check, and that she would keep it against a claim she had against the estate. It was perhaps a wrongful act; but it was not an *acte d'heritier*. It was the act of a creditor. The *Court* thought, therefore, that she was entitled to recover.

Judgment for plaintiff.

No. 79.

Trigge & al. v. *Lavallée*.

Loranger, for plaintiff.
Cherrier, Q. C., *Dorion & Dorion*, for defendant.

This was an action by the representatives of the late Mr. Chandler, to recover the sum of 37*l*., under an *acte* of agreement or *accord*, by which the parties were to settle their disputes respecting the right of Mr. Chandler to prevent the defendant from resting his mill dam on the *Isle aux Cloches*.

The defendant set up that he had consented to the agreement by error, that it was obtained by fraud and menaces, on the part of Chandler; that Chandler had no right to prevent the defendant from resting his mill dam on this *isle;* and he concluded accordingly with a prayer that the deed be set aside.

The whole question was—*first*, whether the agreement was a *transaction;* and next, if it were so, whether the defendant were entitled to relief if shewn that he had laboured under error (*erreur de droit*).

The *Court* thought that the agreement was a transaction, to be governed by all the rules of such contracts. Although there was no litigation pending at the time, it was plain that the agreement was entered into in order to prevent litigation. This was evident from the terms of the document. There was a dispute between the parties with respect to the dam. Chandler, on the one hand, had insisted on his right of property, and Lavallée insisted upon his right to rest his mill-dam upon the island. The agreement between them was a transaction to prevent litigation as to disputed rights. A transaction was not to be set aside for *erreur de droit.* Toullier, 6, N. 71, expressed the matter exceedingly well. Each party gave up exceedingly well founded rights in order to escape doubtful litigation. The *Court* did not find any fraud or deceit on the part of Chandler.

Judgment for plaintiffs.

No. 226.

Johnson v. *Clarke.*

Cross & Bancroft, for plaintiff.
Rose, Q. C., *& Monk*, for defendant.

This was an action to recover 187*l.* 15*s.*, upon certain pretensions set forth in the declaration, to-wit: that defendant had been acting as plaintiff's agent, and took papers and was authorized by him to draw promissory notes; that he had drawn a note which he had given to the firm of J. & D. Lewis in exchange for one of theirs; that with the latter he had got money from the banks, which he put into his pocket, and that the plaintiff had been obliged to pay the note signed by the defendant at its maturity. The action was met by a variety of pleas, six in number, but the questions at issue might be resolved into *two* points. 1st. The defendant set up that there had been a partnership

between him and the plaintiff, that the defendant had the entire control of the business, and was to have one-fifth of the profits, which equalled the amount of this note; that the plaintiff had not selected his proper remedy, which was an action *pro socio*. However, looking at the agreement, the Court doubted very much whether there was a partnership under it. 2nd. The defendant alleged that the note was drawn in the usual course of business, duly entered in the books, and that defendant had a right to do what he did. He further set up that so much was due him by the business, and that the claim was thereby extinguished. The law did not admit of much doubt. The Court thought the plaintiff was not entitled to single out this one note among many others. His recourse against the defendant was by action to account, and the action he had brought was for the wrongful making of the note. If there had been any thing to shew concealment on the part of the defendant, any wrongful taking of money, this might have altered the judgment; but the defendant did not appear to have overdrawn his account.

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28 *June*, 1854.

Present :—Day, Smith and Mondelet (C.), *Justices.*

No. 1400.

McGinnis v. *Choquet.*

DEMURRER.

Laberge & Laflamme, in support.
Bleakley & Andrews, contra.

Day, J., This case comes up on a *défense en droit*. This action is brought by a proprietor who has only the naked property of a farm, the usufruct being in the defendant, who, it is alleged, is neglecting to keep the property in order. The declaration concludes that the usufructuary proprieter be held to make certain repairs, and in default of her doing so that she be condemned to pay 100*l*. damages. There is no such action in law. The action against a usufructuary proprietor is to declare him *déchu de ses droits*, or that he be sequestrated.

Demurrer maintained.

No. 171.

Macfarlane v. *Jameson.*

SERVICE.

The writ and declaration in this cause was served at six in the morning upon the defendant, who appeared under *reserve* and put in an *exception à la forme*, by which he pretended that by a Rule of Practice the service of process should be made between the hours of eight in the forenoon and seven in the afternoon.

Devlin & Doherty, in support.
Bethune & Dunkin, contra.

Day, J., There is evidently an irregularity in the service according to the Rule of Practice; but it is said on the part of plaintiff that the defendant having appeared it was not competent for him to make this objection. The defendant appeared under *reserve*, which he had a right to do in order to raise the point.

His honour referred to *Robinson* v. *McCormick*, 1 L. C. R., p. 27, and to the case of *Stuart* v. *Dorion*.

Exception maintained.

No. 1812.

Leprehon v. *Globensky.*

Lafontaine, Q. C., *& Berthelot*, for plaintiff.
Cherrier, Q. C., *Dorion & Dorion*, for defendant.

Day, J., This is an action of damages brought by the proprietor of a toll-bridge against the defendant for ferrying persons across the river to his mill for profit. To this action the defendant has demurred that no such action lies, that the privilege given to the plaintiff was a prohibition to any one ferrying across the river for profit, that the Statute had provided a remedy, and that the plaintiff has no remedy at common law. The *Court* is of opinion that the Statute which confers this, the 10 & 11 Vic. c. 99, establishes a penalty, and instructs the Justice of the Peace how it shall be distributed. But this remedy is not given in favour of the party aggrieved, but to the informer. The only thing that takes away the remedy at common law is a specific remedy to the party.

Demurrer dismissed.

No. 473.

Berthelet v. *Turcotte et ux.*

Action portée pour faire déclarer exécutoire contre le défendeur le jugement obtenu par le demandeur contre la femme seule du défendeur pendant l'existence de son mariage avec le défendeur.

Deux questions se sont présentées sur une défense en droit.

1o. Peut on faire déclarer exécutoire un jugement quelconque contre un tiers lorsqu'il n'est survenu aucun changement dans la position des parties au jugement, et lorsque cette partie contre laquelle on veut la faire déclarer exécutoire existait lors du jugement avec les mêmes qualités et soumise à l'effet du jugement si on eut pris des conclusions contre elle, en d'autres mots, en ne mettant pas le mari en cause, le demandeur n'a-t-il pas restreint sa demande à la femme, sauf à n'exécuter qu'après la dissolution de la communauté.

2o. Le jugement sur lequel on s'est fondé et qu'on veut faire déclarer exécutoire est nul, n'ayant été rendu que contre la femme commune en biens et sous puissance du mari sans faire condamner le mari.

Jugement maintenant la défense en droit et déboutant l'action du demandeur.

Barnard, pour demandeur.
R. G. Laflamme, pour défendeur.

18*th Sept.*, 1854.

Present: Day, Smith & Mondelet (C.), J. J.

No. 1703.

Boston v. *Leriger dit Laplante.*

DEMURRER—SALE AND CONCESSION.

Held, *that according to the Common Law of France there is nothing to prevent a seignior stipulating a* prix de vente *in a deed of concession* à titre de cens; *and that there is no legislative restriction to this rule in Canada.*

Held, *that erreur* de droit, *which entitles a party to be relieved of his act, is such an error as makes him do something because he believes he is compelled so to do, when in reality he is not.*

This was an action brought by the Seignior of Thwaite for the balance

due as well on the *prix de vente* as for certain arrears of seigniorial dues, on a certain deed, styled a Deed of Sale and Concession, by which deed it appears that the said plaintiff had sold and conceded to the defendant a certain land situate in his seigniory.

To this action the defendant pleaded that it was not competent for a seignior both to sell and to concede by the same deed; that he, the defendant, had already paid, and the plaintiff had illegally received a larger sum than was due on the said deed for arrears of seigniorial dues, which sum so over-paid the defendant prayed might be put in compensation against that part of the claim relating to seigniorial dues, and he also prays that the Deed of Sale and Concession might be annulled as far as regards the sale.

To this exception the plaintiff demurred.

Bethune & Dunkin, in support.
Hubert, Ouimet & Morin, contra.

Dunkin, in support of the demurrer, contended that under the Custom of Paris there was no limit to the right of the seignior in a deed of concession to stipulate such clauses, either of sale or otherwise, as he might choose and as his *censitaire* might consent to, that there was no Provincial law to curtail that right, and that the defendant should have concluded for the setting aside of the whole deed, and not of a part.

Ouimet, contra, contended that under the law as it existed in France it was not competent for the seignior to sell and to concede by the same deed, and even if it were not so in France, by the arrêts of 1711 and 1832 the seignior was forbidden to sell his wild lands, or to charge a price for his land, but was only allowed to concede it, and that the defendant had a right to claim to be relieved of so much of his contract as stipulated a price, as he had been induced by *erreur de droit* to admit this stipulation of price.

Dunkin, in reply, said that there was no *erreur de droit* at all; that the seignior had only done what he had a right to do, that the *arrêt* of 1732 was not specially a prohibition to the seignior to sell wild lands, but to every possessor of wild lands; that if this *arrêt* was in force, every sale of wild lands in Lower Canada might be cancelled, and that the exception did not disclose that the land in question was *en bois de bout*. That the *arrêt* of 1711 was not now in force, and had never been exercised, so

far as is known, and that if it had not fallen into desuetude that, at all events, the Superior Court had not power to adjudicate upon it, as to it had not been transferred the jurisdiction of the Governor, Lieutenant-General and Intendant, who alone could put this *arrêt* in force, but only the jurisdiction of the Intendant alone. And finally, that even if such a jurisdiction as that of the Governor, Lieutenant-General and Intendant existed, the defendant was too late, as the *arrêt* of 1711 only conferred the right of granting the land in case of the absolute refusal of the seignior to concede, and that in this case the seignior had fulfilled all the requirements of that *arrêt*. In a word, that these *arrêts* of 1711 and 1732 were mere temporary *reglements*, and were never intended to be continued after the state of the colony, which caused their being passed, had ceased.

Day, J. By this action the plaintiff seeks to recover a balance of some 88*l*. due on a lot of land acquired by the defendant from the plaintiff by a deed of sale and concession, part of the said amount being due as balance of the purchase money stipulated in the deed, and the rest for seigniorial dues. Defendant says that this deed of sale and concession is illegal, and prays to be relieved of that part of it which stipulates a price of sale, and as to the balance claimed for seigniorial dues, he prays that a former sum paid, as he contends illegally, on account of the said purchase money may be held to compensate the claim for seignorial dues, and he finally prays for the dismissal of the action. To this exception the plaintiff demurs. The first point then which these pleadings bring up is, what was the state of the law in France as to the right of the Seignior to stipulate a price of sale in the deed of concession? We are unable to find anywhere in French law any prohibition to this form of contract in any rule ordinance or jurisprudence. Indeed the authors, with the exception of a few, are silent on this point, but *Guyot** expressly states that the seignior concedes under such conditions as he sees fit. In the Law of France then, as constituting our common law, there is no such prohibition. We then come to the Statute law of the Province of Canada. The defendant first relies upon the *arrêt* of 1732. The question is, does this case come within its scope. On reading this *arrêt* we find it prohibits all persons

* *Traité des Fiefs*, vol. V, p. 6, no, IV. Un premier principe vrai et immuable que Dumoulin nous donne, s. 2, hodie 3, glos. 3, nombre 30, et qu'aucun docteur n'a désavoué; est que le seigneur *potest concessioni suæ adhibere modum quem vult*; le seigneur concède sous telles conditions qu'il lui plait; c'est un vassal, disons mieux, à celui qui demande la concession à accepter ou à refuser.

to sell wild lands under a penalty of nullity of the deed, restitution of price and escheat to the Crown. But all this is only a prohibition to sell wild lands, the object of the King being to prevent speculation and the interruption of settlement. This is in fact a prohibition to speculate in wild land, and is as much a prohibition to all the world as it is to the seignior. In this exception however it is not alleged that the lands in question were *en bois debout*.

On the *arrêt* of 1711 the defendant's pretension must be sustained, if it can be sustained at all. By this *arrêt* it is to be observed that there is no prohibition to sell, but only an injunction to the seignior to concede without exacting *any sum of money*. It is true, it is said in the beginning of the *arrêt*, that it was not the intention of His Majesty that the seigniors should sell, but this is preamble and not an enacting clause.

Then as to the clauses of concession, reference must be had to the body of the *arrêt*. The enacting clauses of this *arrêt* contain an order to the seignior to concede for a specific rent, and if he refuse so to do, then the *habitant* may summon him to appear before the Governor, Lieutenant General and Intendant, who may escheat and regrant land to him. But if the *habitant* thinks fit to abandon this right, where is the clause in this, or in any other law, which says that he shall be relieved of his part of the bargain? There are many reasons for an amicable agreement between the parties, and such a settlement is not *contra bonos mores*. The *habitant* must take the course the law directs or he cannot complain. It is necessary to take this ground in order to come to another branch of the case. It is contended by the defendant that the admission of this stipulation is an error of law, as he could have got the land without it. We must therefore see what kind of error of law would entitle the party to be relieved? This question was long a vexed one; but it is now, without doubt, admitted that error of law is sufficient ground to set aside a contract, but this expression has its own technical and scientific meaning. To plead error of law, it is not sufficient that a party does not know all his rights; but it is when he believes he is compelled to do something which he is not obliged by law to do,—as when one pays money fancying he can be obliged to pay it; or when he consents to enter into a contract when he supposes he could be compelled so to do.

But the party here is under no compulsion whatever. He had two modes of accomplishing his end—the acquisition of the land in question —and he chose one of them. If this reasoning of the defendant were carried out by analogy to error of fact, a man might say that he had bought a thing at a higher price, not knowing there was a lower one.

But further this contract, if bad at all, is bad in whole. Defendant has not placed himself in the condition contemplated by law. If he had summoned the seignior to give him the land and then paid, he might in that case have divided the contract; but we cannot allow him to keep the land and to destroy his obligation towards the seignior. The question intended to be raised cannot come up on a voluntary contract, it is not a nullity either under the old law in France or the law here.

Mondelet (C.), J. It is a popular error, into which I will not say that I did not fall myself, that the seignior cannot sell and concede at once. Under the old French law there was no such prohibition. That established, we come to *arrêt* of 1732; but that only refers to lands *en bois debout* and here there is no mention as to these lands being *en bois debout*. Then in the *arrêt* of 1711, there is a preamble which proposes to do something that never was done. The popular error probably took its rise from this preamble,

As to the question of the *erreur de droit*, I concur perfectly in the view taken by the learned President of the Court.

The Judgment of the Court was *motivé* as follows:—

"The Court having heard the plaintiff by his Counsel upon the merits of this cause, the defendant not having appeared at the hearing of this cause, upon the merits, having examined the proceedings and proof of record and having deliberated thereon; it is considered and adjudged that the plaintiff do recover from the defendant the sum of eighty pounds one shilling and ninepence, current money of the Province of Canada, balance remaining due as well upon the price and consideration money stipulated in the Deed of Sale and Concession made by the plaintiff to the defendant, executed before Maître Joseph Brisset and his Colleague, Public Notaries, on the eighteenth day of October, one thousand eight hundread and forty-five, as and for arrears of rents, *rentes*, due under and in virtue of the said deed upon the land mentioned and described in the declaration of the plaintiff, accrued up to the fifteenth March, one thousand eight hundred ond fifty-two, with interest upon the sum of sixty-three pounds seventeen shilings and twopence from the fifteenth day of March, one thousand eight hundred and fifty-two, and upon the sum of five pounds eighteen shillings and fourpence from the twenty-ninth day of June, one thousand eight hundred and fifty-three, date of service of process in this cause, until actual payment and costs of suit."

19 *September*, 1854.

Present:—Day and Mondelet, J. J.

No. 2631.

Torrance & al v. *Torrance & al.*

DÉLIVRANCE DE LEGS.

Day, J. This was an action instituted on the 6th July, 1848, by Isabella Torrance, of Niagara, assisted by her husband, James Lockhart, against John Torrance, John Fisher, William Lunn, and John Mackenzie, in their capacity of executors and trustees, under the last will and testament of the late Daniel Fisher, in his lifetime of Montreal, merchant, and against Elizabeth Fisher and James B. Willoughby, her husband, and Louisa Fisher, and Robert Pilkington Crooks, her husband; the said Elizabeth Fisher and Louisa Fisher, being the only children and heirs-at-law, as well as residuary legatees and devisees of the late Daniel Fisher. The action sought the *délivrance* of a special legacy of 1,000*l.*, with interest thereon, from the 17th day of July, 1828, the day on which the plaintiff, Isabella Torrance, became of age.

The declaration set up a bequest by the will of the late Daniel Fisher, of date, 1st July, 1825, of 1,000*l.*, to the plaintiff, Isabella Torrance, on her becoming of age; the appointment by the will, of Elizabeth Fisher and Louisa Fisher, as residuary legatees of the testator, share and share alike, and the nomination of the said John Torrance, John Fisher, William Lunn, and John Mackenzie, as executors and trustees for the execution of the will, their function to continue beyond the year and day limited by law, until the provisions of the will should be fully executed; that the testator died on the 15th December, 1826, and the will was proved; that the executors and trustees accepted of their nomination as such, and that the provisions of the will were not yet fully executed. Then followed the allegations of the marriage of the plaintiffs, of Elizabeth Fisher with Willoughby, and Louisa Fisher with Crooks; that the said universal legatees had accepted the estate under the will; that they and the executors were in possession of the estate, which was a rich and valuable estate, and more than sufficient to pay all the legacies; that John Torrance, John Fisher, William Lunn, and John Mackenzie, in their said capacities; and the said Elizabeth Fisher and Louisa Fisher, had received and appropriated to their use and benefit, since the death of Daniel Fisher, the interest and annual profits of the said sum

of 1,000*l.*; and the defendants did, shortly after the death of Daniel Fisher, agree, bind, and oblige themselves, and had since frequently promised, to pay to Isabella Torrance, interest on the amount of the said legacy of 1,000*l.*, from the day of the death of the testator, and that Isabella Torrance was entitled by law to have and obtain from the defendants, the amount of the legacy with interest from the death of Daniel Fisher. The conclusion of the declaration prayed that the defendants might be condemned to make deliverance of the legacy with interest from the 17th July, 1828; that the executors in their said capacity might be jointly and severally condemned to pay the said sum and interest aforesaid; and that Louisa Fisher and Elizabeth Fisher might, each for one-half, be condemned to pay to the plaintiffs, the sum of 1,000*l.*, with interest, from the 17th July, 1828.

Three of the defendants, viz.:—John Torrance, John Fisher and William Lunn, appeared and pleaded to the action; the other defendants made default.

By a first plea, the defendants pleading, said in substance that, besides the said special legacy of 1,000*l.*, the testator bequeathed a life annuity of 120*l.* per annum to his mother-in-law, Elizabeth Kissock, in case she should survive his wife—that she did survive, and was entitled to her legacy, being then still living:—also to each of his children, Elizabeth and Louisa, 5,000*l.*, to be paid to them on their attaining majority, which they had both since attained; and they had not accepted the estate and succession of the testator, either as heirs or residuary legatees, but claimed the special legacies, and had sued the said defendants in the Court of Chancery, Upper Canada, to obtain payment of the said special legacies, the proceedings in which suit were still pending and undetermined, and that the books, papers, and vouchers connected with the said estate were filed in the Court of Chancery, whereby it was impossible to file with the said pleading any statement or account of the affairs of the said estate;—that if interest were recoverable by law, on the legacy, which they denied, yet the estate was insufficient to pay it, and barely sufficient to pay the capital of the special legacies;—that they were willing to pay the said special legacy of 1,000*l.*, on being authorized by the heirs or representatives of Daniel Fisher to do so, or otherwise legally empowered to pay; and, with regard to the allegations in the declaration, that interest was promised by the trustees, they never promised or agreed to pay interest on the said legacy of 1,000*l.*; and they prayed *acte* of their willingness to pay the said legacy (without interest) to whomsoever might be entitled to receive the same, upon being

duly authorized by the heirs or representatives, or otherwise legally empowered to pay the same; and that whatever might be the judgment as regards the capital, that the action as to the interest might be dismissed.

By a second plea, the said three defendants made the same offer of the capital, and, as regards the interest claimed, averred that the said legacy was not by law payable with interest, and no interest could accrue or be due thereon until after a judicial demand (*demande judiciaire*) had been made; that no such demand had been made prior to the institution of this action, and that no interest had ever been promised on the said legacy. The prayer of this plea was like that of the first.

Then followed the general issue.

In answer to these pleas, the plaintiff filed very special answers, of which what follows was an abstract. That the estate was fully adequate to the payment of the special legacies, not only in principal, but also interest; and even if insufficient, it was solely owing to the great neglect and mismanagement of the trustees. It was sufficient at the testator's decease. That defendants never tendered an account, and without doing so could not plead a deficiency, and they ought to have tendered an account with their plea. That, although it was true they had been impleaded by Elizabeth and Louisa Fisher in Chancery in Upper Canada, they were not thereby exempt from paying the said legacy and interest, nor from tendering an account, because said Court of Chancery was a foreign jurisdiction, and defendants were not obliged to answer a suit therein, and their having voluntarily done so would not exonerate them from the liability to render an account to the plaintiffs, which these latter declared their willingness to receive; that the Chancery suit had been settled, and the defendant, John Torrance, with the consent of the other defendants, had received an assignment of the estate, among other considerations, upon condition of paying the plaintiffs, with interest, by means whereof the defendants, as *cessionnaires*, had become the representatives of Daniel Fisher's estate; that defendants had collected large sums belonging to the estate, which they had invested in their own names, and drawn therefrom large revenues and profits, which they had appropriated to their own use;—that they had, when their own administration commenced, appointed John Torrance & Co., consisting of the same John Torrance and his partner David Torrance, their agents, who had the administration of the estate, collected large sums therefrom, which they invested in their business, whereby the said John Torrance made large profits, which had never

been accounted for;—that interest had been paid on the other legacies down to 1845, as also Elizabeth Kissock's annuity of 120*l.* per annum, and sums by way of aliment and interest to the wife of Daniel Fisher during her lifetime;—and down to 1846, when the Chancery suit was instituted, defendants never pretended that the estate was insufficient to pay the special legacies and interest,—but they had stated to the plaintiffs that it was more than sufficient, and their readiness to pay the 1000*l.* with interest, if the heirs consented; and the deficiency was only for the first time alleged in the defendants' plea; that plaintiffs, relying upon the good faith of the defendants, and the declarations made by them, and their agents, John Torrance & Co., that said legacy was in the hands of John Torrance & Co., in the name of the said Isabella Torrance, and for her use, bearing interest, and vested in the defendants as trustees on her behalf, and on their promises to pay said legacy with interest when the heirs should consent, allowed it to remain a long time in their hands, otherwise they would have exacted it promptly;—that defendants' plea was in bad faith, and their pretensions were fraudulent and deceitful, and that they were fully authorized to pay said legacy without the consent of the heirs. That by the will, the defendants were trustees to administer and manage until all the dispositions and bequests were accomplished;—that Elizabeth and Louisa Fisher, being minors and special legatees, the trustees, could not be dispossessed till they, the heirs, became of age, which the youngest had not attained till 1843, when they became competent to accept or repudiate the succession; that plaintiff's legacy had been demanded immediately after the death of Daniel Fisher; that defendants had appointed John Torrance & Co. agents, to manage the estate, who, as well as the defendants, promised to pay said legacy with interest, if the consent of the heirs was obtained; that the said heirs at law, immediately after the decease of Daniel Fisher, left Lower Canada, and became domiciled in Upper Canada; and in 1846 instituted said suit in Chancery for the payment of their special legacies, and for an account of the gestion and administration of the executors, which suit had been settled before the institution of the present action; that by reason of the promises of the defendants, they were jointly and severally and personally bound to pay the interest, and the consent of the heirs for the payment thereof was unnecessary.

The replies to these special answers were general.

His Honour said that, upon the issues joined, there was no difficulty as to the 1000*l.* The controversy was as to the payment of interest. The points which presented themselves were, 1st—whether interest was

due by operation of law or the terms of the will; 2nd—whether there had been a promise to pay interest; 3rd—whether, if such promise had been made by the executors only, it would bind the estate.

On the first point there was no doubt in the mind of the Court. The opinion of the Court had been already expressed, that the only condition on which interest could be due on special legacies was where there had been a judicial demand made, from the day of which demand interest would run. This demand was the sole, absolute, and unqualified condition. The authorities were unanimous on this point. The learned judge named Pothier: Donations Testamentaires, cap. 5, sec. 3, art. 1, § 8. The excellent article in Guyot, *Repertoire Verbo. Legs*, where the opinion of the principal authors and the decisions of the Courts would be found arrayed in support of this rule. The authority cited by the plaintiffs, Domat, b. 4, tit. 2, sec. 8, nos. 3 & 4, did not bear on this question. The case cited there was that of an heir who concealed the existence of the legacy, and was liable for all damages by reason of his fraudulent conduct. The authority cited by plaintiff from Pothier *Coutume d'Orléans*, T. 16, was the same as that from Domat.

With reference, then, to the old law of France, there could scarcely be two opinions. In the modern law of France another exception to the rule of non-liability for interest would be found in Toullier, vol. 5, no. 545, by the 1014th article of the Code Napoleon, which provided that interest should run from the day on which the deliverance had been voluntarily agreed to.

The next question for the consideration of the Court was, whether there had been a promise to pay interest. Was there evidence before the Court that the executors or heirs had entered into an agreement to pay interest? Before entering upon the consideration of this question, the learned judge would remark that such an undertaking by the executors, without the heirs, would not be good in law, so as to bind the estate; but with the heirs, it would be good.—Had any such undertaking been proved? There was no formal instrument produced to establish such an undertaking, but the plaintiffs said that from the letters and correspondence, from the statements made to them by the defendants, from the answers to the interrogatories *sur faits et articles*, from the obvious tenor of the whole of the acts of the defendants, and the natural presumption that the plaintiffs would not have waited 20 years for the legacy unless it bore fruits, they adduced sufficient proof to amount to evidence of such an undertaking. Before adverting to the

correspondence and other evidence relied upon by the plaintiff, the Court would dispose of an incidental point. Motions were made by Torrance and Lunn, for the rejection of certain letters filed by plaintiff in the course of their *enquête*. The Court was against the movers, 1st. Because the papers were not of a character to justify the granting of the motions; 2nd. There was another reason of a technical nature. The motions came too late. The papers were filed in November, and the motions to reject them were only made in May.

The first question the Court would consider was, whether there was an undertaking by the executors. They would first examine the evidence against the executors alone. It was established in evidence that the executors assumed the trust; that at first they secured the services of one Miller, as agent for the estate, and then delivered the management of it to John Torrance & Co. This firm took the entire control of the estate, and the moneys were paid and received by David Torrance, one of them, and this partner conducted the whole of the correspondence. No doubt he could not bind the executors of heirs. There was one letter, no. 49, of printed case, written by him, in answer to no. 48, from Mr. Lockhart, referring to her claims for interest, but this did not prove any contract—it simply conveyed the impression in the mind of the writer that interest ought to be paid. With respect to the letters of the executors, they did not contain any undertaking to pay interest. The plaintiff was always referred to her legal rights. The answers of Torrance, Lunn, and Fisher, to the interrogatories on *faits et articles*, negatived in unqualified terms any undertaking to pay interest. The only piece of evidence of sufficient substance to merit special attention was the paper no. 40, a statement in possession of the plaintiff of the condition of the assets of the estate, and of the payments necessary to equalize the position of all the legatees. It was based on the principle that the plaintiff was to recover interest on her legacy. It shewed that 455*l.* 7s. 5d. should be paid to her to equalize her position with that of the legatees of 5,000*l.* each, and then, assuming the value of the estate to be 10,000*l.*, it shewed that she was entitled to a further sum of 760*l.* for her capital, which would shew a sum of upwards of 1,200*l.* as the share of the plaintiffs. The plaintiffs further relied upon this as shewing that interest was to be paid on the other legacies; but in this the plaintiffs were not well founded. The other legatees were the heirs at law, and the universal legatees and owners of the estate; and, if the estate proved sufficient to pay interest upon their legacies, it would belong to the succession, and to them as representatives, but not as special legatees.

The plaintiff, as a special legatee, could not be placed on the same footing as the universal legatees. Looking at the effect of this statement the allowing of interest in it was an undoubted declaration of the understanding of the party by whom it was made, that interest was to be paid on the plaintiff's legacy. But first of all, this paper had no heading, and was without date or signature, and though it was proved to be in the handwriting of John Fisher, one of the executors, the other executors denied all knowledge of it, and Fisher himself said it was only a loose memorandum of figures. Nor was it proved how the paper came into the possession of the plaintiffs. The statement was before the Court, and the figures conveyed the impression that interest was to be paid. But whose admission was it, and whom did it bind? It did not bind the other executors. It was not formal. It did not even bind Fisher individually. It was only *commencement de preuve par écrit* to justify the adduction by plaintiffs of verbal proof, to establish the undertaking to pay interest, and no such proof had been adduced. There was no other evidence. Going over all the items of evidence, the Court was not justified in the conclusion that the executors undertook to pay interest. The plaintiff was undoubtedly under the belief that interest ran on her legacy, and it was not likely that she would have left her legacy so long in the hands of the executors, except with such a belief; but this was not enough. The Court had nothing to do with equity, but simply to decide upon the recognized principles of law. So far, therefore, as regarded the executors, the claim for interest was dismissed.

It was unnecessary to advert to the proceedings of Upper Canada. They had no bearing on the case. The special legatee had no right to demand an account from the executor. The defendants were not liable to account. But, if they said that the estate was insufficient to pay the special legatees, the plaintiffs were entitled to an account, and the executors were bound to render one. This burden lay upon them to shew the insufficiency of the estate, which they must do by an account of its assets and management.

The Court now came, in the third place, to the alleged undertaking by the residuary legatees and heirs to pay interest, and they had not discovered any such undertaking in any of the correspondence. The evidence against them was in the correspondence, and the interrogatorises *sur faits et articles* put to the heirs. The whole correspondence was strikingly non-committal. It left the matter to be settled by law. The heirs said they had nothing to do with it, but left it to the executors. The whole case, however, was embraced by an elaborate series

of interrogatories drawn by the council for the plaintiffs, and sent with a *commission rogatoire* to Upper Canada; but the heirs had made default and refused to answer. If the affirmative of these interrogatories was taken, it would establish as complete a case against the heirs as a confession of judgment. But it was objected that the certificate of the default of the heirs was not sufficient to justify its reception. The heirs were resident at Toronto, and a rule of Court was obtained to examine them before Commissioners. No objection was taken to the rule. The objection was to the service of notice, and the certificate of default by the commissioners. The service was made personally by one of the commissioners, and the return annexed to the commission was as follows:—After mentioning that they met together, administered the oath to each other, and drew up a notice appointing a day and place for taking the answers, they proceeded to say, "also, that on the twelfth day of the same month of February a true copy of the interrogatories hereunto and unto said commission annexed, and of the Rule of Court also hereunto and thereunto annexed, and the aforesaid notice, marked as aforesaid, were, and each was, by the said John Bell, for and on behalf of himself and both of us, served upon the defendants respectively, and at the same time the said interrogatories and rule exhibited and shewn unto them respectively:" then followed the certificate of default in these terms:—"And that the said defendants, and each and every of them, did refuse to attend at the time and place in the said notice specified or otherwise, or in anywise to give their or either of their attendance, or to answer the said interrogatories in pursuance of the requirements of the said notice, and that they or any or either of them did not attend at the time or place in the said notice specified, nor did otherwise give their attendance or answer the said interrogatories, wherefore we certify that we did not and could not examine the said defendants."

From this return the Court seemed to have before them all that was necessary to satisfy them as to *two* material points. 1st. That service was made, and that it was personal. 2nd. That the defendants did not appear, and refused to answer. The certificate, moreover, was not of a bailiff or other subordinate officer, but of the commissioners, delegated by this Court, and its own officers. The interrogatories as regards the heirs were to be taken *pro confessis*.

In so far, therefore, as regarded the heirs, they were liable for interest, and the judgment should go all against the defendants for the legacy, and

against the heirs at law for the legacy and interest, each one-half, with costs.

Rose, Q. C., *& Monk, and C. Cherrier*, Q. C., for plaintiffs.
Cross, for defendants, Torrance, Lunn and Fisher.

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22 *Sept.*, 1854.

Present:—Bowen, C. J., Day and Smith, J. J.

No. 1714.

Pacaud v. *Bourdages.*

Lafrenaye, for plaintiff.
Cartier, G. E., counsel.
Hubert, Ouimet & Morin, for defendant.

Day, J., This is an action instituted by the *cessionaire* of a claimant under the "Rebellion Losses Act" for the recovery of the sum of 183*l.* awarded to the defendant. The facts are simply these: In the month of September, 1850, the defendant, a claimant under the "Rebellion Losses Act," as a creditor of Dr. Nelson, ceded to plaintiff the sum of 183*l.*, being the half amount of his claim, and which sum, notwithstanding the transfer, was paid to the defendant.

To meet this action the defendant set up two exceptions, by which she in substance raised two points: 1st. That the transfer was illegal, as being a transfer of no claim exigible in law—that there was no *créance* at all; that this claim not being recoverable against the Government could not be recovered by this action. The 2nd point is that defendant was induced to make this transfer because of the fraud and false pretences of the plaintiff.

To begin with the second of these exceptions, there is no proof of fraud.

With regard to the first exception—that those things cannot be sold—it was contended at the argument, as the principle upon which this exception should be supported, that there could be no right where there was no remedy. This is a fallacy. There may be a very good and perfect right where there is no remedy. If it were true that it was competent to the Government not to pay this claim, what answer is this in the mouth of the defendant if Government thought right to pay it? But it cannot absolutely be said that there was no remedy, for Her

Majesty's Ministers were obliged by the statute to pay these claims, and they might have been impeached if they had refused so to do. Pothier says, that there may be a sale of a *créance* or even of an *espérance*. The *res* may be a thing of greater or less certainty in its value, and there may be a greater or less degree of certainty in the probability of its recovery, but the remedy is only an incident. There might be accumulated a great variety of illustrations to show that remedy and right are not synonymous. None of the authorities sustain the pretensions of the defendant. In France such things were frequently sold, and notice given to the proper officer was considered sufficient, V. *Merlin's Repertoire* vo. Person, § 6 and 7. It, however, came to be necessary to establish a limit to these transfers, and the Ordinance of 1779 was established in order to prevent the seizure of the pay of soldiers and retired officers. There, however, the principle we have alluded to was admitted, and these exemptions of the Ordinance were only exceptions. The reason for these exceptions being made was, that it was inconvenient for officers to be allowed to assign their salaries so as to disable them from preforming their duties. It is also so enacted in the Mutiny Act. Lord Kenyon says, that such emoluments as those to officers are given to support the dignity of the State, and should not be appropriated to other purposes. For authorities on this point see III. T R., p. 681, IV. T. R., p. 248. Comyn's Digest v, Assignment, Ch. (C) Note D. Also the case of *Dorwin* v. *Waldorf*, III. *Revue de Legislation*, p. 248.

I have now referred to this case on the common law rules existing in France and England; but on turning to the statute under which this claim is created all doubt as to these claims being of an assignable character ceases. The Preamble of the 12 Vic. c. 58 is in these words: "Whereas in order to redeem the pledge given to the sufferers of such losses, or their *bonâ fide* creditors, assigns, or *ayants droit*, &c.," and the 10 section alludes to the preamble, so as to make it available as an enacting clause. The 11 section also enacts: "That the powers vested in, and duties required of, the said commissioners, or of any three of them, under this Act, shall also extend and be construed to extend to inquire into all such losses sustained by Her Majesty's subjects and other residents within the said late Province of Lower-Canada, and the several claims and demands which have accrued to any such by such losses, in respect of any loss, destruction, or damage of property occasioned by violence on the part of persons in Her Majesty's service, or by violence on the part of persons acting or assuming to act on behalf of Her Majesty, in the suppression of the said Rebellion, or for

the prevention of further disturbances, and all claims arising under or in respect of the occupation of any houses or other premises by Her Majesty's Naval or Military forces, either Imperial or Provincial; subject always to the limitations and exceptions contained in the Preamble of this Act." These then are the enacting clauses in so far as regards the present action, and from thence it is clear that these claims are assignable. It may also be remarked, that the defendant is not herself claimant but only assignee of Dr. Nelson.

Smith, J., At first I was disposed to think that at common law these claims were not assignable; but the Statutre, which was not at first brought up, leaves no doubt on the question.

Bowen, C. J., We think the tender of 75*l.* insufficient.

Judgment for plaintiff.

ST. HYACINTHE CIRCUIT COURT.

10 *June*, 1854.

Present :—McCord (J. S.), J.

Thurber v. *Desève.*

This was an action brought against the endorser of a promissory note, payable to order, endorsed by a cross, the validity of which endorsation is contested.

DeBoucherville, for plaintiff.
Sicotte, for defendant.

McCord (J. S.), J., The 34 Geo. III., c. 2, being repealed, and the French law not recognising a note made or endorsed with a cross, its validity must be tested by the English law, which law recognises the signature by cross. See, *George* v. *Surrey*, 1 Moody and Watkins, p. 516. *Baker* v. *Dinning*, 8 Adolphus and Ellis, p. 94, in which Paterson, J., said "the requisite of signing is supplied by a mark." The decision in the case of *Patterson & al* v. *Pain*, V. 1, L. C. R. p. 219, is in point, and is even stronger than the present case and the English cases I have referred to, as it was an *aval*. See also Byles on Bills, pp. 62, 335,

Judgment for plaintiff.

Refour v. *Senecal.*

DISMES.

Sicotte, for plaintiff.
DeBoucherville, for defendant.

McCord (J. S.), J., The declaration states that the plaintiff is *Prêtre and Curé déservant la mission Catholique de Sté. Cécile*, in the Township of Milton. That the defendant is proprietor in possession of part of lot No. 14, in the 8th range of Milton, and a "*paroissien catholique romain*," domiciliated on the lands of the said mission, to whose *cure* the plaintiff is duly assigned. That in his respective capacities, the defendant is bound to pay plaintiff 10s. for tithes of grain on said lot.

To this the defendant pleads *en droit:*

1. That the *Prêtre déservant* has no right to tithes.

2. That the mission being within the Township of Milton, where the tenure is in free and common soccage and subject to the laws of England, which do not require the payment of "tithes" within this Province.

3. That the mission has not been either civily or canonically erected into a parish or *cure.*

It is well known that both in England and France at the earliest periods when tithes were mentioned they were voluntary contributions, and only became exigible when sanctioned by authority of law, which was so in France, by *Charlemagne*, A. D., in England partially in 786-7, and generally in 930. See 2 *Blk. Comm.*, p. 26. *Burn's Ecc. Law*, V. Tithes, vol. 3, p. 387.

There can, therefore, be no right of tithe without sanction of law. In this Province it formed part of the law of the country introduced by the kings of France, under whose dominion that part of the country known as Seigniorial Canada was subject, and where it was found in force at the conquest of the country in 1759, V. *Edit du mois de Mai*, 1669.

By the Imp. St. 14 Geo. III., c. 83, sect. 5, it is enacted that the inhabitants of Quebec professing the religion of the "Church of Rome, "may have, hold and enjoy the free exercise of the Religion of the "Church of Rome." "And that the clergy of the said church may "hold, receive and enjoy their accustomed dues and rights with res- "pect to such persons only as shall profess the said religion." Had this clause remained alone in the Statute it might perhaps have been

argued that the premission should extend to the entire Province of Quebec, now the Province of Canada, but by the 9th Section all doubt is removed by the following *proviso*: "That nothing in this Act con- "tained shall extend, or be construed to extend, to any lands that have "been granted by His Majesty, or shall hereafter be granted by His "Majesty, his heirs and successors to be holden in free and common "soccage."

The next and only other Statute on the subject is 31 Geo. III. c. 31, sect. 35, which confirms and contains the above provision, with a further restriction that where a Protestant shall possess land, which in the hands of a Roman Catholic would have been liable to tithes, such land shall cease to be so subject to that right.

Such then is the present state of the law of the country, and there being a positive prohibition to the extension of the rights of tithes to lands held in free and common soccage, I am bound to maintain the *défense en droit* secondly pleaded.

Défense en droit maintained.

SUPERIOR COURT.

Oct. 18, 1854.

Present:—Smith, Vanfelson and Mondelet, (C.) J. J.

No. 255.

Darling v. *Cowan.*

Motion to quash the process *ad respondendum*, on the ground that defendant lives out of the jurisdiction of the Court, and that there was no *primâ facie* evidence to show that he had property within the jurisdiction of the Court.

Griffin, in support.

Rose, Q. C., *& Monk*, contra.

Smith, J., The practice of this Court has always been to call in the defendant without such evidence.

Mondelet (C.), J., The Statute does not make such *prima facie* evidence necessary. I think the practice of the Court in not requiring it is a good practice. The Court when it grants a writ in any case is

not absolutely certain that it has jurisdiction over the defendant, who must defend himself by a declinatory plea.

No. 166.

Cowan v. *Darling.*

In this case a preliminary plea had been filed and dismissed after the lapse of the four days from the return of the action. On the dismissal of the 1st plea a second preliminary plea was filed, and plaintiff moved to have it dismissed as coming too late.

Smith, J., The rule of four days established by statute is imperative, the exception must be dismissed.

Monk, S. C., Will the Court go so far as to say that all preliminary pleas should be filed together?

Smith, J., Declined expressing the views of the Court on that point.

Griffin, in support.

Rose, Q. C., *& Monk*, contra.

Motion maintained.

No. 405.

Boudreau v. *Gascon.*

Smith, J., This is a motion to set aside certain proceedings, as there is no replication on the record. The Court is of opinion that a replication is necessary under the Ordinance of '85.

Mondelet (C.), J., Reference was made yesterday to the case of *Gugy* v. *Ferres.* There defendant had waived his right, besides the presiding judge was acting under the direction of the Court.

Carter, in support.

Loranger, contra.

Motion granted.

No. 2258.

Hislop v. *Emerick.*

SEDUCTION BY MINOR—LIABILITY OF FATHER.

Held, *that an action cannot be brought against the father of a minor son for seduction committed by his son; that a minor son cannot be sued* en declaration de paternité, *without the appointment of a curator or some one by law authorized to represent him.*

Devlin & Doherty, for plaintiff.
Holmes, for defendant.

Day, J., This is an action of damages brought by the father of a young woman against a father and his minor son, by the latter of whom the young woman had been seduced, and against the son *en declaration de paternité.* The action is brought against the father simply as being liable for the injury committed by his son, and the son is sued without the appointment of a curator or any one by law authorized to represent him. The Court is against this form of action. A party is only liable for damage for seduction on the presumption that there has been a breach of promise of marriage, and this would not bind the father unless he had assented to it. And the son should not have been impleaded without the appointment of a tutor or curator to represent him. The general rule is that a demand cannot be made on a minor in a civil suit unrepresented, and all the exceptions, such as that established by our Statute, in allowing a minor to sue for wages, are in favour of allowing a minor to implead another party.

Action dismissed.

No. 174.

Lisotte v. *Bulmer.*

Motion to set aside foreclosure as there was no judge on the bench when the foreclosure was entered up.

MacKay & Austin, in support.
Lafrenaye & Papin, contra.

The *Court* granted the motion.

Motion granted.

No. 2627.

Tidmarsh v. *Stephens.*

Motion to set aside plaintiff's *enquête*, on the ground that the case was inscribed on the Role for hearing on the merits at the time of the plaintiff's *enquête.*

David & Ramsay, in support.

Carter, E., contended 1st, that a judgment upon a former motion of defendant's to set aside a previous *enquête* in the case, and by which the previous *enquete* had been set aside, necessarily set aside all the subsequent proceedings in the case, and 2nd, that defendant had waived his right of taking notice of such an irregularity, he having, subsequently to the taking of the second *enquete*, moved to set aside the second *enquete* for other informalities, and had passed over the one now complained.

Smith, J., There is evidently an irregularity in the procedure; but I shall always be disposed to resist any trifling irregularity in a record where it is not taken up at once.

Motion dismissed.

Oct. 23, 1854.

Present :—Smith, Vanfelson and Mondelet (C.), J. J.

No. 1283.

Ex parte *Wood*, Applicant for Ratification of Title.

Smith, J., This is an application on the part of the applicant for Ratification of Title, that opposant to give security of costs he being domiciled out of Lower Canada. On the part of the opposant it is contended that this application comes too late, as the appearance of the applicant must be held to be from the day of his filing this deed of acquisition of the property, the title of which it is sought to ratify. The difficulty is as to the interpretation of the 62 Rule of Practice, and the Court has no hesitation in saying that the appearance of the applicant dates from the presentation of the petition and not from the filing of the deed.

Devlin & Doherty, for applicant.

A. & G. Robertson, contra.

No. 164.

Bates v. *Foley.*

Smith, J., This is an action to oblige defendant to make an inventory. Defendant pleads that he has made one, and plaintiff replies by a *debat d'inventaire.* Defendant demurs to this replication. In technical language this is a departure.

Demurrer maintained.

Barnard, in support.
Badgley, Q. C., *& Abbot*, contra.

No. 373.

Galarneau & al. v. *Robitaille.*

Smith, J., This is an application on the part of the defendant who has been foreclosed, to be allowed to appear and file a plea, as there has been a misunderstanding between the counsel representing the opposing parties. Here both parties have tendered affidavits, so it is impossible for us to say who is right and who wrong. In all cases where there are contradictory affidavits the loss must fall on the party who has over-trusted the other, and he must be more careful in future. But in this case there is another objection which arises in my mind, and that is that the plea is not good.

Mondelet (C.), J., I don't concur in the judgment given on the 2nd ground. I say nothing about the nature of the plea tendered by defendant, but it would be a very delicate duty for us to judge between the contending affidavits of counsel. The party, therefore, must suffer who has allowed himself to fall into irregularity.

Cartier & Berthelot, for plaintiff.
Sicotte & LeBlanc, for defendant.

No. 387.

Berthelet v. *Galarneau & al.*

DOMICILE OF CO-PARTNERSHIP.

Smith, J., This is an action of damages brought for breach of contract of lease from the plaintiff to defendants, who are co-partners. The

action is brought against defendants as co-partners, and service is made at place of business of the co-partnership. The defendants have met this by an *exception à la forme*, in which they allege this is no partnership *debt*, and that the service at their place of business is null. We are against defendants; there was clearly a partnership debt, and the service at the place of business of the firm was good, V. 4 *Pardessus*, No. 976. But at all events this is no ground of exception, but rather of demurrer.

Mondelet (C.), J., I had some difficulty in bringing my mind to agree with the opinion of the other members of the Court, but after looking through a great many books I at last found in the *Nouveau Pigeau*, in the notes, p. 194, 12 exceptions to the rule that a party shall be served personally at his domicile, and also a reason for this being an exception. This is the reason, the partnership is an *être*, and it is at its domicile that the service should take place.

Barnard, for plaintiff.
Cartier & Berthelot, for defendant.

Exception à la forme dismissed.

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25 *Octobre*, 1854.

Present:—Smith, Vanfelson and Mondelet (C.), J. J.

No. 2634.

Lynch, Inft., v. *Papin*, Deft.

This case originated in a *Requête Libellée*, under 12 Vic. c. 41 and the 14 & 15 Vic. c. 125. The informant sought to have defendant ousted from the office of a councillor in the City of Montreal, and to have himself declared entitled to the office. The election referred to in the *Requete* took place in 1853, the councillor returned to hold office till March, 1856. The informant alleged that Papin was disqualified to be elected at that election, not having been, for the twelve months previous, a resident householder in the City of Montreal. The informant further contended that, of all qualified to be elected at that election he had the majority of votes. [In point of fact, Papin had received a majority of votes, Lynch the next greatest number of votes. Lynch

contended that the votes for *Papin* were to be held as wasted, or thrown away.]

The defendant by his *défenses* alleged that he had held *feu et lieu*, and been a resident householder for the twelve months before the election referred to, and that, even if this should be adjudged not so, Lynch, with a minority of votes, could not be declared entitled to the office under that election, but that the Court was bound to order a new election to be had.

MacKay & Austin, for informant, cited *Grant* on Corporations, p. 206, 207 and 208, and particularly *note* on p. 207.

A. A. Dorion & Lafrenaye, for defendant.

Oct. 31st., 1854. The Court gave judgment. Present:—Justice Smith, Vanfelson and Mondelet.

Mr. Justice Smith remarked that the Statute required as qualification for a councillor that he should have been a resident householder in the City for the twelve months before the election; that this required that Papin should have held *feu et lieu*, and had a house during such period, though, of course, a mere temporary absence from home for a few days would not prejudice him. The defendant had by his pleadings alleged such a house-holding. The evidence established the contrary, and that, for the eight months before the election, the defendant had been a boarder and lodger in the boarding house of one Groux. The defendant had, verbally, argued that at a time, about a year before the election, he had taken a house, but that he had been prevented by a *force majeure* from continuing in it, it having been consumed in the great fire; but he had not so pleaded but quite the reverse, nor had he proved impossibility to get another house, nor attempt whatever to get one. He had proved nothing of the kind, nor payment of assessments, or of rent whatever. He was disqualified to be elected at the election referred to.

The Court is further called upon to pronounce on the rights of Lynch averring himself to be entitled to the office, and after consideration of the arguments and authorities it feels bound to declare the votes given for defendant thrown away, and Lynch to be entitled to the office sought by him, he having (of all qualified to be elected) received the majority of votes. Under the law stated in *Grant* on Corporations, the Corporators were bound to know the requirements of their own Charter and Act of Incorporation. In voting for defendant they voted for a man whom they knew, or ought to have known, to be disqualified. The facts

were patent. The defendant has argued that Lynch was bound to give notice to the electors of Papin's disqualification, but it may be argued that the electors had notice; besides the election being by ballot Lynch was not bound to know how the electors would, or did, vote. He was not to know that he himself would receive votes, or that *Papin* would. The electors had right to vote for any body. The conclusions of the *Requête Libellée* are granted with costs.

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