Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [x] Bound with other material/ Relié avec d'autres documents
- [x] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- [ ] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [ ] Quality of print varies/ Qualité inégale de l'impression
- [x] Continuous pagination/ Pagination continue
- [ ] Includes index(es)/ Comprend un (des) index

  Title on header taken from:/ Le titre de l'en-tête provient:

- [ ] Title page of issue/ Page de titre de la livraison
- [ ] Caption of issue/ Titre de départ de la livraison
- [ ] Masthead/ Générique (périodiques) de la livraison

- [ ] Additional comments:/ Commentaires supplémentaires:

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
						✓					

Vol. III. QUEBEC, JUILLET, 1848. No. 10.

REVUE

DE LÉGISLATION

et de Jurisprudence.

QUÉBEC, B. R. No 1503—de 1848, SAMSON vs. BOLDUC.

Pour intenter l'action en réintégrande, le demandeur doit avoir eu la possession de l'an et jour, surtout si sa possession résulte d'une voie de fait.

Dans cette cause, le demandeur avait eu la possession de l'immeuble en contestation entre les parties pendant quatre années, et l'avait abandonné pour aller demeurer à une assez grande distance au lieu appelé le Lac, où il est resté environ trois ans. Peu de temps après son départ, le défendeur avait pris possession de l'immeuble en litige, en vertu d'un acte de vente qui lui en avait été consenti par un tiers, et était demeuré en possession pendant environ trois ans. Pendant une absence momentanée du défendeur, le demandeur avait repris possession de l'immeuble, et y était depuis environ quinze jours, lorsque le défendeur revenu l'en avait dépossédé de nouveau, en l'en expulsant et fesant enlever ses effets. De cette dernière prise de possession par le

défendeur, le demandeur fesait la base de son action en réintégrande.

La seule question à juger entre les parties était de savoir si le demandeur n'ayant pas eu la possession de l'an et jour immédiatement avant le trouble par lui souffert, avait le droit de porter l'action en réintégrande.

M. J. T. Taschereau, pour le demandeur, soutint que dans l'action en réintégrande la possession annale n'était pa requise, et que l'on ne considérait que le fait, et non le mérite et la qualité de la possession, et cita à l'appui de cette doctrine: Anc. Dén. V°. complainte no. 14.—Poth.—T. de la Poss: no. 123.—Pigeau, v. 2, p. 9 et 132.—Raveau, pratic. civ. p. 71.—Lange nov. pratic. v. 1. p. 268.—Duranton v. 4 no. 246, p. 190.—Dalloz v. 1, V°. action poss. no. 52. Rogron, cod. proc. civ. no. 23.

M. F. Lemieux, pour le défendeur, à l'appui de la doctrine contraire, cita:—Toullier v. 11, no. 123, 125, 126, 127, 128, 130.—Poth. T. de la poss. no. 55, 67.—Guyot, R. V°. voie de fait, V°. réintégrande. Troplong, T. de la prescription, etc., etc.

Per curiam.—Il n'y a pas de doute que la question de savoir, si la possession de l'an et jour est requise pour pouvoir intenter l'action en réintégrande, ne soit une question décidemment controversée; il semble toute fois que les auteurs les plus estimés et les arrêts les plus nombreux se sont prononcés pour la possession annale. Mais il y a une distinction importante à faire dans cette matière, et reconnue des auteurs, c'est le trouble causé par un possesseur de l'an et jour, évincé par voie de fait, usurpation et clandestinité:—Les démarches qu'il fait pour recouvrer sa possession contre l'usurpation doivent être jugées d'après la qualité de la possession des deux parties. Dans le cas actuel, le défendeur, lui-même en possession pendant trois ans, qui rentre en expulsant sans violence le demandeur, qui en son absence s'est clandestinement emparé de sa pro-

priété, n'est pas un malfaiteur, un usurpateur, qui sans droit apparent ou prétention, commet une voie de fait.—Voir Guyot, R. V°. voie de fait, et M. Troplong, T. de la prescription, (*possession annale,*) lequel a traité la question à fonds.

QUÉBEC.—B. R. N°. 1404 de 1847. FORTIER vs MERCIER.

L'accusation de parjure ne donne pas lieu de suspendre les procédures dans la cause où le parjure a été commis.

Le demandeur, ayant besoin d'un commencement de preuve par écrit, avait interrogé le défendeur sur faits et articles. Ce dernier ayant nié tous les faits que le demandeur voulait lui faire admettre, fut poursuivi criminellement pour parjure; et le grand jury avait trouvé bien fondé l'acte d'accusation.

En conséquence le procureur du demandeur s'adressa à la cour du Banc de la Reine, siégeant pour les matières civiles, pour obtenir de suspendre toutes les procédures en cette cause, jusqu'à ce que le procès criminel eut été jugé. Cette application est rejetée.

QUÉBEC.—B. R. N°. 615 de 1847.—Caldwell, requérant et les commissaires d'écoles de St. Patrice de la rivière du Loup.

Le domaine seigneurial mis en culture, et exploité comme métairie, est cotisable pour le maintien des écoles élémentaires.

Dans cette cause, les commissaires d'écoles de la paroisse de St. Patrice de la Rivière du Loup, avait fait cotiser le *domaine* de la Rivière du Loup, consistant en un manoir, fermes, moulins etc., etc., possédés par Sir Henry Caldwell, suivant les dispositions de la 9e Victoria, chap. 27.—Sir Henry Caldwell s'était refusé de payer cette cotisation, sur le principe, que le domaine, comme terre non-concédée était exempt de la cotisation, conformément aux dispositions de la section 37, où il est dit:—Que les terres non concédées dans les seigneuries seront exemptes de la cotisation, mais le seigneur paiera pour ses revenus seigneuriaux un quarantième de toute la cotisation. Les commissaires prétendaient que cette exemption ne s'étendait qu'aux terres incultes non-concédées, et non à des terres mises en culture et exploitées comme metairie par le seigneur lui-même.

La cause fut portée devant un juge de paix de la localité qui condamna Sir Henry Caldwell.—Ce dernier se pourvût par *certiorari*, et fit transporter la procédure devant la cour du banc de la Reine, qui la confirma.

King's Bench, Quebec.—No. 80 of 1819.—DARVAULT, plaintiff, vs. FOURNIER, defendant.

A tutor must be superseded in the manner directed by the statute 41, Geo. III, c. 7 Sec. 18, but an appeal is the proper remedy if the appointment of the tutor has not been regularly made. The action *en destitution* lies for subsequent *misconduct* in the tutor.

Per Curiam.—The appointment of a tutor, if it is not regularly made may be set aside, and that must be done upon a *requête* filed by the next of kin according to the provisions of the provincial statute 41, Geo. III, c. 7, sec. 18. The court will not maintain an action *en destition de tutelle*, if the case is so circumstanced as to allow an appeal to the court for irregularity or error in Chambers. The action *en destitution* is the proper remedy for misconduct in the tutor after his appointment. (1)

---

(1) L. C. Den. v. 5. p. 716.—Curatelle sec. 7 N. 5
Bourjon 1st. 69, sec. 6 art. 1.
Ed. et ordce. 11, 202.
Prov. Stat. 41, Geo. III, c. 7 sec. 18.
Pigeau 2d. p. 307.

N. Y. Superior Court,

Before the Honorable THOMAS J. OAKLEY, Chief Justice, and Justices VANDERPOEL and SANDFORD.

LITTLE v. MCKEON.—*June Term*, 1848. (1)

Competency of attorny to give evidence.

An attorney is a competent witness for the party in whose behalf he is conducting a suit. So of a counsellor for the party for whom he is advocating a cause.

The objection to an attorney or counsellor appearing as a witness in such cases, rests upon his bias and favor towards his client. It goes to his credit, not to his competency.

The practice of attornies and counsellors testifying for clients in suits in their charge is reprobated. It is an evil which will work its own cure in the loss of character of those indulging in it.

Certiorari to one of the assistant judges. The suit in the court below was brought by Little against McKeon. Little appeared by David Evans and declared in trespass. Issue was joined, and the cause proceeded to trial. In the course of the trial Evans was sworn as a witness for Little, and being examined by McKeon's attorney, testified that he was an attorney and counsellor at law, and counsel for Little in the suit then on trial. McKeon then objected to

(1) The New York Legal Observer.

Evans, has being incompetent and interested in the event of the suit. The justice sustained the objection, and excluded him from testifying. Judgment was given for the defendant, and Little, the plaintiff, removed it to this court.

D. Evans, for the plaintiff in error, cited Phillips v. Bridge, 11 Mass. 242. Reid v. Colcock, 1 Nott & McCord, 592. Newman v. Bradley, 1 Dallas, 241. Miles v. O'Hara, 1 Serg. & Rawle, 32. Boulden v. Hetel, 17 ibid. 312. Slocum v. Newby, 1 Murphy, 443.

L. F. Therasson, for defendant in error, cited Stones v. Byron, 1 B. C. R. 248. S. C. nomine Stone v. Bacon, 11 Lond. Jur. R. 44, and 1 Penn. Law Journ. (N. S.) 429. Dunn v. Packwood, 1 B. C. R. 312, S. C. 11 Lond. Jur. R. 145, and 1 Penn. L. J. (N. S.) 431. Also the work last cited at page 405.

By the court—SANDFORD, J.—The recent cases to which we were referred, in which the English Bail Court decided that an attorney could not be heard as a witness in a cause in which he acted as counsel on the trial, came under our observation last summer, and we were soon after pressed at *nisi prius* to exclude attornies from being witnesses on the authority of those decisions. The chief justice and myself acting without consultation or comparison of views, severally held the objection to be untenable. We have now, with the aid of our brother Vanderpoel, fully considered the question, and we entertain no doubt but that the attorney, in such a case, is a competent witness. There is an able and interesting article on the subject in the july number of the Pennsylvania Law Journal for 1847, (1 Penn. Law J., N. S. 485,) in which the exclusion of the attorney is vindicated on the ground of public policy. The degradation of the character of the bar, and the probable injury to the course of truth and justice, in some cases, by means of attornies and counsellors testifying in the suits which they are conducting, are strongly portrayed by the author; and

we are prepared to concur with him in many of his arguments and anticipations. But when we test the objection to the attorney by any established principle in the law of evidence, we find no good ground for rejecting him. Thus he is not interested in the event of the suit. There are many cases, doubtless, in which the compensation of such attornies is, by agreement, to depend upon the result; and in those there is a direct interest which excludes the attorney, as it would exclude any one who had bought a contingent share of the matter in controversy.

There is no reason for excluding the attorney on the ground of privilege or of confidence, as between him and the adverse party. This argument is especially aimed at the proof of admissions made by such party to the opposite attorney. There is certainly much less danger of a party's admitting away his rights to a hostile attorney, than there is of his making statements to an intimate friend which may be prejudicial to his cause. But the friend may always be compelled to disclose the most confidential statements. Moreover, testimony of an attorney of such admissions, made to him by the opposite party, affecting a really doubtful or litigated point, are always regarded with extreme suspicion and distrust by both courts and juries. It suffices, however, as to this argument, to repeat, that no privilege or confidence exists in the communications between an attorney and the adverse party, growing out of the character or situation of the former, as an attorney.

As to the ground of public policy, it does not appear to us so cogent as to warrant the introduction of a new exception in the law of evidence.

Aside from its bearing upon the bar itself, it is not stronger than it is in many cases of bias and partiality arising from social relations and family ties, which are of daily occurrence among witnesses. In all such cases, the position of the witness, and his connection with the party calling

him, open to the consideration of the jury in weighing his testimony, and we believe these circumstances usually receive all the consideration to which they are entitled.

As to the effect of this practice upon the character of the bar, we think the evil will work its own cure. Attorneys, as well as counsellors, of standing and character, will never, except in extreme cases, present themselves before a jury, as witnesses in their own causes on litigated questions, and in such cases only, because of some unforeseen necessity. These gentlemen of the bar, who habitually suffer themselves to be used as witnesses for their clients, soon become marked, both by their associates and the courts, and forfeit in character more than will ever be compensated to them by success in such client's controversies.

Our opinion as to the competency of the attorney in general, is snstained by the authorities in this country, so far as they have spoken on the subject. Most of them are to be found in Cowen and Hill's Notes to Philips' Ev. 95. 97. 110. 111. 1528. The Supreme Court assumed the law to be so in Chaffee v. Thomas, 7 Cow. 358. and in Jones v. Savage, 6 Wend. 658. (See to the same effect, Phillips v. Bridge, 11 Mass. 242. Slocum v. Newby, 1 Murphy (N. C.) 423. Geisse v. Dobson, 3 Whart. 34.

There is a further reason why the decision of the court below rejecting Evans was erroneous. Neither attorneys or counsellors are recognized or known as such, in justices' courts. Evans was there merely as the agent of the plaintiff below, and the character of his agency was not affected by the fact that he was an attorney and counsellor at law. Any person not a lawyer could have advocated the plaintiff's cause in that court, and the objection to him would have been equally valid on the score of public policy, so far as that argument is applicable to inferior courts. The cases in the bail court, (Stone v Bacon, and Dunn v. Packwood,) are scarcely an authority for the ruling below, be-

cause in the sheriff's courts, in England, attorneys, *as such*, are recognized and entitled to certain small fees, while there are no attorneys' fees, nor any thing equivalent, allowed in our justices' courts.

The judgment below must be reversed for this error. We are asked to exonerate the defendant from costs, because the point is new; but this we cannot do. If it were new, which we do not think, it was erroneous, and was used to defeat the plaintiff, and the correction of the error should not be at his expense.

Judgment reversed.

This decision seems to be in accordance with the principles of the french law.—The practice of advocates and attorneys testifiyng for their clients was not prohibited, but discouraged. However Mr. Pothier, tr. des obligations, no. 827, says:—" C'est sur le même fondement de soupçon de " partialité, qu'on ne doit pas recevoir dans une cause le " témoignage de l'avocat ni du procureur de l'une ou de " l'autre des parties: L. 25, FF. *de test.* Leur témoignage " seroit suspect de partialité s'ile étaient témoins en faveur " de leurs parties; et il y aurait de l'indécence à les ad- " mettre à être témoins contre leurs parties."

In november 1846, our provincial court of appeals, in the case of Lee appellant, and Huot respondent, decided that the testimony of the plaintiff's attorney was inadmissible and had been im properly received.

IN THE PRIVY COUNCIL.

1835.

On Appeal from the Province of Lower Canada.

Between KENELM OCONNOR CHANDLER and JOSEPH LOZEAU (in his quality of tutor to JOSEPHTE EMELIE and MARIE LOUISE LOZEAU, minor chilgren of the late JEAN BAPTISTE LOZEAU and MARIE ANGELE TRIGANNE LA FLECHE his wife), defendants en garantie in the court below,

Appellants.

AND

The ATTORNEY-GENERAL, Pro Rege, plaintiff and JEAN BAPTISTE GAURON dit GRANBOIS, defendant and plaintiff en garantie in the court below,

Respondents.

Extent of the *seigneurie* Nicolet. Acts of enjoyment can only be made used of to explain the terms of a grant, suppcsing them to be ambiguous.

The crown does not receive nor pay costs.

On the 13th day of march 1828, His Majesty's Attorney-General for the province of Lower Canada filed an information on the part of the crown in the court of King's Bench for the district of Three Rivers, against J. B. Gauron, alleging that he had without title entered into posses-

sion of certain pieces of land, forming part and parcel of the vast tracts of land belonging to the crown, on that part of the lands not granted by the crown, known under the name of the augmentation of the "township of Aston," contiguous partly to the township of Aston, partly to the depth of the fief or seigniory of Roctaillade, and partly to the seigniory of Nicolet, the said pieces of land containing about 3 acres in width and 64 in depth.

To this information the said J. B. Gauron filed a declaration *en garantie* complaining against the said K. C. Chandler, and the said J. Lozeau in his quality aforesaid, jointly lords of the seignory of Nicolet, that on the 17th june 1805, Pierre Michael Cressé, esquire, then *seigneur* of Nicolet, granted possession of the rents and profits to the said J. B. Gauron, that is to say, of the said pieces of land situated in the seigniory of Nicolet, with a warranty that the said J. B. Gauron should enjoy the said pieces of land for ever. The said grant made in consideration of the rent of 24 livres of ancient currency every year, of which land or hereditaments the said J. B. Gauron then took possession, and has since remained in possession upon the faith of such act of concession, and had in consequence cultivated the same, built upon it, and made cousiderable works thereon; wherefore the said J. B. Gauron being summoned to give up the said land, prayed the writ of the said court against the said K. C. Chandler and J. Lozeau in his said character, to compel them to appear and answer the demand of the said J. B. Gauron contained in the said declaration

Afterwards the said K. C. Chandler, one of the said defendants *en garantie*, came to defend the said J. B. Gauron, and by his perpetual exception peremptoire *en droit* pleaded that the said pieces of land were included within the boundaries of the seigniory of Nicolet, in that part of the seigniory called the Côte St. Pierre, and were then the property of and had been held *en roture* by the said J. B. Gau-

ron since the 17th june 1805, and formed part of the lands so held in the said *fief* and *seigneurie* and *augmentation* of Nicolet, of which the said K. C. Chandler and Joseph Lozean in his quality aforesaid were in possession, as being the lawful *seigneurs* and owners and proprietors of the said *fief* and *seigneurie*. And, further, that by a grant bearing date at Quebec on the 29th of october 1672, the extent of the *seigneurie* of Nicolet thereby granted and confirmed to one *sieur de l'*Aubin, was fixed and settled to be two leagues in depth, to be bounded in front by the lake St. Peter, and to extend one league above the river Nicolet and one league below it, the said river included.

That afterwards by another grant bearing date at Quebec on the 4th day of november 1680, Louis de Buade, then Governor of Canada, did grant and confirm to Michael Cressé, his heirs and representatives, the " Isle à la Fourche" with the other islands adjoining thereto in the river Nicolet, and also an augmentation of three leagues in depth to the said *seigneurie* of Nicolet by the whole breadth thereof, making with the original grant, two leagues in front by five leagues in depth exclusive of the Isle à la Fourche, as by a copy thereof therewith produced would appear.

That since the first settlements were made on the said *seigneurie* of Nicolet, to wit, from time immemorial, the said *seigneurie* and *augmentation de seigneurie* had been generally and publicly known to comprise all the land contained within certain limits defined and distinguished on a plan therewith produced by the said K. C. Chandler, that is, all that extent of land lying within the lines represented on the said plan by the letters A. B. C. D. E. F. G. H. I. K. L. M., and within which said limits the said pieces of land in the possession of the said J. B. Gauron were situated.

That in order more fully to ascertain the boundaries of the said *fief* and *seigneurie* of Nicolet and the augmenta-

tion thereof granted as aforesaid, a survey thereof was made on or about the 30th of june 1789, and repeated by Jeremiah Mac Carthy, a sworn surveyor, on the 29th of december 1802, and following days, at the request of Pierre Cressé, Esq. then *seigneur* and proprietor in possession of the said *seigneurie* and augmentation, and with the knowledge and consent of His Majesty's surveyor-general, by which said surveys, and according to the tenor and effect of the said grants of the said *fief*, and *seignenrie*, and augmentation, and the possession of the said grants of the said Pierre Cressé and his predecessors from time immemorial, the same was found to comprise all that portion of land within the limits mentioned in the *procès verbal* of survey and represented on the plan aforesaid, designated by the letters aforesaid, being ten leagues in superficies, or two leagues in front by five leagues in depth, exclusive of the Isle à la Fourche.

That subsequently when certain lands adjoining to the said *seigneurie* aud augmentation thereof were erected into a township called the township of Aston, and a survey thereof made by his late Majesty George the Third, under the directions of the surveyor-general of the province of Lower Canada, and by and with the concurrence of the said Pierre Cressé, then *seigneur* and principal proprietor in possession of the said *seigneurie* and augmentation *de seigneurie*, the line designated on the said plan by the letters K. L. was settled, acknowledged, and determined to be the line of division between the said township of Aston and the said *seigneurie* and augmentation *de seigneurie* of Nicolet, on the north-east side thereof, and the line designated on the said plan by the letters L. M. was in like manner settled, acknowledged, and determined to be the line of division between the said townshiy of Aston and the said *seigneurie* and augmentation of Nicolet on the south west side thereof, according to the marks and boundaries placed at the said letters K. L. M. and at other intermediate spaces along the said lines.

That from the year 1802 the said Pierre Cressé continued in peaceable and quiet possession of the said *seigneurie* and augmentation of Nicolet, as the seigneur and proprietor of two undivided thirds thereof, bounded and divided from the said township of Aston as hereinbefore mentioned, and cause the same to be laid out in concessions, and more particularly that part thereof adjoining the said township of Aston called the côte St. Pierre, and conceded and granted the lands situated within those boundaries and limits to divers persons who applied for the same, and received the *seigneurial* rents and other dues thereon, and exercised and enjoyed the rights and privileges of *seigneur* in, to, and upon the said *fief* and *seigneurie* of Nicolet, and every part there of within the boundaries above mentioned.

That François Baby, junior, esquire, having acquired from the said Pierre Cressé the said two undivided thirds of the said *fief* and *seigneurie* of Nicoled, comprising as well the original grant or concession of two leagues in front by two in depth, as the augmentation of two leagues in front by three in depth, by a certain deed of sale to him thereof made by the said Pierre Michael Cressé and dame Maria Fafard Laframboise his wife, executed before public notaries on the 9th of january 1819, entered into immediate possession thereof, and remained and was possessed thereof within the boundaries above mentioned, and designated by the letters aforesaid on the plan aforesaid.

That under and by virtue of a certain Writ of execution sued out of His Majesty's court of King's Bench, holding civil pleas in and for the district of Three Rivers on the 13th march 1820 at the suit of John Emanuel Dumoulin, against the lands and tenements of the said François Baby, Junior, the sheriff of the district of Three Rivers seized into his hands and took in execution as belonging to the said François Baby, Junior, the said two undivided thirds in the *fief* and *seigneurie* of Nicolet, as the same had been held and enjoyed by the said Pierre Michael Cressé; and the

usual and necessary advertisements and formalities required by the court of the province having been made and complied with, the said two undivided thirds in the said *fief* and *seigneurie*, and premises, such as had been theretofore held and enjoyed by the said late Pierre Michael Cressé, were put up to publie sale in the usual manner at the courthouse in the Town of Three Rivers on the 8th day of january 1821, by the said sheriff, and were then and there sold and adjudged to the said Chandler for the price of £6,530 current money of Lower Canada; which sum being paid into the hands of the said sheriff, the said K. C. Chandler became, and has since been and still is the lawful proprietor and *seigneur* of two undivided thirds in the said *fief* and *seigneurie* of Nicolet, and premises, as the same had been held and enjoyed by the said late Pierre Michael Cressé, that is, according to the limits and boundaries mentioned in the *procès verbal* of survey, and represented in the plan thereto annexed, designated by the letters aforesaid.

That afterwards, to wit, on the 14th day of january 1822, the said K. C. Chandler having entered into actual possession of the said two thirds of the said *fief* and *seigneurie* of Nicolet, and premises as above described, and as heretofore held and possessed by the said late Pierre Michael Cressé, and having exhibited the deeds, titles, and documents, by and in virtue of which he had become the proprietor and *seigneur* thereof as aforesaid, and having paid the quint due to his Majesty, he the said K. C. Chandler made, rendered, and acknowledged fealty and homage therefore at the castle of St. Lewis in the city of Quebec, his Excellency George Earl of Dalhousie then being Governor-in-Chief in and over the said province of Lower Canada, according to the laws in force in the said province, and in consequence thereof became, was, and is entitled to all and every the rights, immunities, benefits, and advantages to be derived therefrom.

That afterwards, to wit, on the 18th of july 1822, by a deed of sale duly executed before public notaries, Marie Angèle Triganne La Flèche, widow of the late Jean-Baptiste Lozeau, did for the sum of £872 10s. 8d. sell to the said K. C. Chandler, one undivided sixth part of the said *fief* and *seigneurie* of Nicolet, and of all the rights appartaining thereto, to her belonging, for her share in the *communauté* which had existed between her and the said late J. B. Lozeau in his life time, *seigneur* proprietor of one undivided third in the said *fief* and *seigneurie*, bounded as before mentioned.

And the said K. C. Chandler, therefore, by his said plea said, that he was the lawful proprietor of five sixths, undivided parts, of the said *fief* and *seigneurie* of Nicolet, of ten leagues in superficies, or two leagues in front by five in depth, according to the limits and boundaries thereof fixed and established in the years 1789, and on the 29th of december 1802, and acknowledged and confirmed by subsequent surveys as having been possessed by him and his predecessors, and as mentioned and described in the sheriff's advertisement and sale of two thirds thereof, that is, according to the limits and boundaries mentioned in the *procès verbal* of survey, and the plan aforesaid.

And the said K. C. Chandler for a further plea pleaded the general issue.

In the same term the said J. B. Lozeau, in his quality aforesaid, the other of the said defendants *en garantie*, came to defend the said J. B. Gauron, and by his perpetual exception *péremptoire en droit*, pleaded the same title as was before set out by K. C. Chandler for five-sixth parts of the said *seigneurie*, except that he traced title to himself in his quality aforesaid for the remaining one-sixth part, by stating a certain notarial act or deed of sale duly executed at the Town of Three Rivers on the 3rd day of july 1811, before a notary public and witnesses, whereby Joseph Claude Poulin de Courval, in consideration of £1366 13s. 4d. cur-

rency, sold to the said late J. B. Lozeau the said undivided third of the said *fief* and *seigneurie* of Nicolet; and that the said J. B. Lozeau having so become the true and lawful owner and proprietor as *seigneur* of one undivided third of the said *fief* and *seigneurie* of Nicolet and of the augmentation thereof, immediately entered into and continued in actual possession thereof during his life-time, during which time the said *fief* and *seigneurie* of Nicolet was possessed and enjoyed according to and within the boundaries mentioned in the said *procès verbal* of survey, and represented on the said plan thereunto annexed.

That on the death of the said J. B. Lozeau, Marie Angèle Triganne La Flèche, widow of the said J. B. Lozeau, became entitled to one sixth undivided part of the said *fief* and *seigneurie* of Nicolet and augmentation as above described, for her share in the *communauté* which existed during their marriage, and the said Josephte Emilie and Marie Louise Lozeau the only surviving issue of the said marriage, and heirs of the said J. B. Lozeau, became entitled to the other sixth undivided part thereof, and the said Joseph Lozeau therefore said by his said plea that the said Josephte Emilie and Marie Louise Lozeau, are the true and lawful owners and proprietors of one sixth undivided part of the *fief* and *seigneurie* of Nicolet, of ten leagues in superficies or two leagues in front by five in depth, according to the limits and boundaries above specified in the plea of the said K. C. Chandler; and the said J. B. Lozeau acting in his said capacity for further plea pleaded the general issue.

The said attorney-general took issue on these pleas, and the cause was inscribed upon the rolls for the adduction and hearing of proof.

The said defendants *en garantie* made certain admissions respecting the locality of the pieces of land described in the said information.

And it was admitted on behalf of the King, that the sig-

nature—Jos. Bouchette, S. General—subscribed to the exhibit of the defendant *en garantie* filed in the said cause was the signature of Joseph Bouchette, who was on the 26th of july 1802, deputy surveyor-general of the said province, and on the 2d march 1829, surveyor general of the said province; And that several other exhibits were copies of the original deeds of concession of which they purported to be copies.

The title of J. B. Gauron, the plaintiff *en garantie*, was proved by two grants from Pierre Cresse to him, dated respectively the 11th and 17th of june 1805.

The pleas of the defendants *en garantie* were supported by producing:

The original grant of the seigniory of Nicolet, containing two leages in width by two leagues in depth, dated the 29th of october 1672.

The original grant of the Isle à la Fourche with three leagues of augmentation, dated 4th day of november 1680 whereby, "The Isle à la Fourche lying in the river Cressé, together with the islands and islets which are in the aforesaid river, to the end of the said island, with three leagues of augmentation in the depth of the lands which are at the end of the width of the said seigniory," were granted to Mr. Cressé, his heirs and assigns for ever.

Numerous surveys relating to the boundaries of the *fief* of Nicolet, or to concessions within that *fief*, or to the limits of the adjoining *fief*, among which the most material is the survey of Jeremiah Mac Carthy on the 26th of january, 1803, setting out the boundaries as claimed by the defendants *en garantie*, accompanied by a plan made by the same surveyor, dated 10th of march 1803, and marking those boundaries by the letters referred to in the pleadings, and with the letter of J. Bouchette, the surveyor-general, dated 26th of july 1802, informing M. Cressé that the crown lands adjoining the *fief* of Nicolet were about to be sur-

veyed, and that it was necessary to fix the boundaries separating the *fief* of Nicolet from the adjoining crown lands, and recommending Mr. Mac Carthy to be employed by Mr. Cressé for that purpose.

The other surveys were :—

Of the front of the *fief* Cressé at Nicolet, 27th of march 1788.

Of the line of division between Nicolet and Roquetaillade in june 1789.

Of the line of the côte St. Pierre in april 1804.

Of the boundary on the south-west of the *fief* of Nicolet, 10th of may 1804.

Ten surveys of different lots for concessions in the côte St. Pierre, made in april 1804.

Also several concessions made by the owners of the *fief* of Nicolet to different grantees ;

Of which, that by J. B. P. de Courval to dame M. Forestier, on 5th of april 1720, extending across the whole Island à la Fourche.

There were also seven concessions in 1805, and three in 1808, of lands in the côte St. Pierre.

Also copies of legal proceedings by M. Cressé against two of the grantees under the said concessions, for non-payment of the rents due to him as owner of the *fief* of Nicolet, and of the judgments obtained by him therein in 1808.

Also copies of fealty and homage rendered at different times ;

By C. Pierre Cressé de Courval on the 7th february 1781.

By K. C. Chandler for two thirds of the *fief* of Nicolet, on 14th january 1822.

By J. Lozeau on 25th may 1829.

Also the sale of the *fief* of Nicolet by P. M. Cressé, Esquire, to F. Baby, the Younger, 9th january 1819.

Also the sale by the sheriff of Three Rivers, to the said K. C. Chandler, of two undivided thirds in the *fief* of Nicolet, 6th march, 1821.

Also the sale by M. A. T. La Flèche, widow of J. B. Lozean, to K. C. Chandler, of one sixth in the *fief* of Nicolet, 18th july 1822.

Also the sale by J. B. C. P. de Courval, to Jean Baptiste Lozeau, of one third of the *fief* of Nicolet, 3rd july 1811.

Three witnesses also were examined, namely, Pierre Hebert, François Pellerin, and Raphael Hebert, who had occupied lands in the côte St. Pierre under concessions from P. M. Cressé as lord of the *fief* of Nicolet, granted at the same time as the concessions granted to J. B. Gauron, some of them in the same range as the concessions to Gauron, and either occupied at the present time by the witnesses, or sold by them under such concessions, or given back to Mr. Cressé.

These witnesses upon cross-examination admitted that their concessions did not lie in rear of the front of the seigniory of Nicolet, but in rear of the seigniories of Roquetaillade and Godefroi.

Afterwards the court gave judgment for the crown that Gauron should restore the lands claimed by the information, and that the defendants *en garantie* should indemnify him, considering that the seigniory of Nicolet comprised in the whole two leagues in width by five leagues in depth,

including therein so much only of the Isle à la Fourche as came within those dimensions.

From this judgment of the court of King's Bench, the appellants appealed to the provincial court of appeals by which court the judgment of the court of King's Bench was affirmed.

From this judgment, pronounced in the provincial court of appeals, the appellants have appealed to His Majesty in council, and they humbly hope that the judgments of the court below will be reversed, for the following amongst other.

REASONS.

First:—Because the said judgments ought, according to law, to have been pronounced in favour of the appellants, and against the respondent, and not as the same have been pronounced, in favour of the respondent and against the appellants.

Second:—Because by the grant of 1680, giving, with the Isle à la Fourche, an augmentation of three leagues in depth by two in width, the lands in question were intended to pass, and the undisputed possession from the time of the grant to the commencement of this suit, is evidence that they did pass, by that grant.

Third:—Because the right of the appellants is established by their possession and the various acts of ownership stated in the case, several of which were done with full notice to the officers of the King, and with their concurrence.

Fourth:—Because by the sale of the sheriff on the 8th

of january, 1821, under the provincial statute of 25th George the Third, cap. 2. sec. 33., which gives to a sale by the sheriff the same force and effect as a *decrêt* had theretofore, the title thereby conveyed to the appellant is indefeasible.

AT A MEETING OF

The Judicial commitee of His Majesty's most Honorable PRIVY COUNCIL.

COUNCIL OFFICE WHITEHALL,
Monday 5th January 1835.

Mr. Baron Parke,

Their Lordships think it unnecessary to trouble the attorney general on the part of the respondents: they are clearly of opinion that the judgment of the court below ought to be affirmed with respect to the claim by the appellants. It is quite clear in the first place that the plea of prescription has not been distinctly made in the court below, and in the next place supposing it had, there is no evidence of distinct, clear and unequivocal enjoyment for 10 years by virtue of any "*juste titre*," the only claim by "*juste titre*", is by Gauron who by virtue of the grant of 1805 took the piece of land in question, but there is no proof that Gauron was clearly and unequivocally in possession of that land as required by law, and therefore that ground of defence must fail.

The only question in the case appears to their Lordships

to be the construction of the grant of 1680, by the King of France to Monsieur Cressé. The alledged acts of enjoyment can only be made use of to explain the terms of that grant supposing them to be ambiguous. It is unnecessary for the court to determine whether or not the whole Island of de la Fourche or à la Fourche, for it is called by both names, passes by that grant. The only question in the case is whether the piece of land which is sought to be recovered, and which consists of three acres in front and 64 acres in depth and lies in that portion of land designated in the plan by the name of la côte St. Pierre, passes to Mr. Cressé by that grant.

In order to determine this, we must look at the language of the grant itself, it is founded on the petition of the grantee, who prays that the crown would be pleased to grant to him in title of *fief* and *seigneurie*, the Island de la Fourche situate in the river Cressé, with the islands and islets which lie in the above river, to the end of the said island, with three leagues of augmentation in the depth of the lands which are at the end of the whole width of the said seigniory; and upon that petition the crown grants the said island, calling it the isle à la Fourche, and three leagues of augmentation in the depth of the lands which are at the end of all the width of the said seigniory. This grant must be construed with reference to the prior grant of 1672, by which an irregular parallelogram being two leagues in front towards the river St. Lawrence and the lake St. Pierre, and two leagues in depth towards the south was granted to the sieur de l'Aubin and constituted the seigniory of Nicolet, and the augmentation prayed for and granted in 1680, is clearly an augmentation to that seigniory.

It is to be observed that a small island which lies in the mouth of the river Nicolet, and is uncoloured upon the appellants plan, was not comprised in the former grant of 1675, and looking at the two grants and comparing them

with the map only, without adverting to any of the parol evidence in the case, I should have been much disposed to think that the Isle à la Fourche, or de la Fourche, meant to be granted by the crown, was that small island lying in the fork of the river, and if that were so, there is no obscurity or difficulty in construing the grant of 1680, which would comprise only an additional parallelogram, to the south of the former grant, of three acres in depth and two acres in width.

But, adverting to the evidence in the court below and to the admissions of the parties in the course of the cause, it seems to be clear that the Isle à la Fourche, or de la Fourche, is not that island, but a Peninsula lying to the south of another fork of the river Nicolet, and extending as far as the point where the two branches of that river approach near to each other, and the whole or a part of that island or peninsula was meant to be comprised in the grant of 1680.

The court below have decided that so much only of that island was intended to pass as was comprised in the space of three leagues by two immediately to the south of the land granted in 1672, and that the rest of that island or peninsula did not pass at all. It is not necessary for us to say whether the court were right or wrong in that respect. We have only to decide whether or no the portion of land in the possession of Gauron, at the time the information was filed, lying in that district called la côte St. Pierre, was comprised within this grant.

Now I have no doubt myself, and the rest of their Lordships agree with me in opinion, that this portion of land is not comprised within the language of the grant of 1680. Besides the Isle à la Fourche no land is granted except that which lies within the space of three leagues in depth immediately to the south of and in addition to the former grant, and the instrument operates as a grant of a new pa-

rallelogram three leagues by two in width, comprising a part of the Isle à la Fourche, and possibly it may also comprise the residue of that island out of these limits. But that is a question which we need not, upon the present occasion, decide, and upon that their Lordships give no opinion.

It is perfectly clear to them that an augmentation of six square leagues in the immediate neighbourhood of the former grant, to be taken wherever it could without interfering with any other then existing grant of the crown, which is the construction contended for by the defendants, was never in the contemplation of the parties to this grant, and though there may be some ambiguity in the terms of the instrument as it relates to the Isle à la Fourche, and it may be doubtful whether the whole or only part of that island was intended to pass, there appears to be no ambiguity with respect to that which relates to the piece of land in question, that at all events was clearly not intended to be included in the grant.

But supposing there was an ambiguity, and that usage and enjoyment were properly admissible as evidence in order to explain the ambiguous terms of the grant, their Lordships are of opinion, that the alleged usage and enjoyment in this case is by no means sufficiently clear to enable them to put a construction upon the words different from that which they *primâ facie* import.

The usage and enjoyment insisted upon consists in the act of the crown's surveyor, and also in the alleged grants by the Lord of the seigniory of Nicolet, and of enjoyment under them of pieces of land situated in the côte St. Pierre, out of the limits of the additional parallelogram above mentioned.

The first of these was in the year 1802 when the crown's surveyor at the request of the Lord of the seigniory of Nicolet marked out the lines of boundary of the augmentation

of the seigniory, and comprised within them the piece of land in question. Now this is an act which took place not less than 122 years after the grant itself and it is some what singular to offer such evidence, as evidence of enjoyment explanatory of the terms of a grant, it is clear that at that time there were no boundaries marked out in that direction as the limits of the new grant: it must have been entirely unoccupied. The only effect their Lordships can give to the act of the crown's surveyor, is to consider it as a declaration of his opinion as to the meaning of the grant, but the court below, and their Lordships on appeal, are the proper persons to construe the grant, and not the crown's surveyor.

The acts of alleged ownership under the grant from M. Cressé, subsequent to that time, in the years 1802-3, and subsequently, are very few and the proof is of a very unsatisfactory nature. There is evidence of the recovery of a small rent reserved upon one of the grants, there is evidence also of payments of small rents upon some of the other grants, but the grantees themselves say that they only paid them sometimes, and sometimes they did not because they were doubtful whether M. Cressé or the crown were entitled to the land, and Raphael Hébert upon whose enjoyment some reliance has been placed, distinctly says that he would have nothing further to do with the land, because he did not think that M. Cressé was entitled to it.

Their Lordships are of opinion that these alleged acts of usage and enjoyment, on the part of the defendants, are very slight and unsatisfactory. On the other hand there is much stronger evidence against the defendants themselves in the terms of the conveyances to them of the undivided portions of the seigniory. In the conveyance by the sheriff under the execution against Baby, the former owner of the seigniory, to M. Chandler one of the defendants, the seigniory is described as "consisting of two leagues in front by five "leagues in depth, entering about four leagues within the

" Isle à la Fourche, bounded in front by Lake St. Peter and " the river St. Lawrence, and in the rear by a part of the " said Isle à la Fourche, and part by the township of As- " ton and other crown lands, joining on the south west side " to the seigniory of la Baie St. Antoine and *fief* Courval, " and on the north east side to the *fief* Roquetaillade and " also to the said township of Aston." This description comprises the parallelogram of three leagues by two, immediately to the south of that formerly granted, and no more, and it appears by another grant, no. 42 that that land which is called côte St. Pierre was considered as being in the augmentation of the township of Aston prior to that time, for the land granted to Douglass by the instrument no. 42 is said to have been occupied by him in 1819, and is described as situate in the augmentation of the said township. The description therefore by which Chandler took his share of the seigniory does not include the land in question, nor, as it appears, any part of that which is called the côte St. Pierre.

Again in the instrument by which the other part of the seigniory was conveyed by Lozeau, no. 70 in the appendix, the seigniory is described as containing in the whole about two leagues in front by about five leagues in depth, such as the *fiefs* were then possessed, or ought to be possessed, according to the titles of the vendor. This conveyance also appears to comprise the second parallelogram above described.

For these reasons their Lordships are of opinion that the land in question was not comprised in the grant of 1680, and therefore that the judgment of the court below was in that respect correct, as has been before said, their Lordships have no occasion to give any opinion, whether or not it was correct in excluding the part of the Isle à la Fourche lying beyond the limits of that parallelogram.

The judgment of the court below must therefore be affirmed and with costs.

Doctor Lushington.—It is not usual to give costs where the crown is concerned.

Mr. Baron Parke.—Yes, that observation is right, the crown will not claim costs, and therefore the judgment must be affirmed without costs.

I forgot to notice the argument that the sale by the sheriff was equal to a sale under a decree, and bound all other persons who did not claim the land comprised, and that argument cannot have effect in this case, for the deed of sale under the execution against Baby did not purport to convey any land not comprised within the additional parallelogram, and therefore did not preclude the crown, or any others, from claiming land out of those limits.

ANALYTICAL INDEX.

Of cases determined in the court of King's Bench for the District of Quebec from 1807 *to* 1822.

(CONTINUED FROM PAGE 360.)

Practice.

Judgments and their incidents.

1st. Judgments (generally).

2nd. Costs and *distraction de frais.*

3rd. Executions.

4th. Oppositions and distributions.

5th. Adjudications and sales by decret.

6th. *Folle enchère.*

1. JUDGMENTS.

Judgment cannot be given for interest and costs if they are not asked in the conclusions of the declaration. Stilson vs. Anderson and al, 1811, no. 189.

Judgment cannot be given against two or more defendants, *solidairement*, if it be not asked in the conclusions. Tram vs. Godin, 1812, no. 585.

Interest is allowed in all cases of judgments on notes of hand from the service of the process *ad respondendum.* Heaviside vs. Mann, 1817, no. 9.

Where an undertaking or promise is declared upon as a joint undertaking by two defendants, and when produced in evidence appears to be a sole promise by one, judgment cannot be recovered against either of the defendants. Ritchie vs. Thomas & al, 1818, no. 937.

A judgment obtained against a person interdicted by reason

of insanity, his curator not being a party to the suit, is null *de plein droit.* Sproat vs. Chandler, 1818, no. 700.

Signification of the judgment is not required where it was given *contradictoirement.* Rogerson vs. Begin, 1819, no. 814.

The year given to absentees by the ordinances for the revision of judgment against them, commences with the execution for "he has no notice before." McKutcheon vs. Price and Price oppt., 1820, no. 185.

A judgment may be compensated but that can only be done by another judgment, or by a debt as "*claire et liquide*" as the judgment to which it is opposed, and contracted after the date of it, ex grâ, a debt due on a notarial obligation.

ART. 2.

Costs & distraction de frais.

A plaintiff who sues *in formâ pauperis* may recover costs. Giroux vs. Ménard, 1819, no. 169.

The costs to be paid on taking off a default on process *ad respondendum* are ten shillings. Fortier vs. Peltier, 1810, no. 176.

Costs must be asked, they cannot otherwise be obtained. Stilson vs. Anderson & al, 1812, no. 189.

No costs can be asked for an *attorney's letter* before the commencement of an action, it is a voluntary *courtesy* and not a necessary proceeding. Bowen vs. Lee, 1812 no. 99.

A plaintiff may in some cases recover the costs of the superior term, though his judgment is for £5 only. Godbout vs. Giroux, 1816, no. 118.

In an action *en bornage* the defendant pleaded 30 years prescription and filed an incidental demande *en bornage*, on the same ground, viz, of title by prescription to which the incidental defendant took no exception, the incidental demand was dismissed as an unnecessary pleading, each party paying their own costs. Dussault vs. Stuart & vice versâ, 1816, no. 267.

On a motion to amend a declaration on payment of costs, the court (if it is allowed) will stay all proceedings, upon motion to that effect until the costs are paid. Miville vs. Caron, 1817, no. 253.

When two defendants join in their defence in an action of trespass, if one is acquitted he is entittled to his costs against the plaintiff notwithstanding his co-defendant is found guilty. Henderson vs. Thompson & Thompson, 1817, no. 632.

Non-payment of costs in a former action is not the subject of an *exception péremptoire*. The party may move to stay proceedings, or take out his execution or sue, by a new action in another court if necessary. Robichaud vs. Fraser, 1817, no. 63.

Although distraction *de frais* may be pronounced at the time of the delivery of the final judgment, without the presence of the party which the attorney represents, it cannot be done after judgment unless the party be present in person or by attorney. Ireland vs. Stevens, 1819, no. 159.

An attorney prosecuting his own action for costs due in a former cause cannot have judgment for costs, he is entitled to the amount of his disbursements and no more. Vallières vs. Duhamel & al, 1819, no. 289.

In an action *hypothécaire*, if the defendant does not appear, he will be condemned to pay costs, for it is he that drives the plaintiff to proof in consequence of the ordinance which requires proof of the demande in all de-

fault actions. Taschereau vs. Bélanger, 1818. no. 1197.

When a plaintiff recovers no more than is paid into court and the sum so paid in was tendered before the action was instituted, the action must be dismissed with costs against the plaintiff. Woodrington vs. Taylor. 1820, no. 482.

The defendant, before the return of the writ of summons, paid the plaintiff his debt, but no costs. The court condemned the defendant to pay costs to the day on which he paid the debt. Gagnon vs. McLeish, 1820, no. 581.

The attorney's right to the costs by *distraction de frais* is personal and vested in him. Esson vs. Black, 1821, no. 70.

In a default action the depositions did not state whether the the witnesses were, or were not, of kin to the parties, the court set them aside and condemned the attorney for the plaintiff, for his omission, to pay the costs of the *enquête*. Stack vs. King, 1821, no. 1452.

ART. 3.

EXECUTION.

The old formalities of the *saisie-exécution* upon immoveable property are no longer required. Volant vs. Drapeau, 1808.

A ca: sa: may be had on a foreign bill of exchange protested. Bowie vs. Skinner, 1809, no 85.

If a sheriff's sale is interrupted and no adjudication is made the highest bidder has no claim to be considered as the *adjudicataire*. Baker vs. Young. 1810, no. 128.

Québec.—Banc de la Reine, 1848, No. 2041.—WURTELE vs. VERRAULT, défendeur, et BROOKE et WILSON, intervenans.

Jugé que pendant la durée d'une contestation relative à la propriété d'effets mobiliers d'une nature périssable, le shérif peut être autorisé à les faire vendre.

Les demandeurs, en leur qualité de syndics à la banqueroute de William Henry, avaient saisi et revendiqué entre les mains du défendeur Verrault la quantité de 25,000 billots, comme leur appartenant en leur dite qualité: Brooke et Wilson, marchands associés, de Liverpool, intervinrent en cette cause, et réclamèrent la propriété de ces billots, en vertu d'une vente qu'ils alléguaient leur avoir été consentie par Henry, quelque temps avant sa banqueroute.

Les demandeurs attaquèrent cette vente comme frauduleuse, et une contestation qui devait nécessairement se prolonger s'engagea entre les parties. Pendant la litispendance, les demandeurs présentèrent requête à la cour, alléguant que le bois saisi était d'une nature périssable, se détériorait de jour en jour, et qu'il était urgent d'en disposer. Ces allégués étaient appuyés de plusieurs affidavits de gens experts. La requête concluait à ce que le shérif fut autorisé à faire vendre ce bois, et à en retenir le produit entre ses mains pendant la durée de la contestation. Les intervenans se contentèrent de s'opposer à cette demande.

L'opinion de M. Pigeau, vol 1, p. 114, 115, 116, fut citée à l'appui de cette demande, ainsi qu'un précédent analogue, Q. B. R. Dorion vs. Farlin, 1838.

Les conclusions de la requête furent accordées par MM.

Panet et Aylwin, contre sir James Stuart, qui était d'avis que les demandeurs auraient dû demander que le bois leur fut délivré à eux-mêmes, en par eux donnant un cautionnement d'en payer la valeur, s'ils faillissaient dans leur action.

Queen's Bench.— Quebec.— No. 1101 of 1810.— PAGÉ, plaintiff, vs. CARPENTIER, defendant.

If it be pleaded by exception that there are other heirs such plea must name them, indicate their place of residence and state them to be alive.

Per Curiam.—If a simple contract creditor sue an heir for the whole of a debt due by his ancestor, *primâ facie*, the action is rightly brought. If there be other heirs, this is a fact of which the defendant and not the plaintiff is connusant, and the defendant therefore must necessarily plead by exception that there are other heirs, he must also name them, aver them to be alive and point out their place of residence, for he must show that they are within the jurisdiction of the court; if they are beyond the authority of the court, it is not in the power of either party, nor even of the court, to make them parties to the suit. In cases similar to this it is the duty of the heir who is sued to call his co-heirs into the suit :—

4 Cochin p. 316. Pothier, Cout: d'Orléans p. 509 no. 80.

Langlois vs. Dénéchaud, executor, B. R. Q. no. 153 of 1813.

Pothier *traité de la propriété* no. 298.—L. C. Denizart verbo *garantie*, sec. V, no. 2.

MERCANTILE LAW CASES.

COLLISION OF VESSELS.

In the United States District Court, sitting in admiralty. Pastre Frerez, owner of ship Jupiter, vs. bark Genesee and owners.

"This," says the *New Orleans Commercial Times*, "was a collision case, and as the decision has been much talked of upon change, we have taken some pains to inform ourselves of the facts and of the testimony, as presented by the record."

It appears that the bark Genesee, about the first of January last, outward bound, full loaded, was making sail outside the Mississipi bar, in the south-west pass, the steam towboat having just left her. The ship Jupiter, bound up, was lying at anchor, in mid-channel-way, directly in the thoroughfare—directly in the channel which vessels inward or outward bound must pass. This was proved by Captain Gillingham, the captain of the Genesee, who has sailed to this port now more than seventeen years. This was proved also by the two mates of the Genesee, and corroborated by Mr. Beebe, the well-known manager of the tow-boat line,

whose skill and experience in such questions are of the highest respect. It was proved, also, that the wind was light, and the current remarkably and unexpectedly strong, that the current was variable, and shifted, and the wind too light to allow of steerage-way; that the force of the current drifted the Genesee broad-side upon the Jupiter. It was proved that the damage done to the Jupiter was in the sum of about $150. Mr. Levi H. Gale, who, it appears, was called by the captains of both ships, and had the damage pointed out to him in the presence of both parties, gave his award in a sum less than $200. The Jupiter was proved to be a very old ship, and rotten.

When the collision appeared to be threatening, the captain of the Genesee cried out to the captain of the Jupiter to pay out chain and let the Jupiter drop down, so that the collision could be avoided—the Jupiter did not pay out her chain, because, as it appeared, it was foul, or was not overhauled. Two fathoms more of chain, and the collision would have been avoided. The Jupiter arrived first in the city, and was the first to bring suit. She laid her damages in the sum of $1,200.

Mr. Upton, the counsel for the Genesee, urged the negligence and wrong on the part of the Jupiter in being anchored in mid-channel, and obstructing a right of way to which the Genesee had full right. He urged the neglect and want of ordinary care on the part of the Jupiter, that her cable, by which she was riding, was foul and not overhauled. He dwelt strongly upon the fact that no vessel at the passes should ride at anchor with their jib-boom out and set. He proved conclusively that the damage done to the Genesee was, immediate and consequential, upwards of $6,000; two of her masts were sprung, and were replaced. She was obliged to return to the city for repairs, &c.

But what we consider of most weight in the case, was the decision read by the counsel for the Genesee, rende-

red some time since by judge McKinley in the matter of the ship Louisville vs. Jonathan Strout et al., which we give in full below, with the remark that it is one of those quiet and sensible opinions for which judge McKinley is eminently distinguished.

The ship Louisville vs. Jonathan Strout et al.—This case comes before this court upon an appeal from the decree of the district court for the Eastern district of Louisiana.

The appellees, owners of the ship Harriet, filed their libel in the court below, for collision, and upon the trial the court rendered a decree in favor of the libellants for $2,701 07. By the evidence, it appears that the Harriet had passed over the bar through one of the passes or outlets at the mouth of the Mississippi River, outward bound, on the 26th of may, 1836, and came to anchor near the bar, the Louisville lying below, a distance of several miles, weighed anchor, with a fresh and favorable wind for coming in through the same pass. As she approached the bar the wind died away, and the current being stronger than usual, owing to a strong wind from the south the night before, she drifted and ran afoul of the Harriet. These passes, it appears, are intricate and difficult to navigate, and subject to counter and under currents. If the wind die away when a ship is coming in, she is certain to drift and become unmanageable. Knowing these facts, a prudent master would never anchor his vessel in the thoroughfare of one of these passes. The evidence shows, however, that the master of the Harriet did anchor his vessel immediately in the thoroughfare, and that too, after having been ran afoul of by another vessel, about a year before, at or near the same place.

There are four possibilities under which a collision may occur:—First, it may happen without blame being attributable to either party, as when the loss is occasioned by a storm, or any other *vis major*. In that case the misfortune

must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. Secondly, when there has been a want of due diligence or skill on both sides. In such case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down, and in this case the injured party would be entitled to entire compensation from the other. (*The Woodross, Sims, and Dodson's Rep.*)

The third rule here laid down, it appears to me, applies with great force to the case under consideration. The misconduct on the part of the master of the Harriet in anchoring his ship immediately in the thoroughfare, is fully made out by the proof; while, on the contrary, there is no fact proved going to show mismanagement, want of skill, or negligence on the part of the master of the Louisville. It is true that the opinions of some nautical men, found in the evidence, show that it was possible for the Louisville to have avoided a collision had everything been done that it was possible to do. But the law imposes no such diligence on the party in this case. So far as the Harriet was concerned, the Louisville was entitled to the full use of the thoroughfare of the pass. The master of the Harriet having obstructed it, with a full knowledge of the danger of doing so, has been guilty of such misconduct as to deprive the appellees of the right of action against the appellant. (3 *Kent's Com.*)

It was insisted by the counsel for the appellees, that the Harriet being at anchor, and the other ship under sail, that the latter was therefore liable. It is true, if a ship be at anchor, with no sails set, in a proper place for anchoring, and another ship, under sail, occasions damage to her, the latter

is liable. But the place where the Harriet anchored was an improper place, and therefore the appellees must abide the consequences of the misconduct of the master. Wherefore, it is decreed and ordered that the decree of the district court be reversed, and held for naught, and the appellants recover of the appellees their costs in this behalf expended; and it is further decreed and ordered that this case be remanded to the district court, with instructions to dismiss the libel of the libellants.

DUNCAN N. HENNEN,
Clerk.

Montreal.—Court of King's Bench.—January, 1827.

Present, the Hon. Mr. Justice Pike.

No. 111.

ANTOINE HAMEL, Plaintiff.
vs.
DAVID JOSEPH, Defendant.

This was an action brought by the plaintiff, an inhabitant of the parish of Berthier, against the defendant . merchant of the same place. The defendant pleaded, as an exception *à la forme*, that the writ of summons, under the 25th Geo. III, c. 2, s. 36, should have been written in the english language, being the language of the defendant; that therefore he was not bound to answer, and prayed that the action might be dismissed. Per cur. Action dismissed with costs.

Bas-Canada.—Cour d'Appel.—Avril, 1843.

—

ANTOINE BAZIN et autres, *opposans en première instance,*

Appelants.

et

LOUIS G. CREVIER et autres, requérans, et H. HENEY et autres, commissaires pour la construction des églises,

Intimés.

Jugé qu'il n'y a pas d'appel d'un jugement rendu sur un writ de *certiorari*.

Certaines procédures des commissaires pour la construction et réparation des églises, etc., pour le district des Trois-Rivières, avaient été transmises à la Cour du Banc du Roi du district des Trois-Rivières, au moyen d'un writ de *certiorari*. Ces procédures avaient rapport à la construction d'une église en la paroisse de St. François du Lac St. Pierre. Le jugement de la Cour du Banc du Roi confirma les procédures des commissaires ;—les appelans interjetèrent appel de ce jugement, et essayèrent de le soumettre, ainsi que les procédures des commissaires, à la revision de la cour d'appel. Les intimés firent motion que le bref d'appel fut déclaré nul, et l'appel mis au néant sur le principe que la cour d'appel n'avait aucune jurisdiction pour reviser un jugement rendu dans la cour inférieure sur *certiorari*.

La cour est unanime à declarer cette prétention fondée,

et déboute l'appel avec dépens. Présens : Sir James Stuart, MM. Bowen, J. Stewart, L. Panet, P. Panet, Bédard.

LOWER-CANADA.—Court of Appeals, 1843.

—

DELERY, (Plaintiff in the court below,)

Appellant.

And

BERNARD LEMIEUX, (defendant in the court below,)

Respondent.

The Court of King's Bench had jurisdiction in hypothecary actions under £10 sterling, notwithstanding the passing of 4th and 5th Vict. cap. 20.

The appellant, usufructuary of the seigniory of New-Longueuil, had sued, hypothecarily in the King's Bench, superior term, the respondent as proprietor and possessor, (*détenteur actuel,*) of a lot known as N°. 63, in that seigniory, for the sum of ten pounds eleven shillings and four pence, balance of arrears of *cens et rentes* and *lods et ventes* due on that

lot by the vendor of the said respondent. The object of the appellant, in instituting an appeal respecting so small a sum, was to obtain the judgment of the court of appeals on a question which divided the judges of the court of King's Bench for the district of Montreal. The chief justice of the court below, (Vallières,) and Mr. justice Rolland were of opinion that the court of King's Bench continued to have jurisdiction in all hypothecary actions; Mr. Justice Gale and Mr. Justice Day were of opinion that the provincial ordinance 4th and 5th, Vict. cap. 20, had deprived the court of King's Bench of jurisdiction *in all actions*, whether hypothecary or not, for sums *under twenty pounds sterling.*

In consequence of this difference of opinion, a great number of actions had for a length of time remained undetermined; and the judges, with a view of affording public relief, had been pleased to mention, that if the parties in any cause would join in a request to that effect, one of the four judges would retire, and a judgment would be rendered by the remaining three, for the purpose of obtaining the opinion of the higher tribunal.

In consequence this cause had been heard in the absence of Mr. Justice Rolland; and Mr. Justice Gale and Mr. Justice Day, (the chief justice dissenting,) rendered judgment, declared that the action should have been brought in the district court, that the Court of King's Bench had no jurisdiction, and therefore dismissed the action.

The grounds upon which the appellant contended that the judgment of the court below ought to be reversed were:

1stly. That the powers of the court of King's Bench respecting hypothecary actions under ten pounds sterling,

were exactly the same then, as they were before the passing of the district court act. (1)

2ndly. That the district courts, even if they had power to take cognizance of hypothecary actions, which was by no means admitted, could not, in actions for arrears of *rente foncière*, or in hypothecary actions, under ten pounds sterling, afford the plaintiff any remedy whatever; and in order to prevent a failure of justice, the superior courts ought to exercise jurisdiction in these actions.

3rdly. That the plaintiff had a right to bring his action in the Court of King's Bench, because the defendant might, under the statute, by an exception, have caused the action to be removed to that court, it being a rule of law, that, wherever a defendant has a right of evocation, the plaintiff can go directly to the tribunal to which he may be ultimately taken by the defendant.

4thly. That the words of the statute were not sufficiently explicit to oust the superior tribunals of their jurisdiction, even had such been the intention of the Legislature, which could not be supposed.

The pretention of the defendant was that the district court had *exclusive jurisdiction in all actions for sums under twenty pounds sterling*,—whether hypothecary or not.

COURT OF APPEALS,
29th July, 1843.

The judgment of K. B., Montreal, is reversed in favor of the appellant, *en déclaration d'hypothèque* &c., according to his conclusions, with costs in both courts.

---

(1) This act is no more in force: but it is likely that a similar question might arise, viz: whether, under the 7 Vict. cap. 16, the superior court, Q. B. has not a concurrent jurisdiction in such cases with the inferior court, Q. B.; though the latter has undoubtedly such jurisdiction.

District of Quebec, district court of St. Thomas.—TALON, plaintiff, vs. CLOUTIER. defendant.—July 1842.—Before Mr. Morin, district judge.

Held that the district court, established by the 4th & 5th Vict. cap. 20, had no jurisdiction in hypothécary actions.

This was an hypothecary action brought by the plaintiff against the defendant for the sum of £12 17 6.

The plea on behalf of the defendant was that the action, being directed against an immoveable property in order to procure the judicial sale of such property, and to be paid an hypothecary claim, the district court had no jurisdiction.

The ground on which the defendant contended that the court had no jurisdiction were:

1stly. That the district court had only jurisdiction in personal actions, where the sum of money or the value of the thing was under twenty pounds sterling.

2ndly. That the hypothecary action having for its object the sale of the mortgaged property, it could not be said that it was limited to a sum under £20 strg.

3rdly. That the district court had not the power of causing immoveable property to be sold, and that the judgment to be rendered could only be executed through the court of King's Bench.

This plea was maintained and the action dismissed with costs.

DU MANDAT, DU CAUTIONNEMENT

des Transactions.

(COMMENTAIRE DES TITRES XIII, XIV ET XV DU LIVRE III DU CODE CIVIL.)

PAR M. TROPLONG (1.)

Toute publication nouvelle de M. Troplong ne saurait manquer d'être désormais un événement important. Qui ne connait les illustres travaux qui ont si justement acquis à l'auteur sa glorieuse renommée ? et peut-on les connaître, sans en appeler de tous ses vœux la suite ? Aussi ces deux volumes ont-ils à peine paru, que déjà de toutes parts, journaux, revues et recueils les célèbrent à l'envi, comme une nouvelle conquête pour la science. C'est qu'il faut s'empresser en effet de rendre compte des œuvres de M. Troplong, si l'on ne veut pas être bientôt en arrière et s'exposer à ce reproche, que LaBruyère fait quelque part fort durement aux prophètes des succès accomplis : " Que ne disiez-vous " voilà un bon livre ? Vous le dites, il est vrai, avec toute la " France, avec les étrangers comme avec vos compatriotes... " il n'est plus temps (1)." Hâtons-nous donc, avant que le commentaire *du mandat, du cautionnement et des transactions* ait rejoint, dans toutes les bibliothèques, le commentaire *de la vente, des privilèges et des hypothèques*, et tous les autres de dire : Voici un bon livre... *La Revue de Législation* annençait dans une de ses livraisons précédentes (1846, t. II, p. 250), que " ces deux nouveaux volumes de M. Troplong " sont entièrement semblables aux précédents pour la forme " et pour le fond." Après l'examen attentif que nous venons d'en faire, nous ne pouvons que nous associer de tous points à ce jugement.

---

(1) Deux forts volumes in 8o. Paris, chez Hingray, 1846.

(2) Des ouvrages de l'esprit.

C'est ainsi que dès les premières pages qui ouvrent le commentaire du mandat, on retrouve cet attrait puissant, que l'auteur a si bien le don de répandre sur les origines de nos institutions juridiques. Nous avons quelque peine à croire ajourd'hui qu'il ait existé une époque où chacun devait nécessairement agir pour soi-même, sans pouvoir employer l'entremise d'un mandataire ! une époque, où le tuteur lui-même ne représentait pas son pupille ! Tel était pourtant le droit civil de Rome dans son âpreté primitive. Rien de plus intéressant que d'assister à ces commencements, à cette enfance du mandat ; de le voir se produire d'abord sous l'égide de ce *jus gentium*, qui devait plus tard, après bien des luttes, modifier si profondément le matérialisme du vieux droit ; de le voir surtout s'annoncer timidement comme une simple convention entre le mandataire et le mandant, sans effet entre le mandant et les tiers. Qu'il y a loin de ce point de départ au but que, à travers la révolution des temps, la science a fini par atteindre ! Comparez donc cette forme primitive du mandat, cette forme grossière et si gênante, à toutes les combinaisons si multipliées, si diverses, auxquelles les besoins de la civilisation et du commerce ont assoupli le mandat de nos jours : mandat proprement dit, commission, préposition, courtage et bien d'autres modalités encore, séparées, dans leur caractère commun, par des nuances souvent fort délicates ! C'était même une des plus grandes difficultés de ce sujet, de saisir exactement ces différences et de discerner, de démêler ces relations, ces rapports, et comme on dit, ces *agissements* divers ; il y avait toujours là, jusque dans ces derniers temps, quelque chose de confus et d'obscur. Déjà MM. Delamarre et Lepointevin, dans leur remarquable ouvrage sur le contrat de commission, avaient porté de vives lumières sur cette partie de la science ; et on verra que personne n'a rendu à leurs travaux meilleure justice que M. Troplong lui-même ; c'est que personne ne pouvait être meilleur juge, et qu'il appartenait surtout au loyal et savant magistrat de reconnaître les succès remportés par ses devanciers sur un terrain dont il vient

d'accomplir définitivement la conquête. Il est impossible de ne pas suivre avec le plus vif intérêt les développements lumineux dans lesquels M. Troplong, décompose et analyse ces diverses espèces de mandat, les comparant tantôt les uns aux autres, tantôt à d'autres contrats, pour nous en faire connaître les affinités et les dissemblances. Comment, par exemple, distinguer le quasi-contrat de gestion d'affaires d'avec le mandat, lorsque le propriétaire connaît la gestion ? (Comp., art. 1984, 1985, 1372). Est-ce à dire que le mandat doit toujours être exprès ? N'y a-t-il plus de mandat tacite ? Ainsi l'ont pensé beaucoup d'interprètes, MM. Proudhon, Toullier, Duranton, Delamarre et Lepointevin. Tel n'est pas le sentiment de M. Troplong, qui s'avance seul contre cette redoutable phalange ; et nous devons dire que l'engagement nous a paru décisif en sa faveur.

(A CONTINUER.)