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SUPREME COURT OF CANADA.

Ottawa, Feb. 20, 1893.

Ontario.]

ATTY. GENERAL OF CANADA v. CITY OF TORONTO.

Municipal corporation—Water rates—Discount by prompt payment —Property exempt from municipal taxation—Discrimination as to—R.S.O. (1887) *c.* 184, *s.* 480, *s.-s.* 3; *c.* 192, *s.s.* 19, 20.

By R.S.O. (1887), c. 184, s. 480, s.-s. 3 (Municipal Institutions Act), it is the duty of a municipal corporation which has constructed water works, to supply water to all buildings on land along the line of any supply pipe, on request of the owner or occupant thereof. By c. 192, s. 19 (Municipal Water Works Act) the corporation has authority to regulate the distribution and use of water and fix the prices and time of payment therefor, and by s. 20 the corporation may pass by-laws, etc., for allowing a discount for pre-payment.

Pursuant to these powers, the corporation of the City of Toronto passed a by-law allowing a discount on all water rates paid in the first month of the quarter for which they should be due, but the same was not to apply to Government or other institutions which are exempt from city taxes. A tender was made to the City of the amount assessed on property of the Dominion Government, less the discount allowed by the by-law, which was refused, and the whole amount having been paid under protest an action was brought against the city for the rebate.

Held, reversing the decision of the Court of Appeal (18 Ont. App. R. 622), and that of Ferguson, J., at the trial (20 O. R. 9) Patterson, J., dissenting, that the legislature intended and enacted that the rate for water supplied by the City should be an equal rate charged upon all consumers alike, and the city corporation had no power to impose a greater rate for water supplied to a consumer who is not subject to civic taxation than is imposed upon consumers who are; therefore the by-law was *ultra vires* in so far as it makes a distinction between the two classes of consumers.

Per Patterson, J.—The imposition of water rates is not a tax, and there is no principle on which the city can be prevented from demanding a larger price for water supplied to consumers who have paid no part of the cost of constructing the works than it is willing to receive from those who have.

Appeal allowed with costs.

Reeve, Q.C. & Wickham, for appellant.

Robinson, Q.C., for respondent.

New Brunswick.]

CANADIAN PACIFIC RY. CO. V. FLEMING.

Appeal—Jurisdiction—Trial by jury—Withdrawal from jury—Disposal of questions of fact by Court—Consent of parties.

In an action against a railway company for damages for an injury caused by an engine of the company, the counsel for both parties agreed at the trial as follows:—"That the jury be discharged without giving a verdict, the whole case to be referred to the Court, which shall have power to draw inferences of fact, and if they shall be of opinion upon the law and the facts that the plaintiff is entitled to recover they shall assess the damages, and that judgment shall be entered as the verdict of the jury. If the Court should be of opinion that the plaintiff is not entitled to recover, a non-suit shall be entered." The jury were then discharged, and the Court in banc, in pursuance of such agreement, subsequently considered the case and assessed the damages at $300, considering plaintiff entitled to recover. The company sought to appeal from such decision.

By the practice in the Supreme Court of New Brunswick all questions of fact are to be tried by a jury, and the Court can only deal with such questions by consent of parties.

Held, Gwynne and Patterson, JJ., dissenting, that as the Court took upon itself the decision of the questions of fact in this case without any legal or other authority therefor, than the consent and agreement of the parties, they acted as quasi-arbitrators, and the decision appealed from was that of a private tribunal constituted by the parties, which could not be reviewed in appeal or otherwise, as judgments pronounced in the regular course of the ordinary procedure of the Court may be reviewed and appealed from.

Held, also, that if the merits of the case were properly before the court the judgment appealed from should be affirmed.

Held, per Gwynne and Patterson, JJ., that the case was appealable; and on the merits, it appearing from the evidence that the servants of the company had done everything required by the statute to give notice of the approach of the train, the appeal should be allowed and a judgment of non-suit entered.

Appeal quashed with costs.

Weldon, Q.C., for appellants.
Skinner, Q.C., for respondent.

New Brunswick.]

PETERS v. CITY OF ST. JOHN.

Assessment and taxes—Insurance company—Net profits—Deposit with Government—Statement to assessors—Variance from form.

By sec. 126 of the St. John City Assessment Law, 1889, (52 V. c. 27) the agent or manager of any Life Insurance company doing business out of the Province is liable to be assessed upon the net profits made by him as such agent or manager from premiums received on all insurances effected by him; and the better to enable the assessors to rate such company, the agent or manager is required to furnish at a certain time in each year a statement under oath in a prescribed form, setting forth the gross income and particulars of the losses and deductions claimed therefrom, and showing the ratable net profits for the preceding year.

By the form prescribed, the deductions to be made from the gross income consist of re-insurance, rebate, etc., actually paid, and amounts paid on matured claims on policies issued by such agent or manager. In the form presented by the agent of a Life Insurance company in St. John, N. B., there was no amount

entered for deductions of the latter class, but instead thereof an item was inserted of "75 p.c. of premiums deposited with Government for protection of policy holders," which was an addition to the form. The statement showed that the deductions exceeded the gross income, leaving no net profits to be taxed. The assessors on receiving this statement disregarded the result shown thereby, and assessed the agent on net profits for the year of $6,300. A rule *nisi* for a *certiorari* to quash the assessment was obtained, in support of which it was shown by affidavit that the amount required to be deposited with the Dominion Government by the company assessed was about 75 p.c. of the premiums received, and that the amount of such deposits from time to time returned to the company was applied for the benefit of policy holders and formed no part of the income or profits of the company. The Supreme Court of New Brunswick discharged the rule and refused to quash the assessment, on the ground that the Government deposit was a part of the income of the company held in reserve for certain purposes and formed no part of the expenditure, and that the agent had no right to strike out certain requirements of the form prescribed and substitute different statements of his own.

Held, reversing the decision of the Court below, Fournier and Taschereau, JJ., dissenting, that the agent was justified in departing from the form to show the real state of the business of the company, and the deposit was properly classed with the deductions; and the assessors had no right to disregard the statement and arbitrarily assess the company as they did.

Appeal allowed with costs.

Weldon, Q.C., & Bruce, Q.C., for appellant.
Jack, Q.C., for respondent.

New Brunswick.]

TIMMERMAN v. CITY OF ST. JOHN.

Assessment and taxes—Taxation of railway—Statutory form—Departure from—Powers of assessors—53 *V.*, *c.* 27, *s.* 125 (*N.B.*)—

By the assessment law of the City of St. John (53 V., c. 27, s. 125 [N.B.] the agent or manager of any joint stock company or corporation established abroad or out of the limits of the Province may be rated and assessed upon the gross and total income eceived for such company or corporation, deducting only there-

from reasonable cost of management, etc., and such agent or manager is required to furnish to the assessors each year a statement under oath in a prescribed form, showing the gross income and the deductions of the various classes allowed, the balance to be the income to be assessed; and in case of neglect to furnish such statement the assessors are to fix the amount of such income to be assessed according to their best judgment, and there shall be no appeal from such assessment.

The Atlantic division of the C.P.R. runs from Megantic in the Province of Quebec, through the State of Maine into New Brunswick. On entering New Brunswick it runs over a line leased from a N. B. Co. to the western side of the River St. John, and then over a bridge into the city, where it takes the I.C.R. Road. The general superintendent has an office in the city, but all monies received there are sent to the head office in Montreal.

The superintendent was furnished with a printed form to be filled up for the assessors as required by said act, which was as follows:—

"Gross and total income received for (Co.) during the fiscal year of —— next preceding the 1st day of April. This amount has not been reduced or off-set by any losses" etc. This latter clause the superintendent struck out and filled in the first clause by stating that no income had been received by the company; the remainder of the form, consisting of details of the deductions, was not filled in. This was given to the assessors as the statement called for, and they disregarded it, assessing the company on an income of $140,000, without making any inquiries of the superintendent as the act authorised them to do. A rule for a *certiorari* to quash this assessment was obtained, but discharged by the Court, on the ground that the superintendent had so far departed from the prescribed form that he had in effect failed to furnish a statement as required by the act, and the assessment against him was final.

Held, reversing the decision of the court below, Fournier and Taschereau, JJ., dissenting, that the superintendent had a right to modify the form prescribed to enable him to show the true facts as to the business of the company in St. John, and the assessors had no right to arbitrarily fix an amount assessable against him without taking any steps to inform themselves of the truth or falsity of the statement furnished.

Held, also, that the provision that there should be no appeal

from the assessment where no statement is furnished, relates only to an appeal against over-valuation under C.S. N.B. c. 100, s. 60, and does not abridge the power of the court to do justice if the assessors assess arbitrarily or upon a wrong principle, or no principle at all.

Held, per Gwynne and Patterson, JJ., that the assessment law of St. John does not apply to railway companies, there being no provision made for ascertaining the amount of business done in the city as proportioned to the whole business of the company.

Appeal allowed with costs.

Weldon, Q.C., for appellant.
Jack, Q.C., for respondents.

New Brunswick.]

ELLIS v. THE QUEEN.

Appeal—Contempt of court—Criminal proceeding—Sup. & Ex. Courts Act (R.S.C. c. 135), s. 68.

Contempt of court is a criminal matter, and an appeal to the Supreme Court from a judgment in proceedings therefor, cannot be brought unless it comes within sec. 68 of the Supreme and Exchequer Courts Act (R.S.C., c. 135). *O'Shea* v. *O'Shea* (15 P.D. 59) followed. *In re O'Brien* (16 Can. S.C.R. 197) referred to.

The Supreme Court of New Brunswick adjudged E. guilty of contempt, but deferred sentence.

Held, that this was not a final judgment from which an appeal would lie to the Supreme Court of Canada.

Appeal quashed.

Weldon, Q.C., for appellant.
Currey, for respondent.

EXCHEQUER COURT OF CANADA.

OTTAWA, March 13, 1893.

Coram BURBIDGE, J.

THE QUEEN v. FARWELL.

Information of intrusion—Appropriate remedies to be prayed for therein—Injunction to re-convey—Practice—Subsequent action between same parties—Res judicata.

Where, in a former action by information of intrusion to recover possession of land, the title to such land was directly

in issue and determined, the judgment therein was held to be conclusive of the issue of title sought to be raised by the defendant in a subsequent action between the same parties.

2. An order directing the defendant to re-convey the land is not an appropriate part of the remedy to be given upon an information of intrusion.

Semble, that letters-patent for public lands situated within the railway belt in British Columbia should issue under the Great Seal of Canada, and not under the Great Seal of British Columbia.

Richards, Q.C., *Pooley, Q.C.*, and *Helmcken* for Crown.

Bodwell (with whom was *Hunter*) for defondant.

January 23, 1893.

ARCHIBALD V. THE QUEEN.

Construction of public work—Interference with public rights – Damage to individual enjoyment thereof—Liability—50–51 *Vic.*, *c.* 16, *s.* 16, (*c*), *Construction of.*

Where the Crown, by the construction of a public work, has interfered with a right common to the public, a private owner of real property whose lands, or any right or interest therein, have not been injured by such interference, is not entitled to compensation in the Exchequer Court, although it may happen that the injury sustained by him is greater in degree than that sustained by other subjects of the Crown.

2. The injurious affection of property by the construction of a public work will not sustain a claim against the Crown based upon clause (c) of the 16th section of *The Exchequer Court Act*, (50–51 *Vic.*, *c.* 16), which gives the Court jurisdiction in regard to claims arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting in the scope of his duties or employment.

R. G. Code for suppliant.

W. B. A. Ritchie for Crown.

March 20, 1893.

MAGEE *et al.* *v.* THE QUEEN.

Rideau Canal—7 Vict. (Prov. Can.) c. 11, 9 Vict. (Prov. Can.) c. 42 — Conditional gift — Expropriation — Acquiescence — Forfeiture for breach of condition subsequent—Remedy against the Crown for unauthorized use of land —Abandonment by Crown—Reverter—Solicitor and client – Privileged communication—Evidence.

The Act 9 Vic., c. 42, was passed with the object of removing doubts as to the application of section 29 of the Act 7 Vic. c. 11, to certain lands set out and expropriated from one *S.* at Bytown. By the first section of the first mentioned Act it was enacted that the proviso contained in the 29th section of the Ordnance Vesting Act should be construed to apply to all the lands at Bytown set out and taken from *S.* under the provisions of the *Rideau Canal Act*, except " (1) so much thereof as was actually occupied " as the site of the Rideau Canal, as originally excavated at the " Sapper's Bridge, and of the basin and bywash, as they stood at " the passing of the Ordnance Vesting Act, and excepting also, " (2) a tract of two hundred feet in breadth on each side of the " said canal,—the portion of the said land so excepted having " been freely granted by the said Nicholas Sparks to the late " Colonel By, of the Royal Engineers, for the purposes of the " canal,—and excepting also, (3) a tract of sixty feet round the " said basin and bywash - - - - - - which was then " freely granted by the said Nicholas Sparks to the Principal " Officers of Ordnance for the purposes of the said canal, pro- " vided that no buildings should be erected thereon."

The site of the canal, and the two hundred feet which were included within the limits of the land so set out and ascertained, had been given by an instrument, dated 17th November, 1826, under the hand of *S.* and one *B.* who was acting for the Crown, by which it was agreed that such portion of the land so freely given as might not be required for His Majesty's service, should be restored to *S.* when the canal was completed. The canal was completed in 1832. Subsequent to the passing of the Act 9 Vict., c. 42, all the lands of *S.* so set out and ascertained were given up to him, except the portions above described, and deeds in the terms of the Act were exchanged between *S.* and the Principal Officers of Ordnance, in regard to the land so given up and so retained respectively.

Held, 1. That apart from the question of acquiescence and delay on the part of *S.* and those claiming under him, the Act 9 Vict., c. 42, and the deeds of surrender so exchanged, were conclusive between the parties so far as the area and boundaries of the lands to be retained and restored respectively, are concerned.

2. That the lands so retained are held by the Crown for the purposes of the canal, and that as to the tract of sixty feet around the basin and bywash there is attached a condition that no buildings are to be erected thereon.

3. That the proviso, that no buildings are to be erected on the said tract of sixty feet does not create a condition subsequent, a breach of which would work a forfeiture and let in the heirs; nor would the use by the Crown of a portion of the lands in question for purposes other than the "purposes of the canal" work such a forfeiture.

4. The court has no power or authority to restrain the Crown from making any unauthorized use of the land, or to compel the Crown to remove any buildings erected thereon contrary to the terms of the grant.

Semble, that the Crown cannot alien the land or any portion of it, and if it should do so the suppliants would have their action against the grantee. If the Crown should abandon the land or any portion of it the land or such part of it would revert to the suppliants, and they might enter and possess it.

Held, also, that where a solicitor or counsel of one of the parties to a suit has put his name as a witness to a deed between the parties, he ceases, in respect to the execution of the instrument, to be clothed with the character of a solicitor or counsel, and is bound to disclose all that passed at the time, relating to such execution.

Robson v. *Kemp*, 5 Esp. 52, and *Crawcour* v. *Salter*, L.R. 18 Chan. 34, followed.

McCarthy, Q.C., and *Christie, Q.C.*, for suppliants.

Robinson, Q.C. and *Hogg, Q.C.*, for Crown.

March 13, 1893.

THE QUEEN *v.* DEMERS *et al.*

Federal and Provincial rights—Title to lands in railway-belt in British Columbia—Unsurveyed lands held under pre-emption record, at time of grant of railway lands coming into operation—British Columbia Land Acts of 1875 *and* 1879—*Terms of Union, section* 11—*Construction.*

Held (1) Lands that were held under pre-emption right, or Crown grant, at the time the statutory conveyance of the railway belt by the Province of British Columbia to the Dominion of Canada took effect, are exempt from the operation of such statutory conveyance, and upon such pre-emption right being abandoned or cancelled, all lands held thereunder become the property of the Crown in right of the Province, and not in right of the Dominion.

2. Unsurveyed lands recorded under the British Columbia Land Acts of 1875 and 1879 are lands held under "pre-emption right" within the meaning of the 11th section of the *Terms of Union* between the Province of British Columbia and the Dominion of Canada.

See Statutes of Canada, 1872, p. XCVII.

Richards, Q.C. and *Helmcken* for Crown.

Attorney-General, B.C. and *A. G. Smith* for defendants.

COURT OF APPEAL ABSTRACT.

Corporation municipale—Confirmation de certificat pour vente de liqueurs enivrantes—Conseillers intéressés—Arts. 135, 136, *code municipal.*

La corporation de Lachine avait, par une seule résolution, voté la confirmation de neuf certificats pour vente des boissons enivrantes. Parmi les membres du conseil présents et qui ont voté, se trouvaient trois conseillers intéressés, et en retranchant les noms de ces trois conseillers, il n'y avait pas quorum des membres du conseil.

Jugé, que, à raison de l'intérêt de ces trois conseillers, la résolution accordant la confirmation des neuf certificats était illégale et qu'on ne pouvait scinder le vote et se demander si, quant au certificat de l'appelant, il y avait un nombre suffisant de voteurs

non intéressés à la confirmation de ce certificat.—*Ouellette* et *La corporation de Lachine.* Montréal, Lacoste, J. C., Baby, Bossé, Blanchet, Hall, JJ., 26 janvier 1893.

Locateur et locataire—Changements aux lieux loués.

Le bail en question contenait la clause suivante:

"Should the lessee desire any alterations to be made to the said premises, and should the lessor see fit to make the same, the said lessee binds and obliges himself to pay 10 per cent per annum upon the total cost thereof, quarterly with said rental."

Jugé:—Que sous cette clause, il était à la discrétion du locateur de faire ou de ne point faire les changements aux lieux loués demandés par son locataire, et que dans l'espèce, ce dernier ne pouvait le forcer d'établir une communication entre plusieurs magasins contigus que le locateur lui avait loués par ce bail.—*Scroggie* et *Watson et al.*, Lacoste, J. C., Baby, Bossé, Blanchet, Wurtele, JJ., Montréal, 28 février 1893.

Injure dans un plaidoyer—Malice et absence de cause probable—Avocats.

Jugé, que l'accusation portée dans un plaidoyer malicieusement et sans cause probable, accusant les demandeurs, avocats et procureurs, d'avoir institué, sans leur autorisation, des procédures et d'avoir perdu, par leur incurie, leur inhabilité et leur ignorance de la loi, des causes que les défendeurs leur avaient confiées, constitue une injure et engage la responsabilité des défendeurs.

(Par la majorité de la cour, Lacoste, J. C., et Hall, J., diss.) Que la malice et l'absence de cause probable peuvent s'inférer du fait qu'un des défendeurs avait au nom de ses co-défendeurs suivi les procédures en question pas à pas et avait exprimé, par écrit, sa satisfaction du travail accompli par ses procureurs.—*Mitchell et al.* et *Trenholme et al.*, Montréal, Lacoste, J. C., Baby, Bossé, Blanchet et Hall, JJ., 28 février 1893.

SUPERIOR COURT ABSTRACT.

Saisine du légataire universel — Exception dilatoire pour arrêter l'action pendant les délais pour faire inventaire et délibérer— Continuation de l'action après qualité prise de légataire universel sous bénéfice d'inventaire— Frais de l'exception dilatoire.

Jugé :—1. Que, dès le lendemain de la mort du testateur, son créancier a le droit d'assigner le légataire universel, et telle assignation est valide à toutes fins quelconques.

2. Que le légataire universel a l'exception dilatoire pour arrêter l'action pendant les délais pour faire inventaire et délibérer.

3. Que, si le légataire universel ensuite accepte sous bénéfice d'inventaire, alors l'action se continuera contre lui en cette nouvelle qualité.

4. Que, les demandeurs n'ayant pas contesté l'exception dilatoire, les frais de cette exception seront mis à la charge de la succession, c'est-à-dire, dans le présent cas, à la charge de la défenderesse ès-qualité de légataire universel sous bénéfice d'inventaire. —*Massé et al.* v. *Lainé*, Fraserville, Cimon, J., 17 novembre 1892.

Bois coupé illégalement sur le terrain d'autrui et converti en bois de construction—Saisie-revendication—Main d'œuvre plus considérable que la matière—Compensation—Arts. 434, 435, *et* 1190 *C. C.*

Jugé :—1. Que les défendeurs, qui ont coupé illégalement du bois sur la terre du demandeur et l'ont enlevé, ne peuvent, à la saisie-revendication que celui-ci en fait, lui opposer, en compensation, du bois qu'il avait coupé illégalement, quatre ans auparavant, sur la terre de l'un des défendeurs : Spoleatus ante omnia restituendus.

2. Que les défendeurs, en coupant ce bois et le convertissant en bois de construction, ont formé une chose d'une nouvelle espèce, dans le sens de l'art. 434 C. C.

3. Que, bien que la main d'œuvre surpasse de beaucoup la valeur de bois debout, le demandeur, maître du bois debout, reste propriétaire de la chose devenue d'une nouvelle espèce, tant qu'il n'aura pas été payé du prix du bois debout, et il a droit de saisir revendiquer la chose.

4. Que, bien que les défendeurs n'aient pas encore offert le prix du bois debout, la cour, en maintenant la saisie revendication, leur

accordera l'option de pouvoir, sous un délai d'un mois, en payant le prix du bois debout, devenir propriétaire de la chose.—*Dubé* v. *Guéret et al.*, Fraserville, Cimon, J., 10 octobre 1892.

Servitude non déclarée ni apparente—Action en diminution du prix—C. C. arts. 548, 1508, 1518, *et* 1519.

Jugé :—1. Que l'acheteur a, contre son vendeur, l'action en diminution du prix et en dommages, à cause d'une servitude non déclarée ni apparente au moment de son achat, et qu'il a trouvée consignée dans le titre de son vendeur sous forme de réserve en faveur d'un tiers, propriétaire de terrain voisin, même si celui-ci n'y était pas partie, et quand bien même la servitude n'est pas assez importante pour autoriser la rescision de la vente.

2. Que c'est au vendeur, si ce tiers n'y a pas droit, à faire disparaître la servitude, et non à l'acheteur à plaider à ce sujet avec ce tiers.

3. Que la clause d'un acte de vente, disant : " l'acquéreur déclare connaître le susdit emplacement et ses accessoires et n'en pas exiger plus ample désignation," est de pur style et ne porte que sur l'état apparent de l'emplacement à ce moment-là.

4. Un tuyau posé dans la terre pour conduire l'eau, lorsqu'il est recouvert de terre, et, surtout, le 9 avril, alors que la terre est recouverte de neige, étant non apparent, la servitude qui pourrait exister à son sujet est, aussi, à ce moment, non-apparente.

5. Qu'un puits sur un emplacement, s'il n'y a aucun signe apparent pour démontrer le contraire, est censé appartenir exclusivement au propriétaire de cet emplacement, et il ne montre pas être une servitude sur cet emplacement.

6. Quand bien même une servitude a été apparente antérieurement, si elle ne l'est pas au temps de la vente et n'a pas été déclarée à l'acheteur, celui-ci aura l'action en diminution du prix et en dommages.—*LeBel* v. *Bélanger*, Fraserville, Cimon, J., 10 octobre 1892.

Vente de graines—Garantie.

Jugé :—Que le marchand de graines de semence, qui vend à un jardinier des graines qu'on lui demande pour semer, est responsable de l'erreur, si ces graines ne sont pas de la qualité deman-

dée, et qu'il doit indemniser l'acheteur de la perte de sa récolte et de ses travaux, quoiqu'il n'y ait aucune mauvaise foi à reprocher au vendeur.—*Lapierre* v. *St. Jacques*, Montréal, en Révision, Gill, Mathieu, Loranger, JJ., 13 février 1892.

Contract—Option thereunder—Interference by Court.

Held :—Where one of the parties to a contract has the privilege of doing something thereunder in such manner as he may elect, as where he has the option, as to lands pledged to him, of selling the same, (in default of fulfilment of conditions of contract) either *en bloc* or in several lots, the Court will not interfere with the exercise of his discretion unless it be clearly shown that the creditor would not be prejudiced and that the debtor would be benefited by such interference.—*Little*, insolvent, *Fatt*, curator, and *Dundee Mortgage & Loan Co., mis en cause*, S. C., Montreal, Pagnuelo, J., Feb. 18, 1892.

Transactions entre mari et femme—Endossement de la femme en faveur de son mari mais pour ses propres affaires—Intérêt—Articles 1301, 1483 *C. C.*

Jugé :—1. Que bien que les avantages soient prohibés entre mari et femme pendant le mariage, cependant lorsqu'il est constant que le mari, et qui était le procureur de sa femme, n'avait par lui-même aucunes ressources et que les biens qu'il possède ont été acquis avec les deniers de sa femme, il lui est loisible de remettre ces biens à cette dernière, et que ce transport ne constitue pas une violation de la prohibition de la loi, mais une remise d'un bien appartenant à la femme et acquis avec son argent.

2. Que lorsque le mari a fait des transactions avec une banque en y escomptant des billets endossés par sa femme et que ces transactions ont été faites pour les affaires de la femme, cette dernière ne peut prétendre que l'obligation qu'elle a assumée est nulle comme constituant un cautionnement en faveur de son mari.

3. Que lorsqu'une banque a vendu sans forme de justice des actions souscrites par le mari, mais transportées à la femme comme acquis de ses deniers, cette dernière est sans intérêt à se plaindre de cette vente lorsqu'il est certain que les dites actions n'auraient jamais réalisé une somme suffisante pour décharger ses obligations envers la banque.—*Jodoin et al.* v. *La Banque d'Hochelaga*, C. S., Montréal, Pagnuelo, J., 15 mars 1892.

Municipal Corporation—Sidewalks—Accident—Damages—Warranty—Demurrer.

Held:—As the Statute 55-56 Vic. Q., c. 50, s. 5, imposes the maintenance and repair of street sidewalks in the city of Quebec on the proprietor of the adjacent lot, and not on the city, a declaration claiming damages from the city for an accident caused by a defective sidewalk discloses no right of action whatever in the plaintiff against the city, and cannot form the basis of an action in warranty by the city against the adjacent proprietor, and such an action will be dismissed on demurrer.

To entitle a party to bring an action in simple warranty a *primâ facie* case in law against him must be shown by the declaration in chief, for if the allegations of the action in chief are unfounded in law there is no utility or reason to bring in a defendant in warranty. There can be no legal uncertainty as to the legal sufficiency of the allegations of the declaration in chief; everyone is bound to know the law, and the defendant in chief can run no risk (legally speaking) in meeting himself an action which will be held bad on his demurrer.—*Seguin* v. *City of Quebec*; and *City of Quebec* v. *Drouin*, in warranty, Quebec, S. C., Andrews, J., January 17, 1893.

Echange—Nullité—Dommages—Frais.

Jugé: Que l'échange est nul lorsque l'une des parties n'est pas propriétaire de la chose qu'il s'est engagé à donner en échange.

Que néanmoins, lorsque le demandeur, qui revendique la chose et réclame des dommages pour non livraison, ignorait que cette chose ne fût pas la propriété du défendeur, et que sa demande de revendication doit pour raison de ce fait être renvoyée, le défendeur sera condamné à payer au demandeur des dommages, et en outre tous les frais de l'action.—*Cadieux* v. *Rawlinson*, Montréal, C. S., Mathieu, J., 11 avril 1892.

Expropriation—Qualité de l'appelant—Objet de la révision—Rue dédiée au public.

Jugé:—Que lorsque la qualité de celui qui appelle de la sentence des commissaires n'a pas été contestée *in limine*, la cour renverra

l'objection faite contre le droit d'un appelant d'inscrire en révision, l'objet de la révision étant seulement de déterminer le montant de l'indemnité à être payée.

Qu'aucune indemnité n'est due pour l'expropriation d'un chemin que le propriétaire a dédié au public.—*La cité de Montréal*, requérant expropriation de la rue Milton, et un propriétaire inconnu, et *Thompson et al.*, Montréal, en Révision, Johnson, J. C., Davidson et Pagnuelo, JJ., 30 novembre 1892.

Exception à la forme—Assignation d'un absent—Rapport de l'huissier—Nullité—Art. 68, *C. P. C.*

Jugé :—Qu'un rapport d'assignation qui constate l'absence du défendeur est irrégulier lorsque l'huissier certifie qu'il a fait la signification au greffe, tandis qu'il aurait dû se borner à dire qu'il avait déposé au greffe la copie d'action.

Que cependant cette irrégularité est suffisamment couverte par l'ordonnance du tribunal permettant l'assignation régulière du défendeur par la voie des journaux.—*Carbonneau* v. *Vallée et al.*, et *Prévost et al.*, T. S., Montréal, C. S., Taschereau, J., 12 avril 1892.

Evidence—Commercial case—54 *Vic.* (*Q.*) *ch.* 45—*Interrupted employment—Resumption of—Salary—Presumption.*

Held:—1. A party to a suit cannot be heard as a witness on his own behalf, in a commercial case, to prove a contract alleged to have been made at a date prior to the coming into force of the Act 54 Vic. (Q.) ch. 45.

2. Where an employee quits his employment, and after an illness of several months resumes his former employment, it will be presumed, in the absence of evidence of a new agreement, that he returned at the salary he was getting at the time he left.—*Platt* v. *Drysdale*, Montreal, S. C., Doherty, J., January 25, 1892.

Promissory note—Parties to—Dilatory exception—Action en garantie—Art. 1953, *C. C.*

Held :—The maker of a promissory note cannot by dilatory exception stay the suit of the holder in order to call in the endorser *en garantie.*—*Molsons Bank* v. *Charlebois*, Montreal, S. C., Davidson, J., February 23, 1892.

Election expenses—Action for.

Held:—The legitimate expenses of a candidate, incurred in connection with an election, are recoverable at law, unless it appear that the expenses were incurred with a corrupt or illegal motive.—*Taylor et al.* v. *Guerin*, Montreal, S. C., Taschereau, J., March 3, 1892.

Promissory note—Prescription—Insolvency of maker—Arts. 1092, 2260, § 4, *C. C.*

Held:—A promissory note is not prescribed by the lapse of five years from the date of the maker's insolvency when he becomes insolvent before the date of maturity. Art. 1092, C. C., which says that the debtor cannot claim the benefit of the term when he has become a bankrupt or insolvent, was enacted in favor of the creditor, and does not create a new date, antecedent to maturity, from which prescription would begin to run in cases of insolvency.—*Whitley* v. *Pinkerton*, Montreal, S. C., Davidson, J., March 23, 1892.

Révocation de jugement—Prescription—Désaveu de procureur ad litem.

Jugé:—Que le représentant de la partie qui attaque un jugement parceque l'instance aurait été reprise, continuée, instruite et jugé sous le nom, mais hors de la connaissance de cette partie et sans son consentement, ne peut réussir dans sa demande si les procureurs *ad litem* qui ont occupé dans cette reprise d'instance n'ont pas été désavoués par la partie ou pour elle.

Que l'action en révocation d'un jugement pour défaut d'autorisation de procédures se prescrit par trente ans, et que le point de départ de cette prescription est la date de ces procédures et non la date du jugement attaqué.—*Dorion* v. *Dorion*, Montréal, C. S., Tellier, J., 31 mars 1892.

Annulation d'un acte pour défaut de consentement—Bénéfice accru au demandeur—Réponse en droit.

Jugé, que l'allégation que le demandeur en nullité a bénéficié de l'acte dont il demande l'annulation pour défaut de consentement de sa part, n'est pas une réponse suffisante, et que cette allégation

sera renvoyée sur réponse en droit.—*Hudon* v. *Provost*, Montréal, C. S., Ouimet, J., 19 mars 1892.

Corporation municipale—Négligence—Responsabilité.

Jugé, qu'une corporation municipale est responsable du fait que les planches d'un de ses trottoirs ne sont pas convenablement clouées, et qu'il ne suffit pas à cette corporation de faire examiner de temps à autre les trottoirs sous son contrôle par ses employés, mais elle est responsable de la négligence de ces employés si ces derniers ne tiennent pas les trottoirs en bon ordre, de manière à offrir toute sécurité possible aux passants.—*Mills* v. *Corporation of the Town of Côte St. Antoine*, Montréal, C. S., de Lorimier, J., 29 février 1892.

Locateur et locataire—Capias—Recel.

Jugé, que le fait d'un locataire d'enlever la nuit les effets qui garnissent les lieux loués constitue un acte de recel donnant lieu au *capias*, et que le locateur n'est pas tenu de faire la recherche des effets recelés pour en opérer la saisie-gagerie par droit de suite, mais qu'il est fondé à exercer son recours par voie de *capias* du moment que le locataire ne lui divulgue pas l'endroit où se trouvent les dits meubles.—*Mitcheson* v. *Burnett*, Montréal, C. S., Jetté, J., 29 février 1892.

Responsabilité—Négligence.

Jugé, qu'un forgeron, qui, après avoir ferré un cheval, l'envoie mener chez son propriétaire sous les soins d'un jeune garçon et sans bride, ni mors, est responsable d'un accident arrivé à ce cheval par la négligence de son conducteur, et aussi du fait qu'il aurait, sans consulter le propriétaire du cheval, fait soigner ce cheval par une personne ignorante dont le traitement a rendu le cheval impropre à tout travail.—*McGuire* v. *Grant*, Montréal, C. S., Jetté, J., 16 mars 1892.

Evidence—Admission of party—Divisibility—Art. 231, §3, *C.C.P.*

In an action for the price of transfer of a tavern license, the defendant, being called as a witness, admitted that he had not

paid plaintiff the price stipulated, but he added that one C. was to do so. In the deed of transfer the plaintiff acknowledged receipt of the consideration.

Held, 1. That the accessory statement, in the defendant's answer, having relation to a fact wholly distinct from the principal fact mentioned in the first part of the answer, the answer was divisible.

2. (Johnson, C.J., *diss.*) The defendant having admitted in his evidence that he had not paid the plaintiff, it was for the defendant to show that some one else had, and he was not relieved from making this proof by the plaintiff's declaration, contained in the deed of transfer, that he had receivel payment.—*St. Amour* v. *St. Amour*, Montreal, in review, Johnson, C.J., Tait and Davidson, JJ., December 30, 1892.

Alimentary allowance—Art. 169, *C. C.*

Held :—In a petition claiming an alimentary allowance, from children and grandchildren, where it is neither alleged in the petition nor established by the affidavits produced in support of it, that the defendants are in a position to pay the alimentary allowance claimed or any part thereof, such petition will be rejected *sauf recours.*—*Levesque* v. *Plourde et al.*, Montreal, S. C., Tait, J., March 21, 1892.

Adopted child—Removal of parents—Claim for maintenance.

Held :—Where a person undertakes the support and maintenance of a child of unknown parents, with the object of bringing it up as his own child, and this purpose is frustrated by the parents, who subsequently appear and claim the child, he is entitled to recover from them a reasonable allowance for the maintenance of the child during the time it was under his care. —*Gingue* v. *Giroux*, Montreal, S. C., Lynch, J., March 3, 1892.

Requête civile—Désistement—Costs.

Held:—A party who, through a misunderstanding between attorneys, has obtained a judgment in the absence of his opponent, but who has voluntarily desisted therefrom, is not obliged to desist with costs; and if the opposite party refuses to accept a *désistement* without costs, and proceeds by *requête civile*, seeking

the revocation of the judgment on grounds of artifice and irregularity, his *requête* may be dismissed with costs, if it be not shown that the judgment was in fact obtained by artifice or irregularity. —*Leet* v. *Crothers*, Montreal, S. C., Doherty, J., March 10, 1892

Procedure—Summary matters—Art. 899*a*, *C. C. P.*

Held, Where the words "summary matters" are not marked upon the writ issued in a cause, the action must be held to have been instituted as a non-summary action, and, as such, is subject to the ordinary delays between service and return of the writ.—*Mousseau* v. *Raeburn*, S. C., Montreal, Doherty, J., March 8, 1892.

Rescision—Transaction—Erreur de droit—Lésion—Crainte d'un procès—Arts. 1012, 1921, *C. C.*

Le demandeur avait acheté de bonne foi d'un tiers, du fer appartenant à la défenderesse, qu'il avait ensuite brisé pour le vendre comme du vieux fer. Ménacé de poursuites criminelles, il s'était obligé à payer à la défenderesse, $1,400, ce qui dépassait considérablement le montant des dommages soufferts par cette dernière.

Jugé :—Que cet arrangement constituant une transaction, il ne pouvait être mis de côté à cause de l'erreur du droit sous l'empire duquel le demandeur s'était engagé à payer cette somme pour éviter des poursuites qui auraient été renvoyées par suite de sa bonne foi, et ce malgré la lésion que le demandeur avait éprouvée, la lésion n'étant plus une cause de nullité entre majeurs.

2. Que la crainte d'un procès suffit en droit pour constituer une transaction et lui servir de cause valable et licite.—*Ste. Marie* v. *Smart et vir & de Lorimier*, m.-e.-c., C. S., Montréal, Jetté, J., 2 avril 1892.

Procédure—Révision de la taxation d'un mémoire de frais—Défaut de produire des pièces.

Le 6 juin les mis-en-cause avaient fourni copies d'un plaidoyer et d'articulations de faits aux avocats du demandeur, mais ce plaidoyer et ces articulations de faits n'étaient pas produits lorsque, le 30 juin, le demandeur s'est désisté de sa demande contre les mis-en-cause.

Jugé :—Que les procureurs des mis-en-cause n'avaient droit qu'aux honoraires d'une action discontinuée après comparution. *Lancaster* v. *Doran et al.*, et *Charlebois et al.*, C. S., Montréal, Pagnuelo, J., 20 février 1892.