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SUPREME COURT OF CANADA.

OTTAWA, May 1, 1893.

MACDONALD v. FERDAIS.

Quebec.]

Action confessoire—Real servitude—Apparent—Registration—44 and 45 Vic., ch. 16, secs. 5 and 6, (P.Q.)—Art. 1508, C.C.—Procedure—Matters of, in appeal.

By deed of sale dated 2nd April, 1860, the vendor of cadastral lot No. 369, in the Parish of Ste. Marguerite de Blairfindie, district of Iberville, reserved for himself as owner of lot 370, a carriage road to be kept open and in order by the vendee. The respondent, as assignee of the owner of lot 370, continued to enjoy the use of said carriage road, which was sufficiently indicated by an open road, until 1887 when he was prevented by appellant Cully from using the said road. C. had purchased the lot 369 from one McD. without any mention of any servitude, and the original title deed created by the servitude was not registered within the delay prescribed by 44 and 45 Vic. (P.Q.) ch. 16, secs. 5 and 6.

In an action brought by F. against C., the latter filed a dilatory exception to enable him to call McD. in warranty, and McD. having intervened, pleaded to the action. C. never pleaded to the merits of the action. The judge who tried the case dismissed McD.'s intervention and maintained the action. This judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of Canada:

Held, affirming the judgment of the court below, that the deed created a real apparent servitude, which need not be registered, there being sufficient evidence of an open road having been used by F. and his predecessors in title as owners of lot No. 370.

Held, also, that though it would appear by the procedure in the case that McD. and C. had been irregularly condemned jointly to pay the amount of the judgment, yet as McD. had pleaded to the merits of the action and had taken up *fait et cause* for C. with his knowledge, and both courts had held them jointly liable, this court would not interfere in such a matter of practice and procedure.

Appeal dismissed with costs.

Paradis and *Belcourt*, for the appellants.
Geoffrion, Q.C., for the respondent.

May 1, 1893.

BURY v. MURPHY.

Quebec.]

Partnership monies—Sequestration of—Contre lettre.

In November, 1886, G. B., by means of a *contre lettre*, became interested in certain real estate transactions in the city of Montreal, effected by one P. S. M. In December, 1886, G. B. brought an action against P. S M. to have a sale made by the latter to one Barsalou declared fraudulent, and the new purchaser restrained from paying the balance due to the parties named in the deed of sale. A plea of compensation was filed and, pending the action, a sequestrator was appointed. In September, 1887, another action was instituted by G. B. against P. S. M., asking for an account of the different real estate transactions they had conformably to the terms of the *contre lettre*. The Superior Court dismissed the first action on the ground that G. B. had no right of action, but maintained the second action. The Court of Queen's Bench affirmed the judgment of the Superior Court, dismissing the first action, and P. S. M. acquiesced in the judgment of the Superior Court on the second action. On appeal to the Supreme Court of Canada it was

Held, reversing the judgment of the court below, that the plea of compensation was unfounded, the appellant having the right to put an end to the respondent's mandate by a direct action, and therefore until the second action of account was finally disposed

of, the monies should remain in the hands of the sequestrator appointed with the consent of the parties.

Appeal allowed with costs.

Barnard, Q.C., for the appellant.

Monk, Q.C., for respondent.

May 1, 1893.

FOGARTY v. FOGARTY.

Quebec.]

Will—Construction of—Division of estate—Right to postpone.

T. F. F., who, in partnership with his brother J. F., carried on business as manufacturers of boots and shoes in Montreal, by his last will left all his property and estate to be equally divided between his two brothers, M. W. F., the appellant, and J. F., the respondent. The will contained also the following provision:

But it is my express will and desire that nothing herein contained shall have the effect of disturbing the business now carried on by my said brother Jeremiah and myself, in co-partnership under the name and firm of Fogarty and Brother. Should a division be requested between the said Jeremiah Fogarty and Michael William Fogarty, should the latter not be a member of the firm for a period of five years, computed from the day of my death, in order that my brother, the said Jeremiah Fogarty, may have ample time to settle his business and make the division contemplated between them and the said Michael William Fogarty, and in the event of the death of either of them, then the whole to go to the survivor.

T. F. F. died on the 29th April, 1889.

On the 30th April, 1889, a statement of the affairs of the firm was made up by the book-keeper, and J. F. and M. W. F. having agreed upon such statement, the balance shown was equally divided between the parties, viz.: $24,146.34 being carried to the credit of M. W. F. in trust, and $24,146.34 being carried to J. F.'s general account in the books of the firm. At the foot of the statement a memorandum dated 12th June, 1889, was signed by both parties, declaring that the said amount had that day been distributed to them.

On the 6th March, 1890, M. W. F. brought an action against J. F., claiming that he was entitled to $24,164.34 with interest from the date of the division and distribution, viz.: 30th April,

1889. J. F. pleaded that under the will he was entitled to postpone payment until five years from the testator's death, and that the action was premature.

Held, affirming the judgment of the court below, that J. F. was entitled under the will to five years to make the division contemplated, and that he had not renounced such right by signing the statement showing the amount due on the 30th April, 1889.

Appeal dismissed with costs.

June 24, 1893.

MILLER v. PLUMMER.

Ontario.]

Promissory note—Accommodation—Bad faith of holder—Conspiracy.

P. endorsed a note for the accommodation of the maker who did not pay it at maturity, but having been sued with P. he procured the latter's endorsation to another note agreeing to settle the suit with the proceeds if it was discounted. He applied to a bill broker for the discount, who took it to M., a solicitor between whom and the broker there was an agreement by which they purchased notes for mutual profit. M. agreed to discount the note. M.'s firm had a judgment against the maker of the note, and an arrangement was made with the broker by which the latter was to delay paying over the money so that proceedings could be taken to garnishee it. This was carried out; the broker received the proceeds of the discounted note, and while pretending to pay it over was served with the garnishee process and forbidden to pay more than the balance after deduction of the amount of the judgment and costs; and he offered this amount to the maker of the note which was refused. P., the endorser, then brought an action to restrain M. and the broker from dealing with the discounted note, and for its delivery to himself.

Held, affirming the decision of the Court of Appeal, that the broker was aware that the note was endorsed by P. for the purpose of settling the suit on the former note; that the broker and M were partners in the transaction of discounting the note, and the broker's knowledge was M.'s knowledge; that the property in the note never passed to the broker, and M. could only take it subject to the conditions under which the broker held it; that the broker not being the holder of the note there was no debt due from him to the maker, and the garnishee order had no

effect as against P.; and that the note was held by M. in bad faith, and P. was entitled to recover it back.

Appeal dismissed with costs.

Donovan, for the appellant.

Beck, for the respondent.

June 24, 1893.

WISNER v. COULTHARD.

Ontario.]

Patent—Combination—Old elements—New and useful result—Previous use.

In an application for a patent the invention claimed was "in a seeding machine in which independent drag-bars are used, a curved spring tooth detachably connected to the drag-bar in combination with a locking device arranged to lock the head block to which the spring tooth is attached substantially as and for the purpose specified." In an action for infringement of the patent it was admitted that all the elements were old, but it was claimed that the substitution of a curved spring tooth for a rigid tooth was a new combination, and patentable as such.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the alleged invention being the mere insertion of one known article in the place of another known article was not a patentable matter. *Smith* v. *Goldie*, (9 Can. S.C.R. 46) and *Hunter* v. *Carrick* (11 Can. S.C.R. 300) referred to.

Appeal dismissed with costs.

Ridout, for the appellants.

Arnoldi, *Q.C.*, and *Roaf*, for the respondents.

May 1, 1893.

HOWLAND v. DOMINION BANK.

Ontario.]

Practice—Renewal of writ—Setting aside order for—Statute of limitations.

A writ issued from the High Court of Justice for Ontario in June, 1887, was renewed by order of a master in chambers three times, the last order being made in May, 1890. In May, 1891, it was served on defendants, who thereupon applied to the master to have the service and last renewal set aside, which application was granted, and the order setting aside said service and renewal

was affirmed on appeal by a judge in Chambers and the Divisional Court. Special leave to appeal from the decision of the Divisional Court was granted by the Court of Appeal which also affirmed the order of the Master. Mr. Justice Osler, who delivered the principal judgment, held that the master had jurisdiction to review his own order; that he held that plaintiffs had not shown good reasons under rule 238 (*a*) for extending the time for service, and this holding had been approved by a judge in Chambers and a divisional court; and that the Court of Appeal could not say that all the tribunals below were wrong in so holding. On appeal to the Supreme Court of Canada:

Held, that for the reasons given by Mr. Justice Osler in the Court of Appeal, the appeal to this court must fail and be dismissed with costs.

Appeal dismissed with costs.

Arnoldi, Q.C., for the appellants.
Dr. McMichael, Q.C., for the respondents.

May 1, 1893.

MOORE v. JACKSON.

Ontario.]

Married woman's property—Separate estate—Contract by married woman—Separate property exigible—C. S. U. C. c. 73—35 *V. c.* 16 (*O.*)—*R.S.O.* (1877) *cc.* 125 *and* 127—47 *V. c.* 19 (*O.*)

By the Married Woman's Property Act, 1887, of Ontario, (47 V., c. 19) a married woman is capable of acquiring, holding and disposing of real or personal property as if she were a *feme sole;* of entering into and rendering herself liable on any contract, and of suing or being sued alone in respect of such property; the right of the husband as tenant by the curtesy is not to be prejudiced by such enactment.

Held, reversing the decision of the Court of Appeal, that the property held by a married woman under this act is "separate property," and may be taken in execution for her debts, notwithstanding the reservation in favour of her husband.

Appeal allowed with costs.

Moss, Q.C., for the appellant.
Armour, Q.C., for the respondent.

May 1, 1893.

DUMOULIN v. BURFOOT.

Ontario]

Contract—Sale of land—Building restriction—Description—Street boundaries—Construction of covenant.

The owners of a block of land in Toronto, bounded on the north by Wellesley street, and west by Sumach street, entered into an agreement with B. whereby the latter agreed to purchase a part of said block which was vacant wild land, not divided into lots, and containing neither buildings nor street, though a by-law had been passed for the construction of a street immediately south of it to be called Amelia street. The agreement contained certain restrictions as to buildings to be erected on the property purchased, which fronted on the two streets north and west of it respectively, and the vendors agreed to make similar stipulations in any sale of land on the south side of Wellesley street produced.

A deed was afterwards executed of said land pursuant to the agreement which contained the following covenant: "And the grantors . . . . covenant with the grantees . . . . that in case they make sale of any lots fronting on Wellesley street or Sumach street, on that part of lot 1 in the City of Toronto, situate on the south side of Wellesley street and east of Sumach street, now owned by them, that they will convey the same subject to the same building arrangements or conditions (as in the agreement).

The vendors afterwards sold a portion of the remaining land fronting on Amelia street, and one hundred feet east of Sumach street, and the purchaser being about to erect thereon a building forbidden by the restrictive covenant in the deed, B. brought an action against his vendors for breach of said covenant, claiming that it extended to the whole block.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the covenant included all the property south of Wellesley street; that the land not being divided into lots any part of it was a portion of a lot of land fronting on Wellesley and Sumach streets, and so within the purview of the deed; and that the vendors could not, by dividing the property as they saw fit, narrow the operation and benefit of their own deed.

Held, per Gwynne, J. The piece of land in question did not front or abut on either Wellesley or Sumach street, but on Amelia

street alone, and was not, therefore, literally within the covenant of the vendors.

Appeal dismissed with costs.

Arnoldi, Q.C., and *Bristol*, for the appellants.

Nesbitt and *Galt* for the respondent.

June 24, 1893.

THE MIDLAND RY. CO. v. YOUNG.

Ontario.]

Title to land—Tenant for life—Conveyance to railway company by—Railway acts—C.S.C., c. 66, s. 11, ss. 1—24 V., c. 17, s. 1.

By C.S.C., c. 66, s. 11 (Railway Act) all corporations and persons whatever, tenants in tail or for life, *grevés de substitution*, guardians, etc., not only for and on behalf of themselves, their heir and successors, but also for and on behalf of those whom they represent . . . . seized, possessed of or interested in any lands, may contract for, sell and convey unto the company (railway company) all or any part thereof; and any contract, etc., so made shall be valid and effectual in law.

Held, affirming the decision of the Court of Appeal, that a tenant for life is not authorized by this act to convey to a railway company the interest of the remainderman in the land.

Appeal dismissed with costs.

Osler, Q.C., for the appellants.

Kerr, Q.C., for the respondents.

June 24, 1893.

CUMMING v. LANDED BANKING AND LOAN COMPANY.

Ontario.]

Trustee—Will—Executors and trustees under—Breach of trust by one—Notice—Inquiry.

W. and C. were executors and trustees of an estate under a will. W., without the concurrence of G., lent money of the estate on mortgage and afterwards assigned the mortgages, which were executed in favour of himself described as "trustee of the estate and effects of" (the testator). In the assignment of the mortgages he was described in the same way. W. was afterwards removed from the trusteeship and an action was brought by the new trustees against the assignees of the mortgages to recover the proceeds of the same.

Held, reversing the judgment of the Court of Appeal, that in taking and assigning said mortgages W. acted as a trustee and as an executor; that he was guilty of a breach of trust in taking and assigning them in his own name; that his being described on the face of the instruments as a trustee was constructive notice to the assignees of the trusts which put them on inquiry; and that the assignees were not relieved as persons rightfully and innocently dealing with trustees inasmuch as the breach of trust consisted in the dealing with the securities themselves, and not in the use made of the proceeds.

Appeal allowed with costs.

Marsh, Q. C. for the appellants.

W. Cassels, Q. C., and *MacKelcan, Q. C.*, for the respondents.

June 24, 1893.

DWYER v. PORT ARTHUR.

Ontario.]

Municipal corporation—By-law—Street Railway—Construction beyond limits of municipality—Validating act—Construction of.

The Corporation of the town of Port Arthur passed a by-law entitled, "a by-law to raise the sum of $75,000 for street railway purposes, and to authorize the issue of debentures therefor," which recited, *inter alia*, that it was necessary to raise said sum for the purpose of building, etc., a street railway connecting the municipality of Neebing with the business centre of Port Arthur. At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the rate-payers and passed, but none was submitted ordering the construction of the work. Subsequently an act was passed by the legislature of Ontario in respect to the said by-law which enacted that the same "is hereby confirmed and declared to be valid, legal and binding on the town . . . And for all purposes, etc., relating to or affecting the said by-law, any and all amendments of the Municipal Act . . . shall be deemed and taken as having been complied with.

Held, reversing the decision of the Court of Appeal, that the said act did not dispense with the requirements of ss. 504 and 505 of the Municipal Act, requiring a by-law providing for construction of the railway to be passed, but only confirmed the one that was passed as a money by-law.

Held, also, that an erroneous recital in the preamble to the act that the town council has passed a construction by-law had no effect on the question to be decided.

Appeal allowed with costs.

Aylesworth, *Q.C.*, for the appellant.

Delamere, *Q.C.*, for the respondents.

June 24, 1893.

HALIFAX STREET RAILWAY CO. v. JOYCE.

Nova Scotia.]

Negligence—Street railway—Height of rails—Statutory obligation—Accident to horse.

The charter of a street railway company required the road between, and for two feet outside of, the rails to be kept constantly in good repair and level with the rails. A horse crossing the track stepped on a grooved rail and the caulk of his shoe caught in the groove and he was injured. In an action by the owner against the company, it appeared that the rail, at the place where the accident occurred, was above the level of the roadway.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that as the rail was above the road level, contrary to the requirements of the charter, it was a street obstruction unauthorized by statute, and, therefore, a nuisance, and the company was liable for the injury to the horse caused thereby.

Appeal dismissed with costs.

Ross, *Q.C.*, for the appellants.

Newcombe, for the respondent.

June 24, 1893.

O'CONNOR v. NOVA SCOTIA TELEPHONE COMPANY.

Nova Scotia.]

Municipal corporation—Ownership of roads and streets—Rights of private property owners—Ownership ad medium filum viæ—R.S.N.S. 5th ser. c. 45—50 Vict. c 23 (N.S.)

The act of the Nova Scotia legislature, 50 V. c. 23, vesting the title to highways and the lands over which the same pass in the crown for a public highway, does not apply to the City of Halifax.

The charter of the Nova Scotia Telephone Company authorized the construction and working of lines of telephone along the sides

of and across and under any public highway or street of the City of Halifax, provided that in working such lines the company should not cut down or mutilate any trees.

Held, Taschereau and Gwynne, JJ., dissenting, that the owner of private property in the city could maintain an action for damages against the company for injuring ornamental shade trees in front of his property in working the telephone line.

Appeal allowed with costs.

Newcombe, for the appellant.

Borden, Q.C., for the respondent.

SUPERIOR COURT ABSTRACT.

Joint stock company—Companies' Act 1862-83, (*imperial*)—*Winding-up Act—Liquidator, status of, before Canadian courts—Intervention—Deposit—Saisie-arrêt.*

Held:—Where Canadian creditors of a joint stock company incorporated under the (Imperial) Companies' Act 1862-83, are proceeding to execute a judgment obtained in the courts of this province upon assets of the company situate within the province, a liquidator named in Great Britain to the voluntary winding-up of such company cannot intervene and demand that the company's assets be removed to Great Britain, to be there by him distributed in accordance with the provisions of the said Companies' Act.

Quære, has such liquidator any standing before the courts of this province?

In the present case, the garnishees ordered to deposit with the prothonotary a sum of $51,000 placed in their hands to meet a possible judgment in another case against the same defendants.—*Quebec Bank* v. *Bryant et al.*, & *Hall et al.*, *T. S.*, *Powis*, intervening, & *The Quebec Bank*, contesting, Quebec, Andrews, J., April 15, 1893.

Procédure—Exécution—Opposition—Fi. fa. rapporté après délai—Venditioni exponas—Saisie, quand caduque—C. P. C., 578-589 *C. P.* 172.

Jugé:—La prorogation du bref de *fieri facias* par le juge n'est requise que lorsque la saisie n'est pas suspendue par une opposition; lorsqu'elle est ainsi suspendue elle subsiste, même après le délai pour le rapport du bref, si l'obstacle que l'opposition fait à la vente n'est pas écarté auparavant.

Comme le code de procédure ne fixe pas un délai pour la péremption de la saisie, dans le cas où l'obstacle n'est écarté que subséquemment au jour fixé pour le rapport du bref, on doit recourir à la loi antérieure pour fixer sa durée, savoir, à l'article 172 de la Coutume de Paris, qui donne à la saisie une durée de deux mois après que l'obstacle à la vente a disparu.

Les mots *écarté subséquemment* de l'article 589, C. P. C., signifient "écarté subséquemment à la saisie, mais avant le retour du bref." *Lavoie* v. *Lacroix*, R. O. Q., 1 C. S. 57, renversée.

Une opposition basée sur le prétendu transport du jugement à un tiers, mais qui n'allègue ni signification ni acceptation de ce transport, sera rejetée sur défense en droit.

Une composition entre le demandeur et le défendeur, antérieure à la saisie, et non payée, ne justifie pas une opposition afin d'annuler par ce dernier.—*Martineau* v. *Fournier*, Québec, C. R., Casault, Caron, Andrews, JJ., 31 mai 1893.

Substitution—Vente forcée d'un bien substitué—Substitution créée par une donation onéreuse—Articles 929, 953, *C. C.*

Jugé:—Le substituant qui, par une donation créant une substitution, a imposé certaines charges au grevé, assurées par privilège de bailleur de fonds, que ce dernier n'a pas remplies, peut faire saisir et vendre l'immeuble substitué, et cette vente a l'effet de purger la substitution.

2. Une substitution ne peut être créée qu'autant qu'elle se rattache à une libéralité, la substitution ne pouvant exister que lorsque la personne qui en a été chargée a été gratifiée par l'acte créant la substitution. Ainsi, lorsque les charges stipulées égalent la valeur de l'immeuble qu'on a prétendue substituer, il n'y aura pas de substitution, l'acte en question constituant une véritable vente.—*Lalonde* v. *Daoust*, Montréal, Taschereau, J., 22 décembre 1892.

Chemin de fer—Co-propriétaires—Incendie causé par flammèches d'engin—Responsabilité.

Jugé:—Une compagnie de chemin de fer qui a la direction d'une voie, dont elle est propriétaire par indivis avec une autre compagnie, est responsable du dommage résultant d'incendies causés par les feux d'engins de l'une ou de l'autre compagnie,

sauf recours.—*Lemieux et al.* v. *Cie. du chemin de fer Québec & Lac St-Jean*, C. R., Québec, Casault, Routhier, Andrews, JJ., 31 mai 1893.

Procédure—Timbres additionnels, apposition de, à pièce insuffisamment timbrée—S. R. Q., 1171, 1172, 1176, 1177—*Action paulienne—Preuve.*

Jugé :—Une réponse à un interrogatoire sur faits et articles qui contient une assertion étrangère aux faits demandés, peut être divisée.

La preuve testimoniale de l'existence d'hypothèques sur un immeuble n'est pas légale.

L'action paulienne ne poursuivant pas la déclaration d'une nullité relative, mais d'une nullité absolue, le montant des timbres à apposer sur les procédures doit être réglé, non par la somme demandée, mais par la valeur des biens qu'on cherche à faire rentrer dans le patrimoine du débiteur.

Lorsqu'une pièce du dossier est insuffisamment timbrée, comme la loi ne fixe pas le délai où la demande pour permission d'y apposer des timbres additionnels doit être faite après la découverte de l'erreur, il suffit que celle-ci existe à la date de la procédure qui n'a pas été revêtue des timbres requis, pour que la partie en faute puisse obtenir permission de la réparer.

Il n'est pas nécessaire que le dossier soit transmis au tribunal de première instance pour avoir cette permission ; elle peut être accordée, cour séante, par la cour de révision, lorsque le défaut n'est signalé que devant ce tribunal.—*Leclaire* v. *Côté et al.*, C. R., Québec, Casault, Routhier, Caron, JJ., 31 mai 1893.

Compagnie minière responsable en dommages envers employé blessé par explosion de poudrière non-munie de paratonnerres—S. R. Q. 876, 1011.

Le demandeur, employé de la défenderesse, en s'en allant de son ouvrage, s'est réfugié pendant un orage dans une bâtisse appartenant à la défenderesse, et pendant qu'il y était la foudre est tombée sur une poudrière voisine, aussi appartenant à la défenderesse, qui n'était ni construite suivant les prescriptions de la loi ni protégée par des paratonnerres, laquelle a fait explosion et a détruit en partie la bâtisse où s'était réfugié le demandeur, infligeant à celui-ci des blessures graves.

Jugé :—Que l'inobservation des prescriptions de la loi dans la construction de la dite poudrière était une faute et une négligence qui ont rendu la défenderesse responsable du dommage que l'explosion d'icelle a causé au demandeur.

Les lois concernant les poudrières, S. R. Q., 876, §6, 1011, et les règlements faits par le lieutenant-gouverneur en conseil conformément à icelles, s'appliquent aux compagnies minières—*Garon* v. *Anglo-Canadian Asbestos Co.*, C. R., Québec, Casault, Routhier, Andrews, JJ., 31 mai 1893.

Damages—Libel in pleading—Justification.

A party who, in a pleading, accuses another of fraud and collusion, will be held liable in damages, if the circumstances be not such as would produce on the mind of a cautious and prudent man an honest conviction of the guilt of the party he accuses.

In the present case, the defendant having been cognizant of the loan made to his debtor by the plaintiff, and having himself received the greater part of it, a charge by him that plaintiff, in taking security for the loan, by way of sale *à réméré* of all the debtor's property, had acted collusively with such debtor to defraud him, the defendant, held libellous and actionable.—Casault, J., diss.) *Matte* v. *Ratté*, C. R., Quebec, Casault, Caron, Andrews, JJ., 31 May, 1893.

Procédure—Amende—Non-enregistrement de déclaration par femme séparée de biens faisant commerce—C. P. C. 981—*Affidavit—S. R. Q.* 5716—*Assignation—Exception à la forme—Contrainte par corps—Forclusion—Enquête—Serment du sténographe.*

Jugé :—1. On ne peut pas objecter à une partie qu'elle poursuit sous ses vrais prénoms, quoiqu'elle l'eût pu sous ceux sous lesquels elle a toujours été connue.

2. Lorsque le mari n'est mis en cause que pour assister sa femme, la signification d'une seule copie, à la femme, des bref et déclaration, est suffisante.

3. Le demandeur dans son action *qui tam*, qui, dans son affidavit (S. R. Q. 5716), néglige de jurer qu'il n'agit point "en vue de retarder ou de faire échouer l'action d'une autre personne," omet une formalité essentielle à son droit de poursuite, et bien que cette omission ne puisse être attaquée par exception à la forme elle peut l'être sans plaidoyer aucun, et elle est fatale à la demande.

4. Lorsque le demandeur, sans produire une pièce sur laquelle l'action est fondée, a forclos le défendeur de plaider et a procédé *ex parte* jusqu'à l'audition au mérite et la mise de la cause en délibéré, il ne peut plus produire cette pièce sans renoncer à la forclusion et à toutes les procédures subséquentes et sans donner avis au défendeur de la production de la pièce en question.

5. L'enquête prise à un jour subséquent à celui fixé, sans ajournement de la cause à tel jour, et sans nouvel avis à l'autre partie, est illégale.

6. Les sténographes officiels, étant des officiers de la cour, doivent prêter un serment d'office, et n'ont pas besoin d'être assermenté dans chaque cause.

7. Dans une poursuite pour amende contre une femme séparée de biens qui fait le commerce sans avoir déposé la déclaration voulue (C. P. C. 981), une condamnation par corps n'est pas autorisée par la loi, et rend le jugement nul.

8. Dans une action *qui tam* le demandeur, tant que le jugement n'est pas prononcé, est *dominus litis* et peut, si la couronne n'intervient pas, renoncer à des procédures de l'instance, mais après que le jugement a été prononcé il ne le peut plus, car ce jugement donne des droits à un tiers, "la couronne," et il ne peut pas y renoncer ni pour le tout ni même pour une partie.

9. Lorsqu'une cause est inscrite à l'enquête et mérite il doit, en l'absence d'un consentement des parties, être procédé à l'enquête cour séante, et le jurat au bas des dépositions doit le constater.—*Guay qui tam* v. *Durand et vir*, C. R., Québec, Casault, Routhier, Caron, JJ., 31 mai 1893.

Procedure—Initial of name—Summary matters.

Held:—1. Where the writ of summons sets forth one of plaintiff's baptismal names and indicates the other by its initial letter, the action will not be dismissed on exception to the form.

2. Where an action is brought by a trader on an account, although the articles the price whereof is sought to be recovered are not such as would form part of the merchandise dealt in by the plaintiff, yet if it be proved that the articles were received and sold by him to the defendant in the ordinary course of his commercial operations, the case is governed by the provisions of art. 887 *et seq.*, C.C.P., regulating summary matters.

3. It is not required by law that the days of delay between

service of writ and return should be juridical days.—*Martin* v. *Martin*, Montreal, Doherty, J., May 25, 1892.

Société—Convention interdisant aux associés d'intéresser un tiers à leur part dans la société—Retrait social.

Le 17 décembre 1888, le demandeur et MM J. L. Cassidy (depuis décédé), et Dumont Laviolette se mirent en société pour acquérir la part de feu Claude Melançon dans la société John L. Cassidy & Co., et convinrent de former une nouvelle société, à l'expiration de celle qui existait déjà, et qui se composait de MM. Cassidy, Laviolette, Aumond, Gariepy et des représentants de feu M. Melançon. La société alors existante avait été formée pour cinq ans, à compter du 5 janvier 1886. Aux termes du pacte social, il était interdit à aucun associé d'intéresser un étranger à sa part dans la société, et il fut de plus convenu que la mort d'un associé ne mettrait pas fin à la société, mais que les représentants de cet associé resteraient associés commanditaires. Le 26 décembre, le demandeur et MM. Cassidy & Laviolette se firent donner, de la part des héritiers Melançon, une promesse de vente des droits de ceux-ci dans la société John L. Cassidy & Co. Le 5 janvier 1891, le demandeur fit signifier cette promesse de vente aux membres de la dite société, demandant le partage d'icelle, mais ceux-ci formèrent une nouvelle société à l'exclusion du demandeur.

Jugé: 1. Que les conventions du 17 et du 26 décembre étaient légales, malgré la clause du contrat de société qui défendait aux associés d'intéresser un tiers à leur part, et que, nonobstant cette clause, il était loisible à quiconque, tiers ou associé, d'acquérir les droits que possèderaient l'un des associés à l'expiration de la société.

2. Que le retrait social, soit le droit, pour les associés, d'acquérir, à l'exclusion des tiers, la part de leurs co-associés lors de la dissolution de la société, n'existe pas dans notre droit en l'absence d'une convention expresse accordant ce droit de préférence aux associés.—*De Martigny* v. *Laviolette et al.*, *& Gratton et al.*, mis-en-cause, Montréal, de Lorimier, J., 31 octobre 1892.

Cour des commissaires—Commissaire illettré—Certiorari.

Jugé:—Un jugement rendu à la cour des commissaires par un commissaire qui ne sait ni lire ni écrire est nul et illégal, et sera cassé sur *certiorari.*—*Meloche & Brunette*, Montréal, Loranger, J., 25 janvier 1892.