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REVUE DE LÉGISLATION

ET DE JURISPRUDENCE.

Rédacteurs et Propriétaires :

MM. S. LELIÈVRE ET F. RÉAL ANGERS.

Troisième Année.—9me Livraison.

QUEBEC:

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Juin 1848.

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REVUE

DE LÉGISLATION

et de Jurisprudence.

ON APPEAL FROM THE COURT OF APPEALS OF LOWER CANADA.

AUGUSTIN GADIOUX ST. LOUIS, and PIERRE BENJAMIN DUMOULIN,

Appellants,

AND

ANTOINE GADIOUX ST. LOUIS, FREDERIC BETTEZ and Dame MARIE GADIOUX ST. LOUIS his Wife, ANTOINE GADIOUX ST. LOUIS, and JOSEPHTE GADIOUX ST. LOUIS,

Respondents. (1)

18 February, 1841.

The rights of the *Seigneur* in *Lower Canada* to the water of an unnavigable river flowing through his *Fief* does not entitle one of several *co-seigneurs* to divert the waters for his exclusive use, which had been accustomed for eleven years to supply the mills of another of his *co-seigneurs.*

(1) present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Right Honourable Dr. Lushington.

The question at issue in this Appeal respected the right to the use of the river Yamachiche, a river not navigable, in the district of Three Rivers, in the Province of Lower Canada.

By the laws of Lower Canada, the *seigneur* of a *fief* is the proprietor of rivers not navigable, as far as they flow through the seigniory.

The appellant, Pierre Benjamin Dumoulin, was one of the *co-seigneurs* of the *Fief Gros Bois*, through which the river flows. The respondents were also *co-seigneurs* of the *fief*.

In the year 1820, the respondent, Gadioux St. Louis, erected a grist-mill; and in the year 1821 he also erected a carding and fulling mill near the grist-mill, upon his own land within the *fief*, and in order to accumulate a sufficient supply of water to work them, he caused a dam to be thrown across the river at a point above the mills.

In 1831, the appelant, Augustin Gadioux St. Louis, erected a saw-mill upon the same river, at a point higher up than the respondents' mills; and for the purpose of working this mill he caused a channel, or canal, to be made from a point on the river above the respondents, dam, to a point below such dam, whereby a portion of the water was diverted from its natural course, and from flowing over the respondents' land, which impeded, and at times actually stopped, the working of the respondents' mills.

In consequence of this encroachment upon their rights, the respondents, on the 22nd of september 1832, instituted an action in the court of King's bench for the district of Three Rivers, against the appellant, Augustin Gadioux St. Louis, for the purpose of having the canal made by him stopped up, and for a prohibition against any future diver-

sion of the water, with damages and costs for the injury already done.

The appellant, Pierre Benjamin Dumoulin, intervened in the cause; as a person in whose name and right, in his character of *seigneur primitif*, the canal and mill mentioned in the declaration had been made.

The appellants then filed their peremptory *exception perpétuelle en droit et défense au fonds en fait*, by which they insisted that the appellant, Dumoulin, was *seigneur* of the greater part of the *fief Gros Bois*, through which the river Yamachiche flows, and that the saw-mill and canal in question were constructed in the *fief*, which was the undivided property of the appellant, Dumoulin, and others, of whom the respondents perhaps formed a part, but at the most a very small undivided part. That the river not being a navigable river, the appellant Dumoulin had the sole right to the use and enjoyment of the water within his seigniory, and to make, or cause to be made, the mill and canal in question; and they insisted that the respondents had not even had the right of *banalité* further back than the year 1820; that the mill could never have been considered *banal* by the *censitaires* of the *fief*, and still less by the *co-seigneurs*, to whom this undivided right appertained, because, since the year 1820, and several years before, there existed another grist-mill within the seigniory, and that even should the respondents have acquired the right of *banalité* in the *fief*, and the right to work their mill by means of the waters (which the appellants denied), they could not have any right to more than would be necessary to work their own mill, whereas, there was more than sufficient to work the respondents' as well as the appelants' mills all the year round. The appellants, moreover, denied that they had ever exercised their right but with the greatest care, and had only taken the surplus water which the respondents had no need of, and had cut their canal on a

level with the respondents' dam, without making, as they were entitled, a dam-head for themselves.

To this exception the respondents filed special answers insisting that the grist-mill was erected by Antoine Gadioux St. Louis, *seigneur*, as mentioned in their declaration, at the instance and request of the tenants *censitaires* of the *fief Gros Bois*, by reason of the neglect and refusal of all the other *co-seigneurs* to erect and provide a good and sufficient mill in the said *fief*, as appeared by several protests from the tenants, copies of which were added thereto.

The respondents also produced various documents to prove their co-partnership of the seigniory, and their several rights therein.

Witnesses were examined on both sides, to prove the relative situations of the mills, and to show in what respect the respondents were injured by the appellants' use of the water.

The cause was fully heard in the King's bench, and the following judgment pronounced:—

"The court having heard the parties on the merits, as well on the principal demand as on the demand in intervention; having examined the process and the proofs, and, after having deliberated thereon, considering that Antoine Gadioux, surnamed St. Louis, one of the plaintiffs, and through whose rights the others act in this cause, has, and could transmit to the other plaintiffs, only a right of co-partnership in the great river Yamachiche; considering that in erecting a mill on the said river, the said Antoine Gadioux could only acquire, at the most, the right of *banalité*, but not at all, either the possession or the exclusive proprietorship of the said river Yamachiche, which is *seigneuriale* and not navigable; considering, lastly, that the intervening party, Pierre Benjamin Dumoulin, being a *co-*

seigneur of the seigniory of Yamachiche or *Gros Bois*, and of the said river which runs through it, has the right to use and enjoy the said river, according to his share and portion in it,—the court has dismissed, and now dismisses, the plaintiff's action with costs to the defendant, and the intervening party respectively, saving to the plaintiff and to the said intervening party their legal recourse to regulate and determine for what parts, and in what manner, they shall use, jointly or severally, the said river for the future."

From this judgment the respondents appealed tothe court of appeals for the province of Lower Canada, and the appeal having been heard, the following judgment was afterwards given:—

" It is considered and adjudged that the judgment of the court of King's bench for the district of Three Rivers in this cause, be, and the same is hereby reversed, with costs to the appellants, as well in this court as in the court below against the said Augustin St. Louis; and this court proceeding thereupon, doth adjudge, condemn and order the said Augustin St. Louis, defendant in this cause in the court below, and one of the respondents in this court, within fifteen days from and after service, and signification of a copy of this judgment, to fill up and close the canal mentioned in the declaration in this cause filed, and to restore the land through which the said canal has been cut to the same situation and condition in which it was before the said canal was commenced, so that the waters of the river Yamachiche may run in the natural course and channel of the said river; and this court doth hereby enjoin the said Augustin St. Louis not to molest in future the said Antoine Gadioux St. Louis in his lawful usufruct and enjoyment of the water of the said river of Yamachiche, and doth condemn the said Augustin St. Louis to pay to the said appellants all such damages as they the said appellants have sustained, or may sustain, by reason of the cutting and making of the said canal, when and so soon as the amount of such

damages shall have been liquidated in due course of law; —and lastly, it is by this court considered and adjudged, that the intervention of the said Pierre Benjamin Dumoulin in this cause filed on the 10th day of january 1833, be, and the same is hereby dismissed, with costs to the appellants against him the said Pierre Benjamin Dumoulin, as well in this court as in the court below."

The appellants then brought the present appeal, submitting that the Decree ought to be reversed for the following reasons: —

I. Because by the law of Lower Canada, the *co-seigneurs* of a *fief* are entitled to use the waters of unnavigable rivers flowing through their *fief*, and one *co-seigneur* has no right to monopolize the same.

II. Because the appellant, Pierre Benjamin Dumoulin, was one of the *co-seigneurs* of the *fief Gros Bois*, through which the unnavigable river Yamachiche flows, and the mill complained of was erected on the waters of the river within the *fief* aforesaid.

III. Because the appellant had a legal right to erect the saw-mill in the place where it is situate, and to use the waters of the river for the working thereof, the appellants not claiming any exclusive right to such waters.

IV. Because it was proved by the evidence adduced in the cause, that the appellants' mill might be worked without inconvenience or injury to the mills of the respondents, by a proper use of the waters of the said river.

V. Because the appellants had always been willing, and had proposed to the respondents to adopt such regulations with respect to the use of the waters as might enable both the appellants and respondents to enjoy the use of the wa-

ters for working their mills, without inconvenience or injury to either.

VI. Because the respondents had refused to assent to any such arrangement, though easy and practicable.

VII. Because the grist-mill, in respect of which the respondents claim, was not entitled to the privileges of *banalité*, and another grist-mill, situate higher up the river, existed within the *fief* long previous to the erection of the respondents' grist-mill, and still continued to exist.

The respondents, however, contended that the decision appealed from was just and proper, for the following reasons :—

I. Because the maxim "*sic utere tuo ut alienum non lædas*" is not only founded upon principles of natural justice, but was consonant to the laws of the province.

II. Because, by the cutting and use of the appellants' canal, the waters of the river Yamachiche were to a considerable extent diverted from their natural course, which is over or by the respondents' land, and by such diversion the respondents were prevented from having the full use and enjoyment of the waters of the river in the manner in which they and their predecessors, owners of the land in respect of which the respondents' action was brought, were accustomed to use and enjoy the same previously to the cutting and use of the canal, and by such diversion of the waters the respondents had sustained considerable damage in respect of their aforesaid mills and lands on the said river.

III. Because the respondents' grist-mill was a *banal* mill, grinding the corn of that part of the *fief Gros Bois*, in which such mill is situate, and the respondents were entitled

to the full use of the waters of the river, for the purpose of working the same mill.

IV. Because, for a period of ten years and upwards, before the commencement of the appellants' canal, the respondents had had the uninterrupted enjoyment of their said mill, with the full flow of the water of the said river for the working thereof.

V. Because, according to the evidence in the action, and the law of the land, no other than the judgment now appealed from could have been given, or would have been proper.

M. Burge, Q.C., for the appellants, and

Mr. Kindersley, Q.C., and Mr. Renshaw, in support of the judgment of the court below.

In the course of the argument, the following authorities were referred to: *Merlin's Rep. Jurisp.* tit. *Cours d'Eau;* 3 *Partida*, L. 15 & 16, tit. 32; *Dig.* lib. 39, tit. i. l. 3; *Code Civil*, Art. 644; *Denisart's Coll.* 4 vol. 294; 2 *Bl. Com.* 90.

The Right Honourable Dr. LUSHINGTON:

The present appeal relates to the right of the contending parties to the use of the waters of the river Yamachiche, a river not navigable, and flowing through the seigniory of *Gros Bois*, in Lower Canada; of that seigniory, Dumoulin, one of the appellants, and the respondents, are *co-seigneurs*.

In the year 1820, Antoine Gadioux St. Louis, with the consent of all the proprietors, as well as tenants, and at the instance of at least some of them, erected a grist-mill on his own land; in 1821, a carding and fulling mill, and a dam, was thrown across the river, for the purpose of supplying the mills with a sufficient quantity of water; until the month of november 1831, these mills continued to be worked without any obstruction or diminution of the ordi-

nary supply of water. At that period, Augustin Gadioux St. Louis, erected a saw-mill on a point higher up the river and, for the purpose of supplying such mill with water, caused a canal to be made.

The respondents, conceiving that such canal intercepted the accustomed flow of water to their mills, thereby preventing them from being worked so beneficially and conveniently as before, in september 1832 brought an action in the court of King's bench of the district of Three Rivers, against Augustin Gadioux St. Louis. The object of this action was to have the canal stopped up, and all things restored to their former state, and to recover damages for the losses sustained.

Dumoulin intervened in this suit, alleging himself to be a partner with the appelant, St. Louis, in the saw-mill, and also interested and entitled, as one of the *co-seigneurs* of the *fief*.

The respondents in their pleadings alleged, among other things, that the corn-mill by them erected in 1820 was a *banal* mill, and entitled to all the privileges of a mill of such character. This averment was denied by the appellants, who further stated, that if it were true, the respondents were only entitled to a sufficiency of water to work it, and that if the waters of the river were properly managed, there would be an overplus of water, to which the appellants would be entitled for the use of their mill.

Evidence, both written and parol, was produced on behalf of the litigating parties, and the cause was first heard before the court of King's bench, which court on the 30th of september 1833, dismissed the action, on the ground that Dumoulin was entitled to enjoy the river according to his share as a *co-seigneur*, and that the plaintiffs had claimed an exclusive use; the court also reserved to the plaintiffs, and to Dumoulin, the intervening party, liberty to resort to the court for the arrangement of their rights.

An appeal having been presented to the provincial court, that tribunal, on the 30th of april 1834, reversed the decree of the court of King's bench, and pronounced according to the prayer of the present respondents in their declaration.

Their Lordships have now to determine, whether they see any sufficient cause for reversing this last judgment; and first they would observe, that they are satisfied by the evidence, that the respondents have suffered some damage by the diverting of the waters through the means of the canal for the use of the mills erected in 1831. To what extent that damage has proceeded, they are not called upon to determine in this appeal.

The question then is, has the appellant Dumoulin shown that he has any right so to use these waters, notwithstanding the loss to the respondents? Has he proved that the loss occasioned is *damnum absque iujurio?* At the time of the erection of these mills in 1820 and 1821, he had no right or interest in the waters of the river at all; the mills were erected and worked with the consent of all interested, for some years before Dumoulin acquired any title to the use of the waters.

The defence of Dumoulin may be shortly stated to consist—First, of a denial that the mill of the respondents is a *banal* mill;—Second, a justification of his carrying off a part of the supply of water from the respondents' mills, on the ground that he is a *co-seigneur* of the fief, and as such entitled to share in the use of the waters, even to the extent of depriving the respondents, his *co-seigneurs,* of the use of a part of their accustomed supply.

Now, leaving out of consideration the question of *banal* mill or not, and what was the privilege of *banalité,* it is evident, that if the appellant cannot support his latter justification, he must fail altogether. The position he must maintain is this, that as *co-seigneur* he has a right to

divert the waters, accustomed for eleven years to supply the mills of one of his *co-seigneurs*, for the purpose of working his own newly erected mill, and this to an extent to which it is not easy to fix a limit. The proposition carries with it some extraordinary consequences; for if the law be as stated, another *co-seigneur*, having property higher up the river, might build a new mill, and divert the waters from all the existing mills; he is in turn to suffer the same loss, if there should be any *co-seigneur* having land situate still higher up the stream.

We are of opinion that the appellants have failed to show that the law prevailing in Lower Canada supports any such proposition, and that, therefore, the decree of the court of appeals must be affirmed.

It may be that the appellants have, by the law of Canada, some claim to have the use of the waters regulated by the courts of that country, so that all the *co-seigneurs* may have the most beneficial use of the same. If this be so, our judgment will not deprive the appellants of any right they may possess to resort to the tribunals of their country, for such purpose. All we affirm is, that the appellants had no right to take the law into their own hands, inflicting a loss or an injury on the respondents. Decree affirmed with costs.

Lower Canada,

In appeal—McLaughlin, *et al* executors—Appellants, and Bradbury, *et al*, Respondents.—1848.

The registration of a notarial obligation, bearing date previously to the enacting of the 4th Victoria, cap. 30, without a memorial of claim for any specific sum for arrears of the interest which may be due upon such obligation, is sufficient to preserve the rights of the creditor for the whole amount of interest due, and it is not necessary that any memorial for arrears of such interest should have been registered.

On the 19th day of november, 1828, the late George Kittson and Ann Tucker his wife, duly authorised by her husband, by deed of obligation executed at Montreal before Doucet and Colleague notaries, acknowledged to be indebted jointly and severally to William Kittson, son of the said George Kittson, then residing at Colville, River Columbia, (the said notaries accepting for him) in the sum of £560, Halifax currency, with interest thereon from the 18th day of november, 1828, payable annually; to secure the payment of which they gave a general *mortgage* upon all their real property then acquired. William Kittson died in the year 1843, having left a Last Will and testament, bearing date at Fort Vancouver the 10th day of january, 1841, whereby he appointed his son Edwin, together with John McLaughlin, John Rowand, Peter Skeen Ogden and James Douglas, esquires, Chief Factors in the Hudson Bay Company's service, and also François Hubert Blanchet, of the Roman Catholic Mission, Columbia, his executors. His said Last Will and testament, and codicils thereunto annexed, were proved on the 19th day of june, 1844, in the

prerogative court of Cantorbury, at London, and administration of all and singular, the goods, chattels and credits, of the deceased, was granted to the said John McLaughlin, Peter Skeen Ogden, and James Douglas, esquires, three of the executors named in the said will. The three last named executors, who are the appellants in the present cause, brought their action in the court of Queen's bench at Montreal, in the november term, 1844, against the said Ann Tucker, then the widow of the said late George Kittson, for the recovery of the debt and interest due under the obligation, to wit, £560, with interest thereon from the 18th day of november, 1828, and on the 30th day of the said month of november judgment on confession, was entered up against the said Ann Tucker, for the full amount of the demand.

The said obligation was duly registered on the 12th day of august, 1844.

On the 21st day of november, 1846, the sheriff returned a writ of *fieri facias de terris*, which had issued in execution of the said judgment, and also the sum of £960 7 6, levied under it.

The respondents, among others, fyled an opposition *afin de conserver*, claiming out of the proceeds of the said levy, a sum of £451 8, with interest on that sum from the 10th day of december, 1836, under a judgment obtained by them against the said Ann Tucker, the defendant in this cause, in the court of King's Bench at Montreal on the 18th day of june, 1846.

A memorial for the arrears of interest accrued thereunder from the 10th day of december, 1835, to the 24th day of october, 1844, was enregistered on the 25th day of october, and the judgment itself was enregistered on the 25th of october 1844.

A report of collocation and distribution was fyled on the

on the 21st day of january, 1847, whereby the appelants were collocated for the sum of £588 16 10, being the interest accrued on the said sum of £560, for which they obtained judgment as above mentioned, from the 18th day of november, 1828, to the 25th day of may, 1846, being the day on which the property was sold, and for the further sum of £283 8 7, in part payment of the principal of the said judgment.

The respondents contested that part of the said report, whereby the appellants were collocated for the said sum of £588 16 10, as and for arrears of interest upon the ground, that no memorial for a claim for any specific sum of arrears of interest was ever enregistered by them; and that consequently they were only entitled to interest for two years, and the then current year previous to the 12th day of august, 1844, the date of the enregistration of their obligation, together with the future arrears of interest subsequent to that date, up to the date of the sale of the property, to wit, for the sum of £151 15 2, and that they could not be legally collocated for any larger sum for any arrears of interest. The appellants answered to the contestation as follows: That the said obligation was duly enregistered at full length according to law, by means whereof, and under and in virtue of the ordinance 4th Victoria, c. 30, and the statute 7th Vict., c. 22. all the hypothecary rights and interest of the said E. Kittson, and of the said appellants in their said capacities, were preserved according to their respective rank and priority, in the same manner as if the said laws had never been enacted: that the appellants have an hypothecary right for the interest accrued upon the said obligation from the day of the date thereof, and a preferable claim for the payment thereof, according to the date of the said obligation; and that they are legally collocated in the distribution of the monies arising from the sale of the said defendant's real property for the amount therein and thereby allowed, in preference to the said respondents.

After hearing the parties, the court below on the 13th day of october, 1847, pronounced the following judgment :—

" The court having heard the parties by their respective " counsel, upon the issue raised by the answer of the said " plaintiffs to the contestation, and *moyens* of contestation " made by the said opposants, William Bradbury and John " Roberts, to that part of the report of collocation and dis- " tribution, prepared by the prothonotary of this court on " the 21st day of january, one thousand eight hundred and " forty seven, whereby the said plaintiffs are collocated for " a sum of five hundred and eighty-eight pounds sixteen " shillings and ten pence currency, as the amount of inte- " rest upon the capital or principal sum of a certain judg- " ment obtained by the said plaintiffs on the thirtieth day " of november, one thousand eight hundred and forty four, " against the said defendants, the said interest being cal- " culated from the 1 ineteenth day of november, one thous- " and eight hundred and twenty eight, up to the twenty " fifth day of may, one thousand eight hundred and forty " seven, having examined the proceedings and the docu- " ments fyled by the plaintiffs and opposants in support of " their respective pretensions, and having deliberated there- " on, considering that the obligation from the said defen- " dant to the said plaintiffs of the nineteenth day of no- " vember, one thousand eight hundred and twenty-eight, " passed before Maître Doucet and colleague notaries pub- " lic, upon which the said judgment of the thirtieth day " of november one thousand eight hundred and forty-four, " was rendered, and under which the said interest has been " allowed, bears the date of enregistration of the twelfth " day of august, one thousand eight hundred and forty- " four, and considering that no memorial of claim for any " specific sum of the arrears of the said interest for which " the said plaintiffs are in and by the said report collocated " was ever enregistered as required by the 4th Victo- " ria, chapter 30, section 16th, and the 7th Victoria,

" chapter 22, section 10th, and further considering, that " without the said enregistration, the said plaintiffs are not " entitled to be collocated in preference to and before other " creditors for such arrears of interest, and can only be al- " lowed the arrears of interest for the two years, and also " for the year then current, and the interest accruing from " and after the date of such enregistration, doth maintain " the said contestation, with costs, against the said plain- " tiffs, and it is ordered that the prothonotary of this court " do prepare a report of distribution and collocation of the " said sum of five hundred and eighty-eight pounds, sixteen " shillings, and ten pence, currency, and do thereby collo- " cate and allow the said plaintiffs, the sum of one hundred " and fifty one pounds, fifteen shillings and two pence, as " and for the arrears of interest for the two years, and " the then current year, as aforesaid, on said obligation of " the nineteenth day of november, one thousand eight hun- " dred and twenty-eight, that is, from the nineteenth day " of november, one thousand eight hundred and forty-one " up to the said twelfth day of august one thousand eight " hundred and forty four, and do thereby also allow the " said plaintiffs the further sum of two hundred and seven- " ty six pounds, eleven shillings and five pence, said cur- " rency, the balance remaining due upon the principal or " capital sum of the said obligation and judgment, and do " distribute the balance remaining after deduction of the " said sum, to wit, the sum of one hundred and sixty pounds, " ten shillings and three pence, amonght the hypothecary " creditors of the said defendant, who have fyled oppo- " sitions in this cause including therein the said opposants " William Bradbury and John Roberts, according to the " rank and priority of their several and respective *mortgages* " and *hypothèques* on the said estate of the said defendant."

This judgment was appealed from. And on the 10th june 1848 the court of appeals rendered judgment in favor of the appellants, the following is an extract of the judgment

in appeal;—" considering that the notarial obligation, hypothecary right, and claim declared upon by the said appellants in the court below, were in full force, before and at the time of the passing of the provincial ordinance or law made and passed in the fourth year of Her Majesty's reign, intituled, " An ordinance to prescribe and regulate " the registering of titles to lands, tenements and hereditaments, real or immoveable estates, and of charges and incumbrances on the same &c." and that the said notarial obligation, hypothecary right and claim were duly registered within the time and in the manner required by law, whereby the same were preserved in full force, according to their rank and priority, in the same manner as if the said ordinance had not been made;—and considering also that the legal effect of the said registration made as aforesaid, was to entitle the said appellants to be collocated and ranked as creditors, in the report of distribution of the proceeds of the sale of the real estates in question, in this cause, not only for the payment of the principal sum in the said notarial obligation mentioned, but also for the interest accrued on the same from and after the twenty eighth day of november in the year of our lord 1828; and considering also that the enactments of the legislature mentioned and referred to in the said judgment of the court below as the ground for rejecting the appellants demand of interest as aforesaid are foreign and inapplicable to this case; and considering that there is manifest error thereupon, in the rendering of the said judgment; it is by the said court now here adjudged, that the said judgment appealed from in this cause, namely, the judgment of the court of Queen's bench for the district of Montreal, in this cause rendered on the thirteenth day of october in the year of our lord 1847, be, and the same is heredy reversed, annulled, and made void. And the said court now here proceeding to render such judgment in the premises, as by the court below ought to have been rendered, it is by the said court now here further adjudged, that the contestation by the said William

Bradbury and John Roberts, opposants in the court below made to a certain part of the report of distribution prepared by the prothonotary of the said court below, therein filed, in what respects the collocation of the said appellants in the said report, be, and the same is hereby over-ruled and set aside."

"And it is by the said court now here further adjudged, that the said John McLaughlin, James Douglas and Peter Skeen Ogden, executors as aforesaid, the appellants, do recover their costs from and against the said William Bradbury and John Roberts, respondents in this causer, as well on the contestation aforesaid in the court below as in this court. And it is by the said court now here adjudged, that the record in this cause be remitted to the court below.

ANALYTICAL INDEX.

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

(CONTINUED FROM PAGE 308.)

The declaration of a *tiers-saisi* must be positive "I do owe," or "I shall owe at a time certain," not, "I may owe," therefore when it was sworn that the debt of a *tiers saisi* depended on a contingency he was discharged. Arnold vs. Uppington, and al, 1821, no. 284.

If a *tiers-saisi*, when examined, denies that he is indebted to the defendant, it is conclusive if his declaration be not contested and disproved. Robinson vs. Reffenstein, 1821, no. 85.

Bail and security for costs.

A seaman not resident in the province must give security for costs. Hearsdman vs. Harrowsmith, 1809.

An officer stationed with his regiment in the province cannot be compelled to give security for costs. Sutherland vs. Heathcote, and al, 1808.

An affidavit to hold to bail though bad in part, may be efficient for the remainder. Patterson and al vs. Bourn, 1809, no. 238.

Affidavit of belief that the plaintiff resides without the province is not sufficient to obtain security for costs. Willey and al vs. Mure and al, 1809, no. 265.

A defendant cannot be arrested for the amount of a penalty incurred for an offence against a penal statute. Graham vs. Whitty, 1818, no. 1056.

A plaintiff resident without the province cannot sue *in formâ pauperis*, in consequence of the statute 41 Geo. III, c. 7, S. 2. which requires security for costs from all plaintiffs so situated without distinction. Barry vs. Harris, 1810, no. 333.

Householders resident in the province are good security for costs, and one is sufficient if he justifies. Colver and al, vs. Darreau and al, 1810, no. 352.

An affidavit to hold to bail cannot be contradicted by counter affidavits. Lawrence vs. Hinckley, 1810, no. 384.

Bail for preliquidated damages may be had, but not for a penalty. Patterson and al, vs. Farran, 1811.

No advantage can be taken of any defect in an affidavit to hold to bail by an *exception à la forme*. Patterson and al, vs. Hart, 1811, no. 47.

If the plaintiff swears he believes the defendant is about to leave the province from his own knowledge, he must state the cause of his belief, because this is the best criterion for the exercise of the judges discretion. If he founds his belief on the information of others, he must swear "that he is credibly informed, hath just reason to believe, and in his conscience doth verily and sincerely believe, that the defendant is immediately about to leave the province. An affidavit to hold to bail made by the plaintiff's wife is sufficient. Chrétien vs. McLane, 1811, no. 63.

An incidental plaintiff resident without the province must give security for costs. McCallum vs. Delano, 1812, no. 399.

A capias to hold to bail may be had *pendente lite* upon the

usual affidavit; if the defendant is about to leave the province. Collins vs. Hunter, 1813, no. 534.

An affidavit to hold to bail sworn before one of the judges is sufficient. Ermatinger vs. Seguin, 1814, no. 30.

If a surrender by bail is not such that an action lies upon it against the sheriff for an escape the bail remain liable on the bail bond. Harvey vs. Dennie and al.

An affidavit to hold to bail must be positive that the debt is due, the words: "as appears by the plaintiffs books" or "as the plaintiff believes," is not sufficient, and the defendant in such case will be discharged on filing a common appearance; no counter affidavits can be filed. Hodgson vs. Oliva, 1821, no. 73.

An affidavit as to the existence and amount of the plaintiff's debt made by his attorney ad negotia is sufficient to hold the defendant to bail if it be positive. Sanderson vs. Robinson, 1821, no. 55.

If in an affidavit to hold to bail on a capias ad respondendum the cause of action is not expressed, or is so expressed that it shows a cause of action different from that which is set forth in the declaration, the court will discharge the defendant on common appearance. Miville vs. Miville, 1819, no. 637.

Appearance and Default.

The default day on process ad respondendum (or tertius dies post) is the third after the return day, the return day not included. Troismaisons vs. Grant, 1809, no. 130.

The *tertius dies post* is the third juridical day next after the return day. The return day not included. Tasché vs. Bérubé, 1809, no. 188.

On taking off a default, ten shillings must be paid into the

hands of the prothonotary. Fortier vs. Betthier, 1810, no. 176.

If a party summoned to admit or deny his signature does not appear in person or by attorney the signature must be taken *pro confesso*. Bryson vs. Hooker, 1811, no. 805.

On a summons ad respondendum and also to admit or deny a signature, appearance by an attorney ad litem is sufficient. Allison vs. Deblois, 1811, no. 204.

The court will not allow a motion for the benefit of the defaults, if it appears that the defendant was not called upon the return day of the process ad respondendum. Ritchie vs. Flower, 1812, no. 170.

In default action the character and capacity in which the plaintiff sues, and in which the defendant is sued, are admitted by the default of the latter, and evidence of the debt only is required by the ordinance 25 Geo. III, c. 2, s. 6. Berthelot vs. Robitaille, 1813, no. 340.

The appearance of a defendant without pleading a defect in the service of the summons is a waiver of the irregularity. Belanger vs. Perrault, 1817, no. 1004.

The costs on taking off a default must be paid into court. Vermet vs. Consigny, 1817, no. 1065.

The court will set aside the default and dismiss the action, if it appears on *délibéré* or at the hearing that they have not been legally obtained, and that the defendant has not been regularly summoned. Shephard vs. Tonnancour, 1818, no. 619.

If in an action *hypothécaire* the defendant makes default and does not appear he will be condemned to pay cost, For it is he that drives the plaintiff to proof in consequence of the ordinance which requires evidence of

the demand in all default actions. Taschereau vs. Belanger, 1819, no. 1127.

A defendant who does not appear admits by default the character in which he is sued. Auld vs. Milne, 1819, no. 509.

If the defendant appears the non-service of a copy of the declaration will only authorise the defendant to move for a copy of the declaration and that the rule to plead should date from the day of the service thereof. Montminy vs. Tappin, 1820, no. 1064.

Enquetes and their incidents.

A plaintiff cannot give evidence out of or beyond his bill of particulars; but the defendant must object to such evidence as it goes beyond it at the time of the *enquête*. Clark vs. Forsyth, 1813, no. 3.

Plaintiffs cannot be allowed to prove a demand not contained in his bill of particulars. Craig vs. James, 1817, no. 5.

A bill of particulars is in the nature of the *articulation de faits*, but it is also a confession. Therefore although it may be amended as to a mere error, it cannot be amended in an essential matter of substance .Reiffenstein vs. Robinson, 1821, no. 53.

Commission rogatoire.

If no step has been taken by the adverse party, a commission *rogatoire* may be had after four days from issue joined. Patterson vs. Bourne 1810, no. 238.

EVIDENCE.

If it appears at the *enquête*, in evidence, that the plaintiff

has a copartner who is not a party to the suit, the court will dismiss the action *quant à présent.* Roger vs. Chapman, 1817, no. 549.

In this case the plantiff declared upon a donation of a certain day and at the *enquête* proved another of a different date; before the cause was heard, he had moved to amend his declaration by inserting the true date of his donation, the defendant consented to this amendment, and the plaintiff then set down the cause for final hearing but without any ulterior proceedings, and when the cause came on, contended that the law would permit him to use an *enquête* taken in a prior suit upon the same cause of action and that this was a similar case, *sed per curiam:* when a cause has been out of court by a *péremption d'instance,* if an *enquête* has been taken, it is allowed to subsist and may be used in a second action founded upon the same grounds of action, and this appears to be reasonable, but we are not aware of any authorities which would justify the reception of an *enquête* in a subsequent cause under other circumstances. Leclerc vs Roy, 1818, no. 509.

The *code civil, titre* XXII art. 4, requires (*à peine de nullité*) according to Rodier p. 435, that the examination of a witness should state his name, surname, age, addition and residence, that he was sworn and whether he is or is not a servant or relation or of kin to either of the parties, and if he is, in what degree; but it does not require that it should state wether he is or is not interested in the event of the suit. To omit therefore to say that he is not interested, does not vitiate his examination. Larrivé vs. Bruneau, 1821, no. 790.

After *enquête* closed, no witness can be examined except as to *faits nouveaux.* Laterrière vs. Simon, 1821, no. 790.

No papers can be filed or produced in evidence after the *enquête* is closed. If a party means therefore to interrogate his opponent on receipts or other papers he must file them before he moves for leave to *examine on faits et articles.* Ryan vs. Chaffers, 1821, no. 1072.

EXHIBITS.

Exhibits offered at the *enquête* before a jury, are by law referred to their consideration and not to the consideration of the court, and upon writ of error are not to be sent up to the court of appeals. Flower and al vs. Dunn.

Exhibits produced at the *enquête* or filed before, may be detained and impounded if there be cause to doubt their authenticity and justice requires it. Allen vs. Harris, 1811, no. 196.

The court will permit another copy of a notarial acte to be filed if it plainly appears that a copy was filed with the declaration and has been mislaid. Osgood vs. Lelièvre, 1818, no. 80.

Faits et Articles.

A party interrogated on *faits et articles* cannot call upon the court to decide upon the pertinency of the questions which are proposed to him, if he has not refused to answer those which he deems objectionable. Leight vs. Guay, 1809, no. 61.

In an action between traders for goods sold, *faits et articles* are admissible under the english rule of evidence. Mathon and al vs. Martin 1809, no. 70.

The motion for *faits et articles* must be made before the *enquête* is closed. Vallerand vs. Hart, 1810, no. 43.

When a party interrogated on *faits et articles* confesses the fact charged and states a distinct fact in *avoidance* of the fact which he confesses, the former is evidence againt and the latter is not evidence for him, but if the fact charged is by the party stated in his answer to be other than that which is alledged, as when the plaintiff asks whether he the defendant did not on a certain day receive from him one hundred pounds,as a loan, and the defendant answers that on that day he did receive one hundred pounds which the plaintiff then and there gave him, the answer manifestly must be taken *in toto* as it is given, and cannot be divided, because nothing of the fact charged, viz: the loan of £100, is admitted, and consequently his answer affords no evidence against him. Hooper vs. Konig, 1813, no. 6.

When a party interrogated admits a fact and states another fact in avoidance of the fact admitted, this admission is evidence against him, but what he states in avoidance of that fact is not evidence for him. Stanfield vs. Masse, 1813, no. 15.

A party cannot be examined *de novo* upon new interrogatories on *faits et articles* which relate to the same facts on which he has before been interrogated. Heaviside vs. Mann, 1817, no. 9.

The defendant on *faits et articles* had answered thus:— " the note is in my hand writing, but it was in part an usurious contract for compound interest," the court held the signature to the note proved, but would not receive the defendant's declaration of usury as evidence, the question was barely, " did you sign the note." Hart vs. Barlowe, 1817, no. 103.

The party interrogated who is requested to answer to the question, "Is the signature to this note of your writing" may admit or deny the signature, but if he admits he cannot add that he has since paid it, for that is a fact separate and distinct from the question propounded. Rochette vs. Laberge, 1817, no. 670.

A plaintiff cannot be compelled to answer on *faits et articles*, or on the *serment décisoire*, to any question which tends to charge him with usury. Hodgson vs. Hanna, 1818, no. 310.

A note is declared upon which is of one date, and a note of another date is annexed to *faits et articles* which a defendant does not answer. This refusal to answer cannot be received as an implied admission of the note declared on, nor can the plaintiff's motion pro confesso be allowed. Manuel vs. Frobisher, 1818, no. 500.

An admission upon *faits et articles* that the defendant was indebted to the plaintiff, not for money lent as demanded, but for a balance due for land sold by a notarial act was held to be a *commencement de preuve par écrit*, and to admit the plaintiff to prove that the acte had been settled and receipted and the balance lent to the defendant. Blais vs. Moreau, 1818, no. 503.

A certificate of service of *faits et articles* must state that the interrogatories and the order to appear and answer were both served. Pozer vs. Muckle, 1819, no. 332.

Faits et articles must be served at the real and actual domicile of the interrogate, and the rule to appear and answer must be served at the same time and place. A motion pro confesso cannot otherwise be allowed. Buteau vs. Duchêne, 1821, no. 110.

A party cannot be examined on *faits et articles* before issue joined, except in cases of necessity, as where ne an-

terrogate is about to leave the province. Quebec Bank vs. Baby,1821, no. 148.

Serment Judiciaire et Décisoire,

If a defendant is ordered to answer on the *serment judiciaire* it is the duty of the plaintiff to serve the rule to appear upon him, and if he does not appear the plaintiff may then move the court to refer the oath to himself. The court however, if they see fit may order the defendant to appear on another day. Prevost vs. Dérousseau, 1813, no. 354.

If an authority to defer the *serment décisoire* is filed by an attorney and is not impeached by his opponent, it must be received on the attorney's oath of office and binds his client until he is disavowed. Jeanne vs. Caldwell, 1816, no. 370.

After final heaving the *serment décisoire* cannot be allowed. The cause has then been finally referred *ad aliud examen.* Burns vs. Giroux, 1817, no. 342.

Witnesses.

A witness not summoned before the *enquête* commenced cannot be heard if an objection be taken and no suffi cient cause is shown to account for his not having been summoned. Roy vs. Miville, 1809, no. 71.

Proof by witness in an action of *dépôt* cannot be admitted without a *commencement de preuve par écrit.* Smith vs. Gateskill, 1812, no. 138.

If a witness eats and drinks at the expence of the party by whom he is summoned. It is not an objection to his competency but to his credit. Bacon vs. Caron, 1817 no. 502.

The objection that a witness is a servant of one of the par-

ties does not affect his competency but his credit. The usual declaration on oath that he is not in the service of either party is sufficient. Casgrain vs. Peltier, 1821, no. 456.

If the deposition of a witness does not state that he is, or is not, of kin to either of the parties it may be set aside. Stack vs. King, 1821, no. 1452.

Practice.

References by the court.

1st. To Arbitres.

2d. To Experts.

3rd. To Juries,

1st. *To Arbitres.*

On a reference to arbitres an award by any two of them is good, if the case was heard by all of them. Meiklejohn vs. Young and al, 1811, no. 292.

If an award is not sufficiently explained so as to enable the court to give judgment upon it the court will refer it back to the arbitrators for further explanation. Duff vs. Hunter and *vice versâ*, 1818, no. 553.

When several matters are in dispute and are referred, the arbitrators must decide *pro.* or *con.* upon the whole and must hear the parties on all of them, for want of these steps the court set aside an award, in this case. Fairfield vs. Butchard, 1821, no. 492.

2d. *To Experts.*

Experts cannot detain their report until their fees are paid, but they may move that a sum should be paid into court to secure their fees and expences before they begin to operate. Hoyt vs. Todd, 1809, no. 62.

If one of the parties die pending an enquiry by experts, their proceedings must be staid until there is a *reprise d'instance*. Taché vs. Levasseur, 1810, no. 187.

A report of experts cannot be amended by the motion of either party, but either may move for a new visit by the same experts, or for new experts and a new report. Dumontier vs. Couture, 1812, no. 33.

It is not necessary that the parties should be present when the oath is administered to experts. Paquet vs. Demers, 1814, no. 397.

An attachment may be issued against experts for contemptuous language. Morin vs. St. Pierre, 1817, no. 220.

If experts are by a judgment ordered to visit works in the presence of the parties, and yet make their visit without the parties, their report must be set aside. L'Abbé vs. Ritchie, 1818, no. 59.

JURIES, NEW TRIALS.

In an action of trespass for entering the plaintiff's house, and seizing and carrying away papers, a jury may be had, Sutherland vs. Heathcote, 1818.

Exhibits and papers read in evidence to the jury upon the trial, (*enquête*) are not to be sent up to the court of appeals upon a writ of error. Flower and al vs. Dunn, 1811, no. 136.

A jury may be had in an action on a promissory note to order, made by one merchant in favor of another. Hunt vs. Leigh, 1813, no. 250.

In an action for maliciously shooting the plaintiff's dog, either party may obtain a trial by jury. Perrault vs. Tolfry, 1816, no. 634.

A motion for a jury cannot be made until issue has been joined. Wilson vs. Trinder, 1818, no. 776.

An action by a merchant against the master of a ship to recover the value of goods lost on a *voyage* from England to Quebec, is a case of implied contract between a " merchant and a trader" and either of them at his option may have the benefit of a trial by jury. If the defendant move it is an acknowledgment that his quality is within the meaning of the ordinance. Rivers vs. Duncan, 1819, no. 440.

Wherever goods are committed to one for a qualified purpose, the disposal of them for other purposes is a *tortious conversion*, therefore, in this case, which was an action *in factum* for the conversion of the plaintiff's property to the defendant's use, it was held that a jury might be had; and it was also held that a challenge to the panel must be decided by three Triers, as in England. Adams vs. Henderson, 1819, no. 1036.

If in an action of account any issues are raised by the *débats* which are cognizable by a jury, a jury may be impannelled to decide them. On bills of account in chancery, issues of fact are often sent to be decided by juries in the court of King's Bench. Hays vs. Woolsey, 1821, no. 989.

In all issues which relate to the sale of merchandize between merchant and merchant a jury may be had, even in an action of revendication. Wood and al vs. Casgrain, 1021, no. 1160.

A new trial may be had after verdict on a trial at Bar. Dempster vs. Lee, 1817, no. 307.

Where evidence has been adduced on both sides the Court will not grant a new trial on the ground that the verdict is contrary to evidence. But where no evidence has been offered to support the verdict, a new trial may

be granted. Scholefield vs. Leblond, 1820, no. 1185.

An action *d'injures* lies for a malicious arrest of the person, and though the court may, in any case, grant a new trial for excessive damages they will not exercise the right unless the *quantum* awarded is such as indicated passion or partiality in the jury.

When conflicting evidence has been offered and the circumstances of the case have been fully and fairly laid before the jury by both parties, a new trial is not allowed. Wood vs. Deschêne and McCallum, 1821, no. 1175.

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SOMMAIRE.

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