THE JUDGES OF THE COMMON PLEAS ON TRIAL

THEIR ARGUMENT IN DEFENCE

MR. JUDGE MABANE
MR. JUDGE DUNN
MR. JUDGE PANET

ORIGINAL MANUSCRIPTS
DATED AT QUEBEC
OCTOBER 30, 1787
NOVEMBER 3, 1787

PRESENTED TO

THE BAR OF QUEBEC

BY

SAMUEL E. WEIR, Q. C.

OF THE BAR OF ONTARIO

ON THE OCCASION OF HIS BEING

CALLED TO THE BAR OF QUEBEC

14TH DECEMBER 1959

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Observations upon the oral and written evidence adduced during the Investigation, ordered in consequence of the address of the Legislative Council so far as respects the Court of Common pleas for the District of Quebec.

However difficult it may be to reduce to a degree of method the incongruous Mass of Evidence as it is termed, collected by the Attorney General, respecting the Court of common pleas for the District of Quebec the Judges thereof have to attempt the Task. It is therefore necessary that it should be ana=lized, and classed under the following Heads, viz.

1.st — Delays

2.ndly — Want of Rules

3.dly — The matter of Costs

4.thly — The Granting writs of Saisie, and

5.thly — Inconsistency and uncertainty in the Judgements of the Courts

These

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these require general animadversions, independent of the observations which will be made on each particular case, in the Course of Examination of the depositions, so far as the cases may appear worthy to be noticed, and the time admit. and

First — With regard to delays in the Court

Complaints of delays in Courts of Justice are Common in every Country, but they are with Justice, to be imputed only to the Suitors themselves or their Attornies, who are but too frequently benefited by them, and not to the Judges, for they can have no interest. Little reflection or experience is sufficient to enable men to conceive the variety of means and Subterfuges which Lawyers and parties will avail themselves of, in order to elude the most vigilant and decided attention on the part of the Judges to expedite the decision of causes. A more than reprehensible instance of such conduct in the Attorney General in the Cause of Gray agst. Grant's may be seen in the four Exhibits N1.

Exhibits. 1.

~~N.° 1~~

The Suitors, as well as their Lawyers, frequently have indulgences for each other, over which it is impossible for the Judges to have any control.

For the purpose of fixing fit days for the hearing of causes, regard must be always had to

the distance

the distance of the place where the Witnesses reside, the Season of the year, and State of the Roads; and the Severity of the Climate frequently renders the Roads impassable.

For seventeen years, antecedent to the last Session of the Legislative Council, as was the practice during the antient Government of this Country, the Sittings of the Court were weekly; and in the course of the Evidence it appears that the Judges, in order to expedite business, frequently gave extraordinary days, which the law authorized them to do; the words of the Ordinance being "one day <u>at least</u> in every Week" a proceeding which the Attorney General, though he had applied for and obtained them on many occasions, wishes now, as appears by his Cross-Examination of Mr. Gray, to be considered as illegal. Great must be the inconsistency of that Man, who at the times he accuses the Judges of granting delays, does not scruple to attempt a censure of their conduct for having, from a desire to dispatch the concerns of the Suitors, by granting extraordinary Sittings, done more than the Law required.

Secondly — With regard to a want of Rules in the Court the mode of proceeding in Suits instituted in the Court

in the Court of Common pleas, is fully regulated by the Ordinance of the Governor and Legislative Council of 1777, continued with additions from time to time to this day. The rules necessary for the Conduct of causes, from the issuing the Writ of Summons to final Judgement, are therein establi=shed. Where the Ordinance is silent, the form of proceeding remains as it was prior to the Con=quest.

As the Ordinance of 1777, with is additions, made deviations from the antient law in declaring the Sheriff / An officer unknown to that law / to be the Officer to whom the process of the Courts should be directed and by whom they should be executed; the Judges supplied a defect in the ordinance with respect to his office by fixing more clearly the manner in which the Sale of moveable and immoveable property should be executed.+

+ See Mr. Lynd's depo=sition

+ They required the Clerks to lay before them each court day a list of the Causes upon the Roll, in order to be called in turn; a rule that was never deviated from, except in particular cases, when the attendance of Witnesses from distant parts of the province, rendered a deviation not only equitable but necessary.

+ See Mr. Lynd's depo=sition

+ They made an additional rule on the 12th. of April 1783, calculated merely to prevent delays, and to enforce obedience to their interlocutory orders

+ See Mr. Lynd's deposi=tion and Exhibit. 2.

orders, by Subjecting the Advocate or Attorney who should not comply therewith, to pay to the advocate moving the Same the costs accrued from his non-compliance in all cases where it was thought fit to enlarge the time.

The Suitors are permitted by the Said Ordi=nance of 1777 to plead, and they frequently do plead their own causes; Stricter rules of practice than those Established by the Ordinance (a circumstance, which the Legislature duly contemplated) would have depri=ved those Suitors of the benefit of that wise provi=sion.

If by the general term Rules, Interlocutory orders are to be understood, as one of the Lawyers in his examination Seems to have apprehended it, these must vary according to the circumstances of each case, and are formed as the Exigency thereof may require for the furtherance of Justice.

Thirdly — The matter of Costs

By the Judgements of the court, costs are Some times divided, Some times proporti=oned in a different manner, Some times a Plaintiff recovering, is ordered to pay them, and Some times costs are not mentioned.

At this distance of time it cannot be expected that the Judges Should be able to recollect the motives which might have determined them in this respect upon the different cases.

In the few causes

In the few causes where no mention is made of costs the error is evidently Clerical, and has been supplied where execution issued.

The Court must have done it either because the Defendt had tendered & deposited the amount in Court and yet the Pltff had prosecuted upon peril of Costs

Where the Plaintiff recovering has been condemned to pay costs, or for reasons equally forcible.

It suffices for the Judges to observe that as well since as prior to the Conquest of the Country, The courts of Justice had, and exercised a right to divide or otherwise proportion the costs as reason and good conscience should dictate. See Bornier's commentary of the Ordinance of 1667 Terrieres Dictionaire de droit, verbo depens, and Extracts from the prevoté of Quebec.

Exhibit 3.

Fourthly — The granting writs of Saisie

Under this head, complaints appear against the court for having granted Writs of Saisie Conservatoire, and Saisie-arret.

These writs have never given inquietude notwithstanding the preamble inserted at full length in the introduction to these observations from the printed ordinance proposed by the Honourable Chief Justice to any of His Majesty's Subjects, except to such Debtors as wished to give under preferences to some of their Creditors, or to the Debtors of the Hon.ble John Cochrane, who had

entertained

entertained hopes that they would not be made liable to Government for the amount of the public money with which he had credited them.

In order to establish the legality of the writs of Saisie commonly distinguished by the names of Saisie conservatoire and Saisie=arret / the first of which is an attachement of a debtor's effects in his own possession, the other an attachement of his debts and effects in the hands of a third person / it may be fit to state briefly, the laws which authorized and required the Judges to issue them upon proper application.

The 164 article of the Custom declares that "An Obligation made and passed under the "Royal Seal / that is to say the Seal of every Royal "Jurisdiction / has the force of an execution against the "Moveables and Immoveables of the Obligor."

The Commentator Ferriere explains himself on this article, as follows, "It must be observed for the "interpretation of this article, which was the 168th of "the antient custom, that contracts or deeds passed "before a Notary, when Sealed have the same force "with Sentences or Judgements of a Court: they carry "execution with them, and are executory without the "authority or permission of the Judges of the Juris= "=diction wherein the Deeds are Sealed. When Deeds "are not Sealed they have not the force of an Execution

Observation

The ordinance of the Governor and Legislative

Legislative Council of 1777 by ordering all writs to be issued in the King's name / in conformity with a Royal Instruction / and requiring the Judges to address the same to the Sheriffs of the respective Districts, who by that Ordinance were appointed and required to execute them, occasioned a material deviation from the mode or form of proceeding followed under the antient practice, which will hereafter be more fully taken notice of.

By the 12.th Article of the 5.th Title or Section of the Edict or Ordinance of 1673, it is ordined, as follows,

"The holders of Bills of Exchange, by the "permission of a Judge, may seize the Effects of the "Drawer or Indorsers of the Bills tho' they may "have been accepted, and even the Effects of the "persons on whom they may have been drawn, pro-"vided they have accepted them."

Mon.r Bornier in his Comment upon this article says, that it is always in case of a protest, and for non-payment, that the Ordinance has found the means the most speedy of re-imbursing the Holder of the Bills, as well from the Drawee as the Drawer or Indorser.

Observation

By this Law

By this Law as well as by the English commercial custom, A protest is only necessary to recover against the Drawer and Indorser. The Holder has no occasion for a protest to enable him to commence an action against the Acceptor; the time of payment being Elapsed, his acceptance alone renders him liable to be prosecuted according to the mode prescribed by the municipal Laws of either Country.

The 5.st article of Title 11 of the same Edict declares "that from the day a debtor absconds or "conceals himself, or that Seals are put upon his "Effects, he shall be reputed a Bankrupt

In the Original.

"La faillite ou Banqueroute sera reputée
"ouverte, du Jour que le debiteur se sera
"retiré, ou que le Scellé aura été apposé
"sur ses biens."

Mons.r Bornier observes upon this article "that "a Merchant who does not pay his acceptances when "due is reputed a Bankrupt; as well as those to whom "a Bill of Exchange, by them drawn or indorsed, "is notified to be returned under protest, if they do not "immediately take up the same."

Observation

This Comment confirmes the foregoing observation on Art 12. Tile 5, with respect to the use and necessity of Protests, and serves to illustrate that article.

The Saisie or attachement commonly called Saisie conservatoire, gives no preference in favor of the

person

person suing out the writ over the other
creditors of an Insolvent Estate, for the 179th
Article of the Custom directs the Estate of
insolvent Debtors to be divided rateably amongst
all their Creditors. Hence the writ of Saisie-con-
=servatoire only prevents Debtors, of bad faith, from
making away with their effects to favoured
creditors, and as such is useful to commonwealth in
general.

The 173 article of the Custom of Paris
says" Under an accustomed privilege, a Citizen
" of Paris who has lived there for a year and
" a day, can proceed to attach the Goods and Effects
" of his Debtor being a Stranger, when found in the
" City without obligation or Writing, but not
" the goods and effects of any Debtors except
" Strangers.

Observation

This article was adopted and in practice here
antecedent to the Conquest.

Ferriere upon the 160th article of the
" Custom observes that one may proceed to attach
" or Saisie moveables in vertue of a Simple Cedule,
" having the permission of a Judge which is obtained
" by petition, according to the 144th Article of the
" Ordinance of Orleans." This Author treats fully
on the Saisie arret in his Law Dictionary, verbo
Saisie-arret.

Follows an

Follows, an application of the said Laws to the writs which have been granted.

1st.

J. Grant, Buchanan & Shannan Shaw & Fraser and John James agst. William Caw.	The Seizure or attachment called Saisie conservatoire issued in this case was granted under the 164th article of the Custom, in consequence of a Deed passed before a Notary and also under the 1st article of Title 11 of the Edict of 1673 called the Code Marchand. the Effects having been previously sealed up by the Notary with the consent of the Debtor who was a Bankrupt.
Laymburner, Jones & Goodall Trustees to the Estate of Cary agst. Thomas Cary	This attachment was likewise granted under the 164th article of the Custom, in consequence of a Deed passed before a Notary, between the Defendant and his Creditors, establishing his Insolvency.
Shoolbred & Barclay, and Davison & Lees, Trustees to the Creditors of John Justus Deihl agst. John Justus Deihl	This attachment was also granted under the 164th article of the Custom in consequence of a Deed passed before a Notary, between the Defendant and his Creditors, and a Subsequent Declaration under his Hand, of his Insolvency.

This

John Fraser & Company
agst.
Thompson & Shaw

This attachment was granted under the 12th article or Section of title 5 of the said Ordinance of 1673 called the code Marchand upon bills of Exchange accepted by the Defendts. and the time of payment elapsed, which constituted their Bankruptcy.

The Solicitor General at the instance of his Excellency General Haldimand
agst.
The Honble. John Cochrane

This attachment of monies in the hands of the Several Debtors of the Honble. John Cochrane was granted upon petition under the 144th article of the Ordinance of Orleans, and the antient usages of this Province, in Consequence of a cedule or account in writing signed by Mr. Cochrane acknowledging the amount of the Debt and other Documents.

Messrs. Watson & Rashleigh
agst.
Daniel & Dalton

This attachment of the effects of the Defendants in the hands of John Dormer was granted upon petition under the 144th article of the Ordinance of Orleans, and according to the antient usage upon a Debt proved by affidavit duly attested under the seal of the City of London affixed by the Lord mayor.

Lindsay & ca
vs
Daniel & Dalton } should be here

Simon Fraser Attorney to Thomas Franklin
agst.
Robert Willcocks

This attachment was granted under the same 12th Art. of the Ordinance of 1673 upon Bills of Exchange accepted by the Defendant and protested for non-payment to preserve recourse whereby he was constituted a Bankrupt.

This attachment

The Solicitor General at the instance of his Excellency General Haldimand agst. The Honble. John Cochrane

This attachment of monies in the hands of several Debtors of the Honble. John Cochrane was granted upon petition under the 144.th article of the Ordinance of Orleans and the antient usages of this province in Consequence of a cedule or account in writing signed by Mr. Cochrane acknowledging the amount of the debt and other documents.

repetition

Messrs. Watson & Rashleigh agst. Daniel & Dalton.

This attachment of the effects of the Defendants in the hands of John Dormer, was granted upon petition under the 144.th article of the Ordinance of Orleans and according to the antient usage upon a debt proved by affidavit duly attested under the seal of the City of London offered by the Lord Mayor.

repetition

Lyndsay # Attorney to Bombanner of Bristol agst. Daniel & Dalton

This attachment was granted upon the same principle of Law, as that granted agst. the same Defendant at the suit of Messrs. Watson and Rashleigh & upon similar proofs under the seal of the city of Bristol.

Morehouse

Thomas Aylwin & Company
agst.
Abraham Morehouse

Morehouse was a foreign Mercht. an Inhabitant of Vermont but at the time of issuing the attachment a Prisoner in the Goal of Quebec upon a Capias ad respondendum at the suit of another Creditor. To obtain the Writ of attachment there was produced to the Judge an obligation passed before a Notary in which the Defendant acknowledged the debt and it was granted under the 164th and 173 articles of the Custom. Morehouse was afterwards tried and convicted in the Court of King's Bench as a cheat for having obtained under false pretences the Goods for which this attachment was granted.

How evident is the inconsistency of Men who at the time they stand up for the interest of commerce, find faults with the Law of the Country, which alone could, by the writ in question prevent these goods from being carried out of the province.

Peter Fargues & Ducan Anderson
Trustees to the Estate of John Volant de Champlain
agst.
Volant de Champlain

The Defendant became a Bankrupt & P.C.Ms were appointed Trustees for his Credrs. His wife who was suspected of secretary his effects of which he could render no acct. sett up as a Marchand Public and died

Upon the Petition of the Several plaintiffs as Trustees & Creditors, and for the preservation of their Just demands, the Court granted an order to the Sheriff to affix Seals on her goods and effects.

Mons.r de Ferriere upon the head of affixing Seals, in his Dictionaire de droit verbo, Scellé, thus explains himself.

" Scellé, is the affixing of a Seal
" with the King's arms / by the Judge
" of a place or a Commissioner of the
" Chatelet / upon the Trunks, Closets,
" and doors of the rooms in which
" are lodged the Goods and moveable
" effects and papers of a person
" deceased or absent, for the purpose
" of preserving them for the Heirs
" or Creditors so as to prevent the
" Seals so affixed from being broken
" or taken up, without the presence
" of the person affixing the same."

"There are many causes
" for which the Seals may be affixed
" a creditor may cause it to be done
" on the Effects of his deceased Debtor,

having

" having a sufficient title constituting
" him a Creditor for a Sum certain &c &c"
The Sheriff is by Law appointed
the proper officer for Executing
the processes and orders of the Court.

The Hon.ble Henry Caldwell Esq.r
agst.
John Harrison. - - -

This attachment or Saisie conser=
=vatoire was granted under the 16.th
article of the Custom upon an obli=
=gation from the Defendant a farmer
to the Plaintiff his Land lord
passed before a Notary for rent.
The Judges might have granted
a Saisie Gagerie in vertu of the
Case, but the obligation had Liqui=
=dated the Debt. and established
the insolvency of the Defendant
who had thereby conveyed to the
Plaintiff his Stock & effects for
payment, part of which he after=
=wards concealed. There was the greater
fitness in granting this writt because such part
of the Stock and Effects of the Defend.r
as could be found by the Sheriff had
been Seized under an Execution at
the Suit of one Macnider for a
Debt.

These writs are very favourable to the interests of Commerce,
in as much as they tend to prevent insolvent Debtors from
giving undue preferences to favoured Creditors and greatly

increase

increase the Security and facilitate the recovery of Debts. from the writt of Saisie arret issued on the 1st Information exhibited by the Solicitor General against the Hon.ble J. Cochran and Messrs Shaw and Fraser as Tiers Saisis, great benefit accrued to the Nation. (here a page is ommitted)

Fifthly

Touching Inconsistency and uncertainty in the Judgements of the Court.

It is not possible adverting to the shortness of the time they have to conclude, and number of Judgements mentioned in the Evidence, oral and written, that the Judges should observe on each particular Judgement.— Perhaps it might be sufficient alone to file the authenticated + lists of causes from which appeals have been made, amounting from the year 1764 to the 1st of May 1775, to the number of twenty one, whereof one Judgement only was reversed in the Court of King's Bench By Chief Justice Hey, and of those of that day to the first of May 1787 amounting in number to Forty one more whereof ten have been reversed in the Court of Appeals; but of these ten two only were appealed to the King in Council; and his Majesty in Council by reversing the Judgement of the Court of Appeals here, confirmed the Judgement of the Common Pleas in both these Causes; the Judges will nevertheless take notice of some of the most remarkable cases mentioned in this Investigation, from which, Conclusions may be Drawn of the misrepresentations that have been made of others by the Witnesses.

+ Exhibits N.4.5

But first

but first the Judges have to observe that the Clamour made here and in England upon the Idea of Inconsistency in the Judgements of their Court, and of uncertainty, is to be attributed to the misapprehension, real or affected, of the Laws and usages of the Country, and the misconception of the extent of the alterations which the Ordinances of the Governor and council has from time to time made in these laws; and perhaps in a great measure, to a desire which the Lawyers, and none more readily and openly than the Attorney General, had to flatter the prejudices, and coincide with the views of such of the Merchants, as were dissatisfied with the Laws and Constitution of the Country as established by the Quebec act.

It will be made to appear in the course of these observations that the Court of Common Pleas at Quebec have uniformly adhered to the same rule of General Construction upon the Governing Laws of the Country Since may 1775 the alterations which have been made in the antient Laws and usages of Canada are considerable, and it May not be improper to point out some of the most Material ones, as it will tend to illustrate the principles which governed the Court in their Several decisions, and Supersede the necessity of particular Observations on Each particular Case, under the Head of Inconsistency and Uncertainty.

The act of the 14.th of his Majesty ch. 83 establishing the antient Laws Customs and usages of Canada Contains a proviso which alters that Law with regard to

the power

the power of testing, and the form of Executing Wills

The provincial Legislature in an Ordinance passed in 1777, by directing the processes of the Courts in the different districts to be addressed to the Sheriffs and executed by them, have altered the mode of Executing Seizures or attachments affixing Seals on the Effects of Insolvent Debtors &c &c

the Same ordinance by enacting "that in proof "of all facts concerning commercial matters, recourse shall be "had to the Rules of Evidence laid down by the English law" made many and very important alterations in the antient Laws and usages of Canada. It over-ruled the objection to the competency of Witnesses of certain Descriptions; It freed the Merchants from the rigid method required by the Ordinance 1673 commonly called the Code Marchand of keeping and getting authenticated their Books to render them probative &ca It changed the nature of the proof in regard to Bills of Exchange Partnerships &ca; and it took from the Courts of Justice the power of examining the parties Sur faits et articles in commercial matters. A power much regretted by the late Judge Blackstone, not to be inherent in the Courts of Justice in England: and which would be useful in preventing undue preferences from being made by insolvent debtors to favoured Creditors; by discovering the dates of, and other circumstances attending payments made in fraud of Creditors; and in this Country would render a Court of Chancery altogether unnecessary, a court proverbial for expence and delay, and is so circuitous a Course of discovering Truth as would render it of very little benefit, if not an evident detriment in this Colony.

The trial

the trial by Jury directed by an Ordinance, passed in 1785, tho it does not, or ought not to affect the fundamental Law of the Land, is very difficult to be made applicable to it in many instances.

The same Ordinance [which being temporary has since been continued] by authorizing and requiring the Judges to receive personal Bail by Justification upon arrests, Appeals &c made to favour merchants is a deviation from the antient Law which required real property for that purpose.

The 28th article of the same Ordinance directs "that for the Satisfaction of all Judgments given in "Commercial matters between merchants, as well as of "all Debts due to Merchants for Goods, wares, and "Merchandizes by them Sold, Execution shall issue "not only against the Goods, chattels, Lands and "tenements of the Defendant, but also in case they "shall not produce the amount of the Plaintiffs "demand, against his person; any Law, usage or "Custom to the contrary notwithstanding"

This article with a view to favour the mercantile Interest extended their Security by rendering the persons of Debtors liable to arrest after discussion of their real & personal property which is greatly facilitated by the Ordinance abolishing the ancient mode by adjudication & Decret so tedious and expensive. and it materially affects the Ordinance of 1673 or Code marchand with regard to the cessio bonorum. it is almost superfluous to observe that the Act

of the

of the 14th of the King by establishing the Criminal Law of England in Canada to the exclusion of every other Criminal Law has abrogated all the parts of the said Code that are penal.

An Ordinance passed the 4th March 1777. regarding the Interest of Money altered the Laws and usages of Canada in that respect, by making that lawful and recoverable which was formerly prohibited in almost every instance.

An ordinance passed the 16th of February 1782 altered the antient Law respecting Majority and thereby materially affected in many particulars the antient Laws and usages.

The foregoing general observations being premised the Judges proceed to examine the Depositions of the Witnesses and most remarkable cases to which they have spoken. The objection of the Judges, by motion and Letters to the Hon.ble Commissioner against the admitting Lawyers and Suitors who had causes decided against them to swear to their opinion of the Legality and Justice of the Proceedings and Judgments, when recourse could, and alone ought to be had to the record, is upon the minutes. Some Lawyers to support their own Importance in the minds of their Clients will not scruple to declare their opinions against Judgements which are in contradiction to the advice they may have given. It becomes frequently the disagreeable duty of Judges to reprimand them in the Course of their practice, to check them in their improper attempts to obtain delays, and to diminish their Bills of Costs upon taxation: Circumstances, which may be easely conceived to indispose such men, as R. Rufsel and Tho.s Walker have been proved to be by the testimony of Mr. Lynd and Mr. Panet the two Clerks

Vide Cross Examination of Messrs. Lynd & Panet

Clerks of the Court upon their Cross Examination and to excite their resentments against Judges.

The Impropriety of admitting Suitors upon Oath to impeach the legality of Judgements given against them is self evident.

The Judges objected and they think with Just reason against the Hon.ble Commissioner's admitting as Witnesses in this Investigation any of the nine persons who signed the paper marked C dated the 30.th of April Last of Record in the Legislative Council, which is the only foundation for the title given by the Comonissioner to this investigation in opposition to the minutes of Reference of the 18.th of May [and ostentatiously re-echoed by the Attorney Gen.l] as being carried on by the commerce. The Judges conceive the Hon.ble Commissioner might with equal propriety consider Mr. Monk a Competent witness to prove his charges made against the Tribunals of Justice here and in England, as any of the persons who signed that paper to prove the contents of it.

The Reason given on the minutes for overruling the objection is Ill grounded, Viz. "the Judges having "called upon Mr. Lester, one of the Nine, to be examined "as a witness upon the proceedings had previous to the "23d of June." Mr. Lester was examined only to prove, in support of their memorial, that the allegations and charges therein stated were made, against the Judges, by the Attorney General on the 14.th of April charges which are neither expressed nor implied in the paper C. whereas he has been admitted to be examined upon oath by the Attorney General, to prove Facts stated in that paper which he has signed, and is therefore personally interested to support.

The first Witness adduced by the Attorney General is. —

James Tanswell Junior —

This Witness for some time a protationary under Clerk in the Office of the Clerk of the Court of Common pleas at Quebec, whose testimony must be considered at least Doubtful upon pursuing the Testimony of his Master Mr David Lynd the Clerk of the Court concerning his Character and Conduct, swears to a fact, which whether true or untrue is equally immaterial and negatory; for taking it upon a Supposition that Mr Gray was, as the Witness States, entrusted with the Judges Signature to a Blank Sheet of Paper to be carried from the Judges House from the Clerks Office to get the Writ made out upon it, grounded as the Law requires upon the Indispensible document "the Judges Fiat upon the Declaration" which with the Blank Sheet the Witness says was delivered to him at the Office, there was neither Irregularity nor impropriety in the business. The Fiat authorised the Clerk to make out the Writ, and the Witness says he made it out accordingly, Obtained the Clerks Signature and affixed the Seal to it. As by the Ordinance of the Province a Copy of the Decla.n and Fiat upon which a writ or process is granted must accompany such writ to the Sheriff whether to Seize the Goods or to arrest the Body in the first Instance and as all Executions must be indorsed and Signed by the Judge as well as Signed in the Body, it is evident that no Detriment of any kind could accrue to any individual from this Circumstance.

This —

Mr John Reid
Attorney at Law

This witness upon what is termed in the Minutes his Cross Examination, proves the practice of the Courts in granting writs of Saisie and that the Ordinance of 1673 or Code marchand was the Law upon which the Writ, alledged to in his Evidence was granted

It may be observed on the term Cross Examination that Mr Gray was also Cross Examined to 64 Interrog. not one of which arose upon his Examination in Chief by the Judges and that without any previous communication of the Questions

John Introbus
Merchant

A Critical Examination of this Witnesses depositions and Cross Examinations, to point out the glaring contradictions he is guilty of, is superseded by the unprecedented tenor of his Conduct on his last Appearance [the 4th of October] at the Board of Investigation from which it is useless to draw Conclusions that upon the mere perusal of the Entry on the minutes, every mans reason will suggest: But where the Witness has the audacity to Swear to a fact that stands Contradicted by a Record, it becomes necessary to bring that Record to meet the public Eye, and by it shew how little Credit is due to testimony from the memory of weak or wicked men, and how dangerous the practice is of admitting persons to be examined to points which are established of Record, the highest, best, and the only admissible Evidence of the point in Question.

The witness in his Answer to the 9th Interrogatory, in support of the Reasons alledged by him why his Master The Honourable John Cochrane had challenged Mr Judge Mabane, deposed "That the Hon.le Judge

notwithstanding

"notwithstanding such Challenge did sit and assert a
"right to sit to hear and adjudge in the said Cause tho'
"he did admit (as the Witness Expresses it) "that he had
"consulted with and advised the said General or Governor
"Haldimand the prosecutor, but not as a Judge as a
"Member of His Majestys Council" Whereas Judge
Mabane did not admit what the witness with temerity
alledges That he had consulted with and advised the
Prosecutor as a Member of His Majesty's Council —
what he said was reduced to writing and that written
paper was next Day filed and has ever since remained
of Record. A True State of the matter supported by the
Record, appears Expedient. In the Cause alluded to by
the Witness, which was instituted in the Common Pleas
and adjudged there in 1783, wherein the Solicitor General
at the Instance of General Haldimand as Commander
in Chief of His Majesty's Forces in the Province in
behalf of the Crown was Plaintiff and the Honour^le
John Cochrane Agent to the Remitters of Public money
was Defendant, it appears that Mr Cochrane after
having pleaded to the Information, the Solicitor Genl
having replied and the Cause being at Issue, He, Mr
Cochrane, filed an Exception to the Competency of the
Court, upon a Ground that the Judges held their
Commissions determinable on the Kings Pleasure
which was overruled by the Court. After hearing of the
Cause, the Witnesses on both Sides Examined, and a
day fixed to Observe upon the Evidence, Mr Cochrane
filed a paper of Challenge by way of motion requir-
ing a Declaration from Judge Mabane under the
Edict of 1667 respecting his Competency. The other

two

two Judges heard and decided the merits of that motion declaring it irregular impracticable and inadmissible, whereupon Judge Habane having resumed his Seat upon the Bench thought fit for his own Satisfaction and that of the Public to make the Declaration which the Edict would have required, had the Objection been found admissible. The declaration was publickly read in Court, and has ever since remained there of Record with the proceedings in the Cause; for the Sake of Comparison with the Deposition of Mr Antrobus the same is here inserted viz.

"Though I acquiesce in the opinion of the Court, I think it "right to declare in writing what I did Yesterday viva voce "upon the motion of the Defendant.

"Whatever Opinion I may have given to His Excellency "the Governor of the Province when consulted by him as a "member of the Kings Council, relative to the measure of "giving Credits for Bills of Exchange and with regard "to the bad Consequences which might arise to the King Service "and the province in General from it; likewise as to the means "of Preventing the same, I have never given an opinion — "which can in the least preclude me in my Capacity as Judge "of the Common Pleas, from giving such impartial Judgement, "either for or against the Defendant, as Law and good "Conscience shall dictate.

"I have to add that though in Common with every "well wisher to my Country I have expressed my Sense of the "abuse which has been made of the public money in "crediting the House of Shaw & Fraser with upwards of "£134,000. of it, at a time when the nation was engaged "in an expensive War, I have not as yet formed any "opinion upon the Question which is before the Court, "how far the Defendant is answerable as set forth in the

Information

" Information of the Solicitor General; though from
" the proofs and papers produced in Court I have made
" out a State of the facts, I have reserved the Consideration
" of the Law which is to result from them until the parties
" shall be heard, and their Observations upon the Evidence
" filed in Court; and this is Consistent with the Knowledge
" of my Brother Judges "

22d July 1783

A Mabane

An attention to the very material difference that is to be observed between the deposition of the Witness and the Declaration of the Judge evinces the danger of admitting Parole Evidence upon a matter remaining of Record, — Proceedings of that nature render the seat of a Judge unpleasant, and unsafe; for no disappointed Suitor, or even the Suitor's Servant, as in the Present instance with such an opportunity, will scruple to brand the Judge with an Imputation of "evident marks of partiality"

David Barclay Merch.

It would Seem that this Witness was Called to be examined upon the heads of Irregularities and Delays, and by way of proof in his answer to the 5th Interog.y. States a Conversation between him and his Lawyer relative to the mode of Action and Trial upon a Note of hand; which indeed proves the error and Common prejudices of Parties and the frequent Misrepresentations of the Attornies; but can as little affect the Reputation of the Judges as the other Conversation stated in his Answer to the 6th Interogatory, the purport of which certainly reflects no Credit upon the Client, and would not have done honour to the Lawyer had he undertaken

to —

to try the Experiment. But where the Witness swears to a Matter of fact, in support of His Lawyer's opinion, the Judges think it right to examine the fact, and compare his Statement of it with the Record. There it appears that instead of a Space of from two to Three years assigned by the Witness as the period of Duration of the Cause instituted against him and his Partner in 1784 by Mr Simon Fraser and recommended by Mr James Grant there were three Separate Actions brought, heard, and adjudged upon the Grounds mentioned by the Witness, within the periods following Viz. One instituted on the 20th. June 1784, in which final Judgement was given the 17th. of May following, another commenced the 5th. of February 1785 and Judgement upon a demurrer pronounced the 23d. of April following, and a third was Instituted the 20th. of Aug. 1785 and final Judgement given therein the 6th. of May following, a period of 22 months and a half that the three Actions were before the Court; — This is a Second Instance of the danger of admitting Parole ~~Evidence~~ testimony against a Matter of Record.

The Insinuation made by the Witness "that the Goods remained all the time rotting in the Defendants Store" relishes more of a malevolent disposition than a Love of Justice, for if those three actions on account of their Importance and Intricacy were continued in Court, for a longer period of time than he might have wished, it proves his neglect and reprehensible mismanagement of the Concern as well as the misconduct of His Lawyer; because if, conceiving he had no authority to Sell the Goods, he or his Lawyer had represented the facts to the Court to be such as he now states in his Deposition, —

doubtless

doubtless an Order to sell the Goods would have been obtained for his Relief and the Advantage of the Concern upon the first Application. The Judgements and the Cost against Mr Grant was appealed from

Robert Woolsey Merchant

This Witness Speaks Incoherently to a small matter brought into the Friday Court in 1776 soon after the raising of the Siege of Quebec by the Rebels, against three Captains of Vessels who were detained here by the Governor, for the purpose of assisting in defending the Town against the Rebels. The Complaint appeared to be that the Servants of these three Captains had during the Siege made use of the wood of a small Old Stable and a few wooden Pickets belonging to the Witness and his Brother for fuel. It appears upon the face of the witnesses Cross examination, and the fact is incontrovertible, that the town was so short of Fuel that several dangerous Sallies were risqued to procure wood from the Old houses and Fences in the Suburbs, and yet the Witness has sworn that Capt.n Park one of the three, had acknowledged in Court that they were allowed wood enough by Gov.r; an Allegation that Could not be founded in truth, and not to be credited that it ever was made by Capt.n Park; besides it did not appear that the Servants who were Sailors had any authority from their Masters to commit the supposed Trespass.

William Grant Esq.r This Witness an Honourable member of the Legis.e Council, called by the Attorney General to speak to the Substance of His, the Attorney Generals Speech at the Board on the 14th of April in his Answer to the 6th Intergatory confirms the testimony of the Witnesses

adduced

adduced by the Judges in support of their Accusation — against the Attorney General stated in their Memorial of the 1st. of May to His Excellency Lord Dorchester, by proving that from the Repetition of the Words Grace and favour by the Attorney General His, the Witness's mind was impressed with and I dare that A & B were not on the same footing of Justice in the Court of Common Pleas.

And on the Head of Delays he says in his answers to 20th. Interrogatory that he has heard the Judges impute procrastination in the Conduct of Causes to the Gentlemen of the Bar.

The other parts of His Testimony regard the practice and decisions of the Court of Appeals, and his Opinion of the Law

George Pownall Esqr. Another Honourable Member of the Legislative Council called likewise by the Attorney General, states in strong terms his Construction of the Expressions made use of by the Attorney General, viz. "The Assertion alone of "Justice being administered through the Grace and favor "of the Judges, did in his Conception imply a charge of "partiality." In answer to the 15th. Interrogatory this Honourable Witness states that Mr Judge Mabane on delivering his opinion in the Court of Appeals for confirming a Judgement of the Common Pleas at Montreal grounded upon a conditional Bill of Exchange did as far as the witness remembered, use several quotations from the English Laws in support of his opinion, but he does not assert that the opinion of that Judge was founded as the Interrogatory imports, upon those Laws. It is true that in giving his voice for the Confirmation

of

of that Judgement Mr Mabane did cite cases from English Reporters, being analogous to the Laws and Usages of Canada upon the point then in Question before the Court, but he cited such cases as correspondent reasoning upon the matter in Contemplation not as the Law to govern it.

Daniel Galvey — Mr Galvey's Deposition though a Longone is merely a relation of hearsay Circumstances totally foreign — and impertinent, and very improperly admitted on the Investigation: the more so, as other Evidence, material to the Complaint of the Judges against the Attorney General was over-ruled and objected

John Eustace Diehl — This Witness appears to have been brought up to speak to facts concerning a Writ of Saisie Conservatoire which he says he applied for against one — Chevalier his Deltor, and was refused it by Judge Panet.

Supposing the Application to have been made, which the Judge does not recollect, the Witness on his Cross Examination Declares that he produced no document to the Judge to intitle him to the writ, and without which the writ could not legally be granted. But at the same time he takes upon him to state another reason for the Judges Refusal, which from — its palpable improbability requires other proofs to establish it than the rash assertion of the witness; this Inference is Just and fair, for it is Customary, and it is always fit, that when a Petition is presented to a Judge he should — enter his Fiat for the Writ, or Express his Rejection of its prayer at the foot of it, which he signs. Had the

petition

Petition been presented and an answer in writing required as is usual, it would have freed the Judge from all misconstruction and consequent misrepresentation.

The next part of his Deposition relates to a Judgement he obtained against the Sheriff, without Costs, for monies levied by the Sheriff's Bailiff, who ran away with them, upon an Execution against a Debtor of the Witness. A Judgement to which the Sheriff rendered himself liable, by employing a Bailiff particularly recommended by the Witness, whom the Sheriff would not otherwise have employed, but had omitted requiring a Note from him that the Bailiff was named for the purpose at the Desire and Risque of the Witness.

The Statement Given by the Witness of his own Affairs, and the Writ issued against him is but partially made; A perusal of the Declaration in that Cause, an authentic Copy whereof is of Record on this Investigation will shew how well the Writ was founded. And his Letter dated Caldwell manor Latitude 45" will shew discover the Character of the man, and the Reasons why he absconded from his Creditors.

It is to be remarked that after his Bankruptcy upon account of Alterations and antidates in his Books and other reprehensible Circumstances there have been two verdicts of Juries (unanimously) ascertaining payments and transfers he made at the Eve of his failure, to have been done in fraud of his Creditors.

This Person was the first of the witnesses adduced by the Attorney General who was Cross examined by the Counsel for the Judges, after Mr Antribus (the bare mention of whose name is sufficient in this place) It

occurred

Occurred to the Counsel for the Judges from the Style and diction of the deposition, with which the witness who is a foreigner, came prepared, that it could not be his own, which led them to put the Interrogatories to him upon that subject, and they were not mistaken, for by his answers to them it appears that he had been assisted by the Attorney General who had made so great alterations in the answers that had been drawn up by the Witness himself, that he was under the necessity of writing out a fair Copy, which he delivered in at the time of his Examination, as his Deposition, a striking Instance of the impropriety and dangerous tendency of delivering Interrogatories to Witnesses previous to their Examination, a mode which the Counsel for the Judges uniformly objected to, though to no purpose, throughout the Course of the Investigation.

George Allsopp Esqr.

This Witness states his Lawyer's Opinion and Observations upon Several Causes adjudged prior to 1775. But if that Lawyer was no better founded in his Supposed Statement than Mr Allsopp himself is in the Causes he cites of a more recent date one may fairly infer That the Complaints of Lawyers to their Clients of causes decided against their advice and opinions are like the Complaints of parties against whom Judgements are given from which no appeal is made — partial and inadmissible Evidence. Besides the Gentleman alluded to was on the Spot and examined at the Board of Investigation but not to those points and the Records are existing. In his Answer to the fourth Interrogatory Mr Allsopp states Mr Cochrane's Debtors

Lymburner

Lymburner, Fraser, Mc Cord, Marchand and others as having been condemned to pay the value of their Notes of Hand some of them payable to order, to Genl Haldimand without delivering them up, while Mr Cochrane threatened a Prosecution and that he himself was for the balance of £180 due on a note in the same Predicament, Yet it must have been known to Mr Allsopp that his Notes were not payable to order as appears by Copies of them sworn to by Mr Legrand the Clerk of the Court of Common Pleas and consequently only assignable and not indorsable over therefore as liable to attachment as any Common debt and dischargeable by a Judgement of a Competent Court.

The last Case mentioned by Mr Allsopp is equally mis-state so far as regards the Law on which the Judge of the Court was founded "The Court gave Judgement "says he on the Articles of the Custom and not on the Code "Marchand that I should return to the Maps the Sum of "£40, to £50 which appeared to be the value of the "Goods of Charles Berthelot not of Watson & Rashleigh "Supply, but Goods furnished by Vialars or purchased of "some other person".

The Articles of the Custom alluded to, give a privilege to the Seller, over every thing Sold, in preference to every other person; and the Code Marchand Tit 11. Art 8th states, that nothing therein contained shall derogate from the privileges upon moveables (ascertained by the Custom) or mortgages upon immoveables, which shall be preserved inviolate. So that Mr Allsopp, for Messrs Watson & Rashleigh in this Cause having a privilege to support them in their Claim to the Restoration of their Goods under the Custom, and that

privilege

privilege reserved or Conferred by an Express article of Exception applicable to the Case, in the Code — marchand, the decision of the Court was strictly — conformable to the Articles of the Custom warranted by the said Exception in the Edict.

The mortgage on the House appeared to the Court to be a bona fide Transaction, It took place 15 days prior to his being threatened with an action at the suit of Vialars Adminis.r and no proof was adduced of fraud or unfairness on the part of the Defendant or Creditor.

Such are the material points of this Witness's testimony, all his hearsays and Conjectures or opinions with regard to the Court or the Judges are of as little — Consequence as his weak illiberal notions of the prejudices he supposes they entertain against him. In refutation of Which the Judges annex an authenticated List of the Causes in which he was a party since 1776 and how decided.

Constant Freman — The Observations upon the testimony of the last witness with regard to the Judgement in the Cause where this Witness as administrator to Vialars Estate was plaintiff and George Allsopp and Berthold Defs.ts will shew how much that Affair has been misrepresented by the Witness, whose Comparison of that with other Causes to shew Contradiction in the Court may be the Effect of Ignorance in him, and will therefore be observed upon in the Contrasts made by the Lawyers Walker, Russel and Monk who ought to be better informed. An Authenticated Copy of the Judgement will speak for itself.

The deposition of this Witness so far as it relates to the Cause of Jonge vs Freman is a fresh instance of

of the impropriety of admitting Oral testimony — where recourse can be had to records, for the Copy of the Record in this Cause so far as ~~relates~~ material to the purpose contradicts the Oath of the Witness, in as much as instead of 4 Days only which the Witness swears positively to have been granted him - The Court gave him till the next Court day to file a plea to the merits which was in reality 4 weeks instead of 4 days on account of the Adjournment for the harvest vacation.

The Conversation which the witness swears to have passed between him and Tonge cannot affect the Judge who knew Nothing of it and the supposed — conversation between the witness and the Judge in Court is highly improbable being so apparently contrary to the Record which shews a written instead of a verbal application for time to plead which is never refused.

The Case of Freeman against Coffin was as follows. John Coffin a native of Boston who had taken refuge in this Country, in 1775 being obliged to leave Boston with his family on account of His Loyalty to the King where he left a very considerable property. In march 1776 Benjamin Homer a native of Massachusets to whom Mr Coffin had given a Note of hand in 1773 was at Montreal during the Invasion of the Province by the Rebels and indorsed the note of Hand in Question to Constant Freeman whom he found at that place (he Freeman having withdrawn himself from Quebec in Consequence of Genl. Carletons Proclamation) but without any valuable consider-ation as he acknowledged in his Cross Examination other than an Accountable Receipt. The Court did Consider the Case of Mr Coffin as very hard and did

with

with great reluctance give Judgement against him, But in this the Judges of Quebec wished for no more than to be at that time authorised to give such relief to Loyalists as the Act of Parliament lately passed in ~~England~~ authorises the Judges in England to give them.

This Transaction happened in the Year 1776 prior to the Ordinance of the Governor and Council in 1777 which altered the Laws and Usages of Canada with regard to Interest, for by those Laws which were declared to be the Rule of decision by the Act of the 14th. of the King after the 1st. of May 1775 the note of hand did not entitle ~~him~~ the holder to Interest; Costs are not mentioned in the Judgement. This might have been a Clerical Error and as such easily rectified upon application to the Court or at the Office for Execution as is stated by Mr Lynd in his Examination. But probably the Witness was contented to pay his own costs and thought himself happy to get payment of the Balance due upon the principal sum knowing well as he has now avowed that it was a Collusion between him and Homer to recover the payment from persecuted Loyalist for the benefit of a Rebel Invador of this His Majesty's Province.

The Cause of Boylston vs Freeman is much complained of by this Witness but the Record to which recourse should be had will shew how very ill founded he is in his Complaints and how little Justifiable he was in giving the Plaintiffs Money in august 1776 — without Orders to Rebel Prisoners for their Bills on other Rebels residing in the Revolted Colonies. The Bills were drawn payable to Boylston and Defendants —

name

name was not upon them The Plaintiff By Mr Monk their Attorney insisted, that Boylston was not bound to Act as an agent for or Trader for Freeman and to take upon him the Negotiation of these bills which however he proved to have been demanded And refused by the persons drawn on tho' not by Protest for reasons by him assigned Arising from the State of the Colonies at the time. The court considering these Bills as an improper and not a legal remittance, Did Condemn the Defend^t to pay the Balance of Mr Boylstons Monies in his hands to Davison & Lees his Attornies, who were ordered to assign over the Bills in Question to the Defendant. In this and all the other material Causes wherein the Witness Complains, the Right of Appeal was given to him, in some he did Appeal, and in those he did not he must be supposed Satisfied with the Judgement Rendered. It would be endless for the Judges to follow up every Cause which this and the other Witnesses think fit to mention and it would be Still more endless as well as useless and unnecessary to observe upon them.

William Goodale This Witness after Stating the Law opinion of Mr Monk with regard to the Case of John Fraser for whom he had obtained a writ of Saisie Conservatoire, and that with Daniel & Dalton on which he was then Consulted gives a true picture of the Attorney General's prejudices against the Courts of Justice which he has on various occasions endeavoured to Instil into the minds of the Public contrary to Good faith and his duty, and the Conversation alledged to have passed at Mr Judge Panets in Presence of Mr Judge Dunn the English Judge is so improbable that it will not easily be credited by dispassionate men For to suppose a Conversation in French upon so material a Business

where

where three Englishmen were present and one of them the party interested not understanding that Language and that he should not address himself to the English Judge who is made to sit — Silent and hear a Gross misrepresentation of the Lawyer to the Client of the reason why the writ demanded was refused is certainly incredible. The Case was that the Writ — granted to John Fraser was founded on Bills of Exchange Accepted and the time of payment elapsed on the greater — part of them, Whereas in the other Case the action was brought upon a Simple Account Current sworn to in London before the Lord Mayor upon which the Law did not authorise more than was Granted Viz. Saisie Arrêt or Attachment in the hands of a third person. The Judges granted in both these Cases what the Law authorised and required.

This Witness goes so far to support the General Clamour in which he is a party as to suppress the truth for he could not be Ignorant that a Writ Similar to that he alledges to have been Granted to Mr Gray for his Client Mr Bonbonous aga: Daniel & Dalton and of which he Complains, was the same day granted to himself against more persons and executed by the Sheriff, upon which — different proceedings were had publickly in Court and in his Presence, At the same time it is to be observed as before that neither of these Writs nor even the Writ of Saisie — Conservatoire granted to John Fraser gives any preference whatever to the Sailors over the Other Creditors [if the Estate be insolvent] but merely prevents the Insolvent Debtor of bad faith, from making away with his Effects to the prejudice of His Creditors. It is therefore in the face of truth that Mr Goodale Asserts he would have got payment of his whole debt by means of a more speedy Judgement It may however be supposed he was misled in this as in

Other

other Law Opinions by his Attorney.

With regard to the Case of Picard in the Friday Court, not to Suppose Mr Goodall Speaking merely from the report made him by His Lawyer Mr Russel would be to Suppose him guilty of a Crime of a Serious nature for so far from the Statement by him given in Evidence being true, the Reverse is the Case, as may appear from the papers produced to the Court and the Testimony of Mr James Tod. where it is Evident that Mr Durcher had only recommended Picard to the House of Hatson and Rashleigh and that no Credit had ever been Given to Durcher on that Acct, But on the Contrary that Mr Rashleigh had informed Mr Tod that he had received £10. in Consequence of Picards Papers and would write to Mr Goodall to Settle it With Picard.

William Laing

This Witness Imputes to the Court of Common Pleas his being obliged to leave off Business as a Taylor by that Court having Declared void an Indenture between him and his Journeyman Blewatt By Judgement dated 22d October 1776 which determined Similar Cases between him and other Journeymen. Whereas it appears by the Record that the Action was a Simple Action of debt from which the Plaintiff was dismissed as nothing appeared to the Court to be due to him, and the Judgment makes no mention whatever of any Indenture. This Witness's Credibility may be Judged of from this glaring Instance of Untruth which in an eminent Degree shews the Dangerous tendency of admitting parole testimony respecting matter of Record.

The Application to Mr Judge Dunn for a writ of Laisie Conservatoire as stated by this Witness must be considered as equally untrue, as no written Proof of that Judges Refusal of such writ is produced and it would be

dangerous

dangerous indeed that the proof of such facts should depend upon the testimony of any witness but especially such a one as Mr Laing while the proper proof is by producing the Judges Refusal on the petition or Declaration which every Suitor is entitled to have and is the Common Practice. It is to be observed also that at the time spoken to, being prior to the Ordinance of 1785 - the Signatures of two Judges were requisite to writs of this nature.

John Jones

This Deposition Begins by stating that Mr Monk and Mr Russell were in general the Witnesses Lawyers and did not fail to impress him as they did others of their Clients with an unfavourable Idea of the Judges. The Petition for fixing the Seals on Cary's Effects made out by Mr Deschenaux notary according to the form used prior to the Conquest was rejected, because the Ordinance of the Governor and Legislative Council of the Year 1777 had made a deviation from that mode by ordering the Sheriff to be the Officer for Executing Writs and orders of the Court, but it appears by the Deposition that the Court made no difficulty in granting a writ of Saisie Conservatoire in the Kings Name addressed to the Sheriff Agreeable to said Ordinance of 1777

This Witness in his Answer to the Special Interrogatories put to him by Mr Ogden asserts facts which are directly contrary to the record and therefore contrary to truth, For by the Record it appears that on the 7th of June 1783 the Solicitor General made a motion grounded upon facts so very Serious and Important Nature in the Cause instituted by him ~~against~~ at the Instance of His Excellency Genl Haldimand for the Crown, against the Honourable

John

John Cochrane Agent to the Remitters of Public money which the Court ordered to be communicated by the Solicitor General to Mr Panet, and that the same should be considered of by the Court. On the 11th the Solicitor General moved for Judgement upon his motion. and Mr Panet read and filed his written Answer, upon which the Court made the Entry or Interlocutory order of that Date not complying altogether with the Solicitor General's motion but providing a remedy against a most unjustifiable Act of the Defendants Mr Cochrane, and his Debtors Messrs. Shaw and Fraser the Garnishees in a deed by them Executed dated the 16th of May 1783. which is worthy perusal. This is the only matter to which Mr Jones's Evidence can have reference. It is therefore with the utmost temerity and untruth that the witness asserts that the Court refused to hear Mr Cochrane's Council, whose written answers to the Solicitor General's motion, as read and filed at the time signed both by Mr Cochrane and His Attorney Mr A. Panet remains of Record of which a Copy is produced by the Judges Viz- Exhibit No

Adam Lymburner

The Deposition or rather Declaration of this Witness States Several Causes, which he has had in the Court, and in which Judgement has been given against him, he gained one of them as he says because in it there was the Intervention of a Jury, but he neglects to tell or Mr Monk his Lawyer has forgot to acquaint him, that the Court gave a Charge to the Jury to find a Verdict for him. In another he had the misfortune to have a Balance found against him because the Court could not admit of a charge against a Young man His Clerk, for Rum at the Rate of Forty Shillings or Eight

Dollars

Dollars a Bottle to Consume His Wages, as appears by the Judgement, Exhibit No This is one Example of the Good Causes supported by Mr Lymburner. He was entitled by Law to an Appeal from the Judgements against him: where he did not appeal, he must be supposed to have acquiesced in the Justice of the Judgements. he appealed from that where Melvin & Wills were Pltffs The Action was for £1400 the price of a Quantity of Tobacco Sold him by the Plaintiffs. The Provincial Court of Appeals having Confirmed the Judgement of the Common Pleas, the Witness appealed to the King and Privy Council but the facts in the Cause are not fairly or fully stated by the Witness. The arrangement, which he made with his adverse Party in England may be true, but it proves nothing against the Legality of the Judgement. The Law which Governed the Judgement was that of the Country, & it being a Cause of a Commercial nature, Evidence was admitted agreeable to the English Law.

The Witness was one of those Subjects who left the Town of Quebec in November 1775.

Mr John Young — This Witness whose own good Sense contrary to the practice of the Investigation and the other Witnesses, appears to have pointed out the Absurdity of Oral testimony where there are Records, that may and ought to be produced, makes an early and pointed reference, thereby Shewing an Example fit to have been adopted in the Conduct of this Investigation. He has also the fairness to applaud and approve the principles of the Judgement in the Cause between him and John Fraser so frequently mentioned, and even to declare the reluctance with which he himself, from the Strength of his own reason had to

enter —

enter upon the Law Suit, because it was to seek a prefer=
=ence which he reprobates, but his Lawyers advice
prevailed, and it is to their Conduct he has to impute the
Loss he and the Estate of His Debtors is supposed to have
sustained, For being as he states in his Cross Examination,
unacquainted with the Language of the Deed he signed
(although that Circumstance did not appear to the
Court of Common Pleas) He must have trusted to His
Lawyers who ought to have taken care of his Interest
in making Conventions which supersede all General
Law by establishing a particular One between the
parties. The priviledge Claimed by the Witness who was
an Intervening Party in the Cause of John Fraser ag^t
Thompson and Shaw is known to the Laws of Canada,
It was not however the Original Ground of His Interven=
=tion which was founded on a Sale made to him by the
Bankrupts of the Wines and Iron in Medio, upon which
no delivery had taken place. The Survey was ordered in
Consequence of the Priviledge claimed, as a necessary Step in
the Cause to ascertain a point of fact previous to trial
of the merits, or entering upon the Consideration of the
Cause for Judgment. The Court in the Interlocutory
Judgment of October, declared the Sale void for want of
Delivery and as made with an Intention to give an undue
Preference, and seeing that by the Deed of Cession and
Agreement between the Parties and their Debtor It
was stipulated in Express terms that in Case the sale
should be declared void the wine and Iron should be
Sold by the Trustees and the proceeds equally divided among
the ~~Trustees~~ Creditors. The Court ordered the Sale in
compliance with that Deed, and afterwards by the
final Judgment in the Cause did hold and Consider the

priviledge

vide Mr Youngs Evid
& the Deed of Cession he
mention which is
produced by Mr Monk
in the Cause of Thomson
& Shaw Trustees vs
Grant & Blackwood
cited in the Judgem^t in
this Cause but not
produced therein by
Mr Monk

priviledge as relinquished by it, The Effect produced by that Judgement was what the Witness so much applauds, an equality among the Creditors, The Court ordered the Sale in Compliance with that Deed, and afterwards by that final Judgement and it appeared so well founded that tho' the Witness gives some Credit to His Lawyer for having pleaded the Cause well on appeal It stood the test of Criticism and was confirmed upon the same foundation If therefore there was partiality in this Cause as afterwards stated by Mr Walker the Witnesses Lawyer in the Common Pleas it must have been of a very general and nature to have affected the members of both Courts, as to the fault that is found with the Different Interlocutory Judgements in this Cause, particularly that of October Ordering the Sale in terms of the Deed of Cession It is to be observed, that if the bad Consequences stated to have arisen from it, and which the Witness has the fairness to say was not foreseen by the Court was known to or apprehended by either party or both at the time, a Joint application to the Court of Common Pleas would have obtained an Alteration of it, and an appeal, if they could not agree was an Evident Remedy, a Renunciation of which by a voluntary Compliance with the order of Court ought to be considered as a perfect Justification of it.

In the Cause of the Witness as a Trustee to Thompson and Shaw Estate along with John Fraser against Messrs Grant & Blackwood He gives the Court of Common Pleas at least the Credit of being Consistent, and he plainly shews by that Decision, that the Court had in view the Code marchand — The Advice of his Lawyers and particularly the preamble to that of

Mr Campbell

Mr Cagnet will be more particularly attended to in the observation upon the testimony of Messrs Walker & Russel

Andrew Cameron — The facility with which charges might be established against the Judges, if such Evidence as that of this Witness could be admitted or considered as in the smallest Degree founded, whether he speaks to facts or opinions where the record of the Causes in which he Complains are extant, may be seen in the acuidity he discovers to detail deliberate falsehood, and the temerity and indecency of his opinion and Conclusions. In the Cause of Irvin vs Cameron where he states the Judge as not only refusing to hear his Evidence but his Lawyers Argument. It does not appear that any Competent proof was offered by him and that his Lawyer as well as the Plaintiffs was heard and the Cause on such hearing put in Deliberation. The Judgement appears to have been founded upon a Deed passed before a Notary against which Oral testimony is not by Law admissible - In the Cause of Drummond & Jordan against Cameron The Court allowed Interest against the Defendant upon the Evidence of Mr Simon Fraser one of the persons alluded to by that witness as having a knowledge of the matter, who clearly proved the dealing and understanding between the parties as well as the Custom in such cases to be that Interest should be paid for the Bills sold upon Credit.

The other Judgement complained of in a friday Court matter of the value of 37/6 is mis-stated. The Defendant produced a Discharge in full of all demands which was after the time plaintiff said he had furnished the Cotton wick for which the Action was brought. The Court, notwithstanding the discharge in full was of itself in Law sufficient to dismiss the Action, yet being in the friday Court for small Causes, the Defend.t was put to his Oath.—

Lewis Marchand — This Witness who takes up 23 pages in answering one short Interrogatory imputes his ruin to the Court of Common Pleas

altho'—

altho' it must be clear that his insolvency was of a much earlier date and that the Court of Common Pleas had no hand in it, for to this Day, however incredible, it may appear, he has not paid one Shilling either to the Solicitor General on behalf of Government, or to Mr Cochrane his immediate Creditor He was Call'd upon as a Garnishee or Tiers Saisie to declare like others what he owed to Mr Cochrane, he declared upon Oath that he owed and stood indebted to him Mr Cochrane in the Sum of £284.9.15.5 Currency Exclusive of Interest as appears by a Copy of His declaration upon Oath, and the Court gave Judgement Accordingly, Vide remarks on the Law and practice of Saisie Arret by Mon.r Ferriere in his Diction.e de Droit.

This Witness when Called on His Cross Examination deems the many important Questions which were thought necessary for explaining or refuting his former Examination to be impertinent, and absolutely refuses to answer them, an easy mode to get rid of a Home Question, but by no means contributing to establish his Credibility respecting the Exparte Testimony he has filed.

Robert Lester

This Witness swears to two material facts in his Examination and Cross Examination. viz.t 1.st That tho' he signed Petitions against the Courts he never had any Causes before them and Consequently no personal Experience, and that he heard only the Cause of His Excellency Gen.l Haldimand vs Cochrane in the Court of Common Pleas for the District of Quebec complained of which Confirms the testimony of Mess.rs Grant & Lees and Establishes the ~~testimony~~ assertion of the Judges that the Clamour against their Court arose with that Prosecution and Secondly that Mr Monk was only instructed by the Petitioners to use his Exertions to prevent the Bill commonly called Mr St. Ours Bill from passing it into a Law, But not to use any personalities against the Judges.

These

James Johnston & John Purfs

These Gentlemen being Partners in Trade their Complaints are in the same words and go to a Judgement of the Common Pleas not allowing Interest upon an Obligation executed under the hand and Seal of Elie Laparre a Canadian in 1770. This Obligation did not intitle the Plaintiffs to Interest the Deed is in french and the Clause respecting Interest in the following words viz. "a peine de tous depens dommages et Interêts" which is what is termed in the french Law an Obligation purement Comminatoire, or Carrying no Interest but from the Day it is put in Suit, and that not rigorously exacted or adjudged.

John McCord —

This Witness says he has sometimes recovered Judgement without Costs but he does not State either the Causes or the Reasons why.

Thomas Walker

The testimony of this Witness requires particular animadversion, he is a Lawyer at the Bar of the Court of Common Pleas and cannot be presumed ignorant of the true State of the Causes he cites upon oath especially such of them as he himself conducted for Plaintiff or Defendant if he is guilty of misrepresentations therefore it must be wilful and the Judges think it the more Incumbent upon them to Detect him as he has been Liberal in his defamation of some of their Characters.

The 1st Case mentioned by this Witness in Contrast with another to shew the inconsistency of the Court is one in which he was Lawyer for the Plaintiff Auld & Against Lindsay. He States that Plaintiffs Demand against Defendant was for £560 due by Hugh McKay and Guaranted by Defendant Verbally, non Assumpsit — pleaded, Reply that Defendant had assumed verbally and on motion to Subpoena witnesses rule granted the

Attorney

Strongly opposed by Defendant and Accordingly Mr Simon Fraser Junior and H. McKay were heard in Support of the Guarantee. The fact from the Record so far as is necessary to prove the absolute falsity of this Witnesses Assertions are, That by the Declaration a Guarantee generally but not a verbal one which is not binding and Cannot be proved by Witnesses, is set forth, Defendant pleaded as stated Non Assumpsit, and no Reply whatever appears to have been made, The Plaintiffs Advocate moved for leave to Examine a Witness Mr Fraser, to which Defendant Objected and filed a written Exception, The Answer to which drawn up and signed by the Witness so far from stating the Guarantee alleged to in the Declaration to be verbal states and requires to prove a written Agreement which by the Interlocutory Judgement upon the Exception and Answer he was allowed to do, and with that intent examined his witnesses, and having produced or proved no such written Guarantee or agreement the Cause was dismissed

The Cause Contrasted with the foregoing is that of McCaulay Vs Antrobus which is as truely stated by the Witness as the other is falsely But the proceedings thereon are strictly conformable to the Laws of the Country and totally dissimilar to the last, the one being a mercantile transaction and the other a Question about the Quantum of Rent agreed for of a House or Store in Quebec, In the former both by the English and Canadian Law, parole proof of the guarantee could not be required, and the Rule of Evidence by the English Law which was the Rule of Evidence in the Cause, knowing nothing of the Serment Decisoire [which in this Case was not Required] the Cause was dismissed for want of Proof. In the latter the Serment

decisoire

decisive was admitted Agreeable to the Antient Laws and Usages of Canada.

The Cause of Thomson & Shaw's Trustees against Col. McBean which is again Contrasted with the last Case has no affinity to it, and the reference to the Serment Decisive of the Defendant was rejected as the fact to be proved was of a Commercial Nature

Mr Walker delivers his opinion that the Code marchand was in force, but states as a fact that the Court always rejected it because not registered at Quebec. He Cites the Case of the Administrators of Vialars against Allsopp and Berthelot in Support of his Assertion, Yet it is impossible to read the Judgement alone in that Cause without discovering that the Code Marchand warranted the decision as observed on Mr Allsopp's Evidence This Case he Contrasts with that of the Trustees of Thomson & Shaw against Grant & Blackwood as two Similar Causes differently adjudged (as he states in Consequence of the Courts having retracted its former erroneous Opinion with regard to the Code marchand] These Cases differ materially in their Circumstances nor was the Code marchand rejected in the one more than in the other, whether Mr Walker has or has not knowledge — enough of the Law to discover or Justice enough to own it, is immaterial.

The witness also states the following Contrasted cases to have been intitled to the same decision tho' differently adjudged.

1st The Causes Walker vs Ferguson with Boylston vs Freeman The Contrast is by no means Justifiable, The one was the Case of a Regular Bill of Exchange indorsed by the Defendant for Value but neglected to be protested by the Holder or notice given in the regular and proper time whereby the Recourse was lost. The other of a Nature and under

Circumstances

Circumstances very different as is spoken to in observing upon Mr Freemans testimony, and may be more fully seen on Examining the Record and proceedings which are too long to be here again observed upon, There is no such Cause as Allsopp against Berthelot, the Witness must mean Vialars Administrators Agst Berthelot and Allsopp which with that of Morehouse and Aylwin is by him Contrasted with the Cause John Fraser against John Young, But these several Causes differ in their Circumstances and required different decisions as may appear by examining the Records, That of Fraser Vs. Young has been stated at large in the Observations upon the Testimony of John Young and that of Vialars Administrators against Berthelot and Allsopp in the Observations upon the testimony of George Allsopp, Aylwin, against Morehouse was somewhat similar to the last Case tho' many Circumstances occurred in the one that did not appear in the Other, the General principle of the Law of Revendication was pleaded in both but the Latter Case was accompanied with a Charge of fraud in Obtaining the Plaintiffs Goods which was tried by a Jury upon an Intervention of a third Party and found against the Claimant who was the Defendants Associate.

The Cases of Lemoine against Grant, & Ferguson vs Liard occurred at the Distance of seven Years from each other, in the former the Plaintiff had Accepted a Conditional Guarantee to return a watch or pay the value in Six Months to which period the Court suspended the Action & the Defend. having then tendered the value the Pltff. accepted the Same & then the Cause ended to the Satisfaction of Both Parties, In the other the Plaintiff had accepted of the Defend. a note of hand payable at a future period without Condition, and the Court

dismissed

dismissed the Action as premature, because the Defend might on the Day Stipulated for payment, tender the Amount of the Debt. This Young man's temerity in Charging the Court with Glaring injustice & no matter of Surprize or Concern to them.

In answer to the 21st. Interrogatory this Witness states his Opinion that in the Cause of John Fraser and John Young there was partiality in favour of the former by one of the Judges and his Reasons for so thinking are contained in his Answer to the 24th. Interrg. which states the Case and Involves the whole Court, (for the Judgement was unanimous) in the Charge of aggravated partiality and Injustice, this Case has already been stated by the Judges in Observations on Mr Youngs testimony and they have only to remark further upon this Daring Violation of decency decorum and respect as well as of truth that there is no length this witness is Capable of going from the innate depravity of his own heart, and nothing he may not be capable of having recourse to from the Desperate State of his private Circumstances.

The Complaints he makes of finding difficulty and Delay in issuing a Capias at the Suit of Willard against Morehouse is not to be attributed to the Judge. He brought a Declaration and his Client to make an Affidavit, upon which he obtained the fiat for his Writ, had he asked the Judges Signature to a Sheet of paper on which to fill up the Writ, prudence would have dictated the Judges Refusal for altho no injury could have arisen from it to the Public Mr Walkers Private Character did not intitle him to that personal Confidence.

The

The Causes of Shoolbred and Barclay vs Grant & Blackwood as contrasted with Howard vs Ainslie in which he charges the Court with an unjust distribution of Justice through Grace and Favour, is like all the Rest, most partially and unjustly stated. In the 1st. Case the Sheriff returned the Summons the 11th. of November, on the 18th. Mr Walker pleaded a tender and a Difference about a trifle of Costs was set down for hearing the 23d. Mr Russel who was Attorney for the Plaintiffs being charged with Mr Walker's Apology to the Court for Non Attendance, as he states, and of Course not insisting on its coming on to be heard — Agreable to the Rule the Cause was Continued. That of Howard vs Ainslie was in very different circumstances, on the 28th. of October a retraxit was filed by Mr Walker for the Plaintiff. and Mr Gray moved on behalf of the Defendant [who was collector of the Customs and wrongfully Sued for some duties said to have been illegally exacted in virtue of his Office] for treble Costs in such case allowed by act of Parliament, 4th. Geo: 3d. The motion was ordered to be put in writing and communicated to Mr Walker. on the 11th. November the motion in writing was ~~again~~ filed and Communication again ordered, on the 13th. November Mr Walker moved for farther time till the 23d. to answer the motion of Mr Gray made the 28th. of October, and on the 23d. Mr Walker not appearing and having filed no answer whatever to the motion, and Mr Gray moving and insisting for Judgement on the Act of Parliament, the Court seeing the Case perfectly clear and Mr Walkers Gross neglect or desertion of the Cause, gave Judgement in favour of the Defendant. These Proceedings appear by the Exhibit No

the

The Clause in the Execution at the Suit of Shoolbred & Barclay vs Hodienne is different from that stated by Mr Walker and was no more than a Detainer upon the Defendant for want of Bail which is clearly agreeable to the Spirit and meaning of the Ordinance under which the Capias ad respondendum is granted. The Sheriff would have kept the Body whether that Clause had been inserted or not in the Execution else the personal Arrest in the First Instance would be nugatory and useless, for no Capias ad satisfaciendum can be obtained till a discussion of the moveable and immoveable Effects.

The Saisie Arret which the witness mentions to have been obtained against W is most grossly mis-stated and most perfectly impossible from the face of the story even as told, for no attachment can ever exceed the Amount of the Debt for which it is laid, In this Case the Plaintiff Hay having a liquidated demand established under the hand of the Defendant in the Clearest manner, Applied at the Office instead of applying to the Judge for a Summons against the Debtor & and an order of Saisie Arret to stop the amount of it in the hands of Melvin & Wills as the Defendant was about to leave the Province and his person could not be arrested for so small a sum as £9. The French Clerk with whom printed forms of Declarations and Summonses (as directed by the Ordinance of the Province for Causes under £10 Ster.) are left signed by the Judge for the Sake of Convenience, gave the Order to attach along with and at the foot of the Summons against the Defendant and the same was executed by delivering a Copy thereof to the Garnishees who were directed to hold in their hands the Effects of the Defendant if any they had for Satisfaction of Plaintiffs Demand till farther Order and of Course to that amount only. The mode of this Writ or Order to attach being obtained was complained of By Mr Walker as Attorney to the Defendant and the

Court

Court at the return set it aside, tho' the Plaintiff was Certainly entitled to such a writ and had he applied by Petition it would have been sustained. ~~In~~

In the other Cause the witnesses temerity exceeds all bounds and if the Judges have to reproach themselves in any thing it is for their mistaken lenety in not having upon this Occasion dismissed him from their Barr which he justly merited, for it is in proof that for a wager the witness applied for and obtained upon a supposed or fictitious Debt of five Shillings, from the Clerk's Clerk or Servant an ignorant Lad whom he imposed upon in the absence of the Clerk a writ of Faisie Conservatoire which he himself filled up or Dictated and for which he was afterwards reprimanded by the Court in a manner that might have prevented his exposing his own turpitude on this Occasion, if he was not Callous to every Sentiment of Delicacy.

Robert Russell The foregoing Example of the Lawyers adduced by Mr Monk to support his Charges may serve as a Preface to the observations upon this witnesses testimony However unusual it is for Lawyers to deliver their Law opinion upon Oath Mr Russel makes no hesitation to swear positively to all he has given, which are in proportion numerous as his Deposition is elaborate and extensive His work appears to have had the Approbation and Sanction of the Attorney General who only corrected a little of his diction before it was delivered in and therefore must be a model of Perfection. The author was employed in assisting Mr Monk in his daily researches into the Records of the Common Pleas since the Commencement of the Investigation and from those recent researches, and his own experience as a practising Lawyer, it might be reasonably Expected there would, as there ought to be, no deviation from truth in the Reports of the cases cited by him—

him in his Deposition, This premised, the Judges will proceed to examine a few of those Cases, the witness being too Voluminous to be followed up in every particular he mentions, from the Comparisons of which with the record of the fact the truth or falsity of the others may be Judged of.

In the outset of his deposition the witness honors the Court with his approbation of a number of their Judgements. The first he Complains of is that of Bricket agat. Savard in July 1776 where the Court committed the Parties and the Witness upon the trial of the Cause This Suit came before the Court recently after the raising of the Siege in May 1776. The parties having a Dispute about some flour It appeared to the Court from the proofs adduced and their own Confession that they had Left the Town under General Carleton's Proclamation in November 1775. and having been aiding and assisting the Rebels during the Blockade, upon their retreat possest themselves by that means of the flour in Dispute; in the Contest for which their Conduct appeared Contemptuous and insulting in the presence of the Court, whose duty it was under such Circum=stances to commit them.

The Second Cause Fraser Vs. Sylvain was deter=mined agreeable to Law, being a Commercial matter Parole Evidence was admitted Agreeable to the Ordinance of the Province.

Freeman Vs. Coffin has been spoke to upon Constant Freeman's deposition. To avoid Repetition the other cases mentioned are referred to be observed upon in that part of the Deposition which Contrasts the Cases & States that Similar Causes have been differently adjudged.

Lemoine vs Grant contrasted with Ferguson vs Liard has been animadverted upon in the observation on

Mr

Mr Walker's testimony.)

The Cause Jones agent &c Drummond & Jordan vs Cameron is Contrasted with Bouchaud vs Johnston & Perry; the former Case has been animadverted upon in observation on Mr Cameron's evidence, the latter in observations on Johnston & Perry's Depositions. The one was a Mercantile matter and Interest allowed agreeable to the Ordinance of the Province because it was proved to have been the understanding and intention of parties as well as the Custom of Merchants in similar Cases to allow and pay interest; In the other, Interest was denied because by the Obligation no interest was stipulated or could be legally recovered either by the English or Canadian Law until legal proceedings were had upon it. The Clause in the Obligation is "à peine de tous depens dommages et Interets" which in the Canadian Law is termed Clause or Obligation Comminatoire the meaning of which may not be understood by Messrs Johnston & Perry but ought to be known to this Witness before he commenced Reporter.

The next Contrast is of the last mentioned Cause with that of Chevalier vs Zach.y McAulay to quit a house he held under a written Lease, in virtue of the Droit de Bourgeois de Paris in which the Court maintained the lease on the principle of its being granted prior to the 1.st of May 1775, But how he would find out any affinity between these two is not to be discovered, for by the Law at the time the Obligation of Laparre was entered into, Judgement could not be recovered upon that Obligation for arrears of Interest.

The Causes of McCaulay vs Antrobus contrasted with that of Henderson aga.t Stewart are as diametrically opposite to each other as any two cases can

be

be, the former was an action for rent and the quantum agreed for, the Subject of ~~the~~ Dispute, which was referred to the oath of the Defend^t. The latter an action for damages for Injury done to plaintiff's Goods in removing them from Defendants house by Order of Court in the Plaintiff's absence, from which he was dismissed, the Defendant having proceeded according to Law and without injury to the Plaintiff.

The Causes of Cameron against Simpson & that of Simpson against Mc Cord & Hay Executors of Mc Aulay are mis-stated, the Circumstances of the two Cases were widely different, Cameron Sued Simpson for damages for remaining 20 days in his house after the Expiration of his lease & recovered rent for that time there appearing no particular damage to Plaintiff, and Defend^t. having remained from necessity by the want of His own house of which Mc Caulay kept possession notwithstanding the Defend^t. had obtained Judgement aga^t. him and used his utmost endeavours to get possession, so as to give the Plaintiff possession in like manner. In that of Simpson vs Mc Aulay's Executors. the Defendant had disobeyed the Judgement of the Court had entered an Appeal with a view to keep possession & then with=drawn it and occasioned considerable Damage and expence thereby to the Plaintiffs who recovered Jugement for £28..7..10 for Damages, Repairs and Expences, so that the Witness is egregiously mistaken in this Report as appears by the Exhibit No

The next very singular contrast made by the Witness proves it's own weakness and his folly, the Cause of Lees attorney to Rybot against Dubruit was instituted the 6th. August 1774 and Continued without Interruption by different Rules and orders to the 29th April 1775

two

two days before the Quebec Act took place and when the new Court of Common Pleas was opened the Cause was transferred under the Ordinance for that purpose & proceeded on to final Judgement. The other Cause of David Aldges vs Madam Dalbergate & Contrasted with the former was instituted in April 1773 and by the Statement in the petition of 1781 mentioned by the Witness, a Copy of which may be seen at length in Mr Lyons Deposition was continued only till July in that Year (altho' the fact is that the last order in the Cause was on the 7th June 1774 ordering the Plaintiff to reply) on the 27th June 1781 that petition was presented and the order of the Court thereon establishes the fact that the papers had been withdrawn by the parties which was an additional Reason to that of a discontinuance for upwards of 7 Years according to the Record and upwards of 8 Years according to the Witness's statement, why the Court could not Comply with the Plaintiffs Request. Qga. which the Witness states as if in contradiction to the Judgement of the Court that his Client told him he had not withdrawn and thus this Witness draws his Comparisons by Concealing the truth and attempting from a hearsay to Contradict a Record.

In the Cause of Davison & Lees Attornies to Baylston vs Freeman, contrasted with Shoolbred and Barclay vs Henry Rimpshoff the witness states the Code marchand to have been rejected in the former altho' the Judgement makes no mention of that Law and the Cause depended not upon its existence or non-existence as Law in the Province but upon the peculiar Circumstances of the Case which are mentioned in Observations on Constant Freemans Evidence and may be seen in the Record.

The

The Cause of Cameron Stuart & Ross ag^t Che. Voyer contrasted with that of Fraser vs Willcocks & Wilson vs Lymburner & others, affords a striking instance of this Witnesses Propensity to misrepresent. In the first Cause the Trustees to Voyers Estate parties intervening or opposing by petition claimed the Goods seized by the Sheriff on Execution in virtue of a Deed of Cession to them made by the Bankrupt which deed contained a Clause or Clauses and conditions that were illegal, as reserving to the Trustees a power to discharge the debtor entirely from personal arrest to which he was subject by the Ordinance of the province, consequently could not be binding on the Plaintiff who had not consented to it. The Court under the Code Marchand could not ratify that Deed which was opposed by the Plaintiffs and tended to deprive them of their proportion of the Bankrupts Effects unless they would submit to the Condition imposed, and therefore ordered the Effects seized to be sold, and the proceeds divided according to Law pro rata among the Creditors as appears by the Judgement a most material part of which viz^z the Reasons for the Judgement is artfully suppressed by the Witness. In the other two Cases there were no illegal Stipulations made by the Debtors with their Creditors who were unanimous in their applications to the Court, for the appointment of Trustees in the first instance, to sell the Effects, having only differed about the nomination of the persons, whom the Court named agreeable to the voice of the majority of Creditors in number and value in Conformity to the Code Marchand, and in the Second the Trustees appointed by the Creditors in General thought proper to proceed themselves by Judgement & taking out

Execution

Execution and never applied to the Court for the Goods to be delivered to them under the Code marchand.

In the Contracted Causes of Lymburner Trustee to Cheverfils vs Olivier Le Blanc with Fraser and Young Trustees to the Estate of Thompson & Shaw vs Col. McBean, the Court Equally rejected the testimony of the Bankrupt Debtors, the very words of the Court made use of on filing the affidavit of William Shaw in the latter Cause shews the footing on which it was allowed to be filed and the final Judgement shews that no faith was given to it. In the other the admissibility or non admissibility of the Bankrupt as a Witness was a matter of more nicety as may appear by the pleadings and was therefore solemnly argued and being put in deliberation received the Judicial opinion of the Court upon the written and parole pleadings of the parties.

In the two other Causes viz Hugh Fraser vs Mr. Lees & McRalay vs Michel D'amour De Pleine the witness has again recourse to misrepresentation as will appear by the Record in the last mentioned cause compared with the former which he has truely stated. Prescription was not pleaded in the latter Cause as it was in the former tho' he states it to have been pleaded in both and it ought to have been known to the witness that the Court could not supply the defect in the parties not pleading prescription even if he was entitled to have availed himself of it. Vide Exhibit No

In all the Causes in which the witness falsely represents the Court to have rejected the Code marchand it is his misfortune to expose his unfitness for the profession. In the Cause of Gregory and Woolsey ag^t Louis Chaperon allowing the Statement by him given to be true. The

Conclusion

Conclusion he draws is by no means a just one for the Code marchand was not rejected in this case, nothing in that Code nor in the assignment mentioned could prevent the Plaintiff from obtaining a Judgement for his Debt neither could that Judgement when obtained give any preference over the Other Creditors.

In answer to the third Interrogatory several causes already observed on are introduced, among others that of Drummond and Jordan vs Freeman where the Code civil is stated to have been rejected in matter of proof; but why? because the Rule of Evidence was that of the English Law.

In answer to the 4th. Interrogatory reference is had to the cause of the Administrators of Vialars vs Berthelot & Allsopp. The principles of which Decision, as stated in observation upon Mr Allsopp's Testimony, this Gentleman, as a Lawyer, ought to know to be founded on the Coutume and the Code marchand.

In answer to the 5th. Interrogatory the witness at once condemns all the Writs of Saisie Conservatoire & Saisie Arrêt that have been issued altho' he afterwards approves of some of them as legal, for the refutation of his opinion if it is worthy of Refutation the Judges refer to their general Observations on the different Saisies that have been issued.

The 1st. Cause in which he states the writ of Saisie Conservatoire to have been refused is that of Watson and Rashleigh against Daniel and Deilton for observations on which see observations on Mr Goodalls testimony, the others which were refused and which are but two in number are stated from hearsay. Vide Observations on the testimony of Laing & Deihl.

In answer to the 11th. Interrogatory the witness states his own incapacity to instruct his Clients what law

should

should govern their Case. If we may Judge from the Opinions and Cases he has cited in this Deposition, it will be seen how well founded he is in this Declaration of his own ignorance, tho' not from the Cause he assigns.

In answer to the 16th Interrogatory the Witness charges the Court with irregularities and delays in procrastinating Judgements greatly detrimental to the Kings Subjects but how must he appear before the World where in support of his oath the very first case he cites is one conducted by himself which he represents as follows — "David Aldgeo prosecuted Madam D'albergate &c. in 1773 and never could obtain Judgement on the merits."

Whereas the Cause stands from the Record as follows. In april 1773 the Plaintiff sued the Defendant for £300 Damages for not fulfilling a Lease of the Island Seigneurie of Bic &c, the Cause was continued till 7th June 1774 by various Rules the last of which on that Day ordered the Plaintiff to reply which it does not appear he ever did for there are no subsequent entries. On the 27th June 1781 at the Distance of 7 — years and upwards as before stated, the Witness for the Plaintiff having presented a petition praying that the Cause might be transferred from the Court of — Common pleas to the then Court under an Ordinance of the Province It was found that the papers had been withdrawn by the parties and therefore as well as in Consideration of the length of time from the Com=mencement and last Entry in the Cause the Petition was refused as appears of Record on the 13th of July.

The very next day the Cause was recommenced by the witness himself as Attorney for the Plaintiff and

prosecuted

prosecuted to final Judgement which was pronounced on the 14th. of August following Vide Exhibit No

Exhibit No
Vide also Mr Lynd's deposition & Copy Petition & Order thereon 13th July 1781. inserted therein

This Specimen alone of the Witnesses Candour or truth is sufficient to enable any one to Judge of the rest of his deposition which from its Extraordinary length and minuteness the Judges cannot undertake to Canvass in every particular without swelling these observations beyond all bounds, they therefore will only cite one more Example of the Witnesses bad faith and want of Truth.

In his Answer to the 19th. Interog. where causes are Contrasted by the Witness with respect to Costs, — that, wherein the Witness himself was plaintiff — against Madam Dalbergate contrasted with the Cause of Vanselson vs Madden demands observation. The 1st. of these was a Suit for the witnesses Bill of Costs which he had swelled up to £19.12.10 when he was only legally intitled to £9. and the other for a Demand of £65.16.1 by account, of which the Defend. Confess'd Judgement the 15th. Feby. 1782 for £44.4.10 reserving to Plaintiff the right of Contesting a Claim of Compensation then produced and filed for the Difference, in which he so far succeeded that Judgement was found agt. Defend. for £6.17.3. more the 23d. of the same month being the Court Day following with Costs so that in this Case the Judgement agt. the Defendant was for £51.2.1 with Costs, a very different Case from the other and of which Difference the Witness from his recent and Daily researches into the Records since the commencement of this Investigation cannot be presumed

Ignorant

Ignorant vide Exhibit No –

Thus the two Lawyers brought forward by the Attorney General may be seen from their own depositions, their Situations and Circumstances as proved by the Clerks may easily account for their Conduct. Their opinions as well as that of Mr Cugnet cited by them & others in regard to the Code Marchand's having been neglected by the Court in their Decisions is refuted in every instance.

Mr John Pager — This Witness who is one of Mr Cochranes insolvent Debtors was a Subscriber to petitions to the King and Parliament against the Laws and Courts of Justice, he heard Lawyers and others complain and he believes what he signed to be true.

William Lindsay — This Witnesses testimony is like the former all grounded upon hear Say which he says induced him to make Settlements equally advantageous to his Concerns rather than go to Law, at same time he might have been induced to have made examples of some of his Debtors if those Reports he heard had not prevented him, he gives no account of any Judgement given against him at Quebec with which he was dissatisfied, but in general with others he Signed Complaints to the King and Parliament and believes what he has signed to be founded not in falsehood but in truth.

To have expected any other answer from the witness on this head would have been to expect him to reverse the Order and necessary consequence of things dependent upon each other.

Messrs. David Lynd & Pierre Louis Panet Clerks of the Court of Common Pleas for Quebec —

The Judges have read the Examination of these Witnesses by Mr Monk and the Commissioner with attention, and Cannot find out what it is Mr Monk would conclude therefrom against them — The Judges are not the Keepers of the Registers, nor of the papers filed in Court. The task of Judge is sufficiently laborious without that Charge.

It has been proved by many of the Witnesses, that no Difficulty was found in getting papers or Copies of papers and Records from the Clerks Office, nor does it appear that any Complaint against them was made to the Judges. The English Clerk of the Court of Common Pleas is the Register of the Court of Vice-Admiralty, of which Court the Attorney General is Surrogate or Deputy Judge. Had the Counsel for the Judges been permitted to have put a few Interrog.s to Mr Lynd with Respect to the Records or proceedings of that Court, such as were put to him in quality of Clerk of the Court of Common Pleas, The Judges are afraid the Answers must have been such as would have made the Attorney General Blush for his Conduct in attempting to bring the Clerks neglect as a Crime against the Judges by a Comparison which would have reflected no honour upon him.

The Judges know not whether Mr Monk has produced any Extracts from the English Register from 1765. to 1769. If he has, nothing can more strongly prove the bad faith which actuates him. The Clerk repeatedly told him that that Register was chiefly a Translation, and that a very incorrect one, from the French Register for the same period. The French Register was the Original, and was inspected by the

Judge

Judge, who not only signed the Transactions of each Day, but affixed the Initials of His name to each Judgement. That the English Register is evidently a Translation of the French Register will appear from the Comparison of the one with the other. There may be some of the Judgements where the Parties Plaintiff and Defendant were old Subjects, which were originally given in the English Language, and for that Reason the Transactions of the Day were signed by the Judge, but that signature gives no authenticity to the Translation of the other Judgements, which are in many cases not only incorrect but unintelligible.

These Witnesses state the usual mode of taking down depositions of witnesses which are signed by the witness and by the Judge. One exception is made to the Usual mode in which the Deposition was taken on the minute Book and signed by the Witness and Judge which was therefore perfectly sufficient. Mr Lynd indeed states that Depositions of some witnesses have not as he supposes been taken down but only Memorandums thereof minuted to aid the Judges memory. But on examining the particular instances alluded to, it will appear that many of them have been regularly taken tho' since lost or mislaid, as those of Gibbons, Davison and Thomas which are stated on the Register and in the Judgements to have been duly taken, some may have by accident and contrary to the usual mode been omitted to be signed, but these will appear very few in number and chiefly

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the Declarations of Garnishees which the Law does not require to be Signed as in the Case of Blackwood in the Cause Thiery vs Sinclair, or attestations to accounts by Plaintiffs, as in Madame Foretiers Cause vs McCauley, some may be in matters not appealable such as the Deposition of John Ross in the Cause of Rey vs Rigby about a Stove seized by the Sheriff and claimed by the owner, and that of J. Blackwood in the Cause Shoolbred and Barclay vs Grant & Blackwood about a matter of Costs amounting to 100/ from which no appeal could be taken

The motion for hearing witnesses in the Cause of Fromenteau ag^t. Prentiss the want of which Mr Russel swears was the Reason upon which his Client in appeal lost his Cause is mentioned on the Register the day it was made as appears by Mr Lynds Testimony and it is again recited with the Reasons for rejecting it in the Judgement from which the Appeal was made Exhibit No and therefore the merits of it must have been canvassed when that Judgement was affirmed.

With regard to some defects in the entries in causes where the Clerk has in Court given out the Copies of Judgements or orders without having previously entered them on the Register or minute book The Judges must admit the Clerk is blameable at the same time it was not a matter to be easily discovered by them upon examining the Registers as it is impossible for them to carry in their memory every Cause that comes before them, and they can only at different periods examine the Register with

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the minute Book, which on such Occasions they generally found to correspond. Their Clerk, an Officer appointed by Government, they considered as a man of Confidence, and a Responsible Character, nor can they consider themselves as answerable for his Clerical Errors and omissions if any should appear

There are several papers also stated to be a missing which the Clerk accounts for by the accidents that may have happened for want of a proper office, & removing frequently; this however with many other things brought forward on this Investigation is not to be imputed to the Judges. It may be observed that as twelve months were given by the Ordinance for the party against which Judgement was given to sue out the writ of Appeal, the parties when that time was expired were permitted to get up their papers agreeable to the Ancient Usage of the Colony, and by that means as well as the Changes of the Clerks Office, and other accidents, some of the papers may be missing, but as the Judges have never heard any complaints from the parties, and as the time limited for Appeal is elapsed. They apprehend they cannot be responsible for the loss of these papers, nor are they of consequence to the public or the parties.

In grasping at every thing which right or wrong it is supposed may make an appearance of a Ground of complaint, the French Clerk is examined to one of the Judges having sat alone in the Court of Common pleas for Causes above £10 Sterling, but the witness tho' tortured upon this point, to prove that the Judge had sat in Judgement, could speak to no such fact as the Attorney General wished to establish, for by this evidence

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it appears and the fact from the Record is that no Judge ever sat alone, but that on some few Occasions to expedite Witnesses from a Distance at the Express requisition of both parties, Mr Judge Panet has taken their depositions, a Circumstance which entitles the Judge rather to merit, than Reproach.

Upon the Cross Examination of Mr Panet there appears an anxious desire in the Attorney General to find out a Cause of Complaints against the Judge for having signed a writ of Execution against Hodierne at the Suit of Shoolbred and Barclay, in which there was a Clause authorising the Sheriff to detain his body then in prison for want of bail upon a Capias ad respondendum until bail should be given according to Law, at the same time that his Effects were under discussion upon Execution, for until they are discussed no Capias ad Satisfaciendum (a writ upon which a Debtor cannot be bailed) could Issue; whoever examines the Clause in this writ and the Law or ordinance of the province for regulating the proceedings in the Courts of Civil Judicature passed the 25th of April 1785, will see how little Ground there is to complain of it, and how ill served the Commerce, as they are called, are in this instance by the Attorney General, who complains of the Execution of the Law in the sense and Construction the most favourable for them, for whose benefit the change, from the Ancient Law, was made; the Witness states that he has never made any such writs, and the Judges have to remark, that there have not been any occasion or application for them, except in this Instance, indeed the clause may be said to be superfluous, because the Sheriff was by Law already sufficiently authorised and bound to detain the body till special

bail

bail was given, or until two days after an Execution by Capias ad Satisfaciendum could be legally had & obtained, and Consequently to keep the Body in Custody while the Goods were in discussion. The writ being drawn up in the Handwriting of Mr Antoine Panet the Advocate, is a Strange Ground of Objection. — It is signed by the Clerk, & under the seal of the Court, and nothing is more Common than for the Advocates and Mr Monk among the number, to make out the writs to expedite Business.

Again the Witness is examined respecting some prosecutions by him carried on in the name of the Clerk of the Peace his associate in the Common Pleas, against sellers of Spirituous Liquors in the Country Parishes without Licence — these prosecutions are frequently brought before the Judges on their Circuits for the Convenience of the Parties, to whom it would be a grievous and intolerable Expence to bring them & their Witnesses to Lewis, and the witness being upon the Circuit in his Official Capacity of Clerk of the Common Pleas, in the absence of the Clerk of the Peace, and at his particular request had the Offenders prosecuted without any Emolument or Advantage whatever as appears by his deposition, altho' Mr Monk would wish to impute it as a Crime that the father sat as the Judge where the son acted as Prosecutor. To such weak and illiberal means has he had recourse during this Investigation.

By an Extract from the Register certified by the Clerk it appears that only four such prosecutions were made and but two Convictions; these were usually done by the Clerk of the Peace, there being great abuse in

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the Country Parishes in Selling Liquors without Licence to the Prejudice of the Revenue & Subversion of good order See Exhibit 48

The Honorable Hugh Finlay

The Judges have only to observe upon the deposi-tion of this witness that the Conduct, which he or other Judges of the Court of Appeals may have had, or the opinion, or the opinion they may have entertained of the Law, which was to govern their Decision, cannot affect the Judges of the Court of Common Pleas of Quebec, who have uniformly made the Laws and Usages of Canada ~~their~~ the Rule for their Decisions. Neither this witness, nor Mr Powell says that Judge Mabane cited the Cases from the English Reports as the Law which was to govern the Court of Appeals in its Decision, tho' Messrs Walker and Russel do not scruple to swear it; Mr Mabane cites the Cases to shew that the English Law with regard to conditional Bills of Exchange was the same as he understood the french Law to be, and gave his voice for Confirming a Judgement given in the Court of Common pleas at Montreal, by the Judges Rouville and Southouse, for in this Cause Judge Fraser had been of a Different opinion from his Brethren.

It is true Mr Mabane did appear in the Court of Appeals in support of a Return, he and the other Judges had made to a mandamus, which had issued from the Court requiring them to transmit papers that had no relation to the Affair in Question. His Conduct was legal, for the Judge of an inferior Court has not only a Right to appear in person in the supreme Court to support his Return to a Mandamus but may Employ Counsel for the purpose —

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An Extract from the Report of the Committee of Council for the Courts of Justice Exhibit No 49 will explain the Interrogatory and Answer mentioned in another part of this Deposition.

The Judges have as Concisely as they could, observed upon the Evidence, and such of the Causes cited by the Witnesses, as appeared to them to be most remarkable, and in which misrepresentations the most likely to mislead persons residing at a Distance, have been made.

What is the Evidence produced against the Judges? The Oath of Suitors, or Lawyers who Ill advised those Suitors, to the Illegality of Judgements pronounced against them; and which Stands contradicted in every essential point by the Records –

Who are those Suitors? many of them, men, who becoming Insolvent, and having no better Reason to assign for their Insolvency to their Creditors in England, attribute their mis-fortunes to the administration of Justice; or men, who being Debtors to Mr Cochrane, or persons connected with them, exclaimed against Laws that afforded to Government the means of Recovering from them the Debts they owed to the Crown; or men, who after having fomented Discontents through the Province, abandoned the Town in 1775 from Disaffection to the Kings Government.

It is not wonderful that such men, whose views agt. the Laws and Constitution of the Country are conspicuous, should stand forth the defamers of Judges, who have at all times and upon all Occasions testified their Attachment to His Majesty's Govern

ment

ment, and discharged their Several duties with firmness and a disregard of popular Clamour.

The Judges now Conclude by observing that the Legislative Council in their Address to His Excellency Lord Dorchester had among other objects an Inquiry into the Uncertainty and consequent Inadequateness of the Laws, and from such Inquiry public benefit might have arisen; but the Investigation has been so conducted, as if nothing was meant but a personal Attack of the Judges of the Common Pleas, to whom it is matter of Grievous Reflexion and Complaint, that though a Specific Calumny was charged against them by the Attorney General, so far back as the 14th. of April, of which they stated their Complaint on the 1st. of May and as they apprehend fully refuted on the 23d. of June Yet that Charge remains to this Day unreported upon to their Great Injury and the manifest Disparagement of Government.

Quebec 30th Oct 1787 (Signd) A Mabane
Thomas Dunn
P Panet

Supplemental Observations

The Judges of the Court of Common Pleas for the District of Quebec having been precluded from the opportunity of Justifying themselves in their administration of Justice by the resolution of the Honble The Chief Justice on the night of the 15th of October Notwithstanding it was apparent that the Attorney General had broke faith with them in the withholding his proofs intended to Establish those charges till near the hour of midnight with the view to deprive them of all opportunity of refutation or defence at tho he had promised and engaged to file all his written evidence on or before the 10th so as to give the Judges an opportunity of countervailing or observing upon them as appears by the annexed Extracts from the Minutes, Did on the 16th apply to the noble Lord at the head of the Government for remedy in that behalf and His Lordship having received the Honble Commissioners report, laid the same before His Majesty's Council on the 26th of October. Messrs Drum and Mabane then requested his Lordship in Council that a day be fixed for publickly reading before the Commissioners their Observations on the Evidence produced by the Attorney General and filing Authenticated Copies from the records in support thereof,

The result was that His Excellcy The Governor & Council directed that the Investigation should be opened for the purpose mentioned in the Minutes of the 30th of October. The Judges of Quebec have since that order had Communication of the Brief

with

with Appendix read and produced by the Attorney General on the evening of the 15th and likewise of a list of the papers which were brought in a bag and emptied upon the Table at midnight in great confusion and disorder, And for this list which they only received two days ago The Judges are obliged to Mr Thomas the Secretary who after repeatedly calling upon the Attorney General for that purpose in vain, deprived himself of his rest to arrange the papers lodged as above and furnish the Judges with a list thereof by which alone they have been able to form any adequate idea of the Contents of that budget, on which however impossible it was expected they should have observed before they were even produced. –

The Judges will now observe upon these productions as far as the time from the evening of the 30th of October to the third of November under a daily attendance upon the Investigation will admitt, and will point out such misrepresentations contained in the said Appendix &c. as appears to them the most striking and which from the manouvres practised in the transactions from the first of October were intended to make part of the Investigation without the Judges of the District of Quebec having had it in their power to refute them

These Appendix seems to contain the Opinion of the Attorney General's charges against the Judges of Quebec, and to render them the

more

striking are call'd Contrasts, which are detected refuted and Exposed as follows —

First The Case of John Fraser Vs Thomson & Shaw and Anderson & Parr Party Intervening. } is Contrasted with Julie Vialars & Freeman Adm.rs of Antoine Vialars Vs Chas Berthelot & Geo Alsoppe

These two Cases are particularly mentioned in the Observations upon the testimony of Messrs Alsoppe and Young. In the one Case Anderson & Parr had by a Deed passd before a notary entered into a Special Agreement with the Plaintiff and Defendant by which they deprived themselves of a priviledge which they otherwise had by the 176 & 177th Articles of the Custom, Whereas in the other Case the priviledge remained in full force hence no inconsistency in the Judgement.

Fraser & Young Trustees to the Estate of Thomson & Shaw Vs Grant & Blackwood } is Contrasted with Vialars & Freeman above stated Vs Berthelot & Alsoppe

The payments or transfers of wines in payment on the Eve of Bankruptcy and with an evident intent to prejudice the Credrs were ordered to be brought back to the Mass of the Bankrupts Estate to be Divided pro rata among the Creditors in the first Case upon the principle of the Code Marchand or Ordinance 1673

In the other the 176th and 177th Articles of the Custom which are reserved and left in full force by the Code Marchand governd the decision

Great

great must be the ignorance or malice which dictated the comparison

John Fraser of London — } are Contrasted with
Vs Thomson & Shaw and — } William Laing Vs
Simon Fraser Attorney — } Daniel Fraser
to Franklin Vs Robt Wilcox }

In the two first cases the Saisie conservatoire was legally granted, In the last there is no proof of its having been refused or demanded unless credit is given to Mr Laings Oath after reading the observations upon it and the proofs which accompany them, It appears by his own Acct that the Bill and protest were never produced or any proof of Defendants refusal to pay the same both of which were necessary to be laid before the Judge to authorise him to grant the writt

Archibald Ferguson — } is Contrasted with
Agt } Thos Boylston By Davison & Lees
Thomas Walker — } Agt Constant Freeman & Hector
} Mr Cauly Agt Saml Stewart

In the 1st of these Cases the Plaintiff lost his recourse against the Defendant for want of a Protest and regular Notice to him who was not the Drawer but an Indorser of the Bill. — The second did not depend on the Code Marchand for its decision, and in the last Case security was ordered mutually to be given by the Parties on the proofs produced which were Considered sufficient in time of war when the Communication was so precarious as often to interrupt the regular Course of Negociation, a circumstance to which Courts of Justice must frequently attend. —

Constant Freeman ag.st John Coffin — is contrasted with — Giles McBean against Hugh Munro & Joseph Lyons of Albany ag.st Capt. Jonathan Jones.

In the first Case the Defendant was condemned only to pay the Balance of the Principal Sum, because at y.e time of the action, Interest was prohibited by the Laws of the Country. The Plaintiff was not condemned in Cost as erroneously stated. In the Second, Interest was allowed because the ordinance of the Governor and L. Council had made it Lawful to take & recover Interest which was before prohibited: in the third Case y.e Interest was allowed upon the same principle as in the Second and as to the Particular Plea, the Court as may appear by the record granted a consi=derable delay to the Defendant in order to prove y.e facts by him alledged, in which having failed the Court was obliged to give Judgment against him

Jacques le Moine ag.st Angus Grant. — is contrasted with — Orlius Ferguson ag.st Charles

These Cause Ocurred at the distance of Seven year & upward from each other. In the first there were Circum=stances that were not in the other. It appeared that the watch in question was not the property of the Plaintiff and the Suspending the action till the time was elapsed, was Satisfactory to Both Parties, for by Consent y.e Plaintiff took the deposit out of Court and there y.e matter ended. In the other Case there appeared no reason whatever for the Plaintiff suing

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the Defendant after having settled accounts and changed the nature of the debts.

Robert Lester attorney to the widow of Peter Fergues agt. Francis Anderson —	is contrasted with	the Same Plaintiff against Dennis McDonnell.

In the one Case Anderson plead inter alia Prescription that he had previous to his going to England whilst Mr. Fergues was living inserted and advertisement in the Quebec Gazette for all Persons who had Demands upon him to bring them in, in order to be paid, He was admitted to make oath of ye Payment at the Special requeste of the Plaintiff In the other Case Defendant plead a Nil Debet and Produced a Receipt as a proof of his having paid ye Demand. from Comparing the date of that receipt with the account & book of the deceased Mr Fergues - The court was convinced that the Balance Demanded remained due.

Henry Caldwell agt. Mr. Robertson master of the Ship argyle	is contrasted with	Charles Le Marchant agt. Willm Gill

These two Cases are perfectly different in their Circumstances and most maliciously Contrasted and misrepresented in Every particular, For in the first by Special agreement of ye Plaintiff filed in Court Exibit No. 53. he admitted himself to be considered as a Defaud. to ye Intent of a Balance being adjuged agt. him if an Examin

nation of the accounts and Claims of the Parties, a Ballance should be found due. In the other the Defendant by his plea concluded not as stated by the Attorney General, who conducted ye Cause, but that the Plaintiff should be dismissed from his action and notwithstanding the Cause was pending in Court long after ye Auditors filed their report & neglected even to state himself as Incidental Plaintiff to recover a Ballance untill after ye death of his Party and a Discontinuance filed by the Plaintiff when it was too late, by which means the action was dismissed simpliciter with costs

The Attorney General in his Zeal to attack ye Reputation of the Judges, insinuates that the Judgement was obtained in favour of Mr. Antrobus by the Influence of his advocate (which he swear to have solicitated) with one of ye Judges, but what opinion must be Entertained of this wilful Misrepresentation when it is considered that the Judgement was given last September after that Mr. Antrobus had been Examined on the Investigation and when surely his Influence if it had Ever Existed, must have been ~~have~~ at an Ends.

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Andrew Cameron agt. Alex^r. Simpson —	is contrasted with —	Alex^r. Simpson agt. Thom^s. Aylwin McLeod & Hay Executors to Dr. McCauley.

In the First of these Case the Defendant was kept out of his own house by the obstinacy of the deceased Dr. McCauley to whom y^e Defendants

in the other Cause were Executors, and remained only twenty days in possession of Plaintiff House from that necessity; whereas in the other, the Defendt. McCauley Disobeyed the Judgment of ye Court, made an appeal to keep Plaintiff out of ye House, which he afterword With=draw, and by these means greatly aggravated the Injury done to Plaintiff which was a proper Consideration for ye Judge in discharging their duty in assessing Damages & Expences

John Jones Agent to Drummond agst. Andrew Cameron — is contrasted with — Bouchard agst. Johnston & Purse

This contrast is a striking one indeed! Interest was allowed in the first Case because it was proved to be the understanding of ye Parties & it was Denied in the other Case because ye obliga=tion did not cary — Interest as is fully set forth in ye observation upon the Evidence of James Johnston & Robert Russel

Charles Hay agst Charles Lortie is contrasted with John Shank Esqr. agst Sarah Neper

In the first Case the Plaintiff got Judgement agreable to his declaration which concluded only for Principal & Costs, in the Second where it is said the Execution was for Interest, when the Judgment did not allow Interest. The fault is Either with the Attorney Robert Russell who sued out ye

Writ

writ of Execution or with the Clerk of ye Court, who made it out, but not with ye Judges who gave their signature in consequence of that of ye Clerk who no doubt made out the writ from the attorney, Fiat, the Partie aggrieved had a remedy, if the case really happened as stated.

Robert Woolsey Attorney to Edward Walls agt Jean Charles Chevalier } is contrasted with { Miles Prentice agt Lewis Rousseau

In those two Cases the reasons of the Judgement are obvious. In the one an allegation of part of the Value or Merchandizes not delivered, was not thought a solid objection to a note of hand for value received. The other was an unlawful Consideration, being alledged to be for money won at play which if proved, would have made the note void

No 4.

Contrast of Judicial opinions & Conduct of the Judges

The Attorney General must beat a great loss to find Incontistancies in the Judicial opinions of the Judges of ye Court of Common Pleas when he has recourse to what passed ye Court of appeal in ye Cause of Dunlop against Grant.

Messrs Finlay and Pownall who sat on the Bench with Mr Mabane and who certainly must have known his opinion with regard to ye English law governing the case had he really given such Opinion, as previous to giving Judgment there was a Conference or Deliberé

between

among
Between the Judges; Say in their Deposition that tho' he cited Cases from English Law Books they do not recollect that he cold them as ye Law to govern the Case

The Extract from the report of the Committee of Council upon the Courts of Justice has been exhibited and will speak for it self. It certainly has no ressemblance to or connection, with ye decision on the Recusation. Messrs Dunn & Panet declar'd that recusation inadmissible, irregular & impraticable. How reprehensible must the attorney General be when he knowingly misconstrues the Declaration made by Mr Mabane & filed in Court, into an admission that he had given his Opinion on the Suit. The truth was that Mr Mabane had streneously advised General Haldimand not to authorise Mr Cochrane to give Bills of Exchange in 1781. upon Credit. He considered the measure as dangerous in a political lyht to the Safety of the Province which was threatened with an Invasion as well as attended with risk of great pecuniary Loss to the Crown, but with regard to ye Question before ye Court he had given no Opinion or advice

With Regard to ye Judges Signature to a blank paper given to Mr Gray and refused to Mr Walker Supposing it to be true as mentioned in the contrast, no detriment could Occrue to the Public or any Individual from it as more fully Explaned in the Observations upon Mr Tanswell Evidence. The Judges Signature to a Blank

Paper

paper might have been abused to his own prejudice, and tho' he might run the Risk with Mr. Gray, he did not chuse to do it with Mr. Walker, if the attorney General think to Justify himself for having said that A & B ——— were not upon an Equal footing in the court of common Pleas at Quebec from this circumstance, he must find himself mistaken.

Mr. Judge Panet considers his sitting to take Depositions of witnesses by consent of Parties in Causes above £10 Sterling in order to Expedite Causes, and to save Expences, when the witnesses attended from a distance not only legal, but praise worthy — . Mr. Judge Panet never signed any writ of Execution that was not thoroughly warranted by law, ye writ agt. Hodier Contained no more than what ye. Law of the Province, made with a view to assist the recovery of Debt Due to merchants, authorised.

Mr. Judge Panet like every other Judges may declin sitting when he considers himself anyway interested in the Event of a Suit: It was no Ground of challenge to him either in Law or conscience that his Son was nominal Prosecutor agt. Some Vendors of Spirituous liquors without Licence, upon the circuit. To what does not ye Attorney General descend in hopes of some Crum to find fault?

Tho' the observations upon the Evidence have in General anticipated the Remarks proper to be made upon ye. Brief of the Attorny General, the Judges will nevertheless observe that the conclusions

drawn

drawn by the Attorney General from opinions ~~which~~ and which are in most essential — Points contradicted by the Record cannot stand the test of Inquiry or Examination. If such Opinion could be admitted as Proof, no Judge and no character in the Province could be safe. —

The Judges In the Introduction have given — a History of the Events which had taken place in the Province since the conquest, at least as far as they concerned the administration of Justice in it. If at any future Period the Public Good or their own vindication renders it necessary, they will find no difficulty to point out the Causes in 1784. which renewed the Clamour — agt. the Laws & constitution of the Country, and which tho in Octobre 1786 the Clamor had subsisted renewed it with redoubled vigor in a short — Space of time

Mr. Mabane having seen amonght the Papers filed on the 15th. Octob. by the Attorney General one purporting to be a protest made by the Honble. William Smith & some other Members of the L. Council during the last Session, and as he is the only Judge on ye. Spot, who was present on that Occasion, observes that the ordinance proposed by Mr. decd. Ours had almost in every artickles his approbation, & that the more Especialy as in it agreeable to ye. motion (Exhibits N/) with which it was prefaced, no mention was made either of old or new Subjects, that ordinance appeared well calculated to put an End to distinctions —

between

between the Inhabitants of the same Province, It is submitted to his Excellency the Governor and other whom it may concern, whether the appelation of "Spirit of party", ought to be imputed to those, who support ye Laws and Constitution of Government Established by the King and Parliament for the Colony, or to others who by themselves and others encourage an opposition to them. —

Mr Mabane was One of the Members of the L. Council, who in his deliberations never lost sight of the Petition of the Canadian Subjects which His Excellcy Lord Dorchester in a message by the Lt Governor recommended to the consideration of the L. Council, He has always considered it as is duty as a faithfull Councellor to the King in framing Ordinances for the Province to give attention to 113000 Natives rather than to 8000 Old Subjects who may from various Causes have reported to it, and this he may the more freely declare as at all times he has testified his readiness to give his assistance and vote for altering or repealing such parts of the Laws and usages of Canada which upon Experience should be found hurtfull to the Interest of Commerce (for next to the Safety of ye Colony in dependance to the Crown of Great Britain, the Extension of its Commerce must be the wish of Every Good Subjects, who is endued with Common Sence) but in making such alteration Mr Mabane and other Members of the L. Council ought to be actuated by a

Conviction that the Alterations proposed were for the General utility of the Province, and not to satisfy the popular Clamor or National prejudices of one Class of men to the detriment of ye People

The Judges leaving the Proceedings upon the Investigations from the 30th. of October unobserved upon from the Shortness of the time left them to conclude and referring to the minutes, finish by observing that they and their Counsel attended on Friday night the 2d. Instant prepared with their general observations of the 30th of October and the above Supplemental Observations, Expecting that the Commissioner would have no objections to put them upon an equality with the Attorney General by permitting them to be read publickly, as He had permitted the Attorney General publickly to read his General observations on the night of the fifteenth of October; but it is with pain they find themselves under the necessity of observing that the Honle. Commissioner did absolutely refuse to permit their Counsel to read their observations on Friday night after they had closed their Evidence as well as after the Attorney General had declared that he had closed the same on his part, a refusal which is injurious to the public as well as to themselves. — The minds of the Kings Subjects have for many months been disturbed by the Complaints and clamor which have been made and created agst. the Judges; it Should therefore have been the peculiar attention of the Honle

Comr.

Commissioner, as chief Justice of the Province, to embrace an opportunity of tranquilizing their mind and restoring confidence in the Tribunals of Justice. which a public Refutation of the Charges would unavoidably have Occasion'd even amongst the most prejudiced of them — But it seems to have been apprehended that a relief so useful and necessary to the mind of the Kings Subjects would Create in them a proper resentment against those who had artfully insisted them

3d Nov 1787

Synd A Mabane
Thomas Dunn
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LA BIBLIOTHEQUE DES AVOCATS, 1896.

C. A. PERRAULT.

T. HUET.

LA BIBLIOTHÈQUE DES AVOCATS, 1912.

C. A. PERRAULT.

LA BIBLIOTHÈQUE DES AVOCATS, 1922

W. F. CHIPMAN K.C. MARÉCHAL NANTEL B. BOURDON E. NANTEL L. GUERIN C. A. PERRAULT A. G. B. CLARKSON