February Term 1821.

Friday 2. Febv. 1821.

Siccard & ux.
vs
Malhiot

This was an action of trespass agt the Defendt as a Justice of the Peace for for causing the Pltffs to be arrested by his warrant, imprisoned & prosecuted for Larceny

On trial by Special Jury.

The Plaintiffs having failed to prove their discharge from the prosecution in the Criminal Court and shewing only that an Indictment had been presented against them and ignored by the Grand Jury, the Court were of opinion that this was not enough, but that Pltffs ought to have shewn the prosecution at an end, by their discharge either by order of the Court, or the expiration of the Sessions — and therefore on the objection taken by the Defendt a non-suit was entered. —

Tuesday 6th Febv. 1821.

Donegany vs. Pickle. Del's

Action on a promy Note, by Indorsee against the Indorsers. —

Plea — Usury. — in transaction between Drawer the Payees & the Indorsee —

The Note was drawn by one Wm Lang in favor of the Defendants, and by them indorsed to the Plaintiff who was the person supplying the money for which the note was made, the names of the defendants being inserted in the Note as a Security to the Pltff —

To prove this plea, the Defendants called William Lang the Drawer of the note —

Rolland on the part of the pltff objected, that Lang was an interested witness and could not be heard, inasmuchas by his proving the usury, he was destroying his own act, and the Security he had given to the Pltff. 2. Esp. N.P. 708. That Lang was the Garant of all the parties, and although not a party to this suit, was in law equally bound as if he were so — That Lang is now prosecuted by the Pltff in another action on the same Note, and he may by his evidence in this Case establish a ground of defence for himself in that action —

Grant for Defendt contended, that the Witness had no interest in this Cause, unless it could be considered as against the Defendts to throw the burden upon them, but, that any Judgmt given here could not avail the Witness in his own Cause —

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The Court were of opinion that the witness was competent and over-ruled the objection —

see Cases. — Peakes Ca. 6. Charrington. v. Milner —
52 Humphrey. v. Moxon. —
1 Camp. Rep. 53. Pool. — v. Bousfield
7 T. Rep. 601. Jordaine — v. Lashbrooke
3 Esp. Rep. 119. Brard — v. Ackerman. —

But there are cases in which it has been held, that the witness in Similar circumstances ought to have a release from the party who calls him on account of his being eventually liable to the Costs, as being the damages accruing from his default —

see — Peakes Ca. 224. Rich. — v. Topping
4 Taunt. Rep. 864. Jones — v. Brook
1 Holts Rep. 390. Harman — v. Lasbrey.

Friday 9th Febr. 1821.

No 695.
Dixon
vs
Finchley

Action against the Defendt for passing his boats through certain locks and sluices made and constructed by the Plff at a certain rapid in the River St Lawrence in upper Canada, by means of which locks and sluices the navigation of the said river had been greatly improved, and a greater facility given for passing boats at the said rapid — the declaration contained also several money Counts. —

The Defendant pleaded, non assumpsit — and that the several matters & things contained in the Plaintiffs declaration were not sufficient in law to entitle him to maintain his action. —

The facts in evidence were, that about twenty years ago there were no locks or Sluices erected at this rapid, and boats usually passed there with facility and without risk — but the plff having erected a mill at this rapid, was under the necessity of erecting a certain dam which run a considerable distance into the river in order to secure a sufficient supply of water for the mill, by which dam the navigation was greatly impeded, as boats were exposed to risk and difficulty in passing at the extremity of this dam — To obviate this the Plaintiff constructed a Sluice and lock, through which boats were conveyed past this rapid with more expedition and safety than before the dam was erected — That the Plff had persons always

always ready for opening this lock and aiding the boats to pass through it, and for this there was usually paid to the Plaintiff for each boat so passing a sum of five shillings.— The defendant, as was customary sent his bons with his boats, which were in this form — "Good to Mr Dixon for "passing one of my boats" — and, "Mr Dixon will please "allow one of my boats to pass." — these bons were now produced in support of the Plaintiffs demand

Grant for the defendant contended, that the present demand was for a toll which the plaintiff had thought fit to exact from the public without any authority for a right of passage through a mill dam which he had erected on the river St Lawrence, in a place where boats used to pass and repass freely as being a navigable river — That the dam so erected by the Plaintiff was a public nuisance, as having been erected without public authority — 2 Hawk. P.C. p. 184. and the plaintiff could maintain no action for any services by him rendered in passing the defendants boats here, however beneficial or convenient this might be. —

Rolland for the Plaintiff in reply — The action is not for any toll or right of peage in the river St Lawrence, but for work and labor done by the Plaintiff and his servants for the use and benefit of the defendant and at his request — the question as to a right of toll is not before the Court, as it is not pleaded by Defendt —, the general issue only, is pleaded, and the Plaintiff has not been called on, nor was it necessary for him to shew any thing touching his right under the issue raised between the parties, all that was necessary was to ascertain the quantum of the demand which has been clearly proved. —

By the Court — From the nature of the issue in law between

between the parties, it comes in question how far the demand as stated by the plaintiff in his declaration is a legal and sufficient demand, as nothing special is stated by the Defendant to bar the action, his plea is rather in the nature of a general demurrer to the declaration or to the first Count of the declaration, to which only it can apply - that Count runs thus - "That whereas "on the first day of august 1817, at Cornwall aforesaid "in upper Canada, the said pltff had at great expence "caused to be made built and constructed at a place called "moulinette-rapid on the bank of the river St Lawrence "certain works, sluices, locks and flood gates for "facilitating the navigation of boats and batteaux on "the said River at the said rapid, whereby the navigation "of the said boats and batteaux was greatly improved "and the persons navigating the same, were enabled by "passing through the said works, sluices, locks & flood "gates, to ascend the said rapid with ease & comfort, & "with much less risk, trouble, expence and loss of time "than before the construction of the said works - That the "said Defendant well aware of the advantages resulting "resulting to him from the said works &c - for the "navigation of his boats & batteaux &c - did request &c"

By this Count it appears to the Court, that the Plaintiff in stating that he had erected works such as mentioned in the declaration, on a public navigable River, ought also to have stated the right and authority under which this was done, for there cannot be a doubt, but that such erections made by individuals without such authority are by Law a nuisance - no man has a right to make such works on a navigable river, more than he could on a public highway, and the plaintiff by thus laying

open

open the ground work of his demand, shews that it was founded on a nuisance, and no action can be maintained by him for benefits resulting to the Kings Subjects out of such nuisance, it would be allowing him to derive right from a wrong, or a benefit from injustice - The Defendants plea therefore is applicable to this Count, and a sufficient bar to it, and considering the evidence adduced, we are of opinion that the action cannot be maintained - action dismissed. -

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Pre Quesse & ux
vs
Pre Quesse, fils
Val.

Action to rescind a deed of donation, & for payment of arrears of a rente & pension viagere

The declaration stated, that by deed of donation made and executed before M Bean, N.P. on 15. April 1816, the Plaintiffs gave a certain lot of land therein described to Pre Quesse fils, their son, on condition among other things of paying to the plaintiffs a certain rente et pension viagere, and that the donee should not alienate or convey away the said lot of land to any other person without the consent of the donors.

That afterwards by deed of Sale bearing date 29th April 1819, the said Pierre Quesse fils, with the consent of the plaintiffs, sold and alienated the said lot of land to one Joseph Chapedelaine & his wife, on the condition among other things of paying to the said Pltffs the aforesaid rente & pension viagere

That on the 29 Sept. 1819, certain arrears became due to the said pltffs of the said rente & pension viagere amounting

amounting to £36. 16. 8. —

That on 18th Oct. 1819, by act passed before Duplessis & his confrere, notaries, the said Joseph Chapdelaine & wife, sold the said lot of land to one Jean Bte Gendron on condition among other things of paying to the said Plaintiffs, the aforesaid rents & pension viagere, in such manner, that they the said Chapdelaine & wife should not be troubled in respect thereof, & particularly the aforesaid arrears so become due on 29 Sept. 1819 in consequence of which Sale, the said Gendron became possessed of the said lot of land & now holds and possesses the same —

That the said Chapdelaine & wife have hitherto refused and neglected to pay to the said Plaintiffs the aforesaid arrears of rents & pension viagere become due and payable as aforesaid on 29 Sept. 1819, nor hath the said Gendron paid to them any part thereof — and therefore concluding, that the said Chapdelaine & wife be condemned to pay to Pltffs the aforesaid sum of £36. 16. 8, and a further sum of £3 - for a milch Cow, making in all £39. 16. 8. with interest & Costs — and further that the said Jean Bte Gendron be jointly & severally condemned with the said Chapdelaine & wife to the payment of the said last mentioned sum of money by reason of his being the possessor of the aforesaid lot of land, (unless the said Jean Bte Gendron prefer to quit and abandon the said lot of land within 15 days) with interest and Costs as aforesaid — The Plaintiffs further concluding, that on default of the Ss Defendts paying and satisfying to them within such delay

as

as shall be fixed and appointed by the Court the aforsaid sum of money interest & Cost, the aforsaid deed of donation so made by the said plaintiffs to Pre Duesse fils, and the deed of exchange made between him and the said Joseph Chapdelaine & wife, and also the deed of Sale by the said Jos: Chapdelaine & wife to the said Gendron, may be rescinded and annulled between the parties respectively, and the said plaintiffs restored to the possession of the aforsaid lot of land to hold and enjoy the same in the same manner as if the aforsaid deed of donation had never been made, the whole w[ith] Cost -

Plea of Exception peremptoire en droit by the Defts Chapdelaine & Gendron. -

That the Pliffs cannot have or maintain their action aforesaid against the said Defendts in manner & form &c. - because they say, that the said action is irregular and insufficient, inasmuch as the Pliffs join two different demands or rights of action, which by law cannot be joined, and which are incompatible and inconsistent, inasmuch as part of the plaintiffs demand against the S[d] Chapdelaine and wife, is for a personal right, or action, and that against the said Gendron is an hypothecary action brought ag[t] him as possessor of the land in question - And further that the matters and things contained in the said declaration are not sufficient in law to authorise the said pltff[s] to demand or obtain that the aforsaid several acts of donation, exchange & Sale mentioned in their said declaration, should be rescinded and annulled, or to compel the S[d] Defendts

to

to quit and abandon the possession & enjoyment of the aforesaid lot of land in manner & form as demanded by the said pltffs — Wherefore &c

The answer Joins issue. —

The Court were of opinion on this plea, that the personal and hypothecary action could not be joined together, that they were different in their nature, and the Judgments to be given thereon were also different that is, in the case of Chapdelaine, the Judgment would be absolute and conclusive, but against Gendron it could only be conditional, and in case Gendron chose to give up the lot of land in question, in order to be exonerated from the present demand, the executions also must be variant — They therefore were of opinion that in regard of Gendron the action ought to be dismissed, but the exception as pleaded by Chapdelaine ought also to be dismissed, as he could not complain that another, although not liable with him, was joined in the action with him. —

James Wilson of the City & District of Quebec, & James Whyte of the same place, Merch.ts & Copartners trading together under the firm of Wilson Robertson & Co ——— Pltffs.

vs.

Malcolm McDonell &c — Defts

On the 7th day of October 1820 the Pltffs obtained a rule on the Defendant and on James Millar & James Birss, the special bail of the Defend.t to shew cause in this Court on the 12th Oct., why the entries made in this Cause in the Registers of this Court

Court on the first and third days of October 1812, should not be amended and corrected, by substituting in the titles of the said entries, the word, James, in lieu and place of the word John; the said word, or name "John" having been written and substituted in each of the said entries, by the Prothonotaries of this Court by error and mistake for and in lieu of the said word "James". —

Ogden for the bail shewed Cause and contended that the rule should be discharged, inasmuchas the amendment thereby prayed for could not be granted the matter had now been at rest for upwards of seven years, and must be considered as a chose jugée — and besides the Judges of the present day have no authority over proceedings of this Court held before other & different Judges, from those now on the bench — cites. Sedgillon. tit. 26. art 5. / Sedgillon

Boston for Plaintiffs contended, that it was only through this means that any remedy could be obtained as the Court must have a controul over the acts of its own officers and correct them when wrong — that here it was evident that an error had been committed by the Prothy of this Court in entering by error and mistake the name of John instead of James — and Justice seemed to require that this should be made manifest, that the Court might set it right — were it otherwise, the Prothy of this Court would have it in their power to destroy the best interests of every Suitor in Court — In England where such errors are not so likely to occur as in this Court, such corrections are allowed, as being essential to the ends of Justice — cites Sellons Prac. 2 Vol. p. 579. — T. T. Rep. 699. 703. — Fowlers Exch. Prac. 1 Vol. p. 120. Tidds Prac. 1 Vol. 652. —

The

The Court were of opinion that the amendment ought to be allowed to be made, and that they were warranted in ordering the same, — That the individuals composing the Court now or when the error was committed was not an object of consideration, it was the power and authority of the Court, to correct what was wrong — The Court must necessarily have a controul over its officers to correct their errors and supply their defects, this is consistent with Justice, and we find it laid down by Ld Kenyon in the Case of The King v. The Mayor & Burgesses of Grampond. 7 T. Rep. 703, that it was within the sound discretion of the Court and for the furtherance of Justice to allow amendments, and we find in various instances amendments to the extent of that demanded here have been allowed in the Courts in England — all we have to look to is, whether the error is so apparent, that Justice necessarily points out the amendment as necessary, and of this there is no doubt in this Court, for in looking at the declaration at the writ of Capias, and at all the subsequent entries in the Cause to those here mentioned, they are correct and consistent, and it would be a reproach to a Court to withholds its aid from correcting what it sees and knows to be wrong by the misprision of their own Officer — Rule absolute. —

see. 1 Taunt. 227. Man. v. Calow & anr. — If there be a failure of the record, through a misprision of the officer of the Court the Court will permit the Recognizance to be amended — and this in Scire facias ad Bail —

2. Tidd. Pr. 862. 3 Doug. 114. —

4 Taunt. 875. Bail piece amended, by changing name from Charles to John. —

4 Maule & Sel. 94. Judgt. amended in a Subsequent Term. —

Monday

Monday 12th Febv. 1821.

McKenzie, Tutr &c
vr
Hallowell &c. } Action of debt on deed of Fideicommis.

The declaration stated - That on the 8th Janv 1811, by a certain act or deed in writing made & executed before S. A. Gray & his colleague, notaries, the said Alexander McKenzie the plaintiff did give and grant to the Defendt his heirs assigns and legal representatives the sum of £1000. for the uses and trusts therein mentioned, that is to say, in trust and on condition that he the said Defendant would pay to Anne McKenzie, wife of him the said Plaintiff, during her natural life, the yearly interest of the said sum of £1000. on the 8th day of april of every year, of which the first payment was to be made on the 8th April 1812 - and that on the death of the said Anne McKenzie, he the said Defendant his heirs and assigns, should pay to the children, or child living of the marriage of the said Anne McKenzie with the said Plaintiff, the said principal sum of £1000, and the interest which might then be in arrear and unpaid all which the said Defendt in and by the said act or deed, bound and obliged himself to do and perform.

That afterwards in the year 1818 at Charlottenburg in Upper Canada, the said Anne McKenzie, died, leaving two minor Children of her marriage with the said Plaintiff, viz: Alexr McLeod McKenzie, and

Mary

Mary McKenzie, to whom the Plaintiff was duly appointed Tutor on 21 Janv. 1819, whereby he hath become entitled to demand and receive of & from the said Defendant the aforesaid sum of £1000, on behalf of the said minor Children as surviving their said mother with the interest thereon due & in arrear since 8th April 1818 — Wherefore &c —

Plea — Contains first a demurrer or exception per. en droit to the declaration, as insufficient &c — and further that in and by the act and deed in trust in question it was stipulated covenanted and agreed, that in case of the death of the said Anne McKenzie, leaving alive any child or children lawfully begotten, the property of the said principal sum of £1000, should belong to such child or children, and be payable to him or them only and should belong and become payable to the said plaintiff only in case no such child or children should then remain alive — and that the said Plaintiff hath not, nor could he have any right to claim or demand, in his capacity of Tutor or in any other manner whatever the payment of the said principal sum of £1000, during the lifetime of the said child or children — and further that the defendant is not indebted to the said plaintiff in manner & form &c —

Gale for Defendt — contended that the principal sum of money demanded ought not to be paid to the Plff who in this instance was coming indirectly against his own act — That the intention of the parties to the deed was to secure to the surviving children the principal sum of money, it is true that the circumstance of the death of the mother during the minority of her children, was

not

not provided for by the deed, but this Court acting as a Court of Chancery, which always watches over the interests of minors and those who are incapacitated from acting for themselves and on this account it will give to those children the same security and relief for the recovery of this money as they would have been entitled to, had the death of the mother happened after their having come of age.— The money at present is vested upon good and sufficient security within the jurisdiction of this Court and liable to its controul, but should it be paid to the Plff under his title of Tutor, that security will be destroyed, and as the Plff lives in Upper Canada, the minors will cease to have any security whatever for this money when they come of age, except their bare personal action against the Plaintiff.— That the deed in question is a donation fideicommissaire entre vifs, and as such is irrevocable, by which we see that the Plff at the time meant that it should not be in his power by any subsequent act of his to injure or diminish the rights of his children in the sum of money he then secured to them, but this action will have that tendency if it could be maintained— cites case of Plenderleath v. Burton & al^s Tunstall opp^t where money secured to minors was ordered to remain in the hands of the purchaser of the Estate upon which it had been vested, and refused to allow their Tutrix to recover it— admits that Plff as Tutor may be entitled to the interest—

Grant for Plff in reply— This action is in conformity to the stipulations of the deed, by which the Children are entitled to the principal sum of money and arrears of interest on the death of their mother, the Court must regard this action as the demand of those children for that money, there is no claim here of the father, the original donor, he claims as Tutor, and as such his claim is founded— in regard of Security, the Plff is willing to give good & sufficient security to appropriate the money for the use of the Children—

Chapman & Co. vs Foke. — Action for goods sold & delivered

The only question here was in regard of the Costs.—

It appeared that the plaintiffs had requested their attorney, Mr Hallowell, to write a letter to the Defendt calling on him for the amount of his acct and in default of payment to prosecute him — This letter was sent to the Defendt on the 27th Septr the next day the Defendt sent his Clerk with the money, (£16. 15.) to the Plaintiffs who refused to receive the same unless the Defendt would also pay three shillings and Sixpence for the charges of the attorneys letter — this the defendant refused to do — but tendered the above amount —

The Court were of opinion that as the charges for writing an attorneys letter constituted no part of the tarif of fees established in this Court, the Defendt was not bound to pay for it, and therefore discharged Defendt from payment of the Costs. —

Fortier & ux vs Morison } Action of debt on deed of transaction.

The declaration stated, that by a certain deed of Sale made and executed before Mr Bean, p. Not. the 28 March 1818, the Plaintiffs sold and conveyed to one Rodk. Morison, all their rights in the Succession of the late Donald Morrison, their father, deceased, also all the rights which they the said plaintiffs then held or might thereafter acquire, or be entitled unto in the Succession of Jane Cairns, their mother, and for this purpose subrogate the said R. Morison, in all the rights of them the said

Plaintiffs

Plaintiffs – That in consideration of the said Sale and conveyance, the said R.ᵏ Morrison bound and obliged himself to pay to the said plaintiffs the sum of two hundred pounds, part of which, that is to say, fifty pounds, he the said Defendant, a party to the said deed bound and obliged himself to pay to the said plaintiffs, on the behalf of the said Roderick Morrison, for the causes & considᵒⁿˢ stated in the said deed mentioned, in 18 months after the date of the said deed, that is to say on the 28ᵗʰ Sept. 1819, – That afterwards, on the 27ᵗʰ July 1818, the said Jane Cairns, widow of the said Donald Morrison, by act executed before the said M.ᶜ Bean, Notary, bearing date on that day, ratified confirmed and approved the said deed of Sale and Conveyance so made between the parties and by means whereof the same became valid & binding on all the parties thereto, and the said Defendᵗ by virtue thereof bound to pay to the said plaintiffs the said sum of fifty pounds according to the stipulations of the said deed, but which to pay he now refuses. Wherefore the

Plea. That the Plaintiffs are not entitled to have or maintain their said action against the Defendant by virtue of the aforesaid deed of 28 March 1818, inasmuch as the wife of the Plaintiff could not in law renounce to the Succession of her mother, Jane Cairns who was then alive, and whose Succession was therefore not yet open, and no agreement between the parties in regard thereof could be valid or binding, unless made by a marriage Contract. –

Replication – That the said deed of 28ᵗʰ March 1818 was valid and binding on all the parties in consequence of the ratification thereof made by the said Jane Cairns, of whom the Succession was in question. –

L.M

L. M. Vigé for the defendant, contended that the deed of 28 March 1818. was null and void in law, as the renonciation of right in the Succession of a parent by the child, during the lifetime of the parent is an act prohibited unless by marriage Contract. cites. 1 Bouj. 909. Repre vo Renonciation. p. 136 — and even by marriage Contract, the males cannot renounce in favor of the females — That the sum of fifty pounds now demanded is stipulated to be paid as well in regard of the rights of the Plaintiffs in the Succession of the father who is dead, as of the mother who is still living, and is therefor void for the whole, as it cannot be ascertained what proportion of this sum would be due for the one Succession, and what for the other. —

Bourré for Plffs contended that they legally could sell their rights in the Succession of the mother altho' still alive, when this was done with her consent. cites. Repre vo Droits Successifs. p. 550. — Dic. Droit de Fer. vo Stipulation contre les bonnes mours. — Poth: Oblign No 132. — Repre vo Renonciation. p. 137. —

The Court were of opinion that the deed of transaction and Sale between the parties of 28 March 1818. was a nullity, and could not be enforced; that although some of the authors on the Customary Law seemed to admit the validity of such a deed, where the consent of the person, whose succession was in question, had been obtained, yet this consent could be obtained only in the particular instance of a marriage Contract, in the opinion of the better writers — action dismissed —

see Poth. obl. No 132. —
——— " Vente. No 526.
——— " Succ. p. 31. §. 3.
1 Despeisses. p. 18. No 5. —
Louet & Brodeau Let. H. Som. 6.
Lamoign. arrêtés. 2 vol. p. 414 —
Dec. des arrets de Billon. vo Renonciation aîné. — p. 813. 16
1. Bouj. 909. Sec. 3. §. 35. 36. —
Poth. Cout. d'Orleans. Introd. au Titre Des droits de Succ. p. 592. No 66. & p. 579. No 3.

Wednesday 14th Febvy. 1821.

Belanger
v.
Lussier. —
& Contra —

Mr Roi the attorney of the plaintiff moved for a distraction de frais, in this Cause under the following circumstances. — The Plaintiff obtained Judgment on his demand against the defendant for £77. 8. 8½ wt interest & Costs — The defendant afterwards had a transfer made to him of a dibt due by the plaintiff to the amount of £25, and subsequently there was a Saisie-arret sued out by one — Pickle upon all the monies of the plaintiff in the hands of the Defendant, to the extent of £500 — The present motion being made subsequent to these proceedings the Plaintiffs attorney contended that he was still entitled to his distraction de frais, inasmuchas the Saisie arret could not affect his right, and as there were sufficient monies in the hands of the Defendt to satisfy the above sum of £25 — besides the Costs claimed by the present motion. — The Plaintiff consented to the motion — On the part of the defendt it was contended that after the masking of the Saisie arret in the hands of the Defendt the distraction de frais could not be granted, as this proceeding necessarily arrested these Costs in the hands of the defendant until the validity of that proceeding had been previously determined, and as Mr Pickle was interested in this question he ought to be heard before the Court made any determination —

The Court however were of opinion that the Saisie-arret did not preclude the attorneys right, & granted the motion.
see. Repse Vo Distraction de depens. p. 731 —
N. Denis. Eo. verb. §. 2. No 4 —
1 Pigeau. 419. 420. —
Poth. Cont. Mandat. No 137. in note. —

Monday 19th Febry. 1821.

Langevin. vs Beauchamps } Action of assumpsit for monies lent &c

The declaration contained two Counts, one for money lent & advanced by Plff to defend. the other for monies had and received by the Defend. by the hands of one Franc. Bourque, the minor son of Plff. on 1 Feby 1819. amount £41. 13. 4.

Plea. Non assumpsit. — and further denying all the allegations in the declaration of the said Plff, the said plea, states and alledges, that on the 5th Octr. 1818, the Plff being desirous of building a Stone house on certain premises belonging to her at St Rock, requested of the defendant to undertake all the joiners work for completing the said house, which the said Defendant promised and undertook to do à dire d'experts and in conformity to a certain act or marché, drawn up for this purpose in order to be signed by the parties, and now produced and filed by Defend., the said defend. thereby binding and obliging himself to continue the said work as the mason work advanced and to complete the whole by St Michel then next ensuing (1819) on condition however that the said plaintiff should and provide upon the spot where the said house was to be built, at her own proper costs & charges, and as the Defendant should require, all the wood and timber for the Joiner & Carpenter work, and all the other materials — requisite for completing the work so undertaken by the said Defendant, and for and in consideration of the sum of £41. 13. 4, and twelve bushels of wheat and a ewe sheep. — to be paid and delivered by the said plff to the D. Defendant.

That

That the said Defendant did in the office of one Allard a public notary, sign the the act or marché which had been drawn up by him touching the matter aforesaid and which the Plaintiff then and there promised also to sign but which she afterwards refused to do when thereunto req^d That the said Defend^t being thus bound to perform all the work aforesaid for the said pl^ff, refused during all the course of last winter to undertake any other work, holding himself always ready to perform what he had so undertaken.—

That although the said defendant was always ready to perform what he had so undertaken, yet the said pl^ff had not yet caused the mason work of the said house to be begun, whereby the defendant has suffered damages to a great amount— That is true that the Defend^t at the time of signing the said act or marché, received from the plaintiff by the hands of Franc. Bourque the said sum of £41. 13. 4 as the money therein & thereby stipulated to be paid to him by the said pl^ff— and the S^d Defend^t therefore says, that if the said sum of £41. 13. 4 so rec^d by the said Defend^t for the causes and considerations so mentioned in the said acte or marché, be the same sum of money which the Plaintiff means to demand by her present action, the said pl^ff cannot have or obtain the same, nor maintain her said action in regard thereof Because her said action is not that which the law gives in such a case for obtaining restitution of the S^d sum of money, were she even entitled to demand that restitution— and because the said pl^ff cannot have or obtain such restitution nor maintain her action in this behalf, but by alledging & proving that the said defend^t had refused to fulfile his said agreement, which the said pl^ff doth not allege, and which the said Defend^t never refused to perform.— Wherefore her Replication joined issue on this, denying all the matter specially pleaded by the Defendant—

At

At the enquête the Defendant endeavoured to make proof of the special matters contained in his plea, but failed, so that the Cause came on to be heard on the merits without proof on either side, beyond what was stated in the pleadings.—

At the hearing of the Cause Rolland for the Plff contended that his demand was sufficiently proved that as the defendant had acknowledged having received the money in question, but pretending that it was on an agreement entered into with the plff for building a house, which the Plff had refused to fulfill, it was therefore necessary for the Defendant to prove what he has alledged and to shew the damage he complains of, otherwise he must be condemned to pay the amount demanded to the Plff.—

Bedard for the Defendant contended that the Plff had made no proof of her demand— That there was no proof to shew that the Defendt had ever borrowed any money from the Plaintiff, as stated in the first Count in the declaration as to the money stated in the 2d Count to have been received by the Defendt by the hands of Bourque, the Defendant admits that he received the sum alledged, but his admission will not support the Plaintiffs demand; because his admission is not made in the terms of the demand, by saying that he received the 1000th in question in a way which made him accountable to the Plff whenever she thought fit to demand them, but he says that he rec'd this money from the Plff under a certain contract and agreement which he was always ready to fulfill, but that the Plff had failed to fulfill her part, & therefore the defendt is not liable to pay back that money— The Defendant in this case was not bound to set-up any Incidental demand on the subject of his agreement with the plaintiff, as he was not sued on

on that agreement.— That the admission made by the defendant in his plea cannot be divided, it must be taken together, and the Plaintiff not having made proof to the Contrary, must take the admission of the defendant of his having received the money in the manner that it is made, that is, on an agreement between the parties to build a house—

Rolland in reply.— It is enough that it appear that the Defendant has received the plaintiffs money, to oblige him to shew a right to retain it.—

By the Court.— The opinion to be held by the Court in this Case will serve to settle a question which has not yet come before it, in regard of an admission or confession of a defendant, how far it shall be considered as evidence agt him, and if every confession made by him, or by any party in a Cause, throws upon that party the weight of proof of what is alledged in avoidance of such confession.—

It is no doubt a safe principle, as well as a rule of law that the confession of a party, should be considered as the strongest evidence against him, but as confessions are often accompanied with allegations which tend to exonerate or excuse the party making them, it is here that the distinction ought to be made, how far such accompanying allegations must be proved.—

It seems to be a clear principle in the French law, drawn from the Civil law, that the confession of a party cannot be divided, but must be taken entire* — but this appears too general, for whatever is admitted, must be considered as proved — if however an admission is accompanied with such facts and allegations as destroy or avoid it, it cannot be considered as an admission, it can in that case be considered only as an incidental Statement to bring into operation those facts and allegations which meant to justify or

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*that is, you cannot separate from the fact admitted, what is alledged in avoidance of it.

to avoid the admission — On this account it seems necessary that a distinction should be made between what is thus admitted in pleading and what is admitted in evidence, between what constitutes the issue and what is necessary to prove it. — What is stated in pleading should be strongly taken against the pleader, for this simple reason, that every person has a controul over his own pleading, he may state what he conceives to be for his interest, and in the way best suited to support that interest, and therefore ought to be strictly bound by what he so pleads — In matters of evidence, the case is different, the witness, or party on faits & articles, has not this controul — he is bound to speak the truth and to state the whole circumstances — he has no choice left of suppressing what is true, nor of suggesting what is false, but all facts & the circumstances attending them must be fairly acknowledged — To separate and divide evidence therefore by singling out the matter admitted, and leaving the other circumstances as of no value, would be dangerous and no man would be safe, if what were given under the Sanction of an oath were liable to be thus garbled and distorted where all was equally to be believed — But in pleading, if a party admits a fact charged against him, and avoids it by other facts, it must be presumed, that the admission so made is upon the principle that what he so pleads in avoidance, is a sufficient excuse for him, and that by shewing the truth of this excuse he can exonerate himself from the fact so charged against him — but if a defendant were to admit a fact charged against him, and plead in excuse other facts wholly irrelevant, or insufficient to exonerate him, his plea must be taken against him — so also does the necessity appear of his proving what he alledges as such excuse when sufficient — for if not proved, it is the same as if it had not been made, or did not exist —

The rule adopted by the Court of Chancery in England seems to be a safe and judicious one, and such as this

Court

2. Ev. Poth. 157. 8 Gilbert. 57. — Wood's Instit. Civ. Law. 305.

Court is disposed to follow, without danger of controverting in any material respect the law of the Country — it is this, when a defendant admits a fact, and insists upon a distinct and separate fact by way of avoidance, he must prove this avoidance, as being the matter of his defence — as where a defendant admitted the receipt of £1100. demanded of him, but added, that he afterwards gave a bond of £1000, and that the plaintiff gave him the other £100. — or if the libel charged, that the Defendt had borrowed £1100 from the Plff and the defendant answered, that he did borrow so much, but that he had since repaid it — or that the plff had promised not to demand it until after the expiration of Seven years — in such cases the defendant must prove his excuse and avoidance of the matters admitted by him, because his admission meets the demand of the plaintiff — But if the defendant states one fact only — as that the plaintiff gave him originally the £1100. — or that he received from the plaintiff the sum of £1100, which he, the Plff, owed him, and no more — this is but one sentence, it cannot be divided, but must be taken altogether and allowed, if not disproved — and if taken altogether, the plaintiff's demand is not proved, because the defendant although he admits receiving money from the Plaintiff, does not thereby meet the demand by admitting to have received it in the manner charged. — Let us apply this principle to the case before us — The plaintiff demands of the Defr a sum of one thousand livres — first as money lent, but of this there is neither proof nor admission to support it. She also demands by a second Count in the declaration a thousand livres for money had and received by the Defdt by the hands of one Bourque — The defendant first pleads non assumpsit — and further, that he received a thousand

livres

livres from the plaintiff by the hands of Bourque on a contract to build a house, which he was always ready to perform, but that the plaintiff had refused to perform her part of it, and that if this be the thousand livres which she demands she is not entitled to recover the same from the defendant — Now this cannot be considered to be an admission of the plaintiff's demand — it does not admit that the money was received as stated in the declaration, and avoids the demand by some new and distinct fact or allegation, but states one fact — that he received a thousand livres on a Contract which he was willing to perform — it is the same as if he had said, that he received money from the Plaintiff which she owed him — had the defendant said, that he received the money demanded, but that it was afterwards agreed between them that he should retain this money on a contract entered into for building a house — he would thus have admitted the demand, and would have been held to prove the avoidance of it — but in the case before us the plea does not go so far, and as the plaintiff has made no proof her action must be dismissed. —

Chorette. vs Gravelle }

Action of trespass, and for malicious prosecution

The plaintiff by his declaration stated that the Defendant had wilfully maliciously and falsely charged the Plaintiff with being indebted to him the defendant in a large sum of money, causing him to be arrested and held to bail for a large sum of money, viz^t for the sum of one hundred and eighty pounds &c to damage of Plff £500 &c

The Defendant pleaded fu exceps.^n that the action was premature, inasmuchas the Suit so commenced and prosecuted by him against the said plaintiff was still pending and undetermined —

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The plaintiff by his answer admitted the pendency of the action, but contended that this was no bar to the present action — but the Court were of opinion that this was a sufficient bar to the action and dismissed it —

Gibb & al'a. vs Gamelin —

This was an action instituted by the Plaintiff as Executors of the last will and Testament of one Gionvilly, for the recovery of a small sum under twenty pounds for goods sold & delivered to the Defr by the Testator — At the return of the writ, the Plaintiffs attorney filed nothing, to shew that the Testator was dead, or that the plffs were Executors of his last will & Testament — The Defendant by his plea took advantage of this omission and pleaded specially denying the capacity assumed by the plaintiffs, or their right of action — The Plaintiff joined issue on this plea, and afterwards — moved to be permitted to fyle the extrait mortuaire, and the last will and Testament of the Testator — this was opposed by the Defendant — The Court granted the motion, but considering the great inattention and negligence of Mr Rossiter the Plaintiffs attorney, in not filing the said exhibits at the return of the writ, as he was bound to do by the rules of practice, condemned him to pay 40/ Costs to the Defendant —

Tuesday 20th Febv. 1821.

The King
vs
Cuvillier & ux

Action of debt on bond

The Information stated, that on the 18th day of October 1816, one James Williams and the said Defendants, did by their certain bond or obligation signed and sealed by them bearing date the day and year aforesaid acknowledge themselves to be held and firmly bound to — Daniel Sutherland deputy post master general of British North America, or to the deputy post master General for the time being, in the sum of one thousand five hundred pounds which they the said James Williams and the said Defendts jointly and severally bound and obliged themselves in & by the said obligation to pay to the said Daniel Sutherland, Deputy Post master General of our Sovereign Lord the King in British North America, or to his Successor, to wit, the deputy post master General for the time being, for our said Sov. L. the King if default should be made in the condition of the said bond or obligation — which condition was and is, that he the said James Williams who had then been appointed the post Master of our said Lord the King in and for the City of Montreal would well and truly account for and pay to the said Daniel Sutherland as such Deputy post master Genl all such sum or sums of money, as he the said James Williams might from time to time as such post master at the City of Montreal aforesaid, receive for our said Lord the King for the post of letters and packets to and from Montreal aforesaid, whenever he the said Daniel Sutherland as such deputy post master General might think fit and proper to demand the same. That the said James Williams as such postmaster of the said City of Montreal hath totally and entirely failed in the

the condition of the said bond or obligation, because altho' the said Daniel Sutherland as such deputy post master General hath often demanded the said James Williams to account and pay to him for our said Sov: L^d the King all such sum & sums of money as he the said James Williams as such post master had received for the post of letters and packets to and from the City of Montreal aforesaid, yet he the said James Williams hath not well and truly accounted for and paid to the said Daniel Sutherland, or to any person duly authorised by him or to our said Sovereign Lord the King such sum and sums of money as were from time to time received by the said James Williams for that on the 27^th day of Dec: last past he the said James Williams was in arrear and indebted to our said Sovereign Lord the King in the sum of £1692. 2.6 Current money, for so much money by the said James Williams before that time had and received for the post of letters and packets to & from the City of Montreal aforesaid, and being so in arrear our said Sov: L^d the King impleaded him the said James Williams in the Court of Kings Bench holden at Montreal on the 20^th day of April 1820, and then and there recovered Judgment against the said James Williams as such post master for the said Sum of £1692. 2.6, then due and in arrear as aforesaid for the monies of our said Sovereign Lord the King by the said James Williams received for the post of letters & other packets up to the said 27^th day of Dec: last, which said Judg^t still remains due and unsatisfied, by reason whereof an action hath accrued to our said Sovereign Lord the King to have and recover from the said Defendants the said Sum of £1500 being the amount of their said bond or Obligation — wherefore

To this declaration the Defendants pleaded fer exceps. per. en droit, that it was insufficient and did not contain any legal ground or cause of action ag^t the Defendants — and also nil deb^t — On this plea issue was taken —

Beaubien for Defendant contended, that upon this Information there appeared no right of action to the King, that the bond made by the Defendants was payable to Daniel Sutherland who alone, or his Successors in office are entitled to an action

thereon

thereon – that Daniel Sutherland as Postmaster is accountable to the King for his deputies, and for his security in this respect the bond in question was taken by him – That his Majesty cannot by his action alter the nature of this obligation which was to pay to D. Sutherland; and the Defendants are besides interested in accounting with D. Sutherland, as they can shew payments made to him on account thereof, which they cannot set up against the King –

Mr Ross, who brings the Information contended that the Bond was made to D. Sutherland in his public capacity as an officer of the Crown for securing a part of the revenues of the Crown, and regularly the action could be brought in its present shape for the recovery of this revenue –

The Court were of opinion, that as the bond was made for securing the public revenue, the King had an interest therein and could maintain the action, – That the Bond was made to a public officer who by his office was acting for and on behalf of the Crown and all acts and contracts made by & with him must be considered as made for the benefit of the Crown, and the King had a right to claim the execution of all such contracts – Exception dismissed

see Pothk. Ob. Nº 74. 82. AAJ. 8. –

Northedge vs Portous & ux } Action of trespass on the Case &c

The declaration contained three Counts, the first against James Portous for enticing away Caroline Portous the Servant of Pliff from his Service – The second for harbouring and concealing the said Caroline Portous after she had left the Service and employment of the Pliff, and knowingly detaining her – to the damage

of

of the Plaintiff eighty pounds Cy. And the third Count was on an indebitata assumpsit, by the Defend. Caroline while sole, to pay to the Pltff £44 . 17. 6. for meat, drink, nursing and attendance & other necessaries found & provided by the said Pltff to the said Caroline, and joint assumpst by the Defendants since their marriage

The Defendants pleaded by exception per. en droit, that the Plaintiff could not have and maintain his action and demand aforesaid against the said Defends because the same was irregular and inadmissible, inasmuchas the Plaintiff had in and by his said declaration joined two causes of action entirely distinct and separate, and which by law cannot be joined in the same action —

The Replication joined issue, and the parties were heard thereon. —

O Sullivan for the defendts contended, that there were two Counts in the declaration for tresspass on the Case & two in assumpsit, which could not be joined, as the former were founded ex delicto, and the latter ex contractu, which were separate and distinct actions and could not be united in the same demand — cites. 1. Pigeau. 37. 1 Chitty on Pleads. 198. —

Blennerhasset for the Pltff, contended that no part of the demand here could be considered as grounded ex delicto but that all the Counts might be joined, more especially in this Court, where great latitude was allowed, and as he knew no law of the Country to operate against it — that even in England these Counts by the practice and decision of the Courts could be regularly united — cites. 2 Salk. 772. That misfeasance and trover may be joined. 2. Wils. 319. — 3 Wils. 348 case & assumpsit may be joined — and a case of this kind the husband may be sued alone. 2 Bl. Rep. 722. 3. Wils. 141. —

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The Court held, that although great latitude was allowed to Suitors in this Court in bringing their actions, yet this ought not to be extended so as to introduce irregularity or confusion — that the practice of the Courts in France as well as in England equally prohibited this, for the same reasons adopted by both. In England it is laid down as a rule that actions founded upon a tort and upon a Contract, cannot be joined in the same declaration, as assumpsit and action upon the Case for a tort, because the pleas are different — nor can assumpsit and an action upon the Case founded upon fraud or deceit, be joined, for the same reason + neither can actions be joined which proceed from different Causes, which tend to introduce a difference in the instruction or course of proceedings in the Courts in France. 1 Pig. 37 — In this Case, the grounds of the demand are wholly — different, as proceeding from different Causes, being partly ex delicto, and partly ex contractu — the pleadings must be different, in same instances the trials might be different as well as the execution thereon, and therefore the Court is of opinion that these causes of action ought not to be joined — action dismissed. —

1 T. Rep. 276 Brown. v. Dixon.
1. Vent. 366. — Denison. v Ralphson

Carth. 189. Willet. v Tydy.

Donegany v Pickle. —

Action on a promissory Note — plea. usury. —

The defendant obtained permission to examine the plaintiff upon faits & articles, who attending for his examination, objection was taken by him to one of the Interrogatories — by which it was enquired of him what was the value or consideration given by him to the defendant for the note in question? — The Plaintiff contended that he was not bound to answer any question which might subject him to the payment of any penalty or which may affect his general character and reputation Repertoire v° Interrogatoire. p. 586. Lacombe. v° Interrogatoire. Despeisses. +

Grant

Grant for the defendant contended, that the Interrogatory in question carried nothing on the face of it which tended in any manner to scandalize the Plaintiff or to render him liable to any forfeiture, but was of a description which might be proposed in any Cause.—

The Court however considering the nature of the plea in this case, admitted the objection.—

Deschamps Curr. &c. vs Turgeon.—

Action for arrears of a rente & pension viagere on deed of donation.—

The action was instituted by Antoine Deschamps as Curator to one Amable Deschamps, interdicted, and by Victoire Beaupres, wife of the said Amable Deschamps and the declaration stated, that by an act or deed made and executed before Chatellin public Notary & witnesses and bearing date the 28 April 1804, one Augustin Beaupres and Magdeleine Limoges his wife, made a donation to the said defendant of a certain lot of land, and also of certain annuities due and payable to them the said Augustin Beaupres and Magdeleine Limoges, as stated and set forth in the said declaration, in consideration and upon condition among other things of paying annually to the said Victoire Beaupres, the daughter of the said donors a certain annuity, or rente & pension viagere of two hundred and forty livres, or ten pounds Currency during her lifetime the first payment whereof was to commence and be made one year after the decease of the Survivor of the said donors That Augustin Beaupres the Survivor of the said donors died on 21 January 1816, and on the 22d day of January 1817, one year of the said annuity became due to the said Victoire Beaupres, and another became due on the 22d day of January 1818, which two years annuities were paid and discharged by the said Defendant, but that the two

subsequent

subsequent years of the said annuity which became due on the 22d day of January 1819. and the 22d day of January 1820 amounting to £20.— the said defendant refuses to pay — Wherefore &c —

Plea. That by the said act or deed of donation of the 28th April 1804. the said Augustin Beaupré and Magdeleine Limoges the donors, warranted the lot of land therein mentioned to contain 70 feet in front by all the depth of seventy three feet, whereas in truth and in fact the said lot of lands — contains only thirty six feet in front by the said depth, which causes a diminution in value of the said lot to the amount of five hundred pounds.— That in and by the said deed of donation the said donors did also transfer and convey to the sd defendant all their moveable property of every description — including therein their tools of trade, yet the said donors not regarding their obligation in this behalf, by act passed on 4th Oct. 1804, made a gift to the said Victoire Beaupres of a large quantity of their moveable property, to belong to her en nature de propre, which moveables were afterwards transferred into the possession of the said Victoire Beaupres, and which were of the value of £72. Cy.— That the said Augustin Beaupres did also on the said 28th day of April 1804, give and hand over to one Francois Gigon all his tools of trade, of the value of at least forty pounds — whereas in and by the said deed of donation of 28 April 1804 the said Augustin Beaupré had divested himself of the said moveable property in favor of the said Defendant, & had become bound not to dispose thereof to any other person, by reason whereof the Succession and heirs of the said late Augustin Beaupré have become bound and liable to account to the said defendt for all such moveable property so transferred and disposed of by the said Augustin Beaupres to the prejudice of his the defendant's right aforesaid, and to pay to the said Defendt the value of the difficiency of the said lot of land, making in all a sum of £612.—

That the said Victoire Beaupres is the only heir at law of the said donors, her father and mother, agt. whom

the

the said defendant is founded to set up his claim by Incidental demand, which he thereby does and concludes that the Plaintiffs be adjudged to pay to him the aforesaid sum of £612 for the value of the said moveable property and effects and also the difficiency on the said lot of land with interest and costs.—

Replication & Plea to the Incidental demand denied all the allegations of facts stated by the Defend^r and further that the said Victoire Beaupré is not bound to warrant any of the property given to the Defend^t in and by the said deed of donation of 28 April 1804, and that it is without cause that the said Defendant complains of the difficiency of the said lot of land after having had possession thereof and held and enjoyed the same since the date of the said deed of donation — and in answer to the demand of the said Jos. Turgeon incidentally made the Plaintiffs say, that the same is wholly insufficient and unfounded in law and in fact, and that he the said Defend^r ought not to have or maintain the same against the said Pltffs —

The Court after hearing the parties were of opinion, that the plaintiffs could not be bound to any garantie in this case — That Victoire Beaupres although the daughter of the donors, claimed nothing as their heir, she claimed as a Stranger under the donation — that she could not be heritiere & donataire at the same time, and as she claimed here as Donataire she had made her election, and thereby appeared to have waived all benefit of her right as heir — That the Defendant here was in fact the heir, as the whole of the property and Estate of the donors had been conveyed to him, he had been in poss^n of the Estate so given from the time of the conveyance so made to him and he could have exercised his present claim as the donors only but not against the Plaintiff Victoire Beaupré who

was

was only a donee. — That the claim of the said Victoire Beaupré for her legitime in the Succession of her father and mother could be exercised only against the Defend^t as holding their estate, but by her present action she had tacitly renounced to all claims as heir, and therefore the defendant ought to have shewn some acte d'heritier, made or done by her to entitle him to maintain his Incidental demand of her, which he had not done — Incidental demand dismissed and Judg^t for Pltff.

se. Riccard dis Don.

Savary, v^ue &c
v
Meunier &c } Action of damages for seduction, and for maintenance of a bastard child. &c

The action was instituted by Marie Savary, widow of the late Michel Peltier, against Antoine Meunier dit Lapierre — The declaration stated, That the plaintiff having been left a widow at the age of twenty nine years, had reason to look forward to another marriage, and the defendant having frequented her house with this purpose and intent, so far gained upon her weakness by his sollicitations and reiterated promises of marriage as to seduce her and have carnal knowledge of her body whereby she became with child, of which she was afterwards delivered on 4^e Sept^r 1815. and which was baptised by the name of Marie Eusebe, and is now still alive — That the said Defendant now refuses not only to marry the Plaintiff, but also to acknowledge himself the father of the said Child, whereby great injury and damage hath accrued to her and which she limits to a sum of £300. Cy — That the plaintiff is also entitled to claim and demand of the Defendant as the father of

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the said child, he should be condemned to pay monthly and in advance, to be reckoned from the said 4th day of September 1815, the sum of two pounds, for the support and maintenance of the said Marie Eusebe until she shall arrive at an age to gain her own livlihood — Concludg that the defendant be condemned to pay to her the sum of three hundred pounds for her damages aforesaid, & further to pay to the Plaintiff the sum of two pounds monthly and in advance to be reckoned from the said 4th day of Sept. 1815, for the support and maintenance of the said Marie Eusebe until she shall arrive at an age to be able to gain her own livlihood, the whole with Costs. —

Plea — The Plaintiff is not entitled to any action ag^t the Defendant by reason of the premises, she being of age & a widow, the law does not allow her any action in this behalf — And further the defendant saith, that at the time of the pretended seduction complained of, the Defendant was the hired servant of the plaintiff and living under her roof, and subject to the orders and directions of the said plaintiff, who cannot therefore complain of such seduction, the presumption being that she had seduced and debauched the Defendant — Concluding with a plea of not guilty — and putting himself upon the Country. —

Replication joins issue on the matters of law & fact above pleaded. —

5th Oct. 1816. The parties were heard on question of law raised by the defendants plea of Excep^n as to the right of the Plff to maintain her action. —

Vigé for Defendant contended, that the law will not lend its aid to a prosecution by a widow under pretence of seduction, she is presumed to have acquired

that

that experience in life as not to be imposed upon, nor led astray by the idle sollicitations such as stated in the declaration when she comes therefore to complain of seduction under such pretence, she is considered as alledging her own turpitude, and as claiming damages out of a wrong in which she was a willing agent, if not the principal instigator, now it is a maxim in law, that volenti non fit injuria, and this applies most pointedly to the case of the Plaintiff – but if the Court could see that in this Case the defendant was at the time the hired servant of the Plaintiff, living under her roof, liable to her controul, and to be guided by her example, all question of seduction would cease, as the presumption in that case must be, that the defendant was the person seduced, and in such case there can be neither damages allowed to the Pltff nor maintainance to the child, were the defendant proved to be the father – cites. Fer. Dic: Vo Turpitude. – Poth. Obl. No 43. Regles de Droit, d'Antoine. 134. Deniz. Vo Delit. No 16. –

Bedard for Pltff. The defendant has not cited the law correctly, the Plaintiff whether as a widow or otherwise has a right to complain of the defendants breach of promise, as to the damages resulting therefrom, they will be more or less according to the circumstances of the Case – but of this as well as of the other facts stated by the Defendant the Jury are alone competent to enquire under the direction of the Court –

9 Oct. 1816. The Court were of opinion to reserve the matters of law now argued until the facts had been enquired into, that although the presumption of law was against the plaintiff in an action of this nature, yet the opinion of the Court must be guided by the facts which may arise out of the Case –

3 June 1817. Trial by Special Jury – On the trial the Court charged the Jury, that as there appeared no proof of a promise of marriage by the defendant, nor any particular act of seduction, and as it appeared that the Defendt was at the time the hired servant of the Pltff, the claim of damages

for

for seduction ought not to be allowed — but as evidence had been laid before them to charge the defendant with being the father of the child, they must enquire into that fact, so that the maintenance of the child might be provided for. "

The Jury returned a verdict finding the Defendant the father of the child, and assessed £25. " damages for the maintenance thereof since the time of its birth — and in regard of the damages for seduction, they found a Verdict for the defendant. "

The Defendant moved for new trial upon the following grounds. —

1° Parceque le verdict est rendu sur un temoignage illegal et inadmissible, et uniquement sur une pretendue confession imparfaite du Defendeur donnée à un des temoins même — produit, consulté par le Defendeur, comme homme d'affaires sur une poursuite de la Demanderesse contre le Defend^r pour le même objet, et ce de l'aveu des deux temoins qui ont deposé à propos de cette Confession. —

2° Parceque la preuve d'une autre Confession dans une — occasion differente, prouvée par un temoin singulier, ne pourroit pas même faire preuve en loi, en supposant pareil temoignage admissible, suivant les principes de la jurisprudence. —

3. Parcequ'en supposant telle preuve legale, elle étoit — insuffisante pour appuyer le verdict des Jurés, d'autant qu'elle n'a été soutenüe d'aucune autre preuve de faits, ou relative à des faits du Defendeur, pas même d'aucune — familiarité de sa part avec la Demanderesse. —

4° Parcequ'en consequence, il n'y a eu aucune preuve legale ou suffisante du pretendu délit porté à la charge du Defend^r qui pût appuyer le verdict des Jurés. "

5° Parceque'il y a eu preuve formelle que le Defend^r etoit serviteur de la Demanderesse, travailloit en cette qualité dans sa maison dans le tems allegué comme celui ou la conception de l'enfant en question, doit avoir eu lieu, laquelle preuve est

restée

restée absolument intacte et sans replique de la part de la Demanderesse. —

6°. Parcequ'il y a eu de meme preuve complette tant ecrite que testemoniale devant les Jurés, que depuis ladite conception la demanderesse a pris le Defendeur à son service, et qu'il a resté comme son serviteur dans sa maison, engagé en cette qualité pendant une demie année, et pendant le tems de la grossesse de la demanderesse, et que cette preuve n'a non plus été contredite ou affoiblie de la part de la Demanderesse. —

7°. Parcequ'il y a eu preuve de la même maniere et sans replique que la demanderesse etoit lors du delit porté à la charge du defendeur, veuve avec six enfans de son mariage avec le defunt Peltier, tenant maison, le tout comme encore actuellement et ayant alors, comme dit est, le defendeur a son service. —

8°. Parcequ'il a eté permis à la demanderesse de produire comme temoin son propre fils, enfant de douze à treize ans sur des faits destinés à fortifier le soupcon du delit attribué au Defendeur par la demanderesse, temoin au surplus unique et singulier, dont la deposition ne peut faire preuve en loi.

9°. Parcequ'il n'a pas eté donné en charge ou instruction aux Jurés, que la preuve produite devant eux des qualités relatives, et de la situation respective des parties mentionnées dans les chefs précedens, devoit interdire toute reclamation et recherche contre le Defendr dans le cas present. —

10°. Parcequ'il a eté donné en charge aux Jurés qu'il suffisoit d'une preuve de filiation contre le Defendeur dans le cas present sur son aveu et confession pour appuyer un verdit contre lui. —

11°. Parcequ'il a eté donné en instruction qu'il suffisoit même en general d'une preuve de filiation contre ledit defendeur pour soutenir l'action de la demanderesse — et qu'il n'a pas eté donné en instruction, que la preuve de la situation et qualité de la Demanderesse relative tant à elle meme qu'au Defendr, formoient un obstacle à la demande

12°. Enfin parceque ledit verdit est irregulier, illegal, repugne aux principes des Loix et des mœurs publiques, qu'il ne repond pas même à l'action de la Demde renferme des contradictions, et va au dela des bornes que la Loi a mis à la jurisdiction des Jurés. —

Ils

11 June 1818. The parties were heard upon this motion. —

20th " — The Court dismissed the motion, being of opinion that the witnesses adduced were competent, and that the charge to the Jury was correctly given — The Court however thought that the assessing of £25 by the Jury for maintainance for the child was a matter fit to be considered by the parties, as it was doubtful how far it was within their competence —

12 Oct. 1818 The defendant moved in arrest of Judgment upon the following grounds —

1°. Parceque le verdict ne se rapporte pas à l'action portée par la demanderesse en cette Cause, ni aux conclusions de la declaration, et que le contenu du dit verdict est absolument etranger à la demande formée contre le defendeur par la dite demanderesse. —

2°. Parceque en effet ledit verdict accorde à la demanderesse ce qu'elle ne demandoit pas par son action, et ne lui accorde pas ce qui est demandé

3°. Parceque les Jurés en accordant par leur verdict ce qui n'etoit point demandé par la declaration, ont prononcé ultra petita, decision que la Cour ne peut confirmer, plus qu'elle ne pourroit rendre un Jugement de cette nature. —

4 Parceque le verdict se trouve rendu en effet en contradiction même avec l'action de la demanderesse, et avec la demande et les conclusions portées dans la declaration. —

5. Parceque ledit verdict lui-même renferme des contradictions, et des dispositions qui repugnent entre elles. —

6°. Parceque en rendant leur verdict les Jurés ont outrepassés la juris diction qui leur est accordée par la loi, et sur un objet qui etoit au dessus de leur competence.

On hearing of this motion, Vizé for the defendant contended, that the plaintiff by her declaration claimed no damages for her child, but only for herself, and a sum of money for past maintainance of the child & that the £25 - assessed by the Jury could not be granted, as it

it was not demanded — the only claim in this respect was a matter of consideration for this Court alone, namely a certain quantum or allowance to be established whereby the maintenance of the child should be regulated — but this was not within the competence of the Jury, nor was it submitted to them, and therefore the Judgment upon this verdict must be staid — Had any demand been made for the past maintainance of the child, either in the shape of a quantum meruit or otherwise, this part of the verdict might have been supported on that principle — The verdict is also irregular and cannot be supported inasmuch as it declares the defendant the father of the child, this was not of their competence, nor does it form any part of the demand, it was a question d'etat, which was not submitted to them and rests solely with the Court. The action is not prosecuted by the Plaintiff as the mother of the child, in order to settle and ascertain such rights and claims as the law might allow to a child under such circumstances, but the action is for the claims of the Pltff for her damages, as an injured person, and therefore the allowance of £25 to her which only could be adjudged to her child cannot be supported —

Bedard for the Pltff contended that the verdict was regular and ought to be maintained, that it determined upon all the points in contest and upon all the matters submitted to them. The first question to be determined was whether the Defendt was guilty of the charges brot. agt him, this they have found against him, and in consequence they were bound to find that he was the father of the child — they allow no damages to the Pltff on the score of seduction — but they allow to the Pltff for the maintainie of that child of which they find the defendant to be the father, a sum of £25 — this they were entitled to do, as being a matter of fact to be enquired into, and constituting a part of the demand, which was

at

at the rate of forty shillings ℔ month, but this the Jury having diminished, because by allowing £25. from the time of the birth of the child to the time of rendering the verdict, this will be only 23/10ˢ ℔ month + and according to this rate the future maintainance of the child ought to be regulated. —

8th. Febry. 1819. The Court were of opinion that the question of the maintainance of the child was not before the Jury — either as to the right or the quantum thereof — that this was a matter hereafter to be determined by the Court and the parties would be entitled to adduce evidence thereon — That the question of maintenance formed no part of the issue for the trial of the Jury, but arose out of their verdict and became a matter of regulation to be determined by the Court — in so far therefore the verdict of the Jury ought to be arrested — but as to the other matters the Court were of opinion the Jury had found correctly. —

The Plaintiff now moved to be admitted to adduce evidence touching the maintainance of the child that the Court might proceed to determine thereupon. &c

Vigé for Defendant contends that the motion is irregular — that matters of law have been pleaded by the defendant in bar of the plaintiffs action and by referring to the evidence given on the trial and to the verdict of the Jury itself, the facts upon which these matters of law were grounded, have been found for the Defendant — The question of law now comes in full force against the Plff for as the main object of this action, and the principle upon which it could be maintained, has failed, the Plaintiff can proceed no further, she has no right in this cause

but

but for her damages for seduction, these have been refused and the further proceedings must cease — That the father of a bastard child is not bound to maintain it, only where there has been seduction, as the parties are in pari delicto and neither of them ought to benefit thereby — The only point before the Court in this Cause, in looking at the verdict of the Jury is to declare the defendant the father of the child — but in this the Plaintiff can have no interest, as her action was not brought for this purpose — nor can she maintain her claim for a maintainance for the child, by the present action — she ought to be appointed Tutrix to the child and bring a Special action for this purpose, the law cannot recognize any right she has as the mother of a bastard child to maintain any claim or demand on behalf of that child — it is filius nullius, filius populi, and the Tutor only, or the father when filiation has been ascertained can claim on behalf of the child — The present motion ought therefore to be dismissed —

Bedard for the plaintiff, as the Court has determined that the matters touching the maintainance of the child were not before the Jury, and as this forms part of the plaintiff's demand, it must necessarily be determined by the Court, and to enable the Court to do so, evidence must be adduced — In regard of the right of the plaintiff to maintain this part of her demand, it ceases to be a question before this Court, it is so determined by law, and by the decisions of this Court in several instances — cites Cases — Christie. v Lang Homes. v Tucker — Auclaire. v Dorions — That the father is the person bound to this maintainance, and as the defendant is recognized to be the father the Court must proceed to charge him with this maintainance — The Plaintiff as the mother of the child is the only person known or capable to make this claim, in which she has a double interest, as well in obtaining a provision for the child, as by exonerating herself

herself therefrom, to which by law she is bound until that burden is thrown upon the father — cites. Repre vo Fornication. and vo Aliments'

20e. April 1820 The Court were of opinion that the motion was regular, that filiation and maintainance of the child were matters in which the mother was interested, and by law was entitled to maintain her demand in respect of the same —

see Ferriere Jr. des Tutelles. p. 24. 25.
N. Denizt vo Batard. § 5. No 3. —
1 Mesle Jr. des Tutelles. 184. 185. —
Decisions de Fromental. Tit. Batards. p. 31.
Arrets de Louet. 1. Vol. p. 18. Tit. Aliments des Batards.
2. Baquet. Droit de batardise. p. 153 —

Evidence having been adduced by the parties, the Court proceeded to adjudge upon the whole case, by dismissing the Plaintiffs action for damages, by adjudging the Defendant to be the father of the child and condemning him to pay to the Plaintiff a very moderate allowance to the child by way of maintainance, as they were of opinion that this burden should not fall on the Defendant alone but that the Plaintiff ought to cooperate for her share in that maintainance — the Defendant to pay his proportion of Costs also —

April Term. 1821.

Tuesday 3d. April 1821.

Archambault & al. vs. Boutonne & al. } This was an action instituted by the Plffs as Syndics or Trustees for building a church in the parish of St. Pierre du Portage de Lassomption, against the defendants undertakers of the mason work, for a breach of contract entered into by them for the mason work of the said Church —

The declaration stated, that on the 8th. day of March 1818, in consequence of a petition from the land holders in the said parish, the Bishop of the Diocese gave his mandate for the building of the said church, specifying the scite and dimensions thereof — in consequence of which and under the authority of the Commissioners for this purpose named, an election was made of the Plffs as Syndics to superintending the building of the said Church, which election was afterwards homologated and confirmed by the order of the said Commissioners bearing date the 2d July 1818, when the said Plffs were also authorised to make a Statement or estimate of the

expence

expence for building the said church, and also an act of repartition of what each proprietor of real estate in the said parish ought to pay towards the defraying such expence, which acts of estimation and repartition were afterwards made by the said plaintiffs and homologated by the said Commissioners on 24th Oct. 1818 — That afterwards on the first day of February 1819, the Plaintiffs in their said capacity entered into a Contract with the said Defts for building the mason work of the said Church, in the manner and on the terms and conditions stated and set forth in the said declaration, the whole to be finished and completed by the first day of August 1820 — and stating as a breach, that the Defendants had not fulfilled their said Contract but had wholly failed therein, as the said mason work was not done and completed by the said first day of Augt. 1818 — and further that the work which had been done was imperfect & insufficient, and had fallen to the ground — concluding to a damage of four thousand pounds —

The defendants pleaded for exception peremptoire en droit, that the plaintiffs could not have or maintain their present action, inasmuchas the parishoners of the said parish of Lassomption were the only persons interested therein, and entitled to institute the same, but that the said parishoners are not parties to the present action nor duly represented therein, and that the said Plaintiffs as Syndics as aforesd cannot be considered as representing the said parish, nor is it stated or alledged in the declaration that the present action is instituted with the consent, and after deliberation had of the parishoners of the said parish as by law is required —

Upon this exception issue was taken by the Plaintiffs and the parties heard thereon, when it was argued by

Mr

Mr Bedard on the part of the Defendants, that the Plffs cannot maintain this action, as they have no claim to damages for if damages have arisen, it must be the parishoners who suffer and not the Plaintiffs, and it therefore became necessary that the action should have been instituted in the name of those parishoners by Syndics specially named for this purpose. cites. Deniz.t Vo Communauté d'Habitans. No 33. — In this action the parish is not represented, and if the defendants had an Incidental demand to set up, they could not exercise it as the plaintiffs, who are merely trustees for a special purpose — That the plaintiffs had no authority from the parish to contract with the defendants, nor had they any authority to bind the parish by their Contract — but the defendants having contracted with the Plaintiffs, and having received from them the monies of the parishoners, in so far the defend.rs may be consid.d responsible for the monies they have received, but this will not extend to a claim for damages, as these damages if due belong to the parish, and the Plaintiffs are not entitled to claim them — That the authority vested in the Plaintiffs as Syndics under the Prov. Ord.ce of 179 , extends only to empower them to make an estimate of the expence necessary for construeing the building in question, and to make a repartition or Assessment of that expence among the landholders of the parish — when this is done, they are *functi officio* — their power ceases — they have no power to bring an action for the recovery of the money so assessed, nor to contract for the application thereof — they must have a new authority for this purpose from the parish, who alone can give it — at all events as the bringing an action of this description is an act of a very special kind, and cannot be considered as an act of administration Ordinaire, the Plaintiffs as Syndics could they be considered even as representing the parish ought to have been authorised in this instance by an *assemblée Speciale* of the Parishoners — cites. Rep.ce Vo Paroisse. —

Rolland

Rolland for the Plaintiffs contended, that hitherto the authority vested in the Syndics by their appointment under the Provincial Ordinance had been construed to extend to the institution of actions and entering into contracts touching the matters for which their appointment had been made – they were considered as a special corporation to superintend and carry into execution all matters relating to the object for which they had been named – refers to law in case of the Commissioners for internal Communications, who are thereby authorised to contract, but nothing is said about bringing of suits, yet it has been held in the Court of Appeals, that this power was also vested in them, as a necessary consequence – In this case the Plaintiffs, as parties to the contract are the only persons who can enforce the execution of it. –

Bedard in reply. – The Plaintiffs as Syndics may in this instance be compared to the representatives of the people in Parliament, who, although they are authorised to – impose taxes on the people, yet are not authorised to levy what they have so imposed, nor to contract for the expenditure thereof – The Syndics here were authorised to find out the ways and means for raising the money, when this was done; when this was done their authority ceased, and it became the right of the parish, as it was their interest, to give suitable directions and to appoint fit and proper persons for recovering this money, and for contracting as to the expenditure of it an authority of this kind cannot be presumed, and by law it has not been vested in the Syndics – No Judgt given in this Case can bind the parish, as they are not parties to the suit – and it is to the paish alone that the Defendants can be made accountable –

The Court without giving any opinion as to the extent of authority of the Syndics under the Provincial Ordinance, held, that the parties who contract together

must

must be considered competent to do every act necessary to enforce such Contract — here the defendants by their Contract as stated, acknowledge the capacity of the Plaintiffs and their right to contract — they receive from the Pltffs a large sum of money for the performance of this Contract, and it w.d be a singular doctrine to permit the defendants to avoid the execution of their Contract, by denying the right of the Plaintiffs to contract, after having thus admitted it, or to divide the Contract, by retaining what was beneficial and rejecting what was onerous — The Pltffs as individuals having an interest in the building in question, & without being Syndics to the parish, could legally contract with the Defendants for doing the labor in question, and as such they alone could have enforced the execution of that Contract the principle being that none but the parties to a — Contract can demand the execution of it — The plea of exception was therefore dismissed —

Lepailleur
Turgeon
E contra

Monday 9th April 1821.

Hall, Tutor &c
vs.
Lacroix. —

Action for medical attend.ce &c —
Plea - 1st Non-assumpsit - 2d Prescription.
Replication - excepts to these pleas as contradictory and inconsistent, and concludes that same be over-ruled. —

Peltier for Pltff - The pleas pleaded by Defend.t are contradictory and cannot stand together — The plea of non-assumpsit denies the debt or demand - but the plea of prescription, on the contrary admits that the debt did exist, but that the defend.t has paid it - This is raising two issues on the same fact, which — cannot be admitted, and being issues of a contradictory nature, the law does not allow them - cites. 1 Pigeau 201.

Bearbien for Defend.t - The Defendant is not precluded from pleading any number of pleas to Plaintiff's action, so as to take advantage of any of them - there is nothing inconsistent or contradictory in the pleas here pleaded - 1st That Defend.t did not promise & undertake to pay this demand - 2d because the Pltff's right of action is by law extinct and gone by not having been instituted within the year and day, from which a presumption of payment arises in favor of the defendant —

The Court maintained the exception, on the authority cited. —

M.c Gillivray val
vr
Wilcocke
Lewis t — Opp.t

On opposition afin d'annuller & a. de distaire, certain moveables and effects as being the property of the Opposant

The opposant after concluding in by her Opposition, that the Saisie of the effects in question should be set aside and annulled, claimed further that the Plaintiffs should be condemned in damages to the Oppt for the illegal seizure of the said effects —

Rolland for the Plaintiffs took exception to these conclusions as irregular, as there could be no proceedings had in this case to assess damages to the Opposant her claim for damages cannot be made until the effect of her opposition shall have been ascertained — at present her claim in this respect is founded upon an uncertain event, which cannot be the ground of any demand

The Court rejected that part of the conclusions of the opposition which regarded the demand for damages.

Whyte. —
vr
Vaughan.

On rule obtained by the Defendant on the plaintiff to shew Cause why the Ca: ad resp. sued out in this Cause should not be quashed, as having issued improvidently,

The affidavit upon the writ of Capias had been granted, stated, that the Defendant was secreting his property and effects, "and doth intend to leave the Province"

This the Court held not to be sufficient, as the law requires, that the affidavit shall state that the Defend.t is immediately about to leave the Province — Rule absolute.

Colt

Colt. v Perault

Action of debt on Obligation. —
The defendant appeared in person & confessed Judgment —

Rolland for Pltff, moved for Judgment on the defendants confession, but did not produce the Obligation and the Court doubted how far a Judgment ought to be rendered without producing the deed or contract upon which the demand was founded, the rule of practice requiring that all such papers should be filed with the declaration — but upon examining the authorities cited by the Plaintiff, Judgment was given for Pltff.

see. Poth. Ob. Nos. 830. 831. —
Repse. vo. Confession. —
Denizt. Eo. Verb. —
Dic. du Digeste. Eo. Verb. —

The Court however intimated that had the action been founded on a negotiable instrument, they would have required the production of it —

see also. Dic: des Arrets. vo Sentence. p. 119. —

Dubord vs
Eno. vs
Dezy.

On action negatoire.

This action was instituted by Therese Dubord of York in the district of Montreal, widow of the late Franˢ Eno, Esq. Seigniores, proprietor and possessor of five sixths of the Seigniory of Isle du Pas, against Joseph Dezy one of the Censitaires of the said Seigniory. The declaron stated, that the Plaintiff, and her predecessors have been proprietor and proprietors of the five sixths par indivis of the said Seigniory for 45 years last-past and upwards - That on the north-east end of the said Isle du Pas, a large tract of land containing about one league in length by the whole breadth thereof hath been reserved and kept unconceded, and is separated from the conceded lands by a certain fence - That on the lot of land so remaining unconceded, there hath been kept and preserved a great number of maple, plane, ash and other trees stands and growing thereon: - That the said lot of land so reserved and not conceded, is free and clear of and from all servitudes and incumbrances in favor of the said defendant, nor hath he any right or title to enter upon the said tract or lot of unconceded land or to carry away the wood and trees aforesaid growing thereon - Yet the defendant well knowing the premises, &c did on or about the first day of November 1816, and at sundry times since between that day and the first day of May 1817, under the pretence of a right of servitude on the said unconceded lot of land, enter upon the same, and did then and there fell, cut down and carry away, a great number of the said trees then standing and growing on the said unconceded lot of land viz. One thousand maple trees, one thousand plane trees, one thousand ash trees, and other trees of various kinds to the number of three thousand, contrary to the will and

consent

consent, and against her express prohibition and to her damage for her said five sixths in the said Seigniory of one hundred pounds — That the said Defend^t. still persists in — claiming a right of servitude on the said unconceded lot of land, and of cutting down and carrying away the trees — standing and growing thereon — wherefore prays that the said unconceded lot of land may be declared free & clear of & from all servitude and incumbrance whatsoever in favor of the said defendant, and particularly of the servitude and incumbrance aforesaid claimed by him of felling cutting down and carrying away the trees so standing & growing thereon, and that the said Defendant be enjoined & forbidden in all time coming to exercise any claim or right of cutting down or carrying away the said trees so growing upon the said unconceded lot of land and to pay to the Plaintiff for her damages aforesaid the said sum of One hundred pounds and costs of Suit. —

Plea. That the action is irregular and ill founded & ought to be dismissed — That the Plaintiff hath no right of property in the said unconceded lot of land in the said Seigniory of the Isle du Pas, but the same hath been reserved and doth belong to all the Censitaires of the said Isle du Pas as a Common, and of which the said defendant and the other Censitaires of the said Seigniory have always hitherto from time immemorial had the possession & enjoyment as well for pasturing their Cattle as for cutting down all necessary wood thereon for domestic purposes — That the said Defendant is entitled by the deeds of Concession of the two lots of land, of which he is the proprietor in the said Seigniory, to a droit de Commune in the said Common.

which

which droit de commune, hath always been held and exercised by the said defendant, and by his predecessors for forty years and upwards, in pasturing his cattle thereon and cutting down and carrying away wood and trees growing thereon for domestic purposes, in the same manner as the other Censitaires of the said Seigniory have held used and enjoyed this right.— That the said defendant by virtue of this said continued possession and enjoyment of the said Common and of pasturing his cattle thereon and cutting down wood thereon, during all the time aforesaid, hath acquired a prescriptive right and title to continue & exercise such poss. & enjoyt. in the said common in future.—

Replication joins issue on this plea.—

The parties having proceeded to an enquête, the Plaintiff proved her title to the five sixths of the Seigniory of the Isle du Pas, as proprietor and Seigniores thereof and the defendant proved, by his deeds of Concession of the lots of land now held and occupied by him in the said Seigniory, that with the grant of those lots, a droit de Commune, had also been granted to be held and enjoyed by him. comme les autres habitans. he also proved that in the exercise of this right, he the Defendant and many other Censitaires of the said Seigniory have pastured their Cattle on the said Common and cut down trees growing thereon, for his & their domestic use for nearly forty years—

Vigé for the Defendt. argued, that by the evidence adduced he had proved that the defendant, and

the

the other tenants of the said Seigniory had enjoyed for forty years and upwards the right of cutting wood, and pasturing their cattle on the said Common, which give him a right by prescription agt. the Plaintiff to exercise such enjoyment in future — cites. Denizt. Vo. Usage - Usager and Vo. Communauté d'Habitans. — But the Defendt in this Case did not rely on a title by prescription, as he had proved a title to the Common in question, which had been granted to his predecessors, by the Seignior at that time, and for a valuable consideration —, and altho' the right of cutting wood is not expressed in this title, yet the use and enjoyment of the Defendant and the other Censitaires for upwards of forty years without let or hindrance on the part of the Seignior in permitting them to cut down wood as well as to pasture their cattle on the said Common, served to explain & confirm the — nature of the title and right given — The Plaintiff therefore ceases to have an absolute right of property in the said Common, as she can neither sell nor concede it, to the prejudice of the defendants rights therein — refers to Case of Eno. v. Rivard. & Dubord. June 1815.

Ross for Pltff in reply — The defendant ought to shew a title for doing what is complained of by this action, but the only title he shews is to a right of Common, which can be considered as the mere enjoyment of the Soil as for pasture of Cattle — but the right of cutting wood, as claimed by the defendt is a right of property in the Soil — now this cannot exist in the defendant without express grant from the Seignior, who is the proprietor, and who

alone

alone can exercise this right – cites Repert. Vo. Usage – p. 378. 9 and also Vo. Paturage. –

Bedard of Counsel for Duff. – As the plaintiff is Propr. of the soil, she alone has a right to the wood growing thereon, and no tenant can claim a right to take this wood without express title – The right of common set up by the defendant is not a right vested in a – Communauté d'habitans, but is a right granted to an individual of enjoyment of the soil of another – and therefore the authorities cited by the defendant do not apply as they regard only a Communauté d'Habitans – The right of the Individual is interpreted more strictly than those of the Communauté d'habitans, as the individual has it in his power to have the rights conveyed to him by his deed fully explained, and if he leaves this doubtful it is his own fault & must be taken against him – Here the defendant sets up a droit de Commune granted to him, by which only can be meant a pasture for cattle it cannot be extended beyond this, for if more had been intended more would have been expressed – The possession of the defendant under this title cannot give it a greater extent than what it carries on the face of it – and this possession was often of a clandestine and interrupted kind and such as no title could be thereby acquired –

cites in support of Duffs right as proprietor for four sixths to bring her action alone – Poth. Propre. No. 291. a

By the Court. There seems to arise in this Case a previous question which requires consideration by the Court, although not particularly spoken to by the parties, more especially as the defendants plea seems to call in question the right of the plaintiff to maintain this action – that is

whether

whether the plaintiff as proprietor of five sixths of the Seigniory in question, is entitled alone to maintain this action — It seems to be a principle of law and practice that where several persons have a joint right or interest in a thing, they ought to join in any action which demands such right or interest — this seems reasonable as otherwise a defendant would be subject to as many actions as there were persons holding such rights — and this principle appears in the opinion of some of the authors to be applied to the Case before us — see Fremainville. Traité du gouvernt. des biens et affaires des Communautés d'Habitans. p. 30. 31. N. Denizart. Vo Commune. §. 6. No 6. — authorities upon which the Court is disposed to think that the present action cannot be maintained. — but as the defendant has not particularly insisted upon this objection, but has argued the Cause upon the merits, the Court will also proceed to give its opinion upon those merits. —

In considering what is meant by a <u>Common</u>, we must look to its origin, and from what Causes it is presumed to arise — we find that a Common is considered to be a right of enjoyment given by the Seignior to his tenants or <u>Censitaires</u> in certain waste lands of his domain, for their convenience and encouragement, which originated in this — The Seigniors who at first had large domains & extensive forrests, but very few tenants, in order to increase the number of those tenants, found it necessary to encourage them by such acts as tended to improve

Henrion de Pansey Dissertations feodales, 1 Vol. p. 439. 40. —

improve their condition and facilitate the progress of agriculture — to do this, the first necessities to be supplied were a habitation for the shelter of the tenant and his family, and the means of building it — Cattle to cultivate the Soil, and a convenience of pasture to enable the tenant to build, to provide fuel as well as many other necessary things, could best be done only by cutting down wood in the forrest, so that the Seignior found a kind of necessary cause for allowing the tenant to pasture his Cattle on the waste lands of the domain, and the use of the forrest for the supply of wood — The right of Common in forrests has also this further origin — the little value the woods at first had; and the little means the Seigniors had of turning them to advantage, were the Cause that they were generally left in a kind of abandoned state, in which every one cut down with impunity what he wanted — in time this forbearance on the part of the proprietors grew into a servitude, and hence it is, that among the Communautés d'Habitans, having rights of common, some hold them under titles, and others by virtue of possession alone —

The right of Common is therefore to be considered under the double point of view, as comprehending a right to cut down wood in the forrest, and the right of pasture for Cattle on the domain of the Seignior — and on this account the grant of a right of Common by the Seignior to the tenant cannot well be limited to the cutting of wood

nor

nor to the pasture of Cattle, because it might so happen that the Common in which the right was so granted, was a forrest wholly unfit for pasture, or a plain wholly destitute of wood — What should therefore be understood by such a grant would be to consider what the Common best supplied for the uses or wants of the tenants, as best coming within the intention of the grantor, whether wood or pasture, or both — The use and occupancy of the tenant of such a Common, will also serve to interpret and explain the grant, even in extending it beyond what might otherwise have been considered as the original intention of the grantor —

Denis. Vo. Usage. No. 4. "Neanmoins ledit usage peut
" etre amplié, ou limité, par titre, ou prescription —
" suffisante au Contraire. — Cela est conforme au
" droit Commun, qui veut, que le droit d'usage soit
" reglé par les Concessions, les titres, et la possession
" des usagers". —

How will this apply to the Case before us? — The tenant holds a title from his Seignior for a droit de Commune, for which the tenant pays an annual acknowledgment or rent, he enjoys this right of Common for nearly forty years, as well by cutting wood as pasturing his Cattle — the Seignior of the present day, finding no doubt the wood to become more valuable, is now pleased to say, that a droit de Commune, means only a right of pasture for Cattle — If the word "commune" comprehended no other object but pasture for Cattle, this interpretation would no

doubt

doubt be right, but as the law allows of a Common in wood, as well as in pasture, the interpretation of the grant can best be had by what has been used and enjoyed by the tenant for a space of time which is sufficient to give stability to any title, and in many instances to acquire one — The Court must therefore determine, that the droit de Commune granted to the defendant, under which he has enjoyed it by the cutting of wood for so many years, ~~his ... his character~~ cannot now be contested by the plaintiff, — Action dismissed (1)

Wednesday 18th April 1821.

The Seminary of Montreal vs Wm Flemming

On action of Complaints for having disturbed the plaintiffs in the enjoyment of their right of banalité, as Seignioss of the Seigniory of Montreal, by erecting a certain Wind-mill within the same. -

The action was brought in the name of Messire Jean Henry auguste Roux, Superior of the Gentlemen Ecclesiastics of the Seminary of Montreal, Seignioss in possession of the Seigniory of Montreal in the district of Montreal in the Province of Lower Canada, and the said Gentlemen Ecclesiastics of the said Seminary of Montreal, Seignioss in possession as aforesaid of the said Seigniory, by Messire Joseph Bornemf, their agent and Attorney, Plaintiffs -

The defendant by his plea of peremptory exception pleaded, that the plaintiffs cannot have or maintain their action aforesaid in manner & form as by them brought, because -

That at the time of suing out the writ of Summons in this Cause, there was not, nor hath there been at any time since, any Corporation, or any body Corporate or politic, or distinguished by the name of "The Gentlemen Ecclesiastics of the Seminary of "Montreal," or by the name of the Superior and Gentlemen Ecclesiastics of the said Seminary of

Montreal

Montreal; or any Corporation, body politic or Corporate whereof the said Jean Henry Auguste Roux was or is Superior — or whereof the said Joseph Borneuf, in the said declaration named, was or is Agent or Attorney: And because the said Jean Henry Auguste Roux, and the said Gentlemen Ecclesiastics of the Seminary of Montreal, and the persons meant to be designated by such appellation, cannot in such their alledged incorporate or Collective name and capacity, legally have or maintain any action or demand whatsoever in the Court now here — and this the said William Fleming is ready to verify — wherefore he prays Judgt pro —

And for further peremptory exception the said Wm Fleming saith, that the said Jean Henry Auguste Roux and the Gentlemen Ecclesiastics of the Seminary of Montreal ought not to have or maintain their action aforesaid, because he saith, that the names of the persons by and for whom the said action hath been brought, are not mentioned, nor are the said persons named in the Writ of Summons in the said action sued out, nor in the said declaration, and because the said declaration doth not set forth or shew, by or for whom the said action hath been brought — and this the said Wm Fleming is ready to verify — wherefore &c

And for further peremptory exception the said Wm Fleming saith, — That the said Gentlemen Ecclesiastics of the Seminary of Montreal, have brought and prosecuted their said action, by and in the name of Joseph Borneuf as their agent

and

and Attorney — and because the said Gentlemen Ecclesiastics of the Seminary of Montreal, cannot by the law of the Land prosecute, have or maintain their said action by or through the said Jos: Borneuf as their agent and attorney. —

And for further peremptory exception the said William Fleming saith, &c — because the said declaration and the matters therein are not sufficient in law to entitle the said Jean Henry Auguste Roux, and the Gentlemen Ecclesiastics of the Seminary of Montreal to have or maintain their said action against him in manner and form as by them brought, to which declaration the said Wm Fleming hath not any need, nor is he bound by the law of the land to answer — and this he is ready to verify — Wherefore &c —

On this plea of Exception issue was raised and the parties proceeded to their proofs on an enquete had in the Cause, after which the proceedings were laid before the Judges for consideration upon the evidence so adduced, without any argument heard by the parties —

The Court having examined the proceedings and evidence adduced, were of opinion that the pleas of peremptory exception pleaded by the defendant, could not be maintained — That the only question to be considered under these exceptions, was whether the Pltffs were a corporate body or not, for in this was comprehended the substance of the whole of the said pleas. —

That it was a question of fact whether, a corporate body, such as the plaintiffs state themselves to be,

existed

existed or not, and it was therefore necessary to examine the evidence adduced to see how far this fact was established This evidence consists of the following heads. —

Edits & Arrets. I Vol. p. 80. —

1st. That the Seminary at Montreal was erected into a Corporate body, or Communauté, by the name of the "Seminaire d' Ecclesiastiques à Montreal," as a branch or subsidiary establishment of the House or Seminary of St Sulpice at Paris, by Letters Patent of Louis 14th King of France, bearing date in May 1677, for the purpose of propagating the Christian religion in Canada and in them as such Corporate body was vested the Seigniory of Montreal.

Id. — p. 304. Arret du Conseil d'Etat du 15. Mai. 1702. — Lettres Patentes de Juillet. 1714. — p. 325. Arret du Roi en Conseil de Mai. 1724. —

This Corporate body so erected and established was recognized by the Government of France in the subsequent acts of regulation or of administration had in this Country wherein the Seminary of Montreal have occasion to be mentioned

2. This Corporate Capacity of the Seminary of Montreal, was also acknowledged by their Ecclesiastical Head or Chief, as appears by a certain act bearing date in 1697. for the appropriation and payment of a sum of 12,000th livres. —

3. Their Corporate Capacity is also acknowledged by the British Crown, when they came under its allegiance. this appears from the articles of Capitulation of the Colony — by the act of Foi & Hommage made by the body to the King's — Representative in Canada, on 3d Febry. 1781 — and by some other acts and papers exhibited in evidence

4. By the Judgments of the Courts of Justice in the Colony since the Conquest, of which a great —

great number has been produced.—

C. Dimas. Vs. Etab Quest: No. 2.3.5.

5. By their possession and enjoyment of their état or Corporate name, as The Ecclesiastics of the Seminary of Montreal, and as such, holding and possessing the Seigniory of Montreal, as far as the witnesses can speak to the extent of fifty years and upwards.—

6. By the original deed of Concession of the lot of land now held and possessed by the Defendant, and upon which the wind mill in question was erected.

These acts sufficiently establish the Corporate capacity of the plaintiffs, and their right to sue under the name they have assumed — There are however some observations arising out of the evidence adduced which are proper to be made — It may be objected that the Letters patent of May 1677, which constitute the Ecclesiastics of the Seminary of Montreal, a Communauté made them such only as being a branch of the House or Seminary of S^t Sulpice at Paris — that they were never known as a separate and independant body or Communauté and when the Country was conquered by the British arms their existence as a part of the Seminary of S^t Sulpice ceased, and thereby ceased also their Corporate Capacity — But it must be allowed, that at the time of the Conquest, the Ecclesiastics of the Seminary of Montreal were de facto a corporate body, holding and enjoying property and rights as such, which property and rights were then secured to them when coming under the Kings protection and allegiance, and although their connection with the Seminary of S^t Sulpice, then necessarily ceased yet they continued to enjoy all their rights and property

as

as they formerly had done, they continued to be Seigniors of the Island of Montreal, which was vested in them as a Corporate body, the same as they were prior to this period and quoad this object at least, they must still be considered as such Corporate body, and they have been recognized as such by the Kings Representative in regard of this Estate. But the situation of the Defendant in regard of the Plaintiffs, is different from that of a Stranger - he is their Censitaire, and holds his estate by a title which acknowledges the rights and capacity of the Plaintiffs as a Corporate body, and cannot therefore be allowed here to contest it - So long as this body, the Ecclesiastics of the Seminary of Montreal hold and possess the Seigniory of Montreal, so long must the defendant as their Censitaire be bound to answer to them in that capacity for all their claims as such Seigniors - he has neither an interest nor a right to contest what his own title admits - As to the Suit being instituted in the name of Joseph Borneuf, as the agent and Attorney of the plaintiffs, the fact is not so, the Suit is in the name of the Corporate body, who are the Plaintiffs, and the adding of the words, "by Joseph Borneuf their agent and attorney" does not vitiate the demand, as every Communauté may be legally represented by their Syndic or attorney - at most the words may be considered as surplusage. -

Exception dismissed. -

Potb. Fiefs. p. 119. N° 12, p. 275. - Denizt. V° Etat. N° 2. 3.

Dec. de Royer. V° assignation. N° 145 - p. 729.

The

The King
vs
Charles.

On an action Negatoire.

The declaration stated, that the King is the true and lawful owner and proprietor of the Seigniory of Sorel in the district of Montreal, and as such hath held and possessed the same for thirty years last past and upwards – That within the said Seigniory of Sorel, there is a certain island situated in the River St Lawrence, called the, Isle St Ignace, which our said Sov. Lord the King holds and possesses with the exclusive right of fishing in the said River in all the said Seigniory – That the defendant hath no right to establish any fishery on the beach of the said Island to the hinderance of the right aforesd of our said Sovereign Lord the King, Yet the Sd Defendt after due notice and prohibition on the part of our said Sov. Lr The King, and without any right, wrongfully, and maliciously did establish a fishery on the beach of the said Isle St Ignace, and did fish in the said River St Lawrence and did take, kill and destroy large quantities of fish in the said river, to the damage of our Sd Sov. Lr the King, one hundred pounds – Wherefore –

Plea. Not Guilty – and issue thereon –

At the enquete, it was proved that in May 1820, the defendant established a Shad fishery on the beach of the Isle St Ignace in the River St Lawrence – that he was forbid by the agent of the said Seigniory to do so, but stile persisted and carried on his fishery during the Season – That the King has always enjoyed the exclusive right of fishery in the said Isle St Ignace and in the said Seigniory – and by a particular regulation of Mr Bezon, formerly Intendant in this Province, all the Tenants of the said Seigniory of Sorel are forbid to fish within the same without special License

Mr

Mr. Ogden for the defendant, argued – The King sues here as a private Seignior and proprietor of a particular, and claims particular priviledges attached to that estate, but he proves no other title but a thirty years possession, but this does not give an exclusive right to the fishery – If the Seignior by a thirty years possn can establish such a right against his tenants and others, the same principle will apply in their favor as the King as Seignior –. The Counsel for the King seems to found his right in this Case on a particular reglement of Mr Begon the Intendant of 1750 – but this applies only to the Tenants or Censitaries of the said Seigniory, but not to Strangers – That public rivers are of public right and enjoyment and belong to all His Majesty's Subjects, and the King holds them only for the public benefit – 2 vol. Fer. Instit. liv. 2. tit. 1. art. 2. Refers to Judgt of 30 June 1804 by which the present defendant recovered Judgt for having been disturbed in the enjoyment of a fishery on a public River – 1. Domat. p. 60. 61. N° 11 – No proof before the Court that river St Lawrence is a public River – nor that the defendant had notice that he was disturbing the King in his right –

The Court however held that the present action could be considered as instituted by the King in his public capacity, and not as a private Seignior, that the King held the Seigniory of Soul and all the Lands in Canada ungranted, as Seigneur Suzerain, and as such has instituted the present action, and was not bound to exhibit any title to his Vassal –. That the King holds exclusively the right of fishing in all public & navigable rivers, and although he holds this right for the use and

benefit

benefit of the public, yet he could at all times prevent individuals from such use and benefit, after due notice given, and in case of refusal, to discontinue it, was entitled to his action as in the present Case, because such prohibition was in conformity to his right and was presumed to be exercised for the public interest in this respect, of which he alone could judge — Judgt. for £10 — damages & Costs.

Sutherland v Pasteur. —

Action by the Plaintiff as Indorsee against the Defendant, the payee and Indorsor of a promissory Note. —

None of the parties to the note were stated to be merchants or traders, and it appeared that the note had been indorsed in blank to the plaintiff, but that the indorsment had been subsequently filled up by the Counsel before instituting the present action — and in consequence, objection was taken by the defendant to the sufficiency of the said indorsement to entitle the Plaintiff to his action thereon under the Prov: Stat. — But it appearing from the evidence adduced that the Defend recognized the Plaintiff to be the Indorsee of the note, and as such promised to pay him the amount thereof and requesting him for this purpose, the Court considered this as a sufficient acknowledgment of the Plaintiff's right to maintain the action, and gave Judgt. accordingly

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Davies.. v Snow.. }

On award made on reference by consent of the parties to three arbitrators – Report made by two, the third dissenting –

Sewell for Pltff. contended that the report or award of the two arbitrators could not be received by the Court nor confirmed, because the reference being to three, three must join in the award – had the reference been to three with power to any two to make an award, the present award might have been sufficient, but not being in the terms of the reference it is of no avail –

But the Court held the report sufficient, as all the Arbitrators had been present and heard the parties and their witnesses, the report of any two of them is sufficient the law does not require that all the parties should join and be of the same opinion in their award, and therefore confirmed it. – see. N. Denizt. Vo Arbitrage. §. 3. No 2.

Dic. des Arrets. Vo Arbitres. Sentence

Thursday 19th April 1821.—

Laberge. —
vs.
Doucet, Curr
& Estate Dumas

Action for work and labor done by Pltff as a Carpenter, founded on a quantum meruit. —

The Plaintiff proved by witnesses the extent of the work done, and also the quantum meruit, and there rested his Case. —

Rolland for the Defendant — objected to the insufficiency of the evidence arising from verbal testimony and contended that it ought not to be received in any cases for work done — That according to the laws of this Country a quantum meruit cannot be admitted in proof, but only in the Cases of quasi-contract — In this case it is evident there must have been a Contrat de louage d'ouvrage which forms a Contrat synallagmatique, in which no quantum meruit can be admitted, nor in any Case where the parties are in law presumed to have contracted together — Poth. Contrat de Louage. N° 397. — the price is the consideration and forms part of this Contract. Danty. p. 89. ch. 2. N° 3. — A Contract must therefore be presumed, and if there was no Contract there can be no payment for what has been done, as the law will presume it to have been done gratuitously — To be admitted to prove a quantum meruit, the Contract must appear to have been made, that the work done should be paid for according to an estimation to be made, or according to a quantum meruit — The labourer who works for another without a Contract is presumed to have been paid by the day, he cannot be considered as an entrepreneur, who works always by devis et marché — At all events, the opinion of witnesses selected by the plaintiff, does not

constitute

constitute legal evidence, should the principle of a quantum meruit be admitted, there ought to be a rapport d' Experts which alone can ascertain the value of the work. —

The Court however were of opinion, that where no Contract appeared, the principle of a quantum meruit ought to be admitted — there may be a Contract for doing the work, and yet nothing be said as to the price, in this case the work must be estimated according to what it is worth — So also where work is done for the use and benefit of another, and with his knowledge and consent, or a son vue & scu, the work so done must be estimated in the same way — where there is a Contract that Contract forms the law between the parties — where there is no Contract, natural justice requires, that one man should not be made richer at the expence of another, and what has been done or furnished must be paid for according to its equitable value — These principles are to be found in the law of this Country, and are consistent with Justice — Where no Contract exists, nor is by law presumed to exist, the best evidence must be produced that the Case will admit of, and the testimony of witnesses will constitute proof — it is true that in the case of work and labor done by an artizan the best mode of ascertaining the value of it was by a rapport d' Experts, which the Court would direct to be had in this Case should the parties require it, but without this, the Court saw sufficient evidence before it to maintain the action on the principle upon which it was instituted — Judgt. for Pltff —

sea. Pothi. Louage № 397
——— № 37 — in fine. —

June Term. 1821.

Monday 4th June.

Taschereau & al. vs Pion.

On report of Experts.

In this case an Interlocutory Judgt of the Court had been rendered, directing certain damages to be estimated by Experts, after having been sworn before a Justice of the Peace, and an objection was now taken to their report as insuffl inasmuch as the Court could not delegate its authority in this way to any person to receive the oath of the Experts but that a Commission ought to have issued for this purpose according to the Provl St. 48. Geo. III. Ch. 22.

The Court were of opinion that the Experts had not been legally sworn, and that the authority given to the magistrate by the Interlocutory Judgment could not be considered as sufficient for this purpose, and that the Court could delegate its authority in this respect, only by the course provided by the Statute — And as there was no consent of the parties to this mode of proceeding, by which they could be bound, the report was set aside

Wednesday 6th June 1821.

Pearson
v
Vanderslays

On action of trespass on the Case for causing the plaintiff to be arrested imprisoned and held to bail as accessary to a felony committed by one Samel Hull Wilcocke.

Trial by Special Jury.

The first Count in the declaration states — That the defendant had charged and accused one Wilcocke with a felony in stealing from the Counting House of Messrs M'Tavish M'Gillivrays & Co. a certain Silver watch with chain & Seals, belonging to the Estate of the late Benjamin Frobisher — and that defend. had charged the plaintiff as accessary to the said felony by aiding and assisting the said Wilcocke to escape — by reason whereof the Pltff was arrested, imprisoned in the Common Gaol, and afterwards admitted to bail to answer to the said Complaint before the Court of Oyer & Terminer and General Gaol Delivery in and for the district of Montreal — and that afterwards the said defendant had caused a bill of Indictment to be laid before the Grand Jury at the said Court, for feloniously stealing a watch, chain & Seals the property of The Hon. William M'Gillivray — which bill was returned ignored by the Grand Jury — whereupon the Pltff, was then and there duly discharged by the said Court from the aforesaid Recognizance, and the said prosecution was wholly ended and determined — Whereby &c —

2d. Count — contains same statement of facts, down to the entering into Recognizance by the Pltff — and it

is

is then stated — That the plaintiff did actually appear before the said Court of Oyer & Terminer &c to answer &c but that he hath not as yet been prosecuted with effect, and that the said complaint is long since ended and determined — Whereby &c

3d Count — same facts and entering into Recognizance as above — but that Defendant did not appear or prosecute, but wholly deserted and abandoned the said complaint — which said last-mentioned complaint is wholly ended and determined — whereby &c

4th Count — Same facts, and entering into Recognizance — But that the said plaintiff hath not been, nor is yet prosecuted with effect — and that the said last mentioned compleaint is long since ended and determined — Whereby &c

On this action the evidence produced was — That the defendant had made an affidavit before M.r Rolland a Justice of the Peace, that a certain Silver watch, Seals and chain belonging to the Estate of the late Benjamin Frobisher had been stolen from the Counting House of Messrs M.c Tavish M.c Gillivrays & Co., which he verily believed had been stolen by one Sam.l Hulle wilcocke their Clerk, as the same had been found at his house in the possession of one Davies his Servant, and that he the defend.t suspected and believed that the Plff and some others, was aiding and abetting the said Wilcocke to escape from Justice, as he had lately left the Province — That in consequence of this affidavit the plff had been arrested on the 24th Oct.r and committed to Gaol, where he remained until the 28th of that month when he was admitted to bail to appear at the ensuing Court of Oyer & Terminer & General Gaol Delivery for the district of Montreal in November following —

That at this Court a bill of Indictment was presented to the Grand Jury against the said Wilcocke, for stealing a certain Silver Watch the property of The Hon. Will.m M.c Gillivray, on which bill the name of the defend.t was inscribed as a Witness — This bill was returned ignored, by the Grand Jury — The other evidence — adduced went to prove the general character and conduct of the plaintiff, the means of the defendant and circumstances tending to shew a want of probable Cause in defendant to make the above complaint — and here the evidence for Pltff was closed. —

The Counsel for the defendant objected — That there was a defect of evidence on the part of the Pltff to maintain the action, and moved for a non-Suit — inasmuchas, the watch stated to have been stolen in the affidavit of the defendant, and in the declaration of the plaintiff, was a watch belonging to the Estate of the late Benjamin Frobisher, the watch laid in the Indictment which had been given in evidence as ignored, was stated to belong to The Hon. Wm M.c Gillivray and therefore not the same watch — That had it even been the same watch, yet the Indictment being proved to be ignored, was no proof of an acquittal or discharge or that the proceedings were at an end in regard of the said Complaint — cites case of Seccard v. Malhiot 2.d feb.y 1821 — where it was so held by the Court. —

The Plaintiffs Counsel on the Contrary contended that the ignoramus on the Indictment was a — discharge of the principal, and consequently of the accessaries — That as the Count in the declaration

Stated

stated the property to belong to the Estate of the late Benjamin Frobisher, and also to belong to the Hon. William McGillivray, this was sufficient to cover the charge in either Shape, as it had been made by the Defendt and the acquittal on the Indictment would apply to both — That there were also Counts in the declaration stating that the defendant had charged the Plaintiff as accessary to a felony, but that defendant had abandoned this accusation, and had not prosecuted the same, to which the Plaintiff had given bail to answer — and on these Counts the evidence was sufficient to maintain the action —

The Court were of opinion that no sufficient evidence had been given to shew in what manner the proceedings instituted against the plaintiff had terminated, or that the Plaintiff had been discharged from the Recognizance entered into by him to answer to the complaint made against him — That in regard of the charge contained in the affidavit of the Defendant, and in the plaintiff's declaration that the watch Stolen was the property of the Estate of the late Benjamin Frobisher, nothing had been shewn in evidence that any Indictment had been presented or prosecuted in regard thereof, or that the proceedings touching the same were at an end in any manner — That as to the Indictment in which a watch was charged to have been stolen, being the property of William McGillivray which had been ignored, there was a variance between that and the fact given in evidence as founded on the affidavit of the Defendt, in as it was alledged that a watch the property of the late Benjamin Frobisher had been stolen, without averring or shewing that both watches were the same, which could not be presumed — and as to the felony charged in the Indictment, there appeared no evidence to shew that the Defendant had charged the plaintiff with being anywise

accessary

accessary thereto — but in either Case, and on all the Counts laid in the Declaration, it did not appear ~~that there~~ that any ~~Plaintiff was~~ evidence had been adduced to shew that the proceedings in question had been determined or ended, nor that the Plaintiff had been discharged from the recognizance he had entered into, either by proclamation, order of the Court ~~of O.T.~~ or by the close and termination of that Court, before which he was bound to appear and answer and not to depart without leave, which said Court might still exist and retain cognizance of the said Complaint — On these grounds the Court were of opinion to non-suit the plaintiff, but he declining to submit thereto, the Court directed the Jury to find a Verdict for the Defendant, which they did

Monday

Monday 11th. June 1821.

Morley. vs Beaubien

This was an action en Separation de Corps instituted by the husband against the wife.

The declaration charged the Defendant with acts of misconduct, inattention to the duties of her situation and the care of her family, of dislike and aversion to her husband, and to her children, and general statement of bad conduct and a vicious disposition — and therefore concluding to a Separation de Corps —

It was pleaded as a peremptory exception to this action, first. That the Defendant being a married woman was not authorised to plead thereto, and that Plaintiff ought to have caused a sufficient authority to be given to her in this behalf before instituting his action and 2dly That the matters alledged in the declaration were not sufficient to maintain the action —

Rolland in support of this plea, contended, that according to the 224th art of the Custom a married woman could ester en Jugement without the authority of her husband, but that the present action could not be considered as such authority — and on default of such authority from the husband the wife must obtain it from the Court — in a case such as the present, where the husband and wife may be considered as having separate interests, it may be assimilated to a Don Mutuel where husband must specially authorise the wife for the validity of the deed — etc. Poth. Puissance de Mari. Nº 42. —

That

2d. That the husband could maintain no action en separation against his wife, unless for cause of Adultery which was not alledged in the declaration — cites — Denizt. Vo Separation. No Poth. Con. Mar. No 525. That Pigeau. 2 Vol. 235 — seemed to be of a different opinion but upon the arrets upon which that opinion appeared to be founded, none of them seemed to apply. —

Mondelet for Plff — The wife cannot avail herself of any defect of authority to plead in this action, which must necessarily be implied to be given to her by her husband, by his requiring her to answer to the complaint now made against, and no express authority is required from the husband when both are parties in the same suit — 1 Pigeau 163. and if such authority had been necessary the defendant ought to have demanded it before pleading to the action — but the action here instituted against her is a sufficient authority. N. Denizt. Vo autorisation § 3. No 5. Dic. de Brillon. Vo autorisation. p. 382. Commre. de Fer. on 224 art. Cout. p. 170 — Repre Vo autorisation 2. Pig. 241. — On 2d. point — the Counsel contended, that adultery, was not the sole cause for which the husband could claim to be separated from his wife — that where she was guilty of such acts as stated in the declaration and wholly to counteract and destroy those principles upon which the union between husband and wife is founded as well in a Civil as in a moral point of view, this action could be maintained — refers to 2 Pigeau. 235. where similar proceedings have been maintained by the husband against the wife — and this author also remarks many Cases, where the wife can maintain this action

agt —

against the husband, and observes thereon, that for the same Causes the husband is entitled to his action against the wife, although adultery is not one of them. —

The Court were of opinion that the first Exception taken by the defendant was not founded, considering the presence of the husband in the Cause as a sufficient authority to the wife to plead to the action — But they maintained the second exception, being of opinion that the husband could not maintain his action en separation against the wife unless for Cause of Adultery — That the husband as head of the wife, had the power of controul over her, and that he could not call for the interference of Courts of Justice for every act of ill humour or bad conduct on the part of the wife which could not be considered as amounting to a — dissolution of that tie which subsisted between them —

action dismissed —

The King }
vs }
Solomons }
& al. —

On action for recovery of duties upon the importation of Snuff & tobacco into this province, under St. 41. Geo. 3. ch. 14. — at rate of 4s ℔ pound for Snuff. & 3s ℔ pound for tobacco.

The Defendants among other matters pleaded payment, and that the King had received monies from them & on their account to a greater amount than the sum demanded. —

It

It appeared, that subsequent to the St. 51 Geo. 3. another St. 55. Geo. 3. had passed, by which among other things the Governor, or person administering the Government for the time, with his Council, were authorised to make rules and regulations respecting trade between this Province and the United States of America by land or Inland navigation, and thereby also to suspend the operation of the whole or of any part or parts of any ordinance or Ordinances, or of any act or acts of the Legislature of this Province relative to trade and intercourse by land or Inland navigation between this Province and the said States of America — In consequence of this authority vested in the Governor and Councie, certain order or regulations of Commerce were made & published on 29th. May 1815. by Sir Gordon Drummond, then administrator of the Province by & with the Consent of his Council, by which a certain act of the 53. Geo. 3 respecting the importation of goods into this Province from the United States, was suspended, and it was ordered that all goods and Commodities imported from the United States should pay duties according to a tarif then established — by this tarif, tobacco was to pay ~~seven pence~~ 4 pound and snuff one Shilling

The Defendants having imported into this Province from the United States the quantity of Snuff & tobacco mentioned in the information, some difficulty arose at the Custom House as to the duty to be paid thereon, it being a question, whether the duty imposed by the orders in Council of 29 May 1815, was the only duty to be paid or whether it was only an additional duty to that imposed by Stat 51. Geo. 3. — in the mean time however, and until

until the question should be determined, the Custom officers at St. Johns exacted and obtained from the Defendants a double bond, that is to say, one bond for the payment of the duties as regulated by the orders in Council, and another bond for the duties imposed by the above St. 41 Geo. 3. — The defendants afterwards paid the duties imposed by the orders in Council and had their bond in this respect cancelled, but refused to pay the duties imposed by the Stat. 41 Geo. 3. conceiving these duties to be absorbed and comprehended in the greater duties imposed by the orders in Council —

The present Information was not founded on any bond given by the defendants, but on the St. of the 41 Geo. 3. which allows 4d ℔ pound on Snuff, and 3d ℔ pound on tobacco imported into this province from the United States

Gale for the Defendants contended, that the duties already paid by them was more than sufficient to cover the present or any legal claim the Crown could make for duties on the importation of those articles from the United States of America — he contended that the Crown was accountable for the monies they had received from the defendants on the bonds entered into by them, inasmuchas the orders in Counc were not valid — 1st Because the Provincial Parliament had no power or authority to delegate to others the right of imposing taxes or duties, — the imposition of taxes or duties is one of the highest acts of legislation and cannot be delegated to third persons, it is a right vested in the people by their representatives, and is personal to them, they cannot be divested of it, nor can they divest themselves of it. 2. That the Provincial Parliament, has not delegated this power of imposing duties, to the Governor in Council,

as

as it would have required the strongest terms, and the clearest language to shew such intention — the only power given to the Governor in Council was to make regulations — respecting the duties then existing, but this cannot be inferred to extend to impose or create new duties, the words of the Statute cannot bear this interpretation, the authority given extending only to regulate the cases where the existing duties should apply. — 3d — That there was a certain condition or pre-requisite necessary to give power to the Governor in Council even to make regulations touching the existing duties, which has not been observed — that was to suspend the Stat. 41 Geo. 3. by which the Inland trade with america was heretofore regulated, for while it remained in force no new regulations could be made by the Gov. in Council under the authority vested in them by St. 55. Geo. 3 — If however the orders in Council are to be considered as in force, they must be considered as incorporated with the St. 41. Geo. 3. and embracing the provisions of it, particularly when we consider the great encreased rate of duties made by the orders in Council, — this new duty carries on the face of it a tacit revocation of all former duties, or otherwise somthing would have been expressed to shew that such new duty was imposed over and above what was then in existence, and this meaning is the more applicable as being the intention of the orders in Council, as the words "over and above", are used in a subsequent part of the said orders in Council as applying to certain articles of the growth and manufacture of the United States — but these words are limited to this particular object, and had a similar intention existed with regard to all the objects of the tarif, it would not have failed to express it, which has not been done — The Defendants are therefore entitled to say that the present demand has been satisfied and set off against the same the monies they have already paid. —

M Ross

Mr Ross, the Informant, acting as Attorney General and in his absence, contended, that the Defendants cannot now be allowed to bring under contemplation the monies they have paid, nor to invalidate their own act in this respect — they discharged their bond to the King, and in doing so they have only paid a debt which they owed and if in conscience they owed this debt, even if the law could not have enforced the payment of it, they cannot now be — allowed to call it in question — Potts. Obls. 195 — Nor can a set-off be allowed against the King - Hughes on Extent. 221. The payment made by the defendants of a debt they owed to the King on a Bond, is no answer to the present demand founded on a particular Statute. — That there was no condition or pre-requisite as to suspending the St. 41 Geo. 3 required by St. 55. Geo. 3, to authorise the Gov. in Council to impose the duties in question, nor was it necessary that any former acts should be suspended to give effect to this authority — it is true the power of suspension was given to the Gov^r. in Council — but it was a power to be exercised as circumstances might require, but not of absolute necessity — and to shew that the Orders in Council cannot be considered as affects the St. 41. Geo. 3. they have suspended other Stat. touching the trade with america but have not — mentioned that of the 41^st Geo. 3. — That the orders in Council cannot be considered as imposing taxes on the Subject, but merely to regulate a branch of trade which was necessary for the welfare of the Country, and this could not be effected without laying duties on certain articles which were imported to the prejudice of the trade of the Country — this cannot be considered as a tax, or it was a tax, which the Defendants were at liberty to pay or not as they should think fit, as it was optional in them to import or not such articles^ which they saw those duties were imposed — Nor can the last act imposing a duty on any article be considered to embrace all former duties or to abrogate all

former

former acts imposing other duties, unless there be express words to this effect —

The court were of opinion that in regard of the payment made by the Defendants of the duties imposed by the Orders in Council, they were estopped from alledging any thing in regard of the right to impose those duties, and that the only question before the Court was, whether the duties on the articles of Snuff and tobacco now demanded as arising out of the St. 41 Geo. 3. ch. ought to be considered as absorbed and included in the duties imposed by the orders in Council. — Had the authority given to the Govr in Council been vested in them upon the Condition of their suspending any prior acts regulating the trade between the United States of America and this Province, as the principle upon which only they could proceed to make any new regulations touching this trade, the Court would consider the making of such new regulations as virtually repealing or suspending the prior acts in this behalf but altho' a power has been given to the Govr in Council to suspend the operation of any former acts touching this trade, yet it does not appear to be a pre-requisite, that they should do so, to warrant the making of new regulations — the power vested in them in this respect was discretionary, and we find they have exercised that discretion, by suspending certain Statutes, namely the 53d. Geo. 3 — which may be considered as a presumption that by repealing or suspending a part of the regulations touching this trade as contained in this Statute they meant that all other Statutes on this subject should remain in force — Is there then any thing in the orders of Council, which in fact, or in law can lead us to presume that the St. 41 Geo. 3d has

been

been, or ought to be considered to be suspended — in point of fact there is nothing, there are no words intimating this intention, unless the circumstance of a much larger duty being imposed by the orders in Council than by that Statute could lead us to draw this inference — but when we consider that the St. 41. Geo. 3. is a general law regulating the trade throughout the Province, and not limited to that with the United States of America by land or inland navigation we must be aware that the Govr in Council could not repeal or suspend this Stat. except in so far as it regarded this particular branch of trade, and therefore the suspending even this part of it would have required more precaution and care as to the words to be used, had the Govr in Council meant that their orders should have this effect — In law it rests as a consideration, how far a Subsequent Statute made in pari materia, can be considered as revoking or suspending a prior one — and in this respect the rule of law seems to be, that where both Statutes are affirmative, and there is no non obstante, clause in the latter, they will both stand together as in force — and we must therefore say that the St. 41. Geo. 3. was not in anywise suspended or affected by the provisions of the Orders in Council, and therefore that the duties now claimed under that Statute are recoverable

19 Vin. Ab. Tit. Statute (E.6) Construction of Statutes. — See also. Nos 85. 86. 132 & on note. p. 525.

Judgt for the King. —

Legaret. vs Petit. }

On action for rescision of a deed of Sale, founded on acts of fraud and deceit on the part of the Defendant the purchaser, and also by reason of a lesion d'outre moitié du juste prix

The Plaintiff having failed to make sufficient proof on the first Count in the declaration touching the fraud alledged against the Defendant, the Court directed that Experts should be named to ascertain the value of the land at the time of the Sale — Experts were named in consequence who visited the land, and made their report, by which it appeared, that the land had been sold by the Plff to the Defendant for the sum of — — 1314ᵗ. —
of which sum, there was paid at passing the deed — 114. —
1200. —
the remaining sum of 1200ᵗ. was stipulated to be paid in ten years, but without interest —

The Experts valued the land at the time of Sale at 2200ᵗ. —

Upon this estimation the Court was of opinion that there was a lesion d'outre moitié, because allowing the value of the land at the time of the Sale to be — 2200 —
and deduct therefrom the sum pᵈ at passᵍ the deed — 114 —
2086
the balance of 2086 would be the sum the Plff was then entitled to receive, but stipulating to receive this sum in ten years without interest, when by law the thing sold produced interest, was taking so much less than the value of the thing, and therfore to ascertain the true value at the end of ten years the interest on 2086ᵗ. ought to be added, 9ᵗ. interest pᵈ 1251ᵗ. —
3337 —
so that the true value would have been 3337ᵗ. — which was much more than double the price paid by Defendᵗ — and therfor the Court gave Judg. for the Plff rescinding the deed of Sale. —

Monday 18th June 1821.

Hedge & Lyman
Pierce vs al'

Action on promissory note drawn by the Defts in favor of one Trueworthy Heath, and by him endorsed to the plaintiffs — Plea, non assumpt. and further that Pltffs are not the owners of the said note, nor have any legal interest therein to entitle them to institute the present action in their own name, the said note still being the property of the said Trueworthy Heath. By the answers of William Lyman one of the pltffs to Interrogs proposed to him by the Defendants, it appeared, that the note in question had been indorsed to the plaintiffs to recover the same from Defendants, and for which the plaintiffs gave a receipt to the said Trueworthy Heath, by which they became answerable to him for the amount when so recovered, and that the Plaintiffs have an interest in the said note, as they had undertaken to obtain the payment thereof and to remit the same to the said Heath —

It was contended on the part of the Defendants, that as the Plaintiffs appeared to be merely the agents of the said Heath, but had no interest in the note in question, they were not entitled to bring this action in their own name. —

The Court however were of opinion that the Pltffs had a sufficient interest in the note to entitle them to bring the action that prima facie the indorsement by Heath in favor of the Pltffs was a sufficient title against third persons, and warranted them to transfer the note to others, and if the Pltffs have given any undertaking to be answerable for the amount of this note, it is a sufficient consideration to warrant the present suit —

Judgt for Pltffs —

Joanette..
vs
Marmier..

Action of Debt on deed of Sale.-
Plea. Lesion d'outre moitié-
Repliv. Demurs to plea, as no sufficient cause of rescision on the part of a purchaser.-

The Court admitted the demurrer and gave Judgt for Plff thereon, upon the authorities cited.-

see- 2. Argou. 376.-
3. Cujas. Lib. 16. cls. 18. p. 506.- & arret du 10 Juillet 1675. Journal du Palais.-
2. Bacquet. cls. 22. p. 68. N° 23.
1 Despeisses. on Contracts. Sec. 4. N° 8. p. 11.
De l'Hommeau, Maximes. liv. 3. p. 164.
Bouchel, Bib. du Dr. F. v° Lesion.
Chenû, en ses questions. 75.
Monotholon. Arretés. 77.-
Domat, Contrat de Vente.
2. Bourjon. tit. 7. art. 124. p. 606.-
Lange Prac. Franc- p. 506- Restitution des majeurs
Denizart. v°- Lesion-
Repre v°- Lesion. p. 466.-
Ferriere - v°- Lesion.-
Lacombe. v°- Restitution
1 Pigeau Proc. Civile. p. 14.-
D'Antoine Règles de Droit Civile. p. 86.
Louet. v° Rescision.-
Oeuvres de Cochin. 1 Vol. p. 511.-
Delaporte Pandectes Francaises.

Donegany

Donegany. v Pickle. a

Action of Indeb: assumpt.—

The declaration stated, that on 2. Nov. 1818, the plaintiff at the instance and request of the Defend. delivered to him the defendant a certain promissory note drawn by one Campbell and indorsed by one Jos. Barlow and the said Defend. and due and payable to the said pltff, being for a sum of £132.. 1.. 6 Cy, to be accounted for by the said defendant to the said pltff, and the said defendant did then and there undertake promise and agree to return to the said pltff the said promissory Note, or on default thereof to pay to him the plaintiff the amount thereof with interest when thereunto afterwards required by the said Pltff — Yet the said defendant, although often requested to return the said note to the said pltff, hath hitherto neglected and refused so to do, and hath not paid to the said pltff the said sum of money in the said note mentioned, but the same still refuses although often demanded

2°. Count for money had and received by the Defendant to the use of the Pltff —

Conclusion — That Defend. be condemned to pay to the Pltff the sum of £150. for his damages w. interest & Costs. a —

Plea — Non assumpsit — & Issue thereon. —

At the Enquete the following agreement or undertaking on the part of the Defendant was given in evidence, to — support the action —

Received of Mr Joseph Donegany a note drawn by Mr James Campbell and endorsed by Joseph Barlow and myself for one hundred and thirty two pounds one Shilling and six pence, which said note I promise to return, or pay Mr Joseph Donegany with interest if not returned Montreal 2° Novr 1818 — John Pickle Jr

Grant for the defendant contended that the action could not be maintained, as it ought to have been brought in the terms of the agreement either to deliver the Note or to pay the money – but the Pltff has no right of action for money until Defendt shall have been legally put in default to deliver the note. —

Rolland for Pltff on the contrary maintained that there was a sufficient demeure on the Defendt by the present action, he ought to have tendered the note to exonerate him from the payment of the money – where any thing is payable on demand, the action is a sufficient demand. –

The Court however were of opinion with the Defendt and dismissed the action –

see Poth. Ob. N° 248. –

Carmel
vs
Hunter & al

Action of assumpsit on promissory note drawn by Messrs Stewart Colroyd & Co & payable to Messrs William & Thomas Hunter and by them indorsed to the plaintiff – Plea, non assumpsit – and further that note in question was an accommodation note to which the Defendants set their names without any value or consideration and this with the knowledge of the Plaintiff, and therefor Plaintiff cannot maintain his action –

It appearing however that the Pltff have given a valuable consideration for the note to Messrs Stewart & Co the Court gave Judgt. of Defendts —

see. Chitty on Bills – p. 87, & 203. –

5. Taunt: Rep. 192. Fentum. v. Pocock & al –

Armour.
vs.
Pickle & al

Action on two promissory notes made by the Defendants and one Jacob Posez, jointly and severally, and payable to the plaintiff, as Cashier for the benefit and in behalf of the association carrying on trade and business in the name of the President Directors and Company of the Bank of Canada –

Vigé for Defendants pleaded, that the plaintiff could not maintain the present action in the name and on the behalf of the association carrying on trade in the name of the President ~~and~~ directors and Company of the Bank of Canada and that he the said pltff hath no interest in the said notes

But the Court were of opinion that the action was well brought, that the exception taken by the Defendrs was not founded in fact, as the action was not brought in the name and for and on behalf of the President Directors and Company of the Bank of Canada, but in the plaintiffs own name upon a Contract or promise made to him for the benefit of third persons – now it is settled in law that these third persons cannot maintain any action on this Contract or promise, not being parties to it, and therefore as the Defendrs acknowledge to have drawn a beneficial interest from it, as the consideration of their promise to the Plaintiff, he alone can maintain the action although for the benefit of ~~a~~ third persons –

see. Bayley on Bills – p. 55. 3d. Edit. –
Chitty on dº — p. 81 — 4th Edit.
Evans. vs. Cramlington. Carth. Rep. 5. —
Smith. vs. Kendall, Esp. 6 T. Rep. 123. —
1 Comyns on Contracts. 247. 248.
2 Espin. Rep. 493. A. Atkin & al. vs. Amber
12. T. Rep. 400 — Metcalf vs Bruin. —
13 Mull. N. P. 130. —
Poth. obl. Nº 58. 59 — and Nº 447. 448.
2 Evans' Poth. pages. 32. 3. 4. & 5. —

Tuesday 19th June 1821.

Shuter. —
vs.
Thayer. —

Action on award. —

The declaration stated, that certain difficulties and matters in dispute between the parties were submitted to the award and arbitration of Horatio Gates of Montreal Merchant, Thomas Andrew Turner and Charles Bancroft by Compromis bearing date the 28th day of October 1818 with power to the said Arbitrators, or amiables compositeurs to examine all accounts, papers and writings, which the said Arbitrators or any two of them should deem necessary which said accounts papers and writings the said parties obliged themselves to produce to the said Arbitrators at their requisition respectively — also that the said Arbitrators should examine Witnesses if produced, and deemed nessary by either party, the said Witnesses to be sworn if required and also to examine both or either of the parties upon oath, and Cause testimony of witnesses residing in Great Britain or in the United States of America to be taken upon interrogatories to be settled between the parties, and that the said Arbitrators or any two of them should should make and render their award in the premises, on or before the 15th day of November next after the date of the said act of Compromis. — That the time for rendering the said award was from time to time continued and extended to the 15th day of February 1819, when the same expired but by a Subsequent act was revived and continued by the parties unto the first day of October 1820 — That on the 30th day of September 1820, the said Arbitrators made their

their award in writing by act passed before two public notaries and bearing date on that day, and by their said award did arbitrate and determine that the said Defend^t should pay to the plaintiff on the 1^st day of October 1820 the sum of £2895. 15. 2 with interest from that date until paid, as and in full and entire payment and discharge (except as therein was excepted & reserved) of all balances of account, debts, dues or claims of any and every description existing between the said parties in dispute - of all which premises he the said Jab^l Thayer, the Defend^t, on the said 30^th day of September 1820 at Montreal aforesaid, had notice - Yet the said defend^t the said Sum of £2895. 15. 2 although often demanded hath not paid to the said Pl^ff, but refuses to pay the same. - Wherefore prays Judg^t against the said defend^t for the said Sum of £2895. 15. 2 with interest & Cost -

Plea - contains first certain exceptions to the sufficiency of the Plaintiffs declaration - 1 Because it did not appear in and by the said declaration, that the said arbitrators heard the witnesses of the plaintiff, or that any witnesses or evidence of any kind was produced to them by the said plaintiff or Defendant or either of them or that they the said arbitrators did consider of any evidence produced to them by the said Plaintiff and defendant or either of them - 2. And because from the allegations matters and things contained and set forth in the said declaration of the said plaintiff, it appears that the said arbitrators did make and give in their said pretended award, without having heard, examined or considered the testimony of the witnesses or the evidence of any kind of the said plaintiff and Defend^t or either of them, and because also the said plaintiff in and by

the

conclusions of his said declaration hath not demanded that the said pretended award should be homologated by this Court — And because it doth not appear in and by the said declaration, that the said pretended award was pronounced, as by law the same ought to have been, or that the said plaintiff and Defendant were, or either of them was notified to attend at any place or time to hear the said pretended award pronounced by the said Arbitrators — And because that no Judgt of this Court can be rendered on the conclusions of the said declaration, whereby execution of the said pretended award can be had by the said plaintiff against the Defendant. — And because the premises in the said declaration contained, do not justify or warrant the conclusion of the said declaration — and that the said declaration doth not set forth or shew a legal Cause of action agt the said Defendant, but that the said declaration and the conclusions thereof are all together illegal & insufficient in law — which he the defend. is ready to verify — wherefore Defend. prays Judgt & that the action be dismissed with Costs. —

And without waiver of the aforesaid exceptions, the said defendant pleads for further exception peremptoire to the action and demande of the said pltff, that the sd pltff cannot have or maintain his action aforesaid agt the said Defend. because the said Arbitrators did not require of the said plaintiff to produce before them the accounts, papers and writings in the possession of the sd plaintiff, and which they necessarily ought to have had before them, and to have examined in order to make up their award in justice and according to right between the said parties, and that the said Arbitrators did not examine the said accounts papers and writings and accounts as

they

they were bound and oblized to have done — And because the said Arbitrators did not hear and examine the witnesses of the said plaintiff and Defendt in their persons, but did illegally and contrary to the tenor of the said Compromis receive as testimony the depositions of divers witnesses on the part of the said plaintiff, which were taken by him ex parte before a magistrate — and did render the said award without evidence to support the same. — And further because the said Defendant was not notified to be and attend at any time or place to hear the said arbitrators pronounce their said award, — and because the said Arbitrators did not pronounce in the presence and hearing of the said Pltff and Defendt or either of them, the aforesaid award as by law they were bound to have done — and because also the said award was not pronounced in any manner or way according to law, to the said Defendant — and because also no copy of the said award was served on or delivered to him the said Defendt as by law the same ought to have been —

The other parts of the plea, taking issue in fact and denying all and every the matters and allegations set forth and contained in the said declaration —

The Replication takes issue on all the matters of law and fact stated in the plea. —

3 Febry. 1821. The parties were first heard on the exceptions in law pleaded by the defendant to the sufficiency of the Plaintiffs declaration —

Sewell for the Defendant contended, that the declaration was wholly insufficient, and that no sufficient premises were stated in it to maintain the conclusions thereof — it was not alledged that the arbitrators had heard the witnesses of the parties, this was necessary for the validity of their proceedings, as an award rendered

rendered without hearing the proofs and allegations of the parties, is wholly null and void — That the declaration ought also to have concluded to the homologation of the award, but it concludes only to the payment of money, and therefore the homologation of the award cannot be granted, nor any Judgment given on it. — That it is not alledged in the said declaration, that the award was pronounced according to Law, nor regularly notified to the parties, which also was necessary. cites. Denizt. Vo. arbitrage. the award aught to have been pronounced to the parties in person, or at their domicile, and ought to have been so stated in the declaration —

Mr Bedard of Counsel for Defendt. It does not appear that the Sentence arbitrale was ever pronounced to the parties, which is essential to the validity of it — Denizt. Vo. Arbitrage. No. 3. — Vo. Compromis — Bornier sur tit. 26. art. 7. Ordo. 1667 — The depôt of the avis arbitrale, in a Notary's Office is not sufficient — Fer. Vo. Sentence Arbitrale — The pronounciation of it alone ensures the date of the Sentence arbe Poth. Proc. Civ. p. 2. ch. 4. art. 2. — Repe Vo. Arbitrage p. 548. Dic. de Jurisprudence, et des arrets. Vo. arbitre. No. 56. — 1 Pigeau 26.

Rolland for Pltff — The declaration is sufficient and enough stated therein to entitle pltff to the conclusions thereof It is alledged in the decl. that the arbitrators took upon themselves the burden of the award, which intimates a regular course of proceeding in making it — That pronounciation of the award to the parties is not a formality essential to the validity of it, this form may often be inconvenient, nay impossible and the law allows other course to be taken, where the same effect will be produced, that is, when the date of the award will be ascertained, and this is done by signifying a copy of the award to the parties and making an authentic act thereof as was done in the present instance — cites. Repe Vo. Arbitrage

p.

p. 548. 2e Col. – Sousse Tr. d'arbitrage. p. 711. – 1 Pigeau p. 25. – neither is the homologation of the award of any use or moment according to the present constitution of the Courts in this Province. – it is enough that the defendant is called to answer to the present demand founded on the award, and the homologation of it is in effect demanded by the demand of Condemnation of the Defend to the payment of the money it adjudges to the plff – According to the Course in France the homologation of an award was an ex parte proceeding, by the Juge Royal, Sousse Justice Civile p. 714 – and the reason of this was merely to ascertain that in the award the rights of the public, or those of minors and persons under the protection of the law, were not involved or prejudiced. the adverse party was never heard, not even if he had desired it. 1 Pigeau. p. 26. Cites Case of Masson. v. Mabbut in 1811 where same exception was over-ruled in this Court. –

12th Febr. The Court dismissed the exceptions pleaded by Defendt to the plaintiffs declaration, considering that the demand was sufficiently set-out to entitle Plff to the conclusions thereof –

The Defendant having subsequently moved to examine the plaintiff upon faits et-articles, and having also moved to examine the Arbitrators as witnesses upon the facts & allegations pleaded in exception to the sufficiency of the Plaintiffs action The Court ordered the parties to be first heard upon those exceptions before adjudging upon the nature of the evidence to be adduced –

2d June Rolland for Plff – The exceptions raised by the defendt to the sufficiency of the plaintiffs action, and to the award on which it is founded, are wholly insufficient, and no evidence ought to be allowed thereon – 1st It is objected that the arbitrators did not require the plaintiff to produce certain accounts, papers and documents in his possession,

before

before them, but they were not bound to do so, if they saw no necessity for it, if none of the parties required the production of these papers it was not for the arbitrators to interfere, provided they had evidence sufficient before them — 2°. It is objected that the arbitrators received in evidence the depositions of witnesses taken ex parte before a magistrate instead of examining the witnesses in person but this was not the only evidence before them, and it is impossible to say whether any or what faith and credit the arbitrators attached to these depositions, nor that their award was founded upon them — 3°. That there was no pronunciation of the avis arbitrale, nor the parties notified to attend to hear it pronounced, nor any copy of it served — with regard to the pronunciation of the award, the Court has already held that this was not necessary, on the objections raised to the sufficiency of the declaration — as to service of a copy, that is a point in evidence which will be proved in due time. —

That the plaintiff ought not to be held to answer on faits et articles in this case — this action is founded on an award, and the Compromis may be compared to a deed of transaction between the parties, as it is conclusive as to all their pretentions under such compromis whether they are lost, abandoned, or otherwise destroyed the matters so referred under a Compromis, cannot become an object of enquête — that all the Interrogatories here proposed to the plaintiff should they be answered in the affirmative, cannot affect the award, nor the regularity of the proceedings of the arbitrators — Among all those Interrogatories not one alledges a fact which carries with it any Cause of nullity in the award at most they would tend to show that the opinion

of

of the arbitrators was wrong or unjust and that they ought to have decided differently — but the mal jugé, is no Cause of objection to an award, the parties have submitted to their opinion and they must be bound by it — Jousse. p. 720 recapitulates all the nullities which may be alledged against an award, but the mal jugé, is not among them. —

It is also attempted to bring up the arbitrators as witnesses in the face of their own award, but this cannot be admitted their faith is bound by that award, which is a Solemn act of material interest to the parties — were the arbitrators even desirous to be heard they cannot be admitted, nor can any man be allowed by his own testimony to destroy the act he has made —

Sewell for the Defendant — The Courts of Justice in this Country must have a controul over the awards of Arbitrators, otherwise the greatest injustice would be committed — This Controul we see daily exercised by the Court of Chancery in England, as it was by the Courts in France. 1 Pigeau. 252. arbitrators may be deceived, or may fall into error from a variety of Causes without intending it — their awards are not conclusive between the parties nor are they precluded from shewing that the proceedings of the arbitrators have been irregular by their giving a Judgment without evidence — Repe vo Arbitrage. p. 553. — Com. Dig. Tit. award. p. 376. — If the arbitrators mistook either the fact or the law it is a Cause to set aside their award, and if so, the parties must be admitted to prove it.

That the Defendant is entitled to examine the arbitrators as witnesses — they act not as public characters, they are not like the Judges of a Court, and there is no other means of ascertaining the facts which passed before them, but by calling on them to give evidence thereof — they are not

interested

interested persons, and may therefore be called upon to explain the nature of the evidence they received, and all the facts which passed before them— if witnesses can be examined touching these facts, the arbitrators are— certainly the best— It is alledged in the Compromis that certain books and papers in the possession of the plaintiff were to be produced before the arbitrators, this the defendant contends was not done, but in lieu thereof fabricated papers of a very different kind— how can this be ascertained but by the evidence of the arbitrators? and we find that in the Court of Chancery in England arbitrators are heard as witnesses and their awards set aside— 1 Atk. Rep. 63. 64.—

At all events the Defendant has a right to examine the plaintiff on faits & articles, touching all the facts which passed before the arbitrators, and in this, as in every other case the Defendant has a right to draw from him any fact which may tend to support his plea.

By the Court—

The exceptions taken to the present action and upon which the Court is enabled to determine upon the present hearing, are two— 1st. That the arbitrators did not require the plaintiff to produce certain accounts papers and documents in his possession to be laid before them, so as to enable them to make their award as they were bound and obliged by the Compromis— 2dly. That the arbitrators did not examine witnesses in person, but received their depositions taken exparte before a magistrate— If the facts here stated, or either of them, be sufficient to vitiate the award, the Defdt must be admitted to prove them, if on the contrary they are not sufficient, all proof becomes idle and unnecessary—

The

The award of arbitrators chosen by the parties is favourably considered, and is not to be set aside as a matter of course, on the Contrary we find that both by the law of England and France great weight was attached to them, and they were considered in some respects as binding as the Judgments of a Court of Law — By the Ordre of Franc 2. in Augt 1560, and of Louis 13. in January 1629, it is said, "encore que dans les
1 Hemys. 438. — " Compromis il n'y ait aucune peine, les Sentences arbitrales
" sont juridiques, et doivent être executées comme si elles
" avoient été rendües par les Juges Ordinaires" — And in England it is held, "If the parties think proper to submit
Peake's Ev. 81 — " their differences to an arbitrator, his judgment is as —
Kyd on awards. " conclusive upon them as that of a Court established by
" the Law" —

It may be a question here however what rule ought to be adopted in determining the objections raised to the award in question — in looking at the statements contained in the declaration and proceedings, it appears that the parties are merchants, and that the objects in contest upon which this award was made, regarded mercantile dealings and transactions, and therefore it may be justly considered that the rule of decision best suited to such a proceeding, as in regard of the evidence to be adduced thereon, should be according to the principles of the English Law — The homologation of this award would have fallen within the Jurisdiction Consulaire in France, which is a further reason to induce the Court to adopt this principle — "En matiere de
Repre Vo Arbitrage " Commerce, les homologations des Sentences arbitrales doivent se
p. 529. 1st Ed. " faire devant les Juges Consuls" —

In following therefore the laws of England, let us see what are the decisions upon this head —

In the Courts of Equity — It is held, that as an award is made by Judges of the parties own chusing, it is final,
3 Atk. Rep. 529. unless there is collusion or gross misbehaviour in the

Arbitrators

arbitrators — and again — unless there is corruption or partiality in an arbitrator, the party cannot set aside his award —

3. Atk. Rep. 644.

8. East. Rep. 344.

Kyd on Awards 226.

And in the Courts of Law — it is held, that partiality and improper conduct in an arbitrator in making his award, without hearing the Defendant and his witnesses cannot be pleaded in bar to an action on the bond conditioned for the performance of the award, but is only matter for application to the equitable Jurisdiction of the Court to set aside the award — and again — When an award is put in suit at law, no extrinsic circumstance, nor any matter of fact dehors can be given in evidence to impeach it — If it be open therefore to any objection of this kind the Defendant must apply for relief either to a Court of Equity by Bill, or if the submission has been made a rule of any Court of Law, to the Summary and equitable — Jurisdiction of that Court —

Bac. Ab. Tit. Arbitrament & Award. —

2. Wils. 148.

2. Burr. 701. —

1 Salk. 71. note (a)

Hence it would appear that the Courts of Equity are the proper Jurisdiction for relief against awards — but even here something must be alledged to impeach the conduct of the arbitrators — The first objection here is, that the arbitrators did not require the plaintiff to produce certain accts papers and documents in his possession as evidence before them — had the arbitrators been bound by the terms of the submission to peruse and examine these papers before making their award, had it been imposed upon them as a matter of indispensable necessity, and not of discretion in the arbitrators to cause these papers to be produced, their proceeding to make up their award without causing such papers to be produced before them, would have been a legal ground of objection to that proceeding — but the compromis as stated, marks nothing beyond a discretionary power in the arbitrators to require the production of those papers, and if they have not done so, their discretion must have induced them —

them to think it not necessary — had the defendant extended this objection a little further, by alledging, that he had required of the arbitrators to cause the said papers to be produced, and that they had neglected or refused to comply with this request, in that case also, there would have been matter of objection to their proceedings — but as the objection as taken does not carry enough on the face of it to impeach the conduct of the arbitrators.— The second objection is, — that the arbitrators received the depositions of witnesses taken ex parté before a magistrate, as evidence instead of examining the witnesses before them — this also is not sufficient — the defendant ought to have alledged that such depositions were so received without his knowledge or contrary to his consent — it is much the same as if the arbitrators had examined the witnesses brought before them without being sworn, if the parties do not object, the proceeding is legal, and their award must be confirmed. neither of these objections can therefore be received as sufficient to vitiate the award, neither in law nor in equity — as to the other objection, touching the want of notice to hear the award pronounced and the want of a sufficient copy being served on the defendant, these being material facts to be proved, a day will be given for this purpose —

1 Bos. & Pul. 91. Ridout v. Pye.

In regard of the facts stated in the Interrogatories for the examination of the plaintiff on oath, they are liable to the same objection, that none of them if true, is sufficient to avoid the award, they do not go far enough, nor shew that the evidence before the arbitrators was objected to by the defendant, or that he required any other or further evidence to be given — they do not charge the arbitrators with having proceeded without the privity or knowledge of the defendant, or that they

refused

refused to hear him — nothing is stated in these Interrogs to charge the arbitrators with corruption or partiality, with collusion, or gross misbehaviour, nor in anywise to impeach the regularity of their proceedings — and although a Court of Justice in judging of the contest that originally existed between the parties, might have required other or further evidence, or might have drawn different conclusions from the evidence adduced, yet this is no cause of objection to the arbitrators, nor to the judgment they may form on the case before them — The motion to examine the Plaintiff on faits et articles is therefore rejected —

In regard of the examination of the arbitrators as witnesses, touching the regularity of their proceedings, or to facts tending to affect or invalidate their award, it may be considered as unnecessary to give any opinion, as the points upon which they were to be examined may be looked on as determined by the opinion now held by the Court on the foregoing objections to the award, but in order to set the question at rest, the Court thinks it right to dispose of the objection made to the Competency of the arbitrators as witnesses by saying, that they are of opinion the objection is well founded, and that the arbitrators cannot be examined to any of the above points - that the only instance where it appears that Arbitrators have been heard as witnesses touching their Award, was to explain what was ambiguous or uncertain in it, but nothing beyond this. —

Repse Vo Arbitrage p. 546.

1 Pigeau. p. 27. end of last paragraph. —

4 T. Reps. 136. — Ravee. v. Farmer

Comier ... vs Henry et al & Baroness of Longueuil Opp.t

In opposition afin de conserver upon a claim for Lods & Ventes due upon two mutations of the property in question — One on the Sale by the Plaintiff to the late Bouthillier, and the other on a Sale by the widow of the said Bouthillier to the Defendants —

It appeared that the plaintiff had sold the lot of land which had been returned as sold by the Sheriff under the writ of execution sued out in this Cause, to the late — Bouthillier after his death, the widow of Bouthillier, having been appointed tutrix to her minor Children, in that capacity, but without being thereunto authorised sold the said lot of land to the Defendants — The plaintiff afterwards prosecuted the present action en declaration d'hypotheque against the Defendant and in consequence of the Judgment rendered thereon, the Execution was sued out upon which the said lot of land was sold —

Rolland for the plaintiff, admitted that one Lods & Vente was due on the Sale from the plaintiff to Bouthillier but that there could be nothing due for Lods & Ventes on the Sale made by the widow of Bouthillier to the Defend.rs as the Sale was null and the property was afterwards given up to be sold on the action hypothecaire — there could be no mutation of property, nor any title given under such a Sale —

Sewell for the Oppos.t contended, that allowing there might be such a nullity in the Sale to the Defend.rs as would be sufficient to operate a rescision of it, yet until that rescision has been effected the Seignior is entitled to his Lods et Ventes — the Sale by a minor is not always null as he may confirm it when he comes of age — That here the Plaintiff must be considered as having confirmed and approved the Sale made to the Defendant, as he prosecuted

the

the detenteur under that Sale and obtained Judgment against him — cites. Repᵗᵒ vᵒ Mineur — p. 519. 521. —
Dᵒ —— Lods Ventes. p. 694. 5. —

Rolland in reply — The Sale here was not by the minor but by the Tutrix, without any authority, in which case the sale is not merely voidable, but is ipso facto void — cites Repᵗᵒ vᵒ Mineur — 1 Merlé. 145 — 2ᵉ dᵒ 35. — 1 Bouyon 586. — That as to the hypothecary action it lies against the detenteur without considering his right to the property vid. Denizᵗ vᵒ Detenteur, and therefore the action hypothecᵃ instituted by the pltff against the Defendᵗ does not affect the Case — and where a party is obliged to the property by deguerpissement, no lods & Ventes are due on his purchase —

The Court however were of opinion that the Lods & Ventes were due to the Seignior although the deed of Sale might not be valid, & if there was a mutation by change of possession under it that was sufficient to warrant the claim for Lods & Ventes —

see. Hervé. Theorie de matiere feodale. 3 Vol. p. 7.
Poudhom. ch. 18. p. 183. —

Wednesday 20ᵗʰ June 1821

Sourimen
v
Montpellier

Fournier
&
Montpellier
&
Chenier. Gar.

Action en declaration d' hypotheque

The declaration states, that on 7th Febr 1820 the plaintiff obtained Judgment in this Court against one Michel Fournier, Curator to the vacant succession of one Clement Racicot, deceased, for a sum of £250.- with interest from 22d August 1812 until paid and Costs taxed at £10.6.3, as well in obtaining the said Judgment as in suing out execution against the personal and real estates of the said Racicot in the hands of the Sd Curator, — which said Judgt was rendered against the Sd Curator for the amount of an obligation due and owing by the said Clement Racicot to the said plaintiff executed before public Notaries on the 22d Augt 1812, whereby a mortgage was created upon the property of the said late Clement Racicot from the date of the said obligation. —

That by deed of Sale made and executed before two public notaries on the 17th March 1818, the said Clement Racicot sold to the defendant a certain lot of land, as (mentioned and described in the declaration) of which said lot of land the said defendt is now the possessor & proprietor by means whereof he the said defendant became bound and is now liable by hypothecairement, to pay to the said Pltff the aforesaid debt interest and Costs, or to quit, abandon and give up the said lot of land that the same may sold according to law for the payment thereof — and Concludes accordingly. —

The defendant called in one Antoine Chenier as his garant. —

Plea of Montpellier. —

1st That the plaintiff's declaration is insufficient, as it does not thereby appear, that the plaintiff ever acquired or had any mortgage upon the lot of land in question — That it is not even alledged in and by the Sd declaration,

that

that the late Clement Racicot ever was the proprietor or in possession of the said lot of land upon which the said plaintiff now claims a right of mortgage.—
2d. That the said plaintiff did never in fact obtain, nor did or could the said late Clement Racicot himself create upon the said lot of land, any right of mortgage, he the said Clement Racicot never having been the proprietor of the said lot of land, nor ever having been in the possession thereof.—
3d. That any right of action the Plaintiff has acquired by reason of his demand aforesaid, it could be maintained only against a lot of land now in the possession of One Antoine Chenier, and which was conveyed to him by the said Clement Racicot by virtue of a deed of exchange of the 17th. March 1818—

On this plea issue was taken by the plaintiff, and the parties having been heard on the plea of exception to the sufficiency of the plaintiff's declaration, the same was dismissed—

On the hearing on the merits it appeared that by deed of Exchange made between the late Clement Racicot and Antoine Chenier dated 17 March 1818, the said Racicot acquired from Chenier the lot of land in question, as mentioned in the declaration, but it was stipulated, that Racicot should enter into the possession thereof at St. Michel next after, that is to say 29 Sept. 1818.— On the same day 17 March 1818, Clement Racicot sold the same lot of land which he had so acquired of Chenier to the Defendant, with the stipulation that his possession should commence only at the above period 29 Sept. 1818.—

L. M. Vigé for Defendant contended that Plff had not acquired any right of mortgage on the lot of land in question That hypotheque is a real right and can be created only by the person who is proprietor. Poth. Hyp. p. 427.— Dic. de Fer. Vo. Hypotheque.— That Racicot never had possession of the

land

land ~~was~~ sold ~~by~~ Chenier,— Racicot had obtained a deed of sale of it by virtue of the deed of Exchange, but this title was not complete without tradition— nor did Racicot give a perfect title to the Defendant, to do which the Seller must be in the actual possession of the thing sold, and must transfer that possession to the purchaser— Poth. Vente. Nº 221. 222. 245. — Deniz.t Vº Vente. Nº 19. — The right sold by Racicot to the Defendt, was only the right which he, Racicot had in the thing, but not the thing itself— Poth. Vente. Nº 247.— Regles de Droit Civ. d' Antoine Rig. 98.— Repre Vº Tradition. p. 221. — That here Chenier has a preferable claim to Racicot on this lot of land for any mortgage right, as being his gage, but if the plaintiffs claim should be maintained it might tend to deprive Chenier of his right—

Lacroix for the plaintiff argued, that the lot of land sold to the Defendant by his, the pltffs debtor, must be mortgaged for the debt due to the pltff — by the deed of exchange Chenier reserved the possession of the lot of land until St Michel 1818 — but this possession was in law the possession of Racicot, and from that moment Chenier held the Estate in the name of Racicot and as representing him. Poth. Prop. Nº 210. retention d'usufruit is tantamount to a delivery. Poth. Vente. Nº 313 & 318 — and Nº 321 shews that a tradition of the description here mentioned operates a transfer of the property.— Repre Vº Tradition. Here therefore the jouissance of Chenier, must be considered as the jouissance of Racicot, and held in his name and right, and was tantamount to a tradition to Racicot and from Racicot to the Defendant— Lacombe. Vº Hypotheque — Poth. Hypotheque. p. 428. 429.—

The Court were of opinion with the plaintiff with ~~the~~ regard to the principles of Law as by him cited and gave Judgment in his favor.—

Galipeau vs Gosselin.

Action of debt on deed of Sale

In the deed of Sale it was stipulated, that a sum of 2000^{tt} part of the purchase money, should remain in the hands of the purchaser, to answer the claim of his daughter to whom he had been appointed Tutor, and for this purpose the money was to be retained by the Defendant, jusqu'à son "âge de majorité, ou qu'elle soit pourvüe par mariage ou "autrement."- The Plaintiffs dying during her minority and before marriage, the present action was thereupon brought to recover the above sum of 2000^{tt}.—

L.M. Vezé for the defendant contended, that the Pltff's right was not yet open to demand this money, and that the action was premature — That the obligation of the Defr was to pay this money upon certain conditions and events, 1st on the Pltff daughter attaining the age of majority — & 2d in case of her marriage — but neither of these events have yet happened, and in regard of the death of the Plaintiff's daughter having happened prior to these events, this was a circumstance not provided for by the deed, and the plaintiff can found no action thereon against the defendant — The stipulations in a deed are to be interpreted in favor of the party bound, but cannot be extended beyond what the express — and although it may be now certain that the Plaintiffs daughter can never never attain the age of majority or be married — yet as the intentions of the parties have not been expressed in regard of this event, the Court cannot supply the defect, by presuming what that intention would have been had it been so expressed That there were also considerations on the part of the Defendant which induced him to make the purchase in question, as the Plaintiff's daughter at the time was a child between

five

five and six years of age, and the defendant looked forward to the certainty of being able to retain this money in his hands for at least ten or twelve years, and also the chance of retaining it until that child arrived at the age of majority — had this not been the case, he would not have purchased the Estate at so high a price — as to the words in the deed, ou autrement, they can apply only to some unforeseen necessity of the minor occuring whereby some part of this money might be required beyond the interest of it, as if the minor had been going into a Convent, or had been entering upon any situation in life, where a part or the whole of this money might be required, but where the personal interest of the minor did not require the payment of this money, it must necessarily remain in the hands of the Defendant —

O Sullivan for the plaintiff, argued, that it was evidently the intention of the parties that the money in question should remain in the hands of the Defendant as a means of securing it for the minor, and to be paid to her in the manner stipulated, but when it became certain that the security of the minor no longer required this precaution, and when the rights of minor became vested in the Deft by succession, the cause ceased to exist, under which the money was held by the Defendant, there could be neither marriage, nor majority of the dead person, and as well might the Defendt contend that he has a right to retain the money altogether, as to say he ought not now to pay it, because neither death nor marriage of the minor has happened, for neither can now happen — The Court must look to the intention of the parties, and in doing so, they will consider the words, "ou autrement," as implying a great deal, as referring to all the possible —

circumstances

circumstances under which the money might be required for the benefit of the minor, when the interest of the minor ceased the right of the defendant to retain this money for her benefit ceased also, it became then a separate right unconnected with any interest of the minor, and that right the Pltff is now founded in exercising, by demanding the payment of it at present.—

The Court were of opinion that under the Circumstances of this Case the plaintiff was not entitled to maintain his action — that a distinction was to be taken as to the interpretation of a term or Condition stipulated by deed, or act inter vivos, and in act, causa mortis, or of donation; in the former all doubts or difficulties were to be interpreted in favor of the party bound or debtor, but in the latter a more favorable interpretation is allowed, by enquiring what was the intention of the donor — Toth. Obl. N. 213. — according to this distinction the interpretation of the deed between the parties must be taken in favor of the Defendant — he was bound to pay this money at the majority of the minor, which must be considered as a certain event, it was a period limited, and the death of the minor prior thereto could not alter it — he was bound to pay the money on the marriage of the minor, this was a Condition which was uncertain, and as soon as it became certain that this Condition could never happen the defendant would have been held to pay the money — but not so in regard of the majority of the Child, because this had reference to a period of time not yet expired, when only the action could be maintained — Action dismissed — as to this part of Pltff's demand. —

October Term 1821.

Saturday 6th October.

No 1096.
Armour.
vs
Thayer et al

On defendants motion to quash the declaration and process, as an irregular copy of the declaration had been served on the Defendant — cites case of Chesser vs. Jones, where action was dismissed.—

O'Sullivan for Plff. The motion is irregular and not within the rules of Practice, touching the service of process, and ought to have been pleaded to the action — and besides there is no variance stated in the motion to enable the Court to see whether it was material or in what it consisted.—

The Court were of opinion, that the subject of the motion was within the 26th sec. of the rules of Practice, but that the motion being in the nature of an exception to the regularity of the proceedings by reason of variance, it was necessary that this variance should be stated in the motion with the same certainty as by plea — but as this was not shewn, the motion was dismissed.

No 250.

Armour & al
v
Jones. —

On defendants motion to quash the writ of Capias. —

Walker for the Defendant stated that the Plaintiff had by his affidavit in this Cause upon which the Capias was granted, sworn positively — that the Defendant was about to leave the Province which was not true, as he was provided with — affidavits to shew that this allegation was wholly without foundation and malicious as well as oppressive, and therefore the Defendant ought to be admitted to a Common appearance. —

Gale for Pltff. — The only question for the consideration of the Court is, whether the affidavit of the plaintiff is sufficient, the truth of it cannot here be enquired into, nor is the Plaintiff obliged to justify upon what grounds it was made — if the Defendant conceives himself injured he must pursue a different remedy. —

The Court were of opinion that they could not receive any affidavits to controvert that of the Plaintiff, nor enter into a discussion of the fact it alledged, when sufficient appeared on the face of it to warrant the suing out the Capias — and therefore dismissed the motion. —

See. Emerson. v. Hawkins & al. 1 Wils. 335. —

Froste & Porter
v
Armstrong

On Defend.ts motion to quash the writ of Capias sued out in this Cause. —

In

In this Cause it appeared that one Huntoon being indebted to the plaintiffs, transferred to them an obligation due to him by the Defendant — The Plaintiffs subsequently wrote a letter to Huntoon — authorising him to prosecute the payment of this obligation either in their names, or in his own as he should see fit, but at his own risk and expence. — To ground the proceedings in this Case, Huntoon stating himself to be the agent and legal Attorney of the Plaintiffs made the requisite affidavit upon which the writ of Capias was granted —

Mr Ogden for the Defendant now moved that inasmuchas it appeared that the person making the affidavit in this Cause could not be considered to be the book-keeper, Clerk or legal attorney of the Plaintiffs, but acting wholly on his account and at his own risk, and ought therefore to have prosecuted the action in his own name, that the Capias ought to be quashed, the affidavit in question not having been made by any of the persons authorised by law

Henshaw for the Plaintiffs contended that the said Huntoon was the legal attorney of the Plaintiffs, and as such entitled to make the necessary affidavit to ground the process in this Cause —

The Court were of opinion, that in regard of the affidavit, Huntoon must be considered as the legal attorney of the plaintiffs, as he appeared to be acting under their authority and consent and for their benefit — as to the question whether the action ought to have been instituted in the name of Huntoon

instead

instead of that of the plaintiffs, it could not be decided upon the present motion, and they therefore declined giving any opinion. — Mo. dismissed. —

Monday 8th October 1821.

No. 258.—

Bourré. vs. Grandprés.

This was an action of damazes for seduction, by the Plaintiff against the Defendant her master, a married man.—

The Cause was tried by Special Jury on 4th June last, and a verdict for the Plff with £125.— damazes.—

On the trial the Plaintiff gave in evidence several acts of familiarity between him and the plaintiff sufficient to raise presumptions against him in this case, and also that after it became known that the Plff was with child that he allowed her to remain in his house where she was brought to bed, and he afterwards carried the child to be baptised.—

The Court in their charge to the Jury weighed more upon the circumstances which could be considered as attaching culpability to the conduct of the Defendt than upon the nature and extent of the damazes to be assessed in an action of this description, leaving this wholly to the consideration of the Jury.— They were disposed to think, that as the Plaintiff was the domestic Servant of the Defendant, a greater degree of responsibility would attach to him in regard of his conduct towards her, inasmuchas he was bound, not only to shew a good example in his house and family but also to check any irregularity, or at least to discountenance it, when it came to his knowledge.— That circumstances

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of familiarity appearing between the plaintiff and Defendant, which between persons not standing in the relative situation of master and servant, might be considered as innocent or indifferent, yet when they tended to destroy the distinction of Master and servant, and that superiority and subordination which ought to exist between them, they were — presumptions against the master, as they were degrading to his situation and character, and gave room to suspect an illicit connexion, by thus paving the way to it —

Mr Rolland for the defendant afterwards moved for a new trial, on the following grounds.

1. That the verdict was without grounds, and contrary to the Evidence —
2. That the Court mis-directed the Jury —
3. That the verdict was contrary to Law — and
4. That the damages were excessive. —

He argued, that in this Case there could be no seduction, at least not in a legal point of view for which damages could be given, as the Plaintiff was of age and presumed to be consenting to the injury of which she complained, and therefor no damages were due. cited. Repre vo grossesse. p. 338. 2. Dareau. 187 — Had the plaintiff even been a minor still damages would not be due to her in this Case because damages in this Case are granted only upon the presumption that seduction had been effected under a promise of marriage — this could not be the

Case

case here as the Plaintiff knew that the defendant was a married man, and she could not allege such a promise as the cause of her seduction, nor expect that honorable reparation which alone could indemnify her — it would therefore be encouraging immorality to allow damages in such a case —. And although the Plaintiff was the servant of the Defendant this does not alter the question, nor give a better right to the Pltff for damages against a married man. — 2 Dareau 199. Denizt Vo Grossesse. — Nor ought stronger presumptions of guilt to be taken against the master in this case than against any other individual, it would even seem that such presumptions are weaker here agt the Defendant than against other persons who frequented the house — 2 Dareau 195. 199. 200 — That the damages in this case were ruinous and excessive, agt the Defendt who was a Habitant without great means, and who must be compelled to sell all he was worth to satisfy this verdict and as the Court has the power of control over the verdict of the Jury, a new trial ought to be granted 1 J. Rep. Ducker. v. Wood. 277 — 5 J. Rep. 257. Jones v Sparrow

Boston for Pltff contended that the circumstances of the case justified the verdict of the Jury, and that no new trial ought to be had — That in this case, the question of damages was not the only point before the Jury, but also the paternity of the child which the Court would not again set afloat by granting a new trial — That in a case of this kind the Court cannot estimate the damages, nor take upon themselves to say they are excessive, the Jury alone are the proper Judges on this point, the case was fairly before them on all the points now argued, and it would therefore

be

be dangerous to grant a new trial upon the principle of the damages being excessive in a case so peculiarly within the province of the Jury — cits. 1 Burr. 609 — Wilford .v. Berkley —

The Court held that in principle they had a power over the verdicts of Juries in all cases, as without this controul, they might deviate into error without the means of correction; but in order to authorise the Courts to interfere in this respect, there must be some just ground, and acknowledged principle to guide them, that the administration of Justice in this ~~breach~~ may be steady and certain. — It is generally allowed, that in cases of tort, such as the present, Courts seldom interfere, where the question rests merely upon the quantum of damages, because where right conclusions have been drawn from the evidence, this question comes more particularly within the province of the Jury — but the Court must see that the case was rightly before the Jury in all its bearings, for if any thing has been with-held from them which they ought to have known, and which might have influenced their opinion, or if an incorrect opinion has been formed by them either as to the facts, or the law of the Case, it will be cause for granting a new trial — In considering the facts of the case in question and the charge given to the Jury the Court sees nothing incorrect, although they think upon considering the state and condition of the parties connected with these facts, that the damages are much larger than they ought to have been, that is, in

comparing

comparing this Case with what has generally been allowed by Juries in former Cases equally and even more favorable than the present — That although the presumptions arising from the conduct of the defendant may be strongly taken against him, as to illicit connexion with the plaintiff, yet in point of law the damages ought to be moderate, because the reason of punishing a defendant in cases of seduction is, that a promise of marriage is supposed to enter into the consideration through which the seduction has been effected, or looked to as the means by which the injury may be repaired, but when it is evident that this could not have been the case, the consent of the injured party is considered as obtained from other motives than the honorable indemnification of marriage — the law in this respect has been correctly stated by the defendant's Counsel — see 1 Dareau 195. where the author seems to hold, that it would be better in such a Case that no damages whatever should be granted. — see also. Denizt. Vo. Grossesse — and Fournel Tr. de Seduction. pp. 8. 66. 67. — It is on this account that the Court is inclined to think, that in point of law, the Case was not sufficiently before the Jury, who seem to have been carried away more by their feelings against the defendant, than a correct principle of decision in assessing the damages so high and the Court thinks that the omission was on their own part in not explaining this principle of law to the Jury for their guidance, as this ought to have been stated to them as well as the facts of the Case — but this omission seems to have arisen, from nothing having been urged by the counsel on this head at the trial

1 Dareau 195.

trial, as the facts given in evidence were the only points then discussed, this matter escaped the Court who left the damages wholly to the consideration of the Jury — Now it is laid down that when a verdict has proceeded on an error in point of law whether committed by the Judge or by the Jury, the Court will set aside the verdict even for smallness of damages. 1 Str. 425. So also if the Jury have been influenced by feeling alone without considering the state or condition of the parties, who appear in this case to be persons of low estate, or if the Jury be influenced by any undue motives or gross error or misconception on the subject a new trial will be granted. 6 East. 256. Chambers. v. Caulfield —

Under these considerations therefore the Court is inclined to think, that it will better answer the ends of Justice, that this Cause should be submitted to the consideration of another Jury, that under a fuller investigation of the law and facts another verdict may be obtained. —

Rule for a new trial absolute on payment of Costs. —

Chamereau & al' v- Chamereau } Action en reddition de Compte. —

In this case it appeared that the Defr had lived for many years with the late Vincent Chamereau her brother, as his house keeper up to the time of his death — That several months previous to his death he had put into her hands a certain promissory note for 10,000ff. made by

by Messrs Garden and Auldjo, payable to one Cadotte or order for value received, and by him specially indorsed to the late vincent Chamereau — This note the Defend^t alledged had been given to her as a reward for her services — but there was no indorsement put upon the note by the deceased — When the late vincent Chamereau died, the defendant as being in possession of his house and property, with the concurrence of the plaintiffs, his other heirs, made an Inventory of his estate, which was afterwards sold and the proceeds amicably divided amongst them — In regard of this promissory note, it was entered par memoire in the Inventory but claimed as being the property of the Defendant, and to which she reserved her right and claim — The present action was now brought by the Plaintiffs the heirs at law of the deceased, claiming from the defendant an Inventory and account of all the succession of the deceased of which she had remained in possession at the time of his death or which had since come to her hands — This action, the Court after much discussion between the parties, held to be ill-founded, except as to the particular promissory note in question, inasmuchas it appeared that all the property of the succession had already been accounted for and disposed of with the participation of the plaintiffs, saving this one object, and for which a special action might have been brought, or the present demand limited to render an account of that object only — The Court thereupon directed the Defendant to account for this promissory note which appeared to have remained in her possession,

and

and in consequence the Defendant rendered and filed her account, by which she claimed this note as her own property, and as having been given to her by her late brother as a recompence for her services. This was denied by the plaintiffs, and the parties being at issue thereon, an enquête was appointed — The defendant on her part examined some of the plaintiffs on faits & articles, not being able to establish her claim from any thing contained in the answers to these faits & articles, she then examined several witnesses to prove the nature of the services she had rendered to her deceased brother, and also the fact, that he had on a certain day in the presence of several persons delivered to her the note in question telling her at the same time, "Take this, my Sister, "and keep it, it will be of service to you, I am "sensible of the services you have rendered me, and "I now give you this as a reward" — this testimony was objected to by the plaintiffs as inadmissible inasmuch as verbal testimony to prove a gift made by the deceased to the Defendant, was not in law sufficient and could not be received — as the whole claim of the Defendant rested upon this point, the parties were heard thereon, and the Court afterwards held —

1st That a gift made by the deceased to the Defendant of the sum of ten thousand livres contained in the promissory note in question could not be proved by verbal testimony.

2ly

2d That as the promissory note in question had been specially indorsed by Cadotte to the deceased, the property in that note could not be transferred to the defendant without an indorsemt. made by him to that effect. — and

3d That the Court could not take into consideration the nature or value of the Services rendered by the Defendant to the deceased, so as to compensate them with the said note, inasmuchas no claim had been set up by the Defendant for such services, nor any demand made by her in this respect —

The Court therefore adjudged the Defendt to account for and pay to the plaintiffs their respective shares in the said note. —

Millar & al'
vs
Maitland & Co}

On action of assumpsit by the Pltffs merchants in Jamaica, against the Defendants, as their factors & agents in Canada, for the sale of certain consignments of Sugar, Coffee and rum — balance demanded of £348. 8. 9. with interest from 1 Dec. 1818. — Plea — Non assumpt — and issue thereon. —

By the exhibits and evidence adduced it appeared that on 10th Dec. 1818 the Defendants rendered an Acct Sales, and an Acct. Curr. to Pltffs — by which there was stated to be due by the Defts to the Plaintiffs a balance of £2835 „ 12. 7 — and by

by which it also appeared, that half Commission only, or 2½ ℔ Cent, was charged by the Defendrs and by a note or memorandum at the bottom of the acct, that there still were debts outstanding to the amount of £4202 — which formed a part of the monies so accounted for. —

On the same day, 10th Decr 1818, the Defdrs wrote a letter to the plaintiffs, in which was stated — " We have now the pleasure of waiting
Answer to Interogs 5th & 6th — " upon you with acct Sales of your different
" Consignments to us, and also acct Curt and to
" advise having further remitted on acct thereof
" a sum of £6000 St: at 1 ℔ Ct discount — The
" acct Curt still exhibits a balance of £2835.12.7
" Cy and we shall anticipate part of the out=
" standing debts by remitting the balance in the
" course of next month." —

On 21 January 1819, the Defendrs wrote another letter to the plaintiffs, in which it is stated, — " By the present opportunity to New
Answrs to Interogs 7th & 8th — " York, we remit to Messrs David Lyon & Co a bill
" for £2071. 0. 6 St: which at a discount of 1 ℔ Ct
" makes up the balance of your acct, less the amount
" of Mr Whitneys debt, which owing to a temporary
" embarassement of his affairs occasioned by the
" unexpected return of bills of exchange upon which
" he is an indorser, he is at present unable to pay." —

The Defendant, Mr Auldjo in his answer to the interrogatories here proposed to him, adds by way of explanation of the above letters — "but
" it must be kept in mind, that the remittance

here

" here alluded to, is in anticipation, (the word
" made use of in our letter of the 10th Dec 1818) of the
" outstanding debts, and it cannot be inferred, that
" although we remit this money, he have assumed the
" outstanding debts — yet we had still a favorable
" opinion of them" —

On the same day, 21 January 1819, the defendants write another letter, to H. Gordon, one of the plffs, in which it is stated — "and we now
" send them (the Plffs) a bill for £2071. 0. 6. to —
Ans. to Interrogs 9th & 10th " which at one p Ct discount will balance the acct —
" between us, keeping out the amount of Mr Whitney's
" debt, which a temporary embarassement of his
" affairs occasioned by the unexpected return of bills to
" a considerable amount on which he was an indorser
" prevents him from liquidating at present." —

On the 12th Febry. 1819. the defendants wrote another letter to the plff. Geo. Millar, in which is stated — "under these circumstances, the
Ans. to Interrogs 11th & 12th " creditors in general, (and independant of his
" debt to you, we are ourselves Creditors) seemed
" disposed to accept of an offer made by Mr Whitney
" to give security for 12/6 in the £ payable in 3 —
" 9 & 18 months, on receiving a discharge, for the
" alternative seemed so very desperate, that not one
" of them seemed disposed to take the ultimate chance
" of the estate burthened with the claims of the bill
" holders, and we therefore considered ourselves perfectly
" justified in acceding to this composition on your part,
" as all the others were, and for ourselves we were decidedly
" in favor of it — This arrangement has since been
" gone into to our satisfaction and that of the other
" Creditors

"Creditors, and we shall be fully enabled to remit
"the different payments as they become due" — The
Defendant in his answer here added — there is —
nothing here said by which it can be inferred, that
my firm had assumed the other outstanding debts
due to Millar and Gordon — I may be here permitted
to explain, that it often happens that on a Consignment
of property being placed in the hands of a merchant for
Sale, he may be induced to make advances thereon to
the extent of perhaps one half, three fourths or even the
whole probable proceeds of such Consignment, yet he
does not make himself liable thereby for any bad debts
that may be made when such property comes to be sold
unless there should be a Special agreement to that effect
and a consideration given for guaranteeing the debts — and
if the advances given should exceed the amount actually
realised for such property the proprietor must be considered
bound to refund the difference — Now in the present case
there was no such agreement, and so far from any con-
sideration given for so doing, the usual Commission for
making Sales without guaranteeing the debts was not
even allowed — Before the period came round for the
payment of the first dividend of Whitney's composition, the
prospect of collecting part of the debts noted as outstanding
became unfavorable, and by the time the third dividend was
paid, it became evident that some would never be paid —
and the sum still outstanding greatly exceeds the amount
of Whitney's composition, so that Miller and Gordon are
now actually in our debt a considerable amount. —

In a letter of 1 May 1819. written by the Defendants
to Messrs Gerrard Gillespie & Co. as agents of the Plaintiffs
Plff's Exhs. № 3. it is further stated, — "a composition has since been accepted
"of which Messrs Miller and Gordon have since been advised

and

" and when the periods of payment come round, we
" shall either pay the dividends to you, or remit them to
" Messrs M. & G's correspondents in London, as they may
" direct."

On the same day, 21 Sept. 1819. In a note written by the Defendants in answer to one received from Messrs Gerrard & Co dated 31 May 1820 — it is stated, — "In reply to your note of this morning
Plff's Exh. No. 4. " we beg leave to state, that the composition made with
" Mr Whitney, was 12/6 in the £ — payable in 3. 9. & 18
" months from Febry 1819, and is consequently not all
" yet due, the total amount is £348. 8. 9. — We have
" however further to observe, that in January 1819. we
" remitted Messrs M & G. the balance of their account
" intending to take our chance of a number of outstandgs
" debts, noted along with Whitney's at the foot of the
" Acct Sales — many of these in Upper Canada are still
" unpaid to a much larger amount than Whitney's
" composition, and Messrs M. & G. have behaved in
" so unhandsome a manner towards us, that we mean
" to hold Whitney's composition liable for what is still
" outstandings"

J. Leslie — By the testimony adduced by the Defendants it is stated, that according to the course and usage of trade, the Defendants as agents for the sale of goods consigned to them, are not liable for the outstanding debts on such Sales, unless upon Special agreement — And that on the Sales in question,
— Ross. there are still certain portions of debts still outstand & and due by persons who are supposed unable to pay. which persons are besides debtors to the Defendts —

Gale for the Defendts – The present action means to fix on the defendts the payment of bad debts, for which they are not liable – the declaration is in the usual and ordinary form of an action in assumpsit with money counts – to this declaration the Defendants could plead only the general issue – On this issue the plaintiffs were bound to have shewn that the Defendants had received the money which they demand – On a transaction of this kind where the Defendants acted as the factors and agents of the plaintiffs, the proper action would have been an action of account, on which they would have been entitled to such balance as might appear to be in the hands of the Defendants, but the present action says nothing about agency, and is wholly inapplicable to the nature of the transactions between the parties, as the Defendants have acknowledged no balance to be due to the Plaintiffs, nor contracted any liability but that of accounting to them as their agents – The evidence adduced of the Defendants undertaking to pay the Plaintiffs any specific sum for – Whitney, or any other, is inapplicable in this case as the action does not admit of it – Whitney's Debt is a partial part of the transactions and cannot be separated from the whole, nor will this action lie upon such a partial transaction – The guarantee of the debts is not alledged, nor is it the custom for agents to guarantee the debts of their principals – without special contract, in which case special assumpsit must be stated – In this case so far from guaranteeing the Debts, the Defendants have been allowed only half the ordinary Commission, which shews that personal

liability

liability was never contemplated — The Plaintiffs rest their Case upon the Defendants letters, that they had rendered themselves liable for all the outstanding debts, but it appears, that this was only a Conditional undertaking, and under the expectation that these debts would be recovered, and from the tenor of these letters this appears to have been the Case, and is so explained by the Defendant, Mr Auldjo, in his answers on faits & articles — By the present action the Plaintiffs cannot recover more money than they prove the Defendants to have received on their account. —

Sewell for Pltffs This is an action of general assumpsit, and under it the Plaintiffs are entitled to recover the sum of £348. 8. 9 which they demand. where the demand does not depend upon a Settlemt of open accounts, but where a balance has been settled and agreed upon, as between Principal and agent, an action of assumpsit will lie. Paley. p. 58. Here the accounts between the parties were closed and the only sum due, which the Defendants have undertaken to pay, and for which the present action is brought, is the Composition they received on Whitneys debt. — In the account rendered by the Defendants, they have accounted for all the outstanding debts, they have actually assumed them, it was their intention to do so when they paid up the balance of their acct it is evident by Pltffs exh. No A. what the Defendants intentions were at that time — but they now wish to change that intention in consequence of the Plaintiffs having taken away their agency from them — but after the transaction was so far closed, it was too late for them

to

to change their intentions — had the money been paid by the Defendants in advance on the Sales, and not as the balance and settlement of their account they would have been entitled to recover back from the Plaintiffs what had been overpaid — but they can now have no lien on the monies they have recovered from Whitney, for their indemnification against outstanding debts which are no longer in question. —

By the Court — An objection has been taken to the form of this action, that it ought to have been an action of account, and not of assumpsit — Certainly as between principal and agent, where the accounts are open and unsettled, the proper action is that of account, but where there has been a settlement of accounts, or a balance struck with a promise to pay, the action of assumpsit may be maintained against the Agent, notwithstanding a Covenant to account. Paley. 58. — The present action must therefore depend upon the proof which has been adduced to support it — The action is brought for £348. 8. 9, being the amount of Whitneys dividend, which the Defendants had undertaken to recover and receive at different periods as it became due, and which they promised to pay as those different periods came round — this dividend they are no doubt liable for, as those different periods had elapsed before the action was brought — the only question before the Court is whether the Defendants have any lien on this dividend, so as

to

to entitle them to retain it for their indemnification against the payment of certain debts yet outstands on the Sales they made for the plaintiffs. — It is agreed, and appears in evidence that the Defendants have paid these outstanding debts, but it is contended by them, that this payment was made by anticipation that is, with an implied reserve and condition that the Plaintiffs would be accountable to them in case the money was not recovered from the debtors on the Sales — It being the Custom of the trade, and therefore to be received as the law which governs it, that in transactions of this kind, the agents contract no personal responsibility for the Sales they make, there can be no doubt, but if the monies paid by the Defendants to the plaintiffs were paid in the view of this anticipation, they will be entitled to recover back from the plaintiffs what had been so advanced beyond the actual produce of the Sales, and they would consequently have a lien on the monies now in their hands for their — indemnification — But after considering the — evidence adduced, the Court is satisfied that the Defendants have no right of lien on this money, nor any claim to recover back what they have paid — On the 10th. Dec. 1818 they remit to the plffs £6000. — and state a balance still due to them of £2835.. 12. 7, and say they will anticipate part of the outstanding debts by remitting the balance the next month — On 21 Jany 1819, they remit this balance also, and the only reservation they then make, is in regard of Whitneys debt, they are silent as to all other debts, notwithstanding they are then paying the balance of the Plaintiffs account save only this debt of Whitneys — This part of the

transaction

transaction would certainly carry strong presumption against the defendants that they contemplated no future claim on the plaintiffs for what they were then paying them — this opinion is ~~so as~~ further confirmed by the subsequent communications betwe en the parties — in the Defdts answers to the 7th & 8th Interrogatories put to them by the Plaintiffs, they allow, that at the time this balance was paid by them to the Plaintiff, they had a good opinion of the debts — and it also appears that the persons owning these debts, were then indebted to the Defendants, which might have influenced them in making this payment — but by the Pltffs ex hib. No. A. the matter is put out of all doubt, when they say that in Janv. 1819 they remitted the balance of the Plaintiffs account, "intending to take "our chance of a number of outstanding debts noted "along with Whitneys at the foot of the acct Sales" — certainly if the balance of the account was paid in this manner and with this intention, there can be no room to recover it back — and this intention having thus carried into effect, any motive for changing cannot now avail the Defendants —

Judgt for Pltffs £318. 8. 9. w: interest from day of demand & Costs. —

Wednesday 10th Oct. 1821.—

Dupuis.—
vs
Courcelles, & Chevalier
& ux.

On action to rescind a deed of Exchange for cause of lesion d'outre moitié.—

The declaration stated, that at the sollicitation of the defendant, and having faith & confidence in his representations, Plff was induced to exchange a certain house and lot of land she possessed, for another lot belonging to the Defendants, as mentioned and described in the declaration — which said exchange was afterwards effected in and by virtue of a certain deed of the 11th august 1820 — executed before Doucet and his Colleague, public notaries, — That the house given by her in exchange to the Defendants, from its advantageous situation she considers to be of equal value with that she received from him.— That in consideration of the said Exchange, the Plaintiff stipulated and became bound to pay to the Defendants a sum of £1500.— payable in 15 years in equal payments of £100 each year — but with the condition, that if the plaintiff should sell the lot of land she so received in exchange from the Defendants, they should in that case be entitled to claim the payment immediately of the whole of the said sum of £1500 — which should then be unpaid — whereby the plaintiff not only stript herself of a property equal in value to that she so received from the Defendants, but was restrained from disposing of the property she had so received in exchange, unless upon paying the said sum of £1500 in manner as aforesaid — That the said exchange so made by the Plaintiff with the said Defendants, is

injurious

injurious to her, and operates a lesion d'outre moitié de juste prix, of the property by her so given in exchange and therefore claims that the said deed of exchange should be rescinded and annulled, and the parties put in the same state and situation they were in previous to the passing thereof. —

Plea of Exceptions to the sufficiency of the Declaration that the matters and things therein contained are not sufficient to maintain the action — and further denying the facts alledged — On this plea issue was taken and the parties heard thereon —

Bender for the Plaintiff contended, that in all Cases of Sale, of real estate, where there was a lesion d'outre moitié de juste prix, the Seller was entitled to demand a rescision of his Contract; that the deed of exchange must be considered as a deed of Sale and is in law more favorably looked upon in regard of this particular action — cites. — 1 Bourj. 157. — 2 Despr. 240. N° 7. Denizt. Vo. Echange. p. 268. — 2. Couchot. 127. Poth. Vente. N° 626. 696. Repr. Vo. Echange. p. 586. —

Lacroix for Defendants, although the present action is given to the Seller in case of a lesion d'outre moitié yet it is refused to the purchaser; now in a deed of exchange like the present, the Plaintiff must be considered as a purchaser as much as the Defendants as one part of the transaction cannot be set aside — without the other, the Sale by the Plaintiff cannot be annulled without annulling her purchase from the Defendants. — That in this Case the lesion, if it can be said to exist, must be considered to be more in the purchase of the Plaintiff, than in the Sale she has

made

made, because the lot of land conveyed by her to the Defendants is of less value, than that she received in exchange from them - and as to the money - stipulated to be paid by her as a soulte & retour, it is a chattel interest, in which there can be no lesion

Mc Gill & al
vs
Burton.
&
The King
Interv.

This was an action by the plaintiffs as proprietors of certain lots of land in the Township of Ranbridge, in order to ascertain the line of division and to establish boundaries between that Township and the rear of the Seigniary of Noyan, of which the Defendant was the proprietor. — By the grant of the French King the Seigniary of Noyan was to have two leagues in front on the River Richelieu by three leagues in depth, and a question having arisen as to the course to be pursued in drawing the front line of the Seigniory, as well as the lateral lines, by reason of a bend in the river Richelieu in the front, and the encroachment of a part of the bay of Missiscoui within one of the lateral lines, so as to allow to the Defendant his full quantity of land according to his deed — The Court directed that the front line should be drawn in such manner as to allow as much land as would compensate the encroachment of the river Richelieu by the bend it made into the front of the Seigniory, and to allow in the rear of the Seigniory an equal quantity of land to the encroachment of the bay of Missiscoui on the lateral line. —

Thursday

Thursday 11th Oct. 1821.

Penfield v Lacasse. } Action by Indorsee agt. drawer of a promissory note.—

Plea — non assumpsit and conclusions to the Country.—

The plaintiff moved that Defendant should be held to change his Conclusions to the Country, as the Cause could not be tried by a Jury, the note in question not being founded on a commercial transaction.—

The Defendant, a merchant, made the note in question to Mr Boston, attorney at law, who indorsed it to the Plaintiff, who is also a merchant.—

The Court rejected the motion.—

Saturday 13th. October 1821.—

Hunter & al
vs
Perrault & al
&
McKenzie.—
Gart.

On motion of Mr O'Sullivan of counsel for Mr Perrault, one of the Defendants, to reject the deposition of Roderick McKenzie a witness produced and examined on the part of the Garant.—

Joseph Perrault and Roderick McKenzie, the defendants dissolved their partnership by deed of 7. May 1818, and it was thereby stipulated that the whole partnership property should belong to McKenzie who in consequence agreed to exonerate Perrault from all the Partnership debts, and for the greater security of Perrault in this respect, Henry McKenzie, the Garant became Caution or Security to Perrault.— The Plaintiffs who were Creditors of the partnership of Perrault and McKenzie, having sued the Defendants for their debt, the Defendant, Perrault, in consequence sued out an action en garantie against the said Henry McKenzie to be saved harmless and indemnified against the demand of the Plaintiffs.— Henry McKenzie appeared, and pleaded, that he had been deceived by the false statements contained in the books of account of the Defendants, as it thereby appeared at the time he became security for the said Roderick McKenzie, that the plaintiffs in this Cause, instead of being the Creditors of the Defendts were indebted to them in a considerable sum of money— and in order to prove this fact, the Garant called and examined the said Roderick McKenzie, one of the Defendts.—

Mr O'Sullivan for Mr Perrault, contended, that the Defendant McKenzie was an incompetent Witness on several grounds.—

1st. Because he had a direct interest in the action—

and

and more particularly in regard of the costs, as in case the Garant should be condemned, the witness will become bound to reimburse to the Garant all the costs he may have laid out in defending the action en Garantie as well those he will be condemned to pay to Perrault, as the costs of his own Attorney. —

2d. Because the witness is a party in the Suit, and cannot be examined as a witness under any circumstances.

3. Because the witness is a party to the act of 7th. May 1818, by which the Garant became Security, and he cannot be admitted as a witness, to impeach the validity of that act nor to alledge his own turpitude as a cause for setting it aside. —

4th. Because the witness is a relation of the Garant, being his first Cousin, and therefore within the prohibited degree of relationship to be examined as a witness on his behalf inasmuchas the question touching the validity of the — Security entered into by the Garant cannot be considered as a matter of a Commercial nature. —

Rolland for the Garant —

The witness has no interest in this question — as he is equally liable for the payment of the debt, either to the plaintiffs, to Perrault, the Defendant, or to the Garant and also for the Costs. —

The witness is no party to the Suit in which he has been called to give his evidence, which is an action en Garantie Simple, by Joseph Perrault ag^{t} Henry McKenzie, a demand wholly separate and distinct from that instituted by the Plaintiffs against the — Defendants. —

That the witness does not come to set aside his own act, but to speak to a fact wholly independant of it — but were it otherwise, where the witness has

no —

no interest, he may be heard against his own act, as his testimony can be of no benefit to himself. —

That relationship is no Cause of incompetency in this Cause, which is altogether of a mercantile nature. —

The Court granted the motion and rejected the deposition of the Witness, on the ground that he was interested as to the Costs on the action en garantie. —

Mc. Farlane vs Wheeler. —

On Cap. ad resp. ret.d 1st inst.

The defendant came in on the 5th and gave bail to the action, and was permitted to enter appearance by his Counsel — On the 4th the Plaintiff had obtained a 2d default against the Defendant, and had in consequence obtained leave to proceed ex parte against the defendant, and appointed his enquête for the 8th inst After entering appearance, the Defendant moved that as the Plaintiff was a foreigner, he should give security for Costs, which was granted, and the security entered the 6th inst. — Three days after, that is, on the 9th the defendant filed a plea, this the Plaintiff moved to reject as coming in too late and after he had been — allowed to proceed ex parte ag.t the Defendant — And the Court granted the motion, upon the principle, that a defendant out upon bail may come in by surrender at any time pending the action, but his laches ought not to prejudice the plaintiff, and the Defendant must be bound by the proceedings had in the Cause, at the time he comes into it, in the same manner as he would have been, had he entered his appearance at the return of the writ. —

Wednesday 17th. October 1821. —

Loedel. —
vs.
Roi. —

Action for medicines furnished, and for medical attendance. —

Plea of excep. per. en droit and plea of prescription
Issue on first plea, and excep. as to second, as irregularly pleaded — hearing on law —

Pettier for Pltff — The pleas of Defendant are — contradictory and inadmissible — the first denies the plaintiffs right of action, by an excepn. per. en droit, and afterwards pleads a plea of prescription, which in its nature is a plea of payment, which admits that Plaintiff had a right of action, — That the plea of prescription is also insufficient, because it doth not alledge that the Defendant hath at any time paid or satisfied the plaintiffs demand, and without the allegation of payment a plea of prescription in this Case cannot be admitted — cit Commentr. on 125t. Art. Cout. on 12e —

Lacroix for Defendant, the pleas of Defendr — are regular and Consistent, as both tend to shew that the plaintiff had no right of action at the time of instituting his present demand. — The Defendant in pleading a plea of prescription is not bound to alledge that he has paid and satisfied the demand of the pltff, all that he is bound to do is to tender his oath with this plea, that he owes nothing to the plaintiff, which the Defendr has don in this Case — see art. 125 Cout — the text of which and not the commentaries on it, are to be considered as the law.

The Court held that the plea of prescription was a plea of payment and that in pleading it is necessary to alledge the payment — they therefore dismissed Defendrs plea of prescription as irregularly pleaded —

see cases.

Friday 19th. October 1821.

Larocque & Dambreville } Action by the plaintiff as marguillier en charge of the Oeuvre & fabrique of the parish of St. Mary, Montreal, against the Defendant for the recovery of arrears of rent of a pew in the said church - Plea - That Plff was not entitled to maintain his action, as he was not thereunto authorised by a special meeting and consent of the former marguilliers

But the Court held that the recovery of the rents of pews, or of the revenues of the Church fell within the ordinary administration of the marguillier en charge and that no special authority was requisite to enable him to bring his action in this respect. -

Judgt. for Plff

Scott. & Briguier. } Action of assumpsit on promissory note

The note was payable in May, but at the sollicitation of the Defendant the plaintiff agreed to give him all the month of June last - In June Term last however the present action was brought and the Defendt. non-assumpsit, and proved the delay allowed him, and therefore contended that the action ought to be dismissed - But the Court were of opinion that a promise of delay of payment after the debt has become due, if made gratuitously and without consideration as in the present case, was not binding - all the remedy

the

the Court could give in such case was in regard of the Costs, and they condemned the Defendant to pay the amount of the Promissory note, but without costs. —

see 1 Esp. Rep. 430. —

Metzler ux. v Price. —

Action on Promiss. Note by Indorsees ag.t the maker. a default case. —

The declaration stated the Defendant the maker of the note, to be Captain of the Steam Boat, Lady Sherbrooke, but it was not alledged that he was a merchant or trader, nor any evidence given to that effect, The note was indorsed to the plaintiffs by the payee but it was not stated to be, "for value received" — The Court considered the Indorsement insufficient to transfer the property of the note to the Plaintiffs and dismissed the action. —

Blackwood & al v Terrien. & al'

Action by the Indorsees of a promissory note against the Indorsers and maker, as jointly and severally bound, solidairement oblig.

Grant for Defendant contended that the action was irregular and could not be maintained, as the undertakings of the parties here were separate and unconnected, and that by law they could not be joined nor were they bound solidairement. —

But the Court was of opinion that the action was regularly brought, and could be maintained against

against the defendants solidairement, — and therefore dismissed the Defend^rs plea of Exc^n per. en droit to the Plaintiffs action —

see. Deniz^t. V^o Endosseurs. N^o 11. —
Rep^re V^o Endossement. p. 709. — bot^m last Column
_____ V^o Billets. p. 382. 3. —
Poth. Cont. de Change. N^os 115 — 162. 181 in fine and 212. —

see also. Rep^re de Jur. de Merlin. V^o Ordre (billet) p. 887. 8. N^o 7. —

Caldwell vs Hilton. a

Action for prêt à usage. —

The question here was, whether, as the value of the thing lent exceeded the value of an hundred livres, proof of the Contract could be legally made by the testimony of witnesses —

The Court admitted the testimony and gave Judgment for Pl^ff. —

see Rep^re V^o Preuve. —
Danty. preuve par Tem. p. 667. a
Deniz^t. V^o Serment. N^o 24. —
Poth. Obl. N^o 809. a
Serpillon. Tit. 22. art. 2 Ord^ce 1667. p. 319. —

Armour vs

№ 1907.
Armour
vs
Thayer. —

On Defendants mo. to consolidate this Cause with Causes № 1903. 1905. 1906. —

Walker for Defendt refers to Ordr of 1677. Tit art. 6. where Causes may be united, which is besides conformable to the English practice. — That the Causes referred to here are all of the same kind and between the same parties, being all actions of assumpsit for notes and bills signed or indorsed by the Defendant.

Sullivan for the Plaintiff — An injury may arise to the plaintiff by joining so many actions together it may inconvenient to apply the credits given, or the proof made in regard thereof — That the absence of a witness in any one of the Cases would delay the whole and many inconveniencies may arise which seem to require that these Causes should not be consolidated — cites 1 Pigeau. 37. 1. Tidds Prac. 615. — (558) Mussenden v O'Hara 1 Str. 520. Bayley. v. Raby.

But the Court on the authority of Cecil. v. Briggs 2. T. Rep. 639. granted the motion — but they refused the application in the following Causes. —

№ 250.
Armour. —
vs
Torres. — —

On Defendants motion to consolidate this Cause with the Cause № 1914. being of the same nature and between the same parties. —

But the Court rejected the application because the two actions were instituted by different attornies, and the Court did not think it necessary to compell the Counsel to unite in the mode of conducting these Causes or in the pleadings that might be made therein —

Forbes. —
vs
Doucet, Tutor &c
Jacob. Opp.d

On opposition afin de conserver. —

In this cause the Plaintiff had obtained Judgment against the Defendant as Tutor to the minor Children of the late Samuel Fitch of Montreal, Shoemaker, by virtue whereof a certain lot of land had been sold as belonging to the said minor children, the present opposition was made by Harriet Pamela Jacob, widow of the said late Samuel Jacob — This opposition stated, that on the 5th day of May 1801, at Windsor in the State of ~~New York~~ Vermont, one of the united States of America, she was lawfully coupled in matrimony with the said late Samuel Fitch then residing in Vergennes in the said State of Vermont, where as well the said Samuel Fitch as the said opposant was then domiciliated and he the said Samuel Fitch and the said opposant after having resided some time at the place last mentd afterwards in the year 1809, came into and became Inhabitants of the Province of Lower Canada, in which Province to wit at the city of Montreal in the Sd Province the said Samuel Fitch afterwards, on the 22d day of December 1815, departed this life — And the said Opposant further saith, that during the Continuance of the said marriage between her and the said Samuel Fitch, viz.t on the 8. day of February 1815 the said Samuel Fitch purchased and acquired the lands and tenements which have been sold by the Sheriff of the district of Montreal under and in pursuance of the writ of Execution in this Cause issued, and mentioned in the return of the said Sheriff to the said writ — And the said Opposant further saith, that by and according to the laws of the said State of Vermont, in which State the said Opposant was married

as

as aforesaid, she the said Opposant from and after the decease of the said Samuel Fitch was entitled for Dower, to her enjoyment during her life, of one third part of the said lands and tenements sold by the said Sheriff as aforesaid, and was and is now entitled, to demand and have during the term of her natural life the enjoyment of the third part of the proceeds of the said lands and tenements sold as aforesaid, amounting to £509.. 6. 6, being £169.. 6. 6, or the interest of the said last mentioned sum to be paid yearly and every year to her the said Opposant during the term of her natural life — and therefore praying, that in the distribution of the money levied by the said Sheriff to be made by the Court, the said sum of £169. 6. 6, may by the Judgment of the Court here, be adjudged to be paid to her to be held and enjoyed by her during the term of her natural life, or that the interest of the said last mentioned sum be paid to her yearly and every year during the term of her natural life, may be secured to her in such manner as the Court here may direct, and that the said Opposant may have her Costs —

Plea of Exception perempte en droit by the Pltff That the said Opposant cannot have or maintain her claim and Opposition, because the matters and things therein stated and set forth are unfounded in fact and insufficient in law to entitle the said Opposant to have and maintain her Opposition aforesaid — and further because all the matters

and

and things in the said Opposition mentioned & contained, even if true, are insufficient to support the claim and Opposition aforesaid —

And for further cause in this behalf the said Plaintiff saith, that the said opposant cannot have or maintain her opposition aforesaid, because he saith, that the said Opposant is an alien, and that her said late husband was an alien, and natives and Citizens of the United States of america, and cannot acquire any right of property, nor any real rights in this Province, nor any rights upon the Immoveable property left by the said late Samuel Fitch and Sold by the Sheriff as aforesaid by virtue of the writ of Venditioni exponas sued out in this cause, to the prejudice of the rights of the said plaintiff, who hath acquired a mortgage on the said Immoveable property by virtue of a Judgment obtained in this Court on the 19th Febry 1819 —

That even although by the laws of the State of Vermont, the said Opposant might be entitled to dower, consisting in the enjoyment during her natural life of one third of the property left by her said husband, this right can create no mortgage in favor of the Opposant to prejudice of the right of the said plaintiff or of the other Creditors of the said late Samuel Fitch, inasmuchas the laws of the said State of Vermont have no controul over nor can create any right upon real Estate in this Province — nor can the said Opposant exercise any right of dower upon the said Real Estate of her said late husband in this Province, until

after

after payment of all hypothecary claims and dues thereon — and further because by the laws of this Province, by which alone the said opposant can maintain her claim and Opposition aforesaid, she the said Opposant is not entitled to any Dower upon or out of the estate of her said late husband — Therefore prays that the said Opposition be dismissed with Costs. —

Upon this plea issue was taken, and instead of going to an enquête the following facts were admitted by the parties — That the Opposant was married to the said Samuel Fitch on the 5th. May 1801, at Windsor in the State of Vermont one of the united States of America, in which State the said Samuel Fitch and the said Opposant were then domiciliated — That the said Samuel Fitch and the said Opposant afterwards on or about the month of February 1809 came into this Province of Lower Canada to reside in the said Province and where they continued to live until the 18th. day of December 1815, when the said Samuel Fitch died at Montreal That during the Continuance of the said marriage the said Samuel Fitch purchased and acquired the lands and tenements sold by the Sheriff of this district, under the writ of execution in the said Cause issued, of which he was seized at the time of his death — That the said Samuel Fitch and the said Opposant, at the time — they came to reside in the said Province of L. Canada were Citizens of the United States of America. —

It was further proved, that by the laws Statutes & customs of the said State of Vermont, the widow of any person dying intestate, is in all Cases entitled to dower, which consists of the use benefit and enjoyment by such widow during her natural life of one third

of

of the real estate or immoveable property, of which her husband died seized and possessed in his own right, provided the said Widow be not endowed by way of Jointure before marriage – and even in this case she may waive her jointure and claim dower. –

The Court held, that the law respecting Dower is a law which affects and binds the realty, or what is called a Statut reel. Boullenois 6e Quest. p. 89. but the laws of a foreign State cannot affect or bind the Realty in this Province – That whatever personal rights the Opposant might have acquired or may be entitled to exercise upon the estate of her husband in consequence of a Contract, or the law of the State where the Contract was made, yet she can be considered only as a creancier chirographaire on such estate in this Province, because neither the Contract, nor the law of a foreign State can create mortgage upon nor bind the realty in this – Province – That in regard of the Dower claimed by the Opposant, she cannot obtain the same to the prejudice of the Plaintiff, nor of any of the Creditors in this Province of her deceased husband having a mortgage claim or privilege upon the Estate sold – Opposition dismissed saving right of Opposant as she may be advised –

Boullenois p. 160 –

Gariepy. 2. J.
vs
Gill. ~

Action to recover penalty on Stat. for Usury.

The declaration stated, that by act passed at Terrebonne in the district of Montreal before Limoges and another, public notaries, on the 28th day of August 1820, the plaintiff transferred and made over to the said defendant with promise of warranty for the due payment and satisfaction thereof, the sum of six ~ thousand livres, equal to two hundred and fifty ~ pounds. currency, which was due and owing to the said Plaintiff by one Francois Armant dit Flamme by a certain act made and executed on the 8th October 1819, before Joliette and his Confrere, public notaries, which said sum of money was payable as follows, that is to say, three thousand livres payable in the month of May 1823, & three thousand livres in the month of May 1824 ~ which said transfer was made by the said plaintiff to the said Defendant, for and in consideration of the sum of four thousand livres equal to one hundred and Sixty Six pounds thirteen shillings and four pence, like Currency, which the said Defendant in and by the said act of transfer bound and obliged himself to pay to the said plaintiff in manner following, that is to say, to pay to one Madame Evans, whatever might be due to her by the said plaintiff, in order to acquit and satisfy a Judgment which the said Madame Evans had obtained in this Court against the said plaintiff, and whatever should remain of the said sum of four thousand livres in the hands of the said Defendant after payment and satisfaction of the said Judgment, that he the said defendant should pay & satisfy

the

the same to the said plaintiff in manner follows that is to say, two hundred livres within eight days from the date of the said act of the 28th Augt. 1820 and the remainder within one month from the date of the said last-mentioned act -

That at the time of passing the said act of the 28th August 1820 - the Plaintiff was straitened by the want of money, which was the only cause which compelled him to enter into that transaction with the Defendt.

That it evidently appears by the said act of the 28th Augt. 1820, that the said defendant hath taken agreed for and stipulated in his favor an illegal and exhorbitant interest, and far beyond the interest allowed by the law of the land

That the said act of 28th August 1820 is therefore usurious and prohibited by law, and by an ordonance of this Province made and passed in the 17th year of the reign of His late Majesty King Geo. 3d. Ch. 3 the said act is wholly null. -

That the said defendant by thus taking and stipulating in his favor an interest as above mentioned hath by the aforesaid Ordinance incurred a penalty equal to triple the sum of money mentioned in the said act of 28th Augt. 1820, that is to say, of the sum of eighteen thousand livres, equal to £750 - Currt. money aforesaid. -

That the said plaintiff is in consequence well founded in demanding that the aforesaid act of the 28th augt. 1820, be declared null and void, and that the said Defendant be condemned to pay the aforesaid penalty of £750 -

Wherefore &c

Plea

Plea – General Issue – and that the matters & things stated and set forth in the Plaintiff's Decln are insufficient in law to maintain the action. –

Grant for the Defendant contended, that the contract between the parties as stated in the declaration was not a Contract for the loan of money, and the taking usurious interest for such loan, for which only the penalty of the Ordinance is incurred – Poth. Usure. Nº 87. That every usurious contract does come within this Ordinance, and although the bargain between the parties here appears to be a hard one, yet the penalty demanded cannot attach to it – That the plaintiff does not alledge that any money was paid on this Contract or that the Defendant actually received any illegal interest, without which the Offence is not complete, as the penalty is incurred only after illegal interest has been paid and received. – Comyns on Usury. a

Roi for Plff, the purchase of a debt, by which more is received than paid is usurious, and comes within the Ordinance. Poth. Vente. 563. 4 – and 577. – It is like discounting a note or bill payable at a distant period if the discount is greater than the legal interest, it is usurious, and the penalty is incurred – the Contract between the parties here may be considered as of this description, the Defendant discounts six thousand livres by giving four, which on the face of the agreement is usurious, as Defendt run no risk, the payment being guaranteed by the Plff – Potts, Usure. Nº 128. q. 30. –

By the Court – The Ordinance of 17 Geo. 3. ch. 3. s. 5th declares, "that all bonds, Contracts and assurances

" whatsoever

"whatsoever whereupon or whereby a greater interest
"(than 5% ℔ Cent. ℔an.) shall be reserved and taken,
" shall be utterly void; And every person who shall,
" either directly or indirectly, take, accept and receive a
" higher rate of interest, shall forfeit and lose for every
" such offence, treble the value of the monies &c. lent
" or bargained for. &c."

There are two branches to this section of the Ordinance — under the first every bond, Contract and assurance, for more than legal interest, is void and in this respect the Contract between the parties may be affected — But under the second, the penalty is incurred only by taking, accepting & receiving more than legal interest — but by the declaration in this Case nothing appears to have been taken accepted or received by the Defendant, whereupon the penalty could attach — this action must therfore be dismissed —

see. 1 Doug. Rep. 235. Fisher. q.t. v. Beasley
3 Salk. 390. —

Saturday 20th October 1821.—

Amour v Taylor.—

On action of debt, and also in assumpsit. Plea of Exception by Defendt That these two Causes of action cannot be joined in the same declaration — But the Court was of opinion that they could — that in this Country there was not the same strictness of pleading required, nor the different forms of action established as in England — that the action being for money due on a contract, whether a Specialty or a simple contract, might be joined with other or different contracts for payment of money — Exceptions dismissed —

Turner v McNider et al

Action on a Policy of Insurance agt Fire.

The Defendants, to the number of 18 persons two of whom were stated to be resident at Quebec, and the other sixteen at Montreal, as associated together as merchant Copartners for insuring against accidents by fire, and carrying on business as such Insurers at the City of Quebec in the district of Quebec, and also at the parish of Montreal in the district of Montreal under the name, style or firm of the Quebec Fire Assurance Company — The process in this cause was served upon 14 of the Defendants by leaving a copy of the writ and declaration, with Adam L. McNider, one of the Defendants in person, in the

City

city of Montreal, as agent for the Quebec Fire Insurance Company, as well for himself as for the said fourteen persons, and upon the other four persons by leaving the copy of the declaration and process at their several domiciles in Montreal speaking to themselves or to some grown person of their families.—

A default was obtained against the Defendants at the return of the writ, on the first inst. and on the 4th M. Papineau took off default and entered appearance for 17. of the defendants, and moved on their behalf that the service of the process in this Cause in so far as regarded the said 17 Defendants should be quashed and set aside, the said process not having been legally served, by leaving copies thereof with the said Adam L. McNider alone, inasmuchas no copy of the said declaration and Summons had been left with the Defendants personally nor with any person at their respective domiciles.—

The parties were heard upon this motion, but in the mean time the Defendants having pleaded nearly the same matter in the form of a plea to the Jurisdiction, the Court suspended giving Judgment on this motion until the parties should be heard on the Plea.—

Papineau for the defendants — The Contract as stated between the parties appears to have been made at Quebec, in the district of Quebec, where only jurisdiction can be had over this Cause — two of the partners who reside at Quebec are summoned to appear before this Court, but the citation is irregal and void, as no process has been served upon them personally nor left at their domicile — The Defendants have already moved to quash the process in this Cause from irregularity of service, but that does not preclude the exception now raised to the Jurisdiction — the regularity

of

of the service of the process in this case is made to depend upon the opinion of the Sheriff, or what some person may have told him, that the Defendants had an office in Montreal and that Adam L. McNider was their agent - but of this the Court can know nothing, -

Vizé of Counsel for the Defendrs The presumption upon the face of the proceedings is, that the Contract between the parties was made at Quebec within the Jurisdiction of another Court, and the persons resident there cannot be amenable to this Court unless by personal service of process on them within the Jurisdiction of this Court, which was not the Case here - The Defendts were bound to appear before this Court in order to plead to the Jurisdiction, but this does not render this Court competent to take cognizance of the merits - cites. Lacombe v° Competence. -

Ogden of counsel for the Plaintiff - The Defendants having appeared and moved to quash the process, have admitted the Jurisdiction of this Court, they also have - admitted that they have a domicile within this Jurisdiction By the motion the defendants do not complain, that they had no domicile within the Jurisdiction of the Court, they only complain that the process had not been served upon them at their domicile, which is admitting that they had a domicile within the Jurisdiction of the Court, or service of process could not have been made there - after making this motion the defendants cannot decline the Jurisdiction, this was sufficient to hold them to plead to the action. 1 Pigeau. 152 the least exception pleaded is a waiver - But the Defendants have a domicile here by the trade they carry on within the jurisdiction of the Court. Boucher. Instit. Commerciales p. 73. N° 451 - The exception à la forme to the sufficiency of the service is irregular and ought to have been made by motion according to the rules of practice, -

The Court held, that as the Defendants, were sued as a Commercial partnership, which had not been

been denied, the exception raised going only to the regularity of service of the Defendants as sued, by leaving copies of the process with one of the Defendants a partner, as well, as well for himself as for several of the other Defendants his Copartners - this was sufficient according to the course and practice of the old laws of the Country by which service upon one Partner was service upon all, and if service upon this one is made in conformity to the Ordinance of 1785, all the Defendants must be considered as regularly before the Court, which appeared to be the case here -

The service of the process being therefore deemed regular this determines the plea to the Jurisdiction, which must in consequence be dismissed. -

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Peddie. -
vs
M^c^rider & al^a^ } Similar Case. -

Gerrard & al
vs
Nickless & al } Action of Revendication. -

The action was instituted in the name of Samuel Gerrard, Alexander Gillespie, Robert Gillespie, Jasper Tough, George Moffat, William Finlay, Robert Strachan, William Stephens and John Jamieson, merchants and Copartners trading at Montreal under the name or firm of Gerrard Gillespie & C^o^ against Joseph Nickless and William M^c^Donell of Montreal aforesaid booksellers and Stationers and Copartners, trading under the name

or

or firm of Nicklass and McDonell, and stated that on 30th June 1819, at Montreal aforesaid they the said plaintiffs, were seized and possessed of all and every the goods wares and merchandises contained and enumerated in a certain schedule annexed to their declaration, and being of the value of £1300 current money of the Province; That being seized & possessed of the said goods wares and merchandises as their own proper goods and chattels, they the said plaintiffs at Montreal aforesaid on the day and year aforesaid lost the said goods wares and merchandises out of their hands and possession, and which afterwards on the day and year aforesaid at Montreal aforesaid came into the hands and possession of the said Defdts without any lawful title, & without act or consent of the said Plaintiffs — Yet the said Defendants well knowing the premises still unlawfully withhold and retain the said goods &c — Wherefore &c

Plea — That Defdts do not detain all or any of the goods &c — And further, that the said plffs ought not to have or maintain their action aforesaid against them the said Defendants, because ~~they say~~, — protesting that the said Plaintiffs were not seized of the several goods wares and merchandises in the said declaration mentioned, as of their own goods and chattels, they, say, that the said goods &c heretofore, to wit, on or about the Sixth day of April now last past (1819) were bargained and sold by certain persons using trade and commerce at London under the name or firm of Wilkinson, Rowlatt, Kemp & Co to them the said Defendants, & afterwards to wit, on or about the day and year last aforesaid

at

at London aforesaid, were shipped on board of a certain ship or vessel called the Luna, for them the said Defendants — and because they further say, that afterwards to wit, on or about the day and year aforesaid at Bristol in England it was agreed by and between the said persons using trade and Commerce under the name or firm of Wilkinson, Rowlatt, Kemp & Co. and them the said Defendants that they the said Defendants should give to the said last mentioned persons, their bill payable in montreal for four hundred pounds at twelve months after date, and that the said goods should be — consigned to the agents of the said last mentioned persons in Quebec or Montreal, and should be delivered to them the said Defendants upon their giving to such agents security for the balance of the amount of the said goods and charges, which the said Defendants then and there agreed to do within one month after the arrival of the Ship on which the said goods were laden, and on failure of their so doing, they, the said Defends further agreed, that the agents of the said persons using trade and Commerce under the name or firm of Wilkinson Rowlatt Kemp & Co. should be at liberty to sell the said goods in any way that they should consider best for the advantage of the said last mentioned persons, and the said Defends did then and there acknowledge themselves liable for any loss that might accrue from such Sale and agreed to pay the same to the said last

mentioned

mentioned persons on their account upon demand and it was further then and there agreed by and between the said last-mentioned persons using trade and Commerce as aforesaid and the said Defends that the terms upon which the balance of the said goods was to be paid, were, one half of the amount at Six months from the date of the Invoice, and the remaining half at nine months — And the said Defendants aver, that they afterwards to wit, on the day and year aforesaid at Bristol aforesaid, did under and in pursuance of the said agreement, make and deliver to the said persons using trade & Commerce together under the name or firm of Wilkinson, Rowlatt Kemp & Co their bill payable in the said City of Montreal for four hundred pounds at twelve months after date according to the true intent and meaning of the said agreement on account and in part payment of the price costs and charges of the said goods — And the said Defendants do also aver, that the said goods mentioned and referred to in the said agreement are the same goods as mentioned in the said declaration — and the said Defendants further say, that the said persons using trade and Commerce together, after the — making of the said agreement, to wit on the 27th day of April last, did make and constitute the said Plaintiffs their agents for the purposes in the said agreement mentioned, and did consign to their care, but to and for the use of the said Defends according to the terms of the said Agreement,

the

the said goods in the said agreement mentioned being the same goods in the said declaration mentioned — And the said Defendrs further say, that from the time of making the said agreement to this day, the said plaintiffs never became — possessed of the said goods wares & merchandises as of their own proper goods and chattels, and neither had, nor could have any claim or demand on them, except as the agents of the said persons using trade and commerce together under the name or firm of Wilkinson Rowlatt Kemps & Co according to the terms of the said agreement — and this the said Defendants are ready to verify — Wherefore they pray Judgment if the said plffs ought to have or maintain their action aforesaid — and that same be dismissed with Costs. —

The Defendrs further stated by their said plea that after the arrival of the said goods, viz. at Montreal on the 9th July 1819, they offered to the said Plaintiffs as agents as aforesaid good and sufficient security for the balance then remaining on the said goods &c but which security the said Plffs then and there refused to accept — Wherefore they pray Judgt that action be dismissed —

The Plaintiffs by their Replication take issue on the said plea, and allege, that the goods &c mentioned in their said declaration were not bargained and sold by the said Wilkinson Rowlatt Kemps & Co

to

to the said Defendants, or delivered to them or shipped for them as their property, but the said goods &c were shipped and specially consigned to the said Plffs and they the said plaintiffs by virtue of such shipment were legally vested seized and possessed of the said goods &c - and had full power over them as of their own proper goods and Chattels, and had power to sell and dispose thereof - & this they are ready to verify &c and further denying that Defendants ever offered to the said Plffs good and sufficient security for the payment of the balance on the said goods, as by the sd Defendants alledged -

It appeared in evidence, that the agreement between the said Wilkinson Rowlatt Kemp & Co and the Defendants was nearly as stated by the Defends in their plea, it was however part of this agreement that the goods should be consigned to the Plffs and remain in their hands until the Defendants should perfect the security they had undertaken to give for the payment of the balance they owed thereon - The goods never came into the actual possession of the Plaintiffs, as after the arrival of the vessel Lyra. the Defendants applied to the master of that Vessel and obtained the delivery of the goods from him without any order or consent of the plaintiffs - and in consequence of this Defendants having thus obtained the goods and not having given the security the Plaintiffs required, the present action was brought. -

Grant

Grant for the Defendants contended, that the Plaintiffs in this Case could not maintain their action because they were not proprietors of the goods, they had no interest in them, nor were they ever in the possession of the plaintiffs — This action can be maintained only by the real owners of the property — cites. Poth. Prop. № 286. Repᵗᵒʳ Vᵉ Revendication. p. 619. — here the goods were merely consigned to the plaintiffs to be delivered to the Defendants, and the Defendants having obtained the possession of the goods are entitled to retain them as they have offered good and sufficient security according to their agreement which the pltffs have refused

Ross & Sewell for Pltffs The goods in question were sold conditionally to the Defendants, and were consigned to the Pltffs as holders of these goods until the conditions should be performed — the Defendants have possessed themselves wrongfully of these goods and without performance of the Conditions — the Pltffs alone can maintain the action, as the goods were entrusted to their Care and must be considered as in their legal possession If there is a qualified property in the plaintiffs it is enough to maintain the action — Poth. prop. №ˢ 288 289 — and here the Plaintiffs must be allowed to have had a qualified property in the goods as the Consignees. But the principles of the English law must apply here, the Contract is made in England, it is a commercial transaction, and ought to be governed by the laws of the Country where the contract was made, and according to these laws an Agent or factor may — maintain Trespass or Trover for goods consigned to him see Paley. 284. 5. — The poss. of the Defendᵗˢ here was tortious and it would be highly injurious to trade if an agent could not maintain an action of this kind —

The

The Court. It appears that Wilkenson Rowlatt Kemp and Co. shipped these goods in England deliverable to their own order in Canada — and they directed them to be delivered to the plaintiffs, by an indorsement on the bill of lading — the goods were sold to the Defendants but were to be held by the plaintiffs as the agents and consignees of the Shippers until security should be given by the Defendants for the payment — The goods never came to the hands of the plaintiffs, but were delivered to the Defendants by the master of the vessel, and the requisite security not being given the Plaintiffs bring the present action — It is generally held that the law of the Country where the Contract between the parties is to receive its execution, must govern the case and not the law of the Country where the Contract was made, and according to this principle, the question will be whether by the laws of Canada the plaintiffs can maintain the present action — now it is clear that by the laws of this Country, the proprietor alone, and none other, can maintain the action of Revendication the factor or agent can in no case maintain it —

Boullenois. p. 150 2nd. Ed.

But even according to the decisions of the Courts in England, it would seem that the plaintiffs could not maintain the present action — they are the Consignees for a special purpose, to hold the goods for the benefit of the Defendants whose property they became on giving the requisite security — this gives the Plaintiffs no property, nor any interest in the goods they had no possession of the goods, and it does not appear that the order of the Shippers on the bill of lading can alone transfer such interest to the Plaintiffs as to enable them to maintain this action — The Court

were

were therefore of opinion that the action should be dismissed. —

see. Cases- Cox. v. Harden. — 4 East. Reps. 211.
Waring. v. Cox. — 1 Camps. — 369
Sargent. v. Morris. 3. Barn: & Ald. 277.

John Scott &
v.
Phonix Assurance
Co. of London —

Action on policy of Insurance against Fire. —

The declaration stated, that on the 30th day of October 1820, by a certain writing or Policy of Insurance, bearing date on that day, signed by G. Auldjo, the authorised Agent of the Phonix assurance Company of London for Insurance from loss or damage by fire, sealed with the Seal of the said Phonix assurance Company, reciting that the said plaintiffs having paid the sum of nine pounds seven shillings and six pence to the said George Auldjo as such authorised Agent, for Insurance from loss or damage by fire, according to the Conditions thereto annexed, not exceeding in each case the sum or sums therein after recited, upon the property therein described, in the place or places therein set forth and not elsewhere, that is to say, on goods wares and merchandises in the Shop which they the said John Scott and William Scott occupied in the house of Messrs Turner Allison & Co in St Pauls Street in the City of Montreal five thousand pounds, the Capital Stock and funds of the said Phonix assurance Co should be subject and liable to pay, make good, and satisfy unto the said assured, to wit, the said plaintiffs, their heirs, Executors

and

and administrators, all such damage or loss as should happen by fire to the property above mentioned from the 30th day of October 1820, to the full end and term of one year, not exceeding the sum of five thousand pounds &c to wit, Current money of the Province; provided always and nevertheless that the Stock and funds aforesaid should not be liable to make good any loss or damage by fire which should happen by any foreign Invasion, Insurrection, Riot, or Civil Commotion, or any military or usurped power or by any earthquake or hurricane — and the said Policy of Insurance to remain suspended and be of no effect in respect to any loss or damage which should happen ~~to~~ arise during the time of any such accident or disturbance — That in case the buildings or goods therein mentioned had been already insured, such Insurance to be made known to the Phoenix Insurance Co. otherwise to be void — The declaration then goes on to state the condition of the Policy of Insurance, as therein mentioned — and then goes on to allege — and the said plaintiffs do aver, that at the time of the making of the said policy of Insurance and from thence until the loss and damage hereafter mentioned, they were interested in the said insured goods wares and merchandises to the amount of the value thereof, and that the said goods wares and merchandises continued and remained in the said House, described in the said Policy of Insurance, until afterwards to wit, on the 29th day of March now last-past, when the same were burnt, consumed and destroyed by fire, which did not happen by any invasion, foreign Enemy Civil commotion or any military or usurped power, or by any earthquake or hurricane whatsoever, whereby the said plaintiffs sustained a loss and damage to a large amount, to wit, to the amount of £356,— Current money

money aforesaid – and the said pltffs further say, that the said goods, wares and merchandises were not insured in any other office – and the said Pltffs further say that on the said 29th day of March last gave notice to the said Phonix Insurance Co at their office at Montreal aforesaid, and did deliver in as particular an account of the said loss & damage as the nature of the Case would admit of, and were always ready and willing and did offer to make proof of the said loss by their oath & affidavits and by such other vouchers as might be reasonably required Yet the said Phonix assurance have refused and still do refuse to pay & satisfy to the said Pltffs the aforesaid sum of £356 – for their damages aforesaid – Wherefore

To this declaration the Defendants pleaded for exception per: en droit, that the said pltffs could not have or maintain their action aforesaid 1st Because, the said pltffs do not in and by their said declaration state and set forth that they at the time of the making of the said policy of Insurce owned as their own property, goods, wares, or – merchandises of the value or amount of five thousand pounds, the amount insured, or any other sum whatever, 2. Because the said plaintiffs do not in the said declaration state and set forth, that they at the time of making of the said Policy of Insurance owned as their own property goods wares or – merchandises of the value or amount of the said sum of five thousand pounds, or that they at that time had and possessed goods, wares or merchandises to that amount, in the House of Messrs Allison Turner & Co in the said declaration described –

3 5

3d. Because the said plaintiffs do not in & by the said declaration state and set forth in any certain or sufficient manner, the damages they pretend to have suffered. –

4th Because the said plffs do not in & by the said declaration state or set forth, that the fire mentioned in the said declaration to have taken place in the said house of Messrs Allison Turner & Co., happened really by misfortune and without any kind of fraud or evil practice –

5th. Because the said plaintiffs do not in and by the said declaration set forth or shew a legal cause of action and that the said declaration and action is altogether irregular, vague and insufficient. –

To this plea a general answer was put in and issue joined thereon, and the parties heard as to the sufficiency of the declaration – and the Court were of opinion that the declaration was sufficient – That every Insurance implied an interest in the things insured Weskett. 215 – and consequently the Insurance of goods to the value and amount of five thousand pounds, implies an interest to that amount – That the averment of interest in the insured may be either general, or special – under a general averment of interest, the plaintiff may give in evidence any interest he may have in the things insured, but if the interest be averred specially, it must be proved as stated – the general averment, as stated in the declaration in this Case, is to be preferred, and is sufficient, not only as to the title or claim of the insured, but also as to the quantum of interest – In assumpsit, and under the present action as brought, the plaintiffs will recover damages according to the evidence, pro tanto, and therefore

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by averring interest generally in the goods insured they will be entitled to recover for the loss in proportion to the damage sustained – 2. Marshall Rs. 589. Lawes on assumpsit. 396. 7.–

Plea of Excep^{n} dismissed –

Thayer & C^{o} – vs – In^{o} Shuter et al } Action of Trespass for illegally seizing the goods & chattels of Plff^{s} –

The action was brought against the Defends John and Joseph Shuter for suing out a writ of attachment against the goods chattels and effects of Labdiel Thayer, and against the Defend^{t} Frederick William Ermatinger, the Sheriff, jointly with the other two defendants for arresting and seizing the goods chattels and effects of the said Plaintiffs under and by virtue of the said attachment, and concluding for damages against the said Defendants jointly and severally, to the amount of £10,000 Cy. –

To this declaration the Defendant Joseph Shuter put in a plea of per. exception, and stated that the same was insufficient on the following grounds.–

1st Because the said declaration doth not state a ground of action against the Defendants jointly.

2^{dly}. Because the allegations in the said declaration do not warrant the conclusions thereof, inasmuch as the said plaintiffs have in and by their S^{d} declaration impleaded the said Defendants jointly, praying that they be jointly and severally condemned to pay the damages demanded by the said plaintiffs, whereas it

it is not stated in the said declaration that the said Frederick William Ernatinzer participated in the suing out of the said Writ of attachment mentd in the said plaintiffs declaration, and that the said John Shuter and Joseph Shuter, are not, nor can they be considered as having executed the said Writ of Attachment in manner as stated in the said declaration, or as being liable for damages in that respect; the said Frederick William Ernatinzer as Sheriff being alone responsible for his doings under the said Writ. —

3d. Because by the law of the land no action lies agt a Sheriff for the malicious suing out of a writ of attachment, wherein he has not participated, nor does an action lie against a party suing out such Writ, by reason of the illegal or malicious execution of the same in what manner soever it may have been obtained. —

4th. Because by the law of the land, no action can be maintained against two or more individuals jointly upon distinct acts and doings of such individuals when they and each of them, are separately liable for their own acts. —

5th. Because by the law of the land no action lies against two or more persons jointly, when such Defendants have necessarily different grounds of defence, and when their liability, if any, proceeds from a distinct cause of action, as in the present Case. —

6th. Because the said plaintiffs have in and by their declaration joined different and distinct causes of action which are incompatible with each other. —

7th. Because from the allegations in the said declaration it does appear that the said Defendants are not jointly, but are separately liable, each for their own acts towards the said plaintiffs, and that by law they cannot be joined in one action —

Issue

Issue was taken on this plea and the parties heard thereon, when the Court held, that the facts charged in the declaration were sufficient to maintain the action as laid — that although the acts done by some of the parties might be considered as personally their own, yet when done with a view of being united with other acts done, or to be done by others, so as to produce a certain effect, the effect so produced, when injurious, — renders all the parties jointly answerable — The mere suing out the writ of attachment by John & Joseph Shuter worked no injury to the plaintiffs, it was the execution of that writ, which produced the injury — but a writ of attachment cannot be executed until the legal forms are gone through for suing it out, so that the suing it out and the execution of it must be united so as to produce the injury complained of — and where several persons agree to effect an injury by means of their separate acts, they must be all equally liable for the injury so effected — The man who watches at the Corner while his associate robs the House, is equally guilty with him — This principle seems certain, and is acknowledged in cases of the description of that now before the Court — see. N. Denizt. Vo Huissier, §. 1. Nº 10. and Nº 15 - where the Huissier, and the party employing him, were condemned Solidairement en dommages — Exceptions dismissed. —

O'Keefe ux vs Monk. —

This was an action on a deed of sale of a certain lot of land made by O'Keefe, one of the plaintiffs to the Defendant, to recover the price. —

In

In the deed it was stipulated for the Security of the Defendant that the wife of the plaintiff should ratify it – In the mean time the Defendant being about to leave the province, after having entered on the possession of the lot of land in question and enjoyed it for a considerable time, he was arrested on the present Suit in which it was alledged that the wife of the Plaintiff had ratified the deed of Sale – This however was not the Case as it afterwards appeared that the wife of the Plaintiff had appeared before one Deshautels a public notary and made this ratification only on the day of the return of the writ – A copy of this ratification as regularly executed before Deshautels and Lukin public notaries, and certified by the attorney of the Plffs was filed with the other exhibits for the Plaintiff – The Defendant contested the action and pleaded, that the Sale was not made to him personally but as Curator to the vacant Succession of one Meredith – an enquête was had in consequence, and the parties were afterwards heard on the merits on the 16th June last – at this hearing it was first noticed that the copy of the act of ratification was informal, inasmuch as it appeared by that copy, that the act had been executed before two Notaries, whereas the minute had not been signed by Lukin, the notaire en second, and that the other notary Deshautels was then dead – but the Plaintiffs satisfied themselves with stating that in case any further ratification should be necessary they were willing to make it – Afterwards on the 19th June the Plffs moved for opening the délibéré and for a new hearing that they might be permitted to fyle a true Copy from the minute of the act of ratification as it stood, and as certified by the

Depositary

depositary of his notarial – this motion was afterwards granted, and the copy of the act, signed only by Deshautels, was filed – and the parties were again heard on the merits on the 16th inst – Mr O'Sullivan for the plaintiffs contended, that the act of ratification although not countersigned by the second notary, did not destroy its validity, nor was it fatal to the action, inasmuch as the deed of sale was of itself perfect and conveyed the property to the Defendant without the aid of any ratification from the wife – the property here was the sole property of the husband, it had been purchased by him alone, and he alone could sell – That if any ratification by the wife was necessary the bringing of this action by her jointly with the husband was equivalent to such ratification – refers to Duplessis in speaking of the Retrait – where the husband sells the property of the wife and dies, and the husband afterwards ratifies; this he says is valid only from the date of the ratification but had it not been the propres of the wife, the ratification would remount to the date of the Sale –

Ogden for Defend. This action is founded on a Contract by which it was stipulated that the deed of Sale should be ratified by the wife – the declaration alledges that this ratification was made, but the proof of this has failed, and the action must be dismissed –

The Court were of opinion that the ratification by the wife, although not formally made, yet was in substance sufficient – here the defect of the act lay in the inattention and negligence of the public officer the Notary, the Plffs had done what they conceived was requisite, and what would have been sufficient had the notaire en second signed the act – the Notary dies, and

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the defect in the act is not discovered tile after the action is brought, but this act although informal as an authentic act, is still valid, is binding on the Pltff. as an acte sous seing privé, who acknowledge it to be their act by bringing the present action and producing this act in support of it — see Denizart. Vo. Acte notarié — §8. No. 4. — The ratification must be considered as sufficient for all the purposes for which it was required namely to protect the Defendant against the claims of the wife on this part of her husbands property — and this the Court thinks has been done by her uniting with her husband in instituting this action — Judgt. for Pltff. —

Warwick. — Ermatinger } Action of trespass, & carrying away goods of Pltff. —

It appeared in this Case, that on the 10th Jany 1818, the Plaintiff sued one Marie Boucher, otherwise known by the name of Maria Lawrence of Montreal Spinster, for a debt of £9 — due for house rent, for securing which a Saisie gagerie was sued out, and sundry articles of household furniture & other effects were seized by vertue thereof, as appeared by the Procès Verbal & return of one Adams a bailiff —

On the 23d Jany. 1818, Judgt. was rendered in the Inferior Court in favor of the plaintiff, and by default against the said Marie Boucher alias Maria Lawrence for £9 — for house rent and Costs of Suit, and it was ordered and adjudged by that Court, that she should immediately quit and abandon the house rented to

her

her by the plaintiff and deliver it up to him, failing which the plaintiff was authorized to put her out of possession and throw her effects out-of doors –

On the 28th February 1818, the plaintiff sued out execution on the said Judgt. for his debt and Costs, and and a seizure of effects was in consequence made by the said bailiff Adams – and on the same day a copy of the said Judgt. of 23d January 1818 was served on the said Marie Boucher alias Maria Lawrence whereby she was directed to quit the house immediately – the goods & effects seized were in the same house –

On the 18th March 1818, the said Marie Boucher having still remained in possession of the said house the plaintiff sued out a writ of possession against her, by virtue whereof she was put out-of possession of the house, and the possession thereof delivered to the said Plaintiff – the goods and effects which had been seized by the bailiff under the aforesaid writ of execution still remained in this house, and in the possession of the Plaintiff.

On the 21 March 1818, Angelique Lafresniere of Montreal, widow, who appears to have been the same person as Marie Boucher & Maria Lawrence in order to get into her possession the effects which had been seized by the bailiff Adams, and which remained in the house under the charge & custody of the plaintiff, after she had been turned out of possession, sued out an action of detinue with a writ of Saisie Revendication against the Plff and the said Adams, for the said goods & effects which Saisie Revendication was put in execution on the 28th March by one Labadie a bailiff, who

under

under the warrant of the Defendant, the Sheriff of the district, forcibly and with violence broke open the door of the house in which the said goods and effects were detained and ~~of~~ which the Plff was then in the possession, and attached and seized all the said goods and effects under the said Writ of Saisie Revendication and after attaching the same delivered them over to Pierre Lachapelle dit Bosque and Olivier Faignant as Gardiens, to be by them kept and detained until they should be required to deliver up the same, either by the Court by the Sheriff, or by the Seizing bailiff, the said Labadie.—

Upon this writ of Saisie Revendication the Sheriff made his return to the Court, that by virtue thereof, he had seized in the possession of the Plff William Warwick, and of Austin Adams in the said writ named, as belonging to Angelique Fresniere also in the said writ named, all and every the goods, chattels and effects, mentioned and contained in a certain schedule (thereunto also annexed) which he held ready to abide the order of the Court— and that he had summoned the parties &c—

On the 3d Febry. 1819 the suit so instituted by Angelique Lafresniere against the plaintiff and Adams, was dismissed with Costs, for want of security for costs to prosecute the action.—

On the 3d March the Plaintiff sued out execution against the goods and chattels of the said Angelique Lafresniere on the above Judgt dismissg the action for the amount of his Costs taxed at £17.— and on the 26th May follows, the Sheriff returned "nulla bona".—

On

On the 9th June 1819, the plaintiff sued out a writ of Venditioni exponas, on the Judgment rendered in the Inferior Court on 23 Janv. 1818, by which the bailiff Adams was directed to sell the goods chattels and effects formerly seized by him under the writ of execution sued out on 28 Febry 1818 – The bailiff returned upon this writ, that after making his seizure as aforesaid under the said writ of execution, he had been dispossessed by the Sheriff, who by virtue of the aforesaid writ of Saisie Revendication had taken possessn of the aforesaid goods chattels and effects – that he the said bailiff had called upon the Sheriff in order to recover back the possession of the said goods chattels and effects, who had refused to give him any answer respecting the same, so that he could not find the said goods chattels & effects.

In consequence of the foregoing proceedings the present action was brought against the Defendant, for retaining and withholding the goods chattels and effects so by him attached and seized, and for not selling or delivering up the same to be sold under the writ of execution sued out for this purpose –

The declaration in this Cause contained two Counts, in the first of which the above circumstances are stated of the Defendant having seized under the aforesaid writ of Saisie Revendication the several goods chattels and effects in the possession of the Plaintiff, and afterwards for returning nulla bona upon the writ of fieri facias addressed to him

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at the suit of the said Plaintiff, by means whereof the Plaintiff was deprived of the pledge he held for the security of his house rent for which he had obtained Judgment, against the said Marie Boucher alias Maria Lawrence, as well as the rent subsequently accrued and the Costs thereon, and further had been deprived of his recourse agt the same goods chattels and effects for the payment of the Costs accrued in defending the action so instituted against him the said plaintiff by the said Angelique Lafressiere — to the damage of the said Pltff £100. — In this Count nothing was said in regard of the Defendants having caused the doors of the Plaintiffs house to be broken open —

In the second Count, it was alledged that the Defendant had by force and violence and without lawful authority seized, and caused to be seized the goods chattels and effects of the said Plaintiff and in his possession, had dispossessed the said plaintiff thereof and had carried them away and refused to deliver them back to the said Pltff but had converted the same to his own use, to the damage of the said plaintiff one hundred pounds Current money aforesaid.

The Defendant pleaded that he was not guilty — and further that the Plaintiff had no right of action against him inasmuches he had delivered over the several goods chattels

and

and effects so by him attached and seized as aforesaid to the guardians before named, as by law he was authorised, and against whom only the said Plaintiff ought to seek his recourse and not against him the said Defendant.—

The whole question of defence turned upon this point whether the Sheriff is responsible to the Plaintiff, or the gardiens named and appointed by him in the execution of any attachment or writ of saisine, for the effects committed to their charge and whether this defence, even if well founded would protect the Sheriff against the charge in the second count of the declaration for forcibly entering the plaintiffs house, and seizing and carrying away his effects.— Upon these points the Court was of opinion, that on the first Count no action lay against the Sheriff, as he had shewn that he had discharged his duty on the writ of Saisie Revendication by delivering over the goods and effects seized to the gardiens by him appointed and that the legal recourse of the Plaintiff ought to be against such gardiens, or he ought to have shewn that they were persons generally known and reputed to be insolvent and ought not to have been accepted or appointed as such gardiens by the Defendant— Serpillon. p. 624.— But upon the Second Count the Court were of opinion that the Sheriff had shewn nothing to justify his officer in breaking open the door of the Plff's house and seizing his effects, and as this

made

made him a trespasser his subsequent appointment of gardeners to keep the goods and effects and to represent them when required would not excuse him in this action, and the Court were therefore of opinion that the Plff was entitled to his damages against the Defendant on this Count - which were assessed at £37. 17. 3 —