Saturday 2d. Feby. 1822

Durocher vals
& Beaubien vals

In action of account

The action is brought by Messire Alexis Durocher Curate of the parish of Pte aux Trembles, by Joseph Durocher, Merchant at Chazy in Vermont, and by Hypolite Durocher, Student in Medicine, brothers and heirs at law of the late Jean Bte Durocher of Montreal Merchant, deceased, against, Benjamin Beaubien Esquire, attorney at Law, and Louis Guy, Esq. Notary Public — The declaration states —

Que feu Jean Bte Durocher Ecuir, en son vivant de la dite Cité de Montreal, ou il est décédé, le, ou vers le 8 Juillet 1811, frere des Demandrs qui sont ses plus proches parens et heritiers Collateraux, auroit par son testament reçu devant Me Papineau Notre confrere, Mres en date du 5 Juillet 1811 au dit lieu de Montreal, nommé ledit Alexis Durocher, demandr en cette action, et les dits Benjamin Beaubien et Louis Guy, les Defendrs, gardiens et Tuteurs de Dlle Charte Durocher sa fille, le seul enfant qu'il eut lors de sa mort, jusqu'a ce qu'elle eut atteint l'âge de majorité, ou qu'elle fut pourvüe par mariage ou autrement, voulant qu'ils eussent conjointement ou separément, ou le Survivant d'eux la gestion et administration des biens qu'il pourroit delaisser a son décés, qu'ils en fissent dresser un Inventaire exact, et procedassent à la vente des effets mobiliers (sauf ceux qu'ils jugeroient à propos de conserver pour l'usage de la dite Dlle Charlotte Durocher, et specialement son argenterie & vaisselle) que les dits Alexis Durocher

Benjamin Beaubien & Louis Guy, ainsi nommés administrateurs, fissent et établir le compte de droits successifs de la dite Dlle Durocher, tels qu'ils pourroient lui revenir du chef de feu Dame Sa mere, ou autrement, pour le tout être prelevé sur les biens qu'il pourroit delaisser, et en former un fond pour le profit et avantage de la dte Dlle Charlotte Durocher, et de ses hoirs et ayans Cause ainsi qu'il — appartiendroit — quant au surplus des biens qu'il pourroit delaisser, ses dettes payées, ledit Jean Bte Durocher les auroit donné et legué à ladte Dlle Charlotte Durocher sa fille, pour en jouir à titre d'usufruit seulement, sa vie durante, sans pouvoir les vendre ni aliener sous quelque pretexte que ce pût être, donnant la propriété des dits biens aux Enfans qui pourroient naitre en legitime mariage de la dte Dlle Chte Durocher sous les conditions mentionnées au dit testament, et que dans le Cas ou ladte Dlle Chte Durocher decedat sans enfans nés en legitime mariage ledit Jean Bapte Durocher, lui auroit substitué le Sr Thomas Durocher, son plus jeune frere, pour par lui jouir egalement, sa vie durante seulement, des dits biens, pour la propriété d'iceux, demeurer et appartenir à ses enfans nés en legitime mariage et professant la religion Catholique Apostolique & Romaine, declarant ledit Jean Bte Durocher en son dit testament, que si contre ses intentions, ladte Dlle Chte Durocher sa fille epousoit aucune personne professant aucune autre religion que la religion Catholique Apostolique & Romaine, elle demeurat dés ce moment privée des avantages qu'elle pourroit pretendre du chef de lui ledit Jean Bte Durocher, ainsi que les enfans qui pourroient naitre de tel mariage, auxquels il ne sera donné à chacun que la somme de cinq chelins cours actuel de la Province, pour les biens de lui ledit Jean Bte Durocher

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être remis et transférés à qui il appartiendroit en vertu de son testament, et à défaut d'aucune personne appellée en icelui à tels autres plus prochains heritiers de lui ledit Jean Bapte Durocher qui professeroient la religion Catholique apostolique et Romaine, et quant à ses biens situés en l'Isle St Domingue ou ailleurs, que le Sr Benjamin Durocher lui auroit legué par son testament, ledit Jean Bapte Durocher auroit declaré y renoncer pour le tout consentant et accordant que lesdits biens demeurassent à qui il appartiendroit au desir du testament du dit feu Sr Benjamin Durocher, sans trouble ni empechement à raison d'aucune disposition en faveur de lui ledit Jean Bapte Durocher — Et pour l'execution & accomplissement de son testament, ledit Jean Bte Durocher auroit choisi et nommé pour icelui les dits Sr Alexis Durocher, (un des Demandeurs) Benjamin Beaubien & Louis Guy (les Defendrs) conjointement ou separement, ou le survivant d'eux, leur laissant la gestion et administration de ses biens meubles et Immeubles jusqu'à l'entiere execution de son dit testament, leur donnant même le pouvoir de vendre, si bon leur sembloit, en telle forme et maniere qu'ils aviseront, certaines terres qu'il possedoit, ou pourroit avoir ou pretendre, soit dans les Townships, soit a Longueuil ou a Laprairie, à telles personnes et pour tels prix qu'ils trouveroient bon, pour les deniers en provenants être placés à rente, et suivre la même destination que prescrit en son dit testament. —

Que ledit Jean Bte Durocher seroit décédé, sans avoir revoqué son dit testament, et qu'aussitôt sa mort, lesdits defendeurs seroient seuls entrés en possession de tous les biens par lui delaissés, ledit Alexis Durocher, un des Demrs n'ayant eu possession d'aucun des dits biens, et ne s'etant en aucune maniere immiscé dans l'administration des biens de ladite Succession. —

Que

Que lors du décés du dit Jean Bapte. Durocher ladle Dlle Che. Durocher sa fille, etant mineur, ledit Benjamin Beaubien et Louis Guy auroient eté elus tuteurs pour la gestion et administration des biens paternels de ladle Dlle Che Durocher, sur avis de parens duement homologué en Justice le deux d'Août de ladite année 1811, et ledit Benjamin Beaubien, tuteur à la personne de la dite Dlle Che. Durocher et à l'administration de ses biens maternels. —

Que ladite Dlle Che. Durocher, ne se seroit pas mariée, & seroit decédé en minorité le 15e Octobre 1820 — Que precédement, c'est-à dire, le 19e Avril 1813, ledit Thomas Durocher, frere du dit Jean Bte Durocher, en faveur de qui ledit testament du dit Jean Bte Durocher, contenoit substitution au cas du décés de ladle Che Durocher sans enfans, seroit decédé sans enfans, de maniere que ladite substitution seroit devenue caduque et sans effet —

Que vu que par son testament ledit Jean Bte Durocher n'auroit legué à ladite Che Durocher sa fille, que le simple usufruit de ses biens sa vie durante, dont l'administration jusqu'à l'entiere execution du testament du dit Jean Bte Durocher etoit donné aux dits Alexis Durocher, Benjn Beaubien & Louis Guy, ladite Che Durocher n'auroit transmis en sa succession aucune partie des biens delaissés par ledit Jean Bte Durocher son pere, dont elle n'auroit eu en aucun tems la propriété, et dont elle n'a pû disposer, ni par acte entre vifs, ni par legs, donation, ou autres actes ou dispositions à cause de mort, les dits biens delaissés par ledit Jean Bte Durocher à son décés, dont ladle Charlotte Durocher auroit eu l'usufruit sa vie durante, appartiendroit en entier aux Demandrs comme plus proches parents et heritiers du dit Jean Bte Durocher, leur frere, les dits Demandrs etant en même tems les plus proches parens et heritiers de ladite Che Durocher du coté paternel, et que les Defendeurs maintenant en possession des dits biens seroient tenus de

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les rendre et restituer aux demandeurs avec les fruits et revenus d'iceux à compter du décés de lad.e Charle Durocher et que les dits defendeurs seroient tenus de rendre aux Dem.rs un Compte fidel et juste de leur administration des dits biens jusqu'à ce Jour. —

Que les dits defendeurs quoique requis de rendre compte aux demandeurs de leur administration, et de rendre et restituer aux Dem.rs les dits biens provenants de la Succession du dit feu Jean B.te Durocher, s'y refuseroient injustement C'est pourquoi les Dem.rs sont dans la necessité de se pourvoir

A ces Causes, les Dem.rs supplient que les Defendeurs soient assignés de repondre à leur presente demande, et concluent à ce que les dits defendeurs soient conjointement et solidairement condamnés à rendre aux dits Dem.rs un compte exact, fidel et juste, et sous serment, de leur administration des biens provenans de la Succession du dit feu Jean B.te Durocher en vertu du d.t testament et a rendre et restituer les d.ts biens tant meubles qu'immeubles dettes, papiers, Sommes d'argent, et toutes autres choses qui en font partie, ou y ont rapport, avec les fruits & revenus d'iceux à compter du Jour du décés de lad.e Ch.le Durocher, et qu'a faute par les dits Defendeurs de rendre ledit Compte, ils soient conjointement et solidairement condamnés à payer aux demandeurs la somme de trois mille livres, cours actuel, sauf aux Dem.rs tout autre recours que de droit, et nommement pour leurs pretentions et droits dans les biens m.x paternels delaissés par lad.e D.lle Chat.e Durocher, et que les Defendeurs soient condamnés aux depens —

Plea — 1.st of Peremptory Exception — that Plff cannot have or maintain their action agt Defend.rs —

1.o Parceque les dits Demandeurs en leur pretendue qualité de plus proches parents et heritiers de feu Jn.t B.te Durocher n'ont aucun droit quelconque aux biens delaissés par ledit

ledit Jean Bte Durocher au jour et heure de son decés, et dont les dits defendeurs ont eu la gestion & administration soit comme Executeurs Testamentaires du dit feu Jean Bte Durocher, soit comme Tuteurs à la personne ou aux biens de defunte Dlle Cht. Durocher fille unique du dit feu Jn Bte Durocher, ni a aucune partie des dits biens et parce qu'en consequence les dits defendrs ne peuvent etre tenus de rendre aux dits Demandeurs en cette pretendue qualité aucun Compte des dits biens, ni de leur restituer aucune partie d'iceux —

Parceque d'ailleurs (en supposant que les dits Demandrs en cette pretendue qualité de plus proches parents et heritiers du dit feu Jn Bte Durocher, ayent aucun droit aux biens par eux delaissés, ce que les Defendrs nient formellement Les dits demandeurs ne sont pas les seuls plus proches parens et heritiers du dit feu Jn Bte Durocher, les dits Defendeurs mettant en fait, qu'il existe en cette Province savoir dans le district de Trois Rivieres, plusieurs neveux et nieces du dit feu Jn Bte Durocher, enfans issus des legitimes mariages de deux des Sours decedés du dit feu Jn Bte Durocher, les quels neveux & nieces par representation de leurs meres sont en loi aussi proches parents et heritiers du dit feu Jn Bte Durocher que les dits Demandeurs —

2o Pour plus ample exception per. disent, que ledit Jn Bte Durocher en son vivant par son testament solemnel du 5 Juillet 1811, auroit entre autres choses ordonné ce qui suit, dans les propres termes suivants, savoir, Veut et ordonne ledit Testateur, que Messire Alexis Durocher, prêtre, son frere, Mre Benjamin Beaubien Ecuier, son beaufrere, et Mre Louis Guy, Ecuier,

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de cette ville, son ami, soient, et demeurent gardiens et Tuteurs de Dlle Chle Durocher sa fille jusqu'à ce qu'elle ait atteint l'âge de majorité, ou qu'elle soit pourvüe par mariage ou autrement, les priant de la faire instruire dans la religion Catholique apostolique et Romaine, faire pourvoir à sa nourriture entretien et education, selon son etat — Veut et ordonne ledit Testateur que les dits Srs Alexis Durocher, Benjamin Beaubien et Louis Guy — conjointement ou separement, ou le survivant d'eux ayent la gestion et administration des biens qu'il pourra delaisser à son décés, qu'ils en fassent dresser un Inventaire exacte et proceder à la vente des effets mobiliers (sauf tels d'iceux qu'ils jugeront à propos de conserver en nature pour l'usage de ladite Dlle Chle Durocher et specialement son argenterie menagere; que les dits Srs Administrateurs — fassent etablir le compte des droits Successifs de ladte Dlle Chle Durocher tels qu'ils peuvent lui revenir de — and endorsed with the words — "et à defaut d'aucune personne appellée par le present testament à tels autres plus prochains heritiers du dit Testateur qui professeront la Religion Catholique apostolique et Romaine" —

Que ledit Jean Bte Durocher seroit decedé le 8 Juillet 1811, sans avoir revoqué ni aucunement changé les dispositions contenüs dans son testament ci-dessus mentionnés, laissant ladite Dlle Chle Durocher sa fille pour sa Seule unique heritiere presomptive —

Que depuis, savoir, le 19 avril 1813, ledit Thomas Durocher nommé dans ledit testament seroit decedé sans enfans, en sorte que la Substitution faite à son profit et au profit de ses enfans, dans et par ledit Testament seroit devenue Cadaque —

Que ladte Chle Durocher, ne s'etant jamais mariée,

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la Substitution portée au dt Testament au profit des plus prochains heritiers du dit feu Jean Bte Durocher dans le cas ou ladle Cht Durocher se marieroit à une personne professante une autre religion que la religion Catholique Apostolique et Romaine seroit également devenue Caduque —

Qu'en consequence de tout ce que dessus, et en vertu des dispositions contenues dans ledit testament, ladite Dlle Cht Durocher seroit devenue et auroit continuée d'être jusqu'à son décés, la seule vraie et legitime proprietaire de tous les biens meubles et Immeubles — delaissés par ledit defunt son pere au Jour d'heure de son decés —

Que par apres s'avoir, le 31 Aout 1820, ladle Dlle Cht Durocher, etant la seule, vraie et legitime proprietaire de tous les biens meubles et Immeubles delaisses par ledt defunt son pere au Jour d'heure de son décés, et etant saine d'entendement, usante de ses droits, et d'âge, savoir, ayant accompli l'âge de vingt ans et vingt sept Jours, auroit fait dicté et nommé son testament solemnel et acte de derniere volonté, et par iceluy auroit ordonné entre autres choses, que son Executeur Testamentaire lui feroit dire le plutot que faire se pourroit des messes de requiem, et auroit disposé de tous ses meubles droits mobiliers et argents qui lui appartiendroient à son décés, c'est à dire, auroit fait plusieurs legs particuliers au profit des pauvres de Montreal de Dame Hbay Montigny, de Dame Vve Giasson de son oncle Pre Desruisseaux, de Dlle Josette Guy, de Dame Amelia Bowers, epouse de Charles Lemaire Labrevois de Bleury, de Dame Appoline Beaubien,

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epouse de James Morley Ecr — et à Franse Beaubien sa Cousine, fille de Benjamin Beaubien, Ecuier, un des dits defendeurs, tous les meubles non legués par son testament et qui se trouveroient à son décés dans la maison de son pere que ladle testatrice habitoit alors, plus ses hardes et linges, cent livres courant avec le surplus de son argenterie; à son oncle Messire Alexis Durocher, l'argenterie qui lui appartenoit et que ledit Messire Alexis Durocher avoit en sa possession, avec la moitié de ses livres; à son Oncle Benjamin Beaubien, Cent livres Courant, et à sa tante Franse Labrevois de Bleury epouse du dit Benjamin Beaubien, Ecuier, sa montre, tous ses bijoux et le surplus de tous ses biens meubles droit mobiliers et argents qui lui appartiendroient à son décés, ainsi qu'il paroit plus amplement par le testament solemnel de ladle Dlle Chte Durocher, dont les dits Defendeurs produisent une vraie copie avec ces presents —

Que par apres, savoir, le 15 Octobre 1820, ladle Dlle Chte Durocher, seroit decedée sans enfans, ni descendans d'elle sans avoir revoqué ni autrement changé son dt testament

Que depuis l'institution de ladle action, savoir le 28e Fev: dernier, aud. Montreal, les dits Defendeurs auroient mis les dits demandeurs et autres heritiers naturels de ladle Dlle Chte Durocher dans l'ordre des Successions, en possession de tous les Immeubles delaissés par ladle Dlle Chte Durocher, au Jour de son décés, et qui lui etoient echus tant du chef du dit feu Jn Bte Durocher son pere, que du chef de ladle Chte ~~Durocher~~ Beaubien sa mere, ainsi qu'ils avoient eté prets à le faire depuis le Jour du deces de ladle Dlle Chte Durocher, et ainsi qu'il appert par acte passé devant Mre Papineau et son Confrere Notres ledit

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jour 28 Fevr. 1821, et dont les dits defendeurs produisent une vraie copie — Et les dits Defendeurs en consequence de tout ce que dessus disent que les dits Demandeurs ne peuvent avoir ni maintenir ladite action, ni obtenir les conclusions par eux prises dans ladte declaration, parceque quant aux biens Immeubles qui ont appartenus au dit Jean Bte Durocher en son vivant, et qu'il a delaissés à son decés, iceux etant devenus la proprieté de ladte Chte Durocher par le deces du dit Jn Bte Durocher son pere, et ladte Chte Durocher ayant par son decés transmis dans sa propre succession ces memes biens immeubles à ses plus proches parents et heritiers, savoir, aux dits Demandeurs, et les dits defendeurs depuis le Jour du decés de ladte Charlotte Durocher, ayant toujours été prets à mettre les dits Demrs et ayant en effet, depuis l'institution de ladte action, mis les demandeurs en possession de ces meme biens Immeubles avec les fruits et revenus d'iceux depuis le Jour du decés de ladte Chte Durocher, les dits Demandrs ne peuvent rien pretendre contre les dits defendeurs, à cause de ces meme biens Immeubles — et parceque, quant aux biens meubles qui ont appartenus au dit Jean Bte Durocher en son vivant, et qu'il a delaissé à son decés, iceux etant egalement devenus la proprieté de ladte Dlle Chte Durocher par le deces du dit feu Jn Bte Durocher son pere, et ladite Charte Durocher en son vivant, ayant le droit de disposer par testament et acte de derniere volonté de ces memes biens meubles, et de tous autres biens meubles lui appartenants, et ladte Dlle Chte Durocher ayant en effet disposé par son testament et acte de derniere volonté ci-dessus mentionné et reité en partie, de tous ces memes

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biens meubles, et de tous autres biens meubles qui lui appartenoient au jour et heure de son décés, les dits Demandrs ne peuvent rien pretendre ni demander dans ces mesmes biens meubles, non plus que dans les autres biens meubles qui ont appartenu à ladte Chte Durocher, et en consequence ne peuvent avoir aucun droit d'action contre les dits Defendeurs.—

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Pour defenses au fond en droit en droit à ladte demande disent que tous les faits matieres et choses allegués et contenus en ladte declaration, et chacun d'eux, sont non fondés et insuffisants en loi, pour par eux les dits Demandeurs avoir ou maintenir l'action par eux intentée &c—

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Pour defenses au fond en fait, disent, que tous les faits allegués par les dits demandeurs, et toutes les matieres & choses contenues dans ladte declaration, et chacun d'eux, sont entierement non fondés en fait, et ne sont pas vrais, & qu'eux les Defendeurs ne sont point comptables en la maniere & forme mentionnées en ladte Declaration—

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Replication — Joris issue on the law, and further states — Et les dits demandeurs admettant qu'il existe en cette Province des neveus et nieces du dit feu Jean Bte Durocher, disent de plus en reponses aux dits exceptions que la presente action n'a pas lieu en leur faveur, et qu'ils n'ont aucun droit à la succession du dit feu Jn Bte Durocher leur oncle, d'autant que ledit Jean Bapte Durocher auroit disposé de ses biens par testament, et qu'il n'y a que dans le cas d'une Succession ab intestat que les neveus et nieces peuvent venir à Succession de leur oncle avec les freres et Sœurs du defunt par representation de leur pere et mere, et que dans le cas actuel, apres l'usufruit

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fini de ladue Dame Charlotte Durocher, les biens echeoient par l'effet de la loi, et de l'intention et volonté presumée du Testateur à ses heritiers les plus proches qui sont les demandeurs. —

Que ladue Charte Durocher n'a recueilli les biens du dit Jean Bte Durocher son pere qu'en vertu des dispositions de son testament et des legs d'usufruit qu'il contient, d'autant que par la loi de ce pais lors du décés d'une personne qui a legué tous ses biens, si l'heritier presomptif est legataire, il recueille la Succession comme tel, et non comme heritier, la Succession etant entierement testamentaire en ce cas. —

Qu'il est evident que ledit Jean Bte Durocher n'a voulu leguer, et n'a en effet legué à la dite Dlle Chte Durocher, autre chose que l'usufruit de ses biens sa vie durante, et qu'à sa mort sans enfans, les plus proches parens du dit Jn Bte Durocher ont été appellés à succeder à la proprieté des biens, non seulement par la loi, mais par la disposition tacite du testateur —

Et les Demandeurs disent de plus, que ladue Dlle Chte Durocher n'a jamais eté, et n'etoit pas lors de son décés proprietaire d'aucuns biens delaissés par ledit Jean Baptte Durocher son pere, et n'a pu disposer, ni des meubles, ni des Immeubles de cette Succession, dont elle n'avoit que l'usufruit — Que d'ailleurs ladue Dlle Durocher n'a pu legüer que des meubles, et ce en faveur des personnes ayant Capacité de recevoir — et que plusieurs des legs contenus en son testament sont nuls et reprouvés par la Loi, nommement les legs faits en faveur de Benjamin Beaubien, Ecuier, un des Defendeurs en cette Cause, son tuteur — de Dame Françoise Sabrevois de Bleury son

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epouse, et de Dame Franc.s Beaubien leur fille, et aussi celui en faveur de Dame Josette Curot, epouse de Louis Guy, Ecuir, un des Defendeurs, aussi Tuteur de ladle Dlle Chte Durocher, de Dame Josette Guy, Sour du dit Louis Guy - encore les legs a Clement Sabrevois de Bleury et a son epouse, les pere et mere de ladite Dame Beaubien, et de Charles Sabrevois de Bleury son frere. — Et les demandeurs admettant que depuis l'institution de cette action ils ont eté mis en possession de certains Immeubles de la Succession du dit feu Jean Bte Durocher suivant l'acte du 28 fev. dernier, — mentionné aux defenses du dit Defendeur, disent, que l'arrangement entre les parties contenue en cet Acte, n'affecte aucunement leur demande actuelle, les Demandeurs s'etant par ledit acte reservé l'exercice de leurs justes droits, & insistant sur leurs droits à la proprieté des biens meubles & Immeubles delaissés par ledit feu Jean Bapte Durocher à son decès, dont ladle Dlle Chte Durocher n'auroit eu que le simple usufruit et dont elle n'a pu disposer par testament ni autrement.

Disent que les defendeurs leurs sont comptables en la maniere mentionnée en la declaration. —

Joining issue also on the plea au fond en fait —

Intervention of Jean Bouthillier, as Executor of the last will & Testament of the late Dlle Marie Charlotte Durocher, and of Benjamin Beaubien, Esq. as having married Dame Genevieve Françoise Sabrevois de Bleury and the said Genevieve Francoise Sabrevois de Bleury by him the said Benjamin Beaubien hereunto duly authorised she being the legataire universel of the said late Dlle Marie Chte Durocher - and by the other legatees of the late Mlle Durocher, claiming to be maintained in the bequests made by her to them out of the property left by her, & that her Executors should be considered seised for the benefit of these legatees and not considered accountable to the plffs — It is not however

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necessary to enter upon this Intervention as it did not come in question in the ultimate decision of the Cause. —

On 6th Oct. 1821. the parties were heard on the matters of law raised by the pleadings —

Rolland for the pltff. The late M. Durocher made his last will and testament and thereby bequeathed certain property to Marie Charlotte Durocher his daughter a titre d'usufruit only, and in case she died without children, that property was substituted in favor of Thomas Durocher, the brother of the Testator in case of the death of the said M. C. Durocher, but as he died before her, the legacy thereby lapsed, became cadue upon the death of the said M. C. Durocher, and thereupon the next heirs of the Testator, who are the pltffs became the proprietors of the estates in question. It may be made a question whether the legacy here was made to the heir burthened with the Substitution or whether it was given to her as a Legatee a titre d'usufruit only — If it was given to her as the heir of the Testator burthened with the Substitution, in that case by the failure of the persons substituted, would leave her absolute proprietor, and her heirs & not the heirs of the testator would now be entitled to claim the property, but if it was given to her as a usufructary enjoyment then upon her decease, the next of kin to the ~~deceased~~ Testator would be entitled, as the Pltffs contend they now are, to obtain possession of the Estate — To settle this question the will must be considered and the intention of the Testator sought for — and in doing this, it appears that the words of the will leave no doubt, and that the estate thereby given to M. C. Durocher, amounted to a life enjoyment only — pour en jouir à titre d'usufruit seulement sa vie durante

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no expressions could have been more clear, no intention more certain; and in looking further to the this intention in the estate given to Thomas Durocher, the same expressions occur and refer to what had been before stated pour jouir egalement sa vie durante, which can be only a usufructuary enjoyment. upon this interpretation of the will the claim of the plaintiffs rests, and it appears to be very clear —

Beaubien for Defendants — The plaintiffs are not the heirs of the late Jean Bapt. Durocher, nor have they any right of action as such as the Defendants in regard of the property in question — The Defendants hold no estate belonging to the late Jean Bapt Durocher but hold the property of the succession of the late M. C Durocher, as heirs of whom the Plffs do not claim — The late J. B. Durocher married in 1792, and of that marriage M. C. Durocher was issue — after the death of her mother, M. C. Durocher became the proprietor of one half the community that subsisted between the said mother & father — this Community was continued and J. B. Durocher died in July 1811 — by his will he appointed his daughter his universal Legatee and Devisee, and by virtue whereof she became vested with the whole Estate left by her father — It was provided by the will, that in case the said M. C. Durocher should intermarry with any person not of the Roman Catholic religion, she should then hold the property only a titre d'usufruit, and the property should then go to Thomas Durocher and his heirs, but failing this condition she remained sole proprietor — The words of the will shew the bequest to M. C. Durocher to be made to her as the heir of the Testator grevé de substitution in favor of her children, — the word usufruit used by the testator in the case of a substitution, is considered

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as tant amount to the property itself and by giving the usufruit, the estate itself is conveyed – refers to Poth. Tr. des substit. Sec. 3. art. 1. p. 508. where the example cited is of the same meaning and import as that contained in Mr Durocher's will — In all cases where a person is grevé de substitution, when the substitution does not take effect, the grevé remains vested with the property here M. C. Durocher, was the grevée de substitution – first in favor of her own children, and on their failure in favor of Thomas Durocher – and as both these conditions failed, the property remained with her and became part of her succession – but the plaintiffs claim here as they say, by a substitution tacite in their favor in default of the substitutions expressed in the will taking place – but we know of no such kind of substitution, as the substitution tacite, the law knows of no substitution but what is expressed, which must be subject to the rules established for the interpretation thereof – Now in interpreting the expressions used in creating a substitution the word usufruit is commonly employed, more with a view to denote the duration of the estate in each of the persons to whom it is conveyed, than the quantum of interest thereby conveyed, for the giving the estate to one person, and upon his death directing it shall go to another it is generally meant and understood that the person first taking, holds only en usufruit, sa vie durante, because after his death it goes out of his succession to another, but where such other fails in the lifetime of the first taker or the grevé de substitution, the law says, that usufruit & propriété are consolidated, and the grevé de substitution takes it – see Poth. des Sub. above cited, also. Tr. des Don. Test.s ch. 6. Sec. 5. §. 1. on question, qui recueille le leg en cas du prédecés ou repudiation de l'heritier – In

this

this case, upon the death of M. C. Durocher, the Substitution fails, this usufruit is given to no one, and her heirs are therefore entitled to claim the property as she was the person last seized under the appointment of the will.— But here M. C. Durocher is heir to this property by the rule of Law, le mort saisit le vif, failing any other appointment by the will, had the estate given to her been a titre d'usufruit only in the strictest sense of the term, and where there is no appointment by will the nearest heirs are entitled to claim — as it is the nearest heirs of the grevé and not of the Testator, who are entitled, when the substitution fails — If however the Plffs are entitled to claim as the heirs of the late Jean Bte Durocher they are not alone entitled, as there are other heirs of equal proximity to the Testator who have not joined in the action, namely the children of his deceased sister —

Rolland in answer — If M. C. Durocher was seized as the heir grevé de substitution, at his decease her heirs would be entitled to the property — but this is not the case, she was a simple usufruitiere according to the express terms of the will, and as she had no right in the property she could transfer none to her heirs — The authorities cited by the Defendants do not apply, as they go upon the presumption that the person in possession was grevé de substitution which is not the Case here — refers to the words of the will as well in regard of M. C. Durocher, as of Thomas Durocher, where the same restrictions and limitations are laid down — That the two devises in favor of M. C. Durocher and of Thomas Durocher having become caduc, there is then a tacit substitution to be considered namely that substitution which the Law would raise — see Poth. des Subs. Sec. 2. tit. 2. — The intention of the Testator evidently is, that the property should not go out of his family, as expressed by him in case of the failure of the substitutions limited by his will — and when

he

he makes use of the words *sa famille*, they must be understood to apply to the family of the Testator. Poth. co. lo. art. 2. Sec. 3. — Domat. Interpretation des Testament lw. 1. Sec. 7. art. 1. 2. 6. & 26. — Ricard des Sub. tit. 3. ch. 7. p. 199 — D'antoine Droit Civil. Reg. 12. p. 63. Lacombe. vo Substitution. partie. 2. Sec. 1. No 17. — the term, *seulement* used by the Testator seems intended to remove any doubt as to the intentions of the Testator that an estate for life only was granted to his Daughter, and this interpretation is supported by law — That the Saisine de l'heritier here is nothing, because the Succession here is testamentary, and the dispositions of the will must be followed and M. C. Durocher held under the will and not as heir of her father, she could claim nothing as heir, as all had been disposed by will, and such case the disposition of the Testator must prevail over the disposition of the Law. cites case of Caron. v Rochon. — The present action is founded on the will, in order to carry into effect the entire execution thereof, and to give to the plaintiffs as his nearest heirs that property which the testator directed should not go out of his family — Had the action been brought to obtain the property of a person dying *ab intestato*, it must have been differently instituted, as the nephews and nieces of the deceased would have been entitled to claim by representation with the plaintiffs, but as nephews and nieces are not *les plus proches* parens of the Testator, they are not entitled to anything under the will — see 1 Argou liv. 2. ch. 14 Gr. Com^re art. 364. No 8. — Rep^re v^o Representation. The action is not brought by the plaintiffs as

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the heirs of the Testator, but as his next of kin — according to the terms of the will after the substitutions thereby raised have had their effect, and as such they are entitled to the account demanded. —

By the Court —

This action is brought by the plaintiffs as the nearest heirs of the late Jean Bap.te Durocher, to obtain from the defendants, two of his Executors an account of the administration of the property which came to their hands by virtue of his last will and testament, and to restore and give up to the plaintiffs all the said property as well moveable as immoveable and all things thereunto belonging with the fruits and revenues to be reckoned and computed from the day of the death of Marie Charlotte Durocher, daughter of the said Testator, that is, from 15.e Oct.e 1820. —

The plea to this action is, — that the said plaintiffs have no right of action, either as the nearest heirs, or heirs at-law of the late Jean Bapte Durocher, inasmuchas the Defendants hold no property belonging to the said Jn.B.te Durocher, but that the property they now hold and which had been bequeathed and devised by the said Jn.B.te Durocher, they hold as Tutors and Executors of the said late Charlotte Durocher, whose property it had become, and was vested in her at the time of her death. — That by the Substitution contained in the last will and testament of the said Jean Bap.te Durocher, the said Charlotte Durocher became seized of the said property and the persons and conditions failing under which the other substitutions were to take effect, these substitutions became lapsed, or, caducques, so that the said Marie

Cte

Charlte Durocher being the person grevée de substitution the property became vested in her and her heirs, to the exclusion of the plaintiffs, and the other heirs of the said Testator.—

The plaintiffs deny this and contend, that as M. Charlte Durocher was entitled by the will of her father, only to the usufructuary enjoyment of the property he bequeathed, nothing vested in her, nor could in her, beyond this, and therefore on her decease and the failure of the substitutions and limitations in the will, the property returned to the nearest heirs of the Testator, who are the plaintiffs, and who ground their present claim in execution of the will of the Testator, and to the exclusion of nephews and nieces who are more distant heirs.— That Charlotte Durocher could not be considered as grevée de substitution, but merely as an usufructuary Legatee under the will, she could acquire no right of property in the estate, and could confer none on her heirs.—

The facts necessary to determine this question stand admitted— and the will of the testator is set out by both parties in their pleadings, so that the whole rests upon that interpretation which the law will give to this clause of it which limits the usufructuary enjoyment to M. C. Durocher, and whether by the failure of the other limitations in the will, the property can be considered as vested in her, or whether it reverts to the heirs of the testator.—

It is admitted on all hands, that if the legacy to Charlotte Durocher could be considered in the light of a fidei-commis, or in other

words

words, if she could be considered as the personne grevée de substitution, the property, by the failure of the personnes substituées, would vest in her, and consequently that the plaintiffs as heirs of the Testator could not maintain their action — we must therefore determine what is the legal import and effect of these words in the will of the testator, wherein he says. —

" quant au surplus des biens qu'il pourroit delaisser
" par — il les donne et legue à la dite Dlle Chte Durocher
" sa fille, pour en jouir a titre d'usufruit seulement,
" sa vie durante, sans pouvoir les vendre ni aliener,
" sous quelque pretexte que ce peut être — donnant la
" propriété des dits biens aux enfans qui pourroient
" naitre en legitime mariage de ladite Dlle Charlotte
" Durocher."

Such of the law writers on the subject of substitutions, who have touched upon the nature and meaning of the word usufruit used in wills and deeds in raising substitutions, seem to think that a bequest or gift of the usufruit, when not separated from the property, that is, when the property is not given at the same time, so as to vest immediately in another person, than the usufruitier, such usufruitier is considered as holding the property itself, or as — charged with the fideicommis in the meantime and until the Condition shall arise upon which the right of property becomes separated from the actual usufruit, and vests in another person — the usufruitier is in this case the temporary proprietor charged with the restitution of the property, — he is the person instituée, to whom the substituee succeeds — as usufruitier he holds for the benefit of the substituée, the usufruitier exercises all the rights and actions of proprietor, and none other can claim this right,

inasmuch

inasmuchas the substitué, has no right, nor property but a simple esperance, until the Condition happens on which his right is founded. —

see. Poth. Tr. des Subs. p. 508. n 4.
Lacombe. vo Substitution. p. 502. N° 18. & dist. 5. N° 3. —
Arrets d'Auzeau. 2° vol. p. ~~361~~ 316. —
Dessaules. Tr. des Subs. ch. 31. p. 183 —
Id —— —— p. 43 —

Here although there was a distinction made by the Testator between the usufruit and the propriété, by his giving the one to M. C. Durocher and the other to her children, yet as this bequest in favor of the Children could not then take effect as they were not then in existence, the property is considered to be held and to vest in the mean time in the person of the usufruitier, until such child or children should appear —

Let us consider these words in the will in another point of view — To settle the precise meaning of the term usufruit in its legal sense when considered as an isolated word, requires no explain, as it is plain and obvious — but when this word usufruit is connected with other terms and expressions, more especially in a will its legal import will be liable to be varied according to what may be considered to be the intentions of the Testator, from the language and expressions used — this seems more particularly the Case in creating of substitutions, a mode of transferring property which has been borrowed from the

Civil

Civil and incorporated into the French law, and the opinions and decisions of the French law writers seem to be founded principally upon the Civil law and is constantly quoted by them — It may therefore be allowed to consider the opinions of some of the Civil law writers on this point. —

The language used by the testator here, would seem to imply, that he bequeathed the whole of his property, that is, the droit de propriété to his daughter, but that he limited her right to an usufructary enjoyment without the power of alienation — it will be otherwise difficult to account for the expressions used by the testator when he says, "quant au surplus de ses biens — il les donne et legue à ladte Dlle Ch.te Durocher pour en jouir a titre d'usufruit seulement sa vie durante, sans pouvoir les vendre ou aliener, sous quelque pretexte que ce peut etre" — Here the whole property is given le surplus de ses biens il donne et legue — but while he gives the property, he limits the estate, pour en jouir à titre d'usufruit seulement sa vie durante if this had not been the intention, why add the words, sans pouvoir les vendre ou aliener, because they were useless if only the bare usufruit had been granted, as a simple usufructier cannot alienate the fond, this prohobition must therefore necessarily apply to the property which he intended to give to his daughter — Now some authors make a distinction, where the property is given and the enjoyment limited to an usufruit only to the Legatee or donee — and where the usufruit

is

is the thing given as a charge upon the property— In the first case where the property is given and the enjoyment limited to an usufruit, the person taking the property in this way, becomes grevée de substitution and is considered as vested with the really, and more especially when this clause of the inhibition to alienate is annexed— In the other case where only a simple usufruit is granted as a charge on the estate, the usufruitier is not vested with the really and can claim only his usufruit—

see Voet on Digest. Tit. de Usufructu. Nº 12—

Merlin. Quest. Droit. 5 Vol. p. 45.

Lorsqu'un Testateur, commence par leguer, non l'usufruit, mais des biens en general, il est censé leguer la propriété de ces biens, encore qu'il ajoute que le legataire n'en jouira que pendant sa vie, et qu'il ne pourra les aliener en aucun cas—

Si ab initio testator non dixerit se usumfructum, sed se bona Titio relinquere, etsi postea addiderit, ea a Titio quamdiu vixerit possidenda esse— Titiumque..... nullo modo.... licentiam alienandi habiturum— clausula illa non impedit quominus proprietas legata censeatur— &c—

But if there were any doubt to be entertained or any different interpretation to be given to these authorities, as not applicable to the particular circumstances of the Case, there is a principle applicable to it, which must be considered as vesting M. C. Durocher with the property— She was the heir at law of the Testator, and the real estate of her father would vest in her until it could be ascertained

whether

whether the legatee would accept the legacy, or, if not in existence, until he could accept — because the realty cannot be in suspence or abeyance, but must always rest upon the head of some one, who can prosecute and defend all actions and answer all demands touching the same — upon the supposition therefore that the usufruit and the propriété could be considered as separated here, as distinct things given by the Will, the one as given to M. C. Durocher, the other, as given to her Children — yet until these children should come into existence, the realty would rest with her as the heir, accountable to her Children for the same when they came into existence — In the mean time however the realty & usufruit would remain united in the person of the said M. C. Durocher. This principle is better explained by the following authorities —

Dessaules. Tr. des Sub. ch. 32. p. 189. —
Nº. 568. 569. to 577. inclusive.

2. Arrets d'Augeard. p. 361. —

In every point of view therefore the Court is of opinion that the present action cannot be maintained, and it is therefore dismissed with Costs. —

Wednesday 6th Febry 1822.

Seigneurie de Longueuil vs Charron ux

Action by the Seignior agt the Censitaire for the recovery of Lods & Ventes.

The declaration stated that the plaintiff as Seignioress and proprietor of the Seigniory of Longueuil is entitled to demand and receive all Lods & Ventes accruing and growing due therein — That on the 19th day of June 1812, by a certain act or deed made and passed before Cadieux & Prevost public notaries, Charlotte Viau widow of the late Franc Charron, did transfer, convey and make over to the Defendant her Son by her marriage with the said late François Charron, a certain lot of land in the said Seigniory, viz. &c &c — Which said conveyance was made by the said Charlotte Viau for and in consideration of a sum of 1400th being for the balance of his rights in the Succession Mobiliaire of his said late father, in consideration whereof the said Defendant did acquit and discharge the S Charlotte Viau of the payment of his said rights, and did also stipulate and agree, that he the said Defendant should and would pay to Marie Franc Charron, & Archange Charron his sisters at their age of majority the sum of 3300th livres each, being the amount of their respective rights in the Succession mobiliaire of the said late Franc Charron their father, as settled by the acte de partage of the property of the Community that subsisted between the said late Franc Charron and the said Charlotte Viau, dated 11 March 1812, passed before Cadieux & his Colleague, notaries, which said several sums of money make together the sum of

eight

eight thousand livres, equal to £333. 6.8 — the Pltff alledging that the said act, or deed of Conveyance is equivalent to a deed of Sale and being made executed between the parties subsequent to the act of partition aforesaid, lots et ventes accrued and became due thereon to the amount of £27. 15. 6 p/p and also the further sum of £2.— for monies laid out by the plaintiff for copies of the several notarial acts aforesaid and now filed in support of this demand, amounting in the whole to £29. 15. 6 p/p for which Suit is brought.—

Plea — nil debt and further that pltff cannot have or maintain her action and demand aforesd for Lods & Ventes on the aforesaid deed of Conveyance inasmuchas the same is in law an accommodement de famille and carries no lods et Ventes.—

Replication joins issue.—

Sewell for Pltff — The deed of Conveyance in question is equivalent to a deed of Sale — the Defendant here takes the lot of land at a stipulated price of 8000th part of which was due to himself and the remainder to his sisters, by their mother — and although this act was passed between parent and child, it makes no difference in regard of the right of lods & Ventes, because all acts passed between parent & child subsequent to the acte de partage, as here, and also all acts of arrangement where money is disbursed bear lods & Ventes to the Seignior — cits —

Poth. Fiefs. p. 361. n 12. and p. 155. 6.
" Cens. Sec. 2. art. 1. p. 355. 4th & p. 142. —
Prudhom. p. 257. 260. 265.
Repre vo Lods & Ventes. p. 594. 616. §. 8. refers to Duplessis
Arrets de Grainville. 1 Vol. p. 267.—
5. Freminville. p. 740. —

Vigé

Vigé for Defendt. — The deed in question can be considered only as an arrangement de famille, in wh case no lods et ventes are due, refers to Case of Martigny vs. Deschamps — the cas here is more favorable — there it was a deed of sale, here it is a donation and partage between the mother and her children — and in case of Rolland. Exer vs. Bellanger held in such case no Lods & Vents were due. — and it is so held in law. Poth. Fiefs. Nº 156. Introd. au Tit. des Fiefs Cout. d'Orl. — Fr. des Fiefs p. 152.3. Repre vo Lods & Ventes. p. 616. §. 8. Pothi. ch. 27. p. 257, 259. Cout. art. 218. 278 shews Cases of arrangement de famille such as present — and art. 76. & 78 exclude donations from payment of Lods & Ventes. — and in all Cases where legitime could be claimed by the Child on a donation by the parent, there can be no lods & ventes due to the Seignior

By the Court.

It has always been held by this Court that every transaction between parent and child in the nature of an arrangement de famille, carries no lods & Ventes, and the Court is disposed to think that in the present instance the deed in question is of that description — The law writers are not all agreed upon what shall be considered an arrangement de famille so as to exclude lods & ventes, some of them, particularly of older date are of opinion, that whatever may have led to the transaction between parent and child, yet where money is paid, or stipulated to be paid, by the child on account of the parent, lods & ventes are due — but later writers and the decisions of the Courts have modified this doctrine, and now hold, that all dealings and transactions of this description carry no lods & Ventes unless the intention evidently appear that a Sale was intended as between Strangers, and nothing of family arrangement — Very few of the authorities cited by the plaintiff will apply to this Case — That from

Poth.

Poth. Tr. des Fiefs. p. 153. is against the Plff. as it appears to accede to the opinion of Livoniere & Guyot which allow no Lods & Ventes — The authority cited from the same author p. 155. 6. refers to general principle of transaction — but says nothing as to the particular kind of transaction between parent and child. — Prudhom. p. 257. says, if the debt paid could be considered as equivalent to the value of the land, in a donation en ligne directe, this would be considered as a Sale, and lods & ventes would be due — but admitting the law to be so, here it is not alledged what the value of land was, nor can we now enquire into it — but the same author in another part of his work p. 259. would seem to be of a different opinion — he there says — "la donation faite par le "pere à un de ses enfans à la charge de payer les dettes "de sa Succession, ne donne ouverture à aucun droit, "parceque les dettes d'une Succession sont les charges "des biens qui composent la Succession." — The arrets cited from the Repre. vo Lods & Ventes. §. 8. p. 616. appear to be reported there only to contrast the opinions of different Writers, and what was formerly held by them, for after noticing these opinions, this author remarks — "mais ces arrets quelque précis qu'ils "paroissent, sont combattus par un grand nombre "d'autres, qui ont enfin emporté la balance" — and he cites Charondas, Guyot, Lapeyrere — & arrets du Parlement de Paris. — The arret cited from Grainville is not in point — that from Freminville 3 Vol. p. 740 is more decided and positive in favor of the plaintiff, and refers to some decisions of the same import — but these are the decisions referred to in the Repre. de Jurisprudence, which he says have been outbalanced by later authorities —

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The authorities on the other side are numerous & respectable, and such as the Court feels bound to adopt in deciding in favor of the Defendant, and without entering into a particular detail of them the Court will merely cite them, for the information of the parties —

Hervé - Theorie des matieres feodales & Censuelles 2 Vol. p. 84. —

Renauldon. Dic. des Fiefs. V.° Lods & Ventes. N.° 204

Boutaric Traité des Droits Seigneuriaux. p. 145.

Fonmaur. Tr. des Lods & Ventes. part. 3. ch. 17. p. 30. N.° 499. — see arrets he cites N.° 1. 2. 3. 4. & 5. — and N.° 500. p. 32. —

arrets cited in the Repr.e de Jurisprudence —

Potts. — v. Burton. — & Contra.

Action on an award. —

The award had been made and deposited in the Office of a notary public within the time limited by the compromis, but was not pronounced in the presence of the parties nor signified to them. — The principal objection taken to the award by the defendant was this defect that it had neither been pronounced nor notified to him within the above period. — other objections were taken on the merits, but to these the Court did not give any attention, as they considered the award to be sufficient, and declined examining into the merits of the case before the arbitrators. —

Rolland for Defend.r pronounciation of the Sentence Arbitrale to the parties is necessary, at all events service of

of a copy ought to have been made on Defendant before the expiration of the Compromis + cites +

Jousse. Just. Civile. 2 vol. sec. 8. N° 13 — and N° 62 in marzin on Traité d'Arbitrage. +

Rep^re +. V^o arbitrage. p. 548. —

Boston for Pluff. contended, that the depot in the office of the Notary was sufficient — cited. Praderier de Larrze. —

By the Court —

The reason why pronounciation of the avis arbitral was required under the French law, was not merely to intimate to the parties the opinion of the arbitrators but to ascertain the date of their award — and we find decisions of a late date, where this was sufficiently ascertained, that the arbitrators had made their award within the time, it was upheld — See Rep^re de Merlin. V^o arbitrage. N° 34. p. 340.

V^o Compromis N° 4.

See also. Dic. de Royer. V^o arbitrage. §. 7. N° 56. p 95. where he says, "un autre arret du meme tribunal " du 19 Juillet 1603, ne considera pas comme une — " nullité que la Sentence qui avoit été dressée par les " arbitres, remise au greffe, et signée par le greffier " dans le delai du compromis, n'eut été prononcée " qu'apres" The ground work of this arret is, that the date of the Sentence was ascertained by the depot with the public officer — the pronounciation was a matter of mere formality, the want of which did not operate the nullity of the award —

And Ferriere in his Dic. de Droit. V^o arbitre, says

says — "A paris on remet la Sentence entre les
" mains d'un Notaire, qui en delivre expedition, laquelle
" est executoire, sans que la Sentence soit homologuée,
" parceque les notaires de Paris sont greffiers des arbitrages,
" de sorte que le depot de la Sentence chez un Notaire de
" Paris equivaut à l'homologation qui se fait ailleurs" —

See also. Rodier. on art. 7. du Tit. 25. p. 223. ou alias p. 226 du Code Civil where he says — "la date des Sentences arbitrales est
" suffisament constatée par l'enonciation que les arbitres
" en font; et des que les parties les ont choisis, elles ne
" peuvent les regarder comme Suspects." — Lapeyrere. Vo Arbitrage pp. 61. —

If therefore pronounciation of the award was not necessary, neither was signification of a Copy, the object of which was the same as that of pronounciation, namely to ascertain the date — and it is held that service of a copy obviated the necessity of pronounciation — Rpse Vo arbitrage. p. 548. —

The Court therefore considering that the signature of the arbitrators and the making of the award being sufficiently authenticated to have been made within the time required by the Compromis, nothing more was requisite, and thereupon gave Judg for Plff

Saturday 9th Febv 1822.

Hibbard
vs
Barnard
&
Barnard
oppt

On the plaintiff's motion for a Summary hearing on the opposition afin d'annuller made by the Defendt to the seizure of his goods and chattels under the writ of execution sued out in this cause, — inasmuch as the reasons contained in the said opposition form no legal ground to support the same, and as the said opposition is made merely for delay and to obstruct the regular course of Justice by preventing the plaintiff from obtaining the execution of his Judgment — The grounds alledged were four, 1st Because the seizure was made without any previous demand on the Defendt to satisfy the debt — 2d Because the Plaintiff did not request two neighbours to be present to assist at the seizure — 3d Because the plaintiff attended in person at the time of making the said seizure — and 4th Because no regular copy of the Proces verbal of seizure was served on the Defendant — all which reasons the plaintiff contends are insufficient in law and ought to be rejected —

Mr Grant for the Defendt — contended that he ought not to be held to proceed in this summary manner to the discussion of the Defendts rights under this Opposition, but ought to be admitted to fyle his moyens and proceed in the usual course — That the reasons of nullity stated in the Opposition were well founded, and any one of them was sufficient to set aside the seizure — That the forms of proceeding

on

on a Saisie-execution are well established and known, and as the proceeding is rigorous it ought therefore to be regular — That the defects complained of are fatal, and Defendt ought to be allowed a day to prove them — refers to Jousse on Code Civil —

The Court dismissed the Opposition w^h Costs as they considered the return of the Sheriff as sufficient to ascertain the regularity of the proceedings on the Saisie, and would not admit the allegations of a defendant to come against it — but more especially in an Opposition of this description where the defendant makes no tender of what he owes, which ought to be done before the Court will allow him to enter upon the discussion of such points of nullity as those alledged by the Defendant — See Serpillon. on 33^e. tit. Code Civil art. 3. p. 621. 2.

Monday 11th Febv. 1822.

Shuter & al
vs
Thayer & al
Thayer & Kay
Intervs

Action on award.

Sewell for Defendrs — It was necessary that the award should have been pronounced to the parties, and signification thereof made to them, which has not been done — as this was a fact to be proved the Court reserved to determine thereon after enquête had, by their Interlocutory Judgt. on the Defendrs exceptions — That the necessity of pronouncing Judgments to the parties in open Court has been dispensed with, but this will not hold in regard to the Judgments of Arbitrators who are expressly bound to pronounce their Judgments to the parties a course which appears to be confirmed and required by very late decisions — cites. Fer. Dic. de Droit. vo. Sentence Arbitrale. — Poth. pro. Civ. p. 2. ch. 4 art. 2. Repre vo Arbitre. p. 548 — Dic. de Royer. co. verb. Dic. de Brillon. co. verb. — That the parties are also entitled to have a copy of the award signified to them, and not a copy of a copy as has been the Case here. — That the plaintiff here is a non resident within the Province and not sufficiently represented in the prosecution of the present suit, and the power of Attorney filed expressly prohibits the prosecution of any suits for the recovery of any monies due to plaintiff on mortgage — and here a mortgage would accrue upon the reference made by the parties by the compromis before notaries —

Rolland

Rolland for plff. The points reserved to be determined according to the Interlocutory Judgt are the facts alledged by the Defendant that no copy of the award had been served upon him, and that no legal notice had ever been given him of any award having been made — This being matter of fact could not then be decided, and the parties were sent to their enquete thereon — it now appears by the Certificate of the Notary on the original award filed that a copy thereof had been served on the Defendant before the expiration of the time limited for making that award — This fact is also further ascertained by the silence of the Defendt in not answering to the faits et articles proposed to him in this respect by the plaintiff — That as to pronounciation of the award by the arbitrators to the parties the plaintiff contends it is not necessary, and the service of a copy is a sufficient pronounciation, were it necessary — cites. Repv. vo. arbitrage, p. 548. — That the power of Attorney filed in this Case is sufficient, as the debt in question was a personal debt due by Defendant but not founded on mortgage — at all events the objection comes too late, after Defendant has pleaded to the action —

The Court were of opinion that pronounciation of the award to the parties was not necessary, and that Defendt having had a copy served upon him had no right to complain of any want of notice of its contents, or of the date of the award, which was

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the ground upon which pronounciation and signification seem to have been required, but when the award appears to have been made within the time limited by the Compromis, as in the present case that is sufficient, and in referring to the opinion the Court already held in the Case of Potts & Bunton, it gave Judgment for the Plaintiff.

Tuesday 19th Febv. 1822.

Bourdon. vs. Auclaire.

Action on promissory note by drawee agt the drawer.

The declaration stated, that the Defendt at a certain time and place, made his certain note in writing commonly called a promissory note, which he then and there delivered to the Pltff and whereby defendt promised to pay pltff &c — but it was not stated in the declaration that the note had been made or given for value received.—

Roi for Defend— demurred to the declaration, and contended that it was insufficient inasmuchas it was necessary to shew that the note in question had been given for value received, otherwise it could be considered only as a mere acknowledgment, but no promissory note.—

Beaubien for Pltff contended that the declaration was sufficient, and that it was not necessary to alledge that the note had been made for value received, that every note of hand was good without this and an action could be maintained thereon — cites. Bourjn tit. 1. ch. 4. sec. 1. §. 1. & 2. That if no value had been received, the defendant ought to alledge so by his plea which would necessarily compel the plaintiff to prove it — That the Provincial Statute made in regard of promissory Notes does not render void all other notes besides those made for value received, this Statute was meant only to regulate the mode and manner of transferring and negotiating promissory Notes.

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The Court were of opinion that the declaration was sufficient; that the allegation contained in it, that the defendant made his promissory note, carried with it all that was necessary to constitute a promissory note, of which one of the requisites was that it had been made and given for value received — but the description of the instrument being sufficient, the parties must go to proof upon it, and if it should turn out not to be a promissory note the Defendant will still be in time to avail himself of his objection. The exception pleaded by Defendant was therefore dismissed. —

Lewis. v Vandersluys } Action for malicious prosecution, and also for forcibly entering Plff's house and carrying away and injuring her property

Rolland for Defend^t book exception to the declaration as insufficient, inasmuchas the plaintiff had blended two separate and distinct causes of action together in ~~different~~ Count, and had demanded entire damages for the whole, without specifying any particular damage sustained upon each cause of action, but by concluding for the payment of one sum of money in damages it was impossible for the Defendant or for the Court to say to which of the Counts this damage ought to apply. a

Bleury for Plaintiff contended that many Counts

and

and many demands may be joined together in the same action — That the present action can be considered only as an action for a malicious prosecution, and all the attendant circumstances stated in the declaration can be considered only as aggravating the offence, but not as separate and distinct Counts or Causes of action.

The Court were of opinion that the declaration was sufficient, as different torts may be joined in the same declaration, and one conclusion for damages — see 2. Chitty on Pl. 369. — exceptⁿ dismissed.

Holmes
v
Jos: Gagnier
In 3ts Gagnier

Action of debt on deed of sale. —

The declaration stated, that by deed of sale executed before Decouagne and his colleague notaries, on the 23 Sept. 1819, the plaintiff sold to the Defendant Jos. Gagnier, a certain lot of land therein described for and in consideration of the sum of 2000 livres, to be paid in three equal instalments, as therein stated — And that for the effectual securing the payment of the said sum of money, the defendant Jean Baptᵉ Gagnier did in and by the said deed become security, pleige et Caution to the said plaintiff, by reason whereof the plaintiff became entitled to demand and receive from the said Defendants jointly and severally, the said sum of money, as being jointly and severally liable to the payment thereof. — That in March last there became due to the said plaintiff by virtue of the said deed of sale a sum of 866ᵗᵗ. 13ˢ. equal to £36. 2. 2½ with interest thereon and for which sum the action was instituted; conclud

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against the Defendants jointly and severally for the payment thereof.—

Plea of Jos. Gagnier.— that the plaintiff cannot maintain his action against him the defendant jointly with Jean Bapt. Gagnier, inasmuchas the said Jean Bapt. Gagnier did not become bound jointly with him the said Joseph, nor solidairement for the payment of the money mentioned in the said deed of sale — and further denying all the facts stated in the declaration.—

Plea of Jean Bapt. Gagnier — That he the Defendt never became bound, nor did he promise and undertake in manner and form as stated in the declaration That he never became bound solidairement with the said Joseph Gagnier for the payment of the money demanded by the plaintiff — That he the defendant became bound only as a pleige et Caution of the said Joseph Gagnier, and not as a principal obligé, or solidaire, and therefore the plaintiff cannot maintain the present action against him.—

Replication joins issue on the above pleas.—

Lacroix for the Defendants, contended that the present action could not be maintained against them jointly and severally, as the obligations they had contracted with the Plaintiff were of a distinct and separate kind, the one as principal, the other as caution, which is always conditional, and in case the principal cannot or will not pay — refers to case of Henry & Guyon. Oct. 1811. where it was so held by the Court.—

Boston for Pltff.— The Defendants must be considered as solidairement bound in this case, as he could have brought his action against either

of

of them upon the present deed for the whole amount, that is, either against Joseph Gagnier as the principal obligé, and with him it could be no objection that another had been joined in the action as equally liable with himself — or against Jean Bte Gagnier as Caution, who could claim only the benefit of discussion in that Case, as he might have done here, and this seems to be the only difference between the Condition of the principal obligé and the Caution, that the latter may take the benefit of the dilatory plea of discussion if he thinks fit, but in point of Obligation both parties are equally bound. — see 1. Pigeau. 189. —

The Court were of opinion that the present action could not be maintained against both Defts at the same time. — That the Obligation of the parties was not the same, the one was liable at all events the other was liable only in case of the inability of the principal to discharge the debt — By instituting his action against the principal the Plaintiff admits this distinction, and was taking a means to — ascertain either that he could procure ~~the~~ satisfaction from the principal, or to establish that kind of discussion and demeure against him which would entitle pltff to his further remedy against the Caution but when Pltff has made his option and proceeded against the principal, he thus by his own act admits the right of the Caution to a delay of proceedings agt him until the discussion so undertaken shall have terminated in some manner — to make the Caution a party to this proceeding was unnecessary, and the demand against him premature — and therefore in regard of Jean Bapte Gagnier, the action must be dismissed. —

Ryan. }
v
Dupré. }

Action on Lease of a house.

In this Case the plaintiff sued out a Saisie Gazerie against the household furniture and effects of the Defendant, in consequence of the Defendant's having quitted the house leased and carried his furniture and effects into another house without the consent of the plaintiff — there was no clause in the lease by which the defendant was bound to stock the house with sufficient effects & furniture for securing the rent, nor was there at the time any rent due to the plaintiff, as the quarter had not at the time expired at the end of which only the rent became due —

Lacroix for the defendant contended, that as there was no rent due to the plaintiff he could exercise no right of action against the Defendant for the payment of the rent, nor could he attach his effects in order to secure it when it should become due — That as the Defendt was not bound to furnish the house in such manner as to secure the rent, he had a right to remove his effects out of it without being liable to an attachment on that account, and as the Defendt had heretofore paid the rent when it became due, he would do so still, but ought not to be harassed with a vexatious and harsh proceeding by Saisie Gazerie when he owed nothing to the plaintiff. —

Grant for Plaintiff — Every tenant is bound to furnish the house with sufficient moveables by tacit obligation, it requires no express stipulation — Poth. Tr. de louage. N°. 204. — That all furniture and effects which are carried into a house and used in it as furniture & such like are liable for the rent, they are the security & pledge of the landlord, and cannot be removed without his consent, and if they are, he has such a lien upon them

them that he can follow them and arrest them by Saisie Gazerie, until all growing rents are satisfied, Potts. Louage. Nº 227. 229. Fer. Gr. Comre on 161 art. Coutume That the defendant can at any time liberate his effects by paying the rent, but in default of this, they ought to be replaced in the house from which they were taken for the security of the Plaintiff.—

The Court were of opinion with the plaintiff and gave Judgment accordingly.—

Guy.— vs Thierry.— } Action of Debt on deed of Sale.—

The declaration stated merely that the defendant was in arrear for an instalment of one hundred pounds which had become due, and concluded to the payment thereof— with interest and costs.—

The Defendant among other matters pleaded, that in and by the deed of sale in question it was expressly stipulated and agreed, that the defendant should not be held or bound to pay the purchase money in question unless in the presence of one prudent Viret, whereas it is not stated or alledged in the declaration, that he the said Plaintiff ever demanded of the said Defendr the said Sum of money in the presence of the said Prudent Viret, or that he the said Defendant was ever put en demeure to pay in that respect.—

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The stipulation in the deed was in the follow[ing] terms- "De plus a eté expressement convenü
" que ledit Sieur Guy s'oblige par ces presentes, qu'a
" chaque échéance des paiements ci-dessus, jusqu'à
" la concurrence de la somme de quatre Cens quatre
" vingt trois livres six chelins et six deniers dit cours,
" seront faits en la presence du S[r] Prudent Vinet, qui
" recevra ladite somme pour et à l'acquit de l'acquisitum
" qu'il va faire aujourd'hui du dit S[r] Prudent Vinet
" autrement ledit Sieur Thierry ne sera pas tenü -
" d'effectuer les dits paiemens."-

The Court were of opinion, that as the plaintiff had undertaken that Prudent Vinet should be present when the money was paid, and that Vinet was to receive this money on the account of the plaintiff, and that without the presence of Vinet the defendant should not be bound to pay- the action was therefore premature, as until the requisites of the Contract were complied with by the Plaintiff he had no right of action against the Defendant.- Action dismissed- sauf à se pourvoir

Plessis
vs
Nadeau et al

Action on deed of Lease, ag[t] the Defd[rs] as security, for house rent.

The declaration was in these words- "Que par acte passé à Montreal le 31 Dec[r] 1818, devant M[e] Doucet & confrere N[rs], le demand[r] auroit loué au nommé Jean B[te] Chalu, aubergiste demeurant alors en cette cité, ce acceptant, à titre de bail à

loyer

loyer pour le tems et espace de trois années, a compter du premier Mai de l'année 1819, une maison sise en cette cité, sur le niveau du nouveau marché tenant par devant au niveau du dit marché, par derriere au terrein du gouvernement, d'un coté aux representants William Andrews, de l'autre au terrein de Franc. Dessrivieres, ecuyer, et ce moyennant la somme de deux Cent cinquante livres Cours actuel, par chaque année, payable par quartier, c'est-à dire, de trois en trois mois. — Que les defendeurs seroient intervenus au dit bail, et se seroient obligés & portés caution pour la diie et entiere execution d'icelui et nommement au paiement du loyer de lad.te maison

Qu'au premier de Novembre dernier, il etoit dû au Demandr. six mois du dit loyer, formant — £125. et pour le paiement desquels il seroit dans la necessité de s'addresser aux Defendeurs, vû l'insolvabilité du dit Chalu. — Pourquoi le Demandr conclut &c —

To this declaration the Defendant pleaded for exception, that it was insufficient, and that the action ought to be dismissed, — "parceque il ne paroit point dans et par ladite declaration que ledit Jeant.te Chalu nommé dans lad.te declaron ayent jamais eté requis ni mis en demeure de payer la somme reclamée par lad.te action, ainsi que ledit demandr etoit tenu et obligé en loi de le faire. 2°. Parceque'il n'est point allegué dans et par lad.te declaration que ledit Jeant.te Chalu ait eté et soit en possession en vertu du bail mentionné dans la declaration, soit par lui-même soit par des Sous-locataires de la maison designée dans ladite declaron ainsi que ledit demandeur etoit tenu en loi de l'alleguer dans et par sa dite declaration. —

3°. Parceque

3°. Parcequ'il ne paroit point par ladte declaron que ledit Jean Bte Chalut ait jamais été mis en possession de ladite maison, ou que ledit demandr ait jamais fait jouir ledit Jean Bte Chalut d'icelle.
4°. Parcequ'il ne paroit point dans et par ladite declaration que le bail mentionné en icelle ait jamais été suivi et executé entre ledit demandeur et ledit Jean Bte Chalut. —
5°. Parceque ladite declaration ne montre pas une cause suffisante d'action. — Pourquoi &c —

The answer to the said exceptions joins issue thereon. —

In the argument nothing was alledged beyond the general matters stated in the pleadings, the principal question being whether the plaintiff was obliged to alledge the execution of the Contract upon which he declared. —

The Court held the declaration to be sufficient considering it unnecessary that the plaintiff should alledge more than the Contract and stipulations between the parties, and that it was for the Defendts to alledge the non-execution of the Contract, or any other matter which would exonerate them from the payment of the rent — That the plaintiff by the lease transferred and conveyed to Chalut the right to hold and possess the house, the presumption is, that he did possess it, but whether he did or did not, unless by some act of the Plaintiff, he, Chalut was bound for the rent, and also the Defendants as his securitys, &c

Leroux

Leroux.
to
J. Bte. Trottier
& J. Bte. Cardinal

Action en declaration d'hypotheque

The declaration states, that by act passed before Payement and his colleague, public notaries on 3d Sept. 1816. the plaintiff conveyed and made over to one Charles Riché dit Louftau, a certain emplacement in the said declaration mentioned, for and in consideration of the sum of one thousand livres, payable by one hundred livres annually in the month of March and on account whereof one hundred livres were paid on executing the said act.

That on 25th Sept. 1816, by act executed before the said Notaries, the said Charles Riché dit Loufteau exchanged the said emplacement, for another lot of land mentioned in the Declaration, with one Jacques Trottier.—

That on 22d. April 1817. by act executed before the said notaries, the said Jacques Trottier sold the said emplacement, to one Joseph Langevin dit Lacroix.

That on 5th. Sept. 1818. by act executed before the said Notaries the said Joseph Langevin dit Lacroix, sold the said emplacement to the defendant Jean Bte Trottier

That on 2d Augt. 1819, the said Jean Bte Trottier by act executed before the said notaries sold a part of the said emplacement to the Defend. Jean Bte. Cardinal.

That the said Charles Riché dit Loufteau, Jacques Trottier and Joseph Langevin, are all become insolvent and unable to pay to Plaintiff the amount now due to her.

That the said Defendants having become proprietors of the said Emplacement in manner as aforesaid

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are now in the actual possession thereof.—

That there now remains due and in arrear to the said plaintiff upon the sale by her made of the aforesaid emplacement, a sum of eight hundred livres, which the said Defendants as holding and possessing the said emplacement are liable and bound to pay to her the said plaintiff the said sum of money, or to quit and deliver up the said emplacement to be sold according to Law.— Wherefore &c. concluding against the Defendants that they be condemned to pay to the plaintiff the aforesaid sum of money unless they shall chuse to quit and abandon the said emplacement to be sold and disposed of and the proceeds applied to the payment of the Pltff's debt with interest & Costs—

Mr Beaubien for Jean Bte Trottier one of the defendants pleaded by exception to the pltff's declaration, that it was irregular and insufficient inasmuchas the conclusions were inconsistent & at variance with the premises therein contained inasmuchas the said declaration alledges that the said Jn Bte Trottier is in possession of part only of the emplacement in question, and Jn Bte Cardinal of the other part, and yet concluding against the said Jean Bapte Trottier that he be condemned hypothecairement for the whole, or that he quit & abandon the whole, when he only possesses a part, and concluding also in the same manner against the said Jean Bte Cardinal, which is contradictory and irregular—

Mr Bedard for Jean Bte Cardinal made

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a similar plea.—

The Court however maintained the declaration as the right of Mortgage attaches to the whole and to every part of the property mortgaged, so that the part possessed by each of the Defendants was liable for the whole of the plaintiffs demand and she would be entitled to her execution accordingly—

Wednesday 20th Febr. 1822.—

Matt.— v. Bricault. } This was an action for the recovery of Lods et Ventes et Cens et Rentes, and was brought against the Defendant as well personally for what he owed during the time of his own possession as hypothecarily for what was due by his predecessors. The Defendant did not appear — The question was whether the personal and hypothecary action could be joined — The Court after looking into the point gave Judgment for the plaintiff —

see Pruth. Ch. 16. p. 180.—
Poth. Introdn au Tit. 20. des arrets & Exons art. 2. No 52. Traité de l'action personnelle & hypothecaire —
Commrs de St Vast. 4e Vol. p. 373.—

De Longueuil & Gaboury } Similar Case.—

Baxter. & Thomas } The plaintiff sued out a Capias ag.t the Defendant, by virtue of which he was arrested but in consequence of the plaintiffs directions the Sheriff liberated him — The plff afterwards served a copy of his declaration on Defendt and after the writ was returned, proceeded to prove his demand ag.t Defendt who did not appear — But the Court dismissed the action

action, considering that the Defendt was not before them, as the writ by discharging the Defendant from his arrest had also discharged the action. —

Brodeur vs Brissette.

This was an action for defamation, in which the Jury gave a verdict for the Plaintiff for five shillings damages and Costs — The Plaintiff having moved for Judgment on the verdict demanded that full costs should be granted to him — The Court at first hesitated, but at length granted the motion, under the impression that the Jury might have diminished the damages in consideration of the costs to be paid by the Defendt but they thought that it would be more adviseable not to take verdicts in this way in future, as the Jury had no power over the Costs, they were sworn to try the issue only between the parties, and to assess the damages, the Costs were an accessary which belonged to the Court to regulate —

Alsopp. &c vs Cook. &c

On rule obtained by pltff agt. Defendt to shew Cause why an attachment should not be granted against him.

It appeared that the plaintiff under a Judgment of this Court had sued out a writ of possession under which he was put into possession of a certain lot of ground, dwelling house & Saw mill on a certain lot of land in the townships of of which lot

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the defendant had wrongfully possessed himself. That some three or four months after the Plaintiff had been so put in possession, the Defd returned and with force ejected the plaintiffs tenant from the saw mill and took possession thereof, and carried on the business of sawing logs therein — Under these circumstances the plaintiff obtained this rule on the defendant to shew Cause why he should not be attached for a contempt to the process of this Court, by opposing the writ of possession and again re-entering after he had been put out by the order and Judgment of this Court.—

It was contended by the defendant that this was no contempt, inasmuchas he had not opposed the execution of the writ of possession, — that the taking possession of the mill several months after the writ of possession had been returned into Court could not be construed into any contempt of a process which had ceased to exist, this could only be a new trespass for which the Plaintiff had his remedy — And the Court being of this opinion the Rule was discharged. c

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The King vs Fraser. c & Stuart. Intervs

The King had obtained Judgment against the defendant for certain duties he owed to the Crown as an auctioneer, on which Judgment execution had been sued out and the household furniture, goods and Chattels of the Defendt had been sold. — previous to the suing out of this execution, the defendant had made an assignment of his property and effects to one Doucet

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for the benefit of his Creditors, and it was agreed that as there were other Judgments against the Defendant in order to save expence, the whole of the effects so assigned should be sold on the execution at the Suit of the Crown saving to all the said Creditors their respective rights priviledges and claims upon the monies levied, the same as if they had been made prior to the said Sale, — which said claims should be heard and determined by the Court — In consequence of this arrangement then Intervention was made by Mr Stuart as proprietor of the dwelling house and premises occupied by the Defendt. claiming a privilege on the monies levied for † house rent, and that the same should be paid to him in preference to the claim of the Crown. —

† one year's.

Stuart in support of his Intervention contended that the Landlord was entitled to a preference for his house rent, cites. Poth. Louage. Nº 226. 228. 252. — Repse vo Privilege. also Vo Bail. p. 22. and Poth. Louage. Nº 255 — where it appears that the preference claimed by the Crown extends only to the taille, which was a subsidy raised on the property of the Subject and a territorial revenue, and of a much higher nature than the Casual duties here claimed but all these laws in favor of the Crown were made subsequent to the establishment of Canada by France and cannot apply as never having been in force in the Country — nor does the law in favor of the taille extend to the Collector of taxes. That the plea to the Intervention in this case does not set up a preference in the Crown to the monies in question —

M.r Ross for the Crown — The question here is whether the Crown or the Landlord has the preference on the monies levied on the effects of the defendant — although in ordinary cases this privilege claimed by the Landlord

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for house rent is founded, but not where it comes in contact with the rights of the Crown, which are always preferred to those of the subject.— at all events and even according to the laws of Canada the priviledge of the landlord against the claim of the Crown can extend only to two terms, or two quarters of the rent. cites Poth. louage Nº. 255.— and altho' the claim of the Crown here is not for the taille, yet the priviledge is the same where it is for the debt of the Crown, and this priviledge extends to every comptable. Repᵗˢ Vº preference. p. 274.— That the priviledge here claimed by the Crown under the Ordᵉ of 1680 of the King of France, must be considered as the law of Canada without any particular registration in the Country, it was a general law and applied in all the Kings dominions where rights were due or could be claimed by the King.— That supposing the Intervening party to be entitled to two quarters rent, yet it appears that he has received fifty pounds on act and also a pipe of wine valued at seventy five pounds this ought to be imputed in satisfaction of these two quarters, and will leave nothing due.— it appears besides that a great portion of the effects sold never made any part of the household furniture, and therefore not within the priviledge claimed.—

Stuart in reply.— Credit has been given for the £50 — and as to the pipe of wine, the imputation has been made by the parties at a time when they could do so, and before there was any question touching the claim of the Crown or of other Creditors.— That the Intervening party is entitled to his priviledge for the whole of his rent in the same manner as if the ordinance of 1680 had never been made, as all laws made in France subsequ to the year 1663, must necessarily have been enregistered in Canada to take effect there.—

By

By the Court—

It is an established principle, that where the Kings right and that of a Subject meet at one and the same time, the King shall be preferred. 16. Viner. 366, 7. Chitty on Prerog. p. 290.—381.— 1 East. 338.— *detur digniori*, is the rule in the case of a Concurrence of right between the King and the Subject. 2. Vent. 268.

But in Countries which, though dependant on Chitty.— p. 26. the British Crown, have different and local laws for their internal governance, such as the plantations & Colonies, the minor prerogatives and interests of the Crown must be regulated and governed by the peculiar and established law of the place.— a principle which must hold in Canada.— The claim here set up by the Intervening party, is for three quarters house rent become due and in arrear at the time of the seizure so that in this respect, although there was only a verbal lease, the right of priviledge in regard of arrears of rent, is the same as if there had been a written lease before a Notary.— Repr. Vo. 13 ail. p. 23.—

Prior to the edit. of 13. Augt. 1669, there appears nothing certain or clearly ascertained by legal decision in regard of the right of preference of the Crown in a conflict of priviledge between the King and the Subject, altho' the preamble to that edict would seem to imply and enforce a renewal of former priviledges by more positive enactments than had formerly existed— And in looking at this edict, it appears doubtful whether it was intended see Edit. 1 Vol. Jer. Gr. Comr. p. 1490. to abridge the priviledge of the landlord to two quarters rent, or to give him a priviledge to this extent which he was not entitled to prior to the Edict, The Court however is disposed to think that the edict was made to abridge and restrain the priviledge of the landlord, from what they can collect of law authorities prior to the edict, and they are of opinion that the question now before the Court must

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be determined according to the law as it stood prior to the edict, as it cannot be considered as having force of law in Canada not having been enregistered there—

In a Case cited by Lebret, in his Traité de la Souveraineté du Roi. p. 556.— 49e action— it would appear as will from the decision of the Court, as from the opinion of Mr Lebret, who was the avocat General en la Cour des Aides à Paris, that the Collector of the Taille, had no priviledge or right of preference over the proprietor to be paid for the taille which the fermier of that proprietor owed— This is a case strongly in point, as the Collector of this tax, the taille, must have exercised all the rights and priviledges of the Crown for the recovery of it, and the situation of the fermier is perfectly analogous to that of the house tenant, in regard of the privilege of the Landlord.— The question was— "Si le "Collecteur a aucun privileze ou droit de préférence "contre le proprietaire, pour être payé de la taille "du fermier"? And by the Judgt of the Court rendered in January 1597— the priviledge was disallowed.—

The Court are therefore of opinion in taking up the principle of this decision, that the claim of the Intervening party ought to be allowed for the three quarters rent.—

April Term 1822.

Thursday 4th. April

Brunet v. Legault } In this case the Judgment of this Court had been reversed in the Court of appeals with Costs to Legault the appellant, and Mr Stuart his counsel had obtained a rule on the plaintiff to shew Cause why execution should not be granted to him on the said Judgment of the Court of appeals.—

Lacroix for the plaintiff stated that since the rendering of the said Judgment the defendant had died, and no further proceedings could therefore be had in his name; that it now became necessary to call in the heirs and legal representatives of the said Legault, in whose name only the Judgment could be made executory— cited a Case of Lacroix. v. Ker, where a similar application for execution had been denied to him, without calling in the heirs.—

Stuart for Legault, contended, that after Judgment rendered the death of one of the parties could not stay the execution— cites. Practicien d'Imbert. p. 389.—

The Court made the Rule absolute— According to the 168th. art. of the Custom, no execution can be sued out against the widow or heirs of a deceased person, until the Judgment rendered against the deceased shall have been declared executory against them.— This principle however holds only in the Case of a Defendant or Debtor but not in regard of the Creditor, the maxim being

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"Le mort execute le vif, et le vif n'execute pas le "mort."— see Fer. Gr. Comᵗ. on 168ᵗ. art. in his remarks on this article.
Loisel Institt. Cout. liv. 6. tit. 5. art. 2
Denizᵗ. Vᵒ Mort. Nº 2.—
Fer. Institt. Cout. liv. 4. Tit. 4. art. 13. p. 474
Quest. de droit de Lamother. vᵒ Mort. Nº 23. of letter M. p. 282. 3. u

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Shuter. u
vs
Thayer.
&
Thayer & Kay
Intervs

In this Case the plaintiff sued out an Attachᵗ. upon his Judgment, and seized a large quantity of Merchandises and effects in the Store of Thayer & Kay.— Thayer and Kay in consequence filed an Intervention in the Cause claiming that the seizure should be set aside, and the goods sized delivered up to them. u

Sewell for the Intervening parties— The property seized does not belong to the Defendant, but to a partnership of which the Defendant is only a member. That partnership property is liable to partnership debts, which when paid, if there remains anything over for the Defendant, his individual or separate Creditors will be entitled to it— That the separate Creditor of one of the partners cannot put an end to the partnership when he pleases, nor demand a division of the property thereof, which would be the Case if a seizure of the partnership property could be permitted for a debt due by one of the Partners.— That there are no conclusions here taken by the pleadings against the partners, nor against their joint property, and the only point in issue is whether the property seized belongs to the Defendant Thayer or

to

to the Intervening parties — according to every principle of Justice and right the debts of the partnership must be first paid. Hulots Dig. 2. vol. p. 534 — Watson on Part.p 263. — It would be ruinous to trade if partnerships could be dissolved in this manner by seizing their whole property for the private debt of one of the partners. —

Rolland for Pltff — This attachment is in the nature of a Saisie Conservatoire — The Intervention here is irregular it ought to have been made in the name of Kay alone for his share in the partnership goods, as the Defend. Thayer can have no right to make any claim — That the Attach is rightly made on the partnership property in order to secure to the plaintiff his rights on Thayers moiety in that partnership, otherwise the rights of a Creditor would be of no avail — That according to the course of proceedings in England, the Sheriff under an execution against one — partner must seize the whole partnership property and leave the other partners to claim their rights therein. Watson on part.p p. 72. & 98. —

The Court were of opinion that the attachment was regular, & that the principles of the Law of England ought to hold in this Case as more consistent with the rights of Creditors, as otherwise the greatest frauds might be practised to the injury of their rights —

see Jacky. v Butler — 2 Rayn. 871.
Chapman v. Koops. 3. Bos. & Pull. 289. —
Doug. Rep. 627. Eddie. v. Davidson —
Taylor. v Fields. 4 Ves. 396. —
Montagine on Partnership. p. 74 & seq.

The Court therefore dismissed the Intervention, leaving Kay to take such steps for securing his rights in the partnership property as he should be advised — Nor did the Court by this

Judge.

I do not mean to give any opinion as to the rights of partnership Creditors on the partnership effects –

Monday 8th. April. 1822.

Gibert vs. Pickle

Action on a Promissory note.—

In the declaration the plaintiff stiled himself Curate of the parish of Maska— To this the Defendant pleaded by exception, that the plaintiff ought to have stiled himself parson or rector of the parish, as there was no such person known as the Curate of the parish and that the french word Curé was not rightly translated by the English word Curate, who was a mere assistant of the parson or rector, or vicair of the Curé.—

Gale for Pltff— The exception is frivolous— the addition of Pltff is besides correct— contends, that Curate is the proper translation of the word Curé, refers for this to St. respecting the enregistration of marriages &c. where it is so translated.

The Court dismissed the exception— All that is necessary is that the plaintiff should assume that title or character that shall distinguish him from other persons, and sufficiently point out to the Defendant the person who calls upon him to answer— This is all that is required by the Code Civil, which in regard of a pltff does not enjoin that his name and surname even should be set out provided he makes himself known sufficiently by any qualité he may possess— That here it was immaterial, whether the pltff assumed the name of Curate, of parson or Vicar, as by either he meant to designate himself as an ecclesiastical person in the particular parish, and as such sufficiently described— That although the distinctions taken by the Defendt in regard of Curate, parson and rector were legal and correct, yet as there was no question before the Court which required a decision upon this distinction, it became unnecessary to consider it.—

Tuesday 9th April 1822.

Aylwin
vs
Cuvillier
&
Cuvillier Oppt

This was an opposition afin d'annuller put in by the Defendant to the execution sued out in this Cause — there were several causes of nullity alledged in the opposition as to the regularity of the writ, and also an allegation that since the rendering of the Judgment the defendant had paid and satisfied the debt — and the plaintiff having moved for a summary hearing thereon, this was opposed by the defendant who contended that the opposition in this case should be regulated according to the usual practice and course of the Court in all cases of opposition — The Court however were of opinion that as oppositions made by a Defendt generally tended to obtain delay, and as the grounds of nullity alledged were such as were to be determined by an inspection of the record, they were of opinion that there ought to be a summary hearing in so far as regarded all such matters of nullity but in regard of the matter of fait alledged by the Defendant that he had paid and satisfied the debt, the parties must proceed according to the usual course and practice of the Courts.

Wednesday 17th April 1822.

Handyside & al. vs Galloway.

On writ of attachment sued out by the Plaintiffs against the goods chattels and effects of the Defendant upon affidavit that Defendt

Grant for the Defendt moved that process should be quashed in default of Plaintiffs shewing the truth of the matters contained in the affidavit, contending that the same were unfounded in fact—

But the Court were of opinion, that where the Plff in his affidavit stated what the law required to warrant the suing out of the process of attachment, this was sufficient and no further evidence was required, nor would they receive any evidence to contradict it, but leave the party to his remedy at law— the motion was therefore rejected.

Friday 19th April 1822.—

Archambault & al. — vs — Fullum & al.

On action brought by the plaintiffs as Syndics, or Trustees appointed for building the Church of St Pierre du l'assomption. against the Defendants as Security for the undertakers of the work, in order to recover the damages which had been adjudged to the Plffs against the undertakers.—

Stuart for the Defendant Poitras, took exception to the declaration upon two points, 1st in regard of the authority under which the Plaintiffs acted not being sufficiently set out in the declaration, and secondly that no discussion was alledged to have been made of the principal debtors, the undertakers which he contended was an essential preliminary in an action against the Caution, and that till this is done the caution are not bound to indicate any property of the personal debtor to the plaintiff, whereon to make or continue the discussion.— cited Pothier. Obl. Nº 411.—

Rolland for the plaintiffs contended that the declaration was sufficient and the authority under which the Plffs acted was sufficiently pointed out.— That discussion is a dilatory exception of which the Defendants as Cautions may avail themselves, but the Plffs are not bound to make, nor to alledge by their declaration that they had made the discussion, to entitle them to their action against the Caution — cites. Repse Vo Caution and Vo Discussion — 1 Pigeau. 186. — Denizt Vo Discussion.

That

That the plea of discussion cannot be admitted as a peremptory plea to the action, but only as a dilatory plea, and even in this case it is necessary that the party pleading it should indicate the property to be discussed and also advance the monies necessary to make such discussion. — cites case of Thayer v. Marchand & al Cps. Term 1819. where it was so held. —

The Court were of opinion that the plea of discussion is only a dilatory plea, and must be pleaded by the Defendant, otherwise it cannot be noticed, and in pleading this plea the Caution must advance the necessary monies to make the discussion — That this had always been the opinion of this Court, and Judgt had been given accordingly — That there were respectable law writers who held a different opinion, and admitted the plea of discussion to be a peremptory plea to the action, but these were comparatively few in number and the Court saw no reason to alter the opinions they have already held on this point, which was founded upon numerous authorities — The Court in other respects held the declaration to be sufficient and therefore dismissed the plea of exceptions —

See Repe Vo Discussion — model of plea on note — it corresponds with 1. Pigeau. p. 186. 187. —

2d — Vo Caution. p. 773. 1st Col.

2. Boury. p. 432. —

Poth. Obl. No 410. —

2 Argou. ch. 13. p. 475. —

Casey-vue Baillé. v. Brunelle. 4 Oct. 1810.

Ravant. Proc. du Chatelet. p. 21. —

St Vast. Come sur les Cout. d'Anjou & Maine 4 Vol. p. 377. —

Cadieux & Durand

action of debt on transport.

The declaration stated, that by act executed before Cadieux and his Colleague, public Notaries, bearing date the 26 Oct. 1818, the defendt. and Marie Joselte Gaudry his wife, made an exchange of a certain lot of land with Jerome Durand fils, and Marie Ursule Leduc his wife, in consideration whereof the said Defendant and his wife became bound and promised to pay to the said Jerome Durand & wife the sum of three hundred pounds of soulte & retour on account of which sum the said Jerome Durand and wife then and in & by the said act acknowledged to have received from the said defendant a sum of £95. 16. 8, and as to the remaining sum of £204. 3. 4 the said defendants bound and oblized himself to pay in two years to the said Jerome Durand and wife from the date of the said deed, save and except the sum of £24. 15. which the said defendant was to retain in his hands on account of a Constitut on the lot received by him in exchange.

That by act executed before Mr Lepailleur & Doucet public Notaries bearing date 9r. Augt. 1819, the said Jerome Durand transferred and made over to the said plaintiff, a sum of fourteen pounds which he the said Jerome Durand acknowledged to be due to him by the said Defendant with a still larger sum under and by virtue of the aforesaid act or deed of exchange of 26r. Oct. 1818, the said sum to become due and payable on 26 Oct. 1820, the said Jerome Durand subrozating the said plaintiff in all his rights and actions to have and demand from the said Defendant the sum of fourteen pounds, and to give all necessary acquittances and discharges for the same in the name and behalf of the said Jerome Durand.

That

That on the 11th Augt. 1819, the said transport was duly signified to the said Defendant by one Vallerand a bailiff of this Court, who left a copy thereof with the Sd. Defendt. by virtue of which transport so signified the said Defendant became bound and liable to pay to the said plaintiff the said sum of fourteen pounds as out of the monies he the said Defendt owed to the said Jerome Durand by virtue of the aforesaid deed of exchange, — but which said sum of fourteen pounds the said defendant refuses to pay to the said plaintiff although often demanded — Wherefore &c

Plea. That Defendt by the aforesaid deed of exchange purchased and acquired from the said Jerome Durand & wife the lot of land mentioned in the declaration, yet the said Jerome Durand and wife did in and by the said deed warrant the same to be free and clear of all mortgages and incumbrances, and that the said lot of land is bound and mortgazed to one Gilbert Leduc and to one Joseph Leduc, and also to the wife of him the said Jerome Durand now separated as to property from her said husband in a larger sum of money than that due to the said Jerome Durand on the said deed of exchange, vizt. in the sum of 5024 livres, as appears by acquittances now filed, by reason whereof the said Defendant does not owe nor is he bound to pay to the said plaintiff or to the said Jerome Durand any sum of money whatever by reason of the aforesaid deed of exchange. —

Replication — That even in admitting the right of the said defendant to pay the mortgage claims of the said Gilbert Leduc and Joseph Leduc to the prejudice of the plaintiff's claim, yet the said defendant could not legally acquit and discharge the claims of the said Marie Ursule Leduc the wife of the said Jerome Durand inasmuchas he the said defendant had nothing to apprehend from any prosecution on the part of the said Marie Ursule Leduc, who by the said deed of

Exchange

exchange had undertaken to warrant and secure the defendant from all claims and demands in and upon the said lot of land so given in exchange to the said defendant, jointly with her said husband

The Court were of opinion, that although the Defr might have resisted any demand of the said Marie Ursule Leduc for the payment of any mortgage claim she had on the lot of land in question beyond the sum of money he had in his hands owing to her husband, yet in as far as this sum of money would extend, he had no interest to enter into such contest, as it was immaterial to whom he paid it — but the defendant was justifiable in having paid this money to the said Marie Ursule Leduc in preference to the plaintiff, because the right of the plaintiff could not be greater than what he derived from Jerome Durand, and Jerome Durand could not by his act deprive his wife of any of her rights on his property, for what was due to her for her matrimonial claims, as she had a mortgage upon all his estate for the satisfaction of these claims, so she had a preferable right to the monies in the hands of the defendant over the plaintiff or any person claiming under a transfer from her husband — The plaintiff stands in the rights of the husband, the Defendant supports those of the wife, and the Court thinks that the claim of the wife must prevail. — action dismissed.

Hertel De Rouville
vs
Jourdain fils

Action for recovery of Lods & Ventes &c.

In this case the Defendt did not appear.

The declaration stated, that by deed executed before Petrimoulx and his colleague notaries, bearing date at the parish of St Jean Baptte the 8 July 1803 one Jacques Jourdain and his wife sold and made over to the defendant their son, a lot of land in the said declaration mentioned, for and in consideration of the sum of 2300 livres - That upon the said Sale there became due to the plaintiff as Seignior, for his lods et Ventes, a sum of £8. 5. 10. -

That on 28 June 1810, by deed executed before M. Rolland and his colleague notaries, one Jean Baptiste Blanchard dit Renaud, Tutor to the minor Children of the marriage of Antoine Jourdain and Charlotte Renaud his wife, sold to the said defendant a certain other lot of land as mentioned & described in the said declaration, for and in consideration of the sum of 350. livres, and to pay to Jacques Jourdain and wife during their lives certain articles for their subsistence and maintainance, and in general to fulfil all the charges and obligations to which the said Antoine Jourdain was bound by the act or deed of 8 July 1803, which said articles of Rente & pension viagere the plaintiff estimates at the sum of 2300 livres, so that upon the said last mentioned Sale there became due to the plff for his Lods & Ventes a sum of £4. 12. 2 - for which Lods & Ventes amounts in the whole to £12. 18. - the action is brought. -

The two following acts were produced and filed in support of this demand

1st

1st an acte, stiled, Vente par Jacques Jourdain et son epouse, a Antoine Jourdain leur fils, dated 8. July 1803 – The terms of this act express a sale by the father and mother to the defendant their son, of the lot of land first mentioned in the declaration with all their moveable property, save and except certain articles which they reserve to themselves during their lifetime – This sale is made for and in consideration of a sum of 2300 livres, in discharge and satisfaction whereof the defendant binds and obliges himself to pay to his said father and mother a certain rente et pension viagere according to the custom of the Country, and as generally contained in deeds of donation à rente et pension viagere – To this act Franc. Tetro and Marguerite Jourdain his wife another of the children of the said Jacques Jourdain who confirm and ratify the same – and by other subsequent acts two other children of the said Jacques Jourdain, that is, Franc. Belvalle and Helen Jourdain his wife, and Franc. Tetro and Magdelaine Jourdain his wife, also confirm the said deed –

The second act. purported to be a deed of Sale by Jean Bte Blanchard dit Renaud, Tuteur ad hoc to the minor children of the said defendant with his late wife, by which the rights of these children (under an avis of an assemblée de parens) in the half of the aforesaid lot of land, which had come to them in right of their mother, were sold and transferred to the said Defendant as the last and highest bidder at the church-door, where the same had been set up for sale –

The Court were of opinion that under these deeds and transactions the Plaintiff was not entitled to recover

recover any lods et ventes, because they considered the deed made by Jacques Sourdain and his wife to the Defendt their son, not to be a deed of Sale, properly so considered, but a family arrangement, by which it appeared to be the common consent and understanding of all the family that the Defendant should take the land and make a suitable provision for his father and mother — this is apparent from all the other children ratifying the deed, a thing wholly unnecessary had it been merely intended to operate as a deed of Sale between the parties — that the other deed made by the special tutor was in the nature of a licitation or partage among Coheirs and operated no right of Lods & Vents — The Court therefore dismissed the action —

—

Sevreau vs Birch.—

On an action petitoire.—

The declaration stated — That whereas heretofore to wit, on the first day of March now instant and for a long time before, he the plaintiff was and ever since has been and now is the true and lawful owner and proprietor of a certain farm, lot, piece or parcel of land situate, lying and being in the Seigniory of Lachenaye in the district of Montreal, containing 79 acres and two thirds of an acre — the said farm piece or parcel of land containing two arpents four perches and three tenths in front and two arpents one perch and $\frac{24}{100}$ parts of a perch in the rear line by 33½ acres in depth on one line and 36 arpents and one half in depth on the other line, bounded in the front by the rear line of farms of the petite Mascouche à la base de profondeur des terres de la petite Mascouche in the rear by lands belonging to Nicolas Caron, Jean Marie Rochon and Michel Leclaire — on the south west side by one Paul Beauchamps, and on the north-east

by

by the Revd Andrew Glen — That he the said Defendr well knowing the premises but intending wrongfully and injustly to deprive the said plaintiff of his property in the said farm, did &c —

To this declaration exception was taken by the Defr that it was insufficient; and that the plaintiff could not maintain an action petitoire thereon, as it did thereby appear, how or in what manner the said plaintiff became the owner or proprietor of the lot of land in question — That in the action petitoire it is necessary for the plaintiff to set out his title — cits. Ravaut Prac. du Chatlet. p. 10. and 2 Pigeau 113. where form is given and it has been so held in appeal —

Bosson for Plaintiff contended, that all that was necessary was that the property should be sufficiently and clearly described, according to the requisites of the Code Civil. tit. 9. art. 3 — Prac. de Lange — Stile de Gamet — and Jousse Prac. Civil

The Court were of opinion that in this action, not only the tenans et aboutissans should be described, but also that the right and title of the plaintiff ought to be set out, because it is upon this right and title that the cause must be determined — If it were allowed the plaintiff to state that he is the owner and proprietor of the estate generally and to fyle his titles in support thereof — the same latitude must be allowed to the Defendant, in which case the titles could only be brought forward in evidence and all questions touching their validity must then be determined as questions arising on the evidence, when the very gist of the action depends upon these questions, — This being however a first instance wherein the Court had occasion to express an opinion on this point, they allowed the plaintiff to amend —

June Term 1822.

Monday 3d June 1822.

Froste & Porter vs McKenzie

On action against the defendant as Security for one Rodk McKenzie, for goods Sold &c—

Rolland for the defendant took exception to the action contending that it was premature, that Pltffs ought to have proceeded in an action against the principal debtor in order to establish a debt against him— and here he distinguished this Case from those Cases where discussion was not necessary, as in debt upon a deed, upon an obligation or other matter where the debt was liquidated and ascertained — here it was not liquidated nor certain, and the debtor himself was therefore the proper person to litigate this point — as he may have a discharge in his pocket to extinguish the debt — or he may have imputations of payment whereof to avail himself, and other matters of defence of which the defendants as his Security are ignorant, and who ought not therefore to be called upon until this question be settled with the principal.—

Cale for the plaintiffs on the contrary contended that in all Cases the Caution were liable to be called upon in the first instance, and they cannot avail themselves of the discussion unless upon those terms and conditions which the law required — here the defendant had pointed out no property, of the principal debtor, nor made tender of any money to defray the expense of that discussion

The

The Court considered that they could make no distinction, between this Case, and the Cases where the debt was liquidated by obligation or Judgment inasmuchas in either case the Caution had a right to contest it — if the plaintiff established no debt there could be no Caution, as until this was done there attached no responsibility on the Caution — if this responsibility was made out the Caution could not claim the discussion of the principal debtor, without pointing out property and advancing the Costs Exceptions dismissed. —

Wednesday 12th June 1822.

McCallum v. Stein.

Action on Obligation.—

The defendant pleaded payment, and produced and filed with his plea, a receipt and discharge from the plaintiff for the debt in question.

The plaintiff moved that he might be permitted to make an inscription en faux against the said paper writing so filed by the defendant, and that the defendant should be held to appear and declare whether he means to make use of the said paper writing in support of his plea.

This was objected to by the defendant, who stated that the application came too late as the Cause was at issue and had been set down for hearing last term on the plaintiffs motion — That the motion ought also to be rejected because, an inscription en faux on an acte sous seing privé became unnecessary in any case, as it carried no authenticity along with it, and must be proved before it can be received in evidence — and the proceeding would besides in such cases, be — attended with much unnecessary delay and expence.

Mr Sullivan in reply, denied that any replication had been filed, or that the Cause had been set down for a hearing last Term — That the inscription en faux was admitted as well against all acts and writings sous seing privé, as against authentic acts, and if the case should turn out to be a forgery, it became essential for public Justice to be ascertained whether the Defendt has really and truly authorised the production of the receipt in question, cites. Poth. Proc. Civ. — Denizt Vo Faux. — Repe Vo Inscription en Faux. — Prac: de Lange. 1 vol. 464. — case at Quebec Grant vs Millar.

The Court were of opinion to grant the motion —

That

That although they considered the inscription en faux unnecessary in any Case of an act sous seing privé, yet as the law appeared to authorise it, they would allow the proceeding reserving to determine upon the Costs which might arise thereon— That the motion also was granted upon the principle that no Replication had been filed nor the Cause set down for hearing as alledged.—

Monday 17th June 1822.—

Dubord vs
Eno.—
vs
Armstrong
vs
Leguay. opp.

On the opposition afin de conserver of Leguay, claiming a privilege for wages

In this Cause the plaintiff under a Judgment obtained by her against the defendant had caused a Schooner with her apparel to be seized and sold.— The opposant was a Sailor who had been employed for a year and upwards in the employment of the Defendant and had served as such in different vessels belonging to the Defendant, but the Opposant had been employed only about 8 or 10 days on board of the Schooner in question within the last year in which he had been in the service of the defendant— The Opposant had obtained a Judgment against the Defendant for the amount of his wages, and now made an opposition claiming that the same should be paid to him out of the proceeds of the Schooner sold in preference to all other Creditors of the Defendant, in as much as he had a privilege for his said wages upon all the effects and property of the defendant, who was now en déconfiture cited. 2. 13 Ours. p. 688. 9. Repre vo Domestique. and vo Privilege. p. 689. 690.—

Ross for Plff. contended that Opposant was entitled to no privilege under any of the authorities cited, that the Opposant could not be considered as a domestique but as a Sailor, and as such he was entitled to his privilege only for the last voyage made by him on board the vessel sold within the last year of his service— Poth. Louage. N° 227— but here the Oppos— had not served at all on board the said Schooner within the last year of his

his service, except a few days, which could not enter into consideration as any regular service.—

The Court were of opinion that the opposant could not be considered in the character of a Domestique or a person attached to the house and family of the Defendant, and not therefore entitled to any privilege for his wages on that account— That had the Oppt contributed to the navigating or to the care & managemt of the vessel sold, within the last year of his service with the defendant, he would be entitled to his privilege thereon for his wages, but this not being the Case, the Court dismissed the Oppts claim for a privilege and directed that he should be collocated au maille la livre with the other Creditors.—

Irvine & al
vs
Mc donald
&
Raymond oppt

On Opposition afin de conserver &c.

In this case the plaintiffs had caused a certain house and lot of land belonging to the Defendant to be sold, and the monies levied having been returned into the Court by the Sheriff Opposant claimed that the amount of his demand should be paid to him in preference to the plaintiffs, as having a prior mortgage thereon.—

The Opposition of the Oppst was founded on this,— the Defendant and another his partner in trade had purchased of the Opposant several building lots in the vicinity of Montreal, upon Constitut,— the deed of purchase was of a date

prior

prior to the plaintiffs Judgment, and as some arrears of rent were due, the Opposant claimed that these arrears should be paid to him, and also that he should receive the amount of the Capital of the said Constituts, ~~with~~ the lots of land upon which the said Constituts were created, were still in the possession of the defendant and had not been sold, nor any proceedings had in regard thereof.

Bourré for the Oppos.t contended, that under the general mortgage he had acquired upon all the defendants property by virtue of the deed of sale of the said lots of land, he had acquired a mortgage upon the house and lot of land of the Defendant which had been sold in this case by the Sheriff, as well for the Capital of the Constituts, as for the arrears of rent thereon that although these Constituts had not been sold as being the property specially mortgazed to the opposant, yet he had no other means of securing his right under the general mortgaze than by making the present opposition, as it was almost certain that the Constituts would not sell for their real amount and where the other property of the defendant so mortgazed to the opposant was about to be disposed of, he was entitled to exercise the right of general mortgaze, and leave the other creditors their recourse agt. the property specially mortgazed after he, the Opposant had been satisfied - cites. Repv. vo. hypotheque - vo. Vente. p. 141. - 2 Bourg: 543. 544. - and Case of Hodgson. v. Stall. and Henry. Oppt.r - Oct. 1819. -

Gale for Pltffs. The opposant who has a hypotheque speciale, cannot be allowed to bring into operation his hypotheque generale, until discussion shall have been previously

previously had of the property specially mortgaged - as there may be more than sufficient to satisfy the claim of the opposant out of the property so specially mortgazed, and it would be great injustice done to the Plaintiffs and other Creditors of the Defendant if they should thus be deprived of their just demands upon the other property of the Defendant, more especially as it does not appear that he is en deconfiture. Loyseau liv. 3. ch. 8. N° 29. The opposant must first discuss the property specially mortgazed. Poth. des Hyp. p. 144 edit. in 8vo. There is a fact stated in the opposition that the Opposant, by the Contrat du Constitut, should be entitled to claim the Capital, if within one month from the date of the deed the Defendant had not paid the Lods & Ventes upon that deed to the Seigneur but this is a penal clause and cannot be enforced against third persons - Poth. Obl. N° 164. and N° 349.

The Court by its Judgt. directed, that inasmuchas the opposant hath a right of mortgaze since 27 Dec 1817 upon the lands & tenements of the defend^rs sold by virtue of the writ of exon sued out in this Cause for securing the payment & satisfaction of the monies claimed by the s^d Oppt, but which right he cannot now exercise until it shall appear that the property specially mortg^d to him for the payt. of the said monies shall have been legally discussed, and upon which discussion, that the said property shall be insufficient to pay & satisfy the amount due to the s^d Oppt. by reason of his said opposition - it was ordered that so much of the monies levied as the s^d Oppt. w^d be entitled now to claim accord^g to his priority of mortgaz, be paid to the Creditor or Creditors next in order upon the distribution to be made of the s^d monies so levied, on condition that such Creditor or Creditors receiving such monies shall give good & suff. Security to bring back & pay the same w^th interest in such manner and to such persons as this Court shall direct

Knower J

Knowerdal
vs
Gregory

This was an action instituted against the defendant by George S. Knower and and Metcalf Haven, Copartners and traders, for defamatory words spoken of them as such traders, by the defendt

The words charged in the declaration were, — "Knower & Haven are not of a good "standing in business — they have been guilty "of an act as bad as robbery, by including you "(one Riegles) to become responsible to me (the "Defendt) for the amount of the note — their "business is merely a floating business, which "appears good to day and will be bad to morrow — "You will do well to provide for the payment "of the whole of the note by the time it becomes "due, for they (the plaintiffs) will not be able "to pay it." and concludes for damages generally but no special damages are laid —

Plea of demurrer to the declaration — That the action cannot be maintained by the plaintiffs jointly or as partners without alledging a special damage —

Sewell for the defendant contended, that two or more plaintiffs cannot join in an action for defamation, as the injury is separate, so must the remedy be — that there may be a greater injury done to one of the parties than to the other, and

in

in that case it would be impossible to apportion the damages on a joint action. 1 Dyer. N. 112. St. 28. Hen. 8. — 1 Com. Dig. 276. 2 Dareau 349 But an action may be maintained by Partners for defamatory words, where there is a special injury done to them in their trade & dealing and a special damage laid therefor in the declaration — 3. Bos. & Pull. p. 105. — Watson on Partnership — Here no special damage is laid which is irregular, because a partnership or firm is a moral entity and cannot suffer damages, but they must appear to exist and apply to the trade and dealing carried on by that partnership in some special or particular instance which ought to set out — 1 Chitty on Pleads. 54. 55. 2 East. Rep. 426. —

O Sullivan for the pltffs An action for defamation can be maintained, when they allege to have sustained in injury in their joint trade and calling — where the injury is joint so must be the remedy — That the Plaintiffs here could not divide their action and bring them separately, when the injury affected them only in their joint capacity, and in tort as well as in contract the action must be joint where the injury affects both parties equally — see. Sander's Reps. 116. letter A. note 2.

The

The Court considered, that the rule to be followed on this point appeared to be plain and simple — where two or more suffer by an injurious act, and the damage to one is the same as to the other, they are jointly entitled to their remedy for reparation — here the injurious act was done to both the plaintiff at the same time, not affecting one of them in particular, but both equally — one loss has been sustained, and therefor one satisfaction only is due and to this satisfaction the one plaintiff has not a better claim than the other, of necessity then both are jointly concerned in demanding it — This case is therefore to be distinguished from those where the injury or inconvenience to the one, is distinct from that to the other, as in such cases, the right of indemnification must also be distinct, since what affects the one is matter of indifference to the other. This seems to be the rule by which the Court ought to be guided, as they find no principle or decision laid down by the writers of French law on this question — The few authorities to be met with in the English books would incline to support the defendant in his plea — but by the law of England many words are not actionable which would be so by the laws of Canada, yet if a special damage is laid, even where the words are not in themselves actionable, because where a special injury arises by the act of another, although not inhibited by law, yet a reparation is due — and this would seem to be the principle of decision in the case cited from 3. Bos. & Pull. 150. Cook. v. Batchlor —

The

The decision in that case does not go the length to say that partners cannot join in an action for defamation, or that the words were not actionable — this is avoided by laying hold of the principle, that as a special damage was stated, it was unnecessary to enquire as to the other points. The editor of Saunders's Reps. (2. Saund. Rps. 117 (a) says on this point — "though there was special damage
" laid in the declaration in this case, yet if words
" are actionable only because they are spoken of
" persons in the way of their trade, I conceive that
" two or more partners may join in an action for
" the words though they had sustained no special
" damage thereby" which seems to be a correct opinion — for we find it laid down, that if partners are slandered in their trade, the injury is joint, because the means of acquiring property is the object impaired, and in those all are concerned. If one partner sustains in addition to general, a special damage, he has in addition to the joint, a separate action — Where several are injured by a malicious pros.n or vexatious suit, they are in general separately aggrieved, since the damage to each is distinct — one does not suffer by another's imprison.t — by the diminution of his fame &c. but to this rule exceptions occur, where the suffering parties being partners are scandalized in their trade by the prosecution, and where they are joint owners of the money paid for defending it, as where borrowed on their joint account — and other exceptions which rest upon the same principles as these may readily be conceived — Defendants plea over-ruled.

Hammond on actions. 41. —

Wednesday 19th June 1822.

Henderson
vs
Babuty

This was an action on a lost note, which had been made by the defendant to the plaintiff — it was stated to be dated in Octo 1817, and payable in May following — The pltff had indorsed the note to Messrs Porter and Froste, but the indorsment not being full, it did not transfer the legal interest to Porter and Froste — On this indorsement however Porter and Froste brought an action against the defendant but it was dismissed from the defect in the indorsement. An action was afterwards instituted by the present pltff against the defendant on the same note as the payee, but on his examination on faits et articles that he had no interest in the note, and that it was not for his benefit nor at his risk, that the action was prosecuted, the action was again dismissed as it did not appear to the Court in whom the interest was, or that the suit was instituted with his consent or for his benefit — The present action was thereupon brought again by the same plaintiff as the payee of the note, but under different circumstances The plaintiff who had received value for the note from Messrs Porter and Froste, made a special transfer to them in writing by an act bearing date 23d. March 1820, and thereby conveyed to them and their assigns all his right and interest therein, and authorises them to prosecute the payment thereof, either in his, or their name or names, and on 9th Sept. 1820. R. Froste transfers all his rights under the said assignment to his partner Mr Porter — And by a memorandum on the back of this transfer it is stated that the present action is brought at the request and at the proper costs and charges of the said Porter —

To —

To prove the making of the note Mr Porteous one Plunkett and the said Frost was called. Frost also proved the loss and destruction of the note by its having been torn and burnt — The Defendant objected to the testimony of Plunkett and Frost as interested Witnesses — the first because it appeared that the note had been originally made by the Defendt for value which had been paid to Plunkett — and to the second, because as Indorsee he could not be examined as a witness on account of his interest also — both these objections however the Court over-ruled at the enquete —

Beaubien for the Defendant pleaded first chose jugée, in consequence of the judgment dismissg the former suit of the present pltff — he moved to reject the testimony of Thomas Plunkett and Robert Frost on account of their interest, and also the exhibit No 1. filed by the pltffs in the Cause, being the act of transfer above mentioned, inasmuchas there was mention made of it in the declaration, and it did not appear to have any connection with the present action — That by rejecting this testimony there would be only one witness who spoke to the making of the note which was not sufficient, as this could not be considered as an affair de commerce, and so considered by this Court, as the Defendant was not a merchant or trader, but a boarding house keeper, and the note was not given for goods sold nor for any thing regarding trade — that the simple billets à ordre are not commercial, and therefor the rules of evidence according to the laws of England cannot be received.

That

That the St. 34 Geo. 3. regarding promissary notes negotiable in any case except when made & subscribed by a merchant &c That the depositions in the cause have also been informally taken, as they do not state whether the witnesses examined were related in any degree to any of the parties.— That the exhibit No 1. — ought to be rejected as it has no connection with the Cause and besides that the interest in this note is in Mr Proctor who ought to be the plaintiff in the Cause — That the plaintiff in this Cause has made no other or better proof than he made in the former Cause, the case is the same in all points and the same Judgment ought to be given — That there can be no action on a lost note. Chitty on bills 168. 169 — That the action ought to have been in the name of Frost and Porter who became seized of that right by vertue of the signification of transport to them by the pltff. Poth. Change. No. 38 to 42.

Gale for the plaintiff — The action now brought is differently supported from any of the former actions, if the present pltff was dismissed in the former action, it was because the Court did not see who was substantially the Plaintiff, or if any one was authorised to bring the action but the present action although in the name of the plaintiff as having the legal interest, is also brought by the authority and at the risk and experce of Mr Porter who has the beneficial interest — The only question before the Court is whether there be sufficient proof of the facts alledged, and in determining this the Court must be of opinion with the pltff that this is a Commercial Case, and that none of the testimony adduced ought to be rejected on the score of interest as no such interest can exist in this Case — The note in question being made payable to order is of a commercial nature, and evidence of its loss must be

admitted

admitted according to the rules of evidence in England. ells. Nouv. Denizt. vo adhiré.

By the Court –

It is clear enough that by the instruments of transfer produced in evidence that the right of Henderson the plaintiff to recover the amount of this note, is vested in Mr Porter, and the plff himself admits that the suit is not instituted for his benefit nor at his risk – it seems therefore to be a question whether Mr Porter can maintain his action in the name of Mr Henderson, either by operation of law, or under the special transfer made to him, without any allegation in the declaration that the beneficial interest in the note is vested in him, Porter, and that he is the person suing through the means of Henderson. By the law of England where a chose en action is transferred, the action must be in the name of the assignor, except in the particular case of bills of Exchange &c, and by the law of France – "Le "Cessionaire peut agir par action utile en son nom "soit que l'action cedée soit personnelle ou réelle, "ou au nom du Cedant." – by which it would seem that an option is given to the Cessionaire, to sue in either right – There appears no reason here why Porter might not have sued in his own name, but he was not bound to do so, all that we have to enquire is, whether it is Porter who is acting as the substantial Plaintiff, and we are satisfied that it is, and by bringing the action in this manner no injury is done to the Defendant.

Chitty on Bills p. 7.

Lacombe. Vo Transport. No 5.

This

This action is therefore materially different from the former instituted by the same plaintiff, as we here see the person at whose instance and for whose benefit the action is brought — in the former action this was not the Case, as there the action might have been brought by Henderson to put the money into his own pocket without the privity or consent of the real owner after a transfer of all his right to that owner — here therefore the plea of chose jugée fails, as the cases are different — In considering the objection to the testimony of Pluckett and Frost, the Court thinks it is not founded, as the Case must be governed by the rules of evidence laid down by the laws of England: a note of hand payable to order is a negotiable instrument by the law of France it is considered as a billet de commerce and has been so held by the Courts in this Country, & particularly in the Case of Henderson & Armour, vs Dieffenback, in Appeal. July 1809. — The St. 34. Geo. 3. does not destroy this negotiability, but in certain cases directs an indorsement to be made in a certain manner, and in regard of proof thereon, the exception contained in the last section of the Statute, would seem to imply, that only the notes which are subscribed with the mark of the maker, shall require two witnesses to prove them. The Court are therefore of opinion that Judgment must be entered for the plaintiff. —

N. Denizt. Vo Billet de Commerce S. 2. No 15. —

Guibert. —
vs
Murphy & al
& Sabourin Gar.

On motion for an attachment against the gardien. —

In this case a Saisie-arret had been sued out in the first instance against the goods and effects of the defendant, and the Gardien had been appointed to the charge thereof — The Plaintiff afterwards obtained Judgment against the Defend^r but nothing was ordered thereby in regard of the effects seized, that they should be sold or otherwise disposed of — Upon this Judgment the plaintiff sued out a writ of fi. fa. in the common form, by virtue whereof the Sheriff called upon the Gardien to deliver the effects of the defendant which had been committed to his charge in order that he might sell the same under the said writ of execution; the effects could not be found in consequence whereof the Sheriff made his special return stating his seizure of the effects under the writ of Saisie-arret, the appointment of the gardien, his calling upon the gardien, and his failure to deliver up the said effects to be sold under the said writ of execution and as defendant had no other effects that he could find, he returned the execution not satisfied in any part and annexed thereto the Proces Verbal of Seizure made by his bailiff, one Boudon, on the aforesaid writ of Saisie-arret, in which was set forth the effects so seized and the appointment of the gardien. —

In consequence of the above proceedings, M^r Bourré for the plaintiff obtained a rule on the gardien to shew cause why an attachment should not issue against him for not producing the effects seized when thereunto required. —

Vigé

Vigé for the gardien – In the execution sued out by the plaintiff in this cause, there is nothing directed in it regarding the seizure or sale of the effects in the hands of the gardien – it is true it refers to a Proces Verbal of one Boundon, but this Court knows nothing of this Boundon and can take no notice of his proces Verbal the Sheriff is the only executive officer this Court knows. That the Judgment rendered in this Case, says nothing of the effects seized which had been put into the hands of the gardien, and under the writ of fi. fa. the Sheriff had no authority to call upon to deliver up the effects he held under the writ of Saisie-arret.–

Bourré for the plaintiff– The gardien is appointed under orders and authority of the Sheriff, and is – responsible to him, and the refusal of the gardien to deliver up the effects committed to his charge makes him liable to an attachment– That the omission in the Judgment to enter the usual order for the sale of the effects seized, is not material in this case nor can it affect the rights of the Plaintiff, nor is the gardien discharged thereby, he is the officer of the Sheriff, and must comply with his directions.–

The Court were of opinion that the gardien was liable to the attachment,– that is not for him to enquire into the nature of the Judgment rendered, unless it had been to discharge him from his responsibility as gardien, nor can he object to the authority of the Sheriff, under whose appointment and authority he acts, and was bound to deliver up the effects in question when thereunto required by the Sheriff– Rule absolute.–

M.Pherson.. vs White & al & Fellows. Opp^t & Adams, a bailiff mis en Cause.

On a rule obtained at the instance of the Opposant upon Adams, a bailiff, to shew cause why he should not be held to bring back certain goods and Chattels of the Defendant, which were purchased by the said Adams at the sale of the Defendants effects under a Writ of execution sued out in this Cause with which execution the said Adams was charged by warrant from the Sheriff –

The Court after hearing the parties, made the rule absolute. – see. Rep^r V^o Adjudication – and V^o Huissier. –

Sandborn. vs Doucet, Cur^t

On action against the defendant as Curator to the estate of M. & S. Dumas, for work and labor done as a Carpenter and Joiner –

The declaration contained the usual money counts in assumpsit –

Plea. Non assumpt^t – and plea of payment in money and in a certain note of hand made and given by the late Sam^l L. Dumas to the said pltff, dated 9^th Febr^y 1820

Replication – joins issue on first plea – and on second states, that the late Sam^l L. Dumas and M. Dumas on 9^th Febr^y 1820 gave Pltff a certain promissory note signed by them for the sum of £332. 6^s payable in all the month of June then following, but that it was understood and agreed by and between the said parties

at

at the time of making the said promissory note, that the same when paid and not till then should be considered and held as a payment and satisfaction of so much of the plaintiffs demand aforesaid and not otherwise but that the said promissory note was not paid by the said Dumas to the said plaintiff in all the month of June after the date thereof, nor at any time since, by reason whereof the Plaintiff is founded in demanding his Judgment against the Defendt

In support of the plea, the Defendant filed an account made by Pluff agt the Dumas, the balance of which was stated to be £332 - and at the bottom of this account was the following receipt - "Recd of Mr &
" Saml Dumas, his note of hand, dated 9th Febry 1820 in
" payment of the above work and labor, which when
" paid will be in full of the above account. Smith Sanborn"

The note produced and filed by the Plaintiff was in the following words & figures - "In all the
" month of June 1821, we promise to pay to Mr Smith
" Sanborn the sum of three hundred and thirty two
" pounds Curt, with interest for value recd till full
" payment - Montreal 9th Febry 1820. M & S. Dumas"

Mondelet for the Defendant contended that there was a novation of the debt and that the plaintiff by accepting the promissory note of M. & S. Dumas, had discharged them from any demand as to work and labor done by him - cites Domat, Tit. Novation. - and further if Plaintiff should recover upon the present demand he would also be entitled to another action upon the promissory note now in his possession. -

Ogden

Ogden for Plaintiff – contended on the contrary that the promissory not was accepted by the plaintiff conditionally, to wit, that when paid it should be in discharge of his demand, but this condition not having been complied with, it was of no avail, and the same as if it had never been made – That the – accepting a note of hand upon these conditions was no novation of the plaintiff's original demand and as to the note itself the plaintiff had filed it in Court there to remain, or be otherwise disposed of as the Court shall see fit. –

The Court were of opinion that the action was maintainable, as there had been no novation of the plff's demand, and the non-payment of the note within the time the time stipulated for the discharge of it, left the Plaintiff at liberty to bring the present action, upon his giving up the note –

Judgt for Plff

J. J. Rep. Owenson. v. Morse.

Smith. – v Beers. – } On action of revendication for the recovery of a dark bay colt, value £30.

Plea – denies allegations in the declaration – and further, that on or about 26th Febry 1821, at Chatham a certain wager or bett was laid between the plff, and Defendant, that he the said defendant could not then and there produce in ready money a sum

of

of seventy five pounds, and it was agreed that in case he the said defendant did then and there produce the said sum of seventy five pounds, he the said pltff would give him the defendant the bay colt in question and in case he the said Defendant could not then and there produce that sum in money he the said defendant would give the plaintiff a certain horse belonging to him the said Defendant – in consequence of which agreement the said pltff did then and deliver the said bay Colt into the hands and possession of one Osbrom and the Defendt at the same time delivered his said horse to the said Osbrom, who was to hold and keep the said Colt and horse until the said wager or bett should be decided, and then and there to deliver both the said Colt and horse to the winner of the said wager or bett – whereupon the said Defendant did immediately produce in money the above sum of seventy five pounds, and was declared to have won the said bett or wager, and thereupon the said Osbrom delivered the said Colt and horse to the said Defendant, whereby the said Colt became the property of him the defendant, and the Plaintiff by reason of the matters aforesaid is not entitled to have or maintain his action aforesaid for the said Colt

Replication, joins issue on the plea – denies the facts stated in the plea secondly pleaded, and that the bett or wager as stated by Defendant is illegal, and by reason thereof the Plaintiff cannot be barred from maintaining his action aforesaid as Defendant. a

Grant for the defendant, stated that the facts alleged in the plea had been proved and that the Defendt was thereby justified

justified in retaining the Colt in question as the same had become his property — That the bett was legal and the whole transaction conducted fairly, and the Pltff himself was satisfied he had lost the bett, and all he had to say at the time was, that he did not think gold was a legal tender — but even if the bett had been illegal after delivery of the property, the loser cannot maintain an action to recover it — Repse Vo Gageure. —

Rossiter for the plaintiff contended that the bett was illegal, that betting is a species of gambling and prohibited by law — That the bett in this case was unfair and could not be considered as binding, inasmuch the risk was not equal, the defendant when he made the bett knew what money he had in his possession the Plaintiff did not, and the defendant cannot therefore legally avail himself of any undue advantage to deprive the plaintiff of his property —

cites. Dic. de Droit. Vo Gageure
Repse — Vo Gageure —
Dantz. preuve par temoins cts. 10. Nos 16 17. 18.

By the Courts. —

Denizt Vo Gageurs No 2. —
1 Desp. p. 264. No 2.
3. T. Rep. 694.

Wagers are not, either by the laws of England or of Canada, prohibited or illegal, qua wagers, except in those cases where the law declares them illegal, or that the subject matter of them ought to be considered as such — thus a wager which would prove an incitement to a breach of the peace — or tending to immorality, or that would affect the feelings or interests of a third person, or expose him to ridicule, or libel him are considered illegal, and no action can be maintained

on

on any such wager — but the case before us presents nothing of this, the wager between the parties was upon a matter wholly immaterial to any but the parties concerned, and perfectly legal, and the Court is satisfied that the facts have been made out as pleaded by the Defendant — The only question which seems to arise, is the fairness of the wager upon the score of the equality of risk, as this equality is necessary to make the Contract binding — and it would at first appear that this equality did not exist here, as the presumption must be that the Defendant knew what money he had in his pocket and that the plaintiff did not — but there is also to be considered, that if the inequality which exists in the contract is a thing known to the parties at the time of making it, there is no injustice — so says Poth. Contrat de Jeu. N°. 20. in fine' — "mais cet avantage que je vous
" fait, etant un avantage que je ne puis ignorer, et que
" je vous fais de mon bon gré et avec une pleine connoissance
" ne contient aucune injustice" — here the plaintiff was fully aware of the advantage the defendant had in the wager, as to the monies he had in his possession, still he chose to run the risk, and in a manner to set the defendant at defiance to produce a sum of seventy five pounds — The Case may be strongly assimilated to the case of the Curé and the peasant touching the number of tithe sheaves, reported in the Repr. v°. Gageure. p. 701 — where the Curé lost his wager, and lost his Suit afterwards. — Action dismissed —

Fer. Dic. v°
Gageure. —

Lusignan
& al.
v
Pickel.

Action en declaration d'hypothèque

The declaration stated the action to be instituted by Charles Lusignan, Alexander Lusignan Hypolite Lusignan, Lucie Lusignan, and Joseph Roi and Emelie Sophie Lusignan his wife against the Defendant— For that whereas by deed executed before Dilsh and his Colleague public Notaries and bearing date the 6th Sept. 1815, the said Charles Lusignan, Alexander Lusignan, Emelie Sophie Lusignan and Lucie Lusignan, as well for themselves as stipulating for and on behalf of, (as portant fort) the said Hypolite Lusignan, did sell, convey and make over to one to one Antome Belanger, a certain lot of ground mentioned and described in the said declaration for and in consideration of the sum of 26,000. livres, equal to £1083. 6. 8 Cy which said sum it was stipulated should remain en Constitut on the said lot of land, paying an annual rent of 1560. livres, the first of which to commence and be made on the 6th Sept. 1816— That for the securing the payment of the said rent the said Antome Belanger did mortgage generally all his property and Estate, which he then had or might thereafter acquire— That the said lot of land was afterwards sold by the Sheriff of the district of Montreal, out of the proceeds of which sale the plaintiffs have received only the sum of £319. 6. 9— and in consequence of the sale so made of the said lot of land the said Plaintiffs are now

founded

founded in demanding the full payment of the aforesaid Capital sum of 26,000 livres — That the balance now remaining due to the said plaintiffs upon the said Capital sum, amounts to £764.0.3 with interest £81.5, with the growing interest since the 3e Dec. 1820. —

That at the time the said Antoine Belanger acquired the said lot of land he was proprietor of a certain lots of land mentioned and described in the said declaration, upon which the mortgage attached in favor of the said plaintiffs by vertu of the aforesaid deed of 6 Sept. 1815, as stipulated by the said Antoine Belanger — That on the 2e April 1817. the said Defde purchased and acquired of and from the said Antoine Belanger the said last-mentioned lots of land, and now holds and possesses the same as proprietor thereof by means whereof the said plaintiffs are founded in demanding that their right of mortgage be declared in and upon the aforesaid last-mentioned lots of land for the payment of the aforesaid balance now remaining due and unpaid to them in consequence of the aforesaid deed of sale of the 6e Sept. 1815, or that the defendant do quit and deliver up the said last mentioned lots of land to be sold and disposed of — according to law for the payment and satisfaction aforesaid remaining sum with interest & Costs — with conclusions to this effect —

The Defendant pleaded for peremptory exception to this action, the following points.

1st That although it appears in and by the said declaration, that Hyppolite Lusignan one of the plaintiffs in the said Cause, was not a party to the deed of Sale bearing date the 6th Sept 1815, in the declaration mentioned, and although the said Hyppolite Lusignan joins with the other plaintiffs in the said action in demanding the debt, sum of money, matters and things in and by the said declaration demanded, yet it is not in and by the said declaration alledged, nor doth it therein and thereby appear that the said Hyppolite Lusignan ever acceded to, ratified or confirmed the said deed of Sale.—

2d For that it is not alledged or shewn in and by the said declaration that the said plaintiffs before the bringing of the said action, brought to discussion or in anywise discussed or proceeded against the estates and property of Antoine Bilanger the debtor of them the said plaintiffs, or that the said estate and property after such discussion were not sufficient for the payment and satisfaction of the pretended debt in the said declaration mentioned, or that any balance after such discussion remained or was due and owing to the said plaintiffs.—

3d For that it is not alledged or shewn in and by the said declaration, that the lands and tenements therein alledged to have been sold a Constitution de rente by the plaintiffs to the said Antoine Bilanger have been or were sold by the Sheriff of this district under any writ or writs of execution against the

lands

lands and tenements of the said Antoine Belanger or in such manner and form as might enable the said plaintiffs to demand or have the principal sum or capital by the said Antoine Belanger, as it is alledged, due and owing to the plaintiffs. —

To these exceptions there was a general answer by the Plaintiffs maintaining that the declaration was sufficient and that they were well founded in their action — and on this answer issue was joined by the replication of the Defendants. —

Stuart for the defendant argued that as Hypolite Lusignan one of the plaintiffs never ratified the deed of Sale to Belanger, he could take no benefit under it, as he could not be bound or liable to any of the obligations therein contained until such ratification took place — that the expressions used in the said deed by the other Plaintiffs as stipulating for and on behalf of the said Hypolite Lusignan, "se portant fort," are words of no import and not binding on him, therefore there being no contract between Hypolite Lusignan and Belanger, there could be no mortgage, consequently the present action cannot be maintained. — Poth. Obl. N. 74. 75.

That if the plaintiffs were regularly before the Court, yet they cannot maintain the present action without having made a previous discussion of the property of the principal debtor. Belanger, which does not appear to have been done, this is established by numerous authorities of Law, and seems a reasonable doctrine and consistent with the principles of Justice, as a tiers detenteur ought not to be troubled until it is ascertained that the real

debtor

debtor has no means to satisfy the debt – cites.

1 Despeisses. p. 723. № 5. and p. 726.
Nouv: Denizt. v° Discussion §1. № 2.

That the sale of the property sold to Belanger as being made by the Sheriff, is not the kind of sale required by law of a Constitut, so as to entitle the Creditor to claim the principal of the rente constituée. this might have been a private and voluntary sale for any thing that appears to the contrary, which is not sufficient, the sale must be a forced sale under legal process, which is not alledged in the declaration.

Roi for the plaintiffs – The vendors to Belanger never became bound to him that Hypolite Lusignan should ratify the deed – but this satification ceases to be a question, as by H. Lusignan's joining in the present action. the ratification is complete and confirms the deed of Sale made ~~by~~ to Belanger. – see Repe v° ratification – Poth. Obl. № 74. 75. –

That the plea of discussion cannot be admitted as a peremptory plea to the action, and must be dismissed it is only received as a dilatory plea and under certain conditions – Poth. Obl. № 410. – 1 Rig. 179. Poth. Tr. des Hyp. part. 1. art. 2. §. 1. p. 436. – Repe v° Discussion – Lacombe. v° discussion – Fer. Institt. de Just. liv. 4. tit. 6. en notes – and Poth. Tr. des hyp. ch. 2. Sec. 1. art. 2. –

That the declaration is sufficient in regard to the sale of the land affected to the Constitut – it is stated to have been made under a Saisie reelle by the Sheriff, which is sufficient – as this must refer to the office of the Sheriff. c

The

The Court were of opinion, that as the vendors to Belanger held no authority from Hyppolite Lusignan to make the sale of the property in question, that he was not bound to any ratification of that sale under the stipulation of "se portant fort" for him — That although the said H. Lusignan may be considered to have ratified the said Sale by his joining in the present action with the other plaintiffs, yet that ratification can have no retroactive effect, it is binding only from the day it is made, nor can H. Lusignan acquire any rights under the said Sale but from the day he made such ratification This action therefore cannot be maintained, as the said H. Lusignan cannot be considered to have acquired any mortgage on the property of Belanger which can affect the defendant in the present action. — Action dismissed saif à se pourvoir. —

see. Dic. Fer, vo. Ratification. —
Denizt — co. rub. No. 7. 8.

Arnoldi v Brown. & al. — Action for Seigniorial rents &c. paid by Plaintiff on account of Defendt. a

The declaration stated, that by deed of sale made and executed before Baron & his colleague public notaries the 6. day of Sept. 1814, the Plaintiff purchased from the late Thomas Johnson and from the

the defendant Elizabeth Brown, a certain lot of land mentioned and described in the Sd declaration by which said deed the vendors bound and obliged themselves to warrant and defend the said pltff from and against all dowers debts mortgages trouble and disturbance whatsoever, and declared the said lot of land to be free and clear from all cens et rentes, lods et ventes and other Seigniorial rights and dues up to the day of executing the said deed of Sale.—

That although the said plaintiff hath well and truly done all and whatsoever he was bound to do & execute in and by the said deed of Sale, yet the said late Thomas Johnson and the said Eliz. Brown his wife have not on their part done and executed what they were bound, in this, that at the time of the said Sale of the 6th Sept 1814, there was due and in arrear to the Seigniors of the Seigniory of Montreal in which the said lot of land is situated, for cens et rentes, lods et ventes, and other Seigniorial rights a sum of £47. 7. 6, that is to say upon the Sale made by one Jean Bte Herigault to the said Thomas Johnson of the said lot of land by deed executed on 12 Augt 1809, which said sum of £47. 7. 6 the said Seigniors of Montreal now claim and demand of & from him the said plaintiff—

That the said plaintiff is now founded in demands of and from the said Elizt Brown and from the other defendants as the heirs and representatives of the late Thomas Johnson, that they produce and exhibit the acquittances and discharges of the said

Seigniors

Seigniors of all lods & Ventes, arrears of cens & rentes & other Seigniorial rights and dues up to the said 6th day of Sept. 1814, or on default thereof that they be adjuged and condemned to pay to the said plaintiff the said sum of £47. 7. 6, but which as well the said late Thomas Johnson in his life time, and the said E. Brown & other defendants since his death have always hitherto refused to do. — Wherefor the

The Defendants made default. —

In support of this action the plaintiff produced the deeds of sale from Herigault to Johnson, and from Johnson to the pltff, and the necessary documents to prove the character and liability of the Defendants as representatives of the late Th. Johnson — he also examined two witnesses, Messire Jos. Comte, to prove that there was due by the late Thomas Johnson on his purchase from Herigault, for lods et Ventes, and for cens et rentes, to the Seigniors of Montreal, a sum of £47. 7. 6 which sum was lately paid by F. W. Ermatinger who had purchased the said lot of land from B. Panet and the said F. W. Ermatinger to prove he had paid the said sum as due on the said lot of land by the said late Thomas Johnson.

The Court were of opinion that the plaintiff could not maintain this action — that as he was not in possession of the land he was not liable to any trouble in that possession, — That he could only be called upon in an action en garantie, as having sold the land subject to the payment of Johnson's Lods et rentes &c but this is not in evidence, nor does it appear that the pltff has been ever called upon for this money — On the Contrary

it

it has been given in evidence that the Seigniors have no claim for these Lods et Ventes as they appear to have been paid by Mr Ermatinger, who alone is now entitled to claim this money from the Defendants as so much paid on their account. —

Action dismissed. —

Thursday 20th June 1822.—

Haight.— vs Barnard & al'.— } Action of debt agt. defendants as Copartners on a contract made with one of them, Barnard.

The declaration stated, that on the 5th day of April 1821. the defendants by an act executed before Lukin and his colleague public Notaries, did promise and agree to and with each other to form a company and did thereby become copartners for the purpose of constructing a horse Ferryboat and carrying on the business of ferrying, and did therein and thereby further agree that the boat and the movements thereof should be built and completed under the direction of the said Barnard — That afterwards, to wit, on the 9th March 1821, in and by a certain Contract or agreement in writing, bearing date on that day, made between the said plaintiff and the said Geo. Barnard, he the said plaintiff did agree and bind himself unto the said Geo. Barnard to build in a good and workmanlike manner the movements for a horse ferry boat, and to place the same into a boat to be built by the said Geo. Barnard for that purpose, the whole of the said movements to be made and completed by the said plaintiff by the 20th day of May then next after the date of the said last mentioned agreement, and to have the same completely placed, fit for putting the horses thereto to move the same as soon as should be practicable after the said 20th day of May, provided the said boat was then ready for placing the same, and in case the said boat should not then be ready, the said movements were to be placed as soon as practicable after the said boat should be

ready

ready to receive the same, and the said movements were to be made in conformity to a plan produced by the said Geo. Barnard subject to such alterations as the said plff and the said G. Barnard should think proper — And the said work was to be done and performed by the said plaintiff for and in consideration of the sum of fifty pounds current money of Lower Canada, ten pounds of which were to be paid on the first day of April then next &c — And the said G. Barnard bound himself to the s^d plff to furnish a sufficient quantity of good & durable materials &c And the said plff avers, that the said movements and the work agreed by him to be done and constructed as aforesaid, were intended for, and were used in, and made part of the same ferry boat, for the building and constructing whereof the said G. Barnard and the other defendants associated themselves together and entered into the Contract and agreement aforesaid — And the said plff avers, that he in performance of his Agreement did make and construct and fully complete in a good and workmanlike manner all and every part of the said movements &c and did place the same in a boat built by the said G. Barnard & the other Defend^s according to the agreement entered into between him the said plaintiff and the said G. Barnard as aforesaid and did deliver the said movements to the s^d defendants who have since used the same as and for a ferry boat in conformity to the intentions of the said Defendants at the time of their association aforesaid — Yet the said Defendants have not paid to the said Plff &c — Wherefore &c —

The Defendants, Seth Pomeroy, Nahum Hall and Rose Baron, pleaded for peremptory exception that the declaration was insufficient and did not

contain

contain a legal cause of action agt. them, denying that by reason of the Contract entered into between the said plaintiff and the said G. Barnard, they the said Defendants are not liable nor bound to pay to the plaintiff the sum of money by him demanded in and by his declaration. —

Replication joins issue. +

The Court were of opinion, that as it did not appear that there existed a joint-interest between Barnard and the other defendants at the time the plaintiff made his contract with Barnard, he had no legal claim upon the other defendants for the performance of that Contract. The nature of the Contract between the plaintiff and Barnard could not be altered or affected by any subsidiary agreement entered into between Barnard and the other defendants, and as the plaintiff was no party to this agreement he could derive no benefit therefrom — That the subsequent joint interest of the Defendants did not constitute a joint liability in favor of the Pltff — Action dismissed as to all the Defendants except Barnard —

see. Coope. v. Eyre. 1 Hen. Bl. 37.
Saville v Roberton. 4. T. Rep. 725.
1 Montagu on Partt. p. 11. 12.

Roussy et al
v.
Roi et al

In this Case there had been an appeal from the Judgment of this Court, which was affirmed, and the Plffs obtained a rule on the defendant to shew Cause why execution should not be granted to them in conformity to the said Judgments — Subsequent to the rendering of the Judgment in the Court of appeals and before the plaintiffs had obtained this rule, the Defendant by his attorney in this Court gave notice of his lodging security as required by law in order to obtain an appeal to the King in Council —

Roi for the Defendant now shewed Cause and contended that the rule obtained by the plaintiffs should be discharged, as they could not having Execution here upon a Judgment rendered in the Court of appeals — That the Defendant was entitled to his appeal to the King in Council on his giving security to this effect, which security the Defendant has given within the time required by law, which must operate a stay of execution on the Judgment. Here the Defendant produced and filed the security —

Rolland for the plaintiff, admitted that he had received notice on behalf of the Plffs of a security to be given by the defendant

for

for an appeal to the King in Council, but this notice was given by a person whom he did not know, as he was not the attorney of the defendant either in this Court or in the Court of appeals — but such security even if legally given cannot stay the execution here as the proceedings have been remitted to this Court by the Court of appeals in order to enable the Plaintiff to sue out his execution — and it was necessary that the Defendant should have obtained an order of the Court of appeals, admitting his appeal to the King in Council to entitle him to a stay of execution — this has not been done and the plaintiffs will be materially injured should they be delayed in the execution of their Judgment —

The Court considering that by St. 34. Geo. 3. ch. 6. sec. 31. it is provided — "that in all "cases where an appeal shall be allowed to His "Majesty in his privy Council, execution shall "be suspended &c." and that no such right of Appeal had been allowed, that the Court could not take notice of the security given by the Defr nor determine on its legality, and must grant the execution demanded, and leave Defendt. to seek his remedy in another Court — Rule absolute.

Scott & Co
vs
Phoenix Ins. Co.

This was an action instituted by the plaintiffs, merchants in the City of Montreal against the Defendants to recover the amount of loss by fire, under a policy of Insurance. — The declaration stated the Contract between the parties on the policy, the loss subsequent thereto, and the amount of the damages sustained — The Defendants pleaded that they were not indebted to the Plff in any sum of money by reason of the matters contained in the declaration, and also denying all the matters and allegations therein set forth: And further, that by a clause in the policy of Insurance in question, it was stipulated, that in case any difference or dispute shall arise between the assured and the Company touching any loss or damage, such difference may be submitted to the judgment and determination of arbitrators, indifferently chosen, whose award in writing shall be conclusive and binding on all the parties, and in consequence of the said clause, concluding that the matters in contest by the present action should be submitted to Arbitrators, — Issue was joined by the Replication on the matters of fact above pleaded, and a demurrer taken to the other parts of the plea touching the submission to Arbitrators — The Defendant afterwards moved that all the matters in contest between the parties should be submitted to Arbitrators for this purpose to be named by the parties, the said Defendants naming their

Arbitrator

arbitrator, and calling on the Plaintiffs to name one on their part, and that a rule of Court should be thereupon entered in consequence. –

Mr Ross for the defendants in support of the motion stated, that the action was brought to recover from the defendants the damages alledged by the plaintiffs to have been sustained by fire founded on a policy of insurance, that in this policy as in all others of a similar kind there is a clause by which it is agreed that all matters of this kind as to the extent of the injury sustained shall be submitted to arbitrators to be named by the parties – this is in order to prevent litigation between them, and instead of instituting an action a reference ought in this Case to have been made to arbitrators agreeably to the Stat. 9th Wm 3. ch. 15. which might have been made a rule of Court if necessary – In answer to this action the defendants have pleaded this clause in the policy, and contend that they are entitled to compel the pltffs to name arbitrators in compliance with the said policy of insurance – This is an equitable application to the Court and ought to be granted according to the principles of the laws of this Country – where parties by their own act have appointed a certain course of proceeding for the decision of their differences, this Court is thereby ousted of its jurisdiction – refus to a case in 2 Atk. Rep. 569. Wellington. v. Mc Intosh – The same principle is also held by the French law writers – Poth. Cont. d'Assurance. No 197. – and more especially in

contracts

contracts between partners, and in mercantile transactions, where there is a submission to arbitrators by consent of the parties, the Courts have held them to conform to such submission. Code March.. ord.e 1673. tit. 4. art. 9. —

Stuart for Plffs. — The power and authority of Courts of Justice to delegate to others a right of decision of the matters in litigation between parties before them, is a question of public law, and must be governed by the principles of the English law — this was held in the Case of Dow. v Wilson in appeal, and is also laid down by Domat. tit. 7. des arbitres. to be a matter of public law — In looking at the English authorities, it is clear that the present motion cannot be granted, because the matter pleaded by the defendants, even if regularly pleaded cannot oust the Court here of its jurisdiction Thompson & al. v Charnock. 8 T. Rep. 139 — such a plea is no bar to an action — Tattersall v Groote. 2 Bos. & Pull. 131. and by the French law, after contestation en Cause, or plea pleaded, an application for a reference to arbitrators comes too late, because the jurisdiction of the Court being once admitted, the parties cannot afterwards withdraw themselves from that jurisdiction, or demand to have the contest transferred to another — Nouv. Denis. vol. 11. vo arbitrage p. 56. in speaking of a policy of Insurance under the Code Marine, according to which, were it to be considered as law in Canada, the parties cannot after Contestation en Cause demand a Reference to arbitrators — But the matters stated by the defendants here in their plea touching this reference, amount

to

to nothing at all, and cannot certainly be considered as a bar to the action, as it concludes to nothing, and the Court can take no notice of it nor adjudge any thing to the defendants thereon — It is therefore evident that neither according to the French or the English law can this motion be maintained. —

By the Court — If the question to be here determined touched the right of the Court to delegate its authority to arbitrators, recourse might be had to the principles of English public law, as the Law of the Sovereign State but the question here, is a question of civil right upon a contract between individuals, and it is for the Court to determine to what extent this Contract shall be binding and whether it ought to operate to the extent contended for by the defendants — were we to look to the law of England we would find several decisions of the Courts there both of Law and of Equity which determined, that an agreement in a Contract between parties to refer matters to arbitration cannot be pleaded in bar of an action, and that there must be a reference, and some say, a reference and an award to bar it. — But this being a question of civil right between the parties, it must be determined by the laws of Canada — According to the authorities both from Pothier & Denizart, and to be found also in Borrier, the parties in certain Cases could claim a right to be sent before arbitrators, if such a request were made before Contestation en Cause — these authorities, it is true, are taken from particular laws or Ordinances, namely the Code Marine and the Code Marchand, neither of which are considered to be in force in Canada — still they were

Mitchel. v. Harris
4 Br. Ch. Rep. 311
2. Ves. Jr. 129. —

Thompson v. Charnock
and
Tattersall. v. Groot
above cited

were laws of the French Empire, and their enactments must have been consistent with recognized principles of law, although limited in practice and application by those Codes — according to the Code Marchand all contests between partners were to be determined by arbitrators, and whether the parties demanded it or not the Court had the right to send them there. and by the Code Marine it was necessary, that there should be a clause in the Policy for a reference to arbitrators, and that some of the parties ought to demand the renvoie before arbitration, avant aucune contestation en Cause; in which case the parties were held to take this method of deciding their differences. Now the Contestation en Cause, was not merely the filing of a plea or joining of an issue, as these were matters which were done without the view or knowledge of the Court, but it was necessary that the parties should have been heard upon these pleadings and some decision of the Court given thereon before the Contestation en Cause was complete + According to this authority therefore, there was no contestation en Cause in this Case, and the defendant's motion would be in time — But putting this authority aside, the Court has here the consent and agreement of the parties to refer their differences to arbitration, and it has the power to give effect to this agreement in the way that shall be consistent with the Justice of the Case, were it not so this clause in the Contract would be nugatory, which is inconsistent with the principles of all Contracts, and there can be no law nor reason why this clause should not be considered to be equally binding on the

parties

Valin. Ordre Marine 2 vol. p. 154. art. 70.

104e art. Coutume.

Nouv: Denizt. Vo Contestn en Cause. §. 2. Nos 1. 2.—

Sallé on Ord. 1667 Tit. 14. art. 13.—

parties and equally to be enforced as every other clause in the Contract between them — That this is consistent with the recognized principles of the French law and of the laws of Canada, we cannot doubt, since we find that in practice, the French Courts assumed the right of sending parties before arbitrators as furnishing a just and equitable mode of decision of their differences, even where there was no agreement between them to this effect, and without any consent of the parties — this depended upon the nature of the Contest and the character of the litigating parties — but with more reason can the Court exercise this right when it is founded upon that Consent — As to the defendants having pleaded to the action before making the present motion, it was perhaps better that they should have done so, because it enables the Court to see whether the points in issue are proper for the decision of arbitrators, as it might happen, that although the parties had a right to go before arbitrators, and had even agreed to do so, yet if the matters in contest were not proper for them to determine, the Court would retain the Cause, but when the matters are proper for their decision, the points in issue will serve to direct the attention of the arbitrators to the objects contested, or according to the opinion of a modern writer — "Les conclusions des parties servent à fixer le point de la contestation comme devant un tribunal ordinaire." The Court therefore thinks that the motion ought to be granted. —

1 Pigeau. p. 246.
1 Jousse. tit. 14 art. 7. ord^{ce} 1667. —
Rep^{re} v^{o} Arbitrage p. 558. N^{o} 3.
1 Couchot. Prac. mix^{e} p. 31. ch. 14.
Poth. Proc. Civ. ch. 3. Sec. 2. art. 2. p. 122.
Dic. de Royer. v^{o} Arbitrages Forcés N^{o} 68. p. 116. 117

Pardessus. 4 Vol p. 104. —

Smith ... & Cuvillier & al & Aylwin Intvs and Cuvillier oppt

In this case, Mr Ogden of Counsel for the Intervening party moved, for an order of the Court, commanding the Sheriff of the district to proceed to the sale of the lands and tenements described in the writ of Vend: exponas, issued at the instance of the said Obadiah Aylwin in obedience thereto notwithstanding the opposition of the said Austin Cuvillier made to the execution of the said last mentd writ, which said opposition has been improperly received by the said Sheriff — nisi Causa —

Stuart for the Oppos: shewed cause agt the rule and contended that the same ought to be discharged as it was irregular and novel, and tended to exclude the hearing on the merits of the Opposition, and to reject it without a hearing, a thing unknown in a Court of Justice — The Court can determine must first hear the merits of the opposition before determing thereon however ill founded it may be — this is the usual mode of proceeding and conformable to the course and practice of the Court — It has been settled that in certain Cases there may be a summary hearing on ~~the~~ oppositions, but there must be a hearing of some kind to enable the Court to know what is demanded by the Opposition — and in this Case there are many material questions raised which will require the consideration of the Court, and particularly in regard of the right of the Intervening party to sue out execution in his name in the same manner as the pltff Smith might have done in consequence of being subrogated in the rights of Mad Perault —

Rolland

Rollard for the Intervening party. cited St. 41. Geo. 3. ch 7. Sec. 11, by which it is directed that no opposition to the sale of any immoveable property seized by the Sheriff by virtue of a writ of Execution, whether such opposition be afin d'annuller, or afin de distraire the whole or a part of the property seized, or afin de charge or servitude on the same, shall be lodged in the hands of the Sheriff, or received by him, except previous to the fifteen days next before the day fixed for the sale and adjudication thereof — and that no such opposition shall be received by the Sheriff to the sale of any Immoveable property, which may be had by virtue of any writ of vend. Exponas, when all the previous notices and advertisements of the Sale, by virtue of the first execution shall have been made and published according to Law — That here all the previous notices and advertisements had been given, and no opposition therefore can be made or received to the Sale of real Estate on a writ of vend. exponas — That the oppos ant ought now to give his reasons in support of his opposition and if these are found insufficient there ought to be no further hearing thereon — if this be not adhered to, no execution whatever can ever be put in force, as upon every new writ which issues, there will be a new oppos^{n} made which will draw after it a long and tedious discussion and eventually be dismissed — to prevent this injury and injustice to Creditors the aforesaid Statute was made which is positive and precise, that no such opposition as that now before the Court ought to be made or can be heard —

The Court considering the words of the above Statute to be express and to apply to all kinds of

Apposition

opposition which could be made tending to retard or affect the Sale of real Estate after the writ of venditioni exponas had issued — made the rule absolute. —

Mr Justice Foucher dissented from the opinion of the Court, and held that a hearing should have been previously had on the opposition to ascertain the nature and effect thereof. —

Hubert & uxr
v.
Cartier. &

Action de Compte & partage. &

The action was instituted by Louis Ed. Hubert of the parish of St Denis as having married Cecile Cartier, and by the said Cecile Cartier, heir for one half of the Estate and Succession of the late Jac: Cartier her father, as of the late Cecile Gervaise her mother, wife of the said late Jacques Cartier, against Jacques Cartier, her brother, heir also for one half of the estate and succession of the said late Jacques Cartier and Cecile Gervaise, his father and mother.

The declaration stated that on 27th Sept 1772, the said late Jacques Cartier and Cecile Gervaise contracted marriage together which was solemnized at the parish of St Antoine on that day — That by their Contract of marriage made and executed before Cherrier, public notary and witnesses on the 25 Sept of the same year, a Community of property was stipulated between them according to the laws of the Country. — That during the said marriage the said late Jacques Cartier and Cecile Gervaise acquired much property,

to

to the amount of twelve thousand pounds besides several real estates of great value. —

That on or about the 8th Febvs. 1783, the said Cecile Gervaise died, leaving as her heirs the said Cecile Cartier and the said defendant, her children by her said husband —

That the said late Jacques Cartier, after the decease of his said wife remained until the day of his death, on 22d. March 1814, in possession of all the property & estate, moveable and immoveable which composed the said Community. —

That the said Cecile Cartier and the said defendant being minors at the time of the decease of the said late Cecile Gervaise their mother and the said late Jacques Cartier never having made any inventory of the said Community, the same was continued between him and his said children until the time of his decease. —

That the said late Jacques Cartier died, without having rendered to the said Cecile Cartier any account of the property and rights accrued to her in the succession of the said late Cecile Gervaise her mother, the said Cecile Cartier and the said defendt. being the only heirs the said Jacques Cartier left at the time of his decease

That the said defendt. at the time of the decease of the said Jacques Cartier obtained the possession, which he still holds and retains of all the property & estate moveable and immoveable, of which the said Jacques Cartier was possessed at the time of his decease, as well the propres of the said late Cecile Gervaise, as the property of the said Community, which had been continued as aforesaid. —

That the said Cecile Cartier, as heir for one half of the estate and succession as well of the said Cecile Gervaise as of the said Jacques Cartier her father and mother, is founded in demanding the said half of the said successions as well as the half of the property of the said Communauté continuée.

That the said Defendant now refuses to render to the said Plaintiffs any account of the rights and property aforesaid of the said Cecile Cartier, and therefore Plaintiffs conclude - That Defendant be held to render this account in due form & pay Costs -

Plea - That the plaintiffs are not entitled to any account of the succession of the said late Cecile Gervaise, or of the Continuation of the said Community because the said Plaintiffs, and the said Defendt by act executed before Dutalmé, public Notary & witnesses, bearing date the 7th January 1809, did transfer, convey and make over to the said late Jac. Cartier their father, all the right title claim and demand whatsoever which they the said pltffs and defendant had or were entitled to claim in the estate and succession of the said late Cecile Gervaise, to be held and disposed of by the said late Jacq. Cartier as his own proper estate - the said transfer being made upon condition and in consideration among other things, that he the said Jacques Cartier should pay to the said plaintiffs and to the said Defendt a sum of one hundred & Sixty Six thousand three hundred and seventy livres, in equal halves, that is to say 83,185. 5. 2 which the said plaintiffs in and by the said act acknowledged to have had and received from the

said

said Jacques Cartier at the time of executing the same by means whereof the said plaintiff renounced all right or claim to any share or interest prior to the property and succession of the said late Cecile Gervaise, and of the said Community so continued —

And the said defendants alledging, that the said transfer and Conveyance not being liable to be rescinded or set aside but upon legal grounds, the same being now produced and shewn to the Court is sufficient bar to the demand of the said plaintiff in so far as regards the estate and succession of the said late Cecile Gervaise, and the continuation of the said Community. —

And in regard of the estate and succession of the said late Jacques Cartier, the said Defend^s states, that by his last will and testament, bearing date the 13^th day of July 1811, and by different Codicils thereunto annexed, dated the 17. & 18. January 1814, deposited by the said Jacques Cartier in his lifetime in the office of M^r Latour, public Notary, to the knowledge of the said Plaintiff and by them acknowledged since the death of the said Jacques Cartier, he the said Jacques Cartier did give bequeath and dispose of all his property estate and effects as in & by the said last will and testaments and Codicils aforesaid is expressed, and did appoint, M^r Dep^t and one Rémi Borleau his executors, but P. Boileau he having declined to act, the said Defend^s as being in possession of all the said estate property and effects did with the consent and approbation of the said plaintiff cause an Inventory thereof to be made —

That the said defendant is ready and willing to render an account of his gestion and administration as Ex^r of the said last will and testament, and to pay to the said plaintiff all and whatever they shall be entitled to claim

in

in and by the said last Will and testament — and thereupon prays that the present action be dismissed

Replication — That the action is well founded and Defendant cannot support or maintain the plea by him set up —

1st Because the said late Jacques Cartier not having in his lifetime caused an Inventory to be made of the property of the said Community, at the time of the decease of the said late Cecile Gervaise and the said Cecile Cartier and the said defendant being then minors, the said Community was thereby continued between the said late Jac. Cartier & his said children —

2e Because the said late Jac. Cartier in his lifetime not having made such Inventory nor rendered such account of the rights and property of the said Cecile Cartier, of which he the said Jac. Cartier, as her tutor had the management, the pretended sale transfer and conveyance of the 7 Janv. 1809 pleaded and set out by the said defendr, is null and void in law, and ought to be held and declared such by this Court, and be considered as of no avail whatever —

That the said plaintiffs are the more founded in demanding the nullity of the said act, inasmuch as it appears that the said late Jac. Cartier, in allowing to his said children the sum of 166.370. 10. 4. as their rights in the said Community and as heirs of their mother, had allowed them only one third instead of one half of the said Community — the said Jacques Cartier thereby retaining to himself not only two thirds of the property of the said Community, but also all the issues and profits thereof for upwards

of —

of twenty five years that he had held & possessed the said property — The said Plaintiffs therefore allege that they suffer a heavy loss in regard of their said rights in the said Community —

The said plaintiffs in answer to the matters further pleaded by the said defendant, say, that the said late Jac. Cartier did not make any last will or testament whereby he disposed of his property and estate, nor did they the said pltffs ever acknowledge that the testament pleaded by the defendant to be the testament of him the said Jacques Cartier — And supposing even the said Testament to be the last will and testament of the said Jacques Cartier, the said plaintiffs are notwithstanding entitled to have and obtain the account and division of the property and estate of the said Jac. Cartier in manner as by them demanded —

Mr Bedard for the pltffs in arguing the Cause contended that the act executed by the pltffs on 7 Janv. 1809. was null and void in law, and that the continuation of the Community could be stopt only by an Inventory — so held by the Court in the Case of Drouin v. Meloche 1811. — here Jacques Cartier acted as the Tutor of his children and such a Contract entered into with these children without an Inventory is declared to be a nullity. 1 Desp. p. 588. Trt. Contrats des Tut. & Cur. Sec. 7. Arrets de Lamet. vol. 2 Lett. T. v° Tuteur p. 736. 7. — Domat des Engagements des Tuteurs. Sec. 3. art. 41. p. 180. Repe v° Compte. p. 321. — Poth. tr. des personnes Tit. 6. art. 6. p. 622. — Lacombe v° Tuteur. Sec. 11. dist. 1. N° 6. That pltffs here produce a copy of the account rendered by the late Mr Cartier to the pltffs in 1809 to shew its insufficiency and by comparing it with the testament it appears that

that Mr. Cartier withdrew from the masse of the Comte a sum of 80,000 livres rupwards for his sisters, thereby depriving the plaintiffs of a sum of 41,000 livres with the interest thereon from 1809, to which they were evidently entitled —

Ross for the defendant, on the contrary contended That Mr. Cartier did render a true and faithful account to the pltffs in 1809, of which they had communication and were satisfied therewith — therefore the authorities of law cited do not apply to this case, but only to a case where no account has been rendered. — and although this account was not in all the form required by the Code Civil, yet it contained a full statement of all the property of the Community and gave the plaintiffs all the necessary information they required — That if this acct had been insufficient or defective, the pltffs ought to have brought their action to rescind the aforesaid act of 7 Janv. 1809, when this question would have been litigated, but the present action does not affect the validity of that act, and cannot be considered as an action en rescision — cites Repse vo Rescision — p. 329. —

Rolland of Counsel for Deft — The present action cannot bring the nullity of the act of 1809 into question as it concludes merely to a reddition de Compte et partage — The sale and transfer made by the pltffs by the said, whether, visis tabulis, or not, must subsist until an action be brought to set it aside — it is not void, but may be voidable — Rep. loco cit. Merlé. p. 289 — & 2d Vol. p. 46 — Lacombe. vo Restitution en entier. No 4. Repse vo Transaction. p. 244. —

3

3. Vol. Gr. Comr. Fer. p. 593. — 1 Duplessis. 480. —

Bedard in reply, when the act is an absolute nullity no action is required to set it aside — the act of 1809. is a nullity — but supposing it were not, yet the present action must be considered as a demande en rescision, and ought to have that effect as to the said acte Regles de Droit d'Antoine. p. 156. §1. — 2 Pigeau. 96. — there are two kinds of demande en rescision, one principal, the other Incidental — 1 Pig. 338 — and Plaintiff by their answer to the plea have demanded that this act should be rescinded, and this may be done by exception as well as by an action —

The Court were of opinion from all the authorities cited, that the act of 7 Janv. 1809. was not in law a nullity, and that an action was necessary to be instituted to have it so declared — that the objection raised by the plaintiffs to this act by their replication could not be considered as having the effect of an action en rescision which required special conclusions — That the pltffs here were not taken by surprise, they were parties to the said act and knew its contents, and while it subsists it must be a bar to the present action — And the Court considering the evidence adduced to prove Mr Cartier's last will and Testament to be sufficient, they dismissed the present action, leaving them to their action as the Defendant as Executor, for what they might be entitled to claim as Legatees, as the will here was a sufficient answer to the demand of the plaintiffs as heirs at law of the late Mr Cartier. —

October Term. 1822.

Saturday 5th Oct. 1822.

Vanderslurys vs Bleury.

This was an action against the defendant an attorney at law for malfaisance in his office in causing the plaintiff to be unlawfully arrested.

The declaration stated, that one Anne Lewis having prosecuted the plaintiff in an action of trespass and false imprisonment, by her affidavit in this behalf made, stated, that the plaintiff was then immediately about to leave the Province and that she had sustained damage to the amount of two thousand five hundred pounds, and praying thereupon that a Writ of Capias ad respondendum might issue to hold the plaintiff to bail for that amount. That upon this demand it was ordered by the Judge that a Capias should issue as prayed against the plaintiff to hold him to bail for the sum of two hundred pounds. That the said Anne Lewis had employed the Defendant as her attorney who acted for her in this behalf, and who notwithstanding the said order of the Judge, maliciously caused and procured the said Plaintiff

to

to be arrested and held to bail for the whole amount of the said sum of two thousand five hundred pounds, to the damage of the Plaintiff one thousand pounds.—

To this action the Defendant pleaded for exception, that it was irregular and unfounded as no action could lie against him for anything done by him as the attorney of another, as he is presumed in law to act under the instructions and directions of the person for whom he is employed and against whom only any recourse can be had That all that is stated in the declaration amounts only to an omission of duty on the part of the Defendant, for which he is answerable only to his client, but there was no act of commission or malfeasance done to the plaintiff.— It is complained that the defendant indorsed the formula required by the rules of practice to be put on the back of the writ, whereby the Sheriff was directed to take bail for the sum of two thousand five hundred pounds, but this is wholly immaterial, and was not necessary to be done in this case as an act of the attorney, as the rule applies only to actions of debt, and not in actions of tort, such as prosecuted by Lewis against the plaintiff — if any thing was requisite to have been indorsed upon that writ by the attorney, it was the order of the Judge, but for this there is no provision by the rules of practice — This action is founded on a charge of non-feasance, but as no duty is shewn to attach on the Defendant it cannot be supported — cites. 1. Bos: & Pull. Scheibel. v. Fairbairn p. 388.—

Rolland for Pliff — The name of this action here

is

is not material, the object of it is for a delit or injury committed by the defendant, and for every injury there must be a remedy — The complaint against the defendant is not for an omission of duty or non-feasance, but for a mal-feasance which has caused an injury to the Plaintiff, and for which the Defend is answerable — It was the duty of the Defendant as Attorney to indorse on the writ of Capias the sum for which bail was to be taken, and here the Defend acted tortiously in directing the bail to be taken for a much greater sum than was allowed. —

The Court were of opinion that the declaration in this instance was sufficient in charging the Defendant with a malfeasance in doing an act which particularly belonged to his ministry in conducting the suit instituted against the Pltff. That it could not be doubted that the Attorney was liable to his client for his misconduct in managing his business, nor could it be doubted that where an illegal and tortious act was done by him to the adverse party, that such party also had his remedy against him — a principle which seemed admitted by the decisions both of French and English laws, and consistent with the principles of Justice — The Court therefore dismissed the exceptions. —

see. Denizt. vo nullité — No. 25. 26. —
Ferriere Dic. vo Procureur. —
Rep.re vo nullité. p. 260. —
Jocfre. Cent. 1. ch. 99. p. 106. — also. ch. 67. —
1 Dareau. des Inj: p. 134. 5. —
3 Wilson. Rep. 368. Barker. vs Barham & Norwood

Wednesday 9.th Oct. 1822. —

Langlois dt Traversy. et vs Wagner. —

On action of debt on deed of Sale. —

The action was instituted by Franc.s Langlois dit Traversy, as well in his Capacity of Executor of the last will and testament of the late Marie anne Prudhomme his mother, in her life time widow of the late André Langlois dt Traversy as universal legatee of the said late Marie ann Prudhome and the declaration states, that by deed of Sale made and executed at Montreal on the 2. March 1810, the said André Langlois dt Traversy and Marie anne Prudhomme his wife, did sell, convey and make over to one William Johnson, a certain lot of land mentioned and described in the said declaration, with the houses and buildings thereon erected — That the said Sale was made upon condition amongst other things of paying to the Sellers the sum of one thousand pounds Currency in the manner and at the periods stipulated in the said deed. — That on the 4.th Dec.r 1805, the said André Langlois dt Traversy made his last will and Testament, and thereby instituted and appointed the said Marie Anne Prudhome his sole and universal legatee of all his property and estate — That the said andré Langlois afterwards died at Montreal on or about the 8.r Nov.r 1812, without changing in anymanner the dispositions contained in his said last will and Testament — That afterwards on 13 Oct.r 1818, the said Marie anne Prudhomme transferred and made over to the said Defend.t, the aforesaid sum of money mentioned in the said deed of Sale,

then

then due and in arrear by the said William Johnson and thereby authorising the said Defendant to demand and receive the same from the said Wm Johnson and give all due discharges for the same — the sum of money then due and in arrear as aforesaid amounting to — £330. — That in consideration of the said transfer so made the said Defendant bound and obliged himself to pay to the said Marie Anne Prudhomme or to her legal representatives a like sum of £330 — according to the terms of payment limited in the said deed of sale. — That on the 6th May 1816, the said Marie Anne Prudhomme made her last will and testament, and therein and thereby instituted & appointed the said plaintiff her son her sole and universal legatee of all her property estate and effects. and afterwards, on or about the 21st October 1820 — died without revoking or altering in any manner the dispositions contained in her said last will and testament — That by virtue of the aforesaid last mentioned deed of transfer and the said last mentd last will and Testament there became due by the said Defendant to the said plaintiff on the first day of May 1821, a sum of Sixty pounds, which the said Defendant now refuses to pay and satisfy to him the said plaintiff — Wherefore &c.

Plea. — That the said late André Langlois dit Traversy and Marie anne Prudhomme, did in and by the said deed of sale in the said declaration mentioned, transfer, convey and make over to the said William Johnson the lot of land and premises mentioned and described in the said declaration without any reservation whatever, and did warrant

and

and guarantee the same to be free and clear of and from all gifts, dubts, mortgages, alienations or other hindrances whatsoever.— That the said William Johnson afterwards on 13th day of May 1817, sold and conveyed the said lot of land and premises to him the defendant, without any reservation whatever — and afterwards, on 29th day of May 1820, the said defendant sold and transferred the said lot of land and premises to one Jacob Dewitt, with promise of warranty against all gifts, mortgages alienations or other hindrances whatever.— And the said Defendant saith that before the making and passing of the said deed of sale in the said declaration mentioned, to wit, on the 27th day of September 1806, the said André Langlois dit Traversy and Marie anne Prudhomme, did by a certain other deed of Sale, convey and make over to one John Teasdale, a certain lot of ground situate in the St Antoine Suburbs, adjoining that so by them sold to the said William Johnson, but to be separated and divided therefrom by a street or passage of twenty two feet wide, which street or passage made part of and was comprehended in the lot of land and premises so sold and conveyed by the said André Langlois dit Traversé and Marie anne Prudhomme to the said William Johnson — by reason whereof the said defendant saith that the said Jacob Dewitt who is now the proprietor and in the possession of the said lot of land in the said declaration described under and by virtue of the said deed of Sale made to him by the said defendant, is troubled and disturbed in the possession thereof by one Theodore Davis, the present proprietor and possessor of the lot of land and

premises

premises so sold by the said André Langlois dit Traversy and Marie Anne Prudhomme to the said John Teasdale, who demands of the said Jacob Dewitt the said street or passage and the right to pass and repass in and upon the same, and he the said defendant is now required and called upon by the said Jacob Dewitt to cause the said trouble and disturbance to cease and determine, as he the said defendant is bound by law to do. That he the said Plaintiff as representing the said André Langlois dit Traversy and Marie Anne Prudhomme is also bound by law to warrant defend and save harmless the said defendant from and against the said trouble and disturbance, of all which the said plaintiff had a knowledge long before the institution of the present action, by reason whereof the said plaintiff cannot have or maintain his said action against him the said Defendant to recover the aforesaid sum of money demanded in and by the said declaration until he the said plaintiff shall have first caused the said trouble and disturbance first to cease and determine, or pay and allow to the said Defendant the amount or value of the said Street or passage and the damages which the said Jacob Dewitt may sustain by reason of the servitude established on his said lot of land by the said Street or passage — And the said Defendt doth further aver that he hath always been ready and willing to pay to the said plaintiff the aforesaid sum of money by him demanded, when and so soon as he should have caused the said trouble and disturbance to cease and determine, or shall have paid the said Jacob Dewitt all such damage as he has sustained or may sustain by reason of the said servitude so established by the said Street or passage — Wherefore &c

Replication — That the said Plea is insufficient
1st Because by the transport mentioned in the declaration in this cause upon which the present action is founded the said Marie anne Prudhomme did not promise to make good and forth coming to the Defendant the sum of money transfered to him, but only that the same was due to her —
2. Because even if the said Marie anne Prudhomme had been bound in any warranty towards the said Defendant under and by virtue of the said deed of transfer, yet that warranty could not extend to the trouble and disturbance complained of by the Defendt
3. And if the said Marianne Prudhomme were bound to the warranty pretended by the said Defendt yet he the said Defendt cannot have or obtain thereby the conclusions taken by him in and by his said plea.
4th That the plaintiff is not bound to warrant the trouble in question, as neither the said plaintiff, nor any of the persons he represents ever sold any right to a street or passage as stated by the Defendt.
5. That even if the said John Teasdale under and by virtue of the sale made to him, had acquired a right of passage or street as pretended, yet he nor his representatives cannot exercise that right upon the property of the defendant, nor cause him any legal trouble or disturbance by reason thereof, inasmuch the said Dewitt and the prior possessors of the said Lot of land sold to the defendant have held and possessed the same quietly and peaceably for the space of ten years and upwards from the day of the date of the sale so made by the said André

Langlois

Langlois dit Traversy and Marie anne Prudhomme to the said William Johnson, without any demand, lett, hindrance or disturbance by reason of the aforesaid street or passage, the same cannot now be claimed in or upon the said lot of land now possessed by the said Dewitt, either by the said Davis or any other person, nor can the said Defendant be legally troubled or bound to any warranty by reason thereof, nor can he the said Plaintiff be bound or required to cause any trouble to cease which the said Dewitt or any other may permit by reason of the said street or passage.—

Wherefore &c

On a hearing had on the above plea, the Court directed the parties to make proof of the facts by them respectively alledged, and an enquête thereon having been had, it now appeared, that according to the deeds and transactions between the parties there ought to be found between the lots of land which had been sold by André Langlois and his wife to Teasdale and to Johnson a street or passage, but for which no provision had been made by the deed of Sale to Johnson, whose lot of land adjoined that of Teasdale's — That although Teasdale and those claiming under him had a right to demand this passage or street, yet they could not demand it on the lot sold to Johnson because he had purchased his lot subject to such a burden, but as the promise of the vendors to Teasdale in the Sale to him, had the effect of a mortgage upon their property, and attached to the lot of land they afterwards sold to Johnson the trouble now complained of could be considered

only

only in the nature of a claim operating as a mortgage upon the lot of land sold to Johnson to be indemnified for the injury, loss, or damage which Teasdale, or Davis claiming under him would have a right to obtain, by being deprived of the use and enjoyment of the said Street or Passage; that this mortgage claim, like every other, being liable to be extinguished, if not exercised against the tiers detenteur in ten years after his purchase and possession this seemed to be the Case here, and the plaintiff was in the opinion of the Court warranted to set up the same answer to the defendant in this case in regard of this mortgage claim, as he the Defendt would have a right to set up against Davis or any other who might set up the claim, and finding the evidence sufficient to maintain the prescription pleaded by the plaintiff against the said claim, the Court maintained the plaintiff's action and gave Judgment against the defendant. ~

Friday 11th. October 1822

Dalrymple
v.
Beaubien

On action on a promissory note made by one James Hallowell to Defendant and by him indorsed to the plaintiff Plea - Non assumpsit - and that note was an accommodation note. -

The Defendant moved for a Comn. Rogatoire to examine Jas Hallowell the drawer, resident at Newyork - This motion was opposed by the Plaintiff's counsel, as the witness was interested and could not be examined -

But

But the Court granted the motion, on the principle already determined in the Case of Donegani. vs Pickle, that the maker may be a witness to invalidate the note he has made — If the witness had an interest it could only be in regard of the Costs on the present action to which he might be eventually liable, but on this point the Court could at present give no opinion, as the witness was not before them, and when called up to be examined he might produce a release as to these costs. —

Monday 15th. October

Lewis. v. Eisenhart

On rule obtained by the plaintiff as to a witness, to shew Cause why a contrainte par corps should not be granted against him for not attending to give evidence as a witness for the Plaintiff at the enquête appointed in this Cause, after having been duly summoned.

The Rule being returned duly served, and the witness not appearing, Mr. Bleury for Plaintiff moved that rule be made absolute. —

But the Court discharged the rule, not being of opinion to proceed against a witness by attachment in the first instance, without proof of some marked contempt or disobedience to its orders (manifeste

desobeissance

desobeissance) but by fine only, in the terms of the ordce 1667. tit. 22. art. 8. — by which the fine was limited to ten livres — But by the Provce Ordce of 32. Geo. 3. ch. 2. S. 4. which seems to have had this course of proceeding under the Code Civil in contemplation this fine is made arbitrary to the extent of £10 — and this course seems the preferable one for the ordinary default of a witness in attending, when subponad + see Case of Warwick & Coe v. Yule val. 10 June 1820. on rule azt one Hudson. —

Tuesday 15th October 1822.

Nickless. v Brown.

On action for defamatory words. — The second Count in the plaintiffs declaration charged the defendant with having said and published of the plaintiff, that he had embezzled the Kings Stores and had been convicted and sentenced to be imprisoned for that offence — The words in the first Count were for saying that the Plaintiff had set fire to his own house in order to defraud the Fire Insurance Office. — To these Counts the Defendant pleaded in Justification that the words spoken by him were true — to this plea the plaintiff demurred

Stuart for the Defendant contended that the plea was good and sufficient, and that he ought to be admitted to prove the justification alledged That the French Courts holding a criminal as well as a Civil jurisdiction over libel, did not on that account admit the truth of the libel to be given in evidence — but in a case of private injury arising from defamatory words, that injury can be in proportion only to the falsity of accusation, for no injury can be supposed to arise from telling what is true, and whatever the opinions of Courts may have been in former times, they seem now to have given way to a more rational and equitable principle of allowing this justification in cases of this description — refers to the laws of England — and also to the Roman law by which this kind of evidence is admitted —

Grant for Pltff — This question cannot be determined either by the laws of England or by the Roman law, but by the laws of Canada, according to which, — justification in the case of libel or defamation cannot

be

be admitted, and the opinions of this Court have always maintained this principle – cites Case of McKay v. St Germain – and Repx vc Injure. –

The Court were of opinion, that the justification pleaded by the defendant in regard of the matters stated in the first Count, was inadmissible, but allowed the plea in regard of the matters alledged in the second Count in the declaration – as the sentence of a competent Court, in regard of the matters in question was a fact too notorious and certain to reject the proof of it – su Dareau.

In this case, the examination of one Lusher a witness about to leave the Province had been taken in vacation, and also his cross-examination on the part of the Defendant – The plaintiff on the trial went through his evidence, but did not produce this examination, alledging it had been mislaid and could not be found – The Defendant contended that plff was bound to lay this evidence before the Jury, as the testimony given by Lusher was very material for the Defr and he ought not to be deprived of it; and thereupon moved that Plff be held to produce the same, or in default thereof that a non-suit be entered against him – The Court were of opinion with Defendant and ordered a non suit to be entered

Thursday

Thursday 17th October 1822.—

Dunn & al
vs
Johnston.

Action on promissory note made by Dfte to the plaintiffs — plea, non assumpsit and conclusions to the Country.

The plaintiff moved that the Defendant be held to change his conclusions and to conclude to the Court, the Cause not being triable by a Jury, as the Defendant is a tavernkeeper and cannot be considered as a merchant or trader in the eye of the Law. — the plaintiffs were brewers of beer & Copartners in trade, but this did not alter the Case. —

But the Court were of opinion that in this instance the parties might be considered as traders the plaintiffs in selling their beer, and the Defendant in buying it to sell out again or retail to his Customers — and as the note on the face of it was a Commercial transaction, the legal presumption was, that it had been given in the course of that Commerce in which both parties were so concerned — motion rejected. —

Friday 18th. October. 1822.—

No. 425.
Brackenridge vs. Jones & al.—

On action against the Defendants as special bail for one Charles E. Hersey.—

In this Case it appeared that the Plaintiff obtained Judgment on his action agt. Hersey, on the 19th. June last, and on 5th. July following sued out his Ca: Sa: against him— On the 3d. August the Defendant surrendered himself to the Sheriff, and was committed to gaol under this writ.—

Grant contended that this surrender of the principal debtor to the sheriff was sufficient to exonerate the bail, which may be done at any time before proceedings are taken against them.— And as the Sheriff has complied with the writ which was given him to execute by the plaintiff, he ought to abide by that execution.—

Boston for the plaintiff contended that the surrender was too late, and the bail could not avail themselves of it as a discharge to them.—

The Court considered the action well brought, as the law requires that the Surrender of the principal should be made within one month after Judgment, otherwise the bail are fixed.—

Judgt. for Pltff.—

No. 13
Bridge & Penn vs. Sheldon—

On action for goods sold & delivered & for monies paid & advanced by Pltffs. to Defdt.—

It

It appeared, that by a contract in writing between the parties, bearing date 1 Dec^r 1821, the Defendant sold to the plaintiffs, a quantity of 12,000 standard white oak pipe Staves, and 10,000 white oak puncheon Staves or thereabouts, then lying at or near Johnstown in Upper Canada, to be by the Defendant delivered there to the plaintiffs or their Agents on or before the 10^th^ day of December then next, and to be transported from thence to Montreal at the diligence of the plaintiffs, but at the expence and risk of the Defendant — for which Staves the plaintiffs were to furnish goods to the S^d Defend^t, except the sum of thirty pounds which they were to pay him in Cash, at and after the rate of £26 - ℔ ℔ thousand of the pipe Staves, and Six pounds for the thousand of puncheon Staves. — It appeared by the testimony of the Subscribing witness to the above agreement, that an error had been committed in it regard of the time of the delivery of the Staves. which ought to have been on the 10^th^ of December instant, instead of December then next, as therein written, which error arose from the agreement having been prepared for execution in November preceding, but having been delayed till December the above words in the body of the agreement had not been attended to or altered — The Defence to the action rested wholly upon this point, that the action was premature, and that verbal testimony could not be admitted, to add to, or alter the contract between the parties. —

1 Ph. Ev. 585. & seq. —

The Court were of opinion to admit the evidence of the error as given by the witness, and the delivery of the goods and monies having been proved, Judgt was given for Pltffs —

Molson.
v.
Deschambeis

On action for house-rent

Letourneau
Vs
St Denis

On action for breach of promise of marriage, and for defamatory words.—

In this Case the plaintiff obtained a verdict on the second Count in the declaration for the defamatory words — and the defendant moved for a new trial on the principle that improper evidence had been admitted to prove the demand in this, that relations of the parties had been admitted to prove the words used by the Defendt as well in his own house and family, as in the house and family of other of his relations — cites Denizt. Vo Temoignage. Nº 6. & 10 — & Repv. eo. verb. p. 65. 66.—

But the Court was of opinion that this evidence was admissible, inasmuchas it was in the private and secret manner in the house and family of the defendant and of his relations, where the injury had been done, and the Court inclined to adopt the opinion of the Commentators on the Ordce of 1667. who thought the evidence in such Cases admissible, as more consistent with the principles of Justice, as relations in this Case must be admitted as necessary witnesses, or an injury must be permitted to exist without redress — The Court therefore discharged the rule for a new trial.—

Su Jousse on Ordce 1667.— Tit. 22. art. 11
Bornier on dce
Rodier on dce
1 Pigeau. p. 281. — nº 3.—

Prudhome
v.
Desilets.

Action of debt on deed of donation.

The declaration stated, that by deed made and executed before Joliette and Brunel, public notaries bearing date the 29th April 1819, the Pltff sold and conveyed to the defendant a certain lot of ground as mentioned and described in the declaration for the considerations therein mentioned, and amongst other things, that the defendant should pay acquit and discharge in the lieu and place of the Plaintiff a certain annuity, rente et pension viagere, which he the plaintiff was bound to pay and furnish annually to one Joseph Blanchard and his wife under and by virtue of a certain deed of donation bearing date the 9th August 1818, so that he the said plaintiff should not be in anywise troubled in regard of the payment thereof, all which the said defendant bound himself duly to perform.

That the defendant hath not however fulfilled his obligations aforesaid, inasmuchas on the 9th Augt. 1822, there was due and in arrear to the said Joseph Blanchard and wife, three years of the said annuity, amounting to a sum of twelve pounds which he the said defendant by virtue of the aforesaid deed was bound to acquit and discharge and which sum therefore the said plaintiff, as being personally liable for the payment thereof to the said Jos. Blanchard and wife, is now entitled to demand and receive of and from the said Defendt.

Plea - That the declaration contained no sufficient

cause

cause of action, on which issue was taken by the Plaintiff and the parties heard thereon. —

L. Vigé for Defendant contended that as the Plaintiff did no shew that he was troubled, or that any demand had been made against him by Blanchard and wife for the payment of the arrears of the rente et pension in question, he had no right of action against the defendant, who may have paid this money to Blanchard, or entered into an arrangement with him in such way as to prevent the Pltff from being troubled — The Defendant had become bound to warrant the plaintiff against all demands on the part of Blanchard, but this warranty cannot be brot in question until such demand is shewn to exist. — The obligation of the Defendant here may be considered as an indication of the payment of a debt to a third person, and therefore the plaintiff is not entitled to claim the money. Potts. Obl. 485. —

Brunean for Pltff, contended that declaration was sufficient, as notwithstanding the obligation of the defendant to pay the arrears in question to Blanchard and wife, yet the right of action to enforce this payment remained in the Pltff, as Blanchard and wife were not parties to the deed made between the Pltff and defendant, and could maintain no action against him in this behalf and therefore the action was open to the Pltff for the non performance by the defendt of that which he had undertaken, and it is sufficient that the Pltff is exposed to an action on the part of Blanchard & wife, without shewing that it has been actually instituted. —

The

The Court were of opinion that the action could not be maintained as stated in the declaration, that the undertaking of the Defendant was to warrant the Plaintiff against the payment of the arrears of rent in question, and to save him harmless in this respect and unless the plaintiff shewed a trouble, or such imminent danger thereof as must tend to injure him, he had no right to call upon the defendant for any warranty — action dismissed — Poth. Vente. No. 102

Forand. Vinceletta & Johnson. Gar.

In an action of warranty on a deed of sale. —

The declaration stated, that by deed executed before two public Notaries the 19th July 1821, the defendts sold to the plaintiff a certain lot of land and premises mentioned and described in the declaration, with warranty against all debts, mortgages and incumbrances, and all trouble in this respect up to the 23d May 1818, the date of the purchase made by the said defendants of the said lot of land of Sir John Johnson; the plaintiff undertaking and becoming bound to pay of all arrears due on the said lot of land from and after that period. — That there were due upon the said lot of land and premises, and for which the same is bound and mortgaged, prior to the said 23d May 1818, sundry arrears of rent and lods et ventes to the Seignior, besides other burdens and servitudes, and particularly, a quantity of fifty bushels of wheat which appear to be due to one Berzer, for all which the said lot of land is bound to the damage of the plaintiff two hundred pounds. That the plaintiff is founded in demanding of the said Defendants the said sum of two hundred pounds or that the defendants do exonerate and discharge

the

the said lot of land of all arrears of rent and other incumbrances thereon, become due and created before the said 23d. May 1818, and also to acquit and discharge the said lot of land of and from the payment of the said 55 bushels of wheat, and of all other burdens & incumbrances whereby the said lot of land may have in anywise become bound or affected prior to the said 23d May 1818, and to produce and furnish to the Plaintiff good and sufficient discharges in this behalf. — Concluding to the payment of the said sum of £200 — damages in case the said Defendants do not acquit and discharge the said lot of land in manner as aforesaid and furnish and deliver to the plaintiff such good and sufficient acquittances & discharges. —

The defendants called into the Cause Sir John Johnson, from whom they had purchased the above lot of land, as their garant formel, he appeared, and pleaded to the demande en garantie, that the said defendants could not have or maintain the same against him, inasmuchas their declaration in this behalf was insufficient and irregular — as it did not appear thereby that the said Jean Baptiste Forand stated or complained in and by his action aforesaid against the said Defendants that he was troubled or in anywise disturbed in his possession by reason aforesaid alledged burdens and incumbrances on the lot of land in question, nor shewed any sufficient right of action against the said Defendants and therefore he the said Sir John Johnson ought not to have been called to defend the same, or to warrant the said defendants in this behalf —

With

with the above plea the said Sir John Johnson under the reserve of all rights to which he might be entitled in case the same should not be maintained filed a plea to the demand in Chief

Upon this plea issue was taken by the Defendts and the parties heard thereon.—

The Court held that Sir John Johnson was bound as the Garant formal of the Defendants in this Cause under the deed of sale stated in their declaration — That it was not necessary that the difindants should shew that the action prosecuted against them was well founded either in form or substance, it was enough to shew that they were troubled by an action, in regard of the lot of land sold to them, the regularity or sufficiency of which it was not their interest to contest until they had called in their Garant — the bringing of this action was a trouble, and this Sir John Johnson was bound to quiet, and it must remain with him to shew that the person causing this trouble, did it wrongfully or without Cause — Judgt was accordingly given declaring Sir John Johnson the garant formal of the Defendants.—

4 Ap. 1822.

The Plea put in by the Garant was a plea of exception peremptoire to the sufficiency of the action and of the declaration, on which issue was joined by the plaintiff —

In support of this plea, Mondelet for the Garant contended, that the declaration was insufficient and contained no legal ground of action; that no titles were set, nor any facts stated with precision by which it could be ascertained what the burdens or incumbrances on the lot of land in question were,

nor

nor by whom, at what time, or under what title contracted, so that it was impossible for the Garant to give any answer thereto — But if all these matters had been sufficiently stated, and were true, yet the plaintiff's action must fail, as there was no allegation that by reason thereof he had been troubled in his possession, which was necessary to support the present action, and was the very gist of it — Cod. liv. 8. tit. 45. Dic. des arrets. vo Eviction et trouble. Garantie. Nouv. Denizt. vo Eviction — That the demand in regard of the 45 bushels of wheat, is not a charge reelle on the land and can be considered only as a personal right as him who owes it, even if it were a rente viagere, which is not stated — Potb. Vente. N° 201. Repe vo Eviction — Garantie and case of Rottot. v. Gouin —

Bleury for the plaintiff contended that the present plea now pleaded by the Garant ought to be considered as determined and over-ruled by the Judgment already given, as it contains the same reasons and grounds — That it was enough for the plaintiff to shew that there were debts and incumbrances on the land at the time he purchased it and for which the Defendt is liable and ought to warrant the Plaintiff — that the allegation of trouble or of a prosecution being instituted against him in regard of such debts and incumbrances was not necessary, if it was shewn that there was a peril du trouble, or that there existed a cause from which such trouble could arise —

The Court considered the declaration of the Plaintiff to be wholly insufficient, and dismissed the action. —

Thayer
vs
Pierce & al
and
E contra.

On action by the plaintiff as indorsee on two promissory notes drawn by H. and E. Curtis in favor of Defendts and by them indorsed to the Pltff.

Plea. That if Defendts did ever promise and undertake they had before the bringing of the present action wholly paid the sums of money demanded by the Plaintiffs.—

2d Non assumpt. under which they stated, that they intended to prove.—

1st That the defendts lent their names to the notes in question merely for the accommodation of Henry and Elijah Curtis.—

2. That Defendants received no value from the Plaintiffs for the said notes.—

3. That Plaintiff as well as Defendts indorsed the said notes in order to accommodate the said Henry and Elijah Curtis, without any undertaking express or implied, that in case of non-payment the defendants should pay the whole or any part thereof to the Plaintiff

4. That the pltff holds and possesses divers goods, monies, credits and effects of the said Henry and Elijah Curtis, by means whereof the Plaintiff hath been, or might have been fully paid the amount of the said notes in consequence whereof the defendants are discharged from any responsibility

3. That the notes were indorsed by Defendts to Pltff without any valuable consideration given them by Pltff.

Incidental demand for goods sold & delivered.

The

The parties being at issue an enquête was appointed at which several witnesses were examined and on 1st Febry 1822, a consent rule was entered into by the parties submitting all matters in dispute to arbitrators with directions that they should the examination of the witnesses heard before them into writing and return the same into Court with their award. —

The arbitrators made their award, by which they were of opinion that the demand in chief should be dismissed, and that the Defendants should recover agt the Plaintiff on their Incidental demand —

On hearing on the award before the Court, Mr Sewell for the plaintiff contended, that the arbitrators had done wrong in deciding contrary to the evidence laid before them and contrary to the Justice of the Case, and demanded that the Court should take up the evidence laid before the arbitrators, and upon examination thereof give that Judgment which ought to have been given by the arbitrators — Mr Ogilvie on the part of the defendant contended, that the Court could not look into the testimony laid before the arbitrators nor change their award unless it should appear that they had proceeded irregularly —

By the Court — The Case before us presents two questions — 1st Can, or ought the Court to investigate the proceedings had before the arbitrators so as to correct their judgment in case the Court should be of a different opinion from theirs? If the Court has this power, then it is to be considered, 2dly, whether the evidence laid before the arbitrators will warrant the Court in drawing a different conclusion from it than the arbitrators have done? — On the the first point it may be observed that a reference to arbitrators to decide differences between parties necessarily gives them that power as effectually as the Court itself could

exercise

exercise it, and if the arbitrators proceed regularly their Judgment is equally binding as that of the Court— It is true that Courts exercise a controul over the awards of arbitrators, and will sometimes set them aside, but this is done only where there appears to be misconduct or partiality in the arbitrators— It is contended here, that as the reference made to the arbitrators, contained an injunction on them, to return with their award the evidence laid before them, that the Court thereby intended to reserve and exercise the right not only of examining the correctness of their proceedings, but of correcting their Judgment if they saw fit, or if it should appear inconsistent with that evidence — but this is a wrong presumption, as the Court are not bound to this investigation, unless it became necessary from the misconduct of the arbitrators, and the direction that they should with their award return the evidence laid before them, can be understood only as a means of informing the Court as to the regularity of their proceedings— It is unprecedented for Courts to judge a case over again after the opinion and judgment of Arbitrators, and if parties were let in to expect this of the Court, a submission to arbitrators would not only prove nugatory, but procrastinate a Cause by useless proceedings and expence, if in every case the discontented party could claim a new hearing before the Court— here it appears that the arbitrators have proceeded regularly, and being judges of the parties own chusing, the Court sees no reason to disturb their award—

But

But if the Court were disposed to enter upon the investigation demanded, they are in this case enabled to say, from what they have seen of the Case, that the arbitrators appear to have formed a correct judgment upon it — The action is — founded upon accommodation paper made by the parties to assist H. and E. Curtis, declining traders, and had it not been from the peculiar form of the instrument drawn up for this purpose, a bill of exchange, or promissory note negotiated, no such action could have been brought, because the credit and currency attached to paper of this kind presumes every thing fair and regular in support of it — the evidence adduced before the arbitrators however gives us a complete view of the transactions, and enables us to see, that as between the plaintiff and Defendants, no value was given or intended to be given on their indorsing these notes to the Plaintiff, nor was it in contemplation that liability should attach upon the one in favor of the other, in a transaction in which they were cooperating to favor their common debtors — and these circumstances are the more strongly to be urged against the plaintiff, as he had been proceeding by a variety of means, to get the property of these debtors into his own hands, in order to indemnify himself agt a responsibility he had contracted on their behalf to the Montreal and Canada Banks — and although this property has not been so productive as he expected, yet his acts shew his views and intentions, by thus laying hold of the debtors means, in which the Defendants had an equal

right

right with himself — The Court therefore see reason on every ground to confirm the award of the arbitrators —

Saturday 19th October 1822.

Mc Gale. qui tam. &c vs Gillon

On action on penal Statute for practising physic &c without licence.

The declaration was in the following words, "Que dans le mois de Mai dernier, avant, ou "depuis, en ladite paroisse de St Roc, ledit defendeur "sans en avoir auparavant obtenu la permission de "son Excellence le Gouverneur, ou du Commandant en "Chef de la Province du Bas Canada pour le tems "d'alors, auroit vendu et distribué des medecines en "detail, et en auroit ordonné pour des malades, dont "il auroit tiré du profit, et pour lesquelles il se seroit "fait payer, et auroit aussi là et alors exercé la medecine "et la chirurgie, et ce en contravention à une Ordonnance "faite et passée par le Gouverneur et le Conseil Legislatif "de la Province de Quebec du 30e jour d'avril 1788, en "la 28e année du regne de George Trois, et actuellement "en force en cette province du Bas Canada, laquelle "ordonnance prohibe une telle pratique sans la "permission du Gouverneur ou Commandant en "Chef d'alors comme susdit est" &c

Plea - of peremptory exception, That declaration is insufficient, inasmuchas no specific act or offence is therein or thereby alledged or set forth. That no precise time is therein stated when the said defendant is alledged to have acted in contravention to the Ordinance aforesaid; nor doth the said declaration set forth with due and legal certainty, either time, place, or circumstance of any contravention of the said Ordinance — Wherefore &c

Upon

Upon this plea issue was taken, and the parties heard thereon, and the Court were of opinion that the declaration was not sufficient as the words, "dans le mois de Mai dernier, avant "ou depuis" were too vague and uncertain, in regard of the time when the offence was committed to enable the defendant to plead thereto with safety and they therefore dismissed the action. —

Roi & Laberge
v
Smith — }

On action on promissory note, made by the Defendant in favor of Gabriel Franchere, for house rent, and by him indorsed to the Plaintiffs. -

The Defendant was stated in the declaration to be an "aubergiste", or tavernkeeper and the note appeared to have been given to Mr Franchere for house rent — The indorsement on the note, was, "Passé à l'ordre de Messieurs Roi et Laberge. 20 Sept 1822. & signed "Gab. Franchere" — Objection was taken to the sufficiency of this indorsement, as it did not contain the words, for value received, which were necessary, as the defend — was not a merchant or trader, whose note could be negotiated otherwise than by a full indorsement — And the Court maintained the objection and dismissed the action. —