Chief Justice Reid

L. C. R. B.

1824-1827

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February Term 1824.

Monday 9th Febr.

Shuter
v
Thayer
& Divers Oppⁿ

On oppositions afin de conserver made by divers persons, creditors of the Defendant, on the distribution to be made of the monies levied by the Sheriff on the lands and tenements of the Defendant, on the execution sued out by the Plaintiff on his Judgment.—

The Plaintiff's Judgment was founded on an award of Arbitrators on certain differences subsisting between him and the Defendt, made in consequence of a compromis entered into between them, and executed before Doucet and his confrere publii notaries, on and the Plaintiff claimed a mortgage on the Defendt property from the date of that Compromis.—

Rolland for the plaintiff contended, that the compromis being an act executed by the parties before notaries, according to the received principles of law this necessarily created a mortgage on the estate of the parties from the date thereof for all the purposes of that compromis. cites. Repre vo Hypotheque. p. 649.— 2. Bourj: p. 531. & 535.— That although no debt was established as due by the Defendant to the Plaintiff

this

this did not alter the principle, the debt took its existence in consequence of the Compromis, and the mortgage must extend thereto as the accessary of the principal — That mortgages may be granted for a debt not yet in existence, as in the Case of a marriage Contract, stipulating a right in favor of the wife for her reprises, and other matrimonial rights not then known nor accrued. — Pothier, in speaking of the mortgage accruing on the Sentences des arbitres. 5. Vol. p. 423. in 4to says, "les sentences des arbitres ne portent "hypotheque que du jour de l'homologation qui en est "faite devant le Juge" &c but this cannot be considered as an authority on the question, for he makes no allusion to the form of the Compromis, nor give any opinion thereon, he alludes merely to the qualité of the persons making the award, and we must presume here meant a Compromis sous seing privé, on which no mortgage could arise. —

Mr Sewell for the Opposants contended, that the act of Compromis gave no right of mortgage to the Plaintiff, who could claim his mortgage only from the date of the Judgment homologating the award of the Arbitrators, in regard of which the Opposants, Gerrard & Co were prior in date to the plaintiff, as they obtained their Judgment in October 1821, whereas the plaintiff obtained his Judgment against the Defendant only in Febr 1822. — The authority cited by the Plaintiff from the Repse, is the only one to be found in his favor, but is controverted by other authorities which must be considered of greater weight, than the opinion of the editors of this Collection — A Compromis creates no debt, nor security for a debt, its object is merely to compel the parties to settle their differences — cites

arrêtés

arrêtés de M. Lemoigron. tit. 21. N°24. p. 120. Poquet de Livoniere. p. 345. N°13. 2. Gr. Com.ty de Ferriere. p. 1205. Arrets de Bardet. p. 826. ch. 8.e and Poth. as cited by Pluff.-

Rolland in reply - None of the authorities cited go so far as to say, that a Compromis executed before notaries does not create a mortgage, on the contrary the principles they lay down are in favor of the position. were it otherwise, this act of Compromis would be a singular exception in the law, and these writers could not have failed to have taken notice of it as such. —

The Court were of opinion that as the end and object of the Compromis was to compel the parties to a settlement of their differences only, any mortgage that could be created thereby could not extend beyond this - and that even the award made by the arbitrators by virtue thereof and whereby a debt was created did not create a mortgage until such award was confirmed by a Court of Justice — as will might it be pretended that an Interlocutory order of a Court of Justice, directing a reference of any matter to arbitrators, would give a right of mortgage, prior to rendering the Judgment, which cannot be allowed. The Plaintiffs claim cannot therefore be allowed —

see. authorities cited by Oppos.te and Traité des Hyp: par Soulatges. p. 69.- Brodeau sur Louet. lettre H. §. 25.

—

N°. 125.

Davies. - vs. Ermatinger.

On action against the Defendant, as Sheriff for the value of certain goods and effects which were seized in the possession

of

of the Plaintiff, on a writ of Saisie-arret sued out against him — On this writ the Defendant as Sheriff, issued his warrant to his bailiff who by virtue thereof seized the plaintiffs effects, and appointed one Burt as the gardien thereof in the usual form. — This Saisie-arret was afterwards withdrawn, and the effects seized were directed to be restored to the plaintiff, when the different articles, the value of which is now demanded by the present action, were said not to be forthcoming — To this action the Defendant pleaded the general issue, and at the enquête produced the gardien Burt as a witness on his behalf having previously given him a release —

Mr Rolland for the plaintiff objected to the witness as incompetent, inasmuchas it was through his fault and neglect that the articles in question were lost, and he is still liable to the Pliff for the same — there exists therefore that well grounded suspicion of partiality as the witness which renders him incompetent, notwithstanding the release. Poth. Obl. Nº 825. — the probity of the witness is here called in question, and he is not the person who can be admitted to support it. Serpillon. 419. —

Sewell for the Defendant — There is a great difference between the Competence and the credibility of a witness — the rules in regard of incompetency are established by law — but credibility depends upon circumstances — the serviteur of the party, is a competent witness, yet it must appear that he is the serviteur that

the

the Court may judge of his credibility — as to the partiality of the witness, this must be determined by his interest, and in this case he can have no interest, as the release discharges the interest. Repv. vo Temoin. p. 61. 63. — Reproches may be made against a witness, but they must be founded on Causes which exist at the time he gives his evidence, and the possibility of another action being brought against But for the same cause as the present is no existing cause of reproche, any more than his present interest in this suit. — cites. 1 Term. Rep. p. 103. 104. Com. Dig. tit. Testmoignage vol. 6. p. 355. 1 Pigeau. 281. 282. —

By the Court — By the rules of evidence in England, in an action against the master for the negligence of his servant, the servant is not a competent witness to disprove his own negligence. — But a release will restore his competency — We cannot however adopt the laws of England on this point, this not being a case of a mercantile nature, the Laws of Canada prior to the Conquest must prevail — Incompetency in a witness is much further extended by the Laws of France, — founded on the Roman Law, than in England, where by the modern decisions we find the Courts disposed to abridge as much as possible the question of incompetence in order to leave it to the Jury as a question of credibility. — L^d Mansfield in the case of Walton. vs Shelley. 1 T. Rep. 300. says, — "The old cases on the competency of witnesses, have gone upon very " subtle grounds, but of late years the Courts have " endeavoured, as far as possible, consistently with those " authorities, to let the objection go to the credit, rather " than to the competency of the Witness". — But

1 Pb. Ev. 57. —
Ib — 132. &
8 Taunt. 454. —

according

according to the mode of ascertaining facts in England by means of a Jury, there was a more competent jurisdiction to try the credibility of witnesses — for however positively a witness might swear, yet his manner and mode of answering before a Jury might induce them to reject his testimony as not being a credible witness — But by the laws of France want of Competence and want of credibility are nearly synonimous as to the legal capacity of a witness — who was examined upon interrogatories, and there was no mode of trying his credibility by the Judge, unless where his answers appeared contradictory, or were contradicted by others — If any reproche was made to the witness, this was to be first heard and determined before the Judge could look at his testimony, and the nature of these objections, called reproches, which went to reject the testimony of the witness if founded are little more than objections to the credibility of the witness according to the rules in England. —

The witness in this case may be considered as having an indirect interest in the question before us as the same responsibility may attach to him as to the Defendant — it is true that he can have no direct or immediate interest in this suit, for whether the plaintiff loses or gains his Cause, the situation, or responsibility of the witness will not be altered — but from the situation of the witness, there is presumed to exist that feeling of partiality in the Cause which the law considers as affecting his competency, and it is said, that not only an immediate or direct interest in a Cause, will exclude him from being a witness, but, " il en seroit de même si le temoin — avoit avec un tiers une Cause pareille que celui

" qui

1 Ph: Ev. 48.

Rodier. Tit. 23. art. p. 363. N°. 20.

" qui le produit." This is what is called, a soupçon de partialité, qui est une juste Cause de reproche qui fait rejetter la deposition du temoin.— c'est sur ce fondement qu'on rejette les depositions de ceux qui ont quelque interet personnel à la decision
Poth: Ob. № 825. de la Cause, quoiqu'ils ne soyent point parties au Proces"— If the Witness here has any interet personnel it would be to prove, that the Plaintiff has no ground of Complaint either against the Defendant in this Cause or against any other —

Let us consider this question in another point of view, in regard of the validity of the release given by the Defendant to the Witness.— The Witness in this Case may be considered as the garant of the Defendt and in regard of the Plaintiff may be considered as solidairement obligé towards him with the Defendt in regard of the present matter of complaint— now although the garanti may discharge his garant as between themselves, yet he cannot release the right of the Plaintiff, or of a third person, to this garant — the Defendant cannot by any act of his invalidate or weaken the security which the plaintiff holds by law against this garant as a principal obligé in regard of him —

Bouthillier. Som: Rur: Tit. 106. p. 692. "Item, dois
" savoir, que celui est reprochable qui a pareille cause
" à traiter, et a demener pour soi, selon la decretale,
" qui dit, a testimonio prostando repelliter, similis
" morbo laborans." — So long therefore as the Pltff can exercise a similar right of action against Burt as gardien, as that now prosecuted against the Defendant as Sheriff, so long must a soupçon de partialité attach to Burt as a Witness, and we therefore think he cannot be admitted as such in the present Case. —

Gagnon. — v Bourassa. & Leclerc oppt.

In this case the Sheriff returned that he had taken in execution the lands and tenements of the Defendant which he had advertised for sale on the 9th day of December last, but that the sale thereof had been prevented in consequence of an opposition made by the Opposant, afin de distraire, which opposition was delivered into the Sheriffs Office on the 21st of Nov preceding —

The plaintiff now moved that the said opposition should be rejected and dismissed — inasmuchas the same had not been made and signified to the Sheriff, fifteen days before the day appointed for the sale of the said lands and tenements as required by law — and further — because no sufficient affidavit accompanied the said Opposition as required by the rules of practice. —

Buchanan for the Opposant stated, that the Provincial Statute 41 Geo. 3. ch. 7 S. 11 in the latter part required only that the Opposn. should be deposited with the Sheriff, fifteen days before the sale, and not fifteen days before the day of sale, and which is sufficient, and all that was intended by law, although the first part of the section would seem to require that such opposition should be made fifteen days before the day of sale, but in this case that kind of interpretation should be put upon the whole as will be most favorable to the right of the subject, as being the true intention of the Legislature — That the affidavit annexed

annexed to the opposition is sufficient, as it states that all the facts stated in the opposition are true, although by the rules of practice no affidavit is required in oppositions afin de distraire.—

By the Court.— The words of the Statute seem to leave no doubt on this point, they are imperative on the Sheriff, that no opposition shall be received by him, except previous to the fifteen days next before the day fixed for the sale and adjudication of the property seized and the subsequent part of the section referred to, in alluding to the notices and publications to be made by the sheriff, evidently refers to the first part of the section by using the words, "as above enacted"— The opposition in this case not having been made and lodged with the Sheriff as required by the Statute must therefore be rejected.—

No. 2124.

Fournier vs Lemai.— } Action of debt on a notarial obligation. Plea— Usury.— In support of this plea the defendant adduced witnesses at the Enquête to prove certain facts and circumstances, and also certain acknowledgments made by the person lending the money, to shew that the transaction was usurious, and the question now was whether such testimony could be received to controvert the fact stated in the obligation that the money had been counted, numbered paid and delivered in the presence and view of the notaries executing the instrument— The Court held that as the Defendant had not made an inscription faux against the Obligation, the testimony was not admissible, and gave Judgment for the plaintiff.—

Potb: Ob. No. 792.
Id— Proc: Civ: p. 60. ex. 4.
Dic. Droit. Ferrier vo Exception d'argent non compte.—
Bretonnier. Tit. Excep: d'argent non Compté.—

Jac: Lemoine de Martigny vr Franc. Messier

Action for the recovery of Lods & Ventes.

The declaration stated, that the Pltff is Seignr in possession of the Fief and Seigniory called the Seigniory de St. Michel, and that on the first day of August 1818, one Francois Xavier Petit dit Beauchemin and Appoline Messier his wife, sold and conveyed by a certain deed of sale of that date, to the Defendant all the immoveable rights and pretentions whatsoever of them the said Vendors, and which she the said Appoline Messier, had or might have in a certain farm or lot of land, (as described in the Dr declaration) the said Plaintiff averring that long before the said first day of August 1818, the said lot of land had been and was divided by and between the Coproprietors thereof, and that the said Appoline did accept and receive as her divided rights share and interest therein one half arpent thereof in front by thirty arpents in depth, and was by her held, used and enjoyed as her separate and divided share and interest therein, and was by her the said Appoline Messier by and with the authority and consent of her said husband sold and conveyed to the said Defendant, as her immoveable rights and pretentions in the entire lot or farm aforesaid. That the said Sale was made for and in consideration of the sum of six thousand livres, over and besides certain burthens and reservations stipulated in and by the said deed of Sale.— That the said Defendant was by law bound to exhibit to the Plaintiff as his Seignr within twenty days from the date of his said purchase the aforesaid deed of sale, which he hath not done.— That the Plaintiff by reason of the premises is entitled to demand and have from the said Defendant the sum of £20. 16. 8 for his lods & Ventes on the aforesaid

Sale

Sale, as well as the lods et ventes upon the aforesaid reserves and burthens – The Conclusions are to this effect and also for the ecu et quart d'ecu parisis for the non exhibition of the defendants title to the said Pltff. the whole with Costs. –

Plea. That the plaintiff cannot have or maintain his action against the Defendant, because the sale in question was of undivided rights, which Frans Xavier Beauchemin and Appoline Messier his wife had in the Succession of the late Jacques Messier father of the said Appoline Messier and of the said Defendant, who were his heirs, and to whom his Succession had fallen, and that the said Sale was made to the said Defendant as Co-heir par indivis in the said Succession with the said Appoline Messier – because there never had been, prior to the said Sale, any partition made either verbal or written between the said Coheirs, nor an undivided enjoyment of the lot of land in question which could operate such partition – because the defendant always enjoyed jointly with the other Cohein the said lot of land up to the time of the said Sale on 1st August 1818 – because the said Sale can be considered only as an act of partition and a family arrangement made in order to determine the undivided rights of the parties – because by the law of the land there are no Lods et ventes due to the Seignior in such cases – and as to the demand for the exhibition of titles the Defdt alledges that he did exhibit the same to the Plaintiff before the institution of the present action – all which he is ready to verify – wherefore &c

Replication – denies all the matters and things alledged in the Plea. –

The testimony adduced at the enquete, as well on the part of the plaintiff as of the Defendant, stated that the said Appoline Messier, Louis Messier and the Deft

Defendant brothers and sister, children of the late Louis Messier, after the decease of the latter which happened about eleven or twelve years ago, made a division of the said lot of land among them, and since that period each enjoyed his own part & portion separately; the part and portions of the said Appoline Messier and the Defendant were separated by a furrow made by the plough, which although not in a straight line served to divide their possessions, but without fence or picket or other boundary mark or any act in writing, the intentions of the parties appearing by their separate enjoyments of their respective portions up to the period of the deed of sale of the first of August 1818 —

Mr Sullivan for the Plaintiff contended that the Plaintiff was entitled to recover the lods & ventes by him demanded, inasmuch as it was evident that after the death of the late Louis Messier, the Defendant with his brother and sister made a division of the real property left by him, and each — enjoyed their separate part and share thereof up to the date of the sale made to the Defendant — the partage thus made was a title to each heir to their separate portion, 1 Duplessis. p. 163. — the sale of such separate share generated lods et ventes — Lebrun des Succ. p. 236. seems indeed to be of different opinion, and that the action de partage lasts for thirty years, as no partage is presumed to be made without other title than mere possession — But here there is proof of a previous partage sufficiently made out. —

Mr Farribault for the Defendant — the only question now before the Court, is whether separate

possession

possession under a verbal partage is sufficient to create a right of lods et ventes on a sale of such separate possession — but the Defendant contends that in this case there was no real partage, nor proof of a partage, the mere fact of individual and separate possession will not amount to a partage among Coheirs, any more than possession would give a title short of that prescription which is required by law to presume title — cites. Poth. Tr. de Prop. p. 267. — Poth. Succ. 169. Lacombe. vo Partage. — Repv vo Lods & Ventes. p. 647. Id. vo Partage. p. 610. Prudhom. cts. 61. p. 326. —

By the Court. — There is no doubt but that the defendant and his Coheirs have had a separate enjoyment of certain portions or shares of the land in question for several years prior to the sale made by Appoline Messier to him on the first Augt 1818. — and the fact of such enjoyment might lead us to presume that this should be considered the effect of a partage made between them — as it appears that a separate lot was marked off for each heir, which was followed by a separate enjoyment by each of them. — if such separate possession among Coheirs can bar the action en partage, so as to give to each a title to his individual share he so enjoyed, against his co-heirs the sale of such share subsequently, must generate lods et ventes to the Seignior — but if such enjoyment does not bar the right of demanding a partage by the Coheirs, there could be no separate right of property exclusively vested in any of the Coheirs and consequently a sale to another Cohein generated no Lods et ventes in favor of the Seignior — now

in

in consulting the authorities of law we find, that the action of partage among Coheirs is favorably received, and no prescription runs against it while the parties possess en Commun, and even when they possess par indivis, this action is not prescribed unless such possession has continued for thirty years. The mere act of possession in this case, will not therefore of itself operate such a partage as to exclude the right of the Coheirs without some other act — the only other act here of the parties, is the manner in which the separate lots of the parties were marked out by a raye de charrue, which it has been contended marked the intention of the parties as effectually as if done in a more solemn manner and by the most positive acts. but it appears to the Court doubtful, whether a boundary so slightly made and so easily to be effaced, can be presumed to carry with it an evidence of a final partage and permanent division of the property, which among the Coheirs would bar the action en partage, we think it would not, more especially as no act or instrument in writing is produced whereby the Coheirs, or any of them, treated such division as a partage, or considered the lots they enjoyed par indivis, as their separate share and portion in the Common inheritance — The deed of sale to the Defendant of the 1st August 1818, does not consider it so, but on the contrary, makes a sale of the undivided right and interest of the Vendors in the Common inheritance, and not of any separate and divided share — and the answers of the Defendant to the faits et articles proposed to him on this point state, that this was not considered a final partage

but

but only a temporary division of the property for the more convenient enjoyment of it by the parties— On this account we are of opinion, that as there was no permanent or effectual partage made previous to the deed of sale in question, this deed can be— considered only in the light of such partage upon which no Lods et Ventes can be claimed by the Plaintiff and therefore dismiss his action with Costs.—

This Judg.t was reversed in appeal—by Judg.t of 30.t July. 1824.

sec. 1. Despeisses. p. 158. in 4.to
Lacombe. v.o Partage.
Rep.se— v.o Partage. p. 610.

No 783.

Keyes & al.— v.s Raymond & al.—

This is an action brought by the plaintiffs Merchants and Copartners, against the— Defendants Coproprietors of the Steam boat Montreal, as Common Carriers, for the loss of a certain quantity of goods put on board that boat to be— conveyed from Montreal to Laprairie, and there— safely delivered to the plaintiffs, for a certain reward or freight to be therefor paid— There is a second Count stating the engagement of the Defendants, the loss of the goods, and a subsequent undertaking to pay.— The third count is on insemul computas.

The plea is very general, and wholly denies

any

any undertaking on the part of the Defendants, and all the facts stated in the declaration.—

The facts as they appear in evidence before us are, that the Steam boat Montreal, owned by the Defend.ts is employed in conveying passengers and goods, at certain rates between Montreal and Laprairie, and that the proprietors for the convenience of the public, and the security of the goods so conveyed, as well as to enable the boat to return without delay to Montreal, have erected a small store, in which articles not immediately claimed, are deposited to be there kept until called for, the door of which is locked at night, and the key kept by the owners of the boat, or by their servants:— in this store seldom any person slept at night, two persons in the employ of the Defts were entrusted with the care of the goods deposited in this store, but no storage was charged for them. That on the 13th. September last, the plaintiffs put on board of the boat a box containing a quantity of goods of various descriptions to be conveyed to Laprairie, which box was so conveyed, and as no person attended there to receive it, the box was in the usual manner deposited in the store of the Defendants erected for that purpose; that on the following day, or soon after persons were sent by the plaintiffs to procure and convey the box to Hemmingsford where they resided, and their agent demanded the box of one Cameron a clerk of the Defendants, who informed him, that the box had been sent or taken to St Johns by mistake, and that he would send for it — It appears that subsequently to this the box was brought back and again deposited in the store, where it was afterwards discovered to have been broken open, and part of the goods, the value of which is now in question, taken

from

from it, and in this state it was delivered to the Plaintiffs — It appears, that upon demand made by the plaintiffs, some of the Defendants promised to make good the loss on the goods, and pay their — proportion thereof, but one of them seems to have qualified this promise, by adding, if he found he was liable.

These being the facts, it is matter of surprise, that a special plea alledging performance of the Contract had not been put in by the Defendants, and that if the goods had been stolen, this was not alledged in the plea, as a legal discharge of their engagement with the Plaintiffs, by which the only question arising out of the true facts of the Case would have been fairly submitted. The Court is not however disposed to criticise the plea, as the Defendants may have had their reasons for pleading as they have done, and we shall therefore confine ourselves to the enquiry, whether the facts proved, support the allegations of the plaintiffs declaration and establish that legal liability which would entitle the plaintiffs to obtain the conclusions thereof. —

It is of some public importance, that the extent of the liability of the Defendants, as owners of the Steam boat should be known and ascertained, as that part of our internal as well as external trade carried on by the route of Laprairie and through the assistance of Steam or other boats of Conveyance, must yearly encrease, and every reasonable facility and just protection must be afforded — It was no doubt necessary that all goods conveyed to Laprairie in the Steam boat should be discharged on her arival to enable the boat to return to Montreal; now from the very nature of their engagement the proprietors and Conductors of the boat, were bound in law safely to Convey and deliver all articles put on board, and the only question is, whether the mere landing of the articles at Laprairie and depositing them in the

Store

Store already noticed, amounted to a delivery of the articles, and a complete performance of the undertaking of the Defendants under all the circumstances, without any particular engagement between the parties, so as to discharge the Defendants from all legal liability: Cases may occur where probably such an extent of liability might be unreasonable and unjust, but the English law has gone great lengths in imposing liabilities on Common Carriers both by land and water and upon principles of public utility, to which all private considerations ought to yield, has determined that nothing will excuse in these Cases, except what is termed the act of God, or that of the Kings Enemies; they are therefore made liable, though they may by violence be robbed of the goods, and the reason given is, the danger of the Carrier combining with robbers to the infinite injury of the Commerce and extreme inconvenience of Society — this rule is however extended only to carriers and not to depositaries, and it may be doubted how far the owners in this Case would be answerable for goods taken by robbery and violence after they had been conveyed to Laprairie. — As to the extent of the liability of the Defendants in the present Case, much will depend upon the circumstances in the consideration of which public utility and security must not be lost sight of. — The Defendants undoubtedly, as well for their own convenience as that of the public, erected the Store in question, and thereby held out to the public this additional security for goods, which their private interest no doubt dictated, to secure to that particular boat a preference of employment over others, and under such circumstances, a greater share of public confidence and support would naturally arise. they therefore necessarily derived an advantage from this Store, and we must suppose that this was also

considered

considered in the freight or reward to be paid; it was not an open shed merely as a shelter from the weather but it was that which admitted to be locked up and secured, and we cannot but think from this circumstance, that the engagement safely to deliver was thereby continued — Such an additional charge was optional with them, but they no doubt found their interest in adopting it, and it would appear, that nothing but a public notification, that they would not be answerable for any goods deposited there could have released them from it; this would have been fair towards the public, who would then have known the extent of their risk and provided against it — It would be wrong therefore to place the Defendants upon the same footing as one who from motives of benevolence and without reward casually takes charge of the goods of another, for in this case, nothing but fraud or gross neglect would attach responsibility upon him; What would be the situation of the public in regard of goods conveyed in the Steam boat and deposited in the Defendants store if no liability attached, it would be this, that they would be exposed to be plundered by the Servants of the Defendants, with whom the keys and the charge of the store were entrusted, without any redress against their employers in whose charge the goods were; nor can it be fairly urged, that because nothing was specifically charged for storage that therefore no liability ensued, inasmuchas an advantage was derived by the Defendants from this Store, though in another way, namely in the freight for the Conveyance

That this is not new doctrine but supported by respectable authority, will be found on consulting Sir William Jones's treatise on bailments — p. 49. he says, when the bailee, improperly called a depositary, either

either directly receives a reward for his care, or takes charge of goods in consequence of some lucrative contract, he becomes answerable for ordinary neglect; since in truth, he is in both cases a conductor operis and lets out his labor at a just price; thus when cloaths are left with a man who is paid for the use of his bath, or a trunk with an Inn-Keeper or his servants, or with a ferryman, the bailees are as much bound to indemnify the owners, if the goods be lost or damaged, through their want of ordinary circumspection, as if they were to receive a stipulated recompense for their attention and pains — Now independant of the want of an averment in the plea that the articles had been stolen, and not by the default of the Defendants, we do not find any thing satisfactory as to the manner in which the articles were taken from the box — it does not appear that the store had been broken open, or that the lock had been forced, yet the servants had charge of the key — it is discovered in the Store to have been broken open, and several articles taken out of it, but whether by Strangers or by those persons immediately employed by the Defendants, remains uncertain — indeed for aught that appears of positive testimony, the box may have been opened when in another situation, even on board the Steam boat, when the liability of the Defendants would not have admitted of a question — It would appear that the Defendants as carriers, & engaged in an useful occupation as to the public, yet in a very advantageous one for themselves, were not generally aware of the diligence and attention which the nature of their employment calls for in return for the advantages they derive from their establishment, for in addition to the loss, it would appear that the

box

box in question had been negligently delivered to a person not authorised to receive it who had carried it to St Johns, so that it could not be found when the plaintiffs sent for it — Now there cannot be a doubt but that the Defendants were bound to deliver the box to the plaintiffs or their agent, and if instead of doing this they have delivered it to another person, they are liable for all the Consequences, and in giving the most favorable construction on the evidence for the Defendant, it is probable, that the box might have escaped depredation, had it been found, to be delivered to the plaintiff's agent when he called for it, inasmuchas by the evidence we find that the box had not been discovered to be broken open, and probably it was not broken open until after the Defendants had caused it to be brought back from St Johns — through this mistake, or rather gross negligence, on the part of the Defendants, or their servants, the loss has accrued; This point of the case we think unanswerable and most conclusive against the Defendants, for regarding them as simple depositaries without reward, they by this act became responsible for every loss or accident that might afterwards occur — It may not be improper here to add, that the charge of the box and the obligation of the Defendants to deliver it, subsequent to its being put into their Store, were clearly recognised and admitted by the Defendants, by their taking upon themselves without hesitation to send to St Johns for the box and causing it to be brought back, they certainly acted right and wisely in doing so, to avoid the liability of paying the value of the whole contents of the box — The authorities which have been cited and the reasons now offered, apply to the first Count in the declaration, nor is it necessary to notice the

undertaking

undertaking of the Defendants as stated in the two last Counts, as the evidence of an acknowledgment and promise on the part of a few of the Defendants, however just and reasonable on their part, might not alone have been sufficient in this Case to charge the whole of the Defendants, but does tend to corroborate the evidence in support of the first Count, as negativing any special exemption from responsibility in respect of the goods deposited in the Store from the boat, either by agreement, or otherwise by public notice to that effect — but upon every principle of law, the Defendants are, under all the Circumstances of the Case, responsible for the loss which has occurred, and as the value of the goods taken from the box has been proved the plaintiffs must have Judgment for the amount.

In citing from Sir William Jones's treatise on bailments, it was not with a view to leave our own law upon the subject out of the question, but because it is well known, and the author himself has declared it, that he has taken his ideas from Pothier and that there is a perfect similarity between the English and French law upon bailments. —

see. 2d Esp. 693. 5 T. Rep. 389 — Poth. Charte Partie. Nº 46.

Judgt. of the Court by Mr Justice Pyke — the other Judges concurring —

Monday 16th Febv. 1824.—

No 513.

Keyes & al' vs Weed.

This was an action instituted by Samuel W. Keyes of Highgate in the State of Vermont one of the united States of America, Trader, and Stephen S. Keyes, of the same place, trader, Copartners carrying on trade together at Highgate aforesaid under the name or firm of S. W. and S. S. Keyes, against Lyman Weed of St Albans in the said State of Vermont, trader, now in the district of Montreal, for a sum of £116. 4. 7. being the amount of a Judgment rendered in the Supreme Court of Judicature of the said State of Vermont, in favor of the said plaintiffs against the said Defendant, and in consequence of the affidavit of one of the plaintiffs in this behalf, the said Defendant was arrested and held to bail for the above amount.—

At the return of the writ, the Defendant appeared and moved by his Counsel, that inasmuch as the debt demanded in and by the declaration was a personal debt, and had been contracted in the said State of Vermont, and as the parties at that time had, and still have their domicile in the said State of Vermont — that as by the laws, usages and customs of the said State of Vermont, no Creditor can in any case, obtain a Capias, or arrest the body of his debtor, so long as such debtor has any moveable or immoveable property which can be seized and sold in satisfaction of his debt — That the plaintiffs having caused the moveable property and effects of the Defendant to be seized and taken in execution by the Deputy Sheriff of the County of Franklin in the said State of Vermont for the security of the payment of the said Judgment which goods and effects are more than sufficient for

that

that purpose, which goods and effects still remain seized in the possession of the said deputy Sheriff — And that on the 5th January last the said plaintiffs had — sued out a writ of execution against the lands and tenements of the said Defendant upon which no return has hitherto been made; that therefore the said plaintiffs after such proceedings on their part against the property and estate of the said Defendant, could not by the laws, usages and Customs of the said State of Vermont, obtain a writ of Capias or right to seize and arrest the body of the said Defendant, so long as the said estate and property of the said Defendant has not been discussed — and that as the said Defendant has come within the Jurisdiction of this Court for the momentary purpose of disposing of certain articles of produce, and to return immediately to the said State of Vermont, as the plaintiffs well knew before the suing out of the said writ of Capias in this Cause — therefore moved that the said writ of Capias be discharged and annulled, and the Dft Defendant discharged from his imprisonment under that writ for the reasons above stated, unless Cause be shewn to the Contrary &c.

Mr. Mondelet of Counsel for the Defendant in support of this rule, contended, that the Contract between the parties regarding a personal debt which was contracted in the State of Vermont, the laws of the place where the Contract was formed must be followed and observed in the execution thereof — cites 1 Prevot de la Jannes. sec. 4. Reg. 9. Introd.n generale à la Cout. d'orleans. Ch. 1. §. 1 No. 8. This Contract must be regulated by the Statuts personnels in regard of the Contraintes to be had on the acts entered into between the parties. Jannes. 3e dist.n par. 11. — Change of domicile may liberate the party from the effect of the laws of the place where the contract was made but

but cannot render him liable to a stricter rule or a more severe execution than prescribed by those laws Introduc: generale à la Cout. d'Orleans No 12. 13 & 24. — The personal actions to be exercised on this Contract must be regulated according to the rules of law where the Contract was made. Repre vo Statut. — In this Case there is a loi d'instruction, and a loi de decision, but the first only must be followed as to the mode of proceeding in this action & cites - Repre vo Preuve. — Lacombe vo Statut. No 3. 4. Id. vo Interets — Mem.x de Froland et Dissertations de Bullenois. — Chassanée sur la Coutume de Bourgogne. — 2. 13 Bur. Rep. Robertson. v Bland. — 5 East. 124. — 1 East. Smith v Buchanan. — Cookes Bankt. Law 347. 3 East. 481. Ballingall v Gloster. Comyns on Usury p. 8. —

O'Sullivan in answer — The plaintiffs acquiesce in all the authorities cited as to the rule of decision of the Contract — but the present question has nothing to do with rules of decision or effect of the Contract, the only question here is as to the course of proceedings to bring the party before the Court, in determining which we must be governed by the laws and rules of this Court and not by the rules of the State of Vermont or the place of the Contract. —

The Court was of opinion, that on the present question they had no right to consider the rule of law of the place where the Contract was made, or the debt contracted, but only the rule of proceeding before the Court in bringing the Defendant before it — the objections raised as to the rule of decision, regarding the merits of the Cause, the regularity of the proceedings must be determined by the laws & orders of the Court where the proceedings are had — It is the instruction

and

and not the decision of the cause we have now to regulate, and according to Boullenois and all the writers on the point, "la regle est de suivre la "procedure et les usages observés dans le lieu ou on "plaide" — and the proceedings in this respect being regular, the rule obtained by the Defendant must be discharged —

see. Repᵗᵒ vᵒ Statut. p. 403. —

Boullenois. traité des Statuts réels & personels. Tit. 2. ch. 3. obs. 23. p. 535 — and case cited in p. 525. —

Mr Justice Heath's opinion in the case of Melan. v. The Duke de Fitzjames 1. Bos. & Pull. Rep. 142 — which was afterwards recognized to be law. 2. East. Rep. 455. —

Thursday 19th Febr. 1824.—

No. 1950.

McDonnell
v.
Atkinson.—
&
Cameron opp.t

In this cause the opposant had in Term obtained a Judgment of Separation de biens. from the Defend.t her husband, upon which however no further proceedings were had until the execution sued out by the plaintiffs in this cause against the goods and chattels of the Defendant, by virtue whereof sundry goods and merchandises were seized in his domicile and possession as his property — In consequence of this seizure the Opposant renounced to the Community that had subsisted between her and the Defendant and put in an opposition in this case, claiming the several goods and merchandises seized, as being her separate property and purchased by her since the Judgment of separation de biens which she had so obtained — It appeared in evidence that the goods had been purchased by the Defendant, subsequent to the Judgment of separation, who declared at the time they were for his wife, and that the wife came some days after and paid for them — that it was the Defendant who, prior to this period, was the person who purchased the goods for the Opposant, who was the person that carried on the business in the sale

of

of them. —

Walker for the Oppos^t. The renounciation to the Community was made by the Opposant on the 2^e June 1823. although the Judgment of Separation was long previous thereto — that subsequent to this Judgment the opposant carried on business in her own name and on her own account. — The goods were seized in May 1823 — and here where the opposant had no rights to claim out of the Estate of her husband by virtue of any marriage Contract, the execution of the Judgment of Separation became unnecessary 2. Pigeau. 195. — 3. Grand. Com^{re} Fer. p. 367 — and acte de notoriété du Chatelet de Paris in explanation of the Custom. — That all the goods and effects seized had been purchased by the Opposant only a few days before the seizure, and had paid for them out of her own pocket — That the renonciation to the Community has a retroactive effect up to the day on which the Judgment of Separation was given, and therefore the property acquired by the Opposant during that intermediate period belonged to her exclusively. — Poth. Com^{te} N^o 521. — Rep^{re} v^o Separation. p. 221. —

Boston for the Plaintiff — The Judgment obtained by the plaintiff in this Case was for house rent, and all the property found in the house rented whether it belonged to the Defendant or to the opposant was equally liable for the rent, as being the gage of the plaintiff — That the Judgment of Separation

obtained

obtained by the opposant, was by fraud and collusion between her and the Defendant, nor was it ever carried into execution until after the seizure made in this Cause, viz^t. on 2^d June 1823, the Community could not be considered to be dissolved until that renunciation was made, and if she had no claims to make against her husband, the whole of the property of the Community remained to him and his creditors had a right thereto. — That the purchase of the goods appears always to have been made by the Defendant, although done by him in the name of the wife, and he was considered the debtor on all such purchases — it is true that in the latter purchases made by him subsequent to the Judg^t of Separation, the name of the wife was entered in the merchants books as the purchaser, but this was mere collusion between them to cover the property from the Creditors — That a Judgment of Separation unless followed up and executed can be of no avail. 2 Pigeau. 194. 5. 6. — Pothier Tr. De Communauté. N^o 521, and the usual course in actions of Separation de biens, is for the wife to renounce to the Community before the Judgment rendered, but by not doing so, she reserves to determine whether she will accept, or not accept the Community — 3 Fer. Gr. Com^e p. 194. — And the Defendant here appears to transact the business in the usual way in the name of his wife, but from which she can derive no separate benefit, as she must be considered as commune until renounciation. 3^e Fer. Gr. Com^e p. 367. —

Walker in answer — The woman may have no matrimonial claims to exercise against her husbands estate, and still have good reason to demand a

separation

separation de biens, as stated by Poth. Comte No 512. That in this case where the opposant had no claim to make of this kind, her renunciation was of no consequence, as it was not necessary that any Inventory should be made, or any discussion had in regard of those claims, the Judgment of Separation was the period from which the separate rights of the Opposant commenced. — 3. Gr. Comre p. 183. — No. 18. —

The Court were of opinion, that every Judgt of separation must be executed as far as it can in order to give any right to the wife to claim a separate property, and therefore her renounciation was a necessary formality to be observed to give effect to the Judgment she had obtained — The mode in which the business was carried on by the Defendant and his wife, might deceive their Creditors, who were not bound to know the intentions or the claims of the wife until she had intimated them in the way required by law — Poth. Comte No 512. — The wife must be considered as Commune until her renounciation is made, and not having been made previous to the Judgment, she can claim no separate property from the date of that Judgment by virtue of any retro active effect of her renounciation. Opposition dismissed with Costs. —

—

No

No 2121.

Bistodeau
Giard. —

In this case the plaintiff prosecuted an action against the Defendant for a balance of £9. 1. 10 for goods sold and delivered to him and his late wife, and the action was instituted as the Defendant as well in his own name as Tutor to the minor children of his marriage with the said deceased — there was another count in the declaration for a sum of £8. 5. 0½ for goods sold and delivered by the Plaintiff to the Defendant in his own separate name since the death of his said wife, making together the sum of £17. 6. 10½ and by the conclusions of the declaration, the Plaintiff prayed for Judgment against the Defendant in his own separate name and right for the above sum of £8. 5. 0½ — and against him as well in his own name as Tutor to his said minor Children, for the said sum of £9. 1. 10 with interest and costs. — The Defend^t appeared but filed no plea — The Court however were of opinion that the conclusions of the Plaintiffs declaration could not be granted, as he had divided his right of action into two separate demands against the Defendant in two separate capacities, which could not be joined in the same action, and would require two separate Judgments and executions — Action dismissed sauf à se pourvoir. —

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No 449.

Woolrich
vs
Malhiot.

On action against the Defendant as

as indorser of a promissory note made by one Porlier in favor of the Defendt for a sum of £125.— dated 2d January 1823, payable in three months after date, and by the Defendant indorsed to the Plaintiff.—

The Defendant pleaded for peremptory exception, that the Plaintiff had prosecuted an action against the maker of the note for the amount thereof which action was still pending and undetermined, and therefore that Plaintiff having made his option could not institute at the same time the present action agt the Defendant as Indorser for the same sum,— until it should be ascertained that no recovery of the money coued be had against the maker on the first action — And further that the Plaintiff did not state or shew in and by his declaration, that he had used sufficient diligence or had given — sufficient notice to the Defendant, of the diligence used by the Plaintiff to obtain payment from the maker of the note, so as to entitle him to his action against the indorser —

The Court however were of opinion that both actions could be brought at the same time, and this according to the principles both of the English and French Law — As to the sufficiency of the Plaintiff's declaration on the score of diligence, the Court thought that enough was stated and in the usual form — and the words, "of all which the Defendant had notice", were sufficient to admit evidence of a legal notice having been given — Exceptions dismissed.—

№ 1748.

Bowman vel
Reid
vs
The Justices
Opps

On opposition à fin de distraire. –

The Defendant was proprietor of a certain lot of ground situate in the vicinity of Montreal, which he had purchased subject to have a certain street opened thereon for the public convenience – In consequence of the improvements made in that part of the town, it was thought adviseable that two streets should be laid out on the Defendants lot; viz^t for the continuation of S^t Catherine Street, and for the continuation of mignonne Street in the Quebec Suburbs, and that the said streets should be forty feet wide instead of thirty six as was stipulated in the Defendants deed – for this purpose arrangements were made with the Defendant by the Justices for opening the said streets, and on the 17^th May 1823, at a special session held by the Justices, the Inspector of the highways and streets was authorised to lay out the streets – On the 24^th May 1823 the Inspector made his report to the Justices that he had complied with their order of the 17^th May and had laid out the said streets and made up the fences, but that Mr Guy and the Defendant had required that a board fence instead of an open fence should be made up opposite their respective lots of land, which was ordered accordingly – On the 21^st June 1824, the Defendant appeared before the Justices, and claimed an indemnification for having delivered up the said streets in May last, at their request, whereas he did not expect this would have been required before the fall of the year, by means whereof he had lost the use of the ground and the crop he had sown upon it, and it was agreed that an indemnification should be

given

given him - Afterwards on the 13th. July 1823, the Defendant made a deed of transfer and conveyance to the Justices for the use of the public of the extent of ground contained in the said two streets of forty feet widtt each.--

The Plaintiffs had sued out execution against the lands and tenements of the Defendant on the 20th. May 1823, and by virtue thereof had caused the lot of land in question to be seized and taken in execution, but without any reserve as to the two streets in question, and in consequence the present opposition was made to withdraw from the seizure the said two streets as being public property.- This was opposed by the plaintiffs who contended that at the time of the suing out of the writ of Ex. execution, and at the time of the seizure the whole of the said lot of land was in the Defendant; and he could not by any subsequent deed transfer or convey away any part of it to the opposants - They admitted that the Opposants were in possession of the parts claimed, at the time and prior to the suing out of the said execution, but that this was a possession without a title and not sufficient to maintain their present Opposition.-

The Court however were of opinion that as the agreement between the Defendant and the Justices had been entered into and the possession given of the two streets prior to the suing out of the Writ of execution against the lands and tenements of the Defendant, it was sufficient to convey a right in the property to the Opposants, and ordered the extent of the two streets in question to be distraits from the seizure see. Dantz on Ev. add. to Ch. 10. No. 5. p. 593.-

Friday 20th February 1824.

No 1905.

Bellows. v French.

Action of assumpsit on a promissory note as bearer.

The declaration stated that the Defendant and one Robert Rodgers, one Anselm Parsons, and certain persons carrying on trade together under the firm of A. McCotter and Company, on the 21st day of May 1823, at Plattsburg, in the State of New York one of the United States of America, made their certain note in writing commonly called a promissory note, bearing date at Plattsburg the day and year aforesaid, the proper hand of each of them, the said Defendant, Robert Rodgers, Anselm Parsons, and the name of the said firm of A. McCotter and Company, in the proper hand of one of the persons composing the said firm, being thereto set and subscribed, to wit, the said Defendant as principal, and the said Robert Rodgers, Anselm Parsons and A. McCotter and Company as Sureties, and thereby, Sixty three days after date, they, viz. the said Defendant, Robert Rodgers, Anselm Parsons and A. McCotter & Company jointly and severally promised, to pay to the President, Directors and Company of the Plattsburg Bank, or Bearer, four hundred dollars, equal to the sum of one hundred pounds, Current money of the Province, for value received, and then delivered the said note to the said President, Directors and Company of the Plattsburg Bank — And the said President Directors and Company of the said Plattsburg Bank, to whom, or to the bearer of the said Promissory note, the payment of the said sum of money therein specified, was to be made, before the payment thereof

thereof, to wit, on the day and year aforesaid, duly assigned over and delivered the said promissory note to the said Plaintiff, who thereby then and there became and was and still is the lawful bearer thereof and entitled to demand and receive payment of the said sum of money therein specified, whereof the said Defendant afterwards at Montreal aforesd. had notice, which said note the said Plaintiff herewith produces. By means whereof the said Defendant became bound and liable, and being so, undertook and promised to pay to the said Plaintiff as bearer of the said promissory note, the said sum of money therein specified according to the tenor and effect thereof.— And the said Plaintiff avers that— according to the laws of the said State of New York, where the said note purports to have been given, interest accrues by mere operation of law on all promissory notes from and after the time limited for their payment, although such notes contain no promise or stipulation concerning interest.—

2d. Count— for a similar promissory note made by the Defendant, and the said Robert Rodgus Anselm Parsons and certain persons carrying on trade under the firm of A. McCotter & Comp.a jointly and severally.—

3d. Count. For money lent and advanced &c.—

4 Count On Insimul computassent &c.—

Concludes for the payment of £100— Cy. with interest and Costs.—

Plea.— 1st Non assumpsit— and 2d. as to the

first—

first and second Counts in the said declaration the said defendant saith, that notwithstanding any thing therein contained, the said plaintiff ought not to have or maintain his said Action, because he saith that he the said Defendant never received any value or consideration for the said promissory notes in the said declaration mentioned, nor did the said plaintiff give any value or consideration for the same — And the said Defendant avers that according to the laws of the State of New York where the said promissory notes purport to have been made, the payment of promissory notes given without consideration cannot be enforced by a person who has not given value for the same, and is not a bona fide holder — And the said defendt doth aver, that the said plaintiff well knew at the time he became possessed of the said notes, that the said Defendant had not received any value or consideration for the same. —

3d That the said promissory notes in the said first and second Counts in the said declaration mentioned were obtained by the said plaintiff and others in collusion with him, by fraud, covin, and misrepresentation, to wit, at Montreal aforesaid, and therefore the said promissory notes are void in law.

Wherefore he prays Judgment &c

Replication joins issue on the plea. —

At the enquête the Plaintiff adduced evidence of the hand writing of the Defendant and of the several other parties subscribing the Promissory note in question. —

The

The Defendant examined the Plaintiff on faits et articles, but failed to establish any of the facts enquired of him, except in regard of the value given by him for the said note, in regard of which he said, that the value he gave for the note was his written promise for an equal sum to the person from whom he received it, whose name is Alexander McCotter, but in case nothing could be obtained from the said note he, the plaintiff was to be exempted from making any payment.—

On hearing on the merits Mr Gale for the Plaintiff stated, that Plaintiff brings the action on the note as bearer, which was made payable to the President Directors and Company of the Bank of Plattsburg, and by them transferred and delivered to the Plaintiff.— In this Case the Plaintiff is entitled to his action without shewing any consideration — cites. Chitty on bills. p. 83., and transfer by delivery is good.— That as the Defendant has shewn no fraud in the transaction or that the plaintiff came by it illegally, the Plaintiff is not bound to shew what was the consideration he gave for it. Chitty. p.68. and on note King. v. Milson. 2 Camp. Rep. 5.— Sir John Lawson v. Weston. 4 Esp. N.P.C. 56. Rees. v Marquess of Headfort 2 Camp. Rep. 274. The Defendant has by his plea alledged Covin and fraud in the making and transfer of the note, but has proved nothing and in order to shew how the plaintiff came by

the

the note he has examined him on faits & articles and his answers prove that he came fairly by the note and had a right in consequence either to transfer it to another or to prosecute the present action thereon, in this Case the possession and the property go together — cites. 1 Bos. & Pull. 651. Collins. v. Martin. Opinion of Ch. J. Eyre.—

Grant for the Defendant. This action cannot be maintained, as the plaintiff has shewn no title to the note, and the Defendant cannot be held to shew a want of consideration, when the Plaintiff shews no title.— The Plaintiff admits by his examination on faits et articles. that he has no interest in this note, he is the mere agent of another person, and sues on the responsibility of that person — It also appears that the person from whom the plaintiff received the note is one of the makers of the note, and who alone could claim the amount of it from the Defts

The Court held, the Plaintiff was not bound to prove any consideration in the transfer of the note so long as the Defendant had not adduced any evidence to shew any suspicious circumstances attending the transaction — possession was title and sufficient to maintain the action until impeached — But in truth the Plaintiff had given that kind of consideration for the note which seemed to require of him some diligence

to

to obtain the recovery of it, and the Plaintiffs possession of the note under this consideration enables him to give the Defendant a sufficient and legal discharge for the amount of it —

Judgt for Pltff — wt interest from service of process & Cost —

see. Chitty on bills. p. 68.
King v. Milson. 2. Camp. Rep. 5. —
Pattison v Hardacre. 4. Taunt. Rep. 114 —
N. Denzf. vo Billets au Porteur No 4.

No 304.
Ex parté
Ant. Deselles

On Petition of Antoine Deselles, a prisoner in Gaol, praying that an alimentary allowance might be made to him. —

The Petitioner had been committed to gaol under a Contrainte par Corps, or execution of Ca: ad Sat: for the defficiency of price on a sale of property at his folle enchere — the Creditor at whose instance the petitioner was confined, resisted his petition, and contended that by Law he was not allowed or entitled to any alimentary allowance.

The Ordinance of 1785. sec. 38. limits this allowance to persons confined in gaol for debt of a commercial nature only, and therefore not appliable in the present instance, and recourse must be had to the general principles of law to determine the question. —

It seems to be a principle of humanity and Justice

Justice admitted by the antient laws of France that every Creditor, at whose instance a debtor was committed to prison, was bound to maintain him there according to a regulated allowance in such Cases.— su Repᵉ vᵉ alimens. p. 322. "Le Créancier
" qui contraint son debiteur par corps, & par emprisonnemᵗ
" de sa personne, doit consigner les alimens suivant la
" taxe."— see also, the Declaration du Roi du 10 Janvᵉ 1680. 2. Bornier. on tit 13. art. 23. Ordᵉ 1670— This article says— "Les Créanciers qui auront fait arreter ou recommander
" leur debiteur, seront tenus de lui fournir la nourriture
" suivant la taxe qui en sera faite par le Juge, et contraint
" solidairement, sauf leurs recours entre eux.— Ce que
" nous voulons avoir lieu à l'egard des prisonniers pour
" Crimes, qui apres le Juzement, ne seront detenus que
" pour interets Civils deu"

On a note by the Commentator on the words, "de lui fournir la nourriture," he says, cet article est conforme à l'ordonnance de François 1ᵉʳ de l'an 1515. ch. 21. et de Henry 3. de l'an 1585. et au droit Civil, par lequel le Créancier est tenu de fournir les aliments à son debiteur, s'il est si pauvre qu'il n'ait point de quoi se nourrir, afin qu'il ne perisse point de faim dans les prisons — Ce qui est confirmé par le sentiment de plusieurs Decisionnaires, et particulierement de G. P.— (Guy Pape) quest. 211. ou il est dit, que cela s'observe generalement dans la Province de Dauphiné.—

Upon the above Declaration of 1680, Bornier makes the following observation — Quoique cette Declaration soit generale, il y a pourtant des dettes d'une nature, qu'on n'est pas obligé à faire aux prisonniers provision d'aliments dans la prison— Comme aux Tuteurs qui sont redevables des deniers pupillaires— aux

depositaires

depositaires des biens par autorité de Justice — Aux Receveurs et Administrateurs publics des Hopitaux, et autres semblables — La raison est, parceque ces — debiteurs sont en mauvaise foi de ne rendre pas ce qu'ils doivent de reste, et qu'en le retenant, ils commettent dol et larcin — Ainsi jugé, par arret du Parlement de Paris, recueilli par Charondas liv. 4. de ses Reponses. Rep. 6.—

The report of this arret is a little fuller in Charondas he states it thus — Car s'ils ne rendent ce qu'ils doivent de reste, en le retenant ils commettent dol et larcin, qui empeche la Cession de biens — et pour leur mauvaise foi, ne semble que celui envers lequel ils sont tenûs pour telles Causes, puisse et doive être contraint à leur faire provision d'alimens en la prison — Ainsi que j'ai recueilli d'un arret de Mardi 3 Sepbr. 1566. sur l'appel du Bailli de Beauvais, que j'ai oui prononcer par Mr Le Premier President de Thou, et declarer ses raisons d'icelui.—

Now it is considered that the purchaser of property or adjudicataire de bien par Decret, is to be compared to the depositaire de bien de Justice — 1. Hericourt Tr. de la vente des Im. par decret ch. 10. No 33. p. 196. says — Le tems que l'Edit du mois de Fevrier 1689. donne à l'adjudicataire pour consigner le prix des biens qui lui ont eté adjugés n'est que de huitaine; des que ce delai est expiré, le procureur du poursuivant etant assuré que la Consignation n'a point eté faite, commence les procedures contre l'adjudicataire — La premiere est la Contrainte par Corps, qui a lieu de plein droit: Ce qui est approuvé, non seulement par les anciens reglemens, mais encore par l'Edit qu'on vient de citer, lequel porte, que les adjudicataires

seront

seront tenus de consigner, comme depositaires de biens de Justice. —

Jousse. Tit. 34. Ordre 1667. art. 4. on a note. p. 219. says, Ceux qui achetent des biens meubles ou Immeubles en Justice, peuvent être contraints par Corps a en payer le prix, sans pouvoir meme alors être admis au benefice de Cession. (Cout. d'Orleans. art. 439) plusieurs autres Coutumes en ont aussi des dispositions est tel est le droit Commun du Royaume —

see also. Repre vo Contrainte — same authority. —

From these authorities these consequences are to be drawn, that the depositaire de biens en Justice and such persons as are not entitled to the benfice de Cession, cannot claim an alimentary allowance while in gaol at the instance of their creditors, and that the adjudicataire par Decret is compared to persons of both these descriptions, and consequently can have no better claim —

Petition rejected —

No. 2051.

Ellice. v Dupuis. —

This action is in Trespass, or voye de fait, and is entitled thus — Robert Ellice of London, in that part of the united Kingdom of Great Britain and Ireland, called England, Lieutenant Colonel in His Majesty's army, Plaintiff, against Augustin Dupuis of Hemingsford &a Yeoman, Defendant —. The declaration sets

forth

forth Letters patent of the 10th May 1811, by which His Majesty granted to the plaintiff in trust for himself and for the Heirs of the late Alexander Ellice, — certain lots of land in the Township of Godmanchester therein described — The plaintiff then states, that being so seized and possessed as aforesaid of the said lots, as well for himself, as in his capacity — aforesaid, the Defendant on the first day of October 1818, and on divers other days and times between that day and the institution of the action, with force and arms at Godmanchester aforesaid, entered upon the said lots belonging to the said plaintiff as well in his own name as in his capacity aforesaid and there cut down, prostrated and destroyed the trees of the said plaintiff of great value, to wit, of the value of £300 Cy, then growing upon the said lots, and took and carried away the same, and converted and disposed thereof to his own use, to the damage of the plaintiff £300 — There is also a second Count more general — Wherefore the Plaintiff says, he is injured and hath sustained damage to the value of £300, and for the Causes aforesaid concludes, that the Defendant be adjudged to pay to him the said plff £300. —

The pleas put in to this action, are, First, a general demurrer — 2dly That there is a previous action pending between the same parties and for the same Cause — 3dly Because the pretended claims, rights and pretentions of the plaintiff are prescribed in law — and because at the time and times of the pretended trespass, the plaintiff was not seized and possessed of the said lots of land, nor lawful proprietor thereof, but that the said lots belong to the Defendant and did so belong at the said times and long before —

That

That in the year 1788, the said lots were granted by His Majesty to J. B. Destimauville, Esquire, from whom the Defendant in 1789. acquired the same, and was put in possession, and hath ever since in good faith been seized and possessed as the owner thereof, and openly, publicly and quietly hath enjoyed and possessed the same and therefore that the pretended title of the plaintiff is null and void, and could not convey any legal right to the said lots, and that the said plaintiff's claim to the said lots is prescribed in law by means of the Defendts public and uninterrupted possession — 4ly That he is not guilty.— The answer and replication are general.

Upon these issues the parties have been heard en droit, and the first and material question which arises upon the said demurrer of the Defendant, is, whether the plaintiff has alledged and set forth substantially in his declaration that which is requisite to maintain an action of Trespass or not; The english term, Trespass, corresponds with that of the French Law, "voye de fait", both convey the idea of violence, damage or injury to the person or property of another — in regard of landed property, to give a right of action for a trespass thereon, the injury must be done to the party in the possession or actual enjoyment thereof by himself or others under him, for it is from the injury to this possession that a consequent right of action arises and he who has the clearest title but has never been in possession of the land thereby conveyed, cannot maintain the action of Trespass or voie de fait against him who is in possession, for any act done thereon — this is consonant to reason, upon which all law is correctly said to be — founded, and therefore the principle is equally recognized by the Laws of England and of Canada, and so strongly is the principle established in the latter, that the action en reintegrande, cannot be brought by him who does not allege a possession of one year previous to the period of his being troubled in or deprived of such possession,

Voy. Dic. Dront. Vo Trouble. Domm: & Int: Action Poss.

nor

nor can he bring either of these actions after the expiration of one year, but must resort to the petitory action to obtain the possession of the land for which he can shew a better title than he who claims by possession only. Now the only allegation of possession to be found in the declaration, is the following — "and being so "seized and possessed as aforesaid", without there being any thing previously stated of any possession whatsoever, as the setting forth the letters patent obtained by the Plaintiff and the description of the lots granted, are alone to be found — In order to convey the domaine de propriété, title alone is not sufficient, it must be followed by tradition of some kind — The Plaintiff therefore has not set out that upon which his right of action wholly depends, and it would be too much to presume in an action of the present nature, that because he holds a title to the lots, he necessarily became the possessor thereof, but on the contrary the presumption must be the other way in favor of the Defendant — An argument has been used, the correctness of which we do not admit, namely, that this is not a possessory action, but one in factum — a description of action, which, although it existed in the Roman Law, as not comprehended in any of their actions, to which special names and precise legal forms were given, did not necessarily exist in France, where the same distinction of names and forms of actions were not adopted, as here, actions were more distinguished and classed by their object than by particular names except those to which the Customs had attached distinguishing titles — The Roman action in factum, is what perhaps in England would be termed a special action on the Case, and must be in effect authorised here, when an injury has arisen, which does not properly come within any special class of actions the law has provided

N. Dennet. Vo Action.

provided, but not for the purpose of avoiding the action specifically given by the law for the injury complained of, and thereby deprive the Defendant of that defence which upon principles of law are afforded to him; it would be attempting an indirect way to obtain that, which in a direct way could not be granted, and would be equally unjust and unreasonable in this case, as it would go to destroy those rights which the law recognizes and supports in the actual possessor of land for a year and upwards — It cannot be, that a person pretending right to land, which to his knowledge is possessed by another person who has, without interruption, been using it as his own for a number of years, should be entitled to the same remedy and favor as he who has been illegally dispossessed of, or troubled in his actual possession, when from his silence the fair presumption may be entertained that he has tacitly acquiesced therein, and thereby admitted the exercise of that right of which he now complains — Again if we were to admit this action, as an action in factum, the title to the land as the very foundation of the action must necessarily be brought in question, — which would be again infringing upon another class of actions, the petitory, and create that confusion, which the law forbids, that of blending the petitory with the possessory action, and would destroy every thing like order and system in the administration of the law of Canada, and produce injustice — The only right that could be exercised under such circumstances would be, to claim by a petitory action, the land to which clear and just title may be opposed to an illegal and insufficient one, in which action all rents, issues, and profits of the land, and damages, might

might be claimed, and would with the land be awarded according to the good or bad faith, or the favorable or unfavorable circumstances under which the true owner may have been deprived of the enjoyment thereof by the person in possession, and thus full and equal Justice done to both parties, without a plurality of actions, the petitory action securing to the plaintiff all his legal rights, and embracing in it every legal remedy and reparation to which he is entitled.— We cannot therefore maintain the present action as one in factum, and the bare perusal of the declaration is sufficient to shew that it cannot be so considered — what is complained of is clearly a trespass, or a voie de fait, and feeling this, the ready ingenuity of the plaintiff's counsel, which the Court is far from wishing to restrain, has resorted to this argument to save his action, but it cannot avail him — The action is of that class of real actions called possessory, which are given to the person in possession without regard to title, and must be so treated, though it has not the usual form and conclusions of those actions — its very foundation is the disturbance or injury done to the land by spoliation, which none but the reputed proprietor in possession can complain of by a mere possessory action as it is this possession which the law protects, and would punish a disturbance of, even by the real and true owner founded in title, who would not be allowed to exercise any act of ownership upon the land, against the will of the person in possession, unless such owner had been in possession, and had been deprived thereof, within the year and day of the act complained of without which he would be compelled to repair the injury and restore the possession — this very exception proves and confirms the general rule, and shews the

protection

protection given to a simple possession, and it must necessarily follow, that he who has thus a right to claim a reparation for a disturbance in that possession, could not himself be sued as a trespasser upon that of which he is presumed to be the proprietor until the contrary is publicly established, and which can be done only by a petitory and not by a possessory action — In the Repertoire, under the title, "Voye de fait, p. 599 - is this observation, - "enfin il est des "voyes de fait qu'on ne peut juger independamment "du merite du fond, sans s'ecarter des maximes receües "sans nourir le monstre de la chicane par des procedures "vraiement frustratoires — Ce seroit donc une maxime "fausse et dangereuse d'avancer indistinctement, comme "certains auteurs, que toutes voies de fait sont defendues "et doivent être reparées par provision" — The Plaintiff therefore must have felt that he could not proceed by action en complainte, or en — recitbegrande, and has not concluded to be — maintained in, or to be restored to the possession, inasmuchas he admits the entry and possession of the Defendant since October 1818, and probably could not have proved any possession in himself prior or subsequent to that period, so upon the same — principle he cannot be admitted to resort to the present mode of action in order to evade the law supporting the rights of the possessor until he has proceeded to establish his preferable title to the land, which is not the subject of the present action, but which must be established by a different species of action and a Judgment deciding directly upon that title — To maintain this action would be giving a provisional Judgment for that which is merely consequent, before deciding upon the main right, and this without — necessity, public policy or justice requiring it, for it must —

must be recollected, that the right to all possessory actions proceeds and flows from the possession annale, upon which alone they are founded and are given, and not upon the right to any ownership in the property, but that which the law presumes from possession — It therefore also follows, that the prescription annale must apply in the present Case as in all other actions founded on mere — possession, so that this plea must also be supported if the facts therein stated are proved — If the Plff has not on the present occasion adopted in point of form one of the two possessory actions given for a trouble or eviction, yet it must be tested by its object so as to be brought within some one class of actions upon which the law of Canada may be brought to bear and apply — now what is the object of this action? — it is damages for injury done to real property, — this therefore is sufficient to bring it within its proper class of actions — the possessory as being founded on possession alone, without which it could not be maintained, and thus the laws regulating real property and actions arising therefrom, afford a rule of decision as applicable to the present Case — it will not however be applicable of course to the petitory action which will embrace all the issues, profits and damages which the plaintiff may be found justly entitled to claim and recover from the Defendant under the particular circumstances of the Case — It is also evident from the general law which we consider applicable to the present case, that if the plaintiff has brought his petitory action, he has thereby waived all right to the possessory action or provisional

action

action, as the same party cannot avail himself of both actions for the reason given in Ferriere's Dictionary under the word possessoire — "Des que le " petitoire est une fois intentée, on ne peut plus former " complainte, parceque'en formant l'action au petitoire " on reconnoit la possession du Defendeur, ce qui est " absolument necessaire à la nature de l'action en " complainte, dans laquelle on se dit possesseur, et " on se plaint d'avoir été troublé en sa possession" — But as these two depend upon the proof and merits of the Case, the only point which it is necessary now to dispose of, is whether possession in the plaintiff has been alledged with sufficient certainty in the declaration to give the legal foundation for the present action, and to admit the parties to proof, and we are of opinion that it is not, but that on the contrary a long and continued possession of the Defendant may therefore be infered sufficient from the plaintiffs own shewing to destroy his present action — It would therfore be no favor to the plff to order proof of possession, as if he cannot establish an actual possession of the land by himself or others under him, but that the Defendants possession is proved (which from all we can discover the latter will be able to establish) the present action must necessarily fail — It may not be improper to observe that the principles upon which the present opinion of the Court is formed, must operate also to prevent a Defendant from pleading title in justification in a possessory action, the only justification to be setup is adverse possession, as it would be unjust

and

and contrary to the policy of the law to allow him to build up and obtain a right to the land through the means of an illegal act or voie de fait. The law has clearly provided remedies in all matters regarding real property, and it is right and proper to adhere to them — For by introducing a new species of action to which no law applicable can be found and this in opposition to those which the law has provided, and moreover tending to set aside or render inoperative the fundamental principles of that law in regard to real property, great mischief, uncertainty and injustice would follow; which it is the duty of the Court to prevent — Action dismissed with Costs.

No

Dupuis.— & Perrault.— & Ellice — Interv.

The principal demand is founded on a promissory note made by the Defendant in favor of the plaintiff, for the amount of which the latter now demands Judgment.

An Intervention has been put in by Mr Ellice claiming that the money be paid over to him under the Letters Patent mentioned in the former action, for that upon two of the lots thereby granted to the Intervening party, the plaintiff had assumed and usurped the right of selling timber trees and wood growing thereon, and that the note in question of Perrault to Dupuis had been given in consideration that the latter had sold to the former timber wood and trees growing on the said lots, and the right of cutting selling and taking timber wood and trees thereon growing as the said Perrault might judge fit — There is an averment, that at the time the note was given, the

Intervening

Intervening party was the true proprietor of the said lots, and was seized and possessed thereof. —

The same pleas have been put in to this Intervention as to the former action. —

This Intervention however goes further than the declaration for the Trespass as therein is contained, a positive averment of the possession of the Intervening party in the lots of land, and an adverse possession being alledged by the plaintiff — this would remain to be proved, and if the Intervening party failed to prove his possession, he would not be entitled to the conclusions of his Intervention — But in the Intervention which is in the nature of an action of Trespass, no one fact is alledged by which any claim for actual damage can be founded — the sale is said to be of timber trees &c — growing on the said lots, but there is no averment that the trespass was ever carried into execution and the trees cut down and removed, this was essential, as non constat, for any thing that is stated in the Intervention, that any damage has accrued to the Intervening party, or that in consequence of the sale by Dupuis, and the note given by Perrault, trees have been cut down and removed — there is therefore here a substantial defect, which upon the general demurrer of the plaintiff upon which the parties have been heard must prove fatal — As to the plea of another action still pending, the adverse possession, prescription, and the title set up by the plaintiff, it is not now necessary to enter into any consideration of these points, but it may be very much doubted, how far the Intervening party could have succeeded in the object he has in view, and that he could interfere in the personal action between the original parties, and how far

for the note could be considered as representing the wood, for which it may have been given, and which the Intervening party considers to have been his property, the delivery over of which he might have opposed during the pendancy of an action of revendication for the wood itself, and have sized conservatorily in the hands of a third person, but in regard to the present action which is for a simple debt, the Intervening party could at best be only considered in the light of a Creditor and that only for damages which are unliquidated, and for which he may not obtain a Judgment — Now we do not consider that any creditor of a Plaintiff has a right to intervene, even for a liquidated debt, in an action between the plaintiff and his personal debtor, and claim that the money should be paid over to him and not to the plaintiff, in discharge of his debt against the latter — the law gives the Saisie-arret to attach the monies of a debtor in the hands of his debtor, but this cannot be obtained prior to Judgment without an affidavit that the debtor is about to secrete his effects: As therefore now advised, the Court would require a precise authority to remove its present impression of a total absence of right in Mr Ellice to intervene as he has done in this Case, under all the circumstances of it — One thing is very certain, that if a petitory action has been instituted by Mr Ellice against Dupuis for the land in question, the Intervention in this Case must by the law of the

Country

1 Pigeau. 116. 117. 170. 171. — Poth. Poss. N° 83. 101. 2. 3. —

Country, be deemed a trouble or disturbance of the possession of Dupuis, and entitle him to an action en complainte; for until such petitory action is decided, the possessor of the land is upheld in his possession and entitled to enjoy the rents, issues and profits thereof without interruption, for the petitory action being once instituted, excludes and bars the possessory action of the same plaintiff — The Court is therefore of opinion, that the demurrer must be supported, and the Intervention of Mr Ellice dismissed.

N°

Ellice. — vs Dupuis.

The title of this Cause, which is a Petitory action, is the same as stated in the action for the Trespass — and the declaration after stating the letters patent, dated, 10 May 1811, of certain lots in Godmanchester, granting to the plaintiff in trust for himself and for the heirs of the late Alexander Ellice, their heirs and assigns, alledges that he the plaintiff, as well for himself as in his capacity aforesaid, had peaceably possessed and enjoyed the said lots as proprietor thereof, until the 2^d. day of October 1820, when the Defendant seized and took possession of the same without right or title, and hath continually held and possessed the same against the will of the Pltff and that the Defendant though often requested has refused to deliver up the lots to the Plaintiff.

Wherefore

Wherefore the said plaintiff acting as aforesaid prays that the Defendant be condemned to deliver up the said lots to him the plaintiff, as well in his own name as in his capacity aforesaid and that he, the petitioner be restored to the possession and enjoyment thereof, and the Defend^t condemned to restore the rents, issues, and profits of the said lots, and to pay the damages by him done and occasioned thereto.—

Defense 1st General demurrer 2d Peremptory Exceptions, denying that the plaintiff is the proprietor of the lots in question, or ever became seized and possessed thereof, but on the contrary that they are the property of the Defendant and belonging to him by right of prescription, for that in or about the year 1788, the lots were granted by His Majesty to J. B. Destimauville, Esquire, from whom the Defendant in the year 1789, lawfully acquired the same, and obtained possession thereof, and hath ever since in good faith been seized and possessed of the said lots, as the true and lawful owner thereof, and hath in good faith openly, publicly, and quietly enjoyed occupied and possessed the same, and that therefore the title of the plaintiff is nugatory, and could not and did not vest in the plaintiff any legal right to the said lots, and that his claim thereto is wholly and entirely prescribed in law, and the plaintiff by reason of the said premises, and the continued and uninterrupted and public possession of the said lots, hath become the lawful proprietor thereof

thereof, and the right of the pltff therein has ceased and become prescribed, extinct, and determined.— 3d That he does not detain the said lots in manner and form &c— 4th That the plaintiffs action — cannot be maintained, because he the Defendant in the year 1789 became seized and possessed of the lots under a lawful title conveying to him the full & absolute right of property in the said lots, and hath since held the same in good faith as proprietor thereof, and during such time hath improved and built houses & buildings thereon to the value of £1000, and that he cannot be — compelled to quit the said lots unless he shall be paid that sum.—

The Answer and Replication are general—

Upon the hearing had upon the pleadings, it has been urged by the Defendant's counsel on the general demurrer, that the action ought to be dismissed in as much as the heirs of Alexander Ellice, in whose favor, as well as that the plaintiff, the letters patent of the lots of land in question were granted, are not parties, or sufficiently and legally represented in the cause by the plaintiff in the name and title he has assumed of Trustee, and that the plaintiff has sued in his own name only—

Regularly the law gives the petitory action to the proprietor only, or to Coproprietors, yet this admits of some exceptions, though we have not been able to find any in the old law of the Country directly applicable to the present case, however we do not see any injury that can be complained of by the Defendant in — recognizing the capacity of Trustee in the plaintiff whereas very serious injury might arise to the rights of all the Grantees, some of whom may be minors, by any further delay in prosecuting their rights—

we

we discover nothing to authorise us to say, that the plaintiff who is one of the persons in whose favor the Grant was made, should not assume the capacity which that grant gives him, and exercise the trust which the Crown has thereby reposed in him, he being always liable to account for his administration under that trust — the purport of the Grant or Letters patent, as set forth in the declaration, being, that His Majesty has given, granted and confirmed to the said Robert Ellice in trust for himself, and for the heirs of the late Alexander Ellice, their heirs and assigns for ever the lots &c — We are not aware that any other person could interfere with this trust, and as the Pltff is individually interested in the preservation of the common rights of the Grantees, no one could more properly sue for them, as he must at all events join in any action under the grant in question, which if upheld and effect given to it by the Judgment of this Court, that Judgment can only reiterate those rights in the manner stated in the Letters Patent. — The quality of Trustee has been by this Court fully recognized since the change in the antient Laws in regard to the powers of Testators, and the right of Executors to exercise a trust created by the Will, has been admitted in regard to real property, and also their right to sue, and liability to be sued in their qualities of Executors, or Trustees in respect of such property; it may therefore with as much, if not with more reason be admitted in this Case wherein the plaintiff has personally, independant

of

Poth: Propte Nos 290. 291. —

of his quality of Trustee, an effective interest to — prosecute and support. — In this action the Pltff has correctly concluded as well for himself as for the heirs of Alexander Ellice in his quality of Trustee though in the title of the Cause he has not taken this quality, but as it is substantially set forth in the body and conclusions of the Declaration, this omission in the title of the Cause, if it at all material, could have been at best only the subject matter of a preliminary plea — This objection has been made also, in the two causes already disposed of, in — which the quality of Trustee is not clearly assumed throughout as in the present Case, and as it ought to have been, for the sake of regularity & consistency for in the action of Trespass the plaintiff has concluded for Judgment in his own name alone. —

The Plaintiff on the other hand, has demurred and under his general answer, objected to the plea of prescription put in by the Defendant as being informal and insufficient, but we do not find that it is — essentially so, to justify the plaintiff's conclusion for its dismissal — It is true that prescription is matter of exception to be specially and substantially pleaded and any essential defficiency therein cannot be aided or supplied by the Court — in this case however we find it substantially pleaded, in which case it is only necessary in a plea as well as in a — declaration, that the party should state his rights in his own words and not be restricted to the use of any precise or special terms — he has declared that his right to the lots of land has been acquired by prescription and stated the period of his possession thereof — he has not in deed mentioned precisely that he possessed thirty

years

years, but he states, that he has quietly, openly, and publicly possessed and enjoyed the land as owner thereof ever since the year 1789 to the present day, which is a period of thirty years and upwards, and this is all that was necessary, and was held sufficient under the French law, as will be found in the Repv. under the title, Prescription. p. 304. 1st Col. "La prescription peut
" être suppléé d'office, lorsque la partie qui a reellement
" prescrit se fait un moyen de la circonstance qu'elle
" possede depuis tant d'années, et en effet si alors la
" prescription n'est pas alleguée en termes exprés, elle l'est
" au moins par equipollence," to which may be added an authority in Pigeau. 1 vol. 126. "Dans notre
" maniere de proceder on est plus simple, chacun
" presente sa demande dans les termes qu'il croit propre
" a rendre sa situation et specifier ce qu'il pretende, —
" pourvu qu'il remplisse les formalités et en justifier, —
" n'importe la maniere dont il en rend compte — c'est de
" cette liberté qu'est venu ce brocard — En France toutes les
" actions sont de bonne foi". — The plea of the Defendt in this case is a better one, than that just stated from the Repertoire — there the prescription was not invoked, and barely a possession alledged, during a certain number of years — but here the Defendant has expressly invoked the prescription and stated the time he was possessed although not in a specific number of years, as is usually done — It is evident therefore that the Defendant invokes the prescription of thirty years, as all the facts necessary to support such a plea are alledged, for had it been the short prescription of Ten or twenty years of which the Defendant meant to avail himself, the plea must of necessity have been differently worded to embrace the facts necessary for the support of either of those prescriptions & particularly

whether

whether the possession was entre presens ou absens, with title and good faith. the plaintiff therefore could not be ignorant of the nature of the defence set up and cannot say that he has been surprised or prevented from answering the exception as being uncertain, ambiguous or obscure. — Nor do we think that the Defendant, setting forth a title, provided it be in its nature translatif de propriété can destroy the prescription, it was not necessary, but does not vitiate the plea; a Defendant however may run some risk in setting out and producing a title, and in general cases, it is perhaps better to avoid it, as it may serve to disclose that which in the event might be injurious to the right of prescription upon the merits of the Case being finally submitted for decision — An authority in the Repse in the pages already cited 2 Col. carries this principle very far — p. 304. Repse vo Prescription 2e Col. " On ne doute pas que la prescription ne puisse être — " proposée en tout etat de Cause, aussi trouvons nous dans and there is an authority in the Old Denizt. to the same effect — And though by our present System, such an after plea might not be admitted, yet it shews this, that there is nothing to prevent the two pleas coming together, or a title being set forth in the prescription of thirty years, though as before observed, the production of the Defendants title where the prescription of thirty years is invoked, might in the event afford to the — Plff matter of proof to impeach that prescription; For though a title does not necessarily destroy the — prescription or render it of no avail, yet it serves to — explain the nature of the possession which no lapse of time can change. (Repse Prescription. p. 321. Col. 2) for he who holds under a lease or any other title which does not convey an absolute right to the property, cannot acquire by any length of possession, and it is therefore principally that the maxim applies, "nul ne peut

prescrire

"prescrire contre son titre" — The Defendants — demurrer must therefore be over-ruled, and the parties proceed to proof upon the remaining Issues. —

The Judgments in the three last Cases were pronounced by Mr Justice Pyke. —

The Bank of Canada. — vs. Jas. Brown

This was an action on a promissory note for £34-10-3 made by James Lane in favor of the defendant James Brown, and by him indorsed to the plaintiffs, dated 3° June 1823, and payable sixty days after date; It appears, that the note became due, or rather, the 60 days expired on the 2°. August, and on the 6th. day after, the note was duly protested for non payment — this was on the 8th. August, and on the 15th. August, seven days after the protest thereof and of non-payment, notice in due form was given, by the Plaintiffs as Indorsees or holders to the Defendant as indorsor of the note — the notice so given, was 15 days after the note became due, without including the days of grace. — The Cause has proceeded ex parte for want of a plea but on its being submitted to the Court, it has been suggested by the Defendants Counsel, that the Plaintiffs as indorsees could not recover agt. the Defendant as indorser, inasmuchas the notice required by the Provincial Statute had not been given within ten days after the note became due, to which it was answered by the plaintiff's counsel, that the ten days allowed for notifying the protest, must be reckoned from the date of the protest, and not from the day on which

which became due — The decision of the question thus offered for the consideration of the Court, must depend upon the construction to be given to the 4th sec. of the Provl Stat. 34. Geo. 3. ch. 2., and upon the intention of the Legislature as therein expressed.

By this section of the Stat. it is declared, that no holder of any note under an indorsement shall maintain any action thereon against an Indorser thereof, unless payment shall have been demanded of the maker of the note, and upon refusal thereof a protest for non-payment shall have been made after the third, and before the expiration of the sixth day after the same shall have become due: and that notice of such non-payment and protest shall have been sent to such indorser or indorsors or to the usual place or places of his, her, or their residence within ten days, if such place of residence is not more than ten leagues distant from the place where such note was protested; and after the rate of one day more for every five leagues further distant

It may not be, from any thing that at present occurs, of much importance, whether as a general rule, the notice is to be given within ten days from the day the note becomes due, or from the date of the protest, but it is of very great importance to the holders of promissory notes, and especially to Commercial men, that the law in this respect, should be clearly defined and correctly understood that they may not be left in doubt, but know with certainty how they ought to act. — It has not been said whether the question has ever received a legal decision in our Courts, and it is the first time we recollect to have heard it agitated — The clause of

the

the provincial Statute now in question, might have been more clearly and fully expressed, and a few additional words, would effectually have removed and prevented any supposed ambiguity: If after the words "within ten days," had been added the words, "after the making thereof," as in the British Statute. 9 & 10. Wm. 3. c. 17. sec. 2. respecting inland bills of exchange, or if the words, "after the said note shall have become due" had been added, either of these additions would have shewn precisely and distinctly what the intention of the Legislature was, but this having been omitted, we are left to collect that intention from the whole tenor and grammatical construction of the section, and of the several parts of which it is composed, and according to the common and usual acceptation of the words therein used — The mistake into which the Defendants Counsel has fallen has been from improperly connecting, or rather confounding two distinct parts of the same clause, the one, limiting the period for making the demand and protest, and the other prescribing the time within which, notice of the non-payment, and protest is to be given to an indorser — Now it is a fair rule to apply to the present question, that inasmuch as that part of the statute, regarding such notice is an exception to the express obligation and liability of an indorser imposed, even by the Statute, and operates a discharge of his undertaking to the holder, nothing ought to be presumed in favor of such a discharge in the interpretation of the Statute, inasmuch as it is a general exception applicable

to

to all cases, and the ordinary rule of construction of all obligations in favor of the obligor cannot be applied in the interpretation of the Statute, but rather as a penal law, should be construed in favor of him upon whom the penalty is to operate — The objection on the ground of want of notice, is stricti juris, and does not always meet the justice of the case, and consequently if the Statute could admit of two constructions, that which tends to hold the defendant, or indorser, to his engagement, ought to be adopted, and we know upon this principle, from repeated decisions, that a very trifling subsequent promise, act, or undertaking, will be deemed a waiver of notice, in the case of bills and notes — With this observation it would appear to us incorrect to insist that the words used in the preceding part of the Section, "after the same shall have "become due," should be considered as understood and intended to follow the words — "within ten days" in the succeeding part — indeed adding these words would make a very imperfect and ungrammatical sentence, as the word "same", would have no proper antecedent, or noun to which it applies, as may be discovered by taking that part of the section in question and adding the words noticed, as being in the preceding and distinct part of the sentence — it would then read thus — "And that notice of such "non payment and protest shall have been sent to "such indorsers or indorser, or to the usual place or "places of his, her or their residence, within ten days "after the same shall have become due" — Now "same" here has no word to which in grammatical order it could apply, except, notice of non-payment

and

and protest, but which would make nonsense of the Sentence — It is therefore evident, that the two parts of the Sentence, are distinct, and if the Legislature had intended, that the notice of the protest should be given within ten days after the note became due, it was necessary to convey that intention, by adding, after the words "within "ten days", the words, "after the said note" (and not the word, "same") "shall have become due", inasmuchas the word, "note", has not been used or mentioned, in that distinct part of the Sentence.— But the intention of the Legislature as the sentence is worded, appears sufficiently clear & conclusive and did not absolutely require additional words to convey that intention — The sentence is in these words — "and that notice of such non-pay.t "and protest shall have been sent to such Endorsers "or indorser, or to the usual place of his, her or their "residence within ten days" — It is clear that the time limited here, has reference to the non-payment and protest, and to nothing else, and if so — are not the ten days given to notify such protest ?— Yet it is contended, that the Legislature only — intended to give four days, that is, Six days for the protest, and the remaining four, making altogether, ten, to notify the non payment & protest; The only answer to be given to this is, that if it had so intended, it would have expressed that intention, and would have said "within four days after "the making of such protest". — It might perhaps be considered unnecessary to remark upon the punctuation observed in this part of the Statute,

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as this is perhaps not much attended to in the framing of acts of Parliament, but if the colon, which divides the two sentences under consideration is to be considered of any moment, it must be clear according to Johnson, that the grammatical construction of what follows this point, must be independant of that which precedes.—

It has been already observed, that the St. 3 & 4th An. must have been consulted by the Provincial Legislature in framing the Statute in question — now in the former, we find in the 4th & 5th clauses, that the protesting of inland bills for non-acceptance is required, and notice thereof to be given within 14 days after such protest, not after the bill becomes due, and it further regulates, that the same notice shall be given in case of protest for non-payment, to entitle the holder to recover, not only interest but damages and costs, ~~to~~ which latter are not allowed in our statute — and in the British Stat: 9 & 10th. Wm 3d. ch. 17. s. 2. referred to in the St: of An. it is declared in regard to the protesting of inland bills as follows "Which protest so made as aforesaid, shall within "fourteen days after the making thereof be sent &c" Yet in both these British Statutes, the same words are used in providing for the protest as in the Provincial Statute — The words in the Stat. of Wm are — "and " after the expiration of three days after the said bill " shall become due" — and these are again recited in the St: of An: — Now these Statutes being worded in this manner, as well as the French Ordinances and Laws, and that none can be found worded in the way the Defendant contends for — and

2. Born. 474. Tit. 5. art. 13. 14. & the notes. — also 493. art. 32.

that

that in no instance, that has fallen under our observation, the time of notifying the non-payment or protest, is calculated from the time the bill or note purports to become due, and that in determining the sufficiency of a notice, it is always calculated from the date, or the making of the protest, we must say, that the provincial Statute has given ten days from the protest for the notification thereof and the time cannot and ought not to be abridged; the holder could not before the protest was made give notice thereof, as he could not give notice of that which had no existence, and as he was to notify the non payment and protest in these ten days, it is natural to conceive that the protest must be in existence during the whole of the ten days, and that upon each of those days, as well the first as the last, the holder had it in his power to notify this protest, which in any event could not be done until after the expiration of the three days of grace and protest made — the holder must therefore have the ten days during which the protest existed, to notify the same to the indorser, and this in the opinion of the Court was the plain and obvious meaning and intention of the Legislature, which made any additional words unnecessary — the holders had until the sixth after the note purports to be due to make the protest — they might have made it on the fourth or fifth, but they were not bound to do so — they made it on the sixth day which was all that was incumbent on them, and as

we

we understand the Statute, they were to notify that protest within ten days after, and they have done it — besides if the notice is to be given within ten days from the day the bill purports to be due the three days of grace will be included, which we cannot presume the law intended, inasmuch as the bill was not strictly and legally due until after the expiration of the days of grace. —

But to consider this case in another point of view, and upon its own particular facts, it is clear that by the Provincial Statute, the three days of grace usually allowed on bills and notes, are therein recognized and allowed, and supposing for a moment, that the intention of the Legislature was, to give ten days for the notification of the protest from the time the note became due, the non-payment of the note, could only be established and protest made under the Statute, until after the expiration of the three days of grace within which the maker of the note was not bound, nor could be compelled to pay, nor was it in contemplation of law due until the days of grace were expired — now the non-payment and protest in this Case were notified within ten days from the expiration of the days of grace, or of the time when the note became legally due, those days expired on the 5th. Augt., and notice of the non payment and protest of the note was given on the 15th., that is, on the tenth day after,

and

and consequently within the ten days after the last day of grace, so that even upon this view of the Case the plaintiffs would be entitled to Judgment.

The Court has however considered the first point upon the construction of the Statute as an essential one to be settled, and therefore has done so as far as depended upon it, but would feel happy, from public considerations, that the question were submitted to the higher Tribunal, that if from any mis con= ception of the intentions of the Legislature this Court may have erred, the Court of appellate Jurisdiction may finally declare what the law is, and establish with certainty the rules of conduct to be observed by the holders of dishonoured notes.—

It may not be improper here to observe, that it is worthy of consideration, how far it may not be necessary under our own System of practice that the objection of the want of notice, should not be specially pleaded, as a fin de non recevoir, and of which a Defendant may not be permitted to avail himself, as in England, under the general issue — see Repᵗᵉ. vᵒ Billet. p. 384. Col. 2ᵈ. par. 2ᵈ.—

April Term 1824.

Monday. 5th April 1824.

No 473.
Rolland.
vr
Pothier.

On action of Account

The Defendant as Executor of the last Will and Testament of the late Madame Lacote, had caused certain lots of ground and emplacements to be set up to sale at public auction, when one Benaiah Gibb became the purchaser of one of these lots, and the Defendant in consequence made a deed of sale of the same to the said Gibb — some days afterwards the Defendant, as one of the heirs at law of the deceased Madame Lacote, claimed the said lot of ground from Gibb by his right of retrait lignager, which was agreed to, and in consequence a transfer of the property was made by Gibb to the Defendant under this right of retrait claimed by him, and the purchase money paid by Gibb was reimbursed to him.

The Plaintiff alledged that as well the Sale to Gibb as the retrocession made by him to the Defendt was done by fraud and collusion in order to deprive the other heirs and legatees of the late Madame Lacote of their right and interest in the lot of land in question and that as the Defendant as Executor could not sell the same to himself, he had contrived this — fraudulent means by connivance with Gibb to

acquire

acquire the property, and charged these acts, as being simulés, and fraudulent, and demanded to be permitted to make proof thereon, which was granted to him —

The Plaintiff now produced as a witness to prove the charge of fraud and simulation alledged by him, the said Benaiah Gibb, when an — objection was taken to his competency by the Defendant, and the parties were now heard thereon.

Mr Bedard for the Defendant — a party to an act cannot be admitted as a witness to invalidate or destroy such act — If Gibb were here a party to this action he could not be examined on faits & articles to any fact touching the pretended simulation, much less can he be examined as a witness to those facts cits. arrets de Louet. lettr. T. N°5. & N°7. — That Gibb must here be considered as an interested witness. either to support or destroy the acts he has passed, and in either case is inadmissible. —

Rolland in answer. — Every man is a legal witness unless excluded by some positive rule of Law — now there is no law by which a party to an act is excluded from being a witness in favor of a third party to shew that there was a simulation in the act — the interest of third persons requires this otherwise the greatest injustice might be done to them without a possibility of relief. Danty. ch. 7. — Here Gibb is not a subscribing witness to the act and attesting its authenticity by his signature, which might restrain from giving evidence contrary to the faith of the act he had so certified, but he is a party

having

having a full knowledge of all the circumstances and bound by no obligation to concealment — he is not interested, for whether the one or the other of the parties gain their Suit, it can make no difference to him, and although he is called upon to prove simulation in the act to which he was a party, yet if he make no objection to answer the facts to be enquired of him, as affecting his character, or his conscience, he ought to be heard as a Witness — It is no reproche to the Witness in this case that he was a party to the act. Danty. ch. 11. addn. N°. 5. cites the Case of fraude in a Retrait, on action by the Seignior, the party to the act is a good Witness — Jer. Gp. Coutu. art. 136. glose. 4. N°. 9. Poth. Retrait N°. 14. Prudhom: ch. 9. p. 506. — 1 Journ. Palais p. 934 arret. 1678. —

By the Court. — The strong grounds urged agt. the admissibility of the Witness here, are — First That no man ought to be allowed by his testimony to — invalidate a Contract or deed to which he was a party, and the truth whereof he has vouched by his signature, otherwise there would be no Security in any Contract and a door would thus be opened to the greatest injustice and bad faith. — 2dly — That a Witness ought not to be heard or believed, who comes to — controvert the truth of the Contract he has made, and that good faith upon which the law presumes it has been made — and — 3dly That a party to a — Contract cannot be compelled to answer to any question which may tend to shew his turpitude, nor to avow his bad faith in any transaction, whereby his honor or his character may be impeached.

It is however certain that parties to a Contract

cannot —

cannot with-hold their evidence in regard of any matters contained in such Contract whereby the rights or interests of a third person may be affected and we accordingly find, that in Contracts, where it may be said that the honor and character of the parties may be implicated, a contracting party may be called as a witness, as in an action for usury, the borrower of the money is held to be a competent witness to prove the whole case, where he has no interest in the suit - and if in such a case a party to the Contract can be a witness, it would seem to establish the principle, that where the rights of a third person are affected by the Contract, the contracting party, not interest^d may be heard as a witness to prove it. -

Smith. q.t. v. Prazer 7. J. Rep. 60.

Although the rules of evidence by the French law are not sufficiently minute in establishing the principles to guide us in a variety of transactions which come before the Courts, yet in the particular case before us, we ~~found~~ find enough to ground our opinion that the party to this Contract is a competent witness.

The Case of Retrait cited by the plaintiff is perfectly analagous to that before us, in so far as regards the Vendor - For although the 136th. art. of the Custom, entitles the retrayant to the oath of the purchaser as to the verity of the price paid by him yet it gives him no such right as to the Vendor, in regard of whom nothing is said, nor any right given to call upon him in anyway. - Ferriere however lays it down on glose 4. N° 9. on this article

" Que si le retrayant doute qu'il y ait de la fraude
" et que le Contrat porte plus haut prix que celui
" qui est convenu entre les parties, il peut aussi
" prendre le vendeur à son serment."

Prudhom: ch. 9. p. 506. says, "Si le Seigneur
" presume

" presume qu'il y a de la fraude, et que le Contrat porte
" un prix plus haut que celui qui est convenu entre les
" parties, il peut prendre le vendeur à son serment aussi
" bien que l'acquereur — Le Juge peut même ordonner
" d'office cette affirmation, quand il s'apperçoit de la
" mauvaise foi de l'acquereur"

Danty. Ch. 11. N° 5. in the additions, cites the opinion of Grimaudet, Tr. des Retraits — he says, "Le meme
" Grimaudet agite la question de savoir si le vendeur
" est un temoin suffisant pour prouver la fraude du
" Contrat de vente par lui faite, parce qu'il ne tire en ce
" Cas dit il, aucun fruit de son temoignage — et il decide
" qu'il faut un autre temoin avec lui, ou des indices et
" des presomptions — La maxime certaine est, que la
" simulation doit se verifier par d'autres temoins que
" ceux qui ont signé au Contrat."—

This last authority refers to the vendor being a temoin, or witness in the Cause, the two former refer to the taking of his oath, as being a party in the Cause, although this must be understood to apply to the information which the vendor could give upon oath, either as a party, or as a witness — In referring to the authority cited from Fer. Gr. Comre on the 136to art. of the Custom, we find he cites in support of his opinion the 204e art. of the Custom of Rheims, where it is said, — "Et ou il y en auroit quelque apparence
" le vendeur pourra être contraint en temoignage
" pour averer la fraude maintenuë par le Retrayant".

See also Coquille on 31st Ch. art. 19. Cout. Nivernois, On the note on this article Coquille observes — "mais
" la difficulté est du vendeur, car il n'est pas partie en
" la Cause du Retrait — ainsi l'Ordonnance de 1539.
" ne lui peut pas être appliquée — toutefois on le peut

" employer

" employer comme temoin" &c

Another author (Tonmaur N° 798) who treats on the subject of Lods et Ventes, says, "Le Seigneur peut de meme " selon Dumoulin, tirer la verité, de la declaration forcée " et judiciaire du vendeur — mais cette assertion doit " etre restrainte au droit de le faire ouir en temoin".

We next come to the question whether the witness ought to be called to testify facts, to which, had he been a party in the Cause, he would not have been bound or liable to answer on faits et articles — as to the liability of a party to answer to faits & articles in a case of this kind, it was the opinion of this Court, that he was bound to answer, and that he could not shelter himself behind the act he had committed, under a pretence, that his honor or his character might be affected by answering, when in the opinion of the Court neither honor nor character could come in question — In this respect however the Court must now alter that opinion, as not being consistent with what has been determined in the Superior Tribunal, to whose decision as settling the law on this point, we are bound to yield — but when we consider the Current of authority on this head, and the principles they establish as touching the question before us, we do not conceive the Case which has been decided, as regarding a party in the Cause, ought to be extended beyond that particular instance, nor be construed to apply to a witness who has no interest in the Cause and whose answers are intended, not to affect himself, but the rights and interests of the parties in the suit — In determining however as to the competency of the witness, it is all that is at

present

present necessary, as the Witness may not object to any of the questions proposed to him — should this happen it will then be the proper time to call for the opinion of the Court upon such objection.—

The objection to the competency of the Witness was over-ruled. —

Mr Guy, the notary before whom the above acts of sale and retrocession were passed in his capacity of public notary, was afterwards produced by the Plaintiff as a witness, who proposed to examine him touching the conversations had between him and the Defendant in regard of the transaction and the Defendants acknowledgments on the subject

Mr Bedard for the Defendant objected to the competency of the Witness, and stated — The witness now adduced is the notary who passed the act in question, and by law he cannot be examined to any thing which took place at the time or since the passing of the act — any conversation the Defendant may have had with the witness since the passing of the act is wholly inadmissible, because the validity of the act which the witness has passed as a public officer may be thereby affected, and he is not the person who can be admitted to give evidence of this kind, it would be of evil consequence if a notary in consequence of private communications had with a party could thereby destroy his own act to which faith and credit and credit is attached by his signature thereto as a public Officer — That proof of admissions made by the Defendant in any conversation he may

have

have had with individuals ought not to be admitted in any case, nor by any witness, as it would be in the power of any man to procure witnesses to prove such conversations — That in this case the faits de simulation must be set out and proved — but what the Plaintiff wishes to prove here is not a fait, and it is facts and not conversations that the Plaintiff must prove. Danty. ch. 7. Tom. 8. and additions N° 52. That no person would be safe if proof of what the Defendant said and acknowledged to individuals was admitted — this case ought to be compared to that of High Treason, where facts & not acknowledgmts must be proved. —

Rolland. — Simulation can be proved only by witnesses, and from a variety of circumstances, as direct proof can seldom be obtained — In this case the witness produced is competent on the question proposed — he is not called to say any thing touching the act he has passed, but as an indifferent person to testify what he has heard and seen without any reference whatever to this act — That it was not necessary for the plaintiff specifically to alledge as the grounds of simulation the different conversations had by the Defendant, and which he means to prove, but only the fact which he intends to prove from such conversations. Dic. Droit. vo Confession. — Repre vo Aveu — Id. vo Confession. p. 425. Poth. Obl. N° 834. Desquiron. p. 20. — 393 and Danty on head of Simulation — these authorities are stated to shew that the acknowledgment of the party may be given in evidence against him in all common cases, and if in such cases evidence of this kind is admissible, à fortiori it must be admitted in the Case of Simulation. —

Mr

Mr Bedard in answer — The witness here is called to prove what tends to destroy the act he has passed, which cannot be admitted, his mouth is shut against such proof — The principle upon qh Gibb was admitted a witness in this case will not apply to the Notary, who cannot divest himself of his public character to destroy the act he has passed

The Court were of opinion that Mr Guy might be examined as a witness to any facts or conversations that took place, not touching upon the stipulations and agreement of the parties at the time the act in question was passed.

Thursday 8th. April 1824.—

N°. 1088.

Rouville. }
vs. }
Gaucher. }

On the 9th February last, the Plaintiff by his counsel made the following motion.

Le demandeur produit une copie de l'Interlocutoire de cette Cour du deux Octobre dernier, duement signifiée au Defendeur, le sixieme Jour du même mois, aussi le projet d'un acte de reconnoissance preparé par Mre Jean Bte Taché, Commissaire nommé par cette Cour pour procedr à la Confection d'un nouveau Terrier pour les Seigneuries du Demandeur et un projet du Defendeur contenant son refus de signer le dit projet d'acte comme sa reconnoissance pour une des terres que possede le Defendeur dans la Seigneurie de Rouville avec ses motifs de refus, le tout en date du 20 Octobre dernier, et encore l'acte de Concession de la terre mentionnée au dit projet d'acte en date du 7 Mars 1783, Grisé, Nore et fait motion que les parties soient entendues de nouveau sur les conclusions de la demande, sur lesquelles la Cour a reservée de prononcer; et qu'il plaise à la Cour, vu le refus du Defendeur de se conformer au Jugement Interlocutoire susmentionné, non seulement pour la terre susmentionnée, mais aussi pour les autres terres qu'il possede en ladite Seigneurie de Rouville, donner tel Jugement et condamnation que de droit, et que le 12 du courant soit ainsi fixé pour entendre les parties.—

On the 16th February, the Defendant by his counsel made the following motion—

Motion du Defendeur qu'il lui soit donné acte par

par cette honorable Cour des offres qu'il a faites en obeissance au Jugement rendu en cette Cause le second jour d'Octobre dernier, de communiquer et exhiber à Maitre Jean Bte Taché Commissaire nommé pour l'execution des Lettres Royaux et Sentence d'enterinement d'icelles mentionnées en la declaration en cette Cause, les titres en sa possession de tous les biens et heritages que lui — Defendeur possede en la Seigneurie de Rouville, et nommement de la terre designée en la declaration en cette Cause, comme aussi de faire et passer ses reconnoissances et declaration de ladite terre et des dits biens, ainsi qu'il y etoit tenu par lesusdit Jugement, s'etant led. Defend. conformement à icelui transporté a cet effet en la maison Seigneuriale du Demandeur en ladite Seigneurie du vingt Octobre dernier à onze heures du matin, tems et lieu auquel ledit Defendeur auroit offert d'exhiber les dits titres et faire les dites reconnoissances, lesquels le Commissaire Jean Bapte Taché auroit refusé de prendre sous d'injustes et frivoles pretextes, ainsi que le tout appert plus au long en l'acte qui à la requisition du Defendeur, auroit été dressé des dites offres par Mre Theophile Lemai. Ne le même jour vingt Octobre — dernier, et de lui signé ainsi que des temoins y — denommés et dont copie auroit été laissé au dt. Commissaire Jean Bapte Taché, lequel acte le Defendeur produit avec les presentes. —

The Plaintiff with his motion produced and filed The deed of Concession of the lot of land in question to Joseph Chabot, dated 7 March 1783, in which are specified all the conditions and reserves of the grant; The offers and protest made by the Defendant dated 20 October 1823 — and the projet de reconnoissance drawn up by Mr Taché, the Commissary of the same date. 20 Oct 1823. —

The Defendant with his motion produced and

and filed the act of tender and protest aforesaid made by the Defendant, dated 20 Oct. 1823 —

By the documents filed by the parties, it appeared that the Defendant had offered to make his declaration and acknowledgment as required, and to pass a new title to the plaintiff for the lands in question, save and except as to the following claims and reserves demanded by the Plaintiff to which he, the Defendant objected —

1°. De faire mesurer et allizner ladite terre, si besoin est, et fournir au dit Seigneur copie du Contrat de Concession de ladite terre et du Proces Verbal du bornage d'icelle à ses frais et depens. —

2°. Reserve du droit de retrait à chaque mutation du tout, ou d'une partie de ladite terre, en rendant à l'acquereur le sort principal, frais et loyaux couts de son acquisition. —

3°. De prendre tous les pins propres pour sciage sans toutefois priver ledit comparant de ceux qu'il pourroit avoir besoin pour son etablissement sur ladite Concession, sans pouvoir en faire de Commerce. —

4°. La faculté de prendre sur ladite terre sans dedommagement tous les bois necessaires, pour construire et reparer les Eglises, presbyteres, — moulins et manoirs de ladite Seigneurie, et autres edifices publics. —

5°. Reserve des places propres a erizer des moulins à scie et à farine. —

6°. Copie du Contrat de Concession des autres propriétés que le Defendeur tient et possede en ladite Seigneurie. —

Rolland for the Plaintiff contended that the

the deed of Concession of the land is the principle whereby the titre nouvel must be made up, as this contains all the clauses and reservations upon which the original convention of the parties was formed and that according to this Deed, all the stipulations and reserves against which the Defendant objected were contained — cites 1. Fuminville. 262. —

L. Vigé for Defendt — The Plaintiff demands a new title according to all the clauses and reserves in the deed of Concession, but there are extraordinary rights contained in this deed which the Defendant is not bound to acknowledge or renew, some of them can exist only by the consent and express stipulation of the parties and many of these are now prescribed and cannot be revived without the consent of the Defendant. — The only rights of a Seignior consist in his right of Cens et rentes, and of lods & ventes accruing thereon these the Defendant is willing to acknowledge and to give a new title accordingly, but as to the droit de retrait, and other rights and reserves stipulated in the aforesaid deed of Concession, and to which the Defendant has formally objected, he is not bound to acknowledge the same nor to give any new title thereto — The principles laid down by the Custom of Paris must regulate this point. — The lot of land described in the declaration was conceded by the Seignior in the year 1783, since that time more than thirty years have elapsed, whereby all the extraordinary rights above mentioned and claimed by the Plaintiff have become prescribed in law and cannot now be claimed by him. 1 Fer. Gr. Comr. p. 314. — Had the deed of Concession in this case been lost, or had it never existed, the Plaintiff could claim none of those rights and the law of the land in that case must govern.

When

when the Seigneur claims any extraordinary rights, such as those now in question, he must not only produce the deed of Concession, ~~&c &c~~ he must make his demand of a papier terrier within the thirty years, otherwise all those extraordinary rights are lost and prescribed, as has been determined in this Court in the Case of Lacroix vs Turgeon, in the demand of a retrait — and the case of Dezery vs Meloche, for a reserve of wood on the land of the Censitaire, which was considered as illegal. — That in regard of the other property held and possessed by the Defendant in the Seigniory of the Plaintiff besides the lot of land mentioned and described in the declaration, the Defendant produced and exhibited to the said Jean Bapte Taché the Comms all the deeds and titles thereof which he the Defendant had in his possession, but not having the deed of Concession thereof he could not produce it — this however the said Commissaire claimed, and said that the Defendant was bound to produce it, and if it was not in his possession to obtain a copy thereof from the Office of the Notary who had passed the same, which the Defendant contends he was not bound to do, nor to procure or exhibit any titles prior to his own acquisition of the said property except those in his own possession — on this account the said Commissaire refused to receive the declaration and acknowledgment of the said Defendant, and the new title such as offered by him. —

Rolland for the Plaintiff — In this case there is no prescription against the rights claimed by the plaintiff — such prescription can be claimed only by the tiers acquereur, but can never be set

up

up by the grantee, who cannot prescribe against his own title, nor can the tiers acquereur prescribe against any extraordinary right stipulated in the deed of Concession until thirty years after such right had accrued and could have been exercised by the Seignior — Potts. Tr. Retrait. 2e. partie. art. prelimre — The Defendant here can set up no prescription but such as he can be entitled to set up as tiers acquereur with thirty years possession, but this he has not had. The Defendant has produced his own deed of purchase of the lot of land in question which is dated 16 March 1795, and on this deed there appears the ensaisinement of the Seignior, by which he reserves the right of retrait and all other rights stipulated in the deed of Concession — this amounts to a personal contract between the parties — the Seignior on the One hand consents to the possession of the property by the Defendant on the terms stipulated in the deed of Concession, and the Defendant consents to this possession and holds it accordingly, and has produced this deed to shew that possession. The Defendant cannot here call to his aid the deed of his auteur, to establish any prescription — against the Seignior, because he has by his own act acknowledged all those rights against which he wished to avail himself of the prescription — That there is nothing illegal in any of the reserves — stipulated by the Seignior in the deed of Concession the law has imposed no restrictions upon the — Seignior in this respect — The offers of the Defendt to execute a new title are wholly insufficient — That as to the other property possessed by the Defendant in

the

the Plaintiffs Seigniory the Defendant is bound to produce and exhibit to the Commissaire, the whole of them, and to take out copies from the office of the Notary of such as he has not in his possession or to make oath that he has not such titles, and that he is unable to procure them.—

Vigé in reply.— The extraordinary rights claimed by the Seignior cannot now be maintained, as prescription runs against them all from the date of the Concession and Ferrinville lays it down as a principle, that the Seigniors are bound to renew their Terriers, every thirty years so as to exclude the prescription which must refer to the date of the Concession.— That the Seignor cannot interrupt the prescription nor create a new title in his own favor by the acte d'ensaisinement, which can be considered only as a confirmation of the purchase made by the Tenant.

The Defendant has produced and filed a copy of the Proces verbal of the barrage of his land, and it appears that the Plaintiff has received a copy of the deed of Concession, being the one produced and filed by him.— In regard of the other property of the Defendant, in case the Defendant does not or cannot produce the titles and deeds respecting the same, it is the duty of the Plaintiff to do so.— 1 Ferm. 279.—

The Court having examined the papers filed and the proceedings had in the Cause, found that in regard of the first ground of demand for a copy of the proces verbal de bornage and the Copy of the Deed of Concession, which it was

stipulated

stipulated by that deed, the grantee should deliver to the Seiznior, this had already been complied with, and therefore ceased to be an object of contest; That in regard of all the other claims and reserves now in contest, except the 6th and last, the Court were of opinion that the Defendant was bound to execute a new title for the same, and that without considering the question of prescription which might have existed, the same had been set aside and the right of the Plaintiff acknowledged by the Defendt's deed of purchase from François Gaucher, dated 16 March 1795, which he himself had produced and filed, and which therefore must be taken as evidence against him as well as in his favor. Upon this deed is the following acte d'ensaisinement by the Seignior — "Le present acquereur François "Bourdalais, ayant payé les Lods a été mis en possession "du terrein à lui vendu pour en jouir suivant les charges "et clauses portés au Contrat de Concession avec reserve du "droit de rachat en cas de vente. Chambly 1795. "Hertel De Rouville". — This is an acknowledgment of the Defendants possession and of his title to the land in question in the terms of the deed of Concession and stops him from alledging prescription. — As to the sixth and last objection, the Court is opinion that the Defendant is not bound to procure a copy from the notaries office at his own charge and expence of the deed of Concession of the other property possessed by him in the plaintiff's Seigniory, and that the Defendant is bound to exhibit to the plaintiff only those deeds & titles which are, and came to his possession when he purchased the said property, saving to the Plaintiff his right to obtain the Defendants affirmation on

oath

oath in regard of all such titles.—

see 1. Freminville. p. 340.

Renauldon Des Droits Seigr. liv. 7. ch. 4. p 586.

5 Hervé. p. 555. 6. & 8.—

The Court therefore pronounced the following Judgment—

La Cour apres avoir entendu les parties par leurs avocats, tant sur la motion du Demandeur du neuf Fevrier dernier, que sur celle faite par le Defendeur le seize du même mois, et apres avoir examiné les pieces produites au soutien des dites motions, considerant que ledit Defendeur etoit tenu et obligé de faire ses declaration & reconnoissance de toutes les charges, clauses, et Conditions, aux quelles etoit assujettie la terre dont est question, par le Contrat de Concession du 7 Mars 1783, et que ledit defendeur possede maintenant en ladite Seigneurie de Rouville en vertu de l'acte de vente à lui fait par Francois Gauchet dit Bordelais son pere, en date du 16 Mars 1795, produit & filé par le Defendeur en cette cause, Ordonne en consequence que ledit Defendeur sera tenu de faire ses dites declaration et reconnoissance conformement au dit Contrat de Concession, et ce de ce Jour au premier Mai prochain, sans autre notice ni requisition, excepté celle de fournir expedition du Contrat de Concession, ainsi que de faire borner et fournir copie du bornage, comme il paroit que ces Obligations ont deja été remplies.— Que quant aux autres proprietés que le Defendeur tient et possede en ladite Seigneurie de Rouville, il sera admis d'en faire ses declaration et reconnoissance, et d'en exhiber les titres qui sont en sa possession en vertu des

quels

quels il tient et possede les dites proprietés, sauf au Demandeur son droit de blâme, et d'avoir du dit Defendeur son affirmation sous serment quant aux titres qu'il peut avoir en sa possession — La Cour reservant à faire droit sur la demande du dit — Demandeur quant aux autres conclusions de la — declaration. —

—

No 127.
Galusha.
vs
Tecmen.

Action on a promissory note made by Defendant in favor of Pltff for £36.. 3. made and dated at Whitestown in the State of New York, 25 Augt. 1820.

The Defendant among other things pleaded his discharge from this debt under a bankrupt law of the State of New York where it was contracted and in proof thereof produced and filed a — discharge given him by Henry Yates, Mayor of Schenectady, dated 15. Febry 1822. with a certificate thereon under the hand and Seal of Dewit Clinton Governor of the said State, with the Seal of the State appended thereto —

But as no proof was made of the Seal, the Court gave Judgment for the Pltff

see 3 East. Rep. 221. Henry. v Adey. —

—

No. 121

Lacroix
Jos: Labelle fils. — et Jos. Labelle fils. Tut. &c. Oppt

The plaintiff sued out execution on his Judgment against the lands & tenements of the Defendant.— An opposition was made to the sale, afin de charge, by Jos. Labelle pere and wife, who had made a donation of the land in question to the Defendant their son, subject to the payment of a certain rente et pension viagere, and claiming that the said land should be sold subject to the payment of this rente & pension in future.— This opposition was admitted by the Plaintiff, and the sale was ordered to be made accordingly.—

Upon the land being advertised for sale subject to the payment of the rente et pension viagere, the Defendant Joseph Labelle fils, as Tutor to the minor Children of his marriage with his late wife Marqte Tassé, claimed one half of the land as their property by an opposition afin de distraire, inasmuchas the said lot of land had been given to the said Joseph Labelle fils and his said late wife, as a — Conquet of their Communauté, and of his said minor children as heirs of their mother were entitled to one half as their separate property.—

To this Opposition the said Jos. Labelle pere and wife answered, that the said Minors are not entitled to demand a division of the property seized, inasmuchas the whole thereof is liable and bound to the demand of them, the Donors, who have a special privilege and mortgage thereon for the payment of their said rente et pension viagere, and that their right in this respect ought not to be limited to the one half belonging to the Defendant, but that the whole ought to be sold as seized.

But

But the Court considering that the minors had not been parties to the Cause in which the Defendt had been condemned, nor on the Opposition made by Joseph Labelle pere & wife the Donors, and although the minors might be considered to be Debtors of the rente & pension in question, solidairement with the Defendant, yet they might have reasons to alledge when regularly called upon, why they should not be condemned, and of those reasons the Court could not at present judge. — The Opposition was therefore allowed —

see 1. Hericourt. p. 82. ch. 6. No 5. —
2. Thibault. p. 18. Nr 21. 22. 23. & 24. —

Cates & Kilborn — Mr Pyke, notes —

Saturday 10th April 1824.

M.cKenzie, Roi.

The matters in dispute between the parties in this case had been referred to Experts, who not having made their report, the Plaintiff obtained a rule calling upon them to shew cause why such report should not be made.

Mr Papineau, one of the Experts appeared in Court, and stated that they were ready and willing to give in their report, but that they were not bound to do so until they should be paid their charges and expences in making up their report. That such was the practice in regard of all the officers of the Court who were not obliged to give their labor without being paid — the same principle held in regard of Jurors, Notaries, and Witnesses, and there were no reasons why Experts should be differently treated. That Experts ought not to be obliged to await the event of the Suit, or the convenience of the parties, to be paid, but having operated under the order and authority of the Court, they ought to be protected by it. That the Experts had already filed a report with an account subjoined, and they were in expectation that this account would have been paid by the parties before calling for the present Report.

Mr Vigé added a few words on the same side, stating that in this Court there was no Greffier depositaire des Rapports des Experts — that by depositing the report at the Prothonotaries office, where there was often hurry and confusion, the report might be lost or mislaid, and the Experts thereby lose all recourse for their fees, and in some cases it was usual to deposit the money before calling

calling for the report of persons appointed to act under the authority of the Court. cited Denizt. vo Epices Nº 32.

The Court however were of opinion that Experts were bound to deliver in their report before being paid, and that the same should remain in the office of the Prothonotary under seal until the account of expences claimed by the Experts should be paid, and that this was conformable to the practice of the Court.—

sce. 1. Pigeau. p. 305. refers to art 25 of Tit. 22 of Ordre 1667.—
Rodier's observations on sd. article—
Sallé— dr— dr—
Serpillon & Bornier on dr—
Code de Proc. Civile. art. 319. 320—

Monday 19th April 1824.

On Petition of Anne Lewis.

The Petitioner was detained in Gaol under a writ of Ca: Sa: sued out of the Court of Kings Bench at Quebec, now applied by her petition to this Court for the usual alimentary allowance on her affidavit that she was not worth ten pounds.—

But the Court were of opinion that they had no right to interfere, as this allowance could be granted only by the Court out of which the writ of Ca: Sa: had issued.

No 360.

Paquin v Proulx et al.

Action of debt on Obligation.—

The declaration stated, that the Defendant François Proulx on the 8: Nov: 1820, made & executed a certain obligation before Mr Paiement and his colleague, public Notaries, and thereby acknowledged to owe to the plaintiff the sum of 424 livres, and promised to pay the same with interest on the first day of May next after, but which said sum of money is still due although often demanded. That the Defendant Felicité LeConte had become a party to the s? Obligation and bound herself as pleiz & Caution for the said Defendant, that in case he failed in the payment of the said principal sum of money and interest, that she would pay it for him to the said Plaintiff.— That an action hath therefore accrued to the said Plaintiff to have and demand from the said Defendants the aforesaid principal sum of money and interest.

And

and concludes, that the Defendants be condemned to pay the said debt with interest and Costs. &c

The Defendants made default — but as the Court entertained some doubts how far the Caution could be joined in the same action with the principal debtor, when not bound solidairement with him, and judgment given against both on the same Conclusions, they requested of the Plaintiffs counsel to speak to the question.—

Cherrier for the plaintiff stated, that in this Case the Caution can have no interest to object to his being joined in this action, as he is personally bound for the debt as well as the principal, and in this respect he might be considered as solidirement obligé with the principal — and in that case they might be sued either jointly or severally. Potts. Ob. N° 411. — That it was even expedient to make the Caution a party to the Cause in case he should have any objection to make to the demand against the principal debtor or the exception of discussion to propose, but unless he proposed this exception the Court could take no notice of it, as by his silence he was presumed to have waived it, and even if he had proposed this exception, the action as to him could only be suspended but not dismissed. — cites.

Brodeau sur Louet. letter H. p. 485. ch. 9.—
Despeisses. 1 Vol. p. 699. part. 2. tit. 2. sec. 3. in 4to.
Guy Pape. Sec. 7. art. 10. p. 252.—
Bretonnier. Rec. Alph. Vo Discussion. p. 91. 95.
Repse Vo Caution. p. 772. 1re Col.—
Potts. Obl. N° 410.
1. Pigeau. p. 188. edit. 1789.—

The Court said that they did not consider the question here to touch upon the right of discussion which a Caution might, or might not avail himself

of

of, as it was introduced solely in his favor, but the action here was against one Defendant as principal Debtor, and against the other Defendant merely as Caution — against the principal debtor because he had not paid what he had promised to pay — and against the Caution on his promise to pay if the principal did not pay — this constituted two different principles of demand, and although they originated in the same Contract, yet were different obligations — and therefore the conclusions taken by the Plff against both Defendants, as if both were equally or solidairement bound, were irregular, as no such solidité here existed — This however being a Case by default, the Court allowed the plaintiff to discontinue as to the Caution, and thereupon gave Judgment against the principal debtor. —

No. 2110.

Hunter. vs Donegany

Action trespass & false Imprisont

The declaration stated, That whereas by the laws and Customs of Lower Canada, no persons whatsoever ought to be arrested or imprisoned in any personal action on mesne process at the suit of any person and before Judgment obtained, without that the person so arrested and imprisoned is immediately about to leave said Province of Lower Canada, whereby the person at whose suit he is so arrested might be deprived of his remedy for the recovery of his debt against the person so arrested or imprisoned — Yet the said Defendant well knowing the premises, but contriving, and wickedly, falsely, and maliciously

intending

intending unjustly to bring into trouble, oppress, injure, prejudice and aggrieve the said Plaintiff, and when the said plaintiff was not immediately about to leave the said Province, and had not any design or intention of leaving the said Province, to wit, on the 24th day of April of the year 1823, at Montreal aforesaid upon his corporal oath deposed before The Hon. George Pyke, one of the Justices of this Honorable Court, duly authorised to administer such oath, among other things in his affidavit contained, that the said plaintiff at the time of the said Defendants taking such oath was then immediately about to leave the said Province and the said Defendant afterwards to wit, on the 24th day of April of the year 1823 aforesaid, under pretence and colour of a process at law for the sum of £490. — current money of Lower Canada, and although the said Plaintiff was always ready to have appeared to any legal process for any sum due by him to the said Defendant according to the tenor of such process, — nevertheless the said Defendant, falsely and maliciously and without any just reasonable or probable Cause, levied a plaint at the suit of the said Defendant agt him the said plaintiff in a plea of debt for the sum of £490. — Current money aforesaid, and the said Defendant falsely and maliciously and without any reasonable or probable Cause whatsoever afterwards to wit, on the said 24th day of April in the year 1823 aforesaid on the said plaint sued out and obtained against the said Plaintiff a certain writ of our — Sovereign Lord the King of Capias or attachment — against the body of the said Plaintiff, commonly called a writ of Capias ad respondendum, directed to the Sheriff of the district of Montreal, commanding him that he should take the said plaintiff if he should be found in his district and him safely keep so that he might have his body before the Judges of the said Court of Kings Bench for the district of Montreal,

on

on Monday the second day of June then next following to answer the said Defendant of a plea for the sum of £490 Current money of Lower Canada, and that he should have there then that writ, which said writ the said Defendant then and there falsely and maliciously caused to be endorsed for bail for £490. Current money aforesaid against the said plaintiff, and the said Defr. further falsely & maliciously and without any reasonable or probable Cause whatsoever afterwards, and before the return of the said writ, to wit, on the said 24th day of April 1823 aforesaid, at the City of Montreal aforesaid, caused and procured the said plaintiff to be arrested and taken by his body and to be kept and detained in prison on that occasion for a long time, to wit, for the space of five months and twelve days then next following, — without any reasonable or probable Cause whatsoever, when in truth and in fact the said Defendant had not either at the time of levying the said plaint, or at the time of suing out the said writ of Capias ad respondendum, or at the time of making of the said arrest and imprisonment and detaining in prison of the said plaintiff in manner and form aforesaid, or at any of those times any Cause or pretence against the said plaintiff whereby or for which the said plaintiff ought to have been arrested imprisoned or detained as aforesaid. Whereby the said plaintiff was compelled to lay out and expend several large sums of money for his support in the said prison, and during the time he continued there on that occasion his necessary affairs remained undone, and besides the said Plaintiff was thereby greatly injured in the means of getting his livlihood for himself, and it was a manifest vexation and trouble to his mind, as well as tended to a great discredit and disgrace of him the said plaintiff to the damage of him

the

said plaintiff of two thousand pounds — Wherefore &c

To this declaration, the Defendant among other matters pleaded the following pla of Peremptory Exceptions

1st Because the action of the said plaintiff being founded on what is stated in the declaration to be the law of the land, providing that no person whatsoever should be arrested or imprisoned in any personal action or mesne process at the suit of any person before Judgment obtained, without that the person arrested is immediately about to leave the province of Lower Canada (which the Defendant does not admit to be the law of the land) it should have been stated, which is not the case, that the Defendant did cause the plaintiff to be arrested and imprisoned before Judgt obtained against the said plaintiff

2dly Because the declaration aforesaid is insufficient to ground the plaintiffs demand and that the conclusions thereof do not follow from the premises therein stated

3dly Because it is not true as stated in the said Declnt that by the laws and customs of the Province of Lower Canada, no persons whatsoever ought to be arrested or imprisoned in any personal action or mesne process at the suit of any persons, and before Judgment obtained without that the person so arrested or imprisoned is immediately about to leave the said Province, but that the law of the land provides, that in all and every case, where one or more Judges is or may be satisfied by the affidavit of a plaintiff, creditor, that the Defendt his debtor is personally indebted to him in a sum exceeding ten pounds sterling, and may also be satisfied by the oath of the said plaintiff by the oath of the said plaintiff creditor as aforesaid, that his said debtor is immediately about to leave the Province, whereby he might be deprived of his remedy against such debtor, it shall and may be lawful for one or more of the said Judges to grant a Capias or attachment against the body of such debtor

to

to arrest him in due course of law — and that under the law as in force, the plaintiff has not stated a sufficient ground for his said demand, namely that the requisites of the law had not been complied with in the arrest and imprisonment of him the said plaintiff, but hath stated the contrary fact —

4ly — Because by the statement of the Plaintiff in his declaration it doth appear that the alledged arrest and imprisonment of him the said plaintiff was legal, and that he can have no right of action whatever against the Defendant —

5ly — Because the said plaintiff hath not in and by his declaration stated or set forth a ground of action agt the Defendant. —

And for further plea of exception the Defendant pleaded, that on the 20th day of June last past, and before the institution of the present action, in a certain suit between him the said Defendant as Plaintiff and the said Plaintiff as Defendant then pending in the Court now here, judgment was rendered by the said Court over-ruling and dismissing the said plaintiff's motion, in due course of law made on the fifth day of the said month of June for the discharge of the said plaintiff from his confinement in gaol under the writ of Capias ad respondendum sued out in the said Cause against his body, being the same writ of Capias or attachment under which the arrest and imprisonment of the said Plaintiff, which is the ground of the present action, was effected, on the grounds, that on the 24th day of April then last past, or before or at any time since that day, he the said plaintiff was not immediately about to leave the Province of Lower Canada, whereby the said Defendant might be deprived of his remedy for the recovery of his debt. — That the said Judgment was so made and rendered before a competent tribunal

and

and in the only cause and suit in which the legality of the arrest of the plaintiff could be put in issue, namely in the suit between the said parties in which the said writ of Capias ad respondendum had issued, and in the Court in which it was made returnable, in which Court final Judgment was afterwards rendered between the parties on the 8th day of October now last past; So that the S. Judgment not appealed from by the said plaintiff, set at rest the legality and propriety of the said arrest, until the same shall have been reversed by a Superior tribunal by appeal, which is the only recourse given by law to the said plaintiff — And the said Défendant avers, that the present action and demand of the said plaintiff is grounded on the pretended illegality in the suing out of the said writ of Capias ad respondendum, whereupon the Court now hus have already pronounced, which is a chose jugée — between the said parties, and upon which a new discussion cannot and ought not to take place in this hon. Court. — Therefore and inasmuch as the said Judgments of the 20th day of June and 8th day of October last, have not, nor hath either of them been reversed, and that they remain in their full force and effect, the said Defendant contends that the said plaintiff cannot have or maintain his present action against him the Defendant — Wherefore &c

The answer and Replication are general

The parties were heard on the matters of law arising out of these pleadings on the exceptions of the Defendt

Mr

Mr Rolland for the defendant argued, - that there was no sufficient Cause of action stated in the declaration. That the action assumed to be for a malicious arrest of the Plaintiff without any Cause or pretence, but this has been insufficiently set out in the declaration - in it the Plaintiff alledges, that before Judgment he cannot be arrested without a sufficient affidavit &c and then goes on to state that the defendant did arrest the Plaintiff but does not say it was before Judgment, which is insuff.t - That the conclusions in the declaration do not arise and flow from the premises - It was necessary for the plaintiff to have shewn, that the writ of Capias which the Defend.t sued out had been set aside by the Court, and thereby the plaintiffs arrest had been declard illegal - but this he could not shew as the fact is otherwise - but the declaration does not even shew what was done on the prosecution so commenced by the Defendant, or whether it be at an end or not, which is also insufficient. 2. Esp. N. P. 31. 34. That there can be no action maintained against a person for using a right which the law gives him - That the law has been incorrectly stated by the Plaintiff in his declaration, - he states there that no man shall be arrested before Judgment unless he be immediately about to leave the province - but this not the law - on the contrary the law says, that when one or more of the Judges shall be satisfied on the affidavit of the Plaintiff &c - that a Debtor is immediately about to leave the Province he or they may grant an order the arrest of such Debtor we are not here to call in question the policy of the law, there may have been many good reasons for making it so - and in this case the Defendant is within that law and even according to the plaintiffs own shewing, he was arrested according to what the law requires. -

But

But the legality of the plaintiff's arrest ceases now to be a question, as it has been determined ~~to~~ by this Court to be legal, and has thereby become a chose jugée between the parties – The plaintiff has already had an opportunity of being heard on this question – he has already laid before this Court all the arguments and all the evidence he could advance to shew to the Court that the arrest was without cause and illegal, yet this Court has declared that it was legal, now then can the plaintiff maintain an action against the Defendt for doing that which is is allowed by law, and which this Court has declared to have been so done – this would be to bring this Court into contradiction with itself – by calling upon it to determine in this Cause that to be illegal, which in another Cause between the same parties it has declared to be legal – the action cannot therefore be maintained. –

Mr Sewell for the plaintiff – This action is for maliciously holding the plaintiff to bail without any sufficient Cause or reason – The Defendant is charged with having under colour of law used a course which was unwarrantable, by stating on oath to the Judge that the plaintiff was immediately about to leave the Province, and in consequence of this – false statement, having obtained from the Judge an order for arresting the plaintiff – by the laws of the land an action is maintainable in such case agt the Defendant. Dareau. Tr. d'Inj. p. 1. & 2. and 194. –

As to the chose jugée pleaded by the Defendant it will not apply, the Court has never determined that the arrest in this case was not malicious and with probable Cause, the fact was never gone into, nor

was

was there ever before this Court a demand on the part of the plaintiff for damages for such an unwarranted proceeding — all that the Court has determined is that the Defendant by having stated a fact in the form the law requires, he was entitled to the extraordinary remedy the law allows in that case, but the Court never enquired into the truth of that fact, nor would it admit the parties to a hearing thereon — So that if this action could not be maintained every debtor would be at the mercy of his creditor to be sent to gaol whenever that creditor chose to take upon himself to sweer that the debtor was about to leave the province — this would be a monstrous doctrine, and in the highest degree oppressive — cites case of Cuvillier v. Aylwin at Quebec, where in consequence of an arrest under similar circumstances, an action was maintained against the Plaintiff prosecuting the arrest —

Rolland in reply — There can be no action maint, nor any malice presumed against the person using a right in the mode and manner the law requires 2. T. Rep. 185. Belk. v Broadbent et al. & Dickinson —

The Court were of opinion that the declaration set out a sufficient ground of action, in stating that the defendant had falsely and maliciously and without probable Cause, sued out a Capias ad respondendum against the Plaintiff — The principal consideration here seemed to rest upon the Defendants plea of chose jugée, and certainly if this Court has already determined that the proceeding used by the Defdt was not malicious but founded on probable Cause it —

it cannot now be called upon to give a contrary decision but the fact is not so — this Court looks only to the sufficiency of the affidavit in cases of arrest on mesne process, it never enters into the merits of the fact upon which such affidavit is founded, nor allow counter or contradictory affidavits on the part of the Defendt. On this account the affidavits offered by the Defendt in the former Cause were rejected — It is true, that this Court has in its practice allowed a Defendant to contest the affidavit of a plaintiff, where he swears merely to information received from others, because in this case, the affidavit may or may not be sufficient according to the nature of the information so received — but here this was not the case the affidavit of the Defendant contained all that the law required, and the Court never exacts more nor does it allow investigation into the fact. — This action must therefore be maintained, — otherwise a manifest injury might be done under the colour of law, which is often considered as the worst kind of injury —

1 Jrd. Brac. 165.

Defendants plea of peremptory exceptions was therefore dismissed. —

This Judgment was confirmed in appeal by Judgt. of 30th July 1824.

Jos:

Jos: Cartier & al
Exec'rs &c
vs
Degen, Curat
and Delaissement
&
Marcel Guertin
Oppost.

On the opposition of Marcel Guertin.

This was an action en declaration d'hypotheque against one Jean Bapte Masse, who made a delaissement of the property, and Gaspard Degen was thereupon appointed Curator to the delaissement, in whose hands the property in question was seized by the plaintiffs. The opposant made the following opposition to the sale thereof as contained in the moyens filed by him, which stated —

That by act passed before Dutalmé and his colleague public notaries at St. Denis on the 12 Febry 1820, one Ignace Bousquet exchanged a certain lot of land (as in the said moyens d'opposition stated) with the said Opposant for another lot of land which he the opposant then transferred in counter-exchange to the said Bousquet — That in consideration of the said exchange so made it was in and by the said deed stipulated and agreed that he the said opposant should pay to the said Bousquet a sum of seven thousand livres, in lieu whereof the said opposant created and constituted a certain annual rente to be paid by him of 420th — to the said Bousquet yearly and every year on the 26th May, the first payment whereof to commence and be made on the 26th May 1821. —

That on the said 12th day of February 1820, the lot of land so transferred and conveyed by the said Bousquet to the said opposant, was specially held and mortgazed for the payment of the sum of 15,000th. livres, for which the said Bousquet and one Charles Choquette had constituted and created thereon

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in favor of Pierre Gueroute and the said Joseph Cartier the plaintiffs, as well in their name and capacity of Executors of the last Will and testament of the late Charles Lamothe, as in their capacity of attornies of Marie Genevieve Lapique dt. Petit, widow of the said late Charles Lamothe, an annual rente of 900ᵗᵗ.— to be paid yearly and every year, which the said Bousquet and Choquette jointly and severally solidairement bound and obliged themselves to pay the said Gueroute and Cartier and their Successors yearly and every year from and after the 26ᵗʰ May 1817.—

That the said rente of 420ᵗᵗ. created and constituted by the said opposant in and by the aforesaid act of the 12ᵗʰ February 1820, was by him so constituted in discharge of so much of the aforesaid rente of 900ᵗᵗ.— so constituted by the aforesaid act of the 26ᵗʰ May 1817, although not so mentioned in the said act of the 12ᵗʰ Febry 1820— and although it was therein and thereby stipulated to be paid to the S^rs Bousquet.

That the said Opposant hath well and truly paid yearly and every year to the said Gueroute and Cartier, the said rente of 420ᵗᵗ. save and except a sum of 160ᵗᵗ. which he still owes upon the rente become due on the 26ᵗʰ May last, which he refused to pay, because the said Bousquet and Choquette had neglected and refused to pay the rest & residue of the rente of 900ᵗᵗ.— to the said Gueroute and Cartier.—

That the said Bousquet and Choquette have not paid a balance they owe on the said rente of 480ᵗᵗ. which they were bound to pay to the said Gueroute and Cartier in discharge of the said rente of 900ᵗᵗ.—

That

That the said Bousquet and Choquette now owe to the said Guerout and Cartier, a sum of 1925^{tt} for arrears of the said rente of 900^{tt} which became due and were in arrear on the 26th May last for the payment whereof the land so conveyed by the said Bousquet to the Opposant, is bound and mortgazed, as well as for the current rente and that which may hereafter become due. —

That the said opposant as holding and possessing the aforesaid lot of land so conveyed to him by the said Bousquet, is now troubled in the enjoyment thereof by reason of a demand made upon him for the payment of the aforesaid sum now in arrear of 1925^{tt} — so due and owing by the said Bousquet and Choquette, and is also liable to be troubled for the arrears which may become due hereafter. —

That the lot of land as aforesaid conveyed by the said Opposant to the said Bousquet is bound by special privilege to the warranty on the part of the said Bousquet accruing under the aforesaid act of the 12 February 1820 — That the said lot of land so conveyed by the said Opposant to the said Bousquet is now seized and taken in execution by the Sheriff of this district in order that the same be sold in the due course of law. —

That the said opposant is well founded in demanding, that the said lot of land be adjudged to him at the highest price at which the same may be estimated by Experts, on condition of his paying out of such estimated value the aforesaid sum of 1925^{tt} and part of the aforesaid principal sum of the said rente constituee of 900^{tt} — viz^{t} the principal sum of 8000^{tt}, for the payment whereof

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land so conveyed to him by the said Bousquet is bound and mortgazed, over and above the said rente of £20^{t} — which he the said opposant hath become bound to pay to the said Bousquet unless the said plaintiffs prefer to cause the said lot of land to sold and adjudged subject to the warranty of what the said Bousquet is bound towards the said Opposant by reason of the aforesaid act of the 12 Febry 1820, or to cause the same to be sold and adjudged at a price — sufficiently high, that the said sum of 1925^{t} — and the said sum of 8000^{t} — be entirely paid and discharged —

Wherefore the Opposant concludes that the Court will be pleased to order and direct that the said lot of land so seized be adjudged to him at the price at which it may be valued and esteemed by Experts, to be named by the parties, and on their default by the Court, on condition that such estimated price shall be paid by the said Opposant in discharge of the said sum of 1925^{t} — and of the said sum of 8000^{t} if so far such estimated value shall extend unless the said Plaintiffs prefer to cause the said lot of land to be adjudged at a price sufficiently high that the aforesaid sums of money may be paid out of the proceeds thereof, or that they sell the said land subject to the peryment, thereof, or that they give an acquittance and discharge to the Opposant for the said sums of money — the whole with costs —

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The plea to the said opposition is a general denegation of the opposants right to have or maintain the conclusions by him therein & thereby taken, and the replication joins issue thereon. —

On the hearing on this opposition Mr Mondelet for the opposant stated, that the opposant had a privilidge on the lot of land he gave in exchange to Bousquet, which land he sold to the Defendant Masse, who having been sued en declaration d'hypotheque for the debt of Bousquet, he abandoned the land, and thereupon Degen was appointed Curator to the land delaissé, on whom the sale by decret is now prosecuted by the plaintiffs — The present opposition claims that the land be adjudged to the opposant on the estimation of Experts, or that the plaintiffs be held to give security that the land be sold high enough to pay the amount of the opposants claim against it. —

It is a right principle that a land ought not to be mortgazed beyond its real value, any stipulation beyond this is useless, nor can a posterior mortgage be allowed to injure or diminish the security given by a prior one — Henrys. liv. 4. ch. 6. quest. 29. No 4 Hericourt ch. 6. No 21. establish that the oldest creditor in mortgage is entitled to have the estate mortgaged adjudged to him at a just value by Experts without going to the expence of a decret. — see also. Nouv. Denizt vo adjudication p. 242. No 4. Repon vo adjudication p. 50. Fer. Dic. Vo adjudication — Poth. Proc. Civile p. 238. ch. 2. art. 8. su. 3. — 2. Bourjon. tit. 18. sec. 7. §. 14. p. 527. 2. Bardet. Tit. 9. ch. 20. p. 605. —

Rolland for Plffs. The doctrine which the opposant wishes to establish cannot hold in this Country, where we

we have neither law nor usage to authorise it.— How could could the other Creditors of the Defendant have a knowledge of the Sale made in this way, so as to give them an opportunity to come forward with their rights, or to compel them to come forward at the risk of losing their rights — The opposant here is not actually a Creditor of the Defendant, but is exposed to be troubled for a debt for the indemnity whereof he is entitled to his mortgage on the land in question — but there may be other creditors who have an equal claim with the Opposant. —

Mondelet in answer — the sale of real property by the prisée d'Experts is allowed in this Country, it is equitable — In this case it is not necessary to call in any creditors, where the Opposant is the only creditor, and if there should be any others their rights cannot be affected, as should they be prior in mortgage to the opposant he must pay them claims, and should their mortgage be posterior to his they can have no claim to make —

The Court held that the opposition could not be admitted — that all the rules and regulations which were adopted in France for the sale of property were not necessarily introduced into this Country, and in regard of the sale claimed to be made to the opposant as a Creditor, it had never been practised that we had but one mode for forcing the sale of a debtors real Estate in this Country which was by the Sheriff as established by the Provincial Ordinance of 1785, which was the safest course to be adopted for securing the rights of all parties

Oppos.t dismissed —

Confirmed in appeal
30 July 1824. —

No 1274.

Vigé & ux. vs Pasteur.

This was an action instituted by the Plaintiff against the Defendant who had been appointed Tutor to Clemence Renaud the wife of the plaintiff, in order to obtain from the Sr Defendt an account of his gestion and administration as such Tutor, and to pay to the plaintiffs such monies as shall appear to be due to them upon such account.

The Defendant for peremptory exception pleaded to the action that it was premature and ill founded and could not be maintained against the Defendant because by the marriage Contract between the said Plaintiffs to which he the said Defendant was a party bearing date the 13 March 1822, it was amongst other things stipulated and agreed by and between the parties thereto, that in regard of the rights of the said Clemence Renaud "lesquels droits ne seront neanmoins payables aux dits futurs epoux qu'à la majorité de la dite future epouse seulement" and the said Clemence Renaud not being yet of age, the present action is therefore premature.

The Plaintiffs in answer contended that notwithstanding the aforesaid clause in the said marriage Contract contained, they are entitled to their action aforesaid against the Defendant

The Court held that although the Plaintiff Clemence Renaud was not of age, that being by law entitled to an account of all her moveable property in the hands of the Defendant as her tutor, the clause in the marriage contract should be restricted to the particular object limited by it as to the payment of what might be due to her, but in regard of the payment of what might be so due this clause must be allowed to have its effect. The Court therefore

ordered

ordred the Defendant to render the account demanded but dismissed the action as to the payment of the rights demanded —

No 1780

Seaver. —
vs
Kendall.
&
The Corporation for superintending the Clergy Reserves Opp^s.

In this Case the plaintiff under the writ of execution sued out by him against the lands and tenements of the Defendant, caused to be seized and sold by the Sheriff a certain lot of ground in the township of Standlead as belonging to the Defendant, but which was one of the lots belonging to the Clergy reserves — this lot was purchased by the Plaintiff at the Sheriffs Sale for a sum of seven pounds ten shillgs but before the Sheriff had made out the deed of sale of the said lot to the plaintiff, he received an opposition on the part of the Corporation for superintending the Clergy reserves, claiming the said lot of ground as being part of the Clergy reserves, and demanding that the sale thereof should be set aside as null and void in law — The Sheriff having made his return on the writ of execution to this effect —

Mr Sewell for the Opp^s. The Opposants hold the right as a Corporate body under letters Patent from the Crown, to claim the property seized as part of the Clergy reserves — It is contended here that this opposition comes in too late, being made after the Sale and adjudication by the Sheriff, on the supposition that the right of the Crown has been divested by that Sale — But this is contested by the Opposants, as no Sale can divest the Crown of its rights, and claim here made by the Corporation

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is on behalf of the Crown — No person can plead a chose jugée against the King. Repse vs Roi. — 2 Chopin. 594 — Jenk: Rep. 215. 219. 2 Hawk. ch. 26, sec. 52. The King cannot be non suited. 16 Viner, Tit. Prerogative — Laches shall not be adjudged at the King. —

Boston for the plff — This opposition cannot be maintained by the opposants — none can claim the rights due to the Sovereign in his Courts, but the attorney General, and we must therefore presume that had it been the intention of the Crown here to claim this property, it would have done so through the medium of the Attorney General — But a Corporation is an inferior being and is created by the Crown and not entitled to same priviledges and exemptions as the Crown — The opposition was irregularly made as there was no affidavit annexed to it as required by the rules of practice — nor any domicile thereon or thereby elected as required by Law — Hericourt sets out the formalities formerly required for the validity of a Sale by decret, these are unknown in this Country — the ordinance of 1785 determines the mode of Sale and adjudication by the Sheriff, which when made must preclude the King as well as the Subject — and therefore when a Sale has actually taken place no Opposition ought to be received — at all events the opposants here ought to pay the Costs on this Opposition, as it has been occasioned by their own negligence — The Law says that no Opposition shall be received but within a certain period before the Sale, and neither the King nor a subject can come against this law — otherwise

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the King may claim all the Estates in the Country in right of Conquest and in the face of every title recognized by law. — After adjudication no opposition can be received in regard of the property sold, not even by the persons most favoured in the law. 1 Pigeau. 728. 729 — 2 Bouy. p 718. 721. art 346. Cout. Paris - art. 354. — The rights of the Crown must be bound by a general law in the same manner as those of a Subject — The King here concurred in making the law and cannot be supposed to have a right to break it.

Sewell in reply — The Corporation have here the right to claim the property as well as the rents issues and profits of the Clergy reserves. That the adjudication of this lot of land by the Sheriff without any title to it in the Defendant would not transfer the property even in the case of a Subject, it would be a seizure supra non domino, and could transfer nothing to the — adjudicataire, and much less in the case of the King, against whom no person can claim without title — As to the Costs, the King neither pays nor receives Costs —

By the Court — The Clergy reserves must be considered as a part of the Domain of the Crown, which cannot be prescribed nor alienated with certain formalities, and the Corporation appointed by the Crown to preserve and manage these reserves, are to be considered as Commissioners appointed to watch over the interests of the Crown

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in this respect, and to represent the Crown in all matters touching the same — That the Crown cannot be bound in the same manner as the Subject in regard of its rights and property because it holds that property for the benefit of the Subject — and no arret, Judgt or pris de son recevoir can be received or admitted as the Crown but what is liable to new examination when the rights of the Crown are concerned and brought in question — and any Sale, Conveyance or alienation made of the property of the Crown may be set aside may the decret itself may be set aside where the King or his officers have not been heard or been parties to the proceeding; nor can the rights of the Crown be lost from a want of opposition to a decret — and the fault or inattention of the officers of the Crown in not making such opposition shall not work a prejudice against the rights of the Crown, in regard of its Domain, although not in regard of its Casual rights Jer. Gp. Comre on art. 359. §. 3. Somre 13. p. 1438 — It therefore seems to be the right of the Crown when the Domaine thereof is concerned to come against any alienation thereof that has been made without its consent, and even after the decret, and to enter upon any possession it may have thereby lost — That the property seized in this case being part of the Clergy reserves the Opposants as superintending the rights of the Crown in this respect are founded in their present opposition. —

Denizt. Vo Domaine No. 8. 9.

Dic. Raisonné des Dom. Vo Domaine §. 6. p. 137.

N. Denizt — Vo Dom. de la Cour. §6. No. 2 —

Dic. Rais. des Dom. Vo Decret. p. 19.

Thibault des Criées ch. 8, Som. 14. p. 176.

Tronçon on 355th art. Cout. on word "s'opposer."

Jr. du Domaine p. 172 —

Chilly on Prescrp. p. 376. 379.

Judgt. that the Sale in question be set aside and the lot of land in question restored to the possession of the opposants, but without Costs. —

No. 1793.

Demers. & Patenaude } This was an action on a cedule or acknowledgment of a debt, stated to have been made and signed by the Defendant in the presence of a notary and one Witness.— The notary and the witness being dead, evidence was adduced of their hand writing, but there was no other evidence of their death, except as stated by the witnesses who proved their signatures — this the Court thought not sufficient, not being the evidence the law required, and therefore dismissed the Plaintiff's action, saving his recourse.—

No. 1877.

Gagnon. & Metras. — Metras. opp.t } In this Case the plaintiff instituted an action as Curator to Antoine Ouimet and Louis Ouimet, absentees from the province, against the Defendant on a notarial obligation made and executed by him on the 19th April 1822, for a debt due by him to the said absentees of £31. 5— the said obligation being payable to the said plaintiff in his capacity of Curator as aforesaid— This action was instituted in april Term 1823.— While the Cause was pending, viz. on the 3d day of October 1823. the Defendant by his counsel intimated to the Pltff and obtained acte thereof from the Court, that one of the absentees represented by the plaintiff was dead, and that the other had since the month of July 1823 returned to this Province

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and was then resident in the parish of Laprairie to the knowledge of the plaintiff — On this — declaration nothing further was done, the Pltff however still persisted in his proceedings and on the 18th day of October 1823 obtained Judgment against the Defendant for the amount of his demand.

The Plaintiff afterwards on the 28th of November 1823, sued out execution upon the said Judgment and caused the Defendants goods and chattels to be seized, when the Defendant put in his — opposition afin d'annuller, and stating that as the Plaintiff had no longer any authority by reason of the death of one of the absentees, and the return of the other to this Province, and that the said execution should be set aside and the seizure of the Defendants effects taken off — Sundry proceedings were had upon this opposition and on the 17th February last the parties were finally heard thereon —

Mr Mondelet for the Opposant, contended, that the plaintiff had no right to proceed in this cause from the time notice was given him of the death of one of the absentees and of the return of the other, and that therefore the Judgment subsequently obtained by the plaintiff on the 18th of October last was null and void and no — execution ought to have been sued out thereon, because the Plaintiff had no qualité de proceder cités. Lacombe. vo Procureur. 1 Journal du Palais. 928 — The Plaintiff here does not come within the

cases

cases where the power of attorney given by the Constituant does not cease by his death — Poth. Mandat. N° 111 — Fr. d'Ob. N° 512. Nouv. Denist v° Curateur — which shew the manner in which the Curatelle such as that of the pltff ceased. The Plaintiff here alledges that the Defendt. ought not to be admitted to contest the validity of the proceedings without first depositing the amount of the Judgment rendered against him — but the Pleintiff has no qualité de recevoir, and therefore not entitled to make this demand. — That in this case the Judgment obtained by the plaintiff was null and void having been rendered after the qualité of the plaintiff had ceased, and after notice thereof had been signified to the plaintiff. Poth. Obl. N° 880. a

Rolland for the Pltff. It is not by this kind of opposition that the Defendant can come against the Judgment which is executory in its nature. — The Defendant in this case ought to have applied to the Court by Petition to have a revision of the Judgt or he ought to have appealed from it, so as to suspend the effect of it — But the Opposition made here, is upon the principle, that no execution ought to have been sued out ~~thereon~~ on the Judgt, because it is null & void, before the Court has declared it to be so, — There must be a proceeding previously to obtain this nullity, before the execution can be stopt. —

The Court were of opinion with the Plaintiff and considered that as no conclusion had been taken by the Defendant in his opposition for revising the Judgment upon which the execution issued, that so long as this Judgment remained

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in force, an execution thereon could not be withheld and that this seemed to be regular course to demand a suspension of the execution until the Judgment could be so revised, and to take the necessary conclusions to this effect. N. Denisart Vo Decés. No 4. The Court therefore dismissed the opposition. —

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No 1974.

Archambault. val'. — vs Tullum val'. v Doyons — oppt. —

In this Case execution was sued out against the lands and tenements of the Defendants, by virtue whereof certain lots of land belonging to the Defendant Francois Xavier Poitras, subsequent to the seizure of this property the said Defendant died, whereupon Doyons his widow and universal Legatee made an opposition afin d'annuller, contending that all the proceedings had or to be had on the said Execution subsequent to the death of her husband were null and void and that it necessary that the Judgment should be declared executory against her as such universal legatee before any further proceedings could be had thereon. —

Buchanan for the Oppost cited 2 Loisel. p. 351. — Poth. Proc. Civ. 4 part. ch. 2. app. 2. art. 1. §. 2. Denizt. Vo Execution des Jugemens. — Poth. tit. 20. Cout. d' Orl. 95. Louage. No 207. —

But the Court were of opinion that the Opposition could not be maintained. su Fer. Gr. Comre art. 168. glose. un. No 20. p. 1152. —

No. 449

Woolrich. vs Malhiot.

This is an action by the indorsee against the indorser of a promissory note, which when due was duly presented to the maker thereof, and on his refusal duly protested for non-payment within the time and as required by law.

The defence set-up is, that due and sufficient notice of the non payment and protest was not sent to the Defendant so as to charge him as indorsee and render him liable to the payment of the note, inasmuchas a written notice and copy of the protest were not delivered to, and left with him —

This defence seems to hold out a particular mode of giving notice, as being requisite under the law of Canada, which notice it is urged is not complete, without leaving a written notice of non-payment and a copy of the protest with the indorsor — it would therefore seem necessary upon the present occasion to settle what may be deemed a sufficient notice and what is required in that respect by our provincial Statute. — Now the words of the provincial Statute in respect to the notice of the dishonor of a note are — "and that notice " of such non payment and protest shall have " been sent to such indorser or indorsers, or to " the usual place or places of his, her, or their " residence within ten days &c." Upon this it is necessary now to decide what may amount

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to a sufficient notice under the requirements of the Statute — It is clear that no particular mode of giving notice is prescribed, though the period within which it is to be given is limited, it is not said whether the notice is to be verbal or in writing, but only that notice shall be — sent — of what? — of the non payment and protest, for the Statute does not require more than that notice of those two facts should be sent, and in no part of the Statute is it said, that a written notice and a copy of the protest shall be left with the indorser — The law therefore in this respect, seems to have left the question as to the sufficiency of the mode of notice adopted in each particular case, to be decided by the Courts. The principal object of the law in requiring such notice was most certainly to prevent any loss accruing to the indorser by the silence of the indorsee or holder of the note, and his with-holding from the indorser the knowledge of the non payment of the note, and thereby prevent him from taking early measures for his security against the maker, and it would therefore appear not very essential in what mode this is done, provided the information is really conveyed or sent by the holder to the indorser within the time limited, and in a manner calculated to reach him at his place of residence or communicated to him verbally — now there cannot be a doubt, that a verbal notice as

effectually

effectually answers the object of the law as a written one, and the knowledge of the dishonor can be acquired by the Indorser as perfectly in the one way as the other, circumstances however may sometimes render it necessary that the notice should be in writing, where from the residence of the parties a verbal notice cannot be given — yet when verbal notice can be given to the Indorser in person, it is the highest and most effectual kind of notice as it regards him — for a letter or written notice might by accident not reach him and still would be held sufficient against him if sent by a regular conveyance — In England much greater strictness is observed in the diligence required of a holder of a note than by our Statute and therefore in the construction of the latter which in the preamble is declared to have been made for the encouragement of trade and Commerce and to facilitate the negotiation of notes, and therefore upon the principles both of the English and French law, must have a liberal construction. 3. Wilson. p. 4. — it would appear a safe and fair rule to adopt, that whatever would in England be deemed sufficient notice should be so held here — Now it is clear that in England, where the law also requires that notice should be sent of the dishonor of the bill to the persons to whom the holder intends to resort for payment and to fix their liability, a verbal notice is deemed sufficient, as will — appear on reference to Chitty on Bills. p. 220. 6th Edit

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It therefore follows that in all Cases against an Indorser, the only and necessary enquiry must be, has the Indorser had the notice which the law intended, and has the object of the law been attained — the fact of notice the holder must be prepared to prove — and notwithstanding what has been observed as to the sufficiency of notice, yet this ought not to induce holders of notes not to take every necessary precaution for the establishment of that fact, as it might in some instances be dangerous to risk a verbal notice, which may be difficult to be made, or to be proved when made, a written notice sent either by letter where there is an established Conveyance, or through the ministry of a notary may be adviseable for the security of the holder — the latter mode it appears was adopted by the plaintiffs in this Cause, and two notaries have by an act in due form certified at the request of the plaintiff, that they went to the residence of the Defendant on the 18th April, the protest having been made on the 8th of the same month, where speaking to him, they delivered to him a copy of the protest for non payment with a copy of such act of notice, and then follows — "upon which "the said Xavier Malhiot said, that he did not "require a copy of the protest, which copy remained "in our possession, hereby giving notice to the said "Xavier Malhiot that payment of the said note "has been refused by the maker thereof." — From this it is evident, that the Defendant had notice of the dishonor of the note within the time prescribed by the Statute, and had not only verbal, but written

written notice — it is however objected that the Notaries did not complete the duty they had to perform, in not leaving a copy of the notice and of the protest so as to charge the Defendant and make him liable for the payment of the note to the holder — this objection under all the circumstances comes with a bad grace from the Defendant, but in order to meet it we will again repeat, that the law does not require that written notice and a copy of the protest should be left with the Drawer. But how is it in point of fact, the Notaries declare, that the written notice and copy of the protest, were delivered, but in consequence of the declaration of the Defendant himself, the copy of the protest remained in their possession, if so, what became of the Copy of the notice, which the Notaries say was also delivered, we must presume that it was retained by the Defendant, and if so, the thing was complete in regard to the notice, and the requisite urged by the Defendant complied with — But supposing that both the notice and protest had remained in the possession of the Notaries, yet these having been previously delivered to the Defendant, it must be admitted that if he had a right to claim them, he had also a right to dispose of them in any way he thought proper and if he had a right to retain them and chose to waive it, he certainly was at liberty to do so — and therefore having declared he did not require them and returned them to the Notaries, he thereby admitted that he had received due notice and cannot be allowed thus to avail himself of his

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own act, to get rid of his liability. — In Pothier's Contrat de Change N° 213, he says, "L'ordonnance ne requerant que des diligences, "sans determiner quelle espece de diligence, et ne "requerant pas specialement un protet, le porteur "ne peut y être assujetti; car en fait de formalités on "ne peut être tenu qu'à ce que la loi oblige" — and in N°. 219. 220, he applies this rule to all notes — payable to order, as does Bornier, as noticed in a case last Term of, "The Bank of Canada v James Brown —

The Court is therefore of opinion, that the notice given was sufficient, and that the Plff is entitled to Judgment. —

№ 1646.

Patenaude & ux. — vs. — Marcile. —

Action en rescision. —

The declaration stated, that one Francois Seraphim Lamarre, pere, was in his life time and at the time of his decease, proprietor and possessor of certain property moveable and immoveable, that is to say. 1st. a certain lot of land in the Fief Dorcour; † 2d. a certain terre a bois, situated in the Seigniory of Montarville, of the value of £37. 10. — 3d. a certain lot of ground or emplacement in the village of Longueuil of the value of £125. Cy. 4th a certain other lot of ground in the said village, of the value of £25. Cy — with moveable property, cattle and farming utencils of the value of £125. Cy. — That the said Lamarre pere, by his last will and testament made and bearing date the 21 Dec. 1805. after making certain legacies to the children of Marie Louise Lamarche his first wife, gave and bequeathed all the rest and residue of his property and estate to François Seraphim Lamarre his son, brother of Marie Lamarre, the wife of the Plaintiff, to be by the said Lamarre fils held and enjoyed during his life time only, and that after the determination of the said usufruct, then to the children born or to be born in lawful wedlock of the said Francois Seraphim Lamarre fils en pleine propriété and in case the said Francois Seraphim Lamarre fils should die without such issue, then that the said property and estate should appertain and belong to the said Marie Lamarre wife of the plaintiffs. —

† of the value of £375 —

That the said Francois Seraphim Lamarre pere died on or about the 13 January 1809. —

That at the time of the dease of the said Lamarre pere, the said Lamarre fils, was then absent from the Province, and one Francois Vincent pere, was named

named and appointed Curator to him, by act of 16 Febvy 1809.- And on the 20 Febvy 1809, Joseph Dubuc, the testamentary Executor of the said Testator made out an Inventory in due form of all the property and estate of the Succession of the said Lamarre pere.

That afterwards the said Lamarre fils having returned to this province, he obtained the possession of all the property and estate so bequeathed to him by the said Lamarre pere, his father-

That on the 10th March 1818, the said Lamarre fils made and executed his last will and testament, by which he gave and bequeathed to the Defendant all and singular his property moveable and immoveable of every discription en pleine propriété, therein and thereby naming and appointing the said Defendant his sole and universal legatee -

That afterwards, on the 17th March 1818, by acte of partage or accord made between the said plaintiffs and the said Lamarre fils, it was stated, stipulated and agreed by and between the said parties to the said act, that inasmuchas they were disposed to divide amicably among them the property which had been devised and bequeathed as aforesaid by the said Seraphim Lamarre pere, it was therefore covenanted and agreed that the said Lamarre fils should transfer and convey, and in and by the said act did transfer and convey to the said Marie Lamarre his Sista, the present enjoyment and all other rights whatsoever which he the said Lamarre fils had or might have in and to the following property and estate which he held and enjoyed under the said last will and testament of his father, for and during his life time, that is to say- the two

lots

lots of ground or emplacements situated in the village of Longueuil as before mentioned, and in consideration thereof and of a sum of 1800 livres which the said plaintiffs then received from the said Lamarre fils, they the said Plaintiffs transferred and conveyed to the said Lamarre fils, the full and entire right of property in and to all the other property moveable and immoveable which belonged to the succession of the said late Lamarre pere, they the said plaintiffs then and there renouncing to all right which they then had or might have in and to any part of the said property so by them transferred and conveyed, under or by virtue of the aforesaid Testament of the said Lamarre pere. —

That the lots or parcels of land which by the aforesaid act of partage fell to the share of the said Lamarre fils, were the lots No. 1. 2. and 3. being in all of the value of £537. 10 and the other lots or emplacements which fell to the share of the said pltffs including the above sum of 1800 which they so received amounted only to the sum of £225 —

That the said Francois Seraphim Lamarre fils afterwards on the 13 January 1823. died without having changed his said last will and testament, whereby the said Defendant became his sole and universal legatee and devisee —

And the said plaintiffs further declare that inasmuchas by the said acte de partage

or

or agreement of the 17 March 1818, the aforsaid lots of land and money which they the said plaintiffs received, amounted together only to the sum of £225, as their share in the property left by the said Lamarre pere, and that the part and share of the said Lamarre fils in & by the said acte de partage of the said property amounted to the sum of £537-10. and inasmuchas the said Lamarre fils had only the life enjoyment of the said property, and that on his decease the said property belonged to her the said Marie Lamarre, the said Plaintiffs have in and by the said acte de partage, been injured by the said Lamarre fils, and have sustained a lesion of more than du tiers au quart of the value of the said property so divided, and they are therefore entitled to demand that the said acte de partage be set aside and annulled, and the said Marie Lamarre be restored to all that she has lost by the said acte de partage, and that she the said Marie Lamarre be declared the true and lawful owner and proprietor of all the lots of land and moveable property thereby transferred to the said Lamarre fils, and which he in and by his aforesaid last will and testament of the 10th March 1818 could not transfer or devise to the said Defendant as having any right of property therein, and finally that the Defendant be held

to

to restore and deliver up to the plaintiffs the afors^d lots of land just above described and also the moveable property and estate aforsaid now in his possession — and concluding to this effect. —

Plea. — In nature of a special demurrer, contains the following grounds of exception to the action, that the same cannot be maintained —

1^st Because the pl^ffs by their declaration set up a right of action founded on a lesion de tiers au quart upon the act of the 17 March 1818, which they call an acte de partage, although the conclusions of the said declaration are not in conformity with this demand. —

2. Because there is evident contradiction between the action as stated in the declaration and the conclusions taken thereon, the action being founded on a pretended lesion, the conclusions being applicable only to an action petitoire. —

3 & 4. Because the action being en rescision, founded on a lesion de tiers au quart, the Pl^ffs do not conclude as they ought to have done that the parties should be replaced in the same state and situation in which they were at the time of passing the said act, but conclude that the whole property should be delivered up to them.

5. Because, the said Plaintiffs cannot alledge the existence of any lesion under the said acte of 17 March 1818, which can be considered only as a transaction between the parties, and an agreement touching future and incertain rights not then capable of evaluation. —

6. That the Plaintiffs are not entitled to ground

any

any claim on the last will and testament of the late Seraphim Lamarre of 25 Dec. 1805, inasmuch as the plaintiffs who were the only persons who eventually could be benefited by the substitution therein contained, have formally renounced thereto by the said act of 17 March 1818. and have sold transferred and conveyed all their right and interest in and to the property in question to Franc. Seraphim Lamarre fils, in whose right and stead the Defend.t now holds and retains the same as the legatee of the said Lamarre fils.—

And further that the Plaintiffs have no right or interest in or to the property in question, but that he the said Defendant is the true and lawful owner and proprietor thereof.—

The answer and reply to the above plea of exceptions are both general.—

On the hearing on the matters of law raised by the pleadings, Mr Vigor for the Defend.t contended, that the action was irregular, as it proceeded upon the principle of being an action of rescision for a lesion in a partage, but that the conclusions thereof were those of an action petitoire— That supposing the action to be maintained in this respect, then it must turn upon the validity of the transaction between the parties of the 17th March 1818, which could not be considered as a partage between Coheirs, but as a compromise between the parties in regard of uncertain rights, the consequence of which was that Lamarre fils gave up to his Sister the Plaintiff the present—

possession

possession of a part of the property, which by the will of their father she could not claim until after the death of the said Lamarre fils, and then only in case he died without legitimate issue — that before the right of the substitué was open it was lawful for him to make any agreement he may see fit with the grevé de substitution, after the death of the Testator or donor — Poth. Tr. des Sub: p. 564. and more especially when such agreement is in the form of a pacte, or transaction between the parties. Repre vo Substitution. p. 541. 1st Col.

Beaubien for the Ptiffs — whether the act in question be considered as a pacte or a partage the effect is the same as it tends to make a division and partition of the property between the parties, in which that equality should be observed which the law requires in a partage among heirs — and even when such act is made in the form a transaction, unless when founded on a suit at law between the parties, it is liable to be set-aside in case of lesion such as complained of by the Plaintiffs — Lacombe. vo Partage. Sec. 3. No. 6. Vigé in reply — This act may be compared to the Sale of droits successifs, in which there can be no lesion. Lacombe. vo Substitution. dist. 5. —

By the Court. — The action of the Plaintiffs here depends upon the construction to be put upon the act of the 17th March 1818 — the Plaintiffs have considered it as an acte de partage between heirs and in this light only could the present action be maintained — but it is evident that this construction

can

cannot be put upon it — for there was no succession here open, which the parties were called to participate in or divide between then — the succession here was limited by substitution of the Testator, and the right of the Plff Marie Lamarre was in abeyance until after the decease of her brother without issue — but it was lawful for her to sell her right as it was for her brother to sell his, and although this might not have been binding upon those who were not then in esse and entitled to be substituted before the Plaintiff Marie Lamarre, yet it was binding in so far as regarded the rights of the parties to that act, which contained an alienation of the rights of the Plaintiff allowed by law — This action must therefore be dismissed —

see Dessaules. on Subn Ch. 52. —

Repre vo Substitution

Pothier on Subn — & as cited by Depr

Friday 18th June 1824.—

Potts.—
v
Burton.—
&
Stuart & al
&
Henry. T. S.

The facts of this case appear to be, that on the 6th February 1822, the plaintiff Potts obtained Judgment in this Court against the Defendt Burton for £423.13.5 with interest & Costs from which Judgment the Defendant appealed, and on 12 Novr 1823, the same was by the Judgment of the Court of Appeals confirmed with Costs to Potts against the Defendt Burton, and it was ordered that the record should be remitted to this Court, and on the same day an order of the Court of appeals obtained by the Petitioners Messrs Stuart and Buchanan in the following terms — It is ordered on motion of Messrs Stuart & Buchanan, that a distraction de frais be allowed them in the said Cause, and that all and every the costs due by and from the appellant to the respondent under the Judgt in this cause rendered by this Court, be and they are hereby declared to be due and owing and payable to them the said Messrs Stuart & Buchanan and to no other person whomsoever.— That consequently and previous to the 3d January last a bill of the said Costs in appeal was made out and taxed at £50.3.4, which was communicated to Mr Rolland the Defendants attorney, who afterwards on the 8th January, informed the Petitioners that he had the money, and desiring them to send

for

for it — That Mr Buchanan called on Mr Rolland with the said bill for payment, and then received the amount, and also three pounds and some shillings for postages of the record on a certiorari which had been omitted in the bill — at the same time Mr Buchanan requested Mr Rolland to pay a further sum of nineteen pounds and upwards for postage on the remission of the record from the Court of Appeals, and which could not have been inserted in the taxed bill, as at the time the record was not remitted, but Mr Rolland refused — at this time the record was still in the post Office and the postage unpaid — Mr Rolland on this occasion observed as a reason for not paying said postage that some arrangements had taken place between the plaintiff Potts and the Agent of the Defendant Burton, which rendered it unnecessary to take up the record — Mr Buchanan at the same time urged the payment stating, that it was the duty of the party successful in appeal to procure the remission of the record — It appears however that a receipt was given by Mr Buchanan for £53. 14. 1, who had received that sum and left the taxed bill with Mr Rolland — On the same day however, Mr Buchanan having consulted with Mr Stuart, returned to Mr Rolland and requested him to take back the money, saying, they would take

up

up the record, pay the postage and get the bill retaxed — Mr Rolland voluntarily gave up the receipt and taxed bill, and the money was returned to him, he saying, they might adopt such measures as they pleased — Subsequently to this the record was taken up from the post office and returned into this Court, and the postage paid by Messrs Stuart and Buchanan, who got the bill of Costs retaxed including the postage. — The Petitioners have now sued out a writ of Saisie Arret, and attached the amount of the last taxed bill in the hands of Mr Henry the Defendants agent — this demand has been resisted in so far as regards the sum paid at the post office on the remission of the record, the only question submitted now is, whether under all the circumstances, the Petitioners, Stuart and Buchanan are entitled, under the Judgment awarding to them the distraction of Costs, to recover the additional sum for postage. —

The argument made use of by the Defendants counsel, that an understanding or settlement had taken place between the parties cannot avail in regard to any costs which may be considered as included in the Judgment awarding the distraction des depens indeed the very object of such a privilidge, is to prevent any understanding of this kind, detrimental to the interests of the advocate, and the right being once claimed and awarded, the party condemned to pay the costs cannot even set up in compensation any debt due to him by the successful party to the prejudice of

the

the advocate, who is not only subrogated in the rights of his client, but secured beyond all controul as to the legal costs and disbursements unsatisfied; This is clearly laid down in Pigeau in the first part cited at the bar, who says, that this exception to the general rule of law has been adopted upon principles of public policy to encourage them in the prosecution or defence of the rights of indigent clients, and he concludes with this observation — "si l'on doit exiger des procureurs " de la probité et de l'exactitude dans leurs fonctions, les " tribunaux doivent les favoriser lorsqu'ils se sont " acquittés de leurs obligations" — Now the Judgment of the Court of Appeals which awarded to the Respondent Potts his costs in appeal, directs, as in every other case the remission of the record and consequently the costs necessarily included the postage of the record as well in its transmission, as in its remission, which last it was not only the interest but the duty of the successful party to effect, from public as well as private considerations nor could any arrangement between the parties dispense with the obligation so imposed, and it was moreover the particular duty of the advocates to see that this part of the Judgment was complied with — The duty of the Petitioners extended to every thing connected with the execution of the Judgment obtained, and their power in this respect is fully stated by Pothier, in his proc. civ. p. 162. Here the remission of the record was a necessary and indispensible part of the execution of the Judgment, not only in this, but in every cause appealed, and the right to the postage accrued from the very institution of the appeal. — The Defendant Burton

therefore

therefore being bound to pay those costs, the only question is, has he paid them? — this he does not pretend to have done, and therefore they remain to be paid — In the discharge of their duty to their client as well as to the public the Petrs have paid the postage in question and caused the record to be returned, and the only remaining difficulty to decide is, whether the Judgment awarding the distraction des frais, includes such postage — Now there cannot be a doubt, that the Judgment awarding the costs to Potts, included the postage of the record, and upon looking at the Judgment awarding the distraction des frais, we find that it embraces all the costs awarded by that Judgment, and necessarily includes the postage The objection therefore raised by the Defendant, that these were after costs not included in the Judgment of distraction, fails, as they were both contemplated in the Judgment so rendered, and made part of the costs awarded by the one and secured by the other, and the only remaining enquiry is whether in point of fact the postage was paid by the Petitioners, which has not been disputed; we must therefore take it for granted that the postage has been paid by the Petitioners and not by their client, inasmuchas it has been included in the Bill which has been taxed, the particulars of which we cannot control, and Mr Buchanan declares on oath that this postage was paid by the Petitioners — the parties must have been present at the taxation, and the Defendant had an opportunity of making his objections thereto if any he had, and we must presume that the Judge who taxed it has done his duty, and at any rate we are bound by it — As to the bill having been

been traced a second time, we do not consider this a serious objection, and do not discover any impropriety or irregularity in doing so upon the present occasion at the costs of the party applying for it. —

We have taken up this Case, as a matter fairly submitted by two professional gentlemen in order to have a decision upon a point sufficiently interesting to the Bar, and being of opinion that the claim of the Petitioners is well founded, Judgt must be entered up according to the conclusions of the Petition en Saisie-Arret. —

See. Nouv. Denizt. Vo Distraction des Depens
1 Pigeau. 419. —

No 1748. —

Ogden. v Gray. —

On action of Indeb: assumpt

The declaration contained the following Counts.

1st Count. That in the month of October 1822. a certain suit at law was depending in this Court wherein the present plaintiff was plaintiff, and Charles Hogg and William Forsyth were Defendrs when they the said Hogg and Forsyth, in consideration that the said Ogden would withdraw and discontinue his suit, on their undertaking to give to the said Ogden their note in writing, whereby they would undertake to pay to the said Ogden the sum of money for which the said suit had been instituted

viz.t

vix.t for the sum of £42.. 1.. 0 and further to procure as a surety jointly and severally with themselves for the payment thereof, the said George Gray the Defendant in this Cause — and that afterwards on the 8.t day of October 1822, in consideration that the said Plaintiff had withdrawn his said suit, and to which the said Gray the defendant was privy, the said Hogg and Forsyth then and there made their certain note or promise in writing and thereby promised Sixty days after date to pay to the said plaintiff or order the above sum of £42. 1. 0 for value received, and the said Defendant being then and there privy to the premises aforesaid, with the intention and design of benefiting the said Hogg and Forsyth, by becoming security jointly and severally with them for the payment to the Pltff of the said sum of money, did write and inscribe his name on the said promissory note which said note so inscribed with the name of the said Defendant for the purposes aforesaid, was then and there by the said Defendant delivered to the said Plaintiff, by means whereof he the said Defendant became bound jointly and severally with the said Hogg and Forsyth, ~~to~~ to pay to the said Pltff the said sum of money in the said note mentioned — That neither the said Hogg and Forsyth nor the said Defend.t have hitherto paid the said sum of money — whereby an action hath accrued to the said Pltff &c.

2.d Count. To the same effect.

3.d Count. That on the 8.t day of October 1822, one Charles Hogg and one William Forsyth, were indebted to the plaintiff in the sum of £42.. 1.. — for goods wares and

and merchandises before that time sold and delivered to them by the said Plaintiff, in consideration whereof they the said Hogg and Forsyth made their certain note in writing, and thereby promised sixty days after the date thereof to pay to the said pltff or order the said sum of money, and the said Defendt with the intention of promoting the interests of the said Hogg & Forsyth and inducing the said Plaintiff to take and receive the said note, and with the express intention of becoming the surety of the said Hogg & Forsyth for the payment of the said sum of money jointly and severally with them, did then and there inscribe his name upon the said note, and which promise & security the said Pltff then and there accepted from the said Defendt by means whereof the said Defendt became bound &c — That the said sum of money hath not been hitherto paid &c — whereby an action hath accrued &c

4th Count. Similar undertaking on the part of the Defendt on the plaintiffs agreeing to give time to the said Hogg & Forsyth to pay. &c

5th Count — To same effect as 4th —

6th Count — For goods sold &c & monies paid laid out & expended to & for the said Hogg & Forsyth. and similar promise on the part of Defendt

7th Count. For money paid laid out & expended for the Defendt & monies paid and advanced &c

8th Count. Insimul computt —

Plea. — Non assumpsit — Further that the Pltff cannot have or maintain his said action agt the said Defendant, for or by reason of the pretended

indorsement

indorsement of the pretended promissory note in the declaration mentioned, because no indorser of a promissory note can be made liable for the payment of the money in such note specified, unless payment shall have been demanded of, and a legal protest made against the makers or drawers of such note for non-payment of the same, after the third and before the expiration of the sixth day after such note shall have become due and payable according to the tenor and effect thereof, and unless also due notice of such protest shall with proper diligence have been given to such indorser — Whereas in truth and in fact payment of the said pretended promissory note, hath never been demanded of the pretended makers thereof, nor hath the same ever at any time been protested against the said makers for non-payment nor doth the said plaintiff's declaration in this Cause even alledge, that payment hath ever been demanded of or refused by the pretended makers of the said note, nor that the same hath ever been protested for non-payment. —

And further denying all the allegations in the Plaintiffs declaration — The Replic.n is general & joins Issue.

The promissory note on which this action is founded, is in the following words —

£42. 1. 0 Montreal Oct. 8. 1822. —

Sixty days after date we promise to pay, or order to Mr. Charles L. Ogden the sum of forty two pounds and one shilling Halifax Currency for value received. —

Charles Hogg
Wm Forsyth.

Indorsed.
George Gray. —

The evidence adduced in support of this action consisted in the proof of the signature of Hogg and Forsyth as drawers of the note, and also the signature of the Defendant indorsed thereon, and that he had signed his name as a security for the drawers of the note. — That at the time the Defendant indorsed the said note he had an account with the drawers of the note and owed them money — that in March 1823, long after the said note became due, and no demand having been made on the Defendant for the payment of the note, he settled with the drawers and paid them the balance he then owed them. —

On hearing of the merits, Mr Gerry for the Pltff stated, that the evidence adduced consisted in the testimony of Mr Hogg, one of the drawers of the note who is in law a good witness, and who states the consideration for which the Defendant signed the said note, see Fell on Garantie. p. 3. — and the answers of the Defendant on faits & articles. — When a person signs his name to an aval, he is bound without any specific promise to pay — The Defendant in his answers to the faits et articles, says, that he signed the note as an Indorser, and considered himself liable as such only — but he cannot by his answers made any evidence in his own favor, if there was any error or mistake in his signing the note, he must prove it by sufficient evidence to exonerate him from the legal obligation imposed on him by that signature Montagu on Partnership — 7 N. Denisé p. 704. — That the plaintiff was not bound to take any legal course

2 Conf. Bourn. p. 449. 450.

of —

of proceeding against the drawers of the note, the Defendant being bound jointly and severally with them his action was well directed against him in the first instance - cites a Case where so held in the Inferior Court of M^c Connel v Lukin - and Irwin & Straught & C^o v Fleming. -

Gale for the Defendant. - Considers the Case not made out. - it is founded on a principle which implies a greater liable in a person's indorsing a note, than the law imposes - it would have required express agreement on the part of the Defendant to have made him liable to the extent stated in the declar^n - but no such agreement has been proved. - In October 1822 Hogg and Forsyth made their note in favor of the plaintiff for £42.1 - but the note is mis-recited in the declaration, and not the same as proved: by the declaration it is alledged that the drawers promised to pay jointly and severally, but by the note in evidence are only bound severally. - The Defendant inscribed his name on the note, and would have been liable for the amount of it as an Indorser had diligence been done against him - but the day of payment lapsed and three months more before the Defendant was called upon, in the interim the Defendant, conceiving with reason that there could be no recourse against him on this note, settled with the drawers Hogg and Forsyth, and paid them a larger sum than the amount of the note, which the Defendant at the time considered to have been taken up

by

by the drawers.— But the Plaintiff aware of the laches he had committed and that the Defendant could not be made liable as an Indorser, has charged a new kind of liability on the Defendt by his having inscribed his name on this note and thereby became bound as the garant of the drawers, a distinction which the Defendant is unacquainted with and the laws does not know.

Objects to the testimony of Charles Hogg as being an interested witness, and in other respects not deserving of credit.—

But if the Defendant could be considered as a Caution or Surety, he could be bound as such only on just and equitable conditions, for if the plaintiff did not obtain his debt, it was his own fault— he did no diligence to get his money from his debtors, nor did he give any notice of non-payt to the Defendant while he was possessed of means to pay him— in justice therefore the Defendant ought to be exonerated from a debt which now exists only by the laches of the plaintiff— had the Defendant in this Case ever given a separate bond for the debt he would have been discharged— Muilman. vs Dequino. 2. Ken: Black.— 1 Sav: Parf: Negs: 218. 621.— If this were an aval, the holder of the note must do diligence and give notice, as muchas the Defendant had been a common indorser— That the party is entitled to notice, although no party to the bill, when he has promised to pay it. Chitty. 264.— and by the law of France

Also

the Subscriber to an aval is entitled to the same rights and priviledges as an indorser of the note Repu vo aval. — 2 Sav. p. 94. 260. — Poth. change. No 213. Lacombe vo lettre de change. sec. 1e garanti.

Gurgy. in reply. — The Defendant by becoming answerable for a debt, is bound to the payment of that debt, and to discharge the obligation he has contracted — nothing is demanded here of the Defdt as indorser of the note, as such he had contracted no obligation — The Promissory note may be set out according to its legal operation. Chitty on Pleads — p. 627. 628. — The drawers here were Copartners and both liable for the whole amount of the note, and is so discribed in the declaration. — That Hogg here is a competent witness — this is a transaction between merchants, and must be considered as commercial — it would be cognizable by the Juges & Consuls — To render the witness incompetent he must have a direct interest in the event of the Suit — but here he can neither lose nor gain. Philips. Ev. 45. 47. — same in case of underwriters to a policy of Insurance. Id. p. 56. 60. — and cases of persons liable to Costs of actions. Id. 63. 65. 124 — Even by the French law the obligor may be a witness for the fidejusseur — at least there is no authority to the contrary — and witnesses must be considered competent when the law does not declare — the contrary. — That the Plaintiff was not bound to sue the obligors and discuss them, the Defendant might have availed himself of the exception of discussion but has not —

done

done so. Poth. Obl. № 414. — It is contended that notice should have been given to the Defr and some authorities have been cited — but these may be answered and reconciled with the right of the plaintiff by having recourse to general principles — the authorities cited apply to billets de change, where the subscriber undertakes to furnish a bill, or bills of Exchange, but this is not the object here — the obligation here is to pay money — Repse vo billet. № 382 — the obligation of the fidejussor is accessary to that of the principal obligation, and no notice is requisite to be given that the principal has not paid — As the Defendant had contracted an obligation to pay the plaintiff, he paid away the money he owed the makers of the note in his own wrong, it was his duty to see that the note was paid. —

By the Court. — To ascertain the extent of the Defendants liability in this case, we must first ascertain the nature of the obligation he has contracted — this must be collected from the evidence in the Cause and the nature of the transaction. — The two debtors, Hogg & Forsyth make their promissory note to the Plaintiff, and as a security for the payment of it, and as an inducement to the plaintiff to accept of it, they get the Defendant to put his name on the back of it — now the question is, what does this imply in law — the Defendant by this signature could not be considered as a drawer, for the note was

already

already perfected in this respect, by the drawers Hogg and Forsyth — nor can the Defendant be considered as an indorser, because he had no authority to indorse what belonged to another and had not been transferred to him — The witness Hogg, who must be admitted as competent in this case, says, that the Defendant promised the drawers that he would be security for them, and with this view and intention put his name upon the note — the Defendant in his answers to the faits et articles, says, that he signed the note as an Indorser, that he never meant or intended to sign it in any other way, nor to create any other liability than that of an Indorser, so as to receive notice of the non-paymt. of the note, if the drawers failed to pay it when due; but whatever understanding took place between the parties Defendant and the drawers of the note, ~~was understood by them~~, there is no evidence to shew that the Defendant ever made any promise of any kind to the plaintiff, who received the note from the drawers, with the name of the Defendant thus indorsed upon it, and there seems no doubt but the plaintiff received it under the same impression with which the drawers delivered it to him — viz^t that the Defendant had guaranteed the payment of the note — It therefore remains a mere question of law as between the plaintiff and Defendant what the nature of the liability is which the Defendant contracted towards the Plaintiff, or any other holder of the note, by this indorsement.

There

There is no doubt, but that the defendant by his indorsement has contracted an obligation towards every holder of the note, and although he cannot be considered in the light of an Indorser yet the law will not allow that a man shall put his name upon such an instrument without contracting some obligation — an indorsement of the description in question, is in law called, an aval, an expression peculiar to the French Law, and is thus described, "Le mot aval,
Pousse on Ordo 1667. Tit. 5. art. 33. p. 132 " est un terme particulierement en usage dans le
" Commerce, qui signifie, faire valoir; Celui
" qui met son aval sur une lettre de change ou
" sur un billet, s'en rend par la Caution, à l'effet
" d'en payer la valeur — Cet aval se fait, en ecrivant
" simplement au bas de la lettre ou billet ces mots,
" pour aval," avec la signature de celui qui l'a
" souscrit." — We also find that this Obligation of an aval, is contracted by the mere signature of the party, without any other words, no doubt for the greater facility of business — "Une
2 Roque. Jurisp: Consulv. p. 354. Bornier Ordo 1673. Tit. 5. art. 33 simple signature sert d'aval, ou au moins —
d'endossement, ce qui est à peu prés la meme —
chose" — another author says, — "Assez ordinairemt.
1. Pardessus p. 420. No 396. " la signature de celui qui donne son aval sur
" la lettre de change elle meme, est précédé de ces
" mots, "pour aval" — mais aucune forme speciale
" n'etant determiné, il y a lieu de croire, que l'usage
" de le donner par une simple signature, n'est point
" abrogé". — see also Pothier. Cont. Change No. 122. —

The Defendant therefore having made this aval

aval, by which he became liable for the payment of the note, the next question is, when, and in what manner, does this liability attach — if the Defdt was the mere Caution of the drawers, it might be doubted whether the degree of diligence contended for by the Defendant would be necessary — To ascertain this we must have recourse to that law — which explains the nature of the obligation contracted by the Defendant — This is a Commercial transaction and affecting the security of negotiable paper, — and accordingly we find it established, that the parties who put their names to such paper as a Caution by Aval, are entitled to the same notice and diligence on the part of the holder, as if they were indorsers — this seems to be an established principle by all the authors. — see auth^s cited by Defend^t — also — Toubeau. Instat. du Droit Com^ce liv. 2. tit. 7. p. 259. — Rogue Jur. Com^ce 2 vol. ch. 66. p. 371. N^o 11. — Pardessus Cours du Droit Commerce 1 vol. p. 422. a And we find ~~that~~ in England that a person who has guaranteed the payment of money, to be paid by a bill is entitled, (though no party to the bill) to insist on the neglect to make a proper presentment, or to give due notice of the dishonor of such bill, if it was probable he would otherwise have been safe — as if the parties who ought to have paid were solvent when the bill or note became due, and have failed since. — 2. Taunt. Rep. 206. Phillips. v Assling — Chitty on Bills. 204. — Bayley on bills. 232. —

Upon these principles therefore, as no diligence

whatever

diligence whatever was done by the Plaintiff to recover the amount of the note when it became due, nor any notice of non-payment signified to the Defendant, who at the time had effects in his hands to have paid the Plaintiff this action must be dismissed. —

No. 1027.

Sutherland v. Christ.r Stem. Thos. Jones. Jun.r

This was an action founded on a promissory note made by the Defendt Christopher Stem in favor of the Plaintiff for £17-10.- dated 1st April 1823, and payable in the course of the month of July next after; on this note the Defendant Jones had subscribed his name as a security for the payment and in consequence of the non-payment of the note was sued as jointly bound with the drawer. — The argument taken in this Case was that the Defendt Jones was neither a drawer nor an indorser of the note, that he had received no value or consideration from any of the parties, and therefore not bound for the payment of the note. —

But the Court in assuming the principles laid down in the foregoing case of Ogden. v. Gray that the Defendant Jones was bound and liable for the amount of the note in consequence of his indorsement or aval thereon, and as in this case due diligence had been done and notice given to him of the non-payment of the note when it became they therefore gave Judgt for the Pltff. —

Fortier.. vr McGillivray

I did not sit nor give any opinion in this Cause on account of my relationship to the Defendt— the following Judgt. was pronounced by Mr Justice Pyke.—

This action is brought to recover the amount of a promissory note made by one Alexander Walker to the plaintiff, the payment of which was guaranteed by the Defendant, and who has pleaded non-assumpsit generally.—

The facts of the Case as collected from the evidence are these— In October 1820, Alexander Walker of the House of Walker & Brothers of Birmingham in England, being at Quebec, there called on the plaintiff respecting a bill of exchange which the plaintiff had remitted to the house of Walker and Brothers, and informed him that they were unable to meet their engagements, but that he Alexander Walker, would give his two notes payable in one and two years for the amount of the plaintiff's claim, and would get the Defendant to guarantee the payment thereof— to which proposal the plaintiff acquiesced.— It would appear that the Defendant had no business transactions with Walker, but they had been long acquainted— that Walker had been engaged in Commerce and had failed which occasioned his going to England to settle with his— his Creditors, which he had effected, and in 1819 or 1820, began a new business connected with his brother John Walker, and in 1820 returned to Canada to solicit orders for the new Concern.— Subsequently to this, on the 21st Octr 1820, two notes were made

by

by Alexander Walker in favor of the plaintiff for £125 Stg each, payable in one and two years; and the following undertaking was made and signed by the Defendant.—

"Montreal Octr 24th 1820."

"I do hereby guarantee the payment of the two
" notes drawn on the 21st instant by A. Walker
" in favor of Louis Fortier dated at Quebec at one
" and two years for £125 Stg each and interest."—

The two notes were sent to Montreal, and afterwards sent back to Quebec with this guarantee and there delivered to the plaintiff and accepted by him— In the same year the maker of the notes, Alexander Walker left this Province, and does not appear afterwards to have returned, one of the Witnesses says, that he, Walker, never had any domicile or place of residence in this Province and that he resided in the United States, he believes at Philadelphia, where he died, a few months previous to October 1822, when the note in question became due— The first note which became due in October 1821 was duly paid the amount having been remitted to Quebec for that purpose, the second note alone remained unsatisfied, and the present action is brought against the Defendant for the amount of £125 Stg upon his guarantee.— It also appears that the Defendant left this Province for England in Novr 1821, and did not return until some time after October 1822. it is however admitted that he had during his absence an office in Montreal, and had an empowered agent to transact his business there.—

Such are the facts of the Case, and under the general

general issue of non assumpsit, the Defendant's counsel has urged two several grounds of defence which shall be taken up in a different order from that which he adopted — the preliminary question we conceive is, whether the paper writing signed by the Defendant, and upon which this action is brought, contains a sufficient and legal consideration to render it valid and binding upon the Defendant?

This transaction certainly bears upon the face of it, that of a mercantile one, and consequently one to be liberally construed and not with restriction, — from the good faith with which all commercial transactions are conducted, but we are not prepared to admit with the Defendant's counsel, that the English Statute of frauds is to operate upon the — validity of the act itself, though it may as to the proof of its execution, nor do we conceive from the very nature of the transaction that even in England upon this ground the guarantee in — question would be invalid — Both by the law of England as well as that of France, and upon the general principles of all law, every obligation must have a good and valid consideration, and the Statute of frauds has not introduced any thing new in respect of the nature or validity of the consideration, it only requires that it should be expressed to prevent fraud and perjury — now it is not necessary, that in obligations that are merely accessary to an original and valid obligation, such as a cautionnement or garantie, that there should be any particular — consideration, it is sufficient, that the original obligation is, that a good consideration existed as between Walker and the plaintiff, and it is very clear that this

consideration

consideration was sufficient for the engagement or guarantee of the Defendant quoad the plaintiff, and we know of no other consideration that could have existed, the note expresses upon the face of it to have been for value received, and had been given for a pre existing debt, and the written undertaking of the Defendant expressly refers to the note, the consideration therefore was as fully expressed as the nature of the transaction would admit, and whether the Defendant entered into the engagement from motives of friendship to Walker or otherwise, is of no legal consequence as far as regarded the plaintiff with whom such engagement was entered into, and who evidently thereon granted a delay or credit of one and two years to Walker, which, if any further consideration was wanting to strengthen the Defend^{ts} engagement was in itself a good and valid one as appearing in the guarantee — We cannot suppose that the Defend^{t} in this cause could wish that this ground of defence should prevail, as it would be destructive of that principle of good faith and confidence which does and necessarily must exist in all transactions between merchants, and we must presume that the Defendant at the time considered the guarantee as a valid one and intended it as such otherwise a deceit has been practised upon the plaintiff which we would be far from imputing either to the defendant or to Mr Walker in this transaction, as it appears to have been conducted mutual good understanding liberality and mercantile confidence in the honor and integrity of the parties which so peculiarly distinguish Commercial engagements. —

The want of diligence on the part of the plaintiff is the next, and a more natural ground of defence than the former, the defendant contending that by the omission of the plaintiff to present for payment the note to the maker, and to notify the defendant of the non-payment he has thereby discharged the Defendant from all

liability

liability under his written engagement or guarantee: Such presentment and notice in most cases in regard to the parties to a note are essentially requisite, but is not with so much strictness required in England in Cases of mere guarantee.— The nature of this transaction, and particularly the facts of the Case, authorise us to say, that proof of presentment and notice of any kind was not necessary; the maker of the note was a person who was merely passing through this Country and had no established residence in Canada, hence the necessity that the creditor should have some respectable resident merchant to secure the payment of the note when it became due, and the Defendant in that case is not in the same situation, as the indorser of a bill or note, nor entitled to require the same diligence from the payee, as it is a mere guarantee, or simple cautionnement, and not an aval — the distinction is very clearly made in Denizart under the word, "aval"; and the garanti might in this Case have claimed, the benefit of discussion, which as an indorser he would not have been entitled to. see N. Denizt. Vo. aval.— It is therefore unreasonable to suppose, and the law does not require it, that inasmuch as there was no place in the province where the note could have been presented for payment, and the maker was absent therefrom, that the plaintiff should be compelled to seek him out of the limits of this Province, much less to make inquiry after his representatives, as it appears in evidence, that Walker, the maker, died in the United States, some months before the note in question became due; of these facts the Defendant must have had as perfect a knowledge, and we must presume had a better opportunity of knowing than the plaintiff, and any notice thereof, would have been an useless formality, and could not have rendered the situation of the Defendant under his guarantee less onerous, nor can we presume that he has been prejudiced thereby.

Had

Had indeed the note been payable at any particular place out of this Province, the objection here offered would have been entitled to some consideration, for — having accepted the note under such terms it would have been incumbent on the plaintiff to have presented the note where it was so payable, but in this Case the note being drawn at Quebec, was payable there, and to this the Defendant as well as the maker was bound to look and provide for: So again, if when the note became due, Walker, the maker had been in this Province and continued there for any time, and that through the inattention and want of diligence, or a desire to favor Walker, the Plaintiff had neglected to demand payment of, or take his legal recourse against him, and the Defendant had been thereby prejudiced, the objection would then have stood upon those favorable grounds which would have claimed our consideration how far the Defendants liability had not thereby been discharged — Here if the Defd suffers any loss, it arises from the nature of his — engagement, and the responsibility which he has voluntarily undertaken, and he suffers from the act, or rather omission of the maker of the note, and not from that of the plaintiff, of which last alone he could justly avail himself. —

It is well understood that the law regarding bills of exchange, is only applicable to promissory Notes on their being negotiated or transferred — the note in question was never negotiated, and indeed the very guarantee of the Defendant, arrested its negotiability as it could not be transferred with the note, and there cannot be a doubt that the plaintiff was not bound to seek Walker the maker, but that the latter was bound to call upon him to take up his note, and we must consider the obligation of the Defendant to embrace

this

this, and that he had undertaken, that Walker should comply not only with his engagement, but with all the other liabilities and obligations which the law imposed upon him as maker of the note, the defendant therefore undertook, that Walker would, when the note became due, call upon the plaintiff and take it up, and it would be — prepostorous to suppose that in consequence of the — guarantee of the defendant, that the Plaintiff should be compelled to hunt for Walker in a foreign Country merely to satisfy the Defendant that diligence had been used to procure payment from him — the absence of Walker must have been better known to the Defendt than to the plaintiff, and as it was impossible, that any diligence under such circumstances could be used by the Plaintiff, we know of no law that compelled him to notify the Defendant that the note remained unpaid, or that prevented him from calling on the Defendant, forthwith on the note becoming due, for the amount of it.

The want of diligence and of notice, has not been — pleaded, and whatever may have been the practice heretofore, it is, as observed in a former case, a question yet to be decided, whether it ought not to be specially — pleaded as à fin de non recevoir, in regard to promissory notes, but more especially as it regards third persons, under liability, though not parties thereto — Such would appear to have been the practice in France, but how far the introduction of the English rules of evidence in proof of Commercial facts, a defence to the action upon negotiable notes, which our own provincial statute has regulated, is to be framed according to the English System of pleading, is a question which must sooner or later undergo discussion, and we shall therefore avoid upon the present occasion giving any opinion, as the Case does not absolutely require it,

Repse vs Billet. p. 384. Col. 2 par. 2
Potb. Change N. 219.

and

and the opinion of a full bench cannot be had upon the point. —

From the authority cited from Denizart, the distinction between this case and the two preceding just decided must be obvious — we recognize the obligation of a party who puts his name to, or upon a note, as an aval, and that in such case, he has a right to require the same diligence of the holder as any other indorsee, the French Ordinance requires this, how far such an aval put at the bottom of a copy of the bill or note, as recognized by some of the writers, may prevail we need not now decide, as this case is not of that — description, and must be treated as a simple cautionnement which by the general law does not require the diligence contended for, and is the cautionnement noticed by Denizart as already cited — un simple billet or on — susceptible d'etre commercé, and it may be observed that the reason why the signature of the Defendant was not put on the note, we must presume was from the circumstance of the drawer residing out of the — Province, and that the plaintiff was unwilling to take upon himself the responsibility of that diligence which the aval of the Defendant would impose upon him, and that therefore the parties adopted the simple — Cautionnement, given on this occasion. —

Judgt for the Pltff. —

No 1255.

Tierney. J. J. vs Steam-Boat Phonix. —

On Seizure and Information agt the Steamboat Phonix for the importation of prohibited goods. —

By the information it was stated, that Barthelemew Tierney, heretofore one of His Majestys

Majesty's Officers of the Customs, to wit, gauger at the port of St Johns, informs the Court, as well for his Majesty, and all others concerned, as for himself, that from and after the second day of December 1820, until the first day of December 1823, he the said B. Tierney, was one of the Officers of His Majesty's Customs as aforesaid, and that between the first day of August 1822 and the first day of September 1822, to wit, on or about the 25th day of August 1822, he the said B. Tierney being such guager as aforesaid, did seize and arrest, to the use of His Majesty and all others concerned, and of himself as forfeited at the port of St Johns aforesaid one trunk containing 46 pieces of Canton crape &c — and also certain ship, vessel or boat, commonly called a Steam boat and known by the name of the Phonix, of the goods and Chattels of persons unknown, for that the said one Trunk &c were within the time aforesaid to wit, on or about the said 25th day of August 1822, imported and brought by inland navigation on board the said Steamboat into the said Province of Lower Canada at and to the said port of St Johns from the united States of America, contrary to the laws and Statutes in such case made and provided and then in force in the said Province of Lower Canada — whereby the said one trunk &c and the said Steamboat with all her tackle and apparel became forfeited — And also for that the importation by land or inland navigation into the said Province of Lower Canada from the United States of America of the said one trunk &c — was during the whole of the time aforesaid, that is to say, between the first of August 1822 and the first day of

September

September 1822, prohibited by Law, and according to the form of the Statute in such case made and provided, and that while the importation of the said articles was so prohibited, the same brought and imported by inland navigation on board the said Steam boat from the United States of America into this Province of Lower Canada, by means whereof, the said goods and Chattels and the said Steamboat with all and every her tackle and apparel became forfeited. —

There were other counts in the said Information touching the seizure of the same goods and of the said Steam boat as having imported them into this Province, for that the said goods were commodities of the growth and produce or manufacture of the East Indies or other places beyond the Cape of Good Hope, without having been bona fide and without fraud laden and shipped in Great Britain in a ship or ships navigated according to the several and respective laws which were in being in Great Britain and in the said Province of Lower Canada in the year 1822 and still in being therein — (and also for that the said last mentioned goods, not being of the goods and commodities of the growth, produce or manufacture of the territories of the United States of America — &c

That the said goods were afterwards on the 19th day of October 1822 condemned as forfeited —

Therefore concluding that the said Steam boat be adjudged and declared forfeited &c —

Upon this Information process of Law was issued on the 11th day of February 1824, and was made returnable and returned into Court on the 18th day of the same month. —

At

At the return of the process, the President and Directors of the Champlain Steamboat Company, being a corporate body under a Law of the State of Vermont appeared by their counsel and claimed the said Steam boat as their property, and pleaded to the said Information 1st That the said Informant could not maintain his plaint and information, nor could the Court take cognizance thereof, inasmuchas at the time the said Information was filed and the process of Monition issued thereon and a long time previous thereto, and now, the said Steam boat was and now is without the jurisdiction and authority of this Court, to wit, in the port of Vergennes in the United States of America.- 2d That the said Informant could not maintain his said Information — first, because it doth not appear in and by the said information that the said B. Tierney, was at the time of exhibiting and filing the said information an officer of His Majestys Customs or one legally entitled to exhibit and file the said information. — 2d Because it appears in and by the said information, that the same hath not been exhibited and filed by His Majesty's Attorney General in this Province, in whom alone by Law the right of filing informations for alledged infractions of the revenue or navigation laws in this Province is vested. — 3d Because it appears in and by the said information, that the alledged importation of of the several goods therein mentioned in the said Steamboat from the United States of America, was made on or about the 25th day of August 1822, and that upwards of one year had elapsed since the alledged importation of the said several goods, before the said information was by reason thereof exhibited and filed, whereby and by Law a right

to

to exhibit and fyle any information in this Court either by the said B. Tierney or any other person save the said Attorney General, was at the time of exhibiting the said information, and now is prescribed and barred — 4ly Because there was not at the time of exhibiting and filing of the said information by the said B. Tierney or at any time prior thereto, nor is there now any law or statute in force in this Province, under and by virtue whereof the said Steam boat could or can be declared forfeited for or by reason of the matters and things in the said information alledged —

Wherefore and for want of a sufficient Informer in this behalf the said president and Directors of the said Steamboat Company pray that the said B. Tierney may be barred from having & maintaining his aforesaid Information &c —

To the above were added sundry pleas to the merits which did not come under consideration in the investigation of the case —

The Replication is general and joins issue on the different pleas. —

The parties were heard on the above pleas on the matters of law raised thereby, when the Court came to the following determination thereon —

That as to the thing seized not being within the jurisdiction of the Court, enough was stated in the information to maintain it, viz. that the vessel was seized at St Johns within the Jurisdiction of the Court, that by a seizure, the right is divested out

of

12. Mod. Rep. 92.
5. Term Rep. 112
7 d° — — 171.
5 Mod. d° — 195.
1 Salk — 223.

of the owner and becomes vested in him that seizes and therefore the subsequent removal of the things seized could not deprive the Court of it's Jurisdiction nor restrain the Informant from proceeding. —

2d. That none but a Custom house officer can prosecute this complaint, and as it does not appear that at the time of exhibiting the present Information the informant was a Custom House officer, he cannot maintain the same.

That although many of the British Statutes made for the protection of the revenue directed that prosecutions of this description should be raised and carried on by some of the Offices of the Customs, which was done in order to prevent collusion by individuals to the prejudice of the revenue, yet it appeared to the Court, that the Stat. 7 Geo. 1. ch. 21. (upon which the present prosecution appeared in part to be founded,) allowed a greater extent in the right of prosecution in the Colonies, as the forfeitures thereon are declared to belong for one third to him or them who shall sue for the same, any law, usage or Custom to the contrary notwithstanding and from the particular expressions contained in this Statute they considered that the Informant although not a Customhouse officer, was entitled to maintain the prosecution That according to this principle, the objection raised by the Claimants as to the prosecution being carried on by the Attorney General was also answered —

3d. That in regard of the objection, that the prosecution had not been raised and made within one year from the time of the importation or seizure of the articles in question, the Court were of opinion that as the Stat. of Queen Eliz. St. 31. ch. 5. §, was in force, ~~and~~ it must be received as law upon a prosecution of this kind according to which the right of the private prosecutor must

be

be barred as not having commenced the prosecution within one year from the time of the Seizure — That it has been held that this Statute must be received as a general rule of limitation to all actions of this kind, and that it applies in all those Cases where no other time is limited — and that it extends to all actions brought upon penal Statutes, whereby the forfeiture is limited to the King, or to the King and the party, whether made before or since the Statute —

1 Highmore on Excise. p. 325.

1 Selw. N. P. p. 66o

The Court therefore dismissed the prosecution in so far as regards the right of the prosecutor for his own benefit, but reserving to the King his right to proceed further thereon as he shall see fit —

Hunter & Co. — vr Perrault & McKenzie and Perrault. Plff en garantie — vr Henry McKenzie Defend. en Garantie

On action en Garantie. —

In this Case Mr Justice Pyke differed in opinion from the Court, and gave his reasons as follows. —

The original action was brought by Hunter Parkinson and Co. of London Merchants and Copartners to recover the balance of an account from the Defendants Perrault and McKenzie of Montreal merchants and Copartners for goods sold, shipped and delivered by the former to the latter, and upon the evidence adduced a Judgment was obtained by the Plaintiffs against the Defendants for £1040. 15. 6 — In this action a demande en garantie by Jos. Perrault one of the Defendants has been made against Henry McKenzie stating

stating that subsequent to the contracting of the above debt by the Defendants, that is to say, on the 7th April 1818, the Defendants dissolved their Copartnership, when an assignment of all the effects and credits of the Concern was made by the Defend Perrault to his partner Roderick McKenzie, who thereon undertook to pay all the partnership debts, and to save Perrault harmless from all demands in regard thereof - to this assignment Henry McKenzie became a party, and bound himself as the Caution of the said Roderick McKenzie and solidairement with him for the payment of the said debts and to save harmless and indemnified the said Joseph Perrault from and against all demands in regard thereof - and in consequence of the action so instituted by the Plaintiffs against the Defendants, the said Jos. Perrault now instituted his demande en garantie against the said Henry McKenzie founded on his obligation aforesaid as contained in the said deed of assignment -

The Plea of Henry McKenzie to the demande en garantie, is 1st That Perrault has no right of action against him under the said assignment, as at the time it was made, he well knew the insolvency of the Concern, and that intending to deceive him and to induce him the said Henry McKenzie to obligate himself to the payment of large sums of money then due by the said partnership, did falsely give him to understand, that the said Concern of Perrault & McKenzie was solvent and deceitfully exhibited the books thereof, in which there were several false entries and omissions of the Defendants particularly set forth in the plea, by which deceit, he Henry McKenzie was induced to become Security and to declare he had been made

acquainted

acquainted with the State of the Concern, and therefore that the obligation of him the said Henry McKenzie was null and void, and that the said Jos. Perrault could not take advantage of his own fraudulent act.— 2dly That without his, the said H.y. McKenzie's knowledge he, Perrault had entered into a Compromise with the Plaintiffs to take the Defendant Roderick McKenzie's notes, and to grant him a delay of 3, 6. & 9 months for the payment thereof, and for which he Perrault had become answerable and personally responsible, and— thereby discharged and lost his recourse agt. him the said Henry McKenzie. 3dly That subsequent to the— assignment Perrault had entered into a compromise with the Creditors of Perrault and McKenzie, and had obtained time and delay for himself and the said Roderick McKenzie, and he Perrault thereby granted delay to Roderick McKenzie and stayed a prosecution against him without the knowledge and consent of the said Henry McKenzie, until about the 1st May 1820, when Roderick McKenzie became insolvent,— whereby Perrault has waived and lost his recourse against the said Henry McKenzie.— 4ly That at the dissolution of the said Copartnership the said Perrault was indebted thereto in a sum of £1295. 2. 5 for monies with drawn by him unknown to his partner but which Perrault had not charged himself with nor accounted for in any manner, his debt appearing in the books to be only £429. 16. 5, but deceived Rodk and Henry McKenzie at the time of the dissolution in respect thereof, and therefore he, Perrault is and ought to be barred from his demande en garantie. 5ly That he, Henry McKinzie is not bound to warrant or— indemnify Perrault from the Judgment to be rendered in the original action of the Plaintiffs —

The Replication is general & joins issue on the Plea.—

Such

such being the issue as between the plaintiff and Defendant en garantie, by which Perrault has contented himself with denying the facts set forth in the plea of Henry McKenzie, and not having demurred thereto, he tacitly admits that those facts if true, are sufficient to bar his demand — the parties have in consequence proceeded to an enquete, and the result of the evidence appears to be, that the Defendants, Jos: Perrault and Roderick McKenzie, had been during several years prior to the 7th April 1818, Copartners in trade, and had extensive dealings with English as well as with Canadian Commercial Houses — that Mr Perrault was principally occupied in attending a large retail Store of the Concern, and appears to have confided to his partner Roderick McKenzie, and to a Clerk in their employ, the keeping of the books — particularly the Ledger and Journal, and no entries were made by Perrault, except in the Waste book or blotter — it appears however that Perrault during that Period made a voyage to England upon the business of the Concern. — The credit of the House would appear to have been good, but in Spring 1818 Mr Perrault withdrew from the Concern, and on the 7th April the two partners by an act passed in due form dissolved their partnership and thereby Perrault agreed to assign and did make over to Roderick McKenzie all the partnership debts & effects without any other consideration than that Roderick McKenzie should keep him Perrault free from all debts and monies due by the Partnership which Roderick McKenzie specially undertook —

individually

individually to pay and discharge, and to the same act, the Defendant en garantie, Henry — McKenzie, became a party, and thereby voluntarily bound and obligated himself solidairement, with Roderick McKenzie to the entire execution of the conditions contained in the assignment in favor of the said Joseph Perrault," it being well understood (for so it is expressed in the acte) by and between the said parties, that the said agreement should not have been passed without the said security or obligation hereby expressed by the said Henry McKenzie, who declares himself acquainted with the state of the affairs of the said Copartnership to his satisfaction, and promises that the said Joseph Perrault shall never be troubled or molested by any — demande whatsoever to be made against him by the Creditors of the said firm, nor by the said Roke McKenzie for the debts then due by the said Copartnership — It appears also in evidence, that at the time of such dissolution and long before, the partnership of Perrault & McKenzie was indebted to the Plaintiffs Hunter Parkinson & Co in a large sum of money for goods shipped for them to the amount of £1733. 16, and that a large balance was then due and unpaid, namely, £950. 14. 2 St3, all which did not appear by, nor had been entered in the Ledger of Perrault & McKenzie, but on the Contrary Hunter, Parkinson & Co stood therein debited with the sum of £555. 12. 1. for which sum Perrault & McKenzie appeared to be their creditors — this debt is the one sued for in the Original action by Hunter Parkinson & Co, and from the payment of which Perrault seeks to be exonerated by Henry McKenzie under the act of 7e April 1818.

After this transaction nothing appears in evidence as to what took place in regard of the Concern as

continued

continued by Roderick McKenzie until the 25th. Janu3 1820, which is the date of a letter from Mr Perrault addressed to a Mr Allison of Montreal, who was the agent of the plaintiffs, this letter is filed and proved and is of the following purport (see letter) — It appears that the proposal contained in this letter was acquiesced in by the agent of the plaintiffs, Mr Allison, who accordingly received from Roderick McKenzie three notes, all dated 1st Febry. 1820. 1st for £418. 4. 10. payable in 3 months
2d. for £424. 8. 5. do —— in 6 do
3d for £430. 12. — do —— in 9 — do
these notes are also filed and proved, and on the fust note there is indorsed a payment of £218. 4. 10. — These notes were taken for the debt sued for on the original action in which the plaintiffs have obtained Judgment, and upon the conditions mentioned in Mr Perrault's — letter — In this transaction it does not appear that Mr Henry McKenzie participated, or that he had any notification or knowledge thereof whatsoever. — ' — Subsequent to this, in the month of September 1820, in consequence of the appearance of an insolvency, a Mr Oldham was employed by Mr Hy. McKenzie to make a Statement of the Concern from the books and such documents as Roderick McKenzie might produce. This statement was made, and by the evidence of Mr Oldham it would appear, that from the entries as they stood in the books, and which were the same which existed at the time of the dissolution of the partnership in april 1818, with the exception of some trifling entries since made, there appeared a balance upon the face of those books in favor of the Concern of £7193. 12. 5 — whereas from the

accounts

accounts exhibited by Roderick McKenzie, and of which no entries had been made in the books there was in April 1818, an apparent actual difficiency of £1198. 15. 7. — The books have been produced and proved to be still in the same state in which they must have been in April 1818 at the period of the dissolution — the statement of Mr Oldham is also produced and proved by him to be the one he so made — It appears also from the evidence of Mr Badgley, who was employed on the part of Mr Perrault to examine the books and draw up a statement of the Concern as it stood in April 1818, that he had discovered several considerable errors in the statement made by Mr Oldham, and that as far as he coued discover, assuming for true certain facts, that there was at the time of the dissolution of the Copartnership, a surplus in its favor of £3719.16.8 Curs, but he agrees with Mr Oldham as to the statement in the Ledger, made by the latter, of the Concern as it therein appeared at the time of the dissolution, he says the statement of Mr Oldham was so far correct, and that it did appear by the books that there was a balance in favor of the Concern of £7193. 12.5 and upwards, and he says, that had the ledger been produced to him, he would have considered the affairs of Perrault & McKenzie as prosperous, but that in making out the statement which he drew from the books and documents — furnished him by Mr Perrault, he discovered several omissions and errors in the general ledger, to large amounts which materially altered the appearance of their affairs from that represented by the said Ledger

at

at the time of the dissolution of the partnership he also adds, that he cannot pretend to say that his statement of balances is correct, further than from the means furnished him by Mr Perrault, the books being in a very irregular and incorrect state — In answer to one question proposed to him he says, he would not have considered it as any hazard to become security for a person whose books exhibited such a balance as £7193. 12.5 provided he had a dependance on the correctness of the statement or books so exhibited

Subsequently to all this it appears that a general deed of Cession, dated 22d Sept. 1820 was executed by Roderick M'Kenzie to and in favor of his Creditors, but to this deed neither Mr Perrault nor Mr Henry M'Kenzie appear to have been parties. The books it is proved contained no other entry relative to the plaintiffs than the following

Dr Hunter Parkinson & Co.

1817
May. To am. Ledger. pa. 91. £555. 12. 1.

Besides this omission it appears, that there were several other sums of magnitude which had not been entered though due by the Concern, and many entries of credit which were erroneous, Mr Perrault however appeared to be a debtor to the Concern in a large sum of money.

It is upon the issues as before stated, and the facts generally as now given, that the parties on the demande en garantie have been heard, and as Judgment has been rendered in the principal demand there remains only the demande en garantie, upon the Court has now to decide —

Upon the whole of the facts of the Case there

cannot

cannot be a doubt but that Henry McKenzie has been drawn into an engagement or undertaking as security for Roderick McKenzie from a false representation of the State of the Concern of Perrault & McKenzie, or a concealment of essential facts, which had they been known to him would have deterred him, as it may justly be presumed from entering into such an engagement; and the first question which arises upon the first ground taken in the plea of the Defendant ~~en garantie~~ is, whether such false representation or concealment of facts, by the law of Canada, will invalidate a Contract, and prevent the person in whose favor it was made from availing himself thereof, and of his own misrepresentation or concealment, whether occasioned by a fraudulent, or by accident or negligence, against the person misled by his ignorance of the facts misrepresented or concealed — It is not a question which will require much research to determine, as there cannot be a doubt, that by the law of this Country, any misrepresentation or concealment of any essential fact, will vacate and annul a Contract as being contrary to that good faith which is required in every party to, and must be the basis of every Contract to render it obligatory. The principles of the French law in regard to Contracts are taken from the Roman law, which was the Common or general law of France, and the same principles are recognized in the English Courts both of Law and of Equity, indeed the more the laws of the two Countries are examined, the more we shall be satisfied of the great similarity between

them

them both in principle and application, and this in a greater degree than appears to be sometimes admitted by general observations and distinctions inconsiderately made, and painful to be heard in respect of the two systems; whatever may be peculiar to each in regard to Customary or municipal law, yet upon the law of Contracts there is a perfect similarity, nor upon this can it be deemed improper to refer to the testimony of a respectable English Law writer, Evans, whose observations upon Pothier's treatise upon Obligations has exhibited that liberality which I trust will ever be the characteristic of his Countrymen they are these " Pothier in his very learned treatise " on obligations lays down the following amongst " other rules for the interpretation of Agreements" (He here gives the rules to be found in Pothier on Obligations from N° 90 to N° 102.) " These rules, continues the " author, claim our particular attention, not only on " account of the high estimation and respect in which " the opinions of Pothier are always received, but because " these rules will be found to be quite consonant to the " principles of the English Law, and to the practice of " our Courts in the Construction of Contracts and agreements " when considered with reference to the authorities " which have been already referred to from our own " Law books, and to a few others which are now about " to be mentioned" — With these introductory observations, I will now proceed upon the consideration of the question, whether false representation or concealment will invalidate a Contract, and that

that they must and ought to have this effect, cannot I think admit of any doubt — The first authority which naturally offers, is that of Domat, book 1st tit. 1. sec. 3. art. 12. "Il n'y a aucune espece de convention " ou il ne soit sous-entendu que l'un doit à l'autre " la bonne foi avec tous les effets que l'equité peut y " demander" — Poth. on Obl. Nº 29. lays down the same principle — "que la bonne foi doit regner " dans tous les Contrats", and then adds in Nº 30. " dans le for interieur on doit regarder comme " contraire a cette bonne foi, tout ce qui s'ecarte, tant " soit peu de la sincerité la plus exacte, et la plus " scrupuleuse la seule dissimulation sur ce qui " concerne la chose qui fait l'objet du marché, et " que la partie avec qui je contracte, auroit interet " de savoir, est contraire à cette bonne foi" — Domat Vice des Conventions. Liv. 1. tit. 18. in the Introduction — Repr. ve Dol. p. 57. 2e Col. — These are sufficient without further citations to establish what are the principles of the French law upon the point in question — It will now be proper to cite some English authorities to the same effect —

Comyns on Contracts. p. 37. 38. —
Park on Insurance — 174. a
3. Bur. Rep. Carter v Boehm 1910
1 Bl. Rep. Hodgson v Richardson. 463

From these it will be manifest, that the principles, by which the question now under consideration is to be decided, are the same in both Systems

and

and consequently must have the same application for where the same premises exist, the same sound conclusions of law and justice must be drawn. In the application however of the same general principles the English Judge and Advocate have an aid and facility, which could not be enjoyed to the same extent in France, for independant of the number and variety of Suits at law, recourse can always be had to correct and full reports of all Cases decided in the different Superior Courts of England, drawn up by able professional men and regularly published, nor can it fairly, or with any reason now be objected, that the opinions and decisions of the enlightened Judges who have from time to time during so long a period adorned the English Bench, should on the present occasion be resorted to, when light is intended to be drawn from them with the same view as Pothier is cited at Westminster Hall, to promote the true ends of Justice, and a correct administration of law — other minor reasons might also be stated to justify a recourse to the decisions of the English Courts, but which are not now necessary particularly to state, as they will naturally arise in the further investigation of the Cause. —

Now if these principles are generally applicable to all Contracts which the authorities that have been cited clearly shew, they ought to be applied with — greater force to all Commercial Contracts, where

necessarily

necessarily for the facility of Commerce both internal and external, and from its very nature, mutual confidence must exist and good faith prevail, without which Commerce would languish and never could be carried to any extent, but when conducted upon the liberal principles which are the peculiar characteristics of a flourishing Commerce, operate so powerfully to promote and advance civilization, and a more general intercourse, not only among people of the same Country but those of other Lands and while it unites the world, forms one of the grand resources of Comfort, wealth, and strength to every nation — On these accounts Commerce has always received the support of enlightened legislators. See Ou

In support of what has now been said with regard to the distinction made between Contracts in general and those purely Commercial, reference may be had to the 2d. art. of 20 Tit. of the Ordr. of 1667. which prohibits verbal testimony in proof of all Contracts exceeding 100 livres, or against the tenor of any written Contract, but which is declared not to extend to the Consular Jurisdiction. — see Bornier on this art. —

Having thus established that fraud vitiates every Contract, in which are comprehended, false representations and concealment practised by one party towards the other and that in Commercial cases these are more particularly fatal, as a departure from that good faith which is the basis of all mercantile dealings, and further that there is a perfect similarity between the French and English law upon all these points, and that it almost immaterial in establishing such fraud, whether recourse is had to the rules of evidence of the one or the other System, it now becomes necessary to shew that the Contract or agreement between the Defendants and Hz. McKenzie was a mercantile contract — And that it was such

will

will not admit of any reasonable doubt. &c &c—

Now it being clearly made out in evidence that the books of the Defendants at the time of the Contract, — exhibited a false representation of the state of their — affairs, many of the debts due by the Concern, and — particularly that now sued for by the Plaintiffs, having been admitted, and on the contrary the present Pltffs appearing therein as debtors to the firm in £500 — and upwards, by all which it was made to appear, that the concern was not only solvent but had been very successful with a large balance in their favor, whereas in truth, the Concern, if it had been fairly represented in their books would have appeared in a very disadvantageous point of view — Two points from these facts, and from the arguments which have been held thereon, naturally arise. 1st How far a fraud or concealment can be alledged by Henry McKenzie, who in the contract declares himself satisfied, and well acquainted with the state of the affairs of the said Concern? — 2d How far, as this was a Contract between the two partners, who must have both been aware of the State of the Concern, any concealment or fraud could be imputed to Perrault, as there was no fraud practised towards the person with whom he principally contracted, and therfore none towards the person who became his Security, who if deceived, was so only by the person for whom he — became bound? — Now as to the first point — It must be admitted as an undoubted principle, that Courts of Justice do not make, but enforce Contracts, and if a man has with his eyes open made a foolish bargain or a losing Contract, he must abide by it, for Courts can give him no relief, and if in truth Henry McKenzie had the knowledge, which by the Contract he seems to admit,

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he must support the consequences — But this admission on the part of Henry McKenzie, that he was acquainted with the affairs of the Copartnership, is not so conclusive against him, as would at first appear and as this is a Commercial Contract, it must be liberally construed, in order that the true meaning and intention of the parties may be ascertained, according to the known usages and customs of Merchants — Now, what is this declaration? It is that he is acquainted with the State of the affairs of the said Copartnership to his satisfaction — this evidently points to a communication of the State of those affairs by the partners, for it could be obtained in no otherwise, and as it reads, it is not the communication of any one, but of both, or it would be otherwise expressed, and it must be kept in view that both partners were parties to the Contract and consenting, and certifying so far the truth of what is therein contained — it may be asked, how is one merchant to satisfy another of the real State of his Concerns, but by the books of that Concern — one need not be a merchant, to know that this is the usual and only true mode, and who from that good faith and correctness and honorable feeling which is presumed to exist among merchants, would have hesitated to consider, those books as a fair representation of the State of the Concern, and to declare that he had been made acquainted and was satisfied therewith — that is satisfied to become security from what had been exhibited to him — we cannot therefore fairly presume, that the admission of Henry McKenzie extended to more than what the books of the Defendants disclosed, nor can we give

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a greater interpretation thereto from the evidence of[n] has been adduced, and which both upon principles of English and French law, as has been already shewn may be admitted to explain and even to controvert the Contents of a Commercial Contract — for the general principles of law, independant of what may be deemed usage and general understanding among merchants is, — "Comme le cautionnement est un office, qui part d'un principe d'affection, l'obligation qui en nait, ne peut aller au dela des bornes dans les quelles le fidejusseur est censé avoir voulu se renfermer". Du Droit. Vo Cautionnement. Nor is there a single presumption that can fairly arise, that more than what the books disclosed, was intended by that admission — the real State of the joint affairs of the Defendants could be known only to themselves, whereas in regard to third persons, it could be known only as far as the partners thought proper to communicate by means of their books or otherwise — The necessity of keeping regular Books and the obligation to keep them, by which the good faith of Merchants may be ascertained, occasioned several articles in the French Commercial Code, and the Observations of Pothier thereon shew the importance of such books; they were considered as full proof against the merchants who kept them, while they often were received as proof in their favor when regularly kept; nor can it be admitted for one moment that this obligation was not binding upon any one partner* — To presume against every proof to the Contrary, that Henry McKenzie had a private knowledge of the Defendants affairs beyond what is contained in the Partnership books, would be to suppose that Henry McKenzie, had

entered

* as upon another and that the good faith of the whole of the partners was to be tested by their books. 2. Boulay. 375. &c — If then those books were received as proof upon certain occasions in the French Courts of Justice, with how much more reason might faith be given to them by an individual — But it is certain, that those books are admitted on all occasions as proof against those who keep them. Pothier in his additions Ch. 8. N°: 26. —

entered into the Contract, if we may be allowed the expression, to defraud himself; for from the disclosure of the real state of the affairs since made out in evidence, and as they stood at the time of the Contract he would have been a madman indeed to have taken upon his shoulders the burthens of another, and the inevitable consequence of being compelled to pay the debts of an insolvent Concern, and this without any consideration therefor or interest therein directly or indirectly, not even in a benefit resulting to the person for whom he intended to become Security, and who thus became individually responsible without consideration to the payment of all the debts, by discharging, or undertaking to exonerate his partner therefrom — indeed as a merchant the very circumstance of a discovery that the books did not contain a true state of the affairs of the Defendants, must have operated to prevent any person from involving himself in a Concern so devoid of correctness and of that good faith required in all Commercial Concerns — We must upon every principle look to the intention of the parties to a Contract, and it would be doing a violence to the Common understanding of mankind to insist in face of the evidence in this Cause, that Henry M'Kenzie intended to bind himself in regard to any other transactions than what the books of the parties exhibited — What, it may be asked, would a jury of Merchants say, if called upon for their verdict as to the nature and extent of the Contract or engagement of Henry M'Kenzie, may it not be presumed, that they would declare it to be this, — that H. M'Kenzie having

examined

examined the books of the concern of the Defendants as exhibited to him, whereby he found that that Concern was in a solvent state (for it is to be remarked, that it was at that time so generally esteemed) and a large balance in its favor, that he undertook with Roderick M'Kenzie, that he, Perrault, with drawing from that concern and making an assignment of all the debts and effects thereof to his partner, should not thereafter be troubled on account of any of the debts which appeared by the books to be due by the Concern, and which Rod^k. M'Kenzie by any future losses in trade might be unable to discharge. Such I presume would be their opinion, and neither in law or equity can a greater extent of obligation than this, under all the facts of the Case, be imputed to M^r. M'Kenzie: were it otherwise, than that the fair intention of the parties at the time of entering into the Contract was to be enforced, it would be to compel Courts of Justice to support cunning and fraud against good faith, instead of enforcing the true and honest contracts of parties, and thereby make those Courts instruments for effectuating surprise and deceit, objects which it is their duty to suppress and put down —

As to the 2^d. point — I take it, that as fraud will vitiate any Contract, so it must necessarily extend to that species thereof which a Security enters into; indeed the authorities are express upon the subject, at the same time it must be conceded in general cases, that however the Security may have been deceived by the debtor, or person he becomes Security, it will not discharge him as to the Creditor who has not participated in that deceit, or himself practised it towards the Security. Domat. des Conventions. tit. 4. sec. 5. art. 3. — and art. 4. latter part — Poth. obl. N^o. 32 —

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These authorities therefore clearly affording to the Security the same protection against fraud, concealment and surprise as to any other parties to the Contract, it will be necessary to consider the situation of the parties and the particular circumstances under which the Security of Hy McKenzie was given. — Two partners, whom as merchants, we cannot consider as ignorant of the State of their own Concerns, but as equally well acquainted therewith, and with the State of the books of that Concern dissolve their partnership, and an Assignment being made by the one to the other, while they are yet Partners, procure Security for the performance of an obligation on the part of the assignee to the assignor, that the former will pay all the partnership debts and exonerate the latter therefrom — these books are exhibited, no matter by which of them to the Security, upon which from their very favorable appearance, he is induced to become such security — at the moment those books were exhibited, it may be asked, whose books were they? — the answer must be, that they were the books of Perrault & McKenzie the Defendants who as merchants were presumed to know their contents, and the correctness of the Statements therein and both answerable therefor — this must hold good as to third persons, nor will the law admit of any exceptions, for he who takes upon himself the character of a merchant must also be subject to the general responsibilities of such a character, nor can he be permitted to visit upon others the effects of his own neglect or want of knowledge — he must be presumed to have a knowledge of his Concerns and every thing connected with them, even upon the general principle of law, which while it presumes that knowledge in him, presumes on the contrary, ignorance

thereof

thereof in third persons strangers to such concerns. This general principle is given by Domat, in his "vices des Conventions" — lit. 18. Sec. 1. art. 9. — It would therefore be a violation of this principle if we were to consider that Mr Perrault was ignorant of the state of the books and affairs of the Concern of Perrault and McKenzie, as it would be to presume a knowledge thereof to be possessed by Mr. McKenzie, except in so far as may have been communicated to him and proved to have been so — proceeding then upon this natural and fair presumption of law, and considering each partner in regard to their joint Concerns, as the — undoubted agent and factor of the other, it matters not by whom the books of the concern may have been exhibited, the entries in those books whether made by one of the partners, or by persons by them employed must be deemed in law the joint and several acts of the partners, and if one partner entrusts the books of the partnership to another and a deceit is practised therewith, though his confidence may have been misplaced, yet he is answerable quoad third persons, for the acts of such partner while the partnership — remains yet undissolved, as must have been the Case when Mr H. McKenzie was induced to become security, for it was Mr Perrault's duty, and he is presumed to attend to the state of the books of the Concern, though he does not write in them — cites. Dic. Droit. Vo Societé — and in addition to the authority already cited from Dunty that the Ledger of the Concern is received as proof against all the partners, he says. in No 27. p. 693. "ce qui a lieu " contre les marchands quoique leur Journal soit ecrit de " la main de leur facteur" — The false representation —

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and statement in the books, the numerous omissions therein, and the exhibition thereof to H. McKenzie must be considered as the act of both partners, and thereby Mr Perrault has directly, or indirectly, participated in that false representation which has induced H. McKenzie to become security, and brings the case within the authorities before cited. — From English decisions there is little doubt upon this point, and to shew the perfect similarity of the two laws on this head, I will cite one authority from Dantz p. 95. Nº. 26. 27. — Was it not from the confidence which one merchant places in another, and that H. McKenzie had in both parties, and that the books exhibited were those of the joint Concern, that he was induced to become security? and could he with that good faith which must be observed in all Commercial transactions have supposed for one moment, that Mr Perrault was ignorant of the state of the books, or that knowing them he would not inform him that his partner was about to practice a deceit upon him, and that they did not contain a true state of the Concern, were it not so, where would be the equality which ought to exist between contracting parties as to the object of the Contract. — We cannot presume, nor could it be expected of Mr. H. McKenzie, that a person holding himself out as a merchant, was to be considered or dealt with but in that character, the consequence of a departure from this principle, would, contrary to the policy of the law, leave such an opening for practising fraud, that it is impossible to admit it in a Court of Justice — let us suppose, for instance, two

partners

partners, one having property and resources in Canada, the other not, they are unsuccessful in business, and putting their wits to work to find out some expedient, they agree to exhibit their Concerns by their books in such a way as to induce some person to become security for the payment of the debts for the one who has no resources in the Country, to the other who accepts a transfer of the effects of the partnership — this effected, the one who has no inducement to remain in the Country, quits it, and leaves his partner, who being through the Security, relieved from the payment of the debts laughs at the Security at being the dupe of his partner — It is against such kinds of fraud that the rules of law and the decisions of the Courts are directed, and should we now depart or relax from those rules, I know nothing to prevent the above Case from occurring with impunity, as the partner who remains has nothing to do, but to declare that he never made any entry in the books of the Concern, and that it was not he who exhibited the books to the Security — But it may be asked, is this the present Case, and if so, has it been proved? but how is such a fraud to be proved? Secrecy in those Cases is always observed, and no disclosure made to third persons, and it is on this account, that the rules of law are so framed as to prevent the necessity of such proof — What is the language of the Court in the Case of Carter v Boehm — the

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reason of the rule which obliges parties to disclose is to prevent fraud and encourage good faith, and it is a fraud in law, although the suppression should happen through mistake. — But suppose for a moment, that Perrault was wholly ignorant of the State of the books, from having confided them to his partner — will this excuse him? — I should think not, considering the situation in which the two Defendants stood at the time of the dissolution and security given, for until that dissolution was effected, the act of the one was the act of the other, and they are the mutual garants of each others acts — it is immaterial therefore, whether the concealment was on the part of Rod.k McKenzie or on the part of Perrault, or on the part of their agent in whom they may have confided, a third person has thereby been deceived and drawn into an engagement which he would not otherwise have entered into, and Perrault cannot derive any advantage from it, otherwise he would be permitted to draw a benefit from his own negligence to the injury of an innocent and third person — the natural conclusion must be, that had Mr McKenzie known the true situation of the affairs of the Concern, he never would have become security, and Mr Perrault would have remained with the responsibility and burthens which legally and upon every principle attached to him, and he was bound to support as the partner of the Concern —

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This principle will I think appear sufficiently established by what is said by L^d Mansfield in the Case of Barber v Fletcher. Douglass. 292 (read Park. 207. 208) — also. Fitzherbert v. Mather. 1 T. Rep. 12. see Park. 211. 212. — If then this rule applies to the acts of Agents, with how much more force does it apply with regard to Copartners, when ignorance can never be presumed in any thing that concerns their trade and dealings, and besides, as Bornier observes. vol. 2. p. 386. "qu'ils sont reputés entre eux, "Instituteurs, exercitéurs, preposés, et maitres" — As far as I can judge from all these principles, if in reality H^y McKenzie had known the extent, or rather, the nature of the risk, he was undertaking, the case would have been very different — had the parties declared that inasmuch as the books of the Concern and the State of the affairs could not be then ascertained, but that at all hazards he H. McKenzie was willing to become security, this would have materially altered the nature of his liability, and it would in such Case have required very strong proof of fraud to have relieved him from such an engagement; but this I conceive is not his undertaking on the present occasion, and it stands in my opinion a Case fairly to be decided upon the general principles and rules which have been before noticed — An endeavour has been made, not only to prove the ignorance of M^r Perrault, of the State of the books, but that the Concern was solvent at the period of

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the transaction between the parties — As to the first it has been I think sufficiently obviated, and as to the last, although it would appear by Mr Badgley's statement that the Concern was in a better situation than that given by Mr Oldham, yet relying upon neither the one nor the other, ~~just~~ alike, both agree in this, that the erroneous statements and omissions in the books gave a more favorable representation of their joint Concern, which the real state of their affairs known only to themselves could justify — Can this vary the Case? — was it not incumbent on the parties to have given a true statement of their affairs? and can it be said, that because the estate was not in reality at the time absolutely insolvent, that therefore H. McKenzie must be held? — I should think not, because we cannot take upon ourselves to say, much less to decide, that H. McKenzie would have become security if the books had appeared according to the statement since made up by Mr Badgley — They were bound to furnish a true statement, and if on the contrary they produce a false one, they and each of them must be the sufferers, and not the person deceived thereby — Mr Perrault individually was bound to give a fair statement of the Concern, nor could he be permitted to have an interest or a right to conceal, for otherwise where is the good faith to be observed in commercial dealings and which requires that nothing should be withheld or concealed — A person may become security for a man who appears to be worth £7000, when he would not be so for one possessed only of £3000 — and this latter perhaps in goods, the price of which might

vary

vary and comprising bad debts - but the broad question and the material one which must govern the case is this, has any material circumstance been withheld which alters the risk for which H. McKenzie undertook to become answerable ? - That such has been the case, from the facts in evidence, no one can doubt and that deception and bad faith have been exercised to draw him into the Contract in which Perrault has participated - What are the words used by the Court in the case of Carter vs Boehm - they are these - " The " question therefore must always be, whether there was " under all the circumstances, at the time the policy " was underwritten, a fair statement or a concealment, " fraudulent if designed, or though not designed, - " varying materially the object of the policy, and - " changing the risk understood to be run " - To judge from the circumstances connected with this case, any person of common understanding would conclude that if any one of the parties was at the time of the transaction in question better acquainted with the real state of the concern of Perrault and McKenzie than the others, it was Mr Perrault himself, or how can we account for his assigning over to his partner without any consideration whatever the whole of the effects and debts of their concern, which according to the then state of the books had a balance in favor of the concern of £7193. 12. 5. ? - it is possible that from motives of benevolence and good will towards his partner, he may have entertained the wish to make a donation to him of his share of the fruits of their joint labors, which it is not however easy to conceive he would do, and at the same time exact

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from his partner security that he would exonerate him from the payment of all the debts, nor is it natural to suppose, that at the moment of a dissolution and transfer of his share of the partnership effects, that he should not have satisfied himself as to the real state of the Concern — indeed it now looks upon the face of it as explained by the facts proved in evidence, to be more a person wishing to get out of a bad concern, and of transferring his share of the debts upon the shoulders of another, a transaction from which he, Mr Perrault, alone could possibly benefit; it certainly was therefore for his pecuniary interest to keep secret his motives, and also his knowledge of the Concern, from the person who was to become security, but in doing so, he did not act with that good faith which is expected from one merchant to another in their commercial dealings, and in which the highest species of good faith and honor should be practised, nor is cunning or selfish interest to be allowed to prevail in obtaining an unfair advantage over the persons with whom we may have contracted, by not acting with that openness sincerity and good faith which must and ought to characterise every Commercial transaction — with regard to Roderick McKenzie, he could not have had, nor could he derive any benefit from such a transaction he made himself personally responsible for Perraults share of the debts, and moreover involved his friend in that responsibility, and for what we can see, no visible motive, unless it was to favor Mr Perrault and to ~~favor~~ torture his views — As to the variance of the —

testimony

testimony and statements of Mr Badgley and Mr Oldham, both agree as to considerable omissions in the Ledger, but the one makes the Concern to be insolvent at the time of the transaction in April 1818, and the other finds a balance in their favor — yet in Sept. 1820 Roderick McKenzie is declared to be insolvent, and this soon after the Statement made by Mr Oldham — It does not appear that the conduct of Rod.k McKenzie was such that the effects of the Concern had been by him dissipated or any part thereof secreted, or that from any bad speculations or losses arising therefrom his insolvency had been produced, no attempt to prove any thing of this has been made by Mr Perrault, and it is therfor reasonable to conclude, that the affairs of the Concern were at the time of the dissolution in an embarassed state, and it would have required some evidence on the part of Mr Perrault to have removed this presumption fairly arising from all the circumstances of the case, nor can we justly conclude, that because the public did not become acquainted with the insolvency until two years after the transaction between the parties, that therfore the insolvency had not existence at the time of the dissolution — is it not known that mercantile Houses have kept up their business and credit for years, when upon an investigation of their books it appeard, that during the whole of that period the Concern was in reality not possessed of one six pence they could call their own, such instances have been too frequent not to occur again at the present day — Whether therfore we consider this case under the rules of law as applicable to it, or whether under its own peculiar features it must be evident that a fraud has been practised, from which Mr

Perrault

Perrault should not be allowed now to profit, and more particularly in regard to the debt in question which not being entered in the books of Perrault & Mckinzie as it ought to have been at the time of the dissolution, cannot justly be deemed one of those contemplated for which H. McKinzie consented to become a security — In making these observations I think the evidence fully justifies them, and I will here add the words of Domat liv. 1. tit. 18. sec. 2. (which see) —

It may be said that most of the observations — which have been made are rather founded on presumptive evidence of fraud than founded upon any direct or positive proof of any act of fraud on the part of Mr Perrault, or of his participation therein, but independant of the general rules which the wise policy of the law has provided to prevent the possibility of fraud, which I think applicable to the present Case, yet it is an undoubted principle that although fraud is never presumed, yet it may under the principles of Roman French and English Jurisprudence, be sufficiently collected from circumstantial as well as direct and positive evidence — In Lecamus's Denizt — vo. Fraude. No 5 — this authority will be found — à défaut de preuve littérale ou — testimoniale la fraude peut encore s'établir par des presomptions fortes. &c &c The same principle is recognized in the English Law — see Park. 214. 215. —

Of the particular debt for the payment of which Mr Perrault now calls upon H. McKinzie to exonerate him, it is impossible that Mr Perrault as the principal

Partner

partner in a large retail concern could possibly have been ignorant, nor does he afterwards hesitate to recognize it as a debt justly due by Perrault and McKenzie, when a demand of payment is made by the Agents of the Plaintiffs for those goods which he had individually assisted in the disposal of, yet without the knowledge or participation of H. McKenzie, he, in acknowledging the debt by his letter to the plaintiffs Agent, Mr Allison, of January 1820, proposes to him to take Rod.k McKenzie's notes for the amount at 3. 6. & 9 months, and engages, if they are not paid when due, he would be responsible for them — here then is a subsequent and express undertaking on his part, long subsequent to the transaction by which H. McKenzie became security, by which he binds himself personally to pay this particular debt, it may reasonably be asked where was the necessity of this interference on the part of Mr Perrault, and why this silence towards Henry McKenzie, and omission to notify him of what was doing; if he considered H. McKenzie as his security for his share of the debt, even to this period there appears to have been a good understanding between the Defendants, who, as may be supposed, considering that they had got H. McKenzie secured, thought themselves at liberty to enter into new engagements with their joint Creditors and obtain delay — this they certainly had no right to do without the consent of Mr. McKenzie and but for the interference of Mr Perrault, now constat, but that taking up the pretended solvency of the Concern this debt would have been discharged, and thereby Perrault having solicited the delay under his own

individual

individual engagement, has discharged the oblign of H. McKenzie towards him in regard to that debt: The debt was due and payable, and by giving the notes in McKenzie's name and Perrault becoming Surety for the payment thereof, has made himself liable therefor to the discharge of H. McK.— by obtaining a delay from the plaintiffs, which we must presume has operated disadvantageously to H. McK. by — encreasing his responsibility, and what is yet more injurious, by obtaining a delay until an actual bankruptcy had taken place — the notes were dated 1st Febry. 1820, payable at 3. 6. and 9. months — the last of which would become due on the 1st October, long before which time the bankruptcy of Rodk McKenzie was publicly known, for on the 22d Sept 1820, the deed of assignment by R. McKenzie of all his effects was made to and in favor of his Creditors — the delay therefore obtained by Perrault has been injurious to H. McKenzie and obtained without his Consent, and although as to the original debt owing by the Defendants to the Plaintiffs, this giving of the notes did not operate either in law, or by the special undertaking of the parties, a novation of the original debt as between the plaintiffs and Defendants, yet it did operate a change and novation of the undertaking as — between Perrault & H. McKenzie, changing — materially the risk and situation of H. McK — without his consent — I would here observe that if this change had not taken place by the special

special interference of Mr Perrault, and that it had been the act of Rod. McKenzie alone, the case would have stood very differently, as he could not weaken the liability of H. McKenzie to Perrault, by his individual act, but it is to be observed, that he on this occasion took an active part, and though in his letter he declares, that this is not to operate a novation of his original debt and liability by taking the notes of one only instead of both, yet in entering into this engagement, he has not reserved his recourse against H. McKenzie, or declared that the transaction should not be deemed as a novation of H. McKenzie's engagement — Why was it, that H. McKenzie was not made a party to and consulted upon this occasion? — Must we not from the previous circumstances be drawn to this conclusion, that as the particular debt was not known to him, he would naturally take alarm and take measures for his own security on the — discovery that he had been deceived, he therefore was not deemed the right person to whom with safety the communication could be made, though the Defendants by their acts shewed that this was necessary from his interest therein. —

For these reasons Mr Justice Pyke stated that the action en garantie against Henry McKenzie could not be maintained. —

The Court in giving their opinion, stated — " admitting, as we necessarily must, that the books of account of the Partnership of Perrault & McKenzie were

irregularly

irregularly and incorrectly kept, and that they did not present a full and correct state of the affairs of the partnership at the time of the dissolution, the first point to be considered is, whether the Contract between the two partners, Perrault and McKenzie for the dissolution of their partnership, under such a state of things, can be considered as legal and binding on them? — We must say it was, — as between themselves they were supposed to have an equal knowledge of all their affairs, and unless facts amounting to fraud, concealment or misrepresentation by one partner to the other, had been practised so as to induce the one or the other to accede to this act of dissolution, we must presume in law that the parties transacted together with equal knowledge of all essential facts, to constitute the validity of this Contract. —

The Contract therefore between Perrault & McKenzie being legal and binding, both parties were equally bound to the performance of it — On the part of McKenzie security was to be given to indemnify Perrault against the debts of the partnership, and without which it is stated, that the Contract between them would not have been made — Here Henry McKenzie comes forward and gives that security. —

It is in regard of the nature and extent of that security, and the law applicable thereto that we differ in opinion — what will constitute fraud, and what the effect thereof is, in regard of Contracts, is too clearly established, to create doubt or difficulty, and we must readily concur in all the principles laid down by the Hon. Judge, who differs in opinion with us, as sufficient

to

to destroy Perrault's action en garantie, if we were satisfied that they were applicable in this Case and could be used be used by the Caution to repell the demand: but in this we are of opinion, that the Caution can avail himself of no defence of which his principal could not have availed himself. —

What was the nature of the Contract entered into by Henry McKenzie as Caution? —. It is not to be considered as a principal Contract entered into between him on One part, and Perrault and McKenzie on the other part, but it is a subsidiary Contract, acceding to the principal one, which was made between Perrault & McKenzie — it was made in aid, and in execution of that part of this principal Contract which Rod.k McKenzie undertook to perform on his part — it was acceding to that Contract, by answering for the performance of it; and the undertaking of every Caution is generaley of this description — "Le fidejusseur en s'obligeant pour "quelqu'un, ne le decharge pas de son obligation, mais en "contracte une qui accede à la sienne" Pothe. Obl. N.o 367. all the authors agree in this definition of the undertaking of a Caution. — The consideration of the original or principal Contract, its validity and consequences attach only as between the contracting parties — but the Caution here is not a contracting party, he can avail himself of no defect in the original Contract unless where he claims to stand in the shoes of the party for whom he is Caution; the dictum of law being, that the obligation of the Caution is accessary to that of the principal obligation, and can be affected only by what would affect the principal, we must consistently with this dictum allow, that the right

of

of the accessary cannot have a greater latitude or effect, nor be dissolved under any pretence or exception of which the principal obligé could not avail himself otherwise we will be controverting this dictum of law by allowing a greater force and extent to the accessary than to the principal obligation —

If therefore the obligation of the Caution is accessary to that of the principal Contract, which is in law valid, how can the Caution be admitted to contest the validity of the principal Contract, or of his own obligation as founded thereon? — The Caution may certainly avail himself of any defence which the principal could have used in so far as regards the exceptio in rem, but not beyond this, the law being, "que le cautionnement participe en tout de la nature » de l'obligation principale, c'est un accessoire qui en a » tous les traits et toutes les qualités". — Repo. V. Caution. p. 765.

The exception of the Caution here may not however be considered as coming within the Scope of the principal obligation, but as applying to himself personally, in this, that he, had been deceived by the parties, and by the false statement in their books — that there had been misrepresentation & concealment in the business, which must viliate every Contract and consequently that of the Caution in this instance. This principle is right, but it must be rightly applied. It must be admitted that the undertaking of the Caution may be avoided or annulled by the dol or fraude of the party in whose favor it is made, in the same manner as every other Contract — but in a personal Contract regarding the separate & individual interest of the parties, such dol or fraud can attach only to the personal act of the party, it must be his

dol

dol personnel, arising from some act of his own — and not from the dol or fraude of another, to be attributed to him only by implication of law — the rule is — "point de dol sans intention de tromper, et par " consequent point de dol qui ne soit personnel" — N. Denizt. Vo Dol. p. 591. — What is the fact here — It is in evidence, that the books of account of Perrault & McKenzie were irregularly kept, by McKenzie alone, that Perrault dissatisfied with his partner, or with the business they were carrying on makes over the whole Concern to his partner, books and all, upon condition that he will save him harmless from the debts — to this his partner agrees, and brings in the Defendant Ty. McKenzie, who declares, that he was acquainted with the affairs of Perrault & McKenzie to his satisfaction, and therefore he becomes the Security. — Where is there any dol personnel to be attributed to Perrault in all this, as between him and the Caution? we see none — It is said, that because the books of Perrault and McKenzie are irregular and imperfect, he the Caution was deceived thereby, and that he Perrault is equally answerable to the Caution in this respect, as his partner Roderick McKenzie — but this is assuming at once the whole argument, and establishing as true an hypothesis which requires to be proved; for if Perrault is answerable in this way, the cause is determined and the Defendant exonerated — But in the first place the Caution here stipulates nothing about the books of Perrault & McKenzie — he neither mentions them, nor refers to them as the object or consideration of his engagement — his consideration in becoming Caution might have been wholly personal between him and Roderick McKenzie, and the satisfaction which

which the Caution anounces to have received, touching the affairs of Perrault & McKenzie, might have arisen from a variety of sources besides those books — and here, had there been no books at all could the Caution, after declaring himself satisfied with the State of the affairs of Perrault & McKenzie, be allowed to avail himself of that defficiency to avoid his undertaking? certainly not. — And 2dly allowing that there did, as there do exist such books — what has Perrault to do with this? There is no contract in this respect between Perrault and the Caution, either express or implied, either as to the State of the affairs or the State of the books of that partnership, and where there is no Contract there can be no warranty Poth. ob. N° 557. p. 274. says — "Le Cautionnement est un "Contrat unilateral, parlequel il n'y a que la Caution "qui s'oblige". — Had this been a partnership Contract entered into with the Caution, either by Perrault and McKenzie, or by McKenzie alone acting in the name of the partnership, Perrault was bound, as by implication of law the act of one Partner is the act of both — but this implied contract here set up by the Caution, cannot be inferred, because it does not exist, nor was it essential to the validity of the undertaking of the Caution, nor stipulated as the Condition or consideration of that undertaking: The declaration of the Caution, "that he was — "acquainted with the State of the affairs of the "partnership of Perrault and McKenzie to his — "satisfaction", can lead to no conclusion, except as between the Caution and the person for whom the Security is given — the inducement and consideration for this security is a matter wholly between them, and it never can be allowed

that

that Perrault can be implicated in any fraud or misrepresentation that may have been used by McKenzie towards the Caution to induce him to become security — In regard of Perrault it was of no consequence, whether the Caution did, or did not know the state of the affairs of Perrault and McKenzie, and the Caution might have been wholly ignorant of all their transactions, a stranger to them in every respect, may have never seen the books, or he may have trusted to statements and representations in regard of them wholly inconsistent with truth, yet this cannot affect the Plaintiff, who in this respect is to be considered as a third person acting for his own separate and individual interest and who was induced to part with his property on the faith of the security so given by the Caution.—

If the principle here contended for by the Caution were allowed, it would be perverting the end and object of the original Contract, and would be making Perrault responsible for the very acts and omissions of his partner, against which he Perrault was probably endeavouring to secure himself — it would be allowing the Caution to avoid his undertaking by the dol personnel of Roderick McKenzie, although ~~he~~ Perrault did not participate therein, and although Rodk. McKenzie could not avail himself of any such ground or exception in his Contract with Perrault, and if we could adopt fraud by implication as operating on this transaction, it is more likely to attach in a supposed Connivance between Roderick

McKenzie

M^c^Kenzie and the caution, than between Rod^k^ M^c^Kenzie and Perrault — because it is in evidence that Rod^k^ M^c^Kenzie alone kept the books, was acquainted with their defects — knew the transactions of the partnership, and the debts it owed, and he alone was able to give the caution that information touching all the matters which gave him the satisfaction he admits to have received when he became caution. —

There is something due to the good faith of Contracts, and here it would appear, that at the time of the dissolution of this partnership there were ample means to pay all the debts, these were entrusted to Roderick M^c^Kenzie under the faith of the security given by the Caution, — these means appear now to be dissipated and gone without any act or participation of the plaintiff, and seems more consistent with Justice and right that the Caution should be held responsible for the acts of his principal, than to be allowed to benefit by the bad faith of that principal, which in this case would leave the plaintiff charged with the payment of the debts of the partnership, while it deprived him of those means which were appropriated for the payment of them — And may we not fairly presume that the Caution by undertaking the responsibility he has assumed, has taken the means to secure himself by some indemnification or counter security obtained from Roderick M^c^Kenzie to save himself from the consequences of that

responsibility

responsibility; and if he has done so,— or if he could have done so, he cannot now with any appearance of Justice, when the partnership property was been expended or misapplied, be allowed to put the plaintiff in a worse situation than he was, so as to deprive him of the means of satisfying the debts of the partnership, when those means were by law, as much in the hands and power of the Caution as of Rodrick McKenzie.

In the ordinary cases of the rescision of Contracts where the demand for such rescision is well founded, the usual course is, to put the parties in the same situation in which they were at the time the Contrait was made — but here that would be impossible, nor is it even offered, the consequence in this Case therefore must be in case the Caution should be liberated from his obligation, that the plaintiff will be deprived not only of that security to which he trusted, but also of those means which he had in some respect confided to the charge and custody of the Caution himself —

As to the novation — novation of a debt will no doubt operate a discharge of it in every Case, so far as regards a Caution or Surety. — The acceptance of one debt for another, when this was evidently the intention, is said to constitute novation — but novation is not easily or readily presumed, the intention of the parties must be so manifest, that doubt cannot be

entertained

entertained in regard of it.— There are certain acts established and recognized by the decisions of law which are said to operate this novation because indicating this intention — there are also certain acts which are held on the Contrary not to be of this description — Thus the extending or prolonging the term of payment by the Creditor to the debtor, will not exonerate the Caution, because this does does not extinguish the debt nor change the nature of it, and even if during this period the debtor should become a bankrupt, will the Caution be exonerated, because when he sees the affairs of his debtor going wrong, he may still take steps to secure himself — so it is held by Poth. Obl. № 506.— In this case however it is said that a new and different debt was contracted from that which the Debtor originally owed, which in law discharged the old debt, viz. by the taking of three notes of hand from Roderick McKenzie payable at different periods for a debt due by the partnership of Perrault and McKenzie to the Plaintiffs for goods sold by them to that partnership — but the proof which the Caution has adduced to establish this fact, enables us to see and judge of the whole transaction — it appears that these notes were conditionally taken by the agent of the plaintiffs in order to ascertain the balance due by the Defendants and to give them breathing time for the payment — no discharge was given

for

for the original debt, nor meant to be given but the responsibility of the parties was held over them until the expiration of the period limited for the payment of the notes, and the condition on which the notes were given having failed, the suspended responsibility of Perrault and McKenzie revived, and was enforced against them — In all this we see no novation of which the Caution can avail himself, unless the giving delay to Roderick McKenzie could be so considered, which it cannot be, according to the above authority from Poth. Obl. N° 406.-

In regard of the debt due by Perrault to the partnership, it has not been satisfactorily established in evidence - and if it had, it cannot be pleaded as a bar to the present demande en garantie - it might have been pleaded in compensation, if of a liquidated nature, or an incidental demand made for it, but this not having been done, the rights of the parties in regard of this matter must be reserved to them - And Judgment given to the Plaintiff on the demande en garantie, according to the conclusions thereof. —

October Term 1824.

Tuesday 19th. October.—

Nº 1877.
Gagnon
vs.
Meiras.
Meiras opt.

On opposition afin d'annuller.

The Defendant had heretofore in the month of April last made his opposition afin d'annuller, but having omitted to take the necessary conclusions in regard of the Judgment upon which the execution had issued the Court considered the opposition to be insufficient and dismissed it — The Defendant now reiterates his opposition upon the writ of vend: exp: which had been sued out, and in this opposition took the necessary Conclusions as well in regard of the Judgment as of all the subsequent proceedings. The previous point to be determined upon the contest raised upon this opposition was, whether a second Opposition of a similar nature with that already made, but with additional conclusions could be admitted — And the Court was of opinion that it could not, that as the Defendant could have made the necessary conclusions upon the first oppn he ought not to be allowed to make a second to supply that defect, and it would be a dangerous precedent to admit such a principle as the reiterating of Oppositions under such Circumstances —

see. Jousse on Tit. 14. art. 4. ordn 1667. p. 161. —
1 Pigeau. 497. —

No 2012.

Guay & uxr
vs
Guay. —

On action en rescision. —

It appeared in this case, that on the 31st Decr 1822, the plaintiffs made a deed of donation to the Defendant their son, of certain lot of land and moveable property as mentioned in the Declre in consideration of a certain annuity to be paid by the Defendant to the plaintiffs; and amongst other things it was stipulated in and by the said deed "que le dit donataire ne pourroit vendre, aliener
" echanger, ni engager, ladite terre sans le consentement
" de ses dits pere et mere, a peine de nullité de la dite
" donation, et que sans la dite condition ledit acte de
" donation n'auroit point été consenti de la part des
" dits donateurs". — The Defendant however by deed executed on the 16th June 1823, exchanged this lot of land for another which he received from one André Tetro dit Ducharme, — and in consequence the present action was instituted by the Plaintiffs to obtain the rescision of the said deed of donation — This action was returned into Court in October Term 1823 — after which, on the 17th Octobr 1823. the Defendant aware that he had committed an infraction of the above condition in the Deed of donation, obtained a resiliation of the above deed of exchange so made between him and Tetro, and on the 20th Oct. filed his plea, by which he stated the above resiliation to have been made, and tendered the Costs of the action up to the time of the plea filed and thereupon to be discharged from the action, and that in case of further Contest on the part of the Plffs they should be dismissed from their said action and

be

be adjudged to pay all Costs.— The plaintiffs did not accept this tender, but persisted in their action — and contended that notwithstanding the aforesaid resiliation, the condition in the deed of donation had been broken, and the Defendant had forfeited his right to hold the land in consequence — that he could not by the subsequent act of resiliation he could reinstate the parties in the same situation in which they were prior to the said deed of exchange, inasmuch as the security of the Plaintiffs on the said lot of land was weakened by means of mortgages that may attach thereto in consequence of the aforesaid deeds of exchange and resiliation — The Defendant with his plea, filed the consent of the Seignior to waive all right and claim to lods et Ventes on any of the above transactions —

The parties being now heard on the law of the case Mr. St. George Dupré for the Plaintiffs contended that their action was well founded, and cited. Repre v° Alienation. — Despeisses — 1. Vol. p. 40. Sec. V. De — l'obligation du Vendeur. art. 1. — Repre v° Donation. p. 199. — Domat. liv. 1. art. 36. p. 122. — Repre v° Comminatoire. p. 78. 79. & 80. —

L. M. Vigé for the Defendant, contended that the clauses in a deed which were of a penal nature, were never to be executed à la rigueur, and inasmuch as the Defendant had satisfied the intention of the donor by resiliating the alienation he had made, and thereby re-acquiring the property in question the security of the Plaintiffs still remained entire. cited. Domat liv. 1. tit. 1. Sec. 4. Des Conventions. — Repre v° Clauses resolutoires — Id. v° Comminatoire. —

Rolland for Pltffs in reply — this is not a clause comminatoire

commminatoire, but de rigueur, as it does not apply to a neglect in the defendant to perform a duty imposed, as in this Case the Court would not have immediately put in force the condition but would have given the defendant a further delay to purge his neglect – but this action charges the Defendant with having done an act contrary to the intention and stipulation of the parties, the penalty is thereby incurred, and it matters not whether the plaintiffs are or may be injured thereby.–

The Court considered, that the plaintiffs were well founded in their action at the time it was instituted, but the question now turned upon the point, whether the subsequent conduct of the Defendant in obtaining the resiliation of the deed of exchange he had thereby avoided the effect of the resolutory clause in the donation – And on this point the Court was of opinion, that unless the plaintiffs could have shewn that injury had accrued to them on this transaction, and that they had not the same security for their right after this resiliation as they had before, they could not maintain their action – this was consistent with the equitable construction the law put upon every stipulation of this kind tending to annul the contract of the parties, that the party in default is allowed to repair the wrong where it can be done – and in this Case the Court saw no injury done to the Pltffs, at least none had been proved, and as the Legree had abandoned his right of Lods & Ventes on the

transaction

transaction, the rights of the Plaintiffs as bailees de fond remained as entire as before for all the objects of the Donation — The Court therefore dismissed the action, but adjudged Defendr. to pay the Costs according to his tender. —

No. 1638.

Baird
v.
McNider et al.

This was an action to recover from the Defendants who were auctioneers & brokers certain articles of merchandise, which had been delivered to them for sale by the agent of the plaintiff, and which he claimed as remaining in the hands of the Defendants as unsold. —

The Declaration contained two Counts, the first of which might be considered in factum, or on the Case, stating the particular circumstances under which the articles were delivered for sale to the Defendts by the agent of the Plaintiff, and that before the sale thereof had been made, the plaintiff requested of the Defendants to restore and deliver up the said articles to him which they refused to do, but without stating what the articles were, or concluding to any damage for the non delivery thereof, the Count merely saying that the articles were of the value of fifty pounds Currency. The second Count was for trover and conversion of certain specified articles of the value of £45.5.10 and concluding to the damage of the plaintiff in a sum of fifty pounds — Various pleas were put in to the action which was tried by a special Jury and

and a verdict was found for the plaintiff generally for £45.5.10.

A motion was made by the Defendant in arrest of Judgment for the following reasons—
1st Because the declaration of the plaintiff embraces two distinct and independant Causes of action, the first Count being in form ex contractu, and the second Count in form ex delicto, which require separate and distinct issues, and to which the same Judgment cannot apply.—
2dly. Because the first Count in the said declaration purports to be founded upon an express or an implied contract or liability on the part of the Defts whereas the second Count thereof, purports to be founded upon an alledged injury or wrong on the part of the said Defendants in tortiously converting to their own use the goods wares and merchandises therein mentioned, grounds of action which are essentially distinct from and at variance with each other, and not susceptible of being joined in one and the same action.—
3dly Because the verdict rendered by the Jury was a general verdict, applicable to the entire declaration and was not limited or restrained to either of the said Counts, and because no Judgment could be legally rendered by the Court here upon the said first Count of the said declaration inasmuchas the same is imperfect, and does not describe the articles of goods wares and merchandises, the value of which, or the damages for the not rendering whereof are claimed of the said Defendants.—
4dly Because the said declaration is contradictory and insufficient— and lastly because the said

parties

parties are not properly at issue upon the pleas by the said Defendant secondly, thirdly, and fourthly pleaded to the second Count of the said declaration. —

On the hearing on this motion, Mr Walker for the Defendants stated, — That the first Count in the declaration being in its nature ex contractu, and the second ex delicto, they could not be joined, as they were different Causes of action. cited 1. Chitty on pleading. 200. — 1 T. Rep. 274. — 1 Salk. 10. — 3 Wilson. 354. — 6 East. 335. — 1 Chitty 138. — That the first Count was uncertain and no verdict could be grounded on it. 1 Chitty. 236. 237 — and 364. 365 — That the goods taken must be stated with certainty. 2 Bos. & Pul. 205 — 5. Com. Dig. tit. pleader c. 21. p. 337. — 1 Tidd's Prac. 405. — 2 Bos. & Pul. 424 — Cowp. 825. Willes. Rep. 443. —

Grant for the plaintiff. The first Count is not in assumpsit or ex contractu, but in Case — and there is no inconsistency between the first and second Counts that can prevent their being joined, they are both for the same thing with one conclusion — adapted to both, and the verdict of the Jury may be supported on either — cites. 2. Chitty 284. where a similar form to that adopted here is laid down —

By the Court — although we are not bound by the English forms of pleading, yet where the parties adopt them, they ought to correctly used and rightly understood, that we may not be called to decide in the face of those authorities under which those pleadings are used and governed — The form used by the plaintiff in his declaration might have been more correct, and have avoided all the objections now raised, still however we think it sufficient even

according

according to the English forms, for according to the principles of the Canadian law, it is enough that the declaration contain the grounds of the demand and the specific remedy demanded. The first count in this declaration may be considered as in detinue, and is in fact a bailment to re-deliver on request, and the second Count is for a supposed finding, now both these Counts may be joined may it is said to be proper and safe to join them and we find also that they may have but one conclusion, and the authority referred to by the Pltffs' counsel, and those cited by Chitty. 2 vol. 284.5.6. shew this to be the Case, which we conceive to be sufficient to warrant our Judgment upon the verdict.

Defendts mo. over-ruled.

No. 1151.

Rouville. v. Hamel.

This was an action instituted by the Pltff as Seizsnier, to obtain from the Defendant as his Censitaire, his declaration and acknowledgment under Lettres de Terrier, which the Plaintiff had obtained. — The Defendant made an inscription en faux against the return of the bailiff who had made the publication, and given the notices required for calling in the Censitaires of the Plaintiff to make their declarations &c — and thereby denying that the bailiff had ever made such notices and publication as certified by him in his return. — The parties were admitted to an enquete thereon, when the Plaintiff moved to examine the Defendant upon faits et articles, tending to shew that he had a knowledge that the notices & advertisements in question were made as certified and returned by the

the bailiff — To this the Defendant objected and contended that in a proceeding by inscription en faux, no examination on faits & articles can be had; that the only question before the Court is, whether the piece against which the inscription en faux is made be false or not, this can be ascertained only from what is contained in the piece, it cannot be bolstered up by any external evidence, nor can the oath of the parties be received to make valid, what otherwise is not so —

M^r Rolland for the Plaintiff stated, that it was a general rule of law and observed in practice, that one party in the suit might examine the other on faits et articles, en tout etat de Cause, — that there was no exception to this rule, and as this was a proceeding in the Cause, yet as the object in contest was the truth of a fact as stated in the return of the bailiff, the reason of the law seemed equally applicable to the case of an inscription en faux as to any other. —

The Court granted the motion, considering the proceeding on the inscription en faux to be merely of a Civil nature, the evidence to be admitted thereon must be regulated by the same principles as in all other Cases. —

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No 815.
Rouville
vs
Destrautels } same point ruled. —

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No. 938.
Rouville.
vs
Dame. — } This action was for the same object, as the two last-mentioned, and the plaintiff having at-

at the return of the writ of process, filed the return and certificate of the bailiff who made the publication and notices required, of the lettres de Terrier, and homologation thereof, the Defendant moved to be permitted to make an inscription en faux against the same, which was granted to him, whereupon the Plaintiff by consent of the Court withdrew the certificate from the record alledging that he did not intend to make use of the same.— At the enquete the Plff moved to examine the Defendant upon faits et articles, in order to prove, that he, the Defendant had a knowledge of the above notices & publication having been made, and further that he with several others had presented themselves before the Commissaire appointed for taking their declarations & acknowledgts and then and there declared themselves ready and willing to do so, and that the only object in difficulty was in regard of the sum to be paid by them to the said Commissaire in this respect, and that in — consequence of his having refused to accept the sum of two shillings and Six pence from each of them for such declaration and acknowledgment he the Defendant and the said other persons had caused a protest to be made as well against the said Commissaire as against the plaintiff, alledging this as the reason why they had not complied with the demand of the Plaintiff.— This motion was objected to by the Defendant, who contended, that as the certificate of the bailiff had been withdrawn, which constituted the only legal evidence of the notices and publication aforesaid, no other evidence ought to be received, nor ought the Defendant to be

called

called upon to supply this defect of evidence by his oath, touching other collateral circumstances, or to the acts done by him, which even if true, did not constitute him en demeure as to the object of the demand.—

Rolland for Pltff- said, that he did not want the bailiffs certificate to maintain his action, if he could make sufficient proof without it, and contended that the facts submitted to the oath of the Defendant with the other evidence in the cause was sufficient for this purpose.—

The Court granted the motion, reserving to determine upon the validity and legal effect of the evidence when adduced.—

Ross & al.— vs. Williams.

This was an action which had been instituted by Ross and Ross two females associated together in the business of Milliners and mantua makers, agt the Defendant in regard of a house which he had promised to rent and repair for them, but having failed in their action they were condemned to pay Costs.— The Defendant having sued out execution for his Costs, a return of nulla bona was made thereon and the Plaintiffs not being possessed of any lands or tenements, the Defendant now moved for and obtained a rule on the plaintiffs to shew Cause why they should not be contraints par corps for the payment of the said Costs and execution issue agt them accordingly.—

Mr Rossiter for the Plaintiffs objected to the form

form of the rule, as it was not stated therein that the costs in question exceeded the sum of 200 livres, and referred to the case of Holt and Savage where a similar principle was maintained by the Court. That the action instituted by the plaintiffs was not in regard of any thing touching the trade or business in which they were concerned, but was an action for damages in regard of a house, and therefore they were not liable by law to a contrainte par corps for the payment of the costs. —

Potts. Proc. Civ. p. 5. ch. 1. sec. 2

Boston for the Defendant, contended, that the rule was sufficiently explicit as it referred to the costs contained in the writ of execution which forms part of the record in the Cause — That the law cited by the plaintiffs referred to debts contracted by the parties, but did not extend to the costs accrued on law proceedings which were more favourably received. —

The Court were of opinion that the Defendant was not entitled to obtain a Contrainte par corps against the plaintiffs in this Case, and dismissed the rule — see. art. 8. Tit. 34. Ordre 1667. Comre de Jousse on this article.

N°1099.

Cadieux & Cadotte. —

The question raised in this Cause is one of general interest — it is, how far an acte synallagmatique sous seing privé, when not executed, double, and in the possession of only one of the parties, is binding, and of any effect —

under

under any circumstances; And though cases similarly circumstanced to the present have been decided in the Inferior terms of this Court, giving effect and validity to such an acte, we have without regard to those decisions, examined the question fully, desirous of correcting the opinion hitherto entertained, should we upon further research and more mature consideration discover that we have been in error. —

The facts of the present case are — that on the 6th Novr. 1818, the parties made and signed an Acte sous seing privé, by which the plaintiff promised in due form to sell to the Defendant present and accepting, a lot of land for the price of one hundred pounds, and to execute a deed thereof within two years, the price to remain in the hands of the Defendant a Constitut, he paying yearly on the 29th September the legal interest thereof, the first payment to be made on the 29th Sept. 1819, and so continue every succeeding year until the principal should be paid. — The Defendant was forthwith to be put in possession of the lot, and bound to close it in the month of June following, and build a dwelling house thereon within two years during which he was not to take therefrom any stone or sand. — This acte was not executed double, and remained in the possession of the plaintiff, but the Defendant was immediately put in possession of the lot and has ever since held and enjoyed the same & improved it — These facts are set forth in the declaration and it is alledged that two years interest became

due

due on the 29th. September 1820, making twelve pounds, for which the plaintiff prays Judgt. It appeared in evidence that at the same time and before the same witnesses and upon the same paper the Defendant, ceded one quarter of the lot to one Charles Bureau, upon condition of his supporting one quarter of the charges and conditions imposed by the promise of Sale from the plaintiff to the Defendant. —

The defence which is set up to this action, consists of defense au fond en droit", peremptory exception as to part of the demand, and the general issue all blended together, and with one general conclusion for the dismissal of the action — but we can draw from it these points of Contest. 1st. That the act declared upon is a nullity and gives no right of action to the plaintiff — 2d. That if valid the Defendant can be liable only for nine pounds being three fourths of the two years rente as the plaintiff was present and consented to the Cession made to Bureau by the defendant of one quarter of the lot. — 3d. Denies all the facts in the declaration. — As far as a defense au fond en droit has been pleaded, it ought regularly to have been first disposed of, the parties however have gone to evidence, and it is proper to notice that no objection has been raised to the production of any part thereof. —

The main question however to be drawn from the issue and submitted in argument is whether the acte containing a promise of Sale and of a Constitution de rente, is one of which the plaintiff can now under all the circumstances

of

of this Case avail himself in support of the present action, the acte being synallagmatique and a sous seing privé not executed double — and in deciding this we are not now under the necessity of entering into the discussion whether such an act, the execution of which has not been entered upon, is a nullity and cannot be enforced by the party alone possessed thereof, as seems to be laid down by Denizart, who cites several arrets to that effect under the title, "Double Ecrit", or of giving any decided opinion upon the strong & reasonable objections offered in the Repertoire under the title Ecrit double; as to the correctness of the principle which those arrets appear to have established in certain Cases, and the Contradictory arrets — reported in the Repertoire — We would only observe that the nullity does not appear to be declared by any law or Ordinance to render it obligatory upon the Courts, and that the decisions not depending upon any local or positive law must rest upon the general law of France alike administered in all its tribunals, and that they have not all in this respect adopted the principle of decision of the Parliament of Paris, and have so far differed in their interpretation of the general law. — It would therefore seem to us, that however — respectable the arrets or decisions of the Parliament of Paris are and ought to be considered, we ought not upon a question of general law and upon the general principles which are natural to — engagements, to consider those arrets as binding upon us when we find, that upon the same

law —

law the decisions of the Courts have not been uniform, but only extend them to such cases as we think that general law will authorise, and the more so as those arrets are not reported in a manner to entitle them to implicit credit and that the general principle seems to be rather a conclusion drawn from the arrets by the authors who have cited and observed upon them, than a fixed and positive principle of nullity to be enforced in all cases depending on acts of the description of the one in question, and which therfore need not be adopted in cases which are not similarly circumstanced. — . If this were an action to enforce the execution of a contract which a party had kept in his possession, — waiting for a favorable and advantageous moment for demanding the execution thereof against a person who had it not in his power equally to enforce it, and thereof to avail — himself in any manner, some doubts might be entertained how far this Contract could be — enforced by the person so alone in possession thereof; and here only we hold that it could with any colour of reason be contended that the act was a nullity and not binding; for though in point of form it might be considered defective not having been executed double, yet it would be revolting to every principle of Justice to admit that a party who has already taken advantage of the act should not be thereby bound, and not be compelled to a performance of his part of the Contract; the principle that it is not binding

upon

upon him exists only from his not having himself the power of enforcing it, but ceases when he has got and obtained in the first instance and immediately upon the execution of the act all that he could then claim under it; for were it otherwise, the Defendant would profit to the detriment of the plaintiff, and bad faith would be encouraged which the Law abhors and puts down. — It is true that in the Repertoire, certain arrets of the Parliament of Paris are given which appear to have declared those acts void, although the parties had entered upon the execution thereof, yet these were upon acts of a particular nature, and the facts of these cases were different from the present; besides, other decisions are there given, which shew that this extension of the principle was not conclusive and applicable to all cases, and in a note to be found in page 349. Repr. Double Ecrit — explanatory of the principle even of the arrets the strongest in favor of the nullity — contended for, it is evident, that the Parliament of Paris would never have declared null an act so far executed as this has been — It is in the subsequent part of this title, that the general principle of these arrets is contested upon which we are not under the necessity of deciding — Now the object of the present action is to recover two years of the stipulated rente which the Defendant has by this act undertaken to pay upon being put in possession of the lot, whereof he has now been in the possession and enjoyment since the 6th. November 1818, here is a valid obligation, and good consideration for the promise and undertaking, and as far as that possession and enjoyment have gone, the Defendt

is

is beyond all doubt liable — there has been a convention and however imperfect the act containing such convention may be in point of form, it certainly may serve and must be received as a Commencement de preuve par ecrit, altho' not complete proof in itself, as much as a notarial act which is null from the want of the signature of one of the notaries or witness to the act — Serpillon. p. 322 &c. The plaintiff has executed the Contract on his part by putting the Defendant in possession, and has done all that was incumbent upon him to give effect to the Contract, and he cannot now retract, and if the remedy he now seeks be refused to him — where would he be? The Defendant has the land and the plaintiff nothing in lieu thereof but an useless piece of paper; nor would he be better off if he sued the Defendant to quit and surrender the land inasmuch as the promise to sell is complete and equivalent to a sale, as it has the three requisites, the thing sold, the price, and the consent of the parties. Rps^ue v. Promesse — It is not however necessary in all cases that the sale should be completely reduced to writing and a formal acceptance thereof Poth. in his Traité d'Obl. N° 801, gives this Case — a letter containing a promise to sell un heritage, at a certain price, upon an action brought to recover back the land, would with the fact of the possession, be considered as a commencement de preuve par ecrit, sufficient to admit verbal testimony of the sale — and then can be no doubt but that if an action had been instituted by the plaintiff to recover the land, the law in this Case would have furnished the Defendant with the means of proving the Sale sufficient to have defeated the object of such an action, which would have been one of bad faith on the part of the Pltff had he brought it, whereas the one instituted is for the recovery of a just demand the result of the

Convention

convention of the parties, and he could not as an honest man have brought any other, and in bringing it he has fully confirmed to the Defendant every advantage he had acquired under the convention. There is another view in which this case may be considered and to which on the present occasion the Court perhaps might with propriety have restricted itself as far as the merits of the plaintiffs demand are concerned, as being the most legal and equitable view thereof. The act in question contains a twofold contract, a sale, and a Constitution de rente, and it is to enforce the latter that the action is brought, and which rente, or rather the interest of the price of the land was to take effect or accrue immediately & be payable yearly, and although the sale gave birth to the constitution de rente, yet as the object of the present action is to enforce the obligation in the latter the Contract of sale is not directly in question, nor can that sale be declared null in the present action; we are therefore proceeding upon an unilateral obligation to which the law in regard to reciprocal obligations will not apply, and the only question could be whether there was a good and valuable consideration for such an obligation; the consideration in this case was, it is true, the price or value of the land which the parties had agreed upon, but the Defendant having been put in possession of the land it so far represented the principal of the rente as to constitute such consideration as much as if a sum of money had been given to the Defendant. The action is now to recover two years of the rente or interest according to the Defendant's undertaking, and though the act may be considered a promise to establish a rente constituée and therefore

not

not complete, it must nevertheless be valid for the time which the Defendant has evidently possessed and enjoyed the principal, which the lot of land may correctly be considered to represent, and must continue valid and the interest payable, as long as that possession continues, and which nothing but the surrender of the land, if it could now legally be effected against the will of the plaintiff, could discharge. It is the same as when a sum of money is given to a person under a promise to pass therefor a Contrat de de constitution de rente, and in the mean time to pay the interest which is a valid undertaking as appears by the following authority from the Repre under the title "promesse" "une promesse de passer Contrat de " Constitution, et cependant de payer l'interet du capital " est valable" — We would not have dwelt so long upon this point of the Case, if we did not feel that upon no principle of law can the defence thus set up be supported, for the defendant has neither law nor good faith on his side — if he wished to get rid of his bargain, why did he not claim that the Convention be declared null and set aside and offer to restore the land — instead of doing so, he retains the possession, pays no rent, and thus full handed puts the plaintiff to defiance — of two things one — he must either execute the Convention or ask to have it set aside, and in the latter case offer to place the plaintiff in the situation he ought to stand, and in doing the latter he must not suppose that this or any other Court would relieve him from the payment of the interest of the two years which he has under the convention possessed and enjoyed the land and for the recovery of which it

it must not be forgotten this action is brought; we will not however presume that there is now any disposition on the part of the Defendant to give up a lot of land which he has improved and built upon and rendered of so much more value than when he obtained the possession thereof — upon the whole we can draw no other conclusion from the conduct of the defendant than this, that he will neither surrender the land nor pay the price or the stipulated rente, and we are fully satisfied in drawing such a conclusion from his long possession, non-payment of the rente, and his present defence.—

In the argument held by the Defendants Counsel he also contended that the action had been irregularly brought by declaring on an acte which in itself was imperfect and consequently gave no action — in this also we consider the Defendant in error, for admitting that the act was in its origin imperfect it does not follow that this action founded upon it must fail, as it would perhaps if he had declared upon a notarial act which should be found to be null as such, from some defect or omission — there possibly the action might not be maintainable and the party ~~declared~~ compelled to declare as upon a sous seing privé; but here though not complete in itself, it is declared on, not as an acte authentique, but as a sous seing privé, and whether it is considered as the Convention, or only a commencement de preuve thereof, it is immaterial, as in point of fact it contains the whole of the Convention, and it is as described in the declaration, which would not be the case in regard to a notarial acte, as before observed, as the want of the necessary formalities

in

in the latter case would prove that no such notarial act existed in point of fact, but only a sous seing privé. —

Upon all these grounds we are of opinion that the action is well brought, and that the defense au fond en droit must be overruled and we are further of opinion that the exception of the Defendant as to his liability to only three fourths of the stipulated rent cannot avail him the cession by him of one fourth of the land to Bureau, though made at the same time and with the knowledge of the Plaintiff, yet in as much as the plaintiff was no party thereto, it cannot be said that he has discharged the Defendant from any part of his engagement, and this additional act so far from serving the Defendant upon the Case as generally submitted affords an additional ground for holding the Defendant to his Contract, as he has thereby confirmed it by exercising the right which he had acquired under it, and more confirmed the conditions upon which he obtained the land — under the remaining issue or negative plea the acte declared on and the possession and enjoyment of the land by the Defendant being fully proved, and the convention of the parties thereby established the Defendant must pay the full sum therein stipulated and now demanded, that is two years interest making £12 —

There

There is a second Count in the declaration for a quantity of building Stone and Sand sold and delivered by the Plaintiff to the Defend^{t} and notwithstanding the objections raised in argument by the defendant's counsel, that the two causes of action could not be united, we are of opinion that even though this had been specially pleaded, the two have not been improperly joined in this action — the object of the law is to prevent as far as practicable a plurality of actions between the same parties, and the Court would not feel itself justified in allowing in practice distinct actions to be brought where one conclusion and Judgment may suffice for the whole, and where from the nature of the actions a joinder would not be incompatible and inconsistent — Upon this Count the plaintiff has not proved to the full amount therein stated, but only to the value of £4.5. which with the twelve pounds for rent forms a Sum of £16.5. for which Judgment is now given. —

No 239

Tetu & ux^{r} vs Masse. & Drolet Intv^{z}

This action was instituted by the Plaintiffs to obtain from the Defendant, who was the father, and had been the tutor of the wife of the Plaintiff Tetu, an account and payment of the rights of his said wife in the Succ^{n} of her mother the wife of the Defendant. —

The Defendant having filed the acct demanded by which it appeared that a — considerable

considerable sum of money was due to Marie Julie Masse the wife of the said plaintiff, Joseph Toussaint Drolet filed an Intervention in the Cause claiming that out of the monies in question there should be paid to him a sum of 3600 livres, due to him by the said Plffs and ~~which~~ for the payt of which had ~~been~~ obtained a transfer of so much of the said monies in the hands of the said Defendant.

To this Intervention a plea was put in by the Defendant, which contested the right of the said Intervening party to obtain the payment of the said sum of money as demanded, in as much as by the marriage contract between the plaintiffs, to which he the Defendant was a party it was stipulated, that all the rights of the s.d Marie Julie Masse as heir of her mother should be employed in the purchase of real property for the benefit and behoof of the said Marie Julie Masse and her heirs.—

The Intervening party contended that this clause in the marriage contract did not prevent him from maintaining his claim, as the Plffs had the power of alienation of the property that might be realised out of the said monies, and therefore could well dispose of the money itself

The stipulation in the marriage contract run thus— "Les droits de ladite future epouse " consistants en ses droits maternels mobiliers " et immobiliers, tels qu'ils lui sont echûs du chef " de sa defunte mere, qu'elle se reserve naturellement " propres pour elle, ses hoirs, de son coté & ligne,

" avec

" avec clause expresse, que les deniers des droits a elle
" appartenants, seront employés en acquisition
" d'heritage par ledit futur epoux."—

The Court were of opinion that the Intervention could not be maintained; that the money in question must be applied for the purposes stipulated in the marriage Contract, from which the Court could not allow the parties to deviate, as the rights of others might be affected thereby,—and therefore dismissed the Intervention.—

No. 748.

Ruiter.— vs May. & al

This was an action in the nature of an action en faux principal, instituted by the plaintiff as one of the heirs at law of the late Philip Ruiter, against the Executors and legatees named in and by his last Will and Testament in order to have that Will set aside and declared null and void from informality and defect of solemnity and form in the making and executing the same.—

The will purported to have been made and executed on the 27th day of October 1820, in the presence of one Leon Lalanne, a notary public, & of two other persons as witness, in the form generally used for a testament solennel, and to have been so made in a certain room in the house of the testator at St Armand.—

The objections taken to the will, and which formed

formed the ground work of the action were. 1st. That the Witnesses, were not present, and heard the testator order, direct, and dictate his will to the notary. — 2d. That the testator was not of sound and disposing mind and memory at the time when the said will was made. — 3d. That the will was not written by the said notary in the presence of the said testator and witnesses. — and 4th. That the said will was not written, made, and executed by or in the presence of the said Testator on the 27th day of October 1820. —

The facts of the Case as they appeared in evidence, are, that on the 27th October 1820, the testator having sent for the public notary to draw up his will, he attended, and on that day took down in writing the dispositions of that will, but towards the evening the testator falling into a weak and comatose state, the will was not then executed, but that next day, the notary having been again called in, and finding the testator much better, and of sound and disposing mind and memory the Witnesses were sent for, and in their presence and that of the notary the testator signed the will after it had been read over to him. The witnesses and notary then signed the same — This was on the 28th day of October, but the date which had been previously written the day before by the notary, was the 27th and was not altered.

On the part of the plaintiff it was contended that the will could not be considered as an acte authentique, as it bore date on a different day

from

from that on which it was executed — and that is was not a testament solemnel, as it had not been dicté & nommé by the testator to the notary in the presence and hearing of the witnesses, and then read over to the testator, which must be one continued act in the presence of all the said persons. cited. D. Gr: Conv. p. 131. sec. 1. p. 118. № 30. p. 106. № 7. p. 131. sec. 7. — Lemaitre. p. 423. —

On the part of the Defendant an objection was taken to the competency of the witnesses, as they were the temoins instrumentaires, they could not be heard. and that without their testimony there was nothing that could impeach the validity of the will in point form. cited. N. Deniz art. tit. Faux principal. 471. 474. That all the forms of the law were not rigorously exacted, in regard of the will being dicté & nommé in the presence of the witnesses. 2. Bouj: 304. 309. — But if according to the laws of France this will should be considered as not sufficient, it certainly was so in regard to the forms adopted by the laws of England, upon which the Defendants rely in this Case. —

The Court were of opinion that the will could not be considered as a testament solemnel according to the laws of France, as it appeared to be dated on a different day from that on which it was executed. — That in this Case, the testimony of the witnesses to the instrument must be admitted, as the proceedings under the inscription en faux was merely of a Civil nature, and no penalty attached to the witnesses nor were they liable to any punishment by the Court, if the faux should be established. — That it had been

insisted

upon as a principle that if the will was not available as a testament solemnel it could be of no avail in anyway, but was wholly null – according to the law of France, this would be so held – But the consideration here, which was of great importance was, whether by the laws of England, the will in its present form would be valid, for if it were, its imperfections under the laws of France would not form an obstacle to its validity – And we are of opinion that according to the laws of England the will is good and valid, – it was executed in the presence of the notary and three witnesses, by the testator who at the time was collected and of sound mind, and even appeared to state to the witnesses the reasons of some of his dispositions – We must judge of this will as they would judge of it in England, were the question of its sufficiency in point of form, and we are satisfied that there its sufficiency would be admitted – And it is fortunate for His Majesty's Subjects in this Country that the greater simplicity of form in wills has been introduced here than existed in France, as the intentions of a Testator will be less liable to be frustrated by the inattention or ignorance of a Notary, as must have been the Case here, had not the laws of England come in to secure them – Action dismissed. –

Cales v. Kilborn — Now in appeal –

Wednesday 20th. October 1824.

No 257

Mathieu vs Plucknett and Sewell, Interv.

This was an action instituted by Scholastique Mathieu against the Defendant to recover from him a sum of £83. 6. 8, being for so much due by him to one Jean Baptiste Luc Berthelet on the sale of a certain lot of land made by the latter to the said Defendant, as part of a greater sum stipulated to be paid in and by the deed of sale of 14 Oct. 1817, and which had been transferred and conveyed over to the plaintiff by the said Jean Baptiste Luc Berthelet by deed of transfer dated 27 June 1823. — In this deed of transfer it was stipulated as the consideration thereof, that as he the said Jean Baptiste Luc Berthelet was indebted to the plaintiff in several large sums of money, to wit, in the sum of 7550 livres for money lent, and in a sum of 12,050 for arrears of a rente et pension viagere, he the said Jean Bapte Luc Berthelet transferred to the said Pltff on account and in part payment of these sums of money, the sum of 13,000 which was due to him by the Defendant on the said deed of Sale. — The Defendant appeared and pleaded to the action —

On the 15th. Oct. 1823, Stephen Sewell filed a petition in Intervention in which he stated that by a deed of Sale made and executed on the 6th July 1821, he the said Stephen Sewell sold

and

and conveyed to the said Jean Bte Luc Berthelet divers lots of ground in the parish of Longueuil for and in consideration of a sum of £450 — to be paid to him by the said Jean Bte Luc Berthelet by different instalments of £80 ea the first of which to become due and payable on the first day of May 1824, and so continue from year to year until the whole of the aforesaid sum of £450 — should be paid and satisfied with interest as in the said deed stipulated. — That the aforesaid deed of transfer and assignment made by the said Jean Bapte Luc Berthelet to the said plaintiff, was falsely and fraudulently made and by covin and deceit between them the said Jean Bte Luc Berthelet and the said plaintiff, inasmuchas at the time, he the said Jean Bapte Luc Berthelet did not owe to the said plaintiff the said sum of 19,600 livres for the causes and reasons expressed in and by the said deed of transfer of the 27 June 1823, or in any other or larger sum of money than £45. — and that the said deed of transfer was made between the said Pltff and the said Jean Bapte Luc Berthelet with the — fraudulent intention of depriving the said Stephen Sewell and others the Creditors of the said Jean Bte Luc Berthelet of the means of being paid their just demands against him, and particularly to — deprive the said Stephen Sewell from being paid and satisfied out of the said monies due by the said Defendant to the said Jean Bte Luc Berthelet the said sum of £450 - due to him the said Stephen Sewell in manner as aforesaid, and that therefore the said deed of transfer so made by the said Jean Bte Luc Berthelet to the said Pltff should by the Judge of the Court be declared to be null and void and of none effect, and the action of the Pltff dismissed

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The plaintiff by her plea to this Intervention denied the matters and things therein & thereby alledged, and also the sufficiency thereof to entitle the said Stephen Sewell to have and maintain the same — On this plea issue was joined and the parties proceeded to an enquête thereon — and the parties having been heard on the merits, the Court entertained some doubts as to the right of the said Stephen Sewell to maintain his Intervention, as at the time of making the same the debt contracted by Jean Bte Berthelet to him did not become due until May 1824, subsequent to the time of making the said Intervention, and as this point had not been noticed in the argument the Court directed the parties to speak to it on another day — And in consequence the parties were again heard this term, when Mr Bedard for the Interv. Party contended that he had right to intervene, and to shew that the deed of transfer in question was an acte simulé, as the Intervs party was interested that the plaintiff should not recover the money from the Defendant as he would thereby be deprived of the only hope and means he had of recovering from Jn Bte Berthelet the amount he owed — cites. N. Denizt. Vo Fraude. No 7. 9. That it is enough for the Intervening party to shew, that he is a creditor of the party, and that eventually his claim may be prejudiced by this act of Collusion between the parties to entitle him to entitle him now to demand that this act be set aside and annulled — N. Denizt. Vo Fraude relativement aux Créanciers". — The Intervening party is the Creditor of Jean Bte Luc Berthelet, and entitled to exercise all the rights of his debtor. — Domat. Lois Civ. liv. 2. Sec. 1 No 1. par. 188. — Digeste par Hulot. vol. 6. No 42. tit. 9. p. 414. 415. Repse Vo Simulation. p. 323. —

Mr Bleury for the plaintiff contended, that the Intervening party shewed no present interest in the suit that could entitle him to intervene inasmuch as the debt contracted by Jn Bte Luc Berthelet was not payable until many months after the Intervention was made, and therefore in law Berthelet must be considered as owing nothing at the time to Mr Sewell, according to the maxim, "celui qui a terme ne doit rien". That here Mr Sewell held a sufficient security for his debt, he was bailleur du fond, and had a priviledge on the property he sold to be paid out of it.—

The Court were of opinion that the Intervening party shewed a sufficient interest to intervene in the Cause, by shewing that he might be eventually injured in recovering the debt due to him by a fraudulent transaction between the Plaintiff and his debtor — And being satisfied from the evidence adduced that Jean Bte Luc Berthelet was not indebted to the Plaintiff in the sums of money specified in the deed of transfer made to the Plaintiff by the act of 27 June 1823, and therefore considering the same as simulé and fraudelent in regard of the Intervening party dismissed the plaintiffs action with costs. —

No 279.

Frost & Porter vs McKenzie.

This was an action instituted by the Pltffs against the Defendant Henry McKenzie, to recover from him a sum of £230 — in consequence of a letter of security he gave them in favor of one Roderick McKenzie, in the following terms — "Gentlemen, Should you

"enter

enter into a contract for lumber deliverable next Summer with the bearer, Mr Roderick Mackenzie and should you have occasion to advance him on account the sum of three hundred pounds, I hereby engage to be his Security to you for that sum. — and

I remain

Dr Sirs

Your most obd Servt

Messrs Porter and Frost. H. Mackenzie

Montreal 5 Janv 1820

In consequence of this letter the plaintiffs — afterwards on the 11th January 1820 entered into a contract with Roderick McKenzie for the delivery of a certain quantity of white oak timber, to be delivered in the month of June or July next following and under the above letter of guarantee advanced to R. McKenzie a sum of three hundred pounds. It would appear that previous to this period, on 23d Dec. 1819, the said Rodk McKenzie had entered into a contract with the plaintiffs for the delivery in all June then next, of 20,000 white oak Staves, and had also received from the plaintiffs on this contract another sum of three hundred pounds — By the subsequent transactions between the Plaintiffs and Rodk McKenzie it appeared that they had at different times advanced money and goods to him beyond the sums paid on the two Contracts, — That on the sale of the Staves which had been furnished by R. McKenzie, the Plaintiffs received a sum of £446. 18. 4, — for west India Staves, a sum of £44. 11. 8 For rum, a sum of £59. 18. 9. and in Cash at Quebec on his acct a sum of £70 — which with £15 — returned by him on acct of money lent, amounted in all to

the

the sum of £636. 8. 9 — The advances made by the Plaintiffs to R. McKenzie, including the above two sums of £300 - advanced on each of the above exceeded what they had so received, and left a balance of £170. 1. 3. which they claimed from Henry McKenzie the Defendant under his aforesaid letter of guarantee — On the Contract for lumber R. McKenzie had furnished nothing —

The only question now in dispute between the parties was in regard of the imputations of payments and whether the Plaintiffs had right to apply the different sums of money they had so received on account of Roderick McKenzie and apply them to the general account of all the transactions between them, or whether the surplus of those monies after payment of the £300 - which they had advanced on the Contract for Staves, should not have been applied to the discharge and payment of the sum of £300 for which the Defendant had become security — And on this point the Court were of opinion that the Defendant was entitled to have the surplus money so paid applied in discharge of his guarantee, as no imputation of these monies had been made or consented to by the Defendant or Roderick McKenzie, and thereupon dismissed the Plaintiffs action —

see. Repr. vo Imputation. p. 91. first Col.
Id — vo Compensation p 272. 1st Col. fine
Poths. Obl. N° 567. Cor. 5. —
Denizt — vo Imputation. —

No

No. 966.

M.Kenzie. v. Moffat.

This action was brought by one Louisa M.Kenzie, a single woman residing in the Indian Country, against George Moffat of Montreal, Executor of the last Will and Testament of the late Kenneth M.Kenzie late a trader in the said Indian Country, and tutor to Margaret M.Kenzie the minor daughter of the said late Kenneth M.Kenzie — The declaration stated that the said late Kenneth M.Kenzie made his last Will and testament at Fort William on Lake Superior on the 15th. day of August 1816, and thereby amongst other things did give and bequeath to the plaintiff, the sum of twenty five pounds Hfax Curry annually as long as she might have charge of her daughter the said Margaret M.Kenzie and be otherwise unprovided for. — That after the death of the said late Kenneth M.Kenzie the said Defendant took upon himself the execution of the said last Will and testament as his executor. — That sufficient monies have come to the hands of the said Defendant as such Executor to pay all the debts and legacies left by the said K. M.Kenzie, and also to pay to the said plaintiff the aforesaid annual allowance of twenty five pounds. — That the said plaintiff had the charge of her daughter Margaret from the said month of August 1816, until the month of August 1820, and has ever since been without pecuniary means entirely dependant upon the bounty of others for support and subsistence and wholly unprovided for. — That on the first day of Septr. 1823. there had accrued and become due to the plaintiff a sum of £175. — being the amount of the said annuity for seven years from the time

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of the death of the said K. McKenzie, and for which sum she prays Judgment—

The Defendant by his plea stated, that the plaintiff was not entitled to her action against him, because that the said late K. McKenzie in and by his said last Will and testament, did give and bequeath unto the said Louisa the Plaintiff, the mother of the said Margaret McKenzie a minor daughter of the said Kenneth McKenzie the sum of twenty five pounds annually, as long as she the said Louisa McKenzie might have charge of her daughter Margaret, viz.t of the said Margaret McKenzie, and otherwise unprovided for, that is to say, that when and so soon as the said Louisa McKenzie should cease to have charge of the said Margaret, that then and in that case the said Louisa McKenzie should not continue to have and receive the said sum of twenty five pounds annually, but that the said Louisa McKenzie should thenceforth be wholly and ever deprived of and lose all right and title to the same and every part thereof — That in the month of Sept. 1820 the said Louisa McKenzie ceased to have the care and charge of the said Margaret, who hath since that time been under the care and charge of the said Defendant as her tutor — and therefore concluding that the claim and demand of the said Louisa McKenzie to have and receive the aforesaid annual sum of twenty five pounds, from and after the said month of September 1820, be disallowed and rejected.—

Upon this plea issue was joined, and the parties were heard thereon.—

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The clause in the will of the testator, after making provision for his daughter Margaret, is in the following terms.—

"I further give and bequeath unto Louisa
" Mackenzie the mother of the before mentioned
" Margaret Mackenzie the sum of twenty five
" pounds Hx Currency annually, as long as she
" may have charge of her daughter Margaret
" and otherwise unprovided for".—

Buchanan for the Defendant contended that the plaintiff was not entitled to the legacy of £25— p an. since Sept 1820. That by his plea he had put the true interpretation on the intentions of the testator and on the words of the will— That in supplying words to interpret a will, it must be done in such way as will do as little violence to the other words of the will as possible, and in order to relieve the residuary legatees from a burthen— and where uncertain words appear that cannot be well interpreted they may be rejected by the Court as non scripta. 2. Furgole. p. 253. ch. 7. sec. 4. № 121— and here the words, "and otherwise unprovided for" may be rejected, as uncertain to what they apply— When there are two affirmative conditions in a will attached to the existence or payment of a legacy, the non-performance of one of them determines the legacy.— 2° Furgole 139. № 78.— That there are here two conditions— while the child remained under the care of the mother— and while the mother remained unprovided for, the first of which has failed.

That

That this is a potestative condition, as the mother alone had the controul over the child and could have retained her under her charge and care while she saw fit, and by her consenting to give up the child she has renounced to the continuance of the legacy— cites— 1 Domat. 3 liv. tit. 1. sec. 8. № 33.—
Corp. Jur. Civ. Dig. liv. 32. law 30 §. 5.
Id. liv. 35. tit. 1. law 8.
Cod. liv. 6. tit. 46. law 3.
2 Furg. p. 235. ch. 7. sec. 5. № 133.—337.355.
2 Desp. p. 324. part. 1. tit. 3. sec. 3.—
Repᵗᵒʳ vº Condition. p. 207.—
2 Furgole. 268.—
Repᵗᵒʳ vº Condition. p. 409.—
2 Boinj: 361.—

That the word "while" is conditional, and when it fails, the legacy fails also.— 2 Furg: 142.— That when a legacy depends upon two conditions (whether affirmative or negative, by the failure of one the legacy fails also. Dig. liv. 28. tit. 7. law. 5.— 2. Furgole 314. 319. 317. Poth. obl. № 223. Desp. 2 vol. 316. p. 1. sec. 2. № 18.—

Gale for the Pltff contended for a different construction of this clause in the will — as it was evidently the intention of the testator, that while the plaintiff was unprovided for she was entitled to the legacy— That the testator has not limited the payment of the annuity to the time only while the child should remain under the care of her mother, for had this been his intention, he would have intimated it by some express declaration, and the rules of construction are favorable to the legatee— That the legacy in this case vests immediately and both contingencies,

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of the mother ceasing to have the charge of her daughter, and that some other provision had been made for her must first happen before she can be deprived of the legacy 1 Swinb. p. 386. & seq. — 2 Blak. 155. — That the Testator was here providing for the subsistence of the mother of his child, and the interpretation of his intentions must be favorably considered towards effecting this object. — Domat. tit. 1. sec. 7. des Testaments. —

The Court was of opinion that the plaintiff was entitled to her legacy as demanded. — That the testator in this clause of the will was making a provision for the mother of his child, and therefore to be favorably interpreted, and the Court ought not to limit the payment of the annuity to any shorter period than we are satisfied it was the intention of the testator to have done — now if we were to say, that his intention was that this annuity should be paid to the plaintiff only while she had the charge of her daughter, the subsequent words, "and otherwise unprovided for," become perfectly useless & unnecessary and we must put them aside as having been used without meaning — but ought we to do so? — or can we do so? — we ought rather to seek for the intention of the Testator in using these words, and to interpret them in such manner as to give effect to this intention — and it seems to be a plain and obvious interpretation of this intention, by saying that this legacy was to be paid to the Plaintiff — "as long as "she should have the charge of her daughter Margaret" "and (as long as she should be) otherwise unprovided for" — this does not force the sense of the words, nor extend their meaning beyond a natural and easy construction. In the interpretation of wills many rules are laid down, and many authorities have been cited in

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this case, as to conditions and limitations, when and how they ought to take effect and to cease — but it is often difficult to bring particular cases within these authorities, for if we were satisfied that the conditions were clearly expressed, the rules of law could be easily applied as to their effect and operation — Courts of Justice have however gone far in interpreting doubtful words and sentences in a will in order to find out the meaning and intention of the testator, and accordingly we find, that when a sentence in a will is rendered uncertain or unintelligible from the circumstance of a testator having made use of the disjunctive, "or", when the copulative, "and", should have been inserted, and, sic e converso, "and" for, "or", the Court of Chancery, in order to effectuate the intention and give validity to the bequest, has corrected the mistake — and adopting this principle in the present case, if we substitute the word, or, for and, preceding the words, "otherwise unprovided for", there would remain no doubt as to the interpretation of this clause of the will, as it must in that case be clear, as we consider it to be the intention of the testator, that this annuity should be paid to the plaintiff, while she remained unprovided for. —

Judgt. for the Plaintiff. —

Roper on Legacies. 2. Vol. p. 297-8. — Maberly. v. Strode 3 Ves. Jr. 450. — Dobbins. v. Bowman 3 Atk. 408. — Bush. v. Dalway 1 Ves. 19. — and Haws. v Haws 1 Ves. 13.