February Term 1825.

Wednesday 2.d Febr.y

Hunter. v. Donegany

Action for a malicious arrest & imprison.t for a Civil debt

Trial by a Special Jury — Verdict for Pl.ff £550 damages —

In charging the Jury in this Cause it was held by the Court, that the Ord.e of 1785 was made to enable a Creditor to secure his debt by the arrest of the body of his absconding debtor, and when the creditor made the affidavit required by that law he became entitled to this remedy and to a judgment thereon for his debt. — That according to the course of practice of the Court, a debtor was not allowed to contest the truth of the affidavit so made, but was left to his action at law against the creditor if he had proceeded upon malicious or ill founded principles. — That in the present action which had been instituted ag.t the Defendant on the principle that the affidavit he had made was unfounded in fact, and that he had proceeded upon malicious and vexatious motives, the presumption was in favor of the Creditor who had pursued the legal Course for the payment of a just debt; and the Court did not consider him bound to shew upon what grounds he had made the affidavit on which the plaintiff had been arrested until

until the plaintiff had shewn by sufficient evidence that there was no probable ground for the arrest; so as to repell the legal presumption in favor of the Defendant's affidavit. — In this Case the plaintiff had proceeded to shew by the testimony of a great many witnesses, that from his general character conduct and deportment, there was no apparent cause or ground of belief, that on the 24th April — 1823, the day of the arrest and for years prior thereto, he intended to leave the province — That considering the nature of this testimony, which was necessarily of a negative nature, but the best that could be given in such a Case, the Court — thought it sufficient to require the Defendant to shew the grounds upon which he had founded his affidavit, and the more especially, as connected with this affidavit there was another affidavit made by the Defendant last term on his motion for putting off the trial, in which he stated, that the grounds of his first affidavit were founded on impressions — communicated from what one James Stewart, a person allied to the plaintiff had told him, which induced the Defendant to believe that the plaintiff was about to leave the Province; and as the testimony of this James Stewart gave no room to form such an opinion or belief, it therefore became necessary for the Defendant to shew some other ground than this, to warrant the arrest of the plaintiff — That in the opinion of the Court the other testimony adduced by the Defdt was too vague and uncertain to have warranted the arrest, and as no good or probable cause had been shewn for this proceeding, the Defendant was liable for such damages as the Jury should assess for the injury complained of from 24th April to the 6th Oct 1823. when this action was instituted. —

Monday 7th February.

This day my Commission as Chief Justice of this Court was publicly read, and I took my Seat accordingly — When Mr Sewell the Doyen of the Bar addressed me in the following words —

"May it please Your Honor" — "The Gentlemen
" of this Bar through me beg leave to offer their —
" sincere and respectful Congratulations on your —
" appointment to the high and important office of
" Chief Justice of the District of Montreal which His
" Majesty has been pleased in his wisdom to confer upon
" you. — Were it permitted to the Gentlemen of this Bar
" to express what had been their wishes on this occasion,
" I do assure Your Honor, that in your appointment,
" these have been fully met, convinced as they unani-
" mously are, from past experience, that in Your hands,
" the arduous and extensive duties of that office, will
" be performed in a manner to be excelled by none." —

In answer to this address, I took occasion to make the following observations, as nearly as I now can recollect —

Mr Doyen, and Gentlemen of the Bar — I beg you will accept my best thanks for the — congratulations you now express — It having pleased His Majesty to appoint me to the situation of Chief Justice of this District, I now enter upon that duty fully sensible of its importance, and with a desire to discharge it to the best of my abilities — It may not be in my power to fill the situation so satisfactorily as my predecessor, to whose industry and abilities the profession is much indebted — he was the first who established an order and system of practice in the Court, and to give a character and a form to

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our Judicial proceedings — he was constant in his attention to the duties of his office, and as a Judge he has left us an example worthy of imitation — I am however happy to say, not only on my own account, but for the sake of public Justice, that I shall be ably assisted by my Brethren on the Bench, whose close and unwearied attention, must satisfy every man, at least those competent to judge, how zealously they discharge the arduous duties of their situation.

When I look at the Bar at the present day and consider what it was some twenty — nay ten years ago, I find it so encreased and encreasing in numbers, as to satisfy me, that the rising generation are looking up to the profession of the law in a more particular manner, as the theatre of their exertions and advancement in life — with numbers, I sincerely hope, that the Bar may also encrease in talents and respectability — as a body of men, intelligent and respectable in your profession, I now address you, to say, that it will be gratifying to me, while I hold this Seat, to support and protect you in the upright discharge of your duty — I need not tell you how useful, how honorable your profession is; nor need I tell you, that a just estimate will always be formed of the man who practises it honourably — be assured that public opinion will not fail to point him out as meriting public confidence, and I shall always be happy to contribute my share to promote his interest. —

In all your dealings with the Court,

Gentlemen,

Gentlemen, I shall expect you will be open, fair, and candid — this creates confidence between the Bench and the Bar, and facilitates in many things the administration of Justice — I am aware that in your situation, you are liable at times to be imposed upon by others, who hope through your aid to impose upon the Court, but whenever you perceive this to be the Case, let no consideration induce you, to be the organ of imposition, or to seek Justice at the expence of every honorable feeling. Your profession does not require you to lend your ministry nor your name to promote the views or the interest of another in any thing not consistent with candor & fairness — and you must be aware that the advocate can never appear to ~~much~~ greater advantage, than when he stands forward in the interests of his client, — impressed with the conviction, that he supports the Cause of Justice and of truth. —

I shall hope to find, that unanimity, ~~and~~ mutual confidence, and liberal practice will always prevail among you — and it is even desirable that there were some bond of union, — some object of Common interest, which might lead you to associate together as a professional body — this I believe does exist to a certain extent — perhaps further than I am acquainted with; — My reason for mentioning this is, that I consider such an association as tending greatly to strengthen your Common interests; — Whatever your opinions or your views may be as individuals, as professional men you should have but one feeling and one Common interest, the respectability of your profession — You must be aware that

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the profession is yet young in Canada, and requires every little support to strengthen this respectability — Such an association would give weight to your opinions and to your decisions — it would prove a powerful check to irregularity or misconduct, should such be found to exist among any of the members — it would promote unanimity and reconcile differences, and would preserve the honor and character of the whole body by preventing the admission of improper persons into the profession — Things like these come more readily within your notice, and are proper subjects for your interference as an associated body. —

To the Young members of the Bar I would recommend, that until you become more — actively engaged in practice, you will apply your time in perfecting yourselves in the knowledge of your profession — your present opportunities of doing so are perhaps the best, and you must be aware, that however much you may have read or learned, there is still much to be acquired. Talents and abilities are not wanting among you, but without a steady perseverance, and a — systematic Study of the grounds and principles of your profession, you will never acquire that eminence in it, which I hope is the ambition of every one of you to attain — Act always with caution, and attention to the interests committed to your charge — and let me request of you to be scrupulously exact in accounting for all monies that may come to your hands — withhold no

man's

man's right on any pretence, and whatever you receive in this way, let it be considered as a sacred deposit to be accounted for without delay. Your punctuality in this respect will gain you a name in your profession, and will secure to you the good opinion of your clients — a contrary conduct will expose you to embarassment and to blame, and to the loss of much valuable practice.

These things, Gentlemen, I mention from that interest I feel towards you as professional men — my own habits in life have necessarily been professional — I have been associated with some of you in my earlier days in the profession, and I have now occasion more or less to know you all, and it is a natural consequence that I should entertain this feeling towards you, that it will be my highest gratification always to find the Bar of Montreal, what I now consider them to be, a body of men, respectable and upright in principle and in practice. —

Tuesday 8th February

Samr. Holmes & al. vr. Wm. Thayer & Ls. Lalanne & al. Garnishees

The plaintiffs are described to be of Springfield in the State of Vermont, and the Defendant formerly of Dunham in the District of Montreal, now of Boston in the State of Massachusets.—

The action is founded on two promissory notes given by the Defendant to the plaintiffs, for £16. 11. 10½ and £44. 15. 9½, dated, Springfield Novr. 11th 1823. and 17 Febr. 1824, and also on an order for goods to the amount of £6. 5, making together £68. 2. 8, and upon the usual affidavit the plaintiffs have obtained the process of the Court to attach in the hands of several persons, any monies or effects they may have due or belonging to the Defendant.— The service of the process on the Defendant is thus certified by the Sheriff "By leaving a copy of the writ and declaration "on the 11th Septr. last at the house of one G. W. Stone "at Dunham aforesaid, the said house being the "last domicile of the said William Thayer".— The process was returned on the first of October last and the Defendant not appearing the plaintiffs have proceeded ex parte and adduced evidence and the Cause has been inscribed on the roll for Judgment.— The Defendant in this stage of the Cause, has petitioned the Court stating, that he never had any domicile in this Country, but that his residence, as well as that of the pliffs. is in the State of Vermont in the United States of America, in support of which he has filed two affidavits, and has prayed that before Judgment the plaintiffs may be held to prove the sufficiency of the service of the process

process, and that he the Defendant be allowed to rebut the same by the adduction of evidence, to prove the facts alledged in the petition.—

A question has been offered for the consideration of the Court, to determine on which of the parties the onus probandi now lies, to prove the domicile, or non domicile of the Defendant in this Province, the plaintiffs contending that the Sheriffs return is sufficient for them, so as to throw the burthen of proof on the petitioner.— Upon this we would say, that there is a distinction to be made — The Sheriffs return is prima facie evidence of those facts of which he may be presumed to have a personal knowledge and also of his own official acts, as in this case the Sheriff returns, that on a particular day he served a true copy of the Writ and declaration at the house of one G. W. Stone at Dunham — so far the return of the Sheriff might be conclusive, but when he adds that this was the last domicile of the Defendant, it is certifying not his own act, but that which presumes the existence of a previous fact, the truth of which he could not officially certify — It is true that in ordinary cases where a Defendant has resided in the Province, and has absconded from his Creditors in Canada, no express proof has been required of the last domicile of such Defendant, but in those Cases the plaintiff and Defendant are described in the declaration to be both of the Province, and the witnesses always are required to depose that they knew the parties as described in the declaration — this hitherto has been held sufficient, but in observing this rule which was to facilitate and secure the recourse of the Canadian Creditor against his absconding and fraudulent debtor the Court never intended that this rule should be extended beyond its just limits, and introduce an evil worse than that which

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the rule was designed to remedy, in those cases the Creditor would otherwise be without a remedy, as he would not know where to find his debtor; but in this Case the plaintiffs and Defendant being foreigners, the Plaintiffs state their Debtor to be now at Boston in the United States and consequently within his reach and against whom the laws of that Country, must we presume, afford him ample relief — this being the Case, and the debt now sued for having been contracted in the United States, and so stated in the declaration, the presumption arising from this, independant of the affidavits filed, must be, that the Defendant never resided in this Province, and this presumption must prevail until rebutted by positive evidence*. — The Sheriff cannot be presumed to know the fact, and his information was probably received from the plaintiffs themselves, which if admitted, would be to allow the plaintiffs to establish a fact by their bare assertion, which cannot be allowed; The fact then which is necessary to be established in order to render the Defendant amenable to this Court is, that he had a domicile in this Country — the plaintiffs shew that the Defendant's domicile is now in Boston, it is therefore essential & incumbent upon them to prove that the Defend't had a domicile in this district at the house stated in the Sheriffs return — this is a fact, which if true, they can prove by persons within this Province, and is an affirmative fact of which they are bound to make proof, as essential to establish the sufficiency of the service to enable the Court to give Judgment in their favor even from their own shewing; and in regard to a stranger it will not be sufficient to prove that he lodged during a short period at a tavern in this — Province to constitute a domicile at which as a last residence service of process could be made. — We are

now —

* That such was the Rule in France is very certain "Si le Defendeur pretend "qu'il n'a pas son "domicile dans le ressort "du Juge pardevant "lequel il est assigné "c'est au Demandeur à "prouver le contraire."

Rep.re v.o ajournement p. 289. 2.e Col.

now called upon to give an opinion upon the prayer of the petition, and have confined ourselves to that, and to the objections thereto raised by the plaintiffs — but it may be matter of consideration for the plaintiffs, should they even establish that the Defendt once had a domicile within this Province, how far they can hope to succeed in this action, under a service of process at the dernier domicile of the Defendant. — Ever since the passing of the Ordce of 1785, the Courts in this Province admitted, as between the Inhabitants of this Country, a service at the dernier domicile, when any debtor who had been domiciliated in the Province had absconded therefrom, and no other interpretation or limitation was given to the Ordce which provides that the writ and declaration shall be served on the Defendant personally or left at his house with some grown person there belonging to the family, than was given to the 3e art. of the 2e Tit. of the Ordce of 1667, which declares thus — "Tous exploits d'ajournement seront "faits à personne ou domicile" — these were providing for ordinary cases, but did not take away the extraordinary remedy in particular cases which is given by the 8e art. of the same title of the Ordce of 1667. "Ceux qui seront condamnés au bannissement ou aux "galeres à tems, et les absens pour faillite, seront assignés "à leur dernier domicile, sans qu'il soit besoin de proces "verbal de perquisition ni de leur creer un Curateur, dont "nous abrogeons l'usage" — this article was considered as remaining in force and not repealed by the Ordce of 1785, no more than the service at an elected domicile, which is to this day admitted in all the Courts. — This interpretation continued to be observed and practised upon in all the districts until the year 1809, when in the District of Quebec alone it was discovered that no such service of process could be admitted under the Ordce of 1785 — as this was the opinion of only one

Court

Court, the others of equal Jurisdiction in Montreal and Three Rivers, did not adopt it, but continued the practice which independant of its existence prior to the Ordre of 1785, had been afterwards uniformly observed for a period of 24 years in all the Courts of the Province — this and the facility which it afforded to Creditors in their recourse against absconding debtors, and the silence of the Legislature being a tacit acquiescence in the interpretation so long given to the Ordre of 1785, induced the Courts at Montreal and Three Rivers to hold to the long established practice, which ought not to be shaken but by an act of the Legislature, or the decision of a Superior Tribunal — nor can we think that these Courts would have been justified in destroying an interpretation so universally and for so long a period received and admitted — We are told however that the Court of Appeals has recently determined that the Ordre of 1785 has been misinterpreted, and that the service of process at the last domicile is insufficient and contrary to law — If such be the decision of that Court, which was formed to controul and correct the errors of the Inferior Courts, this Court must conform to that decision of the Superior Tribunal as the rule for its future Conduct, and it must remain with the Legislature in its wisdom to provide such remedy as it may deem necessary for the service of process in the Cases of absconding debtors, for if at present there be no law to justify the service of process at the dernier domicile, there must be equal reason to conclude that a service upon a Curator, which the Ordinance has not provided for, must be also illegal. —

Mc Connel vs Mc Laughlin

This action was instituted on the 25 Sept 1824 upon six promissory notes made by the Defendt to and in favor of the pltffs for £50.– each, payable at one, two, three, four five, and six months after date, the first dated the 16 June 1824, and the others on the 14th of the same month – The pltffs have declared upon each of the notes separately, and to these Counts has added the usual money Counts and an insimul computassent, and concluded for a balance due of £155.– The Defendant by his defense au fond en droit, has demurred generally to the Six Counts upon the Notes, and has pleaded a temporary exception to the three last of these Counts, and a plea of payment generally to all the Counts.– The two first pleas are regular, but the last which alledges payment forms the subject matter of an exception peremptoire perpetuelle, and should have been so pleaded; and in this third plea which perhaps was intended for the general issue, or defense au fond en fait, its effect as a general denegation, is destroyed by the allegation of payment.– The defenses au fond en droit, then, as to the Six Counts upon the Notes, is the plea first in order to be disposed of, before entering upon the consideration of the others, and it is upon the issue formed thereon that the Six first Counts must stand or fall – Now under this plea it has been contended by the Defendant that the plaintiff has omitted to alledge that the notes were signed by the Defendant, and that delivery thereof was made by him to the plaintiffs – this is true in point of fact as to the whole of the Six Counts, except as to the first in which a delivery is alledged – but we are of opinion that neither of these objections is founded, as the making of the note, which is alledged, implies not

only

only the signing, but the delivery also of the note, and therefore these are not essential parts of a Count upon a note — it has been so held and decided in England — although the allegation of signing and delivering the note is usually found in the English forms of declarations, yet this has not been held to be absolutely necessary, and if not required in the English Courts, with less reason can this be required here, where the same strictness in regard of declarations is not observed; if in point of fact, the note had not been delivered, but possession thereof had been fraudulently obtained, this would be matter of defence, but unless this be urged and proved on the defence, the allegation that the Defendant made his note, by which he promised to pay &c. is sufficient — So the note was no note till signed, and therefore stating that the Defendant made a note, necessarily implies that his signature was thereto, and without which it was of no more value than a piece of blank paper. — The authority cited by the Defendants counsel from Pothier goes no further than this, and therefore not applicable; an obligation is not complete till it is signed, but it is sufficient to state that the Defendant made and executed a certain obligation without stating that it was signed, as the making and executing must import a signing or something equivalent to it without which it could not be said to be made and executed — there is nothing therefore in these two objections. —

Churchill v. Gardner 7. T. Rep. 596.

Elliot. v. Cooper Raym. 1376. —

Another objection however has been offered, which is, that at the time of the institution of the action, three of the notes declared upon were not due and payable and therefore that by the plaintiffs own shewing, and upon the face of the declaration, the plaintiffs have not in regard of these three Counts stated an existing Cause

of

of action.— Although the Court has not considered it necessary to require under the equitable system of law administered in this Country the niceties of English pleading, yet it is not therefore to be understood that a plaintiff is not bound to state a substantial Cause of action in his declaration; for the law of Canada requires, "que l'exploit soit libellé, c'est à dire, "qu'il doit contenir sommairement les moyens sur "lesquels la demande est fondée, et les conclusions du "demandeur, cela est ainsi ordonné afin que la partie "assignée sache pourquoi elle est appellée en Justice, et "qu'elle puisse en consequence ou se defendre ou se "conformer à la demande". Rep^tre V^o ajournement. p. 286. It is in the body of the declaration that this Cause of action must be set forth, and it is not to be aided by any subsequent pleading, as independant of the necessity of stating in a declaration all that is essential to support the conclusions thereof, it would tend to multiply pleadings and lead to endless confusion, if a departure from the principle was permitted, that is, one half in the declaration, and the other half in the replication, which introducing new facts, must necessarily lead to a new issue— moreover as the conclusions flow from the premises, how can a plaintiff expect a Judgment awarding conclusions to which by his premises, he clearly shews he is not entitled — ~~if any thing had occurred since the making of the notes, to prevent the plaintiff recovering before the notes became payable, it should have been stated in the face of the declaration and the right of action declared premature~~ — Now in the three Counts in question, the Defendant declares on three promissory notes, dated the 14 June 1824, payable at 4. 5. & 6 months — the action was instituted on the 25 Sept. 1824, at which time the notes were not yet due and payable, and upon the principle that celui qui a terme ne doit rien, the plaintiff has shewn that at the time of the institution of the present suit his right of action was not open,

yet

yet he concludes for Judgment for the amount of these three notes, and how can this be? when he shews that the notes are not due — the premises here, instead of supporting the conclusions shew that they ought not to be granted — if any thing had occurred since the making of the notes to open the plaintiffs right of action before the notes became payable, it should have been stated upon the face of the declaration and the right of action deduced from it; such not being the Case, and this being matter of substance and not of form the Defendant has a right to avail himself of it under the general defense au fond en droit, to which there is a regular joinder, as it would be called in England, by which the plaintiffs maintain that the declaration is sufficient — but we must say that it is not so, and that in regard of these three Counts, the defense au fond en droit must be maintained and the Counts rejected, but in respect to the three first Counts, it must be overruled for the reason already given. — It is true that term for payment is properly the subject matter of a temporary exception, where the term given does not appear upon the face of the declaration, or is founded upon some subsequent transaction or agreement between the parties, but where it is apparent upon the face of the declaration the Defendant may avail himself thereof under a genral defense au fond en droit, where the plaintiff does not at the same time allege some subsequent fact by which a right has by law accrued to him to prosecute his action before the expiration of the term originally given. — The parties must now be left to proceed to evidence upon the remaining issues of fact upon the other Counts in the declaration. —

Thursday

Thursday 10th February.

No. 1446.

John Roi
G. B. Willard
Ed. Desrivieres
Beaubien.

This action is brought by the pltff as indorsee of a promissory Note against the drawer and indorser thereof, and the declaration both in substance and in form is regular and sufficient.

The Defendant Willard the indorser of the note, has put in what he entitles an exception peremptoire en droit, which appears to be a convenient kind of general title to cover the subject matter of every description of plea which can be used, with the addition of any other matter which the imagination may suggest forming altogether a most confused melange, and exhibiting a general departure from every rule of pleading. — The first reason stated, is, that the maker of the note is not a trader, and that by law the note should have been indorsed in full, and that no such full indorsement was made. — As to the Defendant not being a trader, the plaintiff has not described him as such, but calls him a gentleman, the Defendant therefore here negatives a fact which is not alledged by the plaintiff. — As to the law regarding full and blank indorsements, it was not necessary to cite it in a plea, and the averment that the indorsement was in blank is pleading to evidence which is not admissible — The Defendant may perhaps have occasion to make use of this in argument upon the plaintiff's evidence when adduced — as the burthen of proof lies on the plaintiff he must furnish legal and sufficient evidence to support his demand — It is true that if it had appeared upon the face of the — declaration that the indorsement was in blank, this might have been noticed under an exception or a defense au fond en droit.

The exception à la forme — defense au fond en droit — the perpetual exception, and defense au fond

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en fait, are all blended together, and the subject matter of each of these pleas, or of what may be urged under them, given as reasons in support of what is called an exception peremptoire en droit; there is also in the reasons that which amounts to pleading to evidence, and parts which are embraced by the general issue, and a denegation of facts which are not alledged.— Had the plaintiff moved for the rejection of this plea altogether for irregularity, the Court would have thought it their duty to have granted the motion, in order if possible to compel the attention to a consistent and regular mode of pleading, and it would now order a re-pleader, if it did not feel that they would thereby retard the pltff and reward the Defendant for his irregularity and give him what he appears to be seeking for, delay— Some part of the plea the Defendant may however avail himself of upon the merits, and as the pltff has taken issue upon the whole, and it would be impossible to designate correctly in a Judgment those parts of the reasons which we consider as unfounded, we therefore think it best to let the whole stand for the present and not delay the plaintiff, but order avant faire droit, that the parties proceed to evidence.—

No 2149.—
S. Blin.—
vs
Forrest.—
and
Forrest, oppt

In this Case the plaintiff had obtained Judgment against the Defendant on his Confession, on the 12th June 1824. for a sum of fifty pounds stated to be for the amount of the relief on the purchase made by the Defendant of a Fief holding and depending on the Seigniory of Boucherville, of which the Pltff and the persons whose rights she held were Seignors and proprietors—

Having

Having sued out execution on the said Judt and seized the goods and effects of the Defendt an opposition afin d'annuller was thereto made by the Defendant, in which he stated, that he had by the fraudulent persuasion and contrivance of Pierre De Boucherville the agent of the Plff induced and persuaded to believe that the amount of the Relief in question was fifty pounds whereas in truth and in fact it amounted only to twenty five pounds, and the plaintiff was not entitled to demand or receive anymore than twenty five pounds from the Defendant. That the said Pre de Boucherville had further fraudulently induced and persuaded the said Defendant to give his note of hand to the said plaintiff for the said sum of fifty pounds for and in lieu of the said Relief, the said note payable in one year from the date thereof — That the said Pre de Boucherville, afterwards in October 1823, in the name of the said plff instituted an action against him the said Defendant for the said sum of fifty pounds as and for the amount of the said Relief, when the said Pre De Boucherville under various false pretences, and under a promise of delay to the Defendant to pay the said sum of money of one year, solicited & persuaded the said Defendant to confess Judgment for the same — That the said Defendant not having received a copy of the declaration, and supposing that the said action was instituted by the said Pre De Boucherville for the said note of hand, and being at the time unacquainted with the facts and circumstances under which the Plff

or

or the said Pre De Boucherville on her behalf was entitled to claim and receive from him only the sum of twenty five pounds, did in consequence confess Judgment in favor of the said pltff for the said sum of fifty pounds; and in consequence Judgment was entered up against him for that sum on the 12th June 1824 — That for concludes, that as it was by fraud and deceit and in error that the said Confession was made, that the said Judgment and all the proceedings had thereon be set aside and annulled with Costs —

To this opposition the Plaintiff filed a plea of Exception peremptoire en droit, stating that by reason of the matters and things in the said oppn set forth, the said Defendt could not maintain the same, nor could the Judgment rendered against the said Defendant be set aside by means of the present Opposition —

In support of this plea, Mr Quesnel for the plaintiff contended, that the Opposition was irregular, and that Defendant could derive no benefit therefrom — That if the Defendt had any just grounds of complaint against the principle on which the Judgment was rendered, he ought to propose them by Requete Civile — cites. Pothier Proc. Civ. p. 142. Denizt. vo Requete Civile — Jur. Dic. vo Requete Civile — 1 Pigeau. 548 — & Repse vo Requete Civile — all which authorities agreed upon this point and were founded on the Ordre 1667. Tit. 35. art 1 — That Defendt can have no other recourse here but by appeal — and even in the Court of appeals the moyens used by him, not being moyens de Requete Civile, could not

not avail him — and allowing even that a Requete Civile could be admitted under the shape of an opposition, yet there are no grounds shewn upon which it can be maintained — and in the case of a Confession of Judgment no fraud can will be alledged against it. — At all events the present opposition ought not to suspend the effect of the Judgment

Bedard for the Defendant & opposant — The Court of appeals cannot take cognizance of this Case, not being a Court of original Jurisdiction, they can judge only by what appears on the Record, but admit of no new proceedings — This Court must grant the remedy the opposant looks for on the principle that the Court here alone can enter into the discussion of any facts or principles on which the parties contending before it found their rights — That the present opposition is in the nature of a Requete Civile, as it calls upon the Court to revise its proceedings and correct an injustice which has been done, and considering it even as a Requete Civile it contains sufficient grounds and conclusions to be maintained before the Court — And the Court here is authorised to take cognizance thereof under the Declarations of 10. March 1685 — and April 1631, which give power to the Conseil Superieur to hear and determine all these matters, which power is vested in this Court by the Provincial Stat. of 1794. —

By the Court

This opposition if it can be at all maintained can be enquired into only before this Court, as otherwise the opposant would be without relief — he cannot obtain it in the Court of Appeals, as the facts stated in the opposition can be investigated only in the Courts of original Jurisdiction, and the Court of Appeals examines no new facts beyond what is stated on the Record — It stands besides to reason, that if the Judge has

been

been deceived by a party, or led into error by concealment, or by the false representation of a party by he has a right to recall his Judgment, and this concealment or misrepresentation can be enquired into only in that Jurisdiction where it was committed for until the fact appears the Court cannot judge and no new facts are enquired into in the Court of Appeals.—

This opposition is in the nature of a Requete Civile and although the term, requete Civile is not used, yet in substance it is the same, and the conclusions thereof tend to the same object.— In pursuing the course laid down by the Ordre of 1667, for the practice of the Courts in France, we must often be embarassed if we were bound strictly to adhere thereto, or to assimilate the practice of our Courts to what that Ordre enjoins, or if we were to reject every part thereof that was not consistent with our practice — we must avoid both extremes, and seek for the reason of the law, which ought to be adopted as a rule of decision as far as circumstances will permit —

By the 35th Tit: of this Ordre two modes of proceeding are admitted for a revision of a Judgment by the same Court that pronounced it — One by simple requête afin d'opposition contre le Jugement — the other by Requete Civile. — The first was granted as a matter of Course, to the person who had not been a party in the Cause, that is, who had not been regularly summoned, or who was in default, and had not been heard — The complaint of a person who had been judged under such circumstances carried with it such an appearance of Justice, that no formality was required, but the simple requete en opposition au Jugement, to entitle him to a hearing.

But

But when the person complaining of the Judgt had been a party in the Cause and had been heard, the presumption was against him, he did not so readily obtain a re-hearing, he must make out a strong Case, and many formalities were to be attended to.—

1st. There was to be a consultation de deux anciens avocats et de celui qui aura fait le rapport attachée aux lettres de requête Civile, with their reasons in support of it, and their signatures thereto.—

2. They then applied to the Chancellor to obtain lettres en forme de Requete Civile, addressed in the usual manner to the Judges.—

3. There was then a deposit, or consignation, of 300 livres as a fine to the King, and 150 livres to the adverse party, before these lettres could be confirmed, or enterinées.—

4. When the lettres were enterinées, the party was then allowed to proceed in the usual course prescribed for the instruction of a Cause—

Still however this had not the effect of staying the execution on the Judgment complained of—

But in our Courts none of these formalities are observed or considered as necessary, the party having right finds the doors of Justice open, and whether he forms his complaint in the shape of a Requete Civile, or of an Opposition, if the grounds of it appear sufficient, has not been considered to be material, and in following this Course we comply in a great measure with the declaration du Roi au sujet de Requetes Civiles et d'Opposition of the 22d April 1732, made for Canada, by the 8th art. of which it is provided — "Toutes les simples requetes qui seront "presentées au Conseil Superieur pour revenir contre les "arrets de la qualité enoncée en l'article Six de ces — "présentes, seront reputées Requetes Civiles, et comme

"telles

" telles assujetiés à la consignation d'amende et autres
" formalités expliquées au dit article Six de ces dites presents
" nonobstant, qu'au lieu de leur donner leur veritable
" nom de Requetes Civiles, les parties, ou leurs procureurs
" leur eussent donné celui de requete d'opposition, de
" revision, de rapports, d'arrets ou autres".—

Hitherto the Court has adopted no particular course of proceeding on a Requete Civile, and it has occurred in practice that complaints against Judgments have been urged in the form of opposition, and a revision thereof demanded in consequence—as in the Case of Gagnon v^s. Metras, and Metras oppos^t.—the Court upon this opposition entertained no doubt as to the power they had to revise and correct their Judgment, had there been sufficient grounds for it.—

As to the grounds for revising the Judgment in this Case, the Court thinks, that the dol personnel of the party is alone sufficient,— they therefore over-rule the exception taken by the Plff to the Opposition and admit the parties to proof of the facts therein contained.—

Friday 18th Febr^y 1825.

Present

Ch. J. Reid, & Justices Foucher & Pyke

Blackwood

Guy Val

Friday 18th Febry 1825.

John Blackwood
v.
Joseph Guy, and
Louis Guy.

Action to be subrogated in the rights of Jos. Guy. and of account agt. Louis Guy.

The declaration states, that by Judgment rendered in the Court of Kings Bench at Montreal on the 20th October 1806, the Plaintiff obtained condemnn against the said Joseph Guy for payment of a sum of £1106, 5, 8 Cy with interest thereon from 1 Oct. 1805 and Costs of suit taxed at £16, 18, 1, which said debt interest and Costs are still due and unpaid by the said Jos. Guy to the said pltff. — That the said Pltff as a Creditor of the said Joseph Guy is well founded in demanding that he be subrogated in the rights of the said Jos. Guy, that he may have and obtain the amount of his said debt, interest and costs out of the monies for which the said Louis Guy is accountable as hereinafter mentioned. — That the said Jos. Guy as legatee of the late Pierre Guy and Marie Josette Herrew his father and mother, is proprietor of an undivided fifth part of certain Real estates which belonged to the Community that subsisted between them. — That since the decease of the said late Pre Guy, the said Louis Guy hath held and possessed the said fifth part or share of the said Jos. Guy in the said real estates, consisting of four several lots and parcels of land as mentioned and described in the declaration. — That the said Louis Guy is accountable to the said Jos. Guy for one fifth part of all the rents issues and profits of the said real estates which have been by him so had and received since the day of the death of the said late

late Pierre Guy, vist. 17 Janv. 1812, amounting to a sum of ten thousand pounds. — That the said Louis Guy never having accounted to the said Jos. Guy for the said rents, issues and profits, but having unjustly & wrongfully appropriated them to his own use, the Plaintiff by being subrogated in the rights of the said Joseph Guy will be entitled to obtain a Judgment of condemnation against the said Louis Guy to render an account of the fifth part or share of the said rents, issues and profits, and to pay to the said pltff a sum of two thousand pounds, or such other sum as shall appear to be due by the said Louis Guy to the said Jos. Guy for the Causes aforesaid — and the said Louis Guy now refusing to render to the said Plaintiff the account aforesaid — he therefore concludes, That by Judgment of this Court he the said Plaintiff be declared to be subrogated in the place stead and rights of the said Joseph Guy against the said Louis Guy for the matters aforesaid to the full amount of the aforesaid debt interest and Costs, and thereupon that the said Louis Guy be condemned to render account to the said Plaintiff of one fifth of the rents, issues, and profits of the said real estate so held and possessed by the said Louis Guy, and to pay to the said plaintiff the amount thereof or to the full extent of the aforesaid debt interest and Costs and in default of rendering such account that the said Louis Guy be condemned to pay to the said pltff the said sum of two thousand pounds with interest and Costs of suit. &c

Plea of Peremptory Exception — That the said Joseph Guy is not, nor was he at any time, proprietor of any undivided part or share of the several lots of land mentioned and described in the declaration of the said Plaintiff. — That the said late Marie Joseth Hervieux by her last will and testament bearing date the 4th June gave and bequeathed to the said late Pierre Guy her husband, the enjoyment during his lifetime of all the property moveable and immoveable she should hold or be entitled to at the time of her decease, and after the decease

of

of the said Pierre Guy, did give and bequeath all the said property to the said Louis Guy Etienne Guy, Joseph Guy, Marie Louise and Marie Josette Guy, the children of her marriage with the said Pierre Guy. That the said Marie Josephte Herviews died at Montreal on 12 June 1785. — That in the year 1805 the said Joseph Guy left this Province and has been absent therefrom ever since. — That the said late Pierre Guy on 31 Dec. 1811, made his last will and testament, and amongst other things did therein and thereby order and direct, that all the real estate belonging to him at the time of his decease should be divided into five equal portions, and one portion thereof should belong to each of his children the said Louis, Etienne, Marie Louise and Marie Josette Guy, and as to the share of the said Joseph Guy, the said Testator gave the enjoyment thereof to him the said Joseph Guy during his lifetime, and the property to his children — and did further order and direct that the rents issues and profits of the said portion or share of the said Jos. Guy should not be liable to be stopt or seized by his creditors, nor be by him transferred or conveyed away, the said Testator intending that the said issues and profits of the said fifth portion or share should remain entire for the maintainance and subsistence of the said Joseph Guy. — That the said Pierre Guy died at Montreal on the 7th January 1812. — That on the 30th January of the same year, Jacques Herviews was duly appointed Curator to the said Joseph Guy, as an absentee. ~~That in the month of February of the same year.~~ — That in the month of February of the same year an Inventory was made and immediately after was a Sale of all the moveable property left by the said late Pierre Guy. — That on the 24th April 1812, the said Louis Guy, Etienne Guy, Marie Louise Guy, and Marie Josette Guy, being all of age, as well as the said Joseph Guy then absent, ~~and~~ being desirous to proceed to a Sale by licitation of eleven different parcels of land left as well by the said Pierre Guy as by the said Marie Josette Herviews, as by Elizabeth Guy

their

their aunt, of which the said Jos. Guy was legatee for one fifth part, inasmuchas some of the said lots could not be divided, and the others, not without breaking them into too small lots or shares so as to diminish their true value and the said Jacques Herviews, Curator to the said Joseph Guy not being able to prevent the licitation of the said property, he the said Jacques Herviews in order to prevent expence presented a petition to the Judges of the said Court praying to be authorised in his said capacity of Curator to concur in the sale to be made by licitation of the said lots of land, according to the laws usages and customs followed and observed in this Country since its establishment and in all the Courts of Justice therein — That on the 24th April 1812. the said Jacques Herviews in his capacity aforesaid was authorised upon his said Petition, by The Hon. P. d. Panet then one of the Judges of the said Court, upon the advice of the relations and friends of the said Jos. Guy duly homologated, to sell jointly with the other heirs of the said late Pierre Guy and Marie Josette Herviews and Elizabeth Guy, the said said real property, after three publications at the church door of the parish where the said property was situated during three sundays successively, and that the monies arising from such sale, after payment of the debts, to be equally divided among the heirs and legatees of the said late Pierre Guy Marie Josette Herviews and Elizabeth Guy, and the share of the said monies reserved to be paid to the children born and to be born of the said Jos. Guy, to be placed out and secured according to the intentions of the last will and testament of the said late Pierre Guy. — That the sale of the said real property was advertised in the most public manner and notices thereof posted up in the usual places in the parish of Montreal where the said real property is situated and by advertisements inserted in the Gazettes and public papers. —

That

That the said Immoveable property have been put up to sale and cried at the church door of the parish of Montreal to be adjudged to the highest bidder, during three successive Sundays, viz: the 3. the 10th and 17th Day of May 1812, the said Louis Guy became the purchaser of four of the said lots or parcels of real Estate, (as mentioned in his plea) for the sums of money and prices therein mentioned, and of which the said Louis Guy hath rendered an account in the partition made of the said successions That long before the institution of the present action the said Jacques Herviews had received the fifth part or share belonging to the said Jos. Guy in the said monies arising from the Sale of the said Immoveable property, in order to be placed out for the benefit and advantage of the said Joseph Guy.— That last February Term the said Pltff instituted an action in this Court against the said Jacques Herviews, as Curator as aforesaid, demanding that he should render account to him the said Pltff of the monies he the said Jacques Herviews had and held in his hands belonging to the said Jos. Guy, and to pay out thereof to him the said pltff the aforesaid debt, interest, and Costs. and which account the said Jacques Herviews was by Judgment of the said Court of the 20th Febry. 1821, condemned to render to the said Pltff— That in compliance with the said Judgment the said Jacques Herviews in the month of March after did render to the said Pltff— an account of all the monies in his hands belonging to the said Jos. Guy, proceeding from the Sale of all the property moveable and Immoveable left by the said Pre Guy, Marie Josette Herviews and Elizabeth Guy as aforesaid, as appears by a copy of the said account so rendered herewith produced.— That the said Louis Guy by virtue and in consequence of the sale and

adjudication

adjudication so made to him of the aforesaid four lots of the said real estate, hath become the sole and legal proprietor thereof, and is founded in saying that the said Joseph Guy was never proprietor of any part thereof, and that by reason thereof the said plaintiff cannot have or maintain his action aforesaid against him the said Louis Guy. 1st Because the said Jos. Guy was never proprietor as aforesaid of any part of the aforesaid lots of land. 2d Because he the said Louis Guy having become the proprietor of the said four lots of land by virtue of the sale and adjudication as aforesaid, is not bound to render to the said Joseph Guy nor to his Creditors any account of the rents issues and profits thereof. 3d Because the said Jacques Hervieux as Curator as aforesaid having received the part or share of the said Jos. Guy in the monies arising from the sale of the said several lots of land, the Creditors of the said Jos. Guy have no claim to make against the said Louis Guy in this behalf and therefore concludes that the action of the said Pliff be dismissed with Costs — The said Defendant by further plea denying all the facts stated in the Plaintiff's Declaration and their sufficiency in law to entitle him to have or maintain his action aforesaid. —

On this plea issue was taken by the Plaintiff as well on the facts as on the law. —

The parties having been heard on matters of law were ordered to proceed to proof on the issues of fact before adjudging thereon. —

At the enquete the Defendant gave in evidence the different acts, referred to in his plea, and also produced and filed an extract from the Registers of the proceedings had before the Intendant & other Judges in the Jurisdiction of Montreal prior to the Conquest, of a variety of cases wherein Tutors and Curators had been authorised by the Judge to sell real Estate, under different modifications

also

also similar extracts of a similar authority given by the Judges since the Conquest down to the present time.

The Cause was subsequently argued on the 14th June 1824 –

Rolland for the Plaintiff – The Plaintiff in this action, as being subrogated in the rights of Joseph Guy his Debtor, claims the rights of Joseph Guy in the Community that subsisted between his mother and father now deceased – The Defendt. Louis Guy is now in possession of a part of the property of that Community in which Joseph Guy had an undivided share – The Defendant claims the whole of this property as having purchased it under a Sale by licitation to which a Curator, elected to represent Joseph Guy as an absentee, had acceded – The Defendant by his plea states, that the Curator was authorised by the Judge to accede to this Sale, the validity of which is now contested, and upon which the Court has now to determine – That Joseph Guy could not be legally represented by a Curator in this Case, nor could a Curator dispose of his Estate in this manner – There can be no Curator appointed by the Judge but in two Cases, 1st for the regularity of any process to be served on the absentee – 2d. for the administration of his property, and 3d a Curator to a vacant Estate – but in no Case can a Curator be authorised to alienate the property of absentee of which he has the administration, otherwise the greatest injustice might be done, and more especially to Creditors. –

Mr

Mr Papineau for the Defendant – The Sale made in this Case is valid and sufficient under the usages and Customs of the Country and the constant practice of this Court – In cases of Licitation each tribunal in France and in this Country, had its particular usages and course of practice – those of the Chatelet of Paris are not, nor never were observed in this Country, and there is no law or text of the Custom in regard of licitations, which are – regulated differently in different Jurisdictions – according to the mode and manner adopted for administering the law. cites. 2. Pigeau. p. 421. Edit. 1787. The usage at the Chatelet de Paris was introduced under a particular regulation made by that Court su Actes de Notoriété, p. 321. and the reasoning there held applies to this Case, and the uniform practice in Montreal since the year 1745, as stated in the Extracts filed, sufficiently establish the rule in this respect – The reasons for directing the Sale to be had before the Court at the Chatelet were owing to the great number of parishes and Churches within its jurisdiction, at all of which the notices of Sale could not be given, and if given only at one or a few would have been insufficient, the Sale was therefore directed to be had before the Court – The State of this Country and of this district does not require that this Course should be had, and different usages have been observed from the earliest establishment of the Country, and the Sales of this kind have been made at

at the Church door of the parish where the property is situated — this usage so long continued must form the law until changed by the Legislature. Jer. Dic. vo Coutume. — Repre vo autorités. — cites the Case of Pothier, in this Court where an action was brought by him against his neighbour in the St Lawrence Suburbs in order to compel him to make a mur de clôture as a separation fence between their respective properties, agreeable to the Custom of Paris, but this Court on the evidence laid before it that according to the Custom followed and observed in this Country, wooden fences only were used, rejected the demand for a Stone wall fence and gave Judgment for the wooden fence — The case of licitation is more favorable in this Case, than if it had been property held par divis by the Curator, because parties cannot be held to remain in Community together contrary to their will or their interest — The course followed in this Case is more favorable to Jos. Guy and to his Creditors than if he had been present, as in that case a private licitation might have been made among the Coheirs without the participation of Strangers or Creditors, whereas a Sale at the Church door was public and all the world admitted to bid on the property. 2 Pigeau. 412. Partage à l'amiable where Cases are referred to where minors were concerned.

The Licitation here was judiciaire, and such as was constantly followed in this district and therefore valid in law — the effect of this licitation is, that Joseph Guy is considered as never —

having

having had any part in the property thus disposed of, as the adjudicataire is alone considered the Sole proprietor when a Coheir and as taking his title to the whole from the person in whose succession the Estate was found — Rép^re — V^o Licitation p. 540. 544. 5. Poth. Vente N° 630. 637. 8. 9. & 640.—

Bedard for the Defend^t The plaintiff in this cause instituted another suit in this Court against the Curator of Joseph Guy, in which a demand was made of an account of the property of the said Joseph Guy in his hands — in this suit an Interlocutory Judgment was rendered calling on all the Creditors of Joseph Guy to intervene and to support their respective claims against him, in order to proceed to a division among them of the monies the Curator declared to have in his hands belonging to the said Joseph Guy — this suit is still pending, and as the Plaff has claimed the monies in the hands of the Curator part of which arose from the sale in question he cannot have the present suit ag^t the Defendant for another claim on the same property. — That the sale here made was according to the usual formalities observed in such Cases, by notices and publications at the Church door — refers to the decisions had and forms observed under the French Government, where all such sales were made by simples criées — and the usages of Canada were confirmed by the British Statute of 1774 — By constant usage a Curator is appointed to absentees, and is authorised to proceed to the Sale of real estate held by indivis with such heirs as are present, and in such a

Case

case where the parties are present or represented and consenting there is no necessity for any proceeding being had before the Court — had there been any substitution on the property, this might have been requisite — otherwise the parties might have proceeded à l'amiable before a Notary. 2. Bourg. 525. Nº 11. & 13.—

Mr Rolland in answer.— A Curator cannot alienate the property of the person he represents and a voluntary licitation of such property can be of no avail — a Judgment of the Court was necessary and proceedings had thereon to effect a licitation forcée — and the Court itself could not have ordered a licitation forcée, without having first obtained a report of Experts to establish that the property could not be divided. cites. Repe vo Vente.— The Curator is merely an administrator and cannot sell the realty — There is a great difference between the Curator to an interdit and to an absent — the latter is merely an administrator and has no further authority.— As to the usage set up by the Defendant it is of no avail — the cases cited and extracts referred to are no Judgments of a Court, but mere ex parte proceedings at the Judges Chambers — The Case of minors and absentees even is different — In the Case of minors the sale of their property is allowed under certain formalities on an avis de parens — not so with regard to absentees, because there can be no such thing as an assemblée de parens to authorise the sale of the property of an absentee — The absent always remains seized of his property, which can never be disposed of by the Curator, nor can he be divested

thereof

thereof but by Judgment of law — It would be dangerous to allow to a Curator the power of alienation in a Case like this — The absentee may have withdrawn himself from the Country only momentarily he may remain absent only a month or some short space of time, his return is always uncertain, but if his property can be alienated in this way, without his consent the moment he turns his back the greatest injury and injustice would arise — As to the Minor, he is entitled to a restitution in case of lesion, but there is no restitution for the absent, nor any law to authorise it — The absent may have an agent or attorney to watch over his interest, and yet if a Curator can proceed in this way, he may sell the property without the knowledge of the absent or of his agent. —

The authorities cited in support of what has been a usage which has prevailed here of authorising Curators to sell real estate, are of no avail, for altho' there may be different usages in different Jurisdictions, yet the Judgments which recognize them must be valables — In this Case, to admit such a usage, would have the effect to destroy the law of the Country by an ex parte proceeding, and particularly such acts as those referred to, being had in a time of ignorance when the laws were not so well known nor considered as at present. — In the Case before us the property was evidently susceptible of division, but no division was made and had an action been instituted in order to effect a licitation, the Court could not have maintained it, as the Report of Experts must have shewn that the property was susceptible of division — although the forms of proceeding were different in different Jurisdictions, yet is

laid

laid down as a principle, that there must be no nullité dans la procedure et Jugement, such as in this Case — This Court has no legislative power and cannot by its Judgments establish that as law which is not law, or settle that to be usage in the Country which is no usage — and what is this usage ? merely a usage in the district of Montreal which cannot be admitted as the usage of the Country, and set up as a principle of decision. — Cites 2 Pigeau 414 - where a partage à l'amiable is spoken of, where certain formalities were requisite to be observed with regard to an absent. — The injustice done to the Creditor here is manifest as by making this kind of contrived sale of the property of his debtor instead of making a division of it, as might and ought to have been done, the Creditor is deprived of his mortgage — and of all further recourse — In the exhact of Cases filed by the Defendant there are very few in which a Curator to an absentee was authorised to sell real property, and certainly not enough to constitute any usage on the subject. — Where an absentee has an agent or attorney to represent him there can be no Curator appointed to him, for in this Case he never loses his rights though absent — he inherits, he retains his property, and can dispose of it as much as if he were present — 1 Bourg. 802. — Denizt. v.o Licitation — here Licitation is considered as a species of vente forcee, to effect which certain formalities must be observed — here there was no demande made en Justice for such a Sale, no necessity for it, nor any report of Experts, to shew

that

that the property could not be divided, nor any thing that could compel or justify the consent of the Curator to such a Sale. —

Papineau in reply — It is not surprising that there but few Cases in the Extract filed, relating to the Sale of the property of absentees, as but few occurred but in all the Cases which did occur the course of proceeding was the same — There are 13 Cases in this Court between 1795 and 1805, in which Curators were authorised to sell the property of absentees. That absentees, like minors and interdicted persons are considered to be under the protection of the law and of the Judge, who is the person to determine what is most advisable to be done in all matters regarding them or their property — That it was not necessary that there should be physical impossibility of division of the property, it was enough if a division would have rendered the whole of less value — The sale here must be considered to be judiciaire, as being effected under the authority and direction of the Judge which has been strictly complied with. —

Judgt.

The question here submitted to the Court, and upon which this action turns, is, whether the Curator to an absentee could be legally authorised by the Judge, either to demand, or to consent to the alienation of the

real

real estate in which the absentee had an interest.—

In considering the power and authority of a Curator over the property which he administers, it must be viewed in the same light as that of a Tutor over the property of the minor — Tutors and Curators are by law strongly assimilated, and the only distinction appears to be, that the Tutor is appointed principally to the care of the person, the Curator to that of the property, although there are instances in which we find Curators appointed to the person also — as in the Case of a minor emancipated — mad and insane persons, prodigals — & some others — These Tutors and Curators derive their authority from the same source — they must regulate their conduct by the same principles, and the acts done by the one or the other must be equally warranted by those principles — It is necessary to establish this similarity of right and authority in the Tutor and Curator, because in the argument held by the Counsel for the pltff, a very material distinction was attempted, namely, that the Tutor is vested with a power over the property of the minor greater than can be granted to a Curator over what he administers, in this, that under the advice and opinion of an assemblée de parens, the Tutor may be authorised to alienate the real Estate of the minor, but that a Curator, more especially to an absentee, can acquire no such right, nor can he be authorised under the opinion of an assemblée de Parens, to alienate the Estate of an absentee, or in any manner to affect the same, as the absentee alone has this right, nor can his absence divest him of it.— But the appointment of a Curator to an absentee must be considered as extending to

his

his property as well as to his person in all matters affecting the same, for it regards the public interest as well as the security of individuals that the property of an absentee should be protected and secured for his benefit — Tutors and Curators must be alike considered as administrators in the eye of the law, and as such, if alienation of the property committed to their charge can be authorised by the Judge in the Case of the Tutor, it must be equally lawful in the Case of the Curator — both hold their appointment and are warranted in the acts they do, by the authority of the Judge, and the granting of this authority is founded upon Causes either of necessity or of utility, either upon the principle of preventing an injury to, or promoting the advantage of, the minor, the absentee, or of the persons interested in the Estate under such administration — All proceedings to be had in regard of the Real Estate in the hands of a Curator, whether by Creditors or others, must be directed against him as the fictitious proprietor, he possesses loco domini, and is liable to all actions in regard thereof, to which the absentee himself would be liable, were he present — see the distinction, between a Curator, and a Commissaire, and the power vested in the former, as established by — Dumoulin — Fr. Gr. Cour^re — 1. Vol. p. 629. Glose unique. N° 2. and Denizt. in his Actes de Notorieté, p. 309. in speaking of the course of proceeding by Creditors against a Curator, he says, — "dans l'usage actuel c'est le Curateur qui

"fait

" fait la vente en presence des Creanciers, parceque
" la propriété reside fictivement en sa personne,
" c'est en son nom, et à sa requete que tout se fait."

Curators we find are appointed in a variety of instances besides those above mentioned, and and among these we find the Curateur aux absens, whose functions and powers in regard of the property committed to their charge, seems to be the same as in every other Case where a Curator is appointed, the law makes no distinction. —

Duret. Reg. du Droit Cout. ch. 20. p. 75. 6.

1 Desp. Tit. 16 Sec. 1.

1. Fer. Ge. Comv on art. 34. p. 630. & 635. §. 2.—

The proceeding had in this Case at the instance of the heirs of the late Mr Guy, was not to establish a debt against the Curator, nor to effect the alienation of the property of the absentee for the payment of a debt, but to liquidate the rights of Coheirs in a joint estate, and although the interest of Creditors might be concerned, yet the interest of the family was the acting principle upon which the proceedings were grounded. — This proceeding on the part of the heirs the Curator could not prevent, because the law gave them the right, and his application to be authorised to accede thereto appeared to be grounded on an equitable motive, the saving of expence to the Estate which he administered — in such a Case it would seem that a Curator might well be authorised to consent to the licitation in question under the advice and opinion of an assemblée de parens, confirmed by the Judge. Repv v°. Curateur. p. 194. says, "Si l'acte de Curatelle
" s'etendoit en general à toutes sortes d'affaires, sans
" aucune explication particuliere, le Curateur n'auroit
" de pouvoir suffisant que pour les affaires ordinaires,

" Car

" car s'il s'agissoit d'un mariage, ou d'une alienation
" de fond, le Curateur ne pourroit y consentir, sans avoir
" pris auparavant un avis de parens" — The same principle we also find established in 2. For. Gr. Comre art. 151. p. 909. observ. de Mr +++ where a distinction is taken between the power of the heritier par benefice d'Inventaire over the property of the Succession, and that of the Curator — the former can sell, but the latter cannot, sans l'autorité de Justice — and the same principles may be found in many of the authors that every Curator may sell when thus authorised.

Domat. 1re partie liv. 2. tit. 2. sec. 1. art. 13. —
Ibid. sec. 2. art. 2. & 3. —

The question now is, how far the proceedings to which the Curator acceded under the authority so given to him, were legal and regular so as to effect the licitation and sale of the property in which the absentee had an interest and a share — as far as this Court is enabled to judge in the present action, they are of opinion that the Licitation in question is legal and sufficient — Certainly if we regard the practice followed within the Jurisdiction of this Court, and in the Courts in this district, as well before as since the Conquest of the Country, we have strong and direct ground to support this opinion — but it is said, that this mode of licitation is contrary to the law, as we find it laid down in the French law books, that the proceedings in this Case ought to have been had under the eye of the Court, and the adjudication to have been made by their Judgment — the objection in itself however seems captious, and rests in a point of form merely, for whether the adjudication was had before the Court, or made by the authority of the Judge in any public place and after due notice given, as directed by him, seems in point of substance of little consequence — Are not all the Sales of Minors property made in the same manner at the Church door? — And the same objection may hold with regard to them, as authorities are not wanting in the same French Law books to say, that no Sale of this kind is valid, even when done under the eye of the Court

unless

unless made by decret.— When the Customary law of Paris was introduced into Canada, it was directed to be followed and observed, "en autant qu'il se pourra" in so far as the State of the Country & circumstances would permit — of these circumstances the Judges of the day were alone competent to determine, and what they then settled must have been upon good consideration; nor is it for us at this day, under pretence of knowing better or having made new discoveries in the law, to unhinge what has been so long practised in this respect — We must certainly believe, that the men who first settled this Course of proceeding, were not ignorant of the Laws of France, and of the practice that obtained in the Courts to enforce them — some of these men were born and educated in that Country, and must be supposed to be as well acquainted with the laws and usages thereof, as we can pretend to be at this day — We cannot presume, that they could have introduced a practice contrary to law, or that those who followed them, would have continued a practice so introduced, had it been considered in that light — On the Contrary we must look to what has been so established, as forming part of the laws usages and Customs of Canada, and as such only, have they been confirmed to the people of this Country as a rule of decision of Civil rights, by the British Stat. of 1774.

But allowing we were to take up the laws of France and the practice which obtained under them as laid down in the books referred to, must we consider the Sale here made, and the formalities used to effect it, as a mere nullity, and of no avail whatever? — Certainly not. — Do we not find instances in those Books where Sales have been confirmed by the Courts, even when the prescribed forms of alienation by administrators have not been complied with in every point? We certainly do. and ought we not therefore to enquire how it comes, that the Courts can depart from an established rule of law and confirm by their Judgments what is a nullity. On this enquiry we shall find, that the formalities

prescribed

prescribed for selling the property under the administration of a Tutor or Curator, such as contended for by the plaintiff here, are not established by any article of the Custom, nor introduced by any declaration or Ordinance declaring any aberration therefrom a nullity, but were introduced by some arrets of those Courts, called, Arrets de Reglements, particularly of 28th Febr. 1622, and 9th April 1630, for the better securing the rights of minors, absentees and others in their property, and to prevent injurious or collusive sales thereof being made: We must admit, that these regulations were highly judicious and must have been beneficial, and numerous Judgts have been given confirming their utility — Still however as being ~~a~~ regulations adopted by the Courts, we find them subject to the equitable Controul of those Courts, and sales have been confirmed by them in many instances, although the strictness of formality established by those arrets have not been complied with. — We find this strongly marked by an observation in the Repse Vo Mineur. p. 521. & 522, where the writer lays it down, that these formalities may be departed from, when the property is of small value, and the reason given is a just one — "Comme les formalités n'ont été introduites que "pour l'avantage des mineurs, ce seroit abuser des regles "que de les employer dans ces sortes de Cas — les frais — "absorberoient le prix de la chose, et l'on tourneroit contre "eux ce qui n'a été etabli que pour leur utilité." — We see in this a reason why the Courts may, and do depart from the rule — Yet if the rule were peremptory, and any departure therefrom a nullity, how could the Courts in this instance, or in any instance, depart from it? We must therefore admit, that there existed over these regulations an equitable power of Controul in the Courts; and if in this instance, smallness of value would permit a departure from the rule, other instances may also occur where this equitable power of the Court may interfere upon equally just grounds, for if it can be done in one instance, why not in every instance, where the circumstances are equally strong. —

Authorities

Authorities in the particular case before us, are difficuel to be found, as questions touching the validity of Sales by a Curator are rarely to be met with in the books, sufficient however may be found from analogy and principle to establish what is here contended for.—

We will first consider what is said in the 344th art. of the Custom, and what the Commentators have remarked thereon, as being in some respect applicable to this Case— The article is in these words—"L'Heritier "par benefice d'Inventaire, ou Curateur aux biens— "vacans d'un difunt, ne peut vendre les biens meubles "de la Succession ou Curabelle, si non, en faisant publier "la vente devant la principale porte de l'Eglise de la paroisse "ou le difunt demeurot à l'issue de la messe paroissiale "et delaissant une affiche contre la porte de la maison "du difunt." By this article the heritier par— benefice d'Inventaire, and the Curateur aux biens— vacans, are put on the same footing, and the reason— given by Ferriere is,—"que selon l'usage l'heritier— "beneficiaire n'est reputé que comme un Curateur à "une Succession vacante, il peut y renoncer en rendant "Compte du Contenu en l'Inventaire et de l'administration "des biens"— They both possess loco domini, but with this difference, that the heritier beneficiaire, peut vendre "les biens de la Succession, pourvu qu'il en use comme un "bon pere de famille" but the Curator cannot do this without l'autorité de Justice"— The Curator therefore with this autorité de Justice, stands in every respect in the same situation as the heritier beneficiaire, as to the power to sell.—

4 Gr. Comrs. p. 1170 Glose Un. No. 4.—

2 Gr. Comrs. art. 151. Observ. de de Camus p. 909. No 8.

This being premised, let us see what the— Commentator further remarks on this article—344— he observes— Cet article ne regle point les solemnités qu'il faut garder en la vente des Immeubles par un heritier par benefice d'Inventaire— D'ou vient qu'on fait cette demande, savoir, s'il est necessaire d'y garder les solemnités du decret?— Plusieurs l'estiment ainsi— Je suis neanmoins d'avis contraire, et

crois

" crois, que mon opinion est d'autant plus favorable
" qu'il est notoire, que les frais qui se font aujourd'hui
" aux criées d'un heritage, en absorbent la plus grande
" partie. — Aussi cette opinion n'est-elle pas destituée
" de raison, vû que c'est une regle de droit, que les —
" solemnités surabondantes ne sont jamais absolument
" desirées, si elles ne sont particulierement prescrites par
" par les Loix, ou qu'elles ne soient fondées en une necessité
" comme absolue. — Or en l'espece proposée, notre —
" Coutume, ni aucune Ordonnance ne prescrivent point
" cette solemnité, et d'ailleurs on peut pourvoir par une
" autre voie à la Seureté des Créanciers, savoir, en vendant
" les Immeubles publiquement en Justice ou par forme de
" licitation. — Car pour lors, l'heritier ne pouvant être
" d'intelligence avec l'acquereur, la vente ayant été —
" publique et en Justice, les Créanciers ne peuvent pretendre
" contre lui, ni contre l'acquereur aucune plus valüe des
" Immeubles qui auroient été ainsi vendus". — If therfore the heritier beneficiaire, who while managing under the benefice d'Inventaire, and as such, only an accountable administrator, could sell the Real Estate of the Succession in this way, so we may consider, that the Curator when specially authorised, can also sell, for he is also an accountable administrator —

On the N°5. on the glose — Mr Ferriere further obsevs,
"La Coutume ne parle point des Immeubles, à l'egard
" des quels il faut observer ce qui est porté en l'article —
" 353 de Celle d'Orleans, qui porte, "et quant aux Immeubles
"" n'en peut faire vente, si non en gardant les solemnités
"" requises en matiere de Criées d'Heritage". — neanmoins
" on se contente souvent de faire les ventes & adjudications
" apres trois affiches et publications, pour eviter aux frais des
" criées — C'est le Sentiment de Mr Ricard, qui dit, que les
" heritages etant ainsi vendus, les Créanciers ne peuvent
" pretendre contre l'heritier beneficiaire, ni contre les acquereurs
" la plus valüe des Immeubles ainsi vendus". —

Such are the opinions held respecting the formalities of alienation, not established by any article of the Custom or any Ordinance. — We shall next see, how far this principle has been applied in particular Cases by the decisions of the Courts. —

In

In the arrets de Soefve 4. Cent. ch. 39. p. 399. we find that a Licitation among Coheirs was declared good and valid, although some of the formalities required were not observed, and although it was there objected — Que la vente dont etoit question n'etoit point une veritable licitation, les formalités qui la doivent preceder n'ayant point été gardées, vu qu'il n'y avoit eu aucune visitation faite des lieux par Experts, pour savoir s'ils pouvoient commodement se partager et diviser, ni meme aucune ordonnance du Juge portant que la terre dont etoit question seroit licitée — et que d'ailleurs ladite terre n'avoit été — adjugée à aucun des Coheritiers entre les quels se faisoit cette pretendüe licitation, mais au mari de l'une des Sours coheritieres, qui etoit a vrai dire, une personne etrangere de la famille" — Yet the Court under the circumstances of the Case, confirmed the licitation. —

The next and last case we shall cite is an Arret from Augeard — 1 vol. p. 254. N°. 102. — The question there agitated was, — Si une femme, qui a été interdite pour cause de demence, et qui dans la suite est rentrée dans son bon sens, et dans la jouissance de ses biens, est restituable contre l'alienation faite d'un de ses Immeubles par son Curateur, en consequence d'un avis de parens et une Sentence de Juge? — In this Case, the Juge in homologating the opinion of the relations, ordered simply, "que la maison seroit vendüe " apres trois publications, au plus offrant et dernier — " encherisseur", without any other formality. — The validity of this Sale was attacked and strongly contested by the woman, Anne Bertin, and her second husband, and the general reasons there alledged against Sales so informally made, have been urged in the Case before us, — nevertheless the Court confirmed the Sale — It is true, there is a circumstance attending the Case, which no doubt greatly influenced the opinion of the Court, which was, that this woman, had for two — years after she was restored to her reason, received the interest of the money on the Sale from the purchaser, which was considered a confirmation of it; but it

is

is to be observed, that this is not the only reason given by the Court in its Judgment confirming the sale — there are two others, — namely, that the parties were in good faith, and no injustice or injury appeared to have been done in making the sale — and also, that in setting aside the Sale, the Court would be making way for another law suit between the parties, from the great improvements made on the property by the purchaser — Reasons which might strongly be urged here, after a possession by the Defendant and other individuals of nearly ten years under the sale made to them before the present action was instituted. — Under this authority alone we could maintain the Sale made by licitation among the Coheirs here, which has been made publicly, after notice, and according to the order of the Judge, and no injury or injustice has been made to appear, or has even been alledged against the sale so made. —

But another point occurs in this Case which it is material to notice — The action is brought upon the principle that the whole proceedings touching the Licitation and Sale of the property in question, the petition of the Curator — assemblée de parens — their opinion — the homologation — thereof — the order of the Judge thereon, and the sale made in consequence, were nuls de plein droit, and required no notice to be taken thereof by the plaintiff. — But whatever reason there may be to rescind these proceedings, they cannot be considered as ipso facto void, because the Curator, as administrator for the absentee, held his appointment as a public officer from the Judge, was subject to his authority and justified thereby, in the acts of his administration, and although what the Curator did under that authority, might be wrong as to third persons, yet

it

it was not ipso facto void, as there exists no law which declares it so — it could not be considered as a — nullité de Coutume, ni d'ordonnance, as there is neither Customary law nor Ordinance on the subject, at most it could be considered as a nullité de droit, which gave room to an action to have the proceedings set aside and annulled, if such nullity had been made to appear — This is well exemplified in the Case cited from Augeard, where although the power of the Curator to sell was contested and denied in law, yet this was done under a revision of the proceedings under which the Sale was effected, in order to have them set aside and annulled, they were not there considered, nor could they be taken to be nuls de plein droit, nor can they in this Case — the law will presume the whole to be legal and right until — contested, and the grounds of the nullity declared — But in this Case no nullity is alledged nor conclusions taken to that effect, and none can be adjudged. —

Dens. v° nullité
Nº 2. 3. 5.

Action dismissed with Costs. —

Nº 1145.

Grattons. —
Roi. —

On Defendants motion for a new trial.

The grounds of this motion were 1st Because the Court misdirected the Jury — 2º Because the Court refused to receive evidence of certain facts — material to the defence — namely the facts which took place previous to the 11th March 1824 as to the relative situation of the parties before the trespass and false imprisonment complained of — and also of the acts and agreements made and executed between

the

the parties, on the 24th March and 1 May 1824, which consisted of an act of Cession made by the plaintiff to his Creditors, and the appointment of the Defendant to act as Trustee on behalf of those Creditors, — and 3dly That the damages were excessive

On the first ground — there is no room for the application for a new trial, as the direction of the Court was consistent with the evidence adduced and so admitted — this objection we must consider as more pro forma, than founded upon any real ground. — On the second ground, the Court was founded in rejecting the evidence offered as substantiating the plea of Justification, because the facts preceding the day on which the trespass and false imprisonment was committed, as well as the facts which happened many days afterwards could not justify that trespass, unless it had been a release of the injury — But it may be a question how far such facts ought to have been admitted in mitigation of damages, and although they were not offered to the Court on that principle, but only as aiding to make out the plea of Justification yet it may be matter for the Court to exercise its discretion as to granting a new trial in a Case where so large damages have been given, as some of the facts offered to be given in evidence might have influenced the minds of the Jury as to the quantum of damages. — The Defendant in this Case could make out no justification, and when he found the Court against him on this point he should have offered the evidence in question on the score of mitigation of damages, and it might have been admitted — On the subject of excessive damages — certainly great latitude is allowed to Juries in cases of this kind, and the cases are rare where the

Court

Court has interfered with the verdict of the Jury on the head of excessive damages alone, unless there had been circumstances in the Case to shew that the Jury were either mistaken or prejudiced. — There is no doubt of the power of the Court to exercise a proper discretion in setting aside verdicts for excessiveness of damages, as for any other causes, the only question here is, upon what shall that discretion be exercised? — Will it not be sufficient, in a Case, where we think the damages were great beyond the measure of the injury, to say, that the Defendant had offered evidence upon a wrong principle and therefore rejected, yet if it had been offered upon the right principle it might have been admitted, and have materially affected the quantum of damages? we think this a sufficient ground in this Case to give the Defendant an opportunity of being heard before another Jury. — From the quantum of the damages it may be presumed that the Jury were impressed with the opinion that the plaintiff had been injured in his property as well as in his person and character, and therefore to have indemnified him for any loss he might have sustained in this respect, which would be irregular as there was no question of property submitted to their consideration.

Under this view of the Case the Court is of opinion to make the rule absolute for a new trial on payment of Costs. —

№ 2146.

Martigny vs Choquet

Action for recovery of Lods & Ventes on a deed of donation from father to Son. —

The declaration stated, that on the 9th April

april 1813, Louis Choquet and Josette Bissonette his wife, proprietors of three certain lots of land, one of which was in the Seigniory of the plaintiff called La trinité, made a certain act or deed, fraudulently pretended to be a Deed of Donation, but in truth a deed of sale of the said lots of land to the Defendant Jean Baptiste Choquet their Son — the said deed made in consideration, that the Defendant would pay to them the said Louis Choquet and wife during their lives a certain rente et pension viagere as therein and thereby expressed — and further that the said Defendant should pay all the debts due by the said Louis Choquet and wife up to the day of the date of the said deed — which said deed was not an arrangement de famille, nor made en avancement d'hoirie, but was a sale and made to deprive the Plaintiff of his Seigneurial rights and dues, and particularly his Lods et Ventes. — That the debts due by the said Louis Choquet and wife which the said Defendant undertook to pay, amounted to the sum of 15,000^{tt} or £625. — That the two other Lots of land conveyed by the said deed to the said Defendant, are of small value and not worth more than fifty pounds — Therefore concludes for payment of one twelfth part of the price so paid by the said Defendant to the said Louis Choquet and wife for the said lot of land being in the said Seigniory of La Trinité, that is, as well on the value of the said rente & pension viagere as of the sum of £575, for the amount of the Debts the Defendant undertook to pay as aforesaid deducting the said sum of fifty pounds as the

value

value of the said two lots of land not being within the said Seigniory —

To this action the Defendant pleaded, chose jugée — No fraud in the deed of Donation — which was merely a family arrangement on which no Lods et Ventes were due to the Plff

The parties proceeded to an enquete in order to ascertain the value of the land conveyed to the Defendant, and also the amount of the Debts he had undertaken to pay —

The Cause was argued on the 15th October last. Mr Gugy for the plaintiff — The mutation of the property in question although apparently by a deed of donation, is truly a deed of Sale, and altho' the parties are father and Son, yet this form has been adopted to defraud the plaintiff of his rights — As a genral rule no lods et ventes are due on — transactions between father and son, yet when they deal together as strangers the rule is different which is admitted by the Defendant — In regard of the alledged fraud it is not always possible to obtain clear and positive evidence of it, we must judge thereof from a variety of Circumstances, which can induce us to believe that the intention of the parties was different from what has been openly expressed — cits Tiraqueau. Glose 14. N°28. Repre vo Indices — 3 vol. Guyot des Fiefs 233 — Livonniere p. 262. — 1 Duplessis. 87 — Brunhom. 257. — Repre vo Fraude. p. 656. Id. vo Simulation. p. 324. Id. vo Lods & Ventes. p. 619. — The proof of the fraud in this case consists 1st In the omission in the deed in question to state the relationship

between

between the parties.— 2d. The value paid by the donee, is greater than the value of the land— and 3d. The Donor was under embarassed circumstances and obliged to dispose of land to enable him to pay his debts—

On the first point— The want of discription of the relative situation of the parties so common in all deeds of this kind, is evidence of concealment— In contemplating an act of Donation from a father to a son it can scarcely be believed that one of the principal motives the tie of affection between parent & child could have been omitted as the principal motive of the act— but the truth is, that there was no feeling of affection in it— there was no benefit conferred on the Defendant, it was a mere Do ut Des, it being understood that a valid consideration should be received for what was conveyed— and had the Donor alienated his property to a Stranger he could not have exacted more—

On the 2d point— The price given by the Defendt was more than the value of the land— 1st. by the stipulated annual rent— 2d. by the Debts he undertook to pay, and 3d. by an alledged legitime to be paid to his brother and Sister— The annual rent has been estimated by the witnesses at 15,000 livres the debts are proved to be 10,425. livres, and even more and taking the maximum statement from the testimony of the witnesses the debts may be estimated at 17,000 livres— besides which there appears a legitime of 2000 livres which Defendant is bound to pay to his brother in sister— making in the whole a sum of 34,000 livres which the Defendant has become bound

to

to pay, which is eleven thousand livres more than the value of the land.—

On the 3d point— The donor was constrained to part with his land, it was not a free and voluntary gift he made, but a necessary and absolute sale— The donor here was in the vigor of years, and used even to hire himself to the donee to clear new lands and let his services for hire to his neighbours— This shews that he was able to have cultivated his own land, which it was more natural for him to have done, since he was able to cultivate the lands of others— but this can be accounted for only from the load of debt the donor owed and the necessity he was under of selling his land— The Conveyance here cannot be considered to be en avancement d'hoirie, for by the Defendants marriage contract dated 4 Oct 1804 he appears to have received from the donor all he had a right to expect for his right of inheritance.— The only evidence on the part of the Defendant goes to establish the improved value of land and the genral liberality which prevails between parents and children in their ordinary transactions together.

Vigé for the Defendt— It cannot be doubted that a father may dispose of his property to any of his children upon condition of paying his debts, or upon such conditions as he shall see fit, without being liable to the payment of Lods & Ventes to the Seignior.— In the transaction before us there is no fraud, there is nothing concealed no contrivance between the parties to defraud

the

the Seignior — on the contrary the transaction is open, fair and explicit, and the plaintiff although he has made use of the word fraud in his declaration, he does not state in what the fraud consisted nor has he proved any fact to establish it. — It was not necessary in this deed of donation that the relationship between the parties should have been stated, this may be more owing to the omission of the notary than the intention of the parties, but were this necessary the general tenor of the act shews it sufficiently — By the evidence — adduced it would appear that the land was given for less than its value, and here the Defendant had three lands given to him by the donor —

By the Court —

The deed of donation in this Case is in the terms expressed in the declaration, it is however further stated in this deed, that Amable Choquet, and Christophe Lussier and Felicite Choquet his wife, appeared and consented thereto, on receiving from the Defend^r for their legitime, out of the Successions of their said father and mother, the sum of 1000 livres each. — In all the evidence adduced by the plaintiff there is nothing

to

to shew that there was any fraud used or intended against the plaintiff — nothing has been proved in this respect beyond what the deed of donation itself expresses — namely that the Defendant in consideration of that deed undertook to pay the debts of the donor and to provide him with a certain pension viagere. — It is true we have it in proof that the debts of the donor amounted to 10,425 livres and the annual pension is estimated at 15,000 livres, which would shew that the Defr. had agreed to give a sum of 25,000 livres and upwards for some lots of land which were not worth above 18 or 20,000 livres — and from this circumstance and the age and health of the donor, the alledged fraud is presumed that this was meant and intended as a Sale and not as a donation — As the Case now stands, the question to be determined by the Court is, whether such a donation, or deed made by a father to a son generates Lods et Ventes to the Seignior, or whether it is to be considered as an accommodement de famille which generates no such right. — This brings the question nearly to what we have already decided between these parties on a former suit, and in which the plea of chose jugée might now well apply — In order to establish

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a difference between the action adjudged upon and the present, it was necessary for the plaintiff to allidge fraud in the transaction which is the only distinguishing feature between the two — but if no fraud has been proved beyond what the deed itself expresses we must revert to the question above stated which we consider to have been decided by our Judgment in the former suit — we shall however again examine the authorities to shew that a donation of this description does not engender lods et ventes to the Seignior —

See — Prudhom. ch. 37. p. 257 + 259. —
Boutaric Dr. Seigr. p. 145. —
2. Fonmaur. 31. —
3 Guyot. p. 384. 393. —

It is here very evident that the parties did not treat together as strangers, for a provision is made of a legitime to the Defendts brother and sister, besides what the Defendant had agreed to pay to the donor, which gives a strong appearance of an accommodement de famille to the whole transaction —

Action dismissed with Costs. —

No 519.

Brouillet vs Adams. —

This was an action en voye de fait, for having cut away the ground close to and adjoining

adjoining the house of the plaintiffs so as to endanger its falling and otherwise causing a damage to the plaintiffs.— The Defendant pleaded in justification that he was warranted in cutting away the ground as it was part of the Kings high way, and that he the Defendant as Inspector of roads for the parish had a right to open that part of the road on which the house of the plaintiffs was built, in order to give a free communication from the front-road to the River.—

It appeared in evidence, that by a proces verbal of M^r De Rouville, Grand voyer, dated 22^d. May 1773, there was a rout or bye road laid out from the second Concession of Beloil to the River side— this bye road was in consequence made and fences erected up as far as the front road running along the river, but from this front road down to the river side, the bye road was not opened, there was merely a path way for foot passengers, and nothing had been done under the said Proces Verbal to complete this part of the route — In the line of direction of this bye road, between the front road and the river, stood the house of the Plffs which had existed there for upwards of thirty years, and no attempt had ever been made to disturb them in their possession, till the time of the trouble complained of against the Defd^t who as Inspector of highways in the parish conceived he had a right of his own authority

to

to open the communication from the front-road to the river in the same manner as the rest of the bye road had formerly been made, in doing which the ground in and about the foundation of the house in question was removed to such extent as to threaten the downfall of the house, — The question now was how far the Defendant was justified under the authority he held to commit the trespass complained of — The Court were of opinion that as far as the said Procès Verbal had been carried into execution, the Defendant was justified in keeping up the road, but that he was not warranted to disturb the possession of the Plaintiffs, who were the proprietors of the soil, until some legal course had been taken to oust them of that soil — The Procès Verbal of 1773 had never been confirmed nor homologated by any tribunal, and its operation must be limited to what had been done and submitted to under it, and if its further extension in regard of that part of this bye road which lay between the front road and the River had become necessary, it was the duty of the Grand voyer of the day to have directed the mode and manner of doing this according to the course prescribed by the existing laws, but that a subordinate Officer such as the Defendant could not of his own private authority disturb the legal possession of the Plaintiffs. — Judgment was therefore given for the Plaintiffs

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№ 281.
Grignon
vs
Lacroix.

This was an action hypothecaire instituted against the Defendant as being in possession of a lot of land on which the plaintiff had

acquired

acquired a mortgage under an obligation made by one Daunay who was proprietor of the land in 1821. — It appeared that in 1809. the Defendant then proprietor of this land, made a donation thereof to Daunay who was her son, in consideration among other things of paying to her a certain rente et pension viagere, and it was stipulated in this deed that the donee should not mortgage or alienate the land in question without the special consent of the donor — during his possession, Daunay, gave the mortgage in question to the plaintiff, and afterwards made a retrocession of the land to the Defendant, being unable to continue the payment of the rent — the question now was whether the mortgage so given by Daunay could be made to operate on the land in the possession of the Defr. and the Court were of opinion that the mortgage could not take effect on this land, as the donor had a right to attach such conditions as she pleased to the donation she made to Daunay, and to restrain from mortgazing or alienating the property given him by that donation — The action was therefore dismissed. —

see Repre vo alienation. p. 306. —
Id. — vo Donation. — p 199. 10e partie. —
N. Deniz. vo Donation. § 3. No 1. —
Id — vo Defenses d'aliener — fully stated.

No 1354.

Lacroix. -
Hogue. -
and
& Contra. -

The principal action in this case was founded on a promissory Note made by the Defendant to the plaintiff to which Defendant pleaded non-assumpsit, and set up an Incidental demand for work and labor and for materials furnished and provided for the plaintiff at his instance and request, as a Carpenter and Joiner, - to this demand the plaintiff pleaded a plea of prescription, as the demand had not been made within the year and day, and tendered his oath that he had paid and satisfied the same - To this plea it was answered that there was no prescription of year and day which varied the demand - upon this plea the parties were now heard -

Mr Beaubien for the plaintiff contended that the Incidental demand was prescribed by the lapse of a year & day, and as no interruption had been pleaded by the Defendr Although the Ouvrier is not mentioned in the 127e article of the Custom yet he is comprehended therein under the description of autres mercenaires, but in Sommain 14. p. 541. Gr Com. ouvriers are mentioned - here the prescription is rightly pleaded - cites Lacombe. Vo action annale - he who avails himself of this exception must plead payment and offer his oath - see Somv 3. or art. 127. - Denizt. Vo Prescription. p. 737. No 101. -

Boston for Defendant - The work done by the Defendr here ought to be considered a kind of compensation to the principal demand, as so much paid from time to time on account thereof, which compensation took effect immediately as the work was done Poth. Obl. No 676. But in this case not only work was done but materials also were furnished by the tradesman, which was a

sale

sale and a Commercial transaction proveable under the english rules of evidence — whatever could come before the Juges Consuls must be considered as Commercial — cites Poser. v. Mickljohn. Pyke's Rep. — and before the Juges Consuls prescription was not admitted as a plea. cites. Denizt. vo Prescription. p. 737. Poth. Obl. p. 345. — and where it appears that the party cannot say he has paid, his oath cannot be received. — 2 Bourg. p. 580. — Repre vo Prescription. p. 547. —

Beaubien in reply. — The menusier could not prosecute his action for work done before the Juges Consuls, not being a merchant, nor can he be so considered under the Ordce of 1785. — The plea of prescription with the plea of payment is rightly pleaded. Poth. Proc. Civ: ch. 2. Sec. 2. art. 2. —

The Court were of opinion that where the artisan furnished his labor only, there the prescription applied, because the contract here was merely a louage d'ouvrage, but where he provided all necessary materials for doing the work, it then became a Contrat de vente, and the consideration then was whether the tradesman selling an article in the way of his trade and calling, it could be considered as a Commercial transaction, which it has always been held to be by the Court, and as the evidence of such transaction is regulated by the laws of England, the annal prescription will not apply nor bar the demand — Plea of prescription dismissed. —

Repre vo Louage No 46.

№ 1348

Chs. S. Delorme
Alexr. Reid
& Sarah Sparrow
his wife. —

The declaration in this case states, that by deed of lease made and executed before Jobin & his colleague, public notaries on the 18 Mai 1824, the plaintiff leased and let to Sarah Sparrow the wife of Alexander Reid the Defts. she being for the purposes of the said lease specially authorised by one of the Judges of this Court, a certain dwelling house in the said lease described, for the space and term of five months, that is to say from the 1st May to the 1st Sept. 1824 for and in consideration of the sum of twenty five pounds and it was further agreed that the said Sarah might continue to occupy the said house up to the first May 1825. upon her paying five pounds in advance monthly after the expiration of the said first five months. That on the first of January last 1825 there became due and in arrear of the said rent a sum of £45. which the pltff is now entitled to demand from the said Defendants and therefore concluding that the Defendants be condemned to pay him the said sum of £45. with interest and Costs. —

Plea of Alexr. Reid, one of the Defendts.

1st a demurrer to declaration — that by reason of any thing therein contained the pltff is not entitled to maintain his action aforesaid against him.

2d That he the said Alex Reid was no party to the said deed of lease, nor did he authorise the said Sarah Sparrow his wife to execute the same but that the said lease was executed without the knowledge or consent of him the said Alexander Reid, and therefore the said pltff cannot maintain

his

his action aforesaid ag^t him the said Alexander Reid — and lastly that he the said Alexander Reid is not indebted &c —

Replication — That it was necessary to join the S^d Alexander Reid in the action instituted against the said Sarah Sparrow so as to enable him to obtain Judgment against her inasmuchas she is not separated in law from her said husband — That as no personal obligation was stated in the declaration whereby the said Alexander Reid was indebted to the said Pltff, he the said Alex^r Reid was not bound nor was it necessary that he should plead to the said action, but only declare whether he intended to authorise the said Sarah Sparrow to defend the action — and inasmuchas he has not declared his intentions in this respect, but erroneously pleaded to the action — Concludes that his plea be overruled w^t Cost

The Court were of opinion that the conclusions taken by the plaintiff in his declaration, even according to his own shewing, against the said Alexander could not be maintained, and therefore dismissed the action in regard of him —

De Beaujeu vs Saulnier — Pre Saulnier &ux oppts —

The Opposants Pierre Saulnier and wife by a deed of donation made and executed on 22^d Augt 1820, transfered and conveyed to Jean B^te Saulnier, their adopted son, a certain lot of land and premises mentioned and described in the said, for and in consideration amongst other things of a certain rente & pension viagere — In the Term of February 1824, the Plaintiff prosecuted his action in this Court against the said Defendant for the recovery as well of the Lods et ventes accrued on the said donation as for certain arrears of rent due on the said land, amounting in all to the sum of £25. 12. 0½ —

to

to which action the Defendant appeared and confessed Judgment, and in consequence afterwards on the 19th day of February 1824 Judgment was entered up in favor of the plaintiff for the said sum of £25. 12. 0½ with interest and costs of suit. — That in consequence of the said Judgment the plaintiff sued out execution and took the said lot of land in execution, to the sale whereof an opposition afin de charge was made by the said Opposants claiming that the said lot of land and premises should be sold subject to the payment of the said rente et pension viagere and burthens and charges imposed thereon by the said deed of Donation — In the moyens d'opposition subsequently filed by the said Opposants, they further state — That the said plaintiff was not entitled to any lods et ventes upon the said Deed of donation inasmuchas it was made by the said opposants to their grandson, their descendant in the direct line. and also because a donation a rente viagere, where such rente does not exceed the annual revenue of the Estate given no Lods et Ventes are due thereon but that the said Defendant being in error and impressed with the belief that the said lods et Ventes were due upon the said deed of Donation, and confessed Judgment for the same in favor of the Pl. Plaintiff — That deducting from the demand of the said plaintiff the sum of £23,, 12,, 2½ charged as the Lods et ventes on the said deed of donation there will remain due to him a sum of £1. 19. 10 for arrears of rent, for the amount whereof the said plaintiff is not by law entitled to proceed to the seizure and sale of the Defend.ts real Estate

Poth. Don. à Rente Viagere No. 615. — Boutaric Droits Seig.x p. 133. — 257. 262. — Poth. Fiefs. p. 199.

concluded

conclude, that the aforesaid Judgt. of the 19th Febry 1824 may be adjudged and declared null and of none effect in so far as regards the interests of the said Opposants, and in consequence that the said lot of land and premises be ordered to be sold for the payment of the said arrears of rent subject to the burthen and charge imposed by the said deed of donation —

Poth: Ob. Nos 889. & 906. —

To this opposition several grounds of defense were set up —

1st That the Opposants cannot by law be admitted to plead the nullity of the Judgt of 19 Febry. 1824, because the same having been rendered for good cause and on the confession of the Defendant, the Opposants cannot be admitted to plead any error on the part of the Defend in this respect. —

2. That the opposants are not entitled to demand that the lot of land in question be sold subject to the charges in the donation —

3. That the Defendant, to whom the land was given is a stranger and not the grandson of the Opposants —

4. That Lods & Ventes were due to the plff on the deed of donation in question, & for the part whereof the plaintiff has a special mortgage on the said land and a preferable claim to that of the said Opposants. —

The Court were of opinion, that the opposants could not plead the nullity of the Judgment rendered in favor of the plaintiff upon the Confession of the Defendant, nor could they prevent the plaintiff from obtaining payment and satisfaction of that Judgment upon the estate and property of the Defendant — That in regard of the claims of the Opposants upon the property of the Defendant, they had no doubt a right to resist the Plaintiff's demand whenever it interfered with those claims. — That the opposants could not however claim that the lot of land seized and taken in execution at the instance of the plaintiff in this case should be sold subject to the charges contained in the deed of donation made by them to the Defendant — because these did not constitute a charge upon the land, but merely a right of mortgage thereon nor could they claim such a charge in preference to the plaintiff, who as Seignior had a claim preferable to that of the Opposants upon the said for whatever might be justly due to him for his Seigniorial rights. — Opposition dismissed with Costs. —

Saturday

Saturday 19th February

No. 2110.
Hunter
v
Donegany

On motion in arrest of Judgment

Rolland for the Defendt. By the replication now of record there is no issue taken to the Jury, the replication first filed by the plaintiff having been rejected by the Court and a new replication ordered, that replication contains no similiter, — This being a defect in joinder of the issue there could be no trial, nor can any Judgment be entered on the verdict so given. 1 Str. 641 — Cooper v Spencer — 3 Bur. 1793. — In case of a clerical error Tidd's Prac. 825. —

Sewell for Puff. There is a Replication and joinder to the Country in the Cause, that rejected by the Court regarded only the pleading to the matters of law. — the issue to the Country was never in question nor contested. But upon the supposition that there was no Replication on record, the issue is complete without it — and even where there is no similiter, this has not been considered sufficient to set aside a verdict — the omission is amended by the Statute of Jeofails. St. Hen. 6. ch. 12. — 5 Com. Dig. (Pleadr E. 39). 16 & 17 Chas 2. ch. 8. — Com. Dig. same title. S. 47 — and D. 6. — see also Butler's N. P. p. 324. title, arrest of Judgmt — 2 Bl. Rep. 918. — 2 Tidd's Prac. 835 in a case of a want of a similiter the Court refused to arrest the Judgment — Here we have no rolls for inscribing the pleadings, nor is the same regularity required here as in England — Here the similiter is in some measure complete by the plaintiff's demand for a Jury on the Defendants appearance in the Cause — 1 Sellon's Prac. 399. Cowp. Rep. 407. The Defendant by going to trial has admitted all to be right. 2. Viner. p. 396. title. Amendment — (Jw) —

Rolland in reply, there is no authority to shew, that the want of a replication or the want of a similiter can be cured: where the issue has been irregularly joined, this is cured by

by the verdict or amendable — but here there is no replication, as that first filed has been rejected in toto no part of it can be considered as remaining, had this been the intention of the Court to reserve or save any part of it they would have said so. —

By the Court —

A verdict in this case has been rendered in favor of the plaintiff, and thereon the Defendant has moved in arrest of Judgment, upon several grounds all of which, may be reduced to this, that there was no regular issue formed previous to the trial whereon the verdict of a Jury could be had and received. — It is upon this ground that all the others depend and if in point of fact it be true that no issue was formed or did exist, we must arrest the Judgment. — The Court would however for the sake of Justice, not allow a party who has gone to trial to avail himself of any little irregularity of which he must be presumed to have had a knowledge prior to trial and was bound to notice and inform the Court, and which did not affect the substantial justice of the case. — Now it appears that in this Case the Defendant filed peremptory exceptions and a plea, and that subsequently on the 2d April 1824 the plaintiff filed an answer and replication thereto, and in the latter concluded to the Country — On the 5th April the Defr moved that the answer and replication should be rejected, on the ground that the plaintiff had not specifically answered the plea of peremptory exception and of res judicata. — This motion for rejection was granted by the Court, and although entered generally as to the whole pleading, did not certainly convey the real opinion of the Court, whose intention could never have been to reject a replication which was in

every

every respect regular and sufficient, but only the answer to the peremptory exceptions which was alone objected to, and in the opinion of the Court irregular & inadmissible.

The Court would here observe, as there is something under the present application which concerns the practice of the Court, that independant of the general law, each Court can adopt and has rules for the regulation of its own peculiar practice, a deviation from most of which may however be covered by the subsequent proceedings in the Cause on the part of the party entitled to take advantage thereof — here our rule is, that all pleas should come in upon one and the same paper; in the Court at Quebec although all the pleas must come in at the same time, yet they are filed separately and therefore what has here occurred in the Cause would not have there taken place, as the motion and order thereon would have been for the rejection of the answer and not of the Replication, which last would have remained on the files and another answer substituted for the defective one. — It appears however upon the rejection of the pleading generally, that two days after, on the 7th April, to meet the order of the Court the plaintiff filed general answers only to the Defendants exceptions, as being that part of his former pleading which had been complained of and declared defective, and in the margin of the old pleading opposite the defective answer, he writes thus, "This general answer has been replaced by two several "general answers to the two several exceptions peremptoires "pled by the said Defendant in this Cause, and that "in obedience to the Interlocutory order of this Court of "the 5 April instant." — & signed by the Att^s for the Pl^ff now from the date of this marginal note on the 7th it is evident that such a change took place in the pleading in question, that it was no longer the

same

same, and was adopted as the new Replication, and although the answers filed that day to perfect the remaining issues were on a separate paper, and however this might have been considered somewhat irregular and not according with the ordinary practice, which it is to be wished, for the sake of regularity, had been adhered to, yet as the Defendt has tacitly, and we may say absolutely acquiesced in this irregularity, and to have considered the issue complete by going to trial, it would indeed be perverting the course of Justice were we to allow the Defendant at this advanced stage of the Cause, and after receiving the verdict of the Country thereon, to resort to irregularities of so trifling importance; for in rejecting a pleading it is not the paper on which it is transcribed, but what is thereon written and incorrectly or insufficiently pleaded that is rejected — we however find upon the record an issue formed and sufficiently perfected to all substantial purposes, to which the verdict will apply, and it would be treating the motion of the Defendant far too seriously were we further to enlarge on the grounds of it or resort to books to support us in the rejection of it. — Motion over-ruled — and Judgment for the Pltff on the verdict. —

No 1285.

Connel & al vs Tunstall

The plaintiffs declare on two promissory notes made by the Defendant in favor of Thomas Gibson & Co and by them indorsed to the plaintiffs — the declaration also contains the money Counts and an insimul computassent. —

To this the Defendant has pleaded, what he has entitled a plea in bar to the action, that the

the transfer of the notes to the plaintiffs, is not a legal transfer as the indorsement is in blank whereas he the Defendant and maker of the notes, not being a banker, merchant, broker or trader, but an officer in the army, the notes could be transferred only by a full indorsement, — containing the date thereof, the name of the person to whom indorsed, and specifying for value received, as directed by the provl Statute of the 34 Geo. 3. — the Defendant pleads also the general issue — and the answer and Replication of the plaintiff to these two pleas are general. —

The parties have gone to evidence, and in point of fact it now appears that the Defendant is an officer of the army, and that the two notes in — question are indorsed in blank. —

The Defendant therefore contends that under such indorsements the plaintiffs have no right of action. —

The provl Stat. of the 34 Geo. 3. ch. 2. is a law peculiar to this Province, neither adopting the law of France, nor the law of England in respect to negotiable notes, but forming a system for this Province, and adopting such parts of each as might be considered applicable to the situation of the Colony and particularly the state of its trade, and it is obvious from the preamble to the Statute that negotiable notes of every description, not signed with the mark of the drawer were to be considered generally as billets de Commerce, except in so far as the Statute may have expressly distinguished between the Notes signed by traders and those by persons of a different occupation, as regards the

indorsement

endorsement thereof, for it declares — "Whereas
" it will tend to the encouragement of trade and
" commerce within this province that the negotiation
" of promissory notes should be facilitated" — and
then it immediately proceeds to provide for notes
generally, directing the mode of, and facilitating
their negotiation — It is on this account the
Courts have at all times admitted the English rules
of evidence to prevail in all Cases founded upon
negotiable notes, whether made by traders or others
and that such was the idea and intention of the
Legislature may be inferred, not only from the preamble
and general tenor of the Statute but from the exception
which it contains in regard to notes signed with a
mark — it is the last clause, the 9th in which it is
declared, that nothing in the act should extend to
render negotiable notes whatsoever which are not
subscribed in the handwriting of the person making
the same, which notes not subscribed although
bearing the ordinary mark, shall not be proveable
but by two witnesses, no other action or decision
shall be had thereon, but such as are established by
the laws usages and Customs of this Province — Why,
it may be asked should this exception be made
and also a reserve of the antient law in regard to
notes signed with a mark, if it were not that, all
other notes not thus signed, were no longer to be
considered as governed by the antient law of the
Country, but to be considered a Commercial transaction
subject to the English rules of evidence — And it is to be
remarked that if all the other notes were not subject
to the English rule of Evidence, inasmuch as the Statute
does not say in express terms that they should be
proveable by one witness, the exception would be absurd —
but it was unnecessary to declare how notes in general

were

were to be proved inasmuch as they were evidently considered Commercial transactions and therefore subject to the English rules of evidence and not subject to the antient Law of the Country by which two witnesses would have been requisite — Therefore it has been generally admitted and received in all the Courts that in actions upon negotiable promissory notes, the parties were allowed the same latitude of evidence as in England, under the Ordre of 1785 which admits the English rules of evidence in proof of all commercial facts, which every thing connected with a negotiable note, not subscribed by a mark, must be considered to be, not only from the whole tenor of the Statute in question but from the interpretation given to it by the Judges of all the Courts of the Province — Now in the present Case, it is admitted that the Defendt was no trader but an officer in the army, and strictly speaking the indorsement should have been a full one, but whether this omission is fatal or not, and deprives the holder of an action thereon, does not come in question in this Case, inasmuch as we are of opinion that the recognition by the Defendant of the plaintiffs right, and his obtaining delay from them for the payment deprives him of the right now to object to the indorsement, and though the proof may not be sufficient in support of the first Count in the declaration yet it will be amply sufficient to support the last Count, the insimul computassent, and the money Counts, for though generally speaking those Counts are of no avail between an indorsee and drawer, between whom no privity of Contract can be presumed yet where there has been an express promise on the part of the drawer to pay the indorsee, there cannot be a doubt

but

but those Counts will avail and may be supported under such promise, and as this is a fact connected with the note, it can as well as the note itself be proved by one witness — nor can any possible injustice arise to the Defend^t under such circumstances — if he had alledged payments on these notes to the original payee some doubts might have arisen, and we should have been compelled to decide, whether a holder under such blank indors^t could be considered in any other light than as the mandataire of the payee — but here all that the Defend^t could look for would be a valid discharge and if the plff^s were to be considered merely in the light of the mandataires of the payee, yet the payment to the former would be good and binding against the latter, and the receipt of the plaintiffs a valid discharge of the note against the payee and indorser — The Defend^t has however acknowledged the plff^s to be his creditors, and as the proprietors of the notes has expressly promised pay^t to them, and this as applied to the money Counts is sufficient to support the plff^s action — but at the same time it would be well, that persons receiving a transfer of such notes should be reminded that without a full indorsement, they expose themselves to many difficulties, for the law has not in prescribing such full indorsements, merely had in view the security of the parties to the bill, but also that of third persons, creditors of those parties who in case of insolvency of an indorser might call upon the holders of such notes to account for the monies thereon received. — It was attempted to invalidate the testimony of the plff^s witness by making

him

him declare that he was unacquainted with the Defendant, but we consider that the knowledge he had of his name and person was sufficient under the conversations the Defendant held with one of the plaintiffs in the presence of the Witness, to throw the burthen of proof in this particular upon the Defendant, who, if he was not the person who made the promise, might have easily cleared up any doubt in that respect by exhibiting himself in Court and confronting the witness — but this was not done, and under all the circumstances we think there is enough before us to give Judgment for the plffs. —

No. 1297.

Daunais. vs. Remillard

Action on a notarial Obligation. — Plea. — 1. Nil debet. — 2. no consideration. and 3. The obligation was given to quiet a criminal prosecution agt. the Defendt. for Manslaughter. a

The Defendant had obtained a rule for the examination of the plaintiff upon faits & articles. which having been communicated, the plaintiff now moved to reject the said faits et articles, as impertinents and improper. a

Rolland for the plff — Interrogatories cannot be proposed whereby the character or reputation of the party can be affected, much less in a case like this where the plaintiff is accused of having compromised

a

a felony. 2 Desp. 597. Lacombe v^o Interrog^re Bornier. on Tit. 10. Ord^ce 1667. — That the plaintiff ought not to be held to answer to any of the Interrog^s because the Defendant has by his plea disclosed the fact he wishes to prove and the principle upon which the Obligation was granted, namely to stiffle any complaint being made against the Defendant for having killed the plaintiff's son.

Grant for Defend^t. There is nothing in the Interrogatories to implicate the character of the Plaintiff. — The Defendant has pleaded that he never gave any value or consideration for the obligation, a fact he submits to the oath of the Plaintiff, which on the face of the Interrogatory does not implicate the character of the plaintiff in any manner.

The Court held, that although there were some of the Interrogatories which in themselves carried no apparent objections to them as implicating the character or conduct of the plaintiff, such as the demand whether the Defendant gave any and what consideration for the obligation in question, yet as the answering this Interrogatory might lead to a discovery of facts which he is not bound to declare inasmuch as the Defendant states that the obligation was given turpi causa, and for no other Cause, the Court therefore rejected the whole of the Interrogatories.

This Judg^t. was given on the 10th. —

April Term 1825.

Wednesday 6th. April.

No
Donegany.
Pickle. } The Defendant being detained in gaol under a Ca. ad Sat. now moved that he should be liberated on bail.—

Mr Gale for the Defendant.— The present motion is founded on two principles. 1st on account of the ill state of health of the Defendt. of which strong evidence is now laid before the Court from the certificate and affidavit of the medical attendant of the Gaol, and 2d and principally under the late Provincial Statute 5. Geo. 4. ch. 2. made for the relief of insolvent debtors in Gaol.— This Stat. extends relief to all parties under confinement and has a retrospective view— it cannot be considered as an ex post facto law, a term applicable only to criminal cases. 1 Bl. Com. 46.— There are few laws made which in some way or other will not have a retrospective effect— as laws respecting the change of the Coin— payment of taxes— and in regard of insolvent debtors— This law deprives the plaintiff of no right— he will still be entitled to detain him in the Province and to prevent him leaving it without security for his debt, and it is beneficial for the debtor as it commits him to the hands of securities instead of a gaol.— All debts contracted prior to this Statute must be affected by it— there can no line of distinction drawn between debtors before or since the making of the Statute it is meant to relieve all debtors, who subsequent to that Statute are confined in Gaol.—

Sol.

Sol: General for the Puff- The Court is here called upon to give a construction to a public law, and however beneficial it may be, it cannot be extended beyond what it has clearly expressed - There is no ambiguity in this law, nor can it be made to apply to any proceedings of the Court prior to the passing of it, for this would be destroying the rights of the parties and make an ex post facto law of it - It was made to remedy a grievance complained of under the Provincial Ordinance of 1785, but it states in express terms, that this remedy shall be given only from and after the passing of the act, and cannot therefore be made to apply to any prior proceedings. As to the state of health of the Defendant, it does not appear that he is in such a dangerous situation as to require he should be liberated from his confinement.

Mr Sewell in reply.- The Statute, even according to the letter of it, and certainly according to the intention of it, extends relief to all persons detained in gaol under the provincial ordre of 1785 - no distinction can be made nor line drawn between cases now pending or which may hereafter arise nor between Cases already judged and those now under a course of proceedings for Irdgt - it must be considered as extending the limits of Confinement to debtors from the walls of a Gaol to the whole Province.-

By the Court-

The Stat. 5. Geo. 4. ch. 2. is a remedial law, and ought to be liberally construed - but without straining this construction in any manner, we find no difficulty in saying, that the Defendants Case comes within

the

the letter, as well as within the view and intent of it — It expressly declares, that special bail may be given by every person under arrest and detention at any time either before or after Judgment, that he shall not leave the Province — these are very general terms, and meant to apply to every Case — and altho it is said, that this law can take effect, only from and after the passing of it — yet this cannot mean that it should apply only to persons who should be arrested subsequently to the act, but to all persons without distinction who were in a situation of confinement under the Prov^{e} Ord^{ce} of 1785, as well at the time as after the passing of this act, because they were within the mischief to be remedied as much as those to be subsequently arrested, — a different construction would be limiting those general words of the law, "at any time before or after Judgment" to such Judgments only as were thereafter to be given, which evidently was not the intention of the Legislature. — Motion granted. —

Donegany vs Hunter. — Similar motion, and Judgment —

White vs Salois — Similar motion and Judgment —

N° 1206
Desrivieres vs Tyers. — This was an action petitoire, to recover from the

the defendant a certain lot of ground in the possession of the Defendant, and also certain quantities of wood and timber cut down thereon by the Defendt.—

Mr Morrogh on behalf of the Plaintiff filed certain affidavits shewing that the Plaintiff had always been held and considered the proprietor of the lot of land in question, till the year 1824, when the Defendt took possession thereof, and built a saw mill thereon and is now cutting down the timber growing thereon and laying waste the property, and moved, that as the Defendant shews a disposition to protract the proceedings in this and to delay the Judgment, great injury will be done to the Pltff beyond all possible means of redress, unless the waste can be staid which is now committing on the premises by the Defendt— a sequestrator be appointed to take charge of all the wood and moveable property now upon the lot of land in question, and also to prevent all further waste being committed thereon— cited, Tit. 19. Ordce 1667 by Jousse.— Domat. liv. 3. tit. 7. sec. 1. art. 19.— Bornier on Ordce 1667. on tit. 19.— 1 Pigeau. p. 114. ch. 4. also p. 170. & 388. Repce vo Sequestre.—

Mr Bourré for Defendt The application now made is new, and requires consideration— that he does not deny the right of a plaintiff to obtain the appointment of a Sequestre, but considers it inapplicable in the present instance— That the Defendant is sollicitous for a decision in the present Cause, and has occasioned no delay in the proceedings— That the right obtain a Sequestre must be apparent, which is not the Case here— and it would be hard to deprive the Defendant of the free use and enjoyment of his land upon so slight grounds— Considers the affidavits produced as insufficient— that although

the

the defendant has cut down wood on the lot, yet it has been employed in building a saw mill and in otherwise improving the lot, and no waste has been committed — That a great quantity of wood has been carried upon the lot besides what has been cut down upon it, and upon which the Pltff can have no claim, and it would be injurious to the Defendant to appoint a Sequestre so as to — deprive him of the use of this wood, or of the — revenue of the land. —

The Court having seen the titles filed by the Pltff, and also a Judgment of this Court adjudging to the pltff the possession of the lot of land in — question, and having examined the affidavits now filed, granted the plaintiffs motion. —

Tuesday 19th April 1825.—

No 1097.

Rouville.— vs Dame.—

Action by the plaintiff as Seignior &c. to compel the Defendant his Censitaire to appear before the Commissioner named for this purpose, and his declaration and acknowledgment of the lands he holds and possesses in the Seigniory of the Pliff, under the Lettres de terrier, homologation thereof, the appointment of Mr Taché as Commissaire, and of the affiches and publication made as directed and required by the said Judgment of homologation.

Plea.— 1st In nature of a demurrer — that the plaintiff cannot by law maintain the present action — further denying the facts alledged in the declaration.—

2d. That the pliff has not complied with the requisites contained in the Lettres de Terrier, so as to put the Defendant en demeure.—

3d. That the Defendant never refused to make his acknowledgment and declaration to which by law he is bound, and prays act of the communication he now gives of all the titles of his lands and possessions in the Seigniory of the plaintiff, with a detailed statement thereof — and also prays act of the offer he now makes to give an acknowledgement and declaration of his said lands and possessions, but without being liable to the consequences of this action, and particularly as to the Costs accrued thereon. &c

4th. That the plaintiff cannot cumulate his demand for the exhibition of titles in order to perfect

perfect his terrier, with a demand for the payment of rents and other rights, which are objects of a separate and distinct nature. — and in this respect the declaration is insufficient and irregular. —

5th That the Defendant has never refused to pay the plaintiff what he owes him for Lods & Ventes, but owes nothing for arrears of Cens et rentes — and now offers the sum of £25. 7. 7½ for Lods & Ventes on two lots of land he purchased in the said Seigniory. —

Concludes, that pltff's action be dismissed w Cts.

The answer to exceptions and reply thereon are in general terms. —

On the 1st Febr. 1823. the Defendant moved to be permitted to make an inscription en faux against the Proces verbal and certificate of publication and posting up of the Lettres de Terrier and Judgt of homologation thereof — which was granted.

On the 10th April 1823, the plaintiff withdrew from the record the said Proces verbal & certificate declaring he did not mean to make use thereof.

The plaintiff afterwards obtained permission to examine the Defendant upon faits & articles — the answers to which state, that he the Defendt had no knowledge of the publication of the Lettres de Terrier and Judgment of homologation thereof, but that he in conjunction with divers other tenants of the plaintiff employed one Lemai, a notary public to draw up the protests filed by the Pltff in this Cause. —

The Enquete being closed, the parties were now heard upon the merits. —

M. Rolland for the Pltff. — States the nature

of —

of the action - refers to Lettres de Terrier and homologation thereof, and Defendants obligation to comply therewith, but that he had refused to do so, in consequence whereof the present action is brought - It is a question whether the publication of the Lettres de Terrier be necessary to maintain the present action, contends it is not - but alleges that he has sufficiently proved the publication thereof in so far as regards the Defendant in this Cause - But the Defendant is now en demeure and if no publication whatever had been proved he ought to have come forward upon this action and declare that he was ready to go before the Commissaire and make the declaration and acknowledgement required - The plaintiff has made proof that the necessary affiches and publications were made, by the answers of the Defendant to the faits et articles, who also acknowledges having employed Mr Lemai the notary public to draw up the acts of protest made by him and filed in this Cause, which contain all the necessary acknowledgments on the part of the Defendant to maintain this action, and the knowledge he had of the publishing and posting up the Lettres de Terrier and Judgment of homologation thereof - all which shews that the Defendant was en demeure. - But the Pltff can maintain his action without any publication or proof thereof being made - cites. 1 Freminville. p. 442. 474. 478. & 480. - to shew the different modes of proceeding against the Censitaire - when he is called upon, assigné, he ought to meet the demand made on him, and confess or deny the right demanded of him - this the Defend^{t} has not done here, but contests the right of the Pltff

to

to make any demand against him — the plea is an anomaly of Consent and denial, and does not establish any clear point of defence — as to the offers of the Defendant to make exhibition of title — before this Court, it is a thing not demanded by this action nor can it be ordered, but the Defendant must make his acknowledgment before the person who has been legally appointed for this purpose.

L. M. Vigé for the Defendant. — This action is different from that agt. Gaucher & Bourdalais formerly decided — The present action is founded on two points — the Lettres de Terrier, the homologation and publication thereof, and demeure of the Defdt to make his declaration and acknowledgment, and 2d a demand for £50 for Lods & Ventes & other Seigniorial rights — To these points the plea has been made to apply — for should the demand for the exhibition of titles before the Commissioner be dismissed, the Defendt was right to shew that he was ready to pay the Lods & Ventes demanded.

The first part of the plaintiffs demand rests on the different acts and facts stated in his declaration — as to the publication and posting up of the Lettres de Terrier, and Judgment of homologation, the proces verbal and certificate thereof have been withdrawn by the Plaintiff so that no evidence thereof now remains before the Court, other than what the plaintiff conceives he has drawn from the Defendant's answers on faits et articles — But the Lettres de Terrier and the homologation thereof are of no avail without the notice and publication thereof — it is this alone which gives the right to call the Censitaires before the Commissaire — the publication is a condition under which the Lettres de Terrier

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are granted, and under the benefit of obtaining the exhibition of titles in this summary way, is allowed — This is not a useless formality, but a necessary course to be observed — reading, publishg and posting up the notices are essential forms — of all which in this Case there is no legal or sufficient proof — There is a distinction between this Course of proceeding and a private suit between individuals in a Court of Justice — when a sufficient delay on the service of process is not given, the Court might dismiss the suit, or at most allow a certain delay to the Defend to plead — but in the present Case the whole of the formalities must be complied to give effect to the proceeding — had the plaintiff made but one publication instead of three, the Defr could not upon this have been condemned to go before the Commissioner to make his declaration. As to the acknowledgment of the Defendant in his answers to the faits et articles, it is wholly insufficient; all that the Defendt says is, that he heard that such publication was made, but this does not prove the fact, nor give any right to the plaintiff, because it may or may not be true that such publication was made — the fact most be proved in some more positive manner, and the law looks to an authentic document as the only proof of such a fact — the protests filed do not admit the specific — publications to have been made as relied on by the plaintiff. — As to the offers made by the Defendant, they do not admit the plaintiffs right of action — these offers by the Defendant

to

to make his declaration and acknowledgment were independant of any publication or other formality and cannot be taken against the Defendant - cites Deniz^t. v^o Exception. No. 10. 11. - The Defendant has besides reasons for not appear^g before the Commissioner as there were other questions agitated before him besides the quantum of his fees, he made a demand in favor of the Seigneur of greater rights than were due to him by the original grants. - The Defendant here has offered all that the plaintiff is entitled to by his action before this Court, exhibition of title and payment of Lods & ventes - at all events the Costs ought not to fall on the Defendant. -

Rolland in reply - The only question now to be determined is, whether the plaintiff is entitled to enforce his lettres de Terrier under the present action. There was no condition attached to the lettres de Terrier, as to the mode or manner of enforcing them, and this may be done either by the voluntary act of the party, or in case of objection to call that party before the Court to know upon what ground his objections are founded - if he had no sufficient objection, he must be held to make his declaration in conformity to the Lettres de Terrier - as to the assignation to be given under the Lettres de Terrier it may be general to all the Censitaires at large or it may be particular to any individual, calling upon him to comply therewith - If there had been no publication at all of the Lettres de Terrier, still the plaintiff would be entitled to his present action which was a sufficient notice to the Defendant who was thereby called upon to admit or deny the right of the Plaintiff, had he admitted it,

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the only question then would have been in regard of the Costs — But the protest filed by the Defendant is more than an exception, it is an admission of the plaintiffs right, and an offer to comply therewith except as to the fees of the Commissioner. —

By the Court

The question which arises on the case now before us, is, whether the Defendant can be held and adjudged to appear before the Commissioner appointed for the execution of the Lettres de Terrier, and there to make his declaration and acknowledgments as demanded by the plaintiff, inasmuch as no publication appears to have been made of the said Lettres de Terrier and of the Judgment homologating the same as required by law. — for if the Lettres de Terrier and homologation thereof be of no legal effect without publication in the manner contended for, the plaintiff can derive no benefit therefrom in support of his present action, nor can he demand that the Defendant be held to appear before the said Commissioner to make such declaration and acknowledgmt. if there exists no legal authority to compel him to do so. — It therefore becomes necessary to consider what is the object and effect of the Lettres de Terrier and the homologation thereof, and what the end and object of the publication and notices required to be given

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in consequence thereof. —

Lettres de Terrier, is a Commission granted to a Seignior by the King, (because he alone has the power of granting general Commissions) addressed to the Judges of his Superior Courts authorising them to appoint a Commissioner in order to call before him the Censitaires of the Seigniory, to make their declarations and acknowledgments in regard of their lands and possessions within such Seigniory, and of the rights, duties, and servitudes they owe by reason thereof, and this is done, with a view to enable the Seignior to know who his tenants are — what they possess within his Censive, and what they owe him by reason thereof, and thereby to perfect and complete what is called a Papier Terrier. — These lettres de Terrier are considered to be for the benefit of the Seignior, because although he is by law entitled to his action against each of his Censitaires separately to compel them to make such declaration and acknowledgment, yet there is no article of the Custom, law, or Ordinance, which authorises him to call upon those Censitaires in a body to this effect — and as the proceeding against a whole body of Censitaires individually by action, was expensive and injurious to all parties, we find this Course was adopted, and has been practised in France for Centuries past, to obtain the Commission of Lettres de Terrier from the King, which gave authority to call all

Rageau-Gloss.re Franc.s V.o Terrier. —

7. Hervé. 683.

Dic: de Renauldon V.o Lettres de Terrier

all the tenants before an officer to be appointed for this purpose to make their said declarations and acknowledgments — These Letters were — addressed to some of the Kings Courts or Judges who in confirming the same, nominated a Commissioner for the execution thereof. — This Commission, or Lettres de Terrier operated a — considerable change in the ordinary course of proceeding, as without them, every Censitaire might have employed his own notary to draw up his said declaration and acknowledgment as he saw fit — but by the Lettres de Terrier, the Commissioner appointed was the only person authorised to do so, and the Censitaire was bound to appear before him for this purpose — without the lettres de Terrier, the Censitaires living in different Jurisdictions, could be cited before that Jurisdiction only in which they lived, but by virtue of these lettres, the authority of the Commissioner was extended over all the tenants of the Seigniory although living in different jurisdictions — and without these lettres, every Censitaire could be called upon and sued separately only to answer the demand of the Seignior, whereas by the Lettres de Terrier, the whole tenantry could be called upon in a body for this purpose, and as some of the authors say, stimules tous collectivement. —

7 Hervé. 686. 7. v 690. —

A Judge being thus appointed, a Jurisdiction given, and a course of proceeding pointed out, the next step was to put this in operation, by calling before him the persons bound and liable to this Jurisdiction — this was done by the publication

publication at the church door of the parish and the posting up copies in public places of the Lettres de Terrier, of the homologation thereof by the Court or Judge to whom they were addressed and by a notice from the Commissaire calling on the Censitaires to appear before him at a certain time and place for the purposes contained in the said lettres de Terrier. — When the publication and notices were certified to have been made by the Officer or huissier performing this duty, the whole was complete, and from that moment the Censitaires were considered to be en demeure, if they failed to comply therewith, and the right of prescription they otherwise might have acquired against the Seignior was stopt — nor was this all — for if they obstinately refused to make their acknowledgements, after such notices given, they incurred a fine, and in some provinces, their lands were liable to be seized. —

Rep.re v.o Terrier p. 95.

Les publications tiennent lieu d'interpellation generale à tous les vassaux et sujets, pour passer reconnoissance dans le delai qui est indiqué. —

7. Hervé. 703.
1 Frem.x 80. 81.

Cette interpellation generale et solemnelle suffit pour les constituer en demeure et pour arreter le cours de la prescription. "

But until these publications & notices were made and given, there was no demeure established agt the Censitaire, no prescription staid, nor any fine incurred for disobedience to do, what he had never been called upon to do. —

We come therefore to the point to consider how far the Seignior who has made no publication of the Lettres de terrier &c., can proceed against his Censitaire by action before the Court, in order

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to compel him to make his declaration and acknowledgments in conformity to these lettres, that is, by appearing before the Commissaire appointed for this purpose — We are inclined to think that the Seignior can proceed in this way.

To be satisfied upon this head it seems only necessary to shew, that the Lettres de Terrier are given to the Seignior for his benefit and advantage, to enable him to call together in a body the whole of his Censitaires, by one general notice and proclamation, whereas without recurring to this benefit the Seignior might have his action against each of them individually to this effet; The lettres de Terrier therefore cannot be considered as superceding the right of action which the Seignior could thus exercise, but must be deemed to be in aid of, and extending this right — The proceeding by action is in its effect only a mode of publication of the Lettres de Terrier to the particular individual against whom the same is instituted, and calling upon him to comply therewith — It is true indeed that the Seignior runs the risk of paying the Costs of this proceeding, if the Censitaire comes forward and acknowledges his readiness to comply with the demand — it may be compared to the service of a transport of a debt by an action demanding the payment of the money from the debtor, instead of the signification of that transport by a Notary or otherwise — for in such case the Creditor would run the risk of paying

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the costs if the debtor tendered the money — But it may be said that when the Censitaire is called before the Court, it is to that Court, and not to the Commissaire, that he ought to make his declaration and acknowledgment — this would be destroying entirely the power and effect of the Lettres de Terrier, which vest in the Commissaire named by the Court a particular authority in this respect, namely that all the declarations and acknowledgments of the Censitaires shall be made before him — If the validity of the lettres de Terrier depended upon their being published and posted up so as to give notice thereof to the Censitaires, this action could not be maintained as the plaintiff has not complied with this formality. But the validity of the lettres de Terrier, depends upon the homologation thereof by the Court to which they are addressed, and not on their publication, which is an extraneous formality applicable only to the subsequent proceedings to be had thereon, and this publication may be made, either by general proclamation, or by particular notice or sommation as in the present instance, and which to all legal intents, must be of equal force at least, as if read at the church door, in the absence perhaps of many of the parties concerned — The publications according to the authority cited, "tiennent lieu d'interpellation "generale à tous les vassaux et sujets pour passer "reconnoissance dans le délai qui est indiqué" — a kind of interpellation not admitted in the usual course of Judicial proceedings, and adopted here only on account of the particular Circumstances of the Case, and rather as an exception to the general rule.

If by this opinion any injury or injustice were done

done to the Censitaire, the Court would feel some hesitation, in the absence of specific authority, in adopting it — but we see none — as the proceeding is had at the risk of the Seignior where the Censitaire is willing to comply with the demand — but if the Censitaire when brought into Court, will raise a contest, he must abide by the event of such Contest, like every other pleader before the Court — And it is to be observed, that when the Censitaire makes any objection or raises any Contest, even when called before the Commissaire in the ordinary course of publication of the Lettres de Terrier, such objections or contest cannot be determined by the Commissaire, but must be by him referred to the Court from which he drives his authority, that they may determine thereon, which not only shews that the Commissaire acts as their officer under the Lettres de Terrier, but also the power and authority of the Court as applying directly to all the proceedings had before that officer

We are therefore of opinion that the Defend cannot avail himself of the want of publication and posting up of the Lettres de Terrier and Judgment of homologation thereof — that he cannot complain of the want of a general notification when a particular notification has been made to him — nor will the Court receive his declaration and acknowledgment as the Censitaire of the plaintiff, as it would be breaking in upon that system and uniformity in making up the papier Terrier, to preserve which the Commissaire is authorised and appointed, and is a reason why seperate or detached declarations ought not to be received. —

7 Hurri. 686.

Judgt.

Judgment was therefore given that the Defr should appear before the Commissaire and make his declaration and acknowledgment in the usual form. —

No. 738.
Rouville
vs
Sorette. —

Similar Case — Same Judgment

No. 449
Tremblay
vs
De Longueuil
et al. —

On action to rescind a deed of Concession made by the Defendant to Benjamin Holmes — and to condemn Defendant to execute a deed of Concession to the Plff of a lot of land in the Seigniory of Dispd —

To this action the Defendant pled an exception declinatoire, upon which the parties were now heard —

Mr Bedard for the plaintiff — This action is founded on the arret of 1711, under which the Plff is entitled to obtain the lot of land in question. In May 1815, the plaintiff and twenty other individuals demanded concessions of lands in the Seigniory of the Defendant, but this demand not having been considered as sufficiently formal, it was renewed and made by two notaries on the 5. Augt 1815 — The Plff and the said other individuals ignorantly conceiving that they had by this means acquired a right to the

lands

lands, took possession of them; an action en vove de fait was in consequence instituted against them & they were in consequence compelled to restore the possession thereof to the Defendant - That afterwards on the 14th June 1817 a new demand and sommation was made on the Defendant to grant a Concession of the lands first demanded - upon this the Defendant made a Concession of all these lands to seven different persons, and among others conceded to Benjamin Holmes a lot of land, part of which is demanded by the present action - That when this concession was made to Holmes he was well aware that the said lot of land or a part of it had been demanded by the said plaintiff. - That this Court exercises the powers of the Governor and Intendant under the said arret of 1711, as has heretofore been held in the case of Terrien. vs. De Longueuil. - Cites Declaration of 17 July 1743. 1 Vol. Edits & Ords p. 533. to shew in what instances the Intendant alone, could in the absence of the Governor, exercise the rights vested in him and the Governor jointly by the said arrit of 1711. and this Court by art. 8. of the Judicature act has the same power and Jurisdiction as the Intendant. - That the Deed of Concession made by the Defendant to Holmes cannot injure the rights of the pltff who had acquired a preferable right to the land under the sommations made to the Defendant in 1815 and 1817, and the deed so executed must be considered as null and void as to the plaintiff, and the more especially as the said Concession was made to Holmes in consideration of the payment by him of a certain sum of money in and by a separate deed and transaction, and this over and beyond the usual terms of Concession. -

Mr

Mr Sewell for the Defendant – All that the Plff has stated does not entitle him to obtain a resiliation of the deed of Concession in question. – The mode pursued by the plaintiff is not that pointed out by the law to obtain a Concession of land from a Seignior. – The first thing to be ascertained is, what kind of Sommation is to be made to the Seignior – it certainly cannot be a sommation extrajudiciaire, as in the present case, but it ought to call him into Court that he may have an opportunity of giving his reasons why he ought not to accede to the demand, for otherwise it will be in the power of every man to fix upon any particular spot of the Seigniory to the great damage of the proprietor – The Defendant therefore in this Case had a right to concede her lands in such manner as she should see fit, without being bound by any demand of the plaintiff – the Defendant as proprietor has a right to a choice of tenants, and by granting the land the object of the law was complied with – That this Court cannot rescind the deed of Concession the Defendr has made, nor can this Court assume the right to grant out the lands of a Seigniory to any one Such grants are the acts of the Government of the Country, and not within the Cognizance of Courts of Justice, and unless this power be vested in this Court it is unnecessary to proceed further on the demand of the plaintiff. ⁊

Boston for Defendt. Holmes – If the plaintiff has any right it can be only in damages for not having obtained the Concession of land he had demanded of the Seignior, because the intention

of –

of the law has been fulfilled by the Concession made of the land to the Defendant Holmes who has greatly improved it and made extensive buildings thereon; and he can in nowise be affected by the present action. —

Bedard in reply — The sommation made by the plaintiff to the Defendant in this Case, is that required by the arret of 1711, as it contained the demand of the plaintiff to obtain the lot of land in question which was then a part of the ungranted lands of the Seigniory — this Sommation was made in regular form and at the proper place. — That the plaintiff thereby became entitled to this lot of land, and to have more than one lot of land in the Defendant's Seigniory provided he could comply with the terms of the Concession — it was not the intention of the law to limit the rights of the habitant under this arret of 1711, by allowing him only one land in Concession. — That this Court is vested with the power of determining all Civil rights, and if the plaintiff's right is well founded, it is this Court alone that can determine upon it — The powers of the Intendant in this respect are vested in this Court. —

The Court were of opinion that the demand made by the Plaintiff by a Sommation & protest on the Defendant as stated in the declaration was sufficient to entitle him to maintain his present action in regard thereof, in which the Defendant had an opportunity of alledging all such matters in answer to the said demand as she should see

fit

of it — That this Court was the proper Jurisdiction before which the matters in contest between the parties could be determined, as it possessed all the authority necessary for that purpose — That by the arret of 6 July 1711 a particular Jurisdiction was erected by the King of France for the determination of all complaints and contests under that arret and power was given to the Governor and Lieutenant General and Intendant in Canada for this purpose — This Jurisdiction so erected was of a special and particular kind, and being constituted by Royal authority, was a branch of the Justice Royale, which the King had a right to erect upon all occasions as circumstances should require — That by the 8th Sec. of the Judicature act. 34 Geo. 3. ch. 6. it is provided, that the several Courts of Kings Bench in this Province, shall respectively in the Superior Terms thereof have full power & Jurisdiction and be competent to hear and determine all complaints, suits and demands of what nature soever which might have been heard and determined in the Courts of Prevôté, Justice Royale, Intendant or Superior Council under the Government of the Province prior to the year 1759. touching rights, remedies and actions of a civil nature, which are not specially provided for by the laws & ordinances of this Province since the said year 1759 — So that this Court holding all the authority formerly exercised by the Justice Royale in the County are as competent to determine and to give the same remedy and relief as the Governor Lieutenant General and Intendant could have done under the said

arret

arret of 1711 — The Court therefore dismiss the exception pleaded by the Defendant in so far as regards the right of action and jurisdiction of the Court, reserving to determine upon all other matters till the parties shall have been heard upon the merits

No. 544

De Longueuil vs Berthelet. — and Durocher, Oppt and Bizaillon, mis en Cause. —

The Sheriff under a Writ of Execution sued out in this cause, seized and took in execution a lot of land or farm belonging to the Defendant, the sale whereof he advertised to be made at the church door of the parish of Longueuil as being within that parish, but there being some doubt whether the said lot was within the parish of Longueuil, or that of Laprairie, he took the precaution to cause the sale thereof to be advertised at the church door of the parish of Laprairie also, as a sale to be made at Longueuil as aforesaid — He afterwards proceeded to make the sale of the property at the church door of the parish of Longueuil according to the advertisement, when the said lot was adjudged to Bizaillon the mis en Cause, who paid the money to the Sheriff and obtained his title from on that sale — The Sheriff having made a return of the money levied under the said Writ upon the sale of the said Lot, Durocher the opposant obtained a rule on the parties plaintiff, Defendant and mis en

au Cause, to shew Cause, why, the title given by the Shriff to Bizaillon should not be set aside, and the said lot of land sold anew inasmuchas the sale to Bizaillon was irregular, having been advertised to be made and having been made at the Church door of the Parish of Longueuil, whereas the same ought to have been advertized to be made and to have been made at the Church door of the parish of Laprairie, in which parish the said lot of land is situated —

Certificates of the Curates of Laprairie and Longueuil were filed, and admitted by the parties as legal evidence, that the côte in which the lot of land in question is situated, has been within the Cure of the parish of Laprairie for twenty or thirty years past and always considered to be within that parish

By the Reglement of 20e Septbr 1721. confirmed by the arret du Conseil d'Etat du Roi of 3d march 1722. — made for settling the extent and boundaries of the different parishes in Canada, that of the parish of Longueuil is thus described

"Longueuil, l'etendue de la paroisse de St
" Antoine de Pade, située en la baronie de
" Longueuil, sera de deux lieues et un quart
" et huit arpens le long du fleuve St Laurent,
" savoir, vingt six arpens de front que contient
" le Fief du Tremblay, depuis Boucherville en
" remontant

" remontant jusqu'a Longueuil, une lieue et
" demi de front que contient ladite baronie de
" Longueuil, depuis ledit Fief en remontant,
" jusqu'au lieu dt Laprairie de la Magdeleine,
" et quarante cinq arpens ou environ de front
" que contient le lieu dt. Mouillepieds, etant de
" ladite Prairie St Lambert, a prendre depuis
" Longueuil en remontant jusqu'au ruisseau
" vulgairement appellé du petit Charles, —
" ensemble de l'Isle Ste Marguerite dit D'ufort
" située vis-a-vis ledit Fief du Tremblay, de
" l'Isle Ste Helene, située vis-a-vis ladite baronie
" et des profondeurs renfermées dans les susdites
" bornes". —

Rolland for the Opposant, stated, that by drawing the line of division between the parishes of Longueuil and Laprairie, that is from the ruisseau du petit charles, in a perpendicular direction with the river, it will in the rear intersect the line of the Seigniory & Barony of Longueuil, and by this means the lot of land in question will be found to be the first within the parish of Laprairie —

Vigé for Bizaillon, the mis en Cause, states, that he purchased the lot in question at public sale which was made by the officers of the law — that he was in good faith, and considers that the public Justice of

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the Country is bound to maintain his title — That all due notices and publications of this Sale were made and given as well at the church-door of the parish of Laprairie as of Longueuil — That the arret of the 3. March 1722, has established the boundaries of the different parishes, which is the rule to be followed at the present day, and according to which the Sale of the lot of land in question was made by the Sheriff — the limits of the parishes of Longueuil and Laprairie have never since been changed by any law, and the fact that a part of the parish of Longueuil is desservi by the Curate of Laprairie cannot change the legal boundary of the parish, whatever may have been done for the personal ease of the parishoners in spiritual matters, cannot change or affect the legal rights of other persons — the only question here is, whether the 45 acres beyond the Seigniorial line of Longueuil shall run parallell to that line, or be drawn in a perpendicular line from the River — according to the first mode, the said lot of land will be found within the parish of Longueuil, according to the last it will be within the parish of Laprairie — By the above mentioned law, the whole of the Barony of Longueuil is within the parish of Longueuil, but by drawing the line of

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the 45 acres in a perpendicular direction from the River, a part of the Barony of Longueuil will be made to fall within the parish of Laprairie, which cannot be the right interpretation of the law

Rolland in reply contends that the desserte of the parishes is the only rule the Sheriff ought to follow in the sale of lands by decret, otherwise great inconveniencies will follow and great injustice be done — The presumption here is, that by giving 45 acres more in front to the parish of Longueuil than the extent of the Seigniory, it was intended to draw the division line between the two parishes in a perpendicular direction from the river so as to make a more equal division of the two parishes — this line of division has always been followed, and from this circumstance alone, even if it were an error it has become error Communis, which must form the law at the present day. —

By the Court

We consider the sale and adjudication of the lot of land in question to have been rightly made as being within the parish of Longueuil — if we were to depart from the law which establishes the limits of the parishes

parishes, the greatest uncertainty and confusion would arise, as changes are daily made for private convenience and local purposes, which would constantly break in upon this rule — In whatever manner the spiritual duties of the Curates of Longueuil and Laprairie may have been divided, it cannot affect the temporal rights of the parishioners in this instance — The legal boundaries of a parish are of the utmost consequence, and there can be no usage, or — communis error admitted to explain away what the law has clearly defined — By the arret of the 3d. March 1722, it is evident that all the Barony of Longueuil was included within the parish of Longueuil, and 45 arpents more on the side of Laprairie to the ruisseau called, le petit Charles — "et les profondeurs renfermées dans les susdites bornes" — now it seems agreeable to the natural construction of the words profondeurs &c that it must be the profondeur according to the direction and rhumb de vent of the adjoining line of the Barony of Longueuil, or it must have required express words declaring the Contrary — had it been the profondeur according to a perpendicular drawn on the river, it became necessary to have said so, because such a line would intersect the seigniorial line of the Barony of Longueuil

and

throw a part of it into the parish of Laprairie which is directly contrary to the words of the arret – This perpendicular line would no doubt make a more equal division of the parishes, and of course be more convenient for the parishoners – upon this principle as the lands became cleared and settled the – parishoners seem to have acted, but this – cannot vary the legal question as to the division of the two parishes established by the above arret.

Rule discharged. –

№ 208.

Dupuis & al
vs
Roi. –
&
Dupuis opt

On opposition afin d'annuller. –

Mondelet for Oppt. In this Case an action was instituted by the pltff – as syndics of the parish of against the Defendant for his share and proportion of the Contribution towards building the presbytere of the said parish – in this Court the Plaintiffs obtained Judgment, which was afterwards reversed in the Court of Appeals, and the Plaintiff condemned to pay Costs. – For the payment and satisfaction of these Costs, the Defendant has sued out execution and has seized the individual property of the opposant

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one of the plaintiffs, whereas the Judgment cannot be made executory against the parties in their private capacity, when the condemnation is agt them as Syndics.— assimilates the Case to that of a Tutor. 1 Pigeau. p. 70.— Lacombe. vo Tuteur.— Code. liv. 4. §. 37. Dig. liv. 42. §. 1.— liv. 27. tit. 7.— Arrets de Brillon. vo Depens. (Tuteurs)— Id. vo Tuteur.—

Rollard for Defendt. Two questions arise here. first, whether the persons calling themselves Syndics and being dismissed from their action are not bound to pay Costs, and 2dly. Whether the Pltffs here were Syndics, and had a right to assume the name The Judgment rendered against the plaintiffs here can be executed against them and their property only as there are no means of executing it against the parish which they state themselves to represent— and they must be personally liable for the Costs of an action wrongfully instituted.— cites. Dic. de Droit. vo Depens.— Arrets de Leprêtre. liv. 4. Cent. 4. ch. 68. p. 763. Repse vo depens. p. 446.—

Mondelet in reply— There must be a personal condemnation against the plaintiffs otherwise they are not personally liable to the payment of the Costs, and the Judgment can be considered as rendered against them only in the capacity in which they acted.—

The Court were of opinion that the Judgment against the plaintiffs could not be executed agt them personally, unless by the Judgment it had been so declared, which was not the Case—

see—

see. N. Denizt. vo Depens. S. 2. no 5.—
Dic. des arrets. vo Syndics.—
Repse vo Depens. p. 445. 446.—
1 Pigeau. 418.—

No 374.
Dupuis & al' vr Cartier.— and Comeau opt

Similar Case — same Judgment.

No
Lafresniere vr Warwick and Fagnan, & Lachapelle gardiens & ms en Cause —

In this Case the plaintiff sued out a writ of Saisie Revendication for certain moveables and effects in the hands of the Defendant, and in consequence of the seizure, the parties Fagnan and Lachapelle were appointed Gardiens and the delivered into their charge. The action instituted by the Plaintiff was dismissed in February 1819, but the effects which had been seized were carried off by the Plff.— Summary proceedings were had on the part of the Defendant to obtain the possession of the effects of which he had been thus deprived under colour of the Saisie — Revendication, but without effect — he now obtained a rule on the Gardiens to shew Cause why they should not be held par corps to restore the effects so seized or to pay the value thereof.—

Peltier

Pellier for Lachapelle, contended, that after a lapse of five or six years after Judgment rendered the Gardiens cannot be troubled nor bound to restore the effects seized. Jousse on Tit. 19. Ordre 1667. p. 250. 251. — the more especially as it is not shewn that the effects seized were ever put into the hands and possession of the Gardiens. —

Boston for Defendt. — The Defendant is in time if he makes his demand against the Gardien in 30 years, as they are accountable during that space of time for the property committed to their charge, as it is always presumed to have remained in their possession. Poth. Proc. Civ. 183. —

The Court were of opinion that the Gardiens by having received the charge of the property and the possession of it, were still accountable, and made the rule absolute against them. —

See Ordre 1667. Tit. 19. art. 20. —
Poth. Proc. Civ. p. 183. —
Ordre 1667. Tit. 29. art. 1. —
Rodier on 20e art. Tit. 19. ordre 1667 —
Ferrière. Remarks on 172 art. Coutume —
Glose. 3 —
Le Camus on same art. N. 7. —

No 1172.

Martigny. — vs — Girard. —

Action for recovery of damages by the Pltff a Seignior against the Defendant, his Censitaire for not having carried his grain to the plaintiffs mill to be ground. —

Sol. Genl for the plaintiff. — The defence set up by the Defendant in this action, is, 1st That the plaintiffs mills are not sufficient, nor in sufficient repair. — 2d That the Defendants grain has heretofore been spoiled and damaged by the insufficiency of those mills — 3d That Defendt has suffered injury greater than the plaintiff — and 4th That this action ought to have been brought in the Inferior Court. — But admitting all these facts, they do not constitute a sufficient defence to this action — the Defendant ought to have made a demand upon the plaintiff to repair his mills, and to have put him en demeure, which alone can warrant him in withdrawing from the duty he owed as one of the Censitaires of the Plaintiff. — As to the evidence adduced in the Cause, there is no proof that the Defendant has suffered any injury from the bad state of repair of the plaintiffs mills, nor can the momentary deranzement of the mill be an excuse for the Defendant to withdraw from the mill. — cites. Repse vo moulin. p. 686. 690. — Denvt. vo Bannalité. Loisel. liv. 2. tit. 2. Reg. 3. —

Vigé for the Defendt. The rights of bannality ought not to be rigorously enforced, as they are — contrary to the natural rights and general liberty of the Subject — and it would be extremely hard to compel the Censitaire to institute an expensive and

to

to him a ruinous action against his Seignior on every occasion when the mill of the latter became insufficient or out of repair, there ought to be a reciprocity of right and of obligation, and that the Censitaire should be held to use the mill of his Seignior so long only as that mill is sufficient and in good repair. — The Defendant has proved that the plaintiff's mill was not in good repair and not in a state to make good flour, which is a sufficient defence to this action — this principle of defence is recognized by law — cites arret 12 Nov: 1742. 2d Vol. Edit. p. 212 — and Defendant denies that there exists in this Country any law to compel the Censitaire to institute an action against his Seignior in order to ascertain the insufficient state of the banal Mill, or to compel the Seignior to repair it — But whatever the right of the plaintiff may be the object of this Suit ought to have been brought before the Inferior Court, and the Pltff therefore ought to pay the Costs of this action. —

Lworniere, lw. 6. ch. 6. p. 609. —

The Court maintained the defence so far as to say, that the obligation and duty of the plaintiff and Defendant are reciprocal, that in order to entitle the plaintiff to exact from the Defendant his employing the mill, it must be only while that mill is in sufficient repair, and whenever the Censitaire can shew that this is not the Case, he is exonerated from this obligation — But as from the evidence adduced the Court was not sufficiently satisfied as to the State of the mill at and before the bringing of this action, they therefore ordered

the

the parties to name Experts to visit and examine the same and to report thereon. —

see — Renauldon. Tr. des Dr. Seig.r. liv. 4. ch. 1. quest. 9. p. 265. —

Ola Denis.t Vo Bannalité. No 25. —

New Denis.t — eo. verbo. — § 5. No 3. —

Guyot. Fiefs. 1 vol. ch. 9. p. 445. No 16. —

Pog.t de Liv.re liv. 6. ch. 6. p. 609. —

No 1299.

Daunais. — v. Remillard

Action on obligation. —

On question whether verbal testimony could be admitted in support of the Defendants plea. —

Rolland for the Plaintiff contended that verbal testimony could not be admitted to support any of the pleas set up by the Defendant. The plea first pleaded was not indebted — the 2d. that the obligation was given without consideration, — on neither of these pleas can it be pretended that verbal testimony is admissible without an inscription en faux — Poth. Obl. No 42. an obligation without value is valid unless made for a false cause. 2 La Jannes. p. 135 — Lacombe. Vo Obligation. No 6. — Rep.se Vo Obligation p. 275. — promesse est toujours obligatoire sans valeur. — but even here an Inscription en faux is

necessary

necessary to let in the verbal evidence. Repre vo Inscription en faux. p. 247. — The next plea, is, menace of a criminal prosecution — here also verbal testimony is inadmissible — the defaut de liberté may be proved by verbal testimony. Pand. Poth. liv. 4. Tit. 2. p. 128. 129. sec. 1. art 1. §. 2. No. 7. & 8 — 1 Fer. Dig. p. 172. 173. — but the Defendant does not pretend to say that this menace deprived him of his liberty — and the last plea is, that the obligation was given on the condition that the Defendant should not be prosecuted criminally for a felonious homicide which he had committed — such fact cannot be admitted to be proved, the Defendant cannot be admitted to prove his own turpitude in stifling a criminal prosecution — but even here there there is neither fraude, nor dol alledged in which cases only verbal testimony can be admitted and this only where there is a demand en rescision or restitution. Poth. Ob. No. 17. —

Grant for Defendt. The Defendant cannot be considered as having compromised a felony, as he contends that no felony was committed — he alledges that the obligation was sans Cause, that is without value or consideration of any kind. — But proof the menaces used by the Plaintiff to induce the Defendant to give this obligation must be admitted, to shew the restraint under which he was at the time, and the apprehension of an immediate arrest unless the same were granted. 1 Sousse. 260. 261. Repre vo Simulation. sec. 4. —

The Court were of opinion that verbal testimony could not be admitted to support any of the pleas —

Repre vo Preuve. p. 584. —
4 Henrys. 17. —
Dic. Droit. vo Contrat. p. 421. —
Actes de Not. de Denoz. p. 215. —

No. 753.

Ellice ... vr Dupuis ...

This was an action en revendication brought by the plaintiff to recover the possession of a certain quantity of Timber cut down by the Defendant on two certain lots of land in his possession and of which the Plaintiff claimed the property under a certain deed of Conveyance thereof from the Crown. To this action the Defendant pleaded a possession of the said lots of land for thirty years and upwards and also the pendency of an action petitoire at the suit of the plaintiff for the same lots of land & and therefore that the present action could not be maintained. The plaintiff demurred to this plea, and stated, that as the property was vested in him by Letters patent from the Crown, every act of waste committed by the Defendr must be considered as a new trespass on the property & gave a right of action to the Pltff.

Boston for the Defendr. The Pltff here is not, nor ever was in possession - all he shews is the letters Patent of the Crown conveying the two lots of land to him, but this does not carry any possession along with it to the Plaintiff nor does it divest the Defendr of the possession he always had, even the King must have been compelled to bring his action to recover the property before he could maintain the present demand. - The Plaintiff could not take possession at his own hand, nor can he claim the wood cut on the property while the Defendr holds the possession thereof. - There must have been an actual possession of the thing claimed to maintain this action - The plaintiff cannot try the title to the land by this action, nor can he claim the fruits and revenues of the land without having the possession -

nor

nor will the letters patent give any right to those fruits and revenues until the Court shall have adjudged upon their validity,— To shew the rights of a possessor for a year and day, cites Ord.ce 1667. Tit. 18— Poth. Vente 317— a seller not in possession cannot transfer it to the purchaser— Poth. Prop. Nº 324 — and Poth. Possn. Nº 7. 40. & 41.— That both parties here claim titles under the Crown, and altho' that of the Defendant is not by Letters patent, yet he contends that it is equally valid, and in one respect preferable to that of the plaintiff by being accompanied with possession, but allowing even that the Pltff were the undisputed owner of the property, he cannot maintain the present action while the possession remains in the Defendant— he must first oust the Defendant by his action petitoire, in consequence whereof the Defendant would be liable to account for all the issues and profits of the property in which would be comprehended the timber now in question— Poth. Poss. Nº 3. and Nº 82. 3. 4 — the possessor is entitled to the fruits and revenus without being liable to answer in this way— Ib. Nº 101.— This action must be considered as a disturbance to the Defendant's possession, and would entitle him to maintain an action against the Pltff on that account.— But the Pltff has already brought an action petitoire and cannot maintain the present action which respects merely the possession.— Dic. Droit. vº Petitoire.— Domat. lw.

Sol. Gen. for Pltff— The Petitory action is no bar to this action— as the Defendant might lay waste the whole property while that action was pending if relief were not granted in this way — When the

Deftt

Defendant became informed that the plaintiff had a better title than himself, he was in bad faith, and could not waste the property by destroying the revenue of the soil — The plaintiff's title is from the King and the Defendant can set up nothing against nor will his possession avail him against the right of the Plaintiff — nor can any prescription be set up against the King or those claiming under him —

The Court were of opinion that the action could not be maintained, as until the plaintiff's right of property was ascertained, the Defendant in possession had a right to the enjoyment of the issues and profits of the soil, and if in the meantime during the pendancy of the action petitoire the Defendant committed waste thereof there were means provided by law to stay and prevent waste until the question of property should be settled —

see Poth. Possn. № 83 —
1 Pigeau 114. 115. —

№ 1257.

Mather. v. Ritchie

This was an action of Tort instituted by the plaintiff against the Defendant, for having defamed and injured him by — wilfully and maliciously charging him with having set fire to his own house in order to defraud the Phonix Insurance Office —

The Defendant made default — he subsequently applied to be allowed to take off the default and enter an appearance, but this was not granted —

The circumstances which appeared in evidence are these — The Plaintiff had caused his house and

effects

effects therein to be ensured at the Phonix Insurance Office in Montreal — Some short time afterwards the house and part of the effects were destroyed by fire, and an application was made in consequence to the Insurance for indemnification — in support of this claim, the Defendant and some other neighbours of the Cliff had subscribed a certificate touching the nature and extent of the loss, the accident by which it happened, and the character of the plaintiff — While the negotiations for settling the loss were pending, the Defendant transmitted the following letter to Mr Auldjo one of the agents of the Assurance Office —

"Halley 2d April 1824

"George Auldjo, Esq

"Sir"

"Some time ago a person of the
" name of John Matthers of Compton, lately ensured
" at the Phonix Office, obtained a certificate in my
" official capacity with respect to his house lately
" burnt — At the time of my giving it a thought
" never entered my mind that he was a person
" capable of destroying his own property — Since his
" departure for Montreal the last time, I have had
" information, that property supposed to have been
" burnt, has been found secreted away — I take
" this earliest opportunity to acquaint you of it, that
" an investigation may take place to ascertain the
" fact — Any Commands you may wish to entrust
" me with in respect to the business shall be attended
" to without delay" — "I remain, Sir, &c"

"Wm Ritchie"

In consequence of this letter the Defendant was authorised by the agents of the Insurance Office to make the necessary investigation into the facts contained in it, and they declined all indemnification to the plaintiff on the score of the information the said letter contained — The agents of the Insurance having given communication of this letter to the plaintiff, he in consequence instituted the present action against the Defendant for a sum of £200 damages — It also appeared also that from the investigation had nothing appeared to implicate the character or Conduct of the Pltff, who in consequence obtained an indemnification from the Insurance Office —

The Court were of opinion that the action could not be maintained — that the circumstances under which the above letter was written did not indicate any thing malicious in the Conduct of the Defendant or any wilful intention to do him an injury — that it was a private communication intended for the use of the agent of the Insurance Co for him to act on it as he should see fit — it conveyed merely the information the Defendant had received but contained no positive charge against the Pltff — It was even the duty of the Defendant to give this information, that inquiry might be had and a great public offence punished had it existed, as well as to prevent an injustice being committed on the Insurance Co — and this the more especially as the Defendant had in his public capacity given a certificate to the Pltff ~~corroborating~~ to ground his

claim

claim of indemnification — The Cause of this Suit arose from publishing the Defendants Letter, but this cannot be imputed to the Defendant, as it is evident he never meant it should be published, nor was it prudent to have done so, it was written in confidence, and without the appearance of evil intention, and the breach of this confidence cannot attach blame on the Defendant. —

see. Denis. Vo Lettres missives. № 3. 4. & 7. —

Wednesday 20th April 1825.

No 1208.

Gamelin v Badgley

This was an action for goods sold and delivered to the Defendant so long back as the year 1802, and so stated in the declaration.

The Defendant pleaded in bar to the action, by exceptions or fins de non recevoir — 1st That he did not at any time within Six years next before the institution of the plaintiff's action, promise and undertake &c — 2d That by the law of the land all actions on the Case of which description this was, must and could be brought only within Six years next after the Cause of action, and not after and because the Defendant did not at any time within Six years next before the suing out of the writ of Summons, undertake and promise &c — and because in fact the Cause of action did not accrue within Six years next before the suing out of such writ of Summons. —

The answer to the exceptions was general. —

The Court was of opinion that the Statute of limitations of 21 Jac. 1. ch. 16. being a law made to restrain the right of action, cannot be considered as introduced into this Province by the provision of the Ordinance of 1785, which regards merely the mode of proof in Commercial matters — That under this ordinance the 126th & 127th articles of the Custom had been abrogated in all Commercial matters, inasmuchas these articles

were

were not considered so much ~~as~~ a prescription of the right of action, as a mode of regulating the proof to be adduced in those cases where the action was brought after the year and day — and had the above Statute of Limitations been made or — had applied in any ways to regulate the nature of proof in England, there is no doubt it would have been introduced into Canada under the above Ordinance in the same manner as the Statute of Frauds and Perjuries has been introduced here in so far as it — regulates matters of evidence. — But the Statute of limitations operating an extinction of the right of action in an equal degree as the prescription of thirty years under the Law of Canada, and not furnishing any thing which can be deemed a rule of evidence so as to bring it within the terms of the above Ordinance, we must say it can have no force or operation here, and that the prescription of Six years as invoked by the Defendant has no legal existence in this Country, and as the Law now stands there is no other prescription against demands of the nature of the one now presented but the general prescription of thirty years, until the Legislature shall have otherwise provided, as they have done in regard to actions on promissory notes. —

The exceptions of the Defendant are therefore dismissed. —

June Term 1825.

Friday 3d June

Rust & al' vs Rivers.

The Defendant had been arrested on the plaintiff's affidavit, that he was about to leave the province, and by his counsel now moved that he might be permitted to give bail to the action according to the requirements of the Provincial Stat. 5. Geo. 4. ch. 2.

The Sol. Gen.l for the Plaintiffs contended that the defendant ought to be personally present in Court at the time of giving the bail, that it might appear he was then in the Province, and to establish the right of the plaintiffs against the bail in case he should afterwards leave the Province. That in this Case the Defendant was not now within the Province, but had left it upon giving bail to the Sheriff, so that by giving bail as now proposed by the Defendant the law may be evaded and the Plaintiff's security lost, as the bail cannot be made responsible for any act of the Defendant prior to their becoming bail.

But the Court considered the presence of the Defendant to be unnecessary, as the giving of bail necessarily presumed he was within the Province and imposed the Obligation upon them to present him when called upon, or to pay the debt for him.

Monday 13th June 1825.

Pickle.— vs Donegany

Action for malicious arrest on Civil process.—

Hearing on exceps. pir. endroit pleaded by Defendt.—

Rolland for the Defendant.— In the action which was instituted against the Plaintiff and in which he was arrested, he did not complain of the illegality of that arrest, he on the contrary seemed to admit it, by pleading payment to the Defendts demand,— The object of the action instituted by the Defendant against the plaintiff was to obtain Judgment against him for the amount of his debt and also a confirmation of the arrest agt the person of the plaintiff for the payment of that debt, as no objection was then made by the Plaintiff to this course of proceeding, which was subsequently confirmed by the Judgment of the Court, the legality of these proceedings cannot now be questioned by an action of damages — That had there been room for such an action on the part of the plaintiff, yet the arrest of which he complains having taken place upwards of two years ago, his demand in this respect has become prescribed in law, as being that kind of injure for which the action ought to have been commenced within the year and day after it was committed.— cites. Dec. de Digesta. vo Injure.— No 48.— Pand. de Poth. lv. 47. tit. 10. sec. 1. art. 3. §. 5. No 51.— p. 434. Dec. de Droit. vo Injure — Lacombe vo Injure.— Domat. Dr Pub. lv. 3. tit. 11. No 14.—

Sewell

Sewell for the Pltff.— Where the affidavit of the Creditor is made in the terms of the law, there could have been no relief given to the plaintiff according to the course and practice of the Court, had he even contested the legality of the arrest in the former action, and by not doing so he cannot be said to have lost his right of action here against the Defendant, where only the right and legality of the arrest can be contested.— The plaintiff in that action was not called upon to answer to the process, but to the demand as contained in that process— That the Defendant cannot avail himself of any prescription against the demand, — inasmuch as the Plaintiff is now detained in prison under the arrest, and the prescription could run only from the day that imprisonment ceased— Repv. vo. Injure p. 239.— refers to Dunod on prescription— The imprisonment being one continued act down to the time of bringing the action, no prescription can commence until that imprisonment ceases. Bull. N.P. p. 22.— Salk. 420— and as to the action d'injure, it is prescribed only in twenty years Dareau. 440.—

2. Coke's Instit. 589.— 5. Bac: Ab. Tit. Trespass. D. No 39.

Rolland in reply — the action d'injure is prescribed in one year, and does not extend to twenty years, except as to criminal prosecutions.—

The Court were of opinion that as the question touching the validity of the arrest could not be — determined upon in the action instituted by the Defendt against the plaintiff, where the forms of law were observed the Plaintiff could not be considered to have lost his right, nor could the Judgment rendered on the Defendt's demand be considered as affecting the pltff's right to bring the present action— That in regard of the prescription

pleaded

pleaded by the Defendant it did not apply, as the injury complained of here was not of that description of injure referred to in the authorities cited, but was to be considered as an action en dommages et interets suffered by the abuse of legal process — see N. Denizt. vo Dommages & Interets §. 2. No. 1., which is prescribed only in thirty years and the Case of the Veuve Retel in §. 1. No. 7 seems strongly in point with the present. — The Exceptions dismissed. —

Saturday 18th June 1825.—

No. 183.

Johnson. vs Waldren.

Action by the plaintiff as Seignior of the Seigniory of Argenteuil against the Defendant one of the Censitaires thereof, for the recovery of Lods & Ventes.

Hearing on the exception en droit pleaded by the Defendant.—

Bedard for the Defendant.— On the 3d Decr. 1796 — Patrick Murray then Seignior of the said Seigniory of Argenteuil, conceded to one Jedediah Lane a large portion of land in the said Seigniory, to the extent of about Six thousand acres, and for certain considerations discharged it of all Seigniorial rights and demands, except one sol of Cens upon every 40 acres — The Seigniory was afterwards sold by the Sheriff, and purchased by Sir John Johnson, who sold it to the plaintiff. The Defendant now possesses a part of of Lane's purchase for which Lods & Ventes are now demanded but which the Defendant contends he does not owe to the plaintiff. That Mr. Murray as Seignior of Argenteuil had a right to concede to Lane in the manner he did — it was a franc aleu roturier which he granted to him, and Murray had a right to grant the same, or in the words of the law, de se jouer de son Fief, retaining thereon a mark of dependance on the directe — Poth. Fief. p 303. 304. The proprietor of the Seigniory had a right to make this alienation, because the profits de Lods

et

et ventes, are not essential to the existence of the Censive. Poth. Cens. p. 334. Lacombe. Vo Cens. No 7. — The only reason in France why a vassal could not alienate any part of his wife was on acct of the Justice which was attached to the Directe, he could not detach any of the Censitaires from the droit de Justice - 1 Bourj: p. 149 - This principle does not hold in Canada. — The Vassal, proprietor of a Fief may grant a Franc-aleu in his Seigniory when done with the Consent of the Seigneur Suzerain, and this either by Deed of Concession or otherwise - Repse Vo Franc-aleu. p. 558. — If this Concession to Lane therefore was legal it must be binding on all the succeeding Seigniors to Murray — The Sheriff could seize and sell only the rights of James Murray the Seignior on whom it was sold — the Sheriff's title it is true conveys the right of Lods et Ventes on all the — lands of the Seigniory, but such title of the — Sheriff could convey only the rights of James Murray, and could not create a title which did not exist against Lane and his Successors, nor was Lane, or those holding by purchase from him bound to make any opposition for rights of what as third persons they could not be deprived of by the Sheriff's Sale. —

Rolland for Pltff - The Seignior in this Country may, se Jouer de son fief as to the whole instead of the two thirds under the Custom of Paris., but cannot make a Franc. aleu. Poth. Fiefs. p. 304. has been cited, but the same author in p. 396, lays it down that when an alienation is a sale and not a bail à Cens, such alienation cannot be made, —

because

because such alienations might be extended to deprive the King as Seigneur Suzerain of his rights, on which account it might be necessary to call in the Crown in this Cause — The alienation made by Murray to Lane cannot be considered as a Bail a Cens, it is a Sale — De Lauriere on 51st art. of the Custom gives a definition of the Jeu de Fief, which is wholly different from making a franc aleu, & the Seignor cannot do without the Consent of the Seignior Suzerain — The Cens always generates Lods & Ventes. Rep^se v^o Cens. p. 796. Fr. Gr. Com^r on art. 51. glos 2. Som. 20. 28. & 30 — and a bail of any other kind cannot be given — That this Sale from Murray to Lane was a private transaction between them which cannot bind other persons, the allegation that Sir Johnson had a knowledge thereof when he became purchaser of the Estate at the Sheriff's Sale cannot be material in this Cause nor affect the question between the parties — This question now agitated has already been determined by this Court in the Case of Johnson v Hutchins on a demand for Lods & Ventes.

Bedard in reply. The authority cited from Pothier does not destroy the principle contended for by the Defendant — refers to page 307 — The authority from Lauriere speaks of the demembrement de Fief, but the question here is the jeu de Fief — Here also the Plaintiff wishes to avail himself of the rights of the crown which he cannot do — And Defd^r contends that a Franc-aleu may be created with a Cens modique because it preserves the right of dominality over what has been so alienated. —

By the Court —

This Case turns upon the construction to be put on the deed of Sale and conveyance made by Patrick Murray to one Jedediah Lane on the 3d Dec. 1796, by which Murray, then Seignior of the Seignory of Argenteuil sold and conveyed to Lane the quantity of Six thousand acres of Land in the said Seignory, in consideration of a sum of fifteen hundred dollars, and did by that deed release and discharge the land so sold of all right of Lods et Ventes, retrait, right of banality, and of and from every other right from ever after, reserving only an annual quit-rent of one sol for every forty acres of the land so sold — The validity of this sale has been contested by the Plaintiff, the now Seignior of the said Seignory, as it operated an alienation of all feodal right and was in effect creating a franc-aleu, which the Vassal cannot do without the Consent of his Superior. —

In considering this question under the Custom of Paris, we must have recourse to the 51st. article of that Custom, and to the opinions and Comments of the writers upon it, to ascertain how far the Inferior Lord or Feodal Vassal, could use and dispose of his Estate, without incurring what is there called a demembrement de Fief. — The article is in these words — "Le Vassal ne peut demembrer son Fief
" au prejudice et sans le consentement de son Seigneur
" bien se peut jouer et disposer, et faire son profit des
" heritages, rentes ou Cens etant du dit Fief, sans payer
" profit au Seigneur Dominant; pourvu que —
" l'alienation n'excede les deux tiers, et qu'il en
" retienne

" retienne la foi entiere, et quelque droit Seigneurial
" et domanial sur ce qu'il aliene". —

The only part of the article that comes in question here, is whether the reservation made in this deed can be considered as a droit Seigneurial & domanial

By the old Custom of Paris before its reformation the Vassal could use and dispose of the whole of his Fief, by retaining merely, "la foi", which was found to be inconvenient, and produced what was called, Fiefs en l'air, where the Seignior retained merely the Shadow, while others held the substance, the rights of the Superior Lord became thereby materially infringed, as the Sale of a Fief en l'air, was productive of very little benefit in the shape of feodal profit or "Quint". —, and to correct this, the 51st. article of the Custom, as we now find it, was framed by which the Seignior, was authorized to alienate and dispose of two thirds of his Fief, upon retaining "la foi entiere", the fealty entire, and also imposing on the part alienated some Seigneurial and domanial right. —

Brodeau on 51st. art. Cout. No. 18. p. 365.

By the "Foi entiere", Brodeau explains thus —
" c'est à dire, sans que le vassal se demette ou dessaisisse
" de la foi, et qu'il demeure toujours chargé comme
" auparavant de la foi entiere et de l'hommage envers
" le Seigneur, pour lui payer ou faire payer les droits
" aux ouvertures qui arriveront, tant de ce qu'il retient,
" que de ce qu'il aliene" — By this we are given to understand, that the alienation was to operate no prejudice to the rights of the Superior Lord, which were

were to remain to him as effectual upon the part alienated, as upon that which had not been alienated.

Among the rights which we consider to be Seigniorial and domanial is the Cens, and according to the same Brodeau, it is thus described — "Cens est le
" caractere, la marque et la reconnoissance de la
" Seigneurie directe du fond baillé à Cens, laquelle
" demeure toujours pardevers le Seigneur feodal ou
" Censier bailleur, qui n'a transferé que la Seigneurie
" utile, et emporte par sa nature et qualité essentielle
" le fruit ou obvention du droit de ventes, saisine,
" defaut et amendes, soit qu'il ait été stipulé et
" reservé par la premiere Concession ou non, parceque il
" n'y a point de terre sans Seigneur en la Coutume
" de Paris — sinon que la bailée et Concession soit
" en Franc Aleu". — This is the general interpretation of all the writers on the Custom of Paris, and from them we hold, that whenever Cens is mentioned, it is understood to be Cens, portant profit de Lods & Ventes — When therefore the alienation or Jeu de Fief is made by the Bail a Cens, it must be considered that kind of Cens known and established by the Custom as constituting the droit Seigneurial et domanial — This seems to be the intention of the law according to the opinion of Commentators — Duplessis, in referring to this point, as the troisieme Condition, says, — "que
" dans l'alienation, il doit constituer une mouvance
" Censive ou feodale, de la portion qu'il aliene,
" envers celle qu'il retient — Ces mots, dont use —
" l'article, en retenant quelque droit Seigneurial
" et domanial, sont fort considerables, car il faut

"que

Brod: des Censives & Dr: Seign.x. No 14. p. 538.

1 Dup: Tr. des Fiefs liv. 9. ch. 3. p. 71.

" que ce Droit ait toutes les deux qualités. — S'il
" retenoit simplement, un droit Seigneurial, comme
" de Justice, ou une prestation d'honneur, il ne
" suffiroit pas; et s'il retenoit simplement un droit
" domanial, comme une rente foncière, il ne suffiroit
" pas aussi — il faut donc, qu'il soit l'un et l'autre
" c'est à dire, l'hommage ou Censive qui ont toutes
" les deux qualités"

Now the Bail a Cens, emporte profit, that is carries right of Lods et Ventes — but the express stipulation in the deed from Murray to Lane that the rent reserved, called the quit-rent, shall not carry with it the right of Lods & Ventes makes it a mire bail-à-rente, which is an alienation sans retention de foi — see Poth. Fiefs. p. 306 — "Le
" bail a rente ne renferme point, et ne represente
" point cette retention, il ne presente que la retenüe
" d'un simple droit réel, tel qu'est un droit de rente.
" La retention du Dominium Civile, à laquelle sont
" attachées la qualité de vassal et la charge des
" devoirs feodeaux, doit donc y etre exprimée." —

See further the distinction between the Bail à Cens, et le Bail à rente — N. Denizt. v° Bail à Cens N°. 1. & N°. 3. —

Ferrière speaks also very pointedly on alienations of this kind, he says, "l'alienation faite d'une
" partie d'un Fief à la charge du Cens, produit
" plusieurs effets remarquables sur — " En second
" lieu, que le preneur et ses Successeurs dans cet
" heritage roturier sont obligés de payer le Cens

Fer. Gr. Comme on art. 51. glos 2. N°. 18. 20.

" par

" par chacun an au bailleur ou à ses Successeurs
" dans le Fief, et qu'en consequence les Lods & Ventes
" seront dus au bailleur, au Cas que cet heritage soit
" vendu, parceque les Cens emportent les Lods et
" Ventes payables par l'acquereur"

There is still a further reason for saying that the Cens here reserved must carry Lods & Ventes because the discharging the property alienated from this right, is operating an injury to the Superior, and is diminishing his rights upon the sale of the Estate which he otherwise would had, if this exemption from Lods & Ventes had not been stipulated — this exemption the Vassal cannot grant, for although the jeu de Fief be allowed him, yet the right is reciprocal between him and his Superior, that while it proves beneficial to the one, it must be done without injury to the other — Bourjon says. "Si la portion
1 Bourj. p. 241. No. 26. " demembrée avoit été donné a Cens, cette portion
" quoique d'un Fief, devient roture, et se partage
" comme telle dans la Succession de l'acquereur, 4e
" effet du desmembrement — mais qui ne va pas
" à pouvoir former un franc-aleu, et encore moins
" à prejudicier au Seigneur primitif."

Mr Le Camus in his Observations on the 61st art. of the Custom says — " Un vassal ne peut
" jamais nuire à son Seigneur sans son consentement
" ou au prejudice de l'ordre public établi par la
" Coutume."

Now

Now let us see what is the prejudice or injury done to the Seigneur in this case — 6000 acres of land are alienated by the vassal in consideration of 1500 dollars of money paid to him, and the reservation of an annual quit rent of one sol for every 40 acres, or of 150 Sols for the 6000 acres, free and clear of every other charge and redevance — If this Seigniory should Consist of 40,000 acres of land, and an alienation of this kind be permitted the quit rent of this Estate, and the only annual revenue of it would be one thousand Sols or fifty livres — And if an Estate the whole of whose revenue could never amount to more than 50 livres should be sold, what would be the Quint due thereon to the Superior Lord? — evidently a mere shadow in comparison of what it otherwise would be, had the Seigneurie utile been alienated according to the Ordinary rules of Concession en roture. —

By this kind of Sale, and receiving what is called deniers d'entrée, the vassal distroys all the feodal profit of the Superior, and appropriates to himself an advantage by distroying the very object, which alone could create a benefit to the Superior, and which was his right — The deed made by Mr Murray to Lane can be considered only as a Sale, and not in the light of a Bail à cens, so understood, and the reservation of one sol of quit rent for every 40 acres, was merely to give

1. Duplessis. p. 73. —

a

a colour to the transaction, and was of no real value as an annual revenue, as well might he have reserved a barley Corn, the object was the same —

Hervé in his matiere Feodale, referring to this kind of transaction, and to the decisions on the Custom of Orleans, altho' in some respects different from the Custom of Paris, yet clearly shews the the extent of the injury arising on sales like this and the necessity of repressing them. — "Pendant longtems on y a fait de veritables ventes sous le nom de Baux à Cens, par lequels le vassal, recevoit en deniers le veritable prix de l'heritage dont il se jouoit, et reservoit une mince redevance que l'on qualifioit de Cens, et à l'ombre de la quelle l'acquereur pretendoit être à l'abri des profits — C'etoit visiblement se jouer de la Loi, et non de Son Fief — "Le Cens doit etre proportioné
" au vrai produit de l'heritage accensé, si non l'alienation
" n'est plus un bail a Cens, mais une vente deguisée
" sous ce nom — Aussi cet abus a-t-il eté reformé — Deux
" Arrets, l'un du 14 Juillet 1775 l'autre du 25 du meme
" mois 1780, ont jugé, que les alienations de cette —
" espece faites dans la Coutume d'Orleans, donnoient
" ouverture aux droits et aux profits feodaux, et ne
" faisoient point perdre à l'heritage aliené de cette
" maniere sa vraie qualité feodale, ni au Seigneur
" dominant sa mouvance immediate et utile sur l'heritage
" ainsi detaché du corps du Fief servant". —

3. Hervé. p. 377
Jeu de Fief

But however far it may be said that according

to

to the custom of Paris, the Jeu de Fief, avec deniers d'entrée, may be permitted to the extent limited by the 51st article, and that the quit rent here reserved may be considered as a Cens portant directe Seigneurie, and that a Cens it may subsist and have effect without the profit de Lods & Ventes attached thereto; yet by the laws of this Province, we would say by the Custom of Canada, a sale such as that by Mr Murray to Mr Lane cannot subsist nor be considered as valid, because the Seigniors in Canada are expressly prohibited from making sale of their waste lands, but are bound to grant them by Concession at the taux ordinaires The arret of the 6 July 1711, and more particularly the arret of 15. March 1732, clearly enjoin this, " Fait sa Majesté très expresse inhibition et défenses " à tous Seigneurs et autres propriétaires de vendre " aucune terre en bois de bout à peine de nullité des " Contrats de vente, et de restitution des prix des dites " terres vendues &c— This puts the law of the Country upon the same footing as that of the Custom of Orleans, where all deniers d'entrée in the Jeu de Fief are prohibited, which appears to be more equitable according to the principles of the Feudal tenure, that while the Vassal is allowed all the benifits of the Jeu de Fief, it should be without injury to his Superior. —

The last point to be considered is, how far the present plaintiff, as proprietor of the Fief

and

and Seigniory of Argenteuil, is entitled to avail himself of the nullity of the sale so made by his predecessor, he the plff being considered to stand in the place of the Vendor Murray — This will not admit of much doubt, as independantly of the above arret of the 15. March 1732, the general principles of law seem to concur, that where the Jeu de Fief has been irregular, the parties making it can derive no benefit from it — Ferriere, says, that where the Droit Seigneurial & Domanial is not reserved the Jeu de Fief is nul, and according to another authority already cited, "Un vassal ne peut jamais nuire a son Seigneur sans son consentement, ou au prejudice de l'ordre public etabli par la Coutume". — Henrion de Pansey in his Dissertations feodales, says, — "Mais si le vou de la loi n'est pas scrupuleusement rempli — alors plus de Jeu de Fief, par consequent le bail a Fief ou a Cens n'est autre chose qu'une alienation ordinaire, par consequent le Seigneur Dominant du Fief ainsi aliené, doit conserver sur ce Fief, et sa dominité, et tous les droits attachés à la mouvance immediate". — There is also an authority from 1 Freminville. p. 700 which is strongly in point as to principle, although not as to the particular kind of transaction here in question — it regards the affranchisement of a taillable or main morte, made by the Seignior against which the succeeding Seignior can

claim

Ord art. 57. glos 2. No 16. p. 845.

Le Camus on 51st art. Coutc.

Henrion de Pansey Vo Jeu de Fief No 48. p. 493.

claim, unless he has become bound by his Contract to maintain the affranchissement.

"Sur la seconde Objection que le nouveau Vassal
" acquereur est tenu des faits de son vendeur, que
" ne lui a transmis que les droits qui lui etoient
" acquis et dont il jouissoit — On dira qu'il n'en
" est pas d'une Seigneurie ou d'un corps de Fief, comme
" d'heritages et droits particuliers — Un Seigneur qui
" acquiert un Fief, ses appartenances et dependances
" achete tout ce qui appartient à la Seigneurie sans
" exception, il a droit de jouir de tout ce qui compose
" le Fief, excepté les alienations faites de bonne foi &
" dans les regles — Or l'affranchissement d'un
" taillable, ou d'une main-morte, et leur conversion
" en simple Cens, ne sont pas des alienations qui
" puissent subsister, comme la vente d'un heritage
" ou portion de Fief, qui sont simplement separés du
" corps et partie principale, quoique toujours en la
" mouvance du Seigneur Dominant &c — Cet
" affranchisement diminuant les droits du Fief, le
" degrade, en ne laissant plus l'imposition primitive
" dans son entier, par Consequent le vassal, nouvel
" acquereur, malgré toutes les clauses de son Contrat
" de vente, à moins qu'il n'ait acquis à la charge
" d'entretenir l'affranchissement, est fondé à faire
" retablir les droits affranchis, et les faire revivre,
" et s'en faire payer par le proprietaire utile, sur
" tout si cet affranchisement n'est pas infeodé" —

Upon these authorities and considerations the Court dismiss the Defendants Exceptions. —

№ 1990
Goyette
vs
Bromley

In this Case, I was of a different opinion from that of the Court, whose Judgment was founded on the following grounds —

The plaintiff declares on a Judgment obtained the 24th day of January last in the Inferior Term of the Court of Kings Bench for seven pounds, in the obtaining of which costs were increased to the amount of £13. 19. 5, the two sums forming together £20. 19. 5 — execution was sued out against the moveables of the Defendant, on which was a return of nulla bona, and thereon a further expence of nine shillings and six pence was incurred and it is averred that the Defendant has no moveables within the district, but that he has real property, the seizure and sale of which can be obtained only in virtue of a Judgment of this Court whereby a right has accrued to the plaintiff to bring the present action, and he therefore concludes for Judgment against the Defendant for the above sums of debt and Costs being £21. 8. 11, and also for interest and the Costs of this suit. — To this action the Defendant has put in a defense au fond en droit, under which he contends that the Pltff does not set forth a legal cause of action, and that the allegations of the declaration do not authorise the conclusions thereon taken. —

The object of the present action which is founded on a Judgment of the Inferior Court is evidently to obtain that execution which the Inferior Court

cannot

cannot award, and to levy upon the real property of the Defendant the amount of the Judgment of the Inferior Court under the additional Judgment and process of this Court.— The plaintiff certainly asks for a Judgment which he has already obtained in a Court of exclusive and not of Concurrent Jurisdiction, for this Court can no more entertain a suit under ten pounds Sterling, than the Inferior Jurisdiction can a suit exceeding that sum, except certain cases mentioned in our Judicature act, of which number the present case cannot be considered

If then a Judgment has been obtained in a Court which can grant an execution thereon within the same limits of jurisdiction as this Court, can the Pff legally claim another Judgment for the same thing, and thereby take the execution of the Judgmt. from the Inferior Court? It is true that the Inferior Court cannot award execution against real property, the Legislature not being willing that such a remedy should be given for the satisfaction of such small debts cognizable before that Court, and which are decided summarily and without appeal— and can it be in the power of the Plaintiff to evade the evident intention of the Legislature, or can this Court give its ministry to frustrate that intention, or give a remedy which the law, as we understand it, has denied.— If it were a Judgment not obtained within the limits of this district and upon which no execution could be obtained therein, it would be different,

for

for there can be no doubt but an action of debt on a foreign Judgment may be maintained, but in regard to Judgments obtained in our own Courts, the execution thereof is specially provided for, and under our law it remains for each Court to execute its own Judgments, and that execution which the law authorises and directs alone can issue, it is not for us to say that the Legislature was wrong in not giving equal power to the Superior and Inferior Courts to award satisfaction of their Judgments, and the less so when it is evident, that the sole object of the Legislature was to prevent the sale of real property for the satisfaction of small debts prosecuted in the Inferior Jurisdiction.— The Inferior Court once legally seized of a Cause, must continue so throughout, and must be left to execute its Judgments in the way the law alone will authorise, and this whether the Costs are small or great, nor can the Costs which is only an accessary or result of the action, let the amount thereof be ever so great, change the power of the Court or the nature of the action, or the rights of the parties, which being for a sum under ten pounds sterling — was properly cognizable and could only be brought before the Inferior Court, and before none other — we cannot give to the Costs as an accessary, that which is denied to the principal, they must partake of its nature, and cannot be entitled to any greater or higher privilidge than the principal or original debt; if it were otherwise, it would be better for a Defendant that the Inferior Jurisdiction should be abolished as he would thereby avoid the Costs of a double action which he will now have to support if the principle contended for by the plaintiff in his present action should be found correct — But inasmuch as it is evident that the Inferior Court was not restricted as to the execution

of

of its Judgments, whether the debt awarded with the addition of the Costs, exceeded ten pounds Sterl'g or not, and that the law has forbidden that execution should be awarded against the real property for the satisfaction of such Judgments, and in no part has said, that real property may be sold for any specific sum, but merely limited the issuing of such execution to the Inferior Term in satisfaction of its own Judgments, and that in no part of the law can it be found that thro' the medium of the Superior Court, the plaintiff can obtain the seizure and sale of real property whether by action or otherwise — and inasmuchas it would appear to us to be an attempt to obtain indirectly, what the law has no doubt for wise reasons positively withheld and prohibited, and that the plaintiff is asking for a Judgment upon a Judgment which is already executory and in full force — If this Court had any power, it would be to facilitate the execution of the Judgment of the Inferior Court, but not to give a new action or a remedy or execution which the law denies — here the Judgment of the Court is still executory within the Common limits of the two Courts, and can this Court take upon itself to entertain this action in order to give a party a more extensive remedy than that which the Legislature has thought proper to provide? — where it may be asked is the power of this Court to be found? — if any where it must be in the Judicature acts, and if not there found, is it not fair to presume that no such power was intended to be given? And is it not just also to

presume

presume that ~~no~~ if any such intention had existed the law would have been express, and would, as in the case of executions sent into the other district, have authorised the Superior Terms in certain cases to grant executions of the Judgments of the Inferior Courts, and not have left the parties to the expensive and ruinous remedy of a second action: But it is obvious what was the intention of the Legislature, the sum originally in dispute was to fix the Jurisdiction in which it was to be prosecuted, and all the other consequences followed of Course, and were not therefore necessary to be mentioned. — We are for all these reasons of opinion that the present action cannot be maintained and must be dismissed with Costs, if any inconvenience or evil results from the law as it now stands, the remedy must be found in the Legislature and not in the Courts as at present constituted. —

I differed from the opinion of the Court upon the following grounds. —

It does not appear to me that any positive conclusion can be drawn from the Judicature act against the present action — that act only limits the jurisdiction of the Superior and Inferior Courts, but says nothing as to the relief to be given or as to the consequences that might arise on the Judgments to be rendered in either of these Courts — The Ordinance of 1785 goes further in this respect as it restricts Executions on the Judgts below ten pounds Sterling to be levied

on

on the moveable property only of the debtor — Still this does not meet the question so far as to say, that where there are no moveables, the Creditor shall lose his debt or be without relief against the real estate of the debtor — My opinion is, that where no relief can be had from want of moveables of the Debtor, and that the debt and Costs exceed ten pounds Sterling so as to come within the Jurisdiction of the Superior Court, relief ought there to be granted — Let us consider cases & circumstances where hardship would arise, were it otherwise, and where I am disposed to think relief would not be refused —

The Judgment in the Inferior Court, will certainly give a right of mortgage on the Debtors real Estate, and of course there must be granted a means to preserve and enforce this right when necessity requires it — Where then in this case can the action en interruption — or the action en declaration d'hypothèque be instituted, but in the Superior Court which alone can give this necessary remedy? —

If the plaintiff were to attach in the hands of a third person, the amount of his debt and Costs in this Case, £21.. 8.. 11 — where can he obtain process to this effect? only in the Superior Court — For should the Inferior Court assume Jurisdiction over the execution of its own Judgment in this way, it could be legal only in so far as regards those persons who were parties to the Judgment, but not in regard of third persons — because the Inferior Court cannot grant process to attach any thing in the hands of a third person beyond ten pounds Sterling, nor to call any person before it to answer in anyway touching

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a greater sum of money, and therefore no Judgment could be given against a tiers Saisi in such a case.

In case the Debtor were about to leave the Province the Creditor in this case would be entitled to a Ca: ad resp: against him — and this he could obtain only out of the Superior Court — where only a Judgt to detain the body of the Debtor in this case could be had — and it is to be observed, that under a Judgt to be rendered on this demand, the real estate of the debtor could be seized and sold, because in the execution of Judgments, les contraintes peuvent se cumuler —

If therefore the Superior Court can exercise — jurisdiction over a Judgment rendered in the Inferior Court in any one Case, why not in every Case? — the law does not prohibit it in the case before us, more than those just mentioned, nor does it give any right of relief in those more than in this — but there seems to be a just reason applicable to all, namely, the necessity of the Case, and without the assistance of the Superior Court there would be a failure of Justice, and the Creditor would lose his debt —

From the peculiar constitution of our Courts in this Country, it may be difficult to find anything so analogous to the Case before us in the Courts in France prior to the Conquest, on which we could here ground a decision — there is to be found however in some of those Courts, a course of proceeding from which, an inference may be drawn in favor of the right of the plaintiff in this Case, as it shews the relief given by the Superior Courts for carrying into effect the Judgments of the Subordinate Jurisdictions

There

There were certain Jurisdictions in France which had the power of judging but not the power of executing their own sentences in all cases, that is, although under their sentence the real estate could be seized, yet the formality of sale could not be effected, without calling in the aid of some of the Superior Courts whose jurisdiction extended over these matters – such were –

1. Hericourt-Vente d'Im: p. 10. & 11.

1. The Judgments of the Ecclesiastical Courts – "le Juge d'Eglise" – although under his sentence the real Estate could be seized, yet to effect the sale thereof the party was obliged to apply to the Juge Laic for his pareatis in this purpose. –

2. The same thing held also in regard of the Sentences of the Juges Consuls; for although under the Sentence of the Consular Jurisdiction the real Estate could be seized and sold, yet it was held, that "les criées et l'interposition des decrets "se font par l'autorité des Juges ordinaires des "lieux" – to this rule however the Consular Jurisdiction of Lyons seems to have been an exception –

3. The same principle held also in France in regard of the Sentences of the Lieutenant-Criminel and of the Prevots Marechaux, and also in regard of the Cours des Presidiaux, resembling in some respect our Inferior Court, as it had jurisdiction only to the extent of 250 livres, and altho' under the Sentence of this Court the realty might be seized, yet the formality of the Decret could not be obtained without recurring to the authority of the Juge ordinaire who had Jurisdiction in this respect. –

Now –

Now in all these cases, the power which was given under the sentence of these several Courts to seize, but without the power of enforcing the Decret, was of little effect, and nearly the same as if they could not have made the seizure — in this respect therefore I would assimilate the Case before us, because the present application to this Court, is only in the nature of a demand to grant its authority, or to obtain from it their parcatis to sell the real estate of the Debtor; and from the connection that subsists between the superior and inferior branch of our Court, I would say, the reason is stronger here than in the Courts in France above referred to, between which and the Courts of Jurisdiction ordinaire there did not subsist that immediate connexion — It is true that under the Judgment of the Inferior Court the realty cannot be seized, to effect this there must be a Judgment of the Superior Court, and if the sum demanded be within its jurisdiction, I do not see how it can or ought to withhold that Judgt. To send back the party to the Inferior Court where no execution can be had, nor any satisfaction obtained, is to refuse all remedy, and this without any prohibition in the law or Constitution of this Court which prohibits their assistance in this respect: and it appears to me, as well from the analogy of the Cases referred to, and from the Cases I have stated where the aid and assistance of this Court would no doubt be given to carry into effect the Judgments of the Inferior Court, that this aid

ought

ought to be given in all cases where the sum demanded is within its jurisdiction, upon this broad principle of Justice, that all the property of a debtor whether real or personal, ought to be made liable to the payment of his debts.—

No 1827.
Leblanc
vs
Lesage.
&
Monarque
opp[t]

On oppositions afin de conserver.—

In this Case a contest was raised between the opposants Beaupres and Monarque as to the right of priority of mortgage Beaupres claimed under a notarial instrument posterior in date to that of Monarque whose claim was founded also upon a notarial act executed en brevet, but anterior in date to that of Beaupré's — The question now agitated was — whether an act executed before a notary en brevet carried a mortgage from the date of it —

Bourré for Monarque contended that a notarial acte en brevet did carry mortgage — cited. 2 Fer. Gp. Com[re] p. 121. N°. 17. and p. 253. No. 27. Dic. Droit. V[o] Contrat. Id. V[o] Acte autentique — Id. V[o] Notaire Gp. Com[re] p 1175. Rep[se] V[o] Minute. p. 544. Parfait N[re] p. 92. 94. Rep[se] V[o] Hypotheque. p. 627. a

Mr L. Vigé for Beaupré's contended that the acte en brevet created no mortgage — cited. Dic. de Royer. V[o] Actes de Notaire, and Judg[t] en K. B at Quebec. as stated in Pyke's Rep.

The Court were of opinion that the acte en brevet did create a mortgage, upon the following

grounds

grounds.—

1st All acts may be executed by a Notary en brevet, except in those cases where the law requires that a minute shall remain deposited with the Notary.+

N. Denist. Vo Brevet. §. No 1.

Par rapport aux actes en brevet passés devant notaires, il faut observer, que l'on peut passer en brevet toutes sortes d'actes, meme ceux qui doivent suivant les loix être notariés, à moins que la loi ne porte expressement qu'il en restera minute, sous telle peine

1 Parf: Not. 94

Pour ce qui est des Obligations simples, il n'est pas necessaire d'en faire minute, ni qu'elles demeurent dans les registres des notaires, afin que le debiteur s'etant acquitté, et l'obligation lui — ayant eté renduë par celui à qui il devoit, on ne puisse plus lever de grosses de l'Obligation — mais cela depend de la volonté des parties, et au cas qu'il n'y ait point de minute de l'obligation, l'obligation etant passée et signée par les parties et par les notaires doit etre delivrée au Créancier

see also. Repse Vo acte. p. 141. 1. Col.—

2d The acts executed en brevet before two notaries are in law actes authentiques.—

Cochin. 2e. vol. p. 565.—

Quand la loi permet aux notaires de passer des actes en brevet, l'acte est revêtu du Caractere dont la loi se contente, et par consequent, il n'en est pas moins authentique— Authentique signifie + qui est revêtu de toutes les formes, et qui est attesté par des personnes publiques.—

N. Denist Vo acte authentique §3. No 4.—

and §6. No 1 Pour etre authentique il n'a besoin que

D'etre

d'être revêtu des formalités auxquelles les loix ont attaché le caractère de l'autenticité.—

3. Every acte authentique creates a mortgage
see Rep^re v^e Hypothèque p. 627. 1st Col.
——— v^e authentique p 811 N° 2
N Denis^t v^e Acte autentique §5
——— v^e Brevet §. 3. N° 4.—

4 The controle of notarial acts is an extrinsic formality which does not affect the authenticity of the act, being merely matter of local regulation made for financial or other purposes—

Soulatges Tr. des Hyp. p. 59. 60.
Dic. Droit. v^o Controlle des actes de Notaire

Pour les formalités des Contrats on suit la Coutume du lieu ou ils sont passés, de sorte que les Contrats passés dans le lieu ou le controle est requis ne sont pas authentique à l'effet de porter hypothèque sur les biens situés dans les lieux qui sont exempts du Controle, qu'ils ne soient revêtus de cette formalité — mais les actes passés dans les lieux qui sont exempts de cette formalité sont authentiques, et emportent hypothèque dans les lieux même ou cette formalité est requise —

We are therefore of opinion that the acte en brevet carries a mortgage from the day of the date of it, and that the claim of Monarque should be ranked in the order of collocation accordingly —

№2032

Barsalou
vs
Rochon

Action on a draft accepted by the Defendt by making his mark thereto in the presence of two witnesses —

The witnesses having been brought forward to prove the mark, objection was taken to their testimony being admitted, by Mr Rolland for the Defendant who contended, that a mark was not susceptible of proof by witness as it described nothing particularly belonging to any individual, it was not like a signature or hand writing which was susceptible of proof, — That a mark was a thing to be made by any body, and might be supposed by the witnesses — this could be no check upon men disposed to give false evidence and to admit such evidence was directly contrary to the law for a writing subscribed by a mark was the same as no writing at all — That this was not a commercial matter, and to admit the testimony of Witnesses was admitting the proof of the acknowledgment of a debt by the Defendant without a writing —

By the Court —

A writing is here offered with a mark subscribed to it, said to be that of the Defendant and witnesses are adduced to prove it — but it is contended, that this mark is not a signature and therfore not susceptible of proof by witnesses — Strictly speaking, a mark cannot be called a signature, by which we understand the writing of the name of a party — but we must also allow that the making of a mark by a person who cannot

cannot write, to any act or instrument, as being his act and consent thereto, in the presence of witnesses is something more formal, as expressing by external evidence the intentions of the party, than a mere verbal promise or undertaking — it may be considered as a fact to be proved, that after reading the act, the party did approve of it, by thus making his mark in the presence of witnesses, Danty seems to regard this fact as of weight in the scale of proof — he says — "Ou les temoins affirment qu'ils etoient
2de partie. ch. 5. 1re Somme
" presens lorsque l'ecrit sous seing privé, ou le
" Contrat a eté passé et souscrit, et ils deposent
" qu'ils l'ont vû signer ou souscrire de la main
" de la personne dont on pretend qu'est la signature
" en ce cas la deposition des temoins est une preuve
" indubitable, parcequ'ils deposent de ce qu'ils ont
" vû faire devant leurs yeux et en leur presence, et
" elle n'a pas besoin d'autre preuve, parcequ'elle
" est appuyée sur la foi d'un sens corporel qui ne
" se trompe point." — It is not an argument to say that these witnesses ought not to be trusted, that they may be corrupt men, capable of perverting or concealing the truth, because such an imputation is applicable to witnesses to every instrument even made in the most authentic and formal manner, even the public Notary would be liable to this imputation — he may suppose a mark to the act he makes, and by his signature and that of his confere, who signs ~~[illegible]~~ en second, bind the party most effectually — It is true that the witnesses and the Notary also may

be

be corrupt men, but this is not a presumption to be admitted, it would destroy all confidence among mankind, if all the transactions in life were to be looked upon in this light, and every man to be considered as a rogue until his honesty were proved —

It is indeed true that little is to be found on the books upon this particular point, but from what we do find we are satisfied that the testimony of witnesses may be admitted to prove the making of a mark to an instrument, whether it regard a matter that is commercial or otherwise see what is said by Pigeau as to the mode in which he advises the transaction to be made & executed — "De quelle maniere se fait la Transaction
1 Vol. p. 10. ch. 4. note (e) "Les parties doivent signer l'acte — la marque
" ou croix que mettent souvent ceux qui ne le savent
" pas, ne donne aucune sureté — si la partie qui
" l'a faite est de mauvaise foi elle peut la nier
" et il seroit souvent difficile de prouver qu'elle
" est d'elle" — this clearly implies that the mark may be proved if the witnesses can be procured had it been otherwise Mr Pigeau would have said in express terms that this marque or croix was a thing of no validity and could not be proved — But an old practicien of some note has established the point in more positive language — Couchot states thus in his Practicien
2 Vol. ch 9. p. 219 in 4to Des Preuves et des Presomptions universel — Parmi les artisans et les personnes rustiques, il y en a beaucoup qui mettent leurs marques

"marques au bas des promesses qu'ils font, et
"l'usage est, quand quelqu'un ne reconnoit pas
"sa marque, de recevoir la preuve par temoins qui
"puissent deposer, qu'il contracte ordinairement de
"cette maniere et qu'ils lui ont vû mettre sa marque"

And this usage of which Mr Couchot speaks is well known in this Country and has been fully recognized by the Provl Statute 34 Geo. 3. ch. 2. sec. 9. wherein speaking of promissory notes not signed by the party, says, "Which notes, not subscribed, although
"bearing the ordinary mark, shall not be proveable
"but by two witnesses, and no other action and
"decision shall lie thereupon, but such as are
"established by the laws customs and usages
"in force in this Province" — Indeed this Statute alone was decisive of the question, because the signing the acceptance by the mark of the Defendant would be considered the same as the making of a note under this section. — The testimony of the Witness was therefore admitted. —

No 35.
Cartier. —
Charron
&
Degen, Cur'
&
Sasseville
oppt

On Opposition afin de Conserver —

In this case a lot of land was sold belonging to the Defendant, on which the Opposant Sasseville had a mortgage

for

for the payment of a certain rente et pension viagere and by his opposition claimed the arrears due on the said Rente, and that the balance of the money arising from the said sale should also be paid to him for and in lieu of the Capital of the said Rente — This was opposed by the Pltff who agreed to admit the claim of the Oppt for the arrears of the rente, but contended, that as there was no such thing known in law as the Capital of a rente & pension viagere, that the balance of the monies levied should be paid over to the plaintiff

The Court ordered that the balance of the monies levied, should be paid to the Plaintiffs on his giving security to pay to the Opposant so long as the said rente & pension would be due, the interest on the said balance, in lieu of such rente & pension

see Hericourt. p. 154. 157

Repve vo Opposition p. 433.—

Mondays

Monday 20th. June 1825.

Edwards
qui tam. &c
vs
Prohibited
Goods —
Our Sov: Lo
The King
&c — Interv3

This was an Information at the instance of a Custom House Officer, praying for the condemnation of certain Goods which had been seized by him as illegally imported into this Province, and that the proceeds thereof should be devided and paid, one third to His Majesty one third to the Governor and the other third to himself

An Intervention was filed by the Sol. General on behalf of His Majesty claiming that the one third of the said proceeds should be paid to him, and also one third of the Costs — Another Intervention was also filed by him on behalf of the Governor claiming his third of the said proceeds to be paid to him, and also one third of the Costs —

On behalf of the Informant a plea of exception per: en droit was filed to the said Interventions, stating that the King nor the Governor had neither of them any right, nor could they intervene in the said

action

action, nor could the Sollicitor General in his own name maintain the said Interventions on behalf of the King and the Governor.—

The Sollicitor General for the King contended that as on this Information the King could not be considered as any party in the suit, he was entitled to intervene therein on behalf of the King for the Security of his rights — that in cases of this kind the rights of the King and of the Governor are liable to be frustrated, and therefore the public Officer was bound to take notice and to watch over their interests.—

Ross for the pros^r. In a qui tam action the King cannot interfere. 3. Bl. Com. p. 160 — The King cannot interfere in a Suit commenced 2. Hawk p. 392. The action here is given to the party who shall prosecute the same, and a year and day is given him for this purpose. St. 31 Eliz. ch. 5 The King has no priviledge in actions of qui tam it is the suit of the party — Holts Rep. 611. — 1 Com. Dig. p. 327. — Tit. action on Stat. Letter E. No 2. — That the Interventions here are unnecessary, as they state the same facts and make the same conclusions as already stated and prayed for by the Information Had there been Cause to suspect any collusion or fraud on the part of the Informant, it was necessary to have stated this as the ground of the Intervention That the Sollicitor General is not the public officer who can maintain the suit of the King, it being the right and duty of the Attorney General alone

to

to do so — nor can he obtain Costs in any event as the King neither receives nor pays Costs — Cowp. Rep. 367. Wilson. v. Abbot. —

By the Court —

The question now raised before the Court materially interests the parties concerned as well as the public, and we therefore wish to give our opinion upon all the points here agitated that means may be taken for further investigation — should the parties see fit. — Now we hold that a qui tam action generally speaking is the suit of the party who prosecutes it, and that he may discontinue it, may be non-suited, and may be condemned in Costs. and being the suit of the party the King has no priviledge nor any right to interfere therein — Holt. Rep. 610. — 1 Salk. 2G. on note (a) 1 Highmore on Excise. p. 314 — and it is said that in this kind of action that no body on the part of the Crown has any thing to do with this action, and that the Kings interest commences only after Condemnation of the effects or a recovery of the penalty — 1 Highmore 315 — In this prosecution therefore, and more especially in this stage of it the King has no apparent interest or right to intervene in it — As to the right of the Solicitor General to make this — Intervention, it would seem that he is not the proper Officer to do so, except in the vacancy of the

Office

office of Attorney General, who represents all the interests of the Crown and brings all suits in his name where the King is concerned — now the office of Attorney General vacant, but which we are obliged to know is not the Case, the Solicitor General in that Case would be entitled to act on behalf of the Crown, whose interests must always be supported by the proper officers — see Fowlis Exch. Prac. p. 294 & 400 — Also The King v. Wilkes. Bur. Rep. — Woods Instit. book. 4. Ch. 1. p. 468. — That neither the Solicitor nor Attorney General can maintain, in their own names, any suit or claim on behalf of the Governor. — We are therefore of opinion in this Case that neither the King nor the Governor are entitled to intervene in this prosecution, and that the Sol. General cannot in his own name maintain the Suit of the King or of the Governor. —

Intervention dismissed with Costs.

October Term 1825.

Monday 17th October.

Demarteau vs Labruere val

This was an action by the plaintiff an inhabitant of the parish of Boucherville against René Boucher de la Bruere, Esquire the oldest Justice of the Peace resident in that parish; against Pierre Wilbrenner of the same peace as the oldest Officer of Militia, and against Joseph Racicot the oldest marguillier in office in the said parish, for having tortiously wrongfully refused to grant to the plaintiff the necessary certificates to enable the plaintiff to obtain a Tavernkeeper's licence in the said parish

Quesnel for the Defendant pleaded for exception, that the plaintiff could not by law maintain his action, that the refusal of the Defendants in this respect did not render them liable to any action on the part of the said plaintiff, as a discretionary power was by law granted to them which they had to exercise as they saw fit.—

And of this opinion was the Court, and dismissed the action.—

see Case. Desbiens vs Laurin. 19 June 1816—
Bassett vs Goodschall val 3 Wils. 121.

In 3t. Talon
v
Ls. Talon & al

This was an action prosecuted by the plaintiff against the Defendants who had become special bail for one Pierre Talon dit Lesperance, to recover from them the amount of the Debt interest and Costs awarded to the plaintiff by Judgment of this Court against the said Pierre Talon - the Defendants not having surrendered the said Pierre Talon agreeable as by law required. —

On the 7t. June last the said Pierre Talon the debtor, made a motion by his counsel to be permitted to surrender himself in discharge of his bail the Defendants in this Cause, which after hearing the parties the Court directed to stand over till the parties were heard on the exceptions which the Defendants had filed —

The Exception filed by the Defendants was that they were ready and now offered to surrender the body of the principal debtor in consequence whereof they ought to be discharged from this action — In support of this exception, Mr Vigé for the Defendants contended, that although the Defendants had not surrendered the debtor within the time limited by law, yet it was not now too late, under St. 5 Geo. 4. ch. 2, the object of which was to secure the Creditor against the departure of his debtor from the Province, by the security to be given for this purpose — this security could be given at all times, and was not limited to one month after Judgment, but whenever the debtor chose to offer it — That the Statute ought to be

favorably

favourably construed for the bail, whose rights appear to have been reserved to them.—

But the Court held, that the Statute 5 Geo. 4. ch. 2. was not made for the relief of the Bail, but for the relief of Debtors under arrest or imprisonment, — that the obligation contracted by the Defendants under their recognizance of Bail in conformity to the Ordre of 1785, could not be dissolved by the Statute in question, which could not apply in this Case — nor could they admit the Debtor to be now surrendered after the expiration of the time at which such surrender ought to have been made under the said Ordinance, as the bail were now fixed, and such surrender could not now liberate them. — The Defend^{rs} exceptions were therefore dismissed. —

No. 314.

Madigan v. Livingston

In this Case the Plaintiff had sued out a Cap. ad resp.^{m} who gave bail to the Sheriff, but did not appear at the return of the Writ, and in consequence the Pltff proceeded against him as in default, and obtained his Judgment on the 20th June last. The plaintiff having obtained an assignment of the Bail bond from the Sheriff, had brought against the bail thereon. — The Defendant in this Cause in which Judgment had been

so

so rendered now presented a petition to the Court, praying to be allowed to give bail according to the provisions of the Stat. 5. Geo. 4. ch. 2. — contending that he was in time to give this bail as well after as before Judgment. —

This was opposed by the Counsel for the Plaintiff as being too late, he having now a right to proceed against the bail, for the recovery of his debt. —

The Court were of opinion that the petition could not be granted, that as the Defendant was not in Custody as having been surrendered in discharge of his bail or otherwise, he could not now surrender himself for the purpose of giving bail, so as to exonerate the bail already given against whom an action was now said to be pending — That the Stat. 5 Geo. 4 ch. 2. was not made to dissolve any obligation legally contracted by the Bail, but to relieve debtors under restraint and confinement, and as the Defendant was not in that situation he was not entitled to the prayer of his petition. —

No. 289.

Tabeau — Desforges & Trudeau & al — opp^ts

On oppositions afin de Conserver

In this case the question to be determined was, whether the claim for dower, or for the rights in the Community was preferable in right of mortgage upon the Estate of the Defendant. —

The

The wife of the Defendant having deceased leaving issue of their marriage a daughter, and the property of the Defendant having been sold under a writ of Execution sued out in this Cause, the daughter of the Defendant claimed her share of the Community as heir of her mother, and as the property sold might eventually become liable to the dower of the daughter the purchaser claimed the right to retain the amount of this dower in his hands on giving security and paying the interest thereof in the mean time — It therefore became a question whether the Community rights of the daughter should be first paid, as having a preferable right of mortgage to the Dower, or whether the right of Dower was preferable —

The Court held that the right of Dower had the preferable right of Mortgage —

See. N. Denizt. Vo. Dot. §. 23. No. 1. —
Poth. Douaire. No. 343. —

Thursday 20th October 1825.

No. 471.

Reid
vs
Porteous.

The Plaintiff in this Cause, the master of a Ship, had conveyed goods from London for the Defendant to the port of Montreal where the delivery of them was made to the Defendant - About ten days afterwards the Plaintiff prosecuted an action against the Defr for the recovery of his freight, and in order to preserve his lien on the goods which were still in the possession of the Defendant, he obtained a writ of attachment, under which they were seized. -

The Defendant obtained a rule on the Plaintiff to shew cause why the writ of attachmt should not be quashed for sundry causes, and among others, because it was not stated in the affidavit of the plaintiff, that the Defendant was about to secrete his debts and effects, or doth abscond, or doth suddenly intend to depart from the Province with an intent to defraud his creditors.

The Sollicitor General, in support of this rule contended that the plaintiff by delivering the goods to the Defendant had parted with his lien for his freight - That by law the master had no right to follow the goods and to attach them in order to regain a priviledge he had voluntarily parted with - Abbot on Shipgs p. 246. - That even if the Plaintiff had a lien on the goods in this Case, yet he could not by the laws of this Province

enforce

enforce that lien by process of attachment in the manner he had done in this Case — That by the Provl Ordce of 27 Geo. 3. ch. 4. no process of attachment before Judgment can issue against the estate and effects of a debtor, unless upon affidavit, that such debtor absconded, or was about to secrete his effects, or did suddenly intend to depart the Province — and nothing of this kind appeared on the affidavit upon which the attachment in this Case was granted —

Messrs Beaubien and Badgley shewed cause against the rule, and contended that by an Ordince of the French Kings of 1681, the master of the vessel had the right of attaching for the Surety of freight the goods conveyed by him, during 15 days after delivery while the goods remained in the possession of the Consignee — That this French Ordinance had with other maritime laws been introduced into Canada by an arret de Reglement of 1717, made for the French Colonies, establishing in those possessions Courts of Admiralty, to be governed in their decisions by the said Ordinance of 1681 — That this was the law of the Province under which the plaintiff was entitled to the process of attachment he had sued out — That the law of England did not apply, as it did not form the law of the Country on this point — besides in that Country there was a class of men called wharfingers to whom the master could deliver the goods to be kept till payment of the freight — here we have no wharfingers and such a law could not apply to the state of Commerce in this Country. —

2 Vol. Ed. — Ordes p. 355. —

Mr Sol. Genl in reply, said that the Ordinance of 1681 had never been in force in this Country it having never been enregistered in the Superior Council of

Quebec

Quebec, and at Common law in all cases, the duration of special liens depends wholly upon the continuation of possession — It required a positive enactment to introduce the droit de suite to secure the rights of landlords — but the arret de reglement if it could be regarded as of sufficient authority to dispense with the formality of enregistering the Ordinance of 1681, went to erect Courts of Admiralty in the Colonies whose decisions should be conformable to the said Ordinance and the French maritime law — Those Courts of Admiralty no longer existed, nor could the jurisprudence which they administered constitute the rule of guidance for any other Judicature — It might also be said, that this is a right founded on commercial usages, a portion of law liable to occasional fluctuation, and which were of such influence as even in France they had the effect to subvert Royal Ordinances — in such case we must here look to the usages which obtain in that Country with which we are constantly and solely in Commercial relation, and there we find the rules to be directly against the privilege claimed by the plff — No argument against that portion of the English law could be derived from the circumstance of there being no persons known by the name of Wharfingers in this Country — other depositaries might be found in whose hands the Masters of Ships could place their goods to preserve their lien for freight.

By the Court

Although we may consider the French

Ordinance

Ordinance of 1681 in force in this Country, notwithstanding its not having been enregistered in the Superior Council in this Country, as the King of France as sole Legislator had the power by the arrêt de reglement to introduce a rule of decision in Certain Cases, such as that referred to in the said Ordinance, and although the Plff may be entitled to a right of lien under that Ordinance still however he can obtain it only according to the course prescribed by the existing laws of the Country — It is probable that the Legislature which passed the Ordinance of the 27 Geo. 3. ch. 4 did not contemplate all the priviledges which might be thereby affected, the enactments thereof are very general and in positive terms, and do most expressly prohibit the issuing of attachments prior to Judgment with a view to secure the payment of a debt, without an affidavit of those circumstances of the conduct of the debtor, which the plaintiff's affidavit here does not disclose — It is true the Courts of this Country have granted attachments, called Saisies Revendications, but this was done to enable the party to establish a right of property in the thing seized, and not to secure a priviledge on it for the payment of a debt, which this ordinance positively prohibits — The only exceptions to the rule thus established, are the Cases of dernier equipeur, and the right of landlords for rent, and these exceptions seem more strongly to confirm the rule as applicable in all other Cases —

Rule for quashing the attachment absolute —

No. 94.

De Longueuil vs Terrien. in

In last June Term the Defendant recovered Judgment against the plaintiff for Costs and Mr Bedard the Defendants Counsel now moved that a distraction de depens might be adjudged to him.—

Mr Sewell for the plaintiff resisted this motion and contended that the same could not be granted after final Judgment entered of a preceding Term — That in this case the Defendant is indebted to the plaintiff for other monies advanced to him with which she has a right to compensate the costs so adjudged to the Defendant, and which compensation she now prays may be allowed to her.—

Bedard in reply, Compensation cannot here be admitted under pretence of any new demand against the Defendant, as this would involve a new Contest between the parties and new Costs would be incurred — O. Denoz.t vo Distraction de frais No. 2. & 4. and Repre vo. Distraction p. 131.—

The Court were of opinion that the Plaintiff could not set up a demand en compensation unless for any thing that might appear on the face of the Judgment, or for any Costs that might have been adjudged to her in the course of the proceedings and therefore granted the motion.—

see auths. cited.—

No 1905.

Johnson. vs Cook. " "

This was an action prosecuted by the Pltff as Seignior of the Seigniory of Argenteuil to obtain from the Defendant his Censitaire his declaration and acknowledgment of the titles under which he held and possessed his land in the S^d Seigniory in order to enable pltff to complete his Livre Terrier.—

The Defendant had tendered a declaration and acknowledgment to the Commissaire appointed under the Lettres de Terrier, in which he added a clause in regard of the right of the pltff to claim certain Seigniorial rights on the land the Defend^t possessed and reserving also to himself the right to contest the right of the plaintiff in this respect— This declaration and acknowledgment the Commissaire refused to receive and made out another which he tendered to the Defend^t to be executed by him, but which he also refused to do.—

The question now before the Court was whether the Defendant had sufficiently complied with his obligation as Censitaire by the tender he had so made

Rolland for the plaintiff. The declaration offered by the Defendant is irregular and insufficient as it contains reservations of a right to dispute the Pltffs title, and in a manner to destroy the very declaration and acknowledgment which as Censitaire he is bound to make,— the Commissaire was right in rejecting such a declaration, and the one he tendered to the Defendant was such as the law required, and conformable to the title of the Defendant, and ought therefore to be adopted 1 Frem: 249.— 250.— 262.— 1. Dum. Tit. des Frefs. claus 93.

Bedard for the Defendant.— In France, the Seignior

Seignors were absolute proprietors of their Fiefs, and could dispose of them in such manner and upon such terms as they pleased. 1 Frem. 10.- This is not the case in Canada, where the Seignior is bound to grant out the lands of his Fief upon certain terms to the Censitaires, or he will lose his right to the land - it must be in consideration of a simple redevance, a mere acknowledgment of feodal right - The Arret du Conseil d'Etat du Roi of July 1711 has established this in positive terms, for the more ready settling the waste lands which had been granted to the Seigniors - prior to this arret, the King of France had not fixed what this redevance should be, but this being now determined the Seignior cannot claim more, nor can the Censitaire be bound to acknowledge or submit to the payment of more than the law allows - The plaintiff in this Case has granted his land at a higher rate than the law allows, and wishes to compel the Defendant to submit to the payment of this demand. by making an acknowledgment in the terms of the deed of Concession without any reservation, whereby he would effectually bind himself to continue the payment of what had been hitherto illegally exacted - That by law the Censitaire is entitled to make his reconnoissance in the manner he sees fit, the Seignior cannot prevent him, nor ought he to refuse such reconnoissance it deprives the Seignior of no right, as he has the power to object thereto, or of blâme, to such reconnoissance.- The Seignior cannot claim extraordinary rights, even if included in the deed of Concession, should they happen to be prescribed, nor can he exact an acknowledgment from the Censitaire of such rights.- From the moment the Seignior of Argenteuil began to grant his lands in that Seigniory at a certain redevance, he and his Successors were bound to continue the subsequent grants

on

on the same redevance – this has not been done, but more has been exacted from the Defendant and his autems than from many other tenants in the said Seigniory, the Defendant therefore had a right in the reconnoissance he was making, to make the reservation he has done, so as to be able at a future day to contest the claim of the Seignior in this respect. That there appears but little difference between the reconnoissance offered by the Defendant and that proposed by the plaintiff, still however what the Defendant has offred is what the law allows, and as the Defendant had fulfilled his obligation in this respect prior to the institution of the present action, concludes that the same be dismissed with Costs

The Court were of opinion that the Censitaire had the right to make his reconnoissance in such manner as he thought fit, inasmuchas the Seignior could not be bound thereby if not made as by law required, as the right of blame was reserved to him, which would bring any contested point between the parties before the Court by whose decision the parties must be guided – That although the Defendant had in the present instance satisfied what the law required of him prior to the institution of the present action, yet the Court did not think fit to dismiss it, but reserved to determine on any objection the Plff might have in regard of the reconnoissance so offered by the Defendant –

Hervé. Mat: Feod: 8v. Vol. p. 709.

su also. p. 717. 718.