February Term.
1826.

Wednesday 8th Febr? 1826.

No. 1600.

Bourret
vs
Spatz.
vs
Wilscamps
Tutor &c. Opp.

On the Opposition of Wilscamp as Tutor to Emelie Weisemborne, afin de conserver.

The lands and tenements of the Defendant, John Spatz, were sold at the instance of the plaintiff, and a sum of £192. 13. 8, was thereon levied and returned by the Sheriff.

The Opposant, as Tutor to Emelie Weisemborne the minor daughter of Charles Weisemborne, and Scholastique Spatz, the daughter of the Defendant, claimed a sum of £95. — viz: £86. — C. by a notarial obligation, and nine pounds, for a debt acknowledged to be due to the late Scholastique Spatz, by the last will and testament of Therese Piché, the wife of the Defendant, and for which sums of money the Opposant claimed to be paid to him under a right of mortgage on the lands and tenements sold by the Sheriff under the writ of execution sued out in this Cause.

On.

On the 25th. day of May 1813, Therese Piché, the wife of John Spatz, the Defendant, and a marchande publique, appeared before Jean Guil: Delisle, and his colleague, public notaries, and acknowledged to have received, from Leonard Myers of Montreal, then present and accepting, — the sum of fifty pounds Cy. in money, belonging to Emelie Weissemborne, a minor aged about 8 years, then living with M Thomas Seers, a butcher which sum the said Therese Piché, bound and obliged herself to pay to the said Emelie Weissemborne in twelve years from the first of June then next and in the mean time to pay interest thereon to the said Thomas Seers, to be employed by him in and about the education of the said Emelie — and for the security of all which the said Therese Piché mortgaged all her property and estate, and in particular the lot of land above mentioned, qu'il had been sold by the Sheriff. —

By an act, on the minute of the sd. Obligation dated 21 Febry. 1814, Leonard Myer declared, that in case of the death of the said Emelie — Weissemborne, the said sum of fifty pounds and interest then due, should belong to Scholastique Spatz, the mother of the said Emelie, and wife of Charles Weissemborne. —

Afterwards, on the 1st. Dec. 1821, the Defendt. John Spatz, and Therese Piché his wife by him duly authorised, appeared before Sobin and Bedouin, public notaries, and acknowledged to have received from the said Leonard Myers, the said sum of fifty pounds, in the foregoing obligation mentioned, and promised to pay the same after their decease, to the said Emelie —

Weissemborne

Weissemborne, and in case of her decease before she attained the age of majority, then to pay the same to the said Scholastique Spatz her mother, (Sobin, one of the said notaries, accepting, as well for the said Emelie Weissemborne, as for the said Scholastique Spatz.) with interest on said sum of money, to be reckoned from the 1st June 1813, as stated in the Obligation first mentioned, which the said obligors thereby ratified and confirmed.

On the 3d Dec. 1821 - Therese Peché, wife of the Defendant, by a Codicil to her will, gives a sum of nine pounds to Scholastique Spatz wife of Charles Weissemborne, for so much which had been lent to the testatrix by the said Scholastique: gives her also a sum of fifty pounds in order to equalize her with her other children, which sum she directs to be paid to the said Scholastique, and to her only, and in case of her death before demanding the said sum of money, in that case the testatrix directs, that it should be paid to Emelie the daughter of the said Scholastique, who thereupon should be entitled to receive it after the death of the said John Spatz. —

The Plaintiff contended that these acts were not sufficient to entitle the opposant to maintain his opposition either for a debt or for a mortgage on the lot of land in question. —

1st Because, if any person had a right to demand the money stipulated in the said acts, it was Leonard Myers with whom the first obligation was entered into in regard of the fifty pounds now demanded.

2d Because the said acts were not legally accepted by or on behalf of the said Emelie Weissemborne, to entitle the opposant to claim the said sum of money. —

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3ly Because the said Emelie Weissemborne, gave no value or consideration for the said obligations.
4ly Because the said acts are to be considered as donations, and not as obligations, and not clothed with the necessary formality to render them valid —
5ly. Because neither the said Obligations nor the said Codicil of the said Therese Piché can create any right to the Opposant to the prejudice of the right of the plaintiff upon the property and estate of the Defendant. —

By the Court —

The question which first arises here, is, whether the two acts of the 25. May 1813, and 1 Dec. 1821, are to be considered as obligations, or as donations — if as obligations, they must be binding on the debtors, — for if Leonard Myers from any cause or consideration chose to put into the hands of Therese Piché a sum of money on account of Emelie Weissemborne, and to direct the payment of it to be made for her benefit, Piché — thereby became a debtor for that money & accountable for it — It may however be rightly objected, that the act of 25. May 1813, having been executed by a married woman, although a marchande publique yet as it did not regard the trade or business she — carried on as such marchande publique, it was not binding on her, nor on her husband — allowing this to be the case, yet it serves as a ground work to — presume in favor of the subsequent obligation made on the 1 Dec. 1821, as not being an imaginary transaction got up to serve a purpose, but as founded upon good consideration. — The Obligation of the 1st Dec. 1821, is in point of form sufficient, as the husband is a party, and as to the acceptation of it, we do not

think

think that any acceptation was necessary to render it binding, as it is an unilateral act, and contains the acknowledgment of a debt, which binds without acceptation of the creditor — at all events, the acceptance of the Notary, Tobin, would bind. see 1. Parf: Not: 75. There are however some words in this obligation, which are rather unusual, and tend to raise a supposition of a right in the obligors to dispose of the money — as they promise to pay it, after their decease, and in case of the death of Emelie — Weisemborne before the age of majority, then to pay the money to her mother Scholastique Spatz — and it may well be asked what right had the Debtors to limit the payment of their debt in this way? This no doubt wears something of the appearance of a deed of gift, the validity of which may well be called in question — The Court however is left in doubt as to the merits of the transaction between the parties, as we have no evidence laid before us on this head, and judging upon the face of the acts alone, we do not think that a bare suspicion arising from these words being used, is sufficient to impeach the validity of the transaction — for if the legal import of these acts is to be taken the Defendant was a debtor, and his stipulating to pay the money after his decease, if accepted, yet would not vary the nature of his obligation —

In regard of the nine pounds claimed under the will of Therese Piché, this cannot be maintained as it appears that the property sold belonged to the Defendant, and not to his wife, whose legacies he does not appear to have become bound to pay —

The Opposition admitted as to the Obligation for £50 — and interest demanded —

No. 1719.

Drolet. —
St. Marc. —

On defendants motion to quash the process of attachment sued out in this cause, as the copy of the saisie made and served on the Defendant, was not signed by the bailiff making the same, but was in blank, and therefor informal and insufficient

Mr Bruneau for the Plaintiff, admits the want of signature of the bailiff, but contends that such defect is not sufficient to annul the process, as the Sheriff's return ought to be considered as covering this defect; and at all events, that the Court ought to allow the Officer to amend it by signing his name thereto. —

But the Court was of opinion, that the want of the signature of the bailiff to the exploit de Saisie, was fatal, it being a necessary part of the formality required by law - and as this defect appeared on the record and was admitted by the plaintiff, the Court was bound to notice it, as forming a part of the Sheriff's return -

Motion for quashing the Saisie-arret granted. -

See. Rayot. Proc. Civ. pp. 8. -
Serpillon. p. 22 - on Note 15.
Rodier — p. 11. —
1 Jauety — p. 110 —
1 Pigeau — p. 139. nots. (d) & (e) —
Dec. de Royer. v° Assignation §. 13. N°. 3. p. 722. - & 788. —

Monday 13th February.—

No. 1047.

Rice. vs Allen.—

Action on promissory Note by payee against the maker.—

Sol. Genl for Defendant, pleaded prescription and that plaintiff could not maintain his action on the said note, the same not having been instituted within five years after the making of the note, according to the terms of the Provincial Statute.—

Mr Badgley for the Plaintiff, excepted to this plea as insufficient, inasmuch as the Defendant in pleading the plea of prescription ought to have alledged payment of the note, and to have tendered his oath to this effect.—

Sol. Genl in reply— The Statute does not require that the Defendant should either plead payment or tender his oath, it is only in case the Defendant is required that he is bound to give his oath.—

The Court however considered the plea of prescription was insufficient, as the Statute of 4 Geo 3. ch. regarding promissory notes is not to be considered as a Statute of limitations but as affecting the mode of proof, when the action is not brought within a certain limited time, in which case, where the Defendant means to avail himself of the Statute, he ought to plead payment and tender his oath to that effect, which

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was the course of practice under the 126 & 127 arts of the Custom, although conceived in terms more positive than the above Statute, as to the right of prosecuting an action after the lapse of time therein limited -

Defendant's plea, dismissed. -

No. 1427.
Hebert
vs
Gendron. —

On action petitoire. -

The Sol. Genl demurred to the action, on the ground that the plaintiff had not sufficiently set out the tenans et aboutissans, of his the Plff's land, and particularly in the rear of the land, which in this action became the material object of contest.

Rolland for Pltff - contended, that the matters alledged contained no grounds of a demurrer to the plaintiff's action, but was an exception à la forme, —

Sol. Genl This is a defense au fond en droit by which the Defendant is entitled to avail himself of the defect here stated - cites Dic. Droit. vo Designation.

The Court were of opinion with the plaintiff and dismissed the demurrer. —

Saturday

Saturday 18th Febry. 1826.

No. 1136.

Ex parte
On Petition of
Antoine Dame
for
Decret Volontre.

On motion of the Petitioner, that the Opposition made by afin de conserver, should be rejected the same not having been filed 8 days before the day appointed for the Sale of the property in question. By the Stat. 3 Geo. 4. ch. 2. sec. 4. it is enacted, "That inasmuchas such voluntary "Sheriff's Sale, must have for its main object, to "make known to the person who is desirous of "causing such Sheriff's Sale to be proceeded to, the "charges and rights, and especially the mortgages "which may be the subject of opposition a conserver, "before he procures an adjudication thereof to "himself, it shall in voluntary Sheriff's Sales, be the "duty of every person, having rights of this nature "to claim and enforce, to produce such opposition "eight days at the least before the day fixed for the "said adjudication, and that the Sheriff shall "also be held to notify the public thereof in the said "notices, publications, and placards." The first impression on reading this section of the Statute would lead to a belief, that every person having an opposition afin de conserver to make, was bound to do so eight days before the day of Sale, and failing herein, that he was precluded from doing so afterwards, and consequently that his right was lost. But on considering the object the law had in view, and the manner in which it was worded, we are led to draw a different conclusion.

The intention of this law is to facilitate

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facilitate a proprietor in clearing his property of mortgages, by means of a voluntary Sale by the Sheriff, and on this account when the proprietor becomes the adjudicataire, to enable him to retain in his hands the amount of the adjudication on giving security to the Sheriff for the amount of the oppositions made thereon. It was therefore an object to ascertain what was the amount of these Oppositions before the sale took place, so as to ascertain the extent of the security to be given — Now according to the interpretation to be put upon this law in order to give it effect, we hold, that the adjudicataire can in no case be held to give security, nor to pay, beyond the amount of the adjudication — the strict letter of the law, which would seem to require that in all cases the security should be equal to the amount of the Oppositions, cannot will be complied with, as it would work injustice, which we cannot presume the Legislature intended

When the adjudicataire knows, that he cannot be held to give security beyond the amount of his adjudication, it becomes of less consequence to ascertain the true amount of the Oppositions, and in case no opposition be made before the sale, there will be no security required, still however he must be considered as holding the amount of the adjudication subject to the order of the Court thereon, and in this respect must be considered

like

like any other adjudicataire under a decret forcé, but with this advantage of being allowed to retain the money in his hands without giving security, until the claims upon it shall have been determined.— The Opposant therefore who fails to make his opposition before the Sale loses the advantage of getting security for his claim, but he cannot on this account be considered as having lost his right on the proceeds of the adjudication— the law does not say so— for although it directs, that it shall be his duty to produce his opposition before the Sale, yet it attaches no penalty to his failure in doing so, which would have been requisite had the law intended, that such failure should operate a foreclosure of his right— The law, and the practice of this Court in regard of the ordinary Sales by Decret Forcé has not been altered in regard of the Oppositions to be made here on the Decret Volontaire, and we conceive therefore that the Opposant in this Case is entitled to the benefit of his Opposition—

Petitioners motion disallowed

No. 1440.

Boulanger et al
vs
D: B: Vigé.—

This was an action instituted by the widow and heirs of the late Augustin Gregoire to recover from the Defendant a deposit of money which had been made in his hands by the said Augustin Gregoire in his lifetime and concluding that the Defendant be held to render an account of the deposit so made, and to pay the same to the plaintiffs, failing which that the Defendant be condemned to pay to the said Plffs a sum of two thousand pounds for their damages in this behalf and Costs.—

The Defendant by his plea, denied that the plaintiffs had any right of action against him in regard of the deposit in question— That whatever money he might have received from the said late Augustin Gregoire, it was placed in his hands as a deposit under the seal of secrecy and in confidence that it should be employed by the Defendant, according to the desire and intentions of the said Augustin Gregoire, which he had communicated to the said Defendant under the like seal of secrecy. — That by law the Defendant is not bound to render any account to the said plaintiffs nor to reveal the secret that has been so confided to him further than he shall see fit— and concluding that the Plaintiffs action may be dismissed. —

The Replication is general and in support of the right claimed by the plaintiffs.—

The plaintiffs having obtained a rule for the examination of the Defendant on faits et articles, an order was afterwards made thereon to that effect, when the following interrogatories were

were proposed to him, and the following answers given by him thereto. —

2e. Interr. — N'est il pas vrai, que vous le dit Defendeur avez bien connu, feu Augustin Gregoire, le defunt mari de ladite Catherine Boulanger, nommé dans la declaration des dits Demandeurs en cette Cause, et en son vivant de la paroisse de St. Martin en l'Isle Jesus, maitre-maçon ? —

Reponse. — Oui, j'ai bien connu ledit Augustin Gregoire.

3e. Interr. — N'est il pas vrai, que ledit Augustin Gregoire en son vivant, savoir, avant et depuis l'année mil huit cent dix, vous auroit donné en garde, en differents tems, diverses sommes d'argent, soit en especes monnoyées, ou en billets de l'armée, ou billets de Banque, au montant de la somme de deux mille livres, monnoie courante de la Province du Bas Canada, ou au montant d'aucune autre somme, et de quelle somme, pour lui être rendues et remises à lui-même, ou payée à d'autres personnes par son ordre, lorsqu'il en auroit besoin, ou les demanderait, ou feroit demander ? —

Repe. — Ledit defunt Augustin Gregoire m'a remis deux sommes de deniers, lesquelles, deduction faite d'une petite somme qu'il retira depuis, comme je le dirai ci-apres, formoient quatre Cent quarante sept livres dix chelins cinq deniers courant; l'ayant reçu en deux fois, je ne puis dire assurement, si la seconde somme, qui etoit tres foible, m'a eté remise avant mil huit cent dix — La premiere m'a eté remise avant cet epoque — je l'ai reçu en argent monnoyée — elle m'a eté confiée sous secret pour être employée en ouvre de pieté ou de charité, au cas qu'il n'en disposat pas lui-meme de son

vivant

vivant — Il entra alors, comme il a fait depuis, dans des explications souvent renouvellées, et que j'ai moi-même provoqué, pour me mettre à même de bien connoître ses intentions et de m'y conformer — Je n'ai point reçu d'autres ordres ou instructions a ce sujet — Je n'ai point eu d'autres deniers du dit defunt, excepté une Somme de quinze Cent francs, ou livres ancien Cours, egale à Soixante deux livres dix chelins courant que j'avois reçu pour ledit Augustin Girard, et que j'ai offert depuis son décés à la demanderesse sa veuve, et qu'elle a porté en son — Inventaire — J'ai aussi reçu, ou il m'a payé quelques autres sommes par ses mains, mais dont il ne m'a rien resté, ledit defunt en ayant disposé, comme je le dirai ci-apres. —

4e. Interrgre — N'est il pas vrai que lorsque ledit Augus. Gregoire vous a donné en garde ces diverses sommes d'argent ou aucunes d'icelles, et quelles, ou lorsque ledit Augst. Gregoire vous a prié de vous charger de ces diverses — sommes d'argent, ou en aucun tems avant ou depuis et quand, vous, ledit Defendeur connoissiez bien que ledit augustin Gregoire avoit eté, ou etoit le proprietaire de deux emplacements situés dans le fauxbourg St. Laurent de Montreal et qu'il les avoit vendus, ou — qu'il devoit les vendre ? —

Repse — Je ne me rappelle pas, si le defunt Aug. Gregoire m'a parlé des emplacements dont il est question dans cet Interrogatoire quand il m'a remis ces — deniers; il m'a certainement depuis parlé de la — vente de l'un deux — Il m'avoit chargé de demander le paiement d'une somme duë par l'acheteur — J'ignorais ces circonstances lorsqu'il m'a remis ces deniers la premiere fois — Je ne le connoissais pas lui-meme auparavant. —

5e. Interrgre — N'est-il pas vrai, que lorsque ledit Aug. Gregoire vous a donné en garde ces diverses sommes d'argent ou aucune d'icelles, et quelles, ou en aucun autre tems avant ou depuis, et quand, vous, ledit Defendeur

connoissiez

connoissiez bien, d'apres ce que ledit Augus^n. Grégoire Giroudard vous a dit, ou vous avez donné a entendre, ou — d'apres d'autres informations dignes de foi venües à votre connoissance, que ces diverses sommes d'argent, ou aucunes d'icelles et quelles, proveniocient de la vente des deux emplacements mentionnés dans le quatrieme Interrogatoire ci-dessus, ou de la vente de l'un de ces deux emplacements ? —

Rep^e. — Je ne peux dire d'ou proviennent les deniers en question — le defunt Augustin Gregoire ne me l'a pas dit — Depuis sa mort la demanderesse sa veuve m'en a parlé — Je n'en puis parler d'apres ma propre connoissance. —

6^e Inter^re — N'est il pas vrai que lorsque ledit Aug^n. Gregoire vous a donné en garde ces diverses sommes d'argent ou aucunes d'icelles, et quelles, ou en aucun tems — avant ou depuis, et quand, ledit Aug^n. Gregoire vous a dit, ou donné a entendre clairement, qu'il vous donnoit en garde ces diverses sommes d'argent, ou — aucunes d'icelles, et quelles, pour les raisons suivantes ou pour aucunes d'icelles, savoir, parceque lui, ledit Augustin Gregoire craignoit que ces sommes d'argent ne fussent dépensées, s'il les gardoit chez lui, et — qu'en vous les donnant en garde il les considerait comme placées en lieu de sureté et entre mains sures: ou parceque ledit Augustin Gregoire ne croyoit pas ces sommes d'argent en sureté chez lui; ou parceque lui, ledit Aug^n. Gregoire craignoit que sa vie, ou sa sureté personnelle ou celle de sa famille ne fut exposée s'il etoit connu que lui ledit Augustin Gregoire avoit chez lui des sommes d'argent aussi considerables; ou pour d'autres raisons à peu prés semblables, et pour quelles raisons ? —

Rep^se — Ledit defunt Aug^n. Gregoire en me remettant ces deniers m'a temoigné le dessein bien marqué de les mettre en sureté, et d'assurer l'execution des intentions qu'il

qu'il me communiquoit à ce sujet — Il ne m'a pas parlé de crainte pour sa sureté personnelle, ou celle de sa famille. —

7e Interr.re Si ledit Defendeur repond negativement au sixieme Interrogatoire ci-dessus, ou à aucune partie d'icelui, ledit defendeur sera requis de declarer aussi amplement que s'il y etoit specialement interrogé, — quelles raisons ledit Augustin Gregoire lui a — données à lui ledit defendeur, et quelles vües, et quels motifs ledit Augustin Gregoire lui a temoigné avoir, en lui donnant en garde ces diverses sommes d'argent, ou aucunes d'icelles et quelles; Et s'il n'est pas vrai, que ledit Aug.n Gregoire en lui donnant en garde ces diverses sommes d'argent ne lui a pas temoigné, ou donné a entendre, qu'il eut en le — faisant, d'autres vües, ou d'autres motifs que de placer ces diverses sommes d'argent en mains bien sures, et telles qu'il les peut toucher quand il le voudrait, et à premiere demande, et s'il n'est pas vrai que ledit — Augustin Gregoire lui a temoigné à lui led.t Defendeur d'une maniere claire et certaine, que ses vües, en lui donnant en garde à lui ledit defendeur ces diverses sommes d'argent, ou aucune d'icelles, n'etoient point de se depouiller de son droit de proprieté sur icelles, Et s'il n'est pas vrai, que lui ledit Defendeur en recevant ces diverses sommes sous sa garde a bien compris que ledit Augustin Gregoire en les lui — donnant en garde n'entendoit pas se depouiller du droit de les retirer d'entre les mains de lui ledit defendeur jusqu'au dernier coppre, quand il en auroit besoin, ou quand bon lui sembleroit; Et s'il n'est pas vrai en effet, que toutes les fois que ledit Aug.n Gregoire en son vivant a eu besoin — d'argent, il retiroit d'entre les mains du dit —

Defendeur

Defendeur une partie de ces diverses sommes d'argent qu'il lui avoit donné en garde – et s'il n'est pas – vrai, que ledit Augustin Gregoire en son vivant, a retiré d'entre les mains du dit defendeur une grande partie de ces diverses sommes d'argent qu'il lui – avoit ainsi données en garde ? –

Rep^e J'ai deja en grande partie repondu à cet – Interrogatoire – J'ai rendu compte des viiés du – defunt Aug^n Gregoire en faisant ce depot – il ne m'en a pas communiqué d'autres – Il m'avoit apporté la premiere des deux sommes dont j'ai parlé d'abord, dans un coffre de bois, dans lequel il mit ensuite la seconde – J'avois laissé le tout dans l'etat ou il me l'avoit apporté, et sans en faire la numeration – Plusieurs années apres, pour plus de sureté il me parut convenable de mettre ces deniers ailleurs, ce que je lui dit, et il l'agréa – avant ce deplacement il avoit tiré du coffre qui, autant que je puis me rappeller etoit d'un peu plus de douze livres courant. – Ce n'est que lors du – deplacement que numeration fut faite des deniers qui me restoient confiés – S'il avoit jugé à propos, alors, avant, ou depuis, d'en retirer d'avantage, ou de reprendre le tout, je n'aurais pas cru devoir lui faire la moindre observation, quelles que fussent ses recommendations au sujet de l'emploi de ces deniers – c'etoit à mes yeux un depot, dont je ne me croyais le soin confié qu'autant que son auteur jugeoit à propos de me le laisser entre les mains, et aux conditions qu'il y avoit mis. –

8^e Interog^n N'est il pas vrai, que ces diverses sommes d'argent ni aucune d'icelles, ne vous ont point eté données en garde à vous ledit defendeur par ledit Augustin Gregoire, sous le sçeau du secret proprement dit. ?

Rep^e – Ce depot etoit secret – c'etoit aussi sa recommendation

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que ces deniers fussent par moi employés conformt. aux vües dont il m'avoit fait part, & exclusivement à toute autre. —

9 Interogue — Si ledit defendeur ne repond pas affirmativement au huitieme Interrogatoire ci-dessus, ledt. defendeur sera requis de declarer aussi amplement que s'il y etoit specialement interrogé, quelles sont les — diverses sommes d'argent qui lui ont été données en garde par ledit Augustin Girouard, sous le sceau du Secret, et en outre de declarer de quelle maniere ledit Augustin Gregoire s'est exprimé, s'il est possible, de quelles expressions et de quels mots ledit Augustin Gregoire s'est servi, en lui donnant en garde à lui ledit defendeur ces diverses sommes d'argent, mentionnées en dernier lieu, pour lui temoigner, ou lui donner à entendre à lui ledit defendeur, que lui ledit Augustin Gregoire lui — donnoit en garde à lui ledit defendeur sous le sceau du Secret ces diverses sommes d'argent — mentionnées en dernier lieu; Et s'il n'est pas — vrai que ce que ledit Augustin Gregoire lui a dit alors à lui ledit defendeur, ou que la maniere dont ledit Augustin Gregoire s'est exprimé alors, et que les expressions et les mots dont ledit Augustin — Gregoire s'est servi alors, devaient ou pouvaient s'entendre seulement comme exprimant la — confiance illimitée que ledit Augustin Gregoire avoit en lui ledit defendeur en lui donnant son argent en garde, et comme etant de la part dudit Augustin Gregoire une injonction ou une priere, de ne point dire publiquement ou ouvertement que lui ledit Augustin Gregoire lui avoit donné en garde son argent, mais non comme exigeant de lui ledit defendeur un secret inviolable; Et s'il n'est pas vrai, que du vivant dudit Augustin Gregoire et depuis, et quand, lui ledit Defendeur

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a dit a plusieurs personnes de sa propre famille, et à qui, que lui ledit defendeur avoit en sa garde et possession et chez lui, une certaine somme — d'argent, et quelle somme d'argent, qui lui avoit été donné en garde par ledit Augustin Gregoire en son vivant; Et s'il n'est pas vrai que depuis le décés du dit Augustin Gregoire lui ledit Defendeur a dit et declaré à plusieurs personnes de la famille du dit Augustin Gregoire et à d'autres personnes, nommement à ladite Catherine Boulanqué, veuve du dit feu Augustin Gregoire, et à Sieur Louis Compte Mre Charpentier, neveu et procureur de ladite Catherine Boulanqué, que lui ledit defendeur avoit en sa — possession et entre ses mains une certaine somme d'argent, et quelle somme d'argent qui avoit été mise en sa garde par ledit Augustin Gregoire en son vivant?

Repse — J'ai deja repondu a cette question — la somme qui m'a été remise en depot, deduction faite de celle que le dit Augustin Gregoire avoit retiré du coffre, comme je l'ai dit plus haut, est de quatre cent quarante sept livres dix chelins cinq deniers courant, et destinée aux objets dont j'ai parlé. — J'ai aussi dit, que j'avais reçu pour lui une somme de soixante deux livres dix chelins mentionnée en ma reponse au troisieme Interrogatoire, independante de ce depot — Il m'a aussi passé une ou deux autres sommes par les mains, dont j'ai aussi dit qu'il ne m'est rien resté, et dont je ne me rappelle pas le montant — Je sais qu'elles font partie des prêts par lui faits à un de ses neveux nommé Dubord dit Latourelle, dont j'ai remis les obligations à la demanderesse, veuve du dit defunt Augustin Gregoire, depuis son décés, et qui sont portés dans son Inventaire. — Je ne saurais me rappeller des termes, mots, ou expressions precises dont ledit Augustin Gregoire s'est servi relativement au depôt qu'il m'a — confié — ce que j'en ai dit est le resultat de conversations repetées, et comme je l'ai dit, d'explications que j'ai

provoquées

provoquées pour me guider — J'aurais desiré avoir quelque ecrit de lui à ce sujet, je lui en ai parlé plusieurs fois — il s'y est refusé, s'en rapportant disoit-il à moi, et aux explications qu'il m'avoit données de ses intentions pour les remplir, circonstance qui s'est renouvellée — l'année meme de sa mort. — J'ai cru devoir aussi de l'aveu du defunt Augustin Gregoire, dire quelque chose de ce depot à quelques unes des personnes de ma famille et sur tout en presence du dit defunt Augustin Gregoire à la personne chargée du Soin de mes propres deniers et de la depense de ma maison, et lui faire connoitre ce depot, de qui il venoit, le but general dans lequel il avoit été fait, et ce au Cas d'evenement ou d'accident imprévû. — La demanderesse, veuve du dit Augustin Gregoire, est venu depuis son décés, avec Me Louis Compte Me Charpentier, son neveu, me trouver, pour me parler relativement à ce que j'avais entre les mains venant de son mari — Je lui dit de suite, que j'avais a sa disposition immediate les Soixante deux livres dix chelins dont j'ai parlé deja, et que j'offris de lui remettre de Suite — Je lui remis trois obligations et quelques autres papiers — Dans le cours de l'entretien, je ne crois pas devoir nier que j'eusse d'autres deniers en depot, en lui laissant connoitre qu'ils m'avoient été remis avec des injonctions qui ne me permettoient pas de m'en dessaisir que pour remplir les vües du defunt son mari, et suivant ses intentions être employés en ouvres pies. —

10.e Interrog.re N'est-il pas vrai que vous ledit Defendeur, depuis le décés du dit Augustin Gregoire, avez dit et declaré, tant à ladite Catherine Boulanger, qu'au dit Louis Compte, ou à l'un d'eux, que vous aviez en votre — possession et entre vos mains des deniers du dit Augustin Gregoire une certaine somme montant à ladite somme de deux mille livres courant, ou aucune autre somme et quelle somme, en ajoutant que cette somme avoit été mise entre vos mains par ledit Augustin Gregoire pour

être

être employée en bonnes Ouvres, ou en Ouvres pies, apres le décés du dit Augustin Gregoire, si ledit Augustin Gregoire ne la retirait pas d'entre vos mains de son vivant ?—

Repᵘᵉ — Je n'ai point dit, ni à l'un ni a l'autre que — j'avais en ma possession une somme de deux mille livres courant des deniers du dit Augustin Gregoire, ni a aucune autre personne — Je ne pouvais le dire; Je ne pouvais même, quand la demanderesse veuve du dit Augustin Gregoire est venuë me parler, specifier de somme exacte, ni me rappellant pas dans le moment le montant que je verifiai aussitot apres — Quelques observations de la part de l'un deux, provoquerent de la mienne, que le depôt etoit, ou devoit etre de plus de trois cent livres Courant — j'allais peut être trop loin dans cette occasion — j'aurais peut être dû me renfermer plus absolument dans des generalités — mon motif etoit la crainte de m'en rapporter uniquement à moi-même relativement à l'emploi de ces deniers — Je ne leur dissimulai pas, que ne serai pas fâché — qu'elle, ou les parens du defunt reclamassent ces — deniers par une poursuite s'ils croyoient y avoir un droit legal, dont j'etais satisfait de ne pas me trouver seul le Juge. u —

11ᵉ Interᵗᵉ N'est il pas vrai que ledit Augustin Gregoire, ne vous a jamais dit en son vivant, que si à son décés il restoit entre vos mains ~~en son vivant~~ aucune — somme par lui mise entre vos mains en son vivant, vous l'employriez en bonnes Ouvres, ou en Ouvres pies.? —

Repᵘᵉ J'ai deja dit, que le defunt Augᵗ Gregoire m'avoit plusieurs fois recommandé l'emploi de ces deniers en question et expliqué ses intentions à leur egard: Ma reponse a cet Interrogatoire se trouve dans

mes

mes reponses précédentes et particulierement à celles que j'ai donné au troisieme interrogatoire, et auxquelles je refere. —

12e. Interr. Si ledit Defendeur ne respond pas affirmativemt au onzieme Interrogatoire ci-dessus, ledit Defendeur sera requis de declarer de quelle maniere ledit Augr. Gregoire s'est exprimé, et s'il est possible de quelles expressions, et de quels mots ledit Augr. Gregoire s'est servi, pour l'autoriser lui ledit Defendeur, et lui donner pouvoir d'employer en bonnes Ouvres, ou en Ouvres pies, la somme qui resteroit entre les mains et en la possession de lui ledit Defendeur au jour du decés du dit Augr. Gregoire, et s'il n'est pas vrai que lui ledit Augustin Gregoire n'a jamais dit, ou declaré à lui ledit Defendeur, et ne lui a jamais donné a entendre, en quelles bonnes Ouvres, et quelles Ouvres pies, il voulait et entendait, que la somme qui resterait ainsi entre les mains de lui ledr Defendeur au jour du decés du dit Augustin Gregoire fut employée. ?

Reps. J'ai deja dit que je ne me rappellai pas des mots ou des expressions precises, dont le defunt Augustin Gregoire s'etoit servi relativement au depôt qu'il m'a fait de ces deniers — Je ne puis donner d'autres explications que celles dont il m'a fait part comme je l'ai dit, et qui se trouvent dans mes reponses precédentes, et notamment au troisieme, sixieme, septieme, neuvieme et onzieme, aux quelles je refere. — Il entendoit que ces deniers fussent employés, comme je l'ai dit en Ouvres pies, et s'en rapportant a moi de l'execution de ses volontés à cet egard. —

Some discussions having arisen between the parties in regard of the sufficiency of the Defendts

answers

answers to some of the foregoing interrogatories, it was ordered that he should answer over to the eighth and to the latter part of the tenth Interrog3 He answered as follows.—

Le Defendeur present en Cour, et apres serment prêté, a repondu comme suit au huitieme, et a la derniere partie du neuvieme Interrogatoire à lui proposés par les Demandeurs, en vertu de l'ordre de cette Cour.—

Au 8e Interrog.e Ma reponse a cet Interrogatoire se trouve deja dans celle que j'ai faite au troisieme — J'y ai dit, que ce depot m'avoit été confié sous secret — Je refere à cette partie de ma reponse ainsi qu'aux explications qui l'accompagnent relativement au même sujet. — J'ajouterai, que je ne puis pas dire que le defunt Augn Gregoire en me mettant entre les mains les deniers dont j'ai parlé, se soit servi pour me recommander le secret de ce depot, des termes qui se trouvent dans l'Interrog.re et qu'il m'ait dit, qu'il me les donnait en garde sous le sceau du secret.— Je ne saurais sur cet objet, comme sur plusieurs autres me rappeller quels sont les mots, dont il a fait usage alors et depuis, dans les diverses conversations que nous avons eu ensemble — C'est d'apres leur teneur, le sens de ses recommendations, et les explications qu'il m'a donné de ses intentions, de ses vues, de ses motifs, que j'ai compris que ce depot, m'etoit confié sous le sceau du Secret.— Je me crois aussi obligé d'ajouter encore, que j'ai sû de meme, que son but en me confiant ce depot, pour être employé comme je l'ai dit, etoit d'empecher que ces deniers ne tombassent entre les mains de ceux qui à son decés auroient des droits a exercer sur les biens qu'il pourroit delaisser, et en pourroient prendre possession.

Au

A la dernière partie du 10e Interrogre.

Quant à la dernière partie du dixieme Interrogatoire à la quelle je conçois qu'il m'est ordonné de repondre de nouveau, c'est à dire, "Si j'ai depuis le décés du dit Augr Gregoire, dit "et declaré, tant à la dite Catherine Boulargué, qu'au "dit Louis Compte ou à l'un deux, que la somme que "je pourrai avoir declaré avoir reçu du dit Augr "Gregoire, avoit été mise entre mes mains par ledit "Augustin Gregoire pour etre employée en bonnes "Oeuvres ou en Oeuvres pies apres le décés du dit Augustin "Gregoire, si ledit Augr Gregoire ne la retiroit pas "d'entre mes mains de son vivant" Je ne puis me rappeller des expressions precises dont j'ai pu me servir à cet egard, ce sujet etant plusieurs fois revenu dans les conversations que j'ai eu avec ladite Veuve Augr Gregoire, ou avec ledit Compte. Je crois leur avoir dit assez clairement que ces deniers m'avoient été remis par ledit Augr Gregoire, qu'ils étoient destinés à des Oeuvres de pieté ou de charité, et que j'etois chargé de les employer à ces objets dans le cas du décés du dit Augr Gregoire — Porté par les motifs dont je deja rendu compte à leur faire part autant que les circonstances me paroissoient le permettre à leur laisser connoitre, ce qui pouvoit faciliter à ladite Veuve, et aux heritiers du dit Augr Gregoire, leurs moyens de reclamation, j'ai pu parler dans le sens de la reponse que j'ai deja faite au troisieme Interrogre sur le meme sujet, au moins en partie — Ne supposant pas en même tems que ces conversations dussent devenir un sujet de discussion, ou matiere d'Interrogre je n'ai pas donné au choix de mes expressions l'attention necessaire pour m'en souvenir en detail et y mettre un exacte precision, comme j'aurais pu le faire, si j'avais prevû ce resultat.

Mr Pettit for the Plaintiffs — The money here put into the hands of the Defendant belonged to the Community

community that subsisted between the late Auguste Gregoire and his widow one of the Plaintiffs, who are now entitled to recover the same from the Defendant, — To this action it has been answered that it was a deposit made by the late Augte Gregoire under the Seal of Secrecy and therefore the plaintiffs are not entitled to maintain their action — But the Defendants plea in this respect is not sufficient, he ought to have stated that the depot in question had been employed, or was to be employed in the way and according to the directions and intentions of the deceased — But as it does not appear that the deceased Auguste Gregoire ever made or intended the deposit to be made under the Seal of Secrecy, the law will not leave this money in the hands of the Defendant to be disposed of as he shall see fit — and even under any point of view in which this case can be considered, it is questionable whether the law will favor a deposit of this kind to the exclusion of the rights of the Plaintiffs — There are but two ways for a man to dispose of his Estate by Donation entre vifs, and Donation a Cause de mort — but this act of deposit, cannot be ranked under the head of either, and it is besides deficient in point of form — But according to the general principles of law, the depositaire holds the thing deposited in the name and for the behoof of the person who makes the deposit, and even the possession of the depositaire is considered to be that of the owner. The money here deposited was the property of the Community, and according to the additional answer of the Defendant to the eighth Interrogatory, the deposit was made by Auguste Gregoire in order to deprive those who might have a claim on it after his death from exercising that claim — or in other words to deprive both the widow and the heirs of

their

their respective rights – this he could not do, it is contrary to law, at least as regards the Community rights of the widow, under the 225th art. of the Custom.–

Vigé. Defendt.– The depot is a contrat synallagmatique known in the law, and binding on the parties, and the execution thereof must be left to take effect according to the intentions of the person making the deposit – cites Repre. vo Depot, – 2 Bourg. p. 458, – and in such cases as the present it must be considered as a disposition a Cause de mort, where the thing is immediately handed over by the testator to the person charged with the performance of his intentions – cites. Nouv. Denizt. vo Depot. p. 272. 2 Arrets d'Augeard. p. 135. – where there is a case nearly in point – Old Denizt. vo Depot. No 11. – 1 Augeard. 807. – 2e Journal des Audiences–
That it does not appear here by any statement from the Inventory that the rights of the widow have been infringed, as to the heirs they can claim nothing in what the deceased has disposed of.–

Bedard for Pltff. in reply – The depot here is not made sous le sceau du Secret, although made – secretement, things very different, and implying different obligations – had it been made sous le sceau du Secret, the defendant would never have broken the confidence reposed in him, by communicating it to any one, as he appears to have done, by imparting it to the members of his own family, to the widow and to some of the heirs of the deceased. – But the disposition here made by Gregoire, must be considered as a Cause de mort, but without the necessary formalities – the money was placed in the hands of the Defendant, but the application of it was to be made only after his death, no particular mode of application is stated but it was left to the discretion of the Defendant to dispose of it as he should see fit. – Here a great

distinction

distinction is to be made – Had any particular person or Body been pointed out in whose favor the deceased had vested the money in the hands of the Defendt the nature of the depot, sous le sceau du secret, is such, that from the moment of the deposit being made, such particular person or body acquired such interest therein, that neither the depositaire, nor the person making the deposit could change the nature of the deposit without the consent of such particular person or body – the depositaire became the agent of such particular person or Body, and held the deposit for their benefit – But, as in this Case, where no particular person or Body is named, who are to have the benefit of the deposit, and where the person making the deposit reserves a right over it during his life time, that right upon his decease vests in his heirs who are entitled to exercise it in the same manner as the deceased could have done. – The Defendant says, in his answers to some of the Interrogatories proposed to him, that he understood, "il a compris" that it was under the sceau du secret, that the deposit was made, but this is not the obligation which ought to have been imposed in this case, it ought not to be left to uncertain supposition or understanding but ought to have been expressed in positive terms, in order that the obligation of a deposit of this kind might take effect – But here had the deposit been made under the sceau du secret, the defendant was bound to disclose it, because it was made in fraud of the rights of the Community, and of the heirs of the deceased, and not entitled to be respected as a matter of secrecy – The Defendant has now revealed the whole, and it thereby appears that the intention of the deceased was to defraud his widow and his heirs of their just rights – The disposition here made by Gregoire was to take effect only after his death, or a cause de mort, and does not therefore come within the 225. art. of the Custom. – The law allowed

2. Bourg. p. 458.

the

the law permitted the depot, when regularly made on the principle that it favoured restitution of what had been wrongfully taken – but even in such case the husband appropriate the deniers de la Communauté to the purposes of restitution, much less could he make any depot thereof where there was no restitution to be made – cits. Gr. Comr. de Ferrière. art. 225. Glose. 3. № 33. –

It further appears by the Defendant's answers to the Interrogatories, that the depot in question was to be employed en Oeuvres pies, et en Oeuvres de charité, in this Case the plaintiffs are well entitled to claim it as standing in need of it, as it cannot be more beneficially applied, they have the best claim as being the nearest relations of the deceased. – But the disposition here being made a Cause de mort, it cannot subsist as a verbal disposition being contrary to law – it appears also to have been made, ab irato, which might arisen from a momentary Cause, and ought therefore to take effect where the necessary formalities have not been complied with – allowing it even to be a disposition fidei commissaire, it required the same formalities for its validity as a last will.

By the Court –

Potts. Cout: du Depôt
№ 12.
№ 34.
№ 54.

The general rule of law in regard of deposits is, that the depositaire holds it, as the property of the person making the deposit, subject to his orders, and in all respects his property, nay the very possession is considered to remain in him and on his decease his right in this respect goes to his heirs – In regard of deposits of the kind now in question, to be employed in acts of charity and piety after the decease of the person making the deposit, it is by no means clear,

that

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that when verbally made, as in this case they can under any circumstances be valid, but here there seems to be little doubt, for according to the distinction which has been taken, where no particular person or body was designated as entitled to the benefit of the deposit, and where the person making it retains his power over it during his life time, there has not been such an alienation of the property as to divest the donor of it and therefore it must go to his heirs — The Defendant here has revealed the circumstances under which the deposit was made and the power the deceased retained over it, by taking away a part of it and leaving what should remain after his decease to be applied to objects of charity according as the Defendant should see fit, and the Defend^t says that Gregoire was in his lifetime so much master over the money that he might have taken away the whole of it had he seen fit — Grenier Tr. des Don. pp. 351. 352. N^o 78 — is of opinion that Courts of Justice will enforce the execution of a disposition for a pious or charitable purpose, when the sums given in this manner (that is en depot) serovient modiques "comparativement à la fortune du disposant" but this shews the tender feeling towards dispositions of this kind, and would even call in question their validity — but here we must be guided by principles of law, and besides we have no rule here before us by which to measure the fortune of the donor — And even Grenier himself in the latter part of N^o 78 referred to, sufficiently recognises the principle of law which we are here obliged to follow — he says — "Les difficultés qui s'élevent à ce sujet dérivent "de ce qu'on peut dire que jusqu'à la distribution ou

N. Denis^t V^o Don: entre vifs. § 12. N^o 11.

"l'emploi

" l'emploi des sommes deposées, il n'y a rien eu
" de consommé; qu'au décés de celui qui avoit fait
" le depot, il etoit encore saisi de ces sommes, puisqu'au
" moment même de son décés il pouvoit retirer le depot,
" et que cette saisine s'est continué sur ses heritiers "—

Considering therefore the plaintiffs to be here vested with all the rights of the deceased in regard of this deposit they are entitled to their Judgment against the Defendant that he restore the same to him.—

Judgt for Plffs

sa. Instit". au Droit Franc par Serres. p.335. 336. —

Peltier & ux vs Chaput & ux & Faribault, mis en cause —

The plaintiffs having sued out a writ of Execution against the lands & tenements of the Defendants, afterwards filed an Opposition claiming that the land should be sold subject to the payment of a certain rente & pension viagere due to the said Plaintiffs by the said Defendants on the land which had been so seized, which by the consent of the Defendants was granted, and a writ of venditioni exponas issued in consequence directing the sale of the land subject to the payment of the said Rente & pension — The Land was afterwards sold by the Sheriff agreeable to the order of the Court, and Joseph Edward Farribault became the purchaser subject to the payt of the said Rente & pension and also for a sum of £77. 1. 8, which sum not having been paid, the plaintiffs obtained a rule on Mr Farribault to shew Cause why the land should not be re-sold at his folle enchere — Mr Farribault

appeared

appeared, and presented a petition to the Court in which he prayed that the sale and adjudication made to him of the lot of land in question should be set and annulled, inasmuch as the Plaintiffs and Defendants had by collusion between them obtained an order from the Court for selling the lot of land subject to the payment of a Rente & pension viagere which was no charge foncier, and as the said petitr had purchased the said lot of land subject to the payment of the said rente & pension viagere, he was liable to be evicted from his possession or to be troubled by the Creditors of the Plaintiffs to whom the said Rente & pension viagere was payable — Further that the said lot of land was subject to a dower constituted thereon by one Masta, whose widow or children might claim the same and by reason thereof trouble the said petitioner in his possession aforesaid. —

Mr Bourré for the plaintiffs, stated in answer to the said petition, that the same ought to be rejected as it contained no grounds upon which this Court could set aside the sale and adjudication made by the Sheriff of the lot of land in question to the mis en Cause — That it was a condition of the sale that the said lot of land should be sold subject to the payment of the said Rente & pension viagere, and the mis en Cause having purchased with the knowledge of such condition cannot now come against his own act — As to the Dower, it may never become due, but in any case it is no subject to invalidate the adjudication that has been made to the mis en Cause because the decret does not purge Dower, and if this objection were admit, there could be no sale made by Decret, because there must still be a liability to the payment of dower — That the mis en Cause knew

or

knew or might have known that there was a dower on this lot of land, but whether he did or did not, it cannot affect the validity of the sale, and the mis en Cause must take a different recourse. —

The Court declared the Rule for the folle enchere absolute, as the objections stated by the mis en Cause contained no ground for setting aside the sale made to him. —

No 1052.
Smith. a
vs
Thibault. a

Action of debt on Obligation —

The declaration stated, that on the second day of May 1825, the Defendant being indebted to one Eustache Lambert Nicolas Dumont Seignior in part of the Seigniory of Mille Isles, in the sum of three hundred and thirty three livres ancient Currency, equal to £13,, 17. 6 Current money of the province for certain lods et Ventes on the purchase made by him the said defendant of a certain lot of land in the said Seigniory from one Isaac Berichon and the said Eustache Lambert Nicolas Dumont being then indebted to the said plaintiff in a like sum of £13. 17. 6, he the said Eustache Lambert Nicolas Dumont by a certain act or agreement bearing date the second day of May 1825, did transfer and make over to the said Plaintiff the said sum of money to be by the said Plaintiff recovered and received in discharge of the debt he the said Eustache Lambert Nicolas Dumont so owed to the said plaintiff and the said Defendant being then and there present at the passing of the said act, became a party thereto and did acknowledge himself to owe to the said Eustache

Eustache Lambert Nicolas Dumont the aforesd sum of £13.. 17.. 0 for the causes aforesaid, and did thereupon undertake promise bind and oblige himself to pay the same to the said plaintiff with interest from the date of the said agreement until paid — That the said Defendant hath not paid the said sum of money although demanded — Wherefore &c —

Plea. —

1st Demurrer to the declaration

2. Defense au fond en fait — that the promise and undertaking of the Defendant in and by the said acte or Agreement, was made under an impression and belief that the lods et ventes were due by him the said Defdt to the said Eustache Lambert Nicolas Dumont as therein mentioned, whereas the sale upon which it was stated that the said lods et Ventes had accrued, was never perfected, there never having existed any thing further than a promise to sell made by the said Isaac Berichon to the said Defendant, upon which promise to sell no lods et ventes accrued or became due to the said Seignior, and therefore the promise & undertaking of the said Defendant to pay to the said Plaintiff is without Cause or consideration and null and void in law —

3. Plea of exception peremptoire — That Plff cannot have or maintain his action as he had granted term and delay to the Defendant to pay the same till the month of December then next — 1825 —

The Replication to the different pleas is in general terms, denying the matters of law and fact averred by the Defendant, and joining issue on the pleas.

The parties being heard on the merits, it was contended on the part of the Defendant that enough appeared in evidence to shew that at the time of making the act and agreement in question whereby he the said Defendant became bound to pay to the said plaintiff the sum of money now demanded, he the said Defendant was not indebted to the said Eustache Lambert Nicolas Dumont in the said sum of money, nor in any sum of money whatever, as no sale had been made and perfected of the lot of land in question by the said Isaac Benichou to him the said Defendant, but merely a promise to sell which created no lods et ventes to the Seigneur - That it was therefore an undertaking on the part of the Defendant without Cause or consideration which was not binding and could not be carried into effect -

But the Court held that the Defendant was liable - That at the time of the promise and undertaking made by the Defendant he knew or ought to have known the extent of his obligation to pay the lods et ventes in question a matter which the Plaintiff must be presumed to be unacquainted with, but by the Defendr acknowledgment that he owed this sum of money to the Seigneur and his promise to pay the same to the Plaintiff, the Defendant must be bound, otherwise it would be leading the Plff into

into error, as he was thereby induced to give to Mr Dumont a discharge, or a promise to discharge the debt he owed to the Plaintiff, and the Defend would thus be taking the advantage of his own wrong — But it does not appear that the fact upon which the Defendants plea in this respect is founded, has been made out in evidence. —

Judgt. for Plff

N°2131.

Ex Parte — On Petition of Jno Molson, Insv. for a Decret Volontaire

An execution had issued for the sale of the property in question, to which the Sheriff made his return that the said property had not been sold for want of bidders. —

The Petitioner now moved for and obtained a rule on the Sheriff to Shew Cause why he should not be enjoined to proceed to the sale and adjudication of the property described in the Writ of Execution by Decret volontaire, without imposing the third condition of sale of the said property, by him illegally made for the sale thereof, which condition is in the following words —

" 3ly. The purchaser to give security for the payment
" into my hands at my Office aforesaid, within eight
" days after the Judgment of distribution shall have
" been pronounced, of the several sums of money herein
" after mentioned, for which, oppositions afin de conserver
" have been lodged in my said Office, viz. Opposition
" A by Jean Baptiste Martineau for the sum of
" £500. — with expences thereon — Opposition B. by the
" Gentlemen Ecclesiastacks of the Seminary of Montreal
" for £20. 16. 8, claimed as being due to them for Lods
" et Ventes, with costs" —

And that the said Sheriff be enjoined not to

assume

assume the right without legal authority, to impose upon the said property, or to exact from the purchaser thereof, any charges, burthens or conditions not mentioned and expressed in the writ of execution by virtue whereof the sale of the said property is made, — for the following reasons. —

1st Because the said Sheriff had of his own authority inserted the aforesaid third Condition for the sale of the said property under the writ of Execution sued out for that purpose. —

2. Because by the said writ of Execution the said Sheriff is not enjoined to sell the said property on the Condition or charge by the purchaser to give — security for the payment of the aforesaid Sum of five hundred pounds to the said Jean Baptiste Martineau, nor of the said sum of £20. 16. 8 to the Gentlemen Ecclesiastics of the Seminary of Montreal

3. Because the said sums of money are claimed only by Opposition afin de conserver, that is to the delivery and payment of the monies arising from the said Sale, and not as a burthen and charge — thereon. —

4. Because the said sums of money are claimed as due by right of mortgage on the said property which cannot be claimed by opposition afin de — charge, but only by opposition afin de conserver

5. Because the said Sheriff hath contrary to the intentions of the law, and of his own proper — authority only, by imposing the aforesaid Condition converted the aforesaid Oppositions afin de conserver into Oppositions afin de charge, and hath thereby illegally, and contrary to the tenor of the writ of execution, charged the said property with the payment of the aforesaid Sums of money. —

O &

6th Because by law the purchaser of the said property, cannot be held to pay more than the amount for which the same is sold ~~cannot~~ nor to give Security for more. —

7th Because the said Sheriff is authorised by law to demand and obtain from the purchaser payment of the amount of the purchase money, or on default of payment to obtain Security for the payment of the said oppositions only to the extent of such purchase money. —

Mr Gale on behalf of the Sheriff now shewed cause and stated, that in making the aforesaid condition of Sale he had complied strictly with the requirements of the Stat: 3. Geo. 4. ch. 2. Sec. 5 & 6th which expressly directs, that the amount of the sums for which Oppositions afin de conserver shall be made shall be paid into the hands of the Sheriff by the purchaser, or Security given to him for the payment thereof, so that no option is left with the Sheriff to dispense with what the law requires, and although this law as it now stands is inexplicable and a mere felo de se, yet it was not for the Sheriff to put favorable constructions upon it to answer the views of the parties, but to enforce its injunctions — Submitted the whole to the Court.

The Court said, that although the Statute was not very clearly worded, yet such interpretation ought to be put upon it as to prevent its operating an injustice, which certainly would be the Case if a purchaser should be held to pay or to give Security to the Sheriff for the full amount of all oppositions that might be made afin de conserver

beyond

beyond the extent of his purchase money. This was never intended by the Legislature, and on recurring to the 5th. and 6th. Sections of the Statute we are satisfied that the giving of this Security where the money was not paid, was upon the principle and supposition that the oppositions a fin de conserver and the expences of the Sale, did not amount to the full sum of the purchase money This is evident from the word 'only' which is inserted in the 5th Sec: which can be interpreted only in this way - The words are - "That when the person "suing for such voluntary Sheriff's Sale, shall "become adjudicataire of the real property or "hereditaments for which he shall have obtained "the same, he shall not be obliged to place the "whole price of the adjudication in the Sheriffs "hands, unless it shall have been otherwise agreed "between the parties interested, but only the necessary "expences of the proceeding to such Sheriff's Sale, and "the amount of the sums for which Oppositions a "conserver shall have been made" Now it is evident that if the party was not obliged to plan the whole price of the adjudication in the hands of the Sheriff but only the necessary expences &c - it must be understood, that this was applying to a part, and not to the whole of the price of adjudication, for otherwise this section would be contradictory & insensible, by saying that a part may be greater than the whole, independant of the evident injustice which might arise from such an interpretation - That the Sheriff had put that construction upon the law which his own Security required, and which the words would on a hasty perusal seem to

imply

simply, but upon a closer examination every one must be satisfied this was not the intention of the Legislature, and to this we must look on the present occasion.— The Court made the following order —

The Court having heard the parties by their counsel on the rule obtained on the 6th instant by the said John Molson, Junr., on the Sheriff of this district, to shew cause why the third condition of Sale made by the said Sheriff for the Sale and adjudication by decret volontaire of the lot of land in question, should not be set aside, and the said Sale and adjudication — made without the burthen or charge imposed by the said third condition of Sale — It is ordered, that the said third condition of Sale be altered, and that the same be made by the said Sheriff in the following terms — That the adjudicataire do pay into the hands of the Sheriff the amount of the adjudication, or deposit in the hands of the said Sheriff the amount of the sums for which oppositions afin de conserver have been made, to the extent of the said purchase money, or give good and sufficient Security to place such money in the hands of the said Sheriff, — within eight days after the Judgt. of distribution shall have been pronounced. —

No. 390.

Ware & al. — vs — Savage & al.

This was an action instituted by the Plaintiffs as the payées of two promissory drawn by Dyde & Martinant — and

the

the action was brought against Savage and his wife Dyde, who had been one of the partnership of Dyde & Martinant, the drawers of the notes & also against Martinant the other partner. —

The Defendant Martinant made default. but Savage & wife appeared and pleaded to the action — On the part of Savage it was pleaded that he was not liable to pay the debt in question and that the action in regard of him ought to be dismissed, inasmuchas by his marriage Contract with the said Dyde it was stipulated that there should be no Community of property between them, that each of the parties should be liable for their separate debts up to that period and retain their own property — To this plea the Plaintiffs demurred, and prayed Judgment agt. the Defendants. —

Mr Gale for the Defendant Savage, contended that the marriage Contract between the parties Savage & Dyde, was tantamount to a separation of property, in which case there could be no liability for the debts of each other — Poth. Comte No 1. by the 221st art. of the Custom, the husband is bound for the debts contracted by his wife before marriage only where there is a Communauté between them — "A Cause de la quelle Communauté le mari est " tenu personnellement payer les dettes mobiliaires " dües à Cause de sa femme" ver The Communauté is considered as a kind of partnership, and a consequent liability attaches to the Conjoints as partners for the payment of their debts — but here the Defendant Savage is no partner, for he has stipulated that there shall be no Community

and

and consequently no liability, and there can be no law to support the principle, that a man not a partner and without any undertaking, can be liable for the debts of another. — Here there is an exclusion de Communauté, and the husband cannot be bound for the debts of his wife before marriage, if at all liable, it would be only as a Tiers Saisi, as holding the property of his wife — but the right here claimed is greater than there had ever existed a Communauté with an exclusion of debts. — But it has been said, that the Defendant ought to have caused an Inventory of the wife's property to be made at the time of marriage, this however is not necessary where there is an exclusion of Commté — are there is no confusion of property, and where no property of the wife's is apparent, the presumption is that she had none — and where there is a Communauté, the husband on presenting the Inventory is exonerated. see 222e art. Coutume refers to 2 Vol. Parf: Notre edit. 1813 where a decision in point is to be found. —

Fer. Gr. Commre 3 Vol.

according to the Repre ve Communauté p. 203. Notes of hand are mere cedules of which the date is uncertain — and it is not in proof here when these Notes were made, whether before or since the marriage of the Defendant — and we here see arrets cited which discharged the second husband sued on such Notes — There is no authentic proof here against Savage, not even of his marriage with Dyde, the answers of the wife in this respect to the faits & articles

proposd

proposed to her cannot bind her husband, nor can she speak as to the time the notes were made. For these reasons the Plaintiffs action ought to be dismissed. —

Buchanan for the Plaintiffs — Nothing but a separation contractuelle stipulated by the marriage Contract, could have exonerated the Defendant Savage, because in this Case there is no Communauté, no confusion of property, but on the contrary their is a separate enjoyment of property and a separate liability incident thereon — but there mere exclusion de Communauté does not operate a Separation Contractuelle, nor excuse the husband from using the necessary precaution to prevent the Confusion of property by an Inventory — but here there is no such Inventory made, on the Contrary it is — stipulated by the marriage Contract between the parties that the husband shall have the enjoyment of all the wifes property and Estate during their joint lives, and he must bear the burthen attached thereto of paying her debts — and it is impossible now to say what the — amount of the property of the wife was, in all probability much more than sufficient to pay all her debts, the maxim here applies, "qui capit emolumentum sustinere debet et onus." — This is a Commercial case, and the acknowledgment of one partner is good against the other partner. 1 Ph. Ev. 94. on this account the admissions of Martinant must bind the Partner Dyde. —

By

By the Court

The question before the Court in this Cause to be determined, is whether it was necessary for the Defendant Savage at the time of his Marriage wt Maria Dyde to have made an Inventory of her property or whether the stipulation in the marriage Contract was sufficient, by the exclusion of the Commune auté, to exonerate him from the debts of his wife contracted before marriage — The opinions of all the authors are not uniform on this subject, Ferriere in his Gr. Comre lays it down that the exclusion of the Community is sufficient without any Inventory to protect the husband, but the great majority of the authors hold a different opinion, and by this opinion we must be guided in the present instance — The exclusion of the Community does not seem calculated to prevent that confusion of property which necessarily accrues after marriage and to which the liability to pay the debts of the wife attaches, and in the present instance this is strongly marked by the stipulation in the Marriage Contract that the husband shall hold and enjoy all the property of the wife during the Marriage — after marriage it becomes difficult to ascertain what the nature and extent of the property of the wife was, and wheniever this becomes a question the course taken is to require an Inventory of it at the time of the marriage† — this Inventory not being made the Court is therefore of opinion that the Defdt Savage became jointly & severally liable with his wife for the debt in question —

Judgt for Pltffs —

† This is not like the Case of a Separation Contractuelle, where there is not only an exclusion de Comte but also a right of separate enjoyment & power of disposition reserved by each of the Contracting parties over their separate property, where no Inventory is requisite although considered even in that Case to be useful — 2a Repse Vo Separation. p. 207. Lebrun. liv. 2. ch. 3. sec. 4. No 16. 2. Pigeau. 197. — Renusson. p. 151. —

See

see. Duplessis Tr. de la Comté p. 406.—
Renusson. dº —— ch. 11. Nº 11. & 12. p. 76.
2 Bouryn part. 3. ch. 2. Sec. 4. note on Nº 19. p. 583
Charondas on 222d art. of the Custom—

April Term 1826.

Monday 3d April.

No. 1420.
Clarke
vs
Young & al

Action for breach of Covenant & damages

The Plaintiff by his declaration stated that by a certain contract and agreement made and entered into between him and the Defendants, they bound and obliged themselves for the considerations therein mentioned to construct and build two certain ships of the size and dimensions mentioned, and to have them ready and in a state to proceed to sea by a certain day — That although he Pltff had done all that on his part he was bound to do and perform, yet that the Defendants had on their part neglected to perform what by their said agreement they had undertaken and were bound to perform, in this, that they the said Defendants had not finished and compleated the said ships and put them in a state ready to proceed to sea at the time and in the manner agreed upon, whereby the said Defendants had forfeited and become bound to pay to the said plaintiff the

penalty

penalty of fifteen hundred pounds, stipulated in the said agreement to be paid by them in case of their failure in this respect, and further that the said Defendants had become liable and bound to pay to the said plaintiff the sum of two thousand pounds for his damages by him suffered and sustained in this behalf and thereupon concluding to the payment by the Defendants of the said two Sums of money making together £3500. with interest & Costs.

The Defendants by their plea took exception to the declaration of the plaintiff, inasmuchas by law the plaintiff could not maintain his action both for the penalty and for damages by reason of the non-performance by the Defendants of their contract and obligation aforesaid as stated in the said declaration Upon this plea issue was taken by the Plaintiff and the parties were now heard thereon.+

Rolland for the defendants.— The Plff cannot recover the penalty and damages in the same action, must make his election to take either the one or the other, nor can he prosecute his principal contract and an action for damages at the same time. cites Poth: Obl. N°342. 1 Evans's Poth. 207. the same principle is held. Repre V° Peines Contractuelles Comyn on Contracts. p. 538. & 547. Black: Rep. 395. Winter v River.— This is not like two

Counts

counts in a declaration, but the whole is included in one and the same Count, which cannot be maintained. —

Buchanan for the Plaintiff — The stipulation of a penalty is a mode of securing the performance of the principal Contract, and it frequently happens that the penalty does not sufficiently indemnify the party injured, and we accordingly find that damages may be recovered beyond the penalty 2. T. Rep. 389. 2 Evans's Poth. p. 101. 103, 106. and 109. — and according to the Civil law the action lies both for damages and penalty. Dig: lib. 19. Tit. 1. law. 28. Vinnius on 3 bk. Instit. tit. 16. — Poth. Obl. Nº 342, is in point, and Nº 344 — by the non-delivery of the Ship at the time agreed on, the penalty becomes forfeited and damages also may be recovered. N. Denizt. Vº Clause §. 2. Nº 2. —

Rolland in reply — The authority cited from the digest is no doubt respectable, but its applicability here is questionable — It is certain that damages cannot be claimed and also the penalty, unless in the Case where the penalty is stipulated as an indemnification for delay in the performance of the Contract, and to this the authority cited from Pothier's Obl. Nº 342. and 344 refers, and all the authorities are to the same point. —

By the Court

The stipulation of a penalty in a Contract is made with the view of securing

the

the performance of it, and this penalty stands in the lieu of damages where there is a failure of performance — But in many cases, the penalty may not be sufficient to indemnify the party for the non-performance of the Contract — and cases may also occur where the penalty would be more than a sufficient indemnification in this respect. In the first, it is held that where the penalty is not sufficient, damages also may be demanded and in the later cases, where the penalty is more than sufficient, it may be moderated by a Court of Justice to what would be a sufficient recompence for the damages sustained — In this point of view therefore the penalty may be considered merely as a stipulation of indemnification to be moderated or increased according to circumstances, the principal authorities of law are to this effect, and are well expressed by Pothier Tr. des ob. No. 342 - where he says — "Cette peine est stipulée dans l'intention de
" dedommager le creancier de l'inexecution de l'obligation
" principale; elle est par consequent compensatoire
" des dommages et interets qu'il souffre de l'inexecution
" de l'obligation principale" — The demand therefore for damages beyond the penalty is neither inconsistent nor illegal, as it is only extending the demand for indemnification beyond what has been stipulated, and this the law allows — The Defendants exception must therefore be dismissed. —

Poth: ob. No. 345

Wednesday 19th April 1826.

No 246.
Archambault
v
Sanctot.

Action en declaration d'hypotheque

On the 30th Sept. 1805, one Nicholas Hall made his obligation executed before a public notary, for a Sum of One hundred pounds he acknowledged to owe to the plaintiff. — afterwards On the 12 July 1823, the same Nicholas Hall made a deed of donation to the Defendant of a certain lot of land, and among other considerations it was stipulated in that deed that the Defendt should pay to the plaintiff the above sum of one hundred pounds, which was stated to be "pour autant que ledit Cedant lui doit suivant obligation reçu devant Mre Louis Demers, Nre —

The Defendant pleaded that the Plaintiff had obtained payment and satisfaction of the Debt in question, he having possessed and enjoyed the lot of land in question and received the issues and profits thereof for the space of 17 years prior to the said Deed of Donation, and that the said issues and profits were more than sufficient to pay and satisfy the debt aforesaid —

The Court however rejected this plea, considering that Nicholas Hall the original debtor, who alone had the right to oppose the payment now pleaded by the Defendant, had by the deed of donation above mentioned, acknowledged the debt to be still due, and charged the Defendant to pay it, who became bound to do so by accepting the donation so made to him — There may have been many considerations between

Nicolas

Nicholas Hall and the Plaintiff by which this possession and enjoyment of the land Plff may have been compromised and settled, and with which the Defr could not interfere, he was bound by his deed, and must pay the money or quit the land —

Judgt for Plff

No 1449.
Beaubien.
vs
Monjeau. —

Action en declaration d'hypotheque. —

The Defendant pleaded to this action that he had purchased and acquired the lot of land in question from one Isidore Ayet dit Malo and Therese Delphausse his wife, by deed of sale of 5 Febry. 1818, and by virtue thereof held and possessed the said lot as the true and lawful proprietor thereof — That being such proprietor he had made many considerable repairs and improvements to the houses and buildings on the said lot, which had become necessary and useful and to the amount of twenty thousand livres, which sum of money he the said Defendant has a right to claim to be paid and reimbursed to him before he can be held or bound to quit and deliver up the premises aforesaid to be sold for the payment and satisfaction of the plaintiffs demand and thereupon concludes, 1st That the Plff be held and obliged to pay and reimburse to him the said defendant the said sum of twenty-thousand livres before he shall be held and obliged to quit and abandon the said lot of land — and 2dly That on default of the said plaintiff paying and reimbursing to him the said Defendant, the said

said sum of money within a certain time, to be limited by the Court, the said Plaintiff be ousted of her right of mortgage on the said lot of land and of all further recourse thereon, and be also condemned in Costs. a

The Plaintiff by her replication to the said plea stated, that the facts alledged in and by the said plea, were not sufficient to exempt the said Defendant from being held and adjudged to quit and deliver up the said lot of land in order that the same may be sold and disposed of in the usual manner, he the said Defendant being entitled only to exercise his recourse of indemnity upon the monies arising from the sale of the said lot of land for such improvements and ameliorations as by law he may be entitled to claim.

Mr Quesnel for the Defendant contended, that the Defendant cannot be held to abandon the lot of land in question until his improvements shall have been paid for, this being a principle of law which has always been recognized in this Court — cites Case of M.Kenzie. vs Wurdele. 20 Oct. 1808. — where same principle was held — cites also. Basnage Tr. des Hyp: p. 406. Berthelot Tr. des Evictions. 2 vol. p. 459. & 465. — Ordonc de Moulins, art. 52. Lacombe vo Impenses. No 3. & 4. and Dec: de Jurisp: vo Impenses. —

Beaubien for the Plaintiff — The conclusions of the Defendants plea cannot be maintained, he has no right to retain the possession of the lot of land until his improvements shall have been reimbursed, all he has a right to claim, being only by Opposition on the proceeds arising from the

Sale.

sale of the said lot of land for such improvements Poth. Tr. de l'Hyp. ch. 2. p. 147 & 148. also p. 439. 40. — The Defendant is in this respect entitled to demand that the plaintiff shall be held to give him security that the lot of land shall be sold at a price sufficient to reimburse him in all his said improvements, but this the Defendant has not demanded. That the authorities cited from Lacombe & Ferriere do not apply, as they refer to the Case of a proprietor claiming the property by an action de revendication and the Case cited of McKenzie v Wurdle is according to the principle here contended for by the Plaintiff.

By the Court.—

The authority upon which the plaintiff rests his pretensions, is taken from Pothier in his — Traité d'hypotheque ch. 2. art. 2. §. 4. p. 439. 440. but the opinion of Pothier is not decidedly in favor of this principle — Considering the right of the — detenteur to be reimbursed for his improvements to be an equitable principle, which must always be allowed him, Mr Pothier seems to consider the mode of making this reimbursement, rather as a matter of indifference. — he says — "Neanmoins, " comme il ne seroit pas juste que ce detenteur — " perdit ses depenses, si les frais du decret absorboient " le prix de l'heritage, je pense, que si le Demandeur " n'est pas condamné à lui rendre préalablement " le prix de ses impenses, au moins, il doit être — " condamné à lui donner caution que l'heritage montera " à si haut prix, qu'il en sera payé qu'il en sera " payé, sans encourir les risques d'aucuns frais de " saisie, ou de criées." — This authority would leave it as a matter of discretion in the Court to determine whether the reimbursement ought

to

to be made before or after the delaissement of the property mortgaged, but according to the general opinion of the law writers, and according to the decisions and practice of this Court, the detenteur is not bound to abandon the property until his improvements shall have been reimbursed to him, and we are therefore of opinion to maintain the Defendants plea.—

see N. Deniz: Vo ameliorations §. 3. No 3. and §. 5. No 2.

Lacombe. Vo Impenses. No 3. p. 260.
Berthelot Tr. des Evic: 1 vol. p. 462.—
Soulatges Tr. des Hyp. p. 98.—

No 1063.

White.— Vs Metzler.—

The Plaintiff had obtained a Judgment in this Court on the 19 Oct: 1824 for five pounds for a balance due for house rent and Seven pounds ten shillings for damages for detention of the plaintiff's house after the expiration of his lease, & Cost upon this Judgment executions were sued out in the usual Course.—

The Plaintiff by M. Boston his attorney now moved, that inasmuchas by law the plaintiff is entitled to have recourse against the body of the Defendant for the satisfaction of the debt interest and costs awarded to him in this cause, the Judgment herein having been rendered against the Defendant for damages and costs, for a tort or delit by him committed, as will more fully appear by the record proceedings and Judgment

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in this Cause, reference being thereto had; and inasmuchas the said Defendant hath no goods or Chattels Lands or tenements, upon which the said debt interest and Costs can be levied, and the said Judgment satisfied, that a Writ of Attachment, or Contrainte par Corps, do issue to take and detain the body of the said defendant for the satisfaction of the said Judgment and Costs and also the Costs incurred on the writs of Execution issued in this Cause against the goods and Chattels Lands and tenements of the said Defendant, and that he the said Defendant be condemned also to pay the Costs on the present rule unless Cause to the Contrary on the 10th. inst. sitting the Court. —

A Rule was granted in consequence upon the Defendant, who appeared by Mr Beaubien his Attorney, and for Cause shewn, stated — That sufficient was not stated in the motion of the — Plaintiff to shew that he was entitled to obtain a contrainte par Corps against the Defendant — and the truth is, that there is no ground whatever for the the application — on examination it is found, that the Plaintiff's action originally was for five pounds for house rent, and fifty pounds damages — the Judgment rendered, was for the house rent and for seven pounds ten shillings damages — but to entitle the plaintiff to the present motion, the amount of damages ought to have exceeded two hundred livres — The present application is equally unfounded as to the Costs, which can be taxed and allowed as in an ordinary Case under twenty pounds, the sum adjudged being only twelve pounds ten shillings and therefore the Costs cannot amount to two hundred livres, nor can the plaintiff add the damages and Costs together so as to make up that

amount

amount, but either the damages or the Costs, must form that sum to entitle the party to obtain a contrainte par Corps.— That the course adopted by the plaintiff is besides irregular, as he should have served a copy of the Judgment on the Defendant with a notice that he meant to apply to the Court for a contrainte par Corps against him, and at the expiration of the four months to have made that application to the Court, on this application, if all had been regular the Plaintiff would have obtained an order of the Court directing that on default by the Defendant to satisfy the demand, a Contrainte par Corps would be granted against him sous quinzaine. cites Repv vo Contrainte. p. 598. 599.— That the Costs for discussing the Defendants goods and Chattels cannot be added to the Costs in obtaining the Judgment so as to complete the sum of the 200#.—

The Court were of opinion, that the procedure here adopted was not regular— That the Plaintiff in order to obtain the Contrainte par Corps against the Defendant, was bound to have signified a copy of the Judgment to him, with a notice, that on default of payment he would be contraint par Corps for the same at the expiration of four months,— this has not been done and it is unnecessary to proceed further, because in a case of this rigorous kind, every formality the law requires must be strictly complied with.—

Rule obtained by the plaintiff, discharged

see. Salle, on 10. 11. & 12 artc of 34e title of ordre 1667. p. 546.—

No. 1947.

Window
vs
Boucher de
la Broquerie.

Action of assumpsit on money Counts.—

In support of his demand, the Plaintiff who resides in England, produced an account-Current between him and the late Geo: Stubenger, stating a balance due to Pltff on certain bills of exchange which had been drawn by Stubenger on the Plaintiff, and in proof of his demand he gave in evidence the deposition of his clerk taken before the L. Mayor of the City of London under the Seal of the Corporation, by which it was stated, that the account referred to was a true extract made by him from the books of account of the plaintiff, and that the Said Geo: Stubenger was indebted to the plaintiff in the balance therein stated — No bill of exchange or other document was produced by the Plaintiff in support of his demand. —

Beaubien for the Defendant — The assumpsit in this case is laid on Dec. 1818, and although it be said that the day in point of proof in this case is not material, yet it ought never to be subsequent to the day laid in the declaration, as this is the ground of a new action — Now in this Case the evidence adduced to support the assumpsit, is the Statement of a bill of exchange drawn by the said Geo. Stubenger in April 1819. — in this respect therefore there is a variance between the declaration and the evidence. — But in this case verbal testimony alone cannot support the demand,

because

because the evidence adduced refers to a bill of exchange said to have been drawn by the late Geo. Stubenger, and no such bill has been produced in evidence nor in anywise accounted for — the best evidence the Case will admit of ought to be given, here it is wanting, and this is the more requisite in this Case, as another action may be brought against the Defendant on this very bill by some third person in whose hands it may now be —

The Sol. Genl. in reply. The balance in the acct Current produced is struck in Sept 1818, and the evidence of the book-keeper is in this respect sufficient — This balance of account is founded on money transactions between the parties, and the only proof requisite was the payment of the money for the late Geo. Stubenger — no letter of exchange is referred to in the evidence of the book keeper, nor was any such letter of exchange requisite to support the demand in the declaration. —

The Court were of opinion, that as the transaction between the parties was grounded on a written instrument, it was necessary that that instrument should have been produced to support the demand and therefore dismissed the plaintiff's action. —

see. Esp. N. P. Evidence. p. 66. 67. —
4 Esp. Rep. 159. Dangerfield v. Wilby. —

No. 554.

Dorions. —
v.
Rouleau. —
&
Dorions Opt.

On opposition afin de conserver, for the lods on a deed of retrocession of the land sold, made by one Cochrane to the Defendant. —

The Defendant sold a lot of land to one Cochrane in consideration of the payment of 6000 livres, and of an annual rente et pension viagere to the Defendant. — Cochran entered on the possession of the land and enjoyed it for three years, during which time he paid the rente et pension viagere, and also 2000 livres part of the purchase money. — Being sued by the Defendant for the payments in arrear, Cochran made a retrocession of the land to — Rouleau, who accepted thereof in Court, and Judgment was thereupon given reinstating the Defendant in the possession of the land. — Upon this retrocession the Lods et Ventes are demanded by the present Opposition —

Mr Boston of counsel for one Gravelle another opposant in the Cause, contended that the — Seignior was not entitled to his lods & Ventes on the retrocession made by the said Cochran to the Defendant, because such retrocession is considered more as dissolving the former deed of sale than as creating a new Contract and title to the land in question, and the opinion of this Court has been to exonerate all such acts of retrocession from the payment of Lods & Ventes cites Poth. Tr. Fiefs. pp. 136. 137. 140. & 141. — Repse ve Lods & Ventes. p. 718. 721. 725. & 726. —

Lacroix —

Lacroix for the opposant. — Had the parties remained in the same state as at the time of the Sale by the Defr to Cochran, there might have been some reason to alledge that no Lods et Ventes were due on the Retrocession, but it appears that Rouleau was in possessn of the land for three years during which time he paid the stipulated rente et pension to the Defendt and also two thousand livres on account of the purchase money — this gave a right to Lods & Ventes to the Seignior, as it was a new Contract which was formed between the parties. — cites Prudhomme, and Repre

By the Court. —

The opinion held by this Court has been that where the retrocession was made without any proof of the payment of the Consideration by the purchaser, there no Lods & Ventes were due to the Seignior — But where partial payment had been made, and the retrocession consented to only in regard of what remained due, that there Lods & Ventes were due to the Seignior, and this seems to be the distinction which has been adopted by most of the authors and by many decisions had on the question — see Repre vo Lods & Ventes. p. 716. No. 9. p. 717. Opinion of Mr Lepine de Granville and p. 721 the opinions of the different authors cited Fornier. Tr. des Lods & Ventes. No 625. p. 147. 2e Vol.

Debartzche vu Chalud — 20 apl. 1814.

Gagnon Perrault } 10 april
Richardson opp — } 1820.

Judgt admitting the Opposition. —

№1362.

Beckett & Co. v. M.c Gale. —

Action a bill of exchange by payees agt the Drawer. —

The bill was in the following form —

Montreal 11. Febr.y 1824.

At thirty days sight of this first of exchange second and third of the same tenor and date not paid, pay to Joseph Becket & Co. or order one hundred and sixty four pounds seventeen shillings and three pence, Sterling value received, and charge the same to account of, Your obd.t Serv.t B. M.c Gale, Surgon. —

To Messrs. Greenwood Cox & Co.
Craigs Court, Charing Cross
London. —

This bill was noted for non-acceptance on the 24.th April 1824 — and on the 27.th day of May afterwards was protested for non-payment — but of all this no notice appears to have been given to the Defendant, until late in the year 1824, or the beginning of the year 1825 when the present action was brought. —

The Defendant had married the widow of one Lewis who had been quarter master of the 8.th Reg.t and drew the bill in question on the army agents for a balance which they owed to Lewis, and the difficulty in regard of the payment of this money, was occasioned by the want of legal capacity in the drawer to demand it, and the answer given on the protest for non-payment by the drawees, was, That "letters of administration from "the court of the archbishop of Canterbury to the effects "of the late quarter Master Lewis of the 8.th Foot should "be produced". —

Grant for the Defendant contended, that the Plaintiffs were not entitled to recover as they had shewn

no

no diligence on the bill, and given no sufficient notice of protest or dishonor of the bill to the Defendt. that such want of notice could be excused only in the Case where the drawer had no funds in the hands of the drawee, whereas it is in proof here that the drawees had sufficient funds to answer the bill. — cits Chitty on bills. p. 258. 13 Bailey. 172. —

The Court however held, that the Defendant could not complain of the want of notice in this Case, as he must, or ought to have known that he had no right to draw it, as he could exercise no right over the property of the late Mr Lewis, in regard of which he was a perfect Stranger — and any man drawing a bill which he knows he has no right to draw, is not entitled to any notice of diligence thereon, as he must be satisfied that dishonor will attend it. —

Judgt for Pluff, for balce demanded. —

John Redpath
Chas. Hunter
—

In this case upon the usual affidavit, the plaintiff obtained the fiat of a Judge for a writ of Capias ad respondendum agt the body of the Defendant about to leave the Province, to hold him to bail for the sum of three hundred pounds, and the writ accordingly issued on the 6th March 1826.— The Sheriff on the first of April returned the writ, with a declaration annexed, and a notice to the said Defendant that a copy of the plaintiff's declaration would be left for him at the Prothonotary's Office within five days after the service of such notice upon him — also that he had taken the body of the Defendant, and on the same 6th day of March, had served a true copy of the writ and of the notice upon the Defendt in person — in the body of the writ it is expressed "to answer to John Redpath of a plea contained in the declaration to be served &c" On the entry of the cause, the plaintiff filed his exhibits with a certificate of the Prothonotary that a copy of the declaration was filed in his office on the 9th of March by the plaintiff's attorney.—

The Defendant thereon obtained a rule on the plaintiff to shew cause, why the writ of Capias should not be quashed, the special bail discharged and the action of the plaintiff dismissed with costs upon two grounds — 1st Because no declaron had been hitherto served upon the defendant, either personally, or at his domicile, and 2dly Because it did not appear by the return of the Sheriff to the writ of Capias, that any declaration has been so served upon the Defendant.—

On the hearing of the parties upon the rule so obtained, it appeared to be admitted, that the proceeding adopted by the plaintiff, in regard to the service of the copy of the declaration, is in perfect

conformity

conformity to the 8th article of the 4th Sec. of the rules of practice of this Court, but it has been suggested that the legality of that rule has been questioned in the Court of Appeals, as being contrary to the provisions of the Ordinance of 1785, and that it is intended in the present Case to take the Judgt of this Court and submit it to the consideration of the said Court of Appeals. — With regard to this Court it is not disposed to admit that the rule of practice is illegal, much less unjust, in any respect, nor can it allow itself on the present occasion to be swayed or governed by any extrajudicial opinion expressed in any other district: If however the Superior Court should entertain another opinion, we shall have only to regret that the public and the profession should be deprived of the benefit of an useful rule of practice, and a just creditor impeded in his recourse against his fraudulent and absconding debtor. — We however feel persuaded, that the judicial characters to whom this question may be submitted will pause and reflect, before they pronounce the nullity or illegality of the rule in question, which was framed and adopted upon due consideration by our predecessors on this Bench, among whom at the time, were the two oldest Judges of this Province, and whose characters we know their junior brethren duly appreciate, we allude to the late Ch. Justice of this district and the late Mr Justice Ogden — It is however sufficient upon the present occasion, that we are told that the question is to be submitted to a higher tribunal, that we should now fully, and publicly declare the motives and principles

of

of the decision we are about to give in rejecting the defendant's motion for quashing the writ and for the dismissal of the plaintiff's action, and we are the more inclined to do so, in order that the Superior tribunal may be fully informed of those principles and motives, and that none others may be deceived in respect thereof. —

It is evident that the principal consideration must be the legality of the rule of practice under which the proceedings complained of have been adopted, for it is scarcely to be imagined, that any person possessed of common intelligence could venture to impugn it upon any other ground, the facility it affords to the profession as well as to the creditor in the prosecution of his just demand has been generally felt and acknowledged, — particularly in this district, which from its local situation affords so many facilities for the escape of a fraudulent debtor, and it may be asked, what just ground of complaint can a debtor have to such a rule, or what objection can he make to it, unless that it serves as a check to his escape, since it affords him all the necessary — means of defence to the demand made against him. — Still we are ready to admit, that if the Court was not authorised to make the rule in question, or that it is in violation of any law we are bound to observe, it ought to be set aside by this Court; but no illegality can however be — inferred merely from the circumstance that in the other Courts of this province no such rule exists, for as Mr Le Camus has very justly — observed, — "Il est Constant que dans tous les

" Sieges

" pieges, il y a des procedures differentes les unes des
" autres qui rendent les Jugements egalement valables
" pourvu qu'il n'y ait rien dans les procedures qui soit
" contraire aux Ordonnances" — his authority I have no
doubt will have its due weight in the Superior tribunal,

It will be no difficult task to establish, that there is nothing in this rule which militates against any law of this Country, but that it is consistent both with the letter and spirit thereof, and we apprehend it will be easy to make it appear, that the rule is — useful in practice and beneficial to the public. —

That the arrest of an absconding debtor, is that which demands celerity cannot be denied, and it is also clear that in all such cases a great latitude is given to the Judges to prevent a total failure of Justice, this the general law of the Country has in view, when it dispenses with any formality or act which otherwise might be required in the ordinary course, and the party might be presumed to have it in his power to observe and comply with —

The objection which has been suggested against this rule of practice, and which the present application of the Defendant has been made to meet, is that by the Ordinance of 1785, it is expressly required, that the writ of Summons and declaration should be served upon the Defendant either in person, or at his domicile, and that this rule therefore in so far as it authorises the service of the declaration in another mode is contrary to the said Ordinance of 1785. — Before however proceeding to the — consideration of the Ordinance relied on, we would observe that the right of regulating the general practice is, and necessarily must be inherent in every Superior Court, and that a practice once

established

established, is a part of the law of the land and so far has the principle been carried in England, that in a Case reported in 1 Pr. Wms 207. a practice of seven years only was allowed to prevail against the express words of an act of Parliament — this decision is recognized in 2 Stra. 755 — and 3. Bur. 1755 — but as some might be disposed not to admit so general a power, the legislature of the Country in order to silence all Cavil, has expressly declarid, that the different Courts of Civil Judicature in this Province shall have power and authority to "make and establish rules and orders of practice "in the said Courts in all Civil matters, touching "all services of process, executions and returns "of all writs, proceedings for bringing Causes "to issue as well in Term time as out of Term, "and other matters of regulation within the "said Courts" — It is well known however that the Courts of this Country had exercised this power previous to this enactment, though in consequence of this new law, the several Courts of Kings Bench in this Province, — having distinct jurisdictions and independant of and unconnected with each other, proceeded respectively to revise the old rules, and to adopt such new ones as experience had suggested, to facilitate the administration of Justice — It has so happened, that some variance exists in the practice of the Superior District Courts, but it does not follow, that in those particulars in which they may differ that the rules cease on

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that account to be the law of the land, as applicable to the district in which they have been made — What would the Court of appeals say, if it were urged before it, that because a similar rule to that of this Court is not to be found or been adopted in the other district Courts, that therefore the rule is to be set aside by the Superior Tribunal, and the party who in good faith availed himself of it thus turned round, and a practice which has prevailed for a period of 15 years to be declared not binding upon suitors, no doubt under such circumstances the Court of appeals would say, it is not for us to regulate the practice of the Courts of Kings Bench, they in common with the Court of appeals are authorised to regulate their own practice, and we must enforce it, all that we can do is to see that the Judgment is one which the law of the land and the practice of that particular Court will support, and in the very case cited at the bar, the Judgment of the Court of appeals reversed that of this Court, because it did not appear to that Court, that the plaintiff had complied with the rule of practice, by leaving a copy of the declaration at the Office of the Prothonotary in conformity to that rule, thereby supporting the rule, not declaring its illegality — for as no savica of a declaration of any kind appeared, the mode of service could not have come in question, and consequently no decision was or could be given

thereon

thereon as regulated by our rule of practice, and although something may have fallen from that Court in respect of the rule, yet it was no judicial decision, and consequently not binding upon that or any other Court, had it been otherwise without admitting the Controul over the practice of this Court legally established, we should have rescinded the rule to prevent in that case a greater evil than the rule was intended to prevent. It cannot be that in establishing any rule of practice under a positive law, any appeal can be directly or indirectly made from or against that rule of practice, the Court of appeals has no such jurisdiction, and will only enquire whether the Judgment of the Court is a legal Judgment and correctly proceed upon under the practice as regulated in the Court from which the appeal may have been brought, the mischief of a contrary principle would be incalculable, parties in good faith who may have adopted proceedings under these rules would thereby become the sacrifice of a conformity to that which is the law for their regulation and which nothing but the interference of the legislature can change — it is with the Provincial Parliament only its authority to rescind any rule of Practice which has been established inconsistent with public convenience, and in so far to retract the delegated power the have given to the Courts, but the power to revise the rules of this Court is not in the Court of appeals, and it is necessary for the public security, that they should

not

not have this power, as suitors in good faith, might thereby become the innocent victims of an authority which they were bound to obey, if the rules of practice are to be deemed the law of the land the Courts must recognize them as forming a part of that law — and the rule of practice in question would have long since been rendered inoperative by an act of the legislature if it had been found either illegal, unjust or oppressive, the silence of the legislature thereon is a tacit approval of the rule, and in truth its justice and beneficial effect never could have been correctly questioned — But waiving this in order to meet the supposed objection to the rule under the — Ordinance of 1785, on looking at that ordinance we find, that the first and second sections — provide only for ordinary cases, and for the — issuing and service of writs of summons with a declaration annexed and nothing more, and an attempt has been made to apply these two sections to extraordinary cases, requiring clerity and to place the two upon the same footing, — which we imagine cannot be done without injustice to the legislature of the day, who, we must presume, could distinguish between common cases and those requiring clerity, as well as they can be distinguished at the present day — We therefore find, that in the third section of the Ordinance authorising the granting of a Ca. ad resp." nothing is said with regard to a declaration

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or the service thereof, and if therefore the first and second sections, apply, as they evidently do, to the ordinary process, they must be confined to such, and not extended to cases not therein expressed; but upon reading the 4th sec. who can doubt, but that by virtue thereof a Judge upon the simple affidavit of the plaintiff might grant his order, as now practised for the issuing of an attachment against the body — It is thus worded — "That in all and every case where "one or more Judges of any Court of Common Pleas "is or may be satisfied by the affidavit of the "plaintiff, or his book-keeper or clerk, or legal "attorney, that the Defendant is personally "indebted to the plaintiff, in a sum exceeding "ten pounds Sterling, and may also be satisfied "by the oath of the plaintiff, or some other person "that the Defendant is immediately about "to leave the Province, and whereby the plaintiff "might be deprived of his remedy against such "Defendant, it shall and may be lawful for one "or more Judge or Judges of any Court of Com: "Pleas to grant a capias or attachment against "the body of such Defendant &c." For sometime it was however the practice to annex the declaration to the Capias and to serve copies of both upon the debtor at his arrest, but this, particularly in the district of Montreal, being found to operate in many cases the destruction of the remedy thus afforded to Creditors against their absconding debtors,

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it was found necessary in order to give effect to the law, to change a practice, which not being enjoined by any positive enactment, created so much obstruction to the remedy given by the Ordinance, and therefore this Court declared that a previous declaration should not be required, but inasmuchas a declaration was requisite, and that in many cases, where Debtors having no domicile in this Country upon giving bail they might remove themselves out of the jurisdiction, and evade a service, it was as a necessary consequence provided, that a copy of the declaration should be deposited for the Defendt within five days at the Prothonotarys Office, of which a regular notice was to be served upon the debtor with the Copy of the writ — This therefore in so far from being in contradiction to the Ordinance, was to facilitate its execution and authorised nothing contrary to the letter of the Statute, much less against the spirit of them, the rights of all parties were secured by this rule, as much as by a service of the declaration upon the person or at the domicile of the Defendant, he is notified that a copy of the declaration will be deposited at a public office open and accessible to all, and it would therefore be his own fault if he neglected or refused to apply for it, and if in ordinary cases it was by the first and second Sec. required that copies of the writ and declaration should be served on the Defendant personally or left at his domicile,

at

it was, that he should know the claim made against him, and when he was to appear and answer to it, and thereby put him en demeure, and justify the further procedings against him in case of his non-appearance; and is not this as effectually done by the mode prescribed by our rule of practice, as that pointed out by the Ordinance of 1785 — therefore nothing appears in contradiction to the spirit of the first and second sections of the Ordinance, but the truth is, that those sections applying to ordinary cases, should not by an artful construction be extended to cases different in their nature, and calling to the Courts for their assistance to facilitate a remedy which without that assistance became ineffective — had indeed the Ordinance expressly declared, that such arrest should be allowed by serving a copy of the writ and declaration, as in the preceding sections, there would be some good foundation for the objection to the rule in question, but this not being the case, it is evident that our rule is not repugnant to the spirit or letter of the Ordinance — the nature of the remedy was such as to render the rule general in all cases of arrest as it could be obtained only where the debtor was immediately about to leave the Province, and our rule has become more necessary since the determination of the Court of appeals, that no service of

process

process can be made at the dernier domicile:
It is true that in ordinary cases, this is
obviated by the appointment of a Curator
but this affords no relief in the case of a
recourse against the body of the Debtor to compel
the payment of a just debt — But the rule
of practice does not rest alone upon the fair
interpretation of the Ordinance, the Stat. 41. of
the King as before noticed, expressly authorises
the Courts without limitation or exception, to
make rules touching all services of process, the
execution and return of all writs, and this
statute must have its operation as well as the
Ordinance of 1785, and must as being a later
law, be entitled to a preference, and is, we
conceive most decisive upon the subject — The
legislature by that act have reposed a confidence
in the Judges which has not and will not
be abused, and the framers of the rule have
not quibbled about words, but with more
extensive and just views of the intentions of
the Legislature, have afforded relief where it
was necessary and with a view to give effect to
the law, they have not usurped an authority
which the law had not vested in them — the
duty was imposed upon them and they have
discharged it, and in their endeavours to facilitate
the administration of Justice they made the Rule
in question which we doubt not will before long

be

be adopted by all the Courts of this Province — It would indeed be superfluous to say any thing further as to the relief and benefit which the rule has afforded, it carries its own recommendation, and the Bar perhaps is best able at this moment to appreciate the rule, from its being so immediately connected with their professional duties, which it is calculated to facilitate — The Rule obtained by the Defendant is therefore discharged with Costs —

see also. Repr. Vo Nullité p. 257. middle of 2d Col.

No. 1152.

Fitzgibbon. vs Mc. Leish.

The Defendant on the 7th March last was imprisoned under a Capias ad satisfaciendum, and on the 6th of april petitioned the Court for an alimentary allowance under the Ordinance of 1785, and Provincial Stat. of the 41st Geo. 3d. — It has been objected that the application is premature, as by the Ordinc of 1785 it can be made by the debtor only after having remained one month in prison. — Now on the 6th of this month (april) the petitioner had been in prison 30 days, including the 7th of March the day his imprisonment commenced, and which must be reckoned as one, but he had not been a Calendar month in prison, as that would be completed only on the 7th of April. — The question therefore is,

whether

whether the month mentioned in the Statute, is to be considered a Solar or a Calendar month, or a lunar month, or how it is to be calculated.- In England the question would not admit of a doubt, as the ordinance having mentioned one month without the word Callendar, it would there be considered, a lunar month consisting of 28 days.- The French Authors however seem in a great measure to leave the question in doubt and in the Repᵗᵒʳᵉ under the title, "Mois", it is said, that it was still an unsettled point in France, and yet the opinion of Dunod is there cited, from which it would appear, that there were three modes in France of computing a month, one by the Calendar, varying according to the particular month, another of thirty days, and another of 28 days.- as to the latter Dunod cites an arret of the 1ᵉʳ March 1584 by which it was decided - qu'en delai de preuve et actes de Justice, le mois doit être reglé de quatre Semaines, c'est à dire à 28 jours - this corresponds with the English principle of computation, and Ferriere in his dictionary under the title "mois", says, ce mot proféré simplement sans aucune enonciation de tems certain et prefix est entendu devoir contenir trente jours".- From these two last authorities, it may therefore be doubted, whether the month as stated in the Ordinance, is to be considered of 28, or 30 days, but there is certainly sufficient to establish that it cannot be considered a Calendar month, which is enough for the present to do away with the objection made to the present application, as the Petitioner has been thirty days in prison - previous to such application, which is of a nature to be favoured, and it would therefore seem most adviseable to give effect to the humane

provision

3. Burr. Rep. 1455. Tullet. v. Linfield.
Com: Dig: Tit. "Ann"
4 Mod. 185.-
Stra. 446.-

provision of the ordinance, that the computation should be that of thirty days, as tending to equalize the situation of all debtors who may be in a situation to avail themselves of a law made for their relief — it may however be a question for future decision, whether the — Lunar month ought not to be adopted, — particularly as no decided rule seems to exist upon the subject in the French law, and that the point has been so well established in — England as a rule in the interpretation of the Statute law of that Country, and also that the arret cited from Dunod, as far as it goes, — seems to favour the adoption of the English rule — It was therefore ordered that the Petitioner should be immediately brought up to take the oath required by Law. —

It however appeared afterwards, that there was an error in the Sheriffs return as to the date of the Petitioners being committed to Gaol, and this being corrected, by which it was stated, that the petitioner had been committed to prison only on the 17th instead of the 7th — The above order was in consequence rescinded. —

N° 11484.

Thain. —
vs
Robertson. —
&
Timmens.
Oppt.

The plaintiff in execution of a Judgt had seized the household furniture and moveable property of the Defendt in a house leased to him by the Oppt by a notarial act of the 8th March 1822, and she opposed the sale of the Defendants furniture and effects, as being her legal pledge and surety for the rent actually due under that lease, and also for the accruing rent, that is to say, for the sum of £140 for a years rent due on the first day of May 1826, unless the said furniture and effects so seized should be sold subject to her right of privilege and preference for the above sum, and for the execution of the covenants of the said lease, and unless the plaintiff do give security that the said moveables shall be sold for a sum equal to cover the whole amount of the said rent.

The opposition when made was — perhaps strictly regular, but some time has since elapsed, and the last quarter of the lease will expire in a few days; the Plaintiff therefore now comes forward, acquisces in the preference claimed by the opposant and moves for an order for the sale of the property seized, subject to the legal claims

of

of the opposant for house rent, but to which the opposant objects unless the security claimed by his opposition be given. — When the parties were first heard upon the plaintiffs motion, it did appear to the Court, that the application was a reasonable one, and ought to be granted, as we could not discover that any prejudice to the opposants right of preference could be thereby occasioned, of which at least she could justly complain and upon further consideration, we do not now see any reason to alter that opinion. —

The proprietor of a house has certainly many priviledgis under our law, the moveable effects therein are a pledge and surety for his rent, and he has a preference thereon before other Creditors, and that for three terms and the running one, where the lease is verbal, or sous seing privé; and for the whole rent stipulated in the lease, when executed before Notaries, and in the latter case, he may oppose the sale of such moveables unless security be given to him that his whole rent will be paid as it becomes due — In granting however this right it was not the intention of the law to give a power to the proprietor to invade the first and legal rights of the other Creditors, or to allow him by a capricious and unjust exercise of his

priviledge

privilidge, to carry it beyond the spirit and true intent of the law made only for the security of the preference given to him, much less to enable him to connive with his tenant and under the cloak of privilidge to frustrate the rights of the other Creditors and shelter the tenant from their just claims — for we find that all the authors in treating of this security, have added this — "sauf aux Creanciers
Actes de Not. p. 409. " à faire leur profit de la maison pendant le
" tems qui reste à expirer du bail" — and it is therefore evident that in affording security to the proprietor, the law has not lost sight of the interest of the Creditors, although the Opposant appears to have done so, as she claims the security without this essential saving — With regard to priviledges of every description, as being exceptions to the Common law in favor of particular persons, they must be restrained and not extended and confined to the particular object for which they were created and not allowed to operate beyond it, and they must also be interpreted according to and governed by the general rules of law and justice, which while they will not permit any prejudice being done to a proprietor, by depriving him of his legal security, will not allow the

privilidge

privilidge to operate an injustice in regard to others — the preference given to certain creditors is founded in justice and reason but yet cannot be extended contrary thereto.

Now on comparing the several authorities which apply to this subject, some of which are expressed in rather too general terms, we must come to this conclusion, that the security which the proprietor has a right to claim has reference principally to the rent to grow due and not that which has become due and payable, and we are the more inclined to this opinion from the observations of Ferriere upon the 171st art. of the Coutume which are fuller and more explanatory of the law than any to be found in the other authors — Now in this Case the whole that the opposant pretends to claim or to be entitled to under the lease, is a years rent due the first of May next. (1826) on which day it appears the lease expires — We are therefore of opinion, that as the whole may be now claimed, the running term being about to expire, and that upon a seizure and sale the running term even under a verbal lease may be awarded out of the proceeds, it is not just under the circumstances of the present case that

2. Vol. Gr. Coutu p. 1271. N°. 19.

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the opposant should obtain the security required, nor ought to prevent the Creditor from now selling the goods and effects seized, subject however to the Opposants full right of preference upon the proceeds — The law did not intend to give to the proprietor more than the value of his pledge, the extent of which he is to look to in the first instance, and that value can alone be ascertained by a public Sale, and whether it is sold at the instance of the proprietor, or that of the Creditor, it must be presumed this cannot either diminish or augment the value thereof, nor can the Opposant render it more productive or complain if she receives the true value of the pledge, for it cannot for a moment be tolerated, that the proprietor shall be allowed to suspend the prosecution of his right and recovery of his due and thereby lock up the effects of his tenant, and force the Creditors to give a security beyond the value of such effects, and thus indirectly obtain a preference on the proceeds of other effects of the debtor, and diminish the general masse belonging to the Creditors — The claim of the Opposant

cannot

cannot extend beyond the lease which existed at the time of the seizure, no tacite reconduction much less the executing of a new lease, can prolong her right of priviledge, if therefore she contemplates this by opposing the sale she is endeavouring to obtain an advantage which the law does not give, but expressly refuses — It would be different, and here the law invoked by the Opposant would apply, if on a lease for years and terms unexpired, and the rent therefor not yet due or payable, the security in such case might be claimed — but where we find, that if the proceeds of the whole effects were before the Court, the whole sum pretended to be due to the Opposant and stipulated in the Lease, could be demanded and awarded to her, can it be allowed to the proprietor to remain passive and keep the Creditors of his tenant at bay and as it has been correctly observed by the Plaintiff's Counsel, prevent their discussing his moveables as a necessary and previous step to the seizure of his Immoveables? — And indeed to whatever claim security unless it is to obtain an advantage beyond the pledge, by drawing from the pockets

of

of the Creditors what the Opposant could not probably obtain either from the tenant or from the movables pledged — besides the security cannot be required or directed without granting at the same time to the Creditor the right to release the house and to receive the rent for the unexpired term, and would it not be a mockery of Justice to grant him this for so short a period as until the first of May next — the advantage would be evidently all on one side, and most unjust as regards the Creditor, and in this view alone, it is manifest that at this period the claim for security has no just or legal foundation — Even allowing to the Opposant every advantage which the antient law seems to give her, what object can she have in preventing the sale of the effects in question unless it be to favour the Defendant to the prejudice of his Creditors, which the law will not tolerate — All the rent she claims by her opposition she has certainly a right to receive by preference out of the proceeds of the effects as far as they will go, and if the seizure of the plaintiff is now set aside, the Opposant will be under the necessity

of

of obtaining a Judgment, of suing out execution, and of seizing and selling those effects — the expence attending all this has already been incurred by the present plaintiff and the opposant without any expence has only the trouble of claiming by preference the proceeds of the Sale — so that on the whole she is in a better Situation by the Plaintiffs seizure and will sooner receive her money, than if such seizure had not taken place, and which will produce a better result than if the opposant had herself prosecuted for the rent due — If therefore we were to stop the plaintiffs proceedings upon his execution we should sanction the principle, that it was in the power of a proprietor by means of his privilege, to prevent every attempt of a Creditor to discuss the moveable property of the tenant his debtor and to arrest the execution of every Judgment obtained against him, whether it was necessary for the security of the proprietor or not. —

It was not perhaps necessary as regards the present Case, to have gone so fully into it, but as it involved a question of some importance as respects the privilege of Landlords, and the interest of Creditors in general

general, we have thought it necessary to be explicit, and in the present decision we consider, that we have done nothing more than to restrain that privilege within its due bounds, but at the same time we must distinctly admit, that the landlord can by the law of the Country oppose the Sale of the moveables pledged for the rent in regard to such part as is not expired or become due under a Notarial lease, unless Security be first given by the Seizing Creditor, that the Conditions of the Lease shall be fulfilled

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Thursday 20th. April 1826.

No. 2053.

Ellice.
vs.
Dupuis.

In this case, Mr Justice Pyke gave the Judgment of the Court, which was founded on the following reasons.

If this case has remained under consideration for more than an ordinary length of time, it must be imputed to the importance of the main question which it involves, and to that respect which Judges should, and will always entertain for the opposite opinions of their brethren, and although the result has not been what we could all have desired, an unanimous decision of the Court, yet a majority of the Judges, being after due consideration, decidedly in favor of the Defendant, and for the dismissal of the plaintiff's action, the Judgment has been so entered and published as of this day. It now only remains for us to disclose the grounds upon which that Judgment is founded.

It may be necessary to premise that in every cause, the Judges are called upon to decide those matters only which are submitted by the pleadings of the parties, and upon the facts disclosed in evidence, the Court can never travel out of the record, and the party who has omitted to alledge any essential matter, or to prove any essential facts, has himself only to blame, the presumption must ever be that none such exist, or an attempt at least would have been made to prove them. In viewing the case as it has been submitted heretofore, and entertaining the same opinion of the prescription pleaded by the Defendant as heretofore, it became our

duty

duty, and even appeared essential to a correct decision of the Cause, to see, that the Crown should be informed through the proper officer, of the nature of the Contest between the parties, and of their respective pretentions, and the more so, as the discussion thereof had brought in question a branch of the Royal prerogative, of which the plaintiff was desirous to avail himself in opposition to the right of prescription claimed by the Defendant— This consideration led to the Interlocutory given in the Cause, directing that His Majestys Attorny General should be notified touching the nature of the Contest so raised, that he might be heard in support of the rights of the Crown, should he conceive this to be necessary, this notification having been given, it would seem that the Attorny General has declined interfering in the Cause.— We were not without hopes, that through the intervention of the Crown, either a satisfactory accommodation might have been produced, or that something additional in point of evidence might have been offered to satisfy the Court, that the grant in question had been obtained under circumstances which were calculated to negative any thing like a surprise upon the Government, and that the grant had been made with a full knowledge of the pretentions of the Defendt which he had either lost or forfeited in a way to justify his being deprived of the land, which it appears he had originally cleared and cultivated with the knowledge and under the sanction of His Majestys Government— Our expectations however in these respects have been frustated, and the Case therefore remains as it stood before on the former argument, and we must under such circumstances presume, that the Crown has nothing to claim,

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or to urge in the present Case, but leaves the contest as between two of its subjects to be decided by its Courts, it being most assuredly regard the land in question, a matter of indifference to the Crown, whether the same be occupied by one subject or another, provided the main object of the granting of the Waste lands be attained, namely the settlement and cultivation thereof. — Let us then take the Case up as between the plaintiff and the Defendant —

The object of the plaintiff's action, which is petitory, is to recover from the Defendant the lots Nº 48, and Nº 49, in the first range of Concessions in the Township of Godmanchester, which lots are now in the possession of the Defendant, and whereof the plaintiff alledges he is the proprietor under certain letters patent from the Crown, bearing date the 10th May 1811, whereby the above lots were granted to him, in trust for himself and for the heirs of the late Alexr. Ellice. —

The plea of the Defendant is, 1st That the plaintiff is not the lawful owner of the lots of land in question and was never thereof seized and possessed, but that the same are the property of him the Defendant by right of prescription, for that in the year 1788, His Majesty was pleased to bestow and grant the said lots of land to one J. B. Destimauville, Esquire, as a reward for his military services and from whom the Defendt lawfully acquired the same, and was thereof put in possession, and that he hath ever since in good faith openly and publicly possessed the said lots of land as the true owner thereof, and therefore that the pretended title aforesaid of the said plaintiff is nugatory, and could not vest in the plaintiff nor convey to him any

legal

legal right in the said lots of land, and that his right of action or claim thereto is prescribed in law by the continued uninterrupted and public possession of the Defendant, who hath thereby become the proprietor thereof, and the right of the said plaintiff, if any he had therein hath become prescribed, extinct and determined. — 2ly — That he the said Defendant doth not detain the possession of the said lots of land in manner and form &c 3ly That the plaintiff's action cannot be maintained, as he the Defendant in the year 1789, became seized and possessed of the said lots of land under a lawful title conveying to him the property thereof, and hath since held the same in good faith as the proprietor thereof, and hath built thereon four dwelling houses, two barns, four stables and other buildings, cleared one hundred and fifty acres thereof, erected fences and made other improvements of the value of One thousand pounds, and that he cannot be held to quit and abandon the said lots of land until the said sum of money shall have been paid to him. —

The answers and Replication to these pleas are negative and join issue thereon. —

Upon the issues thus raised, the plaintiff has filed an authentic copy of the Letters Patent of the Crown, under which he has declared, and upon which alone he relies to support his claim, as he has produced no other evidence either documentary or verbal. —

On the part of the Defendant it has been proved that a great part of the lands in the Township of Godmanchester, were located to the officers and privates of a Canadian Corps which served during the first american War, and who were for a certain

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time allowed rations while clearing and improving the land, and that on the original plan of the said Township in the Surveyor General's office at Quebec the name of Lieut. J. B. Destimauville, is inserted for the lots. № 48. and S.W. halves of № 49 in the first and second Concessions of that Township, — containing about 650 acres of land — It also appears that since the year 1789. the Defendant has been in possession of the lots in question, and has improved and cleared the same, has built several houses and has established his children thereon, and that during the three first years, the said Defendant in common with many of his neighbours received rations from Government to encourage them to persevere in the clearing and settlement of the said lands, and one of the witnesses estimates the useful and necessary improvements of the land, which was covered with wood when the Defendant first obtained the — possession thereof at about One thousand and forty seven pounds. — The agent of the plaintiff was also examined as a Witness for the Defendant and he obsewes, that it was understood previous to the year 1811, that the Defendant occupied the lands of one J. B. Destimauville, but how he so understood or from what source he derived his information — does not appear, but he has declared, that as agent he had transmitted certain documents relative to those lands to His Majesty's Government previous to the issuing of the Letters Patent in favor of the Plaintiff, but on being asked what those documents were, the Plaintiff's counsel objected to the question, and the objection was maintained, we are therefore left in the dark as to the nature and purport of those documents, and the evidence in the case is confined

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to the facts which have been just stated, and to which therefore in the decision of this Case we must be limited—

On a review of this evidence, there does not appear any positive trace of any written conveyance of the lots of land from Mr Destimauville to the Defendant, yet considering that in the year 1789 the land in question was not of much value, and that an old Soldier might not be aware of the importance, and ignorant of the necessity of securing to himself a formal and regular title and that in his mind no apprehension could arise that His Majesty's Government whom he had served and whose bounty he had experienced would deprive him of the fruits of his honest labor or that any person high or low, could form a plan to snatch from him the result of his industry; We can easily account for this failure in the evidence, and we must say, that if ever there was a Case to which the principles of equity ought to be extended, this is one, nor can it be for a moment admitted, that the Defendant is to be considered in the light of a trespasser or intruder, when it is proved that he received from the Crown a support during the first three years of arduous exertion, which was to change the face of a Wilderness into a productive field; indeed every fair presumption is in favor of the Defendant, his long and undisturbed possession in the absence of all other evidence, must and ought to weigh powerfully, nor can we suppose, that Mr Destimauville would have neglected to look after a property of this description unless he had surrendered and made over his

claims

claims to the Defendant. — And we are the more inclined to an equitable consideration of this case when we contrast the situation of the plaintiff with that of the Defendant, and under all the circumstances which the parties have thought fit to disclose to us, and as they appear before us, the plaintiff being wealthy and therefore not without friends, and having it in his power to do much good, might be considered by His Majesty's Government as a very proper person to obtain a grant of a certain quantity of the waste lands of the Crown, and thereby to forward and assist the general views of the Government in the clearing and settlement of the Colony, not to encrease a wealth, perhaps already sufficiently great, but to enlarge his sphere of doing good under the benevolent designs of the Government in the actual settlement of the Country — with such legitimate views, what should have been the conduct of the plaintiff, holding Letters patent for an enormous tract of Seventy thousand acres of land, but to have surrendered his claim to the comparatively insignificant proportion thereof as the two lots in question, when he discovered a happy and industrious man and fellow subject with a prosperous and thriving family established on what to him was an earthly paradise, and to request the representative of his Sovereign to revoke the grant and to give him in lieu thereof that which would not disturb

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the peace of a happy and industrious family whose title if doubtful he ought rather to have assisted to make good, inasmuchas the Defend^t had done that which had effected the great object and answered the ends which the Government had and has still in view, the improvement of the Colony: but how does the Case appear, when we find, for so we must conclude from the evidence, that the plaintiff was informed of the Defendant's occupation and improvements before he applied for and obtained the Royal Grant — the part of the evidence to which we allude is this, — the agent of the plaintiff being asked who occupies these lots previous to 1811, answers, never having been on the said lots I cannot speak from personal knowledge, but I always understood that the Defendant occupied the said lots for one I. B. Destimauville and not for himself — now it is evident from this, not indeed that the Defendant held the lots for M^r Destimauville, as it cannot be considered as evidence of any such fact, but that the plaintiff knew that the lands he applied for were under cultivation, and whether the clearings were owned by M^r Destimauville or by the Def^t it was equally improper in him to attempt to — deprive either the one or the other of the land, or to endeavour thus to profit at the expence or — detriment of another — The testimony of the agent discloses more, he says, all the documents relative to these lands were transmitted to the Government of this Province previous to the issuing of the Letters Patent — must we not infer from this, that although

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the Plaintiff knew, that the Defendant had cleared and cultivated the lands and possessed the same for a great number of years, yet as he discovered, that he the Defendant, had not in his the pltffs apprehension a satisfactory title, he the plaintiff therefore determined to obtain one in his own favor, and oust the Defendt of his long enjoyed possession, made valuable by his industry alone. — We therefore see a Soldier retiring retiring with honor from fighting the battles of his Country, fostered and supported by his Sovereign establishing himself on a portion of the waste lands with the knowledge and under the royal sanction, — clearing and cultivating with painful exertion and labor, a considerable tract of land, raising a numerous family and establishing them happily around him, all of whom are now enjoying the fruits of their toil. Viewing this, we find the plaintiff who having — ascertained that the Defendant had not obtained an ultimate title, prays of his Sovereign to deprive this old Servant and subject of his possessions and to bestow them upon him. —

Having thus far stated our view of the complexion of the Case from the evidence before us, it may now be fairly asked; if the Crown was in possession of these facts when the Letters Patent were granted to the plaintiff, we may be assured it was not, and would with becoming indignation have rejected the prayer of a petition under such circumstances, it is here that the honor of the Crown must be supported against every unjust imputation, it would be indeed to impute a diabolical intention which could not

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have had even a motive of interest on the part of the Crown to have dispossessed the Defendant, the Crown has been deceived into a Grant which on its part proceeded upon a pure motive of bounty, and knew not that it was transferring to the rich the hard earned possessions of the poor.— And where are such abuses upon the bounty of the Crown to be detected and frustrated but in His Majesty's Courts, and where is his honor to be more sacredly supported, than by those to whom he has delegated the power of administering Justice to his Subjects — the letters patent in this case are to be considered as nothing more than an act obtained by error, surprise, or concealment, and therefore — subject to be set aside as to the lots of land in question, not to the dishonor, but to the honor of the Crown, not lightly, but on due consideration deprived of its effect to prevent a cruel injustice. —

We have considered this case even in a moral point of view, for it is on this sure base that all law stands, and the principle must be bad that cannot stand the test of sound morality of which the law is nothing but the stream flowing from its pure fountain.— Is it not then a departure from moral principle to take measures to deprive another of that which he has long enjoyed, and is more deserving of than ourselves, and if not altogether so, should any good subject wish his Sovereign to benefit him at the expence of another by depriving that other of the fruits of his honest labour — besides the policy of the Government of all Colonies has been to extend the settlement thereof, and this policy has — prevailed not only during the French Government, but

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since, the object being, not to throw large tracts of land into the hands of land Jobbers, but to locate useful and industrious husband men, through whose exertions alone the main object could be effected, and although large tracts have been occasionally granted to individuals, yet it was with the expectation and upon the express condition of the actual settlement of the lands, which it was thought could be more readily effected in this way than in any other — how far this expectation of the Government has been realised, the vast tracts of land which have been granted and now remain unsettled will best demonstrate — In the instance of the Defendant he has occupied and cultivated no more land than he wanted for his family, and so far he is to be considered in a more favorable light than many who have obtained grants of land from the Crown, having done that which we could wish to see more generally effected in our widely extended forests. The Crown never could deprive a person so situated of the lands which he had cleared and improved for his subsistence without being deceived into such an act nor can there be a doubt that if the particular situation of the Defendant had been known to His Majesty's Representative, the Defendant would have been considered as the person entitled to a grant of the lots in question in preference to any other person. — Let not any thing which has now fallen from us be construed to favor any person who may with bad faith and violence usurp to himself a portion of the waste lands of the Crown, in contempt of its sanction and authority, such persons are entitled to no favorable consideration — every case must be governed by its

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own peculiar circumstances, and the honesty and good faith or otherwise of the parties — But in this case are there not just grounds to presume that the representative of our Sovereign was ignorant of the possession of the Defendant, or of his long enjoyment and improvement of the lots of land and of the early bounty of his Majesty to an old Soldier and subject, or that it was ever intended to bestow on Mr Ellice any other than supposed Wild and uncultivated lands, for such are the very terms of the Grant — to suppose the Contrary would be derogatory to the honor of the Crown and we must say, that the grant thereof has been obtained by surprise and a concealment of facts of which the plaintiff however could not have been ignorant, for independant of all the other circumstances it is usual ~~for~~ in all petitions for grants of the waste lands of the Crown in the Townships to state the specific lots prayed for, the situation and quality of which, the petitioner always ascertains before he applies for them. If it were otherwise in this particular Case, it would have been satisfactory, if upon the discovery of the real situation of the lots the plaintiff had applied to the Crown for a change of location, and he would undoubtedly then have received what was originally intended only to be given to him — Waste and unoccupied lands of the Crown — Indeed we cannot but consider in this particular instance the honor of the Government as pledged to the Defendant, as it appears to have recognized his right to the lands by furnishing him with rations while he was clearing and cultivating

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the said lots — and it cannot be considered as the intention of the Crown first to benefit, in order more effectually afterwards to injure; and there cannot be a doubt but that the Crown would have confirmed the possession of the Defendant had any application been made for that purpose, as the Defendant had done all which the Government looked for or expected, namely, the settlement of the lands. — If any departure from the rule of viewing its subjects with an equal eye, could be admitted, it would be in such a case as that of the Defendant, who had a claim to the favor of Government, the propriety of which had been recognized in furnishing provisions to assist him in the improvement of those very lots which the Plff would now wrest from him under a title we conceive improperly obtained. — It is an undoubted principle both of English and French law, that all engagements or contracts obtained by surprise or concealment are null and void, as being a departure from that good faith which should be the basis of all Contracts, and surely we are not to be told that this will not apply to the grant of the Crown — we consider it applies with more force in that case where there is an exercise of the bounty of the Crown on one side and a concealment made to obtain that bounty on the other; it would however ill befit the Crown, if it could, to withdraw or annul its own grant, the validity or effect of which must alone be determined by the Kings Courts in whom the Crown confides, to prevent any bad use being made of its bounty, and where its grants may be set aside on just grounds after a legal, fair and public investigation — The plaintiff here is not in the favorable situation of him who gives an equivalent

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for what he receives, and what was bountifully given to him he ought to have as freely resigned when he found it could not avail him without operating a cruel injustice. —

From what has been said, the motives which led to the Interlocutory Judgment heretofore rendered will now appear more manifest, as also the reasons we had for considering the Defendants case in a favorable and equitable point of view, and after such an intimation by that Judgment to the Plaintiff, can we now when he persists in calling for the final decision and Judgment of this Court consider the case in a less favorable point of view for the Defendant than heretofore. — We shall therefore proceed to consider the main and material issue — between the parties, that of the prescription of thirty years which the Defendant has pleaded in bar to the plaintiff's action and claim — By this plea the Defr alledgis that he has in good faith openly and uninterruptedly, possessed the lots in question as the true owner thereof from the year 1788 up to the — institution of the present action making a period of about 34 years — The answer of the plaintiff to this exception is a general and negative one — but it has been contended under this issue by the Counsel for the Plaintiff, that this plea cannot prevail, inasmuch as the plaintiff's title is derived from the Crown, against which the alledgid possession of the Defend- cannot operate, and that under the English maxim — nullum tempus occurrit regi, the possession of the Defendant who shews no title from the Crown, can be reckoned only

only from the date of the Letters patent in 1811 when the Crown divested itself of that possession in favor of the plaintiff, and therefore the prescription pleaded is not sufficient, as it could be legally reckoned only from the date of the said Letters Patent.

The question thus raised is certainly an important one, inasmuchas it calls for a decision how far the maxim alluded to extends in regard to the waste lands of the Crown in Lower Canada.—

As the plaintiff wishes to avail himself of a branch of the Royal prerogative in the present contest, it will be well perhaps at this moment, to state what we consider the nature and extent of prerogative generally to be, as a right exclusively enjoyed by the Sovereign — for while on the one hand we are bound to support the prerogative, so on the other we must take care that it be not carried or extended beyond its legal bounds — Now prerogative does not consist in a capricious, unlimited and despotic exercise of Royal power which is unknown to the English law and Constitution, it being an established rule that all prerogative must be for the advantage and good of the people, otherwise they are not allowed by law — As Executive Magistrate the Sovereign is invested with great power and many prerogatives all intended by the Constitution to be employed for the good of the people, none to their detriment, nor can any prerogative be legally so employed, and therefore the King of England is justly stated in the Books — Parens Patriæ, and that he is so virtually as well as legally, no Country can furnish more ample testimony than Lower Canada — Such then is the nature of prerogative as defined by the English

Bac. Ab. Tit, Prerogative 149.—

English Law writers, and indeed were it otherwise how dangerous would prerogative be and subversive of the very principles of its creation if in an extended Empire where the Executive power must be necessarily delegated to many, the acts of the Kings Servants however illegal might be confirmed under the pretext of the Royal Prerogative — it is not however to the Crown or to an incorrect conduct of its officers that we conceive the present Grant is to be imputed — We shall therefore now look at the prescription invoked by the Defendant under the law of Canada and examine, as explanatory of the Judgment rendered its origin and motives. — It is not an odious right, as the short prescriptions are considered, but stands upon a more solid basis, and like the Royal prerogative is founded upon public interest and for the repose of Society — " ainsi disent Ferrieri et Dunod est elle appellée en matiere civile, patrona generis humani; contrary to the other prescriptions of ten and twenty years no title is necessary does it even require good faith in the possessor who invokes that prescription, provided he has possessed as owner, and not under any other quality, inasmuch as no person is permitted to change the nature of his — possession — and this prescription is also founded upon principles of equity and reason, for an — uninterrupted possession, open and public, while it creates a presumption of property in the possessor is considered as a tacit acquiescence in and an — acknowledgment of his right on the part of all others, besides a limitation was necessary for the protection of those who from length of time may have lost their titles, and might in consequence be ousted of a — property acquired in good faith, and exposed to old claims thereon which had been previously ceded — Now

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from the evidence in this Cause the Defendant has brought himself within the spirit as well as the letter of the law of prescription, and no evidence has been adduced by the plaintiff to shew that the Defendant possessed otherwise than owner, except the vague assertion of the agent of the plaintiff, that he understood the Defendant held the land for Mr Destrimanville without further explanation, which cannot have any weight, for independant of this not being legal as being hearsay evidence, the fair and legal presumption is the other way, and had the fact been otherwise, it was incumbent on the plaintiff to prove it and rebut the presumption — where is the person, who is thus admitted in some measure by the plaintiff to have been the owner of the lots? — Can it be supposed that Mr Destrimanville would have quietly allowed another to possess his property without claim or interruption on his part, or is it to be presumed that the Defendant would clear and cultivate a tract of land for another to be resigned when he had rendered it of value, and thus at an advanced age with a large family compelled to seek another residence and other means of subsistence? — Such a presumption can have no foundation in reason or Common Sense and cannot be admitted — bad faith can never be presumed — the Defendant has exercised acts of Ownership, and in the absence of all other proof, the law presumes after such a long and uninterrupted possession, that the possessor is the proprietor — the Defendant therefore is in a more favorable situation than the law requires, as we must presume him in good faith until the contrary appears, besides it is in proof, that when he took

possession

possession, it was with the knowledge of His Majesty's Government who awarded him rations in common with the other persons located on the same tract of land.— Thus therefore stands the case as between Subject and Subject under the law of Canada and upon which no doubt or hesitation can exist, but it remains to enquire how far the possession of the Defendant, without an express grant from the Crown prior to the Letters patent in favor of the plaintiff, can avail him as having a possession against the Crown and upon this ground it has been contended that the title of the plaintiff to the land in question, being a Royal Grant and matter of Record, cannot be resisted; that the plea of prescription set up by the Defendant will not avail, as against the Crown no such prescription can be invoked — but we are not of that opinion to the extent contended for by the plaintiffs counsel, but are disposed to consider, that in regard to an object in which the Crown, or the public as represented by its Sovereign, cannot experience either gain or loss, and that the contest being merely between two Subjects, which of them shall have the enjoyment of the land, the Crown being in no manner interested, the maxim of nullum tempus, cannot and ought not to apply, as it is invoking a privilege, or droit d'autrui, founded on public policy, and which cannot as contrary to the Common Law be extended to benefit any others than those the law intended, nor to operate upon objects not within the scope of that policy — This seems to have been the distinction made by the Attorney General Segrier, in the case cited by Denisart. v° Domaine. p. 615 — where he says, — " On lis usages locaux qu'on oppose au Roi, ne " donnent aucune atteinte aux prerogatives eminentes

" de

" de son domaine, ou, au contraire ces usages ne
" font prejudice à ses droits, dans le premier cas,
" aucun inconvenient à suivre les usages le cause meme
" contre le Roi, au second cas, on ne peut invoquer
" l'autorité de la coutume" — The question in this case is, whether the plaintiff or the Defendant shall have the Sovereign for a benefactor, and the event of the contest can affect only the now contending parties — the grant in this case being purely a donation and not a sale or transfer or any Contract from which the Crown is to derive any pecuniary benefit or advantage whatever, or would be obligated in any manner to make a recompense further than the bounty of the Sovereign might be again exercised in favor of the plaintiff. — The Crown is without doubt the universal occupant of all ungranted Lands, but the waste lands of the Crown emphatically so called, to distinguish them from those which are destined for general public use, or which have been expressly reserved or allotted for such general, or other public use, or for the support of the Government or of the honor and dignity of the Crown, are in a very different situation from the latter, the waste lands being destined by the Crown to be apportioned out to its subjects for their subsistence and for settlement and improvement by that individual exertion without which it would be unproductive and of no value* — now that the lands in question were of that description and destined to such disposal is evident, nor would it require to establish this to look further than the plaintiffs own grant, which gives him a large tract of waste lands upon the express condition

of

* That this is not only the view of the Sovereign but of the British Parliament in regard of the waste Lands of Canada is evident upon reference to the Stat. 31. Geo. 3. ch. 31. Sec. 36. providing for clergy reserves. —

of settlement and improvement, the Crown evidently looking forward to that which unknown to it had been already accomplished by the Defendant in this Cause in so far as regards the lands now claimed from him by this action. — In regard to the legal exemption of the Sovereign from the operation of the articles of the Custom, and consequently those of prescription, there is but one principle upon which it rests, and which from its nature cannot be considered as arbitrary, but one, dont le bien public est l'objet, as opposed to — individual interest — now it is an English as well as a French undivided universal rule, that the motive and intention of the law is chiefly to be considered in the interpretation of it — the author of the Traité du Domaine in page 325, observes in a note — "quand le motif qui a dicté une loi est
" clair et precis, c'est une regle sur l'interpretation
" de cette loi que sa disposition ne va pas au dela
" de son objet" — and it is no doubt, that in — applying this rule with regard to certain lands though strictly included in what was in France called the Domaine, he makes this observation in page 250 — "Ces terres infructueuses aliénées ainsi
" a perpetuité cessent d'etre regardées comme faisant
" partie du Domaine — puisqu'il n'a eu pour objet
" qu'un terrein entierement infructueux, et par —
" conseq uent que l'integrité n'en souffre aucune prejudice"
but with how much more force does this apply — when the lands are destined to enter into Commerce nor can it be correctly said, that because the Crown had

had not by an express grant stamped this character upon the lands in question prior to the Letters Patent in 1811, that they cannot be so considered but from that date, for independant of their being among the waste and unreserved lands of the Crown, His Majisty previous to the Defendants occupation had given that character to the lands, and had sanctioned the clearing and improvement thereof by the Defend^t — And shall it now be allowed to an individual to make a privilidge which had only for its object the public good and benefit, and draw from it a result which could benefit him alone to the injury of another, and not support, but be in direct opposition to the motive and intention of the law. — We have had recourse to the French authors, because we consider that in this instance the privilidge which has been invoked must be regulated by that law, and not by the English law and that all questions of property and of Civil rights are by the act of 1774 to be decided according to the antient laws and usages of Canada — The King as the Sovereign of the Empire, has necessarily all the prerogatives and powers which by the Constitution of the Realm are vested in him as such Sovereign, but in regard to the present question, whether it be decided in favor of the plaintiff or not, the necessary and essential prerogative of the Crown or the Sovereignty cannot in the least be affected — Taking then the undoubted principles of the French law for our guide it is evident that the prescription must prevail even against the Sovereign in the case of lands of which he has the free disposal and the power to alienate,

for

for the imprescriptibility is founded upon the incapacity to alienate, and where the power to alienate exists, the imprescriptibility vanishes — and even in those cases where the prescription does apply, what under the French law is the consequence, but the reunion of the land to the domaine, and not to have the effect to take it from one subject and to give it to another — This may be collected from all the authors who have treated upon the subject — one alone will be sufficient to be cited — Denis. Vo — Domaine de la Couronne. p. 611. §. 6. No 2. — And that the imprescriptibility of the Domain rests upon the inalienability thereof — is clearly laid down by the same author. p. 620. 621. §. 8. No 1. — "L'imprescriptve
" du Domaine de la Couronne est une suite de la Loi
" qui l'a mis en quelque sorte hors du Commerce en
" la declarant inalienable — de la en effet il resulte
" que l'on ne peut supposer aucun titre valable qui
" a donné lieu à l'acquerir par prescription" — and a little further on he is more explicit, and says — "On
" a vû dans les deux Sections precedentes quelles sont les
" bornes de la loi de l'alienabilité du Domaine et quelles
" exceptions elle souffre, dans tous les cas ou l'inalienabilité
" n'a pas lieu l'imprescriptibilité cesse aussi necessairement
" puisque le second privilege derive du premier" —

That the prescription which prevails in ordinary cases as between Subject and Subject may be therefore invoked in certain cases against the Sovereign ~~xxx~~ may be inferred and collected from all these authorities — but is also expressly admitted by the author of the Dic: du Domaine. Tit. Prescription.

sec. 1.

sec. 1. Nº 1. "Le domaine du Roi et les droits de
" Souveraineté sont imprescriptibles par quelque
" laps de tems que ce puisse être; cela demande
" neanmoins une application, parceque la prescription
" établie entre les sujets du Roi peut être invoquée
" en certains cas contre sa majesté même" — again,
" Les biens et droits essentiels de la Souveraineté sont
" absolument imprescriptibles ainsi que les Domaines
" de la Couronne — c'est à dire, ceux qui ne peuvent
" être aliénés qu'à la faculté perpetuelle de rachat —
" A l'egard des biens que le Roi pourroit posseder
" et qui ne seroient pas encore mis et incorporés au
" Domaine de la Couronne, comme dans l'espece —
" expliqué à l'article, Domaine §. 1. Nº 7. ils n'ont
" aucun privilege particulier, et la prescription peut
" être par conséquent invoquée pour ces biens dans
" les mêmes cas ou elle est établie entre les Citoyens" —

Now the same author Denizart, states, that in regard to lands in certain provinces which had been conquered by France, these also were excepted out of the general rule and were considered as echoites, alienable by the Crown, and therfor subject to the laws of prescription — this will be found under the same title, Domaine de la Couronne p. 605. sec. 4. Nº 7. —

We have thus briefly stated our reasons for the recourse we have had upon the present question to the law of Canada as being that which in our opinion is to govern our decision — it may however be

be requisite before concluding to state our reasons for such opinion somewhat more fully than we have yet done, to prevent any misunderstandings upon this part of our Judgment. —

We consider that the law of Canada is that which is to govern the present contest. — The Sovereign under the peculiar situation of Canada had a right to give to Canada a code of laws and has done so, and with the aid of Parliament has declared in the 8. clause of the Statute of 1774, that in all matters of controversy relative to property and civil rights resort shall be had to the laws of Canada as the rule for the decision of the same — and all causes that shall hereafter be instituted in any of the Courts of Justice to be appointed within and for the said Province by His Majesty his heirs and Successors shall with respect to such property and rights be determined agreeably to the said laws & Customs of Canada — There can be no doubt, but that as a portion of the United Kingdom, all the essential privileges and prerogatives of the Crown, necessarily exist here as fully as in every other part of His Majestys dominions, but these priviledges and prerogativis which are not essential to the existence of the Crown, and do not form the pillars upon which it is supported cannot be considered so to exist unless the Sovereign or the British Parliament had so expressly declared and ordered, except in those

cases

cases wherein the law of Canada may not have provided — but having by the act of 1774 declared as has been before noticed, we consider that in all questions relative to property and civil rights the Crown cannot be presumed to have reserved any priviledge which is not recognized and provided for by the law of Canada, but acquiesced therein as the rule of decision in all such cases, and if that rule is as we have understood it in so far as regards the waste and unreserved lands of the Crown, in what respect can it be said that the existence of the Crown is thereby endangered or its pillars shaken, as well, and indeed with more reason might such an argument be used against the nullum tempus act 9 Geo 3. c. 16 which was passed in Great Britain, prescribing the period within which the claims of the Crown to real property should be prosecuted, and by which the King like his Subjects is limited to Sixty years — yet no person ever pretended that so wise a law made for quieting the Estates and possessions of His Majesty's Subjects, was one which affected the existence of the Crown, or deprived it of any essential prop — The principle of prescription as against the King in certain cases is therefore recognized by the laws of both Countries, and if allowed in an old established Country, where real property is so ardently sought

after

after and of so great value, how much more ought it to prevail in a Colony the greatest part whereof is yet a wilderness, which was and still continues to be the interest and policy of the Government should be inhabited & cultivated and is comparatively of no value without the ax of the woodman, which would not be resorted to, but where every other resource fails, so much so, that it is necessary to hold out to settlers every inducement and encouragement to engage in so laborious and arduous an undertaking — If the King then is in England equally limited with his Subjects in actions relating to landed property, is it not admitting that this branch of the prerogative is not an essential one, and therefore cannot be considered as forming part of the law of this Country, and it cannot be contended that a different rule of law should prevail here, and that in Canada as in England the same prescription should not apply as well to the Crown as to the Subject and that the latter should be unlimited as to period for such would be the effect of a contrary decision, — inasmuchas the British Stat. 9 Geo. 3. cannot certainly be considered as the law of this Country — We therefore look to the rule which the local law of the Country, confirmed and established by the act of 1774 has prescribed, and enforce the prerogative no further than we find it there established, — having as we conceive no other rule for our

decision

decision — This rule as we understand it extends the Customary limitation to those lands whereof the Crown has a right to dispose, for being alienable, they are also prescriptible as has been before established by the authorities cited, and upon every principle is it not right that such a rule should prevail, for if any individual subject of His Majesty shall have sat down upon any of the waste lands of the Crown without obtaining a grant thereof, clears and cultivates the soil to an extent sufficient to maintain himself and family, and is permitted to continue in possession thereof and to exercise acts of ownership without interruption for thirty years, where if the lands are not wanted for public use, but are destined to be occupied by an increased population — is the injury to the Crown or to the public that such an individual should be maintained in his possession? — We can see none and consider it would be a wanton act of cruelty to attempt to dispossess him, and the more so if it were done in order to bestow it upon another — The Crown wants no such privilege, and as we have said before, it is more for the honor as well as interest of the Crown that the Defendant should be maintained in his possession, and that

his

his undisturbed possession of thirty years should be equivalent to any title — We wish it however distinctly to be understood, that the lands which may have been expressly reserved or appropriated for any public purpose; or lands possessed by aliens, do not come within the principle we have adopted as the ground of our present decision, and of course cannot be acquired by prescription. — The Plaintiffs action was therefore dismissed with Costs. —

I differed from the Judgment of the Court in this case on the following grounds —

The opinion expressed by the Court in this case is so different from what I consider to be the law on the subject, that I cannot accede to it, and the principles now held are of such general import to the rights of the Crown in this Country, that the question cannot be allowed to rest on the Judgment now given. — I think the feelings of the Court have been unusually excited in favor of the Defendt, and that from the scanty facts in evidence, they have assumed a reasoning founded on circumstances rather gratuitously supposed than real, to consider this a vexatious suit to oppress an honest & industrious fellow subject — Were it becoming, or necessary for me to enter upon the consideration of these facts, a case totally opposite, and perhaps equally near the truth might be advanced to shew the bad faith the obstinacy, and unjust possession of the Defendant

from

from the very commencement — but although upon such gratuitous suppositions there may be much reasoning held and colouring exhibited, yet it is of little profit, it proves nothing in the case before us — I must therefore limit my observations to those principles of law which have been now first established in this Court in regard of the thirty years prescription operating as a bar to the rights of the Crown upon its Domain or Waste lands, and which is now held to vest in the subject a right of property in such lands, after a possession of thirty years, without any other title, and without the consent, nay, — contrary to the Consent of the Crown. — And here again I must put out of the question all — arguments and reasoning about the policy and advantage of those maxims and principles which would be most consonant with good government and the public interest — with these we have nothing to do — we do not sit here to advise the Crown, nor to recommend measures of public policy, our duty is limited to judge, if what has been — done or demanded is legal — is warranted or not by the laws of the land as we find them, and not as we could wish them to be. — Adhering therefore to this principle, and looking at the Case before us, it cannot be doubted or denied, that the plaintiff in this case acquired by virtue of the Letters patent in May 1811, conveying to him the right and property in the lots of land in question all the right and interest which the Crown then had or held in those lots — there are no limitations or

restrictions

restrictions in the grant, nor is it declared subject to any burthen or charge, consequently the grantee took it free and clear of every burthen or claim which coued not have been set up against the Grantor, the Crown — Neither can it be doubted or denied, that the Crown had not by any act or grant made — previous to May 1811 conveyed the right of property in the said lots of land to any person, not even to Mr Destimauville, in whose favor it may be said there appeared something like a promise or — consent, but certainly not a grant, that he should have the said lots of land, a matter to be inferred merely from the circumstance of his name being inserted in the book of Survey in the Office of the Surveyor General of the Province — but the right of Mr Destimauville to have those lots of land, or the terms and conditions upon which he was to have them, are wholly unknown, and unless we can presume upon facts suited to a particular train of reasoning we must say, that this entry in the book of survey, transferred no more right of property in these lots to Mr Destimauville, than it transferred to him a right to the Crown of England, the most that can be said in this respect is, that if Mr Destimauville had rendered any services to the Government, either as a military man, or otherwise, of which however we see nothing, he might have had a claim upon Government for an indemnification, either upon those lots, or upon any other lots such as Govern^t might see fit to grant to him — But in regard

of

of the Defendant in this Cause, he can be considered only as an intruder on the property of the Crown — we see his name in no situation by which he was recognized by the Government either as a Soldier, or as having rendered any services thereto — he does not appear to have had any location ticket from the Government, nor to have been entitled to any — and although much stress has been laid upon the circumstance of his receiving rations, — yet the testimony on this point does not come from the most authentic source, and if any credit can be attached thereto, it must have been the rations of M^r Destimauville which the Defendant was receiving, as he could have no title to the lots marked in the name of M^r Destimauville — he must have been M^r Destimauville's servant, placed on those lots to draw the rations for him, and to keep up a possession for M^r Destimauville, so as to enable him at some future day to claim a grant of the lands from the Crown — the other testimony in the Case would seem to corroborate this supposition — even the very allegation of the Defendant that he had purchased these lots of land from M^r Destimauville, admits, that he originally had no claim to these lots, and not having attempted to make any proof of his alledged purchase, shews this even was an ill-founded assertion, for had the fact been as stated by him, it could easily have been proved by M^r Destimauville's heirs who are now resident amongst us. — But setting aside all this reasoning, we may fairly be admitted to say, that had the Defendant been the injured

injured man he now states himself, or had his claim had even the appearance of truth and justice, such is the honor and generosity of the British Government, that upon a proper representation, he must have received every satisfaction thereon, either by quieting him in the possession of the lots in question, or by other indemnification. It was the duty of the Defendant to have shewn a due submission to the Government by making this application — but if he thinks he can retain these lots without any consent of the Crown, merely by saying, "possedeo quia possedeo" he is entitled to no lenity. — if on the contrary, he has made this application, and has failed, there must in that case be some radical defect or injustice attending his possession with — which we are unacquainted. — The Defendant therefore had nothing left to support his title before this Court but his plea of thirty years prescription, which he says by the laws of Canada is sufficient to maintain him in the possession of these lots of land as the proprietor thereof even against the Crown. — This plea has been supported by the Judgment of the Court, which has been founded upon several citations of French law as being the law of the Country, introduced as it is said by the British Statute of 1774, as forming the rule of decision in all matters of Civil contest — But in

this

this respect I differ very materially from the Court, and am of opinion that the prerogative of the Crown, being a matter of public right, and as it has been stated, exercised for the public benefit, must be governed by the public law of the Empire, and not by that of this or any Colony dependant upon the Empire — It is a principle, that the King cannot be bound nor his prerogative diminished or restrained even by an Act of Parliament unless by express words, and therefore the Stat: of 1774 introducing, or rather confirming the laws of Canada as a rule of decision in all matters of civil right, being totally silent in regard of the rights and prerogatives of the King, it cannot be construed as affecting the same, but as applying merely to the Kings Subjects in the Colony — That Statute may be considered as the Charter granted by the King and his Parliament for the security of his subjects, without any reference being had as to the rights of the Crown, concerning which there was no question — Now it is held, that in every question which arises between the King and his Colonies, respecting the prerogative, the first consideration is, the charter granted to the Inhabitants, if that be silent on the subject, it cannot be doubted,

Chitty on Prerog. 383.
1 Chalm. Opin: p. 18. 113. 118.

Chitty. p. 32.

but

but that the Kings prerogatives in the Colony, are precisely those prerogatives which he may exercise in the mother Country — The Prerogative in the Colonies, unless where it is abridged by grants &c^{a} made to the Inhabitants, is that power over the Subjects, considered either separately or collectively, which by the Common law of England, abstracted from acts of Parliament and grants of liberties &c^{a} from the Crown to the Subject, the King could rightfully exercise in England —

1 Ch. Coll. of Op^{s} 232. 233. —

Let us therefore see how far this prerogative as exercised in England will apply in this Case — It is a principle acknowledged and established, that a Country conquered by the British arms, becomes a Dominion of the King in right of his Crown — such acquisitions attend upon and follow the Crown, secundum jus Coronæ" — This is also acknowledged by the French Writers — see Domat on Public law lw. 1. tit. 6. sec. 1. §. 22. — And therefore on the Conquest of Canada, all the waste lands thereof became vested in the Crown as a part of the Kings Domain, and being a part of his — domain, his prerogative to hold, or to grant the same in such manner as he should see most for the public interest, must necessarily attach — Now it is a principle in regard of the property so held, that no man can make himself

Clutty. 29 — Hall. v^{s} Campbell Cowp. Rep. 204

Clutty. 205.

himself a title to the Kings possession without matter of record, and therefore none can claim any of them as occupant. 5. Bac. Ab. 558. In this respect there can be no prescription allowed agt the King, nor can there be a tenant at sufferance against the King, for as no laches can be imputed to His Majisty for not entering, even if the Kings Tenant hold over he will be considered an intruder — Chitty. 380 — These principles are undeniable according to the law of England, all the authorities go to establish them — There is however one so applicable to the case before us that I cannot omit taking notice of it — it is from 13 Ac. Abr. Tit. Prerogative. p. 562. he says — " Therefore if the King be seized in fee of the Manor " of B. and a Stranger erect a Shop on a vacant " plot of it without paying any rent to the King — " And after the King grant over the manor in Fee, " and the Stranger continue in the Shop and occupy " it as before — this is no disseisin — for the first " entry of the Stranger was no disseisin, but an " intrusion on the Kings possession, for that the " Kings title appearing on record, the entry en pais, " which is not an act of equal notoriety, will not " divest it out of him — if then the King is not " disseised, his Conveyance and the grantee is seized " by virtue of it, and consequently cannot be said " to be disseised by the Stranger, who has made no " entry on him after the Kings Conveyance, but " only continued the old interest, which he had " before the grant — and so remains an intruder

" still

"still, and liable to an action of Trespass or "ejectment for it." The Defendant here being an intruder on the King, the Grant made to the plaintiff, cannot alter the nature of that intrusion, which in the eye of the law still continues, and he must in my opinion be held to abandon a possession to which he has no legal title — Whatever the King may do or permit in favor of Individuals who have sat down on the waste lands of the Crown, and have cultivated and improved them in the hope of afterwards obtaining a title, is mere matter of favor, and the interest or policy of the Govern^t may be extended to their assistance — but as to title, or legal interest in such lands, it is without foundation — And it is in this point of view alone that I can consider the present Case. —

June Term 1826.

Monday 19th June.

N°. 2237.

Delisle. — vr. Bridge.

Action on penal Statute.

This action was instituted by John Delisle as road treasurer, and treasurer of the City of Montreal, against the Defendant an auctioneer and broker, for the penalty of fifty pounds, for having traded and dealt as such auctioneer and broker within the City of Montreal between the 20th day of November 1825. and 14th day of February 1826, without first having obtained a licence to that effect. —

Plea. —

1st Temporary exception peremptoire en droit, that if any penalty had been incurred by the Defdt by reason of the matters contained in the plaintiffs declaration, the same could be demanded only by the Treasurer of the City of Montreal, and that the said plaintiff doth not allege in and by his declaration, that he is the Treasurer of the City of Montreal; The Defendant also denying that the said Plaintiff is such treasurer — and further because the Treasurer of the City of Montreal, hath no right power or authority of himself to institute the present action without the order of three of the Justices of the peace for the district of Montreal first had and

given

given to that effect – and the said plaintiff doth not in and by his said declaration alledge that such order had been given – nor was such order ever given – And because there is no law in force in this province which authorises the Road Treasurr of Montreal to institute the present action against the Defendant. –

2. Perpetual exception perumptoire en droit, that at the time of the institution of the present action and on the different days and times mentioned in the said declaration, and for more than one year prior to the institution of the said action, there existed no law in the Province of Lower – Canada which obliged the Defendant to take out any licence for the purpose of selling by auction nor during all the time aforesaid was any person by law authorised to grant such licence to the said Defendant

3. Defenses au fond en droit – That the allegations matters and things stated and set forth by the said plaintiff in and by his said declaration are not in law sufficient for the said plaintiff to have and maintain his action aforesaid af the said Defendant. –

4th – Not guilty. –

The answer and Replication join issue on the law and fact contained in the plea. –

The parties were now heard on matters of law, when Mr Beaubien for the Defendant argued, that the plaintiff here had no right of action against the Defendant in this case, either as Road Treasurer, or as treasurer of the City

of

of Montreal – That as Road Treasurer the Plff must obtain the order of three Justices to entitle him to bring the present action, cites. 58. Geo. 3. ch. 2. s. 7. & 9 this statute authorises the Treasurer to sue for the amount of the licence, but not for the penalty.

That by the Stat. 55. Geo. 3. ch. 3. Sec. 4. an authority was given to the Secretary of the Province during the existence of that law to grant licences to auctioneers – this law was in existence and had effect only till the 1st May 1822. since which period no provision is made for granting such licences nor is the Secretary of the Province nor any other person authorised by the Stat. 58 Geo. 3. ch. 2. to grant such licence –

That by the said Stat. 58 Geo. 3. ch. 2 new duties are laid on the Subject, and an annual sum of thirty pounds is required to be paid by every auctioneer for a licence to entitle him to carry on his business, and in case he carries on such business without a licence a penalty of fifty pounds is incurred by him, but as no person is authorised to grant such licence there can be no penalty incurred for not obtaining what cannot be obtained, nor can the Defendant know now or where to apply for a licence, as no place or person is pointed out by the Statute for this purpose. –

Mr Sewell of counsel for the Defendant – By the Stat. 55. Geo. 3. a sufficient provision is made for carrying it into execution – this law was continued by subsequent statutes to the 1 May 1822, when it determined – The subsequent Statute of the 58 Geo. 3. ch. 2. s. 5 is loosely drawn, as it does not provide in a precise manner for the mode of its execution – it is not said by whom the penalty here demanded is to be sued for, nor by whom the licence shall be given. – That the declaration in this Case is however insufficient – the plaintiff, in

what

what may be considered the title of the declaration gives himself the addition of Road Treasurer, and Treasurer of the City of Montreal, but it is not stated that he holds either situation, or whether he sues here as Road Treasurer, or as Treasurer of the City of Montreal and a distinction ought to be made because separate rights are given to the separate characters of Road Treasurer, and Treasurer of the City of Montreal. But the Defendant here has raised the question whether the plaintiff can in any capacity maintain this action - it ought to have been instituted in the name of the King or of some of the Crown officers for him, as the fines and forfeitures under this act are to be accounted for to the Lords Commissioners of the Treasury - and where the King alone is interested in the forfeiture no other person can sue for it, Hawk. P. C. 3. vol. p. 107.

Sol. Genl. in answer - The Stat. 55. Geo. 3. ch 3, was public law granting an additional revenue to the King, the subsequent acts are for local purposes - by that Statute the Secretary of the Province was authorised to grant the licences to the auctioneers and although he is not named in the St. 58 Geo. 3 as the person to grant such licences, yet it must be understood, that where licences are to be taken out, that it must be in the manner practised under the general principle stated in the 55th of the late King It has been objected that the Treasurer cannot maintain this action, but by the St. 58. Geo. 3 the Treasurer of the City has the action for the penalty, and this statute is still in force, and has been continued to the 1 May 1827 by the Stat. 5. Geo. 4. - The 7th Sec. gives the action to the Treasurer of the City, and although by the 9th Sec. an order of three Justices is required to be

given

given to the Road Treasurer to carry the law into execution, this however is requisite only in the Case where the City Treasurer refuses to do his duty.— But the law is positive that auctioneers shall not sell without a licence under the penalty of fifty pounds — and the action for the recovery of this penalty is given to the Treasurer of the City,— had it not been so the King alone could have sued for it,— and as to the power of granting a licence it must still exist in the Secretary of the Province as the course pointed out by the Stat. 55. Geo. 3 for obtaining such licence, although the duties under that act are no longer levied —

Beaubien in reply — It is here uncertain in what capacity the plaintiff sues, whether as Road Treasurer, or as treasurer of the City of Montreal, he states himself to be both Road Treasurer and City Treasurer, but this is mere matter of addition to his name, he does not allege that either in the one Capacity or the other the right of action has accrued to him which he here prosecutes — the declaration is therefore vague and uncertain.— That the power given to the Secretary of the Province under the Stat. 55 Geo. 3, cannot exist after that Statute has expired, this is contrary to all legal interpretation. That it is only persons holding Commissions as auctioneers under the Stat. 55. Geo. 3 who are made liable to the penalties of the 58 Geo. 3. — whereas there could be no such auctioniers — holding licences after the expiration of the 55th

Geo.

Geo. 3. as no person was afterwards authorized to grant them.—

By the Court

Three objections appear to be raised to this action— 1st The insufficiency of the plaintiffs declaration — 2d The want of right in the Plaintiff to maintain it — and 3d The impossibility to carry the law into effect from the omission to authorise a person to grant the licences in question.—

On the first point, it would seem from the argument held, that there were two persons named and known under the Stat. 58 Geo. 3. ch 2. as Road Treasurer, and Treasurer of the City of Montreal, and as the plaintiff does not clearly say in which of those Capacities he sues, no presumption is to be taken in favor of one more than of the other — had there been two such characters known as a Road Treasurer and Treasurer of the City of Montreal under the said Statute, the argument might have had some weight, but the fact is otherwise, the only person of this description of which that Statute speaks is, the Road Treasurer of the City of Quebec, and the Road Treasurer of the City of Montreal, and the only question for the Court here is to say whether the present action is brought by the Road Treasurer of the City of Montreal, which we think is sufficiently clear

clear, – it is true the plaintiff states himself Road Treasurer, and Treasurer of the City of Montreal, but the additional words, and treasurer, are mere surplusage and of no import here +

2d It is said that this Treasurer cannot maintain the action – 1st because he ought to have shewn the order of three Justices of the Peace, authorising him to bring it, under the 9th Sec. of the Statute – but this Section can refer only to any doubt, difficulty or unwillingness of the Road Treasurer to institute any action, as it is merely said, that when the Justices make an order to him to institute any action, it shall be his duty to do so, but we are not to infer from this that he can bring no action without the order of the Justices, more especially as we find by the Statute that the – action in this particular case is directed to be prosecuted by the Road Treasurer without any reference to an order of the Justices – It is further said, That the prosecution ought to be in the name of the King as he alone is to have the benefit – to this it has been sufficiently answered that if no person had been authorised to – prosecute in this case, the action must have been instituted in the name of the King – but here the action is especially given to the City Road Treasurer, and not for the benefit of the King as the penalty is to be applied for the purposes of the Act, to be afterwards accounted for to the King through the Commissioners of the Treasury – The words of the Statute are – " The " said fines shall be recovered by action of the

" Treasurers

" Treasurers of the said cities respectively in the
" the Court of Kings Bench of the district in which
" the Offence shall have been committed, on the testimony
" at least of two credible witnesses; which said fines
" shall be applied for the purposes of this act."—
3ly As to the objection, that this Statute cannot be carried into effect from the omission to name the person who should be authorised to grant the licence in question, it cannot avail the Defendant here — The 7th Sec. of this Statute makes mention of licences to be obtained by Tavernkeepers and persons keeping houses of public entertainment as well as Auctioneers, in neither case does it say by whom these licences shall be granted and evidently referring to the usual & ordinary mode in which such licences were granted that is, by the Crown — and on this principle we might say that the Defendant ought to have shewn that he could not obtain a licence in the usual and ordinary mode in which such licences were heretofore granted — But we cannot presume that the Legislature meant to make a law which could not be executed, nor ought we to say that because no person has been named for granting such licence, that no licence can be granted — in such case it becomes the duty of the executive branch of the Government to do what is necessary for the execution of the law, and in this instance to grant the licence, that the — security of individuals and the public interest may be protected — It is much the same, as

when

when a penalty is imposed and no person is authorised to prosecute, in such case the King must have the action for the public benefit, that the law may be executed —

We are therefore of opinion, that the several pleas of exception peremptoire en droit, and of defense au fond en droit be dismissed with Costs.

No 1729.

Torrance. vs Molson. & al

Action for the recovery of Sixty pounds for damages occasioned to four hogsheads of Sugar, on board the Steamboat, Lady Sherbrooke belonging to the Defendants, in conveying the same from Quebec to Montreal

Plea.

1st. Demurrer to the action —

2d. Peremptory exception — The defendants admitting that they received in good order and well conditioned the said four hogsheads of Sugar to be carried and conveyed in the said Steamboat Lady Sherbrooke to be carried and conveyed to the said port of Montreal as by the plaintiff it is alledged, but that the said four hogsheads of Sugar were to be there delivered to the said plaintiff in the like good order and condition as they the said Defendants had received the same (the act of God, the Kings Enemies, fire, and all and every other dangers and accidents of the Seas, Rivers and Navigation, of what nature and kind soever excepted) That the said vessel, Lady Sherbrooke, before and at the time of sailing from Quebec with the said four hogsheads of Sugar on board, was in all respects

Staunch

staunch, tight, strong, and seaworthy, and fit and well conditioned to perform the said voyage from the port of Quebec aforesaid to the port of Montreal, and there safely to carry and convey the said goods, was well and sufficiently equipped, and had a sufficient crew and all things needful and necessary for the said voyage, but that during the said voyage and just before, or at, and immediately after the arrival of the said vessel at the said port of Montreal, by and through the dangers and accidents of the said River St Lawrence and of navigation, and by the wear and tear of the said voyage, and by the action of the water and weather, the said vessel became and was leaky and took in water, and that if the said goods were damaged on board the said vessel, the same was occasioned by the said vessel becoming leaky in manner as aforesaid and from no other cause whatever - of all which the Pltff had due notice - and therefore praying that the action be dismissed -

The Plaintiff by his answer to the above plea took issue thereon, and denying the matters of law and fact therein contained -

The facts stated in the Defendants plea of exception were proved, namely that the vessel about the time or immediately after her arrival at Montreal and before the goods on board were landed the said vessel had become leaky, which was occasioned by some of the oakum having worked out about two feet in length on the larboard quarter considerably under water, which was considered to be an accident of navigation, as the vessel was in all other respects tight staunch and sufficient, and so considered to be when she left Quebec on her said voyage - and by the bill of lading

of

of the sugar, the act of God, the Kings Enemies, fire and all and every other dangers and accidents of the Seas, Rivers and navigation of what nature or kind soever, were excepted by the Defendts as not answerable for them. —

Lacroix for the plaintiff argued that the master and owner of the Vessel were bound to provide a sufficient conveyance for the goods they took on board or answer for the damages — that the Pltff was entitled to his action here against the Defendants from the evident insufficiency of the vessel on which the goods were shipped — cite Poth. charte partie № 30. 34. & 38.

Buchanan for the Defendant contended, that the sugar in question had been damaged by the risks of navigation for which the Defendants were not liable — it is in evidence that the vessel when she left Quebec was staunch tight and sufficient, but that she sprung a leak after her arrival at Montreal — every care was taken of the sugar after the accident, and every thing done that could be done under similar circumstances — but this accident, arising from the risk of navigation being one of those excepted by the bill of lading the Defendants must be discharged from this action — cite Holt on Shipps. p. 83. 85. & 97. Abbot p. 227. & p. 241. 249. & 251 — By the law of France the Pltff ought to have proven that the vessel was not staunch at the time of starting. —

Lacroix in answer — The testimony adduced by the Defendants does not prove the facts as stated by them — this injury did not arise from a risk of navigation, but from the insufficient state

of

of the vessel – and in this case every presumption must be taken against the Defendants, as they did not cause their vessel to be examined by competent persons before she started, so as ascertain her real state and that she was what the Defendants warranted her to be, tight staunch and sufficient in every respect – in this the Defendants have been guilty of neglect and a want of that attention which by law they were bound, and they must therefor answer for the damage – refers to Poth. Ch. parte No 34.

The Court, considering the damages in question to arise from an accident occasioned by the risk of the navigation, for which the Dfnds are not liable, and that there was sufficient to shew the state of the vessel on entering on her voyage to have been staunch and sufficient, dismissed the plaintiff's action with Costs –

No 2169.

Ant. Robert
Franc. Toupin
&
Jas McKenzie
Appt.

In this case, the plaintiff as Executor of the last will and testament of the late Marie Angelique Toupin widow of the late Jean Bapte Normand of Quebec, had obtained Judgment in this Court on the 20th day of February 1824, for a sum of nineteen hundred pounds, against the Defendant, the universal legatee and devisee of the said Marie Angelique Toupin, in

order

in order to pay and discharge the particular legacies made by the said testatrix in and by her last will and testament; by virtue of this Judgment a certain lot of land was seized and sold by the Sheriff of the district of Quebec to — James McKenzie, who now filed his opposition stating, that the lot of land he had so purchased was subject to and chargeable with a certain douaire Coutumier in favor of one Louise Bilodeau, the wife of one Francois Delages dit Lavigueur, and of the children issue of their marriage, in manner following — That by a certain contract of marriage made by and between the said Francois Delages dt. Lavigueur and the said Louise Bilodeau, and executed at the City of Quebec before Louis Dechenaux & another, public notaries, and bearing date the 12 July 1787, the said Franc.s Deslages stipulated and agreed that the said Louise Bilodeau should have and be entitled to the Douaire Coutumier, that is to say, the one half and moitié of all and every the lands tenements and hereditaments at the time of the said marriage held and possessed by him the said F.s Deslages and in the same proportion of all such lands, that he should afterwards become entitled to by donation or succession from his relations and ancestors, or a douaire prefix, of five hundred livres of Old Currency, at the choice and option of the said Louise Bilodeau and of her issue by the said marriage — which said marriage was afterwards on the 17 July 1787 duly solemnized at Quebec —

That

That the said Francois Delages at the time of the said Contract of marriage, was possessed of the lot of land which was sold and adjudged to the Opposant under the writ of execution sued out in this Cause, which lot of land the said Francois Delage jointly with the said Louise Bilodeau, afterwards on the 7th day of March 1788 sold to one Jean Baptiste Normand, under the following description and designation, "une terre &c" — and the said opposant doth alledge and aver, that there are now living several children issue of the said marriage between the said Francois Delages and the said Louise Bilodeau, and that the said Francois Delages is still alive, so that the said dower has not been extinguished or cleared by the said Sheriff's sale, and that he the said Opposant is still liable to be troubled and ousted of his possession thereof by the children of the said marriage and hath a right to his present opposition and to claim, that the Sheriff of the district of Quebec be ordered to pay back to him the said Opposant the sum of £825, Currency, being the one half of the price at which the said land was adjudged to him as aforesaid, as a security against all claims that may hereafter be made against him by reason of the said dower, and to remain in his hands until a discharge or total exemption therefrom can be given to him — and that the monies arising from the sale of the said lot of land, which he the said Opposant hath paid to the said Sheriff, be not adjudged to any other person unless upon giving good and sufficient

Security

Security, Caution judiciaire, to indemnify him the said opposant, his heirs and assigns, from and against all and every action, trouble or eviction which he the said opposant or his said heirs and assigns may suffer in the premises by reason of the said dower – and that the said opposants may have his costs on the present opposition. –

Plea, by the Puff to the said Opposition. –

That the said lot of land so sold and adjudged to the said opposant is not subject to the Customary dower of the said Louise Bilodeau, nor of her children. That by the marriage Contract of the said Louise Bilodeau with the said Franc. Deslages of the 12th July 1787, it is stipulated, "que les futurs " epoux seront Communs en tous biens acquets et " propres echus et à echoir" – by virtue of which stipulation, the aforesaid lot of land which belonged to the said Francois Delages at the time of his marriage with the said Louise Bilodeau, fell into the Community that subsisted between them, and thereby ceased to be subjected to or affected by the dower of the said Louise Bilodeau or of her Children, inasmuchas by law the Dower Coutumier does not attach upon propres ameublis more especially when the husband and wife have subsequently disposed of such propres ameublis during their marriage, as they lawfully may do, and which was the Case in regard of the immoveable property in question, which was sold by the said Francois Deslages and Louise Bilodeau to one Jean Bapte Normand by act or deed of 27 March 1788, as stated in the said Opposition. –

That in consequence the said Opposant

cannot

cannot be troubled in the possession and enjoyment of the said lot of land so by him purchased by reason of the said dower, that his said opposition is therefore ill founded and ought to be dismissed.

The Opposant by his Replication, states, that although it is true that by the marriage Contract between the said Francois Dislages and Louise Pilodeau, it was stipulated and agreed by a clause d'ameublissement, that the respective real estates of the parties should belong to and make a part of the Community between them, that nevertheless the real estate of the husband possessed by him at the time of his marriage is still liable to the dower of the children of that marriage, as such clause d'ameublissement can have no effect as to the rights of the children nor deprive them of their right of dower on renouncing to the succession of their father and of their mother.— That the clause d'ameublissement does not even affect the rights of the wife in the present instance, which is founded on an express stipulation of the parties, and in the same marriage Contract in which this clause d'ameublissement is stipulated, and the intention of the parties ought to be so explained that they may have their effect.— That the property of the Community is necessarily bound and mortgaged for the Douaire prefix.—

On the hearing of this cause it was argued by M. Rolland for the Opposant, that whatever doubt might be entertained as to the right of the wife to claim her dower in consequence of the property liable thereto having been ameubli and brought

into

into the Communauté by the stipulation of the parties, yet no doubt could be entertained as to the right of dower of the Children. - cites. Renusson. Tr. du Douaire in fo: p. 13. Nº 9. and p. 63. ch. 5. in fine in case the children renounce to the succession of their father and mother. Lebrun, Tr. des Suc. p. 392. §. 19 & 20. — 1 Bourj: p. 728. — Duplessis Tr. du Douair. ch 1. sec. 4. Repᵗᵉ vº ameublissement p. 371. in fine. The contract of marriage ought to be interpreted in such way as to give effect to all the intentions of the parties — The present opposition even if not founded as to the Douaire Coutumier, is certainly founded as to the Douaire prefix, as all the property of the Community is liable thereto and mortgaged for the payment thereof. —

Quesnel for the plaintiff. The land sold by the Sheriff to the opposant was part of the succession of Madame Normand — By the marriage Contract between Deslages and his wife, the wife had her choice of dower, but there was a clause d'ameublissement in that Contract, which — destroyed all claim for the douaire Coutumier either for the wife or her children — Deslages and his wife sold the lot of land in question to the husband of Madame Normand with the clause of warranty against dower — Here the wife must be considered as having made choice of the Douaire prefix by signing such a marriage Contract — Here the opposition is made for the douaire Coutumier only and not for the douaire prefix. —

cites. Renusson. ch. 6. sec. 8. p. 627. Tr. des propres — That when the property is ameubli by the Marriage Contract there can be no Douaire Coutumier — cites.

Deniz[t] —

Dervz. Vo ameublissement No. 3.—
Id.— Vo Douaire. No 15.—
Poth. Tr. du Douaire. No 28. 29. 40.
Lemaitre on Cout. de Paris. tit. Douaire p. 297.—
That the douaire of the children is the same as that of the mother. Poth. Douaire, art. 292 & 298. No 300. 321.—
Repre Vo ameublissement & Douaire. p. 290
Jur. Gr. comre 3e Vol. p. 68. No 29.—
To entitle the party to set up a claim to dower the property ought at the time to be found in the possession of the parties who constituted it or in their succession — but here the property was sold, and the husband had a right to sell — ces. Dervt Vo ameublissement. No 5.
Lebrun. Tr. de Comte p. 61. No 10.—
1 Bours: p. 523.—

It is to be observed that the authorities cited by the Opposant are taken from the more antient authors, and they are not all of the same opinion but differ as to the manner in which the dower attaches and how it ought to be claimed & the latter authors cited by the Plaintiff are unanimous that dower cannot take effect in this case.

The Court considered the opposition here made and the conclusions thereby taken to contemplate merely the right of the Douaire Coutumier which Louise Bilodeau, or the children of her marriage with the said François Destages might hereafter be entitled to claim, and that no claim was in and by the said opposition made or conclusion

taken

taken as to the douaire préfix. And considering the arguments held and the authorities cited by the parties, as well as the greater weight of authorities on this subject they were of opinion that neither the wife nor the children of the said Deslages could claim the Douaire Coutumier on the property in question, which had by the stipulation of the parties been put into the Community and by them aforesaids sold as part of the Community property, and therefore that the Opposition made by the said James McKenzie ought to be dismissed.

See Renusson Tr. du Douaire en fo. p. 13. N° 9
Id. p. 63. N° 53.
1 Bourj: p. 728. §. 28.
Duplessis. tr. du Douaire. p. 240.
Old Denizt. v° ameublissement. N° 3.
Id ——— v° Douaire. N° 15.
Poth. Tr. du Douaire. N° 28. 29. 40. 294. 298. 300. 321.
N. Denizt. v° ameublissement N° 6. §. 8. p. 528.
Id. v° Douaire §. 4. N° 8. p. 185.
Prost de Royer. v° ameublissement. N° 11. p. 587. 4e Vol.
Le Maitre. Du Douaire. Tit. 11. ch. 2. p. 310.
Duval. Principes du Droit Coutumier, & du Droit ecrit. Tit. Douaire. p. 455.

№ 1357.

Byrn. —
vs
Nolan. —

The plaintiff by his declaration stated, that on the 13 Sept. 1825, in consideration that he the plaintiff at the special instance and request of the said defendant, would find it convenient to accommodate one John Kelly, the brother in law of him the said Defendant with credit, that is to say to sell to him the said John Kelly goods, wares and merchandises on credit, to the amount of from twenty pounds to thirty pounds on moderate terms, he the Defendant undertook and promised to the said plaintiff to be answerable for the said John Kelly, for whatever credit or goods he the said plaintiff should so accommodate the said John Kelly with for a few months from and after the day and year aforesaid. — That the said plaintiff confiding in the promise and undertaking aforesaid of the said Defendant, did thereupon sell and deliver to the said John Kelly certain goods wares and merchandises on moderate terms and at different times, to a large amount, to wit, to the amount of one hundred and Six pounds four shillings and ten pence Current money of the Province and that although the time for payment of the price of the said goods hath long since elapsed, he the said John Kelly hath not, although often thereunto requested by the said Plaintiff, as yet paid the whole of the said last-mentioned sum of money, but hath thereof only paid the sum of Seventy — eight pounds nineteen shillings and nine pence leaving a balance of twenty seven pounds five shillings and one penny Current money aforesaid still due and unpaid, and which the said John

Kelly

Kelly hath hitherto neglected and refused to pay although demanded.— and that the said Defendt although duly notified of such neglect and refusal on the part of the said John Kelly, and although also thereunto required, doth also now refuse to pay and satisfy to the said plaintiff the said last mentioned sum of money, by reason whereof an action hath accrued to the said plaintiff to demand and have of and from the said Defendant the said last mentioned sum of money.—

The declaration contained besides several other counts for goods sold & delivered, for money paid and advanced, & the usual money Counts.—

Plea.— Exception peremptoire en droit to the declaration and action of the plaintiff, that the plaintiff cannot have and maintain his action and demand aforesaid against the said Defendant because he saith, that according to the plaintiffs own shewing, the letter of credit given by the Defendant upon which the present action is founded, being given for the amount of only thirty pounds, he the said Plaintiff could not advance goods & merchandize to the said John Kelly for more than that sum, nor could he the Defendant be liable for more by reason of the said letter of credit; and as it appears that in his dealings and transactions with the said John Kelly he the said plaintiff hath received from him more than the aforesaid sum of thirty pounds the payments so made by the said John Kelly to the said Plaintiff ought by law to have been imputed and applied to the discharge of him the said Defendant in regard of his obligation aforesaid,

and

and whereby the same hath become acquitted and discharged, and the action of the said Plaintiff in regard thereof cannot now be maintained. — And for further plea, that he the said Defendant did not promise and undertake in manner and form. &c

Replication, joins issue on the plea —

On hearing on the matters of law, Mr Blenny for the Defendant, that according to the Plaintiffs own shewing in the first Count of his declaration he had no right of action whatever against the Defendant — that the credit to be given to Kelly by the Plaintiff and for which the Defendant became answerable was at the furthest to the extent of thirty pounds, only, but that the Plff had thought fit to extend this credit to a sum upwards of one hundred pounds, and after receiving payments from Kelly to the extent of seventy eight pounds, the Plaintiff now charges the balance to the Defendant as due on his letter of Credit — this is contrary to law, as according to the principles of the imputation of payment the Plaintiff was bound to apply the first payments he received from the said Kelly towards the discharge of the said letter of credit, which thereby became satisfied — cites Potts. Obl. by Evans p. 373. also the Case decided in this Court of Frostaval. Vr McKenzie —

Mr Rossiter for the Plaintiff contended. that he was entitled to maintain his action against the Defendant upon the principle stated in his declaration, inasmuchas Kelly who paid the money had not applied it to the discharge

of

of the Defendants undertaking, and the Defendr could not now avail himself of any greater right,

The Court held that the principle maintained by the Defendant was correct, and that the Pltff was bound to have applied the monies he received from Kelly to the discharge of the Defendts undertaking they therefore dismissed the first Count in the declaration — see Poth. obl. N°530.

N°1212

Gamelin. vs Perrault et al

Action by the plaintiff, as widow and sole legatee of James Woolrich late of Montreal, Merchant, deceased, against the Defendants Perrault and M'Kenzie, Merchts and heretofore Copartners, for a sum of £167. 4. 11 for goods wares and merchandises stated to have been sold and delivered by the said late James Woolrich to the said Defendants at Montreal on the first day of January 1822 — There were two other Counts in the declaration — one for a quantum valebant — & the other on an insimul computassent

To this action the Defendants pleaded. first, non assumpserunt — and further, that in the years 1813, and 1814, the Defendants being then partners purchased goods of the said James Woolrich, and that any demand which the said James Woolrich might then have had by reason of the sale of the said goods to them is prescribed by law, the said Defendants protesting that the same were paid and discharged and therefore praying that the Pltffs action be dismissed

The replication joined issue on the Plea.—

On the hearing of the Cause, the Plaintiff by Mr Driscoll her attorney, contended, that the Defts by pleading prescription had admitted the existence of the demand, and they had not proved their allegation of payment; that in this Case the plea of prescription would not apply, being for goods sold by one Merchant to another — That Plff was therefore entitled to her Judgment against the Defendants.

Rolland for Defendant — The Defendants have pleaded non assumpt — and also payment under the plea of prescription — this can make no proof for the Plaintiff of her demand — it being necessary in a plea of prescription to allege payment and to tender the Defendants oath, as determined in the Court of Appeals in the Case of Badgley ats Gamelin —

The Court did not consider the matters secondly pleaded by the Defendants as any answer to the present action or as at all connected with it, the allegation that the Defendants had purchased goods from the late James Woolrich in 1813 & 1814 and paid for them, unless it had been alleged that these were the goods for which the payment is demanded by the present action, is a matter totally foreign to the question before us — but the Defts having pleaded non assumpt and the Plff having made no proof the action must be dismissed

Roi

Roi & al
v.
Sauvageau
& others.

This action was instituted by David Roi and Pierre Roi, against the Defendants as Sousvoyers of the Seigniory and parish of Chateauguai — The declaration stated that on the 18th day of September 1823, by a contract or agreement entered into by and between the Defendants on the one part, and one Jean Baptiste Naulet, of the other part, it was covenanted and agreed, that the said J. Bte Naulet should rebuild the bridge over the River du Loup, commonly called the River Chateauguai, according to the specifications and plan signed by the parties, by act passed before Demers & another Public Notaries bearing date the said 18 Sept. 1823. the said work to be finish and completed à dire d'expert for and in consideration of the sum of fifteen thousand livres to be paid by the said Defendts to the said Jean Bte Naulet in the manner following, to wit — 3000 livres on the 24 Dec 1823 — 3500 livres on the first day of July 1824 — 3750 livres on the 15th day of October 1824, at which time the said bridge should be finished and completed — and another sum of 3750 livres, being the last payment, on the first day of July 1825 — And it was further agreed that the said Jean Bapte Naulet should commence working at the said bridge on or before the 15th day of June then next and deliver the same on or before the 15th day of October 1824, finished to the satisfaction of Experts, and that the said Naulet should give two securities for the faithful performance of all things contained in the said agreement to be by him performed — That afterwards on the 23d day of September 1823, the said plaintiffs at the request of the said Naulet became

became Security for him in the terms of his said Contract with the said Defendants, and became jointly and severally bound with the said Naulet for the performance of the said work, and in the event of the said Jean Bte Naulet not completing the said bridge at the time and in the manner agreed upon, they the said Plaintiffs became bound to execute and complete the same.—

That the said Jean Bte Naulet did not perform and fulfill his said Contract with the said Defendants, and did not finish and complete the said bridge, but neglected and refused so to do, whereupon the said plaintiffs were called upon by the said Defendants, and were obliged to finish and complete the said work, and did finish and complete the said bridge and did deliver the same à dire d'experts within the time specified in the said agreement — by means whereof and by law the said Defendants became bound to pay to the plaintiffs, the several sums of money in the said agreement specified and according to the terms thereof — That upon the delivery of the said bridge and the work aforesaid by the said Plaintiffs to the said Defendants, there accrued and became due and payable to the said Pltffs a sum of 3750 livres, yet the said Defendants although often requested, have only paid on account of the said sum, the sum of 802 livres 16 sols, but to pay the balance, the said Defendants have and still do refuse, whereby an action hath accrued to the said plaintiffs to demand and have of and from the said Defendants the Sr remaining balance being 2947 livres four sols equal to £122. 16 — Current money of the Province part of the said last mentioned sum of 3750 livres,

without

without prejudice to the recourse of the said pltffs for the recovery of the further sum of 3750 livres the last instalment in the said agreement mentd which will become due and payable on the first day of July next. —

The other counts in the declaration were for work and labor done and performed by the pltffs for money paid and advanced, and conclusion in damages for the sum of £500. —

The Defendants amongst other things, pleaded 1st That they were not indebted and did not promise and undertake &c — and 2d That previous to the institution of the present action, vizt. on the 13th day of October 1824, they had advanced paid & satisfied to the said Jn Bte Naulet the full and entire sum of fifteen thousand livres mentioned in the aforesaid contract or agreement, and that the work and labor done by the said plaintiffs in completing the said bridge having been done by them as the Cautions and security of the said Jean Bte Naulet who had failed in this respect, and for whom the said Plaintiffs were liable in damages, gave no right of action against them the said defendants, other or greater than he the said Jn Bte Naulet could himself have exercised —

The Plaintiffs by their replication took issue on the several pleas pleaded by the Defendants, alledging that the several matters pleaded by the said Defendants were not sufficient in law to exonerate them from the Plaintiffs demand aforesaid —

The parties being now heard on the matters of law arising out of the pleadings, the Pltffs by Mr Grant contended, that as the Defendants had anticipated the payments of the money due to the

said

said Jean Bapte Naulet, and had paid to him the entire sum of fifteen thousand livres before the work in question was finished, they had acted in their own wrong, and could not thereby deprive the Plaintiffs who had completed the work on the default of the said Jean Bte Naulet of their right to recover the amount of those payments which were to become due by the Contract after they the said Plaintiffs commenced their labor in finishing the said bridge.-

Mr Bedard for the Defendants- The Plaintiffs have no right of action against the Defendants on the Contract in question, as it was never agreed that the plaintiffs should receive or have a right to claim from the Defendants any of the monies stipulated to be paid to Nolet- The Plaintiffs as Sureties, were bound to all the obligations of Naulet, and at most could exercise only the rights of Naulet in regard of any monies that might be in their hands belonging to him- but if nothing was due to Naulet it is evident that the Sureties could claim nothing.

The Court held that the plaintiffs could not maintain this action according to the facts stated that they had not contracted with the Defendants as principals, but merely as the Sureties of the principal, their contract was subsidiary to the principal contract, and if the principal could claim nothing on his contract as the principal neither could the plaintiffs as his Sureties- Had it been alledged that the payments made by the Defendants here were made in collusion with Naulet and with a view to deprive the plaintiffs of their right

to

to receive what otherwise would have been due to Naulb, the Court must have admitted them to the proof of their demand, but according to the statement now made they have no right of action against the Defendants — action dismissed.

No 528.

Longueuil. vs Terrien. —

Action of indeb: assumps: —

The declaration stated, that on the 22d. day of November 1821, by an acte or deed of Sale passed before Louis Decoigne and Louis Archambault public notaries, one Michel Paquet dit Lariviere and Marie Potvin his wife, sold a certain lot of land to the said Defendant in consideration of a sum of three thousand livres, payable as follows, 400th at the time of passing the said deed of sale — 900 livres in the month of March 1823 — 900 livres in the month of March 1824 — and the remaining sum of 800 livres in the month of March 1825. — the said several sums of money by law bearing interest from and after the several periods fixed for the payment thereof. — That by a certain other acte or deed made and passed before the said notaries on the 21st day of February 1822, the said Michel Paquet, acknowledged and confessed to have received from the said plaintiff the sum of two thousand six hundred livres, to wit, part thereof in the sum of £8,, 6,, 8 paid in money, and the residue by an obligation made and passed by one Louis-Henry Gauvin acting for the said plaintiff for a sum of 2400 livres, payable in instalments and at the periods following, to wit, 900 livres in the month of March 1823, — 700 livres in the month of March 1824, and 800 livres in the month of March 1825 — and thereupon the said Michel Paquet did accept the said Plaintiff

as

as his debtor for the money so due to him on the said deed of sale, and thereupon did acquit and discharge forever the said Defendant from the payment thereof and the said plaintiff alledges that she afterwards did pay and satisfy to the said Michel Paquet the said sum of 2400 livres in the said obligation mentioned according to the terms thereof, and by reason thereof the said Defendant became bound and liable to pay to the Plaintiff the aforesaid sum of 2600 livres equal to £108. 6. 8. Current money of the Province with interest on the several instalments as they became due and payable as aforesaid, and being so liable, the said defendant undertook and promised to pay to the said plaintiff the said sum of £108. 6. 8. with interest thereon as aforesaid when thereunto required.

The plea to this action was. 1st Non assumpt 2d That the allegations matters and things stated in the Declaration were insufficient in law to authorise the plaintiff to maintain her action 3ly That at the time of the institution of the present action, he the said Defendant owed nothing to the said Plaintiff upon the deed of sale of the 22d. Novr 1821 mentioned in the said declaration nor did he then owe, nor does he now owe to the Michel Paquet and wife upon the said deed, because that on the 21st February 1822, the sum of 2600 livres demanded by the said plaintiff in and by her said declaration, and which the Sr Defendt owed to the said Michel Pâquet and wife on the said 22d November 1821, was duly paid & satisfied to the said Michel Pâquet and wife, and in consequence thereof the said Michel Pacquet on the said 21 Febry 1822 did give an acquittance and discharge the said Defendant therefrom, so that there remained no further obligation on the part of the Sr Defendt

to

to pay the same, which had thus become extinct and every thing accessary thereto, as she the said plaintiff well knew

The Replication was general, and joined issue on the matters stated in the plea.

Mr Bedard for the Defendant on hearing of the cause, argued - That the plaintiff cannot maintain the present action in her own name and, because the receipt given by Paquet to the Defendant for what he owed on the deed of Sale of 22d. Nov. 1821 entirely destroys that right and it has thereby become extinct - The plaintiff ought to have obtained a transfer of the rights of Paquet to maintain any action as the Defendant on the above deed of Sale. But the plaintiff has not even proved that she has paid the money mentioned in her declaration to Paquet, she has only shewn an obligation by which she has promised to pay it, but a promise to pay, is not a payment, nor will such promise maintain the present action - The Defendant here never required nor consented to any payment being made by the plaintiff to Paquet on his, the Defendants account, which was necessary to be shewn to maintain the action - the plaintiff might have her action negotiorum gestorum on this transaction, but not the present action. a payment made without the knowledge or consent of the defendant may be considered as a gratification done to him on the part of the plaintiff, but it generates no action at law - cits Potts. Obl. Nº 499. & 551. - The plaintiff has in nowise benefited the Defendant here, if he must still pay the money. Potts. obl. Nº 556. & 558.

Mr

Mr Sewell for the plff. The payment of a debt due by the Defendant is a sufficient — consideration to maintain this action - cites. Prin: du Dr. Fr par Jannes. p. 314. it creates an equitable contract which the law will enforce Poth. obl. № 113. —

The Court were of opinion, that the Plaintiff was entitled to maintain her action against the defendant. - The action must be considered according to those equitable principles by which it is held that no man shall be allowed to enrich himself at the expence of another, and according to which it is established, that had the Defendant even forbidden the Plff to pay the money to Paquet on his the — Defendants, account, yet he would be bound to reimburse the plaintiff in so far as he the Defendant had benefited by the transaction. Poth. Tr. du Quasi-Contrat Negocm Gestorum № 182. 183. - In this instance the Defendt benefited materially by the payment which the plaintiff made for him - as a debt which bore a mortgage on his estate was discharged without any new mortgage being contracted by him, and also a debt which bore interest was acquitted, without any new obligation to pay interest, and therefore according to the principles of our law the Defendant was bound to reimburse to the Plaintiff what she had so paid - Judgt for Plff - but with interest only from the day of the demand. —

Cuvillier

No 1. 42

Cuvillier
v
Boucher
&
Syndics of Com"
of River du Loup
opp"

In consequence of an execution sued out against the Lands and tenements of the Defendant, addressed to the Sheriff of the district of Three Rivers, a certain lot of land was seized and taken in execution as belonging to the said Defendant, but the sale thereof was suspended in consequence of an opposition afin de distraire being put in by the President and Syndics of the Common of the River du Loup, claiming part of the land sold.— The Sheriff having made his return to the Court, the Defendant by Mr Vigé his attorney presented a petition to the Court, stating that inasmuchas the property seized was situated in the ~~Jurisdiction~~ District of Three Rivers, in which this Court had no jurisdiction, and therefore incompetent to determine the question raised by the said Opposition touching the right of property therein, that this Court would order and direct that the said opposition and all the matters touching the same should be transmitted to the Court of Kings Bench for the said district of Three Rivers which was alone competent to determine thereon.—

The Court having heard the parties on the said petition, dismissed the same, being of opinion that as by law they were authorised to send an execution into the different districts of this Province they must hold the authority to determine all matters

touching

touching the mode of enforcing the same, and that there was no law whereby they were authorised or required to transmit the contests arising on such execution to the Court of another district.

No. 1905.

Johnson. —
v.
Cooke. —

Action by the plaintiff as Seignior of the Seigniory of Argenteuil, to compel the Defendant one of his tenants, or Censitaires, to make and deliver his declaration and acknowledgment of the lands and property he holds and possesses in the said Seigniory, and the rights and duties attached thereto, in order to enable the plaintiff to make and complete his Papier Terrier of the said Seigniory, for which purpose Lettres de Terrier had been granted to him —

The Defendant having in consequence of the order and Judgment of this Court made and given in to the Commissaire for this purpose appointed, his declaration and acknowledgment of the lands and real Estate by him held and possessed in the said Seigniory with the rights and duties attached thereto — Stated as follows in his said declaration — "But as the Cens
" et Rentes and other charges imposed on the said
" land by the deeds of Concession, exceed by far
" the rent, which by the laws of this Country
" ought to have been imposed on the said land
" by deed of Concession of the same — the said
" Thomas Cooke saith and declares that he
" intends to complain thereof and take all
" legal means against the Seignior of the
" said Seigniory of Argenteuil to obtain the

" reduction

" reduction of the Cens et rentes and other charges
" imposed on the said lands by the said deeds of
" Concession; the said Thomas Cook offering to pay
" to the Seignior his heirs and assigns such rents
" and other charges as the said lands may be legally
" charged with according to law, that is to say,
" four shillings and two pence Currency in Cash and
" two minots and a quarter in wheat for every —
" ninety arpents superficial, which is the highest
" rate of Cens et Rentes imposed on lands conceded
" in the said Seigniory of Argenteuil before the
" year one thousand seven hundred and ninety
" one". —

To the above declaration, the Plaintiff put in before the said Commissaire, his objections or "blame" —

" And the said Charles Christopher Johnson
" here present, not accepting the declaration
" above made by the said Thomas Cooke, and
" using his right of blame, doth declare that he
" objects thereto, and refers his objections to the
" Court of Kings Bench in the suit now pending
" between him and the said Thomas Cooke, where
" he will take conclusions to have the said declaration
" and pretended acknowledgment declared
" inadmissible and the said Thomas Cooke
" condemned to conform to the said Lettre de
" Terrier, as he is in law bound to do — And doth
" assign as his Causes of his blame, — First, That
" the said Thomas Cooke hath not acknowledged
" as due, nor hath he for himself undertaken to pay
" and discharge for the future the Cens et rentes
" and other Seigniorial rights established by
" the original grants or deeds of Concession,

" but

" but denies the legal existence of such rights — and
" 2dly That his pretended acknowledgment is not
" simple and entire, but qualified, contesting instead
" of admitting the rights in question" —

The Commissaire having made his return to the Court of the aforesaid declaration and blame, the Plaintiff by his attorney filed new conclusions thereon — Stating, The plaintiff hereby taking conclusions in consequence of the Interlocutory Judgment in this cause rendered on the 17th day of October last, prays that the declaration and pretended reconnoissance made by the said Defendant before Joseph B. Lindsay Commissaire au Terrier, bearing date the 25th day of January last, may be declared inadmissible and that this Honorable Court adjudging on the blame of the plaintiff do order that the said declaration be new modelled, reformée, and made without such parts thereof as are objectionable, with Costs against the Defendt, and holding the said Defendant in default until he makes his declaration & reconnoissance in the manner that shall be prescribed by this Honorable Court. —

To the above blame and conclusions thereon taken, the Defendant filed his answer, in which he stated, that in all time past since the year 1711, the Seigniors of the said Seigniory of Argenteuil, were held and bound, and are still held and bound by the laws of this Province to grant concessions of land to all persons demanding them in the ungranted lands of the said Seigniory

of

of Argenteuil, simply on reserve of rent, and without being allowed to demand any sum of money on account of such grants, on pain of being deprived of all their rights in the lands so granted or demanded to be granted, nor could or can they sell any land being wood land, en bois de bout, on pain of the nullity of the Contracts made in this behalf, of restitution of the price and of the reunion of the lands so sold, to the domain of the Crown. —

That the highest rate of Cens et Rentes imposed upon the lands granted in the said Seigniory of Argenteuil in and before the year 1791, by the Seignior of the said Seigniory of Argenteuil, was, two minots and a quarter of wheat, and four livres sixteen Sols Tournois, for each lot of land of ninety acres in superficies being half a bushel of wheat for every twenty acres in superficies and one Sol Tournois — That on the 27 May 1799, the lot of land first mentioned in the declaration and acknowledgment of the Defendant was entirely covered with wood and not granted, and that on the 18 Dec. 1799, the lot of land secondly described in the said declaration and acknowledgment was in the same state. That Patrick Murray, Esquire, formerly Seignior of the said Seignior, and one of the predecessors of the plaintiff, could not legally in making the said two Concessions, impose any greater rate of Cens et rentes than those above mentioned under the penalty imposed by law — Yet the said Patrick in and by the deeds of Concession

of

of the said two lots of land, imposed thereon excessive rates of Cens et rentes, that is, three bushels of wheat and five shillings in money for each ninety acres in superficies — That in consequence the said Defendant as holding and possessing the said lots of land, had a right to make his said declaration and acknowledgment in manner as aforesaid, and is well founded in demanding that by the Judgment of this Court, the said Cens et rentes imposed by the said Patrick Murray on the said lots of land in and by the said deeds of Concession be reduced to the rate of Cens et Rentes in the said Seigniory in the year 1791 — and therefore concludes that the blame made by the said Plaintiff be rejected as unfounded and his conclusions as aforesaid taken by him be dismissed with Costs. —

The Plaintiff in reply stated, that the said Defendant cannot avail himself in the present instance of the reasons by him alledged, were they even well founded, in order to warrant or support the declaration by him made, it being wholly inadmissible and not complying with the intentions of the law, which enjoins the declaration and acknowledgment to be made in such way as to recognize the rights imposed by the bail a Cens, and obliging himself personally to pay the same as well those in arrear as those hereafter to accrue and

become

become due.— That the Defendant by his answer to the blame wishes to raise a question which cannot here be of any use, as the Court cannot decide thereon, the only question now before the Court being, whether the declaration such as it is made by the Defendant be — admissible or not, and whether the blame made thereto by the plaintiff be well founded or not— That the first Concessions of lands in a Seigniory, en bois de bout, cannot fix the rate of Concession of the subsequent grants, and because in this Country there is no fixed rate of Concession established by law by which the Seigniors are bound to grant their lands— The Plaintiff averring that the rates at which the lots of land in — question have been granted are moderate and in conformity to the general rate of Concession in the said Seigniory— The Plaintiff therefore praying that his conclusions may be granted to him.—

On hearing the parties on the above acts and pleadings, Mr Bedard for the Defendant argued, that the Situation of Seigniors in this Country is not the same as in France— there, the Seignior was absolute proprietor of the Soil— in this Country the case is different, the Seigniors here hold their

Seigniories

Seigneuries under a conditional title, that of granting lands to all applicants upon reasonable terms, the law authorities therefore which we find in the French law books cannot therefor apply here to the full extent that they do in France – That the Defendant here has not acknowledged, nor can he be held to acknowledge the right claimed by the Plaintiff nor his right to augment the rates of Concession. To entitle the Defendant to maintain the acknowledgment and declaration he has made he has only to shew that the present rate of Concession is exhorbitant and contrary to what the law allows, cites Domat. liv. 1. tit. 1. sec. 2. art. 10. 11. & 14 – touching the interpretation of the laws as established by the different arrets applicable to this Case – cite 2 Vol. Edits & Ordres p. 25 to 30., where we find that instructions were given to Mr Gaudet on his coming to Canada as a Commissioner appointed to report upon the State of the Country, and we find at p. 29. the favorable intentions of His Majesty the King of France towards the Inhabitants of the Colony and his desire to favor the settlement of the Country by facilitating the granting of lands therein – The arret of 6 July 1711, refers to the practice of the Seignions granting their lands upon such terms as to be equivalent to a Sale thereof

which

which was contrary to public policy and absolutely
in direct contravention of the law, for by imposing
very high rents, these might be considered as holding
the place of a Capital for which the land was sold —
and although no law can now be produced fixing a
tarif of Concession, yet it is evident from the terms of
the arret of 1711, that the Seigniors cannot augment
their rents beyond what they then were. — Cites
also the arret of 19. March 1732 — 2. Vol. Ed. & Ar. 886.7.
If therefore the Cens et Rentes imposed on the lots of
land now held and possessed by the Defendant are
beyond what the law allows, and what was usually
the former rate of Concession, it is a just ground
of objection to be made by him on the present occasion
that it may not hereafter be said that he made his
declaration and acknowledgment with reserving
that right which he means to exercise of having the
said Cens et Rentes reduced to the legal standard. —

Rolland for the plaintiff in reply — The objections
here raised by the Defendant are inadmissible, because
the right of the Plaintiff in this case is too clearly —
defined by law to admit the calling in question those
great objects which the Defendant now wishes to
bring forward — as a tenant and Censitaire of the
Seigniory of Argenteuil, the Defendant is bound
to declare to the Plaintiff, the right and title he the
Defendant has to the Lands he so possess, and
under what duties and obligations he holds
them — this he must do, or quit the land — for there
can be no question raised here, whether those
duties are higher than the law allows in an
action the sole object of which is to ascertain the

fact

fact of possession and the nature of the title under which that possession is held – it is therefore unnecessary for the Plaintiff to enter upon the question of right in the Seignior to claim the rents imposed on the lots of land in question. where the only point to be ascertained is to say, what they are, leaving to the Defendant such recourse as he may be advised for having those rents reduced should he have a right to obtain it – The Court cannot here determine, nor the be allowed to bring in question what the Defendts title ought to be, when he is called merely to say what it is, and every presumption must be taken against a man who wishes to come agt his own title, which is considered to be the law of the parties – The Plaintiff cannot be bound to admit to be entered upon his Terrier a declaration such as proposed by the Defendant, that the title under which he holds is illegal, and that he means to have a law suit to get it set aside – this would be destroying the very end and object of a Terrier, if every Censitaire was allowed to state all his notions and opinions in making his declaration as to the right of the Seignior to hold his Estate or to claim any duty whatever from his tenant – The objections here raised by the Defendant must be rejected, and the Defdt adjudged to make that declaration which the law requires –

By the Court –

31

It appears to the Court that the Defendant cannot in this case avail himself of the objection, or rather of a reservation of right, which he claims to contest the validity of the title under which he holds, because this action has in contemplation the right which the Seignior is allowed to exercise of knowing who his tenants are and by what title they hold; - the declaration of the Defendant ought to be limited to this, he cannot here be allowed to impugn his own title, nor to contest a right which his possession obliges him to acknowledge - In this action, it is the bail a Cens the parties must look to, for this is the law of their own making, they cannot set up any pretention contrary to it, Fremenville, on the question which he proposes - "Quelle difference y-a-t-il
" entre un bail a Cens et une declaration ou -
" reconnoissance a terrier ? - says, " Cette difference
" est des plus notable, le bail a cens est le titre
" primitif et constitutif qui etablit les droits du
" Seigneur et ceux du Censitaire - en un mot, qui
" fait la loi des parties et contient leurs obligations;
" La declaration ou reconnoissance à Terrier n'est
" que le renouvellement du bail à Cens, qui ne peut
" contenir d'autres clauses obligations ni servitudes
" que celles portées par le premier titre." -

In France it is true the Seignior could impose any conditions he pleased on the bail a Cens, as he was the absolute lord of the soil - in this Colony it is however said that the Seignior is not the absolute proprietor, but holds his Seigniory on a conditional title, that of granting it out to sub-tenants at an easy annual rent, "aux taux
" ordinaires

ordinaires et accoutumés", and by no means to sell the lands, which is absolutely prohibited and the deed a nullity - and here the Defendant complains, that although the plaintiff did not sell his lands, yet he granted them at too high a rent, which is illegal, and therefore the deed of Concession, or bail a Cens, is reducible to what would be a moderate and legal rent - But how does this point come in question here that the deed of Concession is reducible? There is nothing apparent on the face of it to stamp it with illegality, and the presumption in point of fact, is against the Defendant, who by acceding to the deed of Concession, and to all the obligations it contains, has admitted it to be a legal and sufficient Contract. - When mutations occur or such a lapse of time has passed as to endanger the rights of the Seigneur to be resisted by prescription he is entitled to claim a renewal of his bail a Cens and the reason given is, "que le Seigneur doit toujours avoir en main un titre executoire contre son debiteur, et que ce dernier doit lui fournir à ses frais". And the nature of the declaration to be made by the Censitaire in such cases is very clearly laid down - "Les declarations sont pour les biens non nobles, ce que les denombrements sont pour les biens nobles - ce sont par consequent de leur nature et par leur objet, de simples titres recognitifs, et non des titres dispositifs, Non interponuntur, dit Dumoulin, animo faciendo novo obligationis, sed solum animo recognoscendi et declarandi obligationem jam dispositam -

Renauldon, - Dr: Seigx liv. 7. ch. 3. p. 582. -

8 Hervé. 655. 5. -

"et

"et subsistentem, unde simplex titulus novus, non
"est dispositorius sed declatorius". — And Mr
8. Vol. p. 675. Hervé, further observes, "Que d'ailleurs il n'y a
pas une seule Coutume qui n'impose au vassal et
au Censitaire l'obligation de respecter la Concession
primitive, et qui ne lui interdise toute disposition
qui porteroit atteinte à cette Concession." —

It seems therefore evident, that as the Censitaire while he retains the possession of the land is bound to make his declaration and reconnoissance, so it would be inconsistent with the nature of this action to allow him to set up a demand either to rescind or to reduce that very title which by law he is bound to acknowledge — It is the existence of the title under which the Defendant holds and not the validity of it which have here to enquire into — had a prescription accrued in favor of the Defendant against any extraordinary stipulation in the deed of Concession, the Defendant might have availed himself of it, but this is the only objection which is allowed to be set up against that deed in an action like the present — in regard of any other right, the Defendant must institute a special action against the plaintiff to bring it into discussion by a more regular Course. — The Court gave the following Judgment — "The Court having heard the —
"parties by their counsel, on the objections, or blame
"raised by the plaintiff to the declaration and
"acknowledgment made by the said Defendant,
"it is considered, that so much of the said declaration
"and acknowledgment as states, that the Cens et
"rentes and other charges imposed on the lands

"in

in question by the deed of Concession greatly exceed what the law allows, and to reduce which he the said Defendant reserves his right of action and complaint against the said Seignior of Argenteuil and the offer made by the said Defendant to pay a different and lesser Cens et Rentes than stipulated in and by the said deed of Concession, is irregular and cannot be received or admitted to be made by the said Defendant in his aforesaid declaration and acknowledgment, and it is thereupon ordered, that the same be rejected as insufficient and inadmissible, and that the said Defendant do within eight days after notification of the present Judgment, reform and make anew, before the Commissioner for this purpose appointed, his aforesaid declaration and acknowledgment, without including or mentioning therein any of the matters aforesaid and hereby rejected. — The Court reserving to determine as to the costs and damages demanded by the said plaintiff. —

Tuesday 20th Jan

Tuesday 20th June 1826

No. 1025.

Cuvillier.—
Stanley, Cur
& Burton opt

On an opposition by the Seignior afin de conserver, for a sum of £38. 5.— for Cens et rentes due on two lots of land sold under the writ of execution sued out by the plaintiff in this cause against the lands and tenements of one Richard Hart deceased, to whose succession the Defendant has been appointed Curator, that is, on lots. No. 13. and No. 14 in the third range of Concessions of the Seigniory of Delery, each lot containing four acres in front by 28 in depth.— The opposition and moyens state, that the late Richard Hart obtained from the agent of the Opposant in the year 1814, a verbal concession of the said two lots of land, on his paying annually on the 11th day of November, the first payment to commence and be made in Nov. 1816, the Cens et rentes, according to the usual rate of Concession in the said Seigniory, that is, at the rate of Six pence of Cens for each of the said lots, and an annual rent of nine Sols for every superficial acre of the same, making for the said two lots a sum of two pounds five shillings of Cens et Rentes payable annually as aforesaid — and thereupon concludes for the payment of the said Cens et rentes, from 11 Nov. 1815 to 11 Nov. 1824 making the above sum of £38. 5.— and for interest and Costs.—

Plea

Plea by the Plaintiff

1st Defenses au fond en droit, denying the right in law of the opposant to maintain his said opposition.—

2d Denying the facts alledged in the opposition

3d That the Opposant cannot claim the Cens et rentes by him demanded since the year 1815, inasmuchas, he had not then conceded the said lots of land to the said Richard Hart, nor had the said Richard possessed the same since that time, but only for two years prior to his decease, vizt. 1818 & 1819.— That the said opposant never conceded the said lots of land at the rate of six pence or 12 Sols of Cens and nine Sols of rente for every arpent as by him alledged; nor had the said opposant by law a right to make such Concession, the redevance due to the Seignior in such cases being limited to one Sol of Cens and one Sol of rente of every superficial Acre, and a Capon or 20 Sols for every arpent in front of the said lots.— That the Cens et rentes demanded by the said Opposant is contrary to law, and must be reduced to that rate which the law allows.— That the Sr. opposant cannot pretend, that the said Concessions alledged by him to have been made without special Contract in writing entered into between the parties, can give him a right to demand or receive, as being the usual and ordinary rent of the said Seigniory, the sum of 12 Sols of Cens and nine Sols of rente, because there cannot exist in the said Seigniory of Dilery any ordinary rate of Cens et rentes, greater than

by

by law is imposed and allowed, which is, one Sol of Cens, and one Sol of rente, and a Capon as above stated — Concludis therefor to the dismissal of the Opposition with Costs.—

The answer or Replication to the Plea is general and joins issue thereon.—

The Witnesses for the Opposant prove, that the ordinary rate of Concession of lands in the said Seigniory of Delery, is £2.2.5 of Cens et rentes for every lot of four acres by 28— and that this has been the case for these last twenty years. That the late Richard Hart came into the possession of the two lots in question in the year 1815, and had a knowledge that the above was the usual rate of Concession in the said Seigniory.—

The question now is whether the Opposant is entitled to maintain his claim for the amount of the Cens et Rentes now demanded by him.—

The grants of Seigniories by the Crown of France to individuals in this Colony, were generally made from gratuitous motives, and frequently as a reward for the services of meritorious officers; and although sound policy required that these grants should be subservient to the great and benificial object of the settlement and improvement of the Colony, by the concessions to be made to the Sub-tenants or Censitaires, still however the immediate object of the grant, was the benefit of the grantee or Seignior, who according to the principles of the feudal tenure, became the vassal of the Crown, and the undoubted proprietor of the Estate; and it is therefore reasonable to presume, that he

would

would endeavour so to manage and dispose thereof, as would prove most beneficial for him; and however far his conduct in this respect might infringe the conditions of the grant, or counteract the policy of the Crown, yet none but the Crown had the right of interference or complaint — the Censitaire was not a party to the Grant made to the Seignior, nor had such beneficial interest in the Estate, as to entitle him to any redress against the Seignior, as to the terms of Concession proposed to him, or under which he actually held from the Seignior — hence it was found necessary to confer this right to the Censitaire by legislative authority, and for this purpose the several declarations and arrets, which we find recorded in the archives of the Country, were made by the French King and under his authority. —

The arret of the 6th July 1711, appears to constitute the principal authority upon which the Plaintiff resists the claim of the Opposant to his Cens et rentes, as demanded, but this arret, as well as several others now extant on the subject of granting lands in Canada, have not provided for the matter herein contest — all these arrets seem levelled against the sale of lands by the Seignior and directing that they should be conceded to the Censitaire upon an annual rent — in fact the whole bent and object of all those arrets, was to encourage the clearing of the lands and settling the Colony, which could best be effected by Concessions of this kind, they being understood to be made on moderate terms, and within the

ability

abilitys of every industrious man to satisfy; while the sale of lands in large tracts and for large sums of money, and all kinds of speculation and jobbing, which operated merely as a transfer of the lands without promoting their actual settlement or improvement, are most expressly prohibited.— But while the principle of granting lands upon a redevance annuelle, is thus maintained we find no arret or law now extant in the Country which establishes what the rate of these redevances should be.— perhaps it was not necessary that any, at least any of a permanent nature, should have been made, because by prohibiting the Seignior from selling his lands as above stated, it necessarily became his interest to dispose of them in the way pointed out by the above arrets, that is by concession à redevance annuelle, to such persons who would take them— and if we could form an opinion of the State of the Country for a Century back, we may readily believe, that the same motive, a view to his interest, would induce the Seignior to concede his lands at a low rate, as the then state of the population required, that the Seignior should rather hold out inducements, than exact unusual rights in the granting of his lands, as there were then more lands to concede than tenants who wanted Concessions— from this circumstance we may account for this fact, that no Suit, or Judgment appears in the Courts of law prior to the Conquest, as far as we have been able to ascertain, by which a Seignior was prosecuted

or

or adjudged to grant lands to a Censitaire under the penalty of the arret of 1711, that is from an extravagant rate of Concession.— It would therefore seem that there could be but little danger or injury likely to arise to the rights of individuals to allow the Concessions to be made according to the phraseology of the day, aux Cens, rentes, et redevances accoutumées, as the parties could agree — On the one hand it was no doubt the interest of the Seignior, when he could not sell his lands to grant them on an annual revenue so as to encrease the value of his property by actual settlement of the lands, so on the other hand it was the interest of the Censitaire to obtain such grants or Concessions upon the easiest terms possible.— In the deed of Grant made by the King of France on the 6e April 1733 of this Seigniory of Delery, we find inserted among the conditions of the grant, the following —

" d'y tenir feu et lieu, et la faire tenir par ses
" tenanciers, et à faute de quoi, elle sera reunie
" au Domaine de Sa Majesté — de deserter et
" faire deserter incessamment ladite terre — laisser
" les Chemins du Roi et autres jugés necessaires
" pour l'utilité publique sur ladite Concession,
" et de faire inserer pareilles conditions dans les
" Concessions qu'il fera à ses tenanciers, aux Cens
" et rentes et redevances accoutumées par arpent de
" terre de front sur quarante de profondeur &c."

Here we find the settlement and clearing of the lands, as being the principal object of this and of every other grant of the day, enjoined

under

under a penalty, while the rate of Concession seems inserted more as words of course, than of particular injunction, nor is any penalty attached to the infringement of this part of the grant, which was usually done, when there was any particular law in existence bearing on the point.— We are then called upon to say, what the words, Cens, Rentes & redevances accoutumées, mean.— These words seem to carry the impression, that there existed some general principle, either established by law, or generally practised in the Country, by which Concessions to the Censitaire were regulated, and therfore as a necessary consequence we should expect to find, all concessions of this description, at least prior to this deed of Grant by the King of France, made subject to the same Cens, rentes et redevances — for if there was a law to this effect, it must have been general in its operation and have bound all the property in the Country equally — but we see, as well from the Judgments on record of that time, and since, as from the generally well known fact, that the Cens, rentes, et redevances of different Seigniories were very frequently different, varying according to circumstances and situation, and at the present day, we may almost say, that scarcely any two Seigniories are alike in this respect.— This fact, as a general usage of the Country argues strongly against the existence of any rule of law on this point, or if any

suit

such did ever exist, that its injunctions could not have been of a permanent nature, or of a general extent.— In the absence therefore of any positive regulation we are left to form that opinion which shall appear to be most consistent with reason and justice according to the circumstances of the case.— As a rule of right therefore it cannot be presumed, that what would have been a reasonable rate of Concession in the year 1733. by the Seignior to the Censitaire, could be considered to be equally so nearly a Century afterwards, unless we could presume, that all the relations and connections in life between man and man, had continued to be the same, and that the improvements both in the moral and physical world, had caused no change in our habits of life, or in those transactions wherein the value of money is the medium of estimation. If the revenue which the Seignior obtained from the concessions made by him, cannot now procure him the same competency and facilities in life, as at that time, while the means and resources of the Censitaire, arising out of the very land so granted to him, are multiplied tenfold, there can in such case be neither reason nor justice in compelling a Seignior to grant his Lands at the same rate at the present day as a Century ago, when we have no rule of law binding in this respect— We have however a rule of law applicable to the present Case arising out of the facts which

have

have been proved — It appears that the general rate of Concession of lands in the Seigniory of Delery, for the last twenty years has been. six pence of Cens and nine sols for every superficial acre of every lot so granted — and of this rate of Concession the late Richard Hart appears to have had a knowledge, and must therefor be considered to have submitted thereto, by taking possession of the two lots of land in question — this made it binding on him even without a deed of Concession to pay what was usual and Customary for tenants in like situations in that Seigniory to pay, and no more has been here demanded. — "L'usage general d'une
1 Hervé. p. 415, "Seigneurie, appellée, usance, ou usement, de
"Fief, peut quelquesfois suppléer à la Coutume
"et aux titres particuliers, et souffire pour soumettre
"à un droit, ou à une prestation qui s'exerce —
"generalement dans l'etendu du Fief, quelques
"vassaux ou Censitaires, qui pretendroient se
"soustraire à ce droit, ou à cette prestation. — Car
"lorsqu'un droit quelconque est enoncé dans —
"presque tous les titres de ce Fief, et s'exerce sur
"presque tous les Sujets du Fief, il doit etre regardé
"comme un droit naturel de la terre dont personne
"n'est exempt, a moins qu'il n'ait un titre precis
"de l'exemption". — This principle is applicable where there is no Concession, which is the case here, for had there been a deed of Concession, it must have formed the law between the parties and the rule of decision on the question of these

rights

rights of Cens et rentes.— The Court therfore are of opinion, that in the Judgment of distribution to be rendred in this Cause, the Opposant be ranked and collocated accordinz to his privilegz, for the amount of his claim as statid in his Opposition, with Costs.—

The Sol: General for the King
v.
Divers Defends

On actions instituted by the Solicitor General on behalf of the Kinz, to recover the amount of various Recognizs which had been estreated in the Court of Kings Bench.—

It was amongst other things pluaded by the Defendants, that the Solicitor General cannot maintain any action for the Crown in his own name, and that all such actions ought to be instituted by or in the name of the Kings Attorney General.— and the parties being heard on this point, it was contended on the part of all the Defendants, that the Solicitor General can in no case, unless that of the vacancy of the Office of Attorney General or in the case of his absence from the Province maintain the Suit of the King in his own name— vide 4 Bur. p. 2554— and the Case in appeal, where on an Intervention made by the Solicitor General for the King on a Qui tam Information for the condemnation of prohibited Goods, it was held that the Intervention could not be maintained.—

The

The Sollicitor General, for the prosecution. There is nothing determined in the Court of appeals which can preclude the right of the Sollicitor General to maintain these actions. It is admitted that in the case of the absence or suspension of the Attorney General, or the vacancy of the Office, the Sol. Gen. steps in to discharge the duties of this office on behalf of the King — this may be the Case here, and the Defendants ought therefore to have pleaded specially that the Attorney General was present and able to prosecute — The case cited from Burrows and as further reported by Ch. J. Wilmot, does not go the length the Defendants would infer — But the Attorney General must as to this Court be considered as absent, it is known that he resides in another district, and as to the business to be conducted before this Court he might as well be in England — That the Sollicitor General is in these Cases authorized to prosecute, but it is not necessary that he should shew this authority, as the Court must presume he is authorized when he speaks or prosecutes before it for the Crown — the Defendants cannot call this authority in question, as they have no right to know what instructions the King gives to His officers to prosecute for him — The King alone can call in question the right to institute these prosecutions. But neither the King nor the Attorney General have done so, and none besides can have any interest or right to do it —

The Court said it was of moment that this

question

question should be settled, so as to leave no doubt upon the subject— The opinion we held in the Case of Edwards. q. t. &c Prohibitis Goods on the Intervention of the Solicitor General on behalf of the King, we are of opinion will apply in this Case; and although there may be some difference in the nature of the present prosecution from that referred, yet we conceive the principle of decision will equally hold, — namely, that the Attorney General is the only legal and Constitutional representative of the King in all his Courts, without special authority given by him to any other officer — The Attorney General is appointed for the Province, and while within any part of the Province no other officer can claim a right to speak for the King by a prosecution in their own name in their Court we are therefore of opinion that these prosecutions be dismissed. —

See Woods Instit. p. 468. Book. 4. ch. 1. —
1 Fowler's Exch. Prac. 294. & 400
Bac. Abr. Tit. Informations (A) note (e) p. 635.
Id — Tit. Prerogative (E) N. 7. p. 564 —
4. Burr. Rep. 2554. The King v Wilkes —
Life of Wilmot — same case. —

№ 1134

Barron & al
v.
Shaw & al

Action on Bail bond.—

This action was instituted by Andrew H. Barron and William W. Brown to recover from the Defendants, the amount of their bail bond which they had given as special bail in an action instituted by the plaintiffs against Robert Watson and Henry Riddell. It was stated in the declaration, that the Defendants, by their bond or writing obligatory did jointly and severally undertake and promise and then and there bound and obliged themselves for and on behalf of Robert Watson and Henry Riddel the Defendants in a certain cause wherein the said Andrew Henry Barron and William W. Brown were plaintiffs, and the said Robert Watson and Henry Riddel were Defendants, that if they the said Robert Watson and Henry Riddell should be condemned at the suit of the said Andrew H. Barron, that is to say, the said Andrew H. Barron and William W. Brown the present plaintiffs, they the said Robert Watson and Henry Riddell should pay the condemnation money and all such costs as should be taxed to the said plaintiffs, to wit, to them the said Andrew Henry Barron and William W. Brown, and in default of their so doing, that they the said Alexander Shaw and Robert Mason should pay the said Condemnation money and Costs, to wit to them Andrew H. Barron and William W. Brown. &c. The declaration then goes on to state the subsequent procedings had and the Judgment the Plaintiffs obtained against the said Robert Watson and Henry Riddel, which they had not paid and satisfied, and the consequent right of the plaintiffs to their present action agt the Defendants.— The Defendants for plea to the action, among other matters pleaded, that they did not owe and were not indebted to the said Plaintiffs in manner and form &c. On

this

On this plea issue was taken by the plaintiffs and the parties were afterwards heard upon the merits, when it appeared, that the Recognizance of Special bail entered into by the Defendants was to Andrew H. Barron alone, on his suit against the said Robert Watson and Henry Riddell, — On account of which variance, the Court dismissed the action. —

—

Woofsteler vs Stacey. —

Action by an indorsee against one of the indorsers & payees of a note. —

The note was for £464. 9. 6 made by Messrs Richardson & M^c^alpine on the 11 July 1825 in favor of the Defendant and one Thomas Mears who indorsed it to the plaintiff, it was payable ninety days after date. — On the 15th October 1825, a Notary went to the Counting house of the drawers, Richardson & M^c^alpine in Quebec, between the hours of three and four in the afternoon and found the doors closed, search was made for the drawers, who could not be found; the Notary was however informed that they had left Quebec, and it was not known where they were gone — The usual protest was accordingly made. —

On the 10th day after the protest (the 15th of October) a letter to the Defendant Stacey, notifying

notifying him of the non-payment of the note and of the protest, was put into the post office at Quebec addressed to the Defendant Stacey, who then resided at Matilda in Upper Canada. — The other indorser, Thomas Mears was notified on the same day, and having paid one half of the note to the plaintiff the present action was brought to recover from the Defendant Stacey the other half still unpaid. —

It was contended by the Defendant's counsel that due and sufficient notice had not been given to the Defendant of the dishonor of the note, that the letter should, as it might, have been put into the post Office at an earlier period — But the Court was of opinion that the plaintiff had complied with the Statute, and that he was not bound to send an earlier notice to a party at a distance than to one residing on the spot, and judgment was therefore given for the plaintiff

October Term 1826.

Friday 6th October.

Dominus Rex
v
Gale & others
Justices &c.

In this case certain opposants to a Proces verbal made by the Grand Voyer of the district for the establishment of a public highway, and which had been homologated in the Court of Quarter Sessions, sued out a Writ of Error from the Judgment of that Court under which the proceedings had been brought before this Court. Mr Lacroix on behalf of the persons who maintained the Judgment of the Sessions, obtained a rule on the said opposants to shew Cause why the said Writ of Error should not be quashed, the same having been irregularly and improvidently sued out.

Sewell for the Opposants argued. That although a writ of Certiorari had been heretofore sued out on the Judgment of homologation of the said Proces verbal, yet the writ of Error may be afterwards sued out. - cites. Bac. Ab. tit. Error. — That the Court of Kings Bench has a superintending Jurisdiction over all Inferior Courts, and a writ of Error lies to them in all cases. That the writ of Error cannot be

quashed

quashed on motion, such course would be irregular, the party must plead to it. — 2. Bac. Abr. 216.—

Sol. Genl. in answer observed, that after the merits of a Case have been heard on a Certiorari they cannot be called in question again on a writ of Error. — But in this Case no writ of Error ought to have been granted, as the law does not admit of it.—

The Court said that there was some distinction to be taken as to the cases where a Certiorari, and where a Writ of Error can be obtained — It is admitted as a general principle, that an erroneous Judgment given in a Court of Record can only be reversed by writ of Error — but this rule is not universal, for although the Court of Quarter Sessions be a Court of Record, yet that Court is authorised to proceed in Cases and to give Judgments upon which no Writ of Error will lie. The general principle applies only to the Cases wherein the Court proceeds according to the Course of the Common law, that is, the Common law of England — and it is held that wherever a new Jurisdiction is erected by act of Parliament and the Court or Judge that exercises this jurisdiction, acts as a Court or Judge of Record according to the course of the common law, a writ of Error lies on their Judgment, but where they act in a Summary method, or in a new course different from the Common law, there a writ of Error lies not, but a Writ of Certiorari. — That

Bac. Ab. tit. Error (A) 1. p. 450.

Id. p. 456.

in

in the matter of Proces verbals of the Grand voyer, a special and summary Jurisdiction is given to the Court of Quarter Sessions by St. 36. Geo. ch. 9. sec. 20 — and they proceed by a course wholly different from that of the Common law they enquire into such facts as they may see fit by the examination of Witnesses, and they may confirm or reject the whole or a part of any Proces verbal brought before them — Now according to the course of proceeding on the writ of error, errors of law or errors of fact may be assigned; if matters of fact be assigned, they are according to the common to be tried by a Jury, those of law, that is, those appearing on the face of the record, by the Judge before whom the record is removed — such a course of proceeding would be wholly inconsistent with that directed by law for hearing and determining the Proces verbals of the Grand voyer, and would be assuming a mode of decision not warranted — as to the quashing of the writ of Error, numerous instances can be shewn where this has been done, and we think it the regular course here —

2 Bac: Ab. 487.

Rule for quashing the writ of Error, absolute.

Ware. vs Adams & King & al. Oppts. —

On opposition afin d'annuller —

The opposants by their moyens d'opposition stated, that by deed of sale made and executed on the thirtieth day of November One thousand eight hundred and twenty four, the Defendant sold transferred and conveyed to them the

the said Opposants the lot of land No 1, seized and taken in execution by the Plaintiffs in this Cause, for the considerations mentioned in the said deed of Sale, on account whereof they the said opposants have paid to the said Defendant a sum of £38.16.6, and then were put in possession of the said lot of land, in which they the said opposants have always since remained, and were still in the possession thereof at the time of the seizure aforesaid—

That long before the suing out of the writ of execution in this Cause, the amount of the debt interest and costs in the said execution mentioned was fully paid and satisfied to the said Pltffs and that the said writ of execution was sued out and the said lot of land seized without the knowledge, order or consent of the said Plaintiffs, but at the instance of the said Defend in order to deprive the said Opposants of their right in the said lot of land.—

The Plaintiffs in answer to the said Oppos' state, that the Defendant never sold the said lot of land to the said Opposants— and that if such sale was ever made, it was made in fraud of the Plaintiffs and other of the Creditors of the said Defendant, as on the said 30th day of Nov' 1824 and long before the said Defendant being a trader was in a state of insolvency and unable to pay his just debts to the said Plaintiffs and

to

to his other Creditors, as they the said Opposants well knew, and therfore the said Defendant could not legally sell and convey to the said Opposants the said lot of land in fraud of his Cr. Creditors — That the said Opposants never held and occupied the said lot of land as the proprietors thereof under any legal conveyance made to them such possession being held by them on the name and as the lessees of the said Defend.r — The said Plaintiffs denying the other matters and allegations in the said Opposition contained.

On this plea issue was taken by the Opposants and the parties proceeded to make proof of the respective facts by them alledged —

It appeared in evidence that on the 5th. day of april 1825, the Plaintiffs received from Messrs. Peter and William Freeland the sum of thirty six pounds, being the balance which remained due by the said Defend.r to them the Plaintiffs on the Judgment rendered in this Cause, in consequence whereof the plaintiffs transferred and conveyed to the said Peter and William Freeland the aforesaid Judgment & all the right and interest they the said Plaintiffs had therein, and all their rights, actions and priviledges they had thereby acquired, for the recovery of the aforesaid debt interest and costs in the said Judgment mentioned — On which

said

said fifth day of April 1825 the said deed of transfer was duly notified to the said Defendt—

The plaintiffs obtained their said Judgt against the Defendant in this Cause on the 19th day of October 1824— and the execution in this Case was dated and sent out on the 26th day of April 1825, without any knowledge or participation of the said plaintiffs, but by the said Peter and William Freland in consequence of the aforesaid transfer made to them by the said plaintiffs.— A paper was produced and given in evidence as the Contract of Sale made to the opposants by the Defendant, it was a sous seing privé, and in the following words—

"Mr Jobin will make a deed of Sale
" in favor of John and Wm Ring of the
" lot of land and house N° 4. or 5. I have —
" forgotten which, with the following —
" conditions, viz^t £60. to be paid within a
" year from the 1st May last— £140. to be
" paid by instalments to commence on the
" first day of May next of £2.10 ℔ month
" till the said £140— be intirely paid, with
" interest on the said £140 till paid from
" 1st day of May last.— A. Adams
Nov^r 30th 1824.—

J1

It was also proved that at the time of suing out of the said Writ of execution and for about two years past, the Oppos^t had been in the possession of the lot of land seized by the plaintiffs, but whether as the tenants of the Defendant, or as the owners and proprietors thereof was uncertain. —

Two questions were raised by the Oppos^t as to the legality of the seizure made by the Plaintiffs. 1st That as the Opposants were in the possession of the lot of land, ~~the lot of land~~, although under an imperfect title, at the time of suing out the said execution the Plaintiffs could not legally seize the same, the possession of the Opposants being a sufficient title to protect them against such seizure — and 2d That the plaintiffs having received satisfaction of their Judgment before the suing out of the said execution, the persons to whom the plaintiffs had transferred their said Judgment could not legally sue out the said execution, without having first obtained a Judgment in their own names on such transfer against the Defendant —

M. Buchanan for the plaintiffs — contended that the execution had been sued out regularly — That although the

Plaintiffs

Plaintiffs had received the amount of their debt, and had assigned their Judgment, yet the assignees were entitled under that assignment to the benefit of this proceeding and to use the names of the Plaintiffs for this purpose — this was the intent and object of the transfer, and is agreeable to law. cites. Denizt. Vo Cession et transport §. 2. No 11. "Lorsque le Cessionnaire
" a donné au debiteur la Connoissance
" authentique du transport, il peut faire
" contre celui-ci les mêmes poursuites que le
" Cedant, et par conséquent saisir si le titre
" est executoire. &c" — Lacombe vo Transport No 4. & 5. is to the same effect — "Le Cessionnaire
" peut agir par action utile en son nom, soit
" que l'action cedée soit personnelle ou reelle,
" ou au nom du Cedant" — see also Pothier Contrat de Vente No 550. who confirms this principle in the clearest manner, that the cessionnaire is in this case compared to the Mandataire who acts for and in the name of his principal, but in the Case of the Cession he is called procurator in rem suam, because he acts for his own benefit and at his own risk — That the Defendant was the only person who could complain of any irregularity in this respect, had such irregularity existed because in regard of the transport in question,

his

his rights alone were concerned - but the Defendant could not object to this proceeding nor could he, after the signification made to heirs of the said transport, as established by the authority from Denizart - That neither the title nor the possession set up by the Opposants here can be of any avail - As to the title, it is at most but a promise to sell without having ever been carried into effect in any way, and if it can be considered to be of any validity, which the plaintiffs contend it cannot, it appears to have been made on the 30. Nov. 1824. upwards of a month after the plaintiffs had obtained their Judgment against the Defts and after the Sheriff had made a return of nulla bona - on an execution sued out on that Judgment against the goods and chattels of the Defendant - Such Sale therefore must be considered as in fraud of the plaintiffs, and by collusion with the Opposants, who never gave any consideration on their pretended purchase - And as to the possession of the Opposants, it cannot be considered as a possession animo domini, as it was uncertain whether they possessed as the lessees of the Defendant or in their own name,

The Court held, that the execution had been regularly sued out here in the name of the Plffs although for the benefit of the Freedmen under

the

transport made to them by the Plaintiffs, under the authorities cited and according to the decisions of the Court.- As to the regularity of the seizure of the lot of land in question in the possession of the Opposants, the question did not rest so much upon the right of possession claimed by them as upon their right as proprietors under the sale that had been made to them by the Defendant, for the possession they allege is only with a view to support the Contract of sale by shewing that it had been so far perfected by tradition of the property, the whole therefore depends upon the validity of the Opposants title as proprietors - but this is imperfect in every respect - the piece of writing produced by the opposants is not a sale but something preparatory to a sale, and until something further was done in execution of the proposal made, nothing could be considered as concluded, nor was there any security on either side without something further - the Oppos^{ts} should have shewn in what respect this proposal had been carried into execution by adducing further evidence to that effect, their possession alone without acceding to the proposal of sale is of a very doubtful nature, as they could have abandoned that possession at any time without any responsibility - but the lot seized, and the house & lot N^{o} 4 or 5. mentioned in the proposal of sale - do not appear to be the same, nor can it be said whether it was the lot N^{o} 4 or N^{o} 5. the Defend^{t} meant to sell - This is too vague - Opp^{n}. dismissed.

Wednesday

Wednesday 11th October

Ex parte
On Petition of
Jos. Doré & al

Mr Vigé presented a petition to the Court on behalf of Joseph Doré & others of the parish of La prairie de la Magdeleine complaining of a Proces Verbal drawn up by the Inspectors of fences and ditches in the said for opening and keeping in repair a certain ditch and praying relief by an appeal to this Court.—

The Court directed that a Writ of Certiorari should issue addressed to the Inspectors who had drawn up the Proces Verbal, in order to bring the same before the Court for the further proceedings thereon.— Mr Vigé stated to the Court, that he was apprehensive that the remedy of the Petitioners would not be so effectual, as if a Writ of appeal had been granted, as under it the parties would be entitled to a more ample and beneficial remedy and that the Statute mentioned that an appeal would lie to this Court from the decision of the Inspectors — The Court however held, that as nothing was said in the Statute as to the kind of writ which this Court should issue, to bring the proceedings of the Inspectors before them, that the Writ of Certiorari was the legal and proper writ for this purpose, and when the proceedings were once before the Court, it could then extend to the parties the full benefit of the Statute. ~~to the parties~~ —

Thursday 19th October 1826.

Simon Fraser
vs
Stephenson
and
Brown - Oppts

On opposition afin de conserver.-

The opposant by his moyens stated that on the 1st Oct. 1821, the opposant and one James Whitford, the Defendts husband, then a merchant at St Rose, settled accounts together in regard of divers sums of money which been paid and advanced by the said opposant to the said Whitford, and for sundry goods wares and merchandises by the said Oppt to the said Whitford before that time sold and delivered, when the said Whitford was found in arrear and indebted to the said opposant in a sum of £3050. 2. 8, which sum he the said Whitford promised and undertook to pay to the said Oppt when thereunto required.- That afterwards, to wit on the 8th Novr 1821, by act passed before Doucet public Notary, and another his colleague, it was stated as follows by and between the said parties, that the said opposant had advanced as well in money as in goods to the said Whitford and to the former partnership of Ellices & Whitford to the amount of the said sum of £3050. 2. 8, in discharge and part payment whereof the said opposant acknowledged to have received a letter of the following tenor:- " Montreal Novr 7. 1821
" Messrs Campbell and Sheppard + Dear Sirs, Your
" favor of the 25 October reached me in town a
" few days ago, and having now occasion for the
" amount in your hands, I beg leave to request
" you to pay Mr James Whitford the amount
" of the two Notes received by you as advised
" vizt

" viz^t. Pemberton's for five hundred pounds Curr^y
" Frost and Porters for two hundred and ninety
" four pounds Currency, and also the balance of
" one hundred and seventeen pounds Currency,
" you permitted me to draw for last August, making
" together the sum of nine hundred and eleven pounds
" Currency; should the notes you made on my
" account since those last rendered enable you to
" make up the last-mentioned sum of exactly one
" thousand pounds Currency, you will also be
" pleased to pay the same to him, so that Mr
" James Whitford or his order may receive the
" exact amount of One thousand pounds Currency
" in the whole — should the sales not enable you
" to do so, you will only pay the Notes and balance:
" I have heard lately, that deals have sold at
" £7. 10- and £8. — I am very truly, Dear Sirs
" Yours &c Jacob Oldham —" "Which sum
" mentioned in the said letter when paid will
" go in discharge and liquidation of so much
" of the debt due by the said James Whitford to
" the said John Brown." — It was in and by
the said act agreed that interest should run
and be allowed on the debit and credit of the
respective accounts, and as to the balance
remaining due by the said Whitford to the
said Opposant, after the said Opposant should
have received the amount of the sum mentioned
in the above letter, the said Whitford in and by
the said act obliged himself, his heirs and assigns
to pay the same to the said John Brown in

three

three equal payments, in twelve, eighteen and twenty four months from the date of the said act, with interest — It was further agreed by the said act, that in case any difficulty arose touching any charge made by the said Opposant that the same should be left to the decision of arbitrators to be chosen by the parties — That the said Opposant afterwards received the said sum of one thousand pounds and also divers other sums on account of the said Whitford. That afterwards a difficulty having arisen between the said Whitford and the said Opposant, and the said Whitford being unwilling to acknowledge the balance due to the said Opposant upon the account Current above mentioned, the said Opposant on or about the 24 July 1823, in order to ascertain the said balance instituted an action against the said Whitford in this Court, returnable on the first day of October 1823, in which action the difficulties aforesaid were submitted to the award and decision of Thomas Andw Turner and Norman Bethune, arbitrators named by the parties, who awarded that the balance due by the said Whitford to the said Opposant, amounted to the sum of £1164. 12. - Currency — That the said Whitford died before the award made by the said Arbitrators and in consequence the said Johanna Stevenson widow of the said Whitford was put in Suit and made a Defendant in the cause by reprise d'instance, as Tutrix to the Minor

children

children of her marriage with the said Whitford and afterwards on the 19th Oct. 1825, by Judge of this Court, the award of the said arbitrators was confirmed, and the said Joh. Stevenson in her capacity aforesaid was adjudged & condemned to pay to the said opposant the said sum of £1164.12, with interest thereon to be reckoned from the 24th day of July 1823, until paid with Costs of Suit taxed at the sum of £76.4.5 making together a sum of £1240.16.5 Currency —

That by means of the premises the said opposant has a right of mortgage upon all the real Estate of the said Whitford which he had at the time of his decease from the date of the aforesaid act, that is, from the 7th day of November 1821 — for the payment & satisfaction of the aforesaid sum of £1240.16.5 and interest as aforesaid — and concluding that in the Judgment of Distribution to be made of the monies arising from the sale of the Lands and tenements of the said Whitford, he the said opposant may be ranked and collocated — according to the date of the said act, that is, from the 7th day of November 1821, for the aforesaid sum of £1240.16.5 with interest & Costs —

Plea, to the above opposition by the pltff
1st Defenses au fond en droit — That by reason of any thing alledged in and by the said opposition he the said opposant is not entitled to have and maintain the same, nor to obtain the conclusions thereof

thereof, because the aforesaid act or agreement bearing date the 7th November 1821 made by and between the said Opposant and the said James Whiteford, is null, void and of none effect in law, and did not create in favor of the said Opposant any right of mortgage upon the property of the said late Whiteford.
2d Defense au fond en fait — denying all the matters of fait alledged in the said opposition —

The Replication to the said plea was general, and joined issue on the matters of law and fait therein mentioned. —

The parties being now heard on the law issue, Mr Morrogh for the plaintiff argued, That the act of the 7th Nov. 1821 upon which the opposant founds his claim of mortgage is null and void in law and could create no mortgage so as to affect the rights of third persons — this act is not an obligation for any specific sum of money, but only a compromis by which the parties agree to submit all differences that may arise — between them to the award of arbitrators, and even as a Compromis it can be of no avail as it wants the essentials requisite to make it valid, as it is not stated what the difficulty to be determined is, by whom it shall be determined, nor when. —

cites

cites. Poth: Pandects. liv. 4. tit. 8. vol. 3. p. 428. sec. 2°. – and p. 437. – Domat. liv. 1. tit. 14. sec. 1. 1 Pigeau. 19. Repse vo Compromis. p. 314. Lacombe vo Compromis. – Journal des Audrs arrêt. 10 Decr 1627. – That the compromis here mentioned has never been acted upon, but has been totally abandoned as an act of no validity and the opposant instituted his action in this Court for the amount of his demand against the late Mr Whitford without any reference or allusion to the aforesaid act of the 7th Nov 1821. or its having been used as the ground work of his demand. –

Beaubien for the Opposant, the 7 Novr 1821 is not to be considered as a compromis between the parties, but as an acknowledgment of a debt and providing the means for the payment of it, and also in case of difficulty, stipulating that such difficulty should be settled by arbitration – Now although the whole debt was not then ascertained still the mortgage is valid, as it may be equally binding for a part as for the whole – Basnage Hyp. ch. 4. p. 30 – and it is only the balance still due under that act, for which the Judgment was obtained, and for which the present opposition is made, there having been no other transactions between the parties since the said 7 Novr 1821, except the payt by the late Whiteford of some small sums of money on account of what he owed – In order that the

mortgage

mortgage may attach, it is not necessary that the quantity or number of the things due should be certain or ascertained — Domat. Liv. 3. tit. 3. sec. 1. Somᵉ 2. Lacombe. vᵒ Hypotheque §. 2 Nº 1. 2 Bourj. 535. Poth. Obl. Nº 131. —

The Court were of opinion that the act of 7 Novᵉ 1821, was certainly an acknowledgment of a debt, and if the sum of money demanded by the Opposant was founded on that act, that he was entitled to his mortgage from the date of it — but as the demand of the opposant appeared to be founded on a Judgment of this Court, which may have been obtained on transactions between the parties foreign to the said act — a day was given to the parties to make proof touching the same. —

Nº 1697.

Lalanne. vs Lewis, & al

Action agᵗ the Defendants for having tortiously sued out a writ of attachment against the goods and effects of the plaintiff, and for having caused the same to be attached and seized without just Cause —

Plea — of excep: per: that the Plff cannot have or maintain his action in manner & form by him demanded, and that the matters and things

things contained in the declaration of the said plaintiff are not sufficient in law in this respect. 1st Because it is not alledged or set forth in and by the said declaration, that the aforesaid attachment hath been by any Judgment of this Court set aside or declared illegal.—
2d. Because it is not alledged that any Judgt hath been given in the Cause in which the said attachment was sued out.—
3d. That the declaration doth not shew a legal cause of action.—

The answer to the said plea was general and took issue thereon—

On hearing the parties on this plea, Mr Boston for the Defendant contended, that the Plaintiff ought to have shewn by his declaration that the attachment had been adjudged upon and declard illegal by the Court before he could maintain the present action—That the action in which the said attachment was sued out was in fact still pending, so that there was a possibility that contradictory Judgments might be given upon the same process, that in this case it might be declared irregular and insufficient and in the other case that it was legal and valid, which cannot be allowed.—

Mr

M^r Rolland for the plaintiff – The Court is here called upon to give the same decision as in the Case of Donegany v. Hunter namely, that whatever may be the result of the Cause in which the writ of attachment was sued out by the Defendant against the Plaintiff, the present action lies, because when the proceedings are regular and the affidavit of the Defendant is sufficient and in the terms required by the law, the Court must confirm the attachment – cite case of Sexton v. Cornell. 4: Aps. 1823

M^r Boston in reply – The case of Donegany vs Hunter was on a Capias, in which there is a great difference from the Case of an attachment, as in the latter the party is called upon to shew Cause why the attachmt should not be declared good and valid and if he does not appear, or does not contest its validity the presumption is that the proceedings is regular – and here the Plaintiff did not contest the validity of the attachment which the Defendant had sued out. –

By the Court –

This is not the first instance in which this point has come before us, and we must here hold as we have already done

that

that the exception pleaded by the Defendant is not sufficient, and does not bar the Pltffs action — The Defendant here grounds his plea according to the course practised in — England, where a plaintiff must shew, not only that the proceeding was without any just or probable cause, but that it has come to a termination, and been decided in his favor, because the Judgment of the Court then upon the merits of the Case determins the regularity or irregularity of the mesne process — But according to the law of this Country, the — suing out of a Capias or of an attachment is an extraordinary proceeding, and granted upon circumstances independant of the debt or demand of a plaintiff — the Plaintiff may have a just debt due to him or a just demand to make against a Defendant, still he may be wrong in suing out either a Capias or an attachment against his Debtor on that — account — The law says, that a plaintiff shall in certain cases be entitled to obtain a Capias or an attachment against his debtor upon his making affidavit to certain facts, now it has not been the course of the Court to admit a Defendant, to contest the facts of the affidavit when regularly made in the terms of the law, or to raise an issue upon them, in

order

order to determine the truth of those facts and the consequent sufficiency or insufficiency of the affidavit, because this does not affect the merits of the Case, upon which a plaintiff may be entitled to his Judgment against the Defendant even where the affidavit appears irregular and insufficient - The only means therefore by which a Defendant can canvass the validity of the affidavit so made is by an action such as the Plaintiff has instituted in the present case, where only the question of right in the party to sue out such extraordinary process can come in question and be legally determined - Defendants exception dismissed

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No.
Lewis.
v.
Bunker.

The Defendant having been arrested and now in prison under a writ of Capias ad respondendum, Mr Buchanan on her behalf obtained a rule on the plaintiff to shew Cause why the Defendant should not be discharged and the said writ of Capias quashed, inasmuchas the Defendant was a married woman, the wife of one - McLeish and separated as to property from him - The parties having been heard thereon, the Court took the matter under

consideration

consideration, and now gave their Judgment thereon. —

By the Court. — Drawn up by Judge Pyke —

Upon looking at the grounds of this motion to discharge the Defendant from detention in prison, where she now remains for want of bail at the suit of the plaintiff, we do not find that the main ground contended for in argument is so distinctly and specifically set forth as could have been wished, as the grounds therein stated contain only facts admitted upon the face of the declaration, namely that the defendant is the wife of Thos Mc Leish and sous puissance de mari, but without negativing the fact of her being separated as to property from her husband, and it might therefore be implied, that the mere circumstance of her being a married woman and sous puissance de mari, was alone relied on, whereas, if we understand the argument correctly, it rested upon the general exception contained in the 8e art. of the 34e tit: of the Ordre of 1667. which excempts women, whether married or unmarried, or separated as to property from their husbands, from the Contrainte par Corps except in certain Cases, in which this cannot be considered as one, and it is therefor upon this general ground, we shall consider ourselves called upon to decide whether this exemption

is

is also to prevail in the right given by the Ordinance of 1785 to a creditor to arrest his absconding debtor, and thereupon to grant or reject the present motion —

The Provincial Ordinance of 1785, under which as an absconding debtor the Defend has been arrested and imprisoned for want of bail, has given a right to a creditor which may sometimes be exercised in cases where it may bear hard upon individual debtors; this though matter of regret cannot affect the question of right, which if clearly given by the Ordinance we are bound to grant & support, it depends not upon the Court to change or restrict that right where the legislature has not thought proper to delegate that authority. Much has been written and said both in antient and in modern times as to the — extraordinary power given to a Creditor to arrest and confine the body of his debtor, but this it is not our duty here to examine, but we would observe, that it is not from particular cases of hardship that a correct judgment can be formed of the expediency or correctness of a general remedy given by law however severe it may appear on a partial view — and in regard of the Ordinance of 1785, its general operation must be considered in the protection and security it affords to just creditors agt their absconding and fraudulent debtors

As during the argument held on this

motion

motion recourse has been had to rules of law which prevail in the construction of the acts of Parliament, and thereon it has been contended, that although the remedy given by the 4th sec. of the Ordce of 1785 is general, yet that it must by equity be construed, not to extend to those persons who were by the previous Ordce of 1667. exempted from the Contrainte par corps, we must here observe in the outset, that in the interpretation of Statutes, there are many rules laid down in the books, which if partially viewed or selected, might lead to a misapplication thereof and produce an effect which the framers of those rules never contemplated, and which in some instances might defeat the very intention of the legislature — now in regard of the Ordonce under which the body of the Defendant has been arrested for the purpose of holding her to bail to answer to the action, it is necessary to notice, that no such remedy or proceeding, as Capias ad respondendum to hold a Defendant to bail, existed under the antient law of Canada, nor was allowed in France, except by special priviledge to the inhabitants of certain Towns which were on that account distinguished by the name of, Villes d'arrets, to arrest their foreign debtors who might pass through those places, and also in cases of fraudulent bankrupts, The Ordinance of 1667 gives no such, but regards

and

and restricts the previous by allowed imprisonment on execution, and allows the Contrainte par Corps, our Capias ad satisfaciendum, only in satisfaction of Judgments in particular Cases — it is however expressly declared by the 5ᵉ art. of the 34ᵉ tit. that nothing in the ordonance was to be considered as derogating from the priviledges of the villes d'arrets, in those cases of contrainte however the Ordᵒᵉ of 1667. declared women exempt, except where they were marchandes publiques, or guilty of that species of fraud called, Stellionat, as far therefore as the provisions of the Ordᵒᵉ of 1667 go, and any contrainte claimed under it, it will be proper to look to that Ordᵒᵉ and award the exemptions contained in it, but it is not right to extend those exemptions which are found in one ordᵒᵉ to the general enactments of another, nor can it be correctly said that the Ordᵒᵉ of 1785 has in this particular instance, repealed, or abrogated in any manner the ordᵒᵉ of 1667.— It would therefore appear to the Court that the remedy given by the 4ᵉ Sec. of the Ordᵒᵉ of 1785. to arrest a flying debtor, is a new remedy and a distinct enactment, unconnected with the Ordᵒᵉ of 1667, and that the provisions or exemptions of the latter cannot be transferred and applied to the former.— In order however to shew, that this opinion is not in contradiction to the known rules of law which govern in the interpretation of Statutes, it will be necessary to refer to the rules

Repᵉ Vᵒ Contrainte. p. 600. 2ᵉ Col — also. Vᵒ Ville d'Arrets. p. 529. 1ᵉ Col. — Bornᵉ art. 5. tit. 34.

N°. 34 & 137. in Viner's abr: title. "Statutes". (E.6)
upon the consideration of the parts of a Statute, the
mischief before, and what things were intended
to be remedied by the Statute, and the true way to
interpret all Statutes in general. — Now what is
the new remedy given by the ord^ce of 1785 — see
the 4^th Sec. — in it we perceive the words are general
and no exceptions are made, and what was the
evil thereby intended to be remedied, but that of
preventing debtors from flying from their Creditors
and thereby depriving those Creditors of a legal
recourse against them, and from obtaining that
Judgment and execution against their property
which the law grants in all cases, and which
would extend not only to property then possessed
by the debtor, but to that which might be afterwards
acquired by his industry or otherwise, all of which
might be evaded by the removal of the person of
the Debtor out of the reach of his Creditor — it was
viewed as a species of fraud in a debtor to quit
the Country without payment of his just debts,
and as such the extraordinary remedy was given
to the Creditors — now in this respect, the evil was
no doubt as great in regard of a female as of a
male debtor, as the law implies fraud in the debtor
by the very act of removing out of the reach of
the Creditor, and upon this principle no doubt
the legislature has made no exceptions, but has
left debtors of both sexes upon the same footing —
and this will appear to have been a principle
admitted in the French law in regard to Bankrupts
as stated by Bornier, in his notes on the 1^st article

of

of the 11th Tit. of the Code Marcds. — It has been urged that equity must be applied in the — interpretation of Statutes, but this will be found to be a rule not to be exercised in all Cases, and may sometimes operate very differently from what the party urging it might wish, so as to be taken rather a[illegible] turn than for him — All Statutes made to redress
Vener. Ca. Cat. N° 47. fraud and to give a speedier remedy for right, being in advancement of Justice and beneficial to the public, shall for that reason be extended by equity — Equity can never operate to destroy a right, it — would indeed be a contradiction in terms, for it will be found, that even in cases out of the letter of a Statute (a stronger case than the present) yet being within the same mischief or cause of the making of the same, shall be within the same
Id. — N°. 32 remedy provided by the Statute — here however the words are general, embracing every case, and the question is, whether equity is to be extended to it, to exempt certain persons from the operation of it — but what is the authority in Vener. tit. Statutes (E6) N° 34, on the construction of Statutes — it is too general a ground to put cases upon Statutes, where things shall be taken by equity; but every Statute stands upon its particular reason, upon consideration of the parts of the Staute, the mischief before, and what things were intended to be — remedied by the Statute — besides the intention of the legislature must also be considered — and would it be consistent with Common Sense, upon which

which all law and equity are founded, to say, that a female debtor, with ample means in her pocket should walk out of the Province and defy her Creditors? It may be said that this is not the case of the unfortunate debtor in the present case — but can this Court take upon itself to make a distinction, so as to exempt one and hold another? we have no such power, but must apply the general enactment of the Ordinance to all alike — the evil and the remedy are plain by the Ordce whereas it is only in Cases where the meaning of an act of Parliament is dubious that Judges are authorised to consider consequences, and in the work already cited, No 93. it is said, that care must be taken, that such an interpretation be not put upon a Statute as will quite elude the force of it — but where it is plain the consequences are not to be regarded, for that would be to assume a legislative authority — The two Ordinances of 1667 and 1785 will also be found to be unconnected, distinct and not to clash with each other, both therefore may exist and stand in force, they do not even seem to be contrary to each other, yet the spirit of the one may be found in the other, for where there is fraud the exemptions of the Ordce of 1667, are declared in that Case not to extend to women, and indeed it would be singular that the consideration of the Sex, should be extended so far as to say, that what was fraud in a man was not so in a woman, or at least that the latter should be allowed to escape with impunity — It

perhaps

perhaps would have been different, if the Ord^e of 1785, had merely added a new case to those mentioned in the Ord^e of 1667, wherein the contrainte might thereafter be allowed, in such case it might be urged, if nothing appeared to the Contrary, that the exemptions of the Ord^e of 1667 should in equity be extended to the new as in the other cases, and perhaps under the 38^e Sec. of the Ord^e of 1785, which gives a positive right to take the body in execution in certain cases after the discussion of the personal and real property of the Defendant, in such cases, the question is not fraud, for the most innocent debtor, may under this particular enactment be imprisoned until he satisfies the debt, — whether he has means or not, and this at the mercy of his Creditor, subject however to the pay^t in the latter case of an aliment any provision to such debtor — But in the present case a new and general remedy wholly unnoticed in the Ord^e of 1667, is given to Creditors against their absconding debtors, a distinct right founded upon the act of the debtor himself who is — about to escape injustly from his Creditor — it is not for us to enquire why the Prov^l Legislature should have granted this general & extraordinary right and remedy to Creditors, which the Law of France withheld except in cases of fraudulent bankruptcy, or as matter of privilege to the Inhabitants of certain towns — we should presume

presume that in France, the evil did not exist to an extent to require a general remedy, but being felt here, and a general remedy has been provided which we cannot diminish or destroy, for we sit here to preserve and grant, and not to withhold the legal rights of individuals, and therefore if the power given to Creditors by the Ordre of 1785, has been found too extensive, it is for the Legislature to restrict it, the hardship of any particular case we as Judges cannot listen to, for we sit to administer the laws without consideration to consequences — We have endeavoured to shew the distinction between the two remedies that of the Capias ad resp: under the Ordre of 1785 and the Contrainte under the Ordre of 1667, the one calculated to hold the flying debtor to bail for his appearance to answer the action, and the other an absolute imprisonment in execution until satisfaction of the debt — it has however been contended, that the one was but the forerunner of the other, and that the Capias ad resp. under the Ordre was after Judgment to be followed up by a Ca. ad Sat. the true contrainte as understood in the French law, but this was merely following up the principle of fraud in the debtor on his attempt to abscond from and elude his just creditor, and continuing that security which the law has justly awarded to the latter as it would have been absurd to say that a debtor under such circumstances is to be more favoured after Judgment rendered than before — The remedy is general and given in all cases of debt whether

Commercial

commercial or otherwise, or of the description of debt for which upon judgment execution might be obtained against the body, and the intention of the legislature evidently was, that no man should depart the Province who is indebted to any one Creditor in a sum exceeding ten pounds Sterling and if he attempted to do so he should be liable to be arrested by his Creditor and compelled to give security not to depart, and failing to do so, to go to prison — Security is therefore the principal thing required, and how could this be enforced without imprisonment, the thing would be impossible — it may be a hardship in those cases where the debtor cannot find bail, but if he suffers in that respect, he has himself only to blame — under this view of the Ordre it had been the practice to award to the creditor after Judgment a Ca. ad satisfm but the legislature considering that this was carrying the remedy beyond the evil provided against, and that the granting of a Ca. Sa, although within the letter was contrary to the spirit of the Ordre, and unwilling that the remedy given should eventually terminate in a real contrainte, has passed an act by which the debtor giving — security not to quit the Province is exempt from imprisonment whether before or after Judgment, if therefore he fails to give that security he is — imprisoned until he does so, it is a contrainte to compel such security, but not the contrainte

par

par Corps for the satisfaction of the debt — Here then it is obvious, the legislature has made the distinction which has now been endeavoured to be explained and must be evident, that the Ordce of 1667, and it provisions and exemptions can have no application to the particular remedy in question which must stand upon its own law and the intention of the legislature as therein expressed. — It has also been observed in argument that the remedy has this effect to convert the Province into one great prison, and therefore it is concluded that the debtor confined in so extensive a prison was entitled to the same consideration and relief as if he were confined within the four walls of a gaol — upon this principle every man in the Province, by a flight of imagination may be considered a prisoner — for the one enjoys as much liberty and freedom as the other, except in this particular that the debtor is not at liberty to quit the Country but must remain in it, until all his just debts be paid — It has also been contended, that by the words of the Ordce of 1785 the remedy could not be extended against women as the Ordce uses the pronoun, he, and has omitted that of, she, but this omission which we find scrupulously avoided in many Statutes more remarkable for their length than for their perspicuity, is not material — females can

contract

contract debts as well as men, and therefore they must be included within the remedy which the Ordinance has provided against absconding debtors and considered within the intent and meaning thereof, besides, Ferriere says, "sous le mot d'hommes "les femmes sont compriss" — a rule in the interpretation of Statutes which also obtained in the Roman law, unless in those cases where by a just interpretation women might be considered as not comprehended, indeed if such an interpretation could be given to the Statute no female Creditor could be entitled to the remedy therein given, inasmuch as the words of the Statute are "satisfied by the oath of the plaintiff or his bookkeeper"

Now in regard to the present motion, all we have further to consider is whether from the peculiar situation of the Defendant as a married woman, sous puissance de mari, she could become the personal debtor of the Plaintiff, and in order to establish this, she is sued alone as being legally separated from her husband, a fact which is not negatived by the present motion — as a femme separée therefore she could no doubt contract and render herself personally liable to be sued independant of her husband having in such case the free administration of her moveable estate, and restricted only as to a Sale and hypothecation of her real property — here we must at present presume she has individually contracted a debt for board and lodging, which by law, she as being separated

could

could contract without the participation, consent or authority of her husband, and if so, she comes within the letter of the Ordinance of being personally indebted in a sum of above ten pounds Sterling and being about to abscond and leave the Province we are of opinion that the plaintiff was entitled to process to hold her to bail — the Rule therefore obtained by the Defendant must be discharged

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Donegany v Maitland & al'. —

In this Case the Plaintiff sued out a Capias ad respondendum against — William Maitland one of the Defendants on his affidavit that the said Defendant was immediately about to leave the Province — The Defendant gave the security required by the — Statute, and now obtained a rule on the Pltff to shew Cause, why the writ of Capias so sued out should not be quashed, and the security so entered into annulled and set aside, on two — grounds, 1st on the insufficiency of the plaintiffs affidavit, and 2d because at the time of the arrest the Defendant was upwards of seventy years of age —

The Sollicitor General, for the Defendant contended on the first point that the affidavit of the plaintiff did not comply with the — requirements of the Ordinance, as it did not

allege

alledge that the Defendant was indebted to the plaintiff in a sum of exceeding ten pounds Sterling but stated merely that the Defendant was indebted to the Plaintiff in a sum of three thousand pounds, Currency, and leaves the inference to be drawn, but does not state the fact as required by the words of the Ordinance which ought in all Cases of this kind to be rigorously observed. — On the 2d point, he contended, That the Defendt being a septuagenaire, is not liable to the contrainte for the payment of his debts under the ordinance of 1667 — That the ordinance of 1785 must be interpreted according to the antient laws of the Country, which opinion was held by this Court in the Case of Obrien v Thomas. april 1823. where a Defendant confined under a Ca: Sa. in Gaol, was liberated by this Court, on the principle that he had become of a deranged mind and was in great bodily disease — That according to the rules adopted for the interpretation of Statutes, where the old Statute applies remedies in particular cases, and the new statute gives a general relief, the remedies so given by the old Statute are not thereby abrogated — cites. Vener's Abr. vo Statute' p. 513. Nº 31. & 132 on note — also Nº 147. — Repe vo contrainte p 603. 4 — Duplessis. 640 — on notes — Poth. Proc. Civ. p 287. Sallé on Ordce 1667. p. 544 — 2 Bourg. 709. —

Mr

M^r Rolland for the plaintiff shewed cause, and stated, that the first ground stated was so frivolous as to require no answer — As to the 2^d. ground — he argued, that the Ord^ce of 1785, had no connection with the Ord^ce of 1667, it being made for particular cases not contemplated nor provided for by the Ord^ce of 1667, and could therefor subsist independantly of it, or be liable to any interpretation of that old law — That the Contrainte here is in the nature of an assignation, in the particular case of a debtor flying from his creditor, the principle of the ord^ce of 1785 being, to give the Creditor a right to have his debtor personally present in Court to answer his demand, without being compelled to follow him to another Country. — That it is considered as a crime in the debtor to absond from his creditor, it is a species of concealment like the Stelionat for which the Defendant would be liable to a Contrainte under the Ord^ce of 1667 — But the Defendant may liberate himself from this — contrainte by giving the Security required by the provincial Stat. of 1825. —

Cites Poth. Pand. liv. 2. tit. 4 art. 1. to shew that the Ord^ce of 1785 introduces only a mode of assignation known in the Roman law, in which there was no priviledge allowed to old men of 70 years. — Ferr. on Code. 2 Vol. p: 200, the principle there extended only to women and mothers of families — If the Ord^ce of 1785 is to be restricted

in

in its operation by the Ordce of 1667, it may then be said that no contrainte can be used under the Ordce of 1785 but what is allowed by the Ordce of 1667- The Defendant is not at present under any contrainte, having given security not to leave the province, he may never be under any contrainte and therfore the prisent application is premature

(Sullivan of Counsel for the Plaintiff — The question here is to determine, what is meant by the Contrainte par Corps as expressed by the Ordce of 1667- It is said that in France the Creditor must have a titre paré to enforce the Contrainte against his Debtor, which could not be done but in satisfaction of a debt and in consequence of a Judgment, portant condamnation par Corps — There was no such Contrainte or imprisonment known in France as that on a Capias ad respondendum — it is a new provision unknown to the old laws — it is in the nature of an assignation to hold a flying debtor to answer to his Creditor — here the Defendant has an alternative, he may go to prison or he may give security — but under the Contrainte par Corps allowed by the Ordce of 1667 there was no alternative, the Debtor must remain prison till the debt was paid —

Sol. Genl in reply — If this be a mode d'assignation under the Ordce of 1785, it cannot be said that ~~it has abrogated~~ it has abrogated the old

old Ordᵉ of 1667, and ought to be restricted to those Cases only, where by that Ordᵉ the Contraint could be allowed — and the Debtor of seventy years is within the exemption — That altho' the Defendant here has given Security under the Provi. Stat. of 1825, he must still be considered as under constraint, as he cannot leave the Province — it is but extending the limits of the Prison to the boundaries of the Province, and imposing on the Defendant a degree of duress qᵗ he is entitled to have taken off —

The arguments in this Case being nearly the same as those offered in the preceding and the principle of decision being the same in both, the Court discharged the rule to shew Cause obtained by the Defendant —

M'Nider & al' vs Gardner.

The plaintiffs in this cause sue in their capacity of Assignees and Trustees of and to the Estate debts and effects of the firm of Alexander and Lawrence Glass, merchants and late Copartners in trade, and the action is brought to recover a sum of £25. 3. 7 for goods sold by the said firm of Alexander and Lawrence Glass to the Defendant Gardner, and which debt it is alledged in the declaration, was with others sold

assigned

assigned, transferred and made over to the plaintiffs by notarial deed for certain considerations and upon trust, and to certain intents & purposes set forth in the said deeds - by means whereof the

To this action the Defendant has pleaded 1st a Peremptory exception and assigned the following grounds -

1st That the plaintiffs were not duly & according to law, elected and chosen Trustees by all, or by such a majority of the Creditors as the law considers sufficient -

2d That the Creditors of the Glasses were not notified to attend a meeting for the purpose of such election, and to take possession of the debts and effects. -

3d That the deed of assignment was not made and executed by all or a sufficient majority of the Creditors or with their concurrence and upon due notification. -

4th That the deed of assignment & nomination of the plaintiffs as Trustees and assignees were not homologated by a Court of Justice as by law required. -

5th That the plaintiffs are not a corporation, or a corporate body duly and legally constituted, and cannot maintain an action in the capacity they have assumed

6th That the plaintiffs are not the Syndics or agents of the Creditors of the Glasses, nor of any corporation legally constituted and cannot maintain an action in the Capacity by them assumed.

&c

7th That the plaintiffs cannot in their assumed capacities maintain any suit whatever.—
8th That the deed of Assignment is devoid of the formalities required by law and is null and void and of no effect in law.—
2d Plea of Peremptory Exceptions —
That the plaintiffs cannot maintain this action because at the time of the institution thereof the said Alexander and Lawrence Glass were and still are the only true proprietors of the debts in question, and the plaintiffs are only their agents and Attorneys and consequently cannot in their own name maintain this action.—
3d Plea of Peremptory Exception —
That the pretended deed of Cession never was notified in due form of law to the Defendant.—
4th Plea — General Issue.—

To the pleas so pleaded the plaintiff has filed what is stiled a Replication, but which also contains in effect two general answers to the exceptions pleaded, and should have been so entitled — The first answer is in the nature of an English demurrer — the other negatives the facts stated in the Exceptions, and both might and ought to have been contained in one general answer, as our general answer to an exception puts in issue the law as well as the facts therein alledged and upon which

issue

issue thus formed the parties would be entitled to a preliminary hearing upon the sufficiency of the exception before being allowed to proceed to proof, and should it be declared insufficient the plaintiffs would be entitled without going to proof to a Judgment dismissing the exception.

Before adjudging however on the exceptions now before us, we would observe, that in the declaration, nothing is said of the bankruptcy or of the creditors of the Glasses, we there see nothing set forth but an assignment which is declared to be in trust for certain purposes but which are not therein disclosed — the exceptions on the other hand although they do not alledge such Bankruptcy, yet are all evidently founded on this presumed fact, it is however unnecessary that in this respect we should call upon the parties to change their pleadings as the question of the sufficiency of the exceptions is now submitted, and no amendment as to the objects mentioned would occasion any change in the decision we are now prepared to give, for conceding to the Defendant, that this is a bankrupt estate assigned to the plaintiffs for the benefit of all the creditors of such bankrupt Estate under the deed declared upon, and that this is an assignment which the Creditors who have not become parties thereto, are not bound by,

and

and may hereafter successfully attack, yet it cannot be permitted for a third person to urge the rights of such creditors or avail himself thereof to evade the payment of a just debt — The debt was originally due to the Glasses, and they for a legal purpose and consideration have sold and transferred the debt to the plaintiffs and thereby divested themselves thereof, and the debt is by virtue of the assignment or transport, now vested in the plaintiffs; this they had undoubtedly a right to do so long as the creditors leave them in a situation to exercise that right; It is true, that by the antient law of France, and perhaps upon the general law of this Country, Creditors might will ask to have an assignment, — surreptitiously and fraudulently made by a bankrupt to their injury, set aside, upon the — principle that the effects of a person in a — bankrupt or insolvent state belong equally to all the Creditors, yet as they only in such a case can be the persons injured, they alone can complain — What interest then has the Defendant to urge the present exceptions, if the debt be justly due and owing, it must be immaterial to him, who receives it, provided the person receiving can give him a legal and sufficient discharge and if the original Creditor could receive and give him an acquittance, so could the persons to whom he may have ceded and transferred

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the debt; the right of action to recover that debt must be vested somewhere, and if it does not exist in the plaintiffs, it is in person or persons whomsoever — the bankrupts cannot bring the action for they have transferred their rights to the plaintiffs, the Creditors who have not come forward, and who may never do so cannot sue, they have merely their recourse by attachment, and in prosecuting their own respective debts against the bankrupt, but it is for them to take that recourse, and to use diligence, indeed as far as those Creditors are concerned, they are in a much better situation than those who have expressly acquiesced in the assignment, the latter are bound while the former are free to act without restriction or limitation in the full prosecution of their rights in such manner as may conceive will best conduce to their interest with every advantage that may result from the assignment made for the general benefit of all the Creditors — At present however all that the Defendant can require is, that the plaintiffs exhibit a legal right to bring this action, and they alledge that the debt has for a legal consideration been transferred to them, this they will be bound to prove and if they cannot shew such a title as the one alledged, their action must fail — but the question whether all the formalities

of

of a cession de biens, or an abandon, has been complied with must rest with the Creditors themselves, the nullities, if any, are relatives, and can be urged by those only whom the law intended thereby to favour — all we should require in the present instance, as between the bankrupts the plaintiffs and the Defendants in this — cause, is whether the bankrupts have by a legal transport or assignment transferred their right of action against the Defendant to the Plaintiffs, for if so, we are of opinion, it must remain in force and have its effect as between the parties to this action so long as the act remains — uninpeached by the other Creditors — here we must presume that the assignment has been made, not only for the benefit of the plaintiffs but of all the other Creditors of the bankrupts, and nothing like fraud or a wish to give a prefrence to one Creditor to the prejudice of another can be, nor indeed has been urged — it is therfore a favorable case compared to that when the — bankrupt acting upon a different principle transfers a debt due to him, and assigns it to a favoured Creditor to the prejudice of the other Creditors, yet in this latter case, can it be said that such a transfer would not enable the assignee to ask for and recover the debt so transferred, and would not the payment —

made

made by the debtor be sufficient for his discharge, unless the injured Creditors came forward to prevent it, by an exercise of their rights in some legal shape, their want of diligence would be a bar to any claim agt the debtor to pay the money over again, it is their own laches, and their sole recourse would then be only against the assignee who had received money to which he was not justly and legally entitled — The Defendant therefore has no interest in the contest which he has raised, he has pleaded the droit d'autrui, a right which may not exist in the present case, and may be purely imaginary, and which would lead to endless confusion, delay, and injury, the never failing consequence of a departure from the rules of law, and this without benefit to the Defendant unless it be the illegitimate one of obtaining a delay and procrastinating the payment of a just debt — The authorities cited by the Defendant therefore will not apply in the present case as between the now parties; they may perhaps be more applicable when the Creditors think proper to complain, or to exercise their recourse against the Bankrupt, and then it will be time enough for this Court to decide how far the law of France in respect to bankrupt

Estates

Estates is in force in this Country, a law which derives its origin more from a principle of humanity towards the bankrupt than affording any additional constraint or remedy than those which the law had before amply provided for, the protection of the rights of Creditors to whose mercy the bankrupt had been left, and to which it was necessary to fix some bounds to prevent abuse and an unnecessary and cruel exercise of power over the persons of their unfortunate Debtors willing but unable to pay them —

This therefore disposes of the 1st. 2. 3d. 4. 6. 7. and 8th grounds contained in the first exception, as to the 5th that the plaintiffs are not a Corporate body legally constituted — no such character is assumed by them, and this ground is therefore an immaterial one, they sue as all other — Cessionaries, under an ordinary transport or assignment of the debt in question, and as such must make out their title, in that stage of the Cause when they will be called on to support their action by legal evidence, which failing to do their action will be dismissed. —

N°1386
Fleming & al
Trustees &c
vs.
Johnson. —

This was an action of a similar description as the proceedings in which the same pleas were put in by the Defendant, and the same Judgment given by the Court.

Friday 20th. October 1826.—

N°397.

Chamard
v.
Meunier.—

Action en reddition de Compte.

The late Joseph Meunier dit Lapierre of the parish of St. Denis, made his last will and testament bearing date the 23 Novr. 1824. and therein and thereby named and appointed Marie Judith Godu his wife, his sole and universal legatee, and for the execution of his said last-Will, named and appointed the Defendant as his Executor — After the death of the said Joseph Meunier dit Lapierre which happened on the 24 Nov. 1824, the said Marie Judith Godu his widow, caused an Inventory to be made of all the property and estate left by her said husband, and afterwards by act passed on 8. March 1825, renounced to the Community that had subsisted between her and her said husband, and also to all benefit under the said last Will and Testament — That in consequence the said plaintiff was named and appointed as Curator to the estate and succession of the said Joseph Meunier dit Lapierre, stated to have become vacant — That after the death of the said Jos: Meunier dit Lapierre, the said Defendant as Executor of his last-Will and testament, entered upon the execution thereof, and continued to act and to do all that was requisite and necessary to be done as such executor for and during the space of one year from and after the decease of the said Testator.

The

The plaintiff by his present action, now demands that the Defendant as Executor as aforesaid be held and adjudged to render to him the said plaintiff as Curator as aforesaid, an account of his the Defendants gestion and administration as such Executor since the death of the said Testator

To this action the Defendant pleaded by peremptory exception, that the Plaintiff could not maintain the present action inasmuches he had not been and could not be regularly appointed Curator to the vacant succession of the said late Joseph Meunier dit Lapierre; That the succession of the said Jos. Meunier dit Lapierre had never been vacant, there being alive at the time of his decease several of his children, who are and were his legal heirs, and who have never renounced nor been required to renounce to the said Succession, and that they alone are the persons to whom he the said Defendant is accountable, and who alone can give him a legal discharge for his gestion and administration as Executor as aforesaid — And therefore concluding that the present action be — dismissed with Costs —

The Plaintiff by his answer to the said Exception stated, that by the renunciation of the said Marie Judith Godin, the Estate and Succession of the said Joseph Meunier dit Lapierre had become vacant, and that he the said plaintiff had been duly appointed Curator thereto — That the Succession of the said Joseph Meunier dit Lapierre by virtue of his said last will and

testament

testament had become testamentaire, and that in a testament any succession it was sufficient in regard of the Creditors thereof, that the person called to take and accept such succession had renounced thereto, and that no other heir had come forward to claim or take the said succession

The Defendant by his replication took issue on the said answer, and the parties were now heard thereon —

Vigé for the Defendant argued, that as there were legitimate heirs of the late Joseph Mennier, who were entitled to claim his — succession, upon the renunciation of the legatee they became the legal representatives of the deceased, and his succession was vested in them — There was therefore no vacant succession to which the plaintiff could be appointed Curator — He admits that the plaintiff was appointed Curator, but contends that under the circumstances such appointment could be of no validity, nor could the plaintiff as such Curator maintain the present action, nor was the Defendant safe in accounting with a character who could not give him a legal discharge — That if he the Defendant had accounted and paid to the plaintiff the monies in his hands belonging to the said Succession, he would be still liable to be called upon by the heirs and to pay it over again to them —

Mr

Mr Roi for the plaintiff argued, that the succession of the late Frans Mercier, was testamentary, and the rights of the heirs in the legitimate succession was set aside — this testamentary succession having devolved on the person of Marie Judith Godu, she became entitled to take the same, her renunciation left this succession vacant, she being the first person called to the succession, upon her renunciation, the Creditors and others having an interest therein were not bound to enquire for other heirs, but to look after the property of the deceased, and if there were other heirs, as there at present unknown, it was their duty to come forward and claim the succession — It is not for the Defendant to avail himself of the rights of third persons, even if they were more certain than those he sets up here — the Plaintiff holds a legal appointment and authority over the Estate of the deceased, and can give a legal discharge to the Defendant for all the objects of his administration as Executor —

+ Resp.ve Curateur p. 197. — Denis.t ve Curateur p. 718. §. 10. — 2. Pigeau. 505.

The Court held, that as the appointment of the plaintiff as Curator to the vacant succession stood admitted, he was entitled to bring the present action — That the plaintiff in such case held his authority under a legal appointment, and was entitled to exercise it

until

until set aside, or impeached in such way as the Court could take notice of it — That all the Court could here take notice of would be any illegality or imperfection appearing in the appointment of the Plaintiff as Curator, any apparent defect in his title — but would not go into the investigation of extraneous or collateral facts to impeach the validity of such appointment, that belonged to the — authority and jurisdiction where the appointment was made, or an application might have been made to this Court by those interested, to have the appointment of the plaintiff set aside — It is enough that the plaintiff holds a legal and sufficient title, to hold the Defendant to account, as all that he can demand is a legal discharge and this the plaintiff is entitled to give him — The Defendants plea of Exceptions dismissed. —

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No 2112.

McKenzie vs Rousselle & Turgeon Intervs

This action was instituted by the Plaintiff as Curator to the vacant succession of the late Simon McTavish Esquire, to recover from the Defendant the Lods et Ventes due to the said succession upon

upon two mutations or sales of a certain lot of land mentioned and described in the declaration and now possessed by the Defendant on a certain sale and adjudication made of the said lot of land by the Sheriff of the district of Montreal, to one Joseph Turgeon, Esquire, on the 30th day of July 1823, and on a sale and conveyance made by the said Joseph Turgeon to the said Defendant of the same lot of land by deed of sale made and executed on the said 30th July 1823.—

Plea.—

1. General demurrer to the demand

2. Exception peremptoire, that the Plaintiff has a right to demand and receive from the said Defendant, only the sum of £6.7.2 for the lods et ventes on the sale made of the said lot of land by Joseph Turgeon to him the said Defendant on the said 30th July 1823, which said sum of money he the said Defendant had long before the institution of the present action tendered and offered to pay to the said Plaintiff.—

The Answer to the said pleas joined issue thereon admitting the tender as pleaded, but denying its sufficiency.—

Joseph Turgeon filed a petition en Intervention in the Cause, stating, that the Sheriff of the

District

District of Montreal did on the 30th July 1823 adjudge and by deed duly executed, transfer and convey to the said Jos. Turgeon the said lot of land, and that on the same day, and before any possession had been had or taken by him the said Joseph Turgeon of the said lot of land, he by deed executed bearing date the said 30 July 1823, sold and conveyed the said lot of land to the said Defendant with promise of warranty against all trouble and demands whatever for the same sum of money for which the same had been adjudged to him by the said Sheriff, viz^t for the sum of £71. 10^s. — That having transferred the right which he the said Joseph Turgeon had so acquired from the said Sheriff in and to the said lot of land to the said defendant, before that any possession thereof had been delivered to or taken by him the said Joseph Turgeon, all things being in their original state, no lods et ventes accrued thereby to the said Plaintiff on such sale and conveyance so made to the said Defendant. — That as he the said Joseph Turgeon is the Garant of the said Defendant in so far as regards the demand made by the said plaintiff against him for lods et ventes on the aforesaid sale and adjudication so made to him the said Joseph Turgeon by the said Sheriff, he prays to be admitted Intervening party in the Cause, and in so far as regards the said lods et ventes last-mentioned to take fait et Cause for him the said Defendant, and that for the reasons aforesaid the

demand

demand of the said Plaintiff for lods & Ventes on the said sale and conveyance so made to him the said Joseph Turgeon be held and considered as unfounded in law and dismissed.—

Plea—by the Plaintiff to the Petition en Intervention of the said Joseph Turgeon, by the Plaintiff, who admits the facts stated in the said Intervention but contends that notwithstanding the matters therein contained the lods et Ventes claimed by the Plff are by law due and owing to him, and that he is now entitled to have and maintain his action and demand aforesaid against the said Defendant for the same.—

The parties being now heard on the matters in contest by the said pleadings, Mr Morrogh for the Plaintiff, contended that he was entitled to the double lods & ventes here demanded, as well upon the sale made by the Sheriff to Joseph Turgeon, as on the sale made by Joseph Turgeon to the Defendant, inasmuch as it was the Contract and not the possession which generates the lods et Ventes to the Seigneur—cites, 3 Hervé. p. 4. & 6.— Code des Seigneurs. 1 Vol. p. 100.— Repre Vo Lods & Ventes. p. 602. Fonmaur No 22. & No 102. p. 83—

Mr Roi for the Defendant and Intervening party contended, that until the sale was perfected by an actual tradition of the property no lods et Ventes were due, and that tradition was considered to be as essential in this respect as the deed of sale

cites.

cites Boutaric. des Lods - ch. 3. §. 2. p. 201. № 1 & 2. Potb. Tr. des Fiefs. p. 1. ch. 5. §. 2. p. 165. 6. - & 5 Fenrinv. d. p. 804. 5. -

By the Court. -

This case presents a question upon which the law writers are much divided, and which for some time past was a *questio vexata* in the Courts - and this Court long maintained the principle that until the sale was perfected by tradition, there could be no demand made for lods et ventes, until it was settled by an ultimate Judgment in the Court of appeals that the deed of Sale alone without tradition gave a right to the Seigneur to demand his lods et ventes thereon. - This principle we now conceive it right to adopt, that the principles of decision may not be considered any longer as doubtful and wavering on this point, and accordingly we must say that the Plaintiff is here entitled to his lods et ventes as demanded.

№ 1117.

Wragg. vs Dwight & Econtra.

This was an action instituted by the Plaintiff in his own, and as legatee of his late brother with whom he had been in partnership as merchants and traders, to recover from the Defendant the amount of

of certain promissory Notes made and given by the said Defendant to the said partnership. In the course of the proceedings it became necessary to prove the death of John Wragg the deceased partner in whose right the plaintiff sued — it appeared that John Wragg had died in England and the only proof of the fact was the letter of a person who had attended him during his illness who was not present the day he died, but who attended at his funeral, all the circumstances whereof were detailed — this it was contended by the Defendant was not sufficient evidence of the decease of this person, either by the laws of Canada or of England — But the Court held that the proof was sufficient of the fact happening in a foreign or distant Country, where a slighter degree of evidence was admitted, more especially in regard of the death of a person, where the other circumstances appeared to corroborate the fact, and thereupon gave Judgment for the Plaintiff

1 Ph. Ev. 237. 8.

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No 1247.

Hunter v. Donegany } This was an action instituted against the Defendant for the malicious arrest and imprisonment of the plaintiff — The Plaintiff had instituted a former action

which

which was still pending at the time the present action was brought, by which he demanded damages of the Defendant for a malicious arrest and and imprisonment of his person up to the time of bringing that action, and in which very large damages had been awarded to the Plaintiff by the Jury, but final Judgment was not yet entered — The Defendant having been detained in gaol for some months subsequent to the period of bringing his first action, now instituted the present action, by which he complained of the malicious arrest under the same proceedings as stated in his first action, and of his subsequent detention in gaol after the period of the said first action, that is from the 24th day of April 1823, for four months next after that Day. —

The Defendant among other things pleaded the pendency of the first action for the same Cause of action, denying that the Pltff could exercise more than one action of any kind for the same — To this the Plaintiff answered that although the Cause of action was the same, yet there had been a continuation of his imprisonment subsequent to the first action which gave him a right to a further action against the Defendt for his damages in this behalf —

Rolland for the Defendant contended that the present action could not be maintained as it would be admitting the principle that

the

the plaintiff may have a new action every day while he is detained in gaol under the writ of Ca: Sa. sued out against him by the Defendant, such proceedings would be unheard of and ruinous to the Defendant were he to succumb - but as the pltff as thought to estimate his damages for what was considered an illegal arrest, he cannot have new damages for the same Cause. If a man be assaulted and beat and get his leg or his arm broken he is entitled to his action of damages for such assault. but he cannot have a second or a third or an hundred actions more for the same assault, because the pain continues in the limb affected, or because he is unable to make use of it - all this is estimated in the first action he so brought - and were it otherwise there would be no end to actions, no security agt. continual persecution - In this case although the arrest of the Plaintiff has been considered illegal, yet his detention ought to be considered as legal under a Judgment of this Court and execution thereon which are still in force. - In England an action of this kind could not be maintained, because the Plaintiff must there shew that the proceedings under which he was arrested and detained are not only at an end, but that he had been discharged and liberated by legal authority from the arrest so made. -

Mr Sewell for the Plaintiff - the distinctions

taken

taken by the Defendant do not apply, the injury here complained of is not the same injury as that for which the former action was brought nor for its consequences, but for a new injury, proceeding under from the same cause, but occasioned and persisted in by the Defendant – it is the continuance of an act of oppression which the Defendant tenaciously persists in although already declared to be tortious on his part, and if no damages were allowed in such a case, it would be a wrong without a remedy, which cannot be admitted by our law. The principle upon which this action is brought is different from what would be admitted in England, this has already been settled and it is unnecessary here to mention it, but in England where there is a continuation of the injury by the act of the Defendant it is undoubted that further damages would be granted –

The Court held that the principle of this action was right according to the facts stated, and that it could be maintained, that upon the supposition that the proceedings of the Defendant here were tortious and illegal in having detained the Plaintiff in gaol subsequent to the bringing of the first action, it was a new injury for which a new action would lie, for it depended upon the Defendant to remove that injury by liberating the Defendant and if he has not thought fit to do so he must

stand

stand to the consequences – Defendants plea of exceptions in this respect is therefor dismissed. –

No 2327.

Ex parte – on Petition of Mr Fournier – Destitution de Tutelle.

Judgt. ent. 19th Octr. 1826. –

The Petitioner, Michel Fournier had during this term presented a petition to the Court en destitution de tutelle, against Charles Bernard Pasteur, Esquire, who had been appointed Tutor to the minor children of one Antoine Renaud, and a day was thereupon given to him to prove the facts alledged in his petition –

The Petitioner, by Mr Bibaud, his attorney, now made the following motion – Le requerant fait motion, qu'il plaise a cette Hon. Cour ordonner qu'il sera nommé et appointé une personne – comme Curateur pour administer temporairement durant la presente instance les personnes et biens des mineurs denommés en ladite requête au lieu et place de leur tuteur actuel, poursuivi, comme – suspect, en destitution; et que cette nomination ou appointement puisse etre faite, a tel jour, lieu et heure qu'il plaise à cet Hon: Cour à fixer, sur avis des parens et amis des dits mineurs, et homologué – par cette Cour ou par un des Juges d'icelle – nisi Causa &c –

A Rule to shew cause having in consequence been

been granted the parties were now heard thereon.

Mr Bibaud for the Petitioner stated, that it was of serious consequence to the minors in this case not only to recover the monies which already fallen into the hands of the tutor, but also to endeavour as far as possible to save what remained of their property from being dissipated by him - this appeared from the statements accompanying his petition already before this Court as by the several acts which were produced that there were monies still due to the minors in the hands of third persons, and it was to be apprehended that from the embarassed state of the tutors circumstances he would use means to get such monies into his possession - That the conduct of the Tutor, from what already appeared was in law suspect, in which case the Petitioner was entitled to apply to this Court that a Curator should be appointed for the interim management of the property and persons of the Minors until the contest raised on the said petition en destitution de Tutelle should be adjudged upon. - cited - Lacombe vo Tuteur. Sec. 10. - Domat liv. 2. tit. 1. Sec. 6. §. 2. Meslé Ch. 10. p. 228. 230. -

Mr Mondelet for the said Tutor, shewed Cause against the rule, and stated, that he was not in a situation of a Tuteur suspect,

and

and that accusation alone could not render him so, this would be contrary to every rule of Justice — that the appointment of a Curator as an interim manager during the contest, is not known in the Customary, it is a proceeding practised only in the Provinces of France governed by the Civil law — nothing can be done to deprive the Tutor of his situation but by the determination of the Court upon the petition en destitution, after hearing the parties — cited. 2 Vol. Edits & Ord^{ces} p. 202. — Bouthillier Somme Rurale. ch. 13. —

By the Court —

Whatever strong grounds the Pet^{r} may have in this instance to complain of the conduct of the Tutor, they have not yet come within the notice of this Court, nor can we ground any opinion thereon — the tutor may be suspect in the eyes of the Petitioner, but with regard to the Court there must be something more than mere accusation against him to enable us to say, that he is suspect — In one of the authorities cited by the petitioner from Mesle, it is indeed said, that "l'administration de la totelle est interdite au tuteur accusé comme suspect," this authority is taken from the Civil law, but was not practised in France

in

in all the rigor of these terms, for we find in Arretés of M. Lamoignon, to which M. Meslé refers in support of the principle, Tit. 5. art. 16 - that the practice in France was more consistent with the rules of Justice - he says - "Le tuteur ne laisse d'administrer, " durant la poursuite que les parens font " pour sa destitution, s'il n'en est autrement " ordonné par le Juge en connoissance de Cause" this Connoissance de Cause we have not yet had, and it would be premature to interdict the administration of the Tutor until we shall have had it - Rule discharged -

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This Judgt. was of 19th Oct. -

No. 1123.

De Rouville vs Livernois & Benoit. -

Action for a sum of £28. 16. 9. due to the Plaintiff as Seignior by the Defendts. his Censitaires, on a deed of sale made to the Defendants -

The Defendants by their plea, stated, that they acknowledged to owe to the plaintiff the sum of money mentioned in the declaration, which they were always ready and still are ready to pay to him and now hereby again tender the same to the Plaintiff, of which tender they demand Acte of the Court - That the Plff

long

long before the institution of the present action having demanded of the Defendants a much larger sum of money for his said lods & Ventes than that now demanded, the Defendants proposed to the said Plaintiff to name experts jointly with him in order to liquidate and ascertain what was justly due to the said Plaintiff and to pay to him what should be so liquidated, this offer the plaintiff refused.—

The Defendants therefore conclude that Judgment be entered for the pltff for the above sum of £28. 16. 9 now tendered, and that the plaintiff be condemned to pay the Costs of this action.—

The Pltff by his Replication concluded upon the tender made that the Defendant be held to pay Costs.—

The Cause being now heard on the merits, the Plaintiff by Mr Rolland his attorney concluded for Judgment against the Defendants for the sum demanded and Costs.—

Mr L. Vigé for the Defendants contended, that the Plaintiff ought in this instance to be condemned to pay the Costs inasmuchas the demand now made by him had never before been made as the quantum of Lods et Ventes due to him on the Defendants purchase of the lot of land in question. That from the nature of that purchase it was

uncertain

uncertain what the real amount of those lods & ventes was, the sale not being made for a specific sum of money, but in consideration of different services and duties to be performed the value whereof could be ascertained only by an estimation of experts, the Defendants without intending to contest to the plaintiff his right to demand his said lods & ventes proposed to him to make the said estimation by Experts, but this the Plaintiff refused to comply with, but on the contrary demanded of the said Defendants the sum of one thousand livres, wh far exceeded to that to which the Plaintiff was entitled, and that which he demands, that had the plaintiff demanded before the institution of the present that which he has thereby demanded the Defendants would have paid & satisfied the same without any expences having been incurred, and as these expences have now been incurred by the present suit the Plaintiff ought to be compelled to pay the same. —

The Court were of opinion that as the Defts knew that they owed a debt to the Plaintiff for lods et ventes, they were obliged to pay him, or to make a sufficient tender in this respect to exonerate them from the costs of an action in this respect — that the demand stated to have been made by the plaintiff of a sum

of

of one thousand livres, although for a greater sum than was due by the Defendants, yet ought to have been met by the Defendants by a tender of what they considered to be due to the Plaintiff because the proposed to liquidate the Plaintiff's right by experts, was not what the plaintiff was bound to accept, it was no satisfaction of his demand, it was rather putting him to a proof of it, and in a way which he did not wish to accept of — his action was therefore open on a refusal of the Defendants to pay, and although a lesser sum is now demanded we see nothing in the tender now made which can exonerate the Defendants from the payment of the costs. — Judgt accordingly. —