February Term

1827.

Monday 12th February.

Pres.

Chief Justice Reid.

Justices Foucher, Pyke & Uniacke.

No. 1988.

Hart. v. Bowron.

This was an action to recover from the Defendant certain instalments of money due on a deed of transfer which the defend had made to the plaintiff under a deed of sale which he, the defendant had made to one Raymond of a house and lot of ground in the vicinity of Montreal — The plaintiff under the transfer made to him had discussed the property of Raymond, and by the present action demanded of the defendant the monies in arrear and unpaid and this in consequence of the clause or stipulation contained in the said deed of transfer on the part of the said defendant, de fournir et faire valoir, what had been so transferred.—

The Defendant pleaded several pleas, several of which had been adjudged upon, but the most material, and that upon which the defence of the

action

action principally depended, was, that when the several instalments so transferred by the said Defr to the said plaintiff became due, and payable by the said Raymond, he the said Raymond was insolvent and good circumstances and able to pay the same, but that by the neglect and culpable laches of the plaintiff, he had delayed to demand and obtain the payment thereof, and in the mean time that the said Raymond having become insolvent and unable to pay the said instalments, the plaintiff ought not by reason thereof to have or maintain the present action agt him.

The parties being heard upon this question, the Defendant contended, that in law all the Defendant was bound to warrant under the above stipulation in the deed of transfer was, that at the time of making and executing that deed, the said Raymond was in a solvent state and able to pay the whole debt; that the warranty of the Defendant could not be extended beyond this, for after having divested himself of the right he held against Raymond he could prosecute him for the debt, nor could he compel the plaintiff to do so should he be negligent in this respect, and according to the just principles of law, the laches of the plaintiff ought to avail him to the prejudice and injury of the Defendant. + cites. Fer. Gr. Comre art. 110. sec. 2. Nos 14 to 23- Dic: de Fer. vo Garantie. - & vo Transport. - Fer. Gr. Comre art. 108. No 24 & 25.- as to the diligence which the creditor is bound to exercise to enforce payt from the debtor. 1 Desp. p. 50. No 20.- Lacombe vo Garantie,- Repre vo Garant. p. 721. 722. - N. Denizt. vo Cession. p. 378. Poth. Cont: Vente. No 565.-

Mr Boston for the plaintiff on the contrary contended that under the above stipulation in the deed of transfer, the Defendant was bound to the warranty

of

of the debt at all times - cited. Repv. v° Garant. p. 722. 728. Poth. Obl. N° 406. 414. 441. & 448. — Argou. p. 387. —

By the Court. — This is a question upon which the authors seem divided, some being of opinion that the warranty in this case does not extend beyond the time of the transfer, if the debt be then due and payable — others on the contrary are of opinion that the warranty attaches until the debt be satisfied unless the creditor be guilty of some act of gross — negligence, such as allowing prescription to accrue as the debt, or the sale by decret of the property mortgaged without making the necessary opposition — and this opinion is adopted by the Court — The Plaintiff here was guilty of no laches of the description here mentioned, it is true that in the opinion of some of the witnesses the debtor Raymond at the time when some of the instalments became due, was in a situation to have discharged them, and the only laches to be imputed to the plaintiff was his not having them compelled the payment of what was due by legal proceedings, but were the law even so, yet there is in this case a circumstance which even here would exonerate the Plaintiff, which is, that the debtor — Raymond was a foreigner and had no domicile or residence here, where the plaintiff could either apply for the payment of his debt or use means to enforce it. — The principal security for the debt, which both parties no doubt looked to here was the house & lot of ground which the Defendant sold to Raymond beyond this the personal responsibility of Raymond was not much considered by the plaintiff, who chose to stipulate for the personal security of the Defendt in the terms of the deed of transfer — and the Defdt

had

had it in his power to use diligence for his safety, against Raymond notwithstanding the transfer to the plaintiff, or he might have called upon the Plaintiff to do so, but both parties remaining inactive, but the responsibility lay on the Defendant –

The Court therefore gave Judgment for the Pltff

see. Repse Vo Garant. p. 722.–
N. Denz. Vo Cession. §. 3. No 6. p. 379. –
Poth. Vente. No 565.–
2 Argou. 387. –
1 arretés de Lamoignon. tit. 22. No 11. p. 140.

No 143.

Molson. vs Forsyth & al' Executors &c & Augn Berthelet Oppost. ——

On the opposition of Augustin Berthelet claiming a sum of £2800. – being two thirds of the sum of £4200. – the amount of the Sale and adjudication of a certain Bail emphyteotique of certain premises belonging to the Estate of the late Mr Dunlop.

On the 25e day of April 1816, the Defendants as Executors of the last will and testament of the late Mr Dunlop sold the property in question at a public Sale, when it was adjudged to Mary C. Cuvillier &co for the sum of £2250. burthened with the annual rent of 300 livres to the Nuns of the General Hospital. Among the other conditions of the Sale it was stated that one third of the price should be paid down immediately on the adjudication – one third on the 1st May 1817, and the remaining third on the 1st May 1818, the two last thirds to bear interest from 1st May 1816, and in case the purchaser

should

should require it, it was agreed that a title should be perfected to the premises sold by means of a Sheriff's sale.—

The sale having been made according to these Conditions, at the bottom thereof the following memorandum was written.—

"Je soussigné declare que l'acquisition que j'ai
" fait du bail du terrain designé en l'ecrit des autres
" parts a eté faite pour Augustin Berthelet fils,
" pour 2/3, et l'autre tiers pour moi— En foi de quoi
" j'ai signé le present ecrit, a Montreal le 25 avril
" 1816."—

Austin Cuvillier, pour
M: C: Cuvillier & Co—

Mary C. Cuvillier & Co having been subsequently required to fulfill the conditions of the sale— they declined doing so until a Sheriff's title should be obtained according to the conditions of the sale, but in the meantime, Mary C. Cuvillier & Co as being the adjudicataire, take possession of the property, hold it as their own, and make considerable— improvements thereon — they remain in possession until Dec: 1818, when a Sheriff's Sale was effected, and the property adjudged at that sale, to— persons stiling themselves Mary C. Cuvillier & Co— for the sum of £4200— which arose from a number of persons bidding at this sale— The adjudicataires pay into the hands of the Sheriff the sum of £2250 being the amount of the purchase at the first sale, and the Defendants in order to enable the Sheriff to give his title to the adjudicataires pay the balance to make up the sum of £4200.

into

into the hands of the Sheriff, who in consequence delivered a deed to Mary C. Cuvillier & Co then compound of Mary C. Cuvillier and S. Cartier.—

During all these transactions the Defendants knew nothing of Augustin Berthelet the opposant he never having made himself known to them as a part owner of the property in question — he never came forward to perform any of the conditions of the sale, nor to claim any right in it — The Defend^rs not knowing him as a party in these transactions had no means by which they could have compelled him to comply with the conditions of the sale — all they knew of him is merely what is stated by — Austin Cuvillier acting for Mary C. Cuvillier & Co — in the memorandum at the bottom of the conditions of the sale, but whether Austin Cuvillier was — authorised to make such a purchase for the opposant was wholly unknown to them, the only persons they could recognize, were, Mary C. Cuvillier & Co who came forward to perfect the conditions of the sale and to perfect their Contract with the Defend^rs —

This defect of any legal right in the property seems to have been felt by the Opposant, from the kind of evidence he has been obliged to have recourse to, in order to establish his claim — evidence to which the Defendants had strong reasons to object, but whose silence in this respect was no doubt influenced by a knowledge of those facts which the witness would testify — Austin Cuvillier, and Mary C. Cuvillier his wife, with some of the Defendants in this Cause, and their Counsel, have all been examined as witnesses, and no objection offered to their —

testimony

testimony by the Defendants — An objection was raised by Austin Cuvillier and his wife as to their competency to be examined as witnesses, but it was over-ruled by the Court, as they were called to speak against their own interests and might be heard — but inasmuchas they are the Witnesses of the Opposant, what they have declared must be the more strongly taken against him — What does Austin Cuvillier say? — he admits that he had agreed with the Opposant to make the purchase in question in the name of the Opposant, and of Mary C. Cuvillier & Co, but that Mary C. Cuvillier & Co were the persons who alone took the possession of the property, and who made the improvements upon it, in which the Opposant refused to contribute, or to advance any money on account thereof, and the witness considered that the Opposant had abandoned all right to the property, and that he, the witness alone continued to finish the improvements and to pay the rent reserved thereon when due; nay more — he settled with the Defendants for the interest which had become due on the two last instalments of the price according to the conditions of sale — and lastly the Sheriff's title was given to Mary C. Cuvillier & Co, considering them as the original purchasers, who paid the purchase money into the hands of the Sheriff — Now we must bear in mind, that this is the testimony of the Witness of the Opposant and of the person he wishes to be considered as his authorised agent in the whole transaction, who speaking no doubt according to the authority he had received from the Opposant and the terms of the agreement entered into between them says, he considered the Opposant to have

abandoned

abandoned all right or claim to the property — How then could the Defendants recognize any right in the opposant, they knew nothing of it beyond what this agent has declared, and he tells them that the Opposant had declined to have any thing to do with the property. — The first occasion on which the Opposant is disposed to shew himself as a proprietor, is after the sale by the Sheriff, when the absolute property had vested in Mary^c Cuvillier & 5^c which they held before only under the Conditional title made under the first Sale — but the Opposant finding that the property had been sold by the Sheriff for nearly double its original price, he now modestly claims two thirds of that money as his share and proportion, without having ever done one single act as proprietor in compliance with the conditions of sale, or of having advanced a penny towards those improvements of which he now wishes to reap the benefit and to appropriate to himself. In the opinion of the Court his claim here is without a shadow of right, as regards the Defendants, to whom in every legal point of view he is a stranger in this transaction — if he has right it can be only against the agent he has employed, when he will be enabled to shew the nature and extent of the authority with which he vested him and his responsibility under that authority —

Two witnesses have been examined for the

Opposant

Opposant, — Moreau, and Carmel — an objection is stated on their depositions as raised to their competency by the Defendants at the time of their examination — but this objection has not been brought under the notice of the Court, nor any judgment demanded thereon, the Court therefore ought perhaps to give no opinion respecting them — but we cannot help observing, that both are certainly incompetent: Moreau in a double point of view, because he comes to support his own interest in one third of the property in question which he sold to the — Opposant, and as to the other facts he states, they cannot be proved by verbal testimony, unless we admit, that there was a sufficient commencement de preuve par ecrit, which is doubtful — this latter observation will in part apply to the — testimony of Carmel, although it goes principally to controvert the facts given in evidence by Mr Curvillier, which is rather extraordinary, as it is contrary to the maxim, that a party shall never be allowed to discredit his own — witness — but could this testimony be admitted, it could not alter the nature of the right here claimed against the Defendants, which is wholly unfounded — Opposition dismissed w^th Costs

No. 1985.

Stansfield & al
vs
Froste. —

This is an action to recover back monies said to have been paid to the Defendant on an overcharge made by him and his late partner, Mr Porter, for their agency in managing the affairs of an insolvent Estate. — It would appear that the plaintiffs had become insolvent, and that the management of their concerns was committed to assignees, for the recovery of their property — these assignees transmitted their power of attorney to the Defendant and his late partner, to settle and recover the debts in this Country — but the Plaintiffs having subsequently arranged matters with their Creditors, the assignees directed Messrs Froste and Porter to account to the plaintiffs as to any monies in their hands and for all acts done by them under their power of Attorney.

We find that two accounts were rendered by Messrs Froste and Porter of their agency, to the Plaintiffs, one in May and one in July 1821 — in which they accounted for the monies they had received, for the notes of hand then in their possession and for the balance then in hand — In these accounts so rendered are included the charges for agency, or Percentage on certain monies received, on monies transmitted to England and on notes, for their trouble in the business, and a balance is struck of £148.2.9, which balance the plaintiffs received on the 6th August 1821, and gave a receipt and discharge to the said Froste & Porter in full of all demands and claims of any kind by reason of their agency aforesaid. The present action is brought by the plaintiffs

against

against the Defendant as surviving partner of Frost and Porter, to recover back the excess of agency demanded and retained by them in the accounts so rendered to the plaintiffs, on the principle that the plaintiffs at the time they gave the above receipt and discharge, were under an error of fact as to the nature of the Commercial usages in this City of Montreal in respect of the usages aforesaid. — Now it is rather extraordinary, that the plaintiffs being merchants should alledge an ignorance of those matters which belong to their profession, as an excuse of their conduct and to adduce this as the ground upon which they claim to be relieved against a transaction they have entered into in the course of their business. — The law however does not admit of such an excuse, it presumes on the contrary, that every man ought to know and does know what belongs to his own particular trade, mystery or profession, "chacun "est presumé savoir ce qui est de son fait". — But the ignorance here set up cannot be alledged as matter of fact, for Commercial usages, constitute part of the Law merchant, and every man, at least every merchant must be bound to know it, the maxim of law being, "ignorantia juris — "neminem excusat". — The writers on the Civil Law have varied in their application of the principle of that Law in regard of the ignorance of fact and the ignorance of Law — It is generally agreed that ignorance of fact vitiates the agreement, but that error of Law does not — We think however that this principle is not invariably true in all cases, and we are disposed to follow the distinction adopted by

Domat. liv. 1. tit. 18. sec. 1. No 8. Des vices des Conventions. — see also. No. 15. & 17.

by Domat and others of his opinion who say, that even the error of fact, where it is not the sole cause of the contract or agreement, but are conneited with other causes which are known and form a part of the consideration, such contract or agreement will not be void in law — Here if there was any error of fact in the agreement between the parties, it was but a partial error limited to one particular object — It was agreed on all hands that the Defendant had been the agent for the insolvent Estate, that his services in this respect merited recompense, it is only in regard of the quantum of the reward that it is said the error existed, but as there was a just cause for allowing it — a Civil & a moral obligation, or of law and of Conscience, to reward the services of the Defendant done for the benefit of the plaintiffs, and as many considerations, not known to this Court may have influenced the Plaintiffs in regard of the quantum of the reward, it would be directly contrary to every just principle to set aside what had been thus regulated by the parties. — The plaintiffs knew, or might have known, the full extent of the services performed, and they also knew, or might have known the adequate recompense for such services, and we cannot now allow a change of sentiment in regard of the value of the services performed, after the agreement in this respect has been closed, for for were this permitted, there would be no security in any transaction. —

This however being a transaction of a mercantile nature, and between Merchants, we may safely have recourse to the opinions and decisions of the Courts in

England

England on this point, and see how the case would have stood before the tribunals of that Country — The decisions on this question are not numerous nor of antient date, and it would seem that some of the more early carry the impression that an error either of law or fact, would vitiate every contract, but the later decisions are uniform and the law is now considered as settled, that error of fact only can vitiate the Contract, and not always error of fact, if the party had the means of knowing it before entering into the Contract — we would refer to the Case of Bilbie v. Lumley 2. East. Rep. p. 469 — where the principle of ignorantia "juris non excusat" was fully recognized — and the case of Martin & al. v. Morgan & another in C.B. 3 Moore. 635 — where Ch. J. Dallas, expresses himself thus — "It is a well known rule of law, that where "a party pays money to another voluntarily, and with "full knowledge, or even full means of knowledge of all "the circumstances of the Case, the party so paying cannot "recover it back" And Mr Justice Park observed "The law has never been doubted, that if a party pays "money to another, voluntarily, with full means of "knowledge of all the circumstances of the case, the "party so paying cannot recover it back again" — In the case before us, there can be no doubt but that the plaintiffs had the same means of knowing all the circumstances of it as fully when they paid the money as when they brought the action —

Action dismissed with Costs —

Nº 1398

Armourgal
vs
Nathan.

Action by the plaintiffs as payees of a promissory note drawn by the Defr for a sum of £410 — dated 28 July 1823

Plea.—
1st Non assumpsit.—
2d That on 28 July 1823, she the Defendant had become insolvent, and was indebted to the plaintiffs in a sum of £248.2.6, and to divers other persons in several large sums of money as stated in a certain Schidule A., (referred to in the said plea) and being about to enter into a deed of Composition with her creditors, the Plffs agreed to sign the said deed upon obtaining from the said Defendant the said note of hand, which she signed and delivered to them in consequence — And that afterwards on the 1st Augt. 1823 she she made such deed of Composition with her said Creditors, to which the said plaintiffs were parties.
3d a Release from all debts and demands by the Plaintiffs, and the other creditors of the said Defendt in consideration of the said deed of Composition.

The Defendant proposed to examine the plaintiffs on faits et articles, touching the matters contained in her plea, to which the plaintiffs objected, contending that they were not bound to answer thereto, but the court being of opinion that they were bound to answer — Robert Shedden one of the plaintiffs, appeared and answered thereto and by his answers states, that the note of hand in question was given by the Defendant to

the

the plaintiffs, as an indemnification to them for the loss they would sustain by signing the deed of composition which the Defendant had made with her other creditors —

Mr. O'Sullivan for the Defendant contended that the plaintiffs by taking the note in question had committed a fraud on the other creditors, who were thereby deceived, as the plaintiffs held themselves out as creditors for their whole debt notwithstanding they had secured a part of it by means of this note of hand, and therefore that the Plaintiffs could not recover — cited — 3. T. Rep. 551 — 4 East. 472 — Douglass 696 — Bos: & Pull. 95 — 1 Hen: Bl. 647. — 1 Atk. 105 —

Mr Walker for the plaintiffs argued, that the note in question having been given to secure the — Plaintiffs in a part of their debt in order to induce them to become parties to a deed of composition the Defend^t had entered into with her other Creditors, it was not on that account null — In general by the law of England such note would be void, but this is only in the case where a debtor stipulates to pay so much in the — pound to his Creditors, and note in a case like the present, where a general assignment is made by the Defendant in order to obtain a discharge from her Creditors — That in this Case the note was not given until after the assignment had been made by the Defendant to her other Creditors, and the note was given as the inducement to the Plaintiffs sign also — cites. 2 T. Rep. 763. —

But the Court considered the note to be void, whether it was given before or after the

the deed of assignment, as it was equally a fraud on the creditors, who are presumed to accept the composition on the principle that they stand all on the same footing — all the authorities both of the French and English law agree on this point, and we have no doubt in saying that the action cannot be maintained.—

see Domat, liv. 2. p. 192 -
2. Term Rep. 763.—

N° 2098
Fabrique de Laprairie
v
Longtin.—

This was an action instituted by the Church wardens of the parish of Laprairie de la Magdeleine, in order to obtain the resession of a certain Concession of a pew in the said Church, which had been made to the predecessor of the Defendant and to his heirs in perpetuity by deed of Concession of 9. Nov^r 1721. the plaintiffs offering to reimburse to the Defendant the sum of 15 livres, — which was the original consideration given for the said Concession.— The only question was whether the Church could revoke the Concession they had so made, considering the same to have been a legal act, and as it was made prior to the Reglement of 1723, made in this Country in regard of the Bancs d'Eglises. The Court however held that the action was well founded, that the Reglement of 1723. was not introducing any new principle, but was merely declaratory of the law on this subject, which has clearly

clearly determined that the Church may at all times revoke the Concession of a pew when granted in perpetuity, such grants, although frequent, were yet considered not to be binding on the Church beyond the life of the grantee.— The Court therefore gave Judgment for the Plaintiffs.—

see. Loiseau Tr. des Droits Hon. ch. 11. Nº 69. 70. 71. 72.
Lacombe Jur. Can.ue vº Droits Hon. sec. 6. Nº 5.—
Sousse Tr. du Gouvt. Temps. & Sp. des paroisses p. 51 to 61.
1 Arrets de Louet. letter E. 9. p. 679.—
1 Marechal Dr. Hon. ch. 2. p. 286.—
Dic. des arrets. vº Banc Hereditaire. Nº 8.
Hericourt Droits Eccles.ue G. 10. Nº 13.—
Dic. du Droit Can. de Durand de Maillane vº Banc dans les Eglises. p. 433.—
3. Code des Curés. p. 619.—

Nº 2326.

Dominus Rex vs. S. Gale & others Justices.—

On Certiorari addressed to the Quarter Sessions of the Peace, touching their proceedings on a certain proces verbal of the Grand Voyer, homologated in that Court—

On the 24 May 1825, Messire Louis Parent, curate, and divers other parishioners of the parish of St. Henry de Mascouche, presented a petition to the Grand Voyer, praying his visit and Proces Verbal for a road from the Riviere Jesus to the banal mill of Lachenaye — The Grand Voyer in consequence made his visit of the road in question, and drew up his Proces Verbal, by which he ordered, —

Que

"Que la route (en question) sera desormais faite
" et entretenüe suivant la loi par les habitants de
" la dite paroisse de Lachenaye, censitaires de feu
" Peter Pangman, Ecuier, Seigneur de ladite Seigneurie
" de Lachenaye, et aux quels ladite Route est utile
" pour les conduire au moulin de ladite Seigneurie
" dont ils sont Censitaires &c."

The homologation of this proces verbal was opposed in the Court of Quarter Sessions by the Inhabitants of the parish of Lachenaye, who contended, that as will by a former Proces Verbal of the present Grand Voyer, bearing date the 29th October 1806, as by an Old proces Verbal of Mr De Boisclere, Grand Voyer, bearing date in the year 1741, the Inhabitants of the said parish of Lachenaye had been exempted from making the said Road, and inasmuchas the present proces verbal of the Grand Voyer had been made without noticing in any way either of the before mentioned proces verbaux, and as if no such Proces verbaux existed, the said Proces Verbaux being of equal authority with that now made, shewed that the law had thereby determined as to the making of this road, and that the present proces verbal shewing no cause for a change it was inept and contrary to law —

It appeared that by the Proces Verbal of the Grand Voyer, bearing date the 29 Octr 1806 — the same line of road is directed to be made, and by it the inhabitants of the said parish of Lachenaye were ordered to make one half of this road, but aware that there existed the former P. Verbal of Mr Deboisclere exonerating these inhabitants from this Labor, he there very properly, states his reasons

for

for departing from the opinion of Mr DeBoisclere and the grounds upon which he considered a change to be necessary and to compel the said — inhabitants to make the half of the said road — This Proces verbal was brought before the Court of Quarter Sessions, which after hearing the parties, on the 17 January 1807, they adjudged that the same should be homologated, — but they exonerated the said Inhabitants of Sachenay from doing any part of the work —

The question now before the Court therefore was how far in point of regularity of proceeding, the Grand Voyer could make another Proces verbal for the same road, without noticing the Proces verbaux already made touching the same, and without stating any ground for a change — The Court held that he could not, that although the Grand Voyer had the power to make new roads, and to alter and change those already made, yet this must be done upon principle and according to such a regular course of proceeding that the rights of individuals may not be thereby injured — When the Grand Voyer ~~has~~ upon a view and survey of the place where a road is required has exercised his Judgment and made his proces verbal, which receives the sanction of the Court, it is a Judgment which binds the rights and enforces the performance of certain duties by individuals, and in which both the public and individuals have an interest — when it becomes necessary to change this road, it must be upon the principle that some change of circumstances require it, for change of circumstances alone can warrant the alteration or

annulling

annulling of a title so formally and legally made, were it otherwise, the whole would depend upon the caprice of the Grand Voyr, to make a proces Verbal one day, and to alter it the next, without assigning any reason - but the Judgments rendered in this respect affect as much the civil rights of parties, as any Judgment given in contests between individuals and ought to be equally secure - The Judgment and opinion of one Grand Voyr is as good and valid, as that of another, and there can be no reason why the latter opinion should prevail over the former where no good cause is assigned for it - nay more there can be no second proces verbal made for a road already established by a Proces verbal, unless the special grounds requiring such second Proces Verbal are plainly and clearly expressed, that the Court may judge of the justice and reasonableness of such second Proces Verbal - In the present instance the Grand Voyr has made a Proces Verbal for a road already established by former Proces verbaux, which as Keeper of those records he was bound to know, he gives no reason for departing from what those Proces verbaux direct, and his Proces verbal in this respect can be of no avail to affect: what has been already established by Law, and we are of opinion that the Court of Quarter Sessions ought not to have confirmed it -

Judgt quashing the Judgt of Qr Sessions

No. 2252.

Crossland vs McVey. —

This was question regarding Costs. — The plaintiff had instituted an action in this Court against one Woods as the maker of a note, which was still pending; in the mean time he instituted the present action against the Defendant as the indorser of the note — the Defr on the day of the return of Writ, tendered to the plaintiff the amount of the debt interest and costs demanded, and claimed that the note should be delivered up to him — this the plaintiff refused to do, alledging that he had occasion for the note to give it in evidence in the suit still pending against Woods the maker — The Defendant deposited his tender, and claimed a right to have the note and all the further costs to — accrue on the action —

The Court were of opinion that the Defendant was entitled to have the note on paying the amount of the Plaintiffs demand, and condemned the Pltff to pay the Costs accrued subsequent to the tender. —

No. 2336.

Ex parte — on Petition of Doré & al' —

The Inspectors of Ditches and fences of the parish of Laprairie to whom the Writ of Certiorari had been addressed, having made their return to the same, that they had made their proces verbal, and deposited the same in the hands of the Notary public as required by law, and that they were unable to return or certify the same to this Court — The Petitioners thereupon obtained a rule upon the Inspectors to shew cause why they should attached and committed

to

to gaol for not having complied with the said writ of Certiorari —

The Inspectors appeared by their counsel and argued that they ought not to be held to make any other return to the said writ, as they were no longer the masters of the said procès verbal which had been deposited in the office of a public notary for the benefit of the public, nor could they compel the notary to deliver up the said Procès verbal to them — They moved to quash the writ of Certiorari as having issued improvidently, inasmuchas the law has directed that an appeal shall lie to this Court from their decision, but has not said that a writ of Certiorari shall be granted for this purpose, and if any writ became necessary it ought to have been a writ in the nature of a writ of appeal — That the parties suing out the said writ have not given security for Costs as required, nor have their names been indorsed on the writ, so as to entitle the parties concerned to their recourse against them hereafter — and that the writ was in other respects informal and insufficient. —

The Petitioners answered that they had applied to the Court to have an appeal from the decision of the Inspectors, and that the Court had considered that the writ of Certiorari was the regular course by which the Procès verbal and proceedings of the Inspectors could be brought before them, as they could not issue any other writ for this purpose, which was a sufficient justification

of

of the petitioners as to the course of proceeding which had been here adopted.— That the return of the Inspectors to the said writ was not sufficient, as upon it the Court could not do justice between the parties — That the writ sued out in this case having been under the direction of the Court the parties were not bound to observe the formalities contended for by the Inspectors —

The Court were of opinion that a writ of Certiorari might legally issue in this case for bringing before them the Proces Verbal and proceedings of the Inspectors, that it is a beneficial writ and in the discretion of the Court to grant in order to examine into the regularity of proceedings of inferior jurisdictions — That the right of appeal given by the Statute was a right given for the benefit of the subject to have the opinion of the Court upon the proceedings of the Inspectors and the mode of bringing those proceedings before the Court could be done the most effectually by the writ of Certiorari, as being compulsory on the Inspectors, and this Court had no right to issue any other writ for this purpose.— at all events the Inspectors had no right to complain as to the mode here adopted, as their proceedings must necessarily be before the Court, before any further proceedings can be had or the Court be seized of the Cause— the application therefore of the Inspectors to quash the writ cannot be granted, as they have no right to complain of

the

the petitioners had been put to the necessity of suing out this writ in order to obtain Justice nor had they a right to exact any security for Costs as the Statute did not require such security to be given on the appeal, and the writ of Certiorari was directed to issue by the order of the Court. — In regard of the return of the Inspectors it was insufficient, as they were the persons exercising the authority vested in them by the Statute, they alone were the persons competent to return what they had done in this particular case under that authority, and although they had deposited their proces verbal with the Notary public, these to remain for the public benefit, yet that did not divest them of all right; as they still had the means of obtaining a copy of it, which certified by them would be received by the Court as a sufficient return to the writ. This however being a first instance of a proceeding had before this Court under the Statute it would give the Inspectors a day in Court to amend their return.

2. J. Rep. 285.

The Court therefore allowed the Inspectors three days to amend their return to the writ of Certiorari, but dismissed their motion to quash that writ. —

№ 2312.

Warwick & Co
vs
Raymond

This was an action by one Partner against another for a misfeasance in the use and employment of the property of the partnership, with the intent to injure the right and interest of the plaintiffs therein, and deprive them of the advantages they otherwise would have reaped from the right use and employment of the common property, — The parties were joint owners of a certain Steamboat called the Montreal, and the Defendant is charged with having bought up all the shares of the former owners, by which means he became proprietor of ten elevenths shares in it, the other share belonging to the plaintiffs — That this boat had been originally constructed to navigate as a ferry boat between Montreal and Laprairie, but that the Defendant afterwards constructed another Steam boat for the same purpose, and having the majority of interest and of votes as to the management and disposal of the said Steamboat Montreal, he diverted her from the use and employment to which she had been originally intended and had hitherto been used, and employed his own boat as such Ferry boat in lieu thereof, without the consent and contrary to the will of the plaintiffs and to their great injury and damage — It is further complained that the said Defendant having thus acquired the sole management and direction of the said Steamboat Montreal, had alone received all the profits and proceeds thereof, and had not accounted therefor to the

said

said plaintiffs although often demanded, to the damage of the said plaintiffs One thousand pounds, for which they bring suit &c.—

The Defendant pleaded for exception — peremptoire en droit to this action, that the same could not be maintained for the following reasons —

1st Because no action lies for having purchased the Shares of the other partners in the said Steam boat Montreal, it not being alledged to be contrary to the original contract of the association.

2d Nor can any action lie or be maintained by the plaintiffs against the Defendant for having built another Steamboat —

3d Because the plaintiffs do not shew by sufficient statement and allegation, that it was part of the original Contract that the said Steamboat Montreal, should not be employed in any other navigation besides that between Laprairie and Montreal. —

4th Because the said action is irregular and insufficient, the conclusions therein taken for damages being founded on facts alledged to have been committed by the Defendant, which have no relation or connection with each other and on which, if an action could be maintained it ought to have been upon such facts separately so as to enable the Defendant to answer thereto, and that the plaintiffs cannot demand damages resulting from so many different causes of action allowing even those causes of action if separately prosecuted, to be sufficient, which the Defendt does not admit. —

5d

5e Because according to the Statement in the Declaration of the said plaintiffs, they alledge that they are entitled to an account and partition of the profits of the partnership which they say exists between them and the said Defendant in the said Steamboat Montreal, but instead of instituting an action pro Socio, they have without any ground concluded for a sum of money, as well for their share of profits of the said Steamboat as for damages arising from the different acts stated in the said declaration to have been done by the Defendant, and thereby cumulating different demands founded upon different Causes of action which cannot be joined together.—

To this pleading a general answer was put in and issue taken thereon, and the parties were now heard upon the same.—

Per Curiam— It has been argued that an action for damages for an injury done to the partnership property, cannot be maintained by one partner against another, and that although a partner may be accountable for such damages, yet he is not liable to an action therefor during the partnership— but we are of opinion, that where there is a mis-use or mis-application of the common property this action will lie, for it might often be injurious and too late to wait the dissolution of the partnership to obtain a remedy— from what is said by Pothier in his Contrat de Societé, such action

can

can be maintained — we have only to peruse what he says in № 93. to be satisfied of this, and we also find the same principle held in the Repre vo Societé. p. 332. — It has also been said that the only action to which the plaintiffs were entitled in regard of the matters complained of, was the actio pro Socio, which is the only kind of remedy one partner can have against another — but if the authorities referred are to be relied upon as the law in this respect this action can be maintained, and so far it may be connected with the actio pro Socio — let us see what this actio pro Socio embraces in regard of the different rights and claims of partners against each other during the partnership — The Repre Vo Societé. p. 332. says — "Le contrat de " Societé etablit entre les associés diverses obligations " respectives qui donnent lieu à l'action appellée " en droit, pro Socio, que chaque associé peut exercer " selon les circonstances — ces Obligations consistent " principalement — 1o En ce que Chaque associé " doit mettre en Societé ce qu'il a promis d'y apporter " 2o En ce qu'il doit faire raison à ses associés de " ce qu'il a tiré du fond commun pour ses affaires " particulieres — 3o En ce qu'il est tenu reparer le " dommage qu'il a occasionné par sa faute à la " Societé." — hence we see that this action in reparation for damages done to the partnership is a branch of the actio pro Socio. — But we are too apt to consider the actio pro Socio to be merely

Poth. Société № 108 + au № 134.

merely an action de Compte et partage, and to limit its whole effect to this object, but this is an error, for although this be one of its principal objects, yet the action can be exercised in many other respects and for different other objects as above stated — see also Poth: Soc: № 135. — "cette
" action quant a son objet principal du partage
" du fond de la Société, ne se donne que lors de
" la dissolution de la Société, et c'est en cela que
" la loi dit, actione Societas solvitur, — Elle peut
" se donner quant aux objets particuliers, durant
" le tems que la Société dure — puta, contre celui
" des associés qui retient tous les gains faits par
" la Société, aux fins qu'il en fasse part aux
" autres — Comme aussi aux fins que mon —
" associé me fasse jouir des choses communes —
" aux fins que les associés contribuent aux reparations
" qui y sont à faire". — There can therefore be no doubt but that an action may be — maintained by one partner against another for any specific damage done by him to the partnership property or interest, so as to obtain reparation thereof, even during the partnership, and upon this principle the first part of this action can be maintained. — It is however said, that this part of the action, if at all maintainable should have stood alone, and ought not to have been joined with a demand for the issues and profits arising from the

said

said Steam boat. — There is no doubt, had the plaintiff joined an action of damages for a tort, with an action of account, it could not be maintained, because the conclusions of such actions and the Judgments to be rendered thereon are different, and they cannot be united — But this is not the case here — The plaintiffs says, that that the Defendant has not accounted to them for the issues and profits of the said Steamboat although often demanded, and that by this refusal a damage has accrued to them; it does not necessarily follow, that although the plaintiffs were entitled to their action of account against the Defendant that they could make no other demand in this respect, for if the Defendant has failed in the performance of an obligation to which by law he was bound, the plaintiffs had an option to prosecute him either for the performance of that obligation, or for their damages for the non-performance thereof — and in this instance the Plaintiffs have chosen the latter course, — they have thereby no doubt assumed a greater burthen of proof but this they must look to, as they had a right to conclude in damages upon this part of their demand, and had they done otherwise their action could not have been maintained, for a conclusion to render an account upon one object of the demand, and for damages on another, could not stand together in the same action — but here the whole sounds in damages arising from the alledged mis-conduct of the Defendant, which appears to be regular in point of form — Exceptions of Defendant dismissed with Costs.

No 1933

Barron & al. v. Watson & al. & Shaw v. Mason special bail of Defts mis en cause

This was a rule to shew Cause obtained by the plaintiffs on the bail, why the Recognizance of Bail should not be amended, by adding to the words André H. Barron in the title of the said Bail bond, the words, "& al:", and to the words André Henry Barron, in the body thereof, the words, "William W. Brown" and the letter, "s" to the word, "plaintiff" wherever it occurs as well in the title of the said bail bond, as in the body thereof. —

Mr Rossiter in support of the rule stated that the Court had the power to amend any of the proceedings had before it, when the error arose from the misprision of its officer — That in this case the error was of this description, the intention of the bail and of all the parties being that the security was given to the plaintiffs in the Cause and not to one of them only — cited, Com. Dig: Title. "Amendment," letter D. — Ib. letter. I. — 3 T. Rep. 329. — Rolls Abr. 198. — Cases in this Court where the principle has been recognized: Cartier v. Dundas. Oct Term 1823. — and Wilson Robertson & Co v. M. Donald 9 Febv. 1821. —

Mr Buchanan of counsel for the Bail, opposed the rule, and stated, that the cases cited did not apply to the Case before the Court. as there the application was by the party to be permitted to correct his own act, but in the present instance the plaintiffs apply to be permitted to amend the act of the bail, who do not wish for any amendment — The Recognizance here entered into is the act and contract of the bail which cannot be altered without their consent

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as the plaintiffs cannot be allowed to make a new contract for them — and we find no instance in the Courts in England where a bail bond has been amended without the consent of the bail — cites 1. Bos. & Pull. 481. 3 Taunt. 263. 5 Taunt. 814 — There is a Case in 1. Bos. & Pull. 31 — where the bail piece was allowed to be amended, but this is very — different from the Recognizance of Bail. —

By the Court — The decisions in the Courts in England have not been uniform on this subject the greater number of decisions is no doubt agt the amendment, while in many we find the Court maintaining its right to amend where the Justice of the Case required it. — In the case of Halliday & al' v Fitzpatrick. 4 Taunt. 875. It was held — "If the Bail acknowledge in a Cause, in " which the plaintiff is correctly named, and the " Officer by a misprision incorrectly names the — " plaintiff in the Recognizance of Bail, the — " Recognizance may be amended at the instance " of the bail, by substituting the plaintiff's right " name". — Here, it is true, the application was made at the instance of the bail, but their consent here ought not to be considered as determining the question, nor affect the power of the Court to order the amendment, because the demand was made by the bail in order to forward their own interest and to obtain their discharge — but we do not find that both parties consented to this, and it was therefore by the authority of the Court alone that the amendment was made — and if

the

the Court could allow it to be made at the —
instance or for the benefit of one party, it must
necessarily have the power to allow it at the —
instance of another — What is the language
of the Court in this Case as the ground of their
opinion? — "if there be a clerical misprision, it
" may be amended" — which is the true distinction
to guide the Court — In this Case the bail
piece was amended, by changing the name
of the plaintiff from Charles to John. —

It is evident, that in regard of amendment
even in cases where Bail are concerned, the
Courts have exercised a discretion according as
they found it tending to the furtherance of
Justice — Thus in the Case of Stevenson, vs
Grant and another. 2. New Rep. 103. the Court
refused to allow the amendment of a declaration
in Scire facias against bail who had failed to
surrender their principal, and this under the
particular circumstances of the Case — but see
the language of L^d. Ch. Just. Mansfield in —
giving the Judgment — "I do not feel the
" reason why mistakes in proceedings against
" bail should not be amended as well as —
" mistakes in other cases — persons must employ
" Clerks in these proceedings as well as others,
" and if mistakes arise I do not see why they
" should not be amended — but in the present
" case we are called upon to aid the plaintiff agt
" the bail, without sufficient reason for exercising
" the power to amend" — &c — In the Case of —

Rex

Rex. v. The Mayor and Burgesses of Grampond T. T. Rep. 699 — where the Court refused to allow an amendment of a return to a Mandamus — Ld Kenyon there says, — "I wish, that that could "be attained that Lord Hardwicke in the case before "him lamented could not be done, namely, that "these amendments were reducible to some certain "rules — but there being no such rule, each — "particular case must be left to the sound — "discretion of the Court — and the best principle "seems to be that, on which Ld. Hardwicke relied "in the same Case — that an amendment shall "or shall not be permitted to be made, as it will "best tend to the furthurance of Justice." —

In the Case of Sweetland v Bigglis & Brown, Barnes Notes. 4. — A Scire facias against Bail and all the proceedings thereupon were ordered to be amended by the record in the original action by inserting the word, Merchant, instead of Mercer, being the Defendants addition, after issue joined on, Nil tul Record. — And in the Case of Perkins. v Pelit. 2. Bos: & Pull. 275. A Scire facias against Bail in error was allowed to be amended by the Record of the Recognizance. Ld Eldon. Ch. J. there said — "We have no doubt "of the power of the Court to amend a Scire — "facias against bail, but as it does not appear "to have been the modern practice to permit "amendments in cases of this kind, we think "the bail in this case ought not to be taken by "surprise — At the same time we desire that "our refusal to amend may not be drawn into "precedent, since after this notice we shall not

"think

" think ourselves bound to abstain from exercising
" the power of granting these amendments in
" future" Yet we find in a subsequent case
that this opinion is controverted by L^d Alvanley
ch. J. in the Case of Fulwood vs Annis. 3. Bos: &
Pull. 321 — where he says. " The power of amending
" writs of Scire facias against bail is certainly
" discretionary, but the Court in the exercise of their
" discretion do not think proper to cure any irregularities
" of which the Bail are entitled to take advantage".
This is certainly not for the furtherance of
Justice and accordingly we find it has not been
followed as a principle of discretion in cases of this
kind, for in 1 Taunt. 221. Mann v Calow. & another
it is held, that in a Scire facias against bail,
if there be a failer of the record through a
misprision of the Officers of the Court, the Court
will permit the Recognizance to be amended — and
the Court there said, that it would be monstrous
if the omission of the Officer could be allowed so
as to render the acknowledgment of the Bail a
nullity —

In considering these different cases and
opinions this Court cannot hesitate in adhering
to that principle which is most consistent with
truth and Justice, and to allow the amendment
to be made according to the record and the intention
of the parties, nor can we see upon what correct
principle any distinction can be made between
the

the case of bail and any other Defendant in a Cause, in regard of what is to be considered as a ministerial error committed by a Clerk, which according 1 Raym. 182, may be amended at any time — This principle the Court has also recognized in the Case cited of Wilson Robertson & Co v McDonald which may be strongly assimilated to the present

Stra. 139. 1132. 1156.
Barnes. 7.
4 East. Rep. 175.

Rule absolute. —

No 1068.

Hoyle. — v Stansfield

This was an action on the Case for goods sold and delivered by the Pltff to one John Robertson on the guarantee of the Defendant —

The declaration was in the French language and contained the following Counts, or chefs de demande —

1st That on the 1st June 1826. one John Robertson of Quebec was indebted to the Pltff in a sum of £111. 2. 3 for goods sold and delivered to the sd Robertson at his special instance and request, and which in consideration thereof the said Robertson undertook and promised to pay to the said pltff —

2. A quantum meruit and assumpsit thereon by the said John Robertson for a like sum of £111. 2. 3 —

3. That a long time before, viz. on the

28th —

28th. day of April 1823 and since, the said Defendant became security (caution) for the said John Robertson to the said plaintiff for the said sum of £111. 2. 3 and personally bound for the payment thereof to the said plaintiff, as appears by his letter to the Plff dated on the said 28th day of April 1823, herewith filed —

That neither the said John Robertson nor the said Defendant have paid to the said plaintiff the said sum of £111. 2. 3. at the' of the demanded — Wherefore &c —

To this action the Defendant filed a defense au fond en droit, on which issue was taken and the parties heard thereon and it was held by the Court that this action could not be maintained against the Defendant, inasmuchas according to the statement in the declaration the Defendant was charged as the caution or security for a debt which did not appear to have any existence at the time the security is stated to have been given, and it is a principle that the obligation of the Caution cannot be greater than that of the principal debtor — That in this Case John Robertson appeared

Poth. Obl. No 370.

appeared to have contracted a debt with the Pltff in June 1826, and that the Defendant undertook in April 1823 to pay the debt which John Robertson owed to the Plaintiff, but it is not stated that at the time of this undertaking of the Defendant that John Robertson owed any thing to the Pltff, and where there was no debt due by the principal there can be no caution.— The Court therefore dismissed the action.—

Pothe. Obl. № 366.

Monday 19th Febv. 1827.

No. 197.
Careau. -
Desbleds.
& Bazinet Gar

This was an action en declaration d'hypotheque, for the payment of a mortgage debt due to the Plaintiff upon the lot of land possessed by the Defendant - The Defendant called in Bazinet as his garant, who pleaded that the Defendant was not bound to quit and deliver up the said lot of land to the plaintiff, until he had paid and reimbursed to the said Defendant all the improvements made thereon since the accruing of the said mortgage - To this plea the Plaintiff demurred and issue was taken thereon and were now heard - The plaintiff argued that according to the principle held by Loiseau and adopted by this Court in the Case of Kidd. vs Raymond. 4: April 1823. the possessor had no right to demand the reimbursement of such improvements from the mortgage Creditor, nor to obtain security for the same, but that the possessor must look to the price of the land when sold to obtain such reimbursement -

Mr Letourneux for Bazinet on the contrary contended that the Defendant was not bound to abandon the land until he had been indemnified either by the actual reimbursement of his improvements or security for the same - That this was the uniform opinion of all the law writers

writers and the Jurisprudence generally adopted by this Court — That the authority relied on from Loiseau does not apply, and even that writer — himself admits that his opinion is not followed in France — cites —

Ordce 1667. Tit. 27. art. 9. —
Bornier on dr —
1. Berthelot. Tr. des Evictions. sec. 6. Nº 9. p. 465
Lacombe. Vo Impenses —
Loiseau. du Deguerpt. liv. 6. ch. 8. p. 167. Nº 8. in fine
——————— liv. 7. p. 169. —
Basnage Tr. de l'Hypt. p. 406 —
Pothier —— dr —— ch. 2. part. 4. p. 440
Dic: de Ferriere. Vo Impenses —
Repre — vo Ameliorations —
N. Denizt — vo ameliorations —
Beaubrun v. Monjean & Garant — Judgt of 12 Febr 1827. —

By the Court —

The opinion generally maintained by this Court in all its decisions has been, that the possessor of an estate, who had made improvements thereon, was not bound to give it up to the proprietor or mortgage Creditor, before being reimbursed in the value of such improvements — but it has been said, that in the Case of Kidd v Raymond, we departed from this principle and refused to grant such reimbursement — In looking to the opinion there held, we find, it was a case under particular

circumstances

circumstances, and that the decision had in it — cannot be drawn into precedent as a general rule — The Case there was, that the mortgage was for a small sum of money compared to the value of the estate before any improvements were made upon it, and to have compelled such a Creditor, or a man with small means to reimburse to the possessor very large and extensive improvements, would tend to deprive such Creditor of all remedy — the Court therefore considered under such circumstances, that the mortgage Creditor ought not to be held to reimburse the improvments, nor to give security for that purpose, as the possessor who could afford to pay a large sum of money for an estate, and make great improvements thereon, must be considered to be better able to pay a mortgage so far below the — original value of the estate, than such Creditor to reimburse all the improvements the possessor had thought fit to make thereon, — That the right of a possessor to obtain the reimbursement of his improvements before being held to give up the estate, was a principle of equity introduced in favor of a possesseur de bonne foi, but it ought not to be extended so as to operate an injury or deprive a man of his right, and the Court therefore considered, that where the estate was more than — sufficient to satisfy the mortgage before any improvements were made thereon, the right to be reimbursed for such improvements could not apply — This was an equitable construction of the law in the particular case, according to what is said by M. Prost de Royer v.° "Ameliorations" — but in the Case before us, it is the general principle that is relied on, and we must therefore maintain the plea of exception of the Garant in this respect. —

No. 1259.

McCallum. — vs. — Mathews. —

This was also an action en declaration d'hypotheque, for a large sum of money. —

In this case the Defendant pleaded the exception dilatoire, that he ought not to be held to abandon the property mortgaged before he was reimbursed in the amount of the improvements he had made thereon — This was contested by the plaintiff who contended that the Defendant was not entitled to this benefit, as he had a knowledge at the time of his purchase of the said property, that the mortgage in question existed — It appeared that a large tract of land in a wild and uncultivated state had been purchased by one Douglass from the plaintiff; that this land had been parcelled out and sold by Douglass to a great many small farmers or proprietors, with a view of settling and improving the same — That the Defendant purchased one of these lots or farms, had cleared a part of land, had built houses and made considerable improvements thereon, but that at the time of his purchase he had a knowledge of the existence of the mortgage in question. —

The Court were however of opinion that the Defe notwithstanding his knowledge of the mortgage was entitled to be reimbursed in his improvements, that the plaintiff ought not to benefit by the labor and improvements of the Defendant in this case on many accounts, because by the improvements made on the land, the value of the soil had been encreased, beyond what it was worth at the time the mortgage was contracted; that it was an object of public interest to promote the improvement of the uncultivated lands in the Province, and

that

that the individual who expended his means and labor in this respect ought to be protected as far as the law would allow — and that in this respect the public interest ought to precede the particular right of the plaintiff — that although the Defendant here had a knowledge of the mortgage, yet he had been induced to expect that by the other lots and farms cooperating, his share of the Plaintiff's claim would have been proportionately small, whereas the whole of that claim was now demanded of him by the present action — It was therefore ordered, before adjudging upon the said improvements, that the nature and extent thereof should be examined and ascertained by Experts. —

No. 1430.

Auger. — vs. — Piette val

Action of account, of the property of the Community that subsisted between the Defendant Marie Josephte Piette and Solomon Mittleberger her late husband

The Defendants appeared but did not plead to the action, and the Cause having been inscribed for hearing ex parte, the plaintiff prayed the Court for an Interlocutory Judgment ordering Defendt to account as demanded. —

The Defendants objected, viva voce, that as the principal part of the plaintiffs demand was — founded upon a Don mutuel in his marriage contract with Sarah Caroline Mittleberger his late wife, no part thereof could be granted inasmuches the said marriage contract had not been enregistered as

as by law required, and was therefor null and void — That although this nullity had not been pleaded by the Defendant, yet that the Court was bound to take notice of it, ex officio, it being a — nullité de Coutume, of which the Defendant could avail herself at all times and in such way as she might see fit, and that a plea in this respect was unnecessary, the bare suggestion to the Court of the nullity, was sufficient to reject this part of the — plaintiff's demand. — cites. 284e art. of the Custom of Paris — Tr. des nullités de droit par Perrin — ch. 2. sec. 1. p. 53. — Repre vo Nullité. p. 251 — Petit Comte de Fer. sur la Cout: de Paris sur l'art. 284 — p. 252. 253. Tr. des Donations par Pothier. p. 249. — 253 — 257. 267 Tr. des Donations entre vifs par Ricard. tom. 1e premie partie ch. 4. sec. 3. p. 284 — 288 à 289 — Lacombe vo Insinuation. p. 361. art. 20. —

The plaintiff on the contrary contended, that the Court could not take notice of a nullity not apparent on the record, and that the Defendants could not avail themselves by this kind of viva voce suggestion of any thing which did not so appear — That the allegation of nullité was a plea of exception and must be pleaded according to the course and practice of the Court, to entitle the Defendant to the benefit of it, and it was a plea grounded on a fact, which the plaintiff had a right to controvert, but without such a plea the Court could not raise the objection nor supply the defect of the plea, any more than it could raise the objection of prescription to the

demand

demand of a plaintiff which had not been pleaded by the Defendant — cites. 3. Grande Coutume p. 1156. art. 14. — Poth. Tr. des Don. entre vifs. p. 473. Repse v° Don: Mutuel. p. 149. 3e partie. — Lacombe v° Don Mutuel. p. 205. — Id. v° Insinuation — Denizt. v° Don Mutuel. N° 19. & 20. — Bretonnier. Quest: de Droit. v° Donation. — Poth. Tr. des Donations N° 172. p. 276. — Repse v° Nullité. p. 250 — citation de Dunod — Dic. des arrets. de Brillon. v° Insinuation p. 812. —

The Court held, that nullities were of two kinds, one of a public and general nature, of which they were bound to take notice without being pleaded by the parties; the other of a private or particular nature, which interested only individuals, and of which the Court could not take notice without being regularly pleaded. That the nullity of the Don Mutuel stated by the Defendant was of the later kind, and ought to have been proposed as an exception to the plaintiffs demand, the silence of the Defendant in this respect must be taken against him, and the Court cannot supply the defect. —

The Court therfore ordered the Defendant to account as demanded —

See — Repse v° Nullité. p. 249. 250. —
2 Jousse. Justice Civile. p. 26. 27. N° 57. 58.
1 Pigeau. p. 399. 400. —
1 Bornier. 279. —
Perrin. Tr. des Nullités. p. 53. 54.

№ 245.
Card & al'.
vs
Geo: Astor

The Defendant was arrested on a Ca: ad respondendum to answer the Plffs on a demand for £500 – founded on a Judgment of the Supreme Court of the State of New York – To this action the Defendant pleaded a discharge from personal arrest to which he had become entitled by a surrender of his property under the laws of the State of New York – On this plea issue was taken by the plaintiffs and the Cause was inscribed for hearing – The day previous to that appointed for hearing, the Defendant moved for and obtained a rule on the plaintiffs to shew cause why he, the said Defendant should not be permitted to file a new plea, grounded on matter which had accrued since the filing of his plea now on record, namely, that since the filing of the said plea, the Judgment of the Supreme Court of the State of New York upon which the present action is founded, hath been vacated and rendered void as to any operation against the Defendant

Mr O'Sullivan for the plaintiffs shewed Cause against the rule, and contended that the documents upon which this rule had been obtained should be rejected from the Record, and the rule discharged, as they shewed a fraud on the part of the Defendt which he wished to impose upon this Court, as these documents had been made up by connivance between the Defendant and certain of his Creditors without the knowledge or participation of the Plaintiffs since

since the institution of the present action, in order to withdraw the Cause from the Cognizance of this Court, by a discharge from the debt — but such a course of proceeding cannot be allowed because after the Court was sized of the Cause, no authority of another Court or Jurisdiction can subsequently to interfere or to divest this Court of its power over the Cause and in proceeding to give Judgment according to the demand before it — ales case of Chevallier. v. Lynch. Doug. Rep. 170. —

Mr. Gale for the Defendant, all that the Court will require upon this rule is to shew that something has accrued since the filing of the plea, which is material, and of which the Defendant has an apparent right to avail himself as a bar to the plaintiff's action — If the Defendant used this as a means of delay it might be refused, but the document upon which the rule nisi has been obtained is — admitted, so that the fact stands before the Court that the Defendant is discharged from the very debt now demanded — this fact being admitted the Court will not refuse to the Defendant an opportunity to state it in a regular mode by plea, that he may obtain the benefit thereof by the Judgment of the Court, nor will the Court now determine whether the fact so admitted is or is not a sufficient plea to the action until issue shall have been taken thereon, and the

question

question come regularly before it. — That the Case cited by the Counsel for the plaintiffs will not apply here, on the contrary it is the lex loci which must govern, and which may be — assimilated to a Contract between the parties — cites. Pothier de la Saisine. P. 70. —

The Court made the rule absolute. —

No. 2037.

De Longueuil vs Brosseau. —

Action by the plaintiff as Seigniress of the Seigniory of Longueuil, against the Defendant for 15 years arrears of Cens et rentes due by him on a lot of land in the said Seigniory. —

To this action the Defendant pleaded, that on the 9th July 1801, the lot of land in question was not conceded but was in a wild & uncultivated state, and that David Alex^r Grant the late husband of the plaintiff, and as such entitled to make grants of lands in the said Seigniory as by law required, refused to concede the said lot of land to the said Defendant, a titre de simple redevance, upon the demand in this behalf made by the said Defendant but that the said D. A. Grant with a view to sell the said lot of land at and for a large sum of money, contrary to law, made a pretended concession thereof a titre de Cens et rentes to one Louis Honoré Joubert, who lent his name for this in connivance with the said D. A. Grant to assist him to elude the requirements of the law, in this behalf, and to sell the

said

said lot of land for a large sum of money over and beyond the usual annual revenue stipulated and imposed thereon, and with this view and intent the said Lo Honoré Joubert afterwards on the 25th day of July 1801, by a certain deed made and executed before Deguay and his Colleague public notaries, sold the said lot of land to the said Defendant, for and in consideration of the sum of one hundred pounds, which was then and there paid by the said Defendt to the said Louis Honoré Joubert on account of the said D. A. Grant, the said lot of land being besides charged with the payment of the seigniorial rights and revenues stipulated in the said pretended deed of Sale, the said Defendant averring that as well the said deed of Concession as the said deed of Sale was and is a pretended deed and made only to avoid the requirements of the law, and to enable the said D. A. Grant to sell the said lot of land, for which purpose he the said Louis H. Joubert lent his name, the said D. A. Grant having by means of the said pretended deeds effected a sale of the said lot of land to the said Defendant — and the said Defendant saith, that the said D. A. Grant having thus sold the said lot of land contrary to the requirements of the law, he the said D. A. Grant in his lifetime was bound, and the said plaintiff since his death is now bound to restore and pay back to him the said Defendant the said sum of one hundred pounds, and that the said lot of land ought to be united to the Domain of the Crown, by reason of the said D. A. Grant having refused

to

to make a Concession thereof to the said Defendt but having on the contrary sold the same in manner as aforesaid contrary to Law, and therefore the said plaintiff cannot demand or have the seigniorial rights and revenues by her demanded by the present action. — That in the Term of October 1811. he the said Defendt instituted an action in this Court agt. the said plaintiff, and the heirs of the said late David Alexander Grant and also against the said Louis Honoré Joubert in order to have the said lot of land re-united to the Domain of the Crown, by reason of the Sale thereof made to him in manner as aforesaid, and the said Plff and other heirs of the said D. A. Grant condemned to restore and reimburse to him the said Defendant the said sum of one hundred pounds and also the sum of £8. 6. 8 paid by the said Defendant for lods et ventes upon the aforesaid pretended Sale so made to him by the said L. H. Joubert, and that in future the said L. H. Joubert should hold the said lot of land of the Crown, and pay the rents and revenues to accrue thereon to His Majesty's Receiver General of the Province, the whole with Costs, as more fully appears by the declaration of the said Defendant filed in the said Cause, a copy whereof is now herewith produced, which said action so instituted by the said Defendant is now pending and undetermined in this Court, and in consequence whereof the said Defendant contends that the said plaintiff cannot have or maintain her present action against him. —

To

To this plea, the Plaintiff answered that the same was insufficient in law and could not be maintained by the Defendant, because that the Court here could not take cognizance of the matters aforesaid pleaded by the said Defendant nor of the action by him instituted in manner as aforesaid, inasmuchas the cognizance of the matters and things so pleaded by the said Defendant, belonged to the Governor, Lieut. Governor and Interdant of the Province of Quebec when under the Government of the King of France, and to the persons now holding those offices in the Province of Lower Canada part of the said Province of Quebec, and not to this Court.— That the pretended law of this Province pleaded by the said Defendant, was not in force in the year 1801, but long before that— period had become obsolete and fallen into disuse (en desuetude) — That in the year 1801. the said Defendant had no right to obtain a Concession of land in the said Barony of Longueuil, the whole of the said Barony, containing Sixty thousand acres of land and upwards, having been before that time granted and conceded to the several Censitaires of the said Seigniory, save and except about five thousand acres thereof.— That the said lot of land now possessed by the said Defendant, hath not been re-united to the Domain of the Crown, nor can it be so re-united without the Judgment of a — competent Court to this effect, but still forms a part of the Censive of the said Plaintiff — and that the Defendant is bound as her Censitaire holding and possessing the said lot of land to pay to the said Plaintiff the rights and revenues by her demanded by her present action — And lastly that all the matters and allegations in the plea of exception aforesaid pleaded

pleaded by the said Defendant are untrue and not founded in fact and in law.—

On this answer the Defendant by his replication joined issue, and the parties were now heard thereon

Mr Bedard for the Defendant moved that this action should be joined with that which the Defendant had instituted against the Plff as mentioned in his plea of exceptions, as both actions regarded the same lot of land — That the matters pleaded by the Defendant were sufficient to bar the plaintiff's action, and in the action so instituted by the Defendant against the plaintiff, he the Defendant had been admitted to prove the facts alledged by him which are the same as those stated in his said plea of exceptions, and the plea to the jurisdiction of the Court set up by the plaintiff in that Cause was dismissed. the Plaintiff has reiterated the same plea in answer to the Defendants exception aforesaid but this plea must also be dismissed and the Defendant allowed to make proof —

Mr Sewell for the plaintiff — The two Causes cannot be joined being for different objects, nor ought the plaintiff to be delayed in her suit by reason of the matters pleaded by the Defendant which are no bar to the present action — That this Court cannot take cognizance of the matters pleaded by the Defendant, nor can it make a conveyance of the lot of land in question to the Defendant — That under the French Government there was a special authority vested in certain

persons

persons by the Crown, under the arret of 1711, to take cognizance of these matters, but this law has fallen into disuse, and there is no such authority now in existence as that mentioned in the said arret, for carrying it into execution.—

M Bedard in reply stated that this Court had in several instances determined that they had jurisdiction in these matters, and referred to the decisions had in the Cases of Brosseau v. De Longueuil — Terrien v. De Longueuil, and Cartier v. Delongueuil. — Lavoie v. De Longueuil. 1820.

The Court said, they considered the Defendants plea, more in the nature of a dilatory than of a peremptory plea, as it stated certain facts and allegations against the validity of the Contract, under which the lot of land in question was — conveyed to him, and in consequence whereof the Seignior was deprived of his right, which had vested in the Crown, but upon this part of the plea, the defendant takes no conclusion, but goes on to add, that for the same causes and matters stated in his plea, he had instituted an action against the — plaintiff, which was still pending, and therefore prays that the plaintiffs action be dismissed — But whether this can be considered as a dilatory or as a peremptory plea, it is equally insufficient, because the plaintiff cannot be barred from the prosecution and recovery of her rights due to her as Seigneress in possession upon a lot of land within her Seigniory, which the Defendant has hitherto held and possessed subject to those rights — nor will the Court so far presume upon the illegality

of

of the contracts between the parties as to delay the plaintiff in her suit by joining it with the cause instituted against her by the Defendant

Plea of exception pleaded by Defendant dismissed with Costs. —

No 1494

Surault & al. vs Benj.n Esty.

The plaintiffs in this case sue in their respective qualities of Widow and heirs of René Aubin, to recover the balance due of the price of a lot of land, which the said René Aubin in his lifetime sold and conveyed to the Defendant by deed dated 21st Oct. 1799. — The Defendant did not file a plea, but at the hearing of the Cause objected to the evidence which has been offered, of the death of the said René Aubin as being insufficient and incomplete to entitle the plaintiffs as his representatives to recover in the present action. In every case it is an established rule, that the best evidence which can be had, must be produced, and in this case the Court thought that the rule had been observed, and that the only evidence in the power of the plaintiffs, had been produced, and under all the circumstances no more could be required. — It is proved that the deceased René Aubin was a voyageur, and engaged and employed as such in the Indian territory, one of his companions, now 73 years of age, proves that he was present at his death and burial, which took place, it appears, on the banks of the river Mississippi in September 1801, now nearly 26 years ago — this is positive and direct evidence of the fact, and much less after such a period

of

of time would have been sufficient, and of itself would have raised ~~exceda~~ a strong presumption of the death of Aubin — There is however another witness, who says, he saw Aubin set off in a — Canoe with others for the Upper Country, and that on the return of the Canoe which he thinks was in 1802, not seeing Aubin among the rest, he — enquired what had become of him, when they one and all informed him, that he was dead, which information he says, was subsequently confirmed by other voyageurs, and by a letter — from Aubin's Son — this witness added, that all the voyageurs of that day, except the other witness, were then dead — There is therefore sufficient, and as complete evidence of the fact as could be procured, nor has it ever been considered necessary on such occasions, to prove that no — burial registers were kept in the Indian territory. Had Aubin died within the limits of this Province the Court would have required a certificate of the fact from the Register of burials, or proof of the non-existence, loss, or destruction of such Register, but in this Case it would be preposterous and unnecessary to require any such evidence — The testimony of the Witnesses stands unimpeached and there is no room to entertain any doubt as to the death of Aubin. —

Judgt. for the Plaintiffs.

No. 31.

Penn. v. Carroll et al

—By the Court—

The motion made in this cause to quash the writ of Capias therein issued, on the ground that no copies of the declaration had been served on the Defendants personally or at their domicile, (altho' in point of fact, such copies were filed and deposited for them at the office of the Prothonotary of this Court, in conformity to, and as authorised by a rule of practice of this Court,) is with some small variance, less favorable for the Defendants in this action, than in the action of Redpath v. Hunter, decided some time ago, which was nearly of a similar nature — after the full explanation which was then given of the motive of the rule of practice, the legality, propriety, and benefit of which, we had not then, nor have we now even the shadow of a doubt, we did not expect that a rule which has now prevailed and been acted upon for a period of upwards of fifteen years without complaint, an objection would have been again raised in the face of one of our own rules. — We would have rather expected, that if in the estimation of any gentleman of the Bar, a rule of this Court could be considered, either as injurious or illegal, which is the strongest case we can suppose, some representation to the Court would have been made, to obtain a revisal, modification or a rescision of the rule, but we certainly cannot applaud an attempt to entrap a bona fide Suitor in the observance of the rules of this Court, nor justify any decision that would

countenance

countenance such an attempt, and much less so in regard of a rule, the benefit and justice of which are generally felt and acknowledged — We understand that the Court of Appeals has, in the last November Term, reversed the Judgment of this Court in the case of Redpath v Hunter (and it is matter of regret that thereby an honest creditor has materially suffered) we cannot however suppose, that the Court of Appeals, can have reversed the Judgment in question upon the ground of the rule of practice being illegal, or of any power existing in that Court indirectly to rescind the rules of practice of this, for what they cannot do directly, they cannot do indirectly; 1 Wilson. 162. 4. Burr. 2572. for That Court must have known, that the practice of the Court was the law of the Court, and as such the law of the land, and it is well known that in England, the practice of the different Courts in Westminster Hall, vary in many particulars, yet quoad these Courts, the practice of each is considered the law of the land, and so must be recognized by the Superior Tribunals — Such also we know to have been the case in France, and more particularly prior to 1667, when legislative authority interposed to render the practice uniform in all the Courts — Some other ground therefore must have existed for the reversal of our decision in the case of Redpath v Hunter, and as every case must be principally governed by its own peculiar circumstances, we must presume that such circumstances must have influenced the Court of Appeals in their Judgment on that Case; for had the legality or propriety of the Rule of practice in question, been doubted, we should have expected that some communication upon the subject, would have been made to us, on the part of the Judges of that —

that Court, and some remedy found to prevent a sacrifice of those interests which are now attempted to be destroyed under the pretended cloak of a — judgment of the Court of appeals — whatever that Judgment may have been, the process in this case was issued before it was rendered, and was with the declaration served in the manner directed by our rule of practice — Can we then consistently say to the plaintiff in this Cause that his proceedings have been irregular and dismiss his action, when in good faith he has acted in strict conformity to that rule of practice ?— the thing is impossible it would have the same effect as an ex post facto law, calculated only to entrap, and fraught with injustice — and we can now only say upon a review of our Rule, that unless the Bar, for whose accommodation and that of their clients the rule was made, shall apply for its rescision, we will not rescind it, and the less so, as it was made by our predecessors, has been acted upon now fifteen years, and we see nothing to doubt the authority that made it, inasmuch as it has been in the most express terms given by the — Legislature, and the rule itself is a just and beneficial one. — But in this case we consider that the Defendants have not one just ground for their application, which is made in bad faith, inasmuchas in conformity to the notice regularly served upon them, they, or their — attorney went to the Prothonotary's office and took up the copies of the plaintiffs declaration which had been there deposited for them, whereby they have admitted and acquiesced in such service,

nay

nay more, an appearance was filed for them on the return day absolutely and without reserve, and if we are to follow the principles of practice in the French Courts, such an appearance was an admission of due service, for in the present Case it is to be observed, that the objection is not, that service was not made, but that it was not made in a certain mode or way — inasmuchas in point of fact, the copies of the declaration served and received by the Defends though not through the ministry of the Sheriff as in ordinary Cases, but at the office of the Prothonotary as provided by the rule of practice, had there been any surprise in the Case upon the Defendants, or that any thing had taken place from which any just ground of complaint could have been offered, any thing tending to deprive them of any just means of defence, there indeed they might with success apply to this Court, but in the present instance they have not the smallest ground for complaint — we conceive however that the plaintiff has ground of complaint inasmuchas upon the non-payment of an alimentary allowance granted to the Defendants during the last vacation, the Judges considering that they could not discharge the Defendants before the return of the writ, the Defendants were by mutual consent of the parties, discharged from Custody, upon condition that they would

appear

appear and defend the action which they now say they are not bound to answer. — Bound to administer the law as we find it no consideration can or will influence us in the discharge of our duty to vary from that which we conceive to be just and right, we wish not to controul the free opinions of others, all we desire is, that no attempt be made, to compel or induce us to do that which we conceive to be wrong or unjust, and we therefore do not hesitate in — dismissing the Defendants motion. —

Tuesday 20th Febr. 1827.

No 1491.

Dom. Rex.
vs.
Gale & others
Justices &c.

On Certiorari to the Justices, touching a Judgment rendered by them at the instance and prosecution of the Inspector of the parish of St Roch, agt an inhabitant of the one said parish — It appeared that a repartition had been made by the Sous-voyers of the said parish of the necessary materials to be furnished by a certain number of individuals bound to repair a certain bridge — The Defendant refused to furnish his quota of materials, and in consequence an action was instituted agt him by the Inspector before the Justices, by which it was demanded that the Defendant should pay a certain sum of money as the value of the said quota of materials he was bound to furnish, or that he should furnish the same in kind — The parties having been heard before the Justices, they gave judgment against the said in the terms of the demand and condemned him to pay Costs.

Mr Bleury on behalf of the said who prosecutes on the said Writ of certiorari, stated three grounds of complaint against the Judgment of the Justices.

1st

1st That the Justices had no jurisdiction in this case, the prosecution before them being for the recovery of money in the nature of damages for the value of certain materials which it is alledged the said was bound to furnish for his quota towards the repairs of the bridge in question —

2d That the Inspector shewed no legal repartition to entitle him to call upon the said to furnish any materials and that if any action could be brought in this respect, it belonged to the Sous-voyer and not to the Inspector

3d That the said repartition is defective and insufficient, the same not having been signed by a majority of the Sous-voyers of the parish, and having been made and signed on a Sunday which is illegal —

Mr Cherrier for the Inspector contended that the Judgment rendered by the Justices was legal — that they had Jurisdiction — that the Inspector had a right to prosecute the action before them — and that the act of repartition was in all things legal and sufficient —

The Court on considering the Road act or Prov. Stat. 36. Geo. 3. ch. 9. were of opinion that the Justices had no authority

or

or jurisdiction in this Case under that Statute That the only instance where a recovery of money assessed upon the parishoners could be had before them was under the 19th Sec. of the said Statute - but this limited to two cases - when money is wanted to pay artificers for conducting the work, or to purchase materials for making - In this case the repartition made by the Sous-voyers was not in money, that was not the thing here required, but in materials, which was the only thing the said was bound to furnish - That the jurisdiction given to inferior Courts and Judges cannot be extended from one Case to another, nor will any presumption raise it, it must be clearly given, and in all the said Statute no such power is given to the Justices as that of condemning a party to pay the value of the materials he is bound to furnish for the public service - The Justices may condemn a party in a penalty for a neglect of any duty under the Statute, and even condemn him in certain Cases to reimburse what has been expended by the public officer in doing the duty which a party was bound to do, but for this there is special authority, but in the Case before us there is none -

The

The Court therefore without considering the other grounds alledged by the prosecutor quashed the Judgment of the Justices —

N°. 984.

Bourdon. v. Assurance Co

This was an action on a policy of Assurance against fire, the objects insured, were two wooden buildings, consisting of a dwelling house and outhouse and a Church Organ, all stated to belong to the plaintiff. To this action several matters were pleaded, fraud, concealment, and a general denegation of all the facts stated in the declaration. — Nothing appeared in evidence to impeach the conduct of the plaintiff in the transaction and the principal facts stated in the declaration were proved by him, it however appeared, that the Church Organ which he had ensured as his own property to the full extent of its value value, viz^t. £300 — belonged to the partnership which subsisted between him and one — Zwigroff, in which the plaintiff had one — third. — It was therefore contended on the part of the Defendants, that the plaintiff had not given a true description of his property. and that the evidence varied from the fact stated in the declaration, in regard of the organ, and that the plaintiff on the present policy meant to ensure an interest which did

did not belong to him, and to derive an undue advantage thereby, that the plaintiff having in this respect deceived the Defendants it ought to vitiate and annul the whole policy & cited. Poth. Contr. d'Assurance № 191. N. Denis^t V^o Dol. № 6. Rep^se v^o dol. - p. 57. - That concealment and misrepresentation even by mistake may be proved under the general issue and will avoid the contract. 2 Selw. N.P. p. 1030. - That it was necessary the party should have an interest in the thing ensured. 2. Pb. on Ev. p. 53 & 58, and a variance as to the interest in the policy is a cause of non-suit, it being considered material to know the true proprietors - cited. Park on Ins: p. 179. 185. 1 Black Rep. 463. 1 Comy. on Cont. p. 38. 3 Bur. Rep. 1910. 14 East. R. 494. 3 Taunt. 37. - 1 N. Rep. 17. 2 Marsh. 46. 6 Taunt. 338.

The Court however held that there did not appear any concealment or misrepresentation to vitiate the Contract, nor any variance in the proof to non suit the plaintiff in this action - It is said that it is necessary that the ensured should have an interest in the thing, and that this interest should be truly described, this must be admitted, - all this has been complied with, the plaintiff had interest in the organ in question, which he could ensure, but it was not necessary that he should describe this interest as that of a partner, it was enough that he had an insurable interest, the extent of it could be ascertained only by the evidence. - That the authorities relied on by the Defendants in regard of the variance apply only where there is a variance between the interest of the party as described in the declaration and that stated in the policy, that variance

Page. v. Fry 2 Bos: & Pull. 240.

Carruthers v. Shedden 6 Taunt: 14. -

is

5. Taunt: 107. Cohen. v Hannah
16 East. Rep. 141 Bole v Ansley.

is fatal, but here the interest described in the declaration is the same as that stated in the policy, the only matter here relied on as a variance is, that the interest insured was an individual interest, & that proved, the interest of a partner. but this is no variance, it is merely an assurance for a greater interest than the plaintiff had, but this cannot injure the insurers, because the Pltff cannot recover for more than the extent of the interest proved, while they have benefited by the premium of the whole sum insured - all the authorities of law both French and English seem agreed on this - see 1 Emerigon. ch. 2. Sec. 7. p. 55. - 2. Valin. liv. 3. tit. 6. art. 3. p. 34. - 2. Pardessus. p. 363. - In this case the interest of the Pltff in the organ in question has been proved to be one third, and the value of the whole to have been £300 - the Pltff is therefore entitled to recover £100 on this object, and £200 - for the value of the two houses which were destroyed, and for which Judgt was accordingly given. -

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No 1221.

Kauntz -- v Edwards & al. -- --

This was an action to recover from the Defendants, who were stated to be the Stewards appointed for conducting certain horse races, a certain stake deposited in their hands in order to be paid to the winner of the race, and which the plaintiff hereby claimed as having won the race. -

By

By the Court.—

The first thing to be here considered, is whether in law an action of this kind can be maintained, that is, whether the contract between the parties, is not to be considered as a gaming Contract, and as such, illegal and void?— If we look to the laws of England, we should not hesitate to determine, that the Contract was legal, for we find that bona fide horse racing is there legalised and regulated by Statute, and we see in the books where actions have been brought and maintained thereon. but we must look to the law of this Country to guide us on this question, and by it, if we consider the Contract here between the parties to be in the nature of a gageure, we shall in like manner be enabled to say, that there is nothing either against law or good morals, which ought to vitiate it.— In the Repe vo Gageure, it is said, "On fait des "gageures sur des choses dont l'execution depend "des parties, comme de faire une Course, ou sur des "faits passés, presens, ou à venir, mais dont les parties "ne sont pas certaines".— "Les gageures n'ont été "admises ou rejettées en Justice qu'autant que l'objet "en etoit bon ou mauvais, et que la Cause en etoit "honnête ou deshonnête".— All the best authors who treat on this subject are of this opinion, and although actions on Contracts of this kind are not favoured in law, yet they are allowed— This therefore being a lawful bet or Wager depending upon the event of a horserace, the plaintiff as the successful Candidate says, he was entitled to the monies deposited in the hands of the Stewards, which they held for the benefit of the winner of the race.—

13. Geo. 2. C. 19
18. Geo. 2. C. 34

If

If the point in contest between the parties, were now to be decided according to the usual principles which obtain in a Court of Justice, we should have little hesitation on the Judgment to be given — but we must see that we have jurisdiction and whether we ought to interfere in matters of this description, where the parties have submitted to a jurisdiction of their own chusing. — Where parties cut out an amusement of any particular description which the law neither protects nor condemns, they may establish such rules for regulating this amusement as they may see fit, and unless there be fraud, or some undue practice used in the application of these rules, Courts of Justice will not interfere, nor lend their aid to either party — so in all cases of this kind, as of bet or wager — "il n'y a point d'autres regles "pour les gageures que les Conventions des personnes "qui les font." — N. Denizt. Vo Gageure. No 7. — and in this particular case, it was a rule established and agreed upon, "That all disputes were to be "settled by the Stewards, whose decision should "be considered final." and as the dispute touching the winning horse, necessarily fell within this rule, the decision of the Stewards must determine it. — What have they decided? — "That the horse "Sir Walter, came in first the third heat, but was "disranced, in consequence of his rider falling or "getting off, after he passed the winning post, before "he came to the proper place to dismount, then and "there to weigh, according to the Rules of racing." — What then has this Court to do with the Case? — The action would seem to be founded on the principle that the decision of the Stewards was

wrong

wrong and unjust, and this Court is appealed to, to do that Justice which the Stewards ought to have done — but can we revise their decision, however wrong it may be? if the parties have made a law for themselves, shall they not be bound by it? Is it for this Court to take up the book, called the Racing Callendar, and say that the Stewards have not decided according to the Rules laid down in that book? In such matters, a Court of Justice will not interfere, and we believe it was never known, that in England, where horse racing is so frequent, an action of this kind was ever brought to revise the decision of the Stewards on any Horse Course in that Country — Had the Stewards refused to decide, had they retained the money deposited in their hands from any unjust motive, or had their decision been obtained by undue or unfair means, in such cases there might be a remedy at law, but this is not pretended here, and we therefore think that the action cannot be maintained. —

Action dismissed with Costs. —

No. 990.

Bell. — vs. Stuart. —

This was an action instituted by the plaintiff as a mason, against the Defr for certain work & labor &c — The declaration contained several Counts. 1st For work and labor done and materials furnished, at the instance and request of the Defendant — 2d for goods sold and delivered & 3d. For money paid

and

and advanced + and &c For an account settled.

To this action the Defendant pleaded the plea of prescription of one year according to the 127 art of the Custom - to which plea the plaintiff demurred and the parties were now heard on the Case -

The Court held, that where the artisan furnished his labor only, there the prescription of the year - applied, because the Contract was then merely a louage d'ouvrage, but when he provided materials for doing the work, as in the present case, it then became a Contrat de vente, and here arises the consideration how far the tradesman thus selling an article in the way of his trade, may be considered a trader, and the transcation commercial +

According to the French Jurisprudence all artisans and persons dealing in any trade or mystery, were to a certain extent considered as merchants, and as such were amenable to the Jurisdiction Consulaire this extended however only to those instances where they purchased articles to sell again in the way of their trade or dealing, and not when they purchased for their own personal use, or where they sold articles to another tradesman for the purposes of his trade or dealing and not for his personal use - But according to the rule in England, we hold, that whenever the tradesman, or dealer, sells any thing in the way of his trade to any other individual, whether to be traded with, or for private use, it is a Commercial transaction, and accordingly we have always considered the Sale by the merchant taylor, the baker, brewer, and all others of this description, to be commercial, and have allowed their demands to be proved according to the rules of evidence of the laws of England - The demand of the plaintiff here as stated in his declaration

is

is of this description, and therefor the plea of prescription cannot be admitted, as he will be allowed to substantiate his demand according to the usual course of evidence in such Cases —

see. Repre vo Louage. p. 46. —
Pract: des Consuls - p. 12. & p. 262. -
Boucher. Institt Comm. ch 3. p. 16. No 16. No 93.

April Term 1827.

Thursday 19th April.

No. 1055.

M. Nider & al
v
Bonner.

This was an action founded on a mercantile guarantee, to recover from the Defendant a sum of £394. 12. 9 for goods sold and delivered by the plaintiffs to one Kenny, on a letter of credit given by the Defendant, in the following terms.—

"Messrs A. L. M'Nider & Scott"

"Gentlemen."

"Mr Asa Kenni informs
" me, that he wishes to purchase some goods of you
" on four months credit, you may if you please—
" deliver him what goods he may want, at this
" time, and I will see you punctually paid at the
" time he may agree." "Samuel B. Bonner."—
" Montreal 4 July 1825."—

In consequence of the said order, the Plaintiffs sold and delivered to the said Kenny, who was a retail Shop-keeper in the Country, sundry goods amounting in all to the sum of £394. 12. 9. in the following manner, viz.

On

On the 8th July, as per acct. delv'd.			£85. 11. 10.
12 d°	d°		129. 7. 2
13 d°	d°		28. 13. 11
16 d°	d°		87. 0. 7
20 d°	d°		63. 19. 3
			£394. 12. 9

Some time after the said goods were delivered and before they became due, Kenny absconded, leaving a few goods in his Store which were attached by his creditors, but which would give but a very small dividend upon the debts he owed.—

The Declaration in this case contained a great many Counts in assumpsit, with the usual money Counts, and concluding to the payment of the above sum of £394. 12. 9— Plea – the general issue.—

At the enquête the plaintiffs proved the sale & delivery to Kenny on the above order of the Defend^ts goods to the amount and in the manner above stated.—

William Kenyon, the clerk of the Plaintiffs, stated in his evidence — That about the 7th July 1825, James Scott, one of the plaintiffs came into the Store with the said Asa Kenny, and told the witness to let Kenny have what goods he wanted. That Kenny in consequence proceed to examine the goods in the Store, and selected therefrom a certain quantity at the prices stated by the witness, observing at the same time that he would trunks to receive and take away the said goods, and as the plaintiffs had not at the moment certain descriptions

of

of goods which he required, he said he would call again in a day or two.— A number of persons were then in the Store at the same time, and my attention was divided between the said Kenny and others who were making purchases and selecting goods — and to the best of my recollection and belief the said Kenny also observed — I see that you are extremely bussy at this moment, I will therefore return again and complete my selection in a day or two, or he assigned as a reason for not then selecting all the goods he required, that he himself was busy and could not then remain any longer, but that he would call again.— That Kenny then withdrew, and the same afternoon or next morning sent up trunks for the goods he had so selected, which were sent to him with a bill of parcels amounts to £85.11.10.— and afterwards on the following days of the 12th 13th 16th and 20th July, the said Kenny purchased the other goods, as per Statement of which a separate bill of parcels was made and delivered with the goods at the time of purchase.

It having become a question, as to the interpretation and meaning to be attached to the words, "at this time", in the order given by the Defendant, testimony was adduced by the parties respectively on this point, and as to the general usage of the times and manner of making sales of goods to dealers such as Kenny — The witnesses did not entirely agree in their testimony on this point, the most material however and that to

which

which the Court attached most weight, was the testimony of Mr Robert Frost.—

On being asked, If by the words, "at this time", contained in the order in question, you would understand, that a particular hour, or day, is meant to be understood, or if on the contrary, the expression at this time, is not susceptible of much greater latitude according to circumstances, and embraces a more extended period? He answered.— Almost every mercantile man, would put his own special construction upon the expression, and that construction would be governed by circumstances.— Were an order such as described, presented to me, and the party desiring to purchase a quantity of goods, if his mind was not made up, as to the exact assortment he wanted, I should think myself entitled to deliver him a part of what he stood in need of, and to allow him to complete his assortment within a few days afterwards upon the same order.— This I conceive to be a liberal interpretation of the language of such an order.—

Walker for the Plaintiffs argued,— That when Kenny delivered the order in question to the plaintiffs he required a considerable quantity of goods,— a complete assortment for the trade he was carrying on, and this was the season when traders and dealers generally lay in their stock — it was a busy season, and it appears that on the day the order was presented, he

trad

had not time, or the means to complete his purchase, some of the goods he then wanted were not unpacked and not in the Store – there were other Customers who stood in his way, and he then intimated that he would call again, in order to complete the supply he required. – According to the usages of trade, four or five purchases made on different days are considered as one in regard of the delay for payment – The whole assortment here purchased could be considered no more than a Summer assortment for a Country dealer, this was the object of the order, and whether completed in one day or in five days could make no difference – refers to the testimony of Mr Frost as to purchases of this kind made at different times – and to the testimony of the other witnesses as nearly to the same effect – cited numerous cases as to the interpritation of Contracts. – We must consider the words used in this order, – the words, "some goods" are very general, and far different from, a few goods, it is as much as if it had said, open an account with you, the extent of credit of four months, implied a considerable purchase, according to the general usage – credit on a single or a small purchase is a thing rare in Montreal, and it can as rarely happen that a retail shop keeper can make up a complete purchase of an assortment in one day. – The extent of the purchase here was left to Kenny's discretion – "what goods he wants", – and the words, "at this time", cannot be limited to an hour or a day – if it had been said in the order, "goods at this time to the extent of £400", and the purchase had been made at different days & times, the Defendant could not have taken advantage of the words

words, "at this time," where the sum was to — determine the credit given, and these words must have the same interpretation without a sum attached to them as with it — the time here meant, was the time requisite for making a usual general purchase of such goods as Kenny then wanted. a

Boston for the Defend^t. contended, that as there was no count in the declaration, in which the order in question was set out, that the order could not be given in evidence in support of the other Counts — That the Statute of frauds, as well as the French Ord^ce of 1667, requires, that in regard of the undertaking to pay the debt of another, it should be in writing, and that writing specially set out in the declaration. — That the Defendant in this case admits his liability to the extent of £85.11.10, the amount of the first purchase made by Kenny on the 8^th July — the defendants undertaking cannot be extended beyond this, — the transaction on that day was complete, a bill of parcels was made out and the goods delivered — the subsequent purchases were separate transactions, separate bills of parcels and wholly unconnected with the first — they were made on subsequent days and times without the knowledge or consent of the Defendant. — The Contract here cannot be explained nor extended by verbal testimony. Poth. Obl. N^o 404. 405. —, but it must be restricted to the most favorable construction for the obligor. — The words, "at this time," must be limited to something certain, — they cannot be extended from one day to another, any more than to a week, a month, or a year, for if they can be extended to the one, they may equally will be extended to any of the other, or to any

subsequent

subsequent time.— The Contract here is to pay the debt of a third person and must be more strictly construed than if made by the debtor himself. etc. 2 Camp. 41. Fell on Guar: 107. 108. —

He further objected to the right the plaintiffs had to maintain this action as the Defendant, after they had without legal authority taken possession of all the property and effects left by the said Kenny at the time he absconded.—

By the Court

In this case we think the declaration is sufficient, and the right of the plaintiffs in point of law to maintain this action is unquestionable — The whole case appears to turn upon the interpretation to be put upon the words, "at this time", in the written order or guarantee given by the Defendant.—

The principal object here, and in every Contract is to ascertain what was the intention of the parties, more than a bare interpretation of words — Now it is very evident to the Court, that it was the intention of the Defendant to assist Kenny in the way of his business by enabling him to procure a stock of goods for this purpose, as the order he gave to the plaintiffs to furnish the goods, was without limits or restriction, and to whatever amount Kenny might require — the words "at this time", must there be construed so as to apply to this intention, they cannot refer to a day or an hour, but to the object to be effected, and may be considered in the same light as if expressed by the words, at "this season" or, on this occasion. — Were we even to assume the interpretation contended for by the

Defend

Defendant, that the words in question refer to the time of presenting the order, this must necessarily admit, that had the Sr Kenny made a demand of goods at that time to the amount of £400 - or to any greater amount, the Defendant must have been liable, for he gave a carte blanche to Kenny, to take from the plaintiffs whatever goods he wanted, and if we look at the circumstances which took place at the time of presenting this order, Kenny did not complete his purchase, he said he wanted more goods than what he then laid aside, and that he would call again for this purpose, this was tantamount to an order for more goods without saying to what extent, but this was unnecessary, for the credit given him was unlimited on the part of the Defendant, and whether he then received the goods or gave an order for them, could not vary the nature of the Defendants undertaking, the transaction throughout appears to have been founded on this undertaking and the subsequent sales a continuation of the original credit - Judgt for Plffs -

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No 2148.

Arnoldi
vs
Perrault & al'
and
Sewis & al' T.S.

The Plaintiff having obtained a Judgt in this Court on the 19th day of April 1826, against Marie Claire Perrault of the City of Montreal, wife of Austin Cuvillier, Esquire of the same place, but separated from him as to property, and using Commerce heretofore

as

as a marchande publique, and Jacques A. Cartier of the said City of Montreal, Merchant, the said Marie Claire Perrault and the said Jacques A. Cartier being heretofore merchants, auctioneers and Brokers and Copartners carrying on trade together at the City of Montreal under the name or firm of M. C. Cuvillier & Co., sued out an attachment or Saisie-arret in the hands of George Lewis of the said City of Montreal, Inn-keeper, of Austin Cuvillier of the same place, auctioneer and broker, and of William Wilson the elder of Montreal aforesaid, distiller, upon such monies credits or effects they might have in their hands due, owing or belonging to the said Defendants. The said George Lewis and Austin Cuvillier by their respective declarations declared that they had nothing in their hands belonging to the said Defendants. William Wilson, the other Garnishee, declared, that on the first of November next (1826) he would be indebted to one Austin Cuvillier and to Jacques Antoine Cartier, one of the Defendants in the Cause, in a sum of twenty five pounds currency, for one quarter of rent due on the premises he occupies, in virtue of a lease passed between them - that he never contracted with Marie Claire Perrault, and does not know her at all; and further that he might be indebted to the said Messrs. Cuvillier and Cartier in a few shillings, having a small demand against them for repairs done in the premises he occupied, for which they engaged to pay half. That on the first day of February next, he will be indebted to the said Cuvillier and Cartier in a like

sum

sum of twenty five pounds, and so on every quarter after, until the expiration of the said lease, which will be as far as I can recollect in three or four years from this date.—

Upon this declaration of Wilson the plaintiff contended that he was entitled to receive the amount of the rent declared by him to be in hands in discharge and satisfaction of his, the plaintiff's Judgment inasmuchas the lease of the premises to Wilson was made by Marie Claire Perrault, the wife of Austin Cuvillier, who was bound for her acts— at all events he was entitled to one half of the said rent as it fell due, this being the proportion and right of the said Jacques Antoine Cartier in the said rent.

The Court however were of opinion that the plaintiff could take nothing by his said Saisie arret or attachment, as it did not appear that the Defendants had any right to the said rent, that the Plaintiff could have no right on the monies due to Cuvillier & Cartier for the payment of a debt due by Marie C. Cuvillier & Co— that although Jacques Antoine Cartier was the Plffs debtor, yet as the property of Jacques A. Cartier in the partnership of Cuvillier & Cartier must first be applied to pay the debts of that partnership, it was essential for the plaintiff to have shewn that the property of this partnership were sufficient for this purpose exclusive of the rent in question, and this could not be done here, as the proper parties were not before the Court.—

No—

No. 1337.

Wm Evans
to
G: Gregory
and
D: M'Naughton
Wm Evans.

These actions originated in the Inferior Court, In the first, William Evans the plaintiff stated by his declaration, that he was proprietor and possessor of a certain farm situate at the Cote St Paul, bounded to the north-west by the little River, commonly called, the petit Lac St Pierre — That the said little river runs through the Defendant's (G. Gregory's) land, below that of the Plff. that in consequence of the neglect of the said Defendt to remove certain obstructions to the free course of the said little River, the said farm of the plaintiff was and is overflowed by the damming back of the water in the said little river in such manner as to prevent the plaintiff from cultivating a large part of his said farm — and therefore concluding that the Defendt be condemned to remove immediately all obstructions from the bed of the said little River and hereafter to keep the same clear, so as to give a free course to the waters thereof which at present inundate the Plff's land, and further to pay five pounds damages & costs of Suit. —

In the other action, Duncan M'Naughton the plaintiff, stated by his declaration — that he is proprietor and possessor of a certain farm situate at the Côte St Paul, through which the little river, commonly called, le petit lac St Pierre, runs, — that the said little river runs also through the land of the Defendant situated below that of the plaintiff — That in consequence of the neglect of the Defendant to remove divers obstructions in the bed of the said river, and to compel the proprietors below him to do the same, the land of the said Plff was and is overflowed by the water from the said River in such manner as to prevent the plaintiff from cutting

his

his hay and otherwise cultivating his said farm to the damage of the plaintiff five pounds Currency, and concluding, that the Defendant be condemned to remove immediately all obstructions from the bed of the said little River, and hereafter to keep the same clear, so as to give a free course to the waters of the said little river, which now inundates the plaintiff's land and further to pay the plaintiff five pounds damages and Costs. a—

These Causes were afterwards united, and by an Interlocutory order of the said Inferior Court of the 19th Sept. 1825— it was directed, that by James Sommerville, Surv. and Michel Turgeon Esq. Experts named by the parties, the lands of the parties should be visited and examined in order to— ascertain and establish the most convenient (cours d'eau) water course for draining the same, to call to their visit all persons interested and to name them in their proces verbal, in which they should also describe and detail the different kinds of labor to be performed and by whom to be done with authority to name a third expert in case of difference of opinion and to make their report on the 21 Nov. then next. —

(— n the 20th January 1826, the said Experts made their report in conformity to the said rule of reference which was filed in the said Court on the 23. of the same month, and in which a great many persons were named as being interested in the water Course directed to be made by the said Proces verbal or Report, —

All the said persons so interested were called into

into Court made parties in the Cause at the instance of the said plaintiffs, who took the following — conclusions, —

Les Demandeurs poursuivent les interéssés pour qu'ils comparoissent en Cour, lundi le 22e Mai prochain, à neuf heures du matin, pour donner leurs raisons, si aucunes ils ont, pourquoi le Procès Verbal du 20e Jour de Janvier dernier, rapporté en ces deux Causes reunies, ne seroit pas homologué —

On the 22d May the said Interessés appeared and a great number of them, by their attorney evocked the Cause, and removed it into this Court —

The Plaintiffs thereupon filed their declaration de novo, in which after stating all the aforesaid proceedings, they conclude, that by the Judgment of this Court, the said Report or Proces verbal made and returned as aforesaid by the said Experts, may be ratified and confirmed, and that the same may be executed according to the form and tenor thereof and thereupon that the said Defendants may be adjudged and condemned to execute and perform all the work required to be done by them in and by the said proces verbal, and further that Syndics or overseers be appointed to superintend and enforce the execution of the same according to law the whole with Costs to be paid by the Ss Interessés Defendants in this Cause. —

To this declaration, the said Interessés by Mr Rolland their attorney, pleaded for exception

peremptoire

peremptoire, first to the regularity of the exploit, calling in the said interessés into the cause, and the conclusions thereon taken by the plaintiffs, and secondly, to the sufficiency and relevancy of the Report and Proces verbal of the Experts upon the matters in contest,

1°- Parceque la demande originaire des Demandrs contre les Defendeurs, est sans fondement, et n'a été qu'une pretexte pour obtenir le rapport d'Experts dont on demande l'homologation.-

2°- Parceque d'apres les Causes pendantes entre les dits Demandeurs et Defendeurs et suivantes les demandes en icelles, il ne pourroit y avoir lieu à un rapport d'Experts, tel que celui qui a eu lieu.+

Several other grounds of exception were added under this head, but the Court without giving any opinion thereon, considered the two grounds above mentioned sufficient to dismiss the demand of the plaintiffs quoad the said intervenes pleading the same, because the original action between the parties was in damages against the Defendants for their personal tort and neglect in causing the waters of the little river to flow back on the lands of the Plaintiffs, and the conclusions thereon taken were to obtain a condemnation in damages against the Defendants and to compel them to remove all the obstructions so made & permitted

by

by them to remain in the said little river, and also that the said Defendants should keep the said little river free and clear of all such obstructions in future — That upon such a demand and conclusions the appointment of Experts for the purpose of ascertaining and establishing a water course to drain the lands of the parties, was a total departure from such demands & conclusions and inconsistent therewith, —

Action dismissed with Costs.

No. 173.

Pothier .. vs Montigny.

On action en exhibition de titre &c

The Defendant in this case admitted his liability to the demand of the plaintiff as to the fine for non-exhibition of his title deeds of the plaintiff and as to the lods et ventes due by him on his own purchase, and with his plea, exhibited and filed the title deed of his own purchase, as being the only deed in his possession of the premises in question. —

M. Roi for the plaintiff contended that this was not a sufficient exhibition of a title such as ought to be made by the Censitaire to his Seigneur; that the Defendant was bound to carry his title to the Manoir and domicile of the Plaintiff and there present it to the Plaintiff and leave it with him for his examination. —

But

But the Court held, that when the Seignior brought his Censitaire before the Court in order to obtain the exhibition of his titles, the exhibition made in Court was sufficient, as the Defendant had failed in the first instance to carry his title deed to the house and manoir of the plaintiff he would be adjudged to pay the penalty of the law for that neglect, but one penalty only was due for such neglect — and besides the exhibition here made was consistent with the conclusions of the declaration. —

Friday

Friday 20th April 1827.

No. 1478.

Arnois. vs
Aylot, pere.

Action negatoire, & for damages.

The declaration in this case stated, that by deed of Donation made and executed before Seguin and his collegue public notaries and bearing date the 21 Sept. 1818, the Defendant transferred and conveyed to the Plaintiff his Son in law, a certain lot of land situated on the north side of the Ruisseau du Point du Jour, and also a certain other lot of land situated at the same place with certain moveable property and effects as mentioned and described in the said declaration, the whole being warranted free and clear of all debts, mortgazes or other incumbrances whatsoever The said Donation being thus made for good and valuable considerations therein mentioned.

That upon the said lots of land so conveyed and given, there existed a certain burthen and servitude which had been imposed thereon by the Defendant himself while he was proprietor thereof, by a deed of sale of the 10 Augt. 1806. the said servitude consisting in the right given by the Defendant to Louis Marsant dit Lapierre and Marie Amable vienne his wife, of taking and carrying wood from off the said lots of land so long as any should be found thereon.— That the said servitude is greatly

injurious

injurious to the plaintiff and causes considerable damage to him, and he is therefore entitled to claim and demand that the said Defendant do cause the said Servitude to cease and determine, or in default thereof that the said Defendant be condemned to pay to the said plaintiff a sum of one hundred pounds for his damages in this behalf, to which the Plaintiff concludes, with costs against the Defendant.—

Plea 1st chose jugée.—

2dly That the plaintiff cannot have and maintain his present action against the Defendant.

1st Because the Deed of Donation in question is far more advantageous than burthensome to the Pltff inasmuchas thereby the said Defendant hath divested himself of all he had in the world in favor of the said Pltff his son in law in consideration of a very moderate annual rente ou pension viagere, barely sufficient for his maintainance

2dly Because had the said plaintiff even received nothing from the Defendr the said Pltff would nevertheless be bound to provide for the maintainance of the Defendant his father in law, now advanced in age and distitute of every thing—

3e— Because by the said deed of donation, the said Plaintiff became bound to pay all the Defendants debts up to the date thereof, and the said Defendant being desirous to favor as much as was in his power, agreed to accept from the said plaintiff the moderate annuity aforesaid, and that the same should not commence to run or be paid until five years after St Michel next following the date of the said deed of Donation, that is in 1823, by means whereof the said plaintiff hath enjoyed all the property aforesaid without any consideration therefor given to the said Defendant

The

The answer and Replication to the said exceptions and plea, are general, and form an issue thereon. —

By the Court. —

The donation in this Case by the Defendant to the Plaintiff his son in law, without looking at the nature or value of it,* is considered as made en avancement d'hoirie, and not as a sale and transfer of property for a valuable consideration, and on this account it is, that no lods & ventes are due to the Seignior on transactions of this kind, which are looked upon as family arrangements — On this acct also the Child who thus accepts the Estate of the parent must take it with all its incumbrances, as he would the Succession were it open — This is one of those Donations in which there is no garantie — The Plff was besides bound to maintain his father from the moment he had no property and was unable to maintain himself — and this without having received any thing from the father in law — The Plaintiff cannot therefore maintain this action against the Defendant — Had the plaintiff been deceived in this arrangement by the warranty promised by the Defendant, he might on that principle have demanded a rescision of the deed and returned the property he received from the Defendt and would thereby have been exonerated from the obligation of paying the stipulated annuity, or the debts of the Defendant, who could with this property made some other arrangement to answer this purpose

Action dismissed

* or the inducements which lead to it,

June Term 1827.

Tuesday 19th June.

No. 331.

Torrance. v. Peddie.

This was an action by the Indorsee agt the indorser of a foreign bill of exchange in the following form –

"£557. 15. 6 Stg" "Quebec 18 July 1826."

"At sixty days sight of this my second of
" Exchange, (first third and fourth unpaid) pay to
" the order of Mr Peter Pentland (in London) five
" hundred and fifty seven pounds fifteen shillings
" and six pence Sterling, value received for the use
" of the Ship Lotilia, being amount of her Cargo
" purchased by me on Owner's account."

"Note. If the above is not duly honoured, the
" holder will ensure the amount, and place the
" premium &c to the Ships and my account."

"Robt Stevens."

" To Mr John Straker"
" Dublin."

This bill having been dishonoured, but no Insurance made, it became a question, on a plea of Exception put in by the Defendant, whether

the

the plaintiff could maintain his action, for not having done the requisite diligence in effecting the Insurance as stated at the foot of the bill of Exch[ge].

Fisher, in opening the case for the plaintiff, that no holder of the bill was bound to make the insurance in question, the direction in this respect at the bottom of the bill, being merely a discretionary notice, but not a condition on which the bill was drawn: Bayley on Bills. 4. edit. p. 25.— says, that a note of this kind is to be considered as no part of the instrument, but as detached from it.— It is not stated in this notice, when and where the — Insurance was to be made, and carries on the face of it almost an impossibility to effect it— but such a note as this at the bottom of a bill cannot alter the obligation of the indorsers, whether the ins insurance were made or not— the drawee — could not avail himself of this clause, nor can the Indorser, who is in law as a new drawer— The drawer could have no interest to have this insurance made, as he eventually must have — paid the whole, and the indorsers cannot be in a better situation— the indorsement constitutes an absolute responsibility to pay on the dishonor of the bill.—

Walker for the Pltff. This note or memorandum at the bottom of the bill can have no legal effect on the present demand.—

1st Because, the words in question form no part of the Contract, but are words left to the discretion of the holder to act upon or not as he should see fit—

2dly

2d. That had these words formed a condition of the Contract, they ought to have been so stated and set out by the Defendant in a plea of exception to the action with the necessary conclusions thereon.—

3. If these words are at all obligatory, the could form no plea to this action, but form the object of a separate and distinct action.—

4. That had these words been meant and intended as a part of the Contract and could be so considered they are merely a nudum pactum, & not obligatory.

5. That did they even form a valid Contract between the parties, they can be of no avail here, as no damage is alledged to have resulted from the non-performance of them.—

6th. That the Condition, if so to be considered, here affixed to the bill, could not be carried into effect the object being, for making a voidable insurance, if not absolutely void

7. That had the plaintiff been entitled or bound to make the Insurance, it could have enured to the benefit of the Insurer only, and not to the benefit of any of the other parties to the bill.—

8. That such Insurance was impracticable by a person in the situation of the Plaintiff, whose residence at Montreal, would not enable him to effect it.—

The objection here raised by the Defendant, is an attempt to engraft a separate and distinct obligation on the right of the Indorsee, which cannot discharge the obligation of any of the parties to the bill — it would so encumber the negotiation of bills as to destroy the effect of them altogether. Bailey. 35.— Chitty. p. 47.

This

This may be assimilated to a parole agreement which cannot be admitted. 3. Camp. Reps. 57.–

A bill of exchange should be free of every incumbrance that may tend to impede its operation, it ought to carry on the face of it a sufficient security and facility for its payment. 3. Chitty's Com: Law. 565.

The words added to this bill, do not constitute a condition precedent, which can impede the Plffs right of recovery on the bill – as to Conditions precendent, see 1 Chitty on pleads 312. Com: Dig: title Condition – letter (A.) № 2. & № 6– Powell on Contracts. 267.

The words here added, are a mere memorandum for the instruction and guidance of the holder, but constitute no obligation – if there was any obligation it was wholly indepenndant of the operation of the bill and of the liability of the parties thereto; and any injury accrued to any of the parties, a thing not stated here, they could have had their recourse for the same. Kingston .v Preston. Doug. Rep. 690. 691. see also as to different kinds of Conditions and covenants. 1 T. Rep. 645. 6 East. 564. where the Contrait is complete without every Condition being stated, Muckleston .v Thomas. Wills Rep 146 & 496. and the reason is, that the damages sustained by the breach of one Covenant may not be adequate to the damage sustained by the breach of the other, – but here if there was a failure in the Condition, there is no damage set out.

But these words can be considered only as a mere nudum pactum, not at all obligatory, but merely discretionary on the holder, they cannot be considered as a part of the bill nor binding as such, no consideration appearing for this unnecessary undertaking – the absolute undertaking of the drawer here was that the bill should

be

be honoured, 3. Ch. Com: Law. 63. – here there was no reciprocity, as no means were furnished to enable the Plaintiff to ensure, and the drawer alone was to have the benefit. – 1 Fonb: on Eq. 326. – In a contract not under Seal, it is necessary in an action on it, to state the consideration and to prove it. 1 Ch. on pleads. 294. 2. Bos: & Pull. 79. 3 Ch: Com. Law. 561. – 7. T. Rep. 350. –

This Contract could not be carried into effect, the Condition being voidable, if not void – the only kind of Insurance that could have been contemplated could not have been of the bill of exchange as such, but of the Ship and Cargo in consequence of the lien of the drawer upon them, for the amount of the money advanced – but none of the parties had a right to effect this insurance, as none of them had any insurable interest in the Ship or Cargo. 3. Chitty Com: Law 453. 5 T. Rep. 709. Camron v Anderson. – Even the equitable interest of a partner will not entitle a party to ensure for the freight of a vessel. 1 Bos. & Pull. 315 & 316. a transfer of a bill of lading was necessary to enable the party to make the Insurance. 1 M. & Selw. 30. 39. – Money advanced to the Captain of a vessel abroad, is not a subject of Insurance on the vessel or Cargo. – Doug. Rep. 539. – The freighter of a Ship has not an insurable interest in the freight. 2. Vern: Rep. in Ch: 269. Goddard. v Garret – and without an interest in the Ship and Cargo, the person advancing money for the Ship has no insurable interest therein. 6 East. 316 – the interest of a Commission broker is allowed, but nothing beyond this. Park on Ins. 404. 405. – there must be a certain interest accruing to the party in the profits arising from the arrival of the Ship, to enable that party to ensure. 3. Burr. 1394. – Where bottomry

interest

interest is ensured it must be specially stated in the Policy and the interest here of the Ship and Cargo was in the owner of the vessel. Park. 14.— 3 Chitty. Com. Law. 455. which is the only case that can be considered as in favor of the Defendant, but it was a case under particular circumstances, regarding the usage of a particular trade and that there was respondentia interest charged on the money advanced.—

That the insured can recover only one satisfaction, and that not beyond the damage sustained — now the condition here might have been held out as an inducement to accept the bill, but the Insurance even in that case could enure only to the benefit of the holder, as he would not only have been entitled to his remedy against the parties to the bill, but also against the Insurers had the vessel been lost. Doug. 468- Lowrie. v. Purdieu — a case in many respects similar to the present.—

Doug. 97. - 9 East. 426. 1 Barn. & Ald. 581 a master of a Ship has no lien on the Ship for his wages, nor for monies borrowed for forwarding a Cargo, and therefore no insurable interest in it.— The case in 6 Taunt. 234 is similar also in many respects before the Court, and although the Court in that Case did not determine the point here agitated, yet the principles there held as law shew that there was no insurable interest on this bill of Exchange.—

If such an insurance could legally have been effected, yet it could not have been done by the Plff from his situation & place of residence, he being a remote indorsee — the Ship might not only have sailed, but might have arrived before the Plaintiff received

received the bill — he was unable to give the necessary information to effect an Insurance, either as to the Ship, the name of the master, the sailing of the vessel, the voyage to be performed or the risk to be incurred, the nature of the Cargo or its destination — things necessary to enable a party to make a valid Insurance — Park. 476/7 — 3. Chitty 477. 483. & Dorr. 12. —

Buchanan for the Defendant. — It is necessary here to look to the nature of the Contract of Exchange, which is a contract of mandatum, and the person who takes the bill is bound to all the obligations contained in it — Pardessus. Cont. de Change. № 60. & № 371. & 396 — Cours Commercial — 3 Cb. Com. Law 566. — Commercial Contracts are made with Conditions, as a bill of lading, and liable to insurance being made thereon. 2. J. Rep. 190. Smith v Lascelles., A party cannot accept a part of the Contract and reject the other. — An Indorser may make his indorsement liable to a Condition. Chitty on bills. 179. 180. also. 3 Camp. Rep. 376. —

The bill here may be considered as a Bill of hypothecation, assignable in the ordinary form — there is no sett form of words for an hypothecation Marsh. on Ins. Abbott on Sh. 152. 153. — where a transaction of a similar nature with the present is referred to, and where the master may pledge the ship and Cargo for money advanced. — 1 Holt on Nav: 401. 2 Pardessus. № 800 — Poth: Cont: à la Grosse avent: № 30 — a hypothecation may be by bill or by bond, and is transferable like

all

all negotiable instruments. Pardess: № 785. — a memorandum in many instances forms a part of the Contract — and the note here is not a loose memorandum, but found in the body of the instrument above the signature of the drawer — Beawes Lex. Merc. № 154. 6. 7 & 8 says, it is not unusual to make bills on Condition and they must be complied with by holders — There is nothing in the Condition here against law or impossible it was introduced for the benefit of the payee who became entitled to the hypothecation — The Case cited by Pliff from 6 Taunt. 235, shews that the condition was for the benefit of the payer of the money, which gave him a sufficient interest in the Ship to effect the Insurance. — The Stat. 19 Geo. 2°. is in favor of the Defendant, as the Insurance here cannot be considered as a gaming policy — The general rule of interest or no interest is laid down in 2. New Rep. 313 — 3 Bos: & Pull. 75. — Here the payee had the greatest interest in the preservation of the Ship to effect an insurance thereon — had she been lost the payee must have suffered. — 1 Marsh. 117 the owner of a respondentia bond has an insurable interest in the Ship Pardessus № 837. — The payee could stipulate that his interest here should be insured by all parties, particularly on a hypothecation Contract. — That although consideration be necessary to support an Obligation, it is not necessary to support a Condition. Poth. Ob. № 139. — Even if Insurance in this Case were unlawful in England,

still

still it might have been effected else where, and have been binding — The bill here is an assignment of a créance liable to the performance of a condition, it is lawful, and the consequence of the non-performce of the Condition must not fall on the Defendant any more than it could on the drawer or maker of the Condition, who has on the contrary a right to avail himself of the non-performance of it — Whoever undertakes a mandatum must execute it, and he is liable for damages if he does not — The plaintiff ought to have stated that he had done diligence on all the parts of the bill, as well touching the dishonor as the insurance to be effected thereon. a

It was not necessary for the Defendant here to have stated any special damage by the non-performce of the Condition, it was enough to state the fact, that the Condition had not been fulfilled — nor ought the Defendant to be driven to his action when he can avail himself of the exception. —

The Condition is called a nudum pactum, but in England as well as here the Contract of mandatum is binding without consideration, and by taking the bill the party was bound to performance. —

The Case in 6 Taunt. 235 — may be considered as an authority more for the Defendant than for the Plaintiff — the Plff in that case recovered — but the present is much stronger, as the Defendant lent his money on bottomry. a

Mr

Mr. Walker in reply.— This although a contrat de mandat, still it was necessary to have shewn that an injury had arisen by the non-performance of it— The words in the bill contained a condition for any holder to insure for his own interest, and not for that of the drawer or payee only.—

No hypothecation of a Ship can be transferred but on a respondentia or bottomry bond— A Captain may hypothecate a Ship in a foreign port for the repairs of the Ship or for a Cargo— Park— 3. Chitty. 540. but he has no lien for his wages or for money advanced for the Ship.—

Hypothecation on a Ship or Cargo even when made by the person who has a lien thereon, cannot be transferred to a third person, 1 Burr 490— Godin & al' v. London Assur: Co where it was held that the lien of the factor subsisted only while he was in possession of the goods— As to cases where hypothecation holds, see 3 Chitty Com. law. 313— and there must be an instrument drawn up in the nature of a bottomry bond— see case. Dorr. Rep. 468. Lowrie v Bourdieu, where money advanced was held to give no lien on the Cargo, and this Case is strongly opposite to the present. a

The only Insurance that could have been made here, would have been, interest or no interest, and that the production of the bill of Exchange should alone be proof of interest— this was the only proof that could have been made of the interest

here

here, and to enable the party to do this, it should have been so expressed in the policy — but such an Insurance would not have been available, as the right of property in the Ship and Cargo was in the owner. —

That although a party having a right of action may have the exception, yet he must shew that the exception would give an action, and the injury must be made to appear, which the Defendr has not done by his exception — In this respect there is a difference between a Bill of Exchange and a Policy of Insurance — in the one a damage is implied because established by law, but in the other it is uncertain and not implied by law, ~~but~~ must be shewn. m —

By the Court —

3 Ch. Com: Law 453.

Insurance is a Contract of indemnity from loss or damage arising from an uncertain event — the object of insurance properly speaking, is not to make a positive gain, but to avoid a possible loss — A man cannot strictly be said to be indemnified against a loss which can never happen to him — there cannot be an indemnity without a loss, nor a loss without an interest — a policy therefore without interest is not an insurance but a

mere

mere wager.—

An insurable interest must be founded on some legal or equitable title; and although a person may have a sort of claim, which as between him and the legal owner might be thought reasonable, and such as the legal owner could not conscientiously dispute, yet if this claim be inconsistent with the title which the law can recognize, it will not be deemed to be an equitable title, and therefore not an insurable interest.—

anno. 1746. By the Stat. 19. Geo. 2. ch. 37. it is provided that no Insurance shall be made on any Ship or Ships, belonging to His Majesty or any of his Subjects, or on any goods or effects laden on board such Ships, interest or no interest, or without further proof of interest than the policy — or by way of gaming or wagering, or without benefit of Salvage to the Insurer —

The Provisions of the French Ordinance of 1681 are in conformity to this Statute.—

In the Case cited of Goddard. v. Garret 2. Vern. Rep. 269. the Defendant had lent money on a bottomry bond, but had no interest in the Ship or Cargo — the money lent was £300— and he insured £450 on the Ship.— The plaintiff's bill was to have the policy delivered up, by reason that the Defendant was not concerned in point of interest as to Ship or Cargo.—

Per.

Per Cur: We take it that the law is settled, that if a man has no interest, and insures, the Insurance is void, although it be expressed in the Policy interested, or not interested, and the reason the law goes upon, is, that these Insurances are made for the encouragement of trade, and not that persons unconcerned in trade, nor interested in the Ship, should profit by it, and where one would have benefit of the insurance, he must renounce all interest in the Ship.—

Note.— In this case notice was taken in the policy that it was to insure money on bottomry.—

Note also— That in this Case, the Ship survived the time limited in the bottomry bond, and was lost within the time limited by the policy— So if Insurance good— Defendant might be entitled to the money on the bond and also on the policy.—

It is true, that there are some subsequent cases referred to in Marshall, where a contrary opinion was held, but these were all prior to the Statute 19 Geo. 2d. but according to the principles established by that act, and the decisions had by the Courts thereon, as we shall here notice, the Case of Goddard v Garrett would be good law.— There is however a case 4. Esp. Rep. 22. where an opinion was held by Ld Kenyon, that the Captain has a lien on the freight for goods furnished to the Ship by his directions and on his credit— White v Barengoal in 1801— this however was a Nisi prius Case, and never met the decision of the Court on the rule obtained to shew Cause, the Cas having been settled.—

But it is now settled and held, that the Master of a Ship has not a lien on the Ship for money expended or debts incurred by him for repairs done during

1. Barn: & Ald. 581.

during the voyage. Hussey. v. Christie val. 9 East. 426 —
That he has no lien on the freight for his wages or for
his disbursements on account of the Ship during the
voyage, or for the premiums paid by him abroad for
the purpose of procuring a Cargo — nor has he any
lien on the Ship for wages, Stores or repairs done in
England — and under these authorities we hold
that as the drawer of the bill in this case had no
insurable interest in the Ship or Cargo, having no
lien thereon for the monies advanced to procure that
Cargo, the note or memorandum at the bottom of the
bill directing an assurance to be made was a nullity
and not binding on any of the parties —

1. Barn: & ald. 575
Smith & al
Plumer & al. —

Wilkins & al
Carmichael.
Doug: 101.

see also cases. Lowry & an. v Bourdieu, Doug. 468.
Kemp & an. v Vigne — 1 T. Rep. 304.

In the case referred to of Tasker. v. Scott. 6 Taunt.
234. where a similar bill of exchange was drawn by
the Defendant, the master of the Ship, to that in the
case before us, a question there arose upon the right
of the plaintiff an indorsee, to recover from the Defendt —
the drawer, the premium which the plaintiff had
paid for insuring the Ship in his own name, on a
policy for three months. — The bill of exchange —
having been paid after the Insurance effected, the
Defendant refused to pay the premium and charges
of Insurance — The interest here declared on was
" on the interest in a bill of exchange drawn by the Defendt
" on Mr Bousfield in favor of J. Goudie, dated,
" Quebec 10 June 1814, being for value received for the
" use of the Ship, and it was agreed that in the event
" of a loss, the bill should be considered as sufficient
" proof of interest, and payment made accordingly."

The

The only question here was, whether under the authority given by the drawer to ensure, the indorsee was entitled to recover from the drawer, the money laid out in effecting the Insurance — The objection taken was, that the Insurance was not only an unavailable, but an illegal Contract, under the 19 Geo. 2. ch. 37. and therfore the premium could not be recoverd back. — The opinion of the Court was, — that it was not an illegal, but only an unavailable Insurance, and they thought, that undoubtedly, if an Insurance were effected by order of a person who had an interest, that though the Insurance were void, yet that he who effected it, might recover back the premium from him by whose order he did it. — This case is strongly in point as to the legal effect of an Insurance made under circumstances like the present — it was an unavailable Insurance, and consequently no party could draw any benefit therefrom. a

It has been said on the part of the Defendant that this clause added to the bill may be considered in the nature and as having the effect of a Bottomry or Respondentia bond, which, it is said, requires no particular form of words, and therfore that those used here may be binding as such. — But we must be satisfied, that it was the intention of the parties to create such a Security; on the one hand that the — Master hypothecated the Ship and Cargo, and on the other, that in case the Ship did not arrive, the lender should lose the money he had advanced — we must presume here that there was no such intention, and if there had, the essentials are wanting to constitute such a Contract, for whatever may be the form or words used by the parties in this respect, yet it is essential that

the

2 Marsh. 747.

the Contract should specify, not only the names of the lender and borrower, but also, that of the Ship and of the master — the sum lent, with the stipulated marine interest — the voyage proposed, with the duration of the riske which the lender is to run — and it must appear whether the money be lent on the Ship or on the goods on board, or on both — But in this respect the Contract contended for is wanting

Plea of Exception dismissed

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No. 1885.

Robillard. vs. Raby & al.

This was an action of debt on a Contract entered into by the plaintiff, a master mason, with the Defendants who were Syndics, or overseers named and appointed for the erection of a Church in the parish of St Benoit, The plaintiff stated by his declaration that in & by a certain notarial instrument made and executed on the first day of August 1822. he had undertaken to build a Church in the said parish agreeable to a certain devis & marché made and consented to between the parties, and for and in consideration of the sum of £2145. 16. 8. Cy. to be paid to the said plaintiff by the said Defendants at the times and in the manner stipulated in and by the said instrument. — That the said plaintiff had built and erected the said Church in all things conformable to his said agreement and in a good

and

and sufficient manner, but that the Defendants unjustly with-held and refused to pay to the Plaintiff a sum of £166. 13. 4, become due to him on the first day of February 1826, being one of the instalments due to him on his said Contract, and for which sum the present action was instituted.—

Plea— That the work done by the plaintiff being defective and insufficient, the parties pliff & Defendrs agreed in order to avoid expence and litigation to submit the whole to experts, and for this purpose they made and executed a certain act or Compromis before Girouard and his confrere public Notaries on the 25th December 1825, whereby ~~the Plaintiff named~~ one Simon Delorme was named as an expert, arbitre and amiable compositeur on the part of the Defendants, and to Joseph Chevallier, and on his default, to Pierre Montagne, expert, arbitre and amiable compositeur named on the part of the Plaintiff, with power to the said persons to examine settle and determine the whole par composition amiable, with power to them in case of necessity to call in and name a third Arbitrator to act with them in the premises, the said promising, binding and obliging themselves to submit to execute and all and whatsoever the said Arbitrators should order and determine, under the penalty of fifteen hundred pounds to be paid by the party refusing to the party acquiescing in such order & determination. That under and by virtue of the power so given to the said Simon Delorme and Joseph Chevallier, they

afterwards

afterwards named and called in one Joseph Fournier as tiers-arbitre, who having been sworn and after hearing the parties and their witnesses, and done executed all & every the matters and things required of them by the said act or Compromis, on the 18th day of January 1826, made and rendered their award and determination upon all and every the matters in contest between the parties, and thereby declared the work and building made and erected by the said plaintiff to defective and insufficient, and such as ought to be received by the said Defendants, and ordered and directed that the said plaintiff should be held and bound to reconstruct and repair the defective parts of the said work and building as described in the said award, or in lieu thereof to pay to the Defendants a sum of 16,500 livres, as damages in this behalf not including therein the expences to accrue in supporting the roof of the building, the said sum of 16500 and other expences to be compensated with and set off against a sum of 19,000 livres, the first payments to become due to the said Plaintiff under his aforesaid Contract.— That in and by the said Award it was also directed, that the said plaintiff should make his election on or before the 30th day of January 1826, either to reconstruct & repair the defective parts of the said Work, or to pay the said damages and expences, and on his default, that the said Defts should be authorised to cause the work to be done & to retain in their hands for this purpose the said sum of 16,500 and other expences aforesaid, out of the monies to become due to the said Pltff as aforesaid

That

That afterwards to wit, on the 23d. day of January 1826, the said award was communicated to the said parties, who declared themselves satisfied therewith and the said Defendants then notified the said Plaintiff, that on his default to fulfill and perform the said award, they would execute the same in the manner therein directed and would cause the work to done as by the said award they were authorised and would retain in their hands the monies due or to become due to him the said plaintiff to indemnify them the said Defendants in this behalf.—

That the said Plaintiff having refused to make his election as aforesaid the said Defendants were afterwards compelled by the urgent necessity of the Case to give the work in question to other workmen to finish and complete the same according to the said Contract, and therefore the Plaintiff cannot maintain his present demand, as the sum he now demands and several other payments hereafter to become due are comprehended and included in the said sum of 16,500 livres for the damages aforesaid, which they are authorised to retain in their hands.—

That the plaintiff by prosecuting the present action, is resisting and opposing the execution of the said award, and hath thereby incurred and become liable to pay to the said Defendants the penalty aforesaid stipulated in and by the said compromis to be paid by the party refusing to the party acquiescing in the said award

Concluding that the Plaintiffs action be dismissed and that the said plaintiff be adjudged & condemned

to

to pay to the Defendants as Incidental Plaintiffs in this behalf, the said sum of fifteen hundred pounds, the peralty so incurred by him the said Pleantiff, the whole with Costs. &c

Answer to Exception — That in and by the Compromis, the said plaintiff authorised and empowered the said Simon Delorme and Joseph Chevallier, the experts, arbitres and Amiables Compositeurs therein and thereby named by the parties, to call in a third expert and arbitre, only in case they the said Simon Delorme and Joseph Chevallier, differed in opinion, yet that the award opinion of the said arbitrators, a third person, one Joseph Fournier, appears to have been called in and to have joined in the award, without its appearing that the said Simon Delorme and Jos: Chevallier had differed in opinion, and consequently without any power vested in them to call in such third person, and therefore the award aforesaid is wholly null and void in law.

(And with the above, further reasons and matter of fact were alledged against the sufficiency of the said award, but which are not here noticed, as not forming a part of the matters of law now contested between the parties.)

And in answer to the demand of the said Defendants as Incidental plaintiffs, claiming that the said Plaintiff be adjudged and condemned to pay to them the said Defendants the sum of fifteen hundred

hundred pounds, as the penalty stipulated in the said compromis, which has been incurred by the said plaintiff in bringing the present action, the said plaintiff says, that the said Defendants are not entitled to maintain their said demand, — because the said sum of fifteen hundred pounds is not due to the said Defendants as of right, had he the said plaintiff resisted and opposed an award legally made by the said arbitrators, because he says, that the said penalty is merely commminatory and the Defendants are not entitled to demand the payment thereof. —

Reply to the said answer is general and joins issue thereon. —

The parties were now heard on the two points here agitated, 1st The right of the Defendants to demand the payment of the penalty stipulated in the Compromis — and 2d As to the sufficiency of the award of the arbitrators. —

Mess.rs L. M. Vigé & Bedard for the Defendants contended, that the compromis being regularly made and in all respects sufficient the Defendants were entitled to claim from the payment of the penalty their stipulated in consequence of the contravention of the Plaintiff in resisisting and opposing the award made by the Arbitrators, cite. Domat on Compromis — 2. Louage Just: Civile on arbitration No. 75. 76. 77. & 78. — 0. Denizt. Vo. — Compromis No 9. & seq. — Pigeau. p. 24 & 25. Rep.re

Vo

vo Arbitre. — The law gives a right to the party Defendr here to obtain the penalty, from the express disposition of the law, which has always been held to be binding in this respect, it even goes so far as to say, "que toute audience doit etre denieé a la partie jusqu'a ce qu'il ait payé la peine stipulée" cite the case of Berthelet v Berthelet decided in this Court on 20 Febvy. 1806.— Dic. de Fer. Vo Sentence Arbitrale — Lacombe. Vo Compromis. a

Roi for the plaintiff stated that the compromis as set out is not his act, — That the — Compromis entered into by the plaintiff authorised the two arbitrators named to call in a third in case they differed in opinion, but it no where appears or is stated that the said two arbitrators did differ in opinion, and the calling in a third to arbitrate and deliberate with them where no such difference existed, makes their award a nullity — Domat liv. 1. tit. 14. sec. 2. No 6. — Id. Droit pub: liv. 2. tit. 7. sec. 1. No 5. —

That the penalty cannot be insisted upon except when the party comes against an — award legally made, in those cases where there is an apparent nullity in the proceedings as here, the penalty cannot be demanded — but in any Cause, the stipulation of a penalty is considered as a clause de rigueur, and is never enforced. Domat. liv. 1. tit. 1. sec. 4 No 18. — Dic. de Droit. Vo clause penale. — Repr co. verb. p. 554. N. Denizt. Vo Compromis §2. No 6. —

Mr O'Sullivan of counsel for the Defendr The act of Compromis here has not been complied with and

and the award of the arbitrators is a nullity. by that act power was given by the parties to two arbitrators only, with power to name a third in case of difference in opinion, but such third was named without any authority, that is without any difference in opinion + refers to C. 1. tit. 4. Dig. 4th book. — where three are appointed and proceedings are had before two only, this has been held to be irregular, and the reason given in the law is, that had the third been present, he might have prevailed in influencing the opinion of the others. and the converse of the proposition will hold — with equal reason, where a third is called in without authority, his opinion wrongfully given may prevail to influence the opinion of those who by themselves might have judged otherwise —

Mr L. Vigé in reply — There is no nullity in the award by a third person having been called in by the arbitrators as they had the power to do so — but it is said that there appears to have been no difference in opinion between the two Arbitrators to warrant this — but this difference in opinion may have existed between the two without any necessity of their saying so, there is no form established in respect, the omission of which will operate a nullity in the award we must on the Contrary presume that there did exist such a difference in opinion unless

the

the contrary is made to appear, we must always presume that the arbitrators acted regularly and within the scope of their authority, without this — This is the case of Amiables Compositeurs, whose proceedings must be favorably considered — they had a right to name a third — they have exercised this right, and they done so even irregularly, yet this cannot vitiate the award given by the two originally named. —

The Court were of opinion, that the award of the arbitrators in this case ought not to be considered as a nullity, although it was not stated, that it was in consequence of a difference of opinion between the two arbitrators originally named that such third arbitrator had been called in and acted with them —

1st Because the authority here given was not merely to arbitrators, but to amiables compositeurs which meant to convey an unlimited power of decision and such equitable course of proceedings as they should see fit — "Amiable compositeur
" est celui qui est élu par les parties pour terminer
" leur different à l'amiable, selon l'equité, sans être
" tenu de garder exactement les formalités de Justice
" à la rigueur de droit" Dic. Fir. Vo arbitrateur, ou Amiable Compositeur — on this account we must not construe so strictly their proceedings, as if they had been bound to any regular form, and we must presume that they have done right unless the contrary manifestly appears. — That in

this

this Case the arbitrators had a right to appoint a third or tiers, in case of difference in opinion, but there appears nothing on the face of their award to say, that they were not of a different opinion, and therefore we ought to infer, that they must have acted consistently with the authority given them — 2d But admitting, that they had not differed in opinion before they named the third Arbitrator, and that under the apprehension of such a difference, or in order to prevent it, they had in the first instance proceeded to this nomination, yet if their award be in other respects conformable to the Submission, this ought not to vitiate it — this appointment of a third arbitrator can in that case be considered only as surplusage, it cannot affect what has been determined, if that determination proceeds from the two arbitrators originally named — Prost de Royer v° arbitre N° 26. p. 70 says, "Le pouvoir des arbitres est borné à l'objet de compromis, et tout ce qu'ils feroient au delà, seroit sans effet" — There is no authority to be found more in point than this, which evidently shews, that what is done beyond their authority shall be without effect, and that only — it would be contrary to first principles to determine otherwise, the maxim being "utile per inutile non vitiatur".

2. Jousse. Just: Cw: 697. N° 32. — "

On the question as to the payment of the penalty stipulated in the Compromis, to be paid by the party refusing to comply or appealing from the award, we think that the penalty ought not

not to be enforced. — It is true we find many arrets and Judgments which enforce the payment of the penalty in cases of this kind conformably to the Ordinance of Francois 2d in 1560, but at the same time we cannot help observing, how differently this law, which was a general law in France, has been interpreted and enforced in the different parliaments in that Country — In some it was not enforced at all and even when the penalty was paid, it was adjudged to be restored — see Denis† as to the Parliaments of Aix, of Douay and Provence — & Rep.ve v.e Compromis. p. 314 — and the Dic: raisonné des Domaines. v.e Compromis, says, "Ces conditions, " (penalités) ne sont pas mêmes executoires. Il y a " des Cours qui n'y ont pas d'egard, et d'autres, " qui les reduisent dans la proportion des dommages " et interets de la partie souffrante" — But even in the Parliament of Paris, and according to those principles of decision which we follow in regard of a penal obligation, there were many modifications adopted by the Courts, which tended to limit and restrict the rigorous enforcing of this penalty — Denis.t says, that this penalty was often considered as Commineatory, and advises a mode to avoid this, by depositing the penalty in the hands of a third person — It is also held as a general principle, that the Courts have the power to moderate the penalty — so say Jousse and the Rep.ve, and the reason given is very just and equitable, "que celui qui " auroit une juste cause d'appeller en seroit " detourné

† V.o Compromis §2. N.o 6.

V.o Arbitrage §1. n.o 6.

2. Jousse. p. 719. N.o 31, Rep.ve V.o Compromis p. 314.

" detourné par le paiement de la peine, qui
" pourroit etre plus forte que l'objet meme du
" proces". — They even went further and held, that in certain cases there should be no right allowed to demand the penalty, as where there was any apparent nullity in the Compromis or Sentence arbitrale. —

All these instances shew in what manner the Courts interpreted the law and enforced it in such way as to meet the ends of Justice, and although little room appears to be left by the words of the Ordinance of 1560, to put any liberal construction upon them, as the law was general, including all cases where a penalty was stipulated, yet in the application of it, the same principles were held which were adopted in the interpretation of all law, that it ought not to be allowed to operate an injustice, which must have frequently happened had it been strictly enforced. —

But the great principle we hold here, and which was recognized in Cases of this kind by the Courts in France, is, that no man can so effectually bind himself by any stipulation, by which he could exclude himself from applying to the Kings Courts for redress when he conceived that injustice had been done to him — "Par le droit, (that is speaking of the Roman law) l'appel contre
2 Jousse. p. 715. n° 72. " les sentences arbitrales n'etoit point recevable, mais
" en France il est permis aux parties de se pourvoir
" par appel contre ces sortes de Sentences, quelques
" clauses que les parties ayent mises dans le Compromis:
" et il n'est pas meme permis aux parties de renoncer

" a

" a cet appel par le compromis, parceque il faut
" toujours, que les magistrats qui sont etablis
" par un ordre public connoissent des jugements
" rendus par ceux qui n'ont d'autre pouvoir que
" celui qui leur a été donné par des particuliers".
But this principle must hold not only in the particular case citid, but in every case where a man has, or pretends to have, rights, which he is desirous, and ought at all times to be entitled to submit to the decisions of a Court of Justice — The laws are made for the governance and ought to extend to the protection of the Subject — he cannot withdraw himself from their controul, nor can he by his voluntary act renounce his right to their decision, — This is a principle whether it be taken from Magna Charta, or from the Droits de l'homme is equally just and equally maintainable in all the Kings Courts — Now we consider it to be nearly the same thing, whether a man renounces his right to be heard before a Court of Justice, or bind himself in a penalty, which will amount to the same thing, if he is unable to pay it — or indeed in any penalty that is unreasonable — for penalties ought not to be enforced without consideration or without injury done to the person in whose favor they are stipulated — all penalties are held to be compensatoires des dommages & interets, but where is the damage or injury that can accrue here to the Defendants, by allowing the Plaintiff to complain that an injury has been done to him by the arbitrators — this is allowing

to

to the Plaintiff no more than is allowed to a party in every suit — for supposing the Defendr had instituted an action against the plaintiff for an homologation of the Report of the arbitrators and to enforce the performance thereof, the Court could not have prevented the plaintiff from alledging as the grounds of his defence, the grounds he now alledges, or any grounds he might think proper — we therefore see the reasonableness of the ground taken by the French Courts, to moderate the penalty — according to circumstances — it was one of those equitable principles adopted by the — French Courts in the administration of Justice, which we find they maintained and applied in all Cases, as well to the — Legislative Edicts and ordinances, as to their own arrets and decisions; and as they possessed the double capacity of Courts of Equity and Courts of law, their powers in this respect were well calculated to promote the great ends of Justice, by administering the law more according to its ~~law~~ intention than its letter. —

Following up these principles we must here determine, that the demand of the — penalty here cannot be admitted as a bar to the plaintiffs action, but that the question touching the recovery of the penalty, or any part of it, must be reserved 'till the parties are heard on the merits. —

No 2441.

M.Kay. vs Rutherford

This was an action of assumpsit for monies had and received by the Deft to the use of the plaintiff and on the other money Counts. — Plea. non assumpt.

To support the demand the plaintiff proved that the Defendant drew a draft or bill of exchange on the plaintiff ~~in favour~~ to the order of one Thomas Porteous for a sum of £737. 8. 11½ for value received, which bill or draft the Plaintiff accepted and paid, & there rested his Case. u

Buchanan for the Defendant contended that the plaintiff had not made proof sufficient to maintain his action — The parties here appear to be all traders. and this transaction must be presumed to be connected with their trade & calling the transaction altogether is of a commercial nature and the rules of evidence as laid down by the laws of England must be received to govern the decision in the Case. —

According to the law of England it is a generally received principle, that he who accepts a bill is presumed to have funds of the drawer in his hands to cover the amount of that bill. cites. 1 Wils. Rep. 187. 2 Phs. on Ev. 32. & 86. — 3 T. Rep. 183. Starkie's Ev. p. 4. 2 vol. p. 276. — Potts. change No. 99. No 227. 231. & No 97. u

Rolland for Pltff. the action here is to obtain the reimbursement of money paid by the Plaintiff on the Defendant's draft or order, which cannot be considered as a bill of Exchange, because both parties here appear to live in Montreal. —

To

To constitute a bill of exchange there must be a remise de place en place, which was not the case here. Poth. Change. № 30. to № 97. — and an action is given to the drawee to recover back what he has paid for the drawer. Id. № 226. — This is a — kind of assignation or rescription — it is like a man advancing money for his friend, it is not considered in the light of a commercial — transaction, and in France would not be cognizable by the Consular Jurisdiction. 2 Rog: 339. — Practi des Consuls liv. 2. Ch. 4. p. 74 to 83 — The case cited by Defendt. from 1 Wilson, is that of an accepted bill of Exchange, which is different from the Case before us — the acceptance of the bill gave it currency, it was a Commercial and a negotiable instrument — but here the money was paid immediately — The action as stated by Wilson, was founded solely on the Custom of Merchants. but here we have no such Custom as in England, for here the person at whose order or request the money is paid is the debtor.

By the Court —

The question to be determined here is, whether the transaction here can be considered as Commercial or not, because the principle of decision must be determined by the rule of evidence which ascertains the fact — Now it appears to the Court that the transaction is Commercial — The parties plaintiff

and

and Defendant appear to be tradesmen, and masons, and the order or draft in question may be presumed to regard their trade — the draft is payable to the order of Thomas Porteous for value received — a common note of hand in this form would constitute a Commercial transaction, and with much more reason a draft of this description — the instrument here was negotiable, and subject to all the consequences of a negotiable bill or note — If therefore the transaction is negotiable the law of England will apply; according to which the presumption always admitted and taken, that the acceptor of a bill or note is presumed to have funds in hands of the drawer sufficient to cover his acceptance this presumption may however be rebutted by evidence shewing the nature of the dealings and transactions between the parties, and if the plaintiff could have shewn here that he advanced his money as an act of friendship only for the Defendant, he must have been entitled to recover back the money — or if the transaction here had not been considered as Commercial, the antient law of the Country would have supported the Pltff's claim —

Action dismissed — Sarrez recourse

see

see 1. Wilson Rep. 185.
2 Ph. on Ev. p. 33 & p. 29
3 T. Rep. 183. Vere & al. v Lewis & al.
2 Starkie on Ev. p. 276. & 290
1 T. Rep. 409. Bickerdike v Bollman
2 T. Rep. 713. Rogers v. Stevens
Bayley on bills Ch. 9. p. 237.
Chitty on bills. 6th Edit. p. 410.

No. 26.
Miriam.
v.
Leblanc.

This was an action founded on a Judgment in the Inferior Court, which by means of the Costs exceeded ten pounds Sterling. The plaintiff in this Case obtained a Ca: ad resp: against the Defr on an affidavit that he was about to leave the Province.

M. L. M. Vigé for the Defendant, contended that the action could not be maintained, it having been already held in several instances that no action can be maintained in this Court on Judgments rendered in the Inferior Court, as it is giving an extension and effect to those Judgments which the law never intended to give.

The Court however were of opinion that this action could be maintained. That it

it had been adjudged in this Court that an action could not be maintained here on a Judgt rendered in the Inferior Court, for the purpose of enabling a party to obtain an execution against the lands and tenements of his adversary, the Court being of opinion that those Judgments were not to be extended so far as to give such execution — But in the present case, the Defendant shews a disposition to deprive the plaintiff of his ordinary recourse for the satisfaction of his Debt, by leaving the Province — this is considered as a fraudulent act on the part of a debtor, and the law has provided a remedy against such fraud by granting the arrest of the Debtor, — this extraordinary course is therefore allowed to a Creditor without considering from what cause the debt originated as to punish bad faith, and prevent injustice by allowing the debtor to escape from his creditor. —

Judgt for Plff

—

No. 1504.

Switzer. —
vs.
Remillard
&
Pincomeau
T. S.

This was a proceeding by Saisie arret in the hands of the Tiers Saisi, on a Judgment rendered in the Inferior Court, amounting with the costs — accrued in that Court, to upwards of ten pounds Sterling — The Defendant was in default, and the only question was whether

whether this proceeding could be maintained in this Court for the satisfaction of the Plaintiffs debt and Costs.—

The Plaintiff cited the Cases of Chartier vs. Dufresne, and Dufresne, Tiers Saisi in April Term 1826— also Tessier v. Laberge, & Monpetit, Tiers Saisi, where proceedings of a Similar discription were had in this Court on Judgments rendered in the Inferior Court—

Judgt. for Pltff.

No. 1665.

Dufaux. —
vs.
Dufresne. —

This was an action of Separation de Corps et de biens by the wife against the husband.— At the enquête, the Plaintiff called upon Mr Vigé, the advocate of the Defendant as a witness on her behalf and the following question was proposed to him.— "S'il a connoissance que la demanderesse
" en cette Cause, lui ait remis chez lui, à son bureau
" une requête en faveur du Defendeur, qui se
" trouvoit alors confiné dans la prison de Montreal
" et cela plusieurs années avant l'institution de la
" presente action.?— To this question the Witness answered, "Quand la demanderesse s'est
" addressée à moi en ma qualité d'avocat, et

"pour

"pour son mari, pour lequel j'agissois en cette qualité je ne crois pas pouvoir être interrogé et examiné — comme temoin relativement à des choses qui sont venües à ma connoissance quand j'etois consulté ou quand j'agissois, comme avocat de la partie, que je represente encore dans le moment actuel, et qui m'ont été communiquées à l'occasion et pour la — conduite des affaires que je fesais ou conduisois pour elle. —

The parties were now heard upon the question how far the Witness was bound to answer, and whether the advocate could be exonerated from answering to the extent contended for by the — Witness. —

Mr Vigé for the Defendant, cited 1 Pigeau 278, to shew that the attorney is not bound in any Case to answer as a Witness after his retainer in any matter either for or against his client. — cites also. Poth. obl. N° 794. Dic: de Fer. V° avocat Domat liv. 3. tit. 6. sec. 3. art. 23. — Rep^ve V° avocat. p. 786. —

Mr Duesnel for the Plaintiff contended, that the question referred to no secret communicated by the client to his attorney, it tended merely to disclose what took place between the Plaintiff and the Witness, - merely to shew that the Plff was taking an interest in what regarded the benefit and advantage of the Defendant her husband - that the priviledge contended for by the attorney could not extend to a case of this

sorte

kind, admitting that he was the Attorney of the Defendant – cites. 1. Pigeau. 278. Desquiron Pr. par Term:–

The Court was about to intimate its opinion on the point, when Mr Viger requested to be further heard – which was granted to him – and having afterwards been fully heard, the Court now proceeded to give its opinion. –

The priviledge claimed by the attorney on behalf of his client, not to be compelled to disclose in evidence what has been communicated to him in confidence and for the benefit of the client, will never be denied, nor ought it to be extended, beyond that just and necessary secrecy and confidence; indeed the rule of law in this respect could never have been meant to operate further. – From the perseverance of the Defendant's counsel in urging and reiterating his priviledge of exemption from being interrogated in any manner by the adversary of his client, we have in order to put the question completely at rest extended our research on this point of priviledge the result of which has been to confirm us in the opinion we at first entertained, and have now to state. –

The general and primary rule in regard of evidence is, "Que tout particulier est obligé de
" deposer ce qu'il sait, toutes les fois qu'il est –
" assigné; cette maxime est fondée sur l'interet
" public qui exige, que tout citoyen sans distinction
" de rang et de qualité, rende hommage à la verité,

" quand

" quand il en est requis" — Repse Vo Deposition. p. 482. 1. Col. — It therefore follows, that the rule now invoked, is rather an exception to the general rule above noticed, and like all other exceptions, the party who wishes to avail himself thereof, must shew that his Case is strictly within the benefit of the exception in order to be exempted from the operation of the general rule — And Jousse, observes, 2e vol. p. 79. — " que la regle generale qu'on peut
" etablir en matiere de deposition, est, que toute —
" personne peut être reçüe à deposer, si elle n'est —
" exclue par quelque loi, ou disposition particuliere". The exemptions therefore must be clear and express, and cannot be extended beyond their true limits, in opposition to general rules founded in reason, and of public benefit. —

Now Pigeau (1 vol. 278) considers as one of the reasons which may be offered by a Witness — against the general rule, in order to be relieved from giving testimony, that he is by his etat bound to secrecy, such as the Confessor, the advocate or Attorney — And with regard to advocates, Pigeau makes this remark — " Domat
" pretend, que c'est parceque leur temoignage —
" seroit suspect — Cette raison n'est pas suffisante,
" la veritable est, que ce seroit blesser la loi de la
" defense naturelle qui ne permet pas, que ce que
" la partie a eté obligée de confier a ses Conseils pour
" sa defense soit revélé. — Comment une partie qui
" ignore les affaires et qui est obligée de recourir
" aux personnes preposées pour l'eclairer, pourroit
" elle s'expliquer avec celles-ci, si elle avoit à

" craindre

" craindre la revelation de ce qu'elle leur diroit? - Aussi
" est ce une opinion generalement recüe, que les Conseils
" necessaires ne peuvent y être contraint" - Here then
with the general rule as laid down by Domat before
him, Pigeau evidently confines the rule to the
confidential and necessary communications of the
client, to whose injury the advocate cannot be
compelled to make any disclosure - he adds afterwards,
" S'il paroissoit cependant que ces Conseils eussent
" connoissance du fait avant qu'on les eut choisi, et
" qu'ils eussent été consultés à dessein par leurs clients
" de les empecher de deposer, le Juge pourroit leur
" ordonner de rendre temoignage à la verité" - In
the Repertoire there is a note to the title Avocat, p. 786.
2. Col. which appears to agree in every respect with the
observations of Pigeau as before given - The note is
in these words - "il n'est point obligé de reveler
comme temoin, ce qu'il ne fait, que comme Avocat
à moins que son client ne lui montré frauduleusement
de la confiance que pour ecarter son temoignage -
ainsi lorsqu'il est assigné comme temoin, et qu'en
deposant, il ne pourroit s'expliquer sans blesser
la confiance d'autrui, au lieu de prêter serment
de dire verité, il doit declaré qu'ayant été consulté
sur l'affaire pour laquelle il paroit devant le
Juge, il repugne à son etat et à son Cour de s'ouvrir
directement ou indirectement, et ainsi qu'il requiert
d'être dispensé de deposer - le Juge doit recevoir cette
declaration par un acte separé de l'enquête, ou de
l'information, en forme de proces verbal, pour qu'elle
soit communiquée, ou au ministere public, ou à la
partie interessée, et pour l'ordinaire l'avocat est
dispensé de deposer, à moins qu'il ne soit question

d'une

see Serpillon. Jousse – Cochin.

" d'une affaire qui interesse essentiellement le Souverain
" de l'etat" — It is obvious from these authorities, that in the application of the rule under consideration, which has been derived from the Roman Law, it not being enforced by any positive Statute or law of France, the French Courts have looked to the reason and spirit of the rule in this, as in every other instance where they may have had recourse to the Civil Law, as raison ecrite, adopting the principles thereof as their guide, where reason, experience and Justice, called for and sanctioned their — adoption and alteration, but never to extend them to cases, where gross injustice, as in this case, would follow, by a fickle, unnecessary and unjust exclusion of testimony, under the cloak of privilege and exemption, which evidently was never — intended to give an unfair advantage to a Suitor but to prevent an unfair advantage on the part of his adversary, by compelling a disclosure of that which he had necessarily confided to his advocate for the support of his rights. — It would appear from Serpillon, that formerly in France, Advocates and Attornies could not be compelled to give evidence against their clients, but that the — jurisprudence in that respect had changed, and that they had since been compelled to answer, and in proof thereof he cites two Arrets of the 18 June 1580 and 5 Sept. 1607 — and also Guypape quest: 45. — he however at the same time adds, that by an arret of 15 May 1605 in a case of retrait in — which the purchaser alledged fraud on the part of the retrayant, the Court refused to allow —

the

the purchaser to interrogate the advocate who had prosecuted the Retrait.— It would however appear from all these, that the rule was not so general as contended for, and that the Courts in France exercised a discretionary power in the application of it, and by no means considered it imperative upon them, and upon a review of all the arrets upon the subject it will be found that it was only the bona fide communication, necessarily made by a client to his advocate that was considered a sacred trust which the advocate could not violate or be compelled to disclose, and that for this object and in this view alone, the rule was originally adopted and enforced by the French Courts in regard to Advocates being called upon to give evidence against their clients. Denizt. under the title Avocat. p. 738. §. 7. no. 10— thus introduces the subject,—and confirms the nature, object and extent of the rule — the terms in which he expresses himself must be particularly attended to, for without this a hasty conclusion might be drawn, that he subscribed to the general rule as laid down by Pothier and Domat— "Une des questions qui touchent le plus à la liberté du — ministere de l'avocat, est de savoir si l'on peut le forcer à deposer comme temoin, ou s'il doit venir à revelation sur un monitoire, dans les affaires sur lesquelles, il ne sait rien qu'en qualité de conseil— Brunean dans son traité des Criées. p. 368. cite, plusieurs auteurs, dont les uns tiennent l'affirmative, les autres la negative — Il ne paroit pas qu'il puisse y avoir de difficulté à embrasser ce dernier parti— On va voir ce que dit Mr l'Avocat—

Generab

General Gilbert dans une Cause ou cette question fut traitée — but as the arrets here alluded to, as cited by Bruneau are not given, it is impossible to say in what the contradiction consisted, perhaps upon close inspection, they might have been found not contradictory but consistent with each other, as each case would necessarily depend upon its own peculiar circumstances, while the same principle would be found to govern throughout, and in no manner departed from — we have however had recourse to Bruneau, and find he merely cites the arrets without stating the cases — but enough appears there to justify the observations we have made, that upon examination, they would not be found inconsistent or contradictory, if tested by the true principle which ought to have guided and no doubt influenced each decision — Bruneau like many others appears to consider the rule either as one without foundation, or amounting to complete exclusion of the testimony of the advocate against his client, neither of which positions is true — The rule exists, and it remains only to make the right application of it, and without perceiving it Bruneau has disclosed enough in respect of these arrets to shew that he himself did not understand them, and that instead of being contradictory they are perfectly reconcileable the one with the other — the principle of the arrets which admit the evidence of the advocate, is upon the general one, that none can be exempted

from

from declaring the truth in a Court of Justice, and that there was nothing of a secret so confidential in its nature in these Cases, as to exempt the advocate from the operation of the general rule — And with regard to the Contradictory arrets, as he erroneously supposes them, this reason is given for them — "qu'il y a trop — " d'inconvenient de forcer un avocat Conseil de " deposer contre sa partie et d'aller en revelation sur " la publication d'un monitoire," instead of drawing the line of distinction between these cases and concluding, qu'a force de juger on a trouvé la vraie application de la regle — he has left the whole in doubt and uncertainty as an unsettled point, whereas, being an exception to a general rule, it has been limited to those Cases which gave birth to the exception, namely that no advocate should be compelled to betray the secret of his client, professionally and necessarily confided to him. —

But from the question as put by Denizart it is evident that he did not consider that the advocate could be exempted generally, otherwise the question he proposes would be a useless one as embraced by a general and positive prohibition or rather exemption — as however he gives no reason for his opinion, but refers to what has been said by the Attorney General Gilbert upon the question as explanatory thereof, we shall therefore give it at large, as it tends not only to corroborate what has been cited from Pigeau, the Repertoire

and

and others, but shews the true reason and spirit of the rule in a manner highly honorable to the profession — but before doing so, we would make this remark, that in the particular case in which the Attorney General spoke, the advocate had already answered to a certain extent; but being pressed for a further explanation, and for a disclosure of other facts, he declined answering, as tending to violate his obligation to secrecy, and the object was to obtain further answers from him. — The Attorney General said — "On ne peut douter en
" general que la foi religieuse du secret ne soit
" essentielle à la profession du barreau, il ne faut,
" pour en être convaincu que considerer qu'elle est
" instituée, pour eclairer, pour conduire et pour
" defendre les autres hommes dans les occasions les
" plus interessantes de la vie — L'avocat, le Juris consulte
" est necessaire aux Citoyens pour la conservation et
" la defense de leurs biens, de leur honneur, et de
" leur vie — Il est etabli par la loi, et autorisé
" par l'ordre public dans des fonctions si importantes.
" La confiance de son client lui est surtout necessaire
" pour s'en acquitter, et ou le secret n'est point
" assuré, la confiance ne peut etre — Ce sont donc
" les loix elles mêmes, qui en instituant l'avocat
" lui imposent la loi du secret, sans laquelle son
" ministere ne peut subsister, et ses fonctions sont
" impossibles" — Mr Gibert further observed
" que dans la conduite particuliere de Mr Leclerc
" (qui etoit l'avocat en question) il n'y avoit ni
" contradiction ni tergiversation a reprendre, et

" qu'on

" qu'on ne pouvoit pas exiger de lui plus ce qu'il avoit
" dit" — And why, may it be asked, could more be
exacted of the advocate, the answer is plain, because
it was attempted to compel him to disclose secrets —
confided to him by his clients, and to their prejudice.
The arret rendered upon the occasion was in conformity
to the conclusions of Mr Gilbert, and is dated the
27th Janv. 1728. — These we conceive sufficient to shew
the nature of the rule which has been so very generally
treated by some authors, and to explain in what
manner it was understood and latterly enforced in the
French Courts — In the rule as thus explained there
is nothing unjust, or from which we should wish
to depart, but on the contrary strictly to adhere to, and
although there may have been in former days some
obscurity in the application of the rule, and perhaps
some misapprehension of its nature and spirit,
it is however evident that lately, it was better and
more clearly defined and explained, and Serpillon,
p. 416. 417. observes, " que plusieurs autres arrets plus
" recens prouvent que Parlement de Paris ne suit plus
" sa jurisprudence ancienne, et qu'il oblige souvent les
" avocats et procureurs à rendre temoignage de la verité
" même contre leurs cliens", from which it is natural
to conclude, that it was considered discretionary with
the Court, to compel the advocates to answer according
to the circumstances of each particular Case, with a
due regard to that secrecy, which by his profession
the advocate was bound invariably to observe, and it
is only in this latter respect, that the reason given by
Pothier would apply — "qu'il y auroit de l'indecence à
" les admettre à etre temoins contre leur parties" — by
destroying the confidential relation of advocate and

client

client — In this respect the advocate stands much in the same situation as a Confessor, and these with the attorney, are by Pigeau, as before noticed, considered as equally bound to secrecy, and therefore exempted from giving testimony — the principle therefore being the same in regard to the advocate attorney and Confessor, the decisions in regard to the one, may serve as a guide in respect to the others, and all the decisions go to say, that the Confessor of a party is not exempt from giving evidence of any fact which may not have come to his knowledge in the discharge of his sacred functions in receiving the confession of a party — "Confesseur ne peut — " deposer de ce qui lui a été revelé en confession" Lacombe. Vo Temoin §. 2. N°5. and Bornier. 2 Vol. p. 59 says, "L'avocat, le medecin, et le procureur ne peuvent " aussi etre contraints a deposer, la raison est, parce qu'on " decouvre la verité sous le sceau de la confession"

Among the various authorities we have consulted upon the question submitted to us, that of Lacombe is worthy of notice, as he has stated in a succinct and clear manner the correct principles and given what appears to us the true conclusions from all the decisions upon the subject — "quant " aux avocats et procureurs, ils ne peuvent etre — " produits pour temoins par leurs cliens ou ils ont " été leurs avocats et procureurs; ni en matiere criminelle " par leurs parties adverses contre leurs cliens, parce qu'on " ne pas reu a accuser celui dont on a fait les affaires, " mais en matiere civile, Cujas et Faber tiennent " que les avocats peuvent etre produits en temoignage " contre leur gré par leurs parties adverses en la cause " en laquelle ils sont avocats, quia nulla constitutione " prohibitum est procuratorem interrogari" Here evidently the rule is too broadly laid down — as the

attorney

Attorney of the party, it is true his evidence is not prohibited but at the same time he ought not to be permitted or compelled to reveal the secrets of his client, and therefore Lacombe, to modify the opinions so given, adds, — "par
" arret du 27 Janvier 1728, sur les conclusions de Mr
" Gilbert, avocat General (the same as before noticed from
" Denisart) Louis Leclerc, avocat, a été decharge avec
" dommages et interets d'une demande formée contre
" lui, à ce qu'il fut tenu de declarer le nom de la personne
" entre les mains de qui Marie Creusson avoit deposé
" une somme, ou de la payer, sous pretexte qu'il avoit
" eté consulté par ladite Creusson pour ce depot" — and why? — because here was evidently a fact upon which he was confidentially consulted, and he was therefore under the obligation of secrecy towards his client, but Lacombe adds — " ce qui doit avoir lieu à moins
" que l'avocat n'ait eté consulté frauduleusement
" pour ecarter sa deposition" — he then concludes with this general observation, "Mais les avocats, procureurs,
" et Notaires sont obligés de deposer contre leurs cliens
" des faits qu'ils savent d'ailleurs que par la —
" necessité de leur profession". —

We have already cited the Repertoire, but will again refer to it under the word, deposition, which is most conclusive on the subject before us, and is — entitled to the more credit, as being the latest work we can now resort to, and must be presumed to embrace the latest decisions and opinions of the Courts of France: but neither under the word alluded to, nor in any other part of the work, is it stated that any variance of opinion existed upon the question at that time or previous, or that the jurisprudence had in respect thereof undergone any change. —

In

In giving evidence of any fact which may militate against his client, an advocate may feel some delicacy still however it would be improper that he should be exempted from a duty which he owes in common with the rest of his fellow citizens to testify the truth, unless called upon to disclose, what the Court would never countenance or permit, the secrets, and confidential communications of his client. — Now to apply these principles to the Case before us. — The plaintiff is the wife of the Defendant and upon the ground of cruel treatment sues him for a separation de corps et de biens, and it would appear that long before the institution of this action, (in which Mr Viger now acts as counsel for the Defendant) the Defendant had been convicted and imprisoned for a misdemeanor, and that while he was confined in gaol, that the Plaintiff had applied to Mr Viger on his behalf to get a petition drawn up to His Excellency the Governor in Chief to obtain the liberation of the Defendant from gaol, and that the Plaintiff upon this occasion interested herself for the benefit of her husband, and this in order to rebut the charge made against her that during the Defendants confinement in gaol, she had neglected the interests of the Defendant, and in other respects conducted herself ill. — The question evidently contains no secret communicated by the client to the attorney and the objection in other respects cannot be maintained. — Objection over-ruled, and ordered that Mr Viger answer to the question proposed to him.

Wednesday

Wednesday 20th June 1827

Dominus Rex
vr
Wm E. Ball & al.

On Habeas Corpus.

Judgment

The case before us presents the followring facts. One Joseph Fisher, stated to be an alien, came lately into this Province, where he was attached by his body about the 10th May last, at the suit of one John Wood a merchant in the State of New Hampshire, for a Civil debt of £160, and was thereupon detained in the Gaol of this district. On the 28th of the same month, two Warrants signed by Samuel Gale, Esquire the Police Magistrate, were lodged with the keeper of the said Gaol, the one charging the said Joseph Fisher, as late of Vermont, gentleman, of "being "accused on oath with having feloniously taken, stolen, "and carried away from a trunk previously locked, "bank notes to the amount of 638 dollars, the property "of John Wood," and directing the detention of the said Joseph Fisher in the said Gaol, to be dealt with according to law — The other warrant being somewhat more extended and precise, stating, "That whereas "Joseph Fisher, late of Vermont, gentleman, an alien, "to wit, a Prussian, now in confinement under Civil "process in the said Gaol, stands charged upon "oath, with having at Middlebury in the State of "Vermont, feloniously stolen, taken, and carried away

"from

" away from a trunk previously locked, bank notes
" to the amount of 638 dollars, and to the number
" of upwards of 240, the property of John Wood of
" Keene in the State of New Hampshire, and with
" having immediately upon the commission of the
" said felony, come into this Province", and —
directing also the detention of the said Jos: Fisher, to be dealt with according to law. — These warrants appear to be founded on two depositions made by the said John Woods, on the said 28th day of May last, before the said police magistrate, in one of which, the stealing of the bank bills or notes, to the amount of 638 dollars, is mentioned, but without stating the time or place when and where the felony was committed, and that the said John Wood verily believed the said felony to have been committed by the said Joseph Fisher — And in the subsequent deposition the — said John Wood swears, " That the said Joseph
" Fisher, committed the crime and felony charged in
" the affidavit aforesaid at Middlebury in the State
" of Vermont — that the said Joseph Fisher is not
" an English Subject, but an Alien, to wit, a Prussian
" as declared by him the said Joseph Fisher, and —
" came into this Province from the State of Vermont
" aforesaid, immediately after the Commission of the
" aforesaid Offence". — It further appears that the offence so charged against the said Joseph Fisher is a felony, and a crime punishable by the laws of the State of Vermont. —

On the 30th day of the said month of May last, a warrant was issued in the name of our Sovereign tested in the name, and signed by His Excellency the Earl of Dalhousie, the Governor in Chief of the Province, the said warrant addressed to the Sheriff of the District

of

of Montreal, and in which it is stated as follows,

Whereas Joseph Fisher late of the town of Middlebury in the County of Addison in the State of Vermont, one of the United States of America, Gentleman, is now committed and detained in our Common Gaol of our said district of Montreal under your Custody, upon & by reason of a certain charge on oath of felony, to wit, upon the charge on oath of having on the 23d day of April 1827, at the said town of Middlebury in the County of Addison in the State of Vermont, one of the United States of America, feloniously stolen and carried away, divers, to wit, 240 Bank notes, for the payment of divers sums of money, in the whole amounting to 638 dollars of the value of £143 " 11 Sterling money of Great Britain, and then and there being the property of one John Wood — And whereas the said Joseph Fisher, not being one of our Subjects, but being an Alien, to wit, a Prussian, hath since the commission of the said offence come into this Province from the said United States of America, and the said offence whereof he is charged as aforesaid, having been committed within the jurisdiction of the said State of Vermont; it is fit and expedient, that the said Joseph Fisher be made amenable to the laws of the said State of Vermont for the offence aforesaid. We therefore Command you, that the body of the said Joseph Fisher, under your custody as aforesaid, you do immediately convey and deliver to such person or persons as according to the laws of the said State of Vermont may be lawfully authorised to receive the same, at some convenient place on the Confines of this Province and of the said State of Vermont, to the end that the said Joseph Fisher, may be

thence

thence safely conveyed by such person or persons as aforesaid to the town of Middlebury aforesaid, and there be made to answer for the offence aforesaid — according to the laws of the said State of Vermont — Provided always, that the said Joseph Fisher be detained under your custody as aforesaid, for no other cause, matter or thing other than the Offence aforesaid and this you are not to omit at your peril. Witness &c.

By the return made to the said writ of Habeas Corpus, sued out by the said Jos: Fisher, it appears that the Sheriff of this district of Montreal, made his warrant to William Easton Ball, his bailiff, and charged him with the execution of the said warrant, so issued in the name of His Majesty.

Upon this return, several questions have been raised, and objections taken on the part of the Prisoner, Joseph Fisher, as to the sufficiency and the legality of this proceeding against him —

These we shall now consider —

1st. It is first objected, — "That there is here no "clear and positive charge of any felony or Crime "having been committed by the prisoner, the — "charge against him amounting merely to a — "suspicion, the grounds or causes of which are "not set out, so as to enable the Court to judge, "how far they are reasonable or sufficient." — But it cannot be supposed, that much stress was — meant to be laid upon this objection, as in the affidavit of John Wood, there is a positive charge against the prisoner, "that he committed the "felony in question at Middlebury in the State of "Vermont" — and so expressed in the Warrant of

Commitment

Commitment — It was no doubt necessary that the charge made against the prisoner should be sufficiently clear and positive to render him amenable to the laws of that Country, he is stated to have violated, for this constitutes the ground work of the whole proceeding — The Court thinks the accusation against the prisoner is sufficiently clear and positive in all material points — it is true, the day when the felony was committed is not mentioned in the affidavit of Mr Wood, although it is in the warrant addressed to the Sheriff: but from the circumstances stated of the Prisoners coming into this Province immediately after the felony committed, and his subsequent arrest here in May last — this would be sufficient to hold him amenable to the law, the omission of a day certain or date when the felony was committed being in many respects not material, nor ought we here to examine this point with that strictness as we might do upon a bill of Indictment. —

2.ly It is objected — "That upon the supposition, "that a sufficient accusation is made against the "Prisoner, Yet that the Sovereign cannot lawfully "deliver him up to the State where the Crime is "said to have been committed — And even allowing "this right to the Sovereign, yet, that it has "never been practised or allowed, except in offences "of the most aggravated nature, such as, Murder "and Robbery, but never in the minor offences of "Larceny and such like". —

This objection embraces the main points in the Case, and the determination upon it, will

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in a great measure obviate all the other objections. In considering this part of the case, much of the argument used must be laid out of the question — such as that founded on offences of a political nature arising out of revolutionary principles excited in any Government, as in these cases, the refusal of a State to surrender the accused, cannot be drawn into precedent, for the authority of the State to which the accused has fled, may well be extended to protect, rather than to deliver him up to his accusers, and this upon a wise and humane policy, as the voice of Justice cannot always be heard amidst the rage of revolution, or in those cases where the Sovereign and the Subject are at open variance respecting their political rights — and therefore no State will ever be induced to deliver men up to destruction nor even to malicious prosecution — We will also lay out of the question, all the Cases depending upon treaties and Conventions entered into — between different nations, as in such cases, the surrender of the accused by one nation to another is not so much the effect of the exercise of a — prerogative right or power of the Executive Govern^t as the execution of a national Convention binding on both parties — We must meet the Case as it presents itself, which calls upon us to Determine whether for any crime, great or Small, committed in a foreign State, there exists in the Executive — Government of this Country, any authority to deliver up the accused to be dealt with according to the offended laws of such foreign State. —

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The crime here charged against the prisoner, is recognized as an offence against the laws of all Christian and Civilized nations, and this crime may be more or less aggravated according to the circumstances of every particular case. — In looking at the authorities cited from Grotius, Puffendorff, Vattel, Heineccius, Burlamequi and Martens, and to what has been written by these authors on this subject we feel it unnecessary to make particular quotations from them in support of the doctrine in hand, — because it is impossible, that any unprejudiced man, can read these authors, without being satisfied, that the principle here objected to, is one admitted as a thing understood, practised, and recognized by the Comity of Nations, that the offender against the laws of one nation, taking refuge with another, may be surrendered to the — offended nation for the ends of Justice — The difference of opinion among these writers as to the enormity of the offence, cannot affect the principle although it may vary the practice among different nations according to circumstances. — This right of surrender is founded on the principle, that he who has caused an injury is bound to repair it, and he who has infringed the laws of any Country, is liable to the punishment inflicted by those laws — if we screen him from that punishment, we become parties to his Crime, we excite retaliation — we encourage criminals to take refuge among us — we do that as a nation, which as individuals, it — would be dishonorable, nay criminal to do. — If on the Contrary, we deliver up the accused to the offended nation, we only fulfill our part of the

Social

social compact, which directs that the rights of nations, as well as of individuals, should be respected, and a good understanding maintained between them, and this is the more requisite among neighbouring ~~nations~~ States, on account of the daily communication which must necessarily subsist between them — A modern writer on the Laws of nations says — "La communication journaliere entre deux Pays limitrophes est inevitable, et elle doit être d'autant plus favorisée par leurs — gouvernements respectifs, qu'elle est naturellement "fondée sur des besoins reciproques, et qu'elle donne "par la lieu à des echanges — d'ailleurs elle — "etablit entre les habitants respectifs des liaisons. "et une sorte de confiance qui assure leur tranquilité "et contribuent à leur jouissances". — Indeed were we to take into account the opinions of modern writers on International law, we would be still more strongly fortified in the principle we here hold — and we see no reason why those opinions should be rejected: — by lapse of time — by new combinations and events, and by revolution, the principles of Government may be amended and improved, and we have in the present age had many lessons to teach us wisdom — at all events, we may safely say, that at the present day the world has become enlightened in the Science of Government as well as in all other — departments of human knowledge, far beyond what was known to those writers who lived

Instit. du Droit des Gens &c. par C. Gerard de Rayneval liv. 2. Ch. 3. §. 4. p. 134

Centuries

Centuries ago, and therfore that the maxims of Government at the present day, may be considered as at least as well understood, and better adapted to the rights and feelings of mankind, than they could have been in the days of Grotius & Puffendorff.—

But let us look more immediately to the laws of our own Country, as the principles there adopted must serve to guide our decision on the question.— The law of England recognizes the law of Nations as part of the Common law of the land, and although upon this question, from the insulated situation of that Country, we do not meet with numerous decisions on the point, yet we find enough to satisfy us, that we are holding to those principles which have been there adopted.

Here we must refer to the Cases cited at the bar, as furnishing the only light on the subject which we have at this moment been able to procure— further research might have been made had the hurry of the Term permitted it —

Rex. v. Hutchinson. 3. Keb: Rep. 785. where the Court refused to bail a man committed for a murder in Portugal.—

Col: Lundy's Case. 2 Vent: Rep. 314, who was arrested in Scotland for a Capital offence committed by him in Ireland — Held that he might be sent there to be tried.—

Rex. v Kimberley. Str. Rep. 848.— Justices of Peace in England may commit a person offending against the Irish law, in order to be sent to be tried in Ireland.—

East—

East India Co. v. Campbell. 1 Ves. Sen. 246, where it was held, that one may be sent from England to Calcutta to be tried for an offence committed there.

Mure. v. Kaye. 4 Taunt. Rep. 43. where Judge Heath held — "That it has been generally "understood, that whenever a crime has been "committed, the criminal is punishable, — "according to the lex loci of the Country against the "law of which the crime was committed, and by the "Comity of Nations, the Country in which the criminal "has been found, has aided the police of the Country "against which the crime was committed, in — "bringing the criminal to Justice — In L. Loughborough's "time the Crew of a Dutch Ship, mastered the vessel "and ran away with her, and brought her into Deal "and it was a question whether we could seize them "and send them to Holland — And it was held "we might — And the same has always been the "law of all civilized Countries".

It has however been said, that the Cases of Lundy - Kimberley - and Campbell, do not apply, as the Countries to which these persons were sent were under the same dominion of the Authority sending them, and therefore there could be no question raised touching international law — This may be considered an ingenious, but we think not the true construction to be put upon these Cases — for the question was, the right to send these persons to a different Country from that in which they then were, to be tried by the laws of that Country for an offence committed against them, and without some law to warrant this, and none

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is cited or relied on, the Sovereign had no more authority to send these persons to such distant Countries for their trial, than he had to send them to a foreign Country for this purpose — besides we see nothing said in any of these Cases, which led us to believe that the decision was founded on the power of the Crown over those Countries — On the contrary, from what was observed in Campbell's Case we must believe, that it was the general principle we here contend for which was recognized — In that Case the Court is stated to have said — "That the " Government may send a person to answer for a " crime wherever committed, that he may not " involve his Country, to prevent reprisals." —

In the other two Cases, the pretence that the offended Country was under the same dominion will not apply, the general principle is there — clearly established, particularly in the latter of Mure. v. Kaye — for there Judge Heath lays it down as the law of all civilized Countries, and although the particular instance for elucidating this general principle, in the case of the Dutch Sailors, has been called a Case of Piracy, and as such always restrained among friendly — nations, yet, without a particular treaty on this Subject, this Case presented only a question of international law, which stood upon no better right than the present — the particular circumstances alone could lead to a more ready exercise of the right of interference of the British Government — And accordingly we find that Mr Chitty in his

treatise

treatise on Criminal Law 1. Vol. p. 16. has laid it down as a general principle — "That if a person
" having committed a felony in a foreign Country,
" comes into England, he may be arrested here and
" conveyed and given up to the magistrates of the
" Country against the laws of which the offence was
" committed." — and he cites as an authority on which he grounds this principle, the above case of Mure. vs. Kaye. —

Two Cases have been cited, as having been decided in the United States of America, applicable to that before us — the one by Mr Chancellor Kent, in the State of New York, and the other by Judge Tilghman, in the State of Pennsylvania. We are happy to have the opinions of enlightened men upon a question of this kind, laid before us, particularly from a Country with which our Communications are so frequent, and our interests mutual — The opinions of these learned men seem however to be at variance upon some points, so that the question might still be considered as unsettled in that Country, without some local law on the subject — We cannot however help expressing our entire approbation of those principles, which have been adopted and so forcibly applied by Mr Chancellor Kent in his Judgment — they appear to us to be founded on a fair interpretation of the law, and well suited to the growing intercourse and good understanding between the two Countries. — The opinion and decision of Judge Tilghman, which has been cited

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and relied upon by the Prisoner, does not seem to favor his Case — we would even say that some parts of it, make strongly against him — To shew this, some statement of that decision may be requisite.

According to the report of the decision which has been communicated to us, it would appear, that one Short, who had fled from Ireland to the United States, was charged by an individual there with having committed a murder in Ireland, and was arrested at the instance of this individual with a view to his being sent back to Ireland — but no demand had been made of the accused by the British Government, nor had the Executive of the United States directed any thing to be done in regard of him, either as to his arrest or detention — The Prisoner, Short, being brought before Judge Tilghman on the writ of Habeas Corpus, it became a question before him, how far the prisoner was liable to be detained under such circumstances — The Judge determined that he could not — But this is not the Case of the prisoner before us, for he has not only been accused of a Crime, but by the order of the Executive Government it has been directed, that he shall be delivered up to the legal authority of that State where the Crime was committed and from what we can collect of Judge Tilghman's decision, there is some reason to believe, that had the prisoner Short, when brought before him, stood in the same situation as the prisoner Fisher now does, he would have determined differently — We

will

will make a short extract from this decision to shew the reasonableness of this belief, from the general principles therein held, which we conceive to be in many respects consistent with the opinion we now hold. — He says. —

"I grant, that when the Executive has been
" in the habit of delivering up fugitives, or is obliged
" by treaty, the Magistrate may issue warrants of
" arrest of their own accord (on proper evidence) in
" order more effectually to accomplish the intent of the
" Government by preventing the escape of the criminal,
" On this principle we arrest Offenders who have
" fled from one of the United States to another, even
" before demand has been made by the Executive of
" the State from which they fled. — But what
" right is there to arrest in cases when the Government
" has declared that it will not deliver up? — For
" what purpose is such an arrest? — Can any
" Judgment be given by which the Executive can
" be compelled to surrender a fugitive? — Most
" certainly not. — If the President of the United
" States, should cause a person to be imprisoned
" for the purpose of delivering him to a foreign
" power, the Judges might issue a Hab: Corpus
" and enquire into the legality of the proceeding —
" but they have no authority whatever to make such
" delivery themselves, or to command the Executive
" to make it. — If these principles be just, it
" follows that under existing circumstances, no
" Magistrate in Pennsylvania, has a right to cause
" a person to be arrested, in order to afford an —
" opportunity to the President of the United States

" to

" to deliver him to a foreign Government. — But
" what if the Executive should hereafter be of opinion
" in the Case of some enormous offender, that it had
" a right and was bound in duty to surrender him,
" and should make application to a Magistrate for
" a warrant of arrest — that would be a Case quite
" different from the one before us, and I should think
" it imprudent at the present moment to give an opinion
" on it. — Every nation has an undoubted right
" to surrender fugitives from other States. — No man
" has a right to say, I will force myself into your
" territory, and you shall protect me. — In the
" Case supposed, the question would be, whether
" under the existing Constitution and laws, the
" President has a right to act for the nation, or
" whether he must wait until congress thinks proper
" to legislate on the Subject. — The opinion of the
" Executive hitherto has been, that it has no power
" to act, and should it ever depart from that opinion
" it will be for the Judges to decide on the Case as it
" shall then stand — Neither do I give any opinion
" whether the Executive of the State of Pennsylvania
" has power to cause a fugitive Criminal to be arrested
" for the purpose of delivering him up. — But confining
" myself to the case before me, in which the arrest was
" made at the request of a private person, I am of
" opinion, that there is no law to support it, and
" therefore the Prisoner is entitled to his discharge."

Taking then the opinion of Judge Tilghman on the principle here stated, and supposing that there existed a law in the United States, authorising

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the President to act for the nation, as the Prerogative of the King of Great Britain, authorises him to act in this behalf, there can be no doubt, but that in the one Country as well as in the other, what the Executive legally directed to be done in regard of delivering up a criminal, would be confirmed by the Judiciary. —

The objection that the offence charged against the Prisoner, is not of that enormity, as either to require or permit, that the Executive should interfere to deliver him up, can have no weight — It would be difficult to establish a rule, where none has been settled to enable us to distinguish the shades of enormity of different Offences, their evil tendency or pernicious effects, so as to limit the power of the prerogative, as applicable only to such crimes, as are productive of a certain quantum of evil in a State. — The certain and positive rule laid down by all writers on international law, and the decisions had thereon, as above referred to, agree to say, that where a crime has been committed, the criminal may be surrendered to the offended Country — there is certainly great difference of opinion among these writers as to what kind of Crime this ought to apply — some holding it to extend only to High Treason, Robbery and Murder while others apply it to minor offences and even to Civil damage — but where the general right is acknowledged, it must be left to neighbouring nations to determine the necessity of enforcing it according as good policy and sound discretion shall require. —

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3d. It is however further objected, that allowing the Sovereign may have the power to deliver up a Criminal to another State, yet that such power cannot be exercised by the Governor of this Province, who as the Servant of the Crown cannot be considered as vested with the exercise of such high Prerogative — or at furthest that it is necessary to Shew, that by his Commission the Governor is vested with this authority —

It would certainly be considered rather extraordinary that this, or any other prerogative of the Crown, necessary to be extended to every part of its dominions, (and none more than in this Province,) should require either the personal presence of the Sovereign, or his special mandate in every case of the exercise of this right. — This would render it nearly impracticable, and — certainly most burthensome to the Subject when seeking to derive a benefit therefrom. — But the prerogatives of the Crown do not rest upon this limited principle — they are equally in vigor in all its possessions, and may at all times be exercised when necessary for the general welfare — The principle as laid down by eminent Crown lawyers and explained by Chitty is, that the Kings Prerogative in the Colonies, unless where it is abridged by grants &c 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 from the Crown to the — subject, the King could rightfully exercise in — England — that is, that the Common law of England with respect to the Royal Prerogative, is the Common law of the Colonies — As therefore the prerogative rights in Canada, are the same by law as in

Ch. on Prerog. 32. 33.
1 Ch. Op. 232. 3.

England

England — how are they to be exercised, but by His Majesty's Representative in the Colony. — Governors of Colonies, although but the Servants & Representatives of the King, yet are in general vested with royal authority and exercise many Kingly functions — It is true, they cannot declare war, nor make treaties, nor do many other acts of royal authority which involve the interests of the whole realm, but what regards the Security, the interest, or the honor of the Province over which he presides, every Governor of a Colony as the Kings representative, must hold, and be authorised to exercise all royal prerogative incident to that situation as a thing requisite for the maintainance of the public welfare, unless it has been particularly excepted and reserved by his Commission. a The Governor is answerable to the King for this exercise of the Prerogative and for the right discharge of his duty, and if in the Case before us, the party be aggrieved, the question must be settled, according to the principles of international law between the Sovereign of that Country to which the Prisoner belongs, and the Kings Majesty — but not by His Courts of Justice —

Ch. on Prer. p. 34.

4th — It has also been objected, that no demand appears to have been made by the American Govern^ts or by any of the American States for the Surrender of the Prisoner — But it is not for the Court to enquire into this — The nature of the demand and the sufficiency of it, must be best known to the Executive, to which it has been made, and which alone is competent to determine how far the Royal prerogative ought to be exercised thereon — What we have to determine is, whether there was legal ground for the arrest and surrender of the Prisoner, and we hold there was — By the warrant of His Excellency

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the Governor in Chief to the Sheriff, the latter is authorised to convey and deliver up the Prisoner to such person or persons as according to the laws of the said State of Vermont may be lawfully authorised to receive him, that is the Executive authority of that State, and we must presume it was the same authority which demanded him — This is not however a question for our consideration. —

But the Prisoner comes before us in a very different character from that of a Subject to whom protection is due as of right — he is an alien, to whom protection is not due, if the King sees fit to with-hold it — The observation of Judge Tilghman may well be applied to him — "That he cannot force himself into the Kings Territories and say, you shall protect me" — It is held that alien friends may lawfully come into the Country without any license or protection from the Crown, though it seems, that the Crown even at Common law, and by the law of nations, possesses a right to order them out of the Country, or prevent them from coming into it, whenever His Majesty thinks fit; and the reason given is, that it is inseparable from the governing power in any Country, that it should be able to take precautions against foreigners residing in such Country, and particularly in a Country where foreigners are amenable only to the ordinary laws — The Prisoner came into this Province, under suspicious circumstances, charged with a felony — as an alien his conduct did not merit protection, unless he had come with a fairer character, and he ought not to be surprised, nor to complain, that His Majesty's Government should direct him to be taken back to that Country from which he came. —

Ch: on Bl: 49.
1 Bl: Com. 259. 260

Upon the several grounds alledged therefore, the Court have no hesitation in saying, that the Prisoner

cannot

cannot be liberated from the restraint under which he is held, but that he must be remitted to the custody of the proper Officer for the execution of the warrant issued against him in the name of His Majesty. w

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October Term 1827.

Friday 19th October.

No 1292.

Scriver
vs
Stanley Curr
&
Scott, Intervs

This was an action of assumpsit, for work and labor done and performed and monies laid out and expended in and about the making and opening a public road and high way upon certain lots of land in the township of Hemmingford, belonging to one Mrs Scott an absentee, to whom the Defendt had been elected as Curator for the purpose of the present Suit—

After some proceedings had in the Cause Mrs Scott, the proprietor of the lands intervened, and pleaded that part of the road in question had been made by herself, and that she had an agent resident on the spot who had undertaken the whole road with the knowledge & consent of the Surveyor, & had begun to make the same, and that the plaintiff had without authority and illegally interfered and made the said road—

On this plea the parties went to evidence and the enquête being closed, they were now heard on the merits.—

Mr

Mr Sewell & Mr Buchanan for Mrs Scott argued that the action must fail for want of proof as there was no evidence of any promise or undertaking on the part of Mrs Scott, without which this action could not be maintained in this case, ~~for~~ the action of assumpsit ~~presumes~~ requires, that there ~~must~~ should be a tacit consent, (where there is no express consent proved) sufficient to raise an assumpsit — but in this case there is neither, the work in question having been done by the plaintiff contrary to the consent of Mrs Scott — That this action having been brought under the Prov: Stat: of the 3d Geo. 4th ch. 19, which authorises the making of public roads on the lands of absentees, cannot be maintained by the plaintiff, because he is not the proper officer pointed out by the law, which gives the action only to a road officer and not to any individual who may choose to interfere — That had the plaintiff been warranted in bringing the present action, yet it cannot be maintained in the form here adopted, he ought to have pursued the remedy given by the Statute which is an action of debt, and no other kind of action is given —

Mr Rossiter for the plaintiff contended that the action was regular and the proof sufficient.

By the Court —

Had the plaintiff an express promise and undertaking on the part of Mrs Scott,

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he might have maintained this action without reference to the Statute, but having failed in this, his remedy can only be under the Statute, which gives an action of debt, and none other, and the present action must therefore be dismissed.—

see 4 T. Rep. 794 - Glass Plate Co v Meredith
Esp. actions on Stat. p. 16 & 30.

No 723.

Gates & Co
vs
Sayer. —
&
Robertson
T. S.

In this case a writ of attachment had been sued out by the plaintiffs upon the property of the Defendant in the hands of Robertson the Tiers Saisi, whose residence was in Upper Canada, but on whom the process had been served personally in this district. As it was inconvenient for the tiers Saisi to attend Court to make his declaration, he gave a special power of attorney executed before a Notary public authorising William Walker, Esq. his attorney in Court, to appear for him, and to make a declaration on oath on his behalf that he, the Tiers Saisi had no monies or property in his hands belonging to the Defendant.—

Mr Walker now moved, that he might be permitted to enter an appearance for the tiers-saisi, and to make his declaration on behalf of the said Tiers Saisi under a special power of attorney for this purpose given by him and now filed.—

The Solicitor General for the plaintiffs opposed the motion, contending that the Tiers

Saisi

saisi must appear in person and make his declaration on oath. — That the tiers saisi here by the power of Attorney given, does not authorise that Attorney to swear, but merely to declare that the tiers saisi had nothing in his hands belonging to the Defendant — But the plaintiffs are entitled to have the oath of the tiers saisi, and the he should with his declaration on oath given the power of Attorney in question. —

Walker in answer observed that the power of Attorney here had been made according to the approved forms and which was admitted to be sufficient in the Courts in France. cites. 1 Pigeau. 656. 657. — Rep^re v^o Saisie-arret. — That the Tiers Saisi here was not liable to the jurisdiction of the Court for the demand in question — he ought to be considered as a Witness, and a tender of his expences ought to have been made to him before he was compelled to answer. a

By the Court. — The power of Attorney here produced, unaccompanied with the declaration on oath of the tiers saisi, is not sufficient, even according to the practice of the French Courts: The Plaintiffs are entitled to the declaration on oath of the Tiers Saisi, but the authorising another to swear for him what he himself would not (perhaps) swear, would introduce a practice unknown & Dangerous: under any circumstances the practice appears extraordinary, that one man can by procuration swear for another in a Court of Justice, and altho'

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it seems to have been admitted in the French Courts in some particular instances, yet all the necessary formalities must be complied with - it is the oath of the principal and not of the Attorney that is to be considered - it is the principal alone who could be convicted of false swearing and not the attorney, unless he co-operated in the act with a wilful and malicious intent; - and therefore the power of Attorney must not only authorise the procureur to swear, it must contain the declaration on oath of the Constituent, which is to be repeated by the Attorney - " J'y declarer jurer et affirmer, " comme le comparant a fait devant les notaires " soussignés &c." Ravaut. p. 749. - With us - however a Notary has no competent authority to receive such an oath, and the tiers Saisi might have avoided all this difficulty by appearing before one of the Judges of this Court, after notice given, and there make his declaration on oath as required - and this respect we may assimilate the Tiers Saisi to a witness about to leave the province, whose testimony may be taken in this way - but as the present application comes before us it cannot be admitted.

No 723
Robertson
vs
Kane & ux

Action on a notarial obligation for debt against the Defendants as jointly and severally bound. -

The

The husband made default — the wife appeared and being authorised to defend the action, she pleaded, that at the time of making and executing the obligation in question she was a minor, and although she was assisted and authorised by her husband, still the said obligation is not in law binding, and therefore that the action ought to be dismissed in so far as regards her — In support of this plea. Poth. Tr. de la puissance maritale. N°. 76.—

Grant for Pltff in answer — minority of the wife is not a sufficient plea — she must also shew lesion, and demand a rescision of the act upon good and sufficient grounds — But in this case the obligation was given by the wife to liberate her husband from prison, against which even the plea of lesion would not be admitted. — cds Lacombe. v° autorisation. —

The Court was of opinion that the plea was not sufficient, that the wife although a minor may bind herself to the payment of a debt with the authority and ~~assistance~~ consent of the husband — It is true the benefit of restitution is always allowed to minors, but this must be demanded upon good and sufficient grounds, otherwise the act is binding — Judgt for Pltff

see 3 Vol. Gr. Com^n p. 145. N°. 19. art. 223. —

N°. 911.

№ 911.

On Petition of Jas. Holt and On Petition of M'Nider & Co

In this Case, James Holt a Creditor of Messrs M'Nider & Scott, presented a petition to one of the Judges of this Court in vacation stating, that he was a Creditor of the said M'Nider & Scott to a large amount, viz^t in the sum of £526.. 18. 8 Cy, being the amount of four promissory notes made and signed by the said M'Nider & Scott, and that there were divers large sums of money due to the said M'Nider and Scott by merchants and other persons commorant and resident within the District of Montreal.— That he the said James Holt might be exposed to sustain damage, or loss the said sum of money so due to him, unless for the security and payment thereof he should be permitted to oppose and prevent the paym^t to the said M'Nider and Scott, of all or any of the sums of money, which may be due and owing to them, by any of the said persons their debtors as aforesaid, so resident in the district of Montreal — and therefore praying that permission should be granted to him the said James Holt to oppose and prevent the payment of the monies aforesaid to the said M'Nider & Scott.—

To this petition was annexed an affidavit by the said James Holt, stating, that he verily believed to be true all the facts stated in the Petition —

On this petition and affidavit an order was made and subscribed by The Hon. Geo. Pyke, one of the Judges of this Court, granting the permission demanded, the said order, dated 21 June 1827.—

In consequence of the above order, the said James Holt proceeded to notify several persons debtors of the said M'Nider and Scott not to pay to them the monies due to them by such debtors, serving at the same

time

time a copy of the said order and protesting as
each of the said debtors for all damages to accrue to
him the said James Holt, in case of payment
of the debts aforesaid.—

On the 9th July 1827, the said M.c Nider and
Scott, after notice given to Mr Holts attorney,—
presented their petition to the Judges of this
Court, stating the great injury and damage accrued
and likely still to accrue to them, by having all
the monies and debts due to them, locked up in
the hands of their debtors, by the order so obtained
by the said James, to an amount far exceeding
that claimed by him, and praying that upon
good and sufficient security being given by them
the said M.c Nider and Scott to pay to the said
James Holt what should be legally due to him
upon his demand aforesaid, (reserving to themselves
the right to have the whole of the proceedings
so had and prosecuted by the said James Holt
to be set aside as illegal and the security now
tendered to be thereupon rescinded) the said
Attachment and opposition so made by the said
James Holt should be now taken off and set
aside, and main-levie thereof granted to the said
M.c Nider and Scott.—

The parties having been heard at Chambers
on the 10th July 1827, the following order was
made upon the petition of the said M.c Nider and
Scott, by M.r Justice Pyke.—

"The

The parties having been heard by their respective counsel upon the petition of Adam Lymburner M'Nider of Montreal in the district of Montreal, Merchant, and James Scott of the same place, Merchant, to that effect presented this day, It is considered that upon good and sufficient security being given by the said A. L. M'Nider and James Scott for the preservation and payment of the debt and sum of money alledged to be due and owing by them to James Holt of Montreal, Merchant, the attachment of and oppositions to the payment to the said A. L. Maimder and James Scott or either of them of all and every the sum and sums of money which were or are or may be due and owing to them or either of them by any person or persons commorant or resident within the district of Montreal aforesaid, made and signified or which shall hereafter be made and signified in pursuance of the permission or authority to that effect obtained by the said James Holt at the hands of the Hon: George Pyke one of the Justices of the said Court upon his petition in that behalf, bearing date the 21 day of June last, and all other the proceedings had and adopted, or which shall or may be had or adopted by the said James Holt under and by vertue of the said permission or authority be discharged and main-levie of the said attachment granted to the said A. L. M'Nider and James Scott, saving and reserving to them nevertheless, the right of causing the said attachments and oppositions and all other the said proceedings to be revised, and if needful or sufficient cause be shewn, set aside, or declared null

and

and void, and the Security so given exonerated and discharged.— And good and sufficient Security having forthwith been given by the said A. L. McNider and James Scott according to the terms of the aforesaid order, it is in consequence ordered and adjudged that the said attachments and oppositions and each and every of them, and all other the proceedings had and adopted, or which shall or may hereafter be had and adopted under and in pursuance of the permission or authority so as aforesaid obtained by the said James Holt at the hand of me the said Honorable George Pyke, be and the same are hereby discharged, and main-levée of the said Attachments and oppositions and each and every of them granted to the said A. L. McNider and James Scott—

George Pyke
J. K. B.

Afterwards in this Court a petition was presented by the said James Holt, praying for the reasons therein stated that the Court would revise the order made and given by the Sd Hon. George Pyke on the 10 July last, and thereupon to rescind and annul the same— And on the part of the said McNider and Scott, a petition was in like manner presented, and for the reasons therein stated, praying that the whole of the proceedings had and adopted by the said James Holt should be set aside as null and illegal, and the security entered into on the behalf of the said McNider & Scott be cancelled and set aside.—

The

The parties were now heard upon both Petitions.

Mr O'Sullivan for Mr Holt, stated that the proceedings adopted on his part were perfectly regular and such as are known and regulated by Law — refers to the practice as laid down by Pegeau 1. Vol. 645. & 651, Poth. Proc. Civ. p. 201. — the same course of proceeding was known and practised in the Custom of Toulouse under the term of "bannissement" — Soulatges. Prat. — and old Denizt holds the same principle — This Law and practice became the law of this Country when the general body of French law under the Custom of Paris was introduced into it, and it has never been repealed. — The provincial Ordinance of 1787, does not affect it — this ordinance had reference merely to proceedings had in Court — to writs sued out and proceedings had thereon — the proceeding here is totally different, this is an arret simple, or opposition to the payment of monies in the hands of a third person, and is distinguishable from the Saisie-arret referred to in the Ordinance — cites Poth. Proc. Civ — 1 Pegeau 622. — Actes de Not. de Denizt. Ordre of 1629. Neron. 15. art. p. 426. 1re Vol. — There is no proceeding in Court here, no instance, no — assignation of the party, nor any course of proceeding to assimilated to the Saisie-arret contemplated by the Ordinance. — There being therefore no analogy in the kind of remedy and effect given by the Arret Simple and the Saisie-arret, there could be no — main-levée granted, because there was no seizure made, as in the case of a Saisie-revendication, or other proceeding founded on a process sued out. The simple-arret may be converted into a Saisie-

execution

execution. Poth. Proc. Civ. 204 — And there is no instance to be found in which the Judge is — authorised to interfere in altering the effect of the arrest simple, by giving to the party using it, a different or less security than the proceeding itself gave him. —

Mr Walker for Messrs McNider and Scott. — The proceeding here is at variance with the ordinary jurisprudence of the Country and is illegal. That Mr Holt has instituted an action agt Messrs McNider and Scott for his present demand. to which a plea of insolvency was put in — that action is still pending, and Mr Holt instead of pursuing his remedy under that action, has had recourse to a more insidious remedy by — obtaining what is called an order of arrest simple without any notice given to the adverse party and has arrested many thousand pounds in the hands of third persons to the very great detriment of McNider & Scott. — This proceeding even if it is to be considered a ministerial one ought to have been deposited in this Court; that the parties intersted might had recourse thereto, but nothing of this appears until by accident McNider and Scott find out, by the means of one of their debtors, that the payment of the monies due to them has been arrested. —

The Ordinance of 1787, has abrogated this kind of proceeding, the only exception being the right of the Landlord for house rent, and this being the only exception the law recognises, it

it must have effet in all other cases. That simple-arret, opposition en maintiere, and saisie-arret are synonimous terms, and are in effect the same, and as such are proscribed by the said Ordinance without observing the formalities there required. That the debt of the seizing Creditor is not ascertained, and it will not be in the power of M'Nider and Scott who are no parties to the proceeding to compel him to establish his demand against them, but this attachment of the whole of their property is to subsist till it shall suit Mr Holts convenience to proceed further — There must be some relief in such a case which operates so manifest an injustice — and in the Custom of Orleans, we find, that where the Creditor is not ready to substantiate his demand, main-levee is granted to the debtor as a matter of right. Poth. Cout: d'Orl. p. 769. & 779. N° 108. — and even where the debt is contested, main-levée is granted to the debtor without giving security. Acte de Not. p. 459. But this proceeding by arret-simple is in law considered of the same nature as an the Saisie-arret 1 Pigeau. 119. 121. & 645. — it is called the same proceeding under a different name. Id. p. 651. 652. & 654 — Poth. Proc. Civ: p. 195. — and p. 202 describes what the arret simple is. — Now the Ordinance of 1787 is a general law and all prior laws or Customs in the Country contrary thereto have been wholly abrogated, there is no exception to it but one, and that is not the case of Mr Holt

The service of the arret simple in this case appears to have been made a person stiling himself a — bailiff of this Court-, but of this the Court can take no notice, as the executive Officer of this Court is the Sheriff, who serves and certifies all its orders and processes, the same as the Serjeant or Huissier did in France, but this Court has no officer of the latter description whose acts it can recognize —

The Court were of opinion that the arret simple or opposition made use of in this case was in its nature and effect, a species of saisie-arret before Judgment, and as such, fell within the prohibition of the Ordinance of 1787- To be satisfied upon this point we have only to examine into the nature of the proceeding, and the opinions of the authors upon it —

The arret simple, is made, on the order of the Judge, without any process or writ being issued out to call any of the parties into Court, — It is an ex parte proceeding made without notice given to the debtor, but is attended with all the — consequences of a saisie-arret, inasmuch as it arrests the payment of the monies due to the debtor or in case payment be made, exposes the person making such payment to satisfy the injury arising to the party obtaining this simple-arret — Now in point of reason and justice this course of proceeding is more dangerous and disadvantageous to the debtor, than the more open course by saisie-

— arret

arret, because the whole of the debtors moveable estate may be enveloped in it and shut-up without his knowledge, and under the most-unjustifiable pretence — a man of the best credit and means might this be exposed to bankruptcy, or to suffer in the opinion of others, by this kind of interdict being laid upon his property without his knowledge and wrongfully — The object of the Ordinance of 1787. was to protect the fair trader and the honest debtor, by prohibiting all attachment of his property before Judgment, without due proof on oath, to the satisfaction of the Judge, that the Defendant or proprietor of the property to be attached was indebted to the plaintiff in a sum exceeding ten pounds Sterling, and that he was about to secrete the same, or did abscond, or did suddenly intend to depart from the Province with an intent to defraud his Creditors — on the contrary the proceeding by arret simple requires no oath of fraud or evil intention in the debtor, it is a proceeding had at the will and nod of the Creditor, or he who will call himself a Creditor, to the evident prejudice of the debtor, who is left to seek a tedious remedy while his property remains attached. —

But the arret-simple, the opposition and the Saisie-arret, are by the authors considered to be of the same nature and effect, and to constitute the same proceeding under a different name — We shall quote from Pigeau — not because he thinks differently from

from the other authors, but his work being a professed treatise on the practice of the Courts, he has written more fully on this point. —
In 1.er Vol. p. 121. edit: 1779. he says — "Mais si dans
" la regle generale, on ne peut saisir les effets d'un
" debiteur non condamné, l'usage le permet à l'egard
" du mobilier qui est en la possession d'un tiers, entre
" les mains de qui on forme opposition à la remise de
" ce mobilier, pour empecher le debiteur d'en disposer;
" ou bien on le saisit et arrete entre les mains de ce tiers
" qui est la meme chose que l'opposition, et n'en differe
" que par la denomination." — In a subsequent part of the same volume, p. 645- in speaking of the Saisie-arret, he says, "Au lieu de faire une
" saisie-arret, une infinité de personnes font une
" Opposition entre les mains du debiteur, à ce qu'il
" ne remette ou paye ce qu'il a ou doit au condamné,
" et comme cet acte a le même effet que la saisie-arret,
" qu'il entraine les mêmes suites et la meme procedure,
" on peut dire qu'il ne fait qu'une même voie avec elle,
" et qu'il n'y a de difference que dans le style de ces
" deux actes, difference qui est même tres peu considerable." —

He then proceeds to shew, the course to be taken in case the creditor wishes to obtain a Judgment and execution upon this Saisie or opposition so made in the hands of a third person — He says, p. 654. — "La Saisie-arret, ou Opposition etant
" faite, si on veut poursuivre, il faut la denoncer
" au debiteur, l'appeller pour la voir declarer valable
" en consequence ordonner la delivrance des deniers

" entre

" entre les mains du Saisissant; on ne peut y parvenir
" sans cela, parceque ce debiteur peut avoir quelque chose
" à opposer contre la Saisie, et que l'on ne doit dépouiller
" personne de ce qui lui appartient, sans l'avoir mis à
" portée de se defendre."—

Here then we find the previous proceedings had under the arret simple, or opposition, — terminate in all respects as the Saisie-arrêt, as practised in this Court, which satisfactorily shews it is one and the same proceeding, or rather that the simple-arret is a branch of the Saisie-Arret, a commencement of it, and if allowed it would be granting to the Creditor by this kind of prior mail proceeding, eventually to effect what the law prohibits, the attachment of the property of his debtor before Judgment, without that proof on oath which the law requires.— We are therefore of opinion that the proceeding by simple arret or opposition adopted by Mr Holt in this instance was illegal and must be set aside, and that the Security entered into on behalf of McNider and Scott be exonerated and discharged — Which was ordered accordingly.—

No. 547.

Hays & another
vs
Gerrard.—

This was an action instituted by Moses Judah Hays and Isaac Valentine, two of the Executors of the last Will & Testament of the late David Davids, to recover from the

the Defendant, the amount of a promissory note made and given by him to the testator in his lifetime.—

It was stated in the declaration, that on the 1st day of October of the year 1815, the said David David, made and published his last Will and testament in writing, and afterwards on the 21st day of January 1824, the said David David made and published a Codicil to his said last Will and testament, and in and by the said last Will and Testament and Codicil, did nominate and appoint the said Moses Judah Hays and the said Isaac Valentine, the plaintiffs, the said Samuel Gerrard the Defendant, one Frederick Wm Ermatinger now deceased, and also one Samuel David, also deceased as Executors of the said last Will and testament and Codicil, and did in and by the said last Will and testament and Codicil, order and declare, that it was his desire, that the power and authority of his said Executors, should not cease or expire at the end of the year but that the same should be continued and vested in them until the entire execution and accomplishment of his said last Will and testament and Codicil, and further that it should be lawful to and for any two of his said Executors, and the Survivors and Survivor of them to execute his said last Will and testament and every part thereof.— That afterwards on the 30th day of November 1824, the said David David died without having altered his last Will and Testament and Codicil, the burthen of the execution whereof the said plaintiffs afterwards took upon themselves— That the said Defendant now refuses to pay to the said plaintiffs in their said capacity the amount of

the

the said promissory note, which is still due and unpaid by the said Defendant - Wherefore &c.

Plea. Exception à la forme - so stiled - That the Defendant is not in law bound to answer to the action and demand aforesaid of the said plaintiffs because he saith, that the plaintiffs as Executors of the last Will and testament of the said David David have not a right to institute the present action against the Defendant, who was and is Co-executor and fiduciary legatee with them the said plaintiffs, and as such Co-executor & fiduciary legatee hath also assumed the burthen of the - execution of the said last Will and testament, and this he is ready to verify, Wherefore &c.

Answer to Plea - The plaintiffs by their answer demurred to the plea as insufficient in law - and further, that although true it is, that the said - Defendant was nominated and appointed by the said late David David a Co-executor with the said plaintiffs and also their Co-fiduciary legatee and did with the said plaintiffs assume the - burthen of executing the said last will and Testament, and was duly sworn to perform his duties as Executor yet the said plaintiffs in their said Capacities can and ought to have and maintain their said action against the said Defendant, because the said late David David did in and by his said last Will and testament and codicil thereunto subjoined, order, direct, and declare his will to be,

that -

that it should be lawful to and for any two of his said executors, and the survivors and survivor of them, to execute his said last Will and every part thereof — Wherefore &c.

The Reply, joins issue on the answer. —

M^r Ross for the Defendant, Two Executors cannot maintain an action against a third for any thing respecting the will of which they are joint Executors, they cannot sue one another. On the death of a testator all his moveable property becomes vested in the Executors they are all equally sized and have equal rights — they may be compared to mandataires, and one mandataire cannot sue another for any thing touching the joint mandat. Potts. Mand: p. 858. 859. — If an Executor is hindered or molested in the discharge of his duty he has his action for the trouble. — Rep^re v^o Executeur p. 159. — The Defendant here acts in trust under the will, and is accountable to the Legatees for the monies in his hands, but he is not accountable to his Co-ex^ters nor could they give him a sufficient discharge to exonerate him against the claim of the Legatees. cites 334 art. Cout. p. 146 Gr. Com^re Som^re 2. N^o 16. & 17. — To maintain this action action it would be necessary that the Defendant should join to sue himself, a thing inconsistent, for where the same person is both Creditor and debtor there can be no action. Rep^re v^o Confusion. — 1 Salk. 299. —

Buchanan for Ptff^s. — This case may be likened to a Contrat de Mandat in the French and Civil law. — Tutors and Curators are also to be likened to persons bound by Contract, although in general they are not liable to account during their Office, yet if the interests of the Minors require it, or are

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in danger, they may be held to account — That the action here cannot be considered as an action of one Executor against another, but against a debtor of the estate which he represents — The Defendant is not sued as Executor, but in his separate and private capacity — cits. Dig. liv. 26. tit. 7. law 26. and law 16 §. 1. — liv. 27. tit. 3. whole of 16e Law. Code. 2e Law liv. 5. tit. 37. 4 Morn. p. 59. — where an action is allowed by one Tutor or Curator against another in all matters of tort & contract. Poth. Pand. liv. 27. tit. 3. 3e Law. §. 64. — 3 Bouchcul. p. 111. Vo Reddition de Compte. &

It is the will of the testator, that two executors shall be authorised to execute the will, they are therefore authorised to discharge any debt due to the testator, and can give a discharge to the Defendant for the debt he owes — the Defendant cannot certainly pretend to discharge himself any more than he could sue himself, and there is no other means whereby this debt can be got in, but by the present action.

Sol. Genl. of counsel for Plffs — The money borrowed by the Defendant for which the promissory note in question was given, was lent at 5 ℔ Ct. interest, whereas the legal interest of the Country is 6 ℔ Ct. and this note has been due since the 1st Oct. 1825, it is the interest of the Estate that the money should be recovered in order to procure a better interest for it. —

Gale of counsel for the Defendant in reply. This action is not only irregular, but it is

without

without Cause and without necessity.— The Inventory made by the Defendant as Executor creates a mortgage on his Estate for the Security of the debt, and the Judgment of this Court cannot give a higher security.— But the law gives no action of this kind, the whole authority of the Testator is vested in the Executors jointly, and they must all sue and be sued jointly. Toller on Exrs. Bac: Abr. tit. Executor. p. 32. One Executor cannot sue another for any thing touching the will.— When the Testator died there were four Executors, but by the will it cannot be presumed that he meant to say, that any two of the Executors could sue the other two.— neither can any two of them sue the third one. 3. T. Rep. Rawlison v. Shaw. 7. East Rep. 276. Cross Sup. v Smith val.— Nor is the Defendant here safe to pay the money to the Pltff Executors.—

By the Court— It is a principle of law that Executors derive their authority from the will of the deceased, and where there are several of them they have all an equal, but none of them a separate power, and therefore when they act or are acted against, they must be joined, for it is in this respect only they can be considered to represent the deceased— this is consistent with law and reason, for were it otherwise the best intentions of a testator might frustrated by the contests among the Executors— This principle is found both in the French and

English

English law, and holds in all instances where a delegated authority is given to several, they must act together, unless otherwise directed. — There may be cases however where one or more Executors may maintain an action against their Co-Exers where they differ as to the mode of executing the intentions of the Testator, or where some of them refuse to comply with his intentions, but that is not the Case before us — This an action of assumpsit on a promissory note for money due by the Defendant to the testator, which implies a right in the two Executors uniting in the Suit to compel the payment of the money by the Defendt their Co-executor to them. but for what purpose this money should be taken out of the hands of the one Executor and put into the hands of the others, whether by the directions of the testator, or to fulfill any of his intentions, we know not — there is no ground or right of action here set forth which one Executor can maintain against another. The authority given by the will to any two of the Exers or the Survivor of them to execute it, can apply only to the case of the death or refusal of the others to act, but can never be meant as giving a separate authority to any two over a third, nor as dividing the authority among them. — Action dismissed.

3 Fargob. Test: p. 372. No. 46. 44

Reps Ve Executeur Testre p. 164. 1er Col.

Poull: du Pare. Pr. du Droit Fse 7 Vol. p. 51. No. 84

13 Ac. Abr. Tit: Exers & admors p. 32

Ven: ab: Tit. Exers 1 (A. 62) p. 363.

No. 461.

Donegany & al
vs
Donegany & al

Action of account.

The declaration stated, that the late John Donegany, and Marie Galla or Gally his wife settled in Montreal in the year 1794, and there remained until the year 1802.— That the said John Donegany during his marriage with the said Marie Galla acquired considerable property, both moveable and immoveable, and particularly the immoveable property mentioned in the declaration, and situated at Montreal aforesaid.—

That on the 25. day of September 1797, Therese Donegany, daughter of the said John Donegany and Marie Galla, married one Joseph Donegany at Montreal aforesaid.—

That on the 16th May 1807, the said Therese Donegany, otherwise called, Marie Therese Donegany, died at Montreal aforesaid, leaving, issue of her said marriage, three children, Jean Antoine Donegany, Joseph Donegany and Guillaume Benjamin Donegany, the plaintiffs in this Cause, as her heirs.

That the said Joseph Donegany, widower of the said Therese Donegany, and father of the said plaintiffs, died at Montreal on the 6th July 1816, and one Joseph Maximillien Bonacina, was thereupon appointed Tutor to the said Jean Antoine Donegany and Joseph Donegany, then minors.

That the said John Donegany, husband of the said Marie Galla, and Grand father of the plaintiffs died at Mottrazio in Lombardy on the Continent of Europe, on or about the 16th day of March 1809, leaving as his only legitimate heirs, the said plaintiffs his grand-children, leaving considerable real Estate

at

at Montreal, as aforesaid, and also at Moltrazio aforesaid, other real estate, to the amount and value of about three thousand pounds, Current money of this Province.-

That the said Marie Galla, widow of the said John Donegany, and grandmother of the said plaintiffs, died at Moltrazio aforesaid in the year 1815, leaving as her only legitimate heirs, the said plaintiffs, and leaving also considerable property - moveable and immoveable at Montreal aforesaid.

That Joseph Donegany, the Defendant, immediately after the decease of the said late John Donegany, the grandfather of the plaintiffs, entered upon and took possession of all the property and estate so left by the said late John Donegany at Montreal aforesaid, without any right or authority, and particularly of the said real property mentioned and described in the declaration, converted the moveable property to his own use, and received the rents, issues, and profits of the real estates aforesaid.-

That the said Joseph Donegany, the Defendant did also immediately after the decease of the said late Therese Galla, the grandmother of the said plaintiffs possess himself of all the real and personal estate - left by the said Therese Galla, at Montreal aforesaid and converted the same to his own use without any right or authority.-

That the said Defendant now refuses to restore to the said plaintiffs all the real Estate with the rents issues and profits thereof as aforesaid or to account to the said plaintiffs for the moveable property aforesaid so by him converted to his own use.-

Wherefore &c.

Plea.-

1. Denying the allegations contained in the declaration.

2. That, he, the Defendant, is the son of the said late John Donegany, of the marriage between him and the said Marie Gally.- That the said late John Donegany on the 23d day of July 1800, being then domiciliated in the City of Montreal aforesaid, made his last Will and Testament by acte passed before Papineau and Barron public notaries, by which he devised and bequeathed to John Donegany his son, brother of the Defendant, the sum of five shillings Cy, to Daniel Donegany his other Son, the fourth part of all the property he, the said late John Donegany should leave at the time of his decease,- to Therese Donegany his daughter, also one fourth part of all his said property, and to the Defendant the one half or remaining part of all the said property, charged with the usufructuary enjoyment thereof to the said Marie Galla, during her life time.

That by a Codicil and testamentary disposition afterwards made by the said late John Donegany bearing date at Montreal aforesaid, and executed before said Papineau and ~~Barron~~ Guy, public Notaries the 7th day of August 1802. the said late John Donegany revocked the legacy he had so made to the said Therese Donegany his daughter by his aforsaid testament, and in lieu thereof gave and bequeathed to her a sum of five hundred pounds, Current money of this Province, revoking also the legacy of five shillings given by him to the said John Donegany his son, and in lieu thereof, giving and devising to him the one fourth part or share of the real Estate he the said late John Donegany should leave at his decease.

willing

willing and intending that the said Daniel, Joseph and John Donegany should be his universal legatees, and that in case any of the said legatees should contest the dispositions so made by him, he should be deprived of the legacy thereby made to him, which should in that case revert to the other legatees. That consequently if the said plaintiffs, are entitled to claim, as the heirs of the said late Therese Donegany, the Defendants Sister, (a right which the Defendant does not admit) they can claim no more from the Succession of the said late John Donegany, than the said legacy of five hundred pounds, which legacy the said Defendant always was and still is ready and offered to pay.

That the said Marie Galla died in Italy and left no property or Estate in Montreal or elsewhere which has come to the possession of the Defendant

Therefore praying that the action aforesaid of the plaintiffs be dismissed.

Says further, that the said real Estate is possessed by him the said Defendant jointly with John Donegany his brother, who are now the proprietors thereof, and that he the Defendant hath made considerable improvements thereon since the death of the said late John Donegany. Wherefore &c

Replication to Plea - & fins de non-recevoir to Exception pleaded by Defendant. -

1st That the matters and allegations contained in the declaration are true and well founded -

2d And denying all the matters and facts alledged by the Defendant in the plea of exception by him pleaded to the action and demand aforesaid, the

said

said plaintiffs say, that the said late John Donegany and Marie Galla, maternal Grandfather and grand mother of the said plaintiffs, at the time they came into this Country and settled at Montreal aforesaid, to wit, in the year 1794, were, and continued to be until the time of their decease, aliens and Strangers, born in a foreign Country, to wit in Austrian Lombardy in Europe, in the dominions and under the allegeance of the Emperor of Austria and without the dominions and allegiance of our late Sovereign Lord King George the Third.

That the said late John Donegany being such alien could not in law dispose by last will and testament of his said property and estate at Montreal aforesaid, to the prejudice of the plaintiffs who are natural born subjects of our said Sovereign Lord the King, and alone entitled to inherit and claim the property left by the said late John Donegany at the time of his decease at Montreal aforesaid, and therefore the said last will and testament of the said late John Donegany so made and executed before the said Papineau & Barron, public notaries, at Montreal on the 23d day of July 1800, and the Codicil made by the said late John Donegany at Montreal aforesaid before the said Papineau, and Guy, public notaries the 7th August 1802, are null and void in law, and ought to be so held and declared by this Court— Wherefore &c—

3. That the said late John Donegany and Marie Galla, were at the time they came into this Country and settled at Montreal aforesaid, to wit,

in

in or about the year 1794, aliens and Strangers as aforesaid, and came to Montreal aforesaid, there to carry on business, but with the intention of returning to their own native Country — That the said late John Donegany being such alien, could not by law dispose of his said property so acquired and held by him at Montreal aforesaid, by any last will and testament made in this Province or elsewhere — but the said late John Donegany by last will and testament made in his native Country, might have disposed of all his property and estate he held and possessed in his native Country, or by his last will and testament made in his native Country might have revoked any other will or testament he had made in this Country. — That the said late John Donegany and Marie Galla returned to their native Country in or about the year 1802, and there remained until the time of their decease. — That the said late John Donegany, being in his native Country, and being one of the Subjects and under the dominion and allegiance of Napoleon the First, Emperor of the French and King of Italy, who was then at open war with and the declared enemy of our said Soverign Lord George the Third, on the 6th day of March 1809, in the Commune of Maltrazio in the Second Canton, in the first district of Como made and dictated, according to the forms required by the said Commune of Maltrazio, to Doctor Jacques Philippe Clarici, notary of the Department of Lario in Como, in the presence of four witnesses, his last will and testament by a public act, and therein and thereby disposed in favour of his said three sons, then and still aliens as aforesaid, of all his

property

property and estate as well in the said Commune of Mottrazio as at Montreal aforesaid and particularly of the property and Estate mentioned and described in the declaration, and therein and thereby revoked and annulled all other Testaments by him made, particularly that of the 7th Augt 1802, before mentioned, intending thereby the aforesaid Codicil mentioned in the said plea of peremptory exception pleaded by the Defendant.— And the said plaintiffs say, that by virtue of the said last will and testament so made by the said late John Donegany on the Sixth day of March 1809, is null and void in law and ought so to be held and declared by this Court, in so far as regards the property and estate aforesaid of the said late John Donegany in Montreal, but that the other dispositions in the said last will and testament, in so far as by the law of the place where made he was authorised to make the same, and particularly the dispostion whereby he revoked and annulled all former and other wills and Testaments, may be considered and held as valid.— and that the testament of the said late John Donegany of the 23d July 1800. and Codicil of the 7th Augt. 1802, mentioned in the said plea of peremptory exception, ought to be declared and held as revoked, annulled and of none effect. Wherefore &c

Reply to Answer to Peremptory Exceptions.—

The Defendant denying the facts alleged by the Plaintiffs in and by their answer to his the Defends plea of peremptory exception, sayth, that the said Plffs

can

can have no interest in pleading the incapacity aforesaid of the said late John Donegany their grandfather, because had that incapacity existed as contended by the said plaintiffs, the said late John Donegany could neither make a last will and testament & thereby dispose of estates in Canada, but could not even hold or possess any real Estate in his own right in any of the dominions of His Majesty, or transmit them by succession to the Pltffs. That therefore the plaintiffs cannot invoke the pretended incapacity of their grandfather, without destroying their own right of inheritance claimed by them in his property in Canada, the more so, as their mother whom they pretend was the daughter of the said late John Donegany, was herself born in a foreign Country. — Wherefore &c.

Reply to the S. answer, joins issue thereon. —

The Case was now argued on matters of law raised by the pleadings.

Bedard for the Pltffs. The late John Donegany came to this Country with four children, three sons and a daughter, from a foreign Country. They were all aliens — the plaintiffs are the grand children of the said late John Donegany, and children of his said daughter, and were born in Canada — they claim the Estate left by their said Grandfather in Canada by right of Inheritance. — They Defendants have set up a will made by the said late John Donegany in the year 1800, and codicil subsequently made in 1802 in Canada — Of this testament and Codicil

the

the plaintiffs have pleaded the nullity, as the Testator was an alien and unable to make any will — but the plaintiffs have further pleaded, that the testator revoked the said testament and codicil, by a — subsequent testament made in Italy in 1809. which he legally could do — That the plaintiffs being born under the allegiance of the King are alone entitled to succeed to their grandfather. —

By law, the alien cannot make a will, nor take by inheritance, for he cannot acquire real property — Dic. Droit. Vo Aubain — 1 Desp. des Contrats. p. 1 tit. 14 — Des Donations — No 12. p. 393. 4. cNo 14 — an alien cannot make a will — 2 Desp. des Test. tit. 1 Sec. 1. No 39. & sec. 4 No 7. — also partie. 2 tit. 1. Des Suc. ab. Intest. No 67. p. 447. & No 68. — Children succeed to the property of an alien parent — Lacombe. Vo Aubain sec. 4. Id. Vo Testament. sec. 3. Strangers cannot make a will. 1 Bourj: tit. 7. Des Personnes &c — Ch 1. Sec. 1. prop. 6. & sec. 2. — Had the late John Donegany died leaving no other children but the plaintiffs they would by law have been his heirs — Cout. d'Orl. tit. 16. Des Testaments sec. 3. §. 1. cNo 33. — Tit. 17. sec. 1. §. 1. — Poth. des Suc. Ch 1. sec. 1. p 203. The children born in the Kings allegiance come to the succession of the alien their ancestor, a favor which is granted to them by law as being natural born subjects — Id. p. 330. des Don: Testres and Lacombe Vo Enfans, says, the grand children are included under the word enfans. —

Vigé of Counsel for the plaintiffs — The two propositions here, are, 1st The alien cannot aliene his estate by last will and testament — and 2d — The child, and under that general term, the Grand-child, of the alien,

will

will succeed to him, if such grand child be a natural born subject.+

Now by law the alien cannot make a will, cites, 4 Gra: Com^{n} p. 167. 168. N° 45.— Polth. des Personnes. 580. & 579.+ Rep^{se} v^{o} Aubain. p. 722.—

The word enfant as to right of succession applis to all the descending line and includes the grand child. Dic. Jer. v^{o} Enfant.+ 2. Journ: des Aud: arret. 1660. feb. 19.—

Rolland for Defend^{ts}. The question here I consider to be, whether any person can claim the succession of an Aubain — in law no such claim can be maintained — The King alone is entitled to the property of the Aubain, who can have no heirs.— vide. Laplanche. v^{o} Droit d'Aubain, 2 vol. p. 3.— And this becomes a question of public law whether the King or the Subject has the better claim — Vattel. liv. 2. ch. 8. N°109. & suiv.—
Rep^{se} v^{o} Droit public. p. 399.—
2 Bl. Com. p. 249. N° 6.—
1 Ev: Stat. tit. Aliens+
N. Denis^{t} v^{o} Etranger. p. 89. sec. 6. & p. 90.

O'Sullivan of Counsel for the Defendant — This is a question of public law — and contest here ought to be settled, between the plaintiffs and the King, who alone can claim the Estate of Donegany if he was an alien.— The word Enfans is here said to include the word petits-enfans, but this will not hold where there was no inheritable blood connecting them — Now the mother of the plaintiffs was an alien, and they cannot under the law of representation claim more than their mother could, and she as an alien could not inherit from her father.— cites. 2 Bl. Com. 293. Com: Dig: v^{o} Alien + and 2 Bl. Com. 251 — as to Stat. for relief of children of aliens. +

Vigé

Vigé in reply — refers to Domat as to the interpretation of the word, Enfans, as extending to petits enfans, — That this is not a question of public law, but of Civil right under the laws of the Country. —

By the Court. The principle here contended for that under the word enfans are included petits Enfans is not universally true, nor does it always receive this Construction — the present is no doubt a case where the Court would be disposed to put the most liberal — interpretation upon the word, and to extend its application as far as the law will permit, but we hold, that where the word enfans is used and admitted as giving a right to the inheritance of the Grandfather, it is upon the supposition of a communication of inheritable blood, and of that legal chain of connection by which inheritance can be transferred — It is so held by the decisions in the English law, the principles of which upon this point correspond with the Civil law and the Law of Canada — see Com: Dig: Tit. Alien. (C.I.) —

This as a question of public law, could only be so considered in so far as the rights of His Majesty were in question, but by some of the Statutes in Great Britain which have been made for the relief of the Children of aliens, and which we consider as applying to this Country, the Crown ceases to have any interest in the Contest, as the grand child, a natural-born subject is thereby entitled to claim the inheritance of his father, or of his grandfather, although an alien, See Stat. 11. & 12. Wm. 3. ch. 6. — By which it is enacted — "That all and every person and persons being the "Kings natural born Subject or Subjects, within any "of the Kings realms or dominions, shall and may "hereafter

" hereafter lawfully inherit and be inherited, as
" heir, or heirs, to any honours, manors, lands,
" tenements or hereditaments, and make their
" pedigrees and titles by descent from any of their
" ancestors, lineal, or collateral, although the father
" and mother, or fathers and mothers or other ancestor
" of such person or persons, by, from, through, or under
" whom, he, she or they shall or may, make or derive their
" title or pedigree, were or was, or is or are, or shall be
" born out of the Kings allegiance, and out His Majesty's
" Realms and dominions, as freely fully and effectually,
" to all intents and purposes, as if such father or mother
" fathers or mothers, or other ancestor or ancestors,
" by, from, through or under whom, he, she, or they
" shall or may make or derive their title or pedigree
" had been naturalized or natural born Subjects".

Now this Statute comprehending all persons being the Kings natural born Subjects, within any his "realms or dominions", will by legal interpretation extend to all the Kings Colonies, & consequently have force here — see 1. Chalm: Ops. p. 201. — and therefore the plaintiffs if natural born Subjects will be entitled to claim the inheritance of their Grandfather although their mother and their grandfather were ~~not~~ aliens. —

Defendant's exception in this respect dismissed —

No 2234.

Jamieson. vs. Desrivieres. } Action on a promissory note by the Indorsee against the Indorser. —

Judgt —

Judgt.

This action is brought upon a promissory note, indorsed by the Defendant who is the payee of the note in favor of the plaintiff — The indorsement is in full, and quoad the present parties to the note the requirements of the provincial act respecting the indorsation and transfer of ~~the~~ promissory notes made by persons not merchants or traders, have been literally complied with — It is true that the subsequent indorsements are in blank, but this even if it were objectionable, clearly leaves the right of action in the plaintiff, the first indorsee under a full indorsement, to meet the entire extent of the argument of the Defendants Counsel, and leaves him without a shadow of defence — The Defendts counsel however wishes to avail himself of the demand of payment and protest having been made, not by the plaintiff but by a subsequent indorsee under a blank indorsement, who he contends had no right to demand payment and that therefore the necessary diligence has not been used to entitle the plaintiff to recover against against the Indorser — but this is not a well founded objection, it is sufficient that the demand has been made within the time prescribed by law, and notice given by any person having possession of the note under a blank indorsement, which indorsement, if it does not vest in him the property of the bill and authorise him to bring an action in his own name, at least amounts to a procuration —

authorising

authorising him to receive payment thereof, and therefore any refusal of payment on such demand must enure to the benefit of the legal owner of the bill, as if such demand had been made by himself. In this case nothing more need be said, than to refer to what has been heretofore observed in former cases, in regard to the transfer of promissory notes, as to the effect of a blank indorsement, and how far the rights of third persons are affected thereby, the provisions of our Provincial Statute in regard to such transfer, has been borrowed from the antient French law and Ordinances, and ought therefore to be interpreted thereby, in respect to which it will be sufficient to refer to a few authorities, which, though they may not be necessary on the present occasion, may serve in other Cases — Ordre 1673. tit. 5. art. 13. and the notes of Bornier thereon. 2e vol. p. 486.] — 7 vol. N. Denis. p. 587. Ve Endossement §. 2 No 1, 2. 4. — and the same author under title. Billet de Commerce, §. 2 No 15. — And that these authorities may not be mistaken, it may be necessary to add, that the billet de Commerce in France, stood in the same situation in regard of the transfer thereof by a full indorsement, as the notes made by persons not merchants or traders under our Provincial Statute — Denist. goes much further than Bornier, but as it regards the present Case, in order to remove all doubt as to the legality of the demand and protest made by the Bank of Montreal who appear to be the

last

last indorsees of the note in question, and the right of the plaintiff to avail himself thereof, we will give a short extract from Bonnier who treats the question with more restriction than Denizart he says — "les ordres mis au dos des lettres de — " change s'ils ne contiennent le nom de celui qui en " a payé la valeur et en quoi, ne produisent que le " même effet, que produiroit une procuration pour " recevoir et donner quittance" — The Bank of Montreal therefore under this authority must be considered as the agents of the plaintiff duly authorised to require and receive payment of the note. —

№ 2297

M'Nider & al
v
O'Mara

This action is brought on a note for £164 — It drawn by one Roche in favor of the Defendant and by the latter indorsed to the plaintiffs — The note is dated the 19 Nov. 1825, payable four months after date, and was on the 23d March 1826, protested for non-payment, and due notice thereof given to all the parties. — It appears that various purchases of goods, before and after the date of the note, were made by Roche from the plaintiffs, and that he also made several payments thereon to the plffs before and after — such date, and by a general account filed by the plaintiffs it appears, that Roche on all these several purchases, including the note, owes a balance of — £43. 18. 11 to the plaintiffs, which they now claim of the Defendant as indorser of the note. — The Defendt pleads payment and satisfaction of the note by Roche the drawer, and inasmuch as the note has been — admitted, and the liability of the Defendt as indorser is not contested, the only question that arises for the opinion of the Court is, how the different payments made by Roche are to be applied, whether in discharge of the note, or of the other purchases made by Roche of the plaintiffs. — If the note and the amount of the other goods had been both due, when the payments were so made, there could be little difficulty, as in that case the payments must be applied to the note, as the — Defendant the indorser thereof is in the light of a Caution and the imputation would in law be upon the note, as being the highest or most onerous debt. — The Defendant in support of his plea of payment,

has

has confined himself to the examination of one of the plaintiffs upon faits & articles, and who by his answers has admitted the payments alledged by the Defendant to have been made, but that they were not by the plaintiffs considered as payments on account of the note, but on account of the goods, the amount of which was then due and payable. - It however appears that of the payments credited in the plaintiffs account a sum of £90.17.6, had been paid by Roche after the note became due, and for this sum the Defend^r has an undoubted right to be credited on the note under another rule of imputation which is thus given by Pothier, "l'imputation se fait plutot sur la dette pour laquelle "le debiteur avoit donné des Cautions que sur celle qu'il "devoit seul, la raison est qu'en l'acquittant il se decharge "envers deux Créanciers, envers son Créancier principal, et "envers sa Caution qu'il est obligé d'indemniser" - Now if the principal debtor had this right, his Caution equally, if not more entitled to it - but the principal difficulty arises upon a credit, under date 4^th. March only 19 days before the note became due, and which is in these words. "By Sales due 20 June, £119.14.10 - now though this credit appears under an anterior date to that on which the note was payable, yet from the terms thereof Roche evidently was not entitled to credit therefor, before the period therein fixed, namely, 20^th June, at which time no doubt, the parties contemplated that the pltffs would, as the Agents of Roche and as Auctioneers & brokers, have collected the amount from the several purchasers of the goods, until which period it could not be considered as a payment made by Roche - We are therefore of opinion, that on depositing with the Pltffs the goods for sale, Roche contemplated the payment of the note therewith, and therefore this sum must also go in discharge of the note; and this opinion is fortified by its

being

being apparent upon the face of the general account that unless the amount of the note had been debited, the credit so given, would have left a balance in favor of Roche against the pltffs, and the opinion is further strengthened by the following general observation of Pothier, upon the rules of imputation of payment, " Tous ces corrollaires " peuvent recevoir par les circonstances des exceptions qui sont " laissées à l'arbitrage du Juge — par example, quoique la dette " dont le terme est echu, prevale pour l'imputation, neanmoins " si celle dont le terme n'est pas echu, devoit echoir dans peu " de Jours, et qu'elle emportat contrainte par corps (which " is another debt preferid upon a question of imputation,) " je pense qu'elle devroit prevaloir pour l'imputation, à une " dette ordinaire dont le terme est echu". — It is evident, that what has now been said could not possibly — affect a third person, who as indorsee of the note, for a valuable consideration, might have received the note from the pltffs before its dishonor — but in this case the note is sued for by the original holders — The transaction is simply this, a purchase of goods is made by Roche for the amount of which, the pltffs for their security required of him an indorsed note — Roche therefore makes his note in favor of the Defendt. Omara, who to oblige his friend, indorses it to the pltffs — it is not the Defendt. Omara who received value for the note, but Roche, The original parties therefore stand thus — The Pltffs were the creditors, Roche was the principal debtor, and Omara was the Caution, and the latter as such, stands in a more favorable situation than an indorser of a note who has received value, and must be considered in the same light as a Caution to an ordinary obligation for the payment of money. — The £119. 14. 10 therefore being added to the other sums paid by Roche, after the note became due, will more than cover the note in question. — The action must therefore be dismissed. —

№ 594.

Mayrand & al. vs Sewell. —

Action agt. Defendant as a Caution. —

The declaration states, that on the 1st Augt. 1816, Edward Hartley and James Robinson made their certain obligation before Griffin and Barron public notaries, and therein and thereby acknowledged themselves to owe and be indebted to the said plaintiffs in the sum of £350 Cy. for value received, and bound themselves for the payment thereof in the course of twelve months without interest. — To this obligation the Defendant became a party and bound himself personally as a security for the payment of the said sum of money to the said plaintiffs, in case the said Edward Hartley and James Robinson should, after the aforesaid sum of money should have become due and payable, have left the Province of Lower Canada, and not otherwise. — That the said Plaintiffs afterwards on the 9th day of February 1818, recovered Judgment in this Court against the said Edward Hartley and James Robinson for the said sum of £350, due by the said obligation with interest thereon from the 7th day of September 1817, the day of the service of process, and costs of suit. Of which Judgment and proceedings had by the said plaintiffs against the said Edward Hartley and James Robinson, the said Defendant was duly notified and had a knowledge. — That the said plaintiffs on the 20th day of October 1826, received on account of their demand aforesaid a sum of £116.9.5, which being deducted from the said principal sum of £350. leaves a balance still due on that principal sum of £233.10.7 Cy

with

with all the interest as above stated on the said Judgment. — That the said Edward Hartley and James Robinson, now are, and for a long time past have been absent from this Province, — by means whereof the said Defendant hath become bound to pay and satisfy to the said plaintiffs the aforesaid remaining sum of £233. 10. 7 with interest on the sum of £350 - from the 7th day of Sept. 1817 to the 20th day of October 1826, and on the sum of £233. 10. 7 from the 20th day of October 1826, until paid with Costs of Suit. —

Plea of exception peremptoire en droit, that the plaintiffs cannot have or maintain their action against the Defendant for any other or greater sum, than the sum of £213, 10. 7, without interest, because notwithstanding the said Defendant did become a party and bound by the said Obligation, yet as the said Edward Hartley and James Robinson were in and by the said obligation bound to pay to the said plaintiffs the sum of £350 in twelve months from the date thereof without interest, the said Defendt cannot be held to pay any sum of money beyond this. That on the 20th day of October of the year 1826, the said Plaintiffs, on an action ~~by them~~ prosecuted against Moses Marshall and Eben Platt by one Zabdiel Thayer, recovered on an opposition by them in this behalf made, a sum of £136. 9. 5 for and on account of their demand aforesaid agt the said Edward Hartley and James Robinson, which said sum of £136. 9. 5 ought to be imputed to the discharge of the said Defendant on the said Obligation thereby

thereby leaving the said balance of £213.. 10. 7. for which sum only the Defendant is now bound to the said Pltffs. The Defendant further denying the allegations contained in the declaration and that he is not indebted to the plaintiffs in manner and form &c.

Answer to Plea.— That the Plaintiffs are entitled to demand and have from the Defendant the interest on the principal sum of money as stated in their declaration, which interest they were and are entitled to demand and receive from the Sd Defendant under and by virtue of the Judgment rendered agt the said Edward Hartley and James Robinson as in the said declaration is also stated.—

That although the said plaintiffs did on the 20th day of October 1826, receive the sum of £136. 9. 5 as mentioned in the said plea, yet the said Defendt being then bound for the payment of the aforesaid debt, interest and Costs mentioned in the said Judgt and for all other Costs accrued in and about the enforcing the payment thereof, did in consideration thereof Consent and agree†, that in case they the said Pltffs would exonerate and discharge him the said Defendant from all the Costs aforesaid, then amounting to a sum of £27.. 12. 7. they the said Pltffs might impute, and keep and retain in their hands out of the said sum of £136. 9. 5. the sum of twenty pounds in satisfaction of all the said Costs, and to leave the remaining sum of £116. 9. 5 to be deducted from the principal sum of mentioned in the said Obligation. The answer in other respects joining issue on the Sd Plea.

Salmon

† to owrite the said Pltffs.—

Salmon for the Pltffs. The question here is, whether the Defendant as Caution, is bound to pay the interest accruing on the debt of the principals, and which they were condemned to pay by the Judgment of this Court, It is true, that by their obligation, to which the caution was a party, the principals had one year to pay the debt without interest, but failing in this, Plaintiffs were under the necessity of proceeding as them and by the Judgment of this Court interest was allowed to the Plaintiffs, and this interest they contend the Defendant is bound to pay as their Caution - cits, Repse vo Cautionnement. p. 765 - Id. vo Interets Judiciaires p. 466. - Potts. Obl. No 405. -

Defendt in person. - The questions here are, whether the plaintiffs are entitled to interest on their present demand, and whether they are entitled to retain a sum of twenty pounds out of monies they have received, to be applied in discharge of their costs. The obligation stipulates that the debt shall be paid within one year without interest, and for this the Defendant became bound. - The proceedings had by the plaintiffs against the principal debtors were for their benefit and better security, to these the Defendant was no party, nor had any legal notice thereof - such proceedings therefore cannot affect the defendant, nor augment his undertaking - And as to the monies received by the Plaintiffs they must be applied to the discharge of the original debt, for which alone the Defendant was bound, as he is not more obliged to pay the Costs than the interest demanded by the Plaintiffs. - The Caution cannot be

bound

bound beyond his undertaking. Poth. Ob. N. 404. Dig. lib. 46. law 68. § 1. — Instruct: sur les Conventions p. 289. — Dic. du Dig: 1 vol. p. 482. Vo Interets. — here the stipulation was that interest should not be paid — as to the the interest which may be due ex mora, 1. Ev. Poth. 375. — in this case the interest is allowed as a damage to the Creditor for which the Caution is not bound. — of this kind is the interest allowed to the Plaintiffs on their Judgment against the principal debtors, it is a different debt from the principal and cannot be demanded of the Caution until he is en demeure to pay. — It is true the Defendant in this case consented that twenty pounds of the money received by the Plaintiffs should be applied to the discharge of the costs accrued by them, but this is not binding on the Defendt. nor can it prevent him from claiming that this sum be deducted from the principal, because the proceedings against the principal debtors were never legally notified to him 2 Ev: Poth. 436. — and this sum had it been paid by the Defendant he could have recovered back as not due. —

Driscoll for Pltffs in reply — By the Defendants consent the twenty pounds were applied to the part of the Costs — this is admitted, and the balance only of what the plaintiffs received must go in deduction of the principal debt. — That the Defendant is also bound to pay the interest demanded as much as the principal debtors — the Defendant was bound conditionally, and the condition has happened, and he is therefor equally bound

as

as the principals.— Poth. Obl. Nº 220. Rep^{re} v^o Condition. p. 405. §. 9. Id. v^o Interets Judiciaires.

By the Court.—

The first, and indeed the main question which arises under these issues, is whether the interest awarded by the Judgment against the principal debtors, from the date of the demande judiciaire, can be recovered in this action against the surety? Now it is an obvious principle, that the obligation of the Surety cannot be extended beyond the terms of his undertaking, and that where an obligation is given for the payment of a certain sum with interest, or a lease is made for a stipulated rent, and the Surety becomes bound for the payment of the principal sum, or the rent, only, no interest in the one case, and no damages in the other for the non fulfillment of the other clauses of the lease can be awarded against such Surety, as the Creditor and lessor have in these cases contended themselves with a limited security — and this is not peculiar to these engagements, but rather the general principle in regard to all Contracts, and which is thus applied, to the particular one of a surety as it is to all others, for no man is considered bound beyond what is expressed in the obligation he has entered into, that is in regard to those undertakings, which depend solely upon the will and consent of the party binding himself as to the extent thereof.— But in respect to the question now under consideration, Pothier makes a distinction between a general limited Security, and in the former case places the obligation of the Surety with all its consequences upon the same footing as that of the principal debtor.— It is therefore in the first

instance.

instance necessary to determine, whether the Security given in this case, was a restricted one or a general one, and that it is of the last description there cannot be a doubt, upon reference to the terms of the engagemt. a restricted Security is where the Surety bcomes bound for less than the principal debtor, but here the oblign of the Surety was co-extensive with that of the principal debtor — the obligation of the latter was to pay a specific sum of money within a certain delay, and without interest — that of the Surety was generally for the due and faithful payment of the sum in the manner stipulated in the obligation, quoad the Creditor the two undertakings were co-extensive, no interest under the obligation could be demanded of the one or the other, as none was stipulated, but on the Contrary excluded. — The interest however which was awarded against the principal debtors and now claimed from the Surety is independant of any agreement to pay interest, it is that which the law grants as a penalty agt the debtor for not paying his Creditor, and as an indemnification to the Creditor for the privation of his money, after it becomes due, and after a legal demand made for the recovery thereof — Now the Surety having become bound for the due payment of the debt at the period stipulated, he stands precisely in the same situation as the principal debtor, and the latter might as well, under the terms of the obligation object to the payment of the Judiciary interest as the Surety — there cannot however be a doubt, that in an action against the one or the other on the obligation, interest might

be

be recovered from the date of the demande judiciaire, the only doubt therefore that can be entertained is whether the Surety is liable for the interest so awarded against the principal debtors, without having been sued, or put en demeure — And upon this all the authors concur in saying, that he is, and evidently upon this principle, that it is a legal consequence of the engagement of the Surety, whereby he undertook that the sum stipulated should be paid by the principal debtors in the manner and at the time specified, or that he himself would pay the same, and the more so as it was his duty to have seen that the debt was paid, or to pay it himself if the principal debtors failed to do so, for on such default of the debtors, the Surety became as much bound to pay the money as if it were his own debt, and became also bound to pay the interest, as a consequence of the failure of payment of the original debt he had guaranteed — he was bound to know, that the law awarded interest from the day of the demande judiciaire, and that it was implied in his undertaking. the interest excluded by the obligation was only conventional interest, such as may be stipulated where a term is given for payment of any debt and not such as the law gives on failure of payment when that term is expired, and the debtor regularly en demeure by an action brought against him. For this no express stipulation was necessary to fix the liability of the Surety — Instruct. sur les Conv: p. 289. "Pour que la Caution soit tenu des interets et des » frais, il n'est pas necessaire, qu'elle y soit soumise » par une clause speciale, il suffit qu'elle ait repondu » en termes generaux, pour toutes les suites de l'obligation".

It

It assuredly was not in the power of the Creditors and principal debtors by any act of theirs, and without the Consent of the Surety, to have augmented his responsibility beyond the terms of his original engagement, and any subsequent agreement between the former as to the payment of interest could not certainly operate against the Surety; but that interest which may be claimed and awarded by force of law and which is independant of any agreement of the parties, is necessarily implied in every obligation for the payment of money, and accrues thereon whether the same be originally payable with interest or not, from the moment the Creditor has right and demands payment by an action at law — These distinctions are evident from what Pothier says in his Tr. d'Ob. N°404, where in treating of the extent of the liability of a Surety who has become bound in general terms for the fulfillment of the entire obligation of the debtor, he declares that such a Surety, is not only bound for the payment of interest ex natura rei, — "mais meme de ceux " que produit la demeure en laquelle est le principal debiteur" and this demeure of which he speaks, can be that only which entitles the party to judiciary interest, for the observation would have been useless, had it been intended to apply to any other; for either interest has been stipulated or it has not — if stipulated, the party is of course bound by his own undertaking, and if not stipulated, it could be claimed only from the demande judiciaire, except where it is due

due of right ex natura rei. — This interpretation which we have given of the rule as laid down by Pothier, corresponds with what is to be found in the other authors upon the subject, who, though varying somewhat in their expressions, yet come to the same result, and thereby mutually explain and strengthen each other, so as to exclude the possibility of any misunderstanding as to the true rule. — The authority cited from the Repe under the title, Interet, p. 466. 2e Col. where the writer treats exclusively of Interets Judiciaires, is most decisive, he says, "La caution du debiteur principal, contre
" lequel le Créancier s'est pourvû judiciairement, et
" a obtenû une condamnation tant pour le capital
" que pour les interets, est tenüe elle-même de ces interets
" a compter du Jour ou ils ont eté demandés contre
" le debiteur principal, quoiqu'il n'y ait point de
" pareille demande formée contre elle". — Old Denizt. title, Caution, No. 36. is to the same effect, he says, the surety is bound, for the interest, "à compter
" du jour de la demande formée contre le principal
" obligé, encore qu'elle n'ait pas eté assignée". — Lacombe also, title, "Caution", sec. 2 No. 5. "Caution
" de l'obligé est tenüe des interets du Jour de la
" demande contre l'obligé — Secus, des depens si la
" caution n'a eté appellée, parcequ'ils sont personnels".

It is therefore clear from all these authorities, that in the present case the Defendant is liable for the Judiciary interest to which the principal debtor has been condemned, and although even according to Pothier, such must be the case, yet there is great reason to conclude, and even where the engagement

of

of the Surety is not so general, as in the cases stated by Pothier, yet that the Surety would be held to pay — judiciary interest upon the specific sum for the payment of which he had become surety, and that in the case of a lease, though the engagement of the surety extended only to the payment of the rent, and not to the other obligations of the lease, yet he would be bound for the judiciary interest awarded against the principal debtor on the non-payment of the stipulated rent, for quoad the rent the — undertaking was general, although not extending to the other clauses of the lease containing distinct obligations independant of the rent, a conclusion however which one would not draw, from merely reading what Pothier has given upon the subject, and we should rather consider the rule therefore as given in the Old Denizt. as the correct one, who says, "La " Caution est tenüe des interets de la somme pour laquelle " elle a cautionnée à compter du Jour de la demande " formée contre le principal obligé, encore qu'elle n'ait " pas eté assignée" — this agrees with what is said in the Repertoire and by Lacombe, and it is evident from these, that even upon an obligation to pay a sum of money with interest, where the Surety has engaged only for the principal sum, yet that — from the demande Judiciaire, he is liable for the interest, although not for that stipulated which may have accrued under the obligation, and — perhaps he might not be liable for judiciary interest if the liability in respect thereof was in express terms excluded in the undertaking of the Surety, and his responsibility thus limited and restricted. —

The minor point raised in this case, is respecting the Costs awarded by the Judgment against the principal debtors, and whether they also can be claimed

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of the Surety — it is very certain that the Surety is bound therefor, but in respect thereof from an equitable consideration, a modification has been adopted in favour of the Surety, that of notification, which has not prevailed in regard to the Judiciary interest, and serves as an exception to, and therefore confirmatory of the general rule which renders the Surety whose undertaking is in general terms, liable to the payment not only of the debt, but also of every thing accessary thereto or arising therefrom, — the reason of this modification, as given by D. Denizt. & Lacombe, is because the costs are personal, which is not very satisfactory or conclusive, for if strictly so, quoad a Surety, he ought in any manner to be considered liable therefor, even when notified — the reason however given by Pothier appears to be the true one, he says, "il doit aussi être tenu des frais contre "le principal obligé car ces frais sont un accessoire de "la dette, mais il n'en doit être tenu que du jour que "les poursuites lui ont été dénoncées, ce qui a été établi "pour empêcher qu'on ne ruine une Caution en frais "qu'on feroit souvent à son insçu, et qu'elle peut éviter "en payant, lorsqu'elle en est avertie — c'est pourquoi "jusqu'a ce que les poursuites lui soient dénoncées "elle ne doit être tenu que du premier commandement "ou du premier exploit de demande". — This is no doubt an extension of that principle — "que les "cautions sont favorables" and which must be allowed to operate in all cases, where reason and Justice will admit thereof, without destroying the clear and express engagement which the Surety may have entered into. — The rule therefore in

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regard to the Costs being that the Surety is not liable therefor without notice – it is now only necessary to enquire how far under the circumstances of this Case, the defendant may be entitled to the benefit thereof; now the plaintiffs in this case do not allodge or prove any express and general notification nor do they claim the entire costs of the action, but on the sum received on account of the Judgment against the principal debtors they have deducted twenty pounds which they have applied in part payment of the Costs awarded by that Judgment and which they contend they were entitled to do in consequence of the consent of the Defendant. The notice to the Surety which the law requires being solely in favor of such Surety, there can be little doubt, but that he might wave his right to the benefit thereof, the maxim being, "nul n'est obligé de se servir du benefice que la loi "lui accorde,", but in regard to the alledged consent of the Defendant, as to the imputation of the £20 – he on being interrogated on faits et articles, answers, "I consented as far as it was "competent for me to do, that the sum of £20 – "should be imputed on the Costs accrued to the "plaintiffs on the said Judgment and subseq^{t} "proceedings, but it is a fact, that I had never "considered the said acts so attentively as to decide "what were my obligations under the same until "about the time the present action was instituted "against me" – Under this answer he must say

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it is now too late to retract the consent given and which it was competent to him to give, and is equally binding as if he had paid so much money on account of the Costs, for in this case he never could have recovered them back from the plaintiffs, and the consent thus given must be consider not only in the light of a waiver of any objection on the score of the want of notice, but a tacit admission of his knowledge of the original Suit, and of his liability to pay the Costs thereof, at least in so far as regards the twenty pounds in question, nor can his having neglected at the time of such consent, to consider what were his undertakings as Surety, or any misapprehension thereof, where no fraud or deceit has been practised or used, affect or destroy the consent so given, as no person can be presumed to be ignorant of his own act and undertaking, much less of the legal obligations resulting therefrom. — The Costs as well as the Judiciary interest being accessaries of the debt for which the defendant became generally security, his undertaking extended to both, and although in order to discharge himself from the payment of the Costs in such case, he might have pleaded the want of notice, yet if he chuses not to avail himself of this plea, any payment of such costs by him, cannot be considered as an erroneous payment of what was never due, and therefore liable to be recovered back — the Surety might have

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had a right to say that the twenty pounds should be imputed upon the principal sum, but here he has consented that it should be otherwise imputed and he must be bound thereby. —

Judgt for Plffs. —

No 94.
Pothier. vs
Hall. vs

On Inscription en faux. —

In this case the only fact proved to support the Inscription en faux, was, that there appeared a renvois in the margin of the minute, which had not been signed by the parties — On this account it was contended on the part of the Defendant that the whole act was null and void — and 1 Parf. Not. p. 69. 70. — Repre vo acte. p. 140 — N. Denizt vo Faux. p. 109. Poth. Proc. Civ. p. 338. —

But the Court held that this did not vitiate the parts of the act which were in other respects regularly executed, and that the renvois only was to be set aside as a nullity. —

Dic. de Jur. vo Apostille.
Repre eo. verbo — & vo addition. p. 715
Prost de Royer — do
N. Denizt. vo Acte Notarié. S. 7. No 9. —

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