February Term 1829.—

Tuesday 3d Febry.

On the Petition of Pre Beaudry & al

Mr Lacroix on behalf of Pre Beaudry and others opposants to the homologation of a certain Proces verbal made and returned into the Court of Quarter Sessions of the Peace by the Grand Voyer of the district, and by the said Court homologated and confirmed on the 31st day of April — 1828, moved to be permitted to give Security for Costs as required by the Stat. 13. Geo. 2. Ch. 18. in order to obtain a writ of Certiorari to bring the said Proces Verbal, and the Judgment thereon rendered before this Court for revision, stating that he had given due notice to the Justices of this application, which he also produced.—

Mr Sewell on behalf of the Justices, stated, that the application was made too late and could not be granted — that the six months allowed for bringing the proceedings before this Court by Certiorari had expired in October last, as the Judgment homologating the Proces verbal was rendered in the Quarter Sessions on the 31st April last — cited. 4. T. Reps. 281. — 5 T. Rep. 279. 280.—

Mr Lacroix in answer contended, that Mr Sewell could not appear for the Justices in this Stage of the Case, nor had they any thing to say against the present application which ought to be granted as a matter of course.— That a former Certiorari had been withdrawn in October Term last, and the parties could not apply to this Court for another before the first day of the present Term.—

The

The Court held that the Justices were entitled to be heard upon the present application, as the end of giving them notice was to enable them to offer any legal ground of objection they might have to a Certiorari being granted, or any other proceeding had in regard thereof.- That the present application could not be granted inasmuch as no Certiorari could be allowed after the expiration of the six months limited by the Statute. That a writ of Certiorari may be granted in vacation as well as in Term, and the parties had the means of applying sooner for this writ if they had thought fit — Motion over ruled.-

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Friday 6th Febry 1829.

No 1736.
Chaffers.
vs
Boutellier.

Mr Walker of counsel for the plaintiff moved on the 4th instant, that the order appointing the trial of the Cause by special Jury on that day should be discharged, and that the same should be had on the 13th instant, and further that a venire de novo should issue to bring up the same Jury for the trial of the Cause on that day as had already been summoned for that purpose.– He stated, that this was consistent with the constant practice in England, and that previous to the Stat. 7. & 8 Wm & M. the party might sue out a writ to compel the appearance of such Jurors who did not attend on the first process.– That a Special Jury when once struck, must be the Jury that tries the Cause. 5 T. Rep. 453. Cowp. 412.–

Mr Grant for the Defendant– The plaintiff here had an opportunity of trying his Cause by the Jury already summoned, but in consequence of the notices given by him there is now no Jury in attendance, he has waived his right to a trial by that Jury– had the Cause gone off from the want of Jurors, the same Jury ought to be called up to try the Cause, but no Jury has in this case ever appeared or been called– That the Case of Perry cited, does not apply, as the King there was a party, and he is not bound to sue out a venire de novo to bring up the same Jury to try his Cause– That Juries here are brought before this Court under the provincial Ordinance of 1785, and they must try the Cause on the day appointed should the trial not be had on that day, the Jury become functi officio, and they cannot afterwards try the Cause.–

Walker in reply, refers to the Statute 3. Geo. 2. ch. 25. sec. 16, which provides specially, that when a Special

Jury

Jury is struck for the trial of a Cause, that Jury must try it —

The Court over-ruled the plaintiff's motion for bringing up the same Jury on the 13th as had been heretofore summoned for the trial of the Cause on the 4th inst. inasmuch as there was nothing on the Record to shew that a Jury had been summoned for the trial of the Cause, and because having waived his right to his trial on the 4th and before the Venire was returned into Court, it had no power over the Jury, who were thus dispensed to attend, nor was the Venire returned so as to enable them to proceed thereon —

The Court however granted the motion for trial on the 13th instant in the usual course —

Saturday 7th Febr. 1829

No. 1361.

Wurtele vs Napier.

On action of assumpsit for monies advanced &c
The plaintiff moved to examine the wife of the Defendant upon faits et articles, although not a party in the Cause.—

This motion was resisted by Mr. McCord for the Defendant who contended that the plaintiff had not shewn enough to entitle him to the benefit of his motion, as it was not stated that there existed a Communauté de biens between the Defendant and his wife, in which case only such examination can be had.— cited. Repe Vo Interrogatoire. 1 Sousse Proc. Civ. 117. Prat. d' Imbert ch. 38. No. 4. note F. Potts. Proc. Civ. p 68. 1 Pigeau 136.—

The Court granted the plaintiff's motion, on the principle that a Communauté must always be presumed to subsist between husband and wife, and that the Defendant ought to have shewn the contrary had he meant to avail himself of that fact on this application.—

Sed qud— May not the wife in certain cases be examined on faits et articles, even where there is no Communauté de biens, and where she is no party to the suit, as in the conduct of many domestic concerns, and where she acts as the agent of her husband?—

No 135.

Webb vs Clarke.

Action of assumpsit on a promissory Note payable to order —

The Defendant moved that the plaintiff should be held to declare whether he intended to make use of the exhibit filed by him in the Cause, being the promissory Note upon which the action is founded, as the said Defendant meant to make an inscription en faux — against the same —

The Court rejected the motion, the instrument on which the action is brought being a negotiable — instrument, the evidence to be adduced touching it validity must be regulated by the laws of England

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Friday 13th. February

No 1736

Chaffers vs Boutellier

This was an action to recover damages from Defendant for criminal Conversation with the plaintiffs wife —

In this Cause, Mr O'Sullivan on behalf of Catherine Henri Blanchet the wife of the plaintiff moved to file an Intervention in this Cause, on the ground that as her character and conduct would come in question, she might be admitted to become a party in the Cause in order to defend herself from the false imputations charged against her by her husband

and

and contending that inasmuchas she the said Catherine Henri Blanchet had not been made a party to the suit with the Defendant the same could not be maintained against him alone, but ought to be dismissed as irregular—

The Court rejected the motion, as they considered such Intervention wholly inadmissible.—

On the trial of this Cause, after several witnesses had been examined on the plaintiff, who stated that he had yet several more to examine, and from the lateness of the hour that the Case would occupy the whole night the Court adjourned the trial until to morrow morning at nine O'Clock, and with the consent of the parties directed that the Jury should be committed to the charge of the Sheriff to be kept in some convenient apartment, and that necessary refreshments should be allowed them at the expence of the parties.—

Thursday 19th February 1829.

No. 531.

Hart — Kidd et al

This was an action instituted by the plaintiff as a Creditor of one Robert M'Nabb, against the Defendant, in order to rescind and set aside a certain transaction entered into between the said defendant and the said M'Nabb on the 10th Febry 1826, whereby the utensils of a certain potash Manufactory were by the said M'Nabb sold and made over to the said Defendant in satisfaction of a debt due to the Defendant, and claiming that the Defendt be held to restore and deliver up the said utencils or pay the value thereof, and also to pay for the use thereof a sum of £40 for the benefit of all the Creditors of the said M'Nabb, on the ground that the said transaction was fraudulent and gave an undue preference to the said Defendant over the other creditors of M'Nabb, who at the time of the said transaction and long before had been, and then was in a state of faillite and insolvency well known to the Defendt

To this action the Defendant pleaded not guilty, and further added, that the transaction in question was fair and made for a valuable consideration and without any fraudulent intention on the part of the said Defendant Kidd

Several witnesses were examined by the parties in support of their respective pretentions, and the parties having afterwards been heard on the merits of the Case, the Court this day gave the following Judgment —

This case presents one of the inconveniencies which accrue to persons concerned in mercantile transactions — from the want of a sufficient bankrupt law, whereby the property of their debtor might be secured to them in case of insolvency, and to prevent his exercising any power over it to the prejudice of his Creditors — It is the great principle in every bankrupt law, that from the moment of failure, the means of the debtor becomes the common property of all the Creditors, and it is therefore an object of the first importance to establish by some

some certain criterion from which the failure of the debtor shall be considered as taking effect.—

The only fact that can be considered as establishing the failure or insolvency of the debtor, McNabb, is the assignment made by him for the benefit of his Creditors in September 1826, by which act only his hands became tied up in regard of any transactions with individual Creditors— But the transaction here complained of, as giving an undue preference to one Creditor over the others took place in the month of February preceding, and in order to judge of its validity, we must in the absence of more special provision, have recourse to the general principles of law regulating the ordinary transactions of life between man and man— According to these principles every man is justified in obtaining from his debtor by all fair means what is justly due, and in this respect one Creditor is not accountable to another for any advantage he may have obtained in securing his debt, provided it has been done fairly and honestly, and without any fraudulent view or intention— In this, as in every other Case we must determine according to the circumstances laid before us in evidence, whether any fraudulent intention has been ascertained in such way as to vitiate the transaction between the parties—

Prior and up to the first day of October 1825, Mr McNabb, the debtor, was carrying on business as a merchant and dealer at Laprairie, when his house and shop were burnt down, and a considerable part of his goods lost or damaged by the fire— McNabb after this accident still continued to carry on his business, but on a diminished scale, up to the time of the above assignment in September 1826— In the opinion of some persons, McNabb was considered to be in insolvent circumstances, and unable to pay his creditors, owing principally to the loss he had sustained by the fire— in the opinion of others, he was considered to be in a situation to pay

all

all his Creditors, as all he lost by the fire was entirely covered by the Insurance he had made — There was no generally credited report of his insolvency — Some had heard it, but others had not, although living in the same village with him, nor is there any thing to shew that the Defendant Kidd was acquainted with the State of McNabbs affairs, or that he had any knowledge of his insolvency by the information of others, except what one Ryan is stated to have told him — Ryan says, that after the fire, but at what length of time after, and whether before or after the transaction in question, is not said, he informed Kidd, that he, Ryan, considered McNabb to be insolvent but that Kidd told him, he did not believe it —

It appears that in February 1826 McNabb was indebted to Kidd in the following sums of money — he owed him £20 or £30, for the rent of a lot of ground on which McNabb had established the manufacture of potash — he owed him also about £25 for goods sold to him, and £250 — for the balance due on the sale of a house made by Kidd to McNabb and one Campbell — In February 1826, Kidd made an arrangement with McNabb — he purchased all his manufacturing utencils for a sum of £125 — which sum was to go in deduction of what McNabb owed Kidd, except a small of ten pounds which Kidd paid to McNabb —

In judging of the validity of this transaction, we must consider the situation of the parties at the time and the views under which they acted — we must also consider the transaction by itself intrinsically and unconnected with any other circumstances — for if there appear bad faith in either case, the transaction ought to be set aside —

In February 1826, McNabb had not been declared insolvent, or en faillete, nor was he publicly reported to be so — in the opinion of many, and as it would seem of the Defendant Kidd, he was solvent — he

had

had continued to carry on his business from the time of the fire up to the time he made an assignment to his Creditors in September 1826, when only he could in law be considered as insolvent or in faillite — whatever the situation of M^c^nabbs affairs prior to this period, no man was obliged to know or to take any notice of, but from the moment his faillite was declared and known, every person was bound to know it at his risk — N. Denis^t^ v^o^ Failitte. N^o^1. "On
" nomme failitte, la situation d'un homme qui —
" s'annonce, soit par une declaration expresse, soit par
" ses actions, pour être hors d'état de faire face à ses
" engagemens" — when this is the case no private transaction with the debtor can be valid — The present action however is not founded on this principle, it is merely contended that the transaction in question is invalid, because the debtor M^c^nabb, although not openly, or a declared bankrupt, was however in insolvent circumstances known to the Defendant Kidd, who by this means and in collusion with M^c^nabb, acquired an undue advantage over the other Creditors — this would be a fraud, and if proved, must annul the transaction — but the proof in this respect is defective, unless we could presume the existence of fraud from the situation of the parties, which we cannot do — The impressions entertained by some individuals of M^c^nabbs insolvency, appear to consist more of private opinions, which never acquired that kind of publicity, of which every man dealing with him must be presumed to have a knowledge — It does not appear to have come to the knowledge of or to have been believed by the plaintiff and the other Creditors of M^c^nabb, or they never could have allowed him to carry on his business from

the

the month of October 1825, when his property was destroyed by fire, but for six months after the transaction in question took place, without coming forward to assert their rights — their silence upon this occasion must have led to a belief of the Solvency of their debtor, or of his being able to get over his difficulties — And allowing even the testimony of Ryan to have its full effect as to the information he gave to the defendant touching M^c^Nabb's insolvency were it even ascertained to have been given before the above transaction took place, yet it must be taken with all its circumstances, vizt that the defendant told him he did not believe it, for unless he acted upon the belief and conviction that M^c^Nabb was insolvent, and that by this transaction he would acquire an undue preference over the other Creditors, there can be no fraud attached to it — had the defendant even acted upon the suspicion of his debtor's — insolvency and a desire to secure his debt — this would not affect the transaction — it must be conviction alone of the fact of the insolvency, and of the consequences that must necessarily result therefrom, that can vitiate the transaction — Denis^t^ v^o^ "Fraude des Créanciers" — in the place cited by the Pltff, says — "Nous observerons seulement
" que le cas de declarer nul le paiement fait à la
" veille de la faillite^s^ (and here it was six months before the failure) " est très rare — Il ne suffit
" de prouver que le Créancier payé soupçonnoit
" la situation de son debiteur, il faut prouver —
" encore qu'il avoit une connoissance certaine de la
" faillite meditée — Celui qui reçoit son dû d'un —
" homme qui fait encore son Commerce, son etat,

" a

"a pu croire qu'il avoit d'ailleurs des resources pour
"payer ses autres Créanciers" — This principle —
holds equally in mercantile as in other transactions,
for when there is no open bankruptcy, no presumption
of fraud can be taken against the diligence used
by any individual Creditor for the payment of his
debt, and decisions to this effect may be found even
where bankrupt laws obtain for regulating such
transactions, and accordingly we find a much stronger
Case than this determined in favor of a particular Creditor
see D. J. Rep. 152. Smith val. v Payne. —

If we look at the transaction in question, by
itself, unconnected with the situation of the parties,
we find it to be fair and equal, and in the opinion
of some to have been advantageous for the debtor, who
got rid of the utencils of a manufacture he was either
unable or unwilling to carry on any longer, and he
received from the Defendant Kidd, the full value of
them, and in the opinion of some more than their
value, and the Defendant now offers to restore them
to M'Nabbs Creditors upon being reimbursed what he
so paid for them —

Upon the whole of the Case we see nothing
of a fraudulent nature, that can warrant us to
set aside the transaction — The action must therefore
be dismissed as to the Defendant Kidd, — and
Judgt. in favor of the Plff. against the Defendant
M'Nabb for the amount of his demand as stated
in his declaration —

№ 1141.

Pothier.-
Maranda.-

This was an action for the recovery of lods et ventes upon two mutations of a lot of land possessed by the Defendant in the Fief-Saguenchiture, one on a sale made by Jean Marie Cadieux to Franc Xavier Brisset, and the other on a remise by Brisset to Cadieux of the said lot, in order to be exonerated from the payment of the arrears of the Constitut established thereon, and the other Conditions of the sale made to him by Cadieux. —

Two questions arose in this Case - The first, whether, as there appearing no written document to establish the sale from Cadieux to Brisset, the Plff as Seigneur could make proof thereof by verbal testimony

On this question the Court was of opinion, that the Seignior ought not to be deprived of his rights either by the neglect or Contrivance of his Censitaires, and that as a Contract of sale may be made without being reduced into writing, so the Seignior ought to be admitted to prove it by verbal testimony, when the parties had contracted verbally — Tournaur № 209. "La vente étant "un Contrat du droit des gens et purement consensuel "elle n'est pas moins valable quand même elle auroit "été faite sans ecrit — conséquement la vente verbale "bien prouvée, est incontestablement sujette aux lods?" —

The other question was whether the proof here made was sufficient to shew that a sale had taken place, on which lods et Ventes were due — On this question the Court was of opinion that the sale as proved was merely a conditional sale, and that by the lot of land having been returned by Brisset to Cadieux the sale had remained without effect — and therefore dismissed the action. —

No 1988.

Olivier. —
vs
Belanger. —
and
Belanger Opp^t

On the opposition made by the Defendant afin d'annuller, on the principle that the Sale and adjudication of the lot of land seized was irregularly made, as there was not a a sufficient number of bids, or encheres, so as to effectuate a legal Sale of the said lot of land. —

The facts were — That at the time of the Sale and adjudication, the only persons present, were the bailiff charged with making the Sale, and the Crier of the parish, who acted under the orders of the bailiff. — It being the impression at the time of the Sale, that three bidders must be present in order to constitute a legal Sale, the Crier said, — the plaintiff was one — he, the Crier would make another — and he sent for his Son, who was at that time in the Presbytere, to make the third — and all this merely to cover the formality of three encheres being made at the time of the Sale, but without any intention either on the part of the Crier, or of his Son to become purchasers — The lot of land being set up for Sale, the plaintiff bid £30 — for it — the Crier bid £31 — the Crier's Son £32 — the Crier £33 — and the plaintiff £34 — for which sum it was adjudged to the plaintiff —

We find no authority of law that requires that there should be three encheres, or three bidders, to constitute a Sale — Under the numerous formalities of the old law when there were no bidders attending at the time and place of Sale, a remise might be obtained by an order of the Court, for setting up the property for Sale on another day, of which order notice was to be given to the Saisi, that he might procure encherisseurs, if he should see fit. — But of the greater part of the

antient

antient formalities of the decret, we have scarcely a shadow remaining under the provincial Ordinance of 1785; for by this Ordinance, there can be no remise allowed, nor ordered by the Court, the sale must be made on a day certain and according to the prior notices given in the Quebec Gazette, and if not then made, a new writ must issue, and new proceedings must be had, according to the circumstances of the Case. —

The Sheriff here has returned a legal sale and adjudication to the purchaser, and it became the duty of the opposant to shew that the sale so made was illegal — If we are to admit the legality of the testimony adduced, it would appear that the plaintiff was the only effective bidder, and that the others were mere auxiliaries, to cover a matter of form, and to enable the officer to adjudge the land to the plaintiff — but in this there appears no fraud or collusion, no contrivance to keep away bidders, or to get the land adjudged at an undervalue. — It was not the fault of the plaintiff if bidders did not attend, he was entitled to take the benefit of his execution, nor was he bound to suspend the sale, and indeed could not suspend it, without incurring an unwarrantable expence — The plaintiff also had a right to bid either for himself or for any other person — And the law although it seems silent as to the number of encherisseurs requisite to effect a legal adjudication, yet seems to point it out to be the duty, as it is the interest of the Partie Saisie to provide the necessary encheresseurs, for we find under the antient forms, that in all the notices given to the Saisi, of the day of sale, and of the different remises given thereon, that in the notice given to the Saisi, it was stated, — " qu'il ait a y faire trouver des encherisseurs " si bon lui semble" — a form also which we find

was

was in use in every Saisie reelle formerly practised in this Country — This would imply, that the sale was always made at the risk of the Saisi, who had no right to complain, if sufficient encherisseurs did not attend, when he took no pains to procure them. —

Royer. Dic: des arrets. Vo Adjudication. p. 776. (Encheres) proposes this question — On suppose le cas, qu'il n'y a pas d'encheres — quel parti prendre? — he solves it in this way — "La somme pour laquelle la Saisie a été faite, " tient lieu d'encheres, et les biens sont adjugés au Saisissant, " qui peut encore avoir son recours sur les autres biens de la " partie saisie, si elle en a, dans le cas, ou il n'est pas rempli " de sa Créance." Although this is not a course that could be adopted under our System of proceeding, yet it sufficiently shews, that the Sale was made at the risk of the partie Saisie, and that no specific number of bids or bidders was required to effect an adjudication of the property. —

Opposition of the Defendant was therefore dismissed with Costs. —

No 1473.

Stem. — } This was an action of trespass instituted by
vs. } the Plaintiff against the Defendant for having
Hatt. — } caused an obstruction to be erected in the navigable
River Richelieu, by building and erecting a certain Mill
dam upon and across a part of the north Channel of the
said River, whereby the Plaintiff was greatly injured, and one
of his rafts of wood which he was navigating through the
said Channel was stopped, impeded in its navigation, was
thrown out of the channel upon a reef of rocks and was
broken and destroyed to the damage of the Pltff £500 —

the

the plaintiff concluding in and by his declaration that the Defendant be condemned to pay to the Plaintiff the said sum of £500 for his damages aforesaid, and also that the Defendant be held and adjudged to remove and carry away within a certain time to be limited the aforesaid obstruction so by him made and erected in the said navigable river, failing which that the said Pltff be authorised to remove and carry away the same at the costs and charges of the said Defendant —

To this action the Defendant pleaded not guilty, and the parties having adduced ~~his~~ evidence respectively were heard on the merits, when the Court after deliberation were of opinion that the Defendant had wrongfully obstructed a part of the navigation of the north Channel of the River Richelieu, and had thereby occasioned damages to the plaintiff, which damages they assessed at the sum of Fifty pounds — But in regard of the Defendants being on the present action adjudged to remove the obstruction he had erected in the said Navigable River, the Court did not consider that their Judgment here ought to extend so far * because the principal remedy her sought for was damages, the removing of the obstruction was merely consequential and depending upon circumstances — That in some cases of this description the Court had ordered the obstruction complained of to be removed, as being a necessary part of the remedy demanded and without which the remedy would have been incomplete, this was not the Case here, for although some obstruction had been created to the navigation by the Defendants dam, yet the navigation was still open, and rafts might pass as usual, — that in such Case the action ought to have been special for the purpose of removing the dam as impeding the private communications & trade of individuals, or as being a public Nuisance by a prosecution at the suit of the Crown, as no —

action

action could be maintained at the instance of a private individual for abating a public nuisance nor could the present action considered as an action populaire be admitted to extend to remove the dam in question as a public nuisance — for the action populaire was never admitted in France —

Rep^re V^o action p. 139. 1 Pigeau. 62. — Serres Instit: Dr. Fr. liv. 4. tit. 1. p. 535. — Davot. Fr. Dr: Fr: liv. 4. tit. 4. ch. 9. — p. 365. 6. —

No 1739.

Phillips. — vs. Mallet. —

This action was founded on an obligation before notaries for the sum of £24.— to which the Defendant has pleaded for defense, that he never received value for the sum demanded, but that being on the 29th Sept^re 1827 indebted to the plaintiff in the sum of £17. 18. 9 for the balance of an account for goods sold &c — the plaintiff on the said 29th day of September, compelled the Defendant by menacing him with an action, to give him an obligation, not only for the above sum be really owed to the said Plaintiff, but also for a further sum of £6. 1. 3 — which the plaintiff exacted for interest and therefore the plaintiff cannot recover the said last mentioned sum of £6. 1. 3, as being illegal interest and prohibited by law — Further that as to the sum of £17. 18. 9 he had offered to pay the same to the plaintiff before the institution of the present action, and concluding that the plaintiff's action be dismissed with Costs. —

To this plea, the plaintiff has put in an answer, consisting of two distinct pleadings, the first denying the sufficiency of the plea to support the conclusions thereof, and 2^ly denying the facts therein alledged —

As in a former case, this answer taken altogether amounts to no more than the general answer for which our rules have provided, and it is to be regretted, that instead of answering the plaintiff had not moved for the

rejection

rejection of the plea, or defenses, as it is entitled, on the grounds of its being irregular and informal, as it certainly contains nothing to support the conclusions thereof, and alledgis nothing certain or precise upon which the real grounds of defence can be ascertained, or any thing to justify the conclusion therein taken, that the action should be dismissed — On the contrary he admits a just and legal debt of £17. 18. 9, and merely alledgis that the surplus of the demand consists of illegal and prohibited interest which the plaintiff cannot recover, the conclusion from which could only be, that the plaintiff was entitled to a Judgment for the sum of £17. 18. 9, and that as to the surplus of the demand, it ought to be rejected as being illegal and usurious interest — It is true, that en passant as it were, he alledgis that he offered the plaintiff, the sum of £17. 18. 9 before the institution of the present action, but when, where, and in what manner he does not set forth, nor is there any thing alledged by which a legal tender can be inferred, nor is the tender — repeated so as to enable the Court to adjudge thereon, for it is not enough to say, that he, the Defendant offered to pay, but that the offer was effectively made that is offres reels with all the formalitys the law requiris and that such offre was refused by the plaintiff, the whole followed up by a plea of tender so as to enable the plaintiff either to accept or refuse the same — this part of the defendants defense therefore is immaterial and insufficient and constitutes no ground for any legal conclusion, and can amount to no more than this, that he had declared his willingness to pay — £17. 18. 9 and no more — The first part of the plea does however contain something from which a — conclusion may be drawn, but it could only be this,

That

that the plaintiff was entitled to Judgment for £17. 18. 9, but that as to the rest, being usurious interest, the action quoad that surplus ought to be dismissed; whereas if the defendant had invoked the Statute, or rather the provincial Ordnance of 1777 whereby all bonds or Obligations wherein a greater interest than Six ℔ Cent shall be reserved or taken, is declared void, and that therefore the obligation in question was on that account void, and should be so deemed and declared by the Court, the conclusion would then have naturally followed, which the Defendant has adopted, that the action be dismissed with Costs, but instead thereof he adds what would seem a waiver of any such right, by declaring that he had before the action, offered to pay part of the sum demanded which he alledges was the original debt due by him to the plaintiff, being £17. 18. 9. The plea is evidently defective, informal & insufficient — the word defense is indeed applicable to all pleas, and is the general term, but the different pleas which are comprehended under that term must be distinctly pleaded, and have their appropriate titles, and however informally and imperfectly pleaded, it is obvious that the whole of the plea contains nothing but the subject matter of an exception and should have been so entitled, and such the plaintiff seems to have considered it by filing an answer thereto and not a replication, although one general answer would have sufficed, without dividing it into two as the plaintiff has done on the present occasion — Upon the whole the Court was of opinion to reject the Defendants plea and to order a repleader. —

All pleas should be as distinct, precise and clear, as the declaration, and we think the more regular form

form of proceeding, and the most expeditious for the plaintiff, where an informal and an irregular plea is filed, would be to move the Court to reject it, and to permit the plaintiff for want of a sufficient plea to proceed ex parte, whereas in rejecting the plea here filed, and upon which the plaintiff has raised an issue, there being no other plea filed, all the Court can do is to reject the plea and order a repleader

No 790.
Hall & ab
Steib. —
Steib. Oppt

The plaintiffs having under the execution sued out by them seized certain lands and tenements of the Defendant, the Defendant became the adjudicataire thereof, but did not pay the price to the Sheriff who in consequence made his return to the Court to that effect in October Term last — In that Term the Plaintiffs moved for and obtained a Writ of Venditioni exponas directing the lands and tenements which had been so purchased by the Defendant to be sold at his folle enchere — The writ of Venditioni having issued, and the lands being again advertised for sale, the Defendant made an opposition to the sale afin d'annuller, and alledging among other things that the Plaintiffs had received payment of their debt interest & Costs and were not entitled to sell the lands —

The Pltffs now moved, that the opposition afin d'annuller made by the Defendant should be dismissed as irregular, and such as by law cannot be received, further that the Defendant be contraint par corps for the amount of the money for which the said lands & tenements were adjudged to him, and also that an alias writ of Venditioni exponas do issue for the sale of the said lands and tenements at the folle enchere of the said Defendant

Mr Grant for the plaintiffs in support of this motion cited. 1 Pigeau. 782. Pothi. Proc. Civ. 587. n. 12.

Mr Beaubien for the Defendant — The writ of Venditioni exponas issued irregularly in this Cause, and without any notice to the Defendant, who had a right to be heard, before a writ issued directing the lands and tenements to be sold at his folle-enchere — That this proceeding being irregular was null and void in law and therefore the opposition here made by the Defendt to prevent the sale of his property under an illegall writ

was

was well founded and ought to be received — That the Defendant did not claim any right in the land under his present opposition, but intended to shew and establish, what he would have heretofore established and proved, had notice been given him by the Plff. of their application to the Court during last term for their said writ of Venditioni exponas, that the Plaintiffs are paid and fully satisfied for the amount of their Judgmt by monies they have received for and on account of the said Defendant —

That the plaintiffs motion for a Contrainte as the defendant cannot be allowed, as the law does not admit of the Contrainte par Corps in a Case of this kind — That by the first article of the 31st title of the Ordre of 1667, all Contraintes par Corps are abolished except those specially reserved by the subsequent articles, and the Case of purchasing real Estate by Decret and not paying for it, is not one of them — and if under this ordinance such Contrainte was ever practised, it has since become abrogated by the Provincial Stat. 41 Geo. 3 ch. which admits only of the sale of the property at the folle enchere of the first adjudicataire, but does allow any proceeding as such adjudicataire in restraint of his person —

Mr Grant in answer stated, that the Defendant being a party in the Cause had notice of all the proceedings taken in it, and the order for the writ of Venditioni was granted with the knowledge of the Defendant — That the opposition here made by the Defendant to prevent the sale of the lands and tenements in question is directly contrary to the provisions of the Stat. of the 41 Geo. 3. which

directs

directs that after the issuing of a writ of vend: exps. no opposition of any kind shall be received. — That the law in regard of the Contrainte par corps against the adjudicataire who neglects or refuses to pay for the property he has purchased has not been abrogated by the above Stat. of 41 Geo. 3. nor in anywise affected thereby; that Statute merely regulates the mode and manner of obtaining the sale at the folle enchere of the purchaser, but in nowise alters the law as to the contrainte.

The Court said, that as there appeared an order of the Court on the motion of the Plaintiffs counsel for the issuing out of the writ of venditioni exponas, they must presume that it was granted in due course and that the Defendant had notice of it — That where the writ of vend: Exp. was thus allowed, no opposition to the sale of the Estate seized could be received under any pretence otherwise the provisions of the Stat. 41 Geo. 3. would be infringed upon, and the practice was not to allow such oppositions — The opposition here made by the Defendr was wrong and ought not to have been received, and the Plaintiffs motion for rejecting it, must be allowed; as to the Contrainte par Corps moved for by the plaintiff against the Defendant, the Plaintiffs were entitled to obtain it — The Contrainte par Corps to compel the payment of property purchased en Justice, was considered as a part of the general law of France, and so held in the different provinces, and the Constant practice in the Chatelet was to grant the Contrainte when of right it was demanded — This practice had been followed in the Courts in this Country, and in this Court it had never been doubted — Plaffs motion granted

see. N. Denis. Vo Folle Enchere — Jousse on 34 Tit. of ordr 1667.—

No. 1752.

Dalrymple. — vs. Laing, Cur.

Action for wages, agt. the defendt. as representing the Estate of the deceased — Laing. —

Plea — prescription — concluding that Defendant had no knowledge that any thing was due to the Plaintiff on account of wages by the deceased, and tendering his oath to this effect —

Answer — Plea insufficient, as every plea of prescription ought to state and alledge payment of the debt demanded without which it cannot be admitted, and the Defendt thereupon to give his oath as far as he knows or believes —

Reply — That Plea is sufficient, and conclusion and tender of defendants oath agreeable to law — as a Curator cannot take upon himself to alledge or to — swear that the debt has been paid, all that the law requires of him, or of the heir of the deceased, is as to his knowledge of the fact —

The Court held the plea to be sufficient.

No. 1895.

Dubreuil & al. vs. Porteous —

Action for Rent on deed of lease. —

Plea of exception — That declaration does not shew or state that the defendant was ever put into the possession of the premises leased to him by the Pliffs — And for exception peremptoire — That the Plaintiffs are not the proprietors of the premises leased by them to the Defendant, but that several other persons, named are the proprietors thereof, and therefore the Defendant is not safe nor bound in law to pay to the plaintiffs the rent

rent now demanded inasmuchas he may be called upon by the real proprietors of the soil to pay to them the said rent, or the use enjoyment he has had of the soil –

To these pleas a general answer was put in by the Plaintiffs and the Parties were now heard thereon –

The Court were of opinion that the pleas above pleaded by the Defendant were not sufficient and could not be maintained in law. That in regard of the plea first pleaded by the Defendant, it was not necessary for the Plaintiffs to alledge that they had put the Defendant into the actual possession of the premisis leased, although it certainly appeared more regular and consistent with the nature of the Contract to alledge possession under it, yet it was enough in law for the plaintiffs to shew as they had done here, that the Contract was in all respects perfect and complete, whereby the Defendant became vested in all their rights to demand and to take possession of the premises, and it was not therefore enough for the Defendant to alledge that the plaintiffs had not put him in possession of the said premises, he ought also to have shewn the existence of some hindrance or impediment which prevented him from taking or entering upon the possession of the said premises, and requiring the Plaintiffs to remove such impediment –

Poth. Louage. № 142
Poth. Vente. № 48
&c — № 307

That as to the plea secondly pleaded, it was also insufficient, as it was not enough to alledge that the property was vested in others besides the plaintiffs, the Defendant ought further to have alledged that he was troubled in his possession by such other proprietors, for if the Defendant has had the quiet enjoyment of the property, the Plffs have fulfilled their Contract with him and he must perform his part of it also –

Defendrs pleas of Exception dismissed wt Cost

No. 1675.

Wm. Andrews
vs.
Jn°. Crooks.

By the Court.—

This was an action of revendication for a piano forte, and to which the Defendant has pleaded. 1st a general denegation of the facts stated in the declaration 2d and for further plea, that the piano forte in question was never in his power or possession, but in the possession of his lodgers Martha Mottashed, wife of Jo^s Andrews who had separate and exclusive apartments from the Defendant; and that the said piano forte had been brought to the house by the father of the said Martha who had deposited and left the same with her.—

The Reply of the plaintiff to the first plea is general and he demurs to the second or special plea of the Defend^t as insufficient; and says, he is not bound to answer thereto and prays that it may be dismissed— but has added a replication to such second plea, denying the facts therein stated.—

This being the State of the pleadings on the 20th Oct last, the plaintiff on the first day of this term, moved, that inasmuch as the Defendant had neglected to file an answer to his the plaintiffs demurrer to the defendants second plea, that such plea be dismissed with Costs.—

If we had confined our attention solely to the immediate object of this motion, there would have been no necessity of taking until this day to consider of it, the motion is new in this Court, and we know of no rule of practice to authorise it, or which could justify the rejection of a plea regularly filed upon the sole ground that the excipient had neglected to fyle a subsequent pleading to complete the issue upon his exception— the utmost advantage to be obtained from such neglect could only be to foreclose the party from fileing any additional pleading, and not to demand the dismissal of the previous one, which stands regularly before the Court— But on a further consideration of this motion, we perceive that in principle it tends to introduce a practice calculated to produce that confusion and unnecessary multiplicity of pleadings, which it has been the object of the Legislature

and

and of our own rules of practice to obviate and prevent; it is not however upon these grounds alone, that we should in all cases consider ourselves bound to confine the parties in their pleadings to those limits which the law and our rules have prescribed, but upon these other and further grounds, that a multiplicity of pleadings might be made use of, either for vexatious delay, or for unnecessary accumulation of expence to suitors, which it is our duty to prevent. — In this case the Defendant has put in with his general or negative pleading a second and affirmative plea, which should have been pleaded as an exception, and so entitled; and to this last the plaintiff has put in what he entitles a Demurrer & Replication and by his present motion, considers the Defendant as in default, by his omitting to file an answer to such demurrer to complete the issue thereon. — Now if the plaintiff has been right in the use of a demurrer, he naturally might have expected an answer thereto, but in order to ascertain whether he was correct in pleading as he has done upon the present occasion, it will be necessary to examine what the pleading which he has entitled demurrer and Replication, does in effect contain. — 1st he says, the matters and things alledged in the special plea are insufficient in law, and this he entitles, demurrer — and 2d that the facts therein stated, are untrue — and this is entitled a Replication — Now these two together are in substance no more than a general answer to the special plea, or exception of the Defendt and which general answer, by our rules would complete the issue upon such exception or affirmative plea — the error therefore has been on the part of the plff in pleading what he has called a demurrer and Replication instead of a general answer which would have put at once the sufficiency of the special plea, or exception of the Defendant in issue, without the necessity of filing a separate demurrer, which last, if admitted would require other pleadings to complete the issue thereon, and if the Court should sanction such a departure from the letter, as well as the spirit of our law and practice, it must obviously lead to irregularity and expence. — It is

true

true that cases have appeared before us, in which we have found English pleadings blended with French, and many departures from our plain and simple, yet wise and efficient System of pleading — but the parties not objecting thereto, so as to bring the correctness thereof under the immediate consideration of the Court, and as a serious injury might arise to one or other of the parties by setting aside the pleadings, particularly after enquête and final hearing, the Court has passed them over to get at the merits of the Case, although it has with regret observed the confusion and uncertainty arising therefrom — It is however full time to declare that we have a System of our own which must be adhered to, nor could we find a more favorable opportunity of doing so than the present Case affords, when a party is seeking to obtain an advantage over his adversary from the omission of the latter, to answer what he the plaintiff has — irregularly and unnecessarily pleaded, nor do we see any injury in the present stage of this Cause that can arise, but on the contrary much good, by rejecting the plaintiff's pleading entitled, demurrer and replication, and to compell him to substitute therefor, a general answer, under which he will be entitled to every benefit he could have promised himself from the pleading now about to be rejected — The general answer so to be substituted will, as before observed, put in issue not only the sufficiency of the Defendant's special plea, but also the truth of the facts therein alledged in bar of the plaintiffs action, for the general answer to an exception is — "that the matters and things in the "said exception set forth and contained, and each and "every of them, is and are wholly and altogether untrue "and unfounded in fact and in law" — Had such general answer been filed by the pleff in lieu of the plea he has put in called "Demurrer & Replication" the — sufficiency of the exception would have been as effectually called in question under the issue thus raised, as by the

Counsel

course adopted by the plaintiff, and with this advantage that the issue by such general answer would have been complete and no further pleading requisite, and the plaintiff might immediately have inscribed the Cause on the role de droit, for a preliminary hearing on the sufficiency of the Defendants special plea — whereas if we admit the demurrer and answer thereto, the plaintiff may consider himself entitled to reply thereto, and if he should, as the demurrer is not a pleading contemplated by our rules and unknown thereto, there would be nothing to prevent it; and thus introducing four pleadings, when the Ordre of 1785, admits only of three in those cases where an exception is filed — that is exception, answer, and replication — and which last or third pleading is by our rules declared to be unnecessary, where the answer to the exception is general, — admitting of a replication only in those Cases, where a special answer alledging new facts may have been put in. — It must be obvious from the whole tenor of our rules, and the practice of the French Courts, that the English demurrer, strictly speaking, does not belong to our System — we have no law to authorise its introduction, and therefore if admitted, as we have no rules to govern it, must we in such case give the same effect thereto, as in the Country from which it is borrowed? — This effect, it will be readily admitted cannot be given — and if so, its admission becomes improper — a partial introduction of it would be obviously injurious, for we should then have that which cannot be assimilated — either to English or French principles of pleading — The truth is that the English demurrer strictly understood is unknown to our law, and yet all that it is justly calculated to effect, we have, as far as pleading to the declaration goes, without thereby conclusively admitting, as in England, the truth of the facts therein alledged, as where the declaration is defective in form, or the right of action imperfectly set out or uncertain, we have the Exception à la forme, — and where the declaration does not set forth a substantial and legal ground of action —

action, we have the, defense au fond en droit — But as to demurrers to special or affirmative pleas of exception, we have no such distinct plea — a general answer to such exception, or a general replication to a special answer to an exception, at once denies the sufficiency as well as the truth of such exceptions or special answers, and our system admits of no other pleadings, and such is the practice and understanding in regard thereto in all the Superior Courts of this Province, for although in their pleadings many professional gentlemen have made use of the term, Demurrer, and the English forms of that pleading, yet throughout the whole of our rules of practice, or of those of the other Courts, no such pleading is recognized or named — And it would have been obviously absurd to have done so, as its introduction would have been incompatible with, and destructive of our System, and therefore it is wrong to file a plea with a title we cannot recognize. — It is certainly a great object to preserve our System entire and in all its purity and simplicity, and to prevent the unnecessary introduction of pleadings borrowed from other Systems, as well as to prevent an improper application of our own. — By adhering to our own System we prevent confusion and unnecessary delay, labor, and expence, and preserve that uniformity and consistency which are so essential to a due and correct administration of Justice — To instance the impropriety and erroneous tendency of adopting English pleas and their titles, the Court would take occasion to advert to the plea of abatement in England which is there altogether a preliminary plea — how often has such a plea, in and with the English form and title been attempted to be used here as a preliminary plea when by our System it is not generally considered as such, we have even seen instances, where the deposit of two guineas has been made on filing an affirmative plea so entitled, whereas with us for the most part, the English plea in abatement, when it amounts to an affirmative plea

alledging

alledging something dehors, answers to our temporary exception peremptoire en droit, which must be filed with all the other pleas to the action so as to admit of but one enquête upon the whole defense, and thus deprive a defendant of any temptation to the filing of a sham plea for the purpose of delay — in such — case the Defendant can gain nothing by such a plea should it be ill founded, while on the other hand, if it be true, and the Plff be satisfied thereof, he will move to amend without risking his Cause upon an enquête, and all is thus set right — It must be obvious, that if in framing pleas, recourse was had to our own System, the error now pointed out, would have been avoided — it is however an error into which all must be led who adopt pleas from other Systems, as they must thereby necessarily become impressed with the law and practice applicable to and governing such adopted pleas in the Country from which they are taken, and thereby lose sight of our own — In such Case what is the Court to do, but to hold the — Defendant to the plea filed, thereby excluding him from any other plea or defense he may have to the action, and which by our rules should come in together — Yet we have not hitherto so rigorously held the party, but have given him an opportunity of correcting the error, which his adoption of an English plea had occasioned — but what has been the consequence — During the present term, an affirmative plea, entitled plea of abatement, has been filed as a preliminary plea, and being otherwise irregular, was rejected — It is impossible that Justice can be correctly and duly administered under a confused System of pleading, always varying and never uniform — We therefore mean in future to hold the parties strictly to the observance of our own System, and to exclude and reject every thing that

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is foreign to it — The System we follow may be easily understood, by an attentive perusal of the reported Case of Forbes. v. Atkinson — in the Quebec Reports — in it will be found a complete definition of the several pleas and the appropriate titles thereto which under our System are known and recognized. It may however be asked by some, what is the System of pleading that the Bar in future is to adhere to, and certainly it is proper that it should be distinctly understood and known, in order to prevent error and confusion — the first thing to be done is wholly to exclude therefrom the titles which belong only to English pleas, and to use our own which are Seven in number, vizt —

Exception declinatoire. —
Exception. dilatoire —
Exception à la forme —
Defenses au fond en droit
Temp^y. Excep: peremp^on en droit
Perpet^e — Excep. peremp^on en droit
Defenses au fond en fait. — And there is no possible ground of defence, that cannot be made the subject matter of one or other of these pleas — It is therefore in the choice of the particular plea or pleas suited to the nature of the defence to be set up, that the Science of pleading principally consists — These pleas have been divided into two principal divisions or classes — The three first form one class and are alone considered preliminary, and a shorter delay is given for the filing thereof than for the filing of the four other remaining pleas, which compose the second class or division. — The preliminary pleas must all be filed within the same delay, and a defendant is not allowed to use them successively.

If the Defendant is not amenable to the Jurisdiction of the Court he pleads the exception declinatoire — if entitled to a temporary suspension of proceedings,

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he pleads the exception dilatoire — and if the writ or declaration, or both, are defective in form, or any essential thereto, wanting, and apparent on the face thereof — the defendant resorts to the exception à la forme, in which the supposed informality or defect must be distinctly and specially set out — This last plea alledges no matter dehors, and should contain no allegation of any fact not apparent & discoverable from the record, or upon which it may be necessary to adduce evidence; for should this last be the case, it must be the subject matter of one of the exceptions of the second division. — Those pleas of the second division, or as many of them as may be essential for the particular defence of any Cause, must be all filed at one and the same time — If the plaintiff has not by his declaration disclosed a legal ground of action to entitle him to the conclusions thereof, or that no legal conclusion can be drawn from any thing therein set forth the Defendant may put the same in issue, by a defense au fond en droit — and if admitting the law, he denies the truth of the facts set forth in the declaration — he does this by a defense au fond en fait, which contains a general denegation, varying according to the nature of the action, and tantamount to what is called, the general issue in England — If however the Defendant has any thing to alledge, which may not amount to an absolute bar of the plaintiffs action, but only entitles him to ask for the dismissal thereof for the present, such as, misnomer — term of payment unexpired — other defendants not sued, and the like — he will make this the subject matter of a temporary exception peremptoire en droit — But if what the Defendant has to offer in his defence, amounts to a perpetual bar of the plaintiff's action, such as payment, — compensation — chose jugée, novation and the like,

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then and in such cases, the plea to be adopted is the perpetual exception peremptoire en droit. — Now the issues upon the two first, the defense au fond en droit, and defense au fond en fait, being simply negative pleas, are completed by a general replication — and upon the two last being affirmative pleas, alledging some new fact not before disclosed, by a general and negative answer thereto, unless in those Cases where the plaintiff may find it necessary to answer specially to one or other of those exceptions, in which cases the issue is completed by a general replication to such special answer — and the same rule is observed with regard to all preliminary pleas except where the plaintiff is willing and does admit the facts stated in the preliminary plea and moves for an immediate hearing, which by our rules he is entitled to do without pleading thereto — Beyond these limits no other pleading can be used or admitted, the parties being restricted thereto as before observed, not only by the Ordre of 1785, but by our own rules of practice, and any departure from a System so plain and simple in itself cannot have any correct or legitimate object in view nor can we come to any other conclusion, unless the system of pleading, of which we have endeavoured now to give a mere outline, is misunderstood, — viz. that, without any of those nice distinctions and subtelties which elsewhere prevail, a Plaintiff here has every fair means allowed him of establishing his demand, and the Defendant every just opportunity of defending himself agt an unfounded or irregular claim, nor is it necessary to give a further latitude than is here

given

given to the ingenuity of the profession, when beyond those limits it cannot be exercised to their honor or credit, or for the true ends of all pleading and professional aid, the attainment of Justice and the preservation of right. —

It may perhaps be right for the information of the junior part of the Bar, now to add, that the several and indeed all of the pleas of the second division, may be used in the same Cause, when the case of their clients affords materials therefor, but they must be pleaded distinctly and separately, and on no account blended together, as each must have its — separate conclusion, and the conclusions of the — temporary and perpetual exceptions differ, and are — followed by different Judgments — Several grounds however may be stated in the same exception, — provided they belong to that particular species of exception, and the same conclusion will apply to the whole, as but one exception of the same species need be used, and if due attention is given to these distinctions there can be no better method of getting at a knowledge of the law applicable to each Case, than by first duly — considering which of those pleas is to be adopted, and distributing the several grounds of defence to the — respective pleadings to which they properly belong, and to prevent Confusion, as the practice here has been to insert all the pleas of the second division upon the same paper, we would recommend, where it may be — necessary to plead more than one of the said pleas, to state them in the following order — 1st. The defense au fond en droit — 2d. The temporis Exceptn 3d. The perpetl Exception 4. Defenses au fond en fait. —

Upon the principle now explained, the motion of the plaintiff for the rejection of the Defts exception or special plea, because the Defendant has

not

not answered the demurrer thereto, is dismissed — and in order to abridge the pleadings so as to meet our own rules, we order that the pleading of the Defft entitled, a Demurrer and Replication, be taken from the record, and the plaintiff be held to answer, the special plea or exception as he may be advised. —

Drawn up by Mr Justice Pyke

No 1757.
Sawyer
v.
Moore

By the Court. —

This action was returned into Court on the first day of October last, when the Defendant appeared and moved for security for costs, as the Plaintiff appeared to reside out of the Province — to give this security the Plaintiff applied for and obtained delay until the first day of November following, but previous thereto on the 27th October, he gave the requisite Security, the Defendant consenting thereto, and on the 31st October gave notice to the Defendant to fyle his plea within three days. — On the 3d November a plea was filed by the Defendant, entitled, "Plea of Abatement" praying Judgment of the writ and declaration, and alledging that he ought not to be compelled to answer thereto, as he is resident in the Seigniory of Noyan, and not in Caldwell's manor, as supposed by the writ & declaration and thereon praying that the action of the plaintiff be dismissed — and with this plea, the Defendant deposited two guineas. —

On the 4th November, the plaintiff inscribed his Cause on the Enquête role, ex parte, for want of a plea, declaring, that he awaited the sitting of the Court, to move for the rejection of that filed. — On Monday the 2d Febr. the Plaintiff accordingly moved to reject the said plea, as having been irregularly filed — and at

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the same time the Defendant also moved, that the inscription of the Cause on the Enquête role should be rejected as irregular — and on the 3d February the Defdt further moved for liberty to proceed exparte, the Plaintiff being in default, not having filed an answer to the plea of Abatement —

It is upon these three motions that the Court has been called upon to decide — Now as all proceedings from the day of the entry of the Cause, were stayed by the Defendants motion for Security for Costs, and that the rules to plead could not commence to run until after such security was given, and this was not given until the vacation, that is on the 27th October. — The Defdt under the 19th Sec. of the rules of practice had twenty days to fyle a plea to the action, and the notice under the new rule could only have been given three days previous to the expiration of the 20 days from the 27th October — whereas in this Case the notice to plead was given on the 31st October, the fourth day after Security given in vacation, which was irregular inasmuches the plaintiff did not thereby allow to the Defendant the 20 days given him by the 19th Sec. of the Rules of Practice to plead — the notice and inscription were therefore irregular and premature, and the motion of the Defendt to reject such inscription must be allowed — But the Plaintiff on the other hand has moved to reject the Defendants plea as irregular and too late filed — and if the plea is in its nature a preliminary plea, this motion also must be granted, as the plea in that case was too late filed — The Defendt certainly appears to have considered it as a preliminary plea, by depositing 2 Guineas therewith, and the introductory part of the plea announces, an exception à la forme — and it is such in its conclusions — whereas the subject matter thereof is that of a temporary exception, which is an affirmative

plea

plea, susceptible of proof, and therefore ought according to our present rules to come in with the other pleas to the merits, so as to admit but of one enquête in the same Cause — the plea therefore is irregular in its form, and must be rejected on that account only — but had it been purely an exception à la forme, both in form and substance, it certainly would have been too late, for all such pleas must be filed before Six O'Clock on the day after the return of the writ or appearance of the Defendant, or as in this case, the day after the suspension obtained on the return day and appearance of the Defendant, was removed by giving security for Costs — whereas it was not filed until the 3d November instead of the 28th October — The late rule permitting the plff to proceed ex parte in vacation for want of a plea does not at all apply to preliminary pleas, as no notice need be given for the filing of such pleas, but only those which are deemed pleas to the action, the preliminary pleas stand precisely as they did before the making of that rule — This is according to the system as it now exists — it may however be matter of future consideration for the Court, whether the error in the addition of a party, should not hereafter be made the subject of a motion and not of a plea, such motion to be supported by affidavits — but this change if adopted must be done with some consideration and caution so as not to defeat the main object of all our rules, which is, to prevent unnecessary and vexatious delays. —

The confusion which generally arises in pleading is in a great measure owing to the unqualified adoption of English pleas, and giving titles thereto unknown to our law; and an Advocate is thereby

deceived

deceived and led into error — the distinction in regard to pleadings which the Court has so long laboured to establish, has certainly not been generally attended to, for it has often been stated from the Bench, that we have but two grand divisions of pleas — the preliminary — and those to the action — and of the first division, namely preliminary pleas, there are three species — the Excep. declin^r — the Excep^n dilatoire, and the Excep^n à la forme — the nature of the two first is too well known to need explanation — but it is in the misapplication of the latter that error has principally occurred — The excep^n à la forme does not alledge any thing new or out of the record, but distinctly points out some defect or nullity visible on the face of the writ and declaration, similar to the special demurrer in England and if such defect or nullity cannot be so pointed out — without alledging some new fact out of the Record, it must necessarily be the subject matter of a temporary exception, and come in with the other pleas to the action, that it may not be made a handle for delay in producing a double enquete and affording encouragement to sham pleas — The English plea in abatement (which in England is a preliminary and distinct plea, although not so here) answers principally to our temporary exception, and in some instances to our exception à la forme, where it is not an affirmative plea, as in the case of a defective writ — and if the bar would drop the title of abatement which has been improperly brought into practice, and look to the pleas which our own rules and practice contemplate and provide for, they would not so often err as to the nature, application and proper title of the pleas filed — To be able to class these pleas according to our own system, is that which should first be looked to, and it is easy to test what is, or is not, an exception à la forme, by the bare enquiry whether

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any fact is therein alledged of which it may be necessary to adduce evidence to establish the truth thereof — for if such evidence be necessary, it is not an exception à la forme or a preliminary plea, but is a temporary exceptn which tends to the dismissal of the action for the present only — as for instance, the pleas of mis-nomer — of a wrong addition, or of other Defendants than those sued, and the like — It has been in this Court too much the fashion, if it may be so termed, to support the pleadings by English principles, which are in many respects at variance with our own, and thereby confound the two systems in a way to render the pleadings neither according to the one nor the other — but when we have a System of our own which is plain and simple, and which affords to a Defendant every just means of ample defence, why should there be an affected resort to another system which has of late undergone so much just and severe criticism —

There is still a third motion to be disposed of, but it is too trifling to merit serious observation, it is that whereby the Defendant asks to be allowed to proceed ex parte, because the plaintiff has not answered his plea — This is not the first time we have heard of a Defendt asking what is now demanded, but such an application is preposterous, and has always been disallowed — for where a plaintiff will not proceed, but remains quiet, we know of no other method under our present rules, to take advantage thereof until after a lapse of two terms when a Defendant may move for the dismissal of the action for want of proceedings — but in this case the Defendants plea being rejected, the motion must fall of course —

The Defendt motion to discharge the Inscription on the role d'Enquete ex parte, is therefore granted and that of the Defendant to proceed ex parte, for want of an answer, is rejected — and the motion of the

Pltff

Plaintiff for the rejection of the Defendants plea, is granted, and the Defendant ordered to plead over—

Drawn up by Judge Pyke + This Judgt was given on the 4th inst.

April Term 1829.—

Monday 6th April.—

No 614.
Fisher.—
vs
Farley.—

This was an action instituted by the Plaintiff a merchant as indorsee of a bill of exchange drawn by the Defendant on England and returned under protest for non acceptance — The Defend^t was stated in the declaration as an Esquire —

The plaintiff having made his application at the return of process for a trial by Jury, the Defendant now moved that the above application should be set aside, and that the cause should be tried by the Court, inasmuch as the Defendant was not a merchant or trader, so reputed and understood according to law

Boston for the plaintiff — The transaction here is of a Commercial nature — A promissory note payable to order, not between merchants, has not been considered so far commercial as to give a right to a Ca. Sa. on the Judg^t By his Rep. — but there is a distinction to be taken in regard of Bills of Exchange, which are not only considered as mercantile transactions, but grounding a Contrainte par corps for their payment, and by the laws of France even the minor who drew a bill of Exchange was liable to the contrainte par corps for the payment of it. Ord^{ce} 1667. tit. 34. art. 14 Denis^{t} vo Contrainte par Corps — The person who drew a bill of exchange was subject also to the Jurisdiction Consulaire —

The Court held, that the Ordinance of 1785, had established in so clear and positive terms the description of persons and cases to be tried by a Jury, and the

decisions

decisions of the Court thereon had been so numerous and uniform, that no doubt could now be entertained upon this point — This ordinance requires, that the persons shall be ~~a~~ merchants or traders so reputed and understood and also that the transaction between them shall be of a mercantile nature — Here the Defendant is not said to be a merchant or trader, and although the transaction may be of a mercantile nature, yet is not sufficient to entitle the plaintiff to a trial by Jury —

Defendants motion granted —

Saturday 18th April 1829

No 375.
Robertson & al
v
Desrivieres
Beaubien —
and
Beaubien opp.

In this case the plaintiffs had about three years ago sued out execution against the goods and chattels of the Defendant, and the process levied thereon were paid to them in deduction of their Judgment — After the interval of three years, they then sued out execution against his lands and tenements, to this execution an opposition afin d'annuller was made by the Defendant, that the plaintiffs ought first to have proceeded by an alias fi. fa. against his goods & chattels from the lapse of time that had intervened between the return of the writ of execution as above sued out & the same, alledging that he was possessed of other goods and chattels sufficient to pay and satisfy the debt of the Pltffs and now prayed to be admitted to prove that fact.

Bourret for the plaintiffs, contended, that they should not be held to a further discussion of the goods and chattels of the Defendant, after having already seized and sold all that the Defendt was possessed of, under a former writ of execution, and the law required no further diligence on their part —

The Court however were of opinion to admit the Deffe to make proof of his being possessed of moveable property at and before the time that his lands and tenements were seized, as the plaintiffs had not followed up their first execution with sufficient diligence, but had allowed the Defendant a sufficient time to acquire other goods and chattels sufficient to pay and satisfy their Judgment, and as it was for the benefit of the debtor, that the law required that his goods and chattels should be first discussed before selling his real Estate, he was at all times entitled to have them first disposed of. —

No 380.

Low v Laing. — Action on two promissory notes made by Defend^r to the plaintiff —

Plea of exception — That Pl^ff had given time and delay to the Defendant for payment of the notes beyond the term at which the present action was brought —

To this plea the plaintiff demurred, and contended that such agreement on the part of the Pl^ff, if ever made (but which he denied) was not binding in law nor sufficient to bar the present action, as no consideration was stated to have been given or agreed upon between the parties — and of this opinion was the Court, and dismissed the exception. —

No 387.

Rolland v Bedard. — This was an action by the plaintiff, as Seignior of the Seigniory of Monnoir for Lods & Ventes —

The declaration stated that on the 24^e Octr 1823, the late Jacques Fournier purchased and acquired from Jean L^s Nadeau and wife, a certain lot of land in the said Seigniory for and in consideration of the price or sum of 4958^#, payable as stated in the deed of sale dated as above, on which purchase there became due to the Pl^ff a sum of 413^#. 3^s. for lods et Ventes on s^d Land now possess^d. by Def^r.

Plea — denies the facts stated in the declaration, and further, that the purchase made by Fournier from the said J^n L. Nadeau and wife, was on the condition, that he the said Nadeau and wife should have the right, for nine years, to exercise the droit de réméré on the said sale and to re-enter on the possession of the said lot of land in the same manner as if the same had never been sold. That in virtue of the said clause and condition in the said deed of Sale, the said Nadeau and wife, on the 19th Novr 1823, obtained the possession of the said lot of land

by

by virtue of a deed of retrocession made to them by the said Fournier, and therefore no Lods et Ventes are due to the said plaintiff upon the said Sale.—

Replication— That notwithstanding the facts alledged by the Plea the Lods et Ventes demanded are due.—

The facts stated in the pleadings having been admitted the parties were heard on the question touching the right of the Pltff to the Lods & Ventes demanded.—

The Court in the examination of this question finding the writers to be much divided upon it, have adopted the opinion of those who have judged it according to those principles which hold, that this sale, although made with faculté de remére, is still a perfect sale, and operates a transfer of the property and of the possession of the thing sold to the purchaser, and a sale of this kind, is admitted on all hands to generate Lods et Ventes — the stipulation of remére, does not suspend the effect of the sale, it merely gives the right to the Seller to take back his property, which he may, or may not exercise as he sees fit— If sales of this kind were permitted without payment of Lods & Ventes it would be the means of depriving the Seignior of this right, and would certainly create great difficulties and delays to his obtaining it, as all sales might be made with a stipulation of remére in order thus to defraud him We therefore think that upon every principle of law and Justice the Plaintiff is entitled to recover—

The following authorities are referred to as supporting the plaintiffs claim—

Traité de Fiefs par Dumoulin par Henrion de Pensey pp. 176. 178.— 299.

3 Guyot, des Fiefs pp. 295. 6. sec. 5. № 4.— & authorities cited by him—

Pothier. Fiefs. p. 147.—

D. Denizt. v. Lods & Ventes. № 78.—

Repre

Repse vo Lods & Ventes. §. 14. p. 649. —
Charondas on 76e art. Custom of Paris
Boutaric. Des Lods. p. 167. —
3. Hervé. p. 153. —
3. Despeisses. p. 70. No. 7. —

The Contrary authorities, are —

1 Bourjon. p. 282 — No 68. — No 69.
Pocquet de Livoniere des Fiefs. p. 161. —
1 Tournaur des Lods. No 382. — although he seems to hold to what he calls the pureté des principes as laid down in No 379. — 380. —
Observations de Mr +++ on 76e art. of the Custom p. 1127 No 4 —
2 Henrys. p. 35. quest. 55. No 1. — & p. 36. No 9. —
Auzanet on 76e art. Coutume. p. 56. —
Lo ——— on 78e art. " ———
Brodeau on 23e art. Cout. p. 198. —
Prudhomme. ch. 55. p. 303. & Suiv. —
Lacombe. vo Faculté de Rachat No 5. —
Renauldon. Dic. des Fiefs. vo Lods & Ventes. No 149. —
Id. ——— Traité des Droits Seignx liv. 2. ch. 2. p. 166. —
5 Freminville. Prat. des Terriers. p. 730 — & Suiv. —
Billecoq. Tr. des Fiefs. ch. 52. p. 206 —
2. Arrets de Bardet. ch. 32. p. 409. —

No 1503.

Duncan McDonald Inspector and others Sous-voyers

This action was instituted by the plaintiff on a contract entered into between him and the Defendant McDonald, as Inspector of roads and bridges in the parish of St Polycarp in this District, and with the other Defendants as Sous-voyers of that parish for the construction of a bridge over a certain rivulet a stream in the said parish, in order to recover from the said Defdts the balance due to him for having constructed the said bridge. — By the declaration the plaintiff prosecutes his demand against the Defendant McDonald, as now or late Inspector of the said parish, and against the other Defendants as now or late Sous-voyers of the same parish, and concludes for a Judgment against the whole jointly and severally for the payt of the balance due to him —

The Defendant McDonald pleaded for exception that he contracted with the plaintiff in his capacity of Inspector of the parish, and therefore is not liable to be prosecuted or condemned personally for the payt of any part of the sum demanded by the plaintiff. The Sous-voyers pleaded a Similar exception — They also pleaded, that by law they hold their situations only for one year, and that at the time and long before the Institution of the present action, they had ceased to hold the situation of Sous-voyers in the said parish, and that other persons (whom they did not name) were appointed as Sous-voyers in their stead, and therefore that the plaintiff's action aforesaid against them ought to be dismissed and take his recourse against their successors in office.

The

The Court after hearing the parties on the above exceptions held, that in regard of the exception pleaded by Mc donald and the Sous-Voyers, as to the right of the plaintiff to prosecute them personally and to obtain a condemnation against them jointly and severally, this must depend upon the nature of the Contract entered into between them and in this respect the Court reserved to determine until the parties were heard on the merits when the nature of that contract would appear — but in regard of the plea secondly pleaded by the Sous-voyers the Court dismissed it, as insufficient in not having stated the names of the persons who had succeeded them in Office as Sous-voyers so as to give the plaintiff an opportunity of having a better recourse, or taking such proceedings thereon as he might be advised, inasmuchas the plaintiff was not bound to know whether the Defendants were still in Office or not, or who the persons were who had succeeded them in their Office — That prima facie the plaintiffs action was rightly brought against the Defendants here as being the persons with whom he had contracted, and they must exonerate themselves from their responsibility, by laying it upon those who were legally bound. —

Martigny —

Martigny & al
vs
Beauchamps
& al.

This was an action hypothecaire, instituted by Jacques Jerome de Martigny and Felicite Elizabette Bailly his wife, as Seignors, proprietors and possessors of the Fief and Seigniory of St. Michel, against the Defendants Frederick Beauchamps and Solomon Beauchamps, as proprietors and possessors of a certain lot of land within the Censive of the said Seigniory, to recover from them 29 years arrears of Cens et rentes, amounting to £43.10, at the rate of 3. for every superficial acre, due on their said land, and that the same may be declared mortgaged to the plaintiffs for the payment of the said sum of money, or that the Defendants do quit and deliver up the same to be sold in the usual manner for the payment of the said arrears of rent— The declaration states that for 29 years next before the first day of April 1826, as well the said Defendants as one Joseph Beauchamps their father, under and by virtue of a certain ~~deed of~~ donation from his father Joseph Beauchamps, as stated in the marriage contract of the said Jos. Beauchamps, the younger and Desanges Martin, made and executed before Duvernay, public notary on the first day of October 1786, and the said Jos. Beauchamps the Grandfather of the said Defendants, who acquired the said lot of land by sale made to him by one Michel Bailly, by deed executed before the said Duvernay, public notary and witnesses on the third day of October 1785, held and possessed the said lot of land subject to the payment of Cens et rentes, to the said plaintiffs— and therefore concluding for the payment of the aforesaid sum

of—

of £43. 10. — in manner as aforesaid, with interest and costs. —

Plea — That the action of the said plaintiffs is not founded in fact, nor can in law be maintained.

That the said lot of land is not bound or liable to pay to the said plaintiffs any cens et rentes or any other right or duty such as claimed by the said plaintiffs —

That the said lot of land is not held en censive but is held en Fief, distinct and independant of the Seigniory of the said plaintiffs, and holding and depending only on the Crown. —

That the said lot of land was granted en Fief on the 21st day of February 1742, by act passed before Loiseau, N.P. and witnesses, to Pierre René Messier, by Pierre René Messier his father then Seignor in part of the said Seigniory of St Michel, since which period, the said lot of land has always been held en Fief, and has been transmitted by the different predecessors of the Defendants to them the said Defendants, and is now held by them as a Fief, free and clear of every redevance of Cens et rentes, or right towards the said plaintiffs, and not within their Censive as appears by the titles and particularly that of 30th August 1752. That neither the said Defendants nor any of their predecessors, have ever paid any cens et rentes, or other redevance to the said plffs or to any others as Seigneurs of the Seigniory of St Michel they the said defendants and their said predecessors holding the said Fief as the Seigniors thereof —

Pleads also a prescriptive possession of fifty years of the said Fief, which would extinguish every

every right of the said plaintiffs had any such ever existed. —

Replication — Denies the matters of fact pleaded by the Defendants, also their sufficiency to bar the plaintiffs from having and maintaining their action aforesaid against the Defendants. —

The Exhibits filed by the plaintiffs, were,

No. 1. Deed of Cession, dated 3d Oct. 1785, before — Duvernay, N. P. by Michel Bailly, Sr. de Massin and Geneviève Aubert de Gaspy his wife to — Joseph Beauchamps, of the lot of land in question and also of another lot of land en bois de bout, in the Seigniory of Bilot, which the vendors declare to belong to them by purchase from Messire Chas Franc. Bailly, Curé of La Pte aux Trembles —

In this deed there is the following clause —

" Cette Cession, retrocession et abandon ainsi faite
" à la charge par ledit Cessionnaire des Cens et rentes
" et droits Seigneuriaux, payables par chaque année
" au Seigneur à qui ils sont, le tout suivant le titre
" de Concession, et au jour porté en icelui, quitte et
" net des dits Cens et rentes du passé &c. "

No. 2. Marriage Contract between Joseph Beauchamps (father of the Defendants) and Desarges Martin, wherein, Joseph Beauchamps, (the Grandfather of the Defendants) makes a donation of the said lot of land to the said Joseph Beauchamps his son. —

The Exhibits filed by the Defendants, were,

No. 1. —

No 1. Contrat d'abandon par René Messier & sa femme à René Messier fils & sa femme, of the lot of land in question, by act passed before Loiseau, public notary, bearing date 21 Febry 1742.—

In this deed the Grantors convey the lot of land to the grantees in the following manner — "sans aucune chose en excepter, retenir, „ ni reserver, que seulement les droits Seigneuriaux „ de ladite terre pendant son vivant; et après son „ décés les dits droits Seigneuriaux appartiendront „ et resteront à son dit fils René Messier, acceptant „ pour lui ses hoirs et ayans Cause, comme c'est „ son aîné, à la charge des redevances qui sont „ dües à Sa Majesté."—

No 2 Contrat de Vente par Sr René Messier and wife to Augustin Bailly Sr de Massin, of the lot of land in question, executed before — Loiseau, public notary, 30e Augt 1752.—

No 3 Abandon par Dame Vve Bailly, chargée de procuration de Mr Chas Franc Bailly Ptre, à Sr Michel Bailly, Sr de Massin, executed before Duvernay, public Notary. 22 Sept 1785.—

No 4 Same as exhibit No 1. of the plaintiffs

No 5 Same as exhibit No 2. of the plaintiffs.—

The title given by René Messier the elder to his son, by deed of the 21 Febry 1742, although not

not expressed in the clearest and most precise terms yet in effect, it created a Fief in the Son, to be held by him and his heirs, as it discharged the lot of ground in question from the payment of Cens & rentes, and consequently of Lods & Ventes to the Fief and Seigniory of St. Michel, of which the Grantor, René Messier, is stated to have been the Seignior, and it transferred this right to his Son, the grantee, and the only redevance reserved, was that of paying to His Majesty, what as Seigneur Suzerain he might be entitled to claim.— It is also evident, that the Defendants now hold this lot of land by a chain of titles derived from the original grantee René Messier fils, the only difficulty which occurs, which would seem to call in question the validity of the Defendants title to hold the said lot of land en Fief, is owing to the expressions contained in the exhibit No 1. filed by the plaintiffs and exh. No 3 & 4 filed by the Defendants, as it is therein stated, that the vendee took the land in question subject to the payment of Cens et rentes et autres droits Seigneuriaux payables au Seigneur à qui sont dûs— and hence it is inferred that the Defendants cannot pretend to hold this lot of land contrary to their own title, nor can they prescribe against it— If the Defendants hold the land en roture, it is certain they cannot by any prescription acquire a right to hold it en Fief; for as this land is situated in the enclave of the Plaintiffs Seigniory, the Defendants must justify their right they now claim, by title creating that right and not by prescriptive possession.— The question must therefore be determined according to

to the legal import and effect of the titles produced —

The first Concession or grant of the lot of land in question appears to have been made by the above deed of 21 Febry. 1742, at least none other appears, and it was at the time the property of the Seignior who conveyed it to his eldest son as a mark of favor and distinction to him, en Fief. — Now the nature and condition of the grant here made must regulate the nature of the tenure, and form the law between the parties in regard of that tenure, until by operation of law, or the Consent of the parties, a change takes place — " Cela depend uniquement du titre de Concession, qui une fois accordé et accepté, établit une loi perpetuelle entre le Seigneur et le Vassal" The original impression stamped upon this lot of land being that of a Fief, we must next see whether this has been by any legal means effaced or changed —

Renaudon. Tr. des Droits Seignt. p. 11. —

By the deed of the 30th Augt. 1752, we find, that René Messier, the original grantee, sold this lot of land to one Augustin Bailly, Sieur de Massin, "avec les mêmes droits et privileges," as he René Messier held it under the said deed of 21 Febry 1742. —

Subsequently we find that Messire Chas Franc Bailly, Curé of the parish of Pointe aux Trembles who appears to have been the son and heir of the said Augustin Bailly, by deed of sale made by Madame Vve Bailly, under his power of Attorney, dated 22d Sept. 1785, transferred and conveyed this lot of land, together with another lot of land situated in the Seigniory of Beloil, to Joseph Beauchamps, (said to be the Grandfather of the

Defendts)

Defendants) In this deed is contained the before mentioned clause or condition of sale, that the lot of land in question should be subject to the payt of Cens et rentes and other Seigneurial rights, as we usually find in cases of property held en roture — and would, in the absence of all other title, destroy all pretentions on the part of the Defendants to hold the property otherwise than en roture — But as a different title has been produced by them to shew that this lot of land was held en Fief — the Seignior can take no advantage of the stipulation between the parties in the said deed of 22d Sept. 1785, as he was no party thereto; nor can he avail himself of this stipulation to change the nature of the tenure of this lot of land which had heretofore been granted en Fief — yet this obstacle would be removed, if the purchaser under that deed has acknowledged the right of the Seignior, and has paid him lods et Ventes on that purchase, or cens et rents as his Censitaire. Now it appears by a receipt at the bottom of this deed, which has been produced in evidence by both parties, that lods et Ventes were paid on the purchase stipulated in this deed — the receipt is thus stated — "Possession, je mets — "l'acquereur, m'ayant payé les lods de trois cent "livres d'achat. 13 Mars. 1786. — Le Guay." It therefore became necessary to ascertain who this Leguay was, and in what capacity he acted, whether as Seignior, or on behalf of the Seignior of St Michel, or of the Seignior of Beloil, as one of the lots of land sold was situated in the Seigniory of St Michel

and

and the other in the Seigniory of Beloeil, and although a presumption might have taken that the lods et Ventes were paid on the purchase of the terre à bois, in the Seigniory of Beloil, as being of the least value, the prix d'achat, being estimated by this Mr Leguay at 300#, yet in a matter on which a doubt might be entertained and on which the question in issue depended it became necessary + that this doubt should be removed, — At all events the Court could not well determine, while this point remained uncertain. — The evidence which has been now adduced under the Interlocutory order of the Court, sufficiently ascertains the fact, that Le Guay was the Agent of the Seignior of Beloil and as such he must be considered to have here received the lods et Ventes for the lot of land situated in that Seigniory, and on which the estimated value was settled at 300#. —

+ for the interest of both parties, but more especially of the Defendants

From this transaction therefore, nor from the stipulations in this deed, can any evidence be drawn in favor of the plaintiffs claim, and there being besides nothing to shew that the proprietors of this lot of land ever paid rent to the Seigniors of St. Michel, or in anywise acknowledged their right as such, it tends to fortify the title of the Defendants to hold this lot of land en Fief, as their legitimate title thereto. —

Action dismissed with Costs. —

June Term 1829.

Thursday 11th June.

No. 1667.
Moffat
vs
Hallowell
&
Selby & others
opp^ts

On Oppositions afin de conserver, and touching the right of collocation of the creditors upon the monies levied on the real estate of the Defendant —

Mr Bedard for the Messrs Selbys opposants, stated, that on the 30th Novr 1824, the Defendant Hallowell being en Communauté with his wife, sold to the Opposants a certain lot of land, being part of the Community property with a promise of ratification by his wife, which ratification was afterwards made on the 25t January 1825 — The Opposants paid to the Defendant £600 — on account of this Sale, for which he claims to be reimbursed, by reason of the mortgages created on the property so sold, by the Defendant — For this sum of money the Opposants contended they were entitled to exercise the rights of the Defendants wife, and to have in consequence a right of mortgage on the property of the husband from the day of the marriage between the Defendant and his wife, in consequence of her right of indemnity on the property of her husband from that period. — That by the 282d article of the Custom, the husband and wife can do no act creating any benefit or advantage for each other — and that during the existence of the Community, the husband is alone the master and proprietor of all the property of the Community; to sell

and

and dispose thereof as he shall see fit, if done without fraud and that during the Community the wife has no right therein. That the husband is alone bound for all the debts of the Community, and the wife is not liable thereto, and only in so far as the property of the Community will extend, even where she accepts it — That when the wife during the Community binds herself with her husband for any debt or obligation he may have contracted, she becomes bound in her own name, and not as Commune en biens, and is personally liable for all such obligations — That the wife here being the debtor of the opposants, they are entitled to exercise her rights on the Estate of husband for the debt due to them, and to exercise her right of mortgage in this respect as well upon all the property of the Community as upon the separate estate of the husband. — Here it is admitted that the husband is insolvent — and by the seizure of the property of the Community the Community is dissolved, whereby the Creditors of the wife can now exercise all her rights on that Community — She cannot either accept, or refuse to renounce to that Community nor do any act to the prejudice of her Creditors, for by that means her creditors might be injured, and their rights be transferred to others having a less preferable claim, and against whom in such case the opposants here could have no recourse — That if from want of a renunciation here on the part of the wife to a Community evidently insolvent, her rights can be considered as extending to only one half of the Community, her creditors can claim only on that half while the other half of the Community would be the exclusive property of the husband, and be liable to his Creditors, without any liability on their part to refund what they had so received, if eventually the Community should be dissolved and a renunciation take place on the part of the wife, or by her Creditors on her behalf —

Poth. Comte. No. 599.

The opposants therefore claim that they may ranked and collocated as exercising the rights of the wife upon the whole of the property of the Community in the same manner as if that Community were dissolved, and a renunciation made thereto on the part of the wife. —

By

By the Court — This case comes now before us on the several oppositions and claims to the monies levied from the lands and tenements of the Defendant, and the question now agitated before the Court is, whether those Creditors who hold Mrs Hallowell as jointly bound with her husband can in the exercise of her rights against the property of her husband, claim her right of indemnity upon that property to the full extent of this indemnity, as if she had renounced to the Community, although no such renunciation hath been made, nor any demand made by the Creditors, that such renunciation should be held and considered as made, as being for their benefit, and which by law they can therefore claim, so as to entitle them to the indemnity demanded —

Without departing from the principles which have been advanced in argument as to the rights of the wife in the Community, except as to the insolvency of husband operating a dissolution of it, we may clearly determine the points here in contest —

It has been rightly held, that during the Community the wife can exercise no rights thereon, while this subsists her rights are incohate, or as Pothier calls it, "informe", and in this point of view, if she can exercise no such rights neither can her Creditors in her name or on her behalf for they can claim no greater right than their debtor had — The rights of the wife, in, or upon the Community commence only from and after the dissolution of it — and those rights must be regulated according as she may accept of it, or renounce to it — In case she accept the Community, her right of indemnity will extend only to one half of the debt she has contracted with her husband, because by her acceptation, she must bear her proportion of the debts, as well as take her share of the emoluments or advantages of that Community — If she renounce to the Community, she is entitled to her entire indemnity

Poth. Com.te Nº 497.

for

for the debts she has thus contracted. — Now the Community can be dissolved only in two ways — either by the death of one of the parties, or by Judgment of a Court of Justice adjudging a separation de biens between the parties — the separation de biens, may be effected on several grounds, and the insolvency of the husband is one of them — but it has never been held, that insolvency operated ipso facto such separation, or operated a dissolution of the Community, without the sentence of a Court of Justice, although it may be a sufficient ground for such a Sentence, and the authority cited from Serieux must be considered in this light. —

Poth. Com.te N°503. 506.

It has also been rightly held, that when the Immoveable property of the husband is discussed, the Creditors who hold the wife as jointly bound with the husband, may exercise her rights and be collocated upon such immoveable property according to the date of mortgage which the wife has for her indemnity, but as the quantum or extent of such indemnity must depend upon the acceptation of, or the renunciation to the Community by the wife, the question which here arises is — how is this to be ascertained, when there is neither acceptation nor renunciation to the Community by the wife — The Creditors of the wife here have established no certain principle upon which their exercise of the rights of the wife can be effected — they have not shewn that without her participation they could in this case renounce on her behalf to the Community on the principle of the insolvency of the husband — such a demand besides, had it been made, was liable to contest by the wife, and by the other Creditors of the husband, and without some determination had on this assumed right of the Creditors of the wife, warranting such renunciation, it cannot be exercised, as no law has been shewn to warrant it. — That the Creditors are entitled to exercise the rights of the wife there can be no doubt, but that they can exercise them in any other way than the wife herself could do, would be inconsistent with the common principles of law by which rights are transferred and vested by subrogation — and it is besides of moment that a renunciation of this kind

should

should be made with prudent precaution, because when made, it cannot be recalled, as neither the wife nor her creditors can renounce to the Community to day, and claim any right in it hereafter, for after such renounciation the property to be acquired by the husband will belong to his creditors, who will be entitled to be collocated thereon according to their priority of mortgage.—

All that can be done in this case so as to secure the rights of the creditors of the wife, where the real estate of the husband has been discussed, is to allow to those creditors, as subrogated in her rights, what she would have been entitled to for her indemnity had she accepted the Community, because to this extent she will in any case be entitled to, but to grant more upon the principle of a renounciation not made, and not even demanded, — would be contrary to right, and upon a supposition which may never take effect — We will not say that the wife can be compelled to renounce, but should she wrongfully refuse to do so, to the prejudice of her creditors, it seems but just, that they should be authorised to do so on her behalf but until this be done, the interests of the parties cannot be benefited nor bound.—

In order however to prevent the property now under discussion from being diverted in such way that the rights of the wife and her creditors could not attach upon it, considering the insolvency of the husband which now stands admitted before the Court, it is — thought right that the creditors of the husband who now claim the proceeds of his estate, should give — security to bring back such part of it, as the wife or her creditors may be entitled to claim, should she, or they on her behalf, be entitled to renounce to the Community between her and her husband — This can be granted upon the same principle, that an opposition for a right of warranty or for a debt due on a condition not yet arrived, may be maintained.—

4 Gr. Comn. p. 1389. No. 2.
Id — p. 1390. No. 5.—
Repn. Vo. Oppos. p. 433.

No. 560.

Ferguson. — Harrison.

This was an action for breach of Contract instituted by the plaintiff against the Defendt on certain indentures of apprenticeship, whereby the father of the Defendant, he being then a minor, bound the Defendant to serve an apprenticeship of five years with the plaintiff, as a printer, under the penalty of one hundred pounds — the plaintiff complaining in and by his declaration that the Defendant did not complete his time of service, but quit the same two years before the expiration thereof without any good cause, to the damage of the Pltff one hundred pounds. —

To this action the Defendant, demurred, on the principle, that being a minor he was not bound, nor liable to the plaintiff in damages for quitting his service That his father, the only capable party to the Contract was alone bound in this respect — That according to the rules and regulations adopted for regulating the rights and complaints between Masters and their apprentices or hired servants, the magistrates were authorised to hear all such complaints and to determine thereon, and had Defendt failed in his duty the Pltff might have had his immediate recourse agt him in this way, but not by an action like the present. — Boston for Defendt referred to 2 Chitty on Pleads — p. 233. where the form of the action against the father is given in this Case — cited also. 2. Doug. 518. — 8 Mod. Rep. 190 — 2 Croke 179. 3 Croke 494. 1 Burn. Just. 66. — Repre vo Puissance Paternelle 101. 109. 139. — Poth. Ob. No 454 — 1 Pigeau 38. Rep. 14 Vol. p. 139.

Driscoll for Pltff. an action may be maintained against a minor, after he comes of age, for a tort committed by him while a minor — that there was a moral obligation here on the Defendant to perform his duty as an apprentice, the

indentures

indentures made by his father in this respect were for the benefit of the Defendant, to enable him to acquire the means of gaining his livlihood, and there was a reciprocity of undertakings to be performed on the part of the Master, and for which the Defendant would have had his action had the Plaintiff failed to perform his part, and there ought therefore to be a reciprocity of action agt. the Defendant for the failure on his part. —

The Court held that the action in this Case could not be maintained — that the object here was the recovery of damages for a breach of Covenant upon a Contract to which the Defendant was not a party, nor could he as a Minor be a party thereto so as to bind himself in damages or in a penalty by his non performance — The right of action on Contracts can attach only on the parties stipulating — even where such stipulations regard third persons — and as to the apprentice here having failed to do his duty, there was another course to be taken by the Master — Action dismissed

—

No. 1585. —

Guichaud & al' vs Devins, Curr. — and Hagar Intervs

—

This was an action en declaration d'hypotheque for a stipulated sum of money on a certain deed of Grant made by the late Mr Dunn of a lot of land in his Seigniory, and also for 29 years arrears of quit rent stipulated to be paid by said deed

To this action the Defendant pleaded. 1st a demurrer to the declaration. 2d. Prescription of ten years possession with title — and 3d. That the Sale in question was null and void having been made by the Seignior of lands en bois de bout in his Seigniory. —

To the first Plea, the Pltffs joined issue — to the second they demurred — and to the third they also joined issue —

Walker for the Defendt contended, on the first plea, that the declaration was insufficient, inasmuch as the grant made by the late Mr Dunn of the land in question, is a deed of Sale and not a deed of Concession of Land to be held en roture à titre de Cens et rentes — That the Sale so made appears to have

been

been made with a view to exonerate his tenants from all Seigniorial rights and dues as tene-tenants, excepting only a mere nominal quit rent — That such a sale is contrary to law, as it tends to destroy the very principle of Feudal tenure, by which Mr Dunn held his Seignory and according to which he was bound to make concessions to his tenants. That the law has provided where the Seignior makes such sale, that he shall lose all right in the land so sold, which is thereby vested in the Crown, and of whom the tenant is accountable for all arrears of rent —

As to the Plea of prescription — The Defendant has set up a title under a sale made to him in which no reference is made to the deed of Concession, nor to any of the burthens thereby imposed; That under this title the Defendant has had the quiet and uninterrupted possession for upwards of ten years, so as to acquire a prescriptive right against the claim now set up by the plaintiffs — It has been objected here, that the plea of prescription has not been sufficiently set out, and not stated in the language of the law, but although not in the same words, the Defendant considers the language used in the plea to be equivalent in every respect to the words of the law — and we find the several authors who treat the subject of prescription do not always use the very words and expressions of the 114e art. of the Custom, but only such general terms and expressions as evidently amount to the same thing — cites. Repre Vo Prescription. p. 303. 308. 315, 316. 319. 363. — Id. Vo Hypothèque. p. 667. & art 114. Cout. Pre Gr. Comre pp. 379. 387. 388. 381. No 2. 6. 7. 8. 9. 10. 11 — Poth. Prescripn. No 579. 590. 37. 591. & No 38. 598. No 57. 58. &

Sol. Gene for Plff. The declaration is sufficient, if the facts therein stated be made out — As to nature of the Grant & conveyance made by the late Mr Dunn to this tenant of the lot of land in question, this is a matter of fact to be enquired into, and the

Defend

Defendant has pleaded specially to this point by another plea to the action — In pleading the plea of prescription the Defendant must use the language of the law, any other terms or expressions cannot be received, as they are liable to different interpretations, as may best suit the views and interest of parties, but the language of the law is always the same, and Courts of Justice cannot admit any other — The Defendant here by his plea of prescription does not allege or shew that kind of continued and uninterrupted possession which the law requires — cits. 2. Gr Comr p. 382. Poth. Hyp. N. 471. — the words franchement & sans inquietation are necessary, but not stated in the plea —

By the Court. — In regard of the demurrer pleaded by the Defendant to the declaration of the plaintiffs, there appears no ground for it, as a good and sufficient consideration is stated on which the contract between the parties is alledged to have been made — And from the arguments used this pleading could be intended merely as drawing the consideration of the Court to a statement of facts subsequently pleaded by the Defendant as an exception to the action — This plea must therefore be over ruled and dismissed —

By his plea of prescription, the Defendant says, that, " he invokes the prescription of ten years as by law established " and that he has possessed the property in question by " good and sufficient titles as proprietor thereof, animo " domini, successively, consecutively, and in good faith, during " ten years and upwards" — The 114th art. of the Custom says — " Quand aucun a possédé et joui par lui et ses " predecesseurs, desquels il a le droit et cause, d'heritage ou " rente, a juste titre et de bonne foi, par dix ans entre presens " et vingt ans entre absens, entre âgés et non privilegiés, — " franchement et paisiblement sans inquietation d'aucune " rente ou hypotheque, tel possesseur du dit heritage ou rente,

a

" a acquis prescription contre toutes rentes ou hypotheques
" pretendues sur ledit heritage ou rente." — Now Ferriere
in his Gr. Coutume on this article, in enumerating the requisites
essential for effecting the prescription states in the glose N°8.
La quatrieme (condition) que la possession ait été continuée
sans trouble ni interruption, suivant ces mots, franchement
et paisiblement sans inquietation d'aucune rente ou —
hypotheque — laquelle n'est pas seulement requise dans
la possession de l'heritage, mais aussi dans celle de la
liberation — selon le sentiment de Duplessis — This would
imply the necessity of setting out in the plea of prescription
not merely a possession animo domini, for ten years successively
but a quiet and peaceable possession without disturbance
by reason of any claim of rent or mortgage on the property
possessed - because prescription is a means not only of
acquiring property but of clearing it from all incumbrance
or mortgage, and ought to be set out with all its requisites
every one of which becomes essential in effecting this object -
But the Defendant has not set out all these requisites
and we therefore consider it as insufficient —

N°5. —
Solomon & al
vs
Jones. —

A similar question and decision as above, on the
plea of prescription. —

N°1998. —
Papineau
vs
Chartrand
&
Brunette
&
Brasseur & al } ops

The plaintiff as representing the late M. de Lotbiniere
Seignior of Vaudreuil, obtained Judgment against
the Defendant for certain Seigniorial rents and dues
and in consequence seized and sold a certain lot of
land belonging to the Defendant, and upon the
proceeds where of now before the Court the present claims
and oppositions have been made — Subsequent to the —
rendering of this Judgment, the Defendant sold another
lot

lot of land belonging to him to the opposant Brunette, and in the deed of sale it was stipulated, that Brunette should pay 2500 livres to the plaintiff in part satisfaction of his said Judgment, and on so doing, should procure from the Plaintiff a subrogation in all his rights and priviledges, in order to secure to the opposant the possession of the land he had so purchased against the claims of other creditors of the Defendant. The opposant paid the money and obtained from the Plff the subrogation in question, and in virtue thereof claims by his present Opposition all the right and priviledge upon the monies levied to which the plaintiff, would have been entitled under his Judgment, to the exclusion of the other Opposants — The other Opposants Brasseur & others claim by their opposition as bailleurs du fond of the land sold at the suit of the plaintiff, and contend that the Opposant Brunette cannot exercise any priviledge on the proceeds of the said land, by virtue of his subrogation to the exclusion of their claim, because the opposant Brunette is not troubled in the possession of the land he purchased from the Defendant, and if present Opposition were allowed he would thereby have not only the value of the land he has so purchased by being reimbursed the 2500 livres he paid to the plaintiff, but would retain this land without paying any consideration for it whatever —

The question here raised is to determine the right and priviledge of the respective claimants on the proceeds of the land sold at the suit of the Plaintiff — It is no doubt certain that the opposant Brunette will be entitled to all the benefits of the subrogation he obtained from the Plff but it would seem that this ought to be limited to the particular land purchased by him from the Defendant and ought not to exclude the rights of other creditors upon the other property of the Defendant, or at least not until he had been ejected from the land he so purchased in consequence of prior claims upon it. —

2 Argou. p. 425. liv. 4. ch. 5.

Le tiers acquereur qui paye les dettes du Vendeur est subrogé

subrogé aux hypotheques des Créanciers qu'il a payé, mais cette subrogation n'a son effet que sur la chose qu'il a acquise, et non sur les autres biens du Vendeur — see also to the same effect — Instruc. sur les Conv: p. 461. §. 6. Renusson Tr. de la Subrog^n ch 5. N° 42. & suiv^t — Lacombe. V^o Subrogation. N° 8. —

It is however evident that injustice might accrue to the opposant Brunette if his opposition were to be wholly rejected, as in case he should suffer a trouble or eviction in the land he purchased from the Defendant by a person having a preferable claim to the other Opposants, he would be without remedy for his indemnification, if the Defend^r had no other property upon which it could be exercised than that now under discussion — As the quiet possession of the land the Defendant sold to Brunette, was the object in contemplation, and the subrogation he took from the plaintiff was the means employed for this purpose, his claim ought therefore to be allowed in so far as this object can be obtained without injury to the rights of other persons, and although his claim of indemnity is not yet open, but may possibly arise, his demand in this respect may be admitted in so far as to oblige the other Opposants to refund the monies now claimed by them should such cause of indemnity arise as would give the opposant Brunette a right to obtain the same — And it was therefore ordered that the monies levied should be paid over to the Opposants Brasseur & al' on their giving good and sufficient security to refund or such part thereof as Brunette might legally claim in case of his being evicted from the land he so purchased from the Defendant —

4 Gr. Com^re p. 1389 N° 2. — & p. 1390. N° 5 — Rep^re v^o Opp^n p. 433.

No. 381.

Alsopp. vs Buck.

On the Report of Experts.

This was an action petitoire to recover from the Defendant the possession of certain lots of land in the Township of which had been granted and conveyed to the Plaintiff by letters patent from the Crown — The Judgment of the Court was that the Defendant should restore and deliver up to the plaintiff the lots of land in question, after payment by the plaintiff of the improvements made on the land, and of which an estimation was directed to be made by experts to be named by the parties, or on their default by the Court — The Plaintiff having refused to name an expert, the Court named one ex Officio, on his behalf, who with the expert named by the Defendant having made their report, the parties were now heard thereon. —

Mr Buchanan for the Plaintiff moved to set aside the report of the experts as wholly inadmissible in principle, inasmuch as the Defendant here could claim no right to retain the land in his possession until his improvements were reimbursed as the lots of land in question were held in free and Common soccage, and the Defendant could claim no priviledge on those lots by reason of any improvements he had made thereon, the maxim being that he who builds or makes improvements on the lands of another must lose all such improvts as they become attached to the soil and vest in the proprietor, and more especially in a case like the present where the Defendant knew that the

property

property belonged to another person, and that he the defendant had no title to it.— According to the Common law of England, by which lands in free and common Soccage in this Province must be governed, the Defendant can claim no privilege on the land for his improvements. Co. Litt. p. 4. (a) 1 Cruise on Real property. p. 19. Coke's Rep. 4th part. p. 87. 3 Peere Wms R. 367. Eq. Ca. abridg. vo Hypothecation— 2 Kent's Com. 271. 3 Atk. Rep. cited by Kent.—

Mr Grant for Defendt The Court has already determined that the Defendant shall retain the land until his improvements are paid,— this cannot be considered as affecting the title to the land in regard of which only the law of England will apply, and it is because those improvements must now go with the land and belong to the plaintiff that as a principle of equity the Court has given this kind of security to the Defendant to retain the temporary possession of what he has so improved in good faith, until he shall be reimbursed the value of such improvements — this principle has long obtained in the Courts and is agreeable to law. and holds as well in regard of the issues and profits of land during the Defendant's possession as in regard of the improvements made on the land. cites Poth. Props. No. 344.

The Court held — that the Defendant was entitled to his improvements on the land — That it was a clear principle of law, strongly applicable in the present case, that no person ought to profit by another's loss, which was not only a principle of

equity

equity but also of morality, that we ought not to make gain by the error of another.— Here it appeared that the Defendant and those from whom he held, had been in possession of the lots of land long before the grant made to the Plaintiff, and that the predecessors of the Defendant had been induced to come into this Province and to settle on the land in consequence of a proclamation of Sir Alured Clarke then Lt Governor of the Province holding out to emigrants an inducement to come into the Province and a promise to grant them such lands therein as they might settle and improve— That the Plaintiff had obtained a grant from the Crown of the said land on a representation that it was waste and unimproved land, which was not strictly true, and further that for ten years after such grant so obtained, the plaintiff had allowed the Defendant to remain in the possession of the said land and to expend his means in the cultivation and improvement thereof, without giving him any notice of the title she had acquired and with which the Defendant appeared to have been unacquainted, as he appeared to conduct himself as the land was his own, or at least to which he had a preferable title to any other person, until the present action was brought against him— Under such circumstances the Court cannot permit the proprietor of the land to retain the improvements so made by the Defendant without indemnification to the extent of the benefit which the Plaintiff will derive therefrom— That in a new Country like this where titles to lands are often uncertain, and their boundaries and extent are unknown, and more

particularly

particularly in the waste lands of the Crown, where occupancy and improvement were generally considered as giving a preferable claim to obtain a title, the law in this Country must be differently administered from that in England even in regard of lands held in free and common Soccage, because in that Country titles to land and its boundaries and extent are generally known or may be ascertained, and a careless intrusion upon the property of another would not be sanctioned, nor ought a man be compelled to pay for improvements upon his own lands which he never authorised and which may have originated in tort — The case here however is wholly different in all its circumstances and calls for the equitable interference of the Court in favor of the Defendant —

Kaimes Pr. Equity p. 91. Seq. — 2 Kent. 273. 4.

Judg[t] confirming the Report of Expert

Massue & ux[r] vs Buchanan.

The facts of this case as stated in the declaration are — That on the 19th Octr 1826, Philippe Leprohon and his wife sold to the Defendant a lot of land for £650. Cy, but which sum it was agreed should remain in his hands à Constitut, he paying the yearly interest thereof, being £39. — in half yearly payments. — That Leprohon and his wife having in the said deed omitted to mention a rente viagere of £12. 10 - due to the Plaintiff Celeste Richard, wife of the said ~~Philippe Leprohon~~ Massue, and with which the said lot was charged by the will of her first husband Fran[s] Campeau, a subsequent act was executed on the 10th Sept[r] 1827, between M[r] Leprohon and the Defendant, without the interposition of M[rs] Leprohon,

by

by which it was agreed, that out of the rent stipulated in the deed of sale to the Defendant, he should pay the said rente viagere to the said Celeste Richard of £12. 10 — in half yearly payments, and which by the said last act the Defendt undertook and bound himself to pay to the plaintiff Celeste Richard, who was not a party to this last act, but on the 27th March 1828, she, authorised by her now husband, Massue, by an act passed before Notaries, consented to the two acts first mentioned, and voluntarily accepted the defendant as her debtor for the payment of the said rente viagere in the manner therein stipulated. The present action is therefore brought by Celeste Richard and her present husband Massue, for two and an half years of arrears of her said rente viagere, and under a defense au fond en droit, put in by the Defendant it has been contended. 1st That to the second act wherein the Defendant stipulated to pay the said rente viagere to the said plaintiff, Mrs Leprohon should have been a party, as she had been to the original deed of sale to the Defendt and this upon the bare supposition, that the lot of land in question might have been her own property — and 2dly That there being no privity of Contract between the plaintiffs and the Defendant, no action could be by them maintained agt him on the said last mentioned act, although the said Celeste Richard may have subsequently ratified that act and accepted of the Defendt for her debtor, and not appearing that the Defendant was a party to the said act of acceptation, or that the same had been signified to him —

Upon the first ground, the Court was of opinion that the presumption was against the Defendant, as it is alledged that the rente constituée, was stipulated to be paid to Mr Leprohon alone, and that the Defendt bound himself so to pay it, and it might therefore be presumed, that the land sold was the common property

of

of Leprohon and his wife, and consequently, he as head of the Community had a right alone to receive and dispose of the rente — that had it been otherwise, it would have been incumbent on the Defendant, after his express stipulation, to have pleaded this by exception, had he thought it for his benefit in this action — Upon the 2d. ground — that although by the authority cited from Pothier, it would appear that the second act was not binding on the plaintiffs, yet the positive engagement of the Defendant to pay to the said Celeste Richard, and her subsequent acceptance, left the Defendant without a shadow of interest to contest the demand of the Plaintiffs as he had become bound to pay to her the said Celeste Richard, and she could give him a sufficient and legal discharge; nor could Mr Leprohon have prevented this, unless upon some strong grounds he had notified the Defendant not to pay — Nor did the Court think in this case that notice of the acceptance by the Plaintiffs was absolutely necessary to be given to the Defendant, as by his own undertaking and covenant he was bound to pay to the plaintiffs the rente viagere, and the want of notice, if it could at all avail, could have become a question, only in the Case that the whole of the rente constituée, had been paid to the original creditor — Leprohon — Nor did it appear, that the ground, of a want of privity as between the plaintiffs and Defendant could be correctly urged in such a Case, as it was evident from the authority cited from the Repr by the Plaintiffs Counsel, that it was not necessary, that the plaintiffs should have been a party to the act stipulating the payment to be made to the said Celeste Richard, or that the Defendant should have been a party to the act of acceptance, as both appeared to come within the authority cited — "La delegation etant une fois

"faite

Poth. Obl. Nos 242. 516. 529.

Repse Vo. Delegation p. 352. 1re Col. last par. — do — 2e Col. and 4e par.

" faite, peut etre acceptée posterieurement par un acte
" particulier, ou le debiteur originaire n'est nullement
" necessaire" and further on, it is said — "la delegation
" quoique non acceptée fait un titre et produit une action
" au Créancier pour exiger la somme deleguée; l'acquereur
" est tellement obligé envers ce Créancier qu'il ne peut
" pas payer le prix au Vendeur au prejudice de la —
" delegation quoique non acceptée — Brillon rapporte
" un arret du 11 Juin 1692, qui l'a ainsi jugé, en —
" condamnant l'acquereur de payer une seconde fois" —
It would therefore appear, that less than what has been alledged by the plaintiffs would have maintained this action, and it seemed reasonable and just, for as the Seller and purchaser had agreed together in this respect, they could not come against their own act, and the receiving the payment or bringing an action by the person to whom the parties agreed the money should be paid, was a sufficient acceptance, without any other formality —

The defense au fond en droit, over-ruled

October Term. 1829.

Monday 19th October.—

No. 2291.—
Jones & al Plffs
vs
Wood. — Defr
and
No. 2315.
Jones & al Plffs
vs
Wm Wood and
Robt Frost & Co Defts

The action, No 2291, was instituted by the Plffs merchants in the City of Montreal, against the Defendant, master and Commander of the Ship John, for trover and conversion, for having refused to deliver to the plaintiffs at the port of Montreal certain goods wares and merchandises which had been shipped on board of the said Ship at Liverpool in England addressed to the plaintiffs, and which by the bills of lading the Defendant had become bound to deliver to the plaintiffs at Montreal—

To this action the Defendant, pleaded that he had a right to retain the goods in question until payment of the freight by the plaintiffs, and also until they should have paid and reimbursed to him the amount of the duties payable upon goods imported into this Province being 2½ ₰ Cent on the Invoice charge, which he the Defendant had become bound to pay and for which he had caused a Bond to be given to the Collector of the Customs at Quebec payable according to law, all which the Plffs had refused to do—

To this the Plaintiffs replied that they were always ready and willing to pay the freight of the said goods and had tendered the same to the said plaintiffs before the

the institution of the present action, denying the right of the Defendant to retain the possession of the said goods until he should be paid or indemnified for the security he alledges to have given for the payment of the duties.—

The action N° 2315. was instituted by the same plaffs against the said Wood, the master of the Ship John and also against Messrs Robert Frost & Co into whose custody the goods in question had been placed by the Defendant Wood to be retained until the freight and duties were paid — This action was en revendication and an attachment issued by virtue whereof the goods were attached and seized in the hands of Messrs Frost & Co —

To this action the same plea was put in by the Defendant Wood, as in the former, with an incidental demand for the amount of the freight £107. 18 6d — The Defendants Frost & Co pleaded that on the arrival of the Ship John at Quebec, being interested in the vessel as the Consignees thereof, they caused security to be given by means of a bond entered into by Josias Wurtele their partner and another person to the Collector of the Customs at the port of Quebec for securing the payment of the duties payable on the said goods on their importation into this Province and that on the refusal of the said plaintiffs to pay and satisfy the said duties, the said Wood, had delivered the goods into their charge and custody to be by them kept and retained until the said duties should be paid and that they the Defendants are by law entitled to hold and retain the said goods until the said duties shall have been so paid and satisfied — Incidental demand for the amount of the said duties, and for the charges of transporting, storing and keeping the said goods —

On these pleas issue was joined by the Plaintiffs denying the right of the Defendants to keep and retain

the

the said goods, and also a plea to the incidental demand denying the right of the Defendants to maintain the same.—

From the nature of these actions the same point being litigated in both, they were by Consent of parties united and after hearing, the Court gave the following Judgt

By the Court— By the evidence addued and admissions made by the parties it appears that the goods in question were shipped at Liverpool in June 1826. by Messrs Brown and Son and addressed to the Plaintiffs in Montreal, and that bills of lading to this effect were signed by the Defendant Wood, the master of the vessel in the usual form— On the arrival of the vessel at Quebec in August following, Josias Wurtele one of the Defendants, entered into bond at the Custom House, to be accountable to the Collector for the duties on all the goods composing the Cargo on board the Ship Johns, and of which those now claimed by the plaintiffs formed a part— It would appear that the Defendts Froste and Co are the Consignees of the vessel, and have accounted to the owners for the freight— as such Consignees they thought it expedient to give the above bond to the Collector of the Customs at Quebec for securing the duties on the Cargo— and the Captain of the vessel, conceiving that Froste & Co were by these means entitled to the possession of the goods, delivered the same to the said Froste & Co, or rather detained the same at the instance of Froste & Co until the payment as well of the freight as of the duties thus secured by the above bond— and the plaintiffs having refused to pay these duties to the Defendants, but consenting to pay the freight, the Defendants now refuse to deliver up the goods until those duties shall also be paid— The question now agitated, is, whether the Defendants Froste & Co as Consignees of the vessel, or under any

other

other pretence, are entitled, by having given bond for the duties on the whole Cargo, to retain in their possession the goods of the plaintiffs, until they shall have paid their proportion of the said duties, (being less than £100) on the offer made by the Defendants to pay the freight only.—

In determining this question, we must necessarily look to the laws of the Country, as regarding a Civil right growing out of a transaction had under those laws, without tying ourselves down implicitly to follow the laws of England on questions of lien which have been largily cited; although it would seem, that in a case of this description, the principles of law in both Countries, are so nearly alike, that we should be doing no injustice to the parties in adopting either in the decision of the Cause—

Comyn on Contracts p. 152.

According to the rule in England, the term, lien, in its strict and legal signification, means the exercise of a qualified right to retain the property of another until a claim is satisfied — The same principle holds in the laws of this Country, under the term "privilege" which is defined to be — "la preference qu'on accorde à un Créancier sur les autres, non pas en egard à l'ordre des hypotheques, mais à la nature des créances, et selon qu'elles sont plus ou moins favorables, et qu'un créancier se trouve avoir un droit special sur un certain effet."—

Repse Vo Privilege. p. 689.—

Privilege, considered as a just and equitable right, may in a variety of instances be traced to the Roman law, and hence, as the wants or conveniencies of Society required it has been modified and extended by the laws of France, according to which, the privilege is considered to take effect in a greater variety of cases, than we find the lien admitted by the laws of England, although in many instances the same rule obtains in regard of both.—

According

Domat

according to the law of France, whoever contributes his time, his trouble, or his means for the security and preservation of the property of another, and in some instances, when he benefits and improves that property, he thereby acquires a special privilege on the property so preserved or improved for what may thus have been expended upon it — We find nearly the same principles to hold in England, where, it is said, that the lien will hold, when from the circumstances, a party has bestowed his labor or expence upon the property detained thereby creating a moral and legal obligation on the owner of such property to make a remuneration before he take it away. —

3. Chitty's Com. Law. p. 539.

Let us however limit these principles to the question before us, and restrict them more particularly to that species of lien or privilege, which was given to the carrier of goods, whether by land or by water, and to those acting under them, and to see how it applies. —

The Contract of locatio operis mercium vehundarum in the Roman law, gave the actio directa, and the actio contraria, out of which resulted the right to retain the goods until the price of the carriage was paid — and with us the same principle has been adopted, and hence it has been held, that whether goods be sent in a general ship, or in a ship freighted for their carriage, the master has undoubtedly a lien for the security of the freight. —

1 Robin: Adm. Rep. 277 — Two Friends —

We find also that in the case of salvage — there is a right of lien allowed on the property saved — So also in the Case of average, for indemnifying the person whose property has been advisedly sacrificed for the general safety; there is a contribution to be levied from each person having property at hazard in a sea voyage, which is to be adjusted and paid before the Cargo is landed, or at least while it is still undelivered and in the possession of the Shipmaster

under

under a right of lien, for average — the master is in this case the factor of the sufferers, and may be held responsible for his neglect in this respect. —

These cases shew the rights vested in the master, and his power over the Cargo, where either accident or necessity raises any claim upon it; and the same principle will hold, where any thing is done for the benefit of the Cargo, such as the payment of any duties thereon, because the master is considered in all such acts done by him, while the goods are in his possession, to be the Agent or factor of the parties concerned, and when such acts done by him touching the Cargo, are either necessary or beneficial, his lien thereon for indemnity ought to be admitted — Domat, in speaking of the Case of the Carrier, which in principle, is the same as that of the master of a Ship, says — "Les voituriers ont un privilige sur les — "marchandises qu'ils ont voiturés, pour les droits de — "voiture, et pour les droits de Douane, d'entrées, ou "autres qu'ils auront payés à cause de ces marchandises — "et ce meme privilege est acquis à tous ceux de qui les — "deniers sont employés à des dépenses d'une pareille — "necessité" —

Abbot. 228
Valin

Abbot and Valin agree in saying, that the master is not bound absolutely to part with the possession of any part of his Cargo, until the freight and other — charges, due in regard thereof are paid — and we conceive, that under the words, other charges, may — well be included, the securing and paying the duties on the Cargo as a thing, necessary to be done, either by the Consignees of the Cargo, or by some person on their behalf, before a delivery of the Cargo can be had. —

It has been argued, that there was no right, nor any necessity, for the Captain of the vessel or any other person here to interfere, as it was the business and duty of the

Consignees

Consignees alone, to have paid or secured the duties — But although the Captain or his agent, cannot by any act of theirs, bind the Cargo, yet it seems consistent with reason and justice, that he or they may do any act, which is necessary or beneficial for it, more especially when it operates for the general advantage of all the Consignees. — Now the securing of the duties, was an act of necessity to be effected either by the Consignees of the goods, or by their agents, and the Captain who had charge of the goods, or his agent, being on the spot and the Consignees at a distance, could more readily effect this object, and in doing so, was saving trouble, and perhaps expence to all concerned — and it is sufficient that the act so done by the Captain or his agents, was either necessary or beneficial for the Plaintiffs, that by law the Captain or his agents, became the agents, or negotiorum gestores of the Plaintiffs. It may also be considered as beneficial to all, or to some of the Consignees, that such securing of the duties, might facilitate the progress of the vessel to her destined port, that is, from Quebec, where the security was given, to Montreal, the port of delivery — and might also be the means of preventing demurrage. a

In regard of the Defendants Robert Frost & Co, they are said to be the Consignees of the vessel, and as such, they were no doubt interested in bringing the voyage to a Conclusion and in unloading the vessel — but they were also on this occasion the agents of the Captain, as he had delivered the Cargo to them, as the fittest persons to retain it, until the freight and charges were paid — they could have no other right or claim on the goods of the plaintiffs beyond what the Captain had, and the possession they held of the goods, may also be considered as that of the Captain, and therefore not a tortious possession on their part — These

Defend^ts

Defendants being Consignees of the vessel, and having an interest therein, might well be warranted to give Security for the duties in question, as they were acting beneficially for all parties — they thereby imposed no greater obligation on the consignees of the goods than the law had imposed, and the act they did was necessary to be done quoad this act therefore, they are to be considered as the Agents of all the parties concerned, and as Agents, are entitled to retain in their possession the property in regard of which they have thus given security, until they are indemnified.

The mode of securing the payment of duties on goods imported into this province, and the means of retention of the goods until those duties are secured, being different from that followed in England, we cannot expect to meet with any pointed decision in the Courts of that Country, on the question here agitated.— In England there are public Docks, wharves, and warehouses, where the goods imported may be immediately landed and stored,— whereby rights of all kinds on such goods, both public & private, are secured, and for which purpose different Statutes have been enacted — But in this Country, the — Captain of a vessel has not the same facility for — unloading his vessel — for if a Consignee of goods — cannot be found — or if he refuses to accept the goods or to pay the duties, the Captain must either retain the goods on board of his vessel, or deliver them into private hands for safe custody.— In England also the wharfinger, or Dock Company who thus receive the goods from the Captain of a vessel, are considered his agents, and are responsible, if they part with the goods, until the freight and other charges are paid, the lien of the Captain being continued through the custody and possession of the wharfinger or Dock &c as his agents — In adopting this principle here, we

ought

ought to consider the Defendants, Robert Frost & Co. as the wharfingers holding the goods, under the lien of the master or Captain of the vessel for freight, and as being themselves entitled to same lien for their indemnification, in having given security for the payment of the public duties thereon, and for which in England the goods would have been liable in the hands of the wharfinger. —

We see neither inconvenience nor injustice in following this principle here, but in rejecting it, both might accrue — for if the wharfinger, or party holding the goods in trust for the Captain, who has become bound for the payment of the duties, were obliged to part with the goods without sufficient indemnity — his lien would be gone — the Consignee might become bankrupt, or he might convey the goods into another Country, and the Captain or wharfinger be thus left to prosecute a tedious and uncertain recourse for the amount of his claim. — We are therefore of opinion that the action of the plaintiffs must be dismissed, and to allow to the Defendants their incidental demand, except in regard of the storage of the goods in regard of which a certain portion only can be allowed, as the evidence adduced does not support the entire claim in this respect. —

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No. 1153.

Pothier. v. Robertson.

This was an action instituted by the plaintiff to recover from the Defendant the arrears of a certain rente Constituée, and of Cens & rentes on an act or deed of Concession of a lot of land in the Fief Lagauchetiere, and also to compel the Defendant to build a house on said lot, in conformity to the Conditions

of

of the said act of Concession.—

To this action the Defendant pleaded

1st a general demurrer, or defenses au fond en droit.—
2d. Defenses au fond en fait.—
3d. That the act in question was not the act or deed of Defr
4th That the said act was never carried into effect, by any tradition, livery of seisin or possession of the lot of land in question.—
5th That if Defendant ever became a party to the said act it was on an illegal agreement to give the Defendant a colorable right to vote at an election.—

The Replication joined issue on all these pleas.—

The act upon which this action was founded, appeared to be in the form of an authentic act passed before a notary, and was found in the notariat of the late Mr Chaboillez, but in an imperfect state, not being signed by the notary, but bearing the parties plaintiff & Defendt and the action was brought upon this act, as being a Contract sous seing privé between the parties, but stating the particular circumstances under which the act had been passed, and the omission of the notary to sign it.

In support of the demand, one of the Prothonotaries of the Court, in whose possession the notariat of the late Mr Chaboillez is now deposited, produced under a Subpoena of duces tecum, the act in question, who stated that he found the same among the minutes of the acts passed by that notary, according to the order of its date — and two witnesses proved the signature of the Defendant to this act — the rate of Cens et rentes and the expence of erecting a house such as demanded, was also proved — but the signature of the plaintiff to the act was not proved — And the question therefore was whether this was sufficient evidence to maintain the action?

The Court was opinion that the action could be maintained on the act in question on the principle

stated

stated in the declaration, as being an acte sous seing privé, but considered the evidence insufficient, as it had not been proved that the plaintiff was a party to the act, or had signed it, — that the acte being in its nature synallagmatique, by which both parties were bound the one to the other, it was necessary to — have proved the plaintiff's signature thereto as well as that of the Defendant, so as to make the contract complete and binding on both parties — The action was therefore dismissed —

No. 134.

Pothier v. Huntoon & ux.

This was an action instituted by the Plaintiff against the Defendants, as representing the late Samuel Pomeroy, it being stated that the Defendant Huntoon had married Minerva Pomeroy who was the daughter and heir at law of her deceased father Samuel Pomeroy — The action was founded on a deed of Concession made by the Plaintiff to the late Samuel Pomeroy, by which certain arrears of a rente Constituée, and of Cens et rentes had become due, which were now demanded.

Plea 1st general issue — and 2d That the late Samuel Pomeroy was married and Commune en biens with one Ama Curtis, and at the time of his death left other Children besides the said Minerva Pomeroy, one of the Defendants, namely Louis, Minot, Cynthia, Ama, and Esther Pomeroy — That by the death of the said Samuel Pomeroy, one half of the lot of land became the property of the said Ama Curtis, his widow, and the other half that of the Children of the said Samuel Pomeroy, and of which half the said Minerva Pomeroy is entitled to claim and have only one sixth part as her share in the succession of her said father and bound to the payment of only a proportionate share of the debts of the said succession, and of that now demanded

and

and which part or share she is now ready and willing to pay to the said plaintiff, but in regard of all the remaining sum demanded the plaintiff ought to have his recourse against the other heirs and representatives of the said late Samuel Pomeroy—

The plaintiff by his replication joined issue on the matters of fact pleaded by the defendants, and further that the matters pleaded were not sufficient to bar the plaintiffs right of action against the Defendants.—

It appeared in evidence that the late Samuel Pomeroy came to this Province from the United States of America several years ago, with his wife and family, being the several children named in the plea, but it did not appear where any of them resided, or that they had accepted or renounced to the succession of their said father.—

It was now contended by the plaintiff that the plea of the Defendants was defective both in law and in fact, inasmuchas they had not stated or shewn the residence of the widow, or of any of the Children of the said late Samuel Pomeroy, nor their acceptance of his succession of his succession — That it was evident there could be no Communauté de biens between the said late Samuel Pomeroy and Asna Curtis his wife, as they had come into this Province long after their marriage, and the property how acquired could belong only to himself and to his Children. That if the plaintiff had the means of calling in the other Children of the said Samuel Pomeroy and making them Defendants in the Cause, yet as it did not appear that they had accepted his Succession, they might upon being sued, renounce to that Succession and thereby create an useless expence and much delay in the proceedings — That it was the duty of the Defendants, who alone knew, or can be presumed to know all these facts, to have put their Co-heirs in Suit, so as to divide the burthen equally

among

among them, more especially as the Defendants must still be liable, should any of those children so renounce —

The Court was of opinion with the plaintiff and gave Judgment in his favor against the Defendants. —

No. 250.

Bent & al. vs Spragg & al & Divers Oppt

On the claim of the Plaintiffs to be ranked and paid as mortgage Creditors of the Defendants, on the proceeds arising from the sale of their real estate —

In April Term last the plaintiffs having sued the Defendants, they appeared in Court on the ninth of that month and confessed Judgment, and on the 20th of the same month Judgment was entered up against them for the amount of the Plaintiff's demand — In consequence of this Judgment the lands and tenements of the Defendants were seized and sold and the proceeds brought before the Court. In answer to the claim of mortgage set up by the Plaintiffs it was contended on the part of the Creanciers chirographaires of the Defendants, that the Judgment so obtained by the said plaintiffs could give them no right of mortage on the property of the Defendants, nor any right of preference over their other creditors, inasmuch as at the time of rendering the said Judgment the said Defendants were in a state of deconfiture and insolvency, and unable to pay their just debts — This fact was denied, and the parties were admitted to proof thereon — On the part of the opposing Creditors it was proved, that in the fall of the year 1826, and Spring 1827, the Credit of the Defendants had been declining, it was considered that their affairs were in a bad way and that their failure must ensue — their Counting house was often shut on business days, — they were hard pressed for money, and some other general facts of this nature,

But

But the most material fact proved, was the making of a deed of assignment by the Defendants on the 12th April 1827 to the agent of the plaintiffs, and to two other persons Agents for Creditors in England, for the general benefit and behoof of all their the Defendants Creditors, this deed was assented to accepted by those Agents as Trustees for the benefit of all concerned. and was drawn up in the view that it would also have been acceded to by all the other Creditors, but to which it would appear they objected, not being satisfied with the nomination to the trusteeship in which they had not been consulted — The Trustees however entered upon their trust, and on the same day 12th April 1827 signed & subscribed an advertisement to be inserted in the Montreal, notifying their appointment as Trustees, and calling upon all persons having claims upon, or being indebted to the defendants, to settle the same with the Trustees — This advertisement appeared in the Montreal Herald on the 14th day of April — 1827. —

Walker for Pltffs contended that the facts proved shewed no insolvency in the Defendants, at the time they made the Confession of Judgment on the 9th April 1827 — That the deed of assignment of the 12th of that month has no connection with the Judgment of the Plaintiffs, but was made in order to facilitate the sale of their real estate, and to prevent a number of suits being brought against them by other Creditors — This real estate was generally considered by all parties as more than sufficient to pay all the debts, and this was principally the ground upon which those Creditors refused to accede to the deed of assignment made by the Defendants, fearful of some sacrifice of the property in the hands of the Trustees — this assignment was

therefore

therefore imperfect and remained without effect, and the other Creditors cannot take advantage of an act, to which they were not parties and the validity whereof they do not recognize — That it was upon the supposition, that the other Creditors would have acceded to this assignment that the persons named as Trustees gave notice thereof in the public papers, but finding their backwardness and the general impression that the Defendants possessed sufficient property to pay all their debts, the plaintiffs proceeded to obtain Judgment against the Defendants and to pursue their recourse thereon — That insolvency, or inability to answer a just demand, will not defeat an hypothecary claim, nor invalidate a hypothecque given by the insolvent. — that faillite is something more than bare insolvency, it is that acknowledgment of insolvency which from its notoriety will invalidate a mortgage — but there is no faillite proved here — it is to be ascertained by external facts. 1 Pigeau. 437. and Repe. Vo Vente. pp. 149. 150. & seq. — The Ordonance of 1673 has established what is to be considered as bankruptcy or faillite, yet the mere failing to pay bills when due, will not constitute bankruptcy — The Repe. Vo Banqueroute, cites three arrets applicable in this case, and clearly establish that the rendering of several Judgments against a debtor do not constitute Bankruptcy. and rejects the opinions held by Prevoux, Jousse, and Ferriere as to what may constitute bankruptcy — That the principles of the law qui in fraudem creditorum of the Digest, appear to have been introduced into France and into Scotland, as to the acts or acknowledgments made by a debtor — refers to Stat. in Scotland of 1621 and 1696 as agreeing with the law of France in this respect — Erske. Instit. cites a case applicable to the present — Willis Rep. 464. 1 Bur. 436 — 12 Raym. 724.

That

That no fraud has been alledged here against the proceedings of the plaintiffs, who are seeking their right by a legal course, and authorities to that point are inapplicable.—

Buchanan for the Créanciers chirographaires, oppos^t contended, that at the time the plaintiffs obtained their Judgment in this Case, the Defendants, were notoriously insolvent and in deconfiture — this appears not only by the testimony of the witnesses adduced but by the Defendants own acknowledgment —
cites. Dig. 42 lib. 1st law — 2 Toubeau. 365. — Dig. lib. 2. tit. 12 Basnage des Hyp. p. 1. ch. 9. Jousse on Ord^n 1673 — 2 Raviot on Perrier. p. 119. —

By the Court — The terms Faillite, Insolvency, — Bankruptcy, and Deconfiture, have been applied to the situation of the Defendants by the contending parties, the plaintiffs contending that although they might be for the moment insolvent, yet there was no faillite, which alone could affect the right of mortgage and preference they are here contending for while the opposing Creditors contend that there was that open and avowed insolvency which must defeat every claim of preference. — In the opinion of the Court if there was either faillite, insolvency, bankruptcy or deconfiture, as generally understood there can be no preference among Creditors on the property of their debtor, nor can a Judgment rendered in such a Case create any right of mortgage or preference. —

Rep^n v^o Banqueroute Pardessus. N° 1091. Savary. v^o Banqueroute

Faillite by some of the writers is considered as a species of bankruptcy, who distinguish it by the failure which arises by misfortune, which they call Faillite simple, from that which is effected by fraud which they call Faillite frauduleuse — But

Faillite

Faillite may be more properly called, Insolvency, or that state into which a debtor falls, when he becomes unable to meet his engagements, and to conduct his business with punctuality — To attach to this situation the name of Bankruptcy, requires the existence of a Bankrupt law which would stamp upon some of the acts done by the debtor that character — Now although we have no Bankrupt law in this Country by which the situation of the Defendts here can be determined, or a bankruptcy declared, yet we have those equitable principles, upon which all bankrupt laws are founded, and by which the rights and interests of all parties are protected. —

Faillite in its literal meaning, is failure, or a failing in any particular object or pursuit, and when applied to the situation of a Trader, is a failing to meet the engagements he has come under, to pay the debts he has contracted, whereby his character and credit is injured or destroyed; and from which it must necessarily follow, that when he cannot pay all his Creditors, he cannot give any advantage to one over another —

Savary. Dic. de Com. v° Banqueroute — Bornier on Ordre 1673. tit. 11. art. 1. — Jousse on same title. — N. Denis. v° Faillite — 1 Pigeau. 437. —

The compilers of the Repre although they have quarrelled with Jousse and Ferriere as to their definition of what constitutes Faillite, yet under the word Faillite, we find in this work, the same meaning if not the same words as given by those writers — It is there described as, — "l'etat dans lequel se trouve un marchand, banquier, ou "negociant, dont les affaires sont tellement derangées, qu'il "est dans l'impossibilité de remplir ses engagemens qu'il a "contractés, et d'acquitter les sommes dont il s'est rendu — "debiteur". —

This character of Faillite or insolvency being so far ascertained, the next consideration is, are the Defendants in that situation, and from what time did they become so? In all cases of insolvency it is material to ascertain at what time it took place, so as to determine the validity

of

of the transactions had between them and other persons who may be affected thereby, whether they can be regarded as done bona fide, or in the contemplation of such insolvency. — The different facts proved of the declining business of the Defendants — of their doors being occasionally shut — of their putting off the payment of debts, and of the rumours afloat as to their declining Credit, although suspicious circumstances, and such as generally precede insolvency, yet may be entitled to a more or less favorable construction according to the result — The result in the present instance is of too decided a character to allow us to hesitate as to its legal effect — When we consider the deed of assignment made by the Defends of all their property and estate, moveable & immoveable to Trustees for the benefit of their Creditors, from that moment their insolvency is apparent — This act, although imperfect in its intended execution, is still the act of the parties who have signed it, and marks as effectually their views and intentions, as if it had been signed by all the parties — its object is too striking and its consequences too plain, and places the Defendants beyond all doubt in the situation of insolvent debtors, who are seeking to do an act of justice to their creditors - that of dividing their property among them as far as it will extend towards the payment of their debts — This a common course of proceeding in all cases of insolvency and is adopted by the Bankrupt laws as a necessary means for securing the property of the debtor for the benefit of his Creditors, and being here the act of the debtors themselves, is the strongest evidence of their insolvency — see 3. Pardessus. Nº 1095. Nº 1097 — Denvz. Vº Faillite 1 Pigeau 437. 470 — other authorities might be cited, but they all agree in this point. —

It has however been stated, that there is a material feature in this transaction, as the leading inducement to this deed of assignment, namely the object of —

facilitating

facilitating the sale of the real property of the Defendants in a more easy and ready manner for the speedier payment of their debts, and a general conviction that this property was more than sufficient for this purpose — This however is not apparent from the act itself, but allowing it were so, it cannot change the nature or the effect of the act and acknowledgement of the Defendants as a proof of their insolvency — the subsequent re-establishment of their affairs by the sale of their property cannot efface the insolvency in which they thereby declared themselves to be in, and their consequent inability to give a preference to one Creditor over another + In this respect the law in England and in France is the same — see the opinion of Lord Ellenborough and of the other Judges in the Case of Bayley and others assignees of Luckraft a Bankrupt, against Schofield and another. 1 M. & Sel. 338. where it became material to ascertain the nature and effect of the insolvency of the Bankrupt, and the sufficiency of his property to pay his debts — Le Blanc. J. says — I take insolvency as it respects a trader to mean, that he is not in a situation to make his payments as usual — and that it does not follow that he is not insolvent because he may ultimately have a surplus upon the winding up of his affairs — and Mr J. Bayley + I agree with my brother Leblanc that insolvency means, that a trader is not able to keep his general days of payment, and that he is not to be considered as solvent, because possibly his affairs may come round. — see also the note on the case of Moss. v. Smith. 1 Camp. Rep. 491. — The decisions in the French law are to the same effect — see. Denvzt. Actes de Notoriété, p 369 — note on arret of 20 Sep. 1710 — N. Denvz. vo Faillite, §1. N. 2. Pour etre en faillite, il n'est pas absolument necessaire d'être hors d'etat de faire face à ses engagemens il suffit s'anoncer pour tel, alors la faillite est constante. — and Repn. Vo Banqueroute. p. 152. — On peut faillir et

possider

posseder plus qu'on ne doit — reciproquement, on peut etre insolvable, c'est à dire - au dessous le Courant de ses affaires, et ne point faillir, and refers to Savary as holding the same principle —

All these authorities elucidate in the clearest manner the nature and effect of the deed of assignment made by the Defendants, and put the question beyond all doubt that from the date of that instrument at least the Defendants were in a state of insolvency, and that the Judgment rendered against them in favor of the Plaintiffs subsequent to that assignment can give neither mortgage nor privilidge to the plaintiffs upon the property of the Defendants to the prejudice of their other Creditors —

— —

No. 2287.

Donegani val
v
Walker. —

This was an action instituted by the plaintiffs against the Defendant for Slander, for having in open Court in defending a certain cause brought by the Plaintiffs against one Dubord, stated, that the Plffs had suborned a witness to give evidence in the Cause — against the said Dubord. —

To this action the Defendant demurred and the question now raised was whether the Plaintiffs could join in the action —

Fisher for the Defendant — This action is brought by the plaintiffs jointly for slander, but not for slandering them in their trade and dealing as Copartners, in which case by reason of their joint interest, they may join in the action, but the slander here charged is for having accused the Plaintiffs of suborning a witness to give evidence on their behalf — this is slander of character merely, in which two or more cannot join, because injury done to the character of John cannot affect the character of Joseph, unless we could

admit

admit the principle, that because John Donegani has been slandered, the whole family of Doneganis in all its branches direct and collateral, can unite in an action of this kind for the injury accruing to them for the slander of their relation — Several cannot join in an action of this kind. cites Com. Dig. tit. Abatement. p. 55.— letter E. 15.— This may be compared to a case of malicious prosecution against several persons — yet they cannot unite in pursuing their remedy for such prosecution Com. Dig. Vo action on case for defamation p. 391. (G. 2) Ib. p. 60.— 2 Viner. 54 — and 1 Rigeau. 61. — That the damages here cannot be severed, so as to apportion what is due to John and what is due to Joseph for this injury, and the one may be a man of good character, and the character of the other not worth six pence —

Driscoll for the plaintiffs. The action is brought by the plaintiffs as joint sufferers by the slander, as Copartners in an action brought by them in this Court— it affected them jointly and was imputed to them jointly in conducting their suit against their adversary and as such joint parties they maintain the present action.—

Fisher in reply — It is the nature of the injury which must be considered — the occasion of the slander was joint, but the gist of the action is the damage sustained — here no damage to trade is pretended, and as damage to character it is a separate right —

By the Court — The action in the case of slander as in every other case, must be adapted to the nature of the injury, and accordingly we find that in actions of this kind, Plaintiffs may join where they have a joint and common interest, as been stated, of traders in regard of their joint trade — this shews the — principle — and we may therefore hold, that wherever

there

there is a joint interest injured, all must join in demanding a remedy — So in the present case — the plaintiffs complain that in pursuing a joint interest as plaintiffs in a Court of Justice, they suffered an injury in respect of that interest by having been treated by the Defendant as men employing undue means to obtain the object of their joint demand — this slander applies to them jointly in regard of their common interest, and the action therefore could not well have been brought by them separately, as the slander, if at all committed, was against them jointly — The Defendants demurrer was therefore over-ruled

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Henderson vs Proctor. — & Midgley & al' Oppts. —

On opposition afin d' annuller. —

Walker for the Oppos^ts — The opposants claim here certain bales of goods, which were put into the hands of the Defendant as an auctioneer and broker for sale, and which have been seized by the plaintiff for house rent due to him by the Defendant.

According to the Custom of Paris, the privilege of the landlord for house rent extends only to what is considered to be, les meubles meublans qui garnissent la maison that is, household furniture — see Fer. Gr. Com^re art. 171. p. 1263. N° 15. — art. 161. p. 1044. N° 14 & 15. — p. 1048. N° 1. — p. 1051. 1052. N°s 21. & 22. — see also on art. 162. — The principle thus laid down is strongly elucidated in the case of the Sous-locataires, whose property although brought into the house and there to remain, may nevertheless be liberated from the claim of the landlord against the principal tenant, on the payment of the rent due by the Sous locataires to such principal tenant — the case of third persons is much stronger who place their property in the hands of the tenant only momentarily

and

and with no view to furnish the house, but to be sold by the Defendant, or otherwise used or disposed of by him according to the nature of the trade and occupation he follows — a contrary principle would be destructive of all confidence in Commercial — transactions. —

Mondelet for the plaintiff — admits that the property seized belongs to the Opposants, and was by them put into the hands of the Defendant for sale, but contends, that the plaintiff is entitled to his privilege thereon for the payment of the house rent — refers to Poth. Louage. Nº 246. 247. 241. 246. 248. 249 — shewing that goods and merchandises are equally liable to the priviledge of the landlord for rent as household furniture — see also the opinion of Ricard on the 162. art. of the Custom. —

Walker in reply according to the principle of the Roman law, the property of third persons in the house of the tenant paid rent only in proportion to the — space they occupied, and Pothier refers to this principle, but by the laws of France, in regard of goods given en depot or nantissement, they are not liable to the payment of any rent — see Poth. Louage. Nº 245. —

By the Court. — Mr Pothier has very clearly laid down the principles of law upon this question, and in following him we find a very satisfactory explanation of the Custom of Paris — He lays down it down as a general principle Nº 245. que les meubles pour etre — sujets au droit que la Coutume accorde au locateur, — doivent exploiter la maison ou metairie qui a été louée; and these moveables he describes to be — ceux qui paroissent y être pour y demeurer, ou pour y être — consommés, ou pour garnir la maison" — Having

established

established this general principle, he then goes on to lay down the exceptions to it — which are as follows — Les choses qui sont dans une maison, non pour y rester, ni pour la garnir, mais qui y sont, comme en passant, ne peuvent donc pas passer pour choses qui exploitent et garnissent la maison, et ne sont pas obligées au locateur — a principle which he says ought to hold the more strongly when these things do not belong to the tenant, but to third persons — and gives the following instances — Suivant ces principes, les effets des voyageurs qui se trouvent dans une auberge, ne sont point obligés aux loyers de cette auberge, et ne peuvent être saisis par le Seigneur d'hotel — car on ne peut pas dire qu'ils exploitent l'auberge — qu'ils la garnissent, puisqu'ils n'y sont qu'en passant — Par la même raison le linge que l'on donne à une blanchisseuse pour le blanchir — l'etoffe qu'on donne à un tailleur pour faire des habits — les montres qu'on donne à un horloger pour les raccommoder — les livres qu'on donne à un relieur pour les relier — et autres choses semblables, ne sont point censées exploiter les maisons de ces personnes, et ne répondent point des loyers qu'elles en doivent" —

These exceptions point so strongly to the case before us, that it is impossible not to see it as forming one of those autres choses semblables to which Pothier refers as coming within the exception and consequently not liable to the rent — There is no doubt but that goods and merchandises are liable for house rent, but they must belong to the tenant, in which case the right of the landlord will attach, as in many instances they may the principal or only property which occupy the house — Main-levée granted to the Opposit with Costs

No 1571.

De St. Ours. — Louis Dufresne and Jos. Dufresne his son. —

This was an action instituted by the plaintiff as Seignior of the Fief Bayeul, against the Defendants for having constructed a grist mill on the land of the Defendant Louis Dufresne within the said Fief without the consent of the Plaintiff and to his damage, and concluding that the said mill be demolished and the Defendants condemned in damages. —

To this action the Defendants pleaded Not guilty — and evidence was thereupon respectively adduced by the parties —

It appeared in evidence that the plaintiff and his predecessors had been in possession of the Fief Baieul and had enjoyed the right of banalité therein for many years past — That the Defendant Louis Dufresne holds and possesses a certain lot of land within the said Fief upon which there was erected a Saw mill — That about the month of November last year a pair of mill stones had been placed in the said mill in such way as to grind wheat and other grain, and that wheat and grain had been there ground by the permission of the Defendants who received the toll for the same. — That the said mill stones had been placed in the said Saw mill by one Louis Dufresne fils, and at his expence, and that this was done with the knowledge of the Defendants but that they took no active part in the work — and further that the said grist mill was kept up by the said Louis Dufresne fils —

Upon this evidence the Defendants among other points contended that the action could not be maintained against them, as it appeared that the grist mill in question had been erected by another person not a party to the suit and against whom no Judgment could be given — But the Court held that as the Defendt Louis Dufresne was proprietor and possessor of the land upon which the said grist mill had been erected, the same

could

could not have been so erected without his permission and consent, and as he had not justified the right which Louis Dufresne had to erect such a mill, which created an injury to the Plaintiff as Seigniors of the Fief Bailent, the Defendt by permitting such erection to be made on a land within the said Fief, must be answerable for that injury, and be held to remove the Cause of it — The Court therefore adjudged the Defendants to dismantle and demolish the said Grist mill in such manner as not to grind grain in future and condemned them in damages and Costs. —

No. 528.
John Neilson
Ls Ed. v. Hubert
Jac: Cartier
Tiers Saisi. —

☞ This Judgt was rendered 20 June 1829. —

This was an action en Saisie-arret in the hands of Jacques Cartier the Tiers Saisi, on a Judgment obtained by the plaintiff against the Defendant in this Court on the 18th day of February 1826, for a sum of £44. 4. 2, with interest thereon from the 5. day of June 1818 and Costs of Suit, taxed at £8. 14. 1. — The process in this Case was served on the Defendant and on the Tiers Saisi, on the 7th Augt 1826. —

No. 756.
Hubert Laparre
Ls Ed. v. Hubert
and
Jac: Cartier. T. S.

This was an action en Saisie-arret in the hands of Jacques Cartier, the Tiers Saisi, on a Judgment obtained by the plaintiff against the Defendant in this Court on the 19th day of April 1827, for a sum of £67. 5. 7, with interest on £59. 11. 4 from the 13th Sept 1821 — and on £9. 14. 3 from the 2d October 1826 and Costs of suit taxed at £10. 6. 7. — The process in this Case was served on the Defendant, and on the Tiers Saisi, on the 13th May. 1828. —

No

№ 1640.

Joseph Cartier.
L. Ed. Hubert.
Jac. Cartier T. S.

This was an action en Saisie-arret in the hands of Jacques Cartier, the tiers Saisi, on a Judgment obtained by the plaintiff against the Defendant in this Court on the 1st day of February 1827, for £383. 10. 11, with interest on £88. 6. 8 from 1st March 1822 — on £144. 12. 7 from 25 Sept. 1826, and on £150. 11. 8 — from 1st March 1822, and Costs of Suit taxed at £9. 17. 9. —

The process in this case was served on the Defendant and on the Tiers Saisi, on the 14th July 1828. —

№ 1641.

Jos. Cartier & al
L. Ed. Hubert
Jac. Cartier T. S.

This was an action en Saisie-arret in the hands of Jacques Cartier, the tiers Saisi, on a Judgment obtained by the plaintiffs against the Defendant on the 20th day of October 1826 for £83. 7 — with interest thereon from the 25 Janv 1822, and Costs taxed at £8. 2. 9. —

The process in this case was served on the Defendant, and on the Tiers Saisi the 14th July 1828. —

№ 1642.

Jos. Cartier, Exer & al
vs
L. E. Hubert & ux.
and
Jac. Cartier, T. S.

This was an action en Saisie-arret in the hands of Jacques Cartier, the Tiers-Saisi, on a Judgment obtained by the plaintiffs against the Defendant on the 20th day of October 1826, for £63. — and costs taxed at £8. 2. 9. —

The process in this case was served on the Defendant and on the Tiers Saisi the 14th July 1828. —

On the 9th April 1829 Jacques Cartier, the Tiers Saisi in the five causes above mentioned, appeared in Court, and made his declaration, — That he owed to the Defendant and his wife by Judgment rendered against him on the 19th February 1829, a sum of £577. 17. 6 with interest as therein stated — That one Jean Bapte Garneau, had caused signification to be made to him of a transport made to him by the said L. Ed. Hubert

and

and wife of the aforesaid Judgment of the 19th day of February 1829, which transport, he annexed to his said declaration —

Afterwards on the eleventh day of April 1829, Jean Baptiste Garneau, merchant in Quebec, filed an Intervention in the above Causes, by which he stated, that on the 26th day of March 1829, the Defendants Louis Edouard Hubert and Cecile Cartier his wife, had transferred and made over to him a sum of £577. 17. 6. due to them by the said Jacques Cartier by Judgment of the 19th day of February 1829, with the interest accrued and accruing thereon, and all their right and interest in the said Judgment — which said transport was made for a valuable consideration, and which he had caused to be signified to the said Jacques Cartier on the said 26th day of March 1829, and therefore praying that the monies declared by the said Jacques Cartier to be in his hands due and owing by him to the Louis Edouard Hubert and wife, being the amount of the aforesaid Judgment of the 19th February 1829, be ordered to be paid over to him the said Jean Bapt. Garneau, in preference to all the other Creditors of the said Defendants. —

The above causes having been united — the Plaintiffs pleaded for exception to the said Intervention, that the same could not be maintained inasmuchas the transport therein mentioned, was made and signified subsequently to the Saisie-arrets made at the suit of the plaintiffs of the monies in question in the hands of the Tiers-Saisi, by vertue of which Saisie-arret, the plaintiffs became vested with the right to have and obtain the said monies in preference to the said Intervening party, and the said transport was of no avail — That the said Transport was fraudulent and made without consideration — and further denying the facts stated in the said Intervention. —

The

The replication joined issue on the several pleas — and the parties were now heard thereon. —

Roi for the plaintiffs — The intervention made by Jean Bte Garneau, is without effect and must be dismissed inasmuchas the transport therein mentioned was made and signified to the Tiers Saisi, long after the attachments sued out by the plaintiffs had been served on the said Tiers Saisi — That a Saisie-arret has the same effect in law as a transport, and any subsequent transport can be of no avail — cites Jur. Pelt Comre on the 108e art. of the Custom — Repre vo Transport. p. 251. Poth. Proc. Civ. —

Roland on same side — The parties must be paid here in the order of their several attachments — as the Intervention cannot be received — Saisie-arret and transport have the same effect. Repre vo Saisie-arret p. 61. — Lacombe vo transport. Poth. Proc. Civ. 201 — 1 Bouf. 557. — That in this Case there can be contribution au marc la livre, although the monies attached in the hands of the Tiers Saisi are not sufficient to pay the demands of all the parties, — inasmuchas no insolvency or deconfiture is alledged and an attachment by Saisie-arret is different from a Saisie-execution. —

Cherrier for the Intervening party — The Saisie-arrets at the time they were made in the hands of the Tiers Saisi, were of no avail, as it was not ascertained what sum he then owed to the Defendants — and it was only after the transport made to the Intervening party and signified to the Tiers Saisi, that the amount of the debt he owed was known — That the créance transferred to the Intervening party, is that of the husband and wife, whereas the greater part of the

Saisie-

Saisie-arrets is made for the creance of the husband only.— That when the sums due by Saisie-arret are greater than the monies attached, there must be a contribution among all the Creditors of the debtor upon the monies so attached.— cites D. Denizt Vo Saisie-arret-No 32. 1 Pegeau. 664. art. 3.—

By the Court— The Saisie-arret must be considered as equivalent to the transport,— in this respect all the authorities agree, and in so far the Intervention made here would be without effect ~~as to any transport~~ the transport therein mentioned appearing to have been made subsequently to the different Saisies— The only point which seems to require notice is the claim of Contribution which the Intervening party now makes, on the principle that the monies attached are not sufficient to satisfy the demands of the seizing Creditors— The authority cited from Pegeau in support of this pretention, appears to have been copied by him from Old Denizt Vo Saisie-arret No 32— and Denizart refers to an arret of 29 Dec. 1639 reported by Henrys. 1 vol. liv. 4. ch. 6.— In referring to Henrys, we are satisfied that it contemplates a case where there was an insolvency of the Debtor, and where consequently contribution is a matter of right— the question decided by the arret appears to have been, that where insolvency exists, the arrestation of monies in the hands of the debtor's debtor, will not give any advantage to the saisissant over the other Creditors, as Contribution may be at any time demanded until the money be actually paid— The general principle is that the premier saisissant is to be preferred, according to the 178e art of the Custom— the exception to this general rule is contained in the 179e which is the case of deconfiture— but this not alleged

to

to be the Case here – The Intervention must therefore be dismissed and the monies arrested in the hands of the Tiers saisi adjudged to be paid to the different Créanciers saisissants according to the date and priority of their respective attachments –

see Poth. proc. Civil 201 –
Fer. Gr. Comre on 178 – art. p. 1353. No 13. –
Lacombe. vo Contribution. –
Lemaitre on 178 – art. Cout. p. 207.
Duplessis. p. 618
Arrets de Lepretre. 2 Cent. ch. 57. p. 514 –
2 Louet (M) No 10. p. 156. No 4. –

No 1827.

Weekes. – vs Girouard & Girouard adjn

On motion of the plaintiff, that the Sheriff be held to amend his return to the writ of execution sued out in this cause, and to bring into the Court the amount charged by him for poundage. –

Mondelet for Pliff. The execution sued out in this case directed specially that the amount of the purchase – money should remain in the hands of the adjudicataire on his giving good and sufficient security to the Sheriff to pay over the same upon a Judgment of distribution being made – that therefore the Sheriff having received no money, he incurred no responsibility, and can be entitled to no poundage – This was held in the Case of Plenderleath vs Burton & oppt June Term 1818.

Sewell for the Sheriff – shewed cause, and stated, that the Sheriff was entitled to his poundage, although the monies levied have not been paid into his hands – that by the Judgment of distribution to be hereafter made these monies must come into the hands of the Sheriff to be paid in conformity to such Judgment – and

besides

besides, the Sheriff here incurred a certain responsibility in regard of the security taken by him from the adjudicataire — Should that security prove insufficient he may be held liable for the money — There also oppositions filed for nearly the amount of the whole money — That should the principle here contended for by the plaintiff be admitted, it would establish a dangerous precedent, and deprive the Sheriff of a great part of the rights of his office, as it would become a constant practice to sell lands in this way, so as to avoid paying the poundage — That the authorising the sale of lands by decret volontaire, admits the right of the Sheriff to claim poundage even when security has been given by the purchaser instead of paying the money — The case cited as decided in this Court, does not apply, as there the monies remained in the hands of the purchaser, but as a charge on the estate sold, in conformity to the dispositions of the last will and testament of the late General Christie —

By the Court — According to the Provincial Ordinance of 25 Geo. 3. ch. 2. sec. 35, the Sheriff is entitled to deduct his poundage from all monies levied by him on execution, and the only question here is, has the money been levied on the execution returned by the Sheriff in this case, on which he charges his poundage? — And it seems evident, that the money has been levied, by the actual sale of the land for a certain price, and although this money has not yet been paid into the hands of the Sheriff, yet it is liable to be paid into his hands under the order and Judgment of distribution of this Court — The money being liable to distribution, shews that it must have been levied, and the taking security from the adjudicataire for the payment, is admitted as a means of facilitating that payment, and pro tempore, stands in lieu of it —

Rule on Sheriff discharged —

No 645.
Froste & al
vs
Wurtele.

In an action of debt for £5000.

The declaration stated, that on the first day of November 1827, the parties plaintiffs and Defdt dissolved a partnership which had previously subsisted between them, and it was then agreed to leave and submit the matters touching the said Copartnership and all matters of difference and dispute between them, to the determination and final arbitrament and decision of William Hallowell of the City of Montreal, Esquire, and Francis Badgley of the same place, Esquire, as arbitrators and equitable referees chosen by the parties, with power to the said arbitrators to examine all books of account, letters papers and documents of every description touching their said Copartnership, and to name and appoint a third Arbitrator or umpire — which said arbitrators were to make and render their award in the premises the fifteenth day of January 1828 — and which award they the said plaintiffs and Defendant did promise and agree to abide by, and conform to under the penal sum of five thousand pounds current money of the Province, all which is stated in the articles of agreement made in this behalf, of a copy whereof the Plffs make a profert in Court —

And the Plffs aver that they were always ready and willing to perform and keep all their covenants & agreements aforesaid, and particularly to submit and refer all and every the matters in dispute between them the said Plaintiffs and the said Defendant to the decision and award of the said William Hallowell and Francis Badgley and did obey the summons and notification made and given by the said William Hallowell and Francis Badgley in this respect, yet the said Defendant hath in all things neglected and refused to perform and keep his promises aforesaid — That the said Defendant was

on

on the 20th and 27th days of December 1827, by the said William Hallowell and Francis Badgley, duly notified that for the purpose of entering upon the duties to them assigned, they required the assistance and attendance of the said Defendant, but that he refused to comply with his promises aforesaid, or to obey the said notices and attend the said Arbitrators, but on the contrary refused to do so - and afterwards on the 12th day of January 1828, the said Defendant did revoke and as far as in him lay did annull the aforesaid submission and reference to the said William Hallowell and Francis Badgley, and did then and there protest against and forbid all and every act of them the said William Hallowell and Francis Badgley under the agreement aforesaid, or to render any award in the premises, in consequence of which said revocation and protest the said William Hallowell declined and refused to ~~make~~ perform the duties assigned to them or to make any award as aforesaid By reason of all which premises an action hath accrued to the said plaintiffs to demand and obtain from the said Defendant the said sum of five thousand pounds -

To this declaration the Defendant demurred and the plaintiffs joined issue thereon - and the parties were now heard touching the sufficiency of the declaration,

By the Court - It does not appear to the Court, that the penalty here sued for can be recovered by the present action - The penalty according to the statement in the declaration is stipulated in order to secure a compliance with the award of the Arbitrators, as is usual in arbitration bonds, and can be demanded only upon a refusal to comply with such award - but here no award appears to have been made, and therefore no penalty could become

due

due — The plaintiffs however consider the refusal of the defendant to attend the arbitrators, and his protesting against their proceeding, as coming within the stipulation of the penalty, but the penalty cannot be extended from one clause in the Contract to another without express stipulation — The refusal of the defendant to allow the arbitrators to proceed may by implication be considered as a refusal to comply with their award when made, but this does not necessarily follow, for had they proceeded and made an award, the Defendant might still have acquiesced therein — but the defect here is, that the stipulation of the penalty does not extend to that part of the Contract in which the Defendant is alledged to have been in default, and therefore the action cannot be maintained — Action dismissed. —

No. 416.

Phillips & al v. Bagg. — & Wurtele, Interv.

In this case the Plaintiffs prosecuted an action against the Defendant for the recovery of a sum of £2595. 16. 9 Cy due by his notarial obligation bearing date the 15th day of September 1823. —

Jonathan Wurtele of the City of Quebec, auctioneer and broker, filed a petition in Intervention in the Cause, by which he stated, that the Defendant Abner Bagg, was indebted him the said Jonathan Wurtele in a sum of two thousand pounds, Currency, by notarial obligation bearing date at Montreal the first day of July 1826, & for the payment of which sum of money the said Defendt bound and mortgaged all his property and Estate — That the obligation as aforesaid granted by the said Defendant to the said plaintiffs for the sum of £2595. 16. 9. was stipulated to be paid to the said plaintiffs without interest

interest — That divers sums of money, amounting in the whole to £1198. 9. 7 Currency, have been paid by the said Abner Bagg the Defendant to the said plaintiffs or to their agents at divers times since the passing of the said Obligation of the 15th Sept. 1823, which said sums of money were imputable and ought to have been imputed upon and in deduction of the aforesaid capital sum of £2595. 16. 9, leaving a balance due to the said plaintiffs of £1397. 7. 2, for which amount only, the said plaintiffs are entitled to their right of hypotheque upon the property of the Defendant, by virtue of their said Obligation. — That it is pretended by the said plaintiffs, that in pursuance of a private understanding with the said Defendant, subsequent to the execution of the said obligation of the 15th Sept. 1823, an account embracing charges for interest, Compound interest, premiums of exchange and Commissions, upon and with reference solely to the debt expressed in the said Obligation, hath been framed against the said Defendant, to which account the payments so made by the said Defendant have been imputed and applied, whilst the aforesaid obligation hath been allowed to subsist to its full extent, in order to secure to the said plaintiffs a mortgage upon the real estate of the said defendant for the security and payment of the balance which now is, or hereafter may become due by the said defendant upon the said account so framed and composed —

That the conduct of the plaintiffs in this respect is contrary to law and a fraud upon the Intervening party and all other Creditors of the said Defendant holding mortgages posterior to that of the said Plaintiffs under the aforesaid Obligation of the 15th September 1823, by reducing the security upon which

they

they relied — That the said Defendant now is, and for several years past, to wit, since the fall of the year 1826, hath been notoriously insolvent and a bankrupt, and his real Estate is deeply mortgaged — That the Intervening party by means of the premises is exposed to lose his security for the payment of his aforesaid debt by reason of the demand now made by the said plaintiffs and the Security therefor which they seek to obtain under their aforesaid obligation of the 15. Sept. 1823, whereas if the payments made by the said Defendt as before mentioned had been rightly applied, there would remain due by the said defendant to the said plaintiffs only the sum of £1397. 7. 2 Cy to which extent alone the said Obligation of the 15 Sept. 1823 ought to be considered as operating a mortgage in favor of the said plaintiffs upon the real estate of the said defendant. — That if the said Obligation of the 15 Sept. 1823 shall be considered as a security and mortgage to the plaintiffs for the amount they now demand, a manifest injury and injustice will be done to the Intervening party and other Creditors of the said Defendant holding mortgages posterior in date to that of the plaintiffs, as the real estate of the said defendant will be nearly or entirely absorbed for the satisfaction of the said demand of the said plaintiffs, whereas if their said demand, in so far as regards their right of mortgage be reduced to the said sum of £1397. 7. 2 the Intervening party may be secured in the full or in part for the debt due to him by his aforesaid obligation of the first of July 1826 — The Intervening therefore conclude that he may be allowed to intervene in the Cause for the preservation of his just rights, and thereupon be allowed to take such conclusions and adopt such measures as by him may be deemed necessary — And further that the Court, in pronouncing upon the merits of the said action so instituted by the said plaintiffs will be pleased to adjudge and declare that the right of hypotheque accruing to them by reason of the aforesaid obligation of the 15th Sept. 1823 shall enure and be available to them only for the sum of £1397. 7. 2, reserving to them their rights for the residue of their demand as a simple debt, or Créance chirographaire — with Costs to the said Intervening party —

To this Intervention the plaintiffs demurred and the parties were now heard thereon —

By

By the Court — This Intervention is made on the principle of securing to the party his right of mortgage upon the property of the Defendant and all the beneficial interest to accrue therefrom, and for this purpose it claims that the right of the plaintiffs in regard of a prior mortgage to which they are entitled under their obligation, may be limited to a lesser sum than that demanded. — If the demand of the plaintiffs were to determine the question of mortgage, or in anywise to affect the right of the other Creditors of the Defendt the Court would consider the present intervention as regular, but this is not the case; the only question to be determined by the action of the plaintiffs, is the amount of a personal debt, which they claim to be due to them by the Defendant — The Judgment to be given in this Case can create no greater right of mortgage to the plaintiffs on the property of the Defendant than they now hold, nor can it determine the extent of that right nor affect the interests of other Creditors in this respect — The Intervention therefore is premature as no question can arise here as to the preferable right of Creditors upon the estate of their Common debtor. —

Intervention dismissed —

No 540.

Stearnes — vs — Dewey — and Sweetman —

This action was brought upon an assignment or transfer made by one Jonathan Wood to the plaintiff of a sum of £95, part of the purchase money due by the Defendant Dewey on a deed of sale to him made by Wood on the 7th June 1815. — The assignment from Wood to the plaintiff was made by a notarial act of the 23d Octobr 1815, and the present action was brought in the June Term of 1819, and in the declaration it is alledged, that the said assignment was in due form of law notified to the Defendant, by a copy thereof having been duly delivered and signified to him. — In the Octobr Term following, the Defendant Dewey put in a plea, consisting of a defense au fond en droit,

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a defense au fond en fait, and a third or special plea, alledging that Stearnes the plaintiff, did not pay or give to Wood any valuable consideration for the debt so assigned, but that the transfer was made without any consideration, and did not vest any right in the plaintiff to recover the sum demanded by this action. — Subsequently to this, on the 2d Febr 1820, Gilbert S. Main as a Judgment Creditor of Jonathan Wood, intervened in the Cause, on the ground that he had seized the monies in the hands of Dewey and obtained a Judgment against him as Tiers Saisi, for the amount, and setting forth other grounds, which together with the issues of law and fact thereon raised, will be hereafter noticed. —

The Court after hearing the parties on the several issues of law, as well in the principal action, as on the Intervention ordered, before adjudging thereon that the parties should proceed to evidence, and the enquete having been afterwards declared closed, they have since been heard finally on the merits, and now in delivering the opinion of the Court upon the whole case, it may be requisite first to dispose of the issues as raised between the plaintiff and Defend[t] independant of S. Main's Intervention, as upon the decision of the former the latter must mainly depend — Now the first plea of the defendant, which is a defense au fond en droit, is evidently unfounded, and must be rejected, as the declaration of the plaintiff contains all that is necessary to support his action and to authorise the conclusions he has taken thereon, and as to the third or Special plea, namely the want of consideration for the assignment, it is immaterial now to enquire, whether this could or could not be offered by Dewey as a legal defence to the action, as it is wholly unsupported by any evidence on the part of Dewey, and the assignment on the face of it, appearing to have been made for a valuable consideration, this part of the defence must also be rejected — In argument however it has been urged, under the second plea of defense au fond en fait, that there being no evidence on the part of the plaintiff to establish that a copy of the assignment had been delivered to the Defendant Dewey, as alledged in the declaration, and required by the 108e article

of —

of the Custom, which declares, that a simple transport ne saisit point, et faut signifier le transport à la partie et en bailler copie avant d'executer, and that therefore the Plff cannot recover in the present action — It is obvious that the Custom does require the formality contended for, as a means of preventing fraudulent transfers to the injury of bona fide Creditors, and points out the ordinary mode of notifying the transfer with which it would be right to conform, and thereby obviate all difficulties that might arise, but it does not follow in all Cases, that because a Copy of the assignment has not strictly been delivered to the debtor in conformity to this Article, that the transfer is of no avail, for it is apparent from all the authors, that this general rule is not without its exceptions and that an acceptation of the Assignment by the debtor, or an engagement on his part to pay the debt assigned, is equivalent to a service of it, as also the payment of a part, or of the whole of the debt transfered, excludes any right on the part of the Creditors of the assignor to seize the monies so assigned although no copy of the assignment was ever delivered, and in the N. Denizt under the word, Cession, p. 376, it is said — Cette maxime ne doit pas etre prise trop à la lettre, elle ne signifie pas que la Saisine ne peut être acquise que par la signification au debiteur, elle signifie seulement que celui-ci doit avoir connoissance authentique du transport — "La Coutume n'a parlé de la signification "que par forme d'example, comme etant la maniere la plus "ordinaire de donner cette Connoissance, mais elle n'a pas "entendu exclure toutes les autres manieres authentiques de "procurer cette Connoissance" — Taking therefore this modification of the 108t article of the Custom, how in point of fact does this Case stand before us? — On the 23d of October 1818, the transfer or assignment was executed before two Notaries, who by a separate act dated the same day declare that speaking to Dewey the debtor, and now Defendant, who at the time was present in the office of one of them, they had made known and notified unto him Dewey, that Jonathan Wood that day transferred unto Andrew Starnes, the present

Plff

Plaintiff, by an act of transfer duly executed before them in the said Dewey's presence, the sum of 380 Spanish mill'd dollars, due by him the said Dewey, for the remaining payments (including the interest on the same up to the first of March next) for a lot of land, he, the said Wood had sold unto the said Dewey, by deed executed before the said subscribing notaries, dated 7 June 1815 — Of this present signification the said Andrew Bearnes requested us the said Notaries to grant him act thereof, which was immediately done, as appears by the act itself in these words, "of which signification we the said Notaries left and gave "unto the said Dewey a true copy, being in the office aforesaid "and speaking unto him as aforesaid, in order that he "might not be ignorant of the transfer in question" — Now although it does not appear that an entire copy of the transfer, which was absolute and unconditional, was delivered to the Defendant, yet the Notaries certify that he was present at the execution thereof, and he therefore must have heard it read, and consequently was well acquainted with the whole of its contents, and moreover a written notice was at the same moment delivered to him in which was contained an abstract of all that was essential or necessary for him to know for his security and interest in regard to the transfer, by all which, he obtained, to use the words of Denizart, "Connoissance autentique du transport", and this from two Notaries, when in ordinary cases, the exploit made by a single huissier, would be sufficient; and as the money was justly due by him, and it being immaterial to him to whom he pays, provided it be to one who can give him a valid discharge; and further, that he has not alledged as a special ground of defence, that he did not receive an entire copy of the transport, of which Denizart says, the debtor alone could avail himself, nor does he plead either payment, Compensation or a seizure by any creditor of the assignor, not even by the Intervening party, we

N. Deniz.t Vo Cession 376. 2e. Col. —

are

are of opinion, that the spirit, if not the letter of the law has been complied with, and that no valid defence has been set up to this action by the Defendant, to deprive the plaintiff of the right acquired under such transfer. — It is true that Ferriere has in unqualified terms in one part of his Commentary on the 108th art. of the Custom, stated, that, "puisque la possession de la dette ou droit cedé n'est transmis, "que par la signification du transport, il s'ensuit que, — "quoique le debiteur eut été fait certain d'ailleurs du transport "et Cession de la dette, neanmoins il peut valablement payer "au Cedant", by which and his having throughout stated no one exception to the rule, we might conclude that he admitted of none, but Despeisses and Brodeau controvert this extraordinary principle of Ferrier, admitting + "Que "si le debiteur a sçu la cession, en ce cas s'il paye le Cedant "il sera tenu de payer le Cessionnaire à cause de sa mauvaise "foi" — indeed so rigid a rule as that laid down by Ferriere, is contrary to every principle and justify an adherence even to the sole opinion of Despeisses; but when it is found that the sentiment of Ferriere appears not to have been adopted nor even mentioned by any of the later and modern French law writers, and when it is considered that they have mentioned various exceptions to the rule, none of which are noticed and admitted by Ferriere in his Commentary, and that this author himself has in his Parfait Notaire, the most correct of his works, stated — "Que "si le transport ou la delegation se fait du consentement "et en présence de mon débiteur, alors mon créancier est "saisi, sans qu'il soit besoin de la signifier, ensorte que des "lors mes créanciers ne peuvent plus saisir ce qui m'etoit "dû." — and when to these are added the authority already cited from Denizart and the followers from Bourjon, there can be little doubt, but that the signification in the present Case is equivalent to that provided by the 108th article of the Custom — see 2. Bourj: p. 448, Tit. 7. ds. 1. sec. 7. —

But as before observed the Defendant has not pleaded a want of legal notice of the transfer, nor does it appear that this could avail him here as in France, where the party might proceed to execute without Judgment; for it has

been

been held in our Courts, that it is not alone a valid objection on the part of the debtor to an action brought against him upon a transport, that the same has not been notified and a copy delivered to him prior to the action, although in such a case it would be very doubtful, how far the plaintiff would be entitled to Costs should the debtor declare his readiness to pay, and his ignorance of the plaintiff being his creditor from the want of due notice — Let it however be considered, that this Case is decided under its own special circumstances and not intended to do away with those formalities which wisdom and prudence have devised as necessary to prevent fraud and to secure the just rights of individuals; And it would be well to caution assignees, that it would be safer on all occasions to comply with the letter of the 108. article of the Custom, as a non-observance thereof under other circumstances might lead to the loss of a debt, otherwise justly transferred and honestly acquired — Negligence cannot, and ought not to be encouraged — but in the present case under its circumstances, it would be an encouragement of bad faith, and a violation of the principles of Common honesty, to admit that the Defendant has not been sufficiently notified of the transfer.—

Having thus disposed of the Case as it stands upon the issues raised between the plaintiff and Defendant the next thing is to dispose of, and decide upon the Intervention made in the Cause by S. Main, and thereon it must be admitted as a clear and undoubted principle, that until the transfer has been notified in due form to the debtor, the Creditor of the Assignor has a right to seize the monies and to be paid in preference to the Assignee — but at the same time it is equally clear that if the notification can be deemed good as against the debtor Dewey, it must necessarily follow, provided the transfer has been bona fide made, and not contrived for the purpose of defrauding the Creditors of the assignor,

that

that the notification must also hold good against the Creditors who might seize and arrest the monies subsequently to such notification — Now the Intervention in this Cause by Gilbert Sweetmain, states, that on the 15th day of April 1818 he recovered a Judgment against the assignor, Jonathan Wood, jointly and severally with five other persons for the sum of £200 — and that thereon he on the 19th Oct 1818, attached in the hands of the Defendt Dewey and of one Auberg as Garnishees, the monies, goods and effects in their hands due owing and belonging to the Defendant (not of the Plaintiff, as no doubt it was intended) and that on the 17th day of February 1819, by the Judgt of this Court the said Jon: Wood was adjudged and condemned to pay him the said Sweetmain £85 — with interest from the 1st March 1818, in part satisfaction of the Judgt so obtained agt Wood, and that the said sum of £85 — and interest which the Defendt was ordered to pay him Sweetmain, is the same sum of money including interest which the plaintiff alledges to have been transferred to him by Wood, and he further alledges, that no such transfer was made by Wood to the plaintiff, nor any transfer in due form of law signified to the Defendant, and no Copy delivered to, or served upon the Defendant, and that the plaintiff was not vested with the right to demand and receive the said sum of money and interest from the Defendant, and that he had a right to seize the money due by Dewey to Wood, and to have and obtain his Judgment against the former to pay the said sum of money to him, and to obtain the same in preference to the plaintiff and all others, and therefore concluding that the plaintiff's action be dismissed, and the Defendt Dewey in conformity to the Judgment already obtained, condemned to pay the £85 — and interest to him Sweetman

Upon this Intervention an issue has been formed and it appears that a very material error therein, has on the argument been overlooked — it is this — that in the Intervention it is stated, that the Judgment obtained upon the Saisie arret, was rendered against the Plaintiff

Stearns

Stearnes, not against Dewey, which renders the Intervention imperfect and absurd; — this probably we might have allowed to be amended, but independantly of this, and taking it for granted, that a Judgment was obtained against Dewey under the attachment made in his hands the Intervening party has not one legal ground to support his pretentions — for if he has a Judg^t ag^t Dewey why has he not enforced it? — And we can see no pretext for this intervention in this Cause, unless it be to favor Dewey the Defendant, for it is not necessary that there should be two Judgments in his favor ag^t Dewey for the same Sum — It is true that the Judg^t obtained by him ag^t Wood and five others for £200 — was obtained on the 15th April 1818, six months prior to the transfer in question — but when the attachment was thereon obtained to seize any monies owing to Wood in the hands of the Defend^t Dewey, or when such seizure was made, does not appear, we cannot therefore presume that it was made prior to the transfer, on the contrary we have to believe it was not, as the transfer and notification was in October 1818, and the Judgment on the seizure by Sweetman was obtained on the 17th Febv^y 1819, in which action the Defendant Wood, and Dewey as Garnishee having made defaut, and the latter in consequence of his non-appearance to make his declaration, is declared to be the personal debtor of the plaintiff, and yet what is very remarkable, he is condemned to pay, in lieu of the sum of £200 — claimed, only a sum exactly corresponding with that transferred to the plaintiff, which would appear somewhat like a secret understanding between the Intervening party and Dewey in that respect — inasmuchas Dewey by his non-appearance has become liable for the whole £200 — But although some suspicion may arise from this circumstance, we are not to presume in the absence of any evidence of the

allegation

allegation of the Intervening party, that the sum now sued for, is the identical money for which the Intervening party obtained Judgment, had Dewey appeared and made his declaration, and that such declaration was now before us, we might obtain a correct knowledge of the fact, but as it is, not constat, but that he owed other and larger sums of money to Wood than the debt transferred to the plaintiff Sheames, the legal presumption is, that he had other monies in his hands, or he would have appeared, knowing as he did of the transfer in question and not subjected himself to the risk of a double payment; and it is somewhat extraordinary, that if in reality the money in question, had been bona fide seized in his hands, that he has not made it a ground of defence as being the most valid answer he could give to the present action — if however he has chosen to make default, or has erred through ignorance, and thereby exposed himself to a double payment, it is his own fault and he must bear the consequences, and the loss must fall upon himself and not upon the bona fide Assignee of a just debt which he had acquired by paying a valuable consideration therefor — besides the notification being in the opinion of the Court a valid one, Dewey could not by any subsequent act or omission of his destroy its effect, nor in the case of the Intervening party, a favorable one in every respect, is it stated, that he has ever sued out execution against Wood or the other five persons upon his Judgment against them — he does not even allege that his Judgt remains unsatisfied, or that the parties, or either of them as of whom he obtained Judgt are in deconfiture, or unable to satisfy the amount — If his case be different, he ought at least to have offered evidence to put it in the power of the Court to do him justice, but having failed to do so, every presumption must be in favor of the plaintiff in the Cause — Sweetman, as far as the facts appear before us, has no interest to intervene

in

in this Cause, unless to protect Dewey from the transfer made to the plaintiff, and there is but too much reason to suspect that an understanding was prevailed between the Intervening party and Dewey throughout, and we must take care that no rule of law shall be turned so as to operate a greater evil than that which it was intended to prevent, and that while we protect just creditors on the one hand we do not allow a bona fide assignee of a debt, to be by any possibility or contrivance, defrauded of his just due — The Intervention must therefore be dismissed upon every ground, but more particularly on this, that a sufficient and due notification of the transfer was given to vest the debt in the plaintiff, which it appears to have fairly acquired before the pretended seizure of the monies in the hands of Dewey.—

Judgment for Pltff — and Intervention dismissed

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No 1298.

Wilcox & uxr vs Hall. —

This was an action brought by Joseph Wilcox and Sophia Blodget his wife, as Tutors to the minor children of the late Isaac Livingston Hall, the first husband of the said Sophia Blodget, and in her own name as Commune en biens with the said late Isaac Livingston Hall, against Isaac Hall, his father.—

The declaration stated, that by act passed before Lukin and his Colleague, public Notaries on the 23d day of February 1810, the defendant sold to his son, the said I. L. Hall, certain goods and effects as therein mentioned, for and in consideration, amongst other things of the sum of £200.— which the Defendt then owed to the said I. L. Hall.— That although delivery was made by the said Defr to the said I. L. Hall, of the said goods and effects, yet the same continued to remain in the possession of the said Defendt, with whom the said I. L. Hall was then living and continued to live until a short time before his death, which happened in July 1821, since which time the said Defendt hath held and possessed

the

the said goods and effects, and now refuses to restore the same to the said plaintiffs, the lawful proprietors thereof.—

That by another act or deed passed before the said Sutton and Colleague notaries on the 23d day of April 1810, the Defendant and Anne Scott his wife, transferred and conveyed to the said S. L. Hall, a certain lot of ground at the Coteau St Louis, and also a certain farm or lot of land in the parish of Lachine, by means whereof the said S. L. Hall, became the proprietor of the said lots of land but of which the said Defendant always retained, and still does retain the possession and reaps the fruits and profits thereof.—

That by virtue of the Community which was by Law established between the said S. L. Hall and the said Sophia Blodget, she has become entitled to claim one half of all the property aforesaid, and jointly with the said Willax her husband, as Tutors to the minor children of the said S. L. Hall, they are entitled to claim the other half of the said property and effects.—

The declaration concluding that the Defendant be adjudged and condemned to restore and deliver up to the said Plaintiffs in their right and capacities aforesaid, all and singular the aforesaid goods and effects, and also the aforsaid lots of land with the issues and profits thereof and default of so doing that the Defendant be condemned to pay to the plaintiffs a sum of £600 for their damages in this behalf and Costs of Suit.—

To this action the following matters were pleaded.—

1st A General demurrer.—

2d That Sophia Blodget is not entitled to demand in her own name any share of the real estate in question. That supposing the act or deed of 23d April 1810 to be valid, being a deed of Donation from the father to the son, the property thereby given would have been a propre in the person of the said S. L. Hall, and would belong to his children to the entire exclusion of his widow.—

3d—

3dly That the action is irregularly brought against the Defendant alone, as Anne Scott his wife ought to have been joined, as having been a party to the said deed of 23d April 1810.—

4th That the said act of 23d april 1810, was never carried into execution by any of the parties thereto, nor were any of the conditions upon which it was made, and which by law were required, were ever complied with, nor was ever tradition of the property given by the Defendant, which was necessary to give effect to the act.— That since the passing of the said act, the said Defendant has continued in the possession of the said lots of land, and with the knowledge and consent of the said J. L. Hall exercised all the rights of proprietor thereon and paid all the duties attached thereto— That the said J. L. Hall did not during his life time pay any part of the rents stipulated to be paid by him in consideration of the said deed, nor fulfill any of the conditions upon which it was made, but continued to live with the said Defendant who supported him and his family.—

5th That the said deed of donation was not enregistered and insinuated as required by law, and was by an act of 8 May 1824 revoked by the said Defendant, as having never been perfected or carried into effect.—

6: That to entitle the plaintiffs to maintain the present action, they ought to have shewn that they had complied with the terms and conditions of the said act or deed, and were still willing to perform and execute the same, and ought to have tendered to the said Defendant all the arrears of rent now due to him under and by virtue of the said deed since the day of the date thereof, none of which has been done —

7 That as to the moveable property and effects claimed by the said Plaintiffs the same were delivered to the said J. H. Hall — at the time of passing the said deed of 23 Febry 1810, and he has since disposed thereof as he thought fit, and the Defendt cannot be held accountable for such of the said goods and

effects

which he has held and possessed for ten years and upwards as his property —

8ly Denying all the facts stated in the declaration —

Upon these several pleas issue was taken by the plaintiffs and evidence was adduced thereon. —

By the evidence adduced in the cause it appeared, that subsequently to the passing of the acts of the 23d Feby 1810 and 23 April of the same year, the late Isaac Livingston Hall lived in the Defendants house, until a short time before his death when he removed to the Township of Ascott where he died in July 1821 — That during all this time the said deeds appeared to have been followed by further act or execution further than appears on the face of them — That the Defendant always exercised the rights of owner and proprietor of the lots of land above mentioned, and was recognized as such by all persons, and was held out as such by I. Livingston Hall himself, particularly in regard of the farm at Lachine. — That the Defendant paid all the expences attending the property and even sold some of it as his own — and that he sold the farm at Lachine to one Henry Hadley which was afterwards sold by decret Volontaire as Hadley's property, without claim or opposition of any person. —

Upon these facts the Court dismissed the action — considering, not merely the want of execution of the contract between the parties for a number of years, but that there had been a departure from it, by the act and consent of the parties, which was apparent from their conduct, and the circumstances of the Case. — That when a contract had been duly made by the parties, delay alone to carry it into execution, was not a sufficient ground why it should not be executed, unless that delay were of a nature to create a prescriptive bar to it, or to operate an undue advantage to one party over the other — because while the contract subsists and is legal, the execution of

it

it may be demanded —

Here the circumstances attending the delay, between the date of the Contracts in 1810, and the time when the present action was brought in 1827, were particular — The deceased Isaac Livingston Hall, the party to these Contracts had sought no remedy by action or otherwise — he had resided with his father the Defendant even after his marriage — was supported by his father, and when he removed from his fathers house with his family, to seek another residence, and to support himself and family by his own means and exertion, we would expect to find that some demand would have been made on the Defendant to furnish those means which are now demanded, for that support — yet we find no such demand was made, nor any action brought to enforce his right — This is not easily accounted for, even between father and son, if we can believe that the claim of the latter still remained unaltered upon a clear and firm basis — But when we come to consider that during all this time, the Defendant was exercising all the rights of proprietor upon the property in question, and even alienating it as his own, and this with the knowledge and consent of the deceased, and to a certain extent of the Plaintiffs themselves, in as far as regards the Deed volontaire made of the farm at Lachine in consequence of the sale made thereof to Hadley by the Defendant, we cannot hesitate in declaring that such circumstances amount to sufficient evidence of a departure from the original Contracts, and left the parties in the same situation as if these Contracts had never been made —

That if the Contracts in question could now be carried into execution, it could be only on the principle that the plaintiffs should perform their part of the conditions upon which they were made, by paying up the arrears of rent which would be due to the Defendt; and here the Court was bound to have looked to —

what

what would have been for the interest of the minors, and as the case now stood, it was manifest from the value of the property and its annual revenue, that the present claim must have been to their disadvantage and therefore not to be enforced on their behalf, at least not until further enquiry should have been had — but this appeared unnecessary in the present instance, as the property in question could not be considered to have formed any part of their father's succession. —

Tuesday 20th October 1829.

No 2321.
Delisle. —
v.
Fire Insurance
Co —

Action on a policy of Insurance against accidents by fire —

The declaration states, that on the 1st April 1829 by a renewed policy of Insurance, and in consideration of the sum of three pounds ten shillings paid by the Plaintiff to the agents of the Defendants they covenanted agreed to insure two certain houses therein described from and against accidents by fire from the said first day of April 1829 to the first day of April 1830 — That on or about the second day of August 1829, one of the said houses — valued and estimated, in the said policy of Insurance, and being of the value of four hundred pounds Cy — was — consumed by fire — and concluding for the payment of the said sum of £400 — with interest and Costs —

To this action two pleas of peremptory exception were pleaded by the Defendants. 1st That in and by the said Policy of Insurance it was stipulated and agreed as one of the Conditions thereof — "that if any difference shall — "arise with respect to the amount of any claim for loss or "damage by fire, and no fraud be suspected, such — "difference shall be submitted to arbitrators indifferently "chosen, whose award, or that of their umpire shall be "conclusive" — and that the said Defendants upon the notice given to them by the said plaintiff of one of the said houses so insured, did by their agents inform the said plaintiff, that they would pay the amount of the loss or damage, so soon as the value of the building should be ascertained by the decision of two experts, arbitrators indifferently chosen for that purpose, inasmuchas the said Defendants considered that the said building was not worth the sum of four hundred pounds claimed by the said plaintiff — Wherefore and inasmuchas

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a difference of opinion hath arisen between the said Plaintiff and the said Defendants touching the value of the said building, they pray, that the same may be referred and submitted to the decision of arbitrators, which they the said Defendants were always willing and now offer to do according to the terms and conditions of the said Policy of Insurance — All which the said plaintiff hath refused to do although by the said Defendants thereunto often required — The said Defendants therefore pray Judgment and that the action of the said plaintiff be dismissed —

The other plea pleaded by the Defendants stated, that they are not indebted to the plaintiff in the sum of money demanded by the said plaintiff, inasmuchas they were entitled, according to the conditions of the Policy of Insurance to have the award and decision of arbitrators as to the value of the house in question, nor can they be compelled to pay any sum of money whatever until such value shall have been so estimated, and which when so estimated they are willing to pay to the said plaintiff — Wherefore the pray that by the order of this Court such reference may be had and that the plaintiff be condemned in the costs of this action, —

To these pleadings the plaintiff demurred, and the parties were now heard thereon. —

By the Court — The question here is, whether the matters pleaded are a bar to the Plaintiffs action, and whether the Plaintiff is compelled under the Covenant contained in the Policy of Insurance, to name arbitrators to determine the amount of the loss — In the case of Scott. v. Phoenix Insurance Co. 20 June 1822, this Court held that the Plff there could be held to comply with his covenant & to submit his demand for loss by fire to the decision of Arbitrators, but the Court of appeals reversed our Judgment and maintained the plaintiffs action, adopting the principles of law as received in the Courts in England, that a Covenant of this kind cannot

be

be enforced, nor can such a Covenant take away the jurisdiction of the Courts — see 1 Wilson. 129. Kill v. Hollister — 8 J. Rep. 139. Thompson & anr. v. Charnock — 2 Atk. 569. Wellington. v. Macintosh — cited by Ld Eldon in Tattersall v. Groote. 2 Bos. & Pull. 135 — and 2 Ves. Jr. 129. Mitchil. v. Harris — This principle of law being so established, this Court considers itself bound to follow it here, and — consequently to over-rule the plea first pleaded by the Defendants, allowing the parties to proceed upon the other plea according to the course and practice of the Court.

No. 148.

Green. —
v.
Hilton & Baird

This was an action instituted by the plaintiff, a Cabinet maker and upholsterer, against the Defendants also Cabinet makers and upholsterers, for work and labor done by the plaintiff in his trade and business at the instance and request of the Defendants — The declaration contained the usual counts in action of assumpsit. —

The Defendants pleaded to the first and second Counts in the declaration, prescription of one year, and that the Defendants had paid to the plaintiff all that he was entitled to claim by reason of the said Counts, and for this purpose they tendered their oath — and 2dly — non assumpsit —

By the evidence adduced it appeared that the Pltff had been employed by the Defendants to make up sundry articles suited to their trade, they furnishing the materials, that the Plaintiff was paid sometimes by the day, and sometimes was paid by the piece according to the description of work in which he was employed. —

The Defendants now contended, that as the Pltff was a mere labourer, working by the day and by the piece and not providing the materials, his demand was liable to the prescription of the 127th article of the Custom, and that the oath of the Defendants ought to be taken as to the payments made by them, and their books of account regularly kept received in evidence for them. —

But

But the Court held that the transaction between the parties must be considered as Commercial, and that the evidence to be admitted in the Case must be governed by that principle The Defendants were traders, so reputed and understood by law, and the work done by the Plaintiff was for the business and trade they were carrying on, and in such even according to the law of France, the contest between the tradesman and those employed by him about his trade would be cognisable by the Juges Consuls — The Court therefore rejected the plea of prescription pleaded by the Defendants and gave Judgment for the Plaintiff according to the evidence in the Cause. —

Prac. des Juges & Cons: p. 262. 3. —

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No 123.

Voyer
v
Wurtele et ae

Action of assumpsit on a promissory note. —

The note was in the following form — "Five "months after date I promise to pay Mr Voyer, or bearer "the sum of thirty five pounds Halifax Currency for value "received, as witness my hand". "Jacob Wurtele." — and below was written — "I do agree to see the above note "paid — Moses Knapp. Junr" —

The first Count in the declaration stated the making of the note by the Defendant Wurtele — and then goes on to add, that the said Moses Knapp. Jr the other defendant, became a party to the said Note and signed the same as Surety, for the payment of the sum of money therein mentioned according to the tenor and effect of the said promissory note, and thereby became bound and liable, and promised (solidairement) jointly and severally with the said Jacob Wurtele to pay the said plaintiff the said sum of money in the said Note specified according to the tenor and effect thereof —

The other Count in the declaration was for the several money promises and assumpsits in the usual form. —

To —

To this action the Defendant Wurtele pleaded non assumpt and minority — The Defendant Knapp, pleaded, a general denegation of the facts stated in the declaration, and demurrez their sufficiency to maintain the action —

To the plea of Wurtele the plaintiff replied, that the Defendant could not avail himself of his plea of minority inasmuchas the said promissory note had been made and given by the Defendant in consideration of a horse sold to him by the said plaintiff — that the said sale was advantageous for the said Defendant, and turned to his profit and advantage, and therefore he is in law bound by his promise and undertaking aforesaid —

To the plea of Knapp the Pltff replied generally. and taking issue thereon. —

It appeared in evidence that the Pltff had sold a horse to the Defendant Wurtele in consideration of the note in question, which turned out advantageously for Wurtele who gained by the bargain, and confirmed it after he came of age —

On the part of Knapp it was contended that he could not be bound to pay the plaintiff — that his signature on the note placed him in the situation of a Surety, to pay on default of the principal, in which case it was necessary to have shewn diligence against the principal which had not been done, and he was thereby discharged — refers to the Case of Stevens. vs Knower and Thompson — Knapp stands in the same situation here as an indorser, and his liability the same, and diligence was requisite to have been shewn against the maker of the note to bind him. —

The Court however held the Defendant Knapp to be jointly liable to the payment of the note with Wurtele — This Case was distinguishable from that of Stevens vs — Knower and Thompson — there Thompson merely endorsed his name on the note, and the obligation he thereby

contracted

contracted was held in law to amount to that of an endorser — here the Defendant Knapp has made a special undertaking, he agrees to see the note paid, which the Court considers to be the same as if he had said he bound himself to pay it, and was an undertaking of the same nature and extent as that of the maker, and the Court held him bound jointly with the maker to pay it — Judgt for the Pleff —

No. 700. —

Tetrau. —
Patenaude
&
Desaules. opt

In this case the Sheriff returned upon the writ execution sued out by the plaintiff agt the lands and tenements of the Defendant, that he had sived and taken in execution a certain lot of land belonging to the Defendant, which he had sold and adjudged to the Defendant, as the best and highest bidder, and that the Defendant had not paid the price of the adjudication so made to him. —

Upon this return the opposant obtained a rule on the Sheriff to shew cause why he should not be held and adjudged to pay to the opposant the amount of his debt and costs, in consequence of having illegally sold and adjudged the said lot of land to the Defdt —

Rolland for the Opposant, — A sale on execution to the Defendant the debtor, is ineffectual and illegal, and the Sheriff ought to answer to the parties for the consequences arising from his illegal proceedings — That in such a case although the opposant may still — proceed to sell the lot of land in question, yet an unnecessary expence and delay have been occasioned by the act and default of the Sheriff, and the lot of land when again set up to sale may not produce the same price as that for which it was adjudged to the Defendt —

That

That it is besides bad in practice to allow the partie saisie to bid for his own property, as besides the little probability of his intending or being able to pay for what may be adjudged to him, the appearance of his bidding at the Sale prevents other purchasers from coming forward — Had it been necessary here to have controverted the Sheriffs return, it might have been proper in that case to have proceeded against the Sheriff by an action, as in the Case of a false return — but here the facts are true as stated by the Sheriff in his return, and his — responsibility is the only question now before the Court, which the Opposant contends makes him liable for his debt, as the Sale here is the same as if no Sale whatever had been made, and the opposant is thereby materially injured — Thibault. Cries. 218. N° 21. — Poth. Proc. Cr. 248 Pericourt. p. 179. N° 22. —

Sewell for the Sheriff — The Sheriff cannot be made answerable in this summary manner to pay the debt of a third person, if at all answerable, it could be only in a legal course of proceeding by action — But we find that Sales have often been made to Defendants of their property seized on execution, and their liability has in consequence been maintained against them by this Court as to the folle enchere, —

It was held by the Court, that although it had granted to prosecuting party the usual recourse agt the Defendant when he failed to pay for his own property which he had purchased on a sale by execution, yet it had never recognized the validity of such a Sale when it was contested — But admitting the insufficiency of the Sale here, it did not appear sufficiently clear to the Court that the Sheriff thereby became responsible for all the debts of the partie saisie, and it might be a question

whether

whether in such a case he could be made answerable — beyond the value of the property seized — but this question cannot be determined by this Summary mode of proceeding the party must bring his action against the Sheriff — that it may be settled by a more formal and legal course — Rule discharged —